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Recent Developments: Agency—Respondeat Superior—Master's Liability for the Intentional Torts of His Servant Committed within the Scope of Employment and in Furtherance of Master's Business. Spence v. Newton, 20 Md. App. 126, 316 A.2d 837 (1974)

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AGENCY—RESPONDEAT SUPERIOR—MASTER'S LIABILITY FOR THE INTENTIONAL TORTS OF HIS SERVANT COMMITTED WITHIN THE SCOPE OF EMPLOYMENT AND IN FURTHERANCE OF MASTER'S BUSINESS. *SPENCE V. NEWTON*, 20 Md. App. 126, 316 A.2d 837 (1974).

Basic to the American system of justice is the concept that for every interference with a legal right there should also exist a corresponding legal remedy. Often, however, these remedies are left unsatisfied due to the tortfeasor's financial inability to comply with the judicial sanctions imposed upon him. This one to one relationship is altered when the person committing the wrong is an agent of another. Through the doctrine of *respondeat superior* the injured party can, in certain circumstances, sue both the employee and his employer, notwithstanding the fact that the employer was not *directly* responsible for the injuries. There presently exists considerable disagreement as to the extent to which plaintiffs should be permitted to utilize the doctrine of *respondeat superior* as a device to impose vicarious liability upon employers. The Maryland Court of Special Appeals was confronted with this issue in the recent case of *Newton v. Spence*.[1] Although no new rules of law were enunciated therein, the court, by failing to consider all of the doctrine's essential elements, appears to have opened the door to future unbridled attacks against employers.

The present case originated on the evening of May 25, 1970 when Michael A. Newton, a part-time sales clerk for Sears, Roebuck & Company ("Sears"), was accused by a security manager of Sears, Michael Di Nicolo, of having taken money from the cash register with the intent of committing a larceny after trust. Di Nicolo acted upon information supplied by another Sears employee, Edward Spence, who allegedly observed Newton remove the money and place it in his pocket.[2] Newton was taken into the security office by Di Nicolo where a search of his person failed to reveal any incriminating evidence. Nonetheless, Spence steadfastly maintained his accusations. This resulted in the detention of Newton for approximately two hours. An audit of the cash register, revealing a deficit of $156.00, prompted Di Nicolo to press formal charges against Spence.[3] At trial, held two days hence, a verdict of not guilty was rendered.[4]

Newton sought retribution for his ordeal by instituting an action against Spence and Di Nicolo, as well as Sears, "alleging that Spence and Di Nicolo were acting individually, jointly and as agents, servants and employees of Sears."[5] Newton's declaration asserted five separate

1. 20 Md. App. 126, 316 A.2d 837 (1974).
2. *Id.* at 129, 316 A.2d at 839.
3. *Id.* at 129, 316 A.2d at 840. Subsequently, the audit department of Sears discovered that no shortage had in fact occurred. This fact was not known to Di Nicolo or Spence when they testified against the appellant at the larceny trial.
4. *Id.* at 130, 316 A.2d at 840.
5. *Id.* at 131-32, 316 A.2d at 841.

causes of action: Assault and Battery, False Imprisonment, False Arrest, Malicious Prosecution and Slander.[6] While there were no new developments in the Maryland law with regard to the first four charges, the existing law pertaining to slander in conjunction with the doctrine of *respondeat superior* was subtly altered. Accordingly, the emphasis of this note will be confined to the discussion of this issue. "The jury by its verdict holding Spence liable for slander, found as a fact that Spence had maliciously lied when he testified that he observed Newton stealing from the register."[7] In addition to Spence, the jury, by invoking the doctrine of *respondeat superior*,[8] found Sears to be liable for slander. As a result, Sears then filed a Motion for Judgment N.O.V. as to the slander count.[9] In granting the motion the trial court reasoned that since "[t]he jury . . . found as a fact that Spence had maliciously lied . . . the law does not permit the jury to find that such malicious action is binding upon the employer of the slanderer under the doctrine of respondeat superior."[10] In essence, the court held the doctrine of *respondeat superior* to be inapplicable in those situations, such as here, where the employee's act was motivated by malice.

On appeal, the trial court's decision sustaining the Motion for Judgment N.O.V. was reversed. The Court of Special Appeals rejected Sears' contention that a finding by the jury that Spence had maliciously lied, by definition, precluded the possibility that he may have been concurrently acting for the benefit of his employer. This rejection was founded on the conclusion that a finding of malice does not categorically infer that Spence was "motivated solely and exclusively by some personal motive . . . ."[11] The court reasoned that an employee may be motivated by a dual desire to further his employer's interest as well as his own. By applying a well established rule of construction, the court noted that after a Motion for Judgment N.O.V. has been introduced, all evidence and inferences deducible therefrom, pertinent to that issue,

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6. *Id.* at 131-32, 316 A.2d at 841. The trial court verdict was as follows: Assault and Battery (Count I)—verdict for Di Nicolo and Sears, False Imprisonment and False Arrest (Counts II and III)—$7,500.00 compensatory damages against Di Nicolo and Sears (submitted on both compensatory and punitive damages), Slander (Count IV)—$1,000.00 punitive damages against Sears, Malicious Prosecution (Count V)—$2,000.00 compensatory damages against Spence, $25,000.00 punitive damages against Sears.
7. *Id.* at 133, 316 A.2d at 841.
8. The invocation of the doctrine was predicated on the court's instruction to the jury, which stated:

   > Sears would be responsible if the jury found Spence was acting within the scope of his employment and in furtherance of the business of Sears, but that if it found he was acting "solely and exclusively by some personal motive such as personal dislike for the plaintiff, Newton, or a grudge against him or some other purely personal motive not related to his position as an employee of Sears, then whatever action he took or whatever he said is not binding on his employer. . . ." *Id.* at 139, 316 A.2d at 845.

