
# STATE OF ARIZONA TRANSPORTATION AND LOGISTICS COMPENDIUM OF LAW

**Updated by**
Phil Stanfield & Samantha Cote
Jones, Skelton & Hochuli, P.L.C.
40 North Central Avenue, Suite 2700
Phoenix, AZ 85004
602-263-1700
www.jshfirm.com

***2021***

## 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. In determining liability, courts focus on "which employer had control of the details of the particular work being done at the time of the injury-causing incident." Tarron v. Bowen Mach. & Fabricating, Inc., 225 Ariz. 147, 150, 235 P.3d 1030, 1033 (2010).

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, 110, 128 P.3d 221, 227 (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. Id. *See* 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).

Remember, a negligent entrustment claim is not limited only to cases arising out of an employer-employee relationship. The Arizona Supreme Court held that "where one who owns a dangerous instrumentality, such as an automobile, and loans it to another who, to the knowledge of the owner, is incompetent to drive such a vehicle, *the owner is guilty of negligence if the driver negligently injures another*." Powell v. Langford, 58 Ariz. 281, 285, 119 P.2d 230, 232 (1941) (emphasis added). Therefore, claiming an employee acted outside the course and scope of employment is not a valid defense against a negligent entrustment cause of action.

3. Negligent Hiring and Supervision

The Arizona Supreme Court, in its 1967 *Lewis* decision, held that the "failure of an employer to hire only competent and experienced employees does not itself constitute an independent ground of actionable negligence." Lewis v. S. Pac. Co., 102 Ariz. 108, 109, 425 P.2d 840, 841 (1967). The Supreme Court also held that refusing to admit evidence of an employee's past negligence was not in error when an employer was not disputing agency, course and scope. *Id*. Since *Lewis*, Arizona has adopted theories of several liability, rights of contribution and comparative negligence. *See* A.R.S. § 12-2501. Indeed, Arizona expressly recognizes negligent hiring, training and supervision as a separate cause of action against an employer. Kassman v. Busfield Enterprises, Inc., 131 Ariz. 163, 639 P.2d 353 (Ct. App.1981). Therefore, the Supreme Court's holding in *Lewis*, that negligent hiring and supervision is not an independent ground of actionable negligence against the employer, is no longer the state of law in Arizona.

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**

Plaintiffs can assert direct claims against employers for negligent entrustment, hiring, supervision and/or retention as well as derivative claims based on Respondeat Superior and vicarious liability. *See* Quinonez for & on Behalf of Quinonez v. Andersen, 144 Ariz. 193, 197, 696 P.2d 1342, 1346 (App. Div. 1 1984). The defenses available for direct and derivative claims depend on the facts of the particular case. Typically, traditional tort defenses, such as arguing comparative fault, mitigation of damages, causation, etc., will apply. In Respondeat Superior cases, the defendant employer can also attempt to establish that its employee was not acting within the course and scope of employment when the acts giving rise to the plaintiff's cause of action occurred.

**C. Punitive Damages**

To recover punitive damages in Arizona, a plaintiff must prove something more than the underlying tort. Rawlings v. Apodaca, 151 Ariz. 149, 726 P.2d 565 (1986). The plaintiff must prove by clear and convincing evidence that a defendant's wrongful conduct was guided by evil motives or the willful or wanton disregard of the interests of others. Rawlings v. Apodaca, id. An "evil mind" can be evidenced by the defendant's intent to injure the plaintiff or the defendant conscious pursuit of a course of conduct knowing it creates a substantial risk of harm to others. Rawlings v. Apodaca, id. However, punitive damages are limited if considered "unconstitutionally excessive." Hudgins v. Sw. Airlines, Co., 221 Ariz. 472, 492, 212 P.3d 810, 830 (App. Div. 1 2009).

The Court's central focus in determining whether to award punitive damages is usually upon the defendant's mental state. Linthicum v. Nationwide Life Ins. Co., 150 Ariz. 326, 330, 723 P.2d 675, 679 (1986). The defendant must be consciously aware of the wrongfulness or harmfulness of his conduct and yet continue to act in a manner that creates a substantial risk of harm. Linthicum v. Nationwide Life Ins. Co., id. Examples of such conduct include instances involving malice, gross negligence, intentional misconduct, fraud, oppression, or criminal acts. Linthicum v. Nationwide Life Ins. Co., id.

If the requisite conduct exists, Arizona courts can hold employers liable for punitive damages under a theory of Respondeat Superior. This theory applies when an employee's actions were committed (1) in the furtherance of the employer's business; and (2) within the scope of employment. Wiper v. Downtown Dev. Corp. of Tucson, 152 Ariz. 309, 310, 732 P.2d 200, 201 (1987). Conversely, the Restatement states, "the absence of independent wrongdoing on the part of the employer [generally prevents the] recovery of exemplary damages." Haralson v. Fisher Surveying, Inc., 201 Ariz. 1, 6, 31 P.3d 114, 119 (2001) (discussing Restatement (Second) of Torts § 909 (1977) and Restatement (Second) of Agency § 217C (1957)). Arizona courts have explicitly rejected the Restatement approach on this topic. *See* Haralson v. Fisher Surveying, Inc., id.

Even though Arizona rejected the Restatement's approach, if an employee's conduct does not warrant recovery of punitive damages, his conduct cannot be the basis for recovering punitive damages from the employer. *See* Haralson v. Fisher Surveying, Inc., id. However, an employer may still be held liable for punitive damages if its own independent tortious conduct justifies such an award. *See* Haralson v. Fisher Surveying, Inc., id.; Ford v. Revlon, 153 Ariz. 38, 734 P.2d 580 (1987).

