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KATHY MARIE HUFF, ADMINISTRATRIX OF THE
ESTATE OF MELISSA ANN HUFF, DECEASED V.
JEFFREY A. MOSER; JOHN DOE; ACUMEN
CONTRACTING, INC.; AND PETE VITI

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NOTICE OF DISSOLUTION

NOTICE IS HEREBY GIVEN that COMPLEX GROUP, INC., a Pennsylvania non-profit corporation, is winding up its affairs in the manner prescribed by the Pennsylvania Non-Profit Corporation Law of 1988, as amended, so that its corporate existence shall cease upon the filing of Articles of Dissolution in the Department of State of the Commonwealth of Pennsylvania.

Ryan P. Siney, Esq.
Tucker Arensberg, P.C.
2 Lemoyne Drive, Suite 200
Lemoyne, PA 17043

5/25

INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN THAT Articles of Incorporation for the CARMEL OF JESUS, MARY AND JOSEPH, FAIRFIELD, INC., have been filed with and accepted by the Department of State of the Commonwealth of Pennsylvania on April 13, 2018, in accordance with the provisions of the PA Nonprofit Corporation Law of 1988. The purpose of the Corporation is to operate a Monastery of contemplative Nuns and promote the religious work of the Roman Catholic Church by prayer and charitable endeavors.

5/25

INCORPORATION NOTICE

NOTICE IS HEREBY GIVEN that articles of incorporation were filed with the Department of State of the Commonwealth of Pennsylvania for CUSTOM CONTRACTORS & LOG HOME SOLUTIONS, INC., formed pursuant to the provisions of the Pennsylvania Business Corporation Law of 1988.

Clifton R. Guise, Esq.
Halbruner, Hatch & Guise, LLP
2109 Market Street
Camp Hill, PA 17011

5/25

KATHY MARIE HUFF, ADMINISTRATRIX OF THE ESTATE
OF MELISSA ANN HUFF, DECEASED V. JEFFREY A.
MOSER; JOHN DOE; ACUMEN CONTRACTING, INC.;
AND PETE VITI

1. It is hornbook law in Pennsylvania that the primary purpose of a pleading is to form a clear and distinct issue for trial between the parties.

2. The pleading must define the issues and thus every act or performance essential to that end must be set forth in the complaint.

3. It is well settled that an employer is held vicariously liable for the negligent acts of his employee, which cause injuries to a third party, provided that such acts were committed during the course of and within the scope of the employment. The conduct of an employee is considered “within the scope of employment” for purposes of vicarious liability if: (1) it is of a kind and nature that the employee is employed to perform; (2) it occurs substantially within the authorized time and space limits; (3) it is actuated, at least in part, by a purpose to serve the employer; and (4) if force is intentionally used by the employee against another, the use of force is not unexpected by the employer.

4. After diligent search, this writer has been unable to find any case law which places a duty on one to take affirmative steps to avoid criminal acts where there is no obvious known risk.

5. Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

IN THE COURT OF COMMON PLEAS OF ADAMS COUNTY,
PENNSYLVANIA, CIVIL 14-S-773, KATHY MARIE HUFF,
ADMINISTRATRIX OF THE ESTATE OF MELISSA ANN HUFF,
DECEASED V. JEFFREY A MOSER; JOHN DOE; ACUMEN
CONTRACTING, INC.; AND PETE VITI.

Matthew L. Owens, Esq., Attorney for Plaintiff

Jeffrey A. Moser, pro se Defendant

Steven L. Banko, Jr., Esq., Attorney for Defendants Acumen & Viti

George, J., May 14, 2018

OPINION PURSUANT TO Pa. R.A.P. 1925(a)

This litigation arises from a tragic motor vehicle accident occurring on November 21, 2013, which resulted in fatal injuries to Kathy Marie Huff. The litigation was commenced by the Administratrix of Huff’s estate (“Appellant”) by Complaint filed on June 18, 2014. The Complaint included claims against Jeffrey A. Moser (“Moser”) as operator of the motor vehicle which struck the decedent; negligence claims against Acumen Contracting, Inc. and Pete Viti (collectively referred to as “Acumen”) as Moser’s employer; causes of action for

