OA 1-9-86

087

IN THE SUPREME COURT OF FLORIDA

TALLAHASSEE, FLORIDA

CASE NO. 67,142

BRIAN J. SHEEN,

Petitioner,

vs.

ARCHIBALD LYON and
ROSE LYON,

Respondents.
_____/

BRIAN J. SHEEN,

Petitioner,

vs.

NICHOLAS TATUSKO and ANNA
TATUSKO,

Respondents.
_____/

PETITIONER'S BRIEF ON THE MERITS

EASLEY MASSA & WILLITS
Forum III, Suite 800
1655 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401
(305) 684-7300
and
LARRY KLEIN, of
KLEIN & BERANEK, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455

TABLE OF CITATIONS

TABLE OF CONTENTS

PREFACE

The parties will be referred to as the plaintiff and the defendants or by their proper names.

The following symbol will be used:

R - Record.

ISSUE

DOES THE RELEASE OF MERRILL LYNCH AND ITS AGENTS AND EMPLOYEES RELEASE AN AGENT OR EMPLOYEE INVOLVED IN THE INCIDENT WHO WAS NO LONGER EMPLOYED BY MERRILL LYNCH AT THE TIME THE RELEASE WAS EXECUTED?

STATEMENT OF THE CASE AND FACTS

Plaintiffs sued Brian Sheen alleging that in 1979 and 1980 he, as an account executive with Merrill Lynch, committed fraud and violations of securities laws, in the course and scope of his employment with Merrill Lynch.

Prior to filing the suit plaintiffs executed releases. The Lyons' release executed December 21, 1981, provided in part:

> KNOW YE, that Mr. Archibald Lyon and Mrs. Rose F. Lyon for and in consideration of the sum of TWO THOUSAND FIVE HUNDRED DOLLARS AND ZERO CENTS (2,500.00) and other good and valuable consideration to be received from MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., the receipt of which is hereby acknowledged, do hereby remise, release, acquit, satisfy, forever discharge and by these presents for my

> heirs, executors administrators and assigns forever, hereby remise, release and forever discharge MERRILL LYNCH, PIERCE, FENNER & SMITH, INC., its officers, directors, agents, employees, successors and assigns forever, of and from any and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialities, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, executions, claims and demands whatsoever, in law or in equity, which I ever had, now have, or which my heirs executors, administrators or assigns hereafter can, shall, or may have for, upon, or by reasons of any matter, cause or thing whatsoever from the beginning of the world to the date of these presents, including, specifically but not exclusively, any damages from financial injuries or personal injures. (Emphasis added)

The Tatusko release executed November 21, 1981, was identical except for the amount of consideration, $4,000, rather than $2,500.

Both Merrill Lynch and Sheen raised the releases as an affirmative defense and the trial court granted both Merrill Lynch and Sheen summary judgments based on the releases. Plaintiffs appealed as to Sheen, but not as to Merrill Lynch. The appeals were consolidated. The Fourth District reversed and held that these releases do not release Brian Sheen, stating:

> The important operative fact here is that at the time the general release was given, the stockbroker no longer worked for Merrill, Lynch and the release only named Merrill,

> Lynch, together with its agents, employees, successors and assigns. Nonetheless, the stockbroker claims that the general release did cover him because he was in the employ of Merrill, Lynch at the time the cause of action arose and because of the circumstances out of which it arose.
>
> We are sympathetic to this argument but find from a reading of the general release that the individual stockbroker was not, in fact, included within its language. As a consequence, we find that the granting of the summary judgment in his favor was erroneous and, accordingly, we reverse and remand for further proceedings.

SUMMARY OF ARGUMENT

The release executed by plaintiffs, releasing Merrill Lynch and its agents and employees, as a matter of law can only refer to agents and employees at the time of the incident. The holding of the Fourth District, which is to the effect that the important fact is whether there was an agency or employment relationship at the time the release was executed does not comport with logic and reason, because that fact would have no connection with the incident. There would be no reason to obtain a release for an agent or employee who had no connection with the defendant employer at the time of the incident. The language in the releases in the present case is clear and unambiguous and did release employees and agents of Merrill Lynch as of the time of the incident.

ARGUMENT

ISSUE

DOES THE RELEASE EXECUTED BY PLAINTIFFS, RELEASING MERRILL LYNCH AND ITS AGENTS AND EMPLOYEES, RELEASE AN AGENT OR EMPLOYEE INVOLVED IN THE INCIDENT WHO WAS NO LONGER EMPLOYED BY MERRILL LYNCH AT THE TIME THE RELEASE WAS EXECUTED?

In Ford v. Coleman, 462 So.2d 834 (Fla. 5th DCA 1984), the plaintiff was injured in an accident by one defendant who was driving an automobile owned by another defendant. Plaintiff settled with the owner of the vehicle and executed a release discharging the owner and its "agent, servants" etc. Plaintiff then sued the driver, who set forth the release as an affirmative defense alleging he was an agent of the owner. The trial court held as a matter of law that the driver, as a permissive user of the vehicle, was the owner's agent at the time of the accident and therefore was released. The Fifth District affirmed, holding that the driver was covered by the release because he was the owner's agent at the time of the accident.

