CAIIA Status Report
January 2015

Insurer Delay Extends Time to Repair or Replace Damaged Property

Credit to Haight, Brown and Bonesteel, Los Angeles, CA

In *Stephens & Stephens XII v. Fireman's Fund Ins.* (No. A135938, filed November 24, 2014), the plaintiffs obtained property insurance on a warehouse. Within a month, it was discovered to be stripped of all wiring and metal. Fireman's Fund paid for emergency repairs but nothing more, concerned that the damage had occurred outside the policy period.

The policy provided for valuation of either "replacement cost," meaning the expenditure required to replace the damaged property with "new property of comparable material and quality," or "actual cash value," defined as the actual, depreciated value of the damaged property. For replacement cost, Fireman's Fund was not required to pay "until the lost or damaged property is actually repaired ... as soon as reasonably possible after the loss or damage," and only "[t]he amount [the insured] actually spend[s]...."

In the subsequent bad faith lawsuit, the jury awarded the full cost of repair, despite there being no repairs. The appeals court reversed, holding that there was no right to an immediate award for the costs of repairing the damage; however, the court nonetheless held that the insured was entitled to a "conditional judgment," awarding those costs if repairs were actually made.

The insured had argued that it was excused from performing repairs because Fireman's Fund had prevented it from doing so, and the appeals court had agreed: "We are persuaded by this reasoning and adopt it. When an insurer's decision to decline coverage materially hinders an insured from repairing damaged property, procedural obstacles to obtaining the replacement-cost value should be excused."

But that did not also eliminate the repair condition: "The policy, however, limits Fireman's Fund's obligation to '[t]he amount [the insured] actually spend[s] that is necessary to repair or replace the lost or damaged property.' Just as we find no basis for excusing [the] obligation to repair, we find no basis for awarding [] a specific amount of replacement cost before [] the actual repairs. Instead, [the insured] is entitled to a judgment declaring its right to receive reimbursement for repair costs, if and when the repairs have actually been performed in a timely manner, and in an amount equal to [] actual expenditures for them."

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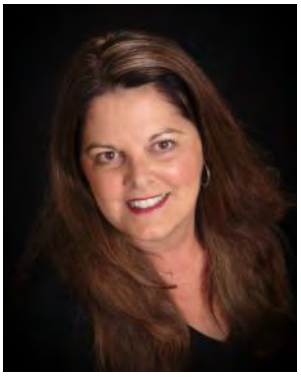
California Association of Independent Insurance Adjusters, Inc.

President's Message



Kim Hickey

CAIIA President

New Year's Eve is one of the favorite celebration days for many people. Spending time with family and friends aside, the impending New Year typically brings hope for a more prosperous and happy 365 days. New Year's is celebrated all over the world.

In ancient Rome the New Year began on March 1. The Gregorian calendar, which marks January 1 as the New Year, was adopted by the Roman Catholic Church in 1582.

January is named after Janus, the god with two faces, one looking forward and one looking backward.

In Italy, people wear red underwear on New Year's Day to bring good luck all year long. I will have to try this one!

In Colombia, Cuba and Puerto Rico, some families stuff a large doll, which is called Mr. Old Year, with memories from the past year. They also dress him in clothes from the outgoing year. At midnight, he is set ablaze, thus burning away the bad memories.

It's good luck to eat foods like black eyed peas, ham and cabbage because it is thought they bring prosperity. But if you want to have a happy New Year, don't eat lobster or chicken. Lobsters can move backward and chickens can scratch in reverse, so it is thought these foods could bring a reversal of fortune. There is a lot to know!

Chinese New Year is celebrated the second full moon after the winter solstice. Jewish New Year is called Rosh Hashanah, and will begin September 13, 2015 and end September 15, 2015.

The top 10 resolutions are usually to lose weight, eat more healthily, exercise more, stop smoking, stick to a budget, save money, get more organized, be more patient, find a better job and to just be a better person over all.

We have a mid-term, and classes to plan, bylaws to review, time to get to work! These are on my list of New Year's resolutions. What are your New Year's resolutions?

