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CAN EMPLOYERS BE LIABLE FOR EMPLOYEES' CAR ACCIDENTS DURING EMPLOYEE COMMUTES? MAYBE.

By Amber Shubin and Tom Wilson

It is rare these days for a California appellate court to weigh in on whether an employer is vicariously liable for accidents involving an employee that occur during the employee's commute to and from work. The law was thought to be fairly settled. Then, in the span of a few weeks last fall, California appellate courts examined this issue not once but twice, issuing decisions that at first blush seemed to come to quite contrary conclusions.

In mid-September 2013, the Second Appellate District of the California Court of Appeal allowed a case to proceed to trial against a company whose employee injured a motorcyclist during her commute home. *Moradi v. Marsh USA Inc.*, 219 Cal. App. 4th 886 (2013). Less than six weeks later, the Fifth Appellate District of the California Court of Appeal affirmed summary judgment in favor of an employer whose employee caused a serious highway accident while driving to work in a company truck. *Halliburton Energy Services, Inc. v. Department of Transportation*, 220 Cal. App. 4th 87 (2013).

continued on page 2

The issuance of the *Moradi* and *Halliburton* decisions provides a timely opportunity to consider the law surrounding an employer's potential liability for employee accidents during work commutes. In order to do so, we need to first revisit some familiar legal constructs that provide a framework for examining this question.

Respondeat Superior, the “Going-and-Coming” Rule and Its “Required Vehicle” Exception

A starting point for this analysis is the doctrine of *respondeat superior* (Latin for “let the master answer”), which prescribes that an employer is vicariously liable for any wrongful actions committed by an employee within the course and scope of that employee's job duties. A long-recognized judicial exception to this doctrine, commonly known as the “going-and-coming rule,” provides that an employee's travels to and from work are generally not within the employee's scope of employment. Consequently, an employer is typically not liable for employee accidents that occur during the employee's daily commute to and from work.

The “going-and-coming” rule, in turn, has its own exception—variously dubbed the “incidental benefit” or the “required vehicle exception”—under which vicarious liability can be imposed upon the employer when the employee's use of his or her personal vehicle gives some incidental benefit to the employer. The rationale behind this exception to the “going-and-coming” rule is that, because the employee is required to use his or her vehicle at work, the employee is within the scope of employment while transporting that vehicle to and from work. While these rules of vicarious liability may appear fairly straightforward, applying them to specific factual scenarios of employee mishaps during a workplace commute can produce unanticipated results and unanswered questions.

The *Moradi* Case: Personal Errands Don't Destroy the “Required Vehicle Exception”

The accident in the *Moradi* case occurred after Judy Bamberger, a sales representative of insurance broker Marsh USA, had left her office and was commuting homeward. Because Ms. Bamberger was required by her employer to use her vehicle for work-related ventures such as traveling to events and meetings outside the office, the “required vehicle exception” to the “going-and-coming” rule was applicable to the question of whether her employer risked any liability for Ms. Bamberger's accident. Clouding this analysis was the fact that Ms. Bamberger was not commuting directly home when the accident happened; she was driving to a yoga class. More specifically, the accident actually happened because Ms. Bamberger decided to stop for a

frozen yogurt on her way to her yoga class. While she was turning her car into the yogurt shop parking lot, her vehicle collided with a motorcycle driven by Mr. Moradi. Mr. Moradi later sued both Ms. Bamberger and her employer, Marsh USA, for the injuries he sustained. The trial court granted Marsh USA's motion for summary judgment, holding that Ms. Bamberger was running personal errands while driving home. Thus, the “required vehicle” exception did not apply and her employer could not be held liable for this accident, as she was not acting within the scope of her employment at the time her car struck Mr. Moradi.

The Court of Appeal took a different view. It reasoned that even when an employee deviates from his or her normal commute to run a personal errand, as Ms. Bamberger did, the “required vehicle” exception still applies as long as the employee's personal business “is not so unusual or startling that it would seem unfair” to hold the employer vicariously liable. Moreover, the court noted that it was “foreseeable” that an employee could stop for personal errands, which in Ms. Bamberger's case were a “minor deviation on her drive home.” The court observed that the yogurt shop and the yoga studio were on Ms. Bamberger's direct route home, even sharing a zip code with her home address. The court then reversed the trial court's summary judgment for Marsh USA and directed that both Ms. Bamberger and her employer could be sued by Mr. Moradi for the injuries he suffered in the accident.

The *Halliburton* Case: When an Employee Makes a “Substantial” Deviation from His or Her Normal Commute

Mere weeks after the *Moradi* decision was issued, a different California Court of Appeal, the Fifth Appellate District, issued a seemingly contrary opinion in *Halliburton Energy Services, Inc. v. Department of Transportation*. There the court found that an employee was acting outside the scope of his employment at the time of an accident, even though the employee was driving to work in a company-owned vehicle. The employee, Troy Martinez, worked as a driller for Halliburton on an oil rig off of Seal Beach, Calif. Halliburton gave Mr. Martinez the option of using a company truck to commute to and from work from Mr. Martinez's home in Caliente, Calif., but did not require him to do so. On the day of the accident, Mr. Martinez did not drive home after his work shift ended. Instead, he drove 140 miles from his job site to a Bakersfield, Calif. car dealership—50 miles from his home—to possibly purchase a car for his wife. He did not tell his employer that he was making such a long journey, despite being on call 24 hours a day, 7 days a week. On his way back to work from Bakersfield, he lost control of his truck and was involved in a major

accident in which a half-dozen people were injured. Several of the injured later filed suit against Martinez, his employer Halliburton, and Caltrans.

As in *Moradi*, the question of whether the employer was vicariously liable depended upon the “required vehicle exception” to the “going-and-coming” rule. The plaintiffs stressed that at the time of the accident, Mr. Martinez was driving an employer-provided vehicle and returning to work. Halliburton responded that Mr. Martinez’s use of the company truck to travel to Bakersfield rather than home involved using the truck for purely personal purposes and in a way that provided no benefit, even an incidental one, to Halliburton. The court agreed with Halliburton. And while the *Halliburton* court did not explicitly compare the case to *Moradi* or in fact cite to *Moradi* at all, it seems clear that the court would have concluded that this decision was in fact not contrary to the one reached there. Unlike Ms. Bamberger’s errands, Mr. Martinez’s deviation from his commute was not a minor, foreseeable deviation, “like stopping on the way home to purchase an item at a nearby store.” It was instead a substantial departure and one that relieved Halliburton of any vicarious liability. Moreover, Halliburton did not require Mr. Martinez to use a company truck to commute. The court affirmed the summary judgment the trial court had awarded Halliburton.

Practical Lessons

The lesson of these cases is that, to the extent possible, and consistent with business needs, employers should be careful not to create a “required vehicle exception” for employee commutes by requiring an employee to use his or her personal vehicle during the workday for work-related activities unless it is absolutely necessary.

If they do so, employers expose themselves to a much greater potential for liability for their employees’ traffic mishaps, even if those mishaps occur while the employee is commuting to or from work.

Companies should also avoid providing company vehicles to employees when it is not necessary to do so. Halliburton did not require Mr. Martinez to use a company truck but the fact that he did so meant that there was a potential for the “required vehicle exception” to apply. Had he been in his own vehicle at the time of the accident, the question of vicarious liability might never have come up, or if it did, it might have been deemed unworthy of pursuit by the plaintiffs’ attorneys. While Halliburton ultimately prevailed, it likely invested a lot of time and money to do so. Companies can protect themselves from a similar fate by reviewing their personal vehicle usage policies, as well as which employees, if any, drive a company car.

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Wende Arrollado | Morrison & Foerster LLP
12531 High Bluff Drive, Suite 100 | San Diego, California 92130
warrollado@mofocom