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Decision Undermines Protection for Witness Statements

For almost 15 years, California lawyers have felt fairly confident that they didn't have to give the other side in a lawsuit any statements from witnesses that the lawyers collected or had collected for them. Transcripts or recordings of statements gathered by the lawyers or their investigators were viewed as the product of the lawyers' efforts in working up the case. That meant the statements were shielded from being shared with others by the privilege that safeguards each attorney's "work product," according to an appellate decision from 1996.

California lawyers handling every kind of litigation from major class actions to minor fender-benders have relied on that decision, called Nacht & Lewis Architects v. Superior Court, to keep most witness statements secret as they prepare for trial.

But this month that rule got tossed on its head by a new appellate decision, which held that simple witness statements are not privileged at all. "[W]e … hold that written and recorded witness statements, including not only those produced by the witness and turned over to counsel but also those taken by counsel, are not attorney work product," the appellate court declared in *Coito v. Superior Court (State of California)*.

The case involves the drowning of a 13-year-old boy in the Tuolumne River, where he and a half-dozen friends were playing — and maybe engaging in some sort of illegal activity. An attorney representing California in a lawsuit over the boy's death sent two state investigators to take statements four of the friends, armed with questions the attorney had drafted.

When the dead boy's mother sought the four friends' statements as part of discovery in the lawsuit, a trial court judge, relying on the 1996 Nacht & Lewis case, said no. On March 4, the appellate court reversed that ruling.

The idea of the work-product privilege is to protect a lawyer's ideas and strategies about a case from exposure to the other side and to prevent a lazy attorney from skating by through cribbing from his opponent. In California, Code of Civil Procedure Section 2018.030(a) protects any writing that "reflects an attorney's impressions, conclusions, opinions, or legal research or theories."

That material is protected by an "absolute" privilege. Other paperwork that a lawyer generates earns only "qualified" protection. The other side can obtain that material if it can show it would be unfairly prejudiced without it.

Another way to slice the work-product pie that many courts have used is to differentiate between product that is purely evidentiary, which is not privileged, and product that is "interpretive" or

“derivative” of the attorney’s efforts, which is. Simple evidence might be the bent fender from a fender-bender, but the analysis of the impact would be derivative.

Using that distinction, a statement prepared by a witness and turned over to the attorney is simple, unprotected evidence, the appellate court noted.

Many have said — and the defense in this case argued — that a statement gathered by an attorney or attorney’s investigator from a witness should be different. The very questions the attorney asks, even the identities of the witnesses he chooses to talk to, hints at his or her analysis of the case, the argument goes.

But the majority in the new decision held that “the weight of authority” from many courts and analysts is that witness statements gathered by the attorney or his investigator are, in most cases, unprotected evidence, too.

The 1996 decision is simply wrong, this court announced. It is “cursory,” has no analysis and doesn’t weigh the purposes of the privilege, the court declared.

Keeping the statements secret would mean the other side could be surprised by them at trial and could be denied favorable evidence unfairly. “These impacts on the quest for truth simply are not justified by the policy of encouraging lawyers to prepare their cases for trial or the policy of protecting the diligent attorney from others who would take advantage of his or her industry,” the court held.

In a concurring and dissenting opinion, one justice argued the attorney-gathered statements should gain the “qualified” privilege, but the majority said no to that idea, too.

It’s an unusual case in which a lawyer’s questions truly reveals much of his thinking, the majority said. “We are confident, however, that competent counsel will be able to tailor their interviews so as to avoid the problem should they choose to do so.”

Given the contrary 1996 and 2010 opinions, and the dissenting view in the new case, the issue likely will need to be resolved by the California Supreme Court.

Rulings Show How Driving Workers Put Employers at Risk

When employees drive as part of their jobs, even only a little, their employers often end up shouldering the costs of their accidents. And sometimes, the tried and true arguments to protect employers from liability don’t help, as two brand-new decisions from California appellate courts show.

In one case, a company may have to pay damages from an accident caused by an employee driving home in his own car. In the second, an employer is stuck with paying a double portion of a $22 million verdict for an accident caused only partially by the employer’s truck driver.

Both cases involved catastrophic injuries to innocent drivers. In the first, *Lobo v. Tamco*, a metallurgist was leaving his work at a steel fabrication company at the end of the day. Pulling out of the driveway, he failed to notice three motorcycle officers roaring up the highway with lights and sirens. One officer, Daniel Lobo, crashed into the metallurgist’s car and died.

The officer’s wife and three daughters sued the driver’s employer, among others, under the theory of respondeat superior or vicarious liability, which makes employers responsible for the actions of their employees. A trial court rejected the suit at the summary judgment stage.

On appeal, the company, Tamco, argued that because the metallurgist, Luis Del Rosario, was commuting home at the time of the accident, he wasn’t driving for a work-related purpose. Under the “going-and-coming rule,” the company said, it shouldn’t be held vicariously liable for the accident.

The officer’s family countered that the “required-vehicle exception” to the going-and-coming rule kept the company on the hook. Because Del Rosario drove to clients’ locations occasionally to help the clients with technical problems, Tamco received an “incidental benefit” from his use of his personal car.

The issue boiled down to what counts as a required vehicle. Tamco argued the use of the personal car must be integral to the job. Previous decisions interpreting the exception involved employees who drove for work frequently.

