



Litigation Update

Litigation Section News

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Failure To Exhaust Administrative Remedies Does Not Affect Subject Matter Jurisdiction Of Court And No Need To Prove Employer Had 5 Or More Employees For Harassment Based Upon Sex.

Apparently plaintiff did not like being hugged and patted on her behind by her boss. After a judge awarded plaintiff \$60,000 against her former employer for sexual harassment, the defendant employer appealed, arguing plaintiff never proved she exhausted her administrative remedies or that the employer had at least five employees. The appellate court affirmed, stating: "We therefore disagree with defendants' underlying premise that exhaustion of administrative remedies affects the fundamental subject matter jurisdiction of the court. Prior to submission of the case for decision, defendants did not request dismissal of the FEHA causes of action based on plaintiff's failure to exhaust. Defendants thereby forfeited any right they may have had (in the abstract) for a judgment of dismissal on the FEHA causes of action." With regard to defendant employer's argument about the number of employees, the appellate court was also unimpressed, stating: "forfeited any right they may have had (in the abstract) for a judgment of dismissal on the FEHA causes of action." (*Kim v. Konad USA Distribution, Inc.* (Cal. App. Fourth Dist., Div. 3; June 12, 2014) 226 Cal.App.4th 1336, [172 Cal.Rptr.3d 686].)

Intersection Of Two Federal Laws In Unfair Competition Context.

The Lanham Act [15 U.S.C. § 1125] permits one competitor to sue another for unfair competition arising from false or misleading product descriptions. The Food, Drug and Cosmetic Act [21 U.S.C. §§ 321(f) and 331] prohibits the misbranding of food and drink, and gives exclusive enforcement authority to the federal government. In the present matter, the petitioner,

who produces and markets a juice blend, brought an action against respondent Coca-Cola Company alleging one of its juice blends misleads consumers into believing the product consists predominately of pomegranate and blueberry juices when it in fact consists predominately of apple and grape juices. Based on the Food, Drug and Cosmetic Act, the federal district court granted summary judgment in Coca-Cola's favor. The United States Supreme Court held that this situation does not represent a preemption case and that competitors may bring Lanham Act claims. (*POM Wonderful, LLC v. Coca-Cola Co.* (U.S. Sup. Ct.; June 12, 2014) 134 S.Ct. 2228, [189 L.Ed.2d 141].)

Component Parts Doctrine Found Inapplicable.

Defendant company supplies sand for sandblasting to plaintiff's employer. Plaintiff brought an action against defendant, alleging injury resulting from airborne toxins. Under the component parts doctrine, which states the manufacturer of a component part is not liable for injuries caused by the finished product, the trial court granted summary judgment in favor of defendant. The appellate court reversed, stating: "We conclude that because [plaintiff's] injuries were allegedly caused by the use of the silica sand during the manufacturing process, rather than by the finished product that was produced by that process, the component parts doctrine does not apply." (*Uriarte v. Scott Sales Co.* (Cal. App. Second Dist., Div. 1; June 13, 2014) 226 Cal.App.4th 1396, [172 Cal.Rptr.3d 886].)

Junction Of CCP Statutes In Expert Exchange Context.

The trial court precluded plaintiff's use of expert witnesses in a medical malpractice case on the ground plaintiffs unreasonably failed to timely disclose their designated trial experts after receiving a statutory demand from defendants. The initial trial date was February

14, 2012. Defendants served their demand for expert exchange on December 6, 2011 [70 days before trial]. Defendants set the disclosure date for, and served their own expert information on, December 27, 2011 [49 days prior to trial]. While not clear, it appears plaintiff responded with expert information somewhere between January 9 and January 14, 2012.

- *Code of Civil Procedure* section 2034.230 (b) states the date on which an expert witness demand may require the information to be exchanged: "The specified date of exchange shall be 50 days before the initial trial date, or 20 days after service of the demand, whichever is closer to the trial date" unless the trial court has found good cause to modify the exchange date.
- *Code of Civil Procedure* section 2034.220 says the expert exchange is triggered by a timely written demand made by any party after the initial trial date is set.
- *Code of Civil Procedure* section 2016.050, states the Civil Discovery Act expressly provides that the five-day extension allowed by § 1013 applies to all discovery methods.
- *Code of Civil Procedure* section 1013 (a) provides that the time for performing any act is extended by five days when the demand or notice is served by mail within the state, as here.
- *Code of Civil Procedure* section 2034.260 sets forth the general requirements for the exchange and the information to be provided.
- *Code of Civil Procedure* section 2034.300 provides that on objection of any party who has made a complete and timely compliance with section 2034.260, the trial court shall exclude the expert opinion of any witness offered by a party who has unreasonably failed to comply with the requirements.

The appellate court reversed, concluding defendants lacked standing to bring their motion under *Code of Civil Procedure* section 2034.300 to preclude plaintiff's experts from testifying because defendants did not completely and timely comply with *Code of Civil Procedure* section 2034.260 themselves and "failed to extend the exchange date by five days by operation of [*Code of Civil Procedure*] section 1013." The appellate court also found the trial court abused its discretion when it sustained defendants' objection to plaintiff's expert disclosure, particularly noting plaintiff offered his experts to be deposed, to which offer defendants declined. (*Staub v. Kiley* (Cal. App. Third Dist.; June 16, 2014) 226 Cal. App.4th 1437, [173 Cal.Rptr.3d 104].)

Less Water For The Crops. After young salmon died along the Russian River during a cold month in a dry year, federal scientists concluded the deaths were caused by abrupt declines in water level after water was drained to spray on vineyards and orchards. The State Water Resources Board adopted a regulation "that is likely to require a reduction in diversion of water from the stream system." The regulation declares that any other use of water is "unreasonable therefore prohibited." The trial court granted a writ of mandate, and the appellate court reversed for several reasons, one of them being "the Board properly found the regulation

to be necessary to enforce water use statutes and did not unlawfully delegate its authority by requiring local governing bodies to formulate substantive regulations. (*Light v. State Water Resources Control Board* (Cal. App. First Dist., Div. 1; June 16, 2014) (As modified July 11, 2014) 226 Cal.App.4th 1463, [173 Cal.Rptr.3d 200].)

