

Understanding the Tort of NEGLIGENT ENTRUSTMENT and Its Application Inside and Outside the Context of Alcohol Intoxication

By Michael Montgomery

In automobile accident litigation, the tort of negligent entrustment often accompanies a primary claim against the allegedly at-fault driver. The requisite elements to support a claim of negligent entrustment have been the subject of numerous opinions by South Carolina appellate courts. The majority of cases involve the factual scenario in which the driver of a vehicle causes injury to a third-party, and a claim is made against the owner, or someone in control of the vehicle, for entrusting the vehicle to the driver. The main issue addressed in these cases to date is the necessity of evidence of alcohol intoxication by the driver to whom the vehicle is entrusted. The purpose of this article is to review the development of the tort of negligent entrustment as it relates to automobile accidents, to examine its current status, and to consider

the unanswered questions in this area of litigation.

The beginnings of negligent entrustment and the legacy of Homer Whatley

Earlier cases involving entrustment of vehicles were analyzed under basic negligence principles with the focus on proximate cause. See *Tucker v. U.S.*, 385 F.Supp. 717, 722-723 (D. S.C. 1974).

The "modern" negligent entrustment cases can be traced back to *American Mutual Fire Insurance Company v. Passmore*, 275 S.C. 618, 274 S.E.2d 416 (1981). In *Passmore*, the S.C. Supreme Court stated that the theory of negligent entrustment provides "the owner or one in control of the vehicle and responsible for its use who is negligent in entrusting it to another can be held liable for such negligent entrustment." *Id.* at 621, 274 S.E.2d at 418

(citing 19 A.L.R.3d 1175, superseded by 91 A.L.R.5th 1, and *Bahn v. Dormanen*, 543 P.2d 379, 381 (Mont. 1975)). The opinion focused on the necessity of an insurable interest for liability insurance to apply, and the court held that an insurable interest would exist if one could be held liable for the vehicle's use. *Id.* The *Passmore* court ultimately determined that a negligent entrustment claim could not be supported against the alleged insured because he did not own or control the vehicle involved in the accident. *Id.*

Passmore has come to form the basis of the analysis in subsequent negligent entrustment cases involving automobiles. However, it is important to note that *Passmore* was a declaratory judgment action to resolve insurance coverage disputes among potential insurers with respect to an automobile accident, and the court simply acknowledged

the "theory" of negligent entrustment. The court did not indicate the factual basis for an underlying claim of negligent entrustment; in fact, the opinion implies that entrustment was not an issue at all. The only elements cited for negligent entrustment were ownership, control and responsibility for the use of the vehicle. *Passmore*, 275 S.C. at 621, 274 S.E.2d at 418.

The next negligent entrustment case was *McAllister v. Graham*, 287 S.C. 455, 458, 339 S.E.2d 154, 156 (Ct. App. 1986). In *McAllister*, an employee furnished with a company truck was involved in an automobile accident while he was off duty and driving under the influence of alcohol. The only evidence asserted to support a cause of action for negligent entrustment against the employer was the fact that the employee had been previously convicted for driving under the influence approximately nine years before the accident.

The S.C. Court of Appeals cited *Passmore* in setting forth, for the first time, the following elements for a negligent entrustment cause of action: (1) knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking; (2) that the owner knew or had imputable knowledge that the driver was likely to drive while intoxicated; and (3) under these circumstances, the entrustment of a vehicle by the owner to such a driver. *McAllister*, 287 S.C. at 458, 339 S.E.2d at 156. The *McAllister* court held the employee's prior DUI conviction was too remote in time to meet the test and that the employer did not have the knowledge required under the first two elements.

