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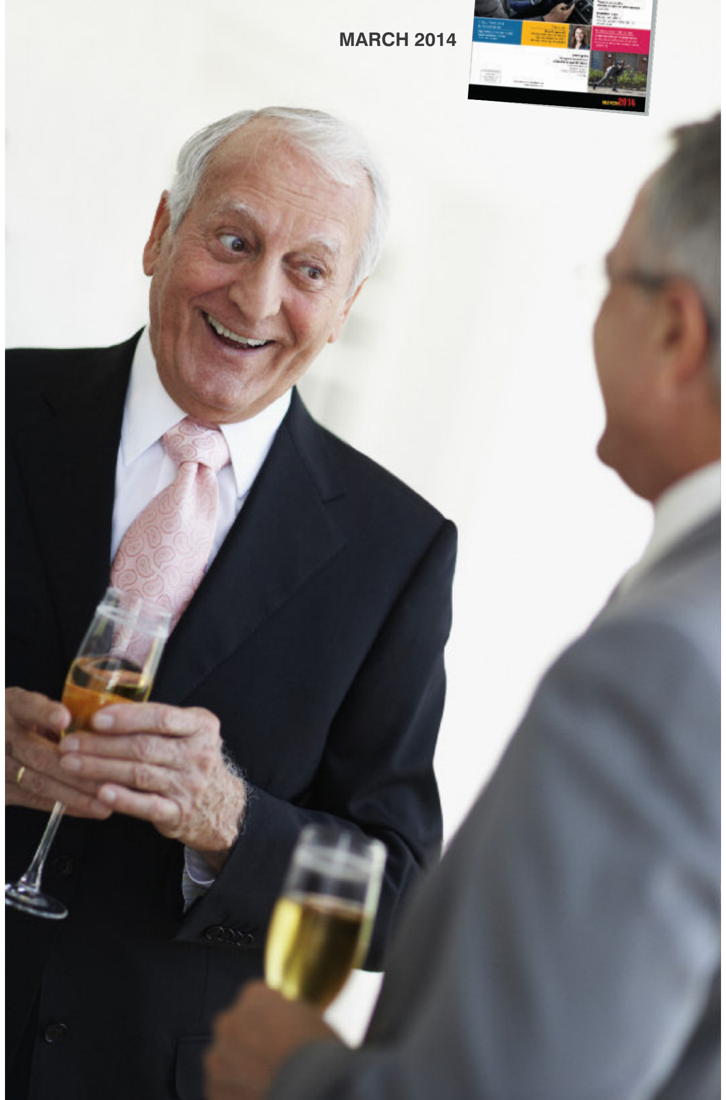

Expanding course and scope: Employee intoxication

A fresh look at the employer's liability for accidents due to drinking

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The state courts throughout the U.S. have long differed on the parameters of course and scope of employment, and when l iability can be imposed upon an employer for the acts of an employee. In the jurisdictional split, several courts have ruled that the accident itself must occur during a time that the employee is acting within the scope of employment. (*Bruce v. Chas Roberts Air Conditioning* (Ct.App. 1990) 166 Ariz. 221, 226; *Holtz v. Amax Zinc Co.* (1988) 165 Ill.App.3d 578, 583-584; *Thies v. Cooper* (1988) 243 Kan. 149, 156.) In other courts, liability may be imposed when an employee has consumed alcohol within the scope of employment; the timing of the accident following is not relevant. (See *Wong-Leong v. Hawaiian Indep. Refinery* (1994) 76 Hawai'i. 433, 441; *Chesterman v. Barmon* (1988) 305 Or. 439, 443-444; *Dickinson v. Edwards* (1986) 105 Wash.2d 457, 468-469; see also *Chastain v. Litton Systems, Inc.* (4th Cir. 1982) 694 F.2d 957, 962.)

McCarty and its progeny

In California, under the *McCarty* case, an employee's drinking may fall within the course and scope of employment when (1) the consumption is allowed by the employer, and (2) the consumption is either a customary incident of employment or it benefits the employer. (*McCarty v. Workmen's Comp. Appeals Bd*. (1974) 12 Cal.3d 677.) In the recent case of *Purton v. Marriott Int'l*, the California Supreme Court revisited *McCarty* and its progeny, and found that if alcohol consumption is the proximate cause of the injury, and the consumption occurred within the scope of employment, liability may be imposed. (*Purton v. Marriott Int'l* (2013) 218 Cal.App.4th 499.) This case expands the *McCarty* ruling to find liability even if the injurious act occurs long after alcohol consumption, because an accident is a foreseeable act

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of an intoxicated employee. (*Ibid*.) The *Purton* court noted that "we focus on the act on which vicarious liability is based and not on *when* the act results in injury;" it is irrelevant that the accident itself occurred after the employee was outside of the course and scope of employment. (*Id.* at 508, 510-511.) The act of consuming alcohol may be within the bounds of the course and scope of employment – the accident that later occurred following the drinking need not be.

