

Key Decisions

JUNE 2010

Welcome to the June 2010 edition of Key Decisions, Berger Kahn's monthly e-newsletter summarizing the most important California and federal court decisions.

CONTENTS

Barnett v. First National Insurance Co. of America

- 4 A Statutory Offer To Compromise Made Jointly To Married Plaintiffs Is Valid

Barragan v. County of Los Angeles

- 10 A Claimant's Disability Can Establish Excusable Neglect

Boeken v. Philip Morris USA, Inc.

- 13 After Suing For Loss Of Consortium Caused By An Injury, A Plaintiff Cannot Then Sue For Wrongful Death Due To That Injury

Chino Commercial Bank, N.A. v. Peters

- 11 Customer Has The Burden Of Showing That A Bank Negligently Issued Payment

Chude v. Jack in the Box, Inc.

- 2 An Uninsured Driver Burned By Hot Coffee Cannot Recover Noneconomic Damages

Huveserian v. Catalina Scuba Luv, Inc.

- 7 Release Language In A Scuba Rental Agreement Did Not Preclude A Lawsuit

Laclette v. Galindo

- 8 Triable Issue As To Whether An Attorney's Representation Of A Client Had Ended, Precluded Summary Judgment Based On A Subsequent Claim Against Their Attorney

Ladd v. Warner Bros. Entertainment, Inc.

- 12 The Implied Covenant Of Good Faith And Fair Dealing Applied To The Allocation Of License Fees For The Sale Of Packages Of Movies

Lockton v. O'Rourke

- 17 Omitting Facts From An Amended Complaint Does Not Make Earlier Admissions Vanish

Martinez v. Ford Motor Co.

- 18 A Defendant Cannot Take Advantage Of California's Generous Discovery Rules And Then Move To Dismiss For Inconvenient Forum

Ron Burns Construction Company, Inc. v. Moore

- 14 Reliance On Opposing Counsel's Extension Agreement Justifies Late Filed Motion

Simpson Strong-Tie Co., Inc. v. Gore

- 12 An Attorney's Advertisement That There May Be Claims Against A Potential Defendant Is Protected Speech Under The Anti-SLAPP Statute

State Compensation Insurance Fund v. Superior Court

- 15 Filing An Amended Complaint Makes A Summary Judgment Motion That Is Directed Toward A Prior Version Moot

Tarleson v. Broadway Foreclosure Investments, LLC

- 10 A Judgment Debtor Was Entitled To Claim A Homestead Exemption

Whitmire v. Ingersoll-Rand Company

- 15 A Litigant Cannot Create A Triable Issue Of Material Fact By Contradicting Its Prior Discovery Responses

Key Decisions is published as a service to our clients and friends. If you are not already a subscriber to this publication and wish to be, please send an email to keydecisions@bergerkahn.com and we will be happy to include you in the distribution of future newsletters.

An Uninsured Driver Burned By Hot Coffee Cannot Recover Noneconomic Damages

Chude v. Jack in the Box, Inc.

(*Cal. Ct. of App., 2d Dist.*), published June 1, 2010

Key Facts

Teckla Chude drove to a Jack in the Box restaurant in her own car. Arriving at the drive-thru menu board, Chude stopped her car and placed an order for a breakfast sandwich and a cup of hot coffee. She then drove into the drive-thru lane and pulled up to the drive-thru window. Chude remained seated in the driver's seat of her car, in her seatbelt, with the engine running, the transmission in "drive," and her foot on the brake pedal. After Chude paid for her order, the Jack in the Box employee handed her the food and the cup of coffee. Chude took the coffee from the employee and brought it inside her car. The cup dropped into her lap leaving the lid in her hands. Coffee apparently pooled on the seat below her. Chude's car rolled forward and so she put the transmission in "park." However, she could not open the car door to unbuckle her seatbelt because the car was too close to a wall, with the result that Chude spent two to three minutes "trying to get [her] butt off . . . the" seat and out of the pooled coffee. Chude suffered second degree burns and skin discoloration to her buttock and thigh. Her buttock injuries prevented her from working, sitting, or driving, and so she missed two weeks of school and received an incomplete, and missed an opportunity for an internship.

At the time of the incident, Chude did not have liability insurance.

Chude sued Jack in the Box alleging negligence. She sought both economic and non-economic damages. Jack in the Box answered the complaint and asserted various affirmative defenses. One of these was that Civil Code § 3333.4 precluded Chude from recovering non-economic damages against Jack in the Box because she was injured while operating her motor vehicle, which was not insured.

Jack in the Box moved for summary adjudication based on section 3333.4.

The trial court granted Jack in the Box's motion.

Holding & Reasoning

The Court of Appeals affirmed. It noted: "Section 3333.4 "prohibits uninsured motorists . . . from collecting noneconomic damages in any action arising out of the operation or use of a motor vehicle." And, it explained that:

Section 3333.4 was enacted through passage of Proposition 213 in the November 5, 1996 General Election. Denominated and publicized as the Personal Responsibility Act of 1996, Proposition 213 sought to restrict the ability of uninsured motorists, convicted drunk drivers and convicted felons to sue for losses suffered in accidents.

Section 3333.4 existed, in large measure, to force drivers to comply with the law that required them to maintain liability insurance so that if they negligently injured someone while using a motor vehicle, the victim would have a source of recovery. The consequence of being selfish, i.e., not having insurance was that when an uninsured driver was injured by the negligence of another, the uninsured driver could not recover for pain and suffering.

