2013

STATE OF ALABAMA
TRANSPORTATION
COMPENDIUM OF LAW

Thomas L. Oliver
Carr Allison
100 Vestavia Parkway
Birmingham, AL 35216
Tel: (205) 822-2006
Email: toliver@carrallison.com
www.carrallison.com
A. Elements of Proof for the Derivative Negligence Claims of Respondeat Superior, Negligent Entrustment, Negligent Hiring or Retention, and Negligent Training or Supervision

In Alabama, there exist four distinct theories by which an employer might be held to have derivative or dependent liability for the conduct of an employee. The four theories of liability are respondeat superior, negligent entrustment, negligent hiring or retention, and negligent training or supervision. These theories are each based on derivative or dependent liability, which simply means that one element of imposing liability on the employer is a finding of culpability by the employee in causing an injury to a third party. In other words, if the employee is exonerated, the employer cannot be liable.

1. Respondeat Superior (Let the master answer)
   a. What are the elements necessary to establish liability under a theory of Respondeat Superior?

To establish a claim under a theory of respondeat superior liability, the plaintiff must establish the status of employer and employee. To do so, the plaintiff must demonstrate that (1) the employer reserved a right of control over the employee and (2) the employer maintained a right of selection over the employee. Ware v. Timmons, 954 So. 2d 545, 553-555 (Ala. 2006). The plaintiff must additionally show, by substantial evidence, that the employee's act was within the scope of the employee's employment. Jessup v. Shaddix, 154 So. 2d 39, 41 (1963) (citing Red's Elec. Co. v. Beasley, 129 So. 2d 676 (1961)). An act is within an employee's scope of employment if the act is done as part of the duties the employee was hired to perform or if the act confers a benefit on his employer. See Jessup, 154 So. 2d at 41. This requirement has been construed liberally in Alabama.

Under a respondeat superior theory, an employer is liable for the acts of an independent contractor if the “alleged employer has reserved the right of control over the means by which the work is done.” Ex parte Union Camp Corp., 816 So. 2d 1039, 1042 (Ala. 2001) (citing Lankford v. Gulf Lumber Co., 597 So. 2d 1340, 1343 (Ala. 1992)). Please note that the test is not the actual exercise of the control but the reserved right of control by the employer.

b. Examples

In Solmica of Gulf Coast, Inc. v. Braggs, an employee, driving under the influence and after hours, created a jury question whether he was in the scope of his employment when he stated that he was “probably” going to his office. 232 So. 2d 638, 641 (Ala. 1970). To exclude the conduct from the master’s liability,
the agent must be “impelled by motives that are wholly personal, or to gratify his own feelings or resentment,” and no action was made in promotion of the business of his employment. Id. at 642-643.

The Alabama Supreme Court also held that "the mere fact that [the employee] was acting against company policy is not … conclusive as to the question of [the employee's] status at the time of the accident." Williams v. Hughes Moving & Storage Co., 578 So. 2d 1281, 1283 (Ala. 1991). Williams involved an employee who was involved in a motor vehicle accident while using his employer's truck. Id. The employer's only defense was that the employee had violated the company's policy regarding use of the truck. Id. This Court held that the employee's violation of the company policy alone was not conclusive proof that the employee was acting outside the scope of his employment. Id.

c. Placard Liability

With regard to placard liability in Alabama, there is a presumption that the equipment is under the control and lease of the carrier whose "placards have not been removed from the equipment." Phillips v. J.H. Transport, Inc., 565 So. 2d 66, 71 (Ala. 1990). Alabama places the burden on the carrier to remove placards at the termination of the lease in order to remove the presumption of control over the equipment. See Phillips, 565 So. 2d at 70.

2. Negligent Entrustment

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

In Pryor v. Brown & Root USA, 674 So. 2d 45, 51 (Ala. 1995), the Supreme Court of Alabama set out the burden a plaintiff must satisfy in order to succeed on a claim for negligent entrustment. The elements for a cause of action for negligent entrustment are: “(1) an entrustment; (2) to an incompetent; (3) with knowledge that he [or she] is incompetent; (4) proximate cause; and (5) damages.” Id. (quoting Mason v. New, 475 So. 2d 854, 856 (Ala. 1985)). Finally, the court paraphrased the most important element of the claim by stating, “the doctrine of negligent entrustment is founded on the primary negligence of the entrustor in supplying a motor vehicle to an incompetent driver, with the manifestations of the incompetence of the driver as a basic requirement of the negligent entrustment action.” Id.
b. Examples

The Alabama Supreme Court affirmed a judgment against a non-commercial truck owner for negligent entrustment after the plaintiff was injured in a motor vehicle accident involving owner’s brother-in-law. *Edwards v. Valentine*, 926 So. 2d 315, 319-331 (Ala. 2005). The owner knew that the brother in law was unlicensed, had been convicted of a prior DUI charge, had a current drinking problem, and was specifically forbidden from using the owner’s truck. *Id.* at 321. However, the brother in law had driven the truck in the past and the owner left the truck available to his sister, wife of the incompetent driver, for emergencies. *Id.* at 320. The Alabama Supreme Court found that this evidence supported the verdict against the owner of the truck for negligent entrustment. *Id.* at 331.

