1972

Hal E. Holmstead v. Abbott G. M. Diesel, Inc. : Petition For Rehearing

Utah Supreme Court

In The Supreme Court of the State of Utah

HAL E. HOLMSTEAD,

Plaintiff-Respondent,

vs.

ABBOTT G. M. DIESEL, INC.,

Defendant-Appellant.

Case No. 12,2[illegible]

PETITION FOR REHEA[illegible]

Interim Appeal from the Judgment o[illegible] Judicial District Court for Utah Coun[illegible] able Joseph E. Nelson, Judge.

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In The Supreme Court of the State of Utah

HAL E. HOLMSTEAD,

Plaintiff-Respondent,

vs.

ABBOTT G. M. DIESEL, INC.,

Defendant-Appellant.

Case No. 12,257

PETITION FOR REHEARING

NATURE OF CASE

This is an action for damages for personal injuries caused by the negligence of defendant's agent.

DISPOSITION IN LOWER COURT

The trial court denied defendant's Motion for Summary Judgment. Thereafter, this Court granted defendant's Petition for Intermediate Appeal. This Court, by its opinion of January 25, 1972, reversed the judgment of the trial court.

RELIEF SOUGHT ON APPEAL

Respondent now seeks a rehearing on the grounds that: 1) The Court did not consider important new cases on the question of covenants not to sue as releasing a principle. (2) The Court's decision is contrary to proper rules of contract construction. (3) The Court misconstrued the function of a covenant not to sue. (4) The Court's decision will proliferate additional lawsuits. (5) The Court's application of respondeat superior defeats the purpose and policy underlying repondeat superior.

STATEMENT OF FACTS

This suit arises out of an accident which occurred December 6, 1968, at the intersection of Lehi Main Street and the frontage road to I-15 near Lehi in Utah County, Utah. A vehicle owned and driven by plaintiff collided with a vehicle driven by one Gideon Allen. At the time and place of the accident, Gideon Allen was an agent and employee of the defendant, Abbott G. M. Diesel, Inc., operating said vehicle and acting within the scope of his employment. Plaintiff, therefore, seeks to hold defendant liable under the doctrine of respondeat superior.

Suit was commenced by filing of the Complaint on April 17, 1969, and Summons was served April 18, 1969.

The employee Gideon Allen was not and has not been named as a party to this action.

On July 7, 1969 in consideration of the payment in behalf of said Gideon Allen of $10,000, plaintiff executed and delivered a simple covenant not to sue in which he did "covenant and agree never to make any demand or claim, or commence or cause or permit to be prosecuted any action at law or in equity, or any proceeding of any description, against Gideon Allen because of personal injury, disability, property damage, loss of services, expense or loss of any kind . . . sustained . . . in consequence of an accident that occurred on or about the 6th day of December, 1968, at or near Lehi, Utah." By mutual mistake a reservation of rights against the defendant Abbott G. M. Diesel was not written into the covenant. The covenant was reformed to include that reservation.

On October 29, 1970, Abbott G. M. Diesel, Inc., filed a Motion for Summary Judgment based upon the pleadings, depositions and records on file and an affidavit of Reed L. Martineau. Both parties filed written memorandums in support of their respective positions, and on September 18, 1970, District Judge, Joseph E. Nelson denied the motion for Summary Judgment. Defendant thereupon filed its petition for intermediate appeal which was granted January 8, 1971. On January 25, 1972, this Court handed down its decision reversing the denial of defendant's motion for Summary Judg-

ment, upon the ground that a covenant not to sue given an agent must of necessity release the principal from liability.

ARGUMENT

I.

THE COURT'S DECISION IS CONTRARY TO THE BETTER REASONED RULE OF NEWER AUTHORITIES.

Three cases decided during 1971 are cited to the Court as evidence of a growing trend in the authorities which is contrary to the Court's decision in the present case. These cases were not available to the plaintiff at the time of writing his brief and, therefore, have not heretofore been cited to the Court.

The first case is from the Court of Appeals of New York, *Plath v. Justus,* (Feb. 17, 1971), 28 N.Y. 2d 16, 268 N.E. 2d 117. In that case the plaintiff's intestate was killed by being struck by an automobile owned by the defendant but driven by a third party. Plaintiff settled with the third party executing a release which reserved a right of action against defendant. Defendant claimed that because he was only derivatively liable, a release of the active tortfeasor also released him. The Court rejected defendant's argument and held that the intent of the parties should govern the affect to be given to the release.

