



Litigation Update

Litigation Section News

June 2013

Jury Verdict In Favor Of Truck Manufacturer Reversed.

A 15-year-old boy threw a 2.5 pound of concrete rock from a freeway overpass, penetrating the windshield of a truck driven by plaintiff, striking plaintiff on the head and causing great bodily injuries. The boy pled guilty and was sentenced to 12 years in prison. Plaintiff and his wife, and later only his wife, who proceeded with the action after her husband died from his injuries, brought an action against the truck manufacturer claiming the truck was defective because its penetration resistance was inadequate. The case proceeded to trial on the question of whether the windshield was defective due to its steep rake angle. The manufacturer argued it was absolved of liability because the 15-year-old's criminal conduct constituted a superseding cause of the injuries. The jury accepted that defense and judgment was entered in favor of the manufacturer. The appellate court reversed, stating: "We conclude the trial court erred in instructing that a heightened foreseeability was required and the error was prejudicial because the special verdict form precluded the jury from considering whether the risk of chunks of concrete hitting the truck's windshield was a reasonably foreseeable road hazard. We accept [the manufacturer's] concession that federal law is not preemptive on the issue of whether glass-plastic would have been a safer design for the windshield." *Collins v. Navistar, Inc.* (Cal. App. Third Dist.; March 29, 2013) 214 Cal.App.4th 1486.

Law Firm's Arbitration Petition Denied In Employment Case.

In an employment discrimination action, defendant law firm petitioned to compel arbitration of the claims based on a letter agreement: "You and the Firm agree that any legal disputes which may occur between you and the Firm and which arise out

of, or are related in any way to your employment with the Firm or its termination, and which disputes cannot be resolved informally, shall be resolved exclusively through final and binding private arbitration before an arbitrator mutually selected by you and the Firm. . . This letter agreement . . . shall be construed in accordance with the internal substantive laws of The Commonwealth of Massachusetts." Plaintiff asserted that Massachusetts substantive law as stated in *Warfield v. Beth Israel Deaconess Medical Center, Inc.* (Mass. 2009) 454 Mass. 390, 398, precluded arbitration of her statutory discrimination claims because *Warfield* required agreements to arbitrate statutory discrimination be in clear and unmistakable terms. Defendant argued *Warfield* was inapplicable because plaintiff's claims were brought for violations of California statutes. The trial court denied defendant's petition to arbitrate. The appellate court affirmed, stating "*Warfield's* holding does not interfere with the fundamental attributes of arbitration as stated in *Concepcion (AT&T Mobility LLC v. Concepcion)* (2011) 131 S.Ct. 1740, 1743, [179 L.Ed.2d 742]." *Harris v. Bingham McCutchen* (Cal. App. Second Dist. Div. 5; March 29, 2013) 214 Cal.App.4th 1399.

Summary Judgment Affirmed On Harassment Claim But Reversed On Retaliation Claim.

Plaintiff worked for a construction company. Her supervisors used foul language, referred to a woman with large breasts as "Double D," told plaintiff she was lucky because women had multiple orgasms, and asked her whether women "got off" when they used a particular type of tampon. At one point, she was told to wear a French maid uniform and clean their trailer. At first, it was the president of the company who inquired of her about her treatment, as he had heard about it from others. He told her to keep him informed,

which she did. But after she informed the president, she was treated worse. Eventually the president told her she couldn't get along and had her escorted from the site. The trial judge granted summary judgment in favor of the employer, and the Ninth Circuit affirmed the judgment on the harassment claim, but reversed and remanded on the retaliation claim. *Westendorf v. West Coast Contractings* (Ninth Cir.; April 1, 2013) (Case No. 11-16004).

An Appellate Court Has The Inherent Power Under The "Disentitlement Doctrine" To Dismiss An Appeal By A Party Who Refuses To Comply With A Lower Court Order.

Defendants, an individual and a corporation located in New York, appealed from a California judgment in favor of plaintiffs, but did not post a bond to stay enforcement of the judgment. Plaintiffs registered the judgment in New York and proceeded with execution. Defendants did not comply with a New York subpoena or with a New York court order compelling compliance with the subpoena, and defendants were held in contempt of the New York court. The California appellate court dismissed the California appeal from the underlying judgment under the "disentitlement doctrine," which provides that an appellate court "may dismiss an appeal where there has been *willful disobedience or obstructive tactics.*" *Stoltenberg v. Ampton Investments, Inc.* (Cal. App. Second Dist.; April 4, 2013) 215 Cal.App.4th 161.

