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Dodging *Diaz*

A PROVEN STRATEGY TO KEEP YOUR NEGLIGENT-ENTRUSTMENT CLAIM VIABLE

The landmark California Supreme Court case of *Diaz v. Carcamo* (2011) 51 Cal.4th 1148 ("*Diaz*") has been cited by negligent employers time and time again. *Diaz* is typically used by the defense in vicarious-liability cases to extinguish an employer's liability for their own negligence by placing their employee in a position to commit the tort in the first place.

No matter how extreme the evidence of employer's negligence may be in hiring, training, supervising, entrusting, and/or retaining their employee, under *Diaz* it may all be subject to exclusion. However, a case we recently handled provides insights on strategies that can be successful in keeping a negligent supervision cause of action viable. In *Bravo v. The Specialty Crop Company, et al.* ("*Bravo*"), a summary adjudication motion on our client's claim of negligent supervision was denied notwithstanding the holding of *Diaz*.

This article serves as a roadmap for litigators seeking to overcome *Diaz* to ensure critical evidence of employer negligence reaches the jury.

Early considerations

At the outset of a case involving a course-and-scope defendant driver, little is known about this driver beyond the accident sequence. We may have a traffic-collision report detailing the collision, the police investigation, identities of the involved parties and the vehicle owners, etc. But not much else.

Virtually nothing is known about how the defendant driver came to operate a vehicle for their employer's business until litigation. We do not know what driving training (if any) they received, what vetting process (if any) the employer used to ensure they were fit to be a driver, nor whether the driver had any physical condition(s) impairing their driving capabilities.

Despite this information gap, it is still best practice to plead in the complaint a negligent-entrustment cause of action against the defendant employer along with general negligence/negligence per se against the defendant driver.

But due to *Diaz*, this creates a dilemma for litigators. This is because the negligent-entrustment cause of action is subject to attack by the defense if the employer admits to course and scope. And, as explained in detail below, the *Diaz* holding will eventually dispose of that cause of action altogether unless certain steps are taken.

To avoid this fate, it is incumbent on the litigator to develop, plead, and, in time, demonstrate a triable issue of facts that would support a punitive-damages claim against the employer. Why? Because *CRST, Inc v. Superior Court* (2017) 11 Cal.App.5th 1255 ("*CRST*") has carved out an exception to the *Diaz* holding, allowing the negligent-entrustment cause of action to remain viable so long as there is a sufficient showing of punitive-damage-worthy conduct by the employer.

But making this showing is usually not possible at the outset of the case. And savvy litigators know that it is best to get your case at-issue and set for trial as soon as possible. Including vague, surface-level punitive-damages allegations in your complaint will only invite a motion to strike and usually just causes delays and avoidable motion practice. Because of this, litigators must be strategic on how and when to incorporate punitive conduct into their case.

Direct vs. indirect negligence

In *Diaz*, the plaintiff was a motorist driving on U.S. Highway 101 in Ventura County. Defendant truck driver for the defendant transportation company was also on the highway. Another motorist/defendant collided with the defendant truck driver, lost control, and struck the plaintiff, causing severe, permanent injuries. It was not until trial that the defendant transportation company offered to admit vicarious liability if the defendant truck driver was found negligent.

Over the defendant transportation company's objection, the trial judge allowed the plaintiff to present evidence showing two prior accidents involving the defendant truck driver, as well as other evidence showing that he was in this country illegally, had been fired from three of his last four driving jobs, and that, when the company had sought information from his prior employers, the lone response gave him a very negative evaluation.

The *Diaz* court agreed with the defense that allowing the jury to hear the evidence about the truck driver's employment history and poor driving record was error. In reaching this holding, the Court focused on the interplay between an employer's direct negligence and an employer's derivative negligence.

The latter is the concept of vicarious liability, or respondeat superior – an employer is liable, irrespective of fault, for an employee's negligence while the employee is in the course and scope of employment. Consequently, an employer liable solely on a theory of respondeat superior can have no greater fault than its negligent employee.

Direct negligence, on the other hand, is solely focused on the fault of the employer. Direct negligence is based on an employer's independent fault for the distinctly culpable act of putting its employee in a position to commit the tort in the first place when the employer should know they were unfit to perform the given assignment. This is most often due to negligence in hiring and retaining an unfit individual or failing to adequately train and supervise the negligent individual before entrusting them with the task.

Under *Diaz*, however, when a plaintiff sues an employer on both theories of respondeat superior and direct negligence, the employer can, by admitting vicarious liability on the first claim, "bar the second." The idea is that all liability for the employer flows through the negligent actions of the employee

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once vicarious liability is admitted. The employer's liability then becomes "coextensive" to the employee's culpability.

