

ASSEMBLY BILL

No. 823

Introduced by Assembly Member Floyd

February 24, 1999

An act to amend Section 3602 of the Labor Code, and to amend Section 437c of, and to add Section 340.8 to, the Code of Civil Procedure, relating to legal actions.

LEGISLATIVE COUNSEL'S DIGEST

AB 823, as introduced, Floyd. Legal actions.

(1) Existing law provides for a one year statute of limitations for personal injuries, except as otherwise specified.

This bill, for injuries or death caused by exposure to toxic substances or cumulative trauma, would provide that the statute of limitations is the later of, one year from the date of the plaintiff's disability, as defined, or the date of death of plaintiff's decedent, or one year after the date the plaintiff either knew, or through the exercise of reasonable diligence should have known, that injury, illness, or death from the exposure to toxic substances or cumulative trauma was caused or contributed to by the wrongful act of another.

(2) Existing law prohibits an employee from suing an employer for injuries that occur during employment, except as specified. Existing court decisions prohibit the use of proximate cause in negligence suits, and require the substantial factor test for legal cause.

This bill would include willful actions of an employer relating to medical, occupational, or environmental monitoring and health and safety hazard concealment or

misrepresentation within the exceptions that would permit an employee to bring an action at law for damages against the employer. This bill would revise language in the existing law on proximate cause to codify the substantial factor test.

(3) Existing law establishes the burden of proof that a plaintiff or cross-complainant and defendant or cross-defendant must meet in order to have a court issue an order of summary judgment.

This bill would make specified changes in the shifting of the burden of proof in a summary judgment proceeding.

Vote: majority. Appropriation: no. Fiscal committee: no. State-mandated local program: no.

The people of the State of California do enact as follows:

1 SECTION 1. Section 340.8 is added to the Code of
2 Civil Procedure, to read:

3 340.8. (a) In any civil action for injury or illness based
4 upon exposure to toxic substances or cumulative trauma,
5 the time for the commencement of the action shall be the
6 later of the following:

7 (1) Within one year after the date the plaintiff first
8 suffered disability.

9 (2) Within one year after the date the plaintiff either
10 knew, or through the exercise of reasonable diligence
11 should have known, that the exposure to toxic substances
12 or cumulative trauma was caused or contributed to by the
13 wrongful act of another.

14 (b) "Disability" as used in subdivision (a) means the
15 loss of time from work as a result of the exposure to toxic
16 substances, or cumulative trauma, which precludes the
17 performance of the employee's regular occupation.

18 (c) In an action for the wrongful death of any
19 plaintiff's decedent, based upon exposure to toxic
20 substances or cumulative trauma, the time for
21 commencement of an action shall be the later of the
22 following:

23 (1) Within one year from the date of the death of the
24 plaintiff's decedent.



1 (2) Within one year from the date the plaintiff first
2 knew, or through the exercise of reasonable diligence
3 should have known that the death of plaintiff's decedent
4 from exposure to toxic substances or cumulative trauma
5 was caused or contributed to by the wrongful act of
6 another.

7 (d) This section is applicable to all causes of action
8 accruing prior to the effective date of this section that
9 have not been adjudicated.

10 SEC. 2. Section 437c of the Code of Civil Procedure is
11 amended to read:

12 437c. (a) Any party may move for summary
13 judgment in any action or proceeding if it is contended
14 that the action has no merit or that there is no defense to
15 the action or proceeding. The motion may be made at any
16 time after 60 days have elapsed since the general
17 appearance in the action or proceeding of each party
18 against whom the motion is directed or at any earlier time
19 after the general appearance that the court, with or
20 without notice and upon good cause shown, may direct.
21 Notice of the motion and supporting papers shall be
22 served on all other parties to the action at least 28 days
23 before the time appointed for hearing. However, if the
24 notice is served by mail, the required 28-day period of
25 notice shall be increased by five days if the place of
26 address is within the State of California, 10 days if the
27 place of address is outside the State of California but
28 within the United States, and 20 days if the place of
29 address is outside the United States, and if the notice is
30 served by facsimile transmission, Express Mail, or another
31 method of delivery providing for overnight delivery, the
32 required 28-day period of notice shall be increased by two
33 court days. The motion shall be heard no later than 30
34 days before the date of trial, unless the court for good
35 cause orders otherwise. The filing of the motion shall not
36 extend the time within which a party must otherwise file
37 a responsive pleading.

