THE SUPREME COURT OF MISSOURI

SANDRA BACH,	)	
	)	
Appellant/	)	
Cross Respondent	)	
	)	SC NO. 89001
	)	
	)	
	)	
vs.	)	
	)	
WINFIELD FOLEY	)	
FIRE PROTECTION DISTRICT,	)	
	)	
Respondent/	)	
Cross Appellant	)	

APPEAL FROM THE CIRCUIT COURT OF LINCOLN COUNTY, MISSOURI

The Honorable Dan Dildine, Circuit Judge

APPELLANT/CROSS RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal arises from a personal injury action involving a rear end car collision with a fire truck. A jury returned a net verdict for Plaintiff for $15,000. Plaintiff filed a Motion for New Trial on the Issue of Liability, which was denied. Plaintiff appeals from this judgment. Jurisdiction is founded upon Article V, Section 10 of the Missouri Constitution, in which cases pending before the Court of Appeals may be transferred to this Honorable Court by order of this Court before or after opinion because of the general interest or importance of a question involved in the case, or for the purpose of reexamining existing law. The Honorable Court may finally determine all causes coming to it from the Court of Appeals, whether by certification, transfer or certiorari, the same as on original appeal.

STATEMENT OF FACTS

On July 7, 2006, Plaintiff-Appellant Sandra Bach (hereinafter "Sandy") filed a Second Amended Petition against Defendant-Respondent Winfield-Foley Fire Protection District (hereinafter "the District") for negligence, alleging that on May 3, 2004, the District negligently parked a fire truck in the westbound lane of Route Y in Lincoln County, Missouri, which resulted in Samuel Madden (hereinafter "Sam"), the driver of Sandy's vehicle, colliding with the fire truck, causing Sandy damages. (L.F. 10-12). On July 17, 2006, the District filed an Answer to Sandy's Second Amended Petition. (L.F. 13-17). Included in the District's Answer was an affirmative defense that Sandy and Sam were engaged in a joint venture and that Sandy, as the owner of the vehicle involved in the collision, rendered Sam her agent for the venture. (L.F. 15).

Sam was born on August 28, 1987. (T.R. 1). On May 3, 2004, he was sixteen years of age and did not own a vehicle. (T.R. 4). Sandy, his aunt, owned a Chevy Lumina. (T.R. 4). She had never learned how to drive. (T.R. 3, 13). On May 3, 2004, Sam was asked by Sandy to take her to a widowers meeting in Troy, Missouri. (T.R. 5, 13). According to Sam, Sandy was to pay for gas and "whatever other expense there would be" (T.R. 3), although he did not ask Sandy for gas money for this trip. (T.R. 4). According to Sandy, there was no such agreement. (T.R. 13). Since she did not know how to drive, there was no expectation that Sandy would share any of the driving responsibilities. (T.R. 3). Sam's intended route of travel from Sandy's house to the meeting was McClay Road to Route Y, to Route W, and then to Highway 47. (T.R. 1 and

Defendant's Exhibit C).

According to Sam, prior to reaching the crest of the hill on westbound Route Y, he had leveled out at 55 miles per hour. (T.R. 2). Sam traveled up the hill, slowed down to about 50 miles per hour, and then reached the crest of the hill, which is located in the middle of the intersection of Route EE and Highway Y. (T.R. 2, 7). There is no stop or yield sign for westbound drivers on Route Y. (T.R. 2). As Sam was driving, the sun was a "nuisance," and Sandy and Sam both put their visors down. (T.R. 2, 6). Neither Sam nor Sandy saw the fire truck until reaching the crest of the hill. (T.R. 2, 14).

At this point, Sam hit his brakes with "a lot of power" and his wheels locked up. Id. He tried to cut his wheel to clear the fire truck, but the brakes were locked up and he slid straight into it. Id. Sandy did not have enough time to warn Sam because the impact occurred within seconds. (T.R. 22) Prior to reaching the crest of the hill, neither Sam nor Sandy had any indication that a fire truck was parked in their lane, nor did they see a helicopter or any people. (T.R. 2, 7, 14). Sam does remember seeing a white car parked on the west side of Route EE without its lights on. (T.R. 2, 7).

Sandy's case proceeded to trial on July 19, 2006. After the close of evidence on July 20, the Court held a Jury Instructions conference while the jury was in recess. (T.R. 43). At the conference, Sandy's counsel objected to the giving of Instructions 7, 8, 9, 10 and Verdict A, on the grounds that any comparative fault of driver Sam could not be imputed to passenger Sandy since a joint venture did not exist between Sam and Sandy at the time of the collision. (T.R. 43-44; L.F. 19, 25-28). The trial court held as a matter of law that since Sandy owned the automobile and Sam was driving at her request, that the

element of control under joint venture was established, which rendered Sam Sandy's agent for the car ride to Troy. (T.R. 8). Sandy's counsel submitted Instructions B, C, and "Refused" Verdict A. (T.R. 44; L.F. 29-31). All were refused by the Court. (T.R. 43-44). Despite Sandy's objections, Instructions 7, 8, 9, 10, and Verdict A were read and submitted to the jury. (T.R. 45). On July 20, 2006, the jury returned a verdict of $100,000, attributing 15% fault to the District and 85% fault to Sandy. (L.F. 19, 20). Judgment was entered in favor of Sandy and against the District in the amount of $15,000, with costs taxed to the District. (L.F. 21).

On August 4, 2006, Sandy filed a Motion for New Trial on the Issue of Liability. (L.F. 22-31). In her Motion, she argued that the trial court erred in allowing any comparative fault of Sam to be submitted to the jury and imputed to her on the grounds that there was no joint venture at the time of the collision and, as a result, the negligence of Sam as the driver could not be imputed to Sandy, as passenger. (L.F. 22-23). Sandy's Motion was denied on September 18, 2006. (L.F. 32).

