



Litigation Update

Litigation Section News

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Legal Malpractice Statute Of Limitations. Plaintiff hired a lawyer to represent her in litigation. After settlement, plaintiff sought a refund of unearned attorney fees she had advanced as the lawyer had written her a letter stating she had a credit balance of \$46,321.85 and the invoice so reflected. When the refund was not forthcoming, she hired another lawyer to try to get the refund. More than a year later, the second lawyer filed an action against the first lawyer for the refund. Under the legal malpractice statute of limitations found in *California Code of Civil Procedure* section 340.6, the trial court sustained a demurrer and dismissed the action. In reversing, the appellate court stated: “But surely it cannot be the case that every conceivable act an attorney may take that affects his or her client is one arising in the performance of legal services. For example, if a client leaves her purse unattended in the attorney’s office and the attorney takes money from it, would we say that act arose in the performance of legal services? How different is it if, when the legal services have been completed and the attorney’s representation has been terminated, the attorney keeps the unearned fees belonging to the client?” Pointing out the case was at the demurrer stage, the appellate court continued: “Here, the facts alleged in [plaintiff’s] second amended complaint could be construed as giving rise to a cause of action for the theft or conversion of an identifiable sum of money belonging to her. This being the case, we cannot say [the pleading] demonstrates clearly and affirmatively on its face that her action is necessarily barred by the section 340.6 statute of limitations.” (*Lee v. Hanley* (Cal. App. Fourth Dist., Div. 3; July 15, 2014) (As mod. Aug. 8, 2014) 227 Cal. App.4th 1295, [174 Cal.Rptr.3d 489].)

Wrong Standard Of Review Applied In Disability Retirement Petition For Writ Of Mandate. In his first application for industrial

disability retirement, a police officer said he could not work because of back pain. After his first application was denied, he submitted a second one stating he experienced PTSD [post-traumatic stress disorder], specifically flashbacks and nightmares about his combat experience during the Gulf War, early in his career with the police department. During the process following his second application, he said he now realizes that it is his PTSD, and not his back pain, which prevents him from working. Expressing no doubt about the police officer’s PTSD diagnosis, an administrative law judge [ALJ] concluded he failed to establish he is permanently incapacitated from performing the duties of a police station duty officer, which involves answering the telephone, scheduling meetings, acting as a hearing officer and signing fix-it tickets. After the City adopted the ALJ’s decision, the police officer filed a petition for writ of mandate to set aside the City’s determination. In denying the petition for writ of mandate, the superior court stated the ALJ’s decision was entitled to the “deference and respect due a judicial decision.” In reversing, the appellate court concluded the superior court applied the wrong standard of review, and remanded the matter for reconsideration under the independent judgment standard of review. (*Rodriguez v. City of Santa Cruz* (Cal. App. Sixth Dist.; July 17, 2014) 227 Cal.App.4th 1443, [174 Cal. Rptr.3d 826].)

Injuries Caused By Bicyclist... A Criminal Case. While riding his bicycle, a defendant in a criminal matter collided with a pedestrian, seriously injuring her. The district attorney charged him with recklessly driving a “vehicle” under *Vehicle Code* section 23103. One section of the code, however, defines “vehicle” in a way that excludes bicycles. (*Veh. Code* § 670.) Another section of the code subjects a bicyclist to “all the provisions applicable to the driver of a vehicle.” (*Veh. Code* § 21200, subd. (a).) Given the seeming tension between the two sections,

can a bicyclist be charged with recklessly driving a “vehicle”? The trial judge denied his motion to set aside the information under *Penal Code* section 995. Pursuant to the defendant’s writ for extraordinary relief, the appellate court agreed with the trial court, concluding “yes, a bicyclist can be charged with recklessly driving a vehicle under § 21200.” (*Velasquez v. Sup. Ct. (The People)* (Cal. App. Second Dist., Div. 3; July 17, 2014) 227 Cal.App.4th 1471, [174 Cal.Rptr.3d 541].)

Arbitration Agreement Not Unconscionable. Plaintiff and defendant entered into an employment contract. One of the provisions stated: “All disputes among the parties arising out of or related to this Agreement which have not been settled by mediation shall be resolved by binding arbitration within the State of Washington. . . .” Another provision stated: “This agreement shall be governed by, construed and enforced in accordance with the internal laws of the state of Washington, without giving effect to principles and provisions thereof relating to conflict or choice of laws, and irrespective of the fact that any one of the parties is now or may become a resident of a different state. Venue for any action under this Agreement shall lie in King County, Washington.” The trial court found the contract unconscionable and declined to order the matter into arbitration. The appellate court, noting that mere inconvenience and additional expense was not persuasive, held the agreement, including the forum selection clause was not unconscionable. (*Galen v. Redfin Corporation* (Cal. App. First Dist., Div. 1; July 21, 2014) 227 Cal. App.4th 1525, [174 Cal.Rptr.3d 847].)

No Breach Of Confidentiality Because Plaintiff Does Not Allege Anyone Actually Read Stolen Medical Records. A thief stole a health care provider’s computer containing medical records of about four million patients. The plaintiffs filed an action

under the Confidentiality Act [*Civil Code* section 56.36], seeking to represent, in a class action, all of the patients whose records were stolen, with a potential award of about \$4 billion against the health care provider. The health care provider demurred to the complaint and moved to strike the class allegations, but the trial court overruled the demurrer and denied the motion to strike. On the petition of the health care provider, the appellate court issued an alternative writ of mandate to review the trial court's rulings. The appellate court granted extraordinary relief and issued a writ of mandate ordering the trial court to sustain the demurrer without leave to amend, stating: "[T]he Confidentiality Act does not provide for liability for increasing the risk of a confidentiality breach. It provides for liability for failing to 'preserve[] the confidentiality' of the medical records. (*Civ. Code* § 56.101, subd. (a).) There is no allegation that [the hospital's] actions with respect to the records on the stolen computer did not preserve their confidentiality because there is no allegation that an unauthorized person has viewed the records." (*Sutter Health v. Sup. Ct. (Dorothy Atkins)*) (Cal. App. Third Dist.; July 21, 2014) 227 Cal. App.4th 1546, [174 Cal.Rptr.3d 653].)

