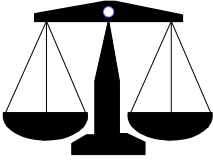


FORD, WALKER, HAGGERTY & BEHAR



Law Review
June, July, & August 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

Jan. '00 edition, p. 4: Dart Industries Inc. v. Commercial Union Ins. Co. has been decertified and review has been granted by California's Supreme Court. Consequently, the opinion is no longer authoritative. See "Coverage" below. '00 Daily Journal D.A.R. 44, 5/25/00.

Jan. '00 edition: Allen v. Suly-Miller Contracting Co. 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 D.A.R. 41, 7/12/00.

Feb. '00 edition, p. 4: Brennan v. Tremco, Inc. 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 D.A.R. 6691, 6/21/00.

March '00 edition, p. 3: Hamilton v. Maryland Casualty Co. has been decertified and review has been granted by California's Supreme Court. Consequently, the opinion is no longer authoritative. See "Bad Faith" below. '00 Daily Journal D.A.R. 5907, 6/2/00.

May '00 edition, p. 5: Cornett v. Department of Transportation has been decertified and review has been granted by California's Supreme Court. Consequently, the opinion is no

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.

longer authoritative. See “Governmental Immunity” below. ’00 Daily Journal D.A.R. 8033, 7/19/00.

April ’00 edition, p. 7: Camargo v. Tjaarda Dairy has been decertified by California’s Supreme Court. Consequently, the opinion is no longer authoritative. See “Torts” below. ’00 Daily Journal D.A.R. 8297, 7/26/00.

Recent Cases

APPEAL

1. TRIAL COUNSEL PRESERVES OBJECTIONS ON APPEAL BY TWICE ASKING FOR RULING: If a defendant who has objected to a declaration or other evidence during summary judgment fails to request a ruling on the objections, the objections are not preserved for appeal. This general rule was rejected by the Second Appellate District here, however, because defense counsel “twice orally requested that the trial court rule on the written evidentiary objections.” Since there was nothing else defense counsel could have done, the court concluded that the objections had been preserved on appeal. Moral? Always ask for a ruling on the objections during oral argument at the hearing on a motion for summary judgment. (City of Long Beach v. Farmers & Merchants Bank of Long Beach ’00 Daily Journal D.A.R. 6553.) [File #26.]

2. ORDER OF ATTORNEYS FEES AT ARBITRATION IS NONAPPEALABLE: The First Appellate District has held that an Order awarding attorneys fees to the party prevailing at an arbitration was a nonappealable order. The court reiterated the rule that such an award is nonappealable even if based upon an error of law. (Pierotti v. Torian ’00 Daily Journal D.A.R. 5661.) [File #180.]

BAD FAITH

1. DECERT. & REV. GR.: INSURER IS NOT BOUND BY SETTLEMENT BETWEEN INSURED AND CLAIMANT WHERE INSURER IS DEFENDING ITS INSURED: As summarized by the First Appellate District, “This case presents issues concerning the rights of claimants against an insurer after the insured, without the approval of the insurer, entered into a good faith settlement agreement with the claimants that included an assignment against the insurer. We find that such a settlement agreement is not binding on an insurer that was actively involved in defending its insured and did not agree to the settlement.” We further find that under the ‘no action’ provisions in the insurance policy, the claimants may not bring a direct action on the policy against the insurer until they have obtained a judgment against the insured after an actual trial or until the insurer has agreed to a settlement. Finally, although we find that the ‘no action’ provisions of the policy do not preclude an action against the insurer for breach of the covenant of good faith and fair dealing in failing to entered into a reasonable settlement agreement, such an action may not be brought against an actively defending insurer until the claimants have obtained a judgment against the insured in excess of

policy limits.” (Hamilton v. Maryland Casualty Co. ‘00 Daily Journal D.A.R. 2057, Decert & rev. gr. 6/2/00, ’00 Daily Journal D.A.R. 5907.) [File #151.]

