COPY SUPREME COURT COPY

PAUL W. ENGSTROM
LEE G. LIPSCOMB
WALTER J. LACK
JERRY A. RAMSEY
STEVEN C. SHUMAN
ELIZABETH LANE CROOKE
BRIAN D. DEPEW
GARY A. PRAGLIN
ROBERT J. WOLFE
DANIEL G. WHALEN
BRIAN J. HEFFERNAN
ADAM D. MILLER
RICHARD P. KINNAN
PAUL A. TRAINA
BRIAN J. LEINBACH

LAW OFFICES

**ENGSTROM, LIPSCOMB & LACK**

A PROFESSIONAL CORPORATION

10100 SANTA MONICA BOULEVARD, 12TH FLOOR

LOS ANGELES, CALIFORNIA 90067-4113

TELEPHONE 310-552-3800

FACSIMILE 310-552-9434

ANN A. HOWITT
MARK E. MILLARD
ROBERT T. BRYSON
JARED W. BEILKE
STEVEN J. LIPSCOMB
GREGORY P. WATERS
ALEXANDRA J. NEWSOM
BRYAN C. PAYNE
THU V. NGUYEN
EDWARD P. WOLFE
JOSEPH A. LACK

GLORIA S. WELLER
DIRECTOR OF ADMINISTRATION

JOHN ALVA
LITIGATION SUPPORT

April 19, 2010

RECEIVED
APR 20 2010
CLERK SUPREME COURT

Honorable Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-7303

Re: *Village Northridge HOA v. State Farm Fire & Casualty Co.*
S161008

Honorable Justices,

This Honorable Court has asked the parties to address the question of whether *Garcia v. California Truck Company*, (1920) 183 Cal. 767, and *Taylor v. Hopper*, (1929) 207 Cal.102, should be overruled. The answer is YES. Both cases are patently out of step with modern jurisprudence and widely recognized legal remedies for fraud. In fact, State Farm answers this question in its own brief to this Court:

> "There is no principled reason why the settlement of a disputed automobile accident should be governed by one set of rules, but the settlement of a disputed defamation claim governed by an entirely different set or rules" (p. 6)

**Timing of this Appeal**

Village Northridge has lamented the delayed trial adjudication occasioned by two duplicative appeals and now an appeal in this Supreme Court. The subject loss occurred back in 1994. On the other hand, the timing could not be better for the purpose of illustrating the importance of this issue from a public policy perspective.

This country is currently in the throws of one of the worst economic melt-downs ever experienced by most living Americans. Underlying this morass of problems is a fundamental distrust of the business community which we will have to overcome before we will ever reconvene and do commerce as we once knew it. Legendary giants such as AIG, Goldman Sachs, Washington Mutual and many others betrayed the trust of their shareholders and an entire economic system causing far reaching harm. Each of these transgressions potentially constitute a form of fraud if proven by clear and convincing evidence in a court of law. Now is not the time to undermine the tort of fraud which is frankly a vital component to the functionality of our system of commerce. Business, investors and consumers must have the confidence that if a party to a business transaction conducts itself in a manner that is fraudulent and causes harm that there is a forum for redress of that wrong.

Our legal system serves a vital role in our system of commerce in assuring a sense of confidence. A rule of law that would shield the perpetrator of a fraud – but only if he is cunning enough to dupe his victim into signing a release – is not a rule of law that will serve our business community well nor would it be in step with the values and reasoned purpose of our modern legal system. The same goes for insisting on Rescission and the return of consideration in every case – a rigid and unprincipled rule that would result in significant injustice in many cases. *Garcia* and *Taylor* undermine the tort of fraud, the integrity of our business community and standard of jurisprudence as we know it. The *DiSabatino*[1] court said it well: "Simply put, the 'New York Rule' serves to deter fraud."

**Be Careful What You Wish For**

State Farm and the Amicus portray impending disaster if the majority rule is recognized. Consider a recent case involving a paralyzed plaintiff who was injured in a Ford Explorer rollover accident and sued Ford. (*summary attached*) While the jury was out, one juror passed a note to the judge inquiring, "What is the maximum amount that can be awarded"? Consequently, Ford immediately settled the case paying significant money in exchange for a release from the plaintiff. It turned out the jury was 11-1 for Ford on liability and it was the one dissenting juror who submitted the note to the Court. Ford now seeks to set aside the settlement on grounds of fraud. Is Ford attempting to "have its cake and eat it too" because

[1]635 F. Supp. @ 356 (Answer Brief @ p. 33)

it wants redress for being duped? Is Ford out of luck because it signed a Release? According to State Farm, the answer would be "yes" because *Garcia* and *Taylor* hold Releases as sacrosanct, even in the face of fraud. The case may be defensible but *Garcia* and *Taylor* are the wrong bases.

