

SHEFFER V. CAROLINA FORGE CO.:
LESSENING THE PLAINTIFF'S BURDEN IN
COMMON LAW CLAIMS

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I. INTRODUCTION

Negligent entrustment and respondeat superior claims are two long-held common law actions available to plaintiffs who have been wronged and seek to become whole again. Both claims impose liability on one for harm done by another. In *Sheffer v. Carolina Forge Co.*, the Supreme Court of Oklahoma held that an employer's knowledge of its employee's propensity to act in a certain way is sufficient to establish knowledge in a negligent entrustment claim.¹ The Court then held that in a respondeat superior claim, the jury must consider the totality of circumstances to establish the scope and course of employment for employees whose discretion in completing their employment is unfettered.²

This Comment begins with a historical perspective regarding a plaintiff's burden of proof in establishing claims of negligent entrustment and respondeat superior. Next, this Comment will discuss the facts, procedural posture, and opinion of the *Sheffer* case. Finally, this Comment will explain how the Court incorrectly determined the knowledge element of negligent entrustment and answer the question of how to establish the scope and course of employment for employees who have unfettered discretion in executing their employment.

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1. *Sheffer v. Carolina Forge Co.*, 2013 OK 48, ¶ 12, 306 P.3d 544, 548.

2. *Id.*

II. HISTORICAL PERSPECTIVE

A. Vehicular Negligent Entrustment Liability

Negligent entrustment is a claim actionable through common law.³ In Oklahoma, the claim is viable when a vehicle is entrusted to another person despite the owner of the vehicle having knowledge, or a reasonable expectation of knowledge, that the entrusted driver is reckless and, due to the vehicle entrustment, injury results.⁴ In 2003, the Court in *Green v. Harris* reiterated that the plaintiff bears the burden of proof in a negligent entrustment case.⁵ This burden has three elements: first, “a person who owns or has possession and control of an automobile allows another driver to operate the automobile”; second, “the person knows or reasonably should know that the other driver is careless, reckless[,] and incompetent”; third, “an injury results therefrom.”⁶ The Court stated the policy behind the elements of control over the entrusted chattel:

3. See *Berg v. Bryant*, 305 P.2d 517, 519 (Okla. 1956) (“[t]his rule of law, existing independent of statute”).

4. *Sheffer*, 2013 OK 48, ¶ 12, 306 P.3d at 548 (citing *Green v. Harris*, 2003 OK 55, ¶ 10, 70 P.2d 866, 868). See also *Berg*, 305 P.2d at 519 (“The liability of one who knowingly permits a careless, reckless, or otherwise incompetent driver to operate his [vehicle], for damages resulting therefrom is recognized in this jurisdiction.”) (citing *Coker v. Moose*, 68 P.2d 504, 505 (Okla. 1937)).

5. *Green*, 2003 OK 55, ¶ 23, 70 P.3d 866, at 871.

6. *Id.* ¶ 10, 70 P.3d at 868. *Green* relies largely upon § 308 of the *Restatement (Second) of Torts*, which 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.

Id. ¶ 10 n.5, 70 P.3d at 868 n.5 (citing RESTATEMENT (SECOND) OF TORTS § 308 (1965)). Additionally, the Court relied on § 390, which 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.

Id. (citing RESTATEMENT (SECOND) OF TORTS § 390 (1965)).

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“The rationale underlying imposition of negligent entrustment liability on suppliers of chattels is that one has a duty *not to supply* a chattel to another who is likely to misuse it in a manner causing unreasonable risk of physical harm to the trustee or others.” . . . Control at the time the automobile is supplied—the initial moment of entrustment—determines a supplier’s negligence.⁷

Under the element of foreseeability, the unreasonable risk of bodily harm to others “does not arise out of the relationship of the parties, but from the act of entrustment.”⁸ In cases dealing with intoxication, Oklahoma “has long held that intoxication and the ‘propensity for becoming intoxicated’ can result in liability for the supplier of the automobile if the supplier knows or has reason to know of such intoxication or propensity for becoming intoxicated.”⁹ Today, Oklahoma courts may refer juries to Oklahoma Uniform Jury Instruction (OUJI) 10.16 to determine liability for negligent entrustment.¹⁰

B. Respondeat Superior Liability

Respondeat superior is “Latin [for] ‘let the superior make answer.’”¹¹ The policy behind the doctrine of respondeat superior is to deter tortious conduct, to ensure victims will be compensated for the harm acted upon them, and finally, because employers have the right to control the conduct of their employee and, as primary recipients of the enterprise’s benefit, are in the best position to bear the cost of tortious employee conduct.¹² Historically, respondeat superior held the head of the household, the master, liable for harm that resulted either negligently or

7. *Sheffer*, 2013 OK 48, ¶ 15, 306 P.3d at 549 (quoting *Casebolt v. Cowan*, 829 P.2d 352, 360 (Colo. 1992)).

