

Key Decisions

May, 2008

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A Construction Defect Complaint That Makes No Mention Of "Drywall" Does Not Trigger A Duty To Defend The General Contractor Under The Drywall Company's General Liability Policy

Monticello Insurance Company v. Essex Insurance Company

(Cal. Ct. of App., 2d Dist.), filed April 28, 2008, published May 20, 2008

KEY FACTS

Blumenfeld Construction Company was a general contractor. It built house for the Goldmans. Dana Drywall was the drywall subcontractor on the project.

Monticello Insurance Company provided liability insurance for Blumenfeld. Essex Insurance Company provided liability insurance for Dana. The Essex policy had an additional insured endorsement which named Blumenfeld as an additional insured to the extent its liability arose from Dana's acts or omissions and the policy covered Dana's liability for those.

The Goldmans sued Blumenfeld. Monticello provided a defense for Blumenfeld.

During the pendency of the Goldmans' action, Blumenfeld filed a cross-complaint for indemnity against Dana. Essex defended Dana.

Blumenfeld tendered the defense of the Goldman action to Essex. Essex declined the tender.

Monticello paid a settlement on Blumenfeld's behalf. Essex paid a settlement on Dana's behalf. Monticello then sued Essex for contribution.

Monticello moved for summary judgment. Monticello contended Essex had a duty to defend Blumenfeld because the underlying complaint and defect list contained allegations of consequential damage caused by the drywall work, including damage to the paint,

custom interior finishes and stucco of the Goldman residence.

Monticello asserted that Essex had a duty to contribute to the defense because the underlying complaint contained allegations that defective drywall damaged the paint, custom interior finishes and stucco at the residence.

Essex argued that Monticello had the burden to establish Blumenfeld's status as an insured under the Essex policy. In order to sustain that burden, Monticello needed to establish that Blumenfeld's liability in the underlying action rested on Dana Drywall's negligence, and that the damages sought against Blumenfeld for Dana Drywall's negligence were covered under the Essex policy.

Because the cost to repair the named insured's defective work is not covered under the Essex policy, Monticello had the burden to show the damages against Blumenfeld for Dana Drywall's negligence related to something other than Dana Drywall's own work, i.e., damage to other property as a result of Dana Drywall's allegedly defective work.

The court determined that nothing in the complaint alleged such damage.

Notwithstanding Monticello's assertions, there was no allegation of resultant property damage. Rather, at best, there were references to defectively installed drywall and the work and expense required to remedy that problem. In the absence of resultant property damage, Monticello was unable to sustain its burden to show Blumenfeld was entitled to a defense as an additional insured under the Essex policy.

The trial court denied Monticello's motion. Monticello concluded that if it could not meet its burden in moving for summary judgment, it could not meet its burden at trial. As a result, it stipulated to a judgment in favor of Essex so it could pursue an appeal.

HOLDING & REASONING

The Court of Appeal affirmed.

The court first held that the stipulated judgment did not preclude Monticello from pursuing an appeal. It then held that because the stipulated judgment arose from the denial of Monticello's motion, the standard of review was *de novo* rather than substantial evidence (which is normally the standard when there is a judgment after a trial).

Turning to the merits of the case, the court discussed the duty to defend and held that "Monticello is entitled to contribution from Essex for defense costs if it

establishes a potential for coverage for Blumenfeld under Essex's policy."

The court held that Monticello had not shown a potential for coverage. It explained:

Monticello cites the allegations in the underlying complaint by the Goldmans that there was "excessive cracking in the interior and exterior of the Goldman property" (para. 18) and that there was "premature failure of painted surfaces" and "water damage to structure" (para. 19). Monticello's reliance on the underlying complaint is unavailing.

The word "drywall" is not even mentioned in the underlying complaint. There was no allegation therein that the "excessive cracking" was in any way related to the work of Dana Drywall or to any drywall installation. "Cracking" and "drywall" are not synonymous. Essex was not required to speculate that the "excessive cracking" might be attributed to the work of Dana Drywall.

