Appellate Reports

Liberty Surplus Insurance v. Ledesma & Meyer Construction – Does an employer's negligent hiring, retention, or supervision of an employee constitute an "accident"?

By Jeffrey I. Ehrlich

Liberty Surplus Ins. Corp. v. Ledesma & Meyer Constr. Co., Inc.

(2018) __ Cal.5th __ (Cal. Supreme)

Who needs to know about this case? Lawyers handling insurance-coverage cases where there is a dispute about whether the insured's conduct constitutes an "accident."

Why it's important: (1) Holds that claims for negligent hiring, retention, and supervision of an employee who commits an intentional tort qualify as an "accident"; (2) makes clear that, in some circumstances, the unintended consequences of the insured's deliberate acts constitute an "accident"; and (3) holds that the term "caused by" or "because of" in the insuring clause of a liability policy refers to "substantial factor" causation.

Synopsis: Ledesma & Meyer Construction Co. ("L&M") was hired to manage a construction project at a middle school. While the project proceeded, an L&M employee, Hecht, molested a 13-year-old student, Doe. Doe sued L&M, among others, for negligently hiring, retaining, and supervising Hecht. L&M's insurer, Liberty, defended under a reservation of rights, and then filed a declaratory relief action in federal court, seeking to establish noncoverage. The district court granted summary judgment in favor of Liberty, finding that (a) L&M's acts of hiring, retaining, and supervising Hecht did not constitute an "accident" and therefore were not an occurrence; and (b) regardless of whether those acts were accidental, they were too attenuated in the causal chain to trigger coverage under the policy.

L&M appealed, and the Ninth Circuit requested that the California Supreme Court answer whether claims against an employer for negligent hiring, retention and supervision of an employee who commits an intentional tort constitute an occurrence under a CGL policy. The Court agreed to answer the question, and answered it in the affirmative.

The Court confirmed that the meaning of the term "accident" in a liability policy in California is settled. "An accident is an unexpected, unforeseen, or undesigned happening or consequence from either a known or an unknown cause." In a liability policy, the word "accident" refers to the conduct of the insured, not a third party. Claims against an employer for negligent hiring, retention, or supervision are direct claims against the employer based on its own allegedly negligent conduct; not vicarious or derivative claims based on the employee's tortious conduct. The fact that Hecht's conduct was not an accident does not foreclose coverage for the claims asserted against L&M for its own negligence.

The term "accident" is more comprehensive than the term negligence, and thus includes negligence. "Accordingly, a policy providing a defense and indemnification for bodily injury caused by an accident promises coverage for liability resulting from the insured's negligent acts."

Where a liability policy promises coverage for liability imposed on the insured "because" of bodily injury, property damage, or personal injury "caused by" or "because of" an occurrence, the relevant causation standard is based on tort causation principles. In California, causation in tort is established if the defendant's conduct is a substantial factor in bringing about the plaintiff's injury. Here, L&M's claimed negligence in hiring, retaining, and supervising Hecht was an indirect cause of Doe's injury, and was not "too attenuated" to constitute a substantial factor in causing that injury.

While L&M's acts of hiring, retaining, and supervising Hecht were deliberate, it did not expect or intend Hecht to commit intentional torts. Even though Hecht's conduct was intentional, from L&M's perspective his conduct could have been an unexpected, unforeseen, or undesigned happening or consequence of its hiring, retention, or supervision of Hecht, and therefore "accidental" for the purposes of liability coverage.

"Absent an applicable exclusion, employers may legitimately expect coverage for such claims under comprehensive general liability insurance policies, just as they do for other claims of negligence."

Short(er) takes:

Class actions; statute of limitations; tolling: *China Agritech, Inc. v. Resh* (2018) __ U.S. __ (U.S. Supreme Court).

In *American Pipe & Constr. Co.* (1974) 414 U.S. 538, the Supreme Court held that the timely filing of a class action tolls the applicable statute of limitations for all persons encompassed by the class complaint. The Court further held that if class-action status was denied, the individual class members could intervene as individual plaintiffs in the still-pending action. The Court later held in *Crown, Cork & Seal Co. v Parker* (1983) 462 U.S. 345, that the rule also applied to individual plaintiffs who chose to bring separate actions, as opposed to intervening in the pending action. Those decisions left open the question of whether the *American Pipe* tolling rule also allowed putative class members to bring a subsequent class action after the original putative class action was not certified as a class action. The *China Agritech* Court unanimously held that it did not.

The "efficiency and economy of litigation" that supported tolling individual actions under the *American Pipe* rule does not apply to successive attempts to bring class-action lawsuits. Economy of litigation favors delaying individual litigation until after a class-certification denial. With class claims, efficiency favors early assertion of competing class-representative claims. If class treatment is appropriate, and all would-be representatives have come forward, the district court can select the best plaintiff with full knowledge of the full array of potential class representatives and class counsel. If the class mechanism is not a viable option, the decision denying certification will be made at the outside of the case, litigated once for all would-be class representatives.

Allowing successive class actions each time a class action is denied certification would extend the statute of limitations time and again. "Endless tolling of a statute of limitations is not a result envisioned by *American Pipe*."

