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Respondeat Superior - the Effect of Deviation on the "Scope of Employment" - A. S. Abell Co. v. Sopher

RESPONDEAT SUPERIOR—THE EFFECT OF DEVIATION ON THE "SCOPE OF EMPLOYMENT"

A. S. Abell Co. v. Sopher[1]

Defendant appealed from a judgment of the trial court holding it liable for the negligence of its servant. The testimony was uncontradicted, and the defendant-appellant contends that the trial court should have ruled as a matter of law that it was not liable. The evidence established that the employee of defendant set out from defendant's place of business, driving defendant's truck, to deliver proof to various customers. He delivered proof to some of the assigned places, the last of which was in the 2100 block of West Lafayette Street. From that point he proceeded to Gwynn Oak Junction, a distance of about fifteen blocks (approximately 2½ miles), where he picked up a package which he intended to deliver to his mother who lived at 3806 Granada Avenue. On his way to his

[1] 22 A. (2d) 462 (Md., 1941).

mother's, at the corner of Main and Granada, the accident occurred. There were other packages of proof still on the truck at the time of the accident, which were to be delivered to Druid Hill Avenue, the North Avenue Market, and the 1700 block of North Charles Street. The Court of Appeals held as a matter of law that the employee was not acting within the scope of his employment, and reversed the judgment for the plaintiff without a new trial.

This case merits notation more because of the prevalence of this particular type of situation, than on account of any inherent difficulty in the law involved. Deviations, stop-offs, and the intermixing of business and pleasure are every-day occurrences. In which cases can the employer be held liable under the doctrine of *respondeat superior*, and in which cases is he relieved of responsibility? The rules of thumb seem to be disarmingly simple. If an employee, engaged in his employer's business, and acting within the scope of his employment, commits an act of negligence, notwithstanding the fact that he has joined therewith some private business or purpose of his own, the employer is liable.[2] However, if the employee deviates to such an extent as to constitute a complete abandonment of his employment (either permanent or temporary) for his own purposes, the employer cannot be held liable.[3]

The Court of Appeals in the principal case states that "when the undisputed, and uncontradicted evidence clearly discloses that a servant has committed an act of negligence, at a time when he is not acting within the scope of his employment, the question of the employer's liability should not be allowed to go to the Jury, but becomes properly a question for the Court."[4] But what evidence, even undis-

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[2] 39 C. J., Master and Servant, Sec. 1494: ". . . where the servant is notwithstanding the deviation, engaged in the master's business within the scope of his employment, it is immaterial that he joined with this some private business or purpose of his own." McDowell v. Magazine Service, 164 Md. 170, 164 A. 148 (1933); Mech v. Storrs, 169 Md. 150, 179 A. 525 (1935).

[3] 39 C. J., Master and Servant, Sec. 1493; Symington v. Sipes, 121 Md. 313, 88 A. 134, 47 L. R. A. (N. S.) 662 (1913); Pollock v. Watts, 142 Md. 403, 121 A. 238 (1923); Fletcher v. Meredith, 148 Md. 580, 129 A. 795, 45 A. L. R. 474 (1925); Trautman v. Warfield-Rohr, 151 Md. 417, 135 A. 180 (1926); Wagner v. Page, 179 Md. 465, 20 A. (2d) 164 (1941). For older cases expressing the general agency doctrine concerning "scope of employment", see Evans v. Davidson, 53 Md. 245, 36 Am. Rep. 400 (1880); Railway Co. v. Peacock, 69 Md. 257, 14 A. 709, 9 Am. St. Rep. 425 (1888); Beiswanger v. American Bonding Co., 98 Md. 287, 57 A. 202 (1904); Steinman v. Laundry Co., 109 Md. 62, 71 A. 517, 21 L. R. A. (N. S.) 884 (1908).

