Appellate Reports

Guernsey v. City of Salinas — When juror affidavits concerning deliberations are admissible for new-trial motions or appeal

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Guernsey v. City of Salinas

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Who needs to know about this case: (1) lawyers making or opposing new-trial motions that include juror affidavits; (2) lawyers litigating jury-instruction error on appeal.
Why it's important: Clarifies when juror affidavits concerning the contents of their deliberations are admissible or inadmissible; finds that error in jury instructions was prejudicial, despite holding that most of the evidence in the juror affidavits were inadmissible.

Celia Capulin struck and injured pedestrian Un Suk Guernsey while Capulin was making a left turn into a shopping center in Salinas. Guernsey sued Capulin and the City of Salinas, for its negligence in failing to maintain the crosswalk on City property, which runs across the driveway into the shopping center. The cross-walk's stripes had been installed in 2007 and had "faded considerably" by the time of the accident in 2013 and were only visible near the curbs. Next to the crosswalk was a 16-foot wide pink concrete strip, which was not on City property. The Stop sign for traffic exiting the driveway was in this pink area, and was not next to the crosswalk. In addition, there were tall bushes next to the driveway's entrance lane, which impeded the ability of drivers leaving the center to see southbound traffic. Most of the bushes were not on City property, but the City had the authority to force the owner to trim them or trim them itself and charge the owner. It did neither.

Guernsey's theory against the City was that the condition of the intersection at the time of the accident was visually confusing for drivers. Because the crosswalk lines had faded so badly, they provided no visual cue to drivers to expect pedestrians; instead, drivers would focus on the pink concrete area.

At the City's request, and over Guernsey's objections, the court instructed the jury: "Plaintiffs have not alleged that the design of the Driveway created a dangerous condition. Instead, Plaintiffs have alleged that it was the City's failure to maintain the crosswalk lines and the bushes that created a dangerous condition. To find that the Driveway presented a dangerous condition, you cannot rely on characteristics of the Driveway itself (e.g., the placement of the stop sign, the left turn pocket, and the presence of the pink cement). Although you can consider those elements of the Driveway when weighing whether or not the faded crosswalk lines and bushes created a dangerous condition, you cannot rely on those design elements of the intersection to find that a dangerous condition existed."

The court also instructed the jury with the following instruction, to which both parties agreed: "The City of Salinas' property may be considered dangerous if a condition on adjacent property, such as the pink stamped concrete or the location of the stop sign, exposes those using the public property to a substantial risk of injury in conjunction with the adjacent property."

The verdict form, which was provided to the jury over Guernsey's objections, contained questions 2a and 2b about the City's liability for a dangerous condition, with the word "or" between the two questions. Question 2a asked: "Was the property in a dangerous condition at the time of the incident because of the lack of crosswalk lines and/or bushes on the City's property? ___ Yes ___ No." Question 2b asked: "Was the property in a dangerous condition at the time of the incident because of lack of crosswalk lines and/or bushes in conjunction with one or more conditions on adjacent property? ___ Yes ___ No If yes, check one or both: ___ Pink concrete ___ Location of stop sign."

The jury found for Guernsey and awarded over $7 million in damages, but it found for the City on questions 2a and 2b.

After the jury had been polled, the foreperson asked if he could "say something on behalf of the jury." He said: "Please paint the crosswalk lines." The court pointed out that the same message was also written on the verdict form, which said "P.S. Paint the xwalk Salinas!" The court entered judgment on the jury's verdict in December 2015.

Guernsey moved for a new trial, and included in her showing juror declarations that made the following points: (1) the vote on dangerous condition was 9 to 3; (2) a juror changed his vote because he "felt outvoted"; (3) it was the foreperson's handwriting on the "[d]esign of the [d]riveway" instruction; (4) the jury used the instruction to answer questions 2a and 2b; (5) the jury discussed and "agreed" that the instruction did not allow them to find a dangerous condition; and (6) some jurors "stated" that the City was partially responsible.

On appeal, the Court held that the City's proposed "Design of the driveway" instruction was erroneous. The instruction implicitly presumed that the City had established that it was entitled to design immunity without that issue ever having been presented to the trial court and, critically, to extend this presumed design immunity to elements of the driveway that were not on the City's property and therefore could not properly have been the subjects of the City's presumed design immunity.

The third and fourth sentences of the instruction improperly told the jury that it could not "rely on" elements of the driveway, including "the placement of the stop sign, the left turn pocket, and the presence of the pink cement" in deciding whether "a dangerous condition existed." This was legally incorrect, and it directly conflicted with another instruction given to the jury, which told it that the City's "property may be considered dangerous if a condition on adjacent property, such as the pink stamped concrete or the location of the stop sign, exposes those using the public property to a substantial risk of injury in conjunction with the adjacent property." Giving the jury these two conflicting instructions could not have been anything but hopelessly confusing to the jury.

The court then considered whether the instruction was prejudicial. It rejected virtually all aspects of Guernsey's juror declarations based on Evidence Code section 1150, which provides that "No evidence is admissible to show the effect of such statement, conduct, condition, or event upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which it was determined." It found that nearly all of the statements relied on by Guernsey were inadmissible "because they were reflections of the jurors' mental processes."

