Washington and Lee Law Review

Volume 18 | Issue 1 Article 20

Spring 3-1-1961

Evidence: Admission Of Agent'S Declarations To Prove Course Of Employment

VIRGINIA COMMENTS

EVIDENCE: ADMISSION OF AGENT'S DECLARATIONS TO PROVE COURSE OF EMPLOYMENT

When one is injured by an agent it is necessary to prove that the agent was acting within the course of his employment before a recovery can be had against the principal. Sometimes the agent will state at the scene of the accident that he was acting for his principal when the accident occurred. The question then arises whether this declaration, which is clearly hearsay, may be put into evidence for the purpose of proving that the agent was acting within the course of his employment.

In *Turner v. Burford Buick Corp.*[1] there was a collision between automobiles driven by the defendant's agent and the plaintiff. At the scene of the accident the agent stated to a police officer and to the driver of the plaintiff's automobile that he was employed by Burford as a salesman and that he was on business for them at the time of the accident. At the trial the defendant admitted that the driver was its agent but denied that he was acting in the course of his employment at the time of the accident. The agent's declarations were offered in evidence by the plaintiff for the purpose of proving course of employment and were admitted over the defendant's objection. However, the trial court later set aside the jury's verdict for the plaintiff on the ground "that the evidence as to the declarations of [the agent] ... should not have been admitted in evidence, and without that evidence there was no proof of the agency ...."[2] On appeal, the trial court's ruling was reversed. The Virginia Supreme Court of Appeals held that the agent's declarations were admissible, reasoning that "when ... a *prima facie* case of agency is made out, the agent's own declarations and admissions become admissible"[3] to prove course of employment.

In essence, the Virginia rule is that extra-judicial declarations are inadmissible to prove the fact of agency,[4] but they are admissible to

---

[1]201 Va. 693, 112 S.E.2d 911 (1960).

[2]Id. at 697, 112 S.E.2d at 914. The trial judge apparently used the word agency in its broadest sense—the fact of agency or employment plus course of employment. This is necessarily so because the defendant admitted that the driver was its employee.

[3]Id. at 697, 112 S.E.2d at 914.

[4]201 Va. 693, 697, 112 S.E.2d 911, 914 (1960); Bankers Fire Ins. Co. v. Henderson, 196 Va. 195, 83 S.E.2d 424 (1954); Griffith v. Electrolux Corp., 176 Va. 378, 11 S.E.2d

prove course of employment once a prima facie case of agency is established.[5] This approach, hereinafter referred to as the "prima facie rule," while recognized by other jurisdictions,[6] appears to be a minority holding.[7] A majority of jurisdictions still adhere to the rule adopted by the *Restatement of Agency* to the effect that extra-judicial declarations of an agent are inadmissible in evidence to prove course of employment as well as the fact of agency.[8] The question, therefore, is why the Virginia court will admit the declarations to prove course of employment when it will not admit them to prove the fact of agency.[9] It would seem that the objections to either would be coexistent.

The reason for excluding such out of court declarations is that they are hearsay.[10] Therefore, if such declarations are admitted to

---

644 (1940); Moore v. Aetna Cas. & Sur. Co., 155 Va. 556, 155 S.E. 707 (1930); Hoge v. Turner, 96 Va. 624, 32 S.E. 291 (1899); Fisher v. White, 94 Va. 236, 26 S.E. 537 (1897).

In Hoge v. Turner, supra, the court stated: "It is settled law that the declarations or acts of an agent cannot be received to prove his agency. That fact must be proved by other evidence, and must first be established before his declarations or acts are admissible as evidence." 96 Va. at 634, 32 S.E. at 295.

[5]201 Va. 693, 697, 112 S.E.2d 911, 914 (1960); Buchanan v. Wilson, 159 Va. 49, 59, 165 S.E. 422, 425 (1932); Royal Idem. Co. v. Hook, 155 Va. 956, 970, 157 S.E. 414, 419 (1931); J. C. Lysle Milling Co. v. S. W. Holt & Co., 122 Va. 565, 571, 95 S.E. 414, 416 (1918).

[6]Some of the cases which have adopted this approach are: Corona Coal & Iron Co. v. Callahan, 202 Ala. 649, 81 So. 591 (1919); Birmingham Mineral R. Co. v. Tennessee Coal, Iron & R. Co., 127 Ala. 137, 28 So. 679, 681 (1900); Syar v. United States Fid. & Guar. Co., 51 Cal. App. 2d 527, 125 P.2d 102, 104 (Dist. Ct. App. 1942); Tsirlis v. Standard Oil, 32 Cal. App. 2d 469, 90 P.2d 128 (Dist. Ct. App. 1939); Pinnix v. Griffin, 219 N.C. 35, 12 S.E.2d 667 (1941); Norton v. Harmon, 192 Okla. 36, 133 P.2d 206, 210 (1942); Stevens v. Moore, 211 S.C. 498, 46 S.E.2d 73, 77 (1948); Bass v. American Products Export & Import Corp., 124 S.C. 346, 117 S.E. 594 (1923); Bell v. Washam, 82 Ga. App. 63, 60 S.E.2d 408, 410 (1950) (dictum).

