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Submitting Theories of Respondeat Superior and Negligent Entrustment/Hiring*

McHaffie v. Bunch[1]

I. INTRODUCTION

An employer who entrusts, hires or retains an incompetent employee to operate a motor vehicle is liable for any resulting damages.[2] Liability does not arise out of the employment relationship, nor does it rest on vicarious liability. It is an independent tort resting on the combined negligence of the employer and the employee.[3]

Establishing liability under negligent entrustment/hiring requires evidence indicating that the employer was aware of the employee's incompetence.[4] Evidence of prior incidents of employee incompetence, normally inadmissible as prior bad acts, is allowed to go to the jury. Such inflammatory evidence may prejudice the defendant employer if the employer already admitted liability for the employee's misconduct under the doctrine of *respondeat superior*.

In *McHaffie v. Bunch*, the Missouri Supreme Court considered this evidentiary problem and concluded that evidence associated with the claims of negligent entrustment/hiring must be excluded when defendant employers stipulate to liability under *respondeat superior*.[5] This Note considers the appropriateness of this holding.

II. FACTS AND HOLDING

In February of 1989, Laura McHaffie was seriously injured in an automobile accident on Interstate Highway 44 in Greene County, Missouri.[6] McHaffie was a passenger in a vehicle driven by Cindy D. Bunch when the

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* The author recognizes the late Honorable Judge Elwood Thomas for his support and assistance in preparing this Note.

1. 891 S.W.2d 822 (Mo. 1995).
2. *See* 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 644 (1980).
3. *See* 57A AM. JUR. 2D *Negligence* § 334 (1989).
4. *See* 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 643 (1980).
5. *McHaffie*, 891 S.W.2d at 825.
6. *Id.* at 824.

vehicle left the highway, crossed the median and collided with a tractor-trailer.[7] Donald R. Farmer, an employee of Rumble Transport ("Rumble"), was the operator of the tractor-trailer.[8] Bruce Transport and Leasing ("Bruce") owned the truck and leased the vehicle to Rumble.[9]

In the Circuit Court of Greene County, McHaffie alleged that Bunch had negligently failed to drive on the correct side of the road and further claimed that Farmer, the tractor-trailer operator, failed to keep a careful lookout.[10] Under the doctrine of *respondeat superior*, McHaffie sought to hold Bruce and Rumble vicariously liable for Farmer's negligence.[11] Bruce and Rumble conceded that Farmer was their employee acting in the course and scope of employment.[12] In a separate count, however, McHaffie sought damages from Rumble for negligently hiring and supervising Farmer.[13]

At the conclusion of the trial, the jury totaled McHaffie's damages at $5,258,000.[14] The court divided and assessed fault as follows: 70% to Bunch, 10% to Bruce and Rumble for Farmer's negligence based upon *respondeat superior*, an additional 10% to Rumble based on negligent hiring and 10% to McHaffie based on her negligence for riding with an intoxicated driver.[15] Farmer, Bruce and Rumble appealed the lower court's decision arguing the appropriateness of McHaffie's negligent hiring claim after Bruce and Rumble conceded to liability for Farmer's negligence under the doctrine of *respondeat superior*.[16] The Southern District Court of Appeals agreed with the Appellants and ordered a new trial on all the issues.[17] The Missouri Supreme Court granted transfer to reconsider the Appellants' arguments.[18] The court considered whether *respondeat superior* and negligent hiring claims

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7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* McHaffie "introduced evidence that Rumble did not require Farmer to have adequate experience, testing, training and medical evaluations before driving their trucks." Further evidence indicated that Rumble "did not adequately enforce regulations requiring Farmer to maintain log books." Nothing in the pleadings or evidence, however, suggested that Rumble's lack of care in hiring and supervising led to McHaffie's injuries. *Id.*
14. *Id.* at 825.
15. *Id.*
16. *Id.*
17. *Id.* at 824.
18. *Id.*; *see* MO. R. CIV. P. 83.03.

are consistent and may be submitted together.[19] The Missouri Supreme Court affirmed the court of appeals decision in part and reversed and remanded in part.[20] The court found reversible error for allowing the negligent hiring claim against Rumble and admitting evidence on that theory after Bruce and Rumble conceded to liability under the doctrine of *respondeat superior*.[21]

III. LEGAL BACKGROUND

A. Theories of Employer Vicarious Liability

There are three predominant theories in Missouri under which an employer is held vicariously liable for the negligence of an employee.[22] These theories are *respondeat superior*, negligent entrustment and negligent hiring.[23] Under the doctrine of *respondeat superior*, an employer is responsible for "the torts of his servants committed while acting in the scope of employment."[24] Missouri courts recognize this cause of action.[25]

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19. *McHaffie*, 891 S.W.2d at 825.

20. *Id.* at 824.

21. *Id.* at 827.

