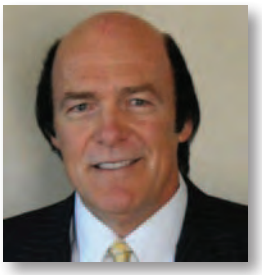
Recent Cases

By Kevin F. Calcagnie



The following are summaries of recently published decisions which may be of interest to consumer attorneys. Official cites are used where available at the time of publication. As with any new case, subsequent histories should be consulted for changes such as depublication or review by the California Supreme Court.

Premises Liability – Fixed Objects Adjacent to Roadways

Gonzalez v. Southern California Gas Company (4th Dist., Dec. 13, 2011) 201 Cal. App.4th 1233, 134 Cal.Rptr.3d 364

A 17-year-old girl was burned to death when she drove her car off a street and struck a natural gas meter serving a mobile home park, causing a gas line to rupture and igniting the escaping gas. The girl's parents filed a wrongful death action against the utility which owned the meter, asserting causes of action for negligence, negligence per se, and premises liability, and contending that the defendant had created a dangerous condition by placing the gas meter assembly only 11 feet from the roadway curb and only 13 feet from a driveway without adequate protection.

A jury found that the utility was negligent and that its negligence was a substantial factor in causing the plaintiffs' damages, and returned a substantial damages verdict. The court of appeal reversed, concluding that the utility did not owe a duty of care to the decedent, but the California Supreme Court granted review and transferred the case back to the court of appeal for reconsideration in light of *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764. The court of appeal then issued a revised opinion reversing the judgment, again holding that the SCG did not owe a duty of care under the circumstances:

> In the general circumstances of this case, it is not reasonably foreseeable a vehicle on a curbed, two-lane street with a relatively low 25-mile-per-hour speed limit with no apparent dangerous conditions (e.g., sharp curves, dips, descents, or ascents) would deviate from, or veer off, the street, go over the curb (e.g., eight-inch-high curb), and strike a fixed object located a substantial distance from the street (e.g., 11 feet, 4 inches beyond the street's curb).[fn] Alternatively stated, we conclude the general event in this case was *not* sufficiently likely to occur in the setting of modern life that a reasonably thoughtful or prudent person would take account of it in deciding where and how to install and maintain a fixed object (e.g., gas meter assembly) on private property adjacent to a curbed, two-lane street with a 25-mile-per-hour speed limit. [Citation.] We conclude it was not reasonably foreseeable under *Rowland* that SCG's installation of the gas meter assembly on private property a substantial distance (i.e., 11 feet, 4 inches) away from Lincoln Avenue, a curbed street with a 25-mile-per-hour speed limit, would cause the general type of harmful event in this case....
>
> The consequences to the community of imposing a duty of care in these circumstances include the likelihood that there would be uncertainty regarding whether, and in what circumstances, a duty would be imposed on all owners of real or personal property near any street or roadway to protect the occupants of all errantly driven vehicles from striking any fixed objects. Were a broad duty to be imposed, the burden on owners of real and personal property adjacent to streets and other roadways presumably would require them to incur substantial demolition, design and/or construction costs to prevent errantly driven vehicles from colliding with fixed objects even though it is not reasonably foreseeable an errantly driven vehicle would do so. If a general duty of care were imposed on all owners of private property located adjacent to curbed, two-lane streets with a 25-mile-per-hour speed limit, millions of property owners would be required to evaluate all fixed objects on their private property and take reasonable measures to prevent collision or other injuries to occupants of vehicles that deviate from those streets.

Roadway Design – Admissibility of Prior Accidents

Ceja v. Department of Transportation (5th Dist., Nov. 12, 2011) 201 Cal.App.4th 1475, ___ Cal.Rptr.3d ___, 2011 WL 6307881

The heirs of two men who were killed when their vehicle crossed a center median on a six-lane state highway and collided with oncoming vehicles, filed an action for wrongful death against the Department of Transportation. The plaintiffs alleged that the roadway was in a dangerous condition due the absence of a median barrier to prevent cross-median accidents. At trial the plaintiffs introduced

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evidence showing there had been a history of accidents at the location, and that several years earlier state engineers had recommended a barrier, which had not yet been installed as of the date of the accident.