The court ruled that Chude "was clearly operating the vehicle as well as using it." She was sitting in her car at the drive-thru window with the motor running, the transmission engaged, and her foot on the brake.

The court rejected Chude's argument that that the negligent act which caused her injury had no relationship to her use of a motor vehicle and that as a result, section 3333.4 should not preclude her from recovering noneconomic damages. The court noted *Harris v. Lammers*, 84 Cal.App.4th 1072 (2000), where the plaintiff was injured while standing in a drugstore parking lot behind her uninsured vehicle and handing out balloons to her children inside, but could not recover noneconomic damages.

The court also rejected Chude's argument that the "accident" was the Jack in the Box employee's negligent act of failing to secure the coffee cup's lid properly and that while it took place while she was inside a vehicle, it was not "because of" the vehicle. The court noted that "but for the vehicle, there would not have been an accident" because Jack in the Box would not have served her in the drive-thru lane. And, it said:

We cannot dissociate Chude's injuries from the fact that they occurred in the vehicle. She was sitting in her car and so the spilled coffee pooled in the seat below her. Escape proved difficult because she was strapped in by her seatbelt. She tried for two to three minutes to lift herself off the seat and out of the scalding coffee. She was compelled to put the car in park in an attempt to extricate herself from the seatbelt and car. Because the hot liquid pooled in the seat below Chude, the injuries she suffered were to her buttocks and thigh. In sum, Chude's specific injuries were caused and exacerbated by the vehicle itself. Had she been standing at the take-out counter, presumably the coffee might have spilled on her shoe, but she would not have been forced to sit in a puddle of hot liquid as she tried to extricate herself from a seatbelt.

The court declined to consider what would have happened had Chude reached out her window to take the cup and spilled coffee on her outstretched arm.

Analysis

This court's opinion emphasizes the role of Chude's own vehicle in the incident. The application of section 3333.4 becomes less likely as the vehicle plays a smaller part in causing the injury.

A Statutory Offer To Compromise Made Jointly To Married Plaintiffs Is Valid

Barnett v. First National Insurance Co. of America
(Cal. Ct. of App., 2d Dist.), published May 27, 2010

Key Facts

Richard and Paula Barnett owned a house in Encino. The house was located in the foothills of the Santa Monica Mountains.

In January and February of 2005, severe rainstorms hit Los Angeles County. As a result of these, the Barnetts sustained significant damage from water intrusion. Although some of the water had entered at the roof flashings, most entered from “down low.”

The Barnetts had property insurance under a policy issued by First National Insurance Company. The policy provided in pertinent part:

We do not cover loss caused directly or indirectly by any of the following excluded perils. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss:

* * *

6. a. wear and tear, marring, scratching, deterioration;
b. inherent defect, mechanical breakdown;
c. smog, rust, corrosion, electrolysis, mold, fungus, wet or dry rot;

* * *

9. Water Damage, meaning:
 - a. flood, surface water, waves, tidal water, tsunami, overflow of a body of water, or spray from any of these, whether or not driven by wind;
 - b. water below the surface of the ground, including water which exerts pressure on, or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool, hot tub or spa, including their filtration and circulation systems, or any other structure;

* * *

16. Weather that contributes in any way with a cause or event excluded in this section to produce a loss. However, any ensuing loss not excluded is covered.

17. Planning, Construction or Maintenance, meaning faulty, inadequate or defective:
 - a. planning, zoning, development, surveying, siting;
 - b. design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;
 - c. materials used in repair, construction, renovation or remodeling; or
 - d. maintenance; [¶] of property whether on or off the insured location by any person or organization. However, any ensuing loss not excluded is covered.

Although First National paid for some of the damage, namely that caused by wind driven rain that entered at the roof flashing, it denied coverage for the remainder of the damage. It asserted that this was surface water and was excluded. The Barnetts sued First National.

Before the trial, First National made a statutory offer to compromise pursuant to Code of Civil Procedure, section 998. The offer was for \$100,000 “in favor of plaintiffs Richard Barnett and Paula Barnett jointly, with each side to bear their/its own costs.” The Barnetts did not accept this offer.

At trial, the court instructed the jury concerning coverage and predominant cause. It did not, however, instruct the jury as to its interpretation of the various policy provisions.

The jury returned a verdict in favor of First National. Since First National achieved a result that was better than its offer, it submitted a cost bill in the sum of \$82,361.52.

The Barnetts challenged the claim for expert witness fees on the ground section 998 (c)(1), did not apply where a single offer was made to two plaintiffs. The trial court declined to award First National its expert witness fees.

The Barnetts appealed the resulting judgment. First National appealed the order disallowing its expert witness fees.

Holding & Reasoning

The Court of Appeal affirmed.

In the unpublished portion of its opinion, the court analyzed coverage. It rejected the Barnetts’ argument that the trial court failed to instruct the jury as to the meaning of the various policy provisions, and in particular the “weather” exclusion and its exception for “ensuing loss.” It held that First National could exclude losses where the predominant cause of the loss was certain kinds of weather conditions but not others. It also held that there was no “ensuing loss.”

In addition, the court held that when all of the possible causes of loss were excluded, the jury was not required to identify a single one as the predominant cause of the loss. It said that doing so would be a useless exercise as it did not matter which was the predominant one. Only if one or more possible causes was a covered cause did it matter which was the predominant one.