22. Ransom v. Adams Dairy Co., 684 S.W.2d 915, 920 (Mo. Ct. App. 1985). Derivative or vicarious liability suggests imposing culpability on the actor for the conduct of a third party. BLACK'S LAW DICTIONARY 1566 (6th ed. 1990).

23. *Ransom*, 684 S.W.2d at 920. In *Ransom*, the court did not restrict the plaintiff to these theories but noted the dependency of these claims on the negligence of the employee. *Id.*

24. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1957). The Restatement specifies that the employer does not have to violate a duty or authorize the negligent conduct to be liable under this doctrine. RESTATEMENT (SECOND) OF AGENCY § 216 (1957). The rationale of the liability derives from the idea that an employer "controls" the physical activities of an employee during and within the terms of employment. RESTATEMENT (SECOND) OF AGENCY § 219 cmt. a (1957). The concept grew out of early common law governing master-servant relationships. RESTATEMENT (SECOND) OF AGENCY, Title B. Torts of Servants, Introductory Note, Historical Note (1957).

25. *See* Burks v. Leap, 413 S.W.2d 258, 266 (Mo. 1967); Leidy v. Taliaferro, 260 S.W.2d 504 (Mo. 1953); Porter v. Thompson, 206 S.W.2d 509 (Mo. 1947); Stumpf v. Panhandle Eastern Pipeline Co. 189 S.W.2d 223 (Mo. 1945); Bass v. Kansas City Journal Post Co., 148 S.W.2d 548 (Mo. 1941); Clark v. Skaggs Companies, Inc., 724 S.W.2d 90 (Mo. Ct. App. 1986); Wagstaff v. City of Maplewood, 615 S.W.2d 608 (Mo. Ct. App. 1981) (quoting the RESTATEMENT OF AGENCY); Smoot v. Marks, 564 S.W.2d 231 (Mo. Ct. App. 1978); Presley v. Central Terminal Co., 142 S.W.2d 799 (Mo. Ct. App. 1940); Daniel v. Phillips Petroleum Co., 73 S.W.2d 355 (Mo. Ct. App. 1934).

No single test exists in Missouri to determine an employer's liability under *respondeat superior*, and courts base their determination of liability on the specific facts of each case.[26] Generally, however, upon establishing a principal/agent relationship, an employer is liable for an employee's conduct occurring within the scope and course of employment.[27] Historically, an employee was acting within the scope of employment if the employer had the right to control the physical conduct of the employee.[28] More recently, however, courts find an employee acting within the scope of employment if the conduct is committed by virtue of the employment and in furtherance of the employer's business or interest.[29]

Under the doctrine of negligent entrustment, an employer is liable for the misconduct of an employee if the employer knows or should know that the employee is likely "to conduct himself in such a manner as to create an unreasonable risk of harm to others."[30] Missouri courts recognize a similar cause of action.[31] In Missouri, the doctrine requires evidence that 1) the

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26. Gardner v. Simmons, 370 S.W.2d 359, 361 (Mo. 1963); Wilson v. St. Louis Area Council, Boy Scouts of America, 845 S.W.2d 568, 571 (Mo. Ct. App. 1992).

27. Strickland v. Taco Bell Corp., 849 S.W.2d 127, 132-33 (Mo. Ct. App. 1993).

28. *See* Smith v. Fine, 175 S.W.2d 761, 765 (Mo. 1944); Mattan v. Hoover Co., 166 S.W.2d 557, 564 (Mo. 1943); Corder v. Morgan Roofing Co., 166 S.W.2d 455, 457 (Mo. 1943).

29. *Burks*, 413 S.W.2d at 266-67. The Supreme Court of Missouri found an employee within the "scope of his employment" even though the employee was not engaged in an activity which he was hired to do. *Id.* The employee, a gold technician, was asked by another employee to make a delivery, and the court concluded that the delivery occurred by virtue of employment and in furtherance of the employer's business and was within the "scope of employment." *Id.*

Noah v. Ziehl, 759 S.W.2d 905, 910 (Mo. Ct. App. 1988). The Missouri appellate court found that the "scope and course" of employment of a bouncer at a drinking establishment did not include the physical attack of a paying customer. The court held that the actions of an enraged jealous employee could not possibly be construed as furthering the "interests" of his employer. *See also* Brickner v. Normandy Osteopathic Hosp. Inc., 746 S.W.2d 108, 115 (Mo. Ct. App. 1988) (holding that the plaintiff did not have to show that the employer had actual control over the employee).

30. RESTATEMENT (SECOND) OF TORTS § 308 (1965). The Restatement indicates that such negligence is not derivative of the misconduct of the employee but exists independently of the employee's negligence. The theory derives from the principle that the entrustee is entitled to use or possess the chattel under the consent or approval of the entrustor. RESTATEMENT (SECOND) OF TORTS § 308 cmt. a (1965).

