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Respondent Superior as an Affirmative Defense: How Employers Immunize Themselves from Direct Negligence Claims

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NOTE

RESPONDEAT SUPERIOR AS AN AFFIRMATIVE DEFENSE: HOW EMPLOYERS IMMUNIZE THEMSELVES FROM DIRECT NEGLIGENCE CLAIMS

J.J. Burns*

Most courts hold that where a defendant employer admits that it is vicariously liable for its employee's negligence, a plaintiff's additional claims of negligent entrustment, hiring, retention, supervision, and training must be dismissed. Generally, courts apply this rule based on the logic that allowing a plaintiff's additional claims adds no potential liability beyond that which has already been admitted. Furthermore, since the additional claims merely allege a redundant theory of recovery once a respondeat superior admission has been made, the prejudicial evidence of an employee's prior bad acts which often accompanies direct negligence claims against employers can be excluded without adversely affecting the plaintiff.

This Note argues that while the majority rule makes sense within contributory negligence jurisdictions, its reasoning breaks down when it is applied in comparative negligence regimes. The rule fails to account for the fault a jury might apportion to an employer for its independent negligence in hiring, retaining, entrusting, supervising, or training. Additionally, the articulation is often imprecise, which results in misapplication. Finally, the rule is unnecessary: courts already have mechanisms with which they can deal with potentially prejudicial evidence without robbing plaintiffs of their valid causes of action.

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INTRODUCTION

Imagine that Paula Plaintiff is traveling down the interstate in her automobile. A tractor-trailer, driven by Ernie Employee, crashes into Paula and injures her. Paula sues both Ernie and his employer. She claims that Ernie was negligent in his operation of the tractor-trailer and that his employer is liable under the doctrine of respondeat superior.¹ She also claims that the company is independently negligent in its entrustment of the tractor-trailer to Ernie. In response, the company claims that Paula was negligent and caused the accident. If the company admits that Ernie is its employee and that Ernie was acting in furtherance of company business at the time of the accident, the court is likely to dismiss Paula's negligent entrustment claim.

The dismissal is based on a tort law rule ("the rule" or "the majority rule") that originated in the middle of the twentieth century: where a plaintiff claims both that an employer is liable for its agent's negligence under respondeat superior and that the employer is directly negligent under a theory of tortious entrustment,² if the defendant employer admits that it is liable for its agent's negligence, the additional negligence counts are disallowed.³ In contributory negligence jurisdictions,⁴ this is reasonable: Paula's entrustment claim adds nothing once Ernie's employer admits that it is liable for Ernie's negligence. If the jury finds that Ernie was negligent, Paula may collect all of her damages from Ernie's employer.⁵ If the jury finds that Paula was at all negligent, she recovers nothing.⁶

1. The common law principle of respondeat superior makes an employer strictly liable for torts committed by its employees in furtherance of the employer's business. *See, e.g.,* *Rosenthal & Co. v. Commodity Futures Trading Comm'n*, 802 F.2d 963, 966 (7th Cir. 1986) ("[I]n legalese, it 'imputes' the employee's negligence to his employer . . .").

2. The rule also might apply to torts such as negligent hiring, negligent supervision, negligent training, negligent retention, and other similar claims. For purposes of this Note, "negligent entrustment" will, for the most part, represent all of these theories.

3. *See, e.g.,* *Armenta v. Churchill*, 267 P.2d 303, 308-09 (Cal. 1954); *Willis v. Hill*, 159 S.E.2d 145, 157 (Ga. Ct. App. 1967) *rev'd on other grounds*, 161 S.E.2d 281 (Ga. 1968); *Houlihan v. McCall*, 78 A.2d 661, 664-65 (Md. 1951).

4. The doctrine of contributory negligence precludes recovery by one injured in an accident in an action based on another's negligence where there is any fault on the part of the injured person. *See, e.g.,* *Condon v. Epstein*, 168 N.Y.S.2d 189, 191 (City Ct. 1957).

5. *See, e.g.,* *Rosenthal*, 802 F.2d at 966.

6. *See, e.g.,* *Condon*, 168 N.Y.S.2d at 191.

This, however, is not the case within a comparative negligence setting.⁷ Paula's damages are the same regardless of the number of her claims or the evidence supporting any of them, but the apportionment of fault that takes place under any comparative negligence scheme will likely be affected by a claim that Ernie's employer was independently negligent. The reason is clear: "If we have comparative negligence, we must look at all of the proximate causes of the collision and its consequent injuries."⁸ If a reasonable jury finds that the company's negligence in entrusting the tractor-trailer to Ernie was a proximate cause of the accident, this likely will affect the jury's apportionment of fault, and therefore affect Paula's damages if she is found to be negligent at all.⁹ If Paula's entrustment claim is dismissed, the only negligence the jury is allowed to consider is that of the drivers in the collision.¹⁰ If, however, the entrustment claim is allowed to proceed, the jury is allowed to consider the negligence of both drivers, and the negligence of the employer.¹¹ In the situation where the jury considers only Paula's and Ernie's negligence, it might well determine that both were 50 percent negligent. In the situation where the jury considers the negligence of all proximate causes, they might find that each party was 33.3 percent at fault. Obviously, Paula's recovery can be dramatically affected when another tortfeasor is added to the mix.¹²

The proposition that Ernie's employer might be able to narrow its liability by admitting to respondeat superior liability¹³ is counterintuitive, but it is the reality in most of the jurisdictions that have decided the issue.¹⁴ Stated

7. In states that have adopted comparative negligence, the negligence of the injured party does not act as a complete bar to recovery. Instead, damages are apportioned according to the relative fault of the parties. *See, e.g.*, FLA. STAT. § 768.81 (2009).

8. *See Christiansen v. Silfies*, 667 A.2d 396, 399–401 (Pa. Super. Ct. 1995); *Amend v. Bell*, 570 P.2d 138, 142 (Wash. 1977).

9. *Lorio v. Cartwright*, 768 F. Supp. 658, 660–61 (N.D. Ill. 1991).

10. *Willis v. Hill*, 159 S.E.2d 145, 159–60 (Ga. Ct. App. 1967), *rev'd on other grounds*, 161 S.E.2d 281 (Ga. 1968).

11. *See, e.g., Lorio*, 768 F. Supp. at 660–61.

12. Absent any fault on the part of the plaintiff, the comparative fault issue is not implicated because, regardless of how the fault is apportioned, plaintiff's actual recovery is not affected. If, however, a plaintiff is even the slightest bit negligent, the rule is almost certain to have an effect on the plaintiff's recovery.

13. An admission of respondeat superior liability is not an admission of liability; rather, it is an admission by the employer that the tortfeasor was its employee and that the incident occurred during and in the course of the tortfeasor's employment. *Willis*, 159 S.E.2d at 157 ("By making the admission the employer says to the plaintiff, 'I stand or fall with my employee; I am liable for whatever damage he may have negligently inflicted.'").

14. Nineteen jurisdictions seem to have adopted the rule (though six of these are actually federal court decisions, which, while applying state law, are not binding on the states): California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Kentucky, Maryland, Mississippi, Missouri, New Jersey, New Mexico, New York, Tennessee, Texas, Washington, D.C., and Wyoming. For a good survey and breakdown of the caselaw on this issue (and advocacy for the majority rule), see 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, 235 & n.20 (2010). Not included in Mincer's survey are Indiana and New Jersey; for those opinions, see *Lee ex rel. Estate of*

simply, the majority rule is that 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.

The rationale for the rule is simple. Courts applying the rule argue that the additional theories of negligence impose no additional liability above and beyond the respondeat superior liability.¹⁵ Since the other theories impose no additional liability, but “merely allege a concurrent theory of recovery, the desirability of allowing these theories is outweighed by the prejudice to the defendants.”¹⁶ This prejudice is the evidence of prior bad acts that is often presented to the jury in cases where negligent entrustment is alleged and that would constitute inadmissible propensity evidence¹⁷ if not for the additional negligence claims.¹⁸ There is concern that many plaintiffs’ reason for pursuing the additional negligence claim is to put the potentially inflammatory evidence in front of the jury.¹⁹ As a result, most courts disallow a plaintiff’s additional negligence claims and force her to pursue only her respondeat superior claim.²⁰

The rationale for the rule is flawed, however. It is based upon principles of contributory negligence that do not apply in jurisdictions that have adopted some form of comparative fault. In addition to the rule’s faulty premise, the articulation of the rule is often unclear, which results in inconsistent application. For example, the rule regularly forces plaintiffs to pursue the case of the defendants’ choosing even in cases where there is no danger of prejudice.²¹ Alternatively, some states do not account for situations where a respondeat superior admission actually fails to establish employer liability for an employee’s injurious conduct.²² Finally, some states recognize an exception to the rule where the plaintiff alleges punitive damages.²³

This Note argues that the majority rule is a remnant of contributory negligence regimes and should be abandoned. What might have been the result

Lee v. J.B. Hunt Transportation, Inc., 308 F. Supp. 2d 310 (S.D.N.Y. 2004), interpreting New Jersey law, and *Tindall v. Enderle*, 320 N.E.2d 764 (Ind. Ct. App. 1974).