When Can You Trust Your Accountant's Advice About When Your Taxes Are Due?

Plaintiff was acting as the executor of an estate when he asked his accountant to apply for an extension of the deadline to file the estate-tax return from the Internal Revenue Service. The accountant told

him the deadline had been extended for one year, when, in fact, it had only been extended for six months. When the filing was finally made, it was four months late, and the IRS imposed a late filing penalty of almost \$200,000. The taxpayer initiated an action for a refund of the penalty, and the district court granted summary judgment in favor of the government. The Ninth Circuit affirmed, agreeing with the trial judge that the plaintiff had not shown reasonable cause to excuse the penalty. *Knappe v. United States of America* (Ninth Cir.; April 4, 2013) (Case No. 10-56904).

Writer Unable To Show ABC Had Access To His Ideas When It Created "LOST."

In 1977, plaintiff, a writer, submitted to ABC a script called "L.O.S.T." about a group of eight survivors connected to the U.S. Olympic team whose plane crash-lands deep in the Himalayas." Five of the survivors are Olympic-bound athletes, one is the team physician, one is a television reporter, and one is the pilot. Among the athletes is a former military man who assumes leadership of the group, a spoiled rich girl with a drug addiction, and a strong-willed man who shows a temper and challenges the former military man's leadership of the group. The plane's radio is smashed in the crash. In 2003 and 2004, ABC created and developed a television series called "LOST." The writer brought an action against ABC, claiming his ideas were used in the television series, and the trial court granted summary judgment in favor of ABC. The appellate court discussed the evidence plaintiff submitted to support his contention ABC used his ideas in creating the television series, stating: "When plaintiffs do not have direct evidence of use, they may raise an inference of use by showing the defendants had access to their ideas and the defendants' work is substantially similar to the plaintiffs' ideas." The court concluded plaintiff's evidence was insufficient as a matter of law "because he relies on a bare possibility of theoretical access premised on mere speculation." *Spinner v. American Broadcasting Companies, Inc.* (Cal.App. Second Dist., Div. 8; April 5, 2013) 215 Cal.App.4th 172.

Rule Set Forth In *Howell v. Hamilton Meats & Provisions, Inc. Applied During Post-Trial Motion.* As plaintiff, a disabled man, passed through the threshold of a door to exit a store, the automatic doors closed on him three or four times before he was able to pass through. When he made it through the doors, he fell to the ground because his leg became twisted. He was taken by ambulance to a hospital where he underwent surgery for a fractured hip. Several months later, he was readmitted to a hospital because of a bed sore diagnosed as a decubitus ulcer. For treatment of his fractured hip and decubitus ulcer, plaintiff's medical providers billed \$690,548.93 (\$177,403.12 for the hip and \$513,145.81 for the ulcer.) But the medical providers settled those bills with Medicare and Medi-Cal for \$138,082.25.

A jury found the store's negligence 95 percent responsible and plaintiff's contributory negligence five percent (5%) responsible. The jury awarded damages for past medical expenses of \$256,109.50 (\$179,443.72 for the hip, which was 100 % of the amount billed for the hip, but only \$76,665.78 for the ulcer, which was just 15 percent of the amount billed for the ulcer.) The jury also awarded \$116,664.50 for future medical expenses, \$30,000 for past noneconomic loss and \$10,000 for future noneconomic loss.

The total jury verdict was \$412,774.00. That total was reduced by five percent because of plaintiff's comparative negligence, so judgment was entered for \$392,135.30.

After the trial, the court reduced the award for past medical expenses to the amount actually paid, which was \$138,082.25. In plaintiff's new trial motion, the court also found the jury had improperly reduced the award for the treatment of the decubitus ulcer to 15 percent, but concluded the evidence supported a reduction to 50 percent, based on plaintiff's failure to mitigate his damages.

After all the adjustments were made, including the effect of plaintiff's failure to recover more than defendants had offered in a pretrial offer under *California Code of Civil Procedure* section 998, the court entered an amended judgment for \$207,057.31.

On appeal, plaintiff contended that pursuant to the holding in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, [257 P.3d 1130, 129 Cal.Rptr.3d 325], when the court applied the 50 percent reduction for the costs of treating the decubitus ulcer, it should have made the reduction from the amounts billed rather than the amount that was actually paid pursuant to an agreement among the medical providers. The appellate court concluded the trial court did not err.