Okay To Require Exempt Employees To Dip Into Annual Leave Time When Absent For Portions Of A Day. Employer has a practice of requiring exempt employees to use their annual leave hours when they are absent from work for portions of a day. A 2005 appellate decision [*Conley v. Pacific Gas & Electric* (2005) 131 Cal.App.4th 260, [31 Cal.Rptr.3d 719]], established that California law does not prohibit such a policy, but plaintiff contends both that the *Conley* case was wrongly decided and that the employer here is not permitted to deduct from an exempt employee's [paid with a salary] leave bank when the employee is absent for less than four hours. The trial court granted summary judgment in favor of the employer. In affirming, the appellate court stated: "We conclude that regardless of whether the absence is at least four hours or a shorter duration, a requirement that exempt employees use Annual Leave time for a partial-day absence does not violate California law." (*Rhea v. General Atomics*

(Cal. App. Fourth Dist., Div. 1; July 21, 2014) 227 Cal.App.4th 1560, [174 Cal.Rptr.3d 862].)

Summary Judgment Reversed... Evidence In Opposition More Than Mere Speculation Regarding Causation.

Plaintiff was diagnosed with mesothelioma in 2010. He filed an action alleging he was exposed to asbestos when he worked at a Goodyear plant from 1968 until 1979, and died while the action was pending. The personal injury action was converted to a survival and wrongful death action. Defendant is a manufacturer of insulation. Defendant moved for summary judgment alleging there was no evidence plaintiff was exposed to asbestos for which it was responsible. In support of its motion, defendant attached plaintiff's responses to discovery and submitted a declaration from its person most knowledgeable who said there was no information and there were no documents to suggest it ever performed any work or supplied any materials to be used at Goodyear's plant. Two months after it filed its motion, defendant produced a document showing it had performed insulation work on steam piping at the Goodyear plant in 1974, so plaintiff amended his discovery responses. The court granted summary judgment, dismissing the importance of the document because it did not identify specific dates when and locations within the Goodyear plant the asbestos work occurred. On appeal, defendant argued plaintiff merely showed a speculative possibility it was the outside contractor who performed the work in 1974. In reversing summary judgment, the appellate court said plaintiff's evidence presented more than mere speculation about causation. (*Ganoe v. Metaclad Insulation Corporation*) (Cal. App. Second Dist., Div. 3; July 21, 2014) 227 Cal.App.4th 1577, [174 Cal.Rptr.3d 787].)

Sabre Rattling Does Not A SLAPP Action Make. After an attorney sent letters threatening litigation over a contract dispute, a plaintiff filed a declaratory relief action. The defendant, the one whose lawyer threatened litigation, filed an anti-SLAPP motion pursuant to *California Code of Civil Procedure* section 425.16, which the trial court denied. In affirming the denial of defendant's anti-

SLAPP motion, the appellate court stated the complaint is not based on plaintiff's sabre-rattling demand letters, and that "[i]n deciding whether a lawsuit is a SLAPP action, the trial court must distinguish between speech or petitioning activity that is mere evidence related to liability, and liability that is based on speech or petitioning activity." (*Gotterba v. John Travolta*) (Cal. App. Second Dist., Div. 6; July 22, 2014) 228 Cal.App.4th 35, [175 Cal.Rptr.3d 47].)

Death Knell Doctrine Applied.

The trial court dismissed plaintiff's class claims with prejudice, and granted defendant's motion to compel plaintiff to arbitrate his individual claims. Under the death knell doctrine, the appellate court reversed because "the trial court erred by deciding the issue whether the parties agreed to class arbitration, and that the court should have submitted the issue to the arbitrator." (*Sandquist v. Lebo Automotive, Inc.*) (Cal. App. Second Dist., Div. 7; July 22, 2014) 228 Cal. App.4th 65, [174 Cal.Rptr.3d 672].)

Extraordinary Relief Denied; Named Plaintiff Had No Authority To Speak For Putative Class.

Counsel for the named plaintiff in a class action and the defendant reached a settlement and stipulated to the appointment of a temporary judge for the purpose of ruling on the motions for preliminary and final approval of the settlement. The superior court declined to appoint the temporary judge on the basis that counsel for the named plaintiff had no authority to sign the stipulation on behalf of the absent putative class members. The named plaintiff petitioned the Court of Appeal for extraordinary relief. In denying relief, the appellate court stated: "We conclude that the California Constitution, the California Rules of Court, and public policy concerns all preclude the appointment of a temporary judge for purposes of approving the settlement of a pre-certification class action. When the class has not yet been certified, the putative class representative has no authority to consent to a temporary judge on behalf of the absent putative class members." (*Luckey v. Sup. Ct. (Cotton On USA, Inc.)*) (Cal. App. Second Dist., Div. 3; July 22, 2014) 228 Cal.App.4th 81, [174 Cal.Rptr.3d 906].)

No Causation In Legal Malpractice Action.

A woman, who was born in the USA, began living with a man in 1998. Without the benefit of a marriage license, in 2000, they participated in a traditional Hmong marriage ceremony. They signed numerous documents, filed tax returns indicating they were married and had two children. In 2009, the woman filed a petition for dissolution of marriage. Counsel informed her she had a 50/50 chance of prevailing on the theory she was a putative spouse. Before trial, the man offered her \$605,000 to dismiss her action and resolve all their disputes, and counsel advised her, due to the significant risks involved, she should accept it. She declined to settle, holding out for \$750,000 which the man refused to pay. The family law judge dismissed the action on the ground she was not a putative spouse. The woman then sued her lawyer for legal malpractice. The superior court granted the lawyer's motion for summary judgment. In affirming the grant of summary judgment, the appellate court noted the woman chose to ignore good advice and said: "In sum, appellant has failed to show the existence of a triable issue of material fact as to causation." (*Moua v. Pittullo, Howington, Barker, Abernathy, LLP* (Cal. App. Second Dist., Div. 2; July 22, 2014) 228 Cal.App.4th 107, [174 Cal.Rptr.3d 662].)