9. A Judgment N.O.V. has been defined as a judgment entered by order of the court, although there has been a jury verdict for the opposing party. Interstate Motor Freight Sys. v. Henry, 111 Ind. App. 179, 38 N.E.2d 909 (1942).
10. 20 Md. App. at 133, 316 A.2d at 841-42 (emphasis deleted).
11. *Id.* at 139-40, 316 A.2d at 845. This was the standard expressed in the jury instruction.

must be weighed favorably for the party against whom the motion was made.[12] Thus, where reasonable minds could differ, such as arose here due to the lack of evidence with regard to Spence's total motivation, the issue is one of fact for the jury rather than one of law for the court.[13]

In addressing itself to the overriding issue of this case, whether Sears should be held liable for the intentional slanderous statements uttered by Spence, the court stated the law of *respondeat superior* to be as follows:

> An act is within the scope of the servant's employment where necessary to accomplish the purpose of his employment and intended for that purpose, although in excess of the powers actually conferred upon the servant by the master. That the act was committed while the servant was on duty performing the functions of his employment and it was committed for the purpose of furthering the business of the master, rather than its method of performance, is the test of employment. When a wrong is committed by an employee in performing or attempting to perform the duties and functions of his employment it is immaterial whether the injury was a result of negligence or willful and wanton conduct; nor is it necessary that the master should have known that the particular act was to be done. . . . The question of liability does not depend on the quality of the act, but rather upon the question whether it has been performed in the line of duty and *within the scope of the authority* conferred by the master.[14]

The first courts to examine a master's vicarious responsibility for the unauthorized willful torts of his servants unanimously refused to extend liability to the master.[15] Subsequently, the theory developed whereby a command could be "implied" from the employment relationship, resulting in the imputation of liability to the employer.[16] This position was based upon the premise that a master is liable in such an action by virtue of his own acts or omissions or because of the master-servant relationship in which he is situated.[17] Under the doc-

12. *Id.* at 134, 316 A.2d at 842.
13. *Id.*
14. *Id.* at 138, 316 A.2d at 844 (emphasis added).
15. *See generally* Bradley v. Stevens, 329 Mich. 556, 46 N.W.2d 382 (1951); Wright v. Wilcox, 19 Wend. 343 (N.Y. 1838); Baskett v. Banks, 186 Va. 1022, 45 S.E.2d 173 (1947); T. BATY, VICARIOUS LIABILITY, ch. 1 (1916); J. WIGMORE, *Responsibility for Tortious Acts: It's History*, 7 HARV. L. REV. 315 (1894).
16. Great Atl. & Pac. Tea Co. v. Dowling, 43 Ga. App. 549, 159 S.E. 609 (1931); Combs v. Kobacker Stores, 65 Ohio L. Abs. 326, 114 N.E.2d 447 (Ct. App. 1953); T. BATY, VICARIOUS LIABILITY, 107 (1916); 1 W. BLACKSTONE, COMMENTARIES *429-46; M. FERSON, *Basis for Master's Liability to Third Persons*, 4 VAND. L. REV. 260 (1951); W. SEAVEY, *Speculations as to "Respondeat Superior,"* HARVARD LEGAL ESSAYS 433, 451 (1934).
17. There are three relationships which fall within the purview of the doctrine of *respondeat superior*. Traditionally, the master-servant relationship and more recently the relationships of employer-employee and principal-agent have been included. Although there are technical differences between these relationships this article will consider their meanings

trine of *respondeat superior* a master is liable for injury to person or property resulting from the acts of his servant done within the *scope of his employment* in the master's service.[18]

There are two primary requirements which are conditions precedent to the utilization of the doctrine: (1) an authentic master-servant relationship must exist in order for the master to be properly charged with the servant's act as if it were his own;[19] and, (2) the servant's tortious conduct must be committed within the scope of his employment.[20] The scope of employment concept, however, due to its historically obscure nature, is not susceptible to minute delineation. In making this determination, the courts traditionally analyze the authority conferred upon the servant who was responsible for the tortious act,[21] and more importantly, closely scrutinize the relationship between the tort committed and the servant's authority.[22] Furthermore, those acts done with either express or implied authority[23] are within the scope of employment of the servant.[24]

In interpreting the "scope of employment" concept there are two distinct constructions: strict and liberal. Those courts which strictly construe scope of employment confine it so as to not include torts of a willful nature, while the broader scope utilized by the "liberalized" courts considers a willful tort to be within the parameters of scope of employment. Additionally, there are two separate branches of the strict constructionist approach. Those allied with the narrower of the two

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as being synonomous with each other. Western Union Tel. Co. v. Hinson, 191 Ark. 617, 87 S.W. 66 (1935); Baltimore & O. R.R. v. Strube, 111 Md. 119, 73 A. 697 (1909).

