STATE OF WEST VIRGINIA
SUPREME COURT OF APPEALS

Debra Salkovick, Maureen Wagner, Rebecca McLeod, Diana Martin, and Connie Blake, Plaintiffs Below, Petitioners

vs) No. 11-0167 (Marshall County 06-C-264)

Giant Eagle, Inc. Defendants Below, Respondent

FILED
June 24, 2011
RORY L. PERRY II, CLERK
SUPREME COURT OF APPEALS
OF WEST VIRGINIA

MEMORANDUM DECISION

Petitioners Debra Salkovick, Maureen Wagner, Rebecca McLeod, Diana Martin, and Connie Blake, plaintiffs below, appeal from an adverse jury verdict in this civil action for sexual harassment and related causes of action. Petitioners seek a new trial. Respondent Giant Eagle, Inc., defendant below, has filed a response.

This Court has considered the parties' briefs and the record on appeal. Pursuant to Rule 1(d) of the Revised Rules of Appellate Procedure, this Court is of the opinion that this case is appropriate for consideration under the Revised Rules. The facts and legal arguments are adequately presented in the parties' written briefs and the record on appeal, and the decisional process would not be significantly aided by oral argument. Upon consideration of the standard of review, the briefs, and the record presented, the Court finds no substantial question of law and no prejudicial error. For these reasons, a memorandum decision is appropriate under Rule 21 of the Revised Rules.

David Kelch and Kelch's Foods, Inc.[1] owned and operated grocery stores under the banner of Giant Eagle located in Moundsville, West Virginia, and Bridgeport, Ohio, during the relevant time period. Petitioners were store employees. Petitioners Salkovick, Blake, and McLeod[2] alleged that they were subject to sexual advances and comments from Kelch.

[1] It appears that David Kelch and Kelch's Foods, Inc., settled with petitioners prior to trial. For purposes of this Memorandum Decision, David Kelch and/or Kelch Foods, Inc., will be referred to as "Kelch."

[2]Respondent Giant Eagle states that petitioner McLeod had sexual relations with Kelch on three occasions: twice at the Bridgeport, Ohio store in 2003, and later in 2005, shortly after McLeod became re-employed with Kelch at the Moundsville store. Giant Eagles states that McLeod admitted at trial that she did not resist Kelch; that she never told him

Petitioners Wagner and Martin allege that while not subject to sexual advances or comments from Kelch, they were subject to the hostile working environment created by him. Eventually, all petitioners left their employment.

Giant Eagle became apprised of the alleged sexual harassment claims and held two meetings with petitioners in March of 2006, during which petitioners state they were asked to provide information concerning their complaints of sexual harassment against Kelch. Giant Eagle states that the meeting were held at the request of petitioner Wagner. Petitioners state that after these meetings, they were told by representatives of Giant Eagle that Giant Eagle could not do anything for them because they were not employees of Giant Eagle, Inc.

Giant Eagle representatives also met with Kelch in March of 2006, regarding petitioners' allegations. Kelch admitted to a consensual sexual relationship with one of his employees [McLeod]. Giant Eagle advised Kelch that it wanted to immediately begin the process of terminating the relationship and removing Giant Eagle's banner from the Moundsville store.[3] Giant Eagle gave Kelch time to find a buyer for the store, which was sold by Kelch in April of 2007. The new owner operated the store as an IGA supermarket.

The relationship between Giant Eagle and Kelch was reflected in numerous contractual commitments, including a Retailer's Agreement. Petitioners assert that the Retailer's Agreement required Kelch to conduct business in compliance with written standards, procedures, rules, and policies issued from time to time by Giant Eagle; that it specifically proscribed sexual harassment; and that it provided Giant Eagle with a remedy of termination for enforcement of that proscription. They add that a sublease agreement between Giant Eagle and Kelch required Kelch to operate the store in accordance with the Retailer's Agreement. Petitioners assert that store manager Billick testified concerning the extensive control that Giant Eagle exercised over the daily operations of the store.

Respondent Giant Eagle states that an independent retailer, such as Kelch, remains a separate and distinct entity from Giant Eagle, Inc. and remains solely responsible for all employee-related matters. Giant Eagle states that the Retailer's Agreement specifically stated that Kelch was an independent contractor; that no agency, partnership, or employment relationship was created; and that the retailer [Kelch] remained an independent contractor responsible for all labor relations. Giant Eagle states that contrary to petitioners' assertion, there was no evidence at trial that Giant Eagle ever fired, disciplined, or otherwise controlled any employee of an independent owner/operator of a "Giant Eagle" supermarket.

"no;" and that she admitted that she once "flashed" her breasts to Kelch while working in the video department at the Bridgeport, Ohio store. Giant Eagle adds that on one of the occasions, McLeod went by herself and reserved a hotel room in which she and Kelch later had sexual relations.