The Ford case is not completely analogous because it was a third party who perpetrated the alleged fraud. Our citation of the same is anecdotal and for illustration. If the injured plaintiff had a hand in the generation of that juror note, would there be any doubt that Ford would have a remedy? The point is this. Be careful what you wish for in eradicating a recognized civil remedy. Statistics show that the business community commonly accesses the tort of fraud in business litigation. To not recognize this cause of action in this day and age would be a huge step backwards in civil jurisprudence. *Taylor* and *Garcia*, as applied by State Farm, are inconsistent with the very tort and remedy for fraud which is both codified in the Civil Code and recognized in the case law.

**The Minority Rule Leads to Confusion**

That *Garcia* and *Taylor* are out of step with established California law is aptly demonstrated by the trial court's confused and inconsistent rulings in the instant case. On several occasions the trial court issued rulings indicating that the plaintiff must affirm the release and sue for damages. Yet, when the plaintiff did just that the trial court time and time again dismissed the very action it had authorized. This was the result of the trial court grappling with *Garcia* and *Taylor* which are wholly inconsistent with the majority rule in requiring rescission and return of consideration. Consequently, the record includes the following order at the trial level:

> "Here, the release was the purpose of the settlement agreement and they are all part of the same agreement (see *Garcia v. Ca Truck Co* (1920) 183 C.767)" [APP 1248]

This order makes no sense, on its face.

The Court of Appeal did the right thing in reversing but again had difficulty in the form of *Garcia* and *Taylor*. The Court of Appeal, at plaintiff's invitation, distinguished *Garcia* and *Taylor* as personal injury / auto accident cases which involve a different relationship than

insurer and insured. While the distinction was appropriate, the better approach is to tackle the real problem which is *Garcia* and *Taylor*. This Supreme Court has asked the $64 question that appropriately resolves this case. *Garcia* and *Taylor* simply cannot survive the compelling reasoning of subsequent cases applying the majority rule.

**The Minority Rule is Out of Step**

This issue is fully briefed in Village Northridge's Answer Brief and therefore will only be summarized. This pending case demonstrates the inequity and confusion that result from the minority rule. The Court should also carefully consider *Davis v. N.E. Haggett* (1956) 244 N.C. 157 (Answer Brief @ pp.24-26) for a compelling illustration of the gross inequity that can potentially result from application of the rigid minority rule.

**The Majority Rule is In Step with California's Modern Jurisprudence**

Our civil justice system has come a long way since 1920 when an auto vs. pedestrian plaintiff (*Garcia*) suffered from buyer's remorse following his personal injury settlement. It was a weak case with an uncompelling fact pattern that should not be used to undermine a legal remedy in compelling cases with compelling fact patterns. Consider the compelling facts of the 1999 case of *Matsurra v. Alston & Bird and E.I. Dupont* discussed in the Answer Brief @ pp. 35-37. There, a corporate litigant defrauded not only its litigation adversary but the Court itself through fraudulent withholding of evidence. Should the Federal Court have blindly applied the minority view thus allowing a fraud on the Court to go unchecked? Of course not. The reasoned opinion that followed should frame the reasoning of this Court today. "Enforcing such a settlement would undermine the policy of encouraging voluntary settlement of disputes; if litigants cannot assume the disclosures and representations of the opposing party are made in good faith, they will be reluctant to settle." *Matsuura* @ 1012.

**Conclusion**

Village Northridge submits that *Garcia* and *Taylor* are simply inconsistent and irreconcilable with recognized causes of action for fraud and must be overruled. The facts of this particular case implicate a potentially troubling issue. Every day, our trial judges grapple with settlement conferences and mediations which are essential for the operation of our civil

justice system (97% of our civil inventory is resolved pre-trial). The reality is that insurance dominates and controls a significant portion of the civil caseload. If a litigant or an insurer can misrepresent their coverage limits with impunity, the entire system is undermined. If a trial judge is told that a defendant's coverage limits are only $100,000 and the injured paraplegic settles in reliance on that misrepresentation when in fact the limits were $1,000,000, is there really no remedy other than rescinding the settlement and returning the $100,000 which has already been spent on medical expenses? What would it say about our system of justice if we were to tacitly condone this type of conduct? How much extra time would trial judges and mediators have to spend verifying coverage limits instead of negotiating the merits of the underlying cases? Look at this case – two appeals and State Farm still has not documented its hearsay version of the policy limits ("the elephant in the room" as the late Justice Boland eloquently noted). The majority rule is the right rule for California and *Garcia* and *Taylor* should be overruled.

