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"RESPONDEAT INFERIOR": The Rule of Vanderpool v. Grange Insurance Association, 110 Wash. 2d 483, 756 P.2d 111 (1988)?

Abstract: At common law, the majority of states held that a tort claimant's release of either an employer whose sole liability was vicarious or the employee who had committed the tort operated to release the other. Washington follows this position for releases of an employee, but Vanderpool v. Grange Insurance Association announces a different rule for releases of an employer. This Note examines Vanderpool in view of relevant public policies, statutes, and prior case law and recommends adopting a rule that the release of a solvent employer operate to release its employee-tortfeasor.

Driving in the course of her employment, a delivery-person negligently collides with another car. The driver of the other car experiences back pain. His doctor diagnoses only minor injuries and advises him that he will soon be able to resume work. A few weeks after the accident, the injured driver settles with the delivery firm's insurer for payment of the wages he has lost, the medical and car repair expenses he has incurred, and a sum for his pain and suffering. The general release he signs names only the firm; it does not mention the firm's employee.

A month after the settlement, the injured driver's pain worsens. His doctor now diagnoses a permanent and disabling back injury, caused by the collision. The driver sues the employee. The court, citing Vanderpool v. Grange Insurance Association,1 rejects the employee's defense that by settling with the employer the driver also released the employee from liability. The driver obtains a substantial judgment covering future lost wages and pain and suffering. When he executes on this judgment the employee loses all of her assets including her home. Meanwhile, her employer records another profitable year.

In Vanderpool v. Grange Insurance Association,2 the Washington Supreme Court considered the effect of a settlement between an injured tort claimant and an employer liable solely under respondeat superior. The supreme court held the settlement with the employer did not bar the claimant from suing the employee-tortfeasor.3 As illustrated above, this holding could upset the distribution of tort liabilities contemplated by the doctrine of respondeat superior.4 Hundreds of millions of dollars are annually spent in Washington to insure

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2. Id.
3. Id. at 484, 756 P.2d at 111.
4. The doctrine of respondeat superior holds an employer liable when its employees commit torts in the course of their employment. PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499–500 (W. Keeton 5th ed. 1984) [hereinafter PROSSER].
against commercial losses.\(^5\) Even a slight shifting of tort liability from employers could therefore have significant monetary impact upon employees.

The Washington Supreme Court's opinion in *Vanderpool* did not consider the loss distribution objectives of respondeat superior, nor did it give proper effect to relevant Washington tort reforms. Moreover, the court's decision in *Vanderpool* is inconsistent with two of its earlier decisions: *Glover v. Tacoma General Hospital*,\(^6\) and *Bennett v. Shinoda Floral, Inc.*\(^7\) This Note will analyze the supreme court's decision in *Vanderpool* and will offer suggestions for approaching future similar cases.

I. BACKGROUND

A. Facts, Reasoning, and Holding of *Vanderpool*

*Vanderpool* arose out of a simple auto accident. While driving within the scope of his employment, a garage-keeper's employee backed into another car, causing seemingly minor injury to the other driver's knee and damaging her car.\(^8\)

Discussions between the injured driver and the insurance company for the garage-keeper began on the day following the accident.\(^9\) These parties settled slightly more than a month after the accident, executing both a release and a future medical expenses agreement. The release named only the employer.\(^10\)

When she signed the release, the claimant expected that her knee would improve.\(^11\) It did not improve as expected, and she sought additional medical treatment.\(^12\) About two months after the signing of the release, her doctor recommended diagnostic knee surgery. The employer's insurance company refused to pay the lost wages associ-


\(^{8.}\) 110 Wash. 2d at 484, 756 P.2d at 111–12. The injured driver suffered no fractures. She returned to work on crutches the next day.

\(^{9.}\) *Id.* at 485, 756 P.2d at 112.

\(^{10.}\) *Id.* The employer's insurance company paid $2,840.16 for the release: $1,000 for pain and suffering, plus compensation for the claimant's medical bills and for her property damage. The future medical expenses agreement reserved $2,000 for medical expenses over the next 18 months, apparently recognizing that the claimant's knee had not healed completely. *See id.*

\(^{11.}\) Her doctor had informed her that she had probably suffered only a bruise and a strained ligament. *Id.*

\(^{12.}\) *Id.* at 486, 756 P.2d at 112.
ated with this surgery because the future medical expenses agreement did not cover lost wages.\textsuperscript{13}

The claimant then sued for recission and a judgment for her personal injuries and property damage.\textsuperscript{14} Although the trial court found no fraud or overreaching in the settlement of the claim, it granted recission on the theory that the insurance adjuster had engaged in a "negligent representation by omission."\textsuperscript{15} But the Washington Court of Appeals reversed, holding the adjuster owed no affirmative duty to the claimant. Further, relying on \textit{Glover v. Tacoma General Hospital},\textsuperscript{16} the court of appeals held that the claimant's release of the solvent employer from vicarious liability also released the employee.\textsuperscript{17}

The claimant petitioned the Washington Supreme Court to review whether an unrepresented claimant who releases a principal before filing a lawsuit thereby also releases the agent whose actions caused the claimant's injuries.\textsuperscript{18} The supreme court held that settlement with the principal does not automatically release the agent.\textsuperscript{19} The supreme court rejected the court of appeals' position that \textit{Vanderpool} was controlled by \textit{Glover}.\textsuperscript{20} Rather, the supreme court considered whether the release was intended to cover both principal and agent.\textsuperscript{21} Noting that the release did not mention the agent and showed no intention to release him, the supreme court held that the release did not relieve the agent from any liability to the claimant.\textsuperscript{22}

