Appellate reports and cases in brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Insurance; med pay; impact of release; collateral estoppel; equitable estoppel: *Barnes v. Western Heritage Ins. Co*. (2013) __ Cal.App.4th __ (3d Dist.)

Justin Barnes was injured when a table fell on his back while he was attending a day camp sponsored by Western Heritage's insured ("Activities Council"). Western Heritage paid $1,478 under the med-pay coverage in its CGL policy. Barnes sued the Activities Council and others in a personal-injury claim, which eventually settled. He later made additional claims on the med-pay coverage, which Western Heritage denied. He sued Western Heritage for breach of contract and bad faith. The trial court granted summary judgment for Western Heritage, finding that he was collaterally estopped to assert the claim after settling his personal-injury claim; and that Western Heritage was not estopped to rely on the statute of limitations in its policy, even though it had not advised Barnes of the time limit when it first paid the med-pay claim. Reversed.

Collateral estoppel does not bar the claim against the med-pay coverage because the issues raised in the case against Western Heritage based on its denial of med-pay coverage were not the same issues that were litigated and necessarily determined in Barnes's personal-injury action. Western Heritage's med-pay coverage obligations under its policy were not at issue in the prior lawsuit and were not litigated. There was no impermissible double recovery because the duties owed by Western Heritage under its policy were different than its obligations to the Activity Council to defend or indemnify. The court disagreed with *Jones v. California Casualty Indem Exch*. (1970) 13 Cal.App.3d Supp.1, which held that a prior settlement of a personal-injury suit would extinguish a med-pay obligation. And the court held that Western Heritage failed to notify Barnes of all the deadlines for seeking med-pay benefits as required by 10 Cal.Code Regs. § 2695.4(a), which created triable issues of fact about whether it was estopped to assert the one-year deadline for med-pay benefits contained in its policy.

Wrongful death; putative spouse: *Ceja v. Rudolph & Slayton, Inc*. (2013) __ Cal.4th __ (Cal. Supreme).

California law allows a decedent's "putative spouse" to pursue a wrongful death claim. Section 377.60(b) of the Code of Civil Procedure defines a putative spouse as "the surviving spouse of a void or voidable marriage who is found by the court to have believed in good faith that the marriage to the decedent was valid." The plaintiff here, Nancy Ceja, was married to the decedent, Robert Ceja, before his divorce was final, and signed documents that would seem to suggest that she was aware of the problem. But she maintained that she always believed that her marriage to Robert was valid. The issue resolved by the Supreme Court was whether the "good faith" inquiry contained within the definition of "putative spouse" is determined under a purely subjective inquiry, focusing on what the putative spouse believed in good faith – or whether the definition also contains an objective component that requires that the putative spouse's belief be objectively reasonable. In a unanimous opinion, the Court held that the inquiry was "purely subjective and evaluates the state of mind of the alleged putative spouse, and that the reasonableness of the claimed belief is properly considered as part of the totality of the circumstances in determining whether the belief was genuinely and honestly held." Since the trial court had granted summary judgment against Nancy on the theory that her belief had to be objectively reasonable, the summary judgment was reversed.

Class actions; coupon settlements; calculation of attorney's fees: *In re HP Inkjet Printer Litigation* (2013) __ F.3d __ (9th Cir.)

The district court approved the settlement of a class action alleging that HP engaged in unfair business practices concerning its inkjet printers' use of ink cartridges. The settlement provided both coupon and injunctive relief. The district court awarded class counsel fees of $1.5 million, and costs of $595,990. Objectors to the settlement appealed. Reversed. Under the Class-Action Fairness Act, 28 U.S.C. § 1712(e) ("CAFA"), attorney's fees for class counsel may not be calculated under the lodestar method in cases based solely upon coupon relief.

In cases subject to the restrictions in CAFA concerning coupon settlements, a district court must perform

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two separate calculations to fully compensate class counsel. First, it must determine a reasonable contingency fee based on the actual redemption value of the coupons awarded. Second, under subsection (b), the court must determine a reasonable lodestar amount to compensate class counsel for any non-coupon relief obtained. This lodestar amount can be further adjusted upwards or downwards using an appropriate multiplier. In the end, the total amount of fees awarded under subsection (c) will be the sum of the amounts calculated under subsections (a) and (b).

Judicial admissions; boilerplate agency allegations in complaints: *Barsegian v. Kessler & Kessler* (2013) 215 Cal.App.4th 446 (2d Dist., Div. 1)

The purchaser of real property sued her sellers and its affiliates for fraud and other claims relating to the transaction. A month later she added her attorneys in the transaction, Kessler & Kessler ("KK"), on several theories. KK later moved to compel arbitration, which the trial court denied the motion under the Code of Civil Procedure section 1281.2, subd. (c), which allows trial courts to deny arbitration when a party to the arbitration agreement is also a party to a pending lawsuit arising out of the same transaction, and there is a possibility of conflicting rulings. KK appealed, and the Court of Appeal affirmed. KK argued that application of section 1281.2,subd. (c) was error because there were no true "third parties." Rather, the plaintiff had pleaded in her typical boilerplate agency allegations that all defendants were the agents of each other, and therefore all were subject to KK's argument. The court rejected this contention.

