

INDEPENDENT CONTRACTOR'S EMPLOYEE CANNOT PURSUE AN INJURY CLAIM AGAINST THE OWNER OF THE PROPERTY WHERE HE WORKS, WHERE OWNER DOES NOT DIRECT THE WORK OR INCREASE THE RISKS

Donald Tilley had been previously employed as a full time employee deputy with the San Bernardino County Sheriff's Department and as a patrol officer for the Adelanto Police Department. At the time in question, he was still an active reserve officer for the County of San Bernardino. Mr. Tilley was also a security guard working for BonaFide Security Services. BonaFide was hired by the Coto de Caza Homeowners Association ("CZ") to work the entrance gates to the gated community, to patrol the property and to respond to complaints by the residents of the community. By contract, the security officers were forbidden from carrying weapons. If they were responding to some sort of a disturbance, Mr. Tilley himself testified that the BonaFide security officers were simply to "observe and report" and not to intervene. They were to contact the Orange County Sheriff's Department if further action were needed.

In August of 1998, a 17 year old resident of the community threw a party at her parent's home. As is not uncommon with such parties, it quickly got out of hand with more guests arriving than anticipated and rowdy behavior. At first, both Orange County Sheriff's Department deputies and BonaFide security officers showed up. The party was broken up and the guests disbursed. After the situation was quieted and the officers left, one of the prior guests returned to the house to "get even" with someone who had assaulted him at the party before it had been broken up. He was successful in exacting his revenge. However, the disturbance caused yet more calls to the security office. It was Mr. Tilley who responded to the location a second time.

When Mr. Tilley arrived 20 to 30 people were still in and around the residence. He was able to identify the individual who had been involved in the altercation. The aggressor was in the process of getting in his truck and leaving. Mr. Tilley approached the truck and informed the perpetrator that he was "under arrest." Mr. Tilley then took the keys to the vehicle. The assailant exited the vehicle and exacted further revenge, but this time on Mr. Tilley. As a result, Mr. Tilley applied for and received workers' compensation benefits from BonaFide. Thereafter, he sued CZ.

By the time Mr. Tilley had gotten to his Third Amended Complaint, he was alleging general negligence (for CZ's alleged failure to take reasonable steps to deter or prevent residents from hosting out of control youth parties), negligent supervision of contract (due to CZ's alleged inadequate control of the details of BonaFide's work and contract performance) and premises liability (for CZ's alleged failure to prevent or restrict parties

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**SETTLEMENT DEMAND IN
LETTER DEEMED VALID C.C.P.
§ 998 OFFER**

In the recent case of *Erika A. Berg v. Ronald L. Darden, D.D.S.* (2004) 120 Cal.App.4th 721, the Appellate Court for the Second District of California ruled that a plaintiff attorney's letter which included a settlement demand and reference to Code of Civil Procedure Section 998, satisfied the requirements of that section.

The case arose out of alleged malpractice by defendant Ronald Darden, D.D.S. Plaintiff's counsel sent a three page letter to defendant's counsel addressing such things as discovery issues and the parties' positions regarding merits of the litigation. In the last paragraph of the letter, plaintiff's counsel stated: "This letter includes and hereby implements a statutory C.C.P. Section 998 offer by Erika Berg to settle this case for \$225,000. If there is no acceptance of this offer within 30 days, and, if at trial we receive a greater sum from Dr. Darden, we will seek the full panoply of 998 awards, including prejudgment interest starting from the date of service and expert costs." The letter was sent via fax and mail to defendant's counsel. Defendant's counsel told plaintiff's counsel he did not believe it was a valid Section 998 offer, and as such, never responded. At trial, plaintiff received an award of \$524,000, and then sought costs pursuant to Section 998. The Trial Court found plaintiff made an ineffective Section 998 offer and denied the motion. The Court of Appeal reversed.

In reversing the Trial Court, the Appellate Court stated that plaintiff's offer satisfied Section 998's requirements, despite the fact that it did not identify the method by which the litigation would be resolved. The Court noted that the purpose of Section 998 is to encourage settlement by providing a strong financial disincentive to a party who fails to receive a better result than the offer. The court further noted that if a settlement offer does not contain "terms and conditions" aside from consideration to consummate the settlement, the offer by virtue of default is deemed to allow judgment to be taken in exchange for the specified amount.

The court further noted that if an offeree is uncertain about some aspect of the offer, or prefers the action to

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be dismissed rather than judgment entered, he is free to explore those matters with the offeror, or even make counter-proposals during the period in which the offer remains open. Under Section 998, the counteroffer will not be deemed to terminate the offer until the time the offer expires or is revoked. A Section 998 offer remains open until it is unequivocally rejected, formally revoked, or lapses due to the passage of time.

In summary, the court noted that a statutory offer of compromise does not need any "magic language," so long as it is clear that it is being made under Section 998, and if accepted, will result in an entry of judgment or other final disposition of the case. The court further noted that a formal proof of service does not need to be attached to the offer to make it effective. Rather, a formal proof of service is but one method to establish the date of service. It is sufficient proof of mailing if the notice or document bears a notation of the date and place of mailing.

