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December 2016

Every Mistake of Judgment is not Negligence
Credit to Low, Ball & Lynch, San Francisco, CA

Sassa Minnegren v. Joshua B. Nozar

Court of Appeal, Second Appellate District (October 24, 2016)

In auto collision cases, the law establishes "that every mistake of judgment is not negligence, for mistakes are made even in the exercise of ordinary care, and whether such mistakes constitute negligence, is a question of fact." In this case, the question arose as to whether a jury verdict in defendant's favor should be overturned, based on substantial testimony that the defendant never saw the other vehicle, and never stopped at a stop sign.

On the morning of September 1, 2010, Joshua Nozar ("Nozar"), while late for his college class and while hastily attempting to obtain a nearby parking spot, proceeded through a controlled intersection after stopping at a stop sign. Sassa Minnegren ("Minnegren"), who had no stop sign and thus had the right-of-way, hit Nozar's vehicle after Nozar misjudged the closing distance of Minnegren's vehicle. Nozar knew the street on which Minnegren was travelling was not controlled by a stop sign.

Varying eyewitness accounts claimed that Nozar "shot out" and "rolled through" the intersection. Nozar denied rolling through the intersection. The responding police officer cited Nozar for failure to yield and deemed him the cause of the accident.

Minnegren filed suit, alleging a cause of action for negligence. During cross examination at trial, Nozar admitted using bad judgment and being the unintentional cause of the accident.

The jury, without being given a jury instruction for negligence per se, returned a defense verdict. Minnegren filed post-trial motions for a new trial and for Judgment Notwithstanding the Verdict ("JNOV") on the grounds of insufficient evidence to support the verdict and that the failure of the court to provide a negligence per se jury instruction prejudiced Minnegren. The trial court denied both motions. Minnegren appealed.

In its analysis of whether the trial court correctly denied Minnegren's motion for new trial and motion for JNOV, the Appellate Court noted that a breach of duty of care and resulting damages are factual jury questions. The Court noted that the fact that Nozar believed and admitted he caused the collision does not necessarily mean he breached a duty of care. The Court further noted that because Nozar saw Minnegren's car approaching and believed he could make it through the intersection safely, he exercised some measure of care. It was a jury question as to whether he exercised "due care."

The Court next moved to Minnegren's argument – the lack of substantial evidence upon which the jury relied in rendering its verdict. The Court applied the substantial evidence test. The test required the Court to view "the record in a light most favorable to the verdict, resolving all conflicts in the evidence and drawing all reasonable

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CAIIA Newsletter
CAIIA Office
PO Box 168
Burbank, CA 91503-0168
Website: www.caiia.com
Email: info@caiia.com
Tel: (818) 953-9200

Editor: Sterrett Harper
Harper Claims Service, Inc.
(818) 953-9200
harperclaims@hotmail.com

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California Association of Independent Insurance Adjusters, Inc.

President's Office

PO Box 28148

Anaheim, CA 92809-0138

Email: steve.washington@sbcglobal.net

Immediate Past President
Paul Camacho, RPA, ARM, Mission Adjusters, So. Lake Tahoe, CA
mail@missionadjusters.com

President
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steve.washington@sbcglobal.net

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OF COUNSEL
Mark S. Hall Esq., HALL LAW FIRM
24881 Alicia Parkway, Suite E-500
Laguna Hills, CA 92653
T. 949.297.8444
F. 949.855.6531

mark@halllawfirm.org

President's Message

Christmas Trees

Steve Washington
CAIIA President

I was on my way to Thermal California to look at a piece of equipment and thinking about what I should write about. So here it is. Christmas is coming upon us faster than a cheetah chasing a wildebeest. Here are some fun and not so fun facts about Christmas trees.

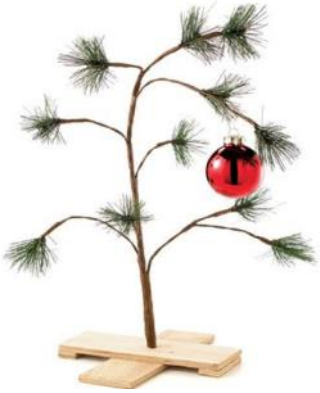
Germany is credited with starting the Christmas tree tradition as we know it in the 16th Century. The tallest Rockefeller Center Christmas tree was 100 feet and was a Norway Spruce. In the United States there are more than 15,000 Christmas tree farms. Manufactured Christmas tree ornaments were first sold by Woolworths in 1880. The average Christmas tree contains about 30,000 bugs and insects. In the first week a tree in your home will consume as much as a quart of water per day.

