Appellate Reports and cases in brief

Cases of interest to members of the plaintiff's bar

By Jeffrey I. Ehrlich

Harb v. City of Bakersfield

(2015) __ Cal.App.4th __ (Fifth Dist.)

Who needs to know about this case? Lawyers litigating cases against doctors or first-responders who are asserting a comparative-fault defense based on the plaintiff's need for medical treatment in the first instance.

Why it's important: First published California decision to hold that doctors and first responders cannot rely on comparative negligence based on the pre-accident/pre-treatment negligence of the plaintiff. Also holds that a trial court can commit reversible error by giving an instruction that is legally correct in the abstract, but which is redundant and ambiguous in the context of the case.

Synopsis: Dr. Mohamed Harb was a neonatologist in Bakersfield. On his way home from the hospital he suffered a stroke and was involved in an automobile accident. The police who responded to the accident observed him in medical scrubs, vomiting, with slurred speech, and disoriented. Although they did not detect any sign of alcohol on his breath, they assumed he was drunk. When the two breath tests they administered registered 0.00 they concluded that the machine was broken or that he was on drugs. They sent away an ambulance that had been dispatched to the scene and kept Harb handcuffed on the curb until they learned who Harb was and that he might have previously suffered from a stroke. A second ambulance was called, and Harb was transported to the hospital. In all, the police's refusal to allow Harb to be transported in the first ambulance delayed his treatment by roughly 25 minutes. Harb survived but is unable to care for himself. He wears diapers and requires assistance to bathe, comb his hair, brush his teeth, and eat.

Harb and his family sued the City and the ambulance company for negligence and loss of consortium. At trial, the City's counsel persuaded the trial court to instruct the jury on comparative fault, which allowed the defendants to argue that Harb bore full responsibility for his situation because he failed to manage his blood pressure in accordance with his doctor's orders. The jury answered the first question on the verdict form — whether the defendants were negligent — "no" and did not reach any other questions, including comparative fault. The trial court denied Harb's new-trial motion. Reversed.

The Court of Appeal held that there were two independent reversible errors. First, the City persuaded the trial court to include an instruction that said, "A police officer is not liable for his actor or omission, exercising due care, in the execution or enforcement of any law." The instruction tracks Gov't Code § 820.4. Harb argued that the instruction was redundant and confusing, because it merely says, in an opaque way, that a police officer is not liable unless they are negligent. The court held that the instruction was ambiguous because it did not clearly state when the police officer is immune from suit, and that the ambiguity created a reasonable likelihood of being misunderstood and misapplied.

With respect to comparative fault, the court held that because Harb was suing the defendants for the *additional harm* that their actions caused, and not for causing his stroke in the first instance, that they could not properly rely on any negligence by Harb in causing the stroke. In effect, that defense allows a defendant who is charged with providing care to the plaintiff to blame the plaintiff for needing care in the first instance. The court surveyed cases from other jurisdictions and concluded that the rule in California, as in the majority of jurisdictions, is that "the issue of a plaintiff's comparative fault should not be presented to the jury when the plaintiff's allegedly negligent conduct occurred before the first responders arrived at the scene of the accident." Accordingly, the jury should not have been given the CACI 405 instruction on comparative fault, and the defense should not have been allowed to argue to the jury that Harb's failure to control his blood pressure was negligence that contributed to the injuries for which the plaintiffs sought damages.

The court further held that the instruction was prejudicial, even though the jury did not reach the issue of comparative fault on the verdict form.

Short(er) takes

On-call time; sleep time; compensable time; wage-and-hour law: *Mendiola v. CPS Security Solutions, Inc.* (2015) __ Cal.4th __ (Cal.Supreme). CPS employed on-call security guards to provide security at construction sites. Part of each guard's day was spent on active patrol. Each evening, guards were required to be on call at the worksite and to respond to disturbances should the need arise. While they were on call, the guards were required to stay in residential trailers provided by CPS on site. Guards could eat, drink, watch TV, read, and sleep while on call. But children, pets, and alcohol were not allowed, and adult visitors were

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permitted only with the approval of the CPS client. During the week, guards patrolled for 8 hours, were on call for 8 hours, and off for 8 hours. On weekends, they patrolled for 8 hours and were on call for 16 hours. The Court held that all of the guards' on-call hours constituted compensable hours worked for which they were required to be paid and, further, that CPS could not exclude "sleep time" from plaintiffs' 24-hour shifts based on federal regulations.

Arbitration; judicial review of arbitration awards; unwaivable statutory rights; "honest belief" defense; California Family Rights Act: *Richey v. Autonation, Inc*. (2015) __ Cal.4th __ (Cal. Supreme). Autonation terminated Richey, who was out on approved medical leave, but who engaged in outside employment in violation of company policy. After an 11-day hearing, the arbitrator ruled in favor of Autonation, applying the "honest belief" test drawn from federal Family and Medical Leave Act cases. The trial court confirmed the arbitrator's award, but the Court of Appeal reversed, finding that arbitrator's application of the defense was contrary to California law and deprived Richey of an unwaivable statutory right. As a result, the court had jurisdiction to vacate the arbitration award. Reversed.

Courts generally cannot review arbitration awards for errors of fact or law. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1, 10. A narrow exception to this rule applies where arbitrators exceed their powers by issuing an award that violates a party's unwaivable statutory rights or that contravenes an express public policy. The Court of Appeal invoked this exception in vacating the arbitration award.

