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Workmen's Compensation -- Employer's Goodwill

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Finally, adoption of the *French* view would tranmute the seemingly irreconcilable rules existing in North Carolina today into one practicable, easy-to-apply rule, which gives effect to the policy behind the doctrine of adverse possession.[26]

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Workmen's Compensation—Employer's Goodwill

In the recent case *Guest v. Brenner Iron & Metal Co.*,[1] plaintiff employee was sent out on the road to change two flat tires on one of defendant's trucks. After replacing the old tubes, it became necessary to obtain air to inflate the tires, so plaintiff drove along the highway until he found a service station open. He asked and received permission from the man in charge to use the air hose. Before he inflated the first tire, plaintiff was asked to assist in pushing off the stalled car of a customer of the station. Plaintiff acceded to this request and, while pushing, was struck and injured by an approaching car.

The North Carolina Industrial Commission awarded compensation on the ground that there was an injury arising out of and in the course of the employment.[2] The supreme court affirmed the award, rejecting the contentions that the plaintiff had deviated from the course of his employment, and that the hazard was not peculiar to the employment.[3] The main reasons given for the holding were that the response of the plaintiff was natural and reasonable; that he had reasonable grounds to believe that his acts were incidental to his employment and beneficial to his employer; and that if the employer had been present he would have instructed the employee to render the assistance. Under the circumstances, the aid received from the service station and the aid given by plaintiff were said to be so closely interwoven that the injury

[26] For excellent discussions on the problem here presented, see: Johnson v. Whelan, 186 Okla. 511, 98 P. 2d 1103 (1940), and Rock Springs v. Sturm, 39 Wyo. 494, 273 Pac. 908 (1929) with annotation in 97 A. L. R. 14 (1935).

[1] 241 N. C. 448, 85 S. E. 2d 596 (1955).

[2] The term "arising out of" refers to the cause or origin of the accident, and "in the course of" refers to the time, place, and circumstances under which the accident occurred. Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. 2d 387 (1947); Wilson v. Mooresville, 222 N. C. 283, 22 S. E. 2d 907 (1942); Ashley v. F-W Chevrolet Co., 222 N. C. 25, 21 S. E. 2d 834 (1942). See also Note, 10 N. C. L. REV. 373 (1932).

[3] If the risk involved is one to which all others in the general area are subjected, as distinguished from a hazard peculiar to the employee's work, the resulting injury is not compensable. Bryan v. T. A. Loving Co., 222 N. C. 724, 24 S. E. 2d 751 (1943); Plemmons v. White's Service, 213 N. C. 148, 195 S. E. 370 (1938). The court in the present case said, "Plaintiff, while pushing the car onto and along the highway, subjected himself to a hazard not common to all others in the neighborhood but peculiar to the task in which he was engaged." Guest v. Brenner Iron & Metal Co., 241 N. C. 448, 454, 85 S. E. 2d 596, 601 (1955).

must be held connected with[4] and incidental to[5] plaintiff's employment. The court also distinguished the present case from the so-called "good Samaritan" cases.[6]

There is a ground for an award of compensation in cases similar to the present case which has been very little used or referred to by the courts; that is, *acts of employees which further the good will of the employer.*[7] Good will is widely, if not universally, recognized as a very valuable asset of any business.[8] The acts of the employee creating good will, such as picking up riders or doing other small favors for the public in general, has a definite benefit to the employer's business.[9] They create a favorable attitude toward the business and aid in keeping its name before the public. This is especially true when the business deals directly with the customer, but it is also of benefit when it deals indirectly, in view of the widespread policy of putting the organization's name in conspicuous places on its cars and trucks.[10]

The employer's good will has been brought up in a few cases where a third party sued the employer or master under the doctrine of *re-*

[4] As to the necessity for a causal connection between the employment and the accident see, Taylor v. Wake Forest, 228 N. C. 346, 45 S. E. 2d 387 (1947).

