

Appellate Reports

Rulings on federal tort claims, duty of care, corporation status, MICRA

By Jeffrey Isaac Ehrlich

Federal Tort Claims Act; intentional torts: *Levin v. United States* (2013) __ S.Ct. __ (U.S. Supreme).

The FTCA waives the government's sovereign immunity from tort lawsuits, but excepts from that waiver certain intentional torts, including battery. (28 U.S.C. § 2860 (h).) The original version of the FTCA did not preclude suit against the alleged tortfeasor as a co-defendant with the U.S., or even as the sole defendant. But later agency-specific statutes immunized certain federal employees from personal liability for torts committed within the course of their official duties. One of these statutes is the Gonzales Act, which makes the FTCA remedy preclusive of any suit against armed forces medical personnel. That Act also says that, "for the purposes of this section," the intentional-tort exception to the FTCA "shall not apply to any cause of action arising out of a negligent or wrongful act or omission in the performance of medical . . . functions." (10 U.S.C. § 1089(e).) After the Gonzales Act was enacted, Congress overhauled the FTCA in the "Federal Employees Liability Reform and Tort Compensation Act" ("Liability Reform Act"), which makes the FTCA remedy against the U.S. the exclusive remedy for torts committed by federal employees acting within the course and scope of their employment, without regard to agency affiliation or line of work.

Plaintiff Levin suffered injuries in a cataract surgery performed at a U.S. Naval Hospital in Guam. He filed suit against the U.S. and the surgeon, alleging that he had withdrawn consent to operate before the surgery, and the surgeon had therefore committed battery. The district court found that the surgeon was acting within the course of his employment and released him under the FTCA, leaving the U.S. as the sole defendant. The Government then moved to dismiss the battery claim, based on the FTCA's intentional-tort exception. The district court granted the motion, and the Ninth Circuit affirmed.

The Supreme Court reversed. It held that the Gonzales Act's direction in section 1089(e) abrogates the FTCA's intentional tort exception and therefore permits Levin's suit against the U.S. based on medical battery.

Corporations, suspension and revival of corporate powers, notices of appeal; appellate jurisdiction: *Bourhis v. Lord* (2013) __ Cal.4th __ (Cal. Supreme).

Brown Eyed Girl, Inc. ("Corporation") and others filed suit against Lord and others ("defendants") for property damage. Before trial, the defendants learned that Corporation's powers had been suspended for failure to pay taxes. The defendants moved to preclude Corporation from offering evidence at trial based on the suspension. The trial court denied the motion contingent on the Corporation reviving its powers. After the trial court entered judgment for the defendants, the Corporation appealed. At the time it filed the appeal, it had not yet revived its corporate powers. It also appealed a post-trial award of attorney's fees against it, also before its powers had been revived. Defendants moved to strike the notices of appeal on December 1, 2011. Corporation opposed, showing that on December 8, 2011, its corporate powers had been revived, and arguing that this validated the prior notices of appeal. The Court of Appeal denied the motion, based on two 1970s-era California Supreme Court decisions that held that revival of corporate powers validates an earlier notice of appeal.

Affirmed. The Court had previously held in *Rooney v. Vermont Investment Corp.* (1973) 10 Cal.3d 351 and *Peacock Hill Assn. v. Peacock Lagoon Constr. Co.* (1972) 8 Cal.3d 369 that the revival of corporate powers will revive a prior notice of appeal filed when the corporation's powers have been suspended. The Court found that there was no reason to depart from this rule, which had apparently proved workable for the last 40 years, and which the Legislature could have changed at any time, but did not. The Revenue and Taxation Code sections at issue apply in a host of situations applying to different kinds of corporate actions. The Court cannot foresee what impact overruling *Rooney* and *Peacock Hill* might have in other contexts, but it could be substantial. Accordingly, any modification should come from the Legislature.

The Court acknowledged that there is an inconsistency between the rule it applies to corporate revival of appeals, and to statutes of limitations, which are not retroactively revived when a corporation revives its status, but finds that the two rules can co-exist.

Negligence, duty of care, good Samaritans, special relationships: *Greyhound Lines, Inc. v. California Highway Patrol* (2013) __ Cal.App.4th _ (5th Dist.)

An SUV struck the center divider of SR 99 in Fresno in an early-morning, single car crash. The SUV came to rest on its side blocking either the number one (1) or number two (2) lane. Its headlights and taillights were out, and its dark undercarriage was facing oncoming traffic.

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At 2:14 a.m., a truck driver reported the accident to the CHP, stating that it was blocking lanes. The CHP 911 operator inputted some of the information into the computer-aided dispatch system, but did not include that the disabled SUV was blocking lanes, despite the fact that lane blockage was one of the CHP's highest priorities. Because of this input error, the call was assigned to a CHP unit at the Fresno jail, instead of to one that was one off-ramp away from the accident scene. Two or three minutes later, a Greyhound Bus struck the SUV, killing three passengers on the bus and three occupants of the SUV. Greyhound was sued based on its alleged negligence, and it cross-complained against the CHP, alleging that it was negligent because the CHP 911 operator failed to enter the code for lane blockage, which delayed the CHP response. The trial court sustained the CHP's demurrer without leave.

Affirmed, because the CHP did not owe the bus passengers a duty of care. (The question of tort immunity does not arise until after the court determines that a duty of care is owed.) In the absence of a special relationship, a person who has not created a peril has no duty to come to the aid of another. But a volunteer who undertakes to come to the aid of another as a "good Samaratan" is under a duty to exercise reasonable care. These general rules apply to law-enforcement personnel, including the CHP. The 911 operator's statement that assistance was on the way did not create a special relationship to the bus passengers. The nonfeasance of the CHP 911 operator did not create the danger, and left the bus passengers in the same position they already occupied. Without detrimental reliance by, or an increase in the risk of harm to the bus passengers, there is no special relationship.

Negligence, Professional Negligence, MICRA, premises liability, statute of limitations: *Flores v. Presbyterian Intercommunity Hospital* (2013) __ Cal.App.4th __ (2d Dist., Div. 3.)

Flores filed suit against the hospital almost two years after she claimed she was injured when she fell from a hospital bed after the bedrail collapsed. The hospital demurred, arguing that the action was one for professional negligence and was subject to the one-year MICRA statute of limitations, not the two-year limitations periods for personal-injury actions. The trial court sustained the demurrer. Reversed.

MICRA defines "professional negligence" as a negligent act or failure to act by a health-care provider in the rendering of professional services. Flores did not allege that the hospital was not negligent in failing to lift the bed rail, or in otherwise failing to secure her – she alleged that the hospital was negligent in failing to adequately maintain its premises and equipment. The collapsing rail of an improperly maintained bed constitutes ordinary negligence, not professional negligence. So the MICRA limitations period does not apply.


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