STATE OF ILLINOIS TRANSPORTATION COMPENDIUM OF LAW

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A. Negligent Entrustment, Hiring, Retention and Supervision in Trucking Cases: Illinois

1. Respondeat Superior (Let the Master Answer)

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

In order to establish liability under this theory, two elements must exist. First, there must be a master-servant relationship and, second, the activity of the agent must be within the scope of the employment. Greene v. Rogers, 147 Ill. App. 3d 1009, 498 N.E.2d 867 (3d Dist. 1986).

There are exceptions to the "scope of employment" element. Conduct that is performed solely for the benefit of the employee is not considered to be within the scope of employment, such as acts of sexual misconduct. Helfers-Beitz v. Degelman, 406 Ill. App. 3d 264, 270 ,939 N.E.2d 1087, 1093 (3d Dist. 2010).

b. Examples and other Issues

It should be noted, in cases involving commercial transportation, a quasi type of respondeat superior, in the form vicariously liability, is almost always going to apply as Illinois recognizes what is commonly known as placard/logo liability.

This vicarious liability stems primarily from the I.C.C. and three Illinois cases. This case law was nicely summarized by the later of these three cases, Fulton v. Terra Cotta Truck Service, Inc., 266 Ill.App.3d 609, 639 N.E.2d 1380 (1st Dist. 1994), which in citing the other two cases stated, "the Supreme Court held a trucking company vicariously liable for a driver's negligence where that driver was operating the vehicle for his or her own use, but the trucking company's name and permit number had not been removed from the vehicle or concealed pursuant to ICC regulations." Fulton, at 613, citing, Schedler v. Rowley Interstate Transportation Co., Inc., 68 Ill.2d 7, 368 N.E.2d 1287 (1977) and Kreider Truck Service, Inc. v. Augustine, 76 Ill.2d 535, 394 N.E.2d 1179 (1979). In lessor/lessee matters to establish placard/logo liability, two conditions must be met: "there must be a current lessee-lessor relationship involving the equipment, and the equipment must be operating under authority of the lessee's Ill. CC license." Id. at 1383. Only one exception, exists as outlined in the Illinois Administrative Code, which explains "the exclusive possession and control does not apply to a lessee when the lessee subleases the equipment to another carrier, since the latter [then] has the obligation to supervise and control the equipment and is bound by the general requirement." Reitz v. Gordon, 1999 WL 167144, *3 (N.D. Ill. 1999).

In Sperl, v. C.H. Robinson, Inc., 408 Ill. App. 3d 1051; 946 N.E.2d 463, 349 Ill. Dec. 269 (3d Dist. 2011); petition for leave denied 955 N.E.2d 480; 2011 Ill.

LEXIS 1450; 353 Ill. Dec. 13. On March 30, 2011, the Illinois Appellate Court held that a principal-agent relationship existed between a broker and a commercial motor vehicle operator. In reaching this determination, the Court considered several factors. The court's "cardinal consideration" is the right to control the manner of work performance, regardless of whether that right was actually exercised. Another significant factor is the nature of work performed in relation to the general business of the employer. Other factors to be considered are: 1) the right to discharge, 2) the method of payment, 3) the provision of necessary tools, materials, and equipment, 4) whether taxes are deducted from the payment, and 5) the level of skill required. *Id.* at 1057-58. *Sperl* has been the subject of much discussion and should be carefully followed.

2. Negligent Entrustment

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

A person may be liable for negligent entrustment of a vehicle where that person entrusts the vehicle to one whose incompetency, inexperience, or recklessness is known or should have been known by the entrustor of the vehicle. Rainey by & Through Rainey v. Pitera, 273 Ill. App. 3d 234, 237, 651 N.E.2d 747 (1st Dist. 1995) *citing*, Bishop v. Morich, 250 Ill. App. 3d 366, 369, 621 N.E.2d 43 (1st Dist. 1993); Johnson v. Ortiz, 244 Ill. App. 3d 384, 387, 614 N.E.2d 408 (1st Dist. 1993). Entrustment can be shown through the giving of express or implied permission. Rainey, 273 Ill. App. 3d at 237, *citing* Bishop, 250 Ill. App. 3d at 369; and Kosrow v. Acker, 188 Ill. App. 3d 778, 784, 544 N.E.2d 804 (2d Dist. 1989).

