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NOTES

SCOPE OF EMPLOYMENT UNDER THE WORKMEN'S COMPENSATION ACT

Out of the following factual situation arose two law suits, the former being by an injured third party in tort and the latter being by the employee's beneficiary under the Workman's Compensation Law:¹ On February 27, 1943, Walter Falconer, employed by Beard-Laney, Inc., as a truck driver, arrived in Rock Hill, South Carolina, from Charlotte, North Carolina, with instructions to deliver a tank load of 4,300 gallons of gasoline. After delivering something over 1,500 gallons Falconer suddenly drove away with the unloading hose dangling from the truck, with gasoline spurting from it. Testimony was to the effect that Falconer was drinking at that time and that his stated intention was to go to York to fill a date. At the instance of another motorist Falconer stopped his truck, alighted, and went to the rear of the truck and cut the flow of the gasoline. Another witness who had seen Falconer stop the truck and cut off the gasoline stated that no visible signs of intoxication were present. Falconer proceeded to McConnellsville and then on to York. At a point entering York, on a curve, Falconer overturned resulting in an explosion. Falconer was found in the cab of the truck burned beyond recognition. The truck had set fire to two houses. Evidence disclosed that there were frequent accidents at this curve due to faulty road construction. The route Falconer was taking would have caused him to travel 55 miles in order to return to Charlotte from Rock Hill, while the shortest route to Charlotte was only 28 miles. Also, the expressed instructions of Beard-Laney, Inc., were to the effect that there would be no drinking by employees while working.

In the former case, the owner of one of the houses which was set afire by the explosion of Falconer's truck, sued Beard-Laney, Inc., for damages sustained. The jury rendered a verdict for the Plaintiff. On appeal the Supreme Court of this state found that Falconer had not gone *outside the scope of his*

1. S. C. CODE OF LAWS, §7035 (1942).

employment. Nevertheless, this decision was not rendered without much controversy, there being three justices in favor of the affirmance and two justices dissenting.²

In the latter case the plaintiff, the daughter of Walter Falconer, presented a claim against the defendants under the Workmen's Compensation Law. The Industrial Commission heard the case and found as facts that Falconer was not so intoxicated that such intoxication was the proximate cause of the accident and that Falconer was at the time of the accident, acting within the scope of his employment, the accident "arising out of" and "in the course of" his employment. On appeal the Circuit Court sustained the findings of the Industrial Commission. On appeal, the Supreme Court of this state reversed this decision holding that the deceased, Walter Falconer, had gone *beyond* the scope of his employment and that there was no evidence reasonably warranting the inference that Falconer's death arose out of and in the course of his employment.³

The master has long been liable for the tortious injury, by his servant, of a third party. Plato provided that the wrongdoing slave should be given up to the injured party or that the master should recompense the injured party for his injury.⁴ On the other hand, the courts have refused to allow recovery by the third party where the servant embarks on a frolic of his own and injures the third party.⁵ Nevertheless, the application of a given set of facts to these rules has long been a perplexing problem. Some courts have set rules for the determination of what facts may constitute a frolic.⁶ Other courts, as this court has done, have upheld the findings of the jury that the servant had merely deviated from his duty and hence was not acting outside the scope of his employment.⁷ South Carolina courts maintain that it is a question of fact for the jury to determine whether a servant had merely deviated or had departed so substantially that he was acting outside the scope of his employment, except where there is no testimony upon which a jury could base a verdict for a plain-

2. *Carroll v Beard-Laney, Inc.*, 207 S. C. 339, 35 S. E. (2d) 425 (1945).

3. *Falconer v. Beard-Laney, Inc.*, 54 S. E. (2d) 904 (S. C. 1949).

4. HOLMES, *THE COMMON LAW*, 7 (1881).

5. *Knight v. Laurens Motor Car Co.*, 108 S. C. 179, 93 S. E. 869 (1917).

6. See 122 A. L. R. 854; 116 A. L. R. 1381.

7. See Note 2, *supra*.

tiff, in which case a directed verdict would be proper.⁸ The latter case recognized that this doctrine of *respondeat superior*, however, was formulated and designed for the protection of "innocent third parties from the acts of agents to whom the principal has entrusted the means of committing an injury."

On the other hand, the suit by the servant for his injury, regardless of his master's fault, is much newer relatively, having begun in Germany in 1884.⁹ It is the result of the Industrial Age coming into its own and the development of sociological ideas which would pass the burden upon industry of caring for the injured employee and his dependents. "The Workmen's Compensation Act is a complete departure from the common law with respect to liability for injury. It is a revolt therefrom and the creation of a complete substitute therefor, and not a mere improvement therein."¹⁰ In practically all of these statutes, there is a clause excluding the employee from recovery, if the injury did not arise "out of and in the course of the employment."¹¹ Early cases in dealing with the interpretation of this clause dealt harshly with the employee by strict construction. Later courts construed the statutes in favor of the worker, basing it on the ground that the statute was intended to benefit the worker and should be construed liberally in his favor. "Liberal construction of this beneficent remedial law, to which this court is committed requires for its fruition, liberal application to doubtful facts. Claims should not be denied upon technicalities."¹² Nevertheless, the South Carolina Courts in construing the Workmen's Compensation Law of South Carolina have stated that a claimant must show that he sustained an injury by accident, arising "out of" and in the "course of" his employment, in order to make his claim compensable and bring it within the provisions

8. *Holder v. Haynes*, 193 S. C. 176, 7 S. E. (2d) 833 (1940).

