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Status Report

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April 2019

No Duty of Care for 3rd Party Liability (APPLE) in Traffic Accident

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

Modisette v. Apple Inc.
Court of Appeal of the State of California, Sixth Appellate District, December 14, 2018

California Civil Code Section 1714 establishes the general duty of each person to exercise reasonable care for the safety of others. This duty is, however, not unlimited. Courts have crafted exceptions to the general duty rule where finding of such duty would result in such significant social burdens that the law should not recognize such claims.

On December 24, 2014, Bethany and James Modisette were traveling on a Texas highway with their daughters Isabella and Moriah when they came to a stop due to police activity. Garrett Wilhelm crashed into the Modisettes' car at highway speed while using the Face-Time application on his iPhone 6 Plus, killing five year old Moriah and injuring the rest of the family. The Modisettes sued Apple Inc. alleging general and gross negligence, negligent and strict products liability, negligent and intentional infliction of emotional distress, loss of consortium, and public nuisance.

According to the Modisettes' First Amended Complaint, Apple developed a lockout technology on the iPhone 6 Plus, which would have automatically prevented drivers from using FaceTime while driving at highway speeds. Apple applied for and obtained the patent for the lockout technology in April 2014. The Modisettes allege that Apple knew or should have known of the risks caused by the use of the iPhone while driving, citing to Apple's 2008 patent application, which stated that 80 percent of auto accidents are caused by driver distractions such as applying makeup, eating, and text messaging on handheld devices. The Modisettes allege Apple was negligent in failing to design the iPhone 6 Plus with the lock-out technology. The Modisettes further allege that Apple failed to warn to warn users that it was dangerous to use the FaceTime application while driving.

In Rowland v. Christian, the California Supreme Court articulated the factors to consider when determining whether to exempt certain categories of cases from the general duty rule. The central factors are (1) the foreseeability of harm, (2) the closeness of connection between the defendant's conduct and the injury suffered, (3) the policy of preventing future harm, and (4) the extent of the burden on the defendant, and consequences to the community of imposing the duty. Applying the Rowland factors, the Court of Appeal affirmed the trial court's order sustaining Apple's demurrer without leave to amend.

While the Court recognized that some of the factors, such as foreseeability of harm and the policy of preventing future harm, were in the Modisettes' favor, other factors were found to weigh more strongly against a finding of a duty. First, the Court determined that there was not a "close" connection between Apple's conduct and the Modisettes' injuries. While the involvement of a third party, the driver Wilhelm, did not preclude a duty of care on Apple, the Court found that there was an insufficient direct relationship to warrant finding of a duty. For the Modisettes to be injured, they had to be stopped on a highway due to police

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President's Message

"Here cometh April again, and as far as I can see the world hath more fools in it than ever..." Charles Lamb

I don't know why, but this quoting movies and poetry is becoming my thing…

You should see my office! I should start an evidence storage company or start charging for storing every broken flex line and failed component I have ever hauled back from a loss site. I frankly wouldn't blame my assistant for not coming into work anymore until I improve the state of my office. Aww Spring! The days of spring cleaning, hang the laundry in the sun, washing the windows and walls (well that's what they do in the movies). Maybe I should to do some "spring cleaning" in the office one of these upcoming weekends. It will probably go much faster than I think, and when I walk in the office on Monday morning, I'll feel like I can tackle the world. While my office may not look it, my files are in much better shape. Believe me there are plenty of files that are older than the (state required) five years!

John Ratto

CAIIA President

Organization is the key to what we do. Despite the multitude of software applications out there which help me stay "virtually" clean and organized, I have found that claims handling keeps coming down to the same few organizational rules.

- Inspect the loss as soon as possible after receiving the claim.
- Return all telephone calls within 24 hours.
- Reply to e-mails as soon as reasonably possible.
- Provide the carrier with a comprehensive report as soon as you have a decent amount of claim information.

