

CAIIA Status Report

April 2014



Right to Repair Act- Not Exclusive Remedy for Homeowner

Credit to Low, Ball, Lynch, San Francisco, CA

Cynthia Burch v. The Superior Court of Los Angeles County
California Court of Appeal, Second Appellate District
February 19, 2014

California's Right to Repair Act ("Act") is codified at Civil Code Sections 895 et. seq., and was intended to provide both homeowners and homebuilders a quick and fair method to resolve claims of defects in residential construction. This case is one of several recent decisions that have limited the ability of developers to rely upon the requirements of the Act to avoid subsequent litigation.

Custom Home Builders was a general contractor who built a number of single family residences for Premier Homes, a developer in the Los Angeles area. Scott Warren and Daniel Sahar were the principals and owners of both Custom Home Builders and Premier Homes. Plaintiff Cynthia Burch bought the house after it was placed on the market. Burch later discovered deficiencies in the home, and filed a complaint against Custom Home Builders, Premier Homes, Warren, Sahar, and others for defects in the construction.

Burch alleged that the defective construction caused her to suffer property damage. She also alleged, in her count for breach of implied warranty, that Custom Home Builders was aware that a party such as herself would purchase the property, and that the defendants impliedly represented to her that they had used reasonable skill and judgment in constructing the residence.

Defendants moved for summary adjudication. They argued that the Right to Repair Act establishes an exclusive statutory remedy for damages for construction defects. In addition, as to the negligence count, they argued that they had no contractual or other relationship with Burch and owed her no duty of care, and that they could not be held liable for a breach of implied warranty. The trial court granted summary adjudication. Burch petitioned and the Court of Appeal granted the writ of mandate.

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President's Message

The CAIIA was an exhibitor at the Combined Claims Conference held March 4th & 5th at the Hyatt Regency in Orange County. We were located at a prime location which enabled us to interact with many insurance professionals. We distributed our Member Directory, the ever-popular compasses and turned business cards into laminated luggage tags!

A huge Thank You to the members who volunteered their time to staff the booth. An even larger Thank You to Sterrett Harper of Harper Claims for setting up and breaking down the booth.

The highlight of my attendance was seeing a now Litigation Supervisor I mentored/trained over 24 years ago. Chance meetings like those are priceless.

The CAIIA is holding its Mid-Term Meeting April 25th at the Marriott Hotel in Manhattan Beach, CA. Insurance professionals are urged to register to attend our Continuing Education class on Ethics which will be held at 9am on April 25th. Please visit our website to download the registration form.



Tanya Gonder
CAIIA President

Tanya Gonder
2013/2014 CAIIA President



Don't Forget...



Continued from page 1

The Court of Appeal reviewed the recent history of the evolution of construction defect claims. First, the California Supreme Court in *Aas v. Superior Court* (2000) 24 Cal.4th 627, held that deficiencies in residential construction were actionable in tort only if they caused property damage or personal injury. In response, the Legislature enacted the Right to Repair Act in 2002 abrogating the holding in *Aas* by allowing the recovery of damages for specified defects resulting in only economic loss. The language of the Act limits remedies and causes of action available for claims covered by the Act, but specifically excepts from those limitations any conduct that “causes damage.”

Based on the history and the language of the Act itself, the Court concluded that the Act provided an exclusive remedy for certain construction defects that caused no property damage, but did not limit or preclude common law claims for damages for construction defects

that caused property damage. Here, Burch alleged negligence that caused property damage, and that the defendants breached an implied warranty with respect to the construction. Both causes of action alleged common law claims for damages for construction defects. The Court held the Right to Repair Act did not preclude such common law claims.

Additionally, the court held that the defendants failed to show the absence of a duty of care to Burch. Burch belonged to a class of prospective homebuyers of the general public for whom the defendants performed the construction. In legal effect, the court said, the construction could have been considered to be intended for her. Therefore, the summary adjudication of Burch’s negligence count was incorrect. With Burch in a position of an intended beneficiary of the construction contract, defendants also failed to negate the claim alleging breach of the implied warranty.

