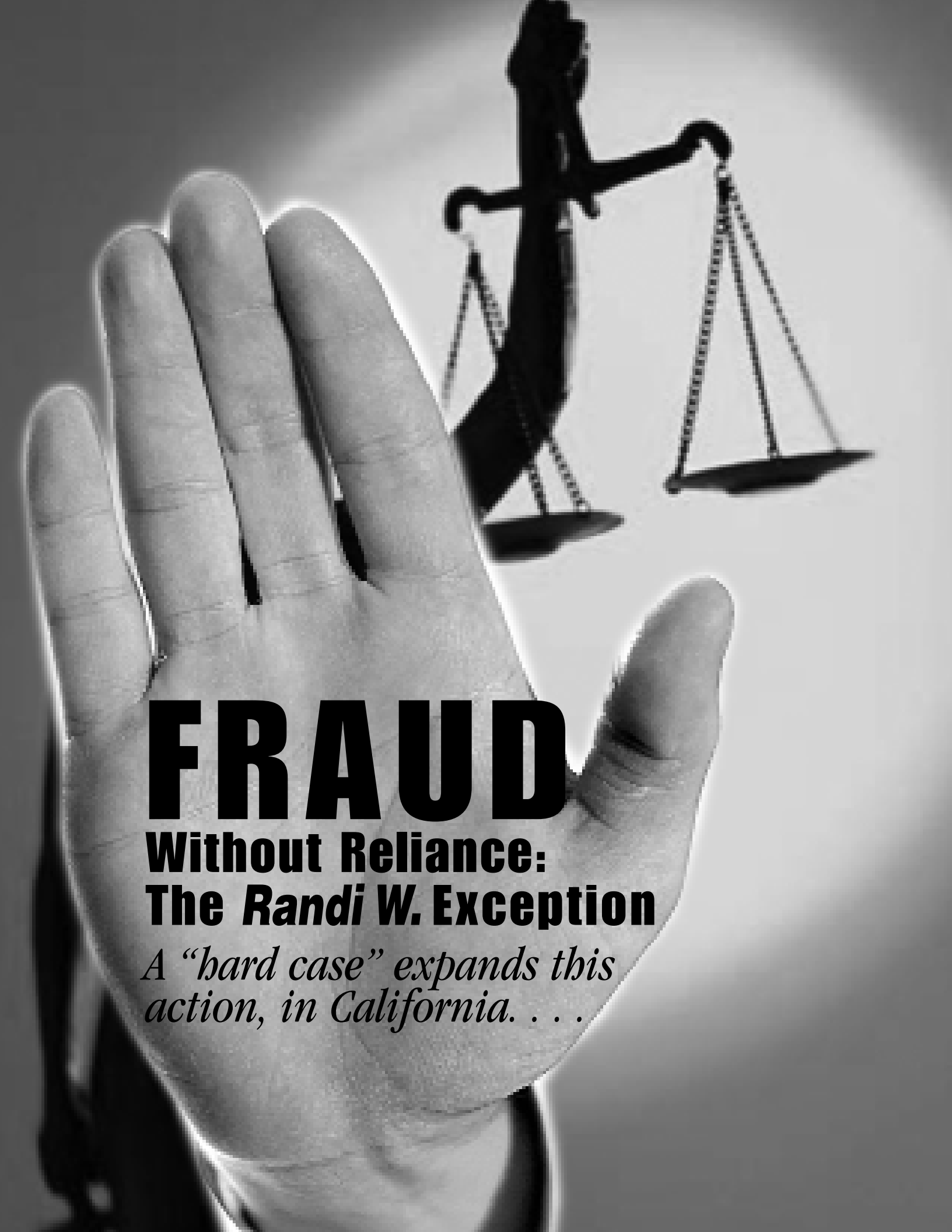

FRAUD

Without Reliance: The *Randi W.* Exception

A "hard case" expands this action, in California. . . .

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by Todd Green

Introduction

It is often said that "hard cases make bad law." If, by "hard cases," we mean cases with troubling facts, it is difficult to imagine facts more disturbing than the sexual molestation of a 13-year-old schoolgirl by the school's vice principal. Those were the allegations in *Randi W. v. Muroc Joint Unified School District,* 14 Cal.4th 1066, 1071 (1997). According to the complaint, prior to his employment at Randi W.'s school, the vice principal, Gadams, had worked at several other schools in other districts. Each of these prior employers knew of improper contacts between Gadams and students and, notwithstanding this knowledge, provided detailed letters of recommendation for Gadams, which failed to disclose Gadams' prior misconduct, knowing that these letters of recommendation would be sent to prospective employers. With these disturbing allegations as its starting point, the California Supreme Court addressed the question of whether Randi W. could sue Gadams' former employers for fraud.

The Physical Injury Exception to *Reliance*

In general, the elements of fraud are: 1) a misrepresentation; 2) knowledge of falsity; 3) intent to defraud, *i.e.,* to induce reliance; 4) justifiable reliance; and 5) resulting damage. *See* Cal.Civ.Code §1709; *Seeger v. Odell,* 18 Cal. 2d 409, 414 (1941); *Molko v. Holy Spirit Assn.,* 46 Cal. 3d 1092, 1108 (1988). Prior to *Randi W.*, the reliance element required that a plaintiff establish that he or she relied on the fraudulent statement. That is to say, only those persons to whom the representation was made and who actually relied on it could sue for fraud. *See, e.g., Mirkin v. Wasserman,* 5 Cal.4th 1082, 1088-89 (1993) ("It is settled that a plaintiff, to state a cause of action for deceit based on a misrepresentation, must plead that he or she actually relied on the misrepresentation.")

Randi W.'s complaint was silent regarding her reliance on the prior employers' letters of recommendation. Indeed, the Supreme Court conceded that she probably did not even know of these letters. *See* 14 Cal.4th at 1084. And if she did not know of these letters, then clearly she could not have taken any action in reliance on them. But in *Randi W.*, the California Supreme Court, adopting the analysis of the Court of Appeal, held that, to state a cause of action for fraud, a plaintiff need not have actually relied on a defendant's misrepresentation. As long as *someone* relied on defendant's misrepresentation and the plaintiff suffered physical, as opposed to economic, injury as a result, the plaintiff may state a cause of action for fraud. *See Randi W.,* 14 Cal.4th at 1084-85. Hence, the physical injury exception to the reliance requirement for fraud.

The Rationale for the Physical Injury Exception

This exception to the reliance requirement is hard to justify. Is physical injury, of any magnitude, always so much more serious than economic injury, of any magnitude, that the elements of fraud should be weakened to make this cause of action available? In its opinion the court observed that "[o]ne of society's highest priorities is to protect children from sexual or physical abuse." 14 Cal.4th at 1078-79. True enough, I suppose, but was it really necessary to compromise the elements of fraud in order to do so? In addition to whatever recourse she had against Gadams, himself, couldn't Randi W. have sued the prior employers on a negligence theory?

In fact, she did just that. But the trial court sustained a demurrer to the negligence cause of action on the grounds that the prior employers owed no duty to Randi W., and the Court of Appeal affirmed. *See* 14 Cal.4th at 1074. For some reason, Randi W. did not seek review in the Supreme Court of the ruling on her negligence claim. Thus, the Supreme Court could not, and did not, address that claim. *See* 14 Cal.4th at 1074. But it appears from the Supreme Court's opinion that, unlike the trial court and the Court of Appeal, it would have found that the prior employers owed Randi W. a duty of care. Indeed, while recognizing that "a duty of care analysis is unnecessary in determining liability for intentional misrepresentation or fraud," 14 Cal.4th at 1076, the Supreme Court nevertheless performed such an analysis and concluded that Gadams' former employers did owe a duty of care to Randi W. *See* 14 Cal.4th at 1076-81. Thus, it appears that the Supreme Court likely would have reversed the dismissal of Randi W.'s negligence claim had it been given the chance. If that had happened, perhaps we would not have the physical injury exception to the reliance requirement for fraud.

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