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NO. 64281-2

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MARIO LaPLANT and CRYSTA PENNAMEN,

Respondents,

v.

SNOHOMISH COUNTY; JOHN DOES 1 – 10,

Defendants/Appellants.

BRIEF OF APPELLANTS

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I. ASSIGNMENTS OF ERROR

- A.** The trial court erred in failing to dismiss Plaintiff LaPlant's claims for negligent training and supervision when Snohomish County (The "County") has admitted the acts Plaintiffs LaPlant and Pennamen ("LaPlant" and "Pennamen") complain of were performed by its employees in the course and scope of their employment with the County.¹
- B.** The Court's error in failing to dismiss the negligent training and supervision claims of LaPlant will allow for the admissibility of irrelevant bad act evidence that would not be admissible in proving the underlying negligence claim thereby unfairly prejudicing the county in defending against the underlying negligence claim.

II. STATEMENT OF THE CASE

A. Procedural History

LaPlant sued the County and John Doe Deputies 1-10 in October of 2005, alleging Snohomish County Sheriff's deputies were negligent in continuing and not terminating a pursuit of a vehicle operated by Jonathan Evans. 2 CP 223-226. LaPlant and Pennamen were passengers in this vehicle. 2 CP 224, 235. Pennamen sued on an identical theory in July of 2006 and the cases were consolidated by stipulation in September of 2006. 2 CP 234-236 and 213-216).

¹ Plaintiff Pennamen has failed to file an Amended Complaint alleging negligent training or negligent supervision on the part of the County. However, in the event she does, the arguments that follow apply to her claims as well.

In late 2007 LaPlant and Pennamen noted the matter for trial. 2 CP 206. The first trial date was set for October 20, 2008. 2 CP 207. Prior to the October 20, 2008 trial date, the parties stipulated to a continuance to accommodate a scheduling conflict of Pennamen's counsel and the Court set the new trial for April 13, 2009.² 2 CP 201-205. On March 30, 2009, approximately two weeks prior to the April 13, 2009 trial date, LaPlant moved to amend his Complaint to add negligent training and negligent supervision claims and a federal Monell claim under 42 U.S.C. §1983. 1 CP 187-197. Pennamen joined in this motion. 1 CP 152-153. The County objected to the proposed amendment arguing these claims were redundant and unfairly prejudicial to the County in light of its admission that its employees, whose actions are claimed to be wrongful by LaPlant and Pennamen, were acting within the course and scope of their employment. 1 CP 175-186, 1 CP 154-174. LaPlant then withdrew the Monell claim and the trial court allowed LaPlant and Pennamen to add the negligent training and negligent supervision claims. 1 CP 116. In light of the late addition of these claims, the County requested the Court continue

² If the case had gone to trial as scheduled on October 20, 2008, there would have been no claim for negligent training and/or supervision brought by either Plaintiff.

the April 13, 2009 trial date to allow the County to conduct additional discovery regarding the new claims. 1 CP 116. LaPlant and Pennamen did not object to this continuance request. Based on the request for a continuance, the trial was then set for July 27, 2009 by agreement of the parties. LaPlant subsequently filed his Amended Complaint. 1 CP 111-115. The County answered LaPlant's Amended Complaint, again admitting the deputies were acting within the course and scope of their employment with the County while conducting the pursuit. 1 CP 106.

On July 10, 2009, the County moved for dismissal of the negligent training and supervision claims arguing these claims were redundant to the negligence claims initially brought by LaPlant as the County has admitted its employees, whose actions are in question, were acting within the course and scope of their employment with the County. The County also argued the training and supervision claims should be dismissed due to the potential for the admission of unfairly prejudicial evidence of other acts (other pursuits involving County Sheriff's Deputies) that would not be relevant and/or admissible to prove the underlying negligence claim. 1 CP 60, 73-77. The trial court reserved ruling on this motion pending other evidentiary rulings. 1 CP 12-13. At this

hearing, LaPlant requested a continuance of the trial date due to recently disclosed documentation by the County and the trial date was continued to November 2, 2009. 1 CP 15. On September 25, 2009, the County noted motions in limine and requested the trial court rule on the pending motion to dismiss the negligent training and supervision claims. Following ruling on the various motions in limine, the trial court denied the County's motion to dismiss the negligent training and supervision claims. 1 CP 6. An order denying the motions was entered by the trial court on October 8, 2009. 1 CP 8-10.

