CAIIA Status Report

NOVEMBER 2008

Hospitality Legal Times

Submitted by Tharpe & Howell

City Not Liable In Civil Rights Action Brought By Motorcycle Members Excluded From Festival For Violation Dress Code

In *George Villegas v. Gilroy Garlic Festival Ass'n (GGFA)*. 2008 Westlaw 4058566 (C.A.9)(Cal.), filed Sept. 2008, for several days during summer, the GGFA, a private non-profit corporation, sponsors and runs the Gilroy Garlic Festival in the City of Gilroy. The Festival offers food, contests, music and family recreation activities. GGFA enters into a faculty reservation contract with the city requiring it to agree that security and traffic control may be required by the police department. George Villegas and his group were members of the Top Hatters Motorcycle Club. As the Top Hatters entered the Festival in their riding attire with vests displaying a winged skull and a top hat, the Festival's chair of security prohibited them from remaining at the Festival pursuant to an unwritten policy of the GGFA prohibiting guests from wearing gang colors or insignia. The Top Hatters brought suit against the city alleging it was enforcing an unconstitutional dress code and against the GGFA under 42 *U.S.C.* Section 1983 for alleged violations of their civil rights.

The district court ruled against the Top Hatters reasoning that wearing such vests was neither expressive conduct or association within the protection of the First Amendment and that the GGFA was not a state actor within the meaning of Section 1983. On appeal, the Court noted the GGFA's chair of security and assistant were volunteer law enforcement officers from the city police department and/or from a local agency. After the festival, the police department submitted a bill to GGFA for staffing the Festival with its law enforcement officers. The Supreme Court created a two step analysis for determining when state action by a private actor is sufficient to establish constitutional tort liability. (*Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982)). The first inquiry was whether the claimed deprivation resulted from exercise of a right or privilege having its source in state authority. Secondary, is whether the private party may be characterized as a state actor. State action may be found if there is such a close nexus between the State ad the challenged action that seemingly private behavior may be fairly treated as

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Inside This Issue

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PRESIDENT'S MESSAGE

Volunteerism

In my first column as President, I want to discuss the reasons you, as an independent adjuster, should become an active member of this organization. As you know, the CAIIA was created to promote the interests of independent insurance adjusters and to provide a forum for its members in which to discuss and act on topics of common concern. Because of this basic structure of our group, it is essential to the group that its members be active ones.

I believe that the CAIIA represents everything that is great about our American culture. It is an open forum, and offers an equal opportunity to anyone who wishes to participate. The group is ready to accept your individual member input. One does not have to be royalty or old guard to make an impact here; this organization is available as a vehicle for you to make an impact. By being active in the planning and operations of our group, you can increase your visibility and showcase your managerial skills.

So how can this group promote your interests? In large part, any prestige that can accrue from being in the CAIIA is generated by your own individual effort. Your activity and the work you do for the good of the organization will be recognized by your fellow members and the industry. If you participate in work that is seen by other members of the industry, say leading a seminar, your effort will be recognized by the attendees. There is great potential reward for showing your leadership through service to the organization. There is little reward for just having your name in the listing of members.

I believe that our recently departed friend Steven Tilghman set an excellent example as a member who demonstrated how to get more out of the organization by putting more into it. If he thought we needed to conduct a seminar on a subject, he proposed it, put it together, and presented it. As a consequence, we recognized him as a superior adjuster, with skills to be shared. If nobody recognizes your skills, perhaps it is because you are not showing us your skills.

There was a member that wrote a note indicating that he was not going to renew. I asked the board if anyone that knew him would contact him to interview him or encourage him. Nobody knew him. I believe that is the explanation for his discontent. The first requirement to getting more out of the organization is to be present.

If you want our membership and the insurance industry to think of you as an outstanding member, there is a clear path. No one can do it for you. Paying $350.00 for membership is just the price of admission. You will get nothing out of it by waiting in your office for an assignment, or waiting for the association to make you visible. If you remain silent and isolated, it's likely you will grow disillusioned, and ultimately drop out.