\section*{B. Common Law Doctrine of Respondeat Superior}

The doctrine of respondeat superior\textsuperscript{23} creates vicarious liability by holding an employer responsible for the torts its employees commit in the course of their employment.\textsuperscript{24} The doctrine imputes the

\textsuperscript{13} Id.
\textsuperscript{14} Id.
\textsuperscript{15} Id. The trial court found the adjuster had breached an affirmative duty to inform the claimant that she could settle the bodily injury and property damage claims separately.
\textsuperscript{16} 98 Wash. 2d 708, 658 P.2d 1230 (1983). In \textit{Glover}, the Washington Supreme Court had ruled that a release of solvent agents operated to release their vicariously liable principal.
\textsuperscript{17} 110 Wash. 2d at 486, 756 P.2d at 112–13.
\textsuperscript{18} Id. at 486, 756 P.2d at 113.
\textsuperscript{19} Id.
\textsuperscript{20} Id. at 487, 756 P.2d at 113.
\textsuperscript{21} Id. at 488, 756 P.2d at 113.
\textsuperscript{22} Id. at 489, 756 P.2d at 114.
\textsuperscript{23} A Latin term meaning "let the master answer." BLACK'S LAW DICTIONARY 1179 (5th ed. 1979).
\textsuperscript{24} 1 J. LEE & B. LINDAHL, MODERN TORT LAW: LIABILITY AND LITIGATION § 7.01, at 185–86 (1988). Where respondeat superior liability applies, the terms "employer," "principal," and "master" are synonymous, as are the terms "employee," "agent," and "servant." Id. at § 7.02, at 186. This Note adopts these interchangeable usages.
employee's negligence to the employer.\textsuperscript{25} Technically, the vicariously liable employer and the primarily liable employee are not joint tortfeasors; however, they are jointly and severally liable to the plaintiff.\textsuperscript{26}

Respondeat superior liability permits a plaintiff to elect a remedy against the employer, the employee, or both.\textsuperscript{27} Election of a remedy against one of the parties to the employer-employee relationship bars further action against the other party.\textsuperscript{28}

At common law, an employer who paid damages to a claimant because of respondeat superior could seek full indemnity from the employee-tortfeasor.\textsuperscript{29} The employee was viewed as the active and primarily liable wrongdoer; the employer was considered innocent, passive, and only secondarily liable.\textsuperscript{30}

Several modern justifications for respondeat superior are recognized. First, respondeat superior helps assure full compensation of tortiously injured parties. The doctrine provides the security of an additional defendant, thus addressing the problem of judgment-proof defendant employees.\textsuperscript{31} Second, the doctrine is justified as a matter of fairness. On-the-job torts by employees are foreseeable consequences of an employer's enterprise; justice therefore requires holding the employer responsible for its costs of doing business.\textsuperscript{32} Third, employers possess superior loss-spreading abilities because they can adjust their prices or rates. Neither tort victims nor employees can absorb the costs of losses and distribute them throughout society as efficiently

\textsuperscript{25} PROSSER, supra note 4, § 69, at 499.
\textsuperscript{27} Johns v. Hake, 15 Wash. 2d 651, 656, 131 P.2d 933, 935 (1942).
\textsuperscript{29} PROSSER, supra note 4, § 51, at 341.
\textsuperscript{31} 2 F. HARPER & F. JAMES, THE LAW OF TORTS § 26.5, at 1371 (1956); RESTATEMENT (SECOND) OF JUDGMENTS § 51 comment b (1982).
\textsuperscript{32} PROSSER, supra note 4, § 69, at 500; RESTATEMENT (SECOND) OF AGENCY § 219 comment a (1958).
“Respondeat Inferior”

as can employers.33 Fourth, compared to their employees, employers generally also have greater resources with which to pay judgments and to procure liability insurance.34 Finally, respondeat superior liability provides employers with an incentive to promote safety on the job.35

The majority of jurisdictions which have decided the issue hold that releasing an employer from vicarious liability also operates to release the employee from primary liability.36 The principles that the victim's damages are not severable and that the victim is entitled only to a single satisfaction for the injury form the basis for the majority rule.37

C. Legislative and Judicial Developments in Washington

In Washington, the liability of employers for the torts of their employees has been affected by two enactments: the 1981 Product Liability and Tort Reform Act38 and the 1986 Tort Reform Act.39 Further, in two recent cases involving vicarious liability, the Washington Supreme Court considered the effect of releasing one party to the employment or agency relationship.40

1. 1981 Product Liability and Tort Reform Act

Several changes made by the 1981 Product Liability and Tort Reform Act (“1981 Act”) have implications for respondeat superior liability or for the specific problem in Vanderpool. These changes include abolishing common law indemnity, creating contribution rights among joint tortfeasors, and permitting partial settlements to release only the settling defendant.

Section 12(1) of the 1981 Act instituted contribution rights among jointly and severally liable tortfeasors, based upon their comparative

33. 2 F. HARPER & F. JAMES, supra note 31, § 26.1, at 1363–64; id. § 26.5, at 1371–73; PROSSER, supra note 4, § 69, at 500–01.

34. 2 F. HARPER & F. JAMES, supra note 31, § 26.1, at 1363; PROSSER, supra note 4, § 69 at 500.

35. See 2 F. HARPER & F. JAMES, supra note 31, § 26.1, at 1364. But see PROSSER, supra note 4, § 69, at 501 (characterizing safety incentive justification as “makeweight”).


