



Litigation Update

Litigation Section News

February 2013

Pregnancy Discrimination Judgment Reversed.

A jury awarded \$113,830 in compensatory damages for employment pregnancy discrimination. The trial court later awarded \$1,157,411 in attorney fees. The employer requested, and the trial court refused to give, the following instruction: "You may not find that [the employer] discriminated against [the plaintiff] based upon a belief that [the employer] made a wrong or unfair decision. Likewise, you cannot find liability for discrimination or retaliation if you find that [the employer] made an error in business judgment. Instead, [the employer] can only be liable to [the plaintiff] if the decisions made were motivated by discrimination or retaliation related to her being pregnant." The plaintiff requested, and the trial court gave, the following instruction: "A potential hazard to a fetus or an unborn child is not a defense to pregnancy discrimination." The appellate court concluded there was prejudicial instructional error with the trial court's decisions on the two instructions, and reversed the judgment. *Veronese v. Lucasfilm LTD.* (Cal. App. First Dist., Div. 2; December 10, 2012) (As Mod. December 28, 2012) 212 Cal.App.4th 1.

Settlement Agreement Declared Void By Court.

In 2002, the city of Los Angeles amended its municipal code to ban off-site advertising signs and alterations and enlargements to existing off-site signs, along with an inspection program involving an inspection fee. An outdoor advertising business brought a reverse validation action under *Code of Civil Procedure* section 860, [The validation statutes permit a local government entity to obtain a judicial decision that a municipal or other local agency has acted legally in making a decision affecting real or personal property. A reverse validation action seeks the opposite, a declaration that the act or omission of a local government is invalid and illegal.] The

City attempted to settle the action by permitting two companies to digitize many of their existing billboards in violation of its own ordinance, and the trial court found the settlement agreement illegal and void. The appellate court affirmed, adding the trial court must also order revocation of all digital conversion permits granted under the illegal settlement agreement. *Summit Media LLC v. City of Los Angeles (CBS Outdoor, Inc.)* (Cal. App. Second Dist., Div. 8; December 10, 2012) 211 Cal.App.4th 921.

Plaintiff Failed To Engage In Interactive Process Required By FEHA.

A Department General Order requires that when a police officer returns to full duty after a period of temporary duty, the officer must be able to perform the essential functions of the full duty police officer position. Here plaintiff started as a police officer in 1981 until 2005 when he suffered a severe heart attack and had five stents inserted. In 2006, he returned to work in a 365-day temporary duty assignment involving light-duty work. At the end of his temporary duty, the officer's doctor stated in a note to the department that the officer "may return to full duty as a police officer. However, because he has coronary artery heart disease, his responsibilities should not include physically strenuous work." Plaintiff was given an opportunity to search for vacant positions that were not classified as sworn police officer positions, but he rejected that option because of the untoward effect it would have on his pension. Plaintiff instead retired in 2008 and filed an action alleging violation of the California Fair Employment and Housing Act [FEHA; *Government Code* section 12900]. The trial court rejected plaintiff's discrimination and failure to accommodate claims and entered judgment in favor of the department. The appellate court affirmed, finding the department had a legitimate reason for its actions and that plaintiff failed to engage in the in-

teractive process mandated by FEHA. *Lui v. City and County of San Francisco* (Cal. App. First Dist., Div. 5; December 11, 2012) 211 Cal.App.4th 962.

Defendant In Civil Child Molestation Action Restrained From Transferring His Assets Pretrial.

Plaintiff brought an action against defendant alleging he repeatedly sexually molested her from the age of 12 until she was 21 a month after he pleaded no contest to one felony count of lewd contact with a child under the age of 14. Pretrial in granting a preliminary injunction, the trial court ordered defendant not to conceal, encumber, impair in value, transfer or dispose any of his assets and for plaintiff to post an undertaking of \$1,000. In a discovery dispute, the court ordered that a declaration be sealed. Defendant appealed from those orders. The appellate court affirmed the orders, finding there was sufficient evidence to support the transfer of assets order under the Uniform Fraudulent Transfer Act [UFTA; *Civil Code* section 3439] and that the trial court did not abuse its discretion in making the order, that the court did not abuse its discretion in ordering such a low undertaking and that the discovery order sealing the declaration was also within the court's discretion. *Ojye v. Fox* (Cal. App. Sixth Dist.; December 11, 2012) 211 Cal.App.4th 1036.

City Did Not Improperly Exclude Adjacent Pending Residential/Commercial Development From Its EIR.

