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Casenotes: Constitutional Law — Award of Punitive Damages Permissible under the Doctrine of Respondeat Superior in First Amendment Cases. Embrey v. Holly, 293 Md. 128, 442 A.2d 966 (1982)

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CONSTITUTIONAL LAW—AWARD OF PUNITIVE DAMAGES PERMISSIBLE UNDER THE DOCTRINE OF RESPONDEAT SUPERIOR IN FIRST AMENDMENT CASES. *Embrey v. Holly,* 293 Md. 128, 442 A.2d 966 (1982).

A radio broadcaster and his employer were held liable for the defamatory remarks made by the broadcaster on his radio program.[1] The plaintiff, a television broadcaster, was awarded compensatory and punitive damages against both defendants.[2] On appeal, both defendants claimed that the imposition of punitive damages against the radio station based on the doctrine of respondeat superior violated the first amendment, as interpreted by recent United States Supreme Court decisions, by imposing liability without proof of fault.[3] In *Embrey v.*

1. Embrey v. Holly, 293 Md. 128, 132, 442 A.2d 966, 968 (1982). During a comedy news routine on his morning radio program, James Embrey, Jr., known professionally as Johnny Walker, truthfully reported that Baltimore television newscaster Dennis Holly was about to undergo knee surgery. In a rebroadcast later that morning, Embrey made these additional comments about Holly: "Too bad about Dennis Holly, though . . . . Wonder how he hurt his knee? Probably fell down carrying that TV during the blizzard last week, right?" During a blizzard in 1979, looters took advantage of immobilized police vehicles and broke into numerous commercial establishments in downtown Baltimore. The jury found these comments libelous and awarded Holly $25,000 in compensatory damages against both defendants, and punitive damages of $5,000 against Embrey and $35,000 against his employer, Baltimore Radio Show, Inc. *Id.* at 131-32, 442 A.2d at 967-68.
2. *Id.* at 133, 442 A.2d at 968.
3. *Id.* at 132, 442 A.2d at 968. Respondeat superior, also known as vicarious liability, is defined as the liability of a master for the tortious acts of his servant, committed within the scope of employment. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 69 (4th ed. 1971).

   In addition, the radio station and Embrey appealed on the ground that punitive damages should not be apportioned between the broadcaster and the radio station. *Embrey,* 293 Md. at 133, 442 A.2d at 968. The Court of Special Appeals of Maryland had sua sponte reversed the trial court's ruling that it was proper to permit the jury to impose punitive damages in differing amounts to the two defendants. *Embrey,* 48 Md. App. at 587, 429 A.2d at 262, *aff'd in part, rev'd in part,* 293 Md. 128, 442 A.2d 966 (1982).

   Prior to *Embrey,* the Maryland rule concerning apportionment of punitive damages was unclear. In Nance v. Gall, 187 Md. 656, 51 A.2d 535 (1946), the court of appeals held that a jury verdict against a railroad employee and the railroad company resulted in a joint verdict, and therefore punitive damages were not apportioned. Thus, when the judgment was reversed as to the railroad company, the joint judgment for damages could not stand against only one defendant. *Id.* at 675, 51 A.2d at 536. In a subsequent case, the court of special appeals, "inclined" by *Nance,* upheld the apportionment of punitive damages against joint tortfeasors. Cheek v. J.B.G. Properties, Inc., 28 Md. App. 29, 43, 344 A.2d 180, 189-90 (1975). However, in Meleski v. Pinero Restaurant, 47 Md. App. 526, 550, 424 A.2d 784, 797 (1981), the court of special appeals retreated from the *Cheek* decision, holding that *Nance* should not be read so broadly as to permit the apportionment of punitive damages between joint tortfeasors. The *Meleski* court stated that only the court of appeals or the legislature is free to change the Maryland rule on apportionment. *Id.* In *Embrey,* the Court of Appeals of Maryland resolved this issue by ruling that punitive damages should be apportioned between joint tortfeasors based on their culpability and pecuniary wealth in order that the damages be fair and effective. *Embrey*, 293 Md. at 141-42, 442 A.2d at

Holly,[4] the Court of Appeals of Maryland affirmed the trial court's judgment, holding that punitive damages may be imposed upon the employer for defamatory remarks made by his employee when the employee acts within the scope of his employment.[5]