Additionally, in *Pryor*, the plaintiff sued the defendant for negligently entrusting one of its vehicles to an employee that struck the plaintiff. 674 So. 2d at 46. After examining the evidence, the Court concluded that the employee’s “prior driving record — two speeding tickets and a suspended prosecution of a DUI charge over a 10 year period — is not sufficient to support a claim of negligent entrustment” against the defendant. *Id.* at 52. The court held that the plaintiff “failed to present substantial evidence that [the employee] was an incompetent driver or that [the defendant] had any knowledge that would indicate [the employee] was incompetent.” *Id.*

3. Negligent Hiring and Retention

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

Claims for negligent hiring or retention are often considered in conjunction with claims of negligent entrustment and negligent training or supervision, as the claims share the common elements of incompetency on the part of the employee and knowledge, either actual or presumed, of the employee’s incompetence on the part of the employer. Typically, all of these allegations will be alleged simultaneously in a plaintiff’s complaint. As such, Alabama courts will usually address these allegations collectively.

The Alabama Supreme Court explained the elements for employer liability under the theory of negligent hiring, training or supervision as follows:

[I]n the master and servant relationship, the master is held responsible for the servant’s incompetency when notice or
knowledge, either actual or presumed, of the incompetency has been brought to the master. For the master to be held liable for the servant’s incompetency, it must be affirmatively shown that had the master exercised due and proper diligence, the master would have learned of the incompetency.

Mardis v. Robbins Tire & Rubber Co., 669 So. 2d 885, 889 (Ala. 1995) (citing Big B. v. Cottingham, 634 So. 2d 999, 1003 (Ala. 1993)). The element of knowledge required in claims of negligent hiring and retention mirrors the element of knowledge required in claims of negligent entrustment, that is, the employer’s knowledge of the employee’s incompetence. For negligent hiring or retention claims, the employer must have known or should have known of the incompetence on the employee’s date of hire or retention.

Notably, evidence of specific acts of alleged incompetency is not admissible to prove that the employee was negligent in doing the act complained of, but is admissible to prove that the employer had notice of the employee's incompetency. Cottingham, 634 So. 2d at 999.

b. Examples

A failure to present evidence of the employer’s knowledge of the employee’s incompetence justified an order of summary judgment for the negligent hiring and supervision claims. Stephens v. City of Butler, 509 F. Supp. 2d 1098, (S.D. Ala. 2007).

4. **Negligent Training and Supervision**

a. What are the elements necessary to establish liability under a theory of negligent training or supervision?

Claims for negligent training or supervision again share the common elements of incompetency on the part of the employee and knowledge of the employee’s incompetence on the part of the employer. The elements of negligent supervision were addressed in Southland Bank v. A & A Drywall Supply Co., as follows:
In the master and servant relationship, the master is held responsible for his servant's incompetency when notice or knowledge, either actual or presumed, of such unfitness has been brought to him. Liability depends upon its being established by affirmative proof that such incompetency was actually known by the master or that, had he exercised due and proper diligence, he would have learned that which would charge him in the law with such knowledge.

21 So. 3d 1196, 1214-1215 (Ala. 2008) (quoting Cottingham, 634 So. 2d at 1003). The party alleging negligent supervision or training must additionally prove the underlying charges against the employee. Stevenson v. Precision Standard, Inc., 762 So. 2d 820 (Ala. 1999).

b. Examples

An employee of the defendant allegedly used improper procedures during the repossession of a vehicle from the Plaintiff. Zielke v. AmSouth Bank, N.A., 703 So. 2d 354, 359 (Ala. Civ. App. 1996). The Plaintiff brought suit alleging, among other counts, negligent training. Id. After notice of the use of the improper procedure was provided to the defendant employer, no evidence was presented to demonstrate that the procedure was repeated. Id. Therefore, the Court held that the plaintiff’s negligent training claim was not proper. Id.

A. Defenses

1. Admission of Agency

The Alabama Supreme Court has not addressed the issue concerning whether the admission of agency by an employer will subsume the other derivative claims of liability against the employer, namely negligent entrustment, hiring, supervision, training, and retention. However, the United States District Court for the Middle District of Alabama has analyzed Alabama case law and determined that Alabama would follow the minority view and allow the plaintiff to maintain derivative claims against an employer. Poplin v. Bestway Express, 286 F. Supp. 2d 1316, 1318-1320 (D. Ala. 2003).

