Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **29th day of June, 2022** are as follows:

BY Hughes, J.:

2021-C-01490 *REGINALD MARTIN VS. RODNEY THOMAS, GREER LOGGING, LLC and NATIONAL LIABILITY AND FIRE INSURANCE COMPANY (Parish of Caddo)*

REVERSED AND REMANDED. SEE OPINION.

Crichton, J., additionally concurs and assigns reasons.
Genovese, J., additionally concurs for the reasons assigned by Justice Crichton and Justice Crain.
Crain, J., concurs and assigns reasons.
Griffin, J., additionally concurs for the reasons assigned by Justice Crichton and Justice Crain.

SUPREME COURT OF LOUISIANA

No. 2021-C-01490

REGINALD MARTIN

VS.

RODNEY THOMAS, GREER LOGGING, LLC and NATIONAL LIABILITY AND FIRE INSURANCE COMPANY

On Writ of Certiorari to the Court of Appeal, Second Circuit, Parish of Caddo

Hughes, J.

At issue in this motion for partial summary judgment is whether a plaintiff may pursue both a negligence cause of action against an employee for which the employer is vicariously liable and a direct claim against the employer for its own negligence in hiring, supervision, training, and retention as well as a negligent entrustment claim, when the employer stipulates that the employee was in the course and scope of employment at the time of the injury. We hold that a plaintiff can maintain both claims even if the employer has stipulated to the course and scope of employment. We therefore reverse the partial summary judgment in favor of the employer which dismissed the claims asserted directly against it, and remand to the district court.

FACTS AND PROCEDURAL HISTORY

Plaintiff Reginald Martin named truck driver Rodney Thomas, his employer Greer Logging, LLC, and its insurer National Liability and Fire Insurance Company as defendants in this personal injury case. The plaintiff alleges that he and defendant Thomas were involved in a collision on South Purdue Street in Vivian, Louisiana at

8:27 p.m. on December 17, 2016. The plaintiff was driving a 2004 Honda Accord. Defendant Thomas was operating a 2016 Peterbilt tractor truck owned by Greer Logging. The plaintiff alleges Thomas was backing into a driveway.

The plaintiff alleges that following the accident he suffered from several injuries including head/facial contusions, multiple broken ribs, a fractured sternum, an open fracture of the tibial plateau, an open comminuted fracture of his left patella, and open wounds of the left leg, knee, and ankle. He also alleges mental anguish and distress in his petition.

The plaintiff's initial petition, filed April 4, 2017, alleged only negligence on the part of driver Thomas. In their answer, the defendants admitted that Thomas was at all pertinent times in the course and scope of his employment with Greer Logging, LLC.

The plaintiff filed a supplemental and amending petition on July 16, 2020. The amended petition added causes of action against Greer Logging for negligent hiring, supervision, training, and retention as well as a negligent entrustment claim (hereinafter "direct negligence claims"). Specifically, the plaintiff alleged negligence on the part of employer Greer Logging for its failure to do a thorough background check on Thomas; to check employment and personal references; to check employment history and attempt to speak with former supervisors; to check driving records and history prior to hiring him; to establish and enforce proper employee screening; in hiring him despite his incompetent driving record; to train him about proper driving; to train him regarding backing the tractor trailer; to train him regarding the proper use of spotters; to train him how to be attentive and do what he should have done or see what he should have seen in order to avoid the accident; to supervise him; for negligent entrustment of the vehicle despite the knowledge that he was an incompetent driver; and for negligent entrustment of the vehicle to him despite actual or constructive knowledge that he would drive the

tractor trailer in a negligent, reckless, or careless manner, while knowing that he was likely to use the vehicle in a manner involving an unreasonable risk of physical harm to other drivers.

The defendants filed a motion for partial summary judgment seeking dismissal of the claims asserted in the amended petition. They argued that because course and scope of employment had been admitted, under Louisiana jurisprudence, a plaintiff cannot maintain direct negligence claims against an employer while also maintaining a claim against an employee for which a plaintiff seeks to hold the employer vicariously liable.

The trial court granted the defendants' partial motion for summary judgment, dismissing with prejudice the claims raised in the amended petition. Plaintiff filed a devolutive appeal, and the court of appeal affirmed. **Martin v. Thomas**, 54,009 (La. App. 2 Cir. 8/11/21), 326 So.3d 334.

