



STATE OF SOUTH CAROLINA TRANSPORTATION COMPENDIUM OF LAW

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Negligent Entrustment in South Carolina

Generally speaking, negligent entrustment is “[t]he act of leaving a dangerous article (such as a gun or car) with a person who the lender knows, or should know, is likely to use it in an unreasonably risky manner.” Black’s Law Dictionary, 7th Edition, P. 847. It is important to note that the elements of this cause of action in South Carolina are not nearly as broad as this general definition. They are narrowly tailored to deal with entrustment of a vehicle to an individual who is likely to use it in an “unreasonably risky manner.” Id.

Elements of Negligent Entrustment in South Carolina

The elements of negligent entrustment in South Carolina have been clearly defined as:

- 1) Knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking;
- 2) The owner knew or had imputable knowledge that the driver was likely to drive while intoxicated; and
- 3) Under these circumstances, the entrustment of a vehicle by the owner to such a driver.

Jackson v. Price, 288 S.C. 377, 342 S.E.2d 628 (Ct. App. 1986). These elements were set forth by the South Carolina Court of Appeals in 1986.

Development of Negligent Entrustment in South Carolina

Although recently challenged, the South Carolina Supreme Court declined to adopt the alternative methods of proving negligent entrustment as found in the Restatement (Second) of Torts, §§ 308 and 390.¹ Gadson v. ECO Services, 374 S.C. 171, 648 S.E.2d 585 (S.C. 2007). Instead, they affirmed the elements listed above from Jackson v. Price. In his concurring opinion, Justice Pleicones said he believed the Court should adopt the alternative methods of proof because he “fear[ed] that our current formulation would not admit (sic) liability where a person permitted an individual to drive an automobile knowing that the driver was intoxicated, but where there was no

¹ Section 308 provides: “It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such a person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.”

Section 390 provides: “One who supplies directly or through a third person a chattel for the 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.”

evidence of the supplier knew the driver was a habitual drinker or addicted to alcohol.”
Id. At 589.

Negligent Hiring / Retention

The employer has a responsibility to exercise reasonable care in hiring its employees. Be careful though. Employers must take precaution to avoid violating privacy and other rights of applicants and employees. Employers should obtain applicant’s written consent to run any background checks involving criminal records, driving records, debt or credit history, etc. Design the employment application to obtain as much legally permissible information as possible. Application should include authorization permitting the employer to verify all information provided and investigate gaps in employment history. It should also require the applicant to certify that the information provided by him or her truthful and complete, and that the employer can decline to hire or terminate the applicant, if the applicant provides incomplete or misleading information.

Negligent Retention on the other hand, involves the reasonable care an employer must exercise after an applicant is hired and becomes an employee. While South Carolina does not have a specific case that applies to the transportation context, the South Carolina case on point is Doe v. ATC, Inc. 367 S.C. 199, 624 S.E.2d 447. Doe involved the inappropriate touching by an ATC employee of a disabled adult female who rode the Medicaid bus to Greenville hospital. Prior to the incident involving Doe, the ATC employee, Calvin Murray, had been involved in an isolated incident where he grabbed a fellow employee, Tycie Moss, and made comments that were sexual in nature to her. Moss reported the incident to her supervisor, Hattie Wright, but told her not to write the incident up because she didn’t want it to “blow up”. Moss refused to file a complaint. Murray gave his side and said the incident was not as interpreted.

Doe’s theory of liability was that ATC was negligent in its retention of Murray by not firing him following the single incident with Moss. The SC Court of Appeals presumed the State Supreme Court would recognize negligent retention and found that the cases should turn on two fundamental elements... knowledge of the employee AND foreseeability of harm to third parties. The court found that the plaintiff must demonstrate that the employee had “dangerous proclivities”. They also found that a single isolated prior incident of misconduct could support a negligent retention claim, if the prior misconduct had a “sufficient nexus to the ultimate harm.” However, in the Doe case they found that the single incident did not give rise to negligent retention liability.

Negligent Supervision

An employer may have a legal duty to use due care in supervising an employee as a result of a contractual relationship with the employee. *Degenhart v. Knights of Columbus*, 420 S.E. 2d 495 (1992). This duty sounds in tort, not in contract. This ensuing duty is limited to the employee's actions undertaken in his capacity as an agent for the employer. *Id.*

Clearly, an employer has a responsibility to exercise reasonable care in its supervision of employees. *Moore v. Berkley County School District*, 486 S.E. 2d 9 (S.C. A. App. 1997). However, in *Degenhart*, the Supreme Court held that an employer is under a duty in some circumstances to exercise reasonable care to control an employee acting outside the scope of employment. Specifically, liability for negligent supervision can be found if an employee intentionally harms another person when: (1) the employee is on the employers property or is using the employers personal property; (2) the employer knows or has reason to know that it has the ability to control the employee; and (3) the employer knows or should know of the necessity and opportunity for exercising such control. *Berkley*, 486 S.E. 2d 9 (citing *Degenhart* 420 S.E. 2d 495 (1992)).