California Evidence Code Privilege Statutes Apply In Work Comp Proceedings.

At some point in a workers' compensation proceeding, the injured worker noticed the deposition of the claims adjuster and requested unprivileged documents. The employer produced a privilege log, identifying certain documents contained in the claims file as exempt from disclosure under "one or more privileges recognized by *California Evidence Code*." At the claims adjuster's deposition, no documents dated after the employer initially retained counsel were produced. The workers' compensation judge [WCJ] got involved, and thereafter, the employer prepared a more complete privilege log, specifically identifying which privilege was claimed. Still, matters did not resolve as to 47 documents, and the case went to trial, and the WCJ concluded that only 11 of the documents were protected from disclosure. The Workers' Compensation Appeals Board [WCAB] rescinded the WCJ's order, concluding a special master should conduct an in camera review of the documents, after which the WCAB ordered the WCJ to "issue a new decision." The employer petitioned for extraordinary relief, and the Court of Appeal concluded the *California Evidence Code* statutes governing privilege are applicable in workers' compensation proceedings, and "*Evidence Code* section 915 expressly prohibits a tribunal from ordering a party to produce documents for review as a means of determining the validity of a claimed privilege." The WCAB's decision was annulled. (*The Regents of the University of California v. Workers' Compensation Appeals Board* (Cal. App. Fourth Dist., Div. 3; June 17, 2014) 226 Cal.App.4th 1530, [173 Cal.Rptr.3d 80].)

Nonsuit Reversed In Breach Of Implied Warranty Of Merchantability Suit. Plaintiff brought an action against a car manufacturer for breach of implied warranty of merchantability under *Civil Code* section 1792.

The trial court granted the manufacturer's nonsuit on the grounds that no reasonable jury could conclude a new vehicle sunroof that spontaneously opens and closes while driving constitutes a safety hazard in violation of the implied warranty. The appellate court reversed, stating: "[T]he minimum guarantee in the implied warranty of merchantability protects not only the vehicle purchaser, but other motorists, passengers, pedestrians, and the public generally. Here, a reasonable jury could conclude that a vehicle sunroof that opens and closes on its own creates a substantial safety hazard. (*Brand v. Hyundai Motor America* (Cal. App. Fourth Dist., Div. 3; June 17, 2014) (As modified July 16, 2014) 226 Cal.App.4th 1538, [173 Cal.Rptr.3d 454].)

New Trial Because Court Permitted Irrelevant Evidence.

A man was standing near his car after a freeway accident when he was struck and killed by a police car. The trial court concluded evidence of the decedent's marijuana use was relevant to assess any fault attributable to him in his minor daughter's wrongful death case. A jury apportioned fault of 14 percent against decedent when it returned a verdict for \$550,000. The appellate court reversed and remanded for a new trial because evidence of decedent's marijuana use was irrelevant. (*Hernandez v. County of Los Angeles* (Cal. App. Second Dist., Div. 5; June 17, 2014) 226 Cal.App.4th 1599, [173 Cal.Rptr.3d 226].)

Action For Wrongful Death Of 17-Year-Old Sleepover Guest.

After the parents of a 16-year-old went to bed, a 17-year-old sleepover guest obtained vodka from the parents' bar and consumed 15 shots. She vomited and passed out. The 16-year-old propped her friend's head against the toilet, closed the bathroom door and went to bed. The girl was pronounced dead the next day. The decedent's parents sued the host parents for wrongful death. The trial court granted defendants' motion for summary judgment, ruling the suit was barred by California's social host immunity statute, *Civil Code* section 1714, subdivision (c). [Probably as a result of this case, *Civil Code* section 1714, subsection (d)(1) was added by the Legislature since then. The new exception states that social host immunity does not prevent a lawsuit

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against a parent or other adult who knowingly furnishes alcohol at his or her residence to a person under 21.] The appellate court noted the plaintiffs in the instant case did not allege defendants knowingly furnished alcohol to their daughter, but that their conduct fell outside the immunity statute because the host parents had a special relationship with the decedent. The appellate court affirmed the trial court's grant of summary judgment, stating: "[Defendants] had a special relationship with [decedent] because she was an invited guest in their home, but that special relationship, by itself, does not negate the specific statutory host immunity applicable to these facts. As to [the 16-year-old, the [plaintiffs] do not cite authority imposing a special relationship on a minor who invites another minor to stay the night." (*Allen v. Liberman* (Cal. App. Third Dist.; June 18, 2014) 227 Cal. App.4th 46, [173 Cal.Rptr.3d 463].)

Another Arbitration Provision Found Unconscionable.

Defendants brought a petition to compel arbitration based on the following provision in their written agreement with plaintiffs: "If a dispute arises between Home Defender Center and Client regarding Home Defender Center's actions under this agreement and Client files suit in any court other than small claims court, Home Defender Center will have the right to stay that suit by timely electing to arbitrate the dispute under the *Business and Professions Code*, in which event Client must submit the matter to such arbitration. The parties agree to bring any such action or proceeding in a state or federal court of competent jurisdiction in Orange County, California, and that jurisdiction and venue are proper in Orange County." The trial court granted defendant's motion to compel arbitration. On appeal, the court began its opinion by stating: "In this appeal we are presented with the recurring issue of the reach of the United States Supreme Court's decision in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___, [131 S.Ct. 1740, 179 L.Ed.2d 742], (*Concepcion*) as it impacts unconscionability as a state law defense to arbitration provisions," and concluded "the arbitration provision here was unconscionable principally because it only applied to plaintiffs." (*Sabia v. Orange County Metro*

Realty, Inc. (Cal. App. Second Dist., Div. 8; June 18, 2014) 227 Cal.App.4th 11, [173 Cal.Rptr.3d 485].)

Lawyer Personally Responsible For Law Corporation's Debt.