• • •

As for the allegations in paragraph 19 of the complaint relating to "premature failure of painted surfaces" and "water damage to structure," the complaint did not allege those damages were in any way related to drywall work. Rather, the complaint alleged those damages were the result of various defects, including improper grading, inadequate drainage, and excessive cracking in the interior and exterior of the Goldman property.

The court also held that Monticello's reliance on the Goldmans' defect list to show a potential for an award of covered damages, was unavailing. It did so because there was no evidence Monticello or Blumenfeld provided the list to Essex at any time before the conclusion of the Goldman action — at any point where Essex could have undertaken Blumenfeld's defense.

ANALYSIS

It is unclear what would have happened had Monticello or Blumenfeld provided Essex with the defect list at a point in time when Essex might have undertaken Blumenfeld's defense. This case was between two insurers. Is the duty to defend a little narrower when another insurer is seeking contribution, as opposed to situations where a policyholder requests a defense?

This is another case that seems to turn on the tension between the rule that an insurer must conclusively eliminate any conceivable potential for coverage before it can safely decline the defense and the rule that a potential for coverage cannot be created by speculation.

In the context of construction defects cases, defendants should expeditiously seek a defect list from the plaintiff and tender it to any insurance carrier that issued a policy under which it might be an additional insured. This case may also impact on the way construction defense plaintiffs prepare their complaints.

This opinion appears in the May 20, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 7259.

A Police Officer Injured While Keeping Physically Fit Was Entitled To Workers' Compensation Benefits

Tomlin v. WCAB

(Cal. Ct. of App., 2d Dist.), filed May 16, 2008, published May 19, 2008

KEY FACTS

Dave Tomlin is a member of the City of Beverly Hills Police Department. He is assigned to the Special Response Team, referred to as SWAT (Special Weapons and Tactics Unit). Officer Tomlin sustained an injury while on vacation, training for an upcoming departmental physical fitness test.

A workers' compensation administrative law judge denied Tomlin workers' compensation benefits. The judge concluded that Tomlin's belief that the department expected him to jog during his vacation was "not objectively reasonable." The Workers' Compensation Appeals Board denied his petition for reconsideration.

HOLDING & REASONING

The Court of Appeal granted Tomlin's petition for a writ of review, and annulled the WCAB's decision. It held that Tomlin's physical training injury, even though occurring while on vacation, is compensable as a workers' compensation benefit.

As to the argument that Tomlin was off duty and on vacation, the court stated: "It should make little difference whether Tomlin was running while off duty after his shift in Beverly Hills or running off duty while on vacation in Jackson, Wyoming. In either case, he was

engaged in training and maintaining fitness for an imminent, employer-mandated physical fitness test."

As to the facts that Tomlin apparently enjoyed running, ran to keep fit prior to joining the department and normally ran when on vacation, the court stated:

These facts are not conclusive. The issue is not whether Officer Tomlin enjoyed running, or whether Officer Tomlin would be covered by workers' compensation if he had been injured while running solely for pleasure. The issue in this case is whether Officer Tomlin's running at the time he was injured was a reasonable expectancy of his employment.

After finding that continual training was a reasonable expectation of his employment, the court found that he was entitled to workers' compensation benefits.

ANALYSIS

The dissenting opinion demonstrates the significance of the majority opinion to employers:

The management of the City of Beverly Hills (the City) will undoubtedly be stunned to discover that it is responsible under the workers' compensation law for an injury suffered by an off-duty police officer engaging in his routine recreational activity of running during a personal vacation in the dead of winter in the State of Wyoming, one thousand miles from the officer's place of employment.

This opinion appears in the May 19, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 7195.

The Victim Of A Third-Party Assault Could Not Recover Against The Owner Of The Property Where It Occurred

Ericson v. Federal Express Corporation

(Cal. Ct. of App., 4th Dist.), filed May 14, 2008, published May 15, 2008

KEY FACTS

Mark Ericson worked for Coast Trucking, an independent contractor that provided trucking services to FedEx at its terminal on Olson Drive in San Diego. Ericson's shift was from approximately 3:00 p.m. to

approximately 5:00 a.m. One morning, as Ericson's shift ended and was in the process of parking his work vehicle and retrieving his personal vehicle, an unknown third party attacked and injured him.