18. A master is responsible for want of care on the part of his servant toward those whom the master owes a duty to use care, provided the servant's failure to use care occurred in the course of his employment. Vivion v. National Cash Register Co., 200 Cal. App. 2d 597, 19 Cal. Rptr. 602 (Dist. Ct. App. 1962); Lange v. National Biscuit Co., 211 N.W.2d 783 (Minn. 1973); Blasinay v. Albert Wenzlick Real Estate Co., 235 Mo. App. 526, 138 S.W.2d 721 (1940); Hantke v. Harris Ice Machine Works, 152 Ore. 465, 54 P.2d 293 (1936).
19. Pennsylvania Co. v. Roy, 102 U.S. 451 (1880).
20. Draper v. Oliver Paving & Constr. Co., 54 Del. 43, 181 A.2d 565 (1964); Klatt v. Commonwealth Edison Co., 33 Ill.2d 481, 211 N.E.2d 720 (1965).
21. *See, e.g.*, Dusquesne Distrib. Co. v. Greenbaum, 135 Ky. 182, 121 S.W. 1026 (1909); Drug Fair of Maryland, Inc. v. Smith, 263 Md. 341, 283 A.2d 392 (1971); Pesio v. Sherman, 285 Minn. 246, 171 N.W.2d 748 (1969). Scope of authority is one of the elements necessary to establish whether or not a particular act was committed within the "scope of employment." The loose application of these concepts has created the mistaken impression that they are synonomous with one another. The court in Hopkins Chem. Co. v. Read Drug & Chem. Co., 124 Md. 210, 211, 92 A. 479, 480 (1914), recognized this by noting: "The simple test is whether [the acts were] within the scope of his employment;... whether they were done by the servant in *furtherance* [of the master's business *and*]... have been authorized." (emphasis added).
22. J. J. Newberry Co. v. Judd, 259 Ky. 309, 82 S.W.2d 359 (1935); Sanders v. Day, 2 Wash. App. 393, 468 P.2d 452 (1970).
23. Pesio v. Sherman, 285 Minn. 246, 172 N.W.2d 748 (1969); Hinkle v. Chicago B. & Q. R.R. Co., 199 S.W. 227 (Mo. 1917).
24. Express authority is that which is specifically delegated by the master to the servant, while implied authority is that which may be inferred from the employment relationship or incidental to it. Bradley v. Stevens, 329 Mich. 556, 46 N.W.2d 382 (1951); Wright v. Wilcox, 19 Wend. 343 (N.Y. 1838); Baskett v. Banks, 186 Va. 1022, 45 S.E.2d 173 (1947); 2 F. MECHEM, AGENCY §§ 1929. 1960 (2d ed. 1914); RESTATEMENT (SECOND) OF AGENCY §§ 228 *et. seq.* (1958).

branches have taken the position that a willful tort is, per se, outside the scope of employment,[25] while those espousing the other view have modified this principle by holding that a willful tort is only prima facie evidence of an act being outside the scope of employment.[26] The rationale applied in these decisions is that public policy is best served by refusing to permit recovery against the master. Due to the willful nature of the servant's tortious conduct, the master lacked the requisite control over these actions, therefore, liability should not attach.

Under the strict construction doctrine, the master "must only respond" when the tortious act of the servant occurs in the furtherance of the master's business.[27] Thus, an intentional tort, by its very nature, is an independent act of the wrongdoer and does not further the interests of the employer. There is, however, an exception to this position in which the master's business would be served by a willfully tortious act, notwithstanding the fact that the tort is outside the scope of employment.[28] Those situations in which the service to be rendered impliedly necessitates, authorizes, or at least anticipates a willful tort are exemplary of this exception.[29] Although these situations approximate actual authorization, the courts have held the master liable on the theory that the authorization arose from the employment rather than the employer.[30] The authority is considered implied from or incidental to the nature of the employment.[31] It can be deduced from these