[4] Citing McDowell v. Magazine Service, *supra*, n. 2; Wells v. Hecht Bros. & Co., 155 Md. 618, 142 A. 258 (1928); International Co. v. Clark, 147 Md. 34, 127 A. 647 (1925); and 22 C. J. 124.

puted, will be sufficient to prove that the servant was not acting within the scope of his employment. Each case must be determined on its own facts, and for this reason when we turn to case law we find that "the decisions are in such hopeless confusion that it is useless to attempt a review of them with any idea that they can be reconciled."[5]

The physical extent of the deviation must be considered in conjunction with the attendant circumstances, since the intent of the employee as determined thereby is one of the prime factors in all of these cases.[6] In this case, the driver went out of his way 15 blocks to pick up a package for his mother. We may then fairly assume that the total intended deviation was at least 30 blocks (about five miles). These circumstances, the Court held, took him out of the scope of his employment as a matter of law. Yet in *McDowell v. Magazine Service*[7] the intended deviation was 64 blocks, and the Court took the opposite view. In that case, however, the deviation actually executed was only about 12 blocks in a trip of 20 miles as compared with about 20 blocks in the principal case, where the total authorized trip would have been only 6 or 7 miles.

The two cases are, in many ways, similar, but in the *McDowell* case the purpose of the deviation was that the servant might eat his lunch at home. It was customary for him during his day's work to eat at any convenient place, and the Court refused to say, as a matter of law, that the intended deviation was beyond the scope of his employment. The reasoning for such a conclusion is based on the extent of the deviation considered in conjunction with the purpose.

The courts as a general rule seem to feel, where a servant has the use of his master's vehicle in going to and from his work, or his meals, in conjunction with his employment, whether such journey is expressly authorized or not, that a jury might well find that such journeys are not exclusively for his own benefit, but are within the scope of his employment.[8] But in the principal case the agent was serving his own interest in going to Gwynn Oak

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[5] McDowell v. Magazine Service, 164 Md. 170, 173, 164 A. 148, 149 (1933).

[6] 39 C. J., Master and Servant, Sec. 1493: "The liability of the master depends upon the degree of deviation and all the attending circumstances."

[7] *Supra*, n. 2.

[8] Mech v. Storrs, *supra*, n. 2; McDowell v. Magazine Service Co., *supra*, n. 2; Silent Automatic Sales Corp. v. Stayton, 45 F. (2nd) 471 (C. C. A. 8th, 1931); Auer v. Sinclair Ref. Co., 103 N. J. L. 372, 137 A. 555, 54 A. L. R. 623 (1927).

Junction and to his mother's, to the complete exclusion of that of his employer. His employer could not have even the remotest interest in the parcel he intended to deliver to his mother. He had even signed a card agreeing that he would not use the car on any business other than his employer's. Of course, the principal's liability to third persons for the torts of his agent cannot be abnegated by a secret contractual agreement,[9] but the breach of such an agreement by an agent might be of some value in determining whether the agent has intentionally abandoned his employment.

One more similarity may be noted between this and the *McDowell* case. In the latter, the Court seemed to stress that the employer still had some bottles to be returned to his employer, and rather implied that in such a case, as his intent was ultimately to return the bottles, he had not completely abandoned his employment. This reasoning had no effect on the ultimate solution of the case, and the emphasis would seem to be entirely misplaced, for even if the employee were returning an empty truck, it is submitted that he would still be acting within the scope of his employment. In the instant case, the agent had proof yet to be delivered, but the Court refused to consider the contention that this had any bearing on the case. By the better view, it is no more than a neutral factor, for even though it may be inferred that the servant intends to resume his task, yet, if it is clear that he is on a frolic of his own, even temporarily, his master is not liable for his negligence.[10]

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[9] Julian Goldman Stores v. Bugg, 156 Md. 36, 143 A. 589 (1928); Emison v. Wylam Ice Cream Co., 215 Ala. 504, 111 So. 216 (1927).