Instead, speak up. If you have an idea you want to share with the members, don't say "someone should do it. Say "I propose to do it." Here is YOUR opportunity to come forward and promote

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Submitted by Tharpe & Howell

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that of the State. Factors considered are (1) if the organization is comprised of state institutions; (2) state officials dominate decision making; (3) funds are largely generated by state institutions; and (4) the organization is acting in lieu of a traditional state actor. The Top Hatters contended the festival was held in a public park, a written permit was issued signed by city counsel members, police officers provided security for which a bill was submitted to GGFA for payment of use of its officers of the city's police department. In *United Auto Workers v Gaston Festivals, Inc.*, 43F,3d 902 (4th Cir.1995), the Court noted that organization, management and promotion of events do not fall within the domain of functions exercised traditionally by the government. In *Marsh v. Alabama*, 326 U.S. 501, while the City required a permit and provided essential security services, it did not relinquish its control of the public areas. Here the city retained control of the park and provided security services, but unlike *Gaston*, the city billed GGFA for its services. Regarding the Top Hatter's contention that the city violated their First Amendment right by enforcing the GGFA dress code, the Court disagreed noting it was generally not a constitutional violation for a police officer to enforce a private entity's rights. Because there was no constitutional violation, thee could be no municipal liability, thus the judgment was affirmed.

Defendants Not Liable For Injuries Of Air Port Security Employee Who Tripped Over Explosive Detection Machine

In *Christopher Jones v. P.S. Development Co., Inc.*, 2008 West law 4060599 (Cal.App. 2 Dist.) filed sept. 2008 Christopher Jones filed a complaint against Invision Technologies, Inc. for negligence and products liability. While employed with Transportation Security Administration (TSA) at Los Angeles International Airport, Jones tripped over mounting bolts secured to an explosive detection machine he alleged was defectively designed. Doe defendants were later named. The Boeing Company (whose structural engineer designed the anchoring system on the machine) entered into a settlement with Jones. This trial court granted summary judgment motions for defendants, Lloyd Electric Company Inc. (hired to perform electrical work on the machine and install seismic anchors) and P.S. Development Company, Inc. dba Comet (hired to install anchors) determining that neither designed or manufactured the machines or its mounting bolts. Jones had not challenged many of his objections and the trial court failed to rule on them, thus his objections were waived. Because Jones failed to oppose the summary judgment motions on the issue of products liability, not addressed on appeal, the Court's inquiry was limited to the negligence claim. The focus on appeal was the "completed and accepted" doctrine (*Sanchez v. Swinerton & Walberg Co.* (1996) 47 Cal.App.4th 146) wherein the court determined when

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PRESIDENT'S MESSAGE

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yourself. We must remember what a volunteer organization is. We do not have departments or staff to support the organization. We do not have a budget for secretaries, travel, research, marketing, or future investment strategy. We have a few active volunteers getting the work done. Therefore, if you want more done, you need to volunteer to do it. If you put in the effort, you will get the recognition and professional growth you are looking for. The association can not do it for you without your direct participation.

The committee assignments are the heart of this organization. They are listed on our web site under the "about" drop down list. If there is a committee that you would like to work on, let the chairman know. By doing the work, you will soon become chairman. Next thing you know, you are on the board and so on. CAIIA welcomes all of its members and encourages you be active. Let your light shine.

PETE VAUGHAN

President - CAIIA 2008-2009

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a contractor completes its work, accepted by the owner, the contractor is not liable to third parties injured as a result of a condition of the work, even if the contractor was negligent, unless the defect was latent or concealed rationalizing that an owner has duty to inspect the work for its safety shifting liability provided a reasonable inspection would disclose the defect. Here, the defect was observed by the owner's agents and precautions could have been taken.

