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TRENDS

Second Quarter, 2005

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CASUALTY & COVERAGE

CALIFORNIA COURT OF APPEAL HOLDS THAT PROPERTY INSURER CAN INTERVENE IN CONSTRUCTION DEFECT ACTION TO ASSERT SUBROGATION RIGHTS

Facts: State Farm issued a homeowner's policy to its insured, which included subrogation rights. The insured submitted a claim to State Farm under the policy for water and mold damage to their house allegedly caused by the negligence of third parties. State Farm paid a portion of the claim. The insured filed a construction defect lawsuit against third parties involved in the construction of the home, seeking damages caused by the water and mold damage. The insured also filed a bad faith suit against State Farm. State Farm's motion to consolidate the two suits was denied. It then moved to intervene in the construction defect action in order to assert its subrogation rights. The trial court denied that motion, stating that "the diversion or complication of adding State Farm would outweigh any prejudice to State Farm by not allowing an intervention."

Procedural History: State Farm appealed the order denying its right to intervene.

Issue: May an insurer intervene in a third party action in order to protect and assert its subrogation rights?

Holding: Yes.

Analysis: A nonparty has a right under Code of Civil Procedure section 387, subdivision (b) to intervene in a pending action "if the person seeking intervention claims an interest relating to the property or transaction which is the subject of the action and that person is so situated that the disposition of the action may as a practical matter impair or impede that person's ability to protect that interest, unless that person's interest is adequately represented by existing parties." State Farm, as a partially subrogated insurer, has an interest "relating to the property or transaction" that is the subject of the construction defect lawsuit. Under the doctrine of subrogation, when an insurer pays money to its insured for a loss caused by a third party, the insurer succeeds to its insured's rights against the third party in the amount the insurer paid. A subrogated insurer has "a direct pecuniary interest" in the outcome of the litigation between the insured and the responsible third party. State Farm has stepped into the insured's shoes and, to the extent it has made payments under the policy, has the same rights as the insured against the various defendants and tortfeasors in the construction defect lawsuit. As an insurance carrier with a right of partial subrogation, State Farm has a direct pecuniary interest in the Hodges action against the allegedly responsible third parties. Further, the court held that State Farm is so situated that the disposition of the construction defect lawsuit may, "as a practical matter impair or impede" its ability to protect its subrogation rights within the meaning of Code of Civil Procedure section 387, subdivision (b).

Hodge v. Kirkpatrick Development, Inc., --- Cal.Rptr.3d ----, 2005 WL 1439193

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CALIFORNIA COURT OF APPEAL HOLDS THAT DEFINITION OF "ADVERTISING" IN CGL POLICY DOES NOT INCLUDE PERSONAL SOLICITATIONS

Facts: The insured, Rombe, was a franchisee of a nationwide temporary employment agency, TRC. On June 6, 2001, Rombe invited customers and employees of its franchise to a breakfast meeting at a hotel. At the meeting, Rombe announced that it would no longer be affiliated with TRC. Rather, it was announced that Rombe would be starting a new employment agency and it asked those in attendance to become customers and employees of the new agency. The breakfast meeting and Rombe's plans were later reported in an Internet newsletter. TRC sued Rombe, alleging causes of action for breach of contract, misappropriation of trade secrets and unfair competition. At the time TRC filed its complaint against Rombe, Rombe was covered by a Premier Businessowners Policy issued by defendant AMCO Insurance Company. The policy provided liability coverage for "advertising injuries" and included the following definition of advertisement: "a notice that is broadcast or published to the general public or specific market segments about your goods, products or services for the purpose of attracting customers or supporters." The advertising offenses covered by AMCO's policy included: slander or libel; violation of the right to privacy; copyright, title or slogan infringement; misappropriation of advertising ideas or style of doing business. Rombe tendered defense of the TRC complaint to AMCO, which AMCO declined. TRC and Rombe eventually entered into a settlement agreement. After settling with TRC, Rombe filed a complaint against AMCO for breach of contract and breach of the covenant of good faith and fair dealing. Rombe filed a motion for summary adjudication and AMCO filed a cross-motion for summary judgment.

Procedural History: The trial court granted AMCO's motion. Although the trial court found that the "market segment" qualification in the policy's definition of advertisement might be broad enough to include the breakfast Rombe hosted, neither the breakfast nor the press report involved any use of TRC's advertising idea or any other covered advertising offense. Judgment was entered in favor of AMCO and Rombe filed a timely notice of appeal. State Farm appealed the order denying its right to intervene.