15. See, e.g., *Clooney v. Geeting*, 352 So. 2d 1216, 1220 (Fla. Dist. Ct. App. 1977).

16. *Id.*

17. Propensity evidence is evidence of prior acts offered to show action in conformity therewith. FED. R. EVID. 404(b). Such evidence is strongly disfavored and inadmissible in most circumstances. See *id.* But see, e.g., FED. R. EVID. 413 (allowing propensity evidence in sexual assault cases). Therefore, Ernie Employee’s driving record is inadmissible if Paula Plaintiff is offering it to suggest that Ernie’s record of reckless driving makes it more likely that he drove recklessly on the occasion in question. Even if the evidence is used for legitimate purposes—for example, to show that Ernie’s employer knew about his reckless behavior and still continued to employ him—the worry is that such evidence could be misunderstood by the jury as propensity evidence. See Stephen M. Blitz, *Conduct Evidencing Negligent Entrustment Is Provable Despite Admission of Vicarious Liability*, 17 STAN. L. REV. 539, 542 (1965).

18. Blitz, *supra* note 17, at 541.

19. *Id.* at 542.

20. Mincer, *supra* note 14, at 235–36.

21. See *infra* Section III.A.

22. See *infra* Section III.B.

23. See *infra* Part IV.

of a sensible balancing test when performed under a contributory negligence scheme is no longer the best approach to reconciling prejudicial evidence with the plaintiff's interest in proper apportionment. Additionally, courts already have mechanisms that can mitigate the effects of any potentially prejudicial evidence that might accompany a plaintiff's additional negligence claims against an employer, and these mechanisms do not deprive plaintiffs of their valid causes of action as the rule does.²⁴

Part I of this Note traces the origin and development of the rule. Part II argues that the rationale of the rule becomes less compelling once a jurisdiction shifts to a regime of comparative negligence. Part III shows how specific articulations of the rule have created two distinct problems: the broadening of the scope of the rule and the "ignorant intermediary" situation. Part IV addresses the exception that some majority rule jurisdictions have made for punitive damages and argues that the exception—while certainly preferable to having no exception—is far from an adequate solution. Finally, Part V suggests several ways in which courts might better resolve the tension between a plaintiff's claim and the potentially prejudicial evidence that sometimes accompanies it.

I. THE ORIGIN AND DEVELOPMENT OF THE RESPONDEAT SUPERIOR ADMISSION RULE

The respondeat superior admission rule probably originated as a specific application of the fundamental principle that the prejudicial effect of a piece of evidence should not substantially outweigh its probative value.²⁵ In a contributory negligence regime, evidence used to support a claim of negligent entrustment is superfluous (and therefore irrelevant) to the plaintiff's overall claim for damages once the employer admits to respondeat superior liability.²⁶ Irrelevant evidence should be inadmissible, as the California Supreme Court held in 1947, "if an issue has been removed from a case by an admission . . . [then] it is error to receive evidence which is material solely to the excluded matter."²⁷ However, a plaintiff may still seek to admit evidence supporting a claim for negligent entrustment not for its probative value, but solely because it prejudices a jury against the employee.²⁸ As such, courts assert that once respondeat superior liability is admitted, evidence of negligent entrustment fails the probative-versus-prejudicial balancing test and is properly excluded.²⁹ State courts applied this principle to a case as early as 1951, when the Maryland Supreme Court held that, where an employer

24. See *infra* Part V.

25. See FED. R. EVID. 403.

26. See FED. R. EVID. 401; FED. R. EVID. 402.

27. *Fuentes v. Tucker*, 187 P.2d 752, 755 (Cal. 1947) (holding that the admission of testimony as to the circumstances of the accident, including the fact that defendant was intoxicated, was error where defendant had admitted liability).

28. Blitz, *supra* note 17, at 542.

29. See *infra* notes 30–35 and accompanying text.

admitted respondeat superior liability, the evidence of an employee's previous misconduct serves "no purpose except to inflame the jury."³⁰ The court reasoned that once an employer admits respondeat superior liability, evidence supporting alternative claims of employer liability is unnecessary.³¹

California adopted the rule soon after,³² as did North Carolina,³³ Mississippi,³⁴ and Texas.³⁵ During the same period, Michigan and Ohio took the contrary position and held that the defendant's admission that he was liable for the negligent acts of his agent did nothing to dispose of the plaintiff's negligent entrustment claim.³⁶ Unfortunately, neither of those opinions presented a satisfying legal counterargument to the rule; both merely pointed out that the two causes of action are distinct.³⁷ Neither Michigan nor Ohio has satisfactorily addressed the issue of prejudicial evidence that usually accompanies a plaintiff's additional negligence claims.³⁸ Michigan and Ohio are in the distinct minority on the issue.³⁹

Perhaps the most important historical note about the rule is that it was first formed and adopted in an environment of contributory negligence. The decisions in California, Connecticut, Maryland, North Carolina, and Texas

30. *Houlihan v. McCall*, 78 A.2d 661, 666 (Md. 1951). Presumably, courts entertaining negligent entrustment claims in the face of respondeat superior admissions before the rule originated decided whether the claims survived on a case-by-case basis and had the discretion to admit evidence on a matter already admitted by a party. See *Fuentes*, 187 P.2d at 759-60 (Carter, J., concurring).

31. *Houlihan*, 78 A.2d at 666.

32. See *Armenta v. Churchill*, 267 P.2d 303 (Cal. 1954). In *Armenta*, the employer admitted that the defendant driver was her employee and that he was acting in furtherance of her business. "Since the legal issue of her liability for the alleged tort was thereby removed from the case, there was no material issue remaining to which the offered evidence [of the employee's traffic violations] could be legitimately directed." *Id.* at 309.

33. See *Heath v. Kirkman*, 82 S.E.2d 104, 107 (N.C. 1954) ("[Negligent entrustment] is applicable only when the plaintiff undertakes to cast liability on an owner not otherwise responsible for the conduct of the driver of the vehicle.").

34. See *Nehi Bottling Co. v. Jefferson*, 84 So. 2d 684, 686 (Miss. 1956) (holding that since defendants' answer admitted that employee was within the scope of his employment at the time of the accident, it was error to admit testimony as to other accidents in which employee had allegedly been involved).

35. See *Patterson v. E. Tex. Motor Freight Lines*, 349 S.W.2d 634, 636 (Tex. Civ. App. 1961) ("The theory of negligent entrustment in order to bind the truck company became immaterial as soon as the stipulation as to course of employment was made."). Connecticut actually formulated a similar position in 1946, but the court's reasoning is not as clear. See *Prosser v. Richman*, 50 A.2d 85, 87 (Conn. 1946) (citing *Greeley v. Cunningham*, 165 A. 678 (Conn. 1933)).

36. See *Perin v. Peuler*, 130 N.W.2d 4, 8 (Mich. 1964); *Clark v. Stewart*, 185 N.E. 71, 73 (Ohio 1933).

37. See *Perin*, 130 N.W.2d at 8; *Clark*, 185 N.E. at 73.

38. See *Perin*, 130 N.W.2d at 8; *Clark*, 185 N.E. at 74.

39. See *Willis v. Hill*, 159 S.E.2d 145, 155-56 (Ga. Ct. App. 1967), *rev'd on other grounds*, 161 S.E.2d 281 (Ga. 1968); cf. *Nichols v. Coast Distrib. Sys.*, 621 N.E.2d 738, 743 (Ohio Ct. App. 1993) (finding it difficult to come up with any justification for the minority position, but upholding it because of *Clark*'s precedent). Other states in the minority include Alabama, Kansas, South Carolina, and Virginia. Mincer, *supra* note 14, at 236 n.20.

were all made under contributory negligence regimes,⁴⁰ under which a plaintiff really did add nothing to her case by supplementing a respondeat superior claim with one based on negligent entrustment.⁴¹ Courts deciding these cases 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 independently negligent in its entrustment, the plaintiff's damages did not increase with the addition of another cause of action.⁴² The defendant employer was responsible for the plaintiff's injuries, and no more.⁴³

After states made the move to comparative fault regimes, via either statute or common law,⁴⁴ jurisdictions had to deal with many of the side effects of the shift on various doctrines of tort law.⁴⁵ Many jurisdictions abandoned doctrines they found to be either incompatible or unnecessary,⁴⁶ or made modifications to doctrines to bring them in line with the principles of comparative negligence.⁴⁷

The majority rule, however, appears to have escaped such scrutiny. Some states continued to recognize the rule even after they shifted to comparative fault.⁴⁸ Other states adopted the rule after shifting to comparative fault.⁴⁹ After states in the first category adopted some form of comparative

40. See Arthur Best, *Impediments to Reasonable Tort Reform: Lessons from the Adoption of Comparative Negligence*, 40 IND. L. REV. 1, 17–22 (2007). The Mississippi decision is the only exception. See *id.* at 20.

41. *Lorio v. Cartwright*, 768 F. Supp. 658, 660–61 (N.D. Ill. 1991).

42. *Id.*

43. *Id.*

44. For a guide to when states made the shift, see Best, *supra* note 40, at 17–22. All jurisdictions—except for Alabama, the District of Columbia, Maryland, North Carolina, and Virginia—have adopted some form of comparative fault. *Id.*

45. Concepts that came under scrutiny include doctrines like last clear chance, assumption of risk, *res ipsa loquitur*, and sudden emergency. See *infra* notes 46–47.

