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THE VIABILITY OF DIRECT NEGLIGENCE CLAIMS AGAINST MOTOR CARRIERS IN THE FACE OF AN ADMISSION OF RESPONDEAT SUPERIOR

*Richard A. Mincer**

The reputation of a driver and his conduct at other times and places are not reliable or safe criterions by which to determine what his conduct was at a particular time and place. . . . A very poor or careless driver may have been wholly free from fault in the particular instance involved and, likewise, the most skilful driver, accustomed to exercising the utmost care, may be grossly negligent on one particular occasion.¹

It is becoming increasingly difficult to find a case arising out of a commercial motor vehicle accident where the driver's employer is not also named as a party. Typically, the motor carrier admits that the driver was acting in the scope of employment, thereby subjecting itself to vicarious liability for the employee's negligence pursuant to the doctrine of respondeat superior.² Nevertheless, plaintiffs

* Partner, Hirst Applegate, LLP; Cheyenne, WY. I want to express my thanks to Amanda Good, an associate at Hirst Applegate, who provided valuable assistance in getting this project off the ground and performed much of the initial research on this topic in the course of our work on transportation cases, and special thanks to Jennifer Cook, a 2L law student at the University of Wyoming, who surveyed the various states to provide an up-to-date "nose count" of majority and minority jurisdictions.

¹ *Holberg v. McDonald*, 289 N.W. 542, 543 (Neb. 1939) (quoted by *Washita Valley Grain Co. v. McElroy*, 262 P.2d 133, 138 (Okla. 1953)).

² Direct negligence claims also arise in a variety of factual situations including workplace accidents, medical and other professional negligence cases, and any other situation where one party may have had some duty to control the actions of the alleged wrongdoer. The majority of the case law on the subject involves negligent entrustment of vehicles, although others will be discussed. Therefore, while this article focuses on motor vehicle accidents, it is equally applicable to other situations.

often assert direct negligence claims against the motor carrier for negligent hiring, training, supervision, retention, or entrustment. The motivation behind such an attempt is to gain the plaintiff a tactical advantage in the litigation, to encourage the court to admit otherwise inadmissible evidence, and to provide a basis for oppressive discovery. The majority of courts hold that such direct negligence claims are improper in the face of an admission of vicarious liability. They are right.

I. THE STORY

If we view this situation in the context of an ordinary motor vehicle accident (one that does not involve a tractor-trailer), we can see the wisdom in dismissing direct negligence claims. As the story goes, Little Johnny was a problem child. He went outside barefoot, tore the tags off mattresses and even ran with scissors occasionally—despite his mother’s repeated warning that he would “put someone’s eye out with that thing.” When he turned sixteen, his mom, Mrs. Jones, was concerned about him starting to drive. But, as a single mother of three, she needed help taking the younger kids to school, practice and other activities. She also hoped Johnny would get a job to help out the family finances.

A. *The First Lawsuit*

As you might expect, Johnny got his fair share of tickets as a young driver. He even had one accident where he rear-ended another vehicle.³ The day before his seventeenth birthday, Johnny was involved in another accident in the school parking lot with a vehicle driven by fellow student, Joe Blow. The other student filed suit seeking to recover property damages as a result of the accident. At trial, Joe’s father, Dr. Blow, wanted to testify that the accident must have been Johnny’s fault. After all, Joe was an honor student,⁴ had never been in an accident and never even received a ticket for a traffic violation. Johnny, everyone knew, could not make the same claims; the accident must be his fault.

Much to the good doctor’s chagrin, Judge Learned excluded the evidence of Johnny’s prior bad acts pursuant to Rules 403 and 404(b).⁵ So, the jury never heard about Little Johnny’s frailties, his less than perfect driving record, or his prior accident. The judge informed the parties that Johnny could only be held liable if he acted negligently at the time of the accident and such negligence was a proximate cause of the damages sought. The jury found in favor of Johnny.

³ Thankfully, no one was hurt.

⁴ If you have any doubts, just look at the bumper sticker on the back of the Blows’ minivan.

⁵ See FED. R. EVID. 403 and 404(b) for examples of rules that exclude unfairly prejudicial evidence, character evidence, and evidence of other acts.

B. The Second Lawsuit

Incredibly, Johnny was in another accident the next week on his way to a job interview with Pizza Darn Quik (PDQ).⁶ Luckily, during the interview, the manager did not ask Johnny why he was late for the interview and never checked his driving record. Johnny got the job, as his mother had hoped, and went to work as a delivery driver for PDQ. Dr. Blow was appalled. Never one to let a grudge go, the good doctor filed suit against PDQ for negligent hiring, training and retention. He learned from the first suit that a person has a duty to act reasonably under the circumstances. Certainly, PDQ acted unreasonably when it hired a person such as Johnny—never even bothering to check his driving record before turning him loose on an unsuspecting public!

Judge Learned, of course, summarily dismissed the Blow claim. After all, while PDQ may have acted unreasonably in hiring Johnny, this act had not translated into any harm. Johnny had not driven negligently, had not caused any accidents, and had not caused any damage to the Blows. Negligence, the judge explained, has four elements—duty, breach, causation and damages—and the good doctor simply could not prove all four. Case dismissed.

C. The Current Lawsuit

Now for the reason we're all here. Johnny was involved in yet another accident. Johnny was driving down a residential street in his PDQ Geo to make a delivery. He was driving the speed limit and paying attention, for a change. Unexpectedly, a man darted out into the street. Johnny slammed on his brakes and, just as his car was coming to a stop a good 20 feet from the man, Joe Blow plowed into Johnny from behind in his brand new Range Rover. The impact propelled Johnny forward and into the man, who was severely injured.

Suit followed against Joe Blow,⁷ PDQ and Little Johnny. The injured plaintiff alleged that the two young drivers acted negligently and caused the accident. The plaintiff also alleged that PDQ was liable for their direct negligence. Specifically, he alleged PDQ negligently hired, trained, supervised and entrusted the vehicle to Johnny. Joe denied that he was negligent and blamed Johnny. Johnny denied that he was negligent and alleged that the accident was caused by the plaintiff's negligence in darting into the street and Blow's negligence in rear ending Johnny at a high rate of speed, causing him to be pushed into the pedestrian. PDQ admitted that Johnny was acting in the course and scope of his employment, admitted it was vicariously liable for Johnny's negligence, if any, but denied that it was directly negligent or that such direct negligence was the proximate cause of

⁶ This one was Johnny's fault and his insurer paid \$12,500 to settle the claim.

⁷ Joe was now 18 and the vehicle was titled in his name.

the accident. PDQ filed a motion to dismiss the direct negligence claims, arguing that the claims were superfluous in light of the admission of respondeat superior.

D. The Direct Negligence Claims Should be Dismissed

Should the Court dismiss the direct negligence claims against PDQ, given the admission that it is vicariously liable for Johnny's negligence under the doctrine of respondeat superior? The obvious and logical answer is *yes* and for a lot of reasons.

II. WHY THE DIRECT NEGLIGENCE CLAIMS SHOULD BE DISMISSED

A. What Is a Direct Negligence Claim?

Generally, a master is liable for the negligent acts of its employee when such acts are performed in the course and scope of employment. This is the familiar doctrine of respondeat superior. Yet, there are other theories that provide a basis to hold a master liable for the negligence of its servant. For purposes of this article, the term "direct negligence claims" means claims such as negligent hiring, negligent training or supervision, negligent retention, and negligent entrustment.⁸ Also known as independent negligence claims, these claims for relief were originally intended to provide a potential means of recovery in situations where vicarious liability is otherwise unavailable.⁹ In other words, liability can exist under these theories when the proximate cause of the injury is an employee's negligence who is acting *outside* the course and scope of his employment.¹⁰ Simply put, these

⁸ Unlike negligent hiring, training, supervision and retention, negligent entrustment does not necessarily arise out of the employment relationship, but is often asserted against a driver's employer. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 308 (1965).

§ 308 Permitting Improper Persons to Use Things or Engage in Activities

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Id.

⁹ *Plains Res. v. Gable*, 682 P.2d 653, 662 (Kan. 1984). "The application of the theory of independent negligence in hiring or retaining an employee becomes important in cases where the act of the employee either was not, or may not have been, within the scope of his employment." *Id.* (quoting 53 AM. JUR. 2D *Master & Servant* § 422). RESTATEMENT (SECOND) OF TORTS § 317 speaks to situations where the master has a duty to control his servant "while acting outside the scope of his employment." Similarly, RESTATEMENT (SECOND) OF TORTS § 318 discusses a duty on the part of a possessor of land or chattels with respect to someone using the same other than as a servant.

¹⁰ *Plains Res.*, 682 P.2d at 662. *See also* RESTATEMENT (SECOND) OF TORTS §§ 317-19. Generally, a person does not owe a duty to prevent a person from causing harm unless a special relationship exists between the actor and the person causing the harm or between the actor and the injured person which gives the injured person a right to protection. RESTATEMENT (SECOND) OF TORTS § 315.

theories are intended to provide an alternate means of recovery against the master for harm caused by his servant when respondeat superior or agency theories might not suffice. It seems apparent, then, that these theories are superfluous when the master has already admitted responsibility for any judgment entered against the servant.

B. Are Direct Negligence Claims Really Superfluous?

It is difficult to imagine a case where an employer's negligence in the hiring, training, or supervising of his employee is truly the proximate cause of harm to a third party in the absence of a wrongful act committed by the servant. In this case, the action against PDQ rises and falls on whether Johnny was negligent and whether his negligence was a proximate cause of the accident. If Johnny acted reasonably under the circumstances, how can anyone find fault with PDQ's conduct as his employer?¹¹ More specifically, if Johnny acted reasonably, how can any unreasonable conduct at a remote time and place possibly be the proximate cause of the plaintiff's accident and injuries?

Put another way, if Johnny's negligence was a proximate cause of the accident, it really does not matter whether the direct negligence claims have merit or not. If Johnny is negligent, whether or not the master is also negligent can neither increase nor decrease the percentage of fault attributable to Johnny. Similarly, whether or not the master is negligent can neither increase nor decrease the amount of recoverable damages. Finally, whether or not the master is also negligent does not change the legal fact that the master is liable for all of the negligence of its servant. Since the direct negligence of the master is derivative of the negligence of the servant, the direct negligence claims serve no real purpose, unless the purpose is to inject prejudice into the proceedings and invite error.¹²

¹¹ Similarly, a manufacturer cannot negligently manufacture a non-defective product, at least for purposes of tort liability.

A manufacturer logically cannot be held liable for failing to exercise ordinary care when producing a product that is not defective because: (1) if a product is not unreasonably dangerous because of the way it was manufactured, it was not negligent to manufacture it that way and (2) even if the manufacturer was somehow negligent in the design or production of the product, that negligence cannot have caused the plaintiff's injury because the negligence did not render the product unreasonably dangerous.

Bradley v. Gen. Motors Corp., No. 96-8073, 1997 U.S. App. LEXIS 15389, at *9-10 (10th Cir. June 26, 1997) (quoting Garrett v. Hamilton Standard Controls, Inc., 850 F.2d 253, 257 (5th Cir. 1988)).

¹² See, e.g., Beavis v. Campbell County Mem'l Hosp., 20 P.3d 508 (Wyo. 2001).

C. *What Harm Can Arise From Allowing the Direct Negligence Claims to Survive?*

If the claims are truly superfluous, why do plaintiffs file such claims and what harm, aside from the obvious waste of time, can result from allowing these claims to go to the jury? The answer should be obvious. Direct negligence claims against the employer provide a plaintiff with a backdoor means to introduce evidence, such as driving records and prior bad acts, which are otherwise inadmissible. Moreover, such claims promote confusion of the issues, and provide an avenue to encourage the jury to act based on passion and prejudice, rather than material facts.