On this last point, I do want to emphasize the word ***comprehensive***. In some of my recent expert witness work, I have been asked for my opinion about how a claim was handled. I have noticed that in the crush of being too busy, some independents emphasize form over substance and rip out a report out within 3 to 5 days that doesn't say much of anything. Then the file never reveals a comprehensive follow-up report. So while it is good to have a clean office and an organized file, it is also good to dig in and provide the substance. … but I'm getting off track.

Let's celebrate spring with a breath of fresh air, keep it simple and organized… and happy office cleaning to any of you who manage to get it done.

By the time this report is coming out to all, we will be attending the midterm on April 5 at the Courtyard by Marriott Los Angeles Burbank Airport**.** The previous night we hope to see you for dinner at the Granville Café (121 N. San Fernando Blvd., Burbank). Look for details to follow.

John Ratto President

CAIIA President

NEWS OF AND FOR OUR MEMBERS

SAVE THE DATE

The CAIIA is proud to be exhibiting at or sponsoring the following upcoming event:

April 4 & 5 CAIIA Midterm Meeting, Courtyard by Marriott, Burbank , CA

August 27-29,2019 Claims Conference of Northern California, Lake Tahoe, CA

Important Note for all Adjusters

Civil Code 1542 Has Changed

As of January 1, 2019, Civil Code Section 1542 has changed. The new wording which now needs to be in all Release Of All Claims documents is:

Section 1542 of the California Civil Code provides as follows: **"**A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS THAT THE CREDITOR OR RELEASING PARTY DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE AND THAT, IF KNOWN BY HIM OR HER, WOULD HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR OR RELEASED PARTY.**"**

[VV1]Civil Code 1542 was amended effective January 1, 2019 (Amended by Stats. 2018, Ch. 157, Sec. 2. (SB 1431) Effective January 1, 2019.)

Editor's note: Be sure to check with defense counsel to have your Release changed to conform with the new wording.

DOI Announcement

Southern California agents charged with embezzlement and theft after allegedly stealing over $60,000 combined

LOS ANGELES, Calif. —Two recent California Department of Insurance investigations have led to the arrests of insurance agents who allegedly stole tens of thousands of dollars from clients and failed to place insurance coverage for those clients, exposing them to significant financial risk.

"California consumers should be able to trust that their insurance agents are looking out for them and ensuring they are protected," said Insurance Commissioner Ricardo Lara. "These agents not only allegedly stole from their clients, they put their clients at great financial risk."

Maria Aquino, 34, of South Gate, was charged with multiple felony counts of embezzlement and theft for allegedly pocketing over $48,000 in clients' insurance premium payments and failing to place insurance coverage for her clients between 2011 and 2018. The premium payments collected by Aquino, while doing business as Kino Insurance and Tax Services, were never sent to insurance carriers. Aquino falsified certificates of insurance for more than eight clients in order to hide her embezzlement. Aquino's license was revoked on July 12, 2018.

In a separate case, Chih Ming Huang, also known as James Huang, 41, of Rowland Heights, was charged with multiple counts of embezzlement, theft and forgery after allegedly stealing nearly $14,000 dollars from more than three clients and also failing to place insurance coverage for his clients. After receiving a complaint from Farmers Insurance, where Huang had been previously employed, the department found that between 2011 and 2013, Huang embezzled premium payments by placing coverage for clients then canceling the coverage without his clients' knowledge. Cancelling the coverage generated refund checks to his clients, which he received because he had changed their address on record to a location he controlled. Huang then applied the refunds to policies in the names of his aliases and cancelled those polices to get refunds in his own name, which he deposited into his personal bank account. The department is taking immediate action against Huang's license.

Both of these cases are being prosecuted by the Los Angeles County District Attorney's Office. Aquino surrendered on February 27, 2019 to the Downey Police Department. Huang will surrender on March 4, 2019.

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activity, Wilhelm had to choose to use his iPhone while driving in a manner that caused him to fail to see that the cars had stopped, and Wilhelm had to hit the Modisettes' car with his car, an object heavy enough to cause the resulting severe injuries. Apple's design of the iPhone did not put the danger in play, and nothing that Apple did induced Wilhelm's reckless driving.

