COMMONWEALTH OF VIRGINIA TRANSPORTATION COMPENDIUM OF LAW

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1. Respondeat Superior (Let the master answer)

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

The doctrine of respondeat superior is firmly grounded in Virginia common law. Over 80 years ago, the Supreme Court of Virginia stated the following in *Davis v. Merrill*, 133 Va. 69, 112 S.E. 628 (1922):

> If a person, acting for himself, willfully and maliciously inflict an injury upon another, he is liable in damages for such injury. And there is no reason why a master should be permitted to turn his business over to servants who have no regard for the public welfare and thereby escape the responsibility which he would otherwise have to bear. It is manifestly right and just that both corporations and individuals be required to answer in damages for wanton and malicious assaults inflicted upon others by their servants, while acting within the scope of the servant's employment duty, and it matters not whether the act of the servant is due to lack of judgment, the infirmity of temper, or the influence of passion, or that the servant goes beyond his strict line of duty and authority in inflicting such injury…

To recover against an employer under respondeat superior, the plaintiff must 1) establish the existence of a employer-employee relationship, 2) that the employee was conducting his employer's business at the time of the commission of the tort, and 3) the employee was acting within the scope of his employment. *Master Auto Serv. Corp. v. Bowden*, 179 Va. 507, 510, 19 S.E.2d 679, 680 (1942).

While the plaintiff carries the burden of proof, this burden shifts to the employer once the plaintiff establishes an employer-employee relationship because "Virginia courts have consistently held that proof of the employment relationship creates a prima facia rebuttable presumption of the employer's liability. Thus, when an employer-employee relationship has been establish, the burden is on the employer to prove that the employee was not acting within the scope of his employment when he committed the act complained of, and if the evidence leaves the question in doubt it becomes an issue to be determined by the jury." *Gina Chin & Assocs., Inc. v. First Union Bank*, 260 Va. 533, 542, 537 S.E.2d 573, 577 (2000).

As a general rule, "an act is within the scope of employment if (1) it was expressly or impliedly directed by the employer, or is naturally incident to the business, and (2) it was performed, although mistakenly or ill-advised, with the intent to further the employer's interest, or from some impulse or emotion that was the natural consequence of an attempt to do the employer's business…. *Id.* at 541, 537 S.E.2d at 577.

A question that often arises is whether an intention tortious act falls within the scope of employment where the employer clearly does not sanction such an act. At first blush, the question would logically be answered in the negative. However, Virginia courts "have long since departed from the rule of non-liability of an employer for willful or malicious acts of his

employee. Under the modern view, the willfulness or wrongful motive which moves an employee to commit an act which causes injury to a third person does not of itself excuse the employer's liability therefor. The test of liability is not the motive of the employee in committing the act complained of, but whether the act was within the scope of the duties of employment and in the execution of the services for which he was engaged." *Tri-State Coach Corp. v. Walsh,* 188 Va. 299, 306, 49 S.E.2d 363, 366 (1948).

The above cited rule of law is best illustrated on two contrasting Virginia Supreme Court cases. In *Tri-State v. Walsh* the Supreme Court found a defendant bus company liable for its driver's physical assault of another motorist during a traffic dispute finding that the driver was engaged in the employer's business, i.e. driving a bus, at the time of his tortious act.

In contrast, the Virginia Supreme Court in *Davis is Cary v. Hotel Rueger, Inc.,* 195 Va. 980, 81 S.E.2d 421 (1954) found that defendant hotel's bellman was not in the scope of his employment when he shot an acquaintance in the hotel who confronted him about a personal debt.

In sum, "the employee's improper motive is not irrelevant to the issue whether the act was within the scope of employment. Rather, it is merely a factor to be considered in making that determination, and, unless the deviation from the employer's business is slight on the one hand, or marked and unusual on the other, but falls instead between those two extremes, the question is for the jury. *Gina Chin & Assocs.,* 260 Va. at 543, 537 S.E.2d at 578.

2. Negligent Entrustment

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

In Virginia, a plaintiff must prove that the defendant owner 1) knew, or had reasonable cause to know, that he was entrusting his car to an unfit driver and 2) that the driver was negligent as the result of his unfitness, and 3) the driver's negligence was the proximate cause of the accident causing injury to plaintiff. *Turner v. Lotts,* 244 Va. 554, 557, 422 S.E.2d 765, 767 (1992).

