CAIIA Status Report

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October 2017

Open and Obvious Dangers; New Evidence Submitted in Reply

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

Jacques Jacobs, et al. v. Coldwell Banker Residential Brokerage Company

Court of Appeal, Second District (July 25, 2017)

Defendant Coldwell Banker Residential Brokerage Company (Coldwell) marketed for sale a vacant, bank-owned property located in Simi Valley. The property had a backyard with an empty swimming pool and diving board. Prior to listing the property, the agent inspected the diving board, hired a company to inspect the pool and board, and warned in the open house listing about the empty pool. While plaintiffs Jacques Jacobs (Jacques) and his wife, Xenia Jacobs (Xenia), were viewing the property as potential buyers for an investment, Jacques stepped onto the diving board to look over the fence. The diving board base collapsed and Jacques fell into the empty pool. Plaintiffs sued Coldwell for negligence and loss of consortium.

Coldwell moved for summary judgment on the grounds that (1) there was no evidence it had breached its duty of care to a prospective purchaser; (2) there was no evidence Coldwell had actual or constructive notice of the allegedly dangerous condition of the diving board; (3) there was no evidence that Coldwell caused Jacques' injuries; and (4) Xenia's claim for loss of consortium was derivative of the negligence claim, which lacked merit. In opposition, Plaintiffs alleged for the first time that the empty swimming pool was a dangerous condition. Coldwell attached to its reply additional exhibits responding to plaintiffs' empty pool theory. Plaintiffs did not object to the additional evidence.

The trial court granted Coldwell's motion for summary judgment. It determined the evidence was undisputed that Coldwell had no actual or constructive notice that the diving board was defective. Regarding the empty pool theory of liability, the court concluded that Plaintiffs had not alleged that theory, either in their complaint or in their discovery responses, and that the circumstances justified Coldwell's submission of reply evidence addressing that theory. Based on all the evidence, the court ruled that Coldwell was entitled to summary judgment on Jacques' negligence claim, as well as on Xenia's derivative loss of consortium claim. This appeal followed.

The Court of Appeal affirmed the granting of summary judgment. Plaintiffs contend the trial court erroneously determined that their complaint failed to plead their empty pool theory of liability and, as a result, they were barred from defeating summary judgment based on that theory. The pleadings play a key role in a summary judgment motion and set the boundaries of the issues to be resolved at summary judgment. Nativi v. Deutsche Bank National Trust Co. (2014) 223 Cal.App.4th 261, 289. Here, the complaint's allegations did not suggest a negligence claim based on the condition of the empty pool as opposed to the condition of the diving board. The allegedly defective condition of the diving board was the only theory stated in the complaint. There was no mention, suggestion, or any facts alleged that would put a reasonable defendant on notice that Plaintiffs were claiming that Coldwell was negligent with respect to the empty pool. Thus, Coldwell's motion for summary judgment did not need to address that claim. (See Hutton v. Fidelity National Title Co. (2013) 213 Cal.App.4th 486, 499.

The trial court correctly found that even if the empty pool theory had been properly pled it was insufficient to defeat summary judgment. Foreseeability of harm is typically absent when a dangerous condition is open and obvious. (Osborn v. Mission Ready Mix (1990), 224 Cal.App.3d 104 at pp. 114-121.) "Generally, if a danger is so obvious that a person could

Continued on Page 4

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Inside this issue…..

Open & Obvious	Pg. 1
President's Message	Pg. 2
News of/for Members	Pg. 3
The Swelling Floor Panels	Pg. 4
Take-Home Exposure	Pg. 5
Landlord-Tenant	Pg. 6
On the Lighter Side	Pg. 7

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President's Message

This will be my last Newsletter as President of the CAIIA. By the time this Newsletter is published, we will have nominated and appointed a new President and new officers. The new President will take over the writing of the Newsletter. I hope you enjoyed the subjects I approached, such as: roller coasters, three for dinner, Places in California, narwhals, Christmas trees, predictions and sandwiches (not my best work). My favorite? California places.

Steve Washington
CAIIA President

It is hard to believe that a year has gone by and my term is over. It has been a busy year. The record California rain and snowfall, wildfires, and now hurricanes Irma and Harvey have kept us extremely busy and have stretched the adjusting corps to its limits. The constant reporting, estimate writing, photographs, statements, and yes, 30 day letters has made time fly. I thank everyone for your help during my term. A special thanks to Kim Hickey, Sterrett Harper and Paul Camacho. Without their help and tutelage, I would not have been able to complete the task.

