CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Diaz v Carcamo 6/23/11

Admission of Vicarious Liability; Independent Liability of Employer

Plaintiff was driving south on US 101 in Ventura County. Defendant Carcamo, a truck driver for defendant Sugar Transport¸ was northbound in the center of three lanes. Defendant Tagliaferri, driving in the center lane behind Carcamo, pulled into the left lane to pass Carcamo, and without signaling, pulled back into the center lane. Her vehicle hit Carcamo's truck, spun, flew over the center divider, and hit plaintiff's SUV head-on, causing severe injuries. Plaintiff sued all three defendants, alleging negligence against the two drivers, and asserting Sugar Transport was both vicariously liable, and directly liable for its own negligence in hiring and retaining Carcamo.

At trial, Sugar Transport offered to admit vicarious liability if Carcamo was found negligent. That admission, it argued, would bar plaintiff from pursuing her claims for negligent hiring, retention and entrustment. Over Sugar Transport's objection, the trial court admitted evidence of Carcamo's driving and employment history, showing prior accidents and prior firings, a false job application, and negative reports from a former employer. At the close of trial, Sugar Transport stipulated to vicarious liability. The jury found both drivers were negligent and Sugar Transport was negligent in hiring and retaining Carcamo as a driver. Fault was allocated 45% to Tagliaferri, 35% to Sugar Transport and 20% to Carcamo. It awarded plaintiff $17.5 million in economic damages and $5 million in non-economic damages. Under the judgment, Tagliaferri and Sugar Transport were both jointly liable for plaintiff's economic damages pursuant to Civil Code section 1431.1 et seq., and severally liable for their respective shares of non-economic damages. The Court of Appeal affirmed, distinguishing the case of *Armenta v Churchill* (1954) 42 Cal.2d 448), and

disagreeing with the case of *Jeld-Wen, Inc. v Superior Court* (2005) 131 Cal.App.4th 853). The Supreme Court granted a petition for review by Sugar Transport and Carcamo.

Sugar Transport contends the Court of Appeal erred, as did the trial court, in failing to bar evidence plaintiff presented on the negligent hiring and retention claim, following the admission of vicarious liability. The 1954 case, *Armenta*, involved a suit by the heirs of a man struck by a truck owned by defendants and driven by their employee. Defendants admitted course and scope, and the trial court excluded evidence of the employee's prior bad driving record which included a manslaughter conviction. The Supreme Court upheld the ruling, finding that the admission of vicarious liability made the negligent entrustment claim irrelevant. Vicarious liability and negligent entrustment were "alternative theories under which to impose upon defendant the same liability as might be imposed on their employee driver." With the admission of vicarious liability, the legal issue of defendant's liability was removed from the case, leaving "no material issue to which the offered evidence could be legitimately directed." (*Armenta* at p. 458)

Since that case was decided nearly sixty years ago, the comparative fault system was introduced to California law. (*Li v Yellow Cab Co.* (1975) 13 Cal.3d 804) Under the old system of "all or nothing" the admission of vicarious liability by the employer meant it would be liable (whether vicariously or "directly" on a negligent entrustment claim) for 100 percent of plaintiff's damages, or none at all. *Li* changed the law so that damages are awarded in direct proportion to respective fault. Later, in 1986, Proposition 51 (Civil Code section 1431.1) limited the scope of liability for non-economic damages to an individual defendant's percentage of fault, while retaining joint liability for economic damages.

One type of defendant excluded from the allocations of fault under Prop 51 is an employer who faces only vicarious liability under the respondeat superior doctrine for torts committed by its employees in the scope of employment. (*Miller v Stouffer* (1992) 9 Cal.App.4th 70) In such a case, the "universe of tortfeasors" among whom the jury must apportion fault does not include the employer. Instead, the employer's share of liability for the plaintiff's damages corresponds to the share of fault that the jury allocates to the employee. An

employer solely liable on a theory of vicarious liability can thus have no greater fault than its negligent employee acting within the course and scope of employment. The question presented in this case is whether an additional claim against the employer for negligent entrustment, hiring or retention, requires a different apportionment of fault.