Although it is well established that compensatory damages may be awarded under the doctrine of respondeat superior, there is a split of authority concerning the awarding of punitive damages.[6] Maryland is among the majority of jurisdictions that applies a "broad respondeat superior doctrine,"[7] holding an employer vicariously liable for punitive damages when the employee's tortious acts are committed within the scope of employment, even in the absence of the employer's authorization, participation, or ratification.[8] Advocates of the broad respondeat superior doctrine argue that the award of punitive damages provides a deterrent effect by encouraging employers to exercise closer control over their employees and by preventing the re-occurrence of similar acts.[9] Furthermore, the employer is deemed to be in a better position to bear any loss caused by the employee's actions through the acquisition of liability insurance.[10]

However, several courts have noted the injustice of punishing the employer — an innocent party.[11] This is particularly true when the employer is a corporation and its stockholders suffer a loss because of an employee's tortious conduct.[12] As a result, a minority position has evolved requiring some degree of complicity by the employer for liabil-

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973. For a further discussion of apportionment of damages, see Note, *Apportionment of Punitive Damages,* 38 VA. L. REV. 71 (1952); *Apportionment of Punitive or Exemplary Damages as Between Joint Tortfeasors,* Annot., 20 A.L.R.3d 666 (1968).

4. 293 Md. 128, 442 A.2d 966 (1982).
5. *Id.* at 140, 442 A.2d at 973.
6. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 (4th ed. 1971). Compensatory damages are awarded to compensate or indemnify a person for the harm sustained. Superior Constr. Co. v. Elmo, 204 Md. 1, 14, 104 A.2d 581, 582 (1954) (quoting the *Restatement of Torts* § 903 (1934)). Punitive, or exemplary, damages are "awarded over and above full compensation, to punish the wrongdoer, to teach him not to repeat his wrongful conduct and to deter others from engaging in the same conduct." Wedeman v. City Chevrolet Co., 278 Md. 524, 531, 366 A.2d 7, 12 (1976).
7. *Embrey,* 293 Md. at 137-38, 442 A.2d at 971; *see* Note, *The Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees,* 70 YALE L.J. 1296 (1961) [hereinafter cited as *Assessment of Punitive Damages.*]
8. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 (4th ed. 1971); *see, e.g.,* Weston Coach Corp. v. Vaugh, 9 Ariz. App. 336, 452 P.2d 117 (1967); Life Ins. Co. of North America v. Knoll Inc., 389 So. 2d 303 (Fla. 1980); Safeway Stores, Inc. v. Barrack, 210 Md. 168, 176-77, 122 A.2d 457, 461-62 (1956).
9. *Assessment of Punitive Damages, supra* note 7, at 1301.
10. *See id.* at 1303.
11. *See, e.g.,* Lake Shore & M.S.R. Co. v. Prentice, 147 U.S. 101, 107-08 (1893); Hartman v. Shell Oil Co., 68 Cal. App. 3d 240, 249, 137 Cal. Rptr. 244, 250 (1977). For additional jurisdictions applying this view of respondeat superior, see *Assessment of Punitive Damages, supra* note 7, at 1300 n.35.
12. *Assessment of Punitive Damages, supra* note 7, at 1306-07.

ity to attach.[13] Under the "complicity rule,"[14] as expressed in section 909 of the *Restatement (Second) of Torts,* the employer is vicariously liable for punitive damages only when the employer authorizes, participates in, or ratifies the employee's tortious activity.[15]

Application of the complicity rule in defamation suits raises no constitutional controversy, because an employer has participated in the tortious activity. Application of the broad respondeat superior rule, however, creates conflicts with first amendment constitutional privileges which protect the media's exercise of freedom of speech and press.[16] The United States Supreme Court has held that public officials,[17] public figures,[18] and private individuals involved in an event of public interest[19] may not recover either punitive or compensatory damages without proof that the defamatory statements were made with actual malice.[20]

In *Gertz v. Robert Welch, Inc.,*[21] the Court extended the privilege

13. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 (4th ed. 1971).
14. *See* Morris, *Punitive Damages in Personal Injury Cases,* 21 OHIO ST. L.J. 216, 221 (1960).
15. The RESTATEMENT provides:
> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
> (d) the principal or a managerial agent of the principal ratified or approved the act.

