

RELEVANCE OF AGENT'S ADMISSION IN DOUBT

Kinman v. R.K.O. Cincinnati Midwest Corp.

171 Ohio St. 72, 168 N.E.2d. 145 (1960)

This action was brought to recover damages sustained by plaintiff in a fall which occurred as she descended a stairway in defendant's theater. Plaintiff alleged that "she was pitched forward and thrown face down to the bottom of the stairs"¹ when the heel of her shoe caught on a plastic or rubber covering on the "lip" of a step, due to defendant's alleged negligence in allowing wear to cause a depression in the step. The Supreme Court of Ohio, in reversing the lower court, rendered judgment for the defendant holding that the record presented no evidence from which an inference of negligence could be drawn.² The Court's opinion shows that immediately following plaintiff's fall, she was approached by a man who identified himself as the manager of the theater. In response to her claim that her "foot was caught in the worn carpeting and I was thrown down the stairs,"³ the manager replied, "Well, I told the repairman these steps should be repaired several days ago."⁴ This statement appears to be an admission imputable to the principal; however, the Supreme Court failed to comment upon its effect.

The law of Ohio pertaining to admissions and the imputation of an agent's admission to his principal is in accord with the general view in America. It is well established that an admission may be given in evidence against the declarant⁵ and as such is not a violation of the hearsay rule. The hearsay rule is based upon the theory that many possible errors, deficiencies, and "untruths" which may exist in a witness's assertions may be exposed by cross-examination, and thus rejects testimony which has not been tested by cross-examination.⁶ An admission may be defined as a statement made by a party to an action which is inconsistent with the party's present claim.⁷ "The admission gets around the Hearsay rule when offered against him as an opponent because he himself is in that case the only one to invoke the Hearsay rule and because he does not need to cross-

¹ *Kinman v. R.K.O. Cincinnati Midwest Corp.*, 171 Ohio St. 72, 168 N.E.2d 145 (1960).

² The court held that statements made by plaintiff in reference to the condition of the stair covering were not direct testimony as to such condition for she only testified that she had told a third party the carpeting was worn, and even if this were direct testimony, it does not present sufficient evidence of negligence as to justify submission to the jury.

³ *Kinman v. R.K.O. Cincinnati Midwest Corp.*, *supra* note 1, at 74, 168 N.E.2d at 146.

⁴ *Ibid.*

⁵ *Latham v. Clark*, 120 Ohio St. 559, 166 N.E. 685 (1929); *Goz v. Tenney*, 104 Ohio St. 500, 136 N.E. 215 (1922); 20 Am. Jur. "Evidence" § 544 (1939).

⁶ 5 Wigmore, Evidence § 1362 (3d ed. 1940).

⁷ 4 Wigmore, Evidence § 1048 (3d ed. 1940).

examine himself."⁸ Likewise, the statements or admissions of an agent are admissible in an action against the principal when made within the scope of his authority and in connection with the transaction pending at the very time.⁹ Sometimes it is stated that these statements of an agent made within the scope of his authority are treated as a part of the *res gestae*.¹⁰ The theory which allows the admission of the agent to be imputed to the principal is a consequence of the principal-agent relationship. The idea behind the establishment of the agency is to delegate authority to another to do that which one may lawfully do in person; therefore whatever the agent does in conducting the business delegated to him is in effect the act of the principal.¹¹

The law allowing admissions of an agent to be admitted into evidence against his principal has often been confused with two other exceptions to the hearsay rule, and it is necessary to distinguish these in dealing with the admission problem. First, admissions are sometimes confused with the separate category of declarations against interest. A declaration against interest refers to a statement of fact against the declarant's pecuniary interest, but an admission need not be a statement of fact.¹² The declaration against interest may be used as an exception to the hearsay rule¹³ only if the declarant is unavailable at the time of trial, but there is no such requirement for the admissibility of an admission.¹⁴ Also, the declaration against interest may be used either against the declarant or in his favor, but the admission may be used only against the declarant, as otherwise the hearsay objection would prevail.¹⁵ Second, the rule allowing an agent's admission to be imputed to his principal should not be confused with the rule which permits an agent's spontaneous declaration made under the

⁸ *Ibid.*

⁹ *Kimbark v. Timken Roller Bearing*, 115 Ohio St. 161, 152 N.E. 385 (1926); *Werk Co. v. Martin*, 18 Ohio L. Abs. 81 (Ct. App. 1934); *F. W. Woolworth Co. v. Saxton*, 39 Ohio App. 118, 177 N.E. 219 (1930); 20 Am. Jur. "Evidence" § 594 (1939).

