Appellate Reports and cases in brief

Cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Reid v. Mercury Ins. Co.

(2013) __ Cal.App.4th __ (2d District, Div. 8)

Who needs to know about this case: Lawyers handling personal-injury cases and lawyers handling cases against insurers for failing to settle within policy limits.

Why it's important: Holds that an insurer is not obligated to initiate settlement negotiations on behalf of its insured or offer its policy limits, in order to avoid a claim for bad-faith failure to settle.

Synopsis: Mercury's insured, Huang, had an auto policy with limits of $100,000 per person and $300,000 per accident. On June 24, 2007, she was involved in a multi-car accident after she ran a red light, colliding with a car driven by plaintiff Reid. Mercury's adjuster recommended internally that Mercury accept 100 percent of liability for the accident. Within a month after the accident, Mercury contacted Reid's insurer and advised it that it was accepting liability, but there might be a "limits issue."

Reid's son retained West as counsel for his mother. West wrote to Mercury on July 28, 2007, confirming his representation and stating that Reid had been "horribly injured" in the "devastating automobile accident" and that she remained in intensive care more than a month after the accident. He asked for information about Huang's vehicle and her policy limits.

On August 15, 2007, Mercury requested a detailed statement from Reid, signatures on medical-verification forms, and an inspection of her vehicle. West was informed of Reid's policy limits by Mercury, but he did not send Mercury a letter demanding Reid's policy limits. He testified that there would have been no point in making a demand because Mercury had been adjusting the case for a month, and was saying it lacked enough information, despite knowing that its insured ran a red light and that Reid had been hospitalized for over a month. Reid's son testified that, because his mother had $250,000 in under-insured motorist coverage, which could not be accessed until Reid resolved her claim with Huang, he would have (on her behalf) accepted Huang's $100,000 policy limits, if it had been offered.

Reid sued Huang on October 10, 2007. On October 29, 2007, Mercury wrote to West, stating that to resolve the claim it still needed a recorded interview with Reid and various medical records. On November 8, 2007, a Mercury claims manager approved giving the adjuster on the file authority to offer $100,000. On December 6, 2007, Mercury again wrote to West and asked for a recorded statement and medical records. West sent the records on January 29, 2008. On May 2, 2008, Mercury wrote to West and stated that it had agreed to tender its $100,000 policy limit to Reid to settle the case. Reid rejected the offer.

More than two years later, Huang was held liable to Reid for $5.9 million. Reid obtained an assignment of Huang's claim for failure to settle, and then sued Mercury on that claim, alleging that Mercury had failed to make a reasonable settlement offer within a reasonable time. The trial court dismissed the case on summary judgment, finding that there had been no breach of contract because Reid never made a policy-limits demand. Affirmed.

"For bad faith liability to attach to an insurer's failure to pursue settlement discussions, in a case where the insured is exposed to a judgment beyond policy limits, there must be, at a minimum, some evidence either that the injured party has communicated to the insurer an interest in settlement, or some other circumstance demonstrating the insurer knew that settlement within policy limits could feasibly be negotiated. In the absence of such evidence, or evidence the insurer by its conduct has actively foreclosed the possibility of settlement, there is no 'opportunity to settle' that an insurer may be taxed with ignoring." An "opportunity to settle" does not arise simply because there is a significant risk of an excess judgment. Since Reid never made a settlement demand, and there was no evidence from which any reasonable juror could infer that Mercury knew or should have known that Reid would have accepted a policy-limits settlement, Mercury could not be held liable for failure to settle.

Kurwa v. Kislinger

(2013) __ Cal.4th__ (Cal. Supreme)

Who needs to know about this case: Trial lawyers who negotiate settlements; appellate lawyers.

Why it's important: Holds that under the "one final judgment" rule, an appeal will not lie from a judgment that disposes of some of the causes of action by dismissal with prejudice, and the parties have agreed to dismiss the remaining claims without prejudice – but to waive operation of the statute of limitations as to those remaining causes of action.

Synopsis: Kurwa and Kislinger were both ophthalmologists. They jointly formed a corporation to provide medical services to patients of an HMO. Years later, Kurwa's medical license was suspended. Kislinger notified the HMO of the suspension, stated that Kurwa's participation in their venture was terminated, and that Kislinger would provide

the services that Kurwa and Kislinger had previously provided. The HMO then terminated its agreement with the Kislinger-Kurwa corporation and entered into a new agreement with Kislinger's own corporation. Kurwa sued Kislinger for breach of fiduciary duty and defamation. Kislinger cross-complained for defamation. In pretrial motions, the trial court found that once they had formed a corporation, neither Kislinger nor Kurwa owed the other a fiduciary duty. Kislinger agreed to dismissal with prejudice of his breach-of-fiduciary duty claims. The parties agreed to dismiss their respective defamation claims without prejudice, and further agreed to waive the statute of limitations with respect to those claims. This would allow the parties to obtain an appellate ruling on the breach-of-fiduciary duty issue and to "preserve" the defamation claims until the appeal was resolved.

