

Key Decisions

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Even If A Plaintiff Dismisses During Trial To Avoid Losing A Motion For Judgment, The Defendant Is Not The Prevailing Party For Purposes Of An Award Of Attorney's Fees

Glencoe v. Neue Sentimental Film AG
(Cal. Ct. of App., 2d Dist.), filed November 25, 2008,
published November 26, 2008

Key Facts

Neue Sentimental Film USA leased commercial property from Marina Glencoe. The lease contained a provision for an award of attorney fees and costs to the prevailing party in any action on the lease. Neue Sentimental Film USA fell behind in the rent.

Marina Glencoe sued Neue Sentimental Film USA and two related companies. Marina Glencoe's theory was that each of these related companies also owed rent as the alter ego of Neue Sentimental Film.

Neue Sentimental Film USA went bankrupt. Marina Glencoe dismissed it from the action.

Prior to trial, one of the related companies sent a letter to Marina Glencoe offering to settle the case. The offer stated it would be deemed rejected if it was not accepted in writing within 5 days.

The case proceeded to trial. The trial court bifurcated the case and tried the issue of the related companies' liability on the debt first. At the close of this phase of the trial, one of the related companies, Neue Sentimental Film AG, moved for judgment. It asserted Marina Glencoe had not made a prima facie case of alter ego liability as against it.

Before the trial court made a ruling, Marina Glencoe dismissed its action against Neue Sentimental Film AG.

As a result of the dismissal, Neue Sentimental Film AG sought an

award of attorney's fees under the lease. The trial court declined, finding that because Marina Glencoe dismissed the action, Neue Sentimental Film AG was not a prevailing party and therefore not entitled to fees.

Holding & Reasoning

The Court of Appeal affirmed. It relied on Civil Code section 1717(b)(2), which provides: "Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of this section."

The court rejected Neue Sentimental Film AG's argument that this provision did not apply because the dismissal was after trial had started and while a motion for judgment was pending. It held that it did not matter when the dismissal occurred or whether it occurred while a motion for judgment was pending.

The court also rejected the argument that Neue Sentimental Film AG's letter was a settlement offer under Code of Civil Procedure section 998, which would trigger a right to costs. It held that the letter did not give Marina Glencoe sufficient time to accept, so as to trigger the benefits of section 998.

Analysis

The policy rationale behind this rule is debatable. On the one hand, a law that encompasses voluntary dismissal of claims that appears meritless makes sense. But how "voluntary" was this dismissal. Did the Legislature actually intend to allow a plaintiff to dismiss a case during trial, after it has rested and while a motion for judgment is pending to avoid the consequences of an attorney's fee clause it had put in a contract?

This case is arguably a windfall for plaintiffs who sue on contracts with attorney's fee provisions. A defendant can do nothing to protect itself from having to pay fees if it concludes it is about to lose. However, a plaintiff, who concludes it is about to lose, can simply dismiss—without consequence.

This opinion appears in the November 26, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 17457.

"Total" Disability Depends On The Nature Of Their Work

Hecht v. Paul Revere Life Insurance Company (Cal. Ct. of App., 2d Dist.), filed October 14, 2008, published November 7, 2008

Key Facts

Michael A. Hecht was and is the owner/president of a successful retail clothing business with several locations in Southern California. For approximately 20 years, he was a "hands on" owner who worked full time every day building this business.

Hecht purchased a disability insurance policy from the Paul Revere Life Insurance Company. He listed his duties as "buyer/manager/office operations." The policy defined "total disability" as being "unable to perform the important duties of Your Occupation. . . ."

Hecht was injured in an automobile accident which resulted in his suffering from neck pain, upper back pain, and lower back pain. He took a variety of medicines to ameliorate these symptoms. His physician confirmed that he had lumbar injury which included bulging discs, spinal stenosis and muscle spasms. This hampered his ability to walk, sit, bend, and lift objects.

Hecht sought disability benefits. His physician declared that he was "partially" disabled.

Notwithstanding his pain and physical limitations, Hecht continued to work full time and performed his work the same way he had done prior to the accident, albeit with less gusto and more physical limitations than before the accident. For example, he could not lift certain items of clothing; he could not physically help in the loading and unloading of merchandise; he could not climb ladders; and he could not sit or stand for lengthy periods of time.

The trial court granted Paul Revere's motion for summary judgment. It held that Hecht was not totally disabled within the meaning of the policy and therefore was not entitled to benefits.