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25. Wright v. Wilcox, 19 Wend. 343 (N.Y. 1838), a willful tort was deemed as a stepping stone from the course of employment; Barry v. Oregon Trunk Ry., 197 Ore. 246, 253 P.2d 260 (1953).
26. Gulf, C. & S.F. Ry. v. Reed, 80 Tex. 362, 15 S.W. 1105 (1891); *see* O'Roark v. Gergley, 497 S.W.2d 931 (Ky. Ct. App. 1973).
27. Bradlow v. American Dist. Tel. Co., 131 Conn. 192, 38 A.2d 679 (1944); Atlanta Baseball Co. v. Lawrence, 38 Ga. App. 497, 144 S.E. 351 (1928); Horton v. Jones, 208 Miss. 257, 44 So. 2d 397 (1950); Mandel v. Byram, 191 Wisc. 446, 211 N.W. 145 (1926); *cf.* Pina v. Narragansett Dounuts, Inc., 304 A.2d 655 (R.I. 1973); 3 T. COOLEY, TORTS § 393 (4th ed. 1932); RESTATEMENT (SECOND) OF AGENCY §§ 214, 228 (1958); Book Note, 45 HARV. L. REV. 342 (1931).
28. Examples of this exception are common where the servant is a bartender or a security guard. In these situations, respectively, a servant may have authority to quell a disturbance but not to assault customers, or a security guard may have authority to question an alleged shoplifter, but not to falsely imprison that customer. When this occurs, often the employer is held liable notwithstanding the fact that the servant's act is not within the scope of his employment. *See* note 62 *infra*.
29. *See, e.g.*, Stewart v. Reutler, 32 Cal. App. 2d 195, 89 P.2d 402 (1939); Lange v. National Biscuit Co., 211 N.W.2d 783 (Minn. 1973); Schmidt v. Vanderveer, 110 App. Div. 755, 97 N.Y.S. 441 (1906); F. MECHEM, OUTLINES OF THE LAW OF AGENCY § 396 (4th ed. 1952).
30. Guillen v. Kuykendall, 470 F.2d 745 (5th Cir. 1972); Great Atl. & Pac. Tea Co. v. Dowling, 43 Ga. App. 549, 159 S.E. 609 (1931); Freedman v. Martin, 43 Ga. App. 677, 160 S.E. 126 (1931); Gillis v. Great Atl. & Pac. Tea Co., 223 N.C. 470, 27 S.E.2d 283 (1943); Combs v. Kobacker Stores, 65 Ohio L. Abs. 326, 114 N.E.2d 447 (Ct. App. 1953); RESTATEMENT OF AGENCY § 245 (1933); 2 F. MECHEM § 1982 (2d ed.1914).
31. Sanders v. Day, 2 Wash. App. 393, 468 P.2d 452 (1970). Although scope of employment is not susceptible to clear and concise definition, there has surfaced a recent trend in which certain courts have adopted a more systematic approach in dealing with the problems involved in determining scope of authority. The RESTATEMENT OF AGENCY has provided the methodology for determining scope of authority:

decisions, that in jurisdictions adhering to a strict construction of the scope of employment requirement, the master is not subject to liability for the intentional or willful torts of his servant unless the former can be held for his own omissions, or unless the type of employment, by its nature, either expressly or impliedly authorizes the commission of such torts.

The concept of the master's non-culpability for the willful torts of his servant has been subjected to widespread liberalization by which a servant's willful tort is more readily imputed to the master. The jurisdictions adhering to this position, which now constitute the majority, reason that the liberalization is warranted since it is the duty of an employer to assure that the acts authorized by his employee are properly performed. In effect, the acts of a servant are the acts of the master, at least in that they would not be performed "but for" the design of the master.[32] Since a master would be liable for his own torts, he should be liable for such torts committed while he was constructively acting.[33]

Prichard v. Gilbert[34] presents an example of this liberalized interpretation of scope of employment, wherein the court held that even in a situation where the servant is not furthering the master's business, the master could become liable for the actions resulting from the personal animosity of the servant. In *Pritchard*, the employer's salesman was driving a company-owned car home from a night sales meeting. The plaintiff swerved his car while passing the defendant salesman, forcing the defendant's car off the road. The enraged salesman then reversed direction, pursued the plaintiff and forced him to stop. The salesman then proceeded to assault and inflict serious bodily injury upon the plaintiff. The court, in finding the employer liable, concluded that as long as the assault originated out of a dispute which arose in the scope

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(2) In determining whether or not the conduct, although not authorized, is nevertheless so similar to or incidental to the conduct authorized as to be within the scope of employment, the following matters are to be considered:
(a) whether or not the act is one commonly done by such servants;
(b) the time, place and purpose of the act;
(c) the previous relations between the master and the servant;
(d) the extent to which the business of the master is apportioned between different servants;
(e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
(f) whether or not the master has reason to expect that such an act will be done;
(g) the similarity in quality of the act done to the act authorized; . . .
(i) the extent of departure from the normal method of accomplishing an authorized result; . . .

RESTATEMENT (SECOND) OF AGENCY § 229 (1958).

32. Some courts have adopted the tort concept of *sine qua non* and applied it to agency relationships, holding, "but for" the master's employing the servant the tort would not have been committed.
33. F. MECHEM, OUTLINES OF THE LAW OF AGENCY § 359 (4th ed. 1952).
34. 107 Cal. App. 2d 1, 236 P.2d 412 (1951); *accord*, Minnesota Mining & Mfg. Co. v. Ellington, 92 Ga. App. 24, 87 S.E.2d 665 (1955).

of employment, no intent to further the business of the master need be found. The assault by the employee was merely one of the risks his employer must bear,[35] even though the act was not in furtherance of his employer's business pursuits. The only recognized limitation arises when the employee completely abandons his employment at the time of the commission of the tort and is wholly serving his own personal desires.[36] *Pritchard*, being an apparent contradiction to this limitation, can only be explained by the court's factual determination that the actions committed did not constitute total abandonment.

Despite the irreconcilable division between the strict and liberal viewpoints, the doctrine of *respondeat superior* is still stated as subjecting the master to liability for any tortious acts of his servants committed within the scope of their employment. The conflict has come to bear in the application of the scope of employment requirement. In this determination the dispositive factor is the causal relationship between the authority conferred upon the servant and the tort committed. This factor undergoes its most extreme test when the tort of slander has been committed. The jurisdictions are divided on the question of whether such an utterance can conceivably fall within the scope of employment.

