

South Carolina Law Review

Volume 13 | Issue 1

Article 6

Fall 1960

Agency

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Recommended Citation

Folk, Ernest L. III (1960) "Agency," *South Carolina Law Review*: Vol. 13 : Iss. 1 , Article 6.

Available at: <https://scholarcommons.sc.edu/sclr/vol13/iss1/6>

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AGENCY

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The agency decisions during the Survey period all represent sound applications of long settled rules of law to predominantly factual situations.

I. Master's Liability for Servants' Torts

*Nature of the Servant's Negligence. Wineglass v. McMinn*¹ well illustrates the doctrine that a master is liable when his servant, acting in the course of employment, leaves a machine or other instrumentality under such circumstances that harm is likely to result to third persons.² In this case, a truck driver went off on a personal errand, leaving a truck in charge of an "unlicensed and inexperienced" fourteen-year-old boy.³ Meanwhile, the driver of a parked car, apparently wedged in by the truck, demanded that the truck be moved. The boy, after unsuccessfully trying to locate the driver, attempted to move the truck himself. In so doing, he injured the plaintiff's person and car. Affirming the verdict and judgment for the plaintiff against the owner of the truck, the court concluded, without discussion, that "the acts of [the truckdriver] . . . were in the scope of his employment,"⁴ a statement which presumably includes (1) the truckdriver's leaving the truck to go on a personal mission, while (2) the truck remained in the boy's custody. As to (1), it is settled that, if the leaving of the instrumentality is within the scope of employment, the purpose for which the truck is left — even though it is a personal frolic of the servant — does not immunize the master from liability.⁵ This proposition, nowhere expressly declared in the opinion, is implicit in the decision, and represents perhaps the only aspect in which the case goes beyond its earlier ruling, under like circumstances, in *Pfaehler v. Ten Cent Taxi Co.*⁶ As to (2) the Court refused to decide whether the master should be liable for the young boy's wrongful acts "under the doctrine of *re-*

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1. 235 S. C. 537, 112 S. E. 2d 652 (1960).
2. RESTATEMENT, AGENCY 2d § 240 (1958) especially at Comment (b).
3. 235 S. C. at 540, 112 S. E. 2d at 654.
4. *Id.* at 541, 112 S. E. 2d at 654.
5. RESTATEMENT, AGENCY 2d § 240 (1958).
6. 198 S. C. 476, 18 S. E. 2d 331 (1942).

spondeat superior,"⁷ viz. whether the boy became a servant or sub-servant of the master, although it recognized liability for a helper's acts "at least under some circumstances" not specified.⁸ The essence of the decision, therefore, is the servant's negligent or improper act in allowing the boy to have custody of the truck. For this the master is liable. The facts as to the lad's youth and inexperience bear upon the servant's negligence in leaving the truck under such circumstances. Given the boy's inexperience, the keys in the ignition, and a crowded street, the event which in fact occurred was precisely the kind of happening which a reasonable person could foresee.

Course of Employment. The course of employment issue, which was not in terms discussed in the *Wineglass* case, was the express basis for decision in *Bolin v. Bostic*.⁹ There the Court reversed a verdict and judgment against a master for injuries sustained by the plaintiff in an accident with an employee assumed by the Court to be a servant,¹⁰ but found, on that assumption, not to be acting within the course of his employment. The employee, previously trained by the master as a sewing machine salesman, furnished his own car and transportation expenses, was subject to no hours or territory requirements, and received commissions; he was required to report at the master's place of business each morning at 8:00 before starting work. On his way there, he negligently caused the accident for which the injured plaintiff sued the master. The Court applied the "general rule" that an employee using his car in going to and from work is not "engaged in work for his master" absent "special circumstances" which were found to be not present on these

7. 235 S. C. at 541, 112 S. E. 2d at 654. Thus, the court did not have to consider the significance of the fact (*Id.* at 539, 112 S. E. 2d at 653) that the truckdriver "[w]ith the knowledge and without objection of [the master]" had "employed and paid" the boy "as a helper, who would assist . . . with the truckdriver's deliveries."

8. *Ibid.*

9. 235 S. C. 319, 111 S. E. 2d 557 (1959). The court said that this was the first time the issue had been "directly before us." *Id.* at 323, 111 S. E. 2d at 559.

