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VICARIOUSLY LIABLE DEFENDANTS ENTITLED TO SETOFF FOR AMOUNTS PAID BY TORTFEASORS UPON WHOSE NEGLIGENCE THE VICARIOUS LIABILITY RESTS

(MOTOR VEHICLE OWNERS ENTITLED TO SETOFF FOR AMOUNTS PAID BY NEGLIGENT DRIVERS)

Beth Andrews[1] – Contributor

At long last, Michigan's Supreme Court has decided an issue which arises in many motor vehicle cases – and in many, many other cases, as well. In *Kaiser v Allen,* ___ Mich ___ (2008) (#133031, 3-26-08), the court ruled that a vicariously liable defendant must receive a dollar-for-dollar setoff for all amounts paid by the negligent tortfeasor for whose negligence he is being held liable. In this case, the owner of a motor vehicle was entitled to a setoff for amounts paid by the negligent driver of that vehicle. The Supreme Court reasoned that tort reform provisions regarding several liability and allocation of fault do not apply to vicariously liable defendants.

Plaintiff Marion Kaiser died as the result of a motor vehicle accident. Her estate settled with the other driver (Allen) for $300,000 and then proceeded to trial against the owner of that other vehicle (Keidel), claiming that he was liable under Michigan's owner's liability statute, MCL 257.401(1).

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At trial, the jury was asked "What is the total amount of damages suffered by the Estate . . . a result of her death in this accident", and responded with the figure of $100,000. Then the real battle ensued.

The defendant claimed that the net verdict should be zero because he was entitled to a setoff for the $300,000 paid by the driver for whose negligence he was being held vicariously liable. In fact, defendant Keidel claimed, the plaintiff had already received *more* in settlement than the jury found it was entitled to in total damages.

Not surprisingly, the plaintiff estate disagreed. It claimed entitlement to the full amount of the jury verdict from owner Keidel because, under tort reform, each defendant was by default only severally liable, and so the verdict against the owner was based only upon that defendant's share of fault.

The trial court sided with the defendant and entered a net verdict of zero, but in October of 2006, the Court of Appeals disagreed and reversed. (#264600, 10-31-06).

The problem lies in the fact that the 1995 tort reforms altered the default form of tort liability, In all but a few situations, the new MCL 600.2956 changed tort liability from joint and several to merely several. (Medical malpractice is one prominent exception under MCL 600.6304(5).) As part of those same tort reforms, the Legislature also repealed former MCL 600.2925d(b), the setoff provision within the contribution act which allowed a dollar-for-dollar setoff of amounts paid by settling tortfeasors. Many wondered where that left jointly and severally liable med mal defendants, but in *Salter v Patton,* 261 Mich App 559 (2004), the Court of Appeals held that where liability remains joint and several, the common law rule against double-recovery continues to apply and mandates a dollar-for-dollar setoff for all amounts paid by other defendants. But the decision in *Salter* says nothing about whether the liability of vicariously liable defendants is joint and/or how the tort reforms apply to them.

The Supreme Court has now resolved this issue. In *Kaiser,* it reversed the Court of Appeals and ordered that the amounts paid by the negligent driver be offset against the verdict. In language which includes (but reaches far beyond) the context of the owners liability statute, the court's rationale was that tort reform provisions regarding allocation of fault do not apply to vicarious liability cases. It held that the fault of the vicariously liable defendant and the negligent tortfeasor is indivisible. Furthermore, the vicariously liable defendant is not truly at "fault" under tort reform because his actions did not "proximately cause" the plaintiff's damages as required by the definition of "fault" in MCL 600.6304(8). The court stated:

> The tort-reform statutes have replaced joint and several liability in most cases, with each tortfeasor now being liable only for the portion of the total damages that reflects that tortfeasor's percentage of fault.
>
> However, the tort-reform allocation-of-fault provisions do not apply to vicarious-liability cases because a vicariously liable tortfeasor is not at "fault" as defined by MCL 600.6304(8). Under MCL 600.6304(8), "fault" is defined

as "an act, an omission, conduct, including intentional conduct, a breach of warranty, or a breach of a legal duty, or any conduct that could give rise to the imposition of strict liability, that is a proximate cause of damage sustained by a party." "[A] proximate cause" is "a foreseeable, natural, and probable cause" of "the plaintiff's injury and damages." *Shinholster v Annapolis Hosp,* 471 Mich 540, 546; 685 NW2d 275 (2004).

