RENDERED: May 7, 1999; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1996-CA-003111-MR

GENE A. DAUER, DONALD H. DUKE,
and RICHARD W. CAREY d/b/a
DAUER, DUKE & ASSOCIATES — APPELLANTS

v.

APPEAL FROM PIKE CIRCUIT COURT
HONORABLE EDDY COLEMAN, JUDGE
ACTION NO. 86-CI-00637

CANADA COAL COMPANY, INC.;
ROY CANADA, ADMINISTRATOR AND
TRUSTEE OF THE ESTATE OF CLAUDE
S. CANADA; ROY CANADA, ADMINISTRATOR
AND TRUSTEE OF THE ESTATE OF LEONA P.
CANADA; and ROBERT H. PAGE AND MARY
GREENHALGH, CO-EXECUTORS OF THE ESTATE
OF JACK T. PAGE — APPELLEES

OPINION

AFFIRMING

** ** ** **

BEFORE: GUIDUGLI, JOHNSON, and MILLER, Judges.

MILLER, JUDGE: Gene A. Dauer, Donald H. Duke, and Richard W. Carey d/b/a Dauer, Duke & Associates (appellants) bring this appeal from a Ky. R. Civ. Proc. (CR) 54.02 order of the Pike Circuit Court entered October 14, 1996. We affirm.

In May 1986, appellants commenced this action in the Pike Circuit Court to secure a commission for their efforts in attempting to obtain a buyer for Canada Coal Company, Inc. (Canada Coal). Appellants alleged that in 1980, after the death of Claude Canada, they entered into an oral agreement with Leona Canada--Claude's widow and controlling shareholder of Canada Coal. They alleged that the oral agreement directed them to act as brokers for Canada Coal. Leona died before the agreement was reduced to writing. (Claude's and Leona's estates are sometimes referred to as "Canada estates".) Appellants further alleged that after Leona's death, Jack T. Page and K.B. Mims promised them reasonable compensation to secure a buyer for Canada Coal. In so doing, Page and Mims were allegedly acting as officers and directors of Canada Coal and as co-executors of Leona's estate. Page was also allegedly acting as executor and trustee of Claude's estate. Additionally, appellants alleged that Page and Mims, individually and as agents for Canada Coal and Canada estates, fraudulently induced them to seek a buyer but never intended to sell Canada Coal because it was so lucrative for them.

The complaint was summarily dismissed by the circuit court in October 1987 for the reason that the appellants were not licensed as either security brokers or real estate brokers. CR 56. The summary judgment was reversed and remanded by this Court in an unpublished opinion (No. 87-CA-2546-MR) rendered October 20, 1989. Upon remand, a lengthy trial was conducted that

resulted in a favorable verdict for appellants on both their breach of contract and fraud claims. The jury determined that appellants were entitled to compensatory damages and punitive damages.[1] The matter proceeded on appeal to this Court a second time. An opinion rendered September 2, 1994,[2] held (1) that the trial court should have directed a verdict in the defendants' favor on the contract claim; (2) that the trial court erred in allowing the jury to assess punitive damages against Canada Coal and Canada estates as there was no evidence that these defendants "authorized or ratified or should have anticipated the conduct" of Page and Mims; (3) that the trial court utilized an inappropriate measure of damages on the fraud claim; and (4) that the probative value, if any, of the evidence casting doubt on the validity of Claude's will and Leona's will was "far outweighed by the prejudicial nature of the testimony."

This court remanded the matter to the trial court "for retrial of the fraud claim in conformity with this opinion."

On remand for the second time, the case was docketed for trial to commence on October 14, 1996. At the pretrial conference, the trial court ordered the parties to brief the issue of Canada Coal's and Canada estates' vicarious liability.

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[1]The jury returned a joint and several verdict against Canada Coal, Canada estates, Jack T. Page (Page), and K. B. Mims (Mims). Mims never perfected an appeal. He is no longer a party to these proceedings. It appears he is insolvent.

[2]Appeal Numbers 92-CA-767-MR, 92-CA-769-MR, and 92-CA-771-MR, were consolidated for review. The opinion was designated "not to be published."

On the morning the second trial was to start, the trial court dismissed appellants' claim against Canada Coal and Canada estates. CR 56. It determined that these defendants could not be vicariously liable for the fraudulent misrepresentation of their agents as a matter of law because "Page engaged in fraudulent conduct for his own benefit and not the benefit of his principals." Thus, the court held that upon this issue there existed "no material issue of fact and the Canada Defendants are entitled to judgment as a matter of law."[3] The trial court made the order final and appealable pursuant to CR 54.02 and, over the objections of Page's estate,[4] continued the trial pending the outcome of this appeal.