Ericson sued FedEx for premises liability. FedEx moved for summary judgment, arguing it owed Ericson no duty to prevent the assault because there were no prior assaults on the property, and alternatively, any breach of duty was not the legal cause of his injuries. FedEx produced evidence that while there were incidents on its premises, none were even remotely like the assault on Ericson.

In opposition to the motion, Ericson argued that even if no "heightened foreseeability" existed because of the lack of prior violent incidents, at a minimum, FedEx had a duty to take simple steps to protect him from third party criminal conduct. He argued the assault was reasonably foreseeable because FedEx required him to park in an isolated area, had notice of transients living in the nearby canyons, ignored requests from Coast to control the parking lot, breached its own policies requiring parking lot checks, and did not include his designated parking space in its security inspections. Ericson argued his assault could have been prevented by, for instance, FedEx allowing him to park on the east or west side of the FedEx building where it allowed its own employees to park. Additionally, he argued FedEx increased the risk of harm to him by negligently undertaking security at the facility.

The trial court granted the motion.

HOLDING & REASONING

The Court of Appeal affirmed.

The court stated the applicable legal standard as:

To prevail on an action in negligence, plaintiff must show that defendants owed him or her a legal duty, that they breached the duty, and that the breach was a proximate or legal cause of his or her injuries.

It then explained:

Ordinarily, there is no duty to protect others from third party criminal activity. Courts, however, "have recognized exceptions to the general no-duty-to-protect rule," one of which is the "special relationship" doctrine. "Courts have found such a special relationship in cases involving the relationship between

business proprietors such as shopping centers, restaurants, and bars, and their tenants, patrons, or invitees." Based on the special relationship, "commercial proprietors are required to 'maintain land in their possession and control in a reasonably safe condition' and this general duty includes taking 'reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures.'"

The court emphasized the importance of foreseeability and then addressed the cases dealing with a property owner's liability for the acts of third-parties.

Citing *Ann M. v. Pacific Plaza Shopping Center*, 6 Cal.4th 666, 680 (1993), the court noted that: "neither the evidence regarding the presence of transients nor the evidence of the statistical crime rate of the surrounding area is of a type sufficient to satisfy this burden." It pointed out that under *Anna M.*, while certain circumstances may require an owner to hire security guards to satisfy the duty of care, that measure will almost always be considered a significant burden, given the financial and social costs, and the uncertainty that patrols will deter crime.

In the absence of prior similar crimes, a property owner will rarely be required to hire security guards to fulfill its duty of care.

In *Sharon P. v. Arman, Ltd.*, 21 Cal.4th 1181, 1191 (1999), the court rejected the notion that underground parking garages are inherently dangerous and thus require security guards.

FedEx was, therefore, not subject to liability for inadequate security.

The court also rejected the argument that the security measures FedEx had taken were negligently taken and gave Ericson a false sense of security for which FedEx could be held liable.

ANALYSIS

Cases involving a duty to provide security may be trending in favor of defendants and against imposition of liability. But the general rules still leave room to argue in many cases.

This opinion appears in the May 15, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 6947.

**The Statute Of Limitations On A
Misappropriation Of Trade Secret Claim
Against A Third Party Infringer Starts To
Run When The Plaintiff First Suspects The
Infringer Knows Of The Infringement**

***Cypress Semiconductor Corporation v.
Superior Court***

(Cal. Ct. of App., 6th Dist.), filed May 30, 2008,
published June 3, 2008

KEY FACTS

Silvaco Data Systems develops and licenses electronic design automation software. Customers use such software to design their own products. Silvaco maintained the source code as a trade secret.

Beginning in late 1998, a former Silvaco employee working for Circuit Systems, Inc. (CSI), incorporated certain Silvaco trade secrets into a CSI's product. Silvaco suspected the misappropriation in 2000 and sued both the employee and CSI at that time. Silvaco did not directly notify or take any action against CSI customers who had licensed CSI's program for use in designing their own products.

