First Supplement to Memorandum 73-76 9/7/73

Subject: New Topic

Commissioner Stanton suggests that the Commission consider adding a new topic to the calendar. (See letter attached as Exhibit I.) The problem arises out of Elkins v. Derby, 32 Cal. App.3d 941 (1973)(attached as Exhibit II) which held that the filing of a workmen's compensation claim does not toll the one-year statute of limitations for personal injury claims provided in Code of Civil Procedure Section 340(3). The court held that the injured plaintiff who wishes to protect himself in a case where there is doubt about jurisdiction under the workmen's compensation provisions should file civil action as well as an application before the Workmen's Compensation Appeals Board.

The staff feels that there is sufficient work already on the calendar and so would prefer that this topic not be added. Although we do not find that any bill has been introduced to directly remedy the problem revealed in Elkins, the staff notes that, if adopted, Senate Bill 1395 would increase the personal injury statute of limitations to two years. A further solution, such as providing that the filing of a workmen's compensation application tolls the statute of limitations, seems the sort of bill some special interest group might put in. What does the Commission wish to do?

Respectfully submitted,

Stan G. Ulrich
Legal Counsel

First Supplement to

Memorandum 73-76

EXHIBIT I

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August 8, 1973

Mr. John H. DeMoully
Executive Secretary
California Law Revision Commission
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Re: Miscellaneous Matters

Dear John:

You have no doubt noted the case of Elkins v. Derby, 32 C. A. 3d 941, which I believe reached an inequitable result and in which the court suggests legislative action. I think this is a matter for consideration by the Commission, particularly in view of the decision in All State Insurance Co. v. County of Alameda, 33 C. A. 3d 418 in which the Court gave effect to an Insurance Code section which substantially extends the statute of limitations on a personal injury claim for the benefit of an insurance carrier.

I also enclose, belatedly, a copy of the recommendations regarding procedural matters in eminent domain on which I have noted several suggested changes and questions.

Yours very truly,

Tom

Thomas E. Stanton, Jr.

TES/bz

Enc.

[Civ. No. 40243. Second Dist., Div. Five. June 13, 1973.]

ORBIE DALE ELKINS, Plaintiff and Appellant, v.
TED DERBY et al., Defendants and Respondents.

**SUMMARY**

The trial court sustained defendants' demurrer to the complaint in a personal injury action based on a theory of absolute liability on the ground that the action was barred by the one-year limitation provided by Code Civ. Proc., § 340, subd. 3, for actions "for injury to or for the death of one caused by the wrongful act or neglect of another." Ten months after being injured, plaintiff had filed an application for workmen's compensation, which application was dismissed on the ground the injuries did not arise out of the employment. The civil action was filed over 16 months after the date of injury. (Superior Court of Santa Barbara County, No. SM 8856, Marion A. Smith, Judge.)

The Court of Appeal affirmed the judgment dismissing the action. It held that the terms "wrongful act or neglect of another" as used in the one-year limitation statute embrace every degree of tort which can be committed against the person, including torts for which there is absolute liability regardless of fault or negligence, and that an application for workmen's compensation is not an action within the meaning of the statute. The court further held that the filing of an application for workmen's compensation does not toll the statute of limitations. It took the view that where there is a doubt as to which tribunal has jurisdiction over an injury, an injured employee must file both an application for workmen's compensation and a civil action even though he has no right to proceed to judgment on both. (Opinion by Ashby, J., with Stephens, Acting P. J., and Cole, J.,* concurring.)

*Assigned by the Chairman of the Judicial Council.

