

California Real Estate Law Newsletter

A Monthly Report of California Real Estate
Law Developments for Realty Professionals

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By Editor Harold Justman, Esq.

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Dear Friend of Bob Bruss:

This month's newsletter has good and bad cases for property owners and those litigants who win and want the losing party to pay their attorneys fees. The Koepnick case makes an owner of property with an elevator liable for the negligence of an independent contractor who negligently maintains the elevator. On the other hand, the Manuel case ruled that the owner of an electrical tower in the middle of nowhere doesn't need to put warning signs on the tower. The Silver Creek case and the County of Sacramento case confirm that a litigant who wins a lawsuit should recover his or her attorneys fees where the contract allows for a recovery of attorneys fees. On the other hand, the Garcia case is a bad case that allows a trial judge to deny an award of attorneys fees to the winner in a lawsuit if the judge decides that the losing party can't afford to pay the winner's attorneys fees. The Garcia case is wrong on the substantive law and wrong on the procedural law. This case will cause significant damage to people who are hit with meritless lawsuits.

Finally, the Dee case will protect property owners from bogus personal injury claims based on so-called expert testimony which is really disguised as junk science. Advisory Board member Ed McCutchan has already used this in a jury trial to obtain a defense verdict. I had the pleasure of watching the trial because I was one of the expert witnesses.

Happy Reading,
Harold

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Property Owner Liable for Elevator Company's Negligence

Kashiwa Fudosan America, Inc. ("Owner") owned an office building in South San Francisco ("Property") which had an elevator serving the second floor. Dennis Koepnick ("Plaintiff") was using the elevator to deliver goods to the second floor of the Property. While the Plaintiff was using the elevator, a plastic liner broke causing an elevator cable to loosen and fall off the sheave, and the elevator stopped suddenly. The sudden stop caused the Plaintiff to fall, resulting in back injuries requiring spinal surgery. The Plaintiff sued the Owner and Otis Elevator Company ("Elevator Company"), an independent contractor hired by the Owner to maintain and repair the elevator. The jury found that the Owner was 75% at fault and that the Elevator Company was 25% at fault. Accordingly, the Owner would be jointly liable for the Plaintiff's economic damages in the amount of approximately \$1 million. The Owner, however, claimed that he should only be severally liable for 75% of the \$4.25 million in noneconomic damages, such as pain and suffering. The trial judge disagreed and held the Owner liable for 100% of the noneconomic damages.

THE DECISION: The Court of Appeal **affirmed** the trial judge's judgment against the Owner for 100% of the noneconomic damages. The Court of Appeal acknowledged that Civil Code Section 1431.2 provides, in substance, that in a personal injury case a defendant is liable only for his or her percentage of fault regarding noneconomic damages. However, the Court of Appeal reasoned that where a defendant is vicariously liable for the acts of the other defendant, there can be no apportionment of fault under Civil Code Section 1431.2. In order to find the Owner vicariously liable for the negligence of the Elevator Company, the Court of Appeal held that the Owner had a nondelegable duty to maintain the Property in a reasonably safe condition. That is, if a property owner hires an independent contractor to maintain the building, the property owner is still liable for injuries caused by the independent contractor's negligence in maintaining the property. The result is that the property owner is held liable for the negligence of the independent contractor.

WHY THIS DECISION IS IMPORTANT: This case shows how a clever plaintiff's attorney can resurrect, in effect, strict liability for property owners. The sagacious reader will recall that the Supreme Court of California once imposed strict liability on property owners for defects in their properties which injured tenants and then turned around and rejected strict liability. In the case of Peterson v. Superior Court (1995) 10 Cal.4th 1185, the California Supreme Court abolished strict liability

of landlords and reinstated the rule that a landlord can only be liable for defects which the landlord either knew about or which would have been discovered by a reasonable inspection. By using the doctrine of a nondelegable duty to maintain the building in a reasonably safe condition, the court allows a jury to find the property owner liable for the independent contractor's failure to discover a defect in the property. That is, a reasonable inspection by a property owner may not have revealed the defect, but a jury can easily find that a reasonable inspection by an independent contractor should have revealed the defect. The result is that the property owner is, in effect, strictly liable for defects in the property.

COMMENT: Tort law is often driven by the unstated desire to find the deep pocket. Property owners need to remember that they often appear to be the deep pocket in a lawsuit.

Koepnick v. Kashiwa Fudosan America, Inc.
(2009) 173 Cal.App.4th 32

Warning Signs Not Necessary on Isolated Dangerous Conditions

Tragically, fourteen-year-old Erika Manuel climbed a Pacific Gas & Electric Co. ("PG&E") transmission tower and was electrocuted. Erika's mother and father ("Plaintiffs") filed a wrongful death action against PG&E. The defense of PG&E was Civil Code Section 846 ("846") which provides, in substance, that real property owners are immune from lawsuits arising out of an injury sustained by a recreational user of the property. It was undisputed that the deceased was engaged in recreational climbing of the tower. The Plaintiffs argued that the 846 immunity didn't apply because there was a willful failure to place warning signs on the tower. 846 provides, of course, that a willful failure to warn recreational users of a dangerous condition is not immune from liability. The trial judge granted a summary judgment in favor of PG&E and against the Plaintiffs.

THE DECISION: The Court of Appeal **affirmed** the judgment in favor of PG&E, pointing out that the tower was in an isolated area and, as a result, there had been no prior incidents of climbing or accidents. As the court reasoned, a willful failure to warn arises where, as a result of a dangerous condition, an injury is probable. But in this case, an injury was not probable due to the isolation of the tower in the wilderness. While someone who found the tower could possibly be injured, the fact that it was not probable that someone would find and climb the tower meant that there was no willful failure to warn.