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# Commonwealth Of Kentucky

# Court of Appeals

NO. 2004-CA-002145-MR

ESTATE OF WILLIAM CLINTON BRYANT, BY AND THROUGH HIS EXECUTRIX, TINA S. BRYANT; TINA S. BRYANT, INDIVIDUALLY, AS WIFE TO THE DECEASED; AND WILLIAM CLINTON BRYANT, JR., A MINOR, BY AND THROUGH HIS MOTHER AND NEXT FRIEND, TINA S. BRYANT — APPELLANTS

v.

APPEAL FROM MONTGOMERY CIRCUIT COURT
HONORABLE BETH LEWIS MAZE, JUDGE
ACTION NO. 03-CI-90240

MID-STATES PLASTICS, INC. — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: The Estate of William Clinton Bryant, by and through his Executrix, Tina S. Bryant, Tina S. Bryant, Individually, as wife of the deceased, and William Clinton Bryant, Jr., a minor, by and through his mother and next friend, Tina S. Bryant (the Bryant Estate), have appealed from the award of summary judgment by the Montgomery Circuit Court in favor of

Mid-States Plastics, Inc.[1] in an action instituted by the Bryant Estate to recover damages from Mid-States for its vicarious liability under the doctrine of respondeat superior. Having concluded that there are genuine issues as to material facts precluding summary judgment, we reverse and remand.

On October 15, 2002, Daniel Edwards leased a private plane and took a business trip to Indianapolis, Indiana, on behalf of Mid-States.[2] Edwards invited his minister, Rev. William Clinton Bryant, to accompany him on the trip so Rev. Bryant could visit his relatives living in Indianapolis. Edwards and Rev. Bryant met at the Montgomery County Airport and departed that morning and they then met up again at the Indianapolis airport that afternoon. During the return flight to Mount Sterling, Kentucky, Edwards negligently flew the plane and hit a guy wire of a cell phone tower owned by Cingular Wireless, Inc. The plane crashed, causing the deaths of both

[1] Mid-States is a Kentucky corporation, with its headquarters and executive offices in Mt. Sterling, Kentucky, and it is a wholly-owned subsidiary of UPONOR, ETI, a Finnish company located within the United States. Daniel Edwards founded the company and in 1998 sold Mid-States to UPONOR. Mid-States's business is the manufacturing and distribution of plastic meter boxes throughout the United States and its business is conducted through its sales representatives and distributors.

[2] Edwards's own private plane was not available due to maintenance repairs; therefore, he made arrangements to lease a rental plane. To prepare for the flight, Edwards went to the Montgomery County Airport to be checked out on the Cessna with a flight trainer. Mid-States argues that it did not require Edwards to fly on business trips, nor did it own, rent, lease, operate, possess, control, or have any relationship to the plane, and that Edwards paid for the leased aircraft in his own name.

Edwards and Rev. Bryant. The Bryant Estate filed this wrongful death action against Mid-States, the Edwards Estate, and Cingular Wireless.[3]

For purposes of this appeal, the following facts are undisputed: (1) on the date of the accident, Edwards had flown to Indianapolis for the purpose of training a sales representative;[4] (2) Rev. Bryant was never an employee of Mid-States, he was a non-business passenger on the trip, and his presence served no business purpose and furthered no interest for Mid-States; and (3) Edwards's negligence contributed to the plane crash.

Prior to his death, Edwards was the president and general manager of Mid-States and he was the chief executive for all operations for Mid-States nationwide. Edwards and Mid-States had entered into an employment agreement, dated February 27, 1998, which charged Edwards with the following duties:

> 1. EMPLOYMENT. [Mid-States] shall employ [Edwards] as the General Manager of [Mid-States], with responsibility for supervision of all aspects of operation

[3] Mid-States argued that the lawsuit was filed against it solely because Edwards was an employee. The Bryant Estate argued in its complaint that Edwards was an agent, servant, and employee of Mid-States. Mid-States denied in its pleadings that Edwards was "acting as an 'agent, servant and employee' of [Mid-States]" at the time of the crash but stated that he was a "contract" employee, with the titles of general manager and president.

