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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000986-MR

JOE A. CHAPMAN, Administrator of the
Estate of J. G. Chapman, deceased — APPELLANT

APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE JOHN D. MINTON, JR., JUDGE
ACTION NO. 98-CI-00664

A. G. EDWARDS & SONS, INC. — APPELLEE

TO BE HEARD WITH: 2000-CA-001457-MR

DEBBIE ALLEN,
LUCILLE HILSMEIER — APPELLANTS

APPEAL FROM WARREN CIRCUIT COURT
v. HONORABLE JOHN D. MINTON, JR.
ACTION NO. 98-CI-00664

JOE A. CHAPMAN, Administrator of the
Estate of J. G. Chapman, deceased — APPELLEE

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

BEFORE: GUIDUGLI, MILLER, AND TACKETT, JUDGES.

MILLER, JUDGE: Joe A. Chapman, Administrator of the Estate of J. G. Chapman, deceased, brings Appeal No. 2000-CA-000986-MR from a summary judgment entered by the Warren Circuit Court on January 19, 2000. We affirm.

Debbie Allen and Lucille Hilsmeier bring Appeal No. 2000-CA-001457-MR from a judgment of the same court, and in the same matter, entered March 23, 2000 upon a jury verdict. We affirm.

APPEAL NO. 2000-CA-000986-MR

On June 11, 1998, the instant action was filed by Joe A. Chapman, Administrator of the Estate of J. G. Chapman, deceased, naming as defendants A. G. Edwards & Sons, Inc. (A. G. Edwards), Debbie Allen and Lucille Hilsmeier, Allen's mother. The complaint made two claims against A. G. Edwards, one under the doctrine of *respondeat superior* and the second predicated upon the theory of negligent hiring. This latter claim was voluntarily abandoned by the complainant. The claim under the doctrine of *respondeat superior* was dismissed on summary judgment, thus precipitating Appeal No. 2000-CA-000986-MR.

The facts are these. Allen was a financial adviser who worked as a stock broker for A. G. Edwards from May 1992 until May 1998. It was alleged that during this period Allen unlawfully acquired approximately $200,000.00 of J. G. Chapman's funds. The mode of acquisition was predicated upon Allen's cultivating a close friendship with Chapman during his later years, and ultimately causing him to place a large sum of money with Putnam Investments in Providence, Rhode Island. This was

done by two investments in February and April 1996. Ultimately, it appears the funds found their way into the hands of Allen and/or Hilsmeier. It is the Providence account that became the basis of this litigation.

The estate claims that J. G. Chapman lacked the mental capacity to open the Putnam account and/or that Allen exerted undue influence upon J. G. Chapman while acting as agent of A. G. Edwards.

At the time of the Putnam transactions, Allen was employed by A. G. Edwards, but J. G. Chapman had ceased to be a customer of A. G. Edwards, his relationship with that firm having ended in 1994.

The essence of the administrator's suit was to hold A. G. Edwards liable for any wrongful acts of Allen. It is upon this issue that the circuit court granted summary judgment in favor of A. G. Edwards.

We review the granting of summary judgment under the precepts of Steelvest, Inc. v. Scansteel Service Center, Inc., Ky., 807 S.W.2d 476 (1991). Absent the existence of a material issue of fact, the case may be disposed of as a matter of law. Ky. R. Civ. P. 56.03.

In this case, there is no dispute as to the facts and the matter is one of law only. The controlling law is enunciated in Fournier v. Churchill Downs-Latonia, Inc., 292 Ky. 215, 166 S.W.2d 38 (1942). Therein, the necessary elements for establishing the liability of an employer for acts of an employee were enumerated as follows:

> (1) the act is of the kind the offender is employed to perform; (2) it occurs substantially within the authorized time and space limits of the employment, and, (3) the offender is actuated, at least in part, by a purpose to serve the master. (Citation omitted).

Id. at 40.

The parties to these proceedings generally agree that the test set forth in Fourtnier is the applicable law. They differ as to whether the conduct of Allen met the test.