The Continuing Chronicles Of Proving Cost Of Medical Treatment.

In a personal injury action, defendants filed a motion in limine to exclude testimony by plaintiffs' nonretained treating physicians on any expert opinions that were not formed at the time of and for purposes of treatment, but instead were formed for purposes of litigation. Defendants argued that Plaintiffs had listed 25 individual, nonretained treating physicians or other health care providers in their expert witness designation and stated in the designation that each would testify on "plaintiff's condition, diagnosis, prognosis and related issues." Defendants argued that this description "does not include opinions on the reasonable value of medical services or the non-medical causation issues relating to the injuries," and that the treating physicians for whom no expert witness declaration was provided should be precluded from testify-

ing on such matters. The trial court granted defendants' motions in limine, ruling that plaintiffs' treating physicians not designated as retained experts could testify only on their medical services provided, their medical diagnoses, and the fees charged for their services. The court ruled that plaintiffs' nonretained treating physicians could not testify on other matters such as whether their fees represented the reasonable value of the services provided. The appellate court reversed the order, stating that unpaid medical bills are not evidence of the reasonable value of the services provided. The appellate court also said that when a demand for exchange of expert witness information under CCP § 2034.210 is made, "to 'expert witness information under *Code of Civil Procedure* section 2034.210, is made, no expert witness declaration is required for a treating physician offering an opinion on the reasonable value of services provided by the treating physician." (*Ochoa v. Dorado* (Cal. App. Second Dist., Div. 3; July 22, 2014) 228 Cal.App.4th 120, [174 Cal.Rptr.3d 889].)

Sanctions Against Lawyer Reversed.

Plaintiff sued the State of California for dangerous condition of public property. Discovery disclosed the State did not own, control or maintain the property, and the State warned the plaintiff's lawyer that it would seek sanctions pursuant to *Code of Civil Procedure* section 1038, if the complaint was not dismissed, which provides for mandatory defense costs where the trial court determines that "a plaintiff, petitioner, cross-complainant, or intervenor" did not bring "the proceeding with reasonable cause and in the good faith belief that there was a justiciable controversy under the facts and law which warranted the filing of the complaint . . ." The trial court ordered plaintiff and her lawyer to pay \$11,457.65 for the State's attorney fees and costs. In reversing the sanctions order against the lawyer, the appellate court noted that *Code of Civil Procedure* section 128.7 provides for sanctions against an attorney, and stated: "Unless and until the Legislature amends section 1038 to authorize an award of 'sanctions' against counsel, defense costs and fees may not be imposed against counsel pursuant thereto." (*Settle v. State of California; James McKiernan, Objector and Appellant* (Cal. App. Sec-

ond Dist., Div. 3; July 23, 2014) 228 Cal.App.4th 215, [174 Cal.Rptr.3d 925].)

Teachers' Names Need Not Be Disclosed Under Public Records Act.

The Los Angeles Unified School District has developed a statistical model designed to measure a teacher's effect on his or her students' performance in the California Standards Tests. This model yields a result—known as an Academic Growth Over Time (AGT) score—which is derived by comparing students' actual scores with the scores the students were predicted to achieve based on a host of sociodemographic and other factors. This writ proceeding raises the question of whether the AGT scores of each teacher, identified by name, must be released under the California Public Records Act (CPRA; *Government Code* section 6250 *et seq.*) In granting extraordinary relief, the appellate court stated: "We hold that the unredacted AGT scores are exempt from disclosure under the catch-all exemption in section 6255 because the public interest served by not disclosing the teachers' names clearly outweighs the public interest served by their disclosure." (*Los Angeles Unified School District v. Sup. Ct. (Los Angeles Times Communications LLC)* (Cal. App. Second Dist., Div. 8; July 23, 2014) 228 Cal.App.4th 222, [175 Cal.Rptr.3d 90].)

Summary Of Documents Supported By Declaration Based On Information And Belief Found To Be Enough To Support The Grant Of Summary Judgment.

Evidence in support of a motion for summary judgment included the declaration of a lawyer representing the moving party in which he avers he has "personal knowledge of the foregoing, except as to those matters stated on information and belief." He indicates in his declaration he reviewed the 80 documents produced by another defendant in discovery and prepared a spreadsheet which tracked the dates of work on the project. The opposing party objected to the lawyer's declaration on grounds of hearsay, lack of personal knowledge, improper opinion evidence and speculation. The trial court overruled the opposing party's objections to the moving party's evidence in its motion for summary

judgment, and then granted the motion for summary judgment.

In affirming, the majority of appellate justices stated: “*Evidence Code* section 1521 expressly permits the admission of secondary evidence to prove the content of a writing except when a ‘genuine dispute exists concerning material terms of the writing.’ Section 1523, subdivision (d), of the *Evidence Code* expressly permits oral testimony of the content of a writing if ‘the writing consists of numerous accounts for other writings that cannot be examined in court without great loss of time, and the evidence sought from them is only the general result of the whole.’” The majority does state: “Secondary evidence, of course, must comply with the rules governing the admissibility of evidence generally, including relevance [citation] and the hearsay rule.”

