

*Insert at pages 684-85 in place of
Estate of Krempasky and the following notes:*

SCHOCK v. UNITED STATES
56 F.Supp.2d 185 (D. RI 1999),
aff'd on other grounds, 254 F.3d 1 (1st Cir. 2001)

LAGUEUX, Chief Judge.

This case arises from the villainy of Attorney Pat Nero, who looted the Estate of his client Ragnar Miller in 1993. Eleanor Schock ("Schock"), Miller's daughter and only heir, is pursuing \$23,331.72 as the assignee of the Estate's claims. Here, she has sued the United States and the Federal Deposit Insurance Corporation ("FDIC") because the bank accounts into which Nero dipped were held by a bank being run by the FDIC as conservator.¹ That bank, Old Stone Federal Savings Bank ("New Old Stone"), was a successor to Old Stone Bank, a Federal Savings Bank ("Original Old Stone"), that had been closed by the FDIC on January 29, 1993. New Old Stone was liquidated in turn July 8, 1994.

Most of the facts of this case were outlined in an earlier opinion and need not be reiterated here. *See Schock v. United States*, 21 F.Supp.2d 115, 117 (D.R.I.1998) (*hereinafter Schock I*). Schock's core grievance is that she believes New Old Stone should not have given the money in Miller's bank account to Nero.² Plaintiff's Amended Complaint alleges three counts: Count I is against the United States under the Federal Tort Claims Act, 28 U.S.C. § 2674 (the "FTCA"), nominally for conversion;³ Count II is against the FDIC ("FDIC-Receiver") as conservator of New Old Stone and operator of the bank on August 27, 1993 for breach of contract; and Count IV is against the United States under the FTCA for negligence.⁴

This case is now before this Court on two motions. The United States moves for summary judgment on Counts I and IV, suggesting three distinct arguments that would preclude plaintiff's recovery. This Court considers each at length below, but in sum, the motion is granted as to Count I and denied as to Count IV.

¹ The Resolution Trust Corporation ("RTC") was the entity that took over Old Stone Bank. The FDIC is the RTC's statutory successor. See 12 U.S.C. § 1441a(m)(1).

² At its most basic, Schock's claim is that Ragnar Miller deposited \$23,331.72 with Old Stone Bank and that the bank did not return it. Nero withdrew \$23,331.72 from Miller's account on August 27, 1993, and deposited that money in his own account. This claim turns on the legal significance of the bank's action, i.e., whether it provided Miller's money to his apparent agent Nero. If it did, the bank fulfilled its obligation; if not, then the bank essentially gave Miller's money to a stranger and owes \$23,331.72 to Schock. See *Schock I*, 21 F.Supp.2d at 121.

³ The exact cause of action is disputed, and it is crucial to this motion. See Section IV(B), *infra*.

⁴ This Court dismissed Count III against the FDIC ("FDIC- Corporate") as the insurer of New Old Stone's deposits. See *Schock I*, 21 F.Supp.2d at 123-34.

Schock renews her motion for summary judgment as to Count II against FDIC-Receiver. She asks this Court to reconsider its prior legal ruling and offers new evidence. Neither tack succeeds, and the motion is denied. *See* Section V, *infra*.

I. *Legal standard*

Rule 56(c) of the Federal Rules of Civil Procedure sets forth the standard for ruling on summary judgment motions:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of any material fact and that the moving party is entitled to a judgment as a matter of law.

Therefore, the critical inquiry is whether a genuine issue of material fact exists. "Material facts are those 'that might affect the outcome of the suit under the governing law.' " *Morrissey v. Boston Five Cents Sav. Bank*, 54 F.3d 27, 31 (1st Cir.1995) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). "A dispute as to a material fact is genuine 'if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.' " *Id.*

On a motion for summary judgment, the Court must view all evidence and related inferences in the light most favorable to the nonmoving party.

[W]hen the facts support plausible but conflicting inferences on a pivotal issue in the case, the judge may not choose between those inferences at the summary judgment stage.

Coyne v. Taber Partners I, 53 F.3d 454, 460 (1st Cir.1995). Similarly,

[s]ummary judgment is not appropriate merely because the facts offered by the moving party seem more plausible, or because the opponent is unlikely to prevail at trial.

Gannon v. Narragansett Elec. Co., 777 F.Supp. 167, 169 (D.R.I.1991).