2. INSURED’S BAD FAITH IS UNAVAILABLE AS AFFIRMATIVE DEFENSE:

Here, according to our Supreme Court, an insurer breached the duty of good faith and fair dealing which it owed to its insured by unreasonably failing to settle a third party’s action against its insured within policy limits. The court concluded that “a liability insurer cannot assert the comparative bad faith of its insured in the underlying third party litigation as an affirmative defense in a bad faith action brought against it.” (Kransco, et al. v. American Empire Surplus Lines Ins. Co. ‘00 Daily Journal D.A.R. 6661.) [File #14.]

3. CLAIMANTS CANNOT RECOVER FOR BAD FAITH ABSENT A SHOWING THEIR LOSS IS COVERED BY THE POLICY: The Ninth Circuit has reversed a multimillion-dollar jury verdict “inasmuch as it permitted the homeowners to recover directly from the insurer without establishing that their claim was covered under the policy.” (Pershing Park Villas Homeowners Ass’n v. United Pacific Ins. Co. ’00 Daily Journal D.A.R. 7474.) [File #21.]

4. SUMMARY JUDGMENT WAS PROPERLY ENTERED IN FAVOR OF ALLSTATE WHERE CHIROPRACTOR’S BILL WAS TIMELY PAID AND SETTLEMENT COVERED OTHER BILLS: Nice language from the Fourth Appellate District: “Not every first party insurance claim is transmogrified into a bad faith suit simply because an insurer questions the amount of a bill before paying it.” (Nager v. Allstate Ins. Co. ’00 Daily Journal D.A.R. 9393.) [File #14.]

5. ABSENT COVERAGE, INSURER OWES NO DUTY TO DEFEND:

Although “[e]ven the bare possibility of coverage is sufficient to trigger” an insurer’s duty to defend, the Fourth Appellate District has made perfectly clear that an insurer “may refuse to defend a claim where the claim can “”. . . by no conceivable theory raise a single issue which could bring it within the policy coverage.”” (Belmonte v. Employers Ins. Co. ’00 Daily Journal D.A.R. 9613.) [File #68.]

CIVIL PROCEDURE – FEDERAL

1. ATTORNEY’S FAILURE TO MEET FILING DEADLINE CONSTITUTES EXCUSABLE NEGLIGENCE: The Ninth Circuit has held that attorney error can constitute excusable neglect for a party’s failure to oppose a summary judgment motion in a timely manner. The decision lays out the appropriate test and points out that the test is not all inclusive. (Bateman v. U.S. Postal Service ’00 Daily Journal D.A.R. 8241.) [File #12.]

2. COURT CAN NOT SUMMARILY ADJUDICATE A CLAIM FOR PUNITIVE DAMAGES WHEN OTHER CLAIMS FOR PUNITIVE DAMAGES REMAIN AT ISSUE: The Fifth Appellate District has held that a trial court erred in

summarily adjudicating one of multiple claims for punitive damages. Summary adjudication of punitive damages can only be granted when the entire claim for punitive damages can be eliminated. (Catalano v. Superior Court '00 Daily Journal D.A.R. 7611.) [File #85.]

CIVIL PROCEDURE – STATE

1. INSUFFICIENT CONTACTS NEGATE JURISDICTION OF CALIFORNIA COURTS: The Fourth Appellate District has held that the mere fact that the plaintiff's office was in California was an insufficient basis for the exercise of jurisdiction by California's courts over the defendants where the subject contract was signed in Maryland, equipment was delivered in Maryland, and the defendants resided in Maryland. (Hunt v. Superior Court '00 Daily Journal D.A.R. 6657.) [File #94.]

2. DISGORGEMENT INTO FLUID RECOVERY FUND IS UNAVAILABLE IN UNFAIR COMPETITION ACTIONS: In the first of two companion cases, our Supreme Court has held that disgorgement into a fluid recovery fund is not a remedy available in non-class action litigation brought by individuals on behalf of others similarly situated. (Kraus v. Trinity Management Services, Inc. '00 Daily Journal D.A.R. 5869.) [File #132.]

