PUBLICATION UPDATE

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California Torts

Publication 116 Release 63 September 2017

HIGHLIGHTS

Case Law Updates

Defendant Need Not Receive Consideration Under Exception to Recreational Use Immunity for Landowners. In *Pacific Gas & Electric Co. v. Superior Court* (2017) 10 Cal. App. 5th 563, the court of appeal held that the consideration exception to the immunity from liability granted to landowners for recreational purposes by Civ. Code § 846 applies even when the defendant received no part of the consideration paid and exercised no control over third party access to the property. See Ch. 15, *General Premises Liability*, § 15.22[3][a][ii].

MICRA Damages Cap Inapplicable to Recovery for Intentional Tort. In *Bigler-Engler v. Breg, Inc.* (2017) 7 Cal. App. 5th 276, the court of appeal held that the $250,000 limit of recovery of noneconomic damages imposed by MICRA in Civil Code § 3333.2 applies only to actions based on negligence and does not apply to recovery for an intentional tort such as intentional concealment. See Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.50[2][a].

Civ. Code § 3333.1 Applies to Future Medical Benefits. In *Cuevas v. Contra Costa County* (2017) 11 Cal. App. 5th 163, the court of appeal held that the exception to the collateral source rule in medical malpractice cases provided by Civ. Code § 3333.1 is not limited in scope to only those medical benefits that have already been paid, but extends as well to evidence of future medical benefits. See Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.50[2][b] and Ch. 53, *Mitigation of Damages (Avoidable Consequences) and the Collateral Source Rule*, § 53.23[1].

Triggering of Limitations Period for Failure to Diagnose Preexisting Condition Clarified. In *Drexler v. Petersen* (2016) 4 Cal. App. 5th 1181, the court of appeal held that if a plaintiff alleges that a health care provider misdiagnosed or failed to diagnose a preexisting disease or condition, there is no "injury" for purposes of triggering the limitations periods of Code Civ. Proc. § 340.5 until the plaintiff first experiences appreciable harm as a result of

the misdiagnosis, and "appreciable harm" occurs when the plaintiff first becomes aware that a preexisting disease or condition has developed into a more serious one. See Ch. 31, *Liability of Physicians and Other Medical Practitioners*, § 31.60[2][b].

Malpractice Claim Against SVPA Attorney Need Not Show Actual Innocence. In *Jones v. Whisenand* (2017) 8 Cal. App. 5th 543, the court of appeal held that offenders who have served their prison sentences and then undergo civil commitment proceedings under the Sexually Violent Predator Act are not required to comply with the "actual innocence" requirement when pursuing a malpractice claim against the attorney who represented the offender during the SVPA proceeding. See Ch. 32, *Liability of Attorneys*, §§ 32.02[5][a], 32.30.

Breach of Fiduciary Duty Claim May be Dismissed if Duplicative of Negligence Claim. In *Broadway Victoria, LLC v. Norminton, Wiita & Foster* (2017) 10 Cal. App. 5th 1185, the court of appeal held that while a claim for breach of fiduciary duty is separate and distinct from a malpractice claim based on professional negligence, as a cause of action for breach of fiduciary duty requires some further violation of the obligation of trust, confidence, or loyalty to the client, if the basis for a claim of breach of fiduciary duty arises from the same facts and seeks the same relief as a malpractice claim based on negligence, the claim for breach of fiduciary duty is duplicative and should be dismissed by the court. See Ch. 32, *Liability of Attorneys*, § 32.02[5][d].

No Action for Bidder on Public Works Contract Against Competitor. In *Roy Allan Slurry Seal, Inc. v. American Asphalt South, Inc.* (2017) 2 Cal. 5th 505, the California Supreme Court held that an unsuccessful bidder on a public works contract does not have an existing relationship with the public entity with a probability of future economic benefit sufficient to state a cause of action for intentional interference with prospective economic advantage against a bidder that was awarded the contract only by submitting an illegal bid. See Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.102[1], [2].

Supreme Court Provides Additional Guidance for Evaluating Anti-SLAPP Motions. In *Park v. Board of Trustees of California State University* (2017) 2 Cal. 5th 1057, the California Supreme Court held that a claim for national origin discrimination was not subject to a motion to strike under the anti-SLAPP statute, as the actionable misconduct was the denial of tenure for an impermissible reason rather than any communication or petitioning activity. The Court clarified that a claim arises from protected activity for purposes of the anti-SLAPP statute when that speech or petitioning activity underlies or forms the basis for the claim, that is, is itself the alleged wrongful conduct and not just evidence of liability or a step leading to some different act for which liability is asserted. A claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity or was thereafter communicated by means of speech or petitioning activity. See Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.106[3][b][i].

Public Injunctive Relief Available in Individual Unfair Competition Action. In *McGill v. Citibank, N.A.* (2017) 2 Cal. 5th 945, the California Supreme Court held that public injunctive relief, that is, an injunction that has as its primary purpose and effect the prohibiting of unlawful acts that threaten future injury to the general public, is available under the unfair com-

petition statute in an action brought solely in the name of a private plaintiff. Moreover, a predispute waiver of the right to seek public injunctive relief in any forum is invalid and unenforceable under California law. See Ch. 40, *Fraud and Deceit and Other Business Torts*, § 40.150[5][a].