The trial court granted a motion in limine to exclude evidence of accidents which had occurred prior to 1994, when the roadway had been widened from 4 lanes to 6, finding that the conditions were substantially different than those which existed at the time of the accident. Following a jury verdict in favor of the State, the plaintiffs appealed, contending that the trial court had erroneously excluded the pre-1994 accidents. However, the court of appeal affirmed the judgment, holding that the trial court had not abused its discretion in excluding accidents which had occurred before the highway was substantially changed:

> Appellants acknowledge that the highway changed but nevertheless argue that the accident history for the road when it was four lanes is relevant to prove that the now six-lane road was in a dangerous condition at the time of the accident.
>
> The trial court has discretion to admit evidence of prior accidents where the conditions existing at the time of the respective accidents are shown to be similar. [Citation.] "Where a dangerous condition of property is involved, there must be proof that there was no substantial change during the interval between the accidents under consideration." [Citation.]
>
> Here, there was a substantial change in the physical conditions existing at the time of the pre–1994 accidents and the Ceja accident. The highway went from four lanes of freeway and expressway to six lanes of freeway and the transitions from six lanes to four lanes at each end of the section were eliminated. Thus, traffic congestion was relieved at this location. Under these circumstances, the trial court did not exceed the bounds of reason when it excluded the pre–1994 accident history. This evidence was not relevant. The accidents that occurred on the four-lane highway would not have a tendency to prove that the six-lane highway was in a dangerous condition. Rather, one would expect a six-lane highway to be safer than a four-lane highway.

Government Immunities – Law Enforcement Investigations

Strong v. State of California (2nd Dist., Nov. 30, 2011; pub. Order Dec. 16, 2011) ___ Cal.App.4th ___, ___ Cal.Rptr.3d ____ 2011 WL 6275930

A motorcycle rider who was injured when he collided with another vehicle filed an action against the California Highway Patrol, alleging that the negligence of the CHP officer who investigated the accident had caused the loss of information identifying the driver of the other vehicle. The plaintiff contended that while on the ground and injured at the scene, and while the other driver was still present, he had asked the investigating officer to obtain the identity of the driver. He further alleged that in reliance upon the officer's promise to provide the requested information in his report, he made no effort to do so independently, and as a result was never able to identify the person responsible for his injuries.

In a non-jury trial the court found for the plaintiff and apportioned 50% of the plaintiff's damages to the CHP, holding that the officer had likely filed an erroneous report concluding the plaintiff was at fault because he had lost the other driver's information. The court further found that the officer's promise created a special relationship, establishing a duty to obtain and preserve the second driver's identifying information.

The court of appeal reversed, holding that although a special relationship had been formed sufficient to create a duty of care, the immunity conferred by Government Code § 821.6 insulated the State from liability for the officer's negligence:

> When a CHP officer conducts an accident investigation, the intended beneficiary of that investigation is the prosecuting agency charged with the responsibility of instituting criminal cases, not private parties contemplating civil action. (*Catsouras v. Department of California Highway Patrol, supra,* 181 Cal.App.4th at p. 879, citing *Williams v. State of California, supra,* 34 Cal.3d at p. 24, fn. 4.) Here, however, Strong expressly asked Officer Swanberg for the identity of the driver who pulled out in front of his motorcycle, and the officer, in turn, agreed to provide that information to Strong in the traffic collision report. Strong, who was on the ground injured, relied to his detriment on the officer's representation and made no efforts to obtain the desired information independently.
>
> Inasmuch as Strong demonstrated that Officer Swanberg "'assumed a duty toward [him] greater than the duty owed to another member of the public'" (*Davidson v. City of Westminster, supra,* 32 Cal.3d at p. 206) and promised to undertake a special duty on Strong's behalf (*Walker v. County of Los Angeles, supra,* 192 Cal.App.3d at p. 1399), we conclude that a special relationship was formed between Strong and Officer Swanberg. As a result, Officer Swanberg owed Strong a duty of due care to collect, retain and communicate the requested information.
>
> Duty, however, "'is only a threshold issue, beyond which remain the immunity barriers.'" ...
>
> [E]ven if Strong has established an otherwise actionable breach of duty by Officer Swanberg, his actions as part of the investigation of the traffic accident fall within the scope of the governmental immunity conferred by section 821.6....
>
> Section 821.6 provides that "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." This immunity provision is to be construed broadly so as to further "its purpose to protect public employees in the performance of their prosecutorial duties from the threat of harassment through civil suits." … For purposes of this immunity provision, investigations are deemed to be part of judicial and administrative proceedings. ...
>
> The State maintains on appeal, as it did below, that since Officer Swanberg lost or destroyed the second driver's identifying information during the course of an official CHP investigation, he is cloaked with the immunity of section 821.6. We agree. Since Officer Swanberg is immune, so too is the State.