Did you know that one (1) in every three (3) Christmas tree fires is caused by electrical problems? A heat source to close to the tree causes one (1) in every four (4) fires. Christmas tree fires, resulting in the ignition of the structure, killed seven people last year. There were many more injured.

Safety tips to prevent Christmas tree fires include; pick out a healthy green tree, place the tree away from any heat source, for example a fireplace, water the tree regularly, and use proper working lights when decorating, which need to be turned off at night or when your away.

There are many types and sizes of Christmas trees, tall, too tall, wide or skinny….some are Douglas or Noble Firs, Virginia Pine, Colorado Blue Spruce and even Cedar. But I think Charlie Brown (looks like a future Insurance Adjuster) had the right idea and maybe the best Christmas tree; free of bugs, not much of a fire risk, very inexpensive and can sit on a coffee table.

Merry Christmas to all and to all a good night!



Steve Washington
CAIIA President 2016-2017
Washington & Finnagan, Inc.
Steve.washington@sbcglobal.net

NEWS OF AND FROM MEMBERS

BILL SUTER IS ALIVE AND KICKING

Many of you will remember Bill Suter of Suter Claims Service. He was a CAIIA Past-President, the executive director of the CAIIA for years, a CAIIA Lifetime Achievement Award winner and all around good guy!. He retired about 23 years ago and is still very active. He contacted the Executive Office recently and advised that he is finally coming into the digital age. He wants everyone to know that he has an email address and would love to hear from you. His email address is: billsuter1319@icloud.com.

DOI Announcement

Friends' fast and furious fraud scheme ends in felony charges

$250K fraud scheme behind reported theft of classic '55 Porsche

SACRAMENTO, Calif. - Constantine Petros, 54, of Petaluma was arrested on October 19, 2016, in Sonoma County and Christopher Hatton, 60, of Tahoma, surrendered himself to Placer County Superior Court on November 14, 2016. Both were charged with multiple felony counts of insurance fraud and conspiracy for filing a false insurance claim for the alleged theft of a classic 1955 Porsche 356 Speedster.

After receiving a suspicious claim referral from Farmers Insurance, the Department of Insurance Fraud Division launched an investigation into circumstances surrounding Hatton's claim that his $250,000 collectable 1955 Porsche 356 Speedster was stolen in Nevada while he attended the area's annual rib cook-off.

"Petros and Hatton allegedly went to great lengths to weave an elaborate scheme in an attempt to defraud Farmers Insurance out of $250,000," said Insurance Commissioner Dave Jones. "Solid investigative work by department detectives stopped them in their criminal tracks."

The investigation revealed a connection between Petros and Hatton and an alleged conspiracy to file a false insurance claim for a stolen collectable Porsche that Hatton never owned and was not stolen.

The alleged scheme began with Petros and Hatton creating a fraudulent paper trail showing Hatton purchased a 1955 Porsche 356 Speedster. Petros then provided a different Porsche so Hatton could secure an appraisal documenting the value of the collectable car. The investigation revealed the vehicle identification number or VIN was altered on the Porsche to make it appear as a different 1955 Porsche 356 Speedster. Using the Porsche with the altered VIN, Hatton was able to secure a vehicle appraisal value of $250,000. Hatton then used the appraisal to obtain an insurance policy for the collectable Porsche. On September 4, 2016, Hatton reported the Porsche 356 Speedster stolen to police and Farmers Insurance.

If convicted on all counts, Petros and Hatton could face more than five years in prison. The case is being prosecuted by the California Attorney General's Office. If anyone has information on this crime or other crimes related to Petros, or has information regarding the missing Porsche, please contact CDI fraud detectives at (916) 854-5842.

Assumption of Risk– Waiver of Liability

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

Kirk Anderson v. Fitness International, LLC

Court of Appeal, Second District (October 27, 2016)

The general rule in California is that all persons are responsible "for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property . . . ." (Civ. Code, § 1714, subd. (a).) However, parties may contract for the release of liability for future ordinary negligence so long as such contracts do not violate public policy. This case considered whether a waiver of liability in a health club contract could successfully be used against claims that the club's shower roof floors were unsafe.

