[Cite as *Estate of Barney v. Manning*, 2011-Ohio-480.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 94947

ESTATE OF WILLIAM R. BARNEY, JR., ET AL.

PLAINTIFFS-APPELLANTS

vs.

CHARLES H. MANNING, ESQ., ET AL.

DEFENDANTS-APPELLEES

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-687812

BEFORE: Gallagher, P.J., Blackmon, J., and Cooney, J.

RELEASED AND JOURNALIZED: February 3, 2011

ATTORNEYS FOR APPELLANTS

Christopher M. Vlasich
Joel Levin
Aparesh Paul
Levin & Associates Co., L.P.A.
Tower at Erieview, Suite 1100
1301 East 9th Street
Cleveland, OH 44114

ATTORNEYS FOR APPELLEES

Charles Manning
12101 County Line Road
Chesterland, OH 44026

For McIntyre, Kahn & Kruse Co., LPA

John T. Murphy
Theresa A. Richthammer
Monica A. Sansalone
Gallagher Sharp
Sixth Floor Bulkley Building
1501 Euclid Avenue
Cleveland, OH 44115

SEAN C. GALLAGHER, P.J.:

{¶ 1} Appellants, Estate of William R. Barney, Jr., the William R. Barney Trust, and Caroline Barney (hereinafter collectively referred to as

"appellants"), appeal the trial court's grant of summary judgment in favor of appellee, McIntyre, Kahn, & Kruse Co., LPA ("MKK"). For the reasons set forth herein, we affirm.

{¶ 2} In 1991, Charles Manning, an attorney, created a trust ("Trust") for William R. Barney, a friend of Manning's father. Restatements of the Trust were made in 1999 and 2001. According to the Trust, Manning was named as successor trustee upon Barney's death. When Barney died in February 2007, Manning became the trustee; Manning also opened the Estate of William Barney ("Estate") and was named executor. Manning was appointed executor for the Estate and dealt directly with Barney's wife, Caroline, on all matters concerning the Trust and estate.

{¶ 3} In 2005, Manning became associated with the law firm MKK. MKK hired Manning, who had expertise in probate and estate matters; Manning was listed on the firm's website and letterhead, and he received insurance coverage through the firm. In exchange, Manning processed the legal fees he generated through MKK's billing system, and was compensated with a portion of those fees. MKK billing records show that Manning billed Caroline Barney and the estate for work he performed for the Estate in 2007 and 2008.

{¶ 4} In April 2007, Manning, in his capacity as trustee, began investing Trust funds into Manning & Banks, a company he controlled.

Between April 2007 and July 2008, Manning transferred funds from the Trust account to Manning & Banks for investment purposes, with the intention of repaying the Trust once the company turned a profit. In total, Manning transferred approximately $1.25 million from the Trust account to Manning & Banks. Manning & Banks failed as a company, and in October 2008, Manning informed Caroline that he had depleted the Trust account entirely. Manning then informed partners at MKK, who had no prior knowledge of Manning's role as trustee of the Trust, that he had invested Trust funds in Manning & Banks. Manning resigned from MKK.

{¶ 5} On March 18, 2009, appellants filed a complaint against Manning, MKK, Manning & Banks, and National City Bank.[1] The complaint alleged legal malpractice, breach of fiduciary duty, conversion, and negligence against MKK. On January 8, 2010, MKK filed its motion for summary judgment, which the trial court granted on March 12, 2010. After appellants raised an issue regarding the court's striking their expert's report, the trial court agreed to reconsider all of the evidence, including appellants' expert report, on their legal malpractice claim. On March 19, 2010, the trial court granted summary judgment on appellants' legal malpractice claim, and

[1] Appellants subsequently filed an amended complaint and a corrected amended complaint. National City Bank was voluntarily dismissed without prejudice.

included "no just cause for delay" language. To date, the trial court has not resolved the claims against Manning or Manning & Banks.

{¶ 6} Appellants filed their appeal, arguing that "the trial court erred in granting defendant/appellee McIntyre, Kahn & Kruse Co., LPA's motion for summary judgment." They argue that summary judgment was improperly granted in MKK's favor because genuine issues of material fact exist as to its liability for Manning's misconduct. They further argue that MKK's failure to rebut their expert report alone defeats summary judgment. We disagree.