negligent entrustment and negligent supervision against Acumen; and Dram Shop Act claims against Taverna, Inc., Taverna 5450, Tom M. Kalathas, Nick Kalathas, Lashay Kalathas, John Doe 2, and Jane Doe (collectively “Dram Shop Defendants”) who were alleged to be instrumental in providing alcohol to Moser prior to the accident. Following the filing of Preliminary Objections by the various Defendants, an Amended Complaint was filed on September 17, 2014. The Amended Complaint substantively mirrored the original Complaint and was similarly met by Preliminary Objections by the Dram Shop Act Defendants. On January 11, 2016, the Appellant withdrew the causes of action against the Dram Shop Act Defendants leaving only the remaining claims against Moser and Acumen. This Court subsequently granted summary judgment in favor of Defendant Acumen. Following resolution of the claim against the remaining Defendant Moser, Appellant files the current appeal challenging this Court’s grant of summary judgment in favor of Acumen. A review of Appellant’s Concise Statement of Errors Complained of on Appeal reveals Appellant does not challenge dismissal of the claims related to negligent entrustment and negligent supervision, but rather challenges only this Court’s ruling on the claim of vicarious liability.

In order to fully understand this issue, it is necessary to identify the precise nature of Appellant’s vicarious liability claim as raised in the Amended Complaint. In Count I, the count which alleges the factual basis for vicarious liability, Appellant identifies only Moser and Acumen as negligent parties.¹ The count thereafter goes on to identify specific acts of negligence on the part of Moser.² The count further identifies two specific theories against Acumen: (1) “Moser was operating a vehicle owned and maintained by [Acumen] and was a permissive driver in the course and scope of his employment...”; and (2) “Acumen, Viti and Doe³ negligently permitted [Moser] access to the subject vehicle or entrusted him with said vehicle.”⁴

¹ Pa. R. Civ. P. 1020(b) requires a heading for each count “naming the parties to the cause of action therein set forth.”

² Appellant’s Amended Complaint paragraph 30

³ John Doe is identified earlier in the Complaint as an employee of Acumen. He has subsequently been identified as Coty Head. He will be referred to as “Doe” in the remainder of this Opinion.

⁴ Appellant’s Amended Complaint paragraph 34

Appellant then goes on to specifically identify the specific acts of vicarious liability as follows:

1. Failing to exercise the degree of care required under the circumstances;
2. Failing to properly train drivers, specifically Defendant Moser;
3. Failing to monitor driver's behavior and driving habits, specifically Defendant Moser;
4. Failing to properly screen and hire drivers, specifically Defendant Moser;
5. Failing to adhere to and comply with general state and local vehicle operating ordinances;
6. Carelessly and negligently permitting access to or failing to properly restrict access to the subject truck by Defendant Moser, its employee, when it or they knew or should have known he did not have a valid operator's license as a result of a history of DUI arrests and had a history of negligent/careless accident prone driving.

Each of the specific acts presumes conduct on behalf of Moser in the course of his employment by Acumen. Yet, as evidenced by Appellant's failure to challenge this Court's dismissal of the claims of negligent entrustment and negligent supervision, there is no factual dispute in the record that Moser was not acting in the course or scope of his employment at the time of the fatal accident.

Appellant attempts to avoid this conclusion by interpreting the language of the Amended Complaint to include a claim that Doe was negligent in permitting Moser access to the vehicle thus making Acumen vicariously liable to Appellant for Doe's negligent acts. Unfortunately for Appellant, this theory is not developed in the Amended Complaint. In fact, although the Complaint alleges Doe was employed by Acumen, the Amended Complaint lacks any allegation Doe, at any relevant time, acted within the course of his employment. If Doe was not acting in the course or scope of his employment, Acumen is not vicariously liable for his conduct.

It is hornbook law in Pennsylvania that the primary purpose of a pleading is to form a clear and distinct issue for trial between the parties. For this reason, Pennsylvania law instructs that a complaint should place the defendants on notice of the claims which they will

have to defend and identify the material facts which will support those claims. *Carlson v. Cmty. Ambulance Servs., Inc.*, 824 A.2d 1228, 1232 (Pa. Super. 2003). “[T]he pleadings must define the issues and thus, every act or performance essential to that end must be set forth in the complaint.” *Swift v. Northeastern Hosp. of Phila.*, 690 A.2d 719, 723 (Pa. Super. 1997).

The elements necessary to establish vicarious liability are summarized in *R.A. ex rel. N.A. v. First Church of Christ* as follows:

It is well settled that an employer is held vicariously liable for the negligent acts of his employee, which cause injuries to a third party, provided that such acts were committed during the course of and within the scope of the employment. *Fitzgerald v. McCutcheon*, 270 Pa. Super. 102, 410 A.2d 1270, 1271 (1979). In certain circumstances, liability of the employer may also extend to intentional or criminal acts committed by the employee. *Id.* The conduct of an employee is considered “within the scope of employment” for purposes of vicarious liability if: (1) it is of a kind and nature that the employee is employed to perform; (2) it occurs substantially within the authorized time and space limits; (3) it is actuated, at least in part, by a purpose to serve the employer; and (4) if force is intentionally used by the employee against another, the use of force is not unexpected by the employer.

