

1 UNITED STATES DISTRICT COURT  
2 DISTRICT OF NEVADA

3 SANDRA DE BLANC,

4 Plaintiff

5 v.

6 ALOHA AIRPORT EXPRESS, LLC,

7 Defendant

Case No.: 2:18-cv-00151-APG-DJA

**Order Denying Defendant’s Motion for  
Summary Judgment and Granting  
Defendant’s Motion in Limine**

[ECF Nos. 25, 27]

8 Plaintiff Sandra De Blanc sues defendant Aloha Airport Express, LLC for injuries she  
9 sustained while stepping out of Aloha’s van. De Blanc brings claims for negligence and  
10 negligent hiring, training, and supervision, but did not sue the driver of the van. Aloha moves  
11 for summary judgment, arguing that (1) the expiration of the statute of limitation against the  
12 driver extinguishes Aloha’s vicarious liability and (2) De Blanc’s negligent hiring, training, and  
13 supervision claim is duplicative of her vicarious liability claim. I predict that the Supreme Court  
14 of Nevada would (1) not hold that the expiration of the statute of limitations against the driver  
15 discharges Aloha’s liability and (2) allow both vicarious liability and negligent hiring, training,  
16 and supervision claims. I therefore deny Aloha’s motion for summary judgment.

17 Aloha also moves to exclude De Blanc’s expert, Lane Swainston. I grant Aloha’s motion  
18 to exclude him because Swainston’s opinions do not assist the jury and are not the product of  
19 reliable principles and methods.

20 **I. BACKGROUND**

21 On August 9, 2016, De Blanc was a passenger on an Aloha shuttle driven by Aloha  
22 employee Daniel Leivas. ECF No. 25 at 21. Upon arrival at McCarran Airport in Las Vegas,  
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1 Leivas placed a step stool next to the van. *Id.* at 19-20. De Blanc fell as she used the step stool to  
2 disembark the van, but she was able to board her flight that day. *Id.*

3 De Blanc filed this suit on October 20, 2017, and Aloha removed it to federal court on  
4 January 26, 2018. ECF No. 1. Aloha disclosed Leivas as a fact witness and produced his  
5 handwritten incident report on March 14, 2018. ECF No. 25 at 23-28. By agreement of the  
6 parties, the final deadline to add parties and amend pleadings was June 25, 2018. ECF No. 21 at  
7 2. De Blanc did not move to join Leivas before the limitation period expired on August 9, 2018.

8 De Blanc offers Swainston’s expert opinion in support of her claims. Swainston  
9 examined the stool and concluded that the “locking mechanism is not reliable and is subject to  
10 operator error or failure of the mechanism to latch shut.” ECF No. 25-1 at 2. He also concluded  
11 that the stool “is not stable under loading that is not deliberately centered on the platform. If the  
12 platform is not properly placed by the driver, it is especially unsafe when used to exit a vehicle.”  
13 *Id.*

## 14 **II. MOTION FOR SUMMARY JUDGMENT**

15 Summary judgment is appropriate if the movant shows “there is no genuine dispute as to  
16 any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.  
17 56(a), (c). A fact is material if it “might affect the outcome of the suit under the governing law.”  
18 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A dispute is genuine if “the evidence  
19 is such that a reasonable jury could return a verdict for the nonmoving party.” *Id.*

20 The party seeking summary judgment bears the initial burden of informing the court of  
21 the basis for its motion and identifying those portions of the record that demonstrate the absence  
22 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The  
23 burden then shifts to the non-moving party to set forth specific facts demonstrating there is a

1 genuine issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531  
2 (9th Cir. 2000); *Sonner v. Schwabe N. Am., Inc.*, 911 F.3d 989, 992 (9th Cir. 2018) (“To defeat  
3 summary judgment, the nonmoving party must produce evidence of a genuine dispute of material  
4 fact that could satisfy its burden at trial.”). I view the evidence and reasonable inferences in the  
5 light most favorable to the non-moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523  
6 F.3d 915, 920 (9th Cir. 2008).

### 7 **A. Vicarious Liability**

8 Aloha argues that when the limitation period against Leivas expired, De Blanc’s  
9 vicarious liability claim against Aloha was extinguished because Aloha’s liability is derivative of  
10 Leivas’s. De Blanc responds that vicarious liability requires only that the employee is under the  
11 employer’s control and acts within the scope of his employment.