8. *Casebolt*, 829 P.2d at 360 (quoting *Mettelka v. Superior Court*, 219 Cal. Rptr. 697, 698 (1985)).

9. *Sheffer*, 2013 OK 48, ¶ 15, 306 P.3d at 548 (quoting *Nat’l Trailer Convoy, Inc. v. Saul*, 375 P.2d 922, 929 (Okla. 1962)).

10. VERNON’S OKLA. FORMS 2D, *Civil*, in OKLAHOMA UNIFORM JURY INSTRUCTIONS 10.16 (2012). “An owner [or provider] of a vehicle [or other dangerous instrumentality] has a duty to use ordinary care to avoid lending it to another person whom he knows [or reasonably should know] is [intoxicated/careless/reckless/incompetent to drive].”

11. BLACK’S LAW DICTIONARY 1426 (9th ed. 2009).

12. 27 AM. JUR. 2D *Employment Relationship* § 374 (2004).

intentionally from the doer of the deed, otherwise known as the servant.¹³ Under the modern approach, “an employer is vicariously liable for the negligence of an agent or employee acting within the scope of his or her agency or employment, although the principal or employer has not personally committed a wrong.”¹⁴ Oklahoma law similarly states, “[t]o hold an employer responsible for the tort of an employee, the tortious act must be committed in the course of the employment and within the scope of the employee’s authority.”¹⁵ Thus, the jury must decide “whether an employee has acted within the course and scope of [his] employment.”¹⁶

1. Determining the Course and Scope of Employment

The crux of the respondeat superior claim is the determination of the scope of employment.¹⁷ According to some scholars, course and scope of employment are “not capable of precise definition although many attempts have been made to define [them].”¹⁸ Jurisdictions use various approaches to determine the scope of employment. For example, the *Restatement (Second) of Agency* has several guidelines to determine whether an act is within the scope of an employee’s employment.¹⁹ Other

13. John H. Wigmore, *Responsibility of Tortious Acts: Its History*, 7 HARV. L. REV. 315, 317 (1894).

14. 27 AM. JUR. 2D *Employment Relationship* § 373 (2004).

15. *Sheffer v. Carolina Forge Co.*, 2013 OK 48, ¶ 18, 306 P.3d 544, 550 (quoting *Baker v. Saint Francis Hosp.*, 2005 OK 36, ¶ 10, 126 P.3d 602, 605) (internal quotation marks omitted).

16. *Id.* ¶ 19, 306 P.3d at 551 (citing *Baker*, 2005 OK 36, ¶ 19, 126 P.3d at 606).

17. RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. b (2006) suggests determination of an employee’s scope of employment is a fact-intensive, case-by-case analysis.

18. 2 FLOYD R. MECHEM, A TREATISE ON THE LAW OF AGENCY §1879 (1914). See also Paula J. Dalley, *A Theory of Agency Law*, 72 U. PITT. L. REV. 495, 528 (“The scope of employment doctrine has proved difficult to apply in a number of not uncommon situations.”).

19. Compare RESTATEMENT (SECOND) OF AGENCY § 228 (1958) (“(1) Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master, and (d) if force is intentionally used by the servant against another, the use of force is not unexpected by the master.”), with RESTATEMENT (THIRD) OF AGENCY § 7.07 (2012) (“(2) An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer’s control. An employee’s act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.”).

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jurisdictions, such as Oklahoma, have adopted a broader approach in determining scope of employment. In *Retail Merchants Association v. Peterman*, the Oklahoma Supreme Court set forth a two-step inquiry:

In general terms it may be said that an act is within the course of employment if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was employed upon the master's business, and be done, although mistakenly or ill advisedly, with a view to further the master's business, or from some impulse of emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent, and personal motive on the part of the servant to do the act upon his own account.²⁰

This inquiry is applied in OUJI 6.7.²¹ The Court further states "that the employer is not liable for damages caused by a driver of an automobile . . . unless . . . the driver of the car was at the time in the performance of his duties as a servant."²² To recover, the plaintiff bears the burden of proving the employee was acting within the scope of his employment.²³

2. Determining a Departure from Scope of Employment

Neither the mere fact that the servant was in the employment of the master at the time of the conduct in question nor the fact that the servant's conduct occurred within the scope of employment automatically establishes liability.²⁴ The liability inquiry revolves around

20. *Retail Merchs. Ass'n & Associated Retail Credit Men of Tulsa v. Peterman*, 99 P.2d 130, 131 (Okla. 1940).