RESTATEMENT (SECOND) OF TORTS § 909 (1977).
16. For a general discussion of the first amendment constitutional privileges, see Black, *A Constitutional Revolution in the Law of Libel:* New York Times *and* Gertz *Applied,* 11 TEX. TECH. L. REV. 611, 612-20 (1980).
17. New York Times, Inc. v. Sullivan, 376 U.S. 254 (1964). No award of punitive or compensatory damages for defamation is constitutionally permissible when the publication deals with the official conduct of public officials unless the statement was made with actual malice. *Id.* at 283. In *New York Times,* a judgment for damages awarded in an Alabama state court, based on a newspaper's advertisement, was reversed because the plaintiff, the Montgomery, Alabama police commissioner, failed to prove actual malice on the part of the defendants. *Id.* at 285-86.
18. Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967). A football coach attained the status of a public figure by his position, while in a companion case, a person involved in political activities attained his status of public figure by "purposeful activity amounting to a thrusting of his personality into the 'vortex' of important public controversy. . . ." *Id.* at 155.
19. Rosenbloom v. Metromedia, Inc., 402 U.S. 29 (1971). The arrest of a private individual for the sale of allegedly obscene material constituted an event of public or general interest. *Id.* at 41-42.
20. New York Times, Inc. v. Sullivan, 376 U.S. 254, 280 (1964). Actual malice is defined by the Court to mean "without knowledge that [the statement] was false or with reckless disregard of whether it was false or not." *Id.*
21. 418 U.S. 323 (1974).

by ruling that a private individual may not be awarded punitive damages in a defamation suit against the media absent a showing of actual malice.[22] However, when awarding compensatory damages in defamation suits brought by private individuals, the Court held that the states are free to determine the proper standard "so long as they do not impose liability without fault."[23] In reaching this conclusion, the Court attempted to balance the countervailing state interest in protecting private individuals from defamatory falsehoods with the federal constitutional interest in protecting freedom of speech and press.[24]

While the Supreme Court has not specifically decided whether punitive damages may be imposed upon employers for their employees' defamatory acts, some insights may be gleaned from the *Gertz* decision and a subsequent case.[25] In *Gertz,* a publisher was held not liable for defamatory statements contained in an article written by a free-lance writer.[26] The Supreme Court affirmed the decision, noting that mere proof of the publisher's failure to investigate, without more, was not sufficient to establish actual malice on the part of the publisher.[27] Since the plaintiff did not argue the respondeat superior theory to the Court, it is unclear whether the theory does not apply in cases involving the constitutional privilege scheme, or that the theory would have failed on the facts presented in *Gertz.*[28]

Respondeat superior was utilized in *Cantrell v. Forest City Publishing Co.,*[29] when the Court held a publisher liable for the defamatory statements of its regular staff writers.[30] The jury verdict against the publisher was upheld under the doctrine of respondeat superior even though the plaintiff failed to prove the publisher's actual malice.[31] Therefore, a distinction appears to exist between defamatory statements made by independent contractors such as free-lance employees, and servants such as regular employees.[32]

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22. *Id.* at 349.
23. *Id.* at 347. Maryland has adopted negligence as the standard of liability for private individual's defamation suits. Jacron Sales Co. v. Sindrof, 276 Md. 580, 596-97, 350 A.2d 688, 697 (1976).
24. *Gertz,* 418 U.S. at 348.
25. For a discussion of the doctrine of vicarious liability in light of the *Gertz* decision, see Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 246-47 (1976).
26. *Gertz,* 418 U.S. at 331-47.
27. Plaintiff raised the doctrine of respondeat superior for the first time before the Court of Appeals for the Seventh Circuit. This claim was dismissed because the plaintiff failed to establish an "employer-employee" relationship. *Gertz,* 471 F.2d at 807 n.15 (7th Cir. 1972), *rev'd,* 418 U.S. 323 (1974).
28. *See* Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 246 (1976).
29. 419 U.S. 245 (1974).
30. *Id.* at 252-54.
31. *Id.* at 253.
32. For a discussion of the differences between servants and independent contractors, see W. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 70-71 (4th ed. 1971);

In *Embrey v. Holly,*[33] the Court of Appeals of Maryland held a radio station liable for the defamatory remarks of its broadcaster despite the station's contention that the award of punitive damages under the doctrine of respondeat superior imposed liability without fault.[34] The majority ruled that *Gertz* was inapplicable because that decision involved the constitutional limitations imposed upon a state when awarding compensatory and punitive damages in defamation suits brought by private individuals.[35] In contrast, *Embrey* involved the award of compensatory and punitive damages in a defamation suit brought by a public figure.[36] The majority also noted that the dissent in *Embrey* misread *Gertz* because "an act done with fault can be committed vicariously by an employer acting through its employee."[37] The *Embrey* court stated that the Maryland courts have consistently imposed vicarious liability on the employer for the tortious acts of the employee.[38] Therefore, the court of appeals concluded that the policy of free expression fostered by the first amendment is overridden by the state interests of protecting citizens from defamatory conduct and deterring future misconduct.[39] Thus, a narrower standard should not be used in defamation suits involving the imposition of punitive damages under the doctrine of respondeat superior.[40]