[5] As to the necessity that the acts of the employee be incidental to the employment see, Goodwin v. Bright, 202 N. C. 481, 163 S. E. 576 (1932).

[6] These cases involve situations where the employee voluntarily offers his assistance to a third party solely as an act of humanity, the act having no connection to the employment or the employer's business. Sichterman v. Kent Storage Co., 217 Mich. 364, 186 N. W. 498 (1922). See also, 17 CHI-KENT REV. 399 (1939), commenting on Puttkammer v. Industrial Commission, 371 Ill. 497, 21 N. E. 2d 575 (1939) in which case compensation was granted.

[7] The appellee refers to good will at only one point: "The primary, if not the sole object in the plaintiff's mind in so doing (pushing the car) was to accomplish his ultimate task for his employer with the good will and good relations expected of him by his employer." Brief for Appellees, pp. 15-16, Guest v. Brenner Iron & Metal Co., 241 N. C. 484, 85 S. E. 2d 596 (1955).

The court quotes from 7 SCHNEIDER, WORKMEN'S COMPENSATION § 1675 (1950): "However, where competent proof exists that the employee understood, or had reasonable grounds to believe that the act resulting in injury . . . was encouraged by the employer in performance of the act or similar acts for the purpose of creating a feeling of good will, . . . " No other specific reference is made to good will, but it is possible that the court may have had good will in mind, although it was not used as a ground for the compensation award.

[8] Ely Lilly & Co. v. Saunders, 216 N. C. 163, 4 S. E. 2d 528 (1939), holding that good will is as much "property" as is coal or pig iron, or wheat, and is subject to audit, taxation, appraisal, purchase, and sale.

[9] Examples are acts of telephone operators, bus or truck drivers, and train conductors, in summoning aid, giving assistance to parties in need, and other courtesies beyond the call of duty. In certain instances these acts may be of an heroic nature. Employers are quick to take full advantage of such acts in their advertisements to build up good will or better public relations for their organizations.

[10] Note, 17 CHI-KENT REV. 399 (1939) discusses the custom of placing the business name on its vehicles, and the effect it has on the public when the driver refuses a small favor. The argument that the plaintiff's act in the present case was in furtherance of the defendant's good will would be stronger if a company car or truck had been used which had the company name painted on the door or side.

spondeat superior for injury caused by the employee's negligence. Generally in these cases, the employee has picked up riders or is accommodating friends, although they may not be potential customers of the employer.[11] The rider, friend, or some other person, *e.g.*, a pedestrian, is injured by the negligence of the employee. The employer contends that the employee has deviated from the scope of his employment, thereby relieving the employer of liability.[12] But if the acts can be shown to have furthered the good will of the employer, the courts may hold them to be within the scope of the employment.[13] This argument would seem to apply as well to workmen's compensation cases. In both groups the main issue is whether the act in furtherance of good will is a deviation[14] to such an extent that it will relieve the employer from responsibility or liability for the injury. The application would not be too far-fetched in view of the fact that the courts tend to give the compensation acts a very liberal construction.[15] Under such a doctrine any bona fide argument in favor of the employee should be considered.

The workmen's compensation cases which have considered the em-

[11] It should be noted that ordinarily one who is engaged to operate a motor vehicle has no implied authority, by virtue of the employment, to invite or permit third parties to ride; and the employer is ordinarily not liable for personal injuries sustained by the invitee while riding therein, except for willful or malicious acts of the employee. Wigginton Studio, Inc. v. Reuter's Adm'r, 254 Ky. 128, 71 S. W. 2d 14 (1934); Cotton v. Carolina Truck Transportation Co., 197 N. C. 709, 150 S. E. 505 (1929). This rule does not apply where there is express or ostensible authority to invite people to ride. Cole v. Johnson Motor Co., 217 N. C. 756, 9 S. E. 2d 425 (1940); Shrimplin v. Simmons Auto Co., 122 W. Va. 248, 9 S. E. 2d 49 (1940). The latter case left open the question whether a servant in charge of an automobile may not in some circumstances be clothed with ostensible or apparent authority.

