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Appellate Reports

DECISIONS INVOLVING LEGAL MALPRACTICE, WAIVER OF ARBITRATION, MEDICAL MALPRACTICE AND INSURANCE BAD FAITH

Legal malpractice; proof of hypothetical underlying judgment; plaintiff's burden; procedure on remand

Kaushansky v. Stonecraft Attorneys, APC. (2025) 109 Cal.App.5th 788 (Second Dist., Div. 7)

Kaushansky hired defendant Stonecraft to pursue a lawsuit against her former landlord for damages resulting from the breach of the warranty of habitability and negligent maintenance. Stonecraft failed to pursue the case. It did no discovery, did not attend hearings, and stipulated to strike the claims for punitive damages and attorneys fees without consulting Kaushansky. Two weeks before the discovery cut-off and six weeks before trial, Stonecraft persuaded Kaushansky to sign a substitution. Kaushansky was unable to retain other counsel, and settled the case against the landlord for $2,500. She sued Stonecraft for malpractice and related claims. In a bench trial, the court awarded her $91,234 on her malpractice claim, based on its evaluation of the amount of what Kausansky would have hypothetically recovered had her claim against the landlord gone to trial, plus an additional $25,000 on her breach-of-fiduciary duty claim.

The Court of Appeal reversed and remanded with instructions to enter judgment for Stonecraft on the ground that, at trial, Kaushansky failed to offer evidence that the hypothetical judgment she would have obtained against the landlord was collectible. The court held that Stonecraft would raise the issue of insufficient evidence on this point for the first time on appeal. The causation and damages elements of malpractice require the plaintiff to establish that, but for the defendant's negligent acts or omissions, the plaintiff would have obtained a more favorable judgment or settlement in the action in which the malpractice allegedly occurred. Under this standard, the "collectability of the hypothetical underlying judgment is a component of the plaintiff's current case relating to damages, as caused by the current negligent attorney defendant."

Collectability is a fact-intensive inquiry, which looks to the actual circumstances to determine whether the judgment would have been collectable. "It is not enough for a plaintiff to present speculation or assumptions about an underlying defendant's ability to respond in damages, as opposed to proof of same." The court held that the evidence Kaushansky presented at trial – an email in which the apartment manager stated that the landlord had sold the building for "over $11 million in cash" was not in evidence, in that it was only used to refresh a witness's recollection. In any event, because there was no evidence concerning any liens or mortgages on the building, the amount of the sale proceeds alone was insufficient to show that the landlord could have satisfied a $91,000 judgment.

The court further held that, because Kaushansky failed to present evidence to support an element of her case, remand for a new trial was not appropriate. Rather, it remanded with instructions for the trial court to enter judgment for Stonecraft.

Arbitration; waiver for participating in litigation before seeking arbitration

Hofer v. Boladian (2025) __ Cal.App.5th __ (Second District, Div. 5.)

Hofer and Boladian are attorneys who worked together and had a falling out, which resulted in litigation. Hofer sued Boladian, seeking a jury trial and several forms of relief. Thereafter, he sought a TRO and preliminary injunction, litigated a demurrer, posted jury fees, set the depositions of Boladian and third-party witnesses, and propounded 159 requests for documents, 203 special interrogatories, 323 requests for admissions, and 49 form interrogatories. Six months after filing his complaint, four months after the denial of his motion for a preliminary injunction, but just three days after Boladian filed a cross-complaint against him, Hofer moved to compel arbitration. The trial court denied the motion based on waiver. Affirmed, the court determined that Boladian established by clear and convincing evidence that Hofer intentionally relinquished the right to arbitrate the dispute by engaging in litigation for four months "before they ever uttered a peep about arbitration."

Arbitration; stalemate caused by consolidation of 7,300 individual arbitration matters before a single arbitrator did not amount to a "refusal to arbitrate" by defendant:

Jones v. Starz Entertainment LLC (9th Cir. 2025) 129 F.4th 1176.