Sincerely,

Brian J. Heffernan

BRIAN J. HEFFERNAN
ENGSTROM, LIPSCOMB & LACK
Attorneys for Plaintiff/Appellant VILLAGE
NORTHRIDGE HOMEOWERS ASSOCIATION

Encl: January 20, 2009 Article re: Ford Trial

Austin American-Statesman
statesman.com

PRINT THIS

TEXAS COURTS

# Claiming juror misconduct, Ford seeks to overturn settlement it agreed to pay

By Chuck Lindell, Corrie MacLaggan
AMERICAN-STATESMAN STAFF
Sunday, January 18, 2009

Right out of a Hollywood movie, the dramatic jury note arrived in the courtroom on the third day of deliberations, changing everything for Ford Motor Co. and its legal opponent, a Texas woman paralyzed in a 2002 rollover accident.

"What," the jury asked, "is the maximum amount that can be awarded?"

Fearing the jury was about to give the Brownsville woman a much larger award, Ford quickly settled the lawsuit for $3 million — about double what the carmaker discussed paying in earlier settlement talks, company lawyers said.

So imagine Ford's surprise upon learning that jurors had been leaning 11-1 in favor of the car company.

What's more, the lone holdout was presiding juror Cynthia Cortez, who wrote the jury note on her own and sent it to the judge over the objection of several other jurors.

Feeling duped, Ford's lawyers asked the Brownsville court to void the $3 million settlement as fraudulently obtained. Suspecting juror misconduct, they also asked permission to force Cortez to answer questions under oath.

Both requests, denied by the trial judge in 2004 and an appellate court in 2006, are now before the Texas Supreme Court.

In the meantime, Rosa Martinez has received no money from the settlement. Paralyzed from the neck down when the Ford Explorer in which she was riding crashed and repeatedly rolled over, Martinez has been living in Brownsville nursing homes so attendants can do the daily tasks she cannot — from getting out of bed to bathing and dressing.

Martinez, who relies on Medicaid to pay for her shared room in the nursing home, hopes the settlement money will let her buy and renovate a house to make it accessible.

"I want to be in my house, be more independent," Martinez, 51, said in Spanish.

Martinez's lawyers accuse Ford of making unsupported accusations of jury misconduct to try to void a legally binding agreement.

Besides, guessing wrong about a jury's intent is no grounds for reversal, lawyer Roger Hughes argued. "Anyone who settles a case based on a jury note assumes the risk their assumptions are mistaken," he wrote in court briefs.

Hughes also warned that if Ford prevails, lower courts may be forced to indulge other litigants who suffer from "buyer's remorse" after settling a lawsuit.

But Ford argues that Cortez's behavior in the jury room raised questions about whether she was directed to send the note by somebody outside the jury, or was trying on her own to provoke Ford into settling the lawsuit.

"We strongly suspect that (Cortez) sent that note in a deliberate effort to mislead the parties," Craig Morgan, a lawyer for Ford, told the Supreme Court during oral arguments in February. "We want to conduct discovery into the circumstances surrounding the sending of this note."

To force jurors to answer questions under oath, Ford will have to overcome a bedrock legal principle that allows most jury deliberations to remain secret. The prospect of weakening jury privacy led several justices to closely question Ford's lawyer during oral arguments.

"I understand and appreciate your dilemma," Justice David Medina told Morgan. "If you prevail here, though, where does it stop?"

'Blink of an eye'

The accident that paralyzed Martinez happened on a Mexican highway with her brother-in-law, Ezequiel Castillo, behind the wheel of a 2001 Ford Explorer he had purchased in Brownsville.

Swerving to avoid debris in the road, Castillo lost control, and the SUV rolled repeatedly. Castillo, his wife and two children were cut and bruised, but Martinez's neck was broken.

"It happened in the blink of an eye. We started to roll, and then I couldn't move," said Martinez, who was a hotel housekeeper before the accident.

Martinez and the Castillos sued Ford, alleging design flaws in the Explorer. After a 21-day trial in 2004, the jury was given two questions to answer:

\• Was the SUV susceptible to rollover accidents?

\• Was the Explorer's roof too weak to protect its occupants?

Jurors were not supposed to determine how much money Ford owed unless they answered "yes" to either question, which is why the company settled so quickly when the jury note — mirroring the climactic scene in Paul Newman's "The Verdict" — asked about the upper limits of a damages award. (There was no limit.)

Afterward, Ford's lawyers wandered into the jury room to discuss the case, a common practice after almost any trial. That's when they learned jurors had favored Ford 11-1 on the roof design question and

were in early discussions on the rollover question just before Ford settled.

Company lawyers asked trial Judge Abel Limas for permission to question jurors under oath. Limas refused and ordered Ford to pay up.