The fundamental rule to be gained from Fournier and like cases is that a master is never liable for the acts of an agent unless the acts are performed pursuant to authority of the master, either expressed or implied. See Slusher v. Hubble, 254 Ky. 595, 72 S.W.2d 39 (1934); and Reynolds' Administrator v. Black Mountain Corporation, 240 Ky. 673, 42 S.W.2d 916 (1931). In other words, if harm comes to another by virtue of an agent's carrying out the work of his employer, then, in that event, the employer may be held liable under the doctrine of *respondeat superior*.

In the case at hand, the record is void as to any authority, either express or implied, for Allen to act for A. G. Edwards in opening the Putnam account and making improper dispersals therefrom. A. G. Edwards had nothing to gain by Chapman's opening of his account with Putnam Investments. Indeed, it seems to us it was counterproductive for the account to be opened with Putnam instead of A. G. Edwards. One can only conclude from the evidence that all the acts performed by Allen were done in her own interest, and not in the interest of A. G.

Edwards. A. G. Edwards stood in no position to benefit from the wrongful acts. The best that can be said is that Allen embarked upon her endeavor to ingratiate herself to Chapman while she was employed by A. G. Edwards. This alone is insufficient to expose A. G. Edwards to liability under the doctrine of *respondeat superior*. As such, we are of the opinion the circuit court was correct in entering summary judgment. See Steelvest, 807 S.W.2d 476.

APPEAL NO. 2000-CA-001457-MR

The claim of Joe A. Chapman, administrator of the estate of J. G. Chapman, deceased, against Debbie Allen and Lucille Hilsmeier came on for trial before jury in March of 2000. The jury returned a verdict in favor of the estate. Judgment was entered thereupon, thus precipitating Appeal No. 2000-CA-001457-MR.

Allen and Hilsmeier raise three issues on this appeal. They claim that (1) the trial court improperly received evidence; (2) they were entitled to a directed verdict, and (3) the jury was improperly instructed.

As to the claim of improper receipt of evidence, it appears that the appellee's intestate, J. G. Chapman, underwent a competency hearing in the Warren District Court in May of 1995. The hearing terminated in favor of J. G. Chapman. The jury determined that he was not incompetent to manage his affairs. The hearing was instigated by J. G. Chapman's three children.

J. G. Chapman died in April 1997 at the age of ninety-one. Between the competency trial in 1995 and his death in 1997, J. G. Chapman disposed of a number of properties. It was during this period of February and April of 1996, that he opened an investment account with Putnam Investments in Providence, Rhode Island. It appears this account later came into the hands of Allen and/or Hilsmeier. It is the Putnam account that forms the basis of this litigation.

In filing the action on behalf of the estate, it was the administrator's contention that Allen and Hilsmeier unduly influenced J. G. Chapman, a person in declining years, to open the Putnam account and to ultimately transfer the proceeds to Allen and/or Hilsmeier. The administrator further maintained his intestate lacked the mental capacity to make a disposition of his funds in favor of Allen and/or Hilsmeier.

At the beginning of trial, Allen and Hilsmeier moved the court to take judicial notice that the inquest of 1995 resulted in J. G. Chapman's favor, and that he was therefore able to care for his business affairs. The court declined to grant this motion and proceeded to allow the administrator to impeach the verdict of the inquest jury. Allen and Hilsmeier claim that receipt of evidence attacking the inquest verdict was improper.

We assign no merit to Allen and Hilsmeier's contention. We are aware that all evidence must be relevant. Ky. R. Evid. 401. However, the determination of relevancy is largely within the discretion of the trial judge. See Glens Falls Insurance Company v. Ogden, Ky., 310 S.W.2d 547 (1958). We perceive no

abuse of discretion in receiving evidence concerning J. G. Chapman's mental capacity either before or after the inquest.

