RENDERED: AUGUST 29, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-001350-MR

BIG SPRING ASSEMBLY
OF GOD, INC. APPELLANT

APPEAL FROM NELSON CIRCUIT COURT
v. HONORABLE CHARLES C. SIMMS, III, JUDGE
ACTION NO. 10-CI-00127

MELISSA STEVENSON,
ADMINISTRATOR FOR THE ESTATE
OF JAMIE MITCHELL; JAMES
MITCHELL; AND REBECCA COLEMAN APPELLEES

AND NO. 2012-CA-001423-MR

MELISSA STEVENSON,
ADMINISTRATOR FOR THE ESTATE
OF JAMIE MITCHELL; JAMES
MITCHELL; AND REBECCA COLEMAN CROSS-APPELLANTS

CROSS-APPEAL FROM NELSON CIRCUIT COURT
v. HONORABLE CHARLES C. SIMMS, III, JUDGE
ACTION NO. 10-CI-00127

BIG SPRING ASSEMBLY
OF GOD, INC.; AND
RONALD DEREK COULTER CROSS-APPELLEES

OPINION
AFFIRMING APPEAL NO. 2012-CA-001350-MR
AND AFFIRMING CROSS-APPEAL NO. 2012-CA-001423-MR

** ** ** ** **

BEFORE: CAPERTON, STUMBO,[1] AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Big Spring Assembly of God, Inc. (Big Spring Assembly) brings Appeal No. 2012-CA-001350-MR and Melissa Stevenson, Administrator of the Estate of Jamie Mitchell (the Estate), James Mitchell and Rebecca Coleman bring Cross-Appeal No. 2012-CA-001423-MR from a May 22, 2012, judgment on jury verdict of the Nelson Circuit Court awarding the Estate $790,000 for the negligent wrongful death of their son, Jamie Mitchell, and awarding $60,000 to both James and Rebecca for the loss of consortium. We affirm Appeal No. 2012-CA-001350-MR and Cross-Appeal No. 2012-CA-001423-MR.

The facts underlying these appeals are both disputed and tragic. Ronald Derek Coulter was employed by Big Spring Assembly as a youth minister

[1] Judge Kelly Thompson was originally assigned to the panel to hear the case. Judge Thompson recused due to a conflict of interest on June 25, 2014, and Judge Janet Stumbo was assigned as substitute judge.

serving the church. Coulter organized a youth camping trip on the night of June 5, 2009. The record reveals that the youth who attended were all members of Big Spring Assembly, with the exception of one minor. Both parties adamantly disagree upon whether the camping event was a church sponsored event. Nonetheless, on the morning of June 6, 2009, it is undisputed that Coulter, Jamie Mitchell, and another youth group member of the church, Jordan Keeling, left the camping area and drove in Coulter's personal motor vehicle to his apartment. At trial, Coulter testified that they eventually left his apartment to return to the campsite in order to retrieve the camping gear and clean the site. Before reaching the campsite, Coulter stopped at a gas station to fill his vehicle. After doing so, Coulter allowed Jamie, who was thirteen years old, to drive the motor vehicle. Unfortunately, Jamie lost control of the vehicle and was killed in the accident; Coulter and Keeling survived.

At the time of the accident, it appears that Coulter persuaded Keeling, who was fifteen years old, to lie about Jamie driving the vehicle and to instead state that Coulter was driving the vehicle when the accident occurred. Both Coulter and Keeling reported to authorities, Coulter's family, and church officials that Coulter was driving. At Jamie's funeral, Coulter gave the eulogy and was the only minister to speak. The falsehood about the accident was perpetuated until Keeling finally informed authorities that Jamie was, in fact, the driver of the vehicle.

Consequently, the Estate, James Mitchell, and Rebecca Coleman filed a complaint against Big Spring Assembly and Coulter. Therein, they claimed, *inter alias*, that Coulter was negligent for allowing Jamie to drive his motor vehicle and that such negligence caused Jamie's death. Also, plaintiffs alleged that Big Spring Assembly was vicariously liable for Coulter's conduct as he was acting within the scope of his employment and was also negligent for its hiring, supervision, and retention of Coulter. James Mitchell, Jamie's father, and Rebecca Coleman, Jamie's mother, additionally raised claims for loss of consortium.