10. The court refused to decide whether the servant was "an agent or independent contractor," but "[a]ssumed that the relationship between Bostic and him was that of principal and agent or master and servant . . ." *Bolin v. Bostic*, 235 S. C. at 322, 111 S. E. 2d at 558.

facts.¹¹ Even though there was nothing to bar the salesman from making a sale prior to his 8:00 A.M. reporting time, the Court concluded that he was not, in fact, acting within the course of his employment, particularly since he had "no intention of transacting any business on his way to work," and in view of the other facts showing his substantial independence of action.¹² Apart from the fact that the master is not responsible for a servant's conduct on the way to and from work, the Court seems quite correctly to have taken the view that a bare possibility that the servant, at any time of the day or night, might make a sale was not enough to bring him into the "course of employment." A contrary position would mean that the master was, in effect, the guarantor of the safety and integrity of all third parties at any time the servant was driving his car, however personal the activity, since, at any time, he could in theory also make a sale.¹³

Defenses Asserted by Master. Two cases between them considered and applied all three common law defenses open to a master sued for a servant's torts: contributory negligence, assumed risk, and the fellow servant rule. The cases turn upon their individual facts, and do not require extended discussion. In *Cooper v. Mayes*,¹⁴ assumed risk and contributory negligence were successfully asserted by a master in bar of a claimed cause of action by a skilled, although as the Court found, negligent electrician seriously injured in falling from a ladder after cutting a live wire. In cutting the wire, he assumed the risk that he would injure himself; the fact that the owner of the property, "a layman unskilled as to electricity," had assured the electrician that the wires

11. *Id.* at 324, 111 S. E. 2d at 559. Decisions holding the master liable for servants' torts on the way to and from work include *Helena Wholesale Groc. Co. v. Bell*, 195 Ark. 201, 70 P. 2d 416 (1938) (truck driver required to make distant deliveries permitted to take truck home and keep it overnight; master liable for accident on the way home); *Cox v. Enloe*, 50 Ariz. 201, 70 P. 2d 331 (1937) (truck driver allowed to go home before starting emergency trip); *Barber v. Jewel Tea Co.*, 252 App. Div. 362, 300 N. Y. Supp. 302 (1937), *aff'd*, 278 N. Y. 540, 16 N. E. 2d 94 (1938) (employee to do "homework" for employer). *Contra S. & W. Contr. Co. v. Bugge*, 194 Miss. 822, 13 So. 2d 645 (1943).

12. *Bolin v. Bostic*, 235 S. C. at 324-25, 111 S. E. 2d at 559-560.

13. Although the Court did not decide the servant vs. independent contractor issue, the result of the case is in accordance with the present tendency of courts not to hold traveling salesmen to be servants, although there is a substantial number of cases precisely *contra* on the issue. *Compare Stockwell v. Morris*, 46 Wyo. 1, 22 P.2d 189 (1933), *with Chatelain v. Thackery*, 98 Utah 525, 100 P.2d 191 (1940).

14. 234 S. C. 491, 109 S. E. 2d 12 (1959).

were dead did not as a matter of law override the electrician's presumably informed judgment as to the risk which he must have known he was taking.¹⁵ These and other facts conclusively showed contributory negligence.¹⁶

An illuminating dictum on one aspect of the master-servant relation appears in *Williams v. E. I. DuPont de Nemours & Co.*,¹⁷ another "contributory negligence" case. There an ailing employee, returning to his old job contrary to his physician's advice and knowing that such work would likely impair his health further, unsuccessfully sued the employer who, he claimed, improperly refused his request for assignment to less strenuous employment. The Court first noted that the employee could have resigned his post as an alternative to working at the only job which the employer could or would assign him to. Economic compulsion to earn a living, even when the employer furnishes only work which may be risky from a health standpoint, "is not a compulsion by the employer or one for the consequences of which . . . the employer may be held liable in damages."¹⁸ Unlike situations where a protesting employee takes a job on the employer's assurance, based on his "superior knowledge", of no health hazard¹⁹ — a case where presumably the employer would be liable for the employee's impaired health — the employee here was fully aware of what he was doing and what it might do to him. He was therefore said to be "contributorily negligent", or, more accurately, to have assumed the risk of further injuring his health.

The proper dimensions of the fellow-servant rule were at issue in *Lewis v. Trawick*.²⁰ Under its fact circumstances, the Court concluded that the employee who had there injured another employee was more than a fellow servant and in fact

15. *Id.* at 496, 109 S. E. 2d at 15.

16. *Id.* at 496-497, 109 S. E. 2d at 15.

17. 235 S. C. 497, 112 S. E. 2d 485 (1960).

18. *Id.* at 520, 112 S. E. 2d 485.

