



Litigation Update

Litigation Section News

January 2012

Client has to pay lawyer twice.

Client hired lawyer to represent him in a probate matter but disputed the fees charged by his lawyer, and demanded a mandatory fee arbitration. So the lawyer hired his own lawyer to represent him in the fee arbitration. The arbitrator found in favor of the lawyer and ordered the client to pay \$33,000 in unpaid fees. The lawyer then sued the client for the fees the lawyer incurred in defending himself in the mandatory fee arbitration. This time the client was ordered to pay an additional \$16,344.41. *Dzwonkowski v. Spinella* (Cal. App. Fourth Dist., Div. 3; October 27, 2011) (Ord. Pub. November 27, 2011) 200 Cal.App.4th 930.

Mad men: season five. A female executive at an advertising agency, who prevailed at trial, lost on appeal on her gender harassment claim. The agency owner dressed as Santa at holiday parties and had women employees sit on his lap, wore a Santa hat with “bitch” across the brow, talked with the plaintiff about her sex life using a certain hand gesture and asked her whether she “got any.” One of the employees brought a plastic penis to the office and executives sometimes referred to women clients by a word that begins with a “c.” One client was called “a demanding, unconstructive, counter-productive, mindless, shitty-ass bitch” in an agency email by an executive. The same executive sent another email which called plaintiff “one big-titted mindless one.” Plaintiff complained to her supervisor as well as the head of the agency. The majority opinion states the plaintiff did not demonstrate severe or pervasive harassment based on gender.

The dissent disagreed with the majority opinion in “that the nonsexual acts of retaliation that took place could not be considered discrimination due to gender,” stating, “from the moment of her

complaint, the atmosphere surrounding her job changed completely” and she became a marked woman, and that “the non-sexual acts of retaliation that took place” should be considered discrimination due to gender. *Brennan v. Townsend O’Leary* (Cal. App. Fourth Dist., Div. 3 October 18, 2011) 199 Cal.App.4th 1336

Sexual harassment severe and pervasive during a five-week period.

During five weeks when a store manager was on leave, a 21-year-old cashier was subjected to rumors she had a sexually transmitted disease and that she and a co-worker were having a sexual relationship and suggestions she could make more money as a stripper. In one incident, she was turned around by the assistant manager who said to her: “Show your butt to the customers and that way you can sell more.” The Court of Appeal affirmed judgment in favor of the plaintiff, noting the workplace was “permeated with discriminatory intimidation, ridicule and insult.” *Fuentes v. Autozone, Inc.* (Cal. App. Second Dist., Div. 4; November 16, 2011) 200 Cal.App.4th 1221.

Tenant’s release for landlord’s negligence enforceable.

Civil Code §1953 says it’s against public policy for “any” provision in a lease to require a lessee to waive a landlord’s exercise of due care to prevent personal injury or property damage. Here tenant waived liability for landlord’s negligence in operating a tenant-only health club and exercise facility. The Court of Appeal said the waiver is enforceable since it has nothing to do with the “tenant’s basic, essential need for shelter.” The dissent says “any” means “any,” and that the waiver provision in the lease is against public policy under the statute. *Lewis Operating Corporation v. Superior Court (John Costabaude)* (Cal. App. Fourth Dist.,

Div. 2; November 10, 2011) 200 Cal.App.4th 940.

Discrimination against member of armed forces must be by employer.

Military and Veterans Code §394 says “no person shall discriminate against” any member of the military. Lt. Mario Pantuso was called to active duty in the Navy, and when he returned from Iraq his supervisor terminated him. The Lieutenant sued the supervisor. The Court of Appeal compared the statute to the Fair Employment and Housing Act, FEHA, *Government Code* §12900, et seq., which has similar language and goals, and concluded that “person” means employers and not individual employees. *Halgowski v. Superior Court (Mario Pantuso)* (Cal. App. Second Dist., Div. 3; November 10, 2011) 200 Cal.App.4th 983.