Second, the Court held that even if the Modisettes' injuries were foreseeable, strong public policy considerations dictate against recognizing a duty of care. In support, the Court looked to other jurisdictions which had held that although it is foreseeable some accidents would result from driver distractions from activities such as eating, applying make up, or looking at a map while driving, it would be unreasonable to impose a duty on the restaurant or cosmetic manufacturer or map designer to prevent such accidents, it is the driver's responsibility to drive with due care.

In addition, the Court looked to the Legislature, which has elected not to ban all cell phone use by drivers in California, instead allowing cell phone use while driving through voice-operated and hands-free mechanisms. The duty alleged by the Modisettes, on the other hand, could preclude phone manufacturers from allowing the use of phones while driving, notwithstanding California law that expressly permits such use under certain circumstances. Given the pervasive and insistent nature of cell phone usage in our society, the complex public policy considerations involved, and the potentially seeping implications of finding a duty by Apple, the Court held that policy considerations dictate finding as a matter of law an exception to the general duty of care.

Next, the Court held that Apple's design of the iPhone was not the proximate cause of the injuries sufficient to support a finding of strict products liability, intentional infliction of emotional distress, and loss of consortium. While the design of the iPhone was a necessary antecedent of Modisettes' injuries, the injuries were not a result of Apple's conduct, but rather Wilhelm's conduct when he crashed into their car while willingly diverting his attention from driving. The Court held that the gap between Apple's design and the Modisettes' injuries was too great to hold Apple responsible.

CONCLUSION

While well-established legal precedence allows for third-party liability, courts allow exceptions to the general duty rule where there is no "close" connection between the defendant's conduct and the plaintiff's' injuries; and the burden to defendant and consequences to the community would be too great if a duty were recognized.

Uninsured Motorist Policy Allows Insurer to Reduce Payments to Insured

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

An uninsured motorist policy allowed an insurer to reduce payments to an insured by the amount of medical expenses that were eligible for payment through workers' compensation, regardless of whether the insured actually sought payment of those expenses through workers' compensation. *(Case v. State Farm Mutual Auto. Ins. Co.* (2018) 30 Cal.App.5th 397)

Facts

In March 2013, Melissa Case was employed by Lawry's Restaurant, Inc., and was insured under a personal automobile policy issued by State Farm Mutual Insurance Company. The State Farm policy had uninsured motorist (UM) bodily injury limits of $100,000 per person. In late March 2013, while returning to Lawry's from an off-site catering location, Case was injured in a car accident involving an uninsured driver. The next day, Case sought benefits through Lawry's workers' compensation policy and Case submitted a claim for benefits under the UM section of her State Farm auto policy.

In July 2014, Case through her counsel sent State Farm a demand for UM benefits totaling approximately $67,000, which included almost $40,000 for alleged past and future medical expenses. In August 2014, Case submitted documentation showing that there was a workers' compensation lien for about $1,900. Between October and November 2014, Case and the workers' compensation insurer submitted more documentation showing that the workers' compensation lien had increased to about $2,200.

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In November 2014, Case made a demand for UM arbitration, and her counsel simultaneously submitted a declaration stating that Case did not expect to receive any additional workers' compensation benefits. State Farm responded that State Farm still needed to determine "to what extent workers' compensation benefits continue to be owed" to Case before State Farm could determine whether it might owe any UM benefits to Case.

In May 2015, Case sued State Farm for breach of contract and bad faith. Case essentially alleged that although she had already provided State Farm with information concerning the workers' compensation lien, State Farm had failed to pay her claim for UM benefits.

In September 2015, the workers' compensation insurer finally determined that in fact Case did not have any additional medical expenses that were payable through workers' compensation. Case's counsel promptly informed State Farm that Case had exhausted the possibility of receiving additional payments through workers' compensation. Two months later, in November 2015, State Farm settled Case's UM claim for $35,000.

