

No. 37327-1-II

COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON

FILED
COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY 
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RIZWANA RAHMAN,

Appellant,

v.

STATE OF WASHINGTON,

Respondent,

v.

MOHAMMAD SHAHIDUR RAHMAN, individually
and
MOHAMMAD SHAHIDUR RAHMAN and RIZWANA RAHMAN,
as a marital community,

Third Party Defendants.

REPLY BRIEF OF APPELLANT

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A. INTRODUCTION

The trial court erred by dismissing Rizwana Rahman's action against her husband's employer, the State of Washington.

Rizwana suffered serious injuries while her husband negligently performed his job. The State is vicariously liable for his acts as a matter of law.

Rizwana replies, with respect to the State's factual and legal allegations, as follows:

B. ARGUMENT

1. The State impermissibly presents new evidence.

In its restatement of the case, the State quotes its own policy regarding passengers in its motor vehicles. Br. of Resp't at 3 n.1. This is an attempt to present new evidence in violation of the Rules of Appellate Procedure. See, e.g., *Dep't of Labor & Indus. v. Lanier Brugh*, 135 Wn. App. 808, 822, 147 P.3d 588 (2006) (introducing new evidence in footnote to brief violates RAP 9.12¹).

¹ The special rule provides: "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12.

The Court should disregard the State's policy altogether because it is based on information not contained in the record before the trial court.

2. The State relies on authority that is contrary to Washington law.

a. *Restatement (Second) of Agency*

The States argues that Section 242 of the *Restatement (Second) of Agency* “specifically covers this case and precludes liability on the part of the state.” Br. of Resp't at 7. The State provides several examples where other provisions of the *Restatement*, which was published 50 years ago, have been recognized. Br. of Resp't at 8 n.2. *Section 242, however, has neither been cited nor adopted by Washington courts.*²

b. Decisions of Other Jurisdictions

The State also presents a series of cases from other jurisdictions, contending the decisions “are in accord with the result indicated by § 242.” Br. of Resp't at 8. Although some other courts may have applied the rule of Section 242 to cases before them, *Washington courts have not done so.*

² The State concedes that “[n]o Washington cases appear to have expressly adopted this section of the *Restatement*.” Br. of Resp't at 7.

c. Trespass Analysis

The State further asserts that trespass law, rather than agency principles, may be relied upon to support the trial court's decision. Br. of Resp't at 10-11. Again, the State offers only cases from foreign jurisdictions to support its proposition.

*No Washington case is identified wherein recovery from an employer for injuries caused to a third party by its employee's negligent driving has been determined on the basis of a trespass analysis.*³

In sum, the State has relied on a restatement provision that has not been cited or adopted by the courts of this state, and on decisions from other jurisdictions, to justify a ruling that is contrary to controlling law.

3. Washington cases presented by the State are distinguishable from this case.

On the basis of two 1917 Washington decisions, the State argues that employees who invite unauthorized passengers to ride in their employers' vehicles are not within the scope of their employment. Br. of Resp't at 5-6.

³ The case quoted by the State for Washington's law on trespass concerns a visitor to a city park who was injured when he struck his eye on a piece of playground equipment. *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 846 P.2d 522 (1993).

In the first case, *Gruber v. Cater Transfer Co.*, Mr. Gruber contracted with a transfer company to move trunks and household goods from his Spokane residence to a location several blocks away. The parties' contract did not specify that Gruber himself would be transported, and the truck used for the transfer "was in no sense a passenger carrying vehicle nor intended to be used as such." 96 Wash. 544, 545, 165 P. 491 (1917).

Gruber asked to accompany two employees, and he was allowed to sit on a small trunk positioned near the rear of the truck. While the truck was passing over a raised crossing in the roadway, Gruber was thrown or fell out, striking his head and shoulders.

The *Gruber* court concluded the transfer company could not be held liable for the passenger's injuries, stating: "Nothing could seem plainer than that the nature of the truck and the purpose for which it was being used would tell [Gruber] that [Cater Transfer] never contemplated persons other than its employés riding thereon." *Id.* at 547-48.

The second case, *McQueen v. People's Store Co.*, also concerns personal injuries. Two men, who were employed by a large Tacoma department store to deliver merchandise to its customers, encountered Myrtle McQueen and another female acquaintance while making deliveries. After engaging the men in

conversation, the young women sat down on the running board of the delivery truck. One employee then drove a short distance onto an unpaved street, and McQueen was injured when she either jumped or was thrown from the vehicle.

