

AGENCY AND PARTNERSHIP I, II.B, III

**Question 4 Analysis**

- Legal Problems:
- (1)(a) Does Lessor exercise sufficient control over Handy to establish Handy as Lessor's "servant" so that Lessor is liable for Handy's torts?
  - (1)(b) If Handy is Lessor's servant, is Handy's conduct within the scope of employment?
  - (2) If Handy is not a servant, did Tenant reasonably rely upon Handy's apparent authority to install an electrical outlet so that Lessor is nonetheless liable for Handy's tort?

DISCUSSION

Summary: Lessor may be held liable for Handy's tortious conduct under either of two theories. First, if the Lessor-Handy relationship is one of master and servant, Lessor is liable for Handy's torts if Handy was acting within the scope of his employment when he committed them. *See* Restatement (Second) of Agency § 219. Second, even if the relationship between Lessor and Handy does not rise to the level of a master-servant relationship, Lessor will be liable for Handy's tort if Tenant relied on statements or conduct by Handy that were within Handy's apparent authority. Restatement (Second) of Agency § 265.

Point One (a): The relationship between Handy and Lessor may be a master-servant relationship (30-40%) such that Lessor is liable for torts committed by Handy while acting within the scope of his employment.

A master is liable for the torts of the master's servants committed while acting in the scope of their employment. Restatement (Second) of Agency § 219(1). Handy is clearly an agent as he agreed to work for, and subject to the control of, Lessor. The more difficult question is whether Handy would be considered to be Lessor's servant.

Note: The Restatement (Third) of Agency has adopted "Employer-Employee" language in place of the traditional "Master-Servant" terminology and applicants may of course use this newer terminology.

Whether Handy performed the work for Tenant as Lessor's "servant" or as an independent contractor agent depends on the degree of control exercised by Lessor over Handy's activities. The Restatement (Second) of Agency § 2(2) provides that 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.” Conversely, the Restatement (Second) of Agency § 2(3) provides that “an independent contractor is a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking.” The Restatement (Second) of Agency § 220(2) lists factors used to determine whether an agent is a servant. These factors are:

- (a) the extent of control which, by the agreement, the master may exercise over the details of the work;
- (b) whether or not the one employed is engaged in a distinct occupation or business;
- (c) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the employer or by a specialist without supervision;
- (d) the skill required in the particular occupation;
- (e) whether the employer or the workman supplies the instrumentalities, tools, and the place of work for the person doing the work;
- (f) the length of time for which the person is employed;
- (g) the method of payment, whether by the time or by the job;
- (h) whether or not the work is a part of the regular business of the employer;
- (i) whether or not the parties believe they are creating the relation of master and servant; and
- (j) whether the principal is or is not in business.

In Handy’s case, the facts permit a persuasive argument on either side. Several factors suggest that Handy should be considered a servant of Lessor. First, Lessor exercises significant control over Handy, in insisting that any repair be approved by Lessor. Second, the relationship appears to be long term, not a temporary arrangement for a small number of repair jobs; it has already lasted for a year. Third, payment is by time worked, not by the particular job. Finally, the work performed is a necessary part of Lessor’s business of owning and operating apartment buildings.

On the other hand, several factors support an argument for classifying Handy as an independent contractor. First, Handy, as a repairman, is engaged in a distinct occupation and business that requires some degree of special skill. Second, Handy provides his own tools. Third, Handy has his own separate repair business and appears to have taken on Lessor’s work in the course of operating that separate business. Fourth, Lessor approves repairs to his properties but does not specify the methods that Handy must use.

Note: Either analysis of the servant issue is plausible. The point is that Lessor is only liable under the theory of *respondeat superior* if Handy is a servant.

Point One (b): If Handy is a servant, his actions were within the scope of employment because, (15-25%) although not authorized, adding an electrical outlet was incidental to authorized conduct.

Conduct is within the scope of employment if the conduct is of the “same general nature authorized or incidental to the conduct authorized.” Restatement (Second) of Agency § 229(1). Factors examined in determining whether conduct is within the scope of employment include whether the

conduct is the kind the servant is employed to perform; whether it occurs substantially within the authorized time and space; and whether it was performed, at least in part, to serve the master. *See* Restatement (Second) of Agency § 228.

In this case, Handy was not authorized to add the electrical outlet as Handy's contract with Lessor expressly prohibited him from doing electrical work. It also prohibited him from doing work "on the side" for a tenant. However, even forbidden activity can be within the scope of employment. Restatement (Second) of Agency § 230.

The Restatement (Second) of Agency § 229(2) sets forth factors to consider in determining whether an action is incidental to the authorized conduct so that it comes within the scope of employment. These factors include:

- (a) whether or not the act is one commonly done by such servants;
- (b) the time, place and purpose of the act;
- (c) the previous relations between the master and the servant;
- (d) the extent to which the business of the master is apportioned between different servants;
- (e) whether or not the act is outside the enterprise of the master or, if within the enterprise, has not been entrusted to any servant;
- (f) whether or not the master has reason to expect that such an act will be done;
- (g) the similarity in quality of the act done to the act authorized;
- (h) whether or not the instrumentality by which the harm is done has been furnished by the master to the servant;
- (i) the extent of departure from the normal method of accomplishing an authorized result; and
- (j) whether or not the act is seriously criminal.

A key fact that points to the conclusion that adding the electrical outlet was incidental to the scope of employment is the fact that Handy did the electrical work while providing Tenant with authorized services.

Point Two: (50-60%) Even if Handy is not a servant, or is a servant not acting within the scope of employment, Lessor is liable if Tenant reasonably believes Handy was Lessor's agent and relied on what appeared to be authority for Handy to perform the work.

Restatement (Second) of Agency § 265 sets out the general rule: "(1) A master or other principal is subject to liability for torts which result from reliance upon, or belief in, statements or other conduct within an agent's apparent authority." Section 265(2) conditions this liability upon reliance.

An agent is clothed with apparent authority when a principal "by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third party to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." Restatement (Second) of Agency § 27. The facts indicate that Lessor clothed Handy with apparent authority by advising tenants to call the "Lessor's Repair Line" when they needed repairs, and

then using Handy's business phone number as the "Lessor's Repair Line." The act of using Handy's number reasonably caused Tenant to believe that Handy was authorized by Lessor to act on Lessor's behalf. There are no facts to suggest that Tenant knew or could expect to know that a person authorized to make general repairs was prohibited by contract from adding an electrical outlet.

With respect to reliance, the facts permit a persuasive argument on either side. Arguably, Tenant did not reasonably rely on Handy's apparent authority because Tenant was told that adding an electrical outlet was an improvement, not a repair, and Handy made repairs. Further, Handy indicated that there was a charge for the electrical work.

However, the alternative argument could also be made. Lessor arranged to have "Lessor's Repair Line" ring directly to Handy's office. Tenant knew that Handy was working for Lessor; in fact Handy was present doing work on behalf of Lessor. It is not unreasonable to believe that the same person designated to make repairs would also make improvements. Further, the facts indicate that Tenant believed the payment for the work (\$200) was to go to Lessor.