

Employee or Independent Contractor? How the Effects of Classifications Impact Employer Liability

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RECENTLY, awareness has begun to grow about the reclassification of workers as employees or independent contractors across all industries.¹ This heightened awareness is the result of increased enforcement actions and challenges by various governmental entities to the classification of workers as contractors.² For example, federal “worker misclassification” legislation has been proposed,³ and the Internal Revenue Service has launched an initiative focusing on more aggressive audits of companies.⁴ Classifying workers as employees or independent contractors can be extremely complex and vital to your case. The stakes are extremely high because consequences can be staggering.⁵

A number of states have also increased enforcement. In California, the Port of Los Angeles and Port of Long Beach implemented mandatory “concession agreements” for drayage trucking services at both ports.⁶ The Port of Los Angeles provision required motor carriers providing drayage services to transition from using independent contractors to using 100-percent employees within a five-year period, beginning with “at least a 20%

transition” to employees by the end of the fourth quarter of 2009.⁷ In Maryland, the legislature enacted a Workplace Fraud Act in 2009 effectively creating a presumption that all workers are employees.⁸ That Act authorized significant potential penalties to be imposed against businesses for “knowing failure” to properly classify individuals as employees.⁹ The importance of these issues also extends to civil litigation.¹⁰

The long established doctrine of *respondeat superior* or imputed negligence provides employers can be held vicariously liable in tort law for the negligence of their employees under various circumstances.¹¹ The doctrine is premised on the notion one who is in a position to exercise control over the performance of a service must exercise it or bear the loss.¹² An employee is usually regarded as a member of the employer’s staff and subject to the control of the employer.¹³ The employee’s tortious acts committed within the course and the scope of his employment resulting in liability are, therefore, imputed to the employer due to the working relationship existing between the parties.¹⁴

⁷ *Id.*

⁸ See S.B. 909 (cross-filed with H.B. 819), Ch. 188, Acts of 2009. (Md. 2009).

⁹ *Id.*

¹⁰ Franklin, Kota and Milane, *supra* note 1.

¹¹ Linda S. Calvert Hanson, *Employers Beware! Negligence in the Selection of an Independent Contractor Can Subject you to Legal Liability*, 5 U. MIAMI BUS. L.J. 129 (1995).

¹² W. Keeton, D. Dobbs, R. Keeton and D. Owen, PROSSER & KEETON ON TORTS, § 71, at 500 (5th ed. 1984 & Supp. 1988).

¹³ RESTATEMENT (SECOND) OF AGENCY, § 2(1)-(2) (1958).

¹⁴ *Id.*

¹ Robert T. Franklin, Michael Kota and Robert M. Milane, *Classifying Workers as “Independent Contractors” or “Employees”: Observations from the Transportation Industry*, 41 BRIEF 24 (Fall 2011) (hereinafter “Classifying Workers”).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ See *Am. Trucking Ass’n v. City of Los Angeles*, 559 F.3d 1046, 1049 (9th Cir. 2009) (each port’s respective drayage services concession agreement requirements went into effect on October 1, 2008).

Generally, a business that contracts with an independent contractor is immune from vicarious liability for damages to a third party for the negligent acts of the contractor committed during the performance of the agreement.¹⁵ An independent contractor is commonly defined as one who contracts to perform a certain task or duty independently according to their own means and methods without being subject to the control of the hiring party except as to the ultimate goal or result.¹⁶ Historically in circumstances where this level of independence existed, the imposition of liability on the hiring entity who only exercised limited control over the method in which the contracted work was performed resulted in inequity.¹⁷ As stated in Prosser on Torts, the work is to be “regarded as the contractor’s own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility for preventing the risk, and administering and distributing against it.”¹⁸ Therefore, the distinction between an “employee” and an “independent contractor” can become a critical liability issue to the hiring entity.¹⁹

This article will discuss the distinction between employees, independent contractors, and borrowed servants for the purpose of imputing tort liability to employers. Specifically, it will focus on the distinction between these classifications

under the purview of two representative states that border one another— Missouri and Illinois. In this context, we provide a series of similar automobile collision cases from Missouri and Illinois depicting common employee-independent contractor situations. As this article shows, similar facts and circumstances associated with the employee-employer relationship may lead to surprisingly different outcomes.

I. Employee, Borrowed Servant, or Independent Contractor?

A. Traditional Employer Liability- *Respondeat Superior*

In *Horner v. FedEx Ground*, Plaintiff was injured in a collision between his car and a semi-truck-tractor driven by Scott Allen (“Allen”) an employee of M&C Unlimited LLC (“M&C”).²⁰ At the time of the accident, M&C was under an exclusive lease agreement to provide trucking services to FedEx Ground Package System, Inc. (“FedEx”), an interstate motor carrier certified by the U.S. Department of Transportation (“DOT”).²¹ The truck-tractor bore FedEx’s DOT registration number and logo when it collided with Plaintiff.²² Plaintiff brought a vicarious liability action against FedEx based on *respondeat superior* principles.²³ The trial court entered judgment for Plaintiff.²⁴ FedEx appealed claiming the trial court’s judgment should be reversed on the

¹⁵ RESTATEMENT (SECOND) OF TORTS, § 409 (1965); RESTATEMENT (SECOND) OF AGENCY, § 219, (1958); PROSSER ON TORTS, *supra*, note 12 at 501-516.

¹⁶ Hanson, *supra* note 11.

¹⁷ *Id.*

¹⁸ PROSSER ON TORTS, *supra* note 12, at 509.

¹⁹ Hanson, *supra* note 11.

²⁰ 258 S.W.3d 532, 534 (Mo. Ct. App. 2008).

²¹ *Id.*

²² *Id.*

²³ *Id.* at 532.

²⁴ *Id.*

ground that the trial court erred in its determination FedEx was vicariously liable for Allen's operation of the truck-trailer because Allen was not acting with the scope and course of his employment or for the benefit of FedEx at the time of the collision.²⁵ The Court of Appeals affirmed.²⁶

The facts determinative of the agency issue were undisputed.²⁷ As a preliminary matter, M&C and FedEx did not dispute the validity of FedEx's lease agreement with M&C, nor that the lease complied with DOT requirements.²⁸ As required by the DOT, the lease agreement specifically provided FedEx shall be considered to have such exclusive possession, use, and control of the equipment required by all applicable regulations.²⁹ Additionally, M&C's hauling operations were limited exclusively to servicing FedEx's business interests pursuant to the lease.³⁰ In fact, all of the truck-tractors owned by M&C were leased to FedEx, as M&C had hauled exclusively for FedEx since M&C's incorporation.³¹ Pursuant to the terms of the lease, responsibility for maintenance of the leased equipment was delegated by FedEx to M&C, and M&C was required to provide equipment maintenance records on a monthly basis to FedEx which was important to ensure the leased truck-tractors were functioning properly and in

safe working condition and in compliance with FedEx's regulatory obligations.³²

On the day of the accident, Allen was dropped off by his wife at a FedEx sub-terminal located in Brookfield, Missouri, where the truck-tractor had undergone maintenance work.³³ Allen was instructed to drive the truck-tractor to a FedEx sub-terminal located in Shawnee, Kansas where, upon his arrival, he was either to pick up a load for transport, or leave the truck-tractor at the FedEx Shawnee hub and return to his home.³⁴ Furthermore, when the collision occurred, the truck-tractor bore FedEx's logo and Interstate Commerce Commission ("ICC") registration number.³⁵

Applying *respondeat superior* principles to the foregoing facts, the Court of Appeals affirmed the trial court's ruling FedEx was vicariously liable for the actions of Allen and thus negligent.³⁶ Under these facts, the court found that FedEx Ground exercised substantial control over Allen's operations, and in Missouri there was further an irrebuttable presumption of vicarious liability for interstate transportation providers that bearing the logo of an employer.

