Introduction:

This course utilizes an electronic casebook, and we will cover three vital (and heavily tested) areas of the law: agency, partnership, and corporations (including LLCs). This syllabus will be religiously followed. Prior to most of the cases, there is a short discussion of some of the important points you should think about while reading each case. Thinking about and being ready to discuss these points is crucial to effective classroom learning.

In addition to the cases, you will choose a publicly traded corporation about which you will write a paper, worth 5% of your grade in the class. There will be a multitude of quizzes. Do not come to class unprepared; you will be required to leave if you do so. Students who are unprepared or who are absent without excuse more than twice, will have their final grade lowered.

Grading:

| Syllabus |
|---|---|
| **Class #01** | Introduction to the course. |
| **Class #02** | Demian v. Frank; Tormo v. Yormark; Bucholtz v. Sirotkin; Rowen v. Flushing; |
| **Class #03** | Cowan v. Eastern Racing; Miguel v. Linden; Wright v. Kelleher; Commission v. Town Taxi; Fortenbacher v. Commonwealth; |
| **Class #04** | Wing v. Lederer; Elliot v. Great National; Gizzi v. Texaco; |
| **Class #05** | Drummond v. Hilton Hotel; Hoddeson v. Koos Bros; |
| **Class #06** | Cullen v. BMW; Commission v. Roger Gray; Flynn v. Dugas; Bridge v. Futurity; |
| **Class #07** | 3A’s Towing v. P&A Well Service; Linkage v. Boston University; Colony of Wellfleet v. Harris; |
| **Class #08** | Thomas v. Ballou-Latimer; Shenn v. Fair-Tex; Pine River v. Mettille; Monge v. Beebe Rubber; |
| **Class #09** | Maddoloni v. Western Bus Lines; Siles v. Travenol Labs; Brockmeyer v. Dun & Bradstreet; |
Class #10  
Farr v. Newman; R & D Muller v. Fontaine’s; Southern Farm v. Allen; Sutton Mutual v. Notre Dame; Georgia Pacific v. Great Plains;  

Class #11  
Arthur Murray v. Witter; Devoe v. Cheatham; 1st American v. Rezatto;  

Class #12  
National Recruiters v. Cashman; Maryland Metals v. Metzner; BBF v. Germanium Power;  

Class #13  
Matter of Heinsheimer Meyer; Upgrade v. Michigan Carton; Williams v. Investors Syndicate; Gormley v. Wilkins;  

Class #14  
Kaufman-Brown v. Long; Martin v. Peyton;  

Class #15  

Class #16  
Meinhard v. Salmon; Meehan v. Shaughnessy; Gibbs v. Breed;  

Class #17  
Nabisco v. Stroud; Roach v. Mead; Prentiss v. Sheffel; Monin v. Monin; Johnson v. Kennedy; Dreifuerst v. Dreifeurst; 8182 Maryland Association;  

Class #18  

Class #19  
Introduction to Corporations;  

Class #20  
Smith v. Barlow; Bayer v. Beran; Shlensky v. Wrigley; Menard v. Dage-MTI; Burg v. Horn; Boylan v. Boston Sand & Gravel;  

Class #21  
Zempel v. Liberty; Walkovsky v. Carlton; Howie v Ikechukwuka; Seal- 

Land v. Pepper Source;  

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Kinney Shoe v. Polan; Bratz v. Arrowbar; My Bread Baking v. Cumberland Farms; Gardemal v. Westin Hotel; Philip Alan, Inc. v. Sar- 
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Class # 01

I. Overview of and Introduction to Classifying Agents

In your first year courses on Contracts and Torts, the cases you read were uncomplicated, at least for the most part. For example, A enters into a contract with B, and the issue is whether the contract is enforceable, because of the Statute of Frauds, or the issue is the proper way to calculate the plaintiff’s damages as a result of the breach. Or A negligently strikes B, and the issue is whether there was a duty owed, or the foreseeability of the damages incurred.

Toward the end of the semester in each of your Contracts and Torts classes, you were introduced to the doctrines of third party beneficiaries, assignment and delegation, and even respondeat superior. In the cases you read involving these concepts, the facts were more complicated, and the issues were more difficult to understand. But what was important about these cases was terminology. Once a party was classified as a third party beneficiary, or as a servant in a master/servant relationship, then liability became clear. In other words, you knew the rules, and the issue was simply how to classify the parties.

To a great extent, the same is true in agency relationships. Once you classify a person or entity, then the rest falls into place. With that as prologue, we can take a look at the cases.

Before continuing please thoroughly acquaint yourself with the Restatement of Agency, 2d, sections 1, 2, 4, 144, and 186, including the comments and illustrations thereto. The Restatement of Agency 2d is on reserve in the library, and is also available on Westlaw or Lexis.

END OF CLASS
Class # 02

Discussion points for Demian v. Frank

This case presents a typical international contracts business scenario. As you read it, try and classify Frank. Is he an agent, independent contractor, servant? What has he agreed to do? What is his job description? How much responsibility has he agreed to bear, either expressly, or by implication? Is it crucial to classify Sun? Keep in mind that if Sun is a subagent of Frank’s, delegation is only allowed if it is 1) authorized, 2) ministerial, 3), customary, or 4) necessary.

DEMIAN, LTD., Plaintiff-Appellant,

United States Court of Appeals, Second Circuit.


MANSFIELD, Circuit Judge:

In this diversity suit for damages for breach of a contract for services in the importation of men's leather and suede garments, plaintiff-appellant, Demian, Ltd. ("Demian"), the purchaser, appeals from a judgment of the Southern District of New York entered by Judge Charles L. Brieant in favor of the defendants, dismissing the complaint after a non-jury trial. We remand the case to the district court for further findings of fact, affirm the dismissal of Frank's counterclaim for commissions, and deny Frank's request for an award of costs, damages, and expenses, including attorneys' fees.

At all pertinent times Demian, a Pennsylvania corporation, was an importer of high grade men's leather garments for sale in the United States and Frank was a service organization with business acquaintances in the Orient. For a commission paid by American importers, Frank would locate manufacturers or sources of supply in the Far East and make arrangements for the manufacture of the goods in the Orient and their importation into the United States. To facilitate importation into the United States of goods made in Korea, Frank entered into an arrangement with K. C. Sun of Da Chong Hong Trading Co., Ltd. ("Sun") in Korea, whereby, for 50% of Frank's commission received for its services, Sun would locate
Korean manufacturers and, following Frank's instructions, do anything further required to effectuate the manufacture, sale and importation of goods purchased by Frank's American clients. One of these clients was Demian.

After approving samples of leather jackets to be manufactured in Korea by Koreanna Moulson, Ltd., a manufacturer located by Frank and Sun, who submitted the samples for consideration, Demian placed two orders with Sun for the purchase of two styles meeting the specifications of the samples. Pursuant to arrangements made by Frank, Demian forwarded to Korea letters of credit in favor of Koreanna, to be honored upon presentation of a certificate by Sun that it had inspected the shipment of the leather jackets made by Koreanna and found them to be of merchantable quality, meeting the sample specifications.

Unfortunately Sun did not properly perform its inspection duties, issuing a certificate that released the purchase price to Koreanna against jackets that did not meet the specifications. In June 1980 Demian brought the present suit against Frank for breach of contract, alleging that in return for commission payments Frank had agreed to:

"(A) Assist plaintiff in the designing of leather jackets which were to be manufactured in the Republic of Korea;
"(B) Arrange for the manufacture of said jackets in the Republic of Korea;
"(C) Inspect said jackets upon completion of the manufacturing to insure that they complied with the standards and specifications required by plaintiff, and in accordance with the terms of a Letter of Credit opened by plaintiff.
"(D) Perform all services necessary to accomplish the importation of the jackets into the United States."

Frank entered a general denial and counterclaimed for a 5% commission "for his services."

At trial Michael Driban, President and owner of Demian, testified that, after Charles A. Frank had described his qualifications and his extensive experience in locating Oriental manufacturers, arranging for their manufacture of goods and importing garments into the United States, they entered into an arrangement under which Frank was to "oversee any program we would enter from start to finish." Frank stated:

"Q What do you mean, from start to finish?
"A From the placing of the orders to making sure that the work was done in time, to make sure the garments were packed in time, that every step of the production process was followed through, that the skins arrived in time to be cut, that the cutting was done in time, that the sewing was done in time, that the skins, when they arrived, were first quality, that when all was said and one (sic), the garments were inspected. Evenness of color, quality of skin, sewing details, etc., were packed, the documents were completed in a satisfactory manner, and that it went out on a ship that would ultimately get to us in time to permit us timely deliveries to our customer, which was our responsibility."

With respect to responsibility for inspection of goods in Korea before release of Demian's letter of credit, Driban testified that Frank advised that full responsibility would be assumed by him or, if he was not in Korea at the time of shipment, by his "man in Korea," K. C. Sun, whom Driban had never met. On cross-examination by Mr. Frank, Driban testified:

"Q Did I ever represent to you as a guarantor of the factory-
"THE COURT: He said yes, you sure did. Why do you keep fooling around? Answer the question. "A You told me you would be personally or someone from your office would be responsible for the final inspection of those garments. Without a certificate certifying to that effect payment would not be made to the factory."

Frank's defense was that he acted merely as a broker, without assuming responsibility other than to bring the principals together. On his deposition, however, he testified that he entered into a relationship with Mr. Sun whereby Sun would perform numerous services for him in Korea, including location of factories, help in obtaining clients, manufacture of garments, and inspection, and that "(i)f there were requirements that a particular client had that I could not do for the clients because I was not there, he would do it." (App. 45A). Frank testified: "If I gave him instructions, he following them out.... Mr. Sun was to execute what I asked him to execute." (App. 47A).

At the close of the trial Judge Brieant, although he found that Frank's "services were totally useless" and he had been a malefactor who had engaged in "unconscionable" conduct, concluded:

"The most the proof shows, an agent was authorized by the principal to delegate a sub-agent and in the absence of some knowledge of it at the time of appointing Sun, that Sun was an improper person to be appointed, there is no liability, no vicarious liability when a sub-agent with the permission of the principal is appointed by an agent to work for the principal, and that is really what happened here with K. C. Sun. 
"... there is no joint venture because, in order to have a joint venture, there must be an agreement proved to share losses and profits. 
"... When two persons could broker in effect like that, neither one becomes the agent for the other, and Mr. Frank does not, by the facts of this case, become the person vicariously liable for the sins and omissions or defaults or delicts (sic) of K. C. Sun, and that is what is sought to be shown here in this case." (App. 37A-38A). Accordingly the court entered judgment dismissing the complaint. Finding that Frank's services were worthless, he also dismissed its counterclaim for commissions, without costs to either side.

DISCUSSION

(1, 2) We do not question the district court's finding that no joint venture existed between the parties since there is no evidence of profit or loss sharing between them, which is essential to recovery on a joint venture theory.... Under the law of agency Frank's liability to Demian for Sun's improper certification turns on whether Sun was employed as Frank's subagent to perform his duties as Demian's agent or as an independent agent of Demian for which it would assume responsibility. If Sun was Frank's subagent, Frank would be liable to Demian for the subagent's conduct. 2 Restatement (Second) of Agency, s 406.

"s 406. Liability for Conduct of Subagent
"Unless otherwise agreed, an agent is responsible to the principal for the conduct of a
subservant or other subagent with reference to the principal's affairs entrusted to the
subagent, as the agent is for his own conduct; and as to other matters, as a principal is for
the conduct of a servant or other agent." Id. 252.

On the other hand, if Sun was not a subagent but a separate agent acting solely for Demian,
Frank would not be liable. Restatement (Second) of Agency, §§ 5, 405.

§ 405. Liability for Conduct of Other Agents

"(1) Except as stated in Subsections (2) and (3), an agent is not subject to liability to the
principal for the conduct of other agents who are not his subagents.

"(2) An agent is subject to liability to the principal if, having a duty to appoint or to
supervise other agents, he has violated his duty through lack of care or otherwise in the
appointment or supervision, and harm thereby results to the principal in a foreseeable
manner. He is also subject to liability if he directs, permits, or otherwise takes part in the
improper conduct of other agents.

"(3) An agent is subject to liability to a principal for the failure of another agent to perform
a service which he and such other have jointly contracted to perform for the principal." Id.
251.

Here we need not speculate as to the nature of the legal theory asserted by Demian as the
basis for its claim against Frank. It does not ask the court to infer from the circumstances
that Sun must have been Frank's subagent rather than an independent agent procured by it as
a broker. It claims that Frank breached an express agreement with it to inspect the jackets
upon completion of the manufacture "to insure that they complied with the standards and
specifications required by plaintiff, and in accordance with the terms of the Letter of Credit
opened by plaintiff." (Compl. Par. 6(C)). Under such an agreement Frank would be
obligated either personally to inspect the manufactured jackets or to see to it that they were
properly inspected by Sun and to issue a certificate or have Sun do so only if they conformed
to the samples approved by Demian, which they admittedly did not. If Frank failed to
perform these promises and allowed substandard jackets to be certified, he would under
elementary principles of contract law be liable in damages to Demian regardless of any joint
venture or subagency theory of liability.

(3) The district court does not appear to have considered this issue of whether Frank
expressly entered into an agreement with Demian to inspect properly and made no findings
with respect to such an agreement. If there were no supporting evidence, we might let stand
the dismissal of this claim for breach of an express contract. But here the record contains an
abundance of testimony by Driban to the effect that Frank agreed to insure that Sun, whom
Frank described as his "man in Korea" who followed Frank's "instructions" and who would
"execute what I asked him to execute," would make a proper inspection and issue a
certificate only if the jackets conformed to Demian's specifications. Nor does Judge Brieant
appear to have discredited Driban as a witness. Indeed at one point he appears to have
accepted Driban's testimony that Frank represented himself to be a "guarantor." Judge
Brieant's characterization of Mr. Frank, on the other hand, indicates some doubt as to his
reliability. The finding that Frank's services were worthless and in violation of his
contractual obligations, disentitling him to a commission, is supported by the record and not clearly erroneous.

In view of these circumstances we vacate the judgment dismissing the complaint and remand the case to the district court for further proceedings, findings, and decision.

Discussion points for Tormo v. Yormark

As future lawyers, this case should be of the utmost importance to you, because it focuses on whether an attorney is going to be liable for the torts of someone else. And again, the question comes down to one of classification. What were Devlin’s responsibilities for his client? How would you classify Yormark? Subagent? Co-Agent? Does it matter that Devlin performed his services pro bono? Is it true that a scumbag is a scumbag is a scumbag? Is it reasonable to trust a person convicted of tax fraud with the job of babysitting your kids? Is it reasonable to trust a pedophile with delivering packages to your clients? Are attorneys held to a higher standard than other professionals?

Another issue which sometimes arises is the agent’s authority to redelegate. The general rule is that there is no authority to redelegate. But within actual authority you have implied authority, so that courts have held that delegation by an agent is acceptable if the delegated task is merely “ministerial,” as opposed to discretionary, or if it customary for agents in similar situations to delegate their tasks. So, if you go to a well respected lawyer in a big law firm, whom do you think is going to do the bulk of the work on your case? Can you avoid such a result?

Karen Wendel TORMO and Henry Wendel, Plaintiffs,
v.  
Milton YORMARK et al., Defendants.  
Plaintiffs,
v.  
Edward DEVLIN, Third-Party Defendant.  

United States District Court, D. New Jersey.  

May 12, 1975.  

OPINION  

COOLAHAN, District Judge.
This case raises questions concerning a New York attorney's liability for negligence in transferring his clients' personal injury case to a criminally indicted New Jersey lawyer who subsequently embezzled the clients' funds. The questions arise on a motion for summary judgment by third-party defendant Edward Devlin, the New York lawyer, against defendants-third-party plaintiffs Fidelity Union Trust Company (Fidelity) and Keene National Bank (Keene).

Pertinent procedural history may be briefly summarized. Devlin's clients, plaintiffs Henry Wendel and Karen Wendel Tormo, brought the main action against six defendants to recover $148,997, the face amount of an instrument issued to settle the personal injury suit and wrongfully converted by Milton Yormark, the New Jersey lawyer consulted by Devlin. Against Fidelity, the depository bank, and Keene, a collecting and presenting bank, plaintiffs alleged causes of action for conversion under section 3-419(1) of New Jersey's Uniform Commercial Code, N.J.S.A. 12A:1-101 et seq. In addition, they alleged against Fidelity alone a cause of action for negligence based on its failure to take reasonable measures to discover whether Karen's endorsement on the draft was genuine. The banks in turn filed a third-party complaint for either contribution or indemnity against Devlin based on negligence toward his clients in selecting and failing properly to supervise Yormark. Procedural facts unrelated to the present motion are set forth in the margin.

Facts pertinent to Devlin's role in this case are confused and conflicting. A chronological history must begin on July 5, 1968. On that date Karen Tormo, then an unmarried infant and a citizen of New York, was involved in a boating accident in Dover Township, New Jersey. Shortly afterward, Karen's father, Henry Wendel, consulted Devlin concerning the matter. Devlin, whom Wendel had often consulted concerning his business affairs, visited the Wendel home on July 20 to discuss the incident. Although no retainer agreement was executed, and Devlin's fee was not discussed, Devlin agreed to see what could be done with regard to settlement of Karen's claim. Devlin Deposition at 10; see Wendel Deposition at 8-9.

Devlin initially learned of Yormark several days later through Yormark's telephone call to his office. Representing that he was 'familiar with the accident,' Yormark requested a personal meeting. Devlin Deposition at 18. Devlin agreed. Yormark, accompanied by an associate, met Devlin at the Kings County Courthouse in Brooklyn on July 23, 1968. He informed Devlin that 'he and/or his representatives had discussed (the accident) with the Wendels and they had secured (Devlin's) name.' Id. at 18. Explaining that he was a 'negligence specialist,' id. at 25, Yormark indicated that he was interested in handling the case. Id. at 20. Devlin declined this 'offer,' but promised to 'consult him later if something developed.' Id.

Devlin's testimony indicates that he informed Wendel of the incident several weeks later. Wendel, however, apparently could not recall having met Yormark. His response, according to Devlin, was 'I had a lot of people in the home' after the accident. Id. at 21. Wendel's testimony indicates that he had never conferred with Yormark and that Devlin never informed him of the meeting. Wendel Deposition at 10-11.
By June 1970, Devlin had not settled Tormo's accident claim, and she had married, changed her residence to Spain, and obtained Spanish citizenship. Since New York was no longer a proper venue for the action, see 28 U.S.C. § 1391(a), and since Devlin was not licensed to practice outside New York, he contacted Yormark, requesting that he bring suit in New Jersey. Whether either Wendel or Tormo actually participated in Devlin's decision is disputed. Devlin testified that he advised Wendel of his action 'when the matter was referred to Yormark.' Devlin Deposition at 23. Wendel's testimony flatly contradicts Devlin. He stated that Devlin failed to advise him of his decision until January 1971. At that time, moreover, Devlin allegedly stated that Yormark was a 'good well-qualified lawyer.' Wendel Deposition at 55-56.

Yormark, meanwhile, had been indicted in 1969 in Essex County, New Jersey, for conspiring fraudulently to obtain money from an insurance company. He was subsequently convicted in January 1971, sentenced the following month to two consecutive 18-month prison terms, and disbarred in February 1972. The facts concerning Yormark's criminal misadventure received coverage in the New Jersey press, but Devlin never discovered them until after Yormark had fully executed his scheme. Devlin Deposition at 26. Prior to consulting him, Devlin's only independent inquiry into Yormark's reputation consisted of ascertaining that he was listed as a licensed New Jersey attorney in a lawyer's directory. Id. at 25.

Devlin's testimony indicates that he believed his responsibilities terminated as a result of the transfer. He notified Wendel that 'Mr. Yormark was going to handle the case,' id. at 39, but never expressly advised him that he considered his own role to have ended. Id. Wendel's testimony indicates that he never understood that to be true. After the transfer, he testified, he contacted Devlin at least twice monthly concerning the case, Wendel Deposition at 19, and Devlin repeatedly assured him that it was progressing well. Id. at 48. Devlin admitted these conversations, but stated that never was any reference made as to his responsibilities in the matter. Devlin Deposition at 39.

Devlin, at any rate, never consulted Yormark concerning resolution of the case after the transfer. Yormark communicated nearly exclusively with Tormo in Spain. Tormo, in turn, communicated with Wendel, and Wendel with Devlin. In early 1971 Yormark communicated a $150,000 offer of settlement to Tormo. She mailed him a letter indicating her willingness to accept that figure in February 1971. In March, misrepresenting to her that he needed further evidence of her intent, he induced her to sign a release. The release was delivered personally by one James Clare, an attorney for the insurance company whose services Yormark had solicited. Clare acted as a witness to the signing. Tormo neither read the document, see Tormo Deposition at 53-54, nor retained a copy for her records. Id. at 26.

Wendel's testimony indicates that he advised Devlin of her signing this document, which he described as 'needed for Mr. Yormark to prove that he wasn't bluffing.' Wendel Deposition at 43. Wendel could not recall if he described Clare's role in the incident, id. at 50, and there is no indication that Devlin was advised of Tormo's February letter to Yormark. But, Wendel
stated, Devlin expressed concern about the nature of the document and indicated that he would investigate the matter. Id. at 50-51. Tormo, further, testified that Devlin telephoned her to obtain a copy of the instrument, but she never complied because she had no copy herself. Tormo Deposition at 25. Devlin's testimony indicates that the call to Tormo never occurred, see Devlin Deposition at 60-61, but that Wendel 'may have' advised him that his daughter signed a letter evidencing her willingness to settle. Id. at 62.

Shortly after the release was signed, the insurance company delivered two drafts totaling $150,000 to Yormark. Yormark, who was then appealing his conviction, and who had apparently been experiencing financial difficulties for several years, forged Tormo's endorsement on the larger draft for $148,997. After depositing the item in a trustee account which he maintained at Fidelity, he immediately applied a substantial portion of the proceeds to his own use. See Askin Deposition Testimony at 89.

Tormo contacted him five weeks later concerning settlement developments. He assured her that all was well. Tormo Deposition at 29. In July 1971, while visiting her family in New York, she and Wendel met personally with Yormark. Yormark explained that three insurance companies involved in the settlement were debating their respective liabilities. Summer vacations, he warned, would further delay payment. Id. at 32. Wendel's testimony indicates that he communicated the substance of this meeting to Devlin. Wendel Deposition at 70. He purportedly complained of the delay involved, but he conveyed to Devlin no suspicion concerning Yormark. Id. Devlin's testimony indicates that this conversation never occurred. Devlin Deposition at 64-65.

After Tormo returned to Spain, she contacted Yormark nearly monthly. He put her off with similar excuses. In March 1972 she was unable to reach him at his office. Devlin, upon being apprized of this by Wendel, contacted Yormark's office and discovered he had disappeared. His investigation then revealed Yormark's embezzlement scheme.

[3][4] Devlin's initial contention is that 'it is not at all clear that (he) was involved in an attorney-client relationship with the plaintiffs.' He points out that a formal retainer agreement was never executed and a fee never paid. But the law of New Jersey imposes the duties incident to such a relationship on one who merely 'assumes to give legal advice and counsel.' **** Neither contractual formality nor compensation or expectation of compensation is required. Devlin does not contend that his promise 'to see what could be done with regard to settlement' was an agreement to perform services nonlegal in character. That undertaking was sufficient as a matter of law to impose upon him the duties owed by an attorney to his clients in his relationship with the Wendels.

[5] Devlin next asserts that proof of the fact that Yormark was indicted at the time of the referral is not evidence of negligence because there is no proof that he had actual knowledge of the fact and, being a New York lawyer, the knowledge cannot reasonably be imputed to him. This assertion has merit. Although the Court finds Devlin was under a duty of care in selecting Yormark to prevent harm subsequently caused by Yormark's criminal misconduct, Devlin could not be found negligent, after verifying Yormark's assertion that he was a
licensed practitioner, simply for failing to inquire further into Yormark's reputation for honesty.

[6][7] An actor generally has no duty to use care to prevent harm to another through the criminal acts of third parties not subject to his control. But excepted from this rule is a defendant who expressly assumes such a duty. An agent who is authorized to employ other agents to handle his principal's affairs, moreover, is under a duty to select competent and otherwise proper agents. Restatement, Agency 2d § 405(2). Thus he might be liable to his principal for loss caused by the other agent's intentional wrongs if the harm were proximately caused by the employing agent's negligence. See id. Prosser, furthermore, has suggested that

there are other situations in which the defendant will be held liable because his affirmative conduct has greatly increased the risk of harm to the plaintiff through the criminal acts of others. The defendant may bring the plaintiff into contact with individuals of known criminal tendencies, as for example, by hiring them, under conditions in which the opportunity for crime is afforded.

[8] Although unaware of New Jersey case law in point, the Court assumes that New Jersey courts would follow these general authorities and apply them to find that Devlin was under a duty to exercise care in retaining Yormark to ensure that he was competent and trustworthy.

[9][10][11] A jury which believed Wendel's testimony could find that the duty arose from Devlin's express representations as to Yormark's qualifications. It arose, at any rate, as a matter of law both from Devlin's duties as an agent toward his principal and from his affirmative conduct in bringing his clients into contact with a person of previously unknown character under circumstances affording the opportunity for crime. But in setting a standard of conduct required to fulfill that obligation, a distinction must be drawn between Devlin and an allegedly negligent New Jersey lawyer. Although expressing no opinion as to the latter, the Court believes it would be unfair to require a New York practitioner referring a case to New Jersey counsel to know facts concerning him which are notorious only within New Jersey. Yormark's indictment was reported by the New Jersey press, but there is no evidence that it was given wider coverage. Devlin ought not be deemed negligent for failing to discover that fact absent proof of the latter sort. A contrary conclusion would subject out-of-state lawyers to possible liability for negligence for failure to consult not only a New Jersey lawyer's personal references and the legal ethics committee in the county in which he practices, but also the offices of local prosecutors. Yet a reference may be unaware of an attorney's criminal misadventure, and proceedings before the State's committees on ethics are required to be kept confidential. See N.J.R. 1:20-3(b). Thus the burden of these additional inquiries greatly exceeds the risk that a referring attorney may cause harm to his client by entrusting his affairs to a lawyer who is known to be licensed by the State. And consultation with a prosecutor would, as a practical matter, simply never occur to an actor in Devlin's position. To impose such a burden on a party who neither holds himself out to the public as a referral agent nor, presumably, derives substantial income from transferring his client's business to other counsel would be unfair. Devlin relied, in making the referral, upon the
State's judgment that Yormark was fit to practice law. State regulation of the legal profession is extensive, designed both to screen unqualified candidates at the outset, see N.J.R. 1:25 (duties of Committees on Character), and to ferret out the unfit thereafter, see N.J.R. 1:20-2 (powers and duties of committees on ethics). Under the circumstances, he could not be found negligent simply for failing to make further inquiries into Yormark's background.

But even if as a matter of law Devlin was not required to know of Yormark's indictment, that conclusion does not resolve entirely the question whether a jury might find him negligent in retaining the New Jersey lawyer. Devlin's testimony shows that Yormark informed him that he had obtained his name through Wendel. But that testimony raises a question whether Wendel consulted Yormark or his 'representatives,' or whether the opposite was true. As an attorney, Devlin was required to realize that the latter situation would constitute a breach of the Code of Professional Responsibility. See DR 2-103(A), (B). The offense of soliciting legal employment from laymen constitutes a ground for disbarment. It evidences a lawyer's unworthiness of the trust and confidence essential to the attorney-client relationship. An attorney who knowingly entrusted his client's business to a lawyer who he had reason to believe was guilty of that offense would be clearly negligent either in making the referral at all, or in doing so without advising his client of his suspicions.

[17] But there remains a question whether any legal principle precludes Devlin's conduct from being a proximate cause. Generally an actor's negligence, even if creating the opportunity for crime, cannot be a proximate cause of injury sustained by a third party's criminal wrong unless the actor should have realized both that the opportunity would be created, and that a third person might avail himself of it. See Restatement, Torts 2d § 448. The issue here is not whether Devlin should have realized that an opportunity for some crime had been created, for he placed a person of doubtful character in a fiduciary relationship with the plaintiffs; he entrusted him with authority to negotiate their affairs and to receive property on their behalf. The issue, rather, is whether Devlin ought to have realized that Yormark would seize that opportunity to embezzle his clients' funds. Conceivably, Devlin had no reason to believe that, because Yormark had resorted to unethical practices to obtain clients, he might also resort to embezzlement to obtain their property.

But no rule of logic or principle of policy would be served by thus fragmenting the nature of the risk created. If prudence requires an attorney to refrain from entrusting his client's case to another lawyer who may be guilty of 'touting' or employing 'runners,' this is so not because the practice of touting itself presents a particular risk of harm to the client. Rather, it is true because the ethical violation evidences a general lack of trustworthiness. So all conduct amounting to a breach of fiduciary trust-- whether it be embezzlement, fraud, or dealing in the client's property for one's own benefit-- must be considered within the risk making the conduct negligent. Such conduct is both a risk foreseeable to the actor and a consequence for which he may justly be held liable. A different case would be presented if the alleged 'touter' caused injury to his client by a criminal assault. But those facts are not before the Court.
Devlin's last contention concerning his own negligence is that, under the facts of the case, all plaintiffs' causes of action against him would be barred by their ratification of his decision to retain Yormark. He rests this sweeping assertion on Wildermann v. Wachtell, 149 Misc. 623, 267 N.Y.S. 840 (Sup.Ct. Trial Term 1933). In Wildermann defendant Wachtell, a New York attorney, was consulted by the plaintiff concerning an unliquidated claim against the executors of a Pennsylvania estate. The attorney advised the plaintiff that Pennsylvania counsel would have to be retained to bring suit in that State and recommended Gumbes for that purpose. The plaintiff agreed that Gumbes should be retained and signed a formal agreement employing both Gumbes and the defendant. Gumbes thereafter negligently failed to file a timely lis pendens in Pennsylvania and plaintiff's judgment, when finally secured, was worthless.

The court found expressly that 'Wachtell himself was not negligent either in retaining Gumbes or in assuming that Gumbes would take care of filing the necessary lis pendens in Pennsylvania.' 267 N.Y.S. at 841. The issue framed for decision was whether an attorney, having retained a Pennsylvania attorney to bring a Pennsylvania suit, 'becomes ipso facto liable for any negligence of the foreign attorney, even though the client has been informed of the necessity and reason for the retainer and has approved the course and choice of attorney.' Id. The court answered this question negatively, reasoning that a contrary conclusion would burden a practicing attorney with 'hazards which he is not qualified either to anticipate or to prevent.'

In accordance with parts I and II of this opinion, Devlin's motion for summary judgment is granted on that portion of third-party plaintiffs' claim alleging negligence in failing to discover the indictment pending against Yormark at the time of the referral. In all other respects, the motion is denied.

Discussion points for Bucholtz v. Sirotkin

We have all at one time or another used travel agents (or other intermediaries) to assist us with our travel plans. What were their responsibilities? How much risk were they taking? How much do they really know about the planes or trains or ships they book us passage on? How much should they know? How much do they get paid for their services? Should that matter? How much should we know? Be honest. What about your dry-cleaning service? Do they do their work on premises, or do they send your clothing out to a big dry-cleaner somewhere else? Should liability for a spot on your collar depend on these facts?

Before continuing please thoroughly acquaint yourself with the Restatement of Agency, 2d, section 3, including the comments and illustrations thereto. The
Restatement of Agency 2d is on reserve in the library, and is also available on Westlaw or Lexis.

Helen BUCHOLTZ, Plaintiff-Respondent,

v.

SIROTKitN TRAVEL, LTD., Defendant-Appellant.

Supreme Court, Appellate Term, Ninth and Tenth Judicial Districts.


PER CURIAM.

Judgment affirmed without costs.

In this Small Claims action, plaintiff seeks to cast defendant travel agency into damages for reservations that went awry. Since it is undisputed that the travel agency had utilized the services of a wholesaler who had put together a 'package tour,' defendant contends on this appeal that the wholesaler alone is liable for any default in performance.

[1][2] Allocation of responsibility in the case before us should proceed upon the principles of agency law. In our opinion, where, as here, there is no proof of an independent relationship between the retail travel agent and the wholesaler, the travel agent should be considered the agent of the customer. If, in using a wholesaler to make the travel arrangements, the travel agent acts with the consent, express or implied, of the principal-customer, then, if reasonable diligence has been used in its selection, the travel agent will not be responsible for any dereliction of duty on the part of the wholesaler. If, on the other hand, the travel agent acts without such consent, he will be responsible to the customer for any damage sustained as a result of the acts of the wholesaler.

[3][4] The court below, in applying these principles, found that the plaintiff did not consent to the employment of the wholesaler. Although its opinion did not so state, the record indicates that the court also declined to hold that knowledge of the practice of employing wholesalers should be imputed to the plaintiff. We see no reason to disturb this determination. The record supports a finding that plaintiff was not informed of the existence of the wholesaler until after the reservations were agreed upon and it cannot be said that knowledge of this practice is so pervasive among the public as to compel a finding of implied consent.

We find no merit in defendant's remaining contention.
Discussion points for Rowen v. Flushing

Not all agents are created equal. For the sake of simplicity, there are two types of agents. The first are general agents. These agents have what is known as “continuity of service” for their employer, the principal. Special agents do not have continuity of service. They are hired to conduct a single transaction. Ultimately, whether you can sue the principal for the acts of the agent depends once more on classification. Stated another way, be careful of special agents, because they possess limited power to bind their principals.

In this case, as in all cases involving contracts between agents and third parties, you have to consider the “reasonable expectations” of the third parties. In short, when dealing with agency law, courts will almost always strive to protect the reasonable expectations of third parties who contract with agents. And this should make sense to you. If agents are to be allowed to act for principals, then third parties should be able to safely rely on the validity and enforceability of their contracts with agents, provided their reliance is based upon “reasonable expectations” (those words again).

So ask yourself, how reasonable was Rowen and Blair, the builder? What assumptions did they make, and should they have made the assumptions they made? Were their assumptions reasonable? Familiarize yourself with the concept of mechanics’ liens in Massachusetts. And note that “reasonable expectations” theory does not apply to torts by agents. Stated another way, you can choose with whom you contract, but you don’t get to choose the owner of the truck which smashes into your nice new car on Route 495. Finally, note the discussion of “apparent authority” which we discuss in depth later, but is subsumed under “reasonable expectation” theory.

Before continuing please thoroughly acquaint yourself with the Restatement of Agency, 2d, section 219, including the comments and illustrations thereto. The Restatement of Agency 2d is on reserve in the library, and is also available on Westlaw or Lexis.


14
KAUFMAN, Judge.

Plaintiff appeals a decision of the Kalamazoo County Circuit Court, which, following a bench trial, refused to impose a mechanics' lien on a building owned by defendant Flushing Operating Corporation (Flushing). We affirm.

The building in question was leased by Flushing to Dutch Treat Bakers, Inc. (Dutch Treat). Dutch Treat desired to expand its operations by acquiring the property but could not finance the acquisition. As a result, Dutch Treat entered into negotiations with Flushing which decided to purchase the building and its plot of land and lease it to Dutch Treat. Flushing leased the realty to Dutch Treat on July 2, 1969, for a term of ten years, commencing October 1, 1969. During negotiations, Flushing and Dutch Treat determined that approximately $45,000 would be needed to renovate the building to serve as a wholesale bakery. As a result, the lease contained a provision for leasehold improvements:

'The landlord has agreed to expend the sum of forty-five thousand dollars ($45,000.00) for improvements to the leased property and for replacement of fixtures as may be required. The alterations, additions and improvements as made with the subject $45,000.00 shall be described in detail by the tenant and a list thereof attached to and made a part of this lease agreement as an exhibit hereto. Any alterations, additions and improvements made, whether from the funds advanced by the landlord or paid for by the tenant, as well as any fixtures, shall immediately become the property of the landlord and at the end or other termination of this lease shall be surrendered to the landlord, with the exception that the moveable personal property and moveable trade fixtures put in by the tenant at the tenant's expense may be removed on or before the expiration or termination of this lease.'

At trial, the testimony presented indicated that, at the time of signing, figures were attached to the lease estimating future repairs to be; structural, $30,000; electrical, $10,000; miscellaneous, $5,000. The list was apparently lost and could not be produced at trial.

