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Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-002177-MR

GARY MCCOY APPELLANT

APPEAL FROM FLOYD CIRCUIT COURT
v. HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 01-CI-00161 AND 01-CI-00261

RWT, INC., d/b/a PAPA JOHN'S PIZZA;
PAPA JOHN'S INTERNATIONAL, INC. APPELLEES

AND: NO. 2003-CA-002241-MR

RWT, INC. CROSS-APPELLANT

CROSS-APPEAL FROM FLOYD CIRCUIT COURT
v. HONORABLE JOHN DAVID CAUDILL, JUDGE
ACTION NO. 01-CI-00161

GARY MCCOY CROSS-APPELLEE

OPINION
AFFIRMING IN PART,
REVERSING IN PART AND REMANDING

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BEFORE: BARBER AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE[1].

HUDDLESTON, JUDGE: On the evening of February 18, 2000, Gary McCoy, the owner of Mountain Metal, a business in Prestonsburg, Kentucky, called a local Papa John's pizzeria. He ordered two pizzas, one to be delivered to his residence and the other to be

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

delivered to his housekeeper's residence. McCoy requested that the delivery person stop at his business, where he would be working late, to receive payment for the pizzas.

Around 6:30 p.m., Wendell Burke, one of the pizzeria's assistant managers, left to deliver McCoy's order. According to Burke, after delivering the pizzas, he went to Mountain Metal to obtain payment. After McCoy paid Burke, he invited Burke to stay so they could talk. When Burke declined the invitation, McCoy allegedly grew belligerent, brandished a rifle and ordered Burke to sit down. McCoy allegedly talked about "visions" and suicidal thoughts that he was experiencing and demanded that Burke watch a videotape recording of one of McCoy's hunting trips. After watching the video, Burke slipped out while McCoy was distracted.

Burke returned to the pizzeria at approximately 8:00 p.m. When he arrived, he told his general manager and his co-workers about McCoy's behavior. According to Burke, the manager suggested that Burke contact the police; but Gretta Salisbury, another of the pizzeria's assistant managers, not Burke, called the Prestonsburg Police Department. Two officers were dispatched to the pizzeria to investigate, and while there, took statements from Burke and his co-workers. The police obtained an arrest warrant for McCoy in which he was charged with unlawful imprisonment. Later that night, McCoy was taken into

custody. However, on April 10, 2000, the criminal charge lodged against McCoy was dismissed without prejudice after McCoy stipulated to probable cause for his arrest.

On February 16, 2001, McCoy filed suit in Floyd Circuit Court against Papa John's International (Papa John's) and Burke in which he sought damages for wrongful arrest, malicious prosecution and defamation. Later, McCoy learned that RWT, Inc., a local corporation, rather than Papa John's owned and operated the Prestonsburg pizzeria and employed Burke. On March 29, 2001, McCoy filed a separate complaint against RWT in which he sought damages for wrongful arrest, malicious prosecution, defamation and the intentional infliction of emotional distress (IIED). Subsequently, the circuit court consolidated McCoy's two lawsuits.

In due course, Papa John's and RWT moved for summary judgment. In their motions, the corporations argued that Burke had acted outside the scope of his employment. They also contended that McCoy's claim for wrongful arrest lacked merit since he had been arrested pursuant to a valid warrant, and they insisted that McCoy's claim for malicious prosecution should be dismissed since McCoy could not possibly prove one element of that tort. After conducting a hearing, the circuit court signed an interlocutory order which was entered on July 29, 2002, in which it concluded that Burke was an employee of RWT and that he

had acted within the scope of his employment; thus, it denied RWT's motion for summary judgment. On the other hand, the court granted partial summary judgment in the defendant-corporations' favor, dismissing McCoy's wrongful arrest claim. The defendants' motions to dismiss McCoy's remaining claims were held in abeyance pending the completion of discovery.