Writing for the dissent, Chief Judge Murphy contended that a different standard should be used in first amendment cases and argued that the court should adopt the *Restatement* test permitting punitive damages against an employer only when he has authorized, participated in, or ratified his employee's tortious act.[41] The dissent claimed that the majority "bootstrap[ped]" the doctrine of respondeat superior into a finding of fault against the employer radio station in direct violation of *Gertz.*[42]

The *Embrey* opinion dismisses *Gertz* as being "not dispositive"[43] without fully discussing whether the doctrine of respondeat superior is a form of strict liability prohibited by Supreme Court mandate. In analyzing the *Gertz* decision and other defamation cases, it appears that

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James, *Vicarious Liability,* 28 TULANE L. REV. 161, 193-207 (1954); Steffen, *Independent Contractors and the Good Life,* 2 U. CHI. L. REV. 501, 501-02 (1935).

33. 293 Md. 128, 442 A.2d 966 (1982).
34. *Id.* at 140, 442 A.2d at 972-73.
35. *Id.* at 139, 442 A.2d at 972.
36. In this instance Holly acknowledged that he was a public figure. *Id.* at n.12, 442 A.2d at 972 n.12.
37. *Id.* at 139 n.13, 442 A.2d at 972 n.13.
38. *Id.* at 135, 442 A.2d at 970. *See* Safeway Stores, Inc. v. Barrack, 210 Md. 168, 176-77, 122 A.2d 457, 461-62 (1956); W.W. Boyer & Co. v. Coxen, 92 Md. 366, 368, 48 A. 161, 162 (1901); Baltimore & Yorktown Turnpike v. Boone, 45 Md. 337, 354-56 (1876); B & O R.R. Co. v. Blocher, 27 Md. 277, 286 (1867).
39. *Embrey,* 293 Md. at 138, 442 A.2d at 971.
40. *Id.* at 140, 442 A.2d at 972.
41. *Id.* at 144-45, 442 A.2d at 975 (Murphy, C.J., dissenting).
42. *Id.*
43. *Id.* at 139, 442 A.2d at 972.

the Supreme Court does not prohibit the application of the doctrine.[44] The different results in *Gertz* and *Cantrell* may be attributed to the usual tort distinctions between servants and independent contractors.[45] However, the *Embrey* court never reaches this issue. Nor does the court give proper consideration to the policy behind the first amendment constitutional privileges, which attempt to provide the media with the "breathing space"[46] necessary for the free flow of information and ideas. Instead, the court of appeals relied on the broad respondeat superior doctrine, a doctrine which has been subject to criticism by many in the business sector who claim that large awards under this rule may overload liability insurance rates and deplete corporate reserves.[47] The critics advocate the adoption of the complicity rule since punitive damages are then awarded only when an employer's culpability justly requires him to assume his portion of the punishment.[48]

The arguments against the broad respondeat superior rule may be justified in some cases, but are not persuasive in others. The strongest justification for the broad respondeat superior rule is deterrence of future tortious misconduct.[49] The employer, though an innocent party, may "secretly applaud" the employee's tortious acts if it costs nothing, since the employee's conduct may result in future profits to an employer.[50] In the present case, the radio station may not have authorized the specific comment. However, the station may have implicitly encouraged this type of comment, in an effort to increase its listening audience, since it was characteristic of others made by Embrey on his program. For these reasons, the award of punitive damages under the application of the broad respondeat superior doctrine in defamation cases may effectuate the policy behind the constitutional privilege scheme by accommodating state defamation law and the first amendment freedoms of speech and press.

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44. *See supra* notes 25-32 and accompanying text.
45. Robertson, *Defamation and the First Amendment: In Praise of* Gertz v. Robert Welch, Inc., 54 TEX. L. REV. 199, 266-67 (1976).
46. New York Times, Inc. v. Sullivan, 376 U.S. 254, 271-72 (1964) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).
47. Morris, *Punitive Damages in Personal Injury Cases,* 21 OHIO ST. L.J. 216, 217-18 (1960).
48. *Id.* at 220-21; *see also* Lake Shore & M.S.R. Co. v. Prentice, 147 U.S. 101, 114-15 (1892).
49. United Securities Corp. v. Franklin, 180 A.2d 505, 511 (D.C. 1962); Eshelman v. Rawait, 198 Ill. 192, 197, 131 N.E. 675, 677 (1921).
50. Morris, *Punitive Damages in Personal Injury Cases,* 21 OHIO ST. L.J. 216, 218-19 (1960).