The circuit court determined that both Coulter and Jamie were negligent as a matter of law in causing the motor vehicle accident and submitted an apportionment instruction to the jury upon Jamie's wrongful death. In its verdict, the jury found that Big Spring Assembly was not vicariously liable for the negligence of its employee, Coulter. However, the jury did find Big Spring Assembly negligent for its hiring, supervision, or retention of Coulter and that such negligence was a substantial factor in causing the accident and Jamie's death. The jury awarded a total of $1,000,000 for Jamie's wrongful death and apportioned 80 percent of fault to Coulter and 20 percent to Jamie. The jury also found in favor of James Mitchell and Rebecca Coleman upon their loss of consortium claims and awarded each a total of $75,000. In its Judgment on Jury Verdict, the circuit court

awarded the Estate $790,000, upon the wrongful death claim,[2] and $60,000 each to James and Rebecca for loss of consortium.[3] These appeals follow.

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Big Spring Assembly contends the circuit court erred as a matter of law by failing to enter a judgment notwithstanding the verdict upon the jury's verdict of negligent hiring, supervision, or retention in favor of the Estate. Big Spring Assembly points out that the jury also found that it was not vicariously liable for Coulter's conduct as Coulter was acting outside the scope of his employment at the time of the accident. Because Coulter was acting outside the scope of his employment, Big Spring Assembly maintains that as a matter of law it cannot be liable for the tort of negligent hiring, supervision, or retention. Big Spring Assembly argues the jury's verdict must be set aside as a matter of law. We disagree.

The tort of negligent hiring, supervision, or retention is based upon the wrongful conduct of the employer. *Smith v. Isaacs*, 777 S.W.2d 912 (Ky. 1989). Under this tort, the employer is directly liable to the victim and not vicariously liable for the employee's conduct. This distinction is pivotal. *Id.* As this tort is founded upon the employer's negligent conduct, the issue of whether the employee's conduct is within the scope of employment is immaterial. Consequently, we reject this contention of error.

[2] The original $1,000,000 award was reduced by 20 percent representing Jamie Mitchell's apportioned fault and by other expenses.

[3] The original $75,000 award was reduced by 20 percent representing Jamie's apportioned fault.

Big Spring Assembly also asserts that it cannot be liable for negligent hiring, supervision, or retention because Coulter's negligent conduct neither occurred on its property nor was effectuated through the use of its chattel. In support thereof, Big Spring Assembly cites to the Restatement (Second) of Torts § 317 (2013):

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

Under the Restatement (Second) of Torts § 317 (2013), Big Spring Assembly argues that it is only liable for Coulter's tortuous conduct if such conduct occurred on its premises or while using its chattel. As neither occurred in this case, Big Spring Assembly maintains that as a matter of law it is not liable for negligent hiring, supervision, or retention.

Our Supreme Court previously adopted the Restatement (Second) of Agency § 213 (2013) as setting forth the proper elements to establish a claim of negligent hiring, supervision, or retention. It reads:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> (a) in giving improper or ambiguous orders of in failing to make proper regulations; or
>
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others:
>
> (c) in the supervision of the activity; or
>
> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

The Restatement (Second) of Agency § 213 was recently superseded by the Restatement (Third) of Agency § 7.05. We believe the Restatement (Third) of Agency § 7.05 currently sets forth the proper law and elements to establish a claim of negligent hiring, supervision, or retention.[4] It reads:

> (1) A principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent.

[4] *See Papa John's Int'l, Inc. v. McCoy*, 244 S.W.3d 44 (Ky. 2008) (holding that the Supreme Court "considered with approval the tentative draft of the Third Restatement of Agency, which rejected the scope of employment formulations based on assessments of forseeability, instead focusing on the employee's purpose."). *See also Ping v. Beverly Enters., Inc.*, 376 S.W.3d 581 (Ky. 2012).

> (2) When a principal has a special relationship with another person, the principal owes that person a duty of reasonable care with regard to risks arising out of the relationship, including the risk that agents of the principal will harm the person with whom the principal has such a special relationship.

