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**Supreme Court
of the State of Washington**

Jerry Porter and Karen Zimmer,

Respondents,

v.

**Pepper E. Kirkendoll and
Clarice N. Kirkendoll,**

Petitioners.

Second Supplemental Brief of Respondents Porter and Zimmer

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Table of Contents

1. Supplemental Argument.....	1
1.1 Kirkendoll is directly, not vicariously, liable.....	1
1.2 Because Kirkendoll's liability is direct, not vicarious, it was not released by Porter's settlement with the loggers.....	5
1.3 This Court should clarify the standard for the assigned common law indemnity claims.....	7

Table of Authorities

Cases

<i>Aberdeen Const. Co. v. City of Aberdeen</i> , 84 Wash. 429, 147 P. 2 (1915)	8
<i>Chicago Title Ins. Co. v. Office of Ins. Com'r</i> ; 178 W.2d 120, 309 P.3d 372 (2013)	1, 2
<i>Fortune View Condo. v. Fortune Star</i> , 151 Wn.2d 534, 90 P.3d 1062 (2004)	7
<i>Glover v. Tacoma Gen. Hosp.</i> , 98 Wn.2d 708, 658 P.2d 1230 (1983)	3, 6
<i>Hill v. Cox</i> , 110 Wn. App. 394, 41 P.3d 495 (2002).....	2
<i>Rufener v. Scott</i> , 46 Wn. 2d 240, 280 P.2d 253 (1955).....	8
<i>Seattle W. Indus. v. David A. Mowat Co.</i> , 110 Wn.2d 1, 750 P.2d 245 (1988)	6
<i>Ventoza v. Anderson</i> , 14 Wn. App. 882, 545 P.2d 1219 (1976)	2
<i>Zimprich v. N.D. Harvestore Systems</i> , 419 N.W.2d 912 (N.D. 1988)	6, 7

Other Authorities

Restatement (Second) of Torts § 886B.....	8
Restatement (Third) of Agency ch. 2	1
Restatement (Third) of Agency § 2.01	2
Restatement (Third) of Agency § 2.02	2

Restatement (Third) of Agency § 2.04	3
Restatement (Third) of Agency § 7.03	4, 5

1. Supplemental Argument

This Second Supplemental Brief will provide additional authority and arguments related to the issues raised in Kirkendoll's petition. Part 1.1 of this brief will discuss principles of agency and show that Kirkendoll is directly, not vicariously, liable for ordering the loggers to remove Porter's trees. Part 1.2 will demonstrate the result: because Kirkendoll's liability is direct, not vicarious, his liability is not released by Porter's settlement with the loggers. Part 2.3 will clarify the standard for common law indemnity.

1.1 Kirkendoll is directly, not vicariously, liable.

Agency law provides three bases for a principal to be held responsible for the legal consequences of the actions of another: 1) when the principal gives the person actual authority to act on the principal's behalf; 2) when the conduct of the principal gives rise to apparent authority for the person's acts; and 3) when the principal is held liable for the person's negligence under the theory of respondeat superior. Restatement (Third) of Agency ch. 2 Introductory Note. When a tortious act falls within an agent or contractor's actual authority, there is no need to engage in a respondeat superior analysis or to determine whether there was a right to control. *Chicago Title Ins. Co. v. Office of Ins. Com'r*, 178 W.2d 120, 144, 309 P.3d 372 (2013).

An agent's actual authority includes 1) actions specified or implied in the principal's manifestations to the agent; and 2) acts necessary or incidental to achieving the principal's objectives. Restatement (Third) of Agency § 2.02(1). By conferring actual authority on an agent, the principal gives the agent power to create legal consequences for the principal. Restatement (Third) of Agency § 2.01, comment c. In other words, by accepting the benefit of acting through another person, the principal must also accept responsibility for the person's authorized actions.