Implied permission exists when a course of conduct or relationship between the parties includes a mutual acquiescence or lack of objection under circumstances signifying permission. Bishop, 250 Ill. App. 3d at 369; Johnson, 244 Ill. App. 3d at 387.

b. Examples and other Issues

In Pelczynski v. J.W. Peters & Sons, Inc., 178 Ill. App. 3d 882, 533 N.E.2d 1137 (2d Dist. 1989), the defendant company had rented a car for an employee with a poor driving record. The defendant instructed the employee to use the car only for travel to his jobsite and not for personal business, but the employee had an accident while violating this directive. The trial court granted summary judgment in favor of the defendant, holding that the employee was acting outside the scope of his permission to use the car. The Second District reversed, stating, "Whether [the employee] was acting within the scope of defendant's consent is not an element of proof in a negligent entrustment case." Pelczynski, 178 Ill. App. 3d at 886. The Court held, that an entrustor is liable for permitting a poor driver to use

the entrustor's vehicle notwithstanding any directions given to the incompetent driver. Id.

Two cases cited by the Pelczynski court which involve negligent entrustment and respondeat superior are Neff v. Davenport Packing Co., 131 Ill. App. 2d 791, 268 N.E.2d 574 (3d Dist. 1971) and Rosenberg v. Packerland Packing Co., 55 Ill. App. 3d 959, 370 N.E.2d 1235, (1977).[1] In Neff, the court was presented with the issue of whether a defendant who admits liability under a respondeat superior theory can also be found liable under negligent entrustment. The court concluded that the defendant could not be held liable under negligent entrustment because "issues relating to negligent entrustment become irrelevant when the party so charged has admitted his responsibility for the conduct of the negligent actor." Neff, 131 Ill. App. 2d at 792, 268 N.E.2d at 575.

The Rosenberg case involved a question of whether defendant negligently entrusted a truck to a driver that it knew or should have known was mentally unstable. While the court held that the defendant could not be held liable under respondeat superior for intentional infliction of emotional distress, defendant could be liable for entrustment of the vehicle to an incompetent driver. Rosenberg, 55 Ill. App. 3d at 965, 370 N.E.2d at 1238-39.

Finally, the decision in Bates v. Doria, 150 Ill. App. 3d 1025, 502 N.E.2d 459 (2d Dist. 1986), bears noting, for it held:

> Our supreme court long ago recognized that an employer's direct liability for negligent hiring and retention[2] differs from his liability by way of respondeat superior and it has been held that the former action may be maintained even if the employee's conduct falls outside the scope of employment.
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> Bates, 150 Ill. App. 3d at 1031, 502 N.E.2d at 458-59.

3. Negligent Retention/Hiring

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

An employer does have a duty to refrain from hiring or retaining an employee who is a threat to third persons to whom the employee is exposed Bates v. Doria, 150 Ill. App. 3d 1025, 502 N.E.2d 454 (2nd Dist. 1986), *citing*, Pascoe v. Meadowmoor Dairies (1963), 41 Ill. App. 2d 52, 56, 190 N.E.2d 156 (1st Dist. 1963). Such a cause of action arises in favor of a person who is injured as the

[1] Neff, Rosenberg, and their progeny are cited in more detail in the Defenses section below.