See Papa John's Int'l, Inc. v. McCoy, 244 S.W.3d 44 (Ky. 2008). Under Restatement (Second) of Agency § 213, Restatement (Third) of Agency § 7.05 and our case law, there is no requirement that Coulter's conduct occurred on the premises of Big Spring Assembly or that he used a chattel of Big Spring Assembly. We, thus, view Big Spring Assembly's contention to be without merit.

Big Spring Assembly next argues that the instruction submitted to the jury upon negligent hiring, supervision, or retention was erroneous, thus entitling it to a new trial. In particular, Big Spring Assembly asserts:

> Instruction No. 6 provided the jury an opportunity to find against Big Springs under four separate cause of action – negligent hiring, training, retention and/or supervision – without providing an opportunity for the jury to distinguish which claim supported their decision. Accordingly, although the jury found in favor of Plaintiff on this issue, it is impossible to ascertain whether they found that Coulter had been negligently hired, negligently trained, negligently retained, or negligently supervised.

Big Spring Assembly Brief at 23.

The jury instruction submitted to the jury upon this tort is found in Jury Instruction No. 6, and it provides:

> You will find for the plaintiff, Melissa Stevenson, Administrator of the Estate of Jamie Mitchell, against the defendant, The Big Spring General Assembly of God,

Inc., if you are satisfied from the evidence of the following:

A. That the defendant, The Big Springs General Assembly of God, Inc., failed to exercise ordinary care in its hiring or its training or its retention or its supervision of the defendant, Ronald Derek Coulter;

B. That the defendant, The Big Springs General Assembly of God, Inc., knew or reasonably should have known that Ronald Derek Coulter was unfit for the job for which he was employed;

C. That Ronald Derek Coulter's placement or retention in that job created an unreasonable risk of harm to others;

AND

D. That The Big Springs Assembly of God, Inc.'s failure to exercise ordinary care was a substantial factor in causing the accident and injuries to Jamie Mitchell.

Otherwise, you will find for the defendant, The Big Springs Assembly of God, Inc.

We, the jury, find for the following:

X – Plaintiff Melissa Stevenson, Administrator of the Estate of Jamie Mitchell

OR

__ Defendant Big Springs Assembly of God, Inc.

Appellate review of a "jury instruction is considered a question of law and is reviewed on appeal under a de novo standard of review." *Mountain Water Dist. v.*

Smith, 314 S.W.3d 312, 315 (Ky. App. 2010). Big Spring Assembly's criticism of Jury Instruction No. 6 is not well-taken.

Our Supreme Court has set forth a model jury instruction upon the tort of negligent hiring or retention in *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705 (Ky. 2009). The Supreme Court model instruction, in relevant part, read:

> b. That prior thereto, the defendant, Ten Broeck Hospital knew, or reasonably should have known, that Feotis Gilbert was dangerously unsuitable for the position for which he was hired or retained as an employee;
>
> AND
>
> c. That Ten Broeck Hospital failed to comply with its duty of ordinary care in the hiring or retention of Feotis Gilbert as an employee[.]

Id. at 731. As is evident in the above instruction, the jury was not instructed separately upon negligent hiring and upon negligent retention; rather, the jury was instructed upon negligent hiring or retention together in one instruction.

In the case at hand, we do not believe the circuit court erred by tendering one instruction encompassing negligent hiring, supervision, or retention. See *Ten Broeck Dupont*, 283 S.W.3d 705. We, thus, conclude that Big Spring Assembly's challenge to Jury Instruction No. 6 is meritless.

Big Spring Assembly additionally maintains that the circuit court erred as a matter of law by failing to render a judgment notwithstanding the verdict upon James' claim for loss of consortium. Big Spring Assembly argues that James "is

barred from a recovery for loss of consortium damages by Mandy Jo's Law," which is codified in Kentucky Revised Statutes (KRS) 411.137 and KRS 391.033. Big Spring Assembly's Brief at 18. Big Spring Assembly contends that "Mandy Jo's Law . . . work[s] . . . to ensure that no abandoning parent benefits from the death of their child." Big Spring Assembly's Brief at 18. Big Spring Assembly points out that James Mitchell failed to timely pay child support for Jamie and was $4,000 in arrears in child support in 2007. Also, Big Spring Assembly argues that James was uninvolved in his son's life and did not regularly exercise his visitation rights. Big Spring Assembly believes that as a matter of law James abandoned Jamie under the precepts of KRS 411.137.

