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Automobiles -- Agency -- Family Purpose Doctrine -- Wife's Liability for Husband's Negligence

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NOTES AND COMMENTS

Automobiles—Agency—Family Purpose Doctrine—Wife's Liability for Husband's Negligence

In *Small v. Mallory*[1] the plaintiff's automobile was damaged in a collision with an automobile driven by defendant's husband. The jury found the husband negligent. On the issue of defendant's liability the husband, as witness for the plaintiff, testified substantially as follows: His wife had purchased the car three years before the accident; it had not been purchased for cash, but had been financed and re-financed; both he and his wife had been working when the car was purchased; she had paid the taxes on the car, made several initial installment payments, and, together with him, had paid repair bills up until the time she had stopped working. However, his wife had not worked for "about three years," and while she was not working he had made all installment payments and had paid the usual expenses incurred in operating an automobile. Both he and his wife had used the car for their pleasure and convenience. The question on appeal was whether, under these facts, the trial court committed error in submitting the case to the jury on the wife's liability for her husband's negligence under the family purpose doctrine[2]. The court affirmed a judgment for the plaintiff. One justice dissented on the ground that the husband, and not the wife, had provided and maintained the automobile for his own and the family's use. "A realistic evaluation of the evidence indicates that through financing and re-financing he was making payments, similar to rentals, to retain the possession and use of the car."[3]

The family purpose doctrine has been used to assure recovery by an outsider when a financially irresponsible member of a family causes injury by his negligent operation of the family car.[4] The doctrine is an

[1] 250 N.C. 570, 108 S.E.2d 852 (1959).

[2] Since N.C. GEN. STAT. § 20-71.1 (1953), which establishes a prima facie case of agency on proof of ownership, was not used by the plaintiff, the case went to the jury on the family purpose doctrine alone. Letter from Mr. John L. Rendleman, attorney for plaintiff, September 30, 1959.

[3] 250 N.C. at 575, 108 S.E.2d at 855.

[4] The importance of the doctrine in North Carolina has been greatly reduced by the Financial Responsibility Act, N.C. GEN. STAT. § 20-227 (1953), which requires all automobile owners to carry liability insurance and writes into liability policies a provision whereby anyone using the car with the insured's consent, either express or implied, is himself insured. However, one can imagine at least two situations in which the plaintiff would still want to join the member of the family who might be liable under the family purpose doctrine, notwithstanding the Financial Responsibility Act. The first is where the extent of the plaintiff's damages appears to be more than the minimum amount of liability insurance required by the act and the tort-feasor is himself "judgment proof." Unless the plaintiff invokes the doctrine, he may get a substantial judgment only to discover that a large part of it is uncollectible because of the driver's insolvency. The second is where the family auto-

extension of the principle of *respondeat superior*,[5] the theory of the doctrine being that some member of the family has made it his business to provide transportation in the form of an automobile for himself and for other members of the family. Thus when the car is being used to transport a member of the family it is being used in the business of the providing member. Under this reasoning the ordinary rules of agency are applied. Therefore, if a plaintiff is successful in casting a financially responsible family member in the role of master, the collectibility of his judgment is assured. The doctrine is of comparatively late vintage,[6] and, although it could be applied with equal logic to any item furnished for family use, it has been confined to automobiles.[7]

In North Carolina the family purpose doctrine was first recognized in 1918.[8] Since that time, fairly well-established rules have attended its application. A plaintiff in order to invoke the doctrine must allege and prove that the car was customarily used by the family as a general-purpose vehicle,[9] and that at the time of injury it was being used[10] by an authorized family member within the scope of his authority.[11]

Assuming these factors to be present, which member of the family is to be held liable under the doctrine? Although the court has frequently stated the rule in terms of a liability of the head of the household,[12] it has not been necessary to show that the defendant was in fact the head of the household to obtain a judgment against him.[13] The fact that one is the head of the household is a factor to be considered in

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mobile involved was owned by an uninsured citizen of a state having no financial responsibility act. In this situation under the prevailing conflicts of law rule the doctrine as applied in North Carolina could be used by the plaintiff to hold the "providing" member of the tort-feasor's family liable for his damages if it appeared that the tort-feasor himself was financially irresponsible. Cronenberg v. United States, 123 F. Supp. 693 (E.D.N.C. 1954); Goode v. Barton, 238 N.C. 492, 78 S.E.2d 398 (1953).

[5] Lyon v. Lyon, 205 N.C. 326, 171 S.E. 356 (1933).

[6] One of the first cases applying the doctrine was Daily v. Maxwell, 152 Mo. App. 415, 133 S.W. 351 (1911).

[7] See, *e.g.*, Felcyn v. Gamble, 185 Minn. 357, 241 N.W. 37 (1932), where the majority of the Minnesota court refused to apply the doctrine to motorboats.

[8] Clark v. Sweaney, 176 N.C. 529, 97 S.E. 474 (1918).

[9] Grier v. Woodside, 200 N.C. 759, 158 S.E. 491 (1931), held that the burden is on the plaintiff to show that the car was used for family purposes. This proof gets his case to the jury. The burden then shifts to defendant to show that at the time of injury the driver was not using it for such purposes.

[10] Goss v. Williams, 196 N.C. 213, 145 S.E. 169 (1928), held the husband liable where a third party was driving at the wife's request. Thus it is not necessary to the invocation of the doctrine that a family member be driving the car. It need only be driven in the interest of the family.

[11] In Vaughn v. Booker, 217 N.C. 479, 8 S.E.2d 603 (1940), it was held proper to instruct the jury to find for defendant father if it believed he had forbidden his son to drive in Raleigh, the site of the accident.

[12] See, *e.g.*, Watts v. Lefler, 190 N.C. 722, 130 S.E. 630 (1925).

[13] In Goode v. Barton, 238 N.C. 492, 78 S.E.2d 398 (1953), the wife was held liable under the family purpose doctrine for the negligent operation of an automobile without any mention of who was the head of the household.

fixing liability, but not a conclusive one. It seems that the true test for determining which member of the family is to be held liable under the doctrine is one of control. The basic question to be determined then is who controls the car, not who is the head of the household.[14]

The factors of ownership and maintenance have been used as a further guide in determining which member of the family controls the car.[15] In *Matthews v. Cheatham*[16] the court had before it the following situation: A minor child had won the family car in a newspaper contest; it was registered in her name; the father had paid all costs of maintaining the car. The mother was adjudged negligent while driving the car alone. The court, in holding the father liable under the family purpose doctrine, said that the one who owns, maintains or controls an automobile for family use is the one responsible for its negligent operation. Thus the father was held liable, in spite of the fact that his daughter held legal title to the car, on the ground that he maintained and controlled it. Then in *Goode v. Barton*[17] it was expressly held immaterial whose funds were used to purchase the car, since liability under the doctrine "is not confined to owner or driver . . . [but] depends upon control and use."[18] The "use" referred to here can only mean that use for which the car was bought, *i.e.*, use by the family as a general purpose car. Since ownership, both legal and equitable, has been held not to be determinative of control, it would seem that maintenance is the more important guide in determining control and, hence, in predicting the family member on whom liability will fall. In taking this view of the doctrine, North Carolina is in line with the weight of authority.[19]

In the principal case the husband testified that the wife had purchased the car by financing it and that he had never signed a mortgage. Thus the wife was the purchaser. Since both husband and wife had made payments on the car, they were both apparently equitable owners. On the other hand, the wife had not worked for more than two years prior to the accident, and all the evidence was to the effect that the husband alone had maintained the car during that time. The majority

[14] Although the principal case is the first instance in which the court has been asked to hold another member of the family under the doctrine for the negligence of the head of the household, the majority of courts facing the issue have held such member liable. *E.g.*, Wyant v. Phillips, 116 W. Va. 207, 179 S.E. 303 (1935); Turner v. Gackle, 168 Minn. 514, 209 N.W. 626 (1926); Smith v. Overstreet, 258 Ky. 781, 81 S.W.2d 571 (1935). *But see* Cewe v. Schuminski, 182 Minn. 126, 233 N.W. 805 (1930).

[15] See, *e.g.*, Elliot v. Killian, 242 N.C. 471, 87 S.E.2d 903 (1955).

[16] 210 N.C. 592, 188 S.E. 87 (1936).

[17] 238 N.C. 492, 78 S.E.2d 398 (1953).

[18] *Id.* at 499, 78 S.E.2d at 404.

[19] See, *e.g.*, Smith v. Doyle, 98 F.2d 341 (D.C. Cir. 1938); Mortensen v. Knight, 81 Ariz. 325, 305 P.2d 463 (1956); Cewe v. Schuminski, 182 Minn. 126, 233 N.W. 805 (1930). *But see* Wyant v. Phillips, 116 W. Va. 207, 179 S.E. 303 (1935), where the wife was held liable because she owned the car, even though her husband, who was driving at the time of the accident, maintained and controlled it.

opinion cited the *Matthews* case, which, as we have seen, declared that the test for fixing liability under the family purpose doctrine was control. Since the evidence clearly showed that the wife had not maintained the car for more than two years prior to the accident and that the husband was head of the household, it seems apparent that two of the important factors in proving control in the wife were lacking. The only evidence that plaintiff presented to establish control of the car in the wife was the not very convincing testimony of the defendant's husband: "Yes, my wife drives. She uses the car and I use the car too . . . . I could use the car anytime that I wanted to."[20] In allowing the case to go to the jury on this extremely weak showing of control, it would appear that the court went beyond established boundaries of the family purpose doctrine as applied in North Carolina. Apparently, under the theory of the principal case, a showing of little more than legal title in the defendant will take a case to the jury under the doctrine.

As has been noted, the family member who maintains the car may be held liable, and the principal case holds an equitable owner liable under the doctrine. In a proper case, could the equitable owner and the maintainer be joined on the theory that each exercised some control over the automobile? In *Cronenberg v. United States*,[21] a federal case applying North Carolina law, the government filed a cross-claim against the parents of the minor co-defendant who was driving his mother's car, as joint tort-feasors under the doctrine. G.S. § 20-71.1, presuming agency on proof of ownership, was used against the wife to establish a prima facie case. The judge, sitting as a jury, found the question of both parents' liability under the doctrine to be an issue of fact which he resolved in their favor on the ground that the car was not used for family purposes. Since the statute only creates a rule of evidence, this holding assumes that, in legal theory, both parents could have been held responsible under the family purpose doctrine. Thus in North Carolina it may be that it is possible to recover from both where one family-member owns the car and another maintains it.[22] Under the approach of the principal case, only a slight showing of control in each party is necessary to take the case to the jury against him.

As has been indicated, the family purpose doctrine is an extension of *respondeat superior*. It came into being as an instrument of social policy to afford greater protection for the rapidly growing number of

[20] 250 N.C. at 572, 108 S.E.2d at 853.
[21] 123 F. Supp. 693 (E.D.N.C. 1954).
[22] On this point the authorities are in direct conflict. The leading case of Birch v. Abercrombie, 74 Wash. 486, 133 Pac. 1020 (1913), held both husband and wife on the theory of joint ownership, and Thalman v. Schultze, 111 W. Va. 64, 160 S.E. 303 (1931), held both because the wife owned and the husband maintained the car. *Contra*, Smith v. Overstreet, 258 Ky. 781, 81 S.W.2d 571 (1935).

motorists in the United States. The principal case seems to indicate that the court, in furtherance of the basic policy of the doctrine, does not wish to impair its utility by imposing technical standards for its use. Thus, from *Small v. Mallory* it may be inferred that if there is any evidence of control in the defendant, it will be sufficient to withstand his motion of nonsuit on the issue of liability under the family purpose doctrine.

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Constitutional Law—Due Process—Denial of Confrontation to Witnesses in Loyalty-Security Hearings

The issue of the right to confront and cross-examine witnesses in loyalty-security hearings was presented to the United States Supreme Court in the recent case of *Greene v. McElroy*.[1] Greene was an aeronautical engineer employed as general manager and vice-president of a private corporation which was doing classified research for the Navy under contract. Such contracts incorporated by reference[2] a condition that the contractor was to exclude from the job all persons not cleared for access to classified information.

Although Greene had been previously cleared,[3] the corporation was notified by the Secretary of the Navy in April 1953 that his clearance was revoked and that he was to be denied access to any classified information. This led to Greene's discharge. He appealed to the Eastern Industrial Personnel Security Board (EIPSB), and a hearing was held at which he was subjected to intense cross-examination by the board without the opportunity to confront and cross-examine his accusers.[4] EIPSB affirmed the order of revocation and this action was affirmed by

[1] 360 U.S. 474 (1959).

[2] All government contracts for classified work incorporated by reference the Department of Defense Industrial Security Manual for Safeguarding Classified Information, 32 C.F.R. § 66 (1954).

[3] Greene was given a Confidential clearance by the Army in August 1949, a Top Secret clearance by the Assistant Chief of Staff G-2, Military District of Washington in November 1949, and a Top Secret clearance by the Air Materiel Command in February 1950. 360 U.S. at 476 n.1. In 1951 Greene's clearance was withdrawn but was restored by the Industrial Employment Review Board (IERB) in 1952. In 1953 the Secretary of Defense abolished the Personnel Security Board (PSB) and the IERB and directed the Secretaries of the three armed services to establish Regional Industrial Personnel Security Boards. 360 U.S. at 480.

[4] The revocation of Greene's security clearance was based primarily on incidents occurring between 1942 and 1947. It was during this period that Greene was living with his former wife who was alleged to have been an ardent Communist. The fact that he stayed with her until 1947 seems to be the main reason that the government suspected that he was a security risk. 360 U.S. at 490. Greene testified that the main reason for the divorce was that his ex-wife held views with which he did not concur and was friendly with persons with whom he had little in common. 360 U.S. at 479. From a review of the record it appears that Greene's clearance was revoked because of his association with his wife.