AGENCY

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During the current survey period familiar principles of agency law were frequently reaffirmed and applied to new factual situations by the Georgia appellate courts. However, there appears to have been only one statute passed affecting this field of law and only one case of first impression.

THE STATUTE

The only statute passed by the General Assembly of significant importance during the survey period was one providing that the owner of watercraft shall be liable for any tort caused by the operation of that craft with his consent.[1] It further provided that the owner's consent will be presumed in case of operation by a member of the owner's family at the time of the unfortunate occurence. The General Assembly has achieved certain distinction by the passage of this "Family Boat Doctrine."[2]

THE CASE OF FIRST IMPRESSION

In *Willis v. Hill*[3] the Georgia Court of Appeals had to decide, for the first time in the state's legal history, whether a plaintiff may pursue both respondeat superior and negligent entrustment theories against a defendant employer who has conceded liability under the theory of respondeat superior. After first noting that apparently the only reason for the plaintiff's pursuing the negligent entrustment theory under these circumstances was the admission into evidence of the employee's prior driving record and then discussing cases dealing with the issue in several other states,[4] the majority decided:

> When the driver's employer comes in and admits the agency and scope of employment, or that he is liable for the driver's acts under the doctrine of respondeat superior if the driver has been negligent, the plaintiff may recover all damages to which he is legally entitled by establishing the driver's negligence. He can

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1. GA. CODE ANN. §105-108.1 (1968).
2. Felcyn v. Gamble, 185 Minn. 357, 241 N.W. 37 (1932).
3. 116 Ga. App. 848, 159 S.E.2d 145 (1967).
4. The court noted cases from seven states (California, Connecticut, Maryland, Mississippi, North Carolina, Texas, and Washington) holding that the negligent entrustment theory may not be pursued after the vehicle owner has conceded the vicarious liability relationship. It noted only two cases (one in Ohio and one in Michigan) indicating otherwise.

> have no greater right and is entitled to no greater recovery by showing a negligent entrustment to an incompetent driver. It can serve only as an instrument of prejudice. . . . In this situation the liability link to the employer is established, rendering proof of the negligent entrustment unnecessary, irrelevant, and inflammatory, and the very same reasons for excluding the evidence of the driver's prior record, etc., as to him, apply with equal force as to the employer.

The three dissenting judges apparently agreed that the plaintiff's sole purpose in pursuing the negligent entrustment theory under the circumstances was that of getting before the jury the otherwise inadmissible evidence of the employee's prior driving record. However, they felt that the public policy against the employment of reckless truck drivers was so strong that the plaintiff should be permitted to proceed. The dissenting opinion points out that there really is no majority rule on this question since it has been dealt with by the appellate courts of only nine states.[5]

MASTER'S LIABILITY FOR SERVANT'S TORTS

The statement that the master is liable for the torts of his servant committed in the course of employment suggests two requirements to be proven by the third party plaintiff before the master can be held vicariously liable: The "his servant" or proof of agency requirement and "the course of employment" requirement. As to the latter, the Georgia Court of Appeals had little difficulty deciding in the case of *Brawner v. Martin & Jones Produce Co., Inc.*[6] that an employee was not in the course of his employment when driving his employer's truck, without permission or consent, to get himself a cup of coffee prior to regular working hours where such employee was not hired as a truck driver but as a combination stock man and janitor and had been instructed never to drive any of the employer's vehicles.

Two cases decided during the survey period illustrate that the Georgia courts are rather strict in requiring proof of an agency relationship, but not so quick to permit substitution of inferences or presumptions for

5. Perhaps an explanation for the relatively small number of cases dealing with the issue lies in the variety of theories, varying from state to state, one may pursue in seeking to recover damages from the owner of an automobile (or truck) for injuries caused by someone else while driving the vehicle. In some states there are bailor's liability statutes removing the need to establish any special vicarious liability relationship between the owner and the driver. Some states have adopted the family purpose car doctrine as a means of imposing liability upon the head of a family for the negligent driving of family members; others have rejected the doctrine. The master's liability for the torts of his servant committed in the course of employment seems universal. This leaves the owner's liability arising out of negligent entrustment as a sort of last straw to be grasped when liability cannot be established under any of the other theories. Since Texas has no bailor's liability statute and has rejected the family purpose car doctrine, it is not surprising that there are quite a few negligent entrustment cases in that state.

6. 116 Ga. App. 324, 157 S.E.2d 514 (1967).

proof. In *Cambron v. Cogburn*[7] neither the statement of the driver of the truck involved in a collision with plaintiff's vehicle that he was Jones' agent nor testimony that Jones had illegally permitted the use of Jones' dealer's tag on the truck was sufficient to establish a vicarious liability relationship between Jones and the truck drver. Similarly, in *Mullis v. Merit Finance Co.*[8] the statement of a finance company assistant manager made after he was involved in a Saturday evening automobile collision (seven hours after he "signed out" at the company office) that he was collecting and the fact that "a number of papers purporting to be delinquent account bills and types of forms were found in the front seat"[9] of the assistant manager's automobile involved in the collision were insufficient to establish the vicarious liability relationship.