We begin by pointing out that the issue of a parent's abandonment under KRS 411.137 does not present an issue of law but rather presents a factual issue. *Kimbler v. Arms*, 102 S.W.3d 517 (Ky. App. 2003). Therefore, Big Spring Assembly's argument is fatally flawed at the outset. Nonetheless, upon review of the record, we conclude that substantial evidence exists to support the circuit court's finding that James had not abandoned Jamie under the precepts of abandonment per KRS 411.137. *See id.* Hence, we are of the opinion that the circuit court did not err by holding that KRS 411.137 was inapplicable.

Big Spring Assembly lastly argues that the circuit court erroneously admitted certain testimony into evidence. Specifically, Big Spring Assembly contends:

> At the close of evidence, the Court granted Big Springs' Motion for a Directed Verdict on the claim of punitive damages against Big Springs. However, by that time, evidence solely relevant to [the Estates'] claim of punitive damages had been admitted against Big Springs. [The Estate] had been allowed to present irrelevant evidence about events and communications that occurred post-accident. In the course of a three hour direct examination of Pastor Mavis Bennett, [the Estates'] counsel spent nearly half their time questioning Ms. Bennett about post-accident church activities. The jury heard evidence of Ms. Bennett's communications with Mitchell's family after the accident, church business minutes and discussions about the youth group going forward, and extensive testimony about the church's communications with Coulter concerning his future as a youth minister. Although [the Estate] couched this testimony in terms of negligent retention, the conduct occurred **after** the injury to Jamie Mitchell, and thus, could not support such a claim. The evidence was **only** relevant to punitive damages, which the court found were not recoverable against Big Springs.
>
> The admission of evidence relating to Big Springs' post-accident conduct substantially and irreversibly prejudiced Big Springs at trial, and may have resulted in a verdict in favor of [the Estate] and against Big Springs.

Big Springs Brief at 22-23 (footnotes omitted).

The preservation of an alleged error admitting or excluding evidence is governed by Kentucky Rules of Evidence (KRE) 103, which provides, in relevant part:

> (a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and
>
> (1) Objection. If the ruling is one admitting evidence, a timely objection or motion to strike appears of record,

> stating the specific ground of objection, if the specific ground was not apparent from the context; or
>
> (2) Offer of proof. If the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.
>
> . . . .
>
> (e) Palpable error. A palpable error in applying the Kentucky Rules of Evidence which affects the substantial rights of a party may be considered by a trial court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

In Big Spring Assembly's brief, it does not claim to have made objections or filed motions to strike the alleged evidence during trial. As Big Spring Assembly failed to properly preserve this issue for appellate review, our review necessarily proceeds under the palpable error rule. Thereunder, "an unpreserved error may be noticed on appeal only if the error is 'palpable' and 'affects the substantial rights of a party,' and even then relief is appropriate only 'upon a determination that manifest injustice has resulted from the error.'" *Wright v. House of Imports, Inc.*, 381 S.W.3d 209, 212 (Ky. 2012) (quoting Kentucky Rules of Civil Procedure (CR) 61.02).

In the case *sub judice*, we simply cannot conclude that the circuit court erred in its admission of such testimony; however, and even if such error occurred, it failed to affect Big Spring Assembly's substantial rights or result in manifest

injustice. Big Spring Assembly only cites this Court to the testimony of Pastor Mavis Bennett as specifically prejudicial. However, the trial lasted some four days and included some fifteen witnesses. Considering Pastor Bennett's testimony and the totality of the evidence produced at the trial, we do not believe that a palpable error occurred under KRE 103(e).

We view all remaining arguments in this appeal as moot or meritless.