Liability Releases – Tenant Amenities

Lewis Operating Corporation v. Superior Court (4th Dist., Nov. 10, 2011) 200 Cal. App.4th 940, 132 Cal.Rptr.3d 849

An apartment resident who was injured while using a treadmill at a 'tenant-only' health club/exercise facility filed an action for personal injuries against his landlord and a personal training company. The plaintiff alleged that an employee of the latter had rolled a ball into the treadmill, causing it to flip upward and throw the plaintiff off of the machine.

The defendants moved for summary judgment based upon a 'release and waiver' provision in the rental agreement under which tenants assumed all risks of harm arising from use of the health and recreation facilities. The trial court denied the motion, finding that the agreement was unenforceable under Civil Code § 1953, which declares void any provision of a dwelling lease or rental agreement that modifies or waives the tenant or leasee's right to have the landlord exercise due care to prevent personal injury. However, the court of appeal issued a peremptory writ of mandate directing the trial court to grant the motion, holding that a landlord's duty to maintain amenities does not necessarily trigger the application of § 1953:

> [A] landlord may be held liable in tort under usual rules of duty and negligence even if the dangerous condition does not exist in the tenant's dwelling and does not affect the statutorily required elements of *habitability* or *tenantability.* We will assume, arguendo, that a landlord may not lawfully require the tenant to sign an exculpatory clause relating to injuries that might occur as a result of the tenant's use of the basic or essential common areas – i.e., a parking area, lawns, walkways or corridors. However, we do conclude that a landlord's duty to maintain *amenities* does not necessarily trigger the application of Civil Code section 1953....
>
> [I]n this case, the provision of an on-site health club or exercise facility was clearly well outside the basic, heavily regulated offering of a residential dwelling....
>
> This brings us back to our case, representing the interplay between a clear matter of essential public interest (residential tenancies) and a nonessential matter of personal improvement or enjoyment (the use of exercise facilities). We conclude that where a landlord chooses to enhance its offering by providing an on-site health club or exercise facility that goes well beyond bare habitability, there is no reason why the landlord may not protect itself by requiring the tenant, as a condition of use of the amenity, to execute the same waiver or release of liability that could lawfully be required by the operator of a separate, stand-alone health club or exercise facility.
>
> Civil Code section 1953 is designed to protect a tenant's basic, essential need for shelter. Real party's recreational use of the fitness facility and equipment was in no way critical to this need. Petitioners had no legal obligation to offer such a facility and we conclude that it was entitled to condition real party's use on his execution of the waiver and release at issue here. No public policy was violated by the exculpatory clause, and it may be enforced against real party in this case.

Premises Liability – Independent Contractors

Gravelin v. Satterfield (1st Dist., Nov. 15, 2011) 200 Cal.App.4th 1209, 132 Cal. Rptr.3d 913

A satellite dish installer who suffered back injuries after he fell through a roof extension awning between a house and a carport, filed an action for premises liability against the homeowners. The plaintiff alleged that he was an employee of an independent contractor which had been hired by a dish network to replace an existing satellite dish, and that when he notified one of the homeowners of the location where he intended to access the roof, she did not express any reservation. He further alleged that the plaintiffs had a duty to warn him of the condition of the roof pursuant to *Kinsman v. Unocal* (2005) 37 Cal.4th 659, based upon the preexisting hazardous condition exception to *Privette v. Superior Court* (1993) 5 Cal.4th 689.

The trial court granted summary judgment, and the court of appeal affirmed, holding that on the facts presented there was no preexisting hazardous condition:

> The alleged hazard – the roof extension – was not a concealed preexisting hazard. The roof extension was fit for its intended and obvious purpose as a small roof that provided rain shelter. The roof extension became hazardous only when plaintiff misused it as an access point and climbed onto it from a small ladder, applying over 250 pounds of man and equipment in a dynamic movement. The unsuitability of the roof extension for that purpose was open and obvious....
>
> It is true, as plaintiff notes on appeal, that a homeowner should anticipate people walking on a roof to perform maintenance and repairs. But a homeowner does not reasonably anticipate that a worker will use a small roof extension only four feet square to climb upon on his way to the main roof because he neglected to bring the right ladder....
>
> It must also be emphasized that a landowner cannot be held liable where a hazard is "created by the independent contractor [himself], of which that contractor necessarily is or should be aware." ...
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> Here, plaintiff Gravelin was responsible for choosing a safe access point, and it was his poor choice to use a small ladder to climb upon a roof extension that created the hazard....
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> In his deposition, plaintiff conceded that he was trained to conduct site surveys as part of his duties as a satellite dish installer and made a site survey at defendants' home. It was as a result of that site survey, not any instruction from the defendant homeowners, that plaintiff chose to access the satellite dish by climbing upon the roof extension. Defendants were not required to warn plaintiff against using his chosen access point. Plaintiff, not the homeowners, assumed responsibility for determining a safe approach to the satellite dish. An independent contractor "has authority to determine the manner in which inherently dangerous ... work is to be performed, and thus assumes legal responsibility for carrying out the contracted work, including the taking of workplace safety precautions." (*Tverberg, supra,* 49 Cal.4th at p. 522, 110 Cal.Rptr.3d 665, 232 P.3d 656.) It was plaintiff's unfortunate

