



STATE OF ARKANSAS TRANSPORTATION AND LOGISTICS COMPENDIUM OF LAW

Prepared by
Thomas G. Williams
John E. Tull III
Thomas H. Wyatt
Quattlebaum, Grooms & Tull PLLC
111 Center Street
Suite 1900
Little Rock, AR 72201
Tel: (501) 379-1700
Email: twilliams@qgtlaw.com
Email: jtull@qgtlaw.com
Email: twyatt@qgtlaw.com
www.qgtlaw.com

A. Elements of Proof for the Derivative Negligence Claims of Negligent Entrustment, Hiring/Retention and Supervision

Arkansas recognizes derivative claims of negligent entrustment, hiring, retention, and supervision against employers. These claims are premised on a theory of negligence on the part of the employer. Generally, to prevail on such claims, a plaintiff must show that the employer owed him or her a duty, that the employer breached that duty, and that this breach was the proximate cause of the plaintiff's injury. See Kristie's Katering, Inc. v. Ameri, 72 Ark. App. 102, 110, 35 S.W.3d 807, 812 (2000).

1. *Respondeat Superior*

- a. What are the elements necessary to establish liability under a theory of *Respondeat Superior*?

The doctrine of *respondeat superior* assigns liability to an employee's expected acts that are incidental to the employee's duties or that benefit the employer; liability attaches to an employer when its employee commits a foreseeable act within the scope of his employment at the time of the incident. See Costner v. Adams, 82 Ark. App. 148, 154, 121, S.W.3d 164, 169 (2003) (citing Porter v. Harshfield, 329 Ark. 130, 136, 948 S.W.2d 83, 86 (1997)). See also Vaughan Hardware Co. v. McAdoo, 196 Ark. 471, 118 S.W.2d 280, 281 (1938). For the purposes of *respondeat superior*, whether an employee is acting within the scope of employment is not necessarily dependent upon the *situs* of the occurrence but whether the individual is carrying out the object and purpose of the enterprise, as opposed to acting exclusively in his own interest. See J.B. Hunt Transport., Inc., v. Doss, 320 Ark. 660, 668, 899 S.W.2d 464, 469 (1995) (citing Razorback Cab of Fort Smith, Inc. v. Lingo, 304 Ark. 323, 327, 802 S.W.2d 444, 446 (1991)).

- b. Examples

In J.B. Hunt, the appellant challenged the trial court's finding that there was no substantial evidence to support the finding that a driver was acting within the course and scope of his employment at the time of an accident. The parties stipulated that the truck involved in the accident was owned by J.B. Hunt and that the operator of the truck was an employee of J.B. Hunt. At the time of the collision, however, the operator was on his way to a truck stop to "check with a buddy;" had been drinking in violation of company's policy; was wearing a J.B. Hunt uniform; and was planning to spend the night at the truck stop before embarking on a twelve-hour, 600-mile drive to make a delivery in Alsip, Illinois. The operator testified that under company policy, he was allowed discretion to pace his driving as he chose, provided he made his delivery on schedule. The Court held the operator was acting in the course and scope of his employment at the time of the accident because there was substantial evidence the operator was engaged in an employer-approved assignment, the details of the execution of which had been entrusted to his discretion. See id. at 668, 899 S.W.2d 469.

In Arkansas, a carrier possessing a certificate from the Interstate Commerce Commission and employing a non-certified independent contractor under a trip lease agreement does not automatically create an employer/employee relationship for the purpose of establishing derivative liability for the independent contractor's negligence. See Julian Martin, Inc. v. Ind. Refrigeration Lines, Inc., 262 Ark. 671, 677-678, 560 S.W. 2d 228, 231 (1978).

In Matthews Trucking Co. v. Zimmerman, 221 Ark. 622, 625, 255 S.W.2d 168, 170 (1953), a plaintiff presented evidence that the defendant trucking company exercised specific, if not complete, control over a driver not employed by the trucking company. There, the Court confirmed the jury's finding that the driver and trucking company maintained a master/servant relationship under these circumstances.

2. Negligent Entrustment

- a. What are the elements necessary to establish liability under a theory of negligent entrustment?

The elements of a claim of negligent entrustment are: (1) the trustee was incompetent, inexperienced, or reckless, (2) the entrustor knew or had reason to know of the trustee's condition or proclivities, (3) there was an entrustment of the chattel, (4) the entrustment created an appreciable risk of harm to the plaintiff and a relational duty on the part of the defendant, and (5) the harm to the plaintiff was proximately or legally caused by the negligence of the defendant. See Arkansas Bank & Tr. Co. v. Ervin, 300 Ark. 599, 603, 781 S.W.2d 21, 23 (1989). Stated another way, a carrier can be liable if it entrusts a vehicle to an incompetent or reckless driver.

