RENDERED: February 26, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-002963-MR

DEMPSEY & CARROLL CO. APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE THOMAS B. WINE, JUDGE
ACTION NO. 96-CI-2462

BETH ROGERS APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, DYCHE, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is an appeal by a defaulting party of a jury's damage award in an employment termination case. After reviewing the pleadings and the uncontroverted evidence, we affirm.

Beth Rogers was employed by Dempsey & Carroll Co. in Louisville, Kentucky, and was its de facto general manager. Sometime in March of 1994, the company was sold to George Ward. George Ward discussed with Beth Rogers moving part of the operation to Baltimore. Beth Rogers was concerned with these changes and discussed looking for another job. George Ward agreed that if she stayed, she would receive nine months'

severance pay upon dismissal. Production was moved to Baltimore, but Beth Rogers still ran the Louisville office. She commuted frequently to the Baltimore office and occasionally to the New York facility, and her duties expanded into sales. In the fall of 1995, George Ward discussed moving the rest of the Louisville office to Baltimore and asked Beth Rogers to relocate and continue working with the company. She agreed and made arrangements to relocate. The relocation move was scheduled for February 29, 1996, after the Christmas season. In December of 1995, Beth Rogers attended a Christmas party for employees of the New York facility. After the party, George Ward showed up at her hotel room. She spurned his advances and he warned her that she would be sorry. In late January of 1996, she was at the Baltimore facility for a scheduled meeting with George Ward and for finding an apartment, etc. George Ward kept putting her meeting off, but asked that she remain over to meet him on Sunday. She agreed. Saturday night she received a call at her hotel room from a part-time employee notifying her that on Friday and Saturday, Dempsey & Carroll Co. had cleaned out the entire Louisville office and shipped everything to the Baltimore facility, including personal items of Beth Rogers. One item, a diamond ring with antique roses, was in a desk drawer and she never got it back. Beth Rogers repeatedly tried to contact George Ward, but he refused to return her calls. On February 10, 1996, Beth Rogers received a letter of termination effective immediately.

Beth Rogers filed suit against her former employer, the appellant herein, for nine months' severance pay pursuant to her employment contract; for conversion of the antique ring; for damages for the intentional infliction of emotional distress; and for punitive damages pursuant to KRS 411.184. The case was set for a jury trial on October 23, 1997. The appellant was not present, so the court granted a default judgment, directing a verdict for Beth Rogers on all counts. A jury trial was subsequently conducted on the issue of damages. The jury returned a verdict, and judgment was entered accordingly:

$ 45,000.00 for severance pay;

$ 3,600.00 for the antique ring;

$100,000.00 for embarrassment, humiliation, emotional distress, etc.; and,

$100,000.00 for punitive damages for fraud, malice, etc., for a total verdict of $248,600.00, plus interest.

Appellant appeals the $100,000.00 award for embarrassment, etc. and the $100,000.00 award for punitive damages. Appellant's first allegation of error is that the conduct complained of in the complaint was committed by George Ward, the president of the appellant corporation, and that KRS 411.184(3) provides that punitive damages cannot be "assessed against a principal or employer for the act of an agent or employee" unless the principal or employer ratified or authorized the act of the employee, or unless the principal or employer "should have anticipated the conduct in question." Appellant alleges that no proof was taken as to whether the

principal/employer, Dempsey Carroll Co., "authorized" or "ratified" or "should have anticipated the conduct" of its president/employee, George Ward. Appellant also contends that Bethesda Engravers bought the stock of the appellant corporation and never ratified the acts of its employee, George Ward.