The Fourth District held that the important fact in determining whether an employee or agent is included within the terms of a release is whether the employee or agent is an employee or agent at the time the release is executed. This holding is not logical and is not supported by any

precedent in Florida. Nor has our research revealed any such precedent in other jurisdictions. The holding of the Fourth District means that if two different stockbrokers with Merrill Lynch had been involved in the present case, but one was still employed and one was not still employed with Merrill Lynch at the time the releases were executed, the stockbroker still employed would be released while the unemployed stockbroker would not be released. Normally a plaintiff would not even know whether the employee or agent still had a relationship with the employer or principal at the time the release was executed.

The plaintiffs stated by affidavit that they did not intend to release Brian Sheen because he was not named in the release. Plaintiff's intent, however, is irrelevant where the language of the release is not ambiguous. Bellefonte Insurance Company v. Queen, 431 So.2d 1039 (Fla. 4th DCA 1983). There is nothing ambiguous about a release which releases Merrill Lynch and its agents and employees. The claim was made against Merrill Lynch as a result of the conduct of Sheen as its agent or employee. The facts existing relative to Sheen's employment with Merrill Lynch at the time the release was executed are in no way relevant. What if Sheen had continued in his employment with Merrill Lynch for a period of time after the incident and then died.

After his death there is a settlement and this same release is executed. Could plaintiff's, after executing this release, maintain an action against Sheen's estate because he happened not to be employed at the time the release was executed?

Assume, in an automobile accident case, X is driving Y's car. X injures a plaintiff and X makes a settlement with the plaintiff in which the plaintiff executes a release releasing "X and the owner of the vehicle". Would anyone argue that if the owner had happened to sell the vehicle prior to the execution of the release, the owner would not be released?

The only sensible resolution of the issue is that the releases in the present case be construed to release anyone employed by Merrill Lynch at the time of the incident for which the settlement was being made. The holding of the Fourth District would require that every employee of a defendant settling a claim be specifically named in the release in order to be protected from a subsequent suit by the same plaintiff. If 100 employees of Ford negligently contribute to an automobile being sold with defective brakes and Ford wants to settle with plaintiff, Ford would have to specifically name all possible employees who could possibly

have been involved in the release. Otherwise, any employees who were not employed at the time the release was executed could be sued.

We are embarrassed at having so little authority to cite to this Court on the issue involved in this case. This may be because the language of such a release is so clear and unambiguous that no one would seriously contest it. The paucity of cases probably also results from the fact that at common law a release of one joint obligor released all. Penza v. Neckles, 344 So.2d 1282 (Fla. 1977). See also 53 Am.Jur.2d Master and Servant § 408, in which it is stated on page 416:

> Although it is generally recognized that where the liability of a master for a tort of his servant is based solely on the doctrine of respondeat superior, the master and the servant are not joint tortfeasors, it is nevertheless the general rule that in such a case a valid release of either of the parties operates to release the other. ...

The common law rule was abrogated in Florida in 1980 with the passage of Section 46.015(1), which provided:

> A written covenant not to sue or release of a person who is or may be jointly and severally liable with other persons for a claim shall not release or discharge the liability of any other person who may be liable for the balance of such claim.

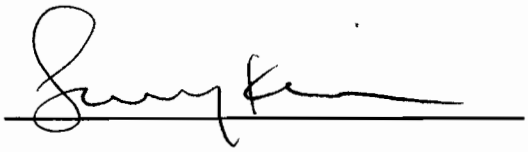
Cases from other jurisdictions are collected at 92 ALR2d 533, Section 4. There are cases from other jurisdictions in which it has been held that the release of the master constitutes a release of the servant, even where there is no reference to the servant in the release. Those decisions are based on the common law, however, which no longer exists in Florida.

The only logical construction of a release of this type is that the reference to agents and employees means those who occupied such a relationship at the time of the incident. There is no reason to release someone who is not employed or an agent at the time of the incident, and that is exactly why the Fourth District erred when it held that the state of facts at the time the release was executed was determinative.

CONCLUSION

The opinion of the Fourth District should be reversed and the decision of the trial court reinstated.

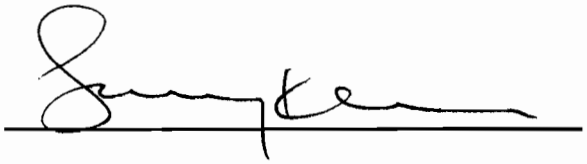
EASLEY MASSA & WILLITS
Suite 800 - Forum III
1655 Palm Beach Lakes Blvd.
West Palm Beach, FL 33401
(305) 684-7300
and
LARRY KLEIN, of
KLEIN & BERANEK, P.A.
Suite 503 - Flagler Center
501 South Flagler Drive
West Palm Beach, FL 33401
(305) 659-5455

By 

LARRY KLEIN

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copy of the foregoing has been furnished, by mail, this 18th day of October, 1985, to: RAYMOND G. INGALSBE, INGALSBE, McMANUS, WIITALA & CONTOLE, P.A., P. O. Box 14125, North Palm Beach, FL 33408.



LARRY KLEIN