37. Annotation, Release of (or Covenant Not to Sue) Master or Principal as Affecting Liability of Servant or Agent for Tort, or Vice Versa, 92 A.L.R.2d 533, 537 (1963).


40. See infra text accompanying notes 49–70.

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fault. Section 12(3) abolished the common law right of indemnity between active and passive tortfeasors. Essentially, then, the 1981 Act substituted contribution for common law indemnity. As the net result, vicariously liable employers may now seek contribution—but not common law indemnity—from their primarily liable employees.

At common law, the release of one joint tortfeasor released all of the jointly and severally liable tortfeasors. The 1981 Act modified this rule. Under section 14, a released person is discharged from liability for contribution, but nonsettling persons are discharged from liability only if the release so provides. Any judgment the plaintiff wins against nonsettling defendants will be reduced by the settlement amount.

A final relevant provision of the 1981 Act—the last sentence of section 12(1)—permits courts to treat two or more persons as a single entity for contribution purposes. The section-by-section analysis of the 1981 Act did not explain this sentence.

2. Glover v. Tacoma General Hospital

The Washington Supreme Court interpreted the 1981 Act in Glover v. Tacoma General Hospital. Glover presented the problem of whether a release of primarily liable agents also released their vicari-

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43. Johnson, 99 Wash. 2d at 560, 663 P.2d at 485.
44. SENATE SELECT COMMITTEE ON TORT AND PRODUCT LIABILITY REFORM, DRAFT FINAL REPORT, reprinted in 1981 WASH. SENATE JOURNAL 637 [hereinafter SENATE REPORT].
45. 1981 Wash. Laws ch. 27, § 12(2) (codified at WASH. REV. CODE § 4.22.040(2) (1987)). Under this statute, covenants not to sue, covenants not to enforce judgment, and similar agreements have the same effect as releases.

For releases which extinguish a third person’s liability to the claimant, and which were reasonable when agreed upon, § 12(2) preserved the releasee’s contribution rights—an exception to the 1981 Act’s general rule that settlements extinguish releasees’ contribution rights. 1981 Wash. Laws ch. 27, § 12(2) (codified at WASH. REV. CODE § 4.22.040(2) (1987)).

46. Provided the amount of the settlement was reasonable at the time it was agreed upon. Id.

47. "[T]he court may determine that two or more persons are to be treated as a single person for purposes of contribution.” 1981 Wash. Laws ch. 27, § 12(1) (codified at WASH. REV. CODE § 4.22.040(1) (1987)).
48. See SENATE REPORT, supra note 44, at 635–36.
ously liable principal.50 The suit began as a medical malpractice action for a patient who had lapsed into a coma after receiving anesthesia at the defendant hospital.51

After the agents in Glover settled with the plaintiff, the trial court denied the hospital's motion for a summary judgment absolving it from vicarious liability.52 The Washington Supreme Court remanded, holding that the single entity statute, section 4.22.040(1), required dismissal of the vicarious liability claim against the hospital.53 Given a reasonable settlement and solvent settling agents, the supreme court answered in the affirmative the question of whether the release of the agents operated to release their principal.54

In discussing this question in Glover, the supreme court noted the position of the Restatement (Second) of Judgments that a vicariously liable principal will ordinarily not be discharged when the responsible agent settles.55 The court acknowledged that it had appeared to follow the Restatement's position in its earlier decision of Finney v. Farmers Insurance Co.,56 but it distinguished Finney on the ground that the settling defendant in Finney apparently was not solvent enough to have paid all of the plaintiff's damages.57 Moreover, the court reasoned, the provision in the subsequently enacted contribution statute for treating two persons as a single entity authorized a different result from Finney.58 According to the court, because the factors used to determine whether a settlement is reasonable59 apply equally between the principal and the agent, the single entity statute can be used to

50. Id. at 718, 658 P.2d at 1236.
51. Id. at 710, 658 P.2d at 1232. The plaintiff in Glover alleged that two agents of the hospital had negligently administered the anesthesia, and that the hospital was vicariously liable for its agents' negligence. The agents settled but the hospital did not. Id. at 710–11, 658 P.2d at 1232. The trial court approved the agents' settlement as reasonable and dismissed the hospital's contribution claim against them, thus exposing the hospital to a potential verdict of $2.5 million with only a $575,000 credit for settlement proceeds. Id. at 711, 658 P.2d at 1233.
52. Id. at 711, 658 P.2d at 1233.
53. Id. at 711–12, 658 P.2d at 1232–33.
54. Id. at 718–19, 658 P.2d at 1236.
55. RESTATEMENT (SECOND) OF JUDGMENTS § 51 comment b (1982).
56. 92 Wash. 2d 748, 600 P.2d 1272 (1979).
57. 98 Wash. 2d at 721, 658 P.2d at 1238. The Glover court then modified Finney: it instructed that to protect the right to proceed against a nonsettling principal, future plaintiffs should request a statement on the record of the reasonableness hearing that full compensation was unlikely to have been obtained from the settling agent. Id. at 724 n.4, 658 P.2d at 1239 n.4.
58. Id. at 721, 658 P.2d at 1238.
59. Earlier in its Glover opinion, the supreme court had adopted the following factors for trial courts to use in evaluating the reasonableness of settlements:

[T]he releasing person's damages; the merits of the releasing person's liability theory; the merits of the released person's defense theory; the released person's relative faults; the risks and expenses of continued litigation; the released person's ability to pay; any evidence of bad
discharge a principal when its agent entered into a reasonable settlement with the claimant. To the *Glover* court, a determination that the agent’s settlement was reasonable had the same effect as a determination that the claim had been satisfied as to both principal and agent.60