The trial court denied a group's petition for writ of mandate to vacate certification of an Environmental Impact Report [EIR]. Petitioners claimed the City wrongly defined the project to exclude the pending residential and commercial development on an adjacent property, and that the project is interrelated with the City's development of a park. The appellate court affirmed, noting the two are

separate projects with different proponents, serving different purposes, and that the EIR adequately analyzes the park's environmental impact. *Banning Ranch Conservancy v. City of Newport Beach* (Cal. App. Fourth Dist., Div. 3; December 12, 2012) 211 Cal.App.4th 1209.

Whistle Blower Statute Applying To Violations Of State Laws Does Not Apply To Violations Of Charter City's "Municipal" Laws. Plaintiff brought an action against a city for wrongful termination in retaliation for her refusal to violate the City's charter, municipal code and its civil service rules and regulations. The trial court dismissed the whistle blower action under *Labor Code* section 1102.5, subdivision (c). The appellate court affirmed, stating: "The primary question presented by this appeal is a question of first impression under California law: Should alleged violations of a charter city's *municipal* law be deemed violations of *state* law for purposes of section 1102.5, subdivision (c)? Based on principles of statutory construction and public policy considerations, we hold that they should not, and accordingly, we affirm." *Edgerly v. City of Oakland* (Cal. App. First Dist., Div. 4; December 12, 2012) (As Mod. December 13, 2012) 211 Cal.App.4th 1191.

Employer Not Estopped From Asserting Plaintiff Did Not Qualify For Family Leave. An employee brought an action for wrongful termination against public policy after his requested family leave under the federal and state family leave laws [29 U.S.C. §2601; *Government Code* sections 12945.1-12945.3.] was denied. The plaintiff, a driver for a linen supply company, informed his supervisor that he needed seven weeks off to go to Sweden to care for his mother after her surgery. The plaintiff did not inform his employer the surgery was elective and could be rescheduled if the date was inconvenient. The plaintiff did submit a required document/medical certification, but it was without any sort of letterhead to indicate it came from a medical establishment. Three days prior to the expected leave, a doctor's note was faxed to the employer, 176 hours short of the required 1,250 hour notice. That same day, the leave request was denied. The next day, plaintiff left for Sweden anyway,

and his employment was terminated. The plaintiff argued the employer was estopped from asserting he did not qualify for family leave because the employer led him to believe his leave had been granted. The plaintiff testified the supervisor told him he could have the leave if he filled out the application and submitted a doctor's certification, but the supervisor said he did not tell him his leave had been approved as he did not have the authority to do so. The appellate court affirmed, concluding there was substantial evidence to support the trial court's decision to find the employer was not estopped from asserting plaintiff did not qualify for family leave. *Olofsson v. Mission Linen Supply* (Cal. App. First Dist., Div. 4; December 13, 2012) 211 Cal.App.4th 1236.

No Fees For Trustee Of Special Needs Trust. Plaintiff served as trustee of a special needs trust for four and a half months. The trust specified that any trustee who succeeded the public guardian was not entitled to compensation. Nonetheless, plaintiff billed the estate \$108,771.07, and the trial court awarded him \$51,285.63, likely because it was the court who had appointed that particular trustee. The appellate court reversed, noting that a trustee is entitled to compensation for its services either as provided in the "trust instrument," if that document "provides for the trustee's compensation" (*Probate Code* section 15680, subdivision (a)), or "reasonable compensation" where "the trust instrument does not specify the trustee's compensation." *Prob. Code*, § 15681. The appellate court concluded: "It is apparent from the plain words of the two statutes in question that the provisions generally confer authority on the probate court to appoint a temporary trustee. There is neither mention of compensation generally nor conferment of specific authority to compensate a temporary trustee differently from the amount specified in the trust instrument." *Thorpe v. Audelith Jenivee Reed, as Trustee* (Cal. App. Sixth Dist.; December 13, 2012) 211 Cal.App.4th 1381.

After Judgment Of Dismissal In Favor Of The Defense, Plaintiffs Must Pay Defense Costs Of Providing Notice To Class Members. A judgment of dismissal was entered by the trial court in favor

of an insurance company in a case which was tentatively certified as a class action. The members of the putative class were insureds who paid their premiums in monthly installments. The trial court granted plaintiffs' motion to tax costs of \$713,463.72 incurred by the insurance company in providing notice to putative class members in a discovery matter. The appellate court reversed the postjudgment order granting plaintiffs' motion to tax costs, stating the costs were "significant special attendant costs beyond those typically involved in responding to routine discovery," and the trial court abused its discretion in taxing them. *In re Insurance Installment Fee Cases* (Cal. App. Fourth Dist., Div. 1; December 13, 2012) 211 Cal.App.4th 1395.

