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**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

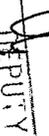
RIZWANA RAHMAN,

Appellant,

v.

STATE OF WASHINGTON

Respondent

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DIVISION II
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STATE OF WASHINGTON
BY  DEPUTY

v.

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

Third Party Defendants

BRIEF OF RESPONDENT

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I. INTRODUCTION

The State of Washington and its Department of Ecology both have specific policies that forbid employees from carrying unauthorized passengers in state vehicles. Mohammad Rahman, in violation of these policies, allowed his wife, Rizwana, to ride along in a state car while he was on a business trip to Spokane. She was injured when the state vehicle he was driving went off the road. She sued the state claiming it was vicariously liable for her injuries. The superior court dismissed her claim on summary judgment determining as a matter of law that an employee is not acting within the scope of his employment when he allows an unauthorized passenger to ride in his employer's vehicle. This comports with Washington law, the *Restatement (Second) of Agency*, and the case law of the vast majority of other jurisdictions that have considered this issue.

II. RESTATEMENT OF THE ISSUE

Is an employer vicariously liable for injuries to a passenger in the employer's vehicle when the employee was specifically prohibited from carrying passengers and had no authority to allow the passenger to ride in the employer's vehicle?

III. RESTATEMENT OF THE CASE

Mohammad Rahman was employed by the Department of Ecology as a temporary employee for three months from June 1 to August 31, 2005. CP at 164. When he began his employment, he was given a new employee orientation by Jennifer McCaslin, the administrative assistant of Mr. Rahman's supervisor, Douglas Johnson. CP at 147-48. As part of this orientation, Ms. McCaslin went over the New Employee Orientation Checklist with Mr. Rahman. CP at 148, 151. This checklist includes the use of state vehicles. CP at 151. Mr. Rahman signed this checklist. CP at 151, 167. Mr. Rahman provided a copy of his license and signed the authorization form for use of state vehicles. CP at 148. He was directed to review the agency policies available on the Department intranet. CP at 148.

Department of Ecology Policy 11-10 covers the operation of Ecology vehicles. CP at 155-57. It provides: "Ecology vehicles are not to be used for personal trips unrelated to the state business for which they were assigned, nor to transport passengers that are not on official state business." CP at 155.

In addition to the Department's own policy, the State of Washington has a policy that covers all executive, judicial, and legislative employees of the State. CP at 176. Every state employee must comply

with these policies. CP at 176. Mr. Rahman's actions were expressly forbidden by these policies.¹ He did not request authorization from his supervisor and would not have been given authorization if he had asked. CP at 187.

In spite of this, Mr. Rahman took his wife with him on an official state business trip. CP at 166. He did so without asking permission and in spite of the fact he was not sure it was a good idea to take her. CP at 166, 170-71. His wife was injured when the state vehicle Mr. Rahman was driving left the road. Following the accident he received a letter of reprimand from his supervisor for taking an unauthorized passenger in a state vehicle. CP at 174.

IV. LAW AND ARGUMENT

A. Standard Of Review

An appellate court reviews *de novo* a summary judgment, engaging in the same inquiry as the trial court. *Chen v. State*, 86 Wn. App. 183, 187, 937 P.2d 612 (1990).

¹ See State Administrative and Accounting Manual (SAAM) Ch. 12.30.20.a., available online at <http://www.ofm.wa.gov/policy/default.asp>:

When a state-owned or leased motor vehicle is being operated, any person exercising control over and/or operating the vehicle is expressly prohibited from engaging in the transportation of unauthorized passengers. Unauthorized passengers are those passengers not engaged in performing official state business and/or not specifically authorized by the agency head or authorized designee. Unauthorized passengers can include, but are not limited to, family members, relatives, friends, and pets.

This court may affirm the trial court's decision if there is any basis in the record for sustaining it, regardless of whether the trial court relied on that basis. *Gross v. City of Lynnwood*, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978).

B. Summary Of Argument

It has long been the law in Washington that an employer is not liable for injury to an unauthorized passenger in a vehicle owned by the employer. The *Restatement (Second) of Agency* states the accepted rule that employers are not vicariously liable for injuries to unauthorized passengers. Washington courts have repeatedly relied upon and adopted sections of the *Restatement (Second) of Agency*. The vast majority of other jurisdictions that have considered the question have also concluded that an employer is not liable for injuries to an unauthorized passenger.

C. Argument

1. Under Washington Law An Employer Is Not Liable For Injury To Unauthorized Passengers

An employer is only responsible under the doctrine of *respondeat superior* for the acts of its employee when the employee "acts within the scope of his or her employment and in furtherance of the master's business. Where a servant steps aside from the master's business in order

to effect some purpose of his own, the master is not liable.” *Kuehn v. White*, 24 Wn. App. 274, 277, 600 P.2d 679 (1979) (citations omitted).

