The Law of Respondeat Superior is Alive and Well in Maryland - A review of *Barclay v. Briscoe*

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Employers can breathe a sigh of relief following the Court of Appeals June decision in *Barclay, et. ux. v. Briscoe*, *et. al*., an opinion that affirmed an earlier Court of Special Appeals decision issued last year. In *Barclay*, the high court declined to extend liability to employers for negligent acts of its employees that occur outside the scope of the employer's business.

Factual and Procedural Background

On January 17, 2006, Christopher Richardson, a longshoreman working for Ports America Baltimore, Inc. ("Ports") was driving home from work in his personal automobile, after working a 22 hour shift. Richardson fell asleep at the wheel, crossed the center line and collided head-on with Sgt. Michael Barclay of the Anne Arundel County Police Department. As a result of the collision, Richardson died and Barclay suffered severe injuries.

Richardson had voluntarily worked a 22 hour shift in order to assist in the unloading and loading of a ship that was behind schedule. He was not required to work the additional hours, but had elected to do so.

Following the accident, Barclay filed a complaint in the Circuit Court for Carroll County naming as defendants Richardson's Personal Representative (Briscoe) as well as Ports and two other trade associations. In addition to the negligence claim against Briscoe for Richardson's actions, Barclay alleged that Ports, et. al. were vicariously liable for Richardson's negligence under the doctrine of *respondeat superior*. Barclay also alleged that Ports was primarily negligent by failing to prohibit or by encouraging employees to work an excessive number of hours.

In response to the lawsuit, Ports and the trade defendants filed a motion for summary judgment which was granted by the Circuit Court. The trial judge reasoned that with regard to the claim of vicarious liability under the theory of respondeat superior, an employer is only liable when the employee is using his vehicle while carrying out the duties of his employer at the time of the accident. As to the argument that Ports was primarily negligent, the trial court found that the employer had no duty to protect third parties from fatigued employees acting outside the scope of their employment in the absence of a "special relationship." Such a "special

relationship," the judge reasoned, only arises if an employee commits a tortious act on the employer's property or when using the employer's chattel.

The Plaintiff appealed the trial court's decision to the Court of Special Appeals which affirmed. The Court of Appeals granted Barclay's Petition for *writ of certiorari* and in doing so, addressed three questions:

1. Did the Circuit Court err in granting the motion for summary judgment when disputes of material fact existed?

2. Can an employer be vicariously liable, under the "special circumstances" exception to the coming and going rule, for injuries suffered by a third party when an employee falls asleep at the wheel while driving home from an unreasonably long shift?

3. Do employers owe a duty to the motoring public to ensure that an employee not drive home when an extended work schedule caused sleep deprivation, increasing the likelihood that the employee could fall asleep at the wheel and cause injury to a third party?

Decision

As to the first question, the high court found that the disputes of fact were not material and therefore summary judgment was appropriate. Concerning the second question, whether the employer could be held vicariously liable, the Court also agreed with the intermediate appellate court finding no liability on the part of the employer under the circumstances of this case. The Court went on to state that "on the job fatigue is not a 'special circumstance' sufficient to prevent application of the general rule that an employer will not be vicariously liable for the negligent conduct of his employee occurring while the employee is traveling to or from work. (quoting *Dhanraj v. Potomac Electric Power Co.*, 305 Md. 623, 628, 506 A. 3d. 224, 226 (1986)). The Court explained that in order to show a "special circumstance," one must prove that the employee is not simply commuting to or from work, but is also using his or her own personal vehicle – authorized by the employer – to engage in the execution of his duties on behalf of the employer. Therefore, even if Ports had forced Richardson to work for an unreasonable amount of time, that alone is not sufficient to impose liability on the employer.

Barclay's second argument – that Ports was primarily liable – as opposed to vicariously liable – was also rejected by the Court. Barclay argued that Ports had a duty "because the risk a fatigued employee poses to the public is foreseeable and the fatigue arose within the scope of [Port's] employment relationship with Richardson." The Court refused to conflate "foreseeability" with "duty" stating that while foreseeability is an important factor in determining whether a duty exists, "[t]he fact that a result may be foreseeable does not itself impose a duty in negligence terms." In so ruling, the Court followed the Restatement (Second) of Torts § 315 which states that there is no duty to control the conduct of a third person so as to

prevent harm to another unless a "special relationship" exists either between the actor and the third person which imposes a duty on the actor to control the third person, or there is a "special relationship" between the actor and the third person which gives the third person a right to protection. The employer must affirmatively exercise control over the employee for a duty to arise.

The Court of Appeals rejected Barclay's urging to adopt the Restatement (Third) which defines special relationships that give rise to a duty as including an employer with employees when the employment facilitates the employee's causing harm to third parties. In other words, the Court declined to expand liability to instances that might be considered a "moral duty."

Although a very small minority of States have imposed such a duty on employers in cases such as this, it clear that our current Court is not inclined to do so.