In for a Penny, in for a Pound: The Pennsylvania Superior Court Holds that the Fair Share Act Apportionment of Liability Among Defendants Applies Only in Situations where a Plaintiff is Comparatively at Fault

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The Pennsylvania Superior Court recently held that the Pennsylvania Fair Share Act (“the FSA”) only applies to potentially limit exposure to joint and several liability when a plaintiff is also comparatively at fault. Absent any comparative fault (liability) on the part of the plaintiff, the FSA does not govern and courts are to apply the common-law principle of joint and several liability.

JOINT AND SEVERAL LIABILITY

Before Pennsylvania enacted the FSA in 2011, the doctrine of joint and several liability applied to negligence and strict liability causes of action governed by Pennsylvania law. Under joint and several liability, a plaintiff can seek to recover his or her entire judgment from any of the defendant tortfeasors that are liable, regardless of the extent to which the defendant’s conduct contributed to the injuries and harm. As long as the factfinder apportions some percentage of liability, no matter how small, to a defendant, the plaintiff can recover the entire judgment from that defendant.

THE FAIR SHARE ACT

In an effort to combat what some viewed as inequitable outcomes caused by joint and several liability, former Governor Tom Corbett signed the FSA into law in 2011. The FSA attempted to move away from joint and several liability and ensure that, subject to certain exceptions, a defendant need only pay its percentage share of an award.

Under the FSA, a defendant must pay only its proportioned percentage fault of an award as long as the defendant is less than 60% liable. If the factfinder apportions 60% or more of the liability to a defendant, the joint and several scheme applies, and that defendant remains jointly and severally liable to satisfy the entire judgment.

A plaintiff’s comparative negligence is not necessarily a complete bar to recovery under the FSA. Instead, the FSA completely bars a plaintiff from recovery only where the plaintiff’s negligence is a greater cause of the plaintiff’s injuries (more than 50%) than the defendants’ combined negligence. If the plaintiff’s comparative negligence is less than the defendants’ negligence, the plaintiff’s award diminishes in proportion to the amount of negligence attributed to the plaintiff.

The FSA does not address whether and how it applies to a scenario where the defendants do not argue that the plaintiff was comparatively negligent or where the factfinder concludes that the plaintiff was not comparatively negligent.

1 42 Pa. C.S.A. § 7402
FACTS OF UNDERLYING CASE

In *Spencer v. Johnson*, a vehicle struck Plaintiff as he was crossing the street as a pedestrian. At the time of the accident, the driver was driving his wife’s vehicle, which her employer had provided to her. Plaintiff suffered permanent, debilitating injuries, which diminished his quality of life. At the trial, the parties agreed that Plaintiff was not comparatively negligent and that the driver negligently operated his wife’s work vehicle when he struck Plaintiff. The parties disagreed as to whether the wife was negligent in allowing her husband to drive her work vehicle, and whether the wife’s employer was negligent under the theory of agency (*respondeat superior*) and vicarious liability in failing to maintain reasonable policies and regulations for the vehicles it provides to its employees.

The jury awarded $12,983,311.47 and apportioned liability for Plaintiff’s injuries across all three defendants: the driver (36%), the wife (19%), and the employer (45%). Arguing that the employer was vicariously liable for the conduct of the wife, Plaintiff moved to mold the verdict to add the wife’s 19% share of liability to the employer’s 45% share of liability, leaving the employer with 64% of the liability. If successful, the Plaintiff would then have been able to collect the entire award from the employer, as the employer’s share of liability would have exceeded the 60% threshold in the FSA. The trial court refused to add the wife’s proportionate fault to that of her employer, leaving the employer on the hook to pay only its proportionate share (45%) of the award. Plaintiff appealed to the Superior Court.

ON APPEAL

On appeal, Plaintiff argued that the trial court erred when it determined that the employer was not vicariously liable for the conduct of its employee and then refused to mold the verdict to add the wife’s share of the liability to the employer’s share of the liability. The employer argued that Plaintiff offered no evidence to support a determination that the wife was acting within the course and scope of her employment at the time of the incident and that the jury made no such finding. Therefore, the employer argued, the trial court correctly held that, according to the FSA, Plaintiff only could recover the employer’s share of the award (45%) from the employer.

The Superior Court held that the employer was jointly and severally liable for the entire award for two reasons: (1) the FSA simply does not apply in a case, such as this one, where the plaintiff was not comparatively negligent; and (2) even if the FSA did apply, because the employer was vicariously liable for the conduct of the wife, the employer’s combined liability exceeded the 60% threshold below which the FSA would insulate the employer from joint and several liability.

Adopting a plain-language approach, the Superior Court held that the FSA only applies where the plaintiff is comparatively negligent. The Court saw no indication that the legislature intended the FSA to apply in situations where the plaintiff is not comparatively negligent, nor could the Court find anything in the FSA that explicitly expands its scope to apply in a situation where the factfinder has not concluded that the plaintiff was comparatively negligent.

The Court stated that the FSA “concerns matters where a plaintiff’s own negligence may have or has contributed to the incident.”4 In the absence of comparative negligence, joint and several liability applies and a plaintiff may recover the entire damages award from only one of the joint tortfeasors irrespective of that tortfeasor’s percentage of fault. Therefore, each tortfeasor – the driver, the wife, and the employer – was jointly and severally liable for the entire award, such that the Plaintiff could collect the entire judgment from any one of the tortfeasors.

Second, the Court concluded that the trial court erred in refusing to mold the verdict to add the wife’s liability to the employer’s liability because, even

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2. $683,311.47 for past medical expenses, $7,300,000 for future medical expenses, and $5,000,000 for non-economic damages.

4. 2021 Pa. Super LEXIS 177 at *64
though the verdict sheet did not expressly ask the jury whether the wife was acting within the scope of her employment at the time of the incident, Plaintiff had introduced sufficient evidence to support such a conclusion. Therefore, even if the FSA applied, which the Court found it did not, the employer’s combined liability would have exceeded the 60% threshold beyond which a defendant remains jointly and severally liable for the entire award.

WHAT DOES THE COURT’S DECISION MEAN?

The implications of this opinion are two-fold. First, this opinion reiterates that the apportioned liability for employees acting within course and scope of their employment can be imputed onto the employer and then combined with the employer’s liability for purposes of reaching the 60% threshold under the FSA. Therefore, businesses should implement policies, including mandatory trainings, written materials, and documentation, that clearly outline the scope of an employee’s employment and the proper use of company resources. Evidence that an employer not only implemented proper policies but also made its employees aware of the policies should help employers defend against efforts to pin on them conduct by employees that does not comply with the policies. Moreover, defense counsel should attempt to obtain jury instructions addressing vicarious liability and jury interrogatories asking whether the plaintiff has established that the employee was acting within the course and scope of his or her employment at the time of the alleged incident.

Second, this opinion drastically narrows the application of the FSA to situations where a plaintiff’s conduct has contributed to his or her own injuries. In cases where a plaintiff who was not comparatively negligent has sued both solvent and judgment-proof defendants, the settlement analysis will change. Solvent defendants with minimal liability will have to consider the risk that they will be required to pay any judgment in its entirety and will be unable to recover portions of the judgment from their co-defendants. In cases where the plaintiff may have contributed to his or her injuries, defendants should take extra care to develop and preserve the defense throughout the litigation and ensure that they properly present it to the factfinder. We will continue to monitor this issue for further developments.

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