

**VICARIOUS LIABILITY AND PUNITIVE DAMAGES ?  
WHO SHOULD BEAR THE LOSS?**

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## 1. Introduction

The traditional rationale which justifies the award of punitive damages against the employer, merely by virtue of the employment relationship, appears to be anchored in the concept of control. National Convenience Stores, Inc. v. Fantauzzi, 94 Nev. 655, 584 P.2d 689 (1978). The loss is deemed to be properly placed on the individual or entity that empowered the employee to be in the position to engage in the misconduct. Punitive damages are not awarded to compensate an injured individual. They do not purport to compensate the actual losses incurred. Instead, punitive damages are awarded because they are deemed to facilitate the goals of punishment and deterrence. Although courts do not expressly note that this re-allocation of the burden and shifting of the loss from the employee to the employer arises because the employee is generally presumed to have minimal assets as compared to the "deep pockets" of the employer, this notion, nevertheless, is an implicit theme in respondeat superior liability.

There are two distinct positions regarding the vicarious liability of an employer for punitive damages based on the grossly negligent, reckless, wanton or willful misconduct of its employee. One position holds that the employer is liable under the doctrine of respondeat superior as long as the employee was acting within the course and scope of his or her employment. Most jurisdictions construe this to denote that the employee was acting for his or her employer's benefit. Under this position, the employer is liable to pay punitive damages awarded because of the employee's wrongful conduct merely because of its status. No fault on the part of the employer is required to impose vicarious liability through the doctrine of respondeat superior.

In contrast, the other position refuses to impose vicarious liability on the employer for punitive damages in the absence of employer culpability and requires some fault on the part of the employer to link the employee's grossly negligent, recklessness, wanton or willful acts to the plaintiff's injuries. A subcategory of this latter theory, which is sometimes referred to as complicity, requires a specific type of fault, as opposed to merely some generic fault which bears a causal relationship to the incident. Under the specific type of fault required/complicity rule, vicarious liability will only be found if the employer authorized or ratified the conduct or the manner in which the particular task was performed; or empowered the employee, i.e., by making him or her a manager; or recklessly hired or retained an employee that was unfit for the particular job.

Lastly, an employer may be held liable to pay two separate and distinct punitive damage awards. This outcome results where the plaintiff establishes that: (1) the employer is vicariously liable under the doctrine of respondeat superior for the wrongful conduct of its employee; and (2) the employer is directly liable to the plaintiff because of the employer's independent gross negligence, recklessness, wantonness or willfulness.

## II. Punitive Damages? Why are they imposed?

The general justification underlying the award of punitive damages is that they serve as punishment to the wrongdoer and as a deterrent to the wrongdoer and others. Briner v. Hyslop, 337 N.W.2d 858, 865-66, 1983 Iowa Sup. LEXIS 1655 (1983). Punishment is a valid justification for punitive damages where the employer is at fault. Briner, 337 N.W.2d at 865. However, under the ?scope of employment/no fault required? position, the employer is held liable under the theory of respondeat superior by virtue of his or her status as employer, without inquiry as to the existence of independent fault of the employer. Id. Because the goal of punishment has no applicability to an employer who did nothing to warrant or justify punishment, the justification for vicarious liability under this position, by default, must be deterrence. Id. Incongruously, the nature of the tortious conduct engaged in by the employee, for which the employer will be held vicariously liable (gross negligence, recklessness, wantonness, or willfulness), is often not of the type that the employer can normally deter. Id.

For instance, the theory underlying the award of punitive damages against the employer as a means of deterrence presumes that the employer can prevent the employee from engaging in the wrongful conduct by exercising more stringent dominion and control over the employee. Id. The Briner court described the inherently flawed logic of this analysis in the following manner:

The ability to better control the actions of the employee through greater supervision is often illusory. Employees may perform their duties where direct supervision is impossible. Further, increased supervision may well be ineffective to prevent the occurrence of certain torts for which punitive damages may be assessed. Thus society?s interest in the preservation of the social order through punishment and deterrence may frequently not be advanced when punitive damages are assessed vicariously against the corporate master.

Id. (citing Tolle v. Interstate Systems Truck Lines, Inc., 42 Ill.App.3d 771, 356 N.E.2d 625, 627 (1976)).

