



Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiffs' bar

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Sargon Enterprises, Inc. v. Univ. of Southern Calif.

(2012) __ Cal.4th __ (Cal. Supreme)

Who needs to know about this case:

Lawyers who seek to present expert testimony to courts; lawyers making or defending claims for lost profits.

Why it's important: The opinion seeks to clarify the trial court's role in admitting and excluding expert testimony, and to explain the type of expert testimony that is too speculative to be admitted in evidence. While not fully endorsing the federal *Daubert* standard for expert testimony, it makes clear that California trial courts have a duty to perform a "gatekeeper" function to exclude speculative expert testimony, and that their rulings in this regard are reviewed for abuse of discretion. The Court held that the trial court's ruling excluding plaintiff's expert's testimony about the lost profits that the plaintiff might have recovered if the defendant had not breached its contract with the plaintiff was not an abuse of discretion.

Synopsis: Sargon Enterprises, Inc. ("Sargon") invented a new dental implant, which could be implanted immediately following a tooth extraction and which contained both the implant and full restoration. At the time, the standard implant required multiple steps, including the surgical placement in a healed extraction socket, followed by a second surgery to inspect whether the implant had properly integrated with the bone, and finally the placement of a crown on the implant. Sargon's implant was a one-step implant: it expanded immediately into the bone socket with an expanding screw, and could be "loaded" with a crown the same day.

Sargon contracted with USC for the school's dentistry school to conduct a five-year clinical study of the implant. In 1999 Sargon sued USC for breach of contract. USC cross-claimed for breach of contract. Sargon prevailed at trial and the jury awarded \$433,000 in compensatory damages. But the trial court had excluded all evidence of lost profits, and based on this ruling the Court of Appeal reversed. On remand the contract claim was retried, and USC moved to exclude the testimony of Sargon's damages expert, James Skorheim, which purported to determine the lost profits Sargon sustained as a result of the breach by USC. The trial court held an eight-day evidentiary hearing. Following that, the trial court issued a 33-page ruling, ultimately concluding that Skorheim's conclusions were too speculative and precluding him from offering them.

Skorheim, an accountant, was prepared to offer an opinion that if USC had not breached the contract, the Sargon implant would have been a runaway hit in the dental-implant industry, and would have catapulted Sargon into the top six dental-implant makers in the world within the next decade. He calculated that the projected profits that Sargon lost ranged from \$220 million to \$1.1 billion, depending on how innovative the jury determined Sargon's implant was.

The trial court ruled that Skorheim's market-share opinion was not based on any historical financial results or comparisons to similar companies, and was therefore not based on the type of matter an expert could rely on. In essence, Skorheim assumed his conclusion and worked backward from there. He started his analysis with a comparison to industry leaders, who were all multi-million or multi-billion dollar international corporations, or their subsidiaries. The only thing that those companies had in common

with Sargon was that they all sold dental implants. There was no similarity in terms of size, history, product line, sales force, access to financing, etc. In a 2-1 unpublished decision, the Court of Appeal reversed, finding that, at least some aspects of Skorheim's testimony were not too speculative to go to the jury. The Supreme Court granted review, and in unanimous opinion authored by Justice Chin, reversed.

The Supreme Court explained that, "This case stands at the intersection of two legal principles: (1) Expert testimony must not be speculative, and (2) lost profit damages must not be speculative." It discussed each, in turn.

Expert testimony. The Court explained that, "[u]nder California law, trial courts have a substantial 'gatekeeping' responsibility." Section 801 of the Evidence Code requires expert opinion to be based on matter that is "of a type" that reasonably may be relied on by an expert in forming an opinion on the subject of his or her testimony. The Court cited with approval a statement from *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 563, construing this limitation in section 801 to mean "that the matter relied on must provide a reasonable basis for the particular opinion offered, and that an expert opinion based on speculation or conjecture is inadmissible." The Court concluded, "Thus, under Evidence Code section 801, the trial court acts as a gatekeeper to exclude speculative or irrelevant expert opinion. As we recently explained, '[T]he expert's opinion may not be based on assumptions of fact without evidentiary support or on speculative or conjectural factors . . . Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony



assist the trier of fact to evaluate the issues it must decide?”

The Court added that this limitation is also inherent in section 802 of the Evidence Code, which says that an expert offering an opinion may state the reasons for the opinion, unless “he is precluded by law from using such reasons or matter as a basis for his opinion.” The statute also gives trial courts discretion to allow an expert to be examined concerning the matter on which his or her opinion is based before the witness is permitted to testify. Hence, this statute governs judicial review of the “reasons” for an expert opinion, and authorizes courts to promulgate rules that restrict an expert’s “reasons.”