46. See *Kaatz v. State*, 540 P.2d 1037, 1047–48 (Alaska 1975) (holding that the last clear chance doctrine is made largely superfluous under comparative negligence); *Knapp v. Stanford*, 392 So. 2d 196, 198 (Miss. 1980) (abolishing the doctrine of sudden emergency because it tends to confuse the principle of comparative negligence).

47. See *Dyback v. Weber*, 500 N.E.2d 8, 11 (Ill. 1986) (holding that plaintiff's freedom from contributory negligence should “no longer be a requirement in order to make out a *prima facie* case under the doctrine” of *res ipsa loquitur*); *Arbegas v. Bd. of Educ.*, 480 N.E.2d 365, 367–68 (N.Y. 1985) (holding that state's comparative causation statute applied to implied assumptions of risk, but not to the express assumptions of risk).

48. For example, California implemented the rule in 1954 and adopted comparative fault in 1975. See *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1243 (Cal. 1975). Connecticut implemented the rule in 1946 and adopted comparative fault in 1973. See CONN. GEN. STAT. § 52-572h (1973). Texas implemented the rule in 1961 and adopted comparative fault in 1973. See TEX. CIV. PRAC. & REM. CODE ANN. § 33.011 (West 2008).

49. For example, Georgia implemented the rule in 1967 and adopted comparative fault in 1863. See GA. CODE ANN. § 51-11-7 (2000). Idaho implemented the rule in 1986 and adopted comparative fault in 1971. See IDAHO CODE ANN. § 6-801 (1971). Florida implemented the rule in 1977 and adopted comparative fault in 1973. *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973). Missouri

negligence, very few of their courts' opinions concerning the rule even mentioned the doctrinal change.⁵⁰ In those that did mention it, little was said but the conclusion was clear: the rule was not affected by the development of comparative negligence.⁵¹ Of those states in the second category, none suggested that the shift from contributory to comparative negligence might have affected the rule's justification. In fact, all of them cite to holdings (and rationales) of other states, almost all of which were decided under contributory negligence assumptions.⁵² In other words, states enforcing the rule have failed to consider carefully—or have consistently ignored—the implications that the shift to comparative negligence has had on the rule.

II. THE IMPLICATIONS OF COMPARATIVE NEGLIGENCE

The assertion that evidence of negligent entrustment is irrelevant and unnecessary once an employer admits respondeat superior liability makes little sense in comparative negligence jurisdictions. The Northern District of Illinois assessed the problem well:

The rationale of [the rule] is very powerful in a contributory negligence jurisdiction. . . .

The reasoning for 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 [depending on the jurisdiction,] the negligence of other non-parties.⁵³

Any comparative fault regime is incompatible with a rule that makes unavailable a cause of action that may result in the allocation of additional fault to a tortfeasor.

The example at the beginning of this Note perhaps best illustrates the injustice that the rule can create. Where the jury considers only Paula's

implemented the rule in 1995 and adopted comparative fault in 1983. *Gustafson v. Benda*, 661 S.W.2d 11, 15 (Mo. 1983).

50. See, e.g., *Estate of Arrington v. Fields*, 578 S.W.2d 173 (Tex. Ct. App. 1979) (failing to mention the shift to comparative fault).

51. E.g., *Jeld-Wen, Inc. v. Superior Court*, 32 Cal. Rptr. 3d 351, 364 (Ct. App. 2005) ("There is nothing in *Armenta* that is adversely affected by the development of these comparative negligence principles, because *Armenta* represents a different and still viable policy rule that is based upon evidentiary concerns about the vicarious liability of an employer for employee negligence.").

52. For example, in the Georgia case adopting the rule, *Willis v. Hill*, 159 S.E.2d 145, 152–54 (Ga. Ct. App. 1967), *rev'd on other grounds*, 161 S.E.2d 281 (Ga. 1968), the court cites to *Patterson* (the Texas case), *Armenta* (the California case), *Houlihan* (the Maryland case), *Heath* (the North Carolina case), and *Prosser* (the Connecticut case) in support of the rule. The Missouri case adopting the rule, *McHaffie ex rel. McHaffie v. Bunch*, 891 S.W.2d 822, 826–27 (Mo. 1995), cites *Armenta*, *Houlihan*, and *Clark*, as well as *Willis* (the Georgia case), *Clooney* (the Florida case), and *Wise v. Fiberglass System, Inc.*, 718 P.2d 1178 (Idaho 1986). See also *Clooney v. Geeting*, 352 So. 2d 1216, 1220 (Fla. Dist. Ct. App. 1978); *Wise*, 718 P.2d at 1181.

53. *Lorio v. Cartwright*, 768 F. Supp. 658, 660 (N.D. Ill. 1991).

and Ernie's negligence, the jurors might well determine that each of the drivers were 50% negligent. Where the jury considers the negligence of all proximate causes—including that of the employer—it might find that each party was 33.3% at fault. Obviously the differences in the findings of relative fault could be even more extreme, but they do not have to be. Indeed, in some jurisdictions, plaintiffs who are assigned 50% of the fault are unable to recover any damages.⁵⁴ A plaintiff found to be 50% negligent recovers nothing, while a plaintiff who is found to be 33.3% negligent recovers 66.6% of her damages. And considering the appeal of 50–50 allocations in situations where juries find it difficult to assign percentages of fault with any precision,⁵⁵ the rule can have drastic effects on recovery.⁵⁶

Plaintiffs are not the only participants in a comparative negligence regime who are adversely affected by the rule. Most of the time, the fault allocation problem is present only if the *plaintiff* is found to be negligent to some extent; if there are defendants in addition to the employee and his employer, the rule will also disadvantage those other defendants. Imagine that Paula sues Ernie, Ernie's employer, and Bert, another driver on the road. If the jury finds both Bert and Ernie negligent and is not allowed to consider the employer's independent negligence—which may well be egregious—then Bert will likely end up being held responsible for a much larger share of Paula's damages than if the jury were to consider all proximate causes of the accident in its apportionment.

As noted in Part I, courts and scholars have largely failed to address this problem head-on. Instead, they tend to focus on the idea that respondeat superior and negligent entrustment are simply different ways of finding the employer liable.⁵⁷ Since both claims are a means to the same end, the thinking goes, the entrustment claim and its accompanying evidence are unnecessary once the employer admits respondeat superior liability. This analysis is simply not responsive to the comparative fault issue. It fails to explain why the employer's own negligence should not be considered in the jury's fault apportionment and, more simply, it does not address why or how a court can ignore a proximate cause to an injury.

Furthermore, the common assertion that a negligent entrustment claim is derivative, vicarious, or imputed⁵⁸ is simplistic. Many of the decisions

54. These jurisdictions include Arizona, Arkansas, Colorado, Georgia, Idaho, Kansas, Maine, Nebraska, North Dakota, Tennessee, Utah, and West Virginia. Jordan H. Leibman et al., *The Effect of Lifting the Blindfold from Civil Juries Charged with Apportioning Damages in Modified Comparative Fault Cases: An Empirical Study of the Alternatives*, 35 AM. BUS. L.J. 349, 352 n.6 (1998).

55. *Id.* at 364.

56. This is especially true in those jurisdictions where it constitutes reversible error to inform the jury of the practical effects of its apportionment. *Id.* at 364–65. Additionally, in those jurisdictions that impose a fault threshold upon the application of joint and several liability, the precise apportionment of negligence is crucial in determining whether a plaintiff is allowed to recover.

57. *Willis*, 159 S.E.2d at 158; *Gant v. L.U. Transp., Inc.*, 770 N.E.2d 1155, 1160 (Ill. App. Ct. 2002); *McHaffie*, 891 S.W.2d at 826; Mincer, *supra* note 14, at 234–35.

58. These terms are treated as roughly equivalent, but some authorities distinguish between “vicarious” claims and “derivative” claims. *See, e.g.*, William D. Underwood & Michael D. Morrison, *Apportioning Responsibility in Cases Involving Claims of Vicarious, Derivative, or Statutory*

recognizing or upholding the rule claim that a negligent entrustment claim is just another way to find an employer vicariously liable for an employee's conduct.⁵⁹ They reason that "causes of action for negligent entrustment and hiring are a means to make a defendant liable for the negligence of another,"⁶⁰ and that negligent entrustment is "derivative in that one may be extremely negligent in entrusting and yet have no liability until the driver causes an injury."⁶¹ Even courts in majority-rule jurisdictions, however, concede that "entrusting is a separate act of negligence, and in that sense not imputed."⁶² Indeed, the "basis of responsibility under the doctrine of negligent entrustment is the owner's own negligence in permitting his motor vehicle to become a dangerous instrumentality by putting it into a driver's control with knowledge of the potential danger existing by reason of the incompetence or reckless nature of the driver."⁶³

In his article supporting the majority rule, practicing attorney Richard Mincer asserts otherwise: "Logically, '[t]he fault of the employer for negligent entrustment . . . [is] derived from the negligence of the employee, therefore, additional liability cannot be imposed on the employer where the employer has already admitted it is liable for 100 percent of the fault attributable to the negligent employee.'" ⁶⁴ Mincer's view of the law con-

Liability for Harm Directly Caused by the Conduct of Another, 55 BAYLOR L. REV. 617, 618-19 (2003). Underwood and Morrison describe the distinction as follows:

The most straightforward of these categories is that involving claims of pure vicarious liability. The person who is being held responsible for the conduct of the tortfeasor has engaged in no wrongful conduct personally, but is liable because of his or her relationship with the actor who engaged in the wrongful conduct. . . . Unlike cases involving pure vicarious liability, cases of derivative liability, such as the wrongful hiring of an incompetent employee, involve wrongful conduct both by the person who is derivatively liable and the actor whose wrongful conduct was the direct cause of injury to another. The liability is derivative because it depends upon a subsequent wrongful act or omission.