{¶ 7} Appellate review of summary judgment is de novo, governed by the standard set forth in Civ.R. 56. *Comer v. Risko*, 106 Ohio St.3d 185, 2005-Ohio-4559, 833 N.E.2d 712, ¶ 8. Accordingly, we afford no deference to the trial court's decision and independently review the record to determine whether summary judgment is appropriate. *Hollins v. Shaffer*, 182 Ohio App.3d 282, 2009-Ohio-2136, 912 N.E.2d 637, ¶ 12. Under Civ.R. 56(C), summary judgment is proper when the moving party establishes that "(1) no genuine issue of any material fact remains, (2) the moving party is entitled to judgment as a matter of law, and (3) it appears from the evidence that reasonable minds can come to but one conclusion, and construing the evidence most strongly in favor of the nonmoving party, that conclusion is adverse to the party against whom the motion for summary judgment is made." *State ex rel. Duncan v. Mentor City Council*, 105 Ohio St.3d 372, 2005-Ohio-2163, 826

N.E.2d 832, ¶ 9, citing *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 327, 364 N.E.2d 267.

{¶ 8} Appellants' underlying claims against MKK are based on Manning's use of Trust funds for his personal use. Appellants have alleged conversion, legal malpractice, breach of fiduciary duty, and negligence. They argue that MKK is vicariously liable for Manning's depletion of the Trust account while he was working for the law firm.

{¶ 9} Appellants argue that MKK is liable for Manning's conduct under a theory of respondeat superior. In order for the doctrine of respondeat superior to apply, the tort of the employee must be committed within the scope of his employment. *Osborne v. Lyles* (1992), 63 Ohio St.3d 326, 587 N.E.2d 825. "Moreover, where the tort is intentional, * * * the behavior giving rise to the tort must be calculated to facilitate or promote the business for which the servant was employed * * *. [A]n employer is not liable for independent self-serving acts of his employees which in no way facilitate or promote his business." (Citations and internal quotation marks omitted.) Id. at 329-330.

{¶ 10} First we consider whether MKK can be held vicariously liable for Manning's conversion of the Trust funds. The elements of conversion include "'(1) plaintiff's ownership or right to possession of the property at the time of conversion; (2) defendant's conversion by a wrongful act or disposition of

plaintiff's property rights; and (3) damages.'" *Dream Makers v. Marshek*, Cuyahoga App. No. 81249, 2002-Ohio-7069, quoting *Haul Transport of Va., Inc. v. Morgan* (June 2, 1995), Montgomery App. No. CA 14859.

{¶ 11} There is no dispute that Manning used the funds in the Trust to invest in a business he controlled, and then was unable to repay the money to the Trust or the Estate. He admitted as much in his deposition. We do not find, however, that MKK can be held vicariously liable for Manning's actions to the extent they may constitute the tort of conversion.

{¶ 12} Conversion is an intentional tort. Intentional torts are typically beyond the scope of employment because they in no way facilitate or promote the employer's business. *Byrd v. Faber* (1991), 57 Ohio St.3d 56, 58, 565 N.E.2d 584. Notwithstanding this rule, "the act of an agent is the act of the principal within the course of the employment when the act can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of the service to be rendered, or a natural, direct, and logical result of it." *Tarlecka v. Morgan* (1932), 125 Ohio St. 319, 324, 181 N.E. 450. Based on agency principles, an employer can be vicariously liable for injury to a third party if the employer expressly authorizes or otherwise ratifies the employee's tortious actions. *Fulwiler v. Schneider* (1995), 104 Ohio App.3d 398, 406, 662 N.E.2d 82, citing *State ex rel. Riley Constr. Co. v. E. Liverpool City School Dist. Bd. of Edn.* (1967), 10 Ohio St.2d 25, 29, 225 N.E.2d 246.

{¶ 13} "An intentional and willful tort committed by an employee for his own personal purposes constitutes a departure from his employment, so that the employer is not responsible." *Caruso v. State* (2000), 136 Ohio App.3d 616, 737 N.E.2d 563, citing *Vrabel v. Acri* (1952), 156 Ohio St. 467, 103 N.E.2d 564. "The fact that the conduct constituting the tort was committed while the employee was on duty and supposedly performing services for his employer, does not render the employer liable where the employee deviated or departed from his employer's business to engage upon a matter for his own personal purposes without benefit to the employer." (Internal citations omitted.) Id.