The hospital in *Glover* argued that because the 1981 legislature had deliberately retained joint and several liability the court was prohibited from extinguishing a vicarious liability claim upon the agent’s settlement.61 The court disagreed. Noting that joint and several liability furthers the policy of full compensation, the court concluded that this policy was adequately served when the plaintiff had settled for a reasonable amount with a solvent agent from whom she could have obtained full compensation. In such a case, the court stated, the tort law policy of full compensation did not require preserving a claim for the plaintiff against the principal.62

Lastly, the *Glover* court considered the 1981 substitution of contribution for common law indemnity. Because a settlement generally extinguishes contribution rights against the settling defendant,63 a nonsettling principal could seek neither common law indemnity nor contribution from its settling agent. Accordingly, the supreme court believed it would be inequitable to hold a principal vicariously liable to the claimant after a reasonable settlement between claimant and agent.64


After the 1981 Act, the Washington Supreme Court decided another case involving the effect of a release in a situation of respondent superior liability. *Bennett v. Shinoda Floral, Inc.*65 concerned whether claimants who gave releases knowing they had suffered some injury were bound by their releases when their injuries later worsened.66 One case reviewed in *Bennett* involved the release of an employer from vicarious liability.67

faith, collusion, or fraud; the extent of the releasing person’s investigation and preparation of the case; and the interests of the parties not being released.

Id. at 717, 658 P.2d at 1236.

60. *Id.* at 722, 658 P.2d at 1238.

61. *Id.*

62. *Id.* at 722, 658 P.2d at 1238.

63. See supra note 45 and accompanying text.

64. 98 Wash. 2d at 723, 658 P.2d at 1239.


66. *Id.* at 388, 739 P.2d at 649.

67. The case giving *Bennett* its name arose when an employee driving in the course of his employment rear-ended an auto, causing a back injury to its occupant. Several months later the injured driver settled. He had been unable to return to work, but he signed a general release and
The claimant in *Bennett* sued both the employer and its employee for damages. The defendants pleaded the release and convinced the trial court to grant them summary judgment. On appeal, the supreme court conceptualized the problem as one of competing policies: assuring the just compensation of accident victims versus encouraging final private settlements of disputes. Final settlement prevailed; the court ruled that a claimant who executed a personal injury release while aware he had suffered some injury was bound by his release, regardless of whether the release had been "fairly and knowingly made."

4. 1986 Tort Reform Act

After the events in *Vanderpool*, *Glover*, and *Bennett*, the Washington Legislature again enacted tort reforms. The 1986 Tort Reform Act ("1986 Act") abolished joint and several liability for most situations in which it had previously applied. However, the 1986 Act provided that joint and several liability would still apply to respondeat superior liability.

D. Releases In States With Contribution Statutes

The contribution statutes of many states now follow the Uniform Contribution Among Tortfeasors Act by providing that releasing one of multiple persons liable to a claimant for the same injury does not discharge any other person liable to the claimant for that injury unless the release so provides. The drafters of Washington's 1981 Act considered the language of the Uniform Act, and included a provision similar to section 4 of the Uniform Act in Washington's

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68. Id. at 389, 739 P.2d at 650. A few months later, his back problem worsened and his doctors concluded that the accident had left him permanently and totally disabled. Id. at 389-90, 739 P.2d at 650.
69. Id. at 390, 739 P.2d at 650.
70. Id. at 394-95, 739 P.2d at 652-53.
72. "A party shall be responsible for the fault of another person or for the payment of the proportionate share of another party . . . when a person was acting as an agent or servant of the party." 1986 Wash. Laws ch. 305, § 401(1)(a), at 1358 (codified at WASH. REV. CODE § 4.22.070(1)(a) (1987)).
73. 12 U.L.A. 57 (1955) [hereinafter UNIFORM ACT].
75. SENATE REPORT, supra note 44, at 622.
Courts in states with contribution statutes take a variety of positions in deciding cases involving the claimant's release of one party to the master-servant or principal-agent relationship.

In Michigan and Tennessee, courts have held their contribution statutes inapplicable to respondeat superior liability. Like the Uniform Act, the Michigan contribution statute states that the release of one of two or more persons liable in tort does not release others unless the release so provides. Michigan courts have narrowly construed this statute and its predecessor, holding them inapplicable to respondeat superior cases because the masters and servants in such cases are not truly joint tortfeasors. Thus, Michigan courts have continued to follow the common law rule giving principals and agents the benefit of each other's releases.

Through different reasoning, the Supreme Court of Tennessee has reached the same result. Tennessee's Uniform Act states that a tortfeasor who is entitled to indemnity has no right to contribution, and that the contribution chapter does not impair any right of indemnity under existing law. The Tennessee court used this statute to find that its Uniform Act does not embrace vicarious liability cases. Like the Michigan courts, the Tennessee court then ruled that its Uniform Act had not changed the common law rule extinguishing a master's derivative liability upon the servant's settlement.

Unlike the Michigan and Tennessee courts, courts in California, Delaware, Idaho, and Rhode Island have interpreted their contribution statutes to cover vicarious liability cases and to change the common law rule giving masters and servants the benefit of each other's releases. In California, Delaware, Idaho, and Rhode Island, the contribution statutes provide that release of one joint tortfeasor does not

80. Craven v. Lawson, 534 S.W.2d 653 (Tenn. 1976). Washington's abolition of common law indemnity is a significant statutory difference which would preclude Washington courts from adopting the Tennessee position.
release other joint tortfeasors unless the release so specifies. Reading these statutes quite literally, California, Idaho, and Rhode Island courts have held that releasing an agent from primary liability does not operate to release the principal from vicarious liability. Likewise, Delaware courts have used their contribution statute to preserve an employee's primary liability after the employer's release.