Next, Allen and Hilsmeier argue that they were entitled to a directed verdict. We must reject this argument as the record contains abundant evidence supporting submission. J. G. Chapman was a man of advanced age and declining health. This alone may form a basis for reasonable belief that he was not capable of disposing of his property by gift. Moreover, it would support a conclusion that he could be easily subjected to influence. We note that the mental ability to execute a gift or to perform a business transaction is more than that necessary to make a will. See Bye v. Mattingly, Ky., 975 S.W.2d 451 (1998). There is evidence in the record that Allen sided with J. G. Chapman in his competency hearing. There is also evidence that J. G. Chapman gave Allen a general power of attorney to the exclusion of his three children. The evidence further reflects a deepening of Allen's relationship with J. G. Chapman as the latter grew older and more infirm. Thus, we believe that a reasonable person could have found that J. G. Chapman was unduly influenced by Allen and/or that J. G. Chapman lacked the mental capacity to dispose of the funds in question. See Lee v. Tucker, Ky., 365 S.W.2d 849 (1963).

Finally, Allen and Hilsmeier complained that the instruction to the jury which permitted a joint and several judgment was erroneous. They contend that a comparative fault instruction should have been rendered.

We observe the majority view is that comparative negligence principles are inapplicable to intentional torts. Whitlock v. Smith, 297 Ark. 399, 762 S.W.2d 782 (1989); Godfrey v. Steinpress, 128 Cal. App. 3d 154, 180 Cal. Rptr. 95 (1982); Cruise v. Graham, 622 So.2d 37 (Fla. Dist. Ct. App. 1993); Hopkins v. First Union Bank, 193 Ga. App., 109, 387 S.E.2d 144 (1989); Fitzgerald v. Young, 105 Idaho 539, 670 P.2d 1324 (Idaho Ct. App. 1983); Lynn v. Taylor, 7 Kan. 2d App. 369, 642 P.2d 131 (1982); and, McLain v. Training & Development Corporation, 572 A.2d 494 (Me. 1990). The sound basis of such view rests upon:

> [T]he general assumption that comparative negligence evolved to provide compensation to tort victims, who were barred by the harsh doctrine of contributory negligence, and should not be used to diminish recovery where the common law had previously treated an intentional tort victim's contributory fault as irrelevant to damage recovery where an intentional tort was inflicted.

Annot. 18 A.L.R.5th 525, 533 (1994). Upon the above authorities, we are persuaded that this Commonwealth should adopt the majority view that comparative negligence is inapplicable to intentional torts.

Allen and Hilsmeier cite this Court to Roman Catholic Diocese of Covington v. Secter, Ky. App., 966 S.W.2d 286 (1998). While we neither approve or disapprove this case, we consider it distinguishable. That case involved apportionment between negligent and intentional tort-feasors. Where only intentional tort-feasors are involved, we think comparative negligence principles inapplicable and, instead, joint and several liability applicable.

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

TACKETT, JUDGE, CONCURS.

GUIDUGLI, JUDGE, CONCURS IN PART AND DISSENTS IN PART AND FURNISHES SEPARATE OPINION.

GUIDUGLI, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I concur in part and dissent in part. I concur with the majority as to Appeal No. 2000-CA-000986-MR. I believe the summary judgment granted A. G. Edwards and Sons, Inc. was proper. However, I dissent as to appeal No. 2000-CA-001457-MR. I would reverse and remand. I believe the evidence admitted at this trial to impeach the verdict of the competency hearing held in May of 1995 was improper. A duly impaneled jury heard the evidence and had the opportunity to judge the credibility of the witnesses, including J. G. Chapman at the time of the inquest. To allow the Chapman heirs a second bite of the apple in determining the medical and mental status of Mr. Chapman was improper and the trial court abused its discretion by permitting such tainted testimony. I also believe the jury instructions used in this case were fundamentally flawed. The instructions failed to provide the jury with an opportunity to specify whether its findings of liability was based on undue influence, unsound mind or both. I further believe that the instructions were flawed by allowing the appellants to be held liable jointly and severally only. I believe under the present status of the law and especially in light of this Court's ruling in Roman Catholic

Diocese v. Sector, Ky. App., 966 S.W.2d 286 (1995), that this case should have included an apportionment jury instruction.

For the foregoing reason, I believe Appeal No. 2000-CA-001457-MR should be reversed and remanded for a new trial.

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