When listing the above elements for negligent entrustment, the *McAllister* court also cited *Nettles v. Your Ice Company*, 191 S.C. 429, 4 S.E.2d 797 (1939). The *Nettles* opinion tells the interesting story of Homer P. Whatley, whose impact on the tort of negligent entrustment is far-reaching, as his actions form the basis for the first two elements of the *McAllister* test. Whatley was a truck driver

employed by "Your Ice Company," where he worked with the plaintiff, Nettles. On a fateful night in 1935, Nettles accompanied Whatley on some evening deliveries. Early in the evening, Whatley bought and began drinking a pint of whiskey. (The court's opinion also reported that "after some persuasion Nettles took a little drink.") By the time they finished their deliveries, Whatley had picked up two additional co-workers. Over Nettles' constant objections, Whatley took the group in the company truck to dance-hall establishments called "Good Time Charlie's" and "Little Italy." The court's opinion gives a highly detailed account of the evening, including the fact that Nettles did not dance or drink at Good Time Charlie's and that Nettles refused to go inside Little Italy. After leaving Little Italy, Whatley drove off the road and the vehicle overturned, which resulted in Nettles having his arm partially amputated.

Nettles' claim against Your Ice Company was based upon the act of entrusting the company vehicle to Whatley, "whom [Your Ice Company] allegedly knew partook frequently of intoxicating liquors to excess...." *Nettles*, 191 S.C.4 S.E.2d at 798-799. Moreover, Nettles presented evidence that Whatley had been fired before the accident for frequently being drunk at work and then rehired as a truck driver less than a month before the accident. Accordingly, the court in *Nettles* held that there was evidence to support a verdict against Your Ice Company based on its own conduct of entrusting a vehicle to Homer Whatley. Another interesting tidbit from the *Nettles* case is that the opinion does not cite one single case, making the background for the court's reasoning difficult to trace.

The *McAllister* court took the habitual drunkenness theme related to Homer Whatley in *Nettles*, combined it with the theory espoused in *Passmore*, and the end result is the current test for negligent entrustment cases involving use of an automobile by an intoxicated driver.

The evolution of negligent entrustment and the Restatement (Second) of Torts

The test set forth in *McAllister* was cited with approval in *Jackson v. Price*, 288 S.C. 377, 342 S.E.2d 628 (Ct. App. 1986). In *Jackson*, the plaintiff's decedent was killed when his vehicle was struck by a vehicle driven by Price, and he brought an action against Price and the owner of the vehicle, Davis, who was a passenger with Price at the time of the accident. Price also died as a result of the collision, and Davis testified he let Price drive despite the fact that Price drank "two or three beers in the hour or so preceding the collision." *Id.* at 380, 342 S.E.2d at 630. After applying the *McAllister* test, the court upheld the jury verdict against Davis because he allowed Price to drive even though Price had consumed three beers within an hour and a half of the accident.

The *Jackson* opinion is somewhat inconsistent due to the fact that Davis' negligent conduct—entrusting the car to Price after Price drank three beers in 90 minutes—does not exactly meet the *McAllister* test. Again, the elements of negligent entrustment following *McAllister* were: (1) knowledge that the driver was either addicted to intoxicants or had the habit of drinking; (2) that the owner knew that the driver was likely to drive while intoxicated; and (3) under these circumstances, the entrustment of a vehicle by the owner to such a driver. Although *McAllister* indicated that all three elements had to be present, there was no evidence presented in *Jackson* that Davis met the first requirement, knowledge of habitual use of intoxicants by Price. After *Jackson*, it appeared that entrustment of a vehicle to someone who was intoxicated at the time of entrustment would be enough to satisfy the *McAllister* test.

Matters were further complicated following the decision of *Lydia v. Horton*, 343 S.C. 376, 540 S.E.2d 102 (Ct. App. 2000). This case involved a first-party claim for negligent entrustment following a single-car

accident. The driver, Lydia, brought an action against the owner of the vehicle, Horton, for negligently entrusting Horton's vehicle to Lydia when Horton knew Lydia was incompetent to drive by reason of his intoxication. Lydia lost control of the vehicle and struck a tree, leaving him a quadriplegic. The trial court granted Horton's motion to dismiss, holding that although Lydia pled the proper elements for negligent entrustment, any recovery would be barred by comparative negligence and by public policy.

