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"Course-and-scope" of employment

Recent decisions give hope to auto accident victims; was the defendant making a work-related cell phone call?


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Despite recent efforts to impede plaintiffs' access to justice, the respondeat superior doctrine remains a viable road to recovery in car accident cases. This article examines three recent decisions which expand the doctrine and benefit plaintiffs.

In *Lobo v. Tamco* (4th Dist., February 24, 2010) 10 Cal. Daily Op. Serv. 2354.), the court held that an employee who used a personal car for work a few times subjected his employer to tort liability when, while driving home from work, the employee struck and killed a police officer. (In *Jeewarat et al. v. Warner Bros. Entertainment, Inc.* (2009) 177 Cal.App.4th 427), a Warner Brothers employee driving home from an out-of-town conference exposed Warner Brothers to tort liability when he was involved in a fatal collision. (And in *Miller v. American Greetings Corp*. (2008) 161 Cal.App.4th 1055, 1063, the court said that an employee who makes a work-related phone call while driving exposes an employer to tort liability under respondeat superior, even if the call does not coincide with the car crash. These decisions demonstrate the need to explore any connection between a defendant-driver and a business activity in a car accident case.

✓DISCOVERY CHECKLIST

The authors have compiled a checklist of 33 items you'll want to include in your discovery.
These include:
- Document Demands
- Deposition subject matter
- Subpoenas

Find the checklist on next page

Respondeat superior

Under the respondeat superior doctrine, an employer is vicariously or strictly liable for an employee's negligent acts or omissions committed in the "course and scope" of employment. (*Lobo v. Tamco*, *supra*, 10 Cal. Daily Op. Serv. at 2355.) This doctrine is based on a policy that allocates risk to the employer as a cost of doing business, because the employer benefits from the activity and can spread the risk through insurance. (*Jeewarat*, *supra*, 177 Cal.App.4th at 434.) The doctrine is to be given a broad application, and extends to risks inherent in or created by the employer's enterprise. (*Ibid*.) "Course and scope" contemplates conduct that is typical of or incidental to the employment. (*Ibid*.)

The "going and coming" rule

Under the "going and coming" rule, an employer is generally exempt from liability for an employee's acts committed while driving to and from work. (*Lobo v. Tamco*, *supra*, 10 Cal. Daily Op. Serv. at 2355.) "This is based on the concept that the employment relationship is suspended from the time the employee leaves work until he or she returns, because the employee is not ordinarily rendering services to the employer while traveling. [Citations.]" (*Jeewarat*, *supra*, 177 Cal.App.4th at 434, quoting *Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 162.) But there are two exceptions to the going-and-coming rule: the required-vehicle exception and the special-errand doctrine.

The required-vehicle exception – *Lobo v. Tamco*

Under the required-vehicle exception, an employer is subject to liability where the use of a car gives some incidental benefit to the employer. (*Lobo v. Tamco*, *supra*, 10 Cal. Daily Op. Serv. at 2355.) In *Lobo v. Tamco*, a metallurgist, Del Rosario, was driving home from work in his personal car when he struck and killed a deputy sheriff. Del Rosario's employer, Tamco, required him to use his car to visit customers, and did

DISCOVERY CHECKLIST

• ***Document Demands***

The defendant-driver's written job description.

All receipts or pay-stubs that reflect the defendant-driver's employer's payment for the defendant-driver's commute time to or from work.

All receipts or pay-stubs that reflect the defendant-driver's employer's payment for the defendant-driver's mileage.

All receipts or pay-stubs that reflect the defendant-driver's employer's payment for the defendant-driver's travel expenses.

All of the defendant-driver's expense sheets for the five years before the incident, for the day of the incident, and for the year after the incident.

All documents that show reimbursements made from the defendant-driver's employer to the defendant-driver for the five years before the incident, for the day of the incident, and for the year after the incident.

All documents that reflect the defendant-driver's use of a personal car for work for the five years before the incident, for the day of the incident, and for the year after the incident.

All documents that reflect the defendant-driver's use of a company car for work for the five years before the incident, for the day of the incident, and for the year after the incident.

The defendant-driver's employer's reimbursement policy.

All documents which discuss an employee's use of a personal car for work.

All documents which discuss an employee's use of a company car for work.

All work-related texts or e-mails to or from the defendant-driver on the day of the incident.

All work-related call logs or messages to or from the defendant-driver on the day of the incident.

All invoices for the defendant-driver's mobile phone for the month of the incident.

All of the defendant-driver's time sheets or logs for the month of the incident.

• ***Deposition subject matter***

The defendant-driver's job duties, including out-of-office job duties and job duties that require car travel.

