

2005 WL 2297554 (Cal. Superior), 38 Trials Digest 8th 15

(Publication page references are not available for this document.)

TITLE: Hemsley vs. Davis

TOPIC:

Synopsis: SETTLEMENT--Passenger injured when casino tour bus involved in rear-ender

Case Type: Vehicle Negligence; Motor Vehicle v. Motor Vehicle; Rear-End; Common Carrier; Bus/Streetcar; Vehicle Negligence; Bus; Course and Scope of Employment; Vehicle Negligence; Impaired Driver; Miscellaneous; Vehicle Negligence; Excessive Speed; Vehicle Negligence; Inattention; Vehicle Negligence; Seatbelt Negligence; Negligent Entrustment

DOCKET-NUMBER: BCVBS08259

VENUE:

Court: San Bernardino County Superior Court/Central

STATE: California

YEAR:

Verdict/Judgment Date: 8/12/2005

JUDGE: Christopher J. Warner

ATTORNEYS:

Plaintiff: Michael P. Ehline, Law Offices of Michael P. Ehline, Los Angeles.

James R. Gillen, Law Offices of James R. Gillen, Marina del Rey.

Defendant: Jason A. Cole, Schaffer, Lax, McNaughton & Chen, Los Angeles.

Daniel L. Ferguson, Borton, Petrini & Conron, San Bernardino.

Dale B. Goldfarb, Harrington, Foxx, Dubrow & Canter, Los Angeles.

Traci Lawson, Harrington, Foxx, Dubrow & Canter, Los Angeles.

Stephen A. Lax, Schaffer, Lax, McNaughton & Chen, Los Angeles.

Ruth M. Segal, Lynberg & Watkins, Los Angeles.

SUMMARY:

Verdict/Judgment: Settlement

Verdict/Judgment Amount: \$750,000

(Range: \$500,000 - \$999,999)

Trial Type: Not Applicable

Trial Length: Not Applicable

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EXPERTS:

Plaintiff: John S. Fabian, bus operation/safety consultant, Fabian & Associates, Schenectady, NY.

Nancy E. Fraser, nurse, Med Legal Consulting Source, Santa Monica, (310) 472-4799.

Lawrence J. Kashar Ph.D., metallurgist, Kashar Technical Services Inc., Culver City, (310) 645-4404.

Anil V. Khadilkar Ph.D., biomechanical engineer, AVK Engineering, Los Angeles, (310) 457-9643.

David J. King, accident reconstructionist, MacInnis Engineering Associates, Lake Forest, (949) 855-4632.

Harry J. Krueper Jr., P.E., civil/traffic engineer, Krueper Engineering & Associates Inc., San Bernardino, (909) 884-2159.

Richard McCay CPA, forensic accountant.

Shelly Woods, life care planner, Med Legal Consulting Source.

Dennis Wylie, human factors expert, Santa Barbara, (805) 681-9289.

Defendant: Michael F. Brones M.D., plastic/burn surgeon, Grossman Burn Center, Los Angeles, (818) 829-4776.

Joe Foust, civil/traffic engineer, Foust & Associates.

Keith A. Miller, accident reconstructionist, Keith Miller & Associates, Pasadena, (626) 792-5305.

Timothy J. Reust, accident reconstructionist, Biomechanical Accident Reconstructionist Sciences, Valencia, (661) 257- 8189.

Edward D. Ruzak, civil/traffic engineer, Ed Ruzak & Associates, Fountain Valley, (714) 964-4880.

Michael S. Sinel M.D., psychiatrist, Beverly Hills, (310) 860-3401.

Jacob E. Tauber M.D., orthopedic surgeon, Glendale, (818) 502-1130.

Merlyn Robert Wilson, accident reconstructionist, Documented Vehicle Drivers Systems Inc., Whittier, (562) 947-1396.

TEXT:

CASE INFORMATION

FACTS/CONTENTIONS

According to Plaintiff: Defendants Gold Strike Hotel and Gambling Hall ('Gold Strike') and Four Queens Hotel & Casino ('Four Queens') operate 'tour bus programs' from their prospective casinos. The casinos subsidize California third party tour bus carriers to bring tourists such as plaintiff from California to Las Vegas for 'Casino Tours'. While at the casinos, the tour bus driver, defendant Columbus Davis Jr., was utilized by both casinos as a casino host, responsible for supervising and instructing plaintiff Doris Hemsley, an 80-year-old retiree, while on and off casino property. Davis was also responsible for sharing the costs of plaintiff's meals and for holding her room key until she gambled enough money to qualify her for a room.

On March 9, 2003, plaintiff was returning from one such Las Vegas 'Casino Tour' to her residence in Los Angeles with defendant Davis at the wheel of a bus owned by

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defendant Gold & Silver Charter Bus Company ('Gold & Silver').

The bus, a Dina/Viaggio 1000 Tour Bus, was not equipped with seatbelts or safety restraints of any kind. Both casinos admitted that they never inspected the bus for safety at any time, even though they had done business with Gold & Silver and Davis for at least 5 or more years at that time. Plaintiff argued that the casinos were common carriers who owed plaintiff a heightened duty because they engaged in common carriage, which included a duty to provide seatbelts or safety restraints on a tour bus. (Greyhound Lines Inc. v. Super.Ct. (Chisefski) (1970) 3 Cal.App.3d 356, 359-360.)

