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Owners of Rental Property Liable for Drowning of Non-Tenant Minor

By David L. Barch, Esq.
Attorney

On February 25, 2014, the Court of Appeal for the Third District of California handed down a decision holding that homeowners who rented out their home – in this case, with a pool – had a duty to protect minors from encountering the pool, even if those individuals were not tenants.

In *Johnson v. Prasad* (2014) 224 Cal.App.4th 74, plaintiff Melina Johnson filed suit against property owners Benorad and Brig Prasad, who had rented out a house with a swimming pool to tenant Tomica Johnson (no relation to plaintiff). The suit alleged wrongful death for the drowning of Melina Johnson's 4-year-old son, Allen Soucy, alleging that the property owners were negligent in failing to properly fence the pool and/or to install automatic door latching mechanisms to protect children from accessing a pool.

In June 2009, Allen's grandparents had brought him to the home for a get-together. The backyard of the home had a swimming pool, and although there was a fence around the backyard itself, there was no separate fence around the pool. When they got there, a number of other people, including children, were already there, and they all went into the pool. Eventually, everyone got out and returned to the house, but Allen's grandmother failed to close the security gate or the sliding glass door behind her, and at some point, Allen went back outside to the backyard.

He was later discovered at the bottom of the pool. He was kept alive on a ventilator but died approximately two weeks later.

Prior to trial, the defendant homeowners filed a motion for summary judgment, asserting they had no duty of care to either Allen Soucy or his mother, plaintiff Melina Johnson, because (1) there were no dangerous conditions on their property; (2) even if there were, they had no notice of such conditions; and (3) they did not act in any way to cause the boy's death. The trial court granted the motion, finding that (a) the defendant homeowners had no duty to inspect the premises; (b) there was no reason to expect children to be playing in the pool; (c) the pool was not a nuisance or unreasonably dangerous; and (d) the homeowners did not contribute to the incident.

The Court of Appeal reversed,

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Truck Drivers in California Entitled to Paid Rest and Meal Breaks—A Trap for the Unwary

By Arsen Sarapinian, Esq.
Attorney

On July 9, 2014, a 3-judge panel of the Ninth Circuit Court of Appeals ruled that truck drivers in California are entitled to paid rest and meal breaks under state law, despite nation-wide federal authority to the contrary. The decision is certain to have implications on trucking and insurance industries.

In *Dilts v. Penske Logistics, Inc.* (9th Cir. 2014) D.C. No. 3:08-cv-00318-CAB-BLM, a certified class of 349 delivery drivers and installers brought a class action against Defendants, motor carriers, alleging that Defendants routinely violate California's meal and rest break laws, Cal. Lab. Code §§ 226.7, 512; Cal. Code Regs. tit. 8, § 11090.

California law requires employers to provide paid time off during extended work shifts—under current law, a 10-minute rest break every four hours and a 30-minute meal period every five hours. Truck drivers argue that they typically work more than 10 hours a day and are either required or encouraged to take unpaid breaks on their own time. Motor carriers take the position that they are exempted from the California law by a nation-wide federal law signed by President Bill Clinton in 1994 (i.e., The Federal Aviation Administration Authorization Act ("FAAAA").)

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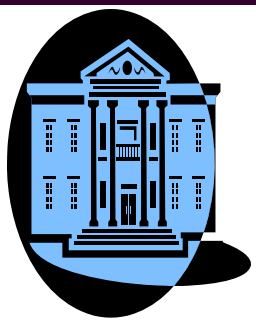

Owners of Rental Property Liable for Drowning, Cont'd

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reasoning that the foreseeability of harm to a child such as Allen weighed in favor of imposing a duty of care on the homeowners. The court relied in part on the spirit (if not quite the letter) of California Health and Safety Code section 115922 (i.e., the Swimming Pool Safety Act), which imposes a duty on homeowners to ensure the safety of their property with respect to pools. (In fact, the Act itself did not specifically apply to the defendant homeowners because the pool was not new or recently remodeled. However, the court found the Act indicated a willingness by the legislature to impose a duty on homeowners to ensure the safety of their property, and applied the underlying logic of the Act to plaintiff's claim.)