On October 16, 2007, the Eastern District affirmed the trial court and held that the trial court did not err in giving Instructions 7, 8, 9, 10, and Verdict A, which allowed any comparative fault of Sam in failing to keep a careful lookout to be imputed to Sandy, and did not err in denying Sandy's Motion for a New Trial. The Eastern District based its holding on its interpretation of Manley v. Horton, 414 S.W.2d 254, 260 (Mo. 1967), holding that Sandy's ownership of the car automatically gave her the right to control it as a matter of law.

On October 31, 2007, Sandy filed a Motion for Rehearing, or in the Alternative,

Motion to Transfer to this Honorable Court under Eastern District Local Rule 407 and Supreme Court Rule 83.02. This Motion was denied by the Eastern District on November 19, 2007.

On December 4, 2007, Sandy mailed her Application for Transfer under Supreme Court Rule 83.04 and 83.05 via regular U.S. Mail. On December 7, 2007, Sandy filed a Motion for Leave to File Application for Transfer Out of Time, which was granted on December 13, 2007. On December 18, 2007, the District filed its Motion for Leave to File Suggestions in Opposition, which was granted on December 18, 2007. The District's Suggestions were filed on December 18, 2007.

On January 22, 2008, this Honorable Court sustained Sandy's Application for Transfer, and said cause was ordered transferred from the Eastern District.

POINT RELIED ON

THE TRIAL COURT ERRED IN GIVING INSTRUCTION NUMBERS 7, 8, 9, 10, AND VERDICT A AND REFUSING INSTRUCTIONS B, C, AND "REFUSED" VERDICT A, AND IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL ON THE ISSUE OF LIABILITY AS A RESULT BECAUSE THE EVIDENCE DID NOT SUPPORT THE SUBMISSION OF COMPARATIVE FAULT AS TO PLAINTIFF IN THAT ANY NEGLIGENCE OF DRIVER SAMUEL MADDEN CANNOT BE IMPUTED TO HER SINCE PLAINTIFF WAS A PASSENGER IN THE MOTOR VEHICLE, AND SHE DID NOT HAVE A MUTUAL RIGHT TO CONTROL THE DIRECTION OF THE CAR RIDE SINCE SHE NEVER

LEARNED HOW TO DRIVE AN AUTOMOBILE.

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ARGUMENT

Standard of Review

The trial court shall either give or refuse a jury instruction according to the law and the evidence in the case. Rule 70.02(a). The question of whether a jury was properly instructed is an issue of law, which is reviewed *de novo*. Ploch v. Hamai, 213 S.W.3d

135, 139 (Mo. App. E.D. 2006).

THE TRIAL COURT ERRED IN GIVING INSTRUCTION NUMBERS 7, 8, 9, 10, AND VERDICT A AND REFUSING INSTRUCTIONS B, C, AND "REFUSED" VERDICT A, AND IN DENYING PLAINTIFF'S MOTION FOR A NEW TRIAL ON THE ISSUE OF LIABILITY AS A RESULT BECAUSE THE EVIDENCE DID NOT SUPPORT THE SUBMISSION OF COMPARATIVE FAULT AS TO PLAINTIFF IN THAT ANY NEGLIGENCE OF DRIVER SAMUEL MADDEN CANNOT BE IMPUTED TO HER SINCE PLAINTIFF WAS A PASSENGER IN THE MOTOR VEHICLE, AND SHE DID NOT HAVE A MUTUAL RIGHT TO CONTROL THE DIRECTION OF THE CAR RIDE SINCE SHE NEVER LEARNED HOW TO DRIVE AN AUTOMOBILE.

On July 17, 2006, the District filed an Answer to Sandy's Second Amended Petition. (L.F. 13-17). Included in the District's Answer was an affirmative defense that Sandy and Sam were engaged in a joint venture and that Sandy, as the owner of the vehicle involved in the collision, rendered Sam her agent for the venture. (L.F. 15). The trial court recognized the direct relationship between joint ventures and agency, but held that since Sandy owned the automobile and Sam was driving at her request, that the element of "control" under joint venture was established as a matter of law, which rendered Sam an agent for Sandy for the car ride to Troy. (T.R. 8). As a result, the trial court allowed any comparative fault of Sam in failing to keep a careful lookout under Instruction 9 to be submitted to the jury and imputed to Sandy under Instructions 7, 8, 9,

10 and Verdict A.

A. The *Manley v. Horton* and *Stover v. Patrick* Decisions Regarding a Passenger's Right to Control are Contradictory and Missouri Courts should Determine a Passenger's Right to Control a Motor Vehicle as a Question of Fact and Adopt the Rule that Owners who do not Know how to Drive or who do not Possess a Valid Missouri Driver's License do not have a Right to Control as a Matter of Law

I. The Eastern District's Decision Highlights a Conflict Between the *Stover* and *Manley* Decisions

In its opinion, the Eastern District holds that mere ownership of a car automatically gives the owner-passenger a right to control the car, which is in direct conflict with this Court's decision in Stover v. Patrick, 459 S.W.2d 393 (Mo. 1970), which holds that the mere ownership of a vehicle in which the owner is riding as a passenger does not establish as a matter of law the owner's right to control the vehicle. Id. at 400-401. In its opinion, the Eastern District cites Manley v. Horton, 414 S.W.2d 254, 260 (Mo. 1967) for the holding that ownership of a car automatically gives a passenger a right to control the car. However, the Manley decision predates the Stover decision and contradicts it. The United States District for the District of Missouri recently acknowledged the "direct conflict" between the holding in Stover and that of Manley and its progeny (including

Perricone v. DeBlaze, 655 S.W.2d 724, 725 (Mo. App. 1983)), in a footnote in its October 15, 2007 decision in Littleton v. McNeely, et al, 2007 U.S. Dist. LEXIS 76361 (W.D. Mo. October 15, 2007).

This conflict highlights inconsistencies and conflicts within Missouri law regarding the issue of a passenger's right to control an automobile as well as vicarious liability within a principal-agent relationship.

In order to understand the error of the trial court's ruling and the inconsistencies in Missouri law pertaining to the issue of a passenger's control over a driver and the imputation of a passenger's negligence to the driver, the imputation of negligence within four traditional relationships that exist between a driver and passenger within the context of an automobile ride must first be understood. Second, other states' law on the issue must be carefully analyzed.

