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CASE NOTES

AGENCY—RESPONDEAT SUPERIOR—MASTER'S LIABILITY TO THIRD PERSONS INJURED AS A RESULT OF ACCEPTING AN UNAUTHORIZED INVITATION FROM THE SERVANT

The defendant's agent departed from his assigned territory during working hours, driving a company car, which had been furnished by the defendant, to call for his daughter. On the return trip home, approximately three miles from their destination, the vehicle collided with another automobile resulting in serious injuries to the daughter. An action was commenced by the daughter against the employer on the theory that a master is liable to an unauthorized passenger for injuries caused by the wilful and wanton misconduct of the servant. Judgment for the plaintiff was affirmed in the appellate court, but reversed by the Illinois Supreme Court, which held that even if the servant had been acting within the general scope of his employment at the time of the accident, the doctrine of *respondeat superior* would not apply. *Klatt v. Commonwealth Edison Co.*, 33 Ill. 2d 481, 211 N.E.2d 720 (1965).

The decision in the *Klatt* case represented a marked departure from the rule that a master is liable to a third person who, while upon the master's vehicle at the unauthorized invitation of the servant, is injured through the servant's wilful and wanton misconduct. Previously, liability could attach to the master on the basis of the Illinois guest statute¹ and dicta,² but in the instant case, the court held the master not liable, even though the evidence was sufficient to establish wilful and wanton misconduct on the part

¹ ILL. REV. STAT. ch. 95½, § 9-201 (1965): "No person riding in or upon a motor vehicle or motorcycle as a guest without payment for such ride, or while engaged in a joint enterprise with the owner or driver of such motor vehicle or motorcycle, nor his personal representative in the event of the death of such guest, shall have a cause of action for damages against the driver or operator of such motor vehicle or motorcycle, or its owner or his employee or agent for injury, death or loss, in case of accident, unless such accident shall have been caused by the wilful and wanton misconduct of the driver or operator of such motor vehicle or motorcycle or its owner or his employee or agent and unless wilful and wanton misconduct contributed to the injury, death or loss for which the action is brought.

Nothing contained in this section shall be construed to relieve a motor vehicle or motorcycle carrier of passengers for hire or responsibility for injury or death sustained by any passenger for hire."

² *Hayes v. Sampsell*, 274 Ill. 258, 113 N.E. 611 (1916), wherein the court stated that as to a trespasser or mere licensee no duty exists and no recovery can be had except in case of wilful or wanton injury.

of the servant. In so doing, Illinois adopted section 242 of the *Restatement of Agency*, which states:

A master is not subject to liability for the conduct of a servant towards a person harmed as the result of accepting or soliciting from the servant an invitation, not binding upon the master, to enter or remain upon the master's premises or vehicle, although the conduct which immediately causes the harm is within the scope of the servant's employment.³

The purpose of this note is to consider the liability of the master to an unauthorized passenger in both Illinois and in other states. In the course of this examination, the underlying rationale of the *Restatement* rule shall be considered, as well as the rationale of those theories in force in the jurisdictions which do not recognize the *Restatement*.

The liability of a master to an unauthorized passenger has never been fully settled, either before or since the *Restatement*. In general, the courts have tended to deny recovery against the master,⁴ but the basis for awarding judgment to the master varies. Justice Holmes, in *Driscoll v. Scanlon*,⁵ denied recovery on the ground that the risk of injury to passengers was not a risk incident to the master's business and one which the servant could not place on him without authority. A few cases have absolved the master of liability by holding that the unauthorized invitation of the servant was the proximate cause of the passenger's injury, and that the injury was legally caused by conduct outside the course of employment.⁶ Other courts follow the argument that the servant's knowledge of the presence of the passenger was acquired through a breach of duty and cannot be imputed to the master who owes no duty to unforeseen trespassers.⁷

³ RESTATEMENT (SECOND), AGENCY § 242 (1958).

⁴ See *Thomas v. Magnolia Petroleum Co.*, 177 Ark. 963, 9 S.W.2d 1 (1928); *Hicks v. Swift & Co.*, 81 Ga. App. 145, 58 S.E.2d 256 (1950); *Mayhew v. De Coursey*, 135 Kan. 184, 10 P.2d 10 (1932); *Dearborn v. Fuller*, 79 N.H. 217, 107 Atl. 607 (1919); *Conca v. Cushman's Sons, Inc.*, 277 App. Div. 360, 100 N.Y.S.2d 212 (1950).