Holding & Reasoning

The Court of Appeal affirmed.

As had the trial court and the parties, the appellate court relied on the seminal case of *Erreca v. West. States Life Ins. Co.*, 19 Cal.2d 388, 396 (1942), explaining:

The black letter rule of law that governs this case is as follows: “The term ‘total disability’ does not signify an absolute state of helplessness but means such a disability as renders the insured unable to perform the substantial and material acts necessary to the prosecution of business or occupation in the usual or customary way. Recovery is not precluded under a total disability provision because the insured is able to perform sporadic tasks, or give attention to simple or inconsequential details incident to the conduct of business. Conversely, the insured is not totally disabled if he is physically and mentally capable of performing a substantial portion of the work connected with his employment. He is not entitled to benefits because he is rendered unable to transact one or more of the duties incidental to his business.”

The court held that although Hecht was a “hands on” owner who frequently did physical labor, the physical labor was not an essential part of his role in the company, and Hecht’s inability to do the physical labor he previously did, did not reduce his income. Hecht was not totally disabled because he was physically and mentally capable of performing a substantial portion of the work connected with his employment.

Analysis

Hecht’s situation did not present a difficult case because his job was not primarily physical and his company lost no money as a result of his injuries.

This opinion appears in the November 7, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 16626.

A Finance Lessor Is Not Liable As One In The Producing And Marketing Enterprise

Arriaga v. CitiCapital Commercial Corporation (Cal. Ct. of App., 5th Dist.), filed November 3, 2008, published November 5, 2008

Key Facts

Guillermo Arriaga was injured when his finger became entangled in a glue spreading machine. The accident occurred because a guard was removed from the glue spreader before Arriaga’s employer, Orepak Hardwood Products, bought it. The prior “owner” acquired the machine through a finance lease under which JLA Credit Corporation, the predecessor to CitiCapital Commercial Corporation, purchased it for, and then rented it to, the prior “owner.”

Arriaga sued for personal injury, alleging causes of action for strict liability, negligence, and breach of warranty. Arriaga sued the manufacturer, retailer, and lessee of the glue spreader. He included CitiCapital as the purported owner/lessor of the machine.

CitiCapital moved for summary judgment on the ground that, as a finance lessor and one time seller of the glue spreader, it was not part of the chain of commerce and thus not subject to strict products liability. CitiCapital asserted that it had no duty to inspect the machine for defects before the machine was purchased by Orepak and thus could not be held liable for negligence. CitiCapital also argued that, in its role as a finance lessor, it could not be held liable for breach of implied warranty.

The trial court granted CitiCapital’s motion.

Holding & Reasoning

The Court of Appeal affirmed. It held CitiCapital was a finance lessor, not a commercial lessor. It was outside the direct chain of distribution, and strict liability as a lessor was inapplicable. The court held that even if CitiCapital is considered to be the seller of the machine, it sold a used product that it had no connection to (other than having obtained bare legal title through the financing mechanism). Thus, the court found that CitiCapital could not be held liable under either strict products liability or negligence theories.

The court explained the scope of the doctrine of strict products liability. A manufacturer is strictly liable in tort when an article it places on the market, knowing that it is to be used without inspection for defects, has a defect that causes personal injury. Anyone identifiable as an integral part of the overall producing and marketing enterprise is also subject to strict liability. Even a nonmanufacturing party who is outside the vertical chain of distribution of the product, but who plays “an integral role in the ‘producing and marketing enterprise’ of a defective product and profits from placing the product into the stream of commerce,” can be strictly liable.

Accordingly, retailers engaged in the business of distributing goods to the public are strictly liable in tort for personal injuries caused by defects in those goods. So, too, are lessors of personal property, wholesale and retail distributors, and licensors.

Nevertheless, imposition of strict liability based on this stream of commerce or marketing enterprise theory is not limitless. A finance lessor is in an entirely different position from others in the stream of commerce. It is little different from a simple lender who takes a security interest in the goods that are acquired with the proceeds of the loan. It does not manufacture, select or supply the product. The lessee does that and simply selects the lessor to provide the financing. Because of the finance lessor’s unique role, it is not strictly liable.

Besides holding that CitiCapital could not be strictly liable as a lessor, the court held it could not be liable as the seller of the spreader. It noted that a seller of used machinery is not strictly liable in tort, unless the seller rebuilds or reconditions the product and thus assumes a role analogous to that of a manufacturer. There was no evidence CitiCapital did so.