Issue: Does "advertisement" as defined in a CGL policy require wide dissemination of the insured's advertisements as opposed to small, personal solicitation?

Holding: Yes

Analysis: Rombe argued that the breakfast it hosted, and the later Internet report of the breakfast and Rombe's plans constituted the "'use of another's advertising idea in your "advertisement" ' within the meaning of the coverage provisions of AMCO's policy. Rombe contended that the breakfast was arguably a form of advertisement to "specific market segments." AMCO contended that the breakfast was not an advertisement and that the news report about the breakfast did not involve any arguable use of TRC's advertising ideas. The court agreed with AMCO on both counts. The breakfast was not an advertisement within the meaning of AMCO's policy. Under the policy's definition, "advertisements" are notices "published or broadcast" either to the general public or specific market segments. The words "published" and "broadcast" include the notion of a relatively large and disparate audience. The reference to "specific market segments," is only a means of relieving an insured of the burden of showing that its advertising was directed to the general public, as opposed to some defined market, such as medical professionals, racing car enthusiasts, or horse breeders. The term "specific market segments" does not relieve an insured of the burden of demonstrating that it was engaged in relatively wide dissemination of its advertisements even if the distribution was focused on recipients with particular characteristics or interests. Neither the breakfast meeting Rombe hosted nor any solicitation which occurred there involved the broad dissemination of information which AMCO's policy required. The breakfast involved invited guests who learned about Rombe's future plans and were encouraged to use its services. This in-person form of promotion is not what is commonly thought of as advertising.

The press report did not suggest any use of AMCO's advertising idea or any other advertising offense. Under the policy, advertising offenses include slander or libel, violation of the right to privacy, copyright, title or slogan infringement, and the misappropriation of advertising ideas or style of doing business. Nothing on the face of TRC's complaint or anywhere else in the record shows that the press report involved any of these offenses. The report appears to have simply reported what occurred at the Rombe breakfast. Thus even if the press report were an advertisement, it did not involve any covered advertising offense.

Rombe Corp. v. Allied Ins. Co. (2005) 128 Cal.App.4th 482

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COURT OF APPEAL HOLDS THAT WORKER INJURED IN "CHERRY PICKER" OF A TRUCK IS NOT AN INSURED UNDER THE AUTO POLICY COVERING THE TRUCK

Facts: An employee of VCP Cable Construction, Llamas, was injured when a "cherry picker" in which he was riding fell. JMSD owned the cherry picker and the truck to which it was attached and was insured under a CGL policy from Scottsdale. Llamas filed suit, naming JMSD as a defendant. State Farm issued an automobile liability insurance policy to JMSD and it identified the truck involved in the accident in its schedule of insured vehicles. The Llamas action settled for $1.375 million. Of this amount, Scottsdale paid $620,000 and State Farm paid $655,000. The insurers filed actions against each other, contesting their respective defense and indemnity obligations. They filed motions for summary judgments against one another, each asserting that the other's policy was primary.

Procedural History: The trial court granted State Farm's summary judgment motion. It ruled that the Scottsdale commercial policy covered the accident and was a primary policy. The State Farm policy provided primary coverage, but the accident was not covered under that policy because Llamas was an insured under that policy and the policy excluded coverage for bodily injury to an insured. The court ordered that Scottsdale take nothing on its complaint and that State Farm recover $655,000 from Scottsdale on State Farm's cross-complaint.

Issue: Did the trial court err in finding that State Farm's exclusion for bodily injury to any insured applied to Llamas's injuries, i.e., was Llamas an insured under the State Farm policy?

Holding: The trial court erred in finding that Llamas was an insured under the State Farm policy.

Analysis: Under the State Farm policy (the policy which insured the truck to which the cherry picker was attached), Llamas was an insured if he was "any other person while using such a car if its use is within the scope of consent of you or your spouse," i.e., if he was using the insured truck. As a matter of law, he was using the insured truck if he was "operating, maintaining, loading, or unloading" it. (Insurance Code § 11580.06, subd. (g).) He was operating it if he was "sitting immediately behind the steering controls of the" truck. (Id., subd. (f).) He was not. He was in the cherry picker attached to the truck. Llamas was not operating the truck to which the cherry picker was attached. He thus was not using it by operating it. The trial court therefore erred in granting summary judgment to State Farm on the ground Llamas was an insured under the State Farm policy. The court also rejected Scottsdale's reliance on Section 11580.9(d), which speaks to the priority of coverage "where two or more policies affording valid and collectible liability insurance apply to the same motor vehicle or vehicles in an occurrence . . . ." The Scottsdale policy does not provide liability insurance for the truck involved in the incident. It provides liability insurance for the cherry picker mounted on the truck. Section 11580.9 thus does not apply to determine priority between Scottsdale's policy and the State Farm and CUIC policies, which are automobile liability insurance policies and describe the truck.