The Supreme Court declined to determine whether the "honest belief" defense applied in cases under the California Family Leave Act. It held that the record allowed the arbitrator to find that, regardless of the defense, that Autonation had grounds to fire Richey for violating its company policy. It therefore determined that any error by the arbitrator in application of the "honest belief" defense was not prejudicial, and there was no basis to vacate the arbitration award.

Arbitration, retroactive adoption of arbitration agreement to apply to pending claims: *Cobb v. Ironwood Country Club* (2015) __ Cal.App.4th __ (4th District, Div. 3) Ironwood Country Club incorporated an arbitration clause into its bylaws four months *after* the plaintiffs filed a lawsuit against it. When Ironwood tried to compel arbitration of the plaintiffs' lawsuit the trial court denied its motion, holding that the plaintiffs had never agreed to arbitrate their claim. Affirmed. The Club's power to amend its bylaws does not mean that members or former members are deemed to agree to whatever amendment the Club makes at any time. When one party to a contract retains unfettered discretion to terminate or modify the agreement, the agreement is illusory and cannot be enforced. With respect to arbitration agreements, the court had already held that the implied covenant of good faith and fair dealing prohibited a party from making unilateral changes to arbitration agreement that applied retroactively to accrued or known claims. (*Avery v. Integrated Health-care Hold-ings, Inc.* (2013) 218 Cal.App.4th 50, 61.) Moreover, even if the Club could enact an arbitration agreement that had retroactive application to accrued or pending claims, there was nothing in the agreement it enacted that indicated that it was intended to have that effect. And the arbitration agreement that the Club enacted only required members' claims to be arbitrated; it expressly carved out applicability to any claims asserted by the Club. This type of one-sided agreement is unconscionable.

Assumption of the risk; non-recreational activities; summary judgment: *Fazio v. Fairbanks Ranch Country Club* (2015) __ Cal.App.4th __ (Fourth Dist., Div. 1.) Fazio, a professional musician, filed suit against the country club, for injuries he suffered when he stepped into a gap on the stage the club had set up for him and injured his leg. The stage was set up so that it had triangular gaps between it and the wall it was set up next to. The trial court granted the club's motion for summary judgment based on primary assumption of the risk. Reversed. Although the doctrine of primary assumption of the risk was developed in the context of sports and recreational activities, courts have applied it in other contexts. The doctrine applies when the court, after examining the nature of the particular activity and the parties' relationship to that activity, concludes that a plaintiff engaged in the activity is harmed by the risks inherent in that activity. When the risks are inherent, the defendant owes no duty to protect the plaintiff from those risks or to take steps to reduce the risks. Here, the Club argued that falling off the stage was an inherent risk of performing on a stage.

The court held that the doctrine was properly applied to Fazio's case. But even where the doctrine applies, defendants have a duty not to increase the risks inherent in the activity. In order to obtain summary judgment, the Club had to make a prima facie initial showing of all elements of its assumption-of-the-risk defense, including a showing that it did not increase the risk of harm to Fazio. Since the Club's motion failed to make that showing, it never carried its initial summary judgment burden, and the trial court therefore erred in granting the Club's motion. Even if the burden had been shifted, the issue of whether the risk had been increased is a factual issue, and Fazio's opposition raised triable issues of fact about whether the way the stage was constructed increased the risk of injury.

Civil Procedure; responses to requests for admission; trial testimony: *Gonsalves v. Li* (2015) __ Cal.App.4th __ (First Dist. Div. 5.) Plaintiff Gonsalves was an automobile salesman at a BMW dealership in Concord. Defendant Ran Li test drove a BMW M3 while Gonsalves

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was a passenger. Li lost control, had an accident, and Gonsalves was injured. Gonsalves prevailed at trial, obtaining a $1.2 million award. Li appealed, based on cumulative prejudice from a host of alleged errors. Reversed. One of the errors that the Court found to be prejudicial was that, at trial, Gonsalves's counsel called Li as a witness in Gonsalves's case-in-chief and examined him on his negative responses to requests for admission propounded by Gonalves in discovery. The RFA asked Li to admit that, "at the time as you began your turn from Concord Avenue onto Highway 242 northbound on-ramp you were driving too fast for the conditions." Li's response was a denial, which said, "Responding party has a lack of information and knowledge to admit this Request for Admission. A reasonable inquiry concerning this matter has been made, and the information known or readily obtainable is insufficient to enable responding party to admit this matter." Gonsalves' counsel then extensively examined Li on this and similar responses to RFA's over multiple defense objections. When Li testified in the defense case-in-chief, Gonsalves' counsel again asked questions in cross-examination about Li's responses to the RFA's and elicited Li's statement, "I stand by my admissions that I signed."

In closing argument, Gonsalves' counsel argued that Li's refusal to admit the basic facts concerning the accident showed that Li failed to take responsibility for his actions.

On appeal, Li argued that the discovery statutes expressly allow *any part of* a deposition or interrogatory to be introduced at trial (with certain restrictions not relevant here), whereas the statutes only provide that *admissions* in response to RFA's are binding on the party at trial. The court agreed, noting that in the majority of jurisdictions to consider the issue, denials of RFAs are not admissible at trial. "We are persuaded, therefore, that denials of RFA's are not admissible evidence in an ordinary case, i.e., a case where a party's litigation conduct is not directly in issue. Thus, the trial court permitted examination of Li that was unfair and prejudicial to him, and erred in admitting those responses in evidence.

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