STATE OF NEVADA TRANSPORTATION AND LOGISTICS COMPENDIUM OF LAW

Prepared by
Brian K. Terry, Esq. and Michael C. Hetey, Esq.
Thorndal Armstrong Delk Balkenbush & Eisinger
1100 East Bridger Ave.
Las Vegas, NV 89125
Tel: (702) 366-0622
Fax: (702) 366-0327

Email:
bkt@thorndal.com
mch@thorndal.com

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I. Negligent Entrustment, Hiring, Retention and Supervision in Nevada

A. Respondeat Superior

1. Negligent Conduct

Nevada's system for respondeat superior is premised upon decisions of the Nevada Supreme Court.

> An employer may be held vicariously liable for the actions of an employee who is under the control of the employer and acting within the scope of employment. *Molino v. Asher*, 96 Nev. 817, 818, 618 P.2d 878, 879 (1980). Generally, an employee who is traveling to or from work is outside the scope of his or her employment unless the employee is performing an errand for the employer or otherwise conferring a benefit upon the employer. *Id.*; *National Convenience Stores v. Fantauzzi*, 94 Nev. 655, 658-59, 584 P.2d 689, 691-92 (1978); *see also Burnett v. C.B.A. Security Service, Inc.*, 107 Nev. 787, 820 P.2d 750 (1991) (employer was not liable for injuries caused by employee when employee's actions were not furthering the business interests of the employer).

Evans v. Southwest Gas, 108 Nev. 1002, 1006, 842 P.2d 719, 722 (1992). The court has also stated "[u]nder the modern rationale for respondeat superior, the test for determining whether an employer is vicariously liable for the tortious conduct of his employee is closely related to the test applied in workers' compensation cases for determining whether an injury arose out of or in the course of employment." *Wood v. Safeway, Inc.*, 121 Nev. 724, 740, 121 P.3d 1026, 1037 (2005).

The determination as to whether an employee was within the "course and scope" of employment is a fact intensive question. Generally "whether an employee was acting within the scope of his or her employment for the purposes of respondeat superior liability is a question to be determined by the trier of fact. However, where undisputed evidence exists concerning the employee's status at the time of the tortious act, the issue may be resolved as a matter of law." *Evans*, 108 Nev. at 1006, 842 P.2d at 721.

Generally, the tortious conduct of an employee in transit to or from the place of employment will not expose the employer to liability, unless there is a special errand which requires driving. *Kornton v. Conrad*, 119 Nev. 123, 67 P.3d 316 (2003). This is known as the "going and coming rule". *Id.* However there are exceptions to this rule. In *National Convenience Stores v. Fantauzzi*, 94 Nev. 655, 584 P.2d 689 (1978), an employee was involved in an accident while traveling to one of his employer's stores to obtain shelf measurements on his day off. The employee had broad discretion to work past his normal hours to measure shelving, and the task was to benefit his employer. The Nevada Supreme Court held there was sufficient evidence for a jury to conclude the accident occurred during a special errand for the employer.

The Nevada Supreme Court has not yet ruled whether admitting course and scope of employment automatically voids negligent entrustment and hiring claims ("the *McHaffie* rule*")*. The *McHaffie* rule is the majority rule and its purpose is to prevent unnecessary litigation over claims that have become redundant due to a factual admission by one party and to avoid the admission of irrelevant, prejudicial material. *McHaffie v. Bunch,* 891 S.W.2d 822, 826 (Mo. 1995). In *Cruz v. Durbin*, 2011 U.S. Dist. LEXIS 51057, 2011 WL 1792765 (D. Nev. May 9, 2011), the Federal District Court of Nevada, anticipating the application of Nevada law, followed the *McHaffie* rule when the Court ruled it was inappropriate to bring separate claims of negligent hiring, training, supervision, etc. against an employer where the sole basis for liability against the employer is the vicarious liability arising from the negligence of its employee, for example arising out of an automobile accident while in the course and scope of employment. The Court explained:

> Under the facts alleged here, Champion's [the employer's] liability on the negligent hiring and training claim is necessarily dependent upon Durbin's negligence. If Durbin [the employee,] is not found to have been negligent, then any negligence by Champion in hiring or training him cannot have been the legal cause of plaintiff's harm. And if Durbin is found liable on the negligence claim, then Champion will necessarily be liable due to its admission of Durbin's employment.

