SUMMARY OF CALIFORNIA APPELLATE DECISIONS

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HOW TO USE THIS CASE SERVICE

When you receive your summaries, each page will have an alphabetical letter located in the upper right-hand corner. Each alphabetical letter corresponds to a separate subject matter category. For a description of the subject matter included within each letter category, consult the Table of Contents in the binder previously received by you. Each page of the summaries should simply be filed behind the appropriate letter category for future reference.

EXAMPLE:

K

DAMAGES; EMOTIONAL DISTRESS; DILLION V. LEGG PRINCIPLE

Jones v. Smith, 82 Cal.App.3d 145

The example cited above deals principally with damages and, therefore, is filed under Category K.

Good luck and pleasant reading!

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A

INSURANCE COVERAGE; VANDALISM AND MALICIOUS MISCHIEF EXCLUSION

Hung Van Ong v. Fire Insurance Exchange
(2015) 235 Cal.App.4th 901, 185 Cal.Rptr.3d 524

FACTS:

The insured had a vacant apartment building. All the tenants had moved out. A transient entered the building on a cold night and started a fire to warm himself. The fire started to spread and the transient attempted to kick the wood out of the door. The building caught fire. The insured made a claim against his insurer (Fire Insurance Exchange), but the carrier denied coverage. The trial court upheld the position of the carrier. The carrier's denial was based upon the exclusion for vandalism and malicious mischief in a building that had been vacant for more than 30 days.

APPELLATE COURT DECISION:

Reversed. This exclusion requires intent or ill will on the part of the transient, and such did not exist in this case. The transient indeed had attempted to put out the fire after he started it, but unsuccessfully. If the insurer had wishes to exclude coverage for vacant buildings under such circumstances, it could have excluded coverage for fire.

COMMENT:

Questionable decision. The "vacancy" and "vandalism and malicious mischief" exclusion, one would think, is designed to protect against exactly this type of conduct in occupancy of a building by transients. There was a dissent.

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INSURANCE COVERAGE; CUMIS; CONFLICT

Centex Homes v. St. Paul Fire and Marine Insurance Co.
(2015) 237 Cal.App.4th 23, 187 Cal.Rptr.3d 542

FACTS:

St. Paul was the insurer of Centex which built single-family homes in Corona, California. Purchasers of those homes brought construction defect actions against Centex. One of the subcontractors for Centex (Oak) was insured by Travelers, and Centex was an additional insured under the Travelers policy. Travelers agreed to defend Centex under a reservation of rights, but sought reimbursement of defense costs for non-covered claims. Centex in turn filed a declaratory relief action seeking to have the court declare that Travels was in a conflict of interest and was favoring its named insured over Centex, together with other allegations, and asked the court to declare that Centex was entitled to independent counsel paid for by Travelers.

The trial court dismissed the suit by Centex.

APPELLATE COURT DECISION:

Affirmed. There are very few facts alleged to support an allegation that independent counsel is required. This claim is premature. A reservation of rights letter on its own does not create a conflict, nor even do claims that are in excess of the policy limit. The trial court correctly dismissed this effort to impose the independent counsel obligation upon Travelers.

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INSURANCE COVERAGE; ACCIDENT; DELIBERATE CONDUCT

Albert v. Mid-Century Insurance Co.
(2015) 236 Cal.App.4th 1281, 187 Cal.Rptr.3d 211

FACTS:

The insured and her neighbor were adjoining properties. The neighbor claimed that the insured erected a fence which enclosed part of the neighbor's property, including nine olive trees. The neighbor also claimed that the insured (Albert) brutally pruned the trees. Albert was insured by Mid-Century under a homeowner's policy which provided coverage for occurrences (meaning accidents). Mid-Century refused to defend and Albert sued for breach of contract and bad faith. The trial court ruled for Mid-Century.