An issue in negligent entrustment cases that may arise is whether the owner gave either expressed or implied permission for the unfit driver to use his vehicle. The courts generally hold that where there is a pattern of conduct, permissive use may be implied. *Denby v. Davis,* 212 Va. 836, 838, 188 S.E.2d 226, 229 (1972).

In sum, "the test of liability under the doctrine of entrustment is whether the owner knew, or had reasonable cause to know, that he was entrusting his motor vehicle to an unfit driver likely to cause injury to others. *Hack v. Nester,* 241 Va. 499, 503-04, 404 S.E.2d 42, 43 (1990

3. Negligent Retention/Hiring

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

In Virginia, negligent retention requires proof that (1) the employer knew or should have known the employee was dangerous and likely to harm, and (2) the employer's negligence in retaining the employee was the proximate cause of the Plaintiff's injuries. Southeast Apartments Management, Inc. v. Jackman, 257 Va. 256, 513 S.E.2d 395 (1999).

The Virginia Supreme Court has also recognized the independent tort of negligent hiring. This cause of action requires proof that (1) the employer knew, or should have discovered by reasonable investigation, propensities in an employment position, (2) it should have been foreseeable that the hired individual posed a threat of injury to others, and (3) the employer's negligent hiring was the proximate cause of the harm to Plaintiff. Interim Personnel of Central Virginia v. Messer, 263 Va. 435, 559 S.E.2d 704 (2002). Mere proof of the failure to investigate a potential employee's background is not sufficient to establish an employer's liability for negligent hiring. Majorana v. Crown Cent. Petroleum, 260 Va. 521, 539 S.E.2d 426 (2000).

The tort of negligent hiring is distinct from tort liability predicated upon the doctrine of respondeat superior, where an employer is vicariously liable for an employee's acts committed within the scope of employment. J. v. Victory Tabernacle Baptist Church, 236 Va. 206, 372 S.E.2d 391 (1988). In contrast, negligent hiring is a tort of primary liability; the employer is principally liable for placing an unfit individual in an employment situation that involves an unreasonable risk of harm to others. Id.

b. Examples:

The fact that an employee had been convicted twice of DUI, had failed to pay fines or attend counseling, and had been declared an habitual offender, would not place a reasonable employer on notice or make it foreseeable that the employee would steal a truck, operate the stolen vehicle during non-business hours for his own frolic, and cause an accident far from his job. Interim Personnel of Central Virginia, 263 Va. 435, 559 S.E.2d 704 (2002).

A suspicion of an alcohol or drug problem by an employee, possible attraction to single women, and some "obnoxious" behavior were insufficient facts to put the employer on notice that its hiring of the employee might reasonably lead to a pre-dawn assault on a tenant. Southeast Aptmts Mgmt, 257 Va. 256, 513 S.E.2d 395 (1999).

4. Negligent Supervision

Virginia does not recognize an independent cause of action for negligent supervision. Chesapeake and Potomac Tel. Co. v. Dowdy, 235 Va. 55, 365 S.E.2d 751 (1988); J. v. Victory Tabernacle Baptist Church, 236 Va. 206, 372 S.E.2d 391 (1988); Sandler v. Barber, 2004 U.S. Dist. LEXIS 9537 (W.D. Va. 2004); Muse v. Schleiden, 349 F. Supp. 2d 990 (E.D. Va. 2004).

B. Defenses

1. Admission of Agency

Virginia has not yet expressly adopted the admission of agency defense. Even if an employer has admitted the agency relationship with its employee, there is no Virginia case limiting plaintiff's right of action against the employee or the employer on other theories of derivative or dependent liability.

The Virginia Supreme Court has permitted a Plaintiff to proceed on both vicarious liability and derivative claims against the employer, even when Plaintiff establishes a prima facie case of respondent superior. See, e.g., Majorana v. Crown Central Petroleum Corp., 260 Va. 521, 539 S.E.2d 426 (2000).

Precedent suggests the Court may consider adopting the admission of agency defense however. The Court recognizes "the tort of negligent hiring [as] distinct from tort liability predicated upon the doctrine of respondeat superior; the two theories differ in focus." J… v. Victory Tabernacle Baptist Church, 236 Va. 206, 211, 372 S.E.2d 391, 394 (1988). The Court explains however, that derivative claims are doctrines of primary liability against the employer and enable a plaintiff to recover in circumstances when respondeat superior's "scope of employment" limitation protects employers from liability. Interim Pers. of Cent. Va., Inc. v. Messer, 263 Va. 435, 440-441 (2002). If the Court recognizes the benefit of a derivative claim as only to preserve the cause of action in the absence of a respondeat superior claim, it may adopt the majority position and only allow a plaintiff to pursue the respondeat superior claim once the employer admits the agency relationship.