31. *See* Evans v. Allen Auto Rental and Truck Leasing, Inc., 555 S.W.2d 325, 326 (Mo. 1977) (en banc); Blankenship v. St. Joseph Fuel Oil & Mfg. Co., 232 S.W.2d 954, 958 (Mo. 1954); Ransom v. Adams Dairy Co., 684 S.W.2d 915, 920 (Mo. Ct. App. 1985); Sampson v. W. F. Enterprises, Inc., 611 S.W.2d 333, 338 (Mo. Ct. App. 1980).

entrustee is incompetent because of age, experience, habitual recklessness or otherwise; 2) the entrustor knew or should have known of the entrustee's incompetence; 3) the chattel was entrusted to the entrustee; and 4) the entrustor's negligence concurred with the misconduct of the entrustee as a proximate cause of the harm to the plaintiff.[32] The employer's liability, therefore, is derivative or dependent on the employee's misconduct.[33] The employer's negligence, however, is independent of the employee's misconduct and the employer's liability under *respondeat superior*.[34]

Under the doctrine of negligent hiring or retention, an employer is liable for the harm resulting from an employee's actions if the employer negligently or recklessly employs or retains an "improper person" for "work involving risk of harm to others."[35]

Automobile entrustment cases include: Bell v. Green, 423 S.W.2d 724, 729-30 (Mo. 1968); Wood v. Hudson, 823 S.W.2d 158, 160 (Mo. Ct. App. 1992); Thomasson v. Winsett, 310 S.W.2d 33 (Mo. Ct. App. 1958); Ritchie v. Burton, 292 S.W.2d 599, 606-07 (Mo. Ct. App. 1956); Lix v. Gastian, 261 S.W.2d 497, 500 (Mo. Ct. App. 1953); Saunders v. Prue, 151 S.W.2d 478 (Mo. Ct. App. 1941).

32. *Evans*, 555 S.W.2d at 326. *Evans* was an automobile entrustment case which questioned the verdict directing jury instruction for this theory. *Id.* This test was reaffirmed. *See Ransom*, 684 S.W.2d at 920 n.5; Shelter Mut. Ins. Co. v. Politte, 663 S.W.2d 777, 778 (Mo. Ct. App. 1983).

33. *Evans*, 555 S.W.2d at 326. Because the employer's negligence in entrusting the chattel must concur with the employee's misconduct, it is dependent on this misconduct. For this reason, the action is similar to a *respondeat superior* claim as liability is derived from the employee's negligence. *See supra* notes 24-29.

34. Bruck v. Jim Walter Corp., 470 So. 2d 1141, 1143 (Ala. 1985) (citing 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 643 (1980)). The Supreme Court of Alabama separated the employer's liability created by entrusting a vehicle to an incompetent employee from the negligence of the employee driver. *Id.* at 1143. The plaintiff brought a wrongful death action against the driver and owner of a tractor-trailer. *Id.* at 1142. The plaintiff pled separate claims of negligent entrustment and *respondeat superior*, and the defendant alleged that this was improper. *Id.* The Alabama court held that negligent entrustment predicates the employer's own negligence and is "separate and distinct" from a claim based upon the doctrine of *respondeat superior*. *Id.*

35. RESTATEMENT (SECOND) OF AGENCY § 213 (1957). An actor is liable for the actions of a third party if the actor knows or should know that the person is "peculiarly likely to commit *intentional* misconduct." RESTATEMENT (SECOND) OF TORTS § 302B cmt. e(D) (1965) (emphasis added). This view was adopted by the St. Louis District Court of Appeals in a case involving an action against a school for the alleged physical and mental abuse of a student by a teacher. Butler v. Circulus, Inc., 557 S.W.2d 469, 475 (Mo. Ct. App. 1977).

The theory is not based on the master/servant relationship. Liability exists only if the employer fulfills all the elements of an action for negligence without considering

Missouri recognizes this cause of action.[36] Under Missouri common law, employer liability depends on the existence of facts indicating that the employer "knew or should have known of the employee's dangerous proclivity" and a determination that the employer's negligence proximately caused the plaintiff's injury.[37] Missouri case law does not require that the offending conduct occur within the course and scope of employment,[38] but implicit in this cause of action, is the existence of an employer-employee relationship.[39] Furthermore, Missouri courts seem to require intentional or criminal employee misconduct.[40] Finally, like the tort of negligent entrustment, the employer's liability under negligent hiring or retention is derivative or dependent on the employee's misconduct.[41] The employer's

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the actions of the employee. RESTATEMENT (SECOND) OF AGENCY § 213 cmt. a (1957).

