STATE OF SOUTH CAROLINA TRANSPORTATION AND LOGISTICS COMPENDIUM OF LAW

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NEGLIGENT ENTRUSTMENT IN SOUTH CAROLINA

Generally speaking, negligent entrustment is "[t]he act of leaving a dangerous article (such as a gun or car) with a person who the lender knows, or should know, is likely to use it in an unreasonably risky manner." Black's Law Dictionary, 10th Edition, 2014. It is important to note that the elements of this cause of action in South Carolina are not as broad as this general definition. They are tailored to deal with entrustment of a vehicle to an individual who is likely to use it in an "unreasonably risky manner." See id; Jackson v. Price, 288 S.C. 377, 342 S.E.2d 628 (Ct. App. 1986).

Elements of Negligent Entrustment in South Carolina

The elements of negligent entrustment in South Carolina have been defined as:

1) Knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking;
2) The owner knew or had imputable knowledge that the driver was likely to drive while intoxicated; and
3) Under these circumstances, the entrustment of a vehicle by the owner to such a driver.

Jackson, 288 S.C. at 382, 342 S.E.2d 631.

Development of Negligent Entrustment in South Carolina

Although recently challenged, the South Carolina Supreme Court declined to extend "liability when the owner knows or had reason to know that such person is likely because of his youth, inexperience, or otherwise, to create an unreasonable risk of physical harm to himself and others." Gadson v. ECO Services, 374 S.C. 171, 177, 648 S.E.2d 585, 589 (2007). See also Restatement (Second) of Torts §§ 308 and 390.[1] Instead, they affirmed the elements listed in Jackson. Id.

NEGLIGENT HIRING

An employer has a responsibility to exercise reasonable care in hiring its employees: "In circumstances where an employer knew of or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff

[1] Section 308 provides: "It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such a person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others."

Section 390 provides: "One who supplies directly or though a third persona a chattel for the sue of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them."

may claim that the employer was itself negligent in hiring. . . the employee. . . ." Kase v. Ebert, 392 S.C. 57, 63, 707 S.E.2d 456, 459 (Ct. App. 2011) (citing James v. Kelly Trucking Co., 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008)). Be careful though. Employers must take precaution to avoid violating privacy and other rights of applicants and employees.

Employers should obtain applicant's written consent to run any background checks involving criminal records, driving records, debt or credit history, etc. Design the employment application to obtain as much legally permissible information as possible. Application should include authorization permitting the employer to verify all information provided and investigate gaps in employment history. It should also require the applicant to certify that the information provided by him or her is truthful and complete, and that the employer can decline to hire or terminate the applicant, if the applicant provides incomplete or misleading information. South Carolina has not yet taken a stance on requesting an applicant's social media log in information as has Maryland, the first state to outlaw such a practice in April 2012.

NEGLIGENT RETENTION

Negligent Retention involves the reasonable care an employer must exercise after an applicant is hired. See, e.g., Doe v. ATC, Inc. 367 S.C. 199, 624 S.E.2d 447 ("South Carolina, indeed, recognizes the tort of negligent retention in the context of a negligent supervision action"). Kase v. Ebert, 392 S.C. 57, 707 S.E.2d 456 (Ct. App. 2011), is the closest case to a Negligent Retention action in a transportation context in South Carolina. Kase involved a fender bender and a following physical altercation. Id. Kase and Ebert were both truck drivers, and Ebert bumped Kase's truck while Kase was inside. Id. A physical altercation ensued between the drivers, and Kase was injured in the fight. Id. Kase contended that Ebert's employer was on notice of Ebert's potential for violence due to "(1) Ebert's poor driving record, which included numerous moving violations; (2) Ebert's insubordinate behavior; (3) Ebert's marital difficulties and resulting financial problems; and (4) [an] incident in Wisconsin and Ebert's erratic behavior afterwards." Id. at 63-64, 707 S.E.2d at 459.

The court cited Degenhart v. Knights of Columbus and the Degenhart court's approval of the Restatement (Second) of Torts § 317. Id. at 64, 707 S.E.2d 460-61. Section 317 provides that:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
> (a) the servant
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
> (ii) is using a chattel of the master, *and*
> (b) the master

(i) knows or has reason to know that he has the ability to control his servant, *and*
(ii) knows or should know of the necessity and opportunity for exercising such control.