A North Dakota decision illustrates a final interpretation of the Uniform Act in a vicarious liability case. The North Dakota statute permits treating a group's liability as a single share "[i]f equity requires." The Supreme Court of North Dakota construed this statute together with the provision of the Uniform Act limiting the effect of a release to the joint tortfeasor who obtains it, and held that the plaintiff who releases a servant also gives up any right to recover from the master because the liability of these defendants constitutes a single share.

II. ANALYSIS

A. Incompleteness of Policy Analysis in Vanderpool

In Vanderpool, the Washington Supreme Court mentioned the policies underlying respondeat superior briefly and indirectly. The court devoted less than a sentence to its policy discussion, and it acknowledged only the policy of fully compensating tort victims. It ignored such modern justifications for respondeat superior as fairness, loss shifting, and loss spreading.

The rule applied in most states, which treats employer and employee liability as a single share, has both policy and practical advantages over the rule followed in Vanderpool. This majority rule offers the dual policy advantages of better serving the policies behind

86. The court states: "The policy reasons underlying vicarious liability (to afford the plaintiff the maximum opportunity to be fully compensated) are inapplicable when a plaintiff has accepted a release from the primarily liable tortfeasor who was financially capable of making him whole." Vanderpool v. Grange Ins. Ass'n, 110 Wash. 2d 483, 487, 756 P.2d 111, 113 (1988).
respondeat superior and of furthering other policy aims of tort law not addressed by the Vanderpool rule. On a practical level, the majority rule represents better employee relations than does the rule in Vanderpool.

The superiority of the majority rule on a policy level can be illustrated by considering the justifications for respondeat superior. All justifications besides that of fully compensating injured parties presume that the employer will shoulder the financial burden of the employee's tort. Holding employers financially responsible for employee torts results in a better distribution of tort losses through society. Further, employers' greater ability to procure liability insurance helps ensure that tort victims will be fully compensated. Holding employers financially responsible for their employees' on-the-job torts also addresses both loss prevention and fairness concerns.

By relieving the employee of liability when the employer settles, the majority rule protects against impoverishment of individuals, an implicit aim of tort law. Admittedly, the majority rule protects individual employees at the expense of a faultless employer. However, the fairness justification for respondeat superior holds that it is not inequitable to make an employer responsible for costs arising out of its business. Moreover, one can question whether a rule such as the Vanderpool rule, which may impoverish employee-tortfeasors, is much more desirable than a rule which may impoverish tort victims. As individuals, the employee-tortfeasor and the tort victim are likely to have comparable resources. When tort costs make either individual a charge upon society, society suffers equally.

By preventing the reopening of settled claims, the majority rule also encourages the private settlement of disputes and thus contributes to judicial economy. The rule followed in Vanderpool, in contrast, could actually waste judicial resources if courts take literally the inti-

87. See infra text accompanying notes 89-93.
88. See infra text accompanying notes 94-97.
89. See supra text accompanying notes 31-35.
90. In practice, employers do appear to shoulder most of this burden. See 2 F. Harper & F. James, supra note 31, § 26.1, at 1363 ("in the vast majority of cases plaintiff seeks satisfaction from the employer alone").
91. See supra text accompanying note 33.
mation in the majority opinion that to release an employee when the employer settles always requires a reasonableness hearing.\textsuperscript{94}

In addition to the above policy advantages, the majority rule has the practical advantage of promoting better employee relations than will result from the Vanderpool rule. In practice, respondeat superior typically shifts the costs of on-the-job torts from the employees who commit them to their employers.\textsuperscript{95} When a rule such as the Vanderpool rule disturbs the usual and expected distribution of losses, employee morale and efficiency can be expected to suffer.\textsuperscript{96} The Vanderpool rule may be seen as a form of discipline, for it can create heavier financial burdens for the employee than serious disciplinary actions like demotion or termination.\textsuperscript{97} Because the Vanderpool rule permits—and perhaps encourages—lawsuits against employees which they must defend with personal funds, it can be expected to place especially heavy financial burdens upon employees.\textsuperscript{98}

The 1981 and 1986 Tort Reform Acts show that the court in Vanderpool overemphasized full compensation as a policy basis for respondeat superior. These Acts demonstrate that the Washington Legislature does not always consider full compensation the foremost concern. The 1981 Act instructed courts to evaluate tort settlements with a reasonableness standard, which indicates that the legislature viewed the reasonableness of a settlement as more important than the completeness of the settling claimant's compensation.\textsuperscript{99} The 1986 Act also deemphasized full compensation by largely abolishing joint and several liability,\textsuperscript{100} and by limiting the amount of noneconomic damages a party can recover.\textsuperscript{101} In short, the 1981 and 1986 Acts legiti-

