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6 SUPERIOR COURT OF THE STATE OF CALIFORNIA
7 FOR THE COUNTY OF SANTA CLARA

8 DAVID R. SMITH and SALLY SMITH,

9 Plaintiffs,

10 v.

11 ROBERT JONES, SARAH JONES, and
12 DOES 1 to 30

13 Defendants.

Case No. CV 0000001

**PLAINTIFFS' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEFENDANT
DISCOUNT INSURANCE COMPANY'S
DEMURRER**

14 Date: February 3, 2002
Time: 9:00 a.m.
Department: 2

15
16 I.

17 INTRODUCTION

18 Plaintiffs David R. Smith and Sally Smith (collectively "the Smiths") respectfully submit the
19 following Memorandum of Points and Authorities in opposition to Defendant Discount Insurance
20 Company's Demurrer on the basis of misjoinder. The Smiths filed a negligence and negligence per
21 se action against Robert and Sarah Jones (collectively "the Joneses") as a result of their dog's savage
22 attack on the Smiths' family dog, Spot. The Smiths, along with their 13-year-old daughter, were
23 walking their fourteen-pound Lhaso-Poo on a leash down a public road. The Joneses' dog, which
24 weighed approximately 100 pounds and was unrestrained, rushed from the Joneses' property and
25 viciously attacked the small, leashed dog. Mr. Smith beat the larger dog away, but not before Spot
26 suffered severe wounds including a punctured lung. The Smiths rushed their dog to the emergency pet
27 hospital where he underwent extensive surgery and two weeks of intensive care. The Smiths incurred
28

1 \$7,991.13 in veterinarian bills. The Joneses' insurance company, Discount Insurance Company,
2 initially agreed to settle the Smiths' negligence claim against the Joneses by reimbursing the Smiths
3 for their veterinarian bills. Discount Insurance reneged on the agreement to settle. As a result, the
4 Smiths filed an Amended Complaint alleging breach of contract against Discount Insurance.

5 Discount Insurance filed a Demurrer claiming that the Smiths improperly joined it as a party
6 to the instant action. The Demurrer should be overruled because Discount Insurance is properly joined
7 as a party. Not only do both claims arise from the dog attack, but both claims also share common
8 questions of fact and law.

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10 II.

11 ARGUMENT AND SUPPORTING AUTHORITIES

12 **DISCOUNT INSURANCE'S DEMURRER SHOULD BE DENIED BECAUSE**
13 **THE SMITHS PROPERLY JOINED DISCOUNT INSURANCE AS A PARTY**
14 **TO THE SUIT.**

15 Discount Insurance's Demurrer should be denied because the Smiths properly joined it as party
16 to the action. Section 379 of the Code of Civil Procedure allows the joinder of all persons as defendants
17 if:

18 (1) Any right to relief jointly, severally, or in the alternative, in respect of or
19 arising out of the same transaction, occurrence, or series of transactions or occurrences
20 and if any question of law or fact common to all these persons will arise in the action;
21 or

22 (2) A claim, right or interest adverse to them in the property or controversy
23 which is the subject of the action.

24 (Cal. Code Civ. Proc. §379.) Discount Insurance asserts that no common questions of law or fact exist
25 between the contract claim against Discount Insurance and the negligence claims against the Joneses,
26 (Memorandum supporting Discount Insurance's Demurrer p. 2), but it is undisputed that the breach of
27 contract claim and negligence claims arose as a direct result of the dog attack on the Smiths' family pet.
28 Although contract and negligence causes of action do have separate, distinct elements, shared questions
of law and fact will arise in this case. For example, any consideration for the oral agreement is based
upon the Joneses' and, as their insurer, Discount Insurance's liability for the dog attack.