12 Aloha relies on a brief reference in *Van Cleave v. Gamboni Construction Company* to “a  
13 harsh [common law] rule” that the “release of an employee automatically releases the vicariously  
14 liable employer.” 706 P.2d 845, 846 (Nev. 1985). In *Van Cleave*, the Supreme Court of Nevada  
15 held that under the Uniform Contribution Among Tortfeasors Act, a release signed by the  
16 employee did not discharge the employer of vicarious liability. *Id.* at 849. Here, however, the  
17 facts present a different question of whether the expiration of the limitation period against the  
18 employee discharges the employer of vicarious liability. The parties agree that there is no  
19 Nevada case law directly on point. ECF No. 25 at 5; ECF No. 32 at 5. So I must predict how the  
20 Supreme Court of Nevada would decide the issue.<sup>1</sup>

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23 <sup>1</sup> When a federal court interprets state law, it is bound by the decisions of the state’s highest  
court. *Assurance Co. of Am. v. Wall & Assocs. LLC of Olympia*, 379 F.3d 557, 560 (9th Cir.  
2004). Where the state’s highest court has not decided the issue, a federal court must predict  
how that court would decide. *Orkin v. Taylor*, 487 F.3d 734, 741 (9th Cir. 2007). I may use

1 I predict that the Supreme Court of Nevada would hold that the expiration of the of  
2 limitation period against the employee does not discharge the employer of vicarious liability.  
3 First, Nevada decisions on vicarious liability require “proof that (1) the actor at issue was an  
4 employee, and (2) the action complained of occurred within the scope of the actor’s  
5 employment.” *Rockwell v. Sun Harbor Budget Suites*, 925 P.2d 1175, 1179 (Nev. 1996); *see also*  
6 *Nat’l Convenience Stores, Inc. v. Fantauzzi*, 584 P.2d 689, 691 (Nev. 1978). Aloha has not  
7 identified, and I have not found, Nevada authority requiring that the employee be held personally  
8 liable to impose vicarious liability on the employer.

9 Second, the Supreme Court of Nevada often looks to the Restatement (Second) of  
10 Judgments in this context. *See Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 321 P.3d  
11 912, 917 n.3 (Nev. 2014) (collecting cases). Comment (a) to Restatement § 51 recognizes that:

12 [B]oth the primary [tortfeasor] and the person vicariously  
13 responsible for his conduct are ordinarily subject to liability to the  
14 injured person. In some situations, the vicariously responsible  
15 person is liable only if the liability of the primary obligor is  
16 established; this is true, for example, of an insurer’s liability for the  
17 acts of the insured. Ordinarily, however, the person vicariously  
18 responsible may be held liable even though the liability of the  
19 primary obligor has not been established. Moreover, in some  
20 situations the person vicariously responsible may be held liable  
21 even though an action cannot be maintained against the primary  
22 obligor. . . . [U]nder prevailing procedural rules the injured person  
23 ordinarily is not required to join both and may decide to bring suit  
in the first instance against only one of them.

19 Restatement (Second) of Judgments § 51 (1982). California recognizes that a “plaintiff seeking  
20 to hold an employer liable for injuries caused by employees acting within the scope of their

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23 “decisions from other jurisdictions, statutes, treatises, and restatements as guidance.” *Assurance Co.*, 379 F.3d at 560 (quotation omitted).

1 employment is not required to name or join the employees as defendants.” *Perez v. City of*  
2 *Huntington Park*, 9 Cal. Rptr. 2d 258, 260 (Cal. Ct. App. 1992).

3 Third, although other states are split, “the jurisprudential trend is tending toward” the rule  
4 I predict here. *Verrastro v. Bayhospitalists, LLC*, 208 A.3d 720, 730 (Del. 2019). In fact, two  
5 state supreme courts have rejected Aloha’s argument since the parties briefed the motion. *See id.*;  
6 *Cameron v. Osler*, 930 N.W.2d 661 (S.D. 2019). The Supreme Court of Delaware’s decision in  
7 *Verrastro* is illustrative. *Verrastro* overruled *Greco v. University Delaware*, 619 A.2d 900 (Del.  
8 1993), which Aloha relies upon, because “it is the negligence of the employee that is imputed to  
9 the employer, not the employee’s liability.” *Verrastro*, 208 A.3d at 729. So “in a negligence  
10 action against a principal based on the doctrine of *respondeat superior*, the dismissal of the agent  
11 on defenses personal to the agent does not automatically eliminate the principal’s vicarious  
12 liability.” *Id.* at 728-29.

