

STATE OF MICHIGAN
COURT OF APPEALS

ELLA JONES and ED JONES,

Plaintiffs-Appellants,

v

WADE LOGAN and ALLSTATE INSURANCE
COMPANY,

Defendants-Appellees.

UNPUBLISHED

June 26, 2003

No. 237781

Genesee Circuit Court

LC No. 1999-065675-NO

Before: Griffin, P.J., and Murphy and Jansen, JJ.

PER CURIAM.

Plaintiffs appeal as of right from a final judgment entered in their favor, and against defendant Logan, following a bench trial. Plaintiffs also appeal a judgment granting defendant Allstate's motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm in part and reverse in part and remand.

This case arises out of a sexual assault committed against plaintiff Ella Jones (Ella) by Logan, an Allstate insurance agent, in his business office. Ella testified that she went to Logan's office to inquire about obtaining insurance, and while at the office, Logan forced himself on her sexually without her consent. Logan and Ella knew each other before the incident based on a relationship they had several years earlier. Logan's position was that Ella consented to the sexual act, and that she forced him to continue the act when he sought to stop. The Michigan Insurance Bureau took action against Logan that resulted in the revocation of his insurance license. The administrative law judge found Ella's testimony to be credible, and Logan's testimony not worthy of belief. On review, this finding was upheld by the Commissioner of Insurance, and the Genesee Circuit Court subsequently affirmed the findings and the license revocation on appeal.

Plaintiffs first argue that the trial court erred in granting defendant Allstate's motion for summary disposition because Allstate could possibly be held liable on an "apparent authority" theory as a result of Logan's sexual assault upon Ella. We disagree. Rulings on motions for

summary disposition are reviewed de novo by this Court. *Armstrong v Ypsilanti Charter Twp*, 248 Mich App 573, 582; 640 NW2d 321 (2001).¹

“The authority of an agent to bind the principal may be either actual or apparent.” *Meretta v Peach*, 195 Mich App 695, 698; 491 NW2d 278 (1992). Apparent authority can arise where the actions of the purported agent lead a third party to reasonably believe that an agency relationship exists. *Alar v Mercy Mem Hosp*, 208 Mich App 518, 528; 529 NW2d 318 (1995). Apparent authority, however, must be traced to the principal and cannot be established only through the acts of the agent. *Id.* Apparent authority is based on the conduct of the employer which leads a third party to reasonably believe that the employee’s actions were taken on behalf of the employer. See *Leitch v Switchenko*, 169 Mich App 761, 766; 426 NW2d 804 (1988). The *Meretta* panel, addressing the issue of apparent authority in the context of authority to accept a mortgage payment, stated:

In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances. The question here is whether an ordinarily prudent person, conversant with mortgage lending, would be justified in assuming Diamond had the authority to accept prepayment of the mortgage. [*Meretta, supra* at 699 (citations omitted).]

Here, while there was no dispute that Logan was an employee and agent of Allstate and had authority with respect to the sale of insurance, there was no documentary evidence presented to show that Ella reasonably believed that Logan had authority from Allstate to engage in sexual conduct with customers. In fact, Ella’s affidavit indicated the contrary; she thought, based on Allstate’s slogan and reputation, that Allstate would employ professional agents and not one who engages in sexual advances. There was no evidence that Logan indicated that he was acting on behalf of Allstate. Importantly, there was also no evidence that Allstate undertook any action that would reasonably suggest that their agents had authority to behave in the manner in which Logan acted. The trial court did not err in ruling that there was no genuine issue of material fact that the theory of apparent authority was not applicable under the documentary evidence and circumstances presented.

¹ Allstate’s motion for summary disposition was granted pursuant to MCR 2.116(C)(10). MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. Our Supreme Court has ruled that a trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Smith v Globe Life Ins Co*, 460 Mich 446, 454; 597 NW2d 28 (1999). In addition, all affidavits, pleadings, depositions, admissions, and other documentary evidence filed in the action or submitted by the parties are viewed in a light most favorable to the party opposing the motion. *Id.* Where the burden of proof on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in the pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996). Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363.

Plaintiffs' reliance on *Johnston v American Oil Co*, 51 Mich App 646; 215 NW2d 719 (1974), and *Green v Shell Oil Co*, 181 Mich App 439; 450 NW2d 50 (1989), to support their apparent authority argument is misplaced as those cases are clearly distinguishable. In *Johnston, supra* at 647-648, the proprietor of a gas station shot and killed a customer after the customer and his friends "razzed" the proprietor, and after the customer, having been declined service, exited his vehicle, demanded service, and confronted the proprietor. The customer was carrying a firearm. *Id.* at 648. In *Green, supra* at 441, the plaintiff alleged an assault and battery by two gas station employees after an altercation erupted between the three in the station's lot when the plaintiff initiated a verbal confrontation. In both cases, this Court held that issues of fact existed with respect to the theory of apparent authority. *Id.* at 446; *Johnston, supra* at 650. These cases are distinguishable from the case at bar because in *Johnston* and *Green*, the issue of apparent authority was addressed solely in the context of the establishment of a general agency or employment relationship, as opposed to here, where there is no dispute that Logan was an employee and agent of Allstate. The question is more narrow, that is whether Logan had apparent authority to undertake the act at issue, which, as indicated above, we find he did not. In *Johnston* and *Green*, it was conceivable, if an agency or employment relationship was factually established, that the gas station employees were acting within the scope of that relationship with authority to maintain order on the premises and to quell disturbances by customers.² Here, as stated by the trial court, the "incident did not arise out of some dispute over insurance or some attempt to purchase insurance." The sexual assault had no connection whatsoever to the operation of an insurance company. The trial court did not err in dismissing the action against Allstate.