For example, Johnny's driving record was inadmissible in the First Lawsuit.¹³ His driving record would be admissible, however, in the Current Lawsuit to show that PDQ acted unreasonably in hiring Johnny to deliver pizzas. Johnny's character, obviously inadmissible in the First Lawsuit, becomes potentially admissible in the Current Lawsuit. Similarly, PDQ's business practices take center stage in the Current Lawsuit, even though the critical inquiry is whether someone operated a vehicle in a negligent manner thereby causing an accident. These issues also provide a basis for unnecessary and costly discovery practices.

III. OVERVIEW OF THE LAW

There are several alternative methods whereby a master can be held liable for the negligence of its servant. The most obvious is respondeat superior. Under this agency doctrine, "a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent."¹⁴ The doctrine applies when the servant is acting within the course and scope of his employment at the time the injury occurs.¹⁵

Otherwise, "vicarious liability or imputed negligence has been recognized under varying theories, including agency, negligent entrustment of a chattel to an incompetent, conspiracy, the family purpose doctrine, joint enterprise, and ownership liability statutes."¹⁶ Regardless, all are different means to a common

¹³ See *supra* notes 3–5 and accompanying text.

¹⁴ BLACK'S LAW DICTIONARY 1311–12 (6th ed. 1990).

¹⁵ *Id.*

¹⁶ State *ex rel.* *McHaffie v. Bunch (McHaffie)*, 891 S.W.2d 822, 826 (Mo. 1995). Note, negligent entrustment does not necessarily impose vicarious liability on an entrustor who is not the trustee's employer, parent, or principal. See, e.g., *Ali v. Fisher*, 145 S.W.3d 557 (Tenn. 2004). Ali was injured in an accident with Fisher who was driving a car owned by his friend Scheve. The jury found Fisher 80% at fault and Scheve 20% on a negligent entrustment theory. The trial court then found Scheve vicariously liable on the negligent entrustment theory and ordered him to pay all of the damages. The Tennessee Court of Appeals reversed and was affirmed by the state supreme

end—to hold one party liable for the negligence of another; and, in the context of the employer-employee relationship. All theories share a common element—the underlying negligence of the employee.¹⁷

In either case, the employer is responsible to the same degree as the employee would be if there were no means to establish vicarious liability. Therefore, the “liability of the employer is fixed by the amount of liability of the employee.”¹⁸ “The employer is [liable] for *all* the fault attributed to the negligent employee, but *only* the fault attributed to the negligent employee as compared to other parties to the accident.”¹⁹ In other words, whether or not the employer is directly negligent neither increases nor decreases the employer’s ultimate liability—nor should it.

A. Majority View

Not surprisingly, the majority of jurisdictions embrace the logically consistent view described above.²⁰ When an employer admits vicarious liability for an employee’s negligence, a majority of courts hold it is improper to allow a plaintiff

court. *Id.* Specifically, the court held that negligent entrustment did not mandate a finding of vicarious liability and that the relative fault of the two defendants must be allocated pursuant to the comparative fault system. Notably, Scheve did not admit he was vicariously liable for Fisher’s actions under any theory and this case did not involve an employer-employee or similar agency relationship.

¹⁷ *Gant v. L.U. Transport, Inc.*, 770 N.E.2d 1155, 1160 (Ill. App. Ct. 2002) (“The doctrine of respondeat superior and the doctrine of negligent entrustment are simply alternative theories by which to impute an employee’s negligence to an employer. Under either theory, the liability of the principal is dependent upon the negligence of the agent.”); *see also* *Beavis v. Campbell County Mem’l Hosp.*, 20 P.3d 508, 515 (Wyo. 2001) (holding that an element of a negligent hiring claim is “some form of misconduct by the employee that caused damages to the plaintiff”) (quoting *McHaffie*, 891 S.W.2d at 826). Thus, even if the defendant hospital was negligent in hiring the nurse, “it is clear such negligence could not be the proximate cause of [plaintiff’s] injuries unless the predicate negligence of [the nurse] was first found.” *Beavis*, 20 P.3d at 515. *But see* *James v. Kelly Trucking Co.*, 661 S.E.2d 329 (S.C. 2008); *Ali v. Fisher*, 145 S.W.3d 557 (Tenn. 2004).

¹⁸ *Campa v. Gordon*, No. 01C50441, 2002 U.S. Dist. LEXIS 15032, at *1 (N.D. Ill. 2002) (quoting *Gant*, 770 N.E.2d at 1160).

¹⁹ *Gant*, 770 N.E.2d at 1159.

²⁰ Many state supreme courts have not specifically decided the issue of whether direct negligence claims should be dismissed in the face of an admission of vicarious liability. Jurisdictions in which the highest court followed the majority view include California, Connecticut, Idaho, Maryland, Mississippi, and Missouri. *See* *Armenta v. Churchill*, 267 P.2d 303 (Cal. 1954); *Prosser v. Richman*, 50 A.2d 85 (Conn. 1946); *Wise v. Fiberglass Systems, Inc.*, 718 P.2d 1178, 1181 (Idaho 1986); *Houlihan v. McCall*, 78 A.2d 661, 665 (Md. 1951); *Nehi Bottling Co. v. Jefferson*, 84 So. 2d 684 (Miss. 1956); *McHaffie*, 891 S.W.2d at 826 (Mo. 1995). *See also* Debra E. Wax, Annotation, *Propriety of Allowing Persons Injured in Motor Vehicle Accident to Proceed Against Vehicle Owner Under Theory of Negligent Entrustment Where Owner Admits Liability Under Another Theory of Recovery*, 30 A.L.R. 4th 838 (1984).

Other jurisdictions that appear to be firmly in the majority include Florida, Georgia, Illinois, New Mexico, Texas, and Wyoming. *See* *Clooney v. Geeting*, 352 So. 2d 1216, 1220 (Fla. Dist. Ct. App. 1977); *Bartja v. Nat’l Union Fire Ins. Co.*, 463 S.E.2d 358, 361 (Ga. Ct. App. 1995); *Gant*, 770 N.E.2d at 1160; *Ortiz v. N.M. State Police*, 814 P.2d 17 (N.M. Ct. App. 1991); *Rodgers v. McFarland*, 402 S.W.2d 208, 210 (Tex. App. 1966); *Beavis*, 20 P.3d 508.

to also proceed against the employer on additional theories of imputed liability, such as direct negligence claims.

1. Direct Negligence Claims Are Superfluous When Vicarious Liability Is Admitted

The doctrine of respondeat superior and direct negligence theories “are simply alternative theories by which to impute an employee’s negligence to an employer. Under either theory, the liability of the principal is dependent on the negligence of the agent.”²¹ Thus, in cases where claims for respondeat superior and direct negligence against the employer are alleged, a defendant employer’s admission of liability under respondeat superior establishes “the liability link” from the negligence of the driver to the employer.²² Evidence of direct negligence claims is rendered “unnecessary and irrelevant,” because vicarious liability under the theory of respondeat superior makes the employer strictly liable for all fault attributed to the negligent employee.²³ The courts expressing the majority view recognized that the dangers of allowing both respondeat superior and direct negligence claims to proceed are many and risk reversible error.

Federal courts in Colorado, Washington D.C., Kentucky, New York, and Tennessee also suggest these states will follow the majority rule. *See Hill v. Western Door*, Civil Case No. 04-cv-0332-REB-CBC, 2006 U.S. Dist. LEXIS 36641 (D. Colo. June 6, 2006); *Hackett v. Wash. Metro. Area Transit Auth.*, 736 F. Supp. 8, 10 (D.D.C. 1990); *Oaks v. Wiley Sanders Truck Lines, Inc.*, 2008 U.S. Dist. LEXIS 109111 (E.D. Ky. Nov. 10, 2008); *Lee ex rel. Estate of Lee v. J.B. Hunt Transport, Inc.*, 308 F. Supp. 2d 310, 315 (S.D.N.Y. 2004); *Scroggins v. Yellow Freight Sys., Inc.*, 98 F. Supp. 2d 928, 931 (E.D. Tenn. 2000).

States that purport to follow the minority rule include: Alabama, Kansas, Michigan, Ohio, South Carolina, and Virginia. *See Poplin v. Bestway Express*, 286 F. Supp. 2d 1316 (M.D. Ala. 2003); *Marquis v. State Farm Fire & Cas. Co.*, 961 P.2d 1213, 1225 (Kan. 1998); *Perin v. Peuler (Perin II)*, 130 N.W.2d 4, 8 (Mich. 1964); *Clark v. Stewart*, 185 N.E. 71, 73 (Ohio 1933); *James v. Kelly Trucking Co.*, 661 S.E.2d 329, 332 (S.C. 2008). Lower courts in Delaware, North Carolina and Virginia also appear in the minority. *Smith v. Williams, C.A. No. 05C-10-307 PLA*, 2007 Del. Super. LEXIS 266, at *16–17 (Del. Super. Ct. Sept. 11, 2007); *Plummer v. Henry*; 171 S.E.2d 330, 334 (N.C. Ct. App. 1969); *Fairshter v. Am. Nat’l Red Cross*, 322 F. Supp. 2d 646, 654 (E.D. Va. 2004).

²¹ *Gant*, 770 N.E.2d at 1160; *accord Beavis*, 20 P.3d at 514–17 (negligent hiring claim rests upon the predicate of the employee’s alleged negligence); *McHaffie*, 891 S.W.2d 822 (finding that, since the purpose of such direct negligence claims is to impose vicarious liability where none otherwise exists, there is no need to submit such claims to the jury where vicarious liability is admitted).

²² *Bartja*, 463 S.E.2d at 361.

²³ *Id.* at 361 (“In cases alleging both respondeat superior and negligent entrustment against an employer for the acts of its driver where no punitive damages are sought, we have stated that a defendant employer’s admission of liability under respondeat superior establishes ‘the liability link from the negligence of the driver . . . rendering proof of negligent entrustment unnecessary and irrelevant.’” (quoting *Thomason v. Harper*, 289 S.E.2d 773 (1982))). “Thus, the evidence of [the driver’s] prior driving record is ‘unnecessary and irrelevant’” *Bartja*, 463 S.E.2d at 817; *see also McHaffie*, 891 S.W.2d at 826–27 (same); *Gant*, 770 N.E.2d at 1160 (holding that if vicarious liability is not disputed, “there is no need to prove that the employer is liable”; the direct negligence cause of action is “duplicative and unnecessary”).

2. *Direct Negligence Claims Confuse the Issues*

The primary issues for a court to consider in a motor vehicle accident case are whether a driver was negligent in the operation of his or her vehicle and whether that negligence was a proximate cause of the plaintiff's injuries. The evidence necessary to support direct negligence claims, such as a driver's driving record, or the employer's hiring practices, is routinely excluded as evidence in a motor vehicle accident case.²⁴ This evidence is either irrelevant to a determination of what happened in the accident or is unfairly prejudicial.²⁵

"A very poor or careless driver may have been free from fault in the particular instance involved and, likewise, the most skillful driver, accustomed to exercising the utmost care may be grossly negligent on one particular occasion."²⁶ This basic tenet of both tort and criminal law forms the basis for rules of evidence such as Federal Rules of Evidence 401, 403 and 404(b). "[C]ollateral misconduct such as other automobile accidents or arrests for violation of motor vehicle laws would obscure the basic issue, namely, the negligence of the driver, and would inject into the trial indirectly, that which would otherwise be irrelevant."²⁷ "A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."²⁸ Simply put,

to hold that the rights and liabilities of the parties should be determined, not solely by what they did, but by their conduct on other occasions and in different situations would put us on a tortious trail—tedious, difficult and expensive to follow and leading in the end only to an intolerable result.²⁹

Evidence of direct negligence risks the danger of the jury drawing inferences from "prior bad acts."³⁰ Therefore, courts bar such superfluous claims because "permitting proof of previous misconduct would only serve to inflame the jury

²⁴ Even minority jurisdictions acknowledge that such evidence should be inadmissible. *See, e.g.,* *Deatherage v. Dyer*, 530 P.2d 150, 152 (Okla. Civ. App. 1974).