Scottsdale Ins. Co. v. State Farm Mut. Auto. Ins. Co. --- Cal.Rptr.3d ----, 2005 WL 1515037

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GENERAL TORTS

APPELLATE COURT HOLDS THAT CLAIM AGAINST HIRER OF INDEPENDENT CONTRACTOR FOR BREACH OF NONDELEGABLE DUTY BASED ON VIOLATION OF SAFETY CODE MAY BE ACTIONABLE UNDER PRIVETTE.

Facts: Plaintiff's employer was hired by defendant to work on defendant's gasoline storage facility. Plaintiff was injured by a fuel tank explosion on the premises.

Procedural History: Plaintiff's theory of liability against defendant was that it violated certain regulations under the Fire Code regarding the location of fire extinguishers. Plaintiff's experts testified that the absence of fire extinguishers at certain locations caused or contributed to the injuries. However, there was no evidence that defendant had "retained control" over plaintiff's employer at the worksite. Defendant filed a motion for summary judgment contending that there was neither retained control nor active negligence on his part. The court agreed and granted the motion.

Issue: Is a claim against a hirer of an independent contractor based on the hirer's alleged violation of a safety code which allegedly causes injury to the contractor's employee actionable under the Supreme Court Privette doctrine?

Holding: Yes.

Analysis: Plaintiff's evidence created a triable issue of fact on his claim for breach of nondelegable duty based on defendant's violation of the Fire Code. Although its negligence was not active in the sense of being "affirmative," there are times when the hirer will be liable for its omissions. Retained control is only one theory of a hirer's liability for injury to a contractor's employee and does not foreclose liability based on breach of a regulatory duty. Here, defendant's failure to comply with an affirmative duty under the Fire Code regulations, which arguably caused or contributed to the injuries in question, is a form of active negligence that will support direct liability under Privette.

The Court distinguished recent cases which held that claims for nondelegable duty did not survive Privette. In those cases, the hirer was charged with vicarious liability based on the negligence of the independent contractor. Claims for vicarious liability are barred by Privette even when based on nondelegable duty. Here, however, the hirer was itself negligent for violating the Fire Code.

Barclay v. Jesse M. Lange Distributor, Inc. (2005) 129 CA4th 281

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COURT OF APPEALS HOLDS THAT RECENT STATUTORY AMENDMENTS WHICH ALLOW DOMESTIC PARTNERSTO SUE FOR WRONGFUL DEATH ARE RETROACTIVE

Facts: Decedent died on May, 2001. His domestic partner filed the action on May, 2002. In 2000, the Legislature amended the Family Code for the purpose of giving recognition or legal status to same sex couples or certain male-female couples who chose "to share one another's lives in an intimate and committed relationship of mutual caring." Fam.C. 297(a). On January, 2002, the wrongful death statute was amended to include not just spouses and children, but domestic partners as defined in section 297(a) as persons who had standing to sue for wrongful death. C.Civ.Pro. §377.60(a).

Procedural History: The trial court dismissed the case because the date of death occurred before the January, 2002 amendments to section 377.60(a), even though the complaint was filed thereafter.

While the case was on appeal, the legislature enacted a further amendment to make the aforesaid provisions retroactive. Defendant argued, however, that the retroactive provisions violated due process.

Issue: Are the retroactive provisions for domestic partners Constitutional?

Holding: Yes.

Analysis: The Court concluded there was no violation of due process. It reasoned that the state had a significant interest in promoting family relationships by giving rights to domestic partners. The 2002 and 2005 amendments to CCP §377.60 effectuated that interest, and thus could be enforced retroactively without offending due process.