APPELLATE COURT DECISION:

Affirmed. This was not an accident. The insured deliberately acted on the trees, and this was no accident. Any belief on the part of the insured that the trees belonged to her was irrelevant. Also, the trial court properly rejected arguments by Albert that the neighbor could have amended the complaint to allege negligence claims against the insured. The trial court correctly ruled in favor of Mid-Century.

A

INSURANCE COVERAGE; APPRAISAL PROCESS

Lee v. California Capital Insurance Company
(2015) ___ Cal.App.4th ___, __ Cal.Rptr.3d ___

FACTS AND HOLDING:

In case of first impression, the Court of Appeal indicates the limits that the statutes impose on the authority of appraisals in the appraisal process following a fire loss. The appraisers are first to take the losses (damaged items) that are agreed to (by the insurer and the insured) and then assign a value to those items. The appraisers are also to decide (when matters are in dispute) whether other items were undamaged or not in existence. The appraisers are not to decide issues of coverage or causation.

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INSURANCE COVERAGE; WHAT IS AN "ACCIDENT"; DEEP VEIN THROMBOSIS

Williams v. National Union Fire Insurance Company of Pittsburgh, PA.
(2015) 792 F.3d 1136 (WL 4080909)

FACTS:

The husband had been engaged in airline travel for 28 hours over a five-day period. After he left the plane, he collapsed and this was due to deep vein thrombosis (DVT) that he had suffered on the plane, which triggered an embolism. The wife sought coverage under the accidental death benefit provision in a life insurance policy. The District Court held that no coverage was provided.

NINTH CIRCUIT DECISION:

Affirmed. For an accident to take place, the cause must be an external one, and not one brought on over time and in a prolonged period of sitting in an airplane. The trial court correctly held that there was no accident.

A

INSURANCE COVERAGE; INTELLECTUAL PROPERTY; MISAPPROPRIATION OF LIKENESS; EXCLUSIONS

Alterra Excess and Surplus Insurance Company v. Synder
(2015) 234 Cal.App.4th 1390, 184 Cal.Rptr.3d 831

FACTS:

The insured was Maxfield which made desk toys. These went by the name as Bucky Balls, Bucky Cubes and Bucky Sidekicks. The name of the toy, Maxfield admitted, came from the name of the famous architect, R. Buckminster Fuller, who died in 1983. The people who ran his estate had established an organization which had the right to issue licenses for the use of Fuller's name. Maxfield never had sought such permission, and the estate sued Maxfield. Maxfield tendered to its carrier (Alterra). The estate ultimately sued Maxfield and in the lawsuit by the estate against Maxfield, the claims were for misappropriation of likeness and invasion of privacy.

When Maxfield tendered to Alterra, Alterra accepted under reservation of rights, but relied upon an exclusion excluding coverage for patent, trademark, trade dress or other intellectual property rights. Alterra filed a declaratory relief action. While the declaratory relief action on the main action was pending, the Consumer Protection Agency descended upon Maxfield and issued orders concerning dangers with the toys and the necessity to issue warnings. This caused a dissolution of Maxfield. The estate then entered into a judgment agreement with Maxfield and ultimately the estate sued Alterra, claiming coverage (Alterra also claimed that the stipulated judgment was invalid).

The trial judge ruled that there was no coverage.

APPELLATE COURT DECISION:

Affirmed. The exclusion is broad enough to embrace the claims that the estate has brought against Maxfield. The fact that such things as patent trademark and trade dress are specifically mentioned does not mean that the exclusion does not apply to other intellectual property claims. Indeed, the exclusion states that it also applies to other intellectual property rights, and the claims brought by the estate are for such rights. The trial court ruled correctly.

