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The Products Liability and Warranty Practice Group at Wilson Turner Kosmo LLP consists of trial lawyers with extensive experience representing manufacturers and sellers in products liability and warranty matters. The firm's experience includes representing manufacturers and retail sellers of automobiles, industrial equipment, hand tools, lawn and garden equipment, pharmaceutical products, medical devices, and consumer goods in all aspects of complex litigation, including trial, arbitration, and mediation.

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California Supreme Court Addresses Disclosure of Recorded Witness Statements and Witness Lists

In *Coito v. Superior Court of Stanislaus County* (2012) 54 Cal.4th 480, the California Supreme Court addressed the level of protection for independent witness interviews conducted by attorneys and/or investigators, and information concerning the identity of witnesses from whom counsel or counsel's investigator has obtained statements (usually sought through form interrogatory 12.3). The Fifth District Court of Appeal in California previously held that there was no absolute or qualified work product protection for this information. The California Supreme Court disagreed, ruling that with regard to the protections surrounding the witness interviews, "we hold that a witness statement obtained through an attorney-directed interview is entitled as a matter of law to at least qualified work product protection. A party seeking disclosure has the burden of establishing that denial of disclosure will unfairly prejudice the party in preparing its claim or defense or will result in an injustice." *Id.* at p. 499.

The court added that if the party resisting discovery claims that a witness statement is absolutely protected because it "reflects an attorney's impressions, conclusions, opinions, or legal research or theories," that party must make a preliminary showing in support of its claim. *Id.* at pp. 499-500. The trial court may then make an *in camera* inspection to determine whether absolute work product protection applies to the information. *Id.* at p. 500.

With regard to form interrogatory No. 12.3, the court stated, "[b]ecause it is not evident that [the interrogatory] implicates the policies underlying the work product privilege in all or even most cases, we hold that information responsive to form interrogatory No. 12.3 is not automatically entitled as a matter of law to absolute or qualified work product privilege. Instead, the interrogatory usually must be answered." *Id.* at p. 502. However, an objecting party may be entitled to protection if it can make a showing that answering the interrogatory would reveal the attorney's "tactics, impressions, or evaluation of the case, or would result in opposing counsel taking undue advantage of the attorney's industry or efforts." *Ibid.*

Governor Brown Signs Legislation Regarding Depositions, Jury Fees

On September 17, 2012, Governor Brown signed Assembly Bill (AB) 1875. The new law, which goes into effect on January 1, 2013, imposes a seven-hour time limit on most depositions in state court and brings California civil procedure in line with the federal rules. The bill was backed by the Consumer Attorneys of California, who argued that many ill and/or elderly plaintiffs were being needlessly deposed on multiple occasions in some cases. Defense lawyers and business groups dropped their initial opposition to this legislation after many exemptions were made available, including exemptions for experts, employment litigation, and certain deponents in complex litigation.

On the same day, Governor Brown approved language clarifying the recent amendment to California Code of Civil Procedure Section 631 regarding jury fees. In June 2012, an amendment made the $150 jury fee nonrefundable and required that the fees be posted on or before the day of the initial case management conference. However, the amendment created confusion as to whether the pay-in-advance jury fees applied to each *party* in a case or each *side*. The new language makes clear that each *side* must post the fee. Notably, if one side posts fees, that does not relieve parties on the opposing side from waiver for failing to timely pay the fee.

In Victory for Plaintiffs, California Supreme Court Alters Rule on Joint and Several Liability

In a setback for the defense bar, the California Supreme Court abrogated the common law "release rule," which held that a plaintiff who settled with one joint tortfeasor released all the others from liability.