Kirk Anderson ("Anderson") joined the L.A. Fitness health club in Glendale in December of 2011. The membership agreement he signed contained a "release and waiver of liability and indemnity" against "any loss or damage…on account of injury to Member's person or property . . . whether caused by the active or passive negligence of L.A. Fitness or otherwise . . . while member is in, upon or about L.A. Fitness premises or using any L.A. Fitness facilities, services or equipment . . ."

Subsequently, in September of 2012, after completing his exercises, Anderson went into the large shower room, wearing shower sandals and carrying his soap in one hand. As he moved toward one of the shower nozzles, his left foot slipped, and he began to fall. When he hit the floor, his humerus snapped in two. One of the fitness instructors called 911, and Anderson was taken to the hospital. He underwent surgery to repair his humerus with a plate and screws.

Anderson filed suit against L.A. Fitness, alleging one cause of action for negligence. He alleged that L.A. Fitness recklessly and negligently maintained a shower room at its facility that caused his injury, that the tile floor has sharply downward slanting slopes towards two drains in the center of the shower room, and that the tile floor was routinely layered and covered with body oils, soap, shampoo, and conditioner residue. Anderson further alleged that L.A. Fitness knew or should have known of the dangerous conditions, in part, because he had repeatedly complained to L.A. Fitness' employees on at least two prior occasions when he had fallen without injury. He alleged L.A. Fitness' conduct constituted gross negligence, and was "an extreme departure from the ordinary standard of care. Because these latter allegations were conclusory, the Court granted L.A. Fitness' motion to strike references to "gross negligence," but did so with leave to amend should discovery in the case warrant it.

Meanwhile, L.A. Fitness moved for summary judgment, asserting that the release and waiver of liability in the Membership Agreement barred any and all claims against L.A. Fitness. Anderson opposed the motion, arguing that even with the granting of the motion to strike, the evidence was sufficient to raise a triable issue of material fact as to whether the club's acts and omissions constituted gross negligence. The trial court granted the motion for summary judgment, noting that the release clearly barred any claims for "ordinary negligence," and that plaintiff had not pled in its complaint nor articulated in its opposition to the motion for summary judgment any facts that would support a finding of gross negligence. The trial court held that the complaint was premised entirely on the contention that Anderson and others had previously slipped in the shower area and had asked L.A. Fitness to make the area more slip-resistant, but that it had failed to do so. The court said there was no case law showing such action to be gross negligence. Anderson appealed.

The Court of Appeal affirmed, concluding no triable issue of material fact existed to preclude summary judgment.

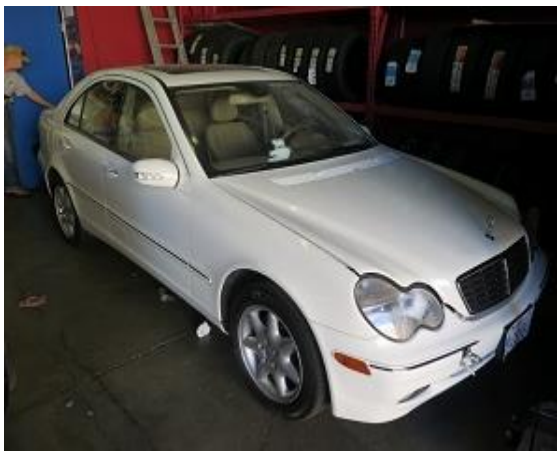
First, the Court confirmed that Anderson as the plaintiff bore the burden to produce evidence creating a triable issue of fact on gross negligence. If a complaint alleges facts demonstrating gross negligence in anticipation of a waiver or release, it is then the moving defendant's burden of refuting the allegations constituting gross negligence.

The Court held that Anderson had failed to alleged sufficient facts to support a theory of gross negligence. Ordinary negligence "consists of the failure to exercise the degree of care in a given situation that a reasonable person under similar circumstances would employ to protect others from harm." Mere nonfeasance, such as the failure to discover a dangerous condition or to perform a duty, amounts to ordinary negligence. To support a theory of gross negligence to overcome a waiver of liability, a plaintiff must allege facts showing either a want of even scant care or an extreme departure from the ordinary standard of conduct. Thus, in cases involving a waiver of liability for future negligence, courts have held that conduct that substantially or unreasonably increased the inherent risk of an activity or actively concealed a known risk could amount to gross negligence, which would not be barred by a release agreement.