Some courts recognize that this approach is more a lenient qualification, and that by adopting it they are not strictly adhering to the rule that declarations by the agent are inadmissible to prove agency. See, e.g., Cornora & Iron Co. v. Callahan, 202 Ala. 649, 81 So. 591, 592 (1919).

[7]The following authorities support the majority rule. Edwards v. Rogers, 120 F. Supp. 499, 503 (E.D.S.C. 1954); Dennes v. Jefferson Meat Mkt., 228 Ky. 164, 14 S.W.2d 408 (1929); Dafoe v. Grantski, 143 Neb. 344, 9 N.W.2d 488 (1943); Annual Survey of Virginia Law, 46 U. Va. L. Rev. 1481, 1516 (1960); Annot., 3 A.L.R.2d 598, 606, 609 (1949); Comment, 16 Wash. & Lee L. Rev. 47, 50 (1959).

It is well established, however, that the agent may testify at the trial concerning his agency and the extent of his authority. Deitz v. Whyte, 131 Va. 19, 26, 109 S.E. 212, 214 (1921). Of course, the agent's declarations are admissible against him in a suit where he is a party. Mapes v. Foster, 38 Wyo. 244, 266 Pac. 109 (1928).

[8]Restatement (Second), Agency § 285 (1958). See cases cited in note 7 supra.

[9]For a collection of cases presenting the subject of declarations made by an agent offered to prove course of employment as distinguished from the fact of agency see Annot., 3 A.L.R.2d 598 (1949).

[10]Dafoe v. Grantski, 143 Neb. 344, 9 N.W.2d 488, 491 (1943); Annot., 3 A.L.R.2d 598, 599 (1949); 2 Am. Jur. Agency § 445 (1936).

prove course of employment, it follows that the court has adopted some reasoning to circumvent the limitations of the hearsay rule.

It is well established that the statements and admissions of an agent are properly admissible in evidence against the principal if they qualify as vicarious admissions.[11] "Under the vicarious admissions rule, a substantive rule of agency, an agent's out of court statements as to his authority (or any other relevant matter) may be received even though hearsay, if other evidence proves he was authorized to speak."[12] The statements admitted in *Turner* were not vicarious admissions because the authority to speak had not been established.[13] But it does seem that the *theory* of vicarious admissions is an underlying factor in the adoption of this prima facie rule. It is apparently reasoned in these cases that once the fact of agency is shown by some evidence, then the agent may speak for his principal as to matters which are authorized; and the fact that the agent declares that he is in the course of his employment is assumed to have been authorized. Since the authority was never established in *Turner,* it appears that in adopting the prima facie rule the court is creating a separate rule of admissibility.

The rationale, however, for the admission of these hearsay declarations in evidence is that they are admitted in corroboration of other evidence of agency.[14] The underlying theory for all the exceptions to the hearsay rule is that there is a degree of reliability in the very nature of the declaration sought to be admitted.[15] It is indicated that the presence of this corroborative element overcomes hearsay ob-

---

[11]4 Wigmore, Evidence § 1078 (3d ed. 1940).

[12]Murphy Auto Parts Co. v. Ball, 249 F.2d 508, 510 (D.C. Cir. 1957).

[13]What is meant by establishing the fact of the authority? It is "the requirement that the agency and the consequent authority to make the statement must be proved by other evidence than the purported agent's own declarations." McCormick, Some Evidence Questions in Personal Injury Cases Suggested by Recent Texas Decisions, 21 Texas L. Rev. 298, 307 (1943). "[I]t is, of course, not meant that there must first be a separate verdict found establishing that fact; what is meant is, that there must first be some competent testimony offered tending to prove that fact." 1 Mechem, Agency § 285 n.81 (2d ed. 1914). However, if the evidence is admitted before the fact of agency and authority to speak is established this error will be cured if those facts are subsequently established. Ibid. Moreover, the trial judge within his discretion may alter the order of proof so that the declaration may be admitted upon condition of subsequent proof of the authority. Ibid.

