

Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Johnson v. Chiu

(2011) __ Cal.App.4th __ (4th Dist. Div. 3.)

Who needs to know about this case: Lawyers opposing motions in limine

Why it's important: Holds that defendants' use of motion in limine to obtain judgment against the plaintiff was a "textbook example of the inappropriate use of motions in limine." Also explains why prior ruling on medical-negligence claim did not preclude plaintiff's cause of action for negligent maintenance of medical laser device that injured her.

Summary: Johnson sued Dr. John Chiu for medical malpractice and negligent maintenance of the laser machine that malfunctioned during a skin treatment, causing her injury. The trial court granted summary adjudication of the medical malpractice claim in favor of Dr. Chiu, but denied summary adjudication of the negligent-maintenance claim. The case was sent to a second judge for trial, and Dr. Chiu brought a second motion to dismiss the negligent maintenance claim, calling it a motion in limine. The motion was denied, as was Dr. Chiu's petition for a writ. The case was then assigned to a third judge for trial, and Dr. Chiu again brought his motion in limine, arguing that Johnson was foreclosed from pursuing her negligent-maintenance claim because the court had previously granted the motion on the medical-malpractice action. The trial court granted the motion, and the Court of Appeal reversed.

The court held that although Chiu's use of an in limine motion was improper and failed to comply with the procedural requirements of Code of Civil Procedure sections 437c and 1008, Johnson did not raise the issue in the trial court and therefore did not preserve it for appeal. The court nevertheless condemned the use of a motion in limine as a substitute for the dispositive motions prescribed by the Code of Civil Procedure. On the merits, the court held that the order granting summary adjudication for Chiu on the medical-malpractice claim was not dispositive of the claim for negligent maintenance of the laser machine because the claims were based on different acts by the defendant.

American Exp. Centurion Bank v. Zara

(2011) 199 Cal.App.4th 383 [131 Cal.Rptr.3d 99] (6th Dist.)

Who needs to know about this case: Lawyers dealing with service of summons and substituted service where the proof of service does not match the facts

Why it's important: Demonstrates how, despite actual notice of suit provided to defendant, there was a failure by plaintiff to show partial or colorable compliance with the service-of-process requirements, which required the trial court to grant the defendants' motion to quash.

Summary: Bank sued Zara for damages. Zara moved to quash service on the grounds he had not been served. The trial court denied the motion, and ultimately a default judgment was entered against Zara. On appeal, he argued that service should have been quashed. Reversed.

A defendant who seeks review of an order denying a motion to quash must ordinarily petition the appellate court for a writ of mandate. (Code Civ. Proc., § 418.10, subd. (c).) But a defendant may reserve his jurisdictional objection on appeal if, after the denial of his motion to quash, he makes no general appearance but suffers a default judgment. That is what happened here.

The proof of service filed by the bank stated, that a registered process server had served "Robert V. Zara party in item 3.a., Asian, Male, 65 Years Old, Black Hair, Brown Eyes, 5 Feet 6 Inches, 160 Pounds" at a listed address in San Jose, CA. It further stated: "I served the party: a. **by personal service.** I personally delivered the documents listed in item 2 to the party or person authorized to receive service of process for the party (1) on: Sat., Jan. 30, 2010(2) at: 6:43PM." And it noted that "The 'Notice to the Person Served' (on the Summons) was completed as follows: a. as an individual defendant."

Zara filed his own declaration stating that he first noticed the summons and complaint on his doorstep when he returned home. That although the proof of service describes him as "Asian" he is not Asian and has gray hair; not black hair as listed in the proof of service. He has lived at the address, alone, for the last 10 years.

The court held a defendant may be "personally served" if the documents are actually handed to the defendant, or if they are delivered to an agent authorized to accept them on the defendant's behalf. An alternative method of service, "substitute

Copyright © 2011 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



service," is accomplished on an individual by leaving a copy of the documents at his or her house, in the presence of a competent member of the household over 18 or a person apparently in charge, followed by mailing the documents to the defendant. But substitute service may only be used as an alternative to personal service if the plaintiff has made a good-faith effort to personally serve the papers. Two or three attempts at personal service will usually satisfy this requirement.

Since the proof of service on its face showed that the process server did not comply with the rules governing service, since it indicates personal service on a person not matching the defendants' description, it was not sufficient to establish personal service on the defendant or an authorized agent. Nor did the service substantially – or even partially or colorably – comply with the statutory requirements. Jurisdiction over the defendant was established by a false proof of service, and thus jurisdiction was obtained through an intentional fraud on the court. The fact that Zara ultimately received notice of the action when he found the papers on his doorstep was not sufficient to establish jurisdiction over him, given the record here.

Short(er) takes

Medical malpractice; expert declarations; need to attach medical records under *Garibay v. Hemmat*: *Shugart v. Regents of University of California* (2011) __ Cal.App.4th __ (2d Dist. Div. 8.)