State Farm then moved for summary judgment, contending that (1) it had paid all policy benefits due and thus it could not be liable for breach of contract, and (2) its refusal to pay Case's UM claim before Case's claim for workers' compensation benefits had been resolved did not constitute bad faith. The trial court granted State Farm's motion. Case appealed.

Holding

The California Court of Appeal affirmed.

With respect to the Case's claim for breach of contract, Case had not shown that State Farm still owed her any benefits under the UM section of the policy. Thus, the trial court properly found that Case had no claim for breach of contract.

With respect to Case's claim for bad faith, consistent with Insurance Code section 11580.2, the State Farm policy's UM section provided that "any amount payable ... shall be reduced by any amount paid *or payable* to ... the insured ... under any *workers' compensation*, disability benefits, or similar law." Italics added. This policy provision authorized State Farm to request a determination regarding the extent to which Case's past and future medical expenses were eligible for payment through worker's compensation, regardless of whether Case actually sought payment through workers' compensation. Here, it was not until September 2015 that the workers' compensation insurer finally determined that Case was not entitled to any additional benefits through workers' compensation. A mere two months later, in November 2015, State Farm settled Case's UM claim. Because State Farm resolved Case's UM claim "shortly after" the determination that Case was not entitled to any further medical expenses through workers' compensation, as a matter of law, State Farm had not unreasonably delayed payment of UM benefits to Case. Thus, Case could not recover from State Farm for "bad faith."

Comment

Under a UM policy's standard loss-payable-reduction provision, the insurer is liable only for any difference between the UM policy limits and the amount of workers' compensation benefits that have been paid or are "payable" to the insured. Notably, this provision allows benefits owed under a UM policy to be reduced by the amount of medical expenses that are eligible for payment through workers' compensation, regardless of whether the insured actually seeks payment of such expenses through workers' compensation benefits. As the amount of the medical expenses that are eligible for payment through the workers' compensation increases, the insurer's obligation to pay UM benefits decreases.

APRIL TRIVIA

You most likely missed it! After 43 years of aiming for April Fools Day, Borrego's famed Pegleg Smith Liars Contest has moved to the first Saturday in March – March 2, 2019.

The contest features tall tales, shaggy dog stories, stale jokes, occasional songs, poems, puns, and outright lies from contestants from throughout Southern California.

The only rules are to keep the lies under five minutes (unless you're really good at it) and that the stories have to somehow involve "Pegleg" Smith, the differently-abled 19th century prospector who claimed to have found (and lost) a fortune in gold somewhere out on the vast California Desert. For the entire news story, click the below link:

https://www.borregosun.com/story/2019/02/01/news/2019-pegleg-smith-liars-contest/4851.html

The Reptile Theory

Credit to Manning,& Kass, Los Angeles, CA

"The public's safety is your top concern, right?" the plaintiff's counsel asks your star witness in a dubious slip-and-fall lawsuit against your organization. "Yes," your witness replies.

Congratulations. You're well on your way to losing a multi-million-dollar suit by falling into a trap guided by a spreading civil-litigation tactic called Reptile Theory. This tactic often supports suits seeking to legitimize fraudulent and inflated insurance claims. Reptile attacks are increasingly deployed by plaintiffs in civil cases against insurers and other large organizations. The goal is to twist a case away from the facts and evidence. Juries are manipulated into deciding cases on raw emotions instead of the evidence and rule of law. Essentially, Reptile tactics create an impossibly — and impermissibly — high legal standard of behavior unrelated to the truth of your case. Reptile tactics are used with growing frequency in civil cases. Purported slip-and-fall injuries, whiplash from vehicle crashes, workplace injuries, medical malpractice losses, elder abuse cases, product-liability fatalities, warranty of habitability cases, and police shooting incidents are frequent Reptile targets in civil suits. Such civil actions may invoke bad-faith or other allegations. Often they also involve spurious or fraudulent claims designed to pressure insures into Reptile Theory to lock in their agenda. Beware of any questions pursuing concepts of safety, danger and priorities. The most-common manifestation consists of building accusations of supposed offenses such as "needlessly endangering the public" or "unnecessarily endangering the community." a skilled plaintiff attorney will try to entrap a defense witness into agreeing with such overly broad Reptile themes.