In contrast, in *Lee v. Pulitzer Publishing*, defendant Pulitzer Publishing Company ("Pulitzer") published, marketed, sold, and distributed a newspaper.³⁷ As part of Pulitzer's marketing, sales, and distribution efforts, Pulitzer had established a network of carrier routes, each of which encompassed an exclusive geograph-

²⁵ *Id.* at 534.

²⁶ *Id.*

²⁷ *Id.* at 536.

²⁸ *Id.* at 536.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 536-37.

³² *Id.* at 537.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 532.

³⁷ 81 S.W.3d 625, 627 (Mo. Ct. App. 2002).

ic territory.³⁸ Some carrier routes were owned and operated by Pulitzer while others were owned and operated by individuals Pulitzer designated as independent contractors pursuant to a Home Delivery Service Agreement (the "Agreement").³⁹ The Agreement stated carriers were self-employed independent contractors and not employees of Pulitzer, had the right to choose their own employees and engage such other subcontractors as the carrier may deem necessary, and the carriers exercised sole and exclusive control and supervision over all subcontractors.⁴⁰ In addition, the Agreement stated carriers were responsible for the costs of conducting and operating their businesses, including the provision of office space, transportation vehicles, equipment, and other supplies, and were responsible for paying all payroll expenses for their employees and must file their tax returns on the basis of their status as independent contractors.⁴¹

In December 1988, David Carron ("Carron") began delivering newspapers on Route 261 for Pulitzer after purchasing it from a third party.⁴² In May 1991, Carron executed a form of the Agreement with Pulitzer and continued to deliver papers as he had before executing the Agreement.⁴³ In October 1992, Carron struck and severely injured a jogger while delivering papers along Route 261.⁴⁴

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.* at 628.

⁴² *Id.* at 629.

⁴³ *Id.*

⁴⁴ *Id.*

Shortly thereafter, Pulitzer chose to terminate its agreement with Carron.⁴⁵ Upon Pulitzer's termination of the Agreement, Carron entered into a contract to sell Route 261 to Rommel Medrano ("Medrano").⁴⁶ No money changed hands with respect to this transaction, and Carron remained the active operator of the route.⁴⁷ Thereafter, Carron hired Jason Meriwether ("Meriwether") to drive the route.⁴⁸

Under the terms of the Agreement, Pulitzer had to receive notice of the sale between Carron and Medrano, together with all information regarding the purchaser.⁴⁹ While Pulitzer was required to approve the sale, it did not have the right to select a purchaser nor did it have the right to select the subcontractor the purchaser could use in carrying out its responsibilities under the Agreement.⁵⁰ Medrano entered into a new Agreement with Pulitzer in August 1993.⁵¹ Medrano and Carron were careful to give Pulitzer the impression Medrano was Route 261's owner.⁵² On April 8, 1999, plaintiff Seung Lee ("Plaintiff") and a friend were jogging on a sidewalk when a van driven by Meriwether crossed into the opposite lane of traffic, left the road, and struck both of them.⁵³ Plaintiff's friend was pronounced

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

dead at the scene; Plaintiff sustained several serious injuries.⁵⁴

Plaintiff filed a petition for personal injuries against Pulitzer, Carron, Meriwether, and Medrano alleging negligence based on different theories including *respondeat superior*, negligent hiring, negligent retention, and negligent entrustment.⁵⁵ Pulitzer sought summary judgment claiming it did not have a master-servant relationship with Medrano, Carron, or Meriwether and, therefore, could not be held liable for any of their negligence.⁵⁶ The trial court granted Pulitzer's dispositive motion holding there was no master-servant relationship between Pulitzer and the other defendants, and there was no contractual duty or other relationship between Pulitzer and Carron giving rise to a duty on Pulitzer's part.⁵⁷ Plaintiff appealed and the Court of Appeals affirmed the trial court's ruling holding the carrier was an independent contractor, rather than a newspaper employee, and thus Pulitzer was not liable to Plaintiff.⁵⁸ The court reasoned that due to the contractual relationship between Medrano and Carron, and due to the structure of the arrangement between Pulitzer and Carron, that Pulitzer exercised no control over Meriwether.

I. Illinois Law

The terms principal/employer and agent/employee do not have material distinctions for purposes of tort liability

under Illinois law.⁵⁹ *Respondeat superior* allows either a principal or employer to be held liable for acts committed by an agent or employee acting within the scope of his agency or employment.⁶⁰ An employer's vicarious liability extends to negligent, willful, malicious, or criminal acts so long as the acts are committed within the scope of employment.⁶¹ The plaintiff bears the burden of showing a contemporaneous relationship between a tortious act and the employee's scope of employment.⁶²

Bagent v. Blessing Care Corporation analyses *respondeat superior* liability and adopts three criteria from the Second Restatement of Agency in determining whether an employee's acts are within the scope of employment: (1) the conduct is of the kind he or she is employed to perform; (2) the conduct occurs substantially within the authorized time and space limits; and (3) the conduct is actuated, at least in part, by a purpose to serve the master.⁶³ All three criteria must be met for an Illinois court to conclude an employee was acting within the scope of employment.⁶⁴ Additionally, the employer's instructions to the employee do not strictly define the scope of employment.⁶⁵ A tort can fall within the scope of a person's employment even if

⁵⁹ Lang v. Silva, 715 N.E.2d 708, 716 (Ill.App. 1999).

⁶⁰ *Id.*

⁶¹ Bagent v. Blessing Care Corporation, 862 N.E.2d 985, 991 (Ill. 2007).

⁶² Pyne v. Witmer, 543 N.E.2d 1304, 1309 (Ill. 1989).

⁶³ Bagent, 862 N.E.2d at 992.

⁶⁴ *Id.*

⁶⁵ Luna v. Meinke, 844 F. Supp. 1284, 1288 (N.D. Ill. 1994).

⁵⁴ *Id.*

⁵⁵ *Id.* at 630.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.* at 625.

the employer has expressly forbidden the conduct.⁶⁶ However, if the employee commits acts that "could not possibly be interpreted as the merely overzealous or ill-judged performance of his duties as agent," courts deem him or her outside the scope of his or her employment.⁶⁷

The determination of whether an employee is acting within the "scope of employment" often depends on the distinction between a "frolic" and a "detour." Illinois courts define "frolic" as a pursuit of an employee's personal business seen as unrelated to employment.⁶⁸ An employer is not vicariously liable for the tortious acts committed by its employee while on a frolic. When an employee abandons a "frolic" and reenters the scope of employment, the employer becomes vicariously liable for injuries caused by the employee's negligence following reentry.⁶⁹ Illinois courts determine whether an employee who has engaged in a "frolic" has reentered the scope of employment by a two-prong test: (1) the employee has formulated an intent to act in furtherance of his employer's business; and (2) the intent is coupled with a reasonable connection in time and space with the work in which he or she should be engaged.⁷⁰ Employees can combine personal business and work without necessarily relieving the employer of *respondeat superior* liability.⁷¹ If an

employee's deviation is slight and not unusual a court may find as a matter of law the employee was still executing the employee's business.⁷² This slight deviation is classified as a "detour," and an employer may be held vicariously liable for the tortious conduct of its employee while on a detour. If a deviation is marked and unusual, courts may find as a matter of law the deviation was outside the scope of employment.⁷³ Cases in between the two extremes are reserved for the jury to determine.⁷⁴

2. Missouri

In Missouri, the requirements for recovery against an employer for its employee's acts under the doctrine of *respondeat superior* are: (1) an employer-employee relationship, (2) existing at the time, date, and place and under the circumstances of the plaintiff's claim, (3) reliance by the plaintiff on the acts or omissions of the employee, and (4) the employee is acting within the scope of the employment or the scope of the agency.⁷⁵ Thus, the employer/independent contractor classification is much more important under Missouri law.

