AGENCY

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ESTABLISHING THE AGENCY RELATIONSHIP

During the past survey, several cases have arisen which deal with the problems of pleading and proving the agency relationship. One of the more involved factual situations presented by this particular class of cases was the case of *Sapp v. Tate.*[1] In this case the plaintiff instituted an action for injuries sustained when a pistol held by one of the co-defendant's employees discharged. The plaintiff was a passenger in a truck driven by one Smith, a co-defendant in this case. Smith had driven the plaintiff to the place of business of another co-defendant, Tate. The plaintiff's petition alleged that the defendant Smith had a .22-caliber revolver in the cab of his truck which one Steppe, an employee and agent of the co-defendant Tate, requested that he might examine. During part of the examination Steppe asked Smith if the gun was loaded, to which question the defendant Smith, replied "No." The plaintiff further alleged that the defendant Steppe produced ammunition and loaded the pistol. Afterwards while the defendant Smith was holding the pistol and discussing matters concerning the business of his employer with another agent of his employer, the pistol discharged striking the plaintiff in the face.

The lower court overruled the general demurrer to the plaintiff's petition. This petition alleged that the injuries sustained by the plaintiff as a result of the discharge of the pistol, which was held by the defendant's employee, were a result of negligence of the defendant-employer through the acts of the employee acting within the scope of the employment. But, on presentment of the evidence, the trial court sustained a motion for a directed verdict in favor of the employer-defendant. The Court of Appeals of Georgia held that the trial court's overruling of the general demurrer on the basis that the petition stated a cause of action in the absence of cross or direct appeal from a ruling on a renewed general demurrer, such ruling became the law of the case. Whether the injuries sustained by the plaintiff were the result of negligence through the acts of the employee acting within the scope of his employment was a jury question.

The case of *North Georgia Ins. Agency, Inc. v. First of Georgia Ins. Co.*[2] illustrates a situation opposite to that described in *Sapp v. Tate.* In this case the plaintiff failed to set forth the facts of his case fully in his petition. This was an action by an insurer against its agent for the recovery of a

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1. 114 Ga. App. 589, 152 S.E.2d 415 (1966).
2. 113 Ga. App. 75, 147 S.E.2d 342 (1966).

sum of money alleged to have been advanced in anticipation of earned commissions. The court of appeals held that the petition, which alleged that the sum of money was due the plaintiff-insured by the reason of fact that the total loss experienced on the business by the agent exceeded eighty-five per cent of the cumulative prorated earned premium plus salvage and subrogation, was insufficient to state a cause of action against the agent. This ruling was based on the fact that the petition failed to allege that the sum sought to be recovered was advanced by the agent because of errors in calculations, or because a reserve for outstanding losses had been improperly reported at the time of the accounting as was provided for and set forth as a prerequisite in the written agency contract.

The final case in this series regarding the pleading of the agency relationsnip is the case of *General Motors Corp. v. Jenkins*.[3] This case was an action brought by the plaintiff, a passenger in an automobile driven by the son of the original purchaser, against the manufacturer and dealer from whom the car was purchased, for serious and permanent injuries sustained when the vehicle, which had been driven about 2,260 miles, without warning and for no apparent reason veered sharply to the left of the highway, developed a total malfunction of both the steering and braking mechanism, and struck a cement culvert which caused it to overturn. The defendant, General Motors Corporation, filed general and special demurrers on the basis that the petition did not contain pertinent and material provisions of the contract which would establish whether the relationship between the automobile manufacturer and the dealer was that of principal and agent or that of independent contractors. The lower court overruled these general and special demurrers. The Court of Appeals of Georgia held that the overruling of these demurrers was error. Generally with nothing else appearing, a simple statement that the wrongful act was committed by the defendant's agent or servant in the prosecution of the principal's business, thus within the scope of the employment or agency is sufficient to invoke the doctrine of *respondeat superior*. However, when special facts, whereby the pleader claims that the relationship of principal and agent exists, are set out, such facts take precedent over the conclusory statement and will control the statement in determining whether the agency has been properly alleged. Thus, the court concluded that when it is obvious that the determination of whether the relationship between the manufacturer and dealer is that of principal and agent or that of independant contractors must be determined from the written instrument, then it would be useless to make a determination based upon the incomplete allegation of the petition.

