

FORD, WALKER, HAGGERTY & BEHAR



Law Review
February 2000

These decisions are of particular interest. Should you wish a copy of any of the decisions below, please contact Maxine Lebowitz at 562/983-2513 with the name of the case and the number.¹

Updating the Law Review

November '99 edition, p. 4: Day v. City of Fontana has been decertified and review has been granted by California's Supreme Court. Consequently, the opinion is no longer authoritative. See "Torts" below. 00 Daily Journal 1772, February 16, 2000.

Recent Cases

APPEALS

1. APPELLATE COURT CAN DIRECT ENTRY OF JUDGMENT IF EVIDENCE DOES NOT SUPPORT VERDICT: The United States Supreme Court has upheld a judgment entered by the Eighth Circuit Court of Appeals. That court had previously held that a district court's admission of certain evidence to establish a design defect was erroneous and that the remaining evidence was insufficient to support a plaintiff's verdict. The Supreme Court held that federal Rules of Civil Procedure, "Rule 50 permits an appellate court to direct the entry of judgment as a matter of law when it determines that evidence was erroneously admitted at trial and that the remaining, properly admitted, evidence is insufficient to constitute a submissible case." (Weisgram v. Marley Co. 00 Daily Journal D.A.R. 1825.) [File #93.]

2. ISSUE NOT ADDRESSED IN PRIOR LAWSUIT HAS NO PRECLUSIVE EFFECT UPON REMAND: The Second Appellate District has held that an issue raised in prior litigation, but not decided, was still open for determination in a second action. Consequently, the court concluded as follows: "where a court of first instance makes its judgment on alternative grounds and the reviewing court affirms on only one of those grounds,

¹ The information contained in this Law Review is meant to be a tool to keep abreast of recent developments in the law in the State of California. It is not intended to give legal advice. It is one interpretation of the cases outlined and is not meant to substitute for a thorough reading of the cases before citing them as precedent. It is also important that the subsequent history of the cases be checked before they are cited.

declining to consider the other, the second ground is not conclusively established.” (Butcher v. Truck Ins. Exch. 00 Daily Journal D.A.R. 1367.) [File #93.]

3. THE ONLY PURPOSE OF RULES OF COURT, RULE 3(b) IS TO EXTEND THE TIME TO APPEAL WHERE A MOTION TO VACATE THE JUDGMENT HAS BEEN FILED: The Fourth Appellate District has held that “the 60-day period within which an appeal must ordinarily be brought (Cal. Rules of Court, rule 2(a)) cannot be shortened by the provisions in rule 3(b), which pertain to time limits for filing appeals after filing” a notice of intent to move to vacate the judgment. (Maides v. Ralphs Grocery Company 00 Daily Journal D.A.R. 1443.) [File #93.]

BAD FAITH

CGL INSURERS OWED A DUTY TO DEFEND AN ADDITIONALLY INSURED GENERAL CONTRACTOR: “The primary issue presented by this appeal is whether insurers who have issued commercial general liability (CGL) policies to subcontractors, including completed operations coverage as to projects completed before their inception, owe a duty to defend the additionally insured general contractor in third party litigation asserting its vicarious liability for their acts.” The Fourth Appellate District has held that “absent language excluding such coverage in the policies, certificates and endorsements the insurers owe the general contractor a duty to defend.” (Pardee Construction Company v. Ins. Co. of the West 00 Daily Journal D.A.R. 1321.) [File #21.]

CIVIL PROCEDURE – STATE

1. ATTORNEY’S FAILURE TO FILE REQUEST FOR TRIAL DE NOVO DOES NOT ENTITLE PLAINTIFF TO RELIEF FROM ADVERSE ARBITRATION AWARD: The Second Appellate District has rejected a plaintiff’s argument that she was entitled to a trial de novo based upon Code of Civil Procedure, section 473, because her former attorney had failed to file a request for trial de novo. The Court held that section 473 was inapplicable to requests for trial de novo after arbitration. (Brown v. Williams 00 Daily Journal D.A.R. 1623.) [File #246.]

2. DEFENDANT WAS NOT ENTITLED TO HAVE HIS ACTION REINSTATED BECAUSE BOTH HE AND HIS ATTORNEY ENGAGED IN DISCOVERY MISCONDUCT: The Second Appellate District has held that defendants were not entitled to the relief generally afforded to litigants by Code of Civil Procedure, section 473, due to attorney error because the parties themselves had engaged in misconduct along with their attorney. (Lang v. Hochman 00 Daily Journal D.A.R. 1195.) [File #66B.]

