Appellate Reports and cases in brief

When a lawyer sues for unpaid fees, the client complains for breach of fiduciary duty

By Jeffrey Isaac Ehrlich

Attorney's fees; contract lawyers; anti-SLAPP motions; self-represented lawyers: *Ellis Law Group v. Nevada City Sugar Loaf Properties LLC* (2014) __ Cal.App.4th ___ (Third Dist.)

Ellis Law Group (ELG) sued a former client to recover unpaid fees. The client cross-complained for breach of fiduciary duty. ELG filed an anti-SLAPP motion, which was granted. ELG then moved for attorney's fees, which the trial court granted. Reversed. The lawyer preparing the anti-SLAPP motion was "of counsel" to ELG, working on a "contract attorney" basis. The court found that because of the close relationship he held with ELG, that in preparing the anti-SLAPP papers, he was a member of ELG. Accordingly, the rule that self-represented attorneys cannot recover attorney's fees under fee-shifting statute applied, and the award was improper.

Statute of Limitations, medical malpractice, intentional torts, "gravamen of action": *Larson v. UHS of Ranch Springs, Inc.* (2014) __ Cal.App.4th __ (4th Dist., Div. 3.)

In November 2010 plaintiff Larson had kidney stone surgery. In September 2011, he sued Shuman, the anesthesiologist, claiming that in performing the preoperative checkup and in administering the anesthesia Shuman had twisted Larson's arm, pried open his mouth, and pushed on his face and head. He claimed that when he awoke from surgery his face was badly bruised, swollen, and sore. Larson's complaint included claims for medical negligence, professional negligence, battery, and intentional infliction of emotional distress. Larson ultimately dismissed his lawsuit without prejudice in March 2012. Eight months later Larson filed a second lawsuit against Shuman arising from the same incident, but this time alleging only intentional torts. The trial court sustained Shuman's demurrer based on the 1-year statute of limitation for medical negligence claims, rejecting Larson's argument that the 2-year limitation period for personal-injury claims governed the claim. Affirmed. Because the gravamen of Larson's complaint was how Shuman performed medical services, the claim was subject to the 1-year limitation period for medical-negligence claims.

Insurance; acts within the scope of employment; sexual misconduct: *Baek v. Continental Cas. Co.* (2014) __ Cal.App.4th __ (2d Dist., Div. 4.)

Baek was employed by Heaven Massage and Wellness Center (HMWC) as a massage therapist. In the underlying action Baek was accused of sexually assaulting the plaintiff while giving her a massage at HMWC. Baek tendered his defense to Continental, which had issued a CGL policy to HMWC. Continental denied coverage. Baek sued for breach of contract and bad faith. The trial court dismissed Baek's suit on demurrer. Affirmed. The policy required that the acts on which liability was based to have been committed "within the scope of employment" or "while performing duties related to the conduct of [HMWC's] business.

The court surveyed the cases that deal with when an employee's sexual assault is considered "within the scope of employment" for the purposes of respondeat superior and insurance coverage. The cases show that where the employment provides the opportunity to encounter and be alone with the victim, but does not "engender" the attack in that "its motivating emotions were fairly attributed to work-related events or conditions" then the attack does not occur within the scope of employment. Here, Baek simply took advantage of solitude with a naïve client to commit an assault for reasons unrelated to his work. There was, accordingly, no coverage.

Insurance; non-relative resident exclusion; roommates: *Mercury Cas. Co. v. Chu* (2014) __ Cal.App.4th __ (4th Dist., Div. 3.)

Chu had auto insurance with Mercury on his Honda Accord. While Chu was driving his car he was involved in a collision with Krystal Hoang. Chu's roommate, Tu Pham, was a passenger in Chu's car and was injured. Pham

filed a personal-injury action against both Chu and Hoang, obtaining a $330,000 judgment against Chu. Mercury filed a declaratory relief action to establish that Chu's policy provided no coverage, and to obtain reimbursement from Chu for the cost of his defense. Mercury argued that the policy's exclusion for coverage for claims brought by "an insured" under the policy applied because Pham was an insured because he resided at the same address as Chu. Given the way it had drafted its policy, an "insured" was defined as a "residents other than [family members], and the policy defined "resident" as "an individual who inhabits the same dwelling as the named insured." The trial court granted Mercury's motion for judgment on the pleadings to enforce its "non-relative resident" exclusion. Reversed.