A bare minimum of a procedural presumption that a tortfeasor was acting within the scope of employment arises if a motor-vehicle-driver tortfeasor is involved in a collision, is employed by an alleged employer at the time of the collision, and is driving a vehicle owned by that

⁶⁶ *Maras v. Milestone, Inc.*, 809 N.E.2d 825, 828 (Ill.App. 2004).

⁶⁷ *Luna*, 844 F.Supp. at 1288.

⁶⁸ *Pyne*, 543 N.E.2d at 1309.

⁶⁹ *Id.*

⁷⁰ *Snodgrass v. Jones*, 755 F. Supp. 826, 830 (C.D. Ill. 1991).

⁷¹ *Pyne*, 543 N.E.2d at 1309.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Studebaker v. Nettie's Flower Garden, Inc.*, 842 S.W.2d 227 (Mo. App. 1992).

employer.⁷⁶ This type of presumption disappears on the adverse party's presentation of substantial, controverting evidence. For example, the evidence in *State ex rel. Missouri Highway and Transp. Com'n v. Keeley* showed the alleged employee committed the tort away from his regular employment place while performing work unrelated to his employer's duties outside his regular work hours.⁷⁷ Therefore, the adverse party's presentation of substantial, controverting evidence was sufficient to rebut the presumption.⁷⁸

An employer is generally not liable under the doctrine of *respondeat superior* to one injured by an employee's negligent operation of a vehicle on his journey to and from work.⁷⁹ Ordinarily, getting to the place of work is not a part of an employee's services.⁸⁰ In the absence of some special benefit to the employer other than the mere making of the services available at the place where they are needed, the employee is not acting within the scope of his employment in traveling to work.⁸¹ Inquiries to determine liability include whether the employer had any control or right of control over how, when, or if the employee got to his place of employment.⁸²

The "special errand doctrine" and the "dual purpose doctrine" are exceptions to

the general rule. The "special errand doctrine" applies when an employee, having identifiable time and space limits on his employment, makes a journey which would normally fall under the going and coming rule, but invests substantial time and trouble, or suffers special inconvenience, hazard, or urgency in making the journey under the particular circumstances so it can be viewed as an integral part of the service itself.⁸³ The "dual purpose doctrine" provides if the employee's work requires the travel, the employee is deemed to be in the course of his employment although he may have been attending to a simultaneous personal purpose.⁸⁴ For the dual purpose doctrine to apply, the travel must have been necessary even where a personal purpose is lacking.⁸⁵

B. Employer Torts- Negligent Hiring, Negligent Retention, and Negligent Entrustment

I. Illinois

In Illinois, negligent hiring, retention, and entrustment actions against a defendant-employer are duplicative where the employer has already admitted liability for the actions of the employee in a *respondeat superior* claim.⁸⁶ The fault of the employer for negligent entrustment, even in a comparative negligence jurisdiction, is still

⁷⁶ *State ex rel. Missouri Highway and Transp. Com'n v. Keeley*, 780 S.W.2d 84 (Mo. App. 1989).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Logan v. Phillips*, 891 S.W.2d 542 (Mo. App. 1995).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.* at 544; see also *Meier v. Schrock*, 405 S.W.3d 31 (Mo. App. 2013) (doctrine inapplicable absent facts showing concurrent service for employer).

⁸⁴ *Tuttle v. Muenks*, 964 S.W.2d 514 (Mo. App. 1998).

⁸⁵ *Id.*

⁸⁶ See *Neff v. Davenport Packing Co.*, 268 N.E.2d 574, 575 (Ill. App. Ct. 1971).

derived from the negligence of the employee; additional liability cannot be imposed on the employer where the employer has already admitted it is liable for 100% of the fault attributable to the negligent employee.⁸⁷ "The liability of the employer is fixed by the amount of liability of the employee."⁸⁸ *Respondeat superior* and negligent entrustment are "simply alternative theories by which to impute an employee's negligence to an employer."⁸⁹ Even under comparative negligence, the two claims remain duplicative where the employer admits liability for the actions of the employee.⁹⁰

The crux of the duplicative rationale appears to be that the goal of satisfying *respondeat superior* liability need be (and should be) met by only one theory of imputable negligence. If a plaintiff were allowed to promote additional theories in establishing *respondeat superior* liability, it would confuse the jury, allow for the potential admission of inflammatory evidence irrelevant to the underlying negligence action, and would allow the jury to assess or apportion the principal's liability twice.⁹¹ In a simple negligence scenario, such as where a trucker injures a pedestrian on the road, arguing the defendant-employer negligently entrusted the truck to his employee has no more consequence

than saying the employee himself was negligent and defendant-employer – by way of employing the trucker who was negligent in the course of performing employment-related duties – is liable under agency theories of *respondeat superior*. However, the Illinois case *Neff v. Davenport Parking Co.* and its progeny are exclusively concerned with establishing imputed liability upon a defendant-employer for the conduct of the employee.⁹² Indeed, what *Neff* and its progeny do not decide are issues of direct negligence by a defendant-employer, which does not rely upon the negligent conduct of an employee.⁹³

A claim of direct negligence alleges the employer was itself negligent.⁹⁴ The plaintiff must prove the employer's breach – not simply the employee's malfeasance – was a proximate cause of the plaintiff's injury.⁹⁵ Both negligent supervision and negligent training theories have been

⁸⁷ *Gant v. L.U. Transp., Inc.*, 770 N.E.2d 1155, 1159 (Ill. App. Ct. 2002).

⁸⁸ *Id.* at 1160.

⁸⁹ *Id.*

⁹⁰ *Campa v. Gordon Food Services, Inc.*, 2002 WL 1879262 at *1 (N.D. Ill. 2002) (applying Illinois law).

⁹¹ See *Thompson v. Northeast Illinois Reg. Commuter R.R. Corp.*, 367 Ill.App.3d 373, 376 (Ill. App. Ct. 2006); *Gant*, 770 N.E.2d at 1160.

⁹² *Neff*, 131 Ill. App.2d at 792 ("the liability of the third party . . . is predicated initially upon the negligent conduct of the driver and absent the driver's negligence the third party is not liable"); See, e.g., *Gant*, 770 N.E.2d at 1159 ("a plaintiff who is injured in a motor vehicle accident cannot maintain a claim for negligent hiring, negligent retention, or negligent entrustment against an employer where the employer admits responsibility for the conduct of the employee under a *respondeat superior* theory." (emphasis added)); *Thompson*, 367 Ill.App.3d at 375 (applying the *Neff* and *Gant* rationale to negligent entrustment and negligent retention, but declining to apply the *Neff* and *Gant* rationale to counts relating to training, qualifications, and supervision—instead holding that they are controlled by federal regulations and preempt Illinois law).

⁹³ See, e.g., *Vancura v. Katris*, 238 Ill.2d 352 (Ill. 2010).

