

# *Transportation Law Overview*

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## **Elements of Proof for the Derivative Negligence Claims of Negligent Entrustment, Hiring/Retention and Supervision**

Alaska recognizes separate causes of action based on respondeat superior, negligent entrustment, negligent hiring and negligent supervision.

### **1. Respondeat Superior.**

- a. What are the elements necessary to establish liability under a theory of Respondeat Superior?

Respondeat superior imposes vicarious liability for the employee's negligent and intentional torts if they were committed within the scope of employment.<sup>1</sup> Alaska follows the factors set out in the Restatement (Second) of Agency, Sections 228 and 229, as relevant considerations in the fact-specific inquiry of determining whether an employee acts within the scope and course of his employment. *Id.* at pp. 358, 359.

### **2. Negligent Entrustment**

- a. What are the elements necessary to establish liability under a theory of negligent entrustment?

Alaska recognizes the common law tort of negligent entrustment and follows the definition in the Restatement (Second) of Torts § 390 (1965), which states: “One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know, to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm

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<sup>1</sup> See, e.g., Taranto v. North Slope Borough, 909 P.2d 354, 358 (Alaska 1996).

resulting to them.”<sup>2</sup> Negligent entrustment is an independent cause of action against the vehicle owner and is not dependent on theories of agency, joint venture, or other forms of vicarious liability.<sup>3</sup> The entrustee’s negligent act is a necessary element of any negligent entrustment claim against the entrustor.<sup>4</sup>

However, AS 09.17.080 requires that the fault of all the parties be apportioned. Based on AS 09.17.080, the jury would be instructed to apportion the separate fault and relative financial responsibility of both the entrustor and entrustee; and the employer and employee.<sup>5</sup> As a result of the apportionment of separate fault to each defendant, the doctrine of respondeat superior is usually asserted independently to make employers vicariously liable for their employee’s acts

### 3. Negligent Hiring

- a. What are the elements necessary to establish liability under a theory of negligent hiring?

Alaska recognizes negligent hiring, supervision and retention as independent bases for negligence liability. The three theories entail an employer’s direct liability for the failure to exercise reasonable care in hiring, supervising, or retaining an employee.<sup>6</sup> An employer also has a duty to others to act reasonably in hiring a competent independent contractor.<sup>7</sup> Plaintiff must show that the defendant employer failed to exercise reasonable care in hiring, and/or retaining or supervising the employee and that the failure to do so was a substantial factor in causing harm to the plaintiff.<sup>8</sup> For actions arising after 1997, Kodiak Island recognized that fault for negligent hiring could be apportioned between the employer and employee to reduce the employer’s share of the fault. Id. at 1012-1015. While our supreme court has not directly addressed whether AS 09.17.080’s apportionment scheme supersedes the common law doctrine of respondeat superior, the court has assumed *in dicta* that respondeat superior continues to apply even where both the employer and employee are named parties and have their fault apportioned.<sup>9</sup>

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<sup>2</sup> Nelson v. Progressive Cas. Ins. Co., 162 P.3d 1228, 1232 (Alaska 2007); Kalenka v. Infinity Insurance Companies, 262 P.3d 602, 610 (Alaska 2011).

<sup>3</sup> Ardinger v. Hummel, 982 P.2d 727, 733 (Alaska 1999).

<sup>4</sup> Nelson v. Progressive Cas. Ins. Co., 162 P.3d 1228, 1234 (Alaska 2007). See also, Neary v. McDonald, 956 P.2d 1205, 1208 (Alaska 1998) with regard to the entrustment of a vehicle, “negligent entrustment liability cannot be established unless the defendant had sufficient control of the vehicle, and negligently supplied it to an incompetent third party.”

<sup>5</sup> See e.g. Nelson at 1233. “[t]he nature and extent of negligence of the entrustor and entrustee are separate and distinct. The percentages of fault may be different in amount and should be determined separately.” Pederson v. Barnes, 139 P.3d 552 (Alaska 2006) ( allocation with fault applies as between principal and agent).

<sup>6</sup> Powell v. Tanner, 59 P.3d 246, 252 (Alaska 2002).

<sup>7</sup> Sievers v. McClure, 746 P.2d 885, 991 (Alaska 1987).

<sup>8</sup> Kodiak Island Borough v. Roe, 63 P.3d 1009, 1011 (Alaska 2003)(negligent hire of counselor with sexual abuse history who sexually abused developmentally disabled resident of Borough facility.)

<sup>9</sup> See Pagenkopf v. Chatham Elec., Inc., 165 P.3d 634 (Alaska 2007).

#### 4. Negligent Supervision

- a. What are the elements necessary to establish liability under a theory of negligent supervision?

Alaska recognizes the actionable failure to exercise due care in supervising persons under the employer's direction and control.<sup>10</sup> As noted above, under AS 09.17.080, an employer will only be liable for its own percentage of fault based on negligent hire, entrustment, or supervision.<sup>11</sup> However, respondeat superior would offer a separate basis for liability against the employer.

#### A. Defenses

1. Admission of Agency

Our court allows a plaintiff to assert both direct negligence and vicarious liability theories even if the employer were to admit vicarious liability based on respondeat superior.<sup>12</sup>

2. Traditional Tort Defenses

Alaska is a pure comparative fault state and allows the apportionment of fault to all parties under AS 09.17.080 to reduce a defendant's share of the fault for direct negligence. Alaska recognizes other traditional tort defenses such as the failure to mitigate damages, and superseding and intervening cause.<sup>13</sup>

#### B. Punitive Damages

1. Is evidence supporting a derivative negligence claim permissible to prove an assertion of punitive damages?

Yes. However, Alaska imposes significant restrictions on the availability of punitive damages. Generally speaking, punitive damages may only be awarded upon a finding, by clear and convincing evidence, of outrageous acts done with malice, or reckless indifference to the interest of another person. AS 09.17.020(b)(2). Further, 50% of any punitive damages recovery goes to the State. AS 09.17.020(j).

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<sup>10</sup> Powell, at 252.

<sup>11</sup> Kodiak Island Borough v. Roe, 63 P.3d 1009 (Alaska 2003) (dicta).

<sup>12</sup> See, e.g., Pagenkopf v. Chatham Elec., Inc., 165 P.3d 634 (Alaska 2007).

<sup>13</sup> Sharp v. Fairbanks Northstar Borough, 569 P.2d 178 (Alaska 1977) (Parental supervision of students was supervening cause of plaintiff's injuries, precluding liability of school district.)

However, with regard to claims for punitive damages based on vicarious liability for an employee's misconduct, Alaska law is even more protective of the employer. AS 09.17.020(k) restricts an employer's vicarious liability for punitive damages (1) to wrongful acts committed by a manager; (2) to wrongful acts of an employee which are authorized or ratified by the manager; or (3) to instances where the employee was unfit to perform the job requested by the employer.

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