Recent cases of interest to the plaintiff's bar

Appellate Reports

Litigation privilege does not apply to conduct that is wrongful independent of the litigation

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Scalzo v. American Exp. Co.

__ Cal.App.4th __, [2010 WL 1693620] (2d Dist., Div. 7.)

Who needs to know about this case: Lawyers who deal with litigation-privilege issues

Why it's important: Clarifies that the litigation privilege does not apply to conduct that is wrongful independent of the litigation.

Synopsis: Martin Scalzo and Fredrick Scalzo co-owned real property. Martin contacted American Express by telephone and convinced it that he was an authorized signer on Fredrick's credit-card account, obtaining six-years worth of credit-card statements. Fredrick sued Martin for invasion of privacy, intentional infliction of emotional distress, and violations of California's Financial Privacy Act. Martin filed an anti-SLAPP motion, arguing that his conduct was protected by the litigation privilege because the credit-card account was at issue in a lawsuit he had filed against Fredrick seeking an accounting concerning the property they co-owned. The trial court granted the motion. The Court of Appeal reversed.

While the litigation privilege immunizes communications with a relationship to a judicial proceeding, it does not immunize illegal conduct that results in damages separate from the litigation. Fredrick alleged that Martin engaged in illegal acts and asserted damages that were not related to the use of the documents in the litigation, including identify theft and damage to credit. Because the litigation privilege did not protect Martin's conduct, he could not show that he would probably prevail on the merits, and the trial court erred in granting the anti-SLAPP motion against him.

Krupski v. Costa Crociere S.p.A.

__ U.S. __, [2010 WL _____] (U.S. Supreme Ct. 2010)

Who needs to know about this case: Lawyers litigating cases in federal court

Why it's important: Clarifies the standard for when an amended pleading relates back to the filing of the original pleading under rule 15(c) under the Federal Rules of Civil Procedure.

Synopsis: Krupski sued Costa Cruise Lines for injuries she received on a cruise ship. Her passenger ticket, which was issued by Costa Cruise Lines, identified Costa Crociere S.p.A. as the carrier, and contained a contractual one-year limitation provision on any suit. The front of the ticket listed Costa Cruise's Florida address and made references to Costa Cruises. Her attorney notified Costa Cruise of her claims and tried, without success, to negotiate a settlement. She then filed a diversity case against Costa Cruise. Over the next several months – after the expiration of the limitations provision – Costa Cruise brought the existence of Costa Crociere to Krupski's attention several times. She moved to amend to add Costa Crociere as a defendant, and the district court granted leave to amend. After she served Costa Crociere with the amended complaint, the district court dismissed Costa Cruise. Costa Crociere then moved to dismiss, arguing that the amendment did not relate back. The district court granted the motion, and the Eleventh Circuit affirmed, finding that Krupski either knew, or should have known of Costa Crociere's identity as a potential party because she furnished her ticket, which identified it, to her counsel long before the limitation period expired. The court held that it was therefore appropriate to treat her as having chosen to sue one potential party over another.

Additionally, the court held that relation back was not appropriate because of Krupski's undue delay in seeking to amend the complaint.

The Supreme Court reversed, holding that relation back under rule 15(c)(1)(C) depends on what the party to be added knew or should have known, not on the amending party's knowledge or timeliness in seeking to amend the pleading. With respect to the latter, the rule sets forth an exclusive list of re-

quirements for relation back, and the plaintiff's diligence is not among them; it mandates relation back if the rule's requirements are met, and unlike rule 15(a), does not give the district court equitable discretion to resolve the issue.

Valencia v. Smyth

__ Cal.App.4th __, [2010 WL 2164609] (2d Dist. Div. 1.)

Who needs to know about this case: Lawyers dealing with real-estate related lawsuits involving the California Ass'n of Realtors' ("CAR") standard residential real-estate purchase agreement.

Why it's important: Holds that the CAR arbitration agreement incorporates the California Arbitration Act, not the Federal Arbitration Act. Hence, the provisions in the California Arbitration Act that permit a trial court to deny a motion to compel arbitration applied.

Synopsis: Valencia and Mendoza sought to purchase real property from Velasco. Velasco's broker on the transaction was Smyth. When Valencia and Mendoza filed suit against Smyth he moved to compel arbitration, citing the arbitration agreement in the CAR standard-form residential purchase agreement. The trial court denied the motion under Code of Civil Procedure section 1281.2, subd. (c), which allows a court to refuse to compel arbitration where (1) some of the parties to the action were not parties to the agreement, and (2) proceedings in different forums – arbitral and judicial – could result in conflicting rulings on a common issue of fact or law. Smyth appealed, arguing that the CAR provision was governed by the Federal Arbitration Act ("FAA"), not the California Arbitration Act ("CAA"). Affirmed.