38 (b) The motion shall be supported by affidavits,
39 declarations, admissions, answers to interrogatories,
40 depositions, and matters of which judicial notice shall or



1 may be taken. The supporting papers shall include a
2 separate statement setting forth plainly and concisely all
3 material facts which the moving party contends are
4 undisputed. Each of the material facts stated shall be
5 followed by a reference to the supporting evidence. The
6 failure to comply with this requirement of a separate
7 statement may in the court's discretion constitute a
8 sufficient ground for denial of the motion.

9 Any opposition to the motion shall be served and filed
10 not less than 14 days preceding the noticed or continued
11 date of hearing, unless the court for good cause orders
12 otherwise. The opposition, where appropriate, shall
13 consist of affidavits, declarations, admissions, answers to
14 interrogatories, depositions, and matters of which judicial
15 notice shall or may be taken.

16 The opposition papers shall include a separate
17 statement which responds to each of the material facts
18 contended by the moving party to be undisputed,
19 indicating whether the opposing party agrees or
20 disagrees that those facts are undisputed. The statement
21 also shall set forth plainly and concisely any other material
22 facts which the opposing party contends are disputed.
23 Each material fact contended by the opposing party to be
24 disputed shall be followed by a reference to the
25 supporting evidence. Failure to comply with this
26 requirement of a separate statement may constitute a
27 sufficient ground, in the court's discretion, for granting
28 the motion.

29 Any reply to the opposition shall be served and filed by
30 the moving party not less than five days preceding the
31 noticed or continued date of hearing, unless the court for
32 good cause orders otherwise.

33 Evidentiary objections not made at the hearing shall be
34 deemed waived.

35 Sections 1005 and 1013, extending the time within
36 which a right may be exercised or an act may be done, do
37 not apply to this section.

38 Any incorporation by reference of matter in the court's
39 file shall set forth with specificity the exact matter to



1 which reference is being made and shall not incorporate
2 the entire file.

3 (c) The motion for summary judgment shall be
4 granted if all the papers submitted show that there is no
5 triable issue as to any material fact and that the moving
6 party is entitled to a judgment as a matter of law. In
7 determining whether the papers show that there is no
8 triable issue as to any material fact the court shall consider
9 all of the evidence set forth in the papers, except that to
10 which objections have been made and sustained by the
11 court, and all inferences reasonably deducible from the
12 evidence, except summary judgment shall not be granted
13 by the court based on inferences reasonably deducible
14 from the evidence, if contradicted by other inferences or
15 evidence, which raise a triable issue as to any material
16 fact.

17 (d) Supporting and opposing affidavits or declarations
18 shall be made by any person on personal knowledge, shall
19 set forth admissible evidence, and shall show
20 affirmatively that the affiant is competent to testify to the
21 matters stated in the affidavits or declarations. Any
22 objections based on the failure to comply with the
23 requirements of this subdivision shall be made at the
24 hearing or shall be deemed waived.

25 (e) If a party is otherwise entitled to a summary
26 judgment pursuant to this section, summary judgment
27 shall not be denied on grounds of credibility or for want
28 of cross-examination of witnesses furnishing affidavits or
29 declarations in support of the summary judgment, except
30 that summary judgment may be denied in the discretion
31 of the court, where the only proof of a material fact
32 offered in support of the summary judgment is an
33 affidavit or declaration made by an individual who was
34 the sole witness to that fact; or where a material fact is an
35 individual's state of mind, or lack thereof, and that fact is
36 sought to be established solely by the individual's
37 affirmation thereof.