A law corporation obtained a business line of credit from a bank in 1997. The law corporation defaulted on the loan in 2008. The bank brought an action against the law corporation and obtained a judgment against the law corporation. The bank later asked the trial court to add the lawyer as a judgment debtor, arguing the lawyer had drained the assets of the law corporation before dissolving it in June 2009, although continuing to practice as a trial lawyer. A declaration in the bank's motion to add the lawyer as a judgment debtor stated that the lawyer and his wife could not explain 200 checks identified as "loan repayments" from the law corporation to themselves. The trial court found there was substantial evidence of the lawyer's liability as an alter ego of the law corporation, and exercised its jurisdiction under *Code of Civil Procedure* section 187, to add the lawyer as a party to the judgment. In affirming, the appellate court stated: "The corporation was a mere shell for [the lawyer's] affairs. Corporate formalities were completely lacking. [The lawyer] did not produce corporate minutes . . ." (*Wells Fargo Bank National Association v. Steven J. Weinberg* (Cal. App. Fourth Dist., Div. 2; June 18, 2014) 227 Cal.App.4th 1, [173 Cal.Rptr.3d 113])

Jury Awarded Lawyer \$5,000/Hour For Fees.

An attorney, who represented a client in two divorce cases and a related *Marvin* action [*Marvin v. Marvin* (1976) 18 Cal.3d 660, [557 P.2d 106, 134 Cal.Rptr. 815]] without a statutorily required written hourly or contingency fee agreement, sued his client for the reasonable value of the services he rendered in the three cases. The jury, using a multiplier of five to increase the attorney's hourly rate to \$5,000 per hour, awarded the attorney \$7.8 million in attorney fees. That amount greatly exceeded the amount that would have been due under an alleged oral hourly rate agreement and the amount to which the attorney would have been entitled under a contingency fee agreement the parties discussed towards the end of the representa-

tion, but to which the parties did not agree. The appellate court reversed, stating: "We hold that under the circumstances of this case, there was no legal or equitable justification for applying a multiplier to the lodestar amount of attorney fees found by the jury. Such multipliers generally are appropriate when, from the outset of an action, an attorney voluntarily assumes the contingent risk of nonpayment for his services—a risk not present here. Therefore, the trial court erred by instructing the jury that it could apply a multiplier to the lodestar amount. In addition, the jury award was excessive and inequitable. Accordingly, we reverse the judgment and remand the matter to the trial court with instructions to enter a new judgment on the special verdict form awarding the attorney a \$1.8 million lodestar amount, minus certain deductions made in the original judgment, based on the jury findings of \$1,000 per hour as the reasonable hourly rate and 1,800 hours as the reasonable number of hours expended on the two divorce cases and the *Marvin* action." (*Chodos v. Borman* (Cal. App. Second Dist., Div. 5; June 18, 2014) (As modified, July 9, 2014) 227 Cal.App.4th 76, [173 Cal.Rptr.3d 266].)

Judgment For Fraud Reversed...Lack Of Reliance.

A trustee brought an action against various persons and investment companies when the trust's fund lost significant value in 2008. A jury awarded \$4,640,380. In a lengthy opinion, the appellate court affirmed the judgment as to a breach of fiduciary duty against those defendants who are investment advisors, but reversed on the actual and constructive fraudulent transfer causes of action as well as for breach of fiduciary duty and professional negligence against some of the defendants "because there is no substantial evidence to show that they were investment advisors within the meaning of *Corporations Code* section 25009." The court also reversed to the extent the judgment was against any of the defendants for fraud by intentional misrepresentation, concealment or negligent misrepresentation, stating that even if the defendants "had made any material misrepresentation or omissions, and even if the initial trustee of the trusts had relied thereon, any such reliance would have been

unreasonable.” (*Hasso v. Hapke* (Cal. App. Fourth Dist., Div. 3; June 19, 2014) (As modified, July 15, 2014) 227 Cal.App.4th 107, [173 Cal.Rptr.3d 356].)

Not A Matter Of Trying To Shoot The Messenger.

Plaintiff suffered complete blindness after taking Lamotrigine [Lamictal]. She and her husband brought an action against the doctor who prescribed the drug, the drug’s manufacturer and the drug store where she purchased it. She also sued the company which produced the drug information pamphlet, known as a monograph, which gave a consumer-language summary of information from the official FDA physician package insert. Monographs are not regulated or reviewed by the FDA, but are required under public law as approved by the Secretary of the U.S. Department of Health and Human Services [Pub.L. No. 104-180 (Aug. 6, 1996) 110 Stat. 1593.]). In this case, it was the drug store, Safeway, that decided the content of the monograph when it requested the company that produces monographs, to re-program its software so it could distribute a shorter version. The trial court denied defendant pamphlet producer’s motion to strike brought under the anti-SLAPP statute set forth in *Code of Civil Procedure* section 425.16. The appellate court affirmed, concluding plaintiff presented evidence the pamphlet producer “intentionally modified its software to allow Safeway to distribute abbreviated drug monographs that automatically omitted warnings of serious risks,” and that “this is not a case in which a defendant merely distributed information from a third party author or publisher.” (*Hardin v. PDX, Inc.* (Cal. App. First Dist., Div. 3; June 19, 2014) (As modified July 21, 2014) 227 Cal. App.4th 159, [173 Cal.Rptr.3d 397].)

No Living-In-Car Ordinance Held Unconstitutional.

Plaintiffs are four homeless persons who contend a city ordinance is unconstitutional. In 1983, the City of Los Angeles enacted an ordinance, *Municipal Code* section 85.02: “No person shall use a vehicle parked or standing upon any City street, or upon any parking lot owned by the City of Los Angeles and under the control of the City of Los Angeles or under control of the Los Angeles Department of Beaches and Harbors, as living quarters either overnight, day-by-day, or otherwise.”

A federal district court granted defendants summary judgment as to all claims. In reversing and finding the law violates the Due Process Clause of the Fourteenth Amendment, the Ninth Circuit stated: “For many homeless persons, their automobile may be their last major possession—the means by which they can look for work and seek social services. The City of Los Angeles has many options at its disposal to alleviate the plight and suffering of its homeless citizens. Selectively preventing the homeless and the poor from using their vehicles for activities many other citizens also conduct in their cars should not be one of those options.” (*Desertrain v. City of Los Angeles* (Ninth Circuit; June 19, 2014) 754 F.3d 1147.)