After the completion of pre-trial discovery, Papa John's moved to alter, amend or vacate the trial court's July 29th order, in effect renewing its motion for summary judgment, while RWT simply re-noticed its original motion for summary judgment. On September 30, 2002, after holding another hearing, summary judgment in favor of both RWT and Papa John's was granted. The court said that McCoy's claims for damages for defamation and malicious prosecution against RWT had accrued on February 18, 2000. Since McCoy did not file suit against RWT until March 29, 2001, these claims were barred by the one-year statute of limitation found in Kentucky Revised Statutes (KRS) 413.140. As to McCoy's claim for the intentional infliction of emotional distress, the court pointed out that this tort exists strictly to redress extreme emotional distress when other traditional torts do not apply. Citing Banks v. Fritsch,[2] the court observed that where a defendant has engaged in acts which constitute one or more of the traditional common law torts that

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[2] 39 S.W.3d 474 (Ky.App. 2001).

allow for recovery for emotional distress, an action for the intentional infliction of emotional distress will not lie. Since McCoy had asserted claims for malicious prosecution and defamation, both of which authorize recovery for emotional distress, the court concluded that McCoy could not assert a claim based on the tort of IIED.

The court said that it was undisputed that Burke was employed by RWT, not Papa John's. Since no employer-employee relationship existed between Papa John's and Burke, the court concluded that Papa John's could only be held vicariously liable for Burke's actions if he was Papa John's ostensible agent. The court determined that McCoy did not rely upon any representation made by Papa John's that had any relation to any of Burke's allegedly intentional acts. And, Burke's intentional acts, the court said, did not advance the cause of Papa John's. Consequently, Papa John's was not vicariously liable for Burke's actions.

Believing summary judgment in favor of the defendant corporations was inappropriate, McCoy appeals to this Court, while RWT challenges in a protective cross-appeal the July 29, 2002, order finding that at relevant times Burke was acting within the scope of his employment with the pizzeria.

OSTENSIBLE AGENCY

On appeal, McCoy insists that the circuit court misinterpreted the law of ostensible agency. Because Papa John's allowed its name to be listed in the telephone directory and allowed its name to be placed on RWT's pizzeria, on Burke's car and on Burke's uniform, McCoy argues, Papa John's induced him to believe that Burke was Papa John's agent. Citing Paintsville Hospital v. Rose,[3] McCoy insists that an ostensible agency situation must be interpreted in light of what the relying party [McCoy] knew or should have known, not what the purported agent [Burke] knew or should have known. There is no genuine issue of material fact, insists McCoy, that Burke was anything but Papa John's ostensible agent. Furthermore, since Burke is Papa John's ostensible agent, then Papa John's is liable under the doctrine of *respondeat superior* for Burke's tortious acts. McCoy also insists that Burke acted within the scope of his employment since his acts occurred substantially within the authorized time and space of his employment.

It is well-settled in this Commonwealth that when considering a motion for summary judgment, the circuit court must view the record in a light most favorable to the party opposing the motion, and the court must resolve all doubts in

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[3] 683 S.W.2d 255 (Ky. 1985).

favor of the party opposing the motion.[4] The court should not grant summary judgment if any issue of material fact exists.[5] We, on the other hand, must determine whether the circuit court correctly found that no genuine issue of material fact exists and that, as a matter of law, the moving party was entitled to judgment in its favor.[6] Since findings of fact are not in issue, we review the circuit court's decision *de novo*.[7]

The Supreme Court of Kentucky has defined "ostensible agency" as follows:

> One who represents that another is his servant or his agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.[8]

To put it another way, for a plaintiff to establish an ostensible agency relationship, he must show that "(1) the defendant made representations leading the plaintiff to reasonably believe that the wrongdoer was operating as an agent under the defendant's authority, and (2) the plaintiff was

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[4] Steelvest, Inc. v. Scansteel Service Center, Inc., 807 S.W.2d 476, 480 (Ky. 1991).

[5] Id.

[6] Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996).

[7] Id.

[8] Roethke v. Sanger, 68 S.W.3d 352 (Ky. 2001), quoting Restatement (Second) of the Law of Agency, § 267 (A.L.I. 1958).

thereby induced to rely upon the ostensible agency relationship to his detriment."[9]

Therefore, McCoy had to show that Papa John's made representations that RWT and its employees, including Burke, were its agents. Such representations could have been made directly to McCoy or to the community at large through advertisements.[10] The record shows that Papa John's had placed its name prominently on RWT's pizzeria or allowed it to be placed there, on the pizza boxes in which pizza was delivered, on Burke's uniform and on his car. As a result, the record contains sufficient evidence to raise a genuine issue of material fact as to whether Papa John's made representations that RWT and, consequently, its employees, including Burke, were its agents.