38 (f) (1) A party may move for summary adjudication
39 as to one or more causes of action within an action, one
40 or more affirmative defenses, one or more claims for



1 damages, or one or more issues of duty, if that party
2 contends that the cause of action has no merit or that
3 there is no affirmative defense thereto, or that there is no
4 merit to an affirmative defense as to any cause of action,
5 or both, or that there is no merit to a claim for damages,
6 as specified in Section 3294 of the Civil Code, or that one
7 or more defendants either owed or did not owe a duty to
8 the plaintiff or plaintiffs. A motion for summary
9 adjudication shall be granted only if it completely
10 disposes of a cause of action, an affirmative defense, a
11 claim for damages, or an issue of duty.

12 (2) A motion for summary adjudication may be made
13 by itself or as an alternative to a motion for summary
14 judgment and shall proceed in all procedural respects as
15 a motion for summary judgment. However, a party may
16 not move for summary judgment based on issues asserted
17 in a prior motion for summary adjudication and denied by
18 the court, unless that party establishes to the satisfaction
19 of the court, newly discovered facts or circumstances or
20 a change of law supporting the issues reasserted in the
21 summary judgment motion.

22 (g) Upon the denial of a motion for summary
23 judgment, on the ground that there is a triable issue as to
24 one or more material facts, the court shall, by written or
25 oral order, specify one or more material facts raised by the
26 motion as to which the court has determined there exists
27 a triable controversy. This determination shall
28 specifically refer to the evidence proffered in support of
29 and in opposition to the motion which indicates that a
30 triable controversy exists. Upon the grant of a motion for
31 summary judgment, on the ground that there is no triable
32 issue of material fact, the court shall, by written or oral
33 order, specify the reasons for its determination. The order
34 shall specifically refer to the evidence proffered in
35 support of, and if applicable in opposition to, the motion
36 which indicates that no triable issue exists. The court shall
37 also state its reasons for any other determination. The
38 court shall record its determination by court reporter or
39 written order.



1 (h) If it appears from the affidavits submitted in
2 opposition to a motion for summary judgment or
3 summary adjudication or both that facts essential to
4 justify opposition may exist but cannot, for reasons stated,
5 then be presented, the court shall deny the motion, or
6 order a continuance to permit affidavits to be obtained or
7 discovery to be had or may make any other order as may
8 be just.

9 (i) If the court determines at any time that any of the
10 affidavits are presented in bad faith or solely for purposes
11 of delay, the court shall order the party presenting the
12 affidavits to pay the other party the amount of the
13 reasonable expenses which the filing of the affidavits
14 caused the other party to incur. Sanctions shall not be
15 imposed pursuant to this subdivision except on notice
16 contained in a party's papers, or on the court's own
17 noticed motion, and after an opportunity to be heard.

18 (j) Except where a separate judgment may properly
19 be awarded in the action, no final judgment shall be
20 entered on a motion for summary judgment prior to the
21 termination of the action, but the final judgment shall, in
22 addition to any matters determined in the action, award
23 judgment as established by the summary proceeding
24 herein provided for.

25 (k) In actions which arise out of an injury to the person
26 or to property, when a motion for summary judgment was
27 granted on the basis that the defendant was without fault,
28 no other defendant during trial, over plaintiff's objection,
29 may attempt to attribute fault to or comment on the
30 absence or involvement of the defendant who was
31 granted the motion.

32 (l) A summary judgment entered under this section is
33 an appealable judgment as in other cases. Upon entry of
34 any order pursuant to this section except the entry of
35 summary judgment, a party may, within 20 days after
36 service upon him or her of a written notice of entry of the
37 order, petition an appropriate reviewing court for a
38 peremptory writ. If the notice is served by mail, the initial
39 period within which to file the petition shall be increased
40 by five days if the place of address is within the State of



1 California, 10 days if the place of address is outside the
2 State of California but within the United States, and 20
3 days if the place of address is outside the United States. If
4 the notice is served by facsimile transmission, Express
5 Mail, or another method of delivery providing for
6 overnight delivery, the initial period within which to file
7 the petition shall be increased by two court days. The
8 superior court may, for good cause, and prior to the
9 expiration of the initial period, extend the time for one
10 additional period not to exceed 10 days.

