

# Employer Not Vicariously Liable for Employee's Assault, Says the New Jersey Supreme Court

In *Davis v. Devereux Foundation*, 2012 WL 638002 (N.J. Feb. 29, 2012), the Supreme Court of New Jersey declined to hold Defendant Devereux Foundation, a national non-profit foundation providing services for persons with emotional, developmental and educational disabilities, notwithstanding that one of its employees, Charlene McClain, poured boiling water on one of its residents, Plaintiff Roland Davis.

The Court reached this holding on two grounds. First, it decided that institutions caring for the developmentally disabled are not bound by a "non-delegable duty" to protect their residents from the harm caused by an employee's intentional acts. Second, it determined that the employee in this case did not act within the scope of her employment when she assaulted the Plaintiff and, therefore, the Defendant was not vicariously liable under the doctrine of respondeat superior.

This article primarily focuses on the second, broader holding affecting all New Jersey employers, discussing the pertinent facts and procedural history, majority opinion and dissent, and takeaway for employers.

## Background

### Facts

This case concerns the assault of the Plaintiff Roland Davis, a then-nineteen year old resident of Devereux's Bridgeton, New Jersey facility. Davis, a resident at Devereux since he was twelve years old, suffered from autism, pervasive developmental disorder, and mental retardation. Almost completely non-verbal, he occasionally displayed aggression toward the Devereux staff and, as a result, required constant supervision.

On the morning of October 9, 2004, Charlene McClain, a resident counselor at Devereux since 2002, arrived at work to start her shift. When told to rouse Davis from bed and dress him for the day, she boiled a cup of water in the microwave, then entered Davis's room and poured the boiling water on him. Davis, severely burned, was hospitalized for six days. He alleges that the assault scarred him permanently.

Two days before the assault, Davis had acted out towards McClain, including kicking her. The following day, he initiated another physical altercation with McClain, but this time the two had to be separated, prompting McClain to angrily ask her supervisor what she was "going to do" about Davis. McClain was not injured in either incident.

When interrogated by police about the October 9, 2004 assault, McClain admitted that Davis had not acted violently toward her on the morning of the attack. She explained that she had boiled the water and brought it into his room because she was afraid Davis would kick her. When he did not, however, she scalded him anyway because she was "just mad" due to the unrelated murder of her boyfriend six months earlier.

McClain was arrested and pled guilty to third degree aggravated assault. She served two and half years in prison.

In accordance with its standard hiring procedures, Devereux carried out a thorough background check of McClain prior to her hire as a resident counselor. In fact, it conducted a criminal background check, obtained her driver's abstract, checked her references, subjected her to a drug test, and reviewed her high school transcripts. Nothing indicated any inclination for violence or erratic behavior.

### Procedural History

Davis's mother, as his guardian, filed suit against Devereux on October 4, 2006, asserting several claims, including breach of a non-delegable duty to protect Davis from harm, and vicarious liability for the actions of McClain.<sup>1</sup> Devereux moved for summary judgment, which the trial court granted, determining that the case law decided under the Developmentally Disabled Rights Act (DDRA), N.J.S.A. 30:6D-1 to -12, and N.J.A.C. 10:47-5.1(b) did not support Plaintiff's argument that Devereux had "a non-delegable duty" of care towards its residents. The trial court further held that the doctrine of respondent superior did not apply because no reasonable fact finder could conclude that McClain acted within the scope of her employment when she assaulted Davis.

Plaintiff appealed, with the Appellate Division affirming in part and reversing in part. The Appellate Division panel agreed with the trial court's refusal to apply a non-delegable duty of care to Devereux, finding that the principle of vicarious liability offered a sufficient avenue for Plaintiff to seek recourse. In that regard, the panel reversed the trial court's grant of summary judgment on the issue of respondeat superior, holding that a rational fact finder could, indeed, find that "McClain's motives were at least mixed," and that if avoidance of a violent outburst by Davis "to serve her employer was her intent, at least in part, her employer is liable . . . ." See *Davis v. Devereux Found.*, 414 N.J. Super. 1 (App. Div. 2010)).

Appealed once more on both grounds, the Supreme Court rendered the following opinion (and dissent) with respect to the issue of Devereux's vicarious liability under the doctrine of respondeat superior.

## Opinion

### Standard

The doctrine of respondeat superior (synonymous with the term vicarious liability) holds employers liable to third parties for the acts committed by employees within the scope of their employment. The doctrine has been embraced by New Jersey courts, with the Supreme Court having addressed before what the "scope of employment" test entails. Here again defined by the Supreme Court as a "fact-specific inquiry" and "concededly imprecise," the scope of employment standard "refers to those acts which are so closely connected with what the [employee] is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment."