The dissenting justice pointed out there was no foundation the underlying documents reviewed were either business records or official records, and that *Code of Civil Procedure* section 437c, subdivision (d), requires that supporting and opposing declarations shall be made by any person on personal knowledge, shall set forth admissible evidence and shall show affirmatively that the affiant is competent to testify to the matters stated in the declarations. The dissent also states: “*Evidence Code* section 1523 is a best evidence rule allowing secondary evidence to prove the content of a writing. In this case, the dissenting justice continues, the discovery requests were not for business records, but for any and all documents. The requests did not ask that any custodian of records submit a verification coinciding with the foundational requirements of *Evidence Code* sections 1271 or 1280, but merely a verification under penalty of perjury that the copies provided are adequate and true and complete. Some of the documents produced, 62 pages, were from other companies, not the company responding to the document requests. According to the dissent, the “fact” in dispute was whether or not there was a continuous 30-day cessation of work which would commence the limitations period, so this issue does not appear to be one of form over substance. (*Golden State Boring & Pipe Jacking, Inc. v. Eastern Municipal Water District (Safeco Insurance Company)*) (Cal. App. Fourth Dist., Div. 2;

July 23, 2014) 228 Cal.App.4th 273, [175 Cal.Rptr.3d 116].)

Yelp Cannot Misrepresent Its Filtering Methods.

Yelp operates a website that serves as a free social media website and search engine, available to the public at no charge. Users who register may post reviews about local businesses, and can rate a business using a star rating of one to five stars, with five stars being the highest rating. Yelp constantly battles the problem of unreliable reviews, which generally are reviews written by friends, employees or relatives of the business being reviewed, paid reviews, and negative reviews written by business competitors. As a result, Yelp developed filtering software with the aim of identifying reviews likely to be unreliable. Plaintiff owns a restaurant and for several months purchased advertising on Yelp’s website. Plaintiff sought an order enjoining Yelp from making any statements concerning its filter which were untrue or misleading, filtering user reviews on the Yelp website while falsely advertising that the unfiltered reviews posted were fair, trustworthy, or unbiased. Yelp filed a special motion to strike pursuant to *Code of Civil Procedure* section 425.16, which the trial court granted. On appeal, plaintiff argued that under *Code of Civil Procedure* section 425.17, if an action is prosecuted solely in the public interest, the action is not subject to the provisions of the anti-SLAPP statute, *Code of Civil Procedure* section 425.16. The Court of Appeal reversed, stating: “We conclude that the commercial speech exemption of section 425.17, subdivision (c) applies to Yelp’s statements concerning the accuracy and efficacy of its review filter, and therefore find the trial court erred in granting Yelp’s special motion to strike under section 425.16.” (*Demetriades v. Yelp, Inc.* (Cal. App. Second Dist., Div. 1; July 24, 2014) 228 Cal.App.4th 294, [175 Cal.Rptr.3d 131].)

No Preemption; UCL Action May Go Forward.

Defendants are a trucking company in Long Beach, California and the company’s owner. The People, on behalf of the State of California, filed this action under *Business and Professions Code* section 17200, Unfair Competition Law [UCL] against defendants for misclassifying drivers as independent contractors and for other alleged violations of California’s labor and unemployment insurance laws.

The complaint alleges numerous violations of law, such as failing to pay unemployment insurance taxes or employment training fund taxes, failing to withhold state disability insurance taxes or state income taxes and failing to provide workers’ compensation or provide itemized written wage statements. The People specifically noted that as a result of failing to follow the above statutes, defendants obtained an unfair advantage over their competitors, deprived employees of benefits and protections to which they are entitled under California law, harmed their truck driver employees, harmed the general public, and deprived the state of payments for California state payroll taxes, all in violation of the UCL. The People seek injunctive relief, civil penalties, and restitution. The trial court determined the action is preempted by the Federal Aviation Administration Authorization Act of 1994 [FAAAA; 49 U.S.C. § 14501(c)(1)] because the action is “related to a price route or service.” The California Supreme Court determined there was no preemption as the principles concerned in preemption cases are not involved here and the laws implicated in this action are generally applicable, governing when a worker is an independent contractor and when a worker is an employee. (*People. ex rel. Kamala D. Harris v. Pac Anchor Transportation, Inc.* (Cal. Sup. Ct.; July 28, 2014) 59 Cal.4th 772, [329 P.3d 180, 174 Cal.Rptr.3d 626].)

Mediation Privilege Has Limits.

A wife filed for divorce, but never served the petition. Six years later, the superior court dismissed the petition for lack of prosecution. As it turned out, a lot had happened in 2006. The parties went to mediation and agreed to a stipulated judgment settling all issues concerning marital rights, child custody, child support, spousal support and division of property. No one, however, filed anything in the superior court. Two weeks after the dismissal in 2011, the wife filed a second petition for dissolution, and moved to have the stipulated judgment entered nunc pro tunc. The husband opposed, arguing he thought the couple had only gone through the “first round of negotiations.” The matter went to trial on the enforceability of the “judgment.” *Evidence Code* section 1119, which has come to be known as the mediation privilege, states

that no writing prepared in the course of a mediation is admissible in a civil action. The trial court overruled the husband's 1119 objection, found "there was complete performance," and entered judgment pursuant to the 2006 agreement. In affirming, the appellate court noted the parties intended the agreement to be a settlement, they both signed it and that *Evidence Code* section 1123 provided an exception to section 1119. (*In re Marriage of Joanne R. Daly and David F. Oyster* (Cal. App. Second Dist., Div. 1; July 29, 2014) 228 Cal. App.4th 505, [175 Cal.Rptr.3d 364].)

Hospital's Lien For Treating Injuries Caused By Insured Tortfeasor.

