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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

RIZWANA RAHMAN,

Plaintiff/Respondent,

vs.

STATE OF WASHINGTON,

Defendant/Petitioner.

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STATE OF WASHINGTON
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BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. These name changes were effective January 1, 2009.

WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of injured persons, including an interest in the proper application of the doctrine of respondeat superior/vicarious liability.

II. INTRODUCTION AND STATEMENT OF THE CASE

Rizwana Rahman brought this tort action against the State of Washington (State) for injuries sustained by her in a motor vehicle accident while a passenger in a State-owned vehicle driven by her husband, Mohammad Rahman, a State employee.¹ The fundamental question before the Court is whether the State is vicariously liable for any negligence of Mohammad in causing the accident on the basis that he was acting within the scope of employment at the time of the accident.

¹ For the sake of simplicity Rizwana Rahman is referred to in this brief by her first name, and her husband by his first name; no disrespect is intended.

The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Rahman v. State, 150 Wn.App. 345, 208 P.3d 566 (2009), *review granted*, 167 Wn.2d 1009 (2010); State Supp. Br. at 1-3; Rahman Supp. Br. at 1-2; State Pet. for Rev. at 2-4; Rahman Ans. to Pet for Rev. at 2-5; Rahman Br. at 2-7; State Br. at 2-3. For the purposes of this amicus curiae brief, the following facts are relevant: Mohammad worked for the State Department of Ecology (Department) in Olympia and was assigned to travel to Spokane to inspect a construction site. Mohammad drove to Spokane in a State-owned vehicle and, unbeknownst to the State, brought his wife along on the trip. At the time a Department policy prohibited unauthorized passengers not engaged in performing official State business. (The State Office of Financial Management had a similar prohibition.) While driving to Spokane Mohammad failed to negotiate a curve, resulting in the accident that injured Rizwana. Mohammad denied knowledge of the passenger prohibition at the time of the accident, although he had been directed to review agency policies on the Department internet website that apparently would have revealed the prohibition. See Rahman Br. at 3; State Br. at 2. After the accident, the Department issued Mohammad a reprimand for violating the passenger prohibition.

Rizwana brought this negligence action against the State, contending it is vicariously liable for the injuries she sustained in the accident. She moved for partial summary judgment on the issue of

vicarious liability. The State filed a cross-motion seeking dismissal of the action, contending that Mohammad's use of the vehicle under the circumstances was not within the scope of his employment. The superior court granted the State's motion, concluding it is not vicariously liable under the circumstances. Rizwana appealed to the Court of Appeals, Division II, which reversed. Rahman, 150 Wn.App. at 350-59. The court held that Mohammad's violation of the passenger prohibition did not absolve the State of vicarious liability when he was otherwise acting within the scope of his employment at the time of the accident. See id. at 356-57.

In reaching this result, the court rejected the State's argument that it should adopt and apply Restatement (Second) of Agency, §242 (1958), which relieves a master of liability for injuries to a person the servant improperly allows to enter or remain upon the master's premises or vehicle, even though the resulting harm occurs while the servant is otherwise within the scope of employment. See Rahman at 352. The Court concluded this Restatement provision had not been adopted in Washington, and is inconsistent with Washington case law. See id. In imposing vicarious liability, the Court of Appeals refused to consider the State's argument regarding the impact of the Ethics in Public Service Act, Ch. 42.52 RCW, on vicarious liability because this issue had not been timely raised; in dicta the court concluded the act was irrelevant in any event. See id. at 358-59 & n.7.

The State sought review by this Court, and its petition for review was granted.

III. ISSUES PRESENTED

- 1.) Does an employee's violation of an employer rule or policy absolve the employer of vicarious liability for the employee's negligent conduct which is otherwise within the scope of employment?
- 2.) To what extent, if any, is resolution of issue #1 impacted by the Ethics in Public Service Act, Ch. 42.52 RCW, when the vicarious liability issue involves a public employee?