The circuit court held that McCoy had failed to show that he relied on any representations made by Papa John's which related to any of the specific actions taken by Burke. However, we agree with McCoy that the court misinterpreted the law as it relates to justifiable reliance. McCoy needed only to show that that he justifiably relied on the representation that an agency relationship existed. Viewed in a light most favorable to McCoy, the fact that he called a number listed in the telephone

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9 Shaffer v. Maier, 627 N.E.2d 986, 988 (Oh. 1993).

10 Gizzi v. Texaco, Inc., 437 F.2d 308, 309 (3rd Cir. 1970).

directory assigned to Papa John's pizzeria is sufficient evidence to raise a genuine issue of material fact as to justifiable reliance. Since the record contained enough evidence to raise a genuine issue of material fact as to the existence of an agency relationship, the circuit court erred in granting summary judgment in Papa John's favor.

STATUTE OF LIMITATIONS

McCoy argues that his claims against RWT could not have been barred by the one-year statute of limitations because of the doctrine of *respondeat superior*. According to McCoy, since RWT is vicariously liable for Burke's actions and RWT had notice of the action against Burke, the statute of limitations did not bar McCoy's otherwise late-filed complaint against RWT.

KRS 413.140 expressly sets forth a one-year statute of limitations for both malicious prosecution and defamation. We have neither been cited to nor found statute or case law that supports McCoy's argument.

In his reply brief, McCoy addresses this issue again. He argues that his malicious prosecution claim was not barred since it accrued on April 10, 2000, at the earliest. Since he filed his complaint against RWT on March 29, 2001, McCoy reasons that this claim was asserted within the one-year statute of limitations.

The tort of malicious prosecution consists of five elements: (1) the institution of a criminal proceeding against a criminal defendant by a complaining witness; (2) the termination of the criminal proceeding in the favor of the defendant; (3) malice on the part of complaining witness in instituting the criminal proceeding; (4) lack of probable cause for the criminal proceeding; and (5) consequent damage to the criminal defendant resulting from the institution of the criminal proceedings.[11] So a cause of action for malicious prosecution does not accrue until the criminal proceedings have been terminated in favor of the defendant.[12]

The record establishes that the criminal charge against McCoy was dismissed without prejudice on April 10, 2000. Thus, McCoy had one year from that date in which to file a claim for malicious prosecution. Since McCoy filed his complaint against RWT on March 29, 2001, his claim for malicious prosecution was timely. The circuit court erred when it found otherwise.

McCoy insists that his defamation claim accrued when the local newspaper ran a short article about his arrest on February 23, 2000, not when Burke spoke to his co-workers and the police on February 18, 2000. McCoy insists that since his

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[11] Raine v. Drasin, 621 S.W.2d 895, 899 (Ky. 1981).

[12] Sneed v. Rybicki, 146 F.3d 478, 481 (7th Cir. 1998).

cause of action for defamation accrued on February 23, 2000, his defamation claim, which was filed on March 29, 2001, was not barred by the one-year statute of limitations.

McCoy is incorrect that his defamation claim accrued when the local paper published an article about his arrest. The tort of defamation consists of four elements: (1) defamatory language, (2) about the plaintiff, (3) which is published and (4) causes injury to the plaintiff's reputation.[13] In general, a cause of action for defamation accrues when the defamatory language is published.[14] Publication occurs when "the words [are] either negligently or intentionally communicated as to be heard by an understanding third party[.]"[15] Burke first communicated the allegedly defamatory words on February 18, 2000, when he spoke to his co-workers. Thus, McCoy's defamation claim accrued on February 18, 2000. Since McCoy filed his defamation claim against RWT on March 29, 2001, he filed it well after the one-year statute of limitations had expired. In addition, even if the cause of action did not accrue until February 23, 2000, McCoy's complaint was filed too late.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

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[13] Columbia Sussex Corporation, Inc. v. Hay, 627 S.W.2d 270, 273 (Ky.App. 1981).