II. The Imputation of Negligence within Four Traditional Relationships Existing in Automobile Cases

a) Bailment

A bailment is a delivery of personal property for the performance of a task pursuant to a contract. *Restatement (Second) of Torts*, § 390. After the task has been performed, the personal property is redelivered by the person who took possession of it (bailee) to the person who delivered it (bailor). Id. In Missouri, a bailor is not liable for the negligence of the bailee in the operation of the bailed chattel, unless the bailor knows that the bailee is unskilled, incompetent, or reckless in its operation. Stafford v. Far Go

Van Lines, Inc., 485 S.W.2d 481, 485 (Mo. App. 1972).

b) Agency

An agency relationship results from two people agreeing that one of them (the agent) shall have the power to act on the other person's behalf (the principal) and be subject to the principal's control with respect to matters entrusted to the agent. State ex rel. Ford Motor Co.v. Bacon, 63 S.W.3d 641, 642 (Mo. 2002); *see also Harold Gill Reuschlein & William A. Gregory, The Law of Agency and Partnership* § 49 (3d. ed. 1990). The right to control by the principal may be exercised by prescribing what the agent shall or shall not do before the agent acts and/or at the time the agent acts. Id. Since an agent who is not a servant is not subject to any right of control by the principal over the details of his physical conduct, the responsibility rests upon the agent alone, and the principal is not liable for harm caused by the agent's unauthorized negligent physical conduct. Id. The general rule is that no vicarious liability exists upon the principal in such a case. Id.

c) Master-Servant

A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the servant in the performance of the service. Id. at § 50. A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is

controlled or is subject to the right to control by the master. Id. Thus, a master controls not only the results of the work but may also direct the manner in which it is performed. Id. The servant remains entirely under the control and direction of the master. Id. Those rendering control over the manner of performing the service are not servants. Id.

Since the master has the right to exercise control over the physical activities of the servant within the time of service, he is vicariously liable for the servant's negligent acts committed within the scope of his employment. State ex rel. McHaffie v. Bunch, 891 S.W.2d 822, 825 (Mo. 1995).

d) Joint Venture

The elements of a joint venture are: 1) an agreement among the members of the group; 2) a common purpose to be carried out by the group; 3) a community of pecuniary interests in that purpose; and 4) an equal right of control. McSorley v. Hauck, 883 S.W.2d 562, 566 (Mo. App. 1994).

For the "control" element to be established for a passenger in an automobile, he or she must have an equal right to be heard in the management of the vehicle. Id. at 566; *see also Prosser and Keeton on the Law of Torts*, §72 at 519 (5th ed. 1984). It is not the fact that he or she does not give directions which is important in itself, but rather the understanding between the parties that the passenger has the right to have his or her wishes respected to the same extent as the driver. Id. at 567. Only when a passenger possesses such control will any negligence of the driver be imputed to the passenger. *See* McSorley at 566.

e) The Determinative Factor for the

Imputation of Negligence: Degree of "Control"

The degree of "control" is the determinative factor in determining whether a driver's negligence will be imputed to a passenger under all of these relationships. Under bailment and agency, control is lacking over the physical details of the work to be performed. For this reason, the bailor and principal bear no vicarious responsibility for the negligence of the bailee or agent in the performance of their duties. However, under a master-servant relationship, since the master maintains control over the physical conduct of his servant, he *is* vicariously liable for any negligence of his servant. Under a joint venture, a finding of "control" will not be found unless the passenger and driver have an *equal* right of control over the management of the vehicle. Id. at 566. Only then will vicarious liability be found.

As the Supreme Court of another state has pointed out, many of the harsh results associated with imputing the fault of a driver to a passenger lies with the mistaken assumption that a principal is vicariously liable for the negligent acts of his or her agent. *See* Smalich v. Westfall, 269 A.2d 476, 480 (Penn. 1970), *infra*. As the above summary makes clear, however, this is not the law. Many states either have not recognized this mistaken assumption (including Missouri, as will be explained), or have addressed the confusion in various ways.

III. The Historical Imputation of a Driver's Negligence to Passengers in Other States

In the past, the "mutual right to control" or "equal voice" in the operation of a vehicle was found when the driver and the passenger had a common property interest in the vehicle, such as when the vehicle was jointly owned. *Prosser and Keeton on the Law of Torts*, §72 at 520 (5th ed. 1984). This result translated into an entirely fault free plaintiff-passenger being barred from recovery simply because the negligent driver jointly owned the motor vehicle. Id. at 520.

However, courts later started to reject this result, by holding that co-ownership of a vehicle does not give a realistic right of control over its movement to a passenger-owner, which meant that the driver's negligence could not be imputed to the passenger under such a scenario. Id. at 520-521. This is the result reached in Stover v. Patrick, 459 S.W.2d 393 (Mo. 1970), which involves joint owners.

Beginning with this line of cases, some states began to formulate rules regarding a passenger's right to control based upon the nature of the relationship between the driver and passenger (e.g., principal-agent, master servant) or whether the passenger had an ownership interest in the vehicle. As a result, four divergent views have emerged regarding the issue of a passenger's right to control a motor vehicle.

a) View No. 1: An Owner-Passenger's Right to Control is a "Question of Fact"

Under this view, when the owner is a passenger in his own motor vehicle which is being operated by another, the negligence of the driver is only imputable to the owner "where the owner assumes to direct or has the power to direct the operation of the

automobile and to exercise control over it." Kremlacek v. Sedlacek, 209 N.W.2d 149, 153 (Neb. 1973). Whether the "right to control" exists is a question of fact for the jury. Id. Among the states to have adopted this view are Nebraska, North Dakota, Michigan, and Arizona. *See* Id.; Pearson v. Erb, 82 N.W.2d 818 (N.D. 1957); Boyd v. McKeever, 185 N.W.2d 344 (Mich. 1971); and Reed v. Hinderland, et al, 660 P.2d 464, 470 (Az. 1983).

b) View No. 2: An Owner-Passenger's Right to Control Cannot Exist in the Absence of a Joint Venture, Master-Servant, or Principal-Agent Relationship

The Louisiana Supreme Court held in 1963 that:

> "It is unrealistic to hold, in the present day uses of motor vehicles when heavy traffic is the rule and not the exception, that the occupant of a motor vehicle has factually any control or right of control over the driving of the operator. Therefore, in the absence of a relationship of principal and agent or other legal relationship for which responsibility is imposed on one of the parties for the fault of the other or of independent contributory negligence of the passenger, or a showing that the parties were engaged in a joint adventure, no cogent reason exists for denying to the

> injured passenger recovery against a third person who has been guilty of negligence having causal connection with the accident." Gaspard v. LeMaire, 158 So.2d 149 (La. 1963).