19. *Ibid.*

20. 234 S. C. 415, 108 S. E. 2d 680 (1959). The facts, briefly stated, were that the master furnished free transportation to employees of its sawmill, and that an employee given possession of the truck in which the men were carried had an accident in which the plaintiff, another employee of the same sawmill, was injured. The trial court had directed a verdict for the master on the basis of the fellow servant rule. *Id.* at 417, 108 S. E. 2d at 680-681. The case was distinguished in *Bolin v. Bostic* on the ground "the employer had assumed the obligation to transport the employees to work, if they desired it, and furnished a truck and driver for that purpose." 235 S. C. at 323, 111 S. E. 2d at 559.

was "a representative of the master . . . performing the duties of the master," so that his negligence "must be regarded as the negligence of the master."²¹ Current judicial disfavor of the fellow servant rule, and corresponding widening of its exceptions (as here), also support the result, the submitting to the jury of the question of whether, in fact, the servant was or was not a "fellow servant" for whose misconduct the master was not liable. The Court correctly noted that although two employees were both acting within the course of their respective employments at the time, as they were here, this did not "make them as a matter of law fellow servants within the fellow servant rule."²²

Family Purpose Doctrine. In *Norwood v. Coley*,²³ plaintiff's decedent was killed while driving with defendant's deceased son in an automobile, the title to which, for financing purposes, was in defendant's name, but which was paid for entirely by the son who had its exclusive use. Reversing a verdict and judgment for plaintiff, the Court held that these facts were sufficient to establish as a matter of law that the car was not for the "general convenience and use of the family" and that the defendant's son was not an agent of his father.²⁴ In so ruling, the Court considered, in line with decisions elsewhere,²⁵ that the mere fact that the supposed "head of the family" owns the car is not of itself enough to impose liability where, as here, the car was clearly not for family use.²⁶ This was strengthened rather than weakened by the refusal of the bank which financed the car to discount the papers from the son, a serviceman, and its insistence that title be placed in the father.

II. Principal and Agent

Authority of Real Estate Brokers. *Gallant v. Todd*²⁷ contains a clear and comprehensive analysis of a typical printed document furnished by real estate brokers to clients engaging

21. The quoted language (234 S. C. at 418, 108 S. E. 2d at 681) is from opinions in *Gunter v. Graniteville Mfg. Co.*, 18 S. C. 262, 270 (1882) and *Wilson v. Charleston & S. Ry.*, 51 S. C. 79, 96, 28 S. E. 91, 97 (1897).

22. *Lewis v. Trawick*, 234 S. C. at 420, 108 S. E. 2d at 682.

23. 235 S. C. 314, 111 S. E. 2d 550 (1959).

24. *Id.* at 318, 111 S. E. 2d at 552.

25. "There is no agency from mere ownership" for purposes of the family car doctrine. *Durden v. Maddox*, 37 S. E. 2d 219 (Ga. App. 1946). See also *O'Keefe v. Fitzgerald*, 106 Conn. 294, 137 Atl. 858 (1927); *Redding v. Barker*, 33 Tenn. App. 132, 230 S. W. 2d 202 (1950).

26. *Norwood v. Coley*, 235 S. C. at 317, 111 S. E. 2d at 551.

27. 235 S. C. 428, 111 S. E. 2d 779 (1960).

their services. Unlike the usual case, presenting the issue in connection with the broker's suit for his unpaid commission, *Gallant* was a purchaser's suit to compel the defendant to convey lands which the purchaser thought he was buying through a real estate broker with full authority to make a contract of sale. Defendant's plea and proof of no authority in the broker was successful. The Court stressed the settled canon of construction that such authorizations will be read as authorizing only the presentment of a purchaser and not a sale, unless that further power is unmistakably clear from the document.²⁸ This rule rests on the "practical reasons" that any real estate sale involves considerably more than just determination of the price, and these other aspects of the transaction properly should be left to the seller and purchaser personally unless there is clear contrary authority.²⁹ The fact, several times noted in the opinion,³⁰ that the authorization was a mere printed form with details filled in, was apparently and rightly regarded as significant, and as bolstering the strict construction of the broker's authority. Finally, despite the use several times in the printed form of the terms "sell" and "sale"³¹ customarily found in such documents³² the Court recognized, in accordance with the overwhelming line of authority,³³ that "sell" does not mean "sell" but "furnish a purchaser." *Wharton v. Tolbert*,³⁴ which pulls the other way, was distinguished and virtually confined to its particular facts.

28. *Id.* at 431, 434, 111 S. E. 2d at 780, 782.

29. *Id.* at 431, 111 S. E. 2d at 781. Indeed, the contrary view would be "dangerous doctrine." *Edwards v. Coleman*, 139 S. C. 369, 376, 138 S. E. 42, 44 (1927).

30. See, e.g., *Gallant v. Todd*, 235 S. C. at 430, 111 S. E. 2d at 780.

31. *Id.* at 431, 432, 111 S. E. 2d at 780, 781.

32. "I hereby authorize [broker] to *sell* for me the below described property of which I am owner, making them my sole agency for that purpose, and in case *sale* of said property is made by them or by anyone else, I do hereby contract and agree to pay them" the specified commission. *Gallant v. Todd*, 235 S. C. at 430, 111 S. E. 2d at 780 (emphasis supplied).

33. RESTATEMENT, AGENCY 2d § 53, comment (b) (1958); MECHEM, AGENCY OUTLINES § 66 n. 10 (1952).

34. 84 S. C. 197, 65 S. E. 1056 (1909).