



COMMONWEALTH OF PENNSYLVANIA TRANSPORTATION AND LOGISTICS COMPENDIUM OF LAW

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A. ELEMENTS OF PROOF FOR THE DERIVATIVE NEGLIGENCE CLAIMS OF NEGLIGENT ENTRUSTMENT, HIRING/RETENTION AND SUPERVISION

Typically, in order to establish a cause of action in negligence, a Plaintiff must demonstrate that a defendant owed them a duty, that the duty was breached, and that the breach caused the Plaintiff damage. “Generally, there is no duty to control the acts of a third party unless the ‘Defendant stands in some special relationship with either the person whose conduct needs to be controlled or... with the intended victim of the conduct, which gives the intended victim a right to protection.’” Paliometros v. Loyola, 932 A.2d. 128, 133 (Pa. Super. 2007) (quoting, Brezenski v. World Truck Transfer, Inc., 755 A.2d 36, 40 (Pa. Super. 2000)).

The Pennsylvania Courts have adopted the *Restatement (Second) of Torts* and the *Restatement (Second) of Agency* along with common law theories to invoke derivative liability on an employer for the acts of its employees. The relevant portions of the Restatements impose upon an employer the duty to exercise reasonable care in selecting, supervising and controlling employees.

1. *Respondeat Superior*

Under the doctrine of *respondeat superior*, recovery is sought on the basis of vicarious liability. An employer is vicariously liable for the wrongful act of an employee if the act was committed during the course of, and within the scope of, his employment. Brezenski v. World Truck Transfer, Inc., et al., 755 A.2d 36, 39 (Pa. Super. 2000). The conduct of an employee is considered “within the scope of employment,” for purposes of vicarious liability, if it is of the kind and nature that the employee is employed to perform, it occurs substantially within the authorized time and space limits, it is actuated (at least in part) by a purpose to serve the employer. This liability may even extend to intentional or criminal acts committed by the employee; however, if the act is done for a personal reason, or in an outrageous manner, it will not be considered as being performed within the scope of employment. Id.

The presence of a company’s name, placard or logo on a commercial vehicle raises the rebuttable presumption that the same company is the owner of the vehicle. See, Caldwell v. Wilson Freight Forwarding Company, 322 F.Supp. 43 (W.D. Pa. 1971). It also raises the rebuttable presumption that the driver of the vehicle is the agent or servant of that company and is operating the vehicle for purposes of that company’s business. Kunkel v. Vogt, 47 A.2d 195 (Pa. 1946). The presumption alone is enough to take the case to the jury “unless the evidence to the contrary is clear, positive, credible, uncontradicted and so indisputable in weight and amount it must be set aside as a matter of law.” Hartig v. American Ice Co., 137 A. 867 (Pa. 1927). If evidence is introduced in the plaintiff’s case that makes it clear that the operator of the vehicle was not operating the vehicle while in the scope of his employment or on business for the defendant owner, the presumption is wholly lost. Kunkel, supra. However, if the evidence to rebut the presumption is not raised until the defendant’s case, the issue is one of fact which is decided by the jury.

Lindenmuth v. Steffy, 98 A.2d 242 (Pa. Super. 1953). When a commercial vehicle has the name, logo or placard of more than one company, each may be held liable for the conduct of the driver. Franceschino v. Mack, 102 A.2d 217 (Pa. Super. 1954). In such a case, two masters may have some control over one servant, rendering both of them liable. Id. It is up to the jury to determine, based on the evidence, who had control over the driver and to what extent. See, Id.

The basic inquiry is whether the alleged employee is subject to the alleged employer's control or right to control with respect to his physical conduct in the performance of the services for which he was engaged. Wilson v. IESI, N.Y. Corp., 444 F.Supp.2d 298, 313 (M.D. Pa. 2006). Although the right to control the manner in which work is to be performed is the touchstone of the inquiry, other factors that are relevant to determining whether a person was an employee or an independent contractor include: whether the person has responsibility for the results only, the terms of the agreement between the parties, the nature of the work to be performed, the skill required for performance, whether the person employed is engaged in a distinct occupation or business, what party supplied the tools, whether payment is by time or by the job, whether the work is part of the regular business of the employer, and the right to terminate employment at any time.

2. Negligent Entrustment

Pennsylvania has adopted §308 of the *Restatement (Second) of Torts*, which address negligence associated with permitting unqualified or incompetent persons to use things. See, Wittrien v. Burkholder, 965 A.2d 1229 (Pa. Super. 2009) (citing, Frey v. Smith, 685 A.2d 169 (Pa. Super. 1996); Johnson v. Johnson, 600 A.2d 965 (Pa. Super. 1991); and Mendola v. Sambol, 71 A.2d 827 (Pa. Super. 1950) (parents were found potentially negligent under Section 308 when their children injured others with a gun)).

The *Restatement (Second) of Torts* defines negligent entrustment as follows: 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 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. *Restatement (Second) of Torts* § 308 (1965). *See also id.* § 317 (duty of master to control conduct of servant); § 316 (duty of parent to control conduct of child).