An employee who, without authority, invites a passenger to ride in their employer’s vehicle is not within the scope of their employment. This has been the law in Washington since at least 1917. In *Gruber v. Cater Transp. Co.*, 96 Wash. 544, 165 P. 491 (1917), the employer, Cater Transport, was a business engaged in the transport of goods “using both automobile and horse-drawn trucks in its business.” *Id.* at 541. Mr. Gruber hired Cater Transport to move his household goods. He was allowed by Cater’s driver to ride on the cargo and was injured when he and the trunk he was sitting on were ejected when the truck hit a bump in the road. The court held that the driver was without authority to allow Mr. Gruber to ride with the cargo and therefore found in favor of Cater Transport. *Id.* at 549-50.

In *McQueen v. People’s Store Co.*, 97 Wash. 387, 166 P. 626 (1917), the court reached the same result in considering the case of a delivery driver, a Mr. Buhre, who chose to give some “young ladies” a ride on the running board of his employer’s vehicle. Myrtle McQueen was injured when she either fell or jumped off the vehicle as it was moving. *Id.* at 387. The court held that the employee was not within the scope of his employment and his employer was not liable. “In inviting the

girls to ride upon the truck Buhre was engaged in furthering his own pleasure, and not in furthering his master's business." *Id.* at 390. In both these cases, the employees appear to be otherwise engaged in performing their jobs. *See also Bradley v. S.L. Savage, Inc.*, 13 Wn.2d 28, 123 P.2d 780 (1942).

Presumably because the issue is well established, there appear to be no more recent cases in Washington on the question of liability to unauthorized passengers. However, more current case law, considering different settings, continues to support the older decisions. In two cases discussing vicarious liability for sexual assault, *Bratton v. Calkins*, 73 Wn. App. 492, 870 P.2d 981 (1994), and *Thompson v. Everett Clinic*, 71 Wash. App. 548, 860 P.2d 1054 (1993), the court considered vicarious liability for the actions of employees while at work. *Bratton* involved a teacher. *Thompson* involved a doctor.

In both cases, even though the conduct complained of occurred at the workplace during the employees' hours of work, the court held definitively that their actions were outside of the scope of employment. "If the servant 'steps aside from the master's business in order to effect some purpose of his own, the master is not liable.'" *Thompson*, 71 Wash. App. at 551 (quoting *Kuehn v. White*, 24 Wn. App. at 277). The *Kuehn* case also involved an employee, a truck driver, who while driving his

employer's truck became angry at a fellow motorist and assaulted him. In that case, too, the court found that White was not acting within the scope of his employment. *Kuehn*, 24 Wn. App. at 281.

The case law, in Washington, consistently has held that when an employee's actions are for his or her personal purpose, not for the benefit of the employer, the actions are outside of the scope of employment. This case is such a case.

2. The Restatement Outlines The Rule That There Is No Vicarious Liability For Unauthorized Passengers

The provisions of *Restatement (Second) of Agency* § 242 (1958) specifically covers this case and precludes liability on the part of the state. Section 242 provides:

A master is not subject to liability for the conduct of a servant towards a person harmed as the result of accepting or soliciting from the servant an invitation, not binding upon the master, to enter or remain upon the master's premises or vehicle, although the conduct which immediately causes the harm is within the scope of the servant's employment.

No Washington cases appear to have expressly adopted this section of the *Restatement*. However, the rule is in accord with the early Washington decisions in *McQueen* and *Gruber*. The *Restatement*

(*Second*) of Agency is considered authoritative and has been relied on in numerous cases by Washington courts.²

3. As In Washington, Other Jurisdictions Do Not Allow Recovery Against The Employer By Unauthorized Passengers

Like Washington, most cases from other jurisdictions discussing this question are older and predate the *Restatement (Second) of Agency* § 242. The decisions however are in accord with the result indicated by § 242, some relying on the first *Restatement*.