[14] Lashlee v. Sumner, 570 F.2d 107, 109 (6th Cir. 1977).

[15] Columbia Sussex Corporation, Inc. v. Hay, supra, note 13, at 274.

In his reply brief, for the first time, McCoy argues that the circuit court erred in dismissing his claim for damages based on the intentional infliction of emotional distress. McCoy acknowledges that the tort is a "gap-filler" intended to provide a remedy when other torts are not adequate. Although McCoy admits that he has not shown that Burke intentionally acted solely to cause McCoy emotional distress, he insists that his claim is still appropriate because when a person acts with reckless disregard and causes extreme emotional disturbance, then a claim for outrage will lie.

As we said in Banks v. Fritsch,[16] the tort of intentional infliction of emotional distress, also known as the tort of outrage, was

> intended as a "gap-filler", providing redress for extreme emotional distress where traditional common law actions do not. Where an actor's conduct amounts to the commission of one of the traditional torts . . . for which recovery for emotional distress is allowed, and the conduct was not intended only to cause extreme emotional distress in the victim, the tort of outrage will not lie. Recovery for emotional distress in those instances must be had under the appropriate traditional common law action.[17]

In his two complaints, McCoy sought damages for both defamation and malicious prosecution. These traditional torts

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[16] 39 S.W.3d 474 (Ky.App. 2001).

[17] Id. at 481.

allow for the recovery of damages due to emotional distress. Thus, a claim for intentional infliction of emotional distress is inappropriate in the present case. In addition, McCoy offers no evidence that Burke acted with the sole intent to cause McCoy emotional distress. The court correctly dismissed McCoy's claim.

SCOPE OF EMPLOYMENT

In a protective cross-appeal, RWT challenges the circuit court's determination that at relevant times Burke was acting within the scope of his employment. RWT cites Roethke v. Sanger[18] and argues that the test to determine ostensible agency is also the one used to determine whether an employee has acted within the scope of his employment. RWT insists that Burke intentionally lied to the police regarding McCoy and intentionally and falsely prosecuted him as well. RWT insists Burke's intentional actions were outside the scope of his employment since they did not inure to RWT's benefit.

Regarding "scope of employment", the Supreme Court has said that

> the critical analysis is whether the employee or agent was acting within the scope of his employment at the time of his tortious act. Wood v. Southeastern Greyhound Lines[19] provides that for it to be within the scope of its employment, the

[18] supra, note 8.

[19] 302 Ky. 110, 194 S.W.2d 81 (1946).

> conduct must be of the same general nature as that authorized or incidental to the conduct authorized. A principal is not liable under the doctrine of *respondeat superior* unless the intentional wrongs of the agent were calculated to advance the cause of the principal or were appropriate to the normal scope of the operator's employment.[20]

RWT bases its argument on the assumption that Burke’s actions were both intentional and tortious. So its argument can only succeed if it is determined as a matter of fact that Burke intentionally lied when he reported that McCoy had unlawfully imprisoned him. Neither we nor the circuit court at this stage can make such a determination since this factual dispute lies at the very heart of this case; only a jury can resolve factual disputes. Since it can often be difficult to determine whether an employee’s actions fall within the apparent scope of his employment, courts generally hold that the issue of scope of employment is a question of fact to be decided by a jury.[21] In the present case, the record contains sufficient evidence to raise a genuine issue of material fact as to whether Burke acted within the scope of his employment; therefore, this issue should be decided by a jury.

CONCLUSION

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[20] Osborne v. Payne, 31 S.W.3d 911, 915 (Ky. 2000). (Citation omitted.)

[21] Willis v. Maysville & B.S.R. Co., 122 Ky. 658, 92 S.W. 604, 605 (Ky. 1906).

That portion of the summary judgment dismissing McCoy's claims for damages based on intentional infliction of emotional distress against Papa John's and RWT is affirmed. That portion of the summary judgment dismissing McCoy's claim against RWT for damages for defamation is affirmed. That portion of the summary judgment dismissing McCoy's claim for damages for defamation and for malicious prosecution against Papa John's and his claim for malicious prosecution against RWT is reversed, and this case is remanded for further proceedings consistent with this opinion.

ALL CONCUR.

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