In the published part, the court’s opinion addressed First National’s statutory offer to compromise.

The Legislature, to encourage litigants to make viable offers to compromise and to carefully evaluate them, imposed a penalty on a litigant who rejected an offer and then did not obtain a better result at trial. The penalty was that the rejecting party, even if the prevailing party, could not recover certain costs of suit.

The court explained that ordinarily, when a joint offer to compromise is made to two plaintiffs, it does not trigger the “penalty” provisions of section 998. This is because when there is such an offer, it requires both plaintiffs accept it. One or the other alone cannot accept even if it wants to do so. And such an offer requires both plaintiffs to “second guess” it. And, if accepted, it requires them to allocate it between themselves. The Legislature did not intend to penalize plaintiffs under such circumstances when the offer placed such a burden on them and they could not accept it.

However, the court concluded that when the joint plaintiffs are husband and wife and are suing over the same claim, the considerations ordinarily applicable to joint offers do not apply. In such a case, because of the community property laws, there is no need to allocate the settlement proceeds.

The court noted that when it rendered its decision in *Weinberg v. Safeco Ins. Co. of America*, 114 Cal.App.4th 1075 (2004), it did not consider the fact that because of the community property laws, there is no need to allocate the settlement proceeds when the plaintiffs are husband and wife. As such, it held that it would no longer follow the *Weinberg* case.

Although the court held that a joint offer to plaintiffs who were husband and wife was not “invalid” for purposes of an award of costs, the Barnetts were entitled to reject what appeared to be an invalid offer without fear that they could thereafter be liable for expert fees and other costs under section 998. As such, it held that First National was not entitled to recover its experts’ fees from the Barnetts.

Analysis

Since the court did not publish its discussion of the coverage issue, its decision is not binding precedent for any other case.

As far as statutory offers to compromise, the court’s ruling represents a significant change in the law. Prior to the court’s decision, a defendant that wanted to be done with a case in which it was being sued by a husband and a wife over the same basic claim found itself in an awkward position. If it wanted to be able use the “penalty” portion of section 998 to force the husband and wife to give serious consideration to its offer, it could not make a joint offer. However, making separate offers was not a viable answer.

If the defendant made separate offers in which it allocated part of the total amount it was willing to pay to each of the spouses, it ran the risk that one spouse would accept and take the money while the other declined. In such a situation, the defendant was not buying “peace.” Moreover, the spouses were getting some money without having to give up the possibility of getting even more later.

With this ruling, when the plaintiffs are spouses and receive an offer by a defendant who wants to end the litigation and associated costs, they must carefully consider the offer in light of their possible recovery or face a possible award of costs.

Release Language In A Scuba Rental Agreement Did Not Preclude A Lawsuit

Huverserian v. Catalina Scuba Luv, Inc.

(Cal. Ct. of App., 2d Dist.), published May 27, 2010

Key Facts

Raffi Huverserian and his son, Ari Huverserian, rented scuba diving equipment from Catalina Scuba Luv. Raffi Huverserian executed an equipment rental agreement which included language purporting to release Catalina Scuba Luv from any claims or liabilities. It stated in bold, underlined print: “Equipment rental agreement, liability release and assumption of risk of scuba & snorkel gear for boat dives or multiple day rentals.” Following this is text in unemphasized type, it said: “This agreement is entered into between Catalina Scuba Luv and rentor and is a release of the rentor[']s rights to sue for injuries or deaths resulting from the rental and/or use of this equipment. Rentor expressly assumes all risks of skin and/or scuba diving related in any way to the rental and/or use of this equipment. Rentor hereby acknowledges receipt of the equipment is in good working condition and that he/she has examined the equipment to ensure that it is free from defects, including checking both the quality and quantity of air in any scuba tank(s) rented. Rentor also understands that Catalina Scuba Luv and its employees, owners, officers, or agents shall not be held liable or responsible in any way for any injury, death or other damages to rentor or his/her family, heirs, or assigns which may occur as a result of the rental and/or use of the equipment, or as a result of product defect, or the negligence of any party, including the released parties, whether passive or active. I have carefully read and understand the above agreement. By signing this agreement, I exempt and release Catalina Scuba Luv and all related entities as defined above, from all liability or responsibility whatsoever for personal injury, property damage, or wrongful death as a result of renting and/or using the equipment, however caused resulting but not limited to product liability or the negligence of the released parties. Rentor agrees that he/she will be charged for damaged or missing gear.”

The Huverserians did not rent the equipment for boat dives or multiple days.

The Huverserians took the dive equipment to Casino Point Dive Park in Avalon and entered the water. Raffi Huverserian ran out of air at a depth of 60 feet. He made a controlled ascent by breathing with his son, but went into cardiac arrest on the beach. Although he was resuscitated in Avalon, he died the next day at UCLA Medical Center.

Raffi Huverserian’s wife, son, and daughter sued Catalina Scuba Luv for wrongful death. It answered the complaint and filed a cross-complaint for indemnity, contribution, and equitable relief against Oceanic Worldwide.

Catalina Scuba Luv filed a motion for summary judgment. It asserted that because of the release language in the rental agreement, it had a complete defense and that as a result, it was entitled to a judgment as a matter of law.

The plaintiffs opposed the motion on the ground that the exculpatory provision did not cover the circumstances of this action.

