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Agency--Presumption Thereof Arising From Ownership of Motor Vehicle and Employment of Driver

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Recent Cases

AGENCY—PRESUMPTION THEREOF ARISING FROM OWNERSHIP OF MOTOR VEHICLE AND EMPLOYMENT OF DRIVER—Plaintiffs brought suit against defendant for injuries they received when struck by a vehicle owned by defendant, but driven by one of his employees. Testimony of the employee-driver was to the effect that he had completed a special mission for the defendant and was at the time of the accident driving the defendant's truck on an errand of his own. The lower court directed a verdict in favor of the defendant on the ground that there was insufficient evidence that the employee-driver was within the scope of his employment and the plaintiffs appealed. The Court of Appeals of Kentucky affirmed the decision, holding that the driver was not acting in behalf of the employer when the accident occured, and that there was no implied authority or consent on the part of the defendant which could be construed to sanction the employee's use of the truck at that time. *Higgins* v. *Deskins,* 263 S.W. 2d 108 (Ky. 1953).

The court recognized the general rule that the plaintiff has the burden of proving both the employment of the driver and his operation of the vehicle within the scope of his agency at the time of the accident. The court also recited the rule that ". . . proof of ownership, coupled with evidence of employment, creates a presumption of responsible agency which requires the defendant to take up the burden of evidence and rebut the presumption. . . ."[1]

The reasoning behind the creation of such a presumption to aid the plaintiff is found in the case of *Webb* v. *Dixie-Ohio Express Company,*[2] where the court said:

> Because it is often impossible for the plaintiff to prove the agency of the operator, it is deemed desirable socially that the burden of introducing evidence on non-agency should be placed upon the defendant in whose peculiar knowledge rests the material evidence essential to a determination of this fact.[3]

The presumption is rebuttable and may be overcome by evidence to the contrary which is clear, convincing, conclusive and unimpeachable.[4] The court, in the principal case, inferred that this presumption

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[1] Higgins v. Deskins, 263 S.W. 2d 108, 110 (Ky. 1953).
[2] 291 Ky. 692, 165 S.W. 2d 539 (1942).
[3] *Id.* at 694, 165 S.W. 2d at 540.
[4] Ashland Coca Cola Bottling Co. v. Ellison, 252 Ky. 172, 66 S.W. 2d 52 (1934).

was raised in favor of the plaintiff but held that it had been sufficiently overcome by the defendant's evidence.

This presumption was first recognized by the Kentucky Court of Appeals in *Wood* v. *Indianapolis Abattoir Company of Kentucky*.[5] However, the rule stated in that case, relating to the requirements for raising the presumption, placed upon the plaintiff not only the burden of proving ownership and general employment, but also ". . . that the employé was driving the automobile with authority, express or implied, of the owner. . . ."[6] The court considered and rejected the rule as stated in the principal case which requires only proof of ownership coupled with evidence of general employment. Thus, there seem to be inconsistent statements in the Kentucky cases concerning the requirements for raising this presumption.[7]

Although such an inconsistency at first glance may seem to be insignificant, it will be well to remember the reasoning behind the adoption of this presumption. The key to the plaintiff's case is the master-servant relationship existing between the employer-owner and the driver; however, this key will most likely be in the possession of the employer-owner since it is usually within his knowledge whether or not the driver was within the scope of employment when the accident occurred. Thus, the courts have established a rule which places the burden of going forward with the evidence upon the employer-owner when the plaintiff has established certain facts. The burden it would seem is not too great, for all the employer-owner need do is rebut the presumption of agency, and if in fact there was no agency, it would seem he is the party who would, in most instances, be best able to so prove. To leave the task of establishing such agency upon the plaintiff would in some cases burden him with an almost impossible task. Therefore, the end result of the rule seems desirable.

The question, then, in order to raise the presumption, is whether the plaintiff should be required to prove ownership coupled with evidence of employment as is required in the principal case, or whether he should be required to go further and prove that the agent was driving the automobile with the authority of the owner, as was

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[5] 178 Ky. 188, 198 S.W. 732 (1917).

[6] *Id.* at 191, 198 S.W. at 733.

[7] Following Wood v. Indianapolis Abattoir Co. of Kentucky: Galloway Motor Co. v. Huffman's Adm'r, 281 Ky. 841, 137 S.W. 2d 379 (1940); Ashland Coca Cola Bottling Co. v. Ellison, 252 Ky. 172, 66 S.W. 2d 52 (1933); Dennes v. Jefferson Meat Market, 228 Ky. 164, 14 S.W. 2d 408 (1929); Mullen and Haynes Co. v. Crisp, 207 Ky. 31, 268 S.W. 576 (1925). Following Higgins v. Deskins: Hickman v. Strunk, 303 Ky. 397, 197 S.W. 2d 442 (1946); Webb v. Dixie-Ohio Express Co. 291 Ky. 682, 165 S.W. 2d 539 (1942); Rawlings v. Clay Motor Co., 287 Ky. 604, 154 S.W. 2d 711 (1941); Home Laundry Co. v. Cook, 277 Ky. 8, 125 S.W. 2d 763 (1939).

required in the *Wood* case.[8] It would seem that the rule of the principal case should be uniformly adopted in Kentucky, and the more recent Kentucky decisions are moving in that direction.[9] The primary reason for having such a rule is that the element of agency is a matter within the knowledge of the employer-owner. It is also within his knowledge as to whether or not the employee had authority to drive the automobile. The latter as well as the former may be very difficult to prove on the part of the plaintiff especially if he is injured by an employee who does not have the duty generally under the terms of his employment to drive the automobile. The principal case is a good example of this because there the employee did not have the duty generally under the terms of his employment to drive the automobile. Therefore, why should the plaintiff be burdened with having to establish an additional fact, which is in some cases impossible for him to do, so as to raise a presumption in his favor, which the defendant can rebut as easily without the additional fact as with it?

Not only do the Kentucky decisions fail to follow a uniform line with regard to the requirements for establishing the presumption in question, but also the requirements as to raising the presumption vary throughout the nation.[10] Some jurisdictions hold that ownership of the vehicle is prima facie proof that the driver of the car was acting within the scope of the owner's business,[11] while some are in accord with the principal case,[12] and others follow the *Wood* case.[13]

Thus, a rather confusing picture is presented with several theories advanced concerning the requirements for raising the presumption of agency in favor of the plaintiff. The rule of the principal case requiring the plaintiff to prove only ownership and general employment seems to be the best rule, as it requires the plaintiff to prove facts which are reasonable under the circumstances and then places the burden upon the defendant to go forward and rebut the presumption raised from proof of such facts. The defendant's position, it would seem, allows him to accomplish this task. It is submitted that the rule of the principal case presents a better balance of the duties and obligations of the parties concerned and a clearer road to justice.

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[8] *Supra* note 5.
[9] *Supra* note 7.
[10] HUDDY ON AUTOMOBILES secs. 794-95 (8th ed. 1927).
[11] Graves v. Utica Candy Co., 209 App. Div. 193, 204 N.Y. Supp. 682 (1924).
[12] d'Aleria v. Shirey, 286 Fed. 523 (C.C.A., 9th Cir. 1923).
[13] White Oak Coal Co. v. Rivoux, 88 Ohio St. 18, 102 N.E. 302 (1913). Some cases hold that such evidence does not present a prima facie case of liability, but that the plaintiff must show affirmatively, at the particular occasion under consideration, the driver was acting for his employer within the scope of employment. Washburn v. R. F. Owens Co., 252 Mass. 47, 147 N.E. 564 (1925).