36. Strauss v. Hotel Continental Co., 610 S.W.2d 109, 112 (Mo. Ct. App. 1980). *See also* Porter v. Thompson 206 S.W.2d 509, 512 (Mo. 1947); Smothers v. Welch & Co. House Furnishing Co., 274 S.W. 678, 679 (Mo. 1925); J. H. Cosgrove Contractors, Inc. v. Kaster, 851 S.W.2d 794, 798 (Mo. Ct. App. 1993); Stubbs v. Panek, 829 S.W.2d 544, 548 (Mo. Ct. App. 1992); Butler v. Hurlbut, 826 S.W.2d 90, 92 (Mo. Ct. App. 1992); Ransom v. Adams Dairy Co., 684 S.W.2d 915, 920 (Mo. Ct. App. 1985); Gaines v. Monsanto Co., 655 S.W.2d 568, 571-72 (Mo. Ct. App. 1983); Priest v. F. W. Woolworth Five & Ten Cent Store, 62 S.W.2d 926, 928 (Mo. Ct. App. 1933).

37. *Gaines*, 655 S.W.2d at 570. *See also J. H. Cosgrove Contractors*, 851 S.W.2d at 798; *Stubbs*, 829 S.W.2d at 548; *Butler*, 826 S.W.2d at 92.

38. *Smothers*, 274 S.W. at 679. The court found that the plaintiff could not recover from the defendant employer under the doctrine of *respondeat superior* because the alleged rape by the employee had not occurred within the scope of employment, but the court noted that the employer's duty "doubtless includes the duty of using ordinary care to employ competent and law-abiding servants." *Id. See also supra* note 35.

39. *J. H. Cosgrove Contractors*, 851 S.W.2d at 798.

40. *Porter*, 206 S.W.2d at 512 (alleging that defendant's employee attempted to shoot plaintiff); *J. H. Cosgrove Contractors*, 851 S.W.2d at 797 (alleging that defendant's employee fraudulently induced plaintiff to obtain loan); *Stubbs*, 829 S.W.2d at 546 (alleging that defendant's employee abducted and murdered plaintiff's child); *Butler*, 826 S.W.2d at 92 (alleging that defendant's employee murdered plaintiff's son); *Gaines*, 655 S.W.2d at 569 (alleging that defendant's employee murdered plaintiff's daughter); *Strauss*, 610 S.W.2d at 110 (alleging that defendant's employee assaulted plaintiff); *Priest*, 62 S.W.2d at 926 (alleging that defendant's employee assaulted plaintiff).

41. The nature of the two torts suggests that there would be no liability on the employer absent the employee's misconduct. *See supra* notes 32-33 and accompanying text.

negligence, however, is independent of the liability imposed under the doctrine of *respondeat superior*.[42]

B. Pleading the Three Theories[43]

The independence of an employer's negligence in a negligent entrustment case poses significant evidentiary conflicts. Ordinarily, evidence of prior negligence, recklessness or intentional employee misconduct is inadmissible in determining *respondeat superior* liability.[44] In a negligent entrustment claim, however, such evidence is relevant, material and admissible.[45] If the defendant employer admits that the employee was acting within the "scope and course of employment" conceding *respondeat superior* liability but denies the negligent entrustment claim, the question arises whether the evidence of prior bad acts should be admissible to establish this independent act of negligence.[46]

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42. *Gaines*, 655 S.W.2d at 570. A wrongful death action was brought by the parents of a murder victim against the defendant employer for negligently hiring and retaining the employee convicted of the crime. *Id.* at 569. The Missouri appellate court found that the defendant employer may be directly liable for the negligent hiring/retention. *Id.* at 570. The claim would be dependent on the employee's misconduct, but the negligence was independent and separable from the employee's negligence and *respondeat superior* liability. *Id.*

See also Butler v. Circulus, Inc., 557 S.W.2d 469, 472-76 (Mo. Ct. App. 1977) (recognizing a negligent hiring/retention claim and a claim under *respondeat superior*).

43. *See generally*, 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).

Even though Missouri recognizes negligent hiring/retention and negligent entrustment as separate and distinct theories, for simplicity, when the author uses "negligent entrustment" that subsumes both theories.

44. Weaver v. Scofield, 198 S.W.2d 240, 243 (Mo. Ct. App. 1947). *See also* McJunkins v. Windham Power Lifts, Inc., 767 S.W.2d 95, 100 (Mo. Ct. App. 1989) (noting that admitting evidence of prior bad acts can be prejudicially erroneous because it is collateral and may mislead or confuse the jury).

45. Negligent hiring requires facts which indicate that the employer knew or should have known of an employee's prior bad acts. *See supra* note 37 and accompanying text. Negligent entrustment requires that the plaintiff show that the employer knew of the employee's incompetence. *See supra* note 32 and accompanying text. Evidenced prior bad acts, therefore, are admitted under these theories to establish these elements.