Area Outside Public Library Is A Public Forum. To regulate leafletting on a municipal library campus, a City Council adopted a Handbill Ordinance restricting leafletting to the front of the library and prohibiting it on vehicles in the parking lot. It also prohibited "offensively coarse" language and gestures and required online reservations to use the "free speech area." Plaintiffs obtained a preliminary injunction enjoining enforcement of the policy. The appellate court agreed with the trial court that the area outside the library is a public forum, and that, with one exception, agreed the plaintiffs were likely to prevail on their challenges to the Handbill Ordinance. But the appellate court found the injunction was overbroad regarding leafletting in the parking lot. *American Civil Liberties Union of Northern California/Prigmore v. City of Redding* (Cal. App. Third Dist.; December 13, 2012.) 211 Cal.App.4th 1322.

Marriage Does Not Automatically Invalidate A Domestic Partnership Agreement. Two men entered into a written domestic partnership agreement and then registered as domestic partners. Later, during the brief period when same-sex marriages were legal in California in 2008, they married. Shortly afterward, one died. The surviving spouse claimed an interest in the estate of the deceased, and the probate court limited him to what he was entitled under the domestic partnership agreement. The surviving spouse argued on appeal there was no pre-nuptial agreement and the marriage termi-

nated the domestic partnership agreement. The appellate court affirmed, stating: “We hold that domestic partnership agreements that are enforceable under the Uniform Premarital Agreement Act (*Family Code* sections 1600-1617), and made after statutes were enacted providing domestic partners with essentially the same California State property rights as spouses, are not automatically invalidated by a marriage license. Since [the surviving spouse] expressly waived his rights to any interest in [the deceased’s] estate in the domestic partnership agreement and the validity of this agreement under the Uniform Premarital Agreement Act is not an issue, he cannot claim any interest as a pretermitted spouse in [the deceased’s] estate.” *Estate of Philip Timothy Wilson, Konou v. Wilson* (Cal. App. First Dist., Div. 2; December 13, 2012) 211 Cal.App.4th 1284.

Disability Access Action Expensive For Wheelchair-Bound Plaintiff. Plaintiff uses a wheelchair and brought an action against a small grocery store “for denying him and other similarly situated disabled persons access to the full and equal enjoyment of the goods and services offered” because a four-inch step at the entry to the market was a barrier. The grocer was granted summary judgment after establishing removal of the barrier was not readily achievable, and then moved for attorney fees. The trial court granted defendant \$118,458 for its attorney fees. While not contesting the summary judgment, plaintiff appealed the trial court’s award of attorney fees. The California Supreme Court agreed with the trial court and “respectfully disagree[d] with the *Hubbard v. SoBreck, LLC*, 554 F.3d 742 court’s pre-emption analysis,” concluding a mandatory fee award was both required by state law and permitted by federal law. It upheld the trial court’s fee award in its entirety. *Jankey v. Lee* (Cal. Sup. Ct.; December 17, 2012) 55 Cal.4th 1038.

No Coverage For Water Damage. Property damage resulted after a toilet malfunctioned when it failed to shut off the intake of water and, because there was blockage in the sewer line, the toilet overflowed. Exclusion in the insurance contract says the policy excludes any “loss or damage caused directly or indirectly by . . . [w]

ater that backs up or overflows from a sewer, drain or sump.” Both the trial court and the appellate court found the language to be unambiguous and that the damages suffered were excluded under the policy. *Cardio Diagnostic Imaging, Inc. v. Farmers Insurance Exchange* (Cal. App. Second Dist., Div. 4; December 18, 2012) 212 Cal.App.4th 69.

No Disqualification Of Counsel Because No Attorney-Client Relationship. In one case, a lawyer represented a client who was one of two shareholders in a development corporation. That client sued the other shareholder for violation of fiduciary duties. The other shareholder filed a petition for court supervision of the winding up of the corporation. In the winding up action, the same lawyer who represented the shareholder who was plaintiff in the fiduciary duty action represented the same shareholder as a creditor claimant in the winding up action. The contention was that, in one action, the lawyer was prosecuting claims on behalf of the corporation and in the other action was simultaneously prosecuting claims against the corporation. Therefore, the argument was that the lawyer should be disqualified. The trial court denied the motion to disqualify, stating “the distinction between a ‘client’ and ‘a real party in interest’ is important in the analysis of this motion. . . . ultimately, there is no basis for this Court to infer that an attorney-client relationship ever arose between [the lawyer’s] firm and [the corporation] such that the firm is concurrently representing two ‘clients’ with adverse interests.” The Court of Appeal agreed with the trial judge, stating it was not convinced the lawyer had a duty of loyalty or confidentiality to the corporation which prevented him from representing his client. *Shen v. Miller* (Cal. App. Second Dist., Div. 2; December 18, 2012) 212 Cal.App.4th 48.

