

Employer Liability for Employee Actions: Derivative Negligence Claims in New Mexico

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Every employer is concerned about potential liability for the tortious actions of its employees. Simply stated: Where does an employer's responsibility for its employee's actions end, the employee's personal responsibility begin, and to what extent does accountability overlap? This article is intended to detail the various derivative negligence claims recognized in New Mexico that may impute liability to an employer for its employee's actions, the elements of each claim, and possible defenses. This subject matter is of particular importance to New Mexico employers generally and transportation employers specifically.

A. Elements of Proof for the Derivative Negligent Claim of Negligent Entrustment, Hiring/Retention and Supervision

In New Mexico, there are four distinct theories by which an employer might be held to have derivative or dependent liability for the conduct of an employee.¹ The definition of derivative or dependent liability is that the employer can be held liable for the fault of the employee in causing to a third party.

1. Respondeat Superior

a. What are the elements necessary to establish liability under a theory of Respondeat Superior?

An employer is responsible for injury to a third party when its employee commits negligence while acting within the course and scope of his or her employment. *See McCauley v. Ray*, 80 N.M. 171, 180, 453 P.2d 192 (1968), *rehearing denied* (1969); *Sutton v. Chevron Oil Company*, 85 N.M. 679, 515 P.2d 1283 (1973). NMUJI Civ.13-407 provides that:

An act of an employee is within the scope of employment if:

1. It was something fairly and naturally incidental to the employer's business assigned to the employee, and
2. It was done while the employee was engaged in the employer's business with the view of furthering the employer's interest and did not arise entirely from some external, independent and personal motive on the part of the employee.

New Mexico has not addressed the doctrine of placard liability or "logo liability." *Cf., Rodriguez v. Ager*, 705 F.2d 1229, 1236 (10th Cir. 1983) (recognizing the doctrine of placard liability/logo liability in the Tenth Circuit). However, New Mexico does acknowledge that under the Interstate Commerce Commission ("ICC") regulations, the carrier/lessee has full and complete responsibility during the term of the lease. *Matkins v. Zero Refrigerated Lines, Inc.*, 93 N.M. 511, 513, 602 P.2d 195 (Ct. App. 1979). It follows that the driver/lessor would become, for liability purposes, the

¹ Where trucking and transportation cases are not available to illustrate a particular point of law, this article will cite to applicable New Mexico cases within the employment context.

employee of the carrier. *See id.* The plaintiff retains the burden of establishing that the employee was within the course and scope of his employment at the time of the accident. *Los Ranchitos v. Tierra Grande*, 116 N.M. 222, 226, 861 P.2d 263 (Ct. App. 1993); NMUJI Civ. 13-407. Whether an employee's actions come within the scope of employment is generally a question of fact to be determined on a case by case basis. *Los Ranchitos*, 116 N.M. at 226; *see also Horanburg v. Felter*, 2004-NMCA-121, ¶ 12-13, 136 N.M. 435, 99 P.3d 685 (distinguishing the legal term of art "within the course and scope of employment" from an action which is merely "employment related").

b. Representative New Mexico cases

The case *Benham v. All Seasons Child Care, Inc.*, 101 N.M. 636, 686 P.2d 978 (Ct. App. 1984), *cert. denied*, 101 N.M. 686, 687 P.2d 743 (1984), stands for the proposition that permission to use an automobile can be limited in scope. In *Benham*, an employee was involved in an accident while on a personal mission with his employer's van, which he was authorized to use. *Id.* at 637. Proof or admission of ownership creates a presumption that the driver of a vehicle causing damages is the servant of the owner and using the vehicle in the master's business. This presumption is sufficient in the absence of evidence to the contrary to support a theory of respondeat superior. *See id.* at 638-39. But it is only a presumption of law and not evidence. Thus, when contradictory evidence is introduced the presumption disappears as though it had never existed. *Id.* In *Benham*, the employer was not liable because the employee was on a personal mission and respondeat superior liability is premised upon whether or not an employee is acting within the scope of his employment. *Id.* at 639.