748 A.2d 692, 699 (Pa. Super. 2000)

As mentioned, Appellant’s Complaint makes no reference to Doe acting in the course of or within the scope of his employment at the time any alleged negligence on his behalf occurred. Their claim that Acumen and Doe were “carelessly and negligently permitting access to or failing to properly restrict access to the subject truck” does not equate to an allegation that Acumen is vicariously responsible for the conduct of Doe who, **working within the scope and course of his employment**, permitted access or failed to properly restrict access to the truck. Appellant’s attempts to skirt this issue by assuming specific allegations which are not in the pleading is unsupported by law.

Even assuming Appellant has properly pled a claim for Acumen’s vicarious liability for the actions of Doe, there remains a lack of any factual dispute which may lead to recovery by Appellant. The undis-

puted factual history viewed in the light most favorable to Appellant is that Acumen employed both Moser and Doe. Moser performed as a general contractor, however, was expressly instructed by Acumen he may not operate the Acumen vehicle at any time. Doe was employed primarily to drive Moser, and occasionally assisted with labor, was aware of this prohibition concerning Moser's use of the vehicle. Nevertheless, Moser claims Doe was aware Moser drove the subject vehicle during non-work hours in violation of Acumen's clear direction to the contrary. On the night of the fatal accident, during non-work hours unrelated to any employment, Moser accessed the vehicle while under the influence of alcohol and ultimately was involved in the accident. The entire cornerstone of Appellant's claim for relief is that Acumen had a duty to secure a vehicle from an unlicensed driver who had been expressly prohibited from operating the vehicle. Unavoidably implicit in this theory is the conclusion that both Moser and Doe acted intentionally and potentially criminally.⁵

After diligent search, this writer has been unable to find any case law which places a duty on one to take affirmative steps to avoid criminal acts where there is no obvious known risk. The suggestion that an unlicensed driver living in the same residence as the owner of a motor vehicle provides knowledge of such a risk finds no support in current Pennsylvania case law and, when extended to its logical conclusion, produces an absurd result; practically every household would need to keep car keys under lock within the residence.

Appellant's only remaining argument is that Moser's use of the vehicle was actually known and authorized by Doe, an employee for whom Acumen is responsible. Although Moser's deposition testimony supports this argument, its Achilles heel lies in Appellant's inability to establish Doe acted in the course and scope of employment; an element necessary to establish vicarious liability. The Restatement (Second) of Agency, Section 228, adopted by the court in *Fitzgerald v. McCutcheon*, 410 A.2d 1270, 1271 (Pa. Super. 1979), provides:

- (1) Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is

⁵ A person is guilty of a misdemeanor of the second degree if they operate an automobile owned by another without consent of the owner. 18 Pa. C.S.A. § 3928

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 the force is not unexpected by the master.

(2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.

There is no dispute that Acumen expressly directed and prohibited Moser's use of the subject vehicle. There is also no dispute that this prohibition was known by both Moser and Doe. Finally, there is no evidence in the record that Doe was employed for any purpose other than to transport Moser to and from the jobsite. If Doe did indeed intentionally permit Moser to operate the vehicle during after-work hours, it goes far beyond the authorized time or space limits and is directly different in kind than authorization granted by Acumen. Moreover, it cannot arguably be considered, even in part, to be a purpose to serve Acumen when it is expressly contrary to Acumen's instructions. As Appellant is unable to establish negligence on the part of Doe for unauthorized access by Moser or, conversely, within the scope or course of work for intentional misconduct by Doe, summary judgment was granted.

For the foregoing reasons, it is respectfully requested that the grant of summary judgment be affirmed.

ESTATE NOTICES

NOTICE IS HEREBY GIVEN that in the estates of the decedents set forth below, the Register of Wills has granted letters, testamentary of or administration to the persons named. All persons having claims or demands against said estates are requested to make known the same, and all persons indebted to said estates are requested to make payment without delay to the executors or administrators or their attorneys named below.