Jones created an account with defendant Starz's online video streaming service. She agreed to Starz's terms of service, which included a mandatory arbitration clause. The clause specified that the arbitration would be held using the JAMS arbitration procedures and rules. In January 2023, Jones submitted an arbitration demand to JAMS, alleging that Starz violated California law by disclosing her identity and the videos she watched to third-party companies like Google and Meta. Her demand was one of 100,978 identical demands, all submitted by Keller Postman LLC ("Keller"), the law firm representing Jones. Four months later, Keller wrote to JAMS requesting individual mediation on behalf of 7,300 clients including Jones, in compliance with the Terms' requirement that the parties endeavor to resolve controversies through JAMS-administered mediation prior to commencing arbitration. The mediation reached an impasse due to the parties' disagreement about how to allocate fees. JAMS

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consolidated the 7,300 matters before a single arbitrator.

JAMS appointed the Honorable Gail Andler as the arbitrator after the parties went through the standard striking-and-ranking process. Fifteen days later, Keller sent a single email to JAMS serving notices of disqualification on behalf of 7,213 claimants, not including Jones. JAMS treated the notices as disqualifying Judge Andler as to the entire consolidated proceeding. This process repeated itself each time JAMS appointed an arbitrator, preventing the arbitration from going forward. At no point did Starz disqualify an appointed arbitrator.

JAMS then suggested that Keller petition the California Superior Court to appoint an arbitrator. That route would appear to prevent repeated sequential disqualifications. Relevant state law grants a party a single peremptory challenge against a court-appointed arbitrator, after which a subsequent appointee can be disqualified only upon a showing of cause. (Code Civ. Proc., § 1281.91, subd. (b)(2).) Jones and her counsel had not taken this path to obtain appointment of an arbitrator by the Superior Court.

Instead, Jones petitioned the district court to compel arbitration under section 4 of the FAA. The district court denied the petition, holding that Jones "failed to demonstrate she is an 'aggrieved' party" within the meaning of section 4. The district court further held that JAMS's consolidation did not present a gateway question of arbitrability for the court to decide. Jones timely appealed. Affirmed.

The Court concluded that Jones was not aggrieved under the statute because Starz never failed, neglected, or refused to arbitrate. An arbitration provider's consolidation of numerous identical filings pursuant to its own rules as incorporated by the parties' agreement does not present a gateway question of arbitrability demanding the federal courts' attention under the Federal Arbitration Act. The Court explained that Jones's opening brief does not point to any conduct by Starz that triggers section 4. To the contrary, the record reflects that Starz engaged in the arbitration process at every step of the way. In response to Keller's request for mediation, Starz expressed that it was "ready and willing to begin mediating," even as it disagreed with Keller's demand that each claimant's mediation fee be capped at $250 (a demand that JAMS later rejected). Starz complied with JAMS's request for the parties to submit their positions on consolidation. The parties do not dispute that Starz paid its initiation fee for the consolidated proceeding, participated in the selection of arbitrators, and remains ready and willing to proceed with the consolidated proceeding.

Jones's position appears to boil down to the assertion that by urging JAMS to consolidate these claims and attempting to participate in the consolidated proceeding, Starz refused to arbitrate individually with Jones as mandated by the Terms. But it was JAMS, not Starz, that made the decision to consolidate, so it is not clear how that decision can be characterized as a refusal by Starz to arbitrate.

To the extent Jones claims injury from the repeated disqualification of arbitrators, there is a solution available to her: She can petition a California Superior Court to appoint an arbitrator, as suggested by JAMS. The California Code of Civil Procedure grants a party a single peremptory challenge against a court-appointed arbitrator and requires any subsequent disqualification to be based upon a showing of cause. (Code Civ. Proc., § 1281.91, subd. (b)(2).) There is thus a limit to the delay that can be caused by disqualifying arbitrators. Had Jones genuinely wanted to obtain a resolution on the merits, she could have availed herself of the California Superior Court.

