

IN THE SUPREME COURT OF GUAM

NADINE FAJARDO and IMEE FAJARDO,
by and through their *Guardian Ad Litem* JAIME FAJARDO
Plaintiffs-Appellees/Cross-Appellants

vs.

LIBERTY HOUSE GUAM, ROLANDO VILLALON,
JOHN DOES, and INSURANCE COMPANY OF
NORTH AMERICA, A CIGNA COMPANY
Defendants-Appellants/Cross-Appellees

OPINION

Filed: January 19, 2000

Cite as: 2000 Guam 4

Supreme Court Case No. CVA99-001
Superior Court Case No. CV0479-98

Appeal from the Superior Court of Guam
Argued and submitted on August 9, 1999
Hagåtña, Guam

Appearing for the Defendants-Appellants/

Cross Appellee:

Kevin J. Fowler, Esq.
Dooley Lannen Keeler & Roberts LLP
Suite 200, Calvo's Insurance Bldg.
115 Chalan Santo Papa
Hagåtña, Guam 96910

Appearing for the Plaintiffs-Appellees/

Cross Appellants:

Seth Foreman, Esq.
Law Offices of Keogh and Foreman
Suite 105, C & A Prof. Bldg.
P. O. Box GZ
Hagåtña, Guam 96932

BEFORE: BENJAMIN J. F. CRUZ, Chief Justice, PETER C. SIGUENZA, Associate Justice, and PETER F. PEREZ, Justice Pro Tempore.

SIGUENZA, J.:

[1] This is an appeal of the lower court’s ruling for Partial Summary Judgment. The Plaintiffs, Nadine and Imee Fajardo (hereinafter “Fajardo”) filed a complaint on February 25, 1998, against the Defendants.¹ The Complaint alleged that on July 11, 1997, Defendant Rolando Villalon (hereinafter “Villalon”), while employed as a security guard for Defendant Liberty House, unlawfully detained the Fajardos under suspicion of shoplifting. In addition, the Fajardos alleged that they were subjected to false imprisonment, intentional and/or negligent infliction of emotional distress and defamation. The Plaintiffs named Defendant Insurance Company of North America (hereinafter “CIGNA”) as a party to the lawsuit, pursuant to Title 22 of the Guam Code Annotated Section 18305 (formerly Government Code § 43354), alleging that Liberty House was insured under a policy issued by CIGNA covering liability for some or all of the claims mentioned in the complaint.² Liberty House and Villalon are represented by the same counsel and generally denied the allegations of

¹ Nadine and Imee Fajardo are minors and the instant suit is prosecuted on their behalf by their *Guardian ad Litem*, Jaime Fajardo.

² That section provides:

On any policy of liability insurance the injured person or his heirs or representatives shall have a right of direct action against the insurer within the terms and limits of the policy, whether or not the policy of insurance sued upon was written or delivered in Guam, and whether or not such policy contains a provision forbidding such direct action, provided that the cause of action arose in Guam. Such action may be brought against the insurer alone, or against both the insured and insurer.

22 GCA § 18305 (1994).

liability and posited the defense that Villalon's actions were in good faith and based upon a reasonable belief that the Plaintiffs may have taken property of Liberty House. CIGNA answered by admitting and denying specific aspects of the Complaint; however, it asserted that its policy of insurance did not provide coverage for the claims of intentional misconduct or for punitive damages.

[2] On September 3, 1998, CIGNA filed its Motion for Partial Summary Judgment with respect to plaintiffs' claims seeking the recovery of punitive damages against CIGNA. CIGNA sought judgment that it may not be held liable to indemnify Liberty House for any award of punitive damages.

[3] On January 5, 1999, the trial court issued its Decision and Order granting partial summary judgment in favor of CIGNA and held that CIGNA is statutorily prohibited from indemnifying Liberty House for any award of punitive damages based upon Liberty House's own conduct. *See Fajardo et al v. Liberty House et al*, CV 0479-98, Decision and Order at 5 (Super. Ct. Guam, Jan. 5, 1999). The trial court, however, held that CIGNA would be liable to indemnify Liberty House for an award of punitive damages imposed against the latter on a respondeat superior theory for the fraudulent, willful or oppressive conduct of Villalon. *Id.* at 6. CIGNA appeals the trial court's finding that it may be held vicariously liable for punitive damages. The Fajardos' cross-appeal asks this court to recognize an exception to the exclusion of punitive damages in cases involving false arrest, false imprisonment and malicious prosecution claims arising from security and law enforcement activities.

DISCUSSION

[4] Jurisdiction in this matter is not in dispute and is obtained pursuant to Title 7 of the Guam Code Annotated Sections 3107 and 3108(b) (1994).

[5] A grant of summary judgment is reviewed *de novo*. *Guam v. Marfega Trading*, 1998 Guam 4, ¶ 9; *Kim v. Hong*, 1997 Guam 11, ¶ 5; *Iizuka Corporation v. Kawasho Int'l*, 1997 Guam 10, ¶ 7. Summary judgment is proper “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact.” Guam R. Civ. P. 56(c) (1995). There is a genuine issue if there is “sufficient evidence “which establishes a factual dispute requiring resolution by a fact-finder. *Iizuka*, 1997 Guam 10 at ¶ 7. However, the dispute must be as to a “material fact.” *Id.* “A ‘material’ fact is one that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. . . Disputes over irrelevant or unnecessary facts will not preclude a grant of summary judgment.” *Id.* (citation omitted).