Judicial admissions may be made in a pleading, by stipulation during trial, or by response to request for admission. Facts established by pleadings as judicial admissions are conclusive concessions of the truth of those matters, are effectively removed as issues from the litigation, and may not be contradicted, by the party whose pleadings are used against him or her. But "not every factual allegation in a complaint automatically constitutes a judicial admission. Otherwise, a plaintiff would conclusively establish the facts of the case by merely alleging them, and there would never be any disputed facts to be tried." Rather, a judicial admission is ordinarily a factual allegation by one party that is admitted by the opposing party. The factual allegation is removed from the issues in the litigation because the parties *agree* as to its truth. Thus, facts to which adverse parties stipulate are judicially admitted, as are a party's responses to requests for admissions in discovery. Likewise, answers that admit factual allegations in a complaint or cross-complaint are judicial admissions. But KK disputed the agency allegations in the plaintiff's complaint. Those allegations therefore could not be treated as judicial admissions about the status of the defendants.

Hospital Lien Act; burden on hospital to enforce lien; failure to show hospital's charges were reasonable: *State Farm Mutual Automobile Ins. Co. v. Huff* (2013) _Cal.App.4th _ (4th Dist., Div. 1.)

Huff was injured in an auto accident, and received treatment at Pioneer Memorial Hospital. At the time of his discharge, he owed the hospital $34,320. Huff sued the other driver involved in the auto accident, and recovered a judgment in excess of $350,000, which included past medical expenses of $232,708. After judgment was entered, Pioneer asserted its right to payment of its claimed lien under the Hospital Lien Act. Huff demanded that the judgment-debtor's insurer, State Farm, pay him the entire judgment. State Farm interpleaded the amount of the judgment. In a bench trial, the district put on a case that showed that Huff had received treatment shown on the bill (which was admitted in evidence) at the hospital's standard rates; that Huff did not have any health insurance; and that at the underlying trial, Huff's lawyer relied on the bill to recover past medical expenses. The trial court held that the hospital had met its burden to establish a valid and enforceable claim to enforce its lien under the Hospital Lien Act. The court specifically held that the Hospital was not required to provide expert testimony to show that the charges it seeks to recover were reasonable and necessary. Reversed.

The Hospital Lien Act, Civil Code section 3045.1, states that a hospital that provides emergency and ongoing care to a patient who was injured by reason of the negligent or wrongful act of a third party, shall have a lien against the patient's recovery against that third party, "to the extent of the amount of the reasonable and necessary charges of the hospital." Given this requirement, it was incumbent on the Hospital to prove both the amount of its charges – which it did; *and* that the charges were "reasonable and necessary." Since it failed to do that, the award in its favor could not stand. Since the Hospital had a full and fair opportunity at trial to prove its claim, but failed to do so, the case was remanded for entry of judgment in favor of Huff, who was entitled to the entire proceeds.

***Cumis* counsel; independent counsel; Civil Code section 2860; disqualification of counsel; conflict of interest:** *Schaefer v. Elder* (2013) __ Cal.App.4th __ (3d Dist.)

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Schaefer hired Elder to design and build a house. Schaefer later sued Elder, alleging claims for breach of contract, negligence, etc. Elder tendered the defense to his insurer, CastlePoint National Ins. Co., which appointed panel counsel to defend Elder, subject to a reservation of rights. CastlePoint also filed a declaratory relief action seeking to establish that there was no coverage for Elder's claims. Elder's policy with CastlePoint included a "contractor's special condition" which excluded coverage for work performed by independent contractors unless Elder had first obtained indemnity agreements and a certificate of insurance from them. Schafer's complaint stated that the work had been done by Elder and his employees. But panel counsel's answers to interrogatories stated that work was done primarily by subcontractors. Elder moved to disqualify panel counsel and to have independent counsel appointed. The trial court granted the motion. Affirmed.

Where there are divergent interests between the insurer and its insured, the insured is entitled to independent counsel under case authority and Civil Code section 2860. Here, it was in Elder's interest to argue that the work at issue was performed by his employees; and it was in CastlePoint's interest to argue that the work was done by independent contractors, to support its coverage position. As part of Elder's case, he will have to show that the party performing the work had some connection to Elder, in a business sense. This implicates the conflict of interest between the parties, and entitled Elder to independent counsel. Because panel counsel had a conflict and was simultaneously representing both conflicted parties, the proper course was to disqualify that firm.

Primary assumption of risk; sports training; weight lifting: *Cann v. Stefanec* (2013) __ Cal.App.4th __ (2d Dist. Div. 5.)

Cann and Stefanec were members of the UCLA women's swim team in 2010. During a mandatory workout in the weight room, Stefanec dropped a weight behind her, which either struck or rolled into Cann's head as she did pushups behind Stefanec. Cann sued Stefanec. The trial court granted Stefanec's motion for summary judgment based on the doctrine of primary assumption of the risk. Affirmed.

The fact that Cann was not lifting weights at the moment that she was struck by the weight that Stefanec dropped did not defeat the operation of the assumption-of-the-risk doctrine. They were both co-participants in the same training session for the swim team. And primary assumption of the risk does not require that both parties be doing the identical activity. Duties regarding the same risk may differ depending on the role played by a particular defendant. In a sporting context, a defendant could be a co-participant, an observer, a coach, or an owner of a venue, for example. The court can determine that weight lifting involves an inherent risk of injury to persons in the vicinity of lifters who drop weights because of a loss of balance, injury during a lift, or other reasons. Stefanec's action of dropping the weight after she lost her balance was not outside the range of ordinary activity for the sport. Nor was the conduct reckless, in light of her coach's instruction to the team that they should drop the weight if they lost their balance.


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