11 (m) (1) If a motion for summary adjudication is
12 granted, at the trial of the action, the cause or causes of
13 action within the action, affirmative defense or defenses,
14 claim for damages, or issue or issues of duty as to the
15 motion which has been granted shall be deemed to be
16 established and the action shall proceed as to the cause or
17 causes of action, affirmative defense or defenses, claim for
18 damages, or issue or issues of duty remaining.

19 (2) In the trial of the action, the fact that a motion for
20 summary adjudication is granted as to one or more causes
21 of action, affirmative defenses, claims for damages, or
22 issues of duty within the action shall not operate to bar
23 any cause of action, affirmative defense, claim for
24 damages, or issue of duty as to which summary
25 adjudication was either not sought or denied.

26 (3) In the trial of an action, neither a party, nor a
27 witness, nor the court shall comment upon the grant or
28 denial of a motion for summary adjudication to a jury.

29 (n) A cause of action has no merit if either of the
30 following exists:

31 (1) One or more of the elements of the cause of action
32 cannot be separately established, even if that element is
33 separately pleaded.

34 (2) A defendant establishes an affirmative defense to
35 that cause of action.

36 (o) For purposes of motions for summary judgment
37 and summary adjudication:

38 (1) A plaintiff or cross-complainant has met his or her
39 burden of showing that there is no defense to a cause of
40 action if that party has proved each element of the cause



1 of action entitling the party to judgment on that cause of
2 action. Once the plaintiff or cross-complainant has met
3 that burden, the burden shifts to the defendant or
4 cross-defendant to show that a triable issue of one or more
5 material facts exists as to that cause of action or a defense
6 thereto. *The burden does not shift to the defendant or*
7 *cross-defendant to show that a triable issue of one or more*
8 *material facts exists as to a defense unless the plaintiff or*
9 *cross-complainant first establishes the absence of*
10 *material evidence, direct or circumstantial, in support of*
11 *one or more elements of the defense.* The defendant or
12 cross-defendant may not rely upon the mere allegations
13 or denials of its pleadings to show that a triable issue of
14 material fact exists but, instead, shall set forth the specific
15 facts showing that a triable issue of material fact exists as
16 to that cause of action or a defense thereto.

17 (2) A defendant or cross-defendant has met his or her
18 burden of showing that a cause of action has no merit if
19 that party has shown that one or more elements of the
20 cause of action, even if not separately pleaded, cannot be
21 established, or that there is a complete defense to that
22 cause of action. Once the defendant or cross-defendant
23 has met that burden, the burden shifts to the plaintiff or
24 cross-complainant to show that a triable issue of one or
25 more material facts exists as to that cause of action or a
26 defense thereto. *The burden does not shift to the plaintiff*
27 *or cross-complainant to show that a triable issue of one or*
28 *more material facts exists as to a cause of action unless the*
29 *defendant or cross-defendant first establishes the absence*
30 *of material evidence, direct or circumstantial, in support*
31 *of one or more elements of the cause of action.* The
32 plaintiff or cross-complainant may not rely upon the mere
33 allegations or denials of its pleadings to show that a triable
34 issue of material fact exists but, instead, shall set forth the
35 specific facts showing that a triable issue of material fact
36 exists as to that cause of action or a defense thereto.

37 (p) Nothing in this section shall be construed to extend
38 the period for trial provided by Section 1170.5.



1 (q) Subdivisions (a) and (b) shall not apply to actions
 2 brought pursuant to Chapter 4 (commencing with
 3 Section 1159) of Title 3 of Part 3.

4 (r) For the purposes of this section, a change in law
 5 shall not include a later enacted statute without
 6 retroactive application.

7 SEC. 3. Section 3602 of the Labor Code is amended to
 8 read:

9 3602. (a) Where the conditions of compensation set
 10 forth in Section 3600 concur, the right to recover such
 11 compensation is, except as specifically provided in this
 12 section and Sections 3706 and 4558, the sole and exclusive
 13 remedy of the employee or his or her dependents against
 14 the employer, and the fact that either the employee or
 15 the employer also occupied another or dual capacity prior
 16 to, or at the time of, the employee's industrial injury shall
 17 not permit the employee or his or her dependents to
 18 bring an action at law for damages against the employer.

19 (b) An employee, or his or her dependents in the
 20 event of his or her death, may bring an action at law for
 21 damages against the employer, as if this division did not
 22 apply, in the following instances:

23 (1) Where *a material and substantial factor in bringing*
 24 *about the employee's injury or death is proximately*
 25 ~~*caused by a willful physical assault by the employer any*~~
 26 ~~*of the following:*~~

27 (A) *Willful physical assault by the employer.*

28 (B) *Willful failure or refusal of the employer to*
 29 *conduct medical, occupational, or environmental*
 30 *monitoring as required by federal, state, or local law, or*
 31 *by administrative regulation, standard, or order*
 32 *promulgated or issued pursuant to any of those laws.*

33 (C) *Failure or refusal by the employer to conduct*
 34 *medical, occupational, or environmental monitoring*
 35 *when a reasonable person having the employer's*
 36 *knowledge of the risk would have instituted the*
 37 *monitoring.*

38 (D) *Willful concealment or misrepresentation by the*
 39 *employer respecting the nature and extent of health or*



1 *safety hazards posed by the employee's work*
2 *environment.*

3 (2) Where the employee's injury is aggravated by the
4 employer's fraudulent concealment of the existence *or*
5 *nature or extent* of the injury and its connection with the
6 employment, in which case the employer's liability shall
7 be limited to those damages ~~proximately caused by~~ *for*
8 *which* the aggravation *by the employer was a material*
9 *and substantial factor in bringing about the damages.* The
10 burden of proof respecting apportionment of damages
11 between the injury and any subsequent aggravation
12 thereof is upon the employer.

13 (3) Where *a material and substantial factor in bringing*
14 *about* the employee's injury or death is ~~proximately~~
15 ~~caused by~~ a defective product manufactured by the
16 employer and sold, leased, or otherwise transferred for
17 valuable consideration to an independent third person,
18 and that product is thereafter provided for the
19 employee's use by a third person.

20 (c) In all cases where the conditions of compensation
21 set forth in Section 3600 do not concur, the liability of the
22 employer shall be the same as if this division had not been
23 enacted.

24 (d) For the purposes of this division, including
25 Sections 3700 and 3706, an employer may secure the
26 payment of compensation on employees provided to it by
27 agreement by another employer by entering into a valid
28 and enforceable agreement with that other employer
29 under which the other employer agrees to obtain, and
30 has, in fact, obtained workers' compensation coverage for
31 those employees. In those cases, both employers shall be
32 considered to have secured the payment of compensation
33 within the meaning of this section and Sections 3700 and
34 3706 if there is a valid and enforceable agreement
35 between the employers to obtain that coverage, and that
36 coverage, as specified in subdivision (a) or (b) of Section
37 3700, has been in fact obtained, and the coverage remains
38 in effect for the duration of the employment providing
39 legally sufficient coverage to the employee or employees
40 who form the subject matter of the coverage. That



1 agreement shall not be made for the purpose of avoiding
2 an employer's appropriate experience rating as defined
3 in subdivision (c) of Section 11730 of the Insurance Code.

4 Employers who have complied with this subdivision
5 shall not be subject to civil, criminal, or other penalties for
6 failure to provide workers' compensation coverage or
7 tort liability in the event of employee injury, but may, in
8 the absence of compliance, be subject to all three.

