STATE OF ARIZONA TRANSPORTATION COMPENDIUM OF LAW

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A. Elements of Proof for Derivative Negligence Claims: Negligent Entrustment, Hiring/Retention and Supervision

1. Respondeat Superior

An employer may be liable for injuries caused by an employee under the doctrine of Respondeat Superior. Santiago v. Phoenix Newspapers, Inc., 164 Ariz. 505, 794 P.2d 138 (1990); Haralson v. Fisher Surveying, Inc., 201 Ariz. 1, 31 P.3d 114 (2001). The employer is liable for the foreseeable acts committed by an employee acting within the scope of the employee=s employment in furtherance of the employer=s business. Pruitt v. Pavelin, 141 Ariz. 195, 685 P.2d 1347 (1984). An employer may also be liable for the employee=s torts that occur outside the scope of employment when the employer entrusts the custody and control of a dangerous instrumentality to the employee. Macneil v. Perkins, 84 Ariz. 74, 324 P.2d 211 (1958).

Thus, an employer may be vicariously liable for torts committed by an employee that cause injury to another=s property or person even if the employer did not have any part in the commission of the tortious act. If an employer has the right to control or controls an employee=s actions, then the employee is an Aemployee@ and the employer is potentially subject to vicarious liability for the employee=s tortious acts. McDaniel v. Troy Design Services Company, 186 Ariz. 552, 925 P.2d 693 (1996).

2. Negligent Entrustment

a. Elements

Plaintiff must prove:

1. That defendant owned or controlled the vehicle;
2. Defendant gave the driver permission to operate the vehicle;
3. The driver, by virtue of his physical or mental condition, was incompetent to drive safely;
4. The defendant knew or should have known that the driver, by virtue of his physical or mental condition, was incompetent to drive safely;
5. Causation; and,
6. Damages.

See, Acuna v. Kroack, 212 Ariz. 104, 128 P.3d 221 (2006). The entrustor can be negligent under this theory, regardless of whether the employee driver was acting within the course and scope of employment. See, Ogden v. J. M. Steel Erecting, Inc., 201 Ariz. 32, 31 P.3d 806 (2002).

b. Examples

In Ogden v. J.M. Steel Erecting, Inc., Id., the parties stipulated to the negligence of the intoxicated employee. The jury returned a verdict against the employer, but found no fault on the admittedly negligent employee. The court remanded for a new trial because in order for an employer to be held liable for negligent entrustment, the employee must have committed a tort. The jury must find some degree of negligence on the part of the primary tortfeasor to find against the employer on a derivative tort claim. See also, Tellez v. Saban, 188 Ariz. 165, 933 P.2d 1233 (1996) (car rental agency not negligent per se for entrusting unlicensed driver who rented vehicle, but issue of fact existed as to whether renting to an unlicensed driver without investigating the reason for the absence of a license; absence of license may create unreasonable risk of harm to public); Neihaus v. Southwestern Groceries, Inc., 127 Ariz. 287, 619 P.2d 1064 (1980) (owner of company van not liable on basis of negligent entrustment of van to employee where employee=s use of van at time of accident was unauthorized).

3. Negligent Hiring and Supervision

a. Elements

Arizona follows the Restatement Second Agency ' 213 as a general rule for deciding cases of negligent hiring and supervision. It states that an employer conducting an activity through employees or agents of the employer is subject to liability for harm to a third party if the employer is negligent or reckless in:

1. Giving improper or ambiguous orders or in failing to make proper regulations of employees;
2. The employment of improper persons for work involving risk or harm to others;
3. The supervision of the employee=s activities; or,
4. Permitting or failing to prevent, negligent or other tortious conduct by persons, whether or not the employer=s employees upon the premises of instrumentalities are under the employer=s control.

To be independently liable for negligence in hiring, retention or supervision, the employer must have known or had reason to know that there was an undue risk of harm to a third person by the employee prior to any harm occurring. Kassman v. Busfield Enterprises, Inc., 131 Ariz. 163, 639 P.2d 353 (Ct. App. 1981).

b. Examples

See, Kassman v. Busfield Enterprises, Inc., id., (employer bar not liable for negligent supervision or hiring of doorman when doorman shoots and injures fleeing customer thought to be committing robbery - no evidence showing doorman known to be vicious or careless person when hired); Pruitt v. Pavelin, 141 Ariz. 195, 685 P.2d 1347 (1984) (realty company liable on theory of negligent hiring when employee realtor defrauded a party to a sale by forging signatures when realty company actively helped employee after learning of fraud); Irving Investors v. Superior Court, 166 Ariz. 113, 800 P.2d 979 (1990) (employer not independently negligent when employer learned of employee misconduct after the fact and the tortfeasor employee was acting outside the scope of employment).

B. Defenses

Defenses depend on the facts of a particular case. With derivative claims, traditional tort defenses may apply such as comparative fault, mitigation of damages, causation, etc. There is no specific case in Arizona holding that admission of Respondeat Superior liability precludes independent action against employer for negligent supervision or hiring or negligent entrustment. However, Arizona will follow the Restatement of Torts, absent contrary authority.

C. Punitive Damages

Arizona courts will hold employers liable for punitive damages under a theory of Respondeat Superior. Wiper v. Downtown Development Corp., 152 Ariz. 309, 732 P.2d 200 (1987). Arizona courts have specifically rejected the Restatement Second, Torts '909 (1979). If an employee commits a tort with an evil mind in furtherance of the employer=s business and within the scope of the employee=s employment, the employer may be subject to a possible award of punitive damages based on the employee=s conduct. Jacobsen v. Superior Court, 154 Ariz. 430, 743 P.2d 410 (1987). If punitive damages are not awardable against the employee, they will not be awarded against the employer unless the employer commits a separate tortious act for which the employer is liable in addition to vicarious liability. Ford v. Revlon, 153 Ariz. 38, 734 P.2d 580 (1987). Gonzalez v. City of Tucson, 124 Ariz. 450, 604 P.2d 1161 (1979).