[4] Edwards was paid for the workday on October 15, 2002, and Edwards's widow was paid the workers' compensation death benefit.

> and administration of [Mid-States], and [Edwards] hereby accepts such employment and agrees to perform such duties and undertake such responsibilities as are customarily performed by others holding positions similar to that assigned to [Edwards] in similar businesses, subject to the general and customary supervision of [Mid-States's] Board of Directors.
>
> . . .
>
> 7. FACILITIES AND EXPENSES. [Mid-States] shall make available to [Edwards] such office space, secretarial services, office equipment and furnishings as are suitable and appropriate to [Edwards's] title and duties. [Mid-States] shall promptly reimburse [Edwards's] for all reasonable expenses incurred in the performance of his duties hereunder, including without limitation, expenses for entertainment, travel, management seminars and use of the telephone, subject to [Edwards's] satisfying [Mid-States's] reasonable requirements with respect to the reporting and documentation of such expenses [emphasis added].

At this time, Mid-States also had a board of directors, which consisted of four people, including Edwards.[5] None of the other three board members was an employee of Mid-States, nor did any of them have an active role in the day-to-day activities of the company.

As part of his position with Mid-States, Edwards traveled to various locations in the United States where he met

[5] The other directors included Scott Long (chairman), Jerry Kukuchka, and Jerry Dukes.

with existing and prospective customers and trained sales representatives for the company. It is the position of the Bryant Estate that Edwards had complete discretion to determine what trips he would make and what mode of transportation he would use. Further, it asserts that before Edwards took a business trip, he did not have to notify any other executive of Mid-States or members of its board of directors of his plans.

Mid-States did not supply Edwards with a company automobile to perform his duties for the company, but Mid-States paid for the insurance on his personal vehicle. Edwards had his own plane, which he used in approximately one-half of his business trips of record from January 1, 2000, through October 15, 2002.[6] Mid-States had no written policy as to reimbursement of travel expenses, but it did have a consistent practice. JoAnne McVey, Mid-States's controller,[7] testified that it was her duty to process all travel expenses and to maintain the related records.[8] She testified that after a business trip, Edwards would customarily submit an expense form for mileage and any

[6] Mid-States's records indicated that Edwards was reimbursed for 46 business trips during this time period. He used a private plane for 23 of the trips, and was reimbursed for all of them, with the exception of the last.

[7] McVey had been controller at Mid-States since May 2000. Edwards was McVey's immediate supervisor on the date of the accident.

[8] McVey testified that she was not aware of the travel policies at the corporate level of UPONOR, but that Mid-States was not required to follow those policies. She further testified that while Edwards would be the one who would initiate a policy for Mid-States, it would probably still go through the corporate office for approval.

out-of-pocket expenses,[9] and she would review it. Afterwards, she would send the expense form to the corporate office for approval and upon approval pay Edwards the reimbursement. If Edwards drove his personal automobile, he would receive mileage based on the federal income tax rate. If he took a commercial flight, he was reimbursed for the cost of the airline ticket. If he flew his personal plane, he received payment equivalent to the cost of mileage if he had driven his personal automobile to his destination. McVey testified that per her discussions with both Edwards and Long, the board chairman, Edwards had discretion to use his private plane for business trips.

McVey testified that to her knowledge, the only person who had previously traveled with Edwards as a non-business passenger was his wife, Pam Edwards;[10] however, regardless of whether Pam traveled with him or not, Edwards's expenses were treated as business-related and were reimbursed. McVey further testified that Mid-States never objected to Edwards taking non-business passengers along with him on business trips. McVey knew the day before the fatal trip that Edwards was going to Indianapolis, but she did not know he was flying or that

[9] This included meals and costs related to the parking of Edwards's private plane at various airports.

[10] Pam was formerly the chief financial officer of Mid-States. However, it is unclear from the record how many times she accompanied Edwards on business trips when she was not an officer of the company.

Rev. Bryant would be accompanying him.[11] McVey did not receive any request for reimbursement for the October 15, 2002, business trip, but if the Edwards Estate had requested it, she would have authorized the reimbursement.