[3]Kelch's Giant Eagle store in Ohio had previously closed following a flood.

Petitioners instituted this sexual harassment action against Giant Eagle,[4] and the case went to trial. Although the parties discuss at length the allegations of sexual harassment and the reasons why petitioners each quit their jobs in their respective briefs, the issues on appeal primarily involve the relationship between Giant Eagle, Kelch, and petitioners, and who controlled petitioners' employment.

Giant Eagle states that each petitioner admitted at trial that Kelch was her employer and exercised exclusive control over labor and employment matters at the Moundsville store. Giant Eagle adds that there is nothing in any contract between Giant Eagle and Kelch that gave Giant Eagle the power of control over Kelch's employment practices or his employees. Conversely, petitioners contend that the numerous contractual commitments between Giant Eagle and Kelch ensured that Giant Eagle exercised control over all aspects of the Moundsville store, including employment issues. They add that store manager Melissa Billick testified concerning the extensive control that Giant Eagle exercised over the daily operation of the store, including employment decisions.

The jury returned a verdict in favor of respondent Giant Eagle. Petitioners' motion for a new trial was denied.

I. Instructional Error - *Respondeat Superior*

Petitioners state that the critical question at trial was whether Kelch could be considered an agent of Giant Eagle with resultant *respondeat superior* liability to Giant Eagle. Petitioners assert that their proposed jury instruction on their claim of vicarious liability should have been given, and that the instruction given by the trial court was confusing because it used the terminology of "master and servant" instead of "principal and agent" in describing their theory of the relationship between Giant Eagle and Kelch.[5] Petitioners argue that the trial court erred by instructing the jury that it must find Giant Eagle was their "master" in order for liability to attach.

Petitioners also assert that the trial court gave their counsel permission to argue that Giant Eagle was vicarious liable for Kelch's conduct, yet, when their counsel attempted to

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[4] Other named defendants included David Kelch and Kelch Foods, Inc.

[5] Petitioners add that further confusion was injected when the trial court attached a copy of syllabus point 5 of *Paxton v. Crabtree*, 184 W.Va. 237, 400 S.E.2d 245 (1990), and a copy of syllabus point 3 of *Akers v. Cabell-Huntington Hospital, Inc.*, 215 W.Va. 346, 599 S.E.2d 769 (2004), to the verdict forms. This Court notes that the copies of these syllabus points are not attached to the verdict forms in the record on appeal.

do so during closing arguments, the trial court upheld Giant Eagle's objection and reiterated its prior ruling that the control issues ran from Giant Eagle to petitioners—not from Giant Eagle to Kelch. Petitioners assert that this ruling removed the possibility of vicarious liability from the case and was contrary to West Virginia law.

Giant Eagle responds that based upon the evidence at trial and the clear directive in *Paxton*, the trial court properly instructed the jury that Giant Eagle had to have the power of control over the terms and conditions of petitioners' employment in order for Giant Eagle to be liable under a theory of *respondeat superior*. *Paxton v. Crabtree*, 184 W.Va. 237, 400 S.E.2d 245 (1990). Giant Eagle asserts that the trial court correctly recognized that only through that power of control would Giant Eagle have had the right, power, and obligation to prevent or stop the alleged hostile work environment at Kelch's Moundsville store. Giant Eagle states that the trial court's jury instruction focused on that control, which was consistent with petitioners' theory of the case and the evidence they presented at trial. Giant Eagle adds that if the jury had found that Giant Eagle had the power of control over petitioners, it could have found that Giant Eagle was vicariously liable under the theory of *respondeat superior* for the acts of Kelch assuming, of course, that petitioners had proven their hostile work environment claims.

Giant Eagle adds that the trial court did not prohibit petitioners' counsel from making closing argument concerning Giant Eagle's vicarious liability for the conduct of Kelch. The trial court only insisted that such argument be made in a manner consistent with its prior rulings. Giant Eagle states that petitioners' counsel argued throughout closing that Giant Eagle, through its relationship with Kelch, possessed control of Kelch's employees.

"As a general rule, the refusal to give a requested jury instruction is reviewed for an abuse of discretion. By contrast, the question of whether a jury was properly instructed is a question of law, and the review is *de novo*." Syl. Pt. 1, *State v. Hinkle*, 200 W.Va. 280, 489 S.E.2d 257 (1996). The Court finds that the trial court neither erred nor abused its discretion in this regard.

II. Denial of Petitioners' Motion for Partial Summary Judgment - Principal and Agent

Petitioners assert that the trial court erred by denying their motion for partial summary judgment asking it to find, as a matter of law, that the relationship between Giant Eagle and Kelch was that of principal and agent that would render Giant Eagle liable under *respondeat superior* for Kelch's conduct. Petitioners assert that whether a defendant owes a duty to a plaintiff is to be determined by the court as a matter of law. Petitioners assert that the contracts and written commitments between Giant Eagle and Kelch demonstrated the degree of control that Giant Eagle had over every aspect of the Moundsville store and that Giant Eagle's insistence that it had no right to control employment practices was insufficient to overcome the documentary evidence to the contrary.