The trial court granted the motion for summary judgment.

Holding & Reasoning

The Court of Appeals reversed.

It found that by virtue of the boldface, underlined language the exculpatory language that followed was limited to persons who rented equipment for a boat dive or multiple day rentals. Since the Huverserians did not fall into either category, the language did not apply to them. As a result, the language did not serve as a defense and Catalina Scuba Luv was not entitled to a summary judgment.

Analysis

This case reveals the close scrutiny liability releases will receive in situations involving death or serious injury. From the perspective of a business that wants to limit its liability, careful drafting is essential.

Triable Issue As To Whether An Attorney's Representation Of A Client Had Ended, Precluded Summary Judgment Based On Statute Of Limitations

Laclette v. Galindo

(Cal. Ct. of App., 2d Dist.), published May 18, 2010

Key Facts

Amarillys Laclette was employed by Elite Properties dba First Class Realty. Laclette was Natalie Ramirez's real estate agent in the purchase of certain real property. After the purchase, Ramirez sued Laclette and Elite for breach of contract and fraud, contending they assured her there were no significant problems with the property and that she did not need an inspection, causing Ramirez to forego an inspection of the property as a condition of purchase. Attorney Alexis Galindo and his law firm defended Laclette and Elite in that lawsuit.

A jury found Laclette liable for breach of fiduciary duties and awarded Ramirez compensatory damages. On January 25, 2005, before entering the punitive damages phase of the trial, the parties reached a settlement under which Laclette was to make payments to Ramirez.

On February 9, 2007, Laclette sued Galindo and his firm for legal malpractice and breach of fiduciary duty. Laclette alleged Galindo had a conflict of interest in representing both Elite and Laclette in the Ramirez case. At the time Laclette filed suit, Laclette was still making payments to Ramirez.

Galindo filed a motion for summary judgment. He asserted that Laclette's action was barred by the statute of limitations. Galindo asserted that based on Laclette's own allegations, she discovered facts constituting Galindo's alleged wrongful acts or omissions no later than January 25, 2005, and sustained actual injury by that same date, when she became obligated to pay Ramirez the sum of \$175,000. Thus, Galindo argued, based on Laclette's own allegations, Laclette had information or circumstances sufficient to put a reasonable person on inquiry, no later than January 25, 2005.

Galindo also argued his representation of Laclette ended no later than January 25, 2005, in that Galindo had no contact with Laclette after that date. Galindo argued that even though the trial court retained jurisdiction over the final settlement that did not form a basis for tolling the statute of limitations.

Laclette opposed the motion. She argued that even though she had no contact with Galindo after January 25, 2005, because the court had retained jurisdiction over the settlement, the case against her was not over and because it was not over and because Galindo had not been discharged, he was effectively still her attorney. She argued that as a result, the statute of limitations was tolled.

The trial court agreed with Galindo and granted a summary judgment.

Holding & Reasoning

The Court of Appeals reversed.

According to Code of Civil Procedure section 340.6, the limitations period for an action against an attorney is tolled while the attorney continues to represent the client regarding the same specific subject matter even if the client is aware of the attorney's negligence. However, the Code of Civil Procedure does not expressly state a standard to determine when an attorney's representation of a client regarding a specific subject matter continues or when the representation ends.

Based on this, the court found that there was a triable issue of material fact as to whether Galindo's representation continued or ended with the settlement. It held that just because Galindo showed there had been no contact between Galindo and Laclette, that did not mean the representation of Laclette had been fulfilled and that all agreed tasks for which Laclette retained Galindo had been completed. Moreover, because the court had retained jurisdiction over the case, it was still open and Galindo had not formally withdrawn, been discharged or otherwise told Laclette his work was over.

Analysis

The court's decision here does not amount to a ruling that Galindo was still acting as Laclette's attorney or that the statute of limitations had not run out. That determination would be made by a trier of fact that had been presented with evidence of what Laclette might have been thinking or specific evidence Galindo had advised Laclette his work was over.

OTHER CASES OF INTEREST

A Judgment Debtor Was Entitled To Claim A Homestead Exemption

Tarleson v. Broadway Foreclosure Investments, LLC
(Cal. Ct. of App., 1st Dist.), published May 18, 2010

Broadway Foreclosure Investments, LLC bought a home owned by Larnise Tarleson at a foreclosure sale. Tarleson responded by filing an action to set aside the sale and quiet title. The court set aside the sale and quieted title, but did so on condition that Tarleson return the money that Broadway had paid to buy the house.

Tarleson failed to make the payment and Broadway responded by seeking to satisfy its judgment through the sale of Tarleson's home. The trial court permitted the sale subject to a \$150,000 homestead exemption in Tarleson's favor.

Broadway appealed the ruling and argued that: (1) Tarleson was not eligible for the homestead exemption, (2) Tarleson was unjustly enriched when the court recognized her right to claim the exemption, and (3) if an exemption was allowable, it should have been limited to \$50,000.

The Court of Appeals affirmed. It concluded that even though there had been some peculiar conveyances of the home, the trial court correctly determined that Tarleson was eligible to claim the exemption. It did so because the home was Tarleson's principal residence prior to attachment of Broadway's judgment lien and continuously thereafter.