⁹⁴ *Id.* at 375.

⁹⁵ *Id.*

analyzed and applied under direct negligence liability.⁹⁶

Cases like *Neff* and *Gant* must be tempered somewhat from a broader reading than may have been intended. *Neff* and *Gant* effectively hold you cannot assert duplicative theories of imputed negligence in order to establish *respondeat superior* liability. If the defendant-employer has admitted agency – and thereby *respondeat superior* liability – plaintiff cannot be allowed to assert additional imputed liability theories, as it would confuse the jury and risk double recovery on the same injury. But, neither *Neff* nor *Gant* decide the issue of direct liability. In fact, in an analogous application, the Illinois Supreme Court was careful to recognize neither *Neff* nor *Gant* would apply to situations where “willful and wanton entrustment” was implicated because the analysis necessarily differs from that of negligent entrustment.⁹⁷ In the “willful and wanton entrustment” scenario, the court recognized defendant-employer’s level of culpability was no longer equal to that of the tortfeasor-agent, and thus the defendant-employer could be found liable for willful and wanton misconduct in addition to the tortfeasor-agents negligence.⁹⁸

Claims like negligent supervision or training, when couched in terms of the defendant-employer being directly negli-

gent itself regardless of its employee’s own negligence, survive independently of *respondeat superior* liability. For example, in *Reynolds v. Jimmy John’s Enterprises, LLC*,⁹⁹ plaintiff settled his negligence claims against the employee in a settlement agreement and yet was allowed to continue litigating direct liability of negligent supervision and training against the employer.

2. Missouri

With regard to whether other theories of imputed liability can be asserted when the employer has already admitted *respondeat superior* liability, *McHaffie v. Bunch*,¹⁰⁰ is the seminal case in Missouri. The Court in *McHaffie* followed the majority view which is “once an employer has admitted *respondeat superior* liability for a driver’s negligence, it is improper to allow a plaintiff to proceed against the employer on any other theory of imputed liability.”¹⁰¹ Subsequent courts have interpreted the rule in *McHaffie* to mean upon the employer admitting *respondeat superior* liability, it is error to permit a “separate assessment of fault” or “to submit evidence” on other theories of imputed liability.¹⁰² However, the *McHaffie* court also noted there are three exceptions to its general rule. An employer “may be held liable on a theory of negligence that does not derive from and is not dependent on the negligence of an ... employee..., an

⁹⁶ See, e.g., *Vancura*, 238 Ill.2d at 375, 381; *Doe v. Brouillette*, 389 Ill.App.3d 595, 605-606 (Ill. App. Ct. 2009) (recognizing that the torts of negligent hiring and negligent supervision do not require the wrongful acts of the employee).

⁹⁷ See *Lockett v. Bi-State Transit Authority*, 445 N.E.2d 310, 314 (Ill. 1983).

⁹⁸ *Id.*

⁹⁹ 370 Ill.Dec. 628, 636-637 (Ill. App. Ct. 2013).

¹⁰⁰ 891 S.W.2d 822 (Mo.1995) (*en banc*).

¹⁰¹ *Id.* at 826.

¹⁰² *Sargent v. Justin Time Transportation, L.L.C.*, 2009 WL 4559222 *1 (E.D.Mo. Nov. 3, 2009).

employer...may be liable for punitive damages which would not be assessed against the employee..., and in a contribution action between an employer and employee, the relative fault of those two parties may be relevant."¹⁰³

The first exception allows for an employer to be held liable on a theory of negligence independent from the negligence of the employee. *McHaffie* stated *respondeat superior*, negligent entrustment and hiring are all theories of an employer's liability dependent upon the employee's conduct.¹⁰⁴ Although there has been other holdings to the contrary,¹⁰⁵ a more recent federal court opinion also held *respondeat superior*, negligent supervision and training, negligent hiring and retaining, and negligent entrustment are all dependent theories of liability.¹⁰⁶ Therefore, the additional theories of imputed liability would not be permitted under the first exception. The applicability of the second exception would be dependent upon the plaintiff successfully asserting punitive damages against the employer. The third exception would be dependent upon whether a contribution action arose between the employer and employee.

C. Borrowed Servant Liability

In *Caballero v. Stafford*, plaintiff Raul Caballero ("Caballero") appealed from the trial court's judgment granting summary judgment in favor of defendant New

Prime, Inc. ("New Prime") in his suit arising from a tractor-trailer accident in which Caballero was injured.¹⁰⁷ The accident involved a tractor, leased by Caballero to New Prime, and a trailer, owned by New Prime.¹⁰⁸ At the time of the accident, Caballero was in the sleeper of the tractor which was being operated by Leland Stafford ("Stafford").¹⁰⁹ Caballero alleged the tractor-trailer unit driven by Stafford left the roadway and overturned on its side while Caballero was a passenger in the sleeping berth.¹¹⁰ Caballero's complaint sought relief from New Prime under the doctrine of *respondeat superior* based upon the alleged negligence of Stafford in his operation of the tractor-trailer, and for its alleged negligent hiring and retaining of Stafford.¹¹¹ New Prime filed a motion to dismiss asserting it was not vicariously liable for the alleged negligence of Stafford because Stafford was under the control of Caballero and was, therefore, his borrowed servant.¹¹² The trial court granted New Prime's summary judgment motion and entered judgment for New Prime finding Stafford was Caballero's borrowed servant.¹¹³ Caballero appealed and the Court of Appeals reversed and remanded the trial court's decision.¹¹⁴

Before the accident Caballero and New Prime entered into a written Independent Contractor Operating Agreement

¹⁰³ *Id.*

¹⁰⁴ *McHaffie*, 891 S.W.2d at 825.

¹⁰⁵ See *Miller v. Crete Carrier Corp.*, 2003 WL 25694930 *3 (E.D.Mo. 2003).

¹⁰⁶ *Rebstock v. Evans Production Engineering Co., Inc.*, 2009 WL 3401262 *14 (E.D.Mo. Dec. 3, 2009).

¹⁰⁷ 202 S.W.3d 683, 685 (Mo. Ct. App. 2006).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 686.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 683.

¹¹⁴ *Id.*

("ICOA") and a written Personnel Service Agreement ("PSA").¹¹⁵ Pursuant to the ICOA, the parties established an independent-contractor relationship whereby Caballero would lease a freightliner tractor to New Prime in order to haul freight for New Prime's customers.¹¹⁶ Caballero could operate the freightliner himself, employ his own drivers, or lease drivers from New Prime pursuant to the terms of the PSA.¹¹⁷ Stafford was a driver leased by New Prime to Caballero.¹¹⁸ The pertinent terms and provisions of the ICOA provided New Prime shall have exclusive possession, control, and use of the freightliner and complete responsibility for the operation of the freightliner, the intent of the ICOA was to establish an independent contractor relationship, Caballero agreed to make the freightliner available to New Prime with qualified and New Prime certified drivers to pick up loads and transport them to destinations designed by various shippers, Caballero shall drive the freightliner himself, employ drivers, or lease drivers, and Caballero shall provide and maintain auto liability insurance for the protection of the public.¹¹⁹ Additionally, the pertinent terms and provisions of the PSA provided New Prime shall, upon the request of Caballero, lease drivers to Caballero who are employees of New Prime to operate motor vehicles transporting freight which are owned or leased by Caballero, drivers shall at all times be deemed to be and shall be employed by New Prime only, all drivers shall be duly

licensed and legally qualified under all state and federal regulations to drive the freightliner in interstate or intrastate commerce, New Prime shall have the sole authority to hire and fire the drivers, New Prime shall be solely responsible for the payment of the driver's wages and shall bear the responsibility of making all deductions from such wages as are required by law, and forwarding such deductions and reports of the same to the proper state and federal authority, and Caballero shall require the drivers to keep and maintain proper daily logs, daily vehicle inspections, on-the-road inspections by law enforcement officers, trip reports and all other records and data necessary to comply with all applicable regulations of the U.S. Department of Transportation ("DOT") and such other state and federal agencies having authority over the operation of Caballero's freightliner.¹²⁰