Plaintiff also contended on appeal that under *Howell*, the Medicare lien amount should be added to the judgment. Specifically, plaintiff argued that if his award for past medical expenses is reduced to the actual amount paid by Medicare and Medicare is entitled to reimbursement from plaintiff for the actual amount it paid, he will receive nothing by way of damages. The Court of Appeal disagreed with plaintiff, stating: "Awarding him the actual amount paid allows him to pay off the Medicare lien and be financially whole (except to the extent he failed to mitigate his damages); awarding him the amount of the Medicare lien *and* the actual amount Medicare paid would provide him with an impermissible double recovery." *Luttrell v. Island Pacific Supermarkets, Inc.* (Cal.App. First Dist., Div. 5; April 8, 2013) 215 Cal.App.4th 196.

Bicycle On A Sidewalk. Plaintiff college student left college on his bicycle. At first, he traveled on the street with the vehicular traffic, then he crossed to the sidewalk against the flow of traffic on the street. As he approached a supermarket parking lot, defendant drove her car out of the parking lot, over the threshold between the parking lot exit and the sidewalk, hitting plaintiff as he pedaled in front of her car, knocking him to the ground. He incurred \$80,000 in medical bills as a result of his injuries. The jury returned a verdict for defendant. On appeal plaintiff argued there were two instructional errors. First, he contended the court erred when it refused to instruct that if defendant violated *Vehicle Code* section 21804 ["(a) The driver of any vehicle about to enter or cross a highway from any public or private property, or from an alley, shall yield the right-of-way to all traffic. . ."], then the jury must find

defendant negligent *per se*. The appellate court found no error, noting that a “driver violates this section only if he or she fails to act as a ‘reasonably prudent and cautious [person].’” Plaintiff’s second argument on appeal was that the trial court erred when it instructed the jury that plaintiff was negligent *per se* because immediately before the accident, he had been traveling on the sidewalk against the flow of traffic in violation of *Vehicle Code* section 21650.1. [a bicycle operated “on a roadway, or the shoulder of a highway, shall be operated in the same direction as vehicles are required to be driven upon the roadway.”]. The appellate court agreed with plaintiff’s second contention, stating, “section 21650.1 does not require bicyclists riding on a sidewalk to travel in the same direction as vehicular street traffic.” But the court found the error to be harmless since the first question and answer on the jury’s special verdict stated defendant was not negligent. *Spriesterbach v. Holland* (Cal.App. Second Dist., Div. 4; April 9, 2013) 215 Cal.App.4th 255.

“Suicide May Be Compensable Even If It Is Planned.”

In 2001, while working as a ship laborer, plaintiff fell 25 to 50 feet from a barge to a dry dock, landing on a steel floor. He suffered blunt trauma to the head, chest and abdomen, a fractured rib and scapula and knee and back pain. He resumed work but left after a while. He filed a workers’ compensation claim under the Longshore Act [33 U.S.C. §§ 901-950]. In 2003, he shot himself in the head, causing severe head injuries, and sought compensation under the Act. A psychiatrist testified plaintiff had a major depressive disorder “due to multiple traumas and chronic pain, posttraumatic stress disorder, and a cognitive disorder.” An administrative law judge denied plaintiff’s claim for benefits. The Ninth Circuit granted petition for review and remanded, stating “the ALJ erroneously applied the irresistible impulse test and concluded that because [plaintiff] planned his suicide, he could not have committed suicide impulsively. But under the correct chain of causation test, a suicide may be compensable even if it is planned. [Plaintiff] need not demonstrate that he attempted to end

his life in a delirium or frenzy.” *Kealoha v. Director Office of Workers Compensation Programs* (Ninth Circuit; April 9, 2013) (Case No. 11-71194).

If At First You Don’t Succeed, Don’t Wait Too Long To Try, Try Again.

