IN THE CIRCUIT COURT OF WASHINGTON COUNTY, ARKANSAS

PHILLIP SHERMAN AND
TINA SHERMAN
PLAINTIFFS

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B. STAMPS

VS. CASE NO. CV – 2008 – 4379-4

MCDONALDS CORPORATION;
MATHEWS MANAGEMENT COMPANY, AND
AARON BRUMMLEY
DFENDANTS

BRIEF IN SUPPORT OF MOTION TO DISMISS FOR SEPARATE DEFENDANT MATHEWS MANAGEMENT COMPANY

INTRODUCTION

Plaintiff has brought suit against Mathews Management Company (Mathews) under various invasion of privacy theories. Plaintiff alleges that a cell phone belonging to Phillip Sherman was left at a McDonald's fast food restaurant located in Fayetteville, Arkansas. After leaving the cell phone, plaintiff claims one of the McDonald's employees took the phone and obtained access to explicit photographs contained therein. It is further alleged that once access was obtained, this individual then downloaded these photographs to the internet for various others to view. Finally, plaintiff alleges this individual sent these photographs to people plaintiff knew in an attempt to cause plaintiff embarrassment and distress.

Plaintiffs contend that due to Mathews being the franschisee of this particular McDonald's restaurant, it is liable for the alleged actions taken by those individuals employed there. However, even if taking every allegation contained in plaintiffs' Complaint as true, they have failed to state a claim to which relief may

be granted. If anything, the situation this Court faces involves a case of gratuitous bailment, and Mathews did not owe a duty to protect plaintiffs against the acts alleged. Further, the conduct alleged in plaintiffs' Complaint would clearly be outside the scope of employment for those individuals employed at this restaurant. Therefore, Mathews could not be held responsible for this conduct under the doctrine of respondeat superior.

ARGUMENT

A. Dismissal Appropriate Where No Duty Owed

Where a plaintiff alleges facts that fail to establish a duty on the part of defendant, a motion to dismiss under Arkansas Rule of Civil Procedure 12(b)(6) should be granted. First Commercial Trust Co. v. Lorcin Eng'g, 321 Ark. 210, 216 (1995). In First Commercial, the plaintiff sued a gun manufacturer for failing to require gun suppliers with "safe-sales policies." Plaintiff claimed that due to the manufacturer's lack of policy, it allowed suppliers to sell guns to individuals who should not have them. In particular, plaintiff claimed a gun was sold to Michael Catlett, who in turn used the gun to fatally shoot Stephanie Jungkind. Id. at 212. The gun manufacturer moved for a motion to dismiss pursuant to Rule 12(b)(6), and the trial court granted the Motion. Plaintiff appealed.

On appeal, the Court affirmed the trial court's decision to dismiss the case. The Court held that defendant did not owe plaintiff any duty to ensure suppliers maintain certain requirements for an individual to purchase a gun. Id. at 216. In coming to this conclusion, the Court reasoned "no duty exists upon the manufacturer of a nondefective handgun to control the distribution of that product

to the general public, as distribution was intended for the general public who presumably can recognize the dangerous consequences in the use of handguns and can assume responsibility for their actions.." Id. Therefore, the trial court was correct in dismissing the case due to there being no duty on the part of defendant.

In our current situation, there was no duty on the part of Mathews Management Company to protect the cell phone plaintiffs left at the McDonald's restaurant in question. The phone was left at the restaurant solely due to plaintiffs negligence, and there is no law establishing a duty on the part of a restaurant franchisee to safeguard the contents of a negligently lost cell phone. Further, this issue should properly be dismissed at the pleading stage because "the question of whether a duty is owed is always a question of law and never one for the jury." Bartley v. Sweetser, 319 Ark. 117, 122 (1994).

B. Gratuitous Bailment

If all of the allegations in plaintiffs' Complaint are taken as true, the current situation merely presents a case of gratuitious bailment. A situation of normal bailment is "comprehensively defined as a delivery of personalty for some particular purpose, or on mere deposit, upon a contract, express or implied, that after the purpose has been fulfilled it shall be redelivered to the person who delivered it." Hinkle v. Perry, 296 Ark. 114, 120 (1988). Therefore, to constitute a normal bailment scenario, there must be "a mutual benefit for the parties." Id. However, if the bailment was conducted "exclusively for the benefit of the plaintiff," then the situation is one of gratuitous bailment. Elliott v. W. E. Clark &

Sons, 247 Ark. 651, 665 (1969). And "one who undertakes to perform a duty gratuitously should not be under the same measure of obligation as one who enters upon the same undertaking for pay." Roberson v. Roberson, 193 Ark. 669, 677 (1937). Gratuitous bailment has been defined as "one in which the transfer of possession or use of the bailed property is without compensation." 8A Am. Jur. 2d Bailments § 8 (1997). A gratuitous bailment situation arises if the bailment is undertaken as a personal favor or is involuntary. *See* United States v. Alcaraz-Garcia, 79 F.3d 769 (9th Cir. 1996)

It has been held that where an individual loses a suitcase at a train terminal, the terminal (and its employees) could not be held liable for the suitcase's contents even though the terminal's employee said he would watch the suitcase. Voorhis v. Consolidated Rail Corp., 92 A.D.2d 501, 504 (N.Y. App. 1983). In Voorhis, the plaintiff sat her suitcase down and asked a terminal employee to watch over it. The employee agreed to watch over the suitcase, but took his eyes off of it for a minute to attend to other work. When the employee returned, the suitcase was gone. Id. at 501. Plaintiff then filed suit against the train terminal and its employee for loss of the suitcase.

At trial, the Court found the situation was one involving a gratuitious bailment. The Court noted that the terminal did not receive any benefit by agreeing to watch over the suitcase. Rather, the employee agreed to watch over the suitcase as a favor to plaintiff, and agreeing to do so was solely for the benefit of plaintiff. Id. at 504. Therefore, "no liability for failure to return the subject of bailment would attach in the absence of proof of gross negligence." Id.

Arkansas defines gross negligence as "intentional failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another." Doe v. Baum, 348 Ark. 259, 278 (2002). So for plaintiff to state a claim for relief against Mathews Management Company, she would have to allege that *Mathews Management* intentionally failed to safeguard plaintiff's phone. Plaintiff has simply failed to do so.

In plaintiffs' Complaint, it states "Defendant Brummley, individually and as an agent and an employee of Defendants McDonald's and Mathews acting within the scope of his employment as manager, stated he would turn Plaintiff Phillip Sherman's cellular phone off, would put it in a safe place in the Defendants McDonald's and Mathews office..." Plaintiffs' Complaint, ¶ 10. The Complaint further states "Defendants, through their agents and employees acting within the scope of his employment downloaded and posted nude photographs of Plaintiff Tina Sherman." Plaintiffs' Complaint, ¶ 17.

From the face of the Complaint, plaintiffs allege separate defendant Aaron Brummley, or another employee of this McDonald's restaurant perpetrated the intentional acts – not Mathews Management. So in essence, plaintiffs' claim of liability on the part of Mathews is only through the doctrine of respondeat superior. However, this is where plaintiffs' Complaint is tragically flawed. That is, even if taking these allegations as true, any such acts by Mr. Brummley or any other worker at this restaurant would clearly be *outside* the scope of their employment. Therefore, plaintiffs' claim under respondeat superior must be dismissed.