Cross-Appeal No. 2012-CA-001423-MR

The Estate argues that the circuit court erred by directing a verdict as to punitive damages in favor of Big Spring Assembly. The Estate maintains that the sufficient evidence demonstrated that Big Spring Assembly should have anticipated Coulter's misconduct and/or clearly ratified same, thus entitling it to a jury instruction upon punitive damages under KRS 411.184(3).[5] The Estate points out that Coulter was only terminated from his position as youth minister by Big Spring Assembly's board some three months after learning of Coulter's misconduct. In addition, Big Spring Assembly maintains:

> In his attempts to shield himself and his church from liability, Coulter went so far as to deliver a eulogy at Mitchell's funeral in which he tearfully perpetuated the lie in his capacity as youth minister. The funeral was attended by Mitchell's family, the children from the youth group, members of the Big Springs congregation, a representative from the Kentucky District of the Assemblies of God, and Mavis Bennett. Bennett even assisted Coulter in drafting his eulogy because she was "his mentor" and because he wanted guidance from her as Pastor of Big Springs. When asked: "When you gave

[5] We note that KRS 411.184(1)(c) was declared unconstitutional in *Williams v. Wilson*, 972 S.W.2d 260 (Ky. 1998).

> that eulogy, were you giving that as Derek Coulter private citizen, or Derek Coulter youth minister?" Coulter answered: "I mean, I guess it would have been as youth minister." Coulter was the only minister who delivered any remarks at Mitchell's funeral. Rebecca Coleman then had another funeral for Mitchell on what would have been his fourteenth birthday, because she wanted him to have a "real funeral."

Estate's Brief at 9 (citations omitted).

A directed verdict is proper where upon consideration of the evidence as a whole, a reasonable jury could only find in favor of the movant. *Lee v. Tucker*, 365 S.W.2d 849 (Ky. 1963); CR 50.01. When ruling upon a directed verdict, all evidence and inferences therefrom must be viewed in a light most favorable to the nonmoving party. *Id.*

The punitive damage statute is codified in KRS 411.184 and provides, in relevant part:

> (3) In no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question.

In order for an employer to be liable for punitive damages based upon the misconduct of an employee, the employer must have authorized, ratified, or anticipated such misconduct as provided by KRS 411.184(3). In the case at hand, the Estate argues that evidence at trial demonstrated that Big Spring Assembly ratified and/or anticipated Coulter's misconduct; thus, a directed verdict was improper.

In interpreting KRS 411.184(3), our Supreme Court held that "ratification is, in effect, the after the fact approval of conduct." *University Medical Center, Inc. v. Beglin*, 375 S.W.3d 783, 794 (Ky. 2012). The Restatement (Third) of Agency § 4.01 (2006) sets forth a more thorough definition of ratification:

> (1) Ratification is the affirmance of a prior act done by another, whereby the act is given effect as if done by an agent acting with actual authority.
>
> (2) A person ratifies an act by
>
> > (a) manifesting assent that the act shall affect the person's legal relations, or
> >
> > (b) conduct that justifies a reasonable assumption that the person so consents.
>
> (3) Ratification does not occur unless
>
> > (a) the act is ratifiable as stated in § 4.03,
> >
> > (b) the person ratifying has capacity as stated in § 4.04,
> >
> > (c) the ratification is timely as stated in § 4.05, and
> >
> > (d) the ratification encompasses the act in its entirety as stated in § 4.07.

To ratify the prior misconduct of an employee, the employer must have full knowledge of the material facts surrounding the misconduct and an intention to ratify same. *Papa John's Int'l Inc. v. McCoy*, 244 S.W.3d 44 (Ky. 2008) (citing the Restatement (Third) of Agency § 4.06 (2006)).

In the case *sub judice*, there was no evidence that Big Spring Assembly directly assented to Coulter's prior misconduct of allowing Jamie to drive his

personal motor vehicle when the accident occurred. And, the evidence adduced at trial would not lead a reasonable juror to assume that Big Spring Assembly through its actions assented to Coulter's prior misconduct. In fact, the evidence revealed that Big Spring Assembly reprimanded Coulter for his prior misconduct and required him to make a public apology to the congregation. Although Big Spring Assembly did not immediately terminate Coulter, the mere failure to terminate an employee is not considered tantamount to ratification of that employee's prior misconduct. Upon the evidence as a whole, a reasonable juror could not have concluded that Big Spring Assembly ratified Coulter's prior misconduct within the meaning of KRS 411.184(3).