[14]Birmingham Mineral R. Co. v. Tennessee Coal, Iron & R. Co., 127 Ala. 137, 28 So. 679, 681 (1900); Norton v. Harmon, 102 Okla. 36, 133 P.2d 206, 210 (1942); Broadway v. Jeffers, 185 S.C. 523, 194 S.E. 642, 647 (1938); J. C. Lysle Milling Co. v. S. W. Holt & Co., 122 Va. 565, 95 S.E. 414, 416 (1918); Bell v. Washam, 82 Ga. App. 63, 60 S.E.2d 408 (1950) (dictum); Annual Survey of Virginia Law, 46 Va. L. Rev. 1481, 1516 (1960).

[15]See 5 Wigmore, Evidence § 1420 3d ed. 1940).

jections on the theory that if the declarations corroborate other evidence, they are likely to have a greater degree of reliability.[16] It is submitted, however, that the mere fact that a hearsay declaration corroborates other evidence of agency does not render it sufficiently reliable to overcome hearsay objections. By definition, corroborative evidence is evidence that tends in some degree to support an essential allegation or issue.[17] Of course, the agent's declaration that he was acting in the course of his employment would lend support to the issue of course of employment. But the question remains: is the declaration more reliable merely because it adds to the cumulative amount of evidence? It is submitted that it is not. The various exceptions to the hearsay rule are based on the theory that some extrajudicial declarations are reliable because of the surrounding circumstances at the time the declaration was made,[18] and not at the time that the declaration is offered in evidence. Therefore, the mere fact that the hearsay declaration is corroborative of other evidence presented at the trial does not make it any more reliable than it would be without such evidence.

The courts have applied the prima facie rule to both contract and tort cases, but it appears that the rule originated in Virginia in the contract cases and was later extended to the tort field.[19] The contract cases present the more usual principal-agent relationship whereby an agent is authorized to bind his principal by contract. Even without this rule, declarations made by an agent concerning his authority

---

[16]Murphy Auto Parts Co. v. Ball, 249 F.2d 508, 510 (D.C. Cir. 1957).

[17]Davies v. Silvey, 148 Va. 132, 138, 138 S.E. 513, 515 (1927), citing Gildersleeve v. Atkinson, 6 N.M. 250, 27 Pac. 477 (1891).

[18]See 5 Wigmore, Evidence §§ 1420, 1422 (3d ed. 1940).

[19]This is evident from the cases cited by the court in Turner: J. C. Lysle Milling Co. v. S. W. Holt & Co., Royal Idem. Co. v. Hook, and Buchanan v. Wilson, supra note 5. The first two cases involved situations wherein the principal contended that the agent was acting outside his authority in dealng with the third party. The rule later came to be applied in the tort field in Buchanan v. Wilson.

In Lysle Milling Co. the court stated: "Looking to the evidence as a whole, we think there was direct testimony tending materially to show that his agency carried with it the authority to make sales, and that, therefore ... it was proper ... to admit, in corroboration, the declarations on that subject made by [the agent] ... in the course of the exercise of his alleged agency." 122 Va. at 570, 95 S.E. at 416 (1918). It would appear, therefore, that the declarations sought to be admitted were properly admissible in any event because there was a sufficient showing of the authority to make the statements. 1 Mechem, op. cit. supra note 13 § 285.

In the instant case and in Buchanan v. Wilson, supra, both tort cases, the authority was never shown by testimonial evidence; all that existed was a presumption of course of employment that arose from the proof of ownership and employment. This would not appear to be a sufficient showing of authority within the language of the court in the Lysle case.

might properly be received in evidence merely to show the reliance of a third party in dealing with him as an agent.[20] The declarations are not within the hearsay rule because they are not offered to establish the truth of the matter asserted therein.[21]

The typical application of the prima facie rule in the tort field is seen in the instant case—an automobile accident wherein the agent is alleged to have been acting within the scope of his employment at the time of the accident. With respect to the employer, declarations by the driver that he was employed by the defendant and that he was acting within the scope of his employment at the time of the accident are within the hearsay rule since they are being offered to prove the truth of the matter asserted. Clearly, they cannot qualify as vicarious admissions until the authority of the agent to speak is established. But since the prima facie rule is itself a rule of admissibility, the declarations become admissible. It is submitted that the application of the rule to the automobile cases represents a questionable extension from a dissimilar agency situation.[22]

Other theories have been employed to admit the declarations of an agent to prove course of employment.[23] The one most frequently relied upon is the *res gestae* exception to the hearsay rule.[24] *Res gestae* is often confused with the doctrines of vicarious admissions and spontaneous utterances, thereby resulting in a tendency to blur the requirements of the two latter exceptions.[25] Under the *res gestae* ex-

---

[20]Ralston Purina Co. v. Novak, 111 F.2d 631, 637 (8th Cir. 1940); Nowell v. Chipman, 170 Mass. 340, 49 N.E. 631 (1898).