IV. SUMMARY OF ARGUMENT

Under Washington common law, an employer is vicariously liable for an employee's negligent conduct within the scope of employment regardless of the employee's violation of an employer rule or policy, as long as there is a causal relationship or nexus between the conduct within the scope of employment and the resulting injury or damage. Under these circumstances, the violation of a rule or policy of the employer is considered incidental and irrelevant to the employer's vicarious liability. To the extent early Washington cases, including Fischer v. Columbia & Puget Sound R. Co., 52 Wash. 462, 100 Pac. 1005 (1909), Gruber v. Cater Transfer Co., 96 Wash. 544, 165 Pac. 491 (1917), and McQueen v. People's Store Co., 97 Wash. 387, 166 Pac. 626 (1917), hold otherwise, they should be disapproved.

The above rule applies to the State in accordance with RCW 4.92.090, because it is "liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation."

The State's argument here that it is not vicariously liable as a matter of public policy because Mohammad violated the Ethics in Public Service Act, should be rejected. This act outlines possible consequences for employee violations of the act, including disciplinary action, penalties, and civil remedies. However, no provision of the act effectively restores sovereign immunity for the State whenever an employee violates one of its provisions while otherwise acting within the scope of employment. Consequently, the State remains subject to vicarious liability to the same extent as a private employer.

V. ARGUMENT

A. **Under RCW 4.92.090 The State Is Vicariously Liable For Employee Torts Committed Within The Scope Of Employment To The Same Extent As A Private Employer, And Nothing In The Ethics In Public Service Act Dictates Otherwise.**

At common law, the State was not liable for the tortious conduct of its officers and employees. See generally Restatement (Second) of Torts, Ch. 45A Introductory cmt. at 392-95 (1979); see also id. at §895B cmt. a. The common law doctrine of sovereign immunity was in effect at the time the Washington Constitution was adopted, although the framers provided the Legislature with the power to declare the circumstances under which the State could be held civilly liable for its acts or omissions. See generally Haddenham v. State, 87 Wn.2d 145, 149, 550 P.2d (1976); Billings v. State, 27 Wash. 288, 293, 67 Pac. 583 (1902).

Article II §26 of the Washington Constitution provides: "The legislature shall direct by law, in what manner, and in what courts, suits

may be brought against the state.” In 1961, the Legislature exercised its power under Art. II §26 and waived sovereign immunity for the tortious conduct of its officers and employees. See Laws of 1961, Ch. 136 §1 (codified as RCW 4.92.090). As amended, RCW 4.92.090 now provides:

The state of Washington, whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct *to the same extent as if it were a private person or corporation.*

(Emphasis added.)² The Legislature has imposed some conditions upon imposition of tort liability on the State, most prominently a pre-suit notice of claim requirement. See RCW 4.92.100-.110. However, under the waiver of sovereign immunity, it is clear the State may be held vicariously liable for the tortious acts of its officers or employees. See e.g. Mason v. Bitton, 85 Wn.2d 321, 327, 534 P.2d 1360 (1975) (recognizing State potentially liable for trooper's negligence in conducting pursuit of traffic offender); Gilliam v. Dept. of Soc. & Health Servs., 89 Wn.App. 569, 584-85, 950 P.2d 20 (1998) (recognizing vicarious liability applies to state agency because its employee acted within scope of employment).

Of course, as in the private sector, in order for vicarious liability to be imposed against the State as employer a plaintiff must show that its employee was acting within the scope of employment at the time of his or

² A similar waiver of sovereign immunity was enacted in 1967 regarding political subdivisions, municipal corporations, and quasi-municipal corporations of the state, providing that these governmental entities "shall be liable for damages arising out of their tortious conduct, or the tortious conduct of their officers, agents, or employees to the same extent as if they were a private person or corporation[.]" Laws of 1967, Ch. 164 §1 (codified as amended at RCW 4.96.010(1)).