The Supreme Court began by noting that negligent entrustment, the subject in *Armenta*, is no different than negligent hiring or retention, the issue here. Awareness that a person is unfit or incompetent to drive underlies a claim that an employer was negligent in hiring or retaining a person as a driver. (CACI No. 426) That same awareness underlies a claim for negligent entrustment. The two claims are functionally identical. Plaintiff's attempt to distinguish the older case was rejected. *Armenta* held that if a plaintiff sues a driver's employer on theories of respondeat superior and negligent entrustment, the employer can, by admitting liability on the first claim, bar the second. (*Armenta*, at p. 457)

Plaintiff claims this holding is inconsistent with the principles of comparative fault. Plaintiff claims the trial court must include the employee and the employer in the universe of tortfeasors to whom the jury will allocate fault. (*DaFonte v Up-Right, Inc.* (1992) 2 Cal.4th 593) The Justices noted, however, that it logically follows from that argument, that the jury can hold an employer responsible for two shares of fault: one based on the employee's negligent driving in the scope of employment for which the employer is liable vicariously, and one based on the employer's own negligence in choosing a driver, for which the employer is liable "directly." Plaintiff argues that to exclude the employer's direct fault would distort the process of allocating fault by removing an at-fault party from the universe of tortfeasors.

In *Jeld-Wen*, the Court of Appeal rejected a similar argument. It stated that negligent entrustment may establish an employer's own fault, but "should not impose additional liability" instead, "the employer's liability cannot exceed that of the employee." (*Jeld-Wen*, at p. 871) Where the employer admits vicarious liability for its employee's negligent driving, the universe of defendants who can be held responsible for plaintiff's damages is reduced by one—the employer—for purposes of establishing fault under Prop 51. The Justices in that case stated the jury must divide fault among the listed tortfeasors and the employer is liable

only for the share of fault assigned to the employee. The employer would not be listed on the special verdict form.

Here, the Court of Appeal disagreed with *Jeld-Wen*, finding that negligent hiring or retention is a distinctly culpable act. The employer should know the employee is not fit to drive and the principles of Prop 51 require a jury to apportion fault among all defendants to ensure that all bear responsibility for non-economic damages in proportion to their degree of fault. The Supreme Court disagreed. It stated that no matter how negligent an employer was in entrusting a vehicle to an employee, it is only if the employee then drove negligently that the employer can be liable for negligent entrustment, hiring, or retention. (*Jeld-Wen*, at p. 863) If the employee did not drive negligently, and is thus zero percent at fault, then the employer's share of fault is zero percent. This is true even if the employer entrusted its vehicle to an employee it knew to be habitually careless with a history of accident. (In a footnote, the Justices commented that there may be instances in which the employer may be liable for negligence independent of its employee, such as when the employer provides the driver with a defective vehicle.)

Comparative fault "is a flexible, commonsense concept" adopted to enable juries to reach an "equitable apportionment or allocation of loss." (*Knight v Jewett* (1992) 3 Cal.4th 296) If an employer offers to admit vicarious liability for its employee's negligent driving, then claims against the employer based on theories of negligent entrustment, hiring, or retention become superfluous. To allow such claims in that situation would subject the employer to a share of fault in addition to the share of fault assigned to the employee, for which the employer has already accepted liability. To assign to the employer, the Justices hold, a share of fault greater than that assigned to the employee whose negligent driving was a cause of the accident would be an inequitable apportionment of loss.

The Supreme Court went on to reject arguments by plaintiff based on the respective moral culpability of the driver versus that of the employer, resting on the principle that the objective of comparative fault is to achieve an equitable allocation of loss. *Armenta*, is reaffirmed and an employer's admission of vicarious liability for an employer's negligent driving in the course of

employment bars a plaintiff from pursuing a claim for negligent entrustment. The trial court thus erred in not applying that holding to the case.

To establish prejudice, a party must show a reasonable probability that in the absence of the error, a result more favorable to it would have been reached. Here the plaintiff presented abundant evidence of Carcamo's prior accidents and poor employment history. He had used a false social security number to get hired and had lied on his work application. He had been fired from three of his last four positions as a driver. Evidence was also presented showing Sugar Transport had poor hiring practices.

The Justices found that had that evidence been excluded, and had Sugar Transport not been listed as a separate tortfeasor on the special verdict form, it is reasonably probable that the jury would have reached results more favorable to one or both of the defendants. Had the jury been instructed to divide fault solely between Carcamo and Tagliaferri, rather than including Sugar Transport, the jury would have assigned to Carcamo alone less than the 55 percent share of fault it assigned to both him and Sugar Transport together. Although Sugar Transport would still have been responsible for the share of fault assigned to Carcamo, the result would have been more favorable, because it would have had no additional, independent liability.

The Judgment is reversed and the case is remanded for a complete retrial.