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Court looks at *Sanchez* and case-specific hearsay

Also, non-English speakers and English-language contracts; contingency-fee agreements

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Case-specific hearsay under *Sanchez*; expert testimony; summary judgment

Strobel v. Johnson & Johnson (2021) 69 Cal.App.5th 34 (First Dist., Div. 4).

Douglas Strobel was diagnosed with malignant mesothelioma in February 2019 and passed away at age 68 in April 2020, during the pendency of the appeal. Before his death, Strobel sued Johnson & Johnson (J&J) for damages under product liability, negligence and fraud theories, alleging that continuous exposure to asbestos in J&J's Baby Powder (JBP), a product he used regularly for some sixty years, was a substantial contributing cause of his mesothelioma.

The trial court granted J&J's motion for summary judgment, which asserted, based on the declaration of its expert, Dr. Matthew Sanchez, who swore that JBP was at all relevant times asbestos-free. Strobel's family opposed the motion with the declarations of several experts, including Dr. Fitzgerald. While the trial court found that Dr. Fitzgerald and another of Strobel's experts raised a triable issue of fact on whether the three talc sources used by J&J to create JBP had been found to contain asbestos, it also found that the Strobels and Dr. Fitzgerald failed to show that the talc ore actually mined and milled into JBP contained asbestos. The court found that Dr. Fitzgerald's conclusion that it did was based on the work of another asbestos-testing expert, Dr. Longo, who did not testify in the case. The trial court found that, to the extent Strobel's experts relied on Dr. Longo's work, that represented an improper reliance on case-specific hearsay in violation of *People v. Sanchez*. Reversed.

The Court of Appeal agreed with J&J that Dr. Fitzgerald's opinion is inadmissible case-specific hearsay to the extent that he relates the specifics of Dr. Longo's testing data and results. But that does not end the inquiry. In its zeal to attack what it characterizes repeatedly as Dr. Longo's "made-for-litigation" testing results, J&J fails to account for the full breadth of the evidence the Strobels put forward in opposition to summary judgment. Both Dr. Sanchez and Dr. Fitzgerald selected and drew upon various published materials from government agencies and professional standard-setting groups, published academic articles, published reports of "historical" testing, as well as testing data from their own labs.

Even without Dr. Longo's testing data and results, the appellate court was satisfied that Dr. Fitzgerald formulated his opinion based upon principles generally accepted in his area of expertise and that he applied those principles upon a proper evidentiary foundation. [*Ed. Note. This is a nuanced opinion that is a must-read for any attorney wanting to understand what does and does not qualify as case-specific hearsay under Sanchez.*]

Arbitration; limited proficiency with English; need to translate or explain arbitration agreement

Caballero v. Premier Care Simi Valley LLC (2021) _ Cal.App.5th _ (Second Dist., Div. 6.)

Miguel Caballero, who claimed to read and write only in Spanish, signed a two-page arbitration agreement when his mother was admitted to Premier Care's facility. The arbitration agreement was in English. Three years after signing the agreement, Caballero and his siblings sued Premier Care for wrongful death. Premier Care moved to compel arbitration. The trial court denied the motion, finding that Premier Care failed to sufficiently inform Caballero of the arbitration agreement's contents. Reversed.

Caballero argued on appeal that there was no "mutual assent" to the arbitration agreement because he cannot read English and therefore did not understand he was waiving his right to a jury or court trial when he signed it. But Caballero's outward manifestations of assent, i.e., the signing of the Arbitration Agreement in two places and the initialing of the provision on "Retroactive Effect," demonstrated mutual assent and an intent to enter into the agreement. Absent fraud or overreaching, his inability to read English and his limited ability to speak or understand English do not alter the conclusion that his signatures and initials on the contract manifested his agreement to its terms.