9. HOROVITZ, CURRENT TRENDS IN WORKMEN'S COMPENSATION, 468 (1947).

10. *Heiliger v. City of Sheldon*, 236 Iowa 146, 18 N. W. (2d) 182 (1945).

11. S. C. CODE OF LAWS, §7035-2 (f) (1942).

12. *Baltimore and Philadelphia Steamboat Co. v. Norton*, 284 U. S. 408 (1931); *Gordon v. Hollywood-Beaufort Package Corp.*, 213 S. C. 438, 49 S. E. (2d) 718 (1948).

of the Workmen's Compensation Law.¹³ Also, the burden is on the claimant to show that the injury did arise "out of" and in the "course of" his employment.¹⁴ After such evidence is presented, each case must stand or fall on its own peculiar merits.¹⁵ Obviously on account of the great variety of cases, it is impossible to establish an invariable rule * * *¹⁶ However it has been said, "The death of the employee usually deprives the dependent of his best witness—the employee himself— and, especially where the accident is unwitnessed, some latitude should be given the claimant."¹⁷ Much the same as the suit by an injured third party in which the jury determines if the servant deviated, the South Carolina courts place upon the Industrial Commission, as a fact finding body, the duty of determining if the servant departed from his duty so as not to be acting within the scope of the employment. "It is the well settled law of this state that if there is any competent evidence to support the findings of the Industrial Commission, such findings are conclusive on appeal," and "Where there is a conflict in the evidence, either of different witnesses, or of the same witness, the findings of fact of the Industrial Commission as triers of fact, are conclusive."¹⁸ As to liberal construction of the statute it is also said that the statute should be fairly, reasonably and liberally construed in order to effectuate the legislative intent to afford compensation for an injured employee and the others to benefit, rather than strictly and technically construed in order to deny compensation.¹⁹ Also, "It is frequently necessary in deciding such questions of law (on appeal) to review the facts of the case as they appear in the record, but this court may not pass upon the force and effect of such facts."²⁰ The present

13. *Spearman v. F. S. Royster Guano Co.*, 188 S. C. 393, 199 S. E. 530 (1938).

14. *Green v. City of Bennettsville*, 197 S. C. 313, 15 S. E. (2d) 334 (1941).

15. *Dicks v. Brooklyn Cooperage Co.*, 208 S. C. 139, 37 S. E. (2d) 286 (1946).

16. *Cyrus v. Miller Tire Service*, 208 S. C. 545, 38 S. E. (2d) 761 (1946).

17. HOROVITZ, CURRENT TRENDS IN WORKMEN'S COMPENSATION, 631 (1947).

18. *Cokeley v. Robert Lee, Inc.*, 197 S. C. 157, 14 S. E. (2d) 889 (1941).

19. *Pelfrey v. Oconee County*, 207 S. C. 433, 36 S. E. (2d) 297 (1945).

20. *Murdaugh v. Robert Lee Const. Co.*, 185 S. C. 497, 194 S. E. 447 (1937); *Phillips v. Dixie Stores, Inc.*, 186 S. C. 374, 195 S. E. 646 (1938).

trend, as indicated by current cases, legislation, and text writers is to favor and benefit the employee. "However, the unending stream of appeals * * * on the ground that injuries do 'not arise out of' the employment, will never abate so long as some courts will inject antiquated common law rules into a new law which intended once and for all to bury the narrow rules of the common law as related to work injuries."²¹

In the two cases arising out of Falconer's accident the facts are practically the same, except for the testimony of one individual, that testimony being by one Morrison who testified as to some short cuts that Falconer could have taken. However, as was stated in the dissenting opinion to that case, it did not appear from any evidence that Falconer took any short cuts or even knew of any. Even if these short cuts over second class dirt roads had saved Falconer a distance of 7 miles, his total departure would still have been 20 miles. So it would appear irrelevant to the decision in either case, assuming it *had* been shown that Falconer knew of any short cuts. Therefore, it is inconceivable to the writer that such testimony standing abstractly alone could be the basis for the court upholding the jury's verdict in the former case and the absence of such inconsequential testimony in the latter case result in the upsetting of the findings of the Industrial Commission.

The question in both cases is the same: Was Falconer at the time of the accident performing an act arising "out of" and "in the course of" his employment? Perhaps the only true justifications for conflicting answers to this question are to be found in the origin of the law in each case. The origin of the law in the *Carroll v. Beard-Laney, Inc.*, case was the doctrine of *respondeat superior*. The law favors the innocent third party who is injured by means of an act of an employee acting with an instrument placed in his hands. However, the jury determines if there are any facts from which it may be inferred that the servant was on a frolic and was not acting in the interest of the master. The courts do not overrule the decisions of the jury in most cases. There must be a total lack of evidence from which the jury could have reached a decision, before the court will overrule the jury's finding. Consequently,

21. HOROVITZ, CURRENT TRENDS IN WORKMEN'S COMPENSATION, 662 (1947).