Id. The court found that Ebert's employer could not be liable for negligent retention because (1) the fight did not take place on the employer's property, (2) Ebert had exited the company vehicle before the fight, and (3) despite the fight happening immediately following the collision, the fight did not involve the use of the employer's personal property (like the tractor). Id. at 64, 707 S.E.2d 461.

A second South Carolina case on point is Doe v. ATC, Inc. 367 S.C. 199, 624 S.E.2d 447. Doe involved an ATC employee inappropriately touching a disabled adult female. Id. Prior to the incident involving Doe, the ATC employee had been involved in an isolated incident where he grabbed a fellow employee and made inappropriate sexual comments to her. Id. at 203, 624 S.E.2d at 449. That incident had been reported to a supervisor but had not been written up and no formal complaint had been filed. Id.

Doe's theory of liability was that ATC was negligent in its retention of employee following the incident with another employee. Id. at 205, 624 S.E.2d at 450. The SC Court of Appeals found that the cases should turn on two fundamental elements: knowledge of the employer AND foreseeability of harm to third parties. Id. at 206, 624 S.E.2d at 450. The court found that a plaintiff must demonstrate that the employee had "dangerous proclivities." Id. at 207, 624 S.E.2d at 451. The court also found that a single isolated prior incident of misconduct could support a negligent retention claim only if the prior misconduct had a "sufficient nexus to the ultimate harm." Id. Thus, in the Doe case they found that the single incident did not give rise to negligent retention liability. Id. at 208, 624 S.E.2d at 451-52.

NEGLIGENT SUPERVISION

An employer has a responsibility to exercise reasonable care in its supervision of employees. *See* Kase v. Ebert, 392 S.C. 57, 64, 707 S.E.2d 456, 459 (Ct. App. 2011); Moore v. Berkley County School District, 326 S.C. 584, 486 S.E. 2d 9 (Ct. App. 1997). This duty is normally limited to actions an employee takes within his scope of employment. Degenhart v. Knights of Columbus, 309 S.C. 114, 117, 420 S.E2d 495, 496 (1992). However, in Degenhart, the Supreme Court held that an employer's duty can extend to an employee's acts outside of his scope of employment. Degenhart, 309 S.C. at 116, 420 S.E. 2d at 496.

Liability for employee acts outside of the scope of employment can be found if an employee intentionally harms another person when: (1) the employee is on the employer's property or is using the employer's personal property; (2) the employer knows or has reason to know that it has the ability to control the employee; and (3) the employer knows or should know of the necessity and opportunity for exercising such control. Berkley, 326 S.C. at 590, 486 S.E. 2d at 12 (citing Degenhart, 309 S.C. 114, 420 S.E. 2d 495); see also

Kase, 392 S.C. at 64, 707 S.E.2d at 459 (citing to and further solidifying the principles cited in Degenhart).

A government entity's liability is limited by the South Carolina Tort Claims Act, and a plaintiff must show that the government was grossly negligent in its conduct. See S.C. CODE ANN. § 15-78-60 (25).

RESPONDEAT SUPERIOR

Liability based on Respondeat Superior is a faultless ground for holding the third party employer liable. James v. Kelly Trucking Co., 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008). Unlike other causes of action such as negligent entrustment, negligent supervision or negligent hiring/retention, holding a employer liable in an action based on Respondeat Superior does not require a showing of the employer's tortious behavior. See id. Liability attaches to the employer because of the relationship between the tortfeasor and the employer.

Basis for Liability

1. An employer is liable for the tort of his servant if the tort is committed within the scope of the servant's employment. South Carolina courts often use a "motive" or "purpose" test by asking if the employee's motive/purpose was to benefit the employer at the time the tort was committed. Wade v. Berkley County, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998). Employers may also be liable for an employee's act that falls outside of his scope of employment. Degenhart v. Knights of Columbus, 309 S.C. 114, 116, 420 S.E2d 495, 496 (1992).

2. Generally an employer may not be held vicariously liable for the tort of an independent contractor, so the defining characteristics of the tortfeasor's relationship to the principle are paramount. This issue often boils down to the level of control the employer had over the actions of the employee. Anderson v. West, 270 S.C. 184, 188, 241 S.E.2d 551 (1978).

