

**BURDEN OF PROOF IN SLIP AND FALL CASES NOW ON DEFENDANT TO SHOW REASONABLE AND TIMELY INSPECTION, EVEN WHERE PLAINTIFF CANNOT SHOW THE SOURCE OF A FOREIGN SUBSTANCE OR HOW LONG IT HAD BEEN ON THE FLOOR**

Commonly, plaintiffs will fall on liquids, foods and other substances and can be forced to admit that they have no evidence as to how long the substance had been there, or even whether it was put there by the owner or its employees (like water from a mop), or came from a third party source. In these circumstances, defendants generally look to a summary judgment or non-suit at trial based on the plaintiff's burden to prove "constructive notice," i.e., that the substance either came from the defendant, in which case no proof of notice is needed, or that the substance had been on the floor for a long enough period of time so that a reasonable and reasonably frequent inspection should have disclosed the danger and led to a cleanup. Most, but not all, of the case law decided in California has supported this basic idea, that the defendant should not be subject to a lawsuit if the plaintiff has no evidence whatsoever from which a jury could infer that the substance had either come from the defendant or been on the ground long enough so that the proprietor, in the exercise of due care, should have discovered the danger through periodic inspections. Now, unfortunately, the California Supreme Court in the long-awaited *Ortega v. Kmart* case (2001 DAR 13099) has held in essence that since the defendant has a duty to put in place a program of reasonably frequent and thorough periodic inspections (generally, a "sweep sheet" protocol calling for inspections on the order of every half hour in the retail environment), the plaintiffs can turn this situation around and claim that the defendant's inability to produce timely inspection reports/sweep sheets can raise an inference in plaintiff's favor that the area was (1) not in fact inspected within a reasonable period of time before plaintiff fell, and (2) that plaintiff in fact fell on an old substance. This gives the plaintiff an inference of liability that the defendant has to try to overcome, which will of course be difficult if the defendant has no sweep sheets or other evidence from which to prove that the foreign substance was not in fact on the ground for an unreasonable period of time before the plaintiff fell.

The facts of *Ortega* were simple. Plaintiff slipped on spilled milk at the Torrance Kmart next to a refrigerator. Plaintiff did not notice whether the milk was sour, warm or cold, or anything else to indicate how long it had been on the floor. Likewise, the manager had no formal "sweep sheets" and stated that the last inspection could have been as long as two hours before plaintiff fell. This is a standard fact pattern for a defense MSJ and victory at trial, a result which is now, at the least, significantly hampered by the *Ortega* holding.

The *Ortega* holding has two major implications. The first is for dispositive motions like summary judgments and non-suits - they are now rendered difficult, if not impossible, in the typical "war of no evidence" situation where neither the plaintiff nor the defendant can put forward any evidence of how long the substance had been there or whether the area in question had been inspected within some reasonable period of time before the fall. In such cases, the matter must now go to the jury even though the plaintiff has no evidence. The holding is puzzling because summary judgment and non-suit are generally proper exactly in situations where the evidence on liability is speculative. Where the plaintiff cannot come up with any

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evidence to suggest how long the substance had been there, and where the defendant cannot come up with any evidence showing that the area had been inspected within a reasonable time before the fall, what is there for the jury to “find”? The *Ortega* case seems to hold that a tie goes to the plaintiff, allowing the plaintiff to get past a motion for summary judgment or non-suit based on an inference that if the defendant did not timely inspect the floor, that the substance was on the ground during that period of time. This is a short-cut to proving causation. With no evidence that the substance had been on the floor longer than a reasonable time, plaintiff can use the defendant’s lack of sweep sheets to infer that the fall was caused by the material being on the ground too long.

This same inference which gets the plaintiff past summary judgment or non-suit leads to the second implication of *Ortega*, namely that the plaintiff will be able to use this inference to prevail ultimately at trial. If neither the plaintiff nor the defendant has any evidence either way as to how long the substance had been there or whether a timely inspection was done before the fall, there is nothing to rebut the *Ortega* inference in plaintiff’s favor that the substance was there a long time. Interestingly, *Ortega* does not require the jury to make this inference; *Ortega* “just” holds that the jury could infer that the substance had been on the floor for an unreasonable time where the defendant cannot produce “sweep sheets” or the like for that time period. This result seems to give the jury the latitude to make an arbitrary and capricious “finding” that the substance had or had not been on the floor for an unreasonable period of time based exactly upon the very lack of evidence one way or the other as to how long it had been there or as to whether the defendant had timely inspected the area before the fall.