LAW AND ANALYSIS

This court applies a *de novo* standard of review in considering lower court rulings on summary judgment motions. **Bufkin v. Felipe's La., LLC**, 14-288, p. 3 (La. 10/15/14), 171 So.3d 851, 854; **Catahoula Par. Sch. Bd. v. La. Mach. Rentals, LLC**, 12-2504, p. 8 (La. 10/15/13), 124 So.3d 1065, 1071. Thus, we use the same criteria that govern the district court's consideration of whether summary judgment is appropriate. **Id**. Pursuant to Louisiana Code of Civil Procedure article 966(A)(3)-(4), a court must grant a motion for summary judgment if the pleadings, memoranda,[1] affidavits, depositions, answers to interrogatories, certified medical records, written stipulations, and admissions show that there is no genuine issue of

[1] *See* La. Code Civ. Proc. art. 966(A)(3) ("[A] motion for summary judgment shall be granted if the motion, memorandum, and supporting documents show that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law."); La. Code Civ. Proc. art. 966, 2015 Revision Comment (c) ("Although a memorandum is not a pleading or evidence, it is a proper document that can be used by a party to advance his arguments in support of or in opposition to the motion. *See, e.g.*, **Meaux v. Galtier**, 972 So.2d 1137 (La. 2008).").

material fact and that the mover is entitled to judgment as a matter of law. **Bufkin**, 14-0288 at p. 3, 171 So.3d at 854; **Catahoula**, 12-2504 at p. 8, 124 So.3d at 1071. The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by art. 969; the procedure is favored and shall be construed to accomplish these ends. La. Code Civ. Proc. art. 966(A)(2). A summary judgment may be rendered dispositive of a particular issue, theory of recovery, cause of action, or defense, in favor of one or more parties, even though the granting of the summary judgment does not dispose of the entire case as to that party or parties. La. Code Civ. Proc. art. 966(E).

The burden of proof rests with the mover; nevertheless, if the mover will not bear the burden of proof at trial on the issue that is before the court on the motion for summary judgment, the mover's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court the absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. La. Code Civ. Proc. art. 966(D)(1). The burden is on the adverse party to produce factual support sufficient to establish the existence of a genuine issue of material fact or that the mover is not entitled to judgment as a matter of law. **Id.** "When a motion for summary judgment is made and supported as provided [in La. Code Civ. Proc. art. 967(A)[2]], an adverse party may not rest on the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided [in La. Code Civ. Proc. art. 967(A)], must set forth specific facts showing that there is a genuine issue

[2] *See* La. Code Civ. Proc. art. 967(A) ("Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. The supporting and opposing affidavits of experts may set forth such experts' opinions on the facts as would be admissible in evidence under Louisiana Code of Evidence Article 702, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.").

for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him." La. Code Civ. Proc. art. 967(B).

Applicant-plaintiff argues to this court that dismissing his direct negligence claims against Greer Logging is in contravention of various Louisiana Civil Code articles including those that require the fault of all persons contributing to the plaintiff's injury be quantified by the jury and those that require employers to be liable for damage caused by employees as well as general tort principles.

The defendants argue that when an employer admits that its employee was acting in course and scope at the time of the accident, direct negligence claims against the employer are "subsumed" by the driver's negligence and fault for which the employer will be vicariously liable.

This case presents an issue of first impression for this court. As always, we begin our analysis by looking at all relevant legislation as legislation is superior to any other source of law. **Willis-Knighton Med. Ctr. v. Caddo Shreveport Sales & Use Tax Comm'n**, 04-473, p. 34 (La. 4/1/05), 903 So.2d 1071, 1092 (*citing* La. Civ. Code art. 2). "[T]he paramount consideration in statutory construction is ascertainment of the legislative intent and the reason or reasons which prompted the Legislature to enact the law." **M.J. Farms, Ltd. v. Exxon Mobil Corp.**, 07-2371, p. 13 (La. 7/1/08), 998 So.2d 16, 27 (*citing* **State v. Johnson**, 03-2993, p. 12 (La. 10/19/04), 884 So.2d 568, 575). It is well established that "[t]he starting point for the interpretation of any statute is the language of the statute itself." **Dejoie v. Medley**, 08-2223, p. 6 (La. 5/5/09), 9 So.3d 826, 829. When a statute is clear and unambiguous and its application does not lead to absurd consequences, the provision is applied as written with no further interpretation made in search of the Legislature's intent. **Dejoie**, 08-2223 at p. 6, 9 So.3d at 829; La. Civ. Code art. 9; La. R.S. 1:4. In the event the language of a statute is susceptible of different meanings, the interpretation must best conform to the purpose of the law. C.C. art. 10. When