The typical scenario

Our recent case of *Bravo* is demonstrative of the typical scenario implicating *Diaz*. The facts are straightforward. Mr. Bravo was driving a tractor along a rural road on a clear day when a large box truck, driven by the defendant's employee, crashed into the rear of the tractor at high speed. Mr. Bravo was immediately ejected from the tractor and landed on the pavement, causing him to suffer severe orthopedic and neurologic injuries.

There was no evidence in the traffic-collision report suggesting that the defendant driver was an unfit driver or anything of that nature. Nor did a background check reveal much of anything. In fact, the driver had claimed to law enforcement that the collision was a true accident, stating that a sudden sun glare had blinded him and prevented him from seeing our client's tractor.

In the course of litigation, however, it was discovered that this driver of the box truck was actually a seasonal farm laborer with no experience driving large commercial motor vehicles. The defendant employer made no attempt to train the driver in the safe operation of these vehicles or even assessed if he was physically capable of doing so. Worse yet, the driver's license required him to wear corrective lenses, but the only pair of glasses he owned were many years out-of-date. Naturally, just six weeks after his employer put him behind the wheel of this large box truck, the subject collision occurred.

As the case approached trial, we took several corporate depositions where we were able to elicit testimony supporting the employer's negligence in putting the driver on the roadway in the first place. Defense counsel caught onto the fact that our negligent-entrustment case was getting stronger and sought to obstruct these efforts based on *Diaz*. The defendant employer finally admitted to course and scope of the defendant driver and immediately brought a motion for summary adjudication on Mr. Bravo's negligent-supervision cause of action. Thereafter, the defense refused to engage in any further discovery concerning the driver's fitness or the employer's negligent conduct, claiming all such evidence was rendered irrelevant and not discoverable under *Diaz*.

Recognizing that this critical evidence of employer negligence hung in the balance, we devised a strategy to ensure it would still reach the jury.

The punitive-conduct exception

In response to the defendant's summary adjudication motion, we brought a motion for leave to amend the complaint to allege punitive damages in connection with the negligent-supervision cause of action.

This strategy was based on the ruling in *CRST*. There, a freightliner driven by a CRST employee struck a vehicle, causing serious injuries to the passengers. After admitting vicarious liability for any negligence by their employee, CRST sought summary adjudication on claims against them for negligent hiring and entrustment under *Diaz*. CRST appealed the trial court's denial of summary adjudication, claiming that *Diaz* bars the recovery of punitive damages in view of CRST's acceptance of vicarious liability. The Court of Appeal rejected CRST's contention regarding *Diaz*, holding "the employer may be subject to punitive damages upon a proper showing of misconduct."

To support our prayer for punitive damages in *Bravo*, the amended complaint cited to the facts uncovered in discovery concerning the employer's direct negligence, including the defendant employer's noncompliance with federal safety regulations. These facts included:

- The driver had no previous experience operating large commercial vehicles and had not received any training from his employer;
- The Federal Motor Carrier Safety Regulations required, amongst other mandates, that the defendant employer have in place a driver safety/orientation program, subject drivers to a compliance road test, and assess drivers' physical qualifications;
- The defendant employer abandoned these federal safety requirements in conscious disregard of public safety; and
- The defendant employer made the conscious decision to disregard these federal safety rules out of pecuniary interest and savings, thereby putting motorists on the local roadways at grave risk.

Of course, the defense opposed our efforts to amend the complaint. But in doing so, the defense made the mistake of arguing on the merits and claiming that our allegations did not rise to the level required to warrant punitive damages. On reply, we pointed out that this is not the standard and that the defense, through its opposition papers, would have the court improperly decide the merits of the punitive facts based solely on arguments of counsel and with no evidentiary record. We cited *Kittredge Sports Co. v. Superior Court* (1989) 213 Cal.App.3d 1045, 1048, which establishes that the correct approach is to permit the amendment and then allow the parties to test its legal sufficiency by demurrer, motion for judgment on the pleadings, or other appropriate proceedings. The court agreed with our argument and granted the motion.

After the amended complaint was filed, we were able to end the defendants' discovery blockade on evidence relating to training and supervision. When the defendant employer later renewed their summary adjudication motion, it again claimed the employer's conduct alleged was insufficient to support a claim for punitive damages. As a consequence, defense argued, the direct-negligent claim was subsumed by the vicarious-liability claim.