On August 18, 2003, Silvaco and CSI entered into a settlement agreement and stipulated judgment. The judgment included the express finding that Silvaco's trade secrets were incorporated into the CSI program. The judgment required CSI to cease licensing the program, to inform customers who already purchased it that the software contained Silvaco trade secrets, and to urge its customers to terminate their use of the CSI program.

Cypress Semiconductor Corp., one of the CSI customers, learned of the judgment in late August 2003.

After judgment was entered against CSI, Silvaco directly notified CSI customers that the CSI program contained misappropriated trade secrets. Silvaco first contacted Cypress in September 2003 and demanded that Cypress cease its use of the trade secrets.

Cypress continued to use the CSI program, so Silvaco sued Cypress in May 2004.

Cypress raised the statute of limitations as a defense. It asserted that Silvaco should have sued CSI customers when it first suspected that the customers had acquired its trade secrets. Silvaco responded that it was an undisputed fact that it had not known of CSI's misappropriation until August, 2003, and pointed out

that the statute of limitations does not begin to run until all the elements of the cause of action are present and that one of the elements of misappropriation is the defendant's knowledge of the wrongfulness of its conduct. The trial court agreed with Silvaco, concluding, as a matter of law, that the cause of action for misappropriation against Cypress "could not have 'accrued'" until August 2003 and that Silvaco filed suit against Cypress well within the three-year period of limitations.

HOLDING & REASONING

The Court of Appeal disagreed and issued a writ of mandate directing the trial court to consider Cypress' statute of limitations defense. It concluded that with respect to the element of knowledge, the statute of limitations on a cause of action for misappropriation begins to run when the plaintiff has any reason to suspect that the third party knows or reasonably should know that the information is a trade secret. The third party's actual state of mind does not affect the running of the statute.

The court rejected Silvaco's argument that the statute of limitations did not start to run against third parties until they had actual knowledge that they were using misappropriated trade secrets, i.e., a judgment against the original wrongdoer. However, it also rejected Cypress' argument that the statute of limitations began to run when the original misappropriation occurred. Instead, it reasoned that a person is liable for misappropriation of trade secret information only if the person knows or has reason to know that he or she is not in rightful possession of the information. The statute of limitations began to run only when Silvaco had reason to know Cypress should have known it was using misappropriated trade secrets.

ANALYSIS

This decision creates a fact intensive approach to the limitations issue. Rejecting both proposed "bright line rules," the rule falls in the middle of two extremes.

This opinion appears in the June 3, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 7940.

Landlord Had A Duty To Inspect A Tenant's Premises While In The Process Of Evicting Tenant, But Only After Obtaining A Judgment For Possession Of The Premises

Stone v. Center Trust Retail Properties, Inc.

(Cal. Ct. of App., 2d Dist.), filed May 30, 2008, published June 2, 2008 (Opinion following rehearing)

KEY FACTS

Stone slipped on water on a temporary wooden dance floor at the Gumboz Creole Cajun restaurant. She sustained serious injuries.

The restaurant was located in a mall owned by Center Trust Retail Properties. Prior to the incident in which Stone was injured, Center Trust initiated eviction proceedings against the restaurant and obtained a writ of possession, but had not obtained possession.

As a result of her injury, Stone sued Center Trust. A jury awarded her significant damages.

Center Trust appealed. Center Trust argued that as the landlord, its duty was to make sure the premises were safe at the beginning of the tenancy and to repair hazards it learned about later.

HOLDING & REASONING

Following a rehearing, the Court of Appeal held that in general a landlord's duty is to make sure the premises were safe at the beginning of the tenancy and to repair hazards it learned about later. It recognized that anything more would require the landlord to interfere with the tenant's tenancy.

However, it also recognized that when the landlord is in the process of evicting the tenant, there is already a problem with the tenancy. And, it noted that a defaulting tenant is likely to be neglecting the property and that this could endanger the public. Based on this, the court held that Center Trust had a duty to inspect the property once it obtained a right to possession.