Although the majority rule states that a willful tort, such as slander, may be within the scope of employment,[37] there does exist a substantial and vocal minority.[38] The latter view takes the position that the traditional scope of employment test is inapplicable in cases founded upon a slanderous utterance.[39] This school of thought reasons that the offense of slander is a voluntary act of the speaker, and thereby is more likely to be an expression of momentary passion or excitement. Thus, it logically follows that such an utterance, clearly unauthorized, must be

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35. *See* Minnesota Mining & Mfg. Co. v. Ellington, 92 Ga. App. 24, 87 S.E.2d 655 (1955); Korhorn v. Smith, 3 Ill. App. 3d 532, 278 N.E.2d 864 (1971). The majority of jurisdictions would construe scope of employment more narrowly, reaching a different conclusion. Although the act of driving home from a meeting was within the scope of employment, the assault after a lengthy pursuit can be considered an act entirely dissociated from the employment and could have been regarded as a departure from the service. The salesman stated at trial that his purpose was to stop an incompetent driver.
36. Hickson v. W. W. Walker Co., 110 Conn. 604, 149 A. 400 (1930); Sandman v. Hagan, 154 N.W.2d 113 (Iowa 1967).
37. *See, e.g.*, Drug Fair of Maryland, Inc. v. Smith, 263 Md. 341, 283 A.2d 392 (1971); Luz v. Stop & Shop, Inc. of Peabody, 348 Mass. 198, 202 N.E.2d 771 (1964); Lange v. National Biscuit Co., 221 N.W.2d 783 (Minn. 1973).
38. *See* note 39 *infra*.
39. Duquesne Distrib. Co. v. Greenbaum, 135 Ky. 182, 121 S.W. 1026 (1909). The court stated that it is insufficient to prove solely that the servant or agent at the time of the commission of the tortious act was engaged in the service of the master or principal, or acting within the scope of employment. It must be further shown that the principal directed or authorized the agent to speak the actionable words, or afterwards approves or ratifies their speaking. *See e.g.*, Mathews v. U.S. Rubber Co., 219 F. Supp. 831 (E.D.S.C. 1963); World Ins. Co. v. Peavy, 110 Ga. App. 527, 139 S.E.2d 155 (1964); McKown v. Great Atl. & Pac. Tea Co., 99 Ga. App. 120, 107 S.E.2d 883 (1959); Miller v. Federated Dept. Stores, Inc., 304 N.E.2d 573 (Mass. 1973); *cf.* Fordson Coal Co. v. Carter, 269 Ky. 805, 108 S.W.2d 1007 (1937). *Contra*, Higgins v. Investors Acceptance Co. of Miami, 287 So. 2d 724 (Fla. Dist. Ct. App. 1974).

ascribed to the personal malice of the servant rather than to an act performed in the course of his employment. This position was articulated in *Duquesne Distributing Co. v. Greenbaum*,[40] wherein the court noted:

> Slanderous words are easily spoken, are usually uttered under the influence of passion or excitement, and more frequently than otherwise are the voluntary thought and act of the speaker. Or, to put it in another way, the words spoken are not generally prompted by or put into the mouth of the speaker by any other person, and represent nothing more than his personal views or opinions about the person or thing spoken of. If principals or masters could be held liable for every defamatory utterance of their servants or agents while in their service, it would subject them to liability that they could not protect or guard against. No person can reasonably prevent another, not immediately in his presence, from giving expression to his voluntary opinions, however defamatory they may be.[41]

The majority, adhering to the liberal position, reasons that there is no distinction between willful and non-intentional torts with regard to the doctrine of *respondeat superior*.[42] The only apparent exception to this assertion is that it has not been extended so as to include a situation in which the willful tort emanated solely from the servant's personal motives, bearing no relation to his employment.[43] The basic rule has been narrowed whereby some courts have held that in order for liability to attach, the slanderous utterance of the servant must not only be within the scope of employment, but must also be in *furtherance of the principal's business*.[44] Those espousing this view reason that no distinction is warranted as to the willful or the non-willful nature of the tort, since in either situation the tort would not have been committed but for the principal's employment of the agent. Thus, the equities demand that the prinicipal assume liability.

The case of *West v. F. W. Woolworth Co.*[45] exemplifies the outer reaches to which this doctrine has been extended. Therein, the employee was given express instructions "to never, under any circum-

40. 135 Ky. 182, 121 S.W. 1026 (1909).
41. *Id.* at 185, 121 S.W. at 1028.
42. *See, e.g.*, Wells v. Shop Rite Foods, Inc., 474 F.2d 838 (5th Cir. 1973); Jones v. Sears, Roebuck & Co., 459 F.2d 584 (6th Cir. 1972); Malvo v. J. C. Penney Inc., 512 P.2d 575 (Alas. 1973); Gillis v. Great Atl. & Pac. Tea Co., 223 N.C. 470, 27 S.E.2d 283 (1943).
43. *See, e.g.*, Wells v. Shop Rite Foods, Inc., 474 F.2d 838 (5th Cir. 1973) (dissenting opinion); Craft v. Magnolia Stores Co., 161 Miss. 756, 138 So. 405 (1931); Hammond v. Eckerd's of Asheville, Inc., 220 N.C. 596, 18 S.E.2d 151 (1942); *cf.* Sullivan v. Morrow, 504 S.W.2d 767 (Tenn. 1973); E. HUFFCUT, LAW OF AGENCY 305–06 (1901).
44. Waters-Pierce Oil Co. v. Bridwell, 103 Ark. 345, 147 S.W. 64 (1912) (emphasis added); *see, e.g.*, Wntesman v. Pettis Dry Goods Co., 82 Ind. App. 504, 146 N.E. 835 (1925); Grist v. Upjohn, 368 Mich. 578, 118 N.W.2d 985 (1962). *Contra*, Smedley v. Life and Cas. Ins. Co. of Tennessee, 221 F. Supp. 119 (W.D. Ark. 1963).
45. 215 N.C. 211, 1 S.E.2d 546 (1939).

