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# Commonwealth of Kentucky

# Court of Appeals

NO. 2014-CA-000079-MR

TOM RAU, P.O.A. FOR HANS G. RAU AND
MARTHA S. RAU — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE A.C. MCKAY CHAUVIN, JUDGE
ACTION NO. 10-CI-003106

LOCY & ASSOCIATES, LLC d/b/a
RIGHT AT HOME — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; D. LAMBERT AND NICKELL, JUDGES.

D. LAMBERT, JUDGE: Tom Rau ("Mr. Rau") appeals the December 13, 2013 judgment of the Jefferson Circuit Court dismissing his complaint that alleged various claims of negligence against Locy & Associates ("Locy"). After review, we affirm.

In June 2007, Mr. Rau arranged for Right at Home, a national provider of non-medical home health services, to care for his aged, infirm parents. Locy was Right at Home's franchisee in the Louisville area at that time. And through this relationship, Locy placed its caregivers in Right at Home's client's homes to assist with activities of daily living and provide companionship.

From November 2008 to July 2009, Locy assigned one of its caregivers, Karen Williams, to the Rau home. During this period, the elderly Raus gave Ms. Williams $35 as an Easter gift and loaned her another $400. Locy suspended Ms. Williams after learning of these additional, prohibited benefits and conducted a background check on her. This background check revealed that Ms. Williams had been arrested on a drug charge less than one month before Locy placed her with the Raus. After confronting Ms. Williams with this information, Locy terminated her employment.

In August 2009, Locy offered the Raus $435 (to reimburse them for the gift and loan) and an additional $400 (the amount of a stipend Locy had been paying Ms. Williams) in exchange for signing a document titled "Release of Liability." The Release of Liability stated that upon cashing check #2826 for $835 the Raus released Right at Home "from any further liability regarding Karen Williams." Mr. Rau and his father signed the Release of Liability and deposited the check in the Raus' trust account.

Locy replaced Ms. Williams with another caregiver, Amie Hatler-McCoy. Locy vetted Ms. Hatler-McCoy before hiring her. Locy conducted

numerous background checks on both the state and federal level and contacted two personal references. They did not receive any negative feedback from this process.

However, in October 2009, Mr. Rau notified Locy that Ms. Hatler-McCoy had made an unauthorized purchase with the Raus' credit card. Locy terminated Ms. Hatler-McCoy's employment as a result and advised Mr. Rau to call the police. A subsequent police investigation revealed that Ms. Hatler-McCoy had also stolen jewelry and other valuable items from the Raus. Some, but not all, of these items were recovered. Following these events, Adult Protective Services and the Office of the Inspector General investigated Locy, and they prepared reports based on their investigations.

In May 2010, Mr. Rau filed a complaint in Jefferson Circuit Court alleging Locy negligently hired and supervised Ms. Williams and Ms. Hatler-McCoy. The complaint also stated Ms. Williams and Ms. Hatler-McCoy stole cash and other valuables in the course and scope of their employment and asserted claims stemming from Locy's alleged violation of Kentucky Revised Statutes (KRS) 209.030.

The Jefferson Circuit Court ruled on both parties' motions for summary judgment as to these claims on August 20, 2011. The trial court dismissed all claims based on *respondeat superior* but found a potential factual dispute with respect to the negligent hiring/supervision claims.

Following the trial court's summary judgment ruling, the parties agreed to resubmit certain non-dispositive issues previously filed with their

summary judgment motions. The court ruled on these motions *in limine* on November 28, 2011. In that ruling, the court found that all claims arising out of Ms. Williams's conduct were released by accord and satisfaction. Furthermore, on May 29, 2012, the trial court ruled on another set of motions *in limine* to exclude the opinions and conclusions contained in the reports prepared by Adult Protective Services and the Office of Inspector General.

In lieu of a jury trial, the parties agreed to resolve the remaining claims—the negligent hiring/supervision claim and the alleged statutory violation claim—via a bench trial. The parties submitted their briefs and the trial court, acting as the trier of fact, entered its judgment on December 13, 2013. The trial court found in favor of Locy on all claims. The trial court found Locy was not negligent in hiring or supervising Ms. Hatler-McCoy and that Mr. Rau failed to establish the necessary causation element to succeed on his statutory claim. This appeal followed.

