Appellate reports

Howell v. Hamilton Meats & Provisions, Inc. *and other recent cases of interest to members of the plaintiff's bar*

BY JEFFREY ISAAC EHRLICH

Howell v. Hamilton Meats & Provisions, Inc.

(2009) __ Cal.App.4th __, 2009 WL 4021368 (4th Dist. Div. 1)

Who needs to know about this case: All trial lawyers who try cases involving damages for medical expenses covered by health insurance.

Why it's important: First case to acknowledge that the collateral-source rule should apply to prevent the defense from reducing the amount of its liability for medical expenses based on plaintiff's health-insurance coverage. Expressly disagrees with the post-trial reduction method approved in *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635 [246 Cal.Rptr. 192], and *Greer v. Buzgheia* (2006) 141 Cal.App.4th 1150 [46 Cal.Rptr.3d 780].

Synopsis: Plaintiff Howell suffered severe injuries in an auto accident caused by an employee of defendant Hamilton Meats, who was acting in the course of scope of his employment. She required two spinal-fusion surgeries, as well as additional surgeries to attempt to repair her neck and hip. The jury returned a special verdict that awarded to Howell compensatory damages in the total amount of $689,978.63, which included $189,978.63 for past economic loss, including medical expenses; $150,000 for future economic loss, including medical expenses; $200,000 for past non economic loss (including physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation, and emotional distress; and $150,000 for future non economic loss.

Hamilton moved post trial, under *Hanif,* and *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298 [112 Cal.Rptr.2d 861] seeking an order reducing the jury's special verdict for Howell's past medical expenses by $130,286.90 (i.e., from $189,978.63 to $59,691.73), based on the amount that Howell's medical insurers actually paid for the care she received, in light of their contracts with the health-care providers. The trial court granted the motion over Howell's objections, grounded principally on the collateral-source rule under *Helfend*.

The appellate court reversed, finding that the post-trial reduction of Howell's damages violated the collateral-source rule. The court noted that Howell executed written contracts with the providers that made her financially liable for all charges incurred and explained that this liability was a compensable detriment or pecuniary loss under the Civil Code. The extinguishment of this liability by the providers under their contracts with Howell's insurers was a benefit to her, that was wholly collateral to and independent of the tortfeasor; hence, it was subject to the collateral-source rule. The court distinguished *Hanif*, as a Medi-Cal case where the plaintiff never incurred any personal liability. The court did not distinguish *Nishihama;* rather, it simply disagreed with its reasoning. The court held that any changes in the collateral-source rule should come from the Legislature.

The court also held that because the collateral-source rule precludes the reduction of medical expenses awarded to a plaintiff based on the amounts paid by the plaintiff's health insurers for that care, the post-trial reduction of jury awards is not authorized.

Roby v. McKesson Corp.

(2009) __ Cal.4th __, 2009 WL 4132480 (Cal.Supreme)

Who needs to know about this case: Employment lawyers; lawyers handling punitive-damages claims.

Why it's important: Court's analysis of the FEHA liability, managing-agent issue, and due-process analysis of punitive-damages award is important. First case in which California Supreme Court holds that maximum amount of punitive-damage award permitted by the due-process clause is one time the amount of the compensatory damages awarded.

Synopsis: Charlene Roby was an employee of McKesson Corp. During her employment, Roby developed an anxiety disorder, which adversely affected her attendance. Soon after, her supervisor began belittling her job, reprimanding her in front of coworkers, insulting her hygiene, and ignoring her during meetings. Roby was ultimately fired due to a violation of company-policy regarding attendance. She sued McKesson for discrimination and harassment in violation of the Fair Employment and Housing Act (FEHA). The jury found McKesson liable for both. The appeals court reversed the harassment finding, reasoning that personnel-management decisions could not be the basis for a harassment claim. It struck all evidence of personnel-management decisions, and then held that there

Obituary

Steven Finz: Plaintiff editor, law professor and would-be farmer

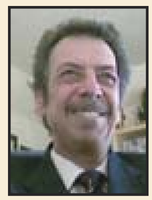
Steven Finz, a law professor and long-time contributor to Advocate and Plaintiff magazines, for which he edited the Appellate Reports column, died Sept. 17 at Sutter Medical Center in Santa Rosa of a heart infection. He was 66.

