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Guest blog: Absent respondeat superior, a negligent entrustment action should not impose vicarious liability on the entrustor

By Guest Blogger on September 28, 2018

In *F.F.P. Operating Partners v. Duenez,* 237 S.W.3d 680, 686 (Tex. 2007), the Texas Supreme Court stated that negligent entrustment is a form of vicarious liability. The basis for imposing liability on the owner of the object entrusted to another is that ownership of the object gives the right of control over its use (*Id.*). But perhaps the court applied this concept too broadly. Perhaps ownership of the object and control of the person using the object are two different concepts. Most Texas cases do not address this distinction because they have construed negligent entrustment in the context of the employer-employee relationship where vicarious liability is otherwise present through respondeat superior [*See TXI Transp. Co. v. Hughes,* 306 S.W.3d 230 (Tex. 2010); *Schneider v. Esperanza Transmission Co.,* 744 S.W.2d 595 (Tex. 1987); but *see, Dao v. Garcia,* 486 S.W.3d 618, 629 (Tex. App.—Dallas 2016, pet. denied)(friend liable for driver's negligent driving where the driver had taken the friend's keys without her knowledge); Williams v. Steves Industries, 699 S.W.2d 570, 571 (Tex. 1985); Goodyear Tire and Rubber Co. v. Mayes, 236 S.W.3d 754, 758 (Tex. 2007); and McGuire v. Wright,140 F.3d 1038, 1998 WL 156342 at *2 (5th Cir. 1998) (unpublished)].

To establish negligent entrustment, a plaintiff has the burden to prove (1) entrustment of a vehicle by an owner; (2) to an unlicensed, incompetent, or reckless driver; (3) that the owner knew or should have known to be unlicensed, incompetent, or reckless; (4) that the driver was negligent on the occasion in question; and (5) that the driver's negligence proximately caused the accident (*Schneider,* 744 S.W.2d at 596).

The doctrine of vicarious liability, or respondeat superior, makes the principal liable for the agent's actions because the principal has the right to control the agent's actions undertaken to further the principal's objectives [*Wingfoot Enterprises v. Alvarado,* 111 S.W.3d 134, 136 (Tex. 2003)]. A negligent entrustment cause of action, as a form of vicarious liability, functions seamlessly in an employer/employee context where the employer has the right of control over the employee and the employee, in operating a vehicle, is furthering the interests of the employer.

In cases where respondeat superior is not present, the policy reasons for imputing the negligence of the driver to the entrustor are not as convincing. For example, in a social context where a vehicle owner allows a buddy to drive his or her car, no respondeat superior is present. In the case of rental car companies, no respondeat superior is present (Rental car companies are protected from claims of negligent entrustment under 49 U.S.C. §30106, The Graves Amendment). Similarly, respondeat superior is not present when a parent permits a teenager to drive the family car, a customer permits a valet to drive his or her car, a car repair company loans a car to a customer, or a person borrows a vehicle from a coworker in order to drive to and from work. In such non-employment scenarios, the driver operates the borrowed vehicle for his or her own benefit, and not for an employer who has control over his or her livelihood and the driving choices that he or she makes. The entrustor is liable for his or her percentage of fault in entrusting the vehicle (In a non-employment scenario, an entrustor has no duty to investigate the driving record of a prospective driver as long as the driver maintains a valid driver's license. [*Avalos v. Brown Auto. Ctr.,* 63 S.W.3d 42, 48-49 (Tex. App.—San Antonio 2001, no pet.)], but should the entrustor be responsible for the percentage of fault attributed to the negligent driver? The justification supporting the imposition of vicarious liability on the entrustor is not present when the driver has no obvious connection to furthering the commercial interests of the entrustor. In one illustrative example, the court in *Dao*found that the driver had implied consent to drive his friend's car, even though he took the car without her knowledge while she was sleeping. The court applied vicarious liability, and imposed joint and several liability on the driver and his friend, now the entrustor, for a fatality resulting from an accident caused by the driver.

The imposition of vicarious liability on the entrustor requires that the entrustor defend the actions of the driver, no matter the negligent driving operations. Furthermore, since under vicarious liability, the negligent driver is not required to be joined as a party and may not be available as a witness, legitimate defenses may be lost. It is not clear whether the entrustor has a post-verdict indemnification claim against the driver as an employer has against an employee [*See Aviation Office of America v. Alexander & Alexander of Texas,* 751 S.W.2d 179, 180 (Tex. 1980) (common law indemnity permitted under pure vicarious liability, but not between joint tortfeasors)]. The entrustor without control over the driver and whose interests are not being carried out, should be liable solely for his or her own negligence and not for the acts and omissions of the negligent driver. In *F.F.P. Operating Partners,* the Texas Supreme

Court construed the Dram Shop Act, Tex. Alco. Bev. Code § 2.02(b), a statute creating the dram shop's legal duties, in conjunction with the Proportionate Responsibility Act, Tex. Civ. Prac. & Rem. Code § 33.003 to hold that dram shops are responsible only for the proportion of damages they cause or contribute to cause (*F.F.P. Operating Partners,* at 692-93). The court specifically noted that the dram shop is responsible for the acts of its employees, but not responsible for the acts of the driver and thus did not have an indemnity claim against the driver. An employer has a common law right of indemnity against an employee (*See Aviation Office of America v. Alexander & Alexander of Texas* at 180). Pursuant to Chapter 33 of the Proportionate Responsibility Act requiring the submission of responsibility of "each claimant, defendant, settling person, and responsible third party" to the jury, the dram shop properly had a contribution claim against the driver. Absent a right of control over the driver, absent a right of indemnity against the driver, and armed with a contribution claim against the driver, the liability of the non-employer entrustor should be determined like the liability of the dram shop in *F.F.P. Operating Partners,* i.e., without vicarious liability.

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