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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001837-MR

DONALD E. JAMES — APPELLANT

v.

APPEAL FROM TAYLOR CIRCUIT COURT
HONORABLE DOUGHLAS M. GEORGE, JUDGE
ACTION NO. 03-CI-00354

THOMAS L. JAMES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

DIXON, JUDGE: Appellant, Donald James, appeals from an order of the Taylor Circuit Court pursuant to a jury verdict in favor of Appellee, Thomas James, and dismissing Donald's underlying claims of breach of fiduciary duty. Finding no error, we affirm.

On August 6, 1993, Donald established an irrevocable trust in order to divest himself of ownership of his company, James Medical Equipment, Ltd. ("JME"). At the time, Donald owned several other healthcare and healthcare equipment companies and routinely referred patients between the various entities. However, due to a change in Medicare law, that practice became prohibited. As a result, he established the trust to divest himself of ownership of JME so that he could continue to manage the daily activities of JME and refer patients between his various companies. After the first two trustees resigned, Donald appointed Thomas, his nephew, as successor trustee on March 5, 1996. At the time, Thomas was a full-time practicing attorney in Washington, D.C.

Upon assuming trustee responsibilities, Thomas discovered that, contrary to Donald's prior assertions, JME was in severe financial distress. In addition, Thomas learned in March 1997, that Medicare intended to assert claims against JME for approximately $600,000 relating to improperly paid benefits. Shortly thereafter, Donald informed Thomas of his plan to transfer JME's patients to another one of Donald's companies, Martin County Medical Oxygen Service, LLC ("MCMOS"), leaving JME a "shell company" in an effort to hinder Medicare's collection efforts. Thomas informed Donald that such activity would constitute fraud and that he should cease and desist immediately. When Donald continued to transfer patients away from JME, Thomas terminated Donald's managerial authority with respect to JME.

Following Donald's termination, Thomas employed Sharon Copeland as CEO of JME to assume all management responsibility. Copeland, Donald's niece and Thomas's cousin, was a trusted family member and had previously worked for Donald in his other businesses. Apparently, JME thereafter had a financial turnaround and became a profitable business in late 1997 and 1998.

However, the record indicates that during this same time period, Donald sought to regain control of JME and went to great efforts to hinder JME's success. In June 1997, Donald filed suit in the Taylor Circuit Court under one of his other companies, DJ's Equipment, Inc., against JME, its officers and Thomas, individually, claiming a breach of equipment lease. In October 1997, Donald filed another lawsuit in the Jefferson Circuit Court alleging the same breach of fiduciary duties against Thomas that he alleged herein and also alleged in a cross-claim in the DJ's Equipment action. In June 1998, the Taylor Circuit Court ruled that DJ's Equipment, JME, and MCMOS were all alter egos of Donald and that he had wrongfully transferred patients from JME to MCMOS by way of fraud and misrepresentation. The Taylor Circuit Court enjoined Donald from engaging in any further activity and interfering with JME. The court also dismissed the breach of fiduciary duty claim against Thomas. Sometime thereafter, the Jefferson Circuit Court also dismissed Donald's action against Thomas therein.

Subsequently, in August 1998, the Taylor Circuit Court ruled that Donald could terminate the trust and regain control of JME. The court determined that even though Donald originally surrendered any power to revoke or alter the trust,

he was the sole beneficiary and thus could, in fact, terminate such. The transfer of control occurred on October 13, 1998. Apparently, between August and October 1998, however, Copeland and another JME employee started a competing home oxygen company named Breathe Easy. Upon regaining control of JME in October, Donald learned that many of JME's customers had transferred to Breathe Easy.

In October 2003, Donald filed the instant action against Thomas, again asserting breach of fiduciary duty. Thomas responded that he did not breach any duties owed to the trust, and further that he had no knowledge of any of the alleged events involving Copeland and Breathe Easy. The matter proceeded to trial in March 2007. At the close of evidence, Donald requested a jury instruction that provided:

> For purposes of this instruction, if you find that Sharon Morrison Copeland was acting within the scope of her apparent authority as an agent of the Defendant, Thomas James, then the Defendant Thomas James would be liable for the fraudulent acts of his agent even if he did not know of the agent's wrongful acts.