Clark v. Atlanta Veterans Transp., Inc.[4] was an interesting case, concerning the question of proof of the agency relationship. In this case, the plaintiff brought action against the taxicab company for injuries sustained

3. 114 Ga. App. 873, 152 S.E.2d 796 (1966).
4. 113 Ga. App. 531, 148 S.E.2d 921 (1966).

by the plaintiff while a passenger in the taxicab. The court of appeals held that evidence that the taxicab bore the name of the taxicab company and that the driver at the scene of the accident had given the passenger (the plaintiff) a card bearing his (the driver's) name, the number of the taxicab and the telephone number for the taxicab company was not, together with the admission that the defendant did business under the names involved, sufficient to make out a prima facie proof of the agency relationship.

The final case in this area involved an oral contract of employment. In the case of *Schaffer v. Wolbe*[5] the plaintiff orally agreed to sell real estate for the defendant, a real estate broker, and was to receive fifty per cent of the commissions on all of the sales and leases in which he participated, either by listing the property, drawing the contract, or showing the property to a prospective purchaser, who subsequently purchased it. The plaintiff alleged that he had shown the property in question to a prospective customer and had participated in certain negotiations and conferences which finally resulted in the closing of the sales transaction. The defendant had advised the plaintiff that it would be unnecessary for him to attend the final closing of the deal, so the plaintiff did not attend the closing. The defendant's demurrer to the plaintiff's petition for recovery of fifty per cent of the commission on the sale was overruled by the lower court. The court of appeals held that this contract having been performed by the plaintiff by participating in the sale of said property was neither so vague and indefinite or lacking in mutuality as to be unenforceable. Therefore, the trial judge did not err in overruling the general demurrers.

Independent Contractor v. Agency Relationship

In the case of *White v. Morris*[6] the plaintiff filed an action against a mail order company to recover damages for personal injuries sustained in a motor vehicle collision. The defendant mail order company owned vehicles which it leased to a delivery company. The delivery company operated these vehicles for the mail order company and used them to transport the mail order company's merchandise exclusively. At the time of the collision, an employee of the delivery company was operating one of these vehicles and was subject to the orders and control of the delivery company. The delivery company hired the employee, initially paid his wages, and had the exclusive right to discharge him or put him about other work. There was no evidence in the record to show the extent to which the defendant mail order company had the right to control or did control the details in the performance of the work of the delivery company. The lower court granted summary judgment for the defendant mail order company. The Court of Appeals of Georgia held that the lower court's ruling was error since

5. 113 Ga. App. 448, 148 S.E.2d 437 (1966).
6. 114 Ga. App. 618, 152 S.E.2d 417 (1966).

the petition alleged the existence of a master-servant relationship between the defendant mail order company and the driver so that evidence indicating the mail order company's direct control of the driver's work was relevant for consideration. The court further held that the record would indicate whether the delivery company was an independent contractor in order to insulate the mail order company from liability. Relying on the rule that where one is employed generally to perform certain services for another, and there is no specific contract to do a certain piece of work according to specifications for a stipulated sum, it is inferable that the employer has retained the right to control the manner, method, and means of the performance of the contract, and that the employee is not an independent contractor, the court held that on a motion for summary judgment the evidence must be construed most favorably to the party opposing the motion. Therefore, the granting of the summary judgment was error.

