IN THE SUPREME COURT OF THE STATE OF WASHINGTON

rizwana rahman, Respondent, v. STATE OF WASHINGTON, Petitioner.	NO. 83428-8 EN BANC Filed January 20, 2011

STEPHENS, J.—In this case, we must decide if the State is liable under the doctrine of respondeat superior for injuries to an unauthorized passenger in a state vehicle. Rizwana Rahman was injured in an automobile accident while riding with her husband, Mohammad Shahidur Rahman, from Olympia to Spokane on state business. The trial court dismissed her suit against the State on the ground that Mohammad[1] was not authorized to allow his wife to ride with him in a state car and was thus acting outside the scope of his employment at the time of the accident. The Court of Appeals reversed, holding that as a matter of law the State is

[1] For clarity, we refer to the Rahmans by their first names, intending no disrespect.

vicariously liable for Mohammad's negligence. We affirm the Court of Appeals.

FACTS

Mohammad was employed as an intern with the Washington State Department of Ecology during the summer of 2005. He worked in the dam safety office where, among other duties, he accompanied senior engineers on inspections and helped to write reports. On July 26, 2005, Mohammad drove from Olympia to Spokane in a state-owned vehicle to meet a department hydrologist with whom he would inspect a construction site; unbeknownst to his employer, he brought his wife, Rizwana, along. At the time, department policy 11-10 provided: "Ecology vehicles are not to be used for personal trips unrelated to the state business for which they were assigned, nor to transport passengers that are not on official state business." Clerk's Papers at 155.

While driving near Tiger Mountain Summit on State Route 18, Mohammad failed to negotiate a curve. The car left the roadway, struck a tree and rolled several times. Rizwana was badly injured. She brought this action for negligence against both Mohammad and the State. The complaint was later amended to name the State as the sole defendant.

Rizwana moved for partial summary judgment, seeking an order determining that the State was vicariously liable under the doctrine of respondeat superior for her husband's negligence in causing the accident. The State filed a crossmotion for summary judgment, seeking dismissal on the ground that its employee's use of a state vehicle to transport an unauthorized passenger fell outside the scope of his

employment.

The trial court granted the State's motion and denied Rizwana's motion. Observing that no Washington case was directly on point, the court relied in part on the *Restatement (Second) of Agency* § 242 (1958) to conclude that vicarious liability did not apply in situations involving unauthorized passengers. The Court of Appeals reversed and ordered entry of a partial summary judgment in Rizwana's favor. Writing for a unanimous panel of the court, Judge C.C. Bridgewater concluded, "Because Mohammad was clearly engaged in his employer's business when his negligence caused injury to Rizwana, Mohammad's employer, the Department, is vicariously liable under the doctrine of respondeat superior as a matter of law." *Rahman v. State*, 150 Wn. App. 345, 359, 208 P.3d 566 (2009).

The State petitioned this court for review, which we granted. *Rahman v. State*, 167 Wn.2d 1009, 220 P.3d 207 (2009).

ANALYSIS

The doctrine of respondeat superior—literally, "let the master answer"—holds that an employer is liable for the negligent acts of its employees that are "'within the scope or course of employment.'" *Dickinson v. Edwards*, 105 Wn.2d 457, 466, 716 P.2d 814 (1986) (quoting *Nelson v. Broderick & Bascom Rope Co.*, 53 Wn.2d 239, 241, 332 P.2d 460 (1958)). The test for determining when an employee acts within the scope of employment is well settled:

> whether the employee was, at the time, engaged in the performance of the duties required of him by his contract of employment, *or* by specific direction of his employer; *or*, as sometimes stated, *whether he was engaged*

> *at the time in the furtherance of the employer's interest.*

Greene v. St. Paul-Mercury Indem. Co., 51 Wn.2d 569, 573, 320 P.2d 311 (1958) (citing *Lunz v. Dep't of Labor & Indus.*, 50 Wn.2d 273, 310 P.2d 880 (1957); *Roletto v. Dep't Stores Garage Co.*, 30 Wn.2d 439, 191 P.2d 875 (1948)). This generally presents a jury question, but the issue may be resolved on summary judgment when there can be only one reasonable conclusion from the undisputed facts. *Breedlove v. Stout*, 104 Wn. App. 67, 70 n.5, 14 P.3d 897 (2001) (citing *Strachan v. Kitsap County*, 27 Wn. App. 271, 274-75, 616 P.2d 1251, *review denied*, 94 Wn.2d 1025 (1980)).