Id.

59. See, e.g., *McHaffie*, 891 S.W.2d at 826; *Willis*, 159 S.E.2d at 158 ("[T]here is more than one way to impose liability upon A for B's conduct. Possibilities for doing so . . . are agency [and] negligent entrustment . . .").

60. *Rosell v. Cent. W. Motor Stages, Inc.*, 89 S.W.3d 643, 657 (Tex. App. 2002).

61. *Loom Craft Carpet Mills, Inc. v. Gorrell*, 823 S.W.2d 431, 432 (Tex. App. 1992).

62. *Id.*; see also *Mid-Century Ins. Co. v. Heritage Drug, Ltd.*, 3 P.3d 461, 464 (Colo. App. 1999) (holding that negligent entrustment liability is not imputed, but direct); *Ridgeway v. Whisman*, 435 S.E.2d 624, 626 (Ga. Ct. App. 1993) ("The liability of the owner in a negligent entrustment action does not result from imputing the negligence of the incompetent driver to the owner, rather negligent entrustment of a motor vehicle to an incompetent driver is an independent wrongful act of the vehicle's owner which is a concurrent, proximate cause of injury when it combines with the negligence of the operator.") (internal quotation marks, brackets, and citations omitted); *Neale v. Wright*, 585 A.2d 196, 199 (Md. 1989) (holding that negligent entrustment liability is not imputed, but direct); *Estate of Arrington v. Fields*, 578 S.W.2d 173, 178 (Tex. Civ. App. 1979) (holding that liability under negligent hiring is derivative and that the basis of responsibility under the doctrine of negligent hiring is the employer's own negligence).

63. *Green v. Tex. Elec. Wholesalers, Inc.*, 651 S.W.2d 4, 6 (Tex. App. 1982); see also *Ridgeway*, 435 S.E.2d at 626 (describing negligent entrustment as "an independent wrongful act of the vehicle's owner") (quotation marks omitted).

64. Mincer, *supra* note 14, at 247 (quoting *Campa v. Gordon*, No. 01 C 50441, 2002 U.S. Dist. LEXIS 15032, at *3-4 (N.D. Ill. Apr. 14, 2002)).

fuses negligent conduct with proximate cause, however. The confusion at least partly stems from the fact that while the possibility of the employer's liability is causally dependent on her employee's misconduct, "[t]he employer's *negligence* . . . is independent of the employee's misconduct and the employer's liability under *respondeat superior*."⁶⁵

In *Willis v. Hill*, the Georgia Court of Appeals made an argument similar to Mincer's and asserted that the plaintiff's additional claim could not make any difference to his recovery because the negligence comparison the factfinder performs considers only the parties actually involved in the accident:

The comparative negligence doctrine must be directed to a comparison between the [plaintiff's] negligence and the *driver-employee's* negligence—that is, between the negligence of the two drivers of the vehicles actually involved in the collision. It is self-evident that in a case such as this, where the sine qua non of the employer's liability under any theory is the negligence of the employee-driver in the operation of the employer's truck, it is the negligence of the employee-driver which must be compared and not that of the employer. If, as all of our cases hold, there could be no liability on the part of the master-entrustor without proof of actionable negligence against the driver-entrustee, regardless of how negligent the master-entrustor may have been in employing the driver, it must follow as night the day that it is the negligence of the two drivers that is to be compared.⁶⁶

The argument seems to be that since the driver-employee's negligence is a necessary condition of the employer's liability, then the employer's own negligence is not to be considered in any apportionment. But this is not accurate. In a negligent entrustment claim, the negligence of the entrustee is simply a necessary component of the causation requirement.⁶⁷ Just because the claim is contingent upon some injurious conduct on the part of the employee does not mean that the employer's conduct is irrelevant in allocating fault.

65. Brent Powell, Note, *Submitting Theories of Respondeat Superior and Negligent Entrustment/Hiring*, 61 Mo. L. Rev. 155, 159 (1996) (first emphasis added). In a footnote, Mincer admits that "negligent entrustment does not *necessarily* impose vicarious liability on an entrustor who is not the entrustee's employer." Mincer, *supra* note 14, at 234 n.16. Regardless of the legal differences of the employment context, Mincer's seemingly insignificant admission suggests that the argument that negligent entrustment is just another method of imputing the negligence of one person to another is flawed.

66. *Willis v. Hill*, 159 S.E.2d 145, 159–60 (Ga. Ct. App. 1967), *rev'd on other grounds*, 161 S.E.2d 281 (Ga. 1968).

67. *Wagner v. Mines*, 277 N.W.2d 672, 674 (Neb. 1979) ("In addition to being negligent in entrusting the vehicle, a plaintiff must likewise plead and prove that such negligent entrustment was the proximate cause of the accident and injury. To establish that proximate causation, a plaintiff must allege and prove that the driver operated the automobile negligently and that his negligence was a proximate cause of the accident.").

It is true—most of the time—that absent negligent conduct⁶⁸ on the part of the employee, a direct negligence claim against the employer is impossible.⁶⁹ But this is not because non-negligence on the employee's part results in no imputed negligence; rather, the direct negligence claim is impossible in those circumstances because a finding of employee non-negligence means that there is no proximate cause, no connection that links the employer's independent negligence with the plaintiff's injuries.⁷⁰ The more sensible approach is that, in negligent entrustment cases, the employer is not responsible for the negligence of another, but is instead responsible for its own negligence in its act of entrustment.⁷¹

From a policy perspective, negligent entrustment should be distinct from respondeat superior liability. An employer who is liable solely because of respondeat superior is not necessarily negligent; instead, it is liable because we have made a "public policy determination that liability for acts committed within the scope of employment should be allocated to the employer as a cost of engaging in that business."⁷² In situations of liability for negligent entrustment, on the other hand, the negligence of the employer is likely the focus of the claim.⁷³ In other words, "[d]irect liability is liability for breach of one's own duty of care, while vicarious liability . . . is liability for breach of another's duty of care."⁷⁴ A negligent entrustment claim is therefore an instance of direct liability,⁷⁵ as one of the

68. If an employee's tortious conduct is intentional, rather than negligent, the rule is probably not implicated. Since intentional torts are almost always outside the scope of employment, employers are not liable for such conduct under respondeat superior. See Michael F. Wais, Note, *Negligent Hiring—Holding Employers Liable when their Employees' Intentional Torts Occur Outside of the Scope of Employment*, 37 WAYNE L. REV. 237, 239 (1990).

69. *Christiansen v. Silfies*, 667 A.2d 396, 400–01 (Pa. Super. Ct. 1995). "Ignorant intermediary" situations are important exceptions to this rule of thumb. See *infra* Section III.B.

70. *Christiansen*, 667 A.2d at 400. In other words, a negligent entrustment claim is only "derivative" in the sense that the trustee's negligence is required strictly for causation purposes. This is different from vicarious liability, which is premised on principles of agency. See *Sword v. NKC Hospitals, Inc.*, 714 N.E.2d 142, 147–48 (Ind. 1999).

71. Certainly, a reasonable jury could find that the employer's actions in hiring, retaining, or entrusting its employee failed to amount to a proximate cause of the plaintiff's injury, but that is the jury's decision. And, of course, juries routinely find otherwise. See, e.g., *McHaffie ex rel. McHaffie v. Bunch*, 891 S.W.2d 822, 825 (Mo. 1995) (explaining that the jury found that a nonemployee driver was 70% negligent, the employee-driver was 10% negligent, the employer was 10% negligent, and the plaintiff was 10% negligent).

72. *Fahrendorff ex rel. Fahrendorff v. North Homes, Inc.*, 597 N.W.2d 905, 910 (Minn. 1999).

73. See, e.g., *James v. Kelly Trucking Co.*, 661 S.E.2d 329 (S.C. 2008); see also *Ridgeway v. Whisman*, 435 S.E.2d 624, 626 (Ga. Ct. App. 1993) ("Accordingly, where the contributory negligence of the trustee is the sole proximate cause of the plaintiff's injury, the plaintiff is barred from recovery against the negligent entrustor because the entrustor's independent negligence is not the proximate cause or concurrent proximate cause of the plaintiff's injury.').

74. *Phillips v. Kaiser Aluminum & Chem. Corp.*, 875 P.2d 1228, 1234 (Wash. App. 1994).