The car company responded by hiring private investigators to interview jurors, court briefs show. According to Ford, jurors said Cortez acted strangely on the final day of deliberations, confidently stating that they would reach a decision that day. She also sent the note despite opposition from several jurors and without reading the note to all jurors, as she had done on previous questions to the judge, the investigators reported.

Cortez cut her interview short after feeling insulted by a Ford investigator, court records show.

Martinez's lawyers noted that the interviews found no evidence of misconduct or outside influence on the jury.

Besides, they said, Texas does not specify how juries communicate with the court — only that notes should be sent through the presiding juror. No rule requires that jurors vote or approve notes sent to the judge, they added.

Unimpressed by the investigators' information, Limas again ordered Ford to pay. Instead, the car company appealed.

That was four years ago.

'Reason to suspect'

Ford contends that its refusal to pay the settlement was a breach of contract. And under contract law, Ford argues, it is entitled to a new round of discovery that includes questioning Cortez and other jurors under oath.

"There is reason to suspect that we had one juror manipulating her official position to produce a result that is completely outside the jury deliberations," Morgan said in oral arguments. "That's an abuse of her position, quite simply, and we have the right to investigate that."

State rules allow jurors to be questioned about allegations of outside manipulation, Morgan added.

But Justice Nathan Hecht, noting that the law gives great deference to jury secrecy in such matters, questioned how Ford could ask about why the note was sent without delving into the jury's deliberations.

"The rules help you on whether you can discover if someone bribed a juror. But with respect to the internal deliberations ... are you entitled to discovery on that, too?" Hecht asked.

Said Morgan: "We might be. We're not sure it's relevant. It would depend on what we learn from more focused discovery about (Cortez's) motives."

Justice Scott Brister challenged that assumption.

"There is no question that, when she sent out the note, the jury was in deliberations. And you are going to ask her to testify about that matter? That's expressly prohibited."

Later in the hearing, however, Brister and Justice Dale Wainwright worried aloud about jurors' motivations.

"If people got to understand that they could manipulate settlements with a note, a lot of jurors might do it. How can we stop that when the law says you can't ask jurors about what happened in the jury room?" Brister asked.

A ruling could come at any time. The Supreme Court typically takes 14 months to issue an opinion after oral arguments. That would put Ford v. Castillo on course toward an April opinion.

"I never imagined it would take this long," Martinez said by phone from the nursing home. "It's been very difficult for me being inactive. I'm not accustomed to this type of life. I'd like to be at home."

clindell@statesman.com, 912-2569.

Vote for this story!

Buzz up!

**Find this article at:**
http://www.statesman.com/search/content/news/stories/local/01/18/0118ford.html

☐ Check the box to include the list of links referenced in the article.

**PROOF OF SERVICE**

STATE OF CALIFORNIA )
)
COUNTY OF LOS ANGELES )

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 10100 Santa Monica Boulevard, 16th Floor, Los Angeles, California 90067-4107. On April 19, 2010, I served a Letter Brief to the Honorable Justices of the California Supreme Court dated April 19, 2010 by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

** SEE ATTACHED MAILING LIST **

__✔__ (BY MAIL) I deposited such envelope in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal Service on that same date in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

__✔__ STATE: I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on April 19, 2010 at Los Angeles, California.

YVONNE R. THOMPSON

## SERVICE LIST

*Village Northridge HOA v. State Farm Fire, et al.*
**2nd Civil No. B188718**

| Attorney | | Party |
|---|---|---|
| Clarke B. Holland, Esq.<br>**LHB Pacific Law Partners**<br>5858 Horton Street<br>Suite 370<br>Emeryville, CA 94509-2025 | PH: 510-841-7777<br>FX: 510-841-7776 | Co-Counsel for Defendant **State Farm Fire & Casualty Company** |
| James R. Robie, Esq.<br>Steven S. Fleischman, Esq.<br>**Robie & Matthai**<br>500 S. Grand Avenue<br>15th Floor<br>Los Angeles, CA 90071-2609 | PH: 213-624-3062<br>FX: 213-624-2563 | Co-Counsel for Defendant **State Farm Fire & Casualty Company** |
| Linda Johnson Savitt<br>**Ballard Rosenberg Golper & Savitt, LLP**<br>10 Universal City Plaza<br>Universal City, CA 91608-1009 | | Attorneys for Pub/Depub Requester: **Ballard Rosenberg Golper & Savitt** |
| California Court of Appeal<br>Second Appellate District<br>Division Eight<br>300 S. Spring Street<br>Floor 2, North Tower<br>Los Angeles, CA 90013-1213 | | 2nd Civil No. B188718 |
| Hon. Wendell Mortimer, Jr.<br>Los Angeles Superior Court<br>Central Civil West<br>600 S. Commonwealth Ave.<br>Los Angeles, CA 90005 | | Judge of the Superior Court<br>Case No. BC265328 |