The CAR form agreement contains a choice-of-law provision requiring the application of California law. This is sufficient to avoid the FAA's procedural provisions, even if their contract may implicate interstate commerce. The CAR form gives the parties a right to discovery under the CAA, but also requires the agreement to be interpreted in accordance with the FAA. By incorporating the CAA provisions, the parties had not expressly adopted the FAA's procedural provisions. Under the CAA, the trial court was authorized to deny the motion to compel arbitration.

Collins v. Plant Insulation Co.

__ Cal.App.4th__ , [2010 WL 2197697] (4th Dist., Div. 1.)

Who needs to know about this case: Asbestos litigators; all personal-injury lawyers who face Prop. 51 apportionment issues when a defendant is immune from liability.

Why it's important: Holds that even though the U.S. Navy was immune from liability from plaintiff's asbestos claims, the jury may properly apportion fault to the Navy under Prop. 51.

Synopsis: Ulysses Collins died of mesothelioma he contracted from workplace exposure to asbestos. He worked as a welder at Hunter's Point Naval Shipyard, a Standard Oil refinery, and at the Mare Island Navy Shipyard. During his career, he worked extensively with asbestos and asbestos-containing products, including those made by Plant Insulation Co. ("Plant"). His heirs filed a wrongful death action. At the close of evidence, plaintiffs moved for a directed verdict regarding the Navy, arguing that fault could not be allocated to the service pursuant to Proposition 51 (Civ.Code, § 1431 et seq.). Citing *Munoz v. City of Union City* (2007) 148 Cal.App.4th 173 [55 Cal.Rptr.3d 393], they claimed federal sovereign immunity precluded the Navy from being a "tortfeasor" for purposes of Proposition 51. They further asserted there was no evidence of an exception to that immunity and thus no evidence the Navy breached any duty of care owed to Collins. Plant opposed the motion, arguing allocation was proper under *Taylor v. John Crane, Inc.* (2003) 113 Cal.App.4th 1063 [6 Cal.Rptr.3d 695], and that there was sufficient evidence to include the Navy among the entities to which the jury could allocate fault. The trial court ruled *Munoz* was controlling, and granted the plaintiffs' motion. The jury found that Plant was negligent and liable under strict products liability, and allocated fault as follows: 20 percent to Plant, 15 percent to Fibreboard, 5 percent to Chevron/Standard Oil, 30 percent to Owens-Corning Fiberglas/FENCO/Kaylo, and 30 percent to Johns-Manville/Western Asbestos/Western MacArthur. Plant appealed the judgment against it.

Thus, under *DaFonte v. Up-Right, Inc.* (1992) 2 Cal.4th 593 [Cal.Rptr.2d 238], and *Richards v. Owens-Illinois, Inc.* (1997) 14 Cal.4th 985 [60 Cal.Rptr.2d 103], whether fault can be allocated to an immune individual or entity under Proposition 51 depends on whether the immunity is essentially an immunity from suit, or whether it is based on a predicate determination the conduct in question is not wrongful under the law. The Navy's immunity here derived from the discretionary-function exception to the Federal Tort Claims Act ("FTCA"). This exception has been held to bar actions based on the federal government's alleged negligence in using asbestos on ships, failing to warn of its dangers, and promulgating an inadequate policy or having no policy for asbestos safety in shipyards. The discretionary-function exception in the FTCA represents a policy decision by Congress that certain actions of the United States, even if wrongful, are immune from suit.

Hence, the nature of the immunity afforded by the discretionary function exception is not predicated on the notion the federal government owes no duty of care in connection with what it does, but rather is grounded on the determination that, given the myriad considerations that go into a discretionary decision, including economic and political costs, as well as the potential for harm to participants, it is not in the public's best interest to subject these decisions to post-hoc examination in the crucible of tort litigation. As a result, the Navy is properly included in

the list of actors or entities potentially at fault, and it was error not to include it. Plant is entitled to a new trial on the issue of apportionment.

Boeken v. Phillip Morris USA

48 Cal.4th 788 (2010) (Cal. Supreme)

Who needs to know about this case: Lawyers handling loss-of-consortium claims

Why it's important: Holds that the dismissal with prejudice of plaintiff's loss-of-consortium claim arising from tobacco-related injuries to her husband operated as bar to her wrongful-death claim arising from her husband's death.

Synopsis: Judy Boeken's husband, Richard Boeken, was a cigarette smoker who contracted lung cancer. He successfully sued Phillip Morris in 1999, asserting that it had wrongfully caused his cancer. In October 2000, while Richard was still alive, Judy filed a separate loss-of-consortium action against Phillip Morris, seeking compensation for the loss of Richard's companionship and affection. Specially, she alleged that defendant's wrongful conduct had caused her husband's lung cancer and that as a result of the cancer, he was unable to perform the necessary duties as a spouse and would not be able to perform such work, services, and duties in the future. She further asserted that she had been permanently deprived of her husband's consortium, and had suffered the loss of love, affection, society, companionship, sexual relations, and support.

