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Appellate Briefs

MICRA AND AMBULANCES INVOLVED IN AUTO ACCIDENTS; ALSO, PAGA WAIVERS, THE TRIVIAL-DEFECT DOCTRINE

MICRA; Statute of limitations; negligently driven ambulance; third parties

Gutierrez v. Tostado (2023) 97 Cal.App.5th 786 (Sixth District)

Gutierrez was driving an auto on the 280 freeway when he was forced to stop. His vehicle was rear-ended by an ambulance driven by Tostado, an EMT. Tostado was transporting a patient from one medical facility to another on a non-emergency basis.

Gutierrez sued Tostado and his employer for negligence within two years of the accident. The action was timely under the two-year statute of limitations for personal injury claims. But Tostado filed a motion for summary judgment based on the one-year limitation period in MICRA for professional-negligence claims against health-care providers. The trial court granted the motion, based on *Canister v. Emergency Ambulance Service, Inc.* (2008) 160 Cal.App.4th 388, which had held on similar facts that MICRA's limitations period governed.

On appeal, Gutierrez argued that *Cannister* had effectively been overruled by the Supreme Court's decisions in *Flores v. Presbyterian Intercommunity Hospital* (2016) 63 Cal.4th 75, and *Lee v. Hanley* (2015) 61 Cal.4th 1225. *Flores* and *Lee* both considered whether the injury to the patient or client was caused by negligence in the provision of professional services or whether the injury was the result of the breach of some broader overlapping duty owed to the public. Gutierrez argued that the contrast drawn in those cases, between a professional duty and the general duty owed to the public, means that MICRA only applies where the defendant owes a professional duty to the plaintiff.

In a 2-1 decision, the court rejected this argument and held that, because the accident occurred while professional services were being rendered to a patient, MICRA governed.

In dissent, Justice Bromberg argued that this outcome was at odds with *Flores* and *Lee*, noting that Gutierrez had no way to know who was in the back of the ambulance or what was occurring therein at the time of the accident. He would have found that, under *Flores* and *Lee*, MICRA's statute of limitations should be interpreted to apply only if the plaintiff advances a claim requiring proof that an obligation owed by health providers was violated. (A petition for review in *Gutierrez* was filed on 1/4/24.)

PAGA; enforceability of PAGA waivers

DeMarinis v. Heritage Bank of Commerce (2023) __ Cal.App.5th __ (First Dist., Div. 3.)

DeMarinis and Patire brought a putative class-action and representative action under PAGA, Labor Code section 2698, et seq., against Heritage Bank of Commerce (Heritage) for wage-and-hour and other Labor Code violations. Heritage unsuccessfully moved to compel arbitration of plaintiffs' individual PAGA claims pursuant to a "representative" action waiver in the parties' arbitration agreement. Affirmed.

Plaintiffs are current and former employees of Heritage Bank. Upon their hiring, plaintiffs purportedly executed a "MUTUAL AGREEMENT TO ARBITRATE CLAIMS" (arbitration agreement) reflecting the parties' "mutual consent to the resolution by arbitration of all claims, arising out of my employment (or its termination) that the Company may have against me, or that I may have against the Company." The arbitration agreement covers claims for wages and other compensation, and for violations of any federal, state, or other law, statute, regulation, or ordinance.

A section of the arbitration agreement entitled "Waiver of Right to File Class, Collective, or Representative Actions" (waiver provision) contains two paragraphs. The first paragraph states, in relevant part: "The Company and I may bring claims against the other only in its or my individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding. There shall be no right or authority for any dispute to be brought, heard, or arbitrated on a class, collective, or representative basis and the Arbitrator may not consolidate or join the claims of other persons or Parties who may be similarly situated."

The second paragraph of the waiver provision includes a nonseverability clause stating: "The Company and I acknowledge and agree that the conditions set forth in [the waiver] provision are material terms of this Agreement and may not be modified or severed, in whole or in part. If this specific provision is found to be unenforceable, then the entirety of this Agreement shall be null and void." The Plaintiffs and the court refer to this last sentence as a "poison pill."

The court held that the waiver provision in the arbitration agreement is unenforceable because it requires plaintiffs to waive their right to bring any "representative" PAGA claim "in any forum," arbitral or judicial, and *all* PAGA claims are "representative" actions. Hence, it purports to waive the right to bring any PAGA claim.