* * *

V. *Schock's Renewal on Count II*

This Court denied Schock's motion for summary judgment as to Count II in *Schock I*. Schock renews that motion, pleading with this Court to reverse its legal ruling and then supplying new facts to bolster its claim.

A. *The Law*

Schock asks this Court to reconsider its decision that a principal's death does not terminate apparent authority by operation of law. This request, although unusual, was understandable, considering that the dearth of Rhode Island cases on this subject

forced this Court to rely on learned treatises. From the same treatise that this Court used, Schock quotes a passage that contradicts the *Schock I* holding. The significance of this issue is that Nero withdrew the money after Miller's death. The death ended actual agency, and the bank must rely on Nero's apparent authority—that the bank knew Nero to be Miller's agent in the past and relied on that when it gave him the money.

Schock is correct that a commentary in the Restatement (Second) of Agency says that apparent authority terminates with the death of the principal. *See* Restatement (Second) of Agency § 120 cmt. c (1958). However, this Court holds that apparent authority does not terminate on the death of the principal under Rhode Island law. The Rhode Island Supreme Court would look to the Restatement, but it would not adopt the illogical rule reported by Comment C that Schock quotes.

The Restatement is not precedent. A sentence in a Comment published in 1958 does not bind this Court in the fashion of a similar sentence from the First Circuit or Rhode Island Supreme Court. Instead, learned treatises are weighed along with Rhode Island court decisions, persuasive opinions by other state courts, and the public policy considerations identified in state decisional law.

The public policy for which the state created apparent agency would be eviscerated by adopting the rule that Schock promotes. The doctrine of apparent agency exists in order to allow third parties to depend on agents without investigating their agency before every single transaction. If a third party had to confirm the agency relationship repeatedly, then it might as well deal directly with the principal. Schock seeks to place the risk that a principal has died onto third parties, rather than on the principal. That is absurd.

Apparent authority exists where a principal manifests to a third party that the agent has the authority to contract on the principal's behalf. The principal need not have direct communication with the third party. The third party must merely have a reasonable belief that the agent has the authority to bind his principal.

That case law clearly manifests Rhode Island's support for the public policy that a third party can reasonably rely on a principal's appointing of an agent. The entire doctrine is based on promoting business and protecting a reasonable third party's reliance on agency. That public policy is bolstered by R.I. Gen. Laws § 18-4-16, which is at issue in this case. *See Schock I*, 21 F.Supp.2d at 122. The Restatement says that apparent authority exists until the third party has notice of its termination or has a manifestation that the principal no longer consents. *See* Restatement (Second) of Agency § 125. Schock wants death to be a special circumstance, but nothing suggests that Rhode Island would make such an illogical differentiation.

In other disputes over agency, the Rhode Island Supreme Court has applied a reasonableness test that promotes the operation of business at the risk of binding an unwilling principal. *See De Pasquale v. Societa De M.S. Maria*, 54 R.I. 399, 173

A. 623, 623-25 (1934). In *Pasquale*, a society was unable to take any formal action for its own protection because of a split among directors, so the administrative officers had the power to hire an attorney to protect the society. The *Pasquale* Court held that an agent may take any action that he reasonably believes necessary to protect the principal when the agent cannot communicate with the principal.

Even the Restatement that Schock quotes appears to undercut her argument. Commentary attached to other sections notes that termination of an agent's authority does not terminate his apparent authority. See Restatement (Second) of Agency § 125 cmt. a. And even more importantly, Comment A to § 120, which discusses policy considerations, contradicts the text of Comment C. Comment A notes that agency is a business rule and that the risk of death is inherent in any agency relationship. See Restatement (Second) of Agency § 120 cmt. a. The common law rule that the Restatement reports in Comment C places the risk on the agent and third parties because the principal's estate would not be bound by a post-death deal. However, Comment A says that "[a]s between the risks to the estate and the harm to business which results from the common law rule, the protection of business is preferable." *Id.*

This Court concludes that the Rhode Island Supreme Court would agree. It would protect business and put the risk on the estate. Under Rhode Island law, apparent authority exists as long as the third party, to whom the principal has made a manifestation of authority, continues to reasonably believe that the agent is authorized.

Therefore, this Court reaffirms its *Schock I* holdings:

- R.I. Gen. Law § 18-4-16 protects third parties who in good faith pay or transfer money to an apparent agent.
- Apparent agency terminates when the third party has notice of the termination.
- Notice occurs when the third party knows, has reason to know, or has been given a notification of the occurrence of an event from which, if reasonable, he would draw the inference that the principal does not consent to have the agent so act for him.