21. VERNON'S OKLA. FORMS 2D, *Civil*, in OKLAHOMA UNIFORM JURY INSTRUCTIONS 6.7 (2012) ("An employee is acting within the scope of [his/her] employment if [he/she] is engaged in the work which has been assigned to [him/her] by [his/her] employer, or is doing that which is proper, usual and necessary to accomplish the work assigned to [him/her] by [his/her] employer, or is doing that which is customary within the particular trade or business in which the employee is engaged.").

22. *Retail Merchs. Ass'n*, 99 P.2d at 131 (citing *Crowe v. Peters*, 43 P.2d 93 (Okla. 1935)).

23. *Baker v. Saint Francis Hosp.*, 2005 OK 36, ¶ 16, 126 P.3d 602, 607.

24. RESTATEMENT (SECOND) OF AGENCY § 228 cmt. b (1958).

whose purpose the employee is furthering: “If the servant or agent was at the time acting for himself and as his own master *pro tempore*, the principal is not liable.”²⁵ Many sources of the law have accepted and expounded on this exception to the employer’s liability.²⁶ If an employee’s actions are beyond the employer’s effective control, the employer is not liable for the tortious or negligent conduct of the employee.²⁷ Generally, an employee’s actions will not fall within the scope of employment if they are done with the purpose of serving the employee’s own interests or if the employee undertakes a frolic.²⁸ Regardless of whether the employee intended to resume the employer’s business later, such frolic must be a clear departure from his duties as an employee.²⁹

Upon the occurrence of an automobile accident, to determine whether an employee’s actions were outside the scope of his employment, Oklahoma courts “look[] to whether, taking into consideration the purpose of the mission and the distance traveled, it could be said that the employee was stepping aside in some marked or unusual manner for some purpose wholly disconnected with his employment.”³⁰ Additionally, courts recognize that an employee’s deviation from the course of employment may be so *de minimus* that, as a matter of law, the court may decide the issue of whether an employee acted within his scope of employment.³¹ Nevertheless, such a decision is narrowly limited: “[W]hen the degree and extent of the deviation is so uncertain that *reasonable contrary inferences may be drawn*, the issue *must* be sent to the jury.”³² OUJI 6.12 articulates this departure from an employee’s scope of employment.³³

25. MECHEM, *supra* note 18, § 1898.

26. See RESTATEMENT (SECOND) OF AGENCY § 228(2) (1958); RESTATEMENT (THIRD) OF AGENCY § 7.07 (2006).

27. RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. b (2006).

28. *Id.*

29. MECHEM, *supra* note 18, § 1899.

30. Sheffer v. Carolina Forge Co., 2013 OK 48, ¶ 18, 306 P.3d 544, 550 (citing Retail Merchs. Ass’n & Associated Retail Credit Men of Tulsa v. Peterman, 99 P.2d 130, 132 (Okla. 1940)).

31. Baker v. Saint Francis Hosp., 2005 OK 36, ¶ 16, 126 P.3d 602, 606–07.

32. Sheffer, 2013 OK 48, ¶ 19, 306 P.3d at 551 (citing Baker, 2005 OK 36, ¶ 16, 126 P.3d at 606–07).

33. VERNON’S OKLA. FORMS 2D, *Civil*, in OKLAHOMA UNIFORM JURY INSTRUCTIONS 6.12 (2012) (“An [agent/employee] is acting outside the scope of [his/her] [authority/employment] when [he/she] substantially departs from [his/her] principal’s [or

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The Tenth Circuit applied Oklahoma law in *Oil Daily, Inc. v. Faulkner*, a case involving an employee with unfettered discretion in the decision-making involved in his course of employment, and determined that departure from the scope of employment requires more than just taking into consideration the purpose of the mission and the distance traveled.³⁴ Rather, departing from the scope of employment only occurs after “taking into consideration all these factors, in light of the particular evidence in each case, it can be said that the servant was stepping aside in some marked or unusual manner for a purpose wholly disconnected with his employment.”³⁵ Furthermore, an employee with a large amount of “discretion or control as to the means or methods to be employed, or [one] that . . . acts in some degree for himself, [is] not of itself determin[ative] that his acts are not within the scope of his employment.”³⁶

III. *SHEFFER V. CAROLINA FORGE CO.*A. *Facts*

William Garris III and David Billups were both employees of the Carolina Forge Company, the defendant in this case.³⁷ Garris, the quality manager, and Billups, a customer service representative, traveled to Joplin, Missouri on August 24, 2006, from their company headquarters in Raleigh, North Carolina to conduct a three-day trip for their employer.³⁸ It was unusual for Billups to go on such a business trip for Carolina Forge.³⁹ At the invitation of their customer, F.A.G. Bearing, Carolina Forge sent their employees on the business trip to entertain

employer's] business by doing an act intended to accomplish an independent purpose of [his/her] own or for some other purpose which is unrelated to the business of [his/her] principal [or employer] and not reasonably included within the scope of [his/her] express or implied [authority/employment]. Such departure may be of short duration, but during such time the [agent/employee] is not acting within the scope of [his/her] [authority/employment].”).