It is this principle of actual authority that drives the outcome in *Chicago Title* and in the trespass cases. In *Chicago Title*, CTIC was liable because Land Title's actual authority included those acts reasonably necessary and proper to do its delegated business in the usual and ordinary way. *Chicago Title*, 178 W.2d at 139-40. In *Ventoza v. Anderson*, 14 Wn. App. 882, 895-96, 545 P.2d 1219 (1976), Anderson was liable because he failed to correct his agent's trespass. In *Hill v. Cox*, 110 Wn. App. 394, 404, 41 P.3d 495 (2002), Cox was liable because he instructed his loggers to cut Hill's trees. Kirkendoll is similarly liable because he instructed his loggers—giving them actual authority—to cut Porter's trees.

This is not a case of vicarious liability under respondeat superior. The doctrine of respondeat superior declares that an

employer is subject to liability for torts committed by employees acting within the scope of their employment. Restatement (Third) of Agency § 2.04. It typically applies to negligent acts that are the consequence of inattentiveness or poor judgment on the part of an employee. Restatement (Third) of Agency § 2.04, comment b. Vicarious liability is imposed on the otherwise innocent employer as a matter of public policy to provide an additional source of recovery for the plaintiff's loss. *Glover v. Tacoma Gen. Hosp.*, 98 Wn.2d 708, 720, 723, 658 P.2d 1230 (1983).

The Restatement explains the difference between direct liability based on actual authority and vicarious liability based on respondeat superior:

- (1) A principal is subject to **direct liability** to a third party harmed by an agent's conduct when
 - (a) as stated in § 7.04, **the agent acts with actual authority** or the principal ratifies the agent's conduct and
 - (i) the agent's conduct is tortious, or
 - (ii) the agent's conduct, if that of the principal, would subject the principal to tort liability;
or
 - (b) as stated in § 7.05, the principal is negligent in selecting, supervising, or otherwise controlling the agent.

...

- (2) A principal is subject to **vicarious liability** to a third party harmed by an agent's conduct when
 - (a) as stated in § 7.07, the agent is an employee who commits a tort while acting within the scope of employment...

Restatement (Third) of Agency § 7.03. When an agent acts with actual authority—such as when the principal directs the agent to take a specific action—the principal is directly liable as though the principal had committed the act himself.

“Direct liability requires fault on the part of the principal whereas vicarious liability does not require that the principal be at fault.” Restatement (Third) of Agency § 7.03, comment b.

Here, Kirkendoll is at fault because he directed the loggers to cut Porter's trees. CP 5, 45, 186. He is directly, not vicariously, liable for the trespass.

Perhaps understanding that fault creates direct liability, Kirkendoll's arguments in the briefs consistently ignore the fact of his own fault in directing the trespass, despite having admitted that fact multiple times in the trial court proceedings. In answer to the original complaint, Kirkendoll “admitted that Pepper Kirkendoll caused timber to be harvested from a right of way easement ... [that] belongs to Plaintiffs.” CP 5. He also admitted fault in his deposition:

Q: ... Did you tell Mr. Peters, “I own right up to the shoulder of the road”? ...

A: I probably told him something like, “That timber – all that timber that goes around that radius is on me.”

Q: Okay. So you think you assured Kyle Peters that you owned to the edge of the – of the roadway surface?

A: I’m sure. Why else would he cut it?

...

Q: All right. And when you represented that to him, did you – did you do so knowing that he was going to rely on that representation as being accurate?

A: Well, I’m assuming that’s the only reason or the only conclusion to that that we could come to was that ... I’m sure he ... I’m sure he understood that I thought the timber was on my side of the line.

CP 45. Kirkendoll is directly liable for his own culpable misfeasance in directing the loggers to cut Porter’s trees. Because the loggers acted with actual authority, there is no need for an analysis of vicarious liability under respondeat superior.

1.2 Because Kirkendoll’s liability is direct, not vicarious, it was not released by Porter’s settlement with the loggers.