analyzing legislative history, it is presumed the Legislature's actions in crafting a law were knowing and intentional. **M.J. Farms**, 07-2371 at pp. 13-14, 998 So.2d at 27. More particularly, this court must assume the Legislature was aware of existing laws on the same subject, as well as established principles of statutory construction and the effect of their legislative acts. **Id.**

Louisiana Civil Code art. 2315(A) provides:

> Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

Louisiana Civil Code art. 2316 provides:

> Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill.

Thus, a plaintiff is allowed to assert a claim against a party who has caused him or her harm.

Louisiana's Code of Civil Procedure establishes a system of fact pleading. La. Code Civ. Proc. art. 891. So long as the facts constituting a cause of action are alleged, the party may be granted any relief to which he is entitled under the pleadings and the evidence; the "theory of the case" doctrine, under which a party must select a theory of his case or defense and adhere to it throughout the litigation, has been abolished. **First S. Prod. Credit Ass'n v. Georgia-Pac.**, 585 So.2d 545, 548 (La. 1991). This allows a plaintiff to recover under whatever legal theory is appropriate based on the facts pleaded. **Perkins v. Scaffolding Rental & Erection Serv.**, 568 So.2d 549, 553 (La. 1990). Further, Louisiana Code of Civil Procedure art. 892 provides for pleading two or more causes of action in the alternative, "even though the legal or factual bases thereof may be inconsistent or mutually exclusive."

The tort of negligent hiring was expressly recognized by this court in **Roberts v. Benoit** as cognizable under Louisiana fault principles embodied in Civil Code article 2315. **Roberts**, 605 So.2d 1032 (La. 1991). In **Roberts**, this court noted that

common law jurisprudence views a claim that is subject to *respondeat superior* and a claim of negligent hiring as distinct:

> The former is based on the [employee's] negligence, which is imputed to the [] employer; the latter is based upon the employer's independent negligence in hiring, commissioning, training and/or retaining the [employee]. These two theories of liability are separate and independent.

Roberts, 605 So.2d at 1037. Likewise, negligent entrustment has also been recognized as a cause of action in Louisiana. *See, e.g.*, **Stokes v. Stewart**, 99-0878 (La. App. 1 Cir. 12/22/00), 774 So.2d 1215.

In this case the plaintiff alleges both the employer and the employee were negligent. Concerning *respondeat superior*,[3] Louisiana Civil Code art. 2317 provides in part:

> We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody.

In addition, Louisiana Civil Code art. 2320 provides in part:

> Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.
>
> In the above cases, responsibility only attaches, when the masters or employers . . . might have prevented the act which caused the damage, and have not done it.
>
> The master is answerable for the offenses and quasi-offenses committed by his servants, according to the rules which are explained under the title: Of quasi-contracts, and of offenses and quasi-offenses.

Thus, the law states that an employer is not only responsible for his or her own tortious conduct but also for that of an employee in the exercise of the function of the employment.[4]

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[3] As noted in **Dennis v. Collins**, vicarious liability is not "a cause of action, but rather a method of holding one party liable for the conduct of another, of which *respondeat superior* is merely a species." No. 15-2410, 2016 WL 6637973, at *5 (W.D. La. Nov. 9, 2016).

[4] We also note that La. R.S. 9:3921(A) provides:

> Notwithstanding any provision in Title III of Code Book III of Title 9 of the Louisiana Revised Statutes of 1950 to the contrary, every master or employer is answerable for the damage occasioned by his servant or employee in the exercise of the functions in which they are employed. Any remission, transaction, compromise, or other conventional discharge in favor of the employee, or any

Furthermore, Louisiana Civil Code art. 2323(A) provides:

> In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

Louisiana Civil Code art. 2324(B) provides:

> If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable.