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INSURANCE; CANCELLATION; RESCISSION; MISREPRESENTATION

Dubeck v. California Physicians Service
(2015) 234 Cal.App.4th 1254, 184 Cal.Rptr.3d 743

FACTS:

Plaintiff went in to see a doctor for a needle biopsy in her breast. The results showed malignancy. Five days later, plaintiff applied to Blue Shield for insurance. Blue Shield had a very detailed application inquiring as to plaintiff's past medical treatment. She answered "no" as to almost all pertinent questions. The policy was issued. Plaintiff needed surgery and when the medical bills started coming in, Blue Shield wrote a letter to plaintiff saying that they would not be paying for the cancer treatment and that they were investigating the matter. Nonetheless, Blue Shield continued to collect premiums for about two years (collecting more in premiums than it paid out in claims). Blue Shield also paid for some other medical claims of the plaintiff unrelated to cancer. Ultimately, Blue Shield cancelled the policy prospectively. In the lawsuit by plaintiff for breach of contract and bad faith, Blue Shield asserted an affirmative defense of the right to rescind. The trial court ruled in favor of Blue Shield.

APPELLATE COURT DECISION:

Reversed. Blue Shield had lost its right to rescind by virtue of its conduct. It should have rescinded when it became suspicious about the misrepresentation. Instead, it remained on the risk for approximately two years and collected premiums and even paid other aspects of plaintiff's claims (not related to the cancer). This is all inconsistent with rescission, and Blue Shield had lost the right to rescind.

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D

PROFESSIONAL LIABILITY; MEDICAL MALPRACTICE; NEW TRIAL

Kabran v. Sharp Memorial Hospital
(2015) 236 Cal.App.4th 1294, 187 Cal.Rptr.3d 475

FACTS:

Plaintiff 's decedent went into the hospital for surgical treatment of a tumor on the spine. After the operation, plaintiff alleged that an occupational therapist negligently removed the patient from the bed to a commode, causing injury to the spine which caused the patient to be a quadriplegic. Plaintiff sued the hospital for negligence and the physician for negligence. A jury found that the hospital had been negligent, but that its negligence was not the cause of the patient's injury (apparently concluding that the tumor itself was the cause of the patient's quadriplegia). Plaintiff moved for a new trial and introduced evidence of the autopsy; plaintiff obtained declarations from the doctors who did the autopsy and they concluded that the defense expert was wrong and that the patient's quadriplegia was caused by the independent injury suffered to the spine when the patient was moved by the occupational therapist. The trial court granted the motion for new trial.

APPELLATE COURT DECISION:

Affirmed. The trial court has wide discretion to entertain such evidence, even though allegedly it might be cumulative. The order granting a new trial is affirmed.

D

HOSPITAL; INDEPENDENT CONTRACTORS; SUMMARY JUDGMENT

Whitlow v. Rideout Memorial Hospital
(2015) 237 Cal.App.4th 631, 188 Cal.Rptr.3d 246

FACTS:

Plaintiff went into the emergency room, accompanied by her son. She was suffering from the worst headache of her entire life, she was nauseous and she was vomiting. When she went in, she signed the admissions form which acknowledged that the doctors in the emergency room were independent contractors. The physician in the emergency room examined plaintiff and discharged her because of a tension headache. She went home and several hours later she fainted and was taken to another hospital, where she died two days later of a temporal hemorrhage. A wrongful death action was filed and plaintiffs attempted to hold the hospital liable for the physicians' negligence. The hospital was successful in moving for summary judgment on grounds that the physician was an independent contractor.

APPELLATE COURT DECISION:

Reversed. There are triable issues of fact as to whether the patient's condition prevented her from reading or understanding the language on the admissions form. Hence, it was error to grant summary judgment and the matter is remanded for further hearings.

COMMENT:

Could really create problems for hospitals in relying upon such language since everyone who enters the emergency room is upset and probably does not pay much attention to what they are signing.

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MEDICAL MALPRACTICE; CONSTITUTIONALITY OF MICRA DUE TO CHANGED CIRCUMSTANCES

Chan v. Curran
(2015) 237 Cal.App.4th 601, 188 Cal.Rptr.3d 59

FACTS AND HOLDING:

Court of Appeal holds that MICRA and its cap of $250,000 remain constitutional, despite changed circumstances since the law was passed in 1975, even though in the meanwhile, the $250,000 cap on general damages has been eroded by inflation and access to attorneys by medical malpractice victims has become more difficult.

