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A Covenant Constitutes a Complete Exoneration of Employee and Removes Any Foundation upon Which to Impute Negligence to Employer.

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VICARIOUS LIABILITY—COVENANT NOT TO SUE—A COVENANT CONSTITUTES A COMPLETE EXONERATION OF EMPLOYEE AND REMOVES ANY FOUNDATION UPON WHICH TO IMPUTE NEGLIGENCE TO EMPLOYER—*Holmstead v. Abbott G.M. Diesel, Inc.*, 493 P.2d 625 (Utah 1972).

Hal Holmstead suffered injuries as a result of a collision between his automobile and one driven by Gideon Allen. Holmstead filed against Allen's employer, Abbott G.M. Diesel, but did not join Allen in this action since they were in the process of negotiating a settlement. Allen's insurance carrier had represented him and obtained from Holmstead a covenant not to sue for a consideration of $10,000, the maximum coverage under Allen's policy. Defendant moved for a summary judgment on the ground that Holmstead's covenant not to sue the employee operated as a matter of law to release defendant from liability.[1] The trial court denied defendant's motion for a summary judgment.[2] Held—*Remanded.* Where a covenant not to sue specified that the injured plaintiff understood that the agreement was to terminate further controversy respecting all claims for damages, the covenant constituted a complete exoneration of the employee and removed any foundation upon which to impute negligence to the employer, whose liability was derivative and secondary, and plaintiff was not entitled to maintain an action against the employer.[3]

The liability of a master for the tortious acts of his servants is based upon the doctrine of respondeat superior, which literally means "let the principal answer." Under this doctrine, "the master becomes responsible for the same act for which the servant is liable."[4] The liability of the servant is primary, while that of the master is derivative and therefore secondary.[5] Where the master does not actively participate in the servant's wrongful act, but is liable only under the doctrine of respondeat superior, the courts reflect a divergence of opinion as to the liability of the master. It has been held that the master and servant

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1 Prior to the hearing on the motion, Holmstead filed an action against Allen and his insurance carrier for reformation of the covenant alleging that the insurance company and Holmstead's attorney agreed that Holmstead had specifically reserved his rights to proceed against Abbott and that through mutual mistake this reservation was omitted from the document. The trial court granted the decree of reformation.

2 The Utah Supreme Court was concerned with the question of whether an agreement, termed a covenant not to sue by the parties and executed between the plaintiff and the active tort-feasor, which expressly reserved all rights against the active tort-feasor's employer should be considered a general release of the employer or merely a covenant having no effect upon the employer's liability.

3 Holmstead v. Abbott G.M. Diesel, Inc., 493 P.2d 625 (Utah 1972).

4 W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 52, at 315 (4th ed. 1971).

5 Simpson v. Townsley, 283 F.2d 743 (10th Cir. 1960); Jacobson v. Parrill, 351 P.2d 194 (Kan. 1960); Marange v. Marshall, 402 S.W.2d 236 (Tex. Civ. App.—Corpus Christi 1966, writ ref'd n.r.e.).

should be regarded strictly as joint tort-feasors.[6] However, other jurisdictions have utilized the principles applicable to joint tort-feasors, while specifically stating that master and servant are not joint tort-feasors.[7] The converse of this approach is exemplified by Texas, where the distinction between master and servant and joint tort-feasors has been called superficial, but the servant is held primarily liable and the master only constructively responsible.[8]

Historically, the rule that the release of one tort-feasor constitutes a release of all is based on the theory that there is but one cause of action. Since the liability is indivisible, when the claimant releases one party the cause of action is extinguished.[9] In order to avoid the harshness of the release rule,[10] whereby the unwary plaintiff lost all rights when he entered into a partial settlement with one or more of the defendants, the covenant not to sue was employed.[11] Courts recognized that the covenant not to sue was an agreement for consideration between the plaintiff and one or more defendants not to sue only those defendants.[12] The release and the covenant not to sue are similar in that both relieve a potential defendant of liability. However, a release is the abandonment of a cause of action[13] while a covenant not to sue is a promise by which the party agrees not to enforce his right of action.[14] Many jurisdictions distinguish a release from a covenant not to sue,[15] but others

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6 Sargis v. Barnett, 287 F. Supp. 835 (N.D.W. Va. 1968); State *ex rel.* Bumgarner v. Sims, 79 S.E.2d 277 (W. Va. 1953); Sherwood v. Huber & Huber Motor Exp. Co., 151 S.W.2d 1007 (Ky. Ct. App. 1941).