Bouley v. Long Beach Mem. Med. Ctr. (2005) 127 Ca4th 601

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COURT OF APPEAL HOLDS THAT THE HIRER OF AN INDEPENDENT CONTRACTOR MAY BE LIABLE FOR ORDERING THE REMOVAL OF SAFETY EQUIPMENT WHICH ALLEGEDLY CAUSED INJURY TO THE CONTRACTOR'S EMPLOYEE

Facts: General contractor hired plaintiff's employer, an independent contractor, to install a fire sprinkler system at a construction site. Plaintiff fell from a ladder while working at the project. Plaintiff claimed owner and general contractor were negligent for ordering the removal of two means by which the fall could have been prevented, i.e., a system of safety lines intended to prevent just such injuries, and some elevated work platforms that would have permitted him to do the work without a ladder.

Procedural History: Defendants moved for summary judgment under the Supreme Court doctrine of Privette and its progeny which absolves hirers of independent contractors for vicarious liability and/or passive negligence under the peculiar risk and other related doctrines, except when the accident is caused by their own affirmative acts of negligence. The trial court granted the motion for summary judgment.

Issue: May an owner and general contractor be liable under Privette for ordering the removal of safety equipment that allegedly would have prevented injury to a subcontractor's employee?

Holding: Yes.

Analysis: The Court held that the furnishing and abrupt withdrawal of safety equipment could be found to constitute negligent performance of a voluntary undertaking, affirmatively contributing to plaintiff's injuries and thereby subjecting defendants to liability.

Defendants had objected, on hearsay grounds, to plaintiff's evidence to the effect that defendants had wanted the elevated platforms removed. The court rejected this objection, holding the evidence of what defendant "wanted" was not evidence of a communicated "statement" and, therefore, not hearsay. Assuming the evidence was of a statement to that effect, it would fall within the hearsay exception for declarant's state of mind. Ev.C. 1250(a).

Finally, defendant objected that plaintiff relied on certain information regarding the cause of the accident that was not mentioned in his answers to interrogatories. The court rejected this objection as well, saying that there is no duty to supplement interrogatory responses.

Brown v. Turner Constr. Co. (2005) 127 Ca4th 1334

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APPELLATE COURT HOLDS THAT ASSIGNEE OF SUBCONTRACTS IN CONSTRUCTION DEFECT ACTION ASSUMES OBLIGATION OF PREVAILING PARTY FEE CLAUSE.

Facts: Plaintiff filed this action against developer, general contractor and subcontractor on numerous causes of action arising from alleged construction defects to his home. Developer and general contractor cross complained against subcontractor (the window manufacturer) for express indemnity and various other theories. The subcontract contained an attorneys fees clause which awarded fees to the prevailing party on any action on the subcontract.

Plaintiff settled with developer and general contractor. As part of the settlement, Defendant and general contractor assigned their express indemnity causes of action to Plaintiff.

Procedural History: The case proceeded to trial and the court ordered the action bifurcated. In the first phase, the court found that subcontractor did not manufacture any defective product and was not liable to plaintiff. In the indemnity phase, the court concluded that (1) the indemnity clause at issue required the indemnitee to establish subcontractor's negligence as a condition to recovery; and (2) since subcontractor was found not negligent in the main action, it was not liable for indemnity.

Subcontractor then moved for attorneys fees under the attorneys fees provision of the subcontract. The claimed fees included legal services in defense of the main action. Plaintiff contended that liability for attorneys fees was not part of the assignment. He also argued that subcontractor could only recover those fees that were specifically attributable to defense of the express indemnity claim, and here the fees incurred in the main action and indemnity action were co-mingled. The trial court found plaintiff liable for subcontractor's attorneys fees, including fees incurred in defense of the underlying action.

Issue: Was the subcontractor, as the prevailing party in the contractual indemnity dispute, entitled to attorneys fees that it incurred in the defense of the underlying construction defect suit?

Holding: Yes.

Analysis: Where, as here, issues on which fees are recoverable and those in which they are not overlap, the prevailing party is normally entitled to fees. In this case, the issue of subcontractor's liability for its own fault was an issue that was in common in both phases of the bifurcated trial. Its lack of fault for the alleged construction defects was also a defense to the indemnity claims.

Accordingly, under the circumstances it was appropriate to allow it to recover attorneys fees incurred in defense of the main action.

As an additional basis for its ruling, the court reasoned that, because plaintiff acquired the indemnity claims by way of assignment, he was subject to both the benefits and burdens of that status. Thus, he was liable for subcontractor's fees to the same extent as if the claims were prosecuted by the contracting parties.