The trial court denied the instruction and the jury subsequently returned a verdict in favor of Thomas. Following the denial of his motions for a new trial and for judgment notwithstanding the verdict, Donald appealed to this Court as a matter of right. Finding no error, we affirm.

Donald first argues that the trial court erred in refusing to instruct the jury on the liability of an agent for the acts and omissions of his agent. Relying upon *Cook v. Holland*, 575 S.W.2d 468 (Ky. App. 1978), Donald claims that Sharon's

fraudulent conduct occurred during the course of her agency relationship with Thomas, as trustee, and thus he is liable for her actions.

There is no question that Thomas, as a trustee, owed Donald a duty to exercise such care and skill in administering the trust as a man of ordinary prudence would exercise in dealing with his property, or to exercise such skill as a trustee has, if greater than a man of ordinary prudence. *Bryan v. Security Trust Co.*, 176 S.W.2d 104 (Ky. 1943). Further, "a [t]rustee is personally liable for torts committed by an agent or employee in the course of the administration of the trust. The principle of respondeat superior is applied to the trustee just as though he were the owner of the trust property free of the trust. His liability is the same as it would be if he were not a trustee. It is immaterial that the trustee receives no benefit from the trust." *Cook*, 578 S.W.2d at 472.

The flaw in Donald's argument, however, is that Copeland was not an agent or employee of Thomas in his capacity as trustee. Rather, Copeland was an employee of JME, whose stock was owned by the trust. Copeland never worked for Thomas personally, nor was she paid by Thomas or trust proceeds. In fact, under Donald's interpretation of the law, every employee of JME would be Thomas's agent, making him vicariously liable for every alleged act of every employee. Clearly, the law as established in *Cook* did not expand the scope of vicarious liability to such an extreme position.

Further, even if we were to accept Donald's argument that Copeland was Thomas's agent, the general rule is that "a trustee is not liable to trust beneficiaries

for losses caused by the acts of agents properly employed in the administration of the trust." *Cook*, 575 S.W.2d at 473. In fact, the trustee is liable to a beneficiary only if he has "failed to satisfy his fiduciary duty to exercise good faith and reasonable diligence on the administration of the trust." *Id.* *See also Kaufman v. Kaufman's Adm'r*, 166 S.W. 2d 860 (Ky. 1942); *Restatement (Second) of Trusts*, § 225. Herein, the jury specifically found that Thomas did not breach any fiduciary duties in the administration of the trust. Accordingly, even if Copeland was Thomas's agent, he could not have been held vicariously liable for her actions.

Next, Donald argues that the trial court erred in permitting the introduction of inadmissible Kentucky Rules of Evidence (KRE) 404(b) evidence. Specifically, Thomas's attorney elicited testimony from Copeland regarding a criminal complaint she had taken out against Donald, as well as his subsequent arrest for terroristic threatening. Donald contends that the evidence was highly prejudicial and was solely intended to portray him as a "bad man." Thomas, on the other hand, defends that the evidence was properly admitted to demonstrate Donald's repeated and continuing efforts to sabotage JME during the time period in question.

We have reviewed the relevant video and conclude that this issue is not preserved for review. Although Donald's counsel raised an issue regarding the method used to refresh Copeland's recollection, no objection was made as to the admissibility of the evidence itself. It is well established that an error will not be

reviewed on appeal if the trial court has not had an opportunity to rule on the objection. *Commonwealth v. Petrey*, 945 S.W.2d 417, 419 (Ky. 1997).

Notwithstanding the procedural deficiency, we find that no error occurred, palpable or otherwise. KRE 404(b) specifically provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." However, "[e]vidence of criminal conduct other than that being tried is admissible only if probative of an issue independent of character and criminal disposition and only if its probative value on that issue outweighs the unfair prejudice with respect to character." *Clark v. Commonwealth*, 267 S.W.3d 668, 680-681 (Ky. 2008) (quoting *Billings v. Commonwealth*, 843 S.W.2d 890, 892 (Ky. 1992)).