Mr. Rau's first argument on appeal challenges the trial court's order and opinion from November 28, 2011, which determined Mr. Rau surrendered any claims against Locy for the actions of Karen Williams under the doctrine of accord and satisfaction. For the following reasons, we agree with the trial court.

Under Kentucky law, whether the facts and circumstances give rise to an accord and satisfaction is typically a question of fact. *Bruestle v. S & M Motors, Inc.*, 914 S.W.2d 353 (Ky. App. 1996). However, when the undisputed facts satisfy the elements of accord and satisfaction—that is: (1) an offer was made

in satisfaction of a claim; (2) that offer was accompanied by an express condition that acceptance is in full satisfaction of the claim; and (3) the offeree takes the money subject to such a condition—then the question becomes one of law. *See Liggons v. House & Associates Ins.*, 3 S.W.3d 363 (Ky. App. 1999). And, this Court reviews questions of law under a de novo standard. *McClendon v. Hodges*, 272 S.W.3d 188 (Ky. 2008).

Here, Mr. Rau and his father signed a document titled "Release of Liability." This document stated the following:

> I, Hans Rau and I Tom Rau, upon receipt and cashing of check #2826, hereby release Right at Home LLC dba Right at Home of any further liability regarding Karen Williams.

From this language, Locy acknowledges its potential liability for Ms. Williams's actions and offers check #2826 (for $835) in satisfaction of any such liability. This offer expressly conditions the release of "any further liability" on the cashing of the check, and it is undisputed that Mr. Rau cashed the check. Based on these facts, we cannot disagree with the trial court. The language did not leave any additional amount or claim in dispute. As such, the release and accompanying cashed check operated as an accord and satisfaction.

Mr. Rau's argument that this "Release of Liability" was actually a deficient exculpatory agreement premised on his reading of *Hargis v. Baize*, 168 S.W.3d 36 (Ky. 2005), is not persuasive. As Locy points out, the *Hargis v. Baize* requirements apply in pre-injury situations where a party seeks to contractually

insulate itself from liability for future negligence—not in scenarios such as this where a valid claim already exists. Thus, the trial court accurately classified this "Release of Liability" as a release under the standard set forth in *Waddle v. Galen of Kentucky, Inc.*, 131 S.W.3d 361 (Ky. App. 2004), that reads, "[a] release is a private agreement amongst the parties which gives up or abandons a claim or right to the person against whom the claim ***exists***." *Id.* at 364 (emphasis added).

For his second argument on appeal, Mr. Rau challenges the trial court's award of summary judgment in favor of Locy with respect to its vicarious liability claim. Mr. Rau maintains that Locy should be vicariously liable for the actions of its employee Amie Hatler-McCoy under the doctrine of *respondeat superior*. Specifically, Mr. Rau argues that provisions of the Services Agreement rendered Locy liable for the foreseeable acts of its employees and that strict liability should apply in instances where employee caretakers commit intentional torts against the elderly. For the following reasons, we reject these arguments and believe the trial court correctly applied Kentucky law.

"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." *Scifres v. Kraft*, 916 S.W.2d 779, 781 (Ky. App. 1996). "Because summary judgment involves only legal questions and the existence of any disputed material issues of fact, an appellate court need not defer to the trial court's decision [but]

will review the issue de novo." *Lewis v. B&R Corporation*, 56 S.W.3d 432, 436 (Ky. App. 2001).

In Kentucky, an employer is only liable under the doctrine of *respondeat superior* for tortious acts of its employees committed in the scope of employment. *Patterson v. Blair*, 172 S.W.3d 361 (Ky. 2005) (rejecting the foreseeability analysis employed by *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir. 1968)). When the employee commits intentional torts, "the focus is consistently on the purpose or motive of the employee in determining whether he or she was acting within the scope of employment." *Papa John's Int'l, Inc. v. McCoy*, 244 S.W.3d 44, 56 (Ky. 2008). Generally, "the [employer] is held liable for any intentional tort committed by the [employee] where its purpose, however misguided, is wholly or in part to further the [employer's] business." However, "if the [employee] acts from purely personal motives ... which [are] in no way connected with the employer's interests, he is considered in the ordinary case to have departed from his employment, and the [employer] is not liable." *Patterson v. Blair*, 172 S.W.3d at 369 (quoting *Prosser and Keeton on the Law of Torts* 500, 505 (5th ed. 1984) (internal quotation omitted)).