7 Simpson v. Townsley, 283 F.2d 743 (10th Cir. 1960); United States v. First Sec. Bank, 208 F.2d 424 (10th Cir. 1953); Biel, Inc. v. Kirsch, 153 N.E.2d 140 (Ind. Ct. App. 1958); Granquist v. Crystal Springs Lumber Co., 1 So. 2d 216 (Miss. 1941); Aljian v. Ben Schlossberg, Inc., 73 A.2d 290 (N.J. 1950).

8 Hunt v. Ziegler, 271 S.W. 936 (Tex. Civ. App.—San Antonio 1925), *aff'd on other grounds*, 280 S.W. 546 (Tex. Comm'n App. 1926, opinion adopted).

9 Greenhalch v. Shell Oil Co., 78 F.2d 942 (10th Cir. 1935); Jacobsen v. Woerner, 89 P.2d 24 (Kan. 1939); Aljian v. Ben Schlossberg, Inc., 73 A.2d 290 (N.J. 1950); Green v. Lang Co., 206 P.2d 626 (Utah 1949).

10 The common law rule has been widely condemned by noted authorities and the courts. *E.g.*, W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 49, at 302 (4th ed. 1971); Dwy v. Connecticut Co., 92 A. 883, 891 (Conn. 1915) in which the court stated: "Time has proved that the rule we are considering [a release of one is a release of all] is wrong in principle and in operation promotes injustice." *See also* Friday v. United States, 239 F.2d 701 (9th Cir. 1957); McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943).

11 Pellett v. Sonotone Corp., 160 P.2d 783 (Cal. 1945); Ellis v. Jewett Rhodes Motor Co., 84 P.2d 791 (Cal. Dist. Ct. App. 1938); McMillen v. Klingensmith, 467 S.W.2d 193 (Tex. Sup. 1971).

12 Pellett v. Sonotone Corp., 160 P.2d 783 (Cal. 1945); Boucher v. Thompsen, 43 N.W.2d 866 (Mich. 1950).

13 United States v. First Sec. Bank, 208 F.2d 424 (10th Cir. 1953).

14 *Id.*; Pellett v. Sonotone Corp., 160 P.2d 783 (Cal. 1945).

15 Terry v. Memphis Stone & Gravel Co., 222 F.2d 652 (6th Cir. 1955); United States v. First Sec. Bank, 208 F.2d 424 (10th Cir. 1953); Abbott v. Goodyear Tire & Rubber Co., 3 P.2d 56 (Cal. Dist. Ct. App. 1931); Mink v. Majors, 279 S.W.2d 714 (Tenn. Ct. App. 1953); Gillette Motor Transp. Co. v. Whitfield, 186 S.W.2d 90 (Tex. Civ. App.—Fort Worth 1945, writ ref'd w.o.m.).

have held that apart from differences in phraseology, the distinction is nebulous and artificial.[16]

In jurisdictions where the employer's liability is only vicarious, the law is unsettled as to the effect to be given to an instrument which releases the active tort-feasor but reserves rights against the vicariously liable defendant.[17] It has been held that if the obligee, in releasing one of the obligors, reserves his rights against the others, this reservation will be given the effect intended.[18] Courts have looked to the intent of the parties as to whether they meant for the instrument to discharge others.[19] Texas courts have supported this view and held that the matter of release is a matter of intention.[20] Furthermore, the inclusion of an express reservation negates the effect of what is otherwise an absolute release and makes it a covenant not to sue, which does not release the other tort-feasor.[21]

This problem was discussed in Utah in 1953 by a federal district court, which the majority failed to mention. Stating that "the law of joint tort-feasors relating to releases and covenants not to sue is applicable" to the situation involving vicarious liability, the federal court held that a covenant not to sue one or more tort-feasors, with express reservation of the right to proceed against the other, does not bar an action against another joint tort-feasor.[22] If the release specifically discloses an intent not to release other tort-feasors, and if full compensation has not been received, then they are not thereby released from liability for uncompensated damage.[23]

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16 *See* McKenna v. Austin, 134 F.2d 659 (D.C. Cir. 1943); Breen v. Peck, 146 A.2d 665 (N.J. 1958).

