Can an employer be vicariously intoxicated under La. C.C. article 2315.4?

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Damages under Louisiana law have long been viewed as a means by which a party is compensated for a proven injury or loss.[1] On the other hand, monetary awards designed to punish or deter reckless conduct, referred to as punitive or exemplary damages, are disfavored under our law and awarded only when expressly authorized by statute or contract.[2] Louisiana Civil Code article 2315.4, one of the most contentious punitive statutes, allows for exemplary damages when "[i]njuries on which the action is based were caused by a wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries." The plain language of article 2315.4 focuses squarely on the conduct of an intoxicated driver who causes injury. Whether an employer can be held vicariously liable for the exemplary damages arising out of the reckless conduct of its intoxicated employee, however, remains unsettled.

In *Smith v. Zurich*, one of the earliest reported decisions on vicarious liability under article 2315.4, Judge Berrigan of the Eastern District of Louisiana granted an employer's summary judgment on exemplary damages, holding that article 2315.4's language "defendant whose intoxication while operating a motor vehicle was a cause-in-fact of the injuries" applied only to the intoxicated employee-driver and not his employer.[3]

Bourque v. Bailey, a 1996 Third Circuit case, sought to expand the scope of punitive damages under article 2315.4 to those who provided intoxicants to a minor driver. The court found that the "non-driving defendants are not answerable, at least directly, for exemplary damages" and that the driver's insurer had possibly contractually assumed that responsibility. The court concluded with dicta that "only the intoxicated driver, his insurer and, where applicable, his legal representatives" could be liable for exemplary damages.[4] In *Rivera v. United Gas Pipeline Co.*, the Fifth Circuit held that "punitive damages, like any other type of negligence, may be imputed to a principal through the acts of its agent."[5] However, that case interpreted article 2315.3, since repealed, which provided for punitive damages for the negligent handling of hazardous substances. To hold otherwise, according to *Rivera,* would "virtually eliminate punitive damage awards."[6] Though *Bourque* and *Rivera* did not address vicarious liability of an employer, under article 2315.4 the parallels are obvious.

Subsequently, in *Curtis v. Rome*, the Fourth Circuit held that the employer was vicariously responsible for the damage caused by its employee, "includ[ing] exemplary damages under . . . art. 2315.4."[7] Thereafter, in *Lacoste v. Crochet*, the Fourth Circuit acknowledged its previous decision in *Curtis*, stating that "this Court held that an intoxicated driver's employer, when held vicariously liable for damages caused by the driver, may be cast for exemplary damages under 2315.4."[8] However, the precedential value of *Lacoste* is questionable in this instance as the employer focused its appellate arguments on whether the plaintiff proved legal intoxication of its employee rather than challenging vicarious liability for article 2315.4 damages.

Following *Curtis* and *Lacoste*, the Louisiana Supreme Court confronted the reach of article 2315.4 in *Berg v. Zummo* and found that the legislature's intention was to directly target and punish intoxicated drivers.[9] Specifically, the court held that article 2315.4 "does not allow the imposition of punitive damages against persons who have allegedly contributed to the driver's intoxication" and thus refused to extend liability under article 2315.4, in this instance, to the bartender who served the intoxicants or otherwise contributed to the driver's intoxication.[10] Notably, the court acknowledged previous appellate decisions that found employers vicariously liable for article 2315.4 damages but reserved judgment on that legal issue for another day.[11]

In *Darby v. Sentry Insurance Automobile Mutual Co.*, one of the first appellate court decisions on exemplary damages following *Berg*, the First Circuit recognized that an employer, as a non-driving defendant, did not fulfill all of the legislatively imposed requirements for liability under article 2315.4.[12] Accordingly, the court held as a matter of first impression that even where the employer's actions are found to be wanton and reckless under a negligent entrustment theory, the employer's liability did not extend to exemplary damages under article 2315.4.[13] While *Darby* did not directly address an employer's

vicarious liability for exemplary damages, the First Circuit made clear that it "is not bound by the decision of [the Fourth Circuit Court of Appeal in *Curtis* and *Lacoste*] on . . . [the] issue [of indirect liability for punitive damages] and . . . [that the Fourth Circuit's] conclusion may be contrary to the principle of strict construction of punitive statutes . . . ."[14]

Vicarious liability for exemplary damages was subsequently analyzed by the Third Circuit in *Romero v. Clarendon* in which a plaintiff alleged that an employee of the defendant trucking company was under the influence of drugs when he caused an accident and resulting injuries.[15] The trial court denied the plaintiff's motion for summary judgment seeking an assessment of exemplary damages against the employer, finding that "art. 2315.4, as a matter of law, is limited in its application to the alleged intoxicated or impaired driver of the motor vehicle."[16] The Third Circuit affirmed the trial court's ruling, reasoning that "[article 2315.4] is clearly aimed at the offending person's behavior [*i.e.*, the driver who is intoxicated] and none other."[17] Interestingly, *Romero* goes on to state that the employer's liability for damages resulting from the employee's intoxicated state "hinges upon whether it could have prevented [the employee] from driving while under the influence of drugs or alcohol."[18]