In a dispute involving construction of a condominium project, defendants failed to file a responsive pleading after the court denied defendants’ petition to order the matter into arbitration. The trial court entered a \$1.7 million default judgment. Defendants moved for mandatory relief pursuant to *Code of Civil Procedure* section 473(b), which the trial court denied because the attorney declaration was “not credible” and “too general.” Weeks later, defendants renewed their motion with a more detailed declaration. Several times the trial court stated the more detailed explanation was not credible, but granted relief nonetheless. The trial court also expressed that, although the renewed motion did not meet the requirements for a motion for reconsideration under *Code of Civil Procedure* section 1008, it felt bound to follow *Standard Microsystems Corp. v. Winbond Electronics Corp.* (2009) 179 Cal. App.4th 868, [102 Cal.Rptr.3d 140], a decision that held section 1008 does not apply to a renewed section 473(b) motion for mandatory relief. After declining to follow the holding in *Standard Microsystems*, the appellate court reversed and ordered reinstatement of the judgment, concluding the trial court lacked jurisdiction to consider the renewed motion as § 1008 requires action within a short period of time. *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (Cal.App. Second Dist., Div. 4; April 10, 2013) 215 Cal. App.4th 277.

Only Three (3) Grounds For Custodial Arrest For An Infraction:

Plaintiff was standing inside a playground surrounded by a fence that had “No Trespassing” signs posted at every entrance. Two police officers arrested him for trespassing and took him to the police station where he was cited for trespass and released. Later plaintiff filed an action against the police officers and the city for violating 42 U.S.C. § 1983, alleging he was unlawfully arrested in violation of the Fourth

Amendment. The district court ruled that as a matter of law the police officers had probable cause to arrest plaintiff under *California Penal Code* section 602(l) [now section 602(m)] or section 602.8. The Ninth Circuit reversed, holding that *Penal Code* section 853.5 provides the exclusive grounds for custodial arrest of a person arrested for an infraction: (1) the arrestee refuses to sign a written promise to appear; (2) the arrestee is unable to produce satisfactory identification; or (3) the arrestee refuses to provide a thumbprint or fingerprint. *Edgerly v. City and County of San Francisco* (Ninth Cir.; April 10, 2010) (Case No. 11-15655).

Not All Venue Selection Clauses Are Contrary To Public Policy.

A wholesale food distributor with its principal place of business in San Diego contracted with a restaurant chain and entered into a “Master Foodservice Distribution Agreement” [MFDA]. The MFDA contained a venue selection clause stating “any litigation related to or arising from this Agreement may be brought in a state or federal court located within Orange County, CA and the parties consent to the jurisdiction of such court.” The distributor brought an action against the restaurant chain in San Diego and the court transferred the action to Orange County. The distributor petitioned for extraordinary relief challenging the San Diego Superior Court’s order transferring the matter to Orange County, claiming the California Supreme Court’s opinion in *General Acceptance Corp. v. Robinson* (1929) 207 Cal. 285, [277 P. 1039], rendered all contractual venue selection clauses void as contrary to public policy in California. The appellate court found the case was properly transferred, stating: “[W]e conclude that the *General Acceptance* court’s holding is that a venue selection clause that attempts to vest venue in a county that is not proper under the legislative scheme may not be given effect. We reject [the distributor’s] interpretation of *General Acceptance* as making a broad pronouncement regarding the validity of venue selection clauses generally; rather, the contract in that case, which attempted to set trial in a county that was improper under the legislative scheme, was void.” *Battaglia Enterprises, Inc. v. Sup.Ct. (Yard House USA)* (Cal.App. Fourth Dist., Div. 1; April

11, 2013) (As Mod. April 29, 2013) (Case No. D063076).

Court Acted Within Its Discretion In Renewing Restraining Order At The End Of Three Years.

In 2008, the superior court issued a three-year restraining order against defendant/appellant. At the end of the three years, the plaintiff/respondent requested a renewal of the restraining order, and defendant/appellant opposed the request. In 2011, the court renewed the order, this time until 2016. The appellate court affirmed the order of the trial court, noting that under *Ritchie v. Conrad* (2004) 115 Cal.App.4th 1275, [10 Cal.Rptr.3d 387], facts supporting an initial order “often will be enough in themselves to provide the necessary proof” to renew the protective order. But the appellate court also noted that in this case, defendant/appellant had violated the initial order in 2011, four days prior to the request to renew, concluding the trial court acted within its discretion in renewing the restraining order. *Lister v. Bowen* (Cal.App. First Dist., Div. 2; April 11, 2013) (Case No. A134290).

Jurors Were Not Asked “Is This Your Verdict?”