COMMENT

Prior to this case and the recent decision in *Liberty Mutual Insurance Company v. Brookfield Crystal Cove, LLC.* (2013) 219 Cal.App.4th 98 ([See Low, Ball & Lynch Construction Law and Litigation Newsletter – February, 2014](#)) the construction industry fought hard to enact the Right to Repair Act and felt that the Act was the exclusive remedy for homeowners or insurers in subrogation actions. If the builder did not comply with the Act, only then could a lawsuit be filed. Under both these decisions, a property owner who has suffered actual property damage may elect to proceed under the Right to Repair Act or common law theories of liability or both.

Don't be fooled...



Torts-Liability Limitations for Actions Outside of Scope of Employment***Credit to Low, Ball, Lynch, San Francisco, CA***

Sara Montague, et al. v. AMN Healthcare, Inc.

**Court of Appeal, Fourth Appellate District
(February 21, 2014)**

Under the doctrine of *respondeat superior*, an employer is vicariously liable for the torts of its employees only when those torts are committed within the scope of the employment. For an employer to be liable for an intentional tort, the employee's act must have some causal nexus to the employee's work. This case addresses the question of whether a medical staffing company that provides personnel to hospitals can be held liable for the torts of one of its medical assistants.

AMN Healthcare, Inc., dba Nursefinders ("Nursefinders") is a staffing company that provides medical personnel to hospitals and medical facilities. Nursefinders hired Theresa Drummond as a medical assistant and assigned her to work at a Kaiser facility, where she worked with Sara Montague, another medical assistant. At some point, Drummond and Montague had a disagreement at work. A few weeks after the disagreement, Drummond poured carbolic acid into Montague's water bottle; and Montague later drank from the contaminated bottle, resulting in injuries to her throat.

Montague sued Drummond and Nursefinders for negligence. As to Nursefinders, Montague also alleged battery, negligence *per se* and intentional infliction of emotional distress under a theory of *respondeat superior*. She claimed that Nursefinders should be held vicariously liable for Drummond's actions, as well as for negligent hiring, training and supervision of Drummond. Nursefinders moved for summary judgment, arguing that the causes of action based on *respondeat superior* liability failed because Drummond was a special employee of Kaiser, or that she acted outside the course and scope of her employment. The trial court granted the motion, finding that the claims based on *respondeat superior* failed because Drummond was a "special employee" of Kaiser. The trial court also concluded that there was no triable issue of fact regarding negligent hiring or supervision. Montague appealed.

In affirming the trial court's ruling, the Court of Appeal found it unnecessary to address the issue of special employment because, even assuming that Nursefinders retained some control over Drummond so as to render it jointly and severally liable for her acts, Montague's vicarious liability claims failed on the alternative ground that Drummond acted outside the course and scope of her employment.

The Court referred to California jury instruction 3720 regarding the test for *respondeat superior*. According to the instructions, the conduct of an employee falls within the scope of his or her employment if the conduct either: (1) is required by or incidental to the employee's duties, or (2) it is reasonably foreseeable in light of the employer's business. The court first considered whether Drummond's acts were required by or incidental to her employment with Nursefinders. Montague presented no evidence regarding the scope of Drummond's employment with either Nursefinders or Kaiser. It was also unknown whether Drummond committed the poisoning during working hours.

The court next considered whether Nursefinders could have reasonably foreseen that Drummond would poison a coworker. It determined that there was no causal nexus between the injury and a work-related dispute because here, the injury was inflicted out of the employee's personal malice. Further, even if the poisoning had arisen from a work-related dispute, the dispute concerned Drummond and Montague's mutual employment with Kaiser, not Nursefinders. In addition, the court noted that public policy factors underlying the doctrine of *respondeat superior* do not support the imposition of vicarious liability to Nursefinders under these facts, because the potential for civil and criminal liability provides a deterrent to the type of aberrant conduct that Drummond committed. Finally, Nursefinders derived no benefit from Drummond's conduct and it would be inequitable to shift the loss to Nursefinders.

With respect to Montague's claims against Nursefinders for negligent training, the court found that there was insufficient evidence to support an inference of negligent training by Nursefinders. Summary judgment in favor of Nursefinders was upheld.

COMMENT

This common-sense decision provides positive guidance on tort liability for staffing company employers. While there may be vicarious liability for actions of temporary employees provided by staffing companies, where the employee's actions are outside the scope of the employee's duties for the special employer, courts will not hold the staffing company vicariously liable either.

