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Agency--Tort Liability of an Ohio Employer for Acts of His Servant--Acts of a Third Person Assisting a Servant (*Fox v. Triplett Auto Wrecking, Inc.*, 1 Ohio App. 2d 102 (1964))

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however, reversed this approach, and the rule now applied in Ohio is that a personal injury release may be rescinded where there is a mutual mistake as to the existence of an unknown injury at the time of the execution of the release. Although many jurisdictions hold that such a rule is more equitable, it nevertheless presents serious problems for insurance companies who favor the finality rule. A few states have even enacted statutes which further attack the finality of releases.<sup>23</sup> To combat this recent trend, insurance companies ought to consider altering their present settlement practices to take into account all the relevant factors. Furthermore, some attempt ought to be made to more precisely establish the intent of the parties in written form.

DAVID R. WILLIAMS

AGENCY — TORT LIABILITY OF AN OHIO EMPLOYER FOR  
ACTS OF HIS SERVANT — ACTS OF A THIRD PERSON  
ASSISTING A SERVANT

*Fox v. Triplett Auto Wrecking, Inc.,*  
1 Ohio App. 2d 102 (1964).

A patron of the defendant wrecking company parked his car in such a way as to block one of the two means of ingress and egress to an area in a building used by defendant to repair motor vehicles. Despite two warning signs at the entrance to the area and an oral protest by one of defendant's employees that the entrance should not be blocked, the patron left the car and went inside to make a purchase.

The defendant's employees had express instructions to order any driver who parked in the entrance to move the vehicle, or if no driver was in the vehicle to push the vehicle out of the entrance way. Accordingly, the defendant's employees asked Mrs. Caldwell, a passenger in the patron's car, to move it out of the entrance. When

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23. A general release does not cover claims unknown at the time of executing the release. *E.g.*, CAL. CIVIL CODE § 1542. A release obtained from a party in the hospital within fifteen days after injury is inadmissible in court. MASS ANN. LAWS ch.271, § 44 (1956). A release obtained within five days after injury shall be voidable for sixty days. MD. ANN. CODE art. 79, § 11 (1957). Any statement obtained from the injured party within thirty days after the accident is presumed fraudulent. MINN. STAT. ANN. § 602.01 (1961). A release is voidable if made within thirty days after injury, or if made while the party is under a disability from the injury it shall be voidable for six months. N.D. CENT. CODE § 9-08-08 (1959).

she responded that she did not know how to drive the car,<sup>1</sup> the defendant's employee told her that a turn of the switch would start the motor. As she turned the switch, the car moved quickly backward crushing the plaintiff Fox, who was walking past the rear of the car, against a brick wall. The issue presented to the Summit County Court of Appeals was whether the defendant's employee was acting within the scope of his employment and in furtherance of his master's business in requesting Mrs. Caldwell to perform a task which he could have performed himself.<sup>2</sup> The court upheld a finding of liability against both the defendant Triplett Auto Wrecking, Inc. and Mrs. Caldwell,<sup>3</sup> stating that "the fact that the employee herein used a means of seeking to unblock the work area that was not specifically permitted, or, even if forbidden, should not relieve Triplett of liability, since the means chosen fell within the range of what Triplett might reasonably expect an employee to use under similar circumstances."<sup>4</sup>

As a general rule, a master is liable for the tort of a third person assisting a servant where the servant has express or implied authority to enlist such aid in furtherance of the master's business.<sup>5</sup> Im-

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1. There was some conflict in the testimony presented at the trial as to whether Mrs. Caldwell told the Triplett employee that she did not know how to drive, or whether she said she did not know how to drive the particular car in question. However, she testified at the trial that she had a driver's license and knew how to drive a Buick. The car involved in the case was a Chrysler. *Fox v. Triplett Auto Wrecking, Inc.*, 1 Ohio App. 2d 102, 103-04 (1964).

2. From a judgment rendered against Triplett Auto Wrecking, Inc. and Mrs. Caldwell, the former appealed and presented several questions for consideration by the court of appeals: (1) whether the plaintiff presented any credible evidence to show that the Triplett employee "insisted" or "demanded" that Mrs. Caldwell move the auto; (2) whether the plaintiff presented any credible evidence that the Triplett employee was acting within the scope of his employment or under some authority in "insisting" or "demanding" that Mrs. Caldwell move the auto; (3) whether a request to a responsible, licensed driver to move an improperly parked auto constitutes negligence; and (4) whether, if a case of actionable negligence were made out, it was the proximate cause of plaintiff's injuries. *Fox v. Triplett Auto Wrecking, Inc.*, 1 Ohio App. 2d 102, 103-04 (1964).

