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TRENDS

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CASUALTY & COVERAGE

CALIFORNIA COURT OF APPEAL RULES THAT A COMPLAINT BY AN INSURER AGAINST A BROKER FOR FRAUD AND NEGLIGENCE PROPERLY STATES A CAUSE OF ACTION

FACTS: An insured of Century Surety Company was sued for construction defects and tendered its defense to Century. Century undertook the defense, but withdrew after it determined that information in the insured's insurance application was false. The insured then sued Century for breach of contract and bad faith. The insured also alleged claims of negligence against its insurance agent, Crosby. Century filed a cross-complaint against Crosby, alleging that Crosby knowingly submitted a false insurance application and that in reliance on that application; Century issued a policy and expended funds defending the insured. Crosby filed a demurrer to that cross-complaint, arguing that it did not owe Century a duty in negligence and that Century could not maintain an action in fraud. Crosby argued that Century's remedy was against its insureds.

PROCEDURAL HISTORY: The trial court sustained the demurrer without leave to amend and entered a judgment of dismissal of the cross-complaint. Century appealed.

ISSUE: May an insurer sue a broker for fraud/deceit and negligence in connection with the broker's participation in the submission of a false application for insurance?

HOLDING: Yes.

ANALYSIS: With respect to the fraud/deceit cause of action, the cross-complaint alleged all of the traditional elements (misrepresentation of a material fact, knowledge of falsity, intent to deceive, reliance and damages). The court rejected Crosby's argument that as a matter of law, an insurer's remedies are limited to action against its own insured. Where the insurer has incurred costs in defending an insured whose policy was later shown to have been obtained in reliance on the broker's misrepresentations, an action may lie. This is especially so where the broker is alleged to have actively forged documents to support an application. With respect to negligence, again, the cross-complaint alleged the necessary elements (duty, breach, causation, damages). Crosby breached a duty to prepare and submit an accurate and honest insurance application. As a matter of public policy, the court found there to be a duty of care owed by Crosby to Century. It emphasized that this does not mean that a broker is a guarantor of information in an application or that it has a duty to independently investigate information supplied by an insured. But rather, when the broker knows of actual misstatements in the application, it may be held liable for transmitting those misrepresentations in an application knowing the insurer will reasonably rely on them.

Century Surety Co. v. Crosby Ins. Co. (2004) 124 Cal.App.4th 116

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PLAINTIFF IN FIRST PARTY BAD FAITH CASE MAY OBTAIN DISCOVERY OF PRIOR CLAIM FILES

FACTS: Maria Luisa Hernandez claimed that Permanent General Assurance Corp. wrongfully denied her first party claim for auto theft. She filed suit for bad faith and other related cause of action and accused defendant of discriminatory treatment of minority claimants.

PROCEDURAL HISTORY: Plaintiff served a notice to produce seeking production of all claims files for all defendants' insureds in California who had submitted a claim for vehicle theft from 1999 to present. Defendant objected on various grounds, including violation of §791 of the Insurance Code, which prohibits an insurance company from disclosing personal and private information regarding its insureds. Plaintiff argued that defense counsel had a practice of "stonewalling...in an effort to hide evidence of [defendant's] racially discriminatory claims practices." The court granted the motion. Defendant filed a writ.

ISSUE: Was the discovery order valid?

HOLDING: Yes, provided that written authorizations are first obtained from the insureds.

ANALYSIS: The appellate court felt that the evidence was potentially relevant since it went to the issue of whether defendant had engaged in a pattern and practice of discriminatory claims handling. However, appropriate consideration must be given to the privacy interests of defendant's insureds. The court held that written authorizations are required from each insured whose claim file is sought, and that the trial court must conduct a hearing to determine the appropriate procedure for obtaining those authorizations.

Permanent Gen. Assur. Corp. vs. Superior Court (2004) 122 Cal.App.4th 1493

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HOMEOWNER INSURER HAD NO DUTY TO DEFEND NONRESIDENT OF INSURED'S HOUSEHOLD

FACTS: Michelle Miller was a 17 year old female who lived with her divorced father in the Santa Barbara area. She occasionally lived in the home of her mother and her mother's boyfriend. The mother was a named insured under a Safeco homeowner's policy. The policy only covered the named insured and members of the named insured's household, and also contained an auto exclusion.