75. The same is true for instances of negligent hiring, retention, and supervision in many jurisdictions. See *Far W. Fin. Corp. v. D & S Co.*, 760 P.2d 399, 410 (Cal. 1988) ("[T]here are many instances in which a defendant who is vicariously liable for another's acts may also bear some direct responsibility for an accident, either on the basis of its own action—for example, the negligent hiring of an agent—or of its own inaction—for example, the failure to provide adequate supervision of the agent's work."); see also *Moses v. Diocese of Colo.*, 863 P.2d 310, 324 n.16 (Colo. 1993)

key components of the tort is that the employer breached its own duty of care.⁷⁶

A complete comparative fault analysis in these situations should therefore include a consideration of the employer's own negligence. By applying the majority rule, courts hold "that the entrustor's negligence cannot be compared, i.e., [the entrustor] is some sort of privileged character who is insulated from comparison."⁷⁷ In admitting to respondeat superior liability, the employer is "given the option of selecting for comparison . . . the least distasteful act of negligence for which he is responsible."⁷⁸ In other words, the employer is afforded the unique opportunity to choose under which claim it might be liable, and can therefore avoid any responsibility for its independently negligent acts.

What makes the failure to examine the employer's independent fault so strange is that courts have no problem considering the independent negligence of an employer in negligent entrustment suits where an independent contractor is involved. Plaintiffs may not bring a claim under respondeat superior in those instances where the worker is an independent contractor because the contractor is not considered to be an "employee" within the scope of the doctrine.⁷⁹ Without a respondeat superior claim, the plaintiff's attempt to establish liability on the part of the company ceases to be "redundant" and the rule will not be applied.⁸⁰

In a case where a plaintiff pursues both a negligence claim against the independent contractor and a negligent entrustment claim against the company that contracted with her, the jury will apportion fault between the contractor and the employer if it finds that both were proximate causes of the plaintiff's injury.⁸¹ If the employer's own negligence in entrusting a

("The tort of negligent hiring is a separate cause of action and does not involve vicarious liability. . . . [N]egligent hiring is based not on the rule of agency but on the law of torts and is therefore distinguishable from the agency doctrine of vicarious liability"); *Read v. Scott Fetzer Co.*, 990 S.W.2d 732, 735 (Tex. 1998) (stating that negligent hiring claims are "not based on a notion of vicarious liability, but upon the premise that [an employer] is responsible for its own actions").

76. See, e.g., *Ridgeway*, 435 S.E.2d at 626; *Ali v. Fisher*, 145 S.W.3d 557, 564 (Tenn. 2004); *Green v. Tex. Elec. Wholesalers, Inc.*, 651 S.W.2d 4, 6 (Tex. App. 1982).

77. *Willis v. Hill*, 159 S.E.2d 145, 165 (Ga. Ct. App. 1967) (Hall, J., dissenting), *rev'd on other grounds*, 161 S.E.2d 281 (Ga. 1968).

78. *Id.* at 166.

79. See *Anderson v. Marathon Petroleum Co.*, 801 F.2d 936, 938 (7th Cir. 1986).

80. The reason the rule does not apply to situations involving independent contractors provides another way of elucidating the logic of the rule. The prejudicial evidence that typically accompanies a negligent entrustment claim is, by itself, not enough for a court to bar the plaintiff's claim. The evidence may prejudice the driver, but the plaintiff has to be given the opportunity to make her case by establishing the employer's liability. If the defendant can claim that the plaintiff has already made her case by establishing respondeat superior liability and that the prejudicial evidence accomplishes nothing more, the balance between probative and prejudicial evidence shifts in favor of exclusion. In other words, courts allow the prejudicial evidence in the independent contractor case because it is "necessary." Courts do not allow the same evidence in the employee scenario because it is—supposedly—not.

81. In some jurisdictions, the negligent entrustment claim, by itself, requires apportionment between the entrustor and the entrustee. See *McCart v. Muir*, 641 P.2d 384, 389 (Kan. 1982) ("The nature and extent of negligence of the entruster and of the entrustee are separate and distinct. The

chattel to an independent contractor can be considered in this instance, why can it not be considered where the driver is an employee of the employer? The fact that the employer stands in the place of her employee for liability purposes is simply a legal consequence of the doctrine of respondeat superior; there is no reason that it should bar the jury from considering the employer's own negligence.

Additionally, the treatment of contribution and indemnification actions⁸² by majority-rule jurisdictions also suggests that the employer's own negligence should be considered in a comparative fault analysis. Generally, an employer is entitled to recover from its employee damages that the employer has paid by reason of the negligence of its employee.⁸³ While courts have not directly addressed how the majority rule might affect an employer's recovery from its employee, the suggestion in *McHaffie v. Bunch* is that the relative fault of the employer may be relevant in these cases.⁸⁴ The notion that the relative fault of the employer and employee is relevant in a subsequent contribution action, but not in the initial suit brought by the injured plaintiff, is without merit. It is granted that the relative fault of employer versus employee might be irrelevant in determining *who* is initially liable for the plaintiff's damages (the employer is responsible for both the employee's negligence and its own negligence),⁸⁵ but as noted above, the determination of the employer's negligence apart from that of the employee's will likely have effects on the plaintiff's recovery in any case where the plaintiff is determined to be at all at fault.⁸⁶

percentages of fault may be different in amount and should be determined separately."); *Ali*, 145 S.W.3d at 564 ("[W]e hold that negligent entrustment does not create vicarious liability and that the jury must allocate the fault between the defendants . . ."). For the argument that this kind of apportionment might actually hurt some plaintiffs' opportunities for full recovery and could undermine employers' incentives to take safety precautions, see *Underwood & Morrison*, *supra* note 58, at 645-47.

82. Contribution is:

the right of a person who has been compelled to pay what another should pay in part to require partial (usually proportionate) reimbursement and arises from principles of equity and natural justice. Indemnity, on the other hand, arises from contract, express or implied, and is a right of a person who has been compelled to pay what another should pay in full to require complete reimbursement.

Travelers Indem. Co. v. Trowbridge, 321 N.E.2d 787, 789 (Ohio 1975) (internal citations omitted).

83. See, e.g., *Am. S. Ins. Co. v. Dime Taxi Serv., Inc.*, 151 So. 2d 783, 785 (Ala. 1963).

84. *McHaffie ex rel. McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo. 1995).

85. This is not always the case. Admittedly, in most situations the employer is in a better position to provide compensation, but where the damages exceed the employer's ability to pay and the fault of the employer is not considered, the effect is to make the employee liable for the entire sum of the damages. On the other hand, where the employer is insolvent and the employer's fault is considered, the employee will likely be liable only for those damages apportioned to the employee. See generally *Bearint ex rel. Bearint v. Dorell Juvenile Group*, 389 F.3d 1339, 1345 (11th Cir. 2004) (explaining that parties are liable in Florida for only the percentage of the plaintiff's damages in an amount equal to the percentage of their fault).

86. See, e.g., *Lorio v. Cartwright*, 768 F. Supp. 658, 660-61 (N.D. Ill. 1991). On a related note—and depending on a variety of factors—the application of the rule in some jurisdictions might very well prejudice the employee as well as the plaintiff. For example, where a negligent entrustment claim and the accompanying apportionment between employer and employee would keep an

In his advocacy of the majority rule, Mincer argues that “the negligence of the plaintiff and third parties is neither enhanced nor diminished by the employer’s direct negligence or lack thereof.”⁸⁷ It is hard to see how this is the case. The reality is that fault allocation is a relative and comparative process: if a party’s negligence is taken out of the equation, the other parties necessarily have to fill in the vacuum that is left by the absent party. The move to comparative negligence means that even after respondeat superior liability has been admitted, a negligent entrustment claim does “add something.” It adds another party to the fault allocation equation, which can dramatically affect a plaintiff’s recovery.

III. THE IMPRECISION AND MISAPPLICATION OF THE RULE

While the most troubling aspect of the rule is its refusal to allow juries to apportion fault accurately, various formulations of the rule have created two other problems. First, the articulation of the rationale behind the rule is not as clear as courts have often asserted. As a result, some claims that involve no potentially prejudicial evidence—or that could survive without such evidence—are at risk of being barred because of the rule. The second issue involves what can best be characterized as the “ignorant intermediary” problem. This occurs when the employer’s negligence is a proximate cause of the plaintiff’s injuries, but the employee, for some reason generally unrelated to his factual negligence, is deemed legally non-negligent. If the rule bars plaintiff’s additional negligence claims in these circumstances, the plaintiff will recover nothing, even though the employer was in fact negligent and such negligence caused the plaintiff’s injuries.⁸⁸

A. Evidence Rule or Redundant Claim Rule?

At its most reasonable, the rule gives effect to a fundamental rule of evidence—that the prejudicial effect of a piece of evidence should not substantially outweigh its probative value.⁸⁹ Indeed, many courts emphasize that the potentially prejudicial evidence that accompanies most negligent entrustment claims is the primary reason the rule is applied.⁹⁰ But some courts’ articulations of the rule broaden its reach. Take, for example, the

employer from recovering the amount of the damages (via an indemnification action) attributable to its own negligence, the rule would bar the apportionment, and if the employee were found to be negligent, then the employer might be able to argue that it is entitled to recover everything from the employee (because the damages are all based upon the servant’s negligence and the master’s liability is based solely on respondeat superior). Depending on the jurisdiction, the employee might be precluded from having the negligence apportioned after the initial lawsuit has concluded.