The court rejected Broadway's argument that Tarleson should be estopped from claiming the homestead exemption because otherwise Tarleson would be unjustly enriched. In making this argument, Broadway argued that because Tarleson reaped the benefits of owning the property without paying for them, she should not benefit from the exemption. However, the court reasoned that were it to disallow Tarleson's claim of exemption on a theory of unjust enrichment, it would frustrate the application of statutory law relative to the homestead exemption.

The court also concluded that the court trial properly set the amount of Tarleson's homestead exemption at \$150,000. It did so because Tarleson presented evidence, through a declaration showing she was over 55 years of age and had less than \$15,000 of annual income. The court rejected Broadway's argument that Tarleson's declaration was biased and self-serving. It noted that there was no contradictory evidence in the record.

A Claimant's Disability Can Establish Excusable Neglect

Barragan v. County of Los Angeles
(Cal. Ct. of App., 2d Dist.), published May 27, 2010

Veronica Barragan was rendered quadriplegic in a single-car rollover accident. She was hospitalized for three months following the accident, and virtually bedridden for the next seven months.

Barragan eventually consulted an attorney, who determined that she may have a claim against the County of Los Angeles for dangerous condition of the road where the accident occurred.

Under the Tort Claims Act (Gov. Code, § 905, et seq.), an individual claiming personal injury must file a claim with the relevant governmental entity within six months. Because Barragan missed that deadline, she filed an application for leave to present a late claim. The county denied her application.

She then filed a petition for relief from the Tort Claims Act's filing requirements with the trial court. She argued she should be given relief because of: (1) excusable neglect; and (2) physical and mental incapacity.

The trial court denied the petition. As to the second ground, for Barragan's petition, the trial court concluded that while Barragan was disabled, she had not proved that her disability was the cause of her failure to file a timely claim. As to the first ground, the trial court concluded that the case law established a strict rule that neglect cannot be excusable if the injured party made no effort to obtain counsel within six months. However, it indicated that other than this, it would have found Barragan's neglect was excusable.

Barragan appealed.

The Court of Appeals reversed. It concluded that the rule requiring an injured party attempt to obtain counsel within six months in order to establish excusable neglect was not absolute, and could be overcome by evidence of disability.

Because there was such evidence and because the trial court applied the wrong rule, Barragan was entitled to relief from the Tort Claims Act's filing requirements.

Customer Has The Burden Of Showing That A Bank Negligently Issued Payment

Chino Commercial Bank, N.A. v. Peters
(*Cal. Ct. of App., 4th Dist.*), published May 27, 2010

Brian D. Peters was the victim of a "Nigerian-style" email scam. He agreed that his corporation would receive money supposedly owed to a gentleman in Malaysia and would then pay that money out as the gentleman directed in exchange for a 15 percent fee. His corporation received checks totaling \$808,988.90 and deposited them in an account with the Chino Commercial Bank. It then had the bank pay out \$468,000. Unfortunately, all of the checks that had been deposited bounced.

The bank filed this action to recover the resulting overdraft from Peters. It promptly obtained a right to attach order against Peters.

Peters appealed from the right to attach order. He argued that the Bank had the burden of proving that it did not act negligently and that it failed to carry this burden.

The Court of Appeals affirmed. It held that, under the California Uniform Commercial Code, Peters had the burden of proving that the Bank did act negligently, and that he failed to do so. Thus, the right to attach order was proper.

The Implied Covenant Of Good Faith And Fair Dealing Applied To The Allocation Of License Fees For The Sale Of Packages Of Movies

Ladd v. Warner Bros. Entertainment, Inc.

(Cal. Ct. of App., 2d Dist.), published May 26, 2010

Warner Bros. Entertainment licensed packages of movies to broadcast television and cable networks. Movies in which actor Alan Ladd, Jr. had rights were included in those packages. These were: Blade Runner, Body Heat, Night Shift, Tequila Sunrise, Outland, Chariots of Fire, and the Police Academy franchise, consisting of the original and sequels 2, 3, 4, 5 and 6. Other movies in the packages were not as popular or valuable. In a practice known as “straight-lining,” Warner allocated the same share of the licensing fee to every movie in a package, regardless of its value to the licensee.

Ladd sued Warner. Ladd asserted that by allocating the same portion of the licensing fee to every movie in a package without regard to the true value of each movie, Warner deprived Ladd of a fair allocation of the licensing fees to which Ladd was entitled as a profit participant.

A jury found in Ladd’s favor.

In the ensuing appeal, the Court of Appeal held that under the implied covenant of good faith and fair dealing, Warner was bound to act in good faith toward profit participants. As such, even though there was no express agreement on how license fees were to be allocated when packages of films were sold, Warner had an obligation to “fairly and accurately allocate license fees to each of the films based on their comparative value as part of a package.” Therefore, the court found the record supported the jury’s determination that Warner’s straight-lining method of allocating licensing fees to profit participants breached the implied covenant of good faith and fair dealing.

An Attorney’s Advertisement That There May Be Claims Against A Potential Defendant Is Protected Speech Under the Anti-SLAPP Statute

Simpson Strong-Tie Co. Inc. v. Gore

(Cal. Sup. Ct.), published May 18, 2010

Simpson Strong-Tie Company, Inc. sued Pierce Gore and his law firm, The Gore Law Firm, for defamation and related claims arising from a newspaper advertisement placed by Gore a few weeks earlier. The advertisement, which was directed to owners of wood decks constructed after January 1, 2004, advised readers that “you may have certain legal rights and be entitled to monetary compensation, and repair or replacement of your deck” if the deck was built with galvanized screws manufactured by Simpson or other specified entities, and invited those persons to contact Gore “if you would like an attorney to investigate whether you have a potential claim.”