3. 1 Ohio App. 2d 102 (1964), *motion to certify denied*, Ohio Sup. Ct. Case No. 338826 (Sept. 23, 1964).

4. *Id.* at 205.

5. *Jacobi v. Nolan Inc.*, 122 So. 2d 783 (Fla. Ct. App. 1960); *Hollidge v. Duncan*, 199 Mass. 121, 85 N.E. 186 (1908); *Franklin Fire Ins. Co. v. Bradford*, 201 Pa. 32, 50 Atl. 286 (1917); *Williamson v. Pike*, 140 S.C. 376, 138 S.E. 831 (1927); *Lipman v. Atlantic Coast Line R.R.*, 108 S.C. 151, 93 S.E. 711 (1917); *Ostun v. South Carolina Cotton & Oil Co.*, 102 S.C. 146, 86 S.E. 202 (1915); *Banks v. Southern Express Co.*, 73 S.C. 211, 53 S.E. 166 (1906); 35 AM. JUR. *Master & Servant* § 540 (1941); 37 C.J.S. *Master & Servant* § 564 (1948); 2 MECHEM, AGENCY § 1866 (2d ed. 1954). See also *McIntire Street R.R. v. Bolton*, 43 Ohio St. 224, 2 N.E. 333 (1885); *Ohm v. Miller*, 31 Ohio App. 446, 167 N.E. 482 (1928), holding that the master owes no duty to a stranger assisting a servant except the duty not to wantonly or willfully injure

plied authority arises by implication from the circumstances or conditions under which the service is to be performed in furtherance of the master's business.<sup>6</sup> Incidental benefit to the master is not controlling in determining liability; and the servant must at all times be acting with the purpose of furthering the master's business.<sup>7</sup>

A servant is not within the course of employment and, hence does not further his master's business when he requests assistance from a third person merely to suit his own convenience.<sup>8</sup> In this instance, the third person is considered merely a volunteer and not a subservant for whose negligence the master would be liable.<sup>9</sup> This distinction was not made in the instant case, nor even investigated. Rather, the court relied heavily on *Crowley v. Bolander*<sup>10</sup> and *Ohm v. Miller*<sup>11</sup> in expounding on the principle that a servant has implied authority to request assistance necessary from a third person when an emergency situation arises. The existence of such an emergency situation arises from the circumstances surrounding the incident and is a question of fact for jury determination.<sup>12</sup>

The *Fox* decision further suggests that when a master can reasonably foresee that a servant will delegate his duties to a third per-

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him. *But see* *Garinger v. Zackary*, 206 Ky. 229, 267 S.W. 182 (1924); *St. Louis & S.F.R.R. v. Bogwell*, 33 Okla. 189, 124 P. 320 (1912), wherein it was held that the master does owe a duty of ordinary care to a stranger assisting a servant.

In several other Ohio cases, the courts have recognized the general rule that a master is liable for the torts of a third person assisting a servant where the servant enlists such aid in furtherance of the master's business, but then have gone on to hold that due to the particular facts in the case, the claim of liability against the master could not be sustained. See, *e.g.*, *Cruikshank v. Frank Sherman Co.*, 153 N.E.2d 525 (Ohio Ct. App. 1957); *Lima R.R. v. Little*, 67 Ohio St. 91, 65 N.E. 861 (1902); *Cleveland Terminal v. March*, 63 Ohio St. 236, 58 N.E. 821 (1900); *Travelers Fire Co. v. Freeman Co.*, 104 Ohio App. 226, 145 N.E.2d 217 (1957); *Smith v. Springgs*, 98 Ohio App. 1, 127 N.E.2d 637 (1954).

6. Implied authority may include the performance of duties where: (1) the master has entrusted the servant with a task which cannot be performed by him within a reasonable time — *Jacobi v. Nolan, Inc.*, 122 So. 2d 783, 788 (Fla. Ct. App. 1960); (2) the nature of the work requires assistance — *Jacobi v. Nolan, Inc.*, *supra* at 788; *Marks v. Rochester R.R.*, 146 N.Y. 181, 189, 40 N.E. 782, 784 (1895); (3) an emergency situation exists — *Jacobi v. Nolan, Inc.*, *supra* at 788; *Marks v. Rochester R.R.*, *supra* at 189, 40 N.E. at 784; or (4) authority is implied from the nature of the circumstances or conditions of the service to be performed — *Jacobi v. Nolan, Inc.*, *supra* at 188; *Marks v. Rochester R.R.*, *supra* at 190, 40 N.E. at 785; *Crowley v. Bolander*, 120 Ohio St. 553, 556 (1929). When any of the above mentioned elements are present, the master is liable for the torts of a third person assisting the servant if the tort is committed while engaged in furtherance of the master's business.