In my first newsletter, one year ago I stated, "The California Association of Independent Insurance Adjusters motto is "Dedication to Excellence". I reiterate that now. The CAIIA provides education in ethics, claims handling, Fair Claims Regulations and a forum where members can provide opinion and wisdom or just commiserate about a tough file. The Association is a great source of knowledge, wisdom and is indeed "Dedicated to Excellence".

I urge all members to participate in the meetings, events and serve in office or on the Board, given the opportunity. The CAIIA has been in existence for 70 years and with the support and participation of its members we will forge ahead.

Steve Washington

CAIIA President 2016-2017

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NEWS FROM AND FOR OUR MEMBERS

SAVE THE DATE

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

October 17, 2017	CPCU Educational Event, Studio City, CA
March 6-7, 2018	Combined Claims Conference, Garden Grove, CA

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Claims Conference of Northern California

Your CAIIA exhibited at the Claims Conference of Northern California. We wish to thank Paul Camacho of Mission Adjusters, South Lake Tahoe, Bill McKenzie, Walsh Adjusting, San Diego and Tanya Gonder, Casualty Claims Consultants, Oakland, for manning the booth this year. If you were not able to be at the CCNC this year, they had a great turnout and wonderful classes.

Correction: We apologize to McCormick, Barstow LLP for last month's error.

McCormick, Barstow LLP's (not "McCormick & Barstow") main office is in Fresno (not Bakersfield). They also have offices in Modesto, Las Vegas, Denver and Cincinnati.

Continued from page 1

reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition." (Krongos v. Pacific Gas & Electric Co. (1992) 7 Cal.App.4th 387, 393.). An exception to this general rule exists when it is foreseeable that the danger may cause injury despite the fact that it is obvious. The issue is whether there is any evidence from which a trier of fact could find that, as a practical necessity, Jacques was foreseeably required to expose himself to the danger of falling into the empty pool. Here, potential buyers did not have to approach the dangerous condition (i.e., the empty pool) in order to inspect the back-yard. As a matter of law it was not foreseeable that he would knowingly embrace an entirely obvious risk by voluntarily using the diving board on an empty pool for a purpose for which it was not intended – to look over the fence.

Lastly, as to the new evidence presented in reply, the Court found the trial court acted within its discretion by allowing Coldwell to provide evidence in response to a new theory of liability raised by Plaintiffs in their opposition. Consideration of additional reply "evidence is not an abuse of discretion so long as the party opposing the motion for summary judgment has notice and an opportunity to respond to the new material." Plenger v. Alza Corp. (1992) 11 Cal.App.4th 349, 362. The record confirms that plaintiffs had notice of the additional material when they received Coldwell's reply papers and ample opportunity to ask the trial court for permission to submit responsive evidence or to file a sur-reply. By failing to take such action, or to even object to the court's consideration of the evidence, Plaintiffs forfeited any claim of a due process violation.

COMMENT

After this opinion was issued, the Association of Defense Counsel petitioned the Court to have it published for three reasons: the Court analyzed the practical necessity exception to the general rule that one owes no duty regarding an open and obvious danger; it addressed the trial court's discretion to consider evidence submitted with a reply brief; and it provided guidance for when evidence is submitted with a reply brief – namely that the burden is on the party opposing summary judgment to ask for permission to file a sur-reply or conduct further discovery.

The Case of the Swelling Floor Planks

Credit to Garrett Engineers, Long Beach, CA

The homeowner's bedroom floor was laid with laminate hardwood tongue-and-groove planks, over a slab-on-grade concrete pad. The flooring was swelling and lifting, presumably because of moisture. GEI was assigned to identify the predominant cause and determine the approximate age of the damage seen.

Our expert visited the property and the homeowner accompanied him on his inspection. The property was a single-family residence of timber framing with a stucco exterior finish and a plaster interior finish under a composition shingle roof. It was constructed circa 1972, according to the Los Angeles County Assessor's web-site. The residence was not located in an active fault zone but was located in a liquefaction zone. As such, the building would be prone to damage from smaller (<3.5M) seismic movements.

