Editor-in-Chief
Jeffrey I. Ehrlich
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Appellate Reports

PATH ACROSS PARK LEADING TO RESTROOMS IS A "TRAIL" FOR THE PURPOSE OF TRAIL IMMUNITY DEFENSE EVEN IF ONLY OCCASIONALLY USED FOR RECREATIONAL PURPOSES

Nonsuit on claim against County based on trail immunity affirmed where pathway where injury occurred was used, in part, for recreational activities.
Loeb v. County of San Diego (2019) 43 Cal.App.5th 421 (Fourth Dist, Div. 1.)

Loeb sued the County for personal injuries she allegedly sustained when she tripped on an uneven concrete pathway in a County park. The County filed successive motions for summary judgment (an initial motion, and a renewed motion based on new evidence) based on its "trail immunity" defense, which provides absolute immunity to public entities for injuries sustained on public trails that provide access to, or are used for, recreational activities. (Gov. Code, § 831.4.) The trial court denied the County's motions, finding disputed facts existed regarding whether the pathway was used for recreational purposes. But when Loeb conceded during argument over the proposed special verdict forms that the pathway was used, at least in part, for recreational purposes, the trial court granted a nonsuit in the County's favor. Affirmed.

Section 831.4 – "the 'trail immunity' statute" – provides that a public entity "is not liable for an injury caused by a condition of" the following: "(a) Any unpaved road which provides access to fishing, hunting, camping, hiking, riding ..., water sports, recreational or scenic areas ..."; or "(b) Any trail used for the above purposes." (§ 831.4, subds. (a), (b).) [S]ubdivisions (a) and (b) of section 831.4 should be read together such that immunity attaches to trails providing access to recreational activities as well as to trails on which those recreational activities take place.

The pathway constitutes a trail under accepted definitions because it is a paved pathway through a park, and a "path" is synonymous with a "trail." The critical dispute in this case revolves around the second immunity factor. Loeb contends the factor requires consideration of the purpose for which the pathway was "designed and used," while the County maintains it requires consideration only of how it was used. The court agreed with the County but would also conclude that the pathway is a trail even if it were to also consider the purpose for which it was designed.

While Loeb asserts the pathway was *designed* for the sole purpose of providing bathroom access, she stipulated that it was also *used* for recreational purposes. The relevant cases have held that in a "mixed-use" situation, trail immunity attaches. Thus, the County is entitled to immunity.

Bankruptcy court's denial of motion for relief from stay constitutes final appealable order; failure to appeal within 14 days waives right to appeal.
Ritzen Group, Inc. v. Jackson Masonry, LLC (2020) __ U.S. __ (U.S. Supreme Court)

An aggrieved party may appeal as of right from "final judgments, orders, and decrees" entered by bankruptcy courts in "cases and proceedings." (28 U.S.C. § 158(a).) Bankruptcy court orders are considered final and immediately appealable if they "dispose of discrete disputes within the larger [bankruptcy] case." (*Bullard v. Blue Hills* (2015) 575 U.S. 496, 501.) Appeals from a bankruptcy court order must be filed "within 14 days after entry of [that] order." (28 U.S.C. § 158(c)(2) and Federal Rule of Bankruptcy Procedure 8002(a).)

Ritzen Group, Inc. (Ritzen) sued Jackson Masonry, LLC (Jackson) in Tennessee state court for breach of a land-sale contract. Jackson filed for bankruptcy under Chapter 11 of the Bankruptcy Code. The state-court litigation was put on hold by operation of 11 U.S.C. § 362(a), which provides that filing a bankruptcy petition automatically "operates as a stay" of creditors' debt-collection efforts outside the umbrella of the bankruptcy case. The Bankruptcy Court denied Ritzen's motion for relief from the automatic stay filed pursuant to section 362(d). Ritzen did not appeal that disposition. Instead, its next step was to file a proof of claim against the bankruptcy estate. The Bankruptcy Court subsequently disallowed Ritzen's claim and confirmed Jackson's plan of reorganization. Ritzen then filed a notice of appeal in the District Court, challenging the Bankruptcy Court's order denying relief from the automatic stay. The District Court rejected Ritzen's appeal as untimely. Affirmed. A bankruptcy court's order unreservedly denying relief from the automatic stay constitutes a final, immediately appealable order under section 158(a). Hence, Ritzen's failure to bring its appeal of that order within the prescribed 14-day period forfeited its right to appeal the order.