Pulleyn v. Cavalier Ins. Corp., 505 A.2d 1016, 1018 fn1 (Pa. Super. Ct. 1986). Importantly, the entrustor's liability is not dependent on, derivative of, or imputed from the trustee's actual liability for damages. Ferry v. Fisher, 709 A.2d 399, 403 (Pa. Super. 1998) (citing, Christiansen v. Silfies, 446 Pa. Super. 464, 473 (1995), and *Restatement (Second) of Torts* § 308).

3. Negligent Supervision

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

- (a) in giving improper or ambiguous orders or in failing to make proper regulations; or
- (b) in the employment of improper person or instrumentalities in work involving risk of harm to others;
- (c) in the supervision of the activity; or
- (d) in permitting, or failing to prevent, negligent or other tortuous conduct by person, whether or not his servants or agents, upon premises or with instrumentalities under his control.

The determination of whether a person was acting within the scope of his employment is typically a question for the jury. Costa v. Roxborough Memorial Hospital, 708 A.2d 490, 493 (Pa. 1998). Where, however, the employee commits an act encompassing the use of force which is excessive and so dangerous as to be totally without responsibility or reason, the employer is not responsible as a matter of law. Id. Further, Pennsylvania courts have held that an assault committed by an employee for personal reasons or in an outrageous manner is not actuated by an intent to perform the business of the employer and, as such, is not within the scope of employment. Id.

4. Negligent Retention

The Supreme Court of Pennsylvania has adopted the *Restatement (Second) of Torts* §317 to guide the lower courts in their evaluation of negligent retention claims. Schofield v. Univ. of Pa., 894 F.Supp. 194, 196 (E.D. Pa. 1995). This section imposes a duty upon an employer to exercise control over an employee acting outside of the scope of employment, when:

- (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 have reason to know of the necessity and opportunity for exercising such control.

An employer may subject himself to liability under this Section by retaining in his employment servants who, to his knowledge, are in the habit of conducting themselves in a manner dangerous to others.

Among the essential elements of a negligent retention claim is proof that a more thorough investigation by the employer would have revealed that the employee had a history of harassing conduct. Sabo v. Lifequest, Inc., 1996 WL 583169, *4 (E.D. Pa. 1996). In other words, the inquiry focuses on whether the harm was reasonably foreseeable by the employer. Schofield at 196.

B. DEFENSES

Pennsylvania courts have also allowed traditional tort defenses such as comparative negligence, failure to mitigate damages, and superseding and intervening cause(s) in regard to derivative negligence causes of action.

C. PUNITIVE DAMAGES

In Pennsylvania, punitive damages are proper only if an actor's conduct was malicious, wanton, willful, oppressive, or exhibited a reckless indifference to the rights of others. SHV Coal, Inc. v. Continental Grain Co., 526 Pa. 489, 493 (1989); Hoffman v. Memorial Osteopathic Hosp., 492 A.2d 1382 (Pa. Super. 1985). This determination typically lies within the sound discretion of the fact-finder and will not be disturbed on appeal unless there was an abuse of discretion. Id.

However, "in Pennsylvania, a punitive damages claim must be supported by evidence sufficient to establish that (1) a defendant had a subjective appreciation of the risk of harm to which the plaintiff was exposed and that (2) he acted, or failed to act, as the case may be, in conscious disregard of that risk." Hutchinson v. Luddy, 870 A.2d 766, 772(Pa. 2005). "[P]unitive damages are an extreme remedy, available in only the most exceptional matters." Phillips v. Cricket Lighters, 883 A.2d 439, 445-46 (Pa. 2005).

Lastly, as a claim for punitive damages arises out of the underlying cause of action, an independent claim for punitive damages cannot stand absent a viable cause of action. Kirkbride v. Lisbon, 555 A.2d 800 (Pa. 1989). A reasonable relationship must exist between the nature of the cause of action underlying the compensatory award and the decision to grant punitive damages. There is no set formula in Pennsylvania for calculating punitive damages. Dillow v. Myers, 916 A.2d 698, 702 (Pa. Super. 2007).

D. Joint and Several Liability and Comparative Negligence

42 Pa.C.S.A. § 7102 changed Pennsylvania negligence law where there are multiple liable parties by making liability several and not joint. This means that the court enters judgment against each defendant separately, for the individual percentage that the defendant is liable. Each defendant then must pay that percentage of the damages.

There are five exceptions to this rule, where joint and several liability is retained. They are: (1) intentional misrepresentations, (2) intentional torts, (3) where the defendant has been held liable of not less than 60% of the total liability apportioned to all parties, (4) releases of hazardous substances, and (5) a civil action for violation of a specific section of the Liquor Code.

Though the Act overhauls the laws for joint and several liability, it is important to note that the general rule regarding a plaintiff's comparative negligence has not changed. Recovery is allowable so long as a plaintiff's negligence is not greater than 50%. The recovery is reduced by the plaintiff's percentage of negligence.

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.