During the period being surveyed two Georgia appellate opinions dealt with problems regarding the master's liability for his servant's intentional torts. In *Brown v. Triton, Inc.*[10] the plaintiff's action for malicious prosecution and false imprisonment failed as against the corporate employer since the plaintiff offered no evidence that the employee had acted within the scope of employment or that his acts were ratified by the corporate employer. In *International Brotherhood of Boilermakers v. Newman*[11] the plaintiff was more successful. Here the defendant-employer union was held not entitled to summary judgment because the evidence left open a question of facts as to whether or not union employees were acting within the scope of their agency when they dynamited a business owned by a non-union member who was employed at a plant being struck. The rule that a verdict finding the servant not negligent requires a verdict for the master also where the master's liability is based solely upon the doctrine of respondeat superior was applied to a peculiar procedural situation where the plaintiff was uncertain as to who was liable as the master in *Millhollan, Adm'x v. Watkins Motor Lines, Inc.*[12] The appellate court held that in view of the rule any error the trial court may have made with regard to the naming of the defendant-master in the pleadings was harmless error, since the jury had found the servant not negligent.

Parent's Liability for Child's Torts

As is perhaps best illustrated by the development of the family purpose car doctrine, the parent's liability for his child's torts is somewhat related to the master's liability for the torts of his servant. Apart from the family

7. 116 Ga. App. 373, 157 S.E.2d 534 (1967).
8. 116 Ga. App. 582, 158 S.E.2d 415 (1967).
9. *Id.* at 585-586, 158 S.E.2d at 418.
10. 115 Ga. App. 785, 156 S.E.2d 200 (1967).
11. 116 Ga. App. 590, 158 S.E.2d 298 (1967).
12. 116 Ga. App. 452, 157 S.E.2d 901 (1967).

car, however, the parent's liability is usually a matter of statute rather than common law. The Georgia statute which imposes liability on the parent for the "wilful and wanton acts of vandalism" of his children[13] was held inapplicable in *Sagnibene v. State Wholesalers, Inc.*[14] to a situation where a four-year-old shot the plaintiff with a pistol because "the child, being only four years old, was not capable of committing a wilful and wanton act."[15]

Torts of Independent Contractors

Three cases involving attempts to hold the employer liable for the torts of his independent contractor were decided by the Georgia appellate courts during the survey period. In two of the cases the general rule that the employer is not liable for the torts of his independent contractor was rather routinely applied. In these cases both an independent truck owner-driver transporting his employer's merchandise from Texas to North Carolina[16] and an automobile mechanic road testing a customer's automobile[17] were considered independent contractors. An unusual exception to the rule of employer's nonliability for the torts of his independent contractor[18] was applied by the Supreme Court of Georgia in *Woodside v. Fulton County*.[19] This was an action brought under the eminent domain provision of the Georgia Constitution[20] for damages done to private property in allegedly negligent highway construction work. One of the defenses advanced was that the negligence, if any, was that of an independent contractor and that the nature of the work did not come within any of the exceptions to the rule of non-liability of an employer for the torts of an independent contractor stated in the exclusive statutory list.[21] The court held that the statutory listing could not be exclusive as to a constitutional duty and therefore, "Fulton County and the State Highway Department cannot escape their constitutional responsibility to compensate for the taking or damaging of petitioner's property on the ground that the parties who did the actual taking or damaging were independent contractors".[22]

13. Ga. Code Ann. §105-113 (Supp. 1967).
14. 117 Ga. App. 239, 160 S.E.2d 274 (1968).
15. *Id.* at 242, 160 S.E.2d at 277.
16. Mathis v. Kimbrell Brothers Tire Service, 117 Ga. App. 399, 160 S.E.2d 855 (1968).
17. Pressley v. Wilson, 116 Ga. App. 206, 156 S.E.2d 399 (1967).
18. The usual exceptions are codified in Ga. Code Ann. §105-502 (Rev. 1956). The inherently dangerous work and statutory duty exceptions were discussed and found inapplicable in Pressley v. Wilson, 116 Ga. App. 206, 156 S.E.2d 399 (1967).
19. 223 Ga. 316, 155 S.E.2d 404 (1967).
20. Ga. Code Ann. §2-301 (Supp. 1967).
21. Ga. Code Ann. §105-502 (Rev. 1956).
22. 223 Ga. at 321, 155 S.E.2d at 409 (1967).

MASTER'S LIABILITY TO SERVANT

During the survey period the Georgia Court of Appeals handed down opinions in two Federal Employers' Liability Act[23] cases which serve to illustrate the workmen's compensation act nature of that federal statute. In *Southern Railway Co. v. Smalley*[24] the court reaffirmed its earlier decision[25] "that when a railroad provides shelter to an employee and at the time of an injury he is using the accommodation to rest and recuperate, he must be regarded as in 'the employ' of the railroad within the Federal Employers' Liability Act"[26] thus illustrating the broadness of the scope of employment concept under the act. In *Atlantic Coast Line Railroad Co. v. Daughterty*[27] the court interpreted a United States Supreme Court case[28] as requiring that in an FELA action "the state court should refrain from imposing additional pleading requirements based on local procedures which might be regarded as imposing an unnecessary burden on a litigant seeking to enforce a federal right through state court action"[29] to make the Georgia rule of strict construction against the pleader not applicable in this type of case.

By way of contrast, *Harrell v. Mayfield*[30] illustrates the rule that in a common law suit against the master for personal injuries the servant must affirmatively plead his own diligence and *Lacy v. Ferrence*[31] reminds us that the fellow-servant defense is still available to the master in such cases.

PRINCIPAL LIABILITY ON AGENT'S CONTRACTS

Perhaps in most cases where the principal's liability on a contract made in his behalf by his agent is disputed the main issue is the agent's authority to bind the principal. Often the principal finds himself liable on the basis of apparent authority, *i.e.*, authority which the principal did not expressly give the agent and which he probably did not intend for him to have but which he permitted the agent to appear to have as far as third persons are concerned. Usually there is no question in apparent authority cases except whether or not the one purporting to be acting for the principal was his agent. The question is not as to the existence of the agency but as to the extent of the agent's authority. The unusual case, that of the apparent agent with no real authority at all, came before the Georgia

23. 45 U.S.C. §§51-60 (1964).
24. 116 Ga. App. 356, 157 S.E.2d 530 (1967).
25. In an earlier appearance of the same case, Southern Ry. Co. v. Smalley, 112 Ga. App. 471, 145 S.E.2d 708 (1965).
26. 116 Ga. App. at 356-357, 157 S.E.2d at 532 (1967).
27. 116 Ga. App. 438, 157 S.E.2d 880 (1967).
28. Brown v. Western Ry. of Alabama, 338 U.S. 294 (1949).
29. 116 Ga. App. at 441, 157 S.E.2d at 884 (1967).
30. 117 Ga. App. 194, 160 S.E.2d 213 (1968).
31. 117 Ga. App. 139, 159 S.E.2d 479 (1968).

Court of Appeals during the survey period. In *Magyer v. Brown*[32] a former employee was permitted by defendant's manager to "hang around" defendant's used car lot. The manager never informed plaintiff, a prospective car buyer, that the former employee was just that but gave the plaintiff (Brown) the impression that he was one of defendant's salesmen. As a result of this misunderstanding, plaintiff paid part of the down payment on an automobile to the ostensible agent. The payment was never turned over to the defendant or his authorized agents or returned to the plaintiff. Brown then brought an action for money had and received. The court held that Brown was entitled to recover from the used car lot owner since under the circumstances he would be deemed in law to have received the money paid to his ostensible agent.

Principal's Liability for Agent's Misrepresentations

The case of *Bonner v. Cotton*[33] is perhaps noteworthy not so much because of its holding the principal responsible for his agent's false representations as for the remedy afforded the defrauded party. In this case the false representations related to the boundaries of a tract of land being sold by the principal. The circumstances were such that the jury properly found that the purchaser had exercised reasonable diligence.[34] The remedy asked and received by the purchaser was not money damages or recission but an equitable reformation of the deed to give him the property he had intended to purchase.

The Agent's Liability to Third Parties

The rule that for an agent to avoid personal liability he must disclose his agency was well illustrated during the survey period in the case of *Dinkler Management Corp. v. Stein*.[35] Here plaintiff was contacted by the food and beverage manager of the Dinkler Hotel in Atlanta and other Dinkler Corporation executives and asked to print menu cards for the Lucayan Beach Hotel. The Dinkler people neglected to tell him who to invoice for the printing job and he did not ask. The court held that under

32. 116 Ga. App. 498, 157 S.E.2d 825 (1967). The general rule regarding the principal's liability in the usual apparent authority cases was clearly restated during the survey period in General Acceptance Corp. v. Guintini, 115 Ga. App. 723, 155 S.E.2d 722 (1967).

33. 223 Ga. 843, 159 S.E.2d 61 (1968).

34. Whether or not the evidence was sufficient to support such a finding was one of the principal issues in the case. The court discussed it in some detail. 223 Ga. at 847-848, 159 S.E.2d at 63-64 (1968).

35. 115 Ga. App. 586, 155 S.E.2d 442 (1967). The somewhat related problem of the proper form for the agent's signature on a written instrument so as to clearly make the obligation the principal's rather than the agent's personal undertaking was involved in National Bank of Ga. v. Little, 115 Ga. App. 327, 154 S.E.2d 624 (1967).

well established common law agency principles the Dinkler Corporation could be held liable to the plaintiff for his services.

Rights and Duties as Between Principal and Agent

During the survey period two Georgia Court of Appeals decisions illustrated the risks to be assumed by an agent when he undertakes a dual agency. In *Siler v. Gunn*[36] a real estate broker sued a real estate purchaser for his commission. The purchaser counterclaimed alleging that the agent had acted as such for both buyer and seller and had violated a fiduciary duty to him as principal by misrepresenting the vendor's minimum price. A judgment in favor of the defendant on his counterclaim was affirmed. The court pointed out in its opinion:

> When a broker is the agent of the vendor only, and misrepresents to a purchaser the lowest price which the vendor will accept, and personally profits by the difference, the courts are divided on whether this represents an actionable wrong against the purchaser. But in the same situation, where there is evidence of a confidential or fiduciary relationship between the two, the courts generally hold the broker liable in damages to the purchaser for the misrepresentation. . . .[37]

In *Spratlin, Harrington & Thomas, Inc. v. Hawn*[38] a mortgage banking concern attempted to receive fees from both borrowers and lenders for its services rendered in arranging shopping center financing without disclosing the dual agency to the borrowers. After observing, "Of course dual agency per se is not against public policy but dual agency unknown to the principal is,"[39] the court held that the agent's statement that it represented various lenders was not sufficient to put the loan applicant on notice as to the dual agency and that the mortgage broker was not a mere middleman under the circumstances and affirmed a judgment denying the "double" agent any recovery of compensation.

Two cases decided during the survey period serve to remind us that employment contracts are basically just that, contracts, to be enforced according to their terms under general principles of contract law. In *Enloe v. Baker*[40] a real estate broker was held entitled to his commission under the terms of his contract with the vendor even though the vendor later refused to convey to the purchaser under the terms of the contract negotiated by the broker. Subsequent litigation and settlement as between the vendor and the purchaser had no effect on the broker's right to commission. In *Elliot v. Delta Air Lines*[41] the court simply applied the familiar

36. 117 Ga. App. 325, 160 S.E.2d 427 (1968).
37. 117 Ga. App. at 326-27, 160 S.E.2d at 428-29 (1968).
38. 116 Ga. App. 175, 156 S.E.2d 402 (1967).
39. 116 Ga. App. at 178, 156 S.E.2d at 406 (1967).
40. 117 Ga. App. 430, 160 S.E.2d 652 (1968).
41. 116 Ga. App. 36, 156 S.E.2d 656 (1967).

rule,[42] "An indefinite hiring may be terminated at will by either party," adding, "A rule of the employer that an employee will be discharged if his wages are garnished by a creditor does not alter the situation."[43]

Two years ago a survey writer described the case of *Otis v. Wren Mobile Homes, Inc.*[44] as a "novel decision".[45] In that case issuing a covenant not to sue to the agent was held not to bar pursuit of the action against the principal, even though the principal (or master) could be liable only under the doctrine of respondeat superior. One of the possibly undesirable effects of that decision, circuity of action, is illustrated by the recent decision in *Wren Mobile Homes v. Midland-Guardian Co.*[46] holding that the principal's right to be reimbursed by its agent for any loss it may have sustained as a result of the agent's misconduct is not affected by any covenant not to sue which the agent may have received from a third party (whose loss has become the principal's loss as a result of litigation). The court further found that the principal had not absolved the agent from liability by ratification of his misconduct since the acts of ratification were without knowledge of material facts.

NON-DELEGABLE DUTIES

It is generally assumed that everything that one may do himself he can not quite have an agent do for him. *Shield Insurance Company v. Kemp*[47] reassures us that filing a transcript of evidence as required by section 10 of the Appellate Practice Act[48] is a duty which the court reporter may delegate to an agent.

42. Codified in GA. CODE ANN. §66-101 (Rev. 1966).
43. 116 Ga. App. at 36, 156 S.E.2d at 656 (1967).
44. 111 Ga. App. 649, 143 S.E.2d 8 (1965).
45. Clark, *Agency, Annual Survey of Georgia Law,* 18 MERCER L. REV. 9, 11 (1966).
46. 117 Ga. App. 22, 159 S.E.2d 734 (1967).
47. 117 Ga. App. 538, 160 S.E.2d 915 (1968).
48. GA. CODE ANN. §6-805 (e) (Supp. 1967).