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Feature Article

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Neuhengen Decision Increases Specter for Recovery of Punitive Damages from Less than Diligent Defendant Employers

A recent ruling by the Illinois Appellate Court First District promises to roil the waters for employers, increasing their responsibility for negligent acts of their employees AND expanding monetary exposure.

Typically, in auto accident litigation involving a driver employed by a commercial defendant, the plaintiff does not expect to actually recover from the driver, but rather, from the "deep-pockets" corporate defendant that employed the driver. Increasingly, however, plaintiffs have been resorting to another form of liability claim against the employer—an imputed (or "derivative") theory of liability as a direct action against the employer. In many of these cases, the plaintiffs attempt to bolster their theory (*e.g*., negligent entrustment, supervision, hiring, retention) by bringing in collateral evidence against the employer to prove one of their theories. Often times, the facts presented come in the form of inflammatory evidence regarding the driver's employment history and prior driving record that is alleged to be connected to the accident. This type of evidence can cause significant prejudice to a defendant and its employer at trial.

The *Neuhengen* Case—Expanding Defendants' Exposure

Neuhengen v. Global Experience Specialists, Inc., 2018 IL App (1st) 160322, arose from a 2012 incident at McCormick Place in Chicago. The plaintiff, Thomas Neuhengen, was working at a trade show when he was severely injured when a 58,000-pound forklift ran over his foot. *Neuhengen*, 2018 IL App (1st) 160322, ¶ 5. The forklift was driven by defendant, Frederick Neirinckx, an employee of defendant, Global Experience Specialists, Inc. (GES). *Id*.

Defendants' Strategy & Trial

Neuhengen proceeded to trial on three claims: negligence against both Neirinckx and GES based on Neirinckx's actions, willful and wanton conduct against Neirinckx, and willful and wanton conduct against GES. *Id.* ¶ 8. The willful and wanton allegations against GES were based upon Neirinckx's conduct as well as GES's own conduct for failing to have a three-person crew, failing to implement a procedure to check certifications of forklift operators, and failing to ensure that Neirinckx was trained in the operation of the Versa Lift. *Id*.

Prior to the jury trial, Neirinckx admitted his negligence, and GES admitted negligence under the *respondeat superior* doctrine. *Id.* ¶ 7. GES further admitted that if Neirinckx's conduct was found to be willful and wanton, GES admitted its *respondeat superior* liability, hoping to extinguish those claims based on admission of agency. *Id*. In other words, GES argued the willful and wanton conduct claims became duplicative and the admission of agency liability thereby eliminates all claims of corporate misconduct. *Id*. After arguments, the trial court only dismissed the claims based on negligence and the willful and wanton conduct claims were submitted to the jury. *Id.* ¶¶ 76-77.

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Verdict & Appeal

Following the trial, the jury awarded the plaintiff a little more than $12 million in compensatory damages on the negligence claims and $3 million in punitive damages after finding GES's conduct to be willful and wanton in a special interrogatory. *Id.* ¶¶ 70-72. The jury found that Neirinckx's conduct was not willful and wanton in a special interrogatory. *Id.* ¶ 71. The defendants filed a post-trial motion raising multiple claims, including a motion for a new trial and a request for judgment notwithstanding the verdict (JNOV) on the $3 million punitive damages award against GES. *Id.* ¶ 73. The trial court granted the defendants' motion for a JNOV on the punitive damages award, finding that the plaintiff failed to prove GES's willful and wanton conduct proximately caused plaintiff's injury. *Id.* ¶ 74.

The defendants appealed, and plaintiff filed a cross-appeal. *Id.* ¶ 131. In their appeal, the defendants argued that the trial court abused its discretion in denying their motion for a new trial because they were deprived of a fair trial when the trial court failed to dismiss the count against GES alleging willful and wanton conduct after GES admitted its *respondeat superior* liability for Neirinckx's conduct. *Id.* ¶¶ 126-127. The plaintiff's argument on appeal was that the trial court erred in granting defendants 'motion for a JNOV on the jury's verdict that GES's conduct was willful and wanton and striking the punitive damages award. *Id.* ¶ 131.

Ultimately, the appellate court found that there was sufficient evidence to support the jury's award of willful and wanton conduct on behalf of GES and that it proximately caused Neuhengen's injuries, thereby reinstating the award of punitive damages. *Id.* ¶¶ 136-49. The court also ruled that a stipulation by an employer to its employee's negligent conduct does not eliminate the employer's liability for its own willful and wanton conduct, as they are two different causes of action and damages for each serve two different purposes. *Id.* ¶ 123. Compensatory damages serve to make the plaintiff whole, whereas punitive damages are specifically reserved for punishment for gross misconduct. *Id.* ¶ 124.