her tortious conduct. See generally David K. DeWolf & Keller W. Allen, 16 Wash Prac. §§3.2 & 14.3 (2006 ed. & 2009-10 supp.). This issue is addressed in §B, infra. However, the State additionally argues that, even if Mohammad were acting within the scope of employment at the time of the accident, vicarious liability should not be imposed because in transporting an unauthorized passenger Mohammad violated the Ethics in Public Service Act, Ch. 42.52 RCW. See State Supp. Br. at 4, 20-22. In particular, the State urges that Mohammad violated RCW 42.52.160(1), which provides:

No state officer or state employee may employ or use any person, money, or property under the officer's or employee's official control or direction, or in his or her official custody, for the private benefit or gain of the officer, employee, or another.

Assuming Mohammad's use of the State vehicle with Rizwana as a passenger violated RCW 42.52.160(1), this does not absolve the State of vicarious liability, when his conduct was otherwise within the scope of employment. A violation of this act may result in disciplinary action against an employee. See RCW 42.52.520. The State may recover through administrative proceedings "damages sustained by the state that are caused by the conduct constituting a violation." RCW 42.52.480(1). Civil penalties may be imposed for a violation of the act, and costs incurred as a result of the violation may be recovered from the offending employee. See id. However, no provision of this act restores sovereign immunity to the State by relieving it of vicarious liability when an employee's conduct violates a provision of the act. Absent such a

provision, the liability of the State, as with private employers, hinges upon whether the employee's conduct is within the scope of employment. This question is governed by the common law, and is addressed below.³

B. The State Is Vicariously Liable For Mohammad's Negligent Driving Within The Scope Of Employment, Regardless Of His Violation Of State Policies Prohibiting Unauthorized Passengers.

An employer is vicariously liable for torts committed by an employee within the scope of employment. See Robel v. Roundup Corp., 148 Wn.2d 35, 52-53, 59 P.3d 611 (2002) (relying on 3-Justice lead opinion in Dickinson v. Edwards, 105 Wn.2d 457, 469, 716 P.2d 814 (1986)). The test for determining whether an employee is acting within the scope of employment is:

whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, *or* by specific direction of his employer; *or*, as sometimes stated, *whether he was engaged at the time in the furtherance of the employer's interest.*

Dickinson, 105 Wn.2d at 467 (lead opinion quoting Elder v. Cisco Constr. Co., 52 Wn.2d 241, 245, 324 P.2d 1082 (1958)). In following this test, the Court has “emphasized the importance of the benefit to the employer in the determination of the scope of employment.” Id. If the employee’s conduct is for the sole benefit of the employer, then the employer is

³ There are instances where the Legislature has provided an immunity to the State for certain conduct. See e.g. RCW 4.92.175 (relieving State of liability for tortious conduct of off-duty state patrol officers); RCW 46.44.020 (relieving State and other governmental entities of liability by reason of any damage or injury due to the existence of a structure over a public highway with vertical clearance of 14 feet or more); RCW 9.94A.843 (providing conditional immunity to State for release of information regarding sex offenders).

vicariously liable. See id. If the employee's conduct is solely for his or her own benefit, then the employer is not vicariously liable. See McNew v. Puget Sound Pulp & Timber Co., 37 Wn.2d 495, 224 P.2d 627 (1950) (holding no vicarious liability for negligent driving where employee's weekend trip home was "wholly unrelated" to employer's business); Roletto v. Department Stores Garage Co., 30 Wn.2d 439, 443, 191 P.2d 875 (1948) (stating "[i]f the servant steps aside from his master's business for some purpose wholly disconnected with his employment, the relation of master and servant is suspended," and concluding employee's negligent driving occurred after he completed his work day); Footte v. Grant, 55 Wn.2d 797, 803, 350 P.2d 870 (1960) (involving deviation or detour by agent, and holding no vicarious liability because he was not furthering his principal's interest "in any way" when negligent driving occurred).