²⁵ Order Granting Defendant's Motion for Partial Summary Judgment at 4, *Wernke v. Powder River Coal, L.L.C.*, Civ. No. 00132-D (D. Wyo. Feb. 20, 2009) (*Wernke Order*) ("The reasons for limiting plaintiffs' causes of action are many, including the risk that the proof of previous misconduct necessary to show [direct negligence claims] might 'inflame the jury.'"); *see also* *McHaffie*, 891 S.W.2d at 826 (citing *Wise*, 718 P.2d at 1181–82; *Willis*, 159 S.E.2d at 158).

²⁶ *Deatherage*, 530 P.2d at 152.

²⁷ *Gant*, 770 N.E.2d at 1158 (quotation and citation omitted).

²⁸ *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *see also* FED. R. EVID. 404(b) (prior acts not admissible).

²⁹ *Deatherage*, 530 P.2d at 152.

³⁰ *Hackett*, 736 F. Supp. at 9 (invoking the "danger that the jury might draw the inadmissible inference that because the [driver] had been negligent on other occasions he was negligent at the time of the accident") (citation omitted).

and result in the ‘danger that the jury might draw the impermissible inference that because the [driver] had been negligent on other occasions he was negligent at the time of the accident.’”³¹

3. *Direct Negligence Claims Invite a Jury to Improperly Assess the Negligence of the Employer Twice*

If a jury finds an employer negligent on the direct negligence claims, it is likely that the jury will allocate a greater percentage of fault to the employer than is attributable to the employee for his negligence, if any, in the accident. In other words, if the employee is found to be forty percent at fault based on his driving, the fact the employer was also negligent in its hiring practices cannot raise the fault of the employee to fifty or sixty percent in the accident—the driver’s conduct in relation to that of other actors remains the same. Such an assessment would be “plainly illogical.”³² “To allow both causes of action to stand would allow the jury to assess or apportion the principal’s liability twice”³³ and for no legally acceptable reason.

To illustrate, we will again use Johnny’s situation. For example, a jury determines that the plaintiff is thirty percent at fault for darting out in the road, Little Johnny is twenty percent at fault for not maintaining a proper lookout, and Joe Blow is fifty percent at fault for rear-ending Johnny.

What if the judge allowed the jury to also consider PDQ’s alleged negligence and the jury found PDQ failed to check Johnny’s driving record and failed to provide any training? What difference does any of this possibly make with respect to the apportionment of fault for the cause of the accident? The answer, quite obviously, is none. But, will some juries be angry enough with PDQ (or confused by the comparative fault jury instructions) to find PDQ some percentage at fault? If so, where does that fault come from—is the fault of Johnny, Blow, or Plaintiff reduced? If so, why? Can PDQ’s negligence increase the amount of plaintiff’s compensatory damages? If PDQ is fault free does that mean the plaintiff’s damages are reduced? Of course not, the special and general damages are still the same. The bottom line is, the jury assesses the fault of the employer as part of the vicarious liability claim. Since the direct negligence claims are derivative of the employee’s negligence, it is improper and unfair to assess the employer’s fault a second time for the same occurrence.

³¹ *Bowman*, 832 F. Supp. at 1021, 1022 (citing *Hackett*, 736 F. Supp. at 9); see also *Hackett*, 736 F. Supp. at 9, 10 (citing, e.g., *Breeding*, 378 F.2d 171; *Hood*, 459 F. Supp. 684; *Elrod*, 628 S.W.2d 17; *Title v. Johnson*, 185 S.E.2d 627 (Ga. Ct. App. 1971); *Plummer*, 171 S.E.2d 330).

³² *McHaffie*, 891 S.W.2d at 826; see also *Wernke Order*, *supra* note 25, at 4. Obviously, this result depends in large part on the jurisdiction’s comparative fault system.

³³ *Thompson v. Ne. Ill. Reg’l Commuter R.R.*, 854 N.E.2d 744, 747 (Ill. App. Ct. 2006).

According to the majority view, even if Plaintiff pursues direct negligence claims, the employer's liability is limited to those compensatory damages proximately caused by the driver's fault in the accident in question.³⁴ Put another way, the negligence of the plaintiff and third parties is neither enhanced nor diminished by the employer's direct negligence or lack thereof. We could instruct juries to only assess fault for the negligence of the driver, but it makes more sense to simply dismiss the claim.³⁵

Another danger of proceeding with claims against the employer and employee in the same action is that a jury could determine that the employer acted negligently and then assess liability without determining that the driver was, in fact, negligent and a proximate cause of the accident. If the jury finds the employer negligent, but not the employee, the claim against the employer must fail for a lack of proximate cause.³⁶ Since direct negligence claims are "predicated initially on, and therefore entirely derivative of, the negligence of the employee,"³⁷ the employer's overall liability cannot exceed the liability of the employee.³⁸ Instead, the liability of the employer is fixed by the amount of employee liability.³⁹

When two or more persons may be vicariously liable for the negligence of the defendant employee, it may be necessary to have a trial to determine which party pays what. This situation arose in *Beavis v. Campbell County Memorial Hospital*, which is discussed in more detail later. The *Beavis* court properly bifurcated the direct negligence claims from the claims against the employee.⁴⁰ Since the employee's negligence must be established to satisfy the proximate cause element of the direct negligence claims, it made sense to try the claims against the employee first. If the employee prevailed, there would be no need to determine whether any other party was vicariously liable for the employee's negligence. Of course, if the plaintiff proved the employee's negligence, a subsequent proceeding would determine whether the employee's negligence should be imputed to either of the other parties, and, if so, in what percentages. The *Beavis* trial court wisely realized that attempting to try all of these issues in one proceeding would likely confuse the issues and may invite error; thus, bifurcation achieved justice.⁴¹

³⁴ *Gant*, 770 N.E.2d at 1159.

³⁵ If, for some reason, the claim remains viable, the direct negligence claims should be tried if and only if the jury first finds the employee at fault.

³⁶ *Browder v. Morris*, 975 S.W.2d 308, 310 (Tenn. 1998) ("By definition, one who is vicariously liable is not one who has 'caused or contributed to' another's injuries."). The causal connection between the employer's conduct and the injury is the act of the employee.

³⁷ *Gant*, 770 N.E.2d at 1159 (discussing a negligent entrustment claim).

³⁸ *Id.*

³⁹ *McHaffie*, 891 S.W.2d at 826 (citing *Helm v. Wismar*, 820 S.W.2d 495, 497 (Mo. 1991)).

⁴⁰ *Beavis*, 20 P.3d at 514–17.

⁴¹ *See id.* at 515.

4. *Evidence of Direct Negligence is Prejudicial to the Driver*

Simply put, if evidence of direct negligence is admitted (e.g., a bad driving record), then “the jury might draw the inadmissible inference that because the [driver] had been negligent on other occasions, he was negligent at the time of the accident.”⁴² All courts recognize that evidence such as a bad driving record or prior bad acts are inadmissible because such evidence will prejudice the jury with respect to the determination of the driver’s negligence.⁴³

Seventy years ago, the Nebraska Supreme Court aptly explained the reason behind excluding such evidence:

The reputation of a driver and his conduct at other times and places are not reliable or safe criterions by which to determine what his conduct was at a particular time and place.

Most automobile drivers operate their vehicles over many thousands of miles without accident and in the presence of the ever-present hazard of other traffic, and yet we are appalled by too many thousands of serious accidents. This situation justifies the conclusion that most motor vehicle accidents chargeable to man-failure are due to lapses from the customary skill and care of the drivers involved. A very poor or careless driver may have been wholly free from fault in the particular instance involved and, likewise, the most skilful driver, accustomed to exercising the utmost care, may be grossly negligent on one particular occasion. In either situation, to hold that the rights and liabilities of the parties should be determined, not solely by what they did, but by their conduct on other occasions and in different situations would put us on a tortuous trail—tedious, difficult and expensive to follow, and leading in the end only to intolerable injustice.⁴⁴

The answer from the majority of jurisdictions is to dismiss the direct negligence claims and not inject error into the proceedings.

⁴² *Hackett*, 736 F. Supp. at 9.

⁴³ See, e.g., FED. R. EVID. 404(b) and similar state rules of evidence. “It is well settled that evidence of other accidents is not admissible to show negligence. Behavior in a remote time and place tells us nothing of the care exercised in the instant accident.” *Deatherage*, 530 P.2d at 152.

⁴⁴ *Holberg v. McDonald*, 289 N.W. 542, 543 (Neb. 1939) (quoted by *Washita Valley Grain Co. v. McElroy*, 262 P.2d 133, 138 (Okla. 1953)); see also *Clooney*, 352 So. 2d at 1220 (“Ordinarily, the evidence of a defendant’s past driving record should not be made a part of the jury’s considerations.”).

5. *Direct Negligence Claims Waste Time and Resources*

Finally, if all of the theories for attaching liability to one person for the negligence of another were recognized and all pleaded in one case where the vicarious liability is admitted, “the evidence laboriously submitted to establish other theories serves no real purpose,” so “the energy and time of courts and litigants is unnecessarily expended.”⁴⁵ Obviously, time, money and energy spent on discovery increases as does the trial time to present evidence of company policies and industry standards with regard to hiring, training and supervision, not to mention the possibility of several mini-trials to determine whether each prior act was really bad or not.

Once vicarious liability for negligence is admitted under respondeat superior, the employer (to whom negligence is imputed) becomes strictly liable to the plaintiff for damages attributable to the conduct of the employee (the person from whom negligence is imputed). This is true regardless of the “percentage of fault” as between the person whose negligence directly caused the injury and the one whose liability for negligence is derivative.⁴⁶ Simply put, the direct negligence claims are superfluous and there is no need for the court or the litigants to expend the time, money and energy to pursue and defend against claims that will not (or should not) affect the outcome. Since allowing these claims to go forward serves no purpose other than to invite error, why take the chance?

B. *Minority View*

Some courts, nevertheless, permit a plaintiff to pursue a direct negligence claim even when the defendant admits it is vicariously liable for the acts of the wrongdoer. The depth of analysis made by these courts is typically very shallow and rarely goes beyond the simple fact that direct negligence claims are independent causes of action requiring proof of the employer’s negligence in a manner different from that of the employee who was actually involved in the accident.

Other courts seize on snippets from other cases without giving any real thought as to the practical effect of such a ruling. Other courts seem to simply misunderstand the law or, worse, misquote the controlling law.⁴⁷ Some of these courts fail to closely evaluate the facts of a specific case before relying on such facts to deny a motion to dismiss the direct negligence claims.⁴⁸ Others essentially hold that the admitted prejudice occurring from the admission of otherwise

⁴⁵ *McHaffie*, 891 S.W.2d at 826; *see also* *Rebstock v. Evans Prod. Eng’g Co.*, No. 4:08CV01348 ERW, 2009 U.S. Dist. LEXIS 96884 (E.D. Mo. Oct. 20, 2009).

⁴⁶ *McHaffie*, 891 S.W. 2d at 826.

⁴⁷ *See, e.g., James*, 661 S.E.2d 329.

