

Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Coito v. Superior Court (State of Calif.)

__ Cal.4th __ (2012) (Cal. Supreme)

Who needs to know about this case? Lawyers asserting and evaluating the assertion of claims of work-product privilege for recordings of witness interviews by investigators employed by counsel, and for information concerning the identity of witnesses from whom counsel has obtained statements.

Why it's important: It settles an important issue concerning the scope of work-product privilege for witness statements obtained by (or for) an attorney, and for the identity of witnesses that an attorney has decided to have interviewed. Holds that recorded witness statements are entitled, as a matter of law, to at least qualified work-product privilege, and on a proper showing are absolutely privileged. But the identity of witnesses from whom counsel has obtained statements is not automatically entitled as a matter of law to absolute or qualified work-product protection. In order to invoke the privilege, a party must persuade the trial court that disclosure would reveal the attorney's tactics, impressions, or evaluation of the case (absolute privilege) or would result in opposing counsel taking undue advantage of the attorney's industry or efforts (qualified privilege).

Synopsis: Coito filed a wrongful-death case against the State of California and other defendants arising out of her 13-year old son's drowning in the Tuolumne River. The state agency defending the action was the Department of Water Resources (DWR), which was represented by the Attorney General (AG). Six juveniles witnessed the accident. The DWR sent two investigators to interview four of the juveniles. The AG provided the investigators with questions he wanted asked. Each interview was audio-recorded and saved on a compact disc. During deposition, the AG used the content of the recorded statement in questioning the witness.

Coito served the DWR with form interrogatories, including no. 12.3, which sought the names, addresses, and telephone numbers of individuals from whom written or recorded statements had been obtained. The document demands sought production of the audio recordings of the four witness interviews. The state objected to the requested discovery based on the work-product privilege. Following proceedings in the trial court and Court of Appeal, the Supreme Court granted review.

California's civil work-product privilege is codified in section Code of Civil Procedure section 2018.030. Subdivision (a) provides absolute protection to any "writing that reflects an attorney's impressions, conclusions, opinions, or legal research or theories." Such a writing "is not discoverable under any circumstances." (*Ibid.*) The term "writing" includes any form of recorded information, including audio recordings. (§ 2016.020, subd. (c) [adopting the definition set forth in Evid. Code, § 250].) Section 2018.030, subdivision (b) provides qualified protection for all other work product. Such material "is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice." (§ 2018.030, subd. (b).)

In light of the origins and development of the work-product privilege in California (which the opinion examined in great detail), the Court concluded that witness statements obtained as a result of an interview conducted by an attorney, or by an attorney's agent at the attorney's behest, constitute work product protected by section 2018.030.

Such interviews may be absolutely privileged and therefore not subject to discovery when they reveal the impressions, conclusions, opinions, or legal research and or theories of the attorney. This may occur when a witness's statements are "inextricably intertwined" with explicit comments or notes by the attorney stating his or her impressions of the witness, the witness's statements, or other issues in the case. And it also may occur when the questions that the attorney has chosen to ask, or not to ask, provide a window into the attorney's theory of the case or the attorney's evaluation of what issues are most important. "Lines of inquiry that an attorney chooses to pursue through follow-up questions may be especially revealing. In such situations, redaction of the attorney's questions may sometimes be appropriate and sufficient to protect privileged material. At other times, however, it may not do to simply redact the questions from the record, as the witness's statements will reveal what questions were asked. Moreover, in some cases, the very fact that the attorney has chosen to interview a particular witness may disclose important tactical or evaluative information, perhaps especially so in cases involving a multitude of witnesses. These are circumstances where absolute work product protection may apply."

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But these circumstances may not always be present. Accordingly, the Court held that witness statements procured by an attorney are not automatically entitled as a matter of law to absolute work-product protection. Instead, the applicability of absolute protection must be determined case by case. An attorney resisting discovery of a witness statement based on absolute privilege must make a preliminary or foundational showing that disclosure would reveal his or her "impressions, conclusions, opinions, or legal research or theories." (§ 2018.030, subd. (a).) Upon an adequate showing, the trial court should then determine, by making an in-camera inspection if necessary, whether absolute work-product protection applies to some or all of the material.