\begin{itemize}
\item \textsuperscript{94} See Vanderpool v. Grange Ins. Ass'n, 110 Wash. 2d 483 at 491, 503-04, 756 P.2d 111 at 115, 121-22 (1988) (Callow, J., dissenting).
\item \textsuperscript{95} See supra note 90.
\item \textsuperscript{96} See United States v. Gilman, 347 U.S. 507, 510 (1954).
\item \textsuperscript{97} See id. In Gilman, a Federal Tort Claims Act case, the United States Supreme Court denied the government's indemnity claim against its employee. The Court stated, "[t]he right of the employer to sue the employee is a form of discipline." Id. at 509-10.
\item \textsuperscript{98} See id. at 510.
\item \textsuperscript{99} See 1981 Wash. Laws ch. 27, § 14(1) (codified at WASH. REV. CODE § 4.22.060(1) (1987)). Glover requires courts to consider "the releasing person's damages" as merely one of several factors to be used in determining reasonableness, virtually assuring that "reasonable" settlements will not afford the claimant full compensation. See supra note 59.
\item \textsuperscript{100} See 1986 Wash. Laws ch. 305, § 401(1) (codified at WASH. REV. CODE § 4.22.070(1) (1987)). Joint and several liability historically has been an important means of assuring full compensation. See SENATE REPORT, supra note 44 at 627.
\item \textsuperscript{101} 1986 Wash. Laws ch. 305, § 301 (codified at WASH. REV. CODE § 4.56.250 (1987)). Noneconomic damages are limited to forty-three percent of the state's average annual wage for the life expectancy of the claimant, with a minimum life expectancy of fifteen years. The limitation includes derivative claims by persons who did not suffer bodily injury.
\end{itemize}
mized judicial concern for the reasonableness of tort compensation and for the distribution of tort liability among defendants.

Similarly, Washington cases have recognized that other considerations may override the policy of fully compensating tort victims. In both Bennett and Glover, encouraging final settlements took precedence over ensuring full compensation. In each of these earlier cases, the plaintiffs left the courtroom with substantially less than full compensation for their injuries. In Bennett, the court reasoned that where the releasing tort victim knew of his injury, the objective of full compensation must yield to that of final settlement. Likewise, in Glover, the court allowed the plaintiff to go without full compensation because she had had the opportunity to obtain full compensation when she settled with solvent agents. Inconsistently, however, in Vanderpool the court both ignored the fact that the tort victim had settled with a solvent principal who was capable of fully compensating her, and it failed to recognize the policy of encouraging final settlements. Thus, the court in Vanderpool overemphasized full compensation at the expense of the policy favoring final settlement.

Despite their different results, the facts in Vanderpool parallel the facts of Bennett. Both plaintiffs were injured by the apparent negligence of employees driving within the scope of their employment. Each plaintiff settled with an employer's insurer before consulting counsel or filing suit. Each plaintiff appreciated the fact, but not the seriousness, of her or his injuries. Each plaintiff believed that the settlement provided sufficient funds, but each later discovered that her or his injuries were worse than previously realized. In each case, the plaintiff sued for damages after her or his injuries failed to improve as expected.

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102. In Glover the plaintiff sought damages of $2.5 million but was left by the court with a settlement of $575,000. See supra note 51. The Bennett opinion does not state how much Mr. Bennett sought in damages, but it does indicate that his claim for a permanent and totally disabling injury was settled for medical expenses, just over three months’ lost wages, and $5,000. See supra note 67.


106. See id. at 484–85, 756 P.2d at 111–12; Bennett, 108 Wash. 2d at 388, 739 P.2d at 649.

107. Vanderpool, 110 Wash. 2d at 484–85, 756 P.2d at 112; Bennett, 108 Wash. 2d at 389, 739 P.2d at 649–50.

108. Vanderpool, 110 Wash. 2d at 485–86, 756 P.2d at 112; Bennett, 108 Wash. 2d at 389, 739 P.2d at 650.

109. Vanderpool, 110 Wash. 2d at 486, 756 P.2d at 112; Bennett, 108 Wash. 2d at 389–90, 739 P.2d at 650.
Notwithstanding these factual parallels, Vanderpool and Bennett differ greatly in result. The supreme court decided that the plaintiff in Bennett was bound by his settlement and that he could not seek further recovery for his later-discovered disability. In Vanderpool, however, the supreme court permitted the plaintiff to pursue a claim for her post-release damages. The difference in these results creates an incentive for injured parties and vicariously liable employers to arrive at only partial settlements. By naming only the employer in a release, the claimant can preserve a cause of action against the employee as a hedge against aggravated or later-discovered injuries. The employer may similarly find it advantageous not to include the employee in the settlement: a partial settlement may help the employer argue for a lower settlement amount.\footnote{10}

To avoid the inconsistency between Vanderpool and Bennett in the future, the court should first analyze whether the parties intended the release to completely settle the claim. Where full settlement was intended it should not matter who the release was intended to cover. The employer has fully satisfied the claim, and the plaintiff is not entitled to more than one recovery for the injury. The procedural history of Vanderpool strongly suggests that the parties there did intend to fully settle the claim, for the plaintiff at first sought only recission of the release and a judgment for damages.\footnote{11} Had she truly intended only a partial settlement and preserved a cause of action against the employee, a recission would not have been necessary.\footnote{12}

The court in Vanderpool undermines several rationales for respondeat superior—economic fairness, loss shifting, loss spreading, and loss prevention—by adopting a rule which fails to take them into account. Because of the court’s incomplete policy analysis, the rule of Vanderpool frustrates the doctrinally desired result of employer responsibility for employee torts.\footnote{13}

\footnote{10. Of course, if a judgment in the future cause of action is paid out of the employer’s insurance policy, as appears will ultimately be the case in Vanderpool, see 110 Wash. 2d at 504, 756 P.2d at 122 (Callow, J., dissenting), the fully insured employer may realize no advantage. This fact could encourage employers to limit their financial responsibility for employee torts, by eliminating liability insurance coverage of employees or by choosing to self-insure such risks.}

