STATE OF NEVADA TRANSPORTATION COMPENDIUM OF LAW

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A. Elements of Proof for the Derivative Negligence Claims of Respondeat Superior, Negligent Entrustment, Negligent Hiring or Retention, and Negligent Training or Supervision

Nevada is like many other jurisdictions in that there are four separate methods by which to impose vicarious liability against an employer for the actions of an employee. These theories are respondeat superior, negligent entrustment, negligent hiring or retention, and negligent training or supervision. If the plaintiff fails to prove any of these four theories, the employer is not liable. Similarly, if the employee is not liable, the same is true for the employer.

1.Respondeat Superior

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

The Supreme Court of Nevada has formulated a specific test to determine when an employee's actions were within the "course and scope of employment."

An employer may be held vicariously liable for the actions of an employee who is under the control of the employer and acting within the scope of employment. *Molino v. Asher*, 96 Nev. 817, 818, 618 P.2d 878, 879 (1980). Generally, an employee who is traveling to or from work is outside the scope of his or her employment unless the employee is performing an errand for the employer or otherwise conferring a benefit upon the employer. *Id*.; *National Convenience Stores v. Fantauzzi*, 94 Nev. 655, 658-59, 584 P.2d 689, 691-92 (1978); *see also Burnett v. C.B.A. Security Service, Inc.*, 107 Nev. 787, 820 P.2d 750 (1991) (employer was not liable for injuries caused by employee when employee's actions were not furthering the business interests of the employer).

Evans v. Southwest Gas, 108 Nev. 1002, 1006, 842 P.2d 719, 722 (1992). The court has also stated "[u]nder the modern rationale for respondeat superior, the test for determining whether an employer is vicariously liable for the tortious conduct of his employee is closely related to the test applied in workers' compensation cases for determining whether an injury arose out of or in the course of employment." *Wood v. Safeway, Inc.*, 121 Nev. 724, 740, 121 P.3d 1026, 1037 (2005).

The determination as to whether an employee was within the "course and scope" of employment is a fact intensive question. Generally "whether an employee was acting within the scope of his or her employment for the purposes of respondeat superior liability is a question to be determined by the trier of fact. However, where undisputed evidence exists concerning

the employee's status at the time of the tortious act, the issue may be resolved as a matter of law." *Evans*, 108 Nev. at 1006, 842 P.2d at 721.

b. Intentional Acts

An employer may not be liable for the actions of an employee if the employee engaged in certain intentional acts. The determination of whether an employer is liable for the intentional conduct of an employee is governed by statute. Nev. Rev. Stat. § 41.475 reads, in its entirety:

1. An employer is not liable for harm or injury caused by the intentional conduct of an employee if the conduct of the employee:

(a) Was a truly independent venture of the employee;

(b) Was not committed in the course of the very task assigned to the employee; and

(c) Was not reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his employment.

For the purposes of this subsection, conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury.

2. Nothing in this section imposes strict liability on an employer for any unforeseeable intentional act of his employee.

3. For the purposes of this section:

(a) "Employee" means any person who is employed by an employer, including, without limitation, any present or former officer or employee, immune contractor, an employee of a university school for profoundly gifted pupils described in Chapter 392A of NRS or a member of a board or commission or Legislator in this State.

(b) "Employer" means any public or private employer in this State, including, without limitation, the State of Nevada, a university school for profoundly gifted pupils described in Chapter 392A of NRS, any agency of this State and any political subdivision of the State.

(c) "Immune contractor" has the meaning ascribed to it in subsection 3 of NRS 41.0307.

(d) "Officer" has the meaning ascribed to it in subsection 4 of NRS 41.0307.

The question presented to the court "is not whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the agent which were authorized by the principal." *Nevada Dept.*

of Human Resources, Div. of Mental Hygiene and Mental Retardation v. Jimenez, 113 Nev. 356, 368, 935 P.2d 274 (1997).
Nevada has several locally famous opinions addressing this scenario. *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 469 P.2d 399 (1970) a casino was held liable for damages arising from a blackjack dealer striking a player at his table in response to offensive remarks. As noted in a subsequent decision remarking on that case:

> This court fails to discern any principled legal distinction between a battery claim against a casino whose blackjack dealer slugs a patron and the same claim against a school district whose teacher fondles a student. In both cases the plaintiff was on the defendant's premises for the purpose of enjoying the defendant's services. In neither case can it reasonably be argued that the employee's duties included acts of common law battery.

Knackert v. Estes, 926 F. Supp. 979, 989 (D. Nev. 1996). Employing this logic, *Knackert* held a school district liable for the molestation of students by a teacher.

This decision is consistent with other Nevada cases imposing vicarious liability upon employers for similar acts. For instance, in *Jimenez* the court found that the sexual assaults, committed upon children placed in a group home by the home's supervisor, were foreseeable. 113 Nev. at 361. Moreover, these acts were not a substantial deviation from the employee's duties "for purely personal reasons … because the sexual assaults were committed during a series of acts authorized by the State." *Id*. In *Ray v. Value Behavioral Health, Inc*., the court found that a psychologist's sexual harassment of his client exposed the counseling firm to liability for its employee's acts. 967 F. Supp. 417 (D. Nev. 1997). The court concluded that the psychologist's abuse of his power was foreseeable, and that the acts were committed in the course of a series of acts authorized by the principal. *Id*. at 421-22.