See *Schock I*, 21 F.Supp.2d at 122. Because agency terminates at death, notice of a principal's death would make a reasonable person understand that the principal no longer consents to having the agent act for him.

B. *The New Facts.*

Schock offers certifications from herself and Karen D'Aillo, a former Old Stone Bank employee. D'Aillo reports that the bank had a procedure for checking the obituaries in *The Providence Journal* to see whether bank clients had died. Schock says that an obituary for Miller appeared in that paper.

These facts go to the issue of whether FDIC-Receiver—in the form of the bank employees—had notice of Miller's death. To be plain, it is inconclusive evidence. To rule that FDIC-Receiver had actual notice of Miller's death from the obituary, this Court would have to infer that a bank employee read the item. Although Fed.R.Evid. 406 says that the routine practice of an organization is relevant to prove the conduct of an organization on a particular occasion, this Court would still have to infer that the bank followed its routine practice on the day Miller's obituary appeared. At the summary judgment stage, inferences are made *against* the moving party. Therefore, this Court infers that bank employees did not notice the obituary.

As with the factual issues pressed by the United States above, the bank's practices may be pivotal at trial, but they cannot support summary judgment at this time.

To focus the parties when they prepare pre-trial memoranda, this Court notes that it does not decide today what facts would constitute notice to the FDIC. The FDIC-Receiver assumes that a bank lacks notice where different employees know facts that would have alerted the bank to its customer's death if they had been pieced together. This Court does not decide that issue today, but it notes that FDIC-Receiver relies on a single mid-level appellate decision from Missouri, *General Ins. Co. of America v. Commerce Bank of St. Charles*, 505 S.W.2d 454 (Mo.App.1974). Whatever the precedential value of *General Insurance Company* in the Show Me State, that question appears open here in the Ocean State.

Conclusion

For the foregoing reasons, this Court grants the United States' motion for summary judgment as to Count I and denies it as to Count IV. This Court denies Schock's renewal of her motion for summary judgment as to Count II.

Two counts remain in this case: Count II alleging a contract claim against the FDIC-Receiver and Count IV alleging a negligence claim against the United States under the FTCA. This dispute now appears poised for resolution by a bench trial.

It is so Ordered.

Notes

1. On motion for summary judgment, the trial court held that there was a fact question as to whether the bank's employees customarily reviewed the obituaries in the local newspaper, and as to the effect of such a custom. The trial court ultimately ruled in favor of Schock:

After a bench trial, where it was established that the bank did indeed have such a procedure, the district court concluded as to the contract claim that the bank should have known that Miller died because his obituary was

published in a local newspaper. That the bank had notice of Miller's death, the court concluded, extinguished Nero's apparent authority, and the bank therefore was not entitled to invoke R.I. Gen. Laws § 18-4-16 as a defense to liability for breach of contract.

Schock v. United States, 254 F.3d 1, 4 (1st Cir. 2001).

2. At common law, death terminates *all* power of the agent to bind the principal, both authority and *apparent authority*, *without notice* to either the agent *or* the third person dealing with the agent. Restatement Second §§ 120 & comment c, 124A comment a; *cf.* Restatement Second § 133. Comment a to Restatement Second section 120 gives the rationale for this rule:

Agency is a personal relation, necessarily ending with the death of the principal; the former principal is no longer a legal person with whom there can be legal relations. One cannot act on behalf of a non-existent person.

3. In *Estate of Krempasky*, 501 A.2d 681 (Pa. Super. 1985), Elizabeth Krempasky died at 2:45 p.m. Sometime between 3:00 p.m. and 4:00 p.m., Anna A. Parana presented to Bank a written authorization to add Ms. Parana as a joint tenant with right of survivorship to four bank certificates of deposit owned by Krempasky. The Executor of Krempasky's estate sued, and recovered the certificates of deposit:

It is well established as the general rule that the death of the principal operates, as an instantaneous and absolute revocation of the agent's authority or power, unless the agency is coupled with an interest. Hence, any act done by the agent, as such, after the principal's death will not affect the estate of the latter.