46. A negligent hiring theory of recovery is essentially indistinguishable from a negligent entrustment theory of recovery for purposes of discussing the propriety of joining *respondeat superior* with either of these two theories. McHaffie v. Bunch, No.

The majority of jurisdictions prohibits the plaintiff from pursuing a negligent entrustment claim once *respondeat superior* liability is established.[47] These jurisdictions reason that the employer, though possibly guilty of a separate tort, is still only liable for the employee's negligence.[48] According to these jurisdictions, the negligent entrustment action is abandoned because the plaintiff cannot hope to recover anymore than what the defendant already conceded to under *respondeat superior*.[49] Collateral evidence necessary to establish negligent entrustment, therefore, becomes unnecessary, irrelevant and inflammatory.[50]

A rare exception to this rule exists in comparative fault jurisdictions.[51] Under ordinary contributory fault principles, if the plaintiff establishes defendant's negligence, the plaintiff may recover if the court does not find contributory negligence.[52] Submitting negligent entrustment with a *respondeat superior* claim adds nothing to the plaintiff's case.[53] Under comparative fault, however, a federal district court in Illinois noted:

18097, 1994 WL 72430 (Mo. Ct. App. Mar 10, 1994).

47. Wise v. Fiberglass Sys., Inc., 718 P.2d 1178, 1181 (Idaho 1986) (citing Elrod v. G & R Constr. Co., 628 S.W.2d 17 (Ark. 1982)); Clooney v. Geeting, 352 So. 2d 1216, 1220 (Fla. Dist. Ct. App. 1977); Willis v. Hill, 159 S.E.2d 145 (Ga. Ct. App. 1967), *rev'd on other grounds sub nom.*, Hill v. Willis, 161 S.E.2d 281 (Ga. 1968); Houlihan v. McCall, 78 A.2d 661, 665 (Md. 1951). *See also* Wax, Annotation, *supra* note 43, at 838; 7A AM. JUR. 2D *Automobiles and Highway Traffic* § 693 (1980); Armenta v. Churchill, 267 P.2d 303, 308-09 (Cal. 1954) (en banc); Prosser v. Richman, 50 A.2d 85, 87 (Conn. 1946); Ledesma v. Cannonball, Inc., 538 N.E.2d 655, 661 (Ill. App. Ct. 1989) *superseded by statute as stated in* Lorio v. Cartwright, 768 F. Supp. 658 (N.D. Ill. 1991); Nehi Bottling Co. v. Jefferson, 84 So. 2d 684, 686 (Miss. 1956); Heath v. Kirkman, 82 S.E.2d 104, 107 (N.C. 1954); Patterson v. East Texas Motor Freight Lines, 349 S.W.2d 634, 636 (Tex. Civ. App. 1961); Bowman v. Norfolk S. Ry. Co., 832 F. Supp. 1014, 1021-22 (D.S.C. 1993); Breeding v. Massey, 378 F.2d 171, 178 (8th Cir. 1967); Hood v. Dealers Transp. Co., 459 F. Supp. 684, 685 (N.D. Miss. 1978); Hackett v. Washington Metro. Area Transit Auth., 736 F. Supp. 8, 9-11 (D.D.C. 1990); Tindall v. Enderle, 320 N.E.2d 764, 767-68 (Ind. Ct. App. 1974); Tuite v. Union Pac. Stages, Inc., 284 P.2d 333, 338-39 (Or. 1955); Ortiz v. New Mexico State Police, 814 P.2d 117, 120 (N.M. Ct. App. 1991).

48. *Elrod*, 628 S.W.2d at 19 (citing Kyser v. Porter, 548 S.W.2d 128 (Ark. 1977)).

49. *Elrod*, 628 S.W.2d at 19.

50. *Willis*, 159 S.E.2d at 157.

51. Respondents' Substitute Brief at 14, McHaffie v. Bunch, 891 S.W.2d 822, 827 (Mo. 1995) (citing Lorio v. Cartwright, 768 F. Supp. 658 (N.D. Ill. 1991) and Lim v. Interstate Sys. Steel Div., Inc., 435 N.W.2d 830 (Minn. Ct. App. 1989)).

52. *Lorio*, 768 F. Supp at 660.

53. *Id.*; *see supra* notes 47-50 and accompanying text.

> If plaintiffs were to prevail on both the negligence claim against the entrustee-agent and on the negligent entrustment claim against the entrustor-principal, the entrustor-principal would be liable for the percentage of plaintiff's damages caused by the entrustee-agent's negligence and for the percentage of plaintiff's damages caused by the entrustor-principal's separate negligence in entrusting the vehicle to the entrustee-agent. This could make a great deal of difference in the amount of judgment. It would not be possible for a finder of fact to make the necessary determination of degrees of fault without having before it the evidence of the entrustor-principal's negligence in entrusting the vehicle to the entrustee-agent.[54]

Therefore, according to the Illinois federal court, an employee's prior bad acts are relevant to support a negligent entrustment claim submitted under a comparative fault statute.