The incident occurred after Ms. Miller had been partying at night with her boyfriend (Parks). They got into an altercation while she was driving him home in her mother's car. She left him on the shoulder of the freeway and drove off. Parks, who was intoxicated, wandered into the traffic lanes and was seriously injured.

PROCEDURAL HISTORY: Parks filed a personal injury suit against Miller. Miller tendered her defense to Safeco. Safeco denied coverage and refused to defend. Parks filed this bad faith/dec relief action against Safeco. In a nonjury trial, the trial court ruled that Safeco breached its duty to defend and was guilty of bad faith.

ISSUE: Did Safeco commit bad faith by refusing to defend a member of its named insured household in this incident?

HOLDING: No.

ANALYSIS There was no duty to defend because, at the time of the inception of the underlying lawsuit, Safeco was in possession of facts which indisputably ruled out any potential for coverage (i.e., that Miller was not a "resident" or "member" of the named insured's household within the meaning of the policy). An insurer may refuse to defend when the facts (based on the allegations of the complaint and/or undisputed extraneous evidence) reveals no potential for coverage.

Safeco Ins. Co. vs. Parks (2004) 122 CA4th 779

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ADVERTISING INJURY COVERAGE OF LIABILITY POLICY HELD NOT TO APPLY TO CLAIMS OF THEFT OF CUSTOMER FILES

FACTS: The insured operated a commercial printing business and was insured under a liability policy which included coverage for "advertising injury". "Advertising injury" was defined as libel/slander, violation of the right of privacy, "misappropriation of advertising ideas or style of doing business", or "infringement of copyright, title or slogan". The insured was sued in an action by a competitor for whom an employee of the insured sued to work, alleging that the employee took customer files upon his departure. The complaint further alleged that the employee solicited plaintiff's customers once he was employed with the insured. The insured tendered the action to its insurer, which denied coverage. The insured subsequently sued for breach of contract and bad faith.

PROCEDURAL HISTORY: The trial court granted Mercury's motion for summary judgment and plaintiff appealed.

ISSUE: Does a claim for theft of customer files fall within the scope of "advertising injury" coverage of a liability policy?

HOLDING: No.

ANALYSIS: In order to trigger coverage under an advertising injury clause, the facts must demonstrate a causal connection between some form of advertising and the alleged injury. While the complaint in the present action alleged that plaintiff spent money on advertising, it did not allege that the customer files directly related to those efforts. The trade secrets allegedly taken were specific customer information, not advertising ideas. The complaint simply alleged that a defecting employee stole trade secrets and attempted to solicit his former employer's customers. Nothing was alleged relating to any advertising activities by the insured.

We Do Graphics Inc. v. Mercury Casualty Co. (2004) 124 Cal.App.4th 131

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GENERAL TORTS

EXCESSIVE PUNITIVE DAMAGE AWARD IN TOBACCO LITIGATION CASE VIOLATED DUE PROCESS

FACTS: Richard Boeken had been smoking Marlboro's since 1957 (when he was a minor). He was diagnosed with lung cancer in 1999. He filed suit against Philip Morris alleging, inter alia, product liability and fraudulent misrepresentation/concealment, claiming personal injuries caused by cigarette addiction.

PROCEDURAL HISTORY: The case proceeded to jury trial on the causes of action for strict products liability and fraud. The jury found for Mr. Boeken on both causes of action and awarded (in round figures) $5.5 million in compensatory damages and $3 billion in punitives. The court conditionally granted Philip Morris' motion for new trial on the basis of excessive punitive damages. The motion was conditioned upon plaintiff's acceptance of a reduction of the punitive award to $100 million. Boeken consented to the reduction, and an amended judgment was filed reflecting the "reduced" punitive award. Defendant appealed all issues (liability and punitives).

ISSUE: The primary issues were whether the jury's findings of fraud and strict liability were supported by substantial evidence and whether its award of $3 billion in punitive damages (reduced by the trial court to $100 million on motion for new trial) violated due process.

HOLDING: The liability findings were supported by substantial evidence, but the reduced punitive award was excessive. The court conditionally remanded the case back to the trial court for a retrial on the amount of punitives unless plaintiff consents to a reduction of the award to $50 million. (Note: The appellate court has granted a rehearing in this case so the decision, at least for now, is not certified for publication).