In a criminal case, the jury advised the bailiff a verdict had been reached. Once all were assembled in the courtroom, the court asked: “And ladies and gentlemen, I understand you’ve reached a verdict. Who is the foreperson?” A juror responded: “Yes sir.” The court asked the juror to hand the verdict forms to the deputy, which he did. The clerk read the verdicts aloud. The verdict forms stated the defendant was guilty and the enhancements were true. The court excused the jury. *Penal Code* section 1149 provides, “When the jury appear they must be asked by the Court, or Clerk, whether they have agreed upon their verdict, and if the foreman answers in the affirmative, they must, on being required, declare the same.” The appellate court reversed defendant’s conviction, but the California Supreme Court reversed the appellate court and affirmed defendant’s conviction, stating “noncompliance with section 1149 is procedural error, subject to harmless error review.” *People v. Anzalone* (Cal. Sup. Ct.; April 15, 2013) (Case No. S192536).

Allegations In Complaint Do Not Amount To Judicial Admissions.

A law firm allegedly represented both buyer and seller in the sale of commercial property. The buyer borrowed more than half the purchase price and relied on rental income to make loan payments. After several months, the tenant stopped paying, and in the absence of rental income, the purchaser was unable to make loan payments. The purchaser brought an action against several persons, including the law firm. The law firm moved to compel arbitration. The trial court denied the petition to compel arbitration due to the possibility of inconsistent rulings. On appeal, the law firm argued that because the complaint alleges that all defendants are agents of one another, that allegation is a binding judicial admission that gives the defendants the right to enforce the arbitration agreement between the purchaser and the law firm. The trial court affirmed the denial of the petition to arbitrate, finding allegations “that all defendants are one another’s agents is not a judicial admission.” *Barsegian v. Kessler & Kessler* (Cal.App. Second Dist., Div. 1; April 15, 2013) (Case No. B237044).

Stored Communications Act Protects Companies Complying With Grand Jury Subpoenas.

Yahoo! Inc., a digital media company, was served with a grand jury subpoena from a Georgia district attorney requiring the disclosure of any and all records regarding the identification of one of its users. Yahoo! complied, and the user brought a putative class action against Yahoo! claiming various statutory provisions, and because the information was produced before the deadline for compliance with the subpoena. The Ninth Circuit affirmed the district court’s dismissal of the action because the Stored Communications Act [SCA; 18 U.S.C. §§ 2701-2712] provides a complete defense to any civil or criminal action where the defendant can demonstrate it produced documents in good faith reliance on a grand jury subpoena. *Sams v. Yahoo! Inc.* (Ninth Cir.; April 15, 2013) (Case No. 11-16938).

One Lawyer In Firm Represents Police Department While Another Advises City Council. Result? Violation Of Due Process.

A police officer once dated a woman who lives at an apartment complex which has a pool and Jacuzzi behind a locked gate. Seven or eight years after the relationship ended, he was spotted using the Jacuzzi by the woman he once dated. She called the police, and the police officer told the investigating officer he was visiting his girlfriend, implying he did not understand why the police had been called. He left. Another woman resident of the complex told police the previous March she saw the police officer masturbating in the Jacuzzi. Internal Affairs found the police officer violated various provisions of the police department’s policies and procedures by trespassing, committing a lewd act in public and engaging in conduct unbecoming an officer. He was terminated. The police officer requested an advisory arbitration. At the arbitration, the police department was represented by a lawyer. The advisory opinion was that the police officer’s termination should be converted into a suspension without pay or benefits. At that point, the City Council asked another lawyer from the same law firm to be its legal advisor. The law firm “implemented an ethical wall” between the two lawyers. The police officer objected “to attorneys from the same firm acting as an advocate for the Department and as a legal advisor to the City Council.” The City Council thereafter rejected the recommendation the termination be converted into a suspension. The police officer filed an administrative writ in court arguing he was denied due process of law. The superior court denied the writ petition, and the appellate court reversed, stating: “We hold that when a partner in a law firm represents a department within a city at an advisory arbitration regarding a personnel matter, and when the city’s decision-making body later reviews that arbitrator’s award for confirmation or rejection, the principles of due process prohibit the decision maker from being advised on the matter by a different partner from the same law firm.” *Sabey v. City of Pomona* (Cal. App. Second Dist., Div. 2; April 16, 2013) (Case No. B239916).

Civil Action Against Detectives And City To Go Forward.