Similarly, jurisdictions that have adopted the broader rule by which an employer will not be held vicariously liable for punitive damages under the doctrine of respondeat superior absent some fault likewise prescribe to the view that because punitive damages go beyond the actual damages suffered by an injured party, they should only be imposed as a punishment of the defendant and as a deterrent to others. Mercury Motors Express, Inc. v. Smith, 393 So.2d 545, 1981 Fla. LEXIS 2531 (1981). The primary distinction between the complicity rule and the broad, general and amorphous ?some fault required rule? is that the former delineates the specific type of fault required. Nevertheless, both categories require that the employee engage in the wrongful conduct with the requisite degree of culpability (gross negligence, recklessness, wantonness, or willfulness, depending on the jurisdiction). Both categories require that the employee was acting

within the course and scope of employment. Both categories require that the employer's fault must have foreseeably contributed to the plaintiff's injury.

### **III. When is an Employee Acting Within the Scope of His or Her Employment For Purposes of Holding An Employer Vicariously Liable to Pay Punitive Damages ?**

#### **1. Acting Within the Scope of Employment**

The scope of employment analysis is linked to the theory of respondeat superior because of the public policy that vicarious liability may be imposed upon the employer because the employer has the right (and apparently, the obligation) to control the employee's activity at the time of the employee's tortious conduct. Smithey v. Hansberger, 189 Ariz. 103, 106, 938 P.2d 498 (1996). In all instances, an employee must be deemed to be acting within the course and scope of employment before punitive damages may be imposed upon the employer under the doctrine of respondeat superior. An employee acts within the scope of employment if:

- < the activity is of the kind the employee is employed to perform;
- < occurs substantially within the authorized time and space limit; and
- < is actuated at least in part by a purpose to serve the master.

Smithey, 189 Ariz. at 106.

#### **2. Whether an Employee is Acting Within The Scope of Employment When He or She Commits Intentional Tortious Acts and/or Engages In Criminal Conduct is Generally a Question of Fact For the Jury**

Some courts refuse to hold an employer vicariously liable for punitive damages awarded because of the intentional torts of its employee. For instance, in Stephens v. A-Able Rents Company, 101 Ohio.App.3d 20, 654 N.E.2d 1315 (1995) the court granted summary judgment in favor of the moving company upon finding that the felonious assault and attempted rape of a customer, by its employee driver, fell outside of the scope and course of employment. This finding was upheld, despite the fact that the incident occurred while the driver/employee was at the customer's home to remove a roll-away bed that the customer had leased from A-Able Rents.

Taylor, the driver for A-Able Rents, was on an assignment to pick up a bed that belonged to A-Able from the plaintiff's home. After doing so, Taylor re-entered plaintiff's home for the purpose of getting directions for his next pick-up of A-Able Rents' equipment. While in the plaintiff's home, Taylor reached under the plaintiff's dress, punched and kicked her, struck her with a fireplace shovel, ripped off her dress, forced her to the floor and attempted to rape her. Taylor was eventually arrested and convicted of attempted rape and felonious assault.

In reaching its decision, the court enunciated the following principles:

- < In order for the doctrine of respondeat superior to apply, the tort of the employee must be committed within the scope of employment;
- < Whether an employee is acting within the scope of his or her employment is generally a question of fact to be decided by the jury;
- < Where the tort is intentional, the behavior giving rise to the tort must be calculated to facilitate or promote the business for which the servant was employed to be deemed within the scope of employment;
- < An employer is not liable for independent self-serving acts of its employees which in no way facilitate or promote its business;
- < Ohio courts have generally held that an intentional tort such as a sexual assault or rape is so far outside of the scope of employment that employers should not be held liable for such acts under the doctrine of respondeat superior;
- < The willful and malicious character of an employee's act does not always, as a matter of law, place it outside of the scope of employment unless the act is so divergent that its very character may be deemed to separate it from the employment relationship;

Stephens, 654 N.E.2d at 1321-22.

### 3. Whether An Employee Is Acting Within The Scope of Employment When He or She Violates Company Policy Is Generally A Question of Fact For The Jury

For example, in Williams v. Hughes, 578 So.2d 1281, 1991 Ala. LEXIS 403 (1991), a third party was injured when a warehouseman/dispatcher drove a company truck home, in violation of the trucking company's policy, and parked it in his driveway in a manner that allowed it to roll from the driveway, into the highway, thereby striking another vehicle. The injured party sued the owner of the trucking company for the alleged negligent and wanton conduct of its employee under the doctrine of respondeat superior.

The trial court directed a verdict in favor of Hughes, the owner of the trucking company. The court based its decision on the finding that the plaintiff failed to proffer substantial evidence that the employee was acting within the course and scope of his employment at the time of the collision. The trial court found that because the company required its employees to return the trucks to the employer's premises after each day's work, the employee could not have been acting within the course and scope of his employment.