87. Mincer, *supra* note 14, at 239.

88. See, e.g., *Rodgers v. McFarland*, 402 S.W.2d 208 (Tex. Civ. App. 1966).

89. FED. R. EVID. 403.

90. See, e.g., *Clooney v. Geeting*, 352 So. 2d 1216, 1220 (Fla. Dist. Ct. App. 1978); *Tindall v. Enderle*, 320 N.E.2d 764, 768 (Ind. Ct. App. 1974); *Houlihan v. McCall*, 78 A.2d 661, 665 (Md. 1951); *Nehi Bottling Co. v. Jefferson*, 84 So. 2d 684, 686 (Miss. 1956).

Missouri Supreme Court's analysis of the majority rule in *McHaffie v. Bunch*:

Vicarious liability or imputed negligence has been recognized under varying theories, including agency, negligent entrustment of a chattel to an incompetent, conspiracy, the family purpose doctrine, joint enterprise, and ownership liability statutes. If all of the theories for attaching liability to one person for the negligence of another were recognized and all pleaded in one case where the imputation of negligence is admitted, the evidence laboriously submitted to establish other theories serves no real purpose. The energy and time of courts and litigants is unnecessarily expended. In addition, potentially inflammatory evidence comes into the record which is irrelevant to any contested issue in the case.⁹¹

The court seems to understand the rule as primarily an efficiency concern—the claim as a whole should be barred because it “serves no real purpose.”⁹² Potentially prejudicial evidence is mentioned as an afterthought. Regardless of whether there is prejudicial evidence, courts who articulate the rule as such seem to bar plaintiffs’ additional negligence claims just because they are “derivative.”

The fact that the rule is unclear has to do, once again, with the shift to comparative negligence. Under a contributory negligence regime, one had no need to choose between a prejudicial evidence justification and a redundant claim justification. No apportionment between tortfeasors meant that the broader version of the rule could be applied and those upholding the rule were technically right: the additional negligence claims against employers who admitted to respondeat superior liability added nothing for plaintiffs.⁹³ That barring these claims also resulted in the exclusion of potentially prejudicial evidence was just another reason to disallow the claim.⁹⁴ Now that comparative negligence is the norm, however, it is problematic to support either version of the rule because it is no longer accurate that the additional negligence claims against the employer add nothing. At least the evidence rule version is somewhat narrower because it contains a limiting factor.

In many situations, evidence that a jury may misunderstand as propensity evidence is necessary to sustain a negligent entrustment claim.⁹⁵ But there are situations where prior bad act evidence is not required for the maintenance of the claim. In these instances, the precise articulation of the

91. *McHaffie ex rel. McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo. 1995). Interestingly, at least one scholar interprets the version of the rule articulated in *McHaffie* as an evidence rule. See Powell, *supra* note 65, at 165. But subsequent Missouri cases suggest that the rule is not so nuanced. See, e.g., *Connelly v. H.O. Wolding, Inc.*, No. 06-5129-CV-SW-FJG, 2007 WL 679885, at *2 (W.D. Mo. Mar. 1, 2007).

92. *McHaffie*, 891 S.W.2d at 826.

93. See, e.g., *Lorio v. Cartwright*, 768 F. Supp. 658, 660 (N.D. Ill. 1991).

94. See, e.g., *id.*

95. See *id.*; see also *Mincer*, *supra* note 14, at 234 (“Direct negligence claims . . . provide a plaintiff with a backdoor means to introduce evidence, such as driving records and prior bad acts, which are otherwise inadmissible.”).

rule can make a critical difference. In *Wise v. Fiberglass, Inc.*,⁹⁶ the plaintiff offered to withdraw evidence of the employee's prior citations and submit evidence only that the defendant employer permitted its employee to drive without proper instruction or experience.⁹⁷ Nevertheless, the Idaho Supreme Court held that the district court properly refused plaintiff's independent negligence claims against the employer.⁹⁸ The dissent pointed out the flaw in the court's reasoning:

The majority points to case law from other jurisdictions. However, there is a critical distinction between that case law and this case. In those cases, the courts were concerned with the introduction of prior acts of negligence by the driver as evidence of the owner's negligent entrustment. . . . Here, no such evidentiary conflict existed.⁹⁹

Suppose that Ernie the driver-employee has been diagnosed with obstructive sleep apnea. Ernie's employer knows about the condition, as does Ernie, and his employer continues to allow him to drive. On a long haul, Ernie falls asleep at the wheel and collides with Paula, injuring her. Paula sues Ernie for negligence and Ernie's employer under theories of respondeat superior and negligent entrustment. Paula intends to show that the employer knew of Ernie's condition because of a medical examination that the company required, but retained him, entrusted him with a tractor-trailer, and failed to take any other precautions regarding his condition.

If the rule is intended to prevent the admission of propensity evidence, it is difficult to explain why Paula's entrustment claim should be barred. She is not arguing that because the employer acted negligently in the past, it was therefore more likely to be negligent on this occasion. Rather, the evidence she intends to use is proof that the employer's actions or omissions on this occasion proximately caused her injuries. This can hardly be described as evidence that could be misunderstood by a jury as propensity evidence.

If, on the other hand, the other version of the rule is applied—the "redundant claim rule"—the claim will be barred simply because it is "derivative," "serves no real purpose," and unnecessarily expends the energy and time of courts and litigants.¹⁰⁰ Both versions of the rule are flawed in that they fail to consider the difference an additional tortfeasor can make in fault apportionment, but the latter version broadens the scope of the rule and bars additional negligence claims against the employer after a respondeat superior admission regardless of any potentially prejudicial evidence.

96. *Wise v. Fiberglass Sys., Inc.*, 718 P.2d 1178 (Idaho 1986).

97. *Id.* at 1185 (Bistline, J., dissenting).

98. *Id.* at 1181–82 (majority opinion).

99. *Id.* at 1185 (Bistline, J., dissenting) (emphasis omitted).

100. *McHaffie ex rel. McHaffie v. Bunch*, 891 S.W.2d 822, 826 (Mo. 1995).

B. The "Ignorant Intermediary"

The "ignorant intermediary" problem, which occurs when the employer's negligence is a proximate cause of a plaintiff's injuries but the employee is found to be non-negligent, is also a result of the imprecision and subsequent misapplication of the rule. The example above assumed that both Ernie and his employer knew about his obstructive sleep apnea, but let us posit instead that Ernie does not know about the condition or its implications and his employer does. When Paula sues Ernie and his employer under these hypothetical conditions, her negligent entrustment claim is disallowed by the rule and she proceeds against the employer on her respondeat superior claim. But the jury, evaluating Ernie's conduct based on how a reasonable person in Ernie's position should reasonably act, finds that Ernie was not negligent. He did not know about his condition, and he had no reason to know that he was a danger on the road. Paula recovers nothing.¹⁰¹ Worse, Ernie's employer has a perverse incentive not to educate its employees about a variety of issues.

Fortunately, some of the courts that employ the rule have addressed this issue. The Georgia Court of Appeals has held, "Should the non-driver defendant (usually the owner) seek to insulate himself from such performance . . . or should his admission be ineffective to subject him to liability to the same extent as could be imposed upon him as a 'negligent entrustor,' a plaintiff may proceed under the entrustment theory."¹⁰²

The trouble persists, however, for those courts that are not convinced by this reasoning or that have overlooked this nuance. For example, the Texas Court of Civil Appeals held in *Rogers v. McFarland*¹⁰³ that the trial court did not err by excluding the driver's driving record once the entrustor stipulated to respondeat superior liability.¹⁰⁴ The driver was found guilty of ordinary negligence, but was not held liable because of his immunity via the guest statute.¹⁰⁵ Since the driver was not legally negligent, no negligence could be imputed to the employer.¹⁰⁶ The plaintiff recovered

101. One is, of course, subject to the same potentiality even if one's negligent entrustment claim is allowed, but only the negligence of those actually involved in the collision can be considered by the jury. This possibility, perhaps more than anything else, shows that the negligence that is at issue in a negligent entrustment claim is that of the entrustor, and not just the imputed negligence of the entrustee.

102. *Willis v. Hill*, 159 S.E.2d 145, 159 (Ga. Ct. App. 1967), *rev'd on other grounds*, 161 S.E.2d 281 (Ga. 1968). For examples of such a situation, see *id.* at 159 n.6 (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), and *Clooney v. Geeting*, 352 So. 2d 1216, 1220 (Fla. Dist. Ct. App. 1977) ("[One] example might be 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 . . ."). It is critical to point out that while the Georgia Court of Appeals is to be applauded for its recognition of these situations, its reasoning here is wholly inconsistent with its position that only the negligence of those actually in the collision can be considered.

103. *Rogers v. McFarland*, 402 S.W.2d 208 (Tex. Civ. App. 1966).

104. *Id.* at 210-11.

105. *Id.* at 211.

106. *Id.*

nothing.¹⁰⁷ In these jurisdictions, it appears that the owner-employer can act as negligently (or as recklessly) as she likes; so long as her employees can be considered non-liable, the owner-employer is completely off the hook. Furthermore, even where the rule and relevant caselaw do not support these results, the rule is easily misinterpreted and misapplied because it is unclear.