\footnote{11. See id. at 486, 756 P.2d at 112.}

\footnote{12. See id. at 493, 756 P.2d at 116 (Callow, J., dissenting).}

\footnote{13. By providing that “[a] party shall be responsible for the fault of another person . . . when a person was acting as an agent or servant of the party,” and by preserving joint and several liability in this situation, the 1986 legislature indicated that it desired the result produced by respondeat superior liability. See 1986 Wash. Laws ch. 305, § 401(1)(a) (codified at WASH. REV. CODE § 4.22.070(1)(a) (1987)).}
B. Failure To Recognize Glover as Controlling Precedent

The Washington Court of Appeals recognized the decision of the Washington Supreme Court in "Glover" as controlling precedent in the "Vanderpool" case.\(^\text{114}\) The grounds used by the supreme court to distinguish "Glover" and to reverse the court of appeals can be categorized as: 1) imputed negligence theory, 2) culpability of the nonsettling party, 3) applicability of the single entity statute, and 4) preservation of contribution causes of action.

1. Imputed Negligence Theory

The court’s first ground for distinguishing the "Vanderpool" case from "Glover" is consistent with the imputed negligence theory of respondeat superior: the court correctly noted that an agent’s settlement undermines “the very foundation of the principal’s liability.”\(^\text{115}\) That the court’s statement is true, however, does not mean that the principal’s settlement in "Vanderpool" should not have the same legal effect as the agent’s settlement in "Glover". Respondeat superior uses the fiction of imputed negligence to achieve a result—employer compensation of the tort victim—which is justified on grounds of public policy. The fact that an agent’s settlement erases the theoretical foundation of the principal’s liability is not a sufficient ground upon which to justify a different result in "Vanderpool" than in "Glover". Rather, the court should have examined whether preserving the agent’s liability would serve the policy aims of respondeat superior.

2. Culpability of Nonsettling Party

The supreme court’s second means of distinguishing "Glover" from "Vanderpool" was its statement that the policy of assuring the plaintiff the “maximum opportunity” for full compensation did not require permitting a plaintiff who had settled with a solvent agent to pursue a principal who “is only secondarily liable.”\(^\text{116}\) The court here seems to focus upon the relative culpability of principal and agent, characterizing the former as innocent. But if vicarious liability is meant to maximize the claimant’s opportunities for full compensation, then the

\(^{114}\) The court of appeals did not publish its decision in "Vanderpool". Vanderpool v. Grange Ins. Ass’n, 42 Wash. App. 1032 (1985), rev’d, 110 Wash. 2d 483 (1988). This shows that it considered its application of "Glover" to the converse fact pattern in "Vanderpool" so unremarkable as to have no precedential value. See WASH. REV. CODE § 2.06.040 (1987).

\(^{115}\) "Vanderpool," 110 Wash. 2d at 487, 756 P.2d at 113.

\(^{116}\) Id.
culpability of the nonsettling party is irrelevant.\textsuperscript{117} \textit{Glover} teaches that it is the solvency, not the culpability, of the released party which maximizes the claimant's opportunity for full compensation.\textsuperscript{118} Given that settling with a solvent agent sufficiently maximizes the claimant's compensation opportunities,\textsuperscript{119} settlement with a solvent principal should likewise be held to sufficiently maximize the claimant's chance to be fully compensated.

3. \textit{Applicability of Single Entity Statute}

Another basis upon which the supreme court in \textit{Vanderpool} attempted to distinguish \textit{Glover} was its statement that there was "no reason to apply RCW 4.22.040(1) which allows a court to determine that two or more persons may be treated as a single person."\textsuperscript{120} As previously discussed,\textsuperscript{121} the \textit{Glover} court had interpreted this single entity statute to allow the discharge of a principal from vicarious liability when its agent and the claimant reached a reasonable settlement.

Single entity liability is well adapted to the typical situation of respondeat superior liability.\textsuperscript{122} Respondeat superior liability differs from joint tortfeasor situations by involving the actual, active negligence of only one party.\textsuperscript{123} Under respondeat superior, the liability of the active and passive tortfeasors is coextensive: so long as the active tortfeasor is liable, the passive tortfeasor will also be liable, and to the same extent.\textsuperscript{124} Often, as in \textit{Vanderpool}, an employer-procured insurance policy will provide liability coverage for both the active and passive tortfeasors, and settlement of the claim against that policy will be achieved by negotiations between the employer's insurance company and the claimant.\textsuperscript{125}

\begin{itemize}
\item \textsuperscript{117} Indeed, respondeat superior imposes liability upon employers despite their lack of culpability.
\item \textsuperscript{119} As \textit{Glover}, 98 Wash. 2d at 721–24, 658 P.2d at 1238–39, and \textit{Vanderpool}, 110 Wash. 2d at 487, 756 P.2d at 113, both indicate.
\item \textsuperscript{120} 110 Wash. 2d at 488, 756 P.2d at 113.
\item \textsuperscript{121} See supra text accompanying notes 58–60.
\item \textsuperscript{122} The official comment to the Uniform Act gives respondeat superior liability as the primary example of single entity liability, stating, "the liability of a master and servant for the wrong of a servant should in fairness be treated as a single share." \textit{UNIFORM ACT, supra} note 73, § 2, at 87, commissioner's comment.
\item \textsuperscript{123} See Kinsey v. William Spencer & Son Corp., 165 Misc. 143, 300 N.Y.S. 391, 396 (1937).
\item \textsuperscript{124} See id. at 143, 300 N.Y.S. 391; Consolidated Gas Utils. Co. v. Beatie, 167 Okla. 71, 27 P.2d 813 (1933). But if the active tortfeasor has a personal defense, the passive tortfeasor may still be liable. See supra note 28.
\item \textsuperscript{125} See Chilcote v. Von Der Ahe Van Lines, 300 Md. 106, 476 A.2d 204, 213 (1984).
\end{itemize}
The Vanderpool court failed to explain why the single entity statute applied in Glover but not in Vanderpool. The absence of a reasonableness determination in Vanderpool was not presented by the court as a dispositive difference, nor should it be so viewed. The terms of the single entity statute do not limit its application to cases where a reasonableness hearing has been held. Rather, the statute applies "for purposes of contribution." The employee in Vanderpool had a potential contribution action against the settling employer, just as the principal in Glover had a potential contribution action against its settling agents. The single entity statute should have been applied in Vanderpool as it was applied in Glover.

