SUMMARY OF CALIFORNIA APPELLATE DECISIONS

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HOW TO USE THIS CASE SERVICE

When you receive your summaries, each page will have an alphabetical letter located in the upper right-hand corner. Each alphabetical letter corresponds to a separate subject matter category. For a description of the subject matter included within each letter category, consult the Table of Contents. Each page of the summaries should simply be filed behind the appropriate letter category for future reference.

EXAMPLE:

K

DAMAGES; EMOTIONAL DISTRESS; DILLION V. LEGG PRINCIPLE

Jones v. Smith
82 Cal.App.3d 145

The example cited above deals principally with damages and, therefore, is filed under Category K.

Good luck and pleasant reading!

Michael J. Brady

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INSURANCE; DUTY TO DEFEND; FIRE OCCURRING AFTER EXPIRATION OF POLICY

Tidwell Enterprises, Inc. v. Financial Pacific Insurance Co., Inc.
(2016) 6 Cal.App.5th 100, 210 Cal.Rptr.3d 634

FACTS:

The owner of the home was Fox. He built the home in the 2007-2008 time period. The home had a fireplace in it. Fox hired Tidwell, the insured contractor, to install a device in the fireplace which would have protected the flue from excessive heat. Tidwell did this work during the time the home was being constructed. Tidwell was insured by Financial Pacific from 2003 through 2010. The policy was a commercial general liability policy which insured for damages which occurred during the policy period. A fire occurred in 2011 resulting in damage to the Fox home. Fox was insured by State Farm under a homeowner's policy. State Farm paid the damage and then sued in subrogation Tidwell. Tidwell referred the matter to Financial Pacific and requested a defense. Financial Pacific refused, contending that the damages happened after the expiration of the policy. Tidwell filed a complaint for declaratory relief and bad faith. The trial court granted summary judgment for Financial Pacific on grounds that the damages had occurred after the expiration of the policy.

APPELLATE COURT DECISION:

Reversed. At the trial, expert evidence had been produced concerning a phenomenon known as pyrolysis. This concept stood for the proposition that when fires are burning in the fireplace, the heat from the fires can cause the deterioration of the wood framing around the fireplace, and this could lead to the occurrence of the fire itself. The insurer is obligated to defend if there is any potential for coverage. The insurer has the obligation to negate conclusively facts which could show the potential for coverage. In this case, the argument of the insured is that the policy provides coverage for losses "because of" property damage. The argument is that property damage was occurring to the wood framing (deterioration caused by increased heat) while the policy was in effect, and that that led to the fire which occurred after the policy had expired. Thus, a potential for coverage was established and the insurer had a duty to defend.

COMMENT:

This pyrolysis theory is controversial. Nevertheless, this case is a "revisit" to the old *Montrose* issues which held that if damage was happening during the policy, even though no one knew about it, it was enough to trigger a duty to defend. The twist in the *Tidwell*

case is the focus on this policy language "because of." The Court also did not give any weight to the claim State Farm was only seeking damages for the fire, not for damages to the wood frame.

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INSURANCE COVERAGE; EXCESS COVERAGE; BURDEN OF PROOF; ADDITIONAL INSURED ISSUES; GENERAL CONTRACTOR AND SUBCONTRACTOR

Advent, Inc. v. National Union Fire Insurance Co.
(2016) 6 Cal.App.5th 443, 211 Cal.Rptr.3d 685

FACTS:

Kielty was the injured party. He was a direct employee of the subcontractor; the construction site was being managed by the general contractor. The subcontractor's insurer was National Union. The general contractor's insurer was Topa. The National Union policy made the general contractor an "additional insured" if the accident arose out of acts or conduct of the subcontractor.

The instant dispute arises between National Union and Topa and concerns each insurers' excess policies. Kielty's injury case was ultimately settled for $10,000,000. Topa paid $5,000,000 (the limits of its excess policy). National Union only paid $1,000,000 under its excess policy. At that point, Topa brought an equitable contribution action against National Union contending that National Union should at least have paid a pro rata share of the settlement. The circumstances of Kielty's accident were largely speculative: he had been directed by the subcontractor's foreman to fetch a piece of plywood. He could easily have retrieved the piece of plywood without entering the building. Instead, he went inside the building and was hurt while doing so. He did not remember the circumstances of the accident, why it occurred, and no one else did. It was all speculation (including whether the subcontractor had done anything negligent in connection with the accident).

In the equitable contribution action, the trial court ruled in favor of National Union.

APPELLATE COURT DECISION:

Affirmed. First of all, the Appellate Court handed down what is probably a new rule on the burden of proof. In the present case, both National Union and Topa had been participating in the defense. National Union, however, refused to participate in an equal settlement and, therefore, would be viewed as a "non-participating" [for purposes of settlement] carrier. Under those circumstances, the non-participating insurer has the burden of proving that there is no coverage under its policy, even though that same carrier is participating in the defense.

However, in this case, the general contractor is only an insured under the subcontractor's policy (National Union's) if Kielty's accident was caused by negligence on the part of the subcontractor. There is no proof as to the circumstances of the accident and, therefore, Topa fails to make its case for equitable contribution and coverage from National Union.

Finally, in dealing with two excess policies, and one is specific and one is general, the specific excess carrier pays first. In this particular case, the National Union obligation to pay was only triggered after exhaustion of the "other insurance" provided by Topa. The Topa policy was specifically written on top of another policy (Landmark), whereas the National Union policy was written on top of not only its primary policy, but other available and collectible insurance. Under those circumstances, the Topa policy would be considered "specific" and the National Union policy "general." Under those circumstances, Topa would pay first and National Union would only be obliged to pay after complete exhaustion of Topa limits, and there would be no proration.

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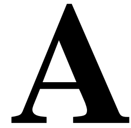
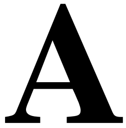


NEGLIGENCE; PREMISES LIABILITY; ASBESTOS; DUTY OF CARE; SECONDARY VICTIMS

Kesner v. Superior Court
(2016) 1 Cal.5th 1132, 210 Cal.Rptr.3d 283

FACTS AND HOLDING:

In this asbestos case, the California Supreme Court examines the extent of duty owed to people in the immediate victim's household who were exposed to asbestos fibers on the clothing, tools, and vehicles handled by the decedent who dies of mesothelioma. The Court says that a duty is owed to all household members who come into contact with such substances brought home by the decedent. Generally, the same principles apply to premises owners (here, a railroad) who were sued on theories of premises liability and negligence.



NEGLIGENCE; RIGHT TO REPAIR LAW; CONFLICT AMONG DISTRICTS

Elliott Homes, Inc. v. Superior Court
(2016) 6 Cal.App.5th 333, 210 Cal.Rptr.3d 889

FACTS AND HOLDING:

This case holds that a homeowner suing for defective construction under common law theories of recovery is also bound by the Right to Repair law, and the litigation was stayed pending homeowner's compliance with that law. This decision is in conflict with two other Appellate Court decisions and, therefore, there is a high likelihood that the California Supreme Court will grant review of this case.

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INSURANCE COVERAGE; MEANING OF "ACCIDENT"; SETTLEMENT WITHOUT ALLOCATING "PREVAILING PARTY"; ATTORNEY FEES

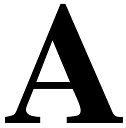
Navigators Specialty Insurance Co. v. Moorefield Construction, Inc.
(2016) 6 Cal.App.5th 1258, 212 Cal.Rptr.3d 231

FACTS:

Moorefield was a general contractor. Moorefield was insured by Navigators under a standard commercial general liability policy which provided coverage for property damage arising out of an "occurrence." In a large shopping center, contracts were let for the installation of carpet tile and vinyl tile over a concrete slab. Moorefield was the general in charge of the work and used subcontractors for some of the work. The contract specifications called for "vapor emission level" testing to make sure that the concrete slab was sufficiently dry when the tiles were laid down. Specific levels of the vapor emission testing were set forth. These levels indicated that the concrete was too wet and was still emitting too much moisture. Nevertheless, Moorefield represented to the owner "Best Buy" that he had encountered this situation before, had gone ahead and installed the tile, and that everything worked out satisfactorily. The tile was installed and shortly thereafter, moisture began oozing from the edges of the tiles. Best Buy itself took care of the problem, replacing the floor for $377,000 and withholding rent from the owner of the store (with whom Moorefield had contracted) to recover the repair of the floor amount. Lawsuits had been filed against Moorefield by Best Buy and others.

Navigators was defending under a reservation of rights. Navigators paid its $1,000,000 policy limits and there was no allocation as to how the $1,000,000 settlement was to be allocated.

Coverage disputes then arose and declaratory relief actions were filed. The trial court ruled that there was no coverage because what happened was not "an occurrence," meaning that there was no accident as required under the policy. Moorefield also claimed that in the settlement, Best Buy was the "prevailing party" and that in the contract Moorefield had with Best Buy/owner, the prevailing party was entitled to attorney fees. Moorefield claimed that Moorefield was entitled to be covered by Navigators for "prevailing party attorney fees." The trial court imposed on Moorefield the burden of proving what portion of the settlement was allocated to prevailing party attorney fees.



APPELLATE COURT DECISION:

Affirmed in part, reversed in part. The Appellate Court agreed with the long line of California cases and found that there was no occurrence or accident in this case. When a party deliberately intends to act, even though there is no intention to cause harm and even though the harm may be unforeseen, there is still no occurrence or accident. This was the circumstance in the present case: Moorefield took a chance and did the work even though the test results indicated the concrete floor was not yet dry. In fact, the problem was so well known that one of the subcontractors demanded a release from Moorefield in case problems developed. When you have such a deliberate act, even though the consequences may be unforeseen, this is still not an accident and there is no coverage/duty to indemnify.

The trial court erred, however, on the misallocation of the burden of proof. The burden of proof as far as the "prevailing party attorney fees" should have been placed on Navigators, not the insured. Navigators had the burden of proving what portion of the settlement was attributable to prevailing party attorney fees and what portion was attributable to non-covered damages. We know that the only damages (cost of repair for the floor) were $377,000. There was no accounting in the settlement documents for the rest of the payment ($623,000). Therefore, the case is remanded for that purpose and for application of a new burden of proof standard.

COMMENT:

This case raises difficult issues for insurers, insureds, and claimants in cases involving construction defects (and possibly other classes of cases). "Allocation" of settlements is often difficult. Insurers will usually want to do everything they can to protect the insured from liability for all claims being brought by the claimant. Those claims would include damages suffered by the claimant and possibly prevailing party attorney fees being asserted by the plaintiff against the insured. The insurer should be interested in having the claimant release the insured from all claims whatsoever (for example, in return for the insurer's payment of policy limits). But the insured then may face claims from the insurer that what it paid in settlement was not covered, or the insured faced with a prevailing party attorney fees claim may want to allocation a settlement more to that rather than to what amount was paid out for "damages" in the underlying lawsuit [possibly because the insured thinks it will be easier to get coverage for the prevailing party attorney fees claim, because that is part of the duty to defend]. But to avoid years of delay and more litigation, it probably is advisable that settlement of cases under such circumstances contain allocations for prevailing party attorney fees so that the parties better know where they stand in future declaratory relief/coverage disputes.

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INSURANCE COVERAGE; NON-OWNED VEHICLES; REGULAR USE

Medina v. GEICO Indemnity Co.
(2017) 8 Cal.App.5th 251, 213 Cal.Rptr.3d 502

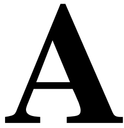
FACTS:

Flores worked for Pacific Bell. Flores had her own car which was insured by GEICO. Pacific Bell allowed Flores to use a company van (owned by Pacific Bell) to make deliveries related to work. They also allowed Flores to use this van for personal use and she often took it home and to run personal errands. On the day in question, Flores had had some wine to drink with lunch. She drove the van to assist her daughter who needed some money to pay the vet. Flores was intoxicated and was involved in an accident with Medina. Medina sued Flores. Pacific Bell was self-insured and ultimately paid $15,000 to Medina (ownership liability). They took the position that Flores was not an “insured” under their program because she was not in course and scope. GEICO took the position that Flores was not covered under its policy because the van had been furnished for her regular use and was therefore not covered under “non-owned” auto coverage. Under non-owned auto coverage, an insured (Flores) is covered for driving a non-owned automobile provided that the non-owned automobile is not furnished for her regular use. In light of the position of Pacific Bell and GEICO, Flores ultimately stipulated to a judgment of more than $512,000 in favor of Medina. Then a bad faith action was filed against GEICO.

In the bad faith action, the trial court granted summary judgment in favor of GEICO.

APPELLATE COURT DECISION:

Affirmed. This vehicle, owned by Pacific Bell, was furnished for the regular use of Flores and therefore not covered under the GEICO policy. She used it not only for business purposes, but also for personal purposes and there were few restrictions on her personal use. Summary judgment for GEICO was proper on the coverage issue.



INSURANCE COVERAGE; D&O COVERAGE; DEFENSE EXPENSES

Stein v. Axis Insurance Company
(2017) 10 Cal.App.5th 673, 216 Cal.Rptr.3d 804

FACTS:

Stein was general counsel for a company called Heart Tronics. Although he was not designated as an officer, he also functioned as an all-purpose director of the company's activities. He had a primary policy for D&O coverage with AXIS and an excess policy with Houston Casualty (Houston). This appeal concerns the Houston policy. The Houston policy contained a provision including coverage for willful misconduct, but required that the company defend the action until there was a "final adjudication" of willful misconduct. Stein was accused of various criminal acts and securities violations. He was convicted by a jury and sentenced to serve in prison. He appealed these convictions. The criminal proceedings were complicated and even after the convictions were affirmed, there were additional proceedings in progress by Stein asking for *en banc* hearing on the issues about sentencing propriety, etc.

The policy with Houston also provided that once there was a final adjudication, Stein was obligated to repay Houston for all the defense expenses. The trial court agreed with Houston that Houston was entitled to recover its defense fees.

APPELLATE COURT DECISION:

Reversed. The trial court applied too narrow a view of the phrase "final adjudication." The record indicates that proceedings were still in progress and therefore, no final adjudication could be found. What is a final adjudication under Federal law is not necessarily determinative. The case is therefore reversed since a final adjudication has not yet occurred.

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INSURANCE; COVERAGE; RESCISSION; MISREPRESENTATION ON APPLICATION

Duarte v. Pacific Specialty Insurance Co.
(2017) 13 Cal.App.5th 45, 220 Cal.Rptr.3d 170

FACTS:

The insured owned a tenant-occupied apartment building. The insured filed an eviction notice against a tenant. The tenant cross-complained, alleging emotional distress and physical injuries. The insured owner of the building tendered the matter to Pacific Specialty (Pacific), its insurer, to defend, but the insurer refused. The insured then sued the insurer for bad faith. The insurer raised the affirmative defense of rescission in its answer, contending that the owner had made various misrepresentations when the owner had filled out the insurance application. The application had asked whether there was any prior unrepaired damage done by tenants in the building. It had also asked whether any business was being conducted by the tenants. To both questions, the landlord had answered "no." There was evidence that the grandfather of the tenant had on occasion sold motorcycle parts out of the basement and the daughter had continued this activity.

