[Cite as *N. Am. Herb & Spice Co., Ltd., L.L.C. v. Appleton*, 2010-Ohio-4406.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

NORTH AMERICAN HERB & SPICE CO., LTD, LLC,	:	
Plaintiff-Appellant,	:	CASE NO. CA2010-02-034
	:	O P I N I O N
- vs -	:	9/20/2010
	:	
WILLIAM R. APPLETON II, et al.,	:	
Defendants-Appellees.		

CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
Case No. CV2007-11-4662

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YOUNG, P.J.

{¶1} Plaintiff-appellant, North American Herb & Spice Company Ltd., LLC (NAHS), appeals from the December 21, 2009 judgment of the Butler County Court of Common Pleas granting summary judgment to defendants-appellees, Martha Moe, Bill Boshears, and Clear Channel Communications, Inc. and Clear Channel Broadcasting, Inc. (collectively Clear Channel).

{¶2} The crux of this case arose from the relationship between Judy Gray, sole owner of NAHS, William R. Appleton II, and Boshears. From 2002 to 2008, Boshears hosted the "Sci-Zone," a talk radio show broadcast by Clear Channel. In 2002, Boshears sought to host Gray and her close friend, Dr. Cass Ingram, on the Sci-Zone to discuss relevant health issues and nutrition.[1] Over the next several years, Gray and Ingram appeared on the Sci-Zone roughly five times to discuss health-related topics, during which time Gray and Boshears developed a friendship.

{¶3} In early 2006, Boshears invited Appleton to the Clear Channel studio with the intent of introducing him to Gray, who was scheduled to appear on the Sci-Zone. Gray testified that during this meeting, Boshears stated Appleton was a "very fine financial advisor, that [Boshears] knew him like a brother and that he trusted [Appleton] more than his son," and that Appleton was "really good at what he did." Gray also testified that Boshears and Appleton described Appleton's "hedge funds and all of his experience * * * and [Appleton] was saying that he knew many, many

1. NAHS manufactured "oregano oil," a substance purported to kill cold viruses, and Gray testified she was "probably the best nutritionist in the whole United States, if not the world."

people, very highly-placed and very rich people, very important people * * * [and that] he was very good with investments[.]"

{¶4} Over the next year, Appleton convinced Gray to invest over three million dollars in various schemes, including Appleton's alleged internet business, My Pet Cams.Com, Inc., and a currency exchange. Gray explained that she chose to invest with Appleton because she trusted Boshears' continual endorsement of his financial capabilities. Gray testified "[w]e had known Boshears for six, seven years and I trusted him. And * * * [Boshears] kept telling me over and over again that [Appleton] was a very reliable, very good person, that he would help * * * with whatever I needed and that [Appleton] was a very dependable, reliable, trustworthy person. * * * [U]nfortunately I know that I was swayed by this referral, by this information."

{¶5} In addition to Gray's cash investments, NAHS owned a valuable collection of antiques, art and jewelry, which Appleton offered to transport to Gray's London home via private plane. Gray entrusted these items to Appleton, only to later discover that he attempted to sell various pieces of the collection in pawn shops throughout Europe.

{¶6} On November 30, 2007, NAHS filed a complaint against Appleton and My Pet Cams.Com, Inc. for conversion, fraud, breach of fiduciary duty, negligent misrepresentation, and violations of R.C. 1707.141 and 2307.60. In its complaint, NAHS also alleged causes of action against Appleton's ex-fiancée, Martha Moe, for conversion and civil theft. NAHS also asserted claims for fraud and negligent misrepresentation against both Boshears and Clear Channel, alleging Clear Channel was liable for Boshears' fraud and/or negligent misrepresentation under the doctrine

of respondeat superior.

{¶7} In March 2008, the trial court granted NAHS' motion for default judgment against Appleton and My Pet Cams.Com, Inc. for $3,538,743.80.

{¶8} In September 2008, Clear Channel moved for summary judgment, seeking dismissal of all claims against them. The trial court granted Clear Channel's motion, holding that (1) the First Amendment protected Clear Channel from liability stemming from Boshears' on-air statements regarding Appleton; and (2) any statements Boshears made privately while introducing Gray and Appleton fell outside the scope of Boshears' employment.

{¶9} In October 2008, Martha Moe moved for summary judgment, asserting that NAHS failed to present evidence with respect to whether she wrongfully disposed of NAHS' antiques, art and jewelry in Europe. The trial court granted Moe's motion, holding that NAHS set forth no facts upon which a reasonable jury could find that Moe acted contrary to NAHS' interests by wrongfully disposing of its items.

