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The Party's Over, But Court Rules Liability May Linger On

Under the legal doctrine known as respondeat superior, an employer can be held liable for the negligence of an employee, provided the employee was negligent while "within the scope of employment." But as a recent California appellate decision shows, when and where that scope shuts off isn't always obvious.

In *Purton v. Marriott International Inc.*, a hotel employee apparently drank too much at a company party, rode home with co-workers and then, about 20 minutes later, volunteered to take one of those co-workers to that person's home. Driving 100 miles per hour, he rear-ended another car, killing the driver. After the accident, the employee — a hotel bartender who admitted he should have known better — tested to have a 0.16 blood-alcohol level.

Even though the bartender had left the party, arrived home and then gone out again, the appellate court ruled the employer could be held liable for the fatal accident. A jury could find that the bartender "acted negligently by becoming intoxicated at the party, that this act was within the scope of his employment and [that it] proximately caused the car accident which resulted in … death," the court explained.

"Stated differently, we focus on the act on which vicarious liability is based and not on *when* the act results in injury," it said later in the opinion.

In this case, a jury easily could find the company party was within the scope of employment because it benefited Marriott by building morale and boosting relations between staff and management.

Marriott argued that holding the company liable in this situation violated the "going-and-coming rule," which generally immunizes employers from negligence by workers driving to and from the job.

But the court, quoting an earlier decision, called the going-and-coming rule "an analytical distraction" because it was what happened during the company party that turned the bartender into "an instrumentality of danger."

Similarly, the court rejected Marriott's argument that its liability should have ended when the bartender arrived home and before he ventured out on the road again. "[N]o legal justification exists for terminating the employer's liability as a matter of law simply because the employee arrived home safely from the employer hosted party."

Assuming that the drinking at the party was the proximate cause of the accident, "the employer's potential liability under these circumstances continues until the risk that was created within the scope of the employee's employment dissipates," the court held.

Finally, the hotel argued that it had no ability to control the actions of someone who had left the party. That thinking "ignores the fact that Marriott *created* the risk of harm" by allowing its employees to get drunk.

Evidence showed people at the party were supposed to be limited to two drinks of beer or wine but that a supervisor actually was pouring Jack Daniels — including refilling the flask the bartender had brought with him.

"Marriott could have lessened this risk in numerous ways," such as enforcing its own rules or even banning alcohol completely, the court said.

Under Section 998, the First Offer Shall Be Last — Sometimes

California Civil Procedure Section 998 uses a carrot-and-stick approach to encourage people to settle their civil cases without going through trial. But if there's more than one carrot, which stick should be used?

The state Supreme Court tackled that question earlier this month. Its answer was, in many cases, the longest stick.

Section 998 generally rewards one side for offering — and punishes the other for rejecting — a reasonable settlement.

Under the statute, if a defendant rejects a properly made settlement offer from the plaintiff but then doesn't beat the offer in a verdict, the overconfident defendant can be ordered to pay the plaintiff's expert witness fees and certain other court costs from the time of the offer. Or if the plaintiff rejects a defense offer but does worse at trial, the plaintiff may be required to pay for the defense experts and other court costs.

But what if the plaintiff made several separate settlement offers, all of which the defense rejected, and the verdict exceeds them all? Does the defense pay expert fees and costs from the time of the first offer or the last?

In *Martinez v. Brownco Construction Co. Inc.*, the unanimous Supreme Court concluded that "allowing recovery of expert fees incurred from the date of the first offer is consistent with section 998's language and best promotes the statutory purpose to encourage settlements."

In that case, a man was badly injured by an electrical explosion, and he and his wife sued the construction company at fault. The wife offered to settle her loss of consortium claim for $250,000 in August 2007 and then again for $100,000 in February 2010. The defense ignored both offers.

At trial, the jury gave her $250,000. Following some earlier precedents based on contract law, the trial judge imposed a "last offer rule." The judge held that the second offer wiped out the first and that therefore the wife could demand only expert fees incurred after the second offer.

That meant she would lose out on about $188,000 in early fees, according to a legal newspaper.

The Supreme Court said contract law shouldn't be allowed to trump the real goal of Section 998, which is to encourage settlements. "The more offers that are made, the more likely the chance for settlement," the court noted.

Therefore, in this case, "section 998's policy of encouraging settlements is better served by *not* applying the general contract principle that a subsequent offer entirely extinguishes a prior offer." That result is consistent with the statute's goals, the court said, because "the chances of settlement increase with multiple offers."

But the court did not abandon the "last offer rule" entirely. That approach should be used for in-between verdicts, that is, when "an offeree obtains a judgment or award less favorable than a first section 998 offer but more favorable than the later offer."

Further, the court noted, judges retain discretion under Section 998 to do justice and prevent gamesmanship.

Overall, the court held, "the policy of compensating injured parties is best served by according parties flexibility to adjust their settlement demands in response to newly discovered evidence."

Hospital Must Prove Its Charges, Not Just Lien on Its Bills

In a series of decisions over the last several years, California courts have acknowledged that what doctors and hospitals bill for medical services isn't necessarily what the services really are worth. For instance, in a major ruling two years ago, the Supreme Court held an injured plaintiff can collect as damages only those expenses his medical providers accepted as payment in full from his health insurer, not the full amount of his medical bills.

Now, a California appellate court has laid a similar limitation on what hospitals can collect from the judgments or settlements won by the injured plaintiffs they've treated.

If a hospital seeks to collect on a lien it has laid on a patient's injury lawsuit, merely showing its bills isn't enough, the court ruled in *State Farm Mutual Automobile Insurance Co. v. Huff*. The hospital must prove "'the amount of the reasonable and necessary charges' for the 'emergency and ongoing medical or other services' it furnished" the patient, the court held, quoting a state law called the Hospital Lien Act.

In this case, Michael Huff was seriously injured in an auto accident and spent seven days in an Imperial Valley hospital. The hospital billed him $34,320, which he never paid. He won a jury verdict against the other drivers of $356,588, which included $232,709 in past medical expenses.

The hospital placed a lien on the judgment under the lien act, and the other drivers' auto insurer asked a court to figure out who should get how much money. The hospital proved that it had treated Huff, that his bills were more than $34,000, that he hadn't paid them and that he'd received notice of the lien.

But the Court of Appeal held that wasn't enough. The amount the hospital billed "is not an accurate measure of the value of medical services," the court held, quoting an earlier decision. Just as provider bills don't govern what a plaintiff can recover as damages, the amount of a hospital's bills "alone does not govern the recovery by a hospital asserting a lien under the Hospital Lien Act."

The court pointed out that the act allows a lien only "to the extent of the amount of the reasonable and necessary charges of the hospital" for treating the plaintiff. Further, it must give the plaintiff notice of "the amount claimed as reasonable and necessary charges."

The act does not state who must prove what those reasonable and necessary charges were. However, generally in litigation the burden to prove something falls on the party making a claim or asserting a fact, the court said. Therefore, the hospital must prove its claim.

Disagreeing with the trial court, the appellate court said that "the hospital should have little difficulty meeting that burden."

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The founder and president of The Rodolff Law Firm, APC, Barry L. Rodolff, is a highly experienced lawyer who has been assisting clients faced with civil litigation for more than two decades. Mr. Rodolff developed his skills with two well-respected defense firms, Schell & Delamer, and Haight, Brown & Bonesteel. He also worked in-house at Travelers Insurance Company, representing a variety of insured companies in many types of litigation. His clients have ranged from small businesses to multinational corporations. Mr. Rodolff brings extensive experience and knowledge in the defense of litigation involving premises liability, business, product liability, personal injury, employment, construction defect, and intentional torts.