

FORD, WALKER, HAGGERTY & BEHAR



Law Review
Second Quarter 2001

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

Recent Cases

First Quarter '01 Edition, pp. 9: Bird v. Saenz has been decertified and review has been granted by California's Supreme Court. Consequently, the opinion is no longer authoritative. See "Torts" below. '01 Daily Journal D.A.R. 4867; 5/16/01.

APPEAL

COURT OF APPEAL CAN IMPOSE SANCTIONS FOR FILING FRIVOLOUS MOTION ON APPEAL: Although statutes addressing frivolous tactics specify their application to trial courts, the Second Appellate District has held that they apply as well to Courts of Appeal. (Dana Commercial Credit Corp. v. Ferns & Ferns '01 Daily Journal D.A.R. 6645.) [File #81.]

ARBITRATION

1. ARBITRATION NEED NOT IMPOSE DISCOVERY SANCTIONS: According to the First Appellate District, "an arbitrator's refusal to impose a discovery sanction provides no ground to vacate the arbitration award, even if the sanction is mandatory under the discovery statutes." (Alexander v. Blue Cross of California '01 Daily Journal D.A.R. 4319.) [File #81.]

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.

2. ENFORCEMENT OF ARBITRATION AGREEMENT DOES NOT REQUIRE AUTHENTICATION OF THE ARBITRATION AGREEMENT: The Fourth Appellate District has held that “For purposes of a petition to compel arbitration, it is not necessary to follow the normal procedures of document authentication.” All that must be established is the existence of the agreement. (Condee v. Longwood Management Corp. ’01 Daily Journal D.A.R. 3321.) [File #81.]

BAD FAITH

1. NO BAD FAITH WHERE THERE IS GENUINE ISSUE AS TO LIABILITY: The Second Appellate District has held that “where there is a *genuine issue* as to the insurer’s liability under the policy for the claim asserted by the insured, there can be no bad faith liability imposed on the insurer for advancing its side of that dispute.” (Chateau Chamberay Homeowners Association f. Associated International Ins. Co. ’01 Daily Journal D.A.R. 6809.) [File #14.]

2. INSURER OWES DUTY TO DEFEND INSURED PLAINTIFF WHERE COVERAGE IS INVOKED BY AFFIRMATIVE DEFENSE: In an unusual set of facts, the Second Appellate District has held that an insured security services company was entitled to a defense paid by its insurer even though the insured was a plaintiff in the litigation at issue. Why? An affirmative defense pled by the general contractor in response to the insured’s complaint raised the possibility of an affirmative award against the insured. (Construction Protective Services, Inc. v. TIG Specialty Ins. Co. ’01 Daily Journal D.A.R. 6641.) [File #68.]

3. EXCESS INSURER MAY BREACH DUTY OWED TO ONE INSURED BY PAYING FULL POLICY LIMIT TO ANOTHER INSURED: The Second Appellate District has concluded “that an excess insurer, with notice of potentially competing claims that exceed policy limits, has an obligation to treat both insureds fairly. That obligation encompasses the duty to refrain from favoring one insured over the other and from impairing either insured’s right to benefits. Evidence that the excess insurer paid full benefits to one insured with knowledge of the other insured’s competing claim to the same pool of funds may establish a breach of that duty, precluding summary judgment for the insurer.” (Schwartz v. State Farm ’01 Daily Journal D.A.R. 4569.) [File #14.]

CIVIL PROCEDURE - FEDERAL

DEFAULT SANCTION ORDER IS AFFIRMED: The Ninth Circuit has upheld a District Court’s entry of a default judgment against a party based upon that party’s “repeated, persistent refusal to follow court orders.” (Estrada v. Cohen ’01 Daily Journal D.A.R. 3225.) [File #52.]

CIVIL PROCEDURE – STATE

1. SMALL CLAIMS COURTS ARE GOVERNED BY THE SAME RULES AS THOSE WHICH GOVERN LIMITED JURISDICTION COURTS UNLESS SPECIFIC RULES PROVIDE OTHERWISE: According to the Second Appellate District, “jurisdiction lies with the appellate division of the superior court to review a postjudgment enforcement order

of a small claims court.” Statutes “and rules applicable to limited civil cases apply to small claims cases unless a small claims statute or rule provides otherwise.” (General Electric Capital Auto Financial Services, Inc. v. Superior Court ’01 Daily Journal D.A.R. 3181.) [File #276.]