Rizwana argues that Mohammad was acting within the course of his employment at the time of the automobile accident because he was driving from Olympia to Spokane in a state vehicle at his employer's direction. The State counters that Mohammad's unauthorized act of allowing his wife to ride along took his conduct outside the scope of his employment, as it was done for his own purposes and was contrary to department policy. In a sense, both parties are correct. Mohammad was indisputably engaged in the duties his employment required, not having departed on a "frolic or detour," but he was also serving his own interests (and his wife's) by having Rizwana along on the drive. His conduct at the time reflected a mixture of both benefit to his employer and to himself.

This circumstance is nothing new. We observed 60 years ago in *McNew v. Puget Sound Pulp & Timber Co.*, 37 Wn.2d 495, 499, 224 P.2d 627 (1950):

> If the work of the employee creates the necessity for travel, he may be in the course of his employment though he is serving at the same time

> some purpose of his own; but if the work for the employer had no part in creating the necessity for travel, and the journey would have been made though no business was transacted for the employer, or would not have been made if the private purpose was abandoned, the journey may be regarded as personal and there would be no employer liability.

In *McNew*, the employee, a head cook at a logging camp, drove his own car home for the weekend to visit his family, bought supplies to take back to the camp en route, and on his return trip was involved in an automobile accident. We held that the employee was acting beyond the scope of his employment as a matter of law because he would have made the trip regardless of purchasing the supplies, and the fact that the supplies were in his car was "merely incidental and contributed in no way to the accident." *Id.* While rejecting vicarious liability on the facts in the case, we observed:

> The general trend of authority is in the direction of holding that, where the employee is combining his own business with that of his employer, or attending to both at substantially the same time, no nice inquiry will be made as to which business the employee was actually engaged in when a third person was injured, and the employer will be held responsible unless it clearly appears that the employee could not have been directly or indirectly serving his employer; also the fact that the predominant motive of the employee is to benefit himself does not prevent the act from being within the course or scope of employment, and if the purpose of serving the employer's business actuates the employee to any appreciable extent, the employer is subject to liability if the act otherwise is within the service.

Id. at 497-98.

Under this analysis, the Court of Appeals correctly concluded that Mohammad was acting within the scope of his employment at the time of the automobile accident that injured Rizwana. Though he combined his own business with the State's by allowing Rizwana to ride along as a passenger, the trip and the route taken were dictated by official state business, and there is no evidence that

Rizwana's presence in any way contributed to the accident.

The State objects that applying the doctrine of respondeat superior in this manner ignores the important fact that Mohammad violated department policy by inviting his wife to ride with him in a state vehicle, leaving the State no meaningful way to limit its liability exposure. *See* Pet. for Review at 13. This argument deserves careful scrutiny, as we should be sensitive to the increased risk employers may face when employees disregard workplace rules. Nonetheless, both precedent and sound policy weigh in favor of recognizing vicarious liability.

First, as to precedent, we have previously rejected the notion that an employee's violation of a workplace rule renders the employee's conduct outside the scope of employment. *Dickinson*, 105 Wn.2d at 470 ("'[A]n act, although forbidden, or done in a forbidden manner, may be within the scope of employment.'" (quoting Restatement (Second) of Agency § 230 (1958))); *Smith v. Leber*, 34 Wn.2d 611, 623-24, 209 P.2d 297 (1949). In each of these cases, an employee's drunk driving caused an accident for which the employer was held vicariously liable. In *Smith*, the employee drove after having been specifically told by his supervisor not to drive. This court upheld a verdict finding vicarious liability, noting that "'as a general rule, an employer is liable for acts of his employee within the scope of the latter's employment notwithstanding such acts are done in violation of rules, orders, or instructions of the employer.'" *Smith*, 34 Wn.2d at 623 (quoting 35 Am. Jur. Master and Servant § 559, at 993 (1941)). Similarly, in *Foote v. Grant*, 55 Wn.2d 797, 350 P.2d 870 (1960), the court found it "irrelevant" to the analysis

of vicarious liability that the driver of a car that struck the plaintiffs' car had invited his sister to ride with him contrary to his transport agreement or that the sister may have been driving at the time of the accident. *Id.* at 799.