Additionally, the Court of Appeal held that even if the tenants named on the lease did not have any minor children of their own, it was unreasonable to assume that children would never enter the homeowners' property and gain access to the pool. The court held that the burden on the homeowners to either erect a fence around the pool or ensure that access to the backyard was controlled was outweighed by the benefit to the community by ensuring the safety of minors.

Following *Johnson*, the message is clear: It is the duty of owners of rental property to ensure that access to a backyard swimming pool is properly protected, and this duty extends beyond the immediate scope of those tenants who have actually rented the property.

Truck Drivers in California, Cont'd

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The FAAAA provides: "States may not enact or enforce a law . . . related to a price, route, or service of any motor carrier . . . with respect to the transportation of property." (49 U.S.C. § 14501(c)(1).) Motor carriers' argue that California's mandatory meal and rest break laws adversely affect pricing, routes, and services. District courts are split on the issue of whether meal and rest periods are considered "related to" a price, route, or service.

In *Dilts*, the Ninth Circuit addressed this very issue and ruled that "California's meal and rest breaks plainly are not the sorts of laws 'related to' prices, routes, or services that Congress intended to preempt. They do not set prices, mandate or prohibit certain routes, or tell motor carriers what services they may or may not be provide, either directly or indirectly. They are 'broad law[s] applying to hundreds of different industries' with no other 'forbidden connection with prices, [,routes,] and services.'" The Ninth Circuit rejected Defendants' arguments as to how meal and rest laws adversely affect pricing, routes, and services. The reasoning behind the Ninth Circuit's decision is that California law does not specifically target motor carriers exclusively, but are broad rules for almost all employers in the state. Thus, California law is not preempted. Defendants can seek "en banc" review or petition the United States Supreme Court.

The *Dilts* decision could have broad implications on the trucking and insurance industries. For example, given the fact that commercial truck drivers have limited parking and rest-area options, the four and five hour rest and meal requirements create challenges for truck drivers in attempting to take breaks, which in turn, creates potential liability concerns. Employers would be wise to plan accordingly and develop training guidelines to ensure that drivers are complying with the law when taking rest and meal breaks.

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The Dilts decision could have broad implications on the trucking and insurance industries.

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No Punitive Damages for Cell Phone Use While Driving

By David L. Barch, Esq.
Attorney

Our office recently dealt with a spirited but ultimately unsuccessful attempt by a plaintiff who sought to bootstrap a claim for punitive damages onto a straightforward motor vehicle negligence action involving a defendant who, at the time of the incident, was allegedly talking on her cell phone. Plaintiff asserted that since defendant's use of a cell phone while driving was a violation of Vehicle Code section 23123 (i.e., "use of wireless telephone while driving"), and that since the statute was "unequivocally a statue designed for public safety," that any violation of the section therefore warranted imposition of punitive damages.

The claim raises a question that has not received much attention, namely, whether there is anything special about the language of section 23123, or the legislative history and intent behind the law, that merits consideration of punitive damages for what is, after all, a fairly routine and unfortunately quite common vehicle code violation.

Procedurally, in order to support a claim for punitive damages, a plaintiff must plead specific and detailed facts establishing that he is entitled to such extraordinary relief. (*Clauson v. Superior Court* (1998) 67 Cal.App.4th 1253, 1255; *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159, 166.) Additionally, a claim for punitive damages separately requires a plaintiff to establish by "clear and convincing" evidence that a defendant is guilty of oppression, fraud or malice. (Civ. Code § 3294, subd. (a).)

Because of the higher burden of proof at trial (i.e., clear and convincing evidence of "despicable conduct," etc.), California courts regularly strike claims for which punitive damages are not clearly authorized. (See, *Woolstrum v. Mailloux* (1983) 141Cal.App. 3d. Supp. 1, 11; see also, Weil & Brown, California Practice Guide (2012) Civil Procedure Before Trial, section 7:187, p. 7 (I)-70.)

Not only does *Woolstrum* recognize a court's need to consider a plaintiff's burden of proof in evaluating the merits of a claim for punitive damages, but the decision holds, citing the California Supreme Court in *Taylor v. Superior Court* (1979) 24 Cal.3d 890, that "routine negligent or even reckless disobedience of traffic laws would not justify an award of punitive damages." (*Woolstrum, supra,* at 11, citing *Taylor* at pp. 899-900.)

First, the language of the statute itself does not support an inference that the legislature ever intended or anticipated that punitive damages would be a component in future claims involving the law. Vehicle Code section 23123 states in pertinent part that:

(a) A person shall not drive a motor vehicle while using a wireless telephone unless that telephone is specifically designed and configured to allow hands-free listening and talking, and is used in that manner while driving.

(b) A violation of this section is an infraction punishable by a base fine of twenty dollars ($20) for a first offense and fifty dollars ($50) for each subsequent offense.

There is nothing in this language that even remotely suggests that the legislature intended or envisioned – much less provided – that violation of the statute and the imposition of its modest fines would or should be construed as constituting the type of egregious conduct required by California's punitive damages statute and subsequent case law.

Second, in *People v. Nelson* (2011) 200Cal.App. 4th 1083, the Court considered the legislative history of section 23123 in applying the "shall not drive" language of the statue to a traffic court appeal where the defendant was observed using a wireless phone as he paused at a red traffic light. (*Nelson*, *supra*, at p. 1087.) The *Nelson* Court was careful to warn that "[i]dentification of the laudable purpose of a statute alone is insufficient to construe the language of the statute. To reason from the evils against which the statute is aimed in order to determine the scope of the statute while ignoring the language itself … is to elevate substance over necessary form." (*Nelson*, *supra*, at p. 1096.) The *Nelson* Court further held that, "in construing statutes, a court aims to ascertain the intent of the enacting legislative body so that it may adopt the construction that best effectuates the purpose of the law. The court looks first to the words of the statute, because the statutory language is generally the most reliable indicator of legislative intent." (*Nelson*, *supra*, at 1097.) The Court further cautioned that "[w]hen a statute defining a crime or punishment is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant." (*Nelson*, *supra*, at 1104.)

There is nothing in *Nelson* that suggests that either the statutory language of section 23123 or the

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. . . where a plaintiff fails to allege necessary specific facts to entitle him to recover exemplary and punitive damages, and in the absence of any legal authority to support such damages, it is correct and proper that courts strike these claims as a matter of law.

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Northern District's Interpretation of Fed. R. Civ. P. 8(b)(1)(A) Places Burden on Defendants to Meet the Heightened Twombly/Iqbal Pleading Standard When Pleading Affirmative Defenses

By Brian J. Finn, Esq.
Attorney

Plaintiffs often have from months to years to investigate their claims and craft their pleadings before filing their complaints in Federal Court. Defendants in the Northern District of California, however, do not enjoy the same benefits when pleading their affirmative defenses according to recent rulings which require defendants to plead their affirmative defenses with the same specificity required of plaintiffs to meet the heightened pleading standard dictated by the Supreme Court in *Bell Atlantic Corp v. Twombly* (2007) 550 U.S. 544 and *Ashcroft v. Iqbal* (2009) 556 U.S. 5662.

An answer must "state in short and plain terms" the defenses to each claim asserted against the defendant in order to provide plaintiffs with fair notice of the defense(s). (Fed. R. Civ. P. 8(b)(1)(A).) Under Federal Rule of Civil Procedure 8(c), an "'affirmative defense is a defense that does not negate the elements of the plaintiff's claim, but instead precludes liability even if all of the elements of the plaintiff's claim are proven.'" (*Barnes v. AT&T Pension Benefit Plan - Nonbargained Program* (N.D. Cal. 2010) 718 F.Supp.2d 1167, 1171-72.) Defendants bear the burden of proof for affirmative defenses. (*Kanne v.Connecticut General Life Ins. Co.* (9th Cir. 1988) 867 F.2d 489, 492.)

Federal Rule of Civil Procedure 12(f) provides that a court may, on its own or on a motion, "strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." (Fed. R. Civ. P. 12(f).) A defense may be insufficient "as a matter of pleading or as a matter of substance." (*Security People, Inc. v. Classic Woodworking, LLC* (N.D. Cal. Mar. 4, 2005) No. C-04-3133 MMC, at 2.) An insufficiently pled defense fails to comply with Rule 8 pleading requirements by not providing "plaintiff [with] fair notice of the nature of the defense" and the grounds upon which it rests. (*Wyshak v. City Nat'l Bank* (9th Cir. 1979) 607 F.2d 824, 827 (citing *Conley v. Gibson* (1957) 355 U.S. 41, 47-48; *see generally* Fed. R. Civ. P. 8.) However, motions to strike are generally disfavored. (*Rosales v. Citibank* (N.D. Cal. 2001) 133 F.Supp.2d 1177, 1180.) When a claim is stricken, "leave to amend should be freely given" so long as no prejudice results against the opposing party. (*Wyshak*, *supra*, 607 F.2d at 826.)

Although the Ninth Circuit has yet to rule on the issue, the majority of district courts require affirmative defenses to meet the heightened pleading standard dictated by the Supreme Court in *Twombly* and *Iqbal*. (See, e.g., *CTF Dev. Inc. v. Penta Hospitality, LLC* (N.D. Cal. Oct. 26, 2009) 2009 WL 3517617, at *7-8 (requiring defendants "to proffer sufficient facts and law to support an affirmative defense"); *Barnes v. AT&T Pension Benefit Plan - Nonbargained Program* (N.D. Cal. 2010) 718 F.Supp.2d 1167, 1171-72 (finding there is "no reason why the same principles applied to pleading claims should not apply to the pleading of affirmative defenses"); *Hayne v. Green Ford Sales, Inc.* (D. Kan. 2009) 263 F.R.D. 647, 649-50 (noting extensive list of cases in which district courts applied *Twombly/Iqbal* heightened pleading standard to affirmative defenses).

Trial Courts in the Northern District have consistently agreed with the majority of district courts across the country and have applied the heightened *Twombly/Iqbal* heightened pleading standard to affirmative defenses. Judges in the Northern District agree that applying a heightened standard to affirmative defenses also "weed[s] out the boilerplate listing of affirmative defenses which is commonplace in most defendants' pleadings where many of the defenses alleged are irrelevant to the claims asserted." (*Barnes*, *supra*, 718 F. Supp.2d at 1172.)

These recent rulings presents a challenge to risk managers, in-house counsel, and litigation counsel alike. Rule 12 provides 21 days for a defendant to file a responsive pleading after service, absent a stipulation or other extension of time. The application of the *Twombly/Iqbal* heightened pleading standards means that defense counsel can no longer plead a slew of boilerplate affirmative defenses and utilize later investigation or pre-trial discovery to determine the applicability of those defenses. Now more than ever, risk managers, in-house counsel, and litigation counsel need to start working together immediately upon receipt of the complaint to coordinate an investigation as to the factual and legal basis for possible affirmative defenses to the claims stated by the plaintiff in the complaint. Otherwise, certain affirmative defenses are subject to motions to strike and additional costly motion practice to amend an answer at a later time.

No Punitive Damages for Cell Phone Use, Cont'd

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legislative history of the statute supports an inference that the simple violation of this section of the Vehicle Code, without more, merits consideration of punitive damages. California's heightened pleading requirements for claims for punitive damages are clear, and they are not satisfied by mere assertion of a Vehicle Code violation.

Third, one may look to more developed case law in comparable cases involving Vehicle Code violations where plaintiffs were also denied claims for punitive damages. It has long been established California law that a showing of a defendant's gross or even reckless misconduct does not entitle a plaintiff to recover punitive damages. (*Bell v. Sharp Cabrillo Hospital* (1989) 212 Cal.App.3d 1034, 1044; *Flyer's Body Shop Profit Sharing Plan v. Ticor Title Insurance Co.* (1986) 185 Cal.App.3d 1149, 1155.) Even in cases where the Vehicle Code violation at issue involved high levels of intoxication, courts still refused to impose punitive damages even where a driver was found negligent, grossly negligent, and even reckless. (*Dawes v. Superior Court of Orange County* (1980) 111 Cal.App.3d 82, 87-89.

Finally, the denial of punitive damages for a Vehicle Code violation makes intuitive sense from a public policy perspective. If the plaintiff's logic were to prevail, a punitive damages claim could be bootstrapped to *any* Vehicle Code violation so long as the statute at issue was "designed for public safety," effectively making an end-run around California's considered and well-established legislative and judicial requirements that claims for punitive damages to be pled with sufficient facts to meet a plaintiff's heightened burden of proof of clear and convincing evidence to warrant their imposition. Given that punitive damages are not covered by insurance, the imposition of such damages for routine negligent acts would up-end established notions of liability and would have far-reaching implications for California insurance law and insurance coverage.

