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HON. LAURENCE KAY

Presiding Justice, California Court of Appeal, First Dist. (Ret.)
Presiding Judge, San Francisco Superior Court (Ret.)

California Court of Appeal, First Appellate District, Division Four, 2000-2005

Presiding Justice January 2002 – August 2005

Associate Justice December 2000 – January 2002

Superior Court, City and County of San Francisco, 1983-2000

Presiding Judge of Superior Court, 1996 – 1997

Assistant Presiding Judge, 1995 - 1996

Presiding Judge, San Francisco Probate Court, 1997 – 2000. Established widely acclaimed mediation programs for San Francisco Probate Court.

Presiding Judge, San Francisco Superior Court Appellate Division, 1991 – 1994

Municipal Court, San Francisco Judicial District, 1981 – 1983

Private Practice of Law, 1963-1981

MEMBERSHIPS/AWARDS

Recipient “*Top 50 Neutral*” in California, Daily Journal, 2009

Member, *Judicial Council of California* (Governing body of the California Judiciary) appointed by the Chief Justice in 2002

Chair, *Judicial Council Rules and Procedures Committee* (RUPRO) 2004-2005. (RUPRO is the internal committee that reviews/modifies all statewide rules of court, forms, procedures and jury instructions on behalf of the Judicial Council)

Vice-Chair, *Judicial Council Policy Coordination and Liaison Committee (PCLC)* 2003, coordinating between the California Legislature and the Judicial Council on all legislation affecting the judiciary

Member, *Judicial Council Interim Court Facilities Panel*

Recipient “*Trial Judge of the Year*” Award, San Francisco Trial Lawyers Association, 1994

Recipient “*Appellate Justice of the Year*” Award, Consumer Attorneys of California, 2004

Founding Member, *USF Chapter of American Inns of Court* (1995-Present)

President, *USF Chapter of American Inns of Court* (1997-1999)

Board Member, *San Francisco Bar Association Litigation Section* (1997-2002)

Member, Executive Committee, *Northern California Chapter of the Association of Business Trial Lawyers* (1996-Present)

Member, *Association of Business Trial Lawyers* (ABTL) since 1994

Executive Board Member and frequent lecturer, *National College of Probate Judges* (1998-2002)

Member, *California Judges Association Appellate Courts Committee*

TEACHING/ARTICLES

- Panelist and Program Presenter, “Protective Orders and Sealed Documents” 2004 Association of Business Trial Lawyers Annual Conference
- Panelist, various “From the Bench” programs for ABTL
- Author, “California Punitive Damages: Life After State Farm”, ABTL Northern California Report Vol. 13, No. 2, Spring 2004
- Participant, Rutter Group programs (The Evidence Master Series and Estates and Trusts) Program presenter at CEB Probate and Trust section programs, California Judicial Education and Research Foundation Faculty; Computer Use for Judges; Lecturer, Three Strikes Sentencing; Editor-in-Chief, Domestic Violence Bench book (1st ed. 1986).

EDUCATION

J.D. (1963) University of California, Boalt Hall School of Law, Berkeley, (Associate Editor, *California Law Review*)

B.S. Economics (1958) University of California, Berkeley

EDUCATION – Other

Possesses an inactive B-1 contractors license

Partial list of significant published appellate opinions authored by Justice Kay:

PROTECTIVE ORDERS AND DISCOVERY

In re Providian Credit Card Cases (2002) 96 Cal.App.4th 292.

This is the leading case involving sealed documents decided after the passage of California Rules of Court, rule 243.1, *et. seq.* It contains an extensive analysis of the requirements for sealing and unsealing documents and what documents may qualify as proprietary trade secrets.

McKesson HBOC, Inc. v. Superior Court (2004) 115 Cal.App.4th 1229.

After being informed that the SEC had begun a formal investigation into accounting irregularities, McKesson shared with the SEC the results of an audit review and interview memoranda prepared by its attorneys. The SEC promised to keep the reports confidential. Later, the company shareholders filed a civil suit against McKesson and tried to discover these reports. McKesson claimed attorney-client and work product privilege. In this leading case, the Court of Appeal decided that McKesson had waived the attorney client and work product privileges by sharing the reports with the SEC while the SEC was a potential adversary.

Anti-SLAPP MOTIONS

Navellier v. Sletten (2003) 106 Cal.App.4th 763.