The reviewing court reversed the grant of the directed verdict, holding that the fact that the employee violated company policy in taking the vehicle home with him instead of returning it to the employer's lot is not conclusive as to the question of his status at the time of the accident. Instead, the court ruled that the issue of whether the employee was acting within the course and scope of his employment for purposes of respondeat superior liability was a question for the jury.

#### IV. When Must ?Deep Pockets? Bear the Burden to Pay Punitive Damages ?

##### 1. Employee Fault Sufficient Standing Alone/ No Fault Required By Employer

Punitive damages may be imposed where the conduct of the employee evinces the degree of culpability sufficient to justify imposition of punitive damages, irrespective of the employer's contributing fault or lack thereof. Some jurisdictions award punitive damages where the employee's conduct is either grossly negligent or in reckless disregard of another person's rights, or is wanton or willful. Other jurisdictions require that the employee's conduct must rise to the level of being wanton or willful before punitive damages may be imposed upon the employer.

For instance, in J.B. Hunt Transport, Inc. v. Doss, 320 Ark. 660, 899 S.W.2d 464 (1995), the court applied the "scope of employment/no fault required rule" and awarded punitive damages against the tractor-trailer company under the doctrine of respondeat superior. The employee was found to be acting within the scope and course of his employment at the time the accident occurred, despite the fact that the injured party just so happened to be the driver's ex-wife.

In J.B. Hunt Transport, Inc., the driver of the tractor-trailer, while en route to "check with a friend" at a truck stop in preparation to embark on a long delivery route, collided with a car driven by his former wife. The trucking company contended that it should not be held vicariously liable because at the time of the accident, the driver was not acting within the course of his employment because: (1) he was engaged in a personal endeavor for his own benefit and not for the benefit of the employer; and (2) he acted intentionally to inflict harm on his ex-wife. The court rejected these arguments and applied the doctrine of respondeat superior to hold the employer liable to pay punitive damages. This finding was not predicated on any fault of the employer.

Lastly, the court highlighted that an employer has a common-law right to seek indemnification for punitive damages awarded against it for the conduct of his employee. However, because the trucking company failed to request this jury instruction, the issue was deemed to be waived. Id. at 470.

##### 2. Some Employer Fault Required

Some jurisdictions hold that an employer will not be held vicariously liable for punitive damages under the doctrine of respondeat superior unless there is some fault on its part. Although imposition of punitive damages upon the employer must be predicated on a grossly negligent, reckless, willful or wanton act of the employee, the employer's independent culpability need not rise to the level of gross negligence, recklessness, wantonness or willfulness. Instead, it is sufficient if the plaintiff establishes some fault on the part of the employer, which foreseeably contributed to the plaintiff's injury. See Mercury Motors Express, Inc. v. Smith, 393 So.2d 545, 549, 1981 Fla. LEXIS 2531 (1981) (willful, wanton or outrageous conduct on the part of the

employer, independent of the willful, wanton or outrageous conduct of its employee-driver, is not a prerequisite to the vicarious punitive damage liability of the employer).

Under this position, the requisite degree of culpable conduct of the employee differs among jurisdictions. Some courts allow imposition of punitive damages where the employee's conduct is merely grossly negligent or reckless. However, some jurisdictions require the employee's conduct to be wanton or willful before punitive damages may be awarded. In regard to the employer's degree of fault, jurisdictions following this position merely require a showing of negligence on the part of the employer, which facilitated or contributed to the employee's capacity to act improperly. Mercury Motors Express, Inc. 393 So.2d at 549.

Some examples of the types of fault by an employer which may be deemed to have contributed to or facilitated the employee's capacity to engage in the wrongful conduct include:

- a. Negligent hiring
- b. Negligent supervision
- c. Negligent entrustment

See Alexander v. Alterman Transport Lines, Inc., 387 So.2d 422, 1980 Fla.App. LEXIS 17526 (1980), *infra*.

In pursuing a negligent hiring claim, a plaintiff must show that an employer knew or should have known that the employee was unfit for the particular job that he was hired to perform. Estate of Arrington v. Fields, 578 S.W. 2d 173, 179 (Tex. App. ? Tyler 1979, writ ref'd n.r.e.). The basis of responsibility under the doctrine of negligent hiring is the master's own negligence in hiring in his employ an incompetent servant whom the master knows or by the exercise of reasonable care should have known was incompetent. *Id.* at 178.