Plaintiff, one of a number of contractors hired by Dutch Treat, pursuant to an oral agreement with Dutch Treat, began electrical work on the building early in July, 1969. A letter agreement embodying the oral terms was prepared by plaintiff and sent to Dutch Treat on October 9, 1969. It was not signed until April 6, 1970. In the meantime, Dutch Treat was making progress payments to plaintiff on a 'cost-plus' basis. Dutch Treat sent plaintiff's first invoice to Flushing which issues a check for $7,040.35 payable to plaintiff and Dutch Treat. This check was endorsed by Dutch Treat and turned over to plaintiff.
This was the first time that plaintiff had any knowledge of or contact with Flushing. Plaintiff's employees noted Flushing's check but did not attempt to ascertain Flushing's position. They assumed that Dutch Treat owned the building.

On December 23, 1969, Flushing sent its last check for leasehold improvements to Dutch Treat because the $45,000 contractual limit had been reached through progress payments to plaintiff and the other contractors. At that time, Dutch Treat was behind in its rental payments, and Flushing, by applying the arrears to the rental payment account, used up the remainder of the account. Dutch Treat itself later made two $5,000 payments to plaintiff on March 30 and May 13, 1970.

On May 27, because of a growing indebtedness to plaintiff and the resultant pressure, officers of Dutch Treat signed a 9 per cent demand note for $40,872.48, the amount of the debt. On May 20, plaintiff had also filed a statement of account and lien with the Register of Deeds. Both Flushing and Dutch Treat were named but no notice was served on Flushing within the 10-day period prescribed by M.C.L.A. s 570.6; M.S.A. s 26.286. Nor had plaintiff served the requisite notice of intention to claim a lien on Flushing within 90 days of the first furnishing of labor, M.C.L.A. s 570.1; M.S.A. s 26.281.

Plaintiff completed work on May 13, 1971, and timely filed the requisite statement with the register of deeds to establish a mechanics' lien against the property occupied by Dutch Treat. Plaintiff claimed that $39,033.50 remained unpaid. A suit to foreclose the lien was begun on May 3, 1971. After this Court reversed a summary judgment for defendant, Rowen and Blair Electric Co. v. Flushing Operating Corp., 49 Mich.App. 89, 211 N.W.2d 527 (1973), a bench trial was held.

The trial court held that plaintiff was entitled to judgment against Dutch Treat for the full amount of the May, 1970, promissory note plus interest. However, after the suit had commenced Dutch Treat had gone bankrupt and had been liquidated. Thus, the crucial issue was the validity of plaintiff's lien against the building, still owned by Flushing. The building was then empty because several creditors had repossessed Dutch Treat's machinery.

The trial court held that the lien was valid against Flushing. It held that plaintiff's failure to give statutory notice to Flushing was not fatal because it found an agency relationship to exist between Dutch Treat and Flushing. Notice to Dutch Treat, the agent, was held to provide notice to Flushing, the undisclosed principal. Merithew v. Bennett, 313 Mich. 189, 193, 20 N.W.2d 860 (1945). The court also held that no apparent authority was present.

However, Flushing's liability was held to be limited to the extent of the authority given to Dutch Treat. The court held that such authority was limited to $10,000. This was the amount allegedly specified for electrical repairs on the Flushing-Dutch Treat lease. Plaintiff had already been paid $17,040.35, an amount in excess of this limit. The court further held that plaintiff had failed to carry the burden of proof which required plaintiff to demonstrate that it was owed money for work other than the electrical job.
On appeal, plaintiff raises two claims of error: ***** Defendant Flushing contends on appeal that the trial court's finding of agency was erroneous. Flushing's claim, however, was not properly raised by a cross-appeal, GCR 1963, 807.1, and we do not consider it.

*****

Although we have held that the trial court was in error in requiring enhancement, we affirm its decision because of our holding on plaintiff's second appellate issue. The trial court found an agency relationship between Flushing and Dutch Treat. It held that Dutch Treat's authority to contract with plaintiff was limited to $10,000.

[6][7] In this case Dutch Treat was acting as a special agent to an undisclosed principal. A special agent is 'an agent authorized to conduct a single transaction or a series of transactions not involving continuity of service'. Restatement of Agency 2d, s 3, p. 15. A special agent can bind an undisclosed principal only with contracts made within the scope of his authority.

The $10,000 figure was the sum estimated by Flushing and Dutch Treat as the amount required for electrical work. We do not agree that this was the correct limitation on Dutch Treat's agency. This sum was only an estimate as to how much electrical work might be done. It was apparently appended to the contract as an exhibit pursuant to a contract clause. That clause, however, required that

"The alterations, additions and improvements As made with the subject $45,000 shall be described in detail by the tenant and a list thereof attached to and made a part of this lease agreement as an exhibit hereto." (Emphasis supplied.)

The $10,000 was only an estimate, not a statement of an amount actually expended or an improvement actually made.

[8][9] We find, instead, that the agency was limited to an expenditure of $45,000 for all improvements, alterations and additions. This was the figure negotiated by the parties to the lease and specifically made part of the lease. Before this amount was reached plaintiff was paid with a check from Flushing. After $45,000 was expended, Dutch Treat itself paid plaintiff $10,000. A mechanics' lien is based entirely on the contract between the parties. As principal and lessor, defendant Flushing's lien liability on the contract between lessee Dutch Treat and plaintiff is limited to the portion made by Dutch Treat within the scope of its agency. The Restatement of Agency 2d, s 195A, provides that:

'A special agent for an undisclosed principal has no power to bind his principal by contracts or conveyances which he is not authorized to make unless:

(a) the agent's only departure from his authority is

(i) in not disclosing his principal, or

(ii) in having an improper motive, or

(iii) in being negligent in determining the facts upon which his authority is based, or

(iv) in making misrepresentations; or

(b) the agent is given possession of goods or commercial documents with authority to deal with them.'
[10] In the instant case, Dutch Treat's actions do not fall within either of the exceptions. The agent's departure from authority here would have been exceeding the monetary limit of that authority and not disclosing the principal. Plaintiff cannot bind defendant Flushing beyond the authority granted by Flushing to Dutch Treat. This authority expired on December 23, 1969, when the $45,000 limit was surpassed. The debts claimed by plaintiff in the instant action arose after that date.

We recognize that this is an unfortunate case where, through no fault of its own, either the plaintiff or the defendant will be subject to a monetary loss. Because of Dutch Treat's bankruptcy, plaintiff's sole remedy has become the mechanics' lien. That lien is, however, an extraordinary remedy, one designed as an alternative to a suit for damages and one to be applied narrowly. Additionally, plaintiff had a demand note from Dutch Treat but failed to negotiate it. These facts present an apparent clash between the purposes of the mechanics' lien law and principles of agency law. This is not a case where defendant used an agent in an attempt to circumvent the lien law. If it were, we would have no trouble applying the lien law.

Because the lien is completely dependent on the underlying contract, plaintiff unfortunately cannot recover from defendant. The contract was a cost-plus agreement, one to be paid as the work progressed. It was not a lump sum payment. Apparently, the other contractors were paid on a similar basis. Defendant carefully restricted Dutch Treat to $45,000 for leasehold improvements. As such, once this figure was surpassed, any liability for paying any of the contractors fell to Dutch Treat.

Affirmed. No costs, neither party having prevailed in full.

END OF CLASS
Discussion points for Cowan v. Eastern Racing

As I mentioned earlier, you don’t look at the reasonable expectations of the third party when it comes to deciding whether to hold the principal (employer) liable for the torts of the agent. Instead, the dreaded “public policy” considerations come into play. And thus we have the doctrine of “respondeat superior.” But again, it comes down to classification. If the agent is an employee (servant), the employer (master) will be held liable for the negligent torts of the employee, provided the agent is acting SOHO, not FOHO (more on this later). If the agent is not an employee, then liability of the employer (principal) is much more difficult (but not impossible) to prove.

The question in this case focuses on the issue whether the police officers who beat the living tar out of the plaintiff are “employees” of the racetrack for purposes of pinning liability on the racetrack. Ask yourself how to differentiate between an agent and an employee. How many factors can you come up with? Are any one of them dispositive?

COWAN
v.
EASTERN RACING ASS'N, Inc.

Supreme Judicial Court of Massachusetts, Suffolk.

Decided April 7, 1953.

COUNIHAN, Justice.

This is an action of tort to recover for an assault on the plaintiff by certain persons alleged to be agents or employees of the defendant when the plaintiff was a business invitee of the defendant at Suffolk Downs, a race track in Boston, owned by the defendant. The answer was a general denial, and by amendments there were special answers in the first of which the defendant denied that the assault was committed by the defendant, its agents or servants or by any one acting in behalf of the defendant, and further set up that if there was any assault on the plaintiff it was committed by two police officers of the city of Boston acting in their own defence and in the public interest; and the second set up that the defendant at the time of the assault was acting as an agent for the National War Fund, Inc., an established charitable organization, in the conduct of the racing meeting on the day of the assault and that all profits
This action was tried to a jury together with two other actions against the police officers who were involved in the assault. The jury returned verdicts against all three defendants.

This action comes here upon exceptions of the defendant to the denial of its motion for a directed verdict; to the denial of fourteen requests for rulings; to five portions of the judge's charge; and to the admission of evidence.

*****

From evidence disclosed in the bill of exceptions considered in its aspect most favorable to the plaintiff the jury could reasonably have found the following facts: On August 11, 1945, the plaintiff, with his wife and her daughter, was in attendance at Suffolk Downs, a race track owned by the defendant. They all paid the required admission fees. A racing meeting was being held under a license granted by the commission. A license had been originally issued to the defendant to conduct a racing meeting for fifty-four days beginning June 11, 1945, and ending August 11, 1945, except Sundays. Following a written request to it from the National War Fund, Inc., an established charitable organization, the defendant petitioned the commission to transfer that part of the license for the last four days of such meeting to the National War Fund, Inc., with the defendant acting as its agent. These days were from August 8 to August 11, 1945, inclusive. On August 1, 1945, the commission voted to approve the transfer of the license of the defendant for these days to the 'National War Fund, Inc.--Eastern Racing Association, Inc. Agent.' The net proceeds of these four days of racing were substantially paid to the National War Fund, Inc., and certain other local charities.

The plaintiff bought a $10 ticket on a horse called 'Johnny, Jr.,' to win in the seventh race. This horse finished first by a length and the plaintiff noticed nothing wrong in the manner in which the race was run. As he went to collect on his ticket he heard loud 'hollering' and he learned that a foul had been claimed. Subsequently the race was declared official and it appeared that 'Johnny, Jr.,' was placed third so that the win ticket was of no value. The plaintiff became excited and upset, and sought information, without success, at the window where he bought the ticket, as to why his horse was disqualified. He then talked with the clerk of the scales. As 'a result of that conversation' he went across the track to the stewards' stand. To get there he had to climb over an iron fence four and one half feet in height and cross the race track. The stand which was on the other side of the track opposite the grandstand looked as if it was 'on stilts with stairs going around and up.' It was enclosed by glass. The plaintiff walked up the circular stairway and entered a room about eighteen feet by nine feet in size. He saw there one Almy, one Conway, and one Conkling who is also called Conklin in the bill of exceptions. These three men were the stewards appointed by the defendant under Rule 22 of the rules of the commission and had been acting as such during the earlier days of the meeting as well as from August 8 to August 11, 1945, inclusive. The plaintiff put his ticket on 'Johnny, Jr.,' on a table in front of Almy and asked him why that horse had been disqualified from winning. Almy told him that he would talk with him after
he had finished making out a report which he was then writing. The plaintiff waited for two or three minutes and then spoke to Almy again. He made no attempt to strike anybody and there was no loud talk. While he was standing at the table talking to Almy, Conkling walked up to the plaintiff and kicked him in the 'shins.' Conkling then beckoned to the police and two officers came into the room. He said to them, 'Throw the son of a bitch out.' They were the defendants in the actions tried with this action. They grabbed the plaintiff from behind and, as he struggled to get away, they beat him many times on his head and body with their billies. The plaintiff fell to the floor where he was beaten again and kicked by the police officers. The plaintiff was brutally assaulted. He suffered severe injuries, was bleeding profusely from his head, and as a result was taken to the Boston City Hospital for treatment. The police officers were part of a detail of the Boston police department on duty at Suffolk Downs under a Lieutenant O’Brien. The commission did not hire or pay the police although it could have because the commission had such power under the statute but it never exercised it. There was no direct evidence as to who hired the police but it could be fairly inferred that they were hired by the defendant because a check in payment for their services in the sum of $1,368 was drawn to the order of the police commissioner (of Boston) and signed 'Eastern Racing Assn. Inc. Agents for National War Fund, Inc.' by its officers. This check was indorsed by the police commissioner. The three stewards in the stand were appointed by the defendant or by it at least as agent for the National War Fund, Inc., and were paid by checks of the 'Eastern Racing Assn. Inc. Agents for National War Fund, Inc.' The defendant appointed and paid these stewards and had a right to discharge them.

We first consider the defendant's exception to the denial of its motion for a directed verdict. The disposition of this exception depends largely upon the application of the principle of respondeat superior, and we must therefore determine whether the steward Conkling or the police officers who were involved in the assault were at that time in the control of the defendant and acting as its agent or agents within the scope of their employment.

[1][2][3] The principle respondeat superior is not applicable unless it could reasonably be found on the evidence together with all permissible inferences 'that the relation of master and servant existed at the time the plaintiff was injured, whereby the * * * act of the servant was legally imputable to the master. The test of the relationship is the right to control. It is not necessary that there be any actual control by the alleged master to make one his servant or agent, but merely a right of the master to control. If there is no right of control there is no relationship of master and servant. If the power of control rests with the person employed, he is an independent contractor.' Khoury v. Edison Electric Illumination Co., 265 Mass. 236, 238, 164 N.E. 77, 78, 60 A.L.R. 1159.

This is the rule in this Commonwealth and is generally accepted in other jurisdictions. Restatement: Agency, § 220. Meechem on Agency (2d ed.) § 1863. 57 C.J.S., Master & Servant, § 563. 35 Am. Jur., Master & Servant, § 539. This rule is applicable although the choice of persons for the particular work is required to be made from a limited class. Restatement: Agency, § 223.
In the Khoury case it was also said 265 Mass. at page 239, 164 N.E. at page 78, 'Although the conclusive test of the relationship of master and servant is the right to control, other factors may be considered in determining whether the right to control exists, but they are subordinate to this primary test. This court has held that the method of payment is not the decisive test. ** Neither is the fact that ** [one] was an employee of the defendant and had no other employment decisive, for a person may be an agent or a servant as to one part of an undertaking, and an independent contractor as to other parts.' To the same effect is Wescott v. Henshaw Motor Co., 275 Mass. 82, at page 87, 175 N.E. 153, at page 155, where it is said, 'It has been frequently decided that one may be the agent or servant of another in some matters and not the agent or servant in other matters.' Likewise 'it is the right to control rather than the exercise of it that is the test. ** While engaged in the same general work, one may be at certain times and for certain purposes the servant of a party, and at other times or for other purposes an independent contractor or the servant of another.'

In the instant case we are of opinion that one of two conclusions could be found by the jury as matter of fact on the evidence. The first one is that in determining the qualifications of horses and jockeys, corrupt riding, questionable practices such as the artificial stimulation of horses, the weights of jockeys, fouls, and the order in which horses finish, the stewards appointed and paid by the defendant had exclusive jurisdiction, and that when acting upon such matters these stewards could be found to be agents of the commission or independent contractors required to be employed by the defendant under the rules of the commission. On the other hand, on the evidence the jury could reasonably find that at the time of this assault the steward Conkling was acting as an agent for the defendant even though the rules of the commission provide that the stewards appointed by the defendant shall have control over and free access to all stands.

The plaintiff was a business invitee of the defendant, at least in its capacity as an agent for the National War Fund, Inc. Whether he was properly in the stewards' stand to make a complaint is of no consequence for excessive force was used to evict him. While talking to one of the stewards about the complaint, Conkling assaulted him and calling the police, by the use of opprobrious words, told them to throw the plaintiff out of the stand. A struggle ensued and a brutal assault followed. Conkling was appointed and paid by the defendant. The stand where the assault took place was owned by the defendant. Conkling apparently assumed that the plaintiff was an interloper and causing a disturbance. Conkling and the other stewards under the rules had control of the stand and presumably had authority to evict obnoxious persons from it and that was for the purpose of seeing to it that racing was orderly conducted. Proper performance of their duty in this respect could reasonably be expected to enhance the reputation of the defendant with its customers for maintaining order and advance its business which was to conduct racing for a profit. If they failed to perform their duties in this respect, the defendant could discharge them. To this extent at least it could be found that the defendant had a right to control them.

It is not unreasonable to assume that Conkling believed that to preserve order in the stand he had a right to call upon the police to assist him. Otherwise there was no need of the presence of the police at the stand. It is clear therefore that if Conkling assaulted the plaintiff, or if the
police at his instigation were guilty of the assault, the defendant could be found liable. 'An
inference of responsibility on the defendant's part was by no means the only permissible
inference, but we think that it was a possible one.'

But apart from the question of agency of Conkling and the responsibility of the defendant for
his conduct, we are of opinion that the question whether the police officers involved in the
assault were acting as agents of the defendant was also for the jury to decide. They were
paid by the defendant and they were hired by the defendant for the obvious purpose of
preserving and maintaining order on the premises of the defendant during the racing
meetings. The maintenance of such order, the prevention of breaches of the peace, with the
possibility of ensuing riots, would serve to afford protection to and avoid damage to the
physical plant used for racing, which was conceded to be owned by the defendant. In this
capacity the police officers were acting not as public officers in a public place but as
employees of the defendant for its private purposes on its private premises. It is also
reasonable to assume that part of their duty was to prevent annoyance or injury to patrons of
the defendant and to that end they could evict from any part of the premises persons who
might be causing a disturbance. 'Acts habitually performed by an agent may import
acquiescence by the principal and become evidence of his authority.' Hartigan v. Eastern

We are of opinion that this action was properly submitted to the jury, and the exception of
the defendant to the denial of its motion for a directed verdict must be overruled.

[8] The defendant has argued that it is not responsible for the brutal assault on the plaintiff
by Conkling or the police officers because none of them was acting within the scope of his
employment when they assaulted the plaintiff. There is no merit in this contention. The case
of Perras v. Hi- Hat, Inc., 326 Mass. 78, 93 N.E.2d 219, cited by the defendant, is readily
distinguishable. The police officers there involved in an assault were in no sense employees
of the defendant. The question of the use of excessive force did not arise for agency alone
was considered. The correct rule is stated in Fanciullo v. B. G. & S. Theatre Corp., 297
Mass. 44, at pages 46- 47, 8 N.E.2d 174, at page 176, with cases cited this court said, 'In a
place of public amusement where large numbers of people are accustomed to gather, the
maintenance of order may incidentally require the use of force. * * * A master not
infrequently may be liable for conduct of a servant who uses means not intended or
contemplated by the contract of employment.' This rule is recognized in Restatement:
Agency, § 245, 'A master who authorizes a servant to perform acts which involve the use of
force against persons or things, or which are of such a nature that they are not uncommonly
accompanied by the use of force, is subject to liability for a trespass to such persons or things
caused by the servant's unprivileged use of force exerted for the purpose of accomplishing a
result within the scope of employment.

Discussion points for Miguel v. Linden Motor Car
The doctrine of respondeat superior rests on two assumptions. First, that the agent was an employee (servant) of the principal (master). And second, that the negligence of the agent occurred within the scope of the agent’s duties. There has been some fudging on this second point. Courts have allowed agents to be straying a little (known as a “slight deviation”) when the negligence occurs and have still held the principal liable. Does this case support that proposition? What if the negligence occurs after the frolic, but while the agent is still not on the correct route?

MIGUEL
v.
LINDEN MOTOR CAR CO., Inc.

Supreme Judicial Court of Massachusetts, Bristol.

Nov. 30, 1942.

COX, Justice.

The report of the trial judge, who found for the plaintiff, states that at the opening of the trial it was agreed by counsel that the only issue to be decided was whether or not one Rebello, at the time he was operating the motor vehicle that was involved in the collision with the plaintiff’s automobile, was the agent or servant of the defendant and acting within the scope of his employment. Upon report, the Appellate Division for the Southern District decided that there was prejudicial error in the denial of the defendant's request for a ruling that Rebello, at the time of the collision, was not acting as the defendant's agent, and ordered the finding for the plaintiff vacated and that a finding for the defendant be entered. It has not been argued that this request does not properly raise the question whether Rebello, at the time of the collision, was acting within the scope of his employment, and the question whether he was is the only one that has been argued.

It could have been found that Rebello was an employee of the defendant, and that part of his work was to 'pick-up' automobiles to be repaired and to deliver automobiles that had been repaired at the defendant's garage. The day before the collision occurred, the daughter of the owner of the automobile that was being operated by Rebello at the time of the collision drove this automobile to the defendant's garage for the purpose of having repairs made. It was impossible to make the repairs that day, and the defendant's manager told another employee to deliver the automobile to the owner's daughter at her place of employment. This employee, however, turned this task over to Rebello, who delivered the automobile, whereupon he and the owner's daughter arranged that she would pick him up at seven-thirty o'clock the following morning in front of the defendant's garage. She did, then drove him to her place of employment and told him to drive the automobile back to the defendant's garage. But instead of doing this, he went to his home for breakfast, and it was while he was driving from his
home to the garage that the collision occurred. Rebello's usual time for commencing work at the garage was eight o'clock in the morning.

The report states that it was agreed by counsel that the most direct and ordinarily travelled route by which an automobile would travel from the daughter's place of employment to the defendant's garage was a distance of one and three-tenths miles 'in a due northerly direction'; that the 'automobile distance' from this place of employment to Rebello's home was one mile in a 'due westerly direction'; and that the 'automobile distance' from Rebello's home to the place where the collision occurred was one-tenth of a mile 'due east'; and therefore that the place of collision was nine-tenths of a mile 'due west' from the place of employment.

[1][2] The liability of the defendant for the admitted negligence of Rebello depends upon whether he was then acting within the scope of his employment. There was no evidence from which it could be found, by inference or otherwise, that Rebello had any authority to use the automobile for the purpose of getting his breakfast as an incident of his employment and there was no evidence from which it could be found, by inference or otherwise, that after Rebello left the automobile owner's daughter at her place of employment, there was anything for him to do in the scope of his employment except to drive the automobile to the defendant's garage.

We are of opinion that the evidence did not warrant a finding that, at the time of the collision, Rebello was acting within the scope of his employment. The permissible findings do not disclose that this is a case where Rebello chose 'the quickest and best way to reach his destination' or that, at the time of the collision, he had resumed the performance of his duty or this his 'deviation from his employer's business had ended.'

Order of Appellate Division affirmed.

Wright v. Kelleher

Carlotta WRIGHT, Administratrix et al

v.

David KELLEHER et al

Superior Court of Massachusetts, Worcester County.

Plaintiff Carlotta Wright (“Wright”), brought this action for wrongful death on behalf of her deceased husband, Kenneth E. Wright (“Decedent”), against the defendants, David Kelleher (“Kelleher”), B & G Leasing, Inc. (“B & G”), George Weston Bakeries Distribution, Inc. (“GWBD”), George Weston Bakeries, Inc. (“George Weston”), Arnold Foods Company, Inc. (“Arnold Foods”), and Route Relievers, Inc. (“Route Relievers”). Wright specifically alleges
that each of the defendants were directly or indirectly negligent when her husband was fatally injured after Kelleher struck him in a motor vehicle accident while making a delivery. The matter is now before this Court on defendants', GWBD, George Weston, and Arnold Foods (collectively “defendants”), Motion for Summary Judgment. They assert that they are entitled to summary judgment because (1) the defendants cannot be held vicariously liable because at the time of these events Kelleher was an independent contractor and not subject to their control, and (2) the defendants were not negligent because they neither breached a duty owed to the Decedent nor owed a duty to the Decedent. Oppositions to this motion were filed by the plaintiffs and the defendant Kelleher. For the following reasons, the defendants' Motion for Summary Judgment is DENIED.

The Summary Judgment Record contains the following undisputed facts and disputed facts viewed in the light most favorable to the nonmoving parties.

On December 15, 1999, Kelleher began work through a temporary employment agency as a shipping clerk at Entenmann's, Inc. and later at Entenmann's Sales Company, Inc. (collectively “Entenmann's”). On April 23, 2000, Kelleher was employed by Entenmann's as a shipping clerk and was required to join a union. While Kelleher was employed at Entenmann's, Entenmann's provided medical and disability benefits, vacation, personal and sick days, a pension plan and withheld taxes. Further, as an employee of Entenmann's, Kelleher punched a time clock and reported to a supervisor on a daily basis.

In June 2001, Bestfoods Baking Distributing Company, Inc., now known as GWBD, advertised the sale of a distributorship business. The distribution rights were for the right to distribute Arnold Foods brand bakery products in the Fitchburg/Leominster area. Kelleher approached Steve Mutascio (“Mutascio”), a district sales manager for Arnold Sales Company, about purchasing the distribution rights. Mutascio interviewed Kelleher, asked employees about Kelleher's work ethic, and informed him that he must have a valid driver's license. Despite the fact that Kelleher was required to have a valid driver's license, the defendants claim that he could “hire anyone to operate his business and deliver product to his customers.”

In June 2001, Kelleher voluntarily terminated his employment with Entenmann's. On July 9, 2001 Kelleher executed a Distribution Agreement with GWBD and organized his business as Kelleher Distribution. Numerous other documents were executed at the time Kelleher signed the distribution agreement. Kelleher contends that these documents were all provided to him by the defendants and that he was instructed where to sign in a very rushed fashion. After entering into the distribution agreement, Kelleher no longer paid union dues, no longer received medical, disability or pension benefits, and no longer received vacation or sick time.

Kelleher financed the purchase of the distributorship through loans he received from Banc of America (“BA”) and Distribution Services of America, Inc. (“DSA”). The defendants claim that these two financial institutions were independent of GWBD. Kelleher claims that BA and DSA were not independent of GWBD because GWBD presented these two financial
institutions to Kelleher. The defendants contend that Kelleher was required to assign his rights in his accounts receivable to the lending institutions in order to secure his loans.

The Distribution Agreement provided that:

The parties intend to create an independent contractor relationship and it is of the essence of this Agreement that DISTRIBUTOR be an independent contractor for all purposes and DISTRIBUTOR shall only identify himself as such in all third party dealings ... As an independent contractor, DISTRIBUTOR has the right to operate the business as DISTRIBUTOR chooses, and shall bear all risks and costs of operating such business. DISTRIBUTOR has no authority to retain any person on behalf of BBDC [Bestfoods Baking Distribution Company]. It is expressly understood that DISTRIBUTOR has no claim, or right under any circumstances, to any benefits or other compensation currently paid by BBDC to employees, or hereafter declared by BBDC for the benefit of employees.

Kelleher purchased/leased a step-van for the operation of his business from B & G. He contends that the defendants recommended B & G to him and that the necessities of the job dictated that he purchase/lease a van. The defendants contend that Kelleher was free to purchase or lease any vehicle he wanted and that he received the names of leasing companies from other independent contractors. There is some dispute as to whether the defendants or Kelleher paid the sales tax, registration fees, and the excise tax to the van. Although Kelleher selected his own insurance company and purchased personal as well as business insurance, the plaintiffs claim that B & G controlled how much insurance Kelleher was required to purchase. Kelleher paid for all of the gas and maintenance for the van.

The defendants claim that Kelleher was an independent contractor who was free to conduct his business however he chose subject to a few exceptions. Kelleher and the plaintiffs dispute this contention and claim that Kelleher was an employee and that the distribution agreement was created simply to avoid liability. The defendants claim that “Kelleher purchased Arnold brand products from GWBD, took title and owned the product, and then sold the product to his customers.” Further, the defendants claim that Kelleher could purchase and sell products other than Arnold Foods products unrelated to GWBD and that Kelleher made his own business decisions and set his own schedule. Kelleher could decide what time he would pick up his product and in what order he would deliver the product to the customers on his route.

Kelleher contends that he did not own the products he delivered and that when he delivered the products they were still owned by GWBD exclusively. Kelleher testified that Mutascio instructed him not to deliver any products other than Arnold Food products. Further, Kelleher claims to have had little control over when he delivered the products. He claims that when he entered into the distribution agreement, each of the stores on his route had a delivery window in which he could deliver the products. Further, Kelleher claims that GWBD negotiated directly with chain stores with regard to delivery times, space allotment, display locations, and prices. The plaintiffs contend that Kelleher was not free to negotiate his own prices and that he was forced to sell his product at prices dictated by the defendants. Moreover, the motion record supports the fact that Kelleher did not bill the customers; he transmitted
information about the transactions to the defendants through a wireless computer provided by
the defendants, who in turn billed the customers and credited Kelleher with his commissions
earned from those transactions.

The defendants admit that although Kelleher did not receive any formal training from
GWBD, he did ride with a former temporary driver, George Senay (“Senay”), who showed
Kelleher where the stores on his route were located. The defendants deny that Kelleher
received any formal “training regarding proper operation of the truck, proper safety rules
regarding a safe number of hours to be driving on the road and the dangers of fatigue.” The
plaintiffs argue that Mutascio directed Senay to take Kelleher with him on his bread
deliveries. Further, the plaintiffs contend that Mutascio introduced Kelleher to shipping
clerks and managers and trained him how to make stops, where to make deliveries, and how
to stock the items on the shelves.

On or about December 15, 2001, defendant Kelleher caused a vehicle he was operating to
collide with Decedent's vehicle. The impact of the head-on crash caused Decedent's death
and injured the other passenger-plaintiffs, Tiarra Wright, Keshawn Wright, and Kinzaqui
Winters. At the time of the accident, the vehicle Kelleher was operating was owned by B &
G, which in turn is alleged to have been an agent of George Weston, GWBD, Arnold Foods
and/or Route Relievers. Kelleher was in the process of making bread deliveries to specific
retail vendors before the accident occurred.

At the time of the accident, Kelleher had finished his deliveries for the day and had
consumed enough alcohol to have a blood alcohol level well in excess of the legal limit for
the operation a motor vehicle. The defendants contend that this shows that Kelleher was not
acting within the “scope of his employment” even if this Court finds that there is a factual
dispute as to whether Kelleher was an employee or independent contractor. They assert that
Kelleher had completed his deliveries for the day and had finished working before he
consumed the alcoholic beverages. Even if he were still working, the defendants claim that
having consumed the amount of alcoholic beverages that the evidence indicates Kelleher had
amounted to a break from the proper scope of his duties that would relieve the defendants of
any liability for Kelleher's actions. Kelleher contends that he was an employee and was still
acting within the scope of his employment and claims that he had not completed his duties
for the day until he entered data into the handheld computer that was provided by the
defendants.

II. Negligence

To prevail on a claim of negligence in Massachusetts, a plaintiff must prove the following
elements: (1) duty, (2) a breach of that duty, (3) damage to the plaintiff, and (4) a causal
relationship between the defendant's breach of duty and the plaintiff's purported damages. In
determining whether an employer should be held liable for the negligence of another under a
theory of vicarious liability, “[i]t is the right to control, as opposed to the actual control, that
is determinative.” Even an employer's attenuated right of control over a seemingly very
independent employee may give rise to liability. *Id.* As long as the employee's conduct was subject to the employer's control or right of control, vicarious liability may be imposed. *Id.* Proof of “a master-servant relationship is ordinarily a question of fact.”

Upon examination of the motion record, summary judgment is not appropriate in this case due to the existence of genuine issues of material fact, including a genuine dispute as to the material issue whether Kelleher was an independent contractor or employee at the time of the accident. This is supported by the following non-exhaustive list of subsidiary factors found within the motion record.

First, it is genuinely disputed as to whether Kelleher took title to the products that he was delivering and whether he was allowed to purchase and sell products other than Arnold Foods brand products. The defendants assert, and the language of the distribution agreement states, that Kelleher was able to sell any product of his choosing. Kelleher contends that the defendants would not have allowed him to sell products other than Arnold Foods brand products and that he was so instructed by Mutascio. This dispute bears upon the issue whether the defendants retained the requisite control over Kelleher so that he should be considered an employee, rather than an independent contractor. FN5 Second, a genuine issue of material fact exists as to whether Kelleher was actually allowed to make and did make his own business decisions independent from the defendants, including the setting of his own schedule. The defendants claim that Kelleher was free to run his business as he saw fit, could pick up the products to be delivered when he wanted, and could deliver those products in the order he chose. Kelleher contends that he did not have control over when he was to deliver the products because the defendants had negotiated with many of the chain stores and narrow windows of time existed in which the products were to be delivered. Further, Kelleher contends that GWBD negotiated directly with chain stores with regard to space allotment, display locations, and prices. Kelleher asserts that he was not free to negotiate his own prices. Thus, whether Kelleher was free to make his own business decisions such as when to make deliveries and how to stock the products remains at issue. Third, whether Kelleher received training from the defendants and the extent thereof is at issue, with the defendants claiming that Kelleher did not receive any formal training and that Senay merely showed Kelleher where the stores on his route were located, but countered by Kelleher who contends that he received training from Mutascio with regard to how he should make the deliveries, where he should make the deliveries and how he should stock the shelves. Fourth, a disputed material fact exists as to whether Kelleher was actually permitted to allow others to deliver the products for him. The defendants, and the distribution agreement, state that Kelleher was free to hire people to help him with his route. Based upon Kelleher's assertions that he was constantly instructed to do things differently than the distribution agreement stated and the fact that Kelleher was required to have a valid driver's license, whether Kelleher could actually have hired and allowed another person to deliver the products for him, and/or whether the defendants retained control over that decision is in dispute.

FN5. For their contention that Kelleher was an independent contractor, the defendants seek support from the recent case of *Commissioner v. Town Taxi of Cape Cod, Inc.*, 68 Mass.App.Ct. 426 (2007). However, that case, as well as that of *Athol Daily News*
Another genuine issue of material fact exists as to whether Kelleher was free to choose the type of vehicle he would use for his deliveries; Kelleher contends that the defendants referred him to B & G to purchase/lease a van. The defendants claim that Kelleher was free to choose any vehicle to use to deliver the products and that he received leasing information on leasing companies from other independent contractors. Further, there is a dispute as to whether Kelleher or the defendants paid the sales tax, registration fees and excise tax for the van. Further, Kelleher contends that B & G dictated how much insurance he was required to carry on the van. There is a genuine issue of material fact as to whether Kelleher had the discretion to lease or purchase the vehicle of his choosing from the supplier/dealer of his choosing.

As the foregoing issues of fact are genuine and material to the question of the fact and extent of the defendants' control over Kelleher's conduct on the date in question, the defendants have not met their burden of demonstrating the absence of a triable issue and that they are entitled to judgment in their favor as a matter of law, summary judgment is not appropriate.

For the reasons stated herein, it is hereby ORDERED that the defendants', George Weston Bakeries Distribution, Inc., George Weston Bakeries, Inc., and Arnold Foods Company, Inc., Motion for Summary Judgment pursuant to Mass.R.Civ.P. 56 be DENIED.

Commissioner v. Town Taxi

COMMISSIONER OF THE DIVISION OF UNEMPLOYMENT ASSISTANCE

v.

TOWN TAXI OF CAPE COD, INC.

No. 06-P-684.

Appeals Court of Massachusetts, Suffolk.

Decided March 12, 2007.

At issue is whether the drivers for Town Taxi of Cape Cod, Inc. (Town Taxi), are independent contractors or employees within the meaning of G.L. c. 151A, § 2, for purposes of requiring Town Taxi to pay unemployment compensation. We affirm the judgment of
the Boston Municipal Court that the drivers are independent contractors.

Procedural background. A review examiner of the division of unemployment assistance (division) affirmed an initial division determination that taxicab drivers for Town Taxi were employees of Town Taxi within the scope of G.L. c. 151A, § 2. On appeal, the division's board of review (board) remanded the matter to the review examiner for the taking of additional evidence and for further findings. Ultimately, the earlier determination was reversed, and the drivers were held to be independent contractors, Town Taxi having met its burden under the conjunctive three-part test set forth in G.L. c. 151A, § 2, and detailed in Athol Daily News v. Board of Review of the Div. of Employment & Training, 439 Mass. 171, 175, 786 N.E.2d 365 (2003) (Athol Daily News).

