



Litigation Update

Litigation Section News

July 2012

There's a new tort in town.

It's called intentional interference with expected inheritance [IIEI]. Two adult males were in a long-term committed relationship when one was hospitalized and awaiting surgery. He asked his partner to prepare a will dividing his estate equally between his estranged sister and the partner. The partner prepared the will and sent a copy of it to the sister. She said she would have a friend prepare a trust and mail it in a few days and that the will should not be presented to her brother. She never sent the promised documents. Nine days later, the brother/partner died intestate, leaving an estate worth over a million dollars. The sister opened probate and applied to become administrator. She stopped responding to the surviving partner's emails and letters. The sister requested the entire estate, and the probate court found the surviving partner had no standing. The surviving partner filed an action alleging IIEI, deceit by false promise and negligence, and the trial court sustained the sister's demurrer without leave to amend. The appellate court reversed and remanded for the surviving partner to amend his complaint. *Beckwith v. Dahl* (Cal. App. Fourth Dist., Div.3; May 3, 2012) 205 Cal.App.4th 1039.

No arbitration for skilled nursing facility in elder abuse case.

A patient sued a skilled nursing facility for elder abuse based on alleged negligent care. Her daughter sued the same defendants in the same complaint for negligent infliction of emotional distress based on what she allegedly observed her mother go through. The mother had signed an arbitration agreement, and defendants moved to compel arbitration. The trial court exercised its discretion under CCP § 1281.2(c) to deny because of the possibility of conflicting rulings from the mother's and daughter's separate claims. The appellate court affirmed, finding § 1281.2(c) is not preempted by the Federal Arbitration Act, the daughter

was not bound by the agreement pursuant to the holding in *Ruiz v. Podolsky* (2010) 50 Cal.4th 838, [237 P.3d 584; 114 Cal. Rptr.3d 263] [“. . .the Supreme Court's holding there does not apply to her because this case does not involve a wrongful death claim by [the daughter] predicated on medical malpractice. . ."], and the trial court did not abuse its discretion. *Bush v. Horizon West* (Cal. App. Third Dist.; April 30, 2012) 205 Cal.App.4th 924, [140 Cal. Rptr.3d 258].

Judgment on the pleadings against manufacturer reversed.

A few months ago, the California Supreme Court limited the liability of manufacturers resulting from asbestos manufactured by third parties in *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, [266 P.3d 987; 135 Cal. Rptr.3d 288]. In this case, the Court of Appeal found the exception articulated in *O'Neil* comes into play, stating the machine here is allegedly defective "because its intended operation necessarily released asbestos fibers into the air and was not a machine manufactured for use as a component in another finished product." Judgment on the pleadings was reversed. *Shields v. Hennessey Industries, Inc.* (Cal. App. First Dist., Div. 1; April 30, 2012) (As Mod. May 3, 2012) 205 Cal.App.4th 782.

Abuse of discretion to deny plaintiffs leave to amend.

In another asbestos case against the same manufacturer, defendant contended the Court of Appeal could not consider the proposed amendments to the complaint because the pleading was not timely presented below. The appellate court did not buy the argument, stating the proposed pleading states causes of action for strict liability and negligence and that "a complaint can be amended to state a cause of action . . . for the first time in the reviewing court." *Bettencourt v. Hennessey Industries, Inc.* (Cal. App. First Dist.,

Div. 5; May 4, 2012) 205 Cal.App.4th 1103.

Lease doesn't last forever.

Commercial lease term stated: "Provided that Tenant shall not then be in default hereunder, Tenant shall have the option to extend the Term of this Lease for 5 (FIVE) YEARS additional FIVE year periods upon the same terms and conditions herein contained . . ." The trial court concluded the lease grants the tenant the right to unlimited five-year extensions for 99 years. A jury subsequently concluded the landlord breached the lease and awarded damages. The appellate court reversed and followed the holding in *Becker v. Submarine Oil Co.* (1921) 55 Cal.App. 698, [204 P. 245], that whether a lease is to be perpetually renewed is at all uncertain, it "will be construed as importing but one renewal." *Ginsberg v. Gamson* (Cal. App. Second Dist., Div. 8; April 30, 2012) 205 Cal.App.4th 873.