Grant Of Landlords’ Anti-SLAPP Motion Against Tenant Reversed. Landlords filed an unlawful detainer action, dismissing it prior to trial purportedly due to the unavailability of an essential witness. The tenant filed an action for nuisance, negligence, and intentional and negligent interference with contract. The trial court granted the landlords’ anti-SLAPP motion because the filing of an

unlawful detainer action is a protected activity. The appellate court reversed in part because the tenant’s pleading alleged that the landlords were trying to evict her because she did not pay an illegal rent increase which was in violation of *Los Angeles Municipal Code* section 151.04.A [a rent control ordinance]. The appellate court stated the landlords “failed to meet their burden of showing that the basis of this cause of action is an act in furtherance of their constitutional right to petition or free speech . . . in other words, [the landlords] were not sued for their conduct in exercising their constitutional rights but for the underlying conduct of illegally raising [the tenant’s] rent.” *Oviedo v. Windsor Twelve Properties* (Cal. App. Second Dist., Div. 3; December 18, 2012) 212 Cal.App.4th 97.

Arbitration Agreement Not Unconscionable. Plaintiff brought an action against her former employer alleging discrimination and harassment based on race and sex. When plaintiff applied for the job, she had filled out an 11-page employment application, several pages of which required her signature on the bottom of the page. The signature lines were highlighted in yellow. Page 8 was entitled, “AGREEMENT TO ARBITRATE.” The Agreement continued onto the ninth page, at the bottom of which was a yellow highlighted signature line. Plaintiff signed all of the signature lines in the application with the exception of the one for the Agreement. She handed the application to [the human resources employee]. He reviewed the application and gave it back to her, saying she had to sign the Agreement. Plaintiff shook her head, indicating she would not do so. [The human resources employee] took the application and spoke to another employee. The other employee told plaintiff, “sign it or no job.” Plaintiff signed the Agreement to arbitrate. The trial court denied the employer’s petition for arbitration, finding the agreement was unconscionable. The appellate court reversed, stating the agreement was not unconscionable. *Baltazar v. Forever 21, Inc.* (Cal. App. Second Dist., Div. 1; December 20, 2012) 212 Cal.App.4th 221.

Tree In Median Did Not Constitute A Dangerous Condition Of Public Property. Several

persons were killed in an automobile accident. The driver of another vehicle was arrested at the scene and later convicted of vehicular manslaughter. An action against the City for dangerous condition of public property was brought, alleging a magnolia tree on the median, the height of the curb and other design features of the roadway were in contravention of sound safety and engineering principles. In ruling on the City's motion for summary judgment, the trial court sustained evidentiary objections to much of plaintiff's evidence, did not find any causal connection between the tree and the accident and entered judgment in the City's favor. The appellate court found the magnolia tree at the center of the median did not constitute a dangerous condition of public property as a matter of law and affirmed the grant of summary judgment. *Cordova v. City of Los Angeles* (Cal. App. Second Dist., Div. 1; December 20, 2012) 212 Cal.App.4th 243.

Sexual Harassment Against Employer Verdict Under Civil Code Section 51.7: Freedom From Violence Or Intimidation.

A woman janitor brought an action against her employer for sexual harassment and acts of violence against her involving kisses and other touching forced upon her by a co-employee who did a lot of drinking on the job. The case was tried, not on FEHA violations, but on causes of action for negligent supervision and hiring and under *Civil Code* section 51.7, ["All persons within the jurisdiction of this state have the right to be free from any violence, or intimidation by threat of violence, committed against their persons or property because of . . ." sex.] The jury found the co-employee "committed violent acts against [plaintiff], that his perception of her sex was a motivating reason for his conduct, and that his conduct was a substantial factor in causing her harm." The jury also found the co-employee's supervisors learned of the conduct after the fact and ratified the co-employee's conduct of violence against the plaintiff. Judgment was entered for \$125,000, and the court awarded \$550,000 for attorney fees. The appellate court affirmed. *Ventura v. ABM Industries Incorporated* (Cal. App. Second Dist., Div. 5; December 20, 2012) 212 Cal.App.4th 258, [77 Cal.Comp.Cases 1091].

Technological Changes Did Not End Design Immunity.

Plaintiffs were injured in an accident on a bridge and brought an action for dangerous condition of public property. Defendants argued they enjoyed design immunity, but plaintiffs contended they lost that immunity when they became aware of certain technological changes which made it appropriate to install modifications. The trial court entered judgment in favor of the defendants. The appellate court affirmed, finding the technological changes do not constitute changed physical conditions required to end design immunity. *Dammann v. Golden Gate Bridge, Highway and Transportation District* (Cal. App. First Dist., Div. 2; December 20, 2012) 212 Cal.App.4th 335.

