Appellate Reports

A review of recent decisions of interest to the plaintiff's bar

By Jeffrey Isaac Ehrlich

Attorneys/Fee arbitration

Perez v. Grajales
(2008) 86 Cal.Rptr.3d 784, 2008 WL 5265644, 2008 Daily Journal D.A.R. 18621 (Sixth Dist.)

California's mandatory fee arbitration act ("MFAA") Business and Professional Code section 6200, et seq., allows clients the right to arbitrate their fee disputes with their attorneys. Arbitration is voluntary for the client, and mandatory for the attorney. An attorney seeking to recover unpaid fees from a client must provide the client with notice of the right to arbitrate the dispute, either before or at the time of serving a collection action. (The notice must be given only after the dispute arises.)

A client can waive the right to arbitrate either by failing to request arbitration within 30 days of receipt of notice from the attorney of the right to arbitrate, or by answering a lawsuit initiated by the attorney where the attorney has provided the client with the required notice of the right to arbitrate. A client may also waive arbitration by filing an action or other pleading seeking judicial resolution of the fee dispute, or affirmative relief against the attorney for malpractice or other misconduct.

The arbitration award is non-binding, unless the parties agree otherwise but will become final if neither party rejects it within 30 days after mailing of notice of the award. If an action is already pending, the request for trial de novo must be made in that action; if no action is pending the party must initiate one within 30 days. An award that becomes binding cannot be set aside under Code of Civil Procedure section 473.

Grajales retained Perez to represent her on a contingent-fee basis in connection with claims against her employer. The case settled in 1998, but a dispute developed concerning proceeds due Grajales. The dispute was arbitrated under the MFAA, with Grajales winning an award of $173,715. Perez filed a lawsuit to obtain de novo review of the award, but then failed to bring the lawsuit to trial within five years, resulting in its dismissal. Grajales moved to confirm the award, but the trial court denied the motion. The Court of Appeal reversed, finding that failing to bring his case to trial within the required time effectively constituted a repudiation of the request for a trial de novo, and required confirmation of the arbitration award.

Insurance

Otay Land Co. v. Royal Indem. Co.
(2008) 86 Cal.Rptr.3d 408. 2008 WL 4988981, 2998 Daily Journal D.A.R. 18635 (Fourth Dist., Div. 1.)

Otay Land Company ("OLC") purchased contaminated property while lawsuits concerning the environmental damage were still pending. OLC attempted to intervene in a declaratory-relief action between the party that sold it the property and the seller's insurer, Royal. OLC was denied leave to intervene. OLC then filed its own declaratory-relief action against Royal, seeking to establish coverage in favor of the seller. The trial court sustained Royal's demurrer without leave, and OLC appealed.

The appellate court affirmed the dismissal of the declaratory-relief action. The court held that OLC's arguments had been raised and rejected in the prior appeal concerning its attempt to intervene. Because OLC was neither an insured nor an additional insured under its seller's policy, it lacked standing to sue the insurer directly. OLC was not a judgment creditor of the seller, and it could not create standing by calling itself a "potential" judgment creditor. While liability insurers are permitted to sue an injured third party as a co-defendant with their insureds in a declaratory-relief action to determine coverage, this does not mean a third party necessarily has equivalent rights. Here, OLC was a stranger to the contract, and its rights were too indirect and remote to state a cause of action for declaratory relief.

Torts/good Samaritans

Van Horn v. Watson
(2008) 197 Cal.Rptr.3d 850, 2008 WL 5246046, 2008 Daily Journal D.A.R. 18512 (Cal.)

Alexandra Van Horn and Lisa Torti smoked marijuana with some friends, then went to a bar with the friends and consumed several drinks. On the way home, Van Horn and Torti were riding in separate cars. The driver of the car in which Van Horn was riding lost control, crashed into a curb at 45 mph and knocked over a light pole, causing the air bags to deploy. Van Horn suffered fractured vertebrae in the accident. The driver of the car in which Torti was riding stopped to help. Torti feared that Van Horn's car might catch fire, so she pulled Van Horn from the car, then placed her on the ground immediately next to the car. Other witnesses said that there was no smoke or any other indication that the car might explode or burst into flames.

Van Horn was rendered a paraplegic. She sued Torti for negligence, alleging that she was not in need of Torti's assistance and that Torti's conduct was the cause of her permanent injury. Torti filed for summary judgment based on Health

and Safety Code section 1799.102, a statute which immunizes any "person who . . . renders emergency care at the scene of an emergency . . ." from liability for civil damages. The trial court granted the motion, the Court of Appeal reversed, and the Supreme Court affirmed the appellate court's judgment, finding that section 1799.102 did not bar Van Horn's claims against Torti.

The Court acknowledged that, read literally, the statute would support Torti's construction that it immunized a "good Samaritan" who provided any type of assistance at the accident scene. But the Court held that several factors showed that the statute should be read more narrowly, to apply only to emergency *medical* attention, which Torti did not provide. These factors included (a) the well established common-law rule that, if a person elects to come to the aid of another, they must exercise due care; (b) the placement of the section 1799.102 in the Health and Safety Code, which suggested that the Legislature did not intend it to operate as a broad grant of immunity; (c) the fact that the statute's placement showed that it was intended, together with neighboring provisions, to deal with the rendering of medical care only; and (d) the Legislative history supported a narrow construction of the statute.