34. *Oil Daily, Inc. v. Faulkner*, 282 F.2d 14, 15 (10th Cir. 1960) (quoting *Wilburn v. McRee*, 193 F.2d 425, 427 (10th Cir. 1951)).

35. *Id.* at 16.

36. *MECHEM*, *supra* note 18, § 1894.

37. *Sheffer*, 2013 OK 48, ¶ 1, 306 P.3d at 546.

38. *Id.*

39. *Id.*

F.A.G. Bearing and play golf.⁴⁰ This particular golf outing was a recurring event for Carolina Forge, and employees were expected to provide entertainment, which included dinner and alcoholic beverages.⁴¹ As part of normal business practice, Carolina Forge funded Garris's and Billups's travel and lodging arrangements as well as an additional \$600 cash for other business expenses.⁴² Carolina Forge reimbursed its employees for any additional personal expenses incurred, including alcoholic beverages.⁴³ In providing for these expenses, however, Carolina Forge failed to maintain any formal "written corporate procedure, guideline, policy, or protocol" governing or restricting such reimbursements.⁴⁴ If an employee of Carolina Forge paid for an alcoholic beverage on a business trip, Carolina Forge would reimburse each payment without limitation.⁴⁵

On August 25, 2006, Garris and Billups toured F.A.G. Bearing's headquarters before giving presentations to F.A.G. Bearing's company officials.⁴⁶ Later, they hosted lunch and a golf outing in the Joplin, Missouri, area for F.A.G. Bearing representatives.⁴⁷ After finishing their business with F.A.G. Bearing, Garris and Billups returned to their hotel room then had dinner.⁴⁸ Upon finishing their meal, the two men decided to travel alone, without any F.A.G. Bearing representatives, from Joplin, Missouri, to Miami, Oklahoma, to visit the Buffalo Run Casino about 30 miles away.⁴⁹ Garris's affidavit indicated that once they arrived, he and Billups did not stay together and that Garris used his own personal money to gamble at the casino.⁵⁰

Well after midnight, when the two men finally left the casino to head back to their Joplin hotel, Billups drove the rental car even though it was signed in Garris's name.⁵¹ He missed the eastbound ramp on Interstate

40. *Id.* ¶¶ 1–2, 306 P.3d at 546.

41. *Id.* ¶ 13, 306 P.3d at 548–49.

42. *Id.* ¶ 2, 306 P.3d at 546.

43. *Id.*

44. Appellants' Brief in Chief at 2, *Sheffer*, 2013 OK 48, 306 P.3d 544 (No. 109,199).

45. *Id.*

46. *Sheffer*, 2013 OK 48, ¶ 3, 306 P.3d at 546.

47. *Id.* ¶ 4, 306 P.3d at 546.

48. *Id.* ¶ 5, 306 P.3d at 546.

49. *Id.* ¶ 5, 306 P.3d at 546–47.

50. *Id.* ¶ 6, 306 P.3d at 547.

51. *Id.* ¶¶ 6–7, 306 P.3d at 547; Appellee's Answer Brief at 1, *Sheffer*, 2013 OK 48, 306 P.3d 544 (No. 109,199).

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Highway 44 and instead began heading westbound toward Tulsa.⁵² Seeing an opening in the lane barricade, Billups decided to make a U-turn, unsuccessfully, and collided with an 18-wheeler tractor-trailer injuring Garris and all three trailer passengers.⁵³

B. Procedural Posture

Plaintiffs Charles Sheffer, Jennifer Sheffer, and their minor son, J.S., filed suit against Carolina Forge in the District Court of Ottawa County, Oklahoma, before the Honorable Robert G. Haney.⁵⁴ Plaintiffs named Carolina Forge as defendant for claims of respondeat superior and negligent entrustment, as well as negligent hiring and training.⁵⁵ Their complaint specifically alleged that Carolina Forge “was vicariously liable for the negligent acts of its employees [Garris and Billups] and was liable for negligently entrusting a vehicle to [them].”⁵⁶ During trial preparation, the Sheffers requested more discovery regarding previous trips made by Carolina Forge employees.⁵⁷ These requests related to “business expense reports and receipts . . . for all trips . . . made to Joplin.”⁵⁸

The trial court denied these discovery requests and dismissed the Sheffers’ claims when Carolina Forge won summary judgment.⁵⁹ The court held first that, as a matter of law, “Garris and Billups were not in the course and scope of their employment at the time of the collision.”⁶⁰ Second, the court found no liability for negligent entrustment on the part of Carolina Forge because “it did not have prior knowledge of any propensity of Billups to drive intoxicated.”⁶¹ The Sheffers subsequently appealed to the Oklahoma Supreme Court.⁶²

52. *Sheffer*, 2013 OK 48, ¶ 7, 306 P.3d at 547; Appellee’s Answer Brief, *supra* note 51, at 1.