Louisiana Code of Civil Procedure art. 1812, titled "Special Verdicts," provides in part:

> C. In cases to recover damages for injury, death, or loss, the court at the request of any party shall submit to the jury special written questions inquiring as to:
>
> (1) Whether a party from whom damages are claimed, or the person for whom such party is legally responsible, was at fault, and, if so:
>
> (a) Whether such fault was a legal cause of the damages, and, if so:
>
> (b) The degree of such fault, expressed in percentage.
>
> ***
>
> (3) If appropriate, whether there was negligence attributable to any party claiming damages, and, if so:

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judgment rendered against him for such damage shall be valid as between the damaged creditor and the employee, and the employer shall have no right of contribution, division, or indemnification from the employee nor shall the employer be allowed to bring any incidental action under the provisions of Chapter 6 of Title I of Book II of the Louisiana Code of Civil Procedure against such employee.

> (a) Whether such negligence was a legal cause of the damages, and, if so:
> (b) The degree of such negligence, expressed in percentage.

In **Thompson v. Winn-Dixie Montgomery, Inc.**, a plaintiff filed suit against a grocery store, which in turn filed a third-party demand against a cleaning service contracted to provide floor care and janitorial services to the grocery store. **Thompson**, 2015-477, p. 1 (La. 10/14/15), 181 So.3d 656, 658-59. The cleaning service filed a third-party claim against its subcontractor for those services. **Id.** at p. 1, 181 So.3d at 659. The jury returned a verdict in favor of the plaintiff, finding the subcontractor 70 percent at fault and the grocery store 30 percent at fault. **Id.** On appeal, the court amended the district court's judgment, holding that the grocery store was statutorily 100 percent at fault, referencing La. R.S. 9:2800.6, which provides for the duty and burden of proof in a negligence case against a merchant. **Id.** at p. 4, 181 So.3d at 660. In reversing the court of appeal, this court wrote:

> [T]he language of Articles 2323 and 2324 clearly and unambiguously provides that comparative fault principles apply in "any action for damages" and apply to "any claim" asserted under "any law or legal doctrine or theory of liability." It is indisputable that under the express provisions of La. C.C. art. 2323, 100% of the causative fault for a harm must be allocated in actions for an injury under any theory of liability. *See* H. Alston Johnson, 12 La. Civ. L. Treatise, Tort Law §§ 8.5 & 16.29 2d ed.). As this court squarely held in **Dumas**, 828 So.2d at 537-39, Articles 2323 and 2324 require that each actor be assigned an appropriate percentage of fault regardless of the legal theory of liability asserted against each person, and that each joint tortfeasor is only liable for his degree of fault. . . . "The fundamental purpose of Louisiana's comparative fault scheme is to ensure that each tortfeasor is responsible only for the portion of the damage he has caused." **Miller v. LAMMICO**, 07-1352 (La.1/16/08), 973 So.2d 693, 706. Statutory duties imposed on one tortfeasor do not excuse joint tortfeasors from the consequences of their own negligent acts.

Thompson, pp. 9-10, 181 So.3d at 664.

Under Louisiana's pure comparative fault regime, the negligence "of all persons," including those not in the litigation, those without the ability to pay, and the injured victim him- or herself, "shall" be assigned a percentage of fault. La. Civ.

Code art. 2323; La. Code Civ. Proc. art. 1812. In addition, a joint tortfeasor cannot be liable for more than his or her degree of fault. La. Civ. Code art. 2324. It is possible that an employer and an employee may both be assigned a percentage of fault, depending on the facts. An employer will still be financially responsible for an employee's percentage of fault if the employee was in the course and scope of employment. The initial assessment of fault required by the law is not bypassed due to the employer-employee relationship.

The assessment of fault shall be made first as required by law. If any fault is assessed to the employee, and if it is determined that the employee was in the course and scope of the employment, then the employer becomes *financially responsible* for the employee's fault under the theory of *respondeat superior*. This societal decision as to who actually pays does not change the manner of assessing fault to all parties as required by law.

It has been noted that the rule that the defendant would have us adopt is a relic of *contributory negligence* that is not compatible with a comparative fault regime. Natalie R. Earles, *Stipulating Vicarious Liability to Avoid Direct Negligence Claims: Why This Relic of the Past Should be Abandoned in Louisiana*, Louisiana Law Review (Mar. 28, 2022, 2:00 P.M.), https://lawreview.law.lsu.edu/2021/10/27/stipulating-vicarious-liability-to-avoid-direct-negligence-claims-why-this-relic-of-the-past-should-be-abandoned-in-louisiana.