Owner liability for an automobile operator's negligence, on the other hand, is a statutorily created vicarious liability. In vicarious-liability cases, one tortfeasor is at fault, and the other tortfeasor, through legal obligation, is entirely liable for the active tortfeasor's negligent actions; that is, the actions of the vicariously liable tortfeasor are not a "natural" cause of the injury. Accordingly, the actions of a vicariously liable tortfeasor do not constitute a proximate cause of that injury.

* * *

There is no percentage of fault and no distinct amount of damages that belongs to the vehicle owner separate from those of the negligent operator. The owner of the vehicle does not need to negligently lend his car to the operator to incur legal liability—he or she merely needs to own the vehicle. As a result, under MCL 257.401(1), a vehicle owner can be held liable for a plaintiff's injuries without being a foreseeable and natural cause of the plaintiff's injuries, that is, without being a proximate cause of the plaintiff's injuries. The purpose behind the owner-liability statute is to hold the passive owner 100 percent liable for the operator's negligence. The basis for a vicariously liable tortfeasor's liability is entirely derivative and does not meet the statutory definition of "fault" because the owner of the vehicle does not need to be the proximate cause of the plaintiff's injuries to be held liable for them. As a result, MCL 600.2957(1) and MCL 600.6304 do not apply to vehicle-owner vicarious-liability cases.

Because MCL 600.2957(1) and MCL 600.6304 do not apply to vehicle owner vicarious-liability cases, the common-law setoff rule remains the operable rule of law to determine the plaintiff's recovery of damages. The common-law setoff rule is based on the principle that a plaintiff is only entitled to one full recovery for the same injury. An injured party has the right to pursue multiple tortfeasors jointly and severally and recover separate judgments; however, a single injury can lead to only a single compensation. See *Verhoeks v Gillivan,* 244 Mich 367, 371; 221 NW 287 (1928).

* * *

> . . . First, the jury verdict awarding damages to plaintiff explicitly states that the award is for "the total amount of damages" suffered by the plaintiff. Second, the damages in this case are *all* due to the fault of Allen because Keidel is only vicariously liable for Allen's actions—Keidel is liable for *everything* that Allen is liable for through vicarious liability conferred by the vehicle-owner liability statute. Allowing plaintiff to recover the entire verdict against Allen and to retain all the proceeds from the settlement from Keidel would allow the plaintiff to recover four times more than the jury determined plaintiff should be awarded for his injuries. The Legislature did not intend that a plaintiff be awarded damages greater than the actual loss in vicarious-liability cases, resulting in a double recovery. The common-law setoff rule should be applied to ensure that a plaintiff only recovers those damages to which he or she is entitled as compensation for the whole injury. Plaintiff's jury verdict against Allen must be offset pro tanto by the settlement paid by Keidel.
> [Emphasis in original.]

The result in *Kaiser* was unanimous, although Justice Kelly authored a separate concurring opinion expressing her simpler opinion that tort reform did not overrule the common-law setoff rule and only made it unnecessary to apply the rule in most situations.

This decision clarifies a long-unresolved issue in tort law and will apply to many situations outside the context of the owners liability statute. For instance, it can be applied equally well to situations where an employer is held vicariously liable for negligence by an employee, to situations where any principal is held liable for the acts of an agent, or, indeed, to any situation involving vicarious liability.

If you have any questions concerning this decision, please feel free to contact Beth Andrews in the firm's Oakland County Office at 248-641-7600.