53. *Sheffer*, 2013 OK 48, ¶ 7 n.5, 306 P.3d at 547 n.5.

54. *Id.* ¶ 0, 306 P.3d at 545.

55. *Id.* ¶ 8, 306 P.3d at 547.

56. Appellants’ Brief in Chief, *supra* note 44, at 1.

57. *Sheffer*, 2013 OK 48, ¶ 26, 306 P.3d at 553.

58. *Id.* ¶ 29, 306 P.3d at 553.

59. Appellants’ Brief in Chief, *supra* note 44, at 1.

60. *Id.*

61. *Id.*

62. *Sheffer*, 2013 OK 48, ¶ 9, 306 P.3d at 547.

C. Opinion

Sitting for the Oklahoma Supreme Court were Chief Justice Tom J. Colbert, Vice Chief Justice John F. Reif, and Justices Yvonne J. Kauger, Joseph M. Watt, James R. Winchester, James E. Edmondson, Steven W. Taylor, Douglas L. Combs, and Noma Gurich.⁶³ Because a trial court's decision whether summary judgment is appropriate is "solely a legal matter,"⁶⁴ the Court's standard of review was de novo, "afford[ing] [the] Court with plenary, independent, and non-deferential authority to examine the issues presented."⁶⁵ In its review, the Court searched for any disputed material facts.⁶⁶ If any reasonable person could reach a different conclusion based on the facts in the record, "[e]ven if basic facts are undisputed," summary judgment is improper.⁶⁷ A successful motion must prevail over all inferences and conclusions drawn in the "light most favorable" to the non-moving party.⁶⁸

Writing for the majority, Justice Gurich found that the record supported the proposition that "reasonable minds could differ on the questions of whether employees of Carolina Forge were in the course and scope of their employment at the time of the accident and whether Carolina Forge negligently entrusted the rental vehicle to its employees."⁶⁹ Holding that summary judgment was improper, the Court reversed the lower court's decision and remanded the case.⁷⁰

1. Negligent Entrustment Under Sheffer

Applying the long-held rule for negligent entrustment, the Court found disputed material facts about whether the vehicle was negligently entrusted.⁷¹ First, in establishing entrustment of the vehicle to Billups

63. *Id.* ¶¶ 31–33, 306 P.3d at 553–54.

64. *Id.* ¶ 10, 306 P.3d at 547–48 (citing *Feightner v. Bank of Okla., N.A.*, 2003 OK 20, ¶ 2, 65 P.3d 624, 626–27).

65. *Id.* ¶ 10, 306 P.3d at 548 (citing *Martin v. Aramark Servs., Inc.*, 2004 OK 38, ¶ 4, 92 P.3d 96, 97).

66. *Id.* ¶ 11, 306 P.3d at 548 (citing *Cranford v. Bartlett*, 2001 OK 47, ¶ 3, 25 P.3d 918, 920).

67. *Id.* (citing *Phelps v. Hotel Mgmt., Inc.*, 925 P.2d 891, 893 (Okla. 1996)).

68. *Id.* (citing *Estate of Crowell v. Bd. of Cnty. Comm'rs of Cleveland*, 2010 OK 5, ¶ 22, 237 P.3d 134, 142).

69. *Id.* ¶ 9, 306 P.3d at 546.

70. *Id.* ¶ 30, 306 P.3d at 553.

71. *Id.* ¶ 9, 306 P.3d at 547.

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and Garris, the record showed Carolina Forge reserved and paid for a rental car specifically for employee use on the business trip.⁷² Carolina Forge argued that it was not possible for the company to have any possession or control over the car when the accident occurred.⁷³ But the Court clarified that control at the time of the accident is not the defining point of control for negligent entrustment; rather, it is “[c]ontrol at the time the automobile is supplied—the initial moment of entrustment—[that] determines a supplier’s negligence.”⁷⁴ Carolina Forge further argued that “it did not entrust the vehicle to Billups because the vehicle was rented in Garris’[s] name,” implying once again that Carolina Forge had no control over Billups, who caused the accident.⁷⁵ The Court also rejected this argument because “Carolina Forge maintained no policy on who could drive [a] rental car” on a business trip.⁷⁶