The court rejected Arriaga’s argument that CitiCapital was liable as the owner/lessor of the glue spreader for failing to exercise reasonable care to inspect the machine for defects. It held a finance lessor, such as CitiCapital, is a passive lessor whose involvement in the transaction is the equivalent of an extension of credit. As a finance lessor, CitiCapital had neither the opportunity nor the expertise to inspect the machine in order to discover defects.

Further, because CitiCapital was not a merchant with respect to spreaders, there was no implied warranty for which it could be liable.

Analysis

This case should give finance lessors a degree of comfort in connection with their financing activities. Had the court found otherwise, those seeking equipment through finance leases would have found fewer opportunities and would have found themselves paying significantly more for the equipment.

This opinion appears in the November 5, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 16534.

An Irrevocable Trust Can Be Irrevocable Even As To One of Its Creators

Aguilar v. Aguilar
(Cal. Ct. of App., 4th Dist.), filed November 6, 2008,
published November 10, 2008

Key Facts

Joe and Manuela Aguilar were married. They created a trust as a means of holding, then disposing their assets at death. By its terms, the trust was a living trust during their lifetimes. And, became irrevocable upon the death of the first of them. The trust recited that certain property being put into it was community property and that it was to retain that status even in the trust.

After Joe died, Manuela tried to take certain community property out of the trust so she could give it to her son. Joe’s son, who was a beneficiary of the trust, objected. Joe’s son filed suit to prevent the withdrawal and transfer.

The trial court denied the petition.

Holding & Reasoning

The Court of Appeal reversed.

After reviewing the key language of the trust agreement, the court determined that: “the intention of the trustors, Joe and Manuela, at the time they created the joint trust, was to make certain that the principal of the joint trust would be distributed in equal shares to the eight children and stepchildren after the

death of the second trustor to die.”

The court held that because the trust agreement was clear, there was no need to look at extrinsic evidence. Nonetheless, the court commented that the extrinsic evidence was consistent with the express terms.

Since the trust agreement was clear that it became irrevocable upon the death of the first spouse, the second could not withdraw assets after the death of the first.

Analysis

The trial court’s reasoning is not spelled out in detail as to how it reached the conclusion that the surviving spouse continued to control trust assets despite irrevocability. The appellate court’s decision underscores the significance of making a trust irrevocable.

This opinion appears in the November 10, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 16681.

If A Jury Decides Fact Issues, Those Facts Bind The Judge’s Subsequent Equitable Determination

Hoopes v. Dolan
(Cal. Ct. of App., 1st Dist.), filed November 12, 2008,
published November 14, 2008

Key Facts

John and Margaret Dolan owned certain commercial property. They leased a portion of it to a café and the remainder to another tenant, Eric Hoopes.

After several years and after renewing the lease, Hoopes sued the Dolans and the café. Hoopes claimed exclusive parking rights under his lease.

The defendants denied Hoopes’ interpretation of the lease, and also asserted that he was equitably estopped from suing because he stood silent for years when he knew the various defendants believed parking was shared between the tenants.

The various defendants moved to bifurcate the trial to have their equitable estoppel defense and other issues tried by the judge first, before a jury trial on Hoopes’ other causes of action.

The trial court denied bifurcation and held a jury trial on Hoopes’ legal claims for breach of contract, trespass, and fraud. The jury found in Hoopes’ favor.

Then, the court held a court trial on the equitable issues. It found that equitable estoppel applied. As such, the trial court entered judgment for defendants.

Holding & Reasoning

The Court of Appeal affirmed. It held that the trial court was bound by the factual findings made by the jury relative to the legal issues. The court further held that because the jury had not made findings relative to the equitable estoppel defense, the trial court was free to do so. Consequently, the Court of Appeal affirmed the trial court’s finding of equitable estoppel.

Historically, there were separate courts of law and equity. The separate law and equity courts have since merged, but the distinction between them remains.

The right to a jury trial for civil actions is generally limited to causes of action that were historically triable in a court of law. A judge is bound by a jury’s verdict rendered on legal causes of action.

A judge determines equitable causes of action. However, a judge may impanel an advisory jury to make preliminary factual findings. Since the findings are advisory only, they do not bind the judge.