Erickson v. R.E.M. Concepts, Inc. (2005) 126 Ca4th 10783

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APPELLATE COURT HOLDS THAT COURT MUST NOT CONSIDER MICRA CAP ON NONECONOMIC DAMAGES IN CALCULATING OFFSETS FOR PRE-TRIAL SETTLEMENTS WITH CO-TORTFEASORS WHO ARE NOT HEALTH CARE PROVIDERS.

Facts: Plaintiff accused his physician of professional malpractice in disclosing Plaintiff's HIV condition to his employer. Plaintiff was discharged but also received workers comp. benefits. He sued his employer for wrongful termination and the physician (defendant) for malpractice. The malpractice claim was subject to MICRA, which imposes a $250,000 cap on noneconomic damages.

Procedural History: Plaintiff settled with his employer for $160,000 and also recovered $43,000 in workers comp. benefits. The case proceeded to a bench trial against Defendant. Plaintiff prevailed. The trial court found that Plaintiff had suffered $70,000 in economic damages and $425,000 in noneconomic damages. It apportioned 33% of the fault to the employer.

Defendant made the following claims for offsets under Proposition 51 and MICRA. With respect to the economic portion of the award, he claimed an offset based on plaintiff's settlement with the employer and the workers comp. benefits received. In making this calculation, the court deemed 22% of the prior recoveries to be "economic damages." That 22% was determined by the ratio between plaintiff's economic damages and the noneconomic damages after the MICRA cap of $250,000 was applied. The court decreased the economic portion of the award by an amount reflecting 22% of the employer settlement and workers compensation benefits.

With regard to the noneconomic damages, those damages were capped at $250,000 per MICRA. The court reduced this figure further to reflect the 33% liability attributable to the employer. This reduced the noneconomic award to approximately $166,000. Plaintiff appealed both rulings.

Issue: Was the trial court's calculation of the offsets under Prop. 51 and MICRA correct?

Holding: No.

Analysis: The court distinguished a 1991 case called Gilman vs. Beverly which held that, in MICRA cases where all alleged tortfeasors are health care providers subject to MICRA, the offsets pursuant to Prop. 51 applied against the MICRA cap. This case was distinguishable from Gilman because the co-defendant/employer was not a health care provider who was subject to MICRA.

Therefore, the trial court committed two errors. First, in applying the offset of the economic award for pre-trial settlement and workers comp., the ratio between economic and noneconomic must be based upon the total amount of noneconomic damages awarded by the jury prior to the MICRA offset. Applying that result, the ratio of economic to noneconomic in the jury award was much smaller. The correct ratio between economic and noneconomic was 14% economic. The smaller

ratio diminishes the amount of the offset of economic damages that is allowed for the pre-trial settlement and workers comp. award.

The court also erred in its determination of the Prop. 51 offset of the noneconomic damages. The fact that the co-defendant was not a health care provider means that defendant's proportionate share of the noneconomic award is applied against the gross noneconomic award ($425,000) and not from the MICRA cap ($250,000). Defendant's percentage share of the total noneconomic award was, therefore, 66% of $425,000.00 rather than 66% of $250,000, thus reducing the noneconomic award to $283,000. Since this amount is higher than the cap, defendant's liability for noneconomic damages should have been capped at $250,000.

Francies v. Kapla (2005) 127 Ca4th 1381

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APPELLATE COURT HOLDS THAT PARTY IN EXPRESS INDEMNITY CASE IS NOT NECESSARILY BOUND BY DEPOSITION TESTIMONY OF ITS OFFICER IN UNDERLYING TORT CASE.

Facts: The parties were the manufacturer and supplier of a log home. They were sued by the purchaser of the home in the underlying case for construction defects. Manufacturer cross complained against supplier based on an indemnity agreement in which supplier agreed to indemnify manufacturer with respect to any claim or loss asserted against manufacturer by any third party (the specific terms of the indemnity agreement are not set forth in the opinion).

Procedural History: Supplier's owner was deposed in the underlying case. He testified that he had no knowledge of any defects in the home and had no criticisms of manufacturer.

After the underlying case settled, manufacturer moved for summary judgment on its cross complaint. Manufacturer agreed that the indemnity agreement precluded recovery for any negligence on the part of the indemnitee (manufacturer), whether active or passive. However, manufacturer contended that supplier's testimony in the underlying case was a binding admission that manufacturer was not at fault, and that such admission precluded it from introducing any conflicting evidence. The court agreed and granted the MSJ.