{¶ 14} "It is commonly recognized that whether an employee is acting within the scope of his employment is a question of fact to be decided by the jury." *Osborne*, 63 Ohio St.3d at 330. Only when reasonable minds can come to but one conclusion does the issue regarding scope of employment become a question of law. Id.

{¶ 15} In our case, we find that reasonable minds could only conclude that Manning's tortious conduct falls beyond the scope of his employment with MKK. While there is no dispute that Manning was employed by MKK as an attorney at the time he admittedly converted the Trust funds, there is also no dispute that MKK was unaware of his activities as they related to the Trust. Appellants have offered no facts that suggest MKK authorized or

otherwise ratified Manning's actions. Manning's tortious conduct cannot be said to be "an ordinary and natural incident or attribute" of the legal services MKK employed him to render, or "a natural, direct, and logical result" of them. Finally, Manning's actions were not done to promote or facilitate MKK's business.

{¶ 16} Quite the opposite is true. The Trust itself was created prior to Manning's employment at MKK. During his employ, Manning never met with Mrs. Barney at MKK's office. Mrs. Barney had never communicated with other MKK attorneys and could not recall ever having received any correspondence from the law firm. All bank statements for the Trust were addressed to Manning at his home address. Any legal work Manning personally performed on behalf of the Barney Estate, a separate entity from the Trust, was billed to the Trust, and Manning paid with Trust funds without Mrs. Barney's or MKK's knowledge. In her deposition, Mrs. Barney stated clearly that she did not consider Manning her attorney.

{¶ 17} When Manning converted the Trust funds as investments in his separate company, Manning & Banks, an entity in which he had the controlling interest, he did so without MKK's knowledge. We find that reasonable minds could only conclude that Manning's actions fell outside the course and scope of his employment, and therefore, this is not a triable issue for the jury.

{¶ 18} We are also not convinced by appellants' argument that conversion is not an intentional tort, especially when applied to the facts in this case. Manning admitted that he intended to use the funds, regardless of whether he intended to repay them. It is his intent to use the funds that is the mental state at issue and that cannot be imputed to MKK.

{¶ 19} Therefore, we find that MKK cannot be held vicariously liable for Manning's conversion of Trust funds. The trial court did not err in granting summary judgment in MKK's favor on this claim.

{¶ 20} Our findings with respect to appellants' conversion claim lead us to similarly conclude that summary judgment was properly granted in MKK's favor on appellants' remaining claims.[2] While we do not decide here how these claims should be resolved against Manning, as they relate to MKK, we find no vicarious liability.

{¶ 21} Whether Manning is ultimately found liable for legal malpractice, that determination would not change the outcome for MKK. We have found that Manning's conduct falls outside the scope of his employment with MKK, thereby relieving the law firm of any vicarious liability as it relates to him.

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[2] Appellants' breach of fiduciary duty and negligence claims are embodied within their legal malpractice claim. See *Illinois Natl. Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.*, Franklin App. No. 10AP-290, 2010-Ohio-5872, in which the court held, "When the gist of a complaint sounds in malpractice, other duplicative claims [breach of fiduciary duty] are subsumed within the legal malpractice claim. Indeed, '[m]alpractice by any other name still constitutes malpractice.'" (Internal citations omitted.)

The facts appellants rely on to prove MKK's liability center exclusively on Manning's conversion of Trust funds; they offer no separate legal theory upon which the law firm could be held liable.

{¶ 22} We are also not persuaded that appellants' expert report, as prepared by W. Jack Rekstis, establishes MKK's vicarious liability for Manning's intentional tortious conduct. In his first report, dated December 10, 2009, Rekstis concludes that MKK would be liable for Manning's legal representation of clients. In his second report, dated February 17, 2010, Rekstis concludes that Manning violated the Ohio Rules of Professional Conduct by converting Trust funds and breaching his duties to appellants.

{¶ 23} We find that neither report addresses whether Manning's conversion of Trust funds falls within the scope of his employment with MKK, which we find it does not. MKK's failure to provide a rebuttal expert in this case does not, in and of itself, create a genuine issue of material fact to defeat summary judgment.

{¶ 24} Appellants' sole assignment of error is overruled.

Judgment affirmed.

It is ordered that appellee recover from appellants costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

SEAN C. GALLAGHER, PRESIDING JUDGE

PATRICIA A. BLACKMON, J., and
COLLEEN CONWAY COONEY, J., CONCUR