Plaintiffs next argue that Logan was collaterally estopped from denying that he sexually assaulted Ella, and that the trial court erred in its finding of facts when it considered Logan's testimony. The applicability of collateral estoppel is a question of law subject to de novo review by this Court. *Minicuci v Scientific Data Mgmt, Inc*, 243 Mich App 28, 34; 620 NW2d 657 (2000). Collateral estoppel precludes relitigation of an issue in a subsequent, different cause of action between the same parties or their privies when the prior proceeding culminated in a valid final judgment and the issue was actually and necessarily determined in the prior proceeding. *Ditmore v Michalik*, 244 Mich App 569, 577; 625 NW2d 462 (2001). It only applies when the basis of the prior judgment can be clearly, definitely, and unequivocally ascertained. *Id.* at 578. For collateral estoppel to apply, the ultimate issue to be concluded in the second action must be the same as that involved in the first action. *Bd of Co Rd Comm'rs for the Co of Eaton v Schultz*, 205 Mich App 371, 376; 521 NW2d 847 (1994). Collateral estoppel applies to administrative determinations if the proceedings were adjudicatory in nature, a method of appeal was available,

² An employer can be held liable for an employee's intentional tort if the tort is committed in the course and within the scope of the employee's employment. *Bryant v Brannen*, 180 Mich App 87, 98; 446 NW2d 847 (1989). However, an employer is not liable if the employee does the act while engaged in the employer's work, but outside of his authority such as where the employee acts to gratify some personal animosity or to accomplish some purpose of his own. *Id.* Here, plaintiffs' respondeat superior claim was summarily dismissed and that dismissal is not challenged on appeal, and thus plaintiffs' use of the apparent authority theory of recovery can only be viewed in the narrow context of alleged authority to engage in the sexual conduct at issue and not authority creating an agency relationship in general as was involved in *Johnston* and *Green*. Logan was clearly attempting to accomplish a purpose of his own.

and the Legislature intended that the administrative determination was to be final in the absence of appeal. *Nummer v Dep't of Treasury*, 448 Mich 534, 542; 533 NW2d 250 (1995).

The trial court stated at trial that Logan was collaterally estopped from testifying and denying he sexually assaulted Ella because the issue was fully litigated in the administrative law proceedings and on appeal in the circuit court. The record reflects that, although the trial court indicated that it was applying collateral estoppel with respect to Logan, Logan testified at length and denied that any sexual assault took place, asserting that Ella consented. However, comments by plaintiffs' counsel prior to Logan's testimony could be interpreted as a waiver of any collateral estoppel claim and explains why the trial court proceeded to take Logan's testimony. The trial court's findings of fact reflected some acceptance of Logan's testimony; however, the court stated in its order on reconsideration that, although there were some minor inconsistencies with its findings and those made by the administrative law judge, the end result was consistent in that it found that Logan had indeed committed a sexual assault against Ella.

We find that plaintiffs waived the issue of collateral estoppel based on counsel's statement to the trial court that it should proceed to take the testimony of Logan, and counsel's statement to the effect that it felt comfortable that the court would, as did the administrative law judge, find Logan's testimony to be unbelievable. See *Hilgendorf v St John Hosp & Medical Ctr Corp*, 245 Mich App 670, 683; 630 NW2d 356 (2001). We also note that it appears that plaintiffs raised the issue of collateral estoppel in an untimely manner based on the court's scheduling order. The collateral estoppel argument had the attributes of a motion in limine, in that, it sought the exclusion of Logan's testimony denying the incident, and motions in limine were to be filed seven days before trial, which apparently was not done here. Moreover, assuming that the issue was not waived and that the doctrine of collateral estoppel was applicable, the trial court's ultimate ruling that a sexual assault occurred is not inconsistent with the findings of the administrative law judge. To the extent that some of the trial court's factual findings were inconsistent, those inconsistencies related to actions by Ella and Logan directly before the sexual assault occurred, and plaintiffs argued collateral estoppel in regards to the occurrence of the sexual assault itself. We cannot conclude that the trial court's findings were clearly erroneous.

Finally, plaintiffs argue that the trial court's findings regarding damages were clearly erroneous. We agree. The thrust of plaintiffs' argument is that the damage awards were grossly inadequate considering the evidence presented at trial. "Where a court following a bench trial has determined the issue of damages, we review the award for clear error." *Marshall Lasser, PC v George*, 252 Mich App 104, 110; 651 NW2d 158 (2002)(citation omitted). Clear error exists where, after a review of the record, the appellate court is left with a firm and definite conviction that a mistake has been made. *Id.*

The evidence indicated that plaintiffs were both negatively and deeply affected by the sexual assault. Ella testified that she missed about five days from school as a result of the assault. Ella further testified that she could not sleep, was not able to function well as a wife, was withdrawn from the whole family, that the incident alienated her and Ed, and affected their marital relations. The trial court's reasoning that Ella suffered no physical injury, that the marriage remained intact, and that there were preexisting marital problems, reflect a failure to properly consider the seriousness and gravity of the sexual assault in and of itself and the debilitating effect that such an act can have on the victim's life and the life of a spouse. To

assert that Ella suffered no physical injury where nonconsensual sexual penetration occurred, indicates a failure to appreciate the egregious physical violation necessarily involved in a sexual assault. The damage awards were *grossly* inadequate in light of the evidence presented, and clear error was committed. We reverse the award of damages with respect to both plaintiffs, and, because this case involved a bench trial, we remand for entry of new damage awards by the trial court. The trial court shall take into consideration the language in this opinion and the evidence previously presented at trial, and it shall allow the parties to submit briefs and oral argument solely on the issue of damages.

Affirmed in part, and reversed in part, and remanded. We do not retain jurisdiction.

/s/ Richard Allen Griffin

/s/ William B. Murphy

/s/ Kathleen Jansen