Both parties filed motions for summary judgment, and on August 10, 2004, a hearing was held before the trial court on both motions. The Bryant Estate relied on records of Mid-States, the deposition testimony of McVey, and an affidavit from Pam. Mid-States also offered in support of its motion an affidavit from Chairman Long, which the trial court did not consider in entering its summary judgment in favor of Mid-States.[12] The trial court focused on whether Rev. Bryant's accompanying Edwards on the trip in any way benefited Mid-States and it also considered "equitable" issues.[13] Ultimately, the trial court granted Mid-States's motion for summary judgment and

[11] Mid-States argues that it did not expressly authorize Edwards to take Rev. Bryant on the trip and did not know that Rev. Bryant was going on the trip. To Mid-States's knowledge, Edwards had not taken Rev. Bryant or any other friend on any previous business trips.

[12] The Bryant Estate filed a motion to strike this evidence from the record because at that point, it had not been allowed an opportunity to depose Chairman Long. This was disputed by Mid-States. The trial court denied the motion to strike, but stated at the hearing that it was not considering Chairman Long's affidavit in making its summary judgment rulings.

[13] At the summary judgment hearing, the trial court asked if the Edwards Estate was a party to the action. At that time, she was informed that it was and that it had offered the policy limits on Edwards's insurance policy of one million dollars. The trial court was also informed at that time that Mid-States did not have an insurance policy in place to pay any award given to the Bryant Estate. The trial court stated that, while it was not the legal standard, it should consider these "equitable" issues.

denied the Bryant Estate's summary judgment motion. The Bryant Estate filed a motion for reconsideration on August 18, 2004, and the trial court denied the motion by an order entered on October 11, 2004. This appeal followed.

"The standard of review on appeal of a summary judgment is whether the trial court correctly found that there were no genuine issues as to any material fact and that the moving party was entitled to judgment as a matter of law."[14] "The record must be viewed in a light most favorable to the party opposing the motion for summary judgment and all doubts are to be resolved in his favor" [citations omitted].[15] Summary judgment "is only proper where the movant shows that the adverse party could not prevail under any circumstances."[16] Because the trial court concluded that the relevant facts were not in dispute, we are not required to defer to the trial court and thus we review the trial court's summary judgment ruling de novo.[17] CR 56.03 states that "[t]he judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, stipulations, and admissions on file, together

[14] Scifres v. Kraft, 916 S.W.2d 779, 781 (Ky.App. 1996) (citing Kentucky Rule of Civil Procedure (CR) 56.03).

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

[16] Id.

[17] Scifres, 916 S.W.2d at 781 (citing Goldsmith v. Allied Building Components, Inc., 833 S.W.2d 378, 381 (Ky. 1992)).

with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."

The Bryant Estate argues that it was entitled to summary judgment because there is no genuine issue as to any material fact as to Edwards's authority to take non-business passengers on business trips and, thus, Mid-States, as Edwards's employer, is vicariously liable for his negligence, or in the alternative, Mid-States's summary judgment award should be reversed because questions of fact exist as to Edwards's authority. Mid-States argues that it had no knowledge of Edwards's transporting a passenger; and if it had been aware of this, it would have prohibited it. It contends that summary judgment in its favor was proper because the Bryant Estate's proof fails under both the scope of Edwards's employment and his authority as an employee.

The sole issue on appeal is whether there is a genuine issue as to a material fact concerning Mid-States's vicarious liability to the Bryant Estate for Edwards's negligence under the doctrine of respondeat superior.[18] If a negligent act of an

[18] See Black's Law Dictionary 927 (7th Ed. 1999) (defining vicarious liability as "[l]iability that a supervisory party (such as an employer) bears for the actionable conduct of a subordinate or associate (such as an employee) because of the relationship between the two parties"); see also Black's Law Dictionary 1313 (defining respondeat superior as "[t]he doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency"). The terms "vicarious liability" and "respondeat superior" are often used

employee occurs in the course and scope of the employer's business, an employer can be held vicariously liable.[19] This liability extends to the employee's own vehicle if the employee's conduct at the time of the occurrence was within the scope of his employment.[20]