The *McQueen* court ruled that the department store was not liable for the passenger's injuries, stating that in inviting her to ride, the driver "was acting without any reference to the business in which he was employed." 97 Wash. 387, 390, 166 P. 626 (1917).

Both cases deal with injuries to plaintiffs who rode on parts of vehicles that were not designed to transport passengers. No such facts are presented here. Rizwana did not recklessly ride in the baggage area or on the running board of a moving vehicle. The case at issue is readily distinguishable.⁴

The State then cites more recent opinions for the proposition that Washington courts have consistently held "when an employee's actions are for his or her personal purpose, not for the benefit of the employer, the actions are outside the scope of employment." Br. of Resp't at 7.

⁴ The State's reference to *Bradley v. S.L. Savidge, Inc.*, 13 Wn.2d 28, 123 P.2d 780 (1942), is puzzling. Br. of Resp't at 6. The *Bradley* court concluded that when a person authorized to use the owner's car turns that car over to a third person, whom the owner does not know and has not authorized to operate the vehicle, liability is not imposed on the owner, under the doctrine of respondeat superior, for the third person's negligence. In the present case, there is no claim of negligence by a third person.

The earliest of these cases, *Kuehn v. White*, is a civil action brought to recover for injuries sustained when an employee truck driver used a metal pipe to attack a motorist during a roadside confrontation.⁵ The *Kuehn* court held that the truck driver's actions were not within the scope of his employment, and thus his employer was not liable. 24 Wn. App. 274, 600 P.2d 679 (1979).

The State discusses two additional cases – *Thompson v. Everett Clinic* and *Bratton v. Calkins*. Br. of Resp't at 6. The question posed by the *Thompson* case is whether a medical clinic can be held vicariously liable for a doctor's sexual contacts with his patients.⁶ The *Thompson* court reasoned that a tort committed by an agent "is not attributable to the principal if it emanated from a wholly personal motive of the agent and was done to gratify solely personal objectives or desires of the agent." 71 Wn. App. 548, 553, 860 P.2d 1054 (1993).

Similarly, in the *Bratton* case, a high school student and her parents sought to impose respondeat superior liability on a school district for a sexual relationship between the student and a teacher. The *Bratton* court held that the district is not vicariously liable for

⁵ The truck driver was convicted of assault. *Kuehn v. White*, 24 Wn. App. 274, 277, 600 P.2d 679 (1979).

⁶ The doctor was convicted of sexual assault. *Thompson v. Everett Clinic*, 71 Wn. App. 548, 550, 860 P.2d 1054 (1993).

the teacher's intentionally tortious acts. 73 Wn. App. 492, 502, 870 P.2d 981 (1994).

These cases correctly articulate Washington law: "Where the servant's intentionally tortious or criminal acts are not performed in furtherance of the master's business, the master will not be held liable as a matter of law." *Kuehn*, 24 Wn. App. at 278; *Thompson v. Everett Clinic*, 71 Wn. App. at 553; see also *Bratton v. Calkins*, 73 Wn. App. at 498.

This law, however, does not apply to the present case, where there is no evidence that Rizwana's injuries resulted from either intentionally tortious or criminal acts by her husband.⁷

4. Under Washington law, the State is vicariously liable for Rizwana's injuries.

The State asserts it is "the law in Washington that an employer is not liable for injury to an unauthorized passenger in a vehicle owned by the employer." Br. of Resp't at 4. This is fundamentally incorrect.

"Washington agency law has long held that a master cannot excuse himself when . . . an unauthorized act is done in conjunction with other acts which are within the scope of duties the employee is

⁷ The State admits that Rizwana's injuries "were, at most, the result of the negligence of her husband; there is not even a suggestion of possible wanton behavior." Br. of Resp't at 11.

instructed to perform.” *Thompson v. Everett Clinic*, 71 Wn. App. 548, 553, 860 P.2d 1054 (1993) (citing *Smith v. Leber*, 34 Wn.2d 611, 623, 209 P.2d 297, 303 (1949)).

“Under the *respondeat superior* doctrine, an employer may be liable for its employee’s negligence in causing injuries to third persons if the employee was within the ‘scope of employment’ at the time of the occurrence.” *Breedlove v. Stout*, 104 Wn. App. 67, 69, 14 P.3d 897 (2001) (quoting *Dickinson v. Edwards*, 105 Wn.2d 457, 466, 716 P.2d 814 (1986)).