The District Court, after analyzing both the majority and minority approach, found that “available case law indicates that the Alabama Supreme Court would hold the torts of negligent entrustment, hiring, training, supervision, and retention as distinct from a negligence claim based on the theory of respondeat superior when the defendant admits liability.” Id. at 1319 (citing Bruck v. Jim Walter Corp., 470 So. 2d 1141, 1142 (Ala. 1985)). The federal court stated that “the tort of negligent
entrustment does not arise out of the relationship between the parties but rather is an independent tort resting upon the negligence of the entrustor in entrusting the vehicle to an incompetent driver." Id. The District Court further offered to bifurcate the trial on the separate issues if the evidence in support of the negligent entrustment claim is prejudicial to the negligence claim. Id.

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 including contributory negligence, statute of limitations, statute of repose, assumption of the risk, failure to mitigate damages, superseding and intervening causes, sudden emergency, laches, waiver, and estoppel.

Notably, in Alabama, contributory negligence is an affirmative and complete defense to a negligence claim. Serio v. Merrell, Inc., 941 So. 2d 960, 964 (Ala. 2006) (citing Knight v. Alabama Power Co., 580 So. 2d 576 (Ala. 1991); Ridgeway v. CSX Transp., Inc., 723 So. 2d 600, 606 (Ala. 1998)). In order to establish contributory negligence, the defendant bears the burden of proving that the plaintiff “1) had knowledge of the dangerous condition; 2) had an appreciation of the danger under the surrounding circumstances; and 3) failed to exercise reasonable care, by placing himself in the way of danger.” Id.

Under this theory if the jury finds that a plaintiff was even 1% negligent, they should not award any damages. However, many juries in Alabama find this rule of law to be harsh. As such, the typical jury will “discount” the award to the Plaintiff in light of the corresponding negligence. This usually is signified by the jury reducing the award to correspond to the damages owed in light of the Plaintiff’s own negligence without assigning any actual negligence to Plaintiff’s own actions.

B. Punitive Damages

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

In Alabama, punitive damages are not available under negligence theories such as negligent hiring, training, and retention. See CP & B Enterprises v. Mellert, 762 So. 2d 356, 362 (Ala. 2000). In order to justify an award of punitive damages, plaintiffs must satisfy the elements required for the corresponding claims of negligence, plus the additional elements required to prove wantonness for those same claims. To substantiate an award of punitive damages, the Alabama Code requires that the employer either: (i) knew or should have known of the unfitness of the employee and
employed him or continued to employ him, without proper instruction, with a disregard of the rights or safety of others; or (ii) authorized the wrongful conduct of the employee; or (iii) ratified the wrongful conduct; except where the plaintiff knowingly participated with the defendant to commit fraud or wrongful conduct with full knowledge of the import of his act. See Code of Ala. § 6-11-27 (1975)

The Alabama Supreme Court considered the tort of wanton training and supervision in Cottingham, referenced above. 634 So. 2d at 1004. The court noted “[w]antonness is defined as . . . conduct which is carried on with a reckless or conscious disregard of the rights or safety of others.” Id. (emphasis added). That interpretation is supported by the following definition of wantonness:

Wantonness is the conscious doing of some act or omission of some duty under knowledge of existing conditions and conscious that from the doing of such act or omission of such duty an injury will likely or probably result. Before a party can be said to be guilty of wanton conduct it must be shown that with reckless indifference to the consequences he either consciously and intentionally did some wrongful act or consciously omitted some known duty which produced the injury.

Alabama Pattern Jury Instructions: Civil (APJI) 29.00 (2d ed. 1993). Moreover, the Plaintiff must submit “substantial evidence” of wantonness to have the issue submitted to a jury. See Scott v. Villages, 723 So. 2d 642, 543 (Ala. 1998).

2. Examples

Alabama courts have found the following factual scenarios present substantial evidence to support the presentation of a wanton claim to the jury:

A claim for wantonness was presented to the jury when the Defendant was exceeding the speed limit, smelled of alcohol, and did not have his lights on when he rear-ended the plaintiffs. See Prince v. Kennemer, 291 So. 2d 152, 153-154 ( Ala. 1974).

Another driver, after hearing a gunshot, ducked below the dashboard, pressed on the accelerator, and knowingly entered an intersection against a red light presented an issue of fact as to whether the driver had acted with reckless disregard for the rights and safety of others, thus precluding summary judgment of the wantonness claim. See Berry v. Fife, 590 So. 2d 884 (Ala. 1991).
A jury question on a wantonness count was found where evidence was presented that the driver was driving much faster than the posted speed limit, not paying attention to the road, and failed to slow his speed despite the presence of construction signs, with prior knowledge that a restaurant into which patrons would likely be turning was on the other side of the hill he was cresting. See *Hicks v. Dunn*, 819 So. 2d 22 (Ala. 2001).

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.