



Avoid the *Diaz* trap

When drafting your complaint against a transportation company, consider a prayer for punitives

By PHIL JOHNSON

You hear it all the time – planning ahead is key to proper performance as an attorney. This cliché is particularly true when drafting a complaint against a transportation company. Your pleading papers frame the issues. With enough advance planning and research, a well-drafted complaint can put you in a position to receive discovery documents defense counsel may not typically produce.

This article will look at how to obtain records of a defendant driver's work history in a suit against the employer transportation company. Say you get the

case, and from the initial information, you believe punitive damages can be properly sought. If you want answers to discovery requests about crash history, background checks, drug/alcohol screening, etc., you will need to frame your pleadings properly with a prayer for punitive damages to avoid the defense trap known as *Diaz v. Carcamo*.

The *Diaz* trap

In *Diaz v. Carcamo* (2011) 51 Cal.4th 1148, the California Supreme Court affirmed a 1954 holding that when an employer admits vicarious liability for its employee's negligent driving, a plaintiff

cannot rely on a negligent entrustment claim, which alleges direct liability, to introduce evidence of the employee's driving record.

In *Diaz*, plaintiff was driving on U.S. Highway 101 when another auto going the opposite direction crashed into a semi-truck, flew over the divider, and hit plaintiff's SUV. Plaintiff sued the driver of the car, the truck driver and the trucking company. Plaintiff alleged that both drivers had driven negligently and that the trucking company was both liable for its employee's negligent driving and directly liable for its own negligence in hiring and retaining him.



At trial, plaintiff introduced evidence of previous avoidable crashes caused by the truck driver. Admission of this evidence was reversible error, the Court ruled, because the trucking company had previously offered to admit vicarious liability. The Court supported that holding, in part, with the following reasoning:

If, as here, an employer offers to admit vicarious liability for its employee's negligent driving, then claims against the employer based on theories of negligent entrustment, hiring, or retention become superfluous. To allow such claims in that situation would subject the employer to a share of fault in addition to the share of fault assigned to the employee, for which the employer has already accepted liability. (*Diaz*, 51 Cal.4th at 1160.)

Since *Diaz*, when an employee driver causes a crash and a plaintiff's attorney sends discovery requests on that employee driver's background, defense counsel can cite the language above, and argue that such discovery is not reasonably calculated to lead to the discovery of admissible evidence. (Civ. Code, § 2017.010.) But what if you need that information for your punitive damages claim?

How your prayer for punitive damages avoids the *Diaz* trap

Diaz left several questions unanswered. Does an employer's admission of vicarious liability preclude recovery of punitive damages against the employer? And what is the proper scope of discovery regarding driver history, employer training, and the like?

The 2nd District Court of Appeal addressed the first question in 2017 in *CRST, Inc. v. Superior Court*, 11 Cal.App.5th 1255. The case arose from a crash involving a semitruck in a construction zone, with allegations of intoxicated driving. There, the appellate court held that upon a suitable demonstration of employer misconduct, a vicariously liable employer may be subject to an award of

punitive damages when an employee was negligent.

The importance of proper pleadings when handling cases against employers was demonstrated recently in the 2019 case of *Moore v. Superway Logistics, Inc.* 2019 U.S. Dist. LEXIS 90111. There, the U.S. District Court for the Eastern District of California heard a plaintiff's argument that an order compelling the depositions of corporate employees was proper because the testimony could bear on a claim for punitive damages. Defendants countered that evidence regarding potential punitive damages was not discoverable because there was no prayer for punitive damages in the complaint. The district court agreed with defendants and noted that the deadline for amending the pleadings had expired.

Plead punitive damages up front to aid your motion to compel

"[W]hen an employer such as CRST admits vicarious liability, neither the complaint's allegations of employer misconduct relating to the recovery of punitive damages nor the evidence supporting those allegations are superfluous. Nothing in *Diaz*...suggests otherwise." (*CRST, Inc.*, 11 Cal.App.5th at 1264.)

The above holding in *CRST* provides solid footing for a plaintiff's attorney to argue in a motion to compel that discovery into driver history and more is relevant, and, at the least, information that might reasonably assist plaintiff in evaluating the case, preparing for trial, or facilitating settlement. (*Gonzalez v. Sup. Ct. (City of San Fernando)* (1995) 33 Cal.App.4th 1539, 1546.)

If you pray for punitive damages up front, expect to face a motion to strike. The proper standard for a motion to strike punitive damages is whether plaintiff has alleged "ultimate facts" showing an entitlement to exemplary damages. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255.) Expect to read the following language in the motion

to strike: "Mere negligence, even gross negligence, is not sufficient to justify such an award" for punitive damages. (*Kendall Yacht Corp. v. United California Bank* (1975) 50 Cal.App.3d 949, 958.) The allegations supporting a request for punitive damages must be alleged with specificity; conclusory allegations without sufficient facts are not enough. (*Smith v. Superior Court* (1992) 10 Cal.App.4th 1033, 1041-1042.)

When opposing the motion to strike, pair the best facts you can find with supportive case law. Remember, the employer controls the best evidence that could support your punitive damages prayer. Less specificity is required when "it appears from the nature of the allegations that the defendant must necessarily possess full information concerning the facts of the controversy," (*Bradley v. Hartford Acc. & Indem. Co.* (1973) 30 Cal.App.3d 818, 825); "[even] under the strict rules of common law pleading, one of the canons was that less particularity is required when the facts lie more in the knowledge of the opposite party." (*Turner v. Milstein* (1951) 103 Cal.App.2d 651, 658; *Committee on Children's Television, Inc. v. General Foods Corp.*, 35 Cal.3d 197, 217.)

Conclusion

Remember, a vicariously liable employer can still be hit with punitive damages upon a proper showing of employer misconduct. When your research reveals facts that a society condemns, you should pray for punitive damages in your complaint, and prepare to fight against a motion to strike. Dig deep into the facts early on, and you can avoid defense's *Diaz* trap.

Phil Johnson is an associate in the Rains Lucia Stern St. Phalle & Silver, PC Personal Injury Group. Phil represents injured individuals and employees in state and federal courts, as well as in administrative hearings.



Johnson