2. Traditional Tort Defenses

Depending on the facts of a particular case, traditional tort defenses may apply to derivative claims, including, contributory negligence, failure to mitigate damages, superseding and intervening cause, etc.

C. Punitive Damages

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

A plaintiff can present evidence to recover punitive damages under a theory of respondeat superior or a derivative theory if the defendants' acts constitute "willful, wanton and malicious" conduct and demonstrate a "conscious and utter disregard of [the plaintiff's] rights, health and safety." Niese v. City of Alexandria, 264 Va. 230, 235 (2002).

Punitive damages do not arise from ordinary negligence. Giant of Virginia, Inc. v. Pigg, 207 Va. 679, 685-86 (1967). They may be recovered only in cases where a tort

has been committed under certain aggravating circumstances. Id. Their primary purpose is to warn others and punish the wrongdoer "if he has acted wantonly, oppressively, or with such malice as to evince a spirit of malice or criminal indifference to civil obligations." Wallen v. Allen, 231 Va. 289, 297 (1986). Willful or wanton conduct imports knowledge and consciousness that injury will result from the act done." Id.

Punitive damages cannot be awarded against an employer for the wrongful acts of his employee when the employer did not authorize or ratify those acts. Hogg v. Plant, 145 Va. 175, 180 (1926); see e.g. Tri-State Coach Corp. v. Walsh, 188 Va. 299 (1948). Without an allegation of authorization or ratification, a defendant cannot have been on notice and the punitive damages claim should not go to the jury. Anderson v. Wiggins, 1997 U.S. Dist. LEXIS 11898 (W. D. Va. 1997). This line of cases is the primary defense to a claim for punitive damages against an employer.

2. Examples of Virginia transportation cases involving derivative theory punitive damages claims against an employer:

Wallen v. Allen, 231 Va. 289 (1986): Plaintiff schoolboy was nine years old and a passenger in the back of a school bus when it was struck from behind by a tractor-trailer. He brought an action against the driver and the trucking company who owned the tractor-trailer and employed the driver. Plaintiff sought a punitive damages award against the owners of the trucking partnership on the theory of wanton negligence in hiring and retaining the driver.

The driver of the truck had been recently hired by the owners and was improperly licensed. The driver had an "operator's license, class A," instead of a "chauffeur's license, class A." A driver of a vehicle, owned by others, having more than three axles and a gross weight in excess of 40,000 pounds, was required by federal regulation at the time of this case to have a "chauffeur's license, class A."

The driver was also somewhat inexperienced in driving tractor-trailers. He had only two weeks experience in operating five-axle, eighteen-wheel equipment of the kind he was driving at the time of the collision. He had operated three-axle, ten-wheel equipment for six months before he was hired.

Furthermore, the driver had been awake and driving for an extended period of time. He had driven over 150 miles, had coupled and uncoupled four trailers, and had loaded a trailer with many tons of wood chips using a front-end loader after having only three hours sleep during the preceding eighteen hours.

Based on the foregoing facts, the trial court admitted evidence of negligence on the part of the owners and allowed the question of punitive damages to go to the jury over defendants' objections.

On appeal, the Virginia Supreme Court reversed, holding that the breaches of duty which the jury might have attributed to the employer could amount to no more than ordinary negligence.

Anderson v. Wiggins, 1997 U.S. Dist. LEXIS 11898 (W. D. Va. 1997): Plaintiff filed a wrongful death action seeking compensatory and punitive damages arising from the death of her husband, who was killed when the pickup truck he was driving was struck by a tractor trailer. Plaintiff alleged that the driver of the tractor-trailer, who was acting in his capacity of employee, was traveling at eighty-five miles per hour, ran a stop sign and collided with her husband's truck. Plaintiff also alleged that the employer failed to adequately interview the driver before hiring him and failed to inquire about the driver's experience, work habits and general fitness for the position of driving a tractor trailer.

Applying Virginia law, the Federal District Court for the Western District of Virginia denied Plaintiff's 12(b)(6) Motion to Dismiss. The Court held that Plaintiff's alleged facts, if taken as true, would substantiate a claim of punitive damages against the employer.