If, as often happens, the employee's conduct involves a mixture of benefit *both* for the employee *and* for the employer, then the employer is vicariously liable as long as there is some causal relationship or nexus between the conduct that benefits the employer and the conduct for which liability is imposed:

The general trend of authority is in the direction of holding that, where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business the employee was actually engaged in when a third person was injured, and the employer will be held responsible unless it clearly appears that the employee could not have been directly or indirectly serving his employer; also *the fact that the predominant motive of the employee is to benefit himself does not prevent the act from being within the course or scope of*

employment, and if the purpose of serving the employer's business actuates the employee to any appreciable extent, the employer is subject to liability if the act otherwise is within the service.

McNew, 37 Wn.2d at 497-98 (emphasis added). Under this “any appreciable extent” standard, the employer is vicariously liable even if the employee’s “predominant motive” is to benefit his or her self-interest because the employee is nonetheless acting within the scope of employment. See Poundstone v. Whitney, 189 Wash. 494, 500, 65 P.2d 1261 (1937) (imposing vicarious liability where the employee’s negligent driving “was merely incidental to the acts he was authorized to perform which would indirectly contribute to the furtherance of the business”).

In the same context presented by Rahman’s case against the State, i.e., vicarious liability for an employee’s negligent driving, this Court has explained:

If the work of the employee creates the necessity for travel, he may be in the course of his employment though he is serving at the same time some purpose of his own; but if the work for the employer had no part in creating the necessity for travel, and the journey would have been made though no business was transacted for the employer, or would not have been made if the private purpose was abandoned, the journey may be regarded as personal and there would be no employer liability.

McNew at 499. Under the facts of McNew, the victims of the employee’s negligence sought to impose vicarious liability on the employer on grounds that the employee was carrying supplies for the employer’s business at the time of the accident. However, the employee was traveling to visit his family and would have made the journey whether or not he

intended to purchase supplies for his employer's benefit. See id. The accident did not occur while he was on his way to or from purchasing supplies, leading the Court to conclude that the accident was "wholly unrelated to the purchase and transportation of the supplies." See id. The fact that the supplies were in the employee's automobile was "merely incidental and contributed in no way to the accident." See id.

While application of the legal analysis set forth in McNew resulted in a finding of no vicarious liability as a matter of law under the facts of that case, the same legal analysis supports a finding of vicarious liability in this case. Unlike McNew, Mohammad's work created the necessity for travel, as appears to be conceded by the State. He was directed by his supervisor to drive from Olympia to Spokane on official State business. He was given a State vehicle in order to make the trip. The briefing of the parties does not suggest he would have made the trip on his own, nor that he deviated or detoured from the assigned route for any personal reason. The accident occurred en route to Spokane, and Rizwana's injuries resulted therefrom. Accordingly, the State should be vicariously liable for Mohammad's negligent driving because it occurred while he was driving within the scope of employment. See Rahman, 150 Wn.App. at 351-57.

Nonetheless, the State argues that it is relieved of vicarious liability for injuries suffered by Rizwana, who happened to be a passenger in the vehicle driven by her husband, in light of State policies prohibiting unauthorized passengers. As an initial matter, it is worth noting that an

employee's violation of a work rule principally involves the relationship between employee and employer inter se. Thus, the State disciplined Mohammad by issuing a reprimand letter to him for letting his wife ride along on the trip from Olympia to Spokane. However, this does not mean that the State can seize upon the violation of its policies to avoid vicarious liability for Mohammad's negligent driving.

An employee's violation of a work rule relates to the analysis of vicarious liability, if at all, only insofar as it may serve as evidence that the employee's conduct is for his or her own benefit. It should not otherwise play a role in the vicarious liability analysis, as there is no freestanding exception to vicarious liability based upon violation of a work rule. To the contrary, in Smith v. Leber, 34 Wn.2d 611, 623, 209 P.2d 297 (1949), the Court held an employer vicariously liable for injuries caused by an employee's drunk driving, despite the employer's verbal order not to drive while in that condition.⁴ See also Poundstone, 189 Wash. at 500 (stating "[t]he fact that [the employee] was performing an unauthorized act does not defeat" the vicarious liability of the employer); Pierson v. United States, 527 F.2d 459, 464 (9th Cir. 1975) (stating "Washington case law clearly indicates that an act done in violation of an express prohibition of

⁴ The fact that the order not to drive drunk was given in the first place supported an inference that the employee was within the scope of employment when he was driving. See Smith, 34 Wn.2d at 624-25.

