California

Ericksen Arbuthnot's Appellate Practice Group Prevails on Two Summary Judgment Motions. The Lesson: Exploit the Weaknesses in Your Opponent's Evidence

Ericksen Arbuthnot's Appellate Practice Group has prevailed on two recent summary judgment motions by presenting strong evidence and exploiting the weaknesses in the opposing evidence. The first case involved a costly fire committed by an unknown arsonist. The Plaintiff's insured operated a health care facility which had retained the Defendant to dispose of medical waste which it kept in a locked storage closet on the premises. As Plaintiff alleged, on December 22, 2015, the Defendant's employee collected the medical waste but did not lock the storage closet on his way out. Four days later, on December 26, 2015, an arsonist set fire to the health care facility. The fire originated in the storage closet and was caused by an unknown arsonist gaining access to the storage closet and igniting combustible materials. Plaintiff alleged that it had paid over $1,800,000 to its insured and was subrogated to the rights of the health care facility for the damages allegedly caused by the Defendant.

Ericksen Arubuthnot filed a motion for summary judgment which, among other things, raised lack of breach of a duty of care, an issue which almost always raises triable issues of fact, but not here. In support of its motion, Ericksen Arbuthnot produced a declaration from the Defendant's employee attesting that he always locked the door to the storage closet, as well as deposition testimony showing that many other people could have left the door unlocked. Thus, as the trial court found, Defendant had satisfied its initial burden of proof to show that an essential element of Plaintiff's case could not be established—i.e., a breach of the duty of care—so the burden shifted to Plaintiff to produce conflicting evidence. As the trial court noted, "[t]o shift the burden on the basis that the plaintiff lacks the necessary evidence to establish an element, 'the defendant need not affirmatively prove anything about what actually occurred; it is enough to show that there is insufficient evidence favorable to plaintiff to establish a necessary element of the cause of action." (Citing Brown v. Turner Constr. Co. (2005) 127 Cal.App.4th 1334, 1339-1340.)

In opposition, the Plaintiff relied heavily upon a declaration from a fire investigator who investigated and concluded that Defendant's employee had left the door open and thus contributed to the fire. Ericksen Arbuthnot objected to the expert declaration to the extent it was based on out-of-court statements of others as independent proof of those facts. The Court sustained this objection, noting that "[a]lthough experts may properly rely on hearsay in forming their opinions, they may not relate the out of court statements of another as independent proof of the fact." (Citing Korsak v. Atlas Hotels, Inc. (1992) 2 Cal.App.4th 1516, 1524-1525.) The Court further sustained Defendant's objections to Plaintiff's declaration from the fire investigator because his opinions were conclusory and had no evidentiary value. (Citing Jennings v. Palomar Pomerado Health Systems, Inc. (2003) 114 Cal.App.4th 1108, 1117 ["When an expert's opinion is purely conclusory because unaccompanied by a reasoned explanation connecting the factual predicates to the ultimate conclusion, that opinion has no evidentiary value because an expert's opinion is worth no more than the reasons upon which it rests."].) Without its expert declaration, Plaintiff had insufficient evidence to raise a triable issue of fact, so the court granted Defendant's motion for summary judgment.

Gregory A. Mase, Esq., Co-Chair of Erickscksen Arbuthnot's Appellate Practice Group, and **Brian M. Sanders, Esq.,** a Shareholder and Partner in the Oakland/East Bay Office and Co-Chair of Ericksen Arbuthnot's Construction Practice Group, prepared and argued the successful summary judgment motion in this case.

In the second case, the Plaintiff sued the Defendants for defamation based on the reporting of an allegedly false debt of $144.06 to the three major credit reporting agencies. Ericksen Arbuthnot filed a motion for summary judgment on behalf of Defendants on multiple grounds, including that the allegedly false debt did not constitute libel per se, also known as "libel on its face." (See Civ. Code, § 45a [" A libel which is defamatory of the plaintiff without the necessity of explanatory matter, such as an inducement, innuendo or other extrinsic fact, is said to be a libel on its face."].) The Court agreed, while citing Gautier v. General Tel. Co. (1965) 234 Cal.App.2d 302 (Gautier), in which the Court found that allegations that a phone was disconnected due to a failure to pay the phone bill was not libel per se. (Id. at p. 309.) The Court thus concluded, as in Gautier, that the statement that Plaintiff had an unpaid debt of $144.06 was not libel per se , so Plaintiff was required to show that he suffered special damages, i.e., damages "… in respect to his or her property, business, trade, profession, or occupation, including the amounts of money the plaintiff alleges and proves he or she has expended as a result of the alleged libel, and no other." (Civ. Code, § 48a.)

In Opposition, Plaintiff produced a one-page printout showing that his credit rating had dropped, but he offered no competent evidence to show what caused his credit rating to drop. In addition, Plaintiff produced no competent evidence to show that the three main credit reporting agencies were informed about the $144.06 debt; Plaintiff only speculated that his credit rating had dropped as a result of the publication of his unpaid debt. Thus, Plaintiff produced no competent evidence to show that his credit score was harmed by the Defendants' reporting of the $144.06 debt, as required to raise a triable issue of fact. Therefore, the Court concluded that Plaintiff had no competent evidence to support his claim for special damages, so it granted Defendants' motion for summary judgment.

Gregory A. Mase, Esq., Co-Chair of Ericksen Arbuthnot's Appellate Practice Group, **and Christopher J. Hogan, Esq.,** Senior Counsel in the Oakland/East Bay Office, prepared and argued the successful summary judgment motion in this case.

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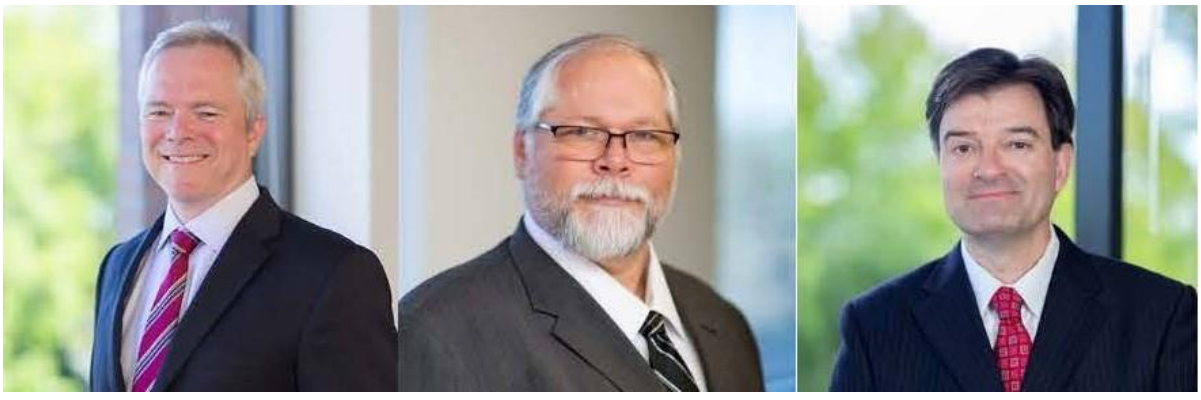

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