ANALYSIS: On liability, the court found sufficient evidence that plaintiff had justifiably relied upon the acts of fraud and concealment regarding the safety of tobacco brought out at trial, that the product was defective under the consumer expectation test (i.e.: the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner), that the trial court did not err by rejecting defendant's proposed instruction under BAJI 9.00.6 (product not defective if it is inherently unsafe, and that unsafe quality generally known by ordinary consumer), since there was evidence that defendant had added things to tobacco which exacerbated the risks of addiction and lung cancer which was unknown to general public, that there was no merit to defendant's federal preemption defenses; and that the court did not abuse its discretion by excluding, under Evid.C. 352, a 1992 felony wire fraud conviction involving plaintiff.

On the question of punitives, the court followed recent U.S. and California Supreme Court precedents which requires the court to take into account the level of reprehensibility and the ratio of punitives to compensatory in conjunction with D's net worth. In this case, the trial court's reduced award amounted to a punitive/compensatory ratio of approximately18 to 1. This was excessive punishment under the Supreme Court's due process test, which rejects anything more than a single digit ratio except in the most extreme cases. Here, however, the level of reprehensibility in this case was high, thus justifying the highest single-digit ratio (9:1).

Accordingly, the court ordered that the judgment be affirmed in all respects except as to the amount of punitives, and ordered the judgment modified to reduce the punitive award reduced to $50 million, provided plaintiff files a timely consent. If he does not consent, the case will be remanded for a new trial on punitives.

Boeken vs. Philip Morris, Inc. (2004) 122 Cal.App.4th 684 (rehearing granted--not certified for publication).

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RAISED SIDEWALK ON PRIVATE PROPERTY IS TRIVIAL DEFECT AS A MATTER OF LAW

FACTS: Josephine Caloroso tripped over a "slight crack" in a walkway in front of defendant's home. The elevation difference along the edge of the crack was less that one-half inch. Ms. Caloroso testified in her deposition that she tripped when her shoe got caught on the elevated part of the walkway. She was looking straight ahead at the time of the fall. There was no evidence concerning other accidents on the walkway. She sued defendant for premises liability and her husband sued for loss of consortium
Plaintiff's expert testified that published standards for safe walking surfaces prohibit height differentials of more than one-quarter of an inch without a ramp or slope, and he opined that the condition was dangerous.

PROCEDURAL HISTORY: Defendant moved for summary judgment on the ground that the defect was trivial as a matter of law. The court agreed and granted the motion.

ISSUE: Did plaintiff's evidence create a triable issue of fact as to whether the walkway was unreasonably dangerous?

HOLDING: No.

ANALYSIS: It was undisputed that the difference in elevation was less than one-half inch. This is trivial as a matter of law. Minor defects such as the crack in a walkway at issue are inevitable and the continued existence of such defects without warning or repair is not unreasonable.

This case is consistent with existing case law on the subject. The courts have stated in the past that a property owner owes no liability for "trivial defects" on his or her property but have applied that term very narrowly. In 1977, the court in Fielder vs. City of Glendale held that a crack in a public sidewalk resulting in a misalignment of one-half inch or less was trivial as a matter of law (expert opinion to the contrary notwithstanding)--at least in the absence of prior similar accidents at the same location. A subsequent case entitled Ursino vs. Big Boy Restaurants applied that same rule to private walkways. This case does not create any new law but confirms that the rule of Fielder and Ursino still controls. However, no case has held that a misalignment in excess of one-half inch is trivial.

Caloroso vs. Hathaway (2004) 122 Cal.App.4th 922

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CALIFORNIA SUPREME COURT HOLDS THAT CAL-OSHA PROVISIONS MAY BE USED TO ESTABLISH DUTY OF CARE IN NEGLIGENCE ACTION

FACTS: An employee of a roofer sustained an injury at a construction site. He sued the general contractor, alleging negligence in failing to provide a safe place to work. Defendant filed a motion in limine, seeking an order excluding references to Cal-OSHA provisions and their alleged violation. This was pursuant to Labor Code section 6304.5, which, until 1999, barred the admission of Cal-OSHA provisions to establish the duty of care in negligence actions. The trial court denied the motion, ruling that a 1999 amendment to section 6304.5 made Cal-OSHA provisions admissible in negligence actions. The case proceeded to trial and testimony was permitted as to how the scaffold on which the accident occurred violated Cal-OSHA provisions. The jury found in favor of plaintiff.