The trial court granted summary judgment on the rescission issue in favor of the insurer; the trial court denied the insured's motion for summary judgment on the duty to defend on grounds that the matter was moot in light of the fact that rescission had been granted and the policy was void.

APPELLATE COURT DECISION:

Reversed. Preliminary, the Court rejected the landlord's argument under Civil Code section 1691 that notice of rescission can only be provided by the cross-complaint filed by the insurer. The notice requirements are adequately satisfied when the insurer answers the complaint and raises the issue of rescission and misrepresentation by affirmative defense. Turning to the merits, however, the policy language about "prior unrepaired damage" done by tenants was ambiguous and would not be enforced. Turning to the issue of whether a business was being conducted on the premises, the evidence indicated the business was not ongoing and was simply occasional, and this is not enough to constitute misrepresentation on the application form.

Summary judgment in favor of the insurer is reversed. The matter is returned to the trial court for further proceedings on the insured's motion for summary judgment on the breach of the duty to defend.

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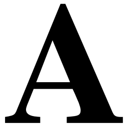

COMMENT:

Interesting decision in saying that a cross-complaint for rescission by the insurer is not necessary and that the affirmative defense is sufficient. This makes it easier for the insurer to raise this issue and avoid a demurrer.

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INSURANCE; RESCISSION; WAIVER

Star Insurance Company v. Sunwest Metals, Inc.
(2017) Fed.Appx. (WL 2198969)

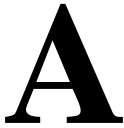
FACTS:

The insured, Sunwest, was in the recycling business, dealing with metals, plastics, paper, and other products. Sunwest purchased a fire insurance policy from Star. The Star policy did not allow coverage if more than 15% of the insured's operations were with plastics and paper. In fact, most of Sunwest's operations dealt with plastics and paper, as distinguished from metals. On the insurance application, Sunwest had not been truthful in this respect. A fire occurred. Sunwest submitted the claim to Star, but Star rescinded the policy. Sunwest sued Star for breach of contract in the Federal District Court.

The Federal District Court ruled that Star had waived its right to rescind based on its failure to investigate.

NINTH CIRCUIT DECISION:

Affirmed. The insurer had a duty to investigate and had not done so. Had it examined Sunwest's own website, it would have seen that most of the operations of Sunwest's business were with plastics and paper. Star, therefore, waived its right to rescind.



NEGLIGENCE; LANDOWNER LIABILITY; CONSTRUCTION DEFECT; RIGHT TO REPAIR ACT

Gillotti v. Stewart
(2017) 11 Cal.App.5th 875, 217 Cal.Rptr.3d 860

FACTS:

This is a complex case arising out of the Right to Repair Act. The plaintiff had a vacation home built. After taking possession, plaintiff discovered various problems with drainage and water damage. One of the problems apparently arose because the driveway had been realigned. This caused damage to various large trees (inability to "breathe properly") caused by covering the roots. Plaintiff had to cut some of these trees down and claimed that she was entitled to recover for that damage. Plaintiff sued the builder/seller, the general contractor, and the subcontractor who had worked in the area of the trees. In a jury trial, the jury found the builder/seller 80% liable, the general contractor 20% liable, and the subcontractor not negligent.

APPELLATE COURT DECISION:

Generally affirmed. To be noted is the fact that the Right to Repair Act lists numerous specific building standards that must be complied with. The Act, as interpreted, also means that the builder/seller is liable even though not at fault. But for others (the general contractor and subcontractors) to be liable under the Act, fault must be shown. In the present case, the subcontractor was specifically found by the jury not to be at fault, and this is a complete defense to the claim against the subcontractor.

Plaintiff argues that she is entitled to sue the subcontractor under common law claims. But the Right to Repair Act is the exclusive remedy under the circumstances, and no common law claim can be asserted.

A critical issue in the present case is whether a plaintiff can recover for damage to her "trees." The Act appears to be limited to damage to structures, and the tree is not a structure. However, other portions of the Act indicate that damage to "improvements" can be sought, and under dictionary definitions, a tree could be considered to be an improvement. The problem for plaintiff is that even with this interpretation, the jury found that the subcontractor was not negligent and, therefore, plaintiff has no claim against the subcontractor.

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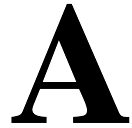
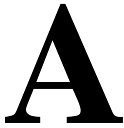


COMMENT:

The plaintiff has appealed to the California Supreme Court. The California Supreme Court currently has several cases pending involving the Right to Repair Act and touching on the issues involved in the *Gillotti* case. Therefore, watch this area carefully for Supreme Court action.



INSURANCE COVERAGE; PROPERTY COVERAGE; COLLAPSE

Tustin Field Gas & Food, Inc. v. Mid-Century Insurance Co.
(2017) 13 Cal.App.5th 220, 219 Cal.Rptr.3d 909

FACTS:

The insured owned a mini-mart in a gas station. Nineteen years before, a tank had been installed underground. The contractor had negligently installed the tank: it was supposed to be surrounding by pea gravel. Instead, the contractor simply dug a hole and filled it with soil and debris. This meant that the tank rested on a boulder and loose stones and had many air pockets. During an inspection, the insured discovered that the outer fiberglass sheath had cracked; the iron tank underneath, however, had not. But under California law, this rendered the tank "useless," requiring it to be replaced. The insured sought to get coverage from Mid-Century, claiming that this was a collapse and, therefore, covered under his property policy. The Mid-Century policy did not define collapse. It did exclude settling or cracking or expansion.

The trial court ruled in favor of the insurer, that the claim was not covered under the collapse hazard.

APPELLATE COURT DECISION:

Affirmed. Simply because the property was substantially impaired (including its use) does not mean that it is entitled to be covered under the collapse hazard. Failure to define collapse is not a problem either. Because the property has to be replaced under California law (because it is useless) also does not push it into the covered collapse hazard category.

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INSURANCE COVERAGE; PRIOR WRITTEN NOTICE REQUIRED OF SETTLEMENT

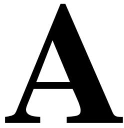
OneWest Bank, FSB v. Houston Casualty Company
(2017) 676 Fed.Appx. 664

FACTS:

The insured, OneWest, had loan arrangements with a bank. The insured was insured by Houston Casualty. OneWest entered into a settlement agreement with the bank concerning the loan without giving prior written notice to Houston and without obtaining Houston's consent. When OneWest sued Houston for coverage, the U.S. District Court granted summary judgment in favor of Houston on the coverage and bad faith claims.

NINTH CIRCUIT DECISION:

Affirmed. The insured violated the prior written consent/notice provision of the Houston policy. Accordingly, Houston owed no benefits to the insured and the coverage and bad faith claims were properly dismissed.



INSURANCE COVERAGE; DECLARATORY RELIEF; STAY OF DECLARATORY RELIEF; OVERLAPPING FACTS

Riddell, Inc. v. Superior Court of Los Angeles County (Ace American Insurance Co.) (2017) 14 Cal.App.5th 755, 222 Cal.Rptr.3d 384

FACTS:

This interesting declaratory relief case concerns the extensive litigation going on in the Federal Courts concerning football concussion injuries. Specifically, in this case, Riddell was the manufacturer of football helmets. In the concussion cases pending in Federal Court, Riddell was a defendant, since the players were arguing that the football helmets had been defectively manufactured and that this contributed to the injuries. Riddell was insured by various insurers. It sought defense and indemnity from the insurers. A declaratory relief action was filed by Riddell. The insurers propounded discovery to the insured: document requests and interrogatories probed such issues as: when individual players played in the football leagues; whether the players at that time were wearing Riddell's helmets; information concerning all settlements that Riddell had made; did Riddell have prior knowledge of a claimed defect in the helmets before Riddell had applied for insurance; and did Riddell "expect or intend" injuries to result from its helmets.

Riddell resisted these discovery requests and sought a protective order from the trial court, contending that issues in a declaratory relief action and the underlying liability action against Riddell overlapped and that Riddell could be prejudiced in having to respond to the discovery. The trial court ruled in favor of the insurers. Riddell petitioned for a writ.

APPELLATE COURT DECISION:

Writ issued to compel the trial court to set aside its orders. Discovery in the declaratory relief action was ordered to be stayed pending resolution of the underlying action. California authority indicates that when factual issues in declaratory and underlying actions are logically related, the declaratory relief action should be stayed since otherwise, the insured is likely to be prejudiced. In the present case, many of the issues sought to be inquired into by the insurers would help the football players in the underlying action prove their case and meet their burden of proof in their action against Riddell. This would obviously prejudice the insured. No confidentiality orders would protect against that development. Accordingly, the discovery in the declaratory relief action is ordered to be stayed.

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INSURANCE COVERAGE; EXCLUSION FOR INVASION OF PRIVACY CLAIM

Los Angeles Lakers, Inc. v. Federal Insurance Company
(2017) 869 F.3d 795

FACTS:

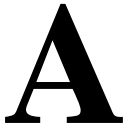
David Emanuel was attending a Los Angeles Lakers game. During the game, the Lakers transmitted to Emanuel a text message. Emanuel considered this an invasion of his privacy. He sued the Lakers claiming a violation of the TCPA Federal law, which prohibits automatic dialing or sending of robo-type messages. The action purported to be a class action. There is no specific cause of action for invasion of privacy, although privacy concerns were mentioned in the Complaint. No damages were sought, just the statutory set amount per violation. The Lakers tendered the matter to their insurer (Federal). Federal refused to defend, relying upon an exclusion in its policy which said that the policy did not apply to any claims arising out of invasion of privacy. The action was removed to Federal Court and a U.S. District Court dismissed the claim, ruling in favor of Federal.

NINTH CIRCUIT DECISION:

Affirmed. The claim clearly arises out of a claimed invasion of privacy. The TCPA, on which the Complaint relies, was expressly designed to prevent intrusions upon an individual's privacy. Under California law, privacy means "a right to be left alone." The exclusion applies, and Federal has no duty to defend or indemnify against the claim.

COMMENT:

One wonders how much respect Mr. Emanuel would have received had he discussed this matter in a downtown L.A. sports bar after the Lakers game!



INSURANCE COVERAGE; EXCESS; HORIZONTAL AND VERTICAL EXHAUSTION

Montrose Chemical Corporation of California v. Superior Court
(2017) 14 Cal.App.5th 1306, 222 Cal.Rptr.3d 748

FACTS AND HOLDING:

This is an extremely complex case dealing with the old issue of continuous and progressive damage and the triggering of multiple insurance policies (excess and primary) over many decades. The insured was Montrose Chemical which made DDT, and they were for decades subject to litigation for damages which occurred over many years. The litigation resulted in several Appellate Court decisions and Supreme Court decisions. Specifically, this particular case involves the issue of horizontal exhaustion, meaning that all primary insurance must be exhausted by the insured before accessing any excess insurance and the rule of "selective vertical exhaustion," allowing the insured wide discretion in choosing the policy year to concentrate on and then stacking all excess insurance for that particular year. In the instant case, the Appellate Court rejects "universal" rules [i.e., all primary insurance must be exhausted before accessing any excess coverage] and instead emphasizes that the language of each policy [excess] must be considered in reaching the decision as to whether that excess policy can be accessed.

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C

BAD FAITH; GENUINE DISPUTE DOCTRINE; UNDERINSURED MOTORIST COVERAGE

Zubillaga v. Allstate Indemnity Co.
(2017) 12 Cal.App.5th 1017, 219 Cal.Rptr.3d 620

FACTS:

The plaintiff was hit by a negligent motorist. The negligent driver had only $15,000 in liability coverage. Plaintiff had a $50,000 underinsured motorist policy with Allstate. Plaintiff took the $15,000 from the negligent driver, leaving $35,000 in underinsured motorist benefits under the Allstate policy. Allstate commenced an investigation and had plaintiff evaluated by an orthopedic surgeon. The orthopedic surgeon concluded that plaintiff did not need epidural injections since the pain was not radiating. Plaintiff had several medical personnel who disagreed. An arbitration commenced and the arbitrator awarded plaintiff the $35,000 remaining in underinsured motorist benefits. Plaintiff then sued Allstate for bad faith. Allstate prevailed on summary judgment based on the "genuine dispute" or genuine issue doctrine.

APPELLATE COURT DECISION:

Reversed. Under the *Wilson* case decided by the California Supreme Court several years ago, an insurer may not rely upon its own medical experts to the exclusion of other experts retained by the plaintiff. The insurer has a duty to reevaluate all the evidence, including opinions received after the opinions that the insurer solicits. Only if the evidence relied upon by the insurer conclusively establishes that it is reasonable can summary judgment be granted. In this case, triable issues of fact existed as to whether plaintiff needed epidural injections as "medical necessary." Accordingly, summary judgment was improperly granted.

COMMENT:

Reliance on the "genuine dispute" doctrine has become increasingly difficult after *Wilson*.

C

INSURANCE COVERAGE; BAD FAITH; EXCESS INSURER; DUTY TO DEFEND; REASONABLE SETTLEMENT OFFERS

Teleflex Medical Incorporated v. National Union Fire Insurance Co. of Pittsburgh, PA (2017) 851 F.3d 976

FACTS:

The insured was LMA. It was a manufacturer of a laryngeal medical device. It was engaged in a patent dispute with another company (Ambu). In the patent litigation, Ambu cross-claimed against LMA for, *inter alia*, false advertising. The litigation went on for several years. There was a mediation that lasted two days. LMA's primary carrier was CNA with $1,000,000 limits. LMA excess insurer was National Union with $14,000,000 of coverage.

LMA's defense attorney was at the mediation, as was CNA. National Union was not, although the attorney kept National Union advised as to progress. During the mediation, a settlement was agreed upon ($4.5 million) conditioned on agreement by CNA and National Union. CNA agreed. National Union postponed its decision, requesting answers to various questions from the attorney. The attorney ultimately advised National Union that the exposure on the case was substantial, in excess of $10,000,000, and that LMA management had been guilty of false advertising, exposing it to treble damages. National Union ultimately rejected the settlement. LMA then informed National Union that it was going ahead with the settlement. A week after that, National Union contacted LMA and said that if LMA would "undo" the settlement, National Union would take over its defense. LMA refused to do so, and the settlement was finalized. Then, LMA sued National Union for breach of contract and for bad faith and obtained a judgment in favor of LMA. National Union appealed.

NINTH CIRCUIT DECISION:

Affirmed. This case is governed by the California case of *Diamond Heights*. In a situation such as is posed by the LMA case, if a reasonable settlement is proposed, and the insured and the primary carrier agree, and the excess carrier refuses to agree, then the excess carrier has a duty to assume the defense of the insured. The excess carrier had an opportunity to do this in the present case, but refused. If the excess carrier refuses to defend the insured, then the insured is freed of its obligations to the excess carrier and may proceed to finalize the settlement and then sue the excess carrier for reimbursement (i.e., bad faith and breach of contract). The excess carrier also loses its rights (waiver) to rely upon the "no action" clause and the "no voluntary payments" clause of its policy. The judgment against the excess carrier, National Union, is therefore affirmed.

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COMMENT:

Excess carriers are, of course, not automatically on the hook for rejecting a reasonable settlement demand. They can take over the defense and see if they can do better. Here, the excess carrier invited substantial damages for having refused to take over the defense, which *Diamond Heights* says it is required to do if it rejects an otherwise reasonable settlement.