Happy New Year, or because I am Italian….Felice Anno Nuovo

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Besides approving a "conditional" declaratory judgment pending future repairs, the *Stephens* court went on to find coverage for a seemingly uncovered portion of the jury's special verdict. An endorsement to the policy covered the insured's lost business income and rental value resulting from a suspension of operations due to direct physical loss to the property. The jury found no loss of rental value but awarded lost income from a failed real estate deal to sell the property, which the court agreed would not be covered as a loss from suspension of the insured's operations. But despite declaring the special verdict unambiguous, the court proceeded to find "latent ambiguity" and interpret the verdict as awarding covered damages.

The appeals court said that "[w]here the trial judge does not interpret the verdict or interprets it erroneously, an appellate court will interpret the verdict if it is possible to give a correct interpretation." In particular, the court noted that the amount in dispute bore no relation to the evidence on the lost real estate sale, but corresponded exactly to the amount claimed for lost rental value. Although lost rental value had been crossed out by the jury, the court chalked it up to confusion and said that "[i]t does not matter whether these lost rents could also have qualified as lost business income. The special verdict must be interpreted as awarding [the insured] damages ... for lost rent on the breach of contract cause of action. This interpretation is consistent with our obligation to uphold the verdict if possible."

Happy New Year

Torts – Negligence – Assumption of the Risk

Low, Ball & Lynch, San Francisco, CA

Tanya Honeycutt v. Meridian Sports Club, LLC

Court of Appeal, Second Appellate District
(November 6, 2014)

The primary assumption of the risk doctrine has been used by courts to provide immunity from suit for certain sporting and recreational activities, based on the public policy consideration that such activities are to be encouraged, rather than discouraged. The immunity from suit typically applies so long as the defendant did not do anything to increase the "inherent risk" of the activity. This case considered the doctrine in the context of a kickboxing class.

Tanya Honeycutt ("Honeycutt") participated in a kickboxing class at Meridian Sports Club, LLC ("Meridian") on June 28, 2011, taught by Hakeem Alexander ("Alexander"), a certified personal trainer and seasoned martial arts instructor. This was her first time participating in kickboxing. Before the class, Honeycutt signed a one-page agreement which contained an express assumption of the risk agreement, advising that use of Meridian's facilities naturally involves risk of injury, which the user understood and voluntarily accepted. According to the agreement, the user agreed that Meridian would not be liable for any injury resulting from negligence by Meridian at or on the premises.

During the class, Honeycutt and the other students were being asked to perform a roundhouse kick. A roundhouse or swinging kick is executed by swinging the leg in a semicircular motion while pivoting on the supporting foot, striking with the shin, instep, or ball of the foot. Alexander observed Honeycutt incorrectly attempting a roundhouse kick, keeping her supporting foot flat on the floor rather than going up on the toe in order to more easily pivot. Alexander approached Honeycutt and corrected her form. Thereafter, while performing a roundhouse kick, Honeycutt allegedly injured her knee.

Honeycutt sued Meridian for negligence and gross negligence. She argued that Alexander acted with gross negligence when he manipulated her leg, causing her knee to snap. Meridian filed a motion for summary judgment arguing that it was not grossly negligent, and that the release signed by Honeycutt barred her action. In opposition, Honeycutt provided an expert declaration that stated that a roundhouse kick is an intermediate or advanced technique, and that the proper teaching method did not involve touching the student, but instead involved demonstrating and verbalizing the maneuver, regressing to an easier maneuver if the kick was too difficult for the student's skills. Meridian objected to the declaration. The trial court overruled the objections, and held that there were triable issues of fact whether Meridian increased the risk of injury and whether it acted with gross negligence. Meridian filed a petition for a writ of mandate which was granted, and the trial court was ordered to enter judgment in Meridian's favor. Honeycutt appealed.

The Court of Appeal affirmed. First, it noted that the Supreme Court had established that coaches and instructors have a duty not to increase the risks inherent in sports participation, and that an instructor may be found to have breached a duty of care only if the instructor intentionally injures the student or engages in conduct that is reckless in the sense that it is "totally outside the range of the ordinary activity" involved in teaching or coaching the sport.