The *Durbin* Court found plaintiff's claims for negligent hiring, etc. against the employer were subject to dismissal. The same result should occur in claims for negligent entrustment against an employer. However, the *Durbin* court further found that if the facts being asserted supported a punitive damage claim against the employer, this would constitute an independent basis of liability, and a motion to dismiss may not be appropriate under those circumstances. *See also, Adele v. Dunn*, 2013 U.S. Dist. LEXIS 44602, 2013 WL 1314944 (D. Nev. March 27, 2013); *Wright v. Watkins & Shepard Trucking, Inc.*, 2013 U.S. Dist. LEXIS 146762, 2013 WL 558005 (D. Nev. October 10, 2013); and *Gonzalez v. Kirk*, 2014 U.S. Dist. LEXIS 66928 (D. Nev. May 14, 2014)

There is conflict among state district court judges as to whether this doctrine applies and the matter has not been solidified by the Nevada Supreme Court. However, the federal district court for Nevada has issued four unpublished decisions expressly adopting and applying it.

2. Intentional Conduct

The determination of whether an employer is liable for the intentional conduct of an employee is governed by statute. Nev. Rev. Stat. § 41.475 reads, in its entirety:

> 1. An employer is not liable for harm or injury caused by the intentional conduct of an employee if the conduct of the employee:
>
> (a) Was a truly independent venture of the employee;
> (b) Was not committed in the course of the very task assigned to the employee; and
> (c) Was not reasonably foreseeable under the facts and circumstances

of the case considering the nature and scope of his employment.

For the purposes of this subsection, conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury.

2. Nothing in this section imposes strict liability on an employer for any unforeseeable intentional act of his employee.

3. For the purposes of this section:

(a) "Employee" means any person who is employed by an employer, including, without limitation, any present or former officer or employee, immune contractor, an employee of a university school for profoundly gifted pupils described in Chapter 392A of NRS or a member of a board or commission or Legislator in this State.

(b) "Employer" means any public or private employer in this State, including, without limitation, the State of Nevada, a university school for profoundly gifted pupils described in Chapter 392A of NRS, any agency of this State and any political subdivision of the State.

(c) "Immune contractor" has the meaning ascribed to it in subsection 3 of NRS 41.0307.

(d) "Officer" has the meaning ascribed to it in subsection 4 of NRS 41.0307.

The question presented to the court "is not whether the wrongful act itself was authorized but whether it was committed in the course of a series of acts of the agent which were authorized by the principal." *Nevada Dept. of Human Resources, Div. of Mental Hygiene and Mental Retardation v. Jimenez*, 113 Nev. 356, 368, 935 P.2d 274 (1997). Foreseeability, as a test for respondeat superior, means that in the context of the particular enterprise, an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it amount the other costs of the employer's business. *Wood v. Safeway, supra*. The Nevada Supreme Court explained an intentional act is "reasonably foreseeable" if "a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the possibility of injury," an inquiry that depends on whether one has "reasonably cause to anticipate such act and the probability of injury resulting therefrom." *Rockwell v. Sun Harbor Budget Suites*, 112 Nev. 1217, 925 P.2d 1175 (1996)(employer might be liable for actions of security guard who shot a victim on the employer's premises if the facts demonstrate that guard was on-call at the time and was responding to emergency call).

Nevada has several locally famous opinions addressing this scenario. In *Prell Hotel Corp. v. Antonacci*, 86 Nev. 390, 469 P.2d 399 (1970), a casino was held liable for damages arising from a blackjack dealer striking a player at his table in response to offensive remarks. As noted in a subsequent decision remarking on that case:

> This court fails to discern any principled legal distinction between a battery claim against a casino whose blackjack dealer slugs a patron and the same claim against a school district whose teacher fondles a student. In both cases the plaintiff was on the defendant's premises for the purpose of enjoying the defendant's services. In neither case can it reasonably be argued that the employee's duties included acts of common law battery.

Knackert v. Estes, 926 F. Supp. 979, 989 (D. Nev. 1996). Employing this logic, *Knackert* held a school district liable for the molestation of students by a teacher.

This decision is consistent with other Nevada cases imposing vicarious liability upon employers for similar acts. For instance, in *Jimenez* the court found that the sexual assaults, committed upon children placed in a group home by the home's supervisor, were foreseeable. 113 Nev. at 361. Moreover, these acts were not a substantial deviation from the employee's duties "for purely personal reasons … because the sexual assaults were committed during a series of acts authorized by the State." *Id*. In *Ray v. Value Behavioral Health, Inc*., the court found that a psychologist's sexual harassment of his client exposed the counseling firm to liability for its employee's acts. 967 F. Supp. 417 (D. Nev. 1997). The court concluded that the psychologist's abuse of his power was foreseeable, and that the acts were committed in the course of a series of acts authorized by the principal. *Id*. at 421-22.