3. ABSENT SUBSTITUTION OF NEW COUNSEL, ATTORNEY SHOULD NOT BE ALLOWED TO WITHDRAW AS ATTORNEY OF RECORD WHEN SUMMARY JUDGMENT IS IMMINENT: Even though it knew that the defendant was about to file a

motion for summary judgment, the trial court allowed plaintiff's attorney to withdraw as counsel of record before new counsel had been retained. Consequently, the plaintiff was unable to oppose a motion for summary judgment and was obliged to dismiss the action without prejudice in order to have any chance of eventually prevailing. Under these facts, the Second Appellate District has held that the trial court erred in denying the plaintiff's motion to vacate the dismissal. (Mossanen v. Monfared 00 Daily Journal D.A.R. 1439.) [File #67.]

COVERAGE

INSURER IS OBLIGATED TO PAY COVERAGE LIMIT FOR EACH YEAR OF EMPLOYEE'S EMBEZZLEMENT: An employer sought insurance benefits for each of the years one of its employees embezzled funds from it. The Ninth Circuit Court of Appeals concluded that the policy at issue was ambiguous with respect to the definition of "occurrence" and that the general rule in California "is that an insurer which issues three separate policies for employee dishonesty is 'liable up to its limit of liability for each policy period.'" (Karen Kane, Inc. v. Reliance Insurance Company 00 Daily Journal D.A.R. 1307.) [File #166.]

EVIDENCE

COLLATERAL SOURCE RULE APPLIES TO MEDICARE AND MEDI-CAL PAYMENTS : The Second Appellate District has reversed a summary judgment granted in favor of the defense in a medical malpractice action on the grounds that the plaintiff's decedent did, indeed, suffer cognizable damage. The trial court had erroneously held that the plaintiff could not establish the essential element of damage because the collateral source rule which would normally bar evidence of the payment of medical bills by extrinsic sources did not apply. The medical bills which the trial court held were admissible had been paid by Medi-Cal and Medicare.

The collateral source rule provides that "if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." In this case, the defense convinced the trial court that the collateral source rule did not apply because this was a medical malpractice action addressed by the MICRA legislation. MICRA modified the collateral source rule by allowing a medical malpractice defendant to introduce evidence of certain collateral source payments to show that the plaintiff's bills had been paid. If the MICRA exception applied, the Medicare and Medi-Cal payments could be introduced to negate the plaintiff's damage.

The appellate court held that the trial court erred in granting summary judgment, however, because the MICRA provision does not require a setoff for the amounts received from the collateral source. Rather, whether to allow the setoff is merely a question of fact for the trier of fact to determine, not for the trial court on summary judgment. Furthermore, the Court pointed out that Medi-Cal payments are not included in the MICRA legislation. As a result, it was wrong to conclude on summary judgment that the defense was entitled to introduce evidence of the Medi-Cal payments and that such evidence negated plaintiff's damage in full. (Hernandez v. California Hospital Medical Center 00 Daily Journal D.A.R. 1951.) [File #5.]

INSURANCE

SELF-INSURED RETENTION MAY BE PAID BY OTHER VALID AND COLLECTIBLE INSURANCE: An insurer took the position that its insured had not satisfied the \$1,000,000 self-insured retention when its insured paid \$539,905 of its own funds and \$1,000,000 paid to it by its indemnitor to settle the underlying lawsuit. The Second Appellate District held that the insured had, indeed, satisfied the \$1,000,000 self-insured retention and that it did not matter that some of the money had been paid by another insurer. (The Vons Companies, Inc. v. United States Fire Ins. Co. 00 Daily Journal D.A.R. 1561.) [File #21.]

TORTS

1. DECERTIFIED & REVIEW GRANTED: PROPOSITION 213 IS PROPERLY APPLIED RETROACTIVELY: The Fourth Appellate District has upheld a jury verdict in which plaintiff was awarded \$500,000 for economic damages, but nothing for non-economic damages due to his failure to have liability insurance on his motorcycle. The Court rejected the plaintiff's assertions that the Yoshioka decision upholding the constitutionality of Proposition 213 was analytically flawed and that Proposition 213 should not be applied retroactively. (Day v. City of Fontana 00 Daily Journal D.A.R. 11591; Decert & Rev. Gr. 2/16/00, 00 Daily Journal D.A.R. 1773.) [File #237.]