We initially observe that the Court of Appeals' 1994 opinion reversed and remanded the fraud claim for retrial based upon inappropriate measure of damages and erroneous admission of evidence. Perforce, we are of the opinion that the issue of fraud, as pertaining to the vicarious liability of Canada Coal and Canada estates, was to be tried *de novo*. Our review shall proceed accordingly.

The argument that Canada Coal and Canada estates can be

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[3]We view the trial court's October 14, 1996 Order as Summary Judgment under Ky. R. Civ. P. 56.

[4]Page died on March 4, 1993, while the second appeal was pending. The action was revived against his estate and the personal representatives of his estate, the appellees, Robert H. Page and Mary Greenhalgh.

held responsible for fraudulent acts of Page is troublesome.[5] The essence of appellants' fraud claim is that Page duped them into seeking a buyer for the coal company, when, in fact, he never intended that Canada Coal be sold because it would deprive him of his lucrative position within the business. Page's fraudulent conduct would have certainly inured to the detriment of Canada Coal and of Canada estates. Considering this set of facts, we are not convinced that liability can be imposed upon either Canada Coal or Canada estates. It may well be that Page has individual liability for his acts, but such is not an issue on this appeal.

A principal's liability for his agent's acts is grounded upon the maxim of *respondeat superior.* See Wolford v. Scott Nickels Bus Company, Ky., 257 S.W.2d 594 (1953). A principal is not liable for his agent's tort unless the tort was committed within the agent's authority. See Home Insurance Company v. Cohen, Ky., 357 S.W.2d 674 (1962). An act is, of course, within an agent's scope of authority when the act is naturally incident to the principal's business and does not arise solely from the agent's personal motive to further his own interest. When the agent "steps aside" from the scope of his principal's business and embarks upon a cause that is not only for his own benefit but inimical to his principal's interest, his acts will not bind the principal to a third party. Brooks v.

[5]As Mims is not a party to the present appeal, we shall review only Page's actions.

Gray-Von Allmen Sanitary Milk Company, 211 Ky. 462, 277 S.W. 816 (1925). Based upon the facts as alleged by appellants, we are of the opinion Page "stepped aside" from the scope of his employment, thus relieving Canada Coal and Canada estates from vicarious liability.

Appellants, seemingly aware of the principles of the law of agency, nevertheless contend that the matter was settled in the 1994 appeal. They, of course, cannot claim agency to be an affirmative defense that must have been asserted under CR 8 and 12. Rather, they reason that the law-of-the-case doctrine prevents this Court from considering the issue of agency in this appeal. We disagree. We do not interpret this Court's 1994 opinion as precluding any defenses that Canada Coal or Canada estates might make to the fraud claim. We are well aware of the law-of-the-case doctrine and the proposition that issues raised in prior proceedings, as well as issues which could have been raised through reasonable diligence, are not subject to reconsideration. See Schrodt's Ex'r v. Schrodt, 189 Ky. 457, 225 S.W. 151 (1920). We, however, do not believe Canada Coal and Canada estates--in its previous appeal--could have reasonably foreseen the necessity of raising the question of Page's departure from agency. This Court's 1994 opinion did not specifically address whether Page acted outside the scope of his employment with Canada Coal and Canada estates. Moreover, there exists a longstanding exception to the law-of-the-case doctrine--a clearly erroneous decision is not conclusive as to the law of

the case in a subsequent appeal. See Folger v. Commonwealth, Department of Highways, Ky., 350 S.W.2d 703 (1961). The genesis of this exception is uncontrovertedly rooted in the fundamental notion that one should not be bound by an erroneous decision or judgment. We perceive this exception as logically enveloping issues (1) which were never ruled upon in a previous appeal and (2) which, if not considered in a subsequent appeal, would lead to a clearly erroneous decision. Any other view would lead to an absurd result. There exists no reasonable cause to treat issues ruled upon by the court differently from those never ruled upon. Indeed, an argument can be made that the latter issues should be more freely reviewed in a subsequent appeal. As failure to consider Page's agency would lead to a clearly erroneous decision, we view as applicable the above exception to the law-of-the-case doctrine.

In sum, we are unaware of a rule of law to support a claim of vicarious liability based upon Page's conduct. As Canada Coal and Canada estates are entitled to judgment as a matter of law, we are of the opinion the trial court correctly entered partial summary judgment. See CR 56; Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991).