Accordingly, “under Evidence Code sections 801, subdivision (b), and 802, the trial court acts as a gatekeeper to exclude expert opinion testimony that is (1) based on matter of a type on which an expert may not reasonably rely, (2) based on reasons unsupported by the material on which the expert relies, or (3) speculative. Other provisions of law, including decisional law, may also provide reasons for excluding expert opinion testimony.”

The Court noted, however, that trial courts must also be “cautious” in excluding expert testimony. “The trial court’s gatekeeping role does not involve choosing between competing expert opinions.” Citing *Daubert*, the Court explained, “The high court warned that the gatekeeper’s focus — must be solely on principles and methodology, not on the conclusions that they generate.” The Court noted in a footnote, that the “general acceptance” test for admissibility of expert testimony based on new scientific techniques articulated in *People v. Kelly* (1976) 17 Cal.3d 24, still applies in California despite its rejection in *Daubert*.

The Court further cautioned that, “The trial court’s preliminary determination whether the expert opinion is founded on sound logic is not a decision on its persuasiveness. The court must not weigh an opinion’s probative value or substitute its own opinion for the expert’s opinion. Rather, the court must simply

determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture.”

Appellate review of the trial court’s decision is based on the abuse-of-discretion standard.

Lost Profits. The Court surveyed the rules governing recovery of lost profits, which make their recovery available, provided that the evidence makes “reasonably certain” their occurrence and extent. Courts are generally distinguished between established and unestablished businesses in lost-profit cases, and have usually found that lost profits are too speculative for an unestablished business to recover, because it cannot point to historical data to support its claim.

The Court cited with approval a case explaining that, “Where the *fact* of damages is certain, the amount of damages need not be calculated with absolute certainty. The law requires only that some reasonable basis of computation of damages be used, and the damages may be computed even if the result reached is an approximation. This is especially true where . . . it is the wrongful acts of the defendant that have created the difficulty in proving the amount of loss of profits or where it is the wrongful acts of the defendant that have caused the other party to not realize a profit to which that party is entitled.” But it also cited with approval a recent case reversing a lost-profit award based on the breach of a real-property sales contract, finding that an appraiser’s testimony of what the profits would have been if the property had been developed according to the intended plans was too speculative and uncertain.

The Court cautioned that the lost-profits inquiry is always “speculative to some degree” and that “inevitably, there will always be an element of uncertainty.” “Courts must not eviscerate the possibility of recovering lost profits by too broadly defining what is too speculative. A reasonable certainty only is required, not absolute certainty.”

In the context of the record before it, the Court concluded that the trial court had not abused its discretion in excluding

Skorheim’s testimony. The Court concluded its opinion with a series of rhetorical questions, such as whether an expert could predict that a particular football team would have won the Super Bowl in a given year if a given play had more quarterback sacks, or was more adept at forcing turnovers. Or whether a first-time novelist could sue a publisher for breach of contract and offer an expert to testify that if the book had been published it would have been a bestseller and “spawned a megahit movie with several blockbuster sequels.”

The Court concluded this section with the observation, “Because it is inherently difficult to accurately predict the future or to accurately reconstruct a counterfactual past, it is appropriate that trial courts vigilantly exercise their gatekeeping function when deciding whether to admit testimony that purports to prove such claims.”

Short(er) takes

Claims against public entities; manner of presentation of claims; substantial compliance not sufficient: *Dicampli-Mintz v. County of Santa Clara* (2012) __ Cal.4th __ (Cal. Supreme).

Government Code section 915, subd. (a) prescribes the manner of presenting a claim to a public entity. It requires that the claim be delivered to the clerk, secretary, or auditor of the entity, or by mailing it to one of these officials “or to the governing body.” Section 915, subd. (e) states that a misdirected claim will be deemed to comply with these requirements if it is actually received by the clerk, secretary, auditor, or board of the local public entity. Here, plaintiffs personally delivered a letter to a County-owned hospital’s Risk Management Department which set forth the basis for the plaintiff’s claim. The letter included a request that it be forwarded to the hospital’s insurance carrier, but did not request that it be forwarded to any of the statutorily-designated recipients stated in section 915.

In a later suit the trial court granted summary judgment for the County based on non-compliance with section 915. The



Court of Appeal reversed, finding that the plaintiff had substantially complied with the statutory requirements by presenting the letter to the County department most directly involved with the processing and defense of tort claims against the County. The Supreme Court reversed, unanimously holding that substantial compliance with section 915 is not sufficient, and that courts may not rewrite the statute to broaden or loosen its requirements concerning the presentation of tort claims to public entities.