The case, *Leung v. Verdugo Hills Hospital* (2012) 55 Cal.4th 291, involved an infant allegedly injured as a result of inadequate medical care provided by his pediatrician and the hospital that employed the doctor. Before trial, plaintiff settled with the pediatrician for $1 million, but the trial court ruled that the settlement had not been made in good faith. At trial, the jury found the hospital to be 40% liable and the doctor to be 55% liable (plaintiff's parents were found to be 5% liable), and awarded $15 million in economic damages. Bound by principles of stare decisis, the Second District Court of Appeal expressed its disapproval of the release rule, but set aside the judgment against the hospital.

Writing the opinion for the Supreme Court, Justice Kennard repudiated the common law rule, explaining that "[u]nder the common law release rule, plaintiff, injured for life through no fault of his own, would be compensated for only a tiny fraction of his total economic damages, a harsh result." *Id.* at p. 302. In deciding how to apportion liability, the court settled upon a "setoff-with-contribution" apportionment approach: the money paid by the settling tortfeasor is credited against any damages assessed against the nonsettling tortfeasors, who are allowed to seek contribution from the settling tortfeasor for damages they have paid in excess of their equitable shares of liability. *Id.* at p. 303. The court noted that "setoff-with-contribution apportionment does not change the respective positions of the parties and is fully consistent with both the comparative fault principle and the rule of joint and several liability." *Id.* at p. 306.

Discovery Abuses and Attorney Sanctions – Authority All Advocates Should Know

In May 2010, U.S. District Judge Jeffrey White ordered San Francisco solo practitioner Gregory Haynes to pay over $360,000 in sanctions for litigation misconduct. Haynes appealed the decision after arguing, to no avail, that he could not afford to pay.

In July 2012, the U.S. Court of Appeals for the Ninth Circuit, in an opinion written by Judge Stephen Reinhardt, diverged from the Seventh Circuit precedent that persuaded the court below and held that a district court may take an attorney's ability to pay sanctions into consideration when determining the amount of sanctions. *Haynes v. City and County of San Francisco*, No. 10-16327, 2012 U.S. App. LEXIS 15102 (9th Cir. July 23, 2012). Notably, though, the Ninth Circuit simply found that the district court has the *discretion* to reduce the award because of appellant's inability to pay. That is, the Ninth Circuit determined only that a district court *may* take an attorney's ability to pay into consideration, not that it *must* do so.

The significant tab Haynes faces warrants revisiting some recent case law involving California courts' broad power to impose sanctions. In *Clement v. Alegre* (2009) 177 Cal.App.4th 1277, the court explained that "[m]isuse of the discovery process includes failing to respond or submit to authorized discovery, providing evasive discovery responses, disobeying a court order to provide discovery, unsuccessfully making or opposing discovery motions without substantial justification, and failing to meet and confer in good faith to resolve a discovery dispute when required by statute to do so." *Id.* at p. 1285 (internal quotation marks and citations omitted).

Although this may be well-known to attorneys, the court's ensuing analysis will likely surprise counsel: "Even assuming we agreed that neither plaintiffs nor [plaintiffs' counsel] intended to be evasive—and we do not—their intent is not relevant here. There is no requirement that misuse of the discovery process must be willful for a monetary sanction to be imposed." *Id.* at p. 1286 (internal quotation marks and citations omitted).

Ultimately, the appellate court agreed with the trial court and determined that "[s]anctions were warranted here, as plaintiffs' objection to the term 'economic damages' was without 'substantial justification' and their responses to those interrogatories were evasive." *Id.* at p. 1287 (citing §§ 2023.030, subd. (a), 2023.010, subds. (e), (f)); see also *Kohan v. Cohan* (1991) 229 Cal.App.3d 967, 971 (stating that California Code of Civil Procedure section 2023 "does not require a misuse of the discovery process to be willful before monetary sanctions may be imposed.").

Despite common belief, willfulness is not a prerequisite to the imposition of sanctions for discovery misuse. Although acting in good faith is not a panacea, Section 2023 does allow one against whom sanctions are sought to show substantial justification to avoid the imposition of sanctions. See, e.g., *Kohan v. Cohan*, *supra*, 229 Cal.App.3d at p. 971.

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