Editor-in-Chief
Jeffrey I. Ehrlich
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Appellate Reports

COURTS LOOK AT NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS IN THE DIGITAL AGE; ALSO DESIGN IMMUNITY AND "HOME PROTECTION PLANS" AS INSURANCE

Short(er) takes

Negligent infliction of emotional distress (NIED); contemporaneous awareness; live-stream video: *Ko v. Maxim Healthcare Services, Inc.* (2020) 58 Cal.App.5th 1144 (Second Dist. Div. 7.)

While attending a youth-basketball game with their older children, the Kos, parents of a disabled two-year-old child, Landon, watched a live feed from a "nanny cam" that showed Landon's care provider physically abusing him. They called the police and the care provider was arrested based on the video. The Kos sued the care provider as well as the agency that employed her, Maxim, asserting a variety of claims. After Landon died, they were given leave to amend to include survivor claims for battery and assault, as well as a third claim on their behalf for NEID. Maxim and the care provider demurred, arguing that no NIED claim could proceed because the Kos were not physically present at the scene of the injury-causing event when it occurred. The trial court sustained the demurrer without leave on the parents' claims.

The Court of Appeal reversed. In *Thing v. La Chusa* (1989) 48 Cal.3d 644, 668, (*Thing*) the Supreme Court held that, to recover on an NIED claim, a bystander plaintiff must be "present at the scene of the injury-producing event at the time it occurs and ... then aware that it is causing injury to the victim." The Court of Appeal held that the Kos could meet this requirement based on their real-time view of the live-stream of the abuse, as it occurred: "Here, as alleged, the Kos were virtually present through modern technology that streamed the audio and video on which they watched Manalastas assaulting Landon in real time, and thus 'personally and contemporaneously perceive[d] the injury-producing event and its traumatic consequences.' (*Thing*, *supra*, 48 Cal.3d at p. 666.) Based on these allegations, the Kos have stated facts sufficient to constitute a cause of action for NIED." (Note: a petition for review was filed on Jan. 29, 2021.)

Public entity's entitlement to design immunity does not preclude liability against it on a failure-to-warn theory: *Tansavatdi v. City of Rancho Palos Verdes* (2021) __ Cal.App.5th __ (Second Dist., Div. 4)

Mother of bicyclist who was killed when his bicycle collided with a turning truck on city street brought action against city, alleging that city created a dangerous condition by removing a bicycle lane from the area of the accident, and had failed to warn of that dangerous condition, leading to accident and bicyclist's death. The trial court granted summary judgment to the City on the basis of design immunity, but did not address the plaintiff's theory that the City could be liable on a failure-to-warn theory. Reversed.

The Court of Appeal found that the trial court had correctly concluded that plaintiff's claim that the City created a dangerous condition when it removed the bike lane was subject to a design-immunity defense. But it held that design immunity does not, as a matter of law, preclude liability under a theory of failure to warn of a dangerous condition. Accordingly, the court reversed the judgment and remanded for the trial court to consider the failure-to-warn theory.

Error to grant demurrer based on judicial notice: *New Livable California v. Association of Bay Area Governments* (2020) 59 Cal.App.5th 709 (First Dist., Div. 3.)

Plaintiff New Livable California dba as Livable California ("Livable California") sued a joint-powers authority called the Association of Bay Area Governments (ABAG), alleging that it used certain procedures at a January 2019 meeting that violated the vote-reporting requirements in the Brown Act, Gov't Code section 54950, et seq. The trial court sustained ABAG's demurrer without leave to amend on the ground that plaintiff had not and could not allege facts sufficient to support any relief for a Brown Act violation. In reaching this conclusion the trial court took judicial notice of a transcribed portion of the meeting in which the ABAG board's vice president made a public announcement about the process that would be used.

The trial court did not give Livable California an opportunity to present extrinsic evidence regarding the meaning of the public announcement. The Court of Appeal reversed, explaining: "A court ruling on a demurrer . . . cannot take judicial notice of the proper interpretation of a document submitted in support of the demurrer. . . . In short, a court cannot by means of judicial notice convert a demurrer into an incomplete evidentiary hearing in which the demurring party can present documentary evidence and the opposing party is bound by what that evidence appears to show."

Motions in limine to preclude party from raising legal contentions that were not disclosed in its answers to contention interrogatories; failure to include settling defendants on verdict form; attorney misconduct in closing argument; excessive damages: *Plascencia v. Deese* (2021) 59 Cal.App.5th 1148 (Second Dist., Div. 6.)

Twenty-year-old Jocelyne Plascencia was killed in an automobile accident when an oncoming motorist (Newcomb) made an illegal U-turn in her path, causing her to swerve and crash into the rear of a big-rig truck illegally-parked by the side of the road. The truck's driver, Deese, had parked there to buy strawberries at a roadside fruit stand. Jocelyne's parents filed a

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wrongful- death lawsuit against Deese; his employer, Flat Creek; the fruit stand and its owners; and the State of California. Deese and Flat Creek answered and alleged a comparative-fault defense. In two different sets of contention interrogatories, plaintiffs asked Flat Creek and Deese to state their contentions underlying the comparative-fault defense. In their answers, Flat Creek and Deese only identified Jocelyne, Newcomb, and the owner of Newcomb's car as potentially at fault.

Before trial, plaintiffs settled with all defendants except Flat Creek and Deese. They moved in limine to preclude Flat Creek and Deese from raising a comparative-fault defense based on the fault of the State of California, the fruit stand, and its owners (the "settling parties"). The trial court granted this motion. During closing argument, plaintiffs' counsel told the jury to "imagine" the loss the clients suffered from the loss of their daughter, and called the defendants and their counsel "liars" for making certain misstatements. The jury returned a verdict in favor of the plaintiffs awarding them $15 million each in non-economic damages, which was discounted to reflect the 40% share of fault allocated to Deese and Flat Creek. The trial court denied the defense's new-trial motion. The Court of Appeal reversed on damages.