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C

INSURANCE COVERAGE; BAD FAITH; PUNITIVE DAMAGES; CONSTRUCTION DEFECTS; COMPLETED OPERATIONS COVERAGE; BRANDT FEES

Pulte Home Corp. v. American Safety Indemnity Co.
(2017) 14 Cal.App.5th 1086, 223 Cal.Rptr.3d 47

FACTS:

Pulte was a general contractor in the home development business. He was involved in several projects. It insisted that its subcontractors provide "additional insured" coverage to Pulte on the subcontractors' policies. The subcontractors complied, and the insurer was American Safety Indemnity Company (ASIC). The endorsements were typical, insuring Pulte for liability that may be imposed upon Pulte because of work done by the subcontractors. California case law and industry practice indicated that general contractors under these circumstances would expect coverage for completed operations under this additional insured provision, meaning that when an occurrence or damage occurred after the project was completed, and lawsuits were filed, the general contractor would be entitled to coverage.

When construction defect lawsuits were filed, Pulte tendered to ASIC for defense and indemnity, but ASIC rejected these tenders. Jean Fisher was counsel who had drafted the additional insured language in the ASIC policies. She took the position that the general contractor was only entitled to additional insured coverage and a defense if the occurrence happened during "ongoing operations" [while the project was being built] rather than after it was completed. Evidence during the trial indicated that ASIC had routinely and regularly denied additional insured coverage in <u>hundreds</u> of cases based upon this theory developed by Ms. Fisher.

Pulte brought declaratory relief, breach of contract, and bad faith claims against ASIC in the trial court. The trial court ruled in favor of Pulte on coverage, and also found that ASIC had acted in bad faith and awarded punitive damages ($500,000) and Brandt fees.

APPELLATE COURT DECISION:

Affirmed. A general contractor can reasonably expect completed operations coverage to be afforded to it, since the named insured [the subcontractor] also has completed operations coverage. And yet this was exactly the kind of coverage that ASIC routinely denied, not only to Pulte, but to hundreds of other additional insureds. There was no justification for this. The trial court correctly found that this was a pattern and practice of ASIC to deny additional insured coverage upon the spurious theories, and this supports a finding of bad

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faith on the part of ASIC, particularly in light of the testimony from Ms. Fisher and the adjusters that she supervised when they provided additional insured coverage. The punitive damages were awarded on a 1:1 basis and, therefore, were constitutional.

Brandt fees: This is the aspect of the case that was reversed. Acting creatively, in the midst of the trial, Pulte changed its "fee arrangement" with its attorneys, switching them from a contingency fee to an hourly rate. The trial court accepted this and awarded Brandt fees, in the amount of approximately $176,000. However, this was manipulative conduct on the part of Pulte and the matter is remanded for recalculation of Brandt fees. Such a recalculation will also require recalculation of the punitive damage award.

COMMENT:

This is a lengthy decision – an excellent discussion of what general contractors expect under the additional insured coverage, particularly with respect to completed operations. The decision also reminds this writer of a John Grisham book (and a movie made about it with Matt Damon) called *The Rainmaker* –about insurance bad faith where the claims manager said that they routinely "denied all claims"!

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PROFESSIONAL LIABILITY; REAL ESTATE BROKERS; ASSOCIATE LICENSEES

Horiike v. Coldwell Banker Residential Brokerage Company et al.
(2016) 1 Cal.5th 1024, 210 Cal.Rptr.3d 1 (California Supreme Court)

FACTS:

Cortazzo was an associate licensee for the real estate broker Coldwell Banker. Cortazzo was handling a residential property. The permit information indicated the property was around 11,000 square feet and there were several buildings on the property. On the Multiple Listing, Cortazzo listed the property as having 15,000 square feet. He had a potential buyer and told the buyer that the buyer could retain an expert to verify the square footage. The buyer lost interest in the property, however. Then new buyers showed up (Horiike), the present plaintiffs. Cortazzo furnished various documents to plaintiffs, including the 15,000 square foot representation. After the plaintiff purchased the property, they discovered the error and a lawsuit was filed against Cortazzo and Coldwell Banker. The trial court held that Cortazzo did not owe a fiduciary duty to plaintiffs. This was on the breach of contract claim. The case went to the jury on other theories such as negligence and intentional misrepresentation, but the jury returned a verdict for Cortazzo. On appeal, the Appellate Court reversed the breach of contract decision. The case then went to the California Supreme Court.

SUPREME COURT DECISION:

Court of Appeal affirmed. The case is remanded to the trial court for further proceedings, and plaintiffs are allowed to proceed on the breach of contract claim. An associate licensee such as Cortazzo owes the same duty as his real estate broker employer, Coldwell Banker. The governing statute is Civil Code section 2017.

D

PROFESSIONAL LIABILITY; MEDICAL; EXPERT EVIDENCE; AMBULANCE COMPANY

Sanchez v. Kern Emergency Medical Transportation Company
(2017) 8 Cal.App.5th 146

FACTS:

Plaintiff suffered a head injury in a football game. The paramedic at the scene administered a Glasgow test (to assess severity of coma). He then called a transport ambulance to take plaintiff to the hospital. The ambulance arrived about nine minutes later. Spinal precautions were taken. Nonetheless, plaintiff suffered a subdural hematoma and had to have a craniotomy after he reached the hospital. Plaintiff apparently had a stroke shortly after the surgery. California law requires that in a suit against an ambulance, plaintiff must prove gross negligence. The trial court granted summary judgment in favor of the defendant on grounds that plaintiff's expert had not adequately dealt with the causation issue.

APPELLATE COURT DECISION:

Affirmed. Plaintiff's expert had not addressed defense expert information that a moderate delay in getting plaintiff to the hospital would often not cause an increase in the damage. There were no serious delays in this particular case. There was also evidence that the stroke followed the surgery and was not brought on by the original injury. The trial court correctly granted summary judgment based upon the failure of plaintiff's expert to deal with such matters.

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D

ANTI-SLAPP STATUTE; RACIAL EPITHET

Daniel v. Wayans
(2017) Cal.App.5th 367, 213 Cal.Rptr.3d 865

FACTS:

Plaintiff was a minor actor in a film produced by Mr. Wayans who was well-known in movie circles. Wayans was noted for poking fun at pop culture and racial stereotypes. Plaintiff was compared to the cartoon character Cleveland Brown and in promotions in the Internet had the word “nigga” under his photograph. Plaintiff brought suit against Wayans. The trial court granted the motion to strike.

APPELLATE COURT DECISION:

Affirmed. All of this arises out of protected activity; namely, free speech. It was also within the creative activity of making films. Plaintiff demonstrated no probability of prevailing in the action. The motion to strike was properly granted.

D

ANTI-SLAPP STATUTE; MEDICAL STAFF PRIVILEGE SUSPENSION; PRIVILEGE

Melamed v. Cedars-Sinai Medical Center
(2017) 8 Cal.App.5th 1271

FACTS:

Plaintiff was a physician at Cedars-Sinai specializing in scoliosis surgery. He planned to operate on a 12-year-old girl. The patient was placed on the operating table and the operation commenced. After the commencement of the operation, plaintiff realized that the table was not the right size and that the padding was too small. He requested the nurses to get a new table and padding, but this was not possible and they were not available. Plaintiff continued with the surgery which lasted 11 hours (it was supposed to last no longer than five). The patient had a bad result and plaintiff realized that within days corrective surgery would have to be undertaken. Plaintiff did not complain to the hospital itself about the lack of adequate equipment, but he told the parents of the girl patient that the hospital had not had adequate equipment. When the hospital found out all the facts, a Dr. Brien intervened aggressively and ultimately plaintiff was suspended. He was not permitted to operate on pediatric patients, but only adults. Hearings were held, including a peer review hearing, and plaintiff's suspension was upheld for a limited period of time, but he was allowed to resume surgery on pediatric patients. Plaintiff ultimately brought suit claiming that his suspension was wrongful and in retaliation (he had never claimed retaliation before).

The defendant hospital filed a motion to strike under C.C.P. §425.16 which was granted by the trial court.

APPELLATE COURT DECISION:

Affirmed. The anti-SLAPP statute does apply to physicians in the context of this case. There are special privileges for the actions of peer review committees and, therefore, plaintiff will not be able to demonstrate the probability of prevailing. Another factor undermining plaintiff's case is the fact that he did not complain to the hospital itself about inadequacy of hospital equipment (he just complained to the parents of the girl patient). The trial court correctly granted the motion to strike.

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PROFESSIONAL LIABILITY; MEDICAL MALPRACTICE; COLLATERAL SOURCE RULE

Cuevas v. Contra Costa County
(2017) 11 Cal.App.5th 163

FACTS:

The mother was scheduled to deliver twins. They had the unusual medical condition of sharing the placenta, but having separate amniotic sacs. This can result in difficulties during delivery. The allegations and the evidence indicated that such deliveries should be brought on before 37 weeks. The twins were born with severe brain damage. In the medical malpractice action, the jury returned a verdict for future medical expenses of more than $9.5 million. The defendant had sought to introduce evidence of future medical benefits that plaintiffs would receive. But the trial court substantially rejected the defendant's argument.

APPELLATE COURT DECISION:

Reversed and remanded for new trial for calculation of future medical benefits and a resulting reduction in the amount of the verdict for future medical benefits.

Under MICRA (section 3333.1), the law was changed and collateral source benefits/ payments are more liberally allowed into evidence. Although Medi-Cal benefits are not admissible, benefits payable under the ACA are allowed. The case should be returned to the trial court for calculation of what collateral sources are properly to be used to reduce the future medical payment portion of the verdict.

COMMENT:

All medical malpractice defense lawyers should consult and review this decision carefully. It is complicated – trying to ascertain which future medical benefits or payments can now be introduced as evidence to reduce the jury verdict for future medical expenses. It is not limited to future medical benefits that are vested at the time of the injury, but also includes amounts under programs such as the Affordable Care Act that could be arranged for and provided to a patient presently disabled. Although the matter is complicated, proper research and analysis could well be worth the effort when reducing large verdicts for future medical expenses based on complicated "bad baby" cases.

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GOVERNMENT LIABILITY; PLAN OR DESIGN IMMUNITY

Gonzalez v. City of Atwater
(2016) 6 Cal.App.5th 929, 212 Cal.Rptr.3d 137

FACTS:

Plaintiff was a pedestrian and was hit by a car at an intersection. An action for wrongful death was filed against the driver of the car and the City of Atwater. The claim was that the intersection was in a dangerous condition. At trial, the plan or design immunity defense was presented (Government Code section 830.6). It was conceded that the design of the intersection, and the facing of the signaling devices, was causally related to the accident. Evidence was produced that the facing design had been approved by a public official who was empowered with discretion to make the decision. The third element of the plan or design immunity is that the plan or design must have reasonable support. On that subject, plaintiff's counsel, during the trial when discussing a witness' testimony, conceded that there was a reasonable basis for the design. The jury returned a verdict for $3.2 million in favor of the plaintiff.

APPELLATE COURT DECISION:

Reversed. The plan or design immunity had been established. The causal relationship was established. The reasonableness of the design was established due to the concession on the part of plaintiff's attorney. Furthermore, there was substantial evidence that a person entrusted with discretion to approve the design had made such a decision.

ANTI-SLAPP STATUTE; USE BY PUBLIC ENTITIES; GOVERNMENTAL IMMUNITIES

Doe v. State of California
(2017) 8 Cal.App.5th 832, 214 Cal.Rptr.3d 391

FACTS:

Several years ago, plaintiff had been convicted as a sex offender and was placed in the State registry of sex offenders. Plaintiff registered as such from time to time. Unbeknownst to plaintiff, his conviction was ultimately overturned. Apparently, this information was not relayed to the proper authorities, and he was arrested by the San Diego Police Department for failing to register as a sex offender. His public defender attorney found out the facts and plaintiff was released. He sued the San Diego authorities for damages and civil rights violations.

The defendant public entities and officials filed a motion to strike under C.C. P. §425.16 which was granted by the trial court.

APPELLATE COURT DECISION:

Affirmed. Plaintiff is unable to show a probability of prevailing. The acts alleged against the public officials and entities arise from prosecutorial and investigative activities which are immunized under the Government Code. Furthermore, plaintiff himself could have checked on his status to make sure that his name was removed from those who are required to be registered as sex offenders (plaintiff's name had never been removed, which is why the San Diego Police Department thought they had the right to arrest him).

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E

DANGEROUS CONDITION OF PUBLIC USE; NEGLIGENCE; TRAIL IMMUNITY; GOLF COURSE

Levya v. Crockett & Company, Inc.
(2017) 7 Cal.App.5th 1105, 212 Cal.Rptr.3d 879

FACTS:

A golf course had given to the County an easement which allowed the County to create a trail for public use. The trail was alongside the golf course. Plaintiff and his wife were walking along the trail when an errant golf ball struck plaintiff in the eye. He sued the golf course on the grounds of negligence and negligent infliction of emotional distress.

The trial court granted summary judgment in favor of the golf course based upon the immunity set forth in Civil Code section §831.4, commonly called trail immunity (no liability for injuries suffered because of the condition of any trail).

APPELLATE COURT DECISION:

Affirmed. The law encourages private landowners to grant such easements to public entities, and after doing so, the private landowner is entitled to the immunity afforded by the statute.

E

DEFAMATION; ANTI-SLAPP MOTION

Charney v. Standard General, L.P.
(2017) 10 Cal.App.5th 149, 215 Cal.Rptr.3d 889

FACTS:

Plaintiff had been CEO for a corporation. The corporation issued a press release indicating that the plaintiff had been investigated by a third party and that he was terminated for cause. Plaintiff brought a defamation suit and defendant moved to strike under C.C.P. §425.16. The trial court granted the motion to strike.

APPELLATE COURT DECISION:

Affirmed. The plaintiff has to demonstrate that he has a probability of prevailing, and he has failed to do so. Simply saying that plaintiff was being investigated by a third party was in fact true and no other facts concerning the investigation or the results were present, there was therefore no falsity, and nothing derogatory. Furthermore, saying that plaintiff had been terminated "for cause" gives none of the reasons, and therefore, cannot form the basis of a defamation case. Therefore, plaintiff did not demonstrate the probability of prevailing and striking his complaint was proper.

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E

DEFAMATION; PRIVILEGE

Lemke v. Sutter Roseville Medical Center
(2017) 8 Cal.App.5th 1292

FACTS:

Plaintiff was a nurse working in a hospital. She claimed that she saw another nurse improperly treating an elderly patient. She complained to her supervisors and to the hospital. They started an investigation of the plaintiff and plaintiff heard that the nursing board was investigating her based on reports received from the hospital. Plaintiff sued the hospital for defamation. The trial court granted summary judgment in favor of the hospital.

APPELLATE CIRCUIT DECISION

Affirmed. A report by a hospital to a nursing board concerning alleged misconduct on the part of the nurse is absolutely privilege under Civil Code section 47(b)(4), and this applies even though bad faith may be involved on the part of the hospital. Summary judgment was properly granted in favor of the hospital on the defamation claim.