2. Negligent Entrustment

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

This theory requires proof that: 1) the owner or person in control of the vehicle permitted another person to operate the vehicle; 2) the owner or person in control of the vehicle knew or should have known that that person was likely to use the vehicle in such a manner as to create an unreasonable risk of harm to others; 3) the person driving the vehicle was negligent in its operation; and 4) that negligence was the cause of the injury to another person. *See Spencer v. Gamboa*, 102 N.M. 692, 693, 699 P.2d 623 (Ct. App. 1985). Stated another way, New Mexico law recognizes that one who negligently entrusts a motor vehicle to an incompetent driver may be liable for injury to a third person caused by the driver's incompetence.

Unlike respondeat superior, the theory of negligent entrustment permits imputation of negligence regardless of whether the employee was acting within the course and scope of his employment. *See e.g., Bryant v. Gilmer*, 97 N.M. 358, 360, 639 P.2d

1212 (Ct. App. 1982) (court's sole inquiry to establish negligent entrustment was whether employer knew or should have known that employee was an unsafe driver).

See also § 65-2A-19 NMSA 1978 (safety requirements for motor vehicles and drivers used in compensated transportation); § 65-3-7 (qualifications of drivers); § 65-3-14 (drug and alcohol testing program; report of positive test).

b. Representative New Mexico cases

In the negligent entrustment context, New Mexico law states that only when the entrustor knew or should have known that the trustee was not qualified to engage in the activity does a duty to investigate exist. *See Spencer v. Gamboa*, 102 N.M. 692, 694, 699 P.2d 623 (Ct. App. 1985) (holding that car dealers are under no affirmative duty to learn the qualifications of customers when allowing test drives of automobiles); *DeMatteo v. Simon*, 112 N.M. 112, 812 P.2d 361 (Ct. App. 1991) (holding that an employer who failed to fully investigate a driver's record despite knowledge of several traffic citations negligently entrusted a vehicle); *McCarson v. Foreman*, 102 N.M. 151, 157, 692 P.2d 537 (Ct. App. 1984) (holding that evidence of an employer's knowledge of an employee's DWI conviction and cocaine charges was sufficient to support a jury finding that employer negligently entrusted a vehicle); *Hermosillo v. Leadingham*, 2000-NMCA-96, ¶ 16, 129 N.M. 721, 13 P.3d 79 (holding that personal injuries sustained from a traffic driven by defendant wife was not negligent entrustment when couple was estranged and had been living separately for approximately two months and husband lacked control and legal authority over the vehicle); *Cf. Sanchez v. San Juan Concrete Co.*, 1997-NMCA-68, 123 N.M. 537, 943 P.2d 571 (where driver "smelled like a brewery" employer's summary judgment motion on negligent entrustment issue could not survive, as employer may have been grossly negligent for not investigating the driver's fitness).

3. Negligent Hiring/Retention.

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

In New Mexico, the elements necessary to prove negligent retention are the same as for those needed to prove negligent hiring. *Lessard v. Coronado Paint and Decorating Center*, 2007-NMCA-122, ¶ 28, 168 P.3d 155. This theory requires proof that 1) the employee was unfit, considering the nature of the employment and the potential risk to those with whom he would foreseeably associate; 2) the employer knew or should have known that the employee was unfit; 3) the employer's negligence was a proximate cause of the plaintiff's injuries. *Id.*

An employer may be held liable for negligent hiring or retention, even if the employer is not vicariously responsible for the employee's negligent acts under a theory of respondeat superior. *Id.* at ¶ 40. As a general rule, New Mexico precludes imposing vicarious liability on an employer for its employee's negligent use of a

personal vehicle while driving to and from work. *Id.* at ¶ 17 (“three circumstances . . . must exist in order to impose vicarious liability on an employer for an employee’s negligent actions in driving a personal vehicle to and from work: 1) the employer must expressly or impliedly consent to use of the vehicle; 2) the employer must have the right to control the employee in his operation of the vehicle, or the employee’s use of the vehicle must be so important to the business of the employer that such control could be inferred; and 3) the employee must be engaged at the time in furthering the employer’s business”).