Arbitration; judicial review of arbitration awards; legal error; denial of statutory rights: *Richey v. Automation, Inc.* (2d Dist. Div. 7.)

Plaintiff Richey was terminated as a sales manager at Power Toyota four weeks before the expiration of his approved medical leave under the California Family Rights Act (“CFRA”). Richey’s claims were submitted to arbitration under the employer’s mandatory arbitration agreement. That agreement provided, in part, that “resolution of the dispute shall be based solely upon the law governing the claims and defenses set forth in the pleadings.” The arbitrator denied Richey’s CFRA claim under the so-called “honest belief” or “honest suspicion” defense. The arbitrator found that under that defense, “an employer who honestly believes that it is discharging an employee for misusing FMLA [leave] is not liable even if the employer is mistaken.” The arbitrator decided that the manager who fired Richey may have been mistaken, but did so for a legally permissible, non-discriminatory reason. The trial court refused to vacate the award in favor of the employer, and Richey appealed. Reversed.

The court acknowledged that it is within the power of the arbitrator to make a mistake either legally or factually, and therefore the general rule is that a court may not review the merits of the controversy between the parties, the validity of the arbitrator’s reasoning or the sufficiency of the evidence supporting the arbitration award.

Nevertheless, the law is also that, “an arbitrator exceeds his or her power within

the meaning of Code of Civil 1286.2 [the statute delineating the grounds on which an arbitration award may be vacated – including “the arbitrators exceeded their powers”] and the award is properly vacated when it violates an explicit legislative expression of public policy, or when granting finality to the arbitration award would be inconsistent with a party’s unwaivable statutory rights. The California Supreme Court has recognized “that an arbitration agreement cannot be made to serve as a vehicle for the waiver of statutory rights created by the FEHA because the enforcement of such rights was for the public benefit and was not waivable.”

Under this rule, the Court held that the arbitrator erred in relying on the honest-belief defense, which is not properly part of the CFRA. Rather, it was part of the burden-shifting framework adopted for employment-discrimination cases under Title VII, which is not a part of the FMLA or CFRA framework. Rather, the rule in California is that “an employer may not, in terminating or failing to reinstate an employee who has been granted CFRA leave, defend a lawsuit from that employee based on its honest belief the employee was abusing his or her leave. Instead, the employer must demonstrate evidentiary facts sufficient to carry the burden of proof imposed by CFRA and FMLA.”

The court held that the arbitrator’s award must be vacated. “Where the parties have agreed the arbitrator will resolve any claim ‘solely upon the law’ and the purported legal error goes to both express, unwaivable statutory rights (the guarantee of reinstatement) and the proper allocation of the burden of proof, judicial review is essential to ensure the arbitrator has complied with the requirements of CFRA.”

Actual agency, ostensible agency, tow trucks, Automobile Clubs: *Monarrez v. Automobile Club of So. Cal.* (2012) __ Cal.App.4th __ (2d Dist. Div. 2.)

Monarrez suffered catastrophic injuries when he was struck by a hit-and-run driver while receiving roadside assistance for a flat tire along the 710 freeway. He sued the tow truck company and also the

Automobile Club of Southern California, which had sent the tow truck under a “Preferred Contractor Roadside Assistance Contract.” The trial court granted summary judgment for the Auto Club, finding that the tow truck company was an independent contractor. Reversed. The Court of Appeal held that there were triable issues of material fact as to whether the tow truck company was the actual or ostensible agent of Auto Club. The Auto Club Training Manual controlled every detail of the driver’s appearance and behavior “from the acceptable (clean, uniformed, well groomed, courteous, prompt, ethical, safe and proficient) to the unacceptable (visible tattoos, tennis shoes, untucked uniform shirts, cigarette smoking). The Training Manual specifies the exact actions a technician must undertake during a highway service call, requiring that the member be put inside the tow truck cab, with the seat belt fastened; Auto Club dispatch must be notified if a member resists getting into the truck.”

The court noted that “Auto Club’s tight control is not illusory. Auto Club trains the technicians how to do the work, dispatches calls to them, then follows up with inspections and customer surveys to ensure that the technicians are maintaining the proper physical appearance and using Auto Club-approved methods. The work performed by the technicians is Auto Club’s regular business, not a one-off job or occasional event. This is full-time employment carrying out Auto Club’s business of providing roadside assistance, under the direction of Auto Club.” This creates sufficient evidence on which a jury could find that the tow truck driver was the Auto Club’s actual or ostensible agent, notwithstanding language in the agreement with Auto Club claiming only an independent-contractor relationship existed.



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