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Caballero assented to the contract terms by signing and initialing the Arbitration Agreement and there is no evidence he asked any Premier Care employee for a Spanish version of the agreement or assistance in understanding the English version. Moreover, the fact that the Arbitration Agreement has two uppercase notices in red, directly above the signature blocks, advising that signing the agreement would result in a waiver of a jury or court trial should have alerted Caballero to the significance of those provisions regardless of whether he could read them. On this record, Caballero's failure to take steps to learn the contents of the agreement is attributable to his own negligence and may not be imputed to Premier Care.

Attorneys; requirement for contingency-fee agreements to be in writing; in-house counsel

Missakian v. Amusement Industry, Inc. (2021) __ Cal.App.5th __ (Second Dist., Div. 5)

Former in-house counsel Craig Missakian (Missakian) filed suit against his former employer, Amusement Industry, Inc. (Amusement) and its founder Allen Alevy (Alevy), based on an oral promise to pay a bonus and share of recovery from litigation. The jury issued a special verdict in favor of Missakian on the claims brought against Amusement for breach of oral contract and promissory fraud, but the jury also made special verdict findings in favor of Alevy on the sole claim of promissory fraud brought against him, finding that Alevy did not make a false promise. The trial court granted judgment notwithstanding the verdict (JNOV) on Missakian's promissory fraud claim against Amusement. Each party filed an appeal. Reversed.

Missakian agreed to work as general counsel for Amusement and agreed to work on ongoing litigation (the *Stern* litigation) stemming from a real-estate deal in which Amusement lost $13 million in an alleged fraudulent scheme. Missakian's contract with Amusement paid him an annual salary of $325,000. The parties further agreed that once the *Stern* litigation resolved, he would be paid a bonus of $6,250 for each month he worked on that litigation (monthly bonus) plus an additional bonus of 10 percent of the recovery in the *Stern* litigation (litigation bonus). The parties exchanged multiple drafts of their agreement but never reduced it to writing.

In March 2011, Missakian learned of a draft agreement that would have substantially altered the terms of his contract by basing the litigation bonus on the net recovery remaining after Amusement recovered its $13 million loss and other litigation expenses. Stern confronted Alevy, who claimed that this was a mistake. As the *Stern* litigation moved close to settlement, Missakian attempted to reduce his contract to writing, but was unable to. He threatened to resign if the issue was not resolved. It was not, and he ultimately left the company.

The *Stern* litigation resolved for $26 million in February 2015. Missakian never received either the monthly or litigation bonuses.

Business and Professions Code section 6147 regulates contingency-fee agreements between lawyers and clients outside of the medical-malpractice arena. Under section 6147, a contingency-fee agreement must be in writing, signed by both parties, and include, among other statutory disclosures, "[a] statement of the contingency fee rate that the client and attorney have agreed upon," and "[a] statement as to how disbursements and costs incurred in connection with the prosecution or settlement of the claim will affect the contingency fee and the client's recovery." (§ 6147, subds. (a)(1) and (a)(2).) Section 6147, subdivision (b), provides: "Failure to comply with any provision of this section renders the [contingency fee] agreement voidable at the option of the plaintiff, and the attorney shall thereupon be entitled to collect a reasonable fee."

Given the terms of the Oral Contract at issue in this case, most significantly the *Stern* Litigation Bonus, and cognizant of Missakian's principal role as an attorney representing Amusement in the *Stern* litigation, the court concluded that he acted as "[a]n attorney who contract[ed] to represent a client on a contingency fee basis." (§ 6147, subd. (a).) Section 6147 has no express language exempting in-house attorneys, nor does the statute's plain language support an implied exemption. Even if a particular form of compensation meets the definition of "wages" under the Labor Code, it may also meet the definition of a "contingency fee" in section 6147. The usual and common-sense meaning of the term fee is broad enough to encompass compensation paid to an in-house attorney, and a review of cases makes that clear.

Because the Oral Contract is voidable under section 6147, the judgment in favor of Missakian on his breach of oral contract claim must be reversed.


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