Finz was the founder of Advance College of Continuing Legal Education which offered MCLE credits from courses on audio-tapes that Finz wrote and recorded.

Finz was chair of the Torts Department at Western State University College of Law (now Thomas Jefferson School of Law) in San Diego until 1990. In addition he was a member of the adjunct faculty at National University Law School in San Diego. He also served on the faculty of the California Appellate Justice Institute in 2000.

Nearly four decades ago, Finz, his wife Iris, their three children and a large St. Bernard named Simba embarked on an adventure of a lifetime. It was the 1970s and Finz had become disillusioned with practicing law in New York City. So he bought a bright orange step van, spent months turning it into a house on wheels, packed up his family and took to the road. For two years they crisscrossed North America, stopping along the way so Finz could pick up odd jobs, including harvesting apples, working in a cedar mill and building campers.

They let their whims guide them—a rodeo in Wyoming, the white sands of Acapulco, an open market in Guatemala—finally settling in San Diego. Finz was offered a position teaching torts at Western State University College. The family bought a small piece of land and a modest home in a rural area of the county and little by little began adding to the homestead. First it was a few chickens, a rabbit and a goat. Soon their small menagerie grew into a full-fledged farm.


Finz

Before Finz left each morning to groom the next wave of lawyers, he helped his wife milk the goats and muck out their stalls. Later they would make their own cheese, yogurt and butter. It wasn't what his New York, Jewish parents would have envisioned for their eldest son, a graduate of the prestigious Bronx High School of Science. But bucking the expected was always his charm.

"Steve was a beautiful, magnificent oddball," said his uncle, the honorable Leonard Finz. "He was off beat, but every beat was right."

In 1994, after their children had grown and Finz had started his own business of providing lawyers and judges continuing legal education, the couple became restless. Once again they packed up their belongings to move to Sea Ranch, the beautiful seaside community they had passed in their travels and had vowed to some day return to. Finz could just as easily run his company while looking out over the Pacific. When he wasn't researching the most recent legal rulings, he was debating politics and philosophy in the letters to the editor of local newspapers.

Besides his wife of 48 years, who he fell in love with when he was 12, Finz is also survived by his three children, Stacy, Laura and Noah, his brother Gene, sister Janet and four grandchildren, Kaley, Zachary, Paulina and Garyn.

Editor's Note: We thank Professor Finz's daughter, Stacy Finz, for her contributions to this obituary.

was insufficient evidence to support the harassment claim.

The Supreme Court reversed. Under FEHA, an employer is prohibited from harassing and discriminating against an employee. Although harassment and discrimination are separate claims, they may rely upon the same evidence. A supervisor's personnel management decisions alone are insufficient to constitute harassment. But employment actions used to convey a harassing message may form the basis for a harassment claim. The court of appeal improperly held that all employment actions were inadmissible to prove harassment, and therefore erred in excluding evidence that Roby's supervisor belittled her job, reprimanded her in front of coworkers, and ignored her during staff meetings. In light of all the evidence, including personnel management decisions, there was sufficient evidence to support Roby's harassment claim.

The Court's analysis of the three-part test to evaluate the maximum amount of a punitive-damage award permitted under the due process clause was extensive. The Court held that punitive damages against McKesson could not be based on the conduct of Roby's supervisor alone, who supervised only four of the company's 20,000 employees. But the fact that mid-level managers became aware of the allegations of wrongdoing and did nothing would support a finding of ratification by a managing agent, but reduced the level of corporate reprehensibility. Because the jury's damage award, which as adjusted and affirmed by the Court exceeded $1.9 million, and the overall reprehensibility of McKesson's conduct as a corporation was low, this formed the upper limit of a punitive-damages award that comported with due process.