PROCEDURAL HISTORY: On appeal, defendant argued that notwithstanding the 1999 amendment to the statute, admission of the testimony regarding Cal-OSHA violations was in error. The Court of Appeal agreed and reversed. The California Supreme Court granted review.

ISSUE: Does the 1999 amendment to Labor Code section 6304.5 permit the introduction of Cal-OSHA provisions and violations in a third party negligence action against a non-employer?

HOLDING: Yes, but not retroactively.

ANALYSIS: The Cal-OSHA provisions were enacted to assure a safe and healthy workplace environment for California workers. Until 1971, these provisions were admitted in workplace negligence actions in order to establish the standard of care, and the violation of the provisions was considered negligence per se. In 1971, the Legislature enacted section 6304.5, which barred admission of the provisions in a negligence action. In 1999, the statute was amended so as to permit introduction of Cal-OSHA provisions and violations in actions between an injured employee and his/her employer. The question before the California Supreme Court was whether that same amendment applies to actions between an injured employee and a third party, non-employer defendant. The Court held that it did. The key to its ruling was the fact that the amendment deleted a section of the statute which had formerly and expressly stated that Cal-OSHA provisions could not be admitted in third party actions. Thus, the new language plus the deletion of the former language means that Cal-OSHA provisions are to be treated like any other statute or regulation under the Evidence Code – they may be admitted to establish a standard of care in third party actions. In this particular case, however, the testimony should not have been allowed since the accident preceded the 1999 amendment and the amendment was not retroactive in nature.

Elsner v. Uveges (2004) --- Cal.Rptr.3d ----, 2004 WL 2924303

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COMMERCIAL LESSOR OWED NO DUTY TO TENANT'S EMPLOYEE WHO WAS INJURED BY BENZENE IN COURSE OF EMPLOYMENT

FACTS: Mr. Laico was hired from a temporary employment agency to work for Chevron Research & Technology Co. (CRTC), which operated a lab facility on property owned by Chevron USA (Chevron). Laico's job required him to use a hazardous chemical (Benzene) in the cleaning of certain products. He sustained injury due to chronic exposure. He recovered workers comp. from his employer but sued Chevron for premises liability.

PROCEDURAL HISTORY: At trial, Chevron moved for nonsuit on the grounds it had no knowledge that employees of CRTC were being exposed to hazardous chemicals on its property. Plaintiff argued Chevron owed a duty of care, both under common law negligence and the "peculiar risk" doctrine. The court denied the nonsuit. The jury found Chevron USA negligent in the management of its premises. Chevron appealed.

ISSUES: Did Chevron owe a duty of care in light of the evidence that it had no actual knowledge of the hazardous conditions alleged by plaintiff, and was it was liable for failing to require its tenant to take precautionary under the peculiar risk doctrine?

HOLDING: On both questions, no.

ANALYSIS: The case is consistent with established precedent that a commercial lessor is not liable for dangerous conditions in the leased premises unless (1) it had actual knowledge of the danger and failed to correct it or warn against it, or (2) it failed to adequately inspect the premises at the time of inception or renewal of the lease. There was no evidence that Chevron had actual knowledge of the benzene danger and no evidence that the benzene problem existed at the commencement of the lease such that it would be discoverable upon inspection.

The court also rejected plaintiff's peculiar risk theory. The Supreme Court's Privette rule applied here even though the relationship between Chevron and CRTC was lessor/lessee as opposed to hirer/subcontractor. Under Privette, the hirer owes no duty to specify the precautions an independent contractor must take for the protection of its employees. He owes no duty of care to the contractor's employees to prevent or correct unsafe procedures or practices to which the he did not contribute by direction, induced reliance, or other affirmative conduct.