Stated succinctly, a passenger should not be barred from recovery against a negligent third party unless the relationship between the passenger-Plaintiff and negligent third party is such that the passenger would be vicariously liable as a defendant for the negligent acts of the third person. Smalich v. Westfall, 269 A.2d 476, 480 (Penn. 1970).

After reviewing the basic tenets of agency law and pointing out that generally a principal does not have control over the details of the physical conduct of his agent, and that the responsibility for the agent's unauthorized negligent physical conduct lies with the agent alone, and not the principal, the Supreme Court of Pennsylvania further narrowed Louisiana's rule. Id. at 481-482. Pennsylvania reasoned that many of the harsh results associated with imputing the fault of the driver to an owner-passenger lies with the mistaken assumption that a principal is vicariously liable for the negligent acts of his or her agent. Id. Using this logic, the Court held that only a master-servant or joint venture relationship will justify imputing the fault of the driver to an owner-passenger. Id. Tennessee followed suit in 1977 as well as Kansas in 1986. *See* Cole v. Woods, 548 S.W.2d 640, 650 (Tenn. 1977) and Lightner v. Frank, et al., 727 P.2d 430, 433 (Kan. 1986).

c) View No. 3: There is a Rebuttable

Presumption that an Owner who is a Passenger in His Own Car has a Right to Control the Driver

Under this view, when an owner is present in his or her own vehicle, an inference is drawn that the owner is in control of the operation of the vehicle at the time of the accident. *See* Blount v. Sutton, 152 S.E.2d 777, 778 (Ga. 1966). However, this inference can be rebutted with any evidence to the contrary. Id. This rule has also been adopted in Utah, Iowa, Maryland, Wisconsin, and Ohio. *See* Fox v. Lavender, 56 P.2d 1049, 1057 (Utah 1936); Phillips v. Foster, 109 N.W.2d 604, 607 (Iowa 1961); Slutter v. Homer, 223 A.2d 141, 145 (Md. 1966); Gervais v. Kostin, 179 N.W.2d 828 (Wis. 1970); Clauss v. Fields, 278 N.E.2d 677, 679 (Ohio 1971).

d) View No. 4: The Modern "Blanket Rule"

According to this view, since the advent of the modern automobile, the imputation of a driver's negligence to a passenger has been widely criticized as being based upon two legal fictions; first, that the passenger shares a "right to control" the vehicle in which he is riding and, second, that the driver is his agent or servant. *Prosser and Keeton on the Law of Torts*, §72 at 522 (5th ed. 1984). As Dean Prosser states:

> "In the usual case the passenger has no physical ability to control the operation of the car, and no opportunity to interfere with it; and any attempt on his part to do so in fact would be a dangerously distracting piece of

backseat driving which might very well amount to negligence in itself." Id.

Recognizing these fictions, the recent trend has been to adopt a "blanket rule" which states that no matter what the legal relationship between a driver and passenger, any negligence of the driver cannot be imputed to the passenger. *See* Watson v. Regional Transportation Dist., 762 P.2d 133, 138 (Col. 1988). This rule is based upon the belief that a passenger does not have the right to control the driver's actions in the age of the modern automobile and that a passenger's right to control became obsolete with the death of the horse and buggy, when a passenger could safely wrest the reins from a driver. Id. The "blanket rule" does allow for an owner-passenger's recovery to be limited under the circumstances where the owner *himself* is negligent, such as where the owner entrusts the driving to a known reckless driver. Id. at 139-140. *See* also Kalechman v. Drew Auto Rental, Inc., 308 N.E.2d 886 (NY 1973) and Seeger v. Canale, 607 N.E.2d 687 (Il. 1993).

IV. A Passenger's Right to Control a Motor Vehicle should be Determined as a Question of Fact and Under This Test, Any Negligence of Samuel, as the Driver, Cannot be Imputed to Sandy, as the Passenger, since she did not have a Right to Control the Vehicle

The Eastern District bases its holding regarding the right to control in this case on Manley v. Horton, 414 S.W.2d 254, 260 (Mo. 1967), which holds that ownership

of a car automatically gives a passenger a right to control the car. However, three years after that decision, this Honorable Court held that mere ownership of an automobile in which the owner is riding does *not* establish as a matter of law the right of control in the owner. Stover v. Patrick, 459 S.W.2d 393, 400 (Mo. 1970). Clearly, these two cases contradict each other and the law in Missouri regarding an owner-passenger's right to control a motor vehicle must be made clear and a definitive rule must be established.