Shugart sued Dr. Warren and the Regents for medical malpractice. Both defendants moved for summary judgment, and submitted Shugart's medical records to the court with their motions as required by *Garibay v. Hemmat* (2008) 161 Cal.App.4th 735. Shugart filed oppositions supported by the declaration of her expert, Dr. Ostergard. No records were attached to Ostergard's declaration, but his declaration discussed the same records that the defendants had placed before the court. The trial court gave Ostergard's declaration zero weight because the medical records were not attached, and granted summary judgment to both defendants. Reversed as to Warren; affirmed as to the Regents. *Garibay* does not require a party to submit the medical records that their expert relies on to the court if the opposing party has already placed those records before the court. The summary judgment as to the Regents was affirmed because, Ostergard's declaration as to the negligence of the doctors employed by the Regents was too general and conclusory.

Negligence, strict products liability, allergic reactions; motions for reconsideration: *Hennigan v. White* (2011) 199 Cal.App.4th 395 [130 Cal.Rptr.3d 856] (3rd Dist.)

Hennigan sued White, a cosmetologist who applied permanent makeup to her eyelids and eyebrows. Hennigan later suffered adverse reaction, causing her eyelids to droop, and other problems. The complaint alleged that White had used defective and tainted pigments for the procedure, and had used incompetent technique to inject the pigments. The trial court granted summary judgment. Affirmed. Based on the evidence submitted, there was no showing that White's failure to test the pigments on a small patch of Hennigan's skin before applying them was negligent because the test would not have shown that Hennigan was likely to have an adverse reaction to the pigment. The strict-liability claim failed because Hennigan's primary objective in patronizing White's business was to obtain a service, not to purchase a product. "White cannot be held strictly liable for providing a service that involved the use of possibly defective products." Even if the court were to find that White was primarily selling a product, the strict-liability claim would fail because the fact that Hennigan suffered an adverse reaction to the pigments used does not establish that they were defective. The trial court properly denied Hennigan's motion for reconsideration, because she was unable to show that any of the information or evidence it contained was not available to her at the time she filed her opposition to White's summary-judgment motion.

Intervention; insurer's right to assert defenses available to insured: *Western Heritage Insurance Company v. Superior Court* (Parks) (2011) __ Cal.App.4th __ (2d Dist., Div. 3.)

Insurer provided a defense to its insured, a commercial provider of home health-care services, arising from damages caused to the plaintiff by the insured's employee. The insured's liability was vicarious. Insurer also defended the employee under a reservation of rights. The employee failed to respond to discovery, and it was then disclosed that the insurer had filed an answer for the employee without ever communicating with her. The trial court struck the employee's answer and entered her default. Insurer moved to intervene to protect its own interests. The trial court granted leave to intervene, but ordered that the insurer could only dispute damages; not the employee's liability. Since the employee's liability was vicarious, this had the effect of adjudicating the employer's liability, leaving only damages for trial. The insurer took a writ, which was granted. The trial court properly allowed the insurer to intervene to protect its own interests, but erred in limiting the intervention to damages issues. An intervening party is not bound by another party's procedural defaults, and there was no other basis to limit the insurer's rights to assert all defenses available to it on all issues.

Strict liability, negligence, assignment of claims for indemnity: *Bailey v. Safeway, Inc.* (2011) 199 Cal.App.4th 206 [131 Cal.Rptr.3d 41] (First Dist., Div. 4.)

Bailey suffered an eye injury when he was constructing a display of Cook's Champagne bottles in a Safeway store, and a bottle exploded. He sued the bottle manufacturer and Safeway for strict products liability and negligence. He settled with the bottle manufacturer for $1 million, plus the assignment of the manufacturer's assignment of its rights to

Copyright © 2011 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**



equitable indemnity against Safeway. The settlement was approved as a good-faith settlement under Code Civil Procedure section 877.6, and the manufacturer's cross-complaints against all defendants were dismissed. The case between Bailey and Safeway went to trial, with the jury finding that the bottle was defectively designed and that neither Safeway nor the manufacturer was negligent or at fault. Bailey and Safeway stipulated that the verdict be modified to find Safeway 100 percent responsible for Bailey's injuries and damages. Bailey then filed a separate lawsuit against Safeway as the assignee of the manufacturer's indemnity rights. Safeway demurred, arguing that the complaint was barred by res judicata. The trial court sustained the demurrer without leave to amend. Affirmed.

Bailey was collaterally estopped to relitigate the issue of Safeway's negligence, because he was a party to the underlying action. And there is no authority that would allow the manufacturer of a product found to be defectively designed to obtain equitable indemnity from a retailer who did nothing more than offer the product for sale. The manufacturer therefore had no right to indemnity against Safeway, and neither did Bailey, as the manufacturer's assignee.


Ehrlich

Jeffrey Isaac Ehrlich is the principal of the Ehrlich Law Firm *in Encino. His practice emphasizes insurance bad-faith and appellate litigation. A Harvard Law graduate, he is certified by the State Bar of California as an appellate specialist. He has twice been selected as Appellate Lawyer of the Year by the Consumer Attorneys Association of Los Angeles.*

Copyright © 2011 by the author.
For reprint permission, contact the publisher: **www.plaintiffmagazine.com**