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Cause of action against insurer for breach of the implied covenant of good faith and fair dealing is not subject to anti-SLAPP statute.
Miller v. Zurich American Ins. Co. (2019) 41 Cal.App.5th 247 (First Dist., Div. 3.)

The Miller Estate filed a lawsuit seeking redress for environmental contamination caused by a dry-cleaning business operated on their property. The defendant filed a counterclaim. Zurich appointed counsel to defend the Miller Estate. The trustees of the estate (the Millers) tendered the defense of the counterclaim to Zurich, arguing they were additional insureds under the Estate's policy. The Millers asked Zurich to appoint independent counsel (*Cumis* counsel) as a result of various potential conflicts between them and the Estate in the action. Zurich refused. The Millers then filed a state-law action against Zurich asserting two causes of action – breach of the duty to defend and breach of the implied covenant of good faith and fair dealing.

Zurich responded with an anti-SLAPP motion challenging both causes of action on the ground that the claims "arise from allegations about the conduct of attorneys representing Zurich's insured in the course of the" federal action, and that such allegations of petitioning activity subjected the complaint to an anti-SLAPP motion. Zurich further alleged the Millers could not demonstrate a probability of prevailing on the claims because the complained of conduct was protected by the litigation privilege. The Millers opposed the motion, arguing that the claims for breach of contract and the implied covenant of good faith and fair dealing did not arise from the petitioning activity allegations, had at least "minimal merit," and were not barred by the litigation privilege. The trial court denied the motion. Zurich appealed. Affirmed.

The Millers seek relief against Zurich – and not against any counsel – based on the overarching premise that Zurich did not meet its duty to defend as it failed to provide independent conflict-free counsel to represent them in defending against the counterclaim. Zurich seeks to strike the cause of action for breach of implied covenant of good faith and fair dealing or certain allegations regarding communications between counsel that are alleged in paragraphs 103-111 of the complaint. Despite Zurich's blanket contention to the contrary, not all attorney conduct in connection with litigation, or in the course of representing clients, is protected by the anti-SLAPP statute. While a breach of the implied covenant of good faith and fair dealing may be carried out by means of communications between the parties' respective counsel, the fact of counsels' communications does not transform the claim to one arising from protected activity within the meaning of section 425.16.

The allegations of counsels' communications do not concern the substantive issue of the Millers' liability as alleged in the counterclaim or any coverage matter. Instead, the communications concern procedural matters regarding "discovery," "correspondence with Zurich's claims handlers," and "payments" to the Millers, directly related to Zurich's duty-to-defend obligations owed to the Millers by appointing panel counsel to represent them in defending the counterclaim.

Thus, "[w]hat gives rise to liability" is not the fact of counsels' communications, but that Zurich allegedly denied the Millers the "benefit" of panel counsel's independent professional judgment in rendering legal services to them. Consequently, the court rejected Zurich's argument that the allegations of counsels' communications give rise to its liability for an action for breach of the implied covenant of good faith and fair dealing. The lawsuit concerns a breach of duty that does not depend on Zurich's exercise of a constitutional right. In other words, the allegations of counsels' communications are only evidence that provides the context for the allegation that Zurich unreasonably and without proper cause interfered with panel counsel's representation of the Millers in defending against the counterclaim.

The court further rejected Zurich's further argument that the trial court should have granted its request for alternative relief and stricken the allegations of counsels' communications as unnecessary. The Millers can submit evidence of counsels' communications to demonstrate that Zurich unreasonably and without proper cause interfered with panel counsel's representation of them, but doing so does not establish those communications as the facts upon which the liability is based.