In most jurisdictions, however, comparative fault does not affect the application of the majority rule.[55] This policy suggests that "comparative fault as it applies to the plaintiff should end with the parties to the accident."[56] Negligent entrustment may establish independent fault on the employer but should not impose additional liability on the employer.[57] The employer's liability under negligent entrustment rests on the negligence of the employee, so the employer's liability cannot exceed the liability of the

54. *Lorio*, 768 F. Supp. at 660-61.

55. Many jurisdictions cited above as supporting the majority rule follow the rule despite adhering to a theory of comparative fault. *See* Wise v. Fiberglass Sys., Inc., 718 P.2d 1178, 1181 (Idaho 1986) (comparative fault adopted in 1971); Elrod v. G & R Constr. Co., 628 S.W.2d 17, 19 (Ark. 1982) (comparative fault adopted in 1955); Clooney v. Geeting, 352 So. 2d 1216, 1220 (Fla. Dist. Ct. App. 1977) (comparative fault adopted in 1973); Whidby v. Colubine Carrier, Inc., 356 S.E.2d 709, 711 (Ga. Ct. App. 1987) (comparative fault adopted in 1913); Nehi Bottling Co. v. Jefferson, 84 So. 2d 684, 686 (Miss. 1956) (comparative fault adopted in 1910); Ledesma v. Cannonball, Inc., 538 N.E.2d 655, 661 (Ill. App. Ct. 1989) *superseded by statute as stated in* Lorio v. Cartwright, 768 F. Supp. 658 (N.D. Ill. 1991) (comparative fault adopted in 1981); Estate of Arrington v. Fields, 578 S.W.2d 173, 178 (Tex. Civ. App. 1979) (comparative fault adopted in 1973); Bowman v. Norfolk S. Ry. Co., 832 F. Supp. 1014, 1021-22 (D.S.C. 1993) (comparative fault adopted in 1991); and Ortiz v. New Mexico State Police, 814 P.2d 117, 120 (N.M. Ct. App. 1991) (comparative fault adopted in 1980).

56. Appellant's Substitute Reply Brief at 6, McHaffie v. Bunch, 891 S.W.2d 822 (Mo. 1995). The Appellant's brief supports the policy argument that plaintiff's comparative negligence should remain the same, regardless of whether the remaining fault can be allocated in part to the employer through negligent entrustment. *Id.*

57. *See supra* note 49 and accompanying text.

employee.[58] For these reasons, the majority rule's rationale is applicable in comparative fault jurisdictions.

Many courts recognize a more common exception to the majority rule where punitive damages are plead along with negligent entrustment.[59] Courts adhering to this exception rationalize that negligent entrustment claims should be admitted where the claim imposes additional liability on the employer than could be derived from the employee's misconduct. The Arkansas Supreme Court in *Elrod v. G. & R. Construction Co.* distinguished between cases submitting punitive damages from cases submitting just compensatory damages.[60] Similarly, a Florida appellate court supported the punitive damages exception because punitive damages plead with negligent entrustment imposes additional liability on the employer outside of the damages caused by the employee's negligence.[61] While interpreting Mississippi law, however, a federal district court in Mississippi failed to recognize the exception.[62] The federal court found that punitive damages could only be determined if the employee would be liable for such damages.[63]

Until recently, the punitive exception did not exist in Missouri because Missouri courts faithfully followed the minority view and allowed negligent entrustment claims to be submitted with theories alleging *respondeat superior* liability.[64] Previous Missouri decisions distinguished the negligence of an employer from the negligence of an employee.[65] The Missouri Supreme Court, however, was unconvinced by the state's longstanding view in this area and argued for the majority rule in *McHaffie*.[66]

IV. INSTANT DECISION

In the instant decision, the court decided that Missouri should adopt the majority view and refused to allow a plaintiff to proceed against an employer under negligent entrustment when an employer conceded to liability under

58. *See supra* notes 33-34, 48-49 and accompanying text.

59. *See Elrod*, 628 S.W.2d at 19; *Clooney*, 352 So. 2d at 1220; Plummer v. Henry, 171 S.E.2d 330, 334 (N.C. Ct. App. 1969).

60. *Elrod*, 628 S.W.2d at 19.

61. *Clooney*, 352 So. 2d at 1220.

62. Hood v. Dealers Transp. Co., 459 F. Supp. 684, 685-86 (N.D. Miss. 1978).

63. *Id.*

64. Gaines v. Monsanto Co., 655 S.W.2d 568, 570 (Mo. Ct. App. 1983). According to the Eastern District in *Gaines*, the tort of negligent entrustment is independent of *respondeat superior* liability. *Id.*

65. *See Gaines*, 655 S.W.2d at 570.

66. McHaffie v. Bunch, 891 S.W.2d 822, 826 (Mo. 1995).

respondeat superior.[67] The court noted that the liability of an employer under any vicarious liability doctrine is "fixed" by the liability of the employee.[68] The court stated that if all theories of vicarious liability were pled the "potentially inflammatory" and "irrelevant" evidence submitted to support these claims would confuse the jury and prejudice the defendants.[69]

The court refused to accept the persuasive case law from minority rule jurisdictions.[70] The court referred to these minority opinions as contrary to "the overwhelming weight of authority" and proclaimed, without explanation, that it would be "illogical" to assess a greater percentage of fault to the employer than is attributable to the employee.[71]

The *McHaffie* court, however, restricted its opinion to the facts of this case[72] and held that an employer may be found liable on a theory that is not derivative of the negligence of the employee.[73] Furthermore, in an action by an employer to recover contribution from an employee, the court found it conceivable that the percentage of fault between the employer and employee may be relevant.[74] Finally, the court recognized the punitive damages exception to the majority rule noting that "it is also possible that an employer or an entrustee may be liable for punitive damages which would not be assessed against the employer/entrustee."[75]

V. COMMENT

The *McHaffie* court's decision pulls Missouri into compliance with the majority view on pleading both *respondeat superior* and negligent entrustment, but unnecessarily eliminates a claim used to compensate the victims of an employer's negligence. The decision, in short, violates the general rule

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67. *Id.*

68. *Id.* The court found that the defendant employer is strictly liable for an employee's misconduct under the doctrine of *respondeat superior*. *Id.*

69. *Id.*

70. *Id.* at 827. Courts allying themselves with the minority view include: Bruck v. Jim Walter Corp., 470 So. 2d 1141, 1142-45 (Ala. 1985); Perin v. Peuler, 130 N.W.2d 4, 8 (Mich. 1964); Clark v. Stewart, 185 N.E. 71, 72-73 (Ohio 1933).

71. *McHaffie*, 891 S.W.2d at 827.

72. *Id.* at 826.

73. *Id.* An example would be where the employee was unknowingly supplied with defective equipment by the employer in which case the employer's liability would not be derivative of the employee's misconduct. Respondent's Substitute Reply Brief at 6, McHaffie v. Bunch, 891 S.W.2d 822 (Mo. 1995).

74. *McHaffie*, 891 S.W.2d at 826.

75. *Id.* (citing Clooney v. Geeting, 352 So. 2d 1216, 1220 (Fla. Dist. Ct. App. 1977)).

allowing a plaintiff to pursue independent and consistent causes of actions without having to elect between them.[76]

The court's decision fails to consider the independent and consistent character of the separate theories.[77] Negligent entrustment and *respondeat superior* are both vicarious liability actions,[78] which are dependent on the misconduct of another.[79] However, the torts are distinguishable and independent of each other.[80] *Respondeat superior* liability is based on the employee's negligence while negligent entrustment liability rests on the employer's own negligence.[81] The independence of these separate torts, however, does not make the claims inconsistent. As long as the *respondeat superior* claim does not allege what the negligent entrustment claim denies, or vice versa, the theories are consistent and may be pled together.[82] Because negligent entrustment and *respondeat superior* claims are independent and consistent, future plaintiffs should be entitled to pursue both claims.

Despite the independence and consistency of the separate theories, the *McHaffie* court found that the collateral evidence supporting negligent entrustment claims is typically "inflammatory" and prejudicial to the defendant employer who has already conceded to liability for the employee's misconduct.[83] The court, however, refused to consider other procedural safeguards commonly used to exclude "inflammatory" evidence.[84] For

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76. *See* Insurance Co. of North America v. Skyway Aviation, Inc., 828 S.W.2d 888, 893 n.1 (Mo. Ct. App. 1992).

77. *See supra* notes 34 and 42 and accompanying text.

78. Ransom v. Adams Dairy Co., 684 S.W.2d 915, 920 (Mo. Ct. App. 1985). *See supra* note 23 and accompanying text.

79. *See supra* notes 33 and 41 and accompanying text.

80. *See supra* notes 34 and 42 and accompanying text. The Alabama Supreme Court found the employer's negligence the basis of a claim under negligent entrustment, stating that the claim was "separate and distinct" from an action under *respondeat superior*. Bruck v. Jim Walter Corp. 470 So. 2d 1141, 1143 (Ala. 1985) (quoting Rush v. McDonald, 106 So. 175, 178 (Ala. 1925)).

81. An employer's vicarious liability based on *respondeat superior* rests on an employee's misconduct committed within the scope of employment. *See supra* notes 27-29 and accompanying text. An employer's liability under negligent entrustment rests on the employer's own negligence in entrusting the employee with responsibility. *See supra* note 34 and accompanying text.