Issue: Whether deposition testimony by the indemnitor in the underlying tort action, in which he denied any knowledge of fault on the part of the indemnitee, is binding on the indemnitor in the subsequent action on the indemnity agreement.

Holding: No.

Analysis: The court reasoned that, for summary judgment purposes, deposition testimony by a witness does not necessarily carry the same weight as judicial admissions in pleadings or in responses to requests for admissions. The deponent (owner of the product supplier) was not an expert who had personal knowledge of all aspects of the facts regarding the manufacture or design of the product. Therefore, his testimony should not preclude supplier from introducing evidence of negligence or fault on the part of manufacturer.

Scalf v. D.B . Log Homes, Inc. (2005) 128 Ca4th 1510

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COURT OF APPEAL HOLDS THAT EVIDENCE OF THE AMOUNTS THAT PLAINTIFF ACTUALLY PAID FOR MEDICAL EXPENSES DOES NOT VIOLATE THE COLLATERAL SOURCE RULE WITH REGARD TO THE ISSUE OF WHETHER THOSE EXPENSES WERE REASONABLE.

Facts: Plaintiff was injured by defendant in a rear end accident. Defendant conceded liability and the case was tried on damages. Defendant insinuated during trial that the medical expenses were inflated and/or that plaintiff was malingering.

Procedural History: Plaintiff sought to prove that he had personally paid the medical bills. The trial court excluded that evidence as violation of the collateral source rule and under Evid. C. §352. The medical specials awarded by the jury were roughly one-half of the amount claimed. Plaintiff appealed.

Issue: Does the collateral source rule preclude plaintiff from showing the amounts that he paid for his own medical expenses on the issue of whether the claimed medical specials were reasonable?

Holding: No.

Analysis: The Court held that the collateral source rule does not bar evidence of payments made by plaintiff on the issue of whether the expenses incurred were reasonable. It was plaintiff's burden to show that the medical services he claims were actually received and that the charges were reasonable. Evidence that a bill was paid is evidence of its reasonableness. There is no more acceptable form of proof that medical bills were paid than evidence that plaintiff had, in fact, paid them.

Smalley v. Baty (2005) 128 Ca4th 977

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PRODUCTS LIABILITY

SUPREME COURT HOLDS THAT STATUTE OF LIMITATIONS ON PRODUCT LIABILITY CLAIM AGAINST MEDICAL DEVICE MANUFACTURER DOES NOT ACCRUE AT SAME TIME AS MEDICAL MALPRACTICE CLAIM AGAINST HEALTH CARE PROVIDER IF REASONABLE INVESTIGATION WOULD NOT HAVE REVEALED PRODUCT LIABILITY CLAIM.

Facts: Plaintiff underwent surgery for a gastric stapling device. After the surgery, she became ill, which progressively worsened. Exploratory surgery revealed a perforation of the stapled closure of the small intestine, which allowed fluid to leak into the stomach cavity. Plaintiff required additional medical care and remained hospitalized until March, 2000.

Procedural History: Plaintiff filed a timely medical malpractice complaint against the medical providers on June 28, 2000. The surgeon who conducted the exploratory surgery was deposed on August 13, 2001. He testified, in summary, that the perforation was caused by a defect in the stapling device.

On November 28, 2001, plaintiff filed an amended complaint which included, for the first time, a product liability claim against the manufacturer. (At that time the one year statute of limitations for personal injury was still in effect). The amended complaint alleged, in summary, that plaintiff did not discover the product claim and did not suspect such wrongdoing until the surgeon was deposed. Manufacturer demurred on grounds the amended claim was time-barred. The trial court sustained the demurrer. The Court of Appeal reversed, but the California Supreme Court granted review.

Issue: Does the statute of limitations on a product liability claim against a medical device manufacturer necessarily accrue at the same time as the statute of limitations on the related medical malpractice claim?

Holding: No.

Analysis: The court held that, at the pleading stage, plaintiff must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence. Under the delayed discovery rule, the statute of limitations begins to run when plaintiff has reason to suspect an injury and some wrongful cause, unless he or she pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. Here, plaintiff could properly allege that, although she was aware of the injury and its connection to her surgery within the one year statute, she had no reason to suspect a stapler malfunction as the cause until the surgeon was deposed.

Fox v. Ethicon Endo-Surgery Inc. (2005) 35 Cal.4th 797