4. Preservation of Contribution Causes of Action

Attempting another distinction from Glover, the Vanderpool court expressed concern for protecting nonsettling principals from losing potential contribution causes of action against their settling agents. Yet the court ignored nonsettling agents' potential contribution actions against their settling principals. Judicial protection of a nonsettling party's contribution action should not depend on that party's identity.

Ever since the 1981 Act replaced common law indemnity rights with contribution rights, Washington law has presented no theoretical barrier to an agent seeking contribution from a principal. Unlike the abolished right of common law indemnity, which typically could be exercised only by passive tortfeasor against active tortfeasor, contribution rights can run in either direction. Washington statutes permit assigning a portion of the "fault" to a person subject to strict liability. Therefore, under present Washington statutes there is no reason why a vicariously liable employer might not be found liable to its employee for contribution.

127. See infra text accompanying notes 130–32.
128. The Vanderpool court stated that it had been "necessary" to release the principal in Glover "because a release between a plaintiff and an agent would foreclose any possibility of the principal receiving contribution from his agent." Vanderpool v. Grange Ins. Ass'n, 110 Wash. 2d 483, 487, 756 P.2d 111, 113 (1988).
129. See infra text accompanying notes 130–32.
132. 2 F. Harper & F. James, supra note 31, § 26.5, at 1372; Prosser, supra note 4, § 69, at 499.
In protecting a contribution cause of action for the principal, but not for the agent, the Vanderpool court implicitly suggests that the change from indemnity to contribution was merely formal and that the legislature simply intended to preserve the status quo between employer and employee. The only authority cited for this suggestion was a line in the legislative history of the 1981 Act which stated the effect of the old rule of indemnity, but which did not express a legislative desire to retain this effect. Other parts of the 1981 Act's legislative history show that the change from contribution to indemnity was not merely formal. The court did not mention that the purpose of the 1981 Act was to create a more equitable distribution of tort liability because of a "growing dissatisfaction with the all-or-nothing recovery rules under the prior law." The court did not explain that the Senate Report had identified common law indemnity as "another form of the 'all-or-nothing' rule which is being departed from in this bill which favors comparative fault principles." These legislative statements are not the indicia of a mere change in form.

C. Suggested Future Approach

Providing the claimant with only one recovery for his or her injury is a basic tenet of the tort system. The majority rule of releasing either employer or employee when the other settles protects against double recovery by holding the claimant to the remedy elected. In contrast, by permitting the claimant "to look to both master and servant for recovery when recovery has been accepted from one . . . as payment in full," the rule in Vanderpool permits the claimant "two bites of the apple." In Glover, the Washington Supreme Court recognized the opportunity to settle with solvent agents as providing the claimant a sufficient opportunity for full compensation. There is no reason not to adopt the same view when the claimant has instead settled with a solvent

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133. The court cites the following sentence in the Senate Report: "'Under current law where the active/passive analysis can be applied, the entire liability can be shifted from the passive tortfeasor to the active tortfeasor.'" Vanderpool, 110 Wash. 2d at 487, 756 P.2d at 113.
135. Senate Report; supra note 44 at 627.
136. Id. at 636.
principal. The solvency requirement suggested in Glover and reiterated in Vanderpool is an appropriate limitation upon the majority rule which will further the policy of full compensation. It should be retained.

Accordingly, the best approach for Washington courts to follow in future cases like Vanderpool would be a modified version of the majority rule. The claimant who settles with a solvent employer should be held to have thereby released the employee. The liability of the employer and the employee should be treated as a single share.

If, for reasons of stare decisis, Washington courts decline to follow the rule used by a majority of other states, still this state's courts would do more to encourage finality and prevent double recovery were they to first consider whether the release at issue was intended to fully compensate the claimant. If the release was so intended, it should be immaterial for the claimant's rights that one potential defendant—the employee—made no monetary contribution to that release. The settling employer might legitimately complain that the employee owes it contribution but the claimant, having accepted a settlement in full, should have no further recovery.

III. CONCLUSION

The justification for respondeat superior lies as much in the distribution of tort liability it achieves as it does in our desire to fully compensate the tort victim. Shifting tort losses to the employer through the fiction of respondeat superior helps avoid impoverishing employees who inadvertently commit torts; it helps spread the cost of accidents throughout society; and it holds employers responsible for the costs of their enterprises.

The holding in Vanderpool may shift significant financial burdens from employers to individual employees, contrary to the loss shifting, loss spreading, and fairness policies behind respondeat superior. The Vanderpool court should have considered these policies in arriving at its holding. In future similar cases, the court should adopt a rule which furthers all of the policies behind respondeat superior: a rule that the release of a solvent employer operates to release its employee.

Karen P. Clark

140. See Restatement (Second) of Torts § 885 comment c (1979).