{¶10} Lastly, Boshears moved for summary judgment, seeking dismissal of NAHS' claims for fraud and negligent misrepresentation. The trial court granted Boshears' motion, holding that a reasonable jury could come to only one clear conclusion: "Gray's relationship with Appleton, while having commenced with the introduction by Boshears, was driven by [Gray's] own research, relationship, and experience with Appleton, independent of any reliance upon statements by Boshears."

{¶11} On appeal, NAHS raises three assignments of error for review.

{¶12} Assignment of Error No. 1:

{¶13} "THE TRIAL COURT ERRED TO THE PREJUDICE OF

PLAINTIFF/APPELLANT BY SUBSTITUTING ITS JUDGMENT FOR THE TRIER OF FACT IN GRANTING SUMMARY JUDGMENT TO DEFENDANT/APPELLEE, CLEAR CHANNEL COMMUNICATIONS, INC., AND CLEAR CHANNEL BROADCASTING, INC. (JOINTLY "CLEAR CHANNEL").

{¶14} Summary judgment is a procedural device used to terminate litigation and avoid a formal trial when there are no issues in a case to try. See *Forste v. Oakview Constr., Inc.*, Warren App. No. CA2009-05-054, 2009-Ohio-5516, ¶7. This court reviews summary judgment decisions de novo. Id. Summary judgment is appropriate under Civ.R. 56 when (1) there is no genuine issue of material fact; (2) the moving party is entitled to judgment as a matter of law; and (3) reasonable minds can come to but one conclusion and that conclusion is adverse to the nonmoving party, said party being entitled to have the evidence construed most strongly in his favor. Id. at ¶8; *Zivich v. Mentor Soccer Club, Inc.,* 82 Ohio St.3d 367, 369-370, 1998-Ohio-389.

{¶15} The moving party bears the burden of demonstrating that no genuine issue of material fact exists with regard to the essential elements of the nonmoving party's claims. *Baker v. Meijer Stores Ltd. Partnership*, Warren App. No. CA2008-11-136, 2009-Ohio-4681, ¶21; *Dresher v. Burt*, 75 Ohio St.3d 280, 292-93, 1996-Ohio-107. A material fact is one that would affect the outcome of the suit under the applicable substantive law. *Baker* at ¶21.

{¶16} Once the moving party supports its motion with appropriate evidentiary materials, the nonmoving party must then present evidence showing that there is some issue of material fact yet remaining for the trial court to resolve. Id. at ¶22. The nonmoving party may not rely on mere allegations or denials in its pleading, but

must respond with specificity to show a genuine issue of material fact. Id.; Civ.R. 56(E).

{¶17} In the case at bar, Gray testified that Boshears introduced her to Appleton during one of her final Sci-Zone appearances in early 2006. Gray testified that throughout the evening, Boshears made statements both privately and on-air regarding Appleton's financial capabilities. As a result, NAHS argued that because Boshears' statements occurred within the scope of his employment as a radio host, Clear Channel was liable for fraud and negligent misrepresentation under respondeat superior.

{¶18} In its motion for summary judgment, Clear Channel argued it was entitled to First Amendment immunity for broadcasting allegedly false information regarding Appleton. Secondly, Clear Channel argued it was not liable for any statements Boshears made privately while introducing Gray and Appleton because the introduction fell outside the scope of Boshears' employment. We will address each argument in turn.

Broadcast Statements

{¶19} With respect to Boshears' on-air statements regarding Appleton's financial capabilities, we find that the trial court properly granted summary judgment in favor of Clear Channel.

{¶20} As a general rule, broadcasters face liability for negligent misrepresentation "only if the disseminator of the information intends to supply it to a specific person or to a limited group of people." *Amann v. Clear Channel Communications*, Hamilton App. No. C-050411, 2006-Ohio-714, ¶21. In *Amann*, the First District Court of Appeals held that Clear Channel's listening audience within the

Greater Cincinnati area was "not a limited group of people," thus Clear Channel was not liable for failing to investigate the veracity of an investment advertisement, which was ultimately shown to be a fraudulent investment scheme. In the case at bar, the Sci-Zone show was broadcast to 38 states; thus, its listening audience was not a "limited group of people." See id. at ¶21. As a result, any on-air statements Boshears made about Appleton were not intended to influence any particular person or group; rather, these statements were clearly intended to reach the large general audience listening in 38 states.

{¶21} Additionally, with respect to Boshears' allegedly fraudulent on-air statements, Clear Channel's liability is "limited to those cases where the [broadcaster] actually knew the ad was false before publication, or where the ad is so inherently improbable on its face that the [broadcaster] must have realized the ad was probably false." Id. at ¶14. In the case at bar, the record is devoid of any evidence that (1) Clear Channel knew that Boshears' statements regarding Appleton were false, or (2) Boshears' statements were inherently improbable on their face.