⁵ 165 Mass. 348, 43 N.E. 100 (1896). The court stated that "(t)he defendant was not bound to expect or look out for people falling from his cart, where they had no business to be, and persons who got into it took the risk of what might happen as against him." (*Id.* at 349, 43 N.E. at 100.)

⁶ This theory is not widely followed and is rejected by the *Restatement* as being artificial and legalistic. In RESTATEMENT (SECOND), AGENCY, Reporter's Notes § 242 at 384 (1958), wherein it says the causation theory "overlooks the fact that, if the injury occurs because of the mismanagement of the vehicle or other improper activity, it is such activity which immediately causes the harm and is the nearest cause, whether or not the invitation is also a proximate cause."

⁷ *Ibid.* The *Restatement* has also rejected this theory, the Reporter's Notes stating that "if the servant is acting within the scope of employment, the principal is bound by the servant's knowledge, which is relevant to his work, except when the servant acts adversely; in these cases, although the servant is disobedient, he is not acting adversely to the principal." (*Id.* at 384.)

In the majority of jurisdictions, the position is sustained by treating the passenger as a trespasser, with the master's duty being to refrain from injuring him by wilful and wanton misconduct.⁸ In *Jaeger v. Sidewater*,⁹ the plaintiff, who was injured while being given a ride home in the master's truck, was held to be "only a trespasser as to the defendant who then would be liable only if plaintiff could show some wanton act or wilful misconduct on the part of the driver while managing the truck."¹⁰ In *Trico Coffee Co. v. Clemens*,¹¹ the court said "it was the duty of the servant and of the master not to willfully and wantonly injure him [the plaintiff]."¹² In *Meyer v. Blackman*,¹³ after stating that an employer is liable to a rider only if there is wilful misconduct by the driver, the court expressly rejected the *Restatement* rule, saying

[i]t is well known that employee-drivers often commit such breaches of duty by carrying unauthorized passengers, and so long as injury to the rider occur while the driver is carrying out his employer's business, the employer must be held liable under the familiar principle of liability for a servant's torts committed as part of the transaction of the master's business, even though the injury may accrue coincident with behavior contrary to the master's express orders. . . . [T]he employer is in the best position to prevent the operation of his vehicles by individuals prone to wilful and reckless driving. . . .¹⁴

The status of the passenger is not that of a guest or invitee but of a trespasser with respect to the master who is liable only for such injuries as are caused by the wilful and wanton acts of the servant.¹⁵ The authorities on this point were so numerous that the tentative draft of the *Restatement* unequivocally stated that the master is liable to the unauthorized passenger as to any other trespasser.¹⁶ This position was clearly recognized in the case of *Higbee Co. v. Jackson*,¹⁷ wherein the court, after reviewing Ohio

⁸ For a criticism of the theory, see MECHEM, AGENCY §§ 387-388 (4th ed. 1952).

⁹ 366 Pa. 481, 77 A.2d 434 (1951).

¹⁰ *Id.* at 483, 77 A.2d at 435.

¹¹ 168 Miss. 748, 151 So. 175 (1933), noted in PROSSER, TORTS § 58 (3rd ed. 1964).

¹² *Id.* at 755, 151 So. at 176.

¹³ 59 Cal. 2d 668, 381 P.2d 916 (1963).

¹⁴ *Id.* at 679-680, 381 P.2d at 923.

¹⁵ *Ball v. Whitaker*, 47 Tenn. App. 677, 342 S.W.2d 67 (1960). *Accord*, *Perry Supply Co. v. Brown*, 221 Ala. 290, 128 So. 227 (1930); *Barall Food Stores v. Bennett*, 194 Okla. 508, 153 P.2d 106 (1944); *Stefan v. New Process Laundry Co.*, 323 Pa. 373, 185 Atl. 734 (1936); *Reynolds v. Knowles*, 185 Tenn. 337, 206 S.W.2d 375 (1947), noted in 20 TENN. L. REV. 290 (1948); *Home Stores, Inc., v. Parker*, 179 Tenn. 372, 166 S.W.2d 619 (1942); *Shrimplin v. Simmons Auto Co.*, 122 W.Va. 248, 9 S.E.2d 49 (1940). See also, *Thomas v. Magnolia Petroleum Co.*, *supra* note 4, noted in 2 U. CINC. L. REV. 440 (1928) and 13 MINN. L. REV. 156 (1928); *Hicks v. Swift & Co.*, *supra* note 4; *Dearborn v. Fuller*, *supra* note 4; *Conca v. Cushman's Sons, Inc.*, *supra* note 4.