Laico vs. Chevron U.S.A., Inc. (2004) 123 CA4th 649

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CALIFORNIA COURT OF APPEAL AFFIRMS SUMMARY JUDGMENT IN FAVOR OF DESIGN PROFESSIONAL IN NEGLIGENCE ACTION DUE TO LACK OF RELATIONSHIP WITH PROPERTY OWNER

FACTS: Plaintiff Weseloh owned property in San Juan Capistrano and contracted with a general contractor, K.L. Wessel Construction Co., Inc. (Wessel), to construct automobile dealership facilities on the property. Wessel, in turn, contracted with Sierra to build the retaining walls on the project. Sierra retained Randle as a design consultant for the walls. Randle had no contractual relationships with either Weseloh or Wessel. When the retaining wall failed, Weseloh sued Wessel, Randle and others for negligence, and Wessel filed a cross-complaint for indemnity against Randle.

PROCEDURAL HISTORY: The trial court granted Randle's motion for summary judgment, holding that Randle did not owe a duty to the plaintiffs as a matter of law. Summary judgment was granted as to indemnity cross-complaint for the same reason. Plaintiff and cross-complainant timely appealed.

ISSUE: Where a design professional is hired as a consultant by a subcontractor and renders opinions only to that subcontractor, do other entities have a cause of action for negligence against that design professional if the professional's opinion is erroneous?

HOLDING: No.

ANALYSIS: In his motion for summary judgment, Randle produced undisputed evidence showing he did not owe the Weseloh plaintiffs or Wessel a duty of care in designing the retaining walls: (1) the Weseloh plaintiffs contracted with Wessel to construct automobile dealership facilities at the property; (2) Randle worked for Sierra; (3) Sierra built the retaining walls at the project; (4) a portion of the retaining walls failed; (5) Randle had no "role in the construction" of the retaining walls; (6) Randle did not enter into a contract with the Weseloh plaintiffs; (7) Randle did not enter into a contract with Wessel; and (8) Randle was never compensated by the Weseloh plaintiffs or Wessel for any work performed for the project. Randle showed he had no contractual privity with either the Weseloh plaintiffs or Wessel and performed only professional design services for a subcontractor involved in the project. The lack of privity of contract does not always preclude the imposition of a duty of care. Rather, a variety of factors must be analyzed to determine if such a duty exists. The court examined those factors and found that none applied. Ultimately, it could find no case which holds that a design engineer who provides only professional services in a commercial construction project owes a duty of care to the property owner of the project or a general contractor, in the absence of contractual privity.

Weseloh Family LP v. K.L. Wessel Const. Co., Inc. (2004) --- Cal.Rptr.3d ----, 2004 WL 2943186

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PROFESSIONAL LIABILITY

STATUTE OF LIMITATIONS FOR PROFESSIONAL NEGLIGENCE CLAIMS DOES NOT APPLY TO ELDER ABUSE CLAIMS

FACTS: The defendants, a nursing center, were sued for allegedly committing elder abuse from the time the resident was admitted in March 1998 until her discharge on December 24, 2001. Defendants filed a motion for partial judgment on the pleadings as to the elder abuse cause of action, contending that the applicable statute of limitations was three years under C.C.P. section 340.5. Defendants argued that the statute began to run in 1998 when the resident sustained appreciable harm and thus the complaint filed on December 23, 2002 was untimely.

PROCEDURAL HISTORY: The trial court granted defendants' motion and plaintiff appealed.

ISSUE: Does the three year statute of limitations applicable to actions against health care providers apply to causes of action against health care providers for "custodial elder abuse" under the Elder Abuse Act?

HOLDING: No.

ANALYSIS: California statutes contain provision addressing both medical negligence (governed by the MICRA laws) and elder abuse. The purpose of the Elder Abuse Act is to protect a vulnerable portion of the population from gross mistreatment in the form of abuse and custodial neglect. It pertains to conduct beyond mere negligent medical treatment of elders but rather governs providers who recklessly neglect elder and dependent adults. Thus, reckless conduct under the Elder Abuse Act is distinct from a cause of action based on "professional negligence". The goal of the Act was to provide heightened remedies for acts of egregious abuse against elders, while allowing acts of negligence in the rendition of medical services to elders to be governed by laws pertaining to professional negligence. It thus follows that egregious acts of elder abuse are not governed by laws applicable to negligence and therefore section 340.5 has no application to elder abuse actions. The two year statute for assault, battery, etc. under C.C.P. section 335.1 is instead applicable, subject to tolling for insanity under section 352, as alleged in this action.

Benun v. Superior Court (2004) 123 Cal.App.4th 113