

IP 05-1706-C H/L Syberg v Value City
Judge David F. Hamilton

Signed on 08/07/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

vs.)
) NO. 1:05-cv-01706-DFH-WTL
)
)
Defendants.)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

MARK SYBERG,

Plaintiff,

v.

MARION COUNTY SHERIFF'S
DEPARTMENT, THE CITY OF
INDIANAPOLIS, VALUE CITY
DEPARTMENT STORES, INC.,
MICHAEL REIGER, individually and in
his official capacity as an officer of the
Indianapolis Police Department,
KELLY FERRELL, individually and in her
official capacity as deputy of the Marion
County Sheriff's Department,
SHELBY WICKLIFFE, individually and in
his official capacity as deputy of the
Marion County Sheriff's Department,

Defendants.

CASE NO. 1:05-cv-1706 DFH-WTL

ENTRY ON THE CROSS-CLAIM OF THE MARION COUNTY SHERIFF'S
DEPARTMENT AND CITY OF INDIANAPOLIS

This case presents legal issues that can arise from a common practice, the employment of police officers as part-time private security guards, though the issues arose under some unusual circumstances in this case. An officer with the Indianapolis Police Department ("IPD") and a deputy with the Marion County Sheriff's Department ("MCSD") worked part-time as security guards for Value City Department Stores. In September 2004, the two officers (with the aid of a third

officer) executed a “sting” operation against their immediate supervisor at Value City, plaintiff Mark Syberg. The officers arrested Syberg for impersonating a police officer by supposedly flashing a badge. During the course of the arrest, Syberg suffered physical injuries. As a result of the arrest, Syberg also lost his job as a loss prevention manager for Value City. Syberg brought suit against the three officers, the Marion County Sheriff’s Department, the City of Indianapolis, and Value City Department Stores. Both local governments also asserted a cross-claim for indemnification against Value City Department Stores.

On December 8, 2007, a jury returned a verdict in favor of Syberg on his federal and state claims against the three defendant officers involved in the sting, awarding a total of \$230,000 in compensatory damages and \$70,000 in punitive damages. By agreement of the parties, all remaining issues concerning liability of Value City, the City of Indianapolis, and the Marion County Sheriff’s Department, including the cross-claim against Value City, had been left for the court to resolve. The parties eventually reached a settlement of all issues except for the cross-claim against Value City asserted by the City of Indianapolis and the Marion County Sheriff’s Department. (For simplicity’s sake, the court will refer to only Indianapolis as the party seeking indemnification in this entry.) The cross-claim seeks to order Value City to indemnify Indianapolis for damages and other expenses incurred as a result of the individual defendants’ actions. As explained below, the court finds in favor of Value City on the cross-claim.

Factual Background

Defendant Michael Reiger was an officer with the IPD; defendants Kelly Ferrell and Shelby Wickliffe were deputies with the MCSD. (At times relevant to this suit, Indianapolis still maintained police services through the IPD, while Marion County still maintained its own police force through the MCSD. The two organizations were merged effective January 1, 2007 to become the Indianapolis Metropolitan Police Department.) Like many full-time police officers, Reiger and Ferrell found part-time work as security guards. Both worked for defendant Value City Department Stores at one of its Indianapolis-area locations. When working for Value City, Reiger and Ferrell would typically wear their police uniforms and badges while stationed at the front of the store. Their purpose was to deter shoplifting. Indianapolis ordinarily requires part-time employers of its police officers to sign indemnification agreements to manage the thorny liability issues that can otherwise arise during the course of such part-time employment, such as this case. In this case, however, Indianapolis has not been able to locate any such indemnification agreement with Value City.

The head of security at the store where Reiger and Ferrell worked was plaintiff Mark Syberg. Syberg has never been a police officer. In March 2004, Value City loss control officer Diana Chiscon told Ferrell that she suspected that Syberg was identifying himself to store customers as a police officer, but she did

not have hard evidence to that effect.¹ Chiscon and Ferrell began an investigation focusing on a badge Syberg had in his possession that appeared to be from the New Castle police department. As part of this investigation, Chiscon and Ferrell contacted the police department in New Castle, Indiana; they were told there was no reason Syberg would have such a badge.² Chiscon also contacted Bob Tavenner, Value City's national vice-president of loss prevention, and told him about her suspicions. Tavenner expressed interest in the outcome of the investigation because it would have been against store policy for Syberg to use a police badge in the course of his work as a loss prevention officer.