'[W]hen a juror in the course of deliberations gives the reasons for his or her vote, the words are simply a verbal reflection of the juror's mental processes. Consideration of such a statement as evidence of those processes is barred by Evidence Code section 1150. . . . '[T]he subjective quality of one juror's reasoning is not purged by the fact that another juror heard and remembers the verbalization of that reasoning. To hold otherwise would destroy the rule ... which clearly prohibits the upsetting of a jury verdict by assailing these subjective mental processes. It would also inhibit and restrict the free exchange of ideas during the jury's deliberations."

The "mental processes" prohibition applies to juror affidavits conveying jurors' statements about their understanding of certain words in instructions. This prohibition also precludes the admission of a statement in a juror affidavit that the polling of the jurors was inconsistent with their actual votes and of statements describing the amount of time that the jury spent discussing an issue. The courts have been firm in precluding affidavits which do no more than characterize the affiant's own state of mind or the state of mind of other members of the jury.

"While there are situations where the fact that a statement was made by a juror during deliberations may be admissible, the situation before us is not one of them. Evidence Code section 1150, subdivision (a) does not prohibit admitting a statement that reflects a juror's reasoning processes *if the statement itself amounts to juror misconduct*, comparable to an objective fact such as reading a novel during trial, or consulting an outside attorney for advice on law relevant to the case. . . . The juror declarations in this case were not aimed at showing juror misconduct; they were addressed to the impact of the "[d]esign of the [d]riveway" instruction on the jury's verdict. In this situation, the fact that a juror made a statement during deliberations has no probative value for any purpose other than to reveal the mental processes of that juror and other jurors."

The only potentially admissible statement in the declarations was the foreperson's declaration that the notations on the "[d]esign of the [d]riveway" instruction had been placed there by him. Nevertheless, even without the foreperson's declaration, it was undisputed that the jury's copy of the "[d]esign of the [d]riveway" instruction bore handwritten notations. A line had been drawn between the third and fourth sentences of the instructions. "2.a." had been written next to the third sentence, and "2.b." had been written next to the fourth sentence.

The fact that the "[d]esign of the [d]riveway" instruction given to the jury bore notations associating the verdict form's questions with the erroneous instruction demonstrates that the jury's verdict was influenced by the erroneous instruction. The only reasonable inference that could be drawn was that some member of the jury had drawn the line on the instruction between the third and fourth sentences of the instruction and written "2.a." next to the third sentence and "2.b." next to the fourth sentence.

The handwriting on the instruction by a member of the jury strongly supports a conclusion that the jury used the

third sentence of the "[d]esign of the [d]riveway" instruction to answer question 2a on the verdict form and the fourth sentence of that instruction to answer question 2b on the verdict form. Since these two sentences of the instruction were erroneous, and questions 2a and 2b were the critical questions regarding whether the City's property was in a dangerous condition, it "seems probable" that the "[d]esign of the [d]riveway" instruction prejudicially affected the verdict.

Additional evidence of prejudice included the conflict between the "design of the driveway" instruction and the "adjacent property" instruction, which otherwise could have provided substantial support for a finding that the City's property was in a dangerous condition. The jury submitted multiple questions to the court about the meaning of "dangerous condition," which suggested that it was struggling with this issue. And there was significant evidence that the City's property was in a dangerous condition since it was undisputed that the crosswalk was badly faded and had been poorly maintained. Under these circumstances, we find that the trial court prejudicially erred in giving the "[d]esign of the [d]riveway" instruction, and reversal is required.

Short(er) takes:

Unfair competition and false advertising; summary-judgment standard. *Sonner v. Schwabe North America, Inc.* (9th Cir. 2018) 911 F.3d 989.

Kathleen Sonner filed a consumer class action against the sellers of two Ginkgold nutritional supplements for violations of California's Unfair Competition Law, Cal. Bus. & Prof. Code § 17200, et seq. ("UCL"), the Consumers Legal Remedies Act, Cal. Civ. Code § 1750, et seq. ("CLRA"), and breach of express warranty. She alleged that these products were falsely labeled as capable of improving various cognitive functions when in fact they provided no such benefits. Although she supported her claims with expert opinion and other scientific evidence, the district court granted summary judgment in favor of the sellers because they produced contrary expert evidence. District courts in the Ninth Circuit appear to be split on the summary judgment standard that applies to false advertising claims under California's UCL and CLRA. (Compare *Korolshteyn v. Costco Wholesale Corp.*, No. 3:15-cv-709-CAB-RBB, 2017 WL 3622226, at *5-6, *12-13 (S.D. Cal. Aug. 23, 2017) [holding that where the scientific evidence is equivocal, summary judgment in favor of a defendant is appropriate because the false labeling claims cannot be literally false], with *Farar v. Bayer AG*, No. 14-cv-04601-WHO, 2017 WL 5952876, at *17-18 (N.D. Cal. Nov. 15, 2017) [holding that where the plaintiffs' expert testimony supported their claim that the defendants' products provide no measurable benefit, and the defendants' expert opined to the contrary, "such conflicting evidence would merely create a genuine issue of material fact inappropriate for summary adjudication"].) "Today we clarify that UCL and CLRA claims are to be analyzed in the same manner as any other claim, and the usual summary judgment rules apply." Accordingly, since both parties provided conflicting expert testimony in support of, and in opposition to, the summary-judgment motion, the plaintiff succeeded in raising a triable issue of material fact that should have precluded summary judgment.

