The Bottom Line

CASE TITLE: Sheldon Deutsch v. Bill Joswig, M.D. and Center for Health Care Medical Associates

CASE NO.: GIC 814562

JUDGE: Honorable Luis R. Vargas

PLAINTIFF'S COUNSEL: Kenneth Sigleman, Esq. and Penelope Phillips, Esq. of Kenneth Sigleman & Associates

DEFENSE COUNSEL: Clark Hudson, Esq. of Neil Dymott Brown Frank & Harrison

TYPE OF ACTION: Alledged Medical Malpractice - Failure to diagnosis congestive heart failure

TIME OF DELIBERATIONS: 2 hours

TYPE OF TRIAL: Jury Trial - 8 days

VERDICT: Defense 10-2

CASE TITLE: Centex Golden v. Neo

CASE NO.: GIC 733027

JUDGE: Honorable Luis R. Vargas

PLAINTIFF'S COUNSEL: Nancy J. Skovholt & Deb C. Pedersdotter, Law Office of Deb C. Pedersdotter

DEFENSE COUNSEL: John P. Cogger, Esq. & William P. Harris, III, Esq., Law Office of Vivian L. Schwartz

TYPE OF ACTION: Breach of Contract, Contractual Indemnity

SETTLEMENT DEMAND/OFFER: P demand of $155,000, D CCP 998 offer of $5,000

TYPE OF TRIAL: Jury Trial - 5 days

VERDICT: Defense

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scenario significantly increases the risks of a facility allowing a meritless claim to proceed to litigation, and unfairly prejudices the innocent operator of an elder care facility. The end result is that an unscrupulous elder abuse claimant now can force an elder care facility or professional to make a choice between (1) risking a sterling reputation or (2) settling an otherwise baseless claims before the matter proceeds to litigation, at which point a confidential settlement is not possible.

Proponents of Section 2031.1 in the legislature had argued that confidentiality agreements were being used to wrongfully protect the guilty facility's reputation, and to prevent public access to information that shows which facilities abuse elders. Numerous shameful and egregious examples of abuse were cited to support this position. However, a complaint under the EADACPA does not even require verification. Thus, there is little incentive to an "elder abuse" claimant to refrain from filing a lawsuit under the EADACPA, even if the claim is questionable. There also are many reasons, other than fault, for a facility to settle an elder abuse claim, including the high costs of litigation, the risk that available insurance will not cover all the defense costs, and the risk of harm to the facility's reputation. It would appear, therefore, that the only way to protect the reputation of an "innocent" client is to either take the case to trial and win, or to settle on a confidential basis along the lines set forth above.

INSURANCE LAW

James M. Roth, The Roth Law Firm

Common sense seems to have reared its ugly head. Recent decisions by the Appellate Courts have generally favored insurance carriers. It's reassuring to know that good facts can make good law.

WORKERS' COMPENSATION CARRIER HAD STANDING TO SUE A THIRD PARTY TORTFEASOR: In Fremont Compensation Ins. Co. v. Sierra Pine, Ltd., (2004) 121 Cal.App.4th 389, the California Court of Appeal, Third Appellate District, held that under Labor Code §3852, a workers' compensation insurer had standing to sue a third party tortfeasor despite the fact that the insurer had paid a death benefit to the worker's former wife (they were divorced at the time of the worker's death). The Workers Compensation Appeals Board ("WCAB") ordered an insurer to pay death benefits to the former wife of an employee killed on the job. The insurer sued the third party tortfeasor to recoup the money under Labor Code §3852. The trial court ruled that the insurer did not have a right to sue to recoup compensation benefits from the third party tortfeasor because §3852 subrogated the insurer to the rights of the former wife, and she had no standing to sue for wrongful death. The trial court sustained a demurrer without leave to amend and the insurer appealed. Because the insurer could have sued to recoup benefits paid to the worker while alive and because recoupment actions survive a worker's death (see Labor Code §3851), the fact compensation was paid as a death benefit, rather than vocational rehabilitation or medical benefits, makes no difference. To allow tortfeasors to escape liability due to the happenstance that the WCAB ordered benefits to be paid to someone who had no standing to file a wrongful death action would conflict with the letter and spirit of §3852.