⁴⁸ *See, e.g., Poplin v. Bestway Express*, 286 F. Supp. 2d 1316, 1319 (M.D. Ala. 2003).

inadmissible evidence to support a direct negligence claim is justified because of the nature of the conduct of the employer, parent, or entrustor.⁴⁹ These bad decisions then serve as the basis for other courts to perpetuate these and similar errors without principled and complete analysis.⁵⁰

1. *Direct Negligence Claims Are Not Derivative of the Employee's Negligence*

This is a common thread that runs through the minority position. Rarely, however, does the court's analysis go beyond this simple statement or does the court explain how and why the claim is not derivative. Are these courts implying that an employer can be held liable for negligent hiring even if the employee acted (drove) appropriately at the time of the accident? If minority courts would complete the analysis, presumably they would conclude that the only way negligent hiring can be the proximate cause of an accident is if the employee is also negligent.

2. *Unfair Prejudice is o.k.*

For example, in *Perin v. Peuler (Perin II)*, a slim majority reversed the trial court's denial of a motion to amend the pleadings to include a claim of negligent entrustment.⁵¹ The *Perin II* court believed the resulting prejudice was warranted based on the conduct of the parents. Perin was a passenger in an automobile that collided with another vehicle owned by Peuler and driven by his son. Perin claimed the son was negligent in his operation of the vehicle and that the father was liable "solely on the basis of imputation of the driver's negligence under the ownership liability statute."⁵² The father was included as a party since he was the owner of the vehicle. Michigan law provided that an owner of a vehicle could be held liable for negligently inflicted injuries by someone other than the owner provided the owner had given his consent to the vehicle's use and the operation of the vehicle at the time of the accident was within such consent. Defendant-father admitted that he was liable for his son's negligence pursuant to Michigan's owner liability statute.⁵³ In short, the father admitted vicarious liability.

At the pretrial conference, Plaintiff sought to amend her complaint to add a claim for negligent entrustment. The admitted purpose of the amendment was to enable Plaintiff to introduce evidence of the son's driving record in an effort to

⁴⁹ See, e.g., *Perin II*, 130 N.W.2d 4.

⁵⁰ *Poplin*, 286 F. Supp. 2d at 1319 (discussed in more detail *infra*.)

⁵¹ *Perin II*, 130 N.W.2d 4.

⁵² *Perin v. Peuler (Perin)*, 119 N.W.2d 552, 553 (Mich. 1963), *overruled by Perin II*, 130 N.W.2d 4.

⁵³ MICH. COMP. LAWS § 257.401 (2003).

show action in conformity therewith.⁵⁴ Such evidence was otherwise inadmissible pursuant to a Michigan statute similar to Rule of Evidence 404(b).⁵⁵ The trial court denied the motion to amend, finding,

[i]t appears therefore, that the sole purpose of the proposed amendment is only to bring in the driving record of defendant-driver and thereby influence the jury. Since the defendant has admitted that the car was being driven with the knowledge and consent of defendant-owner, the defendant-owner will be liable if defendant-driver is negligent.⁵⁶

In other words, since the purpose of a negligent entrustment claim is to hold the entrustor liable for the negligence of the entrustee–driver, there is no need to prove the claim when the owner has already admitted vicarious liability under an alternative theory.

The *Perin* case was appealed to the Michigan Supreme Court, which reversed. The Michigan Supreme Court then granted a request for re-hearing and then, on its own motion, reheard the case again.⁵⁷

The *Perin II* majority recognized a crucial factor often overlooked by other minority courts; namely, there must be a causal connection between the entrustor's negligence and the accident in question, which derives from the negligence of the driver.⁵⁸ The *Perin II* majority correctly observed the entrustor's liability "is in part vicarious for it cannot arise unless the person entrusted with the automobile uses it negligently; but, the primary basis for the owner's liability is said to be his own negligence in permitting its use by an incompetent or inexperienced person with knowledge of the probable consequences."⁵⁹

The *Perin II* majority appeared to recognize the prejudicial effect that would come from admitting evidence of traffic convictions. Nevertheless, the *Perin II* court ruled that not only was such evidence admissible, but the decision seemed to

⁵⁴ *Perin*, 119 N.W.2d at 553–54.

⁵⁵ *See, e.g.*, FED. R. EVID. 404(b). Note that the legacy of the *Perin* decision had more to do with a legislature's power to enact a rule of evidence than whether the admission of such evidence was proper in the face of an admission of vicarious liability.

⁵⁶ *Perin II*, 130 N.W.2d at 19 (Kelly, J., dissenting). The trial court also noted that it typically granted leave to amend, even at such a late date, provided the amendment did not prejudice the rights of the defendant. This amendment obviously did not pass that test.

⁵⁷ *Id.* at 13–14.

⁵⁸ *Id.* at 8–9 (majority opinion). "It could not be sensibly contended, for instance, that the entrusted driver, thus known to be unfit or incompetent, had started any chain of causation back to the entrustor if such entrusted driver, in the operation of the entrusted car, had himself committed no act or omission constituting actionable negligence." *Id.* at 9.

⁵⁹ *Id.* at 8.

encourage its use in the hope that such evidence would, in fact, prejudice the jury and skew the verdict. In effect, the *Perin II* majority *wanted* the jury to misuse the evidence of the son's prior bad acts to send a message to parents by allowing the jury to render a verdict contrary to the evidence or to inflate the damages in a case that did not include a claim for punitive damages. The following quotes from the *Perin II* majority evidence this judicial sanction of improper use of inadmissible evidence:

[T]his defendant parent should take stoically the bitters all like parents neglectfully brew for themselves.⁶⁰

* * * *

The common-law rule of negligent entrustment is both time tried and valuable, and we are not disposed to dilute its worth on assigned ground that the sad proof of junior's record of court-conviction and parental knowledge thereof will "prejudice the entrustor and the trustee before the jury."⁶¹

* * * *

It may, at very least, awaken some overindulgent parent to the fact that, from the beginning in instances disclosed as at bar, his personal, distinguished from vicarious, toes have been exposed to the heavy boot-step of liability whether he is owner or lender of the motor car that known-to-be unfit son or daughter has driven to the casually actionable injury of another.⁶²

* * * *

Provided always the requisite proof is made . . . , such "prejudice" is due solely to the negligence of those who decry it. That kind of prejudice manufactures no judicial error, reversible or otherwise.⁶³

According to the *Perin II* majority, if the evidence causing the prejudice is due solely to the negligence of the party opposing its admission, it becomes admissible. Such evidence is admissible regardless of such "time-tried and valuable" Rules of Evidence such as Rules 402, 403, 404, 802, etc. This is simply incredible!

⁶⁰ *Id.* at 11.

⁶¹ *Id.* This suggests that a proper purpose of a compensatory award is to punish the entrustor.

⁶² *Id.* at 6. It is typically improper to argue in a trial for compensatory damages that the jury should send a message to the defendant and those similarly situated; yet, this court not only approved, but endorsed, such a result.

⁶³ *Id.* at 11. Quite obviously, this position is inconsistent with the rules of evidence.

It should come as no surprise that the *Perin II* majority misused various cases in support of its indefensible position. As aptly noted by the *Perin II* dissent, the three cases cited by the majority all involved instances where the owner had not admitted liability under the applicable owner liability statute.⁶⁴ Obviously, when an owner (or an employer) does not admit vicarious liability in some form, the plaintiff is certainly entitled to pursue his theory of imputed liability.⁶⁵ Where, however, vicarious liability is admitted under an alternate theory, there is no need “for this [c]ourt to possibly prejudice the defendants’ rights to a fair hearing.”⁶⁶ Rather, the vicarious liability part of the case “was completed at the termination of the pleadings.”⁶⁷ After all, the purpose of complaint and answer is to remove from the trial those issues not disputed.⁶⁸

3. *The Comparative versus Contributory Fault Explanation*

In *Lorio v. Cartwright*, an Illinois court also misused precedent in refusing to dismiss direct negligence claims.⁶⁹ Prior to *Lorio*, Illinois courts were squarely in the majority with respect to the viability of a direct negligence claim in the face of an admission of vicarious liability.

Issues relating to negligent entrustment become irrelevant when the party so charged has admitted his responsibility for the conduct of the negligent actor. The liability of the third party in either case is predicated initially upon the negligent conduct of the driver and absent the driver’s negligence the third party is not liable. Permitting evidence of collateral misconduct such as other automobile accidents or arrests for violation of motor vehicle laws would obscure the basic issue, namely, the negligence of the driver, and would inject into the trial indirectly, that which would otherwise be irrelevant.⁷⁰

⁶⁴ *Id.* at 14. Certainly, if the employer defendant does not admit it is vicariously liable for the conduct of its employee driver, then the majority “rule” is never triggered because respondeat superior is still an issue.

⁶⁵ “If they controvert by denial of ownership or consent and put a plaintiff to his proof, he may prove his case of liability by any proof of the driver’s prior incompetence and his necessary scienter thereof.” *Id.* at 20 (O’Hara, J., dissenting); see also *Breeding*, 378 F.2d 171.

⁶⁶ *Perin II*, 130 N.W.2d at 15.

⁶⁷ *Id.* at 15–16 (Kelly, J., dissenting).

⁶⁸ *Id.* at 16.

⁶⁹ *Lorio v. Cartwright*, 768 F. Supp. 658 (E.D. Ill. 1991).

⁷⁰ *Id.* at 659 (quoting *Neff*, 268 N.E.2d at 575).

The *Lorio* court, however, concluded that *Neff* and similar cases decided while contributory fault was the law of Illinois,⁷¹ were inapplicable after the adoption of comparative negligence. While the *Lorio* court acknowledged evidence of negligent entrustment as “highly prejudicial,” the same would be admissible in a comparative negligence case because it is necessary for the trier of fact to determine percentages of fault for both the plaintiff and each defendant.⁷² The *Lorio* court relied on an inapposite case, *King v. Petefish*, to support this reasoning.⁷³

In *King*, the issue was whether the theory of negligent entrustment was available to an entrustee in a claim for damages against the entrustor.⁷⁴ In other words, when the entrustor knows the entrustee is unfit, can the entrustee maintain a claim for negligent entrustment? *King* relied on Restatement (Second) of Torts § 390 for the proposition that the negligent entrustment theory also provides a means of asserting liability for damages suffered by the entrustee.⁷⁵ The defendant argued that, historically, negligent entrustment was a theory only allowed in Illinois when an injured third-party has sued the entrustor for damages. Therefore, a negligent entrustment claim should not be permitted where the plaintiff is the entrustee, especially when the entrustee’s negligence was the proximate cause of the accident.⁷⁶ Plaintiff asserted that even if the user was at fault, she was entitled to a comparative negligence trial and the theory was therefore viable. Plaintiff further argued that Comment c to § 390 was inapplicable in a comparative negligence jurisdiction since the comment contemplates an outcome based on contributory negligence.

⁷¹ Contributory negligence used to be the law of almost all states. This doctrine essentially provided that if a plaintiff was at all negligent in causing his own injuries, with some exceptions, he was barred from recovery. “A number of rationalizations have been advanced in the attempt to justify the harshness of the ‘all-or-nothing’ bar. Among these: the plaintiff should be penalized for his misconduct; the plaintiff should be deterred from injuring himself; and the plaintiff’s negligence supersedes the defendant’s so as to render defendant’s negligence no longer proximate.” *McIntyre v. Balentine*, 833 S.W.2d 52, 54 (Tenn. 1992) (citing W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 452 (5th ed. 1984); J.W. Wade, W.K. Crawford, Jr. & J.L. Ryder, *Comparative Fault in Tennessee Tort Actions: Past, Present and Future*, 41 TENN. L. REV. 423, 424 (1974)).