[6] If the movant can demonstrate that there are no genuine issues of material fact, the non-movant cannot merely rely on allegations contained in the complaint, but must produce at least some significant probative evidence tending to support the complaint. *Id.* at ¶ 8. (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 106 S.Ct. 2505, 2510 (1986)). In addition, the court must view the evidence and draw inferences in the light most favorable to the non-movant. *Id.* (citation omitted).

[7] Under Guam’s statutory authority, a principal may be held liable to third parties for the acts of its agent that causes injury to the third party. Specifically, 18 GCA § 20309 provides:

§20309. Principal's responsibility for negligence or omission. Unless required by or under the authority of law to employ that particular agent, a principal is responsible to third persons for the negligence of his agent in the transaction of the business of the agency, including wrongful acts committed by such agent in and as part of the transaction of such business, and for his willful omission to fulfill the obligations of the principal.

18 GCA § 20309 (1992) (formerly Section 2338 of the Civil Code of Guam (1970)). This provision has been held to be in accord with the letter and spirit of the common law doctrine of respondeat superior and to govern cases involving master and servant as well as principal and agent. *See Concepcion v. United States*, 374 F. Supp. 1391, 1395 (D. Guam 1974) (citing Guam Civ. Code § 2338 (1970)).

[8] However, Guam law incorporates a caveat to the general proposition that the principal is liable to third parties for the negligence of its agents. The following provision states:

§20310. Principal's responsibility for wrongs willfully committed by the agent. A principal is responsible for no other wrongs committed by his agent than those mentioned in § 20309, unless he has authorized or ratified them, even though they are committed while the agent is engaged in his services.

18 GCA § 20310 (1992). Guam's codification is consistent with other authority stating when an employer can be held vicariously liable for punitive damages based on an employee's conduct. The Restatement (Second) of Torts provides:

Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,

- (a) the principal or a managerial agent authorized the doing and the manner of the act, or
- (b) the agent was unfit and the principal or managerial agent was reckless in employing or retaining him, or
- (c) the agent was employed in a managerial capacity and was acting in the

scope of employment, or

(d) *the principal or managerial agent of the principal ratified or approved the act.*

RESTATEMENT SECOND OF TORTS § 909 (1979) (emphasis added).

[9] In addition, Guam’s statutory provision for the remedy of punitive damages states:

In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the Plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

20 GCA § 2120 (1992).

[10] Our plain reading of the aforementioned statutes leads to the conclusion that if the agent is liable to the third party because of some negligent conduct committed in the scope of the agent’s employment then, by operation of the doctrine of respondeat superior, the principal becomes vicariously liable to the third party. However, if the agent commits an intentional tort, then the doctrine of respondeat superior will not hold the principal vicariously liable to the third party unless the principal had authorized or ratified the conduct.

[11] We note, however, that other jurisdictions have specifically rejected the Restatement view in favor of a rule allowing punitive damages against an employer for acts of its employees so long as committed in the furtherance of the employer’s business and acting within the scope of employment. *See Wiper v. Downtown Development Corp.*, 732 P.2d 200, 201 (Ariz. 1987). Other jurisdictions require that before an employer may be held vicariously liable for punitive damages there must be some fault on his part. *See Mercury Motors Express, Inc. v. Smith*, 393 So.2d 545, 549 (Fla. 1981). Further, although the misconduct of the employee, upon which the vicarious liability

of the employer is based, must be willful and wanton, it is not necessary that the fault of the employer, independent of his employee's conduct, also be willful and wanton. *Id.* It is sufficient that a plaintiff allege and prove some fault on the part of the employer which foreseeably contributed to the plaintiff's injury to make him vicariously liable for punitive damages. *Id.* However, we decline to follow this view given the plain and unambiguous prescription of our statutes.

[12] Therefore, although a split of authority exists on the propriety of the imposition of punitive damages upon an employer for the acts of its employee, Guam's statutory provisions are unambiguous and we hold that some authorization or ratification by the employer is necessary before he is vicariously liable for a punitive damages award.

[13] Turning to the instant issue before the court, i.e., whether an employer's insurer should indemnify the employer for punitive damages properly assessed upon him under the theory of vicarious liability we begin by observing that Guam's statutory scheme for the regulation of the insurance business is found in Division 2 of Title 22 of the Guam Code Annotated (Chapters 12 through 29). In the context of the instant case, liability insurance includes all insurance against loss or damage resulting from accident to, or injury, fatal or non-fatal, suffered by any person, and for which the insurer is liable. *See* 22 GCA § 18105 (1994). However, in a specific provision, Guam law exonerates an insurer from liability for a loss occasioned by the willful act of an insured. The statute provides:

§18602. Wilful Act of Insured: Negligence. An insurer is not liable for a loss caused by the wilful act of the insured; but he is not exonerated by the negligence of the insured or of the insured's agents or others.