In the case of *Harvey v. C. W. Matthews Contracting Co.*,[7] the plaintiff brought a wrongful death action seeking recovery as a result of a collision between the deceased's automobile and a dump truck owned by the defendant's hauling company. The hauling company was engaged in transporting road construction materials pursuant to a contract with the third defendant, a highway construction contractor. The evidence disclosed that the construction contractor paid the hauling company for the materials transported on a mileage basis, and that the hauling company contracted separately with the defendant driver for his services as the driver of the truck. The control of the driver by the construction contractor was limited to direction as to where to load and unload the material at such times as the plant was in operation and the materials were required for the construction site. The Court of Appeals of Georgia held that under these circumstances, the evidence demanded a determination that the driver was not an agent or employee of the defendant construction contractor and there was no genuine issue of material fact for the submission to the jury. Therefore, the trial judge did not err in sustaining a motion for summary judgment in favor of the construction contractor.

The final case involving the question of an independent contractor is that of *General Ins. Co. v. Camden Const. Co.*[8] This case arose from an action for declaratory judgment by the insurance company against its insured, the construction company, on a policy which provided that said policy did not apply "to injury or destruction of property owned by, rented to, occupied or used by or in the care, custody or control of the insured or property as to which the insured for any purpose is exercising physical control." The facts as were disclosed by the evidence showed that a tractor-trailer owned by a hauling company delivered a load of asphalt to the

7. 114 Ga. App. 866, 152 S.E.2d 809 (1966).
8. 115 Ga. App. 189, 154 S.E.2d 26 (1967).

insured, the construction company. During the unloading operations the truck caught fire and was destroyed. Conflicting evidence was presented by both sides. The construction company presented evidence indicating that its employees had no control what-so-ever over the tractor-trailer, but merely were involved in the unloading process. Evidence by the insurance company indicated that the construction company controlled the employee of the hauling company by telling him where the truck should be parked and where it should be unloaded; that he was under the construction company's (the insured's) directions after he got on the job site; and that from the time the driver parked the tractor-trailer until the unloading operations were over he had no duties in regard to the operations of the truck unless the construction company requested that he move the truck for further unloading. The only control that the driver had over the truck was that he was the only one allowed to move it.

The court held that from the facts of the case, it appeared that during the unloading process, control of the tanker was in the construction company, and the exclusion clause of the insurance policy would apply.

Liability of the Principal For Contracts Made by the Agent

In the case of *Gay v. American Oil Co.*[9] the acts of the agent were imputed to the principal. In this case, the plaintiff had leased a tract of land to an oil company at a monthly rental to extend for twenty years. The plaintiff then had assigned part of the monthly rental payments to her bank which was to act as a collecting agent. On the month in question the lessee-oil company mailed a check for the designated amount to the bank and a check for the remainder of the rent to the plaintiff. The envelope which contained the plaintiff's check was not stamped. Upon arrival of the letter at the plaintiff's home post office and notice to the plaintiff of the arrival, the plaintiff refused to accept the letter. The plaintiff returned the letter to the defendant and gave notice that she was terminating the lease for default in making payment for this particular month. The plaintiff then sued out a dispossessory warrant. Upon a hearing on the warrant, the trial court found that there had been no forfeiture of the lease.

The Court of Appeals of Georgia upheld the trial court's ruling and held that the bank was in effect an agent of the plaintiff, lessor, and that the retention by the bank of part of the monthly rental was a waiver of the forfeiture. Hence, the court held that the plaintiff could not assert her rights and collect rentals under and upon the terms of the contract and at the same time declare a forfeiture of it for nonpayment.

The second case in this area was the case of *Chambliss v. Hall.*[10] This was an action brought for breach of a contract in which the defendant alleg-

9. 115 Ga. App. 18, 153 S.E.2d 612 (1967).
10. 113 Ga. App. 76, 147 S.E.2d 334 (1966).

edly agreed to pay the plaintiff fifty per cent of any brokerage commission earned for the sale of land to a prospective purchaser in cooperation with the plaintiff. The defendant was an employee of a partnership which did business as "Plantation Services." The plaintiff alleged that the defendant had made the contract by correspondence on stationery bearing the letterhead of Plantation Services with his own name and the names of the owners of that partnership printed thereon, without in any way designating himself as an agent. In speaking of performance of the contract and agreeing on the commission, the defendant used the terms "we" and "us" thus holding himself out as a partner or principal.

