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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-74**

Mark O. Lynch, in his capacity as
Trustee for the heirs and next of kin of
Owen James Lynch, decedent,
Appellant,

vs.

Patrick Joseph Carline,
Respondent.

**Filed December 8, 2009
Reversed and remanded
Hudson, Judge**

Hennepin County District Court
File No. 27-CV-07-21784

Richard J. Malacko, 332 Minnesota Street, Suite W1610, St. Paul, Minnesota 55101 (for appellant)

Patrick Joseph Carline, 5705 Jackson Street Northeast, Fridley, Minnesota 55432 (pro se respondent)

Considered and decided by Hudson, Presiding Judge; Lansing, Judge; and Shumaker, Judge.

UNPUBLISHED OPINION

HUDSON, Judge

In this appeal following a jury verdict for appellant in a wrongful-death action, appellant challenges the district court's determinations that an agency relationship existed

and that punitive damages are not available. Because we hold that no agency relationship existed as a matter of law, and because the district court erroneously granted judgment as a matter of law (JMOL) on the availability of punitive damages, we reverse and remand for a new trial on the issue of punitive damages.

FACTS

On September 7, 1989, Owen James Lynch (decedent) was shot to death in his residence during an apparent robbery attempt. Glenn Phillip Greene, then 17 years old, pleaded guilty to second-degree murder and agreed to testify against respondent Patrick Joseph Carline, a business acquaintance of decedent who allegedly arranged the robbery. On September 26, 1989, respondent was charged with first- and second-degree murder. A jury later acquitted respondent.

Eighteen years later, appellant Mark O. Lynch brought a wrongful-death suit against respondent for his alleged involvement in decedent's murder.¹ The district court granted appellant's motion to add a claim of punitive damages to the complaint.

When Greene refused to testify at the civil jury trial, the district court allowed appellant to present Greene's testimony from respondent's criminal trial. Respondent, pro se, was allowed to present the cross-examination of Greene from that trial.

At the criminal trial, Greene testified that he, respondent, and two other people had discussed the possibility of robbing decedent on the evening of September 6, 1989. Respondent decided that a gun should be used and selected Greene to commit the crime

¹ "An action to recover damages for a death caused by an intentional act constituting murder may be commenced at any time after the death of the decedent." Minn. Stat. § 573.02, subd. 1 (2008).

because Greene owed respondent \$60. Respondent drove Greene to a park area near decedent's residence. He told Greene that decedent lived alone and kept money in his billfold and in the bedroom. Respondent told Greene to make up an excuse to gain entry to decedent's residence, not to touch the door, to take decedent's billfold, and to return to the car. Respondent gave Greene a loaded gun.

Greene, who did not know decedent, approached the residence and spoke to decedent about purchasing one of the cars in decedent's driveway. Decedent asked Greene to come back the next day because of the lateness of the hour. One of decedent's sons was in the residence, so Greene left. Greene returned the gun to respondent and made an excuse as to why he did not commit the robbery.

On September 7, 1989, respondent asked if Greene wanted to rob decedent. Greene said he did not know and that he was high from smoking marijuana. Respondent again drove Greene to the park area and gave Greene a loaded gun. Greene went to decedent's residence and asked to use the telephone. Once inside the residence, Greene demanded \$5,000 and pointed the gun at decedent. A struggle ensued. Greene fired six shots, five of which struck decedent. Greene fled the scene, and decedent died as a result of the gunshot wounds.

Greene returned the gun to respondent and told him that he had shot decedent. The day after the murder, respondent told Greene not to worry because respondent had "grinded" the gun down and had "torched the butts."

In the civil trial, the jury reached a verdict. Out of the presence of the jury, and before the verdict was received, the district court stated:

I wanted to discuss with [appellant] the question of punitive damages.

I read Minnesota Statute 549.20(2) as follows: Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if (a) the principal authorized the doing and the manner of the act. And since there is no testimony and no evidence that [respondent] authorized the doing and the manner of the act, the act being the murder of [decedent], I do not find that I can submit the question of punitive damages to the jury.

Appellant's counsel then argued that an agency relationship did not exist between respondent and Greene. The district court stated that it did not find appellant's argument tenable and that it would not submit the question of punitive damages to the jury.

The jury found that respondent "willfully and wrongfully caused the death" of decedent and awarded appellant \$300,000 in compensatory damages. Appellant moved for a new trial on the issue of punitive damages. The district court denied appellant's motion. This appeal follows.

D E C I S I O N

Appellant argues that the district court erroneously failed to submit the issue of punitive damages to the jury. As an initial matter, we note that motions for JMOL during trial may be made at any time before submission of the case to the jury. Minn. R. Civ. P. 50.01(b). Although no such motion was made here, the district court effectively granted JMOL² on the existence of an agency relationship between respondent and Greene and the availability of punitive damages by not submitting these issues to the jury. *See* Minn.

