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TORTS: A QUESTION OF STATUTORY CONSTRUCTION: ATTORNEYS' FEES ARE ONLY AVAILABLE FOR SLANDER AND LIBEL ACTIONS INVOLVING POLICE OFFICERS

Martin v. Szeto
34 Cal.4th 445

(T&G Partner Patrick Taylor contributed this article.)

The California Supreme Court looks to the legislative history of a statute to decide that attorneys' fees may not be granted in actions for libel and slander generally but only in those actions involving peace officers under CCP § 1021.7.

When attorney Craig Martin discovered that Richard Szeto and Anthony Lincoln had told associates that he was "doing cocaine," thus harming his legal career, Martin responded with a jab of his own: a lawsuit for slander. The plaintiff's bark turned out to be worse than his bite, however: the defendants' motion for summary judgment was granted when, among other things, Martin failed to oppose it.

After succeeding on their motion, defendants went a step further, asking the court for recovery of their attorneys' fees under Code of Civil Procedure § 1021.7. That section says that "in any action for damages arising out of the performance of a peace officer's duties, brought against a peace officer . . . or against a public entity employing a peace officer *or in any action for libel or slander brought pursuant to § 45 or 46 of the Civil Code*, the court may, in its discretion, award reasonable attorneys' fees to the defendant or defendants as part of the costs, upon a finding by the court that the action was not filed or maintained in good faith and with reasonable cause." Emphasis added.

Defendants argued that the italicized language permitted the recovery of attorneys' fees in any action for libel or slander, not just those involving peace officers. This interpretation was directly contrary to the Court of Appeal's holding in *Planned Protective Services v. Gorton*, in which it was determined that an attorneys' fees award was only allowed if a peace officer or an officer's public employer was a party. See *Gorton* (1988) 200 Cal.App.3d 1. A series of appeals brought the matter before the California Supreme Court for resolution.

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Citing the apparent inconsistency between the statute's title and the section language, the Court turned to the legislative history to determine the appropriate reading of the statute. Careful readings of the bill's history led the Court to decide that "nothing in the legislative history suggests a broader intent to make attorneys' fees available in libel and slander actions generally." *Gorton* was thus upheld and defendants went home without the attorneys' fees they had sought.

EMPLOYMENT

TWO BITES AT THE APPLE? EMPLOYEE HIRED THROUGH AN EMPLOYMENT AGENCY CAN MAINTAIN A FEHA CAUSE OF ACTION AGAINST THE TEMPORARY EMPLOYER AND THE EMPLOYMENT AGENCY

Mathieu v. Norrell Corporation
115 Cal.App.4th 1174

(T&G Partner Matthew Marca contributed this article.)

Temporary employees may seek redress from temporary employer and employment agency resulting from the temporary employer's alleged FEHA violations, says the Court of Appeal.

In August 1998, Laura Mathieu accepted a temporary position at Gulfstream Aerospace Corporation. She had found the post through the Norrell Corporation, a temporary employment agency, and accepted it despite the fact that her ex-boyfriend, Richard Fluck, also worked there. After she accepted the position, Mathieu claimed that Fluck began a campaign of harassment against her. Mathieu notified her customer service manager of the situation and Fluck was admonished. The situation seemed to defuse. One month after lodging her complaint, Mathieu was terminated by Gulfstream as a "cost containment measure." Mathieu brought suit against Gulfstream and Norrell for sexual harassment and

sexual discrimination under the Fair Employment and Housing Act ('FEHA'), among other causes of action.

The Court of Appeal held that, with respect to individuals employed by temporary employment agencies and assigned to work on the premises of that agency's client, the traditional labor law doctrine of 'dual employers' best served FEHA's purpose. Under this doctrine, an employee may have both a 'general' and a 'special' employer, each of whom exercise certain control over the employee.

The Court then extended the holding of *Kowalski v. Shell Oil Co.*, which held that "if general and special employment exist, 'the injured [worker] can look to both employers for [workers'] compensation benefits.'" See *Kowalski* (1979) 23 Cal.3d 168, 175. Examining the case before them, the Court saw "no reason not to permit an employee injured by violations of FEHA to likewise look to both employers for redress." Failing to do this would essentially immunize temporary employment agencies such as Norrell from liability if they chose to send their temporary employees into hostile or abusive work environments.

PERSONAL INJURY

CAL-OSHA RULES AND REGULATIONS CAN BE USED TO PROVE LIABILITY IN CIVIL ACTIONS

Gradle v. Doppelmayr USA, Inc.
116 Cal.App.4th 276

(T&G Associate Daniel Dean contributed this article.)

The California Court of Appeal decides that in an action brought by an employee against a third party for negligence, Cal-OSHA rules and regulations can be admitted into evidence to establish negligence.

Your company is sued for causing personal injury to an employee of another company. You are a subcontractor on a job site and your actions or

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inactions injured an employee working for another subcontractor. That employee can now introduce California Occupational Safety and Health Act ('Cal-OSHA') rules and regulations to establish the standards of care for negligence.

In *Gradle*, plaintiff was repairing a ski lift when he fell into the lift's machinery and lost his leg. He sued the company that provided the equipment for the retrofit of the ski lift. He alleged negligence and design defect; more specifically he alleged that defendant's equipment lacked safety guards in violation of Cal-OSHA standards.