The State faults Rizwana for relying on “general statements from cases discussing scope of employment in different settings.” Br. of Resp’t at 12. But the State’s own summary judgment motion rests on the assertion that the State is not liable for Rizwana’s injuries because Rahman’s use of a State vehicle to transport his wife was *outside the scope of his employment*. CP 49-50.

Whether Rahman was acting within the scope of his employment *at the time Rizwana was injured* is the determinative question.

An employee’s conduct is within the scope of his employment “if it is of the kind which he is authorized to perform, occurs substantially within the authorized limits of time and space, and is actuated, at least in part, by a desire to serve the master.”

Elder v. Cisco Constr. Co., 52 Wn.2d 241, 244, 324 P.2d 1082 (1958) (quoting Prosser, Torts (2d ed.) 352).

The State claims it was the act of permitting Rizwana to ride as a passenger that was outside the scope of her husband's employment. Br. of Resp't at 12. Even if this premise were accepted, Rahman was serving his employer *at the time of the accident*. He did not deviate from his assignment to drive to the business meeting in Spokane.

There is no published decision in Washington that is directly on point with the facts of this case. But the case of *Smith v. Leber*, 34 Wn.2d 611, 209 P.2d 297 (1949), is significant:

Leber claimed it was not liable for its employee's negligence in causing a vehicle accident because the employee was driving in a manner contrary to the employer's instructions.

The employee had first been directed to return a vehicle leased by Leber. But given his apparent intoxication, his foreman told him not to drive.

The employee drove the vehicle anyway. As a result of his collision with another vehicle, a third party was killed and another sustained serious injuries.

The *Leber* court held the employer liable for its employee's acts:

'The courts are generally agreed that an employer may be held accountable for the wrongful act of his employee committed while acting in his employer's business and within the scope of his employment, although he had no knowledge thereof, or had disapproved it, or even expressly forbidden it. Also, as a general rule, an employer is liable for acts of his employee within the scope of the latter's employment notwithstanding such acts are done in violation of rules, orders, or instructions of the employer.'

Id. at 623 (quoting 35 Am. Jur. 993 *Master and Servant* § 559).

Even though Rahman was prohibited from carrying unauthorized passengers, the State is vicariously liable for his acts.

The trial court's decision that the State is not liable for Rizwana's injuries is directly contrary to the rule in *Smith v. Leber*. Washington courts have not excluded motor vehicle cases from the general rule of respondeat superior.⁸ And the court cannot import a rule to afford such cases special treatment.

The trial court framed the issue here to be whether the State has a duty to Rizwana under the doctrine of respondeat superior. RP II at 5. It then failed to apply the controlling law. It is the court's duty to interpret the law – not to reinvent it.

⁸ The State criticizes Rizwana for citing four Washington cases "all of which involve injury to third persons and are all readily distinguishable." Br. of Resp't at 13. But the cited cases discuss employers' vicarious liability in the specific context of vehicle accidents. Even if the facts presented are not identical to those of the present case, the principles set out for determining liability when an employee's negligent operation of the employer's vehicle causes injury to a third person are directly applicable here.

Rizwana is entitled to the benefit of precedent: “Take away stare decisis, and what is left may have force, but it will not be law.” *State ex rel. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 666, 384 P.2d 833 (1963).

C. CONCLUSION

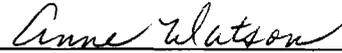
“Washington case law clearly indicates that an act done in violation of an express prohibition of the master can be within the scope of the servant’s employment ‘where such an act was done in conjunction with other acts which were within the scope of the duties an employee has been instructed to perform.’” *Pierson v. United States*, 527 F.2d 459, 464 (9th Cir. 1975) (quoting *Smith v. Leber*, 34 Wn.2d 611, 209 P.2d 297 (1949)).

Mohammad Rahman was performing his job functions, at the express direction of his employer, when the accident occurred. Under Washington law, the State is vicariously liable for his wife’s injuries.

The Court should reverse the trial court’s grant of summary judgment to the State and should remand this matter for entry of summary judgment on liability to Rizwana Rahman and for trial to determine her damages.

DATED this 25th day of August, 2008.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on August 25, 2008, I sent a true and correct copy of the Reply Brief of Appellant by first class mail, postage prepaid, to:

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Dated: August 25, 2008

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