The Court of Appeals discussed the history of negligent entrustment in automobile accident cases, citing *McAllister*, *Jackson* and *Passmore*. The court also examined similar cases that used the same rationale in finding liability where vehicles were not involved; in those cases, some other instrumentality was allegedly negligently entrusted to someone. See, e.g., *Howell v. Hairston*, 261 S.C. 292, 199 S.E.2d 766 (1973) (entrustment of an air rifle to a minor); *Dennis by Evans v. Timmons*, 313 S.C. 338, 437 S.E.2d 138 (Ct. App. 1993) (entrust-

ment of a screwdriver to a minor). After reviewing these cases, the court in *Lydia* adopted the Restatement (Second) of Torts §§ 308 and 390 (1965) as the appropriate standard for negligent entrustment, holding that the Restatement was "a correct statement of the amalgamation of cases decided in South Carolina under various theories of law including: (1) 'negligent entrustment' under *Jackson, supra*; and (2) negligence under *Howell, supra*." *Lydia*, 343 S.C. at 385, 540 S.E.2d at 107.

Sections 308 and 390 of the Restatement are to be read together, with the rule stated in section 390 serving as a "special application" of the rule stated in section 308. RESTATEMENT (SECOND) OF TORTS § 390 cmt. b (1965). Section 308 provides:

It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is

likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

Section 390 provides:

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 resulting to them.

After discussion of the Restatement, the *Lydia* court acknowledged that under section 390, the tort of negligent entrustment encompassed more than an intoxicated driver being given keys to an automobile, and negligent

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entrustment "embraced" a legally incompetent individual entrusted with an automobile who thereafter is involved in an accident. *Lydia*, 343 S.C. at 387, 540 S.E.2d at 108. Thus, the Court of Appeals expanded the cause of action for negligent entrustment to include entrustment of a vehicle to someone likely to use the vehicle in a manner as to create an unreasonable risk of harm.

The Court of Appeals' opinion in *Lydia* with regard to the elements of negligent entrustment should be read in context of the second, and arguably more important, issue in that case. In determining whether a first-party cause of action could be brought for negligent entrustment, the Court of Appeals reversed the trial court and held that a first party claim for negligent entrustment could proceed. In supporting its holding on this issue, the *Lydia* court acknowledged that other jurisdictions had recognized first-party actions for negligent entrustment, but these jurisdictions relied in some manner upon section 390 of the Restatement.

However, the S.C. Supreme Court granted certiorari and reversed the Court of Appeals in *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003). In its decision, the Supreme Court relied exclusively on public policy considerations regarding the relationship between comparative negligence and a first-party action for negligent entrustment. Although the Supreme Court did not address the required elements of a negligent entrustment action, it expressly declined to adopt Sections 308 and 390 of the Restatement based on the set of facts present in *Lydia*.

Several years after the Supreme Court's decision in *Lydia*, the Court of Appeals was faced with a third-party negligent entrustment claim by a passenger in a vehicle against the employer/owner of the vehicle, ECO, who had allegedly entrusted the vehicle to an irresponsible employee, Joseph Jenkins, who in turn entrusted the vehicle to a driver, John Jenkins, who caused the accident. In this case, *Gadson ex rel. Gadson v. ECO Servs. of S.C., Inc.*,

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Op. No. 2005-UP-130, (S.C. Ct. App. filed Feb. 18, 2005), the court again adopted section 308 of the Restatement (Second) of Torts to analyze the negligent entrustment claims against both the employer/owner and the employee, differentiating the case from *Lydia* on the grounds that *Lydia* involved a first-party claim.

In essence, there were two negligent entrustment claims in *Gadson*. Using section 308 as the standard, the first claim against ECO was held to be unsupported by the evidence. The basis for the cause of action against ECO was that it knew that its employee, Joseph Jenkins, was irresponsible, had a spotty work history and would likely cause harm to third parties with the company truck. The Court of Appeals concluded no evidence existed ECO knew that Joseph Jenkins was likely to drive the truck recklessly or that ECO knew Joseph Jenkins was likely to entrust the truck to someone else who would drive it recklessly.

As for the separate claim against Joseph Jenkins for entrusting the

vehicle to John Jenkins, the Court of Appeals upheld the verdict against Joseph Jenkins. The court concluded there was sufficient evidence Joseph Jenkins knew or should have known that John Jenkins' use of the vehicle was likely to cause harm because John Jenkins had been drinking alcoholic beverages—at most, two wine coolers—and because as cousins, Joseph knew of John's character.