17 Gomez v. City Transp. Co., 262 S.W.2d 417 (Tex. Civ. App.—Dallas 1953, writ ref'd n.r.e.).

18 Ford Motor Co. v. Tomlinson, 229 F.2d 873 (6th Cir.), *cert. denied*, 352 U.S. 826, 77 S. Ct. 38, 1 L. Ed.2d 49 (1956); Eberle v. Sinclair Prairie Oil Co., 120 F.2d 746 (10th Cir. 1941); Greenhalch v. Shell Oil Co., 78 F.2d 942 (10th Cir. 1935); Green v. Lang Co., 206 P.2d 626 (Utah 1949). *Contra*, Bryan v. Creaves, 138 F.2d 377 (7th Cir. 1943), *cert. denied*, 321 U.S. 778, 64 S. Ct. 619, 88 L. Ed. 1071 (1944); Shapiro v. Embassy Dairy, Inc., 112 F. Supp. 696 (E.D.N.C. 1953); Price v. Baker, 352 P.2d 90 (Colo. 1959); Max v. Spaeth, 349 S.W.2d 1 (Mo. 1961).

19 Petroleum Carrier Corp. v. Carter, 233 F.2d 402 (5th Cir. 1956); Western Spring Serv. Co. v. Andrew, 229 F.2d 413 (10th Cir. 1956); Eagle Lion Films, Inc. v. Lowes, Inc., 219 F.2d 196 (2d Cir. 1955); Rector v. Warner Bros. Pictures, Inc., 102 F. Supp. 263 (S.D. Cal. 1952); Young v. State, 455 P.2d 889 (Alas. 1969).

20 Armstreet v. Greer, 411 S.W.2d 403 (Tex. Civ. App.—Tyler 1967, writ ref'd n.r.e.); Praetorians v. Simons, 187 S.W.2d 238 (Tex. Civ. App.—Dallas 1945, no writ).

21 Western Guar. Loan Co. v. Dean, 309 S.W.2d 857 (Tex. Civ. App.—Dallas 1957, writ ref'd n.r.e.); Gomez v. City Transp. Co., 262 S.W.2d 417 (Tex. Civ. App.—Dallas 1953, writ ref'd n.r.e.); City of Coleman v. Kenley, 168 S.W.2d 926 (Tex. Civ. App.—Eastland 1943, writ ref'd w.o.m.).

22 United States v. First Sec. Bank, 208 F.2d 424, 428 (10th Cir. 1953); *accord*, Eberle v. Sinclair Prairie Oil Co., 120 F.2d 746 (10th Cir. 1941); Greenhalch v. Shell Oil Co., 78 F.2d 942 (10th Cir. 1935); Bergeson v. Life Ins. Corp. of America, 170 F. Supp. 150 (D. Utah 1958).

23 Greenhalch v. Shell Oil Co., 78 F.2d 942 (10th Cir. 1935).

As in the instant case, some courts have held the contrary view, that an agreement not to pursue an active wrongdoer constitutes an automatic release of anyone whose liability is derivative.[24] These decisions are based on the idea that it would be inequitable to permit the plaintiff to institute an action against a party whose liability is dependent upon a previously exonerated tort-feasor. Following this view, the majority in *Holmstead* stated:

> Under the doctrine of respondeat superior, the liability of the master to a third person for injuries inflicted by a servant in the course of his employment and within the scope of his authority is derivative and secondary, while that of the servant is primary, and absent any delict of the master other than through the servant, the exoneration of the servant removes the foundation upon which to impute negligence to the master.[25]

Thus a covenant not to sue the servant in effect constitutes a release of the master, since the basis upon which to impute negligence is removed.[26]

In this area Utah has adopted the Uniform Joint Obligations Act[27] which provides that one may release a joint obligor without releasing another by including a reservation of rights to the contrary.[28] The majority opinion in *Holmstead*[29] disregards this statute which has been held to provide that a covenant not to sue does not operate to bar an action against a joint tort-feasor.[30] As the dissent points out: "[T]here is no distinction in this statute beween those who are primarily liable and those who are secondarily liable."[31] Where the injured person has not received full compensation from the covenantee, Utah courts have held that the reservation of rights against another co-obligor is effective under the statute.[32]

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24 Bacon v. United States, 321 F.2d 880 (8th Cir. 1963); Simpson v. Townsley, 283 F.2d 743 (10th Cir. 1960); Holcomb v. Flavin, 216 N.E.2d 811 (Ill. 1966).