FIRST PUBLICATION

ESTATE OF RICHARD HEFFERAN HARVEY, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: Jane L. Mack, 19 Timber Lane E., Marmora, NJ 08223

ESTATE OF J. GLEN MILLER, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executor: Gary M. Mummert, 4030 Grandview Road, Hanover, PA 17331

Attorney: Keith R. Nonemaker, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331

ESTATE OF JEAN W. SULLIVAN, DEC'D

Late of Straban Township, Adams County, Pennsylvania

Executrix: Maureen B. Liddle, 12 Musket Dr., Gettysburg, PA 17325

SECOND PUBLICATION

ESTATE OF KIMBERLY A. GROSS, DEC'D

Late of Franklin Township, Adams County, Pennsylvania

Administratrix: Lisa Brillhart-Keiser, 905 Low Dutch Road, Gettysburg, PA 17325

Attorney: John A. Wolfe, Esq., Wolfe, Rice & Quinn, LLC, 47 West High Street, Gettysburg, PA 17325

ESTATE OF GEORGETTE D. WOOLSEY, DEC'D

Late of Oxford Township, Adams County, Pennsylvania

Executrix: Danielle Woolsey Garber, 50 Garber Road, New Oxford, Pennsylvania 17350

Attorney: Elinor Albright Rebert, Esq., 515 Carlisle Street, Hanover, Pennsylvania 17331

THIRD PUBLICATION

ESTATE OF HARRIET ELIZABETH HARTZELL a/k/a HARRIET E. HARTZELL, DEC'D

Late of Cumberland Township, Adams County, PA

Executrix: Angela M. Highlands, 54 Susan Lane, New Oxford, PA 17350

Attorney: Clayton A. Lingg, Esq., Mooney & Associates, 230 York Street, Hanover, PA 17331

ESTATE OF CHARLES G. MURRAY, DEC'D

Late of Menallen Township, Adams County, Pennsylvania

Executor: Christine R. Settle, Vice President and Trust Officer, ACNB Bank, 675 Old Harrisburg Road, P.O. Box 4566, Gettysburg, PA 17325

Attorney: Teeter Law Office, 108 West Middle Street, Gettysburg, PA 17325

ESTATE OF GAIL D. OYLER, DEC'D

Late of Butler Township, Adams County, Pennsylvania

Executor: LeTort Management & Trust Company, c/o Elizabeth P. Mullaugh, Esq., McNeese Wallace & Nurick LLC, 100 Pine Street, P.O. Box 1166, Harrisburg, PA 17108-1166

Attorney: Elizabeth P. Mullaugh, Esq., McNeese Wallace & Nurick LLC, 100 Pine Street, P.O. Box 1166, Harrisburg, PA 17108-1166

ESTATE OF PAUL P. REICHERT JR, DEC'D

Late of the Borough of Abbottstown, Adams County, Pennsylvania

Executrix: Lynne F. Reichert, 514 W. King Street, Abbottstown, PA 17301

Attorney: Keith R. Nonemaker, Esq., Guthrie, Nonemaker, Yingst & Hart, LLP, 40 York Street, Hanover, PA 17331

ESTATE OF JAMES WILLIS SCHULER, JR. a/k/a JAMES W. SCHULER, JR., DEC'D

Late of Berwick Township, Adams County, Pennsylvania

Executors: Steven W. Schuler, Sandra L. Kinneman, c/o Samuel A. Gates, Esq., Gates & Gates, P.C., 250 York Street, Hanover, PA 17331

Attorney: Samuel A. Gates, Esq., Gates & Gates, P.C., 250 York Street, Hanover, PA 17331

Adams County Bar Association Lunch and Learn CLE Course

The ACBA will be presenting a one (1) hour Lunch and Learn CLE course (video) to interested members of the Adams County Bar Association on Friday, June 15, 2018, from 12:00 p.m. until 1:00 p.m. Please see below for registration information.

Course Title: The New Public Access Policy Governing Filings with the Pennsylvania Appellate and Trial Courts.

Location: Adams County Courthouse, 117 Baltimore Street, Gettysburg, PA 17325, Jury Assembly Room, 4th Floor

Date: Friday, June 15, 2018

Time: 12:00 p.m. until 1:00 p.m.

CLE: One (1) Substantive Credit

Presenter: Video Presentation

Moderator: Judge Christina Simpson

Cost: The ACBA has agreed to cover the cost for all ACBA members

You are invited to bring a brown bag lunch.

To register, please contact my assistant, Carolene Santiago at 717-337-5911 or via email at csantiago@adamscounty.us.

Please provide your Attorney ID number for registration purposes to Carolene when you register. Thank you.