Evidence showed Lloyd's and Comet's work was completed and accepted by TSA before the machine was put into full operation prior to the accident and TSA knew it posed a hazard Jones was aware of the as mentioned to co-workers and his supervisor. Jones argued the "completed and accepted" doctrine was abrogated by *Stewart v. Cox* (1961) 55 Cal.2d 857 and its progeny in *Stonegate Homeowners Assn. v. Staben* (2006) 144 Cal.App4th 740. In *Stewart*, a homeowner prevailed after a subcontractor applied concrete to a swimming pool that despite a crack being repaired, it caused water to escape damaging the house. In *Stonegate*, an owners' association prevailed when drainage problems arose, the court finding the contractor had mis-instructed the subcontractor about the scope or work to be performed, thus triable issues existed as to whether the subcontractor had complied with standards of care governing is duties to the owners' association. Because these cases lacked an opportunity to cure the construction defects, the Court here was not persuaded that *Stewart* abrogated the completed and accepted doctrine finding subsequent cases looked to this authority retaining its vitality. In *Klingenstein v. Miele P.P. Etc. Co.* (1919) 41 Cal.App 352, a contractor was hired to convey a printing press sold to a buyer to be installed by an employee of the manufacturer. The contractor's worker assisted installing the press that tipped over and killed a worker. The appellate court concluded the manufacturer was solely responsible reasoning its installer asserted control over the contractor's worker. Like in *Klingenstein*, the contractors had completed their work and retained control over the machine. TSA's acceptance was manifested by its placing the machine in operation and Jones was fully aware of the hazards. The judgment was affirmed.

Property Owner Owed Duty Of Care To Contractor's Employee To Remove Dangerous Dogs From His Property

In *Stephen Salinas v. Paolo Matin*, 2008 Westlaw 3974426 (Cal.App. 1 Dist.) filed Aug. 2008, Paolo Matin hired a contractor to construct a new foundation on his existing residence. The contractor hired Stephen Salinas for the project. With approval, the contractor stored equipment and materials in the backyard and garage on the property. The property owner hired two men to weed and garden the premises and allowed them to keep their pit bull terrier and pit bull-Labrador mix in the back yard. The contractor declared his concerns the dogs were ferocious to the owner. When the contractor sent Salinas to retrieve wood planks for scaffolding from the yard without notifying the owner on the same day permission was given for the dogs to roam the yard, Salinas was attacked by the pit bull terrier and bit repeatedly until he managed to jump onto the property owner's car. The trial court determined the owner had no duty to prevent the dog from attacking, finding property owners must have actual knowledge of the vicious nature or dangerous propensities of another dog to incur liability for injuries incurred on their property. Summary judgment was entered. On appeal, Salinas argued applying the duty of a residential landlord requiring actual knowledge was incorrect in that this was not a landlord-tenant case. Even so, in light of the contractor's declaration that he warned the owner of the ferocious dogs, the owner failed to prove he did not actually know the dogs were dangerous demonstrating a triable issue as to the owner's knowledge.

The burden of persuasion remains with the party moving for summary judgment. Once met, the burden shifts for the other party to show a triable issue of material fact exists as to that defense or cause of action. (*Code Civ. Proc. Section 437c.*) Where a landlord has relinquished control of property to a tenant, it releases the need to engage in potentially intrusive oversight of the property permitting the tenant to enjoy its tenancy unmolested. (*Stone v. Center Trust Retail Properties, Inc.*, (2008) 163 Cal.App.4th 608.) Only when the landlord has actual knowledge of a dangerous animal couples with the right to have it removed, does a duty of care arise.

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(*Ucello v. Laudenslayer* (1975) 44 Cal.App.3d 504.) The gardeners here were not tenants rather they were performing landscaping. The crucial element is control given the owner's continued presence on the property. The scope of the duty is determined by balancing the foreseeability against the burden of imposing the duty. Because the contractor declared his concerns about the dogs and the risk was foreseeable in that the owner gave his permission to unannounced visits to the property during construction and having the unfettered ability to prevent the dangerous condition on the property, the Court concluded the owner essentially participated in the creation of the condition permitting the dogs to run loose in the yard. Thus, summary judgment was improper.