25 Holmstead v. Abbott G.M. Diesel, Inc., 493 P.2d 625, 627 (Utah 1972).

26 *Id.* Emphasizing the split in authorities, the dissent advocated an alternate approach. The dissent stated that Holmstead did not release Allen, but merely covenanted not to sue him, therefore the defendant had no rights under the agreement. The dissent contended that the employer, knowing he might be called on to repay the employer if Holmstead collected a judgment in excess of the settlement figure, assumed this risk. The dissent felt the possibility that the employee might be called on in the future to reimburse the employer was not this court's concern. *Id.* at 630 (dissenting opinion).

27 Uniform Joint Obligations Act, § 1 *et seq.* 9B U.L.A. (1966).

28 UTAH CODE ANN. § 15-4-5 (1953).

29 Holmstead v. Abbott G.M. Diesel, Inc., 493 P.2d 625 (Utah 1972).

30 United States v. First Sec. Bank, 208 F.2d 424 (10th Cir. 1953).

31 Holmstead v. Abbott G.M. Diesel, Inc., 493 P.2d 625, 630 (Utah 1972).

32 Greenhalch v. Shell Oil Co., 78 F.2d 942 (10th Cir. 1935); Plateau Uranium Inv. Corp. v. Sugar & Ulmer, 326 P.2d 1022 (Utah 1958). A Colorado court, applying Utah law, stated that the harsh common law rule regarding releases and joint obligors has been tempered by the Utah Legislature so that one can avoid the harsh rule of having all joint obligors released automatically by an express written reservation against the co-obligor. Melo v. National Fuse & Powder Co., 267 F. Supp. 611 (D. Colo. 1967).

The dissent in *Holmstead* criticizes the majority opinion for giving the instrument the effect of a release even though both parties considered it a covenant not to sue with a reservation of rights.[33] The decision in *Holmstead* indicates that when there is an opportunity to settle with the active tort-feasor, the claimant must either forego compromise or surrender his claim against the one vicariously liable. Previously the covenant not to sue had been a useful means of encouraging settlement. The advantages were the probability of relieving the active tort-feasor from the expense and nuisance of defending a lawsuit,[34] and providing settlement with the plaintiff immediately for a certain sum.[35] An injured party may now be unwilling to execute such a covenant not to sue. The advantages to the claimant to be gained from getting at least partial satisfaction immediately is offset by the result that the release of the other obligor means the claimant may not receive full satisfaction. This rule is nothing more than a trap for the inexperienced claimant who covenants not to sue the active tort-feasor for partial compensation. Although he specifically intends to receive the remaining compensation from the covenantee's employer, he later finds that he has extinguished his rights. As a result of *Holmstead,* if a claimant covenants not to sue an employee, the employer is automatically released from liability even though the instrument specifically reserved the right of action against the employer to complete the compensation for his injuries. It appears that this would be the decision without regard to the Utah statutes[36] and without considering how unjust and unintended the result might be.

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33 Holmstead v. Abbott G.M. Diesel, Inc., 493 P.2d 625, 630 (Utah 1972).

34 If plaintiff later recovered from defendant employer, employer could be compensated by employee and, if necessary, take him to court to recover. *E.g.*, Salt Lake City v. Schubach, 159 P.2d 149 (Utah 1945); Beaver County v. Home Indem. Co., 52 P.2d 435 (Utah 1935).

35 This sum is often much less than that the court might award. *See generally* 33 ROCKY MT. L. REV. 127, 129 (1961).

36 UTAH CODE ANN. § 15-4-1 *et seq.* (1953).