ADMITTING *RESPONDEAT SUPERIOR* LIABILITY IN THE FACE OF DIRECT LIABILITY CLAIMS: THE COUNTERINTUITIVE PRACTICE OF IMMUNIZING A DEFENDANT FROM LIABILITY BY ADMITTING RESPONSIBILITY

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In 1956, the Mississippi Supreme Court was confronted with an appeal taken from a $7,500 verdict rendered in a wrongful death action brought by the parents of a sixteen month old girl who was "run over and killed" by a truck owned by Nehi Bottling Company of Ellisville ("Nehi").[ii] The truck driver, Claude Davis, was a Nehi employee at the time of the accident. Nehi and Davis both admitted "that Davis was within the scope of his employment at the time and place in question…."[iii]

Plaintiff proceeded at trial pursuant to the theory that Davis negligently failed to keep a proper lookout for children he knew were playing near his delivery truck.[iv] In support of this claim, the trial court allowed the Plaintiff to introduce testimony "as to other accidents in which Davis allegedly was involved."[v] The Supreme Court found the following with respect to the admission of this evidence at trial:

> It was error for the trial court to admit testimony for plaintiff as to other accidents in which Davis alleged was involved. This could have been admissible to obviate the necessity of proving agency, under the rule that where one entrusts a vehicle to one known to be a reckless driver, the former is responsible for the acts of the driver, although the driver was not about the owner's business. But in this case appellants' answer admitted that Davis was within the scope of his employment at the time and place in question, and Davis so testified.[vi]

These three sentences have led to a series of decisions rendered in Mississippi federal courts[vii] which stand for this general principle: Once an employer admits that it is liable for the tortious conduct of its employee, claims of negligent entrustment, hiring and retention are no longer available to the plaintiff. This appears to be the majority rule across the country,[viii] though there is a distinct minority of states which reject the *respondeat superior* admission rule.[ix]

The most noteworthy historical note about the *respondeat superior* admission rule is that it was formulated at a time in which contributory negligence regimes were far more prevalent than they are today.[x] Courts deciding cases in a contributory negligence regime rightfully reasoned that "if the defendant employer was liable for the acts of its employee, if the employee was found to be negligent, and if the plaintiff was

found to be entirely non-negligent, the plaintiff was entitled to recover all of her damages from the defendant employer. Regardless of the fact that the employer may well have been independent negligent in its entrustment, the plaintiff's damages did not increase with the addition of another cause of action."[xi] This rationale makes little sense, however, in a comparative fault jurisdiction. As one federal court recognized:

> The rationale of [the *respondeat superior* admission rule] is very powerful in a contributory negligence jurisdiction …. The reasoning of the rule … loses much of its force, however, under comparative negligence. Under comparative negligence, it is necessary for a trier of fact to determine percentages of fault for a plaintiff's injuries attributable to the negligence of plaintiff, the negligence of each defendant, and the negligence of other non-parties.[xii]

Thus, there is an argument to be made the that the *respondeat superior* admission rule is another outdated relic of a bygone time which should be abandoned or modified in favor of comparative fault principles.[xiii] In light of the string of cases from Mississippi federal district courts in recent years, the practitioner who advances this argument would be well advised to anticipate an adverse trial court decision and be prepared to make his argument on appeal. The greater chance of success at the trial court level for the plaintiff's lawyer confronted with a motion to dismiss his negligent entrustment-type claims is to argue in favor of one or more of the three exceptions to the rule.[xiv]

EXCEPTION #1: ENTRUSTMENT OF THE CHATTEL WAS NEGLIGENT BUT THE ENSTRUSTEE WAS NOT NEGLIGENT

Consider a parent that provides a loaded gun to a young child who then shoots someone. A court may rightfully determine that the child was too young to be negligent in her own right, but that the parent's negligence in supplying the gun to the child was the proximate cause of the accident.[xv]

EXCEPTION #2: ENSTRUSTOR KNOWS OF DANGEROUS CONDITION OF THE CHATTEL BUT FAILS TO INFORM THE ENTRUSTEE

As a Florida appellate court recognized, an example of this exception can be found "where an owner or authorized custodian of a motor vehicle who knows that the vehicle has defective brakes allows one who is not aware of this dangerous condition to use it…."[xvi] Those of us who handle tractor-trailer cases should pay particular attention

to this exception. It is neither difficult to imagine nor unique to find a case in which the tractor-trailer operator is unaware of defects or deficiencies with the vehicle that the owner of the rig knew existed and failed to adequately remedy.

EXCEPTION #3: PUNITIVE DAMAGES ARE SOUGHT DUE TO THE ENTRUSTOR'S FAULT

Although the Northern District of Mississippi has ventured an Erie-guess that that the Mississippi Supreme Court would not recognize a punitive damage exception to the *respondeat superior* admission rule, it is important to recall that the Mississippi Supreme Court has not so ruled. Several jurisdictions do recognize an exception to the rule when punitive damages are sought due to the employer's reckless entrustment.[xvii] The diligent and zealous advocate should continue to advance this argument; and, in those cases where the facts support the application of another exception, should expect to achieve success.

CONCLUSION

When crafting your complaint and throughout discovery, be mindful that the *respondeat superior* admission rule is not absolute. Tailor your complaint, written discovery and deposition questioning in a fashion which elicits information that places you squarely within an exception to the rule. When the inevitable motion for summary judgment comes, you will be ready.