3. DISGORGEMENT INTO FLUID RECOVERY FUND IS UNAVAILABLE, BUT COURT MAY ORDER RESTORATION OF UNPAID WAGES TO PERSONS SIMILARLY SITUATED: An action for violation of the Unfair Competition Law, Business & Professions Code, section 17203, seeks recovery of money or property obtained through the use of unfair or unlawful business practices. Although damages are not available for a violation of the Act, our Supreme Court held here that an action seeking payment of unpaid wages was not an action seeking "damages." Payment of wages unlawfully withheld is restitutionary and does not constitute payment of damages. (Cortez v. Purolator Air Filtration Products Co. '00 Daily Journal D.A.R.5885.) [File #132.]

4. DEFAULT MUST BE SET ASIDE WHERE ATTORNEY AFFIDAVIT ESTABLISHES DEFAULT PROXIMATELY CAUSED BY ATTORNEY'S CONDUCT: "Veronica" retained a new attorney shortly before trial. Her previous attorney did not advise the new attorney of the trial date and the new attorney failed to inquire as to the status of the case. When no appearance was made on Veronica's behalf on the date of trial, a judgment in favor of her adversary was granted. Because Veronica had not had her day in court and because she was not at fault in that regard, the Second Appellate District held that the attorney relief provision of Code of Civil Procedure, section 473 was applicable and that the trial court should have set aside the judgment. (Hock v. Gordon-Hock '00 Daily Journal D.A.R. 5611.) [File #52.]

5. CERTIFICATION OF CLASS REQUIRES WELL-DEFINED COMMUNITY OF INTEREST: The Second Appellate District has affirmed the denial of class action certification of plaintiff's employment discrimination action on the grounds that

there was no well-defined community of interest among the purported class members. (McCullah v. Southern Calif. Gas Co. '00 Daily Journal D.A.R. 8051.) [File #320.]

6. EXPERT WITNESS FEES CAN BE TENDERED WITH NOTICE OR AT DEPOSITION: According to the Fourth Appellate District, “under [Code of Civil Procedure] section 2034, expert witness fees [can] be tendered *either* with the deposition notice *or* at the commencement of the deposition.” (True v. Shank '00 Daily Journal D.A.R. 7101.) [File #76.]

7. IMPOSITION OF AWARD OF PUNITIVE DAMAGES AGAINST BUSINESS REQUIRES KNOWLEDGE OF EMPLOYEE’S MALICIOUS CONDUCT BY MANAGING AGENT, NOT JUST STORE SUPERVISOR: According to the Second Appellate District, it is knowledge of a malicious act on the part of a managing agent which is required to warrant the imposition of punitive damages upon an employer, not a mere store supervisor. A “managing agent” is an employee who exercises “substantial discretionary authority over decisions that ultimately determine *corporate policy*.” (Cruz v. Homebase '00 Daily Journal D.A.R. 9303.) [File #229.]

8. AN ATTORNEY CANNOT BE ORDERED TO PAY BOTH SANCTIONS AND A CLIENT’S SHARE OF FEES INCURRED BY A DISCOVERY REFEREE UNLESS BOTH ARE AUTHORIZED BY STATUTE: The statutes relied upon by the trial court, Judge Brett Klein, authorized the trial court to order parties to share in the costs of discovery referees, but not the parties’ attorneys. (Andrews v. Superior Court '00 Daily Journal D.A.R. 8359.) [File #81.]

9. STATUTE OF LIMITATIONS FOR MISAPPROPRIATION OF TRADE SECRETS ACCRUES WHEN PARTY BECOMES AWARE OF POTENTIAL VIOLATION: The First Appellate District has held that “the actual discovery of an act of misappropriating a trade secret commences the limitation period of three years, which is not tolled by subsequent inactivity by the misappropriator” or by a “continuing misappropriation.” (Glue-Fold, Inc. v. Slautterback Corp. '00 Daily Journal D.A.R. 8657.) [File #43.]