[2] Please note, for purposes of these types of cases, Illinois Courts have found that the analysis for Negligent Entrustment, Negligent Hiring/Retention and Negligent Supervision is the same as to all three theories. *See generally*, Adolophous Gant v. L.U. Transport, Inc., 331 Ill.App.3d 924, 770 N.E.2d 1155 (1st Dist. 2002).

proximate result of the employer's negligence in hiring or retaining the employee. *Id.*

An action for negligent hiring or retention of an employee requires the plaintiff to plead and prove: (1) that the employer knew or should have known that the employee had a particular unfitness for the position so as to create a danger of harm to third persons; (2) that such particular unfitness was known or should have been known at the time of the employee's hiring or retention; and (3) that this particular unfitness **proximately caused** the plaintiff's injury. (Emphasis Added) Van Horne v. Muller, 185 Ill. 2d 299, 311, 705 N.E.2d 898 (1998), *citing,* Mueller v. Community Consolidated School District 54, 287 Ill. App. 3d 337, 341-42, 678 N.E.2d 660 (1st Dist. 1997); Fallon v. Indian Trail School, Addison Township School District No. 4, 148 Ill. App. 3d 931, 935, 500 N.E.2d 101 (2nd Dist. 1986).

b. Examples and other Issues

An employer's direct liability for negligent hiring and retention is distinct from its respondeat superior liability for the acts of its employees. Van Horne, 185 Ill. 2d at 311, *citing*, Bates v. Doria, 150 Ill. App. 3d 1025, 1031, 502 N.E.2d 454 (2nd Dist. 1986). Under a theory of negligent hiring or retention, the proximate cause of the plaintiff's injury is the employer's negligence in hiring or retaining the employee, rather than the employee's wrongful act. Young v. Lemons, 266 Ill. App. 3d 49, 52, 639 N.E.2d 610 (1st Dist. 1994)

In order to withstand a defendant's motion for summary judgment, plaintiffs are required to show that any negligence of defendants in hiring or retaining the employee was the proximate cause of his/her injuries. Bates v. Doria, 150 Ill. App. 3d 1025, 502 N.E.2d 454 (2nd Dist. 1986).

4. Negligent Supervision

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

An action for negligent supervision of an employee requires the plaintiff to plead and prove that: (1) an employer had a duty to supervise its employees, (2) the employer negligently supervised an employee, and (3) such negligence proximately caused the plaintiff's injuries. Mueller v. Community Consolidated School District 54, 287 Ill. App. 3d 347, 342-43, 678 N.E.2d 660 (1st Dist. 1997), *citing,* Niven v. Siqueira, 109 Ill. 2d 357, 361, 487 N.E.2d 937 (1985) (plaintiff alleged hospital negligent in supervision of physician); State Farm Fire & Casualty Co. v. Mann, 172 Ill. App. 3d 86, 92, 526 N.E.2d 389, (1st Dist. 1988) (plaintiff alleged parent negligent in supervision of child); Normoyle-Berg & Associates, Inc. v. Village of Deer Creek, 39 Ill. App. 3d 744, 744-45, 350 N.E.2d 559, (3rd Dist. 1976) (plaintiff alleged engineer negligent in supervision of construction project).

b. Examples and other Issues

B. Defenses

1. Admission of Agency/Admitting Liability Under Respondeat Superior

As addressed briefly above, an employer's liability under a respondeat superior theory for the acts of its employees is distinct from its liability for negligent hiring, retention or entrustment. Adlphous Gant v. L.U. Transport, Inc., 331 Ill.App.3d 924, 770 N.E.2d 1155 (1st Dist. 2002), *citing*, Montgomery v. Petty Management Corp., 323 Ill. App. 3d 514, 519, 752 N.E.2d 596 (1st Dist. 2001). A negligence claim brought under a respondeat superior theory is based upon an employer's vicarious liability for the wrongful acts of its employees. By contrast, a negligence claim brought under a theory of negligent hiring or retention is based upon the employer's negligence in hiring or retaining the employee, rather than the employee's wrongful act. Van .Horne v. Muller, 185 Ill. 2d 299, 311, 705 N.E.2d 898, 905 (1998).