These cases underscore the sound policy supporting respondeat superior. The doctrine rests upon the relationship between an employer and employee, which is characterized by a right of control. The very fact that the employer is in a position to impose workplace rules and standards justifies vicarious liability, even where the employee acts in a forbidden way. *See Poundstone v. Whitney*, 189 Wash. 494, 500-01, 65 P.2d 1261 (1937). We said in *Poundstone*:

> "If it were true that a servant is outside the scope of his employment whenever he disobeys the orders of his master the doctrine of *respondeat superior* would have but scant application, for the master could always instruct his servant to use ordinary care under all circumstances. The servant's negligence would therefore always be contrary to orders and the nonliability of the master would follow. But such is not the law. The servant is within the scope of his employment when he is engaged in the master's service and furthering the master's business though the particular act is contrary to instructions."

Id. at 501 (quoting *Smith v. Yellow Cab Co.*, 173 Wis. 33, 35, 180 N.W. 125 (1920)). The justification for imposing vicarious liability is even stronger in this case than in *Dickinson*, *Smith*, or *Poundstone*. In each of those cases, the unauthorized conduct of the employees contributed to the automobile accidents, but there is no allegation here that Mohammad's unauthorized act in allowing his wife to ride in the state car was in any way a cause of the accident that injured Rizwana.[2]

[2] Nor, in fairness to the State's argument, is there any suggestion that, had Mohammad's driving behavior run afoul of a workplace rule requiring employees to "'use ordinary care under all circumstances,'" *Poundstone*, 189 Wn.2d at 501 (quoting *Yellow Cab*, 180 N.W. at 126), the State would be resisting vicarious liability for Mohammad's

Nonetheless, the State argues that Mohammad's specific violation of department policy—allowing an unauthorized passenger to ride in a state vehicle—presents a special case. It relies on the principle of *Restatement (Second) of Agency* § 242, at 534 (1958):

> A master is not subject to liability for the conduct of a servant towards a person harmed as the result of accepting or soliciting from the servant an invitation, not binding upon the master, to enter or remain upon the master's premises or vehicle, although the conduct which immediately causes the harm is within the scope of the servant's employment.[3]

Recognizing that section 242 has never been adopted by this court, the State contends its substance is reflected in two cases from 1917, *Gruber v. Cater Transfer Co.*, 96 Wash. 544, 165 P. 491 (1917) and *McQueen v. People's Store Co.*, 97 Wash. 387, 166 P. 626 (1917), and an earlier case on which they rely, *Fischer v. Columbia & Puget Sound R.R.,* 52 Wash. 462, 100 P. 1005 (1909).

Gruber and *McQueen* each involved injuries to an individual who was riding on a transport truck at the invitation of the driver. In *Gruber*, the plaintiff was allowed to ride in the back of a moving truck and was thrown from or fell out of the truck. 96 Wash. at 545-46. In *McQueen*, the plaintiff and a companion were riding on the running board of a truck when it encountered rough road and the plaintiff was either thrown from or jumped off the truck. 97 Wash. at 388. The court in each of these cases followed the analysis of *Fischer*. *Gruber*, 96 Wash at 546 (relying on *Fischer*); *McQueen*, 97 Wash. at 390 (relying on *Gruber*). In *Fischer*, the plaintiff

negligent driving.

[3] This section was not carried forward in the *Restatement (Third) of Agency*, adopted by the American Law Institute in 2005 and published in 2006. *See* 2 Restatement (Third) of Agency 488 (2006) (parallel tables).

was injured while riding on the engine of a freight train. The court held that the railroad's agent had no authority to create a carrier-passenger relationship and that the plaintiff was contributorially negligent or assumed the risk of injury. *Fischer*, 52 Wash. at 471.

As the Ninth Circuit Court of Appeals has recognized, these cases have in common the fact that the plaintiffs were allowed by an employee to ride on a part of a vehicle not designed to transport passengers. *Pierson v. United States*, 527 F.2d 459, 463 n.2 (9th Cir. 1975). They do not address the circumstance here where Rizwana rode as a passenger in the state car her husband was authorized to drive. More importantly, *Fischer*, *Gruber*, and *McQueen* must be understood in the context of the common carrier liability theory they addressed and the doctrine of contributory negligence, which at the time these cases were decided, barred recovery by a negligent plaintiff.

