

**IN THE COURT OF APPEALS 06/18/96**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 95-CA-00034 COA**

**AMERICAN FUNERAL ASSURANCE COMPANY**

**APPELLANT**

**v.**

**DAISY HUBBS, ADMINISTRATRIX OF THE ESTATE OF LUCILLE KITCHENS,  
DECEASED**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

FRAISER, C.J., SPECIALLY CONCURRING:

The granting of punitive damages in this case causes me concern. However, we are an error corrections court bound by case law enunciated by the Mississippi Supreme Court. *McCann v. Gulf National Life Insurance Co.* 574 So. 2d 654, 657 (Miss. 1990), under facts closely resembling those in this case, states:

Agent fraud or misrepresentation in the application process has been enough in Mississippi to allow the issue of punitive damages to be submitted to the jury.

Justice Blass dissented in *McCann*, stating:

For the majority it easily follows from this that a principal must also pay unlimited punitive damages for the acts of its agents, even though the company neither ratified or approved of such conduct. For me, the result is not so obvious. Indeed there are some jurisdictions that have adopted the approach favored by the majority but the opposite, and in my mind correct, rule is also in effect in many jurisdictions.

The better rule is embodied in the Restatement (Second) of Torts § 909 (1977). It requires that before one is entitled to collect punitive damages against a principal for the acts of an agent a plaintiff must prove that the agent acted with the state of mind required for a punitive damages award and:

(1) the principal or a managerial agent authorized the doing and the manner of the act; or (2) the agent was unfit and the principal or a managerial [sic] was reckless in employing or retaining him or her; or (3) the agent was employed in a managerial capacity and was acting in the scope of employment; or (4) the principal or a managerial agent of the principal ratified or approved the act.

*Id.* This approach ensures that principals are not punished for the actions of employees unless they ratify the conduct, tacitly or otherwise. Imposing punitive damages in the absence of such conduct by the employer is merely a thinly veiled scheme to redistribute the wealth. Worse still, punishing "good" and "bad" employers alike does not put employers on notice as to what type of conduct to avoid to protect themselves from harsh punitive damage awards. Here the majority specifies no conduct by the employer or its managerial personnel that is worthy of blame other than the cynical suggestion that they should have known that their agents would have acted dishonestly.

Other states have enacted statutes that focus on the conduct of the employer. Kentucky, for example, recently enacted a statute that says: "[i]n no case shall punitive damages be assessed against a principal or employer for the act of an agent or employee unless such principal or employer authorized or ratified or should have anticipated the conduct in question." I can only hope that the legislature of our state enacts a similar statute.

*McCann*, 574 So. 2d at 660-61 (citations omitted).

While the articulation of Judge Blass contains worthwhile thoughts, the legislative enactment mentioned by him has not become a part of our statutory law. We therefore remain bound by precedent.

**PAYNE, J., JOINS THIS SEPARATE OPINION.**

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SOUTHWICK, J., dissenting

The majority says it will not "disturb a trial judge's findings on a question of fact," but affirms only after relying on fact findings that the chancellor did not make. The majority lists six facts that allegedly support the chancellor. Most are not probative on the issue that the majority finds supported by these six elements of evidence, namely, that any misstatements on the insurance application were self-serving omissions by agent Willis. The one "fact" that is at least related to what Willis may have done, was not relied upon or even found by the chancellor. That "fact" is disputed. Absent the lower court making a finding on it, we commit error to "find" it ourselves.

Three of the facts have to do with the formation of Lakeover going back over a fifteen-year period: 1) Willis used to work for Gayfer's Department Store, and organized Lakeover Funeral Home in 1989; 2) in 1989, Lakeover became an agent of AFA; 3) Lakeover was in existence for one year prior to Kitchens' application for insurance. None of these facts look incriminating to me. Two facts have to do with how commissions and policy proceeds are paid: 4) Lakeover was paid commissions based on the amount of premiums; and 5) a majority of the proceeds of the policies were paid to Lakeover for burial costs. So far, every fact describes normal, good faith business activities, though the last two at least start to address motive. The one allegation that might impact on whether Willis misrepresented what he was told in filling out Kitchens' application, is an allegation by one of the plaintiffs as to how Willis misstated the information on that plaintiff's entirely separate application at a different time. Whether the chancellor believed that allegation, despite the witness' self-interest that was the equal of the agent's self-interest, does not appear in the record. That allegation appears nowhere in the chancellor's lengthy opinion, and is therefore simply irrelevant to our review. A substantial evidence review of the "facts" cited by the majority leaves us only with motive, opportunity, and . . . nothing more.