The expert took a series of normal light photographs of the site and also included infrared photographs of the floor surfaces.
The rear portion of the residence was added as the later stage of site development. A building permit was approved by Los Angeles Department of Building and Safety in 2014 for a ground floor addition of about 200 square feet for a new family room.

The inspection of the exterior showed that the landscape required lowering to comply with the building code requirement of a 4-inch clearance between foundation weep screeds and the soil (or, in this case, mulch layer). Otherwise, the exterior was unremarkable and did not indicate any potential water entry sites. The rear yard had sod and appeared to be well drained. A local plumber tested the interior plumbing drain lines and the pressurized water lines. He found no drain line leaks nor pressurized water line leaks.

Concrete sub-floors are not required by the Building Code to include a vapor barrier underneath them. They are therefore subject to intrusion by groundwater, in the form of water vapor. Such groundwater as exists under every building is continually moving upward into

Continued on Page 6

Take-Home Exposure

Credit to Low, Ball & Lynch, San Francisco,

Joseph Petitpas v. Ford Motor Company, et al.

Court of Appeal, Second Appellate District, 13 Cal.App.5th 261 (July 5, 2017)

Plaintiffs Marline and Joseph Petitpas sued Exxon Mobil Corporation, Ford Motor Company, and numerous other defendants, alleging that Marline developed mesothelioma as a result of exposure to asbestos-containing products. Exxon and Ford won motions for summary adjudication on strict liability and take-home liability. The Court of Appeal affirmed the defense verdict.

The Court found that summary adjudication based on secondary exposure was appropriate because Exxon did not have a duty to Marline Petitpas since she was not a member of Joseph Petitpas' household at the time he worked at an Enco service station. The Court declined to expand Kesner v. Superior Court (2016) 1 Cal.5th 1132. The Kesner court held: "[T]he duty of employers and premises owners to exercise ordinary care in their use of asbestos includes preventing exposure to asbestos carried by the bodies and clothing of on-site workers. Where it is reasonably foreseeable that workers, their clothing, or personal effects will act as vectors carrying asbestos from the premises to household members, employers have a duty to take reasonable care to prevent this means of transmission." (p. 1140.) Since the Kesner court was very specific and limited this duty to only members of the employee's household, there was no "take-home" exposure in the instant case because Marline and Joseph did not live together at the time of the claimed exposure.

The Court of Appeal also found that summary adjudication of the strict liability cause of action in favor of Exxon was appropriate because the evidence did not show that Exxon was within the stream of commerce for any asbestos-containing products. Exxon submitted undisputed evidence that, at the Pomona Enco station where Joseph Petitpas worked in 1966 and 1967, the asbestos-containing replacement clutches and gaskets came from an independent auto parts store, and the asbestos-containing replacement brakes were supplied by a mobile brake service. None of these products were manufactured by Exxon.

The Court held that Exxon (via the Enco station) was a provider of automobile repair services and not a supplier of products. Hernandezcueva v. E.F. Brady Company, Inc. (2015) 243 Cal.App.4th 249 was distinguished from this case. In Hernandezcueva, defendant drywall installer E. F. Brady's contracts always involved the provision of drywall and related materials. E.F. Brady had an ongoing relationship with the drywall manufacturer which was significant enough for E.F. Brady to exert pressure on the manufacturer to influence product safety.

The evidence in this case did not suggest such a relationship between Exxon and the manufacturers of asbestos-containing auto parts. The Court of Appeal held that the relationship between Exxon and the manufacturers of the asbestos-containing auto parts was similar to that in Monte Vista Development Corp. v. Superior Court (1991) 226 Cal.App.3d 1681, in which plaintiff alleged that a ceramic soap dish installed in her home by contractor Willey Tile was defective and caused laceration. The trial court granted summary adjudication on plaintiff's strict liability claims against Willey Tile, who selected and purchased the soap dish in bulk from a supplier and installed it along with the tile. Willey Tile was performing a service, and was not a "supplier" of tile in the stream of commerce. Monte Vista was considered controlling as to Exxon's status in this case.

After analyzing the premises liability theory against Exxon, the Court turned to the strict liability claim against Ford. Plaintiffs argued that the trial court should not have permitted use of two separate jury instructions on causation. CACI 430 explains that a substantial factor in causing harm "must be more than a remote or trivial factor." CACI 435 does not include the language of a remote or trivial factor, and only requires plaintiff to prove that exposure to asbestos from the product contributed to the risk of developing cancer. The Court analyzed the leading cases and the use notes for these two instructions and concluded that it was appropriate to use both because there was a premises defendant as well as a products defendant remaining in the case when it went to the jury.