The commissioner of the division sought judicial review under G.L. c. 151A, § 42. A judge of the Boston Municipal Court affirmed the decision. After judgment entered and the commissioner's motion for reconsideration was denied, the commissioner appealed.

Facts. The review examiner found that Town Taxi, licensed by the town of Barnstable to operate a taxicab service, required each of its more than thirty drivers to obtain a hackney license from the town, FN3 had set shifts among which the drivers could choose (but drivers were required to obtain a replacement if unable to work a scheduled shift), and provided taxicabs with full tanks of gas at the beginning of shifts, FN4 automobile insurance for all cabs, business cards, and all maintenance and repairs on the cabs. At the conclusion of all shifts, Town Taxi required the drivers to return the cabs with full tanks of gas and to submit fifty percent of the money received for passenger fares, with the drivers retaining both the remaining fifty percent and all tips. Town Taxi did not prohibit the drivers from engaging in other employment while driving its cabs. FN5 Town Taxi used a computerized dispatch system and a global positioning system (GPS) to assist drivers in finding prospective customers, FN6 but drivers were not required to pick up these customers and were allowed to pick up customers on their own without such assistance. Town Taxi did not provide workers' compensation insurance nor did it provide drivers with W-2 forms or Internal Revenue Service Form 1099s.

FN3. The hackney license permits the prospective driver to open his own taxi service or drive for any other taxi service in the area.

FN4. Town Taxi allowed drivers to use their own vehicles if the vehicles bore the name of Town Taxi on them; however, no drivers did so.

FN5. Some drivers delivered food to the airport for shipment to Martha's Vineyard or Nantucket. In such cases, the drivers were paid a fee for picking up and delivering the food to the airport (not split with Town Taxi), in addition to the taxi fare for the trip (split with Town Taxi). Some drivers engaged in other types of business while driving the cabs, e.g., delivering newspapers, performing collection work, and performing duties as a home health aide.
FN6. The review examiner found that “when the company receives a call from a client requesting service, the company's dispatcher enacts the GPS to determine which of their taxicabs is closest to the client's location. The dispatcher then alerts the driver of that cab, through a computer terminal installed in the cab, of the prospective job offer. If the driver chooses to accept the job, the driver presses a button on the computer signifying such. If the driver does not want to accept the job, they simply ignore the offer and after a few minutes, the dispatcher will offer the job to a driver who is the next closest to the client's location.”

“An employment relationship ... exists, for purposes of G.L. c. 151A, unless it can be demonstrated that the services at issue are performed (a) free from control or direction of the employing enterprise; (b) outside of the usual course of business, or outside of all the places of business, of the enterprise; and (c) as part of an independently established trade, occupation, profession, or business of the worker.” Athol Daily News, 439 Mass. at 175, 786 N.E.2d 365. See G.L. c. 151A, § 2. FN8 This three-part test is commonly referred to as the “ABC” test; the failure of the employer to demonstrate any of these three foregoing conditions is sufficient to establish that an employer-employee relationship indeed exists. Athol Daily News, supra at 175-176, 786 N.E.2d 365.

FN8. General Laws c. 151A, § 2, as amended by St.1990, c. 177, § 250, provides that:

“Service performed by an individual, except in such cases as the context of this chapter otherwise requires, shall be deemed to be employment subject to this chapter irrespective of whether the common-law relationship of master and servant exists, unless and until it is shown to the satisfaction of the commissioner that-

“(a) such individual has been and will continue to be free from control and direction in connection with the performance of such services, both under his contract for the performance of service and in fact; and

“(b) such service is performed either outside the usual course of the business for which the service is performed or is performed outside of all the places of business of the enterprise for which the service is performed; and

“(c) such individual is customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.”

Based on our review of the record, we conclude that Town Taxi demonstrated to the board, and the board appropriately concluded, that the drivers were not “employees” as provided for in G.L. c. 151A, § 2. FN9, FN10 We review each part of the ABC test in turn.

Part (a). “The first part of the test examines the degree of control and direction retained by the employing entity over the services performed.” Athol Daily News, 439 Mass. at 176-177, 786 N.E.2d 365. The burden is upon the employer to demonstrate that the services at issue
are performed free from its control or direction. “[T]he test is not so narrow as to require that a worker be entirely ‘free from direction and control from outside forces.’” Id. at 178, 786 N.E.2d 365.

Here, the drivers had the freedom of choosing which shifts to work and were not obligated to respond to calls from Town Taxi regarding a prospective customer in the driver's vicinity. Moreover, the drivers were free to engage in other employment and perform personal business during their shifts using the taxis. See Athol Daily News, supra. As such, Town Taxi met its burden under part (a) of the test.

Part (b). “The second part of the test involves two separate criteria, and, if the employer demonstrates either, part (b) will be met. The question asked is [1] whether the services are performed outside of the usual course of business of the enterprise or [2] whether the services are performed outside of all the places of business of the enterprise.” Athol Daily News, supra.

The board and the judge found that the latter segment of the test was met and we agree. The service performed by the drivers occurred outside the business premises of Town Taxi. Although the taxicabs were stored and the dispatch system was operated at the business premises of Town Taxi, the drivers did not transport customers on those premises. Compare Athol Daily News, 439 Mass. at 179, 786 N.E.2d 365 (where carriers picked up newspapers from employer's distribution center and delivered them to individual houses, stores, bundle drops, or vending machines, “all of the carriers made deliveries outside of premises owned by the [employer] or which could fairly be deemed its ‘places of business’ ”). Further, drivers were free not only to pick up customers not referred from Town Taxi's computerized dispatch system, but also to refuse to pick up a customer referred to them. Drivers were not confined to a specific geographical location and were free to choose locations where they would look for passengers. These factors considered together support the decision made below. Ibid.

Part (c). “The third part of the test asks whether the worker is ‘customarily engaged in an independently established trade, occupation, profession or business of the same nature as that involved in the service performed.’” Athol Daily News, 439 Mass. at 179, 786 N.E.2d 365. The main consideration under this section is “whether the service in question could be viewed as an independent trade or business because the worker is capable of performing the service to anyone wishing to avail themselves of the services or, conversely, whether the nature of the business compels the worker to depend on a single employer for the continuation of the services.” Id. at 181, 786 N.E.2d 365. See Boston Bicycle Couriers, Inc. v. Deputy Director of the Div. of Employment & Training, 56 Mass.App.Ct. 473, 480, 484, 778 N.E.2d 964 (2002) (key is “whether the worker is wearing the hat of an employee of the employing company, or is wearing the hat of his own independent enterprise”; examiner must take into account all relevant facts and circumstances of the working relationship with “[n]o one factor [being] outcome-determinative”).

In Athol Daily News, 439 Mass. at 181-182, 786 N.E.2d 365, the Supreme Judicial Court
found compelling that (1) “the business of delivering newspapers is not limited to a single employer, and nothing with respect to the carriers' job performance in this case is unique to one certain newspaper publisher”; (2) “the carriers are free to deliver newspapers (or other publications, such as advertising flyers) for anyone who wishes to contract with them, even competitors of the News”; and (3) “the carriers are free to advertise their delivery services, if they so desire, in an attempt [to increase business, which is] ... compelling evidence that a carrier is an entrepreneur and performs his or her newspaper delivery service for the News in that capacity....”

These considerations are at play in the case at bar. Upon obtaining a hackney license, the drivers could open their own taxi service or drive for another service. They were free to find customers on their own and reject prospective customers referred from the dispatcher. Town Taxi permitted them to engage in other employment or generate their own businesses while using the leased taxi, and many did so. This “entrepreneurial” spirit, exhibited by a typical independent contractor, was, as in Athol Daily News, 439 Mass. at 182, 786 N.E.2d 365, contemplated by part (c) of the test. Judgment affirmed.

Order denying motion for reconsideration affirmed.

Fortenbacher v. Commonwealth

Michelle FORTENBACHER

v.

COMMONWEALTH.

Appeals Court of Massachusetts, Bristol.

Decided June 16, 2008.

The plaintiff, Michelle Fortenbacher, individually and in her capacity as the administratrix of the estate of her son, Richard MacCord, brought this wrongful death action, pursuant, in part, to the Massachusetts Tort Claims Act (Act), G.L. c. 258, against the Commonwealth as a result of a fatal motor vehicle accident on a bridge. The Commonwealth's motion for summary judgment, which claimed, among other things, that it was immune from suit pursuant to § 10(b) of the Act, was denied by a Superior Court judge.\(^\text{FN2}\) In its as-of-right interlocutory appeal of that order, the Commonwealth claims error in the denial of its motion. We agree and reverse.

1. Background. a. The accident. In the light most favorable to Fortenbacher, the undisputed facts gleaned from the materials submitted on summary judgment reveal the following. On
August 29, 1999, MacCord was a passenger in a car being driven by Melissa Hartnett. Hartnett was driving eastbound on Route 6 over the New Bedford-Fairhaven Bridge (bridge), which spans the Acushnet River, when her car collided with another vehicle on the bridge. As a result of the collision, Hartnett's car struck a bridge railing and fell into the river. Both Hartnett and MacCord drowned in the submerged vehicle.

b. Bridge construction. At the time of the accident, the bridge was equipped with two railings on each side, but only on the westbound side did both railings extend the entire length of the bridge. The exterior railing was a pedestrian railing, which appeared to be part of the original bridge, constructed in 1901. The second, interior railing separated vehicular traffic from pedestrians on the bridge's sidewalk. The interior railing had been built in two sections, each at different times, one on top of the other. The bottom section was a concrete parapet curb and the top section was made of aluminum. Beginning in 1972 and ending in 1973, the Massachusetts Highway Department (MHD) installed the aluminum railing, which increased the height of the original interior railing. The plans for this 1972 installation project show the parapet curb as an existing structure on the bridge.

On the day of the accident, Hartnett's car, traveling east, struck the exterior pedestrian railing, which was the only railing that extended the length of eastbound side of the bridge. The interior railing and parapet curb did not extend far enough on the eastbound side of the bridge to offer a barrier to prevent Hartnett's car from plunging into the river.

c. The complaint and summary judgment. Pursuant to the Act and G.L. c. 229, § 2, Fortenbacher claimed that the MHD breached its duty to properly maintain, repair, and keep safe the bridge, and that those failures caused MacCord's wrongful death. Specifically, she claimed that the MHD failed to follow its own policies when it neglected to install, during the 1972 installation project, a proper guardrail or interior railing that followed the entire eastbound side of the bridge.


Maintaining that the decision whether and how to erect guardrails constituted a discretionary function under § 10(b ) of the Act, which exempts it from suit, the Commonwealth moved for summary judgment pursuant to Mass.R.Civ.P. 56, 365 Mass. 824 (1974). The judge found no need to resolve this issue because even if § 10(b ) applied to the 1972 installation project, the Commonwealth might nonetheless be liable for negligence in light of events that occurred after 1972. Specifically, the judge noted that the record revealed that bridge inspection reports from 1993, 1997, and 1999 stated that the bridge was potentially unsafe to the traveling public due to the nature of the eastbound railing, and the chain link fence that was present could not safely redirect an impacting vehicle. There was also an assertion by Fortenbacher that at least four prior accidents occurred on the bridge, some of which were fatal. Given this, the judge found that genuine issues of material fact existed as to whether the Commonwealth was on notice that the bridge was dangerous, and whether it had committed a
b. *The Massachusetts Tort Claims Act.* The Act was enacted in response to the Supreme Judicial Court's decision in *Whitney v. Worcester,* 373 Mass. 208, 366 N.E.2d 1210 (1977), where the court stated its intention to abrogate the doctrine of governmental immunity unless the Legislature took action as to the doctrine. *Id. at* 210, 366 N.E.2d 1210. The next year, the Legislature passed the Act, which provides that public employers, including the Commonwealth, are liable “for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his office or employment.” G.L. c. 258, § 2, inserted by St.1978, c. 512, § 15.

By design, the Act abrogated some of the traditional notions of sovereign immunity and provided consent to suit, but it also retained specified areas where the Commonwealth would remain unamenable to suit. See G.L. c. 258, § 10. One such area, where the Legislature chose not to waive the Commonwealth's immunity from suit, was for acts or omissions that have a specified discretionary quality. This exemption from the waiver of immunity was codified in § 10(b) of the Act. Section 10(b) renders the Commonwealth immune from suit for “any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused.” G.L. c. 258, § 10(b), inserted by St.1978, c. 512, § 15.

In this case, the judge did not undertake an analysis of the Commonwealth's claim of immunity from suit. Instead, the judge determined that he did not need to resolve the issue because even if the discretionary function applied to the work done on the bridge in 1972 and 1973, the bridge inspection reports from 1993, 1997, and 1999 put the Commonwealth on notice that the bridge was dangerous. Such an approach, however, improperly conflates the questions of the existence of negligence and the availability of immunity. Neither the gravity of the harm alleged nor the substantial merit that may underlie a claim inform the immunity inquiry. Rather, § 10(b) immunity is grounded in the public policy notions that certain governmental activities should not be challenged by suit, and that courts are not positioned to officiate policy disputes related to politics and the allocation of public resources. For these reasons, and because § 10 of the Act provides public employers with immunity from suit in specified areas, “a right that is ‘lost as litigation proceeds past motion practice,.’”

c. *The discretionary function exception.* To determine whether the discretionary function exception of § 10(b) of the Act applies to injury-causing conduct requires a two-step analysis. The first step is to determine whether the Commonwealth had any discretion at all as to what course of conduct to follow. *Ibid.* If the Commonwealth had no discretion because a course of action was prescribed by a statute, regulation, or established agency practice, then the discretionary function exception does not apply. *Ibid.* The second step is to determine whether the discretion that the Commonwealth had is the type of discretion for which § 10(b) provides immunity from suit. *Ibid.* That is, § 10(b) provides “immunity only for discretionary conduct that involves policy making or planning.” *Ibid.* In other words, we must determine whether the conduct that caused the injury has a “high degree of
discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning,” as opposed to conduct that consists of “the carrying out of previously established policies or plans.”

Fortenbacher claims that two statutes, G.L. c. 85, §§ 2 and 35, prescribed a course of conduct which eliminated the MHD's discretion relative to bridge construction, repair, and design. However, neither of these statutes does anything of the kind. The first, G.L. c. 85, § 2, authorizes the MHD to install warning signs and traffic signals on State highways when it deems them necessary, and the second, G.L. c. 85, § 35, regulates weight limits on certain types of bridges. Neither statute purports to limit, in any manner, the MHD's discretion regarding bridge construction, repair and design.

Fortenbacher next asserts that the 1966 MHD safety standards established an agency practice relative to the necessity of bridge guardrails. This allegation is supported by an affidavit from Gilbert M. Nelson, a registered professional civil engineer. Nowhere did Nelson document, assert, or offer any basis from which a reasonable fact finder could conclude that applicable MHD standards existed in 1972, or earlier, or that it was established agency practice to conform to such standards. See *Harry Stoller & Co. v. Lowell*, supra at 141, 587 N.E.2d 780. Instead, what Nelson offered was his opinion that the 1972 reconstruction work on the bridge violated the MHD's construction standards. Nelson neither cited nor appended any actual standards, but rather based his opinion on his claim that he had read the third printing of the “1966 Standards” and “believe[d]” those standards were in place in 1972. Such testimony would not be admissible at trial and, thus, fails to satisfy Mass.R.Civ.P. 56(e), 365 Mass. 825 (1974), requiring that “affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and ... [s]worn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith.” Nelson's unsupported and vague opinion does not create a genuine issue of material fact as to the existence of standards in 1972 sufficient to defeat the Act's discretionary function exception.

In contrast, and in support of its summary judgment motion, the Commonwealth provided an affidavit from Alton Ellis, a structures maintenance engineer for MHD. Ellis categorically denied that there were any requirements or standards in existence that required the bridge's railings to have a certain level of crash resistance or required the MHD to rebuild or redesign the bridge's railings. See *Alake v. Boston*, 40 Mass.App.Ct. 610, 612, 666 N.E.2d 1022 (1996) (where the plaintiff was unable to show that a city had a prescribed policy or regulation, the discretionary function exception applied).

Even if we were to assume that the standards Nelson claimed to be familiar with applied to the 1972-1973 work done on the bridge, both Nelson and Ellis agreed that extending the eastbound interior railing on the bridge to protect the area of the accident would affect access to a privately owned driveway. Nelson also stated that all “standards” must be “adapted” to the existing area of the driveway so as to provide traffic safety, and that such “design and construction” measures were “feasible and economical.” As Ellis described it, “there was no
off-the-shelf solution” to the problem posed by the private driveway, which was unique to any State-owned bridge. According to Ellis, a solution would require “consideration of different alternatives, each of which ha[d] its own strengths and weaknesses.”

As described by these expert witnesses, what we are left with is the quintessential type of discretion for which § 10(b) of the Act provides immunity. That is, “when the conduct that caused the injury has a ‘high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning, governmental entities should remain immune from liability.’ Fortenbacher's contrary claim invites the judicial “second-guessing” of administrative decisions grounded in social, economic, and political policy that the discretionary function exception was designed to prevent.

d. Exceptions to immunity under the public duty rule. Finally, Fortenbacher's argument that § 10(j)(3) of the Act precludes the Commonwealth's claim to immunity is based on a misunderstanding of the purpose of that subsection and the operation of immunity under § 10. Section 10(j) is the Legislature's codification of the common-law public duty rule. Pursuant to § 10(j), the Commonwealth is immune from suit for “any claim based on an act or failure to act to prevent or diminish the harmful consequences of a condition or situation, including the violent or tortious conduct of a third person, which is not originally caused by the public employer or any other person acting on behalf of the public employer.” G.L. c. 258, § 10(j), inserted by St.1993, c. 495, § 57. But immunity under § 10(j) is not limitless, and does not apply to “any claim based on negligent maintenance of public property.” G.L. c. 258, § 10(j)(3).

Here, because we have determined that the Commonwealth is immune from suit pursuant to § 10(b) of the Act, any exception to immunity based on the public duty rule pursuant to § 10(j) is therefore inapplicable in this case. “The immunities provided by § 10 operate in the alternative; even if one immunity contains an exception that would permit a claim to be brought, that claim is barred if any of the other immunities apply.” Brum v. Dartmouth, 428 Mass. at 697, 704 N.E.2d 1147. In this case, § 10(b) provides the Commonwealth with an independent basis for immunity from suit.


So ordered.

“Agents of a Principal” Assignment

In today’s class, you will be given a fact pattern involving agents of a principal. You will submit a paper worth 5% of your grade to me no later than September 30, 2008.
Before continuing please thoroughly acquaint yourself with the Restatement of Agency, 2d, sections 229, 230, and 231, including the comments and illustrations thereto. The Restatement of Agency 2d is on reserve in the library, and is also available on Westlaw or Lexis.

Also, please review section 530(d) of the Revenue Act of 1978

END OF CLASS
II. Overview of and Introduction to Agent’s Powers

We now come to the subject of the powers of agents. Agents might have power, but the real question is whether they have the authority to bind their principals by their acts. The authority of agents flows in two directions. First, they flow from the principal to the agent, either explicitly or implicitly. Hiring a maintenance person for your building, you might give him or her the express power to go into all offices to empty trash, by giving him or her a master set of keys to all of the offices. He or she might also have the implied power to order supplies from the local hardware store to keep the building well maintained. Deciding that issue involves many factors.

The second type of authority is called apparent authority. This does not flow from the principal to the agent. Instead, it flows from the principal to the third party, who, based on the action (or inaction) of the principal, reasonably assumes that the (purported) agent has the actual authority to bind the principal. An example might help illustrate the point I am making. Let’s assume that MSL has hired a maintenance worker named Pat. On his first day of work, he goes to the local hardware store to buy nails for the job he’s working on (he is an agent, acting for his principal). Let’s assume that he has actual authority to buy the nails. When Pat gets to the hardware store and brings the nails to the counter, he tells the clerk to bill MSL for the price of the nails. At this point, ask yourself what the reasonable expectations of the hardware store should be in this situation. Pat has actual authority, but not apparent authority, because MSL has not manifested to the store that Pat is its agent. Would it be reasonable to give him the nails without checking to see whether he really did work for MSL?

Five years go by. Every time Pat goes to the hardware store to purchase items, the bill is sent to MSL, and MSL pays the bill. One day, Pat quits (he now no longer has actual authority to bind MSL as its agent, because he no longer is MSL’s agent). And he goes to the hardware store and buys some nails and stuff, which he uses on his house. The hardware store bills MSL, which refuses to pay. Is MSL liable on the theory of apparent authority? Did MSL lead the hardware store (by action or inaction) to believe that Pat possessed the authority to bind MSL? When Pat came in to the store on that fateful morning after he quit, did the hardware store have the reasonable expectation that MSL would pay for the items purchased by Pat?

Before continuing please thoroughly acquaint yourself with the Restatement of Agency, 2d, sections 7, 8, and 27, including the comments and illustrations thereto. The Restatement of Agency 2d is on reserve in the library, and is also available on Westlaw or Lexis.
Discussion points for Wing v. Lederer

What was the extent of Novera’s actual authority? Did he have any implied authority? Can Wing win against the homeowner using the theory of apparent authority? Why not? What should Wing have done? Stated differently, was Wing reasonable in assuming that Novera had the actual authority to hire him to work on the grounds? What should Wing’s attorney have tried to prove to better his client’s chances of winning? Why can’t Wing succeed on the theory of ratification? (More on that later.) What should Wing do now?

Jacob E. WING d/b/a Wing's Tree Experts, Appellee,

v.

Philip C. LEDERER, Appellant, and Peter Sonza-Novera.

Appellate Court of Illinois, Second District.


DAVIS, Justice.

Plaintiff, Jacob A. Wing, a licensed tree surgeon, d/b/a Wing's Tree Experts, brought this suit against the defendants, Philip C. Lederer, (herein called Lederer), and Peter Sonza-Novera, (herein called Novera), to recover the sum of $500. for services rendered. The complaint alleged that Novera, who acted as a part time caretaker and yardman for Lederer, either individually, or as Lederer's agent, hired the plaintiff to do certain work at the Lederer residence.

The case was tried before the court without a jury and judgment was entered for the plaintiff and against Lederer, in the sum of $250; and for the defendant, Novera. Lederer appealed from the judgment against him and no cross appeal was filed.

Lederer contends that the plaintiff did not prove any contractual relationship with him; failed to offer evidence to sustain this action under a quasi-contract theory whereby Lederer would be liable for the work done by plaintiff; and also failed to prove the fair and reasonable value of the services rendered.

Mrs. Lederer testified that in the early spring of 1964 she asked Novera whether a certain maple tree on the Lederer property needed care. He answered that it did, that he knew a man in the business, and that he would send him to her. Novera then contacted the plaintiff, had him come to the property, and showed him this tree, which had some dead branches near its top. Novera testified that he told the plaintiff to talk to the lady of the house about the tree; and that the plaintiff pointed out other tree and shrubbery work which needed to be done.
Plaintiff's version of this conversation is somewhat different. He testified that Novera showed him the maple tree and that he, the plaintiff, told Novera that it, as well as other trees, needed care; that Novera then told him to go ahead and do what was necessary; and that the cost of the work was not discussed.

At the end of June or the first of July, plaintiff sprayed the foliage. Later he came back and pruned the maple tree and root fed several trees. He returned again in the latter part of July and in early September to do more spraying and root feeding. It is undisputed that he neither saw nor talked to either Lederer, Mrs. Lederer or Novera while working on the premises. Sometime during the summer, Novera told Mrs. Lederer that the tree work apparently had been done since the dead branches in the maple tree had been removed. However, the plaintiff did not contact the Lederers and had no conversation with anyone concerning the work, other than that heretofore related between himself and Novera.

No statement was rendered for this work until November of 1964, at which time Lederer received a bill from the plaintiff for $500. Mrs. Lederer did not pay the bill but called the plaintiff on several occasions to discuss it with him. Plaintiff never returned her calls. No further word was received from the plaintiff until October of 1965, at which time another statement was received. At the trial no testimony was offered which specified the work done or the time and materials used on the job, and there was no evidence relative to the fair or reasonable value of the work done.

[1][2] Lederer had unquestionably constituted Novera his agent to recommend someone to take care of the maple tree. There is no issue as to the existence of an agency between Lederer and Novera, but only as to the latter's authority. The authority of the agent may come only from his principal. There is no dispute as to the actual authority conferred upon Novera. He was told to recommend someone to take care of the maple tree and to have that person talk to Mrs. Lederer. Both the principal and the agent understood this to be the extent of the agent's authority. It clearly did not include the hiring of a tree man for any purpose, and under no circumstances could it be parlayed to include the hiring of such man to do whatever he thought was necessary.

[3][4] Nor can it be said that Lederer clothed Novera with apparent authority to hire plaintiff to do the work which was done. Apparent authority in an agent is such authority as the principal knowingly permits the agent to assume or which he holds his agent out as possessing--it is such authority as a reasonably prudent man, exercising diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess. The plaintiff had no contact with Lederer either before or during the time in which the work was done, and Lederer neither did nor failed to do anything which would justify the plaintiff in assuming that Novera had authority to hire him.

[5] One dealing with an assumed agent is duty bound to ascertain the extent of the agent's authority. Such circumstance alone, should put the person dealing with such agent on guard
in that anyone dealing with such agent must, at his own peril, ascertain not only the fact of the agency, but also the extent of the agent's authority.

[6] Even assuming that the plaintiff's version of his conversation with Novera was correct, he conceded that Novera pointed out to him only the work to be done on the maple tree. It was the plaintiff who mentioned other work which should be done on the trees and shrubbery. Apparently, from the size of the bill, the other work was substantial and, in view of such circumstance, the plaintiff had a duty to confirm that a part time yardman had the authority to direct him to do whatever was necessary.

[7][8] The plaintiff contends that, absent any original authority on the part of Novera, Lederer, by accepting the work which the plaintiff did, and by retaining the benefit thereof, ratified the acts of his agent in hiring the plaintiff. The rule is that where an agent has acted outside of the scope of his authority, a principal may ratify the act and render it obligatory upon himself; and that subsequent assent and ratification is equivalent to an original authorization and confirms that which originally was an unauthorized act. The ratification may either be express or inferred from the surrounding circumstances, but it must come from the acts or conduct of the principal. However, a principal may not be held to have ratified that which was done unless he acts with full knowledge of all the material facts.

[9] Ratification rests on intention. The mere retention of the benefits of a transaction cannot be held to constitute ratification if the principal does not have the privilege of repudiating the unauthorized act. Absent such choice, the principal's conduct in accepting such benefits does not indicate that he assents to what has been done or intends to confirm it. In all of the cases cited by plaintiff, the ratification by a principal was made when he had full knowledge of the facts and a choice of either accepting or rejecting the benefits of the transaction.

[10] Lederer had no choice! His trees had been pruned and sprayed long before he had knowledge of what had been done. He could not undo that which had then been done and his acceptance of the work was not by choice but by necessity. The fact that he did not stop the plaintiff from doing the work is no evidence of ratification, since it is undisputed that Lederer did not have knowledge of the services during the time they were being rendered. Lederer cannot be held to have ratified the hiring of plaintiff even if it is assumed that Novera hired him to do whatever was necessary.

The trial court appeared to have rendered judgment in favor of the plaintiff on the theory that the work was done and he should get something for it. The court apparently entered the judgment of $250 on the theory that plaintiff, who offered no evidence which specified the details of the work or the method used in computing the amount charged, was nevertheless entitled to recover something.

If plaintiff predicates his right to recover upon a quasi contractual obligation on the part of Lederer, he must fail since he neither plead sufficient facts to warrant such recovery nor proved the reasonable value of the materials and services rendered. Proof of delivery of a
bill in a given amount, standing alone, is not evidence of the reasonable value of services rendered or of materials furnished.

For the reasons we have indicated, the judgment of the trial court is reversed and judgment is hereby entered in favor of the defendant, Lederer.

Discussion points for Elliott v. Great National

What was the extent of Spear’s actual authority? How is apparent authority proved in this case? What should the company have done to prevent this type of outcome? Do you think that there is enough evidence of the company’s action or inaction to justify a finding of apparent authority?

B. N. ELLIOTT, Petitioner,  
v.  
GREAT NATIONAL LIFE INSURANCE COMPANY, Respondent.  

Supreme Court of Texas.  


BARROW, Justice.

B. N. Elliott brought this suit to recover the sum of $12,500 remaining unpaid on an alleged oral agreement of employment for a period of one year. Donald Spear, who was Senior Vice-President of Marketing for Great National Life Insurance Company, entered into the agreement with Elliott. The question presented is whether Spear was authorized by Great National to make the agreement. The trial court rendered judgment on the jury verdict for Elliott. The court of civil appeals reversed this judgment and rendered a take-nothing judgment for Great National after concluding that there was no evidence to support the jury finding as to Spear's authority. We reverse the judgment of the court of civil appeals and remand the cause to that court for consideration of other points raised by Great National.

Great National was a Texas corporation which was wholly owned by US Life Corporation, a New York-based corporation. Spear's primary responsibility at Great National was to add to the field vice-president staff. Pursuant to this delegated responsibility, Spear, who was located in the Dallas office, contacted Elliott in Atlanta, Georgia, and inquired as to his interest in a field vice-president's position with Great National.

Elliott twice flew to Dallas to interview with Great National. He also flew to New York City to attend a meeting, sponsored by Great National's parent company, of all the marketing
people from the parent company's subsidiaries. Elliott believed that he was attending the meeting in order to meet the people who would make the decision as to his selection for a field vice-president's position. Each one of these trips was pursuant to Spear's request and authorization. Great National paid for each of the trips. It also paid Elliott one-twelfth of the agreed annual salary for each of the six months Elliott worked for Great National.

During the series of interviews with Spear, Elliott requested that Great National allow him to remain in Atlanta. Spear testified in this regard as follows: "Very early in our conversation, he (Elliott) indicated that he would like to remain there (Atlanta) ... and I spoke to my president about it and we declined to agree that Nick should live there."

Elliott testified that he first knew he would have to relocate to Dallas when he reported to work in the Dallas office on September 16, 1976. He testified as follows: "Q. How did you find out, then, on September 16, that you did not have an agreement? "A. Don (Spear) informed me at that time that we had not had any success at all in talking to New York and getting them to agree to leaving me remain in Atlanta and that I would have to move to Dallas."

The testimony of both Spear and Elliott provides evidence of a chain of communication which facilitated Great National's selection of Elliott as a field vice-president. Spear was expressly delegated to add employees such as Elliott. Spear and Elliott discussed the conditions of employment, and then Spear solicited a decision from the home office. When the decision concerning the conditions of employment was made, Spear communicated the decision to Elliott.

Great National did not limit the use of this chain of communication to a particular time or to a particular condition of employment. In fact, Elliott testified that he did not at any time discuss the terms of his employment with any employee of Great National other than Spear. It was this fact which led Elliott to believe that Spear had the authority to offer Elliott a one year term of employment:

"Q. As a matter of fact, you testified in your deposition a year ago that you knew during the time of these discussions that Mr. Spear did not have the authority on behalf of Great National to guarantee you a one year term of employment? "A. At that time, I didn't think he had the authority, but on September the 16th, I quickly determined that he did have the authority since he was the only person I had had dealings with. I hadn't had any dealings with anyone else and all arrangements were made through him."

In Chastain v. Cooper & Reed, 152 Tex. 322, 257 S.W.2d 422, 427 (Tex.1953), this Court said: "The doctrine of apparent authority is based on estoppel, and one seeking to charge a principal through the apparent authority of an agent to bind the principal must prove such conduct on the part of the principal as would lead a reasonably prudent person, using diligence and discretion, to suppose that the agent has the authority he purports to exercise...."
Great National established a chain of communication by which it communicated with Elliott through Spear. In so doing, Great National permitted Spear to hold himself out as having the authority to convey Great National's offer of employment to Elliott, and therefore indicated to Elliott that Spear had the authority to communicate that offer. In this situation, we hold that there was more than a scintilla of evidence that Spear had the apparent authority to hire Elliott on behalf of Great National for a period of one year. Therefore, the holding of the court of civil appeals that there was no evidence to support the jury finding was erroneous.

This error requires a reversal of the judgment of the court of civil appeals. Since Great National's brief in the court of civil appeals contained points not considered by that court, including factual points beyond this Court's jurisdiction, we remand the cause to the court of civil appeals.

The judgment of the court of civil appeals is reversed and the cause is remanded to that court.

Discussion points for Gizzi v. Texaco

We have all seen the ads – “You can trust your car to the man who wears the star.” What does this mean to the ordinary person, whose reasonable expectations we should protect? On a separate piece of paper, line up all of the arguments you believe that you can muster in favor of finding apparent authority in this case. Then do the opposite, writing down all the reasons why your apparent authority arguments fail in this case. Make them legible, because they will be collected and read aloud. What additional facts would you need to succeed under the theory of reasonable expectations/apparent authority, in your estimation? Also, considering that apparent authority is a factual question, are you convinced that this case is an appropriate one for a directed verdict?

Augustine GIZZI, Appellant, and Anthony Giaccio
v.
TEXACO, INC., Appellee.

Appeal of Anthony GIACCIO.

United States Court of Appeals, Third Circuit.


GERALD McLAUGHLIN, Circuit Judge.

Appellant Augustine Gizzi was a steady patron of a Texaco service station located on Route 130 and Chestnut Street, Westville, New Jersey. The real estate upon which the station was
situated was owned by a third party and was leased to the operator of the station, Russell Hinman. Texaco owned certain pieces of equipment and also supplied the operator with the normal insignia to indicate that Texaco products were being sold there.

In June of 1965, the station operator, Hinman, interested Gizzi in a 1958 Volkswagen van, which Hinman offered to put in good working order and sell for $400. Gizzi agreed to make the purchase and Hinman commenced his work on the vehicle. The work took about two weeks and included the installation of a new master braking cylinder and a complete examination and testing of the entire braking system. On June 18, 1965 Gizzi came to the station and paid the $400. He was given a receipt for the payment and was told that the car would be ready that evening. Gizzi returned at about six o'clock, accompanied by appellant Anthony Giaccio. They took the van and then departed for Philadelphia, Pennsylvania, to pick up and deliver some air-conditioning equipment. While driving on the Schuylkill Expressway, Gizzi attempted to stop the vehicle by applying the brakes. He discovered that the brakes did not work and, as a result, the vehicle collided with the rear end of a tractor trailer causing serious injuries to both Gizzi and Giaccio.

Texaco, Inc. was the only defendant named in the complaint and at trial, the testimony was all directed to the corporation's liability, the court having asked for an offer of proof on that question.

With regard to the sale of this vehicle, no actual agency existed between Texaco and Hinman. Although most of the negotiations involved in the transaction took place at the Texaco station, the record indicates that Hinman was selling the van on his own behalf, and not on behalf of Texaco. Texaco received no portion of the proceeds. The corporation was not designated the seller on the bill of sale, title to the vehicle being listed in the name of a company located in Atlantic City, New Jersey. Gizzi did receive a Texaco credit invoice as a receipt for the cash he paid. It would seem that this was an available convenience utilized by Hinman to record the transaction.

The repair work performed by Hinman was incidental to the sale of the vehicle. He offered to put the vehicle into good working order to further induce Gizzi to purchase it. Some work was done on the van after the money had been paid on June 18 and all work on the braking system was completed prior to that date.

The theory of liability advanced by appellants below was that Texaco had clothed Hinman with apparent authority to make the necessary repairs and sell the vehicle on its behalf and that Gizzi reasonably assumed that Texaco would be responsible for any defects, especially defects in those portions of the van which were repaired or replaced by Hinman. It was further contended that Gizzi entered into the transaction relying on this apparent authority, thereby creating a situation in which Texaco was estopped from denying that an agency did in fact exist.

The concepts of apparent authority, and agency by estoppel are closely related. Both depend on manifestations by the alleged principal to a third person, and reasonable belief by the third
person that the alleged agent is authorized to bind the principal. The manifestations of the principal may be made directly to the third person, or may be made to the community, by signs or advertising. In order for the third person to recover against the principal, he must have relied on the indicia of authority originated by the principal.

In support of their theory of liability, appellants introduced evidence to show that Texaco exercised control over the activities of the service station in question. They showed that Texaco insignia and the slogan 'Trust your car to the man who wears the star' were prominently displayed. It was further established that Texaco engaged in substantial national advertising, the purpose of which was to convey the impression that Texaco dealers are skilled in automotive servicing, as well as to promote Texaco products, and that this advertising was not limited to certain services or products. The record reveals that approximately 30 per cent of the Texaco dealers in the country engage in the selling of used cars and that this activity is known to and acquiesced in by the corporation. Actually Texaco had a regional office located directly opposite the service station in question and Texaco personnel working in this office were aware of the fact that used vehicles were being sold from the station. It was further established that there were signs displayed indicating that an 'Expert foreign car mechanic' was on the premises.