It was later determined that Davis was under psychological disability on and well prior to March 9, 2003, and that he had illegally altered the Gold & Silver bus to include a television monitor next to the left-hand side of the driver's seat so he could watch television and drive. Davis also illegally installed a stereo system with over 1000 watts of power in the bus. The facts further related that Davis was driving the bus at approximately 70-75 mph in a 55 mph construction zone, on the southbound 15 freeway, while conversing on his cell phone and/or listening to a Walkman-type headphone radio. Defendant Jose Cerna was in the vehicle in front of the Gold & Silver bus, operating defendant Hebaragi and Lemi Bus Inc.'s ('Hebaragi and Lemi') tour bus (also a Dina/Viaggio 1000 tour bus), when he apparently stopped his bus in the middle of the freeway.

Davis slammed the Gold & Silver bus into the rear end of the Hebaragi and Lemi bus, with the impact throwing plaintiff from her seat and breaking both of her legs. Plaintiff sued defendants Gold Strike, Four Queens, and Gold & Silver for negligence on or about March 9, 2004, under a common carrier, vicarious liability theory, arguing the casinos were in an agency and joint venture relationship with Davis and Gold & Silver.

Plaintiff was also allowed to pursue punitive damages against the casinos and Davis, based upon a reckless disregard for human life theory, which was sustained after demurrer to plaintiff's original and first amended complaints. Additionally, plaintiff argued at summary judgment that she should be allowed to seek punitive damages as against both casinos for willful neglect. This is because both casinos still continue to employ Davis as a third party carrier, even though they know he is under a psychological disability and that he failed to provide an effective safety restraint on the Gold & Silver bus.

Plaintiff also sued Hebaragi and Lemi under a negligence theory, for stopping in the middle of the freeway and contributing to plaintiff's injuries. Defendants Gold Strike and Four Queens defended on the grounds that they were not in a business relationship with the bus company and thus owed no duty to plaintiff. Defendants Davis and Gold & Silver cross-complained against the bus manufacturer, arguing that the bus was defective. Defendants Hebaragi and Lemi and Cerna argued that Gold & Silver was following too closely under a contributory, comparative negligence defense.

Plaintiff was granted a trial setting preference based upon clear and convincing evidence that the then- 82-year-old plaintiff had only a few months to live. All defendants then moved for summary judgment, with Gold Strike and Four Queens alleging that they were not in a joint venture or agency relationship. Gold Strike relied upon a de-published case from the Los Angeles Second District Court of Appeal, for the proposition that Gold Strike was not in an agency or joint venture

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relationship with Gold & Silver and Davis.

#### CLAIMED INJURIES

According to Plaintiff:

Plaintiff was treated for two broken legs and released from the hospital.

#### CLAIMED DAMAGES

According to Plaintiff:

Past medical: approximately \$80,000. Future medical: plaintiff was diagnosed with only a few months to live as of the date of this publication.

#### SETTLEMENT DISCUSSIONS

According to Plaintiff:

Demand: \$1 million (CCP \$ 998) each defendant. Offer: \$0, all defendants.

#### COMMENTS

According to Plaintiff:

At a hearing on summary judgment on August 11, 2005, the trial judge chastised defense counsel for Jean Development Company for citing a de-published case from the Los Angeles Second District Court of Appeal, and denied defendants' Motions for Summary Judgment. The following day, August 12, 2005, the named defendants settled the case for \$750,000.

Plaintiff conducted discovery early on in this case. Defendants, in a united front, refused to engage in discovery, objected to every deposition request, and argued for over a year that no trial date had yet been set. It appears that once plaintiff was granted an early trial setting preference, defendants were simply unprepared for trial, as they had conducted no meaningful discovery in the case at all.

Also, defendant's reliance on a de-published case seems to have sealed its fate at summary judgment, and also appears to have lost defense counsel much-needed credibility with the trial judge. However, plaintiff was in a much better position for trial, as plaintiff's attorneys effectuated an aggressive discovery regimen early on. Plaintiff's counsel was able to fine tune and develop plaintiff's case, when it opposed the several defendants' motions for summary judgment/adjudication.

The denials of defendant's motions for summary judgment were critical to the outcome of the case. There were over 100 plaintiffs in this tour bus collision case. The granting of plaintiff's trial setting preference motion allowed plaintiff to be the first plaintiff out of the gate. The trial setting preference seems to be the real turning point of the case.

Defendants Davis, Gold & Silver, with defendants Four Queens and Gold Strike, were insured by The Insurance Corporation of New York; defendants Cerna and Hebaragi and Lemu were insured by RLI Insurance Company and General Star Insurance Company.

Traci Lawson and Dale B. Goldfarb represented defendant Gold Strike.

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Ruth M. Segal represented defendants Four Queens. Daniel L. Ferguson represented defendants Jose Cerna and Hebaragi & Lemi. Stephen A. Lax and Jason A. Cole represented defendants Gold & Silver and Davis. Mr. Ehline provided the information for this report.

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San Bernardino County Superior Court/Central

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