Under Retained Control Doctrine Employer Is Not Liable Where Providing A Safe Environment Was Delegated To Subcontractor

In *Antonio Padilla v. Pamona College*, 2008 Westlaw 4060598 (Cal.App. 2 Dist) filed Sept. 2008, the college hired a contractor for remodeling work. Antonio Padilla, the contractor's employee, stood on a ladder to demolish an unpressurized metal pipe. A portion of that pipe came loose and stuck a pressurized pipe causing it to break erupting a gusher or water knocking him from his ladder. Padilla sued the college and the contractor (defendants) for negligence and premises liability alleging they had a duty to ensure the pipes were depressurized where he worked.

The defendants contended Padilla's employer had a contractual duty to understand which pipes were to be demolished and to protect those remaining. The architect's plans indicated some pipes were to remain pressurized to provide water for work on the project. Padilla was advised by his supervisor to avoid damaging the pressurized pipe Padilla claimed he was unaware any pipes were pressurized and knew only which pipes were to remain. Padilla contended the contractor failed to follow Cal-OSHA regulations (Cal.*Code Regs.*, tit. 8 Section 1735, subd.(a)) requiring utilities be shut off, capped and controlled during demolition. Padilla contended by contract with the college, the contractor was responsible for initiating, maintaining and supervising all safety precautions in connection with the project. Padilla argued that under *Privette v. Superior Court* (1995) 5 Cal.App. 689 and *Hooker v. Dept. of Transportation*, 27 Cal.4th 198, a hirer could be liable if its conduct affirmatively contributed to the independent contractor's employee's injuries. The trial court granted the defendants' motion determining they had delegated the task of providing a safe environment to Padilla's employer and there was no necessity to relocate or shut off the pipe. On appeal, Padilla contended the defendants should have depressurized, rearranged, or relocated it while the demolition was taking place relying upon *Ray v. Silverado Constructors* (2002) 98 Cal.App.4th 1120. The court in Ray dealt with whether the contractor's failure to close the roadway during high winds contributed to the death of a worker struck in the head by building material. Here, while only the defendants had the ability to physically turn off the pipe, this control did not rise to the level necessary to depressurize the pipes not marked. Padilla's employer had not requested the defendants to depressurize the unmarked pipes nor did they prevent his employer from setting up an emergency valve on the pipe distinguishing this case from *Ray* wherein complete control was retained. The Court rejected Padilla's argument the Regulation 1735(a) imposed a non-delegable duty that by violating it established negligence per se. Padilla relied on *Evard v. Southern California Edison* (2007) 153 Cal.App.4th 137 it was the nature of the regulation that determined whether the duties created were non-delegable. Thus, the hirer will be liable if its breach of regulatory duties affirmatively contributes to the injury of a contractor's employee. Section 1735(a) pertained solely to the preparation of the worksite when contractors were necessarily present. Padilla could not establish negligence per se in a factual showing that the area had properly been prepared for demolition and did not direct the manner in which Padilla went about his work. Regarding Padilla's argument the defendants failed to disclose a known hazardous condition, the Court looked to *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, regarding a contractor's ability to reasonably ascertain the condition and liability to the landlord if he fails to warn of it. Under *Kinsman*, the defendants were not be liable because Padilla's employer failed to take necessary precautions to protect him from harm during the demolition process. The judgment was affirmed.

Commissioner Poizner Announces Arrest of Husband and Wife in Connection with Insurance Fraud Charges

SACRAMENTO - Insurance Commissioner Steve Poizner today announced the arrests of a husband and wife pair, in connection with insurance fraud charges. Joanne Fawcett, 61 and Steven Fawcett, 62, both of Sacramento, were arrested in Sacramento on October 7.

"Insurance fraud is not a victimless crime," said Commissioner Poizner. "In fact, it adds the equivalent of a $500 tax to every man, woman and child in the state of California. Department of Insurance investigators are on the job, making sure that anyone who attempts to break the law will be brought to justice."

