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Nelson, Mullins, Grier and Scarborough (Columbia, SC)

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AGENCY

R. BRUCE SHAW*

A. Authority of an Agent

The South Carolina Supreme Court, in the survey period under consideration, had occasion to consider two cases involving the question of the authority of an agent.

*American Cas. Co. v. Niagara Fire Ins. Co.*¹ was an action for a declaratory judgment, brought to determine whether Niagara Fire Insurance Company had provided liability insurance coverage for the defendant Mrs. Margaret Register. Mrs. Register had gone to an insurance agency to obtain insurance on her 1958 Plymouth automobile. The defendant, Niagara Fire Insurance Company, agreed to insure the car through the assigned risk plan. Later, Mrs. Register purchased another automobile, a Chevrolet, and asked the same agency to procure liability insurance on it. At the agency's request, Niagara issued an endorsement adding the Chevrolet to the policy insuring the Plymouth. Subsequently, Mrs. Register sold the Chevrolet and asked the insurance agency to cancel the applicable liability coverage. The agency wrote Niagara requesting that the policy be cancelled as to the Chevrolet. Upon receiving the request, however, the company cancelled the entire policy and sent a release to the agency where someone signed Mrs. Register's name to the release. It was not until the unearned premium on the entire policy was refunded that the agency realized a mistake had been made. While the insurance agency was corresponding with the defendant insurance company trying to correct the mistake, Mrs. Register had an accident. Niagara refused to renew the policy on the Plymouth and contended that, as a result of the execution of the release, the policy had been effectively cancelled as to both automobiles. Mrs. Register contended that the cancellation of coverage on her 1958 Plymouth automobile was without her authorization and therefore ineffective.

The lower court held that the policy was effectively cancelled on the basis of the execution of the release on the ground that the insurance agency was acting as Mrs. Register's agent in the matter and she was bound by the acts of her agent.

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1. 244 S.C. 411, 137 S.E.2d 412 (1964).

On appeal, the South Carolina Supreme Court reversed, holding that, although the agency acted as an agent of Mrs. Register to procure the insurance coverage on her automobiles, it had no authority to cancel her policy. The court stated: "An agent to procure insurance is without authority to cancel it unless that authority is clearly conferred."²

It is generally held that an agent to procure insurance is without authority to cancel it unless that authority is plainly and unequivocally conferred, and such authority is not conferred by the request of the owner of the property already insured to keep it insured, that is, to keep the owner's property protected.³ The fact that an agent is authorized to procure insurance for the principal does not carry with it the authority to rescind it. Presumptively, an agent is employed to make contracts, not to rescind or modify them, to acquire interest, not to give them up. No power to modify or vary an agreement is to be inferred from the general power of contracting nor has the agent any implied power to give up the interest of his principal.⁴

The court went on to find that the defendant insurance company had not relied upon the insurance agency as Mrs. Register's agent to cancel the policy, and held, on other grounds, that the defendant Niagara Fire Insurance Company was estopped to deny coverage to Mrs. Register.

The case of *Southern Gen. Factors, Inc. v. Parker Concrete Pile Co.*⁵ involved the question of the authority of an agent to accept notice of an assignment. The plaintiff-assignee, Southern General Factors, sought recovery from the defendant, R. L. Morrison & Sons, on an account of Morrison & Sons which had been assigned to the plaintiff-assignee by the defendant Parker Concrete Pile Company. The plaintiff-assignee contended that it had given Morrison & Sons notice of the assignment and, therefore, any payments on the account should have been made to the plaintiff-assignee. The notice of the assignment was received by a bookkeeper, and Morrison & Sons contended that it had no actual notice of the assignment and that its payment to the assignor, Parker Concrete Pile Company, was proper.

2. *Id.* at 418, 137 S.E.2d at 416.

3. *City of New York Ins. Co. v. Jordan*, 284 Fed. 420 (5th Cir. 1922); *K. C. Working Chem. Co. v. Eureka-Security Fire & Marine Ins. Co.*, 8 Cal. App. 323, 185 P.2d 832 (1947); *Shaller v. Commercial Standard Ins. Co.*, 158 Tex. 143, 309 S.W.2d 59 (1958).

4. RESTATEMENT, AGENCY § 51 (1933).

5. 236 F. Supp. 103 (E.D.S.C. 1964).

H. W. Morrison, one of the owners of Morrison & Sons, testified that he had a bookkeeper who was in charge of the office and the accounts. Morrison also admitted that the bookkeeper had the authority to write letters for the company and that he generally ran the office. Based upon this, the court held, as a matter of law, that the bookkeeper was an agent who had authority to accept notice of the assignment and that notice to him was notice to the defendant.

B. Scope of Employment

In *Lane v. Modern Music, Inc.*,⁶ the court was again faced with the problem of determining whether the acts of a servant were within the scope of his employment so as to make the employer responsible under the doctrine of respondeat superior. The defendant owned about two hundred coin operated piccolos and employed six or seven men to service these machines. This service included placing the machines on location, making necessary repairs, changing the records, etc.