Insurance/policy interpretation

Employers Mut. Cas. Co. v. Philadelphia Indem. Ins. Co.
(2008) 86 Cal.Rptr.3d 383, 2008 WL 5236025 (2d Dist., Div. 2.)

Philadelphia Indemnity Ins. Co. ("Philadelphia"), Employers Mutual Casualty Co. ("Employers"), and Evanston Ins. Co. ("Evanston") insured the owner of a mobile-home park, Simpson. Employers and Evanston defended Simpson in an action by park residents for failure to maintain the park. Employers and Evanston settled the case for $3 million, allocating $1.2 million to damages and $1.8 million to statutory attorney's fees under Civil Code section 798.85. Evanston assigned its rights to Employers, which then sued Philadelphia for contribution. Employers prevailed, and Philadelphia was required to contribute $164,000 in defense fees and costs. In addition, Philadelphia was required to contribute $400,000 to the statutory attorneys' fees, under the theory that they were a "taxed cost." Philadelphia appealed, arguing that the statutory fees did not constitute a "taxed" cost. Affirmed.

The supplementary payments provision in the Philadelphia policy provided that the insurer would pay, in addition to damages assessed against its insured for covered claims, "all costs taxed against the insured in any suit." The parties disputed the meaning of the term "taxed." Philadelphia urged the court to define "taxed" to mean "to judicially assess the amount of costs." It argued that this meaning was consistent with the technical meaning of "taxed" in Rule 3.1700(b) of the Rules of Court, which refers to motions to strike or tax costs that are objectionable and should be eliminated or reduced. The court held that the rule shed no light on the meaning of "taxed" in the policy; while the rule uses the term "taxed" to mean a reduction of costs, the Philadelphia policy uses it to mean an assessment of costs. The court held that the term "taxed" was subject to more than one reasonable construction, and therefore the award of attorneys' fees following judgment constituted a cost that was "taxed" against Philadelphia's insured.

Torts/products liability

Ontiveros v. 24 Hour Fitness Corp.
(2008) 86 Cal.Rptr.3d 767, 2008 WL 5265208 (2d Dist., Div. 5.)

Ontiveros suffered injuries while exercising on a stair-step machine at a 24-Hour Fitness health club, where she was a member. She sued the club on a product-liability theory. The trial court granted summary judgment on the ground that the predominant purpose of her membership was for the club's fitness services, and not for the use of the club's exercise machines. Affirmed.

To the extent that the summary judgment was based on the waiver or release language contained in Ontiveros's membership agreement, she claimed that such a waiver or release of a products-liability claim was contrary to public policy under *Westlye v. Look Sports Inc.* (1993) 17 Cal.App.4th 1715, 1743 [22 Cal.Rptr.2d 781]. Since 24-Hour Fitness did not respond, the court held that this point was conceded, and that the release could not be enforced.

Plaintiff conceded that if the dominant purpose of her agreement was to provide fitness services, and not just the use of exercise equipment, then she could not maintain a claim for strict products liability because the Club would not be in the chain of distribution of the equipment. The evidence showed that the Club was in the business of providing fitness services to its members, and made exercise equipment available to its members as an incident of providing those services. The fact that the plaintiff chose not to avail herself of the services does not change the essential purpose of the membership agreement. It is the terms of the agreement, not her subjective intent, that defines the dominant purpose of the transaction with the Club. In the absence of any evidence that plaintiff ever explained that she only wished to use the machines and not any of the services provided, her uncommunicated intent was not relevant. Since the defendant's uncontradicted evidence allowed the court to conclude that the dominant purpose of the agreement was to provide fitness services, no cause of action for strict products liability would lie.

Torts/assumption of risk

Luna v. Vela
(2008) 86 Cal.Rptr.3d 588, 2008 WL 5206468 (2d Dist., Div. 7.)

Vela built a volleyball court in his front yard, using a volleyball set he purchased, which contained a net, poles, tie lines and yellow stakes. The tie lines were thin and of the same color and material as the net itself. Vela did not take measures to make the tie lines more visible, such as by putting ribbons on the lines. Thirteen-year old Fabian Luna, Vela's neighbor, joined the game. When Luna went to retrieve a ball that had been hit out of bounds, he tripped on a tie line, and fractured his elbow. He sued Vela for negligence. Vela obtained summary judgment based on the doctrine of primary assumption of the risk. Reversed.

The court agreed that tripping over a tie line used to secure a volleyball net is a risk inherent in the sport itself, and could therefore trigger the defense of primary assumption of the risk under *Knight v. Jewett* (1992) 3 Cal.4th 296 [11 Cal.Rptr.2d 2]. But under *Knight* and its progeny, Vela had a duty not to increase the risks inherent in the sport. Luna alleged that Vela's conduct did, in fact, increase the risks he faced beyond those inherent in the sport. This conduct included negligent placement of the tie lines, and the failure to take measures to make the lines more visible. Because Vela was the party moving for summary judgment, it was his burden to show that he had not increased the inherent risks. No such showing was made. Nor did Vela show that taking measures to make the lines more visible, or to place them so that the risk of tripping was reduced, would fundamentally alter the nature of the sport, or deter participants from vigorously engaging in the activity. Since Vela failed to establish a right to judgment as a matter of law, summary judgment was not proper.


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