

THE NEW CONSTRUCTION DEFECT STATUTE A TEN YEAR WARRANTY OR YOU BETTER BUILD A PERFECT HOME

David W. Tiffany, Esq.¹
Law Office of David W. Tiffany

The Civil Code relating to construction defects has been amended effective January 1, 2003. "It is the intent of the Legislature that this act improve the procedures for the administration of civil justice, including standards and procedures for early disposition of construction defects²."

Quality Control

The first goal of the act is to "clarify" the rights and liabilities of quality control inspectors. Civil Code §43.99 addresses the liability of inspectors. If the inspector has completed five years of verifiable experience in the field and he/she is a certified ICBO inspector or a registered professional engineer, or licensed general contractor or architect rendering independent quality review of work of improvements within the scope of their license they are not liable to the homeowner or any subcontractor for any damages caused by their work³. However, they are still liable to the "applicant who retained the qualified person⁴." The fact that an inspection took place during construction cannot be entered into evidence⁵. The qualifying inspector or legal entity must maintain a professional errors and omissions insurance coverage in an amount not less than \$2,000,000⁶.

The act is silent on the ability of the qualified independent quality control professional to contract with the "applicant" to "hold harmless" and otherwise indemnify the professional for the quality of his or her work. Also, the act does not restrict the ability of the quality control professional to require that any disputes between the inspector and the "applicant" be sent to mediation and/or arbitration. Consequently, contract language in the contract between the inspector and the "applicant"⁷ will be extremely critical in determining not only the rights and liabilities between these parties, but in all likelihood, the availability of inspectors to provide quality control inspection of a project.

Statutory "Express Warranty"

Sections 895 through 897 provide for strict liability for every component⁸ and for the operation of every system in a residential unit that is purchased on January 1, 2003 and thereafter.

It virtually operates as a ten-year strict liability express warranty for the operation of every component in the home⁹. Any failure of a moisture barrier or any water intrusions, results in liability¹⁰ to the "builder" to either repair the defect or be subject to strict liability damages. Structural components shall not have "significant" cracks¹¹ and must materially comply with applicable building code requirements that relate to earthquakes and wind loads¹². Soil movement shall not cause damage to the structure¹³ or render other portions of the land "unusable for the purpose represented at the time of original sale by the builder"¹⁴. Defects that represent a fire danger are also covered by the act¹⁵. Other common defects such as stucco cracking¹⁶, drainage¹⁷, secure roof tiles¹⁸ and bonded tiles¹⁹ are also covered.

The act also allows the builder to provide greater protection or protection for longer times²⁰. Specific requirements are set forth in the act for the providing of "additional" protection. The purpose of this section is to allow the builder, who is already practically in the position of providing a ten year express strict liability warranty, to charge a premium for "extra" protection. Perhaps this will generate a new "insurance" product. However, any attempt to place limits by way of exclusions could run afoul of the act.

What in the world does the "builder" get out of this legislation?²¹ The builder gets the "protection" of the Act's "pre-litigation procedures". Keep in mind, as we go through the requirements of this "fix the defect option", that any deviation from the procedures set forth in the act *forfeit the builder's rights to "fix the defect"*²². Also bear in mind that "[a]s to any class action claims that address solely the incorporation of a defective component into a residence, the named and unnamed class members need not comply with this chapter."²³

"Non-adversarial Procedure"

Section 914 sets forth the "nonadversarial (sic) procedure". The preamble warns that "if the procedure does not resolve the dispute between the parties, [the claimant may bring] a subsequent action to enforce the other chapters of this title."

The "non-adversarial" chapter of the act has numerous conditions that must be met by the builder. The first condition occurs at *the time the sales agreement is executed*²⁴. At the time the sales agreement is executed "the builder **shall** notify the homeowner whether the builder intends to engage in the nonadversarial (sic) procedure of (§914) or attempt to enforce alternative nonadversarial (sic) contractual provisions"²⁵. The act also does not limit the ability of the parties to agree to arbitration, mediation or any other form of non-adversarial procedures²⁶. In theory the builder could get two bites at the apple if a "savings" mediation/arbitration clause is inserted in the sales contract. Civil Code §§916, 917 and 918 set forth a very specific procedure to implement the "right to fix" provisions of the act. Failure to follow them will result in the homeowner having the right to sue utilizing the benefits of the act²⁷.

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THE BOTTOM LINE

The Nevada Supreme Court recently granted a writ petition in a case of first impression, whether a plea to voluntary manslaughter establishes a killing with specific intent such that it is not accidental and therefore excluded from coverage. The issue stems from an insurance carrier denial of a defense and indemnity in a wrongful death action. The matter is fully briefed and awaiting invitation for oral argument. **Peter S. Gregorovic** represents defendant insurance carrier.

Case Title: Ted Moore v. Farmers Home Group, dba Western Home Insurance Company

Court Case No: A436121, Nevada Supreme Court

Judge: District Court Judge, Mark Denton

Nature of Case: Insurance Bad Faith

Plaintiff's Counsel: Cal. J. Potter, III

Defense Counsel: Peter S. Gregorovic

Type of Incident: Denial of defense and indemnity on wrongful death suit

Settlement Demand: \$275,000

Settlement Offer: \$35,000

Verdict: Writ pending

Marc D. Cleavinger recently went to trial and prevailed on the ubiquitous litigation practice staple, the dog bite case... with a twist. Plaintiff sought emotional distress damages for putting herself in a frey between two fighting dogs. After achieving successful ruling on defense motions in limine, Attorney Cleavinger snarled and bared his teeth (figuratively speaking... or maybe not), wherein the plaintiff moved the court to dismiss with prejudice.

Case Title: Mariah Burnside v. Thomas Slater

Court Case No.: 783648

Judge: Hon. Thomas O. Lavoy

Nature of Case: Personal Injury/Dog-Bit

Plaintiff's Counsel: Richard C. Donovan

Defense Counsel: Marc D. Cleavinger

Type of Incident: Dog attacking dog

Settlement Demand: \$1,500,000.00

Settlement Offer: \$10,001.00

Verdict: before opening statements, dismissal with prejudice

PRESIDENT'S MESSAGE



Peter S. Doody

Our Board recognizes the reluctance of many defense lawyers to use available technology to assist them at trial. The very same technology which is used by the plaintiffs' bar is often shunned or ignored by more capable and better-experienced defense attorneys. A common firstday-of-trial scenario is the defense attorney unwrapping his or her standard 5' x 3' posterboards while plaintiff's counsel and his or her "AV" assistant are busy running wires, setting up screens and practicing the PowerPoint-enhanced opening statement. Although we are by nature a steadfast and brave lot, the above scenario can be a wee bit intimidating. In an effort to turn the tide and level the courtroom technology battlefield, we hosted "Life Beyond Elmo ... Effective Use of Technology in Trial" presented by Browning E. Marean of Gray, Cary, Ware & Freidenrich and August Larson and Roger Holtzen of AJL Litigation Media, Inc. This panel explained and handily demonstrated how easy it is to use technology, and most importantly, how effective this technology can be at trial.

This year we have also been busy on the "brown bag" circuit and have hosted seminars on such timely topics as "Recent Development in Summary Judgment Law" by Robert J. Walters of Grace, Brandon, Hollis, and another seminar "The 'Right to Repair' Law Meets Risk Shifting: How SB800 Affects Your Client's Business" by Mary Pendleton of Balestreri, Pendleton & Potocki. Also, David Casteel of The Ayers Group recently presented "Collision Analysis and Accident Reconstruction in Litigation." The brown bag seminars are well attended are on the third Thursday of every month. Actually, "brown bag" is a bit of a misnomer since lunch is provided by our sponsor, Brenda Peterson. This month, on June 19, my partner, Craig Higgs, will be presenting "10 (At Least) 'Must Knows' For Successful Mediation." Since so many cases are being sent to mediation, this will be an especially informative and practical seminar.

On the horizon is our second annual San Diego Defense Lawyers golf tournament slated for October 24, 2003 at the Auld Course in Chula Vista. Our charity again this year is the Juvenile Diabetes Foundation. This golf tournament promises to be a great event that you will not want to miss so be sure to save the date. Also, this fall is our 13th annual law school mock trial competition. Our regional competition is gaining national recognition. This year, we expect two teams from New York to participate and we have already received inquiries from Fordham University and Brooklyn Law School. As is true every year, expect a call from one of us asking for your participation to serve as a judge in the mock trial competition. As we move through the summer, please feel free to contact me or other Board members to share any ideas regarding seminar topics or other ways we can serve our membership. Keep up the good fight.

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Construction Defect Statute

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Section 916 allows the builder to conduct testing including destructive testing. The homeowner has the right to record the testing²⁸. The act proceeds to walk through the time table of the inspection, offer to repair and right to mediate disputes that is the heart and soul of the "right to fix" portion of this legislation. In the event the builder proposes a repair after he has inspected the alleged defect the homeowner upon written request shall be provided any available technical documentation, including proposed plans and specifications²⁹. The offer to repair must also include written advice to the homeowner of his or her right to request up to three additional contractors from which to select to do the repair³⁰. The offer to repair must also contain an offer to mediate the dispute³¹. The mediation shall be limited to a four-hour mediation. Unless mutually agreed, the mediation is before a non-affiliated mediator selected and paid for by the builder³². The mediator is selected by the builder and paid for by the builder unless the homeowner agrees to split the costs, in which case the mediator will be selected jointly³³. The carrot for the builder, assuming all the hoops have been properly jumped through, is summarized in a single sentence of the act: "If a builder has made an offer to repair a violation, and the

mediation has failed to resolve the dispute, the homeowner shall allow the repair to be performed either by the builder, its contractor, or the selected contractor."³⁴ Naturally, strict time requirements are imposed by the act³⁵. The repair process can be video taped and the video tape can be used in evidence in a subsequent action³⁶.

But wait, there's more. The builder may not obtain a release for the repair work and the homeowner may proceed with an action for an inadequate repair³⁷. If no prior mediation has taken place, a four hour mediation, paid by the builder, is mandatory prior to filing suit for inadequate repair³⁸.

Finally, nothing in the act prevents a good old fashion "cash payment" and a "reasonable release"³⁹. A "reasonable release" should as a minimum take into account the full range of damages allowed by the act.⁴⁰ Because a release is probably binding on a successor-in-interest⁴¹, an unnecessary issue would be an "unreasonable" release and a reactivation of litigation against the builder by a successor-in-interest.

Sub-contractor liability

Dangerous in its brevity, Civil Code § 936 sets the parameters for sub-contractor liability: "Each and every provision of the other chapters of this title apply to subcontractors, material suppliers, individual product manufacturers, and design professionals to the extent that [they] caused, in whole or in part, a violation of a particular

standard as the result of a negligent act or omission or a breach of contract. ... However, this section does not apply to any subcontractor, material supplier, individual product manufacturer, or design professional to which strict liability would apply." Clearly, the builder wants to produce a contract that requires services, products and/or construction of components that meet the standards set forth in the act. A properly worded contract can create the same "strict liability/express warranty" standard for liability established by the act. This can be accomplished by setting forth the requirements of the act in so far as the construction of the residence is concerned, as the controlling factor for the breach of performance by the subcontractor under the contract. For example, "The quality of construction by the subcontractor party to this agreement shall in all respects meet the requirements of Civil Code §§ 896 & 897. Failure to comply with those statutory requirements shall be considered a breach of this agreement⁴²."

The kicker for subcontractors is the "pre-litigation procedure" process that allows only the builder and the homeowner to inspect, test and develop repair options without the participation of the subcontractor. This process while at the same time it excludes the subcontractors, develops evidence which is admissible at trial. Thus, even if the builder does not intend to make repairs, the process allows him/her to make his case against the subcontractor *fait accompli*.

Summary

The 2003 new homeowner clearly benefits the most from this new legislation. However, the builder is not in a terrible position as long as the subcontractor, material production and design professional contracts incorporate the requirements of the act as the construction and contractual standards and the court considers any defect set forth in the act which is established by the evidence, a breach of contract. Also, if the builder actually employs the proper quality control and markets an extended warranty policy allowed by the act, additional profits can be realized.

Just how long it takes the transactional lawyers to develop all the necessary contracts anticipated by the legislation remains to be seen. In light of the stakes, it could be that the ultimate winners and losers will be from the same professional family, the lawyers.

Footnotes continued on page 4

THE BOTTOM LINE

Case Title: Straley v. Neurosurgical Medical Clinic

Court Case No: GIC 790285

Judge: Honorable Janis Sammartino

Nature of Case: Medical Malpractice

Plaintiff's Counsel: David Margulies

Defense Counsel: Clark Hudson, Esq. and Jennifer Hartzell, Esq., Neil

Dymott Perkins Brown & Frank

Type of Incident: Failure to remove pituitary tumor following

Transsphenoidal Surgery

Settlement Demand: \$100,000

Settlement Offer: Waiver of Costs

Verdict: Defense (12-0)

Trial Length: 6 days

Jury Out: 1 ½ hours

Case Title: Donna and David Tennis v. Wawanesa General Insurance Company.

Court Case No: GIC787385

Judge: Hon. Patricia Cowett

Nature of Case: Insurance Bad Faith

Plaintiff's Counsel: Craig Miller, Esq., Levine, Steinberg, Miller & Huver

Defense Counsel: Kenneth N. Greenfield, Esq., Law Offices of Kenneth N. Greenfield

Type of Incident: First Party Water Damage, Resultant Mold, loss of home/foreclosure

Settlement Demand: \$650,000

Settlement Offer: none

Verdict: defense

Trial length: two weeks

Jury out: 4 ½ hours

Case Title: Deckard vs. Select Tanklines

Court Case No.: GIE008348

Judge: Hon. Jilliam Lim

Nature of Case: Personal Injury

Plaintiff's Counsel: Michael Ferrone, Esq., Law Offices of Howard Kitay

Defense Counsel: Elizabeth A. Skane, Esq., Law Office of Elizabeth A. Skane

Type of Incident: trucking accident

Settlement Demand: \$200,000 (\$400,000 asked during trial)

Settlement Offer: \$5,000

Verdict: 11-0 on liability (we stipulated to a jury of 11 with 9 to carry); 9 to 2 on damages. The jury awarded \$15,939 to Plaintiff.

Trial length: two weeks

Jury out: 1 day

(Footnotes)

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¹JD California Western School of Law, LL.M Admiralty Tulane University, professional mediator San Diego Settlement Solutions, sdsettle@yahoo.com.

²Preamble to the legislation. This title applies only to residences originally sold on or after January 1, 2003. Civil Code §938. However, contracts with sub-contractors executed prior to January 1, 2003 could control litigation issues between the builder and the sub.

³Civil Code §43.99.

⁴Civil Code §43.99 (3);(4)(b); (g).

⁵Civil Code §43.99(4)(b).

⁶Civil Code §43.99(f).

⁷Applicant may very well have a different meaning than "builder" which is defined as builder, developer or original seller of a new residential unit on and after January 1, 2002. Civil Code §911.

⁸Civil Code §897 states: "The standards set forth in this chapter are intended to address every function or component of a structure. To the extent that a function or component of a structure is not addressed by these standards, it shall be actionable if it causes damage.

⁹Plumbing and sewer systems are limited to 4 years in so far as they operate properly and do not materially impair the use of the structure. Civil Code §896 (e). However, as to water issues, i.e. leaks and backups, the "warranty" is the 10 year statute of limitations. § 941 and see §896 (a) (14), (15), (16).

¹⁰Civil Code §896 (a).

¹¹Civil Code §896(b) (1).

¹²Civil Code §896 (b) (4).

¹³Civil Code §896 (c) (1).

¹⁴Civil Code §896 (c) (3).

¹⁵Civil Code §896 (d).

¹⁶Civil Code §896 (g) (2).

¹⁷Civil Code §896 (g) (7).

¹⁸Civil Code §896 (g) (11).

¹⁹Civil Code §896 (g) (13).

²⁰Civil Code §901 et seq.

²¹Keep in mind that the act applies to all new residential units sold on or after January 1, 2003, including spec homes by a single builder.

²²Civil Code §920: "[i]f the builder fails to make an

offer to repair or otherwise strictly comply with this chapter within the times specified, the claimant (homeowner) is released from the requirements of this chapter and may proceed with the filing of an action. If the contractor performing the repair does not complete the repair in the time or manner specified, the claimant may file an action. If this occurs, the standards set forth in the other chapters of this part shall continue to apply to the action".

However, the act does allow for flexibility, time requirements can be "extended" by mutual agreement of the parties. Civil Code § 930 (a).

²³Civil Code §931.

²⁴Civil Code §914 (a).

²⁵Id.

²⁶Civil Code § 914 (b).

²⁷Civil Code § 915.

²⁸Civil Code § 916 (a).

²⁹Civil Code § 917.

³⁰Id. The additional contractors cannot be owned or financially controlled by the builder and they must regularly conduct business in the county where the structure is located. Civil Code §918.

³¹Civil Code §919.

³²Civil Code §919.

³³Id.

³⁴Id.

³⁵Civil Code §921.

³⁶Civil Code §922. "If any enforcement of these standards is commenced, the fact that a repair effort was made may be introduced to the trier of fact." Civil Code § 933.

³⁷Civil Code §926. In the subsequent action, "[e]vidence of both parties' conduct during [the] process may be introduced during a subsequent enforcement action, if any, with the exception of any mediation." Civil Code § 934.

³⁸Civil Code §928.

³⁹Civil Code §929 (b). Reasonable is not defined and the potential for a dispute over this point should not be ignored.

⁴⁰Civil Code §944 sets forth the damages available.

⁴¹Civil Code §945.

⁴²This example is purely for purposes of discussion in the context of this article. No warranty or representation regarding its utility or enforce ability is intended or promised.



Lincoln, Gustafson & Cercos participated in the San Diego MS Walk on April 6, 2003. The MS Walk is an annual event which raises funds to support the research, treatment and cure for Multiple Sclerosis. LG&C's team of 93 members raised \$44,313. They placed second in fund raising for San Diego County for the second consecutive year! LG&C is very proud of this effort and extends a big thanks to the numerous firms and individual attorneys in San Diego that contributed pledges to the team.

Member News



BRUCE BAILEY, ESQ., formerly a partner with Dummit, Faber, Briegleb & Diamond has joined **Bacalski, Byrne, Koska & Otton, LLP** as a partner. Mr. Bailey brings his substantial legal training and 33 years trial

experience in defending doctors, hospitals, dentists, product manufacturers, public entities, schools & universities, businesses and individuals in substantial personal injury claims to the firm. Mr. Bailey is AV rated by Martindale Hubbell and is a member of ABOTA. He has served as an arbitrator and Judge Pro Tem in the San Diego courts. Attorneys **Wyeth Burrows** and **Amy Sies**, also formerly of Dummit, Faber, Briegleb & Diamond, have joined the firm as associates.

Daniel R. Gamez recently joined the **Law Office of Kenneth N. Greenfield** as an associate. Mr. Gamez is licensed to practice law in both Texas and California.

Ian Williamson has joined Summers & Shives, APC. His litigation practice includes all aspects of construction litigation as well as insurance coverage and contribution matters. Mr. Williamson also continues to advise clients on business matters and construction issues. Mr. Williamson earned his JD and MBA from the University of San Diego in 1996, with honors in both degrees. He also holds a BSBA *cum laude* with University Honors from The American University in Washington, DC.

Martha Privette Botten has joined **White, Noon & Oliver** as an associate. Martha attended Colby College and received a B.A., with distinction. She received her J.D. from the University of New Mexico School of Law and graduated magna cum laude. She was admitted to the State Bar of California in 2002. While in law school, Ms. Botten was a student member of the H. Vearle Payne Inn of Court. She received a Dean's award for demonstrated excellence in family law, and a scholarship from the National Italian-American Bar Association. She is a member of the University of New Mexico Chapter of the Order of the Coif and was selected for Who's Who Among American Law Students, 22nd Edition. Her practice areas

include business, construction, personal injury, product liability and professional liability litigation.

The law firm of **P.K. Schrieffler, LLP**, with additional offices in Los Angeles and West Covina recently relocated its San Diego office to the 550 Corporate Center. **Paul K. Schrieffler, Carl H. Starrett II** and **Maha Sarah** will staff the San Diego office. The firm's fifteen attorneys practice insurance defense, employment and labor law litigation, professional liability, bad faith defense and premises liability. In addition to these areas, the San Diego office will focus on all areas of construction law, including defect litigation, mechanic's lien law and construction collection. **Carl Starrett** and wife Lisa are both second-generation natives of San Diego. They have a daughter Michelle, born in 1997. Mr. Starrett has a broad range of experience in construction law, breach of contract/collections, wage claims, SSI disability hearings and mediation. His practice includes the defense of insureds in the areas of professional liability, business litigation, bad faith and employment law. **Maha Sarah** received her Juris Doctor from the University of San Diego School of Law. Ms. Sarah was a member of the University of San Diego International Law Journal, an editor for the USD legal publication *Motions*, an extern for the Honorable Luis R. Vargas, San Diego Superior Court, and a legal intern with the Office of the Governor. Ms. Sarah's practice includes professional liability, business litigation, bad faith and employment law.

Koeller Nebeker Carlson & Haluck, LLP opened their fifth office in Denver, CO in Jan 2003. This office will serve existing clients in the areas of civil litigation and insurance defense with an emphasis in construction defect litigation.

Fredrickson, Mazeika & Grant, LLP, is pleased to announce that **Jacqueline F. Stein** has joined the firm as a partner. She continues to represent large trades in complex construction defect litigation matters. **Allen D. Emmel** has joined the firm Of Counsel. Associates **Matthew J. Hunter, Joanne H. Eng, and Katharine Schonbachler** have joined the firm's San Diego office, and **Joshua A. Kunis, Chris Sullivan, and Lynn N. Hughes** have joined the firm's Las Vegas, Nevada office, as associates.

Jennifer N. Lutz has been named a **shareholder** of Klinedinst PC. Jennifer's main practice areas are employment

litigation and counseling. She advises clients in various aspects of human resources management including wage and hour law compliance, employee handbooks, family and medical leave, employee discipline, and disability matters and has successfully defended employers and managers in discrimination, wrongful termination, and harassment actions before state, federal and administrative forums.

Rob Shields of **Wilson, Petty, Kosmo & Turner, LLP** and his wife have welcomed triplets

Caroline Grace, Zach Robert and Hannah Lynne into their home on March 19th. The babies are in excellent health weighing between 10 – 12 pounds each. Mom and babies are home and doing great!



Patrick Mendes, formerly with Gordon & Rees, has joined member **Robert Tyson** to form **Tyson & Mendes**. The firm will continue its insurance defense practice in the areas of products liability, professional malpractice, construction litigation and insurance coverage. Mr. Mendes, a 1995 graduate of USD Law School, will continue his representation of insurers in coverage matters and construction litigation. Mr. Tyson, a 1989 graduate of Villanova University School of Law, will focus on the defense of professionals and corporate clients.

Grace Brandon Hollis LLP announced that effective July 1, 2003, **Thomas W. Byron** and **James C. Schaeffer** will become partners. Mr. Byron holds an "AV" rating from Martindale-Hubbell. He serves as an arbitrator for the San Diego Superior Court and has served as a Judge Pro Tem for the San Diego Municipal Court. He has been a frequent speaker and seminar panelist on issues of insurance bad faith, insurance fraud, appellate practice and design professional liability. He also serves as an expert witness/consultant in insurance coverage matters. Mr. Schaeffer is an experienced trial lawyer who specializes in the defense of physicians and other health care professionals. He also represents businesses and individuals in various contract disputes over the growing and handling of agricultural products.

THE BOTTOM LINE

Robert Carlson and Megan K. Dorsey recently obtained victory in the largest construction defect lawsuit in Nevada history. Plaintiffs, some 200 homeowners of single-family residences at a development in North Las Vegas, sued the developer, alleging damages of approximately \$25 million. Though the issue of the appropriateness of a class was on appeal before the NV Supreme Court through the trial, (and has not yet been ruled upon), the case proceeded for 5 months. After two days of deliberations the jury awarded \$7.8 million against the only remaining defendant, Beazer who had obtained over \$6.1 million in settlement contributions from the settling subcontractor parties. The plaintiffs will receive less than one-third of their claimed damages and less than half of what the defendant's offered to settle the case. The verdict was considered a victory for the defense, with the trial judge commenting that Blazer's counsel, **Mr. Carlson**, will now forever be known by the Nevada plaintiffs' bar as the "Prince of Darkness" with a gracious smile.

Case Title: Duritsa v. Beazer Homes (aka Villages at Craig Ranch)

Clark County, Nevada

Court Case No.: A418011

Judge: Hon. Allan R. Earl

Nature of Case: Construction defect class action involving over 200 single family homes.

Plaintiff's Counsel: Robert Maddox, Esq. of Robert C. Maddox & Associates in Nevada, and Duane Shinnick of Sildorf & Shinnick, LLP of California

Defense Counsel: Robert Carlson, Esq., Megan Dorsey, Esq., and Christopher Hallman, Esq. of Koeller Nebeker Carlson & Haluck, LLP

Type of Incident: Defects and damages due to expansive soils, inadequate drainage and retaining walls, and improper landscaping.

Settlement Demand: \$ 25,000,000

Settlement Offer: \$16,000,000

Verdict: \$7.8 million

Jury out: Two days

HOT CASES!!!



contributed by:

Carl H. Starrett II, Esq.

P.K. SCHRIEFFER, LLP

ED McMAHON et al., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; AMERICAN EQUITY INSURANCE COMPANY et al., Real Parties in Interest. B162625

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION EIGHT, 106 Cal. App. 4th 112; 130 Cal. Rptr. 2d 407

Effective January 1, 2003, a party moving for summary judgment must provide at least 75 days notice of the hearing date. In the McMahon case, the trial court shortened the MSJ notice requirements to 21 days. The Plaintiffs objected and filed a petition for writ of mandate.

The Court of Appeal granted a writ vacating the trial court's order shortening notice from 75 days to 21 days. The court ruled that the trial court is without authority to shorten the notice period without the consent of the parties. As a result, a party moving for summary judgment will be unable to obtain an order shortening time on a motion for summary judgment. Accordingly, most MSJ's must be filed and served at least 105 days before trial because a motion for summary judgment must be heard 30 days or more before trial, plus 75 days notice of the hearing. Attorneys attending a TSC or CMC should be prepared to calculate the filing deadline for an MSJ. Some firms have suggested obtaining an MSJ hearing date before attending the CMC. If the court tries to set a trial date sooner than the statutory requirements for an MSJ and sooner than the time necessary to prepare one, the party can inform the court a date for the MSJ has already been reserved.

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. V. CAMPBELL, 123 S.Ct. 1513, 71 USLW 4282, 3 Cal. Daily Op. Serv. 2948, 2003 Daily Journal D.A.R. 3783 (4/7/03)

In this case the United States Supreme Court set forth the principles by which punitive damage awards must be scrutinized. Those criteria are (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by plaintiff and the punitive damages award; and (3) the difference between the punitive damages award and the civil penalties imposed in comparable cases. The Court held that a \$145 million punitive damages award rendered in a case in which compensatory damages of \$1 million had been awarded was grossly excessive and violated the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

The case arose when plaintiffs sued State Farm for bad faith in handling the defense lawsuit filed against plaintiffs. Plaintiff Curtis Campbell had been involved in a car accident that killed one person and injured another. Although the evidence suggested that State Farm knew that Mr. Campbell was at fault and would not prevail, State Farm nonetheless refused to settle within Campbell's policy limits of \$50,000. Curtis Campbell was found liable for the injuries he caused in the car accident, and the damages were assessed at \$136,000. State Farm offered to pay \$50,000 of the judgment, and suggested that the Campbells sell their home to make up the difference.

After a year and a half, State Farm eventually agreed to pay the entire judgment of the \$136,000. The Campbells sued and won a totalling \$2.6 million in compensatory damages (later reduced to \$1 million) and \$145 million in punitive damages.

The Supreme Court made clear that

“[t]he most important indicium of (factor in considering) the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct.” As the Court noted:

“We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. The existence of any one of these factors weighing in favor of plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect.”

The Court also stated that “[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” Significantly, the Court noted that “nor, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.” Moreover, “Due Process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis. . . .” Importantly, “[a] defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.”

As to the second factor, that is, the permissible size of a punitive damage award, the Supreme Court noted as follows:

“We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. Our jurisprudence and the principles it has now established demonstrate, however, that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process. In *Haslip*, in upholding a punitive damages award, we concluded that an award of more than four times the amount of compensatory damages might be

close to the line of constitutional impropriety. . . . When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guaranty. . . . In sum, courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.” (citing *Pacific Mut. Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1999)).

As to the third factor, that is, the disparity between the punitive damage award and comparable civil penalties which may be available, the Court noted:

“Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standard of proof. Punitive damages are not a substitute for the criminal process, and the remote possibility of a criminal sanction does not automatically sustain a punitive damages award.”

Conclusion

What is the real import of the Court’s opinion in *State Farm*? The case certainly stands for the principle that punitive/compensatory ratios must be kept under control. In theory, punitive damages are useful to “send a message” to a big company when it acts badly. The difficulty is the practical application of the doctrine. The “anything goes” approach to introducing evidence of the defendant’s bad behavior in assessing punitive damages is no longer permissible and the net worth of a defendant is now a much less significant factor in assessing punitive exposure.



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We welcome the submission of articles by our members on topics of general interest to our membership. Please submit material to:

John T. Farmer - Farmer & Case
402 West Broadway, Suite 1100
San Diego, CA 92101
Phone: 619.338.0300
Fax: 619.338.0180
E-mail: jfarmer@farmercase.com

Brown Bag Series March and April 2003

by: Kelly Boruszewski
Stutz, Gallagher, Artiano, Shinoff & Holtz

The March and April Brown Bag seminars at Peterson & Associates offered lunch, networking opportunities, and two MCLE credits free to all SDDL members on the topics of accident reconstruction and the risk shifting under Senate Bill 800.

In April Mr. David Casteel of The Ayres Group presented a one-hour topic on Collision Analysis and Accident Reconstruction in Litigation. The discussion overviewed the use, benefits, and abuse of this specialized field of study. Using a nine-cell matrix, an expert in this field looks at human, vehicle, and environmental factors before, during, and after the collision occurred. To complete this matrix, information from depositions, statements, declarations, police reports, and photographs are used. Of these, it is the physical evidence that is the most important. To that end, every possible measurement—from dent to ding and skid to curb—is essential. Evidence of the human factor includes the driver's weight, height, and any impact on the interior or the vehicle. Vehicle factors include tire wear and alignment; skid marks; type, make, model, engine size, and vehicle identification number; seatbelt condition; and displacement of lamps, fenders, wheels, axles, doors, control arms, and quarter panels. Environmental factors include weather and road conditions, time of day, and the surface's grade and curvature. In essence, the more evidence, the more complete the matrix, a better analysis of just what occurred at the scene of the accident. Once the information is gathered, computer programs can test and eliminate numerous hypotheses. These programs can then create short animations on how the incident may have occurred.

In March our very own Mary Pendleton of Balestreri, Pendleton & Potocki presented The "Right to Repair" Law Meets Risk Shifting: How SB800 Effects Your Client's Business. This seminar recounted the evolution and enactment of the Bill, its expressed objectives, and its real-world effect. Senate Bill 800 (Civil Code section 895 *et seq.*) was enacted in 2002 to enable the provision of affordable housing which purportedly had been eliminated as a result of the unnecessary litigation against home builders and a virtual collapse in the insurance market for home construction. Ms. Pendleton discussed the Bill's stated objective: giving homebuilders the right to repair allegedly defective conditions. She also discussed its practical effect: shifting the burden on subcontractors and designers, without the support of their insurers.

For example, in pre-litigation, Civil Code section 896 requires that, prior to filing against any party alleged to have contributed to a violation of the standards, the claimant must give written notice. That notice essentially has the same force and effect as notice of commencement of a legal proceeding. Also, construction contract amendments typically contain a "Warranty of Compliance with SB 800" clause having a "no strike" letter attached. Ms. Pendleton recommends encouraging your clients to start a dialogue before your client signs the amendment to make appropriate changes. If your clients are not allowed to talk, Ms. Pendleton recommends sending brief letters to the builders. The letter should be written recording the contract amendment has been signed unchanged, pursuant to the builders' direction and that no changes were allowed to be discussed or permitted. These letters will memorialize that there is no dealing with the builder and will show the climate in which the contract was offered. This may become important in the future, especially because unspoken utterances are not admissible Parol evidence.



San Diego Defense Lawyers Evening Seminar Series

Recap by: Dennis S. O'Neill, Esq., Farmer & Case



Computerized presentations at the trials of all but the smallest cases, is not just the wave of the

future - it is here and now. SDDL's first quarterly seminar on this timely topic, "Life Beyond Elmo . . . Effective Use of Technology in Trial", was presented on April 30, 2003, at the U.S. Grant Hotel by Browning E. Marean, Esq. of Gray, Cary, Ware & Freidenrich, and August Larsen and Roger Holtzen of AJL Video. The seminar explored the reasons to use technology in trial and various ways to use that technology.

The presenters demonstrated that trial technology is useful because juries like it, it is an effective teaching tool, it is persuasive, it helps you win your case, and you look prepared. Further, it allows you to control the images in the mind(s) of the trier of fact and, as stated by F. Lee Bailey, "Graphics are always better than words." It was also pointed out that the use of graphics greatly increases the information retention rate of the jurors and it saves time. The hardware tools used include laptop computers, computer projectors, screens and monitors, scanners, and digital cameras. The software tools used include Excel, PowerPoint, TimeMap, CaseMap, LiveNote, Sanction, and Inspiration. Mr. Marean suggested that it is important to hire a company such as AJL Video that rents the equipment needed, provides technical support for the purposes of equipment set up, provides instruction on the use of the equipment, and scans your graphics, photographs and exhibits into the laptop computer.

In addition to use at trial, this technology can be an effective tool to use at law and motion hearings, and mediation and settlement conferences.

This technology is especially helpful in document-intensive cases to display visual evidence, and to show segments of videotaped depositions. Despite the advantages of using this technology, it was also recommended that foam board blowups and the Elmo should still be used with the computer technology, when appropriate.

All in all, the seminar provided cutting-edge information on ways to better present - and win - your cases.