But even where witness statements obtained through an attorney-directed do not reveal the attorney's thought process, such statements necessarily implicate the interests that the Legislature sought to protect in enacting the work-product privilege. Accordingly, witness statements procured by an attorney are entitled as a matter of law to at least qualified work-product protection under section 2018.030, subdivision (b). The Court thus disapproves prior cases that suggest that a witness statement taken by an attorney does not qualify, as a matter of law, as attorney work product.

With respect to the interrogatory 12.3, seeking, inter alia, the contact information for witnesses from whom statement was obtained, there may be some cases in which the identification of witnesses who were interviewed would reflect the attorney's evaluation or conclusion about which witnesses had the most salient information, and would therefore be absolutely privileged. But not every witness list responsive to form interrogatory 12.3 will reflect counsel's evaluation of the case. "Where it appears that an attorney has sought to take recorded statements from all or almost all of the known witnesses to the incident, compelling a response to form interrogatory No. 12.3 is unlikely to violate the work product privilege."

Because it is not evident that form interrogatory No. 12.3 implicates the policies underlying the work product privilege in all or even most cases, the Court held that information responsive to form interrogatory No. 12.3 is not automatically entitled as a matter of law to absolute or qualified work-product privilege. Instead, the interrogatory usually must be answered. But an objecting party may be entitled to protection if it can make a preliminary or foundational showing that answering the interrogatory would reveal the attorney's tactics, impressions, or evaluation of the case, or would result in opposing counsel taking undue advantage of the attorney's industry or efforts. Upon such a showing, the trial court should then determine, by making an in-camera inspection if necessary, whether absolute or qualified work product protection applies to the material in dispute. A trial court may also have to consider non-party witnesses' privacy concerns.

Patterson v. Domino's Pizza, LLC

(2012) __ Cal.App.4th __ (2d Dist. Div. 6.)

Who needs to know about this case? Lawyers bringing suit against a franchisee, who seek to hold the franchisor liable for conduct by the franchisee's employee.

Why it's important: Provides a good example of a situation where a franchisor's desire for uniformity in franchise operations and its retention of control over the franchisee will be found to make the franchisee its agent, and therefore can create vicarious liability – even if the franchise agreement itself seeks to negate the existence of any principal-agent relationship.

Synopsis: Patterson, a 16-year old employee of a Domino's Pizza franchise (Sui Juris, LLC) claimed she had been sexually harassed and assaulted at work by Renee Miranda, an assistant manager at the Domino's restaurant owned by Sui Juris. The franchise agreement between Domino's Pizza, LLC, as franchisor, and Sui Juris, provided that Sui Juris "shall be solely responsible for recruiting, hiring, training, scheduling for work, supervising and paying the persons who work in the Store and those persons shall be your employees, and not [Domino's] agents or employees." Domino's claimed that this provision, as a matter of law, removes its control over franchisee-employee matters. But there was other evidence in the record that showed that Domino's exercised considerable control over Sui Juris, both generally and with respect to employees.

Sui Juris's owner testified that a Dominos' "district leader" told him to fire Miranda and that if he did not comply with the instructions of Dominos' area leaders, he would be out of business very quickly. The franchise agreement itself provided that Domino's set both the qualifications for the franchisee's employees and the standards for their "demeanor." The identity of all franchise employees must be disclosed to Domino's. Domino's determines the type of training for employees, prescribes the requirements for hiring all personnel involved in "product delivery," and prescribes the documents that must be kept in their employment files. Dominos' Manager's Reference Guide specifies standards for "employee hair, facial hair, '[d]yed hair,' jewelry, tattoos, fingernails, nail polish, shoes, socks, jackets, belts, gloves, watches, hats, skirts, visors, body piercings, earrings, necklaces, wedding rings, '[t]ongue rings,' 'clear tongue' retainers, and undershirts."

Domino's requires its franchisees to use a computer system that gives it independent access to the franchisee's data, and has the right to audit the franchisee's tax returns and financial statements. It also determines its store hours, its advertising, the handling of customer complaints, signage, the e-mail capabilities, the equipment, the furniture, the fixtures, the décor, and the "method and manner of payment" by customers. Domino's regulates the pricing of items at the counter and home delivery, and it sets the standards for liability insurance. The court held that, collectively, this evidence raised a triable issue of fact about whether Domino's exercised substantial control over Sui Juris, making it vicariously liable for Sui Juris's conduct. Since Miranda was a restaurant manager, and not merely a

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co-worker with the plaintiff, Sui Juris and Domino's could be held strictly liable for a supervisor's sexual harassment of a child employee. Even a single sexual assault by a manager can support a hostile work environment claim.