[12] In Russell v. Cutshall, 223 N. C. 353, 26 S. E. 2d 866 (1943) it was alleged that the employee had the implied authority to pick up passengers, on the ground that the defendant customarily carried passengers in the conduct of business in that particular area for the purpose of creating good will. The court held the evidence did not sustain any such custom and the act was a deviation relieving the employer of liability.

[13] Cole v. Johnson Motor Co., 217 N. C. 756, 9 S. E. 2d 425 (1940). In this case there was a conflict in the testimony as to the authority of the employee to pick up hitchikers; there was also evidence that in the course of the employee's duties he was to promote good will by contacting prospects. The court held that he was acting within the ostensible scope of his authority and whether the acts constituted a violation of his instructions and thereby a deviation from the course of the employment was a question for the jury. Cochran v. Michaels, 110 W. Va. 127, 133, 157 S. E. 173, 175 (1931). There the court said, "A friend picked up became an eager informant as well as a partisan of the driver, and the interest of the defendant was thus promoted." The *Cochran* case is criticized in Note, 37 W. VA. L. Q. 441 (1931), but is approved in Note, 18 VA. L. REV. 330 (1931).

[14] Parrish v. Armour & Co., 200 N. C. 654, 158 S. E. 188 (1931) (Workmen's Compensation); Paiewonsky v. Joffe, 101 N. J. L. 521, 129 Atl. 142 (1925) (Master and Servant).

[15] Johnson v. Asheville Hosiery Co., 199 N. C. 38, 40, 153 S. E. 591, 593 (1930): "It is generally held by courts that the various compensation acts of the Union should be liberally construed to the end that benefits thereof should not be denied upon technical, narrow, and strict interpretation."

ployer's good will in granting an award have varied as to the authority granted the employee. There are cases where express authority was granted to do anything necessary to create good will. An example is *Gross v. Davey Tree Expert Co.*[16] where defendant company instructed the employee to do all that he could to further the good will of the telephone company for which defendant was working.[17] Plaintiff's job consisted of trimming trees that grew near the telephone lines. At the request of a third party, plaintiff came down from a tree and pushed the party's car approximately two miles in an attempt to get it started. Plaintiff was injured at that point, distant from his place of employment. Compensation was granted on the ground that the defendant had not placed any limit on the favors the plaintiff could extend.

At the other extreme are cases in which the furtherance of the employer's good will is implied from the nature of the employment itself without any express authority. An example of this is *Parrish v. Armour & Co.*[18] where a wrong delivery was made to one of defendant's customers and plaintiff was sent to straighten out the matter. On the way to see the customer, plaintiff deviated several blocks to obtain some cigars which he thought would be expedient to the purpose of his visit. He was injured before he reached the place where he intended to obtain the cigars. Compensation was granted by the commission on the theory that the deviation was incidental to the employment.

It would also seem probable that acts furthering the good will of the employer might in some instances be done in violation of the employer's express instructions.[19] When the acts violate instructions, com-

[16] 248 App. Div. 838, 290 N. Y. Supp. 168 (3d Dep't 1936), *aff'd*, 272 N. Y. 657, 5 N. E. 2d 379 (1936). See also, Murphy v. N. Y. Butchers Dressed Meat Co., 249 App. Div. 888, 292 N. Y. Supp. 629 (3d Dep't 1937), where the employee was crossing the street to buy a drink for the merchant from whom he had obtained a check in payment of his employer's account. This was a custom and an expense account was furnished for such courtesy. The court held that the employee was engaged in the interests of his employer and in the furtherance of the employer's good will.

[17] The instructions were to create good will for the customer of the employer rather than for the employer himself, but the same reasoning and result would seem to follow in the latter situation.