It appears that the majority of other jurisdictions that have considered the *Restatement (Second)* have accepted its rule. While most of the case law is older, relatively recent cases cite—and are in accord with—§ 242 of the *Restatement*. In *Shannon v. Pac. Rail Servs.*, 70 F. Supp. 2d 1243 (D. Kan. 1999), the court applying Kansas law, dismissed the claim of a visitor to the rail yard who was killed when she exited a truck the employee was driving. The court found, as in the present case, that the invitee was there on purely personal business and the employee

² The court, in *Dickinson v. Edwards*, 105 Wn.2d 457, 716 P.2d 814 (1986), relied upon *Restatement (Second) of Agency* § 230 (1958), part of the same chapter as § 242, in discussing liability for an intoxicated employee. See also *Rho Co., Inc. v. Dep't of Rev.*, 113 Wn.2d 561, 782 P.2d 986 (1989) (citing *Restatement (Second) of Agency* § 328 (1958)). Washington cases that rely on and cite the *Restatement (Second) of Agency* are almost too many to cite, but also include the following: *Fardig v. Reynolds*, 55 Wn.2d 540, 544, 348 P.2d 661 (1960) (*Restatement of Agency (Second)* §§ 2, 220, 250-51); *Passovoy v. Nordstrom, Inc.*, 52 Wn. App. 166, 169, 758 P.2d 524 (1988), review denied, 112 Wn.2d 1001 (1989) (*Restatement of Agency (Second)* § 286 (1958)); *Aungst v. Roberts Const. Co., Inc.*, 95 Wn.2d 439, 625 P.2d 167 (1981) (*Restatement (Second) of Agency* § 320 (1958)). *Restatement (Second) of Agency* § 347 (1958).

was not authorized to make the invitation. *See also Hall v. Atchison, T&SF Ry. Co.*, 349 F. Supp. 326, 329 (D. Kan. 1972) (employee who offered ride to unauthorized passenger outside the scope of employment).

In *Reisch v. M&D Terminals Inc.*, 180 Ariz. 356, 884 P. 2d 242, 244 (1994), the court, citing § 242 of the *Restatement*, similarly held that the wife of a truck driver who accepted a ride from her husband who was prohibited from carrying unauthorized passengers, had no claim against her husband's employer. *See also Klatt v. Commonwealth Edison Co.*, 33 Ill.2d 481, 211 N.E.2d 720, 728-29 (1965) (company that had specific policy prohibiting passengers not liable for death of daughter who was passenger in vehicle driven by father).

The older cases reach the same result. In *Christie v. Mitchell*, 93 W. Va. 200, 116 S.E. 715 (1923), a child was killed after accepting a ride in a truck hauling concrete. Passengers were forbidden by the employer.

The court said:

The general rule, according to the great weight of authority, including our own decisions, is that a master is not liable for personal injuries sustained by one invited to ride on a vehicle by his servant in charge of it without actual or ostensible authority to do so, and where not acting within the scope of his duties.

*Id.*³

Another child was injured while riding on a coal truck in *Braselton v. Brazell*, 49 Ga. App. 269, 175 S.E. 254 (1934). “The driver of a motor-vehicle, in the absence of express or implied authority from the owner to permit third persons to ride therein, is ordinarily held to be acting outside the scope of his employment in permitting them to do so. . . .” *Id.* at 255 (quoting *S. Cotton Oil Co. v. Pierce*, 145 Ga. 130, 132, 88 S.E. 672 (1929)). Cases from other jurisdictions are in accord.⁴

4. The Washington Rule On Trespass Would Mandate the Same Result Reached By The Trial Court

Washington’s law regarding trespass supports the trial court’s decision in this case.⁵ A number of other jurisdictions have relied, not on agency, but jurisprudence regarding trespass law in denying recovery to unauthorized passengers. In *Home Stores, Inc. v. Parker*, 179 Tenn. 372, 166 S.W.2d 619 (1942), the court found:

³ The *Christie* court relied on case law from New York, Massachusetts, Virginia, Arkansas, North Carolina, New Jersey, Illinois, and Michigan. *Christie v. Mitchell*, 93 W. Va. 200, 204, 116 S.E. 715, 717 (1923).

⁴ E.g., *Dempsey v. Test*, 98 Ind. App. 533, 184 N.E. 909 (1933); *Ruiz v. Clancy*, 182 La. 935, 162 So. 734 (1935); *White v. Brainerd Serv. Motor Co.*, 181 Minn. 366, 232 N.W. 626 (1930); *Erickson v. Foley*, 65 N.D. 737, 262 N.W. 177 (1935); *Gunn v. Coca-Cola Bottling Co.*, 154 Neb. 150, 47 N.W.2d 397 (1951); *Armstrong’s Adm’r v. Sumne & Ratterman Co.*, 211 Ky. 750, 278 S.W. 111 (1925).

⁵ The trial court did not rely upon the State’s argument below based upon trespass (CP at 141), but this court may affirm the granting of a summary judgment based upon any argument properly made below. See *Redding v. Virginia Mason Med. Ctr.* 75 Wn. App. 424, 426, 878 P.2d 483 (1994).

“The uncontroverted evidence is that the plaintiff was the guest of the driver of the truck and that the driver had no authority or permission to permit riders on the truck. He was therefore a trespasser as to the defendant Homes Stores, Inc., and it was liable to him only for injuries caused by the wanton, willful, or reckless negligence of the truck driver.”

Id. at 621 (citing 5 Blashfield, [Cyclopedia of Automobiles Law and Practice], Perm. Ed., §§ 3016, 3017). A similar result was reached by the Wisconsin courts. *See Hartman v. Badger Tobacco Co.*, 210 Wis. 519, 246 N.W. 577 (1933).

Washington’s law on trespass is set out in *Van Dinter v. City of Kennewick*, 121 Wn.2d 38, 41 P.2d 846 P.2d 522 (1993): “A landowner generally owes trespassers and licensees the duty to refrain from wilfully or wantonly injuring them, whereas to invitees the landowner owes an affirmative duty to use ordinary care to keep the premises in a reasonably safe condition.” Ms. Rahman’s injuries were, at most, the result of the negligence of her husband; there is not even a suggestion of possible wanton behavior. Even if the court rejects the well settled rule on agency, the State was entitled to summary judgment on this ground.

5. Ms. Rahman Has Offered No Controlling or Persuasive Authority On The Specific Issue In This Case

Ms. Rahman has cited no case in Washington or from any jurisdiction that holds an employer vicariously liable for injuries to an

unauthorized passenger. Instead, she relies on general statements from cases discussing scope of employment in different settings and apparently on the argument that because her husband was headed toward Spokane at the time of accident he was benefitting his employer, making the state liable. This argument ignores the fact that it was the act of permitting his wife to ride as a passenger in the state vehicle that was outside the scope of Mr. Rahman's employment and benefitted no one but the Rahmans.

The cases that Ms. Rahman does cite are all readily distinguishable from the particulars of this case. She cites *Greene v. St. Paul-Mercury Indem. Co.*, 51 Wn.2d 569, 320 P.2d 311 (1958), to support her argument that Mr. Rahman's act of allowing her to ride with him in the state car when this was prohibited does not remove him from the scope of employment. However, the issue in *Greene* was whether a finding of agency bound an insurer as to whether the driver was a permissive user under the contract of insurance.⁶

Ms. Rahman's other case, *McNew v. Puget Sound Pulp & Timber Co.*, 37 Wn.2d 495, 224 P.2d 627 (1950), concerned a cook at a lumber camp who was carrying camp supplies in his vehicle on his way back to

⁶ "The sole question which we must decide on this appeal is: Whether a finding of agency in a suit against an employer and his employee for injuries caused by the negligence of the employee in the operation of the employer's car, is, in a subsequent action on the employer's liability policy, conclusive of coverage of the employee as one who used the car with the owner's permission." *Greene v. St. Paul-Mercury Indem. Co.*, 51 Wn.2d 569, 572, 320 P.2d 311 (1958).

work after spending his time off with family. The court found that he was not within the scope of employment when an accident happened on his way back to work. *Id.* at 500.

Ms. Rahman also contends that the trial court overlooked longstanding authority regarding vicarious liability in the “context of motor vehicle accidents.” She only cites, however, to four cases in a footnote all of which involve injury to third persons and are all readily distinguishable.⁷

V. CONCLUSION

Ms. Rahman was injured solely because her husband violated state and agency directives against carrying passengers in state vehicles. Nothing about her presence in the vehicle benefitted the state. The long standing law in Washington and elsewhere precludes her lawsuit against the state. No contrary authority has been cited to this court. The trial court was correct in granting summary judgment to the state, dismissing

⁷ *Elder v. Cisco Const. Co.*, 52 Wn.2d 241, 324 P.2d 1082 (1958), involved a construction crew on the way home from a work site. The court denied liability based on the going and coming rule. In *Smith v. Leber*, 34 Wn.2d 611, 209 P.2d 297 (1949) the court declined to overturn a jury verdict finding that Leber was within the scope of his employment when delivering a truck to his employer’s workplace. *Leuthold v. Goodman*, 22 Wn.2d 583, 157 P.2d 326 (1945), involved the question of an employee taking a short personal detour while driving for his employer. In *Breedlove v. Stout*, 104 Wn. App. 67, 14 P.3d 897 (2001), the court found an employee who was on his way home, but turned back to get a manual from work, was not within the scope of employment.

this case. The state respectfully requests this court affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 18th day of July, 2008.

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I certify that I served a copy of *Brief of Respondent* on all parties or their counsel of record on the date below via United States Mail, proper postage affixed, as follows:

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STATE OF WASHINGTON
BY
DEPUTY

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 18th day of July, at Tumwater, Washington.


CYNTHIA A. MEYER