

FORD, WALKER, HAGGERTY & BEHAR



Law Review
Fourth Quarter 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

June/July/August '00 Edition, p. 10: McKown v. Wal-Mart Stores, 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. 11291; 10/18/00.

June/July/August '00 Edition, p. 11: Ortega v. K mart Corporation 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. 12250; 11/15/00.

Recent Cases

BAD FAITH

1. NEGLIGENCE OF CONTRACTOR RECOMMENDED BY INSURER ALONE DOES NOT WARRANT IMPOSITION OF TORT DAMAGES UPON INSURER: Noting that homeowners' insurers often recommend and even guarantee work of certain contractors, the Fourth Appellate District has held that such insurers are not to be held liable in tort for negligence on the part of those contractors because their

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.

recommendations and/or guarantees are not part of the insurance policy. The Court drew a fine line, noting that an insurer could still be held liable in tort if one of its agents acted tortiously in determining which repairs could be made. (Rattan v. United Services Automobile Association '00 Daily Journal D.A.R. 11708.) [File #21.]

2. INSURER IS ENTITLED TO RESERVE ITS RIGHTS IN A “MIXED” ACTION: According to the Fourth Appellate District, an insurer does not commit bad faith by reserving its rights where one, but not all, causes of action are covered by its liability policy. The Court noted that “an insurer’s right to reimbursement for defense costs for never-even-potentially-covered-claims is predicated on a legal right ‘implied in law as quasi-contractual,’ not a matter of any agreement between the parties.” (Prichard v. Liberty Mutual Ins. Co. '00 Daily Journal D.A.R. 11974.) [File #68.]

3. POLICY REMAINS IN EFFECT UNTIL INSURER NOTIFIES INSURED OF CANCELLATION: Insurance Code, section 677.2, requires commercial general liability insurers to provide notice to their insureds of cancellation “no less than 10 days prior to the effective date of the cancellation.” If the cancellation is defective, the policy remains in effect even if the premium has not been paid. (Kotlar v. Hartford Fire Ins. Co. '00 Daily Journal D.A.R. 10583.) [File #88.]

4. INDIVIDUAL WHO ACCEPTS GRATUITOUS DEFENSE FROM LIABILITY INSURER IS BOUND BY THE CONTRACT’S TERMS: “Regardless of whether respondent was in fact entitled to such coverage, having sought and accepted the benefit of the insurance policy in handling the underlying malpractice suit, respondent was required to abide by the policy’s requirement of arbitration of disputes.” (Norcal Mutual Ins. Co. v. Newton '00 Daily Journal D.A.R. 11061.) [File 199.]

CIVIL PROCEDURE – STATE

1. STATUTE OF LIMITATIONS ON ASBESTOS-RELATED DISEASE DOES NOT BEGIN TO RUN UNTIL DISEASE BECOMES MANIFEST: The First Appellate District has held that “a plaintiff’s discovery of one asbestos-related disease [does not] trigger[] the running of the statute of limitations on all separate and distinct asbestos-related diseases caused by the same exposure to asbestos.” Rather, the court concluded that “each disease resulting from asbestos exposure triggers anew the running of the statute of limitations.” (Wagner v. Apex Marine Ship Management Corp. '00 Daily Journal D.A.R. 10919.) [File #34.]

2. BENEFITS OF LITIGATION PRIVILEGE EXTEND TO FOREIGN PROCEEDINGS AND COMMUNICATIONS: In a case of first impression, the Second Appellate District has held that the litigation privilege encompassed in Civil Code, section 47, applies to events occurring outside the United States, not just in California. (Beroiz v. Wahl '00 Daily Journal D.A.R. 11571.) [File #106.]

3. INSURER IS ENTITLED TO INTERVENE WHERE ITS INSURED IS A CORPORATION WHICH CANNOT DEFEND DUE TO STATUS AS A SUSPENDED CORPORATION: The Sixth Appellate District concluded “that intervention by an insurer is permitted where the insurer remains liable for any default judgment against the insured, and it has no means other than intervention to litigate liability or damages issues.” (Reliance Ins. Co. v. Superior Court ’00 Daily Journal D.A.R. 11419.) [File #69.]