Louisiana Civil Code art. 2323 was rewritten in 1979 to "eliminate the judicially created rule that contributory negligence was a complete bar to the plaintiff's recovery, and to substitute a procedure by which any negligence on the part of the plaintiff would operate as a percentage reduction of his recovery." **Murray v. Ramada Inns, Inc.**, 521 So.2d 1123, 1132 (La. 1988). Under contributory negligence principles, if a plaintiff is assigned any percentage of fault by the fact-finder, that plaintiff cannot recover. Under comparative fault, the fault of

the plaintiff mitigates damages but does not defeat them entirely. As noted by another jurisdiction, the rule precluding a plaintiff from bringing direct negligence claims against an employer who has admitted course and scope "loses much of is force" when applied in a comparative negligence regime. **Lorio v. Cartwright**, 768 F. Supp. 658, 660 (N.D. Ill. 1991).

Shielding a potential tortfeasor from liability is not compatible with a comparative negligence regime, however. As the federal district court in **Gordon v. Great West Casualty Co.** noted:

> Where an employer's potential fault is merged with that of the employee, the jury might not have a true picture of either party's wrongful acts — which may, in turn, magnify the comparative fault of the plaintiff or other individuals. For instance, a plaintiff involved in a car accident may bring a claim of negligence against a defendant truck driver who failed to exercise adequate care while driving on icy roads. If the employer then stipulates to vicarious liability, the plaintiff cannot also maintain a claim based on the employer's negligent training or supervision of the employee. Accordingly, evidence that the company failed to train employees on how to encounter that hazard or required them to push on with their loads despite the conditions could be ruled inadmissible — as other defendants have argued in multiple cases before this court. If admitted, the evidence could also tend to make the employee look less culpable. After all, is it really his fault that he was not properly trained or supervised? And the verdict sheet leaves no other place to account for the employer's direct negligence. If the jury decides to go easier on the employee, other individuals — for instance, the plaintiff or drivers of other vehicles involved in the accident — necessarily become more culpable and the fundamental purpose of comparative fault is frustrated. Likewise, where the employer can exclude evidence or avoid any public airing of its direct negligence merely because it is also financially liable under a theory of vicarious liability, the deterrent aims of tort law are thwarted. In effect, under such a rule, the employer would serve as insurer for the employee rather than codefendant and need not even have its identity revealed to the jury.

Gordon v. Great W. Cas. Co., No. 2:18-CV-967, 2020 WL 3472634, at *4 (W.D. La. June 25, 2020).

Defendants point to the federal district court opinion in **Dennis v. Collins** as support for their contention that direct negligence claims are "subsumed" by claims against an employee once course and scope are admitted. **Dennis**, 2016 WL

6637973, at *3. In **Dennis**, a Greyhound bus struck a car in which plaintiff was a passenger. **Id.** at *1. The plaintiff alleged that the bus driver was negligent in his driving and that his employer, Greyhound Lines, was negligent in the supervision of, teaching, and training the driver. **Id.** Greyhound stipulated to the fact that the driver was acting in the course and scope of employment at the time of the accident. **Id.** at *5. Greyhound then filed a motion for partial summary judgment seeking dismissal of the direct claims against it. **Id.** at *1.

The **Dennis** court stated at the outset that because there was no binding precedent on this issue under Louisiana law, it would be making "its best Erie guess." **Id.** at *2. Based on previously decided state and federal cases, the **Dennis** court drew a distinction between cases where course and scope were contested or where the tort was intentional and cases where an employer had admitted course and scope at the time of the accident. **Id.** at *6. The **Dennis** court opined that where course and scope was an issue or where the tort was intentional, a plaintiff may simultaneously maintain independent causes of action against an employee and employer. **Id.** at *6-7. On the other hand, according to **Dennis**, if an employer stipulates to course and scope, a plaintiff may not simultaneously maintain direct causes of action against the employer. **Id.** at *7.