Costco Wholesale Corp. v. Superior Court

(2009) __ Cal.4th __, 2009 WL 4133800

Who needs to know about this case: Lawyers seeking discovery of attorney opinion letters.

Why it's important: Clarifies that if opinion letter prepared by attorney is

within scope of attorney-client privilege, entire letter is privileged, including the factual portion, and that client could not be required to produce letter for in-camera inspection.

Synopsis: In 2000, Costco Wholesale Corp. hired the law firm, Sheppard, Mullin, Richter & Hampton ("SMRH"), for legal advice on whether its managers were exempt from the overtime laws. SMRH attorney, Kelly Hensley, spoke with Costco managers and drafted an opinion letter for Costco. Costco employees later filed a class action against Costco, alleging that Costco misclassified managers as exempt employees and failed to pay overtime. When the employees sought to compel discovery of Hensley's opinion letter, Costco objected based on the attorney-client privilege. The trial court ordered a discovery referee to conduct an in-camera review of the letter. The referee found that the privilege did not protect text involving factual information regarding the employees' job responsibilities. The trial court adopted the referee's conclusions and ordered Costco to produce a redacted version of the letter. The Court of Appeal denied Costco's petition for a writ of mandate.

The Supreme Court reversed. The attorney-client privilege attaches to confidential communications between an attorney and a client and bars discovery of that communication. When the privilege applies, the entire communication, including factual information within it, is privileged. The Supreme Court found that the letter between Hensley and Costco was confidential, regardless of the factual information it contained about the job responsibilities of Costco employees. Evidence Code section 915 states that courts "may not require disclosure of information claimed to be privileged" to rule on that claim. The trial court's order directing in-camera review of Hensley's letter violated the attorney-client privilege. It was error to require disclosure of the letter.

Yarick v. Pacificare of California

(2009) __ Cal.App.4th __, 2009 WL 4263719 (5th Dist.)

Who needs to know about this case: Lawyers who bring actions against Medicare-Advantage ("MA") plans.

Why it's important: First decision to hold that the 2003 amendments to the Medicare Act concerning Medicare-Advantage plans (the "MMA") implied preempt state common-law wrongful-death claims that were based on violations of various Medicare regulations.

Synopsis: Decedent Joseph Yarick was admitted to the hospital with a broken leg after a fall. After surgery to repair the break, he was transferred to a skilled nursing facility for rehabilitation and custodial care. Yarick's condition deteriorated over the next three weeks, but he was nevertheless discharged over his family's objection. The family had him transported by ambulance to a different hospital, where he was diagnosed with various conditions, including congestive heart failure and pneumonia. He died two weeks later. Yarick's family sued the various providers involved, including the MA plan, Pacificare. The trial court dismissed the claims on demurrer, and the Court of Appeal affirmed.

The court held that claims based on state statutory law, like the Elder Abuse Act or the Knox-Keene Act, were expressly preempted by the preemption clause in the Medicare Act, which was added by the MMA in 2003. The court further held because the Yarick family's wrongful-death claim was based directly on duties applicable to health plans *as* health plans, and not some generally-applicable common-law duty, the common-law claim was impliedly preempted. The court held: "If state common law judgments were permitted to impose damages on the basis of these federally approved contracts and quality assurance programs, the federal authorities would lose control of the regulatory authority that is at the very core of Medicare generally and the MA program specifically."

Ehrlich

Jeffrey Isaac Ehrlich is the principal of the Ehrlich Law Firm in Claremont. His practice emphasizes insurance bad-faith and appellate litigation. He is certified by the State Bar of California as an appellate specialist, and is the editor-in-chief of Advocate *magazine in Southern California*.