



Litigation Update

District court reversed for penalizing when statute says no penalty. Defendants were sued for false advertising, trademark infringement and cybersquatting under The *Lanham Act* [15 U.S.C. §1051 *et seq.*]. The statute states the sum awarded “shall constitute compensation and not a penalty.” The trial judge doubled the amount of actual damages and the Ninth Circuit reversed, stating the district court apparently had an intent to punish. *Skydive Arizona, Inc. v. Cary Quattrocchi et al.* (Ninth Cir., March 12, 2012) 673 F.3d 1105.

Dismissing elder abuse case costly. Plaintiff sued under the *Elder Protection Act* [Welfare and Institutions Code §15600 *et seq.*]. Defendant hospital served an offer to compromise under *Civ. Proc.* §998 offering “to waive costs and to refrain from pursuing a claim for malicious prosecution” if the suit were dismissed with prejudice. The offer expired, but during jury selection, plaintiff did dismiss the action with prejudice. The trial court awarded \$78,165.98 in costs and the appellate court affirmed, stating: “Here, the dismissal resulted in zero liability for respondent and established the prima facie reasonableness of the section 998 offer.” *Bates v. Presbyterian Intercommunity Hospital* (Cal. App. Second Dist., Div. 4; March 12, 2012) (As Mod. March 22, 2012) 204 Cal.App.4th 210, [138 Cal.Rptr.3d 680].

Suit for loss of horse property damage. Plaintiff brought an action against veterinarians for death of her horse, Cashmere. In anticipation of filing suit, she sent defendants a pre-lawsuit notice under *Civ.Proc.* §364. The court dismissed the action because it was barred by the statute of limitations. In affirming the dismissal, the appellate court stated: “The definition of ‘professional negligence’ in section 364 is clear and is limited to claims for ‘personal injury or wrongful death.’ The definition has never included claims for property damage.” *Scharer v. San Luis Rey Equine Hospital* (Cal. App. Fourth Dist., Div. 1; March 16, 2012) 204 Cal.App.4th 421, [138 Cal.Rptr.3d 758].

Court may not consider financial impact of attorney fee award. When the trial court awarded contractual attorney fees, it stated the full amount “would be individually and collectively ruinous to the plaintiffs.” The appellate court reversed and remanded, stating: “[W]e conclude the trial court erred in reducing Tigor’s attorney fees on the basis of plaintiffs’ limited financial resources and in refusing to award expert witness fees.” *Walker v. Tigor Title Company of California* (Cal. App. First Dist., Div. 1; March 15, 2012) 204 Cal.App.4th 363, [138 Cal. Rptr.3d 820].

When the judge says “return at 1:30,” be there. During trial, the judge called the lunch recess and told everyone to return at 1:30. But neither defense counsel nor the client returned, and the trial resumed. Plaintiffs’ counsel was asking the seventh question of a witness when the latecomers arrived. Later, judgment was entered for plaintiffs. On appeal, defendant argued various constitutional violations because the trial proceeded outside defendant’s and his counsel’s presence. The appellate court said the arguments were mer-

itless and affirmed the judgment. *Colony Bancorp of Malibu, Inc. v. Patel* (Cal. App. Second Dist., Div. 3; March 16, 2012) 204 Cal.App.4th 410, [138 Cal.Rptr.3d 839].

Who holds the contractors license? Contractor and building owner entered a contract for repairs to the building. The work orders listed a contractor’s license number. The building owners terminated the contract after making partial payments, and then refused to pay any more because the contractor’s license was allegedly held by a different legal entity. The trial court granted summary judgment. The appellate court noted the use of a fictitious business name does not create a separate entity, and reversed, stating: “the trier of fact shall determine [if] Montgomery Sansome Ltd. LP is a general partnership and a separate entity from the licensed limited partnership.” *Montgomery Sansome LP v. Rezai* (Cal. App. First Dist., Div. 2; March 28, 2012) 204 Cal.App.4th 786, [139 Cal. Rptr.3d 181].

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gration clause. Plaintiff signed an "Issue Resolution Agreement" [IRA] which included a very broad arbitration agreement, when he submitted his employment application to defendant. When he was hired, he signed an employment contract with an arbitration agreement for "a dispute arising out of the alleged breach of any [] provision of this Agreement." The employment contract stated it was "the entire agreement" in one paragraph, and that "this Agreement is supplemented by such general employment policies and procedures" in the next paragraph. Plaintiff filed suit after defendant terminated him allegedly due to his sexual orientation. Defendant moved for arbitration under the IRA, and plaintiff contended the employment contract supersedes the IRA. The trial court ordered the matter into arbitration. Plaintiff lost and the trial court confirmed the award. The appellate court reversed, finding the employment contract was limited in scope since it concerned the arbitration of claims for breach of contract, not breach of statutory duties as plaintiff alleged. *Grey v. American Management Services* (Cal. App. Second Dist., Div. 4; March 28, 2012) 204 Cal.App.4th 803, [139 Cal.Rptr.3d 210].

Too late to sue priest for molestation. Plaintiffs' complaint alleges that in 2006 they discovered for the first time their adult psychological injuries resulted from the sexual abuse inflicted by a priest when they were children. The appellate court analyzed the statute of limitations set forth in *Civ.Proc.* §340.1, and the implication of its several amendments, and concluded the claims are barred. *Quarry v. Doe I* (Cal. Sup. Ct.; March 29, 2012) 53 Cal.4th 945, 272 P.3d 977; 139 Cal.Rptr.3d 3].

School district pays when it supplies wrong plans to contractor. Contractor who performed construction work for a school district is entitled to recover extra money despite the lack of a written change order because the school district supplied the contractor with misleading plans and specifications. The appellate court stated its ruling was "based on the theory that the furnishing of misleading plans and specifications by the public body constitutes a breach of an implied warranty of their correctness." *G.*

Voskanian Construction, Inc. v. Alhambra Unified School District (Cal. App. Second Dist., Div. 3; March 29, 2012) 204 Cal. App.4th 981, [139 Cal.Rptr.3d 286].

Sai reversed in hostile work environment case. The superior court granted summary adjudication of causes of action for harassment based on national origin and religion in an action brought by a Pakistani Muslim. The complaint alleged three co-workers, all from India, were frequently rude, dismissive and hostile toward him. The appellate court issued a peremptory writ of mandate directing the trial judge to vacate its order because it could not be stated as a matter of law the plaintiff did not experience "a hostile work environment and that his reports of mistreatment were ignored by his supervisor." *Rehmani v. Sup. Ct. (Ericsson, Inc.)* (Cal. App. Sixth Dist.; March 29, 2012) 204 Cal. App.4th 945, [139 Cal.Rptr.3d 464].

Shopper subjected to citizen's arrest by security guards. After calling ahead to discuss her purchasing error, a woman returned a wrong-sized tablecloth to Ralph's by leaving it at the manager's counter when no one arrived to accept it. She finished shopping and did not pay for the replacement when she checked out. She was arrested and the prosecution terminated in her favor. She brought action against the grocery store for malicious prosecution and intentional infliction of emotional distress, which the trial court dismissed pursuant to an anti-SLAPP motion under *Civ.Proc.* §425.16 and after sustaining Ralph's demurrer. The Court of Appeal affirmed. *Johnson v. Ralph's Grocery Co.* (Cal. App. Fourth Dist., Div. 1; April 5, 2012) 204 Cal.App.4th 1097, [139 Cal. Rptr.3d 396].

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