Here, the record indicates Ms. Hatler-McCoy is alleged to have committed several tortious acts while an employee of Locy. Specifically, it is alleged that she stole money, jewelry and other valuable property from the Raus. The trial court characterized these acts as intentional torts, and we can find no argument offered by Mr. Rau that refutes this characterization.

As such, we must now determine whether Ms. Hatler-McCoy took these items to further Locy's interests or her own. Because Locy is not in the business of stealing from its clients—it strictly forbids the practice in its company policies—and because it did not gain in any way from Ms. Hatler-McCoy's actions, we agree with the trial court's conclusion that Ms. Hatler-McCoy acted out of purely personal motivations. Accordingly, she acted outside the scope of employment while committing her intentional torts and Locy is not liable as a matter of law.

Mr. Rau's third argument on appeal challenges the trial court's dismissal of his negligent hiring/supervision claim. In doing so, he does not confront the trial court's factual findings directly; rather, he asserts that the trial court incorrectly excluded the entire reports of the Office of Inspector General and Adult Protective Services from evidence. We agree with the trial court.

On appellate review, a trial court's findings of fact are not set aside unless clearly erroneous. *McClendon*, 272 S.W.3d at 190. A factual finding is not clearly erroneous if supported by substantial evidence. *Owens–Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409 (Ky. 1998). "'Substantial evidence' is evidence, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." *Golightly*, 976 S.W.2d at 414; *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002).

As for evidentiary rulings, the decision whether to admit evidence is vested in the sound discretion of the trial court and will not be reversed absent a

showing of an abuse of discretion. *Welsh v. Galen of Virginia, Inc.*, 128 S.W.3d 41 (Ky. App. 2001); *Young v. J.B. Hunt Transportation, Inc.*, 781 S.W.2d 503 (Ky. 1989). Further, abuse of discretion "implies arbitrary action or capricious disposition." *Allen v. Devine*, 178 S.W.3d 517, 524 (Ky. App. 2005).

In Kentucky, this Court recognized that "an employer can be held liable when its failure to exercise ordinary care in hiring or retaining an employee creates a foreseeable risk of harm to a third person." *Oakley v. Flor–Shin*, 964 S.W.2d 438 (Ky. App. 1998). The test for liability is "[whether the employer] knew, or reasonably should have known, that (1) [the employee] was unfit for the job for which he was employed, and (2) whether his placement or retention in that job created an unreasonable risk of harm to [others]." *Id.* at 442.

Here, the trial court concluded Locy exercised ordinary care in hiring and retaining Ms. Hatler-McCoy as a matter of fact. The trial court found the thoroughness of Locy's hiring process, which complied with then existing Kentucky law and produced no record of illicit activity, provided a sufficient basis for Locy to determine Ms. Hatler-McCoy was fit for the job and did not create an unreasonable risk of harm to others.

First, because we agree that compliance with applicable law during pre-employment screening is ample evidence to induce conviction in the mind of a reasonable person that the employer did not negligently hire or retain an employee as a matter of fact, we will not set aside the trial court's conclusion. Second, as we will further explain, the record indicates the trial court actually considered the

contents of the agencies' reports and did not find them trustworthy or relevant while sitting as the finder of fact.

In its order, the trial court granted Locy's motion *in limine* to exclude "any 'investigative reports' from the Office of the Inspector General and Adult Protective Services … with respect to any recorded opinions and conclusion set out therein." In support of this decision, the trial court cited the following authorities: *Engle v. Baptist Healthcare System, Inc.*, 336 S.W.3d 116 (Ky. App. 2011); *Prater v. Cabinet for Human Resources*, 954 S.W.2d 954 (Ky. 1997); and *Jordan v. Commonwealth*, 74 S.W.3d 263 (Ky. 2003).

Though Mr. Rau proposed alternative grounds to admit these agencies' reports on appeal, he only offered them into evidence at the trial level under the public records exception to the hearsay rule found in Kentucky Rules of Evidence (KRE) 803(8). Thus, his only preserved argument hinges on that subsection, which consists of the following:

> Public records and reports. Unless the sources of information or other circumstances indicate lack of trustworthiness, records, reports, statements, or other data compilations in any form of a public office or agency setting forth its regularly conducted and regularly recorded activities, or matters observed pursuant to duty imposed by law and as to which there was a duty to report, or factual findings resulting from an investigation made pursuant to authority granted by law. The following are not within this exception to the hearsay rule:
> (A) Investigative reports by police and other law enforcement personnel;
> (B) Investigative reports prepared by or for a government, a public office, or an agency when offered by it in a case in which it is a party; and

> (C) Factual findings offered by the government in criminal cases.

