

CASE STUDY PREPARED FROM ORIGINAL PUBLISHED OPINION

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Kasem v Dion-Kindem 10/29/14

Legal Malpractice; Judicial Notice of Statute; Trial Court Error

In 2003, Ralphs Grocery Company sublet the lower level of its commercial building space at 10309 West Olympic Boulevard to Jean Kasem's company, The Little Miss Liberty Round Crib Company (Little Miss Liberty); Ralphs operated its grocery store above the subleased premises. In 2007, water and sewage flowed into the subleased premises, damaging inventory. Kasem, individually and on behalf of Little Miss Liberty, retained attorney Dion-Kindem to represent her in an action against Ralphs for breach of contract based on Ralphs' refusal to pay for the damage incurred.

Ralphs asserted it had no liability, based on two provisions in the sublease. Section 14 provides in pertinent part: "Sublessor shall not be liable for injury or damage which may be sustained by Subtenant or any other person in or about the Demised Premises, to persons, goods, wares, merchandise or property, caused by or resulting from . . . water or rain which may leak or flow from or into any part of the Building of which the Demised Premises is a part or from the breakage, leakage, obstruction or any other such defect of the pipes, wires, appliances, plumbing or lighting

fixtures of the same, whether said damage or injury results from conditions arising upon the Demised Premises or upon other portions of the Building of which the Demised Premises is a part or from the outside.”

Little Miss Liberty asserted that the water and sewage backup was a “Hazardous Material” within the meaning of section 29 of the sublease, and that Ralphs was thus required to indemnify it for damages caused by the release of hazardous material. Under section 29, subdivision D of the sublease, Ralphs was obligated to indemnify its subtenant for all losses and expenses, including damage to property, resulting in whole or in part from Sublessor’s or other tenants’ “release, threatened release, discharge or generation of Hazardous Materials to, in, on, under, about or from the Sublessor’s building or common areas of the Shopping Center parking.”

The case was tried to the court. The trial court found that Little Miss Liberty’s damages resulted from an obstruction or leakage in the pipes or plumbing, within the meaning of section 14 of the sublease. Pursuant to that section, Ralphs had no liability for the resulting damages.

The court rejected Little Miss Liberty’s claim that the discharge from the plumbing lines constituted “Hazardous Material” within the meaning of section 29 of the sublease. According to the court, section 29 relates only to environmental liability laws; the term “Hazardous Material” as used in that section is a term of art to be defined within the referenced environmental laws, ordinances and regulations, and Little Miss Liberty did not plead a violation of environmental law nor provide any credible evidence that the discharge from the plumbing lines constituted a “Hazardous Material” under any environmental law. Little Miss Liberty cited to the Federal Water Pollution Control Act because the definition of

“pollutant” in that statute included the word “sewage.” (See 33 U.S.C. § 1362(6).) She also cited the Safe Drinking Water Act because its definition of “contaminant” is “any physical, chemical, biological, or radiological substance or matter in water.” (42 U.S.C. § 300(f)(6).) The court rejected the argument that this was sufficient evidence to establish that “sewage” is a “hazardous, toxic, contaminated or polluting material, substance or waste” under those statutes. The court also observed that Little Miss Liberty failed to present evidence of substances or chemicals in the discharge from the plumbing lines other than water and sanitary sewage. Judgment was entered for Ralphs; Little Miss Liberty did not appeal.

Instead, Kasem brought this action for **legal malpractice** against her attorney, Dion-Kindem. In the third amended complaint, the charging pleading, she alleged Dion-Kindem committed legal malpractice by failing to designate and call an expert witness at trial on the issue of whether sewage qualified as a hazardous material under the sublease. The court sustained Dion-Kindem’s demurrer to the third amended complaint without leave to amend. Kasem appeals from the judgment of dismissal.

The Second DCA began its opinion by explaining that **to state a cause of action for legal malpractice, a plaintiff must plead the duty of the attorney to use such skill, prudence, and diligence as members of his or her profession commonly possess and exercise; breach of that duty; a proximate causal connection between the breach and the resulting injury; and actual loss or damage resulting from the attorney’s negligence.** (*Jocer Enterprises, Inc. v. Price* (2010) 183 Cal.App.4th 559, 572.) In sustaining the demurrer to the third amended complaint, the trial court took judicial notice of the sublease between Kasem and Ralphs, and of the amended statement of decision in the underlying trial from which the

claim of malpractice arose. These documents, which were properly considered, support the conclusion that Kasem cannot plead the breach of duty element necessary for legal malpractice.

The alleged negligence in this case is that Dion-Kindem failed to designate and call an expert witness at the underlying trial on the issue of whether sewage qualified as a “Hazardous Material” under the lease, even after the trial court denied Dion-Kindem’s request to take **judicial notice** of particular statutes which included sewage in the definition of hazardous material. Kasem further alleged: “Had an expert witness been designated and called to testify, that expert witness would have testified that: 1) Sewage is regulated by the Clean Water Act. 33 U.S.C. § 1251 et seq. Sewage is specifically defined as a ‘pollutant’ by that legislation. 33 U.S.C. § 1362(6). 2) Pursuant to the terms of the Lease, a ‘polluting material’ is included in the definition of ‘Hazardous Materials.’ Lease Sec. 29(A). 3) Similarly, ‘sewage[’] is defined as ‘waste’ under California law as well. California Health and Safe § 5410(a), 5411, and 5411.5(a). That statute is also one of the laws enumerated as ‘Hazardous Materials Law’ in Section 29(A) of the lease. 4) Pursuant to the terms of the Lease, ‘hazardous, toxic, contaminated or polluting . . . wastes’ are included in the definition of ‘Hazardous Materials.’” The complaint also cites other laws, including the Los Angeles Municipal Code, that list sewage, sewage sludge, and biological waste as hazardous materials.