Second, facts in the record viewed in the light most favorable to the plaintiff also established the foreseeability prong for negligent entrustment. Had Carolina Forge known or had reason to know that Garris and Billups had any propensity for becoming intoxicated, reasonable minds could have validly concluded that Carolina Forge’s entrustment of the rental vehicle to the two employees likely created an unreasonable risk of bodily harm to others.⁷⁷ The Court inferred this knowledge-of-the-propensity element of negligent entrustment from many factors. First, the record indicated that Carolina Forge did not regulate employees’ drinking and driving while in vehicles rented by the company.⁷⁸ Second, Carolina Forge reimbursed its employees for all expenses incurred on business trips, including alcoholic beverages.⁷⁹ Third, past records showed reimbursement for alcoholic beverages at numerous places all times of the day.⁸⁰ Lastly, the record indicated the purpose of the business trip was to entertain customers of Carolina Forge, including buying alcoholic beverages for customers.⁸¹ The Court concluded that “[t]he evidence in the record [did] not support a

72. *Id.* ¶ 13, 306 P.3d at 548.

73. *Id.* ¶ 15, 306 P.3d at 549.

74. *Id.*

75. *Id.* ¶ 16, 306 P.3d at 549–50.

76. *Id.* ¶ 16, 306 P.3d at 550.

77. *Id.* ¶¶ 13–14, 306 P.3d at 548–49.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* ¶ 13, 306 P.3d at 548.

determination *as a matter of law* that Carolina Forge did not negligently entrust the rental car.⁸² The Court concluded the negligent entrustment claim was thus a material factual dispute and did not merit summary judgment.⁸³

2. *Sheffer* and Respondeat Superior

The Court next examined Garris's and Billups's actions to see whether they coincided with their prescribed course and scope of employment, concluding that reasonable minds could differ.⁸⁴ In its analysis, the Court looked to the record to view the factors of whether Garris and Billups were within the course and scope of their employment or if "the employee[s] [were] stepping aside in some marked or unusual manner for some purpose wholly disconnected with [their] employment."⁸⁵

The Court first considered the distance the employees traveled from where the business purpose had taken place.⁸⁶ The accident occurred approximately 30 miles from Joplin.⁸⁷ Despite the accident being so far from the intended place of business, Carolina Forge provided no evidence that the company limited how far or where its employees could take the rental vehicle.⁸⁸ Next, the Court looked to the purpose of the business trip: "The record also indicate[d] the business trip for Carolina Forge was the *only* reason the [employees] were in Joplin."⁸⁹ Finally, to rebut Carolina Forge's belief that there were personal portions of the trip not related to business, including the trip to the casino, the Court looked to Carolina Forge's lack of written policy.⁹⁰ Carolina Forge had no written policy as to what expenses the company would pay for or reimburse.⁹¹ Contrary to what Carolina Forge suggested, the record indicated that Carolina Forge paid for employees' expenses even when

82. *Id.* ¶ 17, 306 P.3d at 550.

83. *Id.* ¶¶ 14–15, 306 P.3d at 549.

84. *Id.* ¶ 30, 306 P.3d at 553.

85. *Id.* ¶ 18, 306 P.3d at 550 (citing Retail Merchs. Ass'n & Associated Retail Credit Men of Tulsa v. Peterman, 99 P.2d 130, 132 (Okla. 1940)).

86. *Id.* ¶ 22, 306 P.3d at 551.

87. *Id.*

88. *Id.*

89. *Id.* ¶ 23, 306 P.3d at 552.

90. *Id.*

91. *Id.* ¶ 24, 306 P.3d at 552.

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the employee was on personal time.⁹² Accordingly, the Court found that Carolina Forge would have reimbursed Garris and Billups and completely paid for their trip to Oklahoma.⁹³

In reviewing the record, the Court compared this case to the Tenth Circuit case *Oil Daily Inc. v. Faulkner*.⁹⁴ The Court determined that Garris and Billups were not limited to specific locations or activities on this trip and were not required to distinguish between personal and business expenses and would have received a “blanket reimbursement” for all trip expenses.⁹⁵ As in *Oil Daily*, the trial court’s findings did “not support a determination *as a matter of law* that the men were not in the course and scope of their employment when the accident occurred. The issue is a question of fact for the jury. Summary judgment was improper.”⁹⁶ Justice Taylor’s concurring opinion stated that the totality of the circumstances made this accident foreseeable and that the decision was best left for the jury.⁹⁷

3. Plaintiffs’ Request for Additional Discovery

The Supreme Court decided not to directly address the trial court’s effective denial of the Sheffers’ requests for additional discovery.⁹⁸ Finding the lower court’s grant of summary judgment improper was a preliminary issue; had summary judgment been proper, the Court would likely have reviewed the lower court’s failure to address the Sheffers’ requests from an abuse of discretion standard.⁹⁹ Despite this “non-issue,” the Court ordered “such discovery” to be allowed to the extent it was “relevant to both the respondeat superior and negligent entrustment claims.”¹⁰⁰

92. *Id.* ¶¶ 23–24, 306 P.3d at 552.