Mid-States relies primarily upon Wigginton Studio v. Reuter's Adm'r,[21] where the studio was a corporation engaged in the general photography business, and its secretary-treasurer allowed his personal automobile to be used for business and non-business purposes by the studio's officers and employees. While the vice-president was using the vehicle for a weekend trip in the company of another studio employee and two non-business passengers, the vice-president negligently wrecked the automobile killing one of the non-business passengers. The Court noted that the vice-president and the other studio employee "decided to go to Middlesboro ostensibly for the purpose of securing the business of enlarging the picture for [the other employee's] stepfather . . . and to visit [the other

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interchangeably, but respondeat superior is actually one type of vicarious liability as are estoppel, contract, and joint tortfeasor. See 59 Am.Jur.2d Parties § 52 (2005).

[19] Roethke v. Sanger, 68 S.W.3d 352, 361 (Ky. 2001).

[20] See Chittum v. Abell, 485 S.W.2d 231, 236 (Ky. 1972).

[21] 254 Ky. 128, 71 S.W.2d 14 (1934).

employee's] family over the week-end."[22] The two employees took with them for entirely social reasons the decedent and another young lady. Since the presence of the decedent in Wigginton, like the presence of the decedent herein, served no business purpose, the analysis in Wigginton turned on whether the vice-president "acted beyond the scope of her authority as an employee of the corporation[.]"[23]

In defending the negligence suit brought by the estate of the deceased against the studio based on vicarious liability,[24] the studio maintained that the deceased was an invitee of the vice-president, not the studio, and that her act of inviting the deceased on the trip was beyond the scope of her authority as an employee of the studio. Upon concluding that the deceased was a personal invitee of the vice-president, the Court stated:

> [A]nd, therefore, the question for determination is whether or not Miss Adams'[s] position as vice president of the studio corporation and being in charge of its business, had any more binding effect on the corporation with respect to an invitee, than if Miss Adams had only been a servant or other employee. The rule is well settled in this jurisdiction that a servant has no implied authority to invite or permit a third person to ride on a vehicle in his

[22] Wigginton, 71 S.W.2d at 14.

[23] Id. at 16.

[24] Wigginton, 71 S.W.2d at 14-15.

> charge and if, in so doing, the invitee sustains injuries through negligence of the servant, the master will not be liable, as the servant is not acting within the scope of his authority. . . .
>
> An officer of a corporation, when rendering services for the corporation, is an employee or servant of the corporation and the fact that he is an officer or a stockholder gives him no more authority to bind the corporation than any other employee has to render his principal liable for his acts. . . .
>
> [I]n order for a company to be held responsible for the tort of one of its officers he must be acting within the scope of his employment and in the furtherance of the corporation's business.[25]

Unlike Wigginton, the sole purpose of Edwards's trip in the case before us was related to the employer's business interests. While Rev. Bryant, like the decedent in Wigginton, was traveling only for social purposes, Edwards's trip, unlike the vice-president's in Wigginton, was only for the business of his employer. Thus, our case does not fall squarely under Wigginton; and in determining whether Mid-States can be held vicariously liable for Edwards's negligence, a factual finding must be made as to whether Mid-States had actual knowledge of Edwards's practice of allowing a non-business passenger to accompany him on a business trip and failed to object.

[25] Wigginton, 71 S.W.2d at 16.

Approximately 44 years after Wigginton, this Court revisited the issue of vicarious liability of an employer in Estell v. Barrickman.[26] The pertinent facts of that case differ from those in Wigginton as follows: (1) the employee was clearly on company business when he negligently wrecked the company vehicle he was driving; (2) the employee was accompanied by a non-business passenger who was merely providing him with companionship; and (3) while the employer was not aware that the non-business passenger had accompanied the employee on this particular trip, he was aware that this employee and other employees had used this practice in the past. The trial court found the employer was not liable because the employee had no authority to invite the non-business passenger to ride along and thus was not acting within the scope of his employment.