Right to Repair Act- Notice must be Given to Home Builder before Defects are Repaired***Credit to McCormick-Barstow, Fresno, CA******KB Home Greater Los Angeles, Inc. v. Superior Court (Allstate Ins. Co.) (February 21, 2014) -- Cal.App.4th -- , 2014 W.L. 667368*****UNDERLYING CLAIM**

In March 2010 a water pipe burst pipe in Roy's home, causing damage. Roy made a claim under his Allstate homeowners insurance policy. Allstate inspected the property and completed repairs in June 2010. In July 2010 Allstate sent the builder notice of its intent to pursue subrogation. In November 2010 Allstate sent a demand for settlement to the builder. When the builder did not respond, Allstate filed a subrogation lawsuit. The builder raised as an affirmative defense Allstate's failure to provide timely notice to allow it to repair the defect as required by California's so-called "Right to Repair Act," Calif. Civil Code § 895 et seq. The trial court granted summary judgment in favor of Allstate, finding that the notices Allstate sent in July and November substantially complied with the Act.

THE APPELLATE COURT'S RULING

The court of appeal reversed, holding that "the failure to give timely notice to [the builder] is fatal to Allstate's cause of action...." The court of appeal noted that Chapter 4 of the Act (Civil Code §§ 910-938) sets forth a pre-litigation procedure designed to provide a builder the opportunity, before litigation commences, to repair defects brought to its attention by a homeowner. The appellate court reasoned that the pre-litigation procedure is sequential and begins with the homeowner's notice of defect, gives the builder an opportunity to inspect, and leads to mediation or an offer of repair or cash. This sequential procedure fulfills the purpose of the Act "to give a builder the opportunity to resolve a homeowner's construction defect claim in an expeditious and non-adversarial manner." The court concluded that ". . . completing repairs before giving a notice of defect turns the pre-litigation procedure on its head and precludes the builder from inspecting and making an offer to repair."

The court of appeal rejected Allstate's argument that the Act should not apply when a construction defect causes actual damage because the pre-litigation procedures would give the builder an incentive to "drag its feet" by "delaying action to the maximum allowed time limits." The court noted that, because the builder is required to compensate the homeowner for consequential damages, including the cost of repair of actual property damage caused by a construction defect, any delay up to the statutory maximum risks increasing the builder's liability, and thus the builder has an incentive to act quickly in such cases.

The court of appeal also rejected Allstate's argument that the notices it sent in July and November substantially complied with the pre-litigation requirements of Chapter 4 of the Act, finding those notices made no reference to the Act and "the construction defect they identified no longer existed" at the time the notices were sent. The court of appeal held that because the insured homeowner was required to give the builder timely notice of the construction defects under the Act, no such notice was given, and an insurer's rights in subrogation are not greater than those of the insured, "[t]he failure to give [the builder] timely notice and an opportunity to inspect and offer to repair the construction defect excuses [the builder's] liability for damages under the Act."

EFFECTS OF THE RULING

The holding in *KB Home* creates tension between an insurer's subrogation rights and its claims handling duties. The Fair Claims Settlement Practices Regulations impose various duties on insurers, including the obligation to accept or deny a claim in whole or in part within 40 days after receipt of proof of claim, and a duty to not delay settlement "on the basis that responsibility should be assumed by others, except as may otherwise be provided by policy provisions, statutes or regulations, including those pertaining to coordination of benefits." (10 Cal. Code Regs. §§ 2695.7(b) and (e).) Moreover, the Regulations require an insurer to provide written notice to the insured regarding whether the insurer intends to pursue subrogation, and require that any subrogation demand must include the insured's deductible. (10 Cal. Code Regs. §§ 2695.7 (p) and (q).)

The *KB Home* case effectively imposes a new requirement on an insurer seeking subrogation against a homebuilder responsible for an insured loss to send notice of the defect to the builder before repairs are undertaken. However, the Right to Repair Act sets forth a process outlining the builder's obligation to inspect and options to offer to repair, make a cash offer, or mediate. (Civil Code §§ 913-921.) Depending upon which course the builder chooses, the repair process may take over six months. An insurer will have to act promptly to balance its duty to send notice to the builder and the builder's right to inspect and conduct repairs to preserve subrogation rights versus its duties to the insured.

