

**OVERZEALOUS INVESTIGATION INVOLVING
EGREGIOUS AND DELIBERATE CONDUCT MAY
RESULT IN DISMISSAL OF THE LAWSUIT**

In a case of first impression in California, the Court of Appeal in *Slesinger v. The Walt Disney Company* (2007) DJDAR 14965, held that a trial court has the inherent power to issue a terminating sanction if a plaintiff’s misconduct is found to have tampered with the administration of justice and threatened the integrity of the judicial process. As the court explained, sometimes the misconduct of a plaintiff is so deliberate and egregious that any remedy other than dismissal would be inadequate to preserve the fairness of the trial.

Stephen Slesinger, Inc. (“SSI”) sued Disney alleging a failure to pay royalties allegedly due from the Winnie the Pooh series of children’s stories. Early in the litigation, SSI hired an investigator to surreptitiously obtain Disney documents. Other than instructing the investigator to “obey the law,” SSI did not provide any further direction or supervision as to the activities of the investigator. Over the years, the investigator obtained thousands of pages of documents belonging to Disney, some of which were marked as privileged and confidential. The investigator obtained these documents by breaking into Disney offices, including secured trash receptacles, and by trespassing onto the facility of the company with which Disney contracted to destroy its confidential documents. These documents were passed onto SSI principals and ultimately to SSI attorneys.

During the discovery phase of the litigation, it became apparent to Disney that SSI was in possession of various documents that were considered confidential and privileged, as well as documents Disney thought had been destroyed. When pressed, SSI took various positions as to how it “lawfully” came into possession of the documents.

The trial court ultimately held a sanction hearing and found that SSI’s explanations were not persuasive. In particular, the court found that the investigator had taken documents from multiple Disney locales, as well as the facility contracted by Disney to destroy documents. The court also found that SSI had either explicitly or implicitly authorized these activities and had also altered documents to make it appear that they were not confidential. As to the SSI representatives, the court determined that their responses were either intentionally false, or made with deliberate indifference to the truth.

In exercising its inherent powers to preserve and protect the integrity of the judicial process, the trial court, as a terminating sanction, dismissed SSI’s action with prejudice. A key factor in the court’s decision was that “SSI’s principals, who read Disney’s

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writings, possess in their minds information which no Court order or sanction can purge.”

On appeal, SSI challenged the existence of the trial court’s “inherent power” to dismiss a case as a sanction for misconduct. Holding the trial’s court’s inherent power to dismiss, the court outlined several factors which must be weighed before a terminating sanction can be issued. The trial court must “consider all relevant circumstances, including the nature of the misconduct (which must be deliberate and egregious, but may or may not violate a prior court order), the strong preference for adjudicating the claims on the merits, the integrity of the court as an institution of justice, the effect of the misconduct on a fair resolution of the case, and the availability of other sanctions.” As to SSI, the court found its misconduct to be deliberate and egregious, and agreed that any remedy short of dismissal would be inadequate to preserve the fairness of the trial.

Slesinger confirms that a trial court does indeed possess an inherent power to impose a terminating sanction. This is important as, historically, the notion of permitting a plaintiff to “have his day in court” has been imbedded in the minds of all those involved in the legal process. However, a trial court is now confirmed to possess the ultimate weapon, a device to combat a specific threshold of deliberate and egregious misconduct.

What should not be lost in the *Slesinger* case is the fact that the actions of the investigator were at the heart of the “egregious and deliberate” misconduct. The failure of a litigant to properly direct and supervise those who are appointed, or charged with the responsibility to conduct a thorough investigation may lead to unlawful entanglements and perhaps disastrous consequences. In that regard, one must be clear in the establishment of boundaries and diligent in the management of such personnel.

- John E. Black

ENTERTAINMENT NEWS

Britney Spears Thrown Out of Federal Court

In a bizarre twist in the continuing Britney Spears saga, a Los Angeles Federal District Judge has thrown out the conservatorship proceedings filed by Spears’ alleged attorney, Jon J. Eardley. W&Z has obtained the court’s ruling which states that Mr. Eardley had no authority to remove the original conservatorship case from the California state court. Under the relevant legal standard of 28 U.S.C. 1441, any civil action brought in a State court may be removed exclusively by defendants. As the Honorable Philip S. Gutierrez ruled, the man claiming to be Ms. Spears’ attorney, Jon J. Eardley, is neither a party nor a defendant. The State probate court previously appointed Samuel D. Ingham III as Ms. Spears’ attorney and specifically found that she was mentally incapable of retaining her own counsel. Mr. Eardley did not challenge the probate court’s appointment of Mr. Ingham and has not attempted to intervene in the conservatorship proceeding on her behalf. Instead, Mr. Eardley caused the case to be removed to federal court while “clearly lacking the authority to do so.”

Pamela Anderson Alleges Marriage Induced by Fraud

In court papers filed February 22, 2008 in the downtown Los Angeles courthouse, Pamela Anderson is petitioning the court to find that her marriage to celebrity-by-association Rick Salomon is null and void. Under California law, a marriage is voidable and may be adjudged a nullity (as if it never existed in the first place) if, at the time of the marriage, the consent of either party was obtained by fraud. No word yet on what Anderson alleges constituted the fraud which induced her marriage on October 6, 2007 in Las Vegas. Maybe everything that happens in Vegas, really does stay in Vegas.

