STATE OF OKLAHOMA TRANSPORTATION AND LOGISTICS COMPENDIUM OF LAW

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

In Oklahoma, a trucking company is liable for the negligence of employee drivers under the doctrine of *respondeat superior* (imputed liability), and may be liable for the company's own acts or omissions in the negligent hiring, supervision and retention of its employee drivers and/or the negligent entrustment of a vehicle to an employee driver (direct liability). Although plaintiffs often assert both types of claims against a trucking company, the Oklahoma Supreme Court has indicated that there may be no additional liability on the trucking company when liability is admitted, stipulated or otherwise established on the basis of *respondeat superior*. *Jordan v. Cates*, 1997 OK 9, 935 P.2d 289. But see *Andrea T. Annese v. U.S. Express, Inc., et al*., No. CIV-17-655-C (W.D. Okla. December 20, 2017) "The Hunter opinion concludes that two theories are "separate and independent theor[ies] of relief that may be actionable despite [the trucking company's] stipulation that the [employee] was acting within the course and scope of his employment at the time of the accident." *Hunter v. New York Marine and General Ins. Co*., No. CIV-16-1113-W (W.D. Okla. Jan. 18, 2017). "Oklahoma state and federal courts have recently narrowed the interpretation of Jordan and when considered with Sheffer, have concluded there is at least the possibility for a plaintiff to make out separate claims for vicarious liability and negligent entrustment when the employer admits the employee was acting within the scope and course of his employment.

In 2018, the Oklahoma Supreme Court held that a claim for negligent entrustment as a standalone claim is permissible and that a plaintiff is permitted to bring such a claim against a trucking company despite a course and scope stipulation. *Fox v. Mize*, 2018 OK 75, 428 P.3d 314. There, the district court dismissed the negligent hiring claim, but allowed the negligent entrustment claim to proceed. Upon consideration, the Oklahoma Supreme Court concluded an employer's liability for negligently entrusting a truck to an unfit employee was a separate and distinct theory of liability from that of an employer's liability under the *respondeat superior* doctrine. An employer's stipulation that an accident occurred during the course and scope of employment does not, as a matter of law, bar a negligent entrustment claim.

1. *Respondeat Superior* (Latin, "let the master answer".)

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

      In Oklahoma, a trucking company may be held liable for the employee's negligence, even if the employee is not actually named in the lawsuit. However, in order for a plaintiff to succeed under this theory of employer negligence, the employee must be acting within the course and scope of his or her employment

when the wrongful acts were committed. The burden of proving this element is squarely upon the plaintiff. *Hooper By and Through Hooper v. Clements Food Co.*, 1985 OK 6, ¶ 6, 694 P.2d 943, 944.

Generally, a trucking company will not be responsible for the intentional or willful acts of its employee drivers, unless the employee driver was acting within the scope of his or her employment and the act complained of was committed as a means of carrying out the job assigned to the employee by his or her employer. *Allison v. Gilmore, Gardner & Kirk, Inc.*, 1960 OK 48, 350 P.2d 287; *Mistletoe Express Service, Inc. v. Culp*, 1959 OK 250, 353 P.2d 9. However, the Oklahoma Supreme Court has expanded this theory by holding that an employer may be held liable for the intentional and willful acts of its employees when the acts are fairly and naturally incident to the employer's business, and are done while the servant is engaged in doing his employer's business, with a view toward furthering his employer's interests or if the acts resulted from some impulse or emotion which naturally grew out of or was incident to the employee's attempt to perform his employer's business. The Oklahoma Supreme Court's rationale was that the employee is doing a "rightful thing" (the business of their employer) even though the employee may have done so in a "wrongful manner". *Baker v. St. Francis Hospital*, 2005 OK 36, 126 P.3d 602; *Rodebush By and Through Rodebush v. Oklahoma Nursing Homes, Ltd.*, 1993 OK 160, 867 P.2d 1241. "When recovery against the employer for an act of his servant is rested on prior knowledge of the servant's propensity to commit the very harm for which damages are sought, the basis of liability invoked is not *respondeat superior* but rather the employer's own negligence in not discharging the unfit servant." *Dayton Hudson Corp. v. American Mut. Liability Ins. Co*., 1980 OK 193, 621 P.2d 1155, 1161 (Okla. 1980).