stances, charge any person with theft.'"[46] Nonetheless, the agent accused the plaintiff of having committed a larceny. In holding Woolworth vicariously liable, the court reasoned that "[w]hile the actual authority of the employee is usually material in determining the scope of his employment, *it is not determinative of the liability of the principal.*"[47] This seemingly inconsistent conclusion was based upon the theory that employer's rarely, if ever, specifically instruct their employees to commit tortious acts. Rather, there exists within the master's instructions an implied order that such acts are unauthorized. Recognizing the fact that secondary responsibility may arise under appropriate situations despite this implied instruction, the court found that no distinction is warranted in those situations where the employer attempted to expressly exculpate himself of any liability. As can be seen from the above discussion, whether an employer will be compelled to respond for the willful torts of his servants is determined by the proportionate emphasis given to the following considerations: scope of employment, scope of authority, and the nature of the intentional tort.[48] In the consideration of these tenets the Maryland courts have vacillated between the strict and liberal constructions of the doctrine of *respondeat superior.*[49] The early interpretations of scope of employment were extremely narrow. A master was responsible for the acts of his servant, if and only if the tortious act occurred while the latter was engaged in the performance of the specific service for which he was employed.[50] The limits of the doctrine were subsequently liberalized through decisions in which a master's liability was extended to those acts committed within the scope of employment. The act must also have been within the limits of implied authority, however "erroneous, mistaken, or malicious."[51] Thus, for those acts beyond such limits, no liability resulted unless they were expressly authorized or subsequently ratified by the master.[52]

As the law became more refined a differentiation between scope of authority and scope of employment began to develop.[53] *Drug Fair of Maryland, Inc. v. Smith,*[54] the most recent Maryland case prior to

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46. *Id.* at 212, 1 S.E.2d at 547.
47. *Id.* at 214, 1 S.E.2d at 548 (emphasis added). *See also* Smedley v. Life and Cas. Ins. Co. of Tennessee, 221 F. Supp. 119 (W.D. Ark. 1963).
48. O'Brien v. B. L. M. Bates Corp., 211 App. Div. 743, 208 N.Y.S. 110 (1925); *see* Drug Fair of Maryland, Inc. v. Smith, 263 Md. 341, 283 A.2d 392 (1971); Sandrock v. Taylor, 185 Neb. 106, 174 N.W.2d 186 (1970).
49. *Compare* Adams v. Cost, 62 Md. 264 (1884) *with* Newton v. Spence, 20 Md. App. 126, 316 A.2d 837 (1974).
50. 62 Md. 264 (1884).
51. McCrory Stores Corp. v. Satchell, 148 Md. 279, 285, 129 A. 348, 350 (1925). The defendant's manager mistakenly accused the plaintiff of larceny. The court held that as long as the agent was acting under the impression that the plaintiff had in fact stolen merchandise and so acted with authority, the principal could be held liable.
52. *Id.*
53. Globe Indem. Co. v. Victill Corp., 208 Md. 573, 119 A.2d 423 (1956); Great Atl. & Pac. Tea Co. v. Noppenberger, 171 Md. 378, 189 A. 434 (1937).
54. 263 Md. 341, 283 A.2d 392 (1971).

Newton to examine the doctrine of *respondeat superior*, specifically noted that an authorization, either express or implied, to commit a certain act, is a necessary prerequisite to the invocation of the doctrine.[55] As a result, authority has continued to be a paramount consideration in determining the master's liability for his servant's intentional conduct.[56]

Safeway Stores v. Barrack[57] is exemplary of this position. An employee of the defendant store apprehended the plaintiff and accused him of having committed a larceny from the store. The employee, a security guard, was hired for the purpose of detecting and prosecuting shoplifters. Since the guard's tortious actions in the case at bar were deemed to be in the regular course of his employment the employer was held secondarily liable.[58] By carefully scrutinizing the nature of the job for which the employee was hired, other Maryland decisions have limited *Safeway*. The Maryland Court of Appeals in *Birnheimer v. Becker*[59] recognized the significance of the task to be performed by the agent. Unlike the situation in *Safeway*, the employee in *Birnheimer* was not hired for the purpose of accosting shoplifters. Noting this distinction to be controlling, the court refused to extend liability to the principal on the theory that an *ordinary* agent was not authorized with the power that was exercised therein.[60] Thus, the implied authority doctrine was not allowed to serve as a vehicle through which the courts could categorically hold a principal liable.[61] The *Safeway* and *Birnheimer* decisions thereby established guidelines for the courts to utilize in their determination of whether a particular tortious act of a servant could be said to have occurred within the scope of authority conferred upon him.[62]

When ascertaining the servant's implied authority the character of the position occupied and the duties incidental to it are decisive elements.[63] In studying the character of the position of a servant who has no express authority to protect the master's property, the title of