A suspect was arrested for the attempted murder of a victim who was shot in the leg. At the preliminary hearing, the lead detective testified he and his partner interviewed the victim shortly after that shooting, that he showed the victim a photographic lineup which included the suspect, and that the victim circled the suspect's photo to identify him as the shooter. The victim testified he never saw the suspect before and that the detectives pressured him into circling the photograph. The detective denied pressuring the victim and suggested his reluctance to finger the suspect was the product of a recent death threat from the suspect's fellow gang members. The suspect was bound over for trial, and a jury acquitted him, but only after he spent ten months in jail. The acquitted man brought an action for false arrest, false imprisonment and malicious prosecution under 42 U.S.C. § 1983 against several police officers and the city. The trial court granted summary judgment for the defendants. The Ninth Circuit reversed, finding defendants were not entitled to a judgment in their favor merely because the state court bound defendant over for trial. *Wige v. City of Los Angeles* (Ninth Cir.; April 16, 2012) (Case No. 10-56515).

Common-Fund Doctrine Applies To ERISA Health Plans.

Plaintiff, an employee of an airline, brought an action against a third party for injuries and his lawyers secured \$110,000 for him. After deducting 40 percent for the contingency fees, plaintiff received \$66,000. The airline has a health benefits plan which entitles the airline to reimbursement if an employee recovers money from a third party. The plan paid \$66,866 for plaintiff's medical bills, and the airline demanded reimbursement of the full amount, eventually bringing an action against the plaintiff under the Employee Retirement Income Security Act of 1974 [ERISA; 29 U.S.C. § 1001]. The district court granted summary judgment in the airline's favor. The Third Circuit reversed reasoning there was unjust enrichment. The United States Supreme Court vacated the judgment and remanded the matter for further proceedings, stating the terms of the ERISA plan govern, so general principles of unjust enrichment cannot

override the applicable contract. The Court stated, however, that the ERISA contract is properly read to retain the common-fund doctrine. *U.S. Airways, Inc. v. McCutchen* (U.S. Sup. Ct.; April 16, 2013) 133 S.Ct. 1537, [185 L.Ed.2d 654].

Union Of A Greater And Lesser Estate Does Not Always Result In A Merger Of Title.

Seller of commercial property consisting of several buildings and covering an entire city block sold a portion of the property to buyer, which sale presented a predicament. Some of the buildings on the property straddled lot lines, and the sale did not effectuate a legal lot split to effectuate the parties' intent to completely own certain portions. As a consequence, the parties entered into an easement agreement "to provide for mutual easements with respect to such encroachments." As time went by, the buyer sold portions of its interests. Unfortunately one of the later buyers ceased making payments and that portion was reacquired by the original owner/seller in a foreclosure sale. The question arose as to whether or not the easement was also reacquired in the foreclosure sale. The trial court quieted title by applying the doctrine of merger of title. The appellate court reversed, stating the union of a lesser and greater estate does not always result in a merger, and the application of the doctrine here would result in an injustice. *Hamilton Court, LLC v. East Olympic, L.P.* (Cal. App. Second Dist., Div. 5; April 16, 2013) (Case No. B240052).

Disabled As A Matter Of Law.

Minutes before a scheduled surgery to repair an umbilical hernia, plaintiff's operation was abruptly canceled by the anesthesiologist because she was HIV-positive, and the doctor was concerned for his own safety as well as the safety of the operating room staff. When her primary care physician scheduled the surgery, he had informed the surgeon that the woman was HIV-positive. The woman brought an action against the doctor for disability discrimination in violation of the Unruh Civil Rights Act [Civil Code section 51] and the Confidentiality of Medical Information Act [CMIA; Civil Code section 56]. The trial court granted the doctor's motion for summary adjudica-

tion of the CMIA claim and a jury found she is not disabled within the meaning of the Unruh Civil Rights Act. The appellate court held the trial court correctly granted the doctor's summary adjudication motion "because [the woman] did not disclose any individually identifying medical information." But the appellate court reversed judgment for the doctor on the Unruh Act violation, concluding the trial court erred in permitting a jury to decide whether or not the woman was disabled, noting she was disabled as a matter of law under *Government Code* section 12926.1, subsection (c). *Maureen K. v. Tuschka* (Cal. App. Second Dist., Div. 5; April 17, 2013) 215 Cal. App.4th 519.

Law Firm Sanctioned For Frivolous Appeal.