The testimony showed that one of the piccolos owned by the defendant was located in a cafe in Dillon, South Carolina, and that the plaintiff was in the cafe when two of the employees of the defendant came in and serviced the machine. After this, one of the employees went outside the cafe to the pick-up truck furnished by the defendant and took a mechanism out of the truck and placed it on the sidewalk. He then asked the owner of the cafe to come outside and look at it. As the plaintiff left the cafe, the employee was explaining the mechanism to the owner and he tripped a spring which caused a fake mongoose to jump out at the plaintiff, scaring her and causing her to fall. The testimony also showed that the fake mongoose apparatus belonged to the employee of the defendant and that the defendant did not know that he had such a troublesome item in his possession.⁷

Reversing the lower court and holding that a verdict should have been directed in favor of the defendant, the court pointed out the well-known rule that the doctrine of respondeat superior rests upon the relation of master and servant and that a plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries and the

6. 244 S.C. 299, 136 S.E.2d 713 (1964).

7. The servant was not joined in the action.

servant was then about his master's business and acting within the scope of his employment.

The general rule is that an act is within the scope of a servant's employment where it is reasonably necessary to accomplish the purpose of his employment and is in furtherance of the master's business.⁸ The act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable for his actions. When a servant is acting as his own master, he alone is liable for injuries inflicted by his acts, and when he steps aside from his master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended.⁹

The court found that the only duties of the servant of the defendant were to place piccolos on location, to make necessary repairs to them, to change the records and to collect from the coin box the money deposited by customers. There was a complete absence of any evidence from which an inference could be drawn that the mischievous acts of the servant had any connection with his duties concerning his master's business; therefore, the only reasonable inference from the testimony was that the employee used the mongoose device for his personal or private amusement and to effect an independent purpose of his own. The court stated that if the servant does a mischievous act merely to frighten or perpetuate a joke on a third person, and the act is entirely disconnected from the purpose of employment, the master generally is not liable for the act of the servant.¹⁰

The question of whether a sharecropper was the agent of a landowner arose in *Irick v. Ulmer*. The supreme court did not

8. See, e.g., *Bolin v. Bostic*, 235 S.C. 319, 111 S.E.2d 557 (1959), involving an employee who injured plaintiff while the employee was on his way to work in the morning. The court there held that an employee is not acting within the scope of his employment while merely traveling to work. *Adams v. South Carolina Power Co.*, 200 S.C. 438, 21 S.E.2d 17 (1942); *Holder v. Haynes*, 193 S.C. 176, 7 S.E.2d 833 (1940).

9. *Hyde v. Southern Grocery Stores*, 197 S.C. 263, 15 S.E.2d 353 (1941). On the problem of deviation, see *Carroll v. Beard-Laney, Inc.*, 207 S.C. 339, 35 S.E.2d 425 (1945); *Hancock v. Aiken Mills*, 180 S.C. 93, 185 S.E. 188 (1936).

10. 57 C.J.S. *Master & Servant* § 574(c) (1948).

decide the question as the appellant had failed to object to the charge as given by the trial judge.¹¹

In *United States v. Smith*¹² the defendants sold tobacco stored in their warehouse on which the Farmers Home Administration held a lien. The court found the defendants liable on the ground that they had converted the Farmers Home Administration right to the tobacco and stated also that liability might be imposed on the ground that the warehousemen were agents of the mortgagor and stood in the shoes of their principal.

C. Agent or Independent Contractor

In *Kushner v. Legette*¹³ the plaintiff's intestate was killed when the automobile in which he was a passenger collided with a logging truck owned by the defendant C. M. Fullwood and driven by Legette, his employee. The plaintiff sought to establish that Legette and Fullwood were agents of the defendant Canal Wood Corporation. Canal owned some timber lands and executed a pulp wood sale agreement with C. M. Fullwood who was to pay Canal three and one-half dollars per cord for pulp wood cut from the land. He had the right to sell the pulp wood to anyone he chose, but usually resold the wood to Canal. During the course of the cutting operation, Canal made advances to Fullwood for operating expenses such as truck repairs and insurance premiums. Canal had sold two trucks to Fullwood, including the one involved in the accident, on installment payments and kept records of the transactions between it and Fullwood.

In deciding that Fullwood and Legette were not acting as agents, servants or employees of Canal the court quoted from the South Carolina case of *Gomillion v. Forsythe*:¹⁴

An independent contractor is one who, exercising independent employment, contracts to do a piece of work accord-

11. 246 S.C. 178, 143 S.E.2d 126 (1965). The trial judge's charge that a sharecropper is nothing more than a laborer or servant of the landlord or master and that the landlord could not be liable for the torts of a sharecropper unless at the time of the delict the sharecropper was performing some act, labor or mission at the request of or the command of the landowner, is correct under South Carolina law as the South Carolina Supreme Court so held in *Powers v. Wheless*, 193 S.C. 364, 9 S.E.2d 129 (1940).

12. 237 F. Supp. 29 (E.D.S.C. 1965).

13. 330 F.2d 447 (4th Cir. 1964).

14. 218 S.C. 211, 62 S.E.2d 297 (1950).

ing to his own methods, without being subject to the control of his employer except as to the result of his work; an independent contractor is not a servant, and there is no master and servant relation between his servants and the employer for contractee.¹⁵

Viewing the facts of the case in the light of the above quoted South Carolina law, the court found that there was no master and servant relationship between Fullwood and Legette and Canal Wood Corporation. The court also found that Legette was hired and paid by Fullwood and that Fullwood alone instructed and supervised his employees.

15. *Kushner v. Legette*, 330 F.2d 447, 448 (4th Cir. 1964).