An unenforceable wholesale PAGA waiver is one that requires an employee as a condition of employment to waive their right to bring any "representative" PAGA claims, individual or nonindividual, "*in any forum*." The focus

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of this determination is whether the waiver requires an employee to forgo a "substantive" right (e.g., to seek civil penalties for Labor Code violations on behalf of the state), as opposed to merely changing "how those rights will be processed" (e.g., in an arbitral forum under arbitral rules). The waiver provision here requires plaintiffs to completely abandon their right to bring both individual and nonindividual PAGA claims in any forum, and, for that reason, it is against public policy.

While the parties may draft a severability clause that allows a PAGA waiver to permit arbitration of just the individual PAGA claim, that is not how Heritage structured its arbitration agreement. Instead, it used an arbitration agreement containing a nonseverability clause and a poison pill which together specified that all conditions in the waiver provision are material and may not be modified or severed, either "in whole or in part," and that if the waiver provision is found unenforceable, then "the entirety" of the arbitration agreement is "null and void." Accordingly, the trial court properly denied the motion to compel.

Evidence; expert testimony re: causation; need for published data

Garner v. BNSF Railway Company (2024) __ Cal.App.5th __ (Fourth Dist., Div. 1)

Son brought survival and wrongful-death action under Federal Employers' Liability Act (FELA) against father's former employer, alleging that father's occupational exposure to toxic levels of diesel particulate matter (DPM), benzene, rock dust from railroad track ballast, asbestos fibers, and creosote, during four decades as a trainman for the employer's railroad, was a cause of his father's development of non-Hodgkin's lymphoma after his retirement. The trial court granted employer's motions in limine to exclude opinions of son's experts on liability and causation and dismissed the action. Son appealed. Reversed.

The trial court improperly excluded one expert's general causation opinion that exposure to diesel exhaust and its constituents, including DPM, was more likely than not the cause of the father's non-Hodgkins lymphoma, because there are no epidemiological or other scientific studies that have already stated that conclusion.

This ruling reflects a misunderstanding of the law. As plaintiff correctly argues, there is no requirement that a causation expert rely on a specific study or other scientific publication expressing precisely the same conclusion at which the expert has arrived. (*Kennedy v. Collagen Corp*. (9th Cir. 1998) 161 F.3d 1226, 1229 (*Kennedy*) ["it is scientifically permissible to reach a conclusion on causation without [epidemiological or animal] studies" showing a causal link]; *Wendell v. GlaxoSmithKline LLC* (9th Cir. 2017) 858 F.3d 1227, 1237 (*Wendell*) ["Perhaps in some cases there will be a plethora of peer reviewed evidence that specifically shows causation. However, such literature is not required in each and every case."]; *Turner v. Iowa Fire Equipment Co*. (8th Cir. 2000) 229 F.3d 1202, 1208-1209 ["'we do not believe that a medical expert must always cite published studies on general causation in order to reliably conclude that a particular object caused a particular illness.'"]

First, "[p]ublication ... is not the *sine qua non* of admissibility; it does not necessarily correlate with reliability [citation], and in some instances well-grounded but innovative theories will not have been published. [Citation.] Some propositions, moreover, are too particular, too new, or of too limited interest to be published." (*Daubert v. Merrell Dow Pharms., Inc.* (1993) 509 U.S. 579, 593, 113 S.Ct. 2786, 125 L. Ed.2d 469 (*Daubert*); see also *Primiano v. Cook* (9th Cir. 2010) 598 F.3d 558, 565 ["Peer reviewed scientific literature may be unavailable because the issue may be too particular, new, or of insufficiently broad interest, to be in the literature."].) As Plaintiff's expert explained, this is such a case because few studies of the potential link between diesel exhaust and non-Hodgkin's lymphoma have been conducted. "'The first several victims of a new toxic tort should not be barred from having their day in court simply because the medical literature, which will eventually show the connection between the victims' condition and the toxic substance, has not yet been completed.'" (*Wendell*, *supra*, 858 F.3d at p. 1237.)

In many cases where the available scientific evidence is limited or inconclusive, there will inevitably be *some* analytical gap between the underlying data and the expert's ultimate causation opinion. But *Sargon* should not be construed so broadly that the gatekeeper effectively supplants both the expert's reasonable scientific judgment and the jury's role. That would be at odds with *Sargon*'s emphasis on the limited role of the evidentiary gatekeeper. (*Sargon*, *supra*, 55 Cal.4th at p. 772.) In keeping the gate, it is not the trial court's proper function to second-guess the judgment of a qualified expert who has provided a reasonable scientific explanation for his conclusions and used a scientifically accepted methodology for reaching them based on the available data, even if the data itself is inconclusive.