Many jurisdictions, like Texas, treat negligent hiring, supervision and entrustment claims very similarly. See Deerings West Nursing Center v. Scott, 787 S.W. 2d 494, 495 (Tex. App. ? El Paso 1990, writ denied, reh'g overruled). The leading case dealing with the issue of negligent entrustment is Williams v. Steves Industries, Inc., 699 S.W. 2d 570 (Tex. 1985). The Texas Supreme Court listed the following as elements of negligent entrustment: (1) entrustment of a vehicle by an owner (2) to an unlicensed, incompetent, or reckless driver (3) that the owner knew or should have known to be unlicensed, incompetent, or reckless (4) the driver was negligent on the occasion in question and (5) the driver's negligence proximately caused the accident. *Id.* at 571.

Perhaps the most difficult element for plaintiffs in the negligent hiring, supervision and entrustment cases is establishing proximate cause. ?For entrustment to be a proximate cause, the defendant entrustor should be shown to be reasonably able to anticipate that an injury would result as a natural and probable consequence of the entrustment.? Schneider v. Esperanza Transmission Company, 744 S. W. 2d 595, 596 (Tex. 1987, reh'g overruled). In this case, the

Texas Supreme Court held that the negligent entrustment of a vehicle to an employee was not the proximate cause of the accident.

An employee, Havelka, was allowed to use the company truck for business and personal use. The employee went to a dance with a friend where he consumed alcoholic beverages; he thus asked his friend to drive back. On this trip, the truck collided with the Plaintiff. The Plaintiff then sued the company for negligent and grossly negligent entrustment of the truck to Mr. Havelka which the Plaintiff claimed was the proximate cause of the accident.

The Court found that there was no evidence that [the company] was aware of any propensity of Havelka to become intoxicated or to exercise poor judgment in allowing others to drive the truck. The cause of the accident, according to the Court, was Havelka's failure to use sound discretion in allowing someone else to drive.

Four Justices dissented stating that the causation created by the company's original negligent entrustment of the truck to the employee was not broken by the employee's subsequent negligent act of becoming intoxicated and giving the keys to a non-employee to drive the company truck. *Id.* at 597 (Robertson, J., dissenting). The dissent pointed out that the intervening cause (Havelka allowing his friend to drive) was foreseeable and thus the company's negligence proximately caused Plaintiff's injury.

The Texas courts have held that cause in fact and foreseeability are the two elements of proximate cause. Frito-Lay, Inc. v. Queen, 873 S.W. 2d 85, 86 (Tex. App. ? San Antonio 1994, writ denied, reh'g overruled) (citing Nixon v. Mr. Property Management Co., 690 S.W. 2d 546, 549 (Tex. 1985)). Schneider, 744 S.W. 2d at 597. ?If a negligent act or omission is a substantial factor in bringing about the injury and without which no harm would have occurred, the act or omission is a cause in fact of the injury.? Frito-Lay, Inc., 873 S.W. 2d at 86. If the person as a person of ordinary intelligence should have anticipated dangers which his act created, then foreseeability exists. *Id.*

In the Frito-Lay case, Plaintiff's vehicle was struck by a truck being driven by an ex-employee of the company. The evidence at trial showed that the driver (the ex-employee) was living with the employee who had permission from the company to take the vehicle home. No evidence could show that the employee loaned his girlfriend the company vehicle. Plaintiff sued Frito-Lay for negligent entrustment.

The appellate court reversed the trial court, reasoning that Frito-Lay could not anticipate an injury would result as a natural consequence of the entrustment of the vehicle to the employee. Frito-Lay, Inc., 873 S.W. 2d at 87. Further, the court noted that there was no evidence that the employee had the propensity in allowing others to drive the company vehicle. *Id.*

The issue of driver competence is an arena where all three of these theories, negligent hiring, supervision and entrustment become focal points. Whether driver competence falls within

any particular theory is irrelevant. The important issue is that driver competence is a significant issue in establishing an employer's liability.

An employer who does not check to see if his employee has a valid state license and does not check prior history when his employee has two prior Driving While Intoxicated convictions is liable for negligent entrustment. Jacobini v. Hall, 719 S.W. 2d 396, 399 (Tex. App. ? Fort Worth 1986, writ ref'd, n.r.e., reh'g overruled) (a reading of the case points in the direction that this employee was an incompetent driver). Proof of one previous traffic citation is certainly inadequate to establish incompetency and proof of two traffic citations within a two year period prior to the accident forming the basis of the lawsuit is probably insufficient. Broesche v. Bullock, 427 S.W. 2d 89, 93 (Tex. App. ? Houston [14<sup>th</sup> Dist.] 1968, writ ref'd, n.r.e.); Louis Thames Chevrolet Co. v. Hathaway, 712 S.W. 2d 602, 604 (Tex. App. ? Houston [1<sup>st</sup> Dist.] 1986, no writ). Seven citations in a span of three years prior to entrustment is sufficient to show a driver incompetent. Broesche, 427 S.W. 2d at 93.