Citing the O'Neil case, the Court reiterated that a product manufacturer is not strictly liable or negligent for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm. The Court followed the Johnson v. Arvin Meritor case, which held: "As with the products in O'Neil, there is no evidence that the brake assemblies required asbestos-containing materials in order to function generally." Based on the evidence in the instant case, the Court held that plaintiffs' design defect claim failed.

The Court also addressed plaintiffs' failure-to-warn claim against Ford. Unlike a brake arcing machine whose purpose is to create dust by grinding, the use of brakes to stop a car did not create airborne dust that exposed the user to asbestos fibers. The brake dust could be removed by vacuuming or the use of wet rags, and the manner in which Joseph Petitpas chose to clean brake drums was not under Ford's control.

Plaintiffs presented evidence that Ford knew that cleaning brake dust from brake drums with compressed air could cause the release of respirable asbestos fibers. The Court stated: "While such evidence may have been relevant to a duty to warn, which plaintiffs do not assert here, without more it was not relevant to the design defect claim plaintiffs assert." This footnote creates a loophole for plaintiffs to claim failure to warn even when a design defect claim fails.

COMMENT

This decision addressed significant issues impacting product and premises liability. The Court of Appeal refused to expand liability for take-home secondary exposure to asbestos, which could have opened the door for numerous new claims.

Continued from Page 4

the concrete because the concrete is porous and contains micro-cracks. In addition, because the area soils are subject to liquefaction during seismic events, concrete sub-floors are prone to forming many additional hairline cracks. The micro-cracks formed from the original curing of the cement paste in the concrete, the cracks that formed because of seismic activity, and the porous nature of concrete all allow and encourage movement of groundwater upward from the underlying dirt by capillary attraction. If the flooring finish is laid without a vapor barrier, moisture will travel up into the finish. If the finish is wood or timber, this will result in lateral expansion of that finish. Such lateral expansion will form "tenting" or swelling of the finish. Water vapor movement is detectable using infrared cameras. The infrared photos that the expert took demonstrated this in the bedroom flooring.

The flooring planks that were installed in this particular home were manufactured by Tecsun Building Products, whose website included installation instructions. Those instructions clearly required the installation of a 4-mil vapor barrier and foam underlay.

Our expert found that the floor finish panels had "tented" by swelling and rising off the sub-floor. Other areas of the bedroom floor sounded hollow when tapped, indicating their separation from the sub-floor with potential later "tenting" of the laminate finish.

Based on the foregoing, the expert's opinion was that the predominant cause of the damage seen was the failure to properly protect the installed laminate flooring against moisture traveling up through micro-cracks and the porous concrete floor slab-on-grade foundation from the naturally rising groundwater. The approximate age of the cause of those damages was consistent with the age of the concrete floor slab.

Landlord Tenant

Credit to: Low, Ball & Lynch, San Francisco

Alfonso Ayala v. Randy Dawson

Court of Appeal, First District (August 4, 2017)

Property owner Randy Dawson and tenant Alfonso Ayala signed a written contract in December, 1999, entitled "Residential Lease with Option to Purchase." According to Ayala, he paid a "down payment," "mortgage payments" and a $200/month "fee" in exchange for Dawson purchasing a five-unit residential property in Dawson's name. Allegedly based on an oral contract, and in reliance upon Dawson's purported superior knowledge of real-estate transactions, Ayala would take title to the property in fee at the conclusion of the mortgage. Ayala lived in one of the units, managed the property, and claimed to have spent "hundreds of thousands" of dollars to improve the property.

Dawson disputed that any installment sale contract ever existed. According to Dawson, the parties intended the transaction to be a lease, and the first mention of any "ownership" by Ayala occurred after Ayala allowed the property to fall into disrepair while also failing to make timely lease payments. Dawson claimed that the lease arrangement had been made to facilitate temporary financing while Ayala saved to purchase the property per the "Option to Purchase."

In June, 2012, Ayala filed a lawsuit against Dawson for fraud, breach of an oral contract, and equitable relief. In July, 2012, Dawson filed an unlawful detainer action against Ayala. Ayala did not answer, but rather filed a motion to quash service of summons on the grounds that the unlawful detainer was jurisdictionally defective as no landlord-tenant relationship existed.