miscalculation of an appropriate access route, not any negligence by defendants, that led to his injury.

Damages – Gratuitous Write-Off by Medical Provider

Sanchez v. Strickland (5th Dist., Nov. 4, 2011) 200 Cal.App.4th 758, 133 Cal. Rptr.3d 342

The heirs of three individuals who were killed when their car collided with a truck hauling two semi-trailers filed an action for wrongful death against the owner and operator of the truck. One of the decedents had been hospitalized for four months following the accident, and as a result, his estate had incurred substantial medical bills.

Following a jury verdict in favor of the plaintiffs, the defendants filed a motion to reduce the amount of the verdict representing medical expenses to the actual amounts paid or owed. The verdict had included over $7,000 which had been gratuitously written off by one of the decedent's medical care providers. The trial court granted the motion but the court of appeal modified the award, holding that the limitation on recovery in *Howell v. Hamilton Meats* (2011) 52 Cal.4th 541 with respect to amounts providers have agreed to accept from insurers, does not extend to amounts gratuitously written off:

> In *Howell,* the California Supreme Court stated that the Restatement Second of Torts reflects the widely held view that the collateral source rule applies to gratuitous payments and services, but that California law was less clear on the point. [Citations.] The court also stated that the case presented did not require it to decide the question concerning gratuitous write-offs. Nevertheless, the court discussed whether its holding was inconsistent with a rule of law that would allow a plaintiff to recover the reasonable value of service rendered gratuitously and stated:
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> "We see no anomaly, even assuming we would recognize the gratuitous-services exception to the rule limiting recovery to the plaintiff's economic loss. The rationale for that exception – an incentive to charitable aid (*Arambula v. Wells* [(1999)] 72 Cal. App.4th [1006,] 1013 [85 Cal.Rptr.2d 584]) – has, as just explained, no application to commercially negotiated price agreements like those between medical providers and health insurers. Nor, as discussed below, does the tort law policy of avoiding a windfall to the tortfeasor suggest the necessity of treating the negotiated rate differential as if it were a gratuitous payment by the medical provider." ...
>
> Based on the discussion of gratuitous payments and services in *Howell, Hanif,* and *Arambula* as well as the view contained in the Restatement Second of Torts, we adopt the following rule of law: Where a medical provider has (1) rendered medical services to a plaintiff, (2) issued a bill for those services, and (3) subsequently written off a portion of the bill gratuitously, the amount written off constitutes a benefit that may be recovered by the plaintiff under the collateral source rule.
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> Under this rule of law, the $7,020 written off by Vibra Healthcare for medical services provided to Pedro Hueso at Kentfield Rehabilitation & Specialty Hospital is recoverable as damages because that amount was included in the past medical expenses awarded by the jury.

Wrongful Termination – Duty to Mitigate Damages

Cordero-Sacks v. Housing Authority of the City of Los Angeles (2d Dist., Nov. 17, 2011) 200 Cal.App.4th 1207, ___ Cal.Rptr.3d ___, 11 Cal. Daily Op Serv. 13,972, 2011 Daily Journal D.A.R. 16,695

A woman who was terminated from her position as in-house attorney for a city housing authority, filed suit against her former employer for wrongful termination and retaliatory discharge in violation of California's False Claims Act (Gov. Code § 12653). The plaintiff alleged that she had been fired because she had participated in investigating the alleged misuse of funds by the director of the Authority's technical services department. The plaintiff also contended that following her termination she had been unable to obtain employment so she started her own law practice. However, her new venture was "at best only moderately successful" by the time of trial.