The case of *McMillen v. Klingensmith,* 467 SW 2d 193, was decided on May 12, 1971, by the Supreme Court of Texas. Here a woman was injured in an automobile accident and her injuries were aggravated by the negligent treament of a physician. The driver of the automobile was released by an instrument that made no mention of the physician. The physician argued that he was not a joint tortfeasor, that he did not act concurrently or in concert with the driver and, therefore, he was only secondarily liable. His secondary liability, he argued, was released when the original tortfeasor was released. Reversing its old "unity of release" rule under which a release of the original tortfeasor would also release the malpracticing physician, Justice Pope stated that "a release of a party or parties named or otherwise specifically identified fully releases only the parties so named or identified, but no others."

The third case, decided March 4, 1971, is *Bartholomew v. McCartha,* 179 S.E. 2d 912, in which the Supreme Court of South Carolina stated:

> "Being untrammeled by the ancient rule which, in our view tends to stifle settlements, defeat the intention of parties and extol technicalities, we adopt the view that the release of one tortfeasor does not release others who wrongfully contributed to plaintiff's injuries unless this was the intention of the parties, or unless plaintiff has, in fact, received full compensation amounting to satisfaction."

Realizing full well that the *McCartha* case deals with the liability of joint tortfeasors and not with derivative liability it is cited to the Court as evidence of a trend. The modern trend is toward giving effect to the intention of the parties in settlement agreements, rather than allowing those intentions to be frustrated by some common law dogma. While the most recent decisions in the country are to the effect that a release with a reservation of rights should be construed as a covenant not to sue so as to protect the injured party's right to a recovery; this Court on the contrary has reached the conclusion that a covenant not to sue with a specific reservation should be treated as a general release so as to cut off the injured party's right to a recovery.

II.

THE COURT'S DECISION IS CONTRARY TO PROPER RULES OF CONTRACT CONSTRUCTION.

A covenant not to sue is a contract and should be interpreted in accordance with the rule of contract construction that the intention of the parties to the contract controls its interpretation. As stated in 2 Williston, Contracts [3d ed.] section 338A p. 720:

> "The great majority of the later cases, however, hold that an agreement releasing one joint tortfeasor should be construed in accord-

> ance with the intention of the parties and that if it shows on its face it was not the intention of the injured party to relinquish his claim against the other joint tortfeasor, and his claim has not been fully satisfied, the "release" will be construed as having the effect of a covenant not to sue regardless of its form."

It is clear from the summary of section 338A that the author thinks that the intention of the parties should govern not only in cases of joint torts, but also in cases where the liability of two parties for an injury is based upon respondeat superior, and a release or covenant has been given to one porty.

> "In summary then, where two or more persons are liable for the same injury *though their tort was not joint,* the only question when a release has been given to one, should be: Has the plaintiff obtained full satisfaction, or what he agreed to accept as such, for his injury?" (emphasis added) *Id.* p. 721.

The plaintiff, Hal Holmstead, did not receive full satisfaction for his injuries. Had he known that the $10,000 consideration given for the covenant was to be his total recovery, he never would have signed the agreement. By the terms of the covenant he reserved a right against Abbott G. M. Diesel as part of the consideration for that covenant. The negation of the reserved right varies the terms of the contract materially.

The contract as so modified by the Court is not supported by a consideration which would have been satisfactory to the plaintiff. Certainly, if Hal Holmstead gave up his right to seek redress against the defendant, Abbott G. M. Diesel, he did so unintentionally, and Dean Prosser says, "a plaintiff should never be compelled to surrender his cause of action against any wrongdoer unless he has intentionally done so, or unless he has received [full satisfaction]". (Prosser, Law of Torts [3d ed.], section 46, p. 272.)

III.

THE COURT'S DECISION IS BASED UPON A MISCONCEPTION OF THE FUNCTION OF A COVENANT NOT TO SUE.

In the Court's opinion by Chief Justice Callister it is stated:

> "Under the doctrine of respondeat superior, the liability of the master to a third person for injuries inflicted by a servant in the course of his employment and within the scope of his authority is derivative and secondary, while that of the servant is primary, and absent any delict of the master other than through the servant, the exoneration of the servant removes the foundation upon which to impute negligence to the master."