⁷² *Lorio*, 768 F. Supp. at 660.

⁷³ *King v. Petefish*, 541 N.E.2d 847 (Ill. App. Ct. 1989).

⁷⁴ *Id.* at 847.

⁷⁵ Section 390 provides for liability when an owner of a chattel allows an incompetent or inexperienced person to use the chattel in a manner involving an unreasonable risk of harm to himself or others even if the user may also be liable to third parties for negligence. RESTATEMENT (SECOND) OF TORTS § 390 cmt. c (1965). Comment c, however, contemplates that the contributory fault of the user may bar recovery. *Id.* A detailed analysis of the providence of § 390 is beyond the scope of this article; although, there seem to be sound reasons why the theory, if even viable, should be limited in scope.

⁷⁶ *King*, 541 N.E.2d at 847.

In response to the defense's assertion that negligent entrustment was unavailable as a matter of law where the negligence of the trustee was at least a proximate cause of the accident, the *King* court held:

It is absurd to argue the trustee's negligence is the sole proximate cause of a negligent entrustment plaintiff's injuries, not only because such a suggestion runs counter to comparative negligence law, but because it would always cut off the liability of an entrustor to a third-party plaintiff. If the entrustor cannot be considered a partial cause of the injury, a third-party plaintiff's only remedy would be against the trustee. Such a result would frustrate the theory behind negligent entrustment actions, which is to put the burden of the expense caused by the accident on the owner who, unlike the driver, is expected to carry the necessary insurance to cover such risks.⁷⁷

Thus, the *King* court simply noted that the negligence of a plaintiff did not serve to bar a case based on negligent entrustment. Notably, *King* did not involve a situation where a plaintiff sought to impute the driver's negligence to another party based on a direct negligence theory.

Nevertheless, the *Lorio* court seized on the above quote to hold that direct negligence claims must always go forward so the jury can compare the negligence of the entrustor to that of the trustee, which quite obviously, was not the issue before the *King* court. The trial judge apparently never considered that the courts in the majority were predominately comparative negligence states. Not surprisingly, Illinois courts refused to follow the erroneous lead of *Lorio*, and subsequent decisions moved Illinois back into the majority.⁷⁸ Logically, "[t]he fault of the employer for negligent entrustment, in a comparative negligence jurisdiction, is still derived from the negligence of the employee, therefore, additional liability cannot be imposed on the employer where the employer has already admitted it is liable for 100 percent of the fault attributable to the negligent employee."⁷⁹

⁷⁷ *Lorio*, 768 F. Supp. at 660 (quoting *King*, 541 N.E.2d 853). The *King* court quite obviously was wrong. Nothing in § 390 or its comments suggests that the negligence of the trustee cannot be imputed to the entrustor. In fact, illustration 7 specifically discusses a situation where the entrustor may be liable when the trustees are also negligent. The only exception is when the third-party plaintiff also knows the trustee is incompetent. The *Lorio* court perpetuated this error in finding direct negligence claims are not superfluous in comparative negligence states.

⁷⁸ See, e.g., *Gant*, 770 N.E.2d 1155; *Campa*, 2002 U.S. Dist. LEXIS 15032; *Thompson*, 854 N.E.2d 744; *Rozhon v. GTL Truck Lines*, No. 09 C 4755, 2009 U.S. Dist. LEXIS 87868 (N.D. Ill. Sept. 24, 2009).

⁷⁹ *Campa*, 2002 U.S. Dist. LEXIS 15032, at *3-4 (citation omitted).

At least the *Lorio* and *Perin* courts attempted to provide some rationale behind their decisions. Other courts have simply found that because negligent entrustment is a theory that requires negligence on the part of the employer, it must be allowed to go forward.

4. *The South Carolina Debacle*

South Carolina has an especially checkered past in this regard. In *Bowman v. Norfolk Southern Railway*, the defendant railroad admitted vicarious liability for the engineer's negligence and moved for summary judgment on the negligent entrustment claim.⁸⁰ The railroad argued the direct negligence claim was superfluous in the face of an admission of vicarious liability on other grounds. The United States District Court acknowledged that the South Carolina Supreme Court had never addressed the issue, but held the South Carolina Supreme Court would likely follow the majority rule and granted defendant's motion for summary judgment. Specifically, the trial court acknowledged, "Obviously, plaintiff's motivation behind his negligent entrustment theory is to get the engineer's prior driving record into evidence. Such evidence would otherwise be inadmissible under Federal Rule of Evidence 404(b), but would be admissible in a negligent entrustment action to show notice on the part of the railroad company."⁸¹ Since the claim was superfluous and carried with it the very real danger that the jury "might draw the impermissible inference that because the [driver] had been negligent on other occasions he was negligent at the time of the accident," the trial court dismissed the direct negligence claims.⁸²

Then, in *Longshore v. Saber Security Services, Inc.*, the South Carolina Court of Appeals disagreed.⁸³ There, Longshore sued security guard Schafer and his employer, Saber Security, for a gunshot wound Longshore received during an event where Saber provided security services.⁸⁴ In the first count alleging negligence on the part of Schafer and vicarious liability on the part of Saber, the jury found Longshore and Schafer to each be fifty percent at fault for the shooting, but awarded zero damages.⁸⁵ Likewise, the jury found in favor of the defense on an assault and battery charge against both Schafer and Saber.⁸⁶ Yet, on

⁸⁰ 832 F. Supp. at 1021.

⁸¹ *Id.*

⁸² *Id.* at 1021, 1022 (quoting *Hackett v. Wash. Metro. Area Transit Auth.*, 736 F. Supp. 8, 9 (D.D.C. 1990)).

⁸³ 619 S.E.2d 5, 9–10 (S.C. Ct. App. 2005)

⁸⁴ *Id.* at 7.

⁸⁵ *Id.* at 8.

⁸⁶ *Id.*

the direct negligence claims against Saber only, the jury found Saber 100 percent at fault and found no comparative negligence on the part of Longshore.⁸⁷ How could Longshore be both negligent and fault-free for the same accident?

On appeal, the South Carolina Court of Appeals attempted to reconcile the obviously inconsistent verdict.⁸⁸ The *Longshore* court held that the jury could have found the shooting was an act of negligence and was partially caused by Longshore's negligence.⁸⁹ Since the act was negligent, the jury could have found for the defense on the assault and battery claim because that claim requires an intentional act.⁹⁰ As to the direct negligence claims, the South Carolina Court of Appeals "reasoned" that even though Longshore caused the shooting as between Longshore and Schafer, the jury could have found that Saber's negligence in hiring, training, or supervising Schafer was the sole cause of the shooting as between Longshore and Saber.⁹¹ The *Longshore* court made no attempt to explain how a person could negligently cause an event in one breath and then not even be negligent for the exact same event in the other.

Notably, the *Longshore* court skirted the issue of whether a required element of direct negligence claims is that the employee first commit an actionable tort. Since the jury found Schafer was negligent and partially at fault, the court decided it need not answer that specific question.⁹² Of course, the court needed to answer this question, but could not do so and let the verdict stand.

In *Becker v. Estes Express Lines, Inc.*, the issue arose again.⁹³ Defendant moved for summary judgment, relying in part on the majority of jurisdictions that hold direct negligence claims should be dismissed when the defendant admits vicarious liability.⁹⁴ While the *Becker* trial court did not adopt the *Longshore* reconciliation of the inconsistent verdict, it did cite *Longshore* for the proposition that "[n]either current statutory law nor jurisprudence in this state has specifically required a plaintiff, in an action against an employer for negligent hiring, training, and supervision, to prove the employee committed an actionable tort."⁹⁵ In other words, the *Becker* court removed the proximate cause element from direct negligence claims.⁹⁶

⁸⁷ *Id.*

⁸⁸ *See id.* at 9.

⁸⁹ *See id.* at 10. Schafer argued that Longshore continued to advance towards him with a hand behind his back even after Schafer ordered him to stop and put both hands in the air. *Id.* at 8.

⁹⁰ *See id.* at 10–11.

⁹¹ *Id.* at 10.

⁹² *Id.* at 9.

⁹³ No. 8:07-716-HMH, 2008 U.S. Dist. LEXIS 20400, at *9, *10 (D.S.C. Mar. 13, 2008).

⁹⁴ *Id.* at *8–9.

⁹⁵ *Id.* at *10 (quoting *Longshore*, 619 S.E.2d at 9).

⁹⁶ *Id.* at *10–11.

The *Becker* court also acknowledged the majority position, citing *McHaffie*, but noted that a few other states take the minority position.

These jurisdictions reason that liability under theories of negligent entrustment, hiring, supervision, training, and retention the employer's liability is direct and not derivative. These theories do not rest on the employer-employee relationship, but rather involve the employer's own negligence in entrusting, hiring, supervising, training, or retaining an employee with knowledge, either actual or constructive, that the employee posed a risk of harm to others. Therefore, a plaintiff must be allowed to proceed under both respondeat superior, a theory of imputed liability, and negligent entrustment, hiring, supervision, training, retention, theories of direct liability, when the employer admits the agency of the alleged tortfeasor.⁹⁷

To assert that negligent hiring, training, retention and supervision claims do not rest on the employer-employee relationship is indefensible. Employers hire employees, train employees, supervise employees and retain employees. If the employee was never hired, there would be no claim for negligent hiring *because* an employer-employee relationship was never established. If the employee was terminated rather than retained, there would be no claim for negligent retention. Obviously, an employer has no duty to train or supervise people who are not his employees.

The *Becker* court essentially dispensed with the notion that direct negligence claims are predicated on some wrongful act by the employee or the entrustee. In short, *Becker*, like other minority courts, held that an employer can be held liable for negligent hiring, training, supervision, or entrustment, even if the employee is completely free from fault. If the *Becker* court had been presiding over the *Longshore* matter, it would have upheld the verdict on the direct negligence claims, even if Schafer was found not negligent. Even the *Longshore* court did not go this far. Once a court acknowledges the basic fact that direct negligence claims are derivative of the employee's negligence, there is no logically consistent way to deny a motion to dismiss direct negligence claims in the face of an admission of vicarious liability. It seems obvious that the direct negligence of the employer must manifest itself through the actions of the employee to satisfy the causation element of a negligence claim.

At the same time *Becker* was pending, another United States District Court in South Carolina certified the question to the South Carolina Supreme Court.⁹⁸ *James v. Kelly Trucking Co.* was actually decided three days before *Becker*, but not

⁹⁷ *Id.* at *9–10 (quoting *Poplin*, 286 F. Supp. 2d at 1319 (internal citations omitted)).

⁹⁸ *James*, 661 S.E.2d at 329.

cited therein. Interestingly, the *James* court did not analyze or even cite either *Longshore* or *Bowman*.⁹⁹

Instead, the *James* court relied on the overly simplistic notion that liability on direct negligence theories “does not rest on the negligence of another, but on the employer’s own negligence.”¹⁰⁰ The *James* court purported to rely on Restatement (Second) of Torts § 317, but misread, misunderstood or misinterpreted that section. Section 317 provides:

§ 317 Duty of Master to Control Conduct of Servant

A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if

(a) the servant

- (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
- (ii) is using a chattel of the master, and

(b) the master

- (i) knows or has reason to know that he has the ability to control his servant, and
- (ii) knows or should know of the necessity and opportunity for exercising such control.¹⁰¹

By its plain language, this section only applies to situations where the employee is acting outside the scope of his employment. The *James* court wrote that this scope of employment limitation is only *suggested* in Comment a of § 317.¹⁰² This is quite obviously wrong. The *James* court also ignored that § 317 specifically

⁹⁹ See *id.* U.S. District Court Judge Anderson certified the question. *Id.* Judge Anderson just happens to be the author of the *Bowman* decision. *Bowman*, 832 F. Supp 1014.