As to whether Big Spring Assembly should have anticipated Coulter's misconduct within the meaning of KRS 411.184(3), we think the evidence was lacking at trial. *See Patterson v.Tommy Blair, Inc.*, 265 S.W.3d 241 (Ky. App. 2007). The Estate points to the testimony of Pastor Bennett that she knew Coulter had transported children in his motor vehicle to church. Also, the Estate cites to Coulter's testimony that he previously allowed other youth members to drive his motor vehicle. However, considering the evidence, we think it insufficient to induce a reasonable juror to find that Big Spring Assembly should have anticipated Coulter's misconduct within the meaning of KRS 411.184(3). Hence, we conclude the circuit court properly rendered a directed verdict upon punitive damages.

The Estate next argues that the circuit court erred by instructing the jury to apportion fault between Coulter and Jamie. The Estate maintains that KRS

186.590(3) and relevant "case law" mandate that Coulter is "jointly and severally" liable for Jamie's negligence. Also, the Estate maintains:

> The trial court gravely erred in allowing an apportionment of fault to Jamie Mitchell on the tort of negligent hiring/retention/supervision. As discussed extensively above, there is a distinction between vicariously liability of a principal for the negligence of an agent and direct liability of the principal for its own negligence. Respectfully, it should be plainly obvious that there was insufficient factual basis to allow apportionment on this claim. Jamie Mitchell, the 13-year-old decedent, had nothing to do with the hiring, retention, or supervision of Derek Coulter. Furthermore, Instruction No. 7 states only that Mitchell was comparatively negligent "in regards to the motor vehicle accident at issue." The finding of direct liability on behalf of Big Springs under negligent hiring makes Big Springs liable for the entire amount of damages provided for in the jury verdict regardless of the 20% comparative finding against Jamie Mitchell, and this Court should so hold.

Estate's Brief at 38 (citations omitted).

In this Commonwealth, the law is well-settled that "[i]n order for [an] employer to be held liable for negligent hiring [or] retention . . . the employee must have committed a tort." *Ten Broeck Dupont, Inc. v. Brooks*, 283 S.W.3d 705, 727 (Ky. 2009) (citations omitted). It is the underlying tort committed by the employee that provides the element of damages for the tort of negligent hiring or retention. Consequently, comparative negligence is applicable with the tort of negligent hiring or retention as the underlying tort may have more than one cause.

The Estate also argued that KRS 186.590(3) and relevant case law mandate joint and several liability, thus apportionment of fault was improper. KRS 186.590(3) reads:

> Every motor vehicle owner who causes or knowingly permits a minor under the age of eighteen (18) to drive the vehicle upon a highway, and any person who gives or furnishes a motor vehicle to the minor shall be jointly and severally liable with the minor for damage caused by the negligence of the minor in driving the vehicle.

Joint and several liability attaches under KRS 186.590(3) if:

> (1) he is the owner of the motor vehicle involved in the accident; (2) he caused or knowingly permitted [the individual] to drive the vehicle; and (3) [an individual] is a minor under the age of eighteen.

State Auto. Ins. Co. v. Reynolds, 32 S.W.3d 508, 510 (Ky. App. 2000). It must be pointed out that "[b]y making the person liable who enables a minor to operate a motor vehicle, an additional source for the recovery of damages is provided." *Peters v. Frey*, 429 S.W.2d 847, 849 (Ky. 1968).