Privilege for Report of Complaint to Public Journal Applied to Description of Civil Complaint. In *Healthsmart Pacific, Inc. v. Kabateck* (2016) 7 Cal. App. 5th 416, the court of appeal held that for purposes of applying the absolute privilege of Civ. Code § 47(d) for publication of a fair and true report in or communication with a public journal, fair and true reports describing the allegations of a civil complaint are protected even if the court has not yet taken any official action on the complaint. See Ch. 45, *Defamation*, § 45.11[5].

Prevailing Party Status May be Denied After Dismissal Under Forum Selection Clause When Issues Remain Pending in Alternative Forum. In *DisputeSuite.com, LLC v. Scoreinc.com* (2017) 2 Cal. 5th 968, the California Supreme Court held that if an action is dismissed under a forum selection clause in the applicable contract and the substantive issues remain to be resolved in an action that has been filed in the correct forum, a trial court does not err in finding for purposes of awarding fees and costs that there is no prevailing party on the contract in the California action. See Ch. 50, *Damages, Costs, Attorneys' Fees, and Interest*, § 50.10[5].

Minor Required to Seek Relief From Claim-Filing Requirement When Late Claim Denied. In *J.M v. Huntington Beach Union High School Dist.* (2017) 2 Cal. 5th 648, the California Supreme Court held that if a minor files a timely application for leave to present a late claim against a public entity and, despite the statutory provision mandating that such an application by a minor be granted, that application is denied by the public entity or deemed denied through the entity's failure to act on the application within 45 days, the minor must still file a timely petition in court seeking relief from the claim-filing requirement before filing suit. See Ch. 62, *Claims and Actions Against Public Entities and Employees*, § 62.53[4].

Vocational Rehabilitation Examination May Not Be Mandated as Form of Discovery. In *Haniff v. Superior Court* (2017) 9 Cal. App. 5th 191, the court of appeal held that a defense team may not require a plaintiff seeking damages for wage loss or loss of earning capacity to undergo a vocational rehabilitation examination, as that is not a means of discovery expressly authorized by statute. See Ch. 72, *Discovery*, § 72.13[2][d].

Only Parts of Billing Invoices May Be Covered by Attorney-Client Privilege. In *Los Angeles County Bd. of Supervisors v. Superior Court* (2016) 2 Cal. 5th 282, the California Supreme Court held that billing invoices sent by a law firm to a client, even if intended to be seen only by the client, are not necessarily covered by the attorney-client privilege, although the information contained within some billing invoices, such as information conveyed "to inform the client of the nature or amount of work occurring in connection with a pending legal issue," could be covered by the privilege. See Ch. 72, *Discovery*, § 72.21[1].

Client's Accidental Disclosure Does Not Waive Attorney-Client Privilege. In *McDermott Will & Emery LLP v. Superior Court* (2017) 10 Cal. App. 5th 1083, the court of appeal held that the attorney-client privilege may not be waived through accidental disclosure to a third party even when the client is the one who accidentally,

inadvertently discloses the privileged information. See Ch. 72, *Discovery*, § 72.21[3][a].

Only Some Attorney or Client Communications to Public Relations Consultant are Protected by Attorney-Client Privilege. In *Behunin v. Superior Court* (2017) 9 Cal. App. 5th 833, the court of appeal held that communications among a client, his or her attorney, and a public relations consultant are only protected by the attorney-client privilege if the communications were confidential and disclosing them to the consultant was reasonably necessary to accomplish the purpose for which the client consulted the attorney. See Ch. 72, *Discovery*, § 72.21[3][b].

Public Records Act Extends to Electronic Communications Made Through Employee's Personal Account. In *City of San Jose v. Superior Court* (2017) 2 Cal. 5th 608, the California Supreme Court held that electronic communications by a public employee about the conduct of public business may be subject to disclosure under the Public Records Act even when the communication was made and stored on a personal account, although the Court cautioned that in order to protect the privacy of employees, agencies should first communicate with employees about the requested writings and allow the employee to search his or her own records for the communication. See Ch. 72, *Discovery*, § 72.27[4].

Non-Compliant Expert Witness Testimony May be Excluded at Summary Judgment Stage. In *Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal. 5th 536, the California Supreme Court held that the exclusion of expert witness testimony for failure to comply with the procedural requirements of Code Civ. Proc. § 2034.300 applies at the summary judgment stage if an objection to the evidence is raised, and under those circumstances the admissibility of the expert's opinion must be determined before the summary judgment motion is resolved. See Ch. 72, *Discovery*, § 72.47[2][g].

Insurance Regulations. The California Supreme Court, in *Association of Cal. Ins. Cos. v. Dave Jones* (2017) 2 Cal. 5th 376, has held that 10 Cal. Code Regs., § 2695.183, which regulates calculations for property replacement costs, is valid. *See* Ch. 81, *Insurance Claims: Types of Insurance Policies*, § 81.30[7].

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