



Litigation Update

Litigation Section News

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Volunteer coach unvolunteered.

Volunteer coached a fourth grade basketball team in an after school program. When a problem arose with one boy, the coach tried to work things out with his parents to no avail. The parents rallied others to remove the coach, and the coach was told not to return the next year. The coach, a lawyer who represented himself, sued the PTA and three other volunteers who ran the after school program alleging eight causes of action including libel, slander, negligence and fraud. Defendants filed an anti-SLAPP motion [*Civ.Proc.* §425.16] which was denied. The appellate court reversed and remanded matter to trial court to hold a hearing to award defendants their attorney fees. *Hecimovich v. Encinal School Parent Teacher Organization* (Cal. App. First Dist., Div. 2; February 9, 2012) 203 Cal.App.4th 450, [137 Cal.Rptr.3d 455].

Sometimes okay to allege punitive damages against Kaiser.

A Kaiser Foundation Hospital refused to perform an MRI despite the recommendation of the patient's chiropractor, two acupuncturists and Kaiser's own physical therapy department. After denying approval for the procedure for three months, it was finally performed and revealed "one of the fastest growing types of osteosarcoma." Surgery resulted in loss of the patient's right leg and portions of the pelvis and spine. In the patient's action against Kaiser, it was alleged

that Kaiser devised a system that "removes the physicians' abilities to give medical care which is in the patient's best interests." Defendants brought a motion to strike the punitive damages claim, and plaintiff argued the claims "did not arise out of defendants' professional medical services, but . . . insurance decisions and practices." Plaintiff dismissed the punitive damages claim against Kaiser health care providers only. The appellate court ruled that *Civ.Proc.* §425.13 does not apply to the claims against Kaiser Foundation Health Plan and affirmed the trial court's denial of the motion to strike. *Kaiser Foundation Health Plan, Inc. v. Sup. Ct. (Anna Rahm)* (Cal. App. Second Dist., Div. 7; February 15, 2012) 203 Cal.App.4th 696, [137 Cal.Rptr.3d 741].

No payment, no award. An arbitrator terminated proceedings for lack of payment of fees. A party asked the superior court to confirm the "award." The trial court denied the motion and set the matter for trial. The appellate court affirmed. *Cinel v. Christopher* (Cal. App. Second Dist., Div. 1; February 16, 2012) 203 Cal.App.4th 759, [136 Cal.Rptr.3d 763].

Doctor not liable for report to DMV about epileptic man.

Man caused serious injuries to others when, due to an epileptic seizure, he lost consciousness while driving. Injured people sued the man as well as the man's doctor who informed the DMV that "everything is good," resulting in the restoration of the man's driver's license. The trial court granted the doctor's motion for summary judgment and the appellate court affirmed, concluding "the litigation privilege applies to [the doctor's]... communication to the DMV." *Wang v. Heck* (Cal. App. Second Dist., Div. 4; February 15, 2012) 203 Cal.App.4th 677, [137 Cal.Rptr.3d 332].

Physician-patient privilege does not apply to nurses.

The court issued an injunction under *Civ.Proc.* §527.6 after a nurse reported to the police a neighbor of the petitioner said she made a will and funeral arrangements because she planned to kill her neighbor [petitioner] and then herself. On appeal, the enjoined person argued the only evidence of a credible threat was hearsay protected by the physician-patient privilege found in *Evidence Code* §994. The appellate court, after noting *Evid.Code* §990 does not include a nurse in its definition of a physician, affirmed. *Duronslet v. Kamps* (Cal. App. First Dist., Div. 5; February 15, 2012) 203 Cal.App.4th 717, [137 Cal.Rptr.3d 756].

Arbitration clause found unconscionable.

Plaintiff sued under the *California Fair Employment and Housing Act [FEHA; Gov. Code §12940]*. The employment application contained an arbitration clause which included the words "... in accordance with the applicable rules of the American Arbitration Association in the state where you are or were last employed by [defendant]. The arbitrator shall be entitled to award reasonable attorneys' fees and costs to the prevailing party." The appellate court affirmed the trial court's denial of defendant's petition to compel arbitration, noting plaintiff was not provided a copy of AAA's rules or advised how to find them, and the "prevailing party attorneys'

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fees term exposed plaintiff to a greater risk of being liable to defendant for attorneys' fees than he would have been had he pursued his FEHA claims in court." *Mayers v. Volt Management Corp.* (Cal. App. Fourth Dist., Div. 3; February 27, 2012) (As Mod., February 27, 2012) 203 Cal.App.4th 1194, [137 Cal.Rptr.3d 657].

