Mr. Theurer was driving 45 miles per hour on a two-lane road when he became drowsy or fell asleep, crossed the dividing line into oncoming traffic, crashed into the van of Frederic Faverty, and was killed. Mr. Faverty was seriously injured. The court held that McDonald's was liable for the injuries and death resulting from the accident.

Some courts have declined to follow the *McDonald's* decision. In *Behrens v Harrah's Illinois Corp.*, 852 N.E.2d 553 (Ill. 2006), the court did not allow the family of an employee to recover from the employer when she experienced catastrophic injuries following a rollover accident that occurred when she was driving home from work after being required to work overtime at the casino. A hospital is not liable for injuries caused by a sleep-deprived doctor working extra hours at the hospital. [*Brewster v Rush-Presbyterian-St. Luke's Medical Center*, 836 N.E.2d 635 (111. App. 2005)] And Wal-Mart is not liable for the accident caused by an exhausted manager during the holiday season. [*Aylward v Wal-Mart Stores, Inc.*, 2011 WL 2347762 (D. N.J. 2011)] However, other courts have followed the decision for impairment caused by factors other than sleep deprivation. In *Bussard v Minimed, Inc.*, 105 Cal.App.4th 798, 129 Cal.Rptr.2d 675 (2003), an employer was held liable to a third party under a *respondeat superior* theory where the employee became dizzy and light-headed after being exposed to pesticides at work and, while driving home, struck a car driven by the third party.

Generally, intentional acts not authorized by employers do not result in liability. However, under the theories of the **negligent failure to supervise** and **negligent hiring**, an employer may have liability for inaction when it has notice of the violent tendencies of an employee. *Lange v National Biscuit Co.* (Case 16.4) opened the door for recovery from employers for the intentional acts of employees in certain well-defined circumstances.

CASE 16.4

Lange v National Biscuit Co.
211 N.W.2d 783 (Minn. 1973)

Shelf Space Is My Life: Flipping Out over Oreos

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FACTS

Jerome Lange (plaintiff) was the manager of a small grocery store in Minnesota that carried Nabisco (defendant) products. Ronnell Lynch had been hired by Nabisco as a cookie salesman–trainee in October 1968. On March 1, 1969, Mr. Lynch was assigned his own territory, which included Mr. Lange's store.

Between March 1 and May 1, 1969, Nabisco received numerous complaints from grocers about Mr. Lynch being overly aggressive and taking shelf space in the stores reserved for competing cookie companies.

On May 1, 1969, Mr. Lynch came to Mr. Lange's store to place Nabisco merchandise on the shelves. An argument developed between the two over Mr. Lynch's service to the store. Mr. Lynch became very angry and started swearing. Mr. Lange told him to either stop swearing or leave the store because children were present. Mr. Lynch then became uncontrollably angry and said, "I ought to break your neck." He then went behind the counter and dared Mr. Lange to fight. When Mr. Lange refused, Mr. Lynch viciously assaulted him, after which he threw cookies around the store and left.

Mr. Lange filed suit against Nabisco and was awarded damages based on the jury's finding that although the acts of Mr. Lynch were outside the scope of employment, Nabisco was negligent in hiring and retaining him. The judge granted Nabisco's motion for judgment notwithstanding the verdict, and Mr. Lange appealed.

CONTINUED

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JUDICIAL OPINION

TODD, Justice

There is no dispute with the general principle that in order to impose liability on the employer under the doctrine of *respondeat superior* it is necessary to show that the employee was acting within the scope of his employment. Unfortunately, there is a wide disparity in the case law in the application of the "scope of employment" test to those factual situations involving intentional torts. The majority rule as set out in Annotation, 34 A.L.R.2d 372, 402, includes a twofold test: (a) Whether the assault was motivated by business or personal considerations; or (b) whether the assault was contemplated by the employer or incident to the employment.

Under the present Minnesota rule, liability is imposed where it is shown that the employee's acts were motivated by a desire to further the employer's business. Therefore, a master could only be held liable for an employee's assault in those rare instances where the master actually requested the servant to so perform, or the servant's duties were such that that motivation was implied in law.

The fallacy of this reasoning was that it made a certain mental condition of the servant the test by which to determine whether he was acting about his master's business or not. Moreover, with respect of all intentional acts done by a servant in the supposed furtherance of his master's business, it clothed the master with immunity if the act was right, because it was right, and, if it was wrong, it clothed him with a like immunity, because it was wrong. He thus got the benefit of all his servant's acts done for him, whether right or wrong, and escaped the burden of all intentional acts done for him which were wrong. Under the operation of such a rule, it would always be more safe and profitable for a man to conduct his business vicariously than in his own person. He would escape liability for the consequences of many acts connected with his business springing from the imperfection of human nature, because done by another, for which he would be responsible if done by himself. Meanwhile, the public, obliged to deal or come in contact with his agents, for intentional injuries done by them, might be left wholly without redress. . . . A doctrine so fruitful of mischief could not long stand unshaken in an enlightened system of jurisprudence.

In developing a test for the application of *respondent superior* when an employee assaults a third person, we believe that the focus should be on the basis of the assault rather than the motivation of the employee. We reject as the basis for imposing liability the arbitrary determination of when, and at what point, the argument and assault leave the sphere of the employer's business and become motivated by personal animosity. Rather, we believe the better approach is to view both the argument and assault as an indistinguishable event for purposes of vicarious liability.

We hold that an employer is liable for an assault by his employee when the source of the attack is related to the duties of the employee and the assault occurs within work-related limits of time and place. The assault in this case obviously occurred within work-related limits of time and place, since it took place on authorized premises during working hours. The precipitating cause of the initial argument concerned the employee's conduct of his work. In addition, the employee originally was motivated to become argumentative in furtherance of his employer's business. Consequently, under the facts of this case we hold as a matter of law that the employee was acting within the scope of employment at the time of the aggression and that plaintiff's post-trial motion for judgment notwithstanding the verdict on that ground should have been granted under the rule we herein adopt. To the extent that our former decisions are inconsistent with the rule now adopted, they are overruled.

Plaintiff may recover damages under either the theory of *respondeat superior* or negligence. Having disposed of the matter on the former issue, we need not undertake the questions raised by defendant's asserted negligence in the hiring or retention of the employee.

Reversed and remanded.

CASE QUESTIONS

1. What previous indications did Nabisco have that Mr. Lynch might cause some problems?
2. What test does the court give for determining scope of employment?
3. What is the "motivation test," and does this court accept or reject it?

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