In April 2007, Joanne Fawcett claimed she was hit by a vehicle as she was walking in a parking lot, and injured her knee. Fawcett then alleged that as a result of her injury, she could not walk up stairs or work. Mr. Fawcett confirmed his wife's claims in an interview with insurance company investigators. The CDI investigation revealed that Mrs. Fawcett was able to walk up stairs and was employed cleaning rental properties during the time period she claimed to be unable to do so. Additionally, surveillance video obtained during the investigation revealed that both Joanne and Steven Fawcett working for a property management company. The video also shows Mrs. Fawcett walking normally and moving a refrigerator into a rental property. The Department of Insurance investigation revealed that Joanne Fawcett has filed 24 injury claims since the mid-1990s, costing insurance companies in excess of $450,000.

If convicted, Mr. and Mrs. Fawcett could each face up to five years in prison and thousands of dollars in fines. The Sacramento District Attorney's Office is prosecuting this case.

Weekly Law Resume

Prepared by Low, Ball & Lynch, Attorneys at Law, San Francisco, CA

Underinsured Motorist Coverage – Arbitration – Insured

Lloyd Bouton v. USAA Casualty Insurance Company, Court of Appeal, Fourth District (October 7, 2008)

This case was reviewed by the California Supreme Court and was remanded back to the Court of Appeal over the issue of who decides whether a claimant qualifies as an insured for underinsured motorist coverage.

Lloyd Bouton was injured in an automobile accident while riding in a vehicle owned and operated by Kevin Daniels. He settled his claims against Daniels and Daniels' insurer for the policy limits of $15,000. He then demanded underinsured motorist arbitration under the USAA policy issued to his sister. He alleged he was a permanent resident of her household and a blood relative of her. He filed a petition to compel arbitration.

USAA opposed the petition, stating the issue of whether Bouton was an insured was not an issue for arbitration. The trial court denied the petition. The Court of Appeal, upon appeal by Bouton, reversed the trial court, holding the issue of whether Bouton was an insured was an arbitrable issue. Upon petition to the California Supreme Court, the Supreme Court concluded that a court, not an arbitrator, must decide whether Bouton was an insured. The case was remanded to the Court of Appeal for further proceedings consistent with that opinion. This decision was the result of the Court of Appeal upon remand.

The Court of Appeal reversed the order denying the petition to compel arbitration and remanded the matter to the trial court to conduct a hearing on whether Bouton was an insured. The court noted that Insurance Code §11580.2 provides for arbitration of underinsured motorist disputes. The arbitrator is to decide liability and the amount of damages to which the claimant is entitled. The issue of whether the claimant qualifies for coverage is not subject to arbitration. Thus, the issue of whether Bouton qualified as an insured was one that was required to be decided by the trial court.

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In reviewing the trial court decision, the Court of Appeal concluded the issue of whether Bouton was an insured under the policy was not decided. The Court decided the issue solely on the basis of whether the issue was subject to arbitration. The Court of Appeal concluded this issue could be decided by the trial court on a petition to compel arbitration. It was not necessary to file a separate declaratory relief action. The Court based this decision on cases that hold that in a petition to compel arbitration, the trial court should make a preliminary determination whether the petitioner can enforce the arbitration agreement. In this case, the trial court could determine whether Bouton had standing to enforce the policy's arbitration provisions. This was the most efficient way to determine that question. The Court pointed out that a separate declaratory relief action was also a way to decide that issue, but it was not required.

Since it did not appear the trial court considered the evidence showing Bouton to be an insured, the matter was remanded to the trial court for such a determination. If decided under a petition to compel arbitration, a summary procedure could be held where the Court considered affidavits, declarations, and other documentary evidence, as well as oral testimony to reach a final determination. For that purpose, the matter was remanded to the trial court.

COMMENT

This decision attempts to clarify how the issue of a claimant's standing to make an underinsured motorist claim can be determined. It provides a useful outline for those handling such claims.

