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Negligence of a General Agent Is Not Imputed to the Principal So as to Bar Recovery on Principal's Action for Damages Sustained by the Concurrent Negligence of His Special Agent.

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the housing act was to provide safe and sanitary housing to persons of low income.[50] The Tyler Court of Civil Appeals, in *Crowell*, interpreted the same statute which created the public housing authority and stated "[t]he basic rule of construction of statutes is that the courts must take statutes as they find them."[51] Agreeing with this rule, can the court in *Crowell* justify the strict construction of section 8(a), which also gives the housing authority the power "[t]o sue and be sued" to possibly manifest an intention by the Texas Legislature to allow the public housing authority to contract in an exculpatory manner?[52] On the contrary, there is no section within article 1269k which expressly grants the housing authority the right to use an exculpatory clause in a lease agreement with its tenants. The housing authority is granted the right to contract under section 8(a), however, this right is limited to contracts which are *"necessary or convenient to the exercise of the powers of the authority. . . ."*[53] The purpose of the exercise of the authority's power is to provide *safe and sanitary* housing for low income families.[54] This power should have been limited in *Crowell* to that which would fulfill the purpose of the housing act and should not have been expanded in a manner which defeats such a purpose by allowing an unlimited freedom of contract against a duty imposed by law.

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PRINCIPAL AND AGENT—IMPUTED CONTRIBUTORY NEGLIGENCE—NEGLIGENCE OF A GENERAL AGENT IS NOT IMPUTED TO THE PRINCIPAL SO AS TO BAR RECOVERY ON PRINCIPAL'S ACTION FOR DAMAGES SUSTAINED BY THE CONCURRENT NEGLIGENCE OF HIS SPECIAL AGENT. *Brown v. Poritzky*, 332 N.Y.S.2d 872 (1972).

Plaintiff Brown sold his insurance business to defendant Poritzky with the understanding that defendant was to insure certain of plaintiff's properties against loss by fire. Poritzky negligently failed to insure one such property which was subsequently destroyed by fire. Brown sued for damages occasioned by the loss, and Poritzky set up as his defense the contributory negligence of Brown's general agent who had negligently failed to conduct a follow-up on the status of the fire in-

50 Housing Authority v. Higginbotham, 135 Tex. 158, 164, 143 S.W.2d 79, 83 (1940).

51 Crowell v. Housing Authority, 483 S.W.2d 864, 867 (Tex. Civ. App.—Tyler 1972, writ granted).

52 TEX. REV. CIV. STAT. ANN. art. 1269k, § 8(a) (1963). It should be noted that section 8(d) also gives the public housing authority the authority to obtain insurance "against any risks or hazards" incident to its operation. *Id.* § 8(d).

53 *Id.*

54 Housing Authority v. Higginbotham, 135 Tex. 158, 164, 143 S.W.2d 79, 83 (1940).

surance coverage undertaken by the defendant. The lower court rendered judgment in favor of the plaintiff. Held—*Affirmed.* In an action for damages by a principal against his negligent special agent, the concurrent negligence of the principal's general agent is not imputed to the principal so as to bar recovery.[1]

Basic to the law of agency is the theory that a principal is vicariously liable to third persons for the negligent acts of his agent committed in the course of employment.[2] However, this is not meant to say that an agent is relieved from liability in such a case, for he is always personally liable for his own negligence,[3] and may be liable to his principal in the case where the principal has been held accountable for the agent's tortious acts.[4] The negligent agent in such a situation may assert the defense of the principal's personal contributory negligence where provable,[5] but he cannot impute his own negligence to his principal so as to bar recovery.[6] Such an attempt by an agent to escape liability for his own wrongful conduct has been termed "a perversion of the idea of imputed negligence."[7]

The rule that the negligence of an agent is imputed to his principal in a suit between the principal and a third person, but not in an action by the principal against the negligent agent, is firmly based upon two sound policy considerations: First, a wrongdoer may not attribute his own wrongdoing to the victim so as to avoid liability for negligence;[8] and secondly, an agent's liability to his principal rests on the violation of the agent's personal duty of reasonable care and skill owed to the principal.[9]

Against this background of universally recognized agency rules emerges the question presented by the situation in *Brown v. Poritzky*:[10] Do the laws of imputed contributory negligence leave the master of two concurrently negligent agents without a remedy?

Of the very few cases in which the question has ever been considered, *Zulkee v. Wing*[11] makes the most definitive statement on the issue. In *Zulkee*, an employee sought to recover for services rendered in cutting

1 Brown v. Poritzky, 332 N.Y.S.2d 872, 877 (1972).

2 RESTATEMENT (SECOND) OF AGENCY § 219(1) (1957); *see, e.g.*, Sandrock v. Taylor, 174 N.W.2d 186, 192 (Neb. 1970).

3 RESTATEMENT (SECOND) OF AGENCY § 401 (1957); *see, e.g.*, Male v. Acme Markets, Inc., 264 A.2d 245, 246 (N.J. Super. Ct. 1970).

4 Holmstead v. Abbott G.M. Diesel, Inc., 493 P.2d 625, 627 (Utah 1972); *cf.* Note, 4 ST. MARY'S L.J. 227 (1972).

5 RESTATEMENT (SECOND) OF AGENCY § 415 (1957); *see, e.g.*, Riddle-Duckworth, Inc. v. Sullivan, 171 S.E.2d 486, 491 (S.C. 1969).

6 Alderman v. Noble, 4 N.E.2d 619, 620 (Mass. 1936).

7 *Id.* at 620.

8 *Id.* at 620.

9 RESTATEMENT (SECOND) OF AGENCY § 379(1) (1957); *see, e.g.*, State Auto. & Cas. Underwriters v. Salisbury, 494 P.2d 529 (Utah 1972).

10 332 N.Y.S.2d 872 (1972).

11 20 Wis. 408 (1866).

logs. The defendant employer counterclaimed for damages caused by the plaintiff's negligent cutting of a tree which fell upon and killed his master's horses. The employee contended that the concurrent negligence of a co-worker, in failing to remove the horses from the danger area as warned, was imputed to their employer under the doctrine of respondeat superior, thus rendering him contributorily negligent and barring the counterclaim.

The Wisconsin Supreme Court rejected this theory, stating that the doctrine of imputed contributory negligence had no application as between the master and servant, but only as between the master and third persons.[12] The court stated the policy basis for the holding in these words:

> To apply the maxim in such a case would be an utter perversion of it, and destructive of all liability on the part of servants. The servant in such a case represents, not the master, but himself. It is his own negligence and misconduct for which he is required to answer; and in this respect he stands upon the same footing as any other wrongdoer.[13]

Zulkee has been cited as authority in support of holdings and dicta in various jurisdictions on the few occasions on which the issue has ever been decided.[14] However, in *Capitola v. Minneapolis, St. P. & S. Ste. M.R.R.*,[15] the Minnesota Supreme Court expressly rejected the *Zulkee* holding. The case involved an action brought under the Federal Employers' Liability Act[16] for damages sustained by a railroad fireman in a head-on collision between two of the defendant's locomotives. The defendant railroad company counterclaimed for the damage to its property, asserting that the plaintiff's negligence had contributed to the injury. The court refused the counterclaim and approved the plaintiff's contention that the concurrent negligence of two of the defendant's engineers was imputed to the defendant, rendering it contributorily negligent:

> [*Zulkee v. Wing*] was decided long ago and in another jurisdiction. It is neither controlling nor persuasive here and now. We decline to follow it. We hold that in an action by an employer against his employee for damages resulting from the negligence of the employee, contributory negligence is a defense and may be established

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12 *Id.* at 410.

13 *Id.* at 410.

14 *E.g.*, Buhl v. Viera, 102 N.E.2d 774 (Mass. 1952); Patterson v. Brater, 196 N.W. 202 (Mich. 1923); Raney v. La Chance, 70 S.W. 376 (Mo. Ct. App. 1902); *cf.* Alderman v. Noble, 4 N.E.2d 619, 620 (Mass. 1936).

15 103 N.W.2d 867 (Minn. 1960).

16 Federal Employers' Liability Act, 45 U.S.C. §§ 51-60 (1970).

by attributing to the employer the negligence of a coemployee which is a proximate cause of the damage.[17]

The second and, to date, only other case to reject the *Zulkee* rationale is that of *Insurance Co. of North America v. Anderson*,[18] in which the Idaho Supreme Court embraced the *Capitola* holding in its refusal to allow recovery by an employer's subrogee in an action against a negligent employee, where it was shown that another employee had contributed to the injury to the employer's property through his negligent supervision of the defendant employee.

These represent the total of the cases dealing with the issue discussed herein. However, the court in the instant case had no difficulty in adopting *Zulkee* and in expressly rejecting *Capitola*;[19] nor did it attempt to distinguish the two cases on any basis. Rather, the court expressed in the form of a policy statement its concern that the doctrine of imputed contributory negligence should not be allowed to deny a remedy to an employer injured by two negligent agents. "[A] special agent who breaches a duty owed to his principal should not be insulated from liability by the fortuitous happenstance of a general agent's concurrent negligence."[20]

The court found that Poritzky was Brown's special agent by virtue of the fact that Poritzky, as a condition of the sale of Brown's insurance business, was to be the exclusive insurance broker for Brown's properties. Arkawy, Brown's son-in-law, was appointed his agent in general charge of Brown's properties during an extended absence for health reasons. Among Arkawy's duties was the ascertaining of the extent of insurance coverage of the properties. Poritzky did not obtain coverage due to an administrative error, and Arkawy failed to learn of this omission by the defendant. Consequently, the building destroyed by fire was not covered by the requested insurance protection.[21]

The defendant attempted to distinguish *Zulkee* on the basis that the two negligent agents in that case were co-equals, while the situation in *Brown* involved the concurrent negligence of a special agent and the plaintiff's general agent.[22] A special agent is regarded as one employed for a specific purpose and who acts under limited powers,[23] while a general agent is one engaged to generally conduct all of the various

17 Capitola v. Minneapolis, St. P. & S. Ste. M. R.R., 103 N.W.2d 867, 869 (Minn. 1960).
18 438 P.2d 265 (Idaho 1968).
19 Brown v. Poritzky, 332 N.Y.S.2d 872, 876 (1972).
20 *Id.* at 877.
21 *Id.* at 874.
22 Brief for Appellant at 15, Brown v. Poritzky, 332 N.Y.S.2d 872 (1972).
23 Skutt v. Goodwin, 295 N.Y.S. 772, 777 (Sup. Ct. 1937); RESTATEMENT (SECOND) OF AGENCY § 3(2) (1957).

aspects of the business of his principal.[24] The importance of the distinction relates to the extent of authority of each agent to do certain acts in the name of the principal,[25] rather than to differing standards of care owing to the master.[26] In the instant case, the court did not concern itself with the distinction other than to say that the defendant, as a special agent, " 'was obliged to exercise reasonable diligence to protect the interests of plaintiffs by insurance.' "[27]

It can be argued that *Zulkee* and *Capitola* are distinguishable on the basis of the nature of the employer in each case. In *Zulkee*, the employer was an individual, while in *Capitola*, the employer was a corporation. In the case where the employer is a corporation, *Capitola* may be the desirable approach, for a corporation can act only through its agents, and a defendant employee would not be able to assert successfully the defense of contributory negligence under the *Zulkee* rationale. But the court in *Capitola*, ignored this important distinction and would have all employees behave negligently with impunity, without regard to the nature of their employers under the sweeping application of its holding.

The *Zulkee* doctrine finds additional support from the rules governing joint enterprises, an area of the law to which the doctrine of vicarious liability also applies. Each member of a joint enterprise is both the principal and the agent of the other members.[28] Accordingly, each may subject the others to liability to third persons injured by his negligent conduct while pursuing the objectives of the venture.[29] However, the courts have held that the doctrine of imputed negligence as a defense is available only to third persons and not to members of the joint enterprise in an action among themselves.[30] Thus a negligent member of a joint enterprise may not set up the negligence of himself or of another member as a bar to an action against him by a third member of the joint enterprise. Here again the reluctance of the court to allow an individual to pass his negligence along to another is evidenced.

It is obvious that the decision of the New York Court of Appeals in

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24 Arkansas Medical & Hosp. Serv., Inc. v. Cragar, 249 S.W.2d 554, 557 (Ark. 1952); RESTATEMENT (SECOND) OF AGENCY § 3(1) (1957).

25 *See* RESTATEMENT (SECOND) OF AGENCY § 3 (1957); F. MECHEM, OUTLINES OF THE LAW OF AGENCY § 17 (4th rev. ed. 1952).

26 *See* RESTATEMENT (SECOND) OF AGENCY § 379(1) (1957).

27 Brown v. Poritzky, 332 N.Y.S.2d 872, 876 (1972), *citing* MacDonald v. Carpenter & Pelton, 298 N.Y.S.2d 780, 783 (Sup. Ct. 1969).

28 *Accord, e.g.*, Mercer v. Vinson, 336 P.2d 854, 858 (Ariz. 1959).

29 *Accord, e.g.*, Mayer v. Sampson, 402 P.2d 185 (Colo. 1965).

30 *E.g.*, Gilreath v. Silverman, 95 S.E.2d 107, 109 (N.C. 1956), *quoting* Rollison v. Hicks, 63 S.E.2d 190, 195 (N.C. 1951); Williamson Motor Co. v. Smith, 274 S.W.2d 191, 192 (Tex. Civ. App.—San Antonio 1954, no writ); 58 AM. JUR. 2d *Negligence* § 466 (1971).