Court Erred In Granting Summary Adjudication On Liability Alone.

After several years, one party to a contract decided it became economically infeasible to continue supplying its product at the contract price. When negotiations to resolve the issue failed, the other party filed suit and then moved for summary adjudication on the issue of liability for breach of contract, but not on the issue of damages. The trial court granted with motion for summary adjudication. The appellate court granted extraordinary relief, stating that “summary adjudication cannot be granted in favor of a plaintiff on liability alone.” (*Paramount Petroleum Corporation v. Sup. Ct. (Building Materials Corporation of America)* (Cal. App. Second Dist., Div. 3; June 20, 2014) 227 Cal.App.4th 226, [173 Cal.Rptr.3d 518].)

If Class Proceedings Are Waived In An Arbitration Agreement, Arguments Under Public Policy Or Unconscionability Will Not Prevail.

AT&T Mobility LLC v. Concepcion (2011) 563 U.S. ___, [131 S.Ct. 1740, 179 L.Ed.2d 742], and noting that the United States Supreme Court made it clear that states cannot require a procedure that interferes with fundamental attributes of arbitration, the California Supreme Court addressed whether a state’s refusal to enforce a waiver of class proceedings on grounds of public policy or unconscionability is preempted by the Federal Arbitration Act. The court ruled: “We conclude that it is and that our holding to the contrary in *Gentry v. Superi-*

or Court (2007) 42 Cal.4th 443, [165 P.3d 556, 64 Cal.Rptr.3d 773], (*Gentry*) has been abrogated by recent United States Supreme Court precedent. We further reject the arguments that the class action waiver at issue here is unlawful under the National Labor Relations Act and that the employer in this case waived its right to arbitrate by withdrawing its motion to compel arbitration after *Gentry*.”

The employee, however, also sought to bring a class action under the Private Attorneys General Act [*Labor Code* section 2698; PAGA], which authorizes an action for civil penalties against the employer, with most of the proceeds going to the state. In that regard, the Supreme Court held: “[W]e conclude that an arbitration agreement requiring an employee as a condition of employment to give up the right to bring representative PAGA actions in any forum is contrary to public policy. In addition, we conclude that the FAA’s goal of promoting arbitration as a means of private dispute resolution does not preclude our Legislature from deputizing employees to prosecute Labor Code violations on the state’s behalf. Therefore, the FAA does not preempt a state law that prohibits waiver of PAGA representative actions in an employment contract.” (*Iskanian v. CLS Transportation Los Angeles, LLC* (Cal. Sup. Ct.; June 23, 2014) 59 Cal.4th 348, [173 Cal.Rptr.3d 289].)

Changing The Rules In The Middle Of The Game.

After the U.S. Supreme Court issued its opinion in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___, [131 S.Ct. 1740, 179 L.Ed.2d 742], Nordstrom made revisions to its employee arbitration policy contained in its employee handbook. These changes precluded employees from bringing most class action lawsuits. Weeks later, plaintiff filed a class action against Nordstrom, alleging violations of various state and federal laws. Nordstrom sought to compel plaintiff to submit to arbitration on her individual claims, and the federal district court denied the motion, holding that plaintiff and Nordstrom had not entered into a valid arbitration agreement with respect to the recent revision. The Ninth Circuit reversed, finding plaintiff and Nordstrom had entered an agreement that employment disputes would be resolved through arbitration, and that Nordstrom

“was permitted to unilaterally change the terms of the [plaintiff’s] employment, including those terms included in its employee handbook.” (*Davis v. Nordstrom, Inc.* (Ninth Cir.; June 23, 2014) 755 F.3d 1089.)

Following The Rules Set At The Beginning Of The Game.

When Bloomingdales hired plaintiff, she received a set of documents including advisement that its policy was to resolve disputes through arbitration unless she returned an enclosed form within 30 days electing, as the form put it, “NOT to be covered by the benefits of arbitration.” Plaintiff thereafter filed a class action against Bloomingdales for unpaid overtime wages. The case was removed to federal court, and the district court dismissed it. The Ninth Circuit affirmed, stating plaintiff had the right to opt out of the arbitration agreement, and had she done so she would be free to pursue the class action, but that she “freely elected to arbitrate employment-related disputes on an individual basis.” (*Johnmohammadi v. Bloomingdales* (Ninth Circuit June 23, 2014) 755 F.3d 1072.)

No Common Law Duty For Businesses To Have Defibrillators Available.

A woman suffered a cardiac arrest while shopping at Target. Paramedics took several minutes to arrive and then maneuver through the store, and were unable to revive the woman. The woman’s family filed an action in state court, and Target removed it to federal court. The suit contends that Target breached the duty of care that it owed to business customers by failing to have on hand within its store an automated external defibrillator [AED]. After the federal trial court dismissed the action for failing to state a cause of action, the Ninth Circuit decided that California precedents do not provide sufficient guidance and asked the California Supreme Court to address the issue. The California Supreme Court stated: “[W]e conclude that, under California law, Target’s common law duty of care to its customers does not include a duty to acquire and make available an AED for use in a medical emergency.” (*Verdugo v. Target Corporation* (Cal. Sup. Ct.; June 23, 2014) 59 Cal.4th 312, [327 P.3d 774, 173 Cal.Rptr.3d 662].)

Passage Of Time Not Enough To Demonstrate Constructive Notice Of A Dangerous Condition Of Public Property.

After a man tripped and fell on the protruding base of a post on public property, he filed an action against a city. The trial court granted summary judgment in favor of the city after finding the city lacked constructive notice of a dangerous condition. On appeal, plaintiff contended that based solely on the length of time the condition was present, the city had constructive notice. The appellate court affirmed, noting that plaintiff “failed to present any evidence that the condition was obvious such that the City, in the exercise of due care, should have become aware of it, his claim must fail as a matter of law, notwithstanding his evidence that the condition was present for over one year before his accident.” (*Government Code* section 835.2, subdivision (b).) (*Heskel v. City of San Diego* (Cal. App. Fourth Dist., Div. 1; June 23, 2014) 227 Cal.App.4th 313, [173 Cal.Rptr.3d 768].)