Bad Faith – Underinsured Motorist Coverage

Stuart Brehm IV v. 21st Century Insurance Company, Court of Appeal, Second District (September 16, 2008)

After an underinsured motorist claim has been arbitrated and an award made and paid, the question arises whether a claim for bad faith against the insurance carrier can be made. This case discusses that issue. Stuart Brehm, his father and mother were all injured in an August, 2003 traffic accident caused by Natalie Aguirre. Brehm and his parents settled with Aguirre's insurance carrier for $30,000. Each claimant received $10,000. Brehm then made written claim to 21st Century Insurance Company under the underinsured motorist provisions of the policy which covered his vehicle. The claim went to arbitration when the parties were unable to agree as to the nature and extent of the injuries and the amount to which Brehm was entitled. Brehm had demanded the remaining amount of the limits, $90,000, which reflected a credit for the amount paid by the tortfeasor's carrier, and $5,000 in medical benefits. 21st Century offered $5,000 in addition to benefits already paid. The matter was arbitrated and Brehm was awarded $91,186, which was reduced to the available limit of $90,000. The award was then paid. Brehm then sued 21st Century for bad faith. The trial court sustained 21st Century's demurrer to the complaint on the basis there was no bad faith as a matter of law because there was a genuine dispute as to the value of the claim and 21st Century had a contractual right to challenge the amount of the loss pursuant to arbitration. The case was dismissed following entry of the demurrer without leave to amend. Brehm appealed. The Court of Appeal reversed. The Court stated that while there can be no breach of the covenant of good faith and fair dealing if there is no coverage or potential for coverage, a breach can occur even though there is no breach of an express contractual provision. Where benefits are due, delayed payment can give rise to such a cause of action. 21st Century argued that the genuine dispute rule allowed it to delay payment while arbitration was pursued. This doctrine holds that the existence of a genuine dispute with an insured as to the amount the insured is entitled to receive is not bad faith. The Court noted that the California Supreme Court has held the genuine dispute rule cannot be invoked to protect a delay in payment of benefits unless the position was both reasonable and in good faith. In this case, Brehm alleged that 21st Century's position was not in good faith because they had relied upon a sham IME. He further alleged that 21st Century's settlement offer prior to arbitration was unreasonably low in light of the medical evidence in its possession. The Court stated these issues could not be resolved at the pleading stage, as they were questions of fact. The Court further held that the contractual right to arbitrate a dispute cannot protect the party from a claim of breach of the covenant. While recognizing the right to arbitrate, the Court stated 21st Century still had an obligation to honestly assess the claim and make a reasonable effort to resolve it. These two rights were not inconsistent. The Court further rejected 21st Century's argument that there could be no bad faith from exercising the right to arbitration. The Court acknowledged there is no bad faith from going to arbitration, but this did not vitiate the need to attempt to effectuate a prompt and fair settlement. The Court stated that, while an insurer who loses at arbitration is not automatically liable for bad faith, the insurer must still act in good faith to attempt to resolve the dispute, so as not to unreasonably withhold payments due under the policy. The matter was remanded to the trial court for further proceedings.

COMMENT

While this decision makes the distinction between simply going to arbitration and trying to settle the claimant's matter, we suspect that a demand for arbitration will be interpreted as a basis for bad faith by those who wish to pursue it. This will make these matters even tougher to resolve.

For all or you with any money left, be aware of the next expected mergers so that you can get in on the ground floor and make some BIG BUCKS!

Watch for these consolidations in 2009

1. Hale business Systems, Mary Kay Cosmetics, Fuller Brush and W.R. Grace Co. will merge and become: Hale Mary Fuller Grace

2. PolygramRecords, Warner Bros. And ZestaCrackers join forces and become: Poly Warner Cracker

3. 3M will merger with Goodyear and become: MMMGood

4. Zippo Manufacturing, AudiMotors, Dofasco and Dakota Mining will merge and become: ZipAudiDoDa

5. Fairchild Electronics and Honeywell Computers will become: Fairwell Honeychild

6. Grey Poupon and Docker Pants are expected to become: PouponPants

7. Knotts Berry Farm and the National Organization of Women will become: Knott NOW!

And Finally . . .

8. Victoria's Secret and Smith/Wesson will merge under the new name: Titty Titty Bang Bang