CONSTRUCTION DEFECT

1. CAUSE OF ACTION ACCRUES WHEN DEFENDANT CAUSES “IMMEDIATE AND PERMANENT INJURY” TO REALTY & SUBSEQUENT OWNER MAY LACK STANDING TO SUE: The First Appellate District has held that “a cause of action for damage to real property accrues when the defendant’s act causes ‘*immediate and permanent injury*’ to the property or, put it another way, when there is ‘[a]ctual and appreciable harm’ to the property.” Once the cause of action has accrued, it is not transferred to a subsequent owner absent “some clear manifestation of such an intention.” (Krusi v. S.J. Amoroso Construction Co. '00 Daily Journal D.A.R. 6819.) [File #307.]

2. SELLER OWES DUTY TO DISCLOSE DEFECTS AFFECTING VALUE OF PROPERTY: According to the Second Appellate District, the seller of a condominium unit was entitled to summary judgment in an action brought by the buyer upon proof that prior to the close of escrow it had advised the buyer that the homeowners association had filed a construction defect lawsuit and that the lawsuit had been settled. The buyer complained because the floor of her unit would not support the marble floor she wished to install. The court rejected the buyer's argument that she had not been advised of the particulars of the defects because "the details of the suit were certainly within the diligent attention of the buyer, who could have examined the file in its entirety to learn all the details of the suit and its settlement." (Assilzadeh v. California Federal Bank '00 Daily Journal D.A.R. 7981.) [File #50.]

3. COURTS OF APPEAL DISAGREE ON WHETHER STRICT PRODUCT LIABILITY THEORY APPLIES TO MANUFACTURER OF DEFECTIVE WINDOWS INSTALLED IN MASS-PRODUCED HOUSES: The Fourth Appellate District has concluded that "manufacturers of defective windows installed in mass-produced homes may be subject to strict products liability." In doing so, the court disagreed with a contrary holding in Casey v. Overhead Door Corp. (1999) 74 Cal.App.4th 112. (Jimenez v. Superior Court '00 Daily Journal D.A.R. 8503.) [File #231.]

CONTRACTS

MEMBERS OF HOMEOWNERS ASSOCIATION ARE NOT PERSONALLY LIABLE FOR CONTRACTS ENTERED INTO BY ASSOCIATION: A homeowners' association is a non-profit corporation. According to the Second Appellate District, its members are not personally liable for the association's debts. (ECC Construction, Inc. v. Ganson '00 Daily Journal D.A.R. 8113.) [File #35.]

CORPORATIONS

SIGNATURE OF CORPORATE OFFICER HOLDING MULTIPLE OFFICES SATISFIES CORPORATIONS CODE REQUIREMENT: Corporations Code, section 313, requires the signature of "the chairman of the board, the president or any vice president and" one other officer on certain documents. California's Supreme Court has held that the signature of one person who held several corporate "hats" satisfied section 313. (Snukal v. Flightways Manufacturing, Inc. '00 Daily Journal D.A.R. 7795.) [File #32.]

COVERAGE

1. DECERT. & REV. GR.: INSURED BEARS BURDEN OF ESTABLISHING TERMS AND CONDITIONS OF LOST POLICY: The Second Appellate District has held that

a defendant insurer was entitled to judgment in its favor when the plaintiff, DART Industries, was unable to establish the terms and conditions of a lost policy. The court held that the burden was on the party claiming to have been insured “to prove that the DES claims were potentially covered under the lost policy.” Although “[t]he contents of a lost document may be proved by secondary evidence if it is sufficient to ‘clear[ly] and certain[ly] show ‘all the contents of the [lost document], not literally, but substantially,’” the purported insured failed to do so in this case. (DART Industries, Inc. v. Commercial Union Ins. Co. 00 Daily Journal D.A.R. 957, Decert. 5/25/00 & Rev. Gr. ’00 Daily Journal D.A.R. 44.) [File #68.]

2. HOMEOWNERS’ POLICY INSURER OWES NO DUTY TO DEFEND INSURED IN ACTION BASED ON SEXUAL MISCONDUCT AND HARASSMENT: The Fourth Appellate District has held that a mobile homeowner’s policy’s sexual abuse exclusion effectively negated the insurer’s duty to defend its insured in underlying litigation. (Northland Ins. Co. v. Briones ’00 Daily Journal D.A.R. 6571.) [File #68.]