3 Am. Jur. 2d 453 § 51. It is well settled that the death of the principal puts an end to the agency and terminates the agent's authority to act for the principal unless the agency is coupled with an interest. In our case the decedent died before [the agent] created the joint tenancy. Anna Parana had no interest in the certificates of deposit at the time of the decedent's death. Thus, her death terminated both Parana's and the bank's authority to change the account. For that reason we agree with the appellant's contention that the four certificates of deposit belong to the decedent's estate.

4. The common law rule terminating without notice all power of the agent to act on behalf of a dead principal puts agents in a double bind. So long as the principal lives, the agent is under a duty to act on behalf of the principal. An agent without notice of the principal's death will believe he or she is still required to act. Because the agent will no longer be able to bind the principal (*or his or her estate*), the agent contracting with a third person will breach his or her implied *warranty* of authority

under Restatement section 329. Other than by refusing to consent to an agency relationship, how may the agent protect himself or herself against the death of the principal?

5. The harshness of the common law rule regarding the effect of the principal's death on an agent's power to bind a principal has been criticized, even by the Restatement. Restatement § 120 comment a.

The Restatement Third changes its position on terminations by operation of law. Section 3.07(2) of Restatement Third provides:

(2) The death of an individual principal terminates the agent's actual authority. The termination is effective only when the agent has notice of the principal's death. The termination is also effective as against a third party with whom the agent deals when the third party has notice of the principal's death.

Section 3.11 of Restatement Third provides as follows:

§ 3.11 Termination Of Apparent Authority

(1) The termination of actual authority does not by itself end any apparent authority held by the agent.

(2) Apparent authority ends when it is no longer reasonable for the third party with whom the agent deals to believe that the agent continues to act with actual authority.

Comment b to Restatement Third section 3.11 explains:

b. Principal's death or loss of capacity. A principal's death or loss of capacity does not by itself or automatically end the agent's apparent authority. This is contrary to the position taken in Restatement Second, Agency § 120, Comment *c*. Change is warranted for several reasons, including the nature of apparent authority and various indications of policy contrary to the position taken in § 120.

An agent may act with apparent authority following the principal's death or loss of capacity because the basis of apparent authority is a principal's manifestation to third parties, coupled with a third party's reasonable belief that the agent acts with actual authority. See §§ 2.03 and 3.03. Neither element requires that the principal consent or manifest assent at the time the agent takes action. When third parties do not have notice that the principal has died or lost capacity, they may reasonably believe the agent to be authorized.

Moreover, the rule that the principal's death terminates apparent authority is inconsistent with the effect of contemporary legislation, which in

many respects is protective of third parties who act without notice of the principal's death or loss of capacity. Over half of the states have adopted statutes based on § 4 of the Uniform Durable Power of Attorney Act, providing that the death, disability, or incapacity of a principal who has previously executed any power of attorney, whether or not it is a durable power, does not terminate the agency as to the holder of the power or other person who deals in good faith without actual knowledge of the principal's death or incapacity. See § 3.07, Comment *d*, and § 3.08, Comment *b*. As to third parties who deal with an agent without notice of the principal's death or incapacity, these statutes reflect a policy broad enough to encompass situations in which the principal has made a manifestation to third parties as to the agent's authority, but has not executed a written power of attorney. The executed power constitutes a manifestation of the principal's assent, made to the agent and to third parties as well when the power is displayed to them.

Few decided cases support the traditional rule as to apparent authority, and a well-reasoned recent case rejects the doctrine as illogical. The consequence is that the principal or the principal's estate is bound by transactions of an agent acting with apparent authority as defined in § 2.03. The few decided cases holding otherwise should not be followed.

6. Later in this chapter we will discuss *statutory modifications* of the common law rule.

7. When does death occur?

From ancient times down to the recent past it was clear that, when the respiration and heart stopped, the brain would die in a few minutes; so the obvious criterion of no heart beat as synonymous with death was sufficiently accurate. In those times the heart was considered to be the central organ of the body; it is not surprising that its failure marked the onset of death. This is no longer valid when modern resuscitative and supportive measures are used. These improved activities can now restore "life" as judged by the ancient standards of persistent respiration and continuing heart beat. This can be the case even where there is not the remotest possibility of an individual recovering consciousness following massive brain damage.

Ad Hoc Committee of the Harvard Medical School, "A Definition of Irreversible Coma," 205 J. A.M.A. 337, 339 (1968). *See also In re Quinlan*, 70 N.J. 10, 355 A.2d 647, 656, *cert. denied* 429 U.S. 922 (1976) ("Developments in medical technology have obfuscated the use of the traditional definition of death").