Anti-SLAPP motion may be brought within 60 days of an amended complaint that asserts new causes of action that could not have been raised earlier.
Starview Property, LLC v. Lee (2019) 41 Cal.App.5th 203 (Second Dist., Div. 8.)

In an acrimonious dispute between neighbors over a driveway easement, defendants Stephen and Tracy Lee appealed the trial court's denial of their anti-SLAPP motion brought pursuant to Code of Civil Procedure section 425.16. The motion was directed at three claims plaintiff Starview Property, LLC asserted for the first time in its first amended complaint. Although the Lees' motion was timely filed within 60 days after the filing of the amended complaint, the trial court denied the motion as untimely because the new claims were

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based on facts alleged in the original complaint and the motion was filed more than 60 days after service of the original complaint. Reversed.

An anti-SLAPP motion may be brought within 60 days of service of an amended complaint "if the amended complaint pleads new causes of action that could not have been the target of a prior anti-SLAPP motion, or adds new allegations that make previously pleaded causes of action subject to an anti-SLAPP motion." (*Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism* (2018) 4 Cal.5th 637, 641.) Starview's three newly pled causes of action in its amended complaint could not have been the target of a prior motion, even if they arose from protected activity alleged in the original complaint.

Doe amendments will not relate back to filing date of original complaint where plaintiff was not "genuinely ignorant" of the name of the defendant or the facts giving rise to that defendant's liability.

San Diego Navy Broadway Complex Coalition v. California Coastal Com. (2019) 40 Cal.App.5th 563 (Fourth District, Div. 3.)

San Diego Navy Broadway Compl ex Coalition (Navy Broadway) filed a petition in November 2013 for writ of administrative mandamus challenging the approval by the Port of San Diego and the California Coastal Commission of a proposed expansion of the San Diego Convention Center. The petition did not originally name the City of San Diego or the developer proposing the project, One Park Boulevard, LLC (One Park). In 2015, the City and One Park intervened in the action, and Navy Broadway amended its petition to add them as defendants. The trial court found that the City and One Park were indispensable parties but found after a bench trial that Navy Broadway had been genuinely ignorant of them. Accordingly, it determined that the amendment related back, and that equitable tolling also applied. Reversed.

Code of Civil Procedure section 474 provides that "[w]hen the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, ... and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly ...." "The phrase 'ignorant of the name of a defendant' is broadly interpreted to mean not only ignorant of the defendant's identity, but also ignorant of the facts giving rise to a cause of action against that defendant." (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1170; see *McClatchy v. Coblentz, Patch, Duffy & Bass, LLP* (2016) 247 Cal.App.4th 368, 371-372 ["T]he relevant inquiry when the plaintiff seeks to substitute a real defendant for one sued fictitiously is what facts the plaintiff actually knew at the time the original complaint was filed."].)

In general, a developer is an indispensable party to a lawsuit challenging a decision regarding whether its project can proceed. At the time Navy Broadway filed suit, it possessed information reflecting that the City and One Park were the developers for the Project. On this record, no reasonable trier of fact could find Navy Broadway was genuinely ignorant of the City and One Park and their roles here. Because the trial court's finding of equitable tolling depended on its unsupported "genuine ignorance" finding, its finding on tolling was deficient for the same reasons.

Defendant's officer's conduct – yelling at 13-year-old plaintiff who had been drugged and raped by the defendant's employee that plaintiff was stupid and that the rape was her fault – constituted outrageous conduct sufficient to support verdict for intentional infliction of emotional distress.

Crouch v. Trinity Christian Center of Santa Ana, Inc. (2019) 39 Cal.App.5th 995 (Fourth Dist., Div. 3.)