Caballero deposed two employees of New Prime: Darrell Hopkins ("Hopkins"), who was responsible for accounting and administrative functions; and Donald Lacy ("Lacy"), New Prime's director of safety.¹²¹ Hopkins provided the following information in his deposition testimony: (1) drivers such as Stafford were employed in order to further New Prime's business interests, and Stafford was employed by New Prime on the date of the alleged accident; (2) New Prime carried workers' compensation insurance for its employed drivers including Stafford; (3) at the time of the alleged accident, Stafford was operating the tractor-trailer unit under New Prime's DOT authority; (4) although

¹¹⁵ *Id.* at 686.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* 686.

¹²⁰ *Id.* at 687-88.

¹²¹ *Id.* at 688.

New Prime was reimbursed by Caballero for Stafford's driving services, New Prime signed Stafford's paychecks and was listed as Stafford's employer on his W-2 forms; (5) New Prime dispatched the freight hauled by Stafford, thus dictating when and where Stafford was to pick up, load, haul, and unload freight for New Prime or New Prime's customers; (6) Stafford could not haul freight for any other company while employed with New Prime; (7) any trailer pulled by Stafford was owned by New Prime; and (8) New Prime maintained the authority to suspend Stafford if it felt he was not driving safely.¹²²

In addition, Lacy provided the following information in his deposition testimony: (1) New Prime was responsible for all of the drivers operating under its DOT authority, and must ensure its drivers comply with the Federal Motor Carrier Safety Regulations; (2) if New Prime believed a driver was unsafe, it maintained the authority to disqualify him or her; (3) New Prime dispatched the loads being hauled by Stafford, and controlled when and where the load was to be picked up or delivered; (4) New Prime controlled the length of the haul and all other haul requirements; and (5) Stafford was required by New Prime to comply with its policies regarding the loading and unloading of freight.¹²³ Based on these facts, the Court of Appeals determined Stafford was not a borrowed servant of Caballero.¹²⁴

Similarly, in *Bruntjen v. Bethalto Pizza*, plaintiff was injured when a vehicle driven by Kenneth Lyerla ("Lyerla") crossed the center line and hit a van in which plaintiff

was a passenger.¹²⁵ At the time of the collision, Lyerla was delivering a pizza for his employer Bethalto Pizza, LLC, doing business as Imo's Pizza ("Bethalto"), which was a franchisee of Imo's Franchising, Inc. ("Imo's").¹²⁶ Plaintiff brought an action against Lyerla, Bethalto, and Imo's alleging Lyerla was an employee of Bethalto and Imo's was the franchising corporation establishing policies and procedures for all Imo's franchisees including Bethalto.¹²⁷ The complaint included a count alleging vicarious liability against Imo's as well as a count alleging direct negligence against Imo's.¹²⁸ At the trial court level, Imo's contested it owed a duty to plaintiff and filed a motion to dismiss, motion for summary judgment, and motion for a directed verdict, all of which were denied, and the trial court entered judgment for plaintiff.¹²⁹ Imo's appealed contending plaintiff failed to prove Imo's was liable for the actions of Bethalto and Bethalto's driver Lyerla under a theory of *respondeat superior* because the evidence did not support the jury's findings a principal-agent relationship existed between Imo's and Bethalto.¹³⁰ Specifically, Imo's maintained the franchising agreement between Imo's and Bethalto expressly stated Bethalto was an independent contractor and the evidence showed Bethalto retained total control over its day-to-day operations.¹³¹

¹²⁵ *Bruntjen v. Bethalto Pizza, LLC*, 18 N.E.3d 215, 224 (Ill. App. Ct. 2014).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 225.

¹³⁰ *Id.* at 239.

¹³¹ *Id.*

¹²² *Id.* at 689.

¹²³ *Id.* at 689.

¹²⁴ *Id.* at 683.

After review of record the Court of Appeals found the franchising agreement between Bethalto and Imo's, the confidential operating manual Imo's had all its franchisees follow, and the driver contract executed between the parties provided ample evidence Imo's had the right to control many aspects of Bethalto's daily operations.¹³² These documents allowed Imo's to control employment decisions, training, safety, daily maintenance, wage and hour requirements, record-keeping, supervision and discipline of employees, and hiring and firing, as well as the right to terminate the franchise relationship with Bethalto.¹³³ The agreement required the franchisee to operate the store and provide delivery services in accordance with the operational standards as may be established by the franchisor from time to time.¹³⁴ Furthermore, the agreement required Bethalto to conform with standards relating to signage, color scheme, appearance, hours of operation, cleanliness, sanitation, size of food item portions, menus, methods of preparation, employee uniforms, type of equipment, and décor as designated by Imo's.¹³⁵

In addition, there was evidence Imo's control extended specifically to the pizza delivery drivers.¹³⁶ Pizza delivery was required under the agreement.¹³⁷ Imo's prescribed the minimum delivery area and required Bethalto to name Imo's Franchising, Inc., as an additional insured on all general liability and non-owned auto

insurance policies.¹³⁸ Imo's required the stores to pay a fee equal to 4% of their sales and required Bethalto to adhere to guidelines in hiring, supervising, and terminating the drivers.¹³⁹ The manual included eight pages of detailed requirements entitled "Hiring and Supervising Drivers," and Imo's required drivers have a good driving record as established by a motor vehicle report.¹⁴⁰ Furthermore, Imo's required Bethalto calculate the hourly rate of drivers to ensure they received minimum wage and to make up the difference if they did not.¹⁴¹ Finally, under the agreement, Imo's reserved the right to terminate the franchise if Bethalto did not perform the mandatory obligations under the confidential operating manual.¹⁴²

In reviewing the rules of law and factors applicable to the case, the Court of Appeals found the evidence adduced at trial was sufficient to support the jury's finding on agency and affirmed the trial court's ruling.¹⁴³

I. Illinois law

An employee in the general employment of one employer may be loaned to another for the performance of special work and become the employee of the employer to whom he is loaned while performing the special service.¹⁴⁴ Whether such a transfer of employment occurs depends on whether

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 242.

¹⁴⁴ *A.J. Johnson Paving Co. v. Industrial Comm'n*, 82 Ill.2d 341, 346-347 (Ill. 1980).

¹³² *Id.* at 240.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.* at 241.