Defendants may be sued under both negligent entrustment and *respondeat superior* theories if the defendant generally denies liability. See LeClair v. Commercial Siding and Maint. Co., 308 Ark. 580, 582, 826 S.W.2d 247, 248 (1992). However, if the defendant admits liability under either theory, then the plaintiff may only pursue liability under the admitted theory of recovery. See Elrod v. G. & R. Constr. Co., 275 Ark. 151, 154, 628 S.W.2d 17, 19 (1982).

- b. Examples

In LeClaire, an injured passenger alleged the defendant employer was negligent for entrusting its vehicle to a driver/employee it knew, or should have investigated and learned, frequently became intoxicated and had moving traffic violations. The employer entrusted its vehicle to this employee, who in turn became intoxicated and entrusted the same vehicle to another person, who negligently operated the vehicle and caused injuries to the plaintiff.

The central issue in LeClaire was whether an employee negligently entrusted the employer's vehicle to another barred recovery from the employer due to the employee's negligent entrustment. The Court held that two entrustments do not bar the plaintiff from seeking recovery from the employer under the negligent entrustment theory if liability of the original entrustor is predicated upon negligence in entrusting the chattel to the original trustee. 308 Ark. at 583, 826 S.W.2d at 249.

3. Negligent Hiring/Retention/Supervision

- a. What are the elements necessary to establish liability under the theories of negligent hiring, retention, and supervision?

Under the theories of negligent hiring, retention, and supervision, an employer may be subject to direct liability when third parties are injured as a result of the tortious acts of its employees.

The Arkansas Supreme Court utilizes a two prong test when examining claims of negligent hire: (1) is there something in the employee's history that would have been found by an "adequate"¹ background check and (2) would something discovered in an "adequate" background check have put the employer on notice that the employee was predisposed to commit a violent act. See Saine v. Comcast Cablevision of Ark., Inc., 354 Ark. 492, 501, 126 S.W.3d 339, 345 (2003) (citing St. Paul Fire & Marine Ins. v. Knight, 297 Ark. 555, 562, 764 S.W.2d 601, 605 (1989)). The Saine Court determined that "[t]here must be a direct causal connection between an inadequate background check and the criminal act for which the appellant is attempting to hold the employer liable." Id. at 501, 345. Generally, Arkansas courts will not hold an employer liable for negligent hiring when an "adequate" or reasonable inquiry into the employee's background would not have revealed information that would have given the employer an indication that the employee likely would cause harm to others if hired. See Knight, 297 Ark. at 562, 764 S.W.2d at 605.

Negligent retention occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated the employee's unfitness for duty, and the employer fails to take action such as investigating, discharging, or reassigning the employee. See Saine, 354 Ark. at 497, 126 S.W.3d at 342. "Employers cannot be required to possess clairvoyant powers to discern whether an employee should be retained." Id. at 561, 604. Instead, the employer's potential liability rests upon proof that the employer knew or, through the exercise of ordinary care, should

¹ Arkansas courts have not clearly defined what constitutes an "adequate" background check. The courts appear to analyze the methods used by an employer to ascertain the tortious proclivities of a potential employee on a case-by-case basis with no bright-line rules or guidance. The courts also routinely use the words "adequate" and "reasonable" interchangeably.

have known the employee's conduct would subject third parties to an unreasonable risk of harm. Id. at 562, 605.

An employer's liability for negligent supervision rests upon proof that the employer knew or, through the exercise of ordinary care, should have known that the employee's conduct would subject third parties to an unreasonable risk of harm. See Regions Bank & Tr. v. Stone Cnty. Skilled Nursing Facil., Inc., 345 Ark. 555, 568, 49 S.W.3d 107, 115 (2001); Addington v. Wal-Mart Stores, 81 Ark. App. 441, 458, 105 S.W.2d 369, 381 (2003).

b. Examples

In Saine, the plaintiff brought suit against Comcast for the negligent hiring, retention, and supervision of its employee who raped and attempted to murder the plaintiff. The trial court granted summary judgment in favor of Comcast, and the plaintiff appealed. Evidence in the record demonstrated that the plaintiff, prior to the incident at issue, called and complained to Comcast that its employee made inappropriate sexual comments to her and had unlocked her windows.

Considering these facts, the Arkansas Supreme Court held that there was an issue of fact as to whether Comcast was on notice that its employee might harm a third party. In addition, the Saine Court emphasized its prior holding in Madden v. Aldrich, 346 Ark. 405, 415, 58 S.W.3d 342, 350 (2001), that it was not necessary that a particular harm to the plaintiff be foreseeable but only that the employer be on notice that it was reasonably foreseeable that an appreciable risk of harm to third parties could be caused by the negligent retention of the employee. Saine, 354 Ark. at 500, 126 S.W.3d at 342. The Court's decision was also based upon the plaintiff's argument that the employer did not have a system in place for recording or acting upon complaints about employees and that there was no record in employee files of prior complaints. See id.