The rule's lack of clarity is reason enough to examine its foundation and reasoning. A compromise position would be to keep the rule, but to make certain that claims are not barred in ignorant intermediary situations and that the rule is only applied in those circumstances where a plaintiff's additional negligence claim actually requires potentially prejudicial evidence. But this misses the point (and the reasoning of Part II, *supra*). The cloudy nature of the rule suggests that courts have simply not adequately addressed the issue.¹⁰⁸ The only proper response is a complete reexamination of the rule and how it operates—or fails to operate—under a comparative fault regime.

IV. THE PUNITIVE DAMAGES EXCEPTION

Some jurisdictions that employ the rule recognize an exception where punitive damages are alleged.¹⁰⁹ Others do not.¹¹⁰ Some courts allow the claim to survive on the rationale that it imposes liability above and beyond that admitted by an employer's respondeat superior admission.¹¹¹ That is, in instances where the employer is guilty of reckless entrustment, the additional claim against the employer does more than establish liability; it makes the award of punitive damages possible where the respondeat superior admission, by itself, does not. In other jurisdictions, the employer is liable for punitive damages only if its employee would be liable for such damages.¹¹² Obviously, the punitive damages exception to the rule is not recognized in states that adhere to this view.¹¹³ There are problems with both positions.

107. *Id.*

108. See *supra* notes 48–50 and accompanying text.

109. 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. Civ. App. 1979).

110. See, e.g., *Hood v. Dealers Transp. Co.*, 459 F. Supp. 684, 686 (N.D. Miss. 1978); see also *Rodgers*, 402 S.W.2d at 210 (“[T]he allegation of the owner’s gross negligence is no more material than the allegation of his ordinary negligence in the face of his admission of liability for the acts of the driver.”).

111. See, e.g., *Scroggins v. Yellow Freight Sys., Inc.*, 98 F. Supp. 2d 928, 931 (E.D. Tenn. 2000); *Clooney*, 352 So. 2d at 1220.

112. For example, a federal district court interpreting state law held that “should the question be submitted to the Mississippi Supreme Court that court would hold that the defendant would be liable for punitive damages only if its driver would be liable for such damages had the driver been made a party to the action.” *Hood*, 459 F. Supp. at 686.

113. In other states, the refusal to recognize the exception is clear, but the reasoning is not provided. See, e.g., *Connelly v. H.O. Wolding, Inc.*, No. 06-5129-CV-SW-FJG, 2007 WL 679885, at *2 (W.D. Mo. Mar. 1, 2007) (“Plaintiff correctly notes that other jurisdictions have recognized an exception for punitive damages. However, Missouri has yet to recognize such an exception. Thus, the general rule in Missouri remains—plaintiff cannot assert additional theories of imputed liability when defendant has admitted respondeat superior liability.”) (internal citations omitted).

From the plaintiff's point of view, the punitive damages exception is certainly preferable. While the rule may not allow for negligent entrustment claims where respondeat superior liability is admitted, the exception would allow for reckless entrustment claims.¹¹⁴

Of those jurisdictions that do recognize a punitive damages exception, some invite plaintiffs to make a proffer of the evidence that would entitle them to submit their claims for punitive damages.¹¹⁵ But states have different standards regarding the degree of negligent conduct that is required to request punitive damages.¹¹⁶ In those states that have a relatively high bar for pleading punitive damages, the exception will only come into play in "the most extraordinary cases."¹¹⁷ In those states that have a low bar (or no bar at all), the exception may very well apply in almost every case where the rule is implicated, thereby swallowing the rule.¹¹⁸

Far more troubling than jurisdictions where there is a punitive damages exception, however, are those that employ the rule and do not recognize an exception for punitive damages.¹¹⁹ By not recognizing the exception, courts have declared that employers are completely insulated from liability for their own conduct, regardless of how egregious it may be.¹²⁰ In these jurisdictions, once an employer admits to respondeat superior liability, the employer's wanton disregard, willful misconduct, malice, or conscious indifference become untouchable.¹²¹ This is unjust and antithetical to the very purpose of punitive damages.¹²² In an Arkansas Supreme Court decision upholding the rule and failing to recognize the punitive damages exception, the dissenting justices noted:

The result reached here cannot be justified by the argument that a plaintiff cannot complain if he is compensated for all the damages caused by an

114. See, e.g., *Scroggins*, 98 F. Supp. 2d at 931; *Clooney*, 352 So. 2d at 1220; *Estate of Arington*, 578 S.W.2d at 178–79.

115. See, e.g., *Scroggins*, 98 F. Supp. 2d at 931–33 & n.4.

116. See *infra* notes 117–118.

117. *Scroggins*, 98 F. Supp. 2d at 933; see also *Durben v. Am. Materials, Inc.*, 503 S.E.2d 618, 620 (Ga. Ct. App. 1998) (holding gross negligence insufficient as a matter of law to support a triable claim for punitive damages).

118. See, e.g., *James v. Kelly Trucking Co.*, 661 S.E.2d 329, 332 (S.C. 2008); see also *Porter v. Erickson Transp. Corp.*, 851 S.W.2d 725, 745 (Mo. Ct. App. 1993) ("[The] lack of proper training or qualifications on the part of an employee to perform an assigned task is evidence which tends to support submission of punitive damages . . .").

119. See, e.g., *Connelly v. H.O. Wolding, Inc.*, No. 06-5129-CV-SW-FJG, 2007 WL 679885, at *2 (W.D. Mo. Mar. 1, 2007); *Hood v. Dealers Transp. Co.*, 459 F. Supp. 684, 686 (N.D. Miss. 1978); *Elrod v. G & R Constr. Co.*, 628 S.W.2d 17, 18–19 (Ark. 1982); *Rodgers v. McFarland*, 402 S.W.2d 208, 210–11 (Tex. Civ. App. 1966).

120. See, e.g., *Willis v. Hill*, 159 S.E.2d 145, 165–66 (Ga. Ct. App. 1967) (Hall, J., dissenting) *rev'd on other grounds*, 161 S.E.2d 281 (Ga. 1968).

121. See, e.g., *Elrod*, 628 S.W.2d at 20–21 (Hays, J., concurring and dissenting) ("[N]o matter how culpable the conduct of one who entrusts to another the means of injury to third persons, such entruster cannot incur direct liability for punitive damages and can prevent evidence of wanton misconduct from being considered by the jury by the simple expediency of admitting agency . . .").

122. See *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266–67 (1981).

employee, including punitive damages, for willful and wanton misconduct. The error of that lies in the rationale for punitive damages: such damages are recoverable in appropriate cases not to compensate the injured party but to exemplify the conduct of the wrongdoer. The purpose is to deter others from like conduct.¹²³

Furthermore, punitive damages punish the “creation of an unwarranted risk, not the actual harm that results from the risk.”¹²⁴ Some courts upholding the rule emphasize the fact that the plaintiff’s negligence claim against the employer is dependent upon the employee’s injurious act.¹²⁵ That may be the case, but punitive damages are intended to address the potential but unrealized harm to the victim and others.¹²⁶ In other words, “punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant’s conduct as well as to the harm that actually has occurred.”¹²⁷ An employer’s recklessness may result in actual injury to very few people, but the potential harm and the unwarranted risk created by the reckless employer is often enormous. It may very well be worth it for companies to skimp on background checks and allow incompetent drivers behind the wheel so long as the companies can be held only vicariously responsible for their employees’ negligence.¹²⁸ Courts that apply the rule and fail to recognize the exception disregard the crucial function of punitive damages. Where the rule is in effect, it is clear that the punitive damages exception is necessary, but the exception is far from an adequate solution.

V. ALTERNATIVES TO THE RULE

The rule is antiquated and never would have originated had it not been for the practicalities of employer liability under contributory negligence regimes. In fact, it is difficult to argue that the rule is anything but an overreaction to potentially prejudicial evidence. Unfortunately, the overreaction is itself prejudicial to plaintiffs’ valid claims. Courts already have tools at their disposal that they can use to mitigate the effects of evidence that a jury might misunderstand or misapply; there is no need to deprive a plaintiff of a valid claim. Below are three specific alternatives to the rule—from least to most effective—that courts could implement.

First, and perhaps most obviously, some defendants might be entitled to a jury instruction that particular evidence—a driving record, for example—should not be considered in determining the nature of the employee’s

123. *Elrod*, 628 S.W.2d at 20.

124. *Ayala v. Washington*, 679 A.2d 1057, 1069 (D.C. 1996) (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 459–60 (1993)).

125. *See, e.g., Willis*, 159 S.E.2d at 164–65.

126. *See TXO Prod. Corp.*, 509 U.S. at 460.

127. *Games v. Fleming Landfill, Inc.*, 413 S.E.2d 897, 904 (W. Va. 1991) (citing *Green Oil Co. v. Hornsby*, 539 So. 2d 218, 222 (Ala. 1989)).

128. Scott Beal, *Saving Negligent Entrustment Claims*, TRIAL, February 2007, at 34, 37.

conduct at the time of the accident.¹²⁹ While courts presume that juries appreciate, understand, and act upon their instructions,¹³⁰ an instruction of this sort is easily ignored.¹³¹ Even worse, an instruction may inadvertently encourage illegitimate propensity reasoning by focusing the jury's attention on the prejudicial evidence.¹³² While an instruction may be a good stopgap in the absence of a better alternative, this is not the ideal solution to the problem.