School district shouldn't keep secrets. On May 10, a school district denied a claim made regarding a six-year old, but when it mailed notice of the denial on June 9, it did not include the date the claim was denied. When the plaintiff petitioned under *Government Code* § 946.6 to file a late claim on December 3, a petition which must be filed within six months after a claim is denied, the petition stated the claim was denied on June 9. The school district provided a declaration stating it was denied on May 10. The superior court denied the claim because it was not made within six months of May 10. The appellate court reversed and remanded to permit the plaintiff to amend the petition to allege the school district is estopped from asserting the six-month deadline. *D.C. v. Oakdale Joint Unified School District* (Cal. App. Fifth Dist.; March 1, 2012) 203 Cal. App.4th 1572, [138 Cal.Rptr.3d 421].

Injunctive relief subject to arbitration. Injunctive relief sought and defendant moved to compel arbitration pursuant to an arbitration agreement. The district court denied, finding the arbitration clause unenforceable because of California's rule against arbitration of injunctive claims. *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, [988 P.2d 67, 90 Cal.Rptr.2d 334]. The Ninth Circuit reversed, stating: "We conclude that (1) the FAA preempts the Broughton-Cruz rule and (2) the arbitration clause in the parties' contracts must be enforced because it is not unconscionable." *Kilgore v. Keybank National Association* (Ninth Cir., March 7, 2012) 673 F.3d 947.

Can't SLAPP a hospital peer review committee. Doctor sued hospital for retaliation and discrimination after it terminated his contract. The hospital successfully filed an anti-SLAPP motion [*Civ.Proc.* §425.16]. The appellate court

affirmed, finding the hospital's peer review proceedings qualified as protected activity under the statute. *Nesson v. Northern Inyo County Local Hospital District* (Cal. App. Fourth Dist., Div. 2; March 6, 2012) 204 Cal.App.4th 65, [138 Cal.Rptr.3d 446].

School district may be vicariously liable for sexual harassment of a student. In a case involving allegations of sexual abuse of a 14 or 15-year-old student, the California Supreme Court concluded "a public school district may be vicariously liable under [*Government Code*] section 815.2 for the negligence of administrators or supervisors in hiring, supervising and retaining a school employee who sexually harasses and abuses a student. Whether plaintiff in this case can prove the District's administrative or supervisory personnel were actually negligent in this respect is not a question we address in this appeal from dismissal on the sustaining of a demurrer." *C.A. v. William S. Hart Union High School District* (Cal. Sup. Ct.; March 8, 2012) 53 Cal.4th 861, [270 P.3d 699; 138 Cal.Rptr.3d 1].

Defense lawyer's final argument egregious but not prejudicial. During her final argument in a product liability case involving severe physical injuries to the child plaintiff undergoing a tonsillectomy with the use of an electrocautery device, defense counsel included the following statements: "[Plaintiff] has crafted a case to fit what he wants. He's crafted it. Why? I think you know. I think you've all heard the term. Two words. Very simple. Deep pockets;" "If his family can be in this courtroom almost every day to support him, then certainly they can be at home and support him and make sure he completes the work he needs to complete in order to develop the skills that we all want him to have and that he can have;" "You're sending a message to this family. And the message is, Help him. Help him learn so that he can learn to help himself." The jury found for the defendant. On appeal, the court stated: "We hold that the misconduct, though egregious, was not prejudicial in the circumstances of this case. We therefore affirm the judgment." *Garcia v. Conmed Corp.* (Cal. App. Sixth Dist.; March 8, 2012) 204 Cal.App.4th 144,

[138 Cal.Rptr.3d 665].

Howell v. Hamilton meats concept extended to workers compensation lien. *Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal.4th 541, [257 P.3d 1130; 129 Cal. Rptr.3d 325], held an injured person's recovery of past medical expenses as economic damages was limited to the discounted amount that the medical providers accepted as payment in full from the injured person's private health insurance carrier. This appellate panel concluded "the same result applies where an injured employee's medical provider accepts a discounted amount as payment in full from the employer under the workers' compensation law. In both situations, because the injured person/employee is not liable for the undiscounted sum stated in the provider's bill, the unpaid balance does not represent an economic loss to the plaintiff and is not recoverable as damages." *Sanchez v. Brooke* (Cal. App. Second Dist., Div. 4; March 8, 2012) 204 Cal.App.4th 126, [138 Cal.Rptr.3d 507].

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