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Recommended Citation

Available at: http://scholarworks.law.ubalt.edu/ublr/vol12/iss3/11
A radio broadcaster and his employer were held liable for the defamatory remarks made by the broadcaster on his radio program. The plaintiff, a television broadcaster, was awarded compensatory and punitive damages against both defendants. 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. In Embrey v.
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.\textsuperscript{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.\textsuperscript{6} Maryland is among the majority of jurisdictions that applies a "broad respondeat superior doctrine,"\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{10}

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

\textsuperscript{4} Holy, 293 Md. 128, 442 A.2d 966 (1982).
\textsuperscript{5} Id. at 140, 442 A.2d at 973.
\textsuperscript{6} W. Prosser, \textit{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 \textit{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).
\textsuperscript{7} Embrey, 293 Md. at 137-38, 442 A.2d at 971; see Note, \textit{Assessment of Punitive Damages Against an Entrepreneur for the Malicious Torts of His Employees}, 70 \textit{Yale L.J.} 1296 (1961) [hereinafter cited as \textit{Assessment of Punitive Damages}.]
\textsuperscript{9} \textit{Assessment of Punitive Damages}, supra note 7, at 1301.
\textsuperscript{10} See \textit{id.} at 1303.
\textsuperscript{12} \textit{Assessment of Punitive Damages}, supra note 7, at 1306-07.
Under the "complicity rule," 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.

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. The United States Supreme Court has held that public officials, public figures, and private individuals involved in an event of public interest may not recover either punitive or compensatory damages without proof that the defamatory statements were made with actual malice.

In *Gertz v. Robert Welch, Inc.*, the Court extended the privilege...
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. 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." 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.

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. In Gertz, a publisher was held not liable for defamatory statements contained in an article written by a free-lance writer. 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. 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.

Respondeat superior was utilized in Cantrell v. Forest City Publishing Co., when the Court held a publisher liable for the defamatory statements of its regular staff writers. 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. Therefore, a distinction appears to exist between defamatory statements made by independent contractors such as free-lance employees, and servants such as regular employees.

22. Id. at 349.
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).
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*, 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. 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. In contrast, *Embrey* involved the award of compensatory and punitive damages in a defamation suit brought by a public figure. 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." The *Embrey* court stated that the Maryland courts have consistently imposed vicarious liability on the employer for the tortious acts of the employee. 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. Thus, a narrower standard should not be used in defamation suits involving the imposition of punitive damages under the doctrine of respondeat superior.

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. 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*.

The *Embrey* opinion dismisses *Gertz* as being "not dispositive" 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...
the Supreme Court does not prohibit the application of the doctrine.\textsuperscript{44} The different results in \textit{Gertz} and \textit{Cantrell} may be attributed to the usual tort distinctions between servants and independent contractors.\textsuperscript{45} However, the \textit{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"\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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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\textsuperscript{44} See supra notes 25-32 and accompanying text.
\textsuperscript{48} \textit{Id.} at 220-21; see also \textit{Lake Shore & M.S.R. Co. v. Prentice}, 147 U.S. 101, 114-15 (1892).
\textsuperscript{49} \textit{United Securities Corp. v. Franklin}, 180 A.2d 505, 511 (D.C. 1962); \textit{Eshelman v. Rawait}, 198 Ill. 192, 197, 131 N.E. 675, 677 (1921).