Auto Fire

Credit to: Garrett Engineering, Long Beach, CA

The insured's 2004 Mercedes-Benz C240 suffered an engine fire. GEI was assigned to determine the origin and cause, as well as to research all applicable recalls. A search of recall notices found no open manufacturing recall issues that might have been related to the fire.



Three Mercedes-Benz dealer service order/repair invoices were provided by the client for our examination. The first was dated June 20, 2012. It reported that the engine was not running well,and service was performed on number 3 and number 6 cylinders. The second invoice was dated October 8, 2013. It too reported that the engine was not running well, with multiple misfires found. A third Mercedes-Benz dealer invoice was dated December 8, 2015. It also found that the engine was not running well. Several problems were found, including the need to replace the catalytic converters. The customer refused all services. The fire occurred roughly six months later. The physical inspection of the vehicle showed damages from a limited fire. The exterior of the vehicle was examined. Fire damage was found to the left front fender and the left front tire.

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The interior of the vehicle and the remaining body panels and tires were not affected by the fire and were found in good condition. The hood was opened, and the fire area examined. The left side motor mount, wiring for the ABS control module, left front brake fluid hose, left headlight, and minor plastic components in the left front of the engine compartment and left front wheel well were damaged by the fire.

The point-of-origin of the fire was located in front of the left side catalytic converter. The catalytic converter had been failing for a significant period of time as indicated by the long-term wear-and-tear issues documented by the service records. Catalytic converters of this age with this many miles on them can get clogged up and generate sufficient heat to cause the converter(s) to glow red-hot. The power steering fluid reservoir was found profoundly overfilled to the point where the overflow of fluid was leaking from the reservoir. The power steering fluid spread downwards and along the left side of the engine.

The cause of the fire was the failing catalytic converter that reached a high enough operating temperature to ignite the power steering fluid leaking from the overfilled power steering fluid reservoir.

The Mercedes-Benz dealer had determined that the catalytic converters were worn out and required replacement well prior to the date-of-loss fire as documented on the service invoices. The customer declined the recommended repairs. The continued operation of the vehicle with the poor condition of the catalytic converters allowed the conditions to develop that ignited the overflowing power steering fluid.

Customers who decline recommended repairs and defer needed maintenance frequently discover their thrift to be ill advised, as preventable larger (and more expensive) failures later inevitably occur. Even a Mercedes-Benz will wear out. In this case, replacement of the clogged catalytic converters would have prevented the fire.

Carpooling

Credit to: Tyson & Mendes, La Jolla, CA

Pierson v. Helmerich & Payne International Drilling Co. 2016 WL 6216570
October 6, 2016

In this case, plaintiff Brent Pierson appeals from the trial court's granting of summary judgment in favor of defendant Helmerich & Payne International Drilling Company on the grounds that its employee was not in the course and scope of his employment at the time of his vehicle accident with plaintiff. Based on its analysis of the going and coming rule, and the exceptions thereto, the Pierson court affirmed the judgment.

Facts

Defendant Helmerich & Payne International Drilling Company operates oil drilling rigs. These drilling rigs are operated 24 hours per day by two crews which each work 12 hour shifts for 14 days followed by 14 days off. This scheduling allows employees to reside far from the drilling site. Helmerich & Payne provides employees who live more than two hours away from the rig location with a shared room at a Best Western Hotel. Employees make the hotel arrangements through Helmerich & Payne and can request a specific roommate if they wish. Typically, the employees assigned to a room work opposite shifts. Helmerich & Payne employees do not receive a bill for their stay at the hotel because Helmerich & Payne pays the bill directly. Employee spouses are not allowed to stay in the rooms provided by Helmerich & Payne. Out-of-town employees who stay at the hotel are responsible for arranging and paying for their own transportation between their home and the hotel. Similarly, employees are responsible for arranging and paying for their transportation to and from the hotel and job site.

Helmerich & Payne employee Luis Mooney lived in Bakersfield which was relatively close to the job site. Two of his co-workers and fellow crew members, Ruben Ibarra and Mark Stewart, did not live in the area and stayed at the Best Western Hotel. Mr. Ibarra was the supervisor of the crew. On many occasions, Mr. Mooney provided rides to and from the drill site for Mr. Ibarra and Mr. Stewart in his personal vehicle. Mr. Mooney estimated he had given Mr. Ibarra a ride at least 50 times. Mr. Mooney's route from his home to the job site took him by the hotel.

