



STATE OF MISSOURI 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 Missouri, 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)

- a. What are the elements necessary to establish liability under a theory of *respondeat superior*?

A principal or employer is responsible for injury to a third party when its employee/agent commits negligence while acting within the scope and course of his employment/agency. Smoot v. Marks, 564 S.W.2d 231 (Mo. App. E.D. 1978); Burks v. Leap, 413 S.W.2d 258 (Mo. 1967).

Missouri recognizes rebuttable presumption of the so-called, “statutory employment” doctrine, vis-à-vis placard and/or lease liability in limited situations. Absent evidence to the contrary, mere presence on a vehicle of a placard furnished by a carrier establishes the carrier’s vicarious liability. A carrier may be held liable for a truck driver’s negligence, without regard to the continuing force of the lease, if the jury finds: (1) that a sign of identifying legend was furnished by a carrier in connection with a lease, (2) that the sign was on the truck at the time of the accident, and (3) that the truck was hauling regulated freight at the time of the accident. This is a rebuttable presumption, however, which can be overcome by evidence that the carrier attempted to end the lease and reclaim its placards, or that the driver embarked upon a personal mission, or that the driver was not authorized by the owner of the vehicle to use the vehicle at all, regardless of the use made of it, as for instance, operation by a thief. Brannaker v. Transamerican Freight Lines, Inc., 428 S.W.2d 524 (Mo. 1968); Johnson v. Pacific Intermountain Express Co., 662 S.W.2d 237 (Mo. 1983) (en banc); Parker v. Midwestern Dist., Inc., 797 S.W.2d 721 (Mo. App. E.D. 1990); Robertson v. Cameron Mut. Ins. Co., 855 S.W.2d 442 (Mo. App. W.D. 1993); Horner v. FedEx Ground Package System Inc., 258 S.W.3d 532 (Mo. App. W.D. 2008). To date, no Missouri state court has specifically addressed what effect, in any, the adoption of 49 CFR §§ 376.11(b)(2), 376.12(c)(4), or 376.12(e) has had on the legal relationship between a carrier and driver of its leased vehicle. For instance, 49 CFR § 376.12(c)(4) provides that the so-called “control provision” of 49 CFR § 376.12(c)(1) is not intended to affect whether the motor carrier or driver provided by the motor carrier is an independent contractor or an employee of the motor carrier. See e.g., Huggins v. FedEx Ground Package Sys., Inc., 592 F.3d 853, 862 (8th Cir. 2010).

2. Negligent Entrustment

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

The requisite elements of a claim for negligent entrustment are: (1) the trustee was incompetent by reason of age, inexperience, habitual recklessness or otherwise; (2) the entrustor knew or had reason to know of the trustee's incompetence; (3) there was entrustment of the chattel; and (4) the negligence of the entrustor concurred with the conduct of the trustee to cause the plaintiff's injuries. Evans v. Allen Auto Rental & Truck Leasing Co., 555 S.W.2d 325 (Mo. 1977) (en banc); McHaffie v. Bunch, 891 S.W.2d 822 (Mo. 1995) (en banc); Hallquist v. Smith, 189 S.W.3d 173 (Mo. App. E.D. 2006). Stated another way, a carrier can be liable if it entrusts a vehicle to an incompetent or reckless driver.

This theory permits imputation of negligence regardless if the employee was acting within the scope and course of his employment/agency. McHaffie, 891 S.W.2d 822.

- b. In Stafford v. Far-Go Van Lines, Inc., 485 S.W.2d 481 (Mo. App. 1972), the court held that a truck owner/lessor could be held liable under a theory of negligent entrustment because it was reasonably foreseeable that an employee-driver's "helper" could cause an accident with a truck, even if the "helper" drove the truck without permission of the employee-driver. The truck owner knew of and approved the employee's use of a "helper" when entrusting the tractor-trailer to the employee-driver.

3. Negligent Retention/Hiring

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

In Missouri, the elements of negligent retention are the same as for negligent hiring. Reed v. Kelly, 37 S.W.3d 274 (Mo. App. E.D. 2001); Lonero v. Dillick, 208 S.W.3d 323 (Mo. App. E.D. 2006). This theory requires proof that (1) the employer knew or should have known of the employee's dangerous proclivities at the time of the employee's hiring, and (2) the employer's negligence was the proximate cause of the plaintiff's injuries. J.H. Cosgrove Contractors, Inc. v. Kaster, 851 S.W.2d 794 (Mo. App. W.D. 1993). Implicit to cause of action for negligent hiring and retention is threshold requirement that plaintiff prove that employer-employee relationship existed between defendant and tortfeasor. Id. In other words, liability for negligent hiring turns on whether there are facts from which the carrier knew or should have known of a particular dangerous proclivity of an

employee followed by employee misconduct consistent with such proclivity by the employee. McHaffie, 891 S.W.2d 822.