Second, courts could require special verdicts or answers to interrogatories from the jury.¹³³ For example, a court could ask the jury whether Paula Plaintiff had established that Ernie Employee was negligent on the occasion in question, and whether that negligence was a proximate cause of Paula Plaintiff's injuries. Arguably, "a jury will be less inclined to let evidence of the driver's reckless character influence its decision concerning the driver's negligence if it must decide each issue separately than if requested to respect limiting instructions in returning a general verdict."¹³⁴ If the jury's answers are inconsistent with each other or with the verdict, the judge may "direct the jury to further consider its answers and verdict,"¹³⁵ or "order a new trial."¹³⁶

Third, the Federal Rules of Civil Procedure and most states' procedural rules allow courts to order separate trials "to avoid prejudice."¹³⁷ Under this trial procedure, plaintiffs "would first attempt to prove that the driver's negligence was the proximate cause of his injury. The jury would decide this issue without having heard evidence of the driver's reckless character."¹³⁸ If the driver is found non-negligent, the case would be over because the negligence of the employee is almost certainly a necessary proximate cause ingredient for plaintiff's negligent entrustment claim.¹³⁹ If the driver is found

129. *Bruck v. Jim Walter Corp.*, 470 So. 2d 1141, 1145 (Ala. 1985) (citing *Lockett v. Bi-State Transit Auth.*, 445 N.E.2d 310, 314 (Ill. 1983)).

130. *See Hur v. City of Mesquite*, 893 S.W.2d 227, 231-32 (Tex. App. 1995) (citing *Duncan v. Smith*, 393 S.W.2d 798, 805 (Tex. 1965)).

131. *See Mincer*, *supra* note 14, at 264.

132. *See J. Alexander Tanford, The Law and Psychology of Jury Instructions*, 69 NEB. L. REV. 71, 96-99 (1990).

133. FED. R. CIV. P. 49.

134. *Blitz*, *supra* note 17, at 544. It is important to note that Blitz originally made his suggestions regarding special verdicts (and separate trials, *see infra* note 135 and accompanying text) to accommodate different interests within contributory negligence regimes. *See Blitz*, *supra* note 17, at 544 nn.30-31. While Blitz does not consider how these procedures might function in comparative negligence regimes, the requirement that fault be apportioned among all proximate causes actually provides a more compelling reason to adopt the procedures than the interests that he identifies.

135. FED. R. CIV. P. 49(b)(3)(B).

136. FED. R. CIV. P. 49(b)(3)(C).

137. Federal Rule of Civil Procedure 42(b) provides that, "[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims." FED. R. CIV. P. 42(b).

138. *Blitz*, *supra* note 17, at 545.

139. *See id.*

negligent, the plaintiff would be allowed to present her negligent entrustment claim “without delay and to the same jury.”¹⁴⁰ Only at this time will “evidence of the driver’s general recklessness, incompetence, or inexperience, and the defendant’s knowledge thereof . . . be admissible.”¹⁴¹ This method addresses the prejudice problems that are often cited as reasons for the rule, while protecting the plaintiff’s legitimate cause of action.¹⁴²

The bifurcated-trial approach would not significantly affect the length of trial time. Even in situations where a second trial is necessary, the “total time devoted to litigation should be no greater than if a single trial on all issues were had, provided there is no delay between trials.”¹⁴³ Unnecessary duplication of evidence is usually not a problem in these cases “because evidence of the driver’s negligence on the particular occasion in no way duplicates admissible evidence of entrustment, of the driver’s general recklessness, inexperience, or incompetence, or of the entrustor’s knowledge of the driver’s deficiencies.”¹⁴⁴

Interestingly, one majority rule court has recognized the merits of the bifurcated-trial approach when dealing with cases falling under the punitive damages exception.¹⁴⁵ Yet strangely, the court limited the severance option to those cases where the plaintiff can present evidence that would allow a reasonable juror to find that punitive damages are warranted.¹⁴⁶ The distinction is meritless. This is yet another opinion that fails to consider the potential implications of the addition of a tortfeasor. There is no reason that courts cannot employ this procedure in all cases that implicate the rule, whether or not plaintiffs seek punitive damages. This approach alleviates the danger of unfair prejudice: it allows plaintiffs to craft their own cases and pursue their valid claims, and it recognizes the relevance of the employer’s independent negligence in fault apportionment.

140. *Id.*

141. *Id.*

142. *See id.* (“If plaintiff’s only reason for insisting on his negligent entrustment theory is to introduce prejudicial evidence, he will not desire a second trial because he is already entitled to a verdict against defendant; if he cannot prove the entrustee’s negligence, he is not entitled to a second trial, whatever his motives.”). If courts adopt this method, they still need to account for ignorant intermediary situations. Courts should allow the plaintiff to proceed on to the second part of the trial, regardless of the fact that the employee is found to be non-negligent. *See supra* Section III.B.

143. Blitz, *supra* note 17, at 545–46.

144. *Id.* at 545.

145. *See Scroggins v. Yellow Freight Sys., Inc.*, 98 F. Supp. 2d 928, 933 (E.D. Tenn. 2000). Mincer maintains the same position. Mincer, *supra* note 14, at 263–64.

146. *Scroggins*, 98 F. Supp. 2d at 933. The court failed to explain why the separate trials procedure is warranted only where punitive damages are alleged. Some might argue that separate trials are justified in these situations because the higher stakes created by the potential imposition of punitive damages merits the extra time and effort required by the procedure. This is not likely, however, given that the approach would not significantly affect the length of trial. *See supra* notes 143–144. It is more likely that the decision to bifurcate in cases where punitive damages are alleged is the result of an uneasy compromise. That is, majority rule courts that are willing to allow negligent entrustment claims to survive if punitive damages are alleged may require bifurcation so that defendants will be protected from evidence that could be misunderstood as propensity evidence.

Beyond these specific alternatives, it is important to note that there is a significant difference between a case-by-case analysis that might call for excluding particular pieces of evidence and a general rule, broadly applied, that precludes a cause of action merely because potentially prejudicial evidence might be involved. In its decision to reject the majority rule, the South Carolina Supreme Court explained that its court system “relies on the trial court to determine when relevant evidence is inadmissible because its probative value is substantially outweighed by the danger of unfair prejudice.”¹⁴⁷ In its view, the argument that courts must resort to the drastic act of barring a plaintiff’s claim simply because it implicates potentially prejudicial evidence “gives impermissibly short-shrift to the trial court’s ability to judge the admission of evidence and to protect the integrity of trial.”¹⁴⁸ Regardless of the tools that a court might have available in a given case, the rule makes a court’s case-specific analysis largely irrelevant.

In those comparative negligence states unwilling to abandon it, the rule must, at the very least, be articulated as a prejudicial evidence rule that exempts ignorant intermediary situations and includes an exception for punitive damages. As part of a compromise position, courts might consider imposing the rule only in those situations where the defendant claims that the plaintiff contributed to her own injuries. Where the defendant does not claim that the plaintiff was contributorily negligent, imposition of the rule cannot affect plaintiff’s recovery (unless punitive damages accompany the additional negligence claims). The rule, in such situations, would not lead to an ideal result, but it would, at the very least, appropriately compensate the plaintiff. Additionally, it puts the ball in the employer’s court: an employer can avoid the negligent entrustment claim and its accompanying evidence so long as she does not allege negligence on the part of the plaintiff. Where, however, the defendant demands that the plaintiff’s negligence be considered, the employer’s negligence should be examined as well.

CONCLUSION

The respondeat superior admission rule should be abandoned. It is antithetical to the principles of comparative fault, it creates troubling inconsistencies, and it is unclear and unnecessary. One might be tempted to suggest that the majority’s continued adherence to the rule is simply the product of laying “insistence rather upon the origins of law than upon the ends it is to serve.”¹⁴⁹ But the problem is even more basic, as the proponents of the rule fail to consider its contributory negligence origins. Instead, the rule seems to continue to exist more as an effect of inertia than anything

147. *James v. Kelly Trucking Co.*, 661 S.E.2d 329, 331 (S.C. 2008); *see also* Powell, *supra* note 65, at 167 (“[S]ummary judgment proceedings, the frivolous claims rule and the Federal Rules of Evidence may be used to preclude insufficient or frivolous negligent entrustment claims and the accompanying prejudicial evidence.”).

148. *James*, 661 S.E.2d at 331.

149. Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 107 (1916).

else. Rote incantation, without an appreciation for the logic or original rationale behind the rule, has led to its unnecessary and unjust application. “the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.”¹⁵⁰

In those jurisdictions unwilling to recognize the vestigial nature of the majority rule, perhaps the best course of action for Paula Plaintiff is to proceed against Ernie employee on a negligence claim without a respondeat superior allegation, and against Ernie’s employer on a negligent entrustment claim. Ernie is likely insured as a permissive user and the respondeat superior allegation is probably unnecessary to guarantee that the damages will actually be recoverable. Could respondeat superior then become an actual affirmative defense? Could Ernie’s employer assert it, rather than admit it? The rationale of the rule currently offered by some majority rule jurisdictions seems to support an answer in the affirmative. This underscores the absurdity of the rule, seems intuitively troubling, and brings us back to where we started: the doctrine of respondeat superior was not created so that employers’ negligent conduct could be immunized.

150. O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 469 (1897).