Although the court imposed a duty to inspect, it ruled:

At the time of trial, the parties and the court lacked guidance from case law about the duty to inspect. Accordingly, the parties did not appropriately shape their trial presentations to help the jury pin

down the timing of Center Trust's duty to inspect, the nature of any inspections, and whether Center Trust would have discovered the leak during those inspections. We cannot tell from the record at what point from the restaurant's default in August until Stone's accident in January that the jury concluded Center Trust's duty attached. Consequently, the jury might have concluded Center Trust should have inspected the property shortly after the restaurant's August default, instead of, as we hold, the entry of the judgment of possession in December. We therefore remand for retrial of the restaurant's and Center Trust's liability only.

The court ruled that once the issue of liability was retried, the trial court would apply the damages as found in the first trial.

In addition to the foregoing, the court rejected Center Trust's argument that the evidence did not support the jury's award of economic damages, to wit, Stone's medical bills and past and future lost wages. In this regard, Center Trust argued that there was insufficient evidence that the medical bills were reasonably incurred as Stone only presented evidence as to the amount of her medical bills.

The court reasoned that apart from the medical bills, the jury could have found the economic damages it did just based on Stone's past and future lost wages. If that had been the case, then the award was supported by substantial evidence. Since the record did not show that the jury had not based its damages award on Stone's past and future lost wages, there was no error.

ANALYSIS

This case imposes a new duty on landlords. It requires landlords who are in the process of evicting a tenant to inspect the premises.

This opinion appears in the June 2, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 7871.

**California Does Not Recognize
"Outside" Reverse Piercing Of The
Corporate Veil**

Postal Instant Press, Inc. v. Kaswa

**(Cal. Ct. of App., 4th Dist.), filed May 20, 2008,
published May 22, 2008**

KEY FACTS

Postal Instant Press obtained the judgment against Shahid Rangoonwala based on claims arising out of a franchise agreement. Rangoonwala was a former shareholder of Kaswa Corporation. However, it was not a party to the franchise agreement.

Postal Instant Press sought to satisfy the judgment against Rangoonwala by reaching Kaswa's assets. The trial court granted Postal Instant Press' motion to amend the judgment to add Kaswa as a defendant/judgment debtor. Kaswa appealed.

HOLDING & REASONING

Under the standard alter ego doctrine, in appropriate circumstances the corporate form may be disregarded and the corporate veil pierced so that an individual shareholder may be held personally liable for claims against the corporation. Some courts have recognized a variant of the alter ego doctrine, called third party or "outside" reverse piercing of the corporate veil, by which the corporate veil is pierced to permit a third party creditor to reach corporate assets to satisfy claims against an individual shareholder. However, California courts have never considered whether corporate assets can be reached to satisfy an individual's liability.

Based on its analysis of authorities nationwide, the Court of Appeal reversed and held a third party creditor may not pierce the corporate veil to reach corporate assets to satisfy a shareholder's personal liability.

ANALYSIS

A shareholder's shares in a corporation are an asset that can be reached to satisfy a judgment against the shareholder. Such shares are little different from any other asset of the shareholder.

If the shares give the shareholder sufficient control to force a dissolution and winding up of the corporation, those could be used to liquidate the corporation and satisfy the shareholder's liability. If they could be sold, the proceeds of a sale can be used to satisfy the shareholder's liability. However other than in this manner, it does not appear that the corporation's assets

can be reached to satisfy the shareholder's liability.

This opinion appears in the May 22, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 4702.

OTHER CASES OF INTEREST

**An Appraisal Award Made In Connection
With An Insurance Claim Establishes Only
The Amount Of The Loss And Not The
Insurer's Liability For Payment**

***Devonwood Condominium Owners
Association v. Farmers Insurance
Exchange***

**(Cal. Ct. of App., 1st Dist.), filed May 19, 2008,
published May 22, 2008**

Farmers Insurance Exchange provided property insurance to the Devonwood Condominium Owners Association. The Association suffered a loss and made a claim. A dispute arose over the amount of the loss, so the parties submitted the dispute to appraisal in accordance with the policy terms. Those terms were derived from the California Insurance Code's standard form fire insurance policy.