On October 12, 2009, the County filed a Notice for Discretionary Review of the trial court's denial of its motions to dismiss the negligent training and supervision claims. The County's Motion for Discretionary Review was heard on November 20, 2009, and the Commissioner of this Court granted discretionary review via a written decision on December 11, 2009.

B. Relevant Facts

This is a police pursuit case resulting in a single car crash and injuries to Plaintiffs LaPlant and Pennamen, who were passengers in a stolen vehicle which was driven by Jonathan Evans ("Evans"). Evans failed to negotiate a turn while fleeing from

the Snohomish County Sheriff's deputies, lost control of the vehicle and crashed into a brick sign and then into a building. LaPlant and Pennamen allege the Snohomish County Deputies were negligent in instituting and maintaining this pursuit. 1 CP 113. As a result of this allegation, the issue for the jury to determine is whether the deputies who were conducting the pursuit acted in a negligent manner, either by instituting the pursuit and/or maintaining the pursuit. The County has admitted that the deputies who were involved in the pursuit were acting within the course and scope of their employment with the County at the time of the pursuit. 1 CP 106, 112.

Due to this admission, the County would be liable to LaPlant and Pennamen for any acts committed by its Sheriff's deputies that were found to be negligent and the proximate cause of injury to LaPlant and/or Pennamen. As a result, the negligent supervision and negligent training claims in LaPlant's Amended Complaint, as allowed by the trial court, are redundant and also allow for the introduction of unfairly prejudicial evidence of other pursuits involving Snohomish County Sheriff's deputies that otherwise would not be admissible in proving the negligence claim. In allowing

these claims to go forward, the trial court committed reversible error.

III. ARGUMENT

The trial court erred in failing to dismiss redundant and unfairly prejudicial claims of negligent training and supervision when the County has admitted the employees whose acts are alleged to have been negligent were acting in the course and scope of their employment with Snohomish County. Allowing the redundant claims to go forward will also allow for the admission of character evidence that would not otherwise be admissible in proving the underlying negligence claim.

A. Standard of Review

Denial of summary judgment is reviewed by this court de novo. Hertog v. City of Seattle, 138 Wn.2d 265, 275, 979 P.3d 400 (1999). This Court makes the same inquiry as the trial court, i.e., summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Taggart v. State, 118 Wn.2d 195, 199, 822 P.2d 243 (1992); CR 56(d). The facts and reasonable inferences from those facts are viewed in the light most favorable to the nonmoving party. Overton v. Consol. Ins. Co., 145 Wn.2d 417, 429, 38 P.3d 322

(2002). Questions of law are reviewed de novo. Sherman v. State, 128 Wn.2d 164, 183, 905 P.2d 355 (1995).

B. Negligent training and negligent supervision claims are redundant when the County has admitted its employees were acting within the course and scope of their employment and the trial court erred in allowing LaPlant and Pennamen to amend their Complaints to add these causes of action.

The facts necessary for both this Court and the trial court to make a decision in this case are not at issue. LaPlant and Pennamen have alleged, and the County has admitted, the deputies involved in the pursuit of the vehicle occupied by LaPlant and Pennamen were pursuing the vehicle within the course and scope of their employment with the County. For purposes of deciding this appeal (and the motion for summary judgment below), evidence related to negligent training claims and negligent supervision claims is irrelevant. The issue for this Court is one of law.

Claims for negligent training and/or supervision are redundant and should be dismissed when the County has admitted its deputies were acting within the course and scope of their employment with the County while conducting a police pursuit when the alleged injured parties have claimed the County was vicariously

liable for the negligent acts of its employees. Specifically, claims for negligent training and/or supervision are mutually exclusive to a vicarious liability claim. Employers are liable for the negligent acts of their employees that occur within the scope of employment under the theory of respondeat superior. Shielee v. Hill, 47 Wn.2d 362, 365, 287 P.2d 479 (1955). Therefore, when an employer admits agency (and will thus automatically be held responsible for the acts of its employee if the employee is found to have acted in a negligent manner), issues of whether the employer was negligent in its training and supervision of its employees are “immaterial.” Id.; See also Gilliam v. DSHS, 89 Wn. App. 569, 584-85, 950 P.2d 20 (1998), review denied, 135 Wn.2d 1015 (1998); and Whaley v. State, 90 Wn. App. 658, 676, n. 39, 956 P.2d 1100 (1998). Direct negligence claims (for acts outside the scope), and vicarious liability claims (for acts within the scope) are, therefore, mutually exclusive. As the Court held in Gilliam v. DSHS, 89 Wn. App. at 584-85:

An employer is generally vicariously liable for negligent acts of an employee conducted within the scope of employment. When an employee causes injury by acts beyond the scope of employment, an employer may be liable for negligently supervising the

employee. Whether conduct is inside or outside the scope of employment is ordinarily a question for the jury. Here, the State acknowledged Morrow was acting within the scope of her employment, and that the State would be vicariously liable for her conduct. Under these circumstances a cause of action for negligent supervision is redundant. **If Gilliam proves Morrow's liability, the State will also be liable. If Gilliam fails to prove Morrow's liability, the State cannot be liable even if its supervision was negligent.** We find no error in the trial court's dismissing the cause of action given the record before it. (emphasis added).

In addition to the language of Gilliam, the Court in Shielee stated

. . . [I]t seems clear that so far as the liability of the employer to a third person is concerned, his failure to hire only competent and experience employees **does not of itself constitute an independent ground of actionable negligence.**

Shielee, 47 Wn.2d at 366 (quoting 35 Am.Jur. 978, § 548) (emphasis added).

In Shielee, the plaintiffs sued a hotel owner for injuries received when an elevator malfunctioned and fell several floors. The plaintiffs claimed the elevator operator negligently caused the accident. Additionally, plaintiffs claimed the hotel was negligent for

hiring a young, inexperienced, and incompetent employee to run the elevator.

The hotel admitted the operator was acting within the scope of his employment at the time of the elevator accident. Thus, any negligence on the part of the operator would be attributed to his employer under the doctrine of respondeat superior.

The trial court in Shielee erroneously allowed the plaintiffs to present evidence of the hotel's negligent hiring, retention, and training of the (youthful and inexperienced) operator. The trial court realized its mistake and instructed the jury to disregard that evidence, stating:

In all events the question of the operator's general competency, training, instruction and experience are immaterial and are not to be considered by you.

Id. Following a verdict in favor of the defendant, plaintiff appealed the giving of this instruction to the jury.

The Court upheld the giving of this instruction, reasoning the competency of the operator "was not involved," because the hotel would be vicariously liable for his acts. Id. at 366. This was true "irrespective of how careful or careless [defendants] may have been in selecting him for the job or retaining him in their

employment.” Id. at 366. The Court stated “negligence is not synonymous . . . with incompetency and inexperience.” Id. at 365. “[T]he most incompetent and inexperienced person may be entirely free of any acts of negligence.” Id. at 366.

An application of this law to the facts of this case results in the inescapable conclusion that a claim for negligent training and/or negligent supervision, when coupled with a claim for respondeat superior liability, is redundant and should be dismissed. In order to prevail in this case, LaPlant and Pennamen have to establish that the Sheriff’s deputies were negligent in their conduct of the pursuit. If the jury finds the deputies did not act negligently during the course of the pursuit of the vehicle Evans was driving, the County has no liability no matter how well or how poorly the deputies were trained and/or supervised.

In addition, allowing a negligent training and supervision claim to proceed would result in the introduction of evidence that would unfairly prejudice the County as evidence of “prior bad acts” is inflammatory and not relevant to prove negligence in the conduct of the pursuit. Whatever arguments LaPlant could make regarding the Sheriff’s Office negligence in training and supervising a particular deputy is of no logical consequence if that deputy was not

negligent in carrying out his duties. Similarly, if any deputy is deemed negligent in the pursuit that gave rise to this suit, his acts will automatically create liability for the County, even if his training and/or supervision were impeccable. To that extent, evidence of training and/or supervision is irrelevant. Irrelevant evidence is not admissible. ER 402.

The fundamental illogic of LaPlant's allegations of negligent training and/or supervision cannot be overcome. Either the employee conduct at issue was negligent or it was not. If the conduct was not negligent, the County cannot be deemed liable regardless of its training or supervisory activities. On the other hand, even if the County's training and/or supervision of its deputies was exemplary but the deputies acted negligently during the course of the pursuit, the County cannot use the exemplary training and/or supervision as a defense to its vicarious liability due to the negligence of its deputies. In either case, the trial court should have dismissed the claims of negligent training and/or supervision. Rodriguez v. Perez, 99 Wn. App. 439, 451, 994 P.2d 874 (2000) (citing Niece v. Elmview Group Home, 131 Wn.2d 39, 48, 929 P.2d 420 (1997)).