Because of the differences between legal and equitable claims, the law requires that facts found by the first finder of fact, whether a jury or a judge, are binding on a second finder of fact. As a result, whether the legal claims or equitable claims are tried first can have a significant impact on the ultimate outcome of a case.

Equitable claims are often tried before legal ones. However, the trial judge generally has discretion in deciding which claims to try first.

Because the jury made factual findings in favor of Hoopes, the trial judge was bound by those when he tried the equitable defense of estoppel. However, the jury was not called on to find facts relative to that defense.

There was substantial evidence supporting the trial court's findings as to equitable estoppel. Therefore, the trial court's finding was not reversible and it served as a complete defense to Hoopes' claims.

Analysis

When juries and judges make difficult decisions in a single trial, the fact findings need to be consistent. Here, the equitable defenses involved proving that Hoopes remained silent for years despite knowing that others believed the parking was shared. The defense applies, if proven, whether Hoopes correctly interpreted the lease or not. So there was no inconsistency.

This opinion appears in the November 14, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 16840.

OTHER CASES OF INTEREST

Interference With A Co-Worker's Work Could Lead A Trier Of Fact To Find It Was Motivated By The Same Discriminatory Intent As Prior Discriminatory Remarks

Dominguez v. Washington Mutual Bank (Cal. Ct. of App., 2d Dist.), filed November 21, 2008, published November 25, 2008

Yoko Dominguez sued Washington Mutual Bank and one of its employees Javier Gutierrez for job discrimination and retaliatory termination after she was fired. She alleged discrimination based on sexual orientation.

The bank and its employee moved for summary judgment and summary adjudication of issues. They presented evidence that Dominguez was fired for poor performance, and specifically, for repeatedly being late for work.

Dominguez opposed the motion. She presented evidence that the employee had taunted her about her sexual orientation. She also presented evidence that after complaining to a superior, the

particular employee engaged in a practice of making her job more difficult.

The trial court granted the motion and Dominguez appealed.

The appellate court reversed. It held that there were triable issues of fact relative to the firing.

The court found evidence of a hostile work environment. It stated:

In order to prove discrimination under FEHA, Dominguez must show, among other things, that she was subjected to conduct that was so severe and pervasive that it created a hostile work environment. Relevant to this inquiry are: the nature of the unwelcome acts; their frequency; the total number of days when the conduct occurred; and the context in which that conduct occurred. This requires the use of common sense and an appropriate sensitivity to social context to determine whether a reasonable person in the plaintiff's position would have found the conduct severely hostile or abusive.

It then found that there was evidence that the employee's offensive remarks were abusive and hostile. It stated that after the offensive remarks stopped, they were "replaced by what appears to have been a daily or near-daily campaign of interference with Dominguez's work that a trier of fact could find was motivated by the same discriminatory intent."

The court rejected the bank's assertion that it did not have notice of the conduct. There was evidence that Dominguez reported the conduct to her superiors.

Although there was also evidence that the bank fired Dominguez because of her repeated tardiness, the court found that a trier of fact could find that such reasoning was an excuse. The court was influenced by the fact that Dominguez's tardiness did not bother the bank until it fired her. Additionally, the court found that evidence justifying the tardiness could be relevant.

Although the court reversed as to the bank, it held that the bank was entitled to a summary judgment on Dominguez's claims for punitive damages. At the trial court level, the bank asserted punitive damages could not be awarded because there was no

evidence the people to whom Dominguez complained about the harassment were managing agents. At the appellate level, Dominguez did not address the issue. The court held that she waived the issue and that the bank was entitled to summary judgment on the punitive damage claim.

The court also held that the individual employee could not be liable for retaliation: “retaliation claims are proper against an employer only, not against individual employees.”

This opinion appears in the November 25, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 17340.

A Name-Brand Drug Manufacturer Could Be Liable To One Who Uses A Generic Version Even Though The Generic Manufacturer Is Not Liable

Conte v. Wyeth, Inc.
(Cal. Ct. of App., 1st Dist.), filed November 7, 2008,
published November 10, 2008

Elizabeth Conte developed a serious and irreversible neurological condition. She alleged her condition was due to her long-term consumption of a particular generic prescription drug. She sued the manufacturer of both the name-brand drug and the generic version she used. She alleged that the warnings provided by the manufacturers failed to adequately warn of known dangers resulting from its long-term use.