Gore moved the trial court to have the entire complaint stricken under the anti-SLAPP statute, embodied in Code of Civil Procedure section 425.16. The Legislature enacted section 425.16 to curb abusive litigation that was designed stifle public participation in relevant issues. The problem that the Legislature saw was that targets of public protest would often file lawsuits whose only goal was to intimidate the protestors with the specter of having to defend themselves against meritless claims. Thus, the Legislature created a fast, effective means of disposing of such lawsuits and of punishing those who brought them.

The trial court found that Gore's advertisement was protected speech and that Simpson could not show a probability of prevailing. It thus granted Gore's motion.

The Court of Appeal affirmed.

The California Supreme Court granted review to consider the whether Simpson's complaint was exempt from the anti-SLAPP statute because of subsection (c) to section 425.17. Subsection (c) exempted from the reach of the anti-SLAPP statute causes of action arising from representations of fact about the speaker's or a competitor's "business operations, goods, or services . . . made for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services" or "made in the course of delivering the person's goods or services."

Simpson asserted that Gore's advertisement was "commercial speech" within subsection (c) and was not protected.

The Supreme Court disagreed and affirmed the dismissal of Simpson's action.

After Suing For Loss Of Consortium Caused By An Injury, A Plaintiff Cannot Then Sue For Wrongful Death Due To That Injury

Boeken v. Philip Morris USA, Inc.

(*Cal. Sup. Ct.*), published May 14, 2010

Richard Boeken began smoking cigarettes in 1957. In 1999, doctors diagnosed him with lung cancer. In March 2000, Richard sued cigarette manufacturer Philip Morris USA, Inc., asserting that it had wrongfully caused his cancer. A jury awarded Richard \$5,539,127 in compensatory damages and \$3 billion in punitive damages. After Philip Morris filed a motion for a new trial, the trial court reduced the punitive damages to \$100 million. Both parties appealed. In January 2002, while that appeal was pending, Richard died from his cancer. The Court of Appeal ultimately reduced the punitive damages award to \$50 million, but it otherwise affirmed the trial court's judgment.

In October 2000, while Richard was still alive, Judy Boeken filed a separate common law action against Philip Morris for loss of consortium, seeking compensation for the loss of her husband's companionship and affection. She alleged that Philip Morris' wrongful conduct had caused her husband's lung cancer and that as a result of the cancer he was "unable to perform the necessary duties as a spouse" and would "not be able to perform such work, services, and duties in the future." She further asserted that she had been "permanently deprived" of her husband's consortium.

About four months after filing that action, Judy dismissed it with prejudice. Under California law, a dismissal with prejudice is the equivalent of a final judgment on the merits.

After Richard's death, Judy filed a wrongful death action under Code of Civil Procedure section 377.60, against Philip Morris. In it, Judy sought compensation for the loss of her husband's companionship and affection. This time, she alleged that she had suffered "loss of love, companionship, comfort, affection, society, solace, and moral support."

Philip Morris demurred, arguing that Judy's action for wrongful death was barred by the doctrine of res judicata because her previous loss of consortium action against Philip Morris had involved the same primary right. The trial court sustained the demurrer without leave to amend, and Judy appealed.

The Court of Appeal affirmed.

The California Supreme Court also affirmed. It reasoned that

The doctrine of res judicata prohibits a second suit between the same parties on the same cause of action. In this context, the term “cause of action” is defined in terms of a primary right and a breach of the corresponding duty; the primary right and the breach together constitute the cause of action.

Thus, it concluded that Judy’s wrongful death action involved the same primary right and breach as her earlier loss of consortium action, and that therefore the doctrine of res judicata bars it.

Reliance On Opposing Counsel’s Extension Agreement Justifies Late Filed Motion

Ron Burns Construction Company, Inc. v. Moore
(*Cal. Ct. of App., 4th Dist.*), published May 13, 2010

In 2003, Ron Burns Construction Company sued Moore Electric, Inc., David R. Moore, and Gail Le Moore. In 2005, the trial court entered judgment in favor of Burns and against Moore. Moore appealed. In May 2007, the Court of Appeals affirmed the judgment and awarded Burns costs on appeal. On September 5, 2007, the Court of Appeals issued its remittitur.

Under California Rules of Court, rule 3.1702(c)(1), a motion for attorney fees on appeal must be filed within 40 days after the clerk sends notice of issuance of the remittitur. Accordingly, the original deadline for filing such a motion was October 15, 2007.

After the Court of Appeals affirmed, the parties attempted to reach a settlement which would render the motion for attorney fees moot.

The parties agreed to multiple extensions of Burns’ time to file a motion for attorney fees on appeal, while they were trying to settle. However, they did not comply with the requirements for such an extension.

When negotiations broke down, Burns filed a motion for attorney fees on appeal. Moore did not deny granting several extensions of time; nevertheless, argued that the motion was time-barred. The trial court agreed, and it therefore denied the motion for attorney fees.

Burns filed a motion for relief from default under Code of Civil Procedure section 473. The trial court denied this motion. It gave two reasons: (1) The failure to file a written stipulation in a timely manner was inexcusable neglect; and (2) the motion for relief from default under section 473 was “an improper attempt to circumvent” the requirements applicable to a motion for reconsideration under Code of Civil Procedure section 1008 (section 1008).

