



Litigation Update

Litigation Section News

February 2012

Times have changed, but not completely. Plaintiff, a pre-school teacher at a Bible-based Evangelical Lutheran Church school, was fired because she was living with her boyfriend and raising their child together. She admitted she knew she was supposed to serve as a Christian role model. The court found the church did not qualify as an employer under the California Fair Employment and Housing Act (*Gov.Code* §12900 *et seq.*), the church was exempted under Title VII of the 1964 Civil Rights Act (42 U.S.C. §2000e *et seq.*) and her claim for wrongful termination in violation of public policy is barred by the ministerial exception. *Henry v. Red Hill Evangelical Lutheran Church of Tustin* (Cal. App. Fourth Dist., Div. 3; December 9, 2011) 201 Cal.App.4th 1041.

Motion to set aside judgment extends time to appeal, but only if the motion is timely filed. If a party files a motion to vacate the judgment within the normal time to appeal from the judgment, the time to appeal from the judgment is extended under *Calif. Rules of Court Rule* 8.108(c). Here, defendants did not file their motion to vacate until the time to appeal the judgment had expired. *Starpoint Properties, LLC v. Namvar* (Cal. App. Second Dist., Div. 1; December 12, 2011) 201 Cal.App.4th 1101.

No duty owed for death resulting from placement of gas meter. Parents sued Southern California Gas Company for wrongful death when their daughter died after driving her car off a street, over a curb and striking an SCG gas meter located 11 feet, 4 inches beyond the curb. The Court of Appeal reversed judgment for plaintiffs, concluding it was not reasonably foreseeable that SGC's installation

of the gas meter a substantial distance away from the curb on a street with a 25-mile-per-hour speed limit would cause the general type of harmful event in this case. *Gonzalez v. Southern California Gas Company* (Cal. App. Fourth Dist., Div. 1; December 13, 2011) 201 Cal.App.4th 1233.

Grandfather disqualified from representing his son in custody dispute. In an appeal in which the mother of the infant did not even file a respondent's brief, the Court of Appeal affirmed the disqualification of the paternal grandfather's legal representation of his son, the infant's father. The court expressed concern about the potential for misuse of confidential information. *Kennedy v. Eldridge* (Cal. App. Third Dist.; December 13, 2011) 201 Cal.App.4th 1197.

You spot zone it, you buy it. City imposed an RVL, (residential, very low land restriction), on undeveloped property, which limited parcels to one dwelling per 20 acres. At trial, the court determined city engaged in spot zoning and issued a writ of mandate, giving the City the choice of either complying with the writ or paying damages for the value of the property taken by the RVL restrictions. The appellate court affirmed, stating the City's actions were arbitrary and capricious. *Avenida San Juan Partnership v. City of San Clemente* (Cal. App. Fourth Dist., Div. 3; December 14, 2011) 201 Cal.App.4th 1256.

Must follow contractual alternative to right to repair act. Plaintiffs, owners of 32 homes built by developer, brought a construction defect action. *Civil Code* sections 895 through 945.5, the Right to Repair Act, prescribe non-adversarial pre-litigation procedures a homeowner must initiate prior to bringing a civil action against a

builder for alleged construction deficiencies. Plaintiffs contended the developer did not give the required notice under section 912. The trial court ordered plaintiffs to observe certain contractual procedures. The appellate court denied the plaintiff's writ, finding the developer's failure to comply with section 912 did not bar enforcement of its alternative contractual non-adversarial procedures. *Baeza v. Superior Court (Castle & Cooke California, Inc.)* (Cal. App. Fifth Dist.; December 14, 2011) 201 Cal.App.4th 1214.

Clerk cannot refuse to file motion. "It is difficult enough to practice law without having the clerk's office as an adversary" an appellate court wrote. It added that whether the moving party's motion "has legal merit is a determination to be made by a judge, not by the clerk's office." Noting that actions by the clerk's office were "quite troubling," the court stated that when a document presented for filing is in a form that complies with the rules of court, the clerk has a ministerial duty to file it and then notify the party that the defect should be corrected. *Voit v. Superior Court (Julie Montano)* (Cal. App. Sixth Dist.; December 14, 2011) 201 Cal.App.4th 1285.

Sometimes lawyer's signature sufficient under ccp § 664.6 settlement. A stipulation for settlement was reached during a mediation. Defendant's lawyer, representing the defendant on the cross-complaint, signed the stipulation for the client, and plaintiff asserted the stipulation was not binding because it was not signed by the client. The appellate court found the lawyer signed the stipulation as the designated employee, and that just because the employee happened to be a lawyer did not prohibit signing on behalf of the defendant. *Provost v. Regents of the University of California* (Cal. App.