E

DUTY; SPECIAL RELATIONSHIP; SEXUAL ABUSE OF CHILDREN; YOUTH SOCCER LEAGUES

Jane Doe v. United States Youth Soccer Association
(2017) 8 Cal.App.5th 1118, 214 Cal.Rptr.3d 552

FACTS:

Plaintiff was a 12-year-old girl who was sexually abused by her soccer coach, Emanuele Fabrizio. She sued him and her local, regional, and national youth soccer league affiliates. She alleged that they had a duty to protect her and further had a duty to do background checks on the coaches. Had a background check been done, it would have been discovered that Fabrizio had been convicted of domestic violence. The trial court sustained the defendants' demurrer and dismissed the case.

APPELLATE COURT DECISION:

Reversed. There is a distinction in law between misfeasance and nonfeasance. Generally, a defendant accused of nonfeasance (not doing something to prevent harm to the plaintiff by third party) is not liable and there is no duty unless there is a special relationship. In organizations like youth soccer, there is such a special relationship with the league *in loco parentis* with the child. A background check is required to be done on employees and volunteers for the soccer league. In the present case, a background case would have only cost about $2.50, which could have been passed on. Therefore, plaintiff stated a cause of action against the defendants. However, there is no duty on the part of the defendants to educate or warn plaintiff the risks of sexual abuse. This would be imposing too great a duty and burden upon the youth athletic associations. This is a responsibility instead for the parents of the children. Finally, claims of willful misconduct do not lie in this particular case.

COMMENT:

This is an explosive area: millions of children are engaged in youth athletic activities and leagues embracing all sports across the country. We all know that the instances of sexual abuse have increased dramatically. It is a real societal problem. It does not only exist in the athletic area; it is very prominent in school systems and in school districts where teachers have been found guilty of sexual molestation of children. The California Supreme Court addressed this several years ago (in the *Randy W.* case) in which they said that a school district can be liable for "recommending" a teacher to another school district when the recommending district knows that the teacher has a history of sexual misconduct. The issue of a duty to perform criminal background checks is also controversial, but the present court

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had no problem in imposing such a duty.

An unanswered question is the cost of providing insurance for this new exposure to which soccer leagues and other athletic leagues will be subject. It is probably not insubstantial and these volunteer and youth organizations run on a shoestring budget and, therefore, that is a problem also to be faced.

This Appellate decision from the Sixth District is to be commended for its strong regard for the safety of children and what society must do to carry out that responsibility.

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E

CONSTRUCTION DEFECT LITIGATION; SB 800 (RIGHT TO REPAIR ACT)

Acqua Vista Homeowners Ass'n v. MWI, Inc.
(2017) Cal.App.4th 1129, 213 Cal.Rptr.3d 323

FACTS:

Most litigation we have seen under SB 800 (2002), commonly called the Right to Repair Act, concerns the requirement that a homeowner or a homeowners association must do certain things in trying to remedy the problem with the builder before formally instituting a lawsuit. This case, however, deals with the detailed standards under the Act that are imposed upon builders, general contractors, and material suppliers. The homeowners association in this case brought suit against a material supplier called MVI. MVI supplied pipe made in China which allegedly corroded and leaked. The lawsuit was filed under SB 800 only, and not under any common law theories such as strict liability. The plaintiff attempted to argue that under the violation of the standards for construction projects set forth in the act, plaintiff was not limited to negligence theory, but could also recover for strict liability. A jury returned a verdict for plaintiff, but the Court of Appeal reversed.

APPELLATE COURT DECISION:

When a plaintiff brings suit for violation of the Act (statute), then the theory of liability is limited to negligence or breach of contract. Strict liability is not permitted under the Act, although the plaintiff can sue also under a common law theory of strict liability, if it applies. In the present case, the problem appears to be one laid at the door of the manufacturer of the pipe in China. MVI did not manufacture the pipe. SB 800 allows a negligence or breach of contract claim under the Act, but there is no evidence that MVI was negligent or could have detected the problem, or that MVI breached any contract. There is no evidence of an express warranty.

COMMENT:

If the plaintiff had brought a claim under strict liability in addition to claims under the Act, they might have been able to recover because the materials supplier in strict liability is normally liable for a manufacturing defect, even though there is no active negligence on the supplier's part.

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ADA; CONTRIBUTION CLAIMS; PREEMPTION

City of Los Angeles v. AECOM Services, Inc.
(2017) 854 F.3d 1149

FACTS:

The City of Los Angeles contracted with a designer and builder to construct a bus facility for the City. The contract had a clause in it obligating the designer/builder to indemnify the City in the event of accident or injuries. A certain individual brought an ADA claim against the City, alleging that the bus facility did not provide proper access, as required by Federal law. The lawsuit was filed in Federal District Court. The City cross-complained against the designer claiming indemnity and contribution. The designer successfully convinced the District Court to dismiss the claim on the grounds of Federal preemption.

NINTH CIRCUIT DECISION:

Reversed. The third party claim by the City against the designer is not preempted by Federal law. There is nothing in the ADA which precludes such claims. Also to be noted is the fact that the City does not seek to immunize itself totally from liability, simply to shift a proportionate share of the liability to the designer under the third party complaint. Accordingly, Federal preemption does not apply and the third party complaint can move ahead.

E

GOVERNMENT LIABILITY AND IMMUNITY; TRAIL IMMUNITY

Garcia v. American Golf Corporation
(2017) 11 Cal.App.5th 532 2nd Dist. May 3, 2017)

FACTS:

The County owned a golf course. The course was operated by American Golf Corporation. Alongside the golf course was a trail, also owned by the County. The trail is meant to provide access to various recreational areas. Separating the trail from the golf course was a wall and there was a cyclone fence on top of the wall with some signs warning that people walking the trail should assume the risk of being hit by a golf ball. An errant golf ball hit a child who was being walked along the trail (alongside the golf course) by his mother in a stroller. Suit was filed against American Golf Corporation and the County. Against the County, allegations were dangerous condition of public property. The County relied upon the "trail immunity" defense of Government Code section 831.4. The trial court granted summary judgment for the County.

APPELLATE COURT DECISION:

Reversed. It was the golf course, not the trail, which constituted the dangerous condition of public property. It was alleged that its fairways were too narrow and that it did not have enough trees or control over errant golf balls. Just because the County knew that the trail was going to be alongside the golf course (also County-owned) does not trigger the trail immunity. Summary judgment reversed.

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GOVERNMENT LIABILITY AND IMMUNITY; FIREFIGHTERS

Quigley v. Garden Valley Fire Protection District
(2017) 10 Cal.App.5th 1135, 217 Cal.Rptr.3d 119

FACTS:

Plaintiff was a firefighter for the County. A fire was being fought. Plaintiff was given permission to sleep in an in-field area and she was sleeping when a water truck (operated by an independent contractor) rolled over her, causing injuries. Plaintiff brought a lawsuit against the County for dangerous condition of public property (she was in the firefighters' camp when the injury occurred) and for negligence.

The trial court dismissed the lawsuit based upon the immunity provided in Government Code section 850.4.

APPELLATE COURT DECISION:

Affirmed. The immunity of this statute applies. It says no recovery for injuries suffered because of any condition of a firefighting facility. The area where plaintiff was sleeping was part of a base camp and was part of a firefighting facility. Therefore, the immunity applies.

E

RECREATIONAL USE IMMUNITY; CONSIDERATION PAID

Pacific Gas and Electric Company v. Superior Court
(2017) 10 Cal.App.5th 563, 216 Cal.Rptr.3d 426

FACTS:

A 12-year-old and his family were camping in San Mateo County's Memorial Park. They had paid the County $50 for permission to camp for five nights. The area was full of large trees. PG&E had an easement which entitled it to control the vegetation for its own purposes. While sleeping, a large tree fell on the tent where the boy was sleeping and he was severely injured. A lawsuit was filed against PG&E. PG&E relied upon the "recreational immunity" statute, Civil Code section 846, which immunizes the owner and others for injuries suffered when the property is being used for recreational purposes. But an exception for such immunity exists when the injured person has paid consideration to use the property. The trial court denied PG&E's motion for summary judgment.

APPELLATE COURT DECISION:

Application for writ denied. It makes no difference that PG&E, holder of the easement or non-possessory interest, did not receive the consideration paid by the family. The exception still applies, and the immunity of Civil Code section 846 applies.

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GOVERNMENT LIABILITY AND IMMUNITY; DANGEROUS CONDITION OF PUBLIC PROPERTY; NATURAL CONDITION OF UNIMPROVED PUBLIC PROPERTY

County of San Mateo v. Superior Court
(2017) 13 Cal.App.5th 724

FACTS:

Zachary and family were camping in the San Mateo County campsite. The campsite and surrounding areas had numerous improvements that had been made, including restrooms, cooking facilities, etc. Near the campsite was a 72 foot tree. There was evidence that part of the trunk of the tree was actually growing on the campsite property. The tree was diseased and had a fungus. It fell, crushing Zachary in the tent. Lawsuits were filed.

The County moved for summary judgment alleging immunity under Government Code § 831.2, no liability for natural condition of any unimproved public property. The Superior Court denied the motion. The County petitioned for a writ.

APPELLATE COURT DECISION:

Writ denied. Triable issues of fact existed. There was evidence that improvements that man had made had contributed to weakening of the tree and making it more susceptible to fungus; there was evidence that the actual location where the tree was was on the campsite rather than separate from it (at least part of the tree). Since man's activities contributed to the weakening of the tree, it could not be said that this was a "natural condition." Evidence also indicated that the improvements had been made in the area adjacent to the campsite. Enough triable issues of fact existed to justify the denial of the motion for summary judgment.

E

GOVERNMENT LIABILITY AND IMMUNITY; TRAIL IMMUNITY

Toeppe v. City of San Diego
(2017) 13 Cal.App.5th 921, 220, Cal.Rptr.3d 608

FACTS:

Plaintiff was walking through a city on a trail. A branch from a large eucalyptus tree suddenly fell, striking plaintiff and injuring her. The eucalyptus tree was maintained by the City. Plaintiff sued on dangerous condition of public property. The City claimed that it was entitled to immunity under Government Code § 831.4 (trail immunity). The motion was granted by the trial court.

APPELLATE COURT DECISION:

Reversed. There was no evidence that there was anything defective or dangerous about the trail itself; the condition that created the danger; the problem was the maintenance of the tree which was on the trail. There was also evidence that plaintiff may have been off the trail at the time she was struck by the tree branch. Since triable issues of fact exist, the trial court erred in granting summary judgment.

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GOVERNMENT LIABILITY AND IMMUNITY; POLICE CHASE

Ramirez v. City of Gardena,
(2017) 14 Cal.App.5th 811

FACTS:

Plaintiff's son was a passenger in a pickup truck being pursued by the police. The police bumped the rear of the pickup, causing it to collide into a light pole. The son was killed. A wrongful death action was filed. The trial court granted summary judgment for the City based on the City policy for pursuing vehicles which are fleeing the police.

APPELLATE COURT DECISION:

Affirmed. The City's policies were in conformity with Vehicle Code § 17004.7 which established the requirements that must be followed. The City met its burden and summary judgment was properly granted for the City in this police chase case.

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F

DEFAMATION; ANTI-SLAPP STATUTE; FAIR AND TRUE COMMENT PRIVILEGE

Healthsmart Pacific, Inc. v. Kabateck
(2017) 7 Cal.App.5th 416, 212 Cal.Rptr.3d 589

FACTS:

Drobot operated a company called Healthsmart. This company owned a hospital in Long Beach. Healthsmart advertised the hospital as a specialist in spinal injury treatment. Drobot also controlled the company which allegedly furnished hardware to be used in the spinal surgery (although the hardware was really manufactured by another company). It was also apparently represented that the hardware was FDA approved. Drobot became involved in a criminal action brought by the State concerning bribery of Senator Calderon. The criminal matter involved bribes of Calderon by Drobot to get Calderon to introduce legislation which would allow the passing on of the costs of the surgical implants to workers compensation carriers. The criminal matter charged that Drobot charged highly excessive costs for the implant devices and that he was further involved in kick-back schemes with various doctors and medical providers to "refer" patients to the Drobot hospital.

A woman named Cavalieri brought a lawsuit against Drobot, et al., alleging that she was a victim of substandard implants. She had attorneys named Kabateck and Hutchinson. These attorneys gave interviews to the media commenting on the allegations in the complaint. This resulted in a defamation action brought by Drobot, et al., against the attorneys. The attorneys filed an anti-SLAPP motion under C.C.P. section 425.16 which was granted by the trial court.

APPELLATE COURT DECISION:

Affirmed. The first prong of the anti-SLAPP motion is satisfied, since the matter does involve an issue of widespread public interest. Under the second prong of the statute, when the public issue prong is satisfied, the burden shifts to the plaintiff to show that plaintiff has the probability of prevailing with the lawsuit. But here, that prong cannot be satisfied because defendants will enjoy the benefit of the privilege provided in Civil Code section 47(d) known as the "fair and true comment" privilege. Under that statute, defendants and others are protected from liability for their fair and true comments regarding judicial proceedings. This is what the defendants did in the present case, commenting on the allegations in the Cavalieri lawsuit. Hence, plaintiffs are unable to demonstrate that they have a probability of prevailing in the suit for defamation.

F

INTENTIONAL TORTIOUS INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.
(2017) 2 Cal.5th 505 (California Supreme Court)

FACTS:

Two plaintiffs and the defendant were in the asphalt and asphalt sealing business. They all had an opportunity to make bids for some asphalt sealing work. The bid was awarded to the defendant who submitted the lowest bid. Plaintiffs, the unsuccessful bidders, sued the defendant under a theory of intentional interference with prospective economic advantage. They claimed that the reason why defendant got the bid was because they violated the prevailing wage law and did not pay his workers what the law required, enabling him to underbid the plaintiffs.

The trial court sustained the defendant's demurrer. The Court of Appeal reversed.

CALIFORNIA SUPREME COURT DECISION:

Court of Appeal reversed. No claim has been stated. In order for a claim for intentional interference with prospective economic advantage to be stated, there must be an existing relationship between the potentially harmed plaintiffs and the public entity and there must also be an expectation of economic benefit. None of this exists in the public entity bidding process context. These plaintiffs did not have an ongoing economic relationship with the public entity. They simply hoped that they would get the bid. Furthermore, public entities are required to give the bid to the lowest bidder, although they have considerable discretion in connection with that decision in quality of the bidder, quality of the bid, etc. The probability of economic gain is too speculative in this case and in the public entity context. The issue of public entity contracts is heavily regulated, in any event, and it would be unwise to fasten the tort of intentional interference with prospective economic advantage upon this field.

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DEFAMATION; ANTI-SLAPP SUIT; MALICIOUS PROSECUTION

Argentieri v. Zuckerberg
(2017) 8 Cal.App.5th 768, 214 Cal.Rptr.3d 358

FACTS:

This is a complicated "Silicon Valley" case involving a dispute between an attorney, his client and Facebook. The client is Ceglia. His attorney was Argentieri. Ceglia claimed that years ago, he entered into a contract called "work for hire contract" with Zuckerberg which provided that for Ceglia's providing $1,000, Ceglia became an 84% owner of Facebook(!). Ceglia pursued the matter in litigation. Argentieri associated in in New York State litigation, including Federal Court in New York. Argentieri associated several law firms in the action. Argentieri retained an e-discovery expert who allegedly "found" the original "work for hire" contract on a computer. The New York court ordered expedited discovery. As discovery developed, it became apparent that the contract had been forged and altered. The other law firms that Argentieri had brought into the case began to withdraw from the case, leaving Argentieri alone. Ultimately, the Ceglia lawsuit was dismissed.