“Dateline NBC” Case Going to the Jury

A U.S. District Judge has refused to dismiss the wrongful death lawsuit involving a Texas Assistant District Attorney who took his own life. This case surrounds the news show Dateline NBC in connection with their segment “To Catch A Predator” - a show that works with local police departments and an online “watchdog” group called Perverted Justice to identify

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**PROPOSITION 213 HELPS
DEFENDANTS IN NEGLIGENT
ENTRUSTMENT CASES, BUT DOES
NOT APPLY TO STATUTORY
OWNER'S LIABILITY**

Review of Proposition 213

Proposition 213 confirms the ancient rule that co-defendants are jointly and severally liable for economic damages, but modifies the rule by providing that the co-defendants are only each liable for their own share of non-economic damages, *i.e.*, pain and suffering. When it comes to general damages, everybody now "pays their own way." Proposition 213 is a major advance for the defense because in the many cases where the true tortfeasor is gone, or has a minimal policy, is bankrupt, etc., it at least partially protects the remaining tortfeasors from being hit with full joint liability. For example, if a rapist escapes (or is caught but has no money) and an apartment landlord is sued for having broken gates or locks or bad lighting in the parking garage, the landlord would have to pay 100% of the plaintiff's specials, but only that percentage of the pain and suffering that was attributed by the jury to his negligence. That way the victim is always ensured to be compensated for at least his/her medical specials by the primary defendant, but cannot look to the less culpable defendant for any more than that defendant's proportionate share for pain and suffering.

Proposition 213 Does Not Apply To Vicarious Liability

However, the protections of Proposition 213 only apply to independently liable tortfeasors, not to purely vicarious liability situations. In the recent case of *Bayerbel v. Litovsky* (2008 DJDAR 1372), the court held that when a plaintiff sues a defendant driver and also the car's owner for negligent entrustment, the negligent entrustment is an independent tort and not vicarious liability – and therefore, Proposition 213 applies and the owner will get the protection of that statute. By contrast, statutory owner's liability is vicarious, and Proposition 213 will not apply. In other words, Proposition 213 is about apportioning fault, and

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where a defendant is vicariously liable for an employee's acts – Proposition 213 does not apply.

Negligent entrustment includes personal fault. It is not simply derivative or vicarious liability. In negligent entrustment, the plaintiff is claiming that the entruster was personally negligent in handing over the keys to this individual, not simply that he owned the car. Therefore, he gets the benefit of apportioning fault under Proposition 213. The situation would be different if the defendant were sued only for simple statutory ownership liability.

Examples of truly vicarious or derivative liability, *i.e.*, where Proposition 213 does not give protection to the defendant are:

- Where an employer is sued for vicarious liability for the employee's acts.
- Where a premises owner is sued for an unsafe condition caused by one of its independent contractors.

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NEW AT WESIERSKI & ZUREK

John Black: Mr. Black attended the University of California at Santa Barbara, where he graduated with a Bachelor of Arts degree in speech and communication. Mr. Black studied law at Willamette University in Oregon, receiving his Juris Doctor degree in 1983. Mr. Black is admitted to the California Bar and the United States District Court for the Central District of California.

Prior to joining Wesierski & Zurek LLP, Mr. Black was associated with a plaintiff firm and two southern California defense firms, practicing in the area of civil litigation, including personal injury, products liability, insurance, premises liability and auto liability. Mr. Black also spent some time away from the practice of law, while he built a successful business involving youth sports on an elite level. Mr. Black is a member of the Orange County Bar Association.

Carl Kremer: Mr. Kremer received his Bachelor's degree in Biology from University of California at Davis in 2004. In 2007, he received his J.D. from Loyola Law School, Los Angeles. Carl was on the dean's list at Loyola and received a Loyola Scholar Scholarship. During law school he also worked as a legal intern at the California Department of Transportation. Carl was admitted to the California Bar in November 2007.

He is licensed to practice before all the courts of the state of California as well as the United States District Court, Central District of California.

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and arrest "sexual predators." Here, the decedent, Louis William Conradt, shot himself in his home as he was about to be arrested by the police for attempting to solicit a minor online. NBC moved, pursuant to Rule 12 (b) (6) of the Federal Rules of Civil Procedure, to dismiss the case for failure to state a claim for which relief may be granted. However, on February 26, 2008, U.S. District Judge Denny Chin ruled that the intentional infliction of emotional distress claim and civil rights claim will proceed to trial. Specifically, the court found that a reasonable juror could find that NBC crossed the line from responsible journalism to irresponsible and reckless intrusion into law enforcement.

- Steven Ibarra

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This is because safety is a "non-delegable" duty that cannot be delegated to a contractor. A landowner remains liable for negligent safety acts or omissions by a hired contractor whether or not the premises owner is personally negligent. Unless the contractor is brought in by cross-complaint, and is solvent, the landowner cannot reduce his liability by pointing at the contractor. "Safety" is an exception to the independent contractor rule which usually insulates the hiror from vicarious liability. Because a premises owner remains liable for the unsafe acts of its contractors, the liability is in essence vicarious because it is without regard to the personal fault of the premises owner himself. Therefore, Proposition 213 will not help the landowner.

- **Vehicle Owner Liability.** When a vehicle owner is not charged with negligence in handing over the keys, and is simply charged with strict statutory liability just as the owner, his liability is vicarious and derivative and he does not get the benefit of Proposition 213.

The above is a rough guide to when Proposition 213 will or will not apply to protect a co-defendant. There are many nuances to these rules. For instance, despite the old rule that a tortfeasor is jointly and severally liable for any subsequent malpractice of a treating doctor (on the theory that it was the defendant who made plaintiff go to the doctor in the first place and that occasional medical negligence is foreseeable), a defendant may still sometimes get the benefit of Proposition 213 and may be able to cross-complain against the doctor and/or apportion off the doctor's share of general damages. Wesierski & Zurek LLP will be happy to consult on any case regarding the fine points of whether Proposition 213 is or is not applicable to a particular case.

- Paul J. Lipman

Editor

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