Fourth Dist., Div. 3; December 14, 2011) 201 Cal.App.4th 1289.

Undertaking not required when injunction granted.

CCP §529(a) requires the court to order an undertaking when it grants a preliminary injunction to protect a defendant against losses that may be incurred if the defendant prevails on the merits. But when the court granted the injunction here, it also ruled on the merits of the underlying claim, and, thus, could not order the petitioner to provide an undertaking. *Bardasian v. Superior Court (Santa Clara Partners Mortgage Corporation)* (Cal. App. Third Dist.; December 15, 2011) 201 Cal.App.4th 1371.

Evidentiary hearing required before entering default judgment in quiet title action.

CCP §764.010 provides that in actions to quiet title, the court shall not enter judgment by default but shall in all cases require evidence of plaintiff's title and hear such evidence as may be offered respecting the claims of any of the defendants. The appellate court found this obligated the trial court to hold an evidentiary hearing in open court and "hearing the defendant's evidence." The dissent states a defendant should not be permitted to participate in the hearing. *Harbour Vista LLC v. HSBC Mortgage Services Inc.* (Cal. App. Fourth Dist., Div. 3; December 19, 2011) 201 Cal.App.4th 1496.

Triable issues whether foreclosure sale should be set aside due to unconscionability of transaction.

In action in which a homeowner sued a lender, a loan servicer and others to set aside a trustee's sale claiming predatory lending, the trial court granted summary judgment. The appellate court noted the refinance was for \$1.5 million with a monthly payment of \$12,381.36 and the homeowner had a monthly income of \$3,333. The court reversed the grant of summary judgment finding there was sufficient evidence of triable issues of material fact regarding alleged unconscionability of the transaction. *Lona v. Citibank, N.A.* (Cal. App. Sixth Dist.; December 21, 2011) 202 Cal.App.4th 89.

Can't cut attorney out of his fees. Client/defendant and lawyer entered into a written fee agreement which deferred payment of fees until the court ordered them, which the court did after plaintiff lost. Plaintiff appealed, but settled with the defendant while the appeal was pending, a settlement which did not include payment of the fees. The lawyer sued for his fees. The jury in the fee action awarded the lawyer his fees, finding the plaintiff in the underlying action interfered with the lawyer's contract with his client. The appellate court affirmed. *Little v. Amber Hotel Company* (Cal. App. Second Dist., Div. 1; December 22, 2011) 202 Cal.App.4th 280.

School counselors permitted, not required, to disclose student confidential medical information.

Education Code §49602(c) permits, but does not by its terms, require a school counselor to disclose personal information (including pregnancy-related or abortion-related information) received from an unemancipated student age 12 or older to the student's parents, or school principal when the counselor has reasonable cause to believe that disclosure is necessary to avert a clear and present danger to the student's health, safety or welfare. Where the school counselor fails to disclose pregnancy-related or abortion-related personal information to the parents or school principal, it may not form the basis of civil liability against a school counselor, or his or her employing school, or school district under the doctrine of negligence *per se*. *Opinion of Harris, Office of the Attorney General of the State of California*, Opinion No.08-509 (December 29, 2011).

No employee benefits for independent contractor.

An independent insurance agent for insurance company filed suit claiming employee entitlements under the Labor Code after her contractual relationship with the company terminated. The trial court, after finding she was an independent contractor and not an employee, granted summary judgment in favor of the insurance company. The Court of Appeal affirmed, agreeing with the trial

judge that principles of common law employment applied for purposes of *Labor Code* §2802. *Arnold v. Mutual of Omaha Insurance Company* (Cal. App. First Dist., Div. 1; December 30, 2011) 202 Cal.App.4th 580.

Arbitration clause in employment application unconscionable and unenforceable.

Here's what it says: "I hereby agree to submit to binding arbitration all disputes and claims arising out of the submission of this application. I further agree, in the event that I am hired by AccentCare, that all disputes that cannot be resolved by informal internal resolution which might arise out of my employment with AccentCare, whether during or after that employment, will be submitted to binding arbitration. I agree that such arbitration shall be conducted under the rules then in effect of the American Arbitration Association." Both the trial and appellate courts refused to enforce the "agreement." *Wisdom v. AccentCare, Inc.* (Cal. App. Third Dist.; January 3, 2012) 202 Cal.App.4th 591.

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California Court of Appeal, Fourth District

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Ellen Louie (415) 538-2546
ellen.louie@calbar.ca.gov