In the early part of the 20th century, determining the liability of a carrier for injury to a plaintiff focused on the question of whether the defendant's agent had real or apparent authority to create the necessary carrier-passenger relationship. *See Fischer*, 52 Wash. at 471 ("We conclude . . . that the engineer, in inviting the appellant to get onto the engine, did not act within the real or apparent scope of his authority, that the appellant was required to take notice of this fact, that the appellant was not a passenger, that the company owed him no affirmative duty, and that he cannot recover."); *Gruber*, 96 Wash. at 547 (following *Fischer* and concluding that "the presumption is equally strong in this case that appellant's driver

did not have authority to invite or permit respondent to ride upon the truck, especially in the position in which he did ride"); *McQueen*, 97 Wash. at 390 (following *Gruber*, which the court described as holding "that the driver of the truck had no real or apparent authority to allow or permit Gruber to ride upon the truck; or, stated as a legal proposition, that the driver was not acting within the scope of his employment").

The State is correct that these cases reflect a rule similar to *Restatement (Second) of Agency* § 242, but this rule goes to the question of "apparent authority" in the context of a carrier or owner of land, not to "scope of . . . employment" generally. *Pierson*, 527 F.2d at 463 n.2 (recognizing that comments to section 242 clarify "that [section 242] applies to a servant who 'without authority or apparent authority to do so, permits or invites persons to ride on [the master's vehicle]'" (quoting Restatement (Second) Agency § 242 cmt. a (1958))). Under the *Restatement (Second) of Agency*, a separate provision, section 228, addresses the question of scope of employment, and this section states the general rule consistent with our case law. Restatement (Second) Agency § 228 (1958); *see also Dickinson*, 105 Wn.2d at 470; *Poundstone*, 189 Wash. at 500-01. Though the opinion in *McQueen* describes apparent authority in terms of scope of employment, 97 Wash. at 390, it is clear from the discussion in *McQueen*—including its reliance on *Gruber*, which in turn relied on *Fischer*—that the dispositive question was whether, through the agent's invitation to the plaintiff, a carrier-passenger relationship arose.[4]

[4] This focus reflects the arguments in the parties' briefing in *McQueen*, which the State provided as an appendix to its response to amicus curiae, Washington State

It is only in the context of this question that the additional issue of whether the plaintiff assumed the risk of injury or was contributorially negligent became relevant. *See Fischer*, 52 Wash. at 471 (recognizing that "'there are certain portions of every railroad train which are . . . so plainly not designed for [the plaintiff's] reception, that his presence there will constitute negligence as a matter of law, and preclude him from claiming damages for injuries received while in such position'" (quoting *Little Rock & Fort Smith Ry. Co. v. Miles* (Advance Case Ark. 1882), reprinted in 13 American and English Railroad Cases 10, 23-24 (Lawrence Lewis Jr. ed., 1884))). On the other hand, once it was determined that the defendant's agent was not authorized to grant the plaintiff status as a "passenger," the separate question—whether the employee was acting within the scope of his employment—became irrelevant. *See Pierson*, 527 F.2d at 462-64 (explaining the difference between apparent authority cases such as *Fischer*, *Gruber*, and *McQueen*, and scope of employment cases such as *Smith*).

Thus, once we look behind the language and understand the principles at issue in *Fischer*, *Gruber*, and *McQueen*, it becomes clear why these cases are

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Association for Justice Foundation. In particular, the defendant/appellant's brief quotes the general rule stated in a treatise of the era:

> Servants performing duties in respect of vehicles regularly used for the transportation of goods have usually no authority to act as agents, so as to create the relation of carrier and passenger. The general rule established by the cases is that the employer of a servant in charge of a vehicle which is not normally used for the conveyance of persons cannot be held liable for an injury received by a third party, while riding upon it in pursuance of an invitation given by the servant, unless the invitation is shown by affirmative evidence to have been within the scope of his authority.

