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California Supreme Court Will Hear Key Case On Witness Statements, Attorney Work Product

The California Supreme Court voted unanimously June 9 to consider an appeal from a ruling that had found, for the first time in almost 15 years, that many statements from witnesses taken during civil litigation are not protected by the attorney work-product privilege. That ruling by a lower appellate court, *Coito v. Superior Court (State of California)*, has worried defense lawyers who handle many types of cases, from torts to class actions.

Attorney Barry L. Rodolff wrote an article about dealing with the *Coito* decision in a leading legal newspaper. Click on this link to see Barry Rodolff's article.

Coffee, Ruling Burn Uninsured Plaintiff at Drive-Through

Fast-food restaurants in California have gained new protection from drive-through patrons who can't hold on to their coffees: auto insurance.

The idea of lawsuits over drive-through coffee spills have overheated the passions of businesses, insurers, lawyers and the public since 1994, when a New Mexico jury awarded $2.9 million to a woman badly burned by a small cup of McDonald's steaming brew. In a new California appellate decision, however, the issue wasn't whether someone injured by hot coffee should be able to sue the restaurant, but how much she could sue for.

In the ruling, the appellate court held that a customer scalded by hot coffee at a drive-through window could not collect damages for pain and suffering because she didn't have the auto insurance that California law requires. A 1996 ballot initiative called Proposition 213, declares that drivers must have insurance to collect noneconomic damages for auto-related accidents.

The injured plaintiff in this case was a woman who drove through a Los Angeles Jack in the Box restaurant one morning for a breakfast sandwich and a coffee. As she took the coffee from the employee

inside the window, the cup lid popped off and the coffee cup fell onto her lap. Restrained by her seatbelt and by the wall of the drive-through, which blocked her from immediately opening her car door and climbing out, she raised herself up in her seat. The coffee pooled beneath her, giving her second-degree burns on her thighs and buttocks. Because she had trouble sitting, she missed two weeks of school and the chance for an internship.

She sued Jack in the Box for negligence. Relying on Proposition 213, the trial court judge ruled she could not collect noneconomic damages, so she and the restaurant settled the rest of the case. Then, she appealed.

She argued that Proposition 213 only applies to lawsuits to collect noneconomic damages from accidents "arising out of the operation or use of a motor vehicle." A poorly attached coffee-cup lid at a drive-through window is not that sort of accident, she claimed.

In *Chude v. Jack in the Box Inc.*, the appellate court disagreed. It had no trouble deciding the plaintiff was both operating and using her motor vehicle when she got her coffee. After all, when the coffee spilled, she "was sitting in her car at the drive-through window with the motor running, the transmission engaged, and her foot on the brake," the court noted. "She was in the drive-through lane precisely because she was using her car to purchase coffee from the drive-through window part of the restaurant."

But, in response to a question from the appellate court, the plaintiff also argued that, in this case, the "accident" itself didn't fit within Proposition 213's sweep. The accident was the badly attached lid, she said, and it had nothing to do with her use of her car.

Jack in the Box responded that, because the company bans pedestrians from its drive-through windows, she wouldn't have been there if she hadn't used her car. "She *drove* into the '*drive*-thru' lane and *drove* up to the '*drive*-thru' window," the company pointed out.

The court said the question boiled down to "what part did the uninsured vehicle play in the injuries Chude sustained." A big part, it concluded. The car, its seatbelt and door, trapped the woman in the hot coffee for several minutes. "In sum, Chude's specific injuries were caused and exacerbated by the vehicle itself," the court said.

In fact, if she'd walked up to counter inside, the coffee probably might have spilled on her shoe, "but she would not have been forced to sit in a puddle of hot liquid as she tried to extricate herself from a seatbelt."

Party Ad Posted on MySpace Isn't Invitation to Crime

Many people, particularly adults, worry about the dangers that new "social media" Web sites like Facebook and MySpace pose. Are the people we communicate with online trustworthy? Are we giving away too much private information?

A California appellate court recently had to rule on just such an issue, but it decided that the law for new media is no different from the law for old media. In this case, it held, a host who throws a wild party is not responsible for protecting guests from random violent attacks merely because the host advertised his party on MySpace.