Carra Crouch, at age 13, was drugged and raped by a 30-year-old employee of Trinity Christian Center of Santa Ana, Inc. (TCC) while she was in Atlanta, Georgia to participate in a TCC-sponsored telethon. When Carra returned to California, she and her mother, Tawny Crouch, went to see Carra's grandmother, Jan Crouch, who was a TCC officer and director and was responsible for overseeing the telethon. When Tawny explained to Jan Crouch what had happened to Carra in Atlanta, Jan Crouch flew into a tirade and yelled at Carra that she was stupid, it was really her fault, and she was the one who allowed it to happen. Carra was devastated.

Based on Jan Crouch's conduct, the jury awarded Carra $2 million in damages (later remitted to $900,000) against TCC on her cause of action for intentional infliction of emotional distress (IIED). The jury found that Jan Crouch was acting within her authority as an officer or director of TCC when she yelled at Carra. TCC appealed, arguing that Jan Crouch's conduct was not extreme or outrageous but was just a grandmotherly scolding or irascible behavior. According to TCC, Carra endured nothing more than insults, petty indignities, and annoyances.

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The appellate court concluded that Jan Crouch's behavior toward Carra was sufficiently extreme and outrageous to impose liability for IIED. Yelling at a 13-year-old girl who had been drugged and raped that she was stupid and she was at fault exceeds all possible bounds of decency. By telling Carra she was at fault, Jan Crouch displayed a reckless disregard for the almost certain emotional distress Carra would, and did, suffer.

The court also concluded that the evidence was sufficient to support the jury's finding that Jan Crouch was acting within the course and scope of her authority as an officer or director and, therefore, to support respondeat superior liability against TCC. Accordingly, the court affirmed the judgment.

Thirty-day period to request trial de novo under Mandatory Fee Arbitration Act is not extended by Code of Civil Procedure section 1013 when the award is served by mail. *Soni v. SimpleLayers, Inc*. (2019) 42 Cal.App.5th 1071. (Second Dist., Div. 5.)

Tieney (client) filed a request for arbitration under the MFAA with the Los Angeles County Bar Association (LACBA) against Soni, his attorney (attorney). The attorney objected to the arbitrator that the request for arbitration was untimely, and therefore, the client had waived the right to arbitrate. Arbitration proceedings were held, and the arbitrator issued an award of $2.50 in favor of the attorney. Thirty-three days after the arbitration award was served on the parties by mail, the attorney filed an action in the trial court to recover the full amount of the disputed fees. The client filed a petition in the pending action to confirm the arbitration award on the ground that the award became binding when the attorney did not file an action within 30 days after service of the award. The attorney filed a response to the petition, more than 100 days after service of the award, asserting that the request for trial was timely and the arbitrator lacked jurisdiction. The trial court concluded that the attorney's action was timely, because Code of Civil Procedure section 1013 extended the attorney's time to file by five days for service of the award by mail; the trial court denied the client's petition to confirm the arbitration award. At trial, the court issued an award of $2,890 in favor of the attorney, and also awarded $79,898 in attorney fees to the attorney as the prevailing party. Reversed.

The court held that under LACBA's Rules for Conduct of Mandatory Arbitration of Fee Disputes Pursuant to Business & Professions Code Section 6200 et seq. (the LACBA rules), service is complete at the time of deposit in the mail and not extended for service by mail. The arbitration award became binding when the attorney did not file an action within 30 days after service. Section 6206 did not extend this 30-day deadline. The attorney is barred under Code of Civil Procedure section 1288 from asserting a ground that supports vacating the award, because the attorney did not file a petition or a response within 100 days of service of the award. Even if the attorney were not barred from raising arbitrability issues, however, the LACBA rules provide that the arbitrator has the authority to determine jurisdiction and the arbitrator's ruling that the fee dispute was arbitrable is not reviewable for errors of law or fact.

Jeffrey I. Ehrlich is the principal of the Ehrlich Law Firm, *in Claremont, California. He is a cum laude graduate of the Harvard Law School, a certified appellate specialist by the California Board of Legal Specialization, and a member of the CAALA Board of Governors. He is the editor-in-chief of* Advocate *magazine and a two-time recipient of the CAALA Appellate Attorney of the Year award.*