2. Negligent Entrustment

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

To support an actionable claim for negligent entrustment of a vehicle, the plaintiff must show that: a person who owns or has possession and control of a vehicle allowed another driver to operate the vehicle; the person knew or reasonably should have known that the other driver was careless, reckless and incompetent; and an injury was caused by the careless and reckless driving of the automobile. The question of negligent entrustment is one of fact for the jury and may be proven by circumstantial as well as positive or direct evidence. *Shoemake v. Stich*, 1975 OK 55, ¶ 13, 534 P.2d 667; *Berg v. Bryant*, 1956 OK 336, ¶ 5, 305 P.2d 517; *Coker v. Moose*, 1937 OK 67, ¶ 9, 68 P.2d 504; and *Waddle v. Stafford*, 1924 OK 309, 230 P. 855. See also, *National Trailer Convoy, Inc. v. Saul*, 1962 OK 181, ¶ 10, 375 P.2d 922; and *Greenland v. Gilliam*, 1952 OK 72, ¶ 11, 241 P.2d 384.

It is the negligence of the driver that provides the causal connection necessary to establish liability in tort between the negligence of the entrusting owner and injuries sustained by the plaintiff. If an accident occurs in which the driver is not negligent, there is no causal connection between the owner's precedent negligence and the injury itself. It is the combined negligence of the owner and operator which fastens liability upon the owner. Otherwise, the plaintiff's recovery would rest on no stronger basis than the "but for" doctrine. Strictly speaking, the liability is not derivative; rather it is dependent because the effect is to require an affirmative finding of the driver's negligence. Otherwise dependent liability of the owner cannot be imposed in the face of exoneration of the defendant whose negligent acts are claimed to have been the immediate cause of plaintiff's injury. *Clark v. Turner*, 2004 OK CIV APP 69, ¶ 36, 99 P.3d 736; and *Anthony v. Covington*, 1940 OK 59, 187 Okla. 27, 100 P.2d 461. As indicated above, in 2018 the Oklahoma Supreme Court ruled that an employer's stipulation that an accident occurred during the course and scope of employment does not, as a matter of law, bar a negligent entrustment claim. *Fox v. Mize*, 2018 OK 75, 428 P.3d 314. Thus, present rule of law in Oklahoma is that if an employer admits potential vicarious liability for its employee, then a plaintiff may not maintain any direct negligence actions against the employer, other than negligent entrustment. *See Fox*, *supra*.

3. Negligent Hiring/Supervision/Retention

a. What are the elements necessary to establish liability under a theory of negligent hiring/supervision/retention?

In Oklahoma, generally, employers may be held liable for negligence in hiring, supervising or retaining an employee. *Jordan v. Cates*, 1997 OK 9, ¶ 12, 935 P.2d 289; *Dayton Hudson Corp. v. American Mut. Liability Ins. Co.*, 1980 OK 193, ¶ 17, 621 P.2d 1155,16 A.L.R.4th 1; *Mistletoe Express Serv., Inc. v. Culp*, 1959 OK 250, ¶ 30, 353 P.2d 9. In such instances, recovery is sought for the employer's negligence. The claim is based on an employee's harm to a third party through the course and scope of his or her employment. An employer is found liable, if at the critical time of the tortious incident, the employer had reason to believe that the person would create an undue risk of harm to others. Employers are held liable for their prior knowledge of the servant's propensity to commit the very harm for which damages are sought. There is no distinction between causes of action for or the necessary elements of negligent hiring, supervision and/or retention, except as to the critical time of the tortuous incident relative to the prior knowledge of the employer. However, subject to the recent decision in *Fox v. Mize* specific to a negligent entrustment claim, again, there is no additional liability on the trucking company when liability is admitted, stipulated, or otherwise established on the basis of *respondeat superior*. *Jordan v. Cates*, 1997 OK 9, 935 P.2d 289, and its progeny. 2018 OK 75, 428 P.3d 314. Notably, on March 18, 2019, after the *Fox v.*