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''; quoting Smith). If the rule were otherwise, all employers would be able to immunize themselves from vicarious liability for employee negligence — even if an employee's conduct were for the sole benefit of the employer — simply by adopting a work rule requiring due care. See Poundstone at 501.

In making its argument that Mohammad was acting outside the scope of employment, the State focuses on his ultra vires invitation to his wife to ride along with him. However, the invitation is not the conduct for which Rizwana seeks to impose vicarious liability on the State. Instead, she seeks to impose vicarious liability for her husband's negligent driving during the trip. The proper focus of the vicarious liability analysis should be on the conduct for which liability is imposed. See Dickinson at 468-69 (stating "[t]he employer is, therefore, vicariously liable under *respondeat superior* on the ground that the proximate cause of the accident occurred while the employee was acting within the scope of his employment"; lead opinion)⁵; Roletto, 30 Wn.2d at 442 (noting "it is necessary to show that

⁵ The dissent in Dickinson disagreed that the proximate cause of the employee's motor vehicle accident that was the basis for the plaintiff's personal injury claim occurred within the scope of employment. See 105 Wn.2d at 491-92 (Durham, J., dissenting). However, in so doing, the dissent properly recognized that there must be a causal relationship or nexus between the act for which vicarious liability is imposed and the employer's interest. See id. (stating "[a]lthough we have used different wording to articulate when an employee is within the scope of employment, we have always required that a nexus exist between the employee's activity and the employer's interest before we imposed vicarious liability on an employer").

the relation of master and servant exists between the person at fault and the one sought to be charged for the result of a wrong; and the relation must exist at the time, and in respect to the particular transaction out of which the injury arises”); Foote, 55 Wn.2d at 800 (finding no vicarious liability because “[t]he principle of respondeat superior was not applicable at the time and place of collision”).

Because there is a causal relationship or nexus between the State’s interest and Mohammad’s negligent driving en route to Spokane, the State is vicariously liable for Rizwana’s injuries. Given this causal relationship, the fact that Mohammad’s invitation to his wife violated State policies does not absolve the State of vicarious liability.⁶

This is the same result that would obtain if Mohammad had injured a non-passenger third party as a result of his negligent driving. See Smith, 34 Wn.2d at 611; Poundstone, 189 Wash. at 494. There is no sound reason for treating a passenger differently than a non-passenger when it comes to vicarious liability. Passengers are well within the range of parties foreseeably injured by negligent driving.⁷

Nor is it counter-intuitive to refuse to absolve an employer from vicarious liability based upon an employee’s violation of a directive or

⁶ The fact that Rizwana was present in the vehicle because she accepted her husband’s unauthorized invitation should be considered a mere fortuity, lacking any causal connection to her injury. Cf. Channel v. Mills, 77 Wn.App. 268, 273-79, 890 P.2d 535 (1995) (holding alleged excessive speed which merely places two vehicles at the same place at the same time is not itself sufficient to constitute a proximate cause of collision).

⁷ Note that in Foote the employee violated his employer’s policy against unauthorized passengers, and it may have been the unauthorized passenger who was driving the vehicle at the time of the collision, yet this fact played no role in the Court’s vicarious liability analysis. See 55 Wn.2d at 798-99.

policy. The employer is in the best position to educate employees on its policies and to provide strong disincentives for noncompliance. Here, the State had the opportunity to provide training, and did in fact provide such training to Mohammad, although it arguably did little to ensure that he was actually aware of the policy related to the transport of passengers. After the fact, the State disciplined Mohammad for his violation of the policy, issuing a letter of reprimand to him. This control on the part of the employer, with respect to the manner, means and ultimate ends of employment, is the rationale and justification for imposing vicarious liability. See McNew at 498-99 (referring to control as basis for vicarious liability).⁸

