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Injunctions—Temporary Injunction or Temporary Restraining Order—Right to Continue in Force Pending Appeal

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knowledge of the dangerous characteristics of the employee is essential. RESTATEMENT, AGENCY § 213. Apparently no point was made by the owner of his lack of such personal knowledge.

The court's statement that *respondeat superior* was not involved is misleading unless it is kept in mind that the case was presented to the court by both sides entirely on the theory of original negligence. Actually, the facts clearly establish liability of the owner under the *respondeat superior* theory. The fundamental rule that a master is liable for the tort of his servant committed in the course of the latter's employment fits the facts perfectly. The manager was clearly negligent in the course of his employment in his knowing retention of a sub-servant who was dangerous to tenants. For that tort, the owner is clearly liable under the *respondeat superior* rule. Personal knowledge on the part of the owner thus becomes immaterial, his liability being based rather on the tort of his manager-servant. In approaching the matter from the standpoint of original negligence, *P* sets himself a more difficult task than the facts required. Fortunately, he was aided by the trial judge and opposing counsel who seemed to have ignored the gap in the proof of original negligence of the owner. Failure of plaintiff to invoke the simple *respondeat superior* approach probably arose from the specious belief that the action was based on the janitor's tort which was not in the course of his employment and hence could not have stood the test of *respondeat superior*. The owner's liability, however, actually arose from the separate tort of the manager within the course of his employment, with resulting vicarious liability of his principal, even though the latter was not at fault.

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Injunctions—Temporary Injunction or Temporary Restraining Order—Right to Continue in Force Pending Appeal. *P, ex parte,* requested a temporary restraining order. The court refused the request because the adverse party was not present. The next day both parties appeared and after oral argument by counsel, the court issued an order entitled "Temporary Injunction and Restraining Order and Order to Show Cause." The show cause order was made returnable on the same date as the trial on the merits. The trial court held for *D*. *P* gave notice of appeal and pursuant to REM. REV. STAT. § 1723 [P.P.C. § 5-25] and Rules on Appeal 24, 34A Wn. 2d 27, moved that the court fix the penalty of the bond so that the order would continue in force pending the appeal. Upon the refusal of the court, *P* brought this application for a writ of mandamus. *Held*: Mandamus denied. "If it be conceded that there was a hearing," it was to determine whether a temporary restraining order and not whether a temporary injunction should be issued because the order provided that *D* was to show cause why it should not be continued in effect. The mere fact that the order was continued in force until the trial does not make it a temporary injunction. *Davis v. Gibbs,* 139 Wash. Dec. 163, 234 P. 2d 1071 (1951).

REM. REV. STAT. § 1723 provides that where a "final judgment" of a superior court is rendered in a cause "wherein a temporary injunction has been granted," if the party at whose instance the injunction was granted shall appeal, then, upon proper filing of a bond, the order shall continue in force pending appeal as a matter of right. Because the statute refers only to a temporary injunction and does not provide for the continuance of a temporary restraining order pending appeal, counsel should be certain of the exact nature of the order he requests and subsequently obtains. The purpose of this note is to present the distinction between these two orders and to propose possible solutions to the problem presented by the instant case.

While the court has sometimes distinguished the two orders by purpose, the more

accurate distinction between a temporary restraining order and a temporary injunction is the method by which each is obtained. As regards purpose, the court has held that a temporary restraining order functions to maintain the status quo until there can be a hearing on the application for a temporary injunction, while the purpose of a temporary injunction is to maintain the status quo until the trial on the merits. *Rogers v. Kendall,* 173 Wash. 390, 23 P. 2d 860 (1933). However, when the hearing on the application for a temporary injunction is set for the same date as the trial on the merits and a *restraining* order is kept in force until that date, the court has found the order to be not an injunction but rather a temporary restraining order. *State* ex rel. *Ferguson v. Grady,* 71 Wash. 1, 127 Pac. 305 (1912). This indicates that the purpose criterion is not entirely correct. A more accurate basis for distinction is the method by which the order may be obtained. A temporary restraining order is issued *ex parte* on a showing of emergency. However, a temporary injunction is issued only where there has been a proper hearing on an application therefor. *Swenson v. Seattle Central Labor Council,* 25 Wn. 2d 612, 171 P. 2d 699 (1946). See REM. REV. STAT. § 722 [P.P.C. § 8056] and General Rules of the Superior Courts 18, 34A Wn. 2d 118. *But see State* ex rel. *Ferguson v. Grady,* 71 Wash. 1, 6, 127 Pac. 305, 307 (1912). Because attorneys and judges have sometimes used the two terms interchangeably, *Blakister v. Osgood Panel and Veneer Co.,* 173 Wash. 435, 29 P. 2d 397 (1933), the court has been forced either to ignore the caption or to conclude that it is not determinative of the order's nature. *Swenson v. Seattle Central Labor Council, supra.*

A difficulty arises when the consolidation procedure as outlined in *State* ex rel. *Ferguson v. Grady, supra,* is followed. In the *Ferguson* case and in the instant case, the trial court consolidated the hearing on the temporary injunction with the trial on the merits. Such a practice presents the plaintiff with the procedural puzzle of not having the opportunity to obtain a temporary injunction and of being unable to meet the requirement of REM. REV. STAT. § 1723 that the order can continue in force pending his appeal *only* if it is a temporary injunction. While the court in the *Davis* case is correct in observing that "this [consolidation] procedure is to be commended if the trial on the merits is close at hand, as it obviates trying some of the same issues twice within a very limited period of time," yet such convenience has been achieved at the expense of the rights of the appellant seeking to continue the order in force pending his appeal. While in the *Ferguson* case the court set the hearing over until the trial pursuant to an agreement of the parties, the *Davis* case extended the use of this procedure by holding that the hearing can be continued over until the trial by order of the court without an agreement of the parties. The court did not suggest whether it would have reached the same decision if the plaintiff had objected to the consolidation of the hearing and trial.

Is there a solution to this problem? As a preliminary step, it is suggested that counsel in requesting these orders should be more cautious so as not to confuse the two terms. Where extreme hardship to the plaintiff and little or no hardship to the defendant would otherwise result, the Supreme Court under it general grant of power, WASH. CONST. ART. IV, § 4, may in its discretion direct that a *restraining order* be continued in force pending appeal. *Bier v. Clements,* 95 Wash. 505, 164 Pac. 82 (1917). This exceptional relief was not available to the plaintiff in the instant case, and its granting in any case is problematical. Of course, the appellant's rights will be preserved if the parties agree just prior to the trial to have the temporary restraining order changed to a temporary injunction. However, as a practical matter, the party against whom the restraining order is issued may not enter into such an agreement knowing that he would have to endure the injunction pending the opposite party's appeal. If at the plaintiff's request the court allows a hearing just prior to the trial,

the appellant's rights will again be preserved, but such a course would overlook the considerations of expediency underlying the consolidation procedure. The statutes do not specifically provide that the plaintiff has a right to a hearing. But since the court has consistently held that the order may be continued in force pending appeal, as a matter of right, *only* where it is a temporary injunction, it would seem to follow that the trial court could not, over the plaintiff's objections, so conduct its proceedings as to deprive him of the *opportunity* to obtain a temporary injunction. Therefore, if the Washington trial courts persist in following the consolidation procedure outlined in the *Ferguson* and *Davis* cases, the plaintiff will have one other possible solution. He may wait until the date of the trial and then request that the hearing be held prior to the trial. If the court refuses the request, the only alternative is an application to the supreme court for a writ of mandamus. It is submitted that only in this manner can the appellant's rights under REM. REV. STAT. § 1723 be preserved.

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