93. *Id.* ¶ 24, 306 P.3d at 552.

94. *Id.* ¶¶ 20–22, 306 P.3d at 551. *See Oil Daily, Inc. v. Faulkner*, 282 F.2d 14, 15 (10th Cir. 1960). In *Oil Daily*, an employer allowed an employee to exercise his own judgment in traveling, spending time on the road, selecting hotels or other living quarters, and returning to headquarters. *Id.* The court could not say that such a trip, as a matter of law, was a departure wholly disconnected from the company’s business that would relieve the company of its liability. *Id.* at 15–16.

95. *Sheffer*, 2013 OK 48, ¶ 25, 306 P.3d at 552.

96. *Id.*

97. *Id.* ¶ 33, 306 P.3d at 554 (Taylor, J., concurring).

98. *Id.* ¶ 29, 306 P.3d at 553 (majority opinion).

99. *Id.*

100. *Id.*

IV. ANALYSIS

Throughout the opinion, the Oklahoma Supreme Court applied a traditional analysis to each of the claims of negligent entrustment and respondeat superior, stating the precedent for each. However, in its analysis of respondeat superior, the Court in *Sheffer* did not follow the precedent case law to an exact science but instead extended the common law by adopting the holding of *Oil Daily, Inc. v. Faulkner*.¹⁰¹ Regardless, the Supreme Court of Oklahoma reversed the lower court's decision to grant summary judgment to defendant Carolina Forge.¹⁰² The error of the lower court was so apparent that the Court unanimously overturned the ruling and remanded the case.¹⁰³ The Supreme Court of Oklahoma correctly reversed the respondeat superior claim; however, the Court did not correctly reverse the negligent entrustment claim.

A. Negligent Entrustment: "Propensity over Knowledge"

In reviewing the lower court's decision, the Court in *Sheffer* analyzed the history of negligent entrustment and found that the trial court erred in granting summary judgment for the defendants.¹⁰⁴ After reviewing the record, the Court determined that reasonable minds could differ on whether "Carolina Forge knew or had reason to know that its employees had the propensity to become intoxicated on business trips and that Carolina Forge acted negligently [in giving a rental car to] Garris and Billups."¹⁰⁵ However, the trial court correctly held that "there is absolutely no evidence any whether [sic] . . . [Billups] was a reckless, careless driver or operator of a motor vehicle to where either Carolina Forge knew or should have known."¹⁰⁶

The Court here glossed over the fact that this was Billups's first time to go on a business trip for Carolina Forge.¹⁰⁷ The record indicated that the plaintiffs did not offer any evidence that Carolina Forge had knowledge that Billups had a history of ever driving while intoxicated or

101. *Id.* ¶ 25, 306 P.3d at 552.

102. *Id.* ¶ 30, 306 P.3d at 553.

103. *Id.*

104. *Id.* ¶ 17, 306 P.3d at 550.

105. *Id.* ¶ 14, 306 P.3d at 549.

106. Appellee's Answer Brief, *supra* note 51, at 12.

107. *Sheffer*, 2013 OK 48, ¶ 1, 305 P.3d at 546.

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that he had a history of being “a careless, reckless, or otherwise incompetent driver.”¹⁰⁸ Instead, the Court looked to all of Carolina Forge employees’ past conduct on business trips, not the individual conduct of Garris or Billups.¹⁰⁹

In so doing, the Court weighed propensity over knowledge. From the evidence presented, Carolina Forge had no knowledge of Billups’s history with alcohol or his driving ability. Regarding negligent entrustment, the Court replaced the element of the supplier’s knowledge of third-party actions with the supplier’s knowledge of the third party’s propensity to act a certain way.¹¹⁰ Further still, in an employer–employee relationship, an employer’s knowledge of the propensity of all its employees, not just the employee in question, is enough to satisfy the foreseeability and knowledge element of negligent entrustment.¹¹¹ This ruling will likely make the plaintiff’s burden in establishing a claim of negligent entrustment much easier. The lower court was correct in ruling that there was “no evidence that . . . Carolina Forge had prior knowledge of any propensity to drive recklessly, carelessly, or anything else. And simply because they might have paid for a drink . . . doesn’t make that a negligent entrustment.”¹¹² Summary judgment for the negligent entrustment claim was proper because the plaintiffs could not establish the knowledge element of the claim.

B. Respondeat Superior: Time and Space or Independent Course of Conduct?

Sheffer demonstrates a shift in the analysis of respondeat superior in contemporary workforce and employer–employee relationships. The Court in *Sheffer* correctly reversed the lower court’s grant of summary judgment because the lower court wrongly determined that the conduct was not within the scope of employment.¹¹³ *Sheffer* ultimately determined whether acts of employees who are given large degrees of discretion could be identified, as a matter of law, as being within the scope of employment.