Too Late To Sue For Patent Defects.

In 1993, the Los Angeles County Metropolitan Transportation Authority (MTA) completed the rail station at 4th Street and Hill Street in Los Angeles. In 2011, plaintiff fell on a stairwell at the station. Alleging that the stairwell was “too small” and that its banister was “too low,” plaintiff sued the MTA. The MTA cross-complained against, among others, petitioner, the company which provided design and/or construction services at the station. Petitioner demurred based on *Code of Civil Procedure* section 337.1, the four-year limitations period for patent defects. The trial court overruled the demurrer. The appellate court granted extraordinary relief, stating: “Because we conclude that the defects alleged were patent, we grant [petitioner’s] petition for writ of mandate and direct the trial court to sustain the demurrer without leave to amend.” (*Delon Hampton & Associates v. Sup. Ct. (Los Angeles County Metropolitan Transportation Authority)* (Cal. App. Second Dist., Div. 3; June 23, 2014) 227 Cal.App.4th 250, [173 Cal.Rptr.3d 407].)

Lawyer’s Practice Got Too Big To Control.

The first sentence of the State Bar Court opinion is: “This case illustrates ethical problems that arise when an attorney fails to supervise nonlawyers in a high volume law practice.” The lawyer’s loan modification practice grew quite large and he lost control of what was happening at one of his offices. When he discovered the situation, he attempted to correct the irregularities and eventually contacted the local district attorney and the State Bar. The State Bar Court recommended that the lawyer “be suspended for two years and until he pays restitution and complies with standard [Rules of Procedure of the State Bar, title IV, Standards for Attorney Sanctions for Professional Misconduct] 1.2(c)(1).” (*In the Matter of Jack Chien-Long Huang* (State Bar Ct.; January 16, 2014) (Bar No. 242193).)

Bullying At School.

An elementary school boy who is not a native English speaker, and has been diagnosed with a number of emotional disabilities including bipolar disorder, depression, attention deficit disorder and posttraumatic stress disorder, allegedly was forcibly restrained by other students, beaten, kicked, and forced to endure derogatory comments, epithets and ethnic slurs. The Legislature has imposed on public schools in California an affirmative duty to protect public school students from discrimination and harassment engendered by race, gender, sexual orientation or disability. (*See, Gov. Code*, § 11135; *Ed. Code* §§ 201, 220, 32261, 32280, 32281 & 32282.) *Education Code* section 32282, requires that public schools develop and implement comprehensive school safety plans which include a discrimination and harassment policy. The boy’s parents brought an action against the school district for failing to comply with the law with regard to discrimination and harassment. The court sustained the demurrer to the boy’s father’s prayer for relief, ruling he had no standing since the boy was, by then, attending a different school. The appellate court reversed, stating: “As a citizen and taxpayer [the father] has standing to seek enforcement of laws in which there is an identified public as well as private interest.” (*Hector F. v. El Centro Elementary School District* (Cal. App. Fourth Dist., Div. 1; June 24, 2014) 227 Cal.App.4th 331, [173 Cal.Rptr.3d 413].)

Plaintiff Allowed 128.7's Safe Harbor Period To Come And Go, And The Court Ordered Her And Her Lawyer To Pay \$60,000 In Defense Attorney Fees.

Plaintiff purchased a home from defendants. Two years later, plaintiff brought an action against defendants and their real estate agent to recover damages for their failure to disclose defective subfloors in the home. The real estate agent moved for terminating and monetary sanctions against plaintiff and her counsel pursuant to *Code of Civil Procedure* section 128.7, arguing the undisputed evidence showed the real estate agent had fulfilled his statutory and common law disclosure duties and plaintiff had actual notice of facts disclosing prior problems with subfloors. Plaintiff did not dismiss the action during the safe harbor period, but amended her complaint to add more claims. The court found the real estate agent met his burden, dismissed plaintiff's claims against him and ordered plaintiff and her attorney to pay \$60,000 to the real estate agent for his attorney fees in defending the action. On appeal, the appellate court found the trial court acted within its discretion, and "that no reasonable attorney would have concluded [plaintiff's] statutory and common law claims against the real estate agent were factually and legally supported." (*Peake v. Underwood* (Cal. App. Fourth Dist., Div. 1; June 25, 2014) (As modified July 17, 2014) 227 Cal.App.4th 428, [173 Cal.Rptr.3d 624].)

Exercise Can Be Rewarding.

An off-duty correctional officer was injured while doing jumping jacks at home, and filed a worker's compensation claim. *Labor Code* section 3600(a)(9), forecloses work comp coverage for an injury that arises out of "voluntary participation in any off-duty recreational, social, or athletic activity not constituting part of the employee's work-related duties, except where these activities are a reasonable expectancy of, or are expressly or impliedly required by, the employment." He lost in the worker's compensation arena, but not in the Court of Appeal, which annulled the work comp decision, stating: "We conclude that a county jail correctional sergeant's off-duty injury, sustained when he was performing jumping jacks at home as part of his regular warm-up exercise regi-

men, arose in the course of his employment under section 3600(a)(9)'s exception for coverage, where a departmental order required correctional officers to "maintain themselves in good physical condition so that they can handle the strenuous physical contacts often required of a law enforcement officer," and where the Butte County Sheriff's Department (the Department) required its correctional officers to undergo periodic training exercises, many of which involved physical activity." (*Daniel Young v. Workers' Compensation Appeals Board and County of Butte* (Cal. App. Third Dist.; June 25, 2014) 227 Cal.App.4th 472, [173 Cal.Rptr.3d 643].)