**OPINION**

**ASHBY, J.**—Plaintiff appeals from a judgment of dismissal entered upon plaintiff's request after defendants' demurrer was sustained on the ground that the cause of action alleged in the complaint was barred by the statute of limitations under Code of Civil Procedure section 340.[1]

Respondents were the owners and operators of a business known as Animal Kingdom located in the City of Buellton. On September 8, 1969, while lawfully on the premises of Animal Kingdom, appellant was attacked and injured by a timber wolf kept by respondents. As a result of this attack, appellant suffered severe injury to the bones and nerves in his right arm. Appellant's efforts to recover for these injuries began with the filing of an application for workmen's compensation on July 13, 1970. The Workmen's Compensation Appeals Board ruled that appellant's injury did not arise out of his employment and dismissed his application. On January 19, 1971, appellant filed his complaint for personal injuries. In that complaint, appellant alleged that the attack was without negligence on the part of respondents and was "unprovoked, unanticipated, and could not have been foreseen by plaintiff and defendants."

On February 8, 1971, respondents filed a demurrer alleging that appellant's complaint was barred by the statute of limitations, citing section 340, subd. (3). The trial court sustained the demurrer and subsequently entered a judgment of dismissal of the complaint.

**(1)** Appellant's first contention is that section 340, subd. (3) does not apply to personal injuries for which the respondent is liable under the doctrine of absolute liability. Section 340, subd. (3) provides that there is a one-year statute of limitations in actions "for injury to or for the death of one caused by the wrongful act or neglect of another. . . ."

Appellant argues that in regard to personal injury, section 340, subd. (3) applies only where the injury was caused by the wrongful act or the negligence of the defendant and therefore does not apply where the defendant is subject to absolute liability. The argument is without merit. Section 340, subd. (3) applies in all personal injury situations including an action based on a theory of absolute liability.

The terms "wrongful act or neglect of another" embrace every degree of tort which can be committed against the person, including torts for which there is absolute liability regardless of fault or negligence. *(Zellmer*

[1]Unless otherwise indicated, all citations are to the Code of Civil Procedure.

v. *Acme Brewing Co.*, 184 F.2d 940; *Rubino* v. *Utah Canning Co.*, 123 Cal.App.2d 18 [266 P.2d 163].)

**(2)** Appellant next argues that the filing of an application for workmen's compensation is the filing of "an action" and therefore the requirements of section 340, subd. (3) are satisfied. In support of this argument, appellant cites Code of Civil Procedure section 363 which provides that "[t]he word 'action' as used in this title is to be construed, whenever it is necessary so to do, as including a special proceeding of a civil nature." This argument is without merit. The court in *People* v. *Barker*, 29 Cal.App.2d Supp. 766 at page 770, uses language which appears to give comfort to appellant's position: "The proceeding before the commission leading up to an award is civil in its nature and is in substance and effect, though not in form, a civil action, . . ." The court, however, was merely attempting to illustrate the difference between the burden of proof required in a criminal case and that required in a civil case and based on that distinction expressed the view that evidence of an award by the Industrial Accident Commission was not admissible in a criminal prosecution to prove that the defendant was an employer. Whether it is called an action, a special proceeding or a judicial remedy, to satisfy the requirements of section 340, subd. (3), there must be a filing in a court of law. (See Code Civ. Proc., §§ 20-23.)

**(3)** Appellant's last contention is that the one-year statute of limitations was tolled by the filing of his application for workmen's compensation benefits.[2]

The parties have cited no case which has directly considered the question of whether a workmen's compensation application tolls the statute of limitations as set forth in section 340, subd. (3).

The only case we have found which approaches the specific question of whether a proceeding in workmen's compensation under the Workmen's Compensation Act tolls the statute of limitations as provided in section 340 is *Anderson* v. *National Ice etc. Co.*, 41 Cal.App. 649 [183 P. 273].[3]

[2]Appellant was injured on September 8, 1969. He filed his application for workmen's compensation on July 13, 1970. The period of time between the filing of the application for workmen's compensation and the expiration of the one-year period was 57 days. Assuming that the statute of limitations was tolled only during the pendency of the workmen's compensation proceeding, appellant would have had until 57 days after the workmen's compensation decision became final to file a timely action. The adverse decision of the referee was mailed on October 15, 1970. The decision became final on December 15, 1970. (Lab. Code, § 5906.) Appellant's action was filed on January 19, 1971; 35 days after the workmen's compensation decision became final.