Instead of relying on the evidence that the majority cites, the chancellor relied on something entirely different. It is on that evidence which we must initially focus in deciding whether substantial evidence supports the chancellor. The court held that since the agent Willis physically wrote down the answers on the application as he questioned the insured:

[t]he company is bound by the agent's acts; and, therefore, they have, in effect, filled out

the application for her, and all she did [by signing the form] was authorize them to obtain any information from physicians or hospitals because it is highly improbable that the applicant for burial insurance would know or have any way to answer such question as to a disorder of the brain or nervous system, so the burden would be placed on American, through its agent, to inquire further if they were not satisfied with the application.

While it is true that some questions might be difficult to answer, the chancellor swept into his net all questions that the application required the applicant to answer, even so basic a one as whether the applicant was then suffering from an illness like diabetes. The improbability or not of the applicant knowing of a brain disorder, to use Chancellor Dillard's analysis, hardly absolves the applicant from truthfully answering all questions that can be answered.

It is evident that what caused the chancellor to hold against the insurance company was his view of the legal consequences of this single fact: the agent physically wrote down the answers on the form as he questioned the insured. The chancellor did not find that the insured lied or did not lie, that the agent wrote what the insured said or did not write what she said. Instead, the chancellor's award of \$4,000 actual and \$200,000 punitive damages is "because the insured has no control over what the agent represents to the company. . . ." To say the insured has no control over answers on a form is, shall we say, an oversimplification. The answers were given, an opportunity to review the application provided, and any disagreements could then be handled. There is no case law cited by the parties, the court below, nor the majority, that supports the chancellor's view. There was evidence introduced that the practice of an agent filling out the form based on questioning of the applicant is the norm, not the suspicious exception. Chancellor Dillard's legal conclusion based on the fact that Willis wrote the answers on the form is simply wrong. It is upon that error that the decision to award damages is solely based.

In effect, the chancellor held that since no one else was present, there is an irrebuttable presumption that Kitchens did nothing wrong. On appeal the estate does not seem to think any more of the chancellor's presumption than I do, and thus revives the factual allegation made in the lower court that Willis must have ignored what he was told and wrote down the answers necessary for Kitchens to obtain insurance. Again, the only evidence is the majority's six-part motive and opportunity list. The Plaintiff's testimony that Willis did the same thing to her is not acceptable under a standard of not "disturbing a trial court's fact findings." The chancellor never said he believed it. Further, whether the evidence is admissible does not matter. If it is admissible, it is only admissible for a limited purpose of showing motive or intent. As Rule 404(b) states, evidence of acts similar to those alleged cannot show the person "acted in conformity therewith." M.R.E. 404 (b). Rule 404 evidence "is irrelevant to prove the conduct in question." 22 Charles Alan Wright & Kenneth L. Graham, *Federal Practice & Procedure*, § 5239, at 436 (1978); see *Dawkins v. Redd Pest Control Co.*, 607 So. 2d 1232, 1235-36 (Miss. 1992). In other words, if the only proof is of motive, that is not enough to prove a person acted in furtherance of that motive. The majority affirms the lower court because of three facts that show Willis' innocent activities in setting up his business, and three facts that at most show a motive. A motive to make money is in most business arrangements, so contracting parties beware.