"Running Into Debt Isn't So Bad. It's Running Into Creditors That Hurts." – Unknown

Plaintiff said that over a two-year period, he paid off his Dell computer, which he had financed. Dell's records showed otherwise and, along with 85,000 other Dell financial debts, sold plaintiff's debt to a debt collection company. Plaintiff brought a class action pursuant to 15 U.S.C. § 1692 [Fair Debt Collection Practices Act], alleging the debt collectors made false representations. As to one defendant, plaintiff contends the firm "misleadingly represented that its collection letter was from an attorney when, on [plaintiff's] account of the facts, no attorney had been 'meaningfully involved' in evaluating his case." The federal district court granted summary judgment to the defendants, and the Ninth Circuit, not only reversed, but ordered that judgment should be entered in favor of plaintiff as to one of the defendants. (*Tourgeeman v. Collins Financial Services, Inc.* (Ninth Cir.; June 25, 2014) 755 F.3d 1109.)

Prior To Cell Phones, Our Founders Wrote: "The Right Of The People To Be Secure In Their Persons, Houses, Papers, And Effects, Against Unreasonable Searches And Seizures, Shall Not Be Violated." – Fourth Amendment

A California man was stopped for driving with expired registration. His car was impounded and an inventory search revealed loaded firearms. Incident to arrest, the man was also searched, and police seized his cell phone from his pants pocket. Police accessed information in the "smart phone,"

and found significant evidence of gang involvement. In the man's trial for an earlier shooting, the man moved to suppress all evidence that the police had obtained from his cell phone, which motion was denied by the court. He was later convicted. The United States Supreme Court reversed the judgment of conviction, stating: "Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans 'the privacies of life.' [] The fact that technology now allows an individual to carry such information in his hand does not make it any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to arrest is accordingly simple—get a warrant." (*Riley v. California* (U.S. Sup. Ct.; June 25, 2014) 134 S.Ct. 2473; 189 L.Ed.2d 430].)

After Plaintiff Sued For FEHA Violations, Employer Discovered Plaintiff Used Someone Else's Social Security Number When Hired.

After suffering a back injury at work, plaintiff filed a workers' compensation claim, plaintiff was laid off from his job as a seasonal worker in the swimming pool chemical field. A few months later, the employer called and asked him whether he was recovered and ready to come back to work. Plaintiff said he

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was still seeing a doctor, and the employer responded that plaintiff could not return to work like that. Two months after that, the employer contacted plaintiff to come back to work and bring “a copy of your doctor’s release stating that you have been released to return to full duty.” Plaintiff did not return to work because he had not been released by his doctor, and the employer said it would hold open his job until plaintiff obtained the doctor’s release. The employer never heard from plaintiff again, until plaintiff brought an action for violation of the Fair Employment and Housing Act [FEHA; *Government Code* section 12900] alleging that the employer failed to reasonably accommodate his physical disability and refused to rehire him in retaliation for filing a workers’ compensation claim. Thereafter, the employer, by then a defendant, learned of information suggesting that plaintiff, to gain employment with defendant, had used another man’s Social Security number. The California Supreme Court stated: “The threshold inquiry here is whether the federal Immigration Reform and Control Act of 1986 (8 U.S.C. § 1101 *et seq.*), also known as IRCA, preempts application of the antidiscrimination provisions of California’s FEHA to workers who are unauthorized aliens.” The court concluded the matter was not preempted and that the Court of Appeal erred in applying the doctrine of unclean hands. The grant of summary judgment was reversed, and the matter was remanded to the trial court for further proceedings. (*Salas v. Sierra Chemical Co.* (Cal. Sup. Ct.; June 26, 2014) 59 Cal.4th 407, [327 P.3d 797; 173 Cal.Rptr.3d 689].)

Apartment House Owner Entitled To Credit For Free Rent Given To Resident Manager As Against Manager’s Claim For Minimum Wage. Plaintiff and defendant entered into a written agreement whereby plaintiff would work as a resident manager of an apartment complex and receive free rent, \$100 per month toward utilities, one telephone line and an internet high speed connection. Plaintiff thereafter brought a claim before the Labor Commissioner against defendant for not paying her a minimum wage. Defendant was ordered to pay her a minimum wage, but was en-

titled to a credit for the free rent plaintiff received. In analyzing the situation, the appellate court stated: “The resolution of this issue turns on the interpretation of Industrial Welfare Commission (IWC) wage order No. 5-2001 (*Cal. Code Regs.*, tit. 8, § 11050), commonly known as Wage Order 5.” The court concluded the parties entered into a written agreement which entitled defendant to take a rental credit against plaintiff’s right to receive minimum wage. (*Von Nothdurft v. Steck* (Cal. App. Fifth Dist.; June 26, 2014) 227 Cal.App.4th 524, [173 Cal.Rptr.3d 827].)

Buffer Zone Outside Abortion Clinics Violates First Amendment.

Petitioners are individuals who approach and talk to women outside clinics, attempting to dissuade them from obtaining abortions. In an effort to address clashes between abortion opponents and advocates of abortion rights, Massachusetts passed a law which makes it a crime to knowingly stand on a “public way or sidewalk within 35 feet of an entrance or driveway to any ‘reproductive health care facility,’” where abortions are offered or performed. The Supreme Court of the United States was called upon to decide whether or not the statute violates the First Amendment. The high court concluded it does, stating: “Petitioners wish to converse with their fellow citizens about an important subject on the public streets and sidewalks—sites that have hosted discussions about the issues of the day throughout history. Respondents assert undeniably significant interests in maintaining public safety on those same streets and sidewalks, as well as in preserving access to adjacent healthcare facilities. But here the Commonwealth has pursued those interests by the extreme step of closing a substantial portion of a traditional public forum to all speakers. . . . The Commonwealth may not do that consistent with the First Amendment.” (*McCullen v. Coakley, Attorney General of Massachusetts* (U.S. Sup. Ct.; June 26, 2014) 134 S.Ct. 2518, [189 L.Ed.2d 502].)

Personal Injury Practice Is Quite Complicated Indeed.