3. The Plaintiff has the burden of proving that a master-servant/agent-principle relationship exists. However, once a preliminary showing is made, the Defendant then bears the burden to show that the tortfeasor was actually an independent contractor and not under the control of the employer. Cooper v. Graham, 231 S.C. 404, 414-415, 98 S.E.2d 843 (1957).

Principle Protections

An employer facing liability on a theory of Respondeat Superior has a few unique protections:

1. The employer has the right of indemnity against the tortfeasor. See Addy v. Bolton, 257 S.C. 28, 34, 183 S.E.2d 708, 710 (1971)).

2. A release of the tortfeasor automatically releases the employee from liability. Brown v. Nat'l Oil Co., 233 S.C. 345, 347, 105 S.E.2d 81, 82 (1958). However, a recent case found that the employee must be dismissed *and* exonerated to release the employer. See Austin v. Specialty Transp. Services, Inc., 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004).

Recent Treatment

Some recent statements from the Courts on Respondeat Superior include:

- Kase v. Ebert, 392 S.C. 57, 392 S.C. 57 (2011):

  - "'If the servant is doing some act in furtherance of the master's business, he will be regarded as acting within the scope of his employment, although he may exceed his authority.' Jones v. Elbert, 211 S.C. 553, 558, 34 S.E.2d 796, 798–99 (1945). 'On the other hand, if the servant acts for some independent purpose of his own, wholly disconnected with the furtherance of his master's business, his conduct falls outside the scope of his employment.' Crittenden v. Thompson–Walker Co., 288 S.C. 112, 116, 341 S.E.2d 385, 387 (Ct.App.1986)."

  - "'If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; and this is so *no matter how short the time*, and the master is not liable for his acts during such time.' Lane v. Modern Music, Inc., 244 S.C. 299, 305, 136 S.E.2d 713, 716 (1964) (emphasis added)."

- Armstrong v. Food Lion, Inc., 371 S.C. 271, 639 S.E.2d 50 (2006):

  - "The doctrine of respondeat superior rests upon the relation of master and servant. Lane v. Modern Music, Inc., 244 S.C. 299, 136 S.E.2d 713 (1964). A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope of his employment. Id."

  - "An act is within the scope of a servant's employment where reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business. Id."

  - "The act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he

is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefore. Under these circumstances the servant alone is liable for the injuries inflicted. Id."

- "If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; this is so no matter how short the time, and the master is not liable for his acts during such time. Id."

- Austin v. Specialty Transp. Services, Inc., 358 S.C. 298, 594 S.E.2d 867 (Ct. App. 2004):

  - "Appellant maintains the trial court erred in awarding damages based on the actions of the driver because the driver was previously dismissed as a party to this action. Appellant cites two cases to support its argument- Kirby v. Gulf Ref. Co., 173 S.C. 224, 175 S.E. 535 (1934) and Collins v. Johnson, 245 S.C. 215, 139 S.E.2d 915 (1965). Appellant's reliance on these cases is misplaced. These cases only stand for the proposition that, when a principal and servant are sued together, a principal is not responsible for punitive damages under respondeat superior when the agent was exonerated from liability. In the instant case, the truck driver was dismissed as a party to the case, not exonerated from liability."

EFFECT OF AN ADMISSION OF VICARIOUS LIABILITY

The South Carolina Supreme Court has addressed whether an admission of vicarious liability negates the Plaintiff's claim for negligent entrustment, training, supervision, etc. In James v. Kelly Trucking Co., 377 S.C. 628, 661 S.E.2d 329 (2008), an insurer argued that public policy justified precluding the plaintiff's pursuit of negligent hiring, training, supervision, or entrustment claims against an employer when the employer admitted vicarious liability: "The argument goes that the admission of evidence which must be offered to prove a negligent hiring, training, supervision, or entrustment claim-evidence such as a prior driving record, an arrest record, or other records of past mishaps or misbehavior by the employee-will be highly prejudicial if combined with a stipulation by the employer that it will ultimately be vicariously liable for the employee's negligent acts." Id. at 632, 661 S.E.2d at 331.

The court noted that while a plaintiff may only recover once for an injury, it may assert many causes of action in a single lawsuit. Id. A plaintiff's available causes of action are typically only limited by its ability to demonstrate a *prima facie* case for each cause of action. Id. Thus, the court held that an employer's admission does not preclude a plaintiff's claims for negligent entrustment, training, supervision, etc. 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.