[18] 200 N. C. 654, 158 S. E. 188 (1931). See also, Bauman v. Howard J. Ehmke Co., 126 Pa. Super. 108, 190 Atl. 343 (1937) where a salesman staying overnight at a farmer's house helped the farmer fell a tree. Compensation was awarded upon the ground that the assistance was no more than any other guest would do in the natural order of events. In Boyd v. Philmont Country Club, 129 Pa. Super. 135, 195 Atl. 156 (1937), a caddy went into the woods to pick flowers upon the request of a customer of the defendant and was struck by a golf ball. Compensation was granted.

[19] No workmen's compensation cases discussing good will as a basis for awarding or denying compensation when the acts violated instructions have been found. In Cole v. Johnson Motor Co., 217 N. C. 756, 9 S. E. 2d 425 (1940) (liability of the master for tort of servant) the court said, conceding the instructions prohibited picking up riders, it would be questionable whether the violation was such a deviation from the employment as would put the employee entirely without the purposes and confines of his employment and relieve the employer from liability.

pensation is generally denied if the instructions limited the sphere of the employment, but compensation is generally awarded if the instructions merely directed the employees not to do certain acts, or not to do an act within the sphere of the employment in a certain way.[20] If the violation does not take the employee out of the sphere of the employment, he is only guilty of negligence and is not deprived of the protection of the workmen's compensation acts.[21] In addition, where the act is necessitated by an emergency,[22] or the instructions against committing the acts is habitually violated,[23] the employee's case is greatly strengthened.

It is submitted that if there is authority, express or implied, to do acts in furtherance of the employer's good will, such acts should not be held to be a deviation from the course of the employment to the extent that compensation will not be granted. Of course, the courts will have to examine the facts and circumstances of each case and apply a reasonable rule, such as, whether the acts could be reasonably held within the scope of an employer's policy to create good will. The courts might go further and base the award on whether the act did create, or was aimed at creating, good will for the employer; but whatever the theory or basis used, good will should be given careful consideration by the courts when applicable to a particular fact situation.

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Criminal Law—Attempted Perjury—the Rules of "Legal" and "Factual" Impossibility as Applied to the Law of Criminal Attempts

In a recent decision, *State v. Latiolais*,[1] the Supreme Court of Louisiana upheld a conviction of attempted prejury. So far as is known, this is the first reported conviction of such a crime in the history of law.[2]

[20] Maryland Casualty Co. v. Brown, 131 Tex. 404, 115 S. W. 2d 394 (1938); Prentice v. Twin City Wholesale Grocery, 202 Minn. 455, 278 N. W. 895 (1938); Moss v. Hamilton, 234 Ala. 181, 174 So. 622 (1937).

[21] See note 20 *supra*.

[22] O'Leary v. Brown-Pacific-Maxon, 340 U. S. 504 (1951). Defendant maintained a recreation area for employees. It was forbidden, and signs were erected to that effect, to swim in the channel because of the dangerous currents. The plaintiff's intestate swam in the channel in an attempt to rescue an unknown man and was downed. Compensation was granted.

[23] Archie v. Greene Bros. Lumber Co., 222 N. C. 477, 23 S. E. 2d 834 (1934); Moss v. Hamilton, 234 Ala. 181, 174 So. 622 (1937).

[1] 225 La. 878, 74 So. 2d 148 (1954).

[2] Generally, when courts have been unable to convict a defendant of perjury, the defendant has been acquitted. Where, for example, the officer administering the oath did not have authority to administer it, courts have held that a demurrer to the indictment should be sustained. United States v. Curtis, 107 U. S. 671 (1883); United States v. Garcelon, 82 Fed. 611 (D. Colo. 1897); United States v. Edwards, 43 Fed. 67 (C. C. S. D. Ala. 1890); State v. Phippen, 62 Iowa 54, 17 N. W. 146 (1883).