An employee who has his license suspended for six months as a habitual violator of traffic laws two years prior to employment and still received four traffic violations, two of those accidents, is ample enough for the employer to be liable under negligent entrustment (due to incompetent driver). Southwestern Bell Telephone Company v. Davis, 582 S.W. 2d 191, 195 (Tex. App. ? Waco 1979, no writ).

The Supreme Court of Alabama held that the Plaintiff did not present substantial evidence that [the Defendant] was an incompetent driver when the Plaintiff presented at the trial level that the driver had two speeding tickets five years prior to the accident and a Driving Under the Influence resulting in probation ten years before the accident. Pryor v. Brown & Root USA, Inc., 674 So. 2d 45, 52 (Ala. 1995). The Supreme Court also noted that the trial court did not find any evidence of the driver being involved in an accident prior to the one in question. *Id.* at 51.

Virginia holds a very narrow window for possible Plaintiffs to sue under negligent entrustment. See Bailey v. Sours, 21 Va. Cir. 211 (1990). In this case, the Defendant Scott Sours crashed a vehicle injuring his passenger. The Plaintiffs alleged that the driver (a young man) was incompetent. *Id.* at 213. The Court held that Virginia Courts have limited the doctrine of negligent entrustment to those situations where the permissive driver is unable to competently drive a motor vehicle due to his physical condition, i.e., he is intoxicated or handicapped by blindness or other physical deformity. *Id.* The court wrote that this was a Plaintiff's portrayal of a somewhat troubled young man, just like most of those in his age group. *Id.* The court gave the analogy of a habitual criminal, stating that even with this type of person, he will obey the law on most days. *Id.* This doctrine in relation to a driver's prior conduct, according to the court, would have to be extended for another day. *Id.* at 215.

According to the New Hampshire Supreme Court, the introduction of two prior speeding offenses of a person employed as a limousine driver was enough to go to the jury to prove the

driver's incompetence. Burley v. Hudson, 122 N.H. 560, 564, 448 A. 2d 375, 377 (1982). The court upheld the jury's finding that the driver was incompetent and thus affirmed the decision rendered for the Plaintiff. In New Mexico, several traffic citations and involvement in previous auto accidents (no number mentioned nor when these events occurred) will support a jury finding of a driver's incompetence. DeMatteo v. Simon, 112 N.M. 112, 812 P. 2d 361, 363-364 (1991).

A single moving violation more than two years prior to the accident and three no-fault accidents one to two years prior to the accident will not *as a matter of law* support a finding that the driver is likely to cause harm to others. Tart v. Martin, 2000 N.C. Lexis 900 ( N.C. Dec. 21, 2000) (emphasis added). Thus, negligent entrustment cannot be a claim asserted by a Plaintiff. In this case, the 18 year old driver was killed and Plaintiff (in another vehicle) injured when the driver drove through a stop sign. Likewise, in New York, a driver's two prior accidents (the first one when another driver crashed into his vehicle and the second one occurring when he lost control on a wet road and collided into another car) do not demonstrate that the [driver] had a propensity to drive recklessly. Weinstein v. Cohen, 179 A.D. 806, 807, 579 N.Y.S. 2d 693, 694 (N.Y. App. Div. 2d Dep't 1992).

A Maryland appellate court noted that six traffic violations, three of them occurring within sixteen months of the driver's employment, in a five year period forms a habit of incompetent driving. Curley v. General Valet Service, Inc., 270 Md. 248, 265, 311 A.2d 231, 240 (1973). The issue in this case was whether the employer knew or should have known that the driver was likely to use the company vehicle in a manner involving unreasonable risk of harm to others. *Id.* The court held, however, that a jury hearing this evidence could find that the driver's failure to heed traffic control devices was habitual and as a consequence rendered him an incompetent driver... *Id.* at 266; 241.

Where the plaintiffs are successful in establishing employer liability, the next step is to try to establish a claim for punitive damages. For example, if the liability of the company is established under a finding of negligent entrustment, punitive damages can be imposed if (1) the driver was incompetent or habitually reckless and (2) the owner was grossly negligent in entrusting the vehicle to that driver. Hanna v. Lott, 888 S.W. 2d 132, 137 (Tex. App. ? Tyler 1994, no writ); Schneider, 744 S.W. 2d at 596.

Gross negligence is the entire want of care (which focuses on the objective nature of the actor's conduct) which raises the belief that the act was the result of a conscious indifference (which focuses on the actor's mental state) to the rights of others. Hanna, 888 S.W. 2d at 137. Thus, as courts in Texas reason, gross negligence can never be the result of momentary thoughtlessness, inadvertence, or error in judgment. Wal-Mart Stores, Inc. v. Alexander, 868 S.W. 2d 322, 325-26 (Tex. 1993, reh'g overruled).