Moreover, a government entity's liability is limited by the Tort Claims Act, and a plaintiff must show that the government was grossly negligent in its conduct.

Respondeat Superior

One must be clear that liability based on Respondeat Superior is a faultless ground for holding the third party (employer) liable. Unlike other causes of action like negligent entrustment, negligent supervision or negligent hiring/retention, holding a employer liable in an action based on Respondeat Superior does not require a showing of tortious behavior on the part of the employer. The employer need not cause or contribute in any way to the underlying tort. In such a case liability flows through to the employer merely because of the relationship between the tortfeasor and the employer. Also, in such a case, the tortfeasor remains liable for their own tort and the tortfeasor and employer may be held jointly and severally liable for damages.

Basis for Liability

There are three major areas in the basic doctrine of Respondeat Superior in South Carolina.

1. An employer is liable for the tort of his servant if the tort is committed within the scope of the servant's employment. South Carolina courts often use a "motive" or "purpose" test by asking if the employee's motive/purpose was to benefit the employer at the time the tort was committed (*Wade v. Berkley County*, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998)).
2. Generally an employer may not be held vicariously liable for the tort of an independent contractor so the defining characteristics of the tortfeasor's relationship to the principle are paramount. This issue often boils down to the level of control the employer had over the actions of the employee (*Anderson v. West*, 270 S.C. 184, 188, 241 S.E.2d 551 (1978)).

3. The Plaintiff has the burden of proving that a master-servant (agent-principle) relationship exists. Once a preliminary showing is made however the Defendant then bears the burden to show that the tortfeasor was actually an independent contractor and therefore not under the control of the employer (Cooper v. Graham, 231 S.C. 404, 414-415, 98 S.E.2d 843 (1957)).

Principle Protections

A person sought to be held liable based on Respondeat Superior also has a few unique protections:

1. A judgment against an employer for compensatory damages cannot exceed the judgment against the tortfeasor employee (Brown v. National Oil Co., 233 S.C. 345, 105 S.E.2d 81 (1958)).
2. The employer has the right of indemnity against the tortfeasor (this is indemnity which arises as a matter of law and not through a contractual relationship, Addy v. Bolton, 257 S.C. 28, 183 S.E.2d 708 (1971)).
3. A release of the tortfeasor automatically releases the employee from liability (Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), however a recent case states that the employee must be dismissed *and* exonerated to release the employer (see Austin v. Specialty Transp. Services, Inc. below)).

Recent Treatment

Some recent statements from the Courts on Respondeat Superior include:

- Armstrong v. Food Lion, Inc., 371 S.C. 271, 639 S.E.2d 50 (2006):
 - “The doctrine of respondeat superior rests upon the relation of master and servant. Lane v. Modern Music, Inc., 244 S.C. 299, 136 S.E.2d 713 (1964). A plaintiff seeking recovery from the master for injuries must establish that the relationship existed at the time of the injuries, and also that the servant was then about his master's business and acting within the scope of his employment. Id.”
 - “An act is within the scope of a servant's employment where reasonably necessary to accomplish the purpose of his employment and in furtherance of the master's business. Id.”

- “The act of a servant done to effect some independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, is not within the scope of his employment so as to render the master liable therefore. Under these circumstances the servant alone is liable for the injuries inflicted. Id.”
- “If a servant steps aside from the master's business for some purpose wholly disconnected with his employment, the relation of master and servant is temporarily suspended; this is so no matter how short the time, and the master is not liable for his acts during such time. Id.”
- Austin v. Specialty Transp. Services, Inc., 358 S.C. 298, 594 S.E.2d 867 (S.C. App. 2004):
 - “Appellant maintains the trial court erred in awarding damages based on the actions of the driver because the driver was previously dismissed as a party to this action. Appellant cites two cases to support its argument- Kirby v. Gulf Ref. Co., 173 S.C. 224, 175 S.E. 535 (1934), and Collins v. Johnson, 245 S.C. 215, 139 S.E.2d 915 (1965). Appellant's reliance on these cases is misplaced. These cases only stand for the proposition that, when a principal and servant are sued together, a principal is not responsible for punitive damages under respondeat superior when the agent was exonerated from liability. In the instant case, the truck driver was dismissed as a party to the case, not exonerated from liability.”

Admission of Vicarious Liability

The South Carolina Supreme Court currently has a case under advisement that addresses the issues of whether or not an admission of vicarious liability negates the Plaintiff's claim for negligent entrustment, training, supervision, etc. It is unclear when an opinion will be available.

Much confusion has existed since 1993 when a Federal District Court Judge in South Carolina opined that although South Carolina “apparently had not addressed this issue, the general rule is that when vicarious liability has been admitted, a plaintiff may not proceed on a negligent entrustment theory.” Bowman v. Norfolk Southern Ry. Co. 832 F.Supp. 1014 D.S.C 1993.

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

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