When a plaintiff does not allege any conduct outside the scope of employment, a negligent supervision claim is not proper (and by analogy, a negligent training claim is also not proper).

Although the issue of whether conduct was inside or outside the scope of employment is typically a jury question, here the respondents have not alleged that any conduct occurred outside the scope of employment. On the contrary, their argument rests on the theory that their employees acted according to their assigned duties. The appellants rely upon the same evidence to prove negligent supervision as they do to prove negligent investigation. But because the individual employees as well as their employers had a statutory duty to investigate properly, any negligence on the part of the individual officers is attributable to their employers. Consequently, if the police officers are found negligent in their investigation, then their employers may be held vicariously liable. If the appellants fail to prove negligence, then the employers cannot be held liable even if their supervision was negligent. Based upon the facts present here, no additional cause of action for negligent supervision is necessary.

Rodriguez, 99 Wn. App. at 451.

The rationale of Rodriguez, Gilliam and Shielee compels the conclusion that the trial court committed reversible error in failing to dismiss the negligent training and negligent supervision claims.

Including the negligent training and supervision claims in the trial of this matter will so permeate and potentially taint the trial on the negligence claims that, assuming an adverse finding against the County at trial, a retrial would be inevitable. Therefore, this Court should reverse the trial court and remand this matter to the trial court with instructions to dismiss the negligent training and negligent supervision claims.

C. Allowing negligent training and supervision claims to go forward potentially allows for the admissibility of unfairly prejudicial bad act evidence that would not be admissible in proving the underlying claim of negligence.

Allowing redundant negligent training and supervision claims to go forward would open the door to other “bad act” evidence that would be inadmissible on the underlying negligence claim. LaPlant and Pennamen have evidenced intent to introduce other “bad act” evidence in support of the negligent training and supervision claims which would otherwise be inadmissible under ER 404(b).

LaPlant and Pennamen sought discovery of, and their experts have relied on, evidence of other pursuits conducted by one of the deputies involved in the pursuit at issue, pursuits that occurred both prior to and subsequent to the incident complained of, to buttress their claims the County was negligent in training its

deputies regarding the conduct of pursuits. The County moved in limine to exclude evidence of other bad act evidence under ER 404(b). The trial court reserved ruling and indicated it wanted to review the bad act evidence LaPlant and Pennamen seek to admit prior to ruling on the County's motion in limine. However, the admission of any bad act evidence and couching it as evidence supporting the negligent training and supervision claims is unfairly prejudicial to Snohomish County.

In general, evidence of prior misconduct is inadmissible. State v. Everybodytalksabout, 145 Wn.2d 456, 466, 39 P.3d 294 (2002). ER 404(b)'s first sentence bars evidence of prior "acts" to prove character to show action "in conformity therewith." Allowing evidence of other pursuits to go to the jury would allow the jury to determine whether the June 23, 2003 pursuit was negligently conducted, based on how deputies performed in numerous other pursuits (the "character" of the deputies), which is precisely the type of evidence prohibited by ER 404(b). Irrelevant and prejudicial evidence is not admissible. ER 403, ER 404(b).

Evidence of other acts is unfairly prejudicial and is not admissible to prove the character of a person in order to show action in conformity therewith. Evidence of other wrongs or acts is

not admissible to prove that a person acted in the same way on the occasion in question. ER 404(b).

While ER 404(b) is primarily at issue in criminal cases, it is invoked in civil cases as well. See Dickerson v. Chadwell, Inc., 62 Wn. App. 34, 48-49, 857 P.2d 648, review denied, 125 Wn.2d 1022 (1994). In Dickerson, the court held the trial court's admission of evidence the plaintiff had slapped a woman on two prior occasions, on the question of whether he slapped her on the night in question was erroneous under ER 404(b), and so prejudicial as to warrant a new trial. Id. Allowing evidence of how the County's Sheriff's deputies performed in pursuits on prior occasions on the question of whether they were negligent in the June 23, 2003, is precisely the type of "other wrongful act" evidence the Dickerson court ruled warranted a new trial. The only possible way this type of evidence would be relevant is if LaPlant and Pennamen are allowed to pursue their negligent training and negligent supervision claims. In order to avoid the reversible error that occurred in Dickerson, it is critical this Court find that the trial court committed error as a matter of law in failing to dismiss LaPlant's claims against the County for negligent training and negligent supervision.

