

CASES WHICH THE SUPREME COURT OF ARIZONA SHOULD REVISIT

(Family Purpose Doctrine)

CHESTER H. SMITH*

The Supreme Court of Arizona should revisit and re-analyze its position on the "family car" or "family purpose" doctrine as set forth in the following three cases: *Benton v. Regeser*,¹ *Donn v. Kunz*,² and *Mortensen v. Knight*.³

Facts

In the *Benton* case the court said this:

The cases cited firmly establish the rule that a father who furnishes an automobile for the pleasure and convenience of the members of his family makes the use of the machine for the above purposes his affair or business, and that any member of the family driving the machine with the father's consent, either express or implied, is the father's agent. We are convinced that the rule is based on sound reason and that it is supported by the great weight of authority, and therefore shall adopt it as the rule in this jurisdiction.

In the *Donn* case the court quoted the above statement from the *Benton* case with approval and said, "It is not disputed that the 'family car' doctrine is the established law of the state of Arizona." However, in the *Donn* case the court limited the application of the doctrine to the common law head of the household and refused to extend its application to the community-owned car.

In the *Mortensen* case the court refused to limit the application of the doctrine as set forth in the *Donn* case and extended its application to the community-owned car. The court said, "It is, therefore, our conclusion that the family purpose doctrine applies to impose liability even though the automobile is community property, for the control and management is fixed by statute exclusively in the husband."

Analysis

Three case should be carefully distinguished. (1) If the owner of the car furnishes it to another person who is in fact and in law the owner's agent or servant, then of course, the owner is liable in damages under the familiar doctrine, respondeat superior. With that there can be

* See Contributors' Section, p. 86, for biographical data.

¹ 20 Ariz. 273, 179 Pac. 966 (1919).

² 52 Ariz. 219, 79 P.2d 965 (1938).

³ 81 Ariz. 325, 305 P.2d 463 (1956).

no quarrel. (2) If the owner of the car furnishes it to another person who is known by the owner to be a careless driver then the owner should be liable in damages if such other person continues his negligent driving and injures some third person. (3) If the owner of the car furnishes it or lends it to another person, and that other person uses that car "on a frolic of his own," in fact wholly divorced or apart from the business of the owner, then, under the ordinary law of master and servant or principal and agent, the owner of the car is not liable for damages caused by the user of the car. Their relationship is that of bailor and bailee and the bailor is not liable for the damages caused by the negligent use of the bailed res by the bailee except as set forth under (2) next above.

It is this third case which is beyond the usual law of agency and is included within the "family purpose" or "family car" doctrine. For a master or principal to be liable for the acts of his servant or agent the act must be (a) within the scope of the employment or agency AND (b) in furtherance of the business of the master or principal. Assume the following facts. *F* is the father and head of the household. He has a son, *S*, who is 18 years of age. *S* has a girl friend, *G*, who, in *F*'s opinion, is an evil influence in *S*'s life. *S* and *G* frequent dance halls which are also an evil influence on *S*. On a given evening when *S* is far behind in his "homework" he asks *F*'s permission to take *G* to a dance. *F* gives his consent most reluctantly and in a kindly manner advises *S* of his duties and errors. *S* takes the car and drives negligently, causing injury to *P* who sues *F* and *S* for damages. For the court to take the view that *F* has made *S* his servant or agent while on this "frolic of his own" is simply contrary to fact; and for the court to say *S* is furthering the "business" of *F* is still worse. Further, to construe *F*'s "business" as including the use by *S* of *F*'s car for *S*'s frolic is to give the word a meaning which only the judge would recognize. The truth is this. *F* is the bailor of the car and *S* is a bailee thereof. At common law a bailor is not liable for the bailee's negligent use of the bailed res. If *F* had loaned his car to *X* who is not a member of *F*'s household and *X* had driven the car negligently, *F* would not be liable. Had *F* loaned his rifle or his knife to his son, *S*, and *S* had used either negligently resulting in injury to *P*, the father, *F*, would not be liable.

The vice of the "family car doctrine" is not so much that it holds *F* liable for *S*'s negligent use of *F*'s car, if such be socially desirable as some cases say, but lies in the fact that it selects the "head of the household" of all the types of bailors, and selects a "car" among all the possible items which may be bailed, and makes him and him alone among such bailors liable. It lies in the inequality and discrimination which the law recognizes against that person who happens to be the "head of the household." It singles him out to carry the burden of damages when all

other bailors would go scot free, including other bailors of cars. The doctrine will not stand the light of analysis.

That the Arizona Supreme Court has espoused the doctrine in clear and unambiguous language cannot be doubted as appears in the quotations above. But it is by no means clear that each of the above mentioned Arizona cases could not have been solved under the general doctrine of respondeat superior. It may serve no useful purpose as against the clear and express language of the court to distinguish dicta from holding. It is enough to say that the court has embraced the doctrine as "sound."

Conclusion

The Supreme Court of Arizona should repudiate the "family car" or "family purpose" doctrine on two grounds. (1) It is unsound as a legal proposition. (2) The liability imposed by the doctrine is one which should be created by the legislature, not by the courts.

If it is conceived to be desirable that a "head of a household" be liable for the negligent use of the family car, it would seem to be equally desirable that every other car owner who lends his car to another should be held liable for the borrower's negligent driving of said vehicle. With that premise let the legislature of Arizona enact an appropriate statute to that effect has have the legislatures of other states.⁴

⁴ See Note, 14 TEX. L. REV. 234, 236 (1936), listing Arizona among 18 states which follow the doctrine and p. 241 listing 26 states in which the doctrine is not followed; RESTATEMENT (SECOND), AGENCY § 238, comment c (1958), saying, "A child can pursue his own private affairs as distinguished from the business of his parent, and if in such case he is using the family automobile by permission of his father, he is in a position of a bailee rather than of a servant." A typical statute appears in the Iowa case of Secured Finance Company v. Chicago, Rock Island, & Pacific Railway Company, 207 Iowa 1105, 224 N.W. 88, 61 A.L.R. 855 (1929), which reads as follows: "In all cases where damage is done by any car driven by any person under fifteen years of age and in all cases where damage is done by the car, driven by consent of the owner, by reason of negligence of the driver, the owner of the car shall be liable for such damage." See also 8 N. CAR. L. REV. 256 (1930); 21 Ky. L.J. 483 (1933) and 100 A.L.R. 1021 (1936).