22 GCA § 18602 (1994).

[14] The statute is unambiguous in its proscription against indemnification. Thus, the lower court's ruling that CIGNA would not be liable to Liberty House based upon the latter's intentional acts must be affirmed.

[15] Now to the issue of punitive damages assessed against an insured by operation of the doctrine

of respondeat superior. As pointed out by the parties, Guam's insurance statutes were adopted from California. In that jurisdiction, indemnification of punitive damages is prohibited. *See Peterson v. Superior Court*, 31 Cal.3d 147, 642 P.2d 1305, 181 Cal.Rptr. 784 (Cal. 1982). The California Supreme Court has recognized that indemnification of punitive damages is prohibited for two distinct reasons:

First is the public policy rationale against diluting the deterrent effect of punitive damages by allowing the impact of the penalty to be shifted to the insurer. This justification applies whatever the basis for the punitive damages award. The second reason is applicable only when the basis for punitive damages is the wilful act of the defendant. When the defendant commits an intentional tort, the prohibition of §533 presents an additional reason for disallowing indemnification of the punitive damages, as well as indemnification of the remainder of the plaintiffs' recovery.

Peterson, 31 Cal.3d at 158, 642 P.2d at 1311, 181 Cal.Rptr. at 790. California's Section 533 is the same as 22 GCA § 18602.

[16] Again, there is a split of authorities as to whether insurance may cover liability for punitive damages. In California, indemnification is prohibited. By way of contrast, in Oklahoma, indemnification may be possible. In the case of *Dayton Hudson Corp. v. American Mutual Liability Ins. Co.*, 621 P.2d 1155 (Okla. 1980), the Oklahoma Supreme Court embraced the rule of allowing insurance coverage of punitive damages articulated in *Northwest Nat'l. Cas. Co. v. McNulty*, 307 F.2d 432, 440 (5th Cir. 1962). *Dayton Hudson*, 621 P.2d at 1160. The court reasoned that since the purpose of punitive damages is to punish and deter wrongdoers rather than to compensate injured parties, allowing the responsibility of the wrongdoer to shift that liability would defeat this purpose. *Id.* However, since cases of vicarious liability (such as respondeat superior) involve conduct by

someone else other than the policyholder, it does not contravene public policy to allow coverage of such liability. *Id.*

[17] The Fajardos and the lower court argue that blind adherence to California's precedents is no longer necessary. However, this court has held that:

And while we will not disturb precedent that is "well supported in law and well reasoned", we clearly are within our authority to modify those interpretations previously addressed by federal courts. . . . When choosing to make such changes, we will use our own independent and reasoned analysis of the issues before us. Moreover, based on our familiarity with these matters, we will give consideration to local law and customs, if applicable, and provide for their proper effect.

Sumitomo Const. Co., Ltd. v. Zhong Ye, Inc., 1997 Guam 8, ¶ 6 (citations omitted). In this case, Guam's insurance statutes are adopted from California and there is no compelling reason to deviate from that jurisdiction's interpretation of these statutes.

[18] We hold that it would be against public policy to allow the indemnification of punitive damages by an insurer of an employer who may be liable to another by operation of the doctrine of respondeat superior. The rationale has been stated and herewith adopted as follows:

[P]unitive damages are awarded for punishment and deterrence. . . and should rest ultimately on the party actually responsible for the wrong. If that person were to shift the burden to an insurance company, punitive damages would serve no useful purpose. Such damages do not compensate the plaintiff for his injury, since compensatory damages already have made the plaintiff whole. And there is no point in punishing the insurance company; it has done no wrong. In actual fact, of course, and considering the extent to which the public is insured, the burden would ultimately come to rest not on the insurance companies but on the public, since the added liability to the insurance companies would be passed along to the premium payers. Society would then be punishing itself for the wrong committed by the insured.

Northwestern, 307 F.2d at 440-41.

[19] Therefore, we reverse the lower court's ruling that CIGNA would have to indemnify for punitive damages assessed against Liberty House if liability therefor arose by operation of vicarious liability.

[20] Lastly, with respect to the Fajardo's issue on cross-appeal, we are unconvinced by their policy arguments and decline to carve out an exception for indemnification of punitive damages when the claims against the insured arise from security and law enforcement activities. Again, our holding is consistent with the overall policy of requiring the wrongdoer to feel the full implication of an award of punitive damages and not to escape its consequences by shifting that liability to an insurer.

CONCLUSION

[21] Because we find that Guam's law is unambiguous in precluding indemnification of an insured for the wilful acts of the insured, we **AFFIRM** that portion of the lower court's decision. However, because we find that allowing indemnification, by an insurer, of punitive damages assessed against an insured, even if that liability is vicariously imposed, is against public policy and defeats the very purposes for which punitive damages are imposed, we **REVERSE** that portion of the lower court's decision.

[22] Accordingly, the trial court's ruling is **AFFIRMED** in part, **REVERSED** in part, and **REMANDED** for further proceedings consistent with this opinion.

PETER F. PEREZ
Justice Pro Tempore

PETER C. SIGUENZA
Associate Justice

BENJAMIN J. F. CRUZ
Chief Justice