LEAD CONTAMINATION IN A MUNICIPAL WATER SYSTEM IS "PROPERTY DAMAGE" WHEN THE DEFECTIVE COMPONENT PHYSICALLY INJURES SOME OTHER TANGIBLE PART OF THE LARGER SYSTEM OR THE SYSTEM AS A WHOLE:

In Watts Industries, Inc. v. Zurich American Ins. Co., (2004) 121 Cal.App.4th 1029, the California Court of Appeal, Second Appellate District, affirmed the trial court's grant of an insured's motion for summary judgment holding that its insurer owed a duty to defend a suit by municipalities seeking

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damages and injunctive relief for alleged lead contamination in their water systems. The court rejected the insurer's contentions that no "property damage" was alleged, that the relief sought was purely prophylactic, and that coverage was excluded by the impaired property exclusion. The insured owned a waterworks parts manufacturer which sold parts to municipalities for use in their water systems. The municipalities sued the insured alleging the parts wore out too quickly and caused lead to leach into the water supply. The municipalities also claimed defective parts at thousands of sites needed to be replaced. The court rejected the insurer's contention that no "property damage" was alleged because the municipalities did not claim physical injury to other parts of the water systems. The court noted incorporation of a defective component or product into a larger structure or system does not constitute "physical injury to tangible property," unless the defective component physically injures some other tangible part of the larger system or the system as a whole. It further noted that where products or work containing hazardous materials are incorporated into other products or structures, other property is immediately physically injured at the moment incorporation occurs. Here, the municipalities alleged the defective parts were built into municipal water systems, leaching lead into water supplies and threatening public health and safety. Moreover, the parts were not easily removable, as they had to be dug up and replaced. The court concluded these allegations raised a sufficient prima facie showing of physical injury to tangible property.

DOG BITE OCCURRING WHEN DOG ESCAPED FROM AUTOMOBILE WAS NOT "CAUSED BY AN ACCIDENT RESULTING FROM THE OWNERSHIP, MAINTENANCE OR USE OF" THE INSURED VEHICLE: In State Farm Mut. Ins. Co. v. Grisham, (2004) 122 Cal.App.4th 563, the California Court of Appeal, Third Appellate District, affirmed the trial court's decision that State Farm had no duty to defend or indemnify its insured under an auto liability policy against a dog bite claim because plaintiff's injury was not "caused by an accident resulting from the ownership, maintenance or use of" the insured vehicle. The insured's dog bit plaintiff's leg after escaping from the insured's parked pickup truck. The court recognized that California interprets the word "use" in auto liability policies to require "some minimal causal connection" between the use of the vehicle and the accident. It applied the "predominating cause/substantial factor" test under which the use of the vehicle must contribute in some way to the injury beyond merely serving as the location of the injury. Something involving the vehicle's operation, movement, maintenance, or its loading or unloading must be a contributing cause of the injury. Applying these principles, the court determined that plaintiff's injury did not result from the use of the insured vehicle. The vehicle did not contribute to the injury beyond merely transporting the dog to a place near the injury site. Plaintiff's injury did not result from, or in the course of, the vehicle being operated, moved, maintained, loaded or unloaded. Plaintiff was bit 20 to 25 yards from the vehicle, well beyond any unloading zone or activity. The vehicle had also been parked for some time prior to the insured's dog escaping and biting plaintiff.

CIVIL PROCEDURE

David M. Balfour, DiCaro Coppo & Popcke

ANTI-SLAPP: NEW PROTECTION FOR HOSPITAL PEER REVIEW

Physicians sitting on hospital peer review committees often wonder why it seems they are frequently involved in litigation with disruptive physicians, even though they themselves had voluntarily chosen to assist the hospital in conducting its mandated peer review responsibilities. These peer review committee members are frequently sued personally for their involvement in committee recommendations to censure, discipline or suspend the medical staff privileges of disruptive members of the medical staff. Moreover, the disruptive physicians often do not seek to have allegedly mistaken committee decisions overturned through administrative channels, but instead file lawsuits directly in the civil courts. Although *Westlake*[1] and peer review immunities do exist, litigation is quite an expense and a headache to these physicians voluntarily serving on peer review committees. With its mandatory provision for attorneys' fees, stay on discovery and quick dismissal of frivolous lawsuits, the Anti-SLAPP statute provides stronger protections for physicians serving on peer review committees. The application of the Anti-SLAPP statute to peer review proceedings is currently being reviewed on appeal in cases of first impression.

THE STRUCTURE OF ANTI-SLAPP LEGISLATION AND WHERE PEER REVIEW FITS IN

The Anti-SLAPP statute seems a natural fit to provide these protections for the peer review proceedings. SLAPP is an acronym for Strategic Lawsuit Against Public Participation; Anti-SLAPP being a statute enacted to protect against SLAPP lawsuits. Initially, the Anti-SLAPP statutes were enacted to protect environmental protestors who were abusively burdened, and whose free speech rights were chilled, by the onslaught of litigation launched by large corporations and developers who wished them silent. The purpose of a SLAPP suit is not to assert a legitimate right, but to chill the defendant for exercising its free speech or petition rights. In revising the Anti-SLAPP statute in 1997, the California Legislature found and declared it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through abuse of the judicial process, and furthermore, the Legislature declared to this end this section *shall* be construed broadly.

Since this 1997 Legislative edict, the Courts have responded by applying the Anti-SLAPP statute to a wide array of cases, from malicious prosecution lawsuits to lawsuits arising from disputes among homeowners' associations. The statutorily-mandated hospital peer review

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