In the Hanna case, a garbage truck was being driven by a person (related to the owners of the company) whose license was suspended because of a conviction of Driving While Intoxicated. The truck collided with Plaintiffs' car and personal injury resulted to those inside the vehicle.

The appellate court affirmed the jury's finding of the company being grossly negligent in entrusting the vehicle to that driver.

However, if the driver is merely unlicensed, punitive damages under negligent entrustment are inappropriate. Williams, 699 S.W. 2d at 573. The driver must be incompetent or habitually reckless. *Id.*

In another case in which a company was found to be grossly negligent in entrusting a vehicle to an employee, a Plaintiff sued the company after his vehicle was struck by a company vehicle. See Montgomery Ward and Co. v. Marvin Riggs Company, 584 S.W. 2d 863 (Tex. App. ? Austin 1979, writ ref'd, n.r.e., reh'g overruled). The driver received two citations for speeding, one for running a stop sign, and one for failing to yield the right of way in the year prior to employment. His license was likewise suspended prior to joining the company. The driver did not have a prior job driving nor did he receive special training from the company on how to operate its commercial vehicles. Another employee went with the driver to teach him to adequately maneuver the vehicle. The driver would become nervous and flustered and the opinion of the other employee was that he should not be driving company vehicles. Because the company allowed such action (employing the driver), punitive damages were appropriate.

A jury can find that a company could be found grossly negligent while the driver who caused the accident is found only to be liable for simple negligence. Dalworth Trucking Company v. Bulen, 924 S.W. 2d 728 (Tex. App. ? Texarkana 1996). The appellate court approved the trial court's instructions to the jury that someone in a managerial capacity acting within that capacity had to be grossly negligent in order to find the company grossly negligent. *Id.*

Florida law provides that in the absence of some fault on the part of the employer, the employer will not be liable to pay punitive damages awarded because of the wilful and wanton conduct of its employees. In Alexander v. Alterman Transport Lines, Inc., 387 So.2d 422, 1980 Fla.App. LEXIS 17526 (1980), Penley, the driver of a tractor trailer owned by Alterman Transport Lines, Inc., collided with another vehicle thereby causing the death of the other driver. The decedent's estate sued the driver and the owner of the trucking company. In upholding the award of punitive damages against the trucking company under the doctrine of respondeat superior, the court enunciated the following principles:

- < an employer may not be vicariously liable to pay punitive damages awarded because of the employee's wrongful conduct unless the employer evinced some degree of fault;
- < the employer's degree of fault need not rise to the level of being willful, wanton or outrageous;
- < the driver's conduct met the standard required to impose punitive damages because he was visibly intoxicated at the time of the accident and the voluntary act of driving while intoxicated evinces a sufficiently reckless attitude;

- < it was reasonable for the jury to find that the trucking company was also at fault because the evidence showed that when the driver appeared at the terminal on the morning of the accident, Alterman Transportation Company knew, or in the exercise of reasonable care, should have known that Penley was drunk;
- < the issue of whether Alterman Transportation Company was vicariously liable to pay punitive damages is a jury question.

Alexander, 387 So.2d at 425-426. *See also*, Mercury Motors Express, Inc. v. Smith, 393 So.2d 545, 548-49, 1981 Fla. LEXIS 2531 (1981) (citing, discussing, and applying analysis in Alexander).

### 3. Complicity/Specific Type of Fault Required

Complicity is a subcategory of the some fault required position. It requires that the employer evince a specific type of fault. Under the complicity rule, punitive damages may be awarded against the employer because of the conduct of its employee only where:

- < the principal authorized the doing and the manner of the act; or
- < the agent was unfit and the principal was reckless in employing him; or
- < the agent was employed in a managerial capacity and was acting in the scope of employment; or
- < the principal or the managerial agent of the principal ratified or approved the act.

Briner v. Hyslop, 337 N.W.2d 858, 861, 1983 Iowa Sup. LEXIS 1655 (1983) (*citing* Restatement (Second) of Agency and Section 909 of the Restatement (Second) of Torts).

For instance, the court in Briner v. Hyslop, 337 N.W.2d 858, 861, 1983 Iowa Sup. LEXIS 1655 (1983) expressly adopted Section 217C of the Restatement (Second) of Agency and/or Section 909 of the Restatement (Second) of Torts and employed this standard to assess whether to hold the employer liable to pay punitive damages. Briner, 337 N.W.2d at 861. These Restatement sections employ identical language in delineating the standard by which to assess whether the imposition of punitive damages against the employer arising from the misconduct of its employees is appropriate. Id.