¹⁶ RESTATEMENT, AGENCY § 467 (Tent. Draft No. 3, 1930).

¹⁷ 101 Ohio St. 75, 128 N.E. 61 (1920).

decisions discussing the status of the passenger, concluded that the Ohio cases were merely the statement of a rule everywhere approved.¹⁸

It should be recognized, however, that a small number of authorities have held the master liable to the passenger for ordinary negligence.¹⁹ Representative of this view is the case of *Kuharski v. Sommers Motor Lines*,²⁰ wherein it was held that public policy requires that the master shall be liable for the negligent acts of his servant performed in the course of employment, even though the acts are not authorized. Though the court considered the *Restatement* rule and the trend toward relieving the master of liability, it was not moved by its logic. Accepting the fact that while the invitation of the servant to the passenger was without the scope of employment, the court found little difficulty in concluding that the continued performance by the servant of his duties was sufficient again to bring him within the sphere of his employer's business, and thus held the master liable on the familiar principles of *respondeat superior* after the "re-entry" had occurred. Every person who conducts his business through employees is under a duty to manage his affairs so that third persons will not be injured by a breach of legal duty by the employee engaged in the master's business and within the course of employment.²¹

Under the theories discussed above, the courts have laid emphasis on two factors in determining the master's liability, namely the course of employment and the duty of the master to the passenger. In the jurisdictions which follow *Driscoll v. Scanlon*,²² the presence of an unauthorized third person on the master's vehicle is not within the course of employment, because it is not an incident to the business, and the master is under no duty to safeguard the passenger. Under the rule of *Kuharski v. Sommers Motor Lines*,²³ the servant's actual act of transporting the passenger is viewed as a return to, and is considered to be within, the course of employment,²⁴ and the master must exercise reasonable care to prevent injury to the unauthorized third party. In the majority of jurisdictions, once

¹⁸ *Ibid.* See generally, *Powers v. Harlow*, 53 Mich. 507, 19 N.W. 257 (1884).

¹⁹ See *Pitman v. Merriman*, 79 N.H. 492, 111 Atl. 751 (1920).

²⁰ 132 Conn. 269, 43 A.2d 777 (1945), noted in PROSSER, TORTS § 58 (3rd ed. 1964).

²¹ See also, *Wolf v. Sulik*, 93 Conn. 431, 106 Atl. 443 (1919); *Butler v. Hyperion Theatre Co. Inc.*, 100 Conn. 551, 124 Atl. 220 (1924); *Son v. Hartford Ice Cream Co.*, 102 Conn. 296, 129 Atl. 778 (1925); *Branchini v. Florio*, 119 Conn. 212, 175 Atl. 670 (1934).

²² *Supra* note 5.

²³ *Supra* note 20.

²⁴ Cases involving the liability of a master to a third person found on the master's vehicle due to the unauthorized invitation of the servant are not properly analyzed in terms of the law of frolic and detour and re-entry. They are recognized and treated as a separate category of agency law. MEACHEM, AGENCY § 386 (4th ed. 1952),

it is determined that the passenger is on the master's vehicle as a trespasser, either because he got there by the unauthorized invitation of the servant, or because he is there without the servant having knowledge thereof, the master is only under the duty to refrain from wilful and wanton misconduct to the passenger. Furthermore, the master is only liable if the wilful and wanton misconduct is committed by the servant acting within the course of employment.²⁵ The *Restatement* follows none of these rationalizations.