² Motions for directed verdict and motions for judgment notwithstanding the verdict are now characterized as motions for JMOL. *See* Minn. R. Civ. P. 50 2006 comm. cmt.

R. Civ. P. 50.01(a). We therefore treat the district court's resolution of these issues as a grant of JMOL, which we review de novo. *See Longbehn v. Schoenrock*, 727 N.W.2d 153, 159 (Minn. App. 2007).

[JMOL] should be granted: only in those unequivocal cases where (1) in the light of the evidence as a whole, it would clearly be the duty of the [district] court to set aside a contrary verdict as being manifestly against the entire evidence, or where (2) it would be contrary to the law applicable to the case.

Jerry's Enters., Inc. v. Larkin, Hoffman, Daly & Lindgren, Ltd., 711 N.W.2d 811, 816 (Minn. 2006) (quotation omitted); *see also* Minn. R. Civ. P. 50.01(a) (stating that JMOL is appropriate if "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue").

We first address whether an agency relationship existed between respondent and Greene. "Whether an agency relationship exists is generally a question of fact unless the evidence is conclusive one way or the other." *Smith v. Woodwind Homes, Inc.*, 605 N.W.2d 418, 423 (Minn. App. 2000); *see also PMH Props. v. Nichols*, 263 N.W.2d 799, 803 (Minn. 1978) (stating that "when the evidence is conflicting, whether an agency relation exists presents a question of fact for the trier of fact . . . to determine"). "Agency is the fiduciary relationship that results from manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the other so to act." *A. Gay Jenson Farms Co. v. Cargill, Inc.*, 309 N.W.2d 285, 290 (Minn. 1981) (citing Restatement (Second) of Agency § 1 (1958)). As a matter of law, no agency relationship can exist unless the principal has the right to control the agent's

conduct. *See Vieths v. Ripley*, 295 N.W.2d 659, 664 (Minn. 1980); *Jurek v. Thompson*, 308 Minn. 191, 200–01, 241 N.W.2d 788, 793 (1976).

Here, the evidence is conclusive that no agency relationship existed. Appellant seeks to hold respondent liable for punitive damages because respondent allegedly instructed Greene to commit aggravated robbery³ on respondent's behalf. But, assuming that this instruction took place, respondent had no right to control Greene's conduct. First, the instruction to commit the crime was illegal. *See* Minn. Stat. § 609.05, subd. 1 (1988) (imposing criminal liability on a person who "intentionally aids, advises, hires, counsels, or conspires with or otherwise procures the other to commit the crime"). Because there is no right to commit a crime, respondent had no right to control Greene's attempt to commit the robbery. Second, Greene had no duty to obey such an instruction. *See* Restatement (Third) of Agency § 8.09 cmt. c (2006) ("[A]n agent has no duty to comply with a directive to commit a crime or an act the agent has reason to know will be tortious."). Where the agent has no duty to obey, it follows that the principal has no right to control the agent's conduct. Because respondent had no right to control Greene's conduct, we hold that no agency relationship existed as a matter of law.

The district court also determined that, as a matter of law, punitive damages are not available. We review such a determination de novo. *See Jensen v. Walsh*, 623 N.W.2d 247, 249 (Minn. 2001); *Swanlund v. Shimano Indus. Corp.*, 459 N.W.2d 151, 155 (Minn. App. 1990), *review denied* (Minn. Oct. 5, 1990). Minnesota law provides

³ *See* Minn. Stat. § 609.245 (1988) (defining aggravated robbery as committing robbery while armed with a dangerous weapon or while inflicting bodily harm upon another).

that punitive damages may be recovered in a wrongful-death action if the requirements of the punitive-damages statute are met. Minn. Stat. § 573.02, subd. 1 (2008). Subdivision 1(a) of the punitive-damages statute states that punitive damages “shall be allowed . . . only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.” Minn. Stat. § 549.20, subd. 1(a) (2008). Subdivision 2 of the punitive-damages statute prescribes the availability of punitive damages “against a master or principal because of an act done by an agent.” *Id.*, subd. 2 (2008). As we explained above, the district court based its determination that punitive damages are not available on the erroneous conclusion that an agency relationship existed between respondent and Greene. Because no agency relationship existed, we hold that the district court erred by determining that punitive damages are not available as a matter of law. We therefore reverse and remand to the district court for a new trial on the issue of punitive damages only under Minn. Stat. § 573.02, subd. 1 (2008). *See id.*, subd. 4 (2008) (stating that after compensatory damages are determined, “the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded”).

Reversed and remanded.