13 Finally, the Supreme Court of Nevada recognized that the common law rule that “the  
14 release of one tortfeasor automatically released all other potential tortfeasors” was “harsh and  
15 without any rational basis.” *Russ v. Gen. Motors Corp.*, 906 P.2d 718, 720 (Nev. 1995). The  
16 common law rule here is equally harsh. It would make De Blanc’s timely claim against Aloha  
17 retroactively untimely because she did not sue Leivas. So I predict that the Supreme Court of  
18 Nevada would hold that the expiration of the statute of limitations against the employee does not  
19 discharge the employer of vicarious liability. I thus deny Aloha’s motion for summary judgment  
20 on the negligence claim and do not consider De Blanc’s alternative motion to amend her  
21 complaint to add Leivas.

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1                   **B. Negligent Hiring, Training, and Supervision**

2                   Aloha argues that De Blanc’s negligent, hiring, training, and supervision claim is  
3 extinguished because it is duplicative of her vicarious liability claim against Aloha. De Blanc  
4 points to Nevada decisions (1) acknowledging negligent hiring and vicarious liability as separate  
5 claims and (2) holding that an employer can be liable for negligent hiring whether or not the  
6 employee is acting within the scope of employment, arguing that these cases suggest the claims  
7 are not duplicative.

8                   The parties agree that there is no Nevada case law on point, so I must predict how the  
9 Supreme Court of Nevada would rule. In *Terrell v. Central Washington Asphalt, Inc.*, “I  
10 predict[ed] that the Supreme Court of Nevada would hold that a negligent entrustment claim is  
11 not redundant of vicarious liability, particularly where . . . punitive damages are sought.” 168 F.  
12 Supp. 3d 1302, 1313 (D. Nev. 2016). Although De Blanc does not seek punitive damages, I  
13 reach the same conclusion here.

14                   The argument that the claims are redundant is based on three considerations: (1) evidence  
15 of negligent hiring, training, and supervision is unnecessary because it is just another theory for  
16 holding the employer liable for the employee’s negligence; (2) “the plaintiff cannot recover any  
17 more in damages than he would recover under a theory of respondeat superior”; and (3) evidence  
18 of negligent hiring, training, and supervision “would likely be irrelevant and inflammatory.”  
19 *Alvares v. McMullin*, No. 2:13-CV-02256-GMN, 2015 WL 3558673, at \*3 (D. Nev. June 4,  
20 2015).

21                   Although De Blanc can recover the same damages under the two theories, her claims  
22 address different conduct and will consequently require presentation of different evidence. De  
23 Blanc’s vicarious liability theory arises out of Leivas’s use of the stool, while her negligent

1 hiring, training, and supervision theory focuses on how Aloha hired and supervised its  
2 employees and trained them on how to load and unload passengers and use the stool. ECF No. 32  
3 at 23. A jury could find negligence on one theory and not on the other. And in contrast to a  
4 negligent hiring theory, where sordid details regarding an employee’s background are often  
5 admissible, evidence of Aloha’s training practices is not inflammatory. De Blanc’s negligent  
6 hiring, training, and supervision is not duplicative of its vicarious liability theory.

7 Aloha alternatively argues that summary judgment is warranted because there is no  
8 evidence to support De Blanc’s claims. De Blanc responds that there is sufficient evidence to  
9 allow the jury to find Aloha negligently trained and supervised Leivas because Aloha’s witnesses  
10 testified there was no specific training given to employees regarding loading and unloading  
11 passengers or use of the step stool. *See* ECF No. 32-1 at 43-44; ECF No. 32-2 at 23-24.

12 Under Nevada law, an “employer has a duty to use reasonable care in the training,  
13 supervision, and retention of his or her employees to make sure that the employees are fit for  
14 their positions.” *Hall v. SSF, Inc.*, 930 P.2d 94, 99 (Nev. 1996). Based on the deposition  
15 testimony that Aloha did not train its employees to load or unload passengers or use the step  
16 stool, a reasonable jury could conclude that Aloha failed to use reasonable care in the training of  
17 its employees. De Blanc has identified a disputed issue of fact to sustain her negligent hiring,  
18 training, and supervision claim for trial.<sup>2</sup>

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<sup>2</sup> Aloha replies that De Blanc failed to provide “admissible evidence indicating what training  
21 Aloha was required to provide.” ECF No. 39 at 7. Aloha did not raise this argument in its  
22 opening brief and does not explain what admissible evidence is required. But it fails in any event  
23 because “[w]here . . . the service rendered does not involve esoteric knowledge or uncertainty  
that calls for the professional’s judgment, it is not beyond the knowledge of the jury to determine  
the adequacy of the performance.” *Daniel, Mann, Johnson & Mendenhall v. Hilton Hotels Corp.*,  
642 P.2d 1086, 1087 (Nev. 1982). It is within the jury’s knowledge that use of a step stool to get  
in and out of a vehicle may result in injury.