The Court stressed that the foreseeability of the employee's act is "crucial," and cited to four factors used to determine whether the employee's act indeed falls within the scope of his or her employment, including whether (1) "it is of the kind he 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]."

### Holding

In its holding, the Court expressed that an act may be within the scope of employment "although consciously criminal or tortious," but it is less likely given that the employer "is not responsible for acts which are clearly inappropriate to or unforeseeable in the accomplishment of the authorized result."

Despite this general principle, the Court recognized "and ultimately distinguished" several cases finding employers liable for an employee's assault. See, e.g., *Nelson v. American-West African Line, Inc.*, 86 F.2d 730 (2d Cir. 1936) (determining that an "inebriated boatswain" punching a sailor whom he wrongly believed was supposed to be on duty was "really meant to rouse the plaintiff and send him upon duty?"); *Gibson v. Kennedy*, 23 N.J. 150 (1957) (holding that an employee "in charge of the train" acted in the scope of his employment when he struck a person whom he believed was not authorized to board the train); *Mason v. Sportsman's Pub*, 305 N.J. Super. 482 (App. Div. 1997) (finding liability where a bouncer attempted to eject a patron from the bar prompting a fistfight); *Schisano v. Brickseal Refractory Co.*, 62 N.J. Super. 269 (App. Div. 1960) (holding that an employee charged with keeping his employer's private parking lot clear of unauthorized cars acted within the scope of employment when he punched a man who had parked his car in the lot without permission). The Court emphasized the "common pattern" in these cases "each of the employee's responsibilities include enforcement of the employers' rules."

In differentiating this case from the aforementioned line of cases, the Court discussed *Cosgrove v. Lawrence*, 214 N.J. Super 670 (Law. Div. 1986), which determined that a social-worker therapist who initiated a sexual relationship with his patient "went far beyond authorized space limits." Similarly, the issue in the instant case did not begin with a thwarted effort by McClain to enforce her employer's rules, stressed the Court. Rather, McClain acknowledged that she began her shift by "briefly sitting alone and thinking," then "surreptitiously" boiling the water that she used in her attack. Indeed, according to the Court, McClain did not allege that she was defending herself from the Plaintiff's violent conduct "rather, she acted because she was 'just mad about the murder of her boyfriend.'" The Court also found significant that McClain did not admit to her actions in conversations with her supervisors, and only confessed to them under police interrogation.

The Court concluded that McClain's action was a "premeditated act of aggression," not a "misguided effort to perform her job duties." Accordingly, the conduct fell outside of her employment, as it was not only "inconsistent" with the purpose of her employment, but "directly contravened" Defendant's "mission to protect a resident for whom [it] had cared since his childhood."

## Dissent

The dissent, authored by Justice Hoens, not only took issue with the majority's interpretation of the non-delegable duty doctrine, but also contended that the improper use of force, if personally motivated in part, may still fall within the scope of one's employment, thereby subjecting the employer to vicarious liability.

Based on the facts in the record, the dissent argued that the majority could not summarily determine that McClain's motives were entirely personal. For example, McClain stated that her motivation for boiling the water and bringing it into Davis's room was to defend herself in the event he attacked when she tried to dress him. According to the dissent, this alone created a reasonable question of fact as to whether McClain was acting, however misguidedly, in the service of Devereux.

## Takeaway

As recent New Jersey case law evidences, whether an employee's act falls within the scope of his employment is a circumstance-intensive undertaking, with the potential for a wide range of interpretations. Indeed, although the Court in Davis held that the employer was not vicariously liable, the decision was based on a unique set of facts which the majority and dissent viewed quite differently.

Even in the wake of Davis, whether an employee's assault implicates the doctrine of respondeat superior is not as clear cut as employers would hope or the standard might suggest. In fact, the majority cited with approval a string of cases where the courts held employers vicariously liable for an employee's assault upon a third party. Thus, employers should not read the Davis holding too broadly.

In light of several nuance-based decisions, employers should prepare for the prospect of continued vicarious liability claims (including for assault). Employer policies should strive to define the scope of an employee's job duties in a manner that clearly clarifies its bounds. Preparation also should include conducting background checks (consistent with federal and state laws) on applicants and employees for the purpose of assessing their character and professionalism. Without performing due diligence, employers may incur not only vicarious liability for the misconduct of wayward employees, but direct liability for negligent hires and retention.

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<sup>1</sup> Davis's mother also brought claims for negligent care and supervision. The trial court held that those claims were barred by the Charitable Immunity Act (CIA), N.J.S.A. 2A:53A-7 to -11.