Appellant Gizzi testified that he was aware of the advertising engaged in by Texaco and that it had instilled in him a certain sense of confidence in the corporation and its products.

In granting Texaco's motion for a directed verdict the court stated:

'I am convinced that as a matter of law there could not be any apparent authority on the basis of what I heard so far or what I have had the slightest glimmer that you could show, no apparent authority on the part of this operator to bind Texaco in connection with the sale of this used Volkswagen bus * * *

'In short, nobody could reasonably interpret any of these slogans or representations or indicia of control as dealing with anything more than the servicing of automobiles, and to the extent of putting gas in them and the ordinary things that are done at service stations.

'That 'Trust your car to the man who wears the star' could not possibly be construed to apply to installing new brake systems or selling used cars.'

We are of the opinion that the court below erred in granting the motion. Questions of apparent authority are questions of fact and are therefore for the jury to determine. While the evidence on behalf of appellants by no means amounted to an overwhelming case of liability, we are of the opinion that reasonable men could differ regarding it and that the issue should have been determined by the jury, after proper instructions from the court.

For the reasons stated herein, the order of the district court will be vacated and the case remanded for further proceedings consistent with this opinion. We do not pass on the merits of any other claims advanced on this appeal, but leave them for the consideration of the district court on the remand.
END OF CLASS
Class #05

Discussion points for Drummond v. Hilton Hotel

Before class, find out the difference between a division and a subsidiary, and why the distinction is so important. Is there enough apparent authority in this case to justify a verdict for the plaintiffs? What if the plaintiffs were not hotel patrons, but suppliers of linen who were not paid for their latest delivery? Would the case be decided differently? If so, then why? Why, in Hilton’s case, is this a classic case of trying to have your cake and eating it, too?

As mentioned earlier, if an agent is deemed to be an independent contractor, then liability for the negligence of the agent will not be imputed to the principal (respondeat superior does not apply). However, the principal is not always immune from liability, because of public policy concerns. Some exceptions to the general rule that principals are not liable for the negligence of their independent contractor agents include 1) dangerous disrepair, 2) nuisance, 3) inherently dangerous activities, and 4) nondelegable duties (landlords).

James and Verna DRUMMOND
v.
HILTON HOTEL CORPORATION

United States District Court, E. D. Pennsylvania.

July 3, 1980.

GILES, District Judge.

Defendant, Hilton Hotel Corporation ("Hilton"), has moved for summary judgment in this action for damages. Plaintiff, Verna Drummond was injured as the result of a fall in a hotel whose trade name was the Hilton Inn. Hilton asserts that at no time did it maintain, own, control, or operate the hotel and that the record owner was the Creative Development Company ("Creative"), a wholly-owned subsidiary of the Gebco Investment Corporation ("Gebco"). A written agreement which on its face is a license/franchise agreement exists between Hilton and Creative. In that document, Hilton specifically disavows any agency relationship.

Plaintiffs resist Hilton's summary judgment motion asserting the doctrine of apparent agency. They maintain that Hilton held itself out in such a manner as to lead the general public, including hotel guests, to believe they were dealing directly with either Hilton or a
servant or employee of Hilton, a hotel corporation of international reputation. Plaintiffs assert that representation of the hotel as a "Hilton Inn" estops Hilton from denying all possessory duties.

Upon careful examination of the controlling authority in this jurisdiction, this court concludes that there are material issues of fact presented regarding the existence of both a real and an apparent agency relationship between Hilton and Creative. Accordingly, for the reasons set forth below, Hilton's motion for summary judgment must be denied.

I.

Plaintiff urges that Hilton should be liable for the alleged negligent acts of Creative based on the doctrine of apparent authority as set forth in the Restatement of Agency s 267. Plaintiffs, opposing the instant motion, reference a signed agreement between Hilton and Creative which purports to be a license and franchise agreement. It has a provision which attempts to deny the existence of an agency relationship and to disclaim all liabilities incurred on behalf of the hotel.

"Under Pennsylvania law, when an injury is done by an 'independent contractor,' the person employing him is generally not responsible to the person injured." **** "However, when the relationship between the parties is that of 'master-servant' or 'employer-employee' as distinguished from 'independent contractor-contractee,' the master or employer is vicariously liable for the servant's or employee's negligent acts committed within the scope of his employment." The basic inquiry which the Pennsylvania courts have set forth to determine whether a given person is an employee-servant or an independent contractor is whether such person is subject to the alleged employer's control or right to control with respect to his physical conduct in the performance of the services for which he was engaged.... The hallmark of an employee-employer relationship is that the employer not only controls the result of the work but has the right to direct the manner in which the work shall be accomplished; the hallmark of an independent contractee-contractor relationship is that the person engaged in the work has the exclusive control of the manner of performing it, being responsible only for the result

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(1) In Drexel, the Third Circuit observed that difficulties exist where the parties occupy the status of franchisor and franchisee. The mere existence of a franchise relationship does not necessarily trigger a finding of a master-servant relationship, nor does it automatically insulate the parties from such a relationship. Whether the control retained by the franchisor is also sufficient to establish a master-servant relationship depends in each case upon the nature and extent of such control as defined in the franchise agreement or by the actual practice of the parties. Drexel, 582 F.2d at 786. In Drexel, the defendant occupied the status of franchisor by virtue of a signed agreement. Although the franchise bore the name of the defendant, it denied all ownership and control and thus all liability for any negligence on the part of the franchisee. Notwithstanding a written provision in the agreement which stated
that the liability of the defendant was strictly limited, the court concluded that other clauses in the agreement could be construed as reserving to the defendant the right to control certain facets of the franchise. For example, there were clauses requiring the franchisee to operate under the name of the defendant/franchisor, granting the defendant the right of inspection, and requiring that the franchise operate as part of a national organization securing its strength through adherence to defendant's "uniformly high standards of service, appearance, quality of equipment, and proved methods of operation." Id. 787. Such clauses prompted the court to state that it could not hold as a matter of law that a master-servant relationship did not exist.

(2, 3) In the agreement between Hilton and Creative, Hilton has the right to consult with Creative on operating problems concerning the hotel, the right to inspect the hotel to maintain the standards of the Hilton system. Creative is required to feature Hilton's name in all advertising and promotional material. The agreement does have a clause limiting Hilton's liability. Yet, as stated in Drexel, the mere fact that there is express denial of the existence of an agency relationship is not in itself determinative of the matter. Id. 786. Since such a denial of agency is not sufficient to relieve Hilton of all possible liability as a matter of law, the issue of Hilton's right to control any operations of the hotel is an issue for jury determination.

II.

(4) Plaintiff's contention that Hilton should be liable for the alleged negligent acts of Creative, irrespective of an actual agency relationship, is based on the doctrine of apparent agency as set forth by the Restatement (Second) of Agency s 267 (1975), which provides as follows:

One who represents that another is his servant or other agent and thereby causes a third person justifiably to rely upon the care or skill of such apparent agent is subject to liability to the third person for harm caused by the lack of care or skill of the one appearing to be a servant or other agent as if he were such.

Accord, Restatement of Agency s 267.

Plaintiffs cite Taylor v. Costa Lines, Inc., 441 F.Supp. 783 (E.D.Pa.1977), for the proposition that Pennsylvania law would adopt this section of the Restatement. Hilton asserts that the Pennsylvania courts have traditionally rejected the application of this principle to tort actions. The Third Circuit in Drexel agreed with the decision of the trial court in Taylor, and concluded that the Supreme Court of Pennsylvania would adopt s 267 or some similar principle of apparent agency. Hilton could therefore be liable under this doctrine if the plaintiff makes a showing that Hilton represented Creative to be its servant and that plaintiff justifiably relied on such representation.

In Gizzi v. Texaco, Inc., 437 F.2d 308 (3d Cir.) (applying New Jersey law), cert. denied, 404 U.S. 829, 92 S.Ct. 65, 30 L.Ed.2d 57 (1971) while citing s 267, the court concluded that a question of apparent authority existed where a gas station was neither owned nor operated by Texaco but prominently displayed the Texaco insignia and slogan and where Texaco had engaged in national advertising, the effect of which could be found to instill confidence in Texaco gas stations. In Drexel, the Court also concluded that there were sufficient indicia of authority to raise questions of fact as to whether the elements of apparent agency had been
established. Among these indicia were provisions in the franchise agreement which required the franchisee to use the name of the defendant/franchisor in all promotional and advertising materials.

In the instant case, plaintiffs reference to provisions in the license/franchise agreement between Hilton and Creative which require Creative to "disclose in all dealings with suppliers and persons, other than guests, that it is an independent entity and that Licensor (Hilton) has no liability for debts," and "Feature in the Hotel operation, in the guest rooms, public rooms and other public areas of the Hotel, and on the various articles therein as specified in the Operating Manual and in advertising and promotional material, the name 'Hilton'.

Therefore, this court concludes that whether Hilton held itself out to the public as the owner or operator of the Hilton Inn is a proper issue of fact for determination by a jury.

Discussion points for Hoddeson v. Koos Bros.

Read the facts as they are presented very carefully. It seems to me that someone is lying, either the plaintiff or the defendant (how could something like this happen, if it did happen, without the store knowing about it?). Tell me who is lying, and prepare to justify your answer in class.

Why is there no allegation of actual authority in this case? What is missing? If it is apparent authority which is the theory behind the cause of action, what exactly is the plaintiff’s case built upon? What are her factual allegations? Can you see any public policy considerations lurking around in the background of this case which, if not discussed, should at least be considered?

And finally, a hypothetical to consider. Assume your client was injured, she alleges, by slipping on a tomato at the local grocery store which had fallen on the floor. Will you win if you sue? Over and above proving that she slipped on a tomato on the floor of the store, what more will you need to prove? How will you go about proving it?

Robert HODDESON and Joan Hoddeson, Plaintiffs-Respondents,  
v.  
KOOS BROS., a New Jersey corporation, Defendant-Appellant.

Superior Court of New Jersey.  
The occurrence which engages our present attention is a little more than conventionally unconventional in the common course of trade. Old questions appear in new styles. A digest of the story told by Mrs. Hoddeson will be informative and perhaps admonitory to the unwary shopper.

The plaintiff Mrs. Hoddeson was acquainted with the spacious furniture store conducted by the defendant, Koos Bros., a corporation, at No. 1859 St. George Avenue in the City of Rahway. On a previous observational visit, her eyes had fallen upon certain articles of bedroom furniture which she ardently desired to acquire for her home. It has been said that 'the sea hath bounds but deep desire hath none.' Her sympathetic mother liberated her from the grasp of despair and bestowed upon her a gift of $165 with which to consummate the purchase.

It was in the forenoon of August 22, 1956 that Mrs. Hoddeson, accompanied by her aunt and four children, happily journeyed from her home in South River to the defendant's store to attain her objective. Upon entering, she was greeted by a tall man with dark hair frosted at the temples and clad in a light gray suit. He inquired if he could be of assistance, and she informed him specifically of her mission. Whereupon he immediately guided her, her aunt, and the flock to the mirror then on display and priced at $29 which Mrs. Hoddeson identified, and next to the location of the designated bedroom furniture which she had described.

Upon confirming her selections the man withdrew from his pocket a small pad or paper upon which he presumably recorded her order and calculated the total purchase price to be $168.50. Mrs. Hoddeson handed to him the $168.50 in cash. He informed her the articles other than those on display were not in stock, and that reproductions would upon notice be delivered to her in September. Alas, she omitted to request from him a receipt for her cash disbursement. The transaction consumed in time a period from 30 to 40 minutes.

Mrs. Hoddeson impatiently awaited the delivery of the articles of furniture, but a span of time beyond the assured date of delivery elapsed, which motivated her to inquire of the defendant the cause of the unexpected delay. Sorrowful, indeed, was she to learn from the defendant that its records failed to disclose any such sale to her and any such monetary credit in payment.

Such were the essentialities of the narrative imparted to the judge and jury in the Union County District Court, where Mrs. Hoddeson and her husband obtained a final judgment against the defendant in reimbursement of her cash expenditure. The testimony of her aunt was corroborative of that of Mrs. Hoddeson.

It eventuated that Mrs. Hoddeson and her aunt were subsequently unable Positively to recognize among the defendant's regularly employed salesmen the individual with whom Mrs. Hoddeson had arranged for the purchase, although when she and her aunt were afforded the opportunities to gaze intently at one of the five salesmen assigned to that department of the store, both indicated a resemblance of one of them to the purported salesman, but frankly
acknowledged the incertitude of their identification. The defendant's records revealed that the salesman bearing the alleged resemblance was on vacation and hence presumably absent from the store during the week of August 22, 1956.

As you will at this point surmise, the insistence of the defendant at the trial was that the person who served Mrs. Hoddeson was an impostor deceitfully impersonating a salesman of the defendant without the latter's knowledge.

It was additionally disclosed by the testimony that a relatively large number of salesmen were employed at the defendant's store, and that since they were remunerated in part on a sales commission basis, there existed considerable rivalry among them to serve incoming customers; hence the improbability of the unnoticed intrusion of an impersonator.

Fortifying the defense, each of the five salesmen, but not every salesman, denied that he had attended Mrs. Hoddeson on the stated occasion, and the defendant's comptroller and credit manager verified the absence in the store records of any notation of the alleged sale and of the receipt of the stated cash payment.

The credibility of the testimony of both Mrs. Hoddeson and her aunt was thus shadowed. The trial judge transmitted to the jury for determination the simple factual issue whether Mrs. Hoddeson and her co-plaintiff had established by a preponderance of the credible evidence that the $168.50 was paid in fact to an employee of the defendant; otherwise, the defendant should be acquitted of liability.

The jury resolved that controversial issue in favor of the plaintiffs. The defendant's application for a new trial was denied by the trial judge who announced:

'It is my conclusion that the evidence of the circumstances proved by the plaintiff warranted a finding by the jury that the person who received the money was an employee of the defendant.'

Does it clearly and unequivocally appear that the action of the trial judge constituted a manifest denial of justice under the law?

The ground now asserted on behalf of the defendant for a reversal of the judgment is that there was a deficit of evidence to support the conclusion that a relationship of master and servant existed between the man who served and received the money from Mrs. Hoddeson and the defendant company.

[2] There can be no doubt that the existence of the alleged relationship, or in the alternative an estoppel by the defendant to deny its existence, was an essential element of the legal right of the plaintiff, Mrs. Hoddeson, to recover her monetary disbursement from the company. Neither is it to be doubted that such a relationship of agency, actual or apparent, can be proved by means of circumstantial evidence.
We do not hastily yield to the temptation immediately to adopt the postulate that the person who waited upon Mrs. Hoddeson was without question a humbugger unassociated with the defendant. We recognize that the jurors, pursuant to the directions of the court, weighed on the scales of reasonable probabilities the inferences anent that issue which were to them derivable from the circumstantial evidence relating on the one hand to the described behavior and deportment of the individual and on the other to the revelatory state of the defendant's records.

Perhaps in reality the jurors did not read the scales mistakenly, and so initially we pause to examine the probative range of the circumstantial evidence. True, in the present case there was evidence that the person whose identity is undisclosed approached Mrs. Hoddeson and her aunt in the store, publicly exhibiting the mannerisms of a salesman; inquired if he could be of service; upon being informed of the type of the articles in which Mrs. Hoddeson was interested, he was not only sufficiently acquainted with their description, but also where in the department they were respectively on display, guiding them without hesitation to the location of the mirror and then to that of the indicated bedroom furniture; he represented that those articles were not then available in stock, which significantly the store records disclosed to be true; his prophetic representation concerning their prospective arrival in stock proved to be prescient, unless he gleaned that information from the price tag; he accurately calculated their true sales prices and openly received the cash. Those activities precisely characteristic of the common experiences and practices in the trade were conspicuously pursued in market overt during a period of 30 to 40 minutes.

[3] In the consideration of the propriety of the defendant's motion for an involuntary dismissal of the action, we are not at liberty to suspect that the verified narrative of Mrs. Hoddeson, corroborated by her aunt, was purely imaginative or artfully inventive, but rather to regard it as a trustworthy revelation of the factual events to the extent of her knowledge. Gentile v. Public Service Coordinated Transport.

In the study of the circumstantial evidence, its perceptible legal deficiency and inadequacy inhere in the limitations of its disclosures. Obviously it confines its information solely to the activities of the supposed salesman. It does not embrace or, indeed, touch any manifestations whatever emanating From the defendant tending to indicate Its conference of authority, actual or apparent, upon the alleged salesman.

[4] Where a party seeks to impose liability upon an alleged principal on a contract made by an alleged agent, as here, the party must assume the obligation of proving the agency relationship. It is not the burden of the alleged principal to disprove it.

[5] Concisely stated, the liability of a principal to third parties for the acts of an agent may be shown by proof disclosing (1) express or real authority which has been definitely granted; (2) implied authority, that is, to do all that is proper, customarily incidental and reasonably appropriate to the exercise of the authority granted; and (3) apparent authority, such as where the principal by words, conduct, or other indicative manifestations has 'held out' the person to be his agent.
[6] Obviously the plaintiffs' evidence in the present action does not substantiate the existence of any basic express authority or project any question implicating implied authority. The point here debated is whether or not the evidence circumstantiates the presence of apparent authority, and it is at this very point we come face to face with the general rule of law that the apparenacy and appearance of authority must be shown to have been created by the manifestations of the alleged principal, and not alone and solely by proof of those of the supposed agent. Assuredly the law cannot permit apparent authority to be established by the mere proof that a mountebank in fact exercised it.

*****

[8] Let us hypothesize for the purposes of our present comments that the acting salesman was not in fact an employee of the defendant, yet he behaved and deported himself during the stated period in the business establishment of the defendant in the manner described by the evidence adduced on behalf of the plaintiffs, would the defendant be immune as a matter of law from liability for the plaintiffs' loss? The tincture of estoppel that gives color to instances of apparent authority might in the law operate likewise to preclude a defendant's denial of liability. It matters little whether for immediate purposes we entitle or characterize the principle of law in such cases as 'agency by estoppel' or 'a tortious dereliction of duty owed to an invited customer.' That which we have in mind are the unique occurrences where solely through the lack of the proprietor's reasonable surveillance and supervision an impostor falsely impersonates in the place of business an agent or servant of his. Certainly the proprietor's duty of care and precaution for the safety and security of the customer encompasses more than the diligent observance and removal of banana peels from the aisles. Broadly stated, the duty of the proprietor also encircles the exercise of reasonable care and vigilance to protect the customer from loss occasioned by the deceptions of an apparent salesman. The rule that those who bargain without inquiry with an apparent agent do so at the risk and peril of an absence of the agent's authority has a patently impracticable application to the customers who patronize our modern department stores. Vide, 2 C.J.S. Agency s 93, p. 1193.

[9] Our concept of the modern law is that where a proprietor of a place of business by his dereliction of duty enables one who is not his agent conspicuously to act as such and ostensibly to transact the proprietor's business with a patron in the establishment, the appearances being of such a character as to lead a person of ordinary prudence and circumspection to to believe that the impostor was in truth the proprietor's agent, in such circumstances the law will not permit the proprietor defensively to avail himself of the impostor's lack of authority and thus escape liability for the consequential loss thereby sustained by the customer.

*****

Let it not be inferred from our remarks that we have derived from the record before us a conviction that the defendant in the present case was heedless of its duty, that Mrs. Hoddeson
acted with ordinary prudence, or that the factual circumstances were as represented at the
trial.

[10][11] In reversing the judgment under review, the interests of justice seem to us to recommend the allowance of a new trial with the privilege accorded the plaintiffs to reconstruct the architecture of their complaint appropriately to project for determination the justiciable issue to which, in view of the inquisitive object of the present appeal, we have alluded. We do not in the exercise of our modern processes of appellate review permit the formalities of a pleading of themselves to defeat the substantial opportunities of the parties.

Reversed and new trial allowed.

END OF CLASS
Class #06

Discussion points for Cullen v. BMW

In order to discuss this case, you need to learn a little about franchisors/franchisees. So do some research and be prepared to talk about what you have learned. Understand why actual authority and apparent authority arguments fail for the plaintiff. If the car dealer (Bavarian) is an independent contractor (of sorts), then how can the plaintiff succeed in suing BMW of North America? What are the allegations one must make and prove in order to succeed? When can you go after the principal when the independent contractor is at fault? If your client were run over by a Federal Express truck, could you sue all the companies (the principals) whose packages were being delivered by that Federal Express truck (the independent contractor) when the accident occurred? Why not? What would you have to prove in order to successfully sue those companies?

Thinking back to the Tormo v. Yormark case, do you think that attorneys are held to a higher standard than other professionals (such as hoity-toity foreign car dealers)?

Thomas W. CULLEN, Jr., Plaintiff-Appellee,

v.

BMW OF NORTH AMERICA, INC., Defendant-Appellant.

United States Court of Appeals,
Second Circuit.


Defendant BMW of North America, Inc. ("BMW/NA") appeals from a judgment of the United States District Court for the Eastern District of New York, Honorable Edward R. Neaher, Judge, in favor of Thomas W. Cullen, Jr., in the amount of $18,000 plus interest, and from a judgment of that same court, denying defendant's motion to amend the judgment. BMW/NA is the exclusive importer and distributor in the United States of passenger cars, parts, and products manufactured by Bayerische Motoren Werke, AG. On appeal, BMW/NA claims that the district court erred in finding that it had breached a duty under New York law actively to police the methods of operation of its franchisee, Bavarian Auto Sales, Inc. ("Bavarian"), and had negligently permitted Bavarian to continue as a BMW dealer. We agree with BMW/NA that it did not owe a duty to supervise the operation of Bavarian and to terminate the franchise because of its allegedly precarious financial condition. Accordingly, we reverse the judgments of the district court.
FACTS

On January 24, 1979, Thomas W. Cullen, Jr., and his wife drove past the showroom of Bavarian and decided to shop for a car. Cullen selected a new 1978 BMW, Model 530i, at a price of $18,245, and placed a deposit of $245 on the vehicle. Although Cullen had originally been told that the car would not be available for seven to ten days, a Bavarian salesman called Cullen five days later, advising that the car had arrived and requesting a check for the balance of the amount of $18,000, which was cashed by Bavarian. However, Cullen never received the automobile or the return of his money. In fact, Hans Eichler, Bavarian's president and owner of a 60 percent interest in the franchise, had stolen and absconded with Cullen's money. At no time relevant to the transaction, however, did Cullen have any contact, in person, by telephone, or by mail, with any representative of BMW/NA.

Cullen subsequently commenced a civil suit against Bavarian in New York State Supreme Court, Nassau County. The suit was stayed after Eichler filed a petition in bankruptcy. Cullen also filed criminal complaints with the Queens County District Attorney and the Attorney General of the State of New York, but no indictments were issued. In addition, Cullen brought this action based on diversity grounds against BMW/NA.

Bavarian was operating as a franchised BMW dealer, with Eichler as its principal, when BMW/NA assumed control over the distribution of BMW automobiles in March, 1975. It continued to operate as a franchised BMW dealer until February 16, 1979 when the dealership ended.

***

Pursuant to a standard operating agreement with BMW/NA, Bavarian was responsible for maintaining a prearranged line of credit with a financial institution to be used exclusively for the purchase of BMW vehicles. Bavarian, however, permitted its line of credit to lapse. Prior to August, 1976, Bavarian had a line of credit with the State Bank of Long Island. On August 18, 1976, however, the bank informed BMW/NA that it had terminated its relationship with Bavarian because Eichler had advised the bank that he had arranged to handle Bavarian's credit requirements from personal resources. BMW/NA experienced difficulty, however, in receiving payment for cars and parts and placed Bavarian on a C.O.D. certified check basis, rather than open account status, in the latter part of 1976.

In June, 1977, BMW/NA received a letter from the Israel Discount Bank stating that effective June 16, 1977, Bavarian had established a line of credit for $200,000. From the latter part of 1976 through August 22, 1977, the Israel Discount Bank had paid for approximately eighty-seven vehicles purchased by Bavarian even though no formal letter of credit was in effect for most of this period. The bank also paid BMW/NA for another twenty-six vehicles between September 30, 1977 and December 27, 1977. The Israel Discount Bank continued as Bavarian's credit facility through the summer of 1978. The bank paid BMW/NA for fifty-three automobiles between January 1, 1978 and August 18, 1978. In
the fall of 1978, however, the bank concluded that the dealership was experiencing financial difficulty and decided not to extend further credit. The bank's decision was in part based upon certain tax levies and other legal actions filed against the Bavarian franchise. BMW/NA was unaware, however, of any tax levies filed against Bavarian or the reasons behind the Israel Discount Bank's decision to terminate Bavarian's line of credit.

At approximately the time at which Bavarian lost its line of credit, BMW/NA began receiving an increased number of customer complaints concerning the Bavarian franchise. These complaints ranged from the issuance of checks on accounts with insufficient funds to alleged delays in return of customer deposits. Although an investigation by BMW/NA revealed that all complaints had been satisfactorily resolved and all checks were covered on re-presentation, BMW/NA remained disturbed by Bavarian's continued failure to satisfy certain requirements of its contract with BMW/NA, such as submitting monthly financial statements, and the increased number of checks which Bavarian had issued on accounts with insufficient funds.

Eichler attempted to reassure BMW/NA of Bavarian's financial viability, indicating that he was actively negotiating with a variety of financial institutions to obtain a line of credit. By mid-September, however, Bavarian still had not been able to secure credit funds, and BMW/NA met with Eichler to discuss the future of the franchise. After reviewing the dealership's file, BMW/NA concluded that it would be difficult to terminate the Bavarian franchise at that time, without adequate written documentation certifying the dealer's deficiencies and without providing Bavarian an opportunity to correct those deficiencies. Accordingly, BMW/NA granted Bavarian sixty days to cure all deficiencies, and BMW/NA personnel closely monitored the franchise during this period. BMW/NA continued to operate as a BMW dealer and service facility and maintained the minimum number of vehicles required by its contract with BMW/NA.

At Bavarian's request, the original sixty-day period was extended until November 14, 1978. On the following day, Eichler informed BMW/NA that he had verbal approval from Citibank for credit and that he was awaiting confirmation. Although the Citibank commitment did not materialize, the Lloyd Capital Corporation ("Lloyd") advised BMW/NA by letter dated December 7, 1978, that Bavarian had established a line of credit for $400,000 exclusively for BMW automobiles. Shortly thereafter, BMW/NA allocated seven vehicles to the Bavarian dealership and drew funds pursuant to the Lloyd letter of credit. The cash drafts were refused, however, and Lloyd informed BMW/NA that the letter of credit had been withdrawn. The seven vehicles were then removed from Bavarian and were reallocated to a nearby BMW dealer. Moreover, Friedrich Hanau, vice-president of BMW/NA, immediately wrote to Eichler, setting forth the company's position that unless Bavarian corrected its continuing deficiencies within an additional sixty days, BMW/NA would serve a notice of intent to terminate the franchise. Eichler responded on December 28, 1978, indicating that he was accelerating his efforts to obtain a line of credit, and expressing his desire to continue as a BMW dealer. In early January, 1979, however, Eichler advised BMW/NA that he desired to sell his franchise to another automobile dealer. This prospective purchaser
submitted an application which BMW/NA, in early February, rejected for failing to satisfy BMW/NA's established standards for a new dealership.

On February 13, 1979, BMW/NA officials again met with Eichler to discuss the future of the franchise. At this meeting, BMW/NA officials learned that Eichler had accepted deposits from customers totalling approximately $100,000 and that he had used this money for his own purposes. Three days later, BMW/NA accepted Eichler's voluntary letter of resignation.

DISCUSSION

Cullen alleged at trial two theories of liability: (1) that Bavarian acted as BMW/NA's agent pursuant to principles of either actual agency or agency by estoppel; and (2) that BMW/NA negligently permitted Bavarian to continue as a BMW dealer because it had knowledge of Bavarian's precarious financial condition. The district court rejected the first theory of liability, finding that Cullen failed to prove the essential elements supporting a theory of agency by estoppel. The court held, however, that BMW/NA was liable for damages under the negligence theory, finding that Cullen had met his "burden of proving facts which give rise to a legal duty on the part of BMW/NA, for the protection of its franchisee's customers, to reasonably police the authorized use of the BMW name and supervise the operation of its franchise." Cullen v. BMW of North America, Inc., No. 79 C 970, slip op. at 12 (E.D.N.Y. Oct. 28, 1981). In imposing a duty on BMW/NA, the district court found that BMW/NA "was apprised of Bavarian's propensity for unscrupulous business transactions," Cullen v. BMW of North America, Inc., 531 F.Supp. 555, at 565-66 (E.D.N.Y. 1982), and that as a result, "BMW/NA should have reasonably foreseen that Bavarian might have intentionally caused some financial harm to some BMW customer as a result of its original negligence ...." Id. The court thus concluded that where a franchisor, such as BMW/NA, has a "reasonable opportunity to reduce the risk of foreseeable injury" caused by its franchisee, id., but fails to terminate its franchisee or take other appropriate action, the franchisor is negligent and is liable for damages suffered by the ultimate consumer.

FN6. Cullen's amended complaint alleged four separate theories of liability: (1) that Bavarian was acting as agent for BMW/NA pursuant to principles of either actual agency or agency by estoppel; (2) that BMW/NA was negligent in permitting Bavarian to continue as a dealer because it had knowledge of Bavarian's allegedly precarious financial condition; (3) that BMW/NA entered into a conspiracy with Eichler, and in fact did, defraud customers into doing business with Eichler; and (4) that BMW/NA's conduct constituted a prima facie tort. At the conclusion of discovery, BMW/NA moved for summary judgment dismissing each of Cullen's claims for relief. The district court concluded that an actual agency relationship did not exist between BMW/NA and Bavarian. It also found no evidence to support Cullen's causes of action for conspiracy to commit fraud and prima facie tort, and dismissed those claims as well. Accordingly, only the issues of negligence and agency by estoppel remained to be tried.

We conclude, however, that the district court improperly determined that Cullen's injury was reasonably foreseeable, and thus erred in finding BMW/NA liable for negligent failure to police the methods of operation of its independent franchisee and to terminate the franchise because of Bavarian's precarious financial condition. "The law does not undertake to hold a person who is chargeable with a breach of duty toward another, with all the possible consequences of his wrongful act." Lowery v. Western Union Telegraph Co., 60 N.Y. 198, 201 (1875). It is thus a well-established principle that foreseeability of injury is an indispensable requisite of negligence, and that negligence exists only when there is a reasonable likelihood of danger as the result of the act complained of. Accordingly, an intervening act, tortious or criminal, will ordinarily insulate a negligent defendant from liability when the subsequent act could not have been reasonably anticipated by the defendant.

[3] Applying these principles to the instant action, we decline to hold BMW/NA negligent and liable for damages since it could not reasonably have anticipated the crimes committed by Bavarian's principal, Eichler. Although BMW/NA may have been aware of Bavarian's shaky financial condition, that knowledge alone gave BMW/NA no cause reasonably to anticipate that Eichler would either engage in any criminal activity or that he would abscond with customer funds. In fact, no amount of supervision by BMW/NA would have enabled it to foresee Eichler's thievery. Moreover, even though BMW/NA had notice that Bavarian had been the subject of customer complaints, most complaints were resolved, and the record does not demonstrate that there was any dishonesty or criminal intent associated with these incidents. Furthermore, we note that the district court's finding that Bavarian was an independently owned and operated dealership is sufficient to eliminate any question of control by BMW/NA. BMW/NA had no financial interest in Bavarian, did not participate in the hiring or firing of its officers or employees, or dictate its sales practices. Accordingly, we conclude that BMW/NA, even though it had knowledge of Bavarian's precarious financial condition, was not liable to Cullen for his damages under a negligence theory since it could not have reasonably foreseen Eichler's criminal activity.

Reversed.

III. The Equal Dignities Rule

Nothing much to worry about here, folks. In fact, it is a repeat of a concept you were most likely introduced to in Contracts. The Equal Dignities Rule is just a logical offshoot of the Statute of Frauds, which requires a writing signed by the party to be charged in those Contracts cases it applies to. In these cases, the question does not involve whether a writing exists, which is signed. The question in these cases involves the person who signed – the
agent, not the principal. And the question then becomes, is the agent’s signature on the document enough to bind the principal? And the answer is, it depends. If the jurisdiction follows the Equal Dignities Rule, then you need two writings, one signed by the agent entering into the contract on behalf of the principal, and the other signed by the principal authorizing the agent to enter into the contract on behalf of the principal. If the jurisdiction does not follow the rule, then you need only the writing signed by the agent. But that only takes you half the way there. You still need to bring in the principal under the doctrine of actual or apparent authority.

Before continuing please thoroughly acquaint yourself with the Restatement of Agency, 2d, sections 67, including the comments and illustrations thereto. The Restatement of Agency 2d is on reserve in the library, and is also available on Westlaw or Lexis.

Discussion points for Commission v. Roger Gray

This jurisdiction follows the Equal Dignities Rule. There is no doubt that the agent (property manager) signed the contract extending the lease. The question becomes whether there is a writing signed by the principal (landlord) authorizing him to do so, as required by the rule. And the funny thing is, there is a writing, so the question then becomes, is the writing specific enough? How would you go about proving to this court that the writing was sufficient? Would the doctrine of apparent authority help? The doctrine of implied agency powers? Who do you think has the better argument, the majority or the dissent? Why don’t officers and directors of corporations need writings from their principal (the corporation itself)?

COMMISSION ON ECUMENICAL MISSION AND RELATIONS OF the UNITED PRESBYTERIAN CHURCH IN the UNITED STATES OF AMERICA, Appellant, v. ROGER GRAY, LTD., et al., Respondents.

Court of Appeals of New York.


BREITEL, Judge.

The issue is whether the 'managing agent' of plaintiff landlord's predecessor in interest, who purportedly executed a store lease extension agreement by informal letter, was an agent for
purposes of subdivision 2 of section 5--703 of the General Obligations Law; and, if so, whether the evidence of his authority to execute the extension agreement satisfies the statute.

Vartan Jinishian, now deceased, had been president and sole stockholder of Madison Avenue Realty Corporation, owner of commercial property at 554 Madison Avenue, its sole asset. Harry Aprahamian was the managing agent of the building from 1948 to 1968. During this period he collected the rents, negotiated leases and the extensions of leases, arranged for bids and contracts with respect to painting, plumbing, and electrical work on the premises. In June, 1964 Jinishian, by letter, extended Aprahamian's employment at the same monthly salary as managing agent for the corporation's building for a period of six years to be measured from Jinishian's death. By letter, bearing the date of February 14, 1966, Aprahamian purported to extend the lease of defendant Roger Gray, Ltd., a tenant, for a period of three years from January 31, 1971 until January 31, 1974. The letter was signed 'Madison Avenue Realty Corporation By Harry Aprahamian, Manager'. On May 17, 1966, plaintiff landlord acquired all the outstanding shares of Madison by gift from Jinishian. On November 30, 1967, fee title was deeded by the former landlord Madison to the present landlord, plaintiff.

The date of the purported extension is significant; it is February 14, 1966. This is just short of five years before the tenant's lease was to expire by its terms. And it is just short of three months before the entire corporate stock of the former landlord was transferred to the present landlord as a charitable gift.

The landlord's treasurer, Pattison, first learned of the alleged lease extension to Roger Gray in August, 1966. In January, 1969 plaintiff landlord entered into an agreement for the sale of 554 Madison Avenue subject to, among other things, the Roger Gray lease expiring on January 31, 1971. Upon learning of the prospective sale, the tenant, Roger Gray, informed the landlord of the written extension. The landlord then brought this action for a judgment declaring that the purported lease extension was invalid. Special Term granted the landlord's motion for summary judgment, holding the extension letter to be without legal effect.

The Appellate Division reversed, one Justice dissenting. It premised reversal on alternative theories: First, whether the corporation was a signatory to the extension agreement is determined by general corporate law and is not affected by the General Obligations Law; and, second, assuming Aprahamian to be an agent for purposes of the General Obligations Law, the written authorization need not be specific and referable to the particular lease.