¹⁰⁰ *James*, 661 S.E.2d at 331.

¹⁰¹ RESTATEMENT (SECOND) OF TORTS § 317 (1965).

¹⁰² See *James*, 661 S.E.2d at 331 n.1.

requires the employer to prevent the employee from intentionally harming another or creating an unreasonable risk of bodily harm.¹⁰³ Incredibly, the *James* court read this section to dispense with the necessity of employee misconduct.¹⁰⁴ Yet, employee misconduct is exactly what the employer must prevent. Simply put, the *James* court sanctioned the notion that an employer can be held liable, even when the employee does nothing wrong.

Presumably, these South Carolina courts do not really mean that employers can be held liable when their employees acted reasonably. One can only imagine that even these courts would be quick to affirm Judge Learned's summary dismissal of Dr. Blow's direct negligence action when there is no evidence that Little Johnny did anything wrong or caused anyone any harm. Yet, due to shallow and shortsighted analysis, direct negligence claims are currently viable in the face of an admission of vicarious liability in South Carolina and other minority states.

5. *An Alabama Atrocity*

In *Poplin v. Bestway Express*, Poplin was injured in an accident with a Bestway tractor-trailer driven by employee Billau.¹⁰⁵ Bestway admitted Billau was acting in the course and scope of his employment at the time of the accident.¹⁰⁶ Bestway moved for partial summary judgment on the direct negligence claims.¹⁰⁷ The *Poplin* court first acknowledged that Alabama recognized direct negligence claims, but had not decided whether they survive an employer's admission of respondeat superior.¹⁰⁸

The analysis deteriorated from there. First, the *Poplin* court acknowledged the majority view.¹⁰⁹ The *Poplin* court then cited "snippets" from minority courts without giving much thought to the implications of the decisions. For example, relying on Kansas law, the court found "these theories do not rest on the employer-employee relationship, but rather involve the employer's own negligence in entrusting, hiring, supervising, training, or retaining an employee

¹⁰³ RESTATEMENT (SECOND) OF TORTS § 317. As we all know, negligence is failing to act as a reasonable person under the same or similar circumstances.

¹⁰⁴ See *James*, 661 S.E.2d at 330, 331.

¹⁰⁵ 286 F. Supp. 2d at 1317.

¹⁰⁶ *Id.* at 1317.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 1318.

¹⁰⁹ *Id.* ("Many state courts and federal courts applying state law have held that it is improper to allow a plaintiff to proceed under two theories of recovery once the corporation admits that the alleged tortfeasor was its agent acting with the scope of his employment. . . . This position appears to be the majority view.") (citing Debra E. Wax, Annotation, *Propriety of Allowing Person Injured In Motor Vehicle Accident to Proceed Against Vehicle Owner Under Theory of Negligent Entrustment Where Owner Admits Liability Under Another Theory of Recovery*, 30 A.L.R. 4th 838 (1984)) (additional citations omitted).

with knowledge, either actual or constructive, that the employee posed a risk of harm to others.”¹¹⁰ The *Poplin* court apparently never considered how a theory resting on an *employer’s* hiring, training, supervision and retention of an *employee* can logically be said *not* to arise out of the employment relationship. This is faulty logic.

The *Poplin* court also cited the Alabama Supreme Court case of *Bruck v. Jim Walter Corp.* for the proposition that “the tort of negligent entrustment ‘does not arise out of the relationship between the parties but rather is an independent tort resting upon the negligence of the entrustor in entrusting the vehicle to an incompetent driver.’”¹¹¹ Furthermore, according to the *Poplin* court, Bruck was allowed to pursue direct claims against the employer in addition to its negligence claims against the driver.¹¹² As a result, the *Poplin* court denied Bestway’s motion.¹¹³ A principled reading of *Bruck*, however, fails to support *Poplin’s* position.

Bruck died in a collision with a Jim Walter truck driven by Reynolds.¹¹⁴ Initially, he sued Reynolds and Jim Walter Corporation for Reynolds’s negligence.¹¹⁵ Plaintiff then added a claim for negligent entrustment against Jim Walter and Reynolds’s employer TLI.¹¹⁶ The corporate defendants admitted Reynolds was their agent at the time of the accident. On the first day of trial, the *Bruck* trial court granted a defense motion in limine to exclude evidence of Reynolds’s driving record.¹¹⁷ At the close of the plaintiff’s case in chief, the defendants moved for a directed verdict on the negligent entrustment count.¹¹⁸ The trial court granted the motion.¹¹⁹ The jury later returned a defense verdict and Bruck appealed.¹²⁰

The Alabama Supreme Court acknowledged that negligent entrustment was a viable cause of action in Alabama and that the plaintiff presented this action in the form a valid, well-pleaded complaint consisting of two separate and distinct counts. The court also was “keenly aware” that evidence of the driving record

¹¹⁰ *Poplin*, 286 F. Supp. 2d at 1319 (citing *Kan. State Bank & Trust Co. v. Specialized Transp. Servs., Inc.*, 819 P.2d 587, 589 (Kan. 1991)).

¹¹¹ *Id.* at 1320.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Bruck v. Jim Walter Corp.*, 470 So. 2d 1141, 1142 (Ala. 1985).

¹¹⁵ *Id.*

¹¹⁶ *Id.* Reynolds was employed by TLI, Inc. which was hauling a load for Jim Walter Transportation.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

might prejudice the jury against the driver.¹²¹ The *Bruck* court, relying on Alabama precedent, followed the minority view that a plaintiff should be able to proceed with direct negligence claims even when respondeat superior is admitted.¹²² Accordingly, the Alabama Supreme Court found the *Bruck* trial court committed error when it granted the motion in limine.¹²³

The corporate defendants, however, argued that any error was harmless since the jury found in favor of the driver on the negligent operation of the vehicle count.¹²⁴ As such, “Reynolds’s conduct could not have been the proximate cause of the decedent’s injuries, and any claim for negligent or wanton entrustment could not be sustained.”¹²⁵ The *Bruck* court agreed.¹²⁶

Specifically, the *Bruck* court held that “an entrustor is not liable for injury resulting from negligent entrustment of a vehicle to an incompetent driver unless the injury is proximately caused by his legal culpability.”¹²⁷ Typically, an element of a negligent entrustment claim is the underlying negligence of the driver. The only exception would be “in those rare instances where the trustee’s incompetence results from non-culpable inability to function as a driver (as in the case of a minor under the age of legal accountability or a mental incompetent).”¹²⁸ In other words, direct negligence claims are derivative of the employee’s underlying negligence.¹²⁹

Why then did the *Bruck* court hold it was error to exclude admittedly prejudicial evidence of Reynolds’s driving record when the direct negligence claims were clearly superfluous? Obviously, the *only* result from admitting such evidence would be to inject prejudice into the trial.

What would be the need of ordering separate trials in a case like *Bruck*? If the jury found the driver at fault for negligent operation of the vehicle, the defendants would have been responsible for all of the damages caused by that negligence. A second trial, following a verdict in favor of the plaintiff, would be a monumental waste of time and judicial resources. Undoubtedly, had the trial court admitted

¹²¹ *Id.* at 1144.

¹²² *Id.* at 1143.

¹²³ *Id.* at 1145. The court acknowledged, however, that a trial court could order separate trials to avoid prejudice, if necessary. *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* at 1145–46.

¹²⁸ *Id.* at 1146.

¹²⁹ *Id.*

evidence of the driving record, and if the jury found in favor of the plaintiff, the second trial on the direct negligence claims would never have occurred. That is, unless there was a need to apportion fault between the two corporate defendants.¹³⁰

If the *Poplin* court had thought this through, it would have realized that while the Alabama Supreme Court may say it is in the minority, the underpinnings of its holdings are identical to those cited by the majority. It would have also realized that denying the motion for partial summary judgment served no real purpose other than to inject prejudice into the trial.

C. Wyoming's Treatment of the Issue

1. *Beavis v. Campbell County Memorial Hospital*

The Wyoming Supreme Court has not specifically decided this issue in the context of a motor vehicle accident, but provided important guidance on the matter in *Beavis v. Campbell County Memorial Hospital*.¹³¹ The *Beavis* court correctly held that direct negligence claims are derivative of the employee's negligence.¹³²

In *Beavis*, plaintiffs asserted a medical malpractice claim against Campbell County Memorial Hospital (CCMH), Dr. Horan, and nurse Deb Hazlett.¹³³ The claim alleged Hazlett negligently administered an allergy shot to Pamela Beavis.¹³⁴ Plaintiffs claimed Dr. Horan negligently supervised and trained Hazlett.¹³⁵ CCMH admitted Hazlett was its employee and that it was vicariously liable for her negligence and that of Dr. Horan, if any.¹³⁶ There were no claims of negligence on the part of Dr. Horan for anything other than a failure to train and supervise Hazlett.¹³⁷

¹³⁰ See, e.g., *Beavis*, 20 P.3d at 515.

¹³¹ 20 P.3d at 515 (addressing the issue of negligent hiring). In *Beavis*, the Wyoming Supreme Court cited to *McHaffie* as authority on a negligent hiring claim. *Id.* The *Beavis* court did not address the issue of when such claims are irrelevant and prejudicial to the determination of a negligence claim. Rather, another element of the negligent hiring claim cited in *McHaffie*, that a negligent hiring claim rests upon the predicate of the employee's alleged negligence, ended the need for further analysis in *Beavis*. *Id.*

¹³² *Id.* at 515, 517. The *Beavis* court also affirmed the trial court's determination that evidence of negligent training, which included unrelated errors by Hazlett, were inadmissible pursuant to WYO. R. EVID. 403. *Id.* at 514.

¹³³ *Id.* at 510.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 511.

¹³⁷ *Id.* at 516.

The district court bifurcated the trial, initially trying only the negligence case against the nurse. “The issues at trial were limited to whether Hazlett had properly performed the injection and what damages, if any, occurred as a result.”¹³⁸ The jury returned a verdict in nurse Hazlett’s favor and judgment was entered in favor of all three defendants.¹³⁹

On appeal, the Wyoming Supreme Court reasoned that even assuming the doctor was negligent in his supervision or training of the nurse, or that CCMH was negligent in hiring Hazlett, such negligence could not have been the proximate cause of the plaintiff’s injuries unless the jury first determined that Hazlett was negligent in administering the shot.¹⁴⁰

The *Beavis* court affirmed the judgment.¹⁴¹ The Wyoming Supreme Court determined that the issue of negligence in administering the injection was separable from the claims of negligent hiring, training and supervision.¹⁴² Likewise, it agreed that the district court’s “bifurcation decision is consistent with the purposes of Rule 42, to avoid prejudice by (omitting potentially unfairly prejudicial evidence of Hazlett’s qualifications and training).”¹⁴³

As a legal matter, the Beavises’ negligent hiring theory against CCMH rests upon the predicate of Hazlett’s alleged negligence Indeed, ‘one element of negligent hiring is some form of misconduct by the employee that caused damages to the plaintiff.’ . . . Thus, even assuming CCMH was negligent in the manner the Beavises claim, *i.e.*, breached some duty in hiring Hazlett, it is clear such negligence could not be the proximate cause of Pamela Beavis’ injuries unless the predicate negligence of Hazlett was first found.¹⁴⁴

The *Beavis* court did not, however, dismiss the claims against Horan and CCMH until the jury determined that Hazlett’s actions were not wrongful, or in any manner negligent.¹⁴⁵ Had the jury determined Hazlett acted wrongfully,

¹³⁸ *Id.* at 511.