Under the *Restatement*, the master owes no duty whatever to the unauthorized passenger, even though the act which causes the injury to him may be performed within the course of the servant's employment.²⁶ Unlike the *Driscoll v. Scanlon*²⁷ rationale, the lack of duty is not based on the absence of authority in the servant to take aboard riders, but is rather grounded in the view that by accepting the hospitality of the servant and causing him to commit a breach of duty, the passenger has so identified himself with the servant that his claim against the master is forfeited.²⁸ Thereafter, it is immaterial that the servant drives within the course of employment, because he is also driving for the benefit of the passenger.²⁹ This line of reasoning was adopted by the *Restatement* basically on the strength of two cases, *Union Gas & Electric Co. v. Crouch*,³⁰ and *Mayhew v. De Coursey*.³¹ In the former case, the court held that unless there was evidence of actual wilful and wanton misconduct on the part of the master, the passenger could not recover. The latter case denied recovery

²⁵ In *Higbee Co. v. Jackson*, *supra* note 17 at 79, 128 N.E. at 62, the court stated that "[i]t is a fundamental principle that in order to create a liability in a principal for the acts of an agent, the acts complained of must have been committed while the servant was acting within the scope of his employment. It must be shown, first, that the agent was at the time engaged in serving his principal; second, that the act complained of was within the scope of the agent's employment; and even if this is shown, it must also appear that the agent, in doing the act complained of, violated some duty that the defendant owed to the plaintiff at the time."

²⁶ Two exceptions to the master's lack of duty are that the master is liable for the acts which cause injury to the passenger if the master himself commits them or if they are committed by a servant who did not extend the unauthorized invitation to the passenger. However, the *Restatement* is silent as to whether such liability is based on negligence or wilful and wanton misconduct. RESTATEMENT (SECOND), AGENCY § 242, comment a. (1958).

²⁷ *Supra* note 5.

²⁸ RESTATEMENT (SECOND), AGENCY, *supra* note 6.

²⁹ *Ibid.*

³⁰ 123 Ohio St. 81, 174 N.E. 6 (1933). This case overruled *Higbee Co. v. Jackson*, *supra* note 17.

³¹ *Supra* note 4.

on the ground that the unauthorized invitation was the servant's alone and took the servant outside the course of employment.³² Neither case went as far as the *Restatement*, because neither spoke in terms of a forfeiture of a claim.

In the Reporter's Notes to section 242 of the *Restatement*,³³ numerous cases are listed as being in "apparent accord" with the section.³⁴ However, upon a closer examination of these authorities, it is seen that while they do agree with the result that the master is not liable, only two cases explicitly adopt the *Restatement* rationale. In most of these cases, the master prevailed because the evidence was insufficient to establish a finding of wilful and wanton misconduct or to establish only negligence.³⁵ In other cases, the court emphasized the servant's lack of authority.³⁶ Only in *Dye v. Rule*,³⁷ and *Gunn v. Coca-Cola Bottling Co.*³⁸ did the courts render judgment for the master on the basis of the passenger being the guest of the servant, and thereby foregoing any claim he had against the master,

³² Here, the court cited *Driscoll v. Scanlon*, *supra* note 5, which is authority for the proposition that the master owes no duty to the passenger because the presence of the passenger is not an incident to the master's business.

³³ *Supra* note 28.

³⁴ *Jones v. Avco Mfg. Co.*, 218 F.2d 406 (8th Cir. 1955); *Monroe Motor Express v. Jackson*, 74 Ga. App. 148, 38 S.E.2d 863 (1946). *But cf.*, *Caskey v. Underwood*, 89 Ga. App. 418, 79 S.E.2d 558 (1953); *Eraselton v. Brazell*, 49 Ga. App. 269, 175 S.E. 254 (1934); *Dempsey v. Test*, 98 Ind. App. 533, 184 N.E. 909 (1933); *Dye v. Rule*, 138 Kan. 808, 28 P.2d 758 (1934); *Koch's Adm'r v. Koch Bros. Inc.*, 274 Ky. 640, 119 S.W.2d 1116 (1938); *Electric Bakeries v. Stacy's Adm'r*, 252 Ky. 20, 66 S.W.2d 70 (1933); *Wigginton Studio v. Reuter's Adm'r*, 254 Ky. 128, 71 S.W.2d 14 (1933); *Pinson Transfer Co. v. Music*, 239 S.W.2d (Ky. App. 1951); *Ruiz v. Clancy*, 182 La. 935, 162 So. 734 (1934); *Wilson v. Dailey*, 191 Md. 472, 62 A.2d 284 (1948); *Gunn v. Coca-Cola Bottling Co.*, 154 Neb. 150, 47 N.W.2d 397 (1951); *Struble v. Bell*, 126 N.J.L. 168, 17 A.2d 800 (1941); *Cuba v. Trumelie*, 168 Misc. 256, 5 N.Y.S.2d 811 (1938); *Clark v. Harnischfeger Sales Corp.*, 238 App. Div. 493, 264 N.Y.S. 873 (1933); *Miller v. Benedict*, 25 Ohio L. Abs. 359 (Ct. App. 1937); *Leesman v. Moser*, 8 Ohio Op. 4, 32 N.E.2d 448 (Ct. App. 1935); *Antonen v. Swanson*, 74 S.D. 1, 48 N.W.2d 161 (1951); *Home Stores, Inc. v. Parker* *supra* note 15; *Meyer v. Culley*, 69 Wyo. 285, 241 P.2d 87 (1952).