Seven Percent (7%) Interest On Execution Of Judgment Which Was Later Overturned On Appeal Is Affirmed.

A party collected money by executing on a judgment that was later overturned on appeal and the other party sought restitution under *Code of Civil Procedure* section 908. The party who collected the money did not contest the trial court's order that it pay the money back after the case was overturned, but did contest the court's ordering it to pay seven percent (7%) interest on the money collected because that amount is greater than the reasonable market value. The appellate court affirmed, finding the trial court did not abuse its discretion, and stating when the appellant "collected \$20 million pending an appeal, it assumed the risk that it may have to repay the award along with interest." *Clive Cussler v. Crusader Entertainment, LLC* (Cal. App. Second Dist., Div. 3; December 21, 2012) (As Mod. January 9, 2013) 212 Cal.App.4th 356.

Trial Court Ordered To Deny Motion In Limine After Party Argued It Eviscerated Case.

The trial court granted a motion in limine to exclude the testimony of an appraiser in an eminent domain action. The parties thereafter stipulated to the value of real property and the trial court entered judgment in accordance with the stipulation. The property owner contended on appeal that the use of a motion in limine to eviscerate his case violated his right to a jury trial. The appellate

court did not find a constitutional issue, but stated that when a "motion in limine strays beyond its traditional confines and results in the entire elimination of a cause of action or a defense, we treat it as a demurrer to the evidence and review the motion de novo, lest it be used to evade the more exacting standards for such a motion." The judgment was reversed and the trial court was ordered to deny the motion in limine. *County of Glenn v. Foley* (Cal. App. Third Dist.; December 21, 2012) 212 Cal.App.4th 393.

Second Judge's Order Dismissing Action On Ground Of Forum Non Conveniens Affirmed After First Judge Denied Same Motion.

Just prior to retiring, the first judge denied a motion to stay or dismiss an action on the ground of forum non conveniens in a product liability case. A second judge granted the same motion when it was renewed. Plaintiffs appealed, contending the second judge erred by reconsidering without finding the earlier order was erroneous and that the second judge abused judicial discretion. The appellate court affirmed the order of the second judge, stating: "Under the plain language of [*Code of Civil Procedure*] section 410.30, subdivision (a), as recognized in *Britton* [*Britton v. Dallas Airmotive, Inc.* (2007) 153 Cal.App.4th 127, [62 Cal.Rptr.3d 487]], [the second judge] had the authority to reconsider on her own motion whether California was a convenient forum. *Williamson v. Mazda Motor of America, Inc.* (Cal. App. Fourth Dist., Div. 3; December 26, 2012) 212 Cal.App.4th 449.

No Injunction To Forestall Employer From Providing Obamacare Preventive Services To Women.

An arts and craft Christian retail chain store with 13,000 employees in 500 stores nationwide petitioned for an injunction pending appellate review of its claim under the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act of 1993 [42 U.S.C. § 2000bb]. The employees receive health insurance from self-insured group health plans. Under section 1001(5) of the Patient Protection and Affordable Care Act [42 U.S.C. § 300gg-13(a)] non-grandfathered group health plans must cover certain pre-

ventive health services without cost-sharing, including various preventive services for women. The guidelines for women's services require coverage for "all Food and Drug Administration . . . approved contraceptive methods, sterilization procedures, and patient education and counseling for all women with reproductive capacity." Petitioners contend they will be required to provide insurance coverage for certain drugs and devices they believe can cause abortions, which are contrary to their religious beliefs. The United States Supreme Court denied the request for an injunction, explaining the Court has only one source of authority to grant an injunction [The All Writs Act; 28 U.S.C. § 1651(a)] and that power is to be used sparingly. The Court declined to use its judicial intervention when, as here, such intervention has been denied by lower courts because the petitioners have not shown their entitlement to such intervention is "indisputably clear." *Hobby Lobby Stores v. Sebelius* (U.S. Sup. Ct.; December 26, 2012) 133 S.Ct. 641, [184 L.Ed.2d 448].

Union Has Statutory Protection To Picket Supermarket. The California Supreme Court held: "[T]he supermarket's privately owned entrance area is not a public forum under the California Constitution's liberty of speech provision. For this reason, a union's picketing activities do not have state constitutional protection. Those picketing activities do have statutory protection, however, under the Moscone Act [*Code of Civil Procedure* section 527.3] and [*Labor Code*] section 1138. . ." *Ralphs Grocery Company v. United Food and Commercial Workers Union Local 8* (Cal. Sup. Ct.; December 27, 2012) 55 Cal.4th 1083.