The trial court granted summary judgment in favor of the manufacturers. It granted summary judgment in favor of Wyeth, Inc., the name-brand manufacturer on two grounds: (1) Conte could not show that she or her physician relied upon warnings or product labeling Wyeth disseminated; and (2) a name-brand pharmaceutical manufacturer owes no duty to individuals who take only generic versions. The trial court granted summary judgment in favor of three generic manufacturers on grounds of federal preemption and Conte’s lack of reliance on their warnings or product labeling.

The Court of Appeal reversed. It held that the common law duty to use due care owed by a name-brand prescription drug manufacturer when providing product warnings extends not only to

consumers of its own product, but also to those whose doctors foreseeably rely on the name-brand manufacturer’s product information when prescribing generic versions of the medication.

The court held that Conte showed a material factual dispute as to whether her doctor relied on Wyeth’s product information, and that as such Wyeth was not entitled to a summary judgment. It also held that she was unable to show her doctor relied on any information supplied by the generic manufacturer defendants.

This opinion appears in the November 10, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 16707.

A Person Who Decides Against Paying For A Business’s Services or Products Does Not Have Standing To Sue For Discriminatory Practices

Surrey v. Truebeginnings
(Cal. Ct. of App., 4th Dist.), filed November 18, 2008,
published November 19, 2008

Steven Surrey visited Truebeginnings’ website with the intention of subscribing to its online matchmaking service. However, he discovered that certain of its services were free to female subscribers, but not to male subscribers. As a result of this discovery, Surrey declined to subscribe and instead sued for discrimination.

The trial court granted summary judgment in favor of Truebeginnings. It ruled that since Surrey had not actually subscribed, he did not have standing to sue.

The Court of Appeal affirmed.

In the first case on the topic in California, the court adopted a “bright-line” rule that a person must tender the purchase price for a business’s services or products in order to have standing to sue it for alleged discriminatory practices relating to those services or products.

This opinion appears in the November 19, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 17060.

An Interim Victory In A Prior Action Precludes Liability For Malicious Prosecution

Paiva v. Nichols

(Cal. Ct. of App., 6th Dist.), filed November 26, 2008, published December 1, 2008

In an action for malicious prosecution, an essential element is the absence of probable cause for bringing a prior action. (*Sheldon Appel Co. v. Albert & Olier, 47 Cal.3d 863 (1989)*). One way that a defendant can show it had probable cause (and thereby defeat the claim for malicious prosecution) is by showing an interim victory in the underlying case. For example, if the court in the underlying case granted a preliminary injunction in favor of the malicious prosecution defendant (the plaintiff in the prior case), that would establish probable cause even if the malicious prosecution defendant ultimately lost the prior case. (*Fleishman v. Superior Court, 102 Cal.App.4th 350 (2002)*).

In this case, the court considered whether the defendants' failure to perfect their preliminary injunction by posting an undertaking precludes their assertion that they had probable cause to bring the prior case. It held that even if the defendants failed to perfect their preliminary injunction by posting an undertaking, that does not negate the prior order granting the preliminary injunction. As such, it does not negate the existence of an interim victory or negate probable cause.

This opinion appears in the December 1, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 17546.

An Appeal Bond Is Based On The Lump Sum Present Value Of A Judgment

Leung v. Verdugo Hills Hospital

(Cal. Ct. of App., 2d Dist.), filed November 13, 2008, published November 17, 2008

The jury in a medical malpractice case returned a verdict against Verdugo Hills Hospital and one of its doctors. The jury awarded damages of \$78,375 for past medical costs, and \$250,000 for noneconomic damages. It awarded \$82,782,000 for future medical care, and fixed the present value at \$14 million. It awarded

\$13.3 million for loss of future earnings, with a present value of \$1,154,000.

At the hospital's request, the court, pursuant to Code of Civil Procedure section 667.7, issued a periodic payments judgment. According to the judgment, the hospital was required to make an initial payment, as well as monthly payments.

The hospital appealed. The hospital sought to stay execution on the judgment by posting an appeal bond. It also disagreed with the trial court as to the amount of the bond.

The hospital argued that the bond only had to be one and one-half the amount presently due under the judgment, not one and one-half the total amount of the judgment.

The Court of Appeal rejected the hospital's position. It held that the lump sum present value of the judgment against the Hospital is the "amount of the judgment" for the purpose of calculating the undertaking required to stay the judgment. The fact that the monthly payments were not yet due was irrelevant.

This opinion appears in the November 17, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 16896.

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