The prohibition against the unfairly prejudicial effect of allowing evidence of prior pursuits to go to the jury operates similarly to preclude the admission of any evidence of pursuits subsequent to June 23, 2003. The same unfairly prejudicial effect of allowing the jury to determine negligence of the pursuit at issue based on the deputies' performance in unrelated prior pursuits would remain if the jury is allowed to consider evidence of subsequent pursuits. ER 404(b) operates to exclude evidence of "other crimes, wrongs or acts." ER 404(b). The rule is not limited to prior acts and should be applied to acts subsequent to the June 23, 2003, pursuit.

By analogy, courts are careful to exclude evidence of a driver's driving record in motor vehicle negligence cases. See Hammel v. Rife, 37 Wn. App. 577, 584-585, 682 P.2d. 949 (1984), , citing Breimon v. General Motors Corp., 8 Wn. App. 747, 754-55, 509 P.2d 398 (1973).

Evidence of a previous similar accident involving a party is generally inadmissible to show a lack of care by the same party as the cause of the accident in question. Such evidence is irrelevant concerning the cause of the instant accident since innumerable factors and causes present in the

situation may not have been present previously and vice versa.

Hammel, 37 Wn. App. at 577, quoting Breimon, 8 Wn. App. 754-55.

Breimon similarly holds, “[e]vidence of a previous habit of speed is not admissible to prove conduct at a later time. An inquiry of this nature would raise a collateral issue that would divert the investigation from the quest of causation in the particular accident.” 8 Wn. App. 754-755.

Evidence of other pursuits, if allowed to be presented to the jury, will allow the very type of improper weighing of irrelevant evidence contemplated by cases which exclude evidence of prior motor vehicle accidents or infractions in subsequent motor vehicle lawsuits.

In addition, introduction by LaPlant and/or Pennamen of other pursuits will result in numerous “mini-trials” within the trial to determine whether the deputies negligently conducted the pursuit. Procedurally, before the trial court may admit evidence of other misconduct under 404(b), it must (1) find by a preponderance of the evidence that the misconduct occurred, (2) identify the purpose for which the evidence is admitted, (3) determine the evidence is relevant to a material issue, and (4) determine that the probative

value of the evidence outweighs its prejudicial value. State v. Brown, 132 Wn.2d 529, 571, 940 P.2d 546 (1997). In addition to clouding the issue the jury is to decide, namely whether any negligence occurred arising out of the June 23, 2003 pursuit, allowing evidence of other pursuits to go to the jury will significantly extend the trial in this case, as a review of other pursuits in this case with respect to the criteria listed in State vs. Brown must occur with every other pursuit LaPlant and/or Pennamen may seek to admit.

Reference to other pursuits LaPlant and Pennamen have sought discovery of will confuse and inflame the passions of the jury. Allowing the redundant negligent training and supervision claims to go forward will place prejudicial and inadmissible character evidence before the jury resulting in further error.³

This evidence faces far greater scrutiny prior to admission if not couched as evidence supporting the redundant and impermissible claims of negligent training and supervision. Allowing the claims to go forward in the face of clear case law in

³ Instead of litigating whether the pursuit and the supervision of the pursuit itself was negligently conducted by the two deputies which is the proper focus of the inquiry in this case, the Sheriff's Office itself would be on trial.

opposition could create a situation in which the jury bases its verdict on the underlying negligence claim on improper evidence resulting in the necessity of a new trial.

IV. CONCLUSION

The trial court erred in failing to dismiss the negligent training and negligent supervision claims that are plainly barred by Shielee, Gilliam and Rodriguez. The trial court's error will allow LaPlant and Pennamen to (1) try non-viable negligence claims and (2) poison with unfairly prejudicial bad act evidence the remaining respondeat superior claims that are properly before the jury. This Court should reverse the trial court's denial of the County's motion to dismiss negligent training and supervision in this matter.

Respectfully submitted on March 10, 2010.

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DECLARATION OF SERVICE

I, Gail Bennett, hereby certify that I served a true and correct copy of the foregoing Brief of Appellants upon the person/persons listed herein by the following means:

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I declare under the penalty of perjury of the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

SIGNED at Everett, Washington, this 10th day of March, 2010.



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