In looking to how this issue has been addressed in other states, the rule that provides the most consistent results and the rule which should be adopted by this Court is the rule that analyzes the issue of a passenger's control as a question of fact to be determined by the evidence in the case. While the "blanket rule" recognizes that a passenger's right to control a motor vehicle is generally a legal fiction, since a passenger generally has no physical ability to control the vehicle, there are situations where the owner of the car may possess this control. This situation arises through driver's education programs where the car has two sets of brakes, one for the driver and one for the passenger instructor, who has an ability to control the manner in which the vehicle is handled by using his own set of brakes. *See* Gandy v. Terminal Railroad Assoc. 623 S.W.2d 49, 51 (Mo. App. 1981). While vehicles equipped in such a fashion are indeed rare, the Question of Fact Test allows for such factors to be considered. Outside of these situations, a passenger's right to control a motor vehicle is indeed a fiction, as the "blanket rule" recognizes. This is due to the fact that both the steering and braking mechanisms are located on the driver's side of the vehicle. As Dean Prosser notes under such situations, attempts by the passenger to wrest control of the vehicle is a

"dangerously distracting piece of backseat driving which might very well amount to negligence in itself." *Prosser and Keeton on the Law of Torts*, §72 at 522 (5th ed. 1984). Indeed, Missouri has recognized the liability of a passenger who engaged in dangerous backseat driving and actively encouraged a driver to act recklessly on the roads. *See* Shelter Mutual Insurance Co. v. White, 930 S.W.2d 1 (Mo. App. 1996).

Under Missouri law, the general rule is that an automobile passenger's only duty is to exercise ordinary care for his own safety. Gandy v. Terminal Railroad Assoc. 623 S.W.2d 49, 51 (Mo. App. 1981). This duty may require a passenger to keep a careful lookout in situations where the driver has exhibited an obvious lack of caution or when the passenger knows of imminent danger. Id. However, the passenger owes this duty to himself and not to the driver or any other person. Id. A driver, on the other hand, has a duty to exercise the highest degree of care for the safety of others. Mo. Rev. Stat. § 304.012.

In those cases allowing the imputation of a driver's fault to that of the passenger, a passenger is improperly held to a higher degree of care than that dictated by law. A passenger should only be held to the highest degree of care standard where he or she maintains actual physical control over the manner in which the vehicle is driven, such as those instances where a driving instructor maintains control over the vehicle.

As discussed *supra*, any rule allowing for the imputation of a driver-agent's negligence to that of a principal-passenger based solely upon the nature of that relationship (that of principal-agent), is improper since a principal cannot be vicariously liable for the negligent acts of his agent. As the Supreme Court of Pennsylvania has

pointed out, such results lie with the mistaken assumption that a principal is vicariously liable for the negligent acts of his or her agent. *See* Smalich v. Westfall, 269 A.2d 476, 480 (Penn. 1970). Since the liability of joint venturers to third parties for negligence is governed by the principles of agency law, imputing the negligence of a driver to that of a passenger who has no physical control over the vehicle is improper as a matter of law.

The trial court's ruling that Sandy's ownership of the automobile with Sam driving at her request, established the element of control under joint venture as a matter of law (T.R. 8) rests upon two legal fictions: 1) that a passenger, such as Sandy, with no physical right to control the motor vehicle in which she is riding has any recognized right to control the manner in which it is operated; and 2) that Sandy, as a principal, is vicariously liable for any negligence of Sam in operating her car. Under the Question of Fact Test, these legal fictions vanish because Sam would have to prove that Sandy had an ability to control the physical movements of the car (such as a driving instructor who possesses his own set of brakes), *and* knew how to drive and possessed a valid Missouri driver's license.

If this Honorable Court adopts the Question of Fact Test, the rule should recognize as a matter of law that a non licensed driver such as Sandy who never learned how to operate a motor vehicle does not have a right to control a vehicle as a matter of law. To do otherwise would require a person with no experience or education on the rules of the road or the mechanics of operating a car to be held liable for actions or inactions for something in which he or she had little understanding. Furthermore, allowing any recognition of control over an automobile for non licensed drivers would recognize a

right that those without valid driver's licenses clearly do not and should not have pursuant to law. *See* Mo. Rev. Stat. § 302.020.

For these reasons, this Honorable Court should adopt the Question of Fact Test, which allows a passenger's right to control a motor vehicle to be carefully analyzed on a case by case basis, and hold as a matter of law that a driver who does not know how to drive or operate a motor vehicle or who does not possess a valid Missouri driver's license does not have the right to control a motor vehicle. Furthermore, any cases holding that mere ownership of an automobile automatically entitles the owner of the vehicle to the right to control the vehicle, including Manley v.Horton and its progeny should be overruled.

B. Even if this Honorable Court Finds No Contradiction Between the *Manley v. Horton* and *Patrick v. Stover* Decisions, Any Negligence of Samuel, as the Driver, Cannot be Imputed to Plaintiff, as the Passenger, under Current Missouri Law

Even if this Honorable Court finds no contradiction between the Manley v. Horton and Patrick v. Stover decisions, allowing any comparative fault of Sam to be imputed to Sandy was error as a matter of law because any negligence of Sam, as the driver, cannot be imputed to Sandy, as the passenger, under current Missouri law since Sandy cannot be vicariously liable for the negligence of Sam, who maintained control over the physical details and aspects of driving. Furthermore, since a passenger does not have an equal right to be heard in the manner in which the car is driven, the "control" element is lacking

and no joint venture exists as a matter of law.

I. In an Agency Relationship, the Principal is not Vicariously Liable for the Negligence of Her Agent since the Agent Maintains Control Over the Physical Details of His Work

The liability of joint venturers to third parties for negligence is governed by the principles of partnership and agency law. *See* Swindell v. J.A. Tobin Construction Co, 629 S.W.2d 536, 542 (Mo. App. 1981).

Agency is a fiduciary relationship that results from the manifestation of one person to another that the other shall act on his behalf. State ex rel. Ford Motor Co. v. Bacon, 63 S.W.3d 641, 642 (Mo. 2002). Under an agency relationship, the principal has the right to control the conduct of the agent with respect to matters entrusted to the agent. Id. However, unlike a master-servant relationship, in which the master's control over the servant includes the details of how the work is performed, an agent retains the right to control the details of his physical conduct. *See* Archer v. Outboard Marine Corp., 908 S.W.2d 701, 703 (Mo. App. 1995) and Reiling v. Missouri Insurance Co., 153 S.W.2d 79, 83 (Mo. App. 1941).

A principal is not vicariously liable for the negligence of the agent's actions in carrying out those matters entrusted to the agent. Reiling at 83.