Three patients, covered under a Kaiser Permanente health plan, were treated at an emergency room after being injured in a car accident caused by a third party's negligence. The third party had insurance through California Automobile Association [AAA] and Allstate Insurance Company. Kaiser provided coverage through an agreement it had with the hospital, but neither AAA nor Allstate had a contract with the hospital. The hospital sought to collect from AAA and Allstate its customary billing rates by asserting liens under the Hospital Lien Act [HLA; *Civil Code* section 3045.1], but AAA and Allstate ignored the hospital's liens when they paid settlements to the three Kaiser patients. When it learned of the settlements, the hospital sued AAA and Allstate to recover its HLA liens. The trial court granted the summary judgment motions of AAA and Allstate on the ground the patients' debts had been fully satisfied by their health care plans, reasoning the HLA liens were extinguished for lack of an underlying debt. In the hospital's appeal, the appellate court phrased the issue this way: Does a health care service plan's payment of a previously negotiated rate for emergency room services insulate the tortfeasor's automobile liability insurer from having to pay the customary rate for medical care rendered? The appellate court talks at length about the holding in *Parnell v. Adventist Health System/West* (2005) 35 Cal.4th 595, [109 P.3d 69; 26 Cal.Rptr.3d 569], where the California Supreme Court stated hospitals may not recover their customary rates for emergency room care when they have con-

tractually agreed to accept negotiated rates as payments in full. In the instant case, the contract between the hospital and Kaiser preceded the Parnell holding by ten years, and is silent as to whether the hospital may collect from tortfeasors and their automobile insurers after receiving negotiated rate payments from the patients' health care service plans. In affirming the grant of summary judgment, the appellate court said it was "for lack of contractual reservation of billing rights against third party tortfeasors." (*Dameron Hospital Association v. AAA Northern California* (Cal. App. Third Dist.; September 4, 2014) 229 Cal.App.4th 549, [176 Cal.Rptr.3d 851].)

When One Brings A Technical Motion, One Must Also Meet All Technicalities, Both In The Trial Court And On Appeal.

Plaintiff was exposed to asbestos from the defendants' products or activities when he worked in various construction trades. The trial court granted summary judgment in favor of all defendants. The appellate court affirmed as to all but one defendant, stating the majority of defendants met their initial burdens on summary judgment and the evidence and reasonable inferences would preclude a reasonable trier of fact from finding (without speculating) that plaintiff was exposed to one of their asbestos-containing products. Regarding the remaining defendant, the appellate court found summary judgment was not proper because the evidence, viewed in the light most favorable to plaintiff, demonstrates a triable issue of fact as to whether Loren was exposed to asbestos from its product. The appellate court was quite particular about the moving party's evidence, rejecting much of its argument because it had not objected to plaintiff's evidence either in its summary judgment papers or at the time of the hearing as required by *California Code of Civil Procedure* section 425.16, subdivision (b) (5), and rejecting its lack of causation argument because it did "not present this point [in its appellate brief] under an appropriate heading and [did] not support it with factual analysis" as required by California Rule of Court, rule 8.204(a)(1)(B). (*Collin v. Calportland Company* (Cal. App. Third Dist.; July 30, 2014) 228 Cal.App.4th 582, [176 Cal.Rptr.3d 279].)

General Jurisdiction; Specific Jurisdiction. A non-resident of a California drug manufacturer is presently in a coordinated proceeding involving an alleged defective drug in a California superior court by concession. Identical defect claims have also been brought by non-residents of California in the same proceeding, but the manufacturer moved to quash service regarding the non-residents, claiming lack of persona jurisdiction. The non-resident plaintiffs contend California has jurisdiction, whether it be general [jurisdiction over claims unrelated to the forum state] or specific [based upon the relationship of the defendant and California]. The trial court denied the motion based on its conclusion California has general jurisdiction. Shortly thereafter, the U.S. Supreme Court issued its opinion in *Daimler AG v. Bauman* (2014) 134 S.Ct. 746, [187 L.Ed.2d 624], which limited the application of general jurisdiction under the Fourteenth Amendment. Upon a petition for extraordinary relief by the drug manufacturer, the appellate court concluded California does not have general jurisdiction. Nonetheless, the appellate court, applying the analysis of *International Shoe Co. v. Washington* (1945) 326 U.S. 310, [66 S.Ct. 154; 90 L.Ed. 95], concluded the drug manufacturer has engaged in substantial, continuous economic activity in California, including the sale of more than a billion dollars of the alleged defective drug in California, and that it is consistent with due process to require the drug manufacturer to defend the claims in the coordinated action along with the California resident plaintiffs. (*Bristol-Myers Squibb Company v. Sup. Ct. (Bracy Anderson)* (Cal. App. First Dist., Div. 2; July 30, 2014) 228 Cal.App.4th 605, [175 Cal.Rptr.3d 412].)

Motion In Limine Ruling Reviewed For Abuse Of Discretion.

In 2006, two stores in a center were robbed eight days apart. A jewelry store owner in the same center expressed concern to the center's management about the lack of security. Instead of investing in security, the center's owners and managers requested the local police department to step up security. Seven months after the first two robberies, the jewelry store owner had his 14-year-old daughter at work with him, and shortly after opening the store,

three men entered. They pistol whipped the owner and held a gun to his daughter's head and destroyed counters and stole merchandise. After the jewelry store robbery, the center's owners hired a security service to provide unarmed patrol guards for the center's common areas. The jewelry store owner brought an action for negligence against the center's owners. The trial court made an evidentiary ruling under *Evidence Code* section 1151, in a motion in limine. That section states that evidence of subsequent remedial measures is inadmissible to negligence or culpable conduct in connection with an event. A jury found in the center's favor and the jewelry store owner appealed. Finding no abuse of discretion in the trial court's evidentiary ruling, the appellate court affirmed. (*McIntyre v. The Colonies-Pacific, LLC* (Cal. App. Fourth Dist., Div. 1; July 31, 2014) 228 Cal.App.4th 664, [175 Cal.Rptr.3d 440].)