2. TIME TO FILE PEREMPTORY CHALLENGE BEGINS TO RUN UPON NOTICE OF ASSIGNMENT OF NEW DIRECT CALENDAR JUDGE: The Second Appellate District has held that the time for filing a peremptory challenge to a judge begins to run upon receipt of a notice of assignment. The statutory five-day additional time for service by mail of the notice of assignment applies to extend the 10 days to 15. (Motion Picture and Television Fund Hosp. v. Superior Court ’01 Daily Journal D.A.R. 3635.) [File #301.]

3. FAILURE TO AMEND WITHIN THE TIME AFFORDED BY THE COURT IS NOT CURED BY ATTORNEY “OOPS” PROVISION OF CODE OF CIVIL PROCEDURE, SECTION 473: Plaintiff failed to file a fourth amended complaint within the time afforded by the Court. When the Court refused to allow the filing of that pleading, plaintiff appealed, arguing that the attorney “oops” provision of Code of Civil Procedure § 473 required the Court to allow the filing of the pleading. The Second Appellate District disagreed. “After expiration of the time in which a pleading can be amended as a matter of course, the pleading can only be amended by obtaining the permission of the court.” A noticed motion is required to do so. The Court is entitled to deny the motion if it is not timely filed. (Leader v. Health Industries of America, Inc. ’01 Daily Journal D.A.R. 5325.) [File #4.]

4. REFUSAL TO CONTINUE HEARING ON SUMMARY JUDGMENT MOTION WAS ERRONEOUS WHERE DEFENDANT SERVED OVER 400 PAGES OF DOCUMENTS THE DAY AFTER PLAINTIFF FILED OPPOSITION TO THE MOTION: “In this case, plaintiff provided the requisite Code of Civil Procedure section 437c, subdivision (h) affidavit informing the court of outstanding discovery matters and why essential facts could not be presented at the time.” The Fourth Appellate District reversed the judgment. (Bahl v. Bank of America ’01 Daily Journal D.A.R. 5105.) [File #85.]

5. CLERICAL ERROR CAN BE CORRECTED AT ANY TIME: A judicial error can only be corrected within six months after entry of the erroneous order, but a clerical error can be corrected at any time. Here, the Second Appellate District held that the Court did not err in retroactively correcting a judgment which did not conform to the terms of a settlement agreement. The error was deemed merely clerical, not judicial. (Ames v. Paley ’01 Daily Journal D.A.R. 5405.) [File 319.]

6.

CIVIL RIGHTS

OFFICER WHO THREATENS TO SUE CITIZEN FOR DEFAMATION CANNOT BE HELD LIABLE FOR VIOLATION OF 42 U.S.C. 1983: To state a claim under 42 U.S.C. 1983, it is necessary to establish “State action.” Here, the officer was not acting within the scope of his employment when he threatened to sue the plaintiff for defamation. Consequently, the

District Court of the Central District held that he was not acting “under color of law” and could not be sued for violation of 42 U.S.C. 1983. (Gritchen v. Collier ’01 Daily Journal D.A.R. 5955.) [File #270.]

CONSTRUCTION DEFECT

1. ARCHITECT IS NOT ENTITLED TO INDEMNIFICATION UNDER TERMS OF CONTRACT ENTERED INTO BETWEEN SCHOOL DISTRICT AND CONSTRUCTION MANAGERS: The architect sought standing to sue as a third-party beneficiary to the contract between the school district and the construction managers. The First Appellate District held that the architect was not a third-party beneficiary to that contract and, therefore, could not sue for indemnity thereunder. The Court held that the contract was unambiguous and clearly limited the right to recover for indemnity to the parties to the contract. (The Ratcliff Architects v. Vanir Construction Management, Inc. ’01 Daily Journal D.A.R. 3845.) [File #63B.]

2. GENERAL CONTRACTOR’S CLAIMS AGAINST ARCHITECT AND CONSTRUCTION MANAGER ARE GOVERNED BY TWO-YEAR STATUTE OF LIMITATIONS: According to the First Appellate District, the statute of limitations application “to a general contractor’s claims against an architect and construction manager for economic losses sustained due to their alleged professional negligence during construction” are governed by the two-year statute of limitations of Code of Civil Procedure, sec. 339, subd. (1). (Smith v. SHN Consulting Engineers & Geologists, Inc. ’01 Daily Journal D.A.R.5395.) [File #307.]

3. TEN-YEAR STATUTE OF LIMITATIONS IS TOLLED DURING PERIODS OF REPAIR: The First Appellate District has held that “the 10-year statute of limitations set forth in Code of Civil Procedure section 337.15, for actions to recover damages for latent construction defects, is subject to equitable tolling during periods of repair.” (Lantzy v. Centex Homes ’01 Daily Journal D.A.R. 5812.) [File #307.]

