

The Pennsylvania Superior Court Suggests a New Limitation to the Fair Share Act, Albeit in *Dicta*

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Litigation Alert

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On March 18, 2021, the Pennsylvania Superior Court decided *Spencer v. Johnson*, 2021 Pa. Super. 48 (Pa. Super. Ct. March 18, 2021) in which the court suggested in *dicta* that the Fair Share Act is only implicated when the plaintiff's comparative negligence is at issue. But before getting to that, it is necessary to understand how the issue evolved in the case.

Background

In *Spencer*, the plaintiff pedestrian alleged personal injuries after being struck by a vehicle driven by an individual while allegedly under the influence of alcohol. The vehicle was a company car given to the wife of the driver. The plaintiff alleged negligence by the driver and negligent entrustment theory claims against the driver's wife and the company that owned the car.

The jury found in favor of the plaintiff and awarded a verdict of approximately \$13 million. The jury found all defendants negligent, and apportioned their percentage of liability as: (1) the defendant driver – 36%; (2) wife of the driver – 19%; and (3) company – 45%.

In post-trial motions, the plaintiff requested that the court mold the verdict and hold the company jointly and severally liable. The plaintiff argued that under the Fair Share Act, a defendant is jointly and severally liable when that defendant is responsible for more than 60% of the total liability. Here, the plaintiff maintained that the wife's negligence should be imputed to the company because the company was her employer and she was acting within the course and scope of her employment. The plaintiff averred that because the company should be held vicariously liable for the wife's negligence, the company's negligence therefore exceeded 60% and it should be held jointly and severally liable under the Fair Share Act, 42 Pa.C.S. § 7102(a.1)(3)(iii).

The trial court denied the motion. It first reasoned that the jury made no specific findings that the wife was acting within the scope of her employment at the time of the incident. The trial court noted that the verdict slip — drafted with the input of all counsel — had only two questions regarding the wife of the driver: (1) was she negligent?; and (2) was her negligence a factual cause of harm to the plaintiff? The trial court explained that because the plaintiff did not put the specific question of whether the wife was acting in the course of her employment to the jury, and because the jury made no specific finding as to such, then there was no basis for the court to impute the wife's negligence to the company.

The trial court additionally reasoned that there was insufficient evidence for the jury to find that the wife was acting in the course and scope of her employment such that the company bears vicarious liability. The court noted that the trial evidence showed the wife was making personal use of the car unrelated to the business, as she was attending a family gathering at her mother's house when the driver used the vehicle.

The Appeal

On appeal, the Superior Court disagreed and reversed. The Superior Court held that the evidence was sufficient for the jury to find that the wife was within the scope of her employment at the time of the incident. The court explained that although the wife was at her mother's for personal reasons, the undisputed evidence also indicated that the wife was on-call "24/7" for her job. The court ultimately

concluded that because the wife was effectively on-duty at all times, noting that this is the reason the company provided the vehicle, the jury could have concluded she was acting within the course of her employment.

The court then discussed the verdict slip, noting that an ambiguity existed as to whether the jury found the company vicariously liable for the wife, or directly liable for its own negligence. The court concluded that any ambiguity in the verdict was to be construed in the plaintiff's favor as the verdict winner.

Indeed, the issue here was that the verdict slip did not contain a special interrogatory asking if the wife was acting in the course of her employment. Rather, the slip contained the same two special interrogatories as to wife and the company asking: (1) were they negligent?; and (2) was their negligence a factual cause of the harm? However, the plaintiff had pursued multiple theories of negligence against the wife and the company, including both direct and vicarious theories. The judge had also instructed the jury on both direct and vicarious theories of negligence. The judge further informed the jury that it was to decide whether the wife was acting within the scope of her employment. The jury found the wife and company were negligent and returned a general verdict in favor of the plaintiff, but did not specifically delineate between direct or vicarious liability theories.

Reviewing Pennsylvania cases, including *Halper v. Jewish Family & Children's Services*, 963 A.2d 1282 (Pa. 2009), and *Shiflett v. Lehigh Valley Health Network, Inc.*, 217 A.3d 225 (Pa. 2019), the Superior Court concluded that the plaintiff should not be precluded from recovery under a vicarious liability theory simply because the jury was not asked to make specific findings that the wife was acting as an employee/agent at the time of the incident. The court reasoned that the plaintiff received the benefit of the doubt with ambiguities in the verdict sheet because he was the verdict winner. The court thus ascribed the blame on the company for failing to request a special interrogatory allocating damages based on individual or vicarious liability.

Accordingly, the Superior Court concluded that the jury's general verdict warranted a finding that the company was vicariously liable for the wife's negligence and, therefore, the company was greater than 60% responsible based on the imputation of the wife's negligence. The court thus found that joint and several liability applied, and reversed the trial court's denial of the plaintiff's post-trial motion and remanded the matter to the trial court.

Takeaway

The Superior Court provided an alternative discussion of trial court error in relation to the Fair Share Act. The court noted that, assuming *arguendo* the jury's verdict did not demonstrate the company was vicariously liable, the court would have found the trial court erred in failing to mold the verdict. Specifically, the court provided that it would have found the Fair Share Act inapplicable in this matter. Therefore, it would have concluded the company was jointly and severally liable regardless.

In this alternative analysis, the Superior Court discussed the structure of the Fair Share Act, the history of contributory negligence, the Comparative Negligence Act (the Fair Share Act's predecessor) and the Fair Share Act itself. The court noted that the "general rule" of the Fair Share Act involves situations implicating the plaintiff's own negligence, which is reflected in the history of contributory and comparative negligence. The court then observed that subsection 7102(a.1) provides for the apportionment of recovery against joint defendants that are found liable.

Because of this structure (the so-called "general rule" regarding a plaintiff's comparative negligence preceding the subsection regarding apportionment), the Superior Court reasoned that the apportionment subsection does not apply where a plaintiff's negligence is not at issue. Stated differently, for the apportionment provision of the Fair Share Act to apply, the plaintiff's negligence must be an issue in the case.

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Based on that reasoning, and noting that the plaintiff here was not alleged to be negligent, the Superior Court stated that it would have found the Fair Share Act inapplicable. As such, the court concluded the wife and company would have still been jointly and severally liable for the plaintiff's injuries.

Although the Superior Court's alternative discussion about the application of the Fair Share Act is *dicta*, the discussion is nevertheless notable and could have far-reaching implications for cases involving multiple tortfeasors with no comparative negligence on the part of the plaintiff. The discussion suggests that when the plaintiff's negligence is not at issue in the case, then the Fair Share Act's apportionment provision is inapplicable and the old joint and several liability laws apply.

However, the Superior Court's decision in *Spencer* neither definitively decides the issue nor is it even the end of the *Spencer* story, as we are likely to see an application for reargument and/or a petition from allowance of appeal from the defendants.

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