The appraisers made a determination of the amount of the loss, but did not address any issues relative to the coverage provided under the policy and did not take into account the policy deductible.

The Association petitioned the trial court to confirm the appraisal award and to enter it as a judgment. Farmers opposed this.

The trial court granted the petition, confirmed the award and entered a judgment.

The Court of Appeals vacated the judgment and remanded the matter to the trial court. It found the judgment violates Code of Civil Procedure section 1287.4 because it did not conform to the appraisal award upon which it was based.

The court explained the appraisal process as follows:

The function of appraisers is to determine the amount of damage resulting to various items submitted for their consideration. It is certainly not their function to resolve questions of coverage and interpret

provisions of the policy.

Based on this, the court reasoned that the appraisal award brought finality only to the amount of the loss, not the amount Farmers owed. A judgment establishing what Farmers owed was void as being beyond that which the law authorized.

This opinion appears in the May 22, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 7415.

**When An Employee Is Terminated
Because The Employer Has Lost
Confidence In Him, He Cannot Sue For
Discrimination Or Wrongful Termination**

Arteaga v. Brink's Incorporated

**(Cal. Ct. of App., 2d Dist.), filed May 28, 2008,
published May 29, 2008**

Carlos Arteaga worked for Brink's Incorporated, an armored transportation company.

Arteaga was the subject of an internal investigation into missing cash. Arteaga knew he could be terminated depending on the outcome.

During the investigation, Arteaga notified Brink's for the first time that he suffered from pain and numbness in his arms, fingers, shoulders, and feet. He stated he had experienced those symptoms for a year or two. He expressed his belief that they were work related and filed claims for workers' compensation.

A few days after he filed his claim, Brink's terminated him based on the results of the investigation.

Arteaga filed suit, alleging a claim under the Fair Employment and Housing Act for physical disability discrimination. He also alleged a claim for wrongful termination of employment in violation of public policy, contending Brinks terminated him in retaliation for filing workers' compensation claims.

The trial court granted summary judgment for Brink's.

The Court of Appeal affirmed, holding that the disability discrimination claim failed because Arteaga's symptoms did not constitute a "physical disability" under the FEHA. Specifically, Arteaga's pain and numbness did not make it difficult for him to achieve the life activity of working.

Additionally, Brink's had a legitimate, nondiscriminatory reason for the termination — loss of confidence in the employee — as confirmed by the investigation.

Similarly, the wrongful termination claim, alleging retaliation, failed because Brink's lack of confidence in Arteaga constituted a legitimate, nonretaliatory reason for the termination.

The court rejected Arteaga's argument that there was a triable issue of material fact because Brinks terminated him within days of his disclosing his symptoms and filing his workers' compensation claims. The court reasoned that although temporal proximity, by itself, may be sufficient to establish a prima facie case of discrimination or retaliation, it does not create a triable issue of material fact as to pretext once the employer offered evidence of a legitimate, nonprohibited reason for its action. This is especially so where the employer raised questions about the employee's performance before he engaged in protected activity, and based its subsequent discharge on those performance issues.

This opinion appears in the May 29, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 7758.

**The Plaintiff Could Not Disavow A
Settlement After Accepting Payment**

Myerchin v. Family Benefits, Inc.

**(Cal. Ct. of App., 4th Dist.), filed April 22,
2008, published and modified May 22, 2008**

Joseph Myerchin sued Family Benefits, Inc. for breach of contract. Shortly after filing his complaint, Myerchin entered into a written settlement agreement with Family Benefits. However, after accepting and spending the money paid to him pursuant to the settlement, Myerchin refused to dismiss the complaint.

Family Benefits moved for summary judgment based on the settlement agreement. Myerchin opposed the motion, arguing the settlement agreement was unenforceable, because Family Benefits' attorney had continued to negotiate it with him directly, even after becoming aware he had retained counsel. The trial court rejected Myerchin's assertion the evidence of direct negotiation, even if true, rendered the agreement unenforceable, and granted summary judgment.

