HOW THE CALIFORNIA SUPREME COURT'S *DIAZ V. CARCAMO* DECISION AFFECTS AN EMPLOYER'S POTENTIAL LIABILITY FOR NEGLIGENT HIRING, TRAINING, SUPERVISION AND RETENTION.

Traditionally under California law, there are two types of theories under which an employer may be held liable for the negligent or tortious conduct of its employees: first, under a vicarious liability theory, an employer may be liable for the tortious conduct of its employee; second, under a direct liability theory, an employer may be liable directly for negligent hiring, training, supervision or retention of an employee who was engaged in tortious conduct.

However, in the recent California Supreme Court decision, *Diaz v. Carcamo* (2011) 51 Cal.4th 1148, ("*Diaz*"), the court has effectively abolished any direct liability claim against the employer for negligent hiring, training, supervision or retention where the employer admits that its employee was acting within the course and scope of his employment at the time that he engaged in the tortious conduct. Not only does this ruling potentially affect the type of liability theory that can be raised against an employer in a civil trial, but it also potentially affects the type of evidence that can be admitted (and possibly within the scope of permissible discovery) against the employer, especially with regard to the employee's prior conduct. This ruling is especially relevant for employers whose employees are professional drivers, e.g., truck drivers or delivery drivers, whose prior driving records are often at issue in resulting civil litigation arising from a motor vehicle accident in which the employee was the driver involved.

In *Diaz*, the California Supreme Court held that,

> [i]f, as here, a plaintiff asserts both theories [of vicarious liability and negligent entrustment], and the employer admits vicarious liability for any negligent driving by its employee, can the plaintiff still pursue the negligent entrustment claim? The answer is 'no…' (*See* Diaz at 447.)

Diaz involved a motorist/plaintiff who was injured when a car flipped over a center divider and ran into the plaintiff's vehicle. The divider-jumping car had tried to pass a truck operated by defendant Carcamo, but ran into the front of the truck. Hitting the truck caused the car to flip over the center divider and hit the plaintiff's vehicle. The plaintiff contended that Carcamo was negligent in driving his employer's truck, resulting in injury. Carcamo's employer admitted that Carcamo was working in the course and scope of his employment at the time of the accident.

Carcamo's employer, Sugar Transport, offered to admit vicarious liability, if Carcamo was found negligent. Following the ruling in *Armenta v. Churchill* (1954) 42 Cal.2d 448, the *Diaz* court reasoned that:

> [I]f an employer admits vicarious liability for its employee's negligent driving, a plaintiff cannot rely on a negligent entrustment claim to introduce evidence of the employee's driving record. (*Diaz* at 1154.)

The excluded facts in the case were quite damning to Sugar Transport, as Carcamo had been involved in two previous accidents, one within weeks of the subject incident. Carcamo also lied

on his application to get the job, had been fired from four other trucking jobs for poor performance and was an illegal alien.

The *Diaz* case borrows heavily from *Armenta*, in which the California Supreme Court previously held that a defendant truck driver's 37 moving violations—including a conviction of manslaughter—were removed from the case by the admittance of vicarious liability on the part of the defendant truck driver's employer. In short, admission of vicarious liability made the negligent hiring or negligent training claims irrelevant.

The basic question in *Diaz* was summed up as:

> An employer liable solely on a theory of *respondeat superior* can thus have no greater fault than its negligent employee acting in the scope of employment. The question here is whether plaintiff's assertion of an additional claim against the employer—for negligent entrustment, hiring or retention—requires a different approach to allocating fault. (*Diaz* at 1157.)

The court started its analysis by ruling that a claim for negligent entrustment and negligent hiring were "functionally identical." (*Id*. at 1157.) The court also ruled that there was no issue with admitting liability at trial as opposed to before. The court then analyzed the advent of comparative fault principles subsequent to the holding in *Armenta* and the adoption of Proposition 51.