The problem with this claim is that as counsel, Defendant Dion-Kindem **properly sought judicial notice of the relevant statutes**, which would have established as a matter of law that sewage is a hazardous material within the meaning of section 29 of the sublease. **Under Evidence Code section 451, “Judicial notice shall be taken of the following: [¶] (a)**

The decisional, constitutional, and public statutory law of this state and of the United States” The court was required to take judicial notice of the federal and state statutes proffered by Dion-Kindem when the underlying case was tried. The court’s refusal to do so was error, and this error formed the basis for the adverse result at trial.

In its amended statement of decision, the trial judge faulted Kasem for failing to produce expert testimony “that sewage discharged from the plumbing lines, as a general fact, constitutes ‘Hazardous Material’ within the meaning of Section 29 of the Sublease.” The court noted Kasem “had the opportunity to call expert witnesses or any witness familiar and knowledgeable with the [Federal Water Pollution Control Act], [Safe Drinking Water Act], and/or environmental regulatory scheme set out in Section 29A and failed to do so.”

Had the trial judge taken judicial notice of the referenced, relevant statutes, as required under Evidence Code section 451, subdivision (a), the question whether sewage was included within the definition of “Hazardous Material” would have been readily resolved. The testimony of an expert is limited to such an opinion as is “(a) Related to a subject that is sufficiently beyond common experience that the opinion of an expert would assist the trier of fact[.]” (Evid. Code, § 801, subd. (a).) The information in the referenced statutes is complex, aimed at protecting the quality of the nation’s waters. (See *City of Burbank v. State Water Resources Control Bd.* (2005) 35 Cal.4th 613, 619.) But these statutes were referenced in the underlying trial solely for their inclusion of sewage within the larger category of hazardous material—the term used in section 29 of the sublease. **The consideration of statutes which expressly included sewage as a pollutant, and listed pollutants as coming within the statutory**

schemes referenced by section 29, was not a matter outside the trial court's common experience. To the extent statutory interpretation was an issue, that is a question of law to be determined by the court. (*In re Marriage of Thornton* (2002) 95 Cal.App.4th 251, 253–254.) Dion-Kindem's failure to call an expert to establish that sewage fell within the statutory scheme was not below the standard of care. The **trial court erred** in refusing to take judicial notice of the relevant statutes and their application to the facts and, instead, faulting Kasem for failing to present expert testimony on the issue.

No appeal was taken from that decision, and this subsequent legal malpractice action provides no remedy for the trial court's error. **Judicial error by the underlying trial court can negate the elements of a legal malpractice claim.** (See *Church v. Jamison* (2006) 143 Cal.App.4th 1568, 1584–1585.) That is the case here.

In the amended statement of decision, the court also noted Kasem "did not present evidence of any other substances or chemicals that were present in the discharge from the plumbing lines other than water and sanitary sewage. Identifying that a particular substance is a 'Hazardous Material' within the meaning of the regulatory framework set forth in Section 29A of the Sublease requires the scientific knowledge of an expert." The amended statement of decision repeatedly refers to the discharge as "sewage," and it appears there was no dispute at that trial, nor is there a dispute in this appeal, that the discharge into Little Miss Liberty's premises from the sewage line included "sewage." Kasem's position in the underlying case was that under the relevant statutory law, sewage constituted a hazardous material within the meaning of section 29 of the sublease as a matter of law. The court may have been correct that proof of

“other substances or chemicals” in the discharge would have required expert testimony, but such evidence would not have been necessary for Kasem to prevail based on sewage.

Kasem also alleged Dion-Kindem was negligent in “failing to retain an expert witness in commercial lease interpretation and practice in how environmental clauses in commercial leases are to be applied in a commercial lease.” She again runs afoul of the limitations on expert testimony: expert opinion is generally not admissible on the legal interpretation of contracts. (*Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1180.) She cannot state a cause of action for malpractice based on this allegation.

Finally, in the reply brief, and for the first time in this litigation, appellant argues that if we accept respondents’ argument that the trial court in the underlying suit erred in dismissing that action, the appellant “has a claim against Respondents for failure to advise Appellant of her appellate rights in the underlying case” and judgment should be reversed on that account, and that we should reverse with instructions that appellant be given leave to amend. This is appellant’s entire argument on the point. “Obvious reasons of fairness militate against our considering this poorly developed and untimely argument,” and we do not. (See *Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn 10; *Series-AGI West Linn of Appian Group Investors DE, LLC v. Eves* (2013) 217 Cal.App.4th 156, 168.)

Kasem has had numerous opportunities to amend her complaint to state a cause of action for legal malpractice, but she has not alleged a relevant breach of duty by Dion-Kindem. What she has established instead

is trial court error which precluded her from establishing that the sewage discharge into her premises was covered by section 29 of the sublease.

The judgment is affirmed. The parties are to bear their own costs on appeal.

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