It is respectfully submitted that the Court has erred by implying that a covenant not to sue a servant exonerates him. It does not exonerate the servant. It is a promise not to sue and nothing more. It is not a statement that the servant is without fault. The alleged fault of the servant remains which, if proved, is imputed to the master. It is the fualt of the servant which is the basis or foundation of the master's liability. A covenant not to sue the servant may relieve him of the burden of paying the injured party, but it does not relieve or exculpate his fault.

IV.

THE COURT'S DECISION WHICH PURPORTS TO PREVENT CIRCUITOUS ACTIONS AND REDUCE LITIGATION WILL IN REALITY PROLIFERATE ADDITIONAL LAWSUITS.

As part of the majority's rationale for holding that a covenant given the agent releases the principal from responsibility, the Court outlines the process whereby the principal, if held liable, is subrogated to the rights of the injured party and thereafter sues the agent for indemnification. The Court fears this circuity of action. As a theorectical possibility these circuitous suits seem problematic, but, when examined in the sunlight of the real world this imagined evil disappears. In

reality, the employer will not sue his employee. It is not he who paid the injured party; it was the liability insurer. Would the insurer then sue the employee? No, because the employee is a named insured under the policy. How can an insurer sue its insured for paying that which it has contracted to pay? Certainly, this "circuity of action" problem is more imagined than real.

But, many suits can be foreseen where some unwary plaintiff gives a covenant not to sue an agent with a reservation against the principal only to find that his expressed intent is disregarded in court. The injustice under this situation is clear. The plaintiff will feel cheated. No doubt he will seek relief in equity to set aside a covenant which produced such untoward results on the grounds of mistake or fraud. The rule as presently expressed by the Court is a trap for the unwary.

The Court's decision will force an injured plaintiff to prosecute his case against an agent who was willing to settle. The plaintiff will be unable to settle with the agent for anything less than a full satisfaction for his injuries, for to do so under the Court's ruling would terminate any further rights against the principal. An agent who has no means to pay for a full satisfaction, but who could have paid a partial compensation, will have to be made a party to the action.

The Court's decision in the case, in truth conflicts with the policy of the law to encourage the out-of-court settlement of disputes.

V.

THE COURT'S TECHNICAL APPLICATION OF THE DOCTRINE OF RESPONDEAT SUPERIOR DEFEATS THE VERY PURPOSE AND POLICY UNDERLYING THAT DOCTRINE.

The doctrine of respondeat superior was the invention of courts who wanted to insure that parties unjured by the acts of agents would be adequately compensated by the principal who, for pecuniary gain, had originally set the agent in motion. The development of the doctrine is explained quite succintly in *Agency and Partnership* a casebook by Seavy, Reuschlein, and Hall (West Publishing Co., 1962, at p. 30.)

> "It may be, as Wigmore said (17 Harv.L.Rev. 391, 1894), that at one time the master was not normally responsible for the uncommanded acts of his servants. But as early as the first years of the 18th century, the court in *Hern v. Nichols,* (1 Salk 289, 1708), imposed liability upon a merchant for the deceit of his factor, upon the ground that "there is more reason that he that employs and puts a trust and confidence in the deceiver should be the loser than a stranger." Undoubtedly this thought largely accounts for the imposition of liability upon a master. He benefits from the proper acts of the servants. Because of their activities, he

> acquires the means by which he can pay for their wrongs; they, on the other hand, are seldom financially responsible. It is not unfair that, in return for the privilege which the common law gives one to accomplish results through the aid of other human beings, he should pay for the harm done by the errors of judgment and negligence of those who have created profits for him.

The creation of such terms as "primary and secondary" liability, "active and passive" negligence, "original and derivative" responsibility were all for the purpose of enabling the injured party to have a cause of action against one who could fairly compensate him; but, this Court uses these terms to restrict and defeat the injured party's right to an adequate recovery. By accepting what little the agent is able to pay, the injured party losses the right to recover against the principal who is better able to pay. And what is more ironic is that the loss is attributed to the terms found in the doctrine originally established to make the principal liable and insure full recovery.

CONCLUSION

This Court should adopt the majority and better reasoned rule enunciated above, and reform its opinion that a covenant not to sue given an agent releases the

principal and adopt the view of the Courts heretofore cited that the intention of the parties should govern the interpretation of a covenant not to sue.

Plaintiff requests that the Court vacate its judgment handed down January 25, 1972, and return this case to the District Court for trial on the merits.

Respectfully submitted,

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