The informal investigation came to a head in September 2004. Chiscon and Ferrell decided to set up a sting operation to obtain what they expected would be solid proof that Syberg was representing himself as a police officer in the course of his work at Value City. The two enlisted the help of Reiger, who was an IPD officer and also part-time Value City security guard. Ferrell also recruited Shelby Wickliffe, a fellow deputy with the Marion County Sheriff's Department. Ferrell told Sergeant Travis Matthews, one of her superior officers with the Marion

¹Indiana Code § 35-44-2-3 makes impersonation of a law enforcement officer a Class D felony when such misrepresentation is done "with intent to mislead and induce another person to submit to false authority or otherwise act to the other person's detriment in reliance on the false representation."

²At trial, Syberg testified that this police badge actually came from New Castle, Wyoming, that it was a gift from his predecessor at Value City, and that he kept it as a good luck charm.

County Sheriff's Department, about the planned sting. Chiscon also informed Value City's Bob Tavenner about the plan.

On September 5, 2004, Chiscon, Ferrell, Reiger, and Wickliffe carried out the sting. According to the plan, Wickliffe was to dress shabbily, douse himself in alcohol, and create a disturbance at the front of the store. Chiscon and Ferrell were supposed to make sure that all other Value City security personnel were out of the store at the time, so that Syberg would be forced to respond to customer complaints about Wickliffe. Wickliffe was to raise his hands over his head if and when Syberg flashed a badge and claimed to be a police officer. At that point, Reiger (dressed in plain clothes) would help Wickliffe make the arrest. None of the individual officers were on duty with their respective police departments at the time of this sting, nor were they paid by Value City for this time.

At first, the sting went according to plan. Wickliffe succeeded in creating a disturbance at Value City. Responding to reports of a drunk bothering customers, Syberg approached Wickliffe and asked him to leave. Wickliffe refused. After several minutes of conversation with Syberg, Wickliffe raised his hands to signal that Syberg had flashed a police badge and claimed to be a police officer. Wickliffe testified at trial that Syberg had flashed his badge and told him to leave. Syberg testified that he did not flash a badge or otherwise claim to be a police officer. The jury did not believe Wickliffe's account, and security camera footage of the incident did not indicate that Syberg flashed a badge during this

exchange. Without action by Syberg impersonating a police officer, the arrest would be without probable cause.

Upon seeing Wickliffe's signal, Reiger moved in quickly for the arrest. Both Reiger and Wickliffe announced they were police officers and were arresting Syberg. In the course of the arrest, Wickliffe slammed Syberg hard against the store's metal and glass doors, buckling the door frames inward. Syberg suffered substantial physical injuries as a result of the arrest. He was also fired from his job with Value City and has been unable to find a new job in loss prevention.

Syberg filed this civil action against Reiger, Ferrell, and Wickliffe in their individual and official capacities. He also named as defendants on the state law claims the City of Indianapolis, the Marion County Sheriff's Department, and Value City under a theory of *respondeat superior*. Syberg's federal claims were for false arrest and use of excessive force. His state law claims were for false arrest, battery, tortious interference with an employment contract, and intentional infliction of emotional distress.

A jury trial was held to determine issues of liability as to the individual officers. Indianapolis, Marion County, and Value City agreed to allow the court to determine issues of vicarious liability and indemnification. The jury returned a verdict in favor of Syberg as to most claims against the individual defendants. It found that none of the individual defendants had probable cause for making the

arrest. It found that Wickliffe (but not Reiger and Ferrell) had subjected Syberg to unreasonable physical force during the arrest. All individual defendants were found to have tortiously interfered with Syberg's employment with Value City and to have intentionally inflicted emotional distress upon Syberg. The jury awarded compensatory damages in the amounts of: \$57,500 allocated to Reiger, \$115,000 allocated to Ferrell, and \$57,500 allocated to Wickliffe, for a total of \$230,000. The jury awarded a total of \$70,000 in punitive damages. The jury allocated the punitive damages as follows on Syberg's federal law claims: \$8,750 against Reiger, \$17,500 against Ferrell, and \$8,750 against Wickliffe. The jury awarded the same amounts of punitive damages against each individual defendant on Syberg's state law claims. On February 27, 2007 the court heard evidence on the remaining issues of liability as to both Indianapolis and Value City.

