



# Litigation Update

Litigation Section News

September 2012

## Mobilehome up for sale protected by rent control, even if not principal residence.

Damages awarded against a mobilehome park were measured by the difference between the rent charged and the rent permitted by a city ordinance. *Civil Code* §798.21 provides that a mobilehome space is exempt from a local rent control ordinance if the space is not the principal residence of the homeowner. One homeowner, whose mobilehome was not her principal residence, was given notice her rent would be raised from \$610 to \$910 per month. The homeowner promptly placed her mobilehome on the market, paid the increased rent under protest and brought this action. The trial court ordered the park to pay damages measured by the difference between the controlled rent and the amount paid. Because a person who has their mobilehome for sale is exempt under §798.21, the Court of Appeal affirmed the damages award. *Freeman v. Vista de Santa Barbara Associates* (Cal. App. Second Dist., Div. 6; July 10, 2012) 207 Cal.App.4th 791.

## Advances are not the same as commissions.

Plaintiff was a salesman for Verizon, and his pay was based on a compensation plan, which was basically an hourly wage plus commissions. New hires were advanced 100% of their target commission, but were paid for their actual performance, and advanced commissions were taken back if a customer cancelled service. Plaintiff filed a complaint alleging he was not paid the full commissions he earned when his commissions were charged back after customer cancellations. He sought civil penalties under the *Labor Code Private Attorneys General Act of 2004* (PAGA) (*Labor Code* §2698) for a violation of *Labor Code* §223 which states: "Where any statute or contract requires an employer to maintain the designated wage scale, it shall be unlawful to secretly pay a lower wage while purporting to pay the

wage designated by statute or by contract." The trial judge concluded plaintiff's commission payments were advances, and not wages, and entered summary judgment. The appellate court, noting plaintiff was always paid his base wages, affirmed, stating §223 was not violated. *DeLeon v. Verizon Wireless, LLC* (Cal. App. Second Dist., Div. 3; July 10, 2010) 207 Cal.App.4th 800.

## Attorney fees awarded after summary judgment filed and a dismissal of trade secrets case is filed instead of opposition.

Three individuals left plaintiff's company and joined defendant's company. Plaintiff brought a trade secret misappropriation claim against defendant. Defendant filed a motion for summary judgment containing evidence the purported trade secret was actually an off-the-shelf computer program. Plaintiff asked for several continuances to conduct discovery, but never opposed the motion and filed a dismissal instead. The trial court awarded \$484,943.46 for attorney fees and costs pursuant to *Civil Code* §3426.4 after making a finding the plaintiff was in bad faith when it brought the action. The Court of Appeal affirmed, noting speculation the individuals must have taken trade secrets based on their decision to change employers does not constitute evidence of misappropriation. *Sasco v. Rosendin Electric, Inc.* (Cal. App. Fourth Dist. Div. 3; July 11, 2012.) (As Mod. August 7, 2012) 207 Cal.App.4th 837.

## Improper joinder of claims in sexual assault by a doctor of two patients, but proper joinder of the doctor's employers.

Two patients brought an action against their doctor and the doctor's employers for sexual assault. The trial court sustained defendants' demurrer without leave to amend because the plaintiffs alleged separate and distinct assaults during separate and distinct peri-

ods, and defendants were improperly joined under *Civ.Proc.* §378. The appellate court affirmed the ruling with regard to the doctor but reversed his employers' demurrer. Since the allegations charged the employers were negligent in hiring and supervising the doctor, the actions against them arises out of the same series of transactions or occurrences. *Moe v. Anderson* (Cal. App. Third Dist.; July 11, 2012) 207 Cal.App.4th 826.

## Guarantors left holding the bag.

Borrowers agreed to pay only interest on a loan until its maturity date. The loan contained a provision that barring an uncured default outstanding at the time of the maturity date, and in the bank's sole and absolute opinion and judgment, the maturity date would be extended. Indeed, it was extended five times. After the last extension, the bank downgraded the loan to the category of substandard. Thereafter the bank sent the borrower a term sheet "for a possible restructure," but noted it was "for discussion purposes only, is subject to Bank approval and should not be construed as a commitment to lend." Four months later, the bank sold the loan; the borrowers were in default at that time. The guarantors sued the bank claiming the bank led the borrower to believe it would extend the loan as a matter of course. A jury found the bank intentionally failed to disclose an important fact to the guarantors, but it was done without an intent to deceive. The court then found in favor of the bank. The appellate court affirmed. *SCC Acquisitions v. Central Pacific Bank* (Cal. App. Fourth, Div. 3; July 11, 2012) 207 Cal.App.4th 859.