2. The Effect of Illinois Adoption of Comparative Negligence

The Gant court revisited the questions, first addressed in Neff, of whether negligent entrustment, hiring or supervision claims should be allowed when the employer has admitted vicarious liability via respondeat superior in light of Illinois' adoption of comparative negligence.

In Gant, the trial court determined that the count based on negligent hiring, retention and entrustment could not stand under the holdings of the court in Ledesma v. Cannonball, Inc., 182 Ill. App. 3d 718, 538 N.E.2d 655, and Neff v. Davenport Packing Co., 131 Ill. App. 2d 791, 268 N.E.2d 574 (1971). Gant argued that Ledesma and Neff are no longer applicable in view of the adoption of comparative negligence by the Illinois Supreme Court in Alvis v. Ribar, 85 Ill. 2d 1, 421 N.E.2d 886 (1981).

The Gant Court disagreed and found that in 1989, the same court reaffirmed the Neff holding and its rationale in Ledesma. Although the Ledesma court did not address the issue of the applicability of the Neff holding in a comparative negligence jurisdiction, the Gant Court reaffirmed Ledesma, and found that Neff, is still applicable. Notwithstanding the fact that Illinois is a comparative negligence jurisdiction, a plaintiff who is injured in a motor vehicle accident cannot maintain a claim for negligent hiring, negligent retention or negligent entrustment against an employer where the employer admits responsibility for the conduct of the employee under a respondeat superior theory. Gant, 331 Ill.App.3d at 928.

3. The Rationale Behind Gant and Respondeat Superior v. Negligent Entrustment in Illinois

The Gant Court then provided an in-depth explanation for the rationale behind its ruling and respondeat superior vs. negligent entrustment in Illinois. In a motor vehicle accident, comparative fault as it applies to the plaintiff should end with the parties to the accident. Gant, 331 Ill.App.3d at 928. A plaintiff's comparative negligence remains the same, regardless of whether the remaining fault can be allocated in part to the employer based on negligent entrustment. *Id.* Although negligent entrustment may establish independent fault on the part of the employer, it should not impose additional liability on the employer. *Id.* The employer's liability under negligent entrustment, because it is predicated initially on, and therefore is entirely derivative of, the negligence of the employee, cannot exceed the liability of the employee. *Id.* Regardless of whether the employer is actually guilty of the separate tort of negligent entrustment, the employer who concedes responsibility under the theory of respondeat superior is strictly liable for the employee's negligence. *Id.* The employer is thus responsible for all the fault attributed to the negligent employee, but only the fault attributed to the negligent employee as compared to the other parties to the accident. Gant, 331 Ill.App.3d at 929.

The doctrine of respondeat superior and the doctrine of negligent entrustment are simply alternative theories by which to impute an employee's negligence to an employer. Gant, 331 Ill.App.3d at 929. Under either theory, the liability of the principal is dependent on the negligence of the agent. *Id.* If it is not disputed that the employee's negligence is to be imputed to the employer, there is no need to prove that the employer is liable. *Id.* Once the principal has admitted its liability under a respondeat superior theory, such as in the instant case, the cause of action for negligent entrustment is duplicative and unnecessary. *Id.* To allow both causes of action to stand would allow a jury to assess or apportion a principal's liability twice. Gant, 331 Ill. App. 3d at 929-30. The fault of one party cannot be assessed twice, regardless of the adoption of comparative negligence. Gant, 331 Ill.App.3d at 930.

4. Willful and Wanton Negligence and Respondeat Superior

The Gant Court went on to distinguish the application of negligent entrustment when willful and wanton negligence is alleged. The court stated, we do not believe that the Illinois Supreme Court's decision in Lockett v. Bi-State Transit Authority, 94 Ill. 2d 66, 445 N.E.2d 310 (1983) stands for the proposition that the adoption of comparative negligence rendered Neff no longer viable. The Lockett court held that Neff's rationale does not apply when the entrustment alleged is willful and wanton. Gant, 331 Ill.App.3d at 930.

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