But the court also threw in a bit of modern, social media rationale, ruling that it would be "socially burdensome" on the host to limit the people he invites to his party.

In a decade-old line of cases, California courts generally have resisted crime victims' attempts to turn landlords and business owners into their bodyguards. Relying on standard legal principles of negligence, courts have said a property owner typically has no duty to protect guests from the crimes of third persons unless the crimes were foreseeable. To demonstrate foreseeability, a plaintiff most often must prove there's been some history of similar crimes in the vicinity.

The three plaintiffs in *Melton v. Boustred* arrived at the party expecting live music, dancing and alcohol. Instead, they "were attacked, beaten, and stabbed by a group of unknown individuals. They sustained serious injuries."

Simple common sense made the attack on them foreseeable, the three young men argued. Any "homeowner of common sense would know that a public invitation posted on MySpace to a free party offering music and alcohol was substantially certain to result in an injury to someone."

And, they added, "if common sense is not a measure of reasonableness, the meaning is hard to image."

The appellate court responded that the "defendant's conduct in issuing that invitation did not create the peril that harmed plaintiffs." The violence was not "a necessary component" of the party, and the defendant host took no actions that caused the violence, the court said.

Further, the violent attacks were not foreseeable, and the plaintiffs presented no evidence of similar crimes. Their only argument on that point was "common sense," and "common sense is not the standard for determining duty," the court said.

Even if the attack could have been predicted, the most likely way to have prevented it — hiring roving security guards — would have been "unduly burdensome" on the defendant, the court ruled.

The plaintiffs said the defendant could have avoided that burden simply by sending his party invitation only to his MySpace online "friends," rather than to the public at large.

But the court held that restriction would be "burdensome in terms of social cost." Curtailing the invitation would have prevented the defendant from "networking … both socially and professionally as well as promoting his latest endeavor.

"The proposed precaution thus represents a weighty social burden," the court held.

Duty to Obey Safety Rules Can't Be Delegated to Contractor

For more than a dozen years, California courts have been protecting businesses and landowners from being sued by workers injured on their property when those workers are employed by independent contractors. The basic rationale is that the worker already has a right to injury benefits from the workers' compensation system, and he shouldn't be allowed to collect more than that, particularly from a non-negligent business higher up the employment chain.

That basic rule, however, may not apply completely when the business or property owner has failed to obey safety regulations. In that situation, a court may find that the business could not delegate its duty to follow the safety regulation to its independent contractor, and, in fact, that the business itself was negligent for the safety violation.

The latest California appellate decision to make that point is *Seabright Insurance Co. v. U.S. Airways Inc.* Airline U.S. Airways hired a company to service and maintain the conveyor belts that carry luggage back and forth from its terminal to its planes at the San Francisco International Airport. Anthony Verdon, an employee of that company, got his arm caught by one of the moving belts as he was inspecting it. Although he would have shut the belt down to work on it, for the initial inspection, he had to crawl through the dark conveyor passageway as the belt was running.

A trial court threw out Verdon's suit against the airline, holding that the airline was protected by the general rule. The Court of Appeal reversed because the Supreme Court and other courts have held that "even after [the general rule], a hirer can be liable to the employee of a contractor if the hirer breaches a nondelegable duty imposed by statute or regulation, and the breach affirmatively contributes to the employee's injury."

In this case, a safety expert had offered undisputed opinions that the airline's conveyor belts violated three different regulations because they didn't have shielding covering various dangerous "nip and shear points" and were too dark. The independent contractor company was hired to perform routine maintenance, but it understood that safety was the airline's responsibility, the court added.

Evidence showed that U.S. Airways violated safety regulations and thereby "created a hazard to anyone in the area," the court said. Therefore, Verdon has the right to try to convince a jury that the airline should be held liable.

The *Privette-Toland* rule is based on the policy that letting an injured worker collect workers' compensation benefits and additional damages from his employer's hirer "— *a nonnegligent party* — advances no societal interest that is not already served by the workers' compensation system."

But that policy doesn't apply to situations where there is evidence that the business or property owner actually was negligent in a way that contributed to the worker's injuries, the court held.

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