The **Dennis** court reasoned that an employer could not be found liable of negligent hiring if the employee was not also negligent. **Id.** at *8. Said another way, even if the employer had been negligent in hiring the employee, there is no way that the employer's negligence could have been either the but-for cause or the legal cause of the injury to the plaintiff. **Id.**

Dennis has been used as support in a number of federal and state decisions on this issue.[5] **Dennis** relied on **Libersat v. J & K Trucking**, which, at the time **Dennis**

[5] *See, e.g.*, **Elee v. White**, 19-1633 (La. App. 1 Cir. 7/24/20), --- So.3d ---; **Landry v. Nat'l Union Fire Ins. Co. of Pittsburg**, 19-337 (La. App 5 Cir. 12/30/19), 289 So.3d 177; **Perro v. Alvardo**, 20-339 (La. App. 3 Cir. 9/30/20), 304 So.3d 997; **Wilcox v. Harco Int'l Ins.**, No. 16-

was decided, was one of the only Louisiana cases that discussed the exact issue of a plaintiff not being allowed to put on evidence of negligent hiring and training after an employer admitted course and scope. **Libersat**, 00-192 (La. App. 3 Cir. 10/11/00), 772 So.2d 173. On appeal, plaintiffs in **Libersat** assigned error to the trial court's refusal to instruct the jury on the employer's duty in hiring and training the employee. **Id.** at p. 2, 772 So.2d at 175. The appellate court, reviewing for abuse of discretion, opined:

> [T]his Court finds that the trial court's instructions regarding [the employer's] possible liability are an accurate reflection of the law. Patterson, as Mr. Mitchell's employer, would be liable for his actions under the theory of *respondeat superior*. If Mr. Mitchell breached a duty to the [plaintiffs], then Patterson is liable under the theory of *respondeat superior*. If Mitchell did not breach a duty to the [plaintiffs] then no degree of negligence on the part of Patterson in hiring Mitchell would make Patterson liable to the [plaintiffs]. The trial judge has the responsibility of reducing the possibility of confusing the jury, and he may exercise the duty to decide what law is applicable. **Sparacello v. Andrews**, 501 So.2d 269 (La. App. 1 Cir.1986), *writ denied*, 502 So.2d 103 (La. 1987). The court did not err in using its discretion to omit [plaintiffs'] requested jury instructions regarding negligent hiring and training because they were not appropriate in this case.

Id. at pp. 10-11, 772 So.2d at 179. **Libersat** was correct in pointing out that an employer can *only* be liable under theories of negligent hiring, supervision, training and retention, and negligent entrustment *if* the employee is at fault, and that the employer cannot be liable if the employee is not at fault. As noted in **Libersat**, "no degree of negligence" on the part of the employer in hiring the employee would make the employer liable if the employee did not breach a duty to the plaintiff. This is an accurate, but limited, observation. The possibility that *both* the employee and employer may be at fault is not thus foreclosed or "subsumed." Our traditional civil jury instruction on this point provided in part:

> When I say that the injury must be shown to have been caused by the defendant's conduct, I don't mean that the law recognizes only one cause of an injury, consisting of only one factor or thing, or the conduct

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187, 2017 WL 2772088 (M.D. La. June 26, 2017); *but see* **Gordon v. Great W. Cas. Co.**, No. 18-967, 2020 WL 3472634, at *4-5 (W.D. La. June 25, 2020).

> of only one person. On the contrary, a number of factors may operate at the same time, either independently or together, to cause injury or damage.

H. Alston Johnson III, *Civil Jury Instructions*, *in* 18 *Louisiana Civil Law Treatise* § 3:3 (3d ed. 2021). If no fault is shown on the part of the employee, the inquiry is ended, because there is no cause-in-fact or legal cause. But if fault is shown on the part of the employee, then the issue of whether there is also fault on the part of the employer remains an open question which must be decided according to the evidence on a case by case basis. The fault of both the employer and employee "shall be determined." C.C. art. 2323. Depending on the evidence, the employer may well be entitled to summary judgment. And, in a case like **Libersat**, if the evidence is lacking, a jury instruction at trial regarding an employer's negligence may not be appropriate. But the employer does not automatically prevail on summary judgment as a matter of law merely by stipulating that the employee was in the course and scope of employment. The evidence should determine whether the negligence of both the employer and the employee caused the damages claimed. The application of theories of vicarious liability or *respondeat superior* occur only if a degree of fault has been assessed to the employee in the course and scope of employment, for which the employer becomes financially responsible.

Based on the foregoing, we conclude that the district court erred granting the motion for partial summary judgment in favor of the defendants as a matter of law. Under Louisiana law, fault is compared, not "subsumed" due to the application of the theory of *respondeat superior* after fault has been determined.