Significant consequences follow from the distinction between direct and vicarious liability. Restatement (Third) of Agency § 7.03, comment b. One of those consequences is that although settlement with an agent may release the **vicarious liability** of a principal, it does not release the principal’s **direct**

liability. *Seattle W. Indus. v. David A. Mowat Co.*, 110 Wn.2d 1, 5, 750 P.2d 245 (1988) (holding that claims of direct liability of a principal are not affected by release of an agent); *Glover*, 98 Wn.2d 708 (vicarious claims were released by plaintiff's settlement with the agents, but direct claims against the hospital remained for trial).

This principle was well-stated by the Supreme Court of North Dakota:

We held in *Horejsi* that the release of a servant from liability for his wrongful conduct thereby releases the master from vicarious liability under the doctrine of respondeat superior. We agree with Zimprich, however, that under *Horejsi* **a master is not released from claims of direct liability** against the master even though the servant has been released from liability in the case.

...

[Plaintiff's] release of [agent] from liability does not release [principal] from any claim [plaintiff] might have against it which is based upon [principal's] own wrongful conduct independent of any theory of vicarious liability.

Zimprich v. N.D. Harvestore Systems, 419 N.W.2d 912, 913 (N.D. 1988) (emphasis added). The court continued, “[principal] is as liable for directing another to commit wrongful activity as it would be had it acted alone. For directing another to commit wrongful conduct [principal] can be held directly liable apart

from any theory of vicarious liability which may apply.”

Zimprich, 419 N.W.2d at 914.

Porter’s claims against Kirkendoll have always been direct, not vicarious. *See* CP 136 (“Kirkendoll is the only party asserting an agency relationship”). This direct liability is not released by Porter’s settlement with the loggers.

1.3 This Court should clarify the standard for the assigned common law indemnity claims.

In explaining common law indemnity, the Court of Appeals relied heavily on Justice Madsen’s dissent in *Fortune View Condo. v. Fortune Star*, 151 Wn.2d 534, 90 P.3d 1062 (2004). But in holding that “a genuine issue remained as to whether the Loggers were without personal fault,” the Court of Appeals left out an important clarification made by Justice Madsen: “Courts liberally view ‘without personal fault’ to mean that **indemnity will not be denied** where there is some culpability, instead the cost of negligence will be allocated to the joint tortfeasor primarily responsible.” *Fortune View*, 151 Wn.2d at 545 (Madsen, J., dissenting) (emphasis added).

Justice Madsen’s observation is consistent with precedent. “Our law, however, does not in every case disallow an action by one wrongdoer against another, to recover damages incurred in consequence of their joint offense. The rule is, ‘in pari delicto

potior est conditio defendentis.’ If the parties are not equally criminal, the principal delinquent may be held responsible to his codelinquent for damages incurred by their joint offense.”

Aberdeen Const. Co. v. City of Aberdeen, 84 Wash. 429, 433, 147 P. 2 (1915). “If the tort-feasors are not in pari delicto, and the negligence of one is primary or active, and the negligence of the other is passive, resulting in injury to a third person, and the one guilty of passive negligence is required to answer in damages to the third person, he is entitled to indemnity from the wrongdoer guilty of primary negligence.” *Rufener v. Scott*, 46 Wn. 2d 240, 242-43, 280 P.2d 253 (1955) (also invoking the “without fault” language to describe the passive tortfeasor).

The Restatement provides some examples of situations in which indemnity is appropriate: “(b) [Loggers] acted pursuant to directions of [Kirkendoll] and reasonably believed the directions to be lawful; [or] (c) [Loggers were] induced to act by a misrepresentation on the part of [Kirkendoll], upon which [loggers] justifiably relied.” Restatement (Second) of Torts § 886B (adapted to fit the parties in this case).

On remand, Porter should not be required to prove that the loggers were entirely innocent, only that as between them and Kirkendoll, Kirkendoll was primarily at fault.

Respectfully submitted this 19th day of April, 2019.

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