Section 9 Of The Federal Arbitration Act Is Procedural, Not Substantive. One party to an arbitration petitioned to the superior court to confirm the award of the arbitrator. The other party objected because the parties did not agree in their arbitration agreement that the award could be judicially confirmed as required by section 9 of the Federal Arbitration Act [FAA; 9 U.S.C. § 9.]. The trial court confirmed the award, and the Court of Appeal affirmed, stating, "section 9 of the FAA is procedural, not substantive, and therefore does not apply in state court pro-

ceedings." *Swissmex-Rapid S.A. de C.V. v. SP Systems, LLC* (Cal. App. Second Dist., Div. 3; December 28, 2012) (As Mod. January 4, 2013) 212 Cal.App.4th 539.

Assumption Of The Risk Applies To Bumper Car Rides. Toward the end of a bumper car ride at Great America amusement park, with plaintiff's nine-year-old son at the wheel, and plaintiff as a passenger, plaintiff braced herself by placing her hand on the dashboard. Her son described that "something like cracked," and plaintiff's wrist was fractured. The California Supreme Court found: "We conclude the primary assumption of risk doctrine, though most frequently applied to sports, applies as well to certain other recreational activities including bumper car rides." *Nahwa v. Cedar Fair, L.P.* (Cal. Sup. Ct.; December 31, 2012) 55 Cal.4th 1148.

Spousal Support Waiver Deemed Invalid. On appeal, a husband challenged the trial court's invalidation of a wife's spousal support waiver contained in a 1985 prenuptial agreement. The soon-to-be wife had no input about the wording of the document. She claims the first time she saw it was three days prior to the wedding, after all the invitations had gone out. After the parties married, they had a son, R., who is mentally disabled, and also suffers from Fragile-X syndrome and autism. Roberta stopped working full time in 1997. The parties separated in October 2009, and Roberta filed her petition for dissolution in November 2009. After the separation, Roberta lived with and cared for R., who is now 24 years old. He is able to work part-time as a janitor, earning \$9 an hour. Roberta is unemployed. The appellate court said the status of the law in 1985 was that prenuptial agreements would be enforced if the provisions did not objectively encourage or promote dissolution. There was no *per se* rule invalidating premarital agreements. However, it was also determined any written waiver of the statutory obligation of spouses to mutually support each other was void as being contrary to public policy. But in 2000 our Supreme Court recognized there had been a nationwide shift in public policy towards spousal support waivers. (See, *In re Marriage of Pendleton & Fireman*, 24 Cal.4th 39, [5 P.3d 839; 99 Cal.Rptr.2d

278].) Then in 2002, the California Legislature required spouses to be represented by independent counsel before waiving spousal support in a premarital agreement. (See, *Fam.Code*, §1612, subd. (c)). *Family Code* section 1615, was also amended to create a presumption that a premarital agreement was not executed voluntarily unless the court makes five designated findings [including a 7 day period between the time agreement first presented and the time it was signed.] In affirming the trial court's order, the appellate court stated: "We conclude the trial court properly applied the law as it then existed in 1985." *In re Marriage of Raymond and Roberta Melissa* (Cal. App. Fourth Dist., Div. 3; January 2, 2013) 212 Cal.App.4th 598.

Medical Malpractice, Or Ordinary Negligence? IED Demurrer Reversed. Plaintiff underwent a dilation and curettage procedure following a miscarriage. She alleges that she was administered inadequate anesthesia and awoke during the procedure. When she later confronted the anesthesiologist, the anesthesiologist became angry, shoved a container filled with plaintiff's blood and tissue at her, and then urged plaintiff not to report the incident. Plaintiff sued the anesthesiologist and her medical group, as well as the hospital, asserting that the anesthesiologist's conduct constituted negligence, assault and battery, and intentional infliction of emotional distress, and that the hospital and medical group were liable to her directly and through the doctrine of respondeat superior. The trial court sustained demurrers to the causes of action for assault and battery and intentional infliction of emotional distress; it later granted motions for judgment on the pleadings as to the cause of action for negligence. Plaintiff discovered the incident the day it happened, September 30, 2008, and filed her action on August 11, 2010. The appellate court stated: "The issue before us is whether plaintiff's claim is for 'professional' negligence, and hence is time-barred, or 'ordinary' negligence, and thus is timely." After noting that not every interaction between a doctor and a patient involves professional services, specifically pointing out that placing threatening phone calls about unpaid bills or sexual assaults would not be, the appellate court reversed the trial court's

dismissal on the statute of limitations issue. Regarding the dismissal of the cause of action for intentional infliction of emotional distress, the appellate court also reversed, stating: “a reasonable juror could conclude that forcing a patient who had recently miscarried to look at what she believed to be her dismembered fetus was extreme and outrageous.” *So v. Shin* (Cal. App. Second Dist., Div. 4; January 3, 2013) 212 Cal.App.4th 652.