In this form, KRE 803(8) is available to admit investigative reports of public agencies in any civil action "only if the agency is not a party or if the report is offered by another presumably adverse party." *Prater v. Cabinet for Human Resources* at 957.

In this civil action, the makers of the reports at issue are agencies of the kind enumerated in Federal Rules of Evidence 803(8)(B). However, they were not parties in this civil action and did not offer to admit the reports into evidence. As such, the factual findings they included in their reports were potentially admissible absent an indication of untrustworthiness or some other justification for inadmissibility under the evidence rules. *See Prater*, 954 S.W.2d at 958.

Here, the trial court considered these findings as a part of the bench trial and addressed them in its judgment. The trial court found the agencies' charges against Ms. Hatfield-McCoy were both unsupported by the record and irrelevant for the purposes of Mr. Rau's negligent hiring claim in the following footnote (emphasis added):

> Mr. Rau's assertion that Ms. Hatler-McCoy had a number of 'charges' brought against her by Adult Protective Services and/or Child Protective Services is both unsupported by the record and, in keeping with this Court's Order of May 29, 2012, inadmissible. ***Moreover, and even if properly considered by the Court, it does not follow that Right at Home was, should have or could have been privy to same.***

As such, the trial court's decision to exclude the agencies' reports in their entirety will not be reversed. Pursuant to the holdings of the *Engle, Johnson* and *Prater* decisions *supra*, the trial court found admission of the agencies' opinions would put prejudicial evidence in front of the fact finder by improperly bolstering the credibility of Mr. Rau's evidence while undermining Locy's. Such a decision is left to the discretion to the trial court. As the rest of the information contained in the reports appeared neither trustworthy nor relevant for a negligent hiring/supervision claim, the trier of fact had sufficient reason to disregard it.

Mr. Rau's final argument on appeal challenges the trial court's decision to dismiss all claims arising from Locy's alleged violation of KRS 209.030, as Locy did not report the suspected abuse of the Raus to the Cabinet for Health and Family Services for investigation. The trial court dismissed this claim while once again sitting as the finder of fact, and we agree with its decision.

KRS 446.070 codifies the common-law doctrine of negligence *per se*. *Davidson v. American Freightways, Inc.*, 25 S.W.3d 94, 99 (Ky. 2000). It provides, "[a] person injured by the violation of any statute may recover from the offender such damages as he sustained by reason of the violation, although a penalty or forfeiture is imposed for such violation."

> However, the mere violation of a statute does not necessarily create liability unless the statute was specifically intended to prevent the type of occurrence which has taken place. Not all statutory violations result in liability for that violation. ***The violation must be a substantial factor in causing the injury*** and the violation

> must be one intended to prevent the specific type of occurrence before liability can attach.

*Lewis v. B & R Corp.*, 56 S.W.3d 432, 438 (Ky. App. 2001) (emphasis added). Moreover, KRS 209.030 requires **anyone**[1] who has a reasonable cause to suspect that that an adult has suffered abuse, neglect, or exploitation, to report it to the Cabinet for Health and Family Services.

Here, the trial court concluded Mr. Rau's claim under KRS 446.070 for violation of KRS 209.030 lacked the requisite causation element. Specifically, the trial court wrote:

> [I]t does not follow that had Ms. Williams' misconduct been timely reported to the Cabinet [for Health and Family Services], the Cabinet could have done anything to protect his parents from Ms. Hatler-McCoy's subsequent egregious conduct.

Since we agree with this logic and Mr. Rau provided no explanation how Locy's failure to report Williams's misconduct would have prevented Hatler-McCoy from stealing the Rau's property, the trial court's finding is similarly sufficient to induce conviction in the mind of a reasonable person; it will not be disturbed.

Therefore, we AFFIRM the Jefferson Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT: BRIEF FOR APPELLEE:

[1] As the trial court noted in its December 2013 judgment, both Mr. Rau and Locy were aware of Ms. Williams's misconduct and neither complied with KRS 209.030.

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