[3]*Mock* v. *Santa Monica Hospital*, 187 Cal.App.2d 57, 67 [9 Cal.Rptr. 555], considered whether the statute of limitations was tolled where the plaintiff filed an

In *Anderson,* appellant's husband died of injuries suffered while allegedly in the employ of the defendant. She commenced proceedings before the Industrial Accident Commission and received an award which was subsequently annulled by the Supreme Court on a writ of certiorari. Appellant then filed an action for damages in the superior court. The defendant demurred on several grounds, including the barring of the action by the provisions of Code of Civil Procedure section 340. Appellant argued that the statute of limitations was tolled by Code of Civil Procedure section 355, which provides that where a judgment is reversed on appeal the plaintiff may commence a new action within one year. The Court of Appeal affirmed the judgment for defendant holding that the statute of limitations was not tolled stating that "where an order is annulled upon a writ of review, the annulment thereof cannot be deemed the reversal of a judgment upon appeal within the provisions of section 355 . . ." (Pp. 650-651.)

Respondents refer us to cases which are authority for their argument that appellant could have filed both a civil action and an application for workmen's compensation.[4]

In *Freire* v. *Matson Navigation Co.,* 19 Cal.2d 8 [118 P.2d 809], the employee was injured when a vehicle owned by his employer backed into him crushing his foot. The employee filed an action for damages on the theory that the accident occurred while on his way to work; therefore, did not arise out of or occur in the course of his employment. In holding that his action should have been filed under the Workmen's Compensation Act, the court at page 10 stated: ". . . If an employee is in doubt whether or not his injury is sustained in the course of his employment, he can protect himself against the running of the statute of limitations, and be certain that his claim will be heard in the proper tribunal, by filing both a civil action in the superior court and an application for compensation before the commission. (*Schumacker* v. *Industrial Acc. Com.,* 46 Cal.App. (2d) 95 [115 Pac. (2d) 571].)"

Thus the pendency of a workmen's compensation proceeding does not

application for workmen's compensation and later filed an action against the treating doctors, alleging that the doctors had aggravated his industrial injury by their negligence. The court cited *Smith* v. *Coleman,* 46 Cal.App.2d 507, 513 [116 P.2d 133], and held that the statute was not tolled where a separate action was filed against the doctors only, even though the alleged negligence of the doctors could have been considered in the original workmen's compensation application against the employer.

[4]Cases cited by respondents are: *Freire* v. *Matson Navigation Co.,* 19 Cal.2d 8 [118 P.2d 809]; *Giacalone* v. *Industrial Acc. Com.,* 120 Cal.App.2d 727 [262 P.2d 79]; *Schumacker* v. *Industrial Acc. Com.,* 46 Cal.App.2d 95 [115 P.2d 571]; *Taylor* v. *Superior Court,* 47 Cal.2d 148 [301 P.2d 866]; *Scott* v. *Industrial Acc. Com.,* 46 Cal.2d 76 [293 P.2d 18].

preclude the *filing* of an action in superior court. An employee can file in both tribunals even though the tribunal whose jurisdiction is first invoked has the exclusive jurisdiction to determine jurisdiction, that is; to determine whether or not the injury is industrial. (*Scott* v. *Industrial Acc. Com.*, 46 Cal.2d 76 [293 P.2d 18]; *Taylor* v. *Superior Court*, 47 Cal.2d 148 [301 P.2d 866].)

We find no justification for a different application of section 340 in the instant case. Therefore, we hold that appellant's cause of action is barred by section 340, subd. (3) because it was not filed within the required one-year period and that the filing of an application under the Workmen's Compensation Act does not toll the statute. Under existing law, in order to protect himself where there is a doubt as to which tribunal has jurisdiction over an injury, the injured person must file both an application for workmen's compensation and a civil action even though he has no right to proceed to judgment on both. The consequence of filing both may result in some duplication; however, this is a problem which must be resolved by the Legislature, not by the courts.

The judgment is affirmed.

Stephens, Acting P. J., and Cole, J.,* concurred.

*Assigned by the Chairman of the Judicial Council.