Trivial-defect doctrine; reliance on City standards unavailing

Miller v. Pacific Gas and Electric Company (2023) __ Cal.App.5th __ (First Dist., Div. 3)

A pedestrian, Miller, tripped on vertical misalignment between a metal plate covering an underground utility vault and the surrounding sidewalk. She brought an action against the vault owner and the owner of property

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adjacent to the sidewalk, alleging general negligence and premises liability. The Superior Court granted summary judgment in favor of defendants. Pedestrian appealed. Affirmed.

To recover damages for either negligence or premises liability, Miller must prove defendants breached a legal duty to either repair or warn about the existence of a dangerous condition – the vertical misalignment – that allegedly caused her to trip and fall. It is well settled law that landowners are not liable for damages caused by a minor, trivial or insignificant defect in property. In the context of sidewalk-defect cases, landowners do not have a duty to protect pedestrians from every sidewalk defect that might pose a tripping hazard – only those defects that create a substantial risk of injury to a pedestrian using reasonable care.

Whether a particular sidewalk defect is trivial and nonactionable may be resolved as a matter of law using a two-step analysis. First, we review the evidence of the size and nature of the defect. If that analysis supports a finding of a trivial defect based on its physical characteristics, we then consider whether the defect was likely to pose a significant risk of injury because there was evidence that the conditions of the walkway surrounding the defect or the circumstances of the accident made the defect more dangerous than its size alone would suggest. If the evidence of additional factors does not indicate the defect was sufficiently dangerous to a reasonably careful person, we deem the defect trivial as matter of law.

Here, the court found that the vertical misalignment of the metal plate cover and surrounding sidewalk was a trivial defect as a matter of law, barring Miller's lawsuit. Defendants met their initial burden of presenting evidence (both testimonial and photographic) demonstrating prima facie that the vertical misalignment was a trivial defect based on the following factors: (1) the size, nature, and quality of the defect – a vertical misalignment of less than one inch with no broken pieces or jagged edges on the metal plate or surrounding sidewalk; (2) visibility – although the accident occurred at nighttime, the area was illuminated with artificial lighting from multiple sources and there was no debris or material on the metal plate or surrounding sidewalk that concealed the defect; and (3) lack of prior incidents – there was no evidence of tripping incidents before Miller's accident.

In challenging defendants' prima facie showing, Miller contends the vertical misalignment cannot be deemed trivial as a matter of law because City guidelines require repair of sidewalk height differentials one-half inch or greater and the City inspector ordered repairs of the misalignment. Therefore, she contends, a trier of fact could find the virtual misalignment was a dangerous condition. The court disagreed.

"Miller's reliance on City guidelines requiring repair of sidewalk height differentials of one-half inch or greater is unavailing because she has presented no evidence that the City's standard for repair of sidewalk defects has been accepted as the proper standard in California for safe sidewalks.

Here, we are concerned with an unobscured vertical misalignment of less than one inch, a nighttime urban location illuminated by artificial lights from multiple sources, and no evidence that the City inspector's decision to order repairs was premised on a finding that the vertical misalignment was a hazardous condition.

Having found defendants made a prima facie showing that the vertical misalignment is a trivial defect, we next examine Miller's argument that the circumstances of her accident raise a triable issue of material fact as to whether the defect could be found to be a dangerous condition that would put a reasonably careful pedestrian at significant risk of injury. She asks us to consider that the following circumstances – the steep downward decline of the sidewalk, the weather, the nighttime hour, and the crowds on the street – all combined to make the height differential less obvious than it would appear in the daylight, thereby creating a dangerous condition necessitating denial of summary judgment. We disagree.

As to the decline of the sidewalk, we find unavailing Miller's contention that the visibility of the vertical misalignment was obscured because the incident occurred on a steep (9% grade) downhill slope, affecting her depth perception and creating an 'optical illusion' that the sidewalk surface was level. Even accepting her assertions concerning the grade percentage of the downward slope, neither in the trial court nor on appeal does Miller cite any relevant authority, legal or scientific, supporting her assertions concerning human vision and perception of an "optical illusion."

The balance of her argument fails because the accident occurred on a typical February evening in Chinatown, and the street was illuminated. Moreover, despite the frequency of heavy pedestrian traffic in the area, there is no evidence that anyone other than Miller had complained of tripping at that location."

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