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NEGLIGENCE; ORDINARY NEGLIGENCE; RENDITION OF PROFESSIONAL SERVICES; STATUTE OF LIMITATIONS

Pouzbaris v. Prime Healthcare Services-Anaheim, LLP
(2015) 236 Cal.App.4th 116, ___ Cal.Rptr.3d ___

FACTS:

Plaintiff entered defendant hospital for chest pain. Plaintiff was in a private room with a bathroom. After going to the bathroom, plaintiff slipped and fell on the floor. The floor had been recently mopped, and there were no warnings signs that the floor was wet. Plaintiff sued the hospital, not within one year from the accident, but within two years of the accident. The trial court granted summary judgment based upon the statute of limitations contained in MICRA which says that a claim for rendition of medical services has to be brought within one year. Summary judgment granted for the hospital.

APPELLATE COURT DECISION:

Reversed. This was a case of ordinary negligence, not a claim arising out to the rendition of professional services. Accordingly, there is a two-year statute of limitations, and plaintiff's claim was timely.

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E

GOVERNMENT LIABILITY AND IMMUNITY; MANDATORY DUTY; PROXIMATE CAUSE; SEXUAL OFFENDERS

State Department of State Hospitals v. Superior Court
(2015) 61 Cal.4th 339, 188 Cal.Rptr.3d 309 (California Supreme Court)

FACTS:

The State of California has a statute called the Sexually Violent Predators Act (SVPA). It provides that when someone has been in prisoned for a sexually violent act, and their prison term is completed, but the public authorities conclude that the person is a danger to others, an elaborate procedure is then set up to evaluate the person, the ultimate penalty being a civil commitment to prevent the predator's release into society. Under this elaborate procedure, the Department of Corrections refers the prisoner to the Department of Mental Health. The Department of Mental Health retains two psychiatrists or two psychologists (or one of each) to evaluate the patient. If they conclude that the patient should be recommended for civil commitment, they refer the matter to the County Counsel who files such a motion. The matter is then heard by a judge who makes the final decision on civil commitment.

In the present case, the prisoner's name was Pitre. He had raped a woman and threatened her. His prison sentence was up. The Department of Corrections decided that he needed to be evaluated for civil commitment. But they only used one psychologist for this. The psychologist only reviewed Pitre's records and determined that he was eligible for release. He was released and four days later he murdered someone.

In a wrongful death action, the plaintiffs claimed that the State had breached its mandatory duty to have two separate evaluations made under Government Code section 815 – mandatory duty. The trial court refused to dismiss the case. The appellate court disagreed.

SUPREME COURT DECISION:

The State did breach its mandatory duty of having two psychologists evaluate Pitre. However, this breach of mandatory duty was not the proximate cause of the murder. The reason: if the two evaluations had been properly carried out, this would have involved the exercise of discretion, and it would be pure speculation to attempt to predict how that evaluation would have come out. Even though a mandatory duty can be breached, if the implementation of that duty involves discretion, no proximate cause can exist.

E

COMMENT:

This writer had predicted that the Supreme Court would take up the case, but had not predicted that it would be decided on the issue of proximate cause. I had predicted that breach of mandatory duty would be found (true) because of the egregious facts and the callous way that the evaluation by one psychologist was carried out.