The order of the Appellate Division should be reversed, and Special Term's determination granting plaintiff landlord summary judgment should be reinstated.

The statute reads in relevant part that a lease for a period longer than a year must be in writing and 'subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing' (General Obligations Law, Consol.Laws, c. 24--A, 5--703, subd. 2). The mandate that the authority of the putative agent be in writing is not peculiar to New York but is found in the Statute of Frauds provisions of more than a dozen States (1944 Report of
Defendant tenant urges this court to adopt an interpretation of the statute which is not only strained but also without precedential support. It argues that the statute does not apply when the putative agent is also an employee of the corporation. Because a corporation must perforce act through individuals, it contends that if the instrument is executed by an officer or employee on behalf of the corporation, the act of execution is not that of an agent but the act of the corporation itself. The court then, it says, need not reach the question of agency and the requisite written authorization required by the Statute of Frauds.

This reasoning is unsound.

[1] In the first place, an issue under a Statute of Frauds, such as section 5--703, may not be resolved by reference to rules of agency affecting corporations. If it were otherwise, then the Statute of Frauds would be largely obviated as to corporations and to that extent rendered a virtual nullity. None of the cases in this State or elsewhere have ever taken such a view. The tenant cites none. Indeed, the reasoning urged by the tenant has been expressly rejected as untenable in other jurisdictions. Moreover, the essential premise underlying that reasoning begs the question. The nub of the issue is whether the Statute of Frauds requires that an employee acting as an agent be authorized in writing before he may execute certain kinds of instruments. For that issue it must be assumed that a party can supply parol proof that the actor was both an employee and an agent, and possessed with purported authority. Of course, if by the extraneous proof the purported agent's act was not authorized, or he was not an agent, that is the end of the matter and there is no need to have recourse to the Statute of Frauds. Consequently, the issue tendered on this appeal is, assuming that the purported agent was indeed the agent authorized by parol evidence, does his act of extending the lease fail for lack of compliance with the Statute of Frauds as to his own authorization.

The second problem is whether an employee who is also an agent, or better, an agent who is also an employee, falls within subdivision 2 of section 5--703. Although it has been often stated that a corporate officer or director is not an 'agent' within the meaning of the Statute of Frauds requiring written authorization, the rule has not been applied to employees or agents who are not officers or directors. On the contrary, the authorities relied on by the parties expressly limit the exception to directors and officers. **** A case of marked interest, involving an 'Assistant General Land Agent' for a railroad who lacked any written authorization to execute a contract for the sale of land, arose in Pennsylvania. In Rosenblum v. New York Cent. R.R. Co., 162 Pa.Super. 276, 57 A.2d 690, the court was asked to extend the exception to 'regular employees of the corporation'. It emphatically declined to do so and unequivocally limited the exception to executive officers.

[2] The reason for the exception for officers and directors rests in the view that corporations can only act through individuals. Indeed Fletcher has made the point, with obvious hyperbole, that, 'The officers, as such, are the corporation. An agent is an employee.'
In considering the exception, and any possibility of its extension, it must be kept in mind that the very statute with which this case is concerned deals also with contracts to sell real property and with transfers of real property. Indeed a lease for more than three years is a recordable instrument (Real Property Law, Consol. Laws, c. 50, s 290). The reason why recordable instruments must in turn have their execution supported by documents of rank is self-evident. Otherwise the recorded documents would actually be resting on oral evidence. It is interesting in this context that at common law an agent could execute a sealed instrument only if he himself was authorized to do so under seal (Restatement, Second, Agency, s 28, Comment a). The Law Revision Commission noted that the need for extending the agency provisions of the Statute of Frauds was created by the need to fill gaps resulting from the abolition of the seal (1944 Report of N.Y. Law Rev. Comm., pp. 124--126).

Notably, the tenant, as already said, cites no authority to sustain the argument that an employee-agent does not come within the agency provision of the statute. It tries only to chip away by tenuous distinctions at the cases relied upon by plaintiff landlord, to show that they involve dicta or could have been decided on narrower Rationes decidendi. From a practical point of view it should be recalled that real property instruments, even when executed by corporate officers, have appended corporate certificates of authorization (e.g., 6C Bender's Forms, Real Property Law, p. 1476).

The last and determinative question is whether the employee-agent in this case had any kind of writing sufficient to comply with the statute. He did not. What defendant relies on is Jinishian's letter to Aprahamian of June 4, 1967 which reads as follows:

June 4, 1964

Mr. Harry Aprahamian,
554 Madison Avenue,

Dear Harry:
In view of the fact that you have been an employee of our Corporation for many years and proved yourself efficient and faithful, we agree to extend the period of your employment for six years from the date of my death; and you are to continue as Managing Agent of the building owned by the Corporation at 554 Madison Avenue, New York City, at the same monthly wage which you may be receiving from us at the time of my death.

Very truly yours,

Madison Avenue Realty Corporation

Vartan H. Jinishian

By Vartan H. Jinishian
President
A managing agent is not a corporate officer. Moreover, it is an accordion title. Sometimes it is an honorific and refers to a janitor with authority to negotiate leases. At other times it refers to independent corporate enterprises taking over the entire management and control of buildings, but then, almost invariably under written agreements of considerable length and containing minute detail (see, e.g., the managing agent agreement, dated in 1945 and executed between Jinishian's corporation and Wm. A. White & Sons, including, especially, the typewritten interlining requiring consent in writing by the owner to any new leases or renewals (art. II, par. (c))).

[3] From the foregoing paragraph it is also evident that authority to manage did not imply any authority to execute leases or renewals. At this point it is critical to recognize that two Statutes of Frauds, with independent origins but now embraced in one subdivision of section 5--703 of the General Obligations Law, are applicable: The one, not in issue in this case, which requires leases for terms longer than one year to be in writing; and the other, the issue in this case, requiring an agent, apart from any authority he may be able to establish by parol evidence to execute such a lease, to be authorized to do so in writing. Hence, the issue is not whether the authority to manage embraces, under the second of the mentioned Statutes of Frauds, authority either to negotiate or make leases, but whether the specific authority to execute a lease required to be in writing is itself in writing. The letter to the employee-agent falls far short of satisfying the statute. In thus viewing the letter, it does not mean that a satisfactory written authorization must name the particular transaction, but at the very least it must give express authority to execute documents in a determinate class of transaction; see 37 C.J.S. Frauds, Statute of s 213, p. 709, to the effect that: 'The writing need not be in any special form; but it must contain a sufficient expression of an intent to confer authority, and it must confer authority to execute the very contract which the agent undertakes to execute. The writing must contain express language conferring authority to execute a contract of sale'.

[4] On this analysis plaintiff landlord is entitled to summary judgment as a matter of law, as Special Term concluded. Nor may the frontal issue be avoided by raising attenuated issues of fact. The critical issue of law is whether the statute requires a writing and whether there is one. A writing is required and there is none. To accept the reasoning of the tenant is to blunt the applicable rule of law, open the door to inaccurate if not perjured recollections, and by the inescapable analogy between leases and the other real property instruments covered in the same section 5--703, unsettle the salutary and unvarying interpretations.

A final comment is made necessary on an issue not properly before the court in summary judgment procedure, unless the Statute of Frauds is to be applied only where the court is convinced that the statute is unnecessary because as a matter of law the barred evidence could not be proven. But since reference is made to prior lease extensions arranged by the
employee-agent, it is appropriate to show how different they were and thereby demonstrate a salutary consequence of the statute which might otherwise seem harsh in effect.

It is true that Aprahamian had in the past arranged lease extensions. In each case but one, the tenant was required to return the extension subscribed with his acceptance, or to give notice of acceptance by registered mail, before the extension became binding. In the exception, the extension was not to become binding until a full formal lease extension was signed by the tenant. In each instance, the language of the letter is that of one to whom the English language is evidently the mother tongue with a suggestion of legal terminology. In this case, these characteristics are absent. Most important is that Aprahamian's letter does not bind the tenant. It is unilateral in form, requires and carries no acceptance, and was 'missing' from landlord's files. It is a comparison of these letters, if support were relevant, which justifies a Statute of Frauds applicable to agents who purport to execute leases or extensions by informal letter on behalf of their principals, even if alive.

Accordingly, the order of the Appellate Division should be reversed, with costs, and summary judgment granted to plaintiff landlord.

FULD, Chief Judge (dissenting).

The plaintiff landlord seeks a declaration that a lease extension granted to the defendant Roger Gray, Ltd., and signed by one Harry Aprahamian, as Managing Agent for the plaintiff landlord's corporate predecessor, is invalid. The ground relied on to show invalidity is that the extension is not signed by the party to be charged in accordance with the Statute of Frauds.

It is not disputed that on February 14, 1966, Roger Gray was granted a lease extension in writing, as the statute requires. The question here presented is whether that writing can satisfy the Statute of Frauds when signed by Aprahamian, the 'Managing Agent,' rather than by an officer of the corporation which owned the property. That, in turn, depends upon the authority conferred on Aprahamian in the letter--dated June 4, 1964 and signed by the president of the corporation, Vartan Jinishian--which recited that Aprahamian should 'continue as Managing Agent,' a job, I note, he had held for 20 years. The letter provided that Aprahamian would hold the position until six years after Jinishian's death.

The Statute of Frauds requires that leases for more than one year must be 'subscribed by the party to be charged, or by his lawful agent thereunto authorized by writing' (General Obligations Law s 5--703, subd. 2, italics supplied). I agree with the court's conclusion that Aprahamian's signature must be considered, under the statute, as the signature of an agent and not that of the corporation itself. But I cannot agree with the court's ultimate decision that no issue of fact is presented as to whether Aprahamian was sufficiently 'authorized in writing' to execute the lease extension as agent for the corporation. Accordingly, I do not believe that the plaintiff is entitled to summary judgment.

There can be no question that Aprahamian was 'authorized in writing' to undertake certain actions on behalf of the corporate landlord. The issue here is whether those actions included
signing lease extensions for the building's tenants. Since, as the court recognizes (opn., p. 732), the written authorization to an agent need not be so specific as to 'name the particular transaction' in question, we must consider whether the papers on this summary judgment motion warrant a decision that an appointment as 'Managing Agent' cannot reasonably furnish the requisite authority.

The court's decision rests on the assumption that 'authority to manage (does) not imply any authority to execute leases or renewals' (opn., p. 732). I dispute this hypothesis, for leasing may well be a central part of the Managing Agent's job. According to the Restatement of Agency (black letter), authorization to manage property endows one with the 'authority to lease' it (Restatement, Second, Agency, s 67): 'Unless otherwise agreed, authority to lease land or chattels Is inferred from authority to manage the subject matter if leasing is the usual method of dealing with it'. (Emphasis supplied.) If this be so, then, it logically follows that there is authority to arrange and execute extensions, for an extension is nothing more or less than a new lease on the old terms.

The letter designating Aprahamian as Managing Agent, therefore, at least supplies an inference that he could make contracts for lease extensions. As Professor Corbin notes (2 Corbin, Contracts (1963), s 526, p. 782), '(t)he authority to execute a written memorandum (in satisfaction of the Statute of Frauds) may be proved by implication from authority to make the contract.' Thus, it is unimportant that the letter does not specifically state that Aprahamian could execute written lease extensions. His authority to make such contracts is readily inferable from his position. Whether this inference can be substantiated is, of course, a question of fact, and the record before us is more than ample to create an issue sufficient to defeat a motion for summary judgment. Not only does Aprahamian assert in his affidavit that in the 20 years during which he acted as Managing Agent he 'negotiated the leases and the extensions of leases' for tenants in the building but he actually points to at least four lease extensions (March, 1953; March, 1955; April, 1959; March, 1965) which he did sign--three of them prior to the 1964 letter--on behalf of the corporation with Jinishian's full knowledge and approval. These documents, far from deserving the epithet 'inaccurate if not perjured recollections' (opn., p. 732), could be interpreted to establish that, when in 1964 Jinishian 'continued' Aprahamian's employment as Managing Agent, he fully intended to authorize him to sign lease extensions. Be that as it may, as I have already stated, they create a question of fact as to this issue.

The court's discussion in which it compares the prior extensions with the extension to the tenant in this case (opn., p. 732) is quite irrelevant to the issue before us. That the lease extension herein may not be proper in form is a question involving interpretation of that document, not of the letter granting Aprahamian his authority. Moreover, the fact that the other extensions in the record had to be signed by the Tenant and returned by him to the landlord has no bearing whatsoever on Aprahamian's power to bind the Landlord. What the prior extensions do show, I repeat, is that it is reasonable to assume, and thus create an issue of fact, that Aprahamian's authority to act as Managing Agent was understood by Jinishian, his principal, to empower him to sign lease extensions.
The court points to a detailed contract (opn., p. 731), executed in 1945, between Jinishian and a corporate managing agent (Wm. A. White & Sons), to refute the defendant's position that the simple letter to Aprahamian could have conferred the broad authority claimed for it. I believe that this 1945 agreement is irrelevant. In the first place, it dealt with a different building than the one which Aprahamian was authorized to manage. In the second place, and of greater significance, it is manifest that more detail would be required in dealing with an impersonal corporate manager than with a close associate--and presumably a friend--who had been acting as Managing Agent for many years. In the latter case, there would be no need to set out in detail the procedures which the two men knew so well. Exactly what those procedures were requires further proof.

In sum, and having in mind this court's liberal interpretations of the writing requirements of the Statute of Frauds, we should not approve a grant of summary judgment to the plaintiff. The letter continuing Aprahamian as the 'Managing Agent' raises a question of fact as to whether he was authorized to sign the lease extension. If he was, then, the letter is a written memorandum of such authority as to satisfy the statute.

I would affirm the order appealed from and answer the certified question in the affirmative.

**Discussion points for Flynn v. Dugas:**

Want to absolve yourself of personal liability in a commercial transaction? Then make absolutely sure you don’t sign the contract in a personal capacity.

Massachusetts Appellate Division, District Court Department, Western District.

Edward A. FLYNN, Jr. d/b/a Flynn's Truck Stop, Plaintiff/Appellee,

v.

Adolph DUGAS, Defendant/Appellant.


KOENIGS, J.

Adolph Dugas appeals from a finding that he is individually liable as guarantor for the debt of a corporation sued for unpaid fuel deliveries by Edward A. Flynn, Jr., d/b/a Flynn's Truck Stop. The trial court based this finding on a guaranty contract form that Mr. Dugas signed in his corporate capacity after striking out the preprinted words "Personally and Individually" [sic]. The import of this form, and the circumstances of its signing, are the central issues in this appeal.

1. *The sufficiency of the evidence.*
Mr. Dugas contends, in essence, that the evidence, comprising the testimony of Flynn's general manager, Peter Ferraro, and the guaranty form, was not a sufficient basis for finding him individually liable for the corporation's debts to Flynn.

a. The procedural issue. Although the defendant did not request a ruling of law regarding the sufficiency of the evidence in compliance with the requirements of Mass. R. Civ. P. 64A (b)(2), the issue is capable of resolution because the trial judge made rule 52(c)-compliant findings; the trial was brief, with only one witness and one exhibit (the contract form); the entire trial transcript is 22 pages, and the evidence presents a single, simple issue: Did the defendant, by amending the plaintiff's form and then signing it, bind himself in his individual capacity to pay the corporation's debts to the plaintiff?

***

b. The evidence. Mr. Dugas was the chairman and chief operating officer of Automated Products of America, Inc. ("the corporation"). On behalf of the corporation, Mr. Dugas went to Flynn's offices and met with Flynn's general manager, Peter Ferraro, to arrange for fuel deliveries to the corporation.

Mr. Dugas had been provided a combined credit application and payment guaranty form that, as Mr. Ferraro testified, "we have people sign to set up an account to guarantee the account individually." There was no evidence that the form's purpose, i.e., obtaining an individual guaranty for corporate debt as a prerequisite to opening an account, was ever discussed with Mr. Dugas. The form recites no requirement that an individual guaranty be signed as a condition to obtaining a corporate account with Flynn. During the meeting, Mr. Dugas gave the form, which he had signed in his corporate capacity, to Mr. Ferraro.

One side of the form is entitled "Flynn's Truck Plaza--Credit Application." Below the title, in the spaces provided, bank and businesses references for the corporation are supplied in handwriting.

The other side of the form is entitled "Continuing Individual Guaranty." [FN3] There are several paragraphs describing the promise of the "Undersigned" to "guaranty" payments of the "Debtor." The "Debtor" is described by the corporation's name and address; the "Undersigned" is "Adolph Dugas," but the space provided for the residential address of the "Undersigned" was left blank. Although the preprinted words "individual" and "personal" appear in the title and under the signature line, they are not used in the body of the document. The word "guaranty" repeatedly appears in the term language, but is never modified by the words "personally" or "individually."

At the signature line, Mr. Dugas crossed out the preprinted words "Personally and Individually" with two strokes, and wrote "Automated Products of America, Inc." above his signature, to which he added the designation "Chmn/CEO" thus:
Mr. Ferraro looked at this signature and asked Mr. Dugas if that were "his signature." Mr. Ferraro did not mention the terms "individual" or "personal." Mr. Dugas said it was. The plaintiff's agent saw that the defendant had struck out the terms "Personally and Individually", and said nothing to the defendant about the changes. Mr. Ferraro, believing that the changes had no significance, accepted the form with those changes, and, as the plaintiff's agent, signed his name on the line designated "Witness."

Flynn thereafter began fuel deliveries to the corporation, which later went bankrupt.

c. Discussion. There was insufficient evidence to find that a contract was formed between Mr. Dugas and Flynn regarding payment for the fuel deliveries. Clearly, Flynn intended that Dugas would become individually liable for the fuel deliveries, if the corporation failed to pay. Mr. Dugas' intention is clear as well: by twice striking out the words "Personally and Individually," placing the corporation's name above his own, signing in his corporate capacity, and refusing to provide his own residential address, Mr. Dugas rejected those proposed terms.

Flynn argues that Mr. Dugas is bound, regardless how he signed the contract, by the rest of the preprinted language on the form, which he did not cross out or alter. The contract form does not have a life of its own; it either reflects a meeting of the minds of the parties as to the essential element of a contract, or it does not.

Flynn's preprinted form is full of language commonly used by lawyers to describe a promise to be liable for the debts of a third party; the word "guaranty" appears throughout the form. However, in the real word, ordinary people often use the word "guaranty" synonymously with "promise."

Flynn's form contract does not state, in plain English, that the "Undersigned" is promising to take on personal and individual liability for paying the debts of another. Flynn's failure to cross out "Individual" in the heading, or change other legalistic language in the form (e.g. "the liability of the Undersigned shall be primary and not secondary") is insufficient to establish that he intended to be individually liable. The signature makes clear that Mr. Dugas intended to act only on behalf of the corporation, not individually.

The instrument relied on must be found to state the essential terms of a contract, by which both parties intended to be bound. Flynn's form, with the critical changes made by Mr. Dugas, does not manifest a meeting of the minds, and cannot be construed as an enforceable
contract. It is not a question, therefore, of construing the ambiguous terms of a contract; no contract was ever formed.

2. Remaining issues. In light of this holding, it is unnecessary to reach the other issues raised on appeal.

Judgment reversed; judgment to enter for the defendant.

Discussion points for Bridge Enterprises v. Futurity

This is a Massachusetts case, and Massachusetts generally does not follow the Equal Dignities Rule. See, for example, M.G.L.c 259, section1. But note that the agent signing the document only gets you half way to victory. You still have to prove that the agent was authorized by the principal to enter into this transaction on behalf of the principal under either the actual authority or apparent authority doctrines. Does the court apply the correct doctrine in this case?

BRIDGE ENTERPRISES, INC.
v.
FUTURITY THREAD COMPANY.

Appeals Court of Massachusetts, Middlesex.

Decided May 9, 1974.

This is a bill for specific performance of a written agreement to give the plaintiff a lease of certain premises in Watertown. The defendant appeals from the entry of an interlocutory decree which impliedly overruled his objections to the master's report and expressly confirmed the report, and form the entry of a final decree which ordered the defendant to execute and deliver a written lease, enjoined it from taking certain actions inconsistent with the lease, and determined the amount of rent owed by the plaintiff.

The case was referred to a master. We summarize the facts found by him. The defendant owns a building located at 5 Bridge Street in Watertown. As of February 1, 1972, and for some prior period, the plaintiff occupied the third floor and a portion of the second floor of the defendant's building as a tenant at will. In January of 1972 Benjamin G. Rae, III, the defendant's sales manager, met with George D. Coupounas, the plaintiff's treasurer, to discuss the possible lease of a portion of the building's first floor. Coupounas and Rae did not reach agreement at their first meeting, but on February 1, 1972, they drafted and, in their respective official capacities, signed a memorandum providing, as the master found, for a lease of a portion of the first floor of the building. According to the memorandum, the lease was to commence on the date thereof and run for five years with an option to renew for
another five-year period. The memorandum provided that the defendant would prepare a formal lease document which would be subject to the approval of the plaintiff's attorney.

The defendant drafted a lease, which was signed by Rae, and tendered it to the plaintiff. The draft was rejected by the plaintiff on the ground that it did not conform to the terms of the memorandum (the master found that the draft failed to include an option to renew). Although the plaintiff pointed out the discrepancies between the draft and the memorandum, the defendant refused to prepare another draft. In February of 1972 the plaintiff took possession of a portion of the first floor of the building. It has continued to occupy those premises.

From the pleadings we find that on April 5, 1972, the defendant sent the plaintiff a letter purporting to revoke its offer to lease; soon afterwards it brought an action of ejectment against the plaintiff in a District Court. On May 16 the plaintiff entered the present bill. The master found, inter alia, that the plaintiff was in lawful possession of the premises which it then occupied and that the defendant was not entitled to possession thereof.

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The defendant advances the following as grounds for reversing the final decree: (1) the memorandum signed by Coupounas and Rae did not satisfy G.L. c. 259, s 1 (the statute of frauds), (2) Rae had no authority to bind the defendant, (3) the parties never agreed on the terms of the lease and (4) one of the master's findings concerned an issue not raised by the pleadings.

[3][4] 1. The defendant's objection under c. 259 is grounded upon the theory that the memorandum, which provided for a 'lease of first floor of building we're presently in, which is approximately 10,653 sq. ft., inside dimensions, according to landlord's measurements,' did not adequately identify the space to be leased. The master's ultimate finding, that the memorandum referred to only a portion of the first floor premises in the Bridge Street building, is supported by subsidiary findings that the plaintiff was a tenant of a portion of that building at the time the memorandum was signed and that the total area of the building's first floor was some 43,500 square feet, approximately four times the amount of space specified in the memorandum. His finding that the memorandum referred to the particular area occupied by the plaintiff is supported by evidence that the space in question had been vacant at the time the memorandum was signed, was separated from the rest of the first floor by a fire wall, and had been inspected by Rae while in the company of Coupounas. There is no suggestion that the defendant had available any other space which conformed to the description in the memorandum.

The master also found that the defendant's sales manager, Rae, had actual authority to negotiate the lease in question. The defendant's president had represented to Coupounas that Rae had such authority and Rae had participated in several negotiating sessions with the plaintiff.
The defendant first argues that the finding that Rae had the authority to 'negotiate' for the defendant does not constitute a finding that he possessed the power to bind it to a lease. We reject this interpretation, as there is nothing to indicate that the master intended to make such a distinction or that common usage would support it. See Webster's Third New Intl. Dictionary, p. 1514, which defines 'negotiate' as 'to arrange for or bring about through conference and discussion . . .'
IV. Ratification

Sometimes an agent enters into a contract for a principal but lacks either the actual or apparent authority to do so, which means that the principal is not on the hook for the damages in the event of a breach. And this is where ratification comes in, to save the third party. If the principal, knowing all the material facts of the contract, subsequently manifests his agreement with the contract, either expressly or impliedly, then the contract is said to be “ratified,” and will then be binding on the principal. One other requirement is that the principal must have the capacity to enter into the contract by the agent at two points in time—first, at the time the agent entered into the contract, and second, when the principal ratifies the agent’s contract. One issue which tends to arise in ratification cases is whether a principal will be allowed to ratify part of a transaction, and disavow the rest, or whether ratification is an “all or nothing” proposition.

Discussion points for 3A’s Towing v. P&A Well Service

As you might expect, there are not going to be too many cases involving ratification, simply because of the fact that if the principal looks at the contract and decided to ratify it, there will be very few problems after that worth talking about. But this case presents two interesting questions. First, how was it that Chevron ratified the contract (actually, in this case, Chevron ratified its agent’s repudiation of the contract)? Second, how does this case differ from the result in the prior case of Wing v. Lederer?

3 A's TOWING COMPANY, Plaintiff-Appellee,  
v.  
P & A WELL SERVICE, INC., etc., Defendant-Third-Party Plaintiff-Appellee,  
v.  

United States Court of Appeals,  
Fifth Circuit.  
April 13, 1981.
TATE, Circuit Judge:

Chevron appeals from a judgment holding it liable in damages for its cancellation of a service contract. We find no error in the district court's conclusion that Chevron repudiated its contract with the appellee, P & A, without affording P & A an adequate opportunity to perform. We therefore affirm.

Facts

In December of 1975, Chevron U. S. A., Inc. (Chevron), the third party defendant and appellant in this action, hired P & A Well Service, Inc. (P & A), the third party plaintiff and appellee, to plug and abandon a Chevron well located in the Louisiana coastal waters of Breton Sound. The contract provided that P & A would complete the work within sixty days and would receive $28,900 and the rights to the tubing recovered from the well.

Work commenced in early March of 1976. In late March, equipment problems led the parties to agree to a different method of plugging the well. During the ensuing delay period, rough weather damaged a P & A barge, forcing P & A to withdraw from the well site on April 5, 1976, to obtain repairs.

On April 9, 1976, P & A's president, Edward Estis, telephoned Chevron's Algiers office and was told by an unidentified individual that the Breton Sound contract was cancelled, and that P & A should not return to complete its work at that site. In reliance upon that order, P & A did not return to the Breton Sound well. On June 25, 1976, Chevron sent a letter to P & A cancelling the Breton Sound contract, and in August of 1976, Chevron itself plugged and abandoned that well.

On August 10, 1976, P & A sent an invoice billing Chevron for costs incurred in its attempt to complete the Breton Sound contract, including the salvage value of the unrecovered tubing. This litigation was precipitated when 3 A's Towing Company brought suit against P & A to recover sums due under certain towing contracts. P & A filed a third party demand against Chevron to recover the towing charges incurred in connection with the Breton Sound contract and in addition the lost profit resulting from Chevron's cancellation. Following a bench trial, the district court concluded that since P & A had not forfeited its right to perform as of June 25, 1976, Chevron's letter cancellation of that date without first putting P & A in default constituted a violation of the contract, and that, in any event, Chevron had attempted to cancel the contract during the telephone conversation on April 9, 1976. Accordingly, the district court held that P & A was entitled to recover the profit it would have made had it been permitted to complete its performance, and entered judgment in favor of P & A in the amount of $77,980, with interest and costs.
Chevron does not dispute on this appeal that the April 9 telephone conversation did in fact occur. Chevron argues, rather, that since the unidentified individual who purported to cancel the contract was without authority express, implied, or apparent to act for Chevron in that regard, the cancellation cannot legally be imputed to Chevron, and therefore cannot constitute a violation of the contract entitling P & A to the recovery granted by the district court. Thus, Chevron challenges as erroneous the district court's conclusion of law that "(i)n any event, ... Chevron did, in fact, attempt to cancel the Breton Sound contract during a telephone conversation on April 9." See Conclusions of Law, no. 7 (italics supplied).

We find no error in this conclusion of the district court. The law and jurisprudence of Louisiana clearly establish that the unauthorized act of one purporting to bind a corporation may be implicitly ratified by the corporate principal through the knowing acquiescence of those having the authority, so long as the unauthorized act is not violative of the corporate charter, state law, or public policy. **** Such ratification has retroactive effect and is equivalent to prior authority. E. g., Acadian Production Corp. v. Savannah Corp., 63 So.2d at 143. A ratification may be held to have occurred when corporate personnel with the authority to bind the corporation acquire, or are charged with, knowledge of the unauthorized act and fail to repudiate it within a reasonable period of time. Dunham-Pugh Co. v. Stephens, 99 So.2d at 93-94. Although the acceptance of benefits by a corporation may evidence ratification, the cited decisions do not hold such to be a requirement for ratification of an act by a corporate employee repudiating a corporate obligation.

We disagree.

As noted by the Supreme Court of Louisiana in Dunham-Pugh Co. v. Stephens, 234 La. 218, 99 So. 88, 93-94 (1958), the general rule that a ratification occurs when personnel with the authority to bind the corporation acquire knowledge of the unauthorized act and thereafter fail to repudiate it within a reasonable period of time is particularly applicable where the delay in repudiating is a long one, where the failure to repudiate is accompanied by acts indicating approval of the unauthorized act such as receiving and retaining the benefits accruing from it or where the circumstances call for a quick repudiation. There is no requirement that some measurable benefit inure to the corporate principal from the unauthorized act.

To be sure, where the unauthorized act consists of the making of a contract that purports to bind a corporate principal, there is no more telling indication of the principal's ratification or approval of that act than its receipt and retention of the contracted-for benefits. But not all unauthorized acts involve the potential flow of some measurable benefit or consideration from a third party to the principal. In such cases, the principal's ratification or approval of the repudiation must obviously be manifested in terms other than the receipt of contracted-for benefits.

[4] We find sufficient evidence in this record to support a conclusion that Chevron acquiesced in the April 9 telephone cancellation of the Breton Sound contract, thereby implicitly ratifying it and adopting it as an act of the corporation.
The record shows that the Breton Sound contract was negotiated for Chevron by E. J. Morgan, a staff engineer in Chevron's Algiers office. The contract was signed in Morgan's office. All subsequent discussions of that contract were with Morgan, or with his replacements, C. R. Block and Richard Gist. Virtually all of P & A's dealings with Chevron in connection with the Breton Sound well were conducted over Morgan's telephone. It was Morgan who represented Chevron in altering the procedure to be used in plugging the well and who agreed on Chevron's behalf to supply the mud for the new procedure.

On April 8, 1976, a call was placed to the home of P & A's president, Edward Estis, and a message was left requesting Estis to return the call. The number given was later determined to be that of James Isonhood, E. J. Morgan's immediate inferior, in Chevron's Algiers office. On April 9, 1976, Estis returned the call to the designated number and received no answer. He then called E. J. Morgan's number and spoke to the now-unknown individual who purported to cancel the Breton Sound contract.

Francis R. Daigle, the person who was second in rank at the Algiers office and E. J. Morgan's immediate supervisor, testified in his pretrial deposition, introduced at trial, that he was aware of the fact and the substance of the April 9 telephone conversation. That testimony was at least suggestive of a more general awareness throughout the Algiers office.

Despite that awareness, and despite numerous subsequent contacts between Chevron personnel and P & A personnel, neither Daigle nor any other Chevron employee ever repudiated that conversation, requested P & A to resume its operations on the Breton Sound well, or even inquired into P & A's continued absence from the well site. Chevron took no action in the ensuing weeks that was in any way inconsistent with a cancellation by telephone on April 9. The record shows that telephone cancellation with a follow-up letter of cancellation was an accepted practice in contracts of this sort; and indeed, on June 25, 1976, Chevron notified P & A by letter that it considered the contract cancelled, and thereafter rendered performance by P & A impossible by plugging and abandoning the Breton Sound well with its own resources in August of that year.

Under these facts, we find ample support for a conclusion that Chevron ratified the telephone cancellation by acquiescing in it, and therefore find it unnecessary to determine whether Chevron could likewise be bound by the cancellation under theories of actual or apparent authority. Chevron personnel with the authority to bind the corporation had knowledge of the telephone cancellation and failed to repudiate it within a reasonable period of time. We therefore find no error in the district court's conclusion that Chevron had attempted to cancel the Breton Sound contract by telephone on April 9, 1976.

II

[5] The legal effect of the telephone cancellation, if it is imputable to Chevron, is plain. Under Louisiana law, the active violation of a contract renders the violating party liable in damages from the moment the violation occurs, with no requirement that he first be put in
default. La.Civ.C. art. 1932. The unilateral anticipatory repudiation of the contract constitutes just such a violation.

Conclusion

For these reasons, the judgment of the district court is AFFIRMED.

AFFIRMED.

Linkage v. Boston University

LINKAGE CORPORATION

v.

TRUSTEES OF BOSTON UNIVERSITY.

Decided May 15, 1997.

Supreme Judicial Court of Massachusetts

This dispute arises out of an agreement between Linkage Corporation (Linkage) and Boston University that called for Linkage to create and provide educational, training, and other programs of a technical nature at a satellite facility owned by Boston University. Linkage claims that the agreement was renewed by Boston University and then unlawfully terminated; Boston University claims that the agreement was lawfully terminated and never renewed. Linkage stated its case in the Superior Court by means of a ten-count complaint, which asserted theories of contract and tort liability and violations of G.L. c. 93A, §§ 2(a) and 11. Boston University's answer contained nine counterclaims stating various theories of wrongdoing on Linkage's part and also included a claim under G.L. c. 93A. A judge in the Superior Court granted summary judgment to Boston University on some of Linkage's claims. That judge thereafter recused himself from the case at Linkage's request because, prior to his appointment to the bench, the judge had practiced law with the law firm representing Boston University. The judge next assigned to the case held pretrial conferences, after which he set aside portions of his predecessor's grant of summary judgment. A twenty-nine day jury trial ensued. The jury, in response to a lengthy set of special questions, found Boston University liable for breaches of contract, defamation, wrongful interference with advantageous relations, and violations of G.L. c. 93A. The jury rejected all but one part of Boston University's counterclaims. The judge treated the jury's answers to the special questions on the G.L. c. 93A issues as advisory and subsequently made his own findings of fact and rulings of law on those issues. He also concluded that Boston University had violated G.L. c. 93A, and that Linkage had not. As provided for by G.L. c. 93A, the judge doubled portions of the damages award by the jury and awarded Linkage its attorney's fees and costs. Both before and after his decision on the G.L. c. 93A issues, the...
judge decided several posttrial motions, eventually allowing judgment not withstanding the verdict on some of Linkage's recovery and denying Boston University a new trial on the remainder. Both parties claimed appeals, and we granted Boston University's application for direct appellate review.

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We conclude that the jury's findings that the agreement had been renewed were warranted, and the judge should not have granted Boston University judgment notwithstanding the verdict on the renewal claim. Accordingly, we reinstate the jury's finding on that claim and their award of damages. We also conclude that the jury's finding on Linkage's claim for tortious interference with advantageous business relations may not stand. We uphold the jury's finding on defamation, but vacate their award of damages. We determine that Linkage can be given all the relief it is entitled to under the jury's findings that the agreement had been renewed, and the judge's G.L. c. 93A decision. As a result, we need not deal separately with Linkage's claims for promissory estoppel, breach of the covenant of good faith and fair dealing, or breach of contract (as applicable to the original agreement between the parties) or with its tort claims, except to indicate the grounds on which we set aside the jury's finding on the tortious interference claim and their award of damages on the defamation claim.

1. Background. We recount at some length the facts that could have been found by the jury. Because of the jury findings in favor of Linkage, we base our recitation on the evidence and inferences most favorable to it.

Linkage was founded in 1988 by Philip Harkins to facilitate the creation of corporate training programs for companies and universities. Harkins, who had a background in both education and computer software for business systems, thought that there was a market for intensive training programs targeted at data processing professionals and software specialists and that, in partnership with a college or university, he could develop a series of educational programs and successfully launch his business.

Boston University became aware of Harkins's plans to start Linkage and expressed an interest in working with Linkage to develop training programs. Boston University had recently acquired the Wang Institute, a facility consisting of an 80,000 square foot building located on 200 acres in Tyngsborough, and had assumed the debt on the facility. Harkins met with J. Joseph Meng, Boston University's vice-president for external programs, and discussed his ideas for training offerings with Meng. Meng was looking for a way to produce a revenue stream that would offset Boston University's considerable overhead on the new facility, and Linkage's programs presented a possible solution to this revenue problem.

*******

Together with Dennis Hart of Boston University's office of general counsel, Harkins and Meng drafted an agreement that covered the operation of Linkage's training programs at the Wang Institute (base agreement). Under the terms of the base agreement, Linkage's
performance was to be measured by revenue produced, and Linkage was to receive bonuses for achieving revenue goals. The base agreement also contained a provision restricting both Linkage and Boston University from hiring each other's employees for a period of one year following the termination of the agreement.