Giant Eagle responds that the trial court properly denied petitioners' motion as to vicarious liability and duty of care. Giant Eagle asserts that each petitioner admitted in her deposition that it was Kelch that controlled the Moundsville store and their employment, including their daily activities. Giant Eagle argues that petitioners' admissions, in addition to the deposition testimony of Kelch, Melissa Billick, the former store manager at the Moundsville store, and Giant Eagle executives, were sufficient to raise a material issue of fact as to the issue of *respondeat superior* liability.

"This Court reviews *de novo* the denial of a motion for summary judgment, where such a ruling is properly reviewable by this Court." Syl. Pt. 1, *Findley v. State Farm Mut. Auto. Ins. Co.*, 213 W.Va. 80, 576 S.E.2d 807 (2002). "'A motion for summary judgment should be granted only when it is clear that there is no genuine issue of fact to be tried and inquiry concerning the facts is not desirable to clarify the application of the law.' *Aetna Casualty & Surety Co. v. Federal Ins. Co. of New York*, 148 W.Va. 160, 133 S.E.2d 770 (1963)." *Hicks ex rel. Saus v. Jones*, 217 W.Va. 107, 111, 617 S.E.2d 457, 461 (2005). Under the facts and circumstances of this case, the Court finds that the trial court properly denied the motion for partial summary judgment.

III. Denial of Petitioners' Motion for Partial Summary Judgment - Duty to Act

Petitioners next assert that the trial court erred in refusing to grant their motion for partial summary judgment concerning Giant Eagle's assumption of a duty to act with reasonable care upon learning of their complaints of sexual harassment. Petitioners assert that the evidence and pleadings demonstrated that Giant Eagle was acting in a loss prevention capacity at the time it interviewed petitioners following their complaints of sexual harassment, and, in doing so, it assumed a duty to act with reasonable care toward them. Thus, petitioners argue that the trial court erred by refusing to find that Giant Eagle had a duty to act with reasonable care.

Giant Eagle responds that petitioners could not establish that Giant Eagle had control over the Moundsville employees so as to be deemed their employer, either at the summary judgment stage or at trial. Accordingly, Giant Eagle argues that the trial court correctly refused to rule that Giant Eagle owed a duty of care to petitioners and properly denied their motion for partial summary judgment in this regard.

Relying upon the standard of review set forth in section II above, the Court finds that under the facts and circumstances of this case, the trial court properly denied the motion for partial summary judgment on the duty of care issue.

IV. Prior Knowledge

Petitioners assert that throughout discovery, Giant Eagle objected to their efforts to ascertain whether Giant Eagle had prior knowledge of Kelch's predatory behavior.

Petitioners state that the trial court granted Giant Eagle's motions in limine prohibiting any reference to evidence concerning the alleged reputation of Kelch in the Moundsville community as a philanderer or womanizer, yet allowed Giant Eagle to argue at trial that no one from Giant Eagle had ever heard anything negative about Kelch until petitioners' allegations arose. Petitioners contend that these rulings caused the jury to speculate as to why petitioners' allegations arose at all and unfairly aided Kelch's effort to cast himself as the victim. Petitioners argue that where a witness's credibility is an issue, reputation evidence is admissible under Rules 404(b) and 405(a) of the West Virginia Rules of Evidence.

Giant Eagle responds that petitioners did explore whether Giant Eagle had prior knowledge of Kelch's alleged sexual behavior and reputation in their interrogatories and during the depositions of Giant Eagle witnesses, each of whom denied any foreknowledge. Giant Eagle states that the only discovery precluded by the trial court concerned the identities of any employees with whom Kelch might have had sexual relations, and whether Kelch's wife knew of such employees. Giant Eagle argues evidence of Kelch's alleged affairs was properly excluded under Rules 404(a) and 404(b) because petitioners were clearly offering such evidence to establish that Kelch was "predisposed" to engage in the specific conduct at issue and to prove that he acted in conformity therewith.