Although the appellant's brief alleges Dempsey & Carroll Co. was purchased by Bethesda Engravers, there is nothing in the pleadings about Bethesda Engravers until we received the appellant's brief. The pleadings refer to Dempsey & Carroll Co. The uncontroverted evidence at trial was that this was Mr. Ward's company and he was proud of it. (See video of the trial at 14:13:17.) Likewise, appellant asserts that ". . . no proof was taken as to whether the principal/employer, Dempsey & Carroll Company, 'authorized' or 'ratified' or 'should have anticipated the conduct' of its President/employee George Ward." We disagree. The uncontroverted testimony of Beth Rogers was that George Ward bought the company in March of 1994, and that George Ward still owned the company in 1995. We recognize that, as president, George Ward can be both an employee and an owner of a corporation. In Simpson County Steeplechase Ass'n. v. Roberts, Ky. App., 898 S.W.2d 523, 527 (1995), this Court recognized that an employer can be held liable for acts of an employee if the owner ". . . authorized or ratified or should have anticipated the conduct in question." It would be a bit facetious to contend that George Ward, as owner, did not anticipate that George Ward, as president, would do such a thing. If the facts are not as

Beth Rogers testified, the appellant cannot complain because it failed to produce any evidence or even cross-examine Beth Rogers.

Appellant alleges the trial court erred in allowing the jury to be instructed on intentional infliction of emotional distress and in awarding punitive damages against the appellant. Appellant maintains that the plaintiff must elect whether to proceed for breach of contract or in tort, and the breach of an employment contract does not give rise to an award for intentional infliction of emotional distress.

Appellant's allegation that the instructions were erroneous was not preserved for appellate review. CR 51(3) states that "[n]o party may assign as error the giving or the failure to give an instruction unless he . . . makes objection before the court instructs the jury, stating specifically the matter to which he objects and the ground or grounds of his objection." In Chaney v. Slone, Ky., 345 S.W.2d 484, 486 (1961), the Court stated as follows:

> The object of this requirement [making known the specific grounds for an objection] is to give the trial court an opportunity to avoid error. Unless the stated ground or grounds for the objection were valid it cannot be said that the court was given that opportunity. For this reason the error we observe on reviewing this record was not preserved and thus would not authorize a reversal.

See also Young v. DeBord, Ky., 351 S.W.2d 502, 503 (1961).

Appellant did not tender any instructions. Appellant's failure to attend the trial and specifically object to the allegedly erroneous instruction precludes our consideration of

any such error on appeal. Lewis v. Bledsoe Surface Mining Company, Ky., 798 S.W.2d 459, 460 (1990).

While appellant cannot complain about the instructions, it is also incorrect on the law in the instructions. KRS 411.184(4) provides that "[i]n no case shall punitive damages be awarded for breach of contract", but the Supreme Court, in Wittmer v. Jones, Ky., 864 S.W.2d 885, 890 (1993), stated as follows: "It suffices to say that this Court could not interpret KRS 411.184 to destroy a cause of action for punitive damages otherwise appropriate without fatally impaling upon jural rights guaranteed by the Kentucky Constitution, Sections 14, 54, and 241." Thus, appellant's liability for breach of contract could, in some circumstances, constitute a basis for the punitive damages award. See Curry v. Fireman's Fund Ins. Co., Ky., 784 S.W.2d 176 (1989). The case sub judice goes a step further. Our Courts recognize that there can be a separate tort associated with breach of contract, and in such cases of "separately tortious" conduct, the jury may be instructed on punitive damages, and award them. Ford Motor Co. v. Mayes, Ky. App., 575 S.W.2d 480, 486 (1978); Faulkner Drilling Co. v. Gross, Ky. App., 943 S.W.2d 634 (1997). We are satisfied from the record that George Ward's conduct after the December 1995 Christmas party and the conduct at the end of January and into February of 1996 was sufficient to warrant a jury instruction on intentional infliction of emotional distress or outrage as a theory of separately tortious conduct which would also support an award of

punitive damages. See Kroger Co. v. Willgruber, Ky., 920 S.W.2d 61 (1996).

For the foregoing reasons, the judgment of the Jefferson Circuit Court is affirmed.

COMBS, JUDGE, CONCURS.

DYCHE, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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