3. PROVISIONS OF INSURANCE CODE CONTROL POLICY LANGUAGE: Our Supreme Court has held that a disability insurance policy’s incontestability clause and statutory analog overrode its insurance policy’s coverage limitations. (Galanty v. Paul Revere Life Ins. Co. ’00 Daily Journal D.A.R. 6491.) [File #141.]

4. SELF-INSUREDS ARE NOT PRIMARY INSURERS: The Second Appellate District has concluded that “self-insured retentions are not primary insurance, and the principle of horizontal exhaustion does not apply.” (Montgomery Ward & Co, Inc. v. Imperial Casualty and Indemnity Co. ’00 Daily Journal D.A.R. 6009.) [File #112.]

5. COVERAGE EXISTS FOR RAIN DAMAGE TO ROOF IF CAUSED BY CONTRACTOR’S FAILURE TO INSTALL TEMPORARY ROOF COVERING: Plaintiff’s property was damaged by rain when a third-party contractor failed to place a temporary covering over a space on the roof. The Ninth Circuit has rejected the plaintiff’s insurer’s position that its insured’s rain damage was excluded from the policy issued on the grounds that the negligence of a contractor, and not the rain, was the efficient proximate cause of the damage. (Tento International, Inc. v. State Farm Fire & Casualty Co. ’00 Daily Journal D.A.R. 7687.) [File #21.]

6. INSURER OWED NO DUTY TO PAY ADDITIONAL HOMEOWNERS’ BENEFITS WHERE INSURED FAILED TO COMPLETE REPAIRS WITHIN 180-DAY LIMITATIONS PERIOD: Allstate’s homeowners policy provided that the insured could make “a claim for any additional payment on a replacement cost basis if you repair or replace the damaged building structure within 180 days of the actual cash value payment.” The Fourth Appellate District held that the 180-day limitation was enforceable where the insured failed to complete the repair of their home within the 180-day period. (Fraley v. Allstate Ins. Co. ’00 Daily Journal D.A.R. 7355.) [File #21.]

7. ADVERTISING INJURY COVERAGE DOES NOT EXTEND TO INJURIES OCCURRING DURING EFFORT TO SELL ONE OF A KIND PRODUCT: The First Appellate District has held that a liability policy which covered “advertising injury” did not

require its issuer to defend or indemnify its insured for infringement of “trade dress.” The loss allegedly arose “through the insured’s solicitation of a single customer through a competitive bidding process with a product specifically designed for that customer.” (Peerless Lighting Corp. v. American Motorists Ins. Co. ’00 Daily Journal D.A.R. 8661.) [File #91.]

8. EXPIRATION OF HOMEOWNER’S POLICY’S ONE YEAR LIMIT ON CLAIMS BARS CLAIM FOR DAMAGE FROM NORTHRIDGE EARTHQUAKE: An insured did not discover that the true extent of damage to her home exceeded her deductible until after expiration of her homeowner’s policy’s provision requiring commencement of litigation within one year after a loss. The Second Appellate District held that the one year period had expired and plaintiff’s claim was barred. The court rejected the plaintiff’s claim that the one year was tolled from the time her claim was referred to mediation until the date she was notified by the Department of Insurance that the mediation program was terminated as to her. Although the one year is tolled from the date of referral to mediation, the clock begins to run again when the mediation is either completed or declined. (Michelson v. Mid-Century Ins. Co. ’00 Daily Journal D.A.R. 9649.) [File #91.]

DENTAL MALPRACTICE

STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN UNTIL PATIENT LEARNS OF DENTIST’S NEGLIGENCE: Plaintiff argued that she did not discover the alleged malpractice until she consulted with another dentist for the second time. The Fourth Appellate District observed that “it is not the law that a person who obtains a second medical opinion while under the care of her personal physician and the second physician confirms that her physician is ‘doing nothing wrong’ and then she continues her treatment with her physician, is under an obligation – as a matter of law – to bring suit within one year.” (Kitzig v. Nordquist ’00 Daily Journal D.A.R. 7413.) [File #279.]