{¶22} Therefore, with respect to Boshears' on-air statements regarding Appleton's financial capabilities, the trial court properly granted summary judgment to Clear Channel.

Respondeat Superior

{¶23} In addition to statements broadcast on the Sci-Zone, Gray testified that Boshears made statements regarding Appleton's talents during a private conversation at the Clear Channel station. Because these statements were made to a "limited audience" consisting solely of Gray, Clear Channel is not entitled to First Amendment immunity for these statements. See *Amann*, 2006-Ohio-714 at ¶21.

However, we find that summary judgment for Clear Channel was still appropriate because NAHS failed to present evidence establishing a genuine issue of material fact as to whether Boshears acted within the scope of his employment when he made these statements.

{¶24} "For an employer to be liable for a tortious act of its employee, that employee must be acting within the scope of employment when [he] commits the tortious act." *Johnson v. Church of the Open Door*, 179 Ohio App.3d 532, 2008-Ohio-6054, ¶27, quoting *Groob v. KeyBank*, 108 Ohio St.3d 348, 2006-Ohio-1189, paragraph two of the syllabus. "According to basic agency principles, 'scope of employment' as a legal term lacks a comprehensive definition because the cases are fact specific and present a sui generis issue for review." *Byrd v. Smith*, Clermont App. No. CA2007-08-093, 2008-Ohio-3597, ¶33. However, the Ohio Supreme Court has stated that an employee's act is considered in the course of his employment when it "can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of the service to be rendered or a natural, direct, and logical result of it." Id., quoting *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 274.

{¶25} Additionally, Restatement of the Law 2d, Agency (1957), Section 228 sets forth three factors to consider when determining whether an employee's conduct falls within the scope of his employment. Only when the conduct "is the kind the employee is employed to perform, occurs substantially within the authorized time and space limits, and is actuated, at least partly, to serve the employer," will the employee's acts be considered within the scope of his employment. *Byrd*, 2008-Ohio-3597 at ¶34.

{¶26} NAHS claims Boshears acted within the scope of his employment at the

time he made alleged misrepresentations to Gray regarding Appleton's financial prowess. However, upon review of the evidence, we find that NAHS failed to satisfy the third foregoing factor, namely that in introducing Appleton to Gray and allegedly misrepresenting Appleton's capabilities, Boshears was motivated, at least partly, to serve Clear Channel.

{¶27} Instead, the evidence indicates that the true benefit of Gray and Appleton's introduction rested with Boshears. As a result of the introduction, Appleton gave Boshears two checks totaling $19,300 as a "finder's fee," which Boshears testified was "never part of [their] discussion." Instead of spending the money, Boshears testified he placed it in a safe, because he "didn't really feel comfortable about taking money for something [he] did as a favor." Boshears further testified his "decision to introduce these parties had nothing to do with [his] employment as a radio personality on WLW." Instead, Boshears testified his purpose was to provide a "convenient meeting" amongst like-minded businesspeople. Thus, aside from their initial introduction, which admittedly occurred within Clear Channel's walls, the record is devoid of any evidence that the relationship between Boshears, Gray, and Appleton affected or benefitted Clear Channel in any manner.

{¶28} To defeat the summary judgment motion, it was necessary for NAHS to establish a prima facie case of respondeat superior. Because NAHS offered no evidence under Civ.R. 56, beyond its mere assertions, that in introducing Gray and Appleton, Boshears was motivated, at least in part, to serve Clear Channel, NAHS could not establish an essential element of its case.[2] See *Compston v. Holzapfel*

2. While Boshears' "finder's fee" is somewhat questionable, there is no evidence that Boshears' pecuniary interest in Gray and Appleton's relationship benefitted Clear Channel in any way. Further,

(July 15, 1991), Clermont App. No. CA90-08-079, at 3; *Burt*, 75 Ohio St.3d at 296; *Wilson v. Smith*, Summit App. No. 22193, 2005-Ohio-337, ¶13. In the absence of a prima facie showing of respondeat superior, the trial court had a sufficient basis to conclude that reasonable minds could come to but one conclusion and that Clear Channel was entitled to judgment as a matter of law.

{¶29} Accordingly, NAHS' first assignment of error is overruled.

{¶30} Assignment of Error No. 2:

{¶31} "THE TRIAL COURT ERRED TO THE PREJUDICE OF PLAINTIFF/APPELLANT BY SUBSTITUTING ITS JUDGMENT FOR THE TRIER OF FACT IN GRANTING SUMMARY JUDGMENT TO DEFENDANT/APPELLEE, BILL BOSHEARS."