55. *Id.* at 346, 283 A.2d at 395, quoting Globe Indemnity Co. v. Victill Corp., 208 Md. 573, 119 A.2d 423 (1956).
56. Drug Fair of Maryland, Inc. v. Smith, 263 Md. 341, 283 A.2d 392 (1971); Great Atl. & Pac. Tea Co. v. Noppenberger, 171 Md. 378, 189 A. 434 (1937).
57. 210 Md. 168, 122 A.2d 457 (1956).
58. *Id.* at 174, 122 A.2d at 460.
59. 102 Md. 250, 62 A. 526 (1905); *accord*, Drug Fair of Maryland, Inc. v. Smith, 263 Md. 341, 283 A.2d 392 (1971); Central R.R. Co. v. Brewer, 78 Md. 394, 26 A. 392 (1894).
60. 102 Md. at 255–56, 62 A.2d at 528.
61. *Id.* at 255, 62 A.2d at 528, where an *ordinary* sales clerk falsely imprisoned and assaulted a customer whom he thought had commited a larcenous act. The court said that since such agent's actions were neither authorized nor within the scope of his employment, no liability would be imputed to the principal.
62. *See, e.g.*, Stewart v. Ruetler, 32 Cal. App. 2d 195, 89 P.2d 402 (1939) (bouncer); J. J. Newberry Co. v. Judd, 259 Ky. 309, 82 S.W.2d 359 (1935) (store manager); Schmidt v. Vanderveer, 110 App. Div. 775, 97 N.Y.S. 441 (1906) (guard); Ploof v. Putman, 83 Vt. 252, 75 A. 277 (1910) (caretaker); *see* M. FERSON, PRINCIPLES OF AGENCY § 396 (4th ed. 1952); F. MECHEM, OUTLINES OF THE LAW OF AGENCY § 253 (1946).
63. *See, e.g.*, East Coast Freight Lines, Inc. v. Mayor and City Council of Baltimore, 190 Md. 256, 58 A.2d 290 (1948); Great Atl. & Pac. Tea Co. v. Noppenberger, 171 Md. 378, 189 A. 434 (1937); McCrory Stores Corp. v. Satchell, 148 Md. 279, 129 A. 348 (1925).

"manager" carries an inference that such a person's acts are the acts of the employer, due to the fact that a manager is entrusted with the general management and custody of the entire business. This, in turn, renders the employer liable when such an employee causes the false imprisonment, slander, or malicious prosecution, provided the employee intends to protect the employer's property. Such actions are considered incidental to and consistent with the general scope of such employee's employment.[64]

Conversely, implied authority that is supervisory in nature does not arise for those employees below the level of "manager" or "assistant-manager."[65] Since the protection of the master's property is not normally entrusted to a servant of this capacity, nor is it his implied duty to protect the property of his employer, no liability attaches to the master.[66] An exception arises with regard to those employees, regardless of their technical title, who have been expressly delegated the duty of protecting the master's property. An implied authority to do everything reasonable and necessary to effectuate said delegation is created. Despite this exception, the master cannot be held liable for the tortious conduct originating from the servant's personal motives or malice.[67]

The significance of *Newton v. Spence* lies not in how the controversy between the parties before this court was resolved, but rather in the decision's ramifications upon future jural relationships similarly situated. This prognosis is predicated on the appellate court's determination that the jury instruction, with regard to Sears' liability for Spence's action, "fully conforms with Maryland law on the subject."[68] The salient portion of the instruction states that "Sears would be responsible if the jury found Spence was acting within the scope of his employment and in furtherance of the business of Sears . . . ."[69] A paradox arises when this analysis is compared with the court's own prior contradictory statement of the law where the court propounded *scope of authority* to be one of the essential elements necessary before vicarious responsibility will attach.[70] In addition, the Court of Special Appeals' characterization of the jury instruction to be in "full conformity with the Maryland law,"[71] is in fact a misstatement of the law.[72] Prior to *Newton*, the trend of significantly emphasizing author-

64. *See, e.g.*, Lewis Accelerated Trans.-Pony Express, Inc., 219 Md. 252, 148 A.2d 783 (1959); McCrory Stores Corp. v. Satchell, 148 Md. 279, 129 A. 348 (1925).
65. 219 Md. 252, 148 A.2d 783 (1959).
66. *Id.* at 255, 148 A.2d at 785.
67. Drug Fair of Maryland, Inc. v. Smith, 263 Md. 341, 283 A.2d 392 (1971). *But cf.* Western Union Telegraph Co. v. Rasche, 130 Md. 126, 99 A. 991 (1917).
68. 20 Md. App. at 139, 316 A.2d at 845.
69. *Id.*
70. *See* pp. 176 *supra*.
71. 20 Md. App. at 139, 306 A.2d at 845.
72. The overwhelming majority of courts consider scope of authority to be an essential element as a condition precedent in determining liability for the master. Drug Fair of Maryland, Inc. v. Smith, 263 Md. 341, 283 A.2d 392 (1971); Le Pore v. Gulf Oil Corp., 237 Md. 591, 207 A.2d 451 (1965); Sandrock v. Taylor, 185 Neb. 106, 174 N.W.2d 186 (1970).

ity in determining an employer's liability had guided the Maryland courts. *Newton*, by failing to specifically consider scope of authority, materially altered this trend. *Newton v. Spence* thus gains its prominence in that it broadens the possible range of a principal's liability. As a result, Maryland has assumed a position in the outermost regions of those jurisdictions liberally construing scope of employment, placing it practically in a class by itself.[73] Had the trial court closely examined the scope of Spence's authority, it is clear that its decision would have been different, since neither express nor implied authority was conferred upon him. Nor can it be shown that the accusations by Spence were incidental to his duties as a clerk. Such a conclusion arises from the fact that Spence, being a subordinate agent[74] with few supervisory functions, was not entrusted with those powers normally relegated to managerial personnel. Thus, the acts committed were totally unrelated to his official duties.