Plaintiffs sued defendant for pursuing a cross-complaint in other litigation. When a defendant files an anti-SLAPP motion under Code Civ. Proc., Sec. 425.16 (b) (1) seeking to strike the complaint and for attorney fees, he or she must show that plaintiffs' causes of action arose from defendant's acts in furtherance of "rights of petition or exercise of free speech." This is the "first prong". Once that has been established, the burden shifts to plaintiffs to demonstrate a probability of prevailing on their claims in order to defeat the motion to strike. To do so plaintiffs must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited. Plaintiffs' burden as to the second prong of the anti-SLAPP test is akin to that of a party opposing a motion for summary judgment. Here, plaintiffs were suing over the contents of a cross-complaint filed by defendants in another action. Since in California the contents of a complaint or cross-complaint are absolutely privileged under Code Civ. Proc. Sec. 47, subd. (b), plaintiffs could not show the probability of success. The Court of Appeal ordered the trial court grant defendants' anti-SLAPP motion.

Fontani v. Wells Fargo Investments (2005) 129 Cal.App.4th 719

Fontani was a securities broker-dealer who was terminated by his employer, Wells Fargo Bank. Whenever a registered securities broker-dealer is terminated the employer is required to file a form (U-5) with the NASD setting forth the reasons for the termination. Here the reasons stated were allegedly defamatory and Fontani sued the bank. The Bank filed an anti-SLAPP motion, which the trial court denied. The Court of Appeal reversed. The NASD provides a governmental function in regulating the securities industry and the U-5 form may result in official investigations. Thus, statements in the form are, like pleadings, absolutely privileged under Civil Code section 47, subdivision (b) and the Bank may not be sued for defamation.

GOVERNMENT REGULATION

Power Standards Lab, Inc. v. Federal Express Corp. (2005) 127 Cal.App.4th 1039.

Fed Ex refused to honor its contract to reimburse a shipper for damage to a piece of electronic equipment, forcing the shipper to sue. Fed Ex paid the amount of the repair just prior to trial but refused to pay shipper's attorney fees incurred to that point. The jury awarded attorney fees and punitive damages. *Reversed*. Any recovery in excess of the stated value of the goods shipped is preempted by 49 U.S.C § 41713(b) of the Airline Deregulation Act of 1978.

Liang v. San Francisco Residential Rent Stabilization & Arb. Bd. (2004) 124 Cal.App.4th 775.

The rent board denied a tenant's rent reduction request. Tenant had 90 days to petition for judicial review of the board's decision. The Court of Appeal held that the 90 day time limit is jurisdictional and that the landlord is an indispensable party. Since the tenant failed to serve notice on the landlord within 90 days the trial court was without jurisdiction to review the board's decision.

Personal Watercraft Coalition v. Marin County Bd. of Supervisors (2002) 100 Cal.App.4th 129.

The Court of Appeal upheld a Marin County ordinance that banned personal watercraft.

Pleasant Hill Bayshore Disposal v. Chip-It Recycling (2001) 91 Cal.App.4th 678.

State law creating waste collection exclusive franchise was not preempted by FAA Authorization Act, which clearly did not apply to garbage and refuse collectors. Injunction against recycler prohibiting it from violating a franchise was proper.

LAND USE AND REAL PROPERTY TRANSACTIONS

Moore v. Board of Supervisors of Mendocino County (2004) 122 Cal.App.4th 883.

Government Code sections 66451.301 and 66451.302 adopted in 1983 were intended to preserve mergers accomplished through local ordinance by exempting them from the requirement of recorded notice and allowing more informal notice (by letter). In 1981 the County of Mendocino had just such a merger ordinance that did not require formal notice. In 1982 the ordinance was amended to require formal recorded notice and a hearing. *Held*, the amendment came too late. The parcels had already automatically merged under the prior version of the ordinance.

Bowman v. City of Berkeley (2004) 122 Cal.App.4th 572.

In this leading case, the Court of Appeal ruled that a full environmental impact report is not required where impact is limited to the aesthetic merit of a proposed building in a highly developed urban area.

Aozora Bank v. 1333 N. Cal. Blvd. (2004) 119 Cal.App.4th 1291.

A trial court erred in awarding attorney fees to the lender in connection with its successful prosecution of a waste action against a borrower. Such fees (but not the action for waste itself) were barred by a nonrecourse provision in the parties' contracts.

Citizens for Better Streets v. City & County of San Francisco (2004) 117 Cal.App.4th 1

Following the collapse of a portion of the Embarcadero freeway from the Loma Prieta earthquake, section 72 of the Streets and Highways Code was passed by the state legislature pursuant to which Cal Trans transferred a portion of the property to the City "to construct a system of ramps and City

streets utilizing the Route 480 right-of-way or the proceeds from the sale of that right-of-way for the sole purpose of constructing an alternate system of local streets as above described.” Instead, the City “leased” the property for 99 years at nominal rent to a private developer for the purpose of building low cost housing. The majority affirmed such use. Justice Kay disagreed and wrote a *dissent* in which he said that the City should, at the very least, seek permission from the state legislature before giving the property to a private developer for housing.

Kaczorowski v. Mendocino County Bd. of Supervisors (2001) 88 Cal.App.4th 564.