The Confusing World Of Requests For Admissions. In an appeal following a trial concerning a property line dispute, an appellant contended the trial court abused its discretion in denying costs after the other side failed to admit a request for admission. The request for admission asked the party to admit "the boundary lines between plaintiffs' property and defendants' property are accurately described by the plaintiffs' deed." The following response was given to the request for admission: "OBJECTIONS: Request is not full and complete in and of itself. *Code of Civil Procedure* section 2033.060, subdivision (d). Further, defendants lack the information or knowledge sufficient to allow them to admit or deny the Request in that the Request calls for expert witness testimony and, as such, is untimely expert witness discovery. Based on the foregoing objections, the Request is denied." After trial, the requesting party asked for \$123,196.58 to cover the cost of proving the location of their properties' common boundaries. The trial court denied the motion. The appellate court found no abuse of discretion and affirmed. (*Bloxham v. Saldinger* (Cal. App. Sixth Dist.; August 1, 2014) 228 Cal. App.4th 729, [175 Cal.Rptr.3d 650].) *h*

Previously we reported:

Primary Assumption Of The Risk In Caring For Alzheimer's Patient. A man contracted with a home care agency to provide care for his wife who suffers from Alzheimer's disease. The wife injured the caregiver, and the caregiver brought an action against the husband and wife for negligence and premise liability. The trial court granted summary judgment to the husband and wife, and the appellate court affirmed, stating: "The primary assumption of risk doctrine is a defense as to [the husband], as well as to [the wife]." (*Gregory v. Cott* (Cal. App. Second Dist., Div. 5; January 28, 2013) 213 Cal.App.4th 41, [152 Cal.Rptr.3d 304].)

Recent Ruling On The Same Case By The California Supreme Court:

Agreeing the doctrine of primary assumption of the risk applies, the California Supreme Court stated: "The question in this case is whether patients suffering from Alzheimer's disease are liable for injuries they inflict on health care workers hired to care for them at home. Because agitation and physical aggression are common late-stage symptoms of the disease, injuries to caregivers are not unusual. California and other jurisdictions have established the rule that Alzheimer's patients are not liable for injuries to caregivers in institutional settings. We conclude that the same rule applies to in-home caregivers who, like their institutional counterparts, are employed specifically to assist these disabled persons. It is a settled principle that those hired to manage a hazardous condition may not sue their clients for injuries caused by the very risks they were retained to confront. This conclusion is consistent with the strong public policy against confining the disabled in institutions. If liability were imposed for caregiver injuries in private homes, but not in hospitals or nursing homes, the incentive for families to institutionalize Alzheimer's sufferers would increase. Our holding does not preclude liability in situations where caregivers are not warned of a known risk, where defendants otherwise increase the level of risk beyond that inherent in providing care, or where the cause of injury is unrelated to the symptoms of the disease." (*Gregory v. Cott* (Cal. Sup. Ct.; August 4, 2014) 59 Cal.4th 996, [331 P.3d 179, 176 Cal.Rptr.3d 1].)

Conservator Ordered To Pay Pre-Conservatorship Debt From Conservatee's Estate.

Before the creation of a conservatorship, the now-conservatee committed a tort and a jury issued an award against the now-conservatee. An unpaid balance of \$350,000 for punitive damages remains. Before judgment was entered, a temporary conservatorship was established and later became permanent. The judgment creditor petitioned the probate court to direct the conservator to pay the judgment. The probate court ruled that the conservatee's debt pre-dates the conservatorship "because the debt was incurred at the time the tort occurred" and "all debts and expenses incurred before the conservatorship must be paid by the Conservator regardless of whether that payment would impair the ability to provide the necessities of life to the Conservatee." The probate court ordered the conservator to pay the \$350,000, plus \$137,958 in interest. Citing to *Probate Code* section 2430, subdivision (a)(1), which states that a conservator "shall pay" from the principal and income of the estate "debts incurred by the [] conservatee before creation of the conservatorship, the appellate court affirmed. (*Conservatorship of the Person and Estate of Parker* (Cal. App. Second Dist., Div. 2; August 4, 2014) 228 Cal.App.4th 803, [175 Cal.Rptr.3d 700].)

Previously we reported:

No Jurisdiction In California.

Plaintiffs are 22 residents of Argentina who brought an action in federal court in California against a German manufacturer, claiming the company "collaborated with state security forces during Argentina's 1976-1983 'Dirty War' to kidnap, detain, torture, and kill certain [Mercedes-Benz Argentina] workers." Plaintiffs pled claims under the Alien Tort Statute [28 U.S.C. § 1350] and the Torture Victim Protection Act of 1991 [106 Stat. 73, note following 28 U.S.C. § 1350]. The United States Supreme Court held the company is not amenable to suit in California for injuries allegedly caused by conduct that took place entirely outside the United States. The Court stated: "Even assuming for purposes of this decision, that [Mercedes Benz] USA qualifies as being at home in California, Daimler's affiliations with California are

not sufficient to subject it to the general jurisdiction of that State's courts." (*Daimler AG v. Bauman* (2014) 571 U.S. ___, [134 S.Ct. 746, 187 L.Ed.2d 624].)

Recent ruling by California Court of Appeal on similar issue:

California Does Not Have Jurisdiction Over German Manufacturer. A mother and daughter were driving in a 2004 Jeep Cherokee in California when the vehicle rolled over, causing the roof to collapse. As a result, the mother sustained catastrophic injuries, rendering her a permanent quadriplegic. The daughter also suffered injuries. They filed a complaint for product liability in California state court against designer/manufacturer/distributor DaimlerChrysler Corporation [DCC], a former indirect subsidiary of the German company, Daimler. The trial court granted a motion to quash service of the summons for lack of personal jurisdiction filed by Daimler. The appellate court noted: "Appellants do not argue that Daimler's own contacts with California are sufficient to justify the exercise of general jurisdiction over the German corporation. Nor do they claim that specific jurisdiction over Daimler is appropriate under the facts of the case. Rather, as in *Bauman II*, appellants' sole contention on appeal is that general jurisdiction over Daimler in California is proper based on Daimler's relationship with MBUSA [Mercedes-Benz USA, LLC] and MBUSA's contacts with California." Agreeing with the trial court, the appellate court affirmed, stating: "Finding the United States Supreme Court's recent decision in *Daimler AG v. Bauman* (2014) 571 U.S. ___ [134 S.Ct. 746, 187 L.Ed.2d 624], (*Bauman II*), dispositive on the jurisdictional issue and contrary to the arguments advanced by appellants, we affirm." (*Young v. Daimler AG* (Cal. App. First Dist., Div. 4; August 5, 2014) 228 Cal.App.4th 855. [331 P.3d 179, 175 Cal.Rptr.3d 811].)