Torts; medical malpractice; moving party's conclusory declaration that defendant acted within the standard of care; failure to meet initial burden for summary judgment

Zaragoza v. Adam (2025) 109 Cal.App.5th 113, 119 (First District, Div. 3)

Plaintiff was admitted to Mercy Medical Center, Merced complaining of abdominal pain. She was diagnosed with a bile leak and underwent several procedures for treatment, but all failed. She ultimately had to undergo multiple surgeries to treat the bile leak and related complications. She filed a medical-malpractice case against the hospital and two doctors, Dr. Adam and Dr. Uppal. Dr. Adam moved for summary judgment, supported by a declaration from Dr. Morse. The declaration detailed the procedures that Dr. Adam had performed and stated that, based on his review of plaintiff's medical records, that Dr. Adam performed the surgical procedure on plaintiff "within the standard of care expected of a general surgeon performing this surgery."

In opposing the motion, plaintiffs argued that Dr. Morse's declaration was inadmissible and insufficient to satisfy Dr. Adam's initial burden because Dr. Morse failed to provide a reasoned explanation for his opinions. Plaintiff did not submit an opposing medical expert declaration. The trial court granted the motion. Reversed.

The opinion of any expert is only as good as the facts and reasons on which it is based and the trial court properly acts as a gatekeeper to exclude speculative expert testimony. Dr. Adam argued on appeal that Dr. Morse's declaration was properly admitted by the trial court. The appellate court responded that "we may accept for the sake of argument that Dr. Morse's declaration was properly admitted, but this is not dispositive of whether the declaration was sufficient to carry Dr. Adam's burden as the party moving for summary judgment."

The Court viewed Dr. Morse's explanation for the basis of his opinions as deficient, explaining, "did not explain what acts constitute due care when performing a cholecystectomy, particularly as they relate to avoiding or preventing a bile leak. Morse also concluded, without adequate explanation or elaboration, that plaintiff's bile leak 'was not due to any negligence or inappropriate surgical technique on the part of Dr. Adam.' To the extent Dr. Morse offered this conclusion based on

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the premise that a bile leak is a recognized and relatively minor complication of a cholecystectomy that can occur 'even when the procedure is performed with due care,' his conclusion 'does not follow' because he did not explain how he ruled out a negligent cause for the bile leak in this case."

Dr. Morse's attempt to blame Dr. Uppal's performance of a prior procedure on plaintiff as causing a bowel perforation and attendant complications did not tend to prove the absence of negligence by Dr. Adam in performing a procedure that led to the bile leak. Nor was there any reasoned explanation for the accusation that Dr. Uppal caused the bowel perforation.

"Strictly scrutinizing Dr. Adam's evidence, as we must, we conclude Dr. Morse failed to support his opinions with sufficient factual detail and reasoned explanation to show the absence of a triable issue of material fact."

Insurance bad faith; ripeness before appraisal of damages

50 Exchange Terrace LLC v. Mount Vernon Specialty Insurance Co. (9th Cir. 2025) 129 F.4th 1186

Plaintiff-appellant 50 Exchange Terrace LLC ("50 Exchange") sought to collect under a property insurance policy with its insurer, defendant-appellee Mount Vernon Specialty Insurance Company (Insurer) for damage to 50 Exchange's property, which suffered water damage after frozen pipes burst. 50 Exchange and Insurer disagreed on the cost to repair the damage. Insurer paid its estimated value, less depreciation and the deductible to 50 Exchange. It also demanded appraisal under the terms of its policy.

50 Exchange then filed this action in state court in California alleging that Mount Vernon wrongfully withheld compensation while awaiting the outcome of the appraisal. Mount Vernon removed the action to the United States District Court for the Central District of California and moved to dismiss based on forum non conveniens. The district court ordered supplemental briefing on ripeness and Article III standing and then dismissed the action for lack of both. 50 Exchange has appealed. Affirmed.

Like many property insurance policies, the insurance policy here mandates appraisal in the event the parties disagree about the amount of loss. If the parties retain appraisers and those appraisers "fail to agree" on the amount of loss, "they will submit their differences to [an] umpire." A decision agreed to by any two of the insured's appraiser, the insurer's appraiser, and the umpire is binding. Because 50 Exchange acknowledges that appraisal is required, the extent of any loss cannot be determined by a court until an appraisal is completed. For example, if the umpire were to endorse 50 Exchange's loss estimate, then 50 Exchange would not be injured. Any alleged injury before appraisal is too speculative to create an actionable claim.

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