This is not to say employers are always held liable in Nevada. In *J. C. Penney Co. v. Gravelle*, 62 Nev. 439; 155 P.2d 477 (1945), the employer was not vicariously liable when a store clerk assaulted a third-party bystander because the bystander attempted to prevent the clerk from catching a shoplifter whom the clerk had pursued outside of the store. The bystander followed the employee back to the store, and the two continued to argue, resulting in an ensuing altercation where the bystander was injured. The court determined the employer was not responsible because after the clerk had returned to the store and turned over the merchandise, his actions in assaulting the bystander no longer concerned his employment. It reasoned that based on the circumstances, the assault was "an independent adventure" for the employee's own purposes and was not taken on the employer's behalf or arising from a sense of duty to the employer.

Likewise, in *Wood v. Safeway, Inc*., 121 Nev. 724, 121 P.3d 1026 (2005), a janitor for an independent contractor hired to clean a grocery store sexually assaulted a clerk at a Safeway. The court noted the "sexual assault was also not committed in the course of the tasks assigned to [the employee] as a janitor. [The] sexual assault of Doe was an independent venture outside the course and scope of his employment."

However in *Anderson v. Mandalay Corp.*, -Nev-, 358 P.3d 242 (2015), the court found the employer could be liable for a hotel employee's sexual assault of a hotel guest in one of the guest rooms. In *Anderson*, the employee's job was to clean the hotel's common areas and assist in cleaning guest rooms, as needed. He had little supervision and had a key card to access guest rooms. He had previously been suspended for harassing and threatening a female supervisor, after

which the hotel restored his room keycard access. There had been five prior sexual assaults by employees, three of which were on guests and two on other employees. There also was evidence of employees committing property crimes in guest rooms. Under these facts, it was a question for the jury whether the assault was reasonably foreseeable.

B. **Negligent Entrustment**

Under doctrine of "Negligent Entrustment," a plaintiff must prove that: 1) entrustment actually occurred; 2) the entrustment was negligent. *Zugel v. Miller*, 100 Nev. 525, 688 P.2d 310 (1984). For example, the person entrusting the vehicle knew or should have known that the person being entrusted, because of his youth, inexperience or otherwise, is incompetent to operate a vehicle. *Id.* A parent who entrusts his child with motor vehicle is liable even when parent expressly instructs child not to use vehicle on public roadway. *Id.* Parent or guardian having custody and control of minor child is liable for the willful misconduct of their minor up to $10,000. Nev. Rev. Stat. § 41.470; *Roddick v. Plank*, 608 F. Supp. 229 (D. Nev. 1985).

C. **Negligent Hiring, Retention and/or Supervision**

"The tort of negligent hiring imposes a general duty on the employer to conduct a reasonable background check on a potential employee to ensure that the employee is fit for the position. An employer breaches this duty when it hires an employee even though the employer knew, or should have known, of that employee's dangerous propensities." *Hall v. SSF, Inc*., 112 Nev. 1384, 1392, 930 P.2d 94, 99 (1996) (internal citations omitted).

Once an employee is hired, the employer still owes a duty to ensure the employee is still proper for the position. "In Nevada, a proprietor owes a general duty to use reasonable care to keep the premises in a reasonably safe condition for use. *Moody v. Manny's Auto Repair*, 110 Nev. 320, 331-33, 871 P.2d 935, 942-43 (1994). As is the case in hiring an employee, the employer has a duty to use reasonable care in the training, supervision, and retention of his or her employees to make sure that the employees are fit for their positions." *Hall*, 112 Nev. at 1393, 930 P.2d at 100.

Conceptually, this tort is separate and distinct from respondeat superior. Respondeat superior seeks to hold the employer liable for the actions of an employee whereas negligent hiring, retention and/or supervision seeks to hold the employer liable for its own actions.

II. **Punitive Damages**

The issue of punitive damages against an employer was last addressed by the Nevada Supreme Court in *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 192 P.3d 243 (2008). Punitive damages against employers for the acts of employees are governed by Nev. Rev. Stat. § 42.007, which states in its entirety:

> 1. Except as otherwise provided in subsection 2, in an action for the breach of an obligation in which exemplary or punitive damages are sought pursuant to

subsection 1 of NRS 42.005 from an employer for the wrongful act of his employee, the employer is not liable for the exemplary or punitive damages unless:

(a) The employer had advance knowledge that the employee was unfit for the purposes of the employment and employed him with a conscious disregard of the rights or safety of others;

(b) The employer expressly authorized or ratified the wrongful act of the employee for which the damages are awarded; or

(c) The employer is personally guilty of oppression, fraud or malice, express or implied.

If the employer is a corporation, the employer is not liable for exemplary or punitive damages unless the elements of paragraph (a), (b) or (c) are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation.

2. The limitations on liability set forth in subsection 1 do not apply to an action brought against an insurer who acts in bad faith regarding its obligations to provide insurance coverage.

Countrywide noted:

Under NRS 42.001, "'[m]alice, express or implied'" means conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others." Similarly, "'[o]ppression' means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person." Both definitions utilize conscious disregard of a person's rights as a common mental element, which in turn is defined as "the knowledge of the probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences."