On appeal, the injured plaintiff argued that because the employer placed no restrictions on the employee concerning non-business passengers riding along while on company business and had never objected when it had knowledge of such practice, "his apparent acquiescence raises a question of fact as to whether [the employee] had permission or authority to take guests with him on service runs."[27] The employer argued that based on Wigginton, "the law is clear that an employee has no

[26] 571 S.W.2d 650 (Ky.App. 1978).

[27] Estell, 571 S.W.2d at 651-52.

implied authority to permit a third person to ride in his employer's vehicle, and that, if the guest sustains injuries as a result of the employee's negligence, the employer will not be liable because the employee is not acting within the scope of his authority."[28] Further, the employer argued that regardless of his knowledge, the non-business passenger was not his invitee.

This Court concluded as follows:

> While it is true that, in general, a servant has no implied authority to invite a third party to ride in his employer's vehicle,[29] we cannot agree with Barrickman's contention that his knowledge of other occasions where nonbusiness passengers rode in his vehicle is immaterial to this case. Rather, we are of the opinion that if evidence of such knowledge is substantial enough, a question of fact is raised as to whether this knowledge and lack of objection

[28] Id. at 652.

[29] See Hottovy v. United States, 250 F.Supp. 315, 316-17 (D.Az. 1966) (which stated:

> While the general rule is that the employer is liable for the torts of the servant who is in the scope of his employment, even if the servant's conduct consists of forbidden acts, where the injured plaintiff is an unauthorized invitee of the employee, a recognized exception exists. Restatement of the Law, Agency 2nd (1958) § 242 states:
>
> "Liability to Invitee of Servant.[']"
>
> "A master is not subject to liability for the conduct of a servant towards a person harmed as the result of accepting or soliciting from the servant an invitation, not binding upon the master, to enter or remain upon the master's premises or vehicle, although the conduct which immediately causes the harm is within the scope of the servant's employment").

> make the nonbusiness passenger an invitee of the employer or constitutes a grant of apparent authority to the employee to offer these rides. . . [emphases added].[30]

This Court distinguished between implied and apparent authority by stating as follows:

> Implied authority is actual authority,[31] circumstantially proven, which the principal is deemed to have actually intended the agent to possess, and includes only such powers as are practically necessary to carry out the duties actually delegated. Apparent authority is not actually authority, but rather "is that which, by reason of prevailing usage or other circumstance, the agent is in effect held out by the principal as possessing. It is a matter of appearances, fairly chargeable to the principal and by which persons dealt with are deceived, and on which they rely" [citations omitted].[32]

In conclusion, this Court stated as follows:

> It is our opinion that whether Estell's theory of recovery against Barrickman is

[30] Estell, 571 S.W.2d at 652.

[31] See 3 Am.Jur.2d Agency § 70 (2005) stating as follows:

> Actual authority is such as a principal intentionally confers upon the agent, or intentionally or by want of ordinary care allows the agent to believe himself or herself to possess. The actual authority may be either express or implied; and if it appears that the principal sought to be charged has, orally or in writing, delegated authority to another by words which authorize such other to do a certain act or series of acts, then the authority of the agent in that respect is express authority. Express authority is directly granted to or conferred upon the agent or employee in express terms, and it extends only to such powers as the principal gives the agent in direct terms, with the express provisions controlling [footnotes omitted].

[32] Estell, 571 S.W.2d at 652.

> premised upon the apparent authority of the employee . . . or merely on the principle of respondeat superior based on the appellee making the appellant his invitee by his acquiescence, . . . the evidence presented to this point requires the judgment be reversed and the case remanded for trial on the question of Barrickman's liability for Estell's injuries. In determining whether a genuine issue of material fact exists, all doubts as to the existence of a question of fact must be resolved against the moving party. . . . In this case, we believe that Barrickman's inaction with respect to his employee's practice of permitting nonbusiness passengers to ride in his vehicle raises sufficient doubt so as to preclude summary judgment.[33]

Under Wigginton and Estell, a court in determining vicarious liability of an employer to a non-business passenger who serves no benefit to the employer should consider (1) whether the employee, in furtherance of the employer's business, was acting within the scope of his employment at the time he committed the negligent act;[34] and (2) whether there is substantial evidence to support a finding of apparent authority because the employer had actual knowledge of the employee's practice of allowing a non-business passenger to accompany him on a business trip and failed to object.