Facebook then brought a malicious prosecution against Ceglia and Argentieri. In connection with that malicious prosecution action, Stretch, general counsel for Facebook, issued a press release in New York saying that the underlying claim had been permeated with fraud, that Ceglia was an ex-convict involved in many scams, etc. In complicated proceedings in New York, the Facebook malicious prosecution action was ultimately dismissed, but the Appellate Court reversed the dismissal.

The next litigation occurred in California where Ceglia and Argentieri sued Facebook and Stretch for defamation based on what had been said in the press release. In this defamation action in California, defendants filed a motion to strike. The motion to strike was granted by the trial court.

APPELLATE COURT DECISION:

Affirmed. What Stretch said in the press release was protected by Civil Code §47(d). It was a fair and true report of a judicial proceeding (the complex proceedings in New York had to do with forged documents). This is absolutely privileged. For that reason, plaintiffs in the defamation case could not establish the probability of prevailing, and it was therefore proper to grant the motion to strike.

F

ANTI-SLAPP; DEFAMATION; INVASION OF PRIVACY

Jackson v. Mayweather
(2017) 10 Cal.App.5th 1240, 217, Cal.Rptr.3d 234

FACTS:

Floyd Mayweather is a famous boxer and the highest paid athlete in the world. Shantel Jackson was his girlfriend, and she was a noted model in California and Las Vegas. She relied on Facebook and other media publications to enhance her publicity and traded on the relationship with Mayweather as well. The two had a stormy relationship: Mayweather on occasions abused, assaulted and placed restrictions on Jackson's freedom of activity, according to Jackson's allegations.

Jackson became pregnant with twin boys. She informed Mayweather of this fact and he saw a sonogram and medical report about the pregnancy. Jackson had an abortion. Mayweather found out about this and was upset because he didn't believe in "killing babies." He posted information about the abortion on Facebook and stated his objection. He also gave a radio interview in which he revealed that Jackson had had cosmetic surgery.

Jackson sued Mayweather in various causes of action, including defamation and invasion of privacy. Mayweather filed an anti-SLAPP motion under C.C.P. section 425.16, but the trial court denied the motion.

APPELLATE COURT DECISION:

Trial court substantially reversed. Both Jackson and Mayweather were public figures and the entire matter was one of public interest or "celebrity gossip." Therefore, the preliminary showing justifying dismissal under the anti-SLAPP statute had been made. For Jackson to prevail, she would have to show that she had a probability of prevailing on her causes of action. On the defamation cause of action, there was no probability of prevailing since she admitted that she had had an abortion and she was a public figure. The issue of defamation and the cosmetic surgery should be treated the same, even though she contended that the cosmetic surgery was not as extensive as Mayweather stated in the radio interview. (She claimed that it was limited to her breasts and buttocks, and had nothing to do with her facial features.)

Most of the claims for invasion of privacy should be dismissed under the anti-SLAPP statute because she was a public figure, the matter was one of public interest, and she had also injected herself into the media.

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However, the trial court erred in not allowing Jackson to proceed with her invasion of privacy and intentional infliction of emotional distress claims based upon Mayweather's disclosure of the sonogram and the medical report. This information bordered on the "morbid and sensational" line and crossed the line as far as "protected speech" is concerned. Therefore, she will be allowed to proceed on those claims and those alone. All other claims were properly dismissed.

F

ANTI-SLAPP; PROTECTED ACTIVITY

Park v. Board of Trustees of California State University System
(2017) 2 Cal.5th 1057, 217 Cal.Rptr.3d 130 (California Supreme Court)

FACTS:

Plaintiff was an assistant professor who was Korean in ethnic background. He applied for tenure, which was denied. He sued the University (defendant) for discrimination. The University filed a motion under the anti-SLAPP statute (C.C.P. § 425.16). The trial court denied the motion. The Appellate Court reversed.

CALIFORNIA SUPREME COURT DECISION:

Appellate Court reversed. The essence of this claim is one for wrongful denial of tenure. It is not really based upon things that were said or speech or protected activity under the Constitution. Instead, the claim is based upon wrongful act, instead of speech or protected activity in connection with that act. The matter is not properly within the ambit of the anti-SLAPP statute.

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F

DEFAMATION; HOW BUSINESS CAN OBTAIN IDENTITY OF HOSTILE REVIEWER

ZL Technologies, Inc. v. Does 1-7
(2017) 13 Cal.App.5th 603, 220 Cal.Rptr.3d 569

FACTS:

ZL was a technology business. It hired numerous employees. Defendant Glassdoor was an Internet website company designed to help job seekers. As such, Glassdoor invited people who had been employed by companies such as ZL to submit anonymous "reviews" in a number of categories. Various former employees of ZL submitted anonymous reviews. They were critical of ZL for hiring incompetent people, for low pay, and for disparaging its employees. ZL, complaining that the anonymous reviews contained defamatory material, sued and sought to get the court to issue a subpoena to Glassdoor compelling Glassdoor to disclose the names of the anonymous reviewers. Glassdoor refused to disclose, and the trial court refused to issue the subpoena.

APPELLATE COURT DECISION:

Reversed. Material on the Glassdoor website concerning ZL was sufficiently factual (as distinguished from opinion) to give ZL the right to make a claim for defamation. All ZL has to do is make out a prima facie case that the material is defamatory. However, the trial court has to balance ZL's rights against the Constitutional rights of the former ZL employees who posted information on Glassdoor's website. Also, ZL has to provide some form of notice to the anonymous employee that it is seeking by subpoena to obtain their identity. This is left to the discretion of the trial court to apply.

COMMENT:

There is no Constitutional right to commit libel or defamation. Therefore, it is not clear if the material constitutes defamation what the trial court has to "balance" as far as the anonymous contributors' rights are concerned. The Court does note that, generally speaking, these types of websites predominately contain "opinion" matter which is not subject to a defamation claim and that some presumption should be made that the matter is opinion, but that in this case, there were numerous statements that were sufficiently factual in nature that they would constitute a prima facie showing sufficient to support a defamation claim.

F

ANTI-SLAPP; DEFAMATION; INTERNET PROVIDER (FACEBOOK)

Cross v. Facebook, Inc.
(2017) 14 Cal.App.5th 190

FACTS:

Jason Cross (aka Mikel Knight) was a rap entertainer. He utilized Facebook. Cross had independent contractors around the country, and they drove vans publicizing Cross' music. This was done through a subsidiary of Cross' named MDRST. Some of these van drivers fell asleep at the wheel and caused accidents, resulting in death and serious injury. Lawsuits were filed. The families of some of the victims of these auto accidents posted information on Facebook threatening violence against Cross. Cross requested Facebook to remove this offensive material from the website, but Facebook refused. Cross then sued Facebook.

The trial court ruled that the Communications Decency Act (CDA – a Federal statute) precluded some of the claims, but that the California anti-SLAPP statute did not prevent common law claims and right of publicity claims.

APPELLATE COURT DECISION:

Affirmed in part, reversed in part. Facebook is protected from most of the claims because of the Federal CDA which states that Facebook is not to be treated as a disseminator of the claimed offensive information and is, therefore, not subject to litigation. Furthermore, Facebook has discretion under its "terms of service" agreement as to whether or not to remove the offensive content. It chose not to do so and cannot be sued for that decision. Facebook's actions are also protected by the California anti-SLAPP statute under Facebook's Constitutional rights of free speech.

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G

NEGLIGENCE; INDEPENDENT CONTRACTORS; PECULIAR RISK OF LIABILITY; SAFETY REGULATIONS; NON-DELEGABLE DUTIES

Khosh v. Staples Construction Co., Inc.
(2016) 4 Cal.App.5th 712, 208 Cal.Rptr.3d 699

FACTS:

The University campus needed some new electrical systems installed. Staples was hired to do the work. Staples hired one subcontractor who in turn hired another subcontractor (Myers) to do certain specific work. Khosh worked for Myers. The plans were for the entire electrical system at the University to be turned off for three days so that the necessary new electrical work could be done. Khosh arrived on the day the work was supposed to start, and he arrived a few hours early. He started work while the electrical system was still turned on and an electric arc flashed and Khosh was injured. He sued Staples under the peculiar risk doctrine. Staples had agreed with the University to be responsible for safety at the site.

The lawsuit was under the peculiar risk doctrine and on the theory that Staples retained control and had “affirmatively contributed” to the circumstances of the injury. The trial court granted summary judgment for Staples.

APPELLATE COURT DECISION:

Affirmed. In the first part of the Appellate Court decision, the Court indicates what “affirmative contribution” to the circumstances of the accident means. The Court says although Staples was aware of the hazardous condition and did nothing to prevent it, it does not constitute affirmative contribution. This is but another statement of the general rule that Staples simply made a general promise to be responsible for safety; it would not be responsible for an omission. In other words, if Staples simply makes a general promise to be responsible for safety on the site without a specific promise to be responsible for specified safety regulations, this is not enough. On the issue of the delegation of safety duties, if the promise by Staples was just to be generally responsible for safety on the site, the safety regulations would be delegable, which is what Staples did. Safety regulations become non-delegable only when the injured party is actively engaged at the time in the activity to which that particular safety regulation was in the work undertaken by the injured party’s direct employer, the subcontractor.

G

COMMENT:

This case will be particularly useful to general contractors who are charged with omissions, the argument being that such omissions can amount to affirmative contribution to the accident. The Court disapproves of such arguments.

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ASSUMPTION OF THE RISK; HORSEBACK RIDING

Swigart v. Bruno
(2017) 13 Cal.App.5th 529, 220 Cal.Rptr.3d 552

FACTS:

Plaintiff and defendant were participants, along with 47 other people, in an endurance horseback ride. Plaintiff was riding ahead of defendant. On these types of rides, horses sometimes tailgated or rear-ended the horse in front of them. On this occasion, defendant's horse did rear-end plaintiff's horse, and this caused plaintiff's horse to kick defendant's horse. Later, plaintiff reached a checkpoint and got off the horse. While plaintiff was on the ground, defendant's horse struck plaintiff, injuring her. Plaintiff sued defendant. Defendant prevailed on a motion for summary judgment based upon the theory of assumption of the risk.

APPELLATE COURT DECISION:

Affirmed. Horseback riding is an inherently dangerous sport, and this includes endurance horseback riding. Plaintiff also did not establish a material issue of fact on issues of gross negligence or recklessness. Summary judgment was properly granted.

G

NEGLIGENCE; NEGLIGENT SUPERVISION

Taylor v. Trimble
(2017) 13 Cal.App.5th 934, 220 Cal.Rptr.3d 741

FACTS:

A child and his family were invited to a pool party given by defendant. The child was in the pool and defendant homeowner had agreed to supervise the child. Then, the child's grandfather, a fire captain, arrived and the grandfather agreed to take over supervision of the child. Defendant homeowner agreed. The child then drowned, and suit was filed against the homeowner for negligent supervision. There were also claims that the pool was in a dangerous condition. Expert declarations were filed indicating the pool surface and bottom were dark in color, making it difficult to see; there was inadequate separation from the deep pool from the shallow end (the child drowned in the shallow end); and that the presence of Jacuzzi and waterslide created noise and water turbulence that distracted the attention from the area.

The trial court granted summary judgment for the homeowner.

APPELLATE COURT DECISION:

Affirmed. The homeowner owed no duty of care once the supervision was turned over to a responsible adult; namely, the grandfather. No material issues of fact were posed by the claims of premises liability, because none of the alleged conditions caused or contributed to the circumstances of the drowning. (No evidence presented on that point.)

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NEGLIGENCE; REAL ESTATE BROKERS; PREMISES LIABILITY

Jacobs v. Coldwell Banker Residential Brokerage Company
(2017) 14 Cal.App.5th 438, 221 Cal.Rptr.3d 701

FACTS:

Defendant was a real estate broker. Defendant had a certain property on MLS. The property had an empty swimming pool (which was obvious) and a diving board over the pool. Plaintiff was a prospective purchaser. The MLS listing did contain a warning to be careful about the empty swimming pool. Plaintiff jumped up on the diving board to take a look over the fence. The diving board collapsed, plaintiff fell into the empty pool, and was seriously injured. Defendant broker had had the property inspected by an expert beforehand, and nothing was reported to be defective about the diving board. In a motion for summary judgment, the court rule in favor of defendant broker.

APPELLATE COURT DECISION:

Affirmed. The condition was open and obvious (the empty swimming pool). Defendant did not have a duty of care; the area had been inspected beforehand. Summary judgment was properly granted.

NEGLIGENCE; SEXUAL HARASSMENT; DUTY TO PROTECT

M.F. v. Pacific Pearl Hotel Management LLC
(2017) 16 Cal.App.5th 693, 224 Cal.Rptr.3d 542

FACTS:

Plaintiff was a housekeeper at defendant's hotel. She alleged in her complaint that she was working on the premises; that a trespasser, whose presence was known or should have been known by the employer, came onto the premises and began to harass other employees and proposition them for sexual favors; that she (plaintiff) was raped; that the hotel under the FEHA had a duty to protect her from such incidents and had failed to do so. The hotel employer demurred to the complaint and the trial court sustained the demurrer without leave to amend and dismissed the claim.

APPELLATE COURT DECISION:

Reversed. This matter could not be decided on demurrer. Plaintiff had adequately stated a claim under the FEHA since she claimed that the hotel knew or should have known of the trespasser's presence and should have protected the plaintiff under the circumstances. A hotel does have such a duty with respect to a trespasser coming on the premises. The case was therefore improperly dismissed at the demurrer stage.

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NEGLIGENCE; ASSUMPTION OF THE RISK; COMMON CARRIER

Grotheer v. Escape Adventures, Inc.
(2017) 14 Cal.App.5th 1283, 22 Cal.Rptr.3d 633

FACTS:

Plaintiff was a passenger on a hot air balloon. Plaintiff was from Germany and spoke no English. No real instructions had been provided to the passengers on the balloon before they took off as to precautions to take while landing. As the balloon was descending, it descended at a rapid rate, struck the ground, skidded across the ground, and collided into a fence. Plaintiff broke her leg and sued. The trial court found that assumption of the risk applied and entered judgment for defendant.

APPELLATE COURT DECISION:

Affirmed. Firstly, the balloon company was not a common carrier owing a heightened duty of care. Balloons are notoriously difficult to steer or control – a means of transportation entirely different from a train or a bus. There is always the risk of a rough landing, and it is very difficult to prevent that from occurring. Therefore, the primary assumption of the risk doctrine is appropriate to apply. As far as failure to instruct passengers on how to prepare for a landing, even if this had been done, it would have made no difference since there is no showing that any such failure had any causal connection to the nature of plaintiff's injuries. Judgment was properly entered for the defendant.