¹⁰ *Kimbark v. Timken Roller Bearing*, *supra* note 9; *Baltimore and O. R.R. v. Campbell*, 36 Ohio St. 647, 38 Am. Rep. 617 (1881); *Western Ins. Co. v. Tobin*, 32 Ohio St. 77 (1877); 20 Am. Jur. "Evidence" § 594 (1939); 21 Ohio Jur. 2d "Evidence" § 367 (1956), "*Res gestae* may be broadly defined as meaning matter incidental to the main fact and explanatory of it, including acts and words which are so closely connected therewith as to constitute a part of the transaction."

¹¹ *Ish v. Crane*, 8 Ohio St. 521 (1858); 20 Am. Jur. "Evidence" § 594 (1939).

¹² 4 Wigmore, *op. cit. supra* note 7, § 1049.

¹³ 21 Ohio Jur. 2d "Evidence" § 316 (1956), "The basis of the rule which allows a declaration against the interest of the declarant to be given in evidence is said to be 'extreme improbability of its falsehood,' the regard which men usually have for their own interest being deemed a sufficient security that their declarations against interest are not made under any mistake of fact or from want of information; such declarations are admitted on the presumption that the declarant is best acquainted with his own human rights, and that he would not make such a declaration unless it was true."

¹⁴ 4 Wigmore, *op. cit. supra* note 7, § 1049.

¹⁵ *Ibid.*

impulse of the moment to be allowed into evidence. Spontaneous declarations of an agent or servant may be received in actions against the principal if found to be impulsive and made substantially at the time of the act in question,¹⁶ and as such are an exception to the hearsay rule.¹⁷ However, the admission need not be a statement of impulse or be made at the time of the transaction in order to be admitted into evidence.

According to earlier decisions, it would seem the manager's statement in this case was an admission imputable to the principal.¹⁸ The requirement that the agent be within the scope of his authority would seem to be met as the statement was made by the manager within the theater with regard to a transaction involving his principal's business pending at the very time. If the statement is an admission, it would seem to impute notice to defendant of a dangerous condition existing in its theater and is evidence from which an inference of negligence could be drawn.

Here is a statement made by the defendant's agent immediately following plaintiff's fall, which appears to be an admission imputable to the defendant. The court, however, after examining the testimony which included this statement, held "there is presented by this record no evidence from which an inference of negligence on the part of the defendant could be drawn."¹⁹ The court's decision, by not discussing the effect of the manager's statement, raises a question as to whether it intended to repudiate the doctrine which imputes an agent's admission to his principal. If the court intended to overrule this doctrine, it seems they would have expressed this intention in the opinion. Yet, it is quite clear that the court did not overlook the agent's statement as it is included in the testimony cited in the opinion. Still the court concluded the record presented no evidence from which an inference of negligence could be drawn. The court's failure to comment upon the effect of the manager's statement—that is, whether it is imputable at all to the principal or whether even if imputable it is not an indication of negligence—raises a question as to the standing of agents' admissions in Ohio.

¹⁶ Mechem, Agency § 480 (3d ed. 1923).

¹⁷ 5 Wigmore, *op. cit. supra* note 6, § 1747. This is a general rule of evidence applicable to any person, and not peculiar to the law of agency.

¹⁸ New York Life Ins. Co. v. Seighman, 140 F.2d 930 (6th Cir. 1944) (custodian's statement that his superior, to whom he reported, said he did not have time to examine railing was binding on the issue of notice); Westman v. Clifton's Brookdale, 200 P.2d 814 (Cal. Ct. App. 1948) (testimony of manager's statement to plaintiff's husband after accident that there were poor lights on the stairs and that others had fallen there, should be admitted for the purpose of showing knowledge of dangerous condition on part of defendant); Klein v. Detroit Metallic Casket Co., 336 Mich. 157, 57 N.W.2d 477 (1953) (in action for injuries resulting from alleged negligence on part of defendant's employee, statement by employee to plaintiff's wife that he was sorry and that it was his fault was properly admitted); F. W. Woolworth Co. v. Saxton, *supra* note 9 (testimony that manager of defendant's store stated after plaintiff's fall that he told "them to dry this floor this morning" held admissible to impute notice of floor's condition).

¹⁹ Kinman v. R.K.O. Cincinnati Midwest Corp., *supra* note 1, at 74, 168 N.E.2d at 146.