The Court of Appeal affirmed. A key fact in the court's

analysis was that even though Myerchin sought to disavow the settlement, he did not return the settlement proceeds. The court noted that

Civil Code section 1691 provides that a party wishing to rescind a contract must “promptly upon discovering the facts which entitle him to rescind,” do two things to effect that rescission: “give notice of rescission to the party as to whom he rescinds; and restore to the other party everything of value which he has received from him under the contract or offer to restore the same upon condition that the other party do likewise, unless the latter is unable or positively refuses to do so.”

Since Myerchin did neither, he was not entitled to rescind the settlement agreement.

The court rejected Myerchin’s argument that he did not need to return the settlement proceeds as they could be used as an offset against his expected judgment against Family Benefits. It reasoned that Family Benefits paid the settlement to buy its peace and to avoid the cost of litigation and would not be getting the benefit of the bargain.

The court also rejected Myerchin’s argument that the agreement was void as Family Benefits’ attorney continued to negotiate with him even after he engaged counsel of his own. The court noted that the rule prohibiting an attorney to communicate with a represented opponent was designed to prevent interference in with the attorney-client relationship. However, here, the direct dealings predated Myerchin’s engagement of counsel. Further, there was no evidence of undue influence. The public policy favoring settlements was a significant consideration in balancing the equities.

This opinion appears in the May 22, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 7408.

The Court Has Jurisdiction To Adjust A Court Reporter’s Charges

Serrano v. Stefan Merli Plastering Co.

(Cal. Ct. of App., 2d Dist.), filed May 7, 2008, published May 8, 2008

The Court of Appeal held that the trial court has jurisdiction over a court reporting firm which reports on

a deposition and can set the fee which the firm charges to a non-noticing party if that party contests the reasonableness of the charges.

The court recited the statutes relating to the taking of depositions. Among other things it noted that Code of Civil Procedure, Section 2025.320, subdivision (b) states:

Services and products offered or provided by the deposition officer or the entity providing the services of the deposition officer to any party or to any party’s attorney or third party who is financing all or part of the action shall be offered to all parties or their attorneys attending the deposition. No service or product may be offered or provided by the deposition officer or by the entity providing the services of the deposition officer to any party or any party’s attorney or third party who is financing all or part of the action unless the service or product is offered or provided to all parties or their attorneys attending the deposition. All services and products offered or provided shall be made available at the same time to all parties or their attorneys.

Further Section 2025.570 states:

(a) Notwithstanding subdivision (b) of Section 2025.320, unless the court issues an order to the contrary, a copy of the transcript of the deposition testimony made by, or at the direction of, any party, or an audio or video recording of the deposition testimony, if still in the possession of the deposition officer, shall be made available by the deposition officer to any person requesting a copy, on payment of a reasonable charge set by the deposition officer.

Based on the statutory scheme and Section 128, which gives the court the power “to control in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter pertaining thereto,” the court held a trial court can consider the reasonableness of a reporter’s charges and adjust them if they are unreasonable.

The court’s holding is sound public policy as evidenced by its observation that

The party noticing the deposition can select the deposition reporter based on cost and other considerations, and can bargain for lower rates. The non-noticing party, on the other hand, has no control over the selection of the deposition reporter and is in no position to bargain for lower rates. This arrangement provides no meaningful protection to the non-noticing party against excessive rates. Indeed, price competition may encourage a deposition officer to charge the noticing party less than the actual cost of transcription and other services provided to the noticing party and to shift some of that cost onto the non-noticing parties.

This opinion appears in the May 8, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 6613.

One Who Successfully Moves To Dismiss For Lack Of Jurisdiction Is The Prevailing Party When It Comes To A Claim For Attorney's Fees

Profit Concepts Management, Inc. v. Griffith

(Cal. Ct. of App., 4th Dist.), filed May 5, 2008, published May 7, 2008

Profit Concepts Management, is a California-based company. It sued Greg Griffith, a former employee for breach of contract. The lawsuit was filed in the Orange County Superior Court. The employment contract provided that in any litigation involving the contract, the prevailing party would be entitled to recover attorney fees and costs.