{¶32} In its second assignment of error, NAHS argues the trial court erred in granting summary judgment to Boshears on its fraud and negligent representation claims. Specifically, NAHS argues that genuine issues of material fact existed as to whether Gray justifiably relied on Boshears' alleged misrepresentations regarding Appleton.

{¶33} Boshears supported his motion for summary judgment primarily with Gray's deposition testimony, which stated that prior to investing with Appleton, Gray independently researched his companies. Boshears thus argued that in choosing to invest with Appleton, Gray did not rely on his alleged misrepresentations regarding Appleton's financial prowess. Thereafter, the burden shifted to NAHS to show, by affidavit or as otherwise provided in Civ.R. 56, that there was a genuine issue of fact regarding its fraud and negligent misrepresentation claims. Civ.R. 56(E); *Byrd v.*

NAHS assigns no error relating to Clear Channel's potential benefit from this money.

Smith, 110 Ohio St.3d 24, 2006-Ohio-3455, ¶10.

{¶34} "The elements of fraud and negligent misrepresentation are very similar." *Johnson*, 2008-Ohio-6054 at ¶15. In particular, justifiable reliance is an essential element of both claims. The elements of fraud are: (1) a representation or, where there is a duty to disclose, concealment of a fact, (2) which is material to the transaction at hand, (3) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred, (4) with the intent to mislead, (5) justifiable reliance upon the representation or concealment, and (6) a resulting injury proximately caused by the reliance. Id.; *Mertens v. Dever*, Clermont App. No. CA2005-07-060, 2006-Ohio-1001, ¶14. The elements of negligent misrepresentation are as follows: "One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information." *Delman v. Cleveland Heights* (1989), 41 Ohio St.3d 1, 4.

{¶35} Thus, the central issue is whether the evidence below, when viewed in a light most favorable to NAHS, established as a matter of law that no genuine issue of material fact existed concerning one or more of the necessary elements of fraud and/or negligent misrepresentation, and whether the absence of any such elements entitled Boshears to summary judgment.

{¶36} In granting summary judgment to Boshears, the trial court found NAHS failed to present evidence establishing that Gray justifiably relied on Boshears'

statements regarding Appleton. Specifically, the trial court held "Gray's relationship with Appleton, while having commenced with the introduction by Boshears, was driven by her own research, relationship, and experience with Appleton, independent of any reliance upon statements by Boshears."

{¶37} To determine whether Gray's reliance was justified, "this Court must inquire into the relationship between the parties." *Johnson*, 2008-Ohio-6054, ¶16. We must consider the nature of the transaction, the form and materiality of the representation, the relationship of the parties and their respective means and knowledge, as well as other circumstances. Id.; *Findlay Ford Lincoln-Mercury v. Huffman*, Hancock App. No. 5-02-67, 2004-Ohio-541, ¶22. "Reliance is justified if the representation does not appear unreasonable on its face and if, under the circumstances, there is no apparent reason to doubt the veracity of the representation." *Lecrone v. Yates*, Fairfield App. No. 02 CA 59, 2003-Ohio-1103, ¶32.

{¶38} According to Gray, her decision to invest with Appleton resulted from her relationship with Boshears and her knowledge that Boshears researched his guests before inviting them on the Sci-Zone. However, even assuming the truth of Gray's testimony that Boshears painted Appleton as a "fine financial advisor" whom "he trusted * * * more than his son," such statements fail to create a genuine issue of material fact as to whether Gray justifiably relied upon them. Rather, the evidence indicates that Gray's decision to invest with Appleton was grounded in their friendship, Gray's independent research, and her substantial business experience.

{¶39} During her deposition, Gray testified that between 2006 and 2007, she and Appleton traveled to Chicago, New York, London, and Canada. While traveling,

the two grew closer, sharing not only investment strategies, but also religious viewpoints, nutrition advice, and extensive details regarding Gray's estate and financial affairs. During this time, Gray prepared meals for Appleton from a "very special market," supplied him with "innumerable health supplements," purchased equipment to ease his knee pain, and "talked to him in depth about his soul[.]"

