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by: Colin E. Flora
Associate Civil Litigation Attorney

Indiana Rejoins Minority Permitting Negligent Hiring Claims Even Where *Respondeat Superior* is Admitted

This week, we look to a decision from the Court of Appeals of Indiana, which sought to address a contradiction in Indiana law created by the clash of a 1907 decision from the Indiana Supreme Court and a 1974 decision from the court of appeals. The specific issue was whether Indiana law permits simultaneous claims for the vicarious liability of an employer through the doctrine of *respondeat superior* and a direct claim for negligent hiring/retention/entrustment. Adhering to a more than century-old decision, a panel of the court of appeals rejected four decades of cases to side with the minority view.

The specific facts of this week's case, *Sedam v. 2jr Pizza Enterprises, LLC*, are not particularly important to our discussion. For our purposes, it is sufficient to recognize that the defendant's employer admitted that its employee had acted within the scope of her employment when she was involved in a car accident, which killed the plaintiff. As we have discussed before, where an employee causes harm to another while acting within the scope of his or her employment, the employer can be held liable under the doctrine of *respondeat superior*. The second doctrine–negligent hiring–is not a topic we've previously discussed. An action for negligent hiring is essentially what the name says: "To prevail on their claims, plaintiffs must show that the employer knew or had reason to know of the misconduct and failed to take appropriate action." Unlike *respondeat superior*, negligent hiring is a theory of

direct liability, such that the employer is held to answer for its own actions, not simply the vicarious actions of a person in its employ.

The controversy arises because the majority of states, and a great deal of Indiana caselaw, have held that where a litigant can establish *respondeat superior*, a claim of negligent hiring is foreclosed. For various tactical reasons–largely driven by a desire to introduce prejudicial evidence that would be excluded without the negligent hiring claim–even when a plaintiff may be able to succeed in attaching vicarious liability, he or she may still wish to bring a direct claim against the employer.

In *Sedam*, the plaintiff looked to *Broadstreet v. Hall* to argue that the claims could be brought concurrently. In *Broadstreet*, a business owner sent his nine-year-old son on a horse, which was difficult to control, to deliver a message to a customer two miles away. The boy was known to be a reckless rider, and in the process of the delivery he collided with a buggy causing its passenger to be thrown, resulting in injuries. The Indiana Supreme Court concluded that evidence of the boy's reckless riding was admissible to establish the father's knowledge. Consequently, the court necessarily held that both negligent entrustment (one of the many shades of negligent employment, along with negligent hiring and negligent retention) and *respondeat superior* could be pursued in a single action.

Sixty-seven years later, the court of appeals decided *Tindall v. Enderle*. The court in *Tindall* considered *Broadstreet*, but ultimately yielded to more recent guidance from the federal court for the Northern District of Indiana, which found that *Broadstreet* was confined to narrow "special" circumstance–chiefly where it might be said that the real negligence was of the employer and not of the employee, as where a boy of tender years is entrusted with a task known to his father to be beyond his capability, but easily accepted by a child who does not know any better.

> The *Tindall* court also concluded that the negligent hiring cause of action "generally arises only when an agent, servant or employee steps beyond the recognized scope of his employment to commit a tortious injury upon a third party." The court concluded that a cause of action for negligent hiring "is of no value where an employer has stipulated that his employee was within the scope of his employment."
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>> The doctrine of respondeat superior provides the proper vehicle for a direct action aimed at recovering the damages resulting from a specific act of negligence committed by an employee within the scope of his employment. Proof of negligence by the employee on the particular occasion at issue is a common

> element to the theories of respondeat superior and negligent hiring. Under the theory of respondeat superior, however, when the employer has stipulated that the employee was acting within the scope of his employment in committing the act, upon proof of negligence and damages, plaintiff has successfully carried his burden of proof against the negligent employee's employer. Proof of the additional elements of negligent hiring under such circumstances is not relevant to the issues in dispute, is wasteful of the court's time and may be unnecessarily confusing to a jury.

With *Broadstreet* and the cases resulting from *Tindall* falling into direct contradiction, the plaintiff argued that *Tindall* and its progeny are "contrary to law" and must not be applied. The court of appeals, acknowledging that it cannot override clear precedent of the Indiana Supreme Court, agreed. In so doing, the court did note that the decision draws Indiana into the minority view on the issue.

