



# STATE OF KANSAS TRANSPORTATION AND LOGISTICS COMPENDIUM OF LAW

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A. Kansas recognizes four separate theories of recovery against an employer/principal for an injury caused to a third party by an employee/agent/contractor:

- (1) Respondeat superior;
- (2) Negligent entrustment;
- (3) Negligent hiring or retention; and
- (4) Negligent training or supervision.

Respondeat superior liability is established when an employee is acting within the course and scope of his authority and performing services for which he has been employed, and when he is doing anything that is reasonably incidental to his employment. The test is not necessarily whether the specific conduct was expressly authorized or forbidden by the employer, but whether such conduct should have been fairly foreseen from the nature of the employment and the duties related to it. *Commerce Bank of St. Joseph N.A. v. State*, 251 Kan. 207, 833 P.2d 996 (1992).

A claim of negligent entrustment may be based upon knowingly entrusting, lending, permitting, furnishing, or supplying an automobile to an incompetent or habitually careless driver. An incompetent driver is one who, by reason of age, experience, physical or mental condition, or known habits of recklessness, is incapable of operating a vehicle with ordinary care. *Martell v. Dricoll*, 297 Kan. 524, 302 P.3d 375 (2013).

When a party asserts a negligent retention and supervision claim against an employer, liability results not because of an employer-employee relationship, but because the employer had reason to believe that an undue risk of harm to others would exist as a result of its employment of the alleged tortfeasor. The employer is subject to liability on a negligent retention and supervision claim for only such harm as is within the risk that the employer had reason to believe would likely cause harm. If risk exists because of the quality of the employee, then there is liability only to the extent that harm is caused by the quality of the employee that the employer had reason to believe would be likely to cause harm. *Kansas State Bank & Trust Co. v. Specialized Transp. Services, Inc.*, 249 Kan. 348, 819 P.2d 587 (1991).

Negligent supervision includes not only the employer's duty to supervise, but also includes the duty to control persons with whom the defendant has a special relationship including the defendant's employees or persons with dangerous propensities. *Marquis v. State Farm Fire & Cas. Co.*, 265 Kan. 317, 961 P.2d 1213 (1998).

B. Under Kansas law, an admission by the defendant that an employee/agent was acting within the course and scope of his employment/agency when the employee negligently caused injury to another does not preclude a separate claim against the employer/principal for negligent entrustment or negligent hiring, training, retention or supervision. *Patterson v. Dahlsten Truck Line, Inc.*, 130 F. Supp. 2d 1228 (D. Kan. 2000);

*Marquis*, 265 Kan. at 334, 961 P.2d at 1224. These torts are distinct from respondeat superior as they are not derivative of the employee's negligence. *Patterson*, 130 F.Supp. 2d at 1228. These claims are not imputed but run directly from the employer to the person injured. Absent a specific exclusion for these types of claims, a CGL policy may provide coverage for these separate claims. *Crist v. Hunan Palace, Inc.*, 277 Kan. 706, 89 P.3d 573 (2004) (holding general auto exclusion in the CGL policy did not exclude coverage for negligent supervision or training claims).

Negligent supervision is a separate and distinct theory from negligent hiring and retention. It includes not only the failure to supervise, but also includes the failure to control persons with whom the defendant has a special relationship including defendant's employees or other persons. *Marquis*, 265 Kan. at 331, 961 P.2d at 1223.

Likewise, negligent supervision or control and negligent hiring or retention of employees are separate and distinct from the theory of negligent entrustment, which occurs when an owner of an automobile allows a third party to drive while knowing the third-party driver to be incompetent, careless or reckless. *McCart & Muir*, 230 Kan. 618, 641 P.2d 384 (1982).

- C. Kansas follows the general rule that an employer of an independent contractor is not liable for injuries caused by the negligence of the independent contractor. However, there are various exceptions to that rule, including the negligence of an employer in selecting, instructing or supervising the contractor. This exception is found in the Restatement (Second) of Torts § 411 (1965), which states:

An employer is subject to liability for physical harm to third persons caused by his failure to employ a competent and careful contractor:

- (a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or
- (b) to perform any duty which the employer owes to third person.

See e.g., *Dye v. WMC, Inc.*, 38 Kan.App.2d 655, 172 P.3d 49 (2007) (holding parents and husband of the decedent stated valid claims for relief against the medical center based on its negligent hiring of an aviation company, an independent contractor, to perform air ambulance service).

- D. Traditional comparative fault defenses are available to each of the above theories. Comparative fault can be assessed against both parties and non-parties. There is no joint and several liability. As such, defendant is responsible only for the percentage of fault assessed against it by the fact finder. Additionally, in order to recover any damages against a defendant, a plaintiff's fault must be less than the causal negligence of the party

or parties against whom a claim is made. *K.S.A. §60-258a*. This is sometimes referred to as the 49% rule.

- E. There is a cap for non-pecuniary damages of \$300,000. The cap is set to increase to \$325,000 for claims accruing on or after July 1, 2018 and before July 1, 2022. The cap will increase to \$350,000 for claims accruing after July 1, 2022. The jury is not told of the cap. Awards exceeding the cap for non-pecuniary damages will first be reduced by the comparative fault assessed against the plaintiff or plaintiff's decedent before being capped. *K.S.A. §§60-19a01, 60-19a02*.
- F. *K.S.A. §60-3701* provides that the trier of fact determines if punitive damages are to be awarded. The determination must be supported by clear and convincing evidence that the defendant acted with willful conduct, wanton conduct, fraud or malice. With regard to the acts of an agent, employee, member, partner or shareholder, such acts must be authorized or ratified by the principal, employer, association, partnership or corporation before punitive damages can be assessed against it.
- G. *K.S.A. § 60-3702* provides that the amount of punitive damages is determined by the court in a separate (second) proceeding. However, the statutory procedure providing for the court to determine the amount of punitive damages has been ruled unconstitutional in a federal case in which jurisdiction was based upon diversity. *Capital Solutions, LLC v. Konica Minolta Business Solutions, U.S.A., Inc.*, 695 F.Supp.2d 1149 (D.Kan. 2010) (holding that the Seventh Amendment guarantees the right to a jury trial on the issue of punitive damages). The amount of punitive damages is capped at the lesser of:
  - 1. The annual gross income earned by the defendant, as determined by the court based upon the defendant's highest gross annual income earned for any one of the five (5) years immediately before the act for which such damages are awarded, unless the court determines such amount is clearly inadequate to penalize the defendant, then the court may award up to fifty percent (50%) of the net worth of the defendant, as determined by the court; or
  - 2. Five Million Dollars.
  - 3. In lieu of the limitations set forth above, if the court finds that the profitability of defendant's misconduct exceeds or is expected to exceed the statutory cap, the cap on exemplary or punitive damages which the court may award shall be in the amount equal to one and one-half (1-1/2) times the amount of profit which the defendant gained or is expected to gain as a result of the defendant's misconduct.
- H. *K.S.A. §60-3703* provides that a claim for punitive damages cannot be included in the original petition. The court must issue an order allowing the claim for punitive damages to be added on the basis of supporting and opposing affidavits which establish that there is a probability that plaintiff will prevail on the claim. However, The United States District Court in Kansas allows the original Complaint to state a claim for punitive damages.

**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 situation. These materials are not intended to provide legal advice or to cover all laws or regulations that may be applicable to a specific factual situation. If you have matters or questions to be resolved for which legal advice may be indicated, you are encouraged to contact a lawyer authorized to practice law in the state for which you are investigating and/or seeking legal advice.**