After a one and a half day evidentiary hearing in the unlawful detainer action, the motion to quash was denied. The court found that a landlord-tenant relationship existed, and specifically rejected the theory that Dawson served as Ayala's trusted real estate broker. An Appeals Panel denied Ayala's request for a writ of mandate, and specifically affirmed the landlord-tenant relationship.

In Ayala's suit against Dawson, Dawson filed a motion for summary judgment, asserting that the unlawful detainer ruling collaterally estopped Ayala from moving forward on the same issue in his suit against Dawson. The summary judgment motion was granted, and from that order, Ayala appealed.

The doctrine of collateral estoppel precludes litigating issues argued and decided in prior cases. There are typically five threshold requirements for collateral estoppel to apply: (1) the issue must be identical to that decided in a former proceeding; (2) the issue must be actually litigated; (3) the issue must have been actually decided in the former proceeding; (4) the decision must be final and on the merits; and (5) the party against whom it is being sought must be identical to, or in privity with, the party in the former proceeding. Lucido v. Superior Court (1990) 51 Cal.3d 335, 341.

Continued on Page 7

On the Lighter Side...

While **knock knock jokes** are well known in many countries including the United States, the United Kingdom, France, Australia, Canada and South Africa, in some nations such as Brazil, they are not popular at all. Knock knock jokes, it seems, have been around since the dawn of time. A type of pun, the knock knock joke is essentially what is called a "call and answer" exercise. There is a person who delivers the pun, and a pun recipient. The knock knock joke has even become a developmental tool. Psychologists study how younger children use and tell knock knock jokes, as it allows them to see how their language skills are developing.

Knock, knock!

Who's there?

Boo.

Boo who?

Don't cry; it's only a knock-knock joke.

Knock knock!

Who's there?

Little old lady?

Little old lady who?

Wow! I didn't know you could yodel!

Will you remember me in an hour?

Yes.

Will you remember me in a day?

Yes.

Will you remember me in a week?

Yes.

Will you remember me in a month?

Yes.

Will you remember me in a year?

Yes.

I think you won't.

Yes, I will.

Knock, knock!

Who's there?

See? You've forgotten me already!

Continued from Page 6

Before the holding in this case, the leading authorities on the collateral estoppel effect of unlawful detainer actions were Wood v. Herson (1974) 39 Cal.App.3d 737, and Vella v. Hudgins (1977) 20 Cal.3d 251. The summary nature of unlawful detainer actions gives courts pause in using them for preclusionary effect, though in cases where a party explicitly or implicitly agreed to submit an issue for adjudication, a court may apply the res judicata doctrine. In Wood, the court found that the defendant's affirmative defense of fraud was nearly identical to the fraud allegations in an unlawful detainer action, and found the unlawful detainer case to have res judicata effect. In Vella, the parties were intimately involved, the record was not developed fully, and the only mention of a fraud defense was found as an unaddressed affirmative defense in the unlawful detainer action. So, the Vella court did not bar the fraud cause of action through the res judicata doctrine.

In Ayala, the Court found that the facts were closer to Wood than to Vella. In acceding to the summary procedures of an unlawful detainer action, rather than moving to consolidate the cases, Ayala left himself vulnerable to the collateral estoppel issue preclusion on the fraud matter. Ayala was given the opportunity to conduct discovery, and actually took Dawson's deposition, which he used to cross-examine Dawson at the unlawful detainer hearing. Further, the judge in the unlawful detainer action found "this is certainly not a typical transaction." As in Wood, leasing property to a potential buyer resulted in full litigation of the issue of title; litigation that Ayala voluntarily acceded to.

In conclusion, when an issue is fully, fairly, and voluntarily litigated at an unlawful detainer hearing, the decision on the issue may have collateral estoppel effect in a parallel civil action.

COMMENT

While the holding in Vella was the most recent decision in applying the collateral estoppel doctrine in unlawful detainer cases, the Court in Ayala seems to have re-adopted the Wood approach in allowing unlawful detainer decisions to adjudicate substantive issues other than possession. Litigants would be well advised to thoroughly consider any issues raised in unlawful detainer matters, as adverse rulings may carry into other proceedings.