> We acknowledge that the majority of jurisdictions that have addressed the issue have held that "a plaintiff cannot pursue a claim against an employer for negligent entrustment, hiring, supervision, or training when the employer admits that its employee was acting within the scope of employment when the accident that is the subject of the lawsuit occurred."
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> However, a small number of jurisdictions have concluded that "an admission by an employer that its employee was acting within the scope of her employment does not preclude an action for both *respondeat superior* and negligent entrustment, training, hiring, retention, or supervision." These courts do not allow a "claim of agency to preclude a separate tort claim" because "'negligent entrustment and negligent hiring, retention, or supervision are torts distinct from *respondeat superior* and that liability is not imputed but instead runs directly from the employer to the person injured.'"

The court also found support in application of the Indiana Comparative Fault Act. We have previously discussed the comparative fault act on numerous occasions. The court found:

> We also observe that the Comparative Fault Act was enacted over ten years after our court's *Tindall* decision. The objective of the Act "was to modify the common law rule of contributory negligence under which a plaintiff was barred from recovery where he [or she] was only slightly

> negligent." Under the Act, "each person whose fault contributed to the injury bears his or her proportionate share of the total fault contributing to the injury." See also I.C. 34-51-2-8(b) (establishing that in a jury trial, the trial court "shall instruct the jury" to "determine the percentage of fault of the claimant, of the defendants, and of any person who is a nonparty. . . In assessing percentage of fault, the jury shall consider the fault of all persons who caused or contributed to cause the alleged injury, death, or damage to property . . . regardless of whether the person was or could have been named as a party").
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> In the case before us, Hamblin, Parker, and Bilton were involved in the accident that resulted in Hamblin's death. A jury could find that any one of these three parties committed acts that proximately caused the accident at issue. However, a jury could additionally find that Pizza Hut negligently hired, retained, or supervised Parker, and assign a certain percentage of fault for the accident directly to Pizza Hut. Under the Comparative Fault Act, it would be illogical to disallow a cause of action that could result in the allocation of additional fault to a tortfeasor.

Lastly, the court looked to the Restatement (Third) of Agency, which was created in 2006:

> Furthermore, Section 7.05 of the Third Restatement of Agency provides that "[a] principal who conducts an activity through an agent is subject to liability for harm to a third party caused by the agent's conduct if the harm was caused by the principal's negligence in selecting, training, retaining, supervising, or otherwise controlling the agent." *See also* Restatement (Third) of Agency section 7.03 (explaining that a principal may also be indirectly liable to a third party when its agent commits a tort while acting within the scope of his or her employment). "A principal who is vicariously liable may, additionally, be subject to liability on the basis of the principal's own conduct." *Id.*, cmt. [b].

It merits note that *Tindall* has not necessarily been vacated. Although I agree with the conclusion of the panel in *Sedam*, there is no guarantee that a subsequent panel will not look to *Tindall* for an answer.

Join us again next time for further discussion of developments in the law.

Sources

- *Sedam v. 2jr Pizza Enters., LLC*, ---N.E.3d---, No. 39A05-1602-CT-296, 2016 Ind. App. LEXIS 353 (Ind. Ct. App. Sep. 27, 2016) (Mathias, J.).
- *Broadstreet v. Hall*, 168 Ind. 192, 80 N.E. 145 (1907) (Jordan, J.).
- *Tindall v. Enderle*, 162 Ind. App. 524, 320 N.E.2d 764 (1974) (Staton, J.).
- *Schele v. Porter Mem. Hosp.*, 198 F. Supp. 2d 979, 995 (N.D. Ind. 2001) ("To prevail on their claims, plaintiffs must show that the employer knew or had reason to know of the misconduct and failed to take appropriate action.")
- *Lange v. B & P Motor Express, Inc.*, 257 F. Supp. 319 (N.D. Ind. 1966) (Grant, C.J.).
- Indiana Comparative Fault Act, codified at Ind. Code ch. 34–51–2.
- Colin E. Flora, *Employer Liability: Respondeat Superior Doctrine*, HOOSIER LITIG. BLOG (Apr. 26, 2013).
- Colin E. Flora, *Damages Pt. 5: Assessing Damages When Injured Person is Partially at Fault*, HOOSIER LITIG. BLOG (May 11, 2012).

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