6 C.B. Labatt, Master and Servant § 2499 n.7, at 7611 (2d ed. 1913).

inapplicable to the present case. Instead, the question of vicarious liability here must be resolved by the analysis in *McNew*, *Smith*, *Poundstone*, and *Dickinson*.[5] Under that analysis, the fact that Mohammad acted against department policy by inviting Rizwana to ride with him in a state car does not defeat vicarious liability. At the time of the accident, Mohammad was driving from Olympia to Spokane on official state business. Though bringing Rizwana along certainly served Mohammad and his wife's interests, Mohammad's conduct at the time was also in the service of the State's business. Based on the undisputed facts, vicarious liability must be recognized as a matter of law.[6]

Finally, the State urges us to consider RCW 42.52.160(1), which prohibits state employees from "us[ing] any . . . property under the . . . employee's official control or direction, or in his or her official custody, for the private benefit or gain of the . . . employee, or another." The Court of Appeals refused to consider this statute because the State raised it in a "Supplemental Certificate of Authority" on the eve of oral argument. *Rahman*, 150 Wn. App. at 358-59. Nonetheless, relying on *Clawson v. Grays Harbor College District No. 2*, 148 Wn.2d 528, 545, 61 P.3d

[5] The Court of Appeals correctly noted that the dissent in *Poundstone* relied in part on *McQueen* in arguing against liability for the employee's unauthorized acts, but "that view did not win the day." *Rahman*, 150 Wn. App. at 355 n.5.

[6] While the Court of Appeals relied in part on the California Supreme Court decision in *Perez v. Van Groningen & Sons, Inc.*, 41 Cal. 3d 962, 968-70, 227 Cal. Rptr. 106, 719 P.2d 676 (1986), we rest our decision on Washington precedent and do not find it necessary to look to the law in other states in resolving this issue. We also find that the intentional tort cases the State urges us to follow are not on point. *See Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997); *Thompson v. Everett Clinic,* 71 Wn. App. 548, 860 P.2d 1054 (1993); *Kuehn v. White*, 24 Wn. App. 274, 600 P.2d 679 (1979). The undisputed facts do not suggest that at the time of the accident Mohammad was acting intentionally or solely for personal motives.

1130 (2003), the court stated in dicta that the statute was inapplicable because "[t]here is no allegation or evidence that Mohammad wasted state resources." *Rahman*, 150 Wn. App. at 359 n.7.

The failure of the State to timely cite RCW 42.52.160 in the Court of Appeals does not foreclose its consideration, as an appellate court is entitled to consider relevant law in deciding an issue, regardless of whether any party has cited it. *Ellis v. City of Seattle*, 142 Wn.2d 450, 459 n.3, 13 P.3d 1065 (2000). On the other hand, this case is on appeal from an order granting summary judgment, and our review is appropriately limited to the evidence and issues called to the attention of the trial court. RAP 9.12. Perhaps for this reason, the State does not ask us to affirm the trial court's summary dismissal by relying on RCW 42.52.160, but instead asks only that we correct the Court of Appeals' erroneous interpretation of the statute. Pet. for Review at 14-16; Suppl. Br. of Pet'r at 20-22.

The Court of Appeals relied on *Clawson* to frame the question as whether Mohammad "wasted" state resources, but RCW 42.52.160(1) does not speak in terms of "waste"—rather, it concerns the "use" of state resources. A plain reading of the statute suggests that it reasonably can be construed to reach Mohammad's conduct in transporting his wife in a state vehicle. Nevertheless, even assuming Mohammad's conduct violated RCW 42.52.160, the statutory violation does not render the doctrine of respondeat superior inapplicable. As noted, an employee may be acting within the scope of employment even when engaged in conduct that violates work rules or standards. *Smith*, 34 Wn.2d at 623-24; *Dickinson*, 105

Wn.2d at 470; *Poundstone*, 189 Wash. at 500-01. The State, as an employer, is liable for its employees' negligence to the same extent that a private employer would be, so it makes no difference in this context that a statute (in addition to a department policy) provides a workplace rule. *See generally* RCW 4.92.090. Indeed, to the extent the statute evidences the State's control over its employees' conduct, including the authority to discipline employees who improperly use state resources, this supports rather than undermines the justification for recognizing vicarious liability.

CONCLUSION

The Court of Appeals correctly held that vicarious liability applies to these facts as a matter of law. Accordingly, we affirm the Court of Appeals and remand to the trial court with instructions to enter partial summary judgment in favor of Rizwana Rahman and for further proceedings consistent with this opinion.

AUTHOR:

Justice Debra L. Stephens

WE CONCUR:

	Justice Mary E. Fairhurst
Justice Charles W. Johnson	Richard B. Sanders, Justice Pro Tem.
Justice Tom Chambers	
Justice Susan Owens	