Newton gave lip-service to the characterization of the law articulated in the North Carolina case of *West v. F. W. Woolworth*,[75] whereby liability is imputed to the employer only when it is established that the tortious conduct occurred within the scope of employment, was in furtherance of the employer's business and was authorized. However, it is evident from the decision in *Newton* that the application of the above law was by no means entirely dispositive to the court's holding. Such a conclusion is undeniable by virtue of the fact that *Newton* only adopted the first two of the above premises.[76] Thus, the non-dispositive tenet must only be classified as judicial dictum.

Subsequent North Carolina cases relying on *Woolworth* have reached the same interpretation as *Newton*. A progeny of those interpretations emerged in *Branch v. Dempsey*[77] where the court espoused the following rule of law:

> Under the doctrine of *respondeat superior*, vicarious liability to third persons is imposed upon the master for the servant's torts, not because he authorized the particular act, but because the servant is conducting the master's business, and because the social interest in the general security is best maintained by holding those who conduct enterprises in which others are employed to an *absolute liability* for what their servants do in the course of the enterprise.[78]

Branch, being indicative of the next logical step to *Newton's* interpreta-

73. Only the North Carolina construction is farther reaching than the present Maryland position. *See* Branch v. Dempsey, 265 N.C. 733, 145 S.E.2d 395 (1965).
74. 20 Md. App. at 128, 316 A.2d at 839. In considering the totality of Spence's responsibilities as a full-time clerk it is clear that the authority conferred upon him was only subordinate in nature.
75. 215 N.C. 211, 1 S.E.2d 546 (1939).
76. 29 Md. at 139, 316 A.2d at 845.
77. 265 N.C. 733, 145 S.E.2d 395 (1965).
78. *Id.* at 737, 147 S.E.2d at 408, quoting Porter v. Grennan Bakeries, 219 Minn. 14, 16 N.W.2d 906 (1944) (emphasis added).

tion of *Woolworth*, significantly reveals Maryland's future posture in the area of *respondeat superior*. The absolute liability of the master seems to be an inevitable result.

Barry Genkin

CRIMINAL LAW — JUDICIAL AFFIRMANCE OF THE VALIDITY OF THE YEAR AND A DAY RULE IN MARYLAND. *STATE V. BROWN*, 21 Md. App. 91, 318 A.2d 257 (1974).

A mortal wound rarely claims its victim more than a year after the fatal infliction. The common law established the rule that, in order to constitute felonious homicide, death of the victim must occur within a year and a day after the fatal act.

In *State v. Brown*,[1] a case of first impression, the Court of Special Appeals addressed itself to the applicability of the year and a day rule in Maryland. The appellee was indicted for the murder of his wife. It was not disputed that the decedent, who lingered almost two years before she died, was injured by the appellee.[2] The Criminal Court of Baltimore, in granting the appellee's motion to dismiss the indictment, found the year and a day rule to be valid and viable in Maryland. Upon appeal by the State, the Court of Special Appeals, in affirming the trial court's decision, held that the year and a day rule is in "full force and effect in Maryland."[3] Although the *Brown* court recognized the advancements made by medical science, it was not prepared to conclude that the rule is presently anachronistic.[4] Adjudging any alteration of the rule by judicial discretion inappropriate, the court reasoned that if change in the rule was to occur, it should be by the General Assembly.[5]

The rule is not intended to be a statute of limitations on an indictment for felonious homicide.[6] It is a test of proximate causation

1. 21 Md. App. 91, 318 A.2d 257 (1974).
2. Appellee had pleaded guilty to assault with intent to murder and was subsequently sentenced to a six-year prison term notwithstanding the fact that the State had recommended a five-year sentence. Brief for Appellant at 2.
3. 21 Md. App. at 97, 318 A.2d at 261. The State, in its brief, had not disputed the validity of the common law rule in Maryland but had urged abrogation of the rule. Brief for Appellant at 2.
4. *Id. See also* notes 63–65 *infra*.
5. *Id. See also* note 62 *infra*.
6. A statute of limitations connotes the time in which a prosecution can be brought after the completion of the crime, which, in the case of murder, does not commence until the death of the victim. Because the overwhelming majority of states do not limit prosecution for murder, prosecution may be brought at any time during the life of the offender. *See, e.g.*, GA. CODE ANN. § 26-502 (1972); KAN. STAT. ANN. § 21-3106(1) (Supp. 1972). *Contra*, N.M. STAT. ANN. § 40A-1-8 (1953), no person shall be prosecuted for a capital felony unless an indictment can be found, information or complaint filed within ten years from the time the crime is committed. A number of states do limit the prosecution period for felonies other than murder. *See, e.g.*, OHIO REV. CODE § 2929.11 (1974), prosecution for all felonies other than aggravated murder or murder is barred unless commenced within six years after the offense.