¹³⁹ *Id.* Specifically, the judgment provided, “Plaintiffs’ claims against Mitchell Horan, M.D. are dependent upon establishing negligence of Deb Hazlett. Having failed to establish negligence of Deb Hazlett, judgment is entered in favor of co-defendant Mitchell Horan, M.D.”

¹⁴⁰ *Id.* at 515, 516.

¹⁴¹ *Id.* at 515.

¹⁴² *Id.* (stating the claims were not “so interwoven” as to preclude a fair trial).

¹⁴³ *Id.* (citation omitted); *see also* Christiansen v. Silfies, 667 A.2d 396, 399 (Pa. Super. Ct. 1995) (holding bifurcation of claim of negligence against driver from negligent entrustment claim against employer is not an abuse of discretion).

¹⁴⁴ *Beavis*, 20 P.3d at 515 (citations omitted). Even though Dr. Horan was not Hazlett’s employer, the same reasoning applied to the claims for his alleged negligent supervision. *Id.* at 516.

¹⁴⁵ *See id.* at 511.

thereby satisfying the predicate for direct negligence claims, then the jury would have had to apportion fault between CCMH and Horan.¹⁴⁶ Since the jury exonerated Hazlett, the claims against CCMH and Horan had to fail for lack of proximate cause and the Wyoming Supreme Court affirmed dismissal of those claims following the jury verdict.¹⁴⁷

2. DeWald v. State

Similarly, in *DeWald v. State*, the Wyoming Supreme Court determined that direct negligence claims against an employer are derivative of the employee's negligence.¹⁴⁸ In *DeWald*, two Wyoming Highway Patrolmen were pursuing a motorist suspected of drunk driving.¹⁴⁹ The motorist then collided with DeWald's vehicle at an intersection, killing Mr. DeWald.¹⁵⁰ Ms. DeWald filed suit, claiming the patrolmen were at fault for her husband's death by negligently failing to take the necessary steps to prevent the accident.¹⁵¹ Ms. DeWald also claimed the State of Wyoming negligently trained and supervised the patrolmen and failed to establish and implement appropriate procedures for this type of situation.¹⁵²

The defendants moved for summary judgment, claiming the patrolmen acted reasonably and were, therefore, immune from suit.¹⁵³ The *DeWald* court affirmed the trial court's dismissal of the claims against the officer based on qualified immunity.¹⁵⁴ With respect to the claims for direct negligence against the State of Wyoming:

Having held the patrolmen not liable, we must also hold that the appellee, State of Wyoming, cannot be held liable, the reason being that if the conduct of the patrolmen did not amount to negligence that caused the accident, then neither could their training by the State nor could rules have been a cause of the accident. Stated another way, it would have had to appear that,

¹⁴⁶ *Id.* at 516–17.

¹⁴⁷ *Id.* at 517.

¹⁴⁸ 719 P.2d 643, 652 (Wyo. 1986).

¹⁴⁹ *Id.* at 645.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 645–46.

¹⁵² *Id.* at 646.

¹⁵³ *See id.* at 646. The defendants claimed immunity pursuant to the Wyoming Governmental Claims Act (WGCA) as well as common law qualified immunity. *See id.* at 646, 647. The *DeWald* court held that the WGCA contained an express waiver of statutory immunity for the operation of motor vehicles, but that the WGCA retained common law defenses. *Id.* at 647, 648.

¹⁵⁴ *Id.* at 651–53.

because of inadequate training or failure to follow departmental rules, the officers acted in a negligent manner and caused this accident. We have held that did not occur.¹⁵⁵

Simply put, even if the State of Wyoming was negligent with regard to the training or supervision of the officers and had failed to implement appropriate rules, since the officers acted reasonably under the circumstances, the State's negligence could not possibly be the proximate cause of the accident. As such, the direct negligence claims were dismissed and summary judgment was affirmed.¹⁵⁶

3. *Wernke v. Powder River Coal*

In an unpublished opinion, the United States District Court for the District of Wyoming also accepted the majority view, albeit for somewhat different—but equally practical—reasons.¹⁵⁷ In *Wernke v. Powder River Coal, L.L.C.*, the plaintiff claimed he was injured in a mining accident when a coal shovel allegedly struck his haul truck during loading.¹⁵⁸ Plaintiff alleged that the mine's employee was negligent and that the mine negligently failed to train its employee in the proper operation of the shovel. The District Court dismissed the direct negligence claims in light of the employer's admission of respondeat superior liability.¹⁵⁹

Recognizing that “[t]he logic of the majority view is readily apparent,” the district court reasoned that direct negligence claims are dependent upon, or even derivative of, the employee's negligence.¹⁶⁰ Thus, “Where a defendant employer would already be entirely responsible for his employee's actions through respondeat superior liability, the additional negligence cause of action would be needlessly duplicative.”¹⁶¹

Additionally, the *Wernke* court examined the issue against the backdrop of Wyoming's comparative fault system:

The [c]ourt notes with some concern that if separate negligence claims against an employer are allowed in circumstances such as those presented by this case, they may well become a common

¹⁵⁵ *Id.* at 652.

¹⁵⁶ *Id.* at 653.

¹⁵⁷ Order Granting Defendant's Motion for Partial Summary Judgment at 9, *Wernke v. Powder River Coal, L.L.C.*, Civ. No. 00132-D (D. Wyo. Feb. 20, 2009) (*Wernke Order*).

¹⁵⁸ *Id.* at 1–2.

¹⁵⁹ *Id.* at 9.

¹⁶⁰ *Id.* at 7 (citing *Beavis*, 20 P.3d at 515).

¹⁶¹ *See id.* at 4, 7 (“[T]he employer Defendant's liability would be the same under either a direct or vicarious cause of action.”) (citation omitted).

litigation tactic utilized to overcome § 1-1-109's fifty percent bar by piling on additional claims. If a plaintiff can simply allege additional, independent negligence in an employer's training or hiring, he may succeed in convincing a jury that his own relative fault is less than it actually is, thereby recovering where damages would otherwise be precluded.¹⁶²

Despite this holding, the *Wernke* court acknowledged that there may be circumstances where an independent action against the employer is appropriate. These circumstances could potentially include a claim for punitive damages "where the plaintiff must overcome the additional hurdle of showing willful and wanton misconduct bordering on the criminal in nature" or other unique scenarios.¹⁶³ While the potential exists for a viable claim in the face of an admission of respondeat superior, this case did not present such a scenario. This is because the defendant employer will be fully accountable to the plaintiff—less whatever damages may have resulted from plaintiff's own negligence—via respondeat superior.

D. Exceptions to the Majority View

Because the primary basis for dismissing direct negligence claims is that the claims are superfluous in the face of an admission of vicarious liability, it stands to reason that should a situation arise where the employer faces additional liability beyond that imputed to it by virtue of the employee's negligence, such claims should not be dismissed.¹⁶⁴ This reasoning is logically consistent, but appears to be more theoretical than realistic.

There are three primary situations where majority courts have acknowledged this broad exception. The first, and the most sound of these exceptions, occurs where the entrustment of a chattel was negligent, but the trustee was not independently negligent. Second, some courts have cited a situation where the entrustor knows of a dangerous condition of the chattel, but fails to inform the trustee. Finally, the most often cited exception occurs when a claim for punitive damages is initiated against the employer and is based on the employer's own conduct in hiring, training, supervising, or retaining the employee.

¹⁶² See *id.* at 7–8. See also WYO. STAT. ANN. § 1-1-109 (2009) (indicating Wyoming's Comparative Fault Statute bars recovery where a plaintiff is more than fifty percent at fault for the accident).

¹⁶³ *Wernke Order*, *supra* note 157, at 8.

¹⁶⁴ See, e.g., *McHaffie*, 891 S.W.2d at 826 (citation omitted).

1. *Direct Negligence Claims Not Derivative of the Employee's Negligence Remain Viable*

The first two “exceptions” are not really exceptions at all, since these situations are not derivative of the entrustee’s negligence. For example, if a parent gives a loaded gun to a young child, who then shoots someone, it may be determined the child was not negligent because of his age.¹⁶⁵ In that case, there is no negligence to impute to the parent. Rather, it is the direct negligence of the parent that was the proximate cause of the accident. Similarly, in rare circumstances, a defendant may be held liable when the driver is otherwise free from fault.¹⁶⁶

In the above examples, since neither the child nor the driver was negligent, there is no negligence to impute to the employer or parent. But, unlike the *DeWald* case, there is still a causal link between the accident and the negligence of the employer or parent. The majority rule is simply inapplicable. While the above situations can arise in theory, courts should not allow baseless assertions to subsume the majority rule. Rather, consistent with the standards of review for motions to dismiss for failure to state a claim and for summary judgment,¹⁶⁷ courts should determine whether such claims are actually supported by any facts.

2. *The Punitive Damages Exception*

On the other hand, even when a plaintiff claims the negligence of the employer in hiring, training, supervising, retaining, or entrusting a chattel to an employee was especially egregious, there is still a break in the causal chain if the employee was not negligent. Does it really matter whether the hiring practices were simply negligent or incredibly outrageous if the employee drove reasonably at the time of the accident? If the employee drove his vehicle in a reasonable manner at the time of the accident, what the employer did at some remote time cannot possibly be the proximate cause of the accident.¹⁶⁸

¹⁶⁵ See, e.g., *Keller v. Kiedinger*, 389 So. 2d 129, 133 (Ala. 1980) (“If, however, the person to whom the chattel is supplied is one of a class which is legally recognized as so incompetent as to prevent them from being responsible for their actions, the supplier may be liable for harm suffered by him, as when a loaded gun is entrusted to a child of tender years.”).

¹⁶⁶ See, e.g., *Syah v. Johnson*, 247 Cal. App. 2d 534, 538 (Cal. Ct. App. 1966). The employer was held liable for an accident even though the driver was found free of fault. *Id.* Employer knew driver was prone to dizzy spells and just blacked out in this case. *Id.* at 545. Since the driver was not at fault, vicarious liability was not an issue. *Id.* at 538. Presumably, a vehicle owner may also be held liable where the vehicle is defective, but the driver is unaware of the defect. See *id.* at 539 (citation omitted).

¹⁶⁷ See FED. R. CIV. P. 12(b)(6), 56.

¹⁶⁸ See, e.g., *Rodgers v. McFarland*, 402 S.W.2d 208, 210 (Tex. App. 1966) (“Even if the owner’s negligence in permitting the driving were gross, it would not be actionable if the driver was guilty of no negligence.”).

a. Can the Conduct that Supports a Direct Negligence Claim Ever Support a Punitive Damages Award?

Questions arise when the evidence suggests the employee may have been negligent and the employer's direct negligence was especially egregious. Punitive damages are generally available "to punish the person doing the wrongful act and to deter him, as well as others, from similar conduct in the future."¹⁶⁹ Typically, to support an award of punitive damages, the defendant's conduct must be willful and wanton (that is, outrageous), evidence an evil intent or motive, or show a conscious disregard for the safety of others.¹⁷⁰ Importantly, punitive damages can only be awarded for the misconduct that actually caused the harm.¹⁷¹ Realistically, it appears that it would be a very rare case where an employer's misconduct in hiring, training, retaining, or supervising its employees or in entrusting a vehicle to an employee is so egregious that the conduct could support a punitive damages award.