See also § 65-2A-19 NMSA 1978 (safety requirements for motor vehicles and drivers used in compensated transportation); § 65-3-7 (qualifications of drivers); § 65-3-14 (drug and alcohol testing program; report of positive test).

b. Representative New Mexico cases

The New Mexico Court of Appeals has declined to draw a bright-line rule precluding recovery in a negligent hiring or retention claim if the employee was not acting within the course and scope of his employment. *Lessard*, 2007-NMCA at ¶ 40. It is well settled that an employer may be liable for negligently hiring or retaining an employee even if the employee's acts were outside the scope of his employment. *Id.* Whether the employee was acting within the course and scope of employment is but one factor that the fact-finder may consider in determining foreseeability in the context of proximate cause. *Id.*

In *F & T Co. v. Woods*, 92 N.M. 697, 701, 594 P.2d 745 (1979), the New Mexico Supreme Court held that even if the company was negligent in the hiring or retention of the employee, such negligence must be the proximate cause of the incident.² “Whether the hiring or retention of an employee constitutes negligence depends upon the facts and circumstances of each case.” *Id.* at 701. For example, notice of an employee's drinking problem and violent propensities may make an assault and battery by that employee on a business invitee or customer foreseeable. *Valdez v. Warner*, 106 N.M. 305, 308, 742 P.2d 517 (Ct. App. 1987) (Injured invitee was entitled to instruction on negligent hiring because bar hired employee with a background of violence for a job where he would be in constant contact with the public, many of whom would have been drinking and argumentative).

²The court held that: 1) the company was not liable under a negligent hiring theory for the criminal act of the employee because, as a matter of law, the act of the employee could not have been foreseen by the company at the time it hired the employee; 2) the rape of the injured party by the employee was not foreseeable by the company, nor was it a natural or probable result of the company's retention of the employee.

4. Negligent Training/Supervision

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

One can sue an employer on the theory that their negligent training and supervision of their subordinates caused the misconduct. This theory requires proof that 1) the employer failed to exercise reasonable care in training or supervising the employee; and 2) the employer's negligence was a proximate cause of the plaintiff's injuries. *Gonzales v. Southwest Security & Protection Agency, Inc.*, 100 N.M. 54, 56-57, 665 P.2d 810 (Ct. App. 1983); *see also* § 65-2A-19 NMSA 1978 (safety requirements for motor vehicles and drivers used in compensated transportation); § 65-3-7 (qualifications of drivers); § 65-3-14 (drug and alcohol testing program; report of positive test).

- b. Representative New Mexico cases

Gonzales v. Southwest Sec. & Protection Agency, 100 N.M. 54, 56, 665 P.2d 810 (Ct. App. 1983) (the court concluded that defendant negligently equipped, trained, supervised and retained the guards, and that Southwest's negligence was the cause of Gonzales' harm). Moreover, the New Mexico Court of Appeals recently held that an employer may be liable for negligent supervision "even though it is not responsible for the wrongful acts of the employee under the doctrine of respondeat superior." *See Cain v. Champion Window Co.*, 2007-NMCA-85, ¶ 18, 164 P.3d 90 (claim for negligent supervision where an employee installed a gas furnace on his own time, using his own truck). The court affirmed that "the proper standard for determining whether an employer should be held liable for negligent supervision or retention of an employee [is] . . . whether the employer knew or reasonably should have known that some harm might be caused by the acts or omissions of the employee who is entrusted with such position." *Id.* at ¶ 19, quoting *Los Ranchitos*, 116 N.M. at 228. Further, there must also be "a connection between the employer's business and the injured plaintiff." *Id.*, quoting *Valdez*, 106 N.M. at 307. Here, the claim was dismissed because the employer did not pay for the stove installation, it was not done on the employer's premises, and the employer did not know that the stove was going to be installed which precludes the issue of negligent supervision. *Id.* at ¶ 20.