Best Practices & Things to Consider in Light of *Neuhengen*

The First District's opinion sends an ominous message to employers that they best be mindful of their employment procedures. Plaintiffs will undoubtedly rely on this opinion to substantiate willful and wanton claims against an employer simply on allegations which would properly fall under the negligence umbrella. This is, of course, contingent on the plaintiff's successful hearing pursuant to 735 ILCS 5/2-604.1 to amend the complaint to add a prayer for the recovery of punitive damages. This leaves the sole decision of whether or not a jury should hear such evidence in the hands of the judge. As seen in *Neuhengen*, the admission of such evidence may depend on the severity of the injury, *even if* the underlying corporate conduct is simply negligent.

Litigants should be wary of any direct counts in a plaintiff's complaint against an employer-corporation. To avoid the requirements for pleading and proving willful and wanton conduct, a plaintiff may attempt to bring direct liability claims against the employer couched in various theories such as negligent training and supervision. These claims *appear* to be different from those of negligent entrustment. However, Illinois law has interpreted all of these imputed liability claims as being the same. *See Gant v. LU Transp., Inc.*, 331 Ill. App. 3d 924, 263-64 (1st Dist. 2002) ("a plaintiff . . . cannot maintain a claim for negligent hiring, negligent retention or negligent entrustment against an employer where the employer admits responsibility for the conduct of the employee under a *respondeat superior* theory"); *see also Gilliam-Nault v. Midvest Transp. Corp.*, No. 18-CV-4991, 2019 WL 2208287, at *2 (N.D. Ill. May 22, 2019) ("[C]ourts in this district have consistently extended *Gant*'s holding to claims asserting negligent training and supervision as well.") (citing

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Meyer v. A & A Logistics, Inc., No. 13-CV-0225, 2014 WL 3687313, at *3 (N.D. Ill. July 24, 2014)). Thus, litigants need be diligent in evaluating these claims before trial.

Ensuring best practices are being followed needs to be a continuous process; waiting until a lawsuit is filed to examine a company's practices is too little, too late, by every measure. It is highly recommended that corporations of all sizes frequently engage experienced counsel to examine employment practices and safety protocols in an effort to mitigate and eliminate employment-related risks. Issues for counsel to examine include:

Employee Background Checks and Records

- How extensive of a background check is necessary before an employer is comfortable with a potential new employee?
- How much of a blemished record will be acceptable?

Prior Incidents and OSHA Violations

- For current employees, how much latitude should an otherwise strong employee receive if they make a mistake?
- What constitutes an offense that will result in termination?
- If a policy is in writing, ensure it is followed at all costs. If not followed, prepare to have an explanation in the employee personnel file.
- Reasonable case value could be significantly increased based on a prior incident which may not even be reportable offense, but merely a stringent internal company policy.
- In cases of incidents/accidents/infractions, ensure there is documentation of coaching/improvement on the company's behalf instead of nothing. The company needs to take affirmative steps to justify retention of employee.

Record Keeping

- How should companies keep and maintain employment files?
- How should companies maintain records of prior OSHA citations and abatement?
- Record retention policy; if there is one, ensure it is followed and in compliance with any applicable state and federal laws. Once a policy is implemented, ensure consistent compliance.

How much training/education is necessary?

- Ensure all employee licensures/credentials/certifications are legally proper and up to date.
- Perform federal and state minimum background checks.
- Develop and implement policies for hiring and retention of employees.
- Develop and implement policies to re-educate and take steps to remedy conduct as opposed to remaining stagnant until another incident.
- Develop and implement policies resulting in termination and ensure they are followed.

According to the *Neuhengen* court, a retrospective view that analyzes a corporation's conduct only through the lens of an accident that has not yet happened is the sieve through which willful and wanton conduct should be funneled. In the corporate world, this is not an acceptable way to operate comfortably. Corporations should have reasonable guidance about what to expect when these situations arise.

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About the Author

David A. Warnick is a trial attorney at *Johnson & Bell, Ltd.* handling a wide spectrum of matters in litigation ranging from healthcare to products liability, but his primary practice is on transportation litigation and all its intricacies. Mr. Warnick formerly practiced as a plaintiff's attorney which he believes has been a significant benefit to developing his skill-set. Mr. Warnick typically represents primary/excess insurers, trucking companies, a variety of different types of business owners, and healthcare providers in all aspects of litigation in both state and federal courts throughout Illinois. Mr. Warnick thoroughly enjoys being a trial lawyer and finding creative ways to fulfill differing client needs.

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