At the time that Linkage and Boston University undertook performance of the base agreement, Meng reported to John Silber, the president of Boston University, and to Jon Westling, executive vice-president and Silber's second in command. \(^{FN3}\) Silber reviewed the base agreement in draft form and discussed its provisions with Meng, but Meng understood that he had actual authority to negotiate and sign the agreement with Linkage.

*********

Meng and Harkins executed the base agreement on August 1, 1988. Harkins signed on behalf of Linkage, and Meng signed on behalf of Boston University. The base agreement was limited to a term of three years, ending August 1, 1991. Under the base agreement, Linkage was to manage and market educational programs and services at the Wang facility, renamed the Boston University Corporate Education Center (BUCEC). Boston University agreed to provide over-all direction and supervision of BUCEC, and Meng was given final authority and decision-making power over the development and content of all educational activities, the recruitment and appointment of instructional personnel, and promotional activities.

Under the arrangement, Linkage initiated a variety of training programs, conferences, seminars, and other offerings for the corporate market. Boston University also transferred some university courses to BUCEC, which Linkage then managed for the university. Linkage's performance under the base agreement was highly successful: Linkage exceeded its revenue targets during each of the three years of the base agreement's operation, earning bonus payments as provided in the base agreement.

Harkins reported on a monthly basis to Meng, who reviewed every activity within BUCEC and approved Linkage proposals for new programs. Although Linkage was responsible for managing BUCEC programs, both credit and noncredit, it did not have total financial responsibility over the operation. All income generated by BUCEC was paid directly to Boston University, and Meng was responsible for all financial reporting. BUCEC's financial office, headed by a Boston University employee, prepared a monthly accounting for Meng's review, tracking revenues and expenses and documenting how much money was owed by each organization to the other. \(^{FN4}\)

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Another division of Boston University, the Metropolitan College (MET College), \(^{FN5}\) ran a training program, professional development seminars (PDS), under contract with another independent training and development company similar to Linkage. When the PDS contract expired at the end of June, 1989, Linkage assumed responsibility for this program. Eventually, Linkage executed a contract with Boston University to run the PDS program
(MET College contract). The compensation under the MET College contract differed from Linkage's compensation under the base agreement: under the latter, Boston University received all revenues from the programs and Linkage was paid a fee with incentive bonuses, while under the MET College contract, Linkage received all revenues, paid all expenses, and remitted a 9.15 per cent royalty to Boston University. The MET College contract also provided for six months' prior notice before either party could terminate the agreement and contained a no-hire provision similar to the one in the base agreement. The MET College contract was executed on February 6, 1990. Kenneth Condon, Boston University's assistant treasurer, signed the agreement on behalf of Boston University. FN6 As with the programs in operation under the base agreement, Meng supervised Linkage's operation of the PDS programs.

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In August, 1990, Harkins and Meng began discussing renewal of the base agreement, scheduled to terminate on August 1, 1991. Harkins wanted to begin negotiations early so that, in the event the base agreement was not renewed, Linkage would have time to replace Boston University as a client. In addition to the renewal of the base agreement, Harkins and Meng negotiated the incorporation of the MET College contract into the base agreement. FN7

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In March, 1991, Meng and Harkins, under the direction of Hart, agreed to fold the MET College contract into the base agreement, with the result that Linkage would no longer directly incur the expenses for or receive the revenue from the PDS program and instead would receive a fee for management. FN8 Hart, as Boston University's legal counsel, also expressed concerns that regulations governing Massachusetts Health and Educational Facilities Authority (HEFA) loans (see note 2, supra ), which prohibited reduced rate loans for profit-making institutions, might be violated by the base agreement's provision that authorized bonus payments to Linkage. Harkins and Meng took these issues into consideration as they proceeded through their negotiations toward renewal of the base agreement.

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On March 5, 1991, Boston University instituted a series of changes designed to control costs (March 5 directive). Included in these changes was a requirement that any expenditure greater than $5,000 would require approval of the appropriate dean or vice-president of the university and the provost or senior vice-president. A copy of these new fiscal austerity measures was sent to Harkins and to all vice-presidents, including Meng.

Assuming that the base agreement would be renewed, Harkins and his management team prepared a business plan for the next three years, which was presented at the April meeting of Boston University's trustees in Scottsdale, Arizona. Boston University's chief financial officers attended Harkins's presentation to the trustees. Silber and Westling did not. The
Linkage business plan was well received by the assembled senior Boston University officials. On April 28, 1991, following the presentation of Linkage's business plan at the trustees' meeting, Hart, Meng, and Harkins met, together with Linkage's chief financial officer and the person in charge of financial operations on the Boston University campus. At that meeting, it was agreed that the MET College contract would be folded into the renewal of the base agreement, and new compensation arrangements were reviewed. On May 21, 1991, Meng and Harkins executed an agreement, which had already gone through several revisions to address concerns expressed by Hart, terminating the MET College contract and making it part of the base agreement (May 21 agreement). The language of the May 21 agreement provided that the base agreement “is being revised and renewed effective July 1, 1991.”

Meng promptly sent a confirmatory copy of the May 21 agreement to Westling and Condon. On May 21, 1991, Westling had a copy of the May 21 agreement, together with a copy of the renewal agreement, the terms of which, according to Meng, had been completely finalized. Westling also had a memorandum from Meng directly asking whether anything further was required to secure Boston University's approval. On May 22, Westling met with Harkins and Meng. At that meeting, Harkins reviewed the business plan and told Westling about steps Linkage had taken to expand operations. Westling questioned Harkins regarding conferences and Linkage employees, including program and instructor evaluations. Westling did not raise any concerns about the May 21 agreement or the renewal agreement at this meeting, nor did he object to the fact that Meng had executed the May 21 agreement on behalf of Boston University in apparent contravention of the March 5 directive.

On May 29, 1991, Silber's chief of staff sent a memorandum on behalf of Silber to Westling, Hart, and Condon, asking about the status of the renewal agreement. Westling and Meng subsequently joined Silber in Germany. In his discussions with Meng in Europe, Silber raised no concerns about Linkage, the renewal agreement, or BUCEC. Silber told Meng that he wanted additional information on Linkage. He and Meng agreed that Harkins would repeat the presentation made by Harkins to the trustees for Silber's benefit after he returned from Europe.

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On June 24, 1991, Harkins met with Silber, Westling, and Meng. Silber was rude and confrontational during this meeting, and his actions made it impossible for Harkins to present his business plan. Silber abruptly and angrily left the meeting after only twenty-five minutes. Westling reassured Harkins, who was concerned by what appeared to be Silber's open hostility toward him, and told him, “Things will be all right.”

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Unbeknownst to Harkins or Meng, Silber had been in direct contact with various individuals associated with Linkage's operations at BUCEC. Since his return from Germany, Silber had
been in contact with James Devlin, his son-in-law and a part-time instructor in some of the BUCEC programs, and Robert Daniels, a Boston University employee who had originally been hired to work on BUCEC projects by Linkage. In the period of time before and after the June 24 meeting, Daniels had extended telephone conversations with both Silber and Devlin, and met personally with Silber.

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On July 1, Silber again met with Harkins, Meng, and Westling. During the course of that meeting, Silber contended that he was free to hire Linkage's employees despite the express no-hire provision in the base agreement and asked which employees were the most valuable. Harkins declined to give him this information and insisted that Silber had no right to hire Linkage's employees under the base agreement. Harkins advised Silber that Linkage had turned down opportunities to work with other universities. Silber revealed that he was aware of certain complaints about Linkage. At the close of the meeting, in response to a question by Harkins, Silber told him that the May 21 agreement that Harkins had signed with Meng was ineffective.

Meng, Silber, and Harkins met for the final time on July 3, 1991. At this meeting, Silber produced a preliminary audit report, which, he asserted, gave cause to terminate any agreements between the parties. Silber then demanded that Harkins sign a letter, which, in addition to other provisions, waived the no-hire provisions of the base agreement. When Harkins declined, citing his desire to consult with an attorney, Silber withdrew the first letter and handed Harkins a second letter terminating the base agreement between the parties for cause, effective immediately, based on an unfavorable audit and Linkage's failure to cooperate with the auditors. The letter also terminated the MET College contract between the parties.

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Prior to the July 3 meeting, Silber had ordered Boston University security personnel and vice-presidents, including Westling, to stand by, ready for immediate action at BUCEC. After the meeting with Meng and Harkins, Silber directed this team to “secure [Boston University's] interests” and authorized them to offer increased salaries, if necessary, to Linkage employees to ensure that BUCEC operations would not be interrupted by the termination of the Linkage contract. By the time Harkins returned to Tyngsborough, Boston University security personnel and officials had occupied BUCEC. Some of the security personnel were armed.

Boston University officials gathered Linkage employees into a room. Westling told the assembled employees that Boston University’s contract with Linkage had been terminated “for cause.” In response to a question by a Linkage employee, who detected an intimation of wrongdoing in the statement “for cause” and sought clarification, Westling simply repeated that the contract had been terminated “for cause.” Harkins then met with his employees. Harkins told his employees that he would not seek legal recourse from individual employees.
if they were offered and accepted employment from Boston University. Harkins indicated that he would seek such recourse from Boston University for violating the no-hire provision of the base agreement.

Boston University officials came to BUC EC with prepared letters offering employment to selected Linkage employees. While Harkins was gathering his belongings, Boston University conducted interviews with Linkage employees and hired twenty-eight of Linkage's thirty-two employees on the spot. Boston University insisted on review of all documents that Harkins was removing from the facility, refused to allow Harkins to take some of his personal papers, and made copies of everything that Harkins removed from his office.

At 11 p.m., in response to a threat by a Boston University official, Harkins called Tyngsborough police, who sent an officer to stand watch in Harkins's office. At 4:30 a.m., Harkins and his senior management left Linkage. As they left the facility, Westling swore at them and told them never to set foot on Boston University property again.

After Boston University took over operations at BUC EC, Daniels was hired to head the conference programs at BUC EC, reporting directly to the executive director, and received a raise in pay. In conversations with a Linkage employee who had been hired by Boston University, Daniels made disparaging comments about Linkage and its senior management, implying illegal activity had been the reason for the abrupt termination of the contract. Silber also made unfavorable comments about Linkage to a newspaper reporter.

The internal audit of Linkage operations continued after the takeover. Investigations by the Boston University internal audit department and outside auditors employed by Boston University produced evidence of minor errors in Linkage's reporting of financial matters. Boston University alleged after the termination of the base agreement that a Linkage employee had made backup copies of some Linkage files and that these backup copies were missing.

After the takeover, Linkage was unable to replace Boston University as a client, due in part to its reduced staff and to the conditions surrounding the termination of its contractual relationship with Boston University. Although it has rebuilt to some extent in the time since the termination of its contract with Boston University, the company has not been able to regrow its business to the point where it was in July, 1991.

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[6] 3. **Contract claims.** We next examine the jury's responses to a series of special questions concerning Linkage's claims for violations of pertinent agreements. Our inquiry is conducted under the well-established standard that a jury verdict for a plaintiff is sound if any reasonable view of the evidence discloses any combination of circumstances from which a rational inference may be drawn in the plaintiff's favor, even if different circumstances shown by the evidence would sustain a defense verdict.
(a) Renewal agreement. The jury found that Boston University had entered into the renewal agreement with Linkage and had committed a material breach of that agreement. The jury awarded damages to Linkage, in the amount of $2,148,000 for lost profits and $330,358 for out-of-pocket damages. The judge entered judgment notwithstanding the verdict on these findings, but later partially vacated this order and reinstated the jury's award for out-of-pocket damages. We conclude that the jury's findings on this claim should be upheld in their entirety.\(^{FN23}\)

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Linkage contended that Boston University became bound to the renewal agreement on May 21, 1991, when Meng and Harkins signed an agreement that (1) terminated the MET College contract effective July 1, 1991, (2) provided that the activities covered by that contract would thereafter be governed by the base agreement, and (3) stated that the “base agreement is being revised and renewed effective July 1, 1991.” For Boston University to be bound by Meng's action, the jury had to find, as a fact, that Meng had either actual or apparent authority to enter into the renewal agreement, or that Boston University had acquiesced in, or failed lawfully to disavow, any unauthorized conduct by Meng, and consequently had become bound by that conduct through ratification. The judge carefully instructed the jury on the requirements for establishing a binding agreement under these theories, but the special verdict form submitted to the jury did not include an express question relating to the existence of actual authority. It is not of consequence whether the evidence would have supported a finding of actual authority because the jury found that Boston University was bound by the renewal agreement on the basis of both apparent authority and ratification. There was sufficient evidence to support both of these findings.

\[7][8] (i) Apparent authority. “Apparent or ostensible authority ' results from conduct by the principal which causes a third person reasonably to believe that a particular person ... has authority to enter into negotiations or to make representations as his agent.’ ... If a third person goes on to change his position in reliance on this reasonable belief, the principal is estopped from denying that the agency is authorized.” (Citations omitted.) We inquire whether conduct of Boston University's executives warranted a finding that Harkins reasonably believed Meng had authority to enter the renewal agreement.

The jury reasonably could have made the following findings. As Boston University's vice-president for external programs, Meng had virtual autonomy in supervising Linkage's programs at BUCEC. He negotiated and signed the base agreement on behalf of Boston University. Meng was responsible for ensuring Linkage's performance under the base agreement and the MET College contract. When Meng discussed with Silber the renewal of the base agreement in late 1990, Silber gave Meng a green light to proceed, indicating that the arrangement with Linkage had been advantageous to Boston University. Throughout negotiations with Linkage for renewal of the base agreement and the incorporation of the MET College contract therein, Meng was Boston University's primary representative.\(^{FN24}\) In
both the base agreement and in the MET College contract, Meng was named the official representative of Boston University for all legal notice. It was therefore reasonable for Harkins to believe that Meng had the authority to sign the May 21 agreement, thereby binding Boston University to the termination of the MET College contract, the “fold-in” of that contract to the base agreement, and the renewal agreement.

The strongest evidence against the existence of Meng's apparent authority is the March 5 directive requiring approval by Boston University's provost or a senior vice-president for expenditures over $5,000. Harkins had received this directive. Nonetheless, the jury could have found that Boston University's conduct led Harkins to believe that the directive would not apply to the May 21 agreement or to its renewal of the base agreement. Linkage presented evidence that after the issuance of the March 5 directive, payments were authorized involving BUCEC operations without any approval as required by the directive. From his knowledge of the operations of BUCEC, and his observations of the manner in which decisions concerning Linkage's arrangements with Boston University had been reached in the past, Harkins could have reasonably concluded that the March 5 directive expressed a policy that was not always enforced, especially to programs like BUCEC that were headed by someone with direct contact to Silber. After all, it is not uncommon for an employer to issue a mandate concerning financial expenditures, and then to ignore or overlook the mandate in circumstances that suggest benign oversight because the employer's advantages are being advanced.

Based on the evidence, and their assessment of the credibility of the witnesses, the jury properly could have found that Meng had apparent authority to sign the May 21 agreement, and that the execution of that agreement bound Boston University to the renewal of the base agreement on terms that had been agreed to by Meng and Harkins.

(ii) Ratification. Where an agent lacks actual authority to agree on behalf of his principal, the principal may still be bound if the principal acquiesces in the agent's action, or fails promptly to disavow the unauthorized conduct after disclosure of material facts. “It is the instant duty of a principal, upon ascertaining the facts, at once to disaffirm an act done in his name by an agent in execution of a power conferred but in a mode not sanctioned by the terms of the agency or in excess or misuse of the authority given.”

The jury could have found that any deficiency in Meng's authority to execute the May 21 agreement was obviated by subsequent conduct of Boston University officials, especially Westling in his capacity as provost and executive vice-president, whose approval was ostensibly required by the March 5 directive. Meng sent copies of the May 21 agreement to Condon and Westling immediately on its execution. The draft of the renewal agreement was attached to the May 21 agreement, as was a memorandum from Meng explaining the renewal agreement and explicitly asking whether any further review was needed to secure approval. Harkins and Meng met with Westling on May 22 so that Harkins could present his business plan. Westling did not raise any objections to the renewal agreement, nor did he indicate that the agreement required further approval from him or others before it could take effect. Condon never responded to Meng's query as to whether any further action would be needed.
Silber also failed to repudiate Meng's action on behalf of the university. When he met with Meng in Europe in late May, Silber told Meng only that he wanted to “get up to speed” on the Linkage operation, and Silber expressed no objection to the agreement or that Meng had been unauthorized to enter into it without any further approval. Thus, neither Silber nor Westling raised any question about the validity of the renewal agreement until the meeting on July 1, when Silber finally told Harkins and Meng that, in Silber's opinion, Boston University was not bound by the renewal agreement.

Based on this sequence of events, the jury reasonably could have found that ratification of Meng's execution of the May 21 agreement by Boston University followed from the informed acquiescence of Westling, Silber, and other Boston University officials, and from their failure promptly to disavow Meng's conduct after learning material facts.

[13] There is an additional factor supporting the jury's decision: Boston University clearly benefited from the provisions in the May 21 agreement that folded the MET College contract into the base agreement. “It is settled that one cannot accept the benefits of a transaction purporting to be done in his behalf and afterwards repudiate it.” By incorporating the MET College contract into the base agreement, Boston University eliminated the six-month notice for termination in the MET College contract, and the agreement helped to resolve existing problems with the use of the nonprofit postage permit and potential problems with the HEFA financing incurred in connection with the university's acquisition of the BUVEC site. The jury reasonably could have found Harkins credible when he testified that Linkage agreed to terminate the separate MET College contract only as part of a larger arrangement by which the base agreement was to be renewed.\textsuperscript{FN25} After the May 21 agreement was executed, the “fold-in” provisions were implemented and the terms of the base agreement were followed for both programs. Boston University's acceptance of the benefits of the May 21 agreement thus furnished a separate, and important, indication of its acquiescence to, and ratification of, the renewal agreement.

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So ordered.

Colony of Wellfleet v. Harris

The COLONY OF WELLFLEET, INC.

v.

Edith Keyes HARRIS & others

No. 07-P-287.

Appeals Court of Massachusetts, Suffolk.

Decided April 7, 2008.
The Colony of Wellfleet, Inc. (the Colony), appeals from a judgment of the Land Court denying the Colony's request that the court expunge a 1978 deed transferring title to a cottage and the land upon which it is located (lot 49) to Edith Keyes Harris. The Colony argues that the Land Court judge (1) had a duty under G.L. c. 185, § 114, to expunge an erroneous registration of a deed in fee where the transferee was not a purchaser in good faith; (2) committed an error of law in ruling that the Colony ratified the 1978 deed in 1983; and (3) erred in finding the Colony guilty of laches. We affirm.

On November 22, 1963, the Colony purchased registered land from the Mayo Hill Colony, Inc. The land housed nine cottages which were rented seasonally. At the time of the purchase, Loris Stefani (Loris) was the sole shareholder of the Colony, although he operated the cottage colony with Eleanor Stefani (Eleanor).

The Colony was often subject to financial problems. As a result, it fell behind on mortgage payments and foreclosure proceedings were commenced. On October 30, 1970, Loris transferred certain real estate and stock to his sons, Marco and Paul Stefani, and to Attorney Charles E. Frazier, Jr., as part of a refinancing to avoid foreclosure. This transaction provided that upon payment of the existing mortgages, title to lot 17 and the stock of the Colony would be returned to Loris. The plan further provided for lot F-10 to be subdivided, with authority for the lots to be sold. On December 9, 1971, a judge of the Land Court approved a partial subdivision plan of lot F-10, resulting in the creation of lots 39-52. On September 30, 1972, the Colony's stockholders and officers voted (the vote) to authorize Frazier to sell the lots for a period of five years from that date. In accordance with his authority as granted by the vote, Frazier sold six lots between October 21, 1972, and December 1, 1975, one of which was the sale of lot 40 to Harris on April 30, 1975. FN3

On November 1, 1976, Loris commenced actions in Superior Court (the suit) against his sons and Frazier to recover his stock and lot 17. Loris died on January 26, 1978, and William E. Crowell, Jr., the executor of his estate, was substituted as the plaintiff in the suit. Upon his death, Loris left all of his interest in the Colony to Eleanor.

In the summer of 1978, Harris spoke to Eleanor regarding the purchase of cottage 10B, which stands on lot 49. Eleanor told Harris that there could be no sale of the cottage due to the outstanding court case. After Harris's conversation with Eleanor, Harris approached Frazier and his attorney, Sidney Dockser, and was told that lot 49 was for sale at a price of $40,000.

On August 18, 1978, the Colony and Harris signed a purchase agreement for the sale of lot 49 for the sum of $40,000. Eleanor learned of the sale of lot 49 shortly after the purchase and sale agreement was signed. Lot 49 was conveyed to Harris by deed dated October 7, 1978. The proceeds from the sale were used to pay operating costs of the Colony.

Dockser represented Loris's estate and Eleanor in the suit. In 1978, Dockser advised Eleanor
that the sale of lot 49 to Harris was final. As the suit continued, Eleanor hired new counsel, Judith Bowman and Paul Counihan, both of whom were retained during the summer of 1979. Many times during the suit and after the trial in 1979, Eleanor asked Bowman and Counihan if there was anything she could do regarding lot 49, which she asserted Harris had “stolen.” Based on those conversations, Eleanor concluded that the sale of lot 49 was final.

On October 22, 1979, a Superior Court judge decided in favor of Loris's estate, and ordered that the stock in the Colony and lot 17 be held in trust for the benefit of Loris's estate. The ownership of lot 49 was not raised in the suit.

In 1983, a dispute arose between the Colony and Harris over the ownership of lot 49. Eleanor hired Bowman as her counsel, and was again advised that the sale of lot 49 to Harris was final. This dispute never resulted in a court action, and was not otherwise resolved.

Frazier died before this current Land Court action was initiated. Harris was ninety-nine years old when this action was initiated, and died before trial.

The Land Court case. The Colony argued before the Land Court that Frazier lacked corporate authority to execute the deed to Harris, and as a result, the transfer certificate was issued in error and should be subject to the provisions of G.L. c. 185, § 114. Harris argued that Frazier and Dockser told Harris that they had the authority to sell lot 49 and that Frazier was acting with apparent authority when he executed the deed.

The trial judge first noted that the vote authorizing Frazier to sell the lots expired on September 30, 1977; therefore the deed, which was dated October 7, 1978, was not valid because Frazier did not have actual authority to sell lot 49. Frazier's express authority to sell the lots owned by the Colony was limited by the fact that Frazier was only empowered to sell the lots for a duration of five years. Once that five-year window had closed, Frazier lacked actual authority to sell any of the lots owned by the Colony.

Having concluded that Frazier did not have actual authority to sell lot 49, the trial judge addressed the issue of apparent authority and found that Harris could not have held a reasonable belief that Frazier had authority to execute the deed. Harris had spoken with Eleanor about the possibility of purchasing one of the units on lot 49, and had been informed that no land could be sold due to the dispute as to the ownership of the Colony, the subject of a pending action in Superior Court. The trial judge concluded that without a reasonable belief on the part of Harris that Frazier had the authority to sell lot 49, the doctrine of apparent authority did not apply.

The trial judge determined that the Colony qualified as a “person in interest” under G.L. c. 185, § 114, and as such was permitted to bring a petition in the Land Court to correct the error of the recorder in issuing the transfer certificate for the deed despite Frazier's lack of corporate authority to continue to sell lots on behalf of the Colony.

The trial judge found that Harris was not protected from the provisions of § 114 because she
was not a “purchaser in good faith.” As such, the trial judge concluded that the Land Court was authorized to cancel the certificate.

FN4. The Supreme Judicial Court has held that “the statutory scheme set out in G.L. c. 185 does not protect all purchasers in every circumstance ... [and] anyone who seeks the protection of G.L. c. 185 must fulfill his or her obligation to ‘investigate further other certificates of title, documents, or plans in the registration system’ that are referenced on existing certificates of title for the land to be purchased.... The failure to fulfill that obligation need not be fraudulent for the purchaser to lose his or her claim to certainty of title.” *Doyle v. Commonwealth*, 444 Mass. 686, 692-693, 830 N.E.2d 1074 (2005). In the case at bar, Harris did not fulfill this requirement. The authority granted to Frazier by the vote was listed on the memoranda of encumbrances and it would have been clear that Frazier's authority to sell lots on behalf of the Colony had lapsed more than a year prior to the conveyance to Harris. Because Harris at least had constructive knowledge of the error, she was not a purchaser in good faith, and her case falls under the rationale of *Doyle*.

The Land Court judge concluded that the October 7, 1978, deed to Harris was executed by Frazier after his authority under the 1972 vote had expired, and as such, the provisions of G.L. c. 185, § 114, apply. Accordingly, the Land Court had the authority to cancel the certificate; however, while Harris's deed was originally defective because it was not properly executed, the judge concluded that the Colony ratified the deed as of 1983, and that the Colony's claims were barred by laches.

**Discussion.** 1. General Laws c. 185, § 114. Section 114, as amended by St.1996, c. 481, § 20, states in part as follows.

“A registered owner or other person in interest may apply by motion [for an erasure, alteration or amendment to a certificate of title] to the court upon the ground that ... any error or omission was made in entering a certificate or any memorandum thereon; or ... upon any other reasonable ground; ... and [the court] may order the entry of a new certificate, ... or grant any other relief upon such terms, requiring security if necessary, as it may consider proper; but this section shall not authorize the court to open the original judgment of registration, and nothing shall be done or ordered by the court which shall impair the title or other interest of a purchaser holding a certificate for value and in good faith, or his heirs or assigns, without his or their written consent.”

a. The Colony argues that, having concluded that Frazier had no authority to execute the deed to Harris and that Harris was not a purchaser in good faith, the trial judge was required by § 114 to cancel Harris's certificate and restore title to the Colony, and that failure to do so undermines the purpose of the land registration system.

We are not persuaded that permitting a certificate of title to remain with a party who was not a “purchaser in good faith” defeats the purpose of the land registration system. “[T]he underlying purpose of title registration is to protect the transferee of a registered title.”
Kozdras v. Land/Vest Properties, Inc., 382 Mass. 34, 44, 413 N.E.2d 1105 (1980). This purpose is not defeated by permitting the court to exercise discretion in crafting equitable relief allowing the transferee to maintain possession of a certificate of title where the transferor ratified the deed or where the transferor was guilty of laches.

The argument that the Land Court has no discretion under § 114 is not supported by the language of the statute. A close reading of § 114 leads to the conclusion that this section is intended to be permissive and to provide the court with flexibility in determining relief: the court “may order the entry of a new certificate ... or grant any other relief ... as it may consider proper” (emphasis added). G.L. c. 185, § 114. Section 114 explicitly says that the court has the authority to grant such relief as it deems proper. Such language leads to the conclusion that § 114 was meant to provide flexibility to the judge in deciding what relief to grant: “By its terms, [G.L. c. 185, § 114,] grants a Land Court judge broad powers to correct errors ‘made in entering a certificate.’ ” Doyle v. Commonwealth, 444 Mass. 686, 694, 830 N.E.2d 1074 (2005). Furthermore, the use of the word “may” denotes a discretionary power. Massachusetts law has consistently held that the word “may” in a statute “is a word of permission and not of command.” Cline v. Cline, 329 Mass. 649, 652, 110 N.E.2d 123 (1953). The trial judge therefore correctly determined that he had the authority to cancel the certificate, but did not have an affirmative mandate to do so.

Although the judge found the rationale of Doyle to be controlling in determining that Harris was not a “good faith purchaser,” he had discretion within § 114 to consider other factors, such as whether the Colony ratified the deed, or whether there is a laches concern in this case.

b. The final clause of G.L. c. 185, § 114, states that “nothing shall be done or ordered by the court which shall impair the title or other interest of a purchaser holding a certificate for value and in good faith, or his heirs or assigns, without his or their written consent.”

The Colony argues that (1) it is a good faith purchaser holding a certificate as a result of its purchase from the Mayo Hill Colony, Inc., in 1963; (2) the Land Court decision impairs its title; and (3) it never gave written consent as required under § 114, thereby requiring reversal of the judge's decision.

The Colony was a purchaser holding a certificate for value and in good faith resulting from the transaction with the Mayo Hill Colony in 1963; however, the protections granted to the Colony through § 114 as a good faith purchaser in 1963 do not extend to the transaction between the Colony and Harris in 1978. Following the 1978 transaction, the Colony no longer held the certificate to lot 49. The Colony is more aptly described as a “person in interest,” rather than a “purchaser in good faith” with respect to the transaction in 1978. The Colony's certificate for lot 49 was canceled in 1978, at which time Harris became the new holder of the certificate; Harris, not the Colony, was the “purchaser” for purposes of § 114.

2. Ratification. The Colony argues that the Land Court judge committed an error of law in ruling that the Colony ratified the 1978 deed to Harris based on a theory of constructive
knowledge. We disagree.

A principal may be bound by an agent's unauthorized acts if the principal expressly or impliedly ratifies the agent's acts. See Linkage Corp. v. Trustees of Boston Univ., 425 Mass. 1, 18, 679 N.E.2d 191, cert. denied, 522 U.S. 1015, 118 S.Ct. 1091, 139 L.Ed.2d 488 (1997). Ratification may be effected by the principal's express declaration or inferred from his actions, including failure to repudiate an act. In order to establish ratification it generally must be shown that the principal had “full knowledge of all material facts.” Perkins v. Rich, 11 Mass.App.Ct. 317, 322, 415 N.E.2d 895 (1981), quoting from Combs v. Scott, 94 Mass. 493, 12 Allen 493, 496 (1866). However, the law does not allow one to “purposefully shut his eyes to means of information within his own possession and control, having only that knowledge which he cares to have” (citations omitted). Perkins, supra. Ratification is essentially a question of fact that will be reversed only if clearly erroneous. Diep Bui v. Ha Ma, 62 Mass.App.Ct. 553, 565, 818 N.E.2d 572 (2004).

Although the Land Court judge ultimately decided the issue of ratification with respect to Eleanor, the judge also noted that Marco and Paul were shareholders of the Colony when Frazier conveyed lot 49 to Harris in 1978, and there was no evidence that they objected to the receipt of the proceeds from the sale. This court will affirm a judgment as long as the result is correct on any ground apparent on the record that supports the result reached by the trial court. Gabbidon v. King, 414 Mass. 685, 686, 610 N.E.2d 321 (1993).

If the principal benefits from the unauthorized act, “ratification may be implied pretty quickly from the lapse of time.” Brown v. Henry, 172 Mass. 559, 567-68, 52 N.E. 1073 (1899). In the case at bar, the money generated from the sale of lot 49 was vitally important to the Colony's financial health since it was used to pay operating expenses. The 1981 appeal from the Superior Court suit concluded that a trust was created in favor of Loris, and that Marco, Paul, and Frazier were the resulting trustees. See Crowell v. Stefani, 12 Mass.App.Ct. 966, 428 N.E.2d 334 (1981). As trustees, Marco and Paul were “held to the rule of good faith and due diligence.” Young v. Tudor, 323 Mass. 508, 515, 83 N.E.2d 1 (1948). “[A] trustee must use his or her ‘best informed judgment in good faith.’ ” Fine v. Cohen, 35 Mass.App.Ct. 610, 617, 623 N.E.2d 1134 (1993), quoting from Old Colony Trust Co. v. Silliman, 352 Mass. 6, 10, 223 N.E.2d 504 (1967).

Despite the fact that Marco and Paul were later divested of their positions as the principals of the Colony, the decisions they made at the time as trustees were in good faith, and were binding upon the Colony. Furthermore, there is certainly no issue of knowledge about the lapse of authority granted to Frazier through the vote with respect to Paul and Marco. They authorized Frazier to sell the lots for a period of five years and there is no reason to believe they did not know Frazier sold lot 49 to Harris after the expiration of that authority. The Colony ratified the deed in 1978 when Marco and Paul failed to repudiate the transaction and the Colony benefited from the proceeds from the sale.

Even if Marco and Paul were unable to ratify the actions of Frazier in 1978, the Land Court judge correctly determined that Eleanor ratified the deed in 1983. The trial judge found that
ratification was implied by Eleanor's acts, including her failure to take any action. Ratification may be implied when a principal makes no effort to repudiate a transaction. See *Kelley v. Newburyport & Amesbury Horse R.R.*, 141 Mass. 496, 499-500, 6 N.E. 745 (1886). “Where an agent lacks actual authority to agree on behalf of his principal, the principal may still be bound if the principal acquiesces in the agent's action, or fails promptly to disavow the unauthorized conduct after disclosure of material facts.” *Linkage Corp. v. Trustees of Boston Univ.*, 425 Mass. at 18, 679 N.E.2d 191. When Eleanor became the principal in 1981, she was aware of the sale of lot 49 to Harris. In fact, she specifically asked her counsel during the suit and again in 1983 whether there was anything she could do with respect to the sale of that lot. After researching the issue, her counsel told her that there was nothing she could do. Even though this information may have been incorrect, Eleanor is not absolved by her agents' erroneous advice and the obligation of her agents to discover that which is clearly reflected in the memoranda of encumbrances filed with the certificate. In making this determination, the judge was not clearly erroneous because Eleanor's agents had knowledge of all of the material facts in this case. “If the purported principal has knowledge of facts which would lead a person of ordinary prudence to investigate further, and he fails to make such investigation, his affirmance without qualification is evidence that he is willing to ratify upon the knowledge which he has.” Restatement (Second) of Agency § 91 comment e (1958).

By failing to repudiate the actions of Frazier within a reasonable time after gaining access to all the relevant material facts in 1983, Eleanor ratified the sale of lot 49 to Harris.

3. Laches. The Colony argues that the trial judge erred in finding the Colony guilty of laches. We disagree.


“The operation of laches generally is a question of fact for the judge, and a judge's finding as to laches will not be overturned unless clearly erroneous.” *A.W. Chesterton Co. v. Massachusetts Insurers Insolvency Fund*, 445 Mass. 502, 517, 838 N.E.2d 1237 (2005).

In the case at bar, the trial judge found that Eleanor told her attorneys many times that lot 49 was wrongfully taken from her and inquired about the possibility of getting the property back. The judge found that the delay in this case, twenty-three years, was unreasonable given the circumstances. The trial judge's findings were not clearly erroneous in concluding that the delay was unreasonable where Eleanor's attorneys were specifically asked about her rights in lot 49 and the vote was recorded on the memoranda of encumbrances.
The trial judge further found that the defendants were prejudiced by the delay in that the defense's main witness, Harris, died before trial. Frazier, another witness, also died before trial and was unable to add his testimony to the evidence at trial. The fact that several key witnesses died before this case was tried could certainly have prejudiced the defendant. These findings are not clearly erroneous.

Finally, the trial judge concluded that the Colony, like Harris, knew the facts pertaining to the deed and had access to the records to discover the vote and the limitation of Frazier's authority to execute the deed. The trial judge deemed the Colony to have sufficient knowledge of the material facts to have made the delay in this case unjustified. This conclusion stems from the fact that Eleanor specifically inquired about her rights in lot 49 during the suit, and again in 1983. Her counsel had every opportunity to discover the vote and any rights stemming therefrom. This finding is not clearly erroneous.

For all of these reasons, the trial judge's findings that the Colony ratified the deed as of 1983, and was guilty of laches, were not clearly erroneous. Accordingly, the judgment is affirmed.

So ordered.

V. Termination of Agency

The general rules regarding the duration of an agency relationship are fairly well settled. First, if the agency is for a specific act, the agency terminates when the act is completed. For example, if I hire a real estate broker to sell my house, the agency relationship ends when the house is sold. Second, if the agency is for a specific time period, the agency ends when the time period expires. Third, agency is terminated by operation of law, such as the incapacity or death of either the principal or the agent (but note the exception listed in M.G.L. c. 201B).

There is another general, “American” rule regarding agency (employment) relationships. In the United States, if you are hired for no specific term, then you are an employee “at will,” which means you can quit, or be fired, at any time, without the other party being able to recover for any damages suffered as a result of the quitting (or firing). This general rule has been riddled with exceptions, as you will see.

Before continuing please thoroughly acquaint yourself with the Restatement of Agency, 2d, section 118, including the comments and illustrations thereto. The Restatement of Agency 2d is on reserve in the library, and is also available on Westlaw or Lexis.