4. CERTIFICATION OF CLASS IN ATTEMPTED CLASS ACTION LAWSUIT IS IMPROPER AS TO STRICT LIABILITY: While certification of a class may be correct where common facts and issue of law exist, the facts are not common in a construction defect strict liability action. The Second Appellate District has held that a class action could not go forward on these legal theories because “each class member would have to come forward and prove special damage to her home.” (Hicks v. Kaufman and Broad Home Corp. ’01 Daily Journal D.A.R. 5719.) [File #320.]

5. SECONDARY REINFORCER OF CONCRETE CAN BE HELD LIABLE FOR STRICT LIABILITY BECAUSE IT IS NOT A COMPONENT SUPPLIER OF A BULK PRODUCT: In Artiglio v. General Electric Co., the Court held that suppliers of certain products owed no duty to warn ultimate buyers or consumers of the dangers arising from another’s integration of that product or raw material into an ultimate product. Here, the Second Appellate District held that “the manufacturer of Fibermesh, a secondary reinforcer added to concrete,” was not entitled to the protection afforded by the Artiglio decision because “Fibermesh is a single purpose product.” The fact that it is sold in bulk was held irrelevant. What was relevant was that

it was neither sold in bulk nor versatile. The Court did affirm the trial court's elimination of the causes of action for fraud and negligent misrepresentation, however, because the plaintiffs could not establish actual reliance upon the alleged misrepresentations. (Acosta v. Synthetic Industries, Inc. '01 Daily Journal D.A.R. 4207.) [File #307.]

6. SUBCONTRACTOR WHICH DID NOT DEVELOP, BUILD, CONTRACT OR PERFORM WORK DURING ORIGINAL CONSTRUCTION WAS ENTITLED TO SUMMARY JUDGMENT: The subcontractor's services were limited to repairs made after the 1994 Northridge earthquake. Consequently, the Second Appellate District held that it was entitled to summary judgment on an indemnity cross-complaint brought against it by a contractor sued for alleged defects resulting from the original construction. The condominium complex had been completed some years prior to the earthquake. Because the subcontractor was not involved in the original construction, it could not be held liable for having caused the contractor to become liable to the plaintiffs. (Newhall Land and Farming Co. v. McCarthy Construction '01 Daily Journal D.A.R. 4117.) [File #307.]

COVERAGE

1. DIRECTOR IS NOT COVERED BY CGL POLICY UNLESS ACTING IN THE CAPACITY OF A DIRECTOR: In a declaratory relief action, the Second Appellate District has reversed a trial court by holding that the defendant insurer had no duty to defend. The allegations of a defamation counterclaim against a director of the insured company did not require coverage under the policy because the conduct which formed the basis of the counterclaim was not related to the director's duties. The policy covered directors, but only "with respect to their duties." (Lomes v. Hartford Financial Services Group, Inc. '01 Daily Journal D.A.R. 3188.) [File #21.]

2. COURT PREFERENCES "TIME ON RISK" METHOD OF APPORTIONMENT OVER BRIGHT LINE RULE OF EQUAL APPORTIONMENT: The First Appellate District has adopted a "time on the risk" approach to apportioning liability among insurers responsible for the defense of a mutual insured. (Centennial Ins. Co. v. United States Fire Ins. Co. '01 Daily Journal D.A.R. 3177.) [File #105.]

3. SUCCESSOR CORPORATION IS ENTITLED TO BENEFITS UNDER POLICY ISSUED TO PREDECESSOR: In this action, "a successor corporation which had been sued for such bodily injuries allegedly arising from the predecessor corporation's chemical products business, [sought] defense and indemnity benefits under the predecessor's liability insurance policies." The Second Appellate District held that the successor was entitled to the coverage sought even though the policy had not been assigned to the successor. The Court stated, "We are presented with the question as to whether the successor corporation is nonetheless entitled to the policy benefits of defense and indemnity as to those claims arising from bodily injuries that allegedly occurred *prior* to the transfer of the business to the successor. As we explain, under those circumstances, the successor is entitled, *by operation of law*, to claim such policy benefits." (Henkel Corporation v. Lloyds of London, Etc. '01 Daily Journal D.A.R. 4191.) [File #68.]

GOVERNMENTAL IMMUNITY

1. MINOR DEVIATION IN WIDTH OF MEDIAN FROM PLANNED WIDTH DOES NOT DEPRIVE STATE OF IMMUNITY: The Sixth Appellate District has held that the State was entitled to immunity in connection with the death of plaintiffs' decedent. Plaintiffs argued that the immunity conferred in connection with "the plan or design of a construction" was unavailable because the actual median did not conform with the plan for its design. The plan called for a 46' media; the actual median was only 45'3". The Court held that the deviation was not sufficient to deprive the State of the immunity conferred upon it by Government Code, section 830.6. (Wyckoff v. California '01 Daily Journal D.A.R. 6405.) [File #185.]