It is anticipated that the retail industry and defense bar will react vigorously to this decision, and it may be that the trial courts and courts of appeal will attempt to interpret *Ortega* as narrowly as possible, especially at trial. *Ortega* waffles somewhat about the jury’s latitude to make findings or indulge inferences in the “war of no evidence” situation. If, by the end of the case, there is genuinely no actual evidence whatsoever from which a jury could make inferences about how long a substance had been on the floor, we would anticipate that many trial judges will still reject a plaintiff’s verdict which is based solely on the speculative “inference” that the defendant’s lack of sweep

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## A WORKERS COMPENSATION INSURER THAT MISHANDLES A CLAIM IS PROTECTED FROM EXTRACONTRACTUAL LIABILITY VIA WC EXCLUSIVITY

In *Michelle Hughes v. Argonaut Insurance Company*, Ms. Hughes sought to avoid workers compensation exclusivity by suing the insurer in superior court for insurance bad faith, intentional interference with contractual relations and prospective economic advantage, wrongful assertion of lien and declaratory and injunctive relief, including violations of the unfair competition law. The issue presented to the appellate court was whether a workers compensation claimant can sue her employer’s workers compensation insurer for its purported mishandling of its lien on her settlement with a third party tortfeasor. The First District Court of Appeal rejected her claims.

While employed, Michelle Hughes was injured in an automobile accident with a third party tortfeasor. She received workers compensation benefits from Argonaut of \$5,324.07. She made a personal injury claim against the third party, but did not sue. She settled for \$12,104.75. Argonaut then asserted a lien against the settlement. As Ms. Hughes had a standard 33.33% contingent fee arrangement with her attorney, she deducted one-third from Argonaut’s lien. Argonaut refused to waive its alleged right to collect the entire lien.

The Workers Compensation Act (WCA) allows an employee hurt on the job to get certain benefits without proving fault. The employee may also pursue a third party, but the insurer is entitled to surrogate against any settlement achieved with the third party tortfeasor. The WCA provides that if the employee’s third party attorney is responsible for generating the settlement proceeds, he or she is entitled to settlement costs which are deducted from the amount of settlement. The employer is a passive beneficiary in the situation and its reimbursement rights are subject to reasonable fees and expenses for the attorney services that created the settlement. If Ms. Hughes had filed an action in superior court requiring court approval for settlement, the court and not the WCAB would have had subject matter jurisdiction. In vesting the WCAB with exclusive authority to set and allocate fees recovered in settlement in nonlitigated claims, the court observed that the civil courts should not become enmeshed in determining reasonable attorney fees for the mutual benefit conferred on the employer/insurer and

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employee when the courts have no involvement with the settled claim.

Ms. Hughes also successfully maintained Argonaut was estopped from asserting the WCAB's jurisdiction because it filed a civil action against the third party tortfeasor after the third party issued its settlement check payable to Hughes, her attorney and Argonaut. The court held the WCAB as the exclusive forum for resolving employee claims.

The *Hughes* court also cited to a recent California Supreme Court case in which a group of workers compensation doctors sued workers compensation insurers for deliberately delaying payment on liens to drive these doctors out of business. Our Supreme Court held that the WCA reposed exclusivity upon the WCAB for the delay in paying the doctors' invoices. However, if an insurer acts in concert with other insurers as part of an industry-wide program to put doctors or businesses out of business, the WCAB does not have jurisdiction. Ms. Hughes was unsuccessful in pleading Argonaut was conspiring with other insurers.

Applying this recent case to *Hughes*, the court found the settlement process in *Hughes* to be collateral to or derivative of the claims process. The appellate court felt that the WCAB was the most appropriate forum to enquire into the reasons for the particular lien practices. The WCAB, if necessary, could impose discipline. The court also noted that the workers compensation bargain anticipates that insurers may commit misdeeds during the claims process. Therefore, an employee may maintain a private cause of action against the insurer only when the insurer commits wrongful acts that are independent of its role as a workers compensation insurer. Because Argonaut's efforts did not exhibit a motive violative of a fundamental public policy, its bad faith was not adjudicable in the superior court. The court also held that Argonaut was exempt from being sued under the unfair competition law, as the compensation bargain Ms. Hughes entered into required WCAB jurisdiction.

If one of our represented clients does end up paying a settlement or verdict, it is up to either the WCAB to adjudicate the claim for attorney fees if a lawsuit was not filed, or the superior court if litigation resulted before settlement or judgment. It is up to the employee and the employer/insurer to adjudicate claims for attorney fees and related costs. Fortunately, this is not a cost borne by the third party tortfeasors or their insurers.

## WESIERSKI & ZUREK IN TRIAL

Tom Wianecki recently obtained a defense verdict in a bad faith case with admitted liability. Plaintiff made a left turn in front of another vehicle while under the influence of drugs and alcohol. She was arrested at the scene. Two occupants of the other vehicle filed suit against plaintiff, whose insurance carrier did not know she was in prison. She never filed a loss report. As such, both lawsuits went to default. Plaintiff retained an attorney and filed a bad faith action against the carrier, alleging economic damage and non-economic loss. Plaintiff served a \$998 for \$99,999, defendant served a \$ 998 for \$6,500. The jury found plaintiff suffered no economic loss.

## NEW AT WESIERSKI & ZUREK

As Wesierski & Zurek continues to grow, we proudly present our new attorneys:

**Jay T. Rubin:** Jay comes to our L.A. office after 17 years with another defense firm, with many trials in the areas of auto liability, premises, construction and products.

**Kimberly C. Giep:** Kim is a second-year attorney who has joined our L.A. office. She graduated UCLA and Loyola Law School, and concentrates on auto liability.

**Laura J. Barns:** Laura joins our Irvine office with 20 years of insurance defense practice and extensive litigation experience. She is a graduate of Southwestern Law School and the University of California at Berkeley.

**Lisa Renaud:** Lisa also joins our Irvine office as an attorney after eight years of adjusting experience at 21<sup>st</sup> Century Insurance, where she was a Senior Bodily Injury Examiner.

Welcome all!

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sheets means that the lax inspection protocol was the cause of the fall, i.e., that the substance was in fact on the ground for an unreasonable period of time before plaintiff fell.

In the meantime, the moral for property owners and operators is that it is now imperative to have a frequent, thorough and well-documented inspection program in place to head this whole problem off at the pass, and to keep a lack of evidence from becoming the very means by which plaintiff prevails.

-Paul J. Lipman

**WRONGFUL DISCHARGE MAY NOT  
BE RELITIGATED IF THE  
PREREQUISITES OF COLLATERAL  
ESTOPPEL HAVE BEEN MET IN AN  
ADMINISTRATIVE HEARING**

Forty-nine-year-old Edward Castillo, Jr. had worked for 29 years in the Public Works Department of the Bureau of Engineering for the City of Los Angeles. In June of 1996, he was dismissed from his job due to the City's claims of unauthorized absences and excessive tardiness. Mr. Castillo appealed his dismissal to the Civil Service Commission. In August of 1996, an evidentiary hearing took place. The hearing officer found the charges against Mr. Castillo to be supported by the evidence. The hearing officer recommended that the dismissal be upheld. The Board of Public Works followed this recommendation and reaffirmed the dismissal in January of 1997.

In April of 1997, Mr. Castillo filed a petition for a writ of mandate under *Code of Civil Procedure* §1094.5, the statute which permits inquiry into the validity of a final administrative order. In June of 1997, Mr. Castillo filed one claim each with the California Department of Fair Employment and Housing against his two supervisors and the City of Los Angeles. He alleged that he had been dismissed because of his age, or national origin of Mexico. In July of 1997, the department advised Mr. Castillo that all three cases had been closed without further action, and that he had the right to sue each of the parties.

Mr. Castillo then filed a wrongful termination suit against the city, alleging that his discharge was based on age, race and national origin and was in violation of public policy. While that civil case was pending, the appeal of the administrative hearing was denied in January of 1999. Thereafter, the City of Los Angeles moved for summary judgment in the civil wrongful termination case on the basis of the findings in the administrative hearing, the denial of the appeal of the administrative hearing, and the principle of collateral estoppel which says that once issues have been fully litigated, a new suit on them cannot be brought. After hearing, the court granted the summary judgment in the civil case and Mr. Castillo appealed.

In *Edward Castillo v. City of Los Angeles*, the court noted that all causes of action were similar in that they claimed discrimination on the basis of age, race or national origin. The court noted that if the defense was able to show that Mr. Castillo's discharge was for unsatisfactory attendance and failure to improve, then summary judgment

would necessarily have to be affirmed. However, the court also noted that if those issues had been litigated in the prior proceeding, with a decision on those issues as between the same parties that were now before the court in the wrongful termination suit, then collateral estoppel would apply, and Mr. Castillo would not be allowed to relitigate these questions in the Superior Court.

If the administrative hearing was conducted by an agency acting in a judicial capacity, and if the issue was directly addressed by that agency, then it cannot be revived in superior court litigation. In the administrative hearing, Mr. Castillo was unable to support his contentions that he gave proper notice to take time off and that other persons of different ages and races were permitted to engage in the type of conduct Mr. Castillo was being accused of as being the cause for his termination. Additionally, the administrative decision was final and on the merits. It became final when the trial court denied the petition for a writ of mandate and the time for appeal of that denial had passed. It was on the merits because it followed a full hearing in which the substance of the claim was tried, evidence was heard, and a determination was made.

Finally, the Court of Appeals looked to whether public policy would be best served by precluding relitigation of Mr. Castillo's claims. If Mr. Castillo were allowed to proceed, the new litigation would diminish the value of the administrative process which had been carefully crafted and was operated with a view which would serve the interest of an aggrieved employee. Mr. Castillo had been provided with ample opportunity to present his case at the administrative hearing, and had the opportunity to seek redress from the court with the writ of mandate, but lost on both accounts. Thus, he should not be allowed to seek yet a third review when his rights were amply protected in the first two forums. Since Mr. Castillo could not prove the wrongfulness of his termination, and he was unable to prove an essential element of his cause of action, then the City of Los Angeles was entitled to a judgment as a matter of law.

-Thomas E. Martin

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