1 Because the deposition testimony is evidence of a genuine disputed issue of fact for trial,  
2 and De Blanc’s negligent hiring, training, and supervision claim is not duplicative of her  
3 vicarious liability claim, I deny Aloha’s motion for summary judgment.

4 **III. MOTION IN LIMINE**

5 Aloha argues that Swainston should be excluded from trial because: (1) he is unqualified  
6 to offer product engineering opinions, (2) his opinions are not based upon a sound methodology,  
7 and (3) his opinions do not assist the jury. De Blanc responds that: (1) Swainston is qualified  
8 because of his expertise in “safety evaluation,” (2) inspection of the stool is a reliable method,  
9 and (3) Swainston’s testimony will assist the jury in determining whether Aloha acted  
10 reasonably.

11 Federal Rule of Evidence 702 provides that “[a] witness who is qualified as an expert . . .  
12 may testify in the form of an opinion or otherwise if: (a) the expert’s scientific, technical, or  
13 other specialized knowledge will help the trier of fact to understand the evidence or to determine  
14 a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the  
15 product of reliable principles and methods; and (d) the expert has reliably applied the principles  
16 and methods to the facts of the case.” Fed. R. Evid. 702; *see also Daubert v. Merrell Dow*  
17 *Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). I have a “gatekeeping” function to ensure that the  
18 jury’s consideration of evidence is not contaminated by irrelevant or scientifically unsupported  
19 testimony. *See United States v. Alatorre*, 222 F.3d 1098, 1100-03 (9th Cir. 2000). I enjoy broad  
20 discretion over the discharge of this gatekeeping authority, “not only . . . in determining whether  
21 an expert’s testimony is reliable, but also in deciding how to determine the testimony’s  
22 reliability.” *Elsayed Mukhtar v. Calif. State Univ., Hayward*, 299 F.3d 1053, 1064 (9th Cir.

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1 2002), *overruled on other grounds by Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 467  
2 (9th Cir. 2014).

3 Swainston’s first conclusion that the “locking mechanism is not reliable and is subject to  
4 operator error or failure of the mechanism to latch shut” is not the product of reliable principles  
5 and methods. Swainston explains that “these problems were all observed on the working  
6 platform that [he] examined,” but does not explain how he came to his conclusion that the  
7 locking mechanism is not reliable and is subject to operator error or failure. Swainston does not  
8 identify any principles or methods to support his conclusions, much less reliable ones. *See*  
9 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 153 (1999) (not abuse of discretion to exclude  
10 expert on grounds that method of analyzing visual inspection data was unreliable). It seems the  
11 jury could observe the stool and reach its own conclusion, rendering expert opinion unnecessary.

12 Swainston also concludes that the stool “is not stable under loading that is not  
13 deliberately centered on the platform. If the platform is not properly placed by the driver, it is  
14 especially unsafe when used to exit a vehicle.” This conclusion does not assist the jury. The  
15 jury can understand that a step stool may be unstable if the user does not step in the center of it.  
16 And the jury is capable of determining whether Aloha acted reasonably in this context. *See*  
17 *Daniel, Mann, Johnson & Mendenhall*, 642 P.2d at 1087 (“Where . . . the service rendered does  
18 not involve esoteric knowledge or uncertainty that calls for the professional’s judgment, it is not  
19 beyond the knowledge of the jury to determine the adequacy of the performance.”). Because  
20 Swainston’s conclusions do not assist the jury and are not the product of reliable principles and  
21 methods, I grant Aloha’s motion to exclude him.

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1 **IV. CONCLUSION**

2 I ORDER that defendant Aloha Airport Express, LLC's motion for summary judgment  
3 **(ECF No. 25) is DENIED.**

4 I FURTHER ORDER that defendant Aloha Airport Express, LLC's motion to exclude  
5 Lane Swainston **(ECF No. 27) is GRANTED.**

6 DATED this 23rd day of September, 2019.

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10 ANDREW P. GORDON  
11 UNITED STATES DISTRICT JUDGE  
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