2. FILING OF A CLAIM CONSTITUTES NOTICE BARRING DESTRUCTION OF "RECORDINGS OF TELEPHONE AND RADIO COMMUNICATIONS": Government Code, section 26202.6 provides that a governmental agency may destroy "recordings of telephone and radio communications" after 100 days if proper approval has been obtained. The Second Appellate District has held, however, that, such communications may not be destroyed once a claim for damages has been filed pursuant to the Tort Claims Act. (Nelson v. Superior Court '01 Daily Journal D.A.R. 5273.) [File #47.]

3. STATE WAS IMMUNE FROM LIABILITY ARISING FROM SETTING OF SPEED LIMIT: The Fourth Appellate District has affirmed the grant of a nonsuit based upon a prior motion for summary judgment. The Court held that the Department of Transportation was immune from liability because the alleged cause of the injury at issue was the alleged wrongful setting of the speed limit too high, because the decision to set the speed at the particular rate was discretionary, and because the decision to do so was reasonable. (Fuller v. Department of Transportation '01 Daily Journal D.A.R. 5919.) [File 185.]

INSURANCE

INSURER IS ENTITLED TO REIMBURSEMENT OF AMOUNT PAID TO SETTLE ACTION WHERE RIGHT TO DENY COVERAGE WAS PROPERLY RESERVED: California's Supreme Court has responded in the affirmative to the following question posed by the Ninth Circuit Court of Appeals: "Whether an insurer defending a personal injury suit under a reservation of rights may recover settlement payments made over the objection of the insured when it is later determined that the underlying claims are not covered under the policy.'" (Blue Ridge Ins. Co. v. Jacobsen '01 Daily Journal D.A.R. 4583.) [File #84.]

MEDICAL MALPRACTICE

MICRA LIMITATION DOES NOT APPLY TO INTENTIONAL BATTERY

ACTION: When a doctor performs an operation a patient has repeatedly told him not to perform, an intentional battery is committed. The Second Appellate District has held that the damage limitation of the MICRA legislation does not apply to such a battery. (Perry v. Shaw '01 Daily Journal D.A.R. 3971.) [File #97.]

TORTS

1. CALIFORNIA IS LIKELY TO ADOPT FEDERAL STANDARD FOR WORKPLACE HARASSMENT ACTIONS: The federal District Court for the Northern District of California has held that California is likely to adopt the federal test for determining whether a cause of action has been stated for workplace harassment under California's Fair Employment & Housing Act [FEHA]. The Court held that it is necessary for the plaintiff to plead and prove that he or she was damaged by a tangible detrimental employment action. (Kohler v. Inter-Tel Technologies '01 Daily Journal D.A.R. 3560.) [File #247.]

2. ALLEGED IMPLIED CONTRACT IS NEGATED BY TERMS OF EXPRESS CONTRACT: Here, plaintiff sued from wrongful discharge alleging that his employer had impliedly promises not to terminate his employment except for good cause. The terms of a document he signed indicated, however, that his employment was "at will." The Third Appellate District held that the terms of the express contract controlled. (Starzynski v. Capital Public Radio, Inc. (2001) 88 Cal.App.4th 33.) [File #175.]

3. HOMEOWNER OWES NO DUTY OF CARE TO INVITEE HARMED BY OTHER INVITEE ABSENT KNOWLEDGE OF THE RISK: The Fourth Appellate District has issued a writ of mandate directing the trial court to enter summary judgment in favor of homeowners who had invited teenagers into their home with no knowledge of facts from which the sexual molestation of one teen by another was foreseeable. The decision includes a good discussion of both nonfeasance and misfeasance principles. (Romero v. Superior Court '01 Daily Journal D.A.R. 5830.) [File #50.]

4. UNINSURED MOTORIST MAY NOT CIRCUMVENT PROPOSITION 213 BY SUING MUNICIPALITY ON THEORY OF NUISANCE AND/OR DANGEROUS CONDITION OF PUBLIC PROPERTY: California's Supreme Court has held that Civil Code, "section 3333.4 restrict[s] an uninsured driver's recovery of noneconomic damages against local public entities in an action for nuisance and dangerous condition of property." (Day v. City of Fontana '01 Daily Journal D.A.R. 3405.) [File #237.]