"'The West Virginia Rules of Evidence and the West Virginia Rules of Civil Procedure allocate significant discretion to the trial court in making evidentiary and procedural rulings. Thus, rulings on the admissibility of evidence . . . are committed to the discretion of the trial court. Absent a few exceptions, this Court will review evidentiary and procedural rulings of the circuit court under an abuse of discretion standard.' Syllabus point 1, in part, *McDougal v. McCammon*, 193 W.Va. 229, 455 S.E.2d 788 (1995)." Syl. Pt. 3, *Reynolds v. City Hosp., Inc.*, 207 W.Va. 101, 529 S.E.2d 341 (2000) (per curiam); *see also* Syl. Pt. 2, in part, *Jenkins v. CSX Transportation, Inc.*, 220 W.Va. 721, 649 S.E.2d 294 (2007) (per curiam). "Where the law commits a determination to a trial judge and his discretion is exercised with judicial balance, the decision should not be overruled unless the reviewing court is actuated, not by a desire to reach a different result, but by a firm conviction that an abuse of discretion has been committed." *Covington v. Smith*, 213 W.Va. 309, 322–23, 582 S.E.2d 756, 769–70 (2003)(internal citations omitted). Under these standards and the facts and circumstances of the case *sub judice*, we find no error in the trial court's evidentiary rulings in this regard.

V. Denial of Motion for Judgment as a Matter of Law

At the close of the evidence, petitioners moved for judgment as a matter of law that they had been subjected to sexual harassment by Kelch. The trial court denied the motion finding that it was a jury issue. Petitioners assert that given their testimony as to multiple episodes of grossly inappropriate behavior by Kelch, there was no basis upon which a reasonable jury could have concluded that petitioners McLeod, Blake, and Salkovick had not been sexually harassed by Kelch.

Giant Eagle asserts that the trial court properly denied petitioners' motion for judgment as a matter of law on the issue of sexual harassment as there was a question for the jury concerning the severity and pervasiveness of the alleged hostility. Relying upon *Akers v. Cabell-Huntington Hospital, Inc.*, 215 W.Va. 346, 599 S.E.2d 769 (2004), Giant Eagle argues that evidence sufficient to establish the four elements of sexual harassment merely entitles a plaintiff to submission of the issue to the jury. Giant Eagle adds that given the evidence at trial, the trial court could also have denied the motion on the basis that each petitioner quit her job for a reason other than the alleged sexual harassment.

We have previously stated that a judgment as a matter of law should be granted at the close of the evidence when, after considering the evidence in the light most favorable to the nonmovant, only one reasonable verdict is possible. *Barefoot v. Sundale Nursing Home*, 193 W.Va. 475, 481 n. 6, 457 S.E.2d 152, 158 n. 6 (1995). Further, "'[u]pon a motion for a [judgment as a matter of law], all reasonable doubts and inferences should be resolved in favor of the party against whom the verdict is asked to be directed.' Syllabus Point 5, *Wager v. Sine*, 157 W.Va. 391, 201 S.E.2d 260 (1973)." Syl. Pt. 2, *Yates v. University of West Virginia Bd. of Trustees*, 209 W.Va. 487, 549 S.E.2d 681 (2001). Upon a review of the record and the arguments of the parties herein, the Court cannot find that the trial court erred in denying petitioners' motion for judgment as a matter of law on this issue.

VI. Denial of Petitioners' Jury Instructions on Premises Liability, Fraud, Battery, and Fraudulent Concealment

Petitioners assert that the trial court erred by refusing to instruct the jury or otherwise permitting them to present their claims for premises liability, fraud, and battery, and for refusing their instruction on petitioner Blake's claim of fraudulent concealment in relation to Giant Eagle's statute of limitation defense as to her cause of action. The Court has considered the arguments of the parties in this regard and, under the standard of review set forth in Section I above concerning alleged instructional error, the Court finds no error.

VII. Requested Sanctions

Petitioners sought sanctions against Giant Eagle because its counsel requested— in the presence of the jury and at the conclusion of counsel's cross-examination of petitioner Blake—that the trial court take judicial notice of its earlier order entered with petitioner Blake's consent dismissing Kelch from the case for untimeliness. Petitioners state that although the trial court concluded that defense counsel had acted intentionally, had misrepresented the content of the prior order, and had violated a pretrial order, its "sanction" was to instruct the jury on the applicability of the discovery rule so that the jury could determine whether the statute was tolled. Petitioners assert that this "sanction" did not remove or ameliorate the harmful effect of defense counsel's misconduct and that petitioner Blake was entitled to such an instruction regardless of the misconduct of defense counsel.

Giant Eagle responds that the trial court had previously indicated that it was intending

to dismiss petitioner Blake's claims as time-barred. Accordingly, Giant Eagle argues that allowing the issue to go to the jury was a reasonable sanction.

As we stated, in part, in syllabus point 1 of *McDougal*, 193 W.Va. 229, 455 S.E.2d 788 (1995), "rulings on the admissibility of evidence and the appropriateness of a particular sanction . . . are committed to the discretion of the trial court." We find no abuse of discretion in this regard.

VIII. Conclusion

For the foregoing reasons, we affirm.

Affirmed

ISSUED: June 24, 2011

CONCURRED IN BY:

Chief Justice Margaret L. Workman
Justice Robin Jean Davis
Justice Menis E. Ketchum
Justice Thomas E. McHugh

DISQUALIFIED:

Justice Brent D. Benjamin