In reversing and remanding the lower court's judgment in favor of the defendant the court of appeals held that the evidence of the correspondence which embodied the alleged contract would authorize an inference that the defendant held himself out as a member of the partnership, even though the defendant was only an employee of the partnership, or else this evidence could authorize an inference that it was the intention of the plaintiff and the defendant that the defendant was to be bound individually on the contract. In reaching this decision the court stated that the question of disclosed or undicslosed principal was a question of fact, which the defendant had the burden of proving. The court reiterated the rule that an agent who made the contract without disclosing that he was acting as an agent or without identifying his principal, or an agent who makes a contract with the express or implied understanding with the other party that he is binding himself individually will become individually liable on the contract. The only way the agent could avoid personal liability was to disclose his principal.

Liability of the Principal for the Tortious Acts of the Agent

The case of *Braselton Bros., Inc. v. Better Maid Dairy Prod., Inc.*[11] received extensive treatment by both appellate courts of Georgia due to a disagreement by the courts on the law that should be applied in the case. In this case, an employee of a wholesale dairy, over a period of nearly two years, presented to the store owner on numerous occasions invoices for milk and dairy products in excess of the maximum capacity of the store owner's cooler and received full payment from the owner on these invoices. The store owner brought an action against the dairy company and its employee alleging that the defendant employee had obtained moneys from the store owners through the use of these fraudulent devices.

In reaching its decision on this case the court of appeals followed the old rule that an agent empowered to issue and acknowledge receipts of a given kind based on real transactions does not, by wrongfully issuing and acknowledging such receipts in a like kind based on fictitious or simu-

11. 113 Ga. App. 382, 148 S.E.2d 71 (1966).

lated transactions, pass beyond the scope of his authority but acts fraudulently within it. However, the court espoused the equitable principle that where one of two innocent parties must suffer loss for the fraud of another, the burden of the law should be imposed upon him who most contributed to it. Therefore, the court reasoned that the defrauded store owner could have easily detected the deceit and had neglected to do so over a period of two years. The court concluded that under such circumstances the store owner's fault was to be regarded as the proximate cause of the loss. The court further held that the petition alleged facts which showed as a matter of law that the plaintiff did not use diligence to discover the fraud, and the petition therefore failed to allege a cause of action for fraud and deceit. Thus, the court of appeals affirmed the trial court's judgment sustaining the defendant's general demurrer to the plaintiff's petition.

On certiorari the Supreme Court of Georgia reversed[12] the decision of the court of appeals and held that the plaintiff's petition stated a cause of action for fraud and that whether the dairy owner could have learned of the fraudulent practices by proper diligence was a question for the jury under the evidence to be introduced at the trial, as the owner was justified in relying on the forms that the dairy had furnished to its employee. Thus, the court concluded that the alleged facts did not show a lack of proper diligence as a matter of law.

There were two cases in the past survey period regarding the liability of the principal for the slanderous remarks of his agent. The case of *Herring v. Pepsi Cola Bottling Co.*[13] arose out of the use of allegedly abusive language. The plaintiff, a pharmacist, had purchased soft drinks from the defendant bottling company for retail sale. A young customer had removed one of the defendant company's soft drinks from the drink box located in the plaintiff's store. The plaintiff noticed that there was a safety pin in the unopened bottle and took the drink from the child. The plaintiff then reported this incident to the defendant bottling company. Following this report the co-defendant, Bouzigues, telephoned the plaintiff and identified himself as an insurance adjuster who was engaged to represent the bottling company. The plaintiff's petition alleged that the adjuster stated to him that he had no business calling Pepsi Cola and was stupid for calling them and that he could not get any money out of it, and that he was dishonest for trying to do so. Further, the defendant Bouzigues stated that the plaintiff must be a pretty low character to try such a thing, and that the defendant further stated that the plaintiff was a liar and again stated that he was dishonest. The defendants in this case moved for summary judgment.