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DISCOVERY; DISCOVERY ABUSE; SANCTIONS

Goodyear Tire & Rubber Co. v. Haeger
(2017) 137 S.Ct. 1178 (U.S. Supreme Court)

FACTS AND HOLDING:

Plaintiffs were driving their car which was equipped with a Goodyear G115 tire, which blew out, causing the car to crash. Litigation was commenced against Goodyear. Over the course of a long period of time, plaintiffs sought all test results concerning the G115 tire; Goodyear, in bad faith, resisted all efforts to obtain this information. Ultimately, the lawsuit against Goodyear settled. Seven months later, plaintiffs' attorney learned that in other litigation, Goodyear had disclosed test results for this particular tire. Plaintiffs' attorney then brought a motion for sanctions in the U.S. District Court. The District Court awarded $2.7 million in sanctions and the Court of Appeal affirmed.

The U.S. Supreme Court reduced the sanctions to $2 million against Goodyear. The Court indicated that sanctions are compensatory in nature and cannot be punitive. In a normal case, the party requesting sanctions will be entitled to those fees and costs which were incurred because of the failure to disclose. However, there are categories of cases in which a blanket award of all fees and costs can be awarded. The present case, however, was governed by the "but for" test and the sanctions were somewhat excessive.

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DAMAGES; PUNITIVE DAMAGES

Nickerson v. Stonebridge Life Insurance Co.
(2016) 5 Cal.App.5th 1, 209 Cal.Rptr.3d 690

FACTS:

This is an important California Supreme Court case on punitive damages. The Appellate Court case (decided on remand after the Supreme Court case) is important on punitive damages. Plaintiff was a disabled veteran. He was confined to a wheelchair. When the wheelchair was being unloaded from a van, the chair was dropped and plaintiff broke his leg. He was taken to a VA hospital where he was treated and remained for 109 days. Plaintiff had an insurance policy with defendant. The policy had a provision in it that defendant would only pay for medical expenses which were "medically necessary." Defendant took the position ultimately that it would only pay for 19 days of hospitalization. Plaintiff sued for breach of contract and bad faith. Plaintiff also sought punitive damages.

During the trial, plaintiff produced evidence of emotional distress in the sense of frustration, anger and upset. In the punitive damage phase of the case, plaintiff introduced evidence that the net worth of the defendant was about $368,000,000. Plaintiff was also successful in getting introduced into evidence a "binder" which showed other cases in which the defendant insurer had reduced claims for medical bills under the "medically necessary" standard. The case went to the jury. The jury returned a verdict for $31,000 for compensatory damages (economic damages for the medical bills) and $35,000 for the emotional distress claim.

The parties had not introduced evidence pertaining to the so-called "*Brandt* fees," that is, the amount of the attorney fees plaintiff had expended in proving that policy benefits were owed (coverage was owed). The parties stipulated that after the jury verdict, the *Brandt* fees could be determined by the trial court. This was done, and the trial court found that the attorney fees were $12,500.

The jury awarded $19,000,000 in punitive damages. The trial court then reduced the punitive damages to $350,000. The trial court did not include the *Brandt* fees as compensatory damages for purposes of calculating what the proper amount of punitive damages should be.

The case was then appealed to the Court of Appeal (more on that, *infra*). From there, the case went to the California Supreme Court.

SUPREME COURT DECISION:

The main issue before the California Supreme Court was whether *Brandt* fees are "compensatory damages" and, therefore, can be used as an element to increase the proper amount of punitive damages when calculating the ratio between compensatory and punitive damages. The Supreme Court indicated that *Brandt* fees should be treated as compensatory damages in a bad faith punitive damages case brought against an insurer. The Supreme Court then remanded the case to the Court of Appeal for a final decision on the proper damage award, in toto.

COURT OF APPEAL DECISION ON REMAND:

The Court of Appeal decision has several interesting features. The ultimate result is that the Court says that the amount of the punitive damages which will be entered is $475,000, which is 10 times the amount of the award for emotional distress and *Brandt* fees combined. The award for "policy benefits" is not properly allowed in the compensatory damages column because these are damages for breach of contract; only tort compensatory damages are allowed in calculating the propriety of the size of the damage award and in calculating the ratio between punitive and compensatory damages.

In examining the reprehensibility of the defendant's conduct, the U.S. Supreme Court case of *BMW v. Gore* pointed out that more reprehensibility will be assigned to the defendant when the defendant's conduct results in physical injuries as distinguished from economic harm. In the present case, while it is true that plaintiff was awarded $35,000 for emotional distress, that emotional distress did not manifest itself into physical injuries (such as, plaintiff becoming specially disabled because the emotional distress was so severe that physical injuries such as a nervous breakdown result). In the present case, plaintiff's emotional distress was frustration, anger, and upset, nothing more.

COMMENT:

This is an important feature in insurance bad faith cases. Almost always, the insurer's conduct will not be characterized as "violent" and the damages will most often be economic only, as distinguished from real physical injuries. This, therefore, takes the "reprehensibility" of the defendant insurer down to a lower level than, for example, that of a product manufacturer who knows they are manufacturing a dangerous product but allows it to go on the market anyway; or the situation in which the defendant commits a violent assault.

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The Court of Appeal also considered plaintiff's claim that the punitive damages should be allowed to be higher because plaintiff was uncompensated for potential harm that he might suffer. This is a phrase lifted from some of the U.S. Supreme Court cases (*State Farm* and *Gore*) several years ago which has been relied upon by the plaintiff's bar. The Court of Appeal, however, did not think much of that argument and gave it little weight, which should be somewhat comforting for insurers who should be leery of such claims.

The Court also rejected the insurer's argument that the verdict represented punishment of the defendant for the way it had handled other claims, rather than this particular plaintiff. Remember that a binder showing the way that the insurer had denied other claims based upon the "medically necessary" provision was introduced into evidence. The Court did not seem to have a problem with the introduction of this evidence, although this issue was not treated in great depth. The State Farm U.S. Supreme Court case imposes a rather heavy burden of proof on a plaintiff who relies upon the insurer's treatment of "other claims and other suit," requiring that there be a close similarity between those and the plaintiff's suit. That will probably continue to be the rule.
Finally, the Court of Appeal does accept the admonition from the U.S. Supreme Court that rarely will an award of more than 10 times compensatory damages withstand Constitutional muster under the due process clause.

GENERAL COMMENT:

We failed to mention that the breach of contract committed by the insurer lies in the fact that its "medically necessary" limitation on payments was found to be ambiguous and, therefore, unenforceable by the trial court, with the court saying that the insurer had unreasonably relied upon this provision. When you consider the facts of this case were pretty egregious against the insurer and in favor of the vulnerable plaintiff, it is surprising that the jury award for emotional distress was so low, given the sympathy that must have been present. The huge punitive damage award of $19,000,000 illustrates to defendants how important the U.S. Supreme Court decisions of *State Farm* and *Gore* are in capping, in almost all the cases, the limits on the size of punitive awards.

Another lesson in the case is that plaintiffs' attorneys should generally make sure that the jury knows what the attorney fees are for obtaining policy benefits. It just increases the compensatory damages argued before the jury and can result in a higher verdict. However, there may be special cases in which that issue is complicated and plaintiff's counsel feels that it should properly be decided by the court. The California Supreme Court in the *Nickerson* case does sanction that procedure. (It was actually stipulated to by the parties in *Nickerson*.)

COMMENT:

This case reminds us of the movie *The Rainmaker* about a bad faith case.

(Note: The Court of Appeal gets to the $475,000 total judgment affirmance as follows: $35,000 emotional distress plus $12,500 *Brandt* fees totals $47,500 total compensatory damages x (times) 10 equals $475,000 for the punitive damages.)

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DAMAGES; EMOTIONAL DISTRESS; TRESPASS; NUISANCE

Hensley v. San Diego Gas & Electric Company
(2017) 7 Cal.App.5th 1337

FACTS:

Husband and wife owned a house in which they lived with their daughter. Husband was out of town. A fire occurred at the home and it was claimed that the fire was caused by defendant utility company. Suit was filed and theories of nuisance and trespass were alleged against the utility company, along with claims for emotional distress. The trial court ultimately threw out the claim for emotional distress.

APPELLATE COURT DECISION:

Reversed. When a plaintiff alleges property damage under theories of nuisance and trespass, the plaintiff may also recover emotional distress, even though the plaintiff was not at the home he owned at the time that the fire occurred.

COMMENT:

Years ago, the California Supreme Court in *Thing v. LaChusa* held that in a negligence claim arising out of an automobile accident, causing injury to plaintiff's relative, the plaintiff could not sue for emotional distress unless plaintiff actually witnessed the accident. Coming on the scene a short time later will not suffice. The *Hensley* case above, however, involves the owner of real property, with a stake in the property, and the Court does not limit recovery in the manner in which *Thing* limited recovery.

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MALICIOUS PROSECUTION

Van Audenhove v. Perry
(2017) 11 Cal.App.5th 915, 217 Cal.Rptr.3d 843

FACTS:

Plaintiff's neighbor reported plaintiff to the police claiming that plaintiff was illegally stalking the neighbor and his wife. The police arrested plaintiff, put him in jail overnight, and then he was released. The district attorney refused to prosecute on grounds that this was simply a "neighbor dispute." Plaintiff sued the neighbor for malicious prosecution. Defendant demurrer, and the trial court sustained the demurrer without leave to amend and dismissed the suit.

APPELLATE COURT DECISION:

Affirmed. For a malicious prosecution action to lie, there must be a prosecution, and that was absent in this case. An arrest, without more, is not enough.

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INVASION OF PRIVACY; ANTI-SLAPP STATUTE

Safari Club International v. Rudolph
(2017) 845 F.3d 1250

FACTS:

Safari Club International (SCI) was a private club having to do with wildlife conservation. Rudolph had been active in the club for years and was eventually selected as president. After his term as president was over, the club hired Rudolph to be a public relations person. Bad feelings between Rudolph and SCI then developed and Rudolph was terminated. He sued SCI for defamation. Whipple became president of the club. He and Rudolph were long-time friends. Rudolph called Whipple and invited him to have lunch to discuss old times and the club. Whipple attended a five-hour lunch in a public restaurant. Rudolph assured Whipple that their conversation was confidential and whenever one of the waiters would come over to the table, they would both stop talking. Unbeknownst to Whipple, however, Rudolph had arranged for the conversation to be audio recorded and video recorded. Rudolph later produced a film of this conversation (which reflected on many club activities) and this film was shown to or available to the 50,000 members of SCI.

Whipple then sued Rudolph for several causes of action, including invasion of privacy. Rudolph filed a motion to strike under C.C.P. §425.16 (the action had been removed to Federal Court under diversity jurisdiction and the action was founded upon state law). The trial court denied the motion to strike.

NINTH CIRCUIT DECISION:

Affirmed. The fact that this conversation took place in a public restaurant does not defeat the claim. Rudolph had taken great precautions for a secret (surreptitious) recording, and Rudolph had lured Whipple to the lunch, assuring him that they were old friends and would remain friends and Whipple believed this. Whipple had a reasonable expectation of privacy and confidentiality. The recording was illegal under Penal Code section 632. A motion to strike should be denied when the plaintiff has a reasonable probability of prevailing. Whipple's claims demonstrate that he has a reasonable probability of prevailing and, therefore, the motion to strike was properly denied.

MALICIOUS PROSECUTION

Parrish v. Latham & Watkins
(2017) 3 Cal.5th 767 (California Supreme Court)

FACTS:

Parrish and Fitzgibbons were officers in a company called Indigo. The company made microbolometers, which were designed to detect infrared radiation. Another company called FLIR ultimately acquired Indigo. Parrish and Fitzgibbons were still with the new firm. Parrish and Fitzgibbons then left. They were sued by FLIR and Indigo for misappropriation of trade secrets. In that litigation, Parrish and Fitzgibbons ("Parrish") moved for summary judgment, with expert declarations supporting the motion. The motion for summary judgment was denied: the trial court said that the action was very complex and that some of the claims arguably had merit. The action then continued on to trial, and Parrish won the trial. The trial court then found that the FLIR action had been brought in "bad faith" – a standard which applied under the applicable law, the California Uniform Trade Secrets Act. If an action is brought under that act in bad faith, the prevailing party can obtain costs and attorney's fees. This was the ruling of the trial court. The trial court stated that at the time the summary judgment was denied, it did not fully appreciate the circumstances of the case and had not yet judged the credibility of the witnesses and the other evidence presented.

FLIR appealed from this ruling, and the Appellate Court affirmed. This prompted Parrish to file a malicious prosecution action against the attorney who represented FLIR/Indigo in the underlying action. The question ultimately presented to the Supreme Court was whether the denial of the motion for summary judgment in the trade secrets case meant that there was probable cause for the filing of the suit in the first place and the later finding of bad faith by the trial court did not change that effect.

CALIFORNIA SUPREME COURT DECISION:

The Supreme Court relies upon what is called the "interim adverse judgment" rule. When the trial court initially denied the Parrish motion for summary judgment, this established that there was <u>no</u> lack of probable cause for the bringing of the trade secrets case, and this eliminated the basis for the later malicious prosecution action. It made no difference that the trial court had later ruled that the trade secrets action had been brought in bad faith. Lack of probable cause is a question of law. When an attorney is sued, it must be shown that the underlying action was completely without merit at the time that it was filed, and the law does not seek to discourage attorneys from prosecuting novel or new claims. The interim adverse judgment rule established there was no lack of probable cause in filing the original trade secrets case and, therefore, a subsequent malicious prosecution action is precluded.

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FAILURE TO WARN CLAIM; INCONSISTENT VERDICT; DESIGN DEFECT; CONSUMER EXPECTATIONS TEST

Trejo v. Johnson & Johnson
(2017) 13 Cal.App.5th 110, 220 Cal.Rptr.3d 127

FACTS:

Plaintiff was born in 1988 and lived in Honduras. He had been playing soccer and afterwards suffered pain in his legs. After a while, plaintiff went into the medicine cabinet and found some Motrin, which his mother had sent to him from the United States. He started taking it and took it for a considerable time, obtaining some relief. Eventually, however, plaintiff began experiencing blisters in his mouth and blisters and rashes on his skin. He was hospitalized in Honduras and ultimately transferred to the Shriners Hospital in Galveston, Texas where he was treated for a skin disease called Toxic Epidermal Necrolysis (TEN). This was a small risk factor associated with the taking of Motrin, but was not on the warning label when plaintiff took the drug. Suit was filed against the defendant on a strict liability failure to warn theory, a negligent failure to warn theory, and on a design defect consumer expectations test theory.

A jury returned a verdict in favor of plaintiff on the negligent failure to warn theory, but in favor of the defendant on the strict liability failure to warn theory.

APPELLATE COURT DECISION:

Reversed and remanded for new trial. The verdicts are fatally inconsistent. The duty to warn concerns a warning of substantial dangers associated with use of the drug. When the jury rendered the strict liability failure to warn verdict in favor of the defendant, this meant that the jury found that there was no substantial danger associated with use of the drug. This is fatally inconsistent with a verdict on the negligent failure to warn theory, which involves the same issues of whether there is substantial potential danger associated with the use of the drug.

On the design defect theory; firstly, the consumer expectations test does not apply and secondly, this theory is preempted by Federal law.