Previously we reported:

No Loss Of Consortium Claim Under Labor Code § 4558.

Where an employee is injured in the course and scope of his or her employment, workers' compensation is generally the exclusive remedy of the employee and his or her

dependents against the employer. (*Lab. Code* §§ 3600, subd. (a), 3602.) *Labor Code* section 4558 authorizes an injured worker to bring a civil action for tort damages against his or her employer where the injuries were "proximately caused by the employer's knowing removal of, or knowing failure to install, a point of operation guard on a power press," where the "manufacturer [had] designed, installed, required or otherwise provided by specification for the attachment of the guards and conveyed knowledge of the same to the employer." About whether or not section 4558 permits an injured worker's spouse to bring suit for loss of consortium, the California Supreme Court said "under settled principles of workers' compensation law, the exclusivity rule bars a dependent spouse's claim for loss of consortium. The employer's demurrer to the loss of consortium cause of action below therefore should have been sustained." (*Lefiell Manufacturing Co. v. Sup. Ct. (O'Neil Watrous)* (2012) 55 Cal.4th 275, [282 P.3d 1242, 145 Cal.Rptr.3d 543].)

The same case was again before the Court of Appeal And The Supreme Court.

Writ Of Mandate Issued After Summary Judgment Denied.

This time around, the trial court denied the manufacturer's motion for summary judgment after concluding there was a triable issue of fact as to whether a door that was removed from a machine operated by plaintiff was a point of operation guard. The appellate court granted extraordinary relief and reversed the order of the trial judge by issuing a writ of mandate, concluding the door that was removed from the machine "is not a point of operation guard as a matter of law. The power press exception [*Labor Code* section 4558] applies only to those machines using a die to form material by impact or pressure against the material that impart to the material some version of the die's own shape." (*Lefiell Manufacturing Co. v. Sup. Ct. (O'Neil Watrous)* (Cal. App. Second Dist., Div. 3; August 6, 2014) 228 Cal.App.4th 883, [175 Cal.Rptr.3d 894].)

Petition To Compel Arbitration Denied.

In a wage and hour claim, a plaintiff signed an agreement with her employer. In the 2001 Agreement, the parties agreed to mediate "any dispute arising

out of" employment, except "workers' compensation claims, unemployment insurance[,] and matters governed by the California Labor Commissioner[.]" The arbitration provision provided as follows: "Arbitration. In the event mediation does not resolve the parties' dispute, Employee and [Employer] agree to submit all disputes arising from employment (excepting workers' compensation claims, unemployment insurance[,] and matters governed by the California Labor Commissioner), including[,] but not limited to breach of contract, wrongful termination, violation of public policy, discrimination, and harassment to binding arbitration with the American Arbitration Association ('AAA') under the AAA National Rules for the Resolution of Employment Disputes." The trial court concluded the agreement expressly excluded statutory wage claims from the arbitration obligation. The appellate court agreed. (*Rebolledo v. Tilly's, Inc.* (Cal. App. Fourth Dist., Div. 3; August 6, 2014) 228 Cal. App.4th 900, [175 Cal.Rptr.3d 612].)

Heightened Standard For Pleading Fraud Met By Attaching Loan Documents To Complaint.

Plaintiffs' complaint alleges, among other things, fraud and unfair business practices in the origination of plaintiffs' residential mortgage loans, and negligence in the subsequent servicing of the loans, including negligent review of plaintiffs' applications for loan modification. Plaintiffs contend the trial court erred in sustaining defendants' demurrer when it concluded the complaint fails to allege fraud for which defendants are responsible and in concluding that defendants owed no duty of care to the plaintiffs in the review of their applications for a loan modification. Throughout its opinion, the appellate court discusses the holding in *Boschma v. Home Loan Center, Inc.* (2011) 198 Cal.App.4th 230, [129 Cal.Rptr.3d 874], when it concluded that, although it is not well drafted, plaintiff's operative complaint alleges fraud and that the heightened pleading standard for fraud was satisfied by plaintiff's attaching copies of their notes and truth in lending disclosure statements to their complaint. (*Alvarez v. BAC Home Loans Servicing, L.P.* (Cal. App. First Dist., Div. 3; August 7, 2014) 228 Cal. App.4th 941, [176 Cal.Rptr.3d 304].)

Grandparent's Rights vs. Mother's Right To Parent. A juvenile court judge in dependency court terminated the court's jurisdiction over a minor. At the same time, the court ordered regular visitation with the paternal grandmother. The child's mother contended the visitation order impermissibly infringed on her fundamental parenting rights under the Fourteenth Amendment to the United States Constitution. *Welfare and Institutions Code* section 362.4 states: "[w]hen the juvenile court terminates its jurisdiction over a minor who has been adjudged a dependent child of the juvenile court prior to the minor's attainment of the age of 18 years, and . . . an order has been entered with regard to the custody of that minor, the juvenile court on its own motion, may issue . . . an order determining the custody of, or visitation with, the child." A few courts have interpreted this statute as authorizing a juvenile court to enter an order upon termination of jurisdiction that provides for visitation between a child and a nonparent. In the instant case, the appellate court agreed that section 362.4 gave the juvenile court that authority, and rejected the mother's argument that the juvenile court was required to refer the matter to a family law court for a visitation order. (*In re J.T., Los Angeles Department of Children and Family Services v. Jasmine M.* (Cal. App. Second Dist., Div. 8; August 7, 2014) 228 Cal.App.4th 953, [175 Cal.Rptr.3d 744].)