The language in *Romero* regarding whether the employer could have prevented the employee's intoxication was limited to the employee's own negligence and arguably immaterial to the Court's ultimate ruling on exemplary damages under article 2315.4. However, at least one trial court in the Third Circuit has since relied on that language to distinguish its holding. Specifically, in *Favors v. Aaron's, Inc.*, the trial court, accepting the petition's allegations as true, found a cause of action for vicarious liability for exemplary damages under article 2315.4 because the employer of the allegedly intoxicated driver knew or had reason to know its employee was routinely working while under the influence of illegal substances and had certain corporate drug testing policies and procedures in place that, if followed, could have prevented the employee's intoxicated state and subsequent accident and injury to the plaintiff.[19] Though the trial court's ruling allowed a cause of action for vicarious liability of article 2315.4 damages to survive a judgment on the pleadings, it enhanced the plaintiff's burden at trial beyond simply proving that the employee was intoxicated and in the course and scope of his employment at the time of the accident. Nevertheless, this ruling was not published, and no appellate court has interpreted R*omero* in that fashion.

More recently, in *Langford v. National Carriers, Inc.*, Judge Haik of the Western District of Louisiana examined all of the legislative history and preceding opinions on the issue of vicarious liability for exemplary damages under article 2315.4 — including *Lacoste*, *Curtis*, *Berg* and *Romero* — and found that the legislative intent of the article was to penalize only the intoxicated driver of the motor vehicle, not the employer or any other party.[20] Judge Haik expressly rejected *Curtis* and *Lacoste*, opting instead to follow the Louisiana Supreme Court's more recent analysis of article 2315.4 in *Berg*. Consequently, the court granted partial summary judgment in favor of the employer, finding that "[article 2315.4] is clearly aimed at the offending person's behavior and none other."[21]

The *Curtis* and *Lacoste* decisions finding employers vicariously liable for exemplary damages under article 2315.4 have not been overruled, nor have the holdings in *Bourque* or *Rivera* that arguably allow for exemplary damages to be assessed against a "legal representative" or "principal" of the intoxicated driver, respectively. Moreover, the trial court in *Favors* distinguished *Romero* and recognized a cause of action for vicarious liability for exemplary damages when the employer allegedly "knew or should have known" or "could have prevented" its employee's intoxication and resulting accident. Notwithstanding, the more recent trend beginning with the Louisiana Supreme Court's decision in *Berg,* followed by *Darby*, *Romero* and *Langford,* is to shield anyone other than the intoxicated driver from liability for exemplary damages under article 2315.4.

Until the Louisiana Supreme Court resolves these conflicting decisions, however, an employer's vicarious liability for exemplary damages under article 2315.4 will remain unsettled. Given the serious injuries that are typically caused by intoxicated drivers and the fact that most liability policies do not insure punitive conduct, the highest court's resolution of this legal question cannot come soon enough.

[1]*Int'l Harvester Credit Corp. v. Seale*, 518 So.2d 1039 (La. 1988).
[2]*Ross v. Conoco, Inc.*, 02-0299 (La. 10/15/02), 828 So.2d 546, 555.
[3]1996 WL 537746 (E.D. La. 1996).
[4]93-1657 (La. App. 3 Cir. 9/21/94), 643 So. 2d 236, 240-41.
[5]96-0502 (La. App. 5 Cir. 6/30/97), 697 So.2d 327, 336.
[6]*Id.*
[7]98-0966 (La. App. 4 Cir. 5/5/99), 735 So.2d 822, 826.
[8]99-0602 (La. App. 4 Cir. 1/5/00), 751 So.2d 998, 1003-04.
[9]00-1699 (La. 4/25/01), 786 So.2d 708, 717-18
[10]*Id.*
[11]*Id.* at n.6. ("We express no view on whether punitive damages can be imposed against a party who is vicariously liable for general damages resulting from the conduct of an intoxicated person, such as an employer.")
[12]07-0407 (La. App. 1 Cir. 3/23/07), 960 So.2d 226, 234.
[13]*Id.*
[14]*Id.* at 226, n.1.
[15]10-338 (La. App. 3 Cir. 12/29/10), 54 So. 3d 789.
[16]*Romero v. Clarendon Am. Ins. Co.*, No. 2008-11097-I (5th Jud. Dist. Ct. 8/21/09), 2009 WL 8637959.
[17]*Romero*, 54 So. 3d at 789, 792.
[18]*Id.*
[19]No. 2013-4618 (14th Jud. Dist. Ct. 7/21/14). The Third Circuit and Louisiana Supreme Court denied writs, and this legal issue was not appealed.
[20]No. 12-01280 (W.D. La. February 6, 2015), 2015 WL 518736.
[21]*Id.* at *3.