Sudden-emergency or imminent peril doctrine; CACI 452; summary judgment. *Shiver v. Laramee* (2018) __ Cal.App.5th __ (Second Dist., Div. 6.)

On September 14, 2014 at approximately 6 p.m., three cars entered the southbound US 101 freeway in Santa Maria – a black car driven by an unknown driver, a car driven by Michelle Adams, and a car driven by plaintiff Joshua Shiver. Before they entered the on-ramp, the black car had been tailgating Adams and driving recklessly.

As Adams entered the on-ramp, the black car passed her and entered the right lane of the freeway, with the driver making an obscene gesture toward her. Shiver's car followed Adams into the right lane of the freeway. As he entered the freeway, the black car then slammed on its brakes abruptly, which caused Adams to apply her brakes. Shiver had to apply his brakes to avoid colliding with Adams. As he did so, he was rear-ended by a fully loaded semi-truck driven by Laramee, who was roughly two car lengths behind Shiver as he merged onto the freeway and was unable to avoid the collision. The black car drove away.

Shiver sued Laramee and his employer for negligence. Laramee and his employer moved for summary judgment, relying on the "sudden emergency" doctrine, which is reflected in CACI 452. The trial court granted the motion, and the Court of Appeal affirmed.

The appellate court found that there were no triable issues of fact that precluded application of the sudden-emergency doctrine. The black car's decision to slam on its brakes upon entering the freeway was sudden and unexpected. Shiver testified that Adams braked ahead of him suddenly and slowed from over 40 mph to almost a dead stop. This created an unanticipated situation because vehicles merging onto a freeway normally increase their speed of travel with the flow of traffic instead of stopping suddenly. This satisfied the first element of the doctrine.

The second element was met because Laramee did not cause the emergency. The sole cause of the accident was the black car's sudden and unexpected braking in front of Adams.

The third element was met because Laramee's conduct was reasonable as a matter of law. Shiver admitted in deposition that before the cars ahead of him merged onto the freeway, Laramee had already slowed 15 to 20 percent. Laramee was not required by the vehicle code to leave a "space cushion" between his vehicle and the cars merging ahead of him because Vehicle Code section 21703 prohibits a driver from *following* another car too closely. Laramee was not following Shiver. Laramee was driving in the right lane of the freeway, and Shiver merged onto the freeway ahead of him. Laramee held the right-of-way in that situation.

The expert opinion submitted by Shiver in opposition to the motion, which concluded that Laramee's failure to yield to the cars in front of him fell below the standard of care could not overcome these undisputed facts. Shiver conceded in deposition that, until the moment when Adams slammed on her brakes, he believed he could safely merge onto the freeway ahead of Laramee's truck. An expert's opinion is only as good as the facts on which it is based.

Arbitration; inability to continue to afford to pay arbitration fees: *Weiler v. Marcus & Millichap Real Estate Investment Services, Inc.* (2018) __ Cal.App.5th __ (Fourth Dist., Div. 3.)

Plaintiff Weiler and her husband used defendant Marcus & Millichap ("M&M") to facilitate a like-kind exchange of real estate under Internal Revenue Code section 1031. Weiler later claimed that M&M had handled the transaction improperly, causing Weiler to lose more than $2 million. The Weilers sued M&M and their complaint was met with a petition to compel arbitration, which was granted. The arbitration was overseen by the American Arbitration Association ("AAA"), which assigned a three-arbitrator panel to handle the matter, over Weiler's objection. The hourly cost of the panel was $1,450. After the arbitration had proceeded for over two years, Weiler sought relief from the arbitration panel under *Roldan v. Callahan & Blaine* (2013) 219 Cal.App.4th 87, arguing that she was unable to continue to afford to arbitrate, and that the panel should therefore either (1) order the defendants to bear the entire cost of the proceeding; or (2) remand the case to the Superior Court to proceed in that forum. The panel refused to grant the relief sought, finding that it was beyond their jurisdiction.

Weiler then filed the present action in the Superior Court seeking the same relief. The trial court granted summary judgment against her, finding that the arbitration agreement was valid and enforceable, and her claimed inability to pay the arbitration costs was irrelevant. Reversed.

The facts of Weiler's action are materially similar to the facts in *Roldan*. In that action the court held that where a plaintiff could show that he or she lacked the financial resources to share the costs of arbitration, the defendant should be given the choice of either assuming all the costs of the proceeding or waiving the right to arbitration and having the dispute resolved in the Superior Court.

"[W]e hold, as we did in *Roldan*, when a party who has engaged in arbitration in good faith is unable to continue in such a forum, that party may seek relief from the superior court. If sufficient evidence is presented on these issues, and the court concludes that the party's financial status is not the result of the party's intentional attempt to avoid arbitration, the court may issue an order specifying: (1) the arbitration shall continue as long as the other party to the arbitration agrees to pay, or the arbitrator orders it to pay, all fees and costs of the arbitration; or (2) if neither of these occur, the arbitration shall be deemed 'had' and the case may proceed in the superior court."


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