B. Defenses

1. Admission of Agency

New Mexico has not specifically adopted or rejected the majority view that once an employer has admitted an agency relationship with the employee, it is improper to allow a plaintiff to proceed against the employer on any theory of derivative or dependent liability.

However, the New Mexico Court of Appeals has indicated in dicta that it might adopt the majority view. *See Ortiz v. New Mexico State Police*, 112 N.M. 249, 252, 814 P.2d 117 (Ct. App. 1991) (citing with approval various cases holding that evidence that is relevant only to negligent entrustment is inadmissible when owner admits agency so that vicarious liability is established). Even if New Mexico did adopt this majority view, it would likely only do so to the extent that these theories duplicated each other. For instance, if plaintiff had a claim for punitive damages derived from negligent hiring, then the employer would not be able to do away with that claim simply by admitting vicarious liability. *See id.*

2. Traditional Tort Defenses

All traditional tort defenses (such as comparative fault, failure to mitigate damages, independent intervening cause etc.) may be used to defend against any of the above claims.

C. Punitive Damages

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

In New Mexico, there is not a heightened burden of proof for punitive damages, as there is in some other states. Rather, the standard is simply proof by a preponderance of the evidence. *Jessen v. National Excess Ins. Co.*, 108 N.M. 625, 628, 776 P.2d 1244 (1989); *United Nuclear Corp. v. Allendale Mut. Ins. Co.*, 103 N.M. 480, 485, 709 P.2d 649 (1985).

Punitive damages can be recovered for negligent entrustment, negligent retention/hiring, and negligent supervision/training, provided that there is evidence that the employer's conduct was malicious, willful, reckless or wanton. *See e.g.*, NMUJI Civ. 13-1827. Additionally, punitive damages can be awarded for vicarious liability if: 1) the conduct of the agent or employee was malicious, willful, reckless, wanton, fraudulent or in bad faith; 2) the agent or employee was acting in the scope of his or her employment and had sufficient discretionary or policymaking authority to speak and act for the employer with regard to the conduct at issue, independently of higher authority; or 3) the employer in some other way authorized, participated in or ratified the conduct of the agent or employee. *Id.*

Before a claim for punitive damages can be submitted to a jury, it is incumbent on the plaintiff to make a prima facie case of entitlement to punitive damages. *Sloan v. State Farm Mutual Auto. Ins. Co.*, 135 N.M. 106, 112, 85 P.3d 230 (2004); *Green Tree Acceptance v. Layton*, 108 N.M. 171, 174, 769 P.2d 84 (1989); *Mitschelen v. State Farm Mut. Auto. Ins. Co.*, 89 N.M. 586, 593, 555 P.2d 707 (Ct. App. 1976). This threshold determination may be appropriate for resolution on a motion for partial summary judgment (*see, e.g. Regenold v. Rutherford*, 101 N.M. 165, 167, 679 P.2d 833 (Ct. App. 1984)), although typically a court would wait until the directed verdict

stage. *McGinnis v. Honeywell, Inc.*, 110 N.M. 1, 9, 791 P.2d 452 (1990); *Leon, Ltd. v. Carver*, 104 N.M. 29, 31, 715 P.2d 1080 (1986); *McNeill v. Rice Eng'g & Operating, Inc.*, 133 N.M. 804, 806, 70 P.3d 794 (Ct. App. 2003).

2. Representative New Mexico cases

A Tenth Circuit decision explained New Mexico's punitive damage rule as follows: "punitive damages may not be imposed on an employer for the misconduct of an employee absent some evidence that the employer in some way contributed to, or participated in, the employee's misconduct." *Campbell v. Bartlett*, 975 F.2d 1569, 1582 (10th Cir. 1992) (construing New Mexico law). The court held that trucking officials who knew a driver had been convicted of a DWI several years earlier, but had not had an incident since, were not liable for punitive damages in an accident because "the evidence [of the previous alcohol related crime] was too remote and unconnected with the grossly negligent conduct of Bartlett in the October 1986 accident to meet the standard under New Mexico law." *Id.* at 1583.