The majority is left, then, in the position of holding that proof of the agent's possible motive to misrepresent Kitchens' response to the application's questions is sufficient to establish that the agent actually omitted the responses. This is an untenable position under Mississippi law. The conduct attributed to the agent is fraud. Consequently, to prevail on her claim based on the agent's fraud, Hubbs must prove the conduct attributed to him by clear and convincing evidence. *McCann v. Gulf Nat'l Life Ins. Co.*, 574 So. 2d 654, 657 (Miss. 1990) (describing agent's omission in application of information provided by prospective insured as fraud); *see Cherry v. Anthony, Gibbs, Sage*, 501 So. 2d 416, 420 (Miss. 1987) (holding that fraud must be proved by clear and convincing evidence); *Protective Serv. Life Ins. Co. v. Carter*, 445 So. 2d 215, 216 (Miss. 1983) (same). Proof of motive alone is not clear and convincing evidence of the fraudulent conduct attributed to the agent. *McGory v. Allstate Ins. Co.*, 527 So. 2d 632, 636-37 (Miss. 1988). In *McGory*, the supreme court considered an appeal by insureds from a declaratory judgment against them in favor of an insurance company disputing their entitlement to fire insurance proceeds. The insurance company suspected that the insureds had deliberately set the fire to recover from their insurance coverage and sought court confirmation of the denial of the insureds' claim. In holding that the evidence was sufficient to support a finding that arson by the insureds had been proved by clear and convincing evidence, the supreme court noted that proof of a motive to defraud the insurance company by making a fraudulent claim would have not have been clear and convincing evidence that the insureds actually did commit arson. *Id.* at 636. Likewise, in this case, proof that the agent may have had a motive to omit responses to the application's questions is insufficient evidence that he did indeed act as alleged.

Moreover, based on all the evidence in the record, nothing supports the allegation that Willis misrepresented what he was told. The insurer has the burden to show some part of the application was false. *Home Ins. Co. v. Olmstead*, 355 So. 2d 310, 314 (Miss. 1978). That burden was met. We know the application did not mention diabetes on the list of current health problems, but that Kitchens suffered from diabetes. The Plaintiff concedes the falsity, but just alleges that the error was not Kitchens' responsibility. To the contrary, signatories to written instruments are responsible for the accuracy of their representations. A document purporting to reflect Kitchens' answers to the insurance questions presumptively does just that. It was then the Plaintiff's burden to chip away at the presumption by showing someone else caused the erroneous statement, or by proof of another defect. There was no such credible proof. Thus we must conclude the form accurately represented what Kitchens revealed to the agent.

Since I believe it was error to assign Willis any responsibility for omissions on the form, it is then necessary to determine the effect of failure to disclose diabetes. The evidence is overwhelming that Kitchens knew she had diabetes, and that it was a continuing physical problem for her. There was un rebutted evidence that the company would not have issued her a policy had it known of the diabetes. The Plaintiff scoffs at such evidence, however, because Kitchens died of cancer that she did not know she had at the time of the application.

The question for the court below was whether the insured did something that allowed her to get a policy she otherwise would not have received. She did. She failed to disclose the diabetes. At the time of her death she would not have had insurance except for her omission. The majority's view would mean that no matter how clear the evidence that an applicant for insurance was near death because of various physical ailments she did not disclose, any one of which would have kept her from getting this insurance, the applicant's estate is entitled to punitive damages if the insured dies from a

different cause, such as a car wreck. Insurance law, for all the vast opportunities for plaintiffs to receive extraordinary damages, is not that divorced from normal contract rules. Kitchens should not have had coverage with this company, and thus it was proper for the company to deny the claim.

Though the foregoing indicates there should be no liability on the company, I make a separate statement regarding the punitive damages. The majority finds "substantial credible evidence indicating that economic incentives motivated Willis not to disclose the diabetes." In fact, there is no admissible "evidence," only speculation. There is evidence of the legitimate steps to start this business, and one allegation that even if believed, can only prove motive. No one saw the application being completed; no one knows what was said. That is substantial evidence? Besides the self-serving statement by the Plaintiff that Willis did the same thing to her, there was evidence from every other relative that Willis had properly filled in their applications. Why is Willis' act self-serving, but the Plaintiff's testimony or the deceased's possible failure to disclose both considered disinterested? The deceased wanted a policy; the plaintiff wanted a recovery; the agent wanted a premium. They are all equally self-interested. The Defendants did not have the burden of proof, and thus judgment must be entered for them.

**COLEMAN AND MCMILLIN, JJ., JOIN THIS DISSENT.**