Attorney Stiffed For Contingent Fees Must Sue The Client, Not The Second Attorney For Breach Of Contract, But May Bring Both Client And Second Lawyer Into A Declaratory Relief Action To Set The Reasonable Value Of Services. Plaintiff was the first lawyer to represent two clients in a personal injury case. Defendant was the second lawyer. Defendant obtained a settlement payment for the clients which he deposited in his client trust fund account. Plaintiff demanded payment of attorney fees from defendant; when he was unsuccessful, he sued defendant on the theory he was owed a portion of the settlement. The trial court sustained defendant's demurrer to the second amended complaint because plaintiff

failed to establish the existence, amount, and enforceability of his attorney fee lien in an independent action against the clients. The appellate court affirmed, stating: "Unlike other liens, 'an attorney's lien is not created by the mere fact that an attorney has performed services in a case.' [] An attorney's lien is created only by an attorney fee contract with an express provision regarding the lien or by implication in a retainer agreement that provides the attorney will be paid for services rendered from the judgment itself. It is well established that '[a]fter the client obtains a judgment, the attorney must bring a separate, independent action against the client to establish the existence of the lien, to determine the amount of the lien, and to enforce it.' The appellate court further stated that an attorney's lien is only enforceable after the attorney adjudicates the value and validity of the lien in a separate action, and that "if successful in a declaratory relief action regarding the reasonable value of his services, Plaintiff's fees will be paid out of the clients' settlement funds." (*Mojtahedi v. Vargas* (Cal. App. Second Dist., Div. 3; August 8, 2014) 228 Cal.App.4th 974, [176 Cal.Rptr.3d 313].)

Motion To Compel Arbitration Denied. In a breach of personal service suit, the trial court denied defendant employer's petition to compel arbitration. The collective bargaining agreement's grievance procedure consists of three steps. Step 1 allows the union or an employee to resolve a grievance by discussion with the supervisor. Step 2 permits resolution of the grievance if the union is dissatisfied with the supervisor's resolution of the matter. Step 2 only permits the union to formally present a grievance to a department manager. Step 3 of the grievance procedure can potentially lead to arbitration. The appellate court affirmed, finding the three-step process does not allow defendant to compel arbitration between it and plaintiff. (*Knutsson v. KTLA, LLC* (Cal. App. Second Dist., Div. 5; August 12, 2014) (As mod. September 4, 2014) 228 Cal.App.4th 1118, [176 Cal.Rptr.3d 376].)

Trial Court Erred In Denying Motion For Class Certification. Plaintiff filed a putative class action against Home Service on behalf of customer service managers who were not reimbursed

for expenses pertaining to the work-related use of their personal cell phones. He alleged causes of action for violation of *Labor Code* section 2802; unfair business practices under *Business and Professions Code* section 17200 *et seq.*; declaratory relief; and statutory penalties under *Labor Code* section 2699, the Private Attorneys-General Act of 2004. The trial court denied the motion to certify the class due to lack of commonality, and because a class action was not a superior method of litigating the claims. The appellate court reversed, stating: "We hold that when employees must use their personal cell phones for work-related calls, *Labor Code* section 2802 requires the employer to reimburse them" and remanding for the superior court to reconsider the motion for class certification. (*Cochran v. Schwan's Home Service, Inc.* (Cal. App. Second Dist., Div. 2; August 12, 2014) 228 Cal.App.4th 1137, [176 Cal.Rptr.3d 407].)

Insurance Company Ordered To Turn Documents Over To Its Own Attorneys. In a wrongful termination action, an insurance company defendant withheld or redacted documents requested on the ground they contain privileged or confidential information. Further, the insurance company insisted parties could not disclose the information, even to their own attorneys in the case. The superior court ordered the document in each party's possession could be disclosed to their respective attorneys, and required the insurance company to provide its responsive documents to its attorneys to ascertain whether the material was privileged and to comply with its discovery obligations. The insurance requested extraordinary relief from the appellate court. The appellate court denied the petition, stating: "We hold that, for the limited purposes ordered by the trial court, the court did not err in permitting the parties (and requiring Chubb) to disclose the documents to their respective attorneys in this case. Based on the record before us, there is no meaningful distinction between an allegation of privilege as to a party's information and an allegation of privilege as to a third party's information." (*Chubb & Son v. Sup. Ct. (Tracy Lemmon)* (Cal. App. First Dist., Div. 5; August 12, 2014) 228 Cal.App.4th 1094, [176 Cal.Rptr.3d 389].)

Summary Judgment Affirmed On Fraud Causes Of Action.

Cross-complainant purchased Blackacre. After close of escrow, the owners of the adjacent property, Whiteacre, claimed easement rights across Blackacre and sued to quiet title. The dispute concerned the use of a paved driveway between two commercial properties which had been openly and notoriously used by Whiteacre for years. The owner of Blackacre cross-complained for concealment/suppression of facts and intentional misrepresentation. The owners of Whiteacre moved for summary judgment on the fraud causes of action in the cross-complaint. In opposition to the motion for summary judgment, the owner of Blackacre submitted evidence that, when he observed and complained about Whiteacre's vehicles crossing Blackacre, one of the owners of Whiteacre responded, "I'll take care of it," and he assumed it had ceased. The trial court granted summary judgment and the owner of Blackacre appealed. The appellate court affirmed the grant of summary judgment, stating: "We conclude there was no error. The concealment/suppression of facts claim fails because of the absence of evidence supporting all of the requisite elements of that claim. Two elements of the claim not present were (1) a duty on the part of [Whiteacre] to disclose that it claimed prescriptive easement rights; and (2) the [owner of Blackacre's] justifiable reliance on the facts as they understood them without such disclosure (i.e., their understanding that there were no adverse claims against the [Blackacre] by the owners of the adjacent property). The intentional misrepresentation claim likewise fails because of the absence of evidence that [the owner of Blackacre] justifiably relied on [Whiteacre's] alleged implicit representation that it did not claim any easement rights over the [Blackacre] property." (*Hoffman v. 162 North Wolfe LLC* (Cal. App. Sixth Dist.; August 13, 2014) 228 Cal.App.4th 1178, [175 Cal.Rptr.3d 820].)

Demurrer Procedures Explained.

In a wrongful termination action, the trial court sustained defