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Evidence -- Admissibility of Agent's Declaration Against His Principal

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If the *Batts* decision holds that a cul-de-sac serving only four families is not a road for a public use, it would seem the State Highway Commission may encounter problems of using public funds to maintain other dead-end roads on the Secondary Road System that serve only a limited number of families. Any taxpayer would have standing to bring suit to prevent misuse of agency [State Highway Commission] power.[27] The court said: "To sustain the proposed condemnation . . . under the facts and circumstances here would set a dangerous precedent for the expenditure of public funds by the State Highway Commission. . . ."[28] However, there was not an expenditure of public funds under the facts and circumstances here because the landlocked parties had given the Highway Commission an indemnity bond to cover any damages to the defendants' property. The only expenditure of funds would be for the construction and maintenance of the road, not acquiring the right of way.

Also in the light of the *Batts* decision, it seems that the State Highway Commission will have to alter its administrative policy of adding roads and streets to the Secondary Road System which is maintained by the Commission. At the present time the Commission policy requirements are: "(2) Roads less than one mile in length must have at least four occupied residences fronting the road. . . . (4) There must be at least two individual property owners on the road."[29] The proposed road in *Batts* met both these requirements.

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Evidence—Admissibility of Agent's Declaration Against His Principal

The plaintiff's decedent in *Branch v. Dempsey*[1] was fatally injured in a head-on collision with the defendant owner's truck being operated by the defendant driver in the scope of his employment.[2]

[27] Stratford v. City of Greensboro, 124 N.C. 127, 32 S.E. 394 (1899).
[28] 265 N.C. at 360, 144 S.E.2d at 137.
[29] N.C. STATE HIGHWAY COMM'N, SECONDARY ROADS 14.

[1] 265 N.C. 733, 145 S.E.2d 395 (1965).
[2] The agency relationship between the owner and his driver was presumptively established by N.C. GEN. STAT. § 20-71.1(b) (Supp 1965), which provides:

Proof of the registration of a motor vehicle in the name of any

Sometime after the wreck, the driver told an investigating officer that the truck stalled while he was attempting to make a left turn.[3] When the plaintiff offered this officer's testimony on the issue of the driver's negligence against both defendants, the trial judge instructed the jury that the declaration by the defendant driver was to be considered only against him and not against the owner, and at the close of the plaintiff's case, he entered a nonsuit in favor of the owner.[4] The North Carolina Supreme Court in a four-to-three decision[5] affirmed.[6] The court held that the officer's testimony was hearsay and inadmissible against the owner since the driver had no authority to speak on his behalf.[7] It further held that the defendant owner could not be adjudged liable for the negligent acts of his driver committed within the scope of his employment since the only evidence of his driver's negligence was incompetent against him.[8] The majority and dissenting opinions in this case enunciate almost all the theories advanced with respect to the admissibility of a driver's extrajudicial declaration against his principal and the necessity for such admission where it is the only evidence offered on the issue of a driver's negligence to establish his principal's liability.

It is a well established rule that where an agent has authority to speak for his principal, his extrajudicial declarations are treated "as if" made by the principal and admissible against the principal under the admission of a party opponent exception to the hearsay rule.[9] The rationale is not based on any rule of evidence but is

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person, firm, or corporation, shall for the purpose of any action be prima facie evidence of ownership and that such motor vehicle was then being operated by and under the control of a person for whose conduct the owner was legally responsible, for the owner's benefit, and within the course and scope of his employment.

[3] The investigating officer talked with the driver at the hospital where the plaintiff's decedent was taken after the accident and later at the police station. He testified to the driver's declaration but failed to state in which of these conversations the statement was made. 265 N.C. at 738, 145 S.E.2d at 399.

[4] *Id.* at 739, 145 S.E.2d at 400.

[5] Justice Parker, joined by Chief Justice Denny, dissented. *Id.* at 749, 145 S.E.2d at 406. Justice Sharp also dissented. *Id.* at 756, 145 S.E.2d at 411.

[6] *Id.* at 746, 145 S.E.2d at 404.

[7] *Ibid.* The court reasoned that the North Carolina statute creating a prima facie agency relationship between the registered owner of a motor vehicle and the driver applies only when the vehicle is in operation and not to what the driver says afterwards merely narrative of a past occurrence.

[8] *Ibid.*

[9] STANSBURY, NORTH CAROLINA EVIDENCE § 168 (1963).

founded upon the substantive responsibility of the principal for the acts of his agent committed within the scope of his authority.[10] In the situation where a driver makes a statement, the North Carolina[11] and majority rule[12] is that the principal is not chargeable with the declaration in the absence of proof that his driver had authority to speak. Thus, a driver's statement to an investigating officer of how the accident occurred is inadmissible against his principal. In *Branch,* Justice Sharp dissented[13] and argued that every owner is charged with contemplating the possibility of his driver's having an accident; consequently, public policy demands that he extend his driver's authority to include a narrative statement to an investigating officer.[14]

It appears that the North Carolina Supreme Court could have admitted such extrajudicial declaration against the principal on the basis of other existing decisions. Under the res gestae exception to the hearsay rule,[15] an agent's declaration is admissible against his principal when made contemporaneously with the event complained of or before any time has elapsed for reflection or fabrication that eliminates the "safeguard of trustworthiness."[16] The rationale for this exception is the inherent trustworthiness of the declarant's statement, *i.e.,* the circumstances under which it was uttered makes it extremely unlikely that such declaration was fabricated.[17] Since it is just as unlikely under the circumstances that a

[10] 4 WIGMORE, EVIDENCE § 1078 (3d ed. 1940).

[11] *E.g.,* Hobbs v. Queen City Coach Co., 225 N.C. 323, 34 S.E.2d 211 (1945) (bus driver's admission of conduct). STANSBURY, *op. cit. supra* note 9, § 169.

[12] 8 AM. JUR. 2D *Automobiles* § 968 (1963). See MCCORMICK, EVIDENCE § 244 (1954); 4 WIGMORE, *op. cit. supra* note 10, § 1078.

[13] 265 N.C. at 756, 145 S.E.2d at 411.

[14] *Id.* at 765, 145 S.E.2d at 417. In Martin v. Savage Truck Line, 121 F. Supp. 417 (D.D.C. 1954), the court said:

> To say, in these circumstances, that the owner of a motor truck may constitute a person his agent for the purpose of the operation of such truck over public streets and highways, and to say at the same time that such operator is no longer the agent of such owner when an accident occurs, for the purpose of truthfully relating the facts concerning the occurrence to an investigating police officer on the scene shortly thereafter, seems to me to erect an untenable fiction, neither contemplated by the parties nor sanctioned by public policy.

Id. at 419. For other cases in accord, see Branch v. Dempsey, 265 N.C. 733, 756, 145 S.E.2d 395, 411 (1965) (Sharp, J., dissenting).

[15] STANSBURY, *op. cit. supra* note 9, § 164.

[16] *Ibid.*

[17] *Ibid.*

driver would fabricate a responsive statement to an investigating officer that could subject him to civil liabilities and possible criminal penalties and additionally might cause him to lose his job, a driver's post rem admission of allegedly negligent conduct should be accepted as equally trustworthy.[18] Thus, the court could admit such declaration against the principal by logically extending the res gestae exception as some courts have done[19] or possibly by invoking another limited exception to the hearsay rule.

In addition to the possible approach above, the court appears to have recognized an exception to the rule excluding an agent's post rem declaration. The plaintiff in *Jones v. Raney Chevrolet Co.*[20] was injured when the driver of the car in which he was riding lost control because of defective brakes. In a suit against the defendant car dealer who had recently sold this car to the driver, the plaintiff offered in evidence an unauthorized statement made by the defendant's foreman that he knew the brakes on this type of car were defective but had not changed them before the sale.[21] The court held the agent's statement admissible against the principal for the limited purpose of imputing knowledge of the defective brakes to him.[22] In contrast to the situation where a driver admits his conduct in allegedly causing a wreck, Justice Sharp argued that this distinction seemed illogical since, in both situations, the plaintiff is attempting to establish the principal's liability by such evidence.[23] Furthermore, in *Jones* the risk of the declaration being untrustworthy was far greater than in *Branch* since the declarant-foreman was not an active tort-feasor.[24] This distinction creates the additional problem of defining what is admissible for this limited purpose. For example, if in *Branch* the driver had also told the investigating officer that the truck had stalled on several occasions, would this have been admissible under the knowledge exception? It

[18] Justice Sharp made this statement of trustworthiness as a general argument for admitting an agent's declaration "as if" made by his principal. 265 N.C. at 764-65, 145 S.E.2d at 417.

[19] *E.g.*, Lucchesi v. Reynolds, 125 Wash. 352, 216 Pac. 12 (1923), where the court said, "[T]o argue from one case to another on this question of 'time to devise or contrive' is to trifle with principle and to cumber the records with unnecessary and unprofitable quibbles." *Id.* at 355, 216 Pac. at 13.

[20] 217 N.C. 693, 9 S.E.2d 395 (1940).

[21] *Id.* at 695, 9 S.E.2d at 396.

[22] *Ibid.*

[23] 265 N.C. at 765, 145 S.E.2d at 417.

[24] *Ibid.*

would seem that the court could extend this post rem exception to include a driver's post rem admission of conduct.

Apart from these alternatives for admitting a driver's extrajudicial declaration against his principal, the ultimate question arises: Is it necessary that evidence of an agent's negligence be admissible against his principal to impose liability upon him under respondeat superior? It is a well established rule of law that a principal is substantively responsible for the acts of his agent committed within the scope of his employment.[25] As Justice Parker argued in his dissenting opinion,[26] once the jury finds the tortfeasor's liability upon evidence competent against him and the agency relationship is established for that tortious act, the agent's liability is imputed to the principal by operation of law since "to hold otherwise would be to make a mockery of the law. . . ."[27] This approach is substantively correct, but it creates a dilemma where the principal is sued separately and the only evidence of his agent's negligence is incompetent against him. Had the plaintiff in *Branch* sued the owner without joining the driver as co-defendant, he could not have introduced the driver's admission of allegedly negligent conduct since the driver was not a party to the action.[28] Thus, recognizing that joinder was only a matter of convenience, a majority of the court refused to apply respondeat superior in the *Branch* situation.[29] Even though its rationale is plausible, the court enunciated a rule that undermines the entire concept of a principal's substantive responsibility for the negligent acts of his agent, since it is now possible for a principal to escape liability even though his agent has admitted and been held liable for his alleged negligent conduct.

Where there is other evidence of an agent's negligence in addition to his admission so that his principal cannot obtain a nonsuit, a problem arises as to the effectiveness of a trial judge's instruction to the jury on the issue of their respective liability. The judge will have to charge the jury that they must not consider the agent's admission in deciding the principal's liability so that they must find for the principal if the other evidence of the agent's negligence is insufficient in their minds to establish the agent's negligence. It

[25] 35 AM. JUR. *Master and Servant* § 543 (1941).
[26] 265 N.C. at 749, 145 S.E.2d at 406.
[27] *Id.* at 751, 145 S.E.2d at 407, where Justice Parker was quoting from Grayson v. Williams, 256 F.2d 61, 68 (10th Cir. 1958).
[28] 265 N.C. at 741-42, 145 S.E.2d at 401.
[29] *Ibid.*

is unrealistic to say that a jury will not give added weight to this other evidence of an agent's negligence in view of his admission. Thus, the practical effect of rendering an agent's statement inadmissible against his principal is insignificant where there is enough other evidence of negligence to get the issue of his principal's liability before the jury.

From an insurance standpoint, it may be immaterial in certain instances whether a principal is granted a nonsuit. In the *Branch* type situation involving motor vehicles, the ultimate result might well be the same as if the owner had been adjudged liable unless the verdict exceeds the policy's coverage, since the owner's motor vehicle liability insurance policy would have included the driver as an "insured" under its omnibus provision.[30] However, in other situations where a principal's insurance policy covers only his actions and those of his agents if he is legally liable,[31] an injured plaintiff would be relegated to seeking relief from a possibly uninsured agent if his principal obtained a nonsuit under the *Branch* rule. Thus, to provide adequate redress for a plaintiff injured by an agent in the scope of his employment, the court should reconsider its approach.

It appears that the North Carolina Supreme Court could have either admitted an agent's admission against his principal or applied the doctrine of respondeat superior without regard to the dilemma appearing in successive actions. Should the court continue its harsh approach, it is hoped that the legislature will provide appropriate relief by making an agent's statement to an investigating officer admissible against his principal.

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[30] The National Standard Policy contains the following provision:

> *Definition of Insured.* With respect to the insurance for bodily injury liability and for property damage liability the unqualified word 'insured' includes the named insured and also includes any person while using the [motor vehicle] . . . provided the actual use of the [motor vehicle] is by the named insured or with his permission. . . .

GREGORY & KALVEN, CASES AND MATERIALS ON TORTS 559 (1959). In North Carolina, all motor vehicle owners must carry minimum liability insurance coverage. N.C. GEN. STAT. § 20-309 (Supp. 1965). Even though there is no requirement that such policies contain an omnibus provision, most policies provide this encompassing provision.

[31] This is a general liability insurance policy carried by employers that covers almost all types of liabilities except those arising from motor vehicle operation. For a discussion of the various types of policies, see RIEGEL & MILLER, INSURANCE PRINCIPLES AND PRACTICES 669-726 (1959).