Hyatt Regency v. Winston & Strawn provides a good example of when punitive damages can be awarded against an employer. 184 Ariz. 120, 907 P.2d 506 (1995). There, a lawyer committed malpractice and exposed his client to a $3.6 million judgment that favored another client. At trial, the jury assessed punitive damages against the lawyer's employer, a law partnership, because the lawyer's acts were performed in the "ordinary course of the partnership's business." On appeal, the Court upheld the award of punitive damages because there was evidence that the attorney had purposefully not disclosed the conflict of interest and had knowingly exposed his client to excess liability. Altogether, the attorney's actions were sufficient for the jury to find that he acted with an "evil mind" justifying a punitive damages award.

Without an "evil mind," punitive damages will not be awarded. For example, in Saucedo v. Salvation Army, 200 Ariz. 179, 24 P.3d 1274 (App. Div. 1 2001), a Salvation Army truck driver struck a pedestrian while driving. There, the employee was driving on a suspended license and did not stop his truck after he hit a pedestrian who was wandering in the street and had a blood alcohol content of .22. The employee driver testified that he thought he hit a "garbage bag containing aluminum cans". The court held that the necessary intent for punitive damages did not exist and being involved in a hit-and-run accident was not a sufficient basis for punitive damages. For a punitive damages award to be proper, the employee driver would have had to strike the pedestrian while acting with recklessness or an intent to cause harm.

In Hudgins v. Southwest Airlines, Co., 221 Ariz. 472, 212 P.3d 810 (App. Div. 1 2009), the Court of Appeals explained the limits placed on punitive damages awards. There, the Plaintiffs were two Virginia-based bail enforcement agents who flew on Southwest Airlines from Baltimore to Phoenix to apprehend a fugitive. Before their flight, Plaintiffs worked with the airline to obtain instructions regarding how to lawfully transport handguns on an aircraft. Plaintiffs complied with the airline's instructions, but were still arrested and prosecuted after the flight. After a weekend in custody, federal prosecutors dismissed the charges because it was determined that, although Plaintiffs violated federal law by flying with guns, they made good-faith attempts to comply with instructions given to them by the airline.

Plaintiffs subsequently filed suit against Southwest. 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, the Court analyzed the airline's misconduct in light of the U.S. Supreme Court's ruling in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996). The Court of Appeals focused on three aspects: (1) the degree of reprehensibility of the misconduct; (2) the ratio between compensatory and punitive damages; and (3) how the award compared with other available penalties. The Court ultimately held that Southwest's misconduct fell within the low to middle range of the scale of potentially reprehensible acts. The Court ruled that the 8:1 ratio of punitive damages to compensatory damages was unreasonable.

Accordingly, the Court reduced the punitive damages award to $500,000 for each Plaintiff, a 1:1 punitive damages to compensatory damages ratio. In sum, the reasonableness of a punitive damages award is a fact-specific determination that largely depends on the circumstances of the case.

In Arellano v. Primerica Life Ins. Co., 235 Ariz. 371, 332 P.3d 597 (App. Div. 1 2014), the Court of Appeals relied on Hudgins to determine that a 13:1 ratio of punitive damages to compensatory damages was not proper under the Due Process Clause. There, the Court found that defendant life insurance company committed various reprehensible acts including forgery, unilaterally reducing the death benefit amount, accepting premium payment without obtaining the proper signatures, promising the premium payment secured coverage, and failing to provide the Plaintiff with documentation. The jury found in favor of the Plaintiff and awarded $82,000 in compensatory damages and $1,117,572 in punitive damages, a ratio of roughly 13:1. Despite the numerous misdeeds of the Defendant, the court held that the punitive damages were inflated. Relying on the language from Hudgins, the court determined single-digit multipliers are more likely to comport with due process and that a factor of four comes close to the line of constitutional impropriety. The jury's punitive damages award was reduced to a 4:1 ratio.

Two years prior to Arellano, the Court of Appeals reduced a punitive damage award from a ratio of 4:1 to a ratio of 1:1 because the reprehensibility of Defendant's misconduct was low to, at most, moderate. *See* Nardelli v. Metropolitan Grp. Prop. & Cas. Ins. Co., 230 Ariz. 592, 277 P.3d 789 (App. Div. 1 2012) In Nardelli, the Defendant insurance company refused to declare a stolen vehicle, that was eventually found with severe damage, a total loss. The Court found substantial evidence from which a reasonable jury could find the Defendant acted in bad faith by: (1) deciding to repair rather than total the vehicle, (2) sending the Plaintiffs a check for an amount that did not cover the repair costs, and (3) failing to advise the Plaintiffs of policy provisions relevant to their claim.

In analyzing the reprehensibility of the Defendant's conduct, the Court relied on State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003). The Court considered "whether the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident." Nardelli, 230 Ariz. at 610, 277 P.3d at 807. The Court found the harm to the Plaintiffs to be largely economic and the evidence did not demonstrate they were financially vulnerable. The Court did not hold that the Defendant's conduct was an isolated incident, but it could not point to any evidence that the conduct was part of a pattern of longstanding duration. Based on these findings, the Court found Defendants conduct to be low to moderate on the reprehensibility scale and reduced the punitive damages ratio to 1:1.

**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.**