No one at Helmerich & Payne advised Mr. Ibarra to seek a ride from other employees. This was something Mr. Ibarra did to save the personal expense of a taxi ride to and from the worksite. Mr. Mooney never asked Mr. Ibarra or Mr. Stewart to reimburse him for the rides. Helmerich & Payne never reimbursed Mr. Mooney, Mr. Ibarra or Mr. Stewart for the out of-pocket cost of traveling to and from the oil rig. Similarly, Helmerich & Payne did not pay them for their travel time.

On December 12, 2011, after the end of their shift, Mr. Mooney gave Mr. Ibarra and Mr. Stewart a ride to the hotel on his route home. On the way, Mr. Mooney's vehicle crossed the double yellow line and struck a vehicle being driven by plaintiff Brent Pierson. Mr. Pierson sued both Mr. Mooney and Helmerich & Payne, claiming Mr. Mooney was acting in the course and scope of his employment at the time of the accident.

The Going And Coming Rule

As a general matter, under the going and coming rule, employees traveling to and from work are considered outside the scope of employment and, therefore, employers are not liable for torts committed during the employee's commute. "The rationale for the rule is that the employment relationship is suspended from the time the employee leaves work until he or she returns because an employee ordinarily renders no service to the employer while traveling."

The going and coming rule, however, is subject to several exceptions which were also considered by the Pierson court. Some of the factors which are relevant to the application of the going and coming rule and its exceptions, are the following: "(1) the role played by the employer in any carpooling arrangements; (2) payments by the employer to its employees for the time or expenses incurred in commuting to the jobsite; (3) employer control over the commute; (4) the location of the accident compared to the route the driver would have taken if not transporting other employees; and (5) any incidental benefits accruing to the employer as a result of the employees' carpooling arrangements."

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In this case, although Anderson alleged that the tile floor in the shower room was routinely covered in oily and soapy residue, he did not allege facts to show its condition was an "extreme departure" from conditions one would expect in a health club shower facility. Nor could he allege the risk in using the shower facility was unknown to him, given his prior falls and his execution of the Release. Similarly, he failed to allege facts to show L.A. Fitness' maintenance of the shower room constituted an extreme departure from safety standards or that L.A. Fitness somehow concealed a known dangerous condition. Collectively, Anderson's allegations demonstrated, at best, that L.A. Fitness failed to mitigate, guard against, or warn of a dangerous condition, which is insufficient to support a theory of gross negligence, as opposed to ordinary negligence.

Summary judgment in favor of L.A. Fitness was affirmed.

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Case Analysis

There are three primary exceptions to the going and coming rule – the required vehicle exception, the incidental benefit exception and the special errand exception.

The first exception, the required vehicle exception, covers situations where there is an express or implied employer requirement the employee furnish a vehicle. "If an employer requires an employee to furnish a vehicle as an express or implied condition of employment, the employee will be in the scope of his employment while commuting to and from the place of his employment." In this regard, plaintiff argued the required vehicle exception applied because Mr. Ibarra was Mr. Mooney's supervisor and asked Mr. Mooney for a ride to and from work.

The court concluded this argument was unreasonable under the facts of the case stating: "First, crew members, not H&P, were responsible for arranging their transportation to and from work. Second, providing transportation to Ibarra or other crew members was not a condition of Mooney's employment. Third, there would have been no repercussion to Mooney's job status if he did not provide Ibarra with a ride. These undisputed facts make it unreasonable to infer that when Ibarra asked Mooney for a ride to and from work, H&P was impliedly requiring Mooney to provide Ibarra with transportation."

The second exception, the incidental benefit exception, is described as follows: "The drive to and from work may . . . be within the scope of employment if the use of the employee's vehicle provides some direct or incidental benefit to the employer. There may be a benefit to the employer if (1) the employee has agreed to make the vehicle available as an accommodation to the employer, and (2) the employer has reasonably come to rely on the vehicle's use and expects the employee to make it available regularly."

In discussing this exception, the Pierson court noted "not all benefits to the employer are of the type that satisfy the incidental benefits exception. The requisite benefit must be one that is not common to commute trips by ordinary members of the work force . . . Thus, employers benefit when employees arrive at work on time, but this benefit is insufficient to satisfy the incidental benefits exception. An example of a sufficient benefit is where an employer enlarges the available labor market by providing travel expenses and paying for travel time."

In Pierson, the court concluded Mr. Mooney's use of his personal vehicle to drive his fellow crew members to and from the job site did not provide a direct or incidental benefit to Helmerich & Payne. This was supported by the fact Helmerich & Payne did not pay travel expenses or travel time to its employees.