On appeal from a jury verdict in favor of the plaintiff, the defendant contended that the trial court had misinstructed the jury on the plaintiff's duty to mitigate her damages, and that the court should have instructed the jury that it must determine whether the plaintiff's self-employment was a reasonable alternative to comparable employment. The court of appeal affirmed the judgment, rejecting the defendant's contention that pursuing unprofitable self-employment is inherently unreasonable:

> [T]he Authority's instruction, which the court refused, was infirm because it risked confusing the jury by telling jurors that they must first address the question of whether Cordero-Sacks's decision to open her own practice was reasonable: ....
>
> In fact, because mitigation is an affirmative defense, it was the Authority's burden to show that other employment opportunities were available to Cordero-Sacks. (*Candari v. Los Angeles Unified School Dist.* (2011) 193 Cal.App.4th 402, 409, 122 Cal. Rptr.3d 53 ["As the Supreme Court has explained, the burden to prove failure to mitigate damages lies squarely with the employer."].) In the absence of suitable replacement employment, Cordero-Sacks's pursuit of her own practice was not unreasonable even if it generated little income....
>
> [S]elf-employment is not unreasonable mitigation as long as the discharged employee applies sufficient effort trying to make the business successful, even if those efforts fail. In *Smith v. Great American Restaurants, Inc*. (7th Cir. 1992) 969 F.2d 430, the Court of Appeals explained: "The cases indicate that self-employment, if reasonable, counts as permissible mitigation, and the jury could certainly conclude that [the employee's] efforts were reasonable. In fact, [the employer's] own witness conceded that [the employee's] opening of a restaurant was a reasonable venture. [The employer's] reliance on *Hansard v. Pepsi-Cola Metropolitan Bottling Co.,* 865 F.2d 1461 (5th Cir.), *cert. denied,* 493 U.S. 842, 110 S.Ct. 129, 107 L.Ed.2d 89 (1989), is misplaced. In *Hansard,* the court explicitly recognized the general principle that self-employment can satisfy the burden of diligence in mitigation, but found the plaintiff's burden not satisfied by his flea market enterprise.... Here, in contrast, it is uncontested that [the employee's] efforts

in opening and operating [a restaurant] were serious and in fact much *greater* than required by an ordinary full-time job. A jury could rationally determine that [the employee's] self-employment was a reasonable, good faith exercise of diligence. The notion that starting one's own business cannot constitute comparable employment for mitigation purposes not only lacks support in the cases, but has a distinctly un-American ring."

Construction Defects – Mandatory Arbitration Clauses

Promenade at Playa Vista Homeowners Association v. Western Pacific Housing, Inc. (2nd Dist., Nov. 8, 2011) 200 Cal. App.4th 849, 133 Cal.Rptr.3d 41

A homeowners association filed an action against the developers of a 90-unit condominium complex, alleging construction defects in structural, electrical, plumbing and mechanical components and systems. The developers moved to compel arbitration based upon a mandatory arbitration provision in the CC & R's which required that any disputes between the developers and the association or a condominium owner be submitted to binding arbitration. According to its terms the provision could not be amended without the consent of the developers.

The trial court denied the motion to compel arbitration and the court of appeal affirmed, holding that the developers lacked standing to enforce CC & R's:

> The Developers do not own any property in the Playa Vista complex and therefore have no standing to enforce the CC & R's, including the arbitration provision....
>
> The Developers' reliance on *B.C.E. Development, Inc. v. Smith* (1989) 215 Cal.App.3d 1142, 264 Cal.Rptr. 55 (*B.C.E.Development*) is misplaced. In that case, the developer had authority to enforce the CC & R's through an architectural committee that had the power to approve or reject residential building plans *after* the developer had sold all the units. The CC & R's created the committee and gave the developer the right to appoint its members and carry out its administrative duties....
>
> Here, after the Developers sold the last unit, they retained no authority or control of any kind with respect to the Playa Vista condominiums. Further, unlike the CC & R's in *B.C.E. Development,* the CC & R's in this case preclude the owners from amending or deleting the arbitration provision unless the Developers consent to the amendment, which they refuse to do. The Association represents the views of the owners, and it has opposed the Developers' alleged right to enforce the CC & R's, indicating that the Association and the owners share the same desire....
>
> Here, the Developers have no input or continuing authority of any type over the complex, and the owners at the Playa Vista condominiums cannot amend or delete the arbitration provision in the CC & R's even though they so desire. In addition, section 1354, which was enacted in 1985 (Stats. 1985, ch. 874, § 14, p. 2777), indicates that *B.C.E. Development,* decided in 1989, is wrong; the homeowners association or a property owner, not the developer, should have filed suit to stop the flawed construction....
>
> It is one thing to say that a homeowners association, which consists of property owners, may enforce the CC & R's. (See §§ 1368.3, subd. (a); 1351, subd. (j).) It is quite another to jump to the conclusion that a developer, which has no ownership interest in the property, direct or indirect, may also enforce them. ■