EVIDENCE

EVIDENCE OBTAINED BY INVESTIGATION IS JUST AS ADMISSIBLE AS EVIDENCE OBTAINED THROUGH DISCOVERY: The Second Appellate District has made clear that “there is nothing in the Civil Discovery Act (Code Civ. Proc., sec. 2016 et seq.) to prevent a party from conducting a unilateral investigation without resort to any statutory discovery device, provided only that the investigation is lawful.” In this case, plaintiff’s expert conducted an informal examination of the defendant’s flooring even though the defendant had rejected a formal request to do so on the grounds that the request was untimely. The floor was located in a business which was open to the public; the expert entered during business hours, inspected the floor, purchased an item and left. Since the expert did nothing to interfere with the operation of the store and because he did not damage the floor, his conduct was not unlawful. (Pullin v. Superior Court ’00 Daily Journal D.A.R. 7085.) [File #5.]

GOVERNMENTAL IMMUNITY

REVIEW GRANTED: PLAINTIFF IS ENTITLED TO JURY IN DETERMINATION OF “CHANGED CONDITIONS”: The Second Appellate District has reversed a judgment entered after a trial court held that it and not a jury was entitled to serve as the trier of fact on the question of whether “changed circumstances” deprived the governmental defendant of the defense of design immunity. The trial court bifurcated the issue of the design immunity defense, heard, and decided the issue itself.

Statutory law provides a “design immunity” defense when a public entity is sued for an alleged dangerous condition on public property. But, that defense can be lost upon proof of changed circumstances. Here, the court held that a plaintiff is entitled to a jury trial if disputed material facts exist as to the applicability of the “changed conditions” exception. (Cornette v. Department of Transportation ’00 Daily Journal D.A.R. 4701, Rev. Gr. 7/19/00.) [File #185.]

TORTS

1. DECERT. & REV. GR.: 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, Decert. & Rev. Gr. 6/21/00, ’00 Daily Journal D.A.R. 6691.) [File #135.]

2. SKATEBOARDER ASSUMED RISK OF INJURY: According to the Fourth Appellate District, property owners owed no duty to make their property safe for a skateboarder who was injured by a metal pipe when he fell into a planter aside the driveway. (Calhoon v. Lewis ’00 Daily Journal D.A.R. 5769.) [File #48.]

3. HOMEOWNERS ASSOCIATION OWES DUTY TO PEDESTRIANS PASSING BY: The Second Appellate District has held that a homeowners association owed a duty to warn pedestrians passing by of a dangerous condition on the sidewalk under its control. (Alpert v. Villa Romano Homeowners Ass’n. ’00 Daily Journal D.A.R. 5667.) [File #35.]

4. CAR RENTAL AGENCY OWED NO DUTY TO INQUIRE AS TO LESSEE’S KNOWLEDGE OF CALIFORNIA’S LAWS: The duty of care owed by a car rental agency is limited to “determining whether the lessee has a valid driver’s license” according to the Second Appellate District. (Lindstrom. v. The Hertz Corp. ’00 Daily Journal D.A.R. 6269.) [File #50.]

5. OUTRAGEOUS CONDUCT MUST BE DIRECTED AT PLAINTIFF FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CAUSE OF ACTION TO LIE: According to the Second Appellate District, “In order to recover on a cause of action for intentional infliction of emotional distress, the conduct of the defendant must be ‘directed at the

plaintiff, or occur in the presence of a plaintiff of whom the defendant is aware.” (Hassoldt v. Patrick Media Group, Inc. ’00 Daily Journal D.A.R. 5603.) [File #28.]