12. 222 Ga. 472, 150 S.E.2d 620 (1966).
13. 113 Ga. App. 680, 149 S.E.2d 370 (1966).

In affirming the granting of the motion of summary judgment the Georgia Court of Appeals followed the rule that a corporation is not liable for damages resulting from speaking false, malicious, or defamatory, words by one of its agents, even when, in uttering such words, the speaker, was acting for the benefit of the corporation and within the scope of his agency, unless it affirmatively appears that the agent was directed or authorized by the corporation to speak the words in question. Moreover in the absence of special damages, mere billingsgate, insult, and contemptuous language, are not sufficient alone to state a cause of action. Mere oral abuse, without more, is not actionable in Georgia.

The second case involving the liability of the master for the slanderous remarks made by his servant was brought before the court of appeals in *Jordan v. J. C. Penny Co.*[14] In this case the plaintiff customer alleged that an employee of the department store, in the presence of a large number of other customers, had ordered the plaintiff customer to turn over her charge card for the stated reason that the customer had gone bankrupt. The lower court had rendered judgment in favor of the defendant department store. The court of appeals held that these statements did not constitute opprobrious, insulting or abusive language, and no tortious misconduct by the employee was shown even though the customer was not a bankrupt. Finally, the court held that the plaintiff had erred procedurely in her petition in that, although she alleged that the employee was acting within the scope of his employment and under the direct authority and direction of defendant corporation, she had failed to allege affirmatively that the corporation expressly directed the agent to speak the identical words used by him.

The case of *Pritchett v. Williams*[15] raises the question of whether or not the head of the family can be held liable under the family purpose doctrine, to a party who is injured by an automobile driven by a third party, not a member of the family, but who was authorized to drive by a family member. In this case, the family car was in the possession of the son of the defendant. The son had delivered it to the co-defendant, who was not a member of the family, for the purpose of procuring cigarettes for the son. While the co-defendant was driving the automobile, at the request of the son, he allegedly damaged the plaintiff's automobile. The superior court had overruled the plaintiff's petition for certiorari to review a judgment of the civil and criminal court of that county which had sustained the defendant's general demurrers to the plaintiff's petition.

The Georgia Court of Appeals in affirming the lower court's judgment held that when there are no particular facts sufficient to show that the owner of a family-purpose automobile authorized a family member to delegate his authority to drive the automobile, the owner is not liable for

14. 114 Ga. App. 822, 152 S.E.2d 786 (1966).
15. 115 Ga. App. 8, 153 S.E.2d 639 (1967).

injuries arising out of the operation of the automobile by another person at the request of and for the convenience and comfort of the family member outside his presence and control. The court stated that in no case in Georgia has it been held that the parent is liable when the son or family member was not in the automobile and directing its use or when it was not being used for a family purpose.

The case of *Piedmont Cotton Mills, Inc. v. General Warehouse No. 2, Inc.*[16] involved a dispute between two adjoining property owners. In this case, the plaintiff was in the process of constructing an office building. The defendant's adjoining lot had a stream running through it. In order to provide access to his property the plaintiff was constructing a bridge across the stream. The defendant had demanded that the plaintiff's contractor remove the bridge, stating that he intended to change the stream so that half of it would be on the property of the plaintiff. The defendant fully informed the plaintiff's contractor that if work did not cease immediately he would tear out the construction that had been completed. The plaintiff's petition alleged that on that evening the defendant individually and as an officer and agent of the defendant mill, acting within the scope of his authority did willfully, wantonly, and maliciously go onto the property of the plaintiff, and with the use of a tractor and cables did tear down, demolish, and destroy the work that had been done on the bridge.

Upon an entry of the judgment in favor of the plaintiff, the defendant appealed. One of the errors enumerated in the appeal was that the allegations of the petition did not charge this tort to the corporate defendant, because it did not affirmatively appear that the initial demand was authorized by the corporation or within the scope of the defendant-employee's authority or that the acts were ratified by the corporation. In answer to this allegation, the court followed the rule that a principal may be liable for the willful tort of his agent, done in the prosecution and within the scope of his business, although it is not expressly shown that he either commanded the commission of the willful act or consented to it. Thus, the court held that the allegation that the defendant-employee, was an officer and agent of the defendant corporation and was acting within the scope of his authority, was sufficient to charge the corporation with the tort of the defendant-employee, and the petition was not subject to the special demurrers interposed in regard to this tort.