Under KRS 186.590(3), an owner of a motor vehicle may be held jointly and severally liable for the minor's negligence, but KRS 186.590(3) does not relieve the minor of liability for his or her own negligence. It merely imposes additional liability upon the owner of the motor vehicle for the minor's negligence. As previously pointed out, KRS 186.590(3) provides "an additional source [owner of vehicle] for recovery of damages." *Peters*, 429 S.W.2d at 849. In our case, the Estate has misinterpreted KRS 186.590(3). Jamie is not relieved from liability by

KRS 186.590(3); thus, the circuit court properly instructed the jury to apportion fault to Jamie and Coulter as required by KRS 411.182.[6]

The Estate next maintains that the circuit court erred by directing a verdict upon Big Spring Assembly's vicarious liability for Coulter's outrageous conduct. The Estate believes that sufficient evidence was produced to create a submissible jury issue. The Estate points to Coulter's misrepresentations at the funeral and particularly the fact that he gave the eulogy for Jamie. The Estate contends that Coulter was acting as youth minister at the funeral and was acting as an employee of Big Spring Assembly. Thus, the Estate believes that it was entitled to a jury instruction upon Big Spring Assembly's vicariously liability for Coulter's outrageous conduct.

Our Supreme Court recently addressed the tort of outrageous conduct and the vicarious liability of an employer in *Osborne v. Payne*, 31 S.W.3d 911 (Ky. 2000). Therein, a husband and wife went to a parish priest of the Roman Catholic Church for marriage counseling. The priest and wife engaged in a sexual relationship. The husband discovered the sexual relationship and filed an action against the priest for outrageous conduct and against the Diocese of the Church for vicarious liability for the priest's misconduct. In its analysis of whether the Diocese could be vicariously liable for the priest's outrageous conduct, the Supreme Court held:

> The critical analysis is whether the employee or agent was acting within the scope of his employment at

[6] KRS 411.182 provides for allocation of fault in tort actions.

> the time of his tortious act. *Wood v. Southeastern Greyhound Lines*, 302 Ky. 110, 194 S.W.2d 81 (1946), provides that for it to be within the scope of its employment, the 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. *Hennis v. B.F. Goodrich Co., Inc.*, Ky., 349 S.W.2d 680 (1961). In this situation, it is the abuse by the priest of his position that exceeds the scope of his employment. It is beyond question that Osborne was not advancing any cause of the diocese or
>
> engaging in behavior appropriate to the normal scope of his employment.

Osborne, 31 S.W.3d at 915.

In the case *sub judice*, we, likewise, believe that Coulter's outrageous conduct was not within the scope of his employment with Big Spring Assembly. Coulter's outrageous conduct at the funeral was primarily his deception and misrepresentations. At the time of the funeral, Coulter's deception was unknown to Big Spring Assembly, and Coulter's deception arose from a purely personal motive of hiding his own misconduct. *See Patterson v. Blair*, 172 S.W.3d 361 (Ky. 2005). Coulter's deceptive behavior did not advance any interests of Big Spring Assembly and was actually converse to such interests. *See id.* Consequently, we are of the opinion that the circuit court properly determined that Coulter was not acting within the scope of his employment and properly rendered a directed verdict for Big Spring Assembly on the outrageous conduct claim.

The Estate additionally contends that the circuit court erred by reducing the wrongful death damages by $10,000, which represented Basic Reparations Benefits (BRBs) payable under the motor vehicle's insurance policy. However, the Estate failed to specify that it was not entitled to such benefits and failed to cite to any authority to support its contention. Generally, BRBs are payable regardless of fault in a motor vehicle accident. KRS 304.39-060(2)(a); *Ammons v. Winklepleck*, 570 S.W.2d 287 (Ky. App. 1978). We, thus, conclude the circuit court did not err. *See Dudas v. Kaczmarek*, 652 S.W.2d 868 (Ky. App. 1983).

We view the Estate's remaining contentions as moot or without merit.[7]

For the foregoing reasons, Appeal No. 2012-CA-001350-MR is affirmed and Cross-Appeal No. 2012-CA-001423-MR is affirmed.

STUMBO, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS.

[7] The Estate also argued that it was entitled to a directed verdict for Big Spring Assembly's vicarious liability for Jamie's wrongful death on the premise that Coulter was acting within the scope of his employment when the fatal accident occurred. The Estate prevailed upon its claim of negligent hiring and retention against Big Spring Assembly, and we have affirmed the wrongful death award in the direct appeal. As the Estate recovered for Jamie's wrongful death against Big Spring Assembly and only one recovery is permissible, the issue of Big Spring Assembly's vicarious liability is moot.

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