4. MISREPRESENTATIONS REGARDING INSURANCE POLICY LIMITS MAY SUPPORT RESCISSION OF SETTLEMENT AGREEMENT: The Fourth Appellate District has created an exception to the litigation privilege. Noting that “the litigation privilege normally would bar a claim for rescission of a settlement agreement that is induced by fraudulent statements,” the Court nevertheless allowed the rescission action to go forward in this case. The Court concluded that “the policy considerations in favor of allowing a rescission claim are so strong as to outweigh the considerations underlying the litigation privilege and that an exception to the litigation privilege thus exists under these circumstances” where, “as in this case, the settlement agreement results from a misrepresentation regarding the limits of insurance policies providing coverage or potential coverage for a claim.” (Nafsu v. Hurd ’00 Daily Journal D.A.R. 12238.) [File #106.]

5. STANDARD APPLICABLE TO ACCRUAL OF CAUSE OF ACTION PLAYS NO PART IN DETERMINATION OF WHETHER DOE AMENDMENT IS PROPER: The Second Appellate District has reversed the trial court’s rejection of a “Doe” amendment, holding that the trial court “used the wrong legal standard in addressing the issue. . . .” In determining whether a plaintiff can invoke the “relation back” doctrine encompassed by Code of Civil Procedure § 474, the proper inquiry is whether “the plaintiff is ‘ignorant’ within the meaning of the statute.” That inquiry is satisfied if the plaintiff “lacks knowledge of that person’s connection with the case or with [plaintiff’s] injuries. . . . The fact that the plaintiff had the means to obtain knowledge is irrelevant.” (Fuller v. Tucker ’00 Daily Journal D.A.R. 12301.) [File #89.]

6. AGREEMENT TO SUBMIT CROSS-COMPLAINT TO ARBITRATION DOES NOT SHIELD PLAINTIFF FROM SUBSEQUENT ACTION FOR MALICIOUS PROSECUTION: Nothing in the agreement to submit the cross-complaint to arbitration indicated an intent to foreclose any other type of action. Consequently, there was no reason to bar a subsequent malicious prosecution action according to the Second Appellate District. (Sherman Way Townhomes, Inc. v. The Superior Court ’00 Daily Journal D.A.R. 12903.) [File #113.]

7. NON-PARTY’S DISCLOSURE OF PRIVATE INFORMATION IS NOT PROTECTED BY LITIGATION PRIVILEGE: A drugstore disclosed private information about a client to the client’s husband. That information was used against her in a divorce. Although the husband’s use of the information in the divorce proceedings fell within the litigation privilege encompassed by Civil Code, section 47, the drugstore’s disclosure to the husband did not enjoy the same protection. The defendant was simply the tortfeasor whose conduct allowed the husband to use the information against his wife in the subsequent divorce proceedings. Particularly useful in this opinion is a discussion of the application of

the litigation privilege to protect the husband from liability arising from his report to the DMV of his wife's use of certain prescription drugs. The Court held that "[a]n absolute privilege exists to protect citizens from the threat of litigation for communications to government agencies whose function it is to investigate and remedy wrongdoing." (Wise v. Thrifty Payless, Inc. '00 Daily Journal D.A.R. 10677.) [File #106.]

8. THE ABSOLUTE LITIGATION PRIVILEGE IS NOT "ABSOLUTE" IN AN ACTION FOR INVASION OF PRIVACY: The First Appellate District has held that a cause of action for invasion of privacy was stated by a plaintiff even though his other tort claims were barred by the litigation privilege. The Court held "that a balancing of interest analysis governs application of the litigation privilege to a cause of action for invasion of privacy under California Constitution, article I, section I." (Jeffrey H. Imai, Tadlock & Keeney '00 Daily Journal D.A.R. 13063.) [File #106.]