Del Rosario, on the other hand, rarely drove himself to clients' sites. Most often, he rode out to customer visits with sales engineers.

But the appellate court ruled that the few times Del Rosario did drive are enough to raise a triable issue of fact about whether Tamco benefited from Del Rosario's car. The very fact that he seldom had to drive himself could turn out to be a big part of the reason it was a benefit, the court suggested.

"The availability of Del Rosario's car provided Tamco with both the benefit of insuring that Del Rosario could respond promptly to customer complaints even if no sales engineer was available to drive him to the customer's site and the benefit of not having to provide him with a company car," the court explained.

"If the employer requires or reasonably relies upon the employee to make his personal vehicle available to use for the employer's benefit and the employer derives a benefit from the availability of the vehicle, the fact that the employer only rarely makes use of the employee's personal vehicle should not, in and of itself, defeat the plaintiff's case."

In the second case, *Diaz v. Carcamo*, an employer admitted it was vicariously liable for its truck driver's negligence. But the appellate court ruled it also is liable separately for negligently hiring and retaining the trucker.

The accident was bizarre and horrible. One car changed freeway lanes to get around a truck. Moving back in front of the truck, it somehow clipped the truck's tire, which sent the car sailing over the median, where it landed right on another car, being driven by Dawn Diaz.

She sued the two drivers and the trucker's employer, Sugar Transport. A jury awarded her $17.6 million in actual damages and $5 million in noneconomic damages. Under California's Proposition 51, the three defendants only have to pay the portion of the $5 million equal to their respective percentage of the total fault for the accident.

Diaz argued that Sugar Transport must pay not only the trucker's share of the noneconomic damages, under respondeat superior, but an additional share because it hired the trucker and kept him on the job knowing he'd had several previous accidents.

The appellate court agreed. It noted that the state Supreme Court had ruled in 1943 "that negligent retention is a theory of direct liability independent of vicarious liability."

Unlike in a vicarious-liability situation, the employer isn't held liable because of its relationship to the employee but because employer "had reason to believe that an undue risk of harm would exist because of the employment," the court concluded.

Court Rules Only "Self" May Pay Self-Insured Retention

Litigation over defects in home construction is unfortunately a very busy field, where the lawsuits are complicated and expensive. As a result, contractors and subcontractors nearly always obtain insurance to defend and indemnify themselves from the litigation. As a further result, their insurance policies, too, are increasingly complicated and expensive.

The policies are complicated enough that they generate litigation of their own. For instance, one hot topic in the courts lately is how to read the "self-insured retentions," or SIRs, found in most construction-defect policies.

A self-insured retention is the portion of any eventual insurance payout that the policyholder promises to pay himself, first, before the bulk of the insurance coverage kicks in. It is similar to a deductible in auto or medical insurance, or to the primary layer of liability insurance that applies before any excess policies.

The nagging question seems to be who, exactly, is the "self" that must pay the retention to trigger the policy coverage. The answer, according to a new decision from a California appellate court, is that it depends on what, exactly, the policy itself declares.

In *Forecast Homes Inc. v. Steadfast Insurance Co.*, the general contractor, Forecast Homes, required its subcontractors to buy insurance that listed Forecast as an "additional insured" and that would provide

coverage and a defense for the contractor in any lawsuits. The contracts between Forecast and its subs were very specific about the insurance they had to obtain.

Many of the subcontractors got their insurance from Steadfast, and their policies contained self-insured retentions. Those SIRs required the subcontractors to pay $1,500 toward defense costs or damages first, before Steadfast would have any obligation to provide coverage.

In fact, some of the policies spelled that requirement out in bold type, declaring: “it is a condition precedent to our liability that you make actual payment” of the SIR. “Payments by others, including but not limited to additional insureds or insurers, do not serve to satisfy the self-insured retention,” the policies insisted. In other words, the SIR payment had to come from the subcontractors’ pockets, and nowhere else.

When lawsuits over one development landed on Forecast, some of the subcontractors apparently managed to escape the litigation without calling on Steadfast for help. Forecast suddenly discovered it didn’t have an insurance company to defend and indemnify it in the suits, and it cried foul.

This bizarre result surely isn’t what the deals between Forecast and its subs imagined, the developer argued. It turns the promise of being an additional insured into an illusion, the company said. It violates public policy.

The appellate court, like a trial court judge before it, disagreed in an opinion released in mid-February. Despite the fact that Forecast ended up in an unlikely difficulty, “an SIR, like any insurance provision, must be enforced according to its plain terms,” the court declared. “Who may satisfy the SIR depends on each policy’s express provisions.”

Under these policies, only the named insureds — the subcontractors — could pay the SIR to trigger coverage. After all, these were the subs’ contracts with the insurance company, not the developer’s.

Forecast could have required the subcontractors to have it listed as a named, rather than, additional insured. But that would have increased the cost of the policies and thereby of the overall bid for the construction project.

In any event, Forecast had other means to trigger the coverage, the court suggested, such as demanding the subs pay the SIR or enforcing the “hold-harmless” clauses in its contracts with them. “No public policy supports a lawsuit that could have been rendered moot if Forecast had in the first instance simply requested the subcontractors activate their policies by paying the required SIR,” the court concluded.

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