

**5.76 NEGLIGENT HIRING<sup>1</sup> (4/07)**

**A. Introduction**

The plaintiff, *[insert the plaintiff's name]*, alleges that the defendant, *[insert the employer's name]*, was negligent in the manner in which *[he]* *[she]* *[it]* hired and supervised *[insert the alleged dangerous employee's name]*. The plaintiff further claims that as a result of *[insert employer's name]*'s negligence, *[he]* *[she]* was exposed to *[insert the alleged dangerous employee's name]*, a dangerous individual, who ultimately *[insert a brief description of the alleged damage or injury]*.

**B. Duty Of An Employer Generally**

The mere happening of an unfortunate event does not provide a basis for liability. Liability is established only if it is proven that a person owing a duty to another breached that duty, and the breach of duty caused the injury or damages claimed.

Generally, an employer is not liable for an employee's criminal or tortious act, whether negligent or intentional, unless the act was committed during the course of, and within the scope of, employment. An exception exists in the case of

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<sup>1</sup> The Court specifically recognized the tort of negligent hiring in *DiCosala v. Kay*, 91 N.J. 159, 174 (1982). The Appellate Division first identified the theory in *Bennett v. T&F Distrib. Co.*, 117 N.J. Super. 429 (App. Div. 1971), *cert. den.* 60 N.J. 350 (1972).

a claim of negligent hiring. An employer may be held responsible for the criminal or wrongful acts of [*his*] [*her*] [*its*] employee, even if those acts occur outside the scope of employment, if the employer was negligent in the manner in which [*he*] [*she*] [*it*] hired, supervised or retained an inappropriate or unfit employee.<sup>2</sup>

### C. Negligent Hiring Exception

An employer in a business providing services to the public has a duty to use reasonable care in selecting competent and fit employees for the work assigned to them. An employer is also bound to refrain from retaining the services of an unfit employee.<sup>3</sup>

An unfit employee is one whose dangerous propensities make him or her inappropriate for a particular job assignment<sup>4</sup> and who is likely to cause harm to the public if hired for that position.

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<sup>2</sup> *DiCosala v. Kay*, 91 N.J. 159, 173 (1982).

<sup>3</sup> The focus of the tort of negligent hiring is on the risk the employer creates by exposing members of the public to a potentially dangerous individual. *DiCosala v. Kay*, 91 N.J. 159, 172 (1982). *See Id.* at 171 (citing *Restatement 2d Agency*, §213, Comment d: “Agent dangerous: The principal may be negligent because he has reason to know that the servant or other agent, because of his qualities, is likely to harm others in view of the work or instrumentalities entrusted to him....”). *See also Bennett v. T&F Distrib. Co.*, 117 N.J. Super. 429, 445 (App. Div. 1971), *cert. den.* 60 N.J. 350 (1972) (“The protection of innocent third persons is a major interest in favor of a rule imposing a duty of reasonable care in the selection of employees or independent contractors who may have vicious propensities”).

<sup>4</sup> “The dangerous quality in the [employee] may consist of his incompetence or unskillfulness due to his youth or his lack of experience considered with reference to the act to be performed. An agent, although otherwise competent, may be incompetent because of his reckless or vicious disposition, and if an [employer], without exercising due care in selection,

### D. Elements Explained

In this matter, you may hold the employer liable for the plaintiff's injuries or damages if you find that [he] [she] [it] was negligent in failing to exercise due care in hiring, supervising or retaining an unfit individual and that such negligence was a proximate cause of the plaintiff's injuries or damages.<sup>5</sup>

In order to find that the employer failed to exercise reasonable care in hiring the employee in question,<sup>6</sup> you must find two things:

One, *[insert employer's name]* knew or had reason to know of the particular unfitness, incompetence or dangerous attributes of the employee, *[insert dangerous employee's name]*<sup>7</sup>; and

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employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity....” *DiCosala v. Kay*, 91 N.J. 159, 171 (1982) (citing *Restatement 2d Agency*, §213, Comment d).

<sup>5</sup> Alternative Charge: “Therefore, for you to find (employer) liable for negligent hiring, you must first find (employer) negligent and then find that [his] [her] [its] negligence proximately caused the plaintiff's injuries or damages.”

<sup>6</sup> An employer may not be held responsible under a theory of negligent hiring, supervision or retention for criminal or other wrongful acts of its employee if in the exercise of reasonable care and diligence, a reasonable employer would not have ascertained the employee's incompetence, unfitness or dangerous propensities. In other words, the employer took reasonable care and diligence in researching that individual's background, references, and other relevant information.

<sup>7</sup> *DiCosala v. Kay*, 91 N.J. 159, 173 (1982).