2. CORPORATE EMPLOYEES WHO ARE INVOLVED IN FILING A LAWSUIT ON BEHALF OF THEIR EMPLOYER ARE NOT AMENABLE TO A LATER SUIT FOR MALICIOUS PROSECUTION: Because corporations can act only through their employees, the Second Appellate District has held that individual corporate employees are improper defendants in a malicious prosecution action brought after the corporation lost its lawsuit against another. (Brennan v. Tremco Inc. 00 Daily Journal D.A.R. 1835.) [File #135.]

3. PROPERTY OWNER OWED NO DUTY TO INJURED TRESPASSER: "When an uninvited, nonpaying recreational user becomes injured on private land, [Civil Code] section 846 bars recovery." The Second Appellate District has held that driving an ATV is a recreational use within the meaning of section 846. (Shipman v. Boething Treeland Farms, Inc. 00 Daily Journal D.A.R. 1487.) [File #50.]

4. EVIDENCE DOES NOT SUPPORT CONCLUSION OF CONSTRUCTIVE DISCHARGE: The plaintiff, who had been employed as a deputy city attorney, sued the defendant city for constructive discharge. The United States Court of Appeals for the Northern District found that the facts "alleged were insufficient as a matter of law to support his section 1983 claims." The discussion includes treatment of the plaintiff's section 1983 claim of retaliation in violation of the First Amendment and section 1983 due process claim. (Huskey v. City of San Jose 00 Daily Journal D.A.R. 1971.) [File 175.]

5. **“RICO” ACTION DOES NOT AWAIT “DISCOVERY” BEFORE CAUSE OF ACTION ACCRUES:** The United States Supreme Court has rejected the argument that the statute of limitations in a “Rico” action does not accrue until the plaintiff discovers the injury and pattern. A “pattern” of racketeering requires at least two acts, the last of which occurred within ten years of the first act. The statute of limitations is four years, but the issue before the Court was whether that statute was tolled until the plaintiff discovered the injury and pattern. Previously, in Klehr v. A.O. Smith Corp. 521 U.S. 179, the Court had rejected the “last predicate act” rule. (Rotella v. Wood 00 Daily Journal D.A.R. 1905.) [File #78.]

TRIAL PRACTICE

PUNITIVE DAMAGES WERE PROPERLY AWARDED WITHOUT EVIDENCE OF FINANCIAL CONDITION WHERE A DEFENDANT VIOLATED A COURT ORDER TO PRODUCE EVIDENCE OF FINANCIAL WORTH: The Second Appellate District has held that a defendant who failed to produce evidence of his financial condition in response to a court order was estopped to object to the absence of such evidence to support an award of punitive damages against him. (Mike Davidov Company v. Issod 00 Daily Journal D.A.R. 2019.) [File #56.]

WORKERS’ COMPENSATION

SUPREME COURT DEFINES “DIE” WITHIN MEANING OF POWER PRESS EXCLUSION TO EXCLUSIVE REMEDY PROVISION OF WORKERS’ COMPENSATION ACT: Labor Code, section 4558 provides an exception to the exclusive remedy provision of the Workers’ Compensation Act. The exception is for “workers injured as a result of the employer knowingly having removed or failed to install a point of operation guard on a ‘power press,’ defined in subdivision (a)(4) of the statute as ‘any material-forming machine that utilizes a die which is designed for use in the manufacture of other products.’” The issue in this case was whether the tool being used was, in fact, a “die.” The Court concluded that the tool was not a “die,” and, therefore, that the injury was not caused by the operation of a power press.

In defining a “die,” the Court wrote, “the term ‘die’ clearly denotes not *all* material-forming tools, but a subset of such tools. The devices described in dictionary definitions of ‘die’ generally share two pertinent characteristics. First, they impart form to the material by impact or pressure *against* the material, rather than *along* the material. Second, they impart to the material some version of the die’s own shape. The two characteristics are logically related, since the die, acting by impact against the material, can only alter the form of the material where it impacts it, necessarily leaving an impression or cut-out of its own shape (unlike a linear cutting blade that, moving along the surface of the material, can be directed to cut out any desired shape). The first characteristic (impact or pressure against or through the material) particularly describes dies used in *presses* and hence limits the term as used in section 4558, subdivision (a)(4). . . .”

The Court summarized the definition as “a tool that imparts shape to material by pressing or impacting against or through the material, that is, by punching, stamping or extruding; in none of its uses does the term refer to a tool that imparts shape by cutting *along* the material in the

manner of a blade.” (Rosales v. Depuy Ace Medical Company 00 Daily Journal D.A.R. 1451.) [File #216.]

**CASES OF INTEREST CURRENTLY PENDING
BEFORE THE UNITED STATES SUPREME COURT**

Sacramento County, Ca v. Lewis: Deliberate indifference or reckless disregard is the necessary standard for action based on police high-speed pursuits.

**CASES OF INTEREST CURRENTLY PENDING
BEFORE CALIFORNIA'S SUPREME COURT**

Kransco v. American Empire Surplus Lines Ins. Co.: The issue on appeal has been narrowed to whether "an insurer may assert an affirmative defense of the insured's comparative bad faith in a bad faith action brought against the insurer." (See August '97 law review.)

Walker v. 20th Century Ins. Co.: Felony drunk driver cannot recover attorney's fees in bad faith action against insurer. (See July '97 Law Review.)

Orrick v. San Joaquin Community Hospital: Medical malpractice plaintiff is not collaterally estopped by arbitration agreement with doctor from pursuing recovery against hospital. (See April '98 Law Review.)

Truck Insurance Exchange v. Superior Court: Negligent failure to meet a contractual deadline is not covered by general liability policy. (See March '98 Law Review.)

Aas v. San Diego County Superior Court (The William Lyon Company): Pure economic loss damages and/or market "stigma" damages are not recoverable in a construction defect lawsuit.

Galanty v. Paul Revere Life Ins. Co.: Disability Insurance policy's incontestability clause does not override policy's coverage limitation.

Preferred Risk Mutual Ins. Co. v. Reiswig: Limitations period for indemnity action is not tolled by service of Notice of Intent to Sue.

Carrisales v. Dept. of Corrections: Only those supervisors who participate in or aid sexual harassment can be held personally liable. (See Aug/Sept. Law Review)

Richmond v. A.P. Green Industries, Inc.: Separate limitations period is triggered by each distinct injury suffered due to asbestos exposure.

Paxton v. Stewart: Failure to designate treating physician as expert witness bars opinion testimony.

Moore v. First Bank of San Luis Obispo: Even when their decisions ignore contractual terms, arbitrators do not exceed their power.

Comedy III Productions Inc. v. Gary Saderup Inc.: Use of deceased celebrity's image without consent for sole purpose of profit is not protected speech.

Safeco Ins. Co. v. Robert S.: Homeowners' policy exclusion for "illegal acts" is unambiguous and insurer is not required to indemnify in wrongful death action.

Moshonov v. Walsh: Existence of statutory ground to vacate or correct arbitration award warrants judicial review.

Gwartz v. Super. Ct.: Oral argument is required on all summary judgment motions.

Fox v. Kramer: As "subsequent remedial measures," hospital peer review records are inadmissible at trial.

Gonzalez v. Hughes Aircraft Employees Federal Credit Union: Employment contract's arbitration agreement held unenforceable.

P.L.C.M. Group Inc. v. Drexler (Dearborn Ins. Co.): Reasonable value of legal services performed by in-house counsel may be recoverable.

Bechtel v. City of Beaumont: Failure to exhaust judicial remedies in prior proceeding bars judicial action in subsequent proceeding when party has same right at stake.

Kazi v. State Farm Fire & Casualty Co.: Doubts as to whether duty to defend exists must be resolved in favor of insured.

Transportation Ins. Ltd. v. ShinMaywa Industries Ltd.: If defective part did not damage final product, there is no coverage under a product liability insurance policy.

Industrial Indemnity Co. v. Apple Computer Inc.: Insurer owes no duty to defend English trademark infringement lawsuit.

Torres v. Parkhouse Tire Service: To invoke the willful, unprovoked act of aggression exception to the exclusive remedy provision of the Workers' Compensation Act, it is not necessary to establish a specific intent to injure.

Day v. City of Fontana: Proposition 213 is properly applied retroactively.