

Commonwealth Of Kentucky

Court of Appeals

NO. 2001-CA-002057-MR
AND
NO. 2001-CA-002107-MR

TOMMIE LEE PATTERSON

APPELLANT/CROSS-APPELLEE

APPEAL AND CROSS-APPEAL FROM MCCRACKEN CIRCUIT COURT
v. HONORABLE R. JEFFREY HINES, JUDGE
ACTION NO. 95-CI-00896

THOMAS C. BLAIR, JR. AND
TOMMY BLAIR INC., D/B/A
COURTESY AUTOPLEX

APPELLEES/CROSS-APPELLANTS

OPINION
REVERSING AND REMANDING AS TO THE APPEAL
AND
REVERSING AS TO THE CROSS-APPEAL

** ** * * *

BEFORE: BARBER, DYCHE AND TACKETT, JUDGES.

BARBER, JUDGE: Appellant, Tommie Patterson (Patterson), appeals from a ruling of the McCracken Circuit Court holding that he is not entitled to a jury instruction on punitive damages in his case against Thomas Blair Jr., (Blair) and Tommy Blair, Inc., d/b/a Courtesy Autoplex (Courtesy). Courtesy cross-appeals from

the trial court's finding that it is liable, under the theory of vicarious liability, for the actions of its employee, Blair.

Patterson made an agreement with Courtesy to trade his old vehicle for the new 1995 Jimmy. Patterson informed Courtesy of an amount he believed he still owed on his current vehicle, and the trade-in was accomplished. Courtesy permitted Patterson to take possession of the Jimmy, but did not transfer title of the new vehicle to Patterson.

Courtesy then discovered that Patterson owed an additional sum of \$3000 on the trade-in vehicle. Patterson refused to pay that additional sum, or to return the Jimmy. Blair attempted repossession of the Jimmy by shooting at and flattening the vehicle's tires. When the Jimmy was left beside the roadway, local police officers impounded it and returned it to Courtesy.

Courtesy obtained a judgment against Patterson for the loss in value of the Jimmy. Citizens Bank, which had financed the trade-in vehicle, obtained a judgment against Patterson for the remaining sums owed on the trade-in vehicle. Blair was convicted of the felony offense of wanton endangerment in the first degree. Subsequently, Patterson filed a civil action against Blair and Courtesy for torts committed by Blair against Patterson. At trial in the civil action, the court instructed the jury on assault and on the vicarious liability of Courtesy

for the actions of its agent, Blair. The trial court denied Patterson's request to instruct the jury on punitive damages. The jury awarded Patterson damages in the sum of \$42,465.18.

Patterson objects to the trial court's refusal to instruct on the issue of punitive damages. The trial court instructed on assault, and the jury found Blair and Courtesy liable under that instruction. In order to recover punitive damages for the commission of an intentional tort, a plaintiff must prove that the defendant's misconduct was "of a character that is 'willful, malicious, and without justification.'" Horton v. Union Light, Heat & Power Co., Ky., 690 S.W.2d 382, 389 (1985). More recently, we have reaffirmed the requirement that "the threshold for the award of punitive damages is misconduct involving something more than merely commission of the tort." Banks v. Fritsch, Ky. App., 39 S.W.3d 474, 481 (2001).

The trial court stated that Blair's conduct "did not reveal the type of aggravated intent necessary to sustain an award for punitive damages in a common law assault case where no physical conduct occurred" because Blair "took care to avoid pointing the muzzle of his handgun toward [Patterson]." We note that in a criminal trial Blair was convicted of wanton endangerment in the first degree pursuant to KRS 508.060, which requires a finding that Blair wantonly engaged in conduct

creating a substantial danger of death or serious physical injury to another person under circumstances manifesting extreme indifference to human life. Clearly, the jury was entitled to determine whether Blair's criminal actions reached the level of outrageous conduct. For this reason, we reverse the trial court's denial of the requested instruction on punitive damages.

Courtesy asserts on appeal that it was improperly found liable for Blair's actions under the legal theory of *respondeat superior*. Kentucky law finds that an employer will not be held vicariously liable for the acts of an agent or employee unless the facts show that the wrongful action was "done in furtherance of the master's business or interest...." Moore v. Ford Motor Co., 265 Ky., 575, 97 S.W.2d 81 (1946). The record shows that Blair was the vice president and service manager of Courtesy, and that his duties did not include repossession or reclamation of vehicles.

An employer shall not properly be held liable for the actions of its employee unless the employee is acting within the normal scope of his employment. Osborne v. Page, Ky., 31 S.W.3d 911, 915 (2000). Where, as here, the employee is not advancing the cause of his employer, or acting at the employer's express or implied directive, the employer may not be held liable for the employee's actions. Roethke v. Songer, Ky., 68 S.W.3d 352, 361 (2001).

In Citizen's Finance Co. v. Walton, Ky., 239 S.W.2d 77 (1951), the High Court found that the employer was not liable for the actions of a finance company employee who physically attacked a customer who refused to repay her debt. This ruling was based on the argument that the employee's duty to collect the debt did not carry the authority to use physical force against the debtor. Similarly, Blair's action in shooting out the tires of the vehicle at issue was not within the purview of his job authority, or in furtherance of Courtesy's interest.