Under the third exception, the special errand exception, an "employee is considered within the scope of employment while coming from home or returning to it, while on a special errand either as part of his regular duties or at a specific order or request of the employer . . . An example of a special errand is the delivery of mail to a post office on the way home from work." The court noted "employees on a special errand act within the scope of employment until they deviate from the errand for personal reasons" and an "employee is no longer within scope of employment if he or she completely abandons the errand for personal reasons."

With regard to the Pierson case, the court noted the dispute regarding the special errand exception involved whether Mr. Ibarra's request to Mr. Mooney for a ride to and from the job site could be imputed to Helmerich & Payne. Ultimately, the court ruled there was "no reasonable basis for inferring H&P's conduct caused or allowed crew members to believe that Ibarra's requests for rides were made on behalf of H&P." Therefore, the court ruled the special errand exception did not apply. This finding was based primarily on the fact that Helmerich & Payne made employees responsible for their own transportation to and from the job site, and it did not encourage or discourage carpooling or ridesharing.

On the Lighter Side...

Let's face it - English is a crazy language. There is no egg in eggplant, nor ham in hamburger; neither apple nor pine in pineapple. English muffins weren't invented in England or French fries in France . Sweetmeats are candies while sweetbreads, which aren't sweet, are meat. We take English for granted. But if we explore its paradoxes, we find that quicksand can work slowly, boxing rings are square and a guinea pig is neither from Guinea nor is it a pig..

And why is it that writers write but fingers don't fing, grocers don't groce and hammers don't ham? If the plural of tooth is teeth, why isn't the plural of booth, beeth? One goose, 2 geese. So one moose, 2 meese? One index, 2 indices? Doesn't it seem crazy that you can make amends but not one amend? If you have a bunch of odds and ends and get rid of all but one of them, what do you call it?

If teachers taught, why didn't preachers praught? If a vegetarian eats vegetables, what does a humanitarian eat? Sometimes I think all the English speakers should be committed to an asylum for the verbally insane. In what language do people recite at a play and play at a recital? Ship by truck and send cargo by ship? Have noses that run and feet that smell?

How can a slim chance and a fat chance be the same, while a wise man and a wise guy are opposites? You have to marvel at the unique lunacy of a language in which your house can burn up as it burns down, in which you fill in a form by filling it out and in which, an alarm goes off by going on.

English was invented by people, not computers, and it reflects the creativity of the human race, which, of course, is not a race at all. That is why, when the stars are out, they are visible, but when the lights are out, they are invisible.

PS. - Why doesn't 'Buick' rhyme with 'quick' ?

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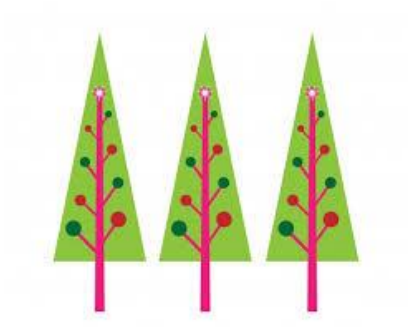
inferences in favor of the verdict." (Kephart v. Genuity, Inc. (2006) 136 Cal.App.4th 280, 291; 38 Cal.Rptr.3d 845.) "We can interfere with the jury's determination only if, when the record is so viewed, we can say that there is no substantial evidence to support the verdict. [Citations.]" (Ibid.). Pursuant to the holding in Kephar, the Court could only rely on Nozar's testimony that he did indeed stop at the stop sign, despite contradictory accounts from eyewitnesses, because Nozar's testimony was in the light most favorable to the verdict.

Finally, regarding the lack of a negligence per se jury instruction; because Nozar was cited for failure to yield the right-of-way and was deemed to be the cause of the accident by the responding police officer, the argument could be made that he was negligent per se, requiring a corresponding jury instruction. The Court held that the driver is liable only if he or she failed to act as a reasonably prudent person. Because the jury was instructed on general negligence and found that the defendant acted as a reasonably prudent and cautious person, the plaintiff was not prejudiced by the lack of a negligence per se instruction. Spriesterbach v. Holland (2013) 215 Cal.App.4th 255, 155.

The Court of Appeal ultimately held that the trial court did not abuse its discretion in denying Minnegren's motion for new trial and motion for JNOV.



Happy Holidays!