Reiling involves an insurance agent who, while out collecting premiums, was involved in a motor vehicle accident resulting in injuries to a third party. Id. at 82. The third party sought to hold the insurance company liable for the insurance agent's

negligence under a respondeat superior theory. Id. at 80.

On appeal, the Court emphasized the importance of determining whether the relationship between the insurance company and the insurance agent was that of a master-servant or principal-agent. Id. at 83. The Court noted that a master-servant relationship is distinct from a principal-agent relationship, in that under the former, a master retains the right to control the physical details of the servant's work, while a principal merely has the right to control the *results* of the agent's work. Id. (emphasis added). The Court concluded that only under a master-servant relationship will the principal be liable for the physical conduct of the servant. Id.

Looking to the nature of the relationship under the facts of that case, the Court held that since the insurance agent retained control over the details of his work, including the manner and method of soliciting, collecting and examining claims, and the means he used for transportation, the relationship was one of principal-agent and that, as a result, the insurance company was not vicariously liable for the agent's negligent driving actions. Id. at 84-86.

As the insurance agent in Reiling maintained control over the physical details of his work, including the driving of his automobile, so did Sam maintain control over the physical aspects of driving Sandy's car. Sandy never learned how to drive and therefore could not be expected to control or share any of the driving responsibilities. (T.R. 3). In fact, there was no expectation among the parties that Sandy was to share in any of the driving duties. (T.R. 3). For these reasons, the trial court erred in allowing any negligence of Samuel in failing to keep a careful lookout to be imputed to Sandy, since a

principal (Sandy) is not vicariously liable for the negligent actions of her servant (Sam).

II. In Automobile Cases, if the Passenger Does Not Have an Equal Right to be Heard in the Manner in which the Vehicle is Driven, the "Control" Element is Not Met and There is No Joint Venture

In general, the negligence of a driver cannot be imputed to a passenger who has no control or authority over the automobile or the driver. Mitchem v. Gabbert, 31 S.W.3d 538, 542 (Mo. App. 2000). However, this control can be found as part of a joint venture if the passenger has an equal right to be heard in the manner in which the vehicle is driven. Id.

Gabbert involved three women driving from Springfield to Bolivar, Missouri. Id. at 540. The plaintiffs were passengers in the defendant driver's car. Id. The defendant driver, who worked with the women at a restaurant, told the other women that she was going to Bolivar to have her nails done, and asked if they would like to make the trip with her that day. Id. at 541. The women decided to make the trip with the driver as a "girls' day" out. Id. While on the way to Bolivar, they were involved in an accident. Id.

On appeal, the defendants asserted that the trial court erred in refusing their tendered jury instructions, which were part of a packet that would permit the jury to find that the plaintiffs and defendant were engaged in a joint enterprise at the time of the accident. Id. The Court of Appeals held that there was no error in refusing to submit these instructions since there was no evidence showing a joint right of control. Id. at 542.

The Court pointed out that there was no evidence that an agreement existed to share expenses of the trip or driving responsibilities. Id. Furthermore, there was no evidence that the passengers had any voice in the route that was to be traveled that day. Id.

The theory that the District presented in its Answer to Sandy's Second Amended Petition for imputing any comparative fault of driver Sam to passenger Sandy was that of a joint venture between Sandy and Sam and that Sandy, as the owner of the vehicle involved in the collision, rendered Sam her agent as part of this joint venture. (L.F. 15). At the jury instruction conference, Sandy's counsel objected to the giving of any instructions that imputed any comparative fault of Sam to Sandy on the grounds that any comparative fault of driver Sam could not be imputed to Sandy, as his passenger, since a joint venture did not exist at the time of the collision. (T.R. 43-44; L.F. 19, 25-28).

As in Gabbert, in the instant case there was no agreement to share expenses of the trip, as Sandy denies that there was any agreement to share money for gas or other expenses. (T.R. 13). Furthermore, since Sandy did not know how to drive, there was no expectation that she would share any of the driving responsibilities for the trip to the widowers meeting. (T.R. 3). For a passenger, such as Sandy, to be engaged in a joint venture involving the use of an automobile, she must have an equal right to be heard in the manner in which the vehicle is driven. Id. Since Sandy never learned how to drive, she did not know how to operate a car. Therefore, as a person incapable of driving, she did not know the manner in which the car should be driven. In Gabbert, it is assumed that the passengers knew how to drive. *Despite that,* the Court held that the passengers did not have an agreement to share driving responsibilities. In the instant case, Sandy could

not possess any authority or right to control the automobile when she did not know how to drive.

Despite the Eastern District's holding in this matter, ownership of an automobile in which the owner is a passenger does not establish as a matter of law right of control in the owner. Stover v. Patrick, 459 S.W.2d 393, 400 (Mo. 1970). While Stover involves a married driver and passenger who both own the vehicle, the case shows that a passenger will not automatically be held liable for the negligent acts of the driver simply because the vehicle's owner is a passenger in the car at the time. To show a mutual right of control, a joint journey requires something in addition to the mere association of the parties for a common end. *See* Manley v. Horton, et al, 414 S.W.2d 254, 260 (Mo. 1967) (*quoting* Prosser on Torts, 2nd Ed and Restatement of Torts, 2nd Ed). For the "control" element to be met, the passenger must have an equal right to be heard as to *the manner* in which the car is driven. Id. It is not the fact that he or she does not give directions which is important in itself, but rather the understanding between the parties that he/she has the right to have his/her wishes respected *to the same extent as the driver*. Id. Perricone takes this a step further, implying that the passenger must have the right to control the actual physical conduct of the driver. Perricone v. DeBlaze, 655 S.W.2d 724, 725 (Mo. App. 1983). A factor in determining whether this right to control exists is whether the passenger knows how to drive. *See* Stevens v. Westport Laundry Co., 25 S.W.2d 491, 498 (Mo. App. 1930).