CAIIA Mid-Term Business Meeting

Thursday April 24th & Friday April 25, 2014

CAIIA REGISTRATION FORM



Manhattan Beach Marriott

1400 Park View Ave., Manhattan Beach, CA 90266

Phone (800) 228-9290 ; (310) 546-7511

Mention CAIIA when calling for Reservations
To receive special \$189/night rate

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EVENT	COST	#TICKETS	TOTAL PRICE
MEMBER CONVENTION Package (*) (Includes Reception, Continental Breakfast, CE Class/Lunch/Meeting)	\$ 150.00	# _____	\$ _____
Non-Member Convention Package (Includes Reception, Continental Breakfast, CE Class/Lunch)	\$ 175.00	# _____	\$ _____
Spouse/Guest fee Name <i>(Includes Reception & Continental Breakfast)</i>	\$ 100.00	# _____	\$ _____
3 Hour CE Class (Includes Continental Breakfast, Presentation, Lunch)	\$ 100.00	# _____	\$ _____
<i>Grand Total payable</i>			\$ _____

SCHEDULED EVENTS

Please specify which events you and/or your spouse/guest will attend by placing a check mark in the box next to the event.

Complete a separate form for each registrant and additional guest.

Please make your checks payable to CAIIA or pay by credit card.
Mail Registration Form & payment to:

- 4/24 - 6:30 P.M. Reception
4/25 - 8:00 A.M. Registration/Breakfast
4/25 - 9:00 A.M. Seminar
4/25 - 12:00 P.M. Lunch
4/25 - 1:30 P.M. Business Meeting (*)

You Spouse/Guest
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Tanya Gonder
c/o Casualty Claims Consultants
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Oakland, CA 94611

	AMEX VISA M/C Circle one	3 Digit Security # (CV)	
Cardholder:		Signature:	
Card No:		Expiration Date:	
Card Address: (City/State/Zip)			

(*) Members only.

On the Lighter Side:

Top 8 morons of the year

1. WILL THE REAL DUMMY PLEASE STAND UP?

AT&T fired President John Walter after nine months, saying he lacked intellectual leadership. He received a \$26 million severance package. Perhaps it's not Walter who's lacking intelligence.

2. WITH A LITTLE HELP FROM OUR FRIENDS:

Police in Oakland, CA spent two hours attempting to subdue a gunman

who had barricaded himself inside his home. After firing ten tear gas canisters, officers discovered that the man was standing beside them in the police line shouting, 'Please come out and give yourself up.'

3. WHAT WAS PLAN B?

An Illinois man, pretending to have a gun, kidnapped a motorist and forced him to drive to two different automated teller machines, wherein the kidnapper proceeded to withdraw money from his own bank accounts.

4. THE GETAWAY!

A man walked into a Topeka, Kansas Kwik Stop and asked for all the money in the cash drawer. Apparently the take was too small, so he tied up the store clerk and worked the counter himself for three hours until police showed up and grabbed him.

5. DID I SAY THAT?

Police in Los Angeles had good luck with a robbery suspect who just couldn't control himself during a lineup. When detectives asked each man in the lineup to repeat the words: 'Give me all your money or I'll shoot'..... the man shouted, 'That's not what I said!'

6. ARE WE COMMUNICATING?

A man spoke frantically into the phone: 'My wife is pregnant and her contractions are only two minutes apart'. 'Is this her first child?' the doctor asked. 'No!' the man shouted, 'This is her husband!'

7. NOT THE SHARPEST TOOL IN THE SHED!

In Modesto, CA, Steven Richard King was arrested for trying to hold up a Bank of America branch without a weapon. King used a thumb and a finger to simulate a gun. Unfortunately, he failed to keep his hand in his pocket. (helooooooooo)?!

8. THE GRAND FINALE!!!

Last summer, down on Lake Isabella, located in the high desert, an hour east of Bakersfield, CA, some folks new to boating, were having a problem. No matter how hard they tried, they couldn't get their brand new 22 foot boat going. It was very sluggish. In almost every maneuver, no matter how much power they applied it just dragged. After about an hour of trying to make it go, they putted into a nearby marina, thinking someone there may be able to tell them what was wrong. A thorough topside check revealed everything in perfect working condition. The engine ran fine, the out-drive went up and down, and the propeller was the correct size and pitch. So one of the marina guys jumped in the water to check underneath. He came up choking on water, he was laughing so hard.

NOW REMEMBER...THIS IS TRUE.

Under the boat still, strapped securely in place, was the trailer!