[21]Annot., 80 A.L.R. 603 (1932). In order for a declaration to be barred under the hearsay rule it must be offered for the truth of the matter asserted. Morgan, Admissions as an Exception to the Hearsay Rule, 30 Yale L. J. 355 (1921); 6 Wigmore, Evidence § 1766 (3d ed. 1940).

[22]See note 19 supra.

[23]This relates to declarations that are properly admissible under the general rules of evidence. Such declarations are admissible regardless of whether the declarant is an agent. Restatement (Second), Agency § 289 (1958). See note, 43 Harv. L. Rev. 936 (1930); Note, 37 Ky. L.J. 417 (1949).

[24]Lowie v. Dixie Stores Inc., 172 S.C. 468, 174 S.E. 394 (1934); 6 Wigmore, Evidence § 1769 (3d ed. 1940); Comment, 36 Ky. L.J. 471 (1948). See cases cited in 3 A.L.R.2d 598, 607, 609 (1949).

Contra, Meyers v. McMaken, 133 Neb. 524, 276 N.W. 167 (1937). The court rejected the rule to the effect that if the declarations are part of the res gestae they may be used to prove agency. "We think that these decisions constitute a minority view and that the better rule is that statements of an alleged agent concerning the existence or extent of his authority are not admissible against the principal to prove its existence or extent even though they might properly be designated as a part of the res gestae." Id. at 168.

[25]Murphy Auto Parts Co. v. Ball, 249 F.2d 508, 510 (D.C. Cir. 1957); Chantry v. Pettit Motor Co., 156 S.C. 1, 152 S.E. 753, 760 (1930) (dissenting opinion); 6 Wig-

ception, declarations of an agent which constitute a part of the transaction and are calculated to explain the transaction in issue are admissible in evidence.[26] It has been suggested that the use of the term *res gestae* is "merely an obscure way of saying that the statement must be made as part of the performance of an authorized act."[27] Therefore, the declaration may qualify as a vicarious admission.

Another approach to this general problem is the spontaneous utterance exception to the hearsay rule.[28] In *Murphy Auto Parts Co. v. Ball*[29] the Court of Appeals for the District of Columbia held that a declaration by the agent after a collision that " he had to call on a customer and was in a bit of a hurry to get home"[30] was admissible in evidence as a spontaneous utterance to prove course of employment. The court stated that "the rationale of the excited utterance doctrine furnishes a separate and distinct basis for admissibility, not to be confused with the vicarious admissions rule."[31] Even though the declaration was made by an agent and it had not been proven that the agent was acting in the course of his employment, the declaration was admissible against the principal. The fact that the declarant is an agent is immaterial insofar as the admissibility of the spontaneous utterance is concerned because such a declaration is admissible anyway under general rules of evidence.[32]

The state of mind exception to the hearsay rule has also been employed to admit declarations of an agent to prove course of employment.[33] The Court of Appeals for the First Circuit in *Garford Trucking Corp. v. Nann*[34] admitted into evidence the extra-judicial statements of a truckdriver concerning his reasons for deviating from his instructed route. The court stated that a declaration "introduced in order to show the purpose for which he did an act or to show his

---

more, Evidence § 1768 (3d ed. 1940); Comment, 4 Texas L. Rev. 506 (1926). See Catterall, Res Gestae in Virginia, 21 Va. L. Rev. 725 (1935).

[26]Hackney v. Dudley, 216 Ala. 400, 113 So. 401, 403 (1927). Salmon v. Pearce, 223 N.C. 587, 27 S.E.2d 647 (1943); Chantry v. Pettit Motor Co., 156 S.C. 1, 152 S.E. 753, 761-62 (1930)) (dissenting opinion). See 6 Wigmore, Evidence § 1769 (3d ed. 1940), quoting Professor James Bradley Thayer.

[27]Comment, 4 Texas L. Rev. 506, 508 (1926).

[28]Salmon v. Pearce, 223 N.C. 587, 27 S.E.2d 647 (1943); Restatement (Second), Agency § 289 comment d (1958). For an explanation of this exception to the hearsay rule see 6 Wigmore, Evidence § 1745 et seq. (3d ed. 1940).

[29]249 F.2d 508 (D.C. Cir. 1957).

[30]Id. at 509.

[31]Id. at 510.

[32]Id. at 511; Restatement (Second), Agency § 289 (1958).

[33]Mattan v. Hoover Co., 350 Mo. 506, 166 S.W.2d 557, 566-67 (1942); Restatement (Second), Agency § 289 comment c (1958). For an explanation of this exception to the hearsay rule see 6 Wigmore, Evidence § 1725 et seq. (3d ed. 1940).

[34]163 F.2d 71 (1st Cir. 1947), cert. denied, 322 U.S. 810 (1947).