- Ronald F. Templar

MEET FRANK D'ORO

Wesierski & Zurek LLP is pleased to welcome Frank J. D'Oro as a partner in our Los Angeles office. Mr. D'Oro has been practicing law for more than 25 years. He spent the last 20 years at a prestigious civil litigation firm where he was a senior trial attorney. Mr. D'Oro is a graduate of Pepperdine Law School where he was a member of their law review. He is currently a member of the American Board of Trial Advocates.

Mr. D'Oro brought a significant book of business to Wesierski & Zurek LLP, including major retailers Kroger and Albertson's. Mr. D'Oro has developed a recognized reputation within the legal community for his representation of retail grocers ranging in size from large corporate chains to the smaller, independent stores serving diverse ethnic communities.

In addition to representing retailers, a portion of Mr. D'Oro's practice includes representation of self-insured public entities such as the City of Big Bear Lake and the City of South Pasadena. Indeed, he has established strong client relationships over a broad geographical area.

The success of Mr. D'Oro's practice is based on his knowledge and experience of both the retail grocery business and governmental tort litigation. By representing both large and small retail chains he has developed a wealth of experience handling claims ranging from excessive force and discrimination to on-site bodily injury. Through the representation of both insured and self-insured entities he is able to offer counsel regarding coverage, indemnity, and excess exposure particular to his client's needs.

Mr. D'Oro has developed an approach to litigation that involves three essential factors. First, he makes sure the client's expectations are clearly established at the beginning of the relationship. "At the outset I meet with the client to make sure I understand what the client's goal is in the litigation. At that point it is important to map out a strategy to meet that goal, letting the client know how you intend to get there and at what price."

Second, he is straightforward with the client. "Telling a client what they want to hear or making promises you



cannot keep may get the client in the door but will not result in repeat business. You never want the client to say, 'If I had known that at the beginning I would have made a different decision.'"

Third, he is mindful that the case belongs to the client. "Many legal professionals think once they have been retained, it is their case and the decisions are for them to make. Know your client, their goals and their expectations. Keep the client informed and work with the client in making decisions that meet the client's goals."

By keeping his focus on the client's goals and expectations, Mr. D'Oro knows and understands his clientele that much better. The client is involved in the process and reaps the benefits of what is truly customized professional service. A perfect fit for the professionalism and integrity that is Wesierski & Zurek LLP.

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while requiring that security personnel respond to out of control parties). CZ moved for summary judgment. The hearing on the motion was continued twice at Tilley's request to purportedly conduct additional discovery (which was never done). When the hearing was finally conducted, Tilley ineffectively requested another continuance to conduct additional discovery. This request was denied and CZ's motion for summary judgment was granted in all respects. An appeal followed.

In *Donald Tilley v. CZ Master Association*, the Fourth District, Division Three extensively reviewed the situation of an employee of an independent contractor who was injured on property owned by the party who hired the independent contractor. The Court of Appeal ultimately affirmed the prior judgment.

In doing so, the Court of Appeal reasoned that CZ had no liability to BonaFide employees under the holdings of *Privette v. Superior Court*, *Towland v. Sunland Housing Group*, and *Hooker v. Department of Transportation*. While it was clear that the security officers were faced with "peculiar risks" in discharging their duties under the contract with CZ, it was BonaFide who set the patrol routes and times, created and instructed its officers on security procedures and instructed its officers on how to respond to parties and otherwise control the day to day operations of security for CZ. In fact, Mr. Tilley testified that he was very rarely given instructions directly from CZ, and that on each occasion in which that occurred, he told the CZ board members that he would have to get the instructions cleared with BonaFide, which he did. CZ had retained virtually no control over the manner in which BonaFide performed its work under the contract. Since it was the plaintiff's choice to abandon his "observe and report" instruction and instead to intervene on his own, there would be no liability under the "Peculiar Risk" doctrine.

The court also held that CZ had no independent duty to restrict the parties thrown by its homeowners or to control the number of non-residents allowed to attend the parties. Plaintiff's contention that youth parties are inherently dangerous due to frequent alcohol use and violence was also rejected by the court. It was not foreseeable that each and every party would

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automatically become an out of hand melee. The court rejected the plaintiff's argument that CZ should have amended its CC&R's to prohibit their residents from throwing parties because they constitute an unreasonable burden on both the homeowners association and the individual homeowners themselves. It also potentially exposes CZ to liability should any party get out of control. The evidence before the court also showed that the parties did not inherently impose danger on the BonaFide security officers where they remained in their "observe and report" mode as opposed to intervening.

The court also held that Mr. Tilley assumed the risk of injury by attempting to intervene on his own with the assailant. Citing *Neighbarger v. Irwin Industries Inc.*, the court found that it would be unfair to charge a defendant with a duty of care to prevent injury to a plaintiff arising from the very condition or hazard the defendant had contracted to remedy. If someone is hired to confront a particular condition, they cannot later complain about the conduct of the entity that hired them.

All was not lost for Mr. Tilley. While not much detail is provided, the opinion makes reference to the fact that he had also sued other defendants unrelated to the homeowners association (presumably the aggressor and the actual homeowner) and that he had settled with them prior to the hearing on the summary judgment motion by CZ.

- Thomas E. Martin

Editor

Paul J. Lipman