Arizona has a heightened standard for punitive damages. To recover punitive damages, the plaintiff must prove by clear and convincing evidence that a Adefendant=s wrongful conduct was guided by evil motives or willful or wanton disregard of the interests of others.@ Piper v. Bear Med. Systems, Inc., 180 Ariz. 170, 180, 883 P.2d 407, 417 (1993). A plaintiff must prove something more than the underlying tort. Piper v. Bear Med. Systems, Id. That is, a plaintiff must prove by clear and convincing evidence that the defendant engaged in aggravated and outrageous conduct with an Aevil mind.@ Rollins v.

Apodaca, 151 Ariz. 149, 726 P.2d 565 (1986). Although the element of intent may be inferred, the plaintiff must also prove outwardly aggravated, outrageous, malicious, or fraudulent conduct. Linthicum v. Nationwide Life Ins. Co., 150 Ariz. 326, 723 P.2d 675 (1986).

In an interesting punitive damages case, Saucedo v. Salvation Army, 24 P.3d 1274 (2001), a Salvation Army truck struck a pedestrian. The employee was driving on a suspended license, while the pedestrian was wandering the street with a blood alcohol content of .22. The employee driver thought that he had hit a garbage bag containing aluminum cans and did not stop at the scene. The pedestrian either died on impact or shortly thereafter. The court held that the necessary intent for punitive damages must occur in tandem with the tortious conduct giving rise to the injury. In other words, the employee driver had to have caused the accident with the requisite Aevil mind@ unless leaving the scene caused or contributed to the cause of the pedestrian=s demise. Leaving the scene alone would not form the basis for punitive damages.

In Hyatt Regency v. Winston & Strawn, 184 Ariz. 120, 907 P.2d 506 (1995), a lawyer malpracticed, intentionally exposing a client to a large judgment in favor of another client, and the jury imposed punitive damages against the lawyer=s law firm under vicarious liability principles. Of note is that the court permitted evidence of the law firm=s assets and revenues in support of the plaintiff=s punitive damages claim, remarking that the punitive damages claim was approximately 3% of the firm=s yearly gross revenues. Thus, regardless of independent wrongdoing by the employer, the employer=s financial position is relevant in Arizona to support a punitive damages claim for an employee=s conduct.

In Hudgins v. Southwest Airlines, Co. (Ariz. Ct. Appeals, Div. One, January 13, 2009), Plaintiffs, two Virginia-based bail enforcement agents, flew Southwest Airlines from Baltimore to Phoenix to attempt to apprehend a fugitive in Arizona. Before their flight, Plaintiffs worked with the airline to obtain instructions about to how to lawfully transport handguns on the aircraft. Plaintiffs complied with the airline's instructions, including the completion of airline forms, and airline employees advised Plaintiffs to take their guns on board even after Plaintiffs asked to check the guns because they did not yet have their fugitive in custody on the outbound flight to Phoenix. After the aircraft departed, a series of events associated with the flight crew's attempts to understand Plaintiffs' forms culminated in Plaintiffs being arrested upon arrival in Phoenix and charged with carrying concealed dangerous weapons on an aircraft. After a weekend in custody, federal prosecutors dismissed the charges because it was determined that, although Plaintiffs violated federal law by flying with their guns, they made good-faith attempts to comply with instructions given to them by the airline.

Plaintiffs subsequently filed suit against Southwest over the ordeal, and their claims of negligence and punitive damages were tried to verdict. The jury awarded each Plaintiff $500,000 in compensatory damages and $4 million in punitive damages. Southwest appealed the verdict and argued, in part, that the punitive damages award was unconstitutionally excessive.

To determine the constitutionality of the punitive damages award, the Court analyzed the airline's misconduct in light of the following three guideposts outlined in the U.S. Supreme Court's ruling in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996): the degree of reprehensibility of the misconduct; the ratio between compensatory and punitive damages; and how the award compared with other available penalties. The Court's decision focused in large part on the appropriateness of the ratio between the jury's compensatory and punitive damages awards. The Court's holding was based to a large extent on the part of the Gore opinion that established that a 4:1 punitive damages to compensatory damages ratio approaches constitutional impropriety and where compensatory damages are substantial, even smaller ratios may approach unconstitutionality.

The Court held that Southwest's misconduct fell within the low to middle range of the scale of potentially reprehensible acts and ruled the 8:1 ratio of punitive damages to compensatory damages was unreasonable. It observed that the airline's conduct did not cause Plaintiffs to sustain physical or economic injury, that the compensatory damages award was substantial, and that the compensatory damages award "likely contained a penal element that the jury duplicated in the punitive damages award." The Court subsequently reversed the jury's punitive damages verdict and reduced the punitive damages award to $500,000 for each Plaintiff, or a1:1 punitive damages to compensatory damages ratio.

Given that the determination of the appropriateness of a punitive damages award is fact intensive and specific to each case, the Court's decision to drastically reduce the jury's award appears to signal an effort by the Arizona Court of Appeals to reduce the potential for "runaway" punitive damages verdicts. Additionally, Arizona litigants appealing excessive punitive damages awards should find encouraging the Court's suggestion that large compensatory damages awards may, depending on the facts of a case, arguably encompass "a penal element." That language appears to open the door for litigants to take the position that even a 4:1 ratio may not be justified when a jury issues an artificially inflated compensatory damages award.

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.