No Arbitration Because Of Possibility Of Conflicting Rulings. Plaintiff sued a residential care facility for elder abuse and wrongful death regarding alleged inadequate care. As her mother’s attorney in fact, plaintiff had entered into a “residency agreement” with the facility, which agreement contained an arbitration clause, but plaintiff did not enter the agreement in her personal capacity. Under the arbitration clause, all claims related to the care plaintiff’s mother received at the facility are subject to binding arbitration, and the clause is binding on heirs and representatives. The trial court denied the petition to compel arbitration because plaintiff is a third party to the agreement and could not be compelled to arbitrate her wrongful death claim, and there was a possibility of conflicting rulings on common issues of fact and law if the survivor claims were arbitrated but the wrongful death claim was not. The appellate court found the trial court did not abuse its discretion and affirmed. *Daniels v. Sunrise Senior Living* (Cal. App. Fourth Dist., Div. 2; January 4, 2013) 212 Cal.App.4th 674.

Acts Preparatory To Official Proceedings Covered By Anti-SLAPP Statute. Plaintiff is the father of a five-year-old daughter and is going through a divorce. He brought a federal civil rights action under 42 USC §1983 against a licensed family and marriage therapist claiming the therapist conspired with his former mother-in-law and others to falsely accuse him of sexually abusing his child. He alleges the therapist coached the child to draw illicit pictures of herself and him in bed together. Child protective services was notified, but the juvenile court dismissed the proceedings when it found no evidence to support allegations against the father. The trial court granted the therapist’s petition to dismiss under the anti-SLAPP statute [*Code of Civil Procedure* section 425.16]. The Court of Appeal affirmed, stating: “We conclude that the section 1983 claims are based on acts in furtherance of the rights of free speech or petition, specifically actions preparatory to or in anticipation of official proceedings, including an official investigation by child protective services and juvenile dependency proceedings.” *Dwight R. v. Christy B.* (Cal. App. Fourth Dist., Div. 2; January 7, 2013) 212 Cal.App.4th 697.

Written Employment Agreement With Parent Company Does Not Preclude Implied In Fact Employment Agreement With Subsidiary. The Federal Deposit Insurance Corporation [FDIC] issued a cease and desist order requiring an employer investment and loan company to replace its senior management and take

other measures to improve its lending practices. The next month, plaintiff and the parent company of the employer entered into a written employment contract stating plaintiff would be employed as Senior Vice President, General Counsel and Chief Legal Officer. Two months after that, plaintiff was appointed interim President and Chief Executive Officer of employer, a subsidiary of the parent company. A new management team replaced plaintiff in several of his positions, although he was kept on to perform legal services. Plaintiff brought an action against the employer, alleging involuntary termination. His employment was then officially terminated by the employer. A jury awarded plaintiff \$1,347,000 for breach of contract. On appeal, the court affirmed the judgment, finding substantial evidence supported the jury’s findings plaintiff was an employee of employer and that the written contract between plaintiff and the parent company did not preclude the existence of an implied in fact contract with its subsidiary, the employer. *Faigin v. Signature Group Holding, Inc.* (Cal. App. Second Dist., Div. 3; December 5, 2012) 211 Cal.App.4th 726, [150 Cal.Rptr.3d 123].

Landlord Was Additional Insured, But Only When It Faced Liability Arising Out Of Tenant’s Acts. A restaurant burned down because of the restaurant’s negligence. There were two insurance policies. The restaurant’s policy listed the landlord as an additional insured, which also had an exclusion for claims between insureds. The landlord had a separate policy and collected under it. The landlord’s insurer brought an action for subrogation against the restaurant owner, alleging negligence that caused the fire. The two insurance companies battled over whether the restaurant’s insurer provided coverage of any claim brought by another insured. Both the trial and the appellate court decided the landlord was an insured under the restaurant’s policy “only when and where it faces liability arising from [the restaurant’s] acts, undertaken in the course of [the restaurant’s] operations on leased premises.” Thus, the exclusion for claims between insureds did not apply here. *Gemini Insurance Company v. Delos Insurance Company* (Cal. App. Second Dist., Div. 5; December 5, 2012) 211 Cal.App.4th 719, [149 Cal.Rptr.3d 889].