The court surveyed all the cases involving similar exclusions, and noted that they all involve the insured's relatives who reside with the insured. Mercury's attempt to create a non-relative resident exclusion was novel. Insurance Code section 11580.1, subd. (c) describes the type of exclusions that insurers may include in California automobile policies, and it does allow an exclusion for claims by "an insured" or when the ultimate indemnification would directly or indirectly accrue to an insured. The court rejected Mercury's argument that its exclusion was consistent with this provision. Even in the context of a "resident relative" exclusion, a family member who briefly visits the insured is not an "insured" for the purpose of the exclusion. In addition, the Insurance Code requires that liability coverage be supported by an insurable interest in the covered risk. Pham, as Chu's roommate, has no such insurable interest. While he might have obtained one had he been a permissive user of Chu's car, he did not have one merely as a passenger. He could not be held liable for loss or injury caused by operation or use of the car merely by his presence in Chu's residence. "It appears Mercury named Pham as 'an insured' for the sole purpose of excluding him from coverage caused by bodily injury caused by use of the insured auto by the named insured. . . . We conclude no public policy consideration or legal authority justifies denying Pham's claim against the named insured of the policy." The court accordingly struck clause including residents other than the named insured's family from the policy, so that Mercury could no longer claim that Pham was an insured.

Insurance; Government agencies; Department of Insurance; mandatory duties; writs of mandate: *Ellena v. Dept. of Ins.* (2014) __ Cal.App.4th __ (1st Dist., Div.2.)

Ellena was an employee of Sonoma County, which had purchased disability coverage for its employees from Standard Insurance. After her disability insurance claim was denied, she sued Standard and the Department of Insurance (DOI). She claimed that the Standard policy contained provisions that were contrary to California law, and that the DOI failed to exercise its obligation to review the policy terms for compliance with California law before approving the policy form. She sought a writ of mandate against the DOI. The trial court dismissed her claim against the DOI on demurrer. Reversed.

Ellena claimed that the Standard policy violated California law in several ways, including by allowing the company to redefine the insured's "own occupation" as one other than the one she actually performed, and then find her not disabled because she could perform the duties of that other occupation. It also violated California law by defining "any occupation" too broadly, to require the insured to be unable to perform all occupations. She alleged that the DOI was aware of these requirements in California law, but never actually performed its statutory obligations to determine whether the policy complied with California law.

The court held that Ellena had made out a proper case for a writ of mandate against the DOI. Section 10291.5 of the Insurance Code states that the Insurance Commissioner (and hence the DOI) "shall not approve any disability policy for insurance or delivery" unless it meets a number of requirements. These include full compliance by the insurer with all requirements in the Insurance Code. After reviewing the relevant provisions of the Insurance Code, the court concluded that the DOI had a mandatory duty to review proposed disability insurance policies for compliance with California law. Accordingly, Ellena's mandamus action was viable.

Attorneys; ownership of interest on fee awards: *Hernandez v. Siegel* (2014) __ Cal.App.4th __ (1st Dist., Div. 5.)

Siegel represented Hernandez in a successful employment-discrimination lawsuit. The jury awarded Hernandez damages of $266,347. In post-trial proceedings, the court awarded her attorney's fees of $623,908 in fees and costs of $26,932. The judgment was affirmed on appeal. While the appeal was pending, the defendant issued Siegel and Hernandez jointly a check for $658,606, which represented the attorney-fee award plus $34,699 in post-judgment interest on that award. Siegel and Hernandez became embroiled in a dispute over who was entitled to the interest, and a lawsuit ensued.

Held: absent an agreement to the contrary, the interest on an attorney's fee award belongs to the attorney who owns the fee judgment on which the interest accrues. "It would make little sense to award interest in a fee award to anyone other than the attorney whose labor remains uncompensated."


Ehrlich

Jeffrey Isaac Ehrlich is the principal of the Ehrlich Law Firm, *with offices in Encino and Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. His practice emphasizes appellate support for the Southern California trial bar and insurance bad-faith litigation. He is editor-in-chief of* Advocate, *the Journal of Consumer Attorneys Associations for Southern California.*