STATE OF MISSISSIPPI TRANSPORTATION COMPENDIUM OF LAW

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

In Mississippi, there exist four distinct theories by which an employer might be held to have derivative or dependent liability for the conduct of an employee. Derivative or dependent liability 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 driver is exonerated, the carrier cannot be liable.

1. Respondeat Superior (Let the master answer)

Since the mid-19th century, the Mississippi Supreme Court has recognized the doctrine of *respondeat superior* which imputes an employee's negligence to the employer. However, for just as long, the Court has limited this vicarious liability to acts of the employee performed within the scope of the authority conferred. Commercial Bank v. Hearn, 923 So. 2d 202, 204 (Miss. 2006).

The Mississippi Supreme Court has never decided a case on placard liability, but the Fifth Circuit Court of Appeals (the circuit in which Mississippi is contained) has decided several cases on the issue.

Prior to 1996, if the ICC numbers of a carrier were present on the truck at the time of the accident, even if the lease had been terminated, the statutory employment doctrine was applicable and the carrier was liable. In *Jackson v. O'Shields*, 101 F. 3d 1083 (5th Cir. 1996) the Fifth Circuit Court of Appeals held a lease agreement had been terminated by the carrier because of the owner's repeated hauling of unauthorized loads and the fact that the carrier notified the owner that the lease was terminated and to remove the carrier's placards. The Court was unwilling to find liability against the carrier when the carrier had terminated the lease and made a diligent effort to have the owner remove their ICC numbers. The court essentially held that in order to be held liable under the statutory employer doctrine, there must exist a valid lease between the parties or, without a lease, the carrier sought to be held liable must have had an interest in the load being transported at the time of the accident.

2. Negligent Entrustment

Mississippi recognizes that under the doctrine of negligent entrustment, one who supplies directly or through a third person a chattel for use 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. *Sligh v. First National Bank of Holmes County*, 735 So.2d 963, 969 (Miss. 1999).

The ultimate purpose of a claim of negligent entrustment under Mississippi law is to hold an employer, who was negligent in allowing an incompetent employee to use its motor vehicle, liable for the negligent acts committed by that employee. *Hood v. Dealers Transport*, 459 F.Supp. 684, 685-686 (N.D.Miss. 1978)

3. Negligent Retention/Hiring

In Mississippi, an employer has the duty to exercise reasonable care in hiring its employees and will be charged with an employee's negligence and be liable for resulting injuries if the employer knew or should have known of the employee's incompetence. *Jones v.* Toy, 476 So.2d 30, 31 (Miss. 1985); *Thacer v. Brennan*, 657 F.Supp.6, 10 (S.D.Miss. 1986).

Several Mississippi federal district courts have held that this duty would likely extend to the training and retention of an employee. This means that under Mississippi law, an employer may be liable for the negligent acts of an employee it knew to be incompetent at the time he was hired or because of events that transpire during the course of his employment, or because it knows that the employee was improperly trained.

4. Negligent Supervision

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless: (a) in giving improper or ambiguous orders or in failing to make proper regulations; or (b) in the employment of improper persons or instrumentalities in work involving risk or harm to others; (c) in the supervision of the activity; or (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control. *Tillman v. Singletary*, 865 So.2d 350, 353 (Miss.2003).

B. Defenses

1. Admission of Agency

The Mississippi Supreme Court has never decided a case addressing the effect of an employer admitting the employment relationship on the independent claims of negligent entrustment, negligent retention/hiring and/or negligent supervision. Several federal district court decisions, however, have concluded that Mississippi would adopt 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. *Hood v. Dealers Transport*, 459 F.Supp. 684 (N.D.Miss. 1978); *Cole v. Alton*, 567 F.Supp. 1084 (N.D. 1983); *Harris v. MVT Services*, 2007 U.S.Dist.LEXIS 65709 (S.D.Miss. 2007).

In *Harris*, which was a case handled by this firm, the district court explained the rationale for such a holding, saying, "in a case such as the one *sub judice* in which the employer acknowledges liability for the acts of its employee, a plaintiff does not have to depend upon the negligent entrustment doctrine to recover from the employer for his injuries as liability of the employer is already established if the plaintiff can prove negligence of the employee. The need to show that the employer was negligent in having entrusted a motor vehicle to a driver it knew to be incompetent is obviated by the fact that the employer has admitted liability for any acts taken by that driver." *Id.* at *4-5(citing *Davis v. Rocor International*, 2001 U.S.Dist.LEXIS 26216, *19-20 (S.D.Miss.2001)).

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

In Mississippi, there is no right to punitive damages. *Doe ex rel. Doe v. Salvation Army*, 835 So.2d 76, 79 (Miss. 2003). Only if certain statutory criteria are met does the court undertake a determination of whether the issue of punitive damages should be submitted to the jury. *Id.* Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant, against whom punitive damages are sought, acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud. *Id.*; Miss.Code Ann. Section 11-1-65.

When deciding whether to submit the issue of punitive damages to a trier of fact, the trial court looks at the totality of the circumstances to determine if a reasonable, hypothetical trier of fact could find either malice or gross neglect/reckless disregard. *Doe v. Salvation Army,* 835 So.2d at 81. The facts must be highly unusual as punitive damages are only awarded in extreme cases. *Gamble ex rel. Gamble v. Dollar General Corp*., 852 So.2d 5, 15 (Miss. 2003).

It is also rather clearly established that the right to punitive damages cannot be established by an employer's alleged past violations of safety regulations; instead the claim for punitive damages must either stand or fall on the conduct of the employee at the time of the alleged negligent act. *Hood v. Dealers Transport*, 459 F.Supp. 684 (N.D.Miss. 1978); *Cole v. Alton*, 567 F.Supp. 1084 (N.D. 1983); *Choctaw Maid Farms v. Hailey*, 822 So.2d 911 (Miss. 2002).

In *Hailey*, the plaintiff sought to recover punitive damages on the grounds that the defendant trucking company failed to properly train their driver, that the driver's logs were not up to date at the time of the accident and because the driver had difficulty

speaking the English language. The Mississippi Supreme affirmed the trial court's refusal to grant a punitive damage instruction, standing firm in their previous holdings that motor vehicle accidents rarely, if ever, warrant punitive damages. *Hailey*, 822 So.2d at 923-924.

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