DECREE

Accordingly, we reverse the district court ruling and remand.

REVERSED AND REMANDED.

SUPREME COURT OF LOUISIANA

No. 2021-C-01490

REGINALD MARTIN

VS.

RODNEY THOMAS, GREER LOGGING, LLC and NATIONAL LIABILITY AND FIRE INSURANCE COMPANY

On Writ of Certiorari to the Court of Appeal, Second Circuit, Parish of Caddo

Crichton, J., additionally concurs and assigns reasons:

I agree with the majority that the plaintiff in this matter may maintain his claims against both the employee and the employer even if the employer has stipulated to vicarious liability for the employee's negligent acts. It is significant that defendants do not argue that plaintiff's employer negligence claims lack factual support. Instead, they take the position that all such claims must be dismissed *as a matter of law* where it is stipulated that the employee was in the course and scope of employment. To the contrary, Louisiana Civil Code article 2323 provides, by its plain language, that the fault of "all persons causing or contributing" to the plaintiff's loss "shall be determined . . . ***under any law or legal doctrine or theory of liability, regardless of the basis of liability***." (Emphasis added.) *See also* La. C.C.P. art. 892 ("[A] petition may set forth two or more causes of action in the alternative, even though the legal or factual bases thereof may be inconsistent or mutually exclusive.").

We have long held that the vicarious liability claim for which an employer may be responsible by law – regardless of causation – and the negligent hiring claim for which an employer may be liable by its own acts of negligence are "two theories of liability [that] are separate and independent." *Roberts v. Benoit*, 605 So. 2d 1032, 1037 (La. 1991), *on reh'g* (May 28, 1992). Where causation is established,

comparative fault applies and requires the trier of fact to consider "both the nature of the conduct of each party at fault and the extent of the causal relation between the conduct and the damages claimed." *Watson v. State Farm Fire & Cas. Ins. Co.*, 469 So. 2d 967, 974 (La. 1985). Because defendants have failed to disprove that some fault may be allocated to both the employer and the employee due to the negligent actions of each, comparative fault requires that the claims against the employer be maintained at this point in the proceedings. WILLIAM E. CRAWFORD, Allocation of fault, 12 LA. CIV. L. TREATISE, Tort Law § 8:5 (2d ed.) ("Under the express provisions of C.C. art. 2323, as implemented by C.C.P. art. 1812c, 100% of the causative fault for a harm must be allocated, whether to parties or nonparties.").

Of course, a plaintiff's claim for negligent hiring must be meritorious. *See* La. Rule Prof. Conduct 3.1 (a lawyer shall not assert a claim "unless there is a basis in law and fact for doing so that is not frivolous"). Furthermore, after adequate discovery it may be that summary judgment in favor of the employer is warranted because no genuine issues of material fact exist and defendant employer is thus entitled to summary judgment as to the negligent hiring claim. Where an employer's negligence is established, however, comparative fault analysis will apply at the trial on the merits.

For these reasons, and those set forth by the majority, I agree to reverse the lower courts and remand to the trial court for further proceedings, including necessary discovery.

SUPREME COURT OF LOUISIANA

No. 2021-C-01490

REGINALD MARTIN

VS.

RODNEY THOMAS, GREER LOGGING, LLC and NATIONAL LIABILITY AND FIRE INSURANCE COMPANY

On Writ of Certiorari to the Court of Appeal, Second Circuit, Parish of Caddo

Crain, J., concurring,

I write separately to emphasize that on the issue presented, often the distinction between vicarious liability and fault has been lost. Vicarious liability involves a shifting of financial responsibility, not fault. If an employee is in the course and scope of employment and causes injury, the employer is financially responsible for the employee's fault. La. Civ. Code art. 2320. That determination is not based on the employer's fault. *See Roberts v. Benoit*, 605 So.2d 1032, 1036-37 (La. 1991). It is an independent financial responsibility based on the employment relationship. *Id.*

Separately, an employer can be assigned fault under any viable theory of liability available against the employer. La. Civ. Code art. 2315. If it involves negligent hiring, supervision, training, retention, or a negligent entrustment claim, the factfinder will simply compare and weigh the acts of both the employee and employer, then assign fault. La. Civ. Code art. 2323. I agree with the majority.