The rationale behind imposition of liability upon an employer is "by consideration of public policy and the necessity for holding a responsible person liable for the actions done by others in the prosecution of his business, as well as for placing on employers an incentive to hire careful employees." Johnson v. Brewer, 266 Ky., 314, 98 S.W.2d 889, 891 (1936). In the present case, there is no showing that Blair was acting at the direction of Courtesy in directing violence at the vehicle operated by Blair. Further, the record indicates that repossession of vehicles was outside the course and scope of Blair's employment with Courtesy. There appears no public policy consideration charging Courtesy with liability for the actions of Blair taken outside the course and scope of his employment.

For the foregoing reasons, the judgment of the McCracken Circuit Court is REVERSED, and the case remanded for trial with directions that an instruction on punitive damages be permitted.

DYCHE, JUDGE, CONCURS.

TACKETT, JUDGE, CONCURS IN PART, DISSENTS IN PART, AND FILES SEPARATE OPINION.

TACKETT, JUDGE, CONCURRING IN PART AND DISSENTING IN PART. I must respectfully dissent from that portion of the majority's opinion reversing trial court's determination Courtesy was liable for Blair's tortious conduct against Patterson under the theory of *respondeat superior*.

I believe that the majority's reliance on Osbourne and Roethke is misplaced. The majority opinion states that "An employer shall not properly be held liable for the actions of its employee unless the employee is acting within the normal scope of his employment. Osborne v. Page, Ky., 31 S.W.3d 911, 915 (2000)." However, the exact quote from the case begins with the caveat that the employer is not liable under *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." Id. at 915.

Prior to the incident where Blair shot out the vehicle's tires, two other employees had attempted to regain possession. At that time, Patterson accosted them and made threats towards them, and they abandoned their efforts to seize the vehicle. Knowing of Patterson's previous behavior, Blair armed himself with a handgun before attempting to repossess the vehicle. However, he did not point the gun at Patterson and threaten to shoot him in order to regain possession of the Jimmy. Rather, after Patterson ignored Blair's taps on the driver's side window, Blair drew the gun and discharged it into the tires in an effort to disable the vehicle and prevent Patterson from driving it. In fact, this strategy succeeded in that the police impounded the vehicle after the tires deflated and subsequently returned it to Courtesy. Blair's use of force, directed towards the vehicle, was clearly an action in furtherance of his duties to his employer, Courtesy, to protect its property from wrongful possession by Patterson.

Roethke, the other case relied on by the majority, is readily distinguishable from the case *sub judice*. Mr. Roethke owned a roofing company, D & B Roofing Corporation, and he hired Chris Sanger to supervise D & B's employees on a commercial roofing job. Sanger owned a crane and operated, together with his father, Larry, Sanger Crane Service. Roethke knew that Sanger had no experience in roofing when he hired him. One day

during a visit to the site, Roethke fell through some insulation and sustained paralyzing injuries. He sued Sanger and the trial court imposed vicarious liability on his father, Larry, under a partnership theory.

The Kentucky Supreme Court held that there was no vicarious liability on Larry's part because the Sangers were in the business of operating a crane service while Chris was being sued for negligence in supervising a roofing installation. Moreover, Chris and Larry were not really in partnership because each man owned a crane and received payment according to the jobs which he performed. That is simply not the case here where Tommy Blair, Jr., was employed by his father and was engaged in repossessing a car owned by his father's business at the time he committed tortious acts against Patterson.

I believe the case of Frederick v. Collins, Ky., 378 S.W.2d 617 (1964) is controlling. In Frederick, a grocery store owner had instructed all employees, including his son, Robert Frederick, not to resist robberies because the store was insured against theft. Collins, a frequent patron, entered the store and told Robert to put his hands in the air and that it was a hold up. Robert was working alone at the time and, without his father's knowledge, he kept a gun with him. He responded to Collins by shooting him and killing him. Collins' estate sued the Fredericks for wrongful death, and Robert's father defended

on the grounds that Robert had been instructed not to resist a holdup and, therefore, was acting outside the scope of his duties. In rejecting this argument, the court stated as follows:

[U]nder modern theories of allocation of the risk of the servant's misbehavior, it has been recognized . . . that even intentional torts may be so reasonably connected with the employment as to fall within the scope of it. The present tendency is to extend the employer's responsibility for such conduct . . .

In the case at bar Robert was admittedly the appellant's employee; moreover, he was in sole charge of the store at the time of the incident. Without doubt Robert Frederick was under obligation generally to manage and protect the appellant's store and its contents. There is no evidence that Robert sought to serve any personal purpose in his activity toward Collins . . . So it is obvious that this case is not governed by any other authorities which deny liability because the employee has acted in furtherance of personal motive as distinguished from a motive connected with the employer's business.

Frederick at 619. Consequently, in the case *sub judice*, the trial court properly allowed the jury to consider holding Courtesy liable for the tortuous conduct of its employee which was undertaken solely in furtherance of its interests.

The majority's opinion fails to address the holding in Frederick and, for the forgoing reasons, I would affirm the

judgment of the McCracken Circuit Court as to Courtesy's cross-
appeal.

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