82. Orrock v. Crouse Realtors, Inc., 823 S.W.2d 40, 41 (Mo. Ct. App. 1991).

83. *McHaffie*, 891 S.W.2d at 826.

84. Defendant employers can file motions for summary judgment to preclude insufficient negligent entrustment claims and the accompanying evidence from the trial proceedings. MO. R. CIV. P. 74.04.

Furthermore, Missouri recently passed a rule of civil procedure similar to federal Rule 11 which would allow defendant employers to preclude frivolous negligent

instance, summary judgment proceedings, the frivolous claims rule and the Federal Rules of Evidence may be used to preclude insufficient or frivolous negligent entrustment claims and the accompanying prejudicial evidence.[85]

Even if the court's findings could be justified, however, the punitive damage exception limits the effectiveness of the *McHaffie* decision. The court's holding reserves a "possible" exception to the majority rule, excluding negligent entrustment claims when punitive damages are pled.[86] The courts which adhere to this common exception rationalize that negligent entrustment claims should be admitted where the claim imposes additional liability on the employer than could be derived from the employee's misconduct.[87] The inflammatory and prejudicial evidence that accompanies the submission of negligent entrustment would, therefore, be admissible with the simplicity of pleading punitive damages.[88]

Punitive damages generally require a showing of willful and wanton misconduct.[89] However, in *Porter v. Erickson Trans. Corp.*,[90] the Southern District Court of Appeals held that "the lack of proper training or qualifications on the part of an employee to perform an assigned task is evidence which tends to support submission of punitive damages."[91] Under

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entrustment claims and the accompanying evidence. MO. R. CIV. P. 55.03. The Missouri rule is almost identical to the federal rule and imposes sanctions against parties who plead frivolous claims in order to bring in additional evidence. MO. R. CIV. P. 55.03; *see also* William E. Corum, Note, *Sanctions Under Missouri Rule 55.03: Problems and Promises*, 61 UMKC L. REV. 381 (1992).

Finally, federal courts may exclude evidence if its probative value is substantially outweighed by the danger of unfair prejudice. FED. R. EVID. 403. A negligent entrustment claim, therefore, may be excluded if the probative value of the entrustment evidence is substantially outweighed by the prejudicial effect on the defendant employer. FED R. EVID. 403.

85. *See supra* note 84.

86. *McHaffie*, 891 S.W.2d at 826.

87. *See supra* notes 59-61 and accompanying text.

88. Respondents' Substitute Brief at 19, McHaffie v. Bunch, 891 S.W.2d 822 (Mo. 1995); Hood v. Dealers Transp. Co., 459 F. Supp. 684, 686 (N.D. Miss. 1978) (interpreting Mississippi law).

89. Propst v. Brown, 854 S.W.2d 844, 846 (Mo. Ct. App. 1993). Specifically, the court found that punitive damages are justifiably awardable for outrageous conduct or for a party's evil motive or reckless indifference to the rights of others. *Id.*

90. 851 S.W.2d 725 (Mo. Ct. App. 1993).

91. *Porter*, 851 S.W.2d at 745 (citing Menaugh v. Resler Optometry, Inc., 799 S.W.2d 71 (Mo. 1990)). The appellate court in *Porter* found the failure of a grade "B" mechanic to have his work reviewed by a grade "A" mechanic could constitute "complete indifference to, or conscious disregard for, the safety of others." *Id.* at 745. Furthermore, the court held that the "failure to properly train an employee to perform

the *Porter* punitive damages standard, almost any evidence of negligent entrustment or negligent hiring could support a request for punitive damages.[92] The trial court may never find punitives, but under the broad *Porter* standard and the *McHaffie* punitive damages exception, the prejudicial evidence which accompanies negligent entrustment claims will be admissible and the purpose and intent of the *McHaffie* decision will be averted. Therefore, while the Supreme Court's holding moves Missouri into the majority view on submitting theories of *respondeat superior* and negligent entrustment, the practical application of this decision may effectively undermine the court's holding.

VI. CONCLUSION

The *McHaffie* decision attempted to address the evidentiary conflict which arises when a negligent entrustment claim continues after a defendant employer admits vicarious liability under *respondeat superior.* The court failed to recognize the independent consistent nature of a negligent entrustment claim as it relates to a claim resting on *respondeat superior.* Other methods to preclude the prejudicial evidence were not considered, and the punitive damage exception left the decision virtually ineffective. With these failings in mind, the court may want to take another look at the decision and reevaluate its findings. Upon review, the court should recognize the problems with the majority view and pull Missouri back under the minority rule.

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a task that, if improperly performed, threatens death or serious harm can suffice as a basis to award punitive damages." *Id.* at 747 (citing Blum v. Airport Terminal Servs., Inc., 762 S.W.2d 67 (Mo. Ct. App. 1988)).

92. *See supra* notes 32 and 37 and accompanying text.