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G

NEGLIGENCE; AUTOMOBILES; JOINT LIABILITY OF PASSENGER

Navarrete v. Meyer
(2015) 237 Cal.App.4th 1276, 188 Cal.Rptr.3d 623

FACTS:

Plaintiff, her husband and children were parked on the side of a rural road. Defendants were driving down the road in the opposite direction. Defendant passenger had been on the road before and had experienced the phenomenon known as "catching air" when a road has dips in it and the car travels rapidly and becomes airborne. Defendant passenger encouraged the driver to drive faster so as to encounter "catching air." The driver followed these instructions, the car became airborne, went out of control and crashed into plaintiff's vehicle, killing plaintiff's husband. A wrongful death action was filed. The theories of the complaint were Vehicle Code section 21701 (interference with driver's control of vehicle), acting in "concert," and joint liability on the part of the driver and the passenger. The trial court granted summary judgment for the passenger.

APPELLATE COURT DECISION:

Reversed. There were triable issues of fact. One triable issue concerned whether the passenger interfered with the driver's control when she directed the driver to speed up, and he did so. This could support a claim that they acted together (in concert), or the existing claim of conspiracy to violate the Vehicle Code prohibiting speed exhibitions.

Summary judgment accordingly was improperly granted.

G

NEGLIGENCE; DUTY TO DISCLOSE; CONCEALMENT

Doe v. Superior Court (First Baptist Church of San Jose)
(2015) 237 Cal.App.4th 239, 187 Cal.Rptr.3d 791

FACTS:

The child of plaintiff parents was attending a summer camp in the year 2007. At this church summer camp, there was a counselor named Woodhouse. In 2006, Woodhouse had been seen kissing the back of a young girl. He was terminated, but then rehired. He was then seen with plaintiffs' nine-year-old girl sitting on Woodhouse's lap. Despite admonitions to stop this, he did it again. The camp never told the parents about this. In 2013, Woodhouse was investigated by the San Jose Police for child molestation, and it was then that plaintiffs discovered what had happened at the camp. They sued for failure of the camp to disclose. The camp's demurrer was sustained and the complaint dismissed.

APPELLATE COURT DECISION:

Reversed. Plaintiffs adequately stated a cause of action for concealment and failure to disclose the incident. Under *Rowland v. Christian*, the camp had a duty to make such a disclosure.

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RELEASES; NEGLIGENCE; SUMMARY JUDGMENT

Jimenez v. 24 Hour Fitness USA, Inc.
(2005) 237 Cal.App.4th 546, 188 Cal.Rptr.3d 228

FACTS:

Plaintiff joined a fitness club. She did not speak English. She signed a release releasing the club form ordinary negligence, but not gross negligence. She was working out on the treadmill. When she stepped off, she fell backwards and apparently hit her head on adjoining equipment. This resulted in severe and permanent injuries. There was only about three feet clearance between her machine and the one behind it, whereas the manufacturer of the treadmills recommended at least six feet of back clearance. Plaintiff sued, claiming gross negligence and misrepresentation of the defendant in connection with the signing of the release. The trial court granted summary judgment for the defendant.

APPELLATE COURT DECISION:

Reversed. The defendant violated the safety clearances recommended by the manufacturer of the treadmills. Triable issues of facts were presented by the plaintiff on the subject of whether this constituted gross negligence. Triable issues of fact were also raised by the plaintiff with respect to the claims of misrepresentation by defendant in connection with the signing of the release.

G

NEGLIGENCE; PRODUCTS LIABILITY GROSS NEGLIGENCE; RELEASES

Chavez v. 24 Hour Fitness USA, Inc.
(2005) 238 Cal.App.4th 632, 189 Cal.Rptr.3d 449 (WL 4107410)

FACTS:

Husband and wife were members of 24 Hour Fitness. They had signed a release releasing the facility for ordinary negligence, but not gross negligence. They were using a cross-trainer machine when the back of the machine fell off and hit the wife in the head. She sued for gross negligence, for premises liability, and for products liability. Plaintiff's claim, *inter alia*, alleged that the cross-training machine was not properly maintained on a regular basis. The evidence indicated that the chart pertaining to the machine showed no maintenance during the month in which plaintiff was injured. The trial court granted summary judgment for the defendant.