[10] In Jordan Stabler Co. v. Tankersly, 146 Md. 454, 126 A. 65 (1924) the Court seemed to stress the fact that there were still undelivered goods of the employer on the truck; but their holding was that the evidence in the case was not sufficient to rule as a matter of law that the agent was acting beyond the scope of his employment, overcoming the presumption to the contrary. Another case in which some stress seems to be laid on the fact that there were undelivered goods in the truck is International Co. v. Clark, *supra*, n. 4. The Court held that this, in conjunction with the other surrounding circumstances, raised a question as to whether or not the agent was acting within the scope of his agency, and left it to the jury. The decision is a poor one on which to rely for any substantive law for although the Court states the rule that "where the facts so offered are undisputed and uncontradicted, it becomes properly a question for the Court" yet it superimposes the pusillanimous qualification that "where the facts are such as to leave the Court in doubt as to the question the proper course is to submit the question to the jury". An almost exact reconstruction of the facts in this case is presented in illustration 5 in Section 237 of the Restatement of Agency (1933) where its collaborators have no difficulty in saying that the agent would not be acting within the scope of his employment. Butt v. Smith, 148 Md. 340, 129 A. 352 (1925) properly

The view of the Maryland courts in regard to deviation, where the employer owns the vehicle driven by someone in his general employ, conceding that each case presents an individual problem, seems to be that there is a presumption that the agent is acting for his principal.[11] This may be rebutted,[12] and if by conclusive and uncontradicted testimony, the principal is as a matter of law relieved from liability.[13] To rebut this presumption the Court must find that the agent was acting exclusively in his own interests.[14]

The criterion applied to the facts must of necessity be somewhat flexible, for the agent is not limited to the most direct route, nor even to express orders, but if he takes a plausible way of going (in the absence of further evidence) the principal is bound.[15]

The one remaining contention advanced by the appellee here was that when the agent left Gwynn Oak Junction, he was travelling in the general direction of his next delivery, and so intended to resume his duties. Arguing that the intent was mixed, the appellee contended that, conceding a complete prior relinquishment of his duties, the servant had returned within the nebulous bounds of his employment. The Court rejected this, citing *Pollock v. Watts*[16] as Maryland authority. *Pollock v. Watts* in fact does not consider the question.

To constitute a resumption of employment, there must be an intention so to resume.[17] This intention may some-

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states that the fact of undelivered goods on a truck, standing alone, has no bearing on the employer's liability and that ". . . there is not a word of evidence showing that the driver had been directed to deliver the tomatoes to anyone, nor is there any evidence that he was trying to deliver them".

[11] Symington v. Sipes, *supra*, n. 3; Debelius v. Benson, 129 Md. 693, 100 A. 505 (1916); Dearholt v. Merritt, 133 Md. 323, 105 A. 316 (1918); Pollock v. Watts, *supra*, n. 3; Jordan Stabler Co. v. Tankersly, *supra*, n. 10; Salowitch v. Kres, 147 Md. 23, 127 A. 643 (1925); Butt v. Smith, *supra*, n. 10; Wells v. Hecht Bros Co., *supra*, n. 4; Wagner v. Page, *supra*, n. 3.

[12] *Ibid.*

[13] *Ibid.*

[14] See cases cited *supra*, n. 3.

[15] Jordan Stabler Co. v. Tankersly, supra, n. 10; RESTATEMENT, AGENCY (1933) Sec. 234.

[16] *Supra*, n. 3.

[17] See the following cases: Erdman v. Horkheimer & Co., 169 Md. 204, 181 A. 221 (1935). In this case a cab driver, during his hours of employment, visited a local tavern and became intoxicated. He testified that he remembered nothing. However, Judge Parke carefully points out in his opinion that evidence was offered purporting to show that the driver "was capable of volition" and also was transporting a passenger in the course of his business. Under the conflicting evidence the jury found that the driver had resumed his employment. A. & P. Co. v. Noppenberger, 171 Md. 378, 189 A. 434 (1937), where it is stated by Judge Offutt ". . . to be within the scope of the employment, the conduct must be of the kind the actor is

times be inferred when the purpose of the deviation has been completed.[18]