The Court of Appeal reversed.

First, it held Burns’ reliance on his adversary’s agreement was excusable neglect, as a matter of law even though his counsel was at fault for failing to file a timely written stipulation. It said:

Admittedly, the law frowns on an attorney’s neglect to comply with a clear rule. However, it positively glowers at another attorney’s exploitation of such neglect as an excuse to break his word.

Second, it held that the motion for relief did not have to satisfy the requirements for a motion for reconsideration. It reasoned that the more persuasive and more analogous cases have held that “[i]f the requirements for relief under section 473 are met, the viability of relief under section 473 cannot be defeated because the requirements for relief under section 1008 may not also have been met.”

Filing An Amended Complaint Makes A Summary Judgment Motion That Is Directed Toward A Prior Version Moot

State Compensation Insurance Fund v. Superior Court
(Cal. Ct. of App., 1st Dist.), published May 24, 2010

State Compensation Insurance Fund sued Onvoi Business Solutions, Inc. to collect unpaid premiums the Fund claimed Onvoi owed for workers’ compensation insurance policies. The Fund’s original complaint included a cause of action for fraud.

Onvoi moved for summary adjudication of the fraud claim. It argued that the three-year limitations period in Code of Civil Procedure section 338, subdivision (d) barred the fraud claim.

Before the hearing, the Fund filed a first amended complaint. It elaborated on the allegations of fraud. It alleged Onvoi was engaged in an ongoing conspiracy to defraud the Fund by concealing information that the Fund needed to calculate the correct premium. Onvoi did not file an amended motion in response to the first amended complaint, and it did not re-notice its original motion.

In opposing Onvoi’s motion, the Fund argued the motion had been mooted by the filing of the first amended complaint.

The superior court granted Onvoi’s motion. It ruled that there was undisputed evidence that the Fund was on notice of the alleged fraud more than three years before it sued Onvoi.

The Fund sought an order from the Court of Appeal directing the superior court to enter a different order. It argued the superior court erred by granting a motion for summary adjudication directed to a superseded pleading.

The Court of Appeals agreed with the Fund. It ruled that once the Fund filed an amended complaint, Onvoi was obligated to address what was in the amended complaint.

A Litigant Cannot Create A Triable Issue Of Material Fact By Contradicting Its Prior Discovery Responses

Whitmire v. Ingersoll-Rand Company
(Cal. Ct. of App., 2d Dist.), published May 24, 2010

Jimmie Whitmire and his heirs sued various defendants after he contracted mesothelioma as a result of exposure to asbestos. Whitmire alleged he was exposed to asbestos while working for Pacific Gas & Electric (“PG&E”). Among the defendants was Bechtel Construction Company. Bechtel was a construction company that did construction work at various PG&E facilities.

Whitmire worked for PG&E at three locations. These were the Contra Costa Powerhouse in Antioch (1961-1966 and 1969-1985), the Pittsburg Powerhouse in Pittsburg (1966-1969), and the Moss Landing Powerhouse in Moss Landing (1985-1993). In the complaint plaintiffs alleged that he had been exposed to asbestos as a result of Bechtel’s conduct at all three sites.

Bechtel served “all-facts” interrogatories on plaintiffs. In these, Bechtel sought the details of Whitmire’s alleged exposure to asbestos specifically attributable to Bechtel. In their responses, plaintiffs set forth two theories of Whitmire’s exposure. First, they asserted that Bechtel was an “outside contractor” that performed modification and overhaul work to PG&E’s Moss Landing power plant boilers, work that included the removal or “ripout” of asbestos-containing insulation from the boilers and resulted in Whitmire inhaling heavy dust. Second, they asserted that Bechtel exposed Whitmire to asbestos as the general contractor responsible for the construction of the Contra Costa Powerhouse.

Bechtel moved for summary judgment. It asserted that plaintiffs could not prove an essential element of their case, namely that Whitmire was ever exposed to asbestos attributable to Bechtel, much less that Bechtel-attributable asbestos was a substantial factor in the causation of his alleged injury.

In opposition, plaintiffs argued that Bechtel had failed to meet its initial moving burden of demonstrating the absence of a triable issue of material fact and, in the alternative, that there was a triable issue as to whether Whitmire was exposed to asbestos as a result of Bechtel’s conduct. In support of this alternative argument, plaintiffs submitted evidence they asserted created a need for a jury trial. This included Whitmire’s declaration in which he stated he was exposed to asbestos attributable to Bechtel while he worked at the Contra Costa plant.

At the hearing on Bechtel’s motion, the trial court’s tentative ruling was to grant summary judgment. The court proposed to disregard Whitmire’s declaration alleging exposure at the Contra Costa plant because it was “inconsistent to prior discovery responses where he declared he had been exposed at the Moss Landing facility.” The trial court granted Bechtel’s motion although the judgment does not reflect the specific reasoning.

The Court of Appeal affirmed. It did so largely because it would not allow the plaintiffs to create a triable issue of material fact by contradicting their own discovery responses given before Bechtel filed its motion for summary judgment.

Although the law permits, in certain circumstances, a party to create a triable issue by contradicting prior discovery responses, the party must make a good showing as to why it should be permitted to do so. For example, it might show it was mistaken in its prior responses or that it did not understand the questions asked of it. However, the court found that “a ‘careful examination in light of the entire record’ here yields no explanation for the discrepancy and no basis for concluding that the interrogatory responses were obviously mistaken.”