Understandably, the State points to three older decisions of this Court, which appear to be at odds with the foregoing analysis, Fischer v. Columbia & P.S.R. Co., 52 Wash. 462, 100 Pac. 1005 (1909), Gruber v. Cater Transfer Co., 96 Wash. 544, 165 Pac. 491 (1917), and McQueen v. People's Store Co., 97 Wash. 387, 166 Pac. 626 (1917). See State Br. at 5-6; State Pet. For Rev. at 5-11; State Supp. Br. at 5-9. To the extent the reasoning in these cases is inconsistent with this Court's more recent pronouncements on vicarious liability discussed above, they should be disapproved.

⁸ See also Restatement (Second) of Agency § 219 cmt. a (1958) ("The conception of the master's liability to third persons appears to be an outgrowth of the idea that within the time of service, the master can exercise control over the physical activities of the servant. From this, the idea of responsibility for the harm done by the servant's activities followed naturally. The assumption of control is a usual basis for imposing tort liability when the thing controlled causes harm"). This Restatement section has been cited with approval by the Court in Stocker v. Shell Oil Co., 105 Wn.2d 546, 548, 716 P.2d 306 (1986).

In Fischer, the plaintiff received permission to ride on the engine of a freight train, and was injured when the train left the tracks. See 52 Wash. at 462-63. He sued the railroad for negligence, and in response the railroad alleged that the plaintiff was contributorily negligent and assumed the risk of injury. See id. at 463. The railroad also alleged that the engineer had no authority to permit plaintiff to ride on the engine, and that he was therefore a trespasser to whom was owed nothing more than a duty to avoid willful and wanton injury. See id. The Court appears to have accepted both of the railroad's arguments. See e.g. id. at 466 (stating "[t]he structure and use of an engine are such as to give notice to all persons of ordinary intelligence that it is not designed for the carrying of passengers"); id. at 471 (stating "that the engineer in inviting the appellant to get onto the engine did not act within the real or apparent scope of his authority"). With respect to both arguments, the Court focused on the invitation, collapsing the analysis regarding the engineer's lack of authority to extend the invitation, with the plaintiff's contributory negligence or assumption of risk in accepting it. See id. at 467-71. Cases from other jurisdictions on which the Court relied focused on the status of the plaintiff as "trespasser" and the choice to assume a dangerous risk voluntarily. See id. at 469-71. The Court does not appear to have engaged in any consideration of whether the operation of the train causing the plaintiff's injury was for the railroad's benefit.

Next, in Gruber the plaintiff obtained permission to ride in the back of a moving truck carrying his belongings, and was thrown out of the truck when it passed over a raised crossing. See 96 Wash. at 544-46. He sued the moving company for the conduct of its employee. See id. at 546. In deciding for the moving company, the Court first noted “the proper disposition of this case is controlled by our disposition in Fischer.” See Gruber at 546. Mixing the analysis of trespass, apparent authority, and contributory negligence/assumption of risk, the Court again seems to have focused on the invitation rather than the operation of the truck causing injury. Also, as in Fischer, the Court does not appear to have considered the benefit, or lack thereof, to the employer in its vicarious liability analysis.

Finally, in McQueen the plaintiff and another girl were offered a ride on the running board of a moving truck, and the plaintiff either jumped or was thrown off of the running board when the truck left the pavement. See 97 Wash. at 387-88. She sued the moving company, and in response the moving company alleged both that the driver was acting outside the scope of employment when he invited the plaintiff to ride on the running board, and that the plaintiff was contributorily negligent in accepting the invitation. See id. at 388. Relying in part on Gruber, the Court held that “[i]n inviting the girls to ride upon the truck [the driver] was engaged in furthering his own pleasure, and not in furthering his master’s business In inviting these girls to ride with him he was neither

doing it as a means nor for the purpose of performing the work.” Id. at 390. While the Court focused on the invitation rather than the negligent operation of the vehicle, the facts of McQueen as portrayed by the Court appear to be entirely consistent with the rule that an employer is not vicariously liable for acts performed solely for the employee’s own benefit, i.e., a frolic or detour. See supra at 9.