At this point there is a great divergence of authority. Some jurisdictions have held that facts showing simply an intent to resume are sufficient to bind the employer.[19] Some others hold that the employee must return within a reasonable proximity of his employment.[20] The third possible view is that the agent must have returned to the point of departure to bind the principal for his torts.[21]

The contention of the appellee that the agent has resumed his employment is clearly inapplicable from the facts of the case, for the primary requisite, an intent to resume,[22] is not present. The agent's state of mind, as found by the Court, was solely to serve his own purposes. Simply because he happened at the time of the accident, to be heading in the direction which would incidentally benefit his employer cannot overrule his actual intent. The fallacy is obvious.

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employed to perform, occur not unreasonably disconnected from the authorized period of employment, in a locality not unreasonably distant from the authorized area, and *actuated at least in part by a purpose to serve the master.*" (italics supplied); Fletcher v. Meredith, *supra*, n. 3; Debelius v. Benson, *supra*, n. 11; RESTATEMENT, AGENCY (1933) Sec. 235.

[18] International Co. v. Clark, *supra*, n. 4; Erdman v. Horkheimer, *supra*, n. 17; Glass v. Wise, 155 La. 477, 99 So. 409 (1923); Fiocco v. Carver, 234 N. Y. 219, 137 N. E. 309 (1922).

[19] A representative jurisdiction would seem to be Louisiana. See Mancuso v. Hurwitz-Mintz Furniture Co. 181 So. 814 (La., 1938); rehearing denied, 183 So. 461 (La., 1938); Gilvert v. Trotter, 160 So. 855 (La., 1935); Cusimano v. A. S. Spiess Sales Co., 153 La. 551, 96 So. 118 (1923). In the Mancuso case the Court stated: "We cannot understand the wisdom or soundness of the doctrine, but must acknowledge that it is well established and must yield our individual views." For extensive notes, see (1922) 22 A. L. R. 1397, (1925) 45 A. L. R. 477, (1930) 68 A. L. R. 1051, (1932) 80 A. L. R. 725, (1939) 122 A. L. R. 858.

[20] Riley v. Standard Oil of N. Y., 231 N. Y. 301, 132 N. E. 97, 22 A. L. R. 1382 (1921). This is more or less of a leading case in New York on the subject of resumption, and it clearly states: "Should there be such a temporary abandonment the master . . . becomes liable for the servant's acts when the latter once more begins to act in his business, . . . a reentry is not affected merely by the mental attitude of the servant. There must be that attitude coupled with a reasonable connection in time and space with the work in which he should be engaged." For extensive notes, see *supra*, n. 19.

[21] Texas seems clearly to follow this view. See Southwest Dairy Products Co. v. L. C. De Frates, 132 Tex. 556, 125 S. W. (2d) 282, 122 A. L. R. 854 (1939). It is interesting to note that this case cites Fletcher v. Meredith, *supra*, n. 3, as authority for its view. This, it is submitted, is an unwarranted deduction from the opinion. The Court held that the agent had not resumed his employment under the particular facts involved, but did not state as law that the employee must return to the point of departure. Rather the inference to be drawn from the language used is that the Court would be disposed to find liability during the course of returning under a different fact situation. For extensive notes, see *supra*, n. 19.

[22] *Supra*, n. 17.

But since we have stated that *Pollock v. Watts*,[23] is inapplicable, even though the question is not involved in the principal case, what is the law of Maryland in regard to resumption, after there has been a complete abandonment of the employment by an agent