While the employer must have played some role in bringing the offending employee into contact with the injured party, Missouri does not specifically require that the employee's misconduct occur within the scope and course of his employment. Hare v. Cole, 25 S.W.3d 617 (Mo. App. W.D. 2000) ("We believe there must be more of a casual connection than simply the fact that the employee was on the way to work and had a random collision.").

4. Negligent Supervision

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

Missouri law defines negligent supervision as follows:

A master is under a duty to exercise reasonable care so to control his servant while acting *outside the scope of his employment* as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of harm to them, if

(a) the servant

(i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or

(ii) is using a chattel of the master, and

(b) the master

(i) knows or has reason to know that he has the ability to control his servant, and

(ii) knows or should know of the necessity and opportunity for exercising such control.

Truck Ins. Exch. v. Prairie Framing, LLC, 162 S.W.3d 64, 82 (Mo. App. W.D. 2005) (emphasis in original) (citing Restatement (Second) § 317); *see also* Kansas City Laser, Inc. v. MCI Telecommunications Corp., 252 Fed. Appx. 100, 102 (8th Cir. (Mo.) 2007); Clevenger v. Howard, 15-6110-CV-SJ-REL, 2015 WL 7738372, at *3 (W.D. Mo. Nov. 30, 2015); Gibson v. Brewer, 952 S.W.2d 239, 247 (Mo. banc 1997); Nickel v. Stephens Coll., WD 77898, 2015 WL 5432252, at *9 (Mo. Ct. App. Sept. 15, 2015); Reed v. Kelly, 37 S.W.3d 274, 277 (Mo. App. E.D. 2000).

However, another line of cases in Missouri holds that all that is required to make out a prima facie case for negligent supervision is: (1) a legal duty on the part of the defendant to use ordinary care to protect the plaintiff against unreasonable

risks of harm; (2) a breach of that duty; (3) a proximate cause between the breach and the resulting injury; and (4) actual damages to the plaintiff's person or property. G.E.T. ex rel. T.T. v. Barron, 4 S.W.3d 622 (Mo. App. E.D. 1999); Cook v. Smith, 33 S.W.3d 548, 553 (Mo. App. W.D. 2000); G.L.F. ex rel. Felter v. Heiman, 423 F.Supp.2d 967 (E.D.Mo. 2006); *see also* Rebstock v. Evans Prod. Eng'g Co., Inc., 4:08CV01348 ERW, 2009 WL 3401262, at *16 (E.D. Mo. Oct. 20, 2009). To recover, a plaintiff "need not show that the very injury resulting from defendant's negligence was foreseeable, but merely that a reasonable person could have foreseen that injuries of the type suffered would be likely to occur under the circumstances." G.L.F. ex rel. Felter, 426 F.Supp.2d 967.

B. Defenses

1. Admission of Agency/Vicarious Liability

Missouri has adopted the majority rule that once an employer has admitted the agency relationship between it and the employee, it is generally improper to allow a plaintiff to proceed against the employer on any other theory of imparted liability, like negligent entrustment/hiring/supervision/training claims. McHaffie, 891 S.W.2d 822; Young v. Dunlap, 223 F.R.D. 520 (E.D.Mo. 2004); Brown v. Larabee, 2005 WL 1719908 (W.D.Mo. 2005); Jackson v. Myhre, 2007 WL 2302527 (Mo. App. E.D. 2007); Connelly v. H.O. Wolding, Inc., 2007 WL 679885 (Mo. App. W.D. 2007); and Hoch v. John Christner Trucking, Inc., 2005 WL 2656958 (W.D.Mo. 2005); Connelly v. H.O. Wolding, Inc., 2007 WL 679885 (W.D.Mo. 2007); Rebstock v. Evans Production Engineering Co., Inc., 2009 WL 3401262 (E.D.Mo. 2009); Coomer v. Kansas City Royals Baseball Corp., 437 S.W.3d 184, 205-06 (Mo. 2014) (en banc).

The rationale for this view is explained in McHaffie, 891 S.W.2d 822: "If all the theories for attaching liability to one person for the negligence of another were recognized and all pleaded in one case where the imputation of negligence is admitted, the evidence laboriously submitted to establish other theories serves no real purpose. The energy and time of courts and litigants is unnecessarily expended. In addition, potentially inflammatory evidence comes into the record which is irrelevant to any contested issue in the case." Id. at 826.

However, McHaffie left open the possibility that exceptions to the rule may exist when: (1) the employer's liability does not derive from the negligence of the employee, (2) when the employer is liable for punitive damages, or (3) when the relative fault between the employer and employee is relevant. Id.