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[ii] *Nehi Bottling Co. of Ellisville v. Jefferson*, 226 Miss. 586, 594, 84 So. 2d 684, 685 (1956).
[iii] 226 Miss. at 596, 84 So. 2d at 686.
[iv] 226 Miss. at 596-97, 84 So. 2d at 686.
[v] 226 Miss. at 596, 84 So. 2d at 686.
[vi] *Id.*
[vii] *See,* e.g., *Curd v. Western Express, Inc.*, 2010 U.S. Dist. LEXIS 116795 , *5 (S.D. Miss. 2010); *Booker v. Hadley*, 2009 U.S. LEXIS 63498, *6 (S.D. Miss. 2009); *Walker v. Smitty's Supply, Inc.*, 2008 U.S. Dist. LEXIS 37949, *16 (S.D. Miss. 2008); *Davis v. ROCOR Int'l*, 2001 U.S. Dist. LEXIS 26216, *17-26 (S.D. Miss. 2001);

Cole v. Alton, 567 F. Supp. 1084 (N.D. Miss. 1983); *Hood v. Dealers Transport Co.*, 459 F. Supp. 684, 685-86 (N.D. Miss. 1978).

[viii] Jurisdictions in which the highest court followed the rule include California, Connecticut, Idaho, Maryland, Mississippi and Missouri; Florida, Georgia, Illinois, New Mexico, Texas and Wyoming have lower appellate court decisions which adopt the rule; and, federal courts in Colorado, Washington, D.C., Kentucky, New York and Tennessee suggest these states would follow the rule. For a pair of excellent discussions of the rule from plaintiff and defense perspectives and a listing of the citations of the cases from each of the states listed herein, *see*, J.J. Burns, Note: *Respondeat Superior as an Affirmative Defense: How Employers Immunize Themselves from Direct Negligence Claims*, 109 Mich. L. Rev. 657 (2011) (plaintiff perspective); and, Richard A. Mincer, *The Viability of Direct Negligence Claims Against Motor Carriers in the Face of an Admission of Respondeat Superior*, 10 Wyo. L. Rev. 229 (2010) (defense perspective).

[ix] The highest courts of six states have rejected the rule (Michigan, Ohio, Alabama, Kansas, South Carolina and Virginia) and two states have lower appellate courts that have rejected the rule (Delaware, North Carolina). *See*, Mincer, *supra* note viii, at 236 n. 20; Burns, *supra* note viii, at 662 n. 39.

[x] *See*, Arthur Best, *Impediments to Reasonable Tort Reform: Lessons from the Adoption of Comparative Negligence,* 40 Ind. L. Rev. 1, 17-22 (2007). All jurisdictions - except for Alabama, the District of Columbia, Maryland, North Carolina and Virginia – have adopted some form of comparative fault. *Id.*

[xi] Burns, *supra* note viii, at 663 (citing, *Lorio v. Cartwright*, 768 F. Supp. 658, 660-61 (N.D. Ill. 1991)).

[xii] *Lorio*, 768 F. Supp. at 660.

[xiii] *See*, e.g., *Knapp v. Stanford*, 392 So. 2d 196, 198 (Miss. 1980) (abandoning the doctrine of sudden emergency because it tends to confuse the principles of comparative fault); *Wilks v. American Tobacco Co.*, 680 So. 2d 839 (Miss. 1996) (abolishing the defense of assumption of the risk in favor of comparative fault principles). Those who advance this argument should be mindful of the fact that Mississippi adopted the rule at a time in which comparative fault was the law of this state. Mississippi is the only state to have done this. *See*, Arthur Best, *Impediments to Reasonable Tort Reform: Lessons from the Adoption of Comparative Negligence*, 40 Ind. L. Rev. 1, 20 (2007).

[xiv] Mincer, *supra* note viii, at 259 ("The first [exception] … occurs where the entrustment of a chattel was negligent, but the entrustee 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 entrustee. Finally, the most often cited exception occurs when a clam 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."). Mincer compellingly argues that the first of these "exceptions" might best be thought of as not exceptions all, but instead as simply situations which fall outside the rule. *Id.* at 260 ("The first two 'exceptions' are not really exceptions at all, since they are not derivative of the entrustee's negligence.").

[xv] *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 suppler may be liable for harm suffered by him, as when a loaded gun is entrusted to a child of tender years."); see also, *Syah v. Johnson*, 27 Cal. App. 2d 534, 538 (Cal. Ct. App. 1966) (employer was held liable for an accident even though the driver was found free of fault, largely because the employer knew the driver was prone to dizzy spells); *Willis v. Hill*, 159 S.E.2d 145, 159 n. 6 (Ga. Ct. App. 1967), rev'd on other grounds, 161 S.E.2d 281 (Ga. 1968) (explaining that where a driver unexpectedly suffers a sudden blackout and causes a collision, a negligent entrustment claim should be allowed despite the majority rule).

[xvi] *Clooney v. Geeting*, 352 So. 2d 1216, 1220 (Fla. Dist. Ct. App. 1977).

[xvii] *See*, e.g., *Clooney v. Geeting*, 352 So. 2d 1216, 1220 (Fla. Dist. Ct. App. 1977); *Estate of Arrington v. Fields*, 578 S.W.2d 173, 178-79 (Tex. Ct. App. 1979).