N

PRODUCTS LIABILITY; ASBESTOS; BYSTANDER LIABILITY; STRICT LIABILITY

Petitpas v. Ford Motor Company
(2017) 13 Cal.App.5th 261, 220 Cal.Rptr.3d 185

FACTS:

From 1966 to 1967, Joseph worked for an Exxon service station. Much of his work had to do with work on brakes and replacement of brake parts. During that period, brakes contained asbestos, as did the replacement parts. Joseph had a girlfriend (Marline) who visited him frequently at work. During work, Joseph would use an air compressor to blow dust from the brake lining to clean the floor. This caused dust to go into the air and Marline breathed the dust. Joseph was later drafted into the Army, and he and Marline went to Colorado to live and he continued to do work on automobiles. When Joseph worked at the Exxon station, most of his work was done on Ford automobiles. Marline subsequently developed mesothelioma. She sued Exxon and Ford, among others. In a jury trial, the jury returned defense verdicts for Exxon and Ford.

APPELLATE COURT DECISION:

Affirmed. No claim for strict liability could be made against Exxon. It was in the position of providing a service, not supplying parts and, accordingly, is not liable for strict liability.

Secondly, Marline sues under a theory of "bystander liability," but she must be a member of Joseph's household in order to do so. She does not qualify since she was not married and they were not living together at the time that Joseph worked at Exxon.

With respect to Ford, Ford cars did not require that replacement parts for the brakes contain asbestos. They were not designed to require asbestos, and replacement parts were available which did not have to contain asbestos. Therefore, the jury properly ruled in favor of Ford on this products liability theory.

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PRODUCTS LIABILITY; ASBESTOS

Lyons v. Colgate-Palmolive Company
(2017) 16 Cal.App.5th 463, 223 Cal.Rptr.3d 883

FACTS:

Plaintiff used Colgate talcum powder from the 1950s through the 1970s (20 years). She claimed that the product contained asbestos and that she developed mesothelioma. Plaintiff filed suit against Colgate. Colgate contended that its product did not contain asbestos and submitted expert declarations to that effect. Plaintiff submitted counter evidence. The trial court granted summary judgment for Colgate.

APPELLATE COURT DECISION:

Reversed. Triable issues of fact existed. Plaintiff submitted expert and other testimony indicating that the product did contain asbestos. Therefore, it was improper for the court to grant summary judgment in favor of Colgate.

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NEGLIGENCE; VICARIOUS LIABILITY; RESPONDEAT SUPERIOR

Secci v. United Independent Taxi Drivers, Inc.
(2017) 8 Cal.App.5th 846, 214 Cal.Rptr.3d 379

FACTS AND HOLDING:

Court of Appeal reverses a trial court which refused to find vicarious liability when a taxi driver was negligent and involved in an accident. The basis for agency liability arose because of the extensive State regulation of taxi companies and drivers; the trial court refused to allow these regulations into evidence. Their admission would have sustained a finding of agency relationship because of the extensive controls that the taxi association was required to exercise over drivers.

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RESPONDEAT SUPERIOR; SPECIAL ERRAND RULE

Morales-Simental v. Genentech, Inc.
(2017) 16 Cal.App.5th 445

FACTS:

Under the “going and coming rule,” when an employee of a corporation is involved in an accident while going to work or returning home, he is not considered to be in the scope of employment, and the employer is therefore not liable for the accident committed by the employee. An exception to the going and coming rule is the “special errand” rule when the employee is on a special trip at the request of the employer or for the benefit of the employer while going to or from work. In the present case, the employee was going to Genentech, his employer, on his night off at 3:35 a.m. when he was involved in an accident, resulting in the death of decedent. A lawsuit was filed against the employee and Genentech. The theory was that Genentech was liable for the accident. Evidence indicated that the employee was on his way to Genentech to pick up some résumés to review since the employee was involved in hiring for a certain department at Genentech.

The trial court granted summary judgment for Genentech on the respondeat superior theory.

APPELLATE COURT DECISION:

Affirmed. The “special errand” exception to the going and coming rule does not apply. The employee was going back to the worksite on his night off; he had not been directed to do so by his employer, nor has his employer directed him to pick up the résumés. Since the special errand exception does not apply, respondeat superior would not apply, and summary judgment was, therefore, properly granted in favor of the employer, Genentech.

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SETTLEMENT; 998 COSTS

Sviridov v. City of San Diego
(2017) 14 Cal.App.5th 514

FACTS:

A police officer sued the City of San Diego for discriminatory termination and made claims under the FEHA. The City offered to settle the case under C.C.P. § 998; plaintiff did not obtain a more favorable judgment, and the City filed a cost bill for more than $90,000. The trial court approved and ordered that plaintiff pay the cost bill.

APPELLATE COURT DECISION:

Affirmed. C.C.P. § 998 is designed to encourage settlements; contrary to plaintiff's argument, there is no requirement that simply because this is an FEHA discrimination claim, defendant must prove that the claim was meritless and brought in bad faith. Defendant City is entitled to obtain its costs if it simply proves that plaintiff did not obtain a more favorable judgment.

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ARBITRATION; FORMATION OF CONTRACT

Norcia v. Samsung Telecommunications America, LLC
(2017) 845 F.3d 1279

FACTS:

Norcia purchased a Samsung phone at Verizon. Inside the box where the phone was was a limited warranty brochure, and this document had a binding arbitration clause in the limited warranty brochure. Norcia filed a class action against Samsung claiming that the phone had been tested at higher speeds than represented. Samsung moved to compel arbitration, but this was denied by the trial court.

NINTH CIRCUIT OPINION:

Affirmed. The parties had not "agreed" to arbitration of the dispute that was before them. The lawsuit was not for breach of warranty; it was for non-warranty matters. Therefore, there was no arbitration agreement between the parties.

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BINDING ARBITRATION; CLASS ACTION WAIVER; PUBLIC INJUNCTIVE RELIEF

McGill v. Citibank, N.A.
(2017) 2 Cal.5th 945, 216 Cal.Rptr.3d 627 (California Supreme Court)

FACTS:

Plaintiff was a credit card holder of Citibank. Plaintiff brought a class action lawsuit alleging violation of the Unfair Competition Law, the Consumers Legal Remedies Act and the False Claims Act by defendant in connection with its marketing activities concerning distribution of the card. Plaintiff had signed an arbitration agreement requiring that all claims concerning the marketing of the card, etc., had to be subject to binding arbitration, that there could be no class-wide arbitration, and that any and all claims had to be treated on an individualized basis. Defendant moved to compel arbitration. The trial court denied the motion; the Appellate Court reversed, saying that the United State Supreme Court decision of *AT&T v. Concepcion* governed and arbitration was required.

CALIFORNIA SUPREME COURT DECISION:

Court of Appeal reversed. In California, existing law prohibits agreements that preclude a plaintiff from seeking public injunctive relief. The agreement in this case purports to do exactly that – prohibit the plaintiff from seeking public injunctive relief against the defendant. In other words, an entire class of claims is prohibited from being brought by the plaintiff, even though such claims are permitted under existing law.

COMMENT:

The Supreme Court is obviously still reluctant to follow the broad reach of *Concepcion*; it will be interesting to see whether this decision stands U.S. Supreme Court analysis, if the matter is taken to the U.S. Supreme Court. This writer believes it is incorrect to take the position that plaintiff was totally precluded from bringing a claim for injunctive relief. A claim for individual injunctive relief can be arbitrated and could have been arbitrated under this agreement. But allowing a claim for public injunctive relief would probably have emasculated the class action waiver, which even the California Supreme Court concedes is valid. This case should, therefore, be watched closely for further developments.

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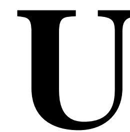

ELDER ABUSE ACT; FINANCIAL DEPRIVATION; INSURANCE AGENTS

Mahan v. Charles W. Chan Insurance Agency, Inc.
(2017) 12 Cal.App.5th 442, 218 Cal.Rptr.3d 808

FACTS:

Fred Mahan and his wife were elderly. Fred was 82; his wife, Martha, had Alzheimer's. Prior to this, the Mahans had purchased and had had for several years two whole life insurance policies. The premium for both policies (combined) was about $14,000 a year. A trust had been set up to take care of paying the premiums and handling the insurance. The trustee was Maureen, the daughter of Fred and Martha. Defendants (Chan) were insurance agents. They became acquainted with Fred and found out about the two whole life policies that he had. They convinced him (and without really talking to Maureen) that these policies should be cashed in and a term life policy should be substituted. Fred agreed. Here were the financial consequences: the Mahans had to pay $250,000 at the outset for these policies. They then had to pay a premium of over $100,000 a year. They then had to pay commissions to the Chans of approximately $100,000 for the policy change. Suit was filed for elder abuse (financial). The trial court sustained a demurrer and dismissed the case.

APPELLATE COURT DECISION:

Reversed. Insurance agents are bound by the Elder Abuse Act. The allegations of this complaint adequately set forth claims for deprivation of a property right by wrongful conduct on the part of the defendants. The premium increases were huge; the commission was huge. The Mahans lost their valuable whole life policies for which the premium was, given their age, relatively small. The defendants were aware of Fred's cognitive disability and of Martha's Alzheimer's. They also did not consult closely with Maureen, the trustee who deferred to her father's wishes in any event. Under the Elder Abuse Act, claims were adequate stated.

NOTE:

The original whole life policies provided a total of $1,000,000 in coverage. This was all that Fred got (alone) under the term life policy [Martha was uninsurable since she had Alzheimer's]. Also, the term life policy terminated when Fred reached 91. The allegations of serious financial adverse effect were substantial, to say the least. The Court also noted that it made no difference that the policies belonged to the trust, as owner. The trust had been set up so that Fred and Martha could benefit their children, and the conduct of the agents meant that their children would receive much less in benefits.

U

ARBITRATION; ENFORCEABILITY

Talmadge Baker v. Italian Maple Holdings, LLC
(2017) 13 Cal.App.5th 1152, 220 Cal.Rptr.3d 887

FACTS:

LaBerge, age 73, with high blood pressure and a bone infection, was admitted to defendant nursing home. After she was admitted, she signed an arbitration agreement. Under C.C.P. § 1295(c), this could be rescinded within 30 days of signing. During that 30-day period, she was in the restroom vomiting. Despite her request for assistance, none was rendered and she fell, injuring her head. She was admitted to the hospital and died shortly thereafter. The autopsy indicated that she died because of the trauma to her head. A lawsuit was filed. The nursing home demanded arbitration. The trial court granted arbitration.

APPELLATE COURT DECISION:

Affirmed. The claim is that because the death occurred during the period when the arbitration agreement could have been rescinded, the arbitration agreement, therefore, is not enforceable. But the arbitration statutes compel a different result. The arbitration agreement is enforceable upon signing.

COMMENT:

There is a contrary case, Rodriguez v. Superior Court (2009) 176 Cal.App.4th 1461, and, therefore, we might expect the Supreme Court to take a look at the *Talmadge* case.

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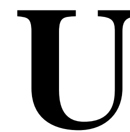

ARBITRATION; INSURANCE DISPUTES; POSSIBILITY OF CONFLICTING RULINGS; FEDERAL ARBITRATION ACT

Los Angeles Unified School District v. Safety National Casualty Corporation
(2017) 13 Cal.App.5th 471, 220 Cal.Rptr.3d 546

FACTS:

At an elementary school in the Los Angeles Unified School District, two teachers were accused by hundreds of students of sexual molestation extending from 1975 to 2012(!). Court litigation was proceeding regarding those claims. During this time period, the District had been insured by 27 insurers. One was Safety National (Safety). Its policy contained a provision requiring arbitration of insurance coverage disputes. Safety moved to compel arbitration, but this was denied by the trial court, on grounds that there was the possibility of "conflicting rulings" between the arbitrator's decision and court decision, and the trial court has discretion under C.C.P. § 1281.2(c) TO DENY arbitration under those circumstances.

APPELLATE COURT DECISION:

Affirmed. The arbitration agreement was silent as to whether the FAA applied or whether FAA procedural and substantive rules applied as distinguished from California rules. Under those circumstances, California rules are not preempted by the FAA, and section 1281.2(c) gives discretion to the trial court to deny arbitration if there is the possibility of conflicting rulings. The decision of the trial court in the present case was proper.

COMMENT:

For those entities favoring arbitration and seeking to take advantage of arbitration, this case suggests that some additional language be put into the arbitration agreement, such as: "The parties agree that the Federal Arbitration Act shall govern all matters that are in dispute and that the procedural and substantive rules of the FAA pertaining to arbitration shall apply." This will assure that contrary California rules (less favorable to arbitration) do not apply.

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HEALTH CARE; DELEGATION OF FINANCIAL RESPONSIBILITIES; DUTY TO MONITOR FINANCIAL CONDITION OF PAYOR; HMOS

Centinela Freeman Emergency Medical Associates v. Health Net of California, Inc.
(2016) 1 Cal.5th 994, 209 Cal.Rptr.3d 280 (California Supreme Court)

FACTS:

Defendant is an HMO. Plaintiffs are emergency room physicians. Plaintiffs have no contract with the HMO requiring the HMO to pay them for their services. Defendant HMO delegated its financial responsibilities to pay physicians to an IPA (by paying a capitation fee to the IPA). This is permitted under California law. The IPA developed financial difficulties and the emergency room physicians were not paid. They brought suit directly against the HMO, alleging that the HMO knew that the IPA was having financial difficulties when they made the delegation and violated a continuing duty to monitor and assess the financial condition of the IPA. Plaintiffs alleged that this resulted in non-payment and damages to the plaintiff emergency room physicians.

The trial court sustained the HMO demurrer without leave to amend.

The Court of Appeal reversed.

SUPREME COURT DECISION:

Court of Appeal affirmed. The Supreme Court held that an HMO, under the circumstances, had a common law duty, even though it had no contract directly with the plaintiffs, not to delegate its financial responsibilities to pay to IPA that it knew was in financial trouble. Furthermore, the Court held that the duty was a continuing duty to assess, in limited fashion, the ability of the IPA to continue to make such payments. Accordingly, the Plaintiffs stated a proper claim under California law.

ANTI-SLAPP MOTION

Dual Diagnosis Treatment Center, Inc. v. Buschel
(2016) 6 Cal.App.5th 1098, 212 Cal.Rptr.3d 75

FACTS:

Plaintiff was a facility for the treatment of alcohol and drug abuse. Plaintiff sued a defendant (publisher) which had republished an article which was critical of plaintiff's license procedure and validity. Plaintiff sued defendant for libel and negligence. Defendant filed a motion under C.C.P. section 1425.16 (anti-SLAPP motion). The trial court denied the motion.

APPELLATE COURT DECISION:

Affirmed. An anti-SLAPP motion cannot be filed unless the matter involved is one of widespread public interest. This case involved something said about the plaintiff alone, not about the drug rehab industry as a whole or any ongoing major controversy. The trial court correctly denied the motion.