A plaintiffs’ law firm filed a personal injury accident in court against a defendant who allegedly caused a vehicle collision. The

defendant driver had \$100,000 in liability coverage. The injured plaintiff’s employer’s workers’ compensation carrier filed a complaint in intervention, contending the benefits it paid exceeded \$100,000, and asserted a right to reimbursement. When the injured plaintiff and the defendant settled their dispute for \$100,000, the defendant’s insurance carrier made the settlement check payable to the injured plaintiff, the plaintiff’s lawyers and the workers’ comp carrier. Plaintiff’s lawyer and the lawyer for the workers’ comp carrier signed a written stipulation stating “that the \$100,000.00 settlement money . . . will be deposited into an interest bearing account” and that “[signatures of both parties will be required to withdraw any money.” The settlement check was duly endorsed and deposited in the law firm’s client trust account. Counsel for the workers’ comp carrier filed a motion “for apportionment of settlement proceeds,” asserting a right to the entire \$100,000 and never mentioning employer negligence. Later, counsel for the workers’ comp carrier withdrew the motion and filed a notice of lien “against any settlement of [sic] judgment in this action,” filed a request for dismissal of the complaint in intervention, but never notified the injured plaintiff’s attorney of those actions. About three weeks later, the injured plaintiff’s lawyers dismissed the complaint. Months later, when the plaintiff’s lawyers became aware the complaint in intervention had been dismissed, they sought release of the settlement check, arguing the workers’ comp carrier had forfeited any right to recover. The trial court ruled: “This case has been dismissed in its entirety. This Court has no further jurisdiction.” The workers’ comp carrier thereafter filed the present complaint against the injured plaintiff’s lawyers for breach of contract, fraudulent inducement, conversion and other causes of action “by disbursing the settlement proceeds without the signature and/or consent of [the workers’ comp carrier] and “falsely promising not to distribute the funds.” The injured plaintiff’s lawyers, by now the defendants in the present action, were unsuccessful in the trial court with a motion strike pursuant to *Code of Civil Procedure* section 425.16 [the anti-SLAPP statute], and went to the appellate court where they were also unsuccessful: “Because the withdrawal of funds underlying

ing the causes of action at issue was neither communicative nor related to an issue of public interest, the trial court properly denied a motion to dismiss those causes of action.” The appellate court did remark, however, that “Nothing in our opinion should be understood to suggest that these causes of action are meritorious.” So, the saga continues. (*Old Republic Construction Program Group v. The Boccardo Law Firm, Inc.* (Cal. App. Sixth Dist.; June 27, 2014) 227 Cal.App.4th 554, [174 Cal.Rptr.3d 91].)

Insured May Proceed With Bad Faith Action Against His Own Insurer.

Plaintiff was injured by an uninsured motorist, and made a claim under his \$250,000 uninsured motorist coverage. His insurer demanded arbitration. After an arbitrator awarded plaintiff \$164,120.91, plaintiff filed a complaint against his insurance company for breach of the implied covenant of good faith and fair dealing by forcing him to arbitrate his claim without fairly investigating, evaluating and attempting to resolve it. The trial court sustained the insurer’s demurrer. The appellate court reversed, stating: “We conclude that the complaint adequately stated a claim for bad faith when it alleged that the insurer, presented with evidence of a valid claim, failed to investigate or evaluate the claim, insisting instead that its insured proceed to arbitration.” (*Maslo v. Ameriprise Auto & Home Insurance* (Cal. App. Second Dist., Div. 4; June 27, 2014) (As Mod. July, 22, 2014) 227 Cal.App.4th 626, [173 Cal.Rptr.3d 854].)

Substantial Factor, Not But-For Test, Applies In Suit Against Drug Company.

A former drug salesman filed a *qui tam* action [*qui tam* is short for the Latin phrase *qui tam pro domino rege quam pro se ipso in hac parte sequitur* which means “who pursues this action on our Lord the King’s behalf as well as his own.”] against his former employer, a drug company. The California Insurance Commissioner intervened. The suit alleges the drug company engaged in a course of illegal and fraudulent conduct aimed at doctors, health care providers, pharmacists and insurance companies who were recipients of lavish gifts such as tickets to sporting events and concerts, free rounds of golf, resort vacations, meals, gifts and other

incentives, in order to induce physicians to prescribe its drugs and to reward them for doing so. The action was brought under *Insurance Code* section 1871.7, a portion of the Insurance Fraud Prevention Act [IFPA]. The parties submitted a stipulated motion for summary adjudication pursuant to *Code of Civil Procedure* section 437c, which permits summary adjudication of legal issues that the parties stipulate and the trial court agrees will reduce the time to be consumed in trial or will significantly increase the likelihood of settlement. After the trial court ruled in a way that benefited the drug company’s case, the Insurance Commissioner applied for a writ of mandate, contending the trial court was incorrect in its analysis of the proof required under *Insurance Code* section 1871.7. The appellate court granted the writ, stating: “We conclude that for the assessment of monetary penalties (but not the imposition of other available remedies), *Insurance Code* section 1871.7 requires proof of resulting claims that are in some manner deceitful, though not necessarily containing express misstatements of fact; and that causation may be established under the standard substantial-factor test, not the but-for test.” (*The State of California ex rel. Michael Wilson v. Sup. Ct. (Bristol-Myers Squibb Co.)* (Cal. App. Second Dist., Div. 4; June 27, 2014) (As Mod. July 25, 2014) 227 Cal.App.4th 579, [174 Cal.Rptr.3d 317].)

Under The Religious Freedom Restoration Act, Closely Held Corporations Are Excused From Obamacare’s Contraceptive Mandate.

The United States Supreme Court was called upon to decide whether the Religious Freedom Restoration Act of 1993 [RFRA] permits the United States Department of Health and Human Services [HHS] to demand that closely held corporations provide health insurance coverage by methods of contraception that violate sincerely held religious beliefs of the companies’ owners. One of the companies is owned by a couple who are devout members of the Mennonite Church, which opposes abortion and believes that “the fetus in its earliest stages . . . shares humanity with those who conceived it.” That couple believes they are required to run their business “in accordance with their religious beliefs and moral principles.” Another couple

are Christians, and their business statement of purpose commits them to “honoring the Lord in all they do by operating the company in a manner consistent with Biblical principles.” They sued HHS and other federal officials under the RFRA and the Free Exercise Clause of the First Amendment, seeking to enjoin application of the Affordable Care Act’s [ACA or “Obamacare”] contraceptive mandate insofar as it requires them to provide health insurance coverage for four FDA-approved contraceptives that may operate after the fertilization of an egg, including the “morning after” pill and two types of intrauterine devices. The high Court ruled: “The contraceptive mandate, as applied to closely held corporations, violates RFRA. Our decision on that statutory question makes it unnecessary to reach the First Amendment claim.” (*Burwell v. Hobby Lobby Stores, Inc.* (U.S. Sup. Ct.; June 30, 2014) 134 S.Ct. 2751, [189 L.Ed.2d 675].)