APPELLATE COURT DECISION:

Reversed. The trial court was correct on the products liability claim, since the fitness center was engaged in the provision of services, not products. On the gross negligence claim, plaintiff had raised triable issues of fact in light of the total lack of records of proper maintenance of the machine in question. The case is, therefore, remanded for further review.

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NEGLIGENCE; DUTY; DUTY TO WARN; SEXUAL MISCONDUCT

Conti v. Watchtower Bible & Tract Society of New York, Inc.
(2015) 235 Cal.App.4th 1214, 186 Cal.Rptr.3d 26

FACTS:

This is an interesting case, going back for many years (early 90s) and involving the Jehovah's Witnesses Church and claims of sexual misconduct by a member. Kendrick was married to Evelyn. Evelyn had a child by a former marriage. Evelyn saw Kendrick touch her daughter's breast. She reported this to the elders of the church. The elders placed restrictions on Kendrick's ability to engage in field operations with any Jehovah's Witnesses Church children. These field operations involved the door-to-door visits in which members of the church engage in trying to spread the religion. Before putting such restrictions on Kendrick, the elders consulted the Watchtower, the overall policy group governing Jehovah's Witnesses congregations.

Many years later, Kendrick was somehow again involved in a field operation and was left alone with a nine-year-old girl named Conti. Her parents were in the process of getting a divorce and were not paying much attention to her. Kendrick started a routine of sexual molestation of Conti that lasted for well over a year. He would commit sexual molestation in his own home after field operations. Conti was severely emotionally damaged as a result of molestation.

A lawsuit was filed against the Fremont Church and the Watchtower. One of the theories was that the church had a duty to warn <u>all of its members</u> that Kendrick had engaged in sexual misconduct and that had this warning happened, the injuries to Conti would not have occurred. There was also a separate claim that the defendants had negligently failed to supervise Kendrick and had failed to prevent him from engaging in field activities with children.

A jury returned a verdict of $7,000,000 in compensatory damages against the defendants and $22,000,000 in punitive damages. Plaintiff consented to a reduction of punitives to $8,000,000.

APPELLATE COURT DECISION:

Punitive damages reversed; compensatory damages affirmed (negligent failure to supervise Kendrick).

G

The punitive damages are reversed because there is no duty on the part of the defendants to warn the members of the congregation. Normally, under American jurisprudence, an individual or group has no duty to warn others in danger of being injured by a third person unless there is a special relationship, which does not apply in this case. Imposing a duty on the part of the church to warn its members that in the 1990s Kendrick had been guilty of sexual molestation (he had been convicted of a misdemeanor when his wife reported his conduct to the police) would raise many difficult questions: for example, what kind of sexual misconduct triggers a duty to warn; how serious must it be? The burdens associated with imposing such a duty on the church to warn its members outweigh the benefits.

However, on the issue of negligence, the jury had sufficient evidence to hold the defendants liable. The defendants had a continuing duty to monitor Kendrick and prevent him from engaging in field operations. They failed in that duty and as a result, Conti suffered a severe injury.

COMMENT:

This is a well-reasoned decision. Its most interesting aspect concerns the tension associated with imposing a duty to warn on the part of the church to warn its members that another member has been found guilty of molestation (misdemeanor) and the failure of the court to impose such a duty.

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L

MALICIOUS PROSECUTION; FAVORABLE TERMINATION; PREMATURITY

Pasternack v. McCullough
(2015) 235 Cal.App.4th 1347, 186 Cal.Rptr.3d 81

FACTS AND HOLDING:

In a complicated case involving a real estate deal, resulting in a malicious prosecution action and a motion to strike under the anti-SLAPP statute, the Court of Appeal holds the following: (1) A malicious prosecution is premature if only one of several claims is resolved finally in the underlying action; (2) When the malicious prosecution plaintiff is actively pursuing another related claim in the underlying action, the malicious prosecution action is deemed premature and no "favorable termination" exists.