This is not to say employers are always held liable in Nevada. In *J. C. Penney Co. v. Gravelle*, 62 Nev. 439; 155 P.2d 477 (1945), the employer was not vicariously liable when a store clerk assaulted a third-party bystander because the bystander attempted to prevent the clerk from catching a shoplifter whom the clerk had pursued outside of the store. The bystander followed the employee back to the store, and the two continued to argue, resulting in an ensuing altercation where the bystander was injured. The court determined the employer was not responsible because after the clerk had returned to the store and turned over the merchandise, his actions in assaulting the bystander no longer concerned his employment. It reasoned that based on the circumstances, the assault was "an independent adventure" for the employee's own purposes and was not

taken on the employer's behalf or arising from a sense of duty to the employer.

Likewise, in *Wood v. Safeway, Inc*., 121 Nev. 724, 121 P.3d 1026 (2005), a janitor for an independent contractor hired to clean a grocery store sexually assaulted a clerk at a Safeway. The court noted the "sexual assault was also not committed in the course of the tasks assigned to [the employee] as a janitor. [The] sexual assault of Doe was an independent venture outside the course and scope of his employment."

2.Negligent Entrustment

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

Under doctrine of "Negligent Entrustment," a plaintiff must prove that: 1) entrustment actually occurred; 2) the entrustment was negligent. *Zugel v. Miller*, 100 Nev. 525, 688 P.2d 310 (1984). For example, the person entrusting the vehicle knew or should have known that the person being entrusted, because of his youth, inexperience or otherwise, is incompetent to operate a vehicle. *Id.* A parent who entrusts his child with motor vehicle is liable even when parent expressly instructs child not to use vehicle on public roadway. *Id.* Parent or guardian having custody and control of minor child is liable for the willful misconduct of their minor up to $10,000. Nev. Rev. Stat. § 41.470; *Roddick v. Plank*, 608 F. Supp. 229 (D. Nev. 1985).

3. Negligent Hiring, Training, Supervision and/or Retention

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

"The tort of negligent hiring imposes a general duty on the employer to conduct a reasonable background check on a potential employee to ensure that the employee is fit for the position. An employer breaches this duty when it hires an employee even though the employer knew, or should have known, of that employee's dangerous propensities." *Hall v. SSF, Inc*., 112 Nev. 1384, 1392, 930 P.2d 94, 99 (1996) (internal citations omitted).

Once an employee is hired, the employer still owes a duty to ensure the employee is still proper for the position. "In Nevada, a proprietor owes a general duty to use reasonable care to keep the premises in a reasonably safe condition for use. *Moody v. Manny's Auto Repair*, 110 Nev. 320, 331-33, 871 P.2d 935, 942-43 (1994). As is the case in hiring an employee, the employer has a duty to use reasonable care in the training, supervision,

and retention of his or her employees to make sure that the employees are fit for their positions." *Hall*, 112 Nev. at 1393, 930 P.2d at 100.

A. Defenses

1. Admission of Agency

The Supreme Court of Nevada has not spoken as to whether an admission by the employer that the employee was within the course and scope of employment will then eliminate claims for negligent hiring, training, supervision and/or retention. The United States District Court for the District of Nevada has predicted, in an unpublished order, that Nevada would adopt the majority position, extinguishing these claims if course and scope is conceded. *Cruz v. Durbin*, 2011 WL 1792765 (D. Nev. 2011).

2. Traditional Tort Defenses

Nevada still permits a number of traditional tort defenses, similar to other jurisdictions, such as statute of limitations, statute of repose, assumption of the risk, failure to mitigate damages, superseding and intervening causes, sudden emergency, laches, waiver, and estoppel. Nev. Rev. Stat. § 41.141 is Nevada's codification of a modified comparative negligence system. A plaintiff may not recover if she is more than 51% responsible for the injurious event. If comparative negligence is not assessed to the plaintiff, however, joint and several liability is imposed upon the defendants.

B. Punitive Damages

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

The issue of punitive damages against an employer was most recently addressed in detail by *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008). Punitive damages against employers for the acts of employees are governed by Nev. Rev. Stat. § 42.007, which states in its entirety:

1. Except as otherwise provided in subsection 2, in an action for the breach of an obligation in which exemplary or punitive damages are sought pursuant to subsection 1 of NRS 42.005 from an employer for the wrongful act of his employee, the employer is not liable for the exemplary or punitive damages unless:

(a) The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed him with a conscious disregard of the rights or safety of others;

(b) The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or

(c) The employer is personally guilty of oppression, fraud or malice, express or implied.

If the employer is a corporation, the employer is not liable for exemplary or punitive damages unless the elements of paragraph (a), (b) or (c) are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation.

2. The limitations on liability set forth in subsection 1 do not apply to an action brought against an insurer who acts in bad faith regarding its obligations to provide insurance coverage.

Interpreting this statute, the Supreme Court noted

Under NRS 42.001, "'[m]alice, express or implied'" means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others." Similarly, "'[o]ppression' means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person." Both definitions utilize conscious disregard of a person's rights as a common mental element, which in turn is defined as "the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences."

124 Nev. at 739, 192 P.3d at 252-53. Thus the question as to whether punitive damages are available focuses on whether the employer consciously disregarded the plaintiff's rights, which the court determined Countrywide had done. Punitive damages are not, however, automatically available in all cases. "Before punitive damages may be recovered, NRS 42.005(1) requires clear and convincing evidence of either implied malice or oppression. Once the district court makes a threshold determination that a defendant's conduct is subject to this form of civil punishment, the decision to award punitive damages rests entirely within the jury's discretion." *Id*.

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