Failing to see the plaintiff's contentions regarding the inapplicability of *Armenta,* the *Diaz* court summed up its opinion:

> Thus, when a plaintiff alleges a negligent entrustment or hiring cause of action against the employer and 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 apportioning fault under Proposition 51. Consequently, the employer would not be mentioned on the special verdict form. The jury must divide fault for the accident among the listed tortfeasors and the employer is liable only for whatever share of fault the jury assigns to the employee. (*Diaz* at 1159)

The court then buttressed its reasoning by stating:

> No matter how negligent an employer was in entrusting a vehicle to an employee, however, it is only if the employee then drove negligently that the employer can be liable for negligent entrustment, hiring or retention…If the employee did not drive negligently, and thus is zero percent at fault, then the employer's share of fault is zero percent. That is true even if the employer entrusted its vehicle to an employee whom it knew, or should have known, to be a habitually careless driver with a history of accidents. (*Diaz* at 1159-60, internal citations omitted.)

In essence, the California Supreme Court reaffirmed that the doctrine of comparative fault is a common sense approach to reach an equitable apportionment of damages. When, as is the case

in *Diaz*, an employer admits to vicarious liability, claims 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 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. (*Diaz* at 1160.)

The *Diaz* case makes abundantly clear that, if the employer admits to being vicariously liable, then there is no claim to show how bad the driver was before the accident. Any evidence of previous accidents or issues with the driver's employment are not relevant or admissible in the case.

Evidence of an employee's past accidents (admitted here to support the negligent hiring claim against employer, Sugar Transport) is highly prejudicial to the defense of a negligent driving claim against the employee:

> Such evidence creates a prejudicial risk that the jury will find that the employee drove negligently based not on evidence about the accident at issue, but instead on an inference, drawn from the employee's past accidents, that negligence is a trait of his character. (*Diaz* at 1162.)

However, there are two issues in which the *Diaz* court does not give any further insight which may be left to the appellate courts to later interpret and reconcile with the holding in *Diaz*. First, the court failed to discuss the ruling in relation to the plaintiff's claim for punitive damages. There may be a conflict between Civil Code Section 3294(b), as it relates to a claim for punitive damages, which seems to statutorily authorize the use of previous acts of an employee in determining punitive damages against an employer and the *Diaz* case, which precludes evidence of negligent training, hiring or supervision when there is admitted vicarious liability.

For example, in *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, which pre-dated the *Diaz* decision, the plaintiff, a legal secretary, sued her law firm and a partner at the firm for sexual harassment. The firm contended that evidence of the partner's previous bad acts was not admissible for a number of reasons, prejudice being one. The court found that the evidence spoke to the punitive damages claim against the firm, which had earlier been found to be directly liable for the acts of the partner. The first appellate district affirmed the admission of the evidence regarding the partner's previous bad acts:

> We accept without analysis, Baker & McKenzie's contention that by stipulating to liability for compensatory damages resulting from Greenstein's acts of sexual harassment, Baker & McKenzie established grounds for objecting to evidence introduced to support the theory that it was liable for failing to take all reasonable steps necessary to prevent discrimination or harassment from occurring. It does not follow, however, that

> evidence of Greenstein's earlier conduct became inadmissible. The majority of the evidence at issue was relevant not only to the question of Baker & McKenzie's liability for compensatory damages under Government Code section 12940, subdivision (i), but also to the question of its liability for punitive damages under Civil Code section 3294, subdivision (b)…The evidence therefore was admissible whether or not Baker & McKenzie's stipulation rendered moot Weeks's theory that Baker & McKenzie should be liable for failing to protect her from sexual harassment. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1160-61).

Perhaps one of the key facts to distinguish the *Weeks* case is that the trial court had already determined that the law firm was directly liable to the plaintiff, rather than simply liable under a vicarious liability theory, pursuant to California Government Code Section 12940, as the plaintiff's direct employer. The *Diaz* decision seemed to rest on the employer only being liable under a vicarious liability theory for the damages to the plaintiff, who was not an employee of the employer (as was Weeks), rather than being directly liable for the plaintiff's damages.

The other aspect that the *Diaz* court did not specifically address was the scope of discovery – if any – allowable where there is an admission of vicarious liability by the employer. Typically, the pleadings define the scope of discovery in a civil lawsuit. Where the employee's prior acts are no longer admissible at trial and the employer admits vicarious liability for the employee's conduct, it is highly questionable whether the aggrieved plaintiff should be allowed discovery as to those prior acts. Since it may be that even where the plaintiff makes a claim for punitive damage, evidence of such prior conduct is not admissible at trial, it stands to reason that such conduct is also not within the scope of proper discovery and should not be allowed.

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