7. *Marks v. Rochester R.R.*, *supra* note 6, at 189, 40 N.E. at 783.

8. *Id.* at 189, 40 N.E. at 784.

9. *Ibid.*

10. 120 Ohio St. 553, 166 N.E. 677 (1929).

11. 31 Ohio App. 446, 167 N.E. 482 (1928).

12. *Marks v. Rochester R.R.*, 146 N.Y. 181, 188-89, 40 N.E. 782, 784 (1895).

son, the master is liable for the acts of that third person. In applying this principle to the instant case, the court indulged in circular and self-defeating reasoning. Granted that when the means and method of accomplishing a task are left to a servant's determination, the master is chargeable for the servant's negligence in carrying out the directions of the master.<sup>13</sup> However, this principle is not wholly applicable under the facts in the instant case. Although the defendant-master's employees had express instructions as to how an auto was to be removed from the entrance way, and conceding that there may have been a slight deviation from the instructions, the means ultimately used were neither foreseeable nor within the scope of the servant's employment. First, Mrs. Caldwell told the defendant's employee that she did not know how to move the car. According to the express instructions given the employee, the car should have then been pushed out of the entrance way. Second, in asking Mrs. Caldwell to start the car, the employee was serving his own convenience. In *Marks v. Rochester R.R.*,<sup>14</sup> a New York court held that if a third person undertook upon the servant's solicitation and for his convenience to assist the servant in extricating a car from a blockage, *when the servant could have accomplished the work himself, no authority to employ assistance can be implied.*<sup>15</sup> A servant has "no authority, express or implied to call upon bystanders to assist him in the discharge of any service which he himself could reasonably perform."<sup>16</sup> According to this line of reasoning, the defendant's employee in the instant case was not within the course of his employment when he requested Mrs. Caldwell to move the car. Consequently, Mrs. Caldwell became a volunteer and not a subservant with the result that the defendant wrecking company should not have been held responsible for her acts of negligence.

The decision in the *Fox* case suggests that the subjective motivation<sup>17</sup> of the servant to further the master's business is controlling over the express instructions of the master, even where the acts are wrongful or impliedly forbidden by the master, or where not neces-

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13. *Hanslip v. Hammer*, 40 Ohio App. 178, 176 N.E. 19 (1931). The rationale for charging the master with liability when the specific mode of performance is left to the servant's determination is that the master must exercise a high degree of care in the selection of his servants. The degree of care used in selecting servants must be ascertained from: (1) the nature of the duties to be performed; and (2) the nature of the instrumentalities under the servant's control. *MECHEM, AGENCY* §§ 374-387 (2d ed. 1954).

14. 146 N.Y. 181, 40 N.E. 782 (1895).

15. 146 N.Y. 181, 189, 40 N.E. 782, 783 (1895).

16. *Ibid.*

sary or appropriate to best serve the interests of the master and are merely for the convenience of the servant.<sup>18</sup> Also interwoven in the doctrine of respondeat superior is the principle of imputed negligence.<sup>19</sup> Although the limitation here is based on whether a servant was acting in furtherance of his master's business and within the scope of his employment,<sup>20</sup> public policy often demands an expansion rather than a limitation of fixing liability.<sup>21</sup> It appears that public policy considerations were controlling in the *Fox* case. However, the harshness of *Fox* may overshadow its usefulness. It is likely that a reasonably prudent employer will be reluctant to accept the position of guarantor of his employee's conduct, especially when his employee's conduct is in violation of express instructions or the servant's conduct is primarily in furtherance of his own convenience and only incidentally in furtherance of his master's business.

Although the *Fox* decision was based on principles of law which are widely recognized and generally accepted, they were wholly inapplicable to the facts of that particular case. One may wonder whether this is good justice or merely bad law.

#### ALBERTA DE CAPITO

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17. Recent Decision, 45 MARQ. L. REV. 136, 141 (1961).

18. *Fox v. Triplett Auto Wrecking, Inc.*, 1 Ohio App. 2d 102 (1964).

19. *Id.* at 105. Imputed negligence renders one person, who has committed no wrongful act of his own, liable for the tort of another.

20. 56 C.J.S. *Master and Servant* § 181 (1948).

21. Prosser states that "it is now quite generally recognized that the true basis of such vicarious liability is one of policy. . . . The losses caused by torts of the servant which . . . occur in the conduct of the master's enterprise, and are closely connected with it, are placed upon the employer because he is better able to bear them, and to distribute them, through prices, rates or liability insurance, to the public." PROSSER, TORTS § 62, at 351 (2d ed. 1955).