"We are unpersuaded by the notion that a plaintiff must not only produce affirmative evidence, but also fatally undermine the defendant's evidence, in order to proceed to trial. "[A]bsolute certainty is not the evidentiary benchmark in civil (or even criminal) litigation," *Hobbs v. Gerber Prods. Co.*, No. 17 CV 3534, 2018 WL 3861571, at *7 (N.D. Ill. Aug. 14, 2018), and it has never been the standard for weighing conflicting evidence for purposes of summary judgment. If the plaintiff's evidence suggests that the products do not work as advertised and the defendant's evidence suggests the opposite, there is a genuine dispute of material fact for the fact-finder to decide. We see no reason to diverge from the usual summary judgment rules for UCL and CLRA claims."

Voluntary dismissals; appealable orders; void orders; timeliness to appeal; Code Civ. Proc. § 904.1. *Gassner v. Stasa* (2018) 30 Cal.App.5th 346 (Fourth Dist., Div. 2.)

Gassner, an attorney, filed an action against Stasa, a former client, to recover unpaid fees. In 2016, Gassner voluntarily dismissed her action without prejudice. Stasa filed a memorandum of costs seeking $2,698 in ordinary costs. She also filed a motion seeking attorney's fees against either Gassner or her counsel, the Grossman firm. Gassner did not file a motion to tax costs, but did file an opposition to the fee motion. The trial court denied the motion and awarded costs of $2,698, payable by either Gassner or her counsel. A month later Gassner filed a motion to vacate the cost award, based on section 473, subdivision (b) of the Code of Civil Procedure. The only error discussed was the failure to file a motion to tax costs.

On October 3, 2016, after hearing argument, the trial court denied the motion. Gassner filed objections to the proposed order, arguing that it was inaccurate because the trial court never awarded costs against counsel. On January 30, 2017, the trial court held a hearing on the objections. It concluded that the order was accurate in light of its August 4, 2016 order that had awarded costs against both Gassner and her counsel.

On March 29, 2017, the Grossman firm filed a notice of appeal, purportedly from the March 29, 2017 order denying the motion to vacate.

Although there is mixed authority on the issue, the Court of Appeal concluded that a costs order following a voluntary dismissal by the clerk without prejudice is not appealable as a *post judgment* order under Code of Civil Procedure section 904.1, subdivision (a)(2) because a voluntary dismissal without prejudice is not a judgment. For the same reason, however, such a costs order is the final determination of the parties' rights; hence, it is a judgment and appealable as such under Code of Civil Procedure section 904.1, subdivision (a)(1).

Unless rule 8.108 of the Rules of Court extended the time, the latest date to appeal from the August 4, 2016 order was 180 days after entry of the order (rule 8.104(a)(1)(C)); this time expired on January 31, 2017. The notice of appeal, filed on March 29, 2017, was filed too late to obtain review of the August 4, 2016 order.

Because the order awarding costs was appealable as a judgment. Thus, the later orders refusing to set it aside were appealable, if at all, as postjudgment orders. Ordinarily, a postjudgment order cannot be appealed on issues that could have been reviewed on appeal from the prior judgment; a *new issue* must be raised.... Otherwise, the parties would effectively be allowed two appeals from the same ruling. But an exception to this general rule applies when the underlying judgment is void. In such a case, the order denying the motion to vacate is itself void and appealable because it gives effect to a void judgment. Accordingly, one of the orders denying the motion to vacate – either the October 3, 2016 minute order or the January 20, 2017 formal order – was appealable.

On October 3, 2016, when the trial court orally denied the motion to vacate, it did not direct anybody to prepare a written order. It merely directed Stasa to give notice, which is not the same thing. Admittedly, under rule 3.1312(a), Stasa was required to prepare a written order; rule 8.104(c)(2), however, specifically provides that the preparation and entry of a written order under rule 3.1312 does not reset the entry date of an oral order that has been entered in the minutes. Thus, the Grossman firm's time to appeal started running on October 3, 2016, when the oral order was entered in the minutes, and not on January 30, 2017, when the formal order was entered.

On October 4, 2016, Stasa served a "Notice of Ruling," giving notice of this order. However, because it was not entitled "Notice of Entry" and did not attach a file-stamped copy of the trial court's minute order, it did not trigger the 60-day deadline to appeal under rule 8.104(a)(1)(B). The Grossman firm therefore had 180 days to appeal from the October 3, 2016 order denying the motion to vacate – i.e., until April 3, 2017. Its notice of appeal, filed on March 29, 2017, was timely.

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