{¶40} Despite their newfound friendship, Gray remained wary of Appleton's activities.[3] Gray testified that Appleton "would do just enough," stating "when you would start getting a little suspicious * * * he would come back and do just enough to make you feel like, oh, well, I guess I was just being an old ninny[.]" Based upon her suspicions, Gray sought additional assurances prior to investing with Appleton. Gray testified "I did do some homework [on Appleton's company, My Pet Cams.Com, Inc.]. I did look it up. There was, in fact, a website with all of this available and there was a company in existence. * * * And I went on to one of these security sites where you pay $25 to do the search on a person and stuff on the web. All of the stuff that [Appleton] had told me was on there * * * his address, Appleton securities or whatever he had was listed on there. And so I thought, well, at least he has the companies and * * * he was in a legitimate business as Boshears told me." Gray also testified that she engaged NAHS employees to verify the existence of Appleton's various companies.

{¶41} Thus, despite Boshears' alleged endorsements, the evidence clearly indicates that Gray remained suspicious of Appleton, choosing not to invest with him prior to performing her own research and developing a well-rounded relationship with

3. Gray testified that "[Appleton] wanted to know every single penny that I had, *which I was very hesitant about telling him that.* * * * I told him quite a bit, more than I really felt even good about doing, but he's very pervasive. He doesn't give up[.]" (Emphasis added).

him.

{¶42} Under these circumstances, we find that Gray's reliance on Boshears' statements was not justified as a matter of law. Because NAHS failed to present evidence to support a necessary element of both claims against Boshears, we find that the trial court properly granted summary judgment on his behalf.

{¶43} Accordingly, NAHS' second assignment of error is overruled.

{¶44} Assignment of Error No. 3:

{¶45} "THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT TO DEFENDANT MARTHA MOE."

{¶46} In its final assignment of error, NAHS argues the trial court erred in granting summary judgment to Moe on its conversion and civil theft claims.

{¶47} In her summary judgment motion, Moe argued NAHS failed to present evidence tying her to any participation in the attempted sale of its jewelry and antiques. In support, Moe filed an affidavit from Appleton, stating that the art, jewelry and antique collection was "never in any way entrusted to Martha Moe nor ever in her possession or under her control, nor did she participate in any way in the alleged sales of pieces of the collection to pawn shops across Europe." Additionally, Moe submitted NAHS' responses to her request for admissions, in which NAHS admitted that it lacked video or other electronic surveillance of Moe's alleged activities in Europe.

{¶48} In opposition, NAHS filed one picture of Moe and two pictures of Appleton, along with an unsworn written statement from "Miss R. Gill," owner of Johnson Walker, Ltd. Jewelry store, stating "I, Miss R. Gill confirm I saw Gentleman and Lady in the summer '07. As seen in the attached picture." In addition, NAHS

filed an affidavit from Gray, stating that Miss Gill "positively identified both Martha Moe and William Appleton as being in the jewelry store in the summer of 2007 and attempting to sell jewelry owned by [NAHS]." Gray's affidavit also stated "I spoke to several officers within the London Metropolitan Police Department. I have been told by officers that there is a police report containing additional facts and evidence regarding Martha Moe's involvement in attempts to sell [NAHS'] property in London." As a result, NAHS claimed that a genuine issue of material fact existed regarding whether Moe participated in the attempted sale of its jewelry and antique collection.

{¶49} When ruling on a motion for summary judgment, a trial court must consider only admissible evidence. *Lowe v. Cox Paving, Inc.*, Brown App. No. CA2010-03-005, 2010-Ohio-3816, ¶27. Hearsay statements, i.e. statements other than ones made by the declarant while testifying at the trial or hearing, offered to prove the truth of the matter asserted, are not admissible evidence in a summary judgment context unless an exception to the hearsay rule applies. Id.; Evid.R. 801(C).

{¶50} Miss Gill's written statement did not meet the requirements of Civ.R. 56(E), as it was unsworn hearsay that did not go beyond the allegations in the pleadings. Evid.R. 801(C). Consequently, we need not consider Miss Gill's statement as evidence in this proceeding. See *Fuson v. Fisher* (Feb. 17, 1998), Butler App. No. CA97-05-013, at 3; *Chaplynski v. Van Holle* (Apr. 13, 1992), Clermont App. No. CA91-08-060, at 3. Additionally, the police reports and officers' statements referenced in Gray's affidavit constitute hearsay. Evid.R. 801(C). In light of NAHS' failure to produce any such police reports or statements, we need not consider them as evidence, either.

{¶51} As such, NAHS failed to present any competent evidence showing Moe's involvement in the attempted sale of its jewelry and antiques in Europe. As a result, no dispute exists regarding Moe's participation in the attempted sale of NAHS' collection. Because reasonable minds could come to but one conclusion, that conclusion being adverse to NAHS, we hold that the trial court correctly issued summary judgment on behalf of Moe.

{¶52} Accordingly, NAHS' third assignment of error is overruled.

{¶53} Judgment affirmed.

BRESSLER and HENDRICKSON, JJ., concur.