¹³⁶ *Id.*

¹³⁷ *Id.*

the borrowing employer has the right to control the employee with respect to the work performed.¹⁴⁵ In making this determination, various factors such as the manner of hiring, the mode of payment, the nature of the work, the manner of direction and supervision of the work, and the right to discharge are considered.¹⁴⁶ The dominant factor is the right to control the manner in which the work is to be done, and the most significant inquiry is the extent to which the first employer delegated or released to the second employer the right to control.¹⁴⁷ The fact an employee does not receive his wages from the borrowing employer will not defeat the finding of a loaned employee situation.¹⁴⁸ Nor will the fact the loaning employer receives some compensation or benefit from the borrowing employer necessarily defeat such a finding.¹⁴⁹ Although the existence of a loaned employee relationship is generally a question of fact, it may become a question of law where the undisputed facts are susceptible of but a single inference.¹⁵⁰

As previously stated, "under the doctrine of *respondeat superior*, an employer can be held vicariously liable for the tortious

acts of its employees, including negligent, willful, malicious, or even criminal acts of its employees when such acts are committed in the course of employment and in furtherance of the business of the employer."¹⁵¹ However, the doctrine also provides if an employee is a borrowed employee at the time of some alleged tortious conduct, the loaning employer is not liable for the conduct.¹⁵² In *Crespo v. Weber Stephen Products Co.*,¹⁵³ the court stated, "[t]he primary factor in determining a borrowed-employment relationship is the right to control the manner and direction of the subject employee's work."¹⁵⁴

2. Missouri law

Employers sometimes loan, borrow, or share workers with other employers.¹⁵⁵ If

¹⁵¹ *Alms v. Baum*, 343 Ill.App.3d 67, 71 (Ill. App. Ct. 2003).

¹⁵² *Kawaguchi v. Gainer*, 361 Ill.App.3d 229, 296 (Ill. App. Ct. 2005).

¹⁵³ 275 Ill.App.3d 638, 641 (Ill. App. Ct. 1995).

¹⁵⁴ See also *Gundich v. Emerson-Comstock Co.*, 21 Ill.2d 117, 123 (Ill. 1960) ("the criteria reiterated in the Illinois case law for the existence of a master-servant relationship is the right to control, which includes the power of discharge"); 17 ILL. L. & PRAC. EMPLOYMENT § 3, at 365 (2006) ("Whether a transfer of employment occurs depends on whether the alleged borrowing employer has the right to control the allegedly borrowed employee"); *Binz v. Brandt Construction Co.*, 301 F.3d 529, 533 (7th Cir. 2002) ("When determining whether the loaned-servant doctrine applies, Illinois law provides that several factors be considered; however, the dominant factor to be considered is who has the right to control the manner in which the work is being completed").

¹⁵⁵ *Shurvington v. Cavender Drywall*, 36 S.W.3d 432, 437 (Mo.App. 2001).

¹⁴⁵ *Id.* at 347.

¹⁴⁶ *Mosley v. Northwestern Steel & Wire Co.*, 76 Ill.App.3d 710, 719 (Ill. App. Ct. 1979).

¹⁴⁷ *Id.*

¹⁴⁸ *A.J. Johnson*, 82 Ill.2d at 349; *Bituminous Casualty Corp. v. Wilson*, 119 Ill.App.3d 454, 460 (Ill. App. Ct. 1983).

¹⁴⁹ See *American Stevedores Co. v. Industrial Comm'n*, 408 Ill. 449, 452 (Ill. 1951); see also *Highway Insurance Co. v. Sears, Roebuck & Co.*, 92 Ill.App.2d 214, 216 (Ill. App. Ct. 1968).

¹⁵⁰ *M & M Electric Co. v. Industrial Comm'n*, 57 Ill.2d 113, 117 (Ill. 1974); *American Stevedores*, 408 Ill. at 453.

the employers are sharing workers, they may be joint employers.¹⁵⁶ If they are joint employers, each is jointly and severally liable for workers' compensation benefits.¹⁵⁷ If they are not joint employers, the loaned employee is a borrowed servant of the special employer.¹⁵⁸ An employer is defined as "... [e]very person ... using the service of another for pay."¹⁵⁹

The core of the borrowed servant defense is that the general employer has surrendered to the borrower all control over the employee, so the employee has become, with respect to the work for which he was loaned, exclusively the employee of the special employer or borrower.¹⁶⁰ The essential elements necessary to establish a "borrowed servant" relationship in Missouri are as follows: (a) consent on the part of the employee to work for the special employer; (b) actual entry by the employee upon the work of and for the special master pursuant to an express or implied contract so to do; and (c) power of the special employer to control the details of the work to be performed and to determine how the work shall be done and whether it shall stop or continue.¹⁶¹

Control, or lack of control, of the employee, while of greatest significance,

is not conclusive.¹⁶² In any event the 'control' must be authoritative direction and control, not mere suggestions as to details or necessary co-operation.¹⁶³ The mere fact the general employer permits some division of control does not give rise to the inference he has surrendered control.¹⁶⁴ Surrender of partial control in a third person does not relieve the general employer.¹⁶⁵ An employee is not "lifted out of his general employment and set down in the service of another by the mere fact such other is authorized by the general master to indicate the work to be done or to furnish information or give signals calling the servant into activity."¹⁶⁶ The general employer must release full and complete control.¹⁶⁷ The fact directions are given the driver as to when and where to go, what shall be carried, he was told to hurry or take his time, or he also assisted in the work the hirer was doing for which the unit was used, does not relieve the general employer.¹⁶⁸

D. Independent Contractor

I. Illinois

Under Illinois law, a defendant who employs an independent contractor to do work generally is not liable for the independent contractor's acts or omis-

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* Citing Section 287.030.1(1) R.S. Mo. 1998.

¹⁶⁰ *Huff v. Belford Trucking Co.*, 809 S.W.2d 71, 73 (Mo. App. 1991).

¹⁶¹ *Ballard v. Leonard Bros. Transport Co., Inc.*, 506 S.W.2d 346, 350 (Mo. 1974).

¹⁶² *Schepp v. Mid City Trucking Co.*, 291 S.W.2d 633, 640 (Mo. App. 1956).

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 640.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

sions.¹⁶⁹ This is because the defendant generally does not supervise the details of the independent contractor's work and is not in a good position to prevent negligence, while the independent contractor's employees have submitted to the independent contractor's right to monitor and direct such details as their employer.¹⁷⁰ However, there is an exception to the general rule when an owner retains control over the independent contractor.¹⁷¹ As stated in the Restatement (Second) of Torts:

In order for the rule to apply, the employer must have retained at least some degree of control over the manner in which the work is done. It is not enough that he has merely a general right to order the work stopped or resumed, to inspect its progress or to receive reports, to make suggestions or recommendations which need not necessarily be followed, or to prescribe alterations and deviations. Such a general right is usually reserved to employers, but it does not mean that the contractor is controlled as to his methods of work, or as to operative detail. There must be such retention of

a right of supervision that the contractor is not entirely free to do the work in his own way.¹⁷²

Illinois adopts the Restatement (Second) of Torts to determine whether a worker is an employee or an independent contractor.¹⁷³ The Restatement lists the following factors: (1) the right to control the manner in which the work is performed; (2) the right to discharge; (3) the method of payment; (4) whether taxes are deducted from the payment; (5) the level of skill required to do the work; (6) the furnishing of necessary tools, materials and equipment; and (7) whether the worker's occupation is related to that of the employer. The more involvement the employer has with any of these factors, the more likely the worker will be considered an employee of the employer rather than an independent contractor.¹⁷⁴

Illinois has also adopted the Restatement of Agency to determine whether a worker is an employee.¹⁷⁵ The factors according the Restatement of Agency are: (1) the extent of control which, by agreement, the master may exercise over details of work; (2) whether or not one employed is engaged in distinct occupation or business; (3) the kind of occupation, with reference to whether, in locality, work is usually done under employer's direction or by specialist without supervision; (4) the skill required in particular occupation; (5) whether employer or

¹⁶⁹ See *Calderon v. Residential Homes of America, Inc.*, 381 Ill.App.3d 333, 340 (Ill. App. Ct. 2008); *Pestka v. Town of Fort Sheridan Co.*, 371 Ill.App.3d 286, 300 (Ill. App. Ct. 2007); *Martens v. MCL Construction Corp.*, 347 Ill.App.3d 303, 313 (Ill. App. Ct. 2004).