The District will attempt to distinguish the Gabbert decision on the grounds that in that case the owner was the driver of the automobile. However, the same principles

apply: the right to control must be established in order to impute negligence. The control element is lacking in the instant case because Sandy *never learned how to drive and, hence, did not have any recognized right*

under Missouri law to operate or control a vehicle on a public highway. See Mo. Rev. Stat. § 302.020. (Those without a valid driver's license cannot operate a car).

In the instant case, there was no expectation that Sandy would share in any of the driving responsibilities because she did not know how to drive. (T.R. 3, 13). Not only did Sandy and Sam agree that she would not bear any responsibility for the driving, but Sandy could not physically or legally drive her car. Thus, she had no control over the manner in which the car could be driven despite the fact that she owned the car. Since the element of control was not met in this case, there can be no joint venture/journey, including agency.

SUMMARY

The Manley and Stover decisions contradict each other, in that Manley holds that mere ownership of a car does not automatically entitle the owner-passenger to control the vehicle, while Stover holds the opposite. Recognizing the inconsistencies and conflicts within Missouri law regarding the issue of a passenger's right to control an automobile, this Honorable Court should allow the issue of a passenger's control over a vehicle to be analyzed as a question of fact on a case by case basis. The determinative factor for the imputation of negligence to a passenger under agency law is the degree of control the passenger possesses over the physical operation of the vehicle. Furthermore, this

Honorable Court should rule as a matter of law that automobile owners who do not know how to drive or who do not possess a valid Missouri driver's license do not have a right to control a motor vehicle.

The trial court erred in giving Instruction Numbers 7, 8, 9, 10, and Verdict A and in refusing Instructions B, C, and Refused Verdict A (which did not include comparative fault) because the evidence did not support the submission of comparative fault as to Sandy in that any negligence of Sam as the driver cannot be imputed to her since Sandy was a passenger who did not have a mutual right to control the car ride since she never learned how to drive and possessed no recognized right under Missouri law to operate a motor vehicle.

Furthermore, allowing any comparative fault of Sam to be imputed to Sandy was error as a matter of law because Sandy cannot be vicariously liable for the negligence of Sam, who maintained control over the physical details and aspects of driving. Since a passenger does not have an equal right to be heard in the manner in which the car is driven, the "control" element is lacking and no joint venture exists as a matter of law.

CONCLUSION

For these reasons, Appellant-Cross Respondent ("Sandy") respectfully requests this Honorable Court to rule as follows:

That the judgment of the trial court as to liability be reversed, and that judgment be entered in favor of Plaintiff for $100,000, plus interest, or in the alternative, that the case be remanded for another trial on the issue of liability only, and that instructions be given to bar the submission of comparative fault as to Plaintiff as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

An original and ten copies of the foregoing and a floppy disc complying with Rule 84.06 (g) were mailed, via Federal Express overnight mail, this 7th day of February, 2008 to: The Clerk of the Missouri Supreme Court, 207 West High Street, Jefferson City, MO 65101 and two copies and a floppy disc were mailed by first class mail, proper postage prepaid, to: Mr. Gregory Wolk, 4925 Lindell Blvd., St. Louis, MO 63108.

Ryan R. Cox

RULE 84.06(b) and (c) CERTIFICATION

1. Appellant-Cross Respondent's brief contains the information required by Rule 55.03.

2. Appellant-Cross Respondent brief complies with the limitations contained in Rule 84.06(b) and contains 9,319 words.

Ryan R. Cox

RULE 84.06(g) CERTIFICATION

Pursuant to Rule 84.06(g), Appellant-Cross Respondent certifies that the floppy disk containing this brief has been scanned for viruses and that it is virus-free.

Ryan R. Cox

THE SUPREME COURT OF MISSOURI

SANDRA BACH,	)	
	)	
Appellant/	)	
Cross Respondent	)	
	)	SC NO. 89001
	)	
	)	
	)	
vs.	)	
	)	
WINFIELD FOLEY	)	
FIRE PROTECTION DISTRICT,	)	
	)	
Respondent/	)	
Cross Appellant	)	

APPEAL FROM THE CIRCUIT COURT OF LINCOLN COUNTY, MISSOURI

The Honorable Dan Dildine, Circuit Judge

APPENDIX TO APPELLANT/CROSS RESPONDENT'S SUBSTITUTE BRIEF

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§ 302.020 R.S.Mo. (2007)

§ 302.020. Operation of motor vehicle without proper license prohibited, penalty --motorcycles--special license--protective headgear, failure to wear, fine, amount--no points to be assessed

1. Unless otherwise provided for by law, it shall be unlawful for any person, except those expressly exempted by section 302.080, to:

(1) Operate any vehicle upon any highway in this state unless the person has a valid license;

(2) Operate a motorcycle or motortricycle upon any highway of this state unless such person has a valid license that shows the person has successfully passed an examination for the operation of a motorcycle or motortricycle as prescribed by the director. The director may indicate such upon a valid license issued to such person, or shall issue a license restricting the applicant to the operation of a motorcycle or

motortricycle if the actual demonstration, required by section 302.173, is conducted on such vehicle;

(3) Authorize or knowingly permit a motorcycle or motortricycle owned by such person or under such person's control to be driven upon any highway by any person whose license does not indicate that

the person has passed the examination for the operation of a motorcycle or motortricycle or has been issued an instruction permit therefor;

(4) Operate a motor vehicle with an instruction permit or license issued to another person.

2. Every person operating or riding as a passenger on any motorcycle or motortricycle, as defined in section 301.010, RSMo, upon any highway of this state shall wear protective headgear at all times the vehicle is in motion. The protective headgear shall meet reasonable standards and specifications established by the director.

3. Notwithstanding the provisions of section 302.340 any person convicted of violating subdivision (1) or (2) of subsection 1 of this section is guilty of a class A misdemeanor. Any person convicted a third or subsequent time of violating subdivision (1) or (2) of subsection 1 of this section is guilty of a class D felony.