For entire article: https://files.constantcontact.com/14b0456a001/7828199c-55d7-49c7-803f-c524a3fb6bff.pdf

PHOTO CREDIT TO CNN

Happy Spring! This is definitely the year to get out and enjoy the wildflowers.

Places to enjoy Southern California's Super Bloom:

Anza Borrego

Lake Elsinore

Antelope Valley Poppy Reserve

CAIIA REGISTRATION FORM

California Association of Independent Insurance Adjusters

MID-TERM BUSINESS MEETING - April 4-5, 2019

Courtyard by Marriott Los Angeles Burbank Airport 2100 W Empire Ave, Burbank, CA 91504 – Tel: (818) 843-5500

Your Name_____ Spouse/Guest_____

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EVENT	COST	#TICKETS	TOTAL PRICE
MEMBER CONVENTION Package (*) (Includes Reception dinner April 4-5, Continental Breakfast, CE Class/Lunch/Meeting)	$ 150.00	#_____	$_____
Non-Member *Convention Package* (Includes Reception dinner, Continental Breakfast, CE Class/Lunch) April 4-5	$ 175.00	#_____	$_____
Spouse/Guest fee Name_____ (*Reception dinner, breakfast*)	$ 50.00	#_____	$_____
3 Hour CE Class Only (Includes Continental Breakfast, Presentation, Lunch)	$ 100.00	#_____	$_____
		Grand Total payable	$_____

SCHEDULED EVENTS

Please specify which events you will attend by placing a check mark in the box next to the event.

Complete a separate form for each registrant and additional guest.

		You	Spouse/Guest
04/04 – 6:30 P.M.	Welcome/Dinner (Granville Café 121 N. San Fernando Blvd, Glendale, CA 91502)	[ ]	[ ]
04/05 – 8:00 A.M.	Registration/Breakfast for hotel guests	[ ]	
04/05 – 9:00 A.M.	Seminar (3 CE credits-Ethics)	[ ]	
04/05 – 12:00 P.M.	Lunch	[ ]	
04/05 – 1:00 P.M.	(Approximate) Business Meeting	[ ]	

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2) Please indicate the date payment was made using PayPal _____

On the Lighter Side…

Did I read that sign right?

TOILET OUT OF ORDER. PLEASE USE FLOOR BELOW.

In a Laundromat:

AUTOMATIC WASHING MACHINES: PLEASE REMOVE ALL YOUR CLOTHES WHEN THE LIGHT GOES OUT.

In a London department store:

BARGAIN BASEMENT UPSTAIRS...

In an office:

AFTER TEA BREAK, STAFF SHOULD EMPTY THE TEAPOT AND STAND UPSIDE DOWN ON THE DRAINING BOARD.

Notice in health food shop window:

CLOSED DUE TO ILLNESS...

Seen during a conference:

FOR ANYONE WHO HAS CHILDREN AND DOESN'T KNOW IT, THERE IS A DAY CARE ON THE 1ST FLOOR.

On a repair shop door:

WE CAN REPAIR ANYTHING. (PLEASE KNOCK HARD ON THE DOOR - THE BELL DOESN'T WORK.)

Something Went Wrong in Jet Crash, Expert Says

Really? Ya' think?

Juvenile Court to Try Shooting Defendant

See if that works better than a fair trial!

Red Tape Holds Up New Bridges

You mean there's something stronger than duct tape?

And the winner is...

Typhoon Rips Through Cemetery; Hundreds Dead

Did I read that right?

****

Now that you've smiled at least once, it's your turn to spread the stupidity and send this to someone to whom you want to bring a smile..... (maybe even a chuckle).