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Government Tort Claim Delivery Requirement Strictly Construed. After being damaged by medical negligence at a county hospital, plaintiff's lawyer gave written notice under *Code of Civil Procedure* section 364, that a suit for personal injuries would be filed. Counsel personally delivered copies of the letter to the hospital's administration and requested that it be forwarded to the hospital's insurance carrier. It is undisputed the letter was never personally served, or presented, nor mailed, to the county clerk. The trial court dismissed the action brought by plaintiff because he did not present a claim in accordance with *Government Code* section 915, which requires a claim be delivered to the clerk, secretary, or auditor. The appellate court held the *Code of Civil Procedure* section 364 letter, substantially complied, and the California Supreme Court reversed the action of the Court of Appeal, stating: "We reject this judicial expansion of the statutory requirements and affirm that a claim must satisfy the express delivery provision language of the statute." *Dicamplic-Mintz v. County of Santa Clara* (Cal. Sup. Ct.; December 6, 2012) 55 Cal.4th 983, [289 P.3d 884, 150 Cal.Rptr.3d 111].

Anti-SLAPP Motion Properly Denied. After the 2003 Southern California wildfires, attorneys represented insureds for both claims and subsequent bad faith cases. After a claim was settled, the attorneys divided the proceeds on a percentage basis among the client, an attorney and a claims handler. The insurance company brought an action alleging a conspiracy whereby the claims handler would obtain clients to submit insurance claims, submit false or inflated estimates of damage. The attorneys contend they were legitimate claims, but to the extent they were not the attorneys believed they were. The attorneys filed anti-SLAPP motions under *Code of Civil Procedure* section 425.16, which the trial court denied after concluding protected activity was not at stake. The appellate court affirmed, stating that the "bald assertions that the claims were submitted with the subjective intent that litigation would follow are insufficient, without more, to constitute prima facie evidence that the insurance claims constituted prelitigation conduct." *The People ex rel. Fire Insurance Exchange v. Anapol*

(Cal. App. Second Dist., Div. 3; December 6, 2012) 211 Cal.App.4th 809, [150 Cal.Rptr.3d 224].

Collateral Estoppel/Res Judicata/Waiver Applied When Previous Proceeding Was Administrative. 31-year employee of a water district who delivered water to farmers was involved in an on-duty vehicular accident while driving a district truck. The police report on the accident indicated the employee had consumed alcohol the previous evening. A field sobriety test was performed and police determined he still had alcohol in his system with a blood-alcohol level of .031 at the time of the accident. The police concluded he was not under the influence of an alcoholic beverage but that he caused the accident by failing to yield the right of way. In an administrative hearing, the water district board concluded the employee's firing for causing a serious accident while affected by alcohol was supported by substantial evidence. The employee challenged the board's conclusions by filing a civil action in superior court and by seeking extraordinary relief in a writ petition also filed in superior court. The superior court judge granted summary judgment under the principles of res judicata and collateral estoppel, and denied the writ petition, finding he waived his due process and bias claims by failing to raise them in the administrative hearing. The appellate court found the administrative hearing possessed the critical attributes of a quasi-judicial proceeding and agreed with both the reasoning and the ruling of the trial judge. *Basurto v. Imperial Irrigation District* (Cal. App. Fourth Dist., Div. 1; December 7, 2012) 211 Cal.App.4th 866, [150 Cal.Rptr.3d 145].

Even Though Expert Had Previously Testified In Asbestos Cases, A Daubert Hearing Was Required. An expert witness testified in federal court that a plaintiff's exposure to asbestos for 20 years at a paper mill caused his mesothelioma. The defendant filed a motion in limine to exclude the expert testimony, which the trial court denied because the doctor had previously testified in other asbestos cases. A jury awarded \$10,200,000 to the plaintiff. The Ninth Circuit reversed because the trial court

failed to fulfill its obligations regarding the admission of expert testimony required under *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, [113 S.Ct. 2786; 125 L.Ed.2d 469]. *Barabin v. AstenJohnson, Inc.* (Ninth Cir.; November 16, 2012) 700 F.3d 428.

Mobile Home Conversion Is A Development Under Coastal Act. The California Supreme Court held the Coastal Act [*Public Resources Code* section 30000] and the Mello Act [*Government Code* section 65590] apply to a proposed conversion, within California's coastal zone, of a mobilehome park from tenant occupancy to resident ownership. In so holding, the Supreme Court rejected the argument that such a conversion is not a development. *Pacific Palisades Bowl Mobile Estates v. City of Los Angeles* (November 29, 2012) 55 Cal.4th 783, [288 P.3d 717, 149 Cal.Rptr.3d 383].

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