Notwithstanding the provisions of section 302.340, violation of subdivisions (3) and (4) of subsection 1 of this section is a class C misdemeanor and the penalty for failure to wear protective headgear as required by subsection 2 of this section is an infraction for which a

fine not to exceed twenty-five dollars may be imposed. Notwithstanding all other provisions of law and court rules to the contrary, no court costs shall be imposed upon any person due to such violation. No points shall be assessed pursuant to section 302.302 for a failure to wear such protective headgear.

§ 304.012 R.S.Mo. (2007)

§ 304.012. Motorists to exercise highest degree of care--violation, penalty

1. Every person operating a motor vehicle on the roads and highways of this state shall drive the vehicle in a careful and prudent manner and at a rate of speed so as not to endanger the property of another or the life or limb of any person and shall exercise the highest degree of care.

2. Any person who violates the provisions of this section is guilty of a class B misdemeanor, unless an accident is involved then it shall be a class A misdemeanor.

A6

Mo. Sup. Ct. R. 70.02 (2007)

70.02. Instructions to Juries

(a) Requests for Instructions. Any party may, and a party with the burden of proof on an issue shall, submit written requests for instructions on the law applicable to the issues. Requests shall be submitted prior to an instruction conference or at such time as the court directs. A party need not request a converse instruction until the court has indicated the verdict directing instruction expected to be given. The court may give instructions without requests of counsel. All instructions shall be submitted in writing and shall be given or refused by the court according to the law and the evidence in the case. Each instruction shall be submitted with an original and one copy for the court and one copy for each party. Each copy shall indicate whether it was prepared at the court's direction or by which party it was tendered and shall contain a notation as follows:

"MAI No. ___" or "MAI No. ___ modified" or "Not in MAI" as the case may be.

A7
Instruction No. 7

In your verdict you must assess a percentage of fault to Defendant whether or not plaintiff was partly at fault if you believe:

First:

Defendant stopped its motor vehicle in a lane Reserved for moving traffic, and failed to adequately warn Samuel Madden of the blockage of Route Y by defendant's firetruck, and

Second, defendant in any one or more of the respects submitted in paragraph First, was thereby negligent, and

Third, as a direct result of such negligence, plaintiff sustained damage.

(MAI 6th 17.02 [1980 Revision] modified by 17.20 [1969 New] and 37.01 [1986 New] and Not in MAI)

A8

Instruction No. 8

In your verdict, you must not assess a percentage of fault to Defendant unless you believe defendant was negligent as submitted in Instruction No. 7.

(MAI 6th 33.03(2) [1995 Revision] modified by 37.04 [1986 New])

A9

Instruction No. 9

In your verdict, you must assess a percentage of fault to Plaintiff, whether or not defendant was partly at fault, if you believe:

First, the driver Samuel Madden failed to keep a careful lookout, and,

Second, Samuel Madden was thereby negligent, and

Third, as a direct result of such negligence plaintiff sustained damage.

In assessing any such percentage of fault against Plaintiff, you must consider the fault of Samuel Madden as the fault of Plaintiff.

(MAI 6th 37.05(2) [1986 New] modified)

Instruction No. 10

If you assess a percentage of fault to defendant, then, disregarding any fault on the part of plaintiff, you must determine the total amount of plaintiff's damages to be such sum as will fairly and justly compensate plaintiff for any damages you believe she sustained and is reasonably certain to sustain in the future, as a direct result of the occurrence mentioned in the evidence. You must state such total amount of plaintiff's damages in your verdict. In determining the total amount of plaintiff's damages you must not reduce such damages by any percentage of fault you may assess to plaintiff. The judge will compute plaintiff's recovery by reducing the amount you find as plaintiff's total damages by any percentage of fault you assess to plaintiff.

(MAI 6th 37.03 [1986 New])

Verdict A

Note: Complete the following paragraph by filling in the blanks as required by your verdict. If you assess a percentage of fault to any of those listed below, write in a percentage not greater than 100%, otherwise write in "zero" next to that name. If you assess a percentage of fault to any of those listed below, the total of such percentages must be 100%.

On the claim of plaintiff Sandra Bach for personal injury, we, the undersigned jurors, assess percentages of fault as follows:

Defendant (Winfield-Foley Fire Protection District)	____% (zero to 100%)
Plaintiff (Sandra Bach)	____% (zero to 100%)
TOTAL	____% (zero OR 100%)

Note: Complete the following paragraph if you assessed a percentage of fault to defendant:

We, the undersigned jurors, find the total amount of plaintiff's damages disregarding any fault on the part of plaintiff to be $_____(*stating the amount*).

Note: The judge will reduce the total amount of plaintiff's damages by any percentage of fault you assess to plaintiff.

Note: All jurors who agree to the above must sign below.

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

(MAI 6th 37.07 [1986 New])

Refused Instruction B

Your verdict must be for plaintiff if you believe:

First, either:

Defendant stopped its motor vehicle in a lane reserved for moving traffic, or

Defendant failed to adequately warn Samuel Madden of the blockage of Route Y by Defendant's firetruck, or

Defendant failed to park its motor vehicle within the intersection of Highway EE and Route Y, and

Second, defendant in any one or more of the respects submitted in paragraph First, was thereby negligent, and

Third, as a direct result of such negligence, plaintiff sustained damage.

(MAI 6th 17.02 [1980 Revision] modified by 17.20 [1969 New] and Not in MAI)

Refused Instruction C

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained and is reasonably certain to sustain in the future as a direct result of the occurrence mentioned in the evidence.

(MAI 6th 4.01 [2002 Revision])

Refused Verdict A

Note: Complete this form by writing in the name required by your

verdict.

On the claim of plaintiff Sandra Bach for personal injuries against defendant Winfield-Foley Fire Protection District, we,

the undersigned jurors, find in favor of:

_____

(Plaintiff Sandra Bach) or (Defendant Winfield-Foley Fire Protection District)

Note: Complete the following paragraph only if the above finding is in favor of plaintiff Sandra Bach.

We, the undersigned jurors, assess the damages of plaintiff Sandra Bach at $_____ (*stating the amount*).

Note: All jurors who agree to the above findings must sign below.

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

(MAI 6th 36.01 [1980 Revision])