Mechanic’s Lien Eliminated After Deed In Lieu Of Foreclosure.

Property was subject to a first deed of trust and a mechanic’s lien. The property owner defaulted on the loan secured by the trust deed. Faced with foreclosure on that senior debt, the property owner gave the trust deed beneficiary title to the property by means of a grant deed in lieu of foreclosure. The trust deed beneficiary, by then the grantee, foreclosed on the property. The holder of the mechanic’s lien filed suit to foreclose its lien. The superior court ordered foreclosure on the mechanic’s lien. The appellate court reversed, stating: “Under well-established California law, the senior beneficiary’s lien and title ordinarily do not merge when a deed in lieu of foreclosure is given if there are junior lienholders of record. The foreclosure after acceptance of the deed was therefore valid

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and eliminated all junior liens, including plaintiff's mechanic's lien." (*Decon Group, Inc. v. Prudential Mortgage Capital Company, LLC* (Cal. App. Second Dist., Div. 1; June 30, 2014) 227 Cal.App.4th 665, [174 Cal.Rptr.3d 205].)

Summary Judgment Reversed In Sex Discrimination [Against Men] Case. In 2006, the San Francisco Sheriff's Department implemented a new policy prohibiting male deputies from supervising female inmates in the housing units of the jail operated by the County. In 2007, 35 deputies filed suit alleging the policy constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964. The federal trial judge granted summary judgment in favor of the County. The Ninth Circuit reversed, stating: "The fact that the Policy seeks to advance such important goals as inmate safety is not, by itself, sufficient to permit discrimination on the basis of sex. When moving for summary judgment, the County bears the heavy burden of showing that there are no genuine issues of material fact as to whether excluding male deputies because of their sex is a legitimate substitute for excluding them because they are actually unfit to serve in the female housing pods." (*Ambat v. City and County of San Francisco* (Ninth Cir. July 2, 2014) 757 F.3d 1017.)

Good Faith Error Does Not Disqualify For Unemployment Benefits. An employee refused to sign a written disciplinary notice because he disputed the factual allegations in it and because he thought he was entitled to consult with his union representative first. The only question before the California Supreme Court was "whether the single act of disobedience constituted misconduct within the meaning of California's *Unemployment Insurance Code*," and, if so, the employee was disqualified from receiving unemployment benefits. The court held it was not misconduct, but "at most, a good faith error in judgment that does not disqualify him from unemployment benefits." (*Paratransit, Inc. v. Unemployment Insurance Appeals Board* (Cal. Sup. Ct.; July 3, 2014) 59 Cal.4th 551, [327 P.3d 840, 173 Cal.Rptr.3d 739].)

Duty Of Care Extends To Architects. A homeowners association brought an action for construction defects which made the homes unsafe and uninhabitable. Two of the defendants are architectural firms which allegedly designed the homes in a negligent manner but did not make the final decisions regarding how the homes would be built. When the case reached the California Supreme Court on the issue of duty, the court stated: "Building on substantial case law and the common law principles on which it is based, we hold that an architect owes a duty of care to future homeowners in the design of a residential building where, as here, the architect is a *principal architect* on the project — that is, the architect, in providing professional design services, is not subordinate to other design professionals. The duty of care extends to such architects even when they do not actually build the project or exercise ultimate control over construction." (*Beacon Residential Community Association v. Skidmore Owings & Merrill LLP* (Cal. Sup. Ct.; July 3, 2014) 59 Cal.4th 568, [327 P.3d 850, 173 Cal.Rptr.3d 752].)

Defendants Took Drunk Friend To The Edge Of A Cliff, And Then Didn't Call For Help When He Fell. Plaintiff was severely injured from a fall from a cliff above the Sacramento River in Redding. Although he cannot recall how or why he fell, he sued his two companions, asserting causes of action for assault and battery, negligence, willful misconduct, and intentional infliction of emotional distress. He claims that defendants put him in peril by bringing him to the edge of a cliff when he was highly intoxicated, leading to his fall, and that they aggravated his injuries by waiting several hours to inform the authorities of the fall. The trial court granted summary judgment in favor of a defendant named Sarah. The appellate court reversed in part, stating that plaintiff "established triable issues of material fact as to the negligence and willful misconduct causes of action, that on the facts tendered a jury reasonably could infer that Sarah had acted to put an inebriated [plaintiff] in peril at the edge of a cliff. We shall reverse the summary judgment entered in favor of Sarah but affirm the summary adjudication of the assault and battery and

intentional infliction of emotional distress causes of action." (*Carlsen v. Koivumaki* (Cal. App. Third Dist.; July 7, 2014) 227 Cal.App.4th 879, [174 Cal.Rptr.3d 339].)

Employers May Not Average Commission Payments Over Certain Pay Periods. Plaintiff is a commissioned salesperson who received biweekly paychecks, which included hourly wages in every pay period and commission wages approximated every other pay period. After plaintiff's wage and hour action against her employer was removed to federal court and made it to the appeal stage, the Ninth Circuit requested the California Supreme Court to answer a question about averaging an employee's commission payments over certain pay periods when it is equitable and reasonable for the employer to do so. The California Supreme Court said no, it was not consistent with California's compensation requirements. (*Peabody v. Time Warner Cable, Inc.* (Cal. Sup. Ct.; July 14, 2014) 59 Cal.4th 662, [328 P.3d 1028, 174 Cal.Rptr.3d 287].)

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