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PRODUCTS LIABILITY; STRICT LIABILITY

Sherman v. Hennessy Industries, Inc.
(2015) 237 Cal.App.4th 1133, 188 Cal.Rptr.3d 769

FACTS:

The defendant in this case manufactured an arcing machine. This was used to grind brake linings, among other things. The plaintiff had worked as a mechanic around brake linings for years. Some of these brake linings contained asbestos, and plaintiff got this material on his clothes and took them home and his wife developed mesothelioma and died. A lawsuit was filed for strict liability against defendant. Summary judgment was granted for defendant.

APPELLATE COURT DECISION:

Reversed. The defendant is subject to strict liability, even though its machine could also be used to grind brake linings which did not contain asbestos. The use of the arcing machine on brake linings which contained asbestos created a hazardous situation, and it was appropriate to apply the doctrine of strict liability.

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U

CIVIL RIGHTS; PUNITIVE DAMAGES; POLICE

Castro v. County of Los Angeles
(2015) 785 F.3d 336 *B*

FACTS:

Castro was arrested by the Los Angeles County Sheriff's Department for public intoxication. He was taken to the West Hollywood jail. There he was placed in a "sobering" cell which consisted of a cell with only mattresses on the floor and a toilet in the room. Later, another person named Gonzalez was arrested. He was known for being "combative" and despite policies against placing combative people in a cell with other prisoners, Gonzalez was placed with Castro. After the cell door was closed, Castro began pounding on the window for a minute, but no one paid any attention. Thereafter, an intern volunteer working at the facility noticed that Castro was lying on the mattress appearing to be asleep. Then a sheriff's deputy came by and noticed that Gonzalez was stomping on Castro's head. The deputy intervened, but Castro had suffered severe brain damage.

A civil rights trial was brought against the County and the deputy sheriffs. A verdict for compensatory and punitive damages was returned against the individual deputy sheriffs and compensatory damages were awarded against the County as well.

NINTH CIRCUIT DECISION:

Affirmed as to the deputies; reversed as to the County. The evidence was sufficient to indicate that the deputies had acted with deliberate indifference to the risk of harm which faced Castro. They had no business placing a combative prisoner in with Castro, and they did not check and observe him adequately. They were also aware that sobering cells were supposed to be equipped with audio monitoring devices, and this one was not. Punitive damages can be returned for callous indifference to the risk of harm by others, and there is no difference between callous disregard and reckless indifference.

However, with respect to the County, the verdict is reversed. The County's liability would be founded upon knowing a violation of a policy that the County had adopted. There is a State regulation requiring that the sobering cells have audio monitoring devices inside so that the deputies can keep track of what is going on inside. This administrative regulation had been violated, since no such audio monitoring device was placed in this cell. Even though the Sheriff's Department was on constructive notice of such a violation, constructive notice is not sufficient to impose liability upon the County; actual notice of the violation must exist, and there was no evidence indicating that the County had actual notice that such a violation had occurred. Therefore, the verdict against the County is set aside.

U

EMPLOYMENT TORTS; DISCRIMINATION; ARBITRATION

Ashbey v. Archstone Property Management, Inc.
(2015) 785 F.3d 1320

FACTS:

When plaintiff became employed, he signed a dispute resolution manual which contained a binding arbitration agreement. This included a requirement that discrimination claims, including Title VII (retaliation), be resolved by arbitration, including all state law claims. Plaintiff sued for retaliation after his wife was fired after plaintiff himself was terminated. The employer moved for arbitration which was denied by the trial court, finding that plaintiff had not knowingly waived his right to a jury trial.

NINTH CIRCUIT DECISION:

Reversed. Plaintiff had clearly signed the dispute resolution manual which contained the arbitration clause. Arbitration is required, and the judgment is therefore reversed.