³⁵ *Jones v. Avco Mfg. Co.*, *supra* note 34 (no allegation of wilful and wanton misconduct in complaint); *Ruiz v. Clancy*, *supra* note 34 (evidence established negligence); *Wilson v. Dailey*, *supra* note 34 (evidence insufficient to establish wilful and wanton misconduct); *Struble v. Bell*, *supra* note 34 (evidence insufficient to establish wilful and wanton misconduct); *Antonen v. Swanson*, *supra* note 34 (evidence established negligence); *Meyer v. Culley*, *supra* note 34 (no showing of wilful and wanton misconduct).

³⁶ *Monroe Motor Express v. Jackson*, *supra* note 34 (servant had no implied authority to permit passenger to ride on master's truck); *Dempsey v. Test*, *supra* note 34 (no authority to extend invitation and acted outside course of employment); *Cuba v. Turmelie*, *supra* note 34 (servant's invitation unauthorized and liability depends on common law principles).

³⁷ *Supra* note 34.

³⁸ *Supra* note 34.

and only in the former case did the court expressly cite section 242 of the *Restatement*.³⁹

In the case at bar, the Illinois Supreme Court clearly followed the overwhelming majority of American jurisdictions by relieving the master of liability to a third person injured while a passenger on the master's vehicle at the unauthorized invitation of a servant. However, by adopting the *Restatement* rule and its rationale, the court went one step further by denying recovery on the theory that plaintiff had forfeited her claim against the master by accepting the invitation of the servant. The effect of this decision cannot be underestimated, for clearly it has rendered obsolete in Illinois those key factors previously accepted by our courts in determining the master's liability. No longer will inquiry be made as to whether there is evidence of wilful and wanton misconduct, or whether the accident occurred within the course of employment. The break with the past is clear. It remains now to be seen whether other jurisdictions will follow the example of Illinois and Kansas, the only two jurisdictions which expressly recognize the section as controlling authority.

Robert Williams

³⁹ In this regard, it will be noted that the Supreme Court of Illinois, in *Klatt v. Commonwealth Edison Co.*, 33 Ill. 2d 481, 211 N.E.2d 720 (1965), cited only *Union Gas & Electric Co. v. Crouch*, *supra* note 30, *Mayhew v. De Coursey*, *supra* note 31, and the Reporter's Notes to the *Restatement*.

BANKRUPTCY—PRIORITY OF UNRECORDED FEDERAL TAX LIEN—RIGHTS OF TRUSTEE IN BANKRUPTCY

On June 3, 1960, the District Director of Internal Revenue assessed some \$14,000 in withholding taxes and interest against the Kurtz Roofing Company. Kurtz refused to pay upon demand, thereby giving rise to a federal tax lien.¹ On June 20, 1960, Kurtz filed a petition in bankruptcy, but as of this date no notice of the federal tax lien had yet been filed by the government. The trustee in bankruptcy contended that his status was one of a

¹ INT. REV. CODE OF 1954, § 6321 provides: "If any person liable to pay any tax neglects or refuses to pay the same after demand, the amount . . . shall be a lien in favor of the United States upon all property and rights to property, whether real or personal, belonging to such person." INT. REV. CODE OF 1954, § 6322 provides: ". . . the lien imposed by section 6321 shall arise at the time the assessment is made . . ." In addition to property owned at the time of attachment, the lien also attaches to all after-acquired property of the taxpayer while it subsists. *Salsbury Motors, Inc. v. United States*, 210 F.2d 171 (9th Cir. 1954), *cert. denied*, 347 U.S. 953 (1954). However, the Collector's rights are limited to those of the taxpayer in the property. *Shaw v. United States*, 331 F.2d 493 (9th Cir. 1964).