The reason such a situation is unlikely to occur is because it requires, practically speaking, the employer to show a conscious disregard for its own self interest. In motor vehicle accident cases, the result of this "outrageous" conduct is a motor vehicle accident. Obviously, motor vehicle accidents, in addition to potentially harming people, also damage property, often including the expensive tractor-trailer units owned by the motor carrier. Accidents also often cause damage to the goods being hauled by the motor carrier or cause delays in the delivery of the goods, which can result in a breach of the shipping contract. Loss of a tractor or trailer can also result in lost business income, because the unit is not available to generate income for the motor carrier. Even when there are no personal injuries arising out of an accident, the motor carrier is almost assuredly going to suffer some loss in the form of repairs to the vehicle, damage claims by shippers, and lost income for the time the equipment is out of service.

It is simply counterintuitive to assert that a motor carrier is going to willfully and wantonly send an untrained driver out on the road in expensive equipment if the motor carrier believes there is a high likelihood that the driver will be involved in an accident. Unless a motor carrier acted with conscious disregard of its own rights, it cannot be said it acted the same with respect to the rights of others. At least with respect to cases arising out of motor vehicle accidents, it seems that direct negligence typically will not support a punitive damages award.

¹⁶⁹ *Smith v. Williams*, No. 05C-10-307, 2007 Del. Super. LEXIS 266, at *7 (Del. Super. Ct. June 22, 2007) (citation omitted); *see also Danculovich v. Brown*, 593 P.2d 187, 191 (Wyo. 1979).

¹⁷⁰ *Smith*, 2007 Del. Super. LEXIS 266, at *7; *Danculovich*, 593 P.2d at 191.

¹⁷¹ *See Smith*, 2007 Del. Super. LEXIS 266, at *8; *Danculovich*, 593 P.2d at 189 (discussing exemplary damages in context of wrongful death action).

With respect to commercial motor vehicles, these employers and their drivers are subject to federal regulations. The Federal Motor Carrier Safety Regulations (FMCSR) provide the framework specifying driver qualification and training requirements.¹⁷² The FMCSR specifies when a driver must be disqualified from driving.¹⁷³ The FMCSR also provides license standards, requirements and penalties that must be followed by the states in issuing and regulating commercial driver licenses.¹⁷⁴ In short, if a truck driver has obtained a CDL and is not disqualified from driving, any negligence on the part of his employer with respect to hiring, training, and retention simply cannot be viewed as so egregious as to warrant the imposition of punitive damages, because the employer has complied with federal regulations.¹⁷⁵

Moreover, the Federal Motor Carrier Safety Administration (FMCSA) inspects motor carrier operations for compliance with the regulations.¹⁷⁶ Specifically, the FMCSR contains procedures for the FMCSA “to determine the safety fitness of motor carriers, to assign safety ratings, to direct motor carriers to take remedial measures when required, and to prohibit motor carriers receiving a safety rating of ‘unsatisfactory’ from operating a CMV.”¹⁷⁷ The FMCSA conducts on-site inspections of motor carriers as well as inspections of vehicles and drivers at weigh stations and ports of entry across the country. Motor carriers, especially smaller outfits, might make missteps while trying to operate in a heavily regulated industry, but these missteps are negligence at most.¹⁷⁸ If the FMCSA has not disqualified a motor carrier from operating CMVs, then the manner in which the motor carrier runs its business was not so egregious as to warrant punitive damages.

¹⁷² 49 C.F.R. § 391.1(a) (2009).

¹⁷³ § 391.15(a)–(d).

¹⁷⁴ §§ 383.1, 384. “The purpose of this part is to help reduce or prevent truck and bus accidents, fatalities, and injuries by requiring drivers to have a single commercial motor vehicle driver’s license and by disqualifying drivers who operate commercial motor vehicles in an unsafe manner.” § 383.1(a).

¹⁷⁵ See, e.g., *Smith*, 2007 Del. Super. LEXIS 266, at *13–14. The court conducted a thorough analysis of the evidence presented for and against punitive damages and concluded punitives were not warranted against the defendant motor carrier. *Id.* at *14. This analysis included that Williams was a licensed driver, passed his physical, and was certified to drive. *Id.* at *13–14.

¹⁷⁶ 49 C.F.R. § 385.1 *et seq.*

¹⁷⁷ § 385.1(a).

¹⁷⁸ Even this negligence, however, cannot serve as a basis of liability in the absence of driver negligence that caused the accident. For example, if the motor carrier negligently failed to verify the driver’s medical certificate, it does not mean the driver was medically unfit to drive. Similarly, even if the driver has an expired medical certificate, it does not mean he actually has a disqualifying medical condition. Even if the driver is medically unfit to drive, it does not mean this condition manifested at the time of the accident. Finally, even if the condition manifested at the time of the accident, it does not mean it caused him to drive negligently. Maybe he was rear-ended by another vehicle and was totally fault free as to the cause of he accident. If the driver was fault free, the rest is irrelevant for purposes of a tort action.

The FMCSA is staffed by professionals who are given the authority to disqualify both drivers and motor carriers for especially egregious conduct. Certainly, the FMCSA is better qualified and equipped to determine whether the hiring, training, retention and supervision of a driver is so egregious as to merit penalty, than is a jury typically hearing a case in an emotionally charged environment, on a body evidence quite properly limited by the rules of evidence, and often with a pre-determined bias against big trucks. If a driver or motor carrier has not been disqualified by the FMCSA, then punitive damages simply are not warranted except in the most unusual circumstances.

b. Artful Pleading Should Not Subsume the Rule

As discussed above, it seems the “punitive damages” exception cited by some majority courts is more theoretical than practical. Nevertheless, even the theoretical deserves a court’s attention to determine whether or not the plaintiff’s punitive damages claim is viable or should also be dismissed. Just as it is dangerous to have a hard and fast rule that all direct negligence claims should be dismissed in the face of an admission of vicarious liability, it is equally dangerous to adhere to an inflexible rule that when a plaintiff asserts a claim for punitive damages, the direct negligence claims must necessarily survive summary dismissal.

To the contrary, for the very reasons that majority courts dismiss direct negligence claims in the first place, these courts should make sure to closely scrutinize punitive damage claims so that artful pleading does not subsume the rule. Plaintiffs should not be able to inject prejudicial evidence into a proceeding simply by adding a paragraph to a Complaint.¹⁷⁹

E. How to Handle These Claims at Trial

As described above, there is rarely good reason to allow direct negligence claims to go forward when vicarious liability has been admitted under a different theory. The one valid exception is when direct negligence claims can impose liability beyond that of the employee and such claims are supported by competent evidence. If the Plaintiff presents facts that support a claim for punitive damages—or to support the rare case where the employer may be held liable in the absence of employee negligence—then the case should be bifurcated to ensure the defendant receives a fair trial on the underlying negligence claim against the driver. If—and

¹⁷⁹ See *James*, 661 S.E.2d at 332. The defendant proposed that the court adopt the majority rule with the punitive damages exception. *Id.* at 331. The court declined the invitation and noted the futility of a hard and fast exception for punitive damages. *Id.* “As requests for punitive damages are commonplace in cases of this type, we think traveling the road the [defendant] proposes would create an exception which swallows the rule.” *Id.*; see also *Wernke Order*, *supra* notes 157–63 and accompanying text.

only if—the driver is found negligent should the trial proceed to the second phase where the plaintiff is given a fair opportunity to present the claim for punitive damages.

In such cases, the only means to prevent substantial prejudice on the primary negligence claim is to bifurcate the proceedings and try the driver negligence claims first.¹⁸⁰ This is necessary because even when the direct negligence claims may impose additional liability on the employer, the direct negligence claims are almost always derivative. Absent this necessary element, judgment as a matter of law is proper on the direct negligence claims.

Although bifurcated trials may pose an additional demand on our busy trial courts, “[e]fficiency cannot be permitted to prevail at the expense of justice.”¹⁸¹ Moreover, bifurcation will actually save time and avoid unnecessary prejudice in cases where the employee was not at fault. Jury instructions, while often touted as a means to allow both types of claims to go forward, cannot protect against the substantial prejudice to the employee driver.¹⁸²

IV. LOGICAL CONCLUSION

Upon a review of the various perspectives, the logical conclusion appears to be consistent with that of the majority—when an employer admits it is vicariously liable for its employee’s negligence, claims of negligent hiring, supervision, training, retention, and entrustment should be dismissed in virtually every case. The reasons are apparent: (1) evidence needed to prove a direct negligence claim is inadmissible with respect to the negligence of the employee, regardless of whether the employee is a named party or not; (2) allowing the direct negligence claim to survive adds nothing, other than prejudice, to the trial; (3) neither the percentage of fault nor the amount of damages can be increased or decreased based on the ultimate finding on the direct negligence claims.

¹⁸⁰ See *Martin v. Minnard*, 862 P.2d 1014, 1016 (Colo. App. 1993) (“An abuse of discretion occurs where the court’s failure to order separate proceedings virtually assures prejudice to a party.”) (citation omitted); *Christiansen*, 667 A.2d at 399 n.3 (determining that bifurcating the liability phase of a trial so that the jury would hear the case against the defendant driver independently from that against the tractor-trailer owner and lessee was a proper exercise of discretion). The court reasoned, “The critical factor, however, is that the prejudicial negligent entrustment evidence be kept separate from the initial determination of the driver-defendant’s negligence.” *Id.*; *Angelo v. Armstrong World Indus.*, 11 F.3d 957, 964 (10th Cir. 1993) (“Bifurcation is not an abuse of discretion if such interests [as convenience, *avoiding prejudice*, expedition, and economy] favor separation of issues and the issues are clearly separable.”) (citation omitted).

¹⁸¹ *State v. McCraime*, 588 S.E. 2d 177, 205 (W. Va. 2003) (citation omitted).

¹⁸² See, e.g., *Martin*, 862 P.2d at 1016 (indicating that even with a curative limiting instruction, the jury could improperly use the evidence to show a propensity of negligent driving).

Importantly, there is no mechanical rule that a court can or should apply in lieu of factual analysis. There may be some causes of action where the defendant truly faces liability beyond respondeat superior. The court must then assess the practical outcome of the claims before dismissing the direct negligence claims.

There may be a rare situation where the employer's actions in hiring, training, supervising, or retaining an employee may give rise to punitive damages. It is hard to imagine what such a case looks like, especially in a motor vehicle case, but *if* it occurs, then the case should be bifurcated. *If* the jury finds the driver at fault, then the jury can assess whether the direct claims are so egregious as to warrant punitive damages. But first, the court should carefully review the allegations and the evidence supported in summary judgment proceedings to make sure a punitive damages claim actually states a cause of action and is not merely a case of artful pleading.¹⁸³

If a court allows direct negligence claims to go to the jury in the face of an admission of vicarious liability, it should always bifurcate the trial, as did the *Beavis* court. Knowing that evidence to support a direct negligence claim is routinely excluded when the employer is not a party should be sufficient basis to bifurcate every such case. Bifurcation will often save time in the end. The first phase of the trial should focus on only the accident. The number of witnesses and the scope of the subject matter will be greatly reduced since there will be no need to receive evidence related to hiring practices, other acts of either the employer or the employee, or what is necessary to reasonably train the employee. Obviously, the results at trial will often alleviate the need for the second proceeding.

At the end of the day, this is first and foremost a fairness issue that is not susceptible to mechanical determinations. If courts will avoid the mechanical application of any position, whether majority or minority, apply a reasoned and complete analysis of the practical effects of the decision, and decide each case on its relative merits, the rights of *all* litigants to a fair trial will be preserved.

¹⁸³ It is also a determination that should be given careful scrutiny even at the motion to dismiss stage where all well-pled factual allegations are taken as true. Courts that routinely deny all 12(b)(6) motions should appreciate that such a decision costs all parties a substantial amount of time and money during the discovery phase. While a plaintiff's hurdle to survive a 12(b)(6) motion may not be all that high, courts should faithfully apply the standard of review for these motions.