Four months after she filed the action she dismissed it with prejudice. No basis appears in the record for the dismissal. Under the doctrine of res judicata a dismissal with prejudice is the equivalent of a final judgment on the merits, barring the entire cause of action. After Richard's death, Judy filed a wrongful-death action against Philip Morris. Phillip Morris demurred, arguing that Judy's wrongful-death action was barred by res judicata because of her earlier dismissal with prejudice of her prior action, which sought recovery based on the same primary right. The trial court sustained the demurrer without leave to amend, and plaintiff appealed. A divided panel of the Court of Appeal affirmed. In a 4-3 decision, the Supreme Court affirmed.

In California the phrase "cause of action" is often used indiscriminately to mean counts that state, according to different legal theories, the same cause of action. But for purposes of applying the doctrine of res judicata, the phrase "cause of action" has a more precise meaning: It is the right to obtain redress for a harm suffered, regardless of the specific remedy sought or the legal theory advanced. Even where there are multiple legal theories upon which recovery might be predicated, one injury gives rise to only one claim for relief. Hence a judgment for the defendant is a bar to a subsequent action by the plaintiff based on the same injury to the same right, even though he presents a different legal ground for relief.

Judy's common-law action for loss of consortium alleged that Philip Morris's wrongful conduct "permanently deprived" her of her husband's companionship and affection. The primary right was the right not to be wrongfully deprived of spousal companionship and affection, and the corresponding duty was the duty not to wrongfully deprive a person of spousal companionship and affection. The breach was the conduct of Philip Morris that wrongfully induced her husband to smoke. Regardless of the reasons that caused Judy to dismiss that claim with prejudice, once she did so, the primary right and the breach of duty (together, the cause of action) had been adjudicated in defendant's favor. Therefore, she could not later allege the same breach of duty in a second lawsuit against defendant, based on a new legal theory (statutory wrongful death).

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In brief – Brief summaries of potentially important cases that may be of interest, but which cannot be fully discussed because of space constraints.

Tort claims against public entities; limitations *S.M. v. Los Angeles Unified School Dist*. (2010) 184 Cal.App.4th 712 (2d Dist. Div. 8.) Parent's knowledge of sexual abuse of child is not what triggers accrual of cause of action; it is when child is aware that the conduct was wrong. Action dismissed for failure to file timely tort claim under Tort Claims Act.

Arbitration: Class-action waivers. *Arguelles-Romero v. Superior Court* (2010) 184 Cal.App.4th 825 (2d Dist. Div. 3.) In evaluating validity of a class-action waiver in an arbitration agreement, court must examine *both* whether the arbitration agreement is unconscionable, *and* whether the use of a class action is the preferred means to vindicate statutory rights. Hence, plaintiff's failure to establish unconscionability did not necessarily mean that the waiver was enforceable.

Torts; police officers. *Camp v. State of California* (2010) __ Cal.App.4th __, [2010 WL 1065878] (2d Dist. Div. 6.) CHP officers who came upon a car-accident scene saw plaintiff Camp lying on the ground next to the car. In response to their inquiries, she stated she was not injured and declined an ambulance. They left. She was later hospitalized with severe spinal injuries, causing paraplegia. Jury award in favor of Camp reversed because officers owed her no duty of care; their conduct did not mislead Camp or place her in harm's way; and their failure to access her injuries was nonfeasance that left her in the same position she was in before they arrived.

Commercial-speech exception to anti-SLAPP statute; Attorney advertising *Simpson Strong-Tie Company, Inc. v. Gore* (2010) __ Cal.4th __ , [2010 WL 1948283] (Cal. Supreme.) Attorney Gore took out an advertisement directed to owners of wood decks that might contain galvanized screws manufactured by Simpson Strong-Tie Co. ("Simpson"). Simpson filed a defamation action. Gore obtained dismissal under the anti-SLAPP statute. The Supreme Court considered whether Code Civil Procedure section 425.17, which creates an exemption from the anti-SLAPP statute for commercial speech, applied. It held that it did not. It held that Section 425.17(c) applies when

(1) the cause of action is against a person primarily engaged in the business of selling or leasing goods or services; (2) the cause of action arises from a statement or conduct by that person consisting of representations of fact about that person's or a business competitor's business operations, goods, or services; (3) the statement or conduct was made either for the purpose of obtaining approval for, promoting, or securing sales or leases of, or commercial transactions in, the person's goods or services or in the course of delivering the person's goods or services; and (4) the intended audience for the statement or conduct meets the definition set forth in section 425.17(c)(2). The exemption did not apply to Gore's speech because of point (3) Simpson's claims against Gore did not arise from representations of fact about Gore's business operations, goods or services.


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