In Briner, although the court adopted complicity rule, it remanded the case to determine whether the employer's acts and/or omissions evinced the type of fault as delineated thereunder. This was the first case in which Iowa adopted the complicity rule. In doing so, the court vehemently rejected the "scope of employment/no fault required rule," and stressed that there is little justification for awarding punitive damages against an innocent employer. Id. at 865-67. Alternatively, the court found that it was reasonable to punish an employer for the reckless employment or retention of an employee, the ratification or approval of outrageous acts, or for the outrageous acts performed by an employee acting in a managerial capacity. Id. at 867.

Further, the court highlighted that the complicity rule is not limited solely to employee conduct that is expressly authorized by the employer. Id. at 866. Instead, the court deemed the complicity rule to extend employer liability to employee conduct which would be difficult to prove was authorized, but for which the employer is at least partially to blame for the employee's wrongful conduct because the employer hired an unfit person. Id.

The court found that evidence of fault on the part of the employer consisted of the following:

- < awareness of its employees' driving and sleeping habits, but failing to properly supervise and/or alter their driving and sleeping habits;
- < the employer knew, or should have known of its employees' sleeping habits because of their phone calls and by examining their gas and motel slips;
- < failing to set schedules or guidelines for its drivers;
- < lack of an established time for reviewing the logs kept by its drivers and the fact that one-hundred-twenty days could pass before the drivers' logs were reviewed;
- < the employer's knowledge that Hyslop had not kept a log for the three week period before the collision and that in the past, Hyslop had failed to keep a log;

Id. at 867-68.

Similarly, the court in Campbell v. Bartlett, 975 F.2d 1569 (10<sup>th</sup> Cir. 1992) (applying law of New Mexico), held that an employer must evince a specific type of fault before he or she will be liable to pay punitive damages arising from the employee's wrongful conduct. However, the court did not expressly adopt the complicity rule as set forth in the Restatement Sections. Instead, the court crafted its own standard of employer fault under which an employer will be held vicariously liable to pay punitive damages.

In Campbell, the court held that an employer may not be vicariously liable to pay punitive damages under the doctrine of respondeat superior absent evidence that the employer contributed to, or participated in the employee's misconduct. Campbell, 975 F.2d at 1582. The trial court directed a verdict in favor of the Garrison Trucking Company, precluding the jury from considering the plaintiff's claim for punitive damages against it under the doctrine of respondeat superior. This outcome was based on the court's finding that the trucking company's acts or omissions failed to fall within the purview of the complicity rule. This verdict was affirmed.

In Campbell, a tractor trailer driver en route from Iowa to Arizona, collided with another tractor-trailer driven by Bartlett and owned by Garrison Trucking Company. The accident arose when Bartlett made a U-turn across the four lane highway. Although Campbell saw that this westbound truck in the right-hand lane ahead of him was beginning to turn onto the shoulder, he was unable to brake or steer out of its path. Bartlett was intoxicated at the time of the collision.

The court set forth the following analysis and legal principles:

- < an employer-principal is vicariously liable for punitive damages only where the principal or master has in some way authorized, participated in or ratified the acts of the agent or servant, which acts were wanton, wilful, reckless, grossly negligent, in bad faith, oppressive, malicious, fraudulent or criminal in nature;
- < a plaintiff must prove: (1) employer authorization, participation or ratification; and (2) that the employee's conduct satisfied the general requirements for the imposition of punitive damages;

Campbell, 975 F.2d at 1582-83.

#### 4. In Some Instances, An Employer May Be Liable To Pay Two Awards of Punitive Damages

In Torres v. North American Van Lines, Inc., 135 Ariz. 35, 658 P.2d 835 (1982), a tractor-trailer company was found to be liable to pay punitive damages based on two separate and distinct theories: (1) vicarious liability under the doctrine of respondeat superior which was not predicated on any fault of the employer; and (2) independent/direct liability predicated on findings that the employer's corporate safety policies constituted a wanton disregard for the safety of the public. The tractor-trailer company was thus responsible for two separate awards of punitive damages.