In opposing the defendants' motion, we pointed to case authority establishing that a violation of safety standards, if credible, can support a showing of "a conscious disregard of the rights or safety of others" within the meaning of Civil Code section 3294, subdivision (b). This included *Romo v. Ford Motor Co.* (2002) 99 Cal.App.4th 1115, where the court found

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that the "defendant ignored its own internal safety standards," upholding an award of punitive damages.

We analogized the facts of our case to *Romo*, arguing that, not only did the defendant employer certify it knew of the federal safety rules, it also committed to having a system in place to ensure continuing compliance with those requirements. Despite this confirmation that they knew the rules, the defendant employer did not train the defendant driver in the safe operation of heavy commercial motor vehicles. The company also failed to confirm his physical qualifications to operate these vehicles or assess his fitness to operate the subject truck.

The trial court agreed and issued its ruling denying the motion for summary adjudication. The court held an employer may be subject to punitive damages upon a proper showing of misconduct notwithstanding an admission of vicarious liability. The court affirmed that the evidence we submitted regarding the defendant employer's non-compliance with federal safety rules created a triable issue of fact on the punitive damages claim.

Developing a punitive-damages case

There is no one-size-fits-all approach to establishing punitive conduct in a case involving a course-and-scope defendant driver. Plus, developing a triable issue of fact on punitive conduct is a high bar and many judges are reluctant to permit it in a seemingly ordinary motor-vehicle accident case. But it certainly can be done and there are certain categories of inquiry that should be fully explored throughout litigation.

The categories of inquiry include: (1) the initial hiring and vetting of the employee to ensure they are a safe, qualified, and capable driver; (2) whether the employer has created, implemented, and actually followed a fleet safety program with adequate training; and (3) whether the employer has created adverse workplace conditions that contributed to the cause of the collision.

The first category, initial vetting, is fairly self-explanatory. If an employee has a physical condition or takes medication that impairs their ability to drive, the employer needs to know and account for it. If an employee has a poor driving record and has demonstrated they are an unfit driver, they should not be operating motor vehicles for the employer's benefit.

If the employer knew of these issues but allowed the employee on the roadway anyway, that can be strong evidence to support punitive damages. Likewise, if the employer completely abandoned their duty to vet the driver at all, the absence of evidence can be equally strong. In fact, for companies engaged in interstate commerce, the Federal Motor Carrier Safety Regulations ("FMCSR") may require the company to conduct a medical examination, vet the prospective driver's driving record, and perform a road test. Non-compliance with the FMCSRs can be particularly powerful evidence of punitive conduct.

The second category, fleet safety, can also uncover compelling evidence. A fleet-safety program is a set of policies, procedures, and practices that a company may enact to enhance the safety of a company's vehicles and drivers. If a company is putting many vehicles on the roadway without a fleet-safety program, that alone is strong evidence that the employer is deviating from industry norms and ignoring safety. Or, alternatively, if a company has created a fleet-safety program but does not follow it, that can be damning evidence as well. For example, we have seen cases where an employer's fleet-safety program calls for annual training both in the classroom and on the road, but that simply is not followed.

In certain cases, typically ones involving large transportation companies, the defendant employer may even subscribe to AI software, such as the Lytx system, which is used to monitor driver behaviors as part of their fleet management. Companies like Greyhound, UPS, Amazon, and others have installed driver-facing cameras in their fleet vehicles that are constantly monitoring the driver's movements while the vehicle is in operation.

If the driver is using a phone, speeding, rolling stops, falling asleep, or engaging in other risky behaviors while driving, the software can identify these behaviors in real-time. This cloud-based software is further able to generate reports automatically, which are provided to the company. The data collected about a driver from this software can be key evidence of both dangerous driving by the employee and notice to the employer.

The last category, adverse workplace conditions, is essentially where the employer sets the employee up for failure. If the employer is overworking drivers and causing them to experience driver fatigue, this can certainly add to the punitive-conduct allegations. Where driver inattention or fatigue appears to be a contributing crash factor, discovering the driver's work hours leading up to the collision is key.

For companies subject to the FMCSRs, there are hours-of-service requirements, such that a driver can only drive a certain number of hours in a given time period. If the company exceeds these requirements or pushes the driver to be at or near the limit, this too can supply evidence of gross negligence by the employer.

These three broad categories are by no means an exhaustive list. Each case is unique, and litigators need to adjust their strategy based on where the facts and evidence lead them.

Conclusion

Litigators should not allow the *Diaz* holding nor an admission to course and scope to serve as the end of the conversation on a claim for negligent entrustment. The punitive-conduct exception set forth in *CRST* provides a viable path for litigators to ensure critical evidence of an employer's direct negligence reaches the jury.

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