Kurwa appealed the judgment in favor of Kislinger. The Court of Appeal held that the judgment was final and appealable, reasoning that because the defamation counts had been dismissed, they were no longer pending between the parties and the trial court had no jurisdiction to proceed further on any cause of action. In reaching this conclusion, the court declined to follow a line of appellate authority beginning with *Don Jose's Restaurant, Inc. v. Truck Ins. Exchange* (1997) 53 Cal.App.4th 115, which held that the parties' agreement holding some causes of action in abeyance for possible future litigation after an appeal from the trial court's judgment on others renders the judgment interlocutory and precludes an appeal under the one-final-judgment rule.

The Supreme Court granted review to resolve the split of authority, and reversed, finding that the *Don Jose* rule was correct. The one-final-judgment rule, codified in section 904.1 of the Code of Civil Procedure, allows an appeal from a judgment, "except . . . an interlocutory judgment." In *Morehart v. County of Santa Barbara* (1994) 7 Cal.4th 725, 740-741, the Supreme Court held that a judgment that disposes of fewer than all of the causes of action framed by the pleadings is necessarily "interlocutory" and not yet final as to any parties between whom another cause of action remains pending.

The Court held that *Don Jose's* stated the correct rule, and [t]o permit this kind of manipulation of appellate jurisdiction – in effect, allowing the parties and trial court to designate a substantively interlocutory judgment as final and appealable – would be inconsistent with the one final judgment rule. Accordingly, the Court held that, "When, as here, the trial court has resolved some causes of action and the others are voluntarily dismissed, but the parties have agreed to preserve the voluntarily dismissed counts for potential litigation upon conclusion of the appeal from the judgment rendered, the judgment is one that 'fails to complete the disposition of all the causes of action between the parties and is therefore not appealable."

Short(er) takes

Respondeat superior, negligence, going-and-coming rule, incidental-benefit exception to the rule: *Halliburton Energy Services, Inc. v. Dept. of Transp.* (2013) __ Cal.App.4th __ (Fifth District).

Martinez was employed by Halliburton as a driller. He was assigned a company pickup truck to drive. He was permitted to use the truck to commute to and from work, and to run personal errands while en route. Martinez was working on assignment in Seal Beach, got off work, and drove 140 miles to Bakersfield, 40 miles from his home in Caliente. He met his wife at a car dealership to purchase a car for her. The deal fell through; he had lunch with his wife and drove back toward Seal Beach. On the way, his truck fishtailed on some gravel on the freeway, became airborne, and caused a serious traffic accident that injured six people. The injured parties' separate lawsuits against Halliburton, Martinez, and the State of California were consolidated. Halliburton moved for summary judgment, arguing that it could not be held liable under respondeat superior or other theories because Martinez was not acting within the scope of his employment when he was involved in the accident. The trial court granted the motion. Affirmed.

The undisputed evidence indicated Martinez was not performing his ordinary duties for Halliburton at its place of business or at his assigned worksite at the time of the accident. The accident occurred when he was between shifts, approximately 120 miles away from his assigned worksite. Under the "going and coming" rule, an employee going to and from work is ordinarily considered outside the scope of employment so that the employer is not liable for his torts. But there is an exception to the rule when the commute involves an incidental benefit to the employer, not common to commute trips by ordinary members of the work force. When the employer incidentally benefits from the employee's commute, that commute may become part of the employee's workday for the purposes of respondeat superior liability. Plaintiffs argued that the incidental-benefit exception applied.

The court disagreed, finding that Halliburton presented undisputed facts establishing that Martinez was engaged in purely personal business at the time of the accident, and was not acting within the scope of his employment for purposes of respondeat superior liability. Martinez's purpose in traveling to and from Bakersfield on September 13, 2009, was entirely personal. He finished his shift and drove the company truck 140 miles to Bakersfield; he intended to meet his wife at a car dealership and sign the papers to purchase a vehicle for her. Martinez was not performing any services or running any errands for Halliburton. His supervisor was unaware of the trip until after the accident. The trip was not made in the furtherance of any business activity of the employer. The risk of a traffic

accident during this personal trip was not a risk inherent in, or typical of or broadly incidental to, Halliburton's enterprise.

Public-entity liability; natural conditions; unimproved public property; parking lots; trees. *Meddock v. Yolo County* (2013) __ Cal.App.4th __ (3d District).

A tree fell on Meddock while he was in the parking lot of the Elkhorn Boat Ramp, which was part of a regional park owned by Yolo County. Meddock's suit against the county claimed that the trees were diseased and infested with parasites, which created a risk of danger to those using the parking lot. He also argued that he was injured on the parking lot, which constituted an improved portion of public property, so that the immunity for injuries arising from natural conditions on unimproved public property did not apply. The trial court granted summary judgment for the county. Affirmed.

When the county paved the parking lot and made improvements to the property around the boat ramp it assumed liability for a dangerous condition of the parking lot, provided that it had notice and time to correct it. The county is immune, however, for injuries "caused" by a natural condition of any unimproved public property. The county argued, and the court found, that Meddock's injury was "caused" by trees, which were native flora, located near or adjacent-to the parking lot, but on unimproved property. The fact that the injuries occurred on the parking lot does not mean that county was liable, because the county's immunity does not turn on the location of the injuries; it turns on whether they were caused by a natural condition on unimproved property – which they were.


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