The jury awarded \$5000.00 in punitive damages against the driver of the tractor-trailer, for which the employer was liable under the doctrine of respondeat superior. Although the court did not expressly so note, under Arizona law, no independent fault is required to support the jury's finding of vicarious liability. See Wiper v. Downtown Development Corporation of Tucson, 152 Ariz. 309, 732 P.2d 200 (1987) (stressing that Arizona has specifically rejected the complicity rule in favor of a rule allowing punitive damages against an employer for acts of its employees so long as committed in the furtherance of the employer's business and acting within the scope of employment). Additionally, the jury awarded \$10,000,000.00 against the tractor-trailer company directly, based upon its independent finding that the company acted in wanton disregard for the safety of the public. Significantly, the jury's finding that the trucking company's acts and omissions were in wanton disregard for the safety of others exclusively supported the jury's award of punitive damages under a direct finding of liability. Subsequently, the total award of punitive damages was reduced to \$2,500,000.00. Plaintiffs agreed to accept this amount in lieu of further litigation on the issue of the excessiveness of the punitive damages awarded.

The court did not discuss the degree of culpability of the driver in awarding punitive damages against him, for which North American Van Lines, Inc., was held vicariously liable to pay. The direct and independent liability of North American Van Lines, Inc., was based on the following findings establishing that corporate safety policies constituted a wanton disregard for the safety of the public:

- < the trucking company failed to enforce DOT reporting regulations requiring truck drivers to properly log their on-duty driving time;

- < the trucking company failed to verify the entries made by the drivers by comparing log times to fuel receipts, and inconsistently verified such entries by comparing log times to toll receipts on a spot-check basis, despite having sophisticated computer equipment and sufficient resources and personnel to complete these analyses;
- < imputed awareness of the necessity to monitor and verify the time logs based on the company's two prior investigations by the federal government which revealed false logs which underestimated the actual hours driven to conceal the violation of the maximum hour requirement;
- < the trucking company's failure to employ a trip assignment system to detect and warn drivers who would likely exceed the allowable on-duty hours;
- < the trucking company's allowance and/or tolerance of its drivers' violations of the 70 hour rule, a federal regulation which provides that no motor carrier shall permit any driver sued by it to remain on duty for total of more than 70 hours in any period of eight consecutive days; and
- < the fact that in 1979 and 1980, North American drivers were involved in approximately 1,000 traffic accidents, yet North American never attempted to analyze the accident-producing potential of driver fatigue.

Torres, 658 P.2d at 837-39.

Similarly, in Sakamoto v. N.A.B. Trucking Co., Inc., 717 F.2d 1000 (1983) (applying Tennessee law), the reviewing court upheld the jury's award of \$900,000.00 in punitive damages against N.A.B. Trucking Company, Inc., for the trucking company's direct and independent gross negligence, and \$100,000.00 in punitive damages awarded against the driver, for which the trucking company was also liable to pay under the doctrine of respondeat superior. The court did not address the issue of whether contributing fault on the part of the employer is necessary to sustain a verdict of punitive damages awarded against the employer under the doctrine of respondeat superior.

Although the court affirmed the jury's finding that N.A.B. was grossly negligent, the court did not specify which of the following acts or omissions of N.A.B. Trucking Company constituted gross negligence:

- < N.A.B. Trucking Company knew or should have known based on Walkup's driving schedule and the fact that he declined to stay in a motel room that he had not slept for more than 40 hours at the time of the accident;
- < N.A.B. knew or should have known that Walkup was a habitual user of amphetamines;
- < allowing the tractor-trailer to have insufficient warning lights;
- < failing to inspect and/or repair the flare compartment in the tractor cab;
- < despite the obvious danger to other motorists, instructing Walkup to continue to drive to Georgia without having the tractor inspected or repaired when Walkup first reported to the dispatcher that the tractor was malfunctioning .

Sakamoto, 717 F.2d at 1002-03.

Prior to trial, Walkup and N.A.B. Trucking conceded that each was guilty of ordinary negligence. Thus, the central issue at trial was whether either of the defendants could be deemed to have acted grossly negligent. The jury found that Walkup's decision to turn his tractor-trailer around on the interstate highway itself, instead of continuing straight and getting off at the next exit was grossly negligent. Under the doctrine of respondeat superior, N.A.B. Trucking Company was held vicariously liable. Likewise, the jury held N.A.B. Trucking Company directly liable for its independent acts and omissions which contributed to the accident. Thus, N.A.B. was liable to pay both awards of punitive damages.

## 22. Conclusion

Vicarious liability can be an opportunity for plaintiffs to establish claims for both compensatory and punitive damages against employers. Some jurisdictions allow the imposition of punitive damages when a plaintiff merely establishes that the employee operated within the scope of employment. Others require some fault on the part of the employer. Still others allow the potential for punitive damages to be imposed under both theories.

Regardless of the jurisdiction, vicarious liability is a dangerous weapon that requires employers to act vigilantly to enforce their work rules and federal regulations. Otherwise these rules and regulations can supply the ammunition for awards of compensatory and punitive damages.