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EMPLOYMENT TORTS; CLASS ACTIONS; ARBITRATION; CLASS ACTION WAIVER; PRIVATE ATTORNEY-GENERAL THEORY; SEVERABILITY

Securitas Security Systems USA, Inc. v. Superior Court
(2015) 234 Cal.App.4th 1109, 184 Cal.Rptr.3d 568

FACTS AND HOLDING:

In a complicated case involving an arbitration of an employment agreement, the Court of Appeal renders the following decisions: (1) Class action waiver in employment agreements is valid; (2) It is, however, invalid to require an employee to arbitrate a PAGA (Private Attorneys General Action) cause of action because this affects public rights, and not private rights; (3) Because the agreement was made up of many provisions and prohibited absolutely severability, and because the PAGA claim could not be arbitrated, the entire agreement is therefore voided and plaintiff is entitled to proceed in litigation.

U

EMPLOYMENT TORTS; ARBITRATION; ATTORNEY FEES; ENFORCEABILITY

Serafin v. Balco Properties Ltd., LLC
(2015) 235 Cal.App.4th 165, 185 Cal.Rptr.3d 151

FACTS:

Plaintiff worked for a real estate company. She signed an arbitration agreement. Disputes then arose and plaintiff attempted to sue for wrongful termination, retaliation, Labor Code violations, etc. The employer sought to enforce the arbitration agreement and was successful in doing so in the trial court. Arbitration was held and the arbitrator ruled in favor of the employer. This was confirmed by the Superior Court.

APPELLATE COURT DECISION:

Affirmed. Just because the employer did not sign the arbitration agreement does not mean that the agreement is not binding on the employer who prepared the agreement. Just because the agreement gave the employer the right to modify the agreement (but not the employee) does not invalidate the agreement, since the employer must do so in good faith and reasonably. One of the provisions of the agreement prohibited the employee from recovering attorney fees under circumstances whereby attorney's fees would be recoverable in a court action. Although this is an invalid provision, the trial court took care of it by striking the provision, allowing the remaining matters to be arbitrated. This was proper.

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V

CLASS ACTION; SONG-BEVERLY ACT; ASKING FOR PERSONAL IDENTIFICATION

Harrold v. Levi Strauss & Co.
(2015) 236 Cal.App.4th 1259, 187 Cal.Rptr.3d 347

FACTS:

Plaintiff went into a Levi store. Plaintiff claimed that she paid for the transaction with a credit card and the store asked for her email address. She then filed a class action contending that this violated the Song-Beverly Act which precludes a store from asking for personal identification as a condition to completing a transaction using a credit card. Plaintiff sought to bring a class action on behalf of herself and other customers.

The trial court threw the case out.

APPELLATE COURT DECISION:

Affirmed. Here, the store did not ask for the email address as a condition to processing the credit card transaction, but only asked for the information after completing the processing of the credit card. There was no violation of the Act and, therefore, there was no basis for a class action as well.

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EMPLOYMENT TORTS; STANDING; SEXUAL HARASSMENT

Hirst v. City of Oceanside
(2015) 236 Cal.App.4th 774, 187 Cal.Rptr.3d 119

FACTS:

Plaintiff was a phlebotomist working for a company called AFN. AFN was engaged to provide some services to the police department of the City of Oceanside, and plaintiff commenced those duties. Plaintiff claims to have been sexually harassed by a City employee and she filed suit under the FEHA. A jury returned a verdict for over $1,000,000. The City moved for a new trial and JNOV. The trial court granted the motion for a new trial on grounds of excessiveness of damages, but denied the JNOV. Plaintiff did not appeal the grant of a new trial; the City did appeal the failure to grant the JNOV on the ground that plaintiff lacks standing to sue.

APPELLATE COURT DECISION:

Affirmed. Plaintiff had standing to sue. The defendant contends that only employees of the defendant (City) would have standing to sue for sexual harassment. This is not true. The FEHA extends its protections to those that provide services to the City, and that would include plaintiff.

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