## Dismissal of appeal rejected & jury award upheld after work comp benefits deducted.

Response by the Court of Appeal when the parties notified the court the matter had been settled: "The parties stipulated to a dismissal of the appeal on the day before the matter

was initially set for oral argument based on a proposed settlement. We rejected the stipulation and re-calendared oral argument because we determined that the reasons of the parties for requesting dismissal and vacating the trial court judgment did not outweigh the erosion of public trust that may result from the nullification of the judgment and the risk that it would reduce the incentive for pretrial settlement.”

This is what the case was about: There was a collision involving two trains and plaintiff, a member of the derailment team, was seriously injured when a block from a crane fell on his head. He brought both a workers’ compensation claim and an action against Union Pacific Railroad under the *Federal Employers’ Liability Act* [FELA]. He was awarded \$3,695,493.93 which was reduced by the amount of the work comp lien to \$2,695,493.93. The Court of Appeal held the trial court did not err in determining the plaintiff could seek recovery against the railroad under FELA after accepting workers’ compensation benefits through his special employer. The appeals court also found there was substantial evidence to support the jury’s finding Union Pacific had the right to control plaintiff’s work as well as the coworker whose negligence caused plaintiff’s injury, the trial court did not err in awarding attorney fees payable out of the workers’ compensation lien amount and that the trial court did not abuse its discretion when it granted defendant’s motion for new trial for excessive damages and deducting the lien amount from the amount of the judgment. *Collins v. Union Pacific Railroad Company* (Cal. App. Fourth, Div. 2; July 11, 2012.) 207 Cal.App.4th 867.

**Summary judgment in favor of insurance company reversed.** Charlotte Russe stores contracted to become the exclusive sales outlet for “premium, high end” clothing called People’s Liberation, a brand owned by a company called Versatile. Charlotte Russe allegedly offered the clothing at severely discounted “fire-sale” prices. Versatile brought an action against Charlotte for breach of contract and other causes of action, requesting damages for diminution of its brand and trademark. Charlotte Russe tendered the suit to Travelers for a defense, and Travelers declined to either defend or indemnify

Charlotte Russe. Travelers filed a declaratory relief action, and Charlotte Russe cross-complained for breach of contract and breach of the implied covenant. The trial court granted summary judgment to Travelers. The Court of Appeal reversed, stating the underlying litigation need not allege all elements of a cause of action for trade libel in order to trigger personal injury coverage for product disparagement, and coverage may be triggered by implied allegations of disparaging statements. As to Traveler’s argument that disparagement in the insurance context refers to the tort of trade libel, the appellate court pointed out Versatile’s pleadings allege that Charlotte Russe had published prices for the goods that were impliedly false, and “that is enough.” The court also noted there was a possibility Versatile’s pleadings could be understood to state the dramatic discounts of its premium clothing line meant the line was not, in fact, premium, high-end goods, and that “arguably, a trade libel claim might survive under these theories.” *Travelers Property Casualty v. Charlotte Russe* (Cal. App. Second, Div. 1; July 13, 2012) 207 Cal.App.4th 969.

**City ordinance relating to clean and safe rental properties.** Petitioner is the owner of residential properties in Santa Cruz. Prompted by findings of substandard, overcrowded and unsanitary residential rental properties, the City of Santa Cruz passed an ordinance calling for annual inspections of all residential rental properties within City limits. Petitioner filed a petition for writ of mandate, arguing the ordinance is preempted by *Health and Safety Code* §17910 et seq., that it violates constitutional principles of privacy and equal protection, and that it imposes a tax in violation of the California Constitution. The Superior Court denied his petition. Noting that Santa Cruz is a charter city, the Court of Appeal found the ordinance was not preempted. Regarding the claimed right to privacy, the appeals court said petitioner lacks standing to assert the claim on behalf of tenants. As to the equal protection claim that the ordinance results in a different set of rules for owners of rental property and other property owners, the court found the City had a rational basis for its ordinance and rejected the argument. Regarding the illegal tax issues,

the appellate court noted the law provides a local government may charge reasonable regulatory costs. The Court of Appeal affirmed the denial of the writ. *Griffith v. City of Santa Cruz* (Cal. App. Sixth Dist.; July 16, 2012) 207 Cal.App.4th 982.

**The court cannot compel a city to exercise its discretion in a particular way.** In response to a Request for Proposal for a golf concession at Los Angeles public parks, a business group submitted a bid. A Board for the Recreation and Park Commissioners voted to award the contract to the business group. Pursuant to an Executive Directive, the contract had to be reviewed by the mayor’s office because it was for longer than three years. The Office of the City Administrative Officer [CAO] recommended that the City Council authorize the Board to execute the contract. The mayor’s office asked the CAO to review the matter again, which it did and made the same recommendation. Eventually the matter was put up for a vote by the City Council, which voted to disapprove the proposed contract. The business group filed a petition for both ordinary and administrative mandamus, alleging a competitor improperly sought to influence the Board and the City Council by hosting golf outings and engaging in behind the scene maneuvers. The trial court granted the City’s demurrer without leave to amend after the City contended it could not be compelled to exercise its discretion in a particular way. The Court of Appeal affirmed, stating: “Thus, [the business group] seeks a trial court judgment to the effect that self-operation is not to the advantage of the City, and only an award of the concession to [the business group] would be to the advantage of the City. Such an order would [] exceed the scope of mandamus review.” *Michael Leslie Productions, Inc. v. City of Los Angeles* (Cal. App. Second Dist., Div. 8; July 16, 2012) 207 Cal.App.4th 1011.