The S.C. Supreme Court granted certiorari to review the Court of Appeals' unpublished decision in *Gadson* but limited its review to the negligent entrustment claim against Joseph Jenkins. In *Gadson ex rel. Gadson v. ECO Services of South Carolina, Inc.*, 374 S.C. 171, 648 S.E.2d 585 (2007), the Supreme Court again expressly declined to adopt sections 308 and 390 of the Restatement (Second) of Torts when analyzing a negligent entrustment claim, and the Court addressed the issue using the elements set forth in *Jackson*. *Id.* at 176-77, 648 S.E.2d at 588. Under the criteria articulated in *McAllister* and *Jackson*, the Supreme

Court held that plaintiff could not meet the first element of negligent entrustment that there be knowledge the driver was either addicted to intoxicants or had the habit of drinking. *Id.* at 177-78, 648 S.E.2d at 589-589.

Interestingly, there was evidence in *Gadson* that John Jenkins, the at-fault driver, had consumed two wine coolers prior to driving. However, the Supreme Court clarified, "[k]nowledge that a driver has had a drink or two is a far cry from meeting the first element of negligent entrustment that there be knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking." *Gadson*, 374 S.C. at 177, 648 S.E.2d at 589-590. This conclusion stands in contrast to *Jackson*, where the test was met despite only evidence of consumption of several beers. Furthermore, the Supreme Court in *Gadson* highlighted the lack of evidence that Joseph Jenkins knew of John Jenkins' driving record or general behavior. If the court was truly limit-

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ing its analysis to the *McAllister* test, instead of the broader test in Section 308 of the Restatement, it would seem unnecessary to address any factors beyond addiction to intoxicants or habitual use of alcohol.

The importance of the Supreme Court's decision in *Gadson* is that it confirmed the court's unwillingness to adopt sections 308 and 390 of the Restatement (Second) of Torts in automobile accident cases involving negligent entrustment and alcohol intoxication. Additionally, it reaffirmed the *McAllister* test as the criteria to determine negligent entrustment in cases involving intoxicated drivers. However, it should be noted that of the five current members of the S.C. Supreme Court, three justices have previously approved adoption of sections 308 and 390 in this context. Justice Pleicones authored a concurring opinion in *Gadson* advocating adoption of these sections to eliminate the loophole in situations where a person permitted an individual to drive an automobile with knowledge that the driver was

intoxicated, which may not always meet the *McAllister* test. Justice Beatty and Justice Kittredge were members of the three-judge *per curiam* panel on the Court of Appeals' unpublished opinion in *Gadson* that adopted the Restatement for the second time.

Additionally, Justice Hearn authored the Court of Appeals' opinion in *Jones v. Enterprise Leasing Company Southeast*, 383 S.C. 259, 678 S.E.2d 819 (Ct. App. 2009), which was the most recent negligent entrustment claim addressed by the court. In *Jones*, the issue of alcohol intoxication was not the basis of the plaintiff's negligent entrustment claim, and although the court acknowledged that neither party asked the court to adopt sections 308 and 390 for the third time, the opinion indicated that the court would consider adopting sections 308 and 390 in situations not involving an intoxicated driver. However, the court in *Jones* decided the case on an element necessary to any test for negligent entrustment, namely the requirement that the

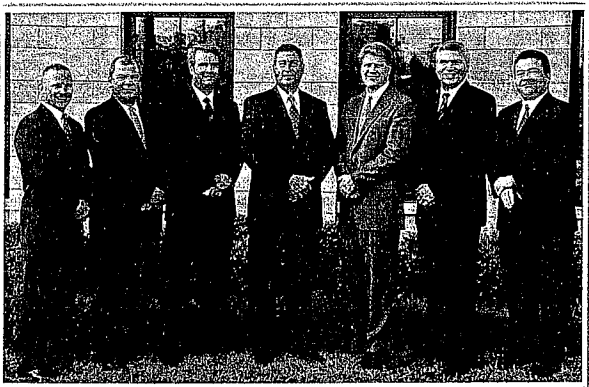
alleged entrustor had ownership or control of the vehicle.