The benefits the defendant-driver's employer has derived from the defendant-driver's performance of out-of-office job duties.

The method of travel for work.

Ownership of the vehicles used by the defendant-driver when traveling for work.

Ownership of the vehicle used during the car trip which resulted in the incident.

The purpose of the car trip which resulted in the incident.

The route of the car trip which resulted in the incident.

All stops the defendant driver made during the car trip which resulted in the incident.

All time and attention devoted to work during the car trip which resulted in the incident.

The defendant-driver's use of a mobile phone during the car trip which resulted in the incident.

Equipment or tools (including any mobile phones or GPS equipment) the defendant-driver kept in a personal car.

The defendant-driver's normal commute route.

The defendant-driver's use of a personal car for work before the incident.

The defendant-driver's use of a company car for work before the incident.

The defendant-driver's employer's expectations regarding car use for work.

The number and positions of employees who use a personal car for work.

The defendant-driver's employer's reimbursement policy and practices.

• ***Subpoenas***

The defendant-driver's mobile phone records for the month of the incident.

The 911 tapes for the incident.

not provide a car because the visits occurred so infrequently. Del Rosario used his car for customer visits only two or three times in the two years before the accident, and 10 or fewer times over 16 years. But he kept boots, a helmet and safety glasses in his car, and if he had been asked to visit a customer on the way home from work on the day of the accident, "he 'would have gotten in [his] car and used [his] car to go to that facility.'" (*Id.* at 2356.)

The court found that the required-vehicle exception applied, because the employer required Del Rosario to make his car available for work, and derived a benefit from the availability of the car. (*Lobo v. Tamco*, *supra*, 10 Cal. Daily Op. Serv. at 2356.) Significantly, the court rejected Tamco's argument that the required-vehicle exception should not apply because Del Rosario rarely used his car to visit customers. (*Ibid.*) The court explained that the inquiry did not turn on the frequency of car use, but on whether the employer required or expected the car to be available, and derived a benefit from its availability. (*Ibid.*)

The special-errand doctrine – *Jeewarat v. Warner Bros. Entertainment, Inc.*

Under the special-errand doctrine, an employer is subject to liability when an employee commits a tort while engaged in a special errand or mission for the employer. (*Jeewarat*, *supra*, 177 Cal.App.4th at 436.) An employee on a special errand acts within the course and scope of employment from the time the employee starts on the errand until the employee has returned or deviates from the errand

for personal reasons. (*Ibid*.) The rule promotes the risk-allocation policy because the errand benefits the employer. (*Ibid*.)

In *Jeewarat*, a Warner Brothers employee driving home from an out-of-town conference collided with another car. (*Jeewarat*, *supra*, 177 Cal.App.4th 427.) The court held that the special errand doctrine applied because Warner Brothers expected to derive a benefit from the employee's attendance at the conference. (*Id*. at 437-438.) The court reasoned that "[a] special errand continues for the entirety of the trip" and there were no personal deviations on the trip. (*Id*. at 438.)

Work-related phone calls while driving – *Miller v. American Greetings Corp.*

Mobile phone use for work falls within the course and scope of employment, and exposes an employer to vicarious liability. In *Miller v. American Greetings Corp*. (2008) 161 Cal.App.4th 1055, an employee, Magdeleno, took a day off to speak with a lawyer about a personal matter. While driving to meet the lawyer, Magdeleno was involved in a car accident. The plaintiff introduced evidence that Magdeleno placed a one-minute, work-related mobile-phone call about eight or nine minutes before the accident.

The court of appeal affirmed summary judgment for the defendant-employer, but said:

> We envision the link between respondeat superior and most work-related cell phone calls while driving as falling along a continuum. Sometimes the link between the job and the accident will be clear, as when an employee is on the phone for work at the moment of the accident. Oftentimes, the link will fall into a gray zone, as when an employee devotes some portion of his time and attention to work calls during the car trip so that the journey cannot be fairly called entirely personal. But sometimes, as here, the link is de minimis – one call of less than one minute 8 or 9 minutes before an accident while traveling on a personal errand of several miles' duration heading neither to nor from a worksite. When that happens, we find no respondeat superior as a matter of law.

(*Miller*, *supra*, 161 Cal.App.4th at 1063).

So a work-related phone call subjects an employer to vicarious liability if a car crash occurs during the call. Additionally, multiple work-related phone calls (or texts) during the same car trip may expose an employer to vicarious liability if a crash occurs during the trip.

Conclusion

Recent cases demonstrate the need to discover any connection between a defendant-driver and work at the time of an accident. Business activities that occurred before and during the car trip may establish an employer's vicarious liability.

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