Condominium owner must pay association’s fees. Condo owner sued association for violation of

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CC&R's, but dismissed most of the causes of action on the Friday prior to the trial date the following Monday. On Monday, the plaintiff successfully moved to continue the trial for the few remaining counts. A few weeks later, citing *Civil Code* §1354 (c), the association requested \$252,767 for fees incurred in defending the eight causes of action dismissed. The trial court denied the fee request, and the Court of Appeal reversed. *Salehi v. Surfside III Condominium Owner's Assoc.* (Cal. App. Second Dist., Div. 6; November 14, 2011) 200 Cal.App.4th 1146.

Actual innocence required for malpractice against criminal defense lawyer. Convicted criminal, acting as a plaintiff in a legal malpractice action, sued his criminal defense lawyer, alleging deficient representation concerning payment of restitution which resulted in his being charged with a probation violation, spending more time incarcerated and losing wages. The appellate court found no error after the trial court sustained a demurrer without leave to amend because the law requires a showing of actual innocence. The court noted we should not permit a guilty defendant to profit from his own wrong. *Khodayari v. Mashburn* (Cal. App. Second Dist., Div. 4; November 15, 2011) (As mod. November 22, 2011) 200 Cal.App.4th 1184.

Roof extension not a concealed hazard. Plaintiff was hired by Dish Network to install a satellite dish on the roof of a residence. When he stepped from his ladder onto a roof extension which had been installed by the homeowner without a permit, the 225 pound plaintiff crashed to the ground, suffering significant injuries. He sued the homeowner. The court affirmed the grant of summary judgment, noting that a homeowner does not reasonably anticipate that a worker will use a small roof extension only four feet square to climb upon on his way to the main roof because he neglected to bring the right ladder. *Gravelin v. Satterfield* (Cal. App. First Dist., Div. 4; November 15, 2011) 200 Cal.App.4th 1209.

Discovery games in child abuse suit. An employer was sued for negligence in hiring, training, controlling and supervising a swim coach who "had a long history of molesting underage female swimmers placed under his control" and was convicted and sentenced to 40 years in state prison for molesting a 15-year-old swimmer. Defendant asked for a protective order excluding documents pertaining to "swim coaches who have merely been alleged to have engaged in sexual misconduct, but such allegations have not been proven. . ." The court ordered production of all documents but permitted redaction of the names of the accused coaches. Defendant obliterated all information indicating the dates, places, or nature of the complaints, preventing any analysis. Finding no abuse of discretion in the trial court's order of sanctions for failing to comply or in the trial court's failing to hold an in camera inspection of the documents, the appellate court affirmed. *Jane Doe v. United States Swimming, Inc.* (Cal. App. Sixth Dist.; November 21, 2011) 200 Cal.App.4th 1424.

What happens in Zimbabwe, stays in Zimbabwe. A lawyer provided an affidavit to support his client's application for relief in a Zimbabwe court. The result in the foreign court could have influenced an action in a California court. The client's application in Zimbabwe was denied and the lawyer was sued in California for malicious prosecution. The appellate court found the lawyer's affidavit constituted an exercise of his right to free speech. The appellate court ordered the matter stricken under the anti-SLAPP statute, *Civ.Proc.* §425.16. *Summerfield v. Randolph* (Cal. App. Second Dist., Div. 5; November 28, 2011) 201 Cal.App.4th 127.

\$10,000 sanction in obtaining extension of time to file response to appeal. Respondent's counsel asked for an extension of time to file a response. Under penalty of perjury, he said he needed more time due to the many "complex issues raised." When the brief was filed, it contained "identical—and we mean word-for-word identical"

assertions contained in another brief filed by the same counsel in 2009. The appellate court gave notice it was considering issuing sanctions, and when the time came for a hearing on possible sanctions, not only did counsel not appear for argument, he sent another lawyer who was unaware that sanctions were even being considered. A second notice was sent to counsel; this time, he was ordered to personally appear. Noting "it is critical to both the bench and the bar that [the court] be able to rely on the honesty of counsel," the appellate court sanctioned counsel \$10,000 and sent a copy of the opinion to the State Bar. *Kim v. Westmoore Partners* (Cal. App. Fourth Dist., Div. 3; November 29, 2011) 201 Cal.App.4th 267.

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