5. MALICIOUS PROSECUTION ACTION FAILS WHERE UNDERLYING ACTION WAS RESOLVED BY CONTRACTUAL ARBITRATION: California's Supreme Court has held that a plaintiff may not recover for malicious prosecution where the underlying action was resolved through contractual arbitration. The parties had agreed to submit their dispute to binding arbitration. (Brennan v. Tremco Inc. '01 Daily Journal D.A.R. 3669.) [File #113.]

6. EPITHETS OF “THIEF” AND “LIAR” WHEN HURLED IN ANGER ARE MERE OPINION AND, THEREFORE, NOT ACTIONABLE: The Third Appellate District has upheld the grant of a SLAPP motion to dismiss on the grounds that epithets hurled at the plaintiff in a shopping center in connection with a “bitterly-fought local initiative campaign” were mere opinion. Defamation actions cannot be based upon mere opinion. (Rosenauro v. Scherer ’01 Daily Journal D.A.R. 3425.) [File #314.]

7. PUBLICATION OF PHOTOGRAPH OF LITTLE LEAGUE TEAM WITH STORY ABOUT COACHES WHO SEXUALLY MOLEST YOUTHS PLAYING TEAM SPORTS CONSTITUTES INVASION OF PRIVACY: The Fourth Appellate District has held that the trial court correctly denied a “SLAPP” motion to dismiss on the grounds that the plaintiffs had demonstrated a substantial likelihood of prevailing on their claim for invasion of privacy. Sports Illustrated and HBO used a picture of the team to illustrate stories about youths who had been molested by their coaches. (M.G. v. Time Warner, Inc. ’01 Daily Journal D.A.R. 5407.) [File #201.]

8. BUSINESS OWNERS ARE NOT LIABLE FOR INJURY CAUSED BY CRIMINAL ACTS OF THIRD-PARTIES ABSENT THEIR OWN NEGLIGENCE: California’s Supreme Court has held that a business owner will not be held liable to individuals injured as the result of criminal activity of others unless the owner’s “negligence was an actual, legal cause of” the injuries sustained. Here, plaintiff was assaulted by unknown individuals when she attempted to deliver a package to the resident of an apartment. (Saelzler v. Advanced Group 400 ’01 Daily Journal D.A.R. 5383.) [File #50.]

9. PATRON SHOT BY PASSERBY CANNOT RECOVER FROM STORE OWNER WHERE INCIDENT WAS NOT FORESEEABLE: Absent proof of similar events having had occurred before, the defendant owed no duty to prevent the attack which resulted in the killing of plaintiff’s decedent. (Hassoon v. Shamieh ’01 Daily Journal D.A.R. 5809.) [File #50.]

10. DECERT. & REV. GR.: WRONGFUL DEATH ACTION WILL LIE AGAINST PARTIES WHO ALLEGEDLY HASTENED A TERMINAL CANCER PATIENT’S DEATH: Causation was at issue here. Whether the defendant’s conduct contributed to the decedent’s death was a question of fact according to the Second Appellate District. “The plaintiff’s ‘inability to pin down the exact extent to which defendants’ conduct contributed to the outcome is immaterial for purposes of *causation*.” (Bird v. Saenz ’01 Daily Journal D.A.R. 463; Decert. & Rev. Gr. 5/16/01, ’01 Daily Journal D.A.R. 4867.) [File #102.]

11. PARTICIPANTS OF SKI CLINIC ASSUMED RISK OF HARM: According to the Fourth Appellate District, “[f]alling and thereby being injured or even killed are inherent dangers of skiing.” As a result, plaintiff’s recovery here was barred by the doctrine of primary assumption of the risk. (Kane v. National Ski Patrol System, Inc. ’01 Daily Journal D.A.R. 3317.) [File #48.]

TRIAL PRACTICE

1. STORE OWNER'S DUTY OF CARE WAS NOT INCREASED BY JURY INSTRUCTION: The Third Appellate District has rejected the argument that a jury instruction improperly increased the defendant's duty of care. The instruction advised the jury that "the attention of persons who visit public stores ordinarily is attracted by the display of wares offered for sale and may be more or less absorbed by the transactions which they have in mind." The instruction did not increase the duty normally owed a possessor of land, i.e., to exercise reasonable care. (Craddock v. Kmart Corp. '01 Daily Journal D.A.R. 6164.) [File #50.]

2. DEFENDANT'S NEGATIVE NET WORTH IS NO BAR TO AWARD OF PUNITIVE DAMAGES: Because the defendant had the ability to pay an award of punitive damages, the fact that it had a negative net worth did not render the award improper. (Zaxis Wireless Communications, Inc. v. Motor Sound Corp. '01 Daily Journal D.A.R. 5333.) [File #56.]