Several federal courts applying Missouri law have recognized these exceptions and allowed plaintiffs to proceed under other independent imputed negligence

theories even after defendants admitted to respondeat superior liability. *See e.g., Jackson v. Wiersema Charter Serv., Inc.*, 2009 WL 1310064 (E.D.Mo. 2009); *Miller v. Crete Carrier Corp.*, 2003 WL 25694930 (E.D.Mo. 2003); *Burroughs v. Mackie Moving Systems Corp.*, 2010 WL 576799 (E.D.Mo. 2010); *Kwiatkowski v. Teton Transportation*, 2012 WL 1413154 (W.D.Mo. 2012); *Harris v. Decker Truck Line, Inc.*, 2013 WL 1769095 (E.D.Mo. 2013); *King v. Taylor Exp., Inc.*, 2013 WL 5567721 (E.D.Mo. 2013).

In *Wilson v. Image Flooring, LLC*, 400 S.W.3d 386, 392-93 (Mo. App. W.D. 2013), a Missouri appellate court announced that there indeed exists a punitive damages exception to the general rule in *McHaffie*, which otherwise bars direct liability negligence claims against an employer. The court stated that to invoke the said punitive damages exception, a plaintiff must plead sufficient facts to support a claim for punitive damages. It should be noted that the Missouri Supreme Court has not yet revisited the punitive damages issue.

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

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

In Missouri, it is not enough for plaintiffs to establish the predicates for punitive damages by a preponderance of the evidence, the standard for negligence. *Lopez-Vizcaino v. Action Bail Bonds*, 3 S.W.3d 891, 893 (Mo. App. W.D. 1999). Rather, plaintiffs are held to the higher “clear and convincing standard.” *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 110 (Mo. 1996) (en banc); *Lopez-Vizcaino*, 3 S.W.3d at 893. The clear and convincing standard is needed to counter-balance the extraordinary nature of an award of punitive damages and to ensure that it is “applied only sparingly.” *Rodriguez*, 936 S.W.2d 104.

While *McHaffie*, 891 S.W.2d 822, sets forth the holding that admitting agency prevents a plaintiff from proceeding on any other derivative or dependent liability theory, it left open the possibility that such evidence may be admissible to prove a punitive claim. *Id.* at 826; *see also Jackson*, 2009 WL 1310064; *Miller*, 2003 WL 25694930; *Burroughs*, 2010 WL 576799.

As discussed in section B.1. above, in *Wilson*, 400 S.W.3d at 392-93, the Western District Court of Appeals held that there is a punitive damages exception to the

general rule in McHaffie. Specifically, it stated that although the discussion in McHaffie was dicta, “[W]e find that dicta persuasive and believe that, if faced with the issue now, our Supreme Court would determine that such an exception exists.” Thus, it is probable that a trial court, while precluding a plaintiff from producing additional theories of derivative or dependent liability, will allow the plaintiff to pursue discovery to the extent needed to prove a punitive claim.

However, before a claim for punitive damages can be submitted to a jury, it is incumbent on the trial court to make a threshold determination that the predicates for such a claim have been properly pled and proven. Lopez-Vizcaino, 3 S.W.3d at 893; Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). This threshold determination “is a question of law,” and is appropriate for resolution on a motion for partial summary judgment. Perkins v. Dean Machinery Co., 132 S.W.3d 295, 299 (Mo. App. W.D. 2004); Rodriguez, 936 S.W.2d at 110.

2. Can a principal be held vicariously liable for an agent’s punitive conduct?

In Flood v. Holzwarth, 182 S.W.3d 673 (Mo. App. S.D. 2005), the court affirmed a jury’s award of punitive damages against the employer of a tractor-trailer driver, holding that “when an employer is vicariously liable for the acts of his agent, all that is necessary to award punitive damages against the employer is for the agent to be acting in the scope of employment and that his actions meet the level justifying an award of punitive damages.” Id. at 680.

However, Missouri Courts have not yet addressed the “complicity rule” under Restatement (Second) § 909. In Sherf v. Antoniak, 05-0447-CVW-HFS, 2007 WL 2463210, at *3 (W.D. Mo. Aug. 27, 2007), the United States District Court concluded that Missouri Courts would likely follow Restatement (Second) § 909, although it did not consider the Flood case mentioned above. In any event, Restatement (Second) § 909 provides:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

- (a) the principal or a managerial agent authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
- (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or

(d) the principal or a managerial agent of the principal ratified or approved the act.

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If you have any questions, please feel free to contact Kevin Fritz (klfritz@lashlybaer.com) or Patrick Foppe (pfoppe@lashlybaer.com) at Lashly & Baer, 314-621-2939.

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