California Coastal Commission was an indispensable party to administrative mandamus challenging the Commission’s issuance of a permit for a proposed project approved by the Mendocino County Board of Supervisors subject to California Environmental Quality Act.

Traverso v. Department of Transportation (2001) 87 Cal.App.4th 1142.

Plaintiff argued that Cal Trans revoked billboard permits belonging to his predecessor in interest in the 1970’s without due process. Thus, he should not be barred by the statute of limitations for bringing an action to reinstate the permits. Since time for challenging revocations had long passed, he was in the position of any new permit applicant. In that posture, he was not entitled to the permits. One cannot avoid the statute of limitations by alleging denial of due process.

CONSUMER LAW

Krumme v. Mercury Ins. Co. (2004) 123 Cal.App.4th 924.

Insurers engaged in unfair practices by selling car insurance through “broker-agents” who were not appointed agents and by advertising the cost of such insurance without including the brokers’ commissions.

Yu v. Signet Bank/Virginia (2002) 103 Cal.App.4th 298.

Bank practice of subjecting California credit card consumers to personal jurisdiction in Virginia for purposes of collection was distant forum abuse, inconsistent with constitutional due process.

CONTRACTS

CIT Group/Equipment Financing, Inc. v. Super DVD, Inc. (2004) 115 Cal.App.4th 537.

Where an equipment lease provided a precise formula for the computation of damages in the event of breach, an order of attachment could be issued against the property of the breaching lessee.

Oakland-Alameda County Coliseum Authority v. CC Partners (2002) 101 Cal.App.4th 635.

The arbitration clause in the seat revenues licensing agreement between team owners and the Oakland Coliseum impermissibly purported to expand the rights of the parties to judicial review of arbitration decisions to include errors of fact and law. This is forbidden by *Moncharsh*. The team owners argued that this language invalidated the entire arbitration clause. It did not. The question to be answered in each case is whether the parties would have agreed to arbitration without the invalid language.

Vahle v. Barwick (2001) 93 Cal.App.4th 1323.

An attorney was sued for malpractice by a client, the plaintiff in a personal injury case, after signing a release with the other party. The release clause purported to cover the defendant and “all other

persons”. Whether the plaintiff’s attorney was an intended beneficiary of the release was a triable issue of fact. The trial court should not have granted summary judgment to the attorney.

CONSTRUCTION CASE DISCOVERY

Justice Kay tried many construction defect cases as a trial judge and handled the discovery himself. He possesses an inactive B-1 contractors license from when he was a homebuilder many years ago, which gives him an understanding of complex construction issues.

EMPLOYMENT LAW

West v. Bechtel Corp. (2002) 96 Cal.App.4th 966.

An American engineer employed in Saudi Arabia sued Bechtel for age discrimination when he was discharged. Bechtel’s contract was subject to oversight by the Saudi Royal Commission. West showed that the Saudi Royal Commission was biased against him due to age but Bechtel could not be held liable.

Birschtein v. New United Motor Manufacturing, Inc. (2001) 92 Cal.App.4th 994.

A co-worker of plaintiff had made unwanted explicit sexual advances and had been warned to discontinue the behavior. Following the warning the co-worker began a persistent staring campaign. Plaintiff alleged that the employer was told but failed to intervene. Under these circumstances staring may be sexual harassment. The trial court erred in granting summary judgment for the employer.

ATTORNEY MALPRACTICE

Orrick Herrington & Sutcliffe v. Superior Court (2003) 107 Cal.App.4th 1052.

The client was a husband who signed a settlement agreement with his wife on advice of counsel that divided very substantial assets. The agreement did not contain a complete release from wife. Husband claimed to have been advised by Orrick that it was a “non-binding term sheet.” With new attorneys he attempted, unsuccessfully, to set it aside, incurring sizeable attorney fees and costs in the process. He sued Orrick for professional malpractice. The trial court had denied Orrick’s motion for summary judgment and the Court of Appeal reversed. The client had failed to show that, following a trial, he would have obtained a judgment dividing the property more favorably than his settlement agreement, or that his wife would try to take advantage of the absence of a complete release by asking for additional property. Orrick was entitled to summary judgment.

PHYSICIAN-PATIENT PRIVILEGE

Shaddox v. Bertani (2003) 110 Cal.App.4th 1406.

A dentist who reported a police officer’s persistent requests for pain killer drugs to the police department could not be sued. Because this was a disclosure of suspected unfitness, it was lawful and privileged for the dentist make the disclosure under the Confidentiality of Medical Information Act.

MEDICAL MALPRACTICE

Schiff v. Prados (2001) 92 Cal.App.4th 692.

A physician cannot be sued for failing to disclose the existence of an alternative treatment for cancer, which cannot be legally administered in California.