The appellate court stated: "Attorney Defendants have misrepresented the record and ignored established case law without explanation or justification." In its disposition, the appellate court further stated: "As sanctions for a frivolous appeal, Attorney Defendants shall pay Kendall the amount of \$52,727.56. Attorney Defendants also are assessed \$8,500 sanctions for bringing this frivolous appeal, payable to the clerk of this court no later than 15 days after the date the remittitur is filed." *Kleveland v. Siegel & Wolensky, LLP* (Cal. App. Fourth Dist., Div. 1; April 17, 2013) 215 Cal.App.4th 534.

Rent Control In Mobilehome Park Not A Taking.

A city enacted a mobilehome rent stabilization ordinance which imposed rent controls tied to the consumer price index. Years later, the city amended the ordinance to add "vacancy control," which gave any new resident taking over a mobilehome pad lease the right to rent the pad at the same rate as the previous tenant. The park owner brought an action alleging that the combination of pad rent control and vacancy control amounted to an unconstitutional taking. The Ninth Circuit stated: "In this appeal, we consider whether San Rafael's mobilehome rent regulation violates the park owners' substantive due process rights, constitutes a regulatory taking under *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104 [98 S.Ct. 2646, 57 L.Ed.2d 631] or runs afoul of the 'public use' require-

ment of the Fifth Amendment under the standards articulated in *Kelo v. City of New London* (2005) 545 U.S. 469, [125 S.Ct. 2655, 162 L.Ed.2d 439]. We conclude that the regulation passes muster against all of these challenges.” *MHC Financing Limited Partnership v. City of San Rafael* (Ninth Cir.; April 17, 2013) (Case No.’s 07-15982, 09-16447, 09-16451, 09-16612, 09-16613).

Evidence Of Title Insurance Should Have Been Admitted.

The signatures on loan documents were forged. Interest-only payments were made. A larger replacement loan was made, again based upon forged documents. When the property owners realized what had happened, they brought an action for fraud against various persons. Everything settled, except a cross-complaint of one lender against another lender. At trial, a jury decided a private mortgage broker breached fiduciary duties owed to a private lender and that the mortgage broker acted with malice, fraud or oppression, and awarded \$590,469.51 in compensatory damages and \$62,500 in punitive damages. Arguing the collateral source rule, the private lender had successfully prevailed upon the trial court to exclude evidence of payments it received under a title insurance policy. The mortgage broker appealed. The appellate court reversed, finding prejudicial error in excluding evidence of the private lender’s title insurance receipts since the mortgage broker presented an offer of proof that industry standards required it to obtain title insurance covering fraud and forgery for a loan transaction. *Chanda v. Federal Home*

Loans Corporation (Cal. App. Fourth Dist., Div. 1; April 19, 2013) 215 Cal.App.4th 746.

Employment Arbitration Provision Not Unconscionable.

Plaintiff brought an action against her employer under the Fair Employment and Housing Act [FEHA; *Government Code* section 12940] and the Family Rights Act [*Government Code* section 12945.2] and for wrongful termination in violation of public policy. The arbitration agreement plaintiff signed provided, “I understand and agree that if my employment is terminated or my employment status is otherwise changed or if any other dispute arises concerning my employment and The Company and I cannot resolve such dispute through informal internal efforts, I will submit any such dispute (including, but not limited to wage and hour claims, claims of unlawful discrimination based on race, sex, age, national origin, disability or any other basis prohibited by law, but excluding claims which are required by law to be resolved solely by a public agency, such as claims relating to workers’ compensation or unemployment insurance) exclusively to binding arbitration before a retired judge. I further agree to abide by the procedures in The Company’s Arbitration Policy. I have received a copy of the Arbitration Policy that is located in the employee handbook.” The trial court denied the employer’s motion to compel arbitration, agreeing with plaintiff that the agreement was unconscionable. The court found the agreement to arbitrate, considered alone and on its face, lacked mutuality because it required an employee to arbitrate employ-

ment-related claims, but did not compel the employer to arbitrate its disputes with an employee. Finding the arbitration provision was not unconscionable, the appellate court reversed and directed the trial court to grant the employer’s motion to compel arbitration. *Serpa v. California Surety Investigations, Inc.* (Cal. App. Second Dist., Div. 7; April 19, 2013) 215 Cal.App.4th 695.

Expedited Jury Trials are here – Are you Ready?

Judge Mary House will demystify the rules and explain how EJT’s are done, what forms are available, how to craft EJT agreements and how you and your clients can benefit.

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