IQBAL CASE IS FINAL

In *Law Fax, Vol. XX, No. 6*, (February 18, 2008), we reported on the published Court of Appeals decision in *Iqbal v Bristol West Ins Co and ACIA*. The time for further appeals lapsed on March 27, 2008 and, as of that date, Bristol West had not filed a Petition for Leave to the Michigan Supreme Court. Therefore, *Iqbal* resolves the question as to whether the no fault statute requires each owner to be a named insured on a policy of insurance: There is no such requirement!

GRAND RAPIDS BREAKFAST SEMINAR

The Firm is pleased to present its Annual Spring Breakfast Seminar on April 24, 2008 at the Frederik Meijer Gardens and Sculpture Park, located at 1000 East Beltline, NE in Grand Rapids [(616) 957-1580]. Comprehensive written materials will be distributed to all program attendees.

After the seminar, feel free to enjoy all of the open indoor garden areas as our guest. The agenda for this event is as follows:

8:00 - 8:25 a.m.	Registration and Continental Breakfast
8:25 - 8:30 a.m.	Welcome and Introduction **Speaker: David N. Campos**
8:30 - 9:00 a.m.	Northern Michigan Recreational Accidents: An Overview of Civil Liability * General Liability Principles for Landowners & Participants; Governmental Immunity; Relationship with MVA Laws * Skiing * Off Road Vehicles * Snowmobiling * Hunting * Fishing * Equine Activities * Bicycling **Speaker: Peter B. Worden**
9:00 - 9:20 a.m.	Employment Law in Michigan *Litigation: Claims, Statutes, The Legal Process * Litigation Prevention: Handbooks, Policies & Record Keeping * Employee Wellness Programs **Speaker: Aaron L. Belville**
9:20 - 9:40 a.m.	Impact of Medicare, Medicaid & SCHIP Extension Act of 2007 on PIP Claims *Medicare Set-Aside Trusts: What Are They & When Are They Used? *MSAs for Workers Comp, General Liability and No Fault Claims **Speaker: Tara L. Velting**
9:40 - 10:15 a.m.	Michigan Third Party Automobile Liability Update *Non-Party At Fault Rule * Threshold Requirements * *Kreiner* and Its Progeny * Proposed Legislative Changes * Uninsured Motorist/Underinsured Motorist Coverage **Speaker: Christopher P. Jelinek**
10:15 - 10:30 a.m.	Break
10:30 - 11:15 a.m.	Michigan Auto No Fault First Party Update * "Constructive Ownership" & Responsibility to Insure (or not) a Motor Vehicle .3101 * Equitable Estoppel of One Year Statute of Limitations .3145 * No Fault Insurer's Right to IME .3151 & .3159 * Equitable Estoppel with Denial of Coverage Relative to Failure to Disclose .3163 * Tort Liability Exposure above PPI $1 million .3121 * Business Use Exclusions Enforceable with Auto, B.I. policy, *Bristol West v Butzbach* **Speaker: David N. Campos**

11:15 - 11:45 a.m. Demonstration of an Orthopedic Exam
Speaker: Clifford M. Buchman, D.O.

11:45 a.m. - Noon Question and Answer Session

If you are able to attend this complimentary annual event, please register via email to: lbeatty@garanlucow.com or phone Lynn Beatty at (616) 742-5500 or (800) 494-6312 for reservations.

BASIC NO FAULT COURSE AT LTU

The Basic No Fault course will commence on Tuesday, May 13, 2008 and run through July 29, 2008. The classes will be at the Southfield campus of Lawrence Tech University. Please call Tim Meloche at (248) 204-4055 for additional information or to register for the course.

FALL BREAKFAST SEMINAR

The Firm's annual Fall Breakfast Seminar will be offered on Thursday, September 18, 2008 at the Troy Marriott. Please mark your calendar and, if you wish to do so, preregister with Beth Bezenah at bbezenah@garanlucow.com. This seminar will also be available by Webcast.