

KEGEL, TOBIN & TRUCE

INTEROFFICE MEMORANDUM

TO: ALL ATTORNEYS AND CLIENTS

FROM: W. JOSEPH TRUCE

DATE: DECEMBER 6, 2004

RE: SURVEILLANCE AND APPLICANT'S CIVIL ACTION
FOR INFLICTION OF INTENTIONAL EMOTIONAL DISTRESS

In a case that thankfully was not certified for publication, the Court of Appeal in *Camilla Nunez v. S. Melgar Investigations, Inc.* has held that a defendant in a workers' compensation case went "too far" in its surveillance efforts to film the applicant. The plaintiff's attorneys were Pine & Pine and were joined by the applicant's firm of Graiwer & Kaplan.

In the workers' compensation case, defendant, Argonaut Insurance, hired S. Melgar Investigations to conduct surveillance of the applicant's activities as Argonaut suspected that the applicant's claim "might be fraudulent."

The plaintiff/applicant alleged in her lawsuit that the surveillance investigator's "outrageous conduct" included excessive pretext telephone calls and pretext knocks on door to applicant's residence, climbing over applicant's backyard fence, observing applicant's residence from parked car, and following applicant's children..."

In the workers' compensation case, the defendant agreed (for some reason, which is not clear to me) to refer the applicant out to Agreed Medical Examiners in orthopedics and psychiatry and both AMEs found that the applicant's injuries were compensable. In my opinion, this case simply is one more reason never to utilize Agreed Medical Examiners.

In essence, the Court of Appeal could not understand why the defendants' insurance company, after utilizing Agreed Medical Examiners who found the applicant's injuries to be compensable, could ever suspect that the applicant was engaging in fraud.

It would appear that as a result of the reports of the AMEs, the Court of Appeal found that defendants did not have an adequate basis for suspecting that applicant's workers' compensation claims were fraudulent and warranted investigation.

In defending their actions with regard to surveillance of the applicant, the defendant relied on the case of *Teague v. Home Insurance Company* (1985), 168 Cal. App. 3d 1148; 50 CCC 738 in which the court held that the "knowledge that surveillance might exacerbate a claimant's

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psychological or emotional problems does not preclude the use of reasonable surveillance techniques by compensation carriers..."

In *Nunez*, the court held this case was consistent with the Court of Appeal decision in *Teague* as "based on the evidence submitted by *Nunez*, the investigation in this case appears to have gone beyond what was reasonable..."

In referring to the defendant's alleged unreasonable conduct, the Court of Appeal noted as follows:

"In light of Nunez' mental condition, the conduct described in Nunez' evidence – the incessant "wrong number" telephone calls, the pretext door knocks, the attempts by an investigator to climb over the backyard fence or to take pictures while peering over the fence, the surveillance of Nunez' children as they drove away from the house, the length of the investigation (at least 21 months, according to the investigator's written reports) and the "neighborhood canvassing" – is sufficiently extreme and outrageous to create a triable issue as to liability..."

In light of the Court of Appeal decision in *Nunez*, this case will proceed to Trial on the issue of intentional infliction of emotional distress; invasion of privacy and newly enacted Civil Code §1708.8. This statute is the statute presumably enacted to ensure that celebrities would enjoy privacy from newspaper reporters and/or photographers. The statute reads as follows:

"A person is liable for physical invasion of privacy when the defendant knowingly enters onto the land of another without permission or other committed a trespass in order to physically invade the privacy of the plaintiff with the intent to capture any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity..."

However, plaintiff's attorneys argue that this statute is also applicable to surveillance investigators and the Court of Appeal in the *Nunez* case agreed.

When recommending surveillance on a workers' compensation case, we want to take care in articulating our suspicions that a particular applicant is not being truthful in describing his and/or her disability and we want to ensure that the investigator selected does not violate Civil Code §1708.8 which may expose our client to civil liability.


WJL/sr