¹⁷⁰ See *Calderon*, 381 Ill.App.3d at 340; *Martens*, 347 Ill.App.3d at 313-314.

¹⁷¹ See, e.g., *Martens*, 347 Ill.App.3d at 315 (whether a duty exists under Restatement (Second) of Torts Section 414 "turns on whether the defendant controls the work in such a manner that he should be held liable").

¹⁷² RESTATEMENT (SECOND) OF TORTS § 414, Comment c, at 388 (1965).

¹⁷³ See *Calderon*, 381 Ill.App.3d 333, 340-341.

¹⁷⁴ See Restatement 2d Torts § 414.

¹⁷⁵ See *Horwitz v. Holabird & Root*, 212 Ill.2d 1, 9 (Ill. 2004).

workman supplies instrumentalities, tools, and place of work for person doing work; (6) length of time for which person is employed; (7) method of payment, whether by time or by job; (8) whether or not work is part of employer's regular business; (9) whether or not parties believe they are creating relation of master and servant; and (10) whether principal is or is not in business.

2. Missouri law

Courts have listed numerous factors a fact-finder should use in distinguishing employees from independent contractors and other workers.¹⁷⁶ These factors include the following: (1) the amount of control that is exerted over the details of an individual's work (the more control, the more likely the individual's status is employee); (2) whether or not the worker is engaged in a distinct occupation (typically an indicator of an employee) or a business (typically an indicator of an independent contractor); (3) the amount of skill required for performing a particular occupation (the more skill required, the more likely the individual is an independent contractor); (4) whether or not the worker supplies the instrumentalities, tools, and the place for doing the work (independent contractors typically supply their own instrumentalities, tools, and place for doing their work); (5) the length of time for which the worker is engaged to do the job (an indefinite period typically indicates an employee and a set, definite period indicates an independent contractor); (6) the method of payment, whether according to time or by the job (payment

according to time typically indicates an employee); (7) whether or not the worker routinely performs his or her duties as part of the paying parties' regular business (indicating an employee); and (8) whether or not the parties believe that they are creating a master-servant relationship.¹⁷⁷ No one of these factors is determinative.¹⁷⁸ A fact-finder must consider them collectively.¹⁷⁹

Missouri Revised Statutes Section 288.034.5 begins the analysis distinguishing an employee from an independent contractor; it states:

Service performed by an individual for remuneration shall be deemed to be employment subject to this law unless it is shown to the satisfaction of the division that such services were performed by an independent contractor. In determining the existence of the independent contractor relationship, the common law of agency right to control shall be applied. The common law of agency right to control test shall include but not be limited to: if the alleged employer retains the right to control the manner and means by which the results are to be accomplished, the individual who performs the service is an employee. If only the results are controlled, the individual performing the service is an independent contractor.¹⁸⁰

There is a presumption services performed by an individual for remuneration

¹⁷⁶ *Ascoli v. Hinck*, 256 S.W.3d 592, 594-595 (Mo. App. 2008).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 595.

¹⁷⁹ *Id.*

¹⁸⁰ MO. REV. STAT. § 288.034.5.

is "employment" subject to Missouri's Employment Security Law. This presumption is overcome by satisfying the Division of Employment Security ("Division") that "such services were performed by an independent contractor."¹⁸¹ To aid in this determination, the courts favor the use of applying common law rules and utilizing the Internal Revenue Service's "twenty common law factors" test identified in IRS Revenue Ruling 87-41.¹⁸² The twenty IRS factors, stated succinctly, include: (1) Instructions, (2) Training, (3) Integration, (4) Services rendered personally, (5) Hiring, supervising and paying assistants, (6) Continuing relationship, (7) Set hours of work, (8) Full-time required, (9) Work on employer's premises, (10) Order or sequence of set work, (11) Oral or written reports, (12) Payment by hour, week, or month, (13) Reimbursement of expenses or travel, (14) Furnishing tools and materials, (15) Significant investment, (16) Realization of profit or loss, (17) Works for more than one person or firm, (18) Offers services to the general public, (19) Right to fire, and (20) Right to quit.¹⁸³ However, Missouri courts are careful to point out these factors are intended as guidelines only, and a tabulation of the factors cannot result in an outcome by themselves; rather, each case is decided on the basis of its own facts.¹⁸⁴

A thorough review of Missouri case law reveals concrete trends of judicial thinking that should be carefully consid-

ered. First, in the context of transportation services such as trucking or taxi fare, Missouri courts have indicated a heavy preference for finding a driver to be an employee when he or she leases a vehicle from a company and said company's primary means of revenue is the services of those drivers – this situation describes Factor #3 of the IRS Test.¹⁸⁵ Second, Missouri courts heavily emphasize the "right to fire" and "right to quit" by routinely holding a person to be an employee when the working relationship between the parties can be terminated at any time without consequence – regardless of whether notice itself is required.¹⁸⁶ Cases like *Stover v. Delivery Systems* and *Merick Trucking, Inc. v. Missouri Division of Employment Security, Labor and Industrial Relations Commission of Missouri* attempt to delineate between an at-will employment situation and an employment relationship created by contract, whereby the party refusing to continue performance would be found in material breach of the parties' agreement.

¹⁸⁵ See *Stover v. Delivery Sys., Inc., v. Missouri Div. of Employment Sec.*, 11 S.W.3d 685, 692 (Mo. App. 1999); see also *State ex rel. Sir v. Gateway Taxi Management Co.*, 400 S.W.3d 478, 487 (Mo. App. 2013) (avoiding a full-blown analysis of the twenty factors in favor of finding that Missouri case law heavily favors the fact that the putative employer who owns the vehicle derives almost all of its business from drivers it "contracts" with).

¹⁸⁶ See, e.g., *Stover*, 11 S.W.3d at 695; *Merick Trucking, Inc. v. Missouri Div. of Employment Sec., Labor and Indus. Relations Com'n of Missouri*, 902 S.W.2d 871, 875 (Mo. App. 1995) (finding that employer's right to discharge gives it control over the employee through the threat of dismissal).

¹⁸¹ *Id.*

¹⁸² See *Higgins v. Missouri Div. of Employment Sec.*, 167 S.W.3d 275, 283 (Mo. App. 2005).

¹⁸³ IRS Rev. Rul. 87-41.

¹⁸⁴ *Higgins*, 167 S.W.3d at 283.