The final case in this area deals with the question of deviation of a servant from his master's business at the time that a tort is committed. The case of *Sparks v. Buffalo Cab Co.*[17] arose out of an action against the taxicab company for injuries sustained in an accident involving the automobile driven by the company's employee and an automobile of the plaintiff. In

16. 222 Ga. 164, 149 S.E.2d 72 (1966).
17. 113 Ga. App. 528, 148 S.E.2d 919 (1966).

this case, the defendant filed a motion for summary judgment based on a supporting affidavit which disclosed that the employee of the taxicab company had completed his work on the day before the accident and had driven from Atlanta to Douglasville to visit his parents and children. While returning to Atlanta on the next day, the defendant-employee, was involved in an automobile collision with the plaintiff. The defendant alleged the taxicab employee was engaged in a matter purely personal to himself, namely, visiting with his family and had not been working at all during the time of the collision. The court stated that this affidavit, which indicated that the employee was not working for his employer at the time but was preoccupied with a personal enterprise of his own, was clear, positive and uncontradicated evidence sufficient to pierce the plaintiff's allegations predicating the defendant's liability upon the doctrine of *respondeat superior.* In affirming the lower court's grant of summary judgment for the defendant, the court of appeals followed the rule that where a servant, while not engaged in the performance of his master's business, and during a time when he is freely engaged in his own pursuits, uses his master's automobile for his own purposes (although he does so with the knowledge and consent of his master), and while so using it, negligently injures another by its operation, the master is not liable for the injuries.

The Liability of the Master to His Servant for Injuries Incurred by the Servant in Performing His Master's Work

The case of *Southern Ry. v. Hamilton*[18] involved an action for damages prosecuted by the plaintiff, a railroad employee, for injuries sustained while the plaintiff was carrying out work of his employer in the railroad's shop. The plaintiff alleged that while in the process of using a tool known as a "puller", which was furnished by the employer and regularly used in this type of work, the puller broke, causing the plaintiff to fall and injure himself. Part of the plaintiff's petition included the allegations that the employer had failed to use reasonable care to furnish the plaintiff with a reasonably safe place to work. The lower court had overruled the defendant's general and special demurrers to the plaintiff's petition.

In affirming the lower court's judgment the court of appeals ruled that the question of negligence under the Federal Employer's Liability Act was a federal question and that on that question federal decisional law formulating and applying the concept governs. Although the court had stated that federal decisional law would govern the concept of negligence applicable in this case, it also cited a previous Georgia decision which espoused the rule that a master in employing his servant and in putting him to work at the master's machine by implication of law warranted to him that the machine contained no latent defect undisclosed so far as the master

18. 222 Ga. 259, 149 S.E.2d 842 (1966).

knew or by reasonable care could discover and that the master would use reasonable care to keep it in that condition. Hence, it became the master's non-delegable duty to use ordinary care to see that the machine remained free from such defects and to have reasonable inspection made to prevent them from arising.

The question of the employee's own negligence was involved in a wrongful-death action in the case of *Seaboard Airline R.R. v. Haupt.*[19] While working in the defendant's switch yard and engaged in making up freight trains, it became necessary for the deceased to climb upon the car of a train standing on an adjacent track in order that his signals to the engineer might be seen. While in the performance of these duties the car upon which he was standing was suddenly moved without warning, which resulted in a fall that was the cause of his death.

The court of appeals affirmed the lower court's judgment which overruled the defendant-railroad's general and special demurrers. In affirming this decision the court held that if the petitioner alleges negligent acts on the part of the defendant in constituting the proximate cause of the death or injury to the employee, the case should not be withdrawn from the jury merely because it appears that the employee's own negligence in some way contributed to his injury or death.