One of the earliest expressions on the subject in Maryland is found in *International Co. v. Clark*[24] where, rationalizing the *Symington v. Sipes* case,[25] it was said: "The facts . . . without contradiction showed that there had been a departure from the master's business and that the accident occurred before the servant had returned to the *point* of departure . . ."[26] If this is a proper interpretation of *Symington v. Sipes*, it would seem that Maryland has adopted the third and strictest rule above mentioned. However, it is respectfully submitted that the above statement is not the proper interpretation, nor is the inference drawn therefrom a sound one. In *Symington v. Sipes* the decision was predicated solely on the ground that the servant was on a frolic of his own at the time of the accident. No contention was raised that he might have *resumed* his employment. Further, the fact that an agent may have returned to the *point* of departure after a deviation is not determinative of the principal's liability, for by all authorities the basic requirement is an intent to resume,[27] even though it may be possible to infer such intent by the return itself in a proper case.[28]

We have a later decision in the case of *Fletcher v. Meredith*[29] where the question of resumption is directly presented. The agent borrowed his principal's car to attend a funeral, and agreed that on the way to the funeral he would make a delivery for his principal. The agent made the delivery, attended the funeral, and on the return to the garage had an accident. The Court held that the principal was not bound, stating that "the bare fact of return toward the garage after a personal use by the employee does not alone constitute resumption of the employer's service; that it may in some circumstances and in others may not." Since the trip originated in a permissive personal use and the delivery for the principal was incidental, the Court found

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[23] *Supra*, n. 3.
[24] *Supra*, n. 4.
[25] *Supra*, n. 3.
[26] Italics supplied.
[27] *Supra*, n. 17.
[28] *Supra*, n. 18.
[29] *Supra*, n. 3.

that the intent of the agent was to serve his own interests at the time of the accident.[30]

The result of the Maryland cases on resumption, here discussed and noted, is rather vague. While it is clear that there must be an intent to reenter the principal's business, we cannot say with certainty what degree of physical return is necessary. The inference to be drawn is that Maryland would follow the majority of jurisdictions, as is set forth in the *Restatement of Agency:*

> "A servant who has temporarily departed from the scope of employment does not re-enter it until he is again reasonably near the authorized space and time limits and is acting with the intention of serving his master's business."[31]

The *Fletcher v. Meredith* case,[32] although it holds that the agent was not within the scope of his employment, nevertheless leaves adequate room for the Court to make out a case of resumption under a different set of facts. In *A. & P. Co. v. Noppenberger,*[33] the Court, by way of dictum, approves of the position taken by the Restatement. The strictest rule, that the agent must return to the point of departure might be indicated by dicta in *International Co. v. Clark,*[34] but this, it is submitted, is not only too flexible to allow the Court to look into the circumstances of the case, but manifestly unjust and unconscionable when we consider the rights of innocent third persons. The third view is stated in Corpus Juris:[35]

> "The servant will be considered to have resumed the prosecution of the Master's business when after the fulfillment of his own purpose he is returning to

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[30] The Court of Appeals quoted extensively from this case in Phipps v. Milligan, 174 Md. 438, 199 A. 498 (1938). That case reviews the Maryland decisions which relate to deviation and resumption at some length. Nevertheless, the decision of the Court is contained in one sentence: "As in the opinion of this Court, the uncontradicted and conclusive evidence is that Miller was not, at the time of the accident complained of, the agent, servant or employee of Phipps, the judgment against him should be reversed." If this is to be interpreted to mean that there was simply a permissive use by Miller, disconnected from his employment, the decision is theoretically correct. Any other interpretation would put Maryland in the position of having repudiated *in toto* the well settled principles of agency insofar as they relate to resumption.

[31] RESTATEMENT, AGENCY (1933) Sec. 237.

[32] *Supra,* n. 3.

[33] *Supra,* n. 17.

[34] *Supra,* n. 4.

[35] 39 C. J. 1298, Master and Servant, Sec. 1495.

> resume his duties; it is not necessary for him to have reached the zone of his employment or the territory in which he was employed to work."

This view permits injustice to be worked on the principal in many cases, and is for that reason undesirable.

The intermediate and majority view allows the Court to sit more or less as a jury, balancing the equities of each individual case, and then ruling as a matter of law. This, it might be urged, makes the rule more difficult to apply, but nevertheless, is the only one whereby substantial justice may be accomplished in the great majority of the cases.