Two, *[insert employer's name]* could have reasonably foreseen that hiring a person with the employee's attributes created a risk of harm to others, whether on or off the premises.<sup>8</sup>

An employer may be held liable if, during the hiring process or course of employment, the employer actually knew the employee had an inappropriate or dangerous characteristic, attribute or tendency that made the employee an unacceptable candidate for the position.<sup>9</sup> An employer may also be held liable if reasonable investigation would have disclosed the employee's undesirable characteristic, attribute or tendency.<sup>10</sup>

In determining whether the employer exercised due care in this matter, you must examine all the circumstances surrounding the hiring and employment of the employee.<sup>11</sup> Since there is no hard and fast rule as to what constitutes an

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<sup>8</sup> *DiCosala v. Kay*, 91 N.J. 159, 173 (1982). *But see Johnson v. Usdin Louis Co., Inc.*, 248 N.J. Super. 525 (App. Div. 1991), *cert. den.* 126 N.J. 386 (1991) (negligent hiring not found where the employer could not have reasonably foreseen the employee would steal nitric acid from the employer and use it to attack his wife and daughter.)

<sup>9</sup> *For instance, the employer may hire someone without a license as a taxi driver.*

<sup>10</sup> Using the same example of a taxi driver, the employer may check that the applicant has a license on his person but not check whether the license was revoked. Had the employer checked the status of the license, the employer would have a reason to know that the applicant was unlicensed.

<sup>11</sup> *Lingar v. Live-In Companions, Inc.*, 300 N.J. Super. 22, 32 (1997).

appropriate hiring process, you should consider all of the facts and circumstances of this particular case, including but not limited to:

- a) The employer's application and interview process;
- b) The nature of the job;
- c) The checking of references;
- d) The nature and extent of information reasonably available to the employer at the time of hire, including access to public records of criminal or other convictions;<sup>12</sup>
- e) Whether such information was available to the employer through reasonable, and not extraordinary means, including extraordinary cost;
- f) The nature of the criminal conviction, if any; and
- g) Whether the pre-hiring investigation of the employee, if any, was adequate under the totality of the circumstances.

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<sup>12</sup> Insert the following if criminal history investigation is applicable: "In this case, the employee, *[insert employee's name]*, had an undisclosed and undiscovered criminal history which made [him] [her] unfit and dangerous for the duties of the position. Liability of *[insert employer's name]*, though, is not predicated solely upon [his] [her] [its] failure to investigate the criminal history of the applicant. With regard to the criminal record of a candidate for employment, you must consider the totality of the circumstances, and specifically: (a) What investigation, if any, the employer could have legally taken; and (b) What information was reasonably available to the employer at the time of hire.

If you find the employer knew or could have known of the employee's unfit characteristic, you must then decide whether the employer could have reasonably foreseen that such qualities created a risk of harm to others.<sup>13</sup>

Foresight, not hindsight, is the standard by which an employer's duty of care must be judged.<sup>14</sup> The fact that one may look back now and decide the employee was unfit does not satisfy this element of the claim. The employer must be judged on what [he] [she] [it] had reason to know at the time the employee was hired or retained.<sup>15</sup> In deciding if the employer knew or could have known about the employee's characteristic and should have foreseen it to be dangerous, you may take into consideration the following:

- 1) The nature of the work;
- 2) The extent to which the employee would or would not be supervised;
- 3) Whether the employee would have access to the home and valuables of the public in general, and the plaintiff in particular; and

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<sup>13</sup> *DiCosala v. Kay*, 91 N.J. 159, 173 (1982). *But see Johnson v. Usdin Louis Co., Inc.*, 248 N.J. Super. 525 (App. Div. 1991), *cert. den.* 126 N.J. 386 (1991) (Where the Appellate Division refused to find negligent hiring judging the employer could not have reasonably foreseen the employee would steal nitric acid from the employer and use it to attack his wife and daughter.)

<sup>14</sup> *Johnson v. Usdin Louis Co., Inc.*, 248 N.J. Super. 525 (App. Div. 1991), *cert. den.* 126 N.J. 386 (1991) (quoting *Hill v. Yaskin*, 75 N.J. 139, 144 (1977)).

<sup>15</sup> *The Foreseeability Charge, 5.10B, may be used to supplement.*

4) The particular vulnerability, if any, of members of the public to abuse, harm or other loss caused by exposure to a potentially unsuitable, incompetent or dangerous employee.<sup>16</sup>

**E. Proximate Cause**

If you find the employer, *[insert employer's name]*, was negligent in the manner in which *[he]* *[she]* *[it]* hired the employee, *[insert dangerous employee's name]*, the employer still will not be liable for the plaintiff's injury or damage unless you also find the employer's negligence proximately caused the plaintiff's injury or damage.<sup>17</sup>

This means that, in order to find the employer liable, you must find that the employer's negligence in hiring the unfit employee was a substantial factor that singly, or in combination with one or more other causes, brought about the plaintiff's injury or damage.<sup>18</sup>

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<sup>16</sup> *Lingar v. Live-In Companions, Inc.*, 300 N.J. Super. 22, 23 (1997) discusses these factors at some length.

<sup>17</sup> *DiCosala v. Kay*, 91 N.J. 159, 174 (1982).

<sup>18</sup> Adapted from the Proximate Cause Products Liability, Charge 5.40I.