The *McCarty* court found that the oft-cited "going and coming" rule, which has been used to exempt an employer from liability for acts committed by an employee when going to or coming home from work, does not protect an employer if the employee becomes intoxicated at a workplace function, then causes injury to himself or others – and the intoxication was the proximate cause of that injury. (*McCarty v. Workmen's Comp. Appeals Bd., supra,* 12 Cal.3d at 681.) The *McCarty* court ruled that "if the proximate cause is of industrial origin, the time and place of injury or death even if foreign to the premises does not serve to nullify recovery." (*Ibid*.) The *Purton* case underscores this ruling along with other California court opinions, finding that "[i]t is irrelevant that foreseeable effects of the employee's negligent conduct occurred at a time the employee was no longer acting within the scope of his or her employment," and that a duty of care can be breached by an employee becoming intoxicated at a party. (*Purton v. Marriott Int'l, supra,* 218 Cal.App.4th at 514.) *Purton* again emphasized prior rulings, finding that "the employer's potential liability under these circumstances continues until the risk that was created within the scope of the employee's employment dissipates." (*Id.* at 519.)

Effects of the *Purton* analysis

The next step in the *Purton* analysis is to define whether the event where the employee was drinking, was in fact an event that falls within the course and scope of employment. *Purton* again expands the prior case law by broadening the definition and analysis. The court found that, in following *McCarty's* two-pronged approach, a drinking event with employees may benefit the employer simply because it improved employee-employer relations, morale, and camaraderie; or even more broadly, that drinking was "a customary incident to the employment relationship." (*Id.* at 517.) It may also benefit the employer if the alcohol consumption helps customer relations, an important analysis in the context of informal networking or cross-marketing gatherings. (*Id.* at 509-510.)

The *Purton* court concludes the opinion by stating that questions relating to both the negligent act itself and the scope of the employment are for a trier of fact to decide, thus removing the opportunity for defendants to successfully argue otherwise in a motion for summary judgment or adjudication. (*Id.* at 523.) To further bolster an opposition to a summary judgment motion, a number of previous cases leading up to the *Purton* holding may be relied on. In *Childers v. Shasta Livestock Auction Yard, Inc.* (1987) 190 Cal.App.3d 792, the court ruled that the "going and coming" rule did not apply because an intoxicated employee was the proximate cause of the injury. The employees, though drinking off-duty, had gathered at the jobsite and had permission from their supervisor to drink at the site. Additionally, these gatherings were regular occurrences. In *Harris v. Trojan Fireworks Co.* (1981) 120 Cal.App.3d 157, the court found that the employer had received a benefit from a casual gathering because the point of the party was to improve employer-employee relations, or to provide the employees a motivation to continue working for the employer because of the "benefit" of the party – or simply to improve relations between employees.

Defense counsel routinely moves for summary judgment or adjudication on the grounds that an employee's conduct was outside the course and scope of employment. To oppose these motions, *Purton* should be heavily relied on, as should *McCarty* and its progeny. To bring forward evidence to support an opposition to such a motion, numerous facts can be obtained through depositions of employees and the employer. It should be determined if the employer had a policy regarding social functions; if alcohol was paid for in part by the employer; if food was provided; if free rides home were offered or could otherwise be expensed; if social functions were frequent or at least consistent; if functions were encouraged by the employer.

If the function falls outside of the parameters of a typical "work party," liability may be established if the event was a customer or marketing meeting, no matter how informal. If the function served to benefit the employer in some way, including simply an informal or unplanned get-together between friends that could result in new business or a new opportunity, liability may be imposed. Furthermore, motions for summary judgment often arise out of evidence that suggests employees were drinking after hours, in informal settings. To prevail, it should be argued that the socializing was either paid for in part, or simply encouraged no matter how informally, by a person representing the employer – and that the employer benefitted from this socializing in that it improved relations between the employees, and it helped morale. To stave off a motion for summary judgment altogether, depositions of employees and a review of employer policies regarding social events should be obtained in the initial stages of discovery to proactively establish for the defendants that the conduct falls within the course and scope of employment.

The *Purton* ruling has provided a strong basis to impose broader liability upon employers in these contexts. As the *Childers* court noted, if an employer permits or encourages the consumption of alcohol amongst employees for the benefit of the enterprise, "fairness requires

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that the enterprise should bear the burden of injuries proximately caused by the employees' consumption." (*Childers v. Shasta Livestock Auction Yard, Inc.*, *supra*, 190 Cal.App.3d at 810.)

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