Discussion

Indianapolis seeks indemnity under common law from Value City for all costs incurred in defending the claims and any damages (other than punitive damages) it was required to pay in the case. As a general rule, a party cannot seek indemnity from another absent a contractual obligation to that effect, as Judge Dillin explained in *McClish v. Niagara Machine & Tool Works*, 266 F. Supp. 987, 989 (S.D. Ind. 1967), which remains the definitive statement of Indiana law on the subject. In *McClish*, Judge Dillin recognized that a narrow exception to this general rule exists under Indiana law: "the right to indemnity may be implied at

common law only in favor of one whose liability to a third person is solely derivate or constructive, and only as against one who has by his wrongful act caused such derivate or constructive liability to be imposed upon the indemnitee.” *McClish*, 266 F. Supp. at 991. There is no contract of indemnity in this case. As noted earlier, Indianapolis did not follow its usual policy of obtaining a signed indemnification agreement from Value City prior to Reiger’s and Ferrell’s employment as part-time security guards for the company.

Common law indemnity provides a means for otherwise faultless parties to seek relief against those who actually caused the harm. Common law indemnity therefore does not apply when both parties to the indemnity claim were responsible for producing the injury:

Where the negligent acts of parties concur in producing injury, they are jointly and severally liable not only where there is a breach of a common duty owing by them, but also where their acts of negligence are separate and independent. In either situation they would be joint tort-feasors, *in pari delicto*, and no right to indemnity exists As a joint tortfeasor, [a party] has no right of common law implied indemnity under Indiana law.

Avery v. Mapco Gas Prods., 848 F. Supp. 1388, 1397 (N.D. Ind. 1991), *affirmed*, 18 F.3d 448, 455 (7th Cir. 1994), quoting *Consolidated Rail Corp. v. Allied Corp.*, 692 F. Supp. 924, 930 (N.D. Ind. 1988), *affirmed*, 882 F.2d 254, 258 (7th Cir. 1989), quoting in turn *McClish*, 266 F. Supp. at 991.

Indianapolis is not entitled to common law indemnification in this case. Indianapolis bore as much culpability as Value City for the wrongful acts of the individual defendants under a theory of *respondeat superior*. See, e.g., *Terminal Transport Company, Inc. v. Cliffside Leasing Corp.*, 577 S.W.2d 455, 459 (Tenn. 1979) (holding that common law indemnity does not apply when underlying liability of both parties to claim for indemnity is premised on doctrine of *respondeat superior*). In carrying out the ill-advised “sting” against plaintiff Syberg, the individual defendants were not working only for Value City or only for Indianapolis. They were acting as agents of both Indianapolis and Value City simultaneously. See *Pourghoraishi v. Flying J., Inc.*, 449 F.3d 751, 763 (7th Cir. 2006) (though Indiana law is “less than crystal clear” on this issue, determining agency when a police officer works part-time as a security guard requires “a highly factual inquiry into the nature of the acts performed and the manner in which security guards identified themselves”), citing *Owen v. Indiana*, 490 N.E.2d 1130, 1134-36 (Ind. App. 1986).

The circumstances here show that the individual defendants were acting within the scope of their employment as police officers when they acted wrongfully against Syberg. Ferrell, Reiger, and Wickliffe were employed by Indianapolis as police officers at all times relevant to Syberg’s lawsuit. In carrying out the sting operation against Syberg, the individual defendants were attempting to further the interests of Indianapolis by enforcing a criminal statute making illegal the impersonation of a police officer. See *Konkle v. Henson*, 672 N.E.2d 450, 456 (Ind.

App. 1996) (employee acts within the scope of his employment when he acts at least in part to further interests of his employer). As Reiger and Wickliffe moved in to arrest Syberg, they announced that they were police officers. Ferrell, Reiger, and Wickliffe acknowledged in interrogatory answers that they were acting within the scope of their employment as police officers during the investigation. Ferrell testified further that in setting up the sting operation, she had obtained authorization from one of her superior officers with the Marion County Sheriff's Department. Moreover, Indianapolis itself acknowledges that Indiana Code §§ 34-13-3-5(d) and 34-13-4-1 apply in this case. These statutory provisions require Indianapolis to pay certain judgments obtained against an employee, but only when that employee's act or omission occurred within the scope of employment with the city. For these reasons, the doctrine of *respondeat superior* applies with at least as much force to Indianapolis as to Value City. Under these circumstances, Indianapolis is no less culpable than Value City, and common law indemnification is not available.

Conclusion

Indianapolis is not entitled to common law indemnity from Value City. Final judgment shall be entered accordingly.

So ordered.

Date: August 7, 2007

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

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