The briefs herein contain many extraneous arguments concerning circuit court orders made *in limine* pertaining to evidentiary matters and the like. We deem those orders irrelevant to resolution of this appeal. They were interlocutory orders not subject to review. CR 50.01. In any event, the

remaining contentions are moot.

For the foregoing reasons, the judgment of the circuit court is affirmed.

GUIDUGLI, JUDGE, CONCURS.

JOHNSON, JUDGE, DISSENTS BY SEPARATE OPINION.

JOHNSON, JUDGE, DISSENTING. Respectfully, I dissent. I have no quarrel with the majority's general discussion of the law as it relates to the doctrine of respondeat superior. However, I believe that the appellees have waived any defense predicated on the nature of the conduct of their agents, Page and Mims, as being beyond the scope of their authority and agree with the appellants that the trial court erred in dismissing Canada Coal and the Canada estates at this juncture in the litigation.

The theory of fraud advanced by the appellants at the first trial did not change on remand. The appellees' liability for the alleged fraudulent misrepresentations of Page and Mims was always predicated on a theory of vicarious liability. Clearly, any defenses that Canada Coal and the Canada estates had that would relieve them of liability for the alleged fraud of their agents should have been raised prior to, or during the first trial, thereby preserving the issues for review in the prior appeal. A review of the record, however, clearly demonstrates that, as "troublesome" as the issue is for the majority, neither Canada Coal nor the Canada estates sought relief in the trial court on this basis, nor did either preserve

the issue for review in any manner prior to the judgment that resulted in the second appeal. Both parties failed to move the trial court for dismissal, or to seek a directed verdict on the basis that Page and Mims were acting outside the scope of their authority.

To the contrary, counsel, who represented both the Canada estates and Page at the first trial, sought a directed verdict on behalf of Page in his individual capacity and argued that the evidence established that everything Page did was either in his capacity as an officer of the corporation, or as executor of the Canada estates.[6] Page's and the Canada estates' joint counsel, as well as counsel for Mims, argued that there was no evidence that Page and Mims did anything in their individual capacities that would constitute fraud. Further, after these motions were made, counsel for Canada Coal told the trial court that he desired to adopt all the arguments made by counsel for Page and Mims. At trial, there was an obvious attempt to protect Page and Mims in their individual capacities. I can only assume that this trial strategy resulted in a conscious decision on the part of trial counsel not to argue, as they did after the second

[6]Canada Coal and the Canada estates are no longer represented by the attorneys who represented them during the first trial. Page was, as stated above, represented at the first trial in his individual capacity and in his capacity as administrator and trustee for the Canada estates by the same attorney. Likewise, Mims was represented at the first trial in both capacities by a single attorney. After the jury returned a verdict in favor of the appellants at the first trial, the Canada estates obtained new and separate counsel to represent them in the appeal.

appeal, that Page and Mims were acting outside the scope of their authority as officers and directors of Canada Coal and as co-executors of the Canada estates.

Accordingly, I believe the appellants are correct that this issue is governed by the law-of-the-case doctrine which provides that a final appellate court decision, "whether right or wrong, is the law of the case and is conclusive of the questions therein resolved. It is binding upon the parties, the trial court, and the [appellate courts]." Martin v. Frasure, Ky., 352 S.W.2d 817, 818 (1961). The doctrine incorporates the doctrine of res judicata which prevents relitigation of issues that "could have been introduced in support of the contention of the parties on the first appeal." Hutchings v. Louisville Trust Company, Ky., 276 S.W.2d 461, 466 (1954). See also Burkett v. Board of Education of Pulaski County, Ky. App., 558 S.W.2d 626, 628 (1977). "[I]ssues which, if sustained, call for dismissal, are taken as decided and rejected when the case has been reversed and remanded on the first appeal." Board of Trustees of the University of Kentucky v. Hayse, Ky., 782 S.W.2d 609, 614 (1989).

Further, I fail to see any basis for the majority's observation that Canada Coal and the Canada estates could not "have reasonably foreseen the necessity of raising the question of Page's departure from agency in its previous appeal." The failure of Canada Coal and the Canada estates at the first trial to raise the issue of whether or not they should be vicariously liable for the misrepresentation of Page and Mims was obviously

the result of their attorney's trial strategy, or it could possibly have been the result of a conflict in interest on the part of their legal representatives at the first trial.[7] In any event, an examination of the pre-hearing statements filed in the prior appeal reveals that after the multi-million dollar judgment was rendered, the appellees finally decided to raise the issue.[8] However, as they had not preserved the issue for consideration, they were denied any relief by this Court on that basis. The September 1994 Opinion by this Court specifically states:

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[7]See note 1 infra.