Griffith filed a motion to quash service for lack of personal jurisdiction. He did so based on the fact he was a resident of Oklahoma. Profit Concepts Management filed a notice of nonopposition, and the trial court granted Griffith's motion. Griffith then requested attorney fees as the prevailing party.

The trial court granted Griffith's request for attorney's fees. Profit Concepts Management appealed.

The Court of Appeal affirmed. It held that because the trial court granted the motion to quash service for lack of personal jurisdiction, Griffith was the party prevailing on the contract under Civil Code section 1717. He was

therefore entitled to recover his reasonable attorney fees and costs.

This opinion appears in the May 7, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 6555.

When The Court Of Appeal Orders The Parties To An Appeal To Mediate Their Dispute, The Parties And All Relevant Insurance Carriers Must Attend

Campagnone v. Enjoyable Pools & Spas Service & Repairs, Inc.

(Cal. Ct. of App., 3d Dist.), filed May 30, 2008, published June 2, 2008

The Court of Appeals' local rules permit it to order that a dispute be submitted to mediation under a program in which the court provides free mediation services. The local rules provide that the parties and their counsel must appear and have full settlement authority. They also provide: "If a party has potential insurance coverage applicable to any of the issues in dispute, a representative of each insurance carrier whose policy may apply also must attend all mediation sessions in person, with full settlement authority."

The court ordered the parties to the appeal to mediation. They attended, but the excess insurer for one of the defendants, which was not notified of the mediation, did not. When the matter did not settle, the plaintiff sought sanctions against the insurer for failing to attend the mediation.

The Court of Appeal held that an insurer is considered a party to the mediation and may be ordered to pay sanctions if it does not appear at the mediation with full settlement authority.

Because of statutes regarding mediation confidentiality, the only thing the court need consider or can consider is the failure to attend. That failure must be raised by a party, not the mediator.

At a minimum, the sanctions will encompass the time wasted at the mediation by virtue of a party's failure to attend with full settlement authority.

The court declined to sanction the absent insurer because it had not been given notice of the mediation. It declined to sanction the insured or its counsel as there had been no prior explicit statement that they were

responsible for giving the insurer notice of the mediation. However, the court's opinion now constitutes such notice.

This case is notable in that it may have opened a "can of worms" for the appellate court in terms of when an insurance policy "may apply." While it is unlikely insurers will disregard notices of mediations, questions will eventually arise as to whether an insurer which has denied coverage and refused to defend must attend and when another party argues that the insurer's policy "may apply."

This opinion appears in the June 2, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 7908.

**A Settlement Which Included A
Penalty For The Defendant's Failure To
Abide By Its Terms Was Unenforceable**

***Greentree Financial Group v. Execute
Sports, Inc.***

**(Cal. Ct. of App., 4th Dist.), filed May 6, 2008,
modified and published May 29, 2008**

Greentree Financial Group sued Execute Sports, Inc. for breach of contract. It sought \$45,000 for financial advisory services it provided to Execute Sports. Before trial, the parties agreed to settle the case for less than half the amount sought by the complaint. The settlement provided that Execute Sports would make installment payments. It also provided that if Execute Sports failed to make a payment, Greentree Financial Group could file a stipulation for entry of judgment, with the amount of the judgment being the entire amount sought in the complaint, as well as prejudgment interest, attorney fees, and costs.

Execute Sports failed to make the first payment, and the trial court entered judgment pursuant to the terms of the parties' stipulation for entry of judgment.

The Court of Appeal reversed and remanded. It held that the judgment constitutes an unenforceable penalty because it bears no reasonable relationship to the range of actual damages the parties could have anticipated would flow from a breach of their settlement agreement. And, it directed the trial court to enter judgment in the amount specified in the settlement agreement, plus postjudgment interest and costs.

This opinion appears in the May 29, 2008 edition of the Los Angeles Daily Journal, Daily Appellate Report, at p. 7754.

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