In the two cases of *Miss Georgia Dairies, Inc. v. McLarty,*[20] an employee and his wife brought separate actions against the defendant dairy for damages for personal injuries allegedly sustained as a result of negligence with respect to the use of dry ice by the employee while packing bulk ice cream. The plaintiff alleged that his employer used dry ice in the packaging of ice cream. Furthermore, he alleged that the employer had knowledge of the dangerous propensities of the dry ice but did not furnish the plaintiff-employee with any protection for his work while the plaintiff was handling the dry ice. On the stated occasion, the ice adhered to his right hand resulting in the freezing of his hand and fingers. The general and special demurrers of the defendant dairy company were overruled by the trial court.

In affirming the trial court's overruling of these demurrers the court of appeals held that under the so-called "assumption of skills" doctrine the master is conclusively presumed to have knowledge of the nature of the constituents and general characteristics of substances and things used in his business. Thus, this presumption frequently makes knowledge implied against the master superior to that implied against the servant as to things used in connection with the master's business, and having such knowledge the master is under a duty to warn his servant of the dangers involved. The court further held that it is just as much the duty of the master to use reasonable care to protect his servants against the dangers

19. 113 Ga. App. 66, 147 S.E.2d 331 (1966).
20. 114 Ga. App. 259, 150 S.E.2d 725 (1966).

of employment which may reasonably be expected to produce disease as it is to use reasonable care to protect his servants against dangers of employment which may produce physical injuries.

A question similar to that which was raised in the preceeding case was also involved in the case of *Thigpen v. Executive Comm. of Baptist Convention*.[21] The plaintiff in her petition alleged that she contracted hemolitic staphylococcus while working for the defendant hospital. She further alleged that there was a duty on the part of the hospital to exercise ordinary care to provide its employees with a safe place in which to work and that a breach of such duty by the hospital's alleged negligence which was the proximate cause of the employee's contracting the disease entitled her to damages for such negligence. The lower court sustained the defendant's general demurrers and dismissed the plaintiff's action.

On appeal, the court of appeals reversed the lower court's judgment sustaining the defendant's general demurrers. In reversing this judgment the court held that although the defendant hospital was not an insurer of its employees' safety, it had the duty to use reasonable care to protect its employees against dangers of the employment which might reasonably be expected to produce disease. Furthermore, under the assumption of skills doctrine, the master's technical or scientific knowledge of his business made the knowledge implied to him superior to that implied against the servant as to matters connected to the business and the master is under a duty to warn his servant of the dangers involved. Thus, because assumption of the risk by a servant as well as questions of negligence and diligence were questions for the jury the court, remanded the case for an evidentiary hearing.

In the case of *Maxwell v. Harrell*,[22] an employee brought actions against his employer, a construction contractor, and a land owner for injuries sustained while the employee was engaged in the business of his employer. The land owner had contracted with the construction contractor to construct a dam on the defendant's land. In a separate contract, the defendant land owner had engaged the defendant-contractor to clear the land surrounding the proposed dam site. The defendant-contractor had sent the plaintiff into an area where other fellow servants were clearing for the dam site. While following these orders the plaintiff was struck by a falling tree. The plaintiff alleged that his injury was due to the negligence of his employer by sending him into a place of danger. The lower court granted a motion for new trial by the plaintiff-employee after a jury had returned a verdict for a small amount in favor of the plaintiff against his employer. In affirming the trial judge's grant of a new trial, the court of appeals held that the trial judge did not abuse his discretion. The court stated that although the master is not ordinarily liable for the negligence of a fellow

21. 114 Ga. App. 839, 152 S.E.2d 920 (1967).
22. 115 Ga. App. 97, 153 S.E.2d 653 (1967).

servant he is liable for his own negligence or that of his vice principal acting for him and that from the allegations of the petition and inferences drawn therefrom, there was sufficient evidence to authorize the conclusion that the injury was not due to any negligence on the part of the tree cutter, but to the negligence of the employer in sending the plaintiff into a place of danger.