The Ninth Circuit has characterized all three of these cases as involving “instances in which plaintiff was invited by an employee of defendant to ride on a part of a vehicle plainly and obviously not designed to transport passengers.” Pierson, 527 F.2d at 463 n.2 (noting “[t]he Washington Supreme Court, without using the label, dealt with the cases in terms of the plaintiff assuming the risk of riding in an obviously unsafe place”). This characterization has the virtue of harmonizing the facts, if not the reasoning, of Fischer, Gruber, and McQueen with the more modern approach to scope of employment cases.⁹

The State did not cite Fischer in the Court of Appeals below, and presumably for that reason, the court did not address the case. The Court of Appeals distinguished Gruber, at least in part, on the same terms as the Ninth Circuit. See Rahman, 150 Wn.App. at 353 (stating “the vehicle at issue was obviously not meant to accommodate passengers in its cargo area”). The Court of Appeals harmonized McQueen on grounds that it was

⁹ However, with respect to McQueen, the Court expressly declined to address the issue of contributory negligence. See 97 Wash. at 390.

a solely-for-the-benefit-of-the-employee-type of case. See id. at 354-55 & n.4.

The Court's focus on the employee's invitation in Fischer, Gruber and McQueen can be explained in part by the fact that the plaintiffs in each of these cases were perceived either as being contributorily negligent or as having assumed the risk involved, both complete defenses at the time. Issues of contributory negligence and assumption of risk should be separate inquiries, independent of vicarious liability.

The focus on the employee's invitation can also be explained in part by the trespass flavor of Fischer, which may have influenced Gruber if not McQueen, even though it is not expressly carried forward. The duty of an owner or possessor of property should also be a separate and independent inquiry from vicarious liability.¹⁰

In any event, to the extent Fischer, Gruber and McQueen focus on the employees' invitation in their vicarious liability analyses, rather than

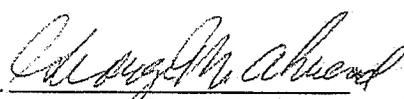
¹⁰ The Restatement (Second) of Agency § 242, which the State urges the Court to adopt in this case, is similarly grounded in notions of trespass. See Restatement (Second) of Agency §242 cmt. a. The Restatement specifically notes a division of authority on this issue, and recognizes that "[i]n some states the master is liable for his servant's negligence." See id. cmt. c; see also id. Reporter's Notes (stating "[t]he cases with reference to the situations dealt with in this section are in conflict; in some, the basis of decision is not clear"). The State acknowledges that the second Restatement has been "superseded" by the third. See State Supp. Br. at 19-20 & n.9. It argues that the newer version merely consolidates the treatment of certain topics, presumably including § 242, and did not intend any substantive change. See id. at 20 n.9. However, the specific provision on which the State relies has not been carried forward, and the third Restatement is likewise devoid of the trespass rationale on which it is based. See Restatement (Third) of Agency § 7.07 (2006); see also id. Reporter's Note a (omitting mention of Restatement (Second) of Agency § 242 in its "consolidated treatment"). Consistent with the Court of Appeals below and this brief, the third Restatement states the rule that "[i]n general, travel required to perform work, such as travel from an employer's office to a job site or from one job site to another, is within the scope of an employee's employment[.]" See id.

the employees' negligent conduct, the reasoning of these cases should be disapproved. Under this Court's more recent cases, the focus of the vicarious liability analysis should be on the negligent conduct because that is the basis on which liability is imposed.

VI. CONCLUSION

The Court should adopt the arguments advanced in this brief, and resolve this appeal accordingly.

DATED this 19th day of April, 2010.


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with authority

On behalf of WSAJ Foundation

*Brief transmitted for filing by email; signed original retained by counsel.