CONSTRUCTION DEFECT

1. DEVELOPER CANNOT DEPRIVE HOMEOWNERS OF RIGHT TO JUDICIAL FORUM BY INSERTING ARBITRATION CLAUSE IN CC&R'S: The Fourth Appellate District has held that "a developer can [not] use a declaration of covenants, conditions and restrictions (CC&R's) containing a binding arbitration clause as a device to preclude homeowners, and the homeowners association of which they are members, from pursuing an action for construction or design defect damages in a court of law." (Villa Milano Homeowners Ass'n '00 Daily Journal D.A.R. 11862.) [File #307.]

2. NO DAMAGES FOR NEGLIGENT CONSTRUCTION ABSENT ACTUAL PROPERTY DAMAGE: In a landmark case, California's Supreme Court has held that "homeowners and a homeowners' association may [not] recover damages in negligence from the developer, contractor and subcontractors who built their dwellings" in the absence of property damage. (Aas v. Superior Court '00 Daily Journal D.A.R. 12831.) [File #307.]

COVERAGE

1. "ACCIDENT" INCLUDES UNINTENDED HARM FLOWING FROM INTENTIONAL ACT: Division Seven of the Second Appellate District has opined that "the 'intentional act vs. intentional harm' analysis" often used is overly simplistic. The court adopted a New Jersey rule that "'the accidental nature of an occurrence is determined by analyzing whether the alleged wrongdoer intended or expected to cause an injury. That interpretation prevents those who intentionally cause harm from unjustly benefiting from insurance coverage while providing injured victims with the greatest chance of compensation consistent with the need to deter wrong-doing.'" (Commercial Underwriters Ins. Co. v. Superior Court '00 Daily Journal D.A.R. 11221.) [File #68.]

2. INCONSPICUOUSLY PLACED POLICY PROVISION IS UNENFORCEABLE: According to the Fourth Appellate District, a liability provision

appearing on the last page of an automobile insurance policy was not conspicuous enough to be enforceable given the fact that “Persons Insured,” which included permissive users, were defined on the policy’s first page. The provision in question defined the Permissive User Coverage. The court concluded that “the permissive user coverage clause should be included in the ‘Liability’ section of the policy.” (Thompson v. Mercury Casualty Company ’00 Daily Journal D.A.R. 11107.) [File #141.]

3. INSURER WAS ESTOPPED TO DENY COVERAGE WHERE POLICY LACKED THE STANDARD ONE-YEAR SUIT PROVISION: The Fourth Appellate District has reversed an award of summary judgment on the grounds that the defendant insurer had failed to notify its insured that a lawsuit on the policy had to be brought within one year. (Neufeld v. Balboa Ins. Co. ’00 Daily Journal D.A.R. 11773.) [File #34.]

MEDICAL MALPRACTICE

EVIDENCE OF SUBSEQUENT PHYSICIAN’S AGGRAVATION OF INJURY IS ADMISSIBLE IN DETERMINATION OF NONECONOMIC DAMAGES DUE FROM ORIGINAL TORTFEASOR: Here, alleged malpractice by an emergency room physician was aggravated by the patient’s personal physician thereafter. The plaintiff argued that evidence of the personal physician’s negligence was inadmissible. The Second Appellate District disagreed, holding instead that the original tortfeasor was entitled to have his liability for noneconomic damages reduced in proportion to the extent of the subsequent tortfeasor’s fault. (Marina Emergency Medical Group v. Superior Court ’00 Daily Journal D.A.R. 11471.) [File #35.]

TORTS

1. PLAINTIFF WHO IS BARRED BY PROPOSITION 213 FROM RECOVERY OF NONECONOMIC DAMAGES IS NONETHELESS ENTITLED TO SEEK PUNITIVE DAMAGES: Holding that punitive damages are not compensation for “pain, suffering, inconvenience, physical impairment, disfigurement, [or] other nonpecuniary damages” so as to be included in those damages barred by Proposition 213, Division Four of the Second Appellate District has concluded that an uninsured motorist is nevertheless entitled to pursue an award of punitive damages. (Nakamura v. Superior Court ’00 Daily Journal D.A.R. 10167.) [File 327.]