What comes next and why it is important

Perhaps the biggest unanswered question is whether the tort of negligent entrustment is limited to situations involving intoxicated drivers. If negligent entrustment can be applied in other contexts, what would the standard be? The Supreme Court's unwillingness to adopt the Restatement in cases involving alcohol intoxication places a higher burden on injured parties to recover against the entrustor for potentially egregious conduct. In other words, the Homer Whatley rule remains in effect. If courts will not relax the standard for alcohol-related accidents, why would it do so for situations where the owner entrusts a vehicle to a driver with multiple speeding tickets?

The Court of Appeals' latest opinion in *Jones* seems to concede that case law in South Carolina requires an "element of drinking" for the tort of negligent entrust-

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ment. Jones, 383 S.Cld. at 265, 678 S.E.2d at 822. The basis for the negligent entrustment claim in *Jones* focused on the dismal driving record of the driver of the at-fault vehicle, who had rented a vehicle from one of the defendants. Again, the *Jones* court recognized that sections 308 and 390 of the Restatement would extend the applicability of negligent entrustment to situations that do not involve alcohol, but the court ultimately concluded that the issue could be decided without resorting to the Restatement.

On the other hand, in a recent U.S. District Court case, *Becker v. Estes Express Lines, Inc.*, 2008 WL 701388 (D. S.C. 2008) (unreported), the court denied the defendant's motion for summary judgment on a negligent entrustment claim, despite the fact that the plaintiff's claim did not involve an element of alcohol intoxication. In *Becker*, the court allowed the plaintiff's negligent entrustment claim to proceed, which was based on the allegation that the defendant

employer had knowledge of the employee's medical condition that made the employee prone to fainting or dizzying spells while driving. The court ultimately held that the S.C. Supreme Court's opinion in *Gadson*, which reaffirmed the *McAllister* factors, was limited to cases involving an intoxicated driver. However, the opinion in *Becker* does not specify what the test for negligent entrustment would be in that case, as it only cites the "theory" of negligent entrustment set forth in *Passmore* and does not consider the Restatement.

Answering these questions when bringing or defending negligent entrustment claims in the employer-employee context is especially important following the S.C. Supreme Court's decision in *James v. Kelly Trucking Co., Inc.*, 377 S.C. 628, 661 S.E.2d 329 (2008). In *James*, the court held the plaintiff in a civil case may maintain causes of action against an employer for negligent hiring, supervision, entrustment, etc. in situations where the employer has admitted vicarious liability.

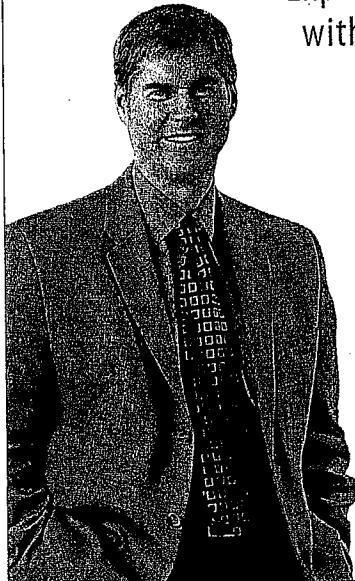
Thus, a plaintiff has potential evidentiary advantages of pursuing independent causes of action against the employer while also proceeding under a theory of respondeat superior.

In conclusion, the current status of negligent entrustment in cases involving intoxicated drivers appears to be settled, as the Supreme Court has maintained a high standard for recovery in this area. In other contexts, it remains to be seen whether the broader standard of sections 308 and 390 of the Restatement (Second) of Torts will ever prevail. Given the uncertainty surrounding the tort of negligent entrustment in situations not involving intoxicated drivers, it appears that the stakes are now high enough for parties in these kinds of cases to persist until the questions are answered.

Michael Montgomery is an associate at Sowell Gray Stepp & Laffitte in Columbia, where he handles personal injury, construction and general litigation matters.


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