END OF CLASS

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Class #08

Discussion points for Thomas v. Ballou-Latimer

First and foremost, this is a case about how important it is that you learn how to draft contracts (employment agreements) which are as clear as possible. Looking at the facts relied upon by the court to find that the contract was for year to year, do you find any of them compelling enough to overcome the American rule? Aren’t some of these facts borderline irrelevant? Did Thomas get shortchanged on the bonus?

Bessie B. THOMAS, Executrix of the Estate of George Winton Thomas, Deceased, Plaintiff-Respondent,

v.

BALLOU-LATIMER DRUG CO., Defendant-Appellant.

Supreme Court of Idaho.

July 8, 1968.

TAYLOR, Justice.

February 16, 1962, George Thomas and the Ballou-Latimer Trust entered into an employment agreement which reads in part:

'That Trustees hereby hire and employ party of the second part as General Manager of said drug store belonging to Trustees and General Manager does hereby accept such employment under the compensation, terms and conditions and for the times hereinafter specified, commencing as of the date hereof.

'The Trustees agree to pay, and the General Manager agrees to accept for the services to be rendered hereunder, a salary of Seven Hundred Twenty-Five (725.00) Dollars per month, payable semi-monthly on the first and 15th day of each month, the first salary payment to be due March 1, 1962. In addition thereto General Manager shall receive a bonus of twenty-five per cent (25%) of the net profit of said Ballou-Latimer Company, before income taxes and before any distribution under provisions of the above mentioned Trust Agreement. Such bonus shall be due as of December 31st of each year or portion of a year this agreement shall be in operation. Said net profit shall be calculated within a reasonable time after the close of the calendar year, and as soon as possible to ascertain the receipts and expenditures and to complete necessary bookkeeping and auditing.
General Manager is charged with and hereby accepts the full responsibility of the management and conduct of the business in general of the Trustees' said drug business in Boise, Idaho, subject only to accountability to, and supervision and direction of the Trustees. General Manager shall not make changes in general policy or discharge key employees without first consulting Trustees.

General Manager agrees to so conduct himself, personally and in business, as not to affect adversely the business or the good standing or reputation of himself or the said Ballou-Latimer Co.

General Manager agrees that he will not engage in any business or enterprise other than covered by this contract, except with the consent of the Trustees, but this shall not apply to personal investments made by him.

It shall be the duty of the General Manager to keep full and complete books of account of the business in accordance with recognized accounting procedure and as prescribed by the Trustees or the company auditor; said books to at all times be available for inspection by the Trustees or said auditor or upon order of any of them. The auditor for the business shall be one to be selected by the Trustees and General Manager.

Said General Manager shall make such statements and reports as a Trustee or Trustees shall require; and shall cause an inventory of such business to be taken as of December 31st and June 30th of each year, commencing with June 30, 1962.

This Agreement shall take effect as of February 16, 1962 and shall continue in force until terminated as hereinafter provided.

It shall terminate upon the death of the said General Manager, or upon the sale or liquidation of the business without provision for a successor to assume the obligations of this Agreement. It is agreed that Trustees shall provide, in case of death of second party, the sum of $5000.00 to the wife of the General Manager, provided she survives him, or in event of her demise, to his children, share and share alike. Said sum to be paid in a lump sum, within 45 calendar days of date of death.

It may be terminated by either party hereto on December 31, 1962. In order for such termination to become effective, a written Notice of such termination shall be delivered to the other party by the termination party at least thirty days prior to said termination date. In event of such a termination by either party, General Manager agrees that upon request of the Trustees, he will remain in his employment at least sixty (60) days beyond any such termination date and shall in that event share in the profits accordingly during such period. This Agreement shall terminate upon exercise of option of General Manager to purchase in as hereinafter set forth.
'IT IS UNDERSTOOD AND AGREED, That in event of no termination, that this Agreement shall be reviewed as of each December 31st after date, for the purpose of adjusting and correcting inequities that may develop herein.

'IT IS FURTHER UNDERSTOOD AND AGREED, That at the date of entering into this Agreement, the said drug business is heavily indebted and that the main consideration of entering into this Agreement and the bonus provision hereof, is to provide inducement and encouragement for the General Manager's developing the said drug business to a point where the business will be a strong and going concern, free of debt except for its current monthly bills. It is also agreed, that in the process of liquidating such indebtedness that sufficient funds must be retained to properly maintain and operate said business.'

Thomas was employed by Ballou-Latimer under the terms of the agreement until February 12, 1965, when the agreement was terminated by the defendant.

April 21, 1965, Thomas instituted this action to recover under the terms of the contract his salary for the remainder of 1965, bonus money for the year 1963, and vacation pay. The case was heard by a jury, and a special verdict was rendered answering three questions submitted to it by the court. Based on the verdict, judgment was entered in favor of Thomas, awarding him $7,612.50 salary for the remainder of 1965, $1,500.00 bonus for the year 1963, and $21.15 in costs. Vacation pay was not awarded. From the judgment, Ballou-Latimer has appealed. No appeal was taken by plaintiff Thomas.

The evidence at the trial showed that, although Thomas signed writings purporting to be resignations, in fact he had been given the choice by the directors of defendant of quitting or being discharged. Defendant attempted to prove that Thomas had been discharged for cause, asserting:

A. He had failed to prepare certain statements as required by the contract of employment.

B. He had accepted employment with a tire distributorship and had done work for the tire company on Ballou-Latimer time, using Ballou-Latimer personnel and equipment without permission of the directors in contravention of the contract of employment. Thomas presented evidence indicating that the directors and their attorney had failed to provide him with certain information necessary for the completion of said statements, though he had requested it from them numerous times. He also contradicted Ballou-Latimer's evidence with regard to the outside employment.

On the issue of the bonus, there is no dispute that Ballou-Latimer failed to show a profit, according to the terms of the employment contract, during the time Thomas held his position. Thomas, however, offered evidence that subsequent to the written contract, he and the directors agreed to an oral modification thereof. By the terms of the oral agreement changes in the method of determining profit and loss were made. Under the oral modification, Thomas contended Ballou-Latimer had a profit before taxes of $6,000.00 in 1963; and that by the terms of the contract, therefore, he was entitled to a bonus of $1,500.00.
The Ballou-Latimer directors admitted that such a modification had been discussed, but testified that it had been rejected by them.

In answer to the questions put to it the jury found:
A. That Thomas had been discharged;
B. That the discharge was without cause;
C. That Thomas and Ballou-Latimer had agreed orally to modify the terms of the written contract as to the method of computing the bonus for 1963.

The trial court then decided that the contract was a contract of employment from year to year, renewable each December 31st. Since Ballou-Latimer failed to produce any evidence that Thomas could have or did mitigate damages by accepting other employment after discharge, the court awarded plaintiff his full salary for the remainder of 1965 ($7,612.50).

On the bonus question, the court accepted Thomas' testimony as to the amount due, Ballou-Latimer having presented no contrary evidence, and awarded $1,500.00.

Defendant contends that the court erred in concluding that the contract contemplated employment from calendar year to calendar year. It is agreed by all parties that the terms of the agreement were not specific as to duration of employment. The contract gave both parties the option of termination on December 31, 1962. Neither party acted upon that option.

[5][6] There is conflict among the authorities in cases similar to the one before us, when the duration of the contract of employment is not specified. According to the old English Doctrine, since modified, such a general hiring presumes a hiring for one year. Under the American Doctrine, a general hiring not limited to a specified period creates a presumption of a hiring at will under which either party may terminate the employment without cause at any time, assuming any notice requirements are met. As corollaries to the above, jurisdictions following the old English rule have held that a hiring at a named price per week, month, or year is presumed to be a definite hiring for the period named; while jurisdictions following the American rule hold that such a term, standing by itself, fixes the rate of compensation and not the period of employment. In all jurisdictions, however, the presumptions are rebuttable. The controlling factor is the intention of the parties as evidenced not only by the terms of the contract, but by all the surrounding circumstances. ****

[7][8] The law outlined herein under the term 'American Doctrine' is better suited to the ordinary business practice in our jurisdiction than the old English rules, and consequently is the law followed in Idaho. In the application of the law, whether a contract of employment which does not contain a provision defining duration of employment is of indefinite duration (and thus terminable at will) or of fixed duration for a definite term (and thus not terminable at will) is ultimately a question of fact. See Edwards v. Morrison-Knudsen Company, 61 Wash.2d 593, 379 P.2d 735 (1963); Lasser v. Grunbaum Bros Furniture Co., supra. The trier of the facts as to this issue was the district judge. From his memorandum decision, it is
clear that he applied the correct rule of law when he decided that the contract contemplated employment from calendar year to calendar year, after December 31, s962. The facts relied on by the trial court in reaching its conclusion may be summarized as follows:

A. The provision in the contract for an annual bonus as of December 31st of each year;

B. The provision in the contract for inventories as of June 30th and December 31st of each year;

C. The provision in the contract for an annual vacation of fourteen days per calendar year;

D. The provision in the contract to review the agreement as of December 31st each year;

E. The provision in the contract giving plaintiff the option to purchase an interest in the business subsequent to December 31, 1962;

F. The testimony of Thomas that defendant's attorney told him, at the time the contract was negotiated, that the agreement could be terminated only as of December 31st of any given year (except on the occurrence of certain specified events, none of which are relevant here);

G. The fact that the position was of some importance and not the type that would last for only a short period;

H. The fact that Thomas moved from Washington to Idaho to accept the position.

Taken individually, the facts relied on by the trial court do not of themselves show that the contract contemplated employment from calendar year to calendar year. But, taken in their totality (that is, considering all the circumstances) the facts of this case justify the finding of the trial court. As stated before, the question of whether an employment at will or an employment for a definite term was contemplated basically is a factual issue. We do not hold that as a matter of law, the facts in this case show that employment from calendar year to calendar year was contemplated; rather we hold that the trier of the facts did not err in reaching the factual determination under review. Findings of the trial court, supported by substantial, competent, though conflicting, evidence, will not be reversed on appeal.

Discussion points for Shenn v. Fair-Tex

This case is a good counterpoint to the Thomas case, and it shows a fairly typical result. Note that these cases are very fact intensive, but also note that a court can focus on specific facts and inferences (and ignore countervailing ones) to reach the result it desires. Maybe the difference is in the contract language, as this case has a definite ending of the agency relationship, while the Thomas case arguably did not.
Al SHENN, Plaintiff-Respondent,
v.
FAIR-TEX MILLS, INC. and Champagne Knitting Mills, Inc., Defendants-Appellants.

Supreme Court, Appellate Division, First Department.


PER CURIAM.

This appeal is from an order entered January 14, 1966, which denied defendants' motion to dismiss the complaint.

Plaintiff seeks damages for the amount of unpaid salary from April 9, 1965, the date of his alleged wrongful discharge, to October 31, 1965, the date plaintiff claims his contract of employment expired, and an accounting for commissions from November 1, 1964, to and including October 31, 1965.

The complaint alleges that plaintiff and defendant Fair-Tex Mills, Inc. (herein Fair-Tex) entered into a written contract of employment August 22, 1958, whereby plaintiff was employed by Fair-Tex as a salesman for a period up to and including October 31, 1959, at a weekly salary of $200 plus 1% commission on sales. The agreement is attached to and made a part of the complaint. Plaintiff alleges that at the expiration of the term he continued in the employ of Fair-Tex 'without any new express agreement * * * on the same terms and conditions' and by reason thereof an agreement was created between the parties for plaintiff's employment for one year. The complaint continues that there were like annual renewals in 1961, 1962, 1963 and 1964 except that in 1964 his weekly salary was increased to $300 though the commission remained the same. After plaintiff's discharge on April 9, 1965, he commenced this action. He claims that in each year set forth, including the year involved in this suit, there was an implied renewal of his contract of employment for one year, and that he is entitled to salary from the date of discharge to October 31, 1965, and to commissions as stated.

[1][2] The general rule is that where one enters the employ of another for a fixed period at a stated annual salary, and the employment continues beyond that period, the presumption is continuance of the relationship for another year at the same salary (Adams v. Fitzpatrick, 125 N.Y. 124, 26 N.E. 143; Mason v. New York Produce Exchange, 127 App.Div. 282, 111 N.Y.S. 163, aff'd 196 N.Y. 548, 89 N.E. 1104). In the Adams case, the court quoted with approval from Story on Contracts '(b)ut when wages are payable at a stipulated period, as per week, or month, or half year, such circumstances, standing alone, indicate that the hiring is
for such period' (Adams v. Fitzpatrick, supra, 125 N.Y. p. 129, 26 N.E. p. 145). Nor is Carter v. Bradlee, 245 App.Div. 49, 280 N.Y.S. 368, cited by respondent, to the contrary. In that case plaintiff was employed for a fixed period, at a stated annual salary payable monthly.

[3] In the case before us there is no provision for a fixed annual salary, merely a fixed weekly salary. The written agreement upon which plaintiff relies expressly provided that it could not be modified orally, that no oral agreement, understanding, etc., could bind Fair-Tex unless in writing. Such agreement by its terms expired October 31, 1959. The contention that the contract might be considered as 'equivalent to a general hiring, which means from year to year' (see Adams v. Fitzpatrick, supra, p. 127) is rejected both because of the absence of a fixed annual salary and because of the inclusion of a specified weekly salary only, plus commissions. Nothing is shown to warrant an inference of fact or implication of law that there was an annual contract.

The order appealed from should be reversed on the law, the motion to dismiss the complaint granted, with costs and disbursements to appellants, but with leave to respondent, in the exercise of our discretion, to apply to Special Term for leave to serve an amended complaint if plaintiff is so advised, as to the existence of a contract for one year.

Order, entered on January 14, 1966, unanimously reversed, on the law, with $50 costs and disbursements to the appellants, and defendants' motion to dismiss the complaint granted, with $10 costs, with leave, however, to respondent, in the exercise of discretion, to apply at Special Term for leave to serve an amended complaint if respondent is so advised, as to the existence of a contract for one year.

All concur.

**Discussion points for Pine River v. Mettille**

This case amply demonstrates how difficult it is to fit traditional contract law doctrine (such as the need for mutual consideration existing at the time of contract modification) into employment agreements. So for now, forget about contract law, and ask yourself, is this result fair? Note how long a promise of “lifetime employment” really is. And consider the logical absurdity of the Court's ruling. What if Mettille were caught embezzling from the company?

**PINE RIVER STATE BANK, Appellant,**

**v.**

**Richard E. METTILLE, Sr., Respondent.**

Supreme Court of Minnesota.
SIMONETT, Justice.

An employee hired for an indefinite, at-will term claims his discharge was in breach of his employment contract as subsequently modified by an employee handbook. A jury awarded the employee damages and the employer appeals from a denial of its post-trial motions. We affirm.

In early 1978 respondent Richard Mettille, then unemployed, nearly 48 years of age, married and living in St. Paul, sent his resume to the appellant Pine River State Bank. After an interview, the bank offered Mettille a job at a salary of $1,000 a month or $12,000 a year. Mettille accepted, moved to Pine River, and started work as a loan officer on April 10, 1978. The employment agreement was entirely oral. Nothing was said as to the position being permanent or for any specific term. Mettille conceded that he felt free to leave the bank and to take a better job elsewhere if he wished to do so.

Mettille survived his 6-month probationary period and was shortly given the title of loan officer. His duties were to lend, procure insurance on loan collateral, file UCC financing statements, and prepare reports on student loans.

Late in 1978 the bank distributed to its employees, including Mettille, a printed Employee Handbook. The handbook had been drafted by the bank's president, E.A. Griffith, who relied heavily on a model handbook he had received at a recent seminar on employee relations sponsored by the Minnesota Bankers Association. The handbook contained information on the bank's employment policies, including such matters as working hours, time off, vacations, and sick leave. With respect to employee responsibilities, the handbook discussed such matters as punctuality, confidentiality of the work, personal appearance and conduct, and telephone courtesy. The handbook also contained sections on "job security" and "disciplinary policy." According to Griffith, the handbook was intended as a source of information for employees on bank procedures and as a guideline within the bank so that people would know when vacations would be available and how many days the employee would be allowed for vacations. Griffith testified that he never intended the handbook to become part of an employee's employment contract with the bank.

In April 1979 Mettille received his annual performance review and with it a 7% raise. Apparently, about this time he also took out a home improvement loan with the bank. The following September state bank officials conducted an unannounced examination of the Pine River State Bank, and after reviewing the loan portfolio, reported to Griffith that some "technical exceptions" existed, i.e., failures to comply with the applicable law and regulations. Griffith then ordered his own independent review of the 85 files noted in the examiner's report. This investigation disclosed that 58 of the 85 files contained "serious" technical exceptions and that Mettille was responsible for the serious technical exceptions in 57 of these 58 files. Thus, 28 files showed no vehicle certificate of title; 33 files showed no
insurance covering the secured collateral; 4 files showed inadequate insurance; 6 files showed failure to record financing statements properly (although here the bank disagreed with the examiner that the financing statement filings had been improper); and 4 files showed expired financing statements. Characterization of these deficiencies as "serious" was made by the bank officers, because those errors created possible loss to the bank. They testified that the defective files involved loans totaling over $600,000.

Mettille was home ill at the time of the audit by the bank examiners and the subsequent review of the files by the bank. On September 28, 1979, Mettille returned to work. The president called Mettille into his office and fired him. The parties at this time did not review the list of technical exceptions. The disciplinary procedures outlined in the handbook were not followed, nor was the handbook even mentioned. Mettille was given 2 months' severance pay.

The reason for Mettille's dismissal and whether that dismissal was for good cause were sharply contested. The bank claimed that the only reason given for the dismissal was the existence of loan errors, although excessive sick leave and a reduction in force were also factors. Mettille alleged that he was fired because of a personality dispute with his superiors. He argued that no problems were discovered in the course of previous bank examinations, that the exceptions in the 1979 audit were correctable and, in fact, were corrected within a month after he was fired. He disputed that the exceptions were "serious." There was also testimony that Mettille had never received any reprimands or complaints as to his performance prior to September 1979 and that he was loyal and "tried hard." At the time of trial Mettille was still unemployed.

In November 1980 the bank sued Mettille on two notes on which he was in default. Mettille counterclaimed, alleging that the bank had breached his contract of employment by dismissing him without cause and in violation of required disciplinary procedures. The case was tried in January 1982 and the jury found: (1) that the parties had a contract under which the defendant could not be terminated without good cause; (2) that the bank terminated Mettille without good cause; and (3) that Mettille sustained damages of $27,675. The trial judge deducted from the damages award the amount owed on the notes and ordered judgment in favor of Mettille and against the bank for $24,141.07. Both parties moved for a new trial. The bank's main argument was that Mettille's employment contract was at-will and that it was free to terminate him as it did. Mettille argued that he should have been permitted to show mental anguish to recover more damages. The trial judge denied both motions. Only the bank appeals.

The issues may be broadly stated: (1) Can a personnel handbook, distributed after employment begins, become part of an employee's contract of employment? (2) If so, are job security provisions in the handbook enforceable when the contract is of indefinite duration? and (3) In this case, was the employee's summary dismissal without following the job termination procedures of the handbook a breach of contract by the employer? Other issues to be discussed briefly relate to evidentiary rulings and damages.
I.

Whether a handbook can become part of the employment contract raises such issues of contract formation as offer and acceptance and consideration. We need first, however, to describe the Pine River State Bank's handbook. It contains, as we have said, statements on a variety of the bank's employment practices or policies, ranging from vacations and sick leave to personal conduct and appearance. Our inquiry here, however, concerns only the job security provisions. A section entitled "Performance Review" provides for at least an annual review of the employee's work. Another section entitled "Job Security" speaks in general, laudatory terms about the stability of jobs in banking. The key section, central to this case, is entitled "Disciplinary Policy." This section provides for what appears to be a three-stage procedure consisting of reprimands for the first and second "offense" and thereafter suspension or discharge, but discharge only "for an employee whose conduct does not improve as a result of the previous action taken." The section concludes with the sentence, "In no instance will a person be discharged from employment without a review of the facts by the Executive Officer." [FN3]

FN3. The section entitled "Disciplinary Policy" reads:
In the interest of fairness to all employees the Company establishes reasonable standards of conduct for all employees to follow in their employment at Pine River State Bank. These standards are not intended to place unreasonable restrictions on you but are considered necessary for us to conduct our business in an orderly and efficient manner.
If an employee has violated a company policy, the following procedure will apply:
1. An oral reprimand by the immediate supervisor for the first offense, with a written notice sent to the Executive Vice President.
2. A written reprimand for the second offense.
3. A written reprimand and a meeting with the Executive Vice President and possible suspension from work without pay for five days.
4. Discharge from employment for an employee whose conduct does not improve as a result of the previous action taken.
In no instance will a person be discharged from employment without a review of the facts by the Executive Officer.

[1][2][3] Generally speaking, a promise of employment on particular terms of unspecified duration, if in form an offer, and if accepted by the employee, may create a binding unilateral contract. The offer must be definite in form and must be communicated to the offeree. Whether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties, not by their subjective intentions. Cederstrand v. Lutheran Brotherhood, 263 Minn. 520, 532, 117 N.W.2d 213, 221 (1962). An employer's general statements of policy are no more than that and do not meet the contractual
requirements for an offer. Thus, in Degen v. Investors Diversified Services, Inc., 260 Minn. 424, 110 N.W.2d 863 (1961), where the employee was told he had a great future with the company and to consider his job as a "career situation," we said these statements did not constitute an offer for a lifetime employment contract.

[4] If the handbook language constitutes an offer, and the offer has been communicated by dissemination of the handbook to the employee, the next question is whether there has been an acceptance of the offer and consideration furnished for its enforceability. In the case of unilateral contracts for employment, where an at-will employee retains employment with knowledge of new or changed conditions, the new or changed conditions may become a contractual obligation. In this manner, an original employment contract may be modified or replaced by a subsequent unilateral contract. The employee's retention of employment constitutes acceptance of the offer of a unilateral contract; by continuing to stay on the job, although free to leave, the employee supplies the necessary consideration for the offer.

An employer's offer of a unilateral contract may very well appear in a personnel handbook as the employer's response to the practical problem of transactional costs. Given these costs, an employer, such as the bank here, may prefer not to write a separate contract with each individual employee. See Note, Protecting At Will Employees against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv.L.Rev. 1816, 1830 (1980). By preparing and distributing its handbook, the employer chooses, in essence, either to implement or modify its existing contracts with all employees covered by the handbook. Further, we do not think that applying the unilateral contract doctrine to personnel handbooks unduly circumscribes the employer's discretion. Unilateral contract modification of the employment contract may be a repetitive process. Language in the handbook itself may reserve discretion to the employer in certain matters or reserve the right to amend or modify the handbook provisions.

[5] We conclude, therefore, that personnel handbook provisions, if they meet the requirements for formation of a unilateral contract, may become enforceable as part of the original employment contract.

II.

The next issue is whether handbook provisions relating to job security require special treatment, i.e., whether they are an exception to the general rule just discussed. Put more precisely, the question is whether, in an at-will hiring, the job security provisions in a subsequently adopted employee handbook are enforceable. On this issue, the courts are split, see Sherman v. St. Barnabas Hospital, 535 F.Supp. 564, 573 (S.D.N.Y.1982) (citing cases), and our own case law is unclear.

[6][7] Where the hiring is for an indefinite term, as in this case, the employment is said to be "at-will." This means that the employer can summarily dismiss the employee for any reason or no reason, and that the employee, on the other hand, is under no obligation to remain on the job. See Cederstrand v. Lutheran Brotherhood, 263 Minn. 520, 532, 117 N.W.2d 213,
Nor will a claim by the employee that he or she was promised "permanent" or "lifetime" employment change the at-will nature of the hiring, Skagerberg v. Blandin Paper Co., 197 Minn. 291, 266 N.W. 872 (1936), at least not in the absence of some kind of additional consideration supplied by the employee which is uncharacteristic of the employment relationship itself. Bussard v. College of St. Thomas, 294 Minn. 215, 200 N.W.2d 155 (1972).

Here the employee does not claim, nor could he, that he was promised "permanent" employment. The law is hesitant to impose this burdensome obligation on an employer in the absence of an explicit promise to that effect. See Degen v. IDS, Inc., 260 Minn. 424, 428-29, 110 N.W.2d 863, 866-67 (1963). Instead, the respondent employee is claiming that his job termination was wrongful because the job security provisions set out in the employee handbook were not followed. The appellant bank, relying on the "at-will" doctrine as expressed in our cases beginning with Skagerberg, argues that without additional consideration, the job security provisions are not enforceable. Other cases cited by the bank hold that job termination restrictions, even if part of a contract for an indefinite duration from the outset, can never be enforceable.

This court did say, by way of dictum in Cederstrand, that parties to a contract for an indefinite duration might transform the contract into one where the employee will not be dismissed without cause, and we observed, "This is not to say that such a contract would be unenforceable." 263 Minn. at 536, 117 N.W.2d at 223. We need, therefore, to examine the three reasons given for the unenforceability of job termination restrictions in an employment contract of indefinite duration: (1) the at-will rule takes precedence over any such restrictions; (2) the restrictions ordinarily lack the requisite additional consideration; and (3) mutuality of obligation is missing.

The first argument, that because the contract specifies no duration the parties did not intend any job termination restrictions to be binding, is without merit. The argument misconstrues the at-will rule, which is only a rule of contract construction, as a rule imposing substantive limits to the formation of a contract. See Restatement (Second) of Agency, § 442, comment a (inference that employment is at-will may be rebutted by specific terms of the agreement). The general rule is that contracts for a specified duration can nonetheless be terminated during the period of the contract if the employer has good cause. Thomsen v. Independent School District No.91, 309 Minn. 391, 244 N.W.2d 282 (1976). When a contract is for an indefinite duration, the duration is not set, and a corollary is that either party may then terminate it at any time for any reason. Further, if the contract purports to establish "permanent employment," this will be interpreted as a contract for an indefinite period, and hence also at-will. Thus, in Bussard v. College of St. Thomas, 294 Minn. 215, 223, 200 N.W.2d 155, 161 (1972), we said, "[T]he somewhat arbitrary rule of most jurisdictions that a contract for permanent employment will be construed to be terminable at the will of either party * * * is arguably too mechanical an answer to the more basic issue of ascertaining the real intent of the parties" (emphasis added). See also Note, Employment Contracts of Unspecified Duration, 42 Colum.L.Rev. 107, 120-21 (1942).
The cases which reason that the at-will rule takes precedence over even explicit job termination restraints, simply because the contract is of indefinite duration, misapply the at-will rule of construction as a rule of substantive limitation on contract formation. It should not be necessary for an employee to prove a contract is of "permanent" employment or for a specified term in order to avoid summary dismissal if the parties have agreed otherwise. There is no reason why the at-will presumption needs to be construed as a limit on the parties' freedom to contract. If the parties choose to provide in their employment contract of an indefinite duration for provisions of job security, they should be able to do so.

The second argument against enforceability is, at first glance, more troublesome in view of our case law. The argument is that a provision for job security in a contract of indefinite duration, whether initially promised or subsequently added, is not binding without additional, independent considerations other than services to be performed. In Skagerberg, we noted the general rule that when an employee purchases "permanent" employment with a valuable consideration that is other than and in addition to his services, the employment will be held to be continuous and to extend as long as the employee's work is adequate and there is work to be done. This rule makes sense as a presumption in construing contracts. Where the "permanent" employment is purchased with additional consideration, we have better reason to believe that the parties, in discussing "permanent" employment, were referring to lifetime employment and were not, instead, simply making a distinction between temporary or seasonal employment and employment which is steady or continuing although nevertheless terminable at will.

To say that a job security provision in a contract of indefinite duration is never enforceable without additional consideration is to misconstrue the additional consideration exception recognized in Skagerberg. The requirement of additional consideration, like the at-will rule itself, is more a rule of construction than of substance, and it does not preclude the parties, if they make clear their intent to do so, from agreeing that the employment will not be terminable by the employer except pursuant to their agreement, even though no consideration other than services to be performed is expected by the employer or promised by the employee.

While language in some of our cases may suggest otherwise, our discussion of additional, independent consideration in Skagerberg, Cederstrand, Bussard and Degen was primarily in the context of the employee attempting to avoid a discharge without cause by proving (albeit unsuccessfully in those cases) "lifetime" or "permanent" employment. But none of our cases purport to hold that additional, independent consideration is the exclusive means for creating an enforceable job security provision in a contract of indefinite duration. Handbook provisions relating to such matters as bonuses, severance pay and commission rates are enforced without the need for additional, new consideration beyond the services to be performed. Thus, the consideration here for the job security provision is Mettille's continued performance despite his freedom to leave. As such, the job security provisions are enforceable.
Finally, the third argument is that job security provisions lack enforceability because mutuality of obligation is lacking. Since under a contract of indefinite duration the employee remains free to go elsewhere, why should the employer be bound to its promise not to terminate unless for cause or unless certain procedures are followed? The demand for mutuality of obligation, although appealing in its symmetry, is simply a species of the forbidden inquiry into the adequacy of consideration, an inquiry in which this court has, by and large, refused to engage. See Estrada v. Hanson, 215 Minn. 353, 10 N.W.2d 223 (1943). "If the requirement of consideration is met, there is no additional requirement of * * * equivalence in the values exchanged; or * * * 'mutuality of obligation'." Restatement (Second) of Contracts § 79 (1981). We see no merit in the lack of mutuality argument; as we pointed out in Cardinal Consulting Co. v. Circo Resorts, 297 N.W.2d 260, 266 (Minn.1980), the concept of mutuality in contract law has been widely discredited and the right of one party to terminate a contract at will does not invalidate the contract.

To summarize, we do not find the reasons advanced for the unenforceability of job security provisions in an at-will hiring to be persuasive. We hold, therefore, that where an employment contract is for an indefinite duration, such indefiniteness by itself does not preclude handbook provisions on job security from being enforceable, whether they are proffered at the time of the original hiring or later, when the parties have agreed to be bound thereby.

Not every utterance of an employer is binding. It remains true that "the employer's prerogative to make independent, good faith judgments about employees is important in our free enterprise system." Blades, Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power, 67 Colum.L.Rev. 1404, 1428 (1967). Properly applied, we think that the unilateral contract modification analysis appropriately accommodates the interests of the employee and the employer.

III.

[11] We now apply the principles discussed in the first two sections to the Pine River State Bank's handbook. First of all, it should be noted that this is a breach of contract case; we are determining if there was a contract, what were its terms, and was it breached. We are not dealing with a discharge that is retaliatory, in bad faith or abusive. Nor do we have before us the question, suggested by the employee here, whether public policy should constrain an "at-will" firing. See generally, Annot., Modern Status of Rule that Employer May Discharge At-will Employee for Any Reason, 12 A.L.R. 4th 544 (1982).

We do not think that the language in the handbook section entitled "Job Security" constitutes any offer. It is no more than a general statement of policy. Cf. Degen v. IDS, supra (invitation to consider job as a "career situation" not an offer). The provisions of the handbook section entitled "Disciplinary Policy" do, however, set out in definite language an offer of a unilateral contract for procedures to be followed in job termination. The handbook states that "[i]f an employee has violated a company policy, the following procedure will apply." This offer was communicated to the employees, including respondent. Mettille's
continued performance of his duties despite his freedom to quit constitutes an acceptance of the bank's offer and affords the necessary consideration for that offer, with the bank gaining the advantages of a more stable and, presumably, more productive work force. [FN5] Here the jury could find, as it did, that the handbook provisions on disciplinary procedures had become part of respondent Mettille's employment contract, thus restricting the bank's right to terminate Mettille at will.

But in what way do the handbook procedures restrict the bank's right to discharge Mettille at will? Although the disciplinary procedures were admittedly not followed, the trial court apparently construed the handbook to allow summary dismissal for good cause. The jury was asked, in the verdict form, to find if Mettille's dismissal had been "without good cause," and, in instructions to the jury, the jury was told (apparently without objection) that good cause consisted of a breach of the standards of job performance established and uniformly applied by the bank. Whether, assuming a good cause requirement, this was a proper definition of good cause has not been made an issue, and we need not decide it. Nor need we decide if summary dismissal for good cause can be implied or inferred in Mettille's contract or, on the other hand, if summary good cause termination is precluded by the handbook, since the issues were not raised and, in any event, are mooted by the jury's finding of lack of good cause.

It is enough for disposition of this case that the disciplinary provision was applicable and enforceable, and that it was not followed. The bank's only excuse for not following the disciplinary procedures was that it did not have to do so, since Mettille was an "at-will" employee. This argument is without merit, since we have found the procedures to be contractually binding. Had the procedural disciplinary steps been honored, Mettille might have corrected his deficiencies to the bank's satisfaction and have kept his job. The bank did not assert otherwise and there was evidence that the loan file deficiencies were rather easily correctable and that Mettille was amenable to correction. Therefore, we hold that as a matter of law the bank breached its employment contract with Mettille by not affording him the job termination procedures of its handbook, resulting in Mettille's unemployment.

IV.

The appellant bank also contends that the evidence does not support the jury's finding of lack of good cause, that the trial court erred on several evidentiary rulings, and that damages should not include lost wages to date of trial. We find no reversible error.

[12] There was evidence that Mettille's work was unsatisfactory; but there was also evidence of a personality conflict with a supervisor, that Mettille's errors were not serious and were easily correctable, and that other officers' errors were ignored or forgiven. The factual dispute was for the jury.

[13][14] While the trial court refused to allow into evidence the model handbook from which Griffith, the bank president, drafted his own handbook, the trial court did allow the
employee's counsel to cross-examine Griffith about provisions in the model handbook. In particular, counsel was permitted to bring out that the model handbook's annotations contained language cautioning the bank executives that "your handbook constitutes your 'contract' with your employees." It would have been better not to have admitted this evidence. Since, however, the bank's purpose in drafting and issuing its own handbook was at issue, under the law of the case, and since Griffith said he relied on the model handbook in drafting his own, we cannot say that the allowance of this testimony so affected the results of the trial as to be prejudicial error. Poppenhagen v. Sorns in Construction Co., 300 Minn. 73, 79-80, 220 N.W.2d 281, 285-86 (1974). The bank also complains that the trial court refused to let it show why errors committed by other loan officers were not serious. The trial court did, however, allow explanations of several of these errors and then sustained an objection because testimony of further errors was repetitious and irrelevant. It seems to us that the bank was given an opportunity to explain generally why these errors of other officers were not as serious as Mettille's, and we cannot say the trial court abused its discretion in so ruling.

[15] The bank also claims that damages should not include lost wages to date of trial. It may well be that had the bank complied with its handbook procedures it could, in due course, have terminated Mettille, but the fact is that termination did not occur in this way. "The measure of damages for breach of an employment contract is the compensation which an employee who has been wrongfully discharged would have received had the contract been carried out according to its terms." Zeller v. Prior Lake Public Schools, 259 Minn. 487, 493, 108 N.W.2d 602, 606 (1961). On this record it is not shown that, if the progressive disciplinary steps had been followed, with the employee having been warned and given an opportunity to mend his ways, he would not have retained his employment to date of trial. We cannot say that the evidence does not sustain the damages award. Implicit in this award of lost wages to the date of trial is our recognition that the bank's disciplinary procedures confer some degree of substantive protection to the employee. Without that, the disciplinary procedures here would be virtually meaningless.

Finally, respondent Mettille argues that he should have a limited new trial to show additional damages for mental anguish. The issue is not before us, since respondent filed no notice of review. Minn.R.Civ.App.P. 106.

Affirmed.

Discussion points for Monge v. Beebe Rubber

This was one of the first cases to recognize the fact that the “at-will” doctrine of employment in reality favored the employer, to the detriment of the employee. So the courts began to carve out exceptions to the at-will doctrine, and allowed employees to sue in tort or contract when the reasons for dismissal violated generally accepted norms of civilized behavior. Is it important that the personnel manager of the Beebe rubber Company was aware of and did nothing to help Monge? Note what she gets for damages – would she have done better suing under a tort theory?
LAMPRON, Justice.

Action of assumpsit to recover damages for an alleged breach of an oral contract of employment. Plaintiff was hired in September 1968 at wages of $1.84 per hour to work on a conversion machine in defendant's factory and was allegedly told that if she worked well she would get better jobs with better pay. Plaintiff claims that she was harassed by her foreman because she refused to go out with him and that his hostility, condoned if not shared by defendant's personnel manager, ultimately resulted in her being fired. Trial by jury resulted in a verdict for the plaintiff in the amount of $2,500. Defendant's objections to denial of its motion to set aside the verdict, for judgment n.o.v. and to various evidentiary and substantive rulings were reserved and transferred by Loughlin, J.

