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Negligence--Liability of Charitable Hospital--Insurance

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agreements with employers, but that the union is the principal for the benefit of its members, as illustrated by the instant case. Thus, a contract made by a labor union with an employer may be enforced by an employee even though he is not mentioned by name in the contract.

The West Virginia court, in *Gleason v. Thomas,* 117 W. Va. 550, 186 S.E. 304 (1936), permitted the employees to enforce the contract between the employer and the union, but failed to indicate the theory under which the parties were bound.

In *Yazoo & Miss. Valley R.R. v. Webb,* 64 F.2d 902 (5th Cir. 1933), the court allowed a non-union employee to recover on the union-employer contract under the third-party beneficiary theory.

The Mississippi court permitted recovery under this theory in *Gulf & S.I.R.R. v. McGlohn,* 183 Miss. 465, 184 So. 71 (1938). *Accord, Schlenk v. Lehigh Valley R.R.,* 74 F. Supp. 569 (D.C.N.J. 1947).

A distinction between the agency theory and the third-party-beneficiary theory is that, under the former, the union has little retained by way of direct enforcement, with whatever rights of enforcement the contract provides given the employees on whose behalf the contract was entered into; while under the third-party theory, both the union and the individual employees are able to enforce the contract.

Thus, the courts of many states, including West Virginia, have not been consistent with their reasoning in regard to the right of the employee to sue on the union-employer contract.

The third-party beneficiary theory seems the most satisfactory and just method in dealing with this problem, and the West Virginia court seems to have applied this theory in the principal case.

J. L. A.

NEGLIGENCE—LIABILITY OF CHARITABLE HOSPITAL—INSURANCE.—*P* brought an action against *D,* a charitable hospital, for injuries sustained as a result of the negligence of its employee, alleging that *D* carried liability insurance out of which a judgment could be satisfied. *D* demurred on the basis that coverage by insurance did not create liability in instances where the policyholder was immune from liability because of its charitable character. *Held,* on certification, that *D* was not liable; that the immunity still existed even

though *D* was insured against such liability. *Fisher v. Ohio Valley General Hospital Ass'n,* 73 S.E.2d 667 (W. Va. 1952).

The weight of authority supports the rule that a beneficiary of a charitable association cannot hold the association liable for negligent injuries. *Hospital of St. Vincent v. Thompson,* 116 Va. 101, 81 S.E. 13 (1914); 109 A.L.R. 1202 (1937). The reasons for the rule differ widely in the adjudicated cases. Some courts say that one accepting the benefits of such a charity exempts his benefactor from liability for the negligent acts of its servants; others that nonliability is based on the ground that trust funds created for benevolent purposes should not be diverted to purposes never intended by the donor. Exemption is frequently sanctioned upon the basis of the inapplicability of respondeat superior, in that hospital employees and attendants are not servants of the hospital but of the patient because of the nature and manner of their services to the patient. Immunity is also ofttimes predicated upon the ground of public policy, holding that the common welfare requires that charities should be encouraged, and the trust funds protected from dissipation.

Our court in *Roberts v. Ohio Valley General Hospital,* 98 W. Va. 476, 127 S.E. 318 (1925), decided that a charitable hospital is liable to a beneficiary for negligent injuries sustained only in instances where it has been negligent in the selection and retention of employees, taking a position of conditional or qualified liability.

The court refused to alter the rule in the instant case, even though a new question, that of liability insurance coverage by the charitable association, was presented. Some courts, as our court admitted, which hold charitable hospitals immune under other circumstances, withdraw the immunity where such insurance is carried. *Morton v. Savannah Hospital,* 148 Ga. 438, 96 S.E. 887 (1918); *O'Conner v. Boulder Colorado Sanitarium Ass'n,* 105 Colo. 259, 96 P.2d 835 (1939). In the opinion, the Illinois court was pointed out as a court which recognized the complete immunity of such institutions where insurance was not carried, and *Simon v. Pelouze,* 263 Ill. App. 177 (1931), was cited as authority. Then the court further pointed out that in *Wendt v. Servite Fathers,* 332 Ill. App. 618, 76 N.E.2d 342 (1947), the Illinois court withdrew the immunity when insurance was carried, taking the view that the charitable institution waived the immunity since a fund, other than the trust fund, was provided to satisfy the imposed liability.

While our court did not go into the matter, the fallacy in this line of reasoning lies in the fact that premiums paid for the insurance deplete the trust fund and may do so to a greater extent than if the institution were held liable for the negligence of its servants and agents in the first place.

In refusing to hold that carrying of insurance made any difference, our court stated, ". . . to make an exception in the case of one institution which has such insurance and deny in others that do not, would constitute the beginning of a descent into a quagmire of judicial confusion. . . ."

This is in line with its holding that the carrying of liability insurance on school buses does not waive immunity of the board of education from liability. In *Boice v. Board of Education,* 111 W. Va. 95, 160 S.E. 566 (1931), where the board had secured insurance, it was held that it could not waive its governmental immunity. It might be said that charitable hospitals could not waive an immunity given them by the law, since such immunity is given them on the basis of public policy. See *Roberts v. Ohio Valley General Hospital, supra.*

In West Virginia it could be ably argued that there was no intent to waive immunity on the part of the institutions when insurance was purchased since they are conditionally liable under the doctrine laid down in the *Roberts* case, and therefore they might well purchase the insurance as being necessary to cover that liability and possibly at a premium rate less than if they were completely liable. Therefore it seems that the court was right in deciding that the purchase of liability insurance created no right of action where none had existed.

Cases supporting the West Virginia position are substantial in number. *Williams v. Church Home,* 223 Ky. 355, 3 S.W.2d 753 (1928); *Greatrex v. Evangelical Deaconess Hospital,* 261 Mich. 327, 246 N.W. 137 (1933); *Mississippi Baptist Hospital v. Moore,* 156 Miss. 676, 126 So. 465 (1930); *Schau v. Morgan,* 241 Wis. 334, 6 N.W. 2d 212 (1942); *DeGroot v. Edison Institute,* 306 Mich. 339, 10 N.W. 2d 907 (1943).

[Since the writing of this comment the court has reaffirmed its position in *Meade v. St. Francis Hospital of Charleston,* 74 S.E.2d 405 (W. Va. 1953).]

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