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FALSE ADVERTISING; CONSUMER TORTS

Veera v. Banana Republic, LLC
(2016) 6 Cal.App.5th 907, 211 Cal.Rptr.3d 769

FACTS:

Plaintiff was walking past the Banana Republic store. Plaintiff saw a sign in the window saying "40% off" and interpreted this to mean that there was a 40% discount on all merchandise. Plaintiff went in and selected numerous items. When she got to the cash register and the clerk started ringing up the purchases, she noticed that some were at full price and some were discounted. When she questioned the clerk, the clerk said that the 40% off did not apply to all the merchandise, but only to selected merchandise. Plaintiff had waited in line, and there were many customers behind her. She was embarrassed. Plaintiff elected to purchase some of the items, but not all of them. She sued Banana Republic for false advertising, a breach of three California consumer protection statutes.

The trial court sustained the defendant's demurrer, largely on grounds that plaintiff could have avoided everything by simply not purchasing anything. The trial court granted summary judgment for Banana Republic.

APPELLATE COURT DECISION:

Reversed. For purposes of summary judgment, triable issues of fact exist. It is necessary to show an economic injury in order to establish standing to sue for false advertising. This can be shown if there is a substantial invasion of a legally protected interest. If plaintiff can prove before a jury the facts as she claims exist, plaintiff will have established a false advertising claim. Here, she says she was misled, commenced shopping, selected goods, was embarrassed when she discovered the discrepancy, felt pressure, and went on to purchase some of the goods. This, if true, would establish sufficient evidence to show standing to sue for false advertising.

There was a dissent: The dissent pointed out that plaintiff's realization of the misrepresentations allowed her to prevent herself from being injured; nonetheless, she purchased some of the items, and she does not have standing to sue.

COMMENT:

In this writer's opinion, the dissent is better reasoned.

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CONSUMER RIGHTS; UNSOLICITED SPAM CALLS AND TEXTS; FEDERAL AND STATE LAW

Van Patten v. Vertical Fitness Group, LLC
(2017) 847 F.3d 1037

FACTS:

Plaintiff signed up to join a gym. In the contract, plaintiff provided a cell phone number. A few days after plaintiff signed up for the gym, he cancelled the membership. Two years later, the gym started soliciting him to join the gym as it was under new ownership. These were typical "spam" texts sent to plaintiff's cell phone. Plaintiff brought a class action for violation of Federal law and State law (Unfair Competition Law in California). The Federal law is called the Telephone Consumer Protection Act (TCPA) 47 U.S.C. § 227(b)(1)(C). It prohibits an unsolicited advertisement, and this can be by telephone, cell phone, or text. The Federal law allows standing to exist without economic harm and on claims of aggravation, etc.

The trial court dismissed the Federal claims and the State claims for violation of the Unfair Competition Law.

NINTH CIRCUIT OPINION:

Affirmed. Under the Federal law, plaintiff might have had a claim if plaintiff had not "consented" to the calls. When plaintiff gave his cell phone number to the gym, this was sufficient "consent" to being called, and this defeats plaintiff's Federal cause of action.

Under the State law claims, mere aggravation is not enough. Plaintiff has to show economic harm or injury. Plaintiff claims that he had to pay for the texts and this would constitute economic harm, which is a necessary element for standing under the Unfair Competition Law. However, the phone service that plaintiff had signed up for allowed <u>unlimited</u> texting for both sending and receiving texts and, therefore, plaintiff is unable to demonstrate concrete economic harm from the receipt of the texts.

COMMENT:

I am sure all of you will sympathize with the plaintiff in this case. Please note this Federal statute and the possible remedy that it affords to those of you who are bothered constantly by unsolicited calls or texts. Standing under the Federal law is much easier to establish than under State law.

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CONSUMER RIGHTS; GROWTH HORMONES; PHARMACEUTICALS

Kwan v. SanMedica International
(2017) 854 F.3d 1088

FACTS:

Plaintiff brought a class action in Federal Court against a company which manufactured a growth hormone. Plaintiff alleged that the defendant marketed the hormone representing that it enhanced skin quality and provided substantial increases in energy. Plaintiff alleged that the advertising claims of the defendant were not substantiated. The trial court ultimately dismissed the case.

NINTH CIRCUIT DECISION:

Affirmed. Plaintiff did not allege that the marketing claims were actually false. Plaintiff also never alleged that he or any other class members actually used the product; simply that they purchased it. There were no other allegations of injury associated with use of the product. In the absence of such claims, a consumer has no private right of action to enforce the provisions of the Consumer Legal Remedies Act or the Unfair Competition Law statutes. Instead, this rests with the Attorney General, the Director of Consumer Affairs, and other public officials. Under the circumstances, the trial court correctly dismissed the case.

NOTE:

The essence of the Court's decision is that plaintiff had not alleged that the marketing claims were contrary to expert scientific evidence, just that they were not substantiated.

ELDER ABUSE

Stewart v. Superior Court
(2017) 16 Cal.App.5th 87

FACTS:

Carter was 78 years old. He was exhibiting some confusion. He was admitted to St. Mary's. Carter's partner, Stewart, was a registered nurse and she had the power of attorney, including a power to consent to medical procedures for Carter. An initial diagnosis by the hospital indicated that Carter needed a gastronomic tube to assist in getting calories into his system. Stewart objected to his, saying another procedure could be tried. Carter had "gaps" in his heartbeat and the hospital next suggested that a pacemaker should be installed. Stewart objected to this repeatedly on grounds that his problem was sleep apnea. The hospital persisted, but so did Stewart in her objections to the installation of a pacemaker. The hospital ethics committee met (without providing notice to Stewart) and concluded that a pacemaker should be installed. Surgery was scheduled and carried out. Carter died shortly thereafter. In a lawsuit brought by Stewart for elder abuse, Stewart did present evidence from other doctors that the pacemaker surgery was not necessary. The trial court in essence granted summary adjudication for the hospital on the elder abuse claim.

APPELLATE COURT DECISION:

Writ issued to compel the trial court to set the decision aside. There were triable issues of fact on the elder abuse claim. Clearly, Stewart had the power to provide the consent for the surgery, and she had withheld it. The hospital had gone ahead anyway, and this could constitute the "neglect" in order to prove the elder abuse claim, and the hospital's conduct could also constitute recklessness under the elder abuse statute. Triable issues of fact exist, and the trial court order is set aside.

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EMPLOYMENT TORTS; ANTI-SLAPP LAW

Wilson v. Cable News Network, Inc.
(2016) 6 Cal.App.5th 822, 211 Cal.Rptr.3d 724

FACTS:

Plaintiff was a news producer for defendant Cable News Network. Plaintiff was a "behind-the-scenes" person, working in the backroom on news matters. Plaintiff was not a reporter and did not appear on camera. Plaintiff sued defendant claiming discrimination, wrongful termination, retaliation, and defamation. Among other claims, plaintiff claimed that defendant wrongfully accused plaintiff of plagiarism. Defendant filed a motion to strike which was granted by the trial court.

APPELLATE COURT DECISION:

Reversed. Defendant's claim of free speech rights is rejected. This case did not involve issues of free speech or public interest. Plaintiff was a behind-the-scenes person, unknown to the public, and was not a reporter. The purposes, therefore, behind the anti-SLAPP laws are not furthered.

There was a dissent, and the dissent took the position that the case really involved an employer's control over staffing and other employment decisions, and that this did involve free speech rights.

EMPLOYMENT TORTS; DISABILITY; FAILURE TO ACCOMMODATE

Atkins v. City of Los Angeles
(2017) 8 Cal.App.5th 696, 214 Cal.Rptr.3d 113

FACTS:

Plaintiffs were five police recruits for the City of Los Angeles. They were enrolled in the Academy and were engaged in training activities when they were injured. They took some time off to recover from their injuries. State law and regulations allowed a period of two years for police officers who had been too injured to complete their Academy work. The City had its own policy (which was adopted after plaintiffs had suffered their injuries in training) that there was a six-month period allowed after the injury and then there could be termination if the employee was unable to complete the Academy program, including the probationary period. The City also had something called a "Recycle" program under which injured employees were placed in the program and accommodated to a certain extent taking into account their disability and their injury.

Plaintiffs were fired and filed suit for disability discrimination under the FEHA. A jury returned a verdict of $12 million in favor of the five plaintiffs.

APPELLATE COURT DECISION:

The jury verdict on liability was supported, but the damages were speculative. The Court found that the City policy allowing termination was adopted after the plaintiffs were injured and, therefore, plaintiffs were being treated differently than other employees who had been in the Academy and who were injured before the new City policy was adopted. The City, therefore, was charged with responsibility for "accommodating" plaintiffs due to their injury, and the evidence support a verdict in favor of plaintiffs on this point.

However, the damages were speculative. The damages were based upon the expert's testimony and assumption that plaintiffs would have graduated from the Academy and would have been police officers until the time of their retirement. This was entirely too speculative and the damages award cannot stand.

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EMPLOYMENT TORTS; RESCISSION OF RESIGNATION BY EMPLOYEE

Featherstone v. Southern California Permanente Medical Group
(2017) 10 Cal.App.5th 1150

FACTS:

Ruth Featherstone was employed by Kaiser in Southern California. She told her supervisor (Sheppard) that she had a sinus tumor. She had it removed surgically and returned to work. She thereafter told Sheppard she was resigning in order "to do God's work." Sheppard thought that this was somewhat odd, but in keeping with Featherstone's character. Later, Featherstone sought to rescind her voluntarily resignation (she had confirmed in writing to the employer). The employer refused to accept Featherstone's rescinding of the resignation. Featherstone filed suit. She alleged that after the sinus surgery she was on two drugs, including codeine, which affected her adversely and that the defendant's failure to accommodate her violated the FEHA laws against disability discrimination. The employer had no notice of Featherstone's alleged disability problem prior to Featherstone's resignation.

The trial court granted summary judgment in favor of defendant.

APPELLATE COURT DECISION:

Affirmed. The primary basis for the Appellate Court's decision was the fact that when Featherstone voluntarily resigned, this terminated the employment relationship and she had no rights after that point and the employer had no obligation to entertain her request to rescind the resignation. Featherstone was an at-will employee with no contractual rights to be accommodated after her resignation. Furthermore, the employer had no knowledge of any claimed disability.

Since no employment relationship existed upon the voluntarily resignation, the failure to accept her request to rescind the resignation did not constitute an "adverse employment effect" prohibited by the FEHA. The trial court correctly ruled in favor of defendant.

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EMPLOYMENT TORTS; RETALIATION; WRONGFUL TERMINATION; DISCRIMINATION; REINSTATEMENT; IMMIGRATION LAW

Santillan v. USA Waste of California, Inc.
(2017) 853 F.3d 1035

FACTS:

Plaintiff had been a garbage collector for USA Waste since 1979. He worked in Manhattan Beach, California and was well-liked by hundreds of people in that community. A new supervisor named Kobzoff took over. He sought to terminate plaintiff and also two other Spanish-speaking employees. Plaintiff ultimately filed suit based on age discrimination, alleging that his position had been taken by somebody who was younger. The defendant, USA Waste, contended in collective bargaining negotiations that plaintiff had had four accidents. Plaintiff denied this. In collective bargaining negotiations, a settlement was reached and it was agreed that plaintiff could be reinstated subject to various conditions. One of these conditions was that plaintiff had to demonstrate that he was eligible for employment in the United States (e-Verify). Plaintiff submitted various documentation on this subject, but it was not deemed acceptable to USA Waste and he was terminated after several efforts to satisfy this condition.

On plaintiff's complaint, the U.S. District Court granted summary judgment.

NINTH CIRCUIT DECISION:

Reversed. The principal reason for reversal was the fact that the 1986 immigration law which USA Waste sought to impose upon plaintiff did not apply to him. The law indicated that it did not apply to employees who had become employed prior to 1986. This was plaintiff's case, and that "exemption" also applied to employees who had been fired but then reinstated – again, plaintiff's position. Plaintiff also stated a valid claim for retaliation; namely, that he had been fired because he had had an attorney representing him during the collective bargaining and settlement agreement negotiations.

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EMPLOYMENT TORT; EQUAL PAY FOR WOMEN

Rizo v. Yovino
(2017) 854 F.3d 1161

FACTS:

Defendant Fresno County hired plaintiff as a math consultant. They based her salary on what she had earned before as an Arizona teacher, plus 5% and a stipend for her master's degree. Plaintiff eventually sued for violation of the Equal Pay Act alleging that four other math consultants (all men) were paid more than she was for comparable work. The County moved for summary judgment which was denied by the trial court.

NINTH CIRCUIT DECISION:

The Court indicated that basing plaintiff's salary on her prior salary was properly an affirmative defense claim and that the matter should be returned to the District Court for further hearing as to whether this was a proper business decision on the part of the County. It is acceptable to base plaintiff's salary on her prior salary rather than her sex-gender. The County asserted various business reasons for doing this, and upon remand, those reasons should be explored for their reasonableness.

EMPLOYMENT TORTS; DISCRIMINATION; TERMINATION

Merrick v. Hilton Worldwide, Inc.
(2017) 867 F.3d 1139

FACTS:

Merrick had worked for 19 years for defendant hotel corporation. He was 60 years of age. He was in charge of property management. In the mid-2000s, the hotel chain (Hilton) was having revenue problems and directed that a reduction in force (RIF) be carried out. Hilton desired that the payroll at the hotel where Merrick worked (Torrey Pines in La Jolla) be reduced 7-10%. Among considerations as to who was to be replaced, the hotel announced that if the person had little contact with guests and if the person was not a direct generator of revenue, this would be relevant. Merrick's position did not involve contact with guests and he was not a direct generator of revenue. The decision-makers with Hilton decided to terminate Merrick. He was replaced with a younger employee (Kohl) who received a salary increase while assuming Merrick's position. Merrick sued for age discrimination.

In the trial court, summary judgment was granted for Hilton.

NINTH CIRCUIT DECISION:

Affirmed. Hilton had demonstrated legitimate reasons for terminating Merrick, with no age discrimination having been shown. With the firing of Merrick alone, the Torrey Pines Hilton was able to meet the directive handed down by Hilton managers; namely, a reduction in payroll by 7-10%. Merrick had no contact with guests and was not a direct generator of revenue. Even though he was replaced by a younger employee, this made no difference. Summary judgment was properly granted, and no age discrimination claim was demonstrated.

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EMPLOYMENT TORTS; WRONGFUL TERMINATION; DISABILITY

Alamillo v. BNSF Railway Company
(2017) 869 F.3d 916

FACTS:

Plaintiff was employed by BNSF (a railroad). He had a choice of work schedules: he could work a straight five-day-a-week job or he could be "on the board," subject to being called to work at any time. Plaintiff chose the latter. He started missing calls and was subjected to disciplinary proceedings by the employer. Plaintiff then went to a doctor who diagnosed a condition known as sleep apnea. This was unknown to the employer until plaintiff revealed it. At some point, plaintiff decided to return to a regular five-day-a-week work schedule. Eventually, his employer fired him for past missed calls, and plaintiff sued for wrongful termination. Summary judgment was granted for the employer by the trial court.

APPELLATE COURT DECISION:

Affirmed. The claim of disability discrimination is rejected. The employer did not even know that plaintiff had any disability when it became displeased with plaintiff's missed calls. Therefore, no claim of disability discrimination can be made. The employer did reasonably attempt to accommodate plaintiff, but this simply did not work out. Summary judgment was properly granted for the employer.

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