108. Appellee’s Answer Brief, *supra* note 51, at 12 (citing the trial court opinion).

109. *Sheffer*, 2013 OK 48, ¶¶ 13–14, 306 P.3d at 548–49.

110. *Id.* ¶ 14, 306 P.3d at 549.

111. *Id.*

112. Appellee’s Answer Brief, *supra* note 51, at 13 (quoting the trial court opinion).

113. *Sheffer*, 2013 OK 48, ¶ 25, 306 P.3d at 552.

In previous cases determining whether an employee was “wholly disconnected with his employment,” the Court has focused mostly on “the purpose of the mission and the distance traveled.”¹¹⁴ In previous analysis and reference to scope of employment, courts also looked to see if the act was “too little actuated by a purpose to serve the master.”¹¹⁵ However, this scope of employment formulation fails to consider the type of work that is not limited by time or distance.¹¹⁶ An employee may act on behalf of his employer even though he is neither “continuously or exclusively engaged in performing assigned work” nor on the employer’s premises.¹¹⁷ This old approach overlooks acts that could be motivated by some purpose to serve the employer that would be found outside the employee’s scope of employment.¹¹⁸

The Court in *Sheffer* adopts a new approach to answer this problem. *Sheffer* adopts the approach taken in *Oil Daily* when dealing with cases involving employees with “unrestricted discretion.”¹¹⁹ This totality-of-the-circumstance approach is more than just a purpose-and-distance analysis and is the better approach for the modern workforce because it takes into consideration each factor and the particular evidence in each case.¹²⁰ Not only does this approach address those employees with unfettered discretion in executing their employment, but also it reaffirms the holding in *Baker*.¹²¹ By requiring courts to take into consideration all

114. *Id.* ¶ 18, 306 P.3d at 550 (citing *Retail Merchs. Ass’n & Assoc’d Retail Credit Men of Tulsa v. Peterman*, 99 P.2d 130, 132 (Okla. 1940)).

[T]he correct test to be applied is not so much whether the conduct of the servant was a departure or a mere deviation from his line of duty, but whether, taking into consideration the purpose of this mission and the distance traveled, it could be said that the servant was stepping aside in some marked or unusual manner for some purpose wholly disconnected with his employment.

Retail Merchs., 99 P.2d at 132 (quotation marks omitted) (quoting *Heard v. McDonald*, 43 P.2d 1026, 1027 (Okla. 1935)).

115. RESTATEMENT (SECOND) OF AGENCY § 228(2) (1958).

116. RESTATEMENT (THIRD) OF AGENCY § 7.07 cmt. b (2006).

117. *Id.*

118. *Id.*

119. *Sheffer*, 2013 OK 48, ¶ 25, 306 P.2d at 552.

120. *Oil Daily, Inc. v. Faulkner*, 282 F.2d 14, 16 (10th Cir. 1960) (holding that abandonment of scope of employment can only be determined when taking into consideration all factors, in light of the evidence of each case, and cannot be held as a matter of law).

121. *Baker v. Saint Francis Hosp.*, 2005 OK 36, ¶ 16, 126 P.3d 602, 606 (holding that the question of whether an employee has acted within the course and scope of employment at any given time is a question for the fact-finder).

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the factors of the case and not just the purpose and distance, future cases will have fewer matter-of-law holdings. It will also likely cause courts to focus more heavily on the foreseeability of the result when dealing with employees who receive large amounts of discretion in executing their scope and course of employment.¹²²

V. CONCLUSION

In *Sheffer*, the accomplishments of the Supreme Court of Oklahoma are twofold. First, the decision lessened the burden on the plaintiff in establishing the knowledge element of a negligent entrustment claim. Second, the Court established a modern approach in analyzing a respondeat superior claim dealing with employees being given unfettered discretion in executing their employment by their employers. Under the first accomplishment, the Court clearly recognized that a knowledge element is present in establishing a negligent entrustment claim. However, in the context of a negligent entrustment claim regarding an employer–employee relationship, if the plaintiff can establish the employer’s knowledge of the propensity of any of its employees to become intoxicated, no further evidence about the specific employee in question is necessary to meet the plaintiff’s burden. Under the second accomplishment, the Court took a step forward in resolving the scope of employment problem where employees have large amounts of discretion in accomplishing the purpose of their employment. The Court also narrowed in what situations these employees depart from the scope of their employment. By taking a case-by-case analysis of the totality of the circumstances and foreseeability of the result and not just a purpose-and-distance analysis, the question of whether an employee is within the course and scope of his employment will remain a question for the jury.

122. *Sheffer*, 2013 OK 48, ¶ 33, 306 P.3d at 554 (Taylor, J., concurring).