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[33] Id. at 652-53.

[34] Mid-States argues that Rev. Bryant's travel with Edwards was not an act within the scope of Edwards's employment. Mid-States concedes that Edwards's flying home on a business trip was within the scope of his employment, but it contends the issue is whether transporting a non-business passenger was within the scope of Edwards's employment. Under these cases, the relevant act was the flying home on the business trip, not the act of allowing Rev. Bryant to travel with him.

Mid-States contends that had it known of Edwards's practice of taking non-business passengers on business trips, it would have prohibited this practice. However, we agree with the Bryant Estate that even if Edwards had violated Mid-States's policy by allowing Rev. Bryant to fly with him, Mid-States could be held vicariously liable because Edwards's flying home from business was within the scope of his employment. Subsequent to Wigginton, the former Court of Appeals held in Sam Horne Motor & Implement Co., Inc. v. Gregg,[35] that once it is determined that a master-servant relationship exists between a company and the person negligently causing an injury, "we do not think the violation of a general rule of the company constituted a deviation from [the employee's] course of employment in view of the fact that the automobile was taken in furtherance of the company's business for the very purpose for which [the employee] was employed."[36]

Still, an alternative argument relates to the amount of control Edwards had over the policies of Mid-States and whether his knowledge as an officer could be imputed to Mid-States. The undeveloped trial court record failed to address

[35] 279 S.W.2d 755 (Ky. 1955).

[36] Gregg, 279 S.W.2d at 759; see also Bejma v. Dental Development & Manufacturing Co., 356 F.2d 227, 229 (6th Cir. 1966) (relying on Gregg, the Sixth Circuit concluded that a violation by an employee does not, as a matter of law, prohibit a finding that he was in the scope of his employment. In Bejma, an employee was returning from a business trip in his own vehicle and had a car wreck while intoxicated, injuring passengers in a passing car).

this issue. This Court in Paducah Newspapers v. Goodman,[37] stated as follows:

> In practice a corporation may, and often does, bind itself by the actions of its executive officer or agent without formal granting of power to do so by some act of the board of directors, or by permitting the officer to act within his apparent authority; or from the manner in which the board of directors has permitted him to transact its business of a similar character . . . or his authority may arise from a custom of the board of directors from long practice, permitting him to act generally for the corporation. Nothing is better settled than that a corporation may be bound by its officer or agent acting in the regular course of business, even though no specific authority be granted by the board of directors, if by subsequent action, the board ratifies his acts, or acquiesces therein and receives the benefits or advantages of his actions [emphasis added] [citations omitted].

Mid-States offered no evidence of the extent of Edwards's authority, except for the affidavit of Chairman Long, which the trial court did not consider in granting summary judgment in Mid-States's favor. There was no evidence as to the conversations between Edwards and Mid-States as to its policy regarding a non-business passenger traveling with an employee on a business trip to allow a determination as to whether it was a prohibited or accepted practice.

[37] 251 Ky. 754, 65 S.W.2d 990, 992 (1933).

In the case before us, the trial court granted summary judgment after very limited discovery had occurred. For Mid-States to be entitled to a summary judgment, it must demonstrate that there is no genuine issue as to any material fact concerning Mid-States's knowledge of Edwards's travel practices or concerning Edwards's authority as an officer of Mid-States in establishing travel policies. Mid-States argues that the Bryant Estate has produced no evidence that it knew Edwards would travel with a non-business passenger. However, it is undisputed that Mid-States knew that Edwards's wife accompanied Edwards from time to time on business trips. After viewing the facts in this case in the light most favorable to the party opposing summary judgment, we conclude there are genuine issues of material fact as to Mid-States's knowledge of Edwards's travel practices and Edwards's authority in setting the travel policies. Thus, we reverse the summary judgment of the Montgomery Circuit Court and remand this matter for trial.

COMBS, CHIEF JUDGE, CONCURS.

McANULTY, JUDGE, CONCURS IN RESULT ONLY.

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