As Thomas points out, the purpose of the evidence was not to show that Donald was a bad person, but rather to demonstrate Donald's repeated and continuing efforts to disrupt JME after he was removed from his managerial position. In fact, the criminal complaint and terroristic threatening charge stemmed from acts committed by Donald against Copeland and other JME employees at the JME offices. In light of Donald's claim that Thomas's actions (or inaction) while trustee resulted in financial harm to JME, it was certainly relevant to show that Donald himself had engaged in a pattern of conduct that was intended to harm JME. Thus, the trial court did not abuse its discretion in allowing the evidence.

Donald also challenges the trial court's admission of evidence relating to other prior lawsuits. Donald claims that evidence that he had been sued by various vendors for non-payment, as well as alleged underpayment or non-payment of tax liabilities, constituted inadmissible hearsay. Again, a review of the video record reveals that no hearsay objection was raised at trial, nor do we perceive how the complained of evidence constituted hearsay since the evidence was admitted through Donald and Copeland themselves. Further, it was Donald's counsel who first elicited information regarding the other lawsuits and, as the trial court noted during Copeland's testimony, both parties had "opened the door" to the admission of the evidence.

Moreover, we disagree with Donald that the evidence of other lawsuits was irrelevant to the issues presented at trial. As previously noted, the basis of Donald's claim against Thomas was that Thomas's breach of fiduciary duties and mismanagement of JME caused the alleged destruction of the business. Thus, JME's financial condition at the time Thomas became trustee was highly relevant.

Donald's next claim of error relates to Thomas's qualification as an expert witness with respect to the Medicare statutes, laws and regulations as they pertained to JME. Donald claims that Thomas somehow perjured himself at trial in testifying about his experience and qualifications. We find no merit in this claim.

KRE 702 allows a party to elicit expert testimony on matters involving "scientific, technical, or other specialized knowledge" if it will assist the trier of

fact to understand the evidence or determine a fact in issue. A witness qualified as an expert by "knowledge, skill, experience, training, or education" may testify in the form of an opinion. *Id.* It is within the trial court's discretion to determine whether a witness is qualified to provide expert testimony on a particular subject, and the test of reliability is a "flexible" one. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). Thus, on appeal we will not disturb the trial court's decision absent an abuse of discretion. *Id.*

At the time of trial, Thomas had been a practicing attorney for over twenty-two years with an emphasis in healthcare law. In addition, he had previously been qualified as an expert in healthcare law by the same trial court during the DJ's Equipment litigation. Despite Donald's claim that Thomas perjured himself at trial, Donald fails to cite to one instance where Thomas provided false information. Further, Donald's counsel had the opportunity to thoroughly cross-examine Thomas regarding his knowledge and expertise. We agree with the trial court that Thomas was qualified to testify to such matters and it was within the province of the jury to assess what weight and credibility to give to such testimony. Thus, the trial court did not abuse its discretion.

Finally, Donald claims that he was prejudiced when Thomas mentioned during his testimony that his professional liability insurance would not cover any judgment against him since he was providing trust services in a personal capacity and not as an employee of his law firm. Donald contends that Thomas's testimony violated KRE 411, which provides in relevant part that "evidence that a person was

or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully."

A review of relevant testimony indicates that Donald's objection to Thomas's statement was sustained and no further reference was made to insurance. Because Donald received all the relief he requested, the question of the prejudicial effect of the improper comment has not been preserved for our review. It was incumbent upon Donald, if dissatisfied with the objection alone, to move the trial court for a further admonition or to move for a mistrial. *Curtis v. Commonwealth*, 474 S.W.2d 394 (Ky. 1971). *See also Lewis v. Charolais Corp*., 19 S.W.3d 671 (Ky. App. 1999). His failure to do so precludes relief on appeal. *Allen v. Commonwealth*, 286 S.W.3d 221, 225-226 (Ky. 2009). Thus, we find no reversible error.

The order of the Taylor Circuit Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

C. Thomas Hectus
Courtney L. Graham
Louisville, Kentucky

BRIEF FOR APPELLEE:

Scott P. Zoppoth
Jennifer L. Hulse
Louisville, Kentucky