At trial, the jury found in favor of defendant. Plaintiff appealed on the ground that the trial court improperly excluded evidence of Cal-OSHA's rules and regulations to establish negligence per se. Plaintiff argued on appeal that the rules and regulations were admissible under amended Labor Code § 6304.5.

The Court of Appeal examined the original version of § 6304.5 and the 1999 amendment. The court found that it was clear that the former law limited application of Cal-OSHA standards and safety orders to actions between an employee and his employer. Therefore, in personal injury actions against third parties, Cal-OSHA regulations and rules were not admissible to prove negligence. However, the 1999 amended version of § 6304.5 is not as clear as the former law.

The *Gradle* court concluded that the Legislature intended for Cal-OSHA standards to now be admissible in actions against third parties. Therefore, the judgment for defendant was reversed, and the case was remanded for a new trial.

In sum, this case allows plaintiffs in personal injury actions to use the Cal-OSHA rules and regulations to establish the standards of care for negligence, effectively making it easier for plaintiffs to succeed on negligence claims where Cal-OSHA rules have been violated. This same issue is currently pending before the California Supreme Court in *Elsner v. Uveges*. We will keep you posted.

CIVIL PROCEDURE

CIVIL LITIGATION AND PROCEDURE: SERIOUS ILLNESS AND DEATH OF PARTY'S ATTORNEY WILL BE CONSIDERED GOOD CAUSE TO CONTINUE TRIAL AND REOPEN DISCOVERY

*Hernandez v. Superior Court of California for the
County of Ventura*
115 Cal.App.4th 1242

(T&G Associate
Katherine Fraser
contributed this article.)

*Opposing counsel's
arguments to the
contrary
notwithstanding,
serious illness and
subsequent death of
party's attorney do
constitute good cause
to continue trial and
reopen discovery.*

John Hernandez and David Neal were involved in a serious automobile accident that left Hernandez in need of spinal surgery. Two weeks before the trial of his case against Neal, Hernandez learned that his attorney was dying of pancreatic cancer. Plaintiff's attorney was able to obtain a three-month continuance of the trial date just before he died, but with his health waning, he failed to designate a liability expert.

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HOW ARE WE DOING?

If you have any suggestions or comments about the newsletter or any legal matter, we would love to hear them.

Please contact Patrick E. Taylor at patrickt@taylor-gutierrez.com or at 415/591.3300.

The day after learning of his attorney's death, Hernandez began searching for new counsel. A lawyer named Rosenberg indicated that he could take the case, but only if the trial date could be continued and discovery reopened. Hernandez brought an ex parte application seeking such relief. At the hearing, opposing counsel argued that their client would be "at a disadvantage" if plaintiff was now allowed to designate a liability expert and that "the time of the court should not be wasted by failure of plaintiff and counsel to be prepared and for plaintiff to shop around for attorneys." The trial court, asking for no further evidence of the potential prejudice to the opposing party and disregarding the fact that plaintiff was scheduled for spinal surgery, moved the trial back five weeks and declined to reopen discovery. Plaintiff appealed, citing abuse of discretion.

Citing precedent, the Court of Appeal noted that "the appropriate [appellate] test for abuse of discretion is whether the trial court exceeded the bounds of reason." See *Shamblin v. Brattain* (1988) 44 Cal.3d 474, 478. Here, the trial court did indeed have discretion as to requests for extensions of discovery deadlines and continuances of trial dates. While the trial court was empowered to consider such factors as delay reduction and calendar management, at the end of the day, the just resolution of cases on their merits must be the court's top priority. Moreover, "the death or serious illness of a trial attorney or a party 'should, under normal circumstances, be considered good cause for granting the continuance of a trial date.' [Citation omitted.] The same circumstances should generally constitute good cause to reopen discovery after a trial date has been continued." The trial court was thus ordered to enter a new order continuing the trial date for at least six months and reopen discovery.

Taylor & Gutierrez is pleased to report that we have recently made a successful Motion for Summary Judgment on behalf of one of our longtime clients, CSX Intermodal. CSX is the United States' only stand-alone integrated intermodal company, serving most major U.S. ports and markets.

The lawsuit arose out of a workplace accident wherein plaintiff injured himself while transporting a large container full of freight in a railroad yard in Oakland, California. Plaintiff was driving a tractor and was pulling a chassis with the container on it. While plaintiff was backing into a parking slot, the container fell off the chassis and caused the tractor plaintiff was driving to shoot up in the air and then come crashing down to the ground.

Plaintiff filed his lawsuit in state court in Alameda County for general negligence against several companies that he believed were connected in some way to the container and his accident, including CSX. Plaintiff argued that the freight in the container was improperly loaded and thus shifted, causing the container to fall and leading to his injuries.

We countered plaintiff's allegations with proof that CSX merely owned the container and assisted in loading the container onto the train in Chicago prior to it being transported to Oakland. CSX did not load the freight, it did not transport the container to Oakland, and it did not assist plaintiff in driving the container around the Oakland yard. We were able to establish that CSX in no way caused or contributed to this accident. The court agreed and granted the Motion for Summary Judgment.

332 Pine Street, Suite 600
San Francisco, CA 94104
Telephone: 415/591.3300
Facsimile: 415/591.3310

1714 Franklin Street, #100-295
Oakland, CA 94612
Telephone: 510/873.8750
Facsimile: 510/893.3143