TERMINATION OF THE AGENCY RELATIONSHIP

The first case in this area, involved a question of whether or not there was a contract made between the employer and the employee for the termination of the employee's services. In the case of *Webb v. Warren Co.*[23] the defendant-corporation's executive committee stated in a letter to the employee that in consideration of the efforts of the employee that a retirement income would be established for payment over a two-year period. Also, the executive committee promised in this letter to establish a life insurance policy for the benefit of the employee's wife. The employee died before any payments under this letter were made. The deceased employee's wife brought action alleging that this letter constituted a retirement agreement. The lower court sustained the defendant's general demurrer to the plaintiff's petition.

In affirming the lower court's decision that the petition failed to state a cause of action, the court of appeals held that the proffered retirement income was merely a gratuitous promise made without consideration and having no binding effect upon the company. Also, it was the court's opinion that the defendant's obligation was owed to the decedent personally and would have been extinguished by his death.

In the case of *Parker v. Schochat,*[24] the employee brought an action to recover compensation allegedly due him under the terms of written contract of employment executed by the plaintiff-employee and the defendant-employer. By the terms of the contract executed on October 17, 1963, the employee was to be compensated on a commission basis with a guaranteed salary and a weekly draw of a set amount. Also, either party under the expressed terms of the agreement could cancel the contract for any reason upon the giving of thirty days notice to the other. On October 27, 1963, the defendant-employer notified the plaintiff that he was terminating the provisions of the original employment contract providing for a weekly draw and an annual guarantee but that the plaintiff could continue working for the defendant on a straight commission basis. This action was brought for the recovery of the amount due the plaintiff under the original contract. The lower court entered a judgment in favor of the plaintiff in the amount equal to the sum due the plaintiff employee under the original

23. 113 Ga. App. 850, 149 S.E.2d 867 (1966).
24. 113 Ga. App. 113, 147 S.E.2d 58 (1966).

agreement. In affirming the lower court's decision the court of appeals held that the purported departure from the terms of the original contract was unilateral in intent and not mutual and that the action on the part of the defendant in attempting to cancel certain provisions of the contract and substitute new ones in their place merely constituted the exercise by the defendant of his right to cancel the contract upon the giving of thirty days notice.

The final case in this area was that of *Orkin Exterminating Co. v. Gill.*[25] A former employer, the exterminating company, filed a petition for temporary and permanent injunction against a former employee for the violation of restrictive covenants contained in the employment contract. The plaintiff-employer alleged that under the employment agreement the defendant-employee had expressly covenanted and agreed that for a period of two years immediately following the termination of this agreement that he would not for any reason whatsoever directly or indirectly for himself or on behalf of or in conjunction with any other person, companies, partnerships or corporations engage in certain described activities. The contract further provided that these covenants would be construed as an agreement. The petitioner alleged that the defendant-employee had breached the covenants by accepting employment with another exterminating company in Georgia and in soliciting contracts and business for this competitor of the plaintiff. The defendant's defense was that the plaintiff had willfully and wrongfully breached his contract of employment by terminating the defendant's position in violation of the terms of the employment agreement and thereby the petitioner came into equity with unclean hands. The superior court denied the petition for temporary and permanent injunction.

The Supreme Court of Georgia reversed this denial and held that the trial judge was bound as a matter of law to grant the temporary injunction. The court based its decision on an interpretation of the employment contract. The court reasoned that under the circumstances whether or not the employee voluntarily terminated the contract or was involuntarily discharged would be of no consequence since the convenant restricting the right of the individual to work for a competitor would not be contingent on the matter of termination and, regardless of who was at fault, these covenants would be valid and enforceable.

CONCLUSION

The cases here-in-above discussed are not to be considered as a complete compilation of all the Georgia appellate decisions on the law of Agency during the past survey period. This is to be considered merely as a summary of the most important and informative decisions in this area.

25. 222 Ga. 760, 152 S.E.2d 411 (1966).