D. Negligent Hiring

In *Hayward v. C.H. Robinson*, decedent died from severe injuries she sustained when her vehicle collided with a tractor-trailer driven by an employee of Pella Carrier Services, Inc. ("Pella").¹⁸⁷ At the time of the collision, Pella was transporting the contents of a tractor-trailer as an independent contractor for C.H. Robinson Worldwide, Inc. ("Robinson").¹⁸⁸ Specifically, defendant Vlado Petrovski ("Petrovski"), while employed by Pella, attempted to make an illegal U-turn with his tractor-trailer when a vehicle driven by decedent struck the side of the tractor-trailer ultimately resulting in the death of decedent.¹⁸⁹ Plaintiff Richard Hayward ("Plaintiff"), acting in his capacity as special administrator of decedent's estate, brought an action under different legal theories of liability for negligence including negligent hiring, retention, and supervision naming Petrovski, Pella, and Robinson as defendants.¹⁹⁰ The trial court found Pella was operating as an independent contractor and not as an agent of Robinson, and Robinson had no control over Pella's operation.¹⁹¹ The court also found Robinson did not negligently hire or supervise Pella or Petrovski.¹⁹² On that basis, the trial court granted summary judgment in favor of Robinson.¹⁹³ On appeal, Plaintiff submitted a question of

material fact existed regarding whether Robinson negligently hired or supervised Pella.¹⁹⁴

In relying on the summary judgment pleadings, the Court of Appeals affirmed the trial court's ruling.¹⁹⁵ The summary judgment pleadings established the following uncontested facts. Petrovski had a valid commercial driver's license ("CDL") for seven years preceding the date of the collision and Petrovski's driving record did not include any traffic or moving violations.¹⁹⁶ Additionally, Petrovski's tractor-trailer was in good condition with no safety violations when the accident occurred.¹⁹⁷ Furthermore, during the seven years when Petrovski established a safe driving record, he was employed by Pella as a driver of tractor-trailers hauling freight and was an employee of Pella at the time of the collision.¹⁹⁸

As for the relationship between Robinson and Pella, Robinson entered into an Agreement for Motor Contract Carrier Services (the "contract") with Pella and the contract remained in effect at the time of the collision.¹⁹⁹ The contract between Pella and Robinson detailed Robinson's role as a transportation broker was to arrange for the transportation of freight cargo belonging to Robinson's customers from one location to another, and Pella's role was to provide contract carriage, as an independent contractor, and transport the freight cargo from point A to point B as

¹⁸⁷ *Hayward v. C.H. Robinson Co.*, 24 N.E.3d 48, 50 (Ill. App. Ct. 2014).

¹⁸⁸ *Id.*

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 54.

¹⁹⁵ *Id.* at 58.

¹⁹⁶ *Id.* at 51.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

brokered by Robinson.²⁰⁰ At the time of the collision, Pella was transporting freight cargo for Robinson under the terms of the contract.²⁰¹ Pella received compensation directly from Robinson for transporting freight cargo.²⁰² The contract required Pella, at its own cost, to produce and maintain all required licenses, fees, taxes, fuel tax payments, road tax, equipment use fees or taxes, equipment license fees, driver's license fees, tolls and any other fees and fines assessed on its equipment or operations.²⁰³ Robinson did not own, operate, or lease any of its own vehicles or equipment or hire any of the operators of the tractor-trailers.²⁰⁴ The contract further required Pella to provide and maintain all vehicles used to transport the freight cargo and to comply with all applicable motor vehicle safety regulations.²⁰⁵ Under the contract, Pella had to maintain a U.S. DOT safety rating that was satisfactory, conditional, or unrated. Pella also had to ensure its drivers were properly trained and licensed, and were competent and capable of safely handling and transporting Robinson's shipments.²⁰⁶

In addition, Clause 11 of the contract specifically provided,

Pella is an independent contractor and shall exercise exclusive control, supervision, and direction over (i) the manner in which transportation serv-

es are provided; (ii) the persons engaged in providing transportation services; and (iii) the equipment selected and used to provide transportation services. Pella shall have full responsibility for the payment of local, state, and federal payroll taxes, workers compensation and other social security and related payment requirements with respect to all persons engaged in the performance of transportation services. This contract does not create, nor shall it be deemed to create a partnership, joint venture, or agency relationship between Robinson and Pella.²⁰⁷

Furthermore, the contract required Pella to maintain the minimum amounts of insurance for any liabilities resulting from Pella hauling loads for Robinson.²⁰⁸ The contract included an indemnification clause providing Pella shall indemnify, defend, and hold Robinson, its customers, consignors, and cosignees harmless from and against any and all losses, harm, injuries, damages, claims, costs, expenses, and liabilities arising from, or in connection with services provided by Pella, its employees, agents, and contractors, unless resulting directly from the negligence or willful act or omission of Robinson or its customers and their consignors and cosignees.²⁰⁹

Finally, Robinson attached to its summary judgment motion an affidavit and deposition transcript of Bruce Johnson ("Johnson"), Robinson's manager for carrier services.²¹⁰ Johnson explained Rob-

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.* at 51-52.

²⁰⁴ *Id.* at 52.

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

inson obtained proof of Pella's federal operating authority and liability insurance prior to contracting with Pella and, before signing the contract, Robinson also checked Pella's safety record using the U.S. DOT website and confirmed Pella had an acceptable safety rating.²¹¹ In addition, Robinson annually rechecked the safety rating of all its independent contractors and determined Pella continued to have satisfactory safety ratings.²¹²

Based on these facts, the Court of Appeals held Petrovski was an employee of Pella and Pella an independent contractor of Robinson.²¹³ Therefore, Robinson could not be held liable for the negligence of Petrovski or Pella, and the trial court's granting of Robinson's motion for summary judgment was affirmed.²¹⁴

1. Illinois law

Hayward reinforces that a business which employs an independent contractor will not be liable for the latter's acts or omissions. The most common exceptions to this general standard occur where the principal orders or directs the acts causing the harm, retains control over the operative details of the contractor's work, or—as is most commonly pleaded—negligently selects an incompetent contractor.²¹⁵ To succeed in a cause of action regarding the negligent hiring of an independent contractor, a plaintiff must show defendant negligently hired a third-party, designated

by the contract to be an independent contractor, when defendant knew or should have known the hired third-party was unfit for the required contracted job so as to create a danger of harm to other third parties.²¹⁶ One must examine the pleadings and their attached documentation to determine whether the undisputed facts demonstrate defendant knew or should have known the third-party had a “particular unfitness” that created a danger of harm to third persons prior to the date of the incident in question, while the third-party was performing work as an independent contractor for defendant.²¹⁷ If so, one must also assess whether there was a connection between that particular unfitness and the negligent act of the independent contractor.²¹⁸

2. Missouri law

Like Illinois, in Missouri an employer is liable for the negligent action(s) of an independent contractor when the employer did not exercise reasonable care in hiring a competent independent contractor.²¹⁹ The employer's duty is to hire a skilled and competent contractor.²²⁰ So if the independent contractor hired is competent, the employer is not liable for negligence despite any lack of care used in the selection.²²¹ An essential element of a negligent hiring claim, in the

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* at 53.

²¹⁴ *Id.* at 58.

²¹⁵ *DiMaggio v. Crossings Homeowners Ass'n*, 219 Ill.App.3d 1084, 1089 (Ill. App. Ct. 1991).

²¹⁶ *Id.* at 1090; *Huber v. Seaton*, 186 Ill.App.3d 503, 508 (Ill. App. Ct. 1989).

²¹⁷ *Huber*, 186 Ill.App.3d at 508.

²¹⁸ *Id.*

²¹⁹ *Lonero v. Dillick*, 208 S.W.3d 323, 330 (Mo. App. 2006).

²²⁰ *Id.*

²²¹ *Id.*

context of an independent contractor, is the failure by the employer to hire a skilled and competent independent contractor.²²² The independent contractor analysis discussed in above should also be considered.

II. Conclusion

The classification of a worker as an employee, independent contractor, or borrowed servant can have a significant impact on an employer's liability for those

tortious acts committed by the worker. It is critically important for any employer to take under consideration all the circumstances surrounding the worker's employment in order to be certain of the classification in which the worker will fall. By outlining various factors courts look to when making classification decisions, employers can now be advised on how to structure their employment contracts to conform to the type of liability exposure they wish to avoid.

²²² *Id.*