In view of the plaintiffs’ interrogatory answers that identified only the Moss Landing facility as the place where Whitmire was exposed to asbestos attributable to Bechtel and the absence of actual evidence that that asbestos was actually attributable to Bechtel, and in view of the court’s rejection of Whitmire’s declaration, there was no basis on which Bechtel could be held liable for Whitmire’s injuries. There was no need for a trial against Bechtel and Bechtel was entitled to a summary judgment.

A Plaintiff Cannot Cure A Defect In The Complaint, Which Shows That He Has No Viable Cause Of Action, By Omitting It In An Amended Complaint

Lockton v. O'Rourke

(Cal. Ct. of App., 2d Dist.), published May 24, 2010

The trial court dismissed David Lockton's legal malpractice action because the allegations of his complaint and various amended complaints showed that it was barred by the statute of limitations. In particular, they showed that Lockton was aware of the basis for his malpractice action and that he was represented by new counsel early enough so that legal malpractice lawsuit was time barred. However, the final version of the amended complaint did not contain the allegations that showed that his legal malpractice action was time barred.

David Lockton sued various law firms and attorneys for legal malpractice. The trial court sustained demurrers without leave to amend on the ground the action was barred by the statute of limitations.

In the ensuing appeal, Lockton argued the trial court improperly based its ruling on facts that did not appear on the face of the fifth amended complaint and that as a result, the ruling was contrary to the purposes underlying the continuous representation tolling rule. That rule provided that the statute of limitations was tolled on a legal malpractice claim when the attorneys against whom the claim was made continued to represent the aggrieved client.

The Court of Appeal affirmed. It held that the trial court's ruling was based on facts alleged in previous verified versions of Lockton's complaint. This, said the court, "was proper under established pleading doctrine."

The court explained that the allegations of the fifth amended complaint were sufficient to establish that the various defendants represented Lockton's interests in the subject matter of the underlying action only until new counsel was retained to pursue those claims in a separate state court action. Since Lockton learned that his underlying state court claims were barred more than one year before he filed the final action, the trial court did not err in sustaining the demurrers without leave to amend on ground. Thus, the result was not contrary to the purposes underlying the continuous representation tolling rule.

A Defendant Cannot Take Advantage Of California's Generous Discovery Rules And Then Move To Dismiss For Inconvenient Forum

Martinez v. Ford Motor Co.

(Cal. Ct. of App., 2d Dist.), published May 28, 2010

Jose Martinez and Jesus Manuel Ibarra Campos were injured and Andres Esparza Hernandez and Georgina Isabel Ibarra Campos de Esparza were killed when the Ford Explorer Martinez was driving with the others as passengers crashed as the result of an alleged defect in the vehicle's tires. The crash occurred in Mexico, where all of the victims lived.

The victims or their heirs filed a lawsuit in the Superior Court of California for the County of San Diego. They sued Ford as the manufacturer, along with the dealership in San Diego where the vehicle was purchased, the manufacturer of the tires and the actual seller of the tires, which was also located in San Diego. The dealership that sold the car and the seller of the tires were defaulted.

At the tire manufacturer's request, the case was transferred to the County of Los Angeles to become part of the coordinated proceedings pending in Los Angeles relative to "Ford rollovers."

After the defendants conducted extensive discovery, based on the California Code of Civil Procedure, Ford moved to dismiss. It asserted that the case should have been brought in Mexico and that a trial in California would be inconvenient.

The trial court granted Ford's motion.

The Court of Appeals reversed. It held that it would be inequitable to allow Ford and the tire manufacturer to take advantage of California's generous discovery rules and to then complain that litigating in California was unfairly inconvenient. In reaching this conclusion, the court rejected Ford's assertion that until it was able to conduct the discovery, it did not have a basis for making a motion to dismiss for inconvenient forum.

Contacts

Lance A. LaBelle
Orange County
llabelle@bergerkahn.com
(949) 474-1880

David B. Ezra
Orange County
dezra@bergerkahn.com
(949) 474-1880

Roberta T. Winston
San Diego
rwinston@bergerkahn.com
(858) 547-0075

Ann K. Johnston
S.F. Bay Area
ajohnston@bergerkahn.com
(415) 899-1770

Orange County

2 Park Plaza
Suite 650
Irvine, CA
92614
(949) 474-1880
(949) 474-7265 (f)

San Diego

10085 Carroll Canyon
Rd.
Suite 210
San Diego, CA
92131
(858) 547-0075
(858) 547-0175 (f)

S.F. Bay Area

7200 Redwood
Boulevard
Suite 325
Novato, CA
94945
(415) 899-1770
(415) 899-1769 (f)

ADVERTISING MATERIALS. This may be considered advertising under the rules of some states. *Key Decisions* is published as a service to our clients and friends. The cases summarized may or may not remain valid legal precedent. The summaries themselves are not intended to constitute advertising, solicitation or legal advice. Berger Kahn does not guarantee the outcome of any particular legal matter. Application of these cases to any specific matter may require legal advice. Permission to reprint any portion of *Key Decisions* must be obtained by contacting Carla Levenson at clevenson@bergerkahn.com.
©2010 Berger Kahn, A Law Corporation. All rights reserved.