2. DECERTIFIED & REV. GRANTED: 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; Decert. & Rev. Gr. ’00 Daily Journal D.A.R. 12250, 11/15/00.) [File #50.]

4. DECERTIFIED & 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; Decert & Rev. Gr. ’00 Daily Journal D.A.R. 11286, 10/18/00.) [File #197.]

5. AWARD OF NONECONOMIC DAMAGES WAS IMPROPER WHERE INJURED OWNER WAS UNINSURED: The First Appellate District reversed a portion of an award at trial because the plaintiff was the owner of an uninsured vehicle involved in the accident even though plaintiff was not in the vehicle at the time. The facts were odd: Plaintiff “Harris was behind her vehicle (an Izusu) and was handing balloons to her children inside. Lammers backed out of her parking space and then pulled forward. As she did so, she clipped the door of Harris’s Izusu and pinned Harris against the back of the vehicle.” The Court explained that Proposition 213, Civil Code, section 3333.4, applies so long as the injuries sustained arose “out of the operation or use of a motor vehicle. . . .” The Court concluded that the plaintiff was using her vehicle to transport her children and supplies and that the accident “arose” from that use. (Harris v. Lammers ’00 Daily Journal D.A.R. 12158.) [File #237.]

6. NEGLIGENT HIRING CLAIM AGAINST HIRER OF INDEPENDENT CONTRACTOR DOES NOT SURVIVE PRIVETTE: According to the First Appellate District, an “employee may not pursue [a] claim [for negligent hiring] because a hirer’s duty to exercise reasonable care in employing a competent and careful independent contractor with the skills necessary to perform the work without creating an unreasonable risk of injury to others does not extend to an employee of the independent contractor.” (Minster v. Contadina Food, Inc. ’00 Daily Journal D.A.R. 11509.) [File #197.]

7. USE OF STATISTICS TO ESTABLISH AGE DISCRIMINATION FAILS: The United States District Court for the District of Arizona has affirmed the grant of summary judgment in favor of the defendant employer in an age discrimination lawsuit. Although the plaintiffs were able to establish a prima facie case of discrimination, the defendant countered by establishing a legitimate, non-discriminatory reason for firing the plaintiffs. Following the defendant’s evidence establishing just such a reason, the plaintiffs were unable to introduce evidence to raise a triable issue of fact to establish that the reason given by their former employer were pretextual. The decision provides an excellent roadmap for the shifting burdens of proof in an age discrimination case. (Coleman v. The Quaker Oats Company ’00 Daily Journal D.A.R. 12305.) [File #243.]

8. EMPLOYER IS NOT RESPONSIBLE FOR RAPE COMMITTED BY ITS EMPLOYEE BECAUSE THE CRIME WAS BEYOND THE SCOPE OF THE EMPLOYMENT: “This case involves the potential respondeat superior liability of a private security company for an alleged sexual assault by an on-duty security guard.” The Second Appellate District held that the employer could not be held liable “because the alleged rape was not within the scope of the security guard’s employment.” (Maria D. v. Westec Residential Security, Inc. ’00 Daily Journal D.A.R. 12776.) [File #229.]

9. INSURERS WHO PAY ON FRAUDULENT CLAIMS HAVE STANDING TO SEEK RESTITUTION: “The fact that insurance companies were obligated to make the payments to Moloy be reason of their contracts with the insureds does not foreclose the conclusion the insurance companies were direct victims of Moloy’s fraud. Indeed, the insured motorists suffered no financial loss arising out of Moloy’s submission of false insurance claims and there is no evidence that Moloy or his accomplices attempted to obtain any property fraudulently from the motorists with whom they induced automobile collisions, or that funds were received from anyone other than an insurance company. the loss that flowed from the conduct for which Moloy was convicted was born entirely, and directly, by the insurance companies.” (People v. Moloy ’00 Daily Journal D.A.R. 1127.) [File #322.]