[8]For example, the Canada estates included the following issue in their pre-hearing statement:

> 2. Whether, given the evidence presented by the Appellees at trial concerning the activities of the former Executors and Trustees of the estates, Appellants Page and Mims, the trial court erred in submitting to the jury any claims against the Estates.

Likewise, in its pre-hearing statement, Canada Coal listed the following issue:

> 33. Whether Jury Instruction No. 2 (on the promissory fraud claim) is so clearly erroneous and contrary to law as to constitute reversible error in the grounds that it directs the jury to find for the Appellees against the Appellant Canada Coal Company if it finds that "the Defendants Jack Page and Bernie Mims", not the Appellant, made the intentional misrepresentations set forth therein, thereby directing the jury to assess liability against the Appellant for the intentional torts of others and not on account of its own actions or misrepresentations.

> A number of other issues have been raised by the appellants. Some of these have not been preserved for our review, while we deem it unnecessary to consider others which have been preserved either because the result we have reached renders them moot, such as the pre-judgment interest claim, or the alleged errors are unlikely to recur on retrial.

Thus, contrary to the position of the majority, Canada Coal and the Canada estates did raise the issue in the prior appeal, and the issue was rejected by the prior Opinion of this Court due to lack of preservation. For this reason, I cannot agree with the majority's conclusion that this Court, in its prior Opinion, contemplated that Canada Coal and the Canada estates would be entitled to raise issues on remand that they could have, and should have, raised in the first trial. Clearly, any absurdity in requiring the appellees to be liable for their agent's conduct is the result of how the appellees practiced the case during the initial fifteen-day trial, and this Court's imposition of the well-settled principle that errors must be preserved in order to be considered on review. See Skaggs v. Assad, by and through Assad, Ky., 712 S.W.2d 947 (1986). Thus, the trial court had no more authority to relieve these parties from their failure to timely raise this issue and properly preserve the issue for this Court's consideration in the appeal from the first trial, than this Court would have in a subsequent appeal. Commonwealth v. Schaefer, Ky., 639 S.W.2d 776 (1982).

Finally, I believe the majority has erred in its reliance on Folger v. Commonwealth, supra, a case in which the

Court declined to apply the law-of-the-case doctrine after a "re-examination" of its first Opinion "convinced" it that it was wrong. Folger "recognize[s] there should be some flexibility in applying the [law of the case] rule in order for an appellate court to correct a palpable error in the first opinion." Inman v. Inman, Ky., 648 S.W.2d 847, 852 (1982) (Stephenson, dissenting). As our Supreme Court recently reiterated, "[t]here are few exceptions to the law of the case doctrine." Wilson v. Commonwealth, Ky., 975 S.W.2d 901, 904 (1998). In my opinion, the exception to the law of the case doctrine carved out in Folger is designed to correct errors made by the Court in a previous appeal, not error or omissions made by the parties or their attorneys. It is my belief that this Court's Opinion of September 1994 does not contain a palpable error and in fact would have been erroneous if it had relieved the principals of liability on remand for grounds that were not timely raised in the trial court and thus not preserved for appellate review. See Kesler v. Shehan, Ky., 934 S.W.2d 254, 256 (1996) ("The Court of Appeals could not review an issue which was not raised in the trial court or decided by the trial judge.").

Accordingly, I would reverse the order of the Pike Circuit Court and remand for a new trial to include the Canada estates and Canada Coal as parties.

BRIEF FOR APPELLANTS:

Hon. John Burrus
Hon. Stephen M. O'Brien, III
Lexington, KY

BRIEF FOR APPELLEE, CANADA COAL CO., INC. and ROY CANADA, ADM'R AND TRUSTEE OF THE CANADA ESTATES:

ORAL ARGUMENT FOR APPELLANTS:

Hon. Stephen M. O'Brien, III
Lexington, KY

Hon. James R. Cox
Louisville, KY

Hon. William G. Francis
Prestonsburg, KY

BRIEF FOR APPELLEE, ROBERT H. PAGE AND MARY GREENHALGH, CO-EXECUTORS OF THE ESTATE OF JACK T. PAGE:

Hon. Lawrence R. Webster
Pikeville, KY

ORAL ARGUMENT FOR APPELLEE, CANADA COAL CO., INC. and ROY CANADA, ADM'R AND TRUSTEE OF THE CANADA ESTATES:

Hon. James R. Cox
Louisville, KY

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