**No luck with mandamus involving a board of supervisor’s exercise of discretion either.** A trust appealed from the denial of its petition for administrative mandamus in which it sought to overturn the decision of the Board of Supervisors denying its application to turn a mobile home park from rental to

condominium ownership. The trust argued that under *Government Code* §66427.5 (e) the Board erred when it considered the near-unanimous opposition of the park residents. The Court of Appeal affirmed, finding the County was authorized to take the results of a resident survey into account. *Goldstone v. County of Santa Cruz* (Cal. App. Sixth Dist.; July 17, 2012) 207 Cal.App.4th 1038.

**Another tricky statute of limitations issue in legal malpractice case.** Lawyer successfully obtained a default judgment, but failed to successfully enforce it. When he was sued for legal malpractice, the trial court sustained the lawyer's demurrer without leave to amend on the issue of the statute of limitations. The plaintiffs in the malpractice action argued the lawyer's acts or omissions may have been harmless if it turned out there was nothing available to levy upon, so the statute of limitations was tolled while they performed necessary discovery to find out the extent of the damages caused by the lawyer's acts or omissions. The appellate court quoted the applicable statute of limitations, *Civ.Proc.* §340.6, subdivision (a), which states the action had to be filed within one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the facts constituting the wrongful act or omission, or four years from the date of the wrongful act or omission, whichever occurs first, but in no event shall the time exceed four years except that the period shall be tolled if the plaintiff has not sustained actual injury. Plaintiffs here clearly filed within the four year require-

ment. The Court of appeal affirmed the trial court's sustaining of the demurrer without leave to amend, noting that by failing to promptly and competently pursue enforcement of the judgment in the underlying action, the lawyer caused "actual injury." *Croucier v. Chavos* (Cal. App. Fourth Dist., Div. 3; July 18, 2012) 207 Cal.App.4th 1138.

**Offers under CCP §998 need to be thought through!** In an action involving the purchase of a new motor home, an offer under *Code of Civil Procedure* §998 was for plaintiffs to be paid \$50,000 in exchange for a release and dismissal, and plaintiffs accepted. After the action was dismissed with prejudice, plaintiffs moved to recover their attorney fees and costs under *Civil Code* §1794(d) [the *Song-Beverly Consumer Warranty Act*; §1790 *et seq.*], and defendant opposed, arguing there was no formal judgment. The trial court rejected defendant's argument, found plaintiffs to be prevailing parties and awarded plaintiffs their fees and costs in the amount of \$125,362.08. The appellate court affirmed, stating that plaintiffs' voluntary dismissal did not preclude them from being the prevailing parties under §1794(d). *Wohlgemuth v. Caterpillar, Inc.* (Cal. App. Fifth Dist.; July 23, 2012) 207 Cal.App.4th 1252.

**When plaintiff died and widow filed a wrongful death action, a new government tort claim required.** A prisoner was the original plaintiff in an action against the Department of Corrections. He had a growth

on his penis and was referred to a urologist, but was transferred to another prison prior to the scheduled appointment. At his new location, there was another referral with a note to "rule out squamous cell carcinoma," but the prisoner was released to federal authorities prior to that appointment. He was kept in the custody of Immigration and Customs Enforcement for the next 11 months. Upon his release, he was diagnosed with invasive squamous cell carcinoma and his penis was amputated. While he was still alive, he brought an action on his own behalf after filing a government tort claim. After he died, his widow alleged a cause of action for wrongful death, but did not file another government tort claim, and the state moved for judgment on the pleadings which the trial court denied. A jury returned a verdict totaling \$1,734,557. The appellate court reversed, finding the widow did not fulfill a condition precedent to her suit by filing a government tort claim. Additionally, the appellate court found the state is immune to suit pursuant to *Government Code* §§844.6 and 845.6 which establish immunity "for injury proximately caused by the failure of the employee to furnish or obtain medical care for a prisoner in custody." The court noted the facts "do not amount to a failure to summon medical care." *Castaneda v. Department of Corrections and Rehabilitation* (Cal. App. Second Dist., Div. 3; July 26, 2012) 207 Cal.App.4th 1488.

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