It held that it was error for the trial court to rely on the defendants' answers to contention interrogatories to preclude them from putting the settling parties on the verdict form, because the Discovery Act does not require parties to update their interrogatory responses and because Proposition 51 requires that all settling parties be included on the verdict form. The Court further held that plaintiff's counsel's closing argument included misconduct, which appeared to be prejudicial in light of the size of the verdict. (Note: The plaintiffs will be filing a petition for review.)

Negligent misrepresentation; intent to induce reliance: *Borman v. Brown* (2021) 59 Cal.App.5th 1048 (Fourth Dist., Div. 1.)

Alice Borman sought treatment for a droopy eyelid and brow from Tara Brown, M.D. Her complaint alleges that Brown told Borman that she could perform a "brow lift" to correct the problem, but that it would not be covered by her insurance. Instead, Brown advised Borman that she could perform a blepharoplasty (an eyelid lift) to correct the problem, which *would* be covered by insurance. Borman alleged that she relied on Brown's statements, underwent the blepharoplasty, and continued to have the same problems with her eyelid and brow. She was advised by another doctor that she had undergone the wrong procedure, and that a brow lift had been necessary. She further alleged that Brown had no reasonable basis to advise her that her insurance would not cover a brow lift. Borman sued Brown for malpractice, battery, and fraud and deceit. The trial court granted Brown's motion for summary adjudication on her fraud and deceit and battery claims. Borman went to trial on the remaining claims and lost. The Court of Appeal reversed, finding that Borman should have been allowed to proceed on a negligent-misrepresentation claim.

The court concluded that "the record contains evidence from which a reasonable jury could find that Dr. Brown intended for Borman to rely on her statement that a brow lift would not be covered by Borman's insurance. No more was required for Borman to prove the 'intent to induce reliance' element of her fraud and deceit cause of action premised on negligent misrepresentation. Since this is the sole element of a negligent misrepresentation theory of liability that the trial court found Borman would be unable to prove, we further conclude that the trial court erred in granting summary adjudication of Borman's fraud and deceit cause of action."

"Home protection plan" as "insurance"; breach of home protection plan not a tort: *Chu v. Old Republic Home Protection Company, Inc.* (2021) __ Cal.App.5th __ (Second Dist., Div. 5)

Plaintiffs purchased a condominium in Los Angeles and obtained a "home protection plan" from the defendant, in which the defendant agreed to "provide service for covered systems and appliances within the condominium" reported as malfunctioning during the term of the contract. While the plan was in force, plaintiffs made a claim seeking repair of their malfunctioning HVAC system. The defendant would not allow plaintiffs to repair the problem with their own contractor, but instead engaged its own licensed HVAC contractor who performed substandard work that did not fix the problem and that damaged the system. The trial court sustained the defendant's demurrer to the plaintiff's claims for insurance bad faith and unfair business practices. Affirmed.

The Court of Appeal held that whether a contract qualifies as insurance under the Insurance Code for regulatory purposes is not dispositive of the tort liability issue. The court held that "an evaluation of the policy considerations underlying tort liability in the traditional insurance context demonstrates that home protection contracts are not sufficiently analogous to insurance to support the imposition of tort liability."

Specifically, the court noted that nothing in the record suggested that buyers and sellers of residential property who enter into home protection contracts lack bargaining power. "As a result, such contracts do not appear to be the product of disparate bargaining power that would otherwise support the imposition of tort remedies."

In addition, "home protection companies do not undertake the quasi-

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fiduciary responsibilities of defending homeowners or settling claims against them; instead, their duties to homeowners are limited to the repair, or if necessary, the replacement of specifically covered home systems or appliances. The absence of such quasi-fiduciary policy considerations also supports the conclusion that home protection companies should not be subject to additional tort remedies for breaches of their repair and replacement obligations under home protection contracts."

Classification of workers as employees or independent contractors; *Dynamex;* whether the *Dynamex* decision is retroactive: *Vazquez v. Jan-Pro Franchising International, Inc*. (2021) __ Cal.5th __ (Cal. Supreme)

In *Dynamex Operations West, Inc. v. Superior Court* (2018) 4 Cal.5th 903, the California Supreme Court held that under one of the definitions of "employ" set forth in all California wage orders – namely, to "suffer or permit to work," – any worker who performs work for a business is presumed to be an employee who falls within the protections afforded by a wage order. The Court further held that such a worker can properly be found to be "an independent contractor to whom a wage order does not apply only if the hiring entity establishes: (A) that the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (B) that the worker performs work that is outside the usual course of the hiring entity's business; and (C) that the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity." (*Id.* at pp. 916-917.) This standard, also used in other jurisdictions to distinguish employees from independent contractors, is commonly referred to as the "ABC test."

In *Vazquez*, the Court held that its decision in *Dynamex* applied retroactively, "that is, to all cases not yet final as of the date our decision in *Dynamex* became final." In reaching this conclusion, the Court relied primarily on the fact that *Dynamex* addressed an issue of first impression. It did not change a settled rule on which the parties below had relied. No decision of this court prior to *Dynamex* had determined how the "suffer or permit to work" definition in California's wage orders should be applied in distinguishing employees from independent contractors. Particularly because the Court had not previously issued a definitive ruling on the issue addressed in *Dynamex*, it saw no reason to depart from the general rule that judicial decisions are given retroactive effect.

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.*