192 P.3d at 252-253. Thus the question as to whether punitive damages are available focuses on whether the employer consciously disregarded the plaintiff's rights, which the court determined Countrywide had done. The *Countrywide* Court went on to clarify the definition of conscious disregard due to prior ambiguity and elaborated as follows:

To eliminate confusion regarding this mental element, the legislature defined conscious disregard under NRS 42.001(1) in plain and unambiguous terms. Rather than rely on past cases that pre-dated NRS 42.001(1), in defining what conduct would amount to conscious disregard, [the Nevada Supreme Court] look[s] no further than the statute's language. Since its language plainly requires evidence that a defendant acted with a culpable state of mind, we conclude that NRS 42.001(1) denotes conduct that, at a minimum, must exceed recklessness or gross negligence.

Id. at 255; *see also, Wyeth v. Rowatt*, 244 P.3d 765, 783 (Nev. 2010)(affirming punitive damages based on negligence that "exceeded 'mere recklessness or gross negligence'" and hence qualified as malice under the punitive damages statute).

Punitive damages are not automatically available in all cases. "Before punitive damages may be recovered, NRS 42.005(1) requires clear and convincing evidence of either implied malice or oppression. Once the district court makes a threshold determination that a defendant's conduct is subject to this form of civil punishment, the decision to award punitive damages rests entirely within the jury's discretion." *Id*.

Where the employer is a corporation, however, it may only be held liable for the actions of its employees if the above-mentioned factors, NRS 42.007(1)(a)-(c), "are met by an officer, director or managing agent of the corporation who was expressly authorized to direct or ratify the employee's conduct on behalf of the corporation. NRS 42.007(1). For example, an employer can be directly liable to a Plaintiff based upon its employee's negligence if the Plaintiff can establish the employer ratified the employee's conduct by negligently hiring and training him, and/or failing to suspend or reprimand an employee for dangerous driving in conscious disregard for the safety of others.

III. Auto Insurance

Nevada requires all motor vehicles to be insured for at least $15,000 for bodily injury or death liability and $10,000 in property damage liability. NRS 485.185; NRS 485.3091(1)(b)(1), (3). These minimum requirements are "absolute," meaning the insurance applies even if the insured's actions violates or voids the policy. NRS 485.3091. This is true even if the insured fails to cooperate in defense of a claim and the insurer obtains a declaratory relief judgment finding there is no duty to defend or indemnify the insured. *Torres v. Nev. Direct Ins. Co.*, 131 Nev. Adv. Rep. 54, 353 P.3d 1203 (2015).

IV. Joint and Several Liability

Nevada's joint and several liability statute is somewhat unique. Defendants are severally liable when "comparative negligence is asserted as a defense." NRS 41.141(2)(a). Fault can only be apportioned amongst the parties at trial. *Warmbrodt v. Blanchard*, 100 Nev. 703, 692 P.2d 1282 (1984); NRS 41.141(3). Fault cannot be apportioned to non-parties, although a defendant will receive a credit against an adverse judgment for any amounts a non-settling party paid plaintiff to settle. NRS 41.141(3).

When plaintiff sues one defendant for an intentional tort and another defendant for negligence, each defendant is responsible only for its percentage of liability. In *Café Moda, LLC v. Palma*, 100 Nev. 703, 272 P.3d 137 (2012), the jury found the café defendant 20% at fault for a stabbing occurring on its premises and the defendant who stabbed plaintiff, a non-employee, 80% at fault. The Nevada Supreme Court held the café was liable only for 20% of plaintiff's damages.

To avoid an apportionment of fault to a defendant unable to pay a judgment, plaintiffs only sue the financially viable defendant. This occurs when the non-viable defendant was negligent and has no insurance or assets. It also occurs when the non-viable defendant commits an intentional tort, as the intentional tortfeasor is not a necessary party to the litigation. *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. Adv. Rep. 85, 312 P.3d 484 (2013). Because fault can only be apportioned amongst parties at trial, if the jury believes defendant is 1% liable and the intentional tortfeasor is 99% liable, it must apportion 100% of the liability to defendant less any liability apportioned to plaintiff.

Under NRS 41.141, you can argue a non-party is responsible for causing Plaintiff's damages. Pursuant to *Banks v. Sunrise Hosp.*, 120 Nev. 822, 102 P.3d 52 (2004), NRS 41.141 does not permit comparative fault between a party of the case and a non-party. Thus, you can assert a non-party (empty chair) is 100% at fault but cannot argue X defendant is 25% at fault and the non-party defendant is 75% at fault. The defendant tortfeasor can file a Third-Party Complaint against the at-fault non-party but any responsibility assessed against that party will be assessed against the defendant tortfeasor first.