In short, where a plaintiff fails to allege necessary specific facts to entitle him to recover exemplary and punitive damages, and in the absence of any legal authority to support such damages, it is correct and proper that courts strike these claims as a matter of law.

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Defense Research Institute (DRI)

International Association of Defense Counsel

Northern California Association of Defense Counsel

American Bar Association (ABA)

San Mateo Bar Association

Bar Association of San Francisco

Alameda County Bar Association

San Francisco Trial Lawyers Association

California Trial Lawyers Association

National Association of Subrogation Professionals (NASP) (Northern California Chair 2004-2008)

Trucking Industry Defense Association (TIDA)

San Francisco Defense Association

UPCOMING EVENTS

The San Francisco Defense Association (SFDA) is honored to announce that Congresswoman Barbara Lee will attend and speak at the SFDA's upcoming luncheon in 2014.

The SFDA has several seminars planned for 2014 with additional distinguished speakers. For more information on the SFDA or to become a member, please contact Kevin Cholakian, President, at kcholakian@cholakian.net or Arsen Sarapinian, Secretary, at asarapinian@cholakian.net.

Congresswoman Barbara Lee

Cholakian & Associates is listed in Best's Insurance Directory, has been AV rated by Martindale-Hubbell since inception, and is retained defense counsel to a dozen major commercial carriers doing business in California. This practice includes, though is not limited to, the representation of carriers regarding commercial and personal lines claims as well as the defense of insureds involved in serious personal injury, catastrophic trucking accident litigation, complex commercial litigation, product liability/fire subrogation matters and coverage litigation. This also includes defense of matters involving allegations of construction defects, mold related claims, inter and intrastate trucking, commercial landlord/tenant, environmental liability, labor and employment law, and uninsured/underinsured motorist matters. The attorneys in this practice group have significant litigation experience, with emphasis on high exposure cases.

Kevin K. Cholakian a native Californian who grew up on a family farm in the Central San Joaquin Valley. He attended valley schools until his senior year of high school, when he received a full scholarship to attend North Carolina School of the Arts in Winston-Salem, North Carolina from 1971-1972. He then attended San Francisco Conservatory of Music on a Ford Foundation Scholarship from 1972-1974. He graduated *magna cum laude* with a B.A. in Philosophy from CSU Fresno in 1977. From 1976 to 1978, he served as Chief Administrative Assistant to California State Senator Rose Ann Vuich (first woman elected to the California State Senate serving Central California), managing the Senator's Central Valley field offices stretching from Modesto to Bakersfield. In 1981, he received his law degree from the University of California, Hastings College of the Law, where he was on Law Review and which he attended on scholarship. Mr. Cholakian began his legal career practicing with the litigation sections of Littler, Mendelson, Fastiff & Tichy and McCutchen, Doyle, Brown & Enersen (Bingham-McCutchen) in San Francisco. He became an equity partner and managed the defense practice of an AV rated 25 attorney San Francisco insurance defense firm (1988 through 1999). He founded Cholakian & Associates in January 2000 and has continued to specialize in high exposure personal injury defense, product liability/fire liability matters, environmental, coverage and employment/housing discrimination matters. He has been selected as Northern California Super Lawyer under the Personal Injury Defense and Environmental Defense categories for six consecutive years. He was awarded "Gladiator of the Year" in 2006 and 2009 by Farmers/Zurich for trial accomplishments and awarded the Values and Vision Medallion by the Director of Commercial Claims in 2008 and 2010. Mr. Cholakian regularly defends cases that have exposures in excess of $1,000,000.00. His trial record is 46-1 in disputed liability jury trials.

Mr. Cholakian is a member of the following organizations: Defense Research Institute (DRI), the International Association of Defense Counsel, the Northern California Association of Defense Counsel, the American Bar Association, the San Mateo Bar Association, Bar Association of San Francisco, the San Francisco Trial Lawyers Association, the California Trial Lawyers Association, National Association of Subrogation Professionals (former San Francisco Chapter President) (NASP), and Trucking Industry Defense Association (TIDA). Mr. Cholakian is the current President of the San Francisco Defense Association, a 40 year old organization comprised of defense litigators. Mr. Cholakian sits on the Executive Committee of the Board of Governors of the City Club of San Francisco.