Under Arkansas law, carriers should consider two areas when assessing the potential risk of liability for negligent hiring, retention, and supervision: (1) the steps taken by the carrier to assess whether an employee poses a potential harm to others, and (2) upon receipt of information or notice that an employee might pose a potential harm to others, the measures taken to prevent harm to those to whom the carrier owes a duty of care. It is also important that a carrier have a procedure in place for tracking and then addressing information the carrier receives based on background checks performed prior to and during the course of employment or from reports from others that a certain employee may pose a danger to others.

“The theory of negligent supervision is separate and distinct from the *respondeat superior* theory of vicarious liability, as a claim of negligent supervision does not preclude recovery where the acts committed by the employee are intentional and outside the scope of employment.” Madden, 346 Ark. at 415, 58 S.W.3d at 350 (emphasis added). An Arkansas employer is subject to vicarious liability for the intentional acts of its employee “if the act was not unexpected [sic] in view of

the duties of the servant.” Porter, 329 Ark. at 137, 948 S.W.2d at 86 (quoting Restatement (Second) of Torts § 245 (1958)). Even if an employee acts beyond the scope of employment, a carrier’s failure to supervise and properly react to reports is an indicator that an employee’s conduct would subject third parties to an unreasonable risk of harm.

B. Defenses

1. Admission of Agency

Arkansas has adopted the majority view that once an employer has admitted the agency relationship between it and the employee, it is improper to allow a plaintiff to proceed against the employer on any other theory of derivative or dependent liability. See Elrod, 275 Ark. at 154, 628 S.W.2d at 19; Kyser, 261 Ark. at 358, 548 S.W.2d at 132.

2. Traditional Tort Defenses

Depending on the facts of a particular case, given the derivative nature of these theories, traditional tort defenses may also apply, such as comparative fault, failure to mitigate damages, superseding and intervening cause, etc.

C. Punitive Damages

1. Is evidence supporting a derivative negligence claim permissible to prove an assertion of punitive damages?

In Arkansas, mere negligence, or even gross negligence, is not sufficient to justify punitive damages. See D’Arbonne Constr. Co., Inc. v. Foster, 80 Ark. App. 87, 96, 91 S.W.3d 540, 546 (2002). Under Arkansas law, “an award of punitive damages is justified only where the evidence indicates that the defendant acted wantonly in causing the injury or with such a conscious indifference to the consequences that malice may be inferred.” Yeakley v. Doss, 370 Ark. 122, 128, 257 S.W.3d 895, 899 (2007).

Malice may be inferred from the operation of a motor vehicle, and “[a] corporation may be held liable for punitive damages for acts done by its agents or servants acting within the scope of their employment.” J.B. Hunt Transport., Inc., 320 Ark. at 669, 899 S.W.2d at 469. Arkansas law does not limit evidence to support a punitive damages claim simply because such evidence may support a derivative negligence claim. The evidence would have to be inadmissible based upon the applicable rules of evidence.

2. Examples

In D'Arbonne Const. Co., Inc., 80 Ark. App. at 91, 91 S.W.3d at 540, an accident victim brought an action against a truck driver, his employer, and others for injuries and deaths suffered when the truck crossed the center line and collided head-on with the victim's car. There was evidence the truck driver was speeding, that the truck had brake problems that caused the truck to pull to the left, that the brakes were so worn they could not function properly, and that the brakes had been effectively disabled so they could not lock up the truck's wheels, yet the truck continued to operate. See id. at 93-94, 544-545. In support of its finding that plaintiff was entitled to punitive damages, the court stated, "there was not only evidence of gross negligence in the failure to maintain the braking and control systems of the truck and in permitting Johnson to drive it, but there was also evidence that the brakes were intentionally disabled so that the truck could continue to operate, after a fashion, despite the lack of maintenance." D'Arbonne Constr. Co., Inc., 80 Ark. App. at 96, 91 S.W.3d at 546. Punitive damages may also be available in cases involving intoxicated drivers. See Yeakley, 370 Ark. at 127-28, 257 S.W.3d at 899; J.B. Hunt Transport., Inc., 320 Ark. at 668, 899 S.W.2d at 469.

This Compendium outline contains a brief overview of certain laws concerning various litigation and legal topics. The compendium provides a simple synopsis of current law and is not intended to explore lengthy analysis of legal issues. This compendium is provided for general information and educational purposes only. It does not solicit, establish, or continue an attorney-client relationship with any attorney or law firm identified as an author, editor or contributor. The contents should not be construed as legal advice or opinion. While every effort has been made to be accurate, the contents should not be relied upon in any specific factual situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.