Plaintiff, before coming to this country in 1964, was a school teacher in Costa Rica. She came to New Hampshire in 1965, and was attending college from 7 to 10 o'clock five nights a week to qualify to teach here. She used the money she earned from her employment with the defendant on the night shift beginning at 11 o'clock for her college expenses. She was employed by the defendant in a union shop and joined the union as required after her employment, thereby becoming subject to the seniority and other rules of the union contract. After working without incident on the conversion machine for about three months, she applied to fill an opening on a press machine at higher wages. She testified that her foreman told her that if she wanted the job she would have to be 'nice'. She got the job at $2.79 per hour and claims that her foreman then asked her to go out with him, which she refused to do because she was married and had three children. After working on the press machine for about three weeks, the machine was shut down and she was put on a degreaser machine at $1.99 per hour. Her overtime was taken away, although no one else's was. She testified that when she told her foreman she needed overtime money he told her she could sweep floors. She agreed to do this and claims the foreman also made her clean the washrooms and ridiculed her.

On July 23, 1969, she ran out of boxes for her machine. When she reported this to the foreman, he told her to make her own, which she claims she could not do while keeping up her production. When she spoke to the union steward about it, the foreman ordered her back to her machine and fired her at 2:00 o'clock in the morning when she refused to comply with his order. After complaining to the union, she was reinstated with a warning.
On Saturday, July 26, she called the personnel manager at his home to tell him that on advice of her lawyer she was calling to say she would not be in on Sunday because of illness. She also called in on Sunday, July 27, to say she would not be able to work because of illness and would enter the hospital the next day. The company's records show her absent with excuse on July 28 through 31.

She testified that when she reported for work at 11:00 p.m. on the night of August 4, the personnel manager was there, although she had never seen him at the plant before at that time of day, and that he asked her 'What kind of face I got to come back?' After being at work for two and one-half hours that same night, she was found unconscious in the ladies' room and was taken to the hospital. The company records show her hospitalized for the next four days including August 8. Nothing is shown in these records regarding the next two days but they show her absent on August 11, 12 and 13 without having called in. On August 13, 1969, the personnel manager sent her a letter stating that since she failed to report for work for three consecutive days without notification to the company, she was 'deemed a voluntary quit'.

There was evidence both from the plaintiff and the foreman that she did in fact call in on Sunday, August 10, to report that she was still sick. There was also evidence that some time after defendant had refused her foreman's advances, the personnel manager had visited her at home about some annoying telephone calls she was receiving. In the course of their conversation, he told her he knew her foreman used his position to force his attentions on the female employees under his authority and he asked her 'not to make trouble.'

[1] Plaintiff sued for breach of an employment contract for an indefinite period of time. The employer has long ruled the workplace with an iron hand by reason of the prevailing common-law rule that such a hiring is presumed to be at will and terminable at any time by either party. When asked to reexamine the long-standing common-law rule of property based on an ancient feudal system which fostered in a tenancy at will a relationship heavily weighted in favor of the landlord, this court did not hesitate to modify that rule to conform to modern circumstances.

The law governing the relations between employer and employee has similarly evolved over the years to reflect changing legal, social and economic conditions. In this area '(w)e are in the midst of a period in which the pot boils the hardest and in the process of change the fastest.' Id. Although many of these changes have resulted from the activity and influence of labor unions, the courts cannot ignore the new climate prevailing generally in the relationship of employer and employee.

[2][3] In all employment contracts, whether at will or for a definite term, the employer's interest in running his business as he sees fit must be balanced against the interest of the employee in maintaining his employment, and the public's interest in maintaining a proper balance between the two. We hold that a termination by the employer of a contract of employment at will which is motivated by bad faith or malice or based on retaliation is not the best interest of the economic system or the public good and constitutes a breach of the employment contract. Such a rule affords the employee a certain stability of employment
and does not interfere with the employer's normal exercise of his right to discharge, which is necessary to permit him to operate his business efficiently and profitably.

[6][7] The jury could draw the not-so-subtle inference from the evidence before it that the hostility of defendant's foreman and connivance of the personnel manager resulted in the letter of August 13, 1969, and that that letter was in effect a discharge. The foreman's overtures and the capricious firing at 2:00 a.m., the seeming manipulation of job assignments, and the apparent connivance of the personnel manager in this course of events all support the jury's conclusion that the dismissal was maliciously motivated.

[8][9] In our opinion, however, the verdict includes elements of damage not properly recoverable. The plaintiff lost 20 weeks employment at an average pay of $70.81 per week. This would account for $1,416.20 of the verdict, leaving $1,083.80 attributable to mental suffering. Such damages are not generally recoverable in a contract action. They could not be found in this case to have resulted from the discharge. Defendant had been having difficulty with her husband and had been receiving annoying telephone calls which upset her. She presented no medical testimony. Although she alleged that her discharge caused her mental suffering, her difficulties all preceded the discharge. We therefore remand the case for a new trial unless the plaintiff consents to a reduction of the verdict by the amount of $1,083.80.

Remanded

END OF CLASS
Class #09

Discussion points for Maddaloni v. Western Bus Lines

The doctrine of employment at will used to mean that you could get fired for any reason, and have no cause of action for being fired. But as you have seen, certain firings are based on facts so egregious as to require some form of remedy. In Monge, it was sex. In this case, it was greed. But note that the remedy is hardly compensatory, or stated another way, the punishment does not fit the crime. What incentive (or rather, disincentive) will discourage the employer from trying to screw over employees in the future?

Joseph MADDALONI
v.
WESTERN MASS. BUS LINES, INC.

Supreme Judicial Court of Massachusetts,
Hampden.


We consider whether an employee, serving under a contract of employment terminable at will, may recover for lost wages and fringe benefits in addition to commissions related to past services, when the employee is discharged in bad faith. After a trial in the Superior Court, the jury returned a verdict for the plaintiff on his claim that he was discharged in "bad faith." By interrogatories accompanying the general verdict, see note 6, infra, the jury determined that the plaintiff would have earned $61,000 in commissions for past services. The judge also submitted the issue of damages to the jury on a quantum meruit theory. The jury determined that on a quantum meruit basis, the plaintiff was entitled to damages in the amount of $28,000.

The judge entered a judgment on the quantum meruit theory. Both parties appealed. The Appeals Court concluded that the plaintiff was entitled to $61,000 in lost commissions, and that the issue of damages for lost wages and fringe benefits should have been submitted to the jury. For the reasons set forth in this opinion, we agree with the Appeals Court that the plaintiff was entitled to $61,000 in damages for lost commissions. A majority conclude that the judge correctly declined to allow the jury to consider the issue of the plaintiff's damages for lost wages and fringe benefits.

We summarize the evidence most favorable to the plaintiff and resolve in his favor all reasonable inferences that could be drawn from that evidence. The plaintiff was hired by the defendant, Western Mass. Bus Lines, Inc. (WMBL), as general manager in April, 1964. At
that time, the president of WMBL, John F. Fortier, was interested in obtaining a grant of
interstate charter rights from the Interstate Commerce Commission (ICC). The plaintiff had
considerable experience appearing before the Massachusetts Department of Public Utilities
(DPU) and the ICC, in order to secure new operating authorities. Besides dealing with the
ICC, the plaintiff's duties as general manager of WMBL included arranging the operating
schedule, soliciting, advertising for, and quoting prices on charter trips, preparing the billing,
checking employee time-cards, and generally overseeing the entire operation.

[1] About six weeks after the plaintiff was hired, the plaintiff drafted, and the parties
executed, a contract setting forth the terms of his employment. [FN2] No definite term of
employment was set out in the contract, and thus the contract was terminable at will. The
contract provided that the plaintiff would receive a salary of $120 a week plus Blue Cross
and Blue Shield insurance benefits. Additional weekly compensation was to be provided at
the discretion of the defendant. The contract also provided that after the ICC granted the
defendant interstate charter rights, the plaintiff would receive a five per cent commission on
the special and charter revenues of the defendant as reported to the DPU and the ICC. The
commission was to be paid to the plaintiff on the fifteenth of each month.

FN2. The contract provides in pertinent part: "For Good and Valuable Consideration
and in consideration of mutual covenants and agreements contained herein, the parties
hereto agree as follows:
"1. That the Employer shall engage the services of the Employee as General Manager.
"2. The Employee agrees to work for the Employer in an industrious and capable
manner.
"3. The Employer agrees to compensate the Employee as follows:
"a. The same as presently paid, namely $120.00 per week. In addition, Blue Cross
and Blue Shield monthly insurance cost for the Employee will be paid by the
Employer.
"b. Any additional weekly compensation to that mentioned in paragraph 3a will rest
with the Employer.
"c. Immediately after the grant of Inter-state Charter Rights to the Employer by the
Interstate Commerce Commission, the Employer further agrees to compensate the
Employee, at the rate of 5% commission of the total Special and Charter revenue
income as reported to the Massachusetts Department of Public Utilities and the
Interstate Commerce Commission. This 5% commission compensation will be paid to
the Employee by the Employer each month, namely, on the 15th day of each month,
of the total Special and Charter revenue income received by the Employer for the past
month."

The defendant obtained interstate charter rights in June, 1966, and the plaintiff received the
commissions called for in the contract for five and one-half months. In November, 1966, the
grant was revoked after the United States District Court for the District of Massachusetts held
that the ICC had erred in granting the interstate charter rights to the defendant. The plaintiff's
commissions under the contract ceased thereafter.
In September, 1970, Mario Cantalini bought WMBL and became its president. The plaintiff
remained as general manager. In October or November, 1970, the plaintiff met with
Cantalini and his attorney to discuss the need for obtaining interstate charter rights. Cantalini
then took out the plaintiff's employment contract and handed it to his attorney to read. The
attorney read it and returned it to Cantalini, stating that "this would be all right with the
company."

Sometime later the plaintiff and Cantalini sought to obtain from the ICC a grant of interstate
charter rights. On October 1, 1973, the ICC again granted interstate charter rights to the
defendant. About a week later, the plaintiff told Cantalini, "[N]ow that we [have] received
the operating authority from the I.C.C., ... that portion of my agreement on the commission
[is] now in effect." Cantalini replied that "he didn't understand it to be that way, but that ... he
would check the agreement." On November 14, 1973, a day before the plaintiff's
commissions for October became payable under the contract, Cantalini telephoned the
plaintiff and asked him if he had to pay the five per cent commission for the month of
October. The plaintiff responded, "[Y]es, that was in accordance with the agreement he
[Cantalini] had accepted." Cantalini replied "that it was a lot of money, that it was cream off
the top." Cantalini sought to postpone the discussion, but the plaintiff stated, "We are not
going to talk about it later because tomorrow is the day that I am supposed to be paid ...."
The last thing Cantalini said before he hung up was "all right."

In addition to the payment for October, the plaintiff received commissions for November
and December. On January 19, 1974, Cantalini discharged the plaintiff from his
employment. Cantalini stated that he was discharging the plaintiff because the plaintiff was
responsible for the poor profit statement which Cantalini claimed was inhibiting his attempt
to sell the company. "[B]esides," stated Cantalini, "you wanted to get paid the commission
under the agreement you made with Jack [Fortier]." Thereafter, the plaintiff filed a
complaint in the Superior Court alleging that the defendant's termination of the contract was
based on a bad faith attempt to avoid paying the plaintiff his commissions.

1. Liability of defendant for breach of contract. The defendant claims that there was
insufficient evidence to support the jury's verdict, and that the judge should have granted its
motion for a directed verdict or judgment notwithstanding the verdict. The Appeals Court
concluded that "[f]rom the evidence as set out above, the jury could have found facts which
bring this case within Fortune." We agree.

In Fortune, we held "that an employer may not in every instance terminate without liability
an employment contract terminable at will.... [W]e upheld the plaintiff's claim for future
commissions based on past service when the employer terminated the plaintiff's employment
without good cause and for the purpose of retaining the sales commissions for itself." In that
case we declined to "speculate as to whether [a] good faith requirement is implicit in every
contract for employment at will." We believe that the plaintiff in this case, like the plaintiff
in Fortune, could reasonably expect that his employment would not be terminated by the
defendant in order to deny him commissions.
There is no merit to the defendant's claim that the plaintiff's interest in the commissions is distinguishable from the interest of the plaintiff in the Fortune case. The defendant claims that the plaintiff's right to commissions only vested each month that the plaintiff was employed, and, therefore, there were no commissions due the plaintiff. Contrary to the defendant's argument that the commissions payable in Fortune are distinguishable because they had already vested, in that case we stated, it is "clear that under the express terms of the contract Fortune ... received all the bonus commissions to which he [was] entitled." Fortune, supra at 101, 364 N.E.2d 1251.

In this case the plaintiff used his skills, knowledge, and experience to assist the defendant in obtaining interstate charter rights from the ICC. The contract provided for compensation in the form of commissions if the charter rights were secured. The plaintiff is entitled to receive the commissions, and a discharge to avoid payment of commissions is a discharge in bad faith. An employer may not discharge an employee in order to avoid the payment of commissions or to reap for itself financial benefits due its employee. Id. at 105, 364 N.E.2d 1251.

In his appeal, the plaintiff claims that the jury should have been allowed to consider the issue of damages for lost wages and fringe benefits. In Fortune v. National Cash Register Co., 373 Mass. 96, 101 n.7, 364 N.E.2d 1251 (1977), we left open the question whether such damages "might be justified in cases of bad faith termination." A majority of the court believe that the judge properly refused to instruct the jury on the issue of lost wages and fringe benefits unrelated to past services.

We therefore vacate the judgment and remand the case to the Superior Court for entry of judgment for the plaintiff in accordance with this opinion.

So ordered.

**Discussion points for Siles v. Travenol Labs**

The historical development of the at-will employment doctrine has come a long way in a short time. Borrowing again from contract law, Massachusetts now implies a covenant of good faith and fair dealing in employment contracts. How meaningful this is in reality is something which must be considered. Just because you don’t have a good reason for firing somebody, it does not mean you’ve violated the covenant of good faith and fair dealing. Who has the burden of proof in these cases, and how important is that?

**Richard J. SILES**

v.

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The plaintiff, Richard J. Siles, brought suit against his former employer, the defendant Travenol Laboratories, Inc., for wrongful termination of employment. Following a jury verdict for the plaintiff which awarded Siles $250,000 in damages, the Superior Court judge allowed the defendant's motion for judgment notwithstanding the verdict. We hold that the judge was correct in concluding that the evidence was insufficient to support a finding that the defendant's termination of the plaintiff's at-will employment was the result of "bad faith," and affirm the judgment.

We review the evidence in the light most favorable to the plaintiff, and resolve in his favor all reasonable inferences that could be drawn from that evidence. In October, 1977, Siles was hired to work for Travenol as a respiratory therapy specialist at a starting salary of $14,500 per year plus commissions and other employment benefits. The employment agreement was terminable at will by either party. Siles participated in a two-week training program and was assigned to sell various items to hospitals in the southern region of New England.

Siles's immediate supervisor was Howard Small, the person who hired him. Once or twice a month for about two or three days at a time Small would work with Siles, making calls with him to customers and evaluating Siles's performance. Approximately five months after beginning employment, Siles, accompanied by Small, went to the Miriam Hospital on a routine sales call. At the hospital, a verbal confrontation occurred between Siles, Small and the hospital delivery receiver, Stephen Tremblay, apparently concerning delivery truck problems. Tremblay reported the incident to his superiors. Both the assistant purchasing agent and the director of purchasing for the hospital spoke with Siles and Small. After the incident, Small orally rebuked Siles for his conduct.

The director of purchasing at the hospital, Robert Hoag, subsequently wrote to Travenol to complain about the conduct of Siles and Small. He demanded an apology and excluded Siles and Small from conducting business activities at the hospital for a one-year period. The letter also indicated that the hospital was reviewing all existing purchase agreements with Travenol in order to determine the feasibility of obtaining an alternative supplier. Small called Siles at his home and asked him to write an apology to Hoag and to Tremblay. Small also informed Siles that he would be coming to Boston one week later to give Siles his six-month review.

Siles met Small at the airport the following week. At that meeting, Small informed Siles that he was unhappy with Siles's sales performance and that Siles should consider himself
fired. Siles had not been advised prior to that meeting that Travenol was considering the termination of his employment. At the time of his discharge, Siles had earned about $17,000 for the six-month period of employment with Travenol.

Vito Manon, the national sales representative of the respiratory division of Travenol, testified that he had conducted an investigation of the Miriam Hospital incident. Small had recommended that Siles be put on probation; however, Manon decided to fire Siles in order to preserve customer good will. According to Manon, factors such as the lack of new business development and complaints concerning Siles's attitude contributed to his decision. Manon also testified that Travenol pays commissions to the salesmen assigned to particular territories on goods sold by them, regardless of who first brought in the account. Thus, Siles was entitled to commissions from the first day he was assigned to a sales territory, even though those commissions were the result of customer contacts made by previous salesmen in that territory. Similarly, any subsequent commissions resulting from accounts originated by Siles would, after the termination of Siles's employment, be paid to Siles's successor.

After his termination, Siles was unable to find new employment in the medical sales field, and eventually obtained employment as an electronic parts salesman, earning approximately $400 per week. Siles's wife testified, over the objection of Travenol, that she has been forced to return to full-time work for financial reasons, even though such employment was against her doctor's orders.

Based upon the evidence put forth, Siles alleged that Travenol had wrongfully terminated his employment. In particular, Siles claimed that Small had deceived or misled representatives of Travenol concerning the Miriam Hospital incident so as to protect his own self-interest at the expense of Siles's job. Furthermore, Siles alleged that, by refusing to allow Siles to resign, and by refusing to give Siles any references, Travenol prevented Siles from getting another job in the health care field.

After trial, the jury returned a verdict in favor of Siles and assessed damages against the defendant Travenol in the amount of $250,000. The trial judge subsequently allowed the defendant's motion for judgment notwithstanding the verdict, ruling that "the evidence taken in a light most favorable to the plaintiff was insufficient as a matter of law to warrant a finding that the defendant's termination of the plaintiff's employment was the result of bad faith." The judge reserved a final ruling on the defendant's motion for a new trial, noting in his "Conclusion and Order" that "(s)hould an appeal result in a decision that the evidence warranted a finding for the plaintiff, I would then order a remittitur or order a new trial on the issue of damages only." Siles appeals from the judgment. We hold that the judge correctly allowed the defendant's motion for judgment notwithstanding the verdict on the plaintiff's claim that Travenol terminated his employment in bad faith.

[1][2][3] Massachusetts now recognizes that an employer may not in every instance terminate without liability an employment contract which is terminable at will. As was stated in the Fortune case, an employment at will contract, in the circumstances described therein, "contains an implied covenant of good faith and fair dealing, and a termination not
made in good faith constitutes a breach of the contract." Fortune, 373 Mass. at 101, 364
N.E.2d 1251. However, the mere absence of good cause to discharge an employee, while
tending to negate the existence of good faith, does not by itself give rise to an enforceable
claim for breach of a condition of good faith and fair dealing. Rather, our cases indicate that
a plaintiff generally does not have an enforceable claim for a "bad faith" termination of an at-
will employment contract unless he can show that: (1) the discharge involved an intent of the
defendant to benefit financially at the plaintiff's expense, such as for the purpose of retaining
for itself sales commissions or pension benefits which would otherwise be due to the
plaintiff, or (2) that the employer's reason for the discharge was contrary to public policy.

[4] There is no evidence in this case to suggest that Travenol discharged Siles so that it could
retain certain sales commissions for itself, or otherwise benefit financially at Siles's expense.
Indeed, the evidence made clear that Travenol would not keep for itself the commissions
which would become due on sales accounts originated by Siles, but instead would pay those
at 105, 364 N.E.2d 1251.

Nor is this a case in which public policy considerations justify the imposition of liability on
the employer. To the contrary, in light of the incident at Miriam Hospital, to deny that
Travenol acted within its discretion by discharging Siles would violate "the general
principles that an employer is entitled to be motivated by and to serve its own legitimate
business interests; that an employer must have wide latitude in deciding whom it will employ
in the face of the uncertainties of the business world; and that an employer needs flexibility
in the face of changing circumstances." Fortune v. National Cash Register Co., 373 Mass. at
101-102, 364 N.E.2d 1251.

We hold that the judge was correct in concluding that the evidence was insufficient to
support a finding that the defendant's termination of the plaintiff's at-will employment was
the product of bad faith. We further conclude that the testimony regarding Travenol's refusal
to give Siles business references, even if believed, does not by itself support a finding that
Siles was barred by Travenol from ever obtaining employment in the health care field or that
such refusal would be improper in the light of the justifiable termination. Because we affirm
the judgment by the Superior Court, we need not reach the other questions argued.

Judgment affirmed.

Discussion points for Brockmeyer v. Dun & Bradstreet

The Wisconsin rebuttal to the Massachusetts approach. Note that the Wisconsin court is very
much interested in retaining employer flexibility in hiring and firing. While willing to give
fired employees some redress, Wisconsin won’t go as far as Massachusetts. What’s
interesting is that Wisconsin insists on applying contract law to these situations, but then chooses to ignore the “implied covenant of good faith and fair dealing” found in all UCC contracts, and in the Restatement 2d of Contracts, at section 205. This leads to three questions. First, is the difference in the approaches by the Massachusetts courts and the Wisconsin courts all that different, or is it all just words? Stated another way, would a fired employee’s case which is a loser in Wisconsin be a winner in Massachusetts? If this is true, and you represent a company with a sales force spread throughout the country, does the Wisconsin approach offer some planning ideas? And finally, assume you are in Massachusetts and you know you are about to be fired. What might you do prior to the axe falling on you?

Charles J. BROCKMEYER,  
v.  
DUN & BRADSTREET,  

No. 81-2024.  

Supreme Court of Wisconsin.  

Decided July 1, 1983.

STEINMETZ, Justice.
The principal issue on appeal is whether Wisconsin has any judicial exceptions to the employment at will doctrine. [FN1] We hold that in certain limited circumstances as discussed below, there are exceptions.

I.

This is a review of the court of appeals decision reversing the circuit court for Milwaukee county, the Honorable Ralph G. Goreinstein. The plaintiff, Charles J. Brockmeyer, began his employment with Dun & Bradstreet in August, 1969, as a business analyst trainee. From June, 1977, until his termination in May, 1980, he held a management position as district manager of the credit services division for the State of Wisconsin. Brockmeyer had no contract of employment.

Brockmeyer's career with Dun & Bradstreet as a district manager could be characterized as erratic. For a time in 1978, he was on employment probation. By improving his performance, Brockmeyer removed himself from probation. His sales ability potential was considered quite good. His income production was above average, but nevertheless, his superiors in Chicago were not satisfied with the performance of his other duties as a manager.
The events of the weekend of February 16, 1980, caused his immediate superiors some concern. They were informed that Brockmeyer, who was married but separated, was vacationing in Montana with his secretary when it was believed that he was performing his normal duties as district manager. Additional inquiries revealed that Brockmeyer had also smoked marijuana in the presence of company personnel. Supervisory personnel in Chicago sought permission from the national office to terminate or reassign Brockmeyer should they receive verification of these reports. Because of Brockmeyer's above average performance record, permission for termination or reassignment was denied. Instead, the supervisory personnel were directed to confront Brockmeyer with the information received to resolve the problem. Brockmeyer was called to a meeting in Chicago for this purpose. At that meeting he acknowledged the relationship with his secretary. He apologized for his absenteeism without notice. He admitted smoking marijuana and promised not to do it again. It was suggested at this meeting that either Brockmeyer or his secretary consider a job in another division of Dun & Bradstreet. At the conclusion of the meeting, Brockmeyer was firmly told that he would be terminated or reassigned if existing conditions did not improve.

Brockmeyer attempted to find a position for his secretary within the company, but was unsuccessful. The Chicago office then told him that the only remaining alternative was to obtain her resignation. Her resignation was received on February 25, 1980. Shortly thereafter, Brockmeyer's former secretary filed a sex discrimination claim against Dun & Bradstreet. In May, 1980, on a variety of separate occasions, Brockmeyer was asked by his superiors to submit a written report about the course of events which led to her resignation. Brockmeyer refused because he feared he would become Dun & Bradstreet's scapegoat for the alleged discrimination actions taken against his former secretary. He also indicated that if called to testify at a hearing or trial, he would tell the truth.

On May 27, Dun & Bradstreet settled the claim with Brockmeyer's former secretary for $12,000. Three days later, Brockmeyer was discharged. At the time of the discharge, he was offered $8,500 if he would sign a release agreeing not to sue Dun & Bradstreet. Brockmeyer refused the offer.

Brockmeyer then initiated this action alleging that he was wrongfully discharged. He also requested damages for intentional infliction of emotional harm. Dun & Bradstreet claimed that Brockmeyer was terminated for: (1) smoking marijuana in front of employees; (2) lack of attention to job duties; (3) an open affair with his secretary; and (4) low morale among employees in his office.

At trial the jury was instructed that a terminated employee can recover damages from his or her employer "where the discharge violates some clear and specific public policies or where the discharge is retaliatory or is motivated by bad faith or malice." The jury found that Dun & Bradstreet had wrongfully discharged Brockmeyer and awarded him $250,000 in compensatory damages and $250,000 in punitive damages. The jury rejected Brockmeyer's claim for intentional infliction of emotional harm.
On appeal, the court of appeals held that: "Recovery will be permitted if termination offends clearly defined public policy, or results from the exercise of bad faith, or results from malicious or retaliatory activity on the part of the employer." 109 Wis.2d 44, 46-47, 325 N.W.2d 70 (Ct.App.1982). However, the court reversed the judgment and remanded the case with instructions to dismiss the complaint on the merits because the record contained insufficient evidence to sustain Brockmeyer's claim that he was wrongfully discharged. For the reasons explained below, neither the trial court nor the court of appeals applied the proper law.

II.

[1][2] Under English common law, an employment contract for an indefinite period was presumed to extend for one year unless there was reasonable cause to discharge. The English rule had evolved from the Statute of Labourers, which provided that "no master can put away his servant." Early American courts followed this approach. In the late nineteenth century, apparently influenced by the laissez-faire climate of the Industrial Revolution, the American courts then rejected the English rule and developed their own common-law rule, the employment at will doctrine. The doctrine recognized that where an employment was for an indefinite term, an employer may discharge an employee "for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong."

By the turn of the twentieth century, the at will doctrine was absolute and was even temporarily afforded constitutional protection. However, since the New Deal, government regulation in the workplace has increased dramatically as Congress and state legislatures recognized the need to curb harsh applications and abuse of the rule in an effort to stabilize labor relations.

Statutory modification of the at will doctrine can be found in a variety of federal and state laws prohibiting certain forms of discrimination. Both Title VII of the Civil Rights Act of 1964 and Wisconsin's Fair Employment Act, secs. 111.31-111.395, Stats., make it unlawful for an employer to discharge an employee because of race, color, religion, sex or national origin. Similarly, the National Labor Relations Act and the Wisconsin Employment Peace Act, sec. 111.06(1)(c)1, prevent discharges for union activities. Other forms of discriminatory discharges have also been prohibited by the legislature.

Consistent with the philosophy of the statutory modifications, many state courts have recognized the need to protect workers who are wrongfully discharged under circumstances not covered by any legislation or whose job security is not safeguarded by a collective bargaining agreement or civil service regulations. The courts have accomplished this objective by modifying the at will doctrine. The courts have recognized both contract and tort actions under assorted legal theories. Two theories are often utilized by the courts. The adoption of either theory or both theories is urged by Brockmeyer.

The first, and the more expansive of the two theories, is imposing upon an employer an implied duty to terminate an employee only in good faith. Two cases frequently cited for this
theory are Monge v. Beebe Rubber Co., 114 N.H. 130, 316 A.2d 549 (1974) and Fortune v. National Cash Register Co., 373 Mass. 96, 364 N.E.2d 1251 (1977). In Monge, a female employee was terminated because she refused to date her foreman. In Fortune, a salesman was discharged to avoid payment of commissions. Both courts held that the employment contract contained an implied covenant of good faith and fair dealing and that a discharge made in bad faith constituted a breach.

[3] We refuse to impose a duty to terminate in good faith into employment contracts. To do so would "subject each discharge to judicial incursions into the amorphous concept of bad faith." Moreover, we feel it unnecessary and unwarranted for the courts to become arbiters of any termination that may have a tinge of bad faith attached. Imposing a good faith duty to terminate would unduly restrict an employer's discretion in managing the work force.

The second, and more popular of the two theories, is widely known as the "public policy exception." This theory allows the discharged employee to recover if the termination violates a well-established and important public policy.

The leading case on the public policy exception is Petermann v. Teamsters Local 396, 174 Cal.App.2d 184, 344 P.2d 25 (1959). In Petermann, the employee was instructed by the defendant to commit perjury before a legislative committee. He was discharged when he refused. The California Court of Appeals reasoned:

"It would be obnoxious to the interests of the state and contrary to public policy and sound morality to allow an employer to discharge any employee ... on the ground that the employee declined to commit perjury, an act specifically enjoined by statute.... [I]n order to more fully effectuate the state's declared policy against perjury, the civil law, too, must deny the employer his generally unlimited right to discharge an employee whose employment is for an unspecified duration, when the reason for the dismissal is the employee's refusal to commit perjury." 344 P.2d at 27.

Other states similarly recognize the public policy exception in those instances where the employee is discharged for refusing to violate a statute.

Some states have applied the public policy exception when an employee was terminated for activities consistent with a legislative policy. In Frampton v. Central Indiana Gas Co., 260 Ind. 249, 297 N.E.2d 425 (1973), the employee was discharged for filing a workmen's compensation claim. The court noted that the state's workmen's compensation laws give employees a right to such compensation and that "If employers are permitted to penalize employees for filing workmen's compensation claims, a most important public policy will be undermined. The fear of being discharged would have a deleterious effect on the exercise of a statutory right." 297 N.E.2d at 427.

Other states have applied the public policy exception where the discharge violates judicially conceived and defined notions of public policy, but does not necessarily contravene any explicit statutory provision. This broadest view of the public policy exception was expressed
in Palmateer v. International Harvester Co., 85 Ill.2d 124, 52 Ill.Dec. 13, 421 N.E.2d 876 (1981). In Palmateer, the court permitted a cause of action by an employee who had been discharged for supplying information about a fellow employee to local law enforcement authorities. The court stated: "No specific constitutional or statutory provision requires a citizen to take an active part in the ferreting out and prosecution of crime, but public policy nevertheless favors citizen crime-fighters." 52 Ill.Dec. at 17, 421 N.E.2d at 880.

Other states recognize the public policy exception in principle, but take a strict view of what public policies would support an action for wrongful discharge. In Geary v. United States Steel, 456 Pa. 171, 319 A.2d 174 (1974), no relief was granted to an employee who was discharged for objecting to the marketing of a potentially defective product. The court noted that notwithstanding the employee's praiseworthy motives, no clear and compelling mandate of public policy was violated. Similar reasoning was applied in Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980). In Pierce, the court found no violation of a clear mandate of public policy when a physician employee was terminated for refusing to work on a drug research project which she contended was medically unethical.

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III.

[4] We have concluded that in the interests of employees, employers and the public, a narrow public policy exception should be adopted in Wisconsin. Accordingly, we hold that an employee has a cause of action for wrongful discharge when the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law.

Public policy is a broad concept embodying the community common sense and common conscience. The provisions of the Wisconsin Constitution initially declared the public policies of this state. Each time the constitution is amended, that also is an expression of public policy. In addition, public policy is regularly adopted and promulgated in the form of legislation. These declarations of public policy are inherently incorporated into every employment at will relationship.

[5] Given the vagueness of the concept of public policy, it is necessary that we be more precise about the contours of the public policy exception. A wrongful discharge is actionable when the termination clearly contravenes the public welfare and gravely violates paramount requirements of public interest. The public policy must be evidenced by a constitutional or statutory provision. An employee cannot be fired for refusing to violate the constitution or a statute. Employers will be held liable for those terminations that effectuate an unlawful end.

We intend to recognize an existing limited public policy exception. An employer may not require an employee to violate a constitutional or statutory provision with impunity. If an employee refuses to act in an unlawful manner, the employer would be violating public policy by terminating the employee for such behavior. To say that the employer could be
prosecuted for criminal involvement as a result of the activities would be little solace for the discharged employee.

[6] Courts should proceed cautiously when making public policy determinations. No employer should be subject to suit merely because a discharged employee's conduct was praiseworthy or because the public may have derived some benefit from it.

[7][8] A plaintiff-employee alleging a wrongful discharge has the burden of proving that the dismissal violates a clear mandate of public policy. Unless the employee can identify a specific declaration of public policy, no cause of action has been stated. The determination of whether the public policy asserted is a well-defined and fundamental one is an issue of law and is to be made by the trial court. Once the plaintiff has demonstrated that the conduct that caused the discharge was consistent with a clear and compelling public policy, the burden of proof then shifts to the defendant employer to prove that the dismissal was for just cause.

We believe that the adoption of a narrowly circumscribed public policy exception properly balances the interests of employees, employers and the public. Employee job security interests are safeguarded against employer actions that undermine fundamental policy preferences. Employers retain sufficient flexibility to make needed personnel decisions in order to adapt to changing economic conditions. Society also benefits from our holding in a number of ways. A more stable job market is achieved. Well-established public policies are advanced. Finally, the public is protected against frivolous lawsuits since courts will be able to screen cases on motions to dismiss for failure to state a claim or for summary judgment if the discharged employee cannot allege a clear expression of public policy.

[9][10][11] Whether the cause of action for wrongful discharge should be maintained in tort or contract or both needs to be resolved. Those cases implying a contractual term of good faith dealing sounded in contract. Most, though not all of the public policy exception cases from other states were tort actions. The most significant distinction in our view between the two causes of action in wrongful discharge suits is in the damages that may be recovered. In tort actions, the only limitations are those of "proximate cause" or public policy considerations. Punitive damages are also allowed. In contract actions, damages are limited by the concepts of foreseeability and mitigation. The remedies established by the majority of Wisconsin wrongful discharge statutes are limited to reinstatement and backpay, contractual remedy concepts. We believe that reinstatement and backpay are the most appropriate remedies for public policy exception wrongful discharges since the primary concern in these actions is to make the wronged employee "whole." Therefore, we conclude that a contract action is most appropriate for wrongful discharges. The contract action is essentially predicated on the breach of an implied provision that an employer will not discharge an employee for refusing to perform an act that violates a clear mandate of public policy. Tort actions cannot be maintained.

IV.
We now turn to the question of whether Brockmeyer's discharge violated a fundamental mandate of public policy. Brockmeyer initially contends that Dun & Bradstreet's actions violated public policy as expressed in sec. 134.01, Stats., and sec. 134.03. Sec. 134.01 prohibits willfully and maliciously injuring another in his reputation, trade, business or profession. Sec. 134.03 prohibits the use of threats, intimidation, force or coercion to keep a person from working. There is no evidence that Dun & Bradstreet engaged in any behavior of this sort. To hold that under the facts of this case, Dun & Bradstreet violated the policies as expressed in secs. 134.01 and 134.03 would completely abolish the at will doctrine. This court intends only a recognition of stated public policy as reflected in the constitution and statutes of Wisconsin. While Dun & Bradstreet's discharge of Brockmeyer may have constituted bad faith, which is what the jury in this case presumably believed, its actions did not contravene the policies of secs. 134.01 and 134.03.

Affirmed.

VI. Introduction to Notice and Knowledge

Notice is an important concept in agency law. It is broader than knowledge, and generally, the law provides that if you have notice of something, constructively or actually, then you have knowledge of it. And if you have knowledge of something, then liability might very well follow. Another general rule is that notice to the agent is notice to the principal. But keep in mind that notice to an agent has to be to an agent authorized to receive notice (in the scope of his agency). In other words, handing an antitrust lawsuit against Federal Express to a Federal Express truck driver is not notice to Federal Express, and the time frame for answering the complaint will not begin to run. Even though the truck driver is an agent of Federal Express, he or she is not an agent authorized to accept service of process in a lawsuit.

Before continuing please thoroughly acquaint yourself with the Restatement of Agency, 2d, section 9, including the comments and illustrations thereto. The Restatement of Agency 2d is on reserve in the library, and is also available on Westlaw or Lexis.

END OF CLASS