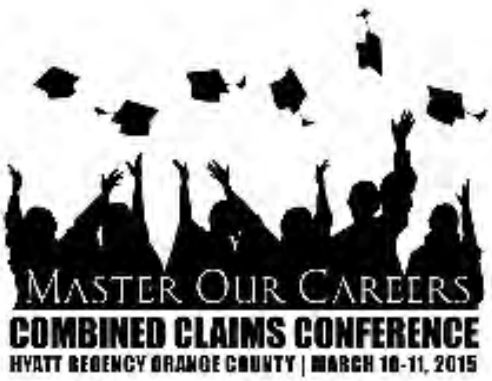
There was no argument that the instructor intentionally injured Honeycutt, and the court held there was no evidence that he engaged in reckless conduct. The uncontroverted facts showed that Honeycutt was performing roundhouse kicks along with other students, that Alexander saw that she was performing the kicks incorrectly, and he took steps to assist her in proper execution of the movement. According to the Court, injuries to shoulders, hands, and knees are risks inherent in a vigorous, physical activity such as kickboxing. These types of injuries are entirely foreseeable, with or without the physical intervention of an instructor. Based on these facts, the Court held that the injury fell squarely within the doctrine of primary assumption of the risk.

The Court also disagreed with Honeycutt's argument that by grabbing her leg and directing her to rotate without demonstrating the maneuver, Alexander had acted with gross negligence. Honeycutt argued that her expert's declaration stated that an instructor should not touch the student, and instead should demonstrate and verbalize the maneuver, regressing to an easier maneuver if the kick was too difficult for the student's skills. Relying on past cases, the Court noted that "a mere difference of opinion as to how a student should be instructed does not constitute evidence of gross negligence." There was nothing in the expert declaration showing gross negligence, and the release signed by Honeycutt precluded liability for general negligence.

Judgment in favor of Meridian was affirmed on appeal.

Comment

Primary assumption of the risk is one of the few areas that are strong for the defense of negligence claims, particularly where sporting or recreational activities are involved. As long as the co-participant or instructor does not intentionally injure the plaintiff, or increase inherent risk of the activity, courts will continue to be reluctant not to honor releases of liability for the same.



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On the Lighter Side

1. Law of Mechanical Repair - After your hands become coated with grease, your nose will begin to itch and you'll have to pee.

2. Law of Gravity - Any tool, nut, bolt, screw, when dropped, will roll to the least accessible place in the universe.

3. Law of Probability - The probability of being watched is directly proportional to the stupidity of your act.

4. Law of Random Numbers - If you dial a wrong number, you never get a busy signal; someone always answers.

6. Variation Law - If you change lines (or traffic lanes), the one you were in will always move faster than the one you are in now.

7. Law of the Bath - When the body is fully immersed in water, the telephone rings.

8.Law of Close Encounters - The probability of meeting someone you know INCREASES dramatically when you are with someone you don't want to be seen with.

9. Law of the Result - When you try to prove to someone that a machine won't work, IT WILL!!!

10. Law of Biomechanics - The severity of the itch is inversely proportional to the reach.

11. Law of the Theatre & Hockey Arena - At any event, the people whose seats are furthest from the aisle, always arrive last. They are the ones who will leave their seats several times to go for food, beer, or the toilet and who leave early before the end of the performance or the game is over. The folks in the aisle seats come early, never move once, have long gangly legs or big bellies and stay to the bitter end of the performance. The aisle people also are very surly folk.

12. The Coffee Law - As soon as you sit down to a cup of hot coffee, your boss will ask you to do something which will last until the coffee is cold.

13. Murphy's Law of Lockers - If there are only 2 people in a locker room, they will have adjacent lockers.

14. Law of Physical Surfaces - The chances of an open-faced jelly sandwich landing face down on a floor, are directly correlated to the newness and cost of the carpet or rug.

15. Law of Logical Argument - Anything is possible IF you don't know what you are talking about.

16. Brown's Law of Physical Appearance - If the clothes fit, they're ugly.

17. Oliver's Law of Public Speaking -- A CLOSED MOUTH GATHERS NO FEET!!!

18. Wilson's Law of Commercial Marketing Strategy - As soon as you find a product that you really like, they will stop making it, OR the store will stop selling it!!

19. Doctors' Law - If you don't feel well, make an appointment to go to the doctor, by the time you get there you'll feel better.. But don't make an appointment, and you'll stay sick.