Mize opinion was published, a Federal Judge in the Western District of Oklahoma granted partial summary judgment to a trucking company in an effectively identical situation:

> The Court finds that Plaintiff's negligent hiring claim against Defendant Xpress should be dismissed. First, *Jordan* has not been overruled. Thus, it still remains good law and, in applying Oklahoma law, this Court is bound to follow it. Moreover, by limiting *Jordan* to its facts, *Mize* bolsters the result here because the same facts present here were at issue in *Jordan*. Indeed, the particular claim at issue in Jordan was a negligent hiring claim – the same claim at issue here. As a result, the Court finds that Plaintiff's negligent hiring claim against Defendant Xpress should be dismissed.

Annese v. U.S. Xpress, Inc., et al., U.S.D.C. for Western District of Oklahoma, Case No. CIV-17-655-C, Memorandum Opinion and Order, March 19, 2019 [Doc. 169].

B. Defenses

1. Admission of Agency

Oklahoma has adopted the majority view that once an employer has admitted or stipulated to the agency relationship between it and the employee, plaintiff will not be allowed to proceed on any other theory of derivative or dependent liability with exception of the claim for negligent entrustment. The rationale for this view is that claims for negligent hiring, supervision, or retention of employees would not afford plaintiff any additional liability against the employer. *Jordan v. Cates*, 1997 OK 9, 935 P.2d 289. However, as noted above, in 2018 the Oklahoma Supreme Court held that an employer's stipulation that an accident occurred during the course and scope of employment does not, as a matter of law, bar a negligent entrustment claim. *Fox v. Mize*, 2018 OK 75, 428 P.3d 314. Thus, present rule of law in Oklahoma is that if an employer admits potential vicarious liability for its employee, then a plaintiff may not maintain any direct negligence actions against the employer, other than negligent entrustment. *See Fox*, *supra*.

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. In general

In Oklahoma, "an award of punitive damages is controlled by statute." *American National Bank and Trust Co. of Sapulpa v. BIC Corp.,* 1994 OK CIV APP 70, 880 P.2d 420, 425. In order to obtain an award for punitive damages, a plaintiff must present "clear and convincing" evidence of the trucking company or driver's gross negligence. 23 O.S. §9.1. Oklahoma's punitive damages statute sets forth only three circumstances under which punitive damages may be awarded.

In order to prove gross negligence as alleged, a plaintiff must prove the trucking company acted with entire want of care or recklessness of conduct as is the equivalent of positive misconduct or evidences a conscious indifference to consequences. *Dayton Hudson Corp v. American Mutual Liability Ins. Co.,* 1980 OK 193, 621 P.2d 1155, 1161, n.24 (citations and quotations omitted).

One often case cited by trucking company defendants, the court found punitive damages were unwarranted when the driver of a large truck ran a stop sign and collided with another automobile, killing two women. *White v. B. K. Trucking Co., Inc.,* 405 F.Supp. 1068 (W.D. Okla. 1975). The court held the case involved a tragic accident, but did not involve such gross negligence as could be deemed equivalent to evil intent or indicate a reckless disregard for the rights of others. *Id.*

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

While the Oklahoma Supreme Court has held that admitting agency prevents a plaintiff from proceeding on any other derivative or dependent liability theory other than negligent entrustment, it specifically found that such evidence was relevant to the issue of punitive damages under a tort theory of liability. *Jordan v. Cates*, 1997 OK 9, 935 P.2d 289. However, to award punitive damages, the jury must find by clear and convincing evidence that the defendant has been guilty of reckless disregard for the rights of others or has acted intentionally and with malice ("ill-will" or "hatred" towards others.) 23 O.S. § 9.1. In an action for the breach of an obligation not arising from contract, the jury may award punitive damages for the sake of example and by way of punishing the defendant based upon the following factors: seriousness of the hazard to the public arising from the defendant's misconduct; profitability of the misconduct to defendant; duration of misconduct and any concealment of it; degree of defendant's awareness of the hazard and its excessiveness; attitude and conduct of the defendant upon discovery of the misconduct or hazard; and financial condition of the defendant. *Id.*

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.