Short(er) takes

Excessive force by police; nonsuit; expert testimony: *Allgoewer v. City of Tracy* (2012) __ Cal.App.4th __ (Third District).

Allgoewer was arrested by two Tracy police officers arising out of a confrontation at his home, when they approached him to inquire about a complaint made by his ex-wife that he had violated a child-custody order. Allgoewer alleged that the officers used excessive force in throwing him to the ground, pinning his arms behind his back, and Tasering him. During trial, the trial court granted nonsuit to the City and the officers based on Allgoewer's failure to call an expert witness on the use of force. Reversed. While there is no California law on whether excessive-force cases require expert testimony, there is substantial authority from other jurisdictions that show that there is no per se rule that requires expert testimony in all cases. The defendants agreed that there was no per se rule, but argued that an expert was necessary "because 'the instant case involved specialized training and experience regarding police practices and procedures.'" But beyond this vague assertion, the defendants offered no explanation of why or how this was true. In the absence of any explanation, the court was left to conclude that there was nothing about the particular use of force in the case that was so far removed from the comprehension of a lay jury as to necessitate expert opinion testimony on the issue of reasonable force.

Foreclosures; Civil Code section 2923.5; demurrers; federal preemption: *Skov v. U.S. National Bank Ass'n.* (2012) __ Cal.App.4th __ (6th Dist.)

Civil Code section 2923.5 requires that a foreclosing lender must contact the borrower before filing a notice of default "in person or by telephone in order to assess the borrower's financial situation and explore options for the borrower to avoid foreclosure." Whether the defendant has complied with this requirement is a question of fact. Hence, a court cannot take judicial notice of recitals in the lender's foreclosure documents to establish that it has complied with the statute to negate allegations in the complaint that the lender did not comply. The court therefore erred in sustaining the lender's demurrer to the claim that the lender violated section 2923.5. The court further held that there is an implied private right of action that allows borrowers to sue to enforce the statute, and that when narrowly construed, the statute is not preempted by the National Bank Act.

Insurance; policyholder's liability to insurer for reimbursement of settlement costs for uncovered claims: *Axis Surplus Ins. Co. v. Reinoso* (2012) __ Cal.App.4th __ (2d Dist., Div. 5.)

Appellant Linda Reinoso, her husband Edgar Reinoso, and their management company, owned and managed 80 rental properties in Southern California. Edgar had been convicted of misdemeanor violations of City housing codes in 2001 and 2002. In 2003 the Reinosos acquired a 48-unit apartment complex in Lancaster, "as husband and wife, as community property." They testified that they worked together in connection with the management of the property. Later in 2003 the City of Lancaster issued a notice of code enforcement corrections concerning the apartments. Two years later the tenants of the complex filed a civil action against the Reinosos and others concerning the lack of habitability at the complex, including cockroach infestation, inoperable heating and cooling systems, water leaks, mold, and electrical deficiencies. They also alleged that the common areas were maintained in unsafe and unsanitary conditions. The suit sought damages in excess of $10 million, plus punitive damages.

The Reinosos' insurer, Axis, defended them under a reservation of rights, and settled the case for just over $3 million in total, with Axis contributing $2.1 million. Axis then sued the Reinosos to recover its defense costs and settlement contribution. In a bench trial, the trial court denied the insurer's claim for reimbursement of defense costs, because Axis failed to show the claims it defended were not potentially covered. But it awarded Axis the $2.1 million in settlement payments for claims it determined were not covered by the policies. The parties treated the judgment as holding Edgar, Linda, and their management company jointly and severally liable. Linda appealed, arguing that the trial court erred in finding that she was not an "innocent" insured entitled to the benefits of the policies, and when it failed to apportion the settlement between Axis's three insureds – Edgar, Linda, and their management company. Affirmed. There was ample evidence showing that Linda was subjectively aware of the substandard conditions at the apartment complex. And Linda benefited sufficiently from the settlement that not to allocate to her joint and several liability for the full amount of the settlement paid by the insurer would amount to unjust enrichment. Linda conceded that she would have been jointly and severally liable for any tort committed by Edgar, and therefore stood to be held jointly and severally liable in the tenants' action. Her potential exposure was up to $30 million, plus potential punitive damages. Since she received the full benefit of the settlement, it was not error to allocate joint and several liability for the settlement to her.


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