6. REVIEW GRANTED: PROPOSITION 213 IS INAPPLICABLE IN PREMISES LIABILITY ACTION AGAINST PRIVATE CONSTRUCTION COMPANY: The Second Appellate District has held that an uninsured motorist is not barred by Civil Code, section 3333.4 – Proposition 213 – from recovering pain and suffering damages in a premises liability action against a private construction company. Plaintiff was injured in a single vehicle motorcycle accident when he attempted to turn right across an elevated concrete bus pad. He sued various entities including a contractor, a subcontractor, and the City of Los Angeles in connection with on-going road construction, alleging he was inadequately warned of the danger. The trial court’s ruling that he was barred by Proposition 213 from recovering damages for pain and suffering was reversed. (Allen v. Sully-Miller Contracting ’00 Daily Journal D.A.R. 4369, Rev. Gr. 7/12/00.) [File #237.]

7. REVIEW GRANTED: SUPPLIER OF DEFECTIVE EQUIPMENT CAN BE HELD LIABLE TO EMPLOYEE OF INDEPENDENT CONTRACTOR: Notwithstanding the California Supreme Court’s decisions in Privette v. Superior Court and Toland v. Sunland Housing Group, Inc., the Fourth Appellate District has held that an injured employee of an independent contractor may sue the party who hired the contractor for providing unsafe equipment which allegedly contributed or caused the injury. This case has subsequently been accepted for review by California’s Supreme Court and, therefore, is no longer authoritative. (McKown v. Wal-Mart Stores, Inc. ’00 Daily Journal D.A.R. 8139.) [File #197.]

8. QUALIFICATION FOR PRESENT POSITION IS CONDITION PRECEDENT FOR APPLICATION OF AMERICANS WITH DISABILITIES ACT: The Ninth Circuit has held that an employer owes no duty to make reasonable accommodations to a disabled person unless the person is qualified for the position sought and that the employee can perform the duties of the position if the employer makes an accommodation which would not impose an undue hardship on the running of the business. (Braunling v. Countrywide Home Loans, Inc. ’00 Daily Journal D.A.R. 8099.) [File #162.]

9. LANDOWNERS’ CONDUCT CREATED DUTY OF CARE TO WARN OF DANGER ON ADJACENT BEACH: A landowner who gives children toy buckets to play on a beach owes a duty to warn of any dangerous condition existing on the beach or in the surf. (Pacheco v. United States ’00 Daily Journal D.A.R. 8415.)

10. JURY CAN INFER NEGLIGENCE FROM MERCHANT’S SHODDY INSPECTION PRACTICES: Plaintiff slipped on milk which had been spilled on a K-Mart floor. Absent evidence establishing how long the milk had been there, plaintiff argued that K-Mart’s negligence could be inferred from its normal shoddy inspection practices. The Second Appellate District agreed. “California law provides that if a plaintiff establishes a shoddy inspection practice by a merchant, the trier of fact can infer the substance was on the floor long enough that a reasonable inspection would have led to its discovery.” (Ortega v. K-Mart, Inc. ’00 Daily Journal D.A.R. 9305.) [File #50.]

11. CEDARS-SINAI CASE HOLDING THERE IS NO CAUSE OF ACTION FOR INTENTIONAL SPOILIATION OF EVIDENCE APPLIES RETROACTIVELY:

The Fourth Appellate District has applied the general rule that “judicial decisions are given retroactive effect” to the Supreme Court’s decision in Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal.4th 1. (Penn v. Prestige Stations, Inc. ’00 Daily Journal D.A.R. 9609.) [File #47.]

TRIAL PRACTICE

GRANT OF NEW TRIAL WILL NOT BE DISTURBED ON APPEAL ABSENT A SHOWING THAT THE WHOLE RECORD WAS NOT CONSIDERED: The Third Appellate District rejected the defendant’s contention that the trial court had erred in ruling on a motion for new trial because the entire transcript had not yet been transcribed. “The trial judge may not have been able to read the entire transcript, but he presided over the entire eight-day trial” and ruled on the motion within two months after entry of the judgement. This was enough to convince the court that in ruling upon the motion the trial court considered the entire record. (Maher v. Saad ’00 Daily Journal D.A.R. 8943.) [File #220.]