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If you want to work here, sign this. Carpet installers were told to sign a form contract when they were hired and again during their employment. The contract included an arbitration provision among its 37 paragraphs, a six-month statute of limitations and a unilateral attorney fee provision which worked to the detriment to the employees. The forms were in English and the employees did not read English. The installers sued for failure to pay minimum wage or overtime and the employer petitioned to compel arbitration. The trial court denied the petition, finding the agreement “highly unconscionable from a procedural standpoint” and that it demonstrated “strong indicia of substantive unconscionability.” The Court of Appeal affirmed. *Samaniego v. Empire Today LLC* (Cal. App. First Dist., Div. 3; May 7, 2012) 205 Cal.App.4th 1138.

Carry on [probation], nurse. Registered Nurse with a blood alcohol of .16 lost control of a car on the freeway, was convicted of a misdemeanor and placed on three years probation. The Board of Registered Nursing revoked the R.N.’s license to practice nursing, but stayed revocation subject to three years probation. The R.N. convinced the superior court the Board abused its discretion by imposing discipline because the conviction did not bear a substantial relationship to the qualifications required to practice nursing, and the trial judge granted extraordinary relief. The Court of Appeal concluded the discipline imposed by the Board was authorized and reversed the trial court. *Sulla v. Board of Registered Nursing* (Cal. App. First Dist., Div. 5; May 8, 2012) 205 Cal.App.4th 1195.

You’ll need to be monitored, doctor. When the Board of Psychology imposed discipline on a psychologist, the trial court denied the doctor’s writ petition. The psychologist acted as a special master in a family law proceeding in California and testified in a family law proceeding in Florida. In the California matter, he emailed one of the spouses “that he could not work with dishonesty and incorrectly accused her of perjury.” The spouse asked him to resign as special master. He agreed to resign but conditioned his resignation on the spouse withdrawing her grievance against him.

The Board concluded there was “general unprofessional conduct.” In the Florida matter, the psychologist informed the judge a child at the center of a custody dispute was severely alienated from the mother and that the custody order should be changed to the mother. The Board found the psychologist “offered an opinion about a characteristic of a child whom he had not interviewed or evaluated.” His license was revoked but stayed revocation for five years during which time he would be monitored. *Rand v. Board of Psychology* (Cal. App. Third Dist.; May 10, 2012) (As Mod. June 11, 2012) 205 Cal.App.4th 1209.

Does caretaker for elderly person in the home get overtime? Plaintiff is not a licensed or trained nurse. The family of a 90-something invalid hired her to provide care for the elderly person at home. After she left employment, plaintiff sued for failure to pay her overtime wages. The appellate court found plaintiff “was a personal attendant as a matter of law and thus, exempt from overtime pay requirements.” *Cash v. Winn* (Cal. App. Fourth Dist., Div. 1; May 14, 2012) 205 Cal.App.4th 1285.

Another non-signatory wrongly sent to arbitration. The trial court decided that, since a janitorial business had an arbitration agreement with its workers compensation insurance company, the doctrine of equitable estoppel applied with regard to whether, or not, it had to arbitrate a dispute with the third party administrator of its workers compensation claims. The Court of Appeal found the doctrine inapplicable and issued extraordinary relief. *DMS Services, Inc. v. Superior Court (Zurich Services Corp.)* (Cal. App. Second Dist., Div. 7; May 15, 2012) 205 Cal.App.4th 1346.

Partner in medical group has standing to sue under FEHA. A doctor was the regional director for an emergency physicians’ medical group with 700 partners who work in emergency rooms throughout California. She served on the Board of Directors for 11 months when she was terminated from her position as regional director after she reported that “certain officers and agents” of the group

had sexually harassed female employees of the group’s management and billing subsidiaries. A jury decided she was a partner, and then the trial court entered judgment in favor of the medical group because “she did not have standing to assert a cause of action for retaliation under FEHA [California Fair Employment and Housing Act.]” The Court of Appeal reversed and remanded. *Fitzsimons v. California Emergency Physicians Medical Group* (Cal. App. First Dist., Div. 3; May 16, 2012) 205 Cal.App.4th 1423.

When you point a finger at a doctor, back it up. Plaintiff was injured when an elevator fell six floors. One of the defendants asked a question at trial about whether or not a treating physician met the standard of care. The trial judge sustained the plaintiff attorney’s objection. During deliberations, the jury asked whether it could assign a percentage of responsibility to a person not listed as a defendant in the case, and the court answered that it could. The jury’s verdict found a zero percentage of fault on the part of the elevator maintenance company, 40 percent against the owners and agents, eight percent against the plaintiff and 52 percent on the part of a treating, non-defendant doctor. The court reversed and remanded for a new trial after stating defendants did not prove the elements of breach and causation on the part of the doctor nor request jury instructions regarding medical malpractice. *Chakalis v. Elevator Solutions, Inc.* (Cal. App. Second Dist., Div. 3; May 18, 2012) 205 Cal.App.4th 1557.

Provision in arbitration agreement contrary to public policy. Plaintiff sued a nursing home alleging negligent care and treatment. Defendant petitioned to compel arbitration, which the trial court granted, after severing the attorney fee provision which stated the parties would bear their own attorney fees and costs. The trial judge explained that provision was contrary to the *Elder Abuse Act [Welfare and Institutions Code §15657]* which calls for recovery to a prevailing plaintiff. The arbitrator made an award to the plaintiff and added \$666,725.30 for attorney fees and another \$94,694.70 for costs. The trial court affirmed the award and defendants appealed. The appellate

court agreed with the trial court and found the waiver of attorney fees was contrary to public policy. *Bickel v. Sunrise Assisted Living* (Cal. App. Fifth Dist.; May 21, 2012) 206 Cal.App.4th 1.

A motion for summary judgment gets even more difficult.

An appellate court held a failure to provide opposition to objections raised by the other side in the trial court on summary judgment bars a party from challenging on appeal the trial court's order sustaining unopposed evidentiary objections. *Tarle v. Kaiser Foundation Health Plan* (Cal. App. Second Dist., Div. 3; May 22, 2012) 206 Cal.App.4th 219.

Where's the dotted line?

Defendant made an offer pursuant to *Civ.Proc.* §998 to settle the case for \$100,000.49, and plaintiff did not accept. At trial, plaintiff was awarded \$77,986 in compensatory damages and \$1,400 in punitive damages. When defendant tried to collect his costs under the statute, plaintiff claimed his offer was invalid because the statute requires "a statement of the offer, containing the terms and conditions of the judgment or award, and a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted." The trial court found the section 998 offer was invalid because it failed to include the statutorily required acceptance provision. Brushing aside defendant's argument plaintiff did not show she would have accepted the offer had it been valid, the ap-

pellate court affirmed. *Perez v. Torres* (Cal. App. Fifth Dist.; May 24, 2012) 206 Cal. App.4th 418.

Noneconomic damages recoverable despite plaintiff's lack of a driver's license.

Plaintiff, who was unlicensed, suffered serious and permanent brain injuries in a car accident. A jury awarded her \$31,656,208. Defendant, who admitted liability, argued *Civil Code* §3333.4 prevented plaintiff from recovering \$22,000,000 of the award, the portion for noneconomic damages. The vehicle the plaintiff was driving was purchased and insured by her father. Section 3333.4 precludes recovery of noneconomic damages by the operator of a vehicle who cannot establish financial responsibility as required by law. The trial judge ruled section 3333.4 did not apply because plaintiff was a permissive user. The appellate court affirmed. *Landeros v. Torres* (Cal. App. Fifth Dist.; May 24, 2012) 206 Cal.App.4th 398.

No qualified immunity for police officer in wrongful death of suspect.

A jury found a police officer caused the wrongful death of a suspect who died "through the unconstitutional use of excessive force" while in police custody at a hospital. The appellate court analyzed: "Taken as a whole, the combined effect of [the] evidence supports a finding that Macias punched and tasered a non-resisting and compliant man that he knew was emotionally troubled and physically ill, and continued to do so when Mendoza did no more

than flinch from the pain and cry for help. It also shows that Macias was responsible for the restraint that caused Mendoza to asphyxiate." The court found such conduct violated a clearly established constitutional right, and the qualified immunity doctrine did not apply. *Mendoza v. City of West Covina* (Cal. App. Second Dist., Div. 8; May 30, 2012) 206 Cal.App.4th 702.

Court erred in finding a lack of mutual assent.

A commodities merchandiser entered into 12 contracts. It sued the buyer alleging it failed to accept and pay for some of the merchandise. After a bench trial, the court found there was no mutual assent for lack of certain contract terms. Judgment was entered for the buyer. The Court of Appeal reversed, stating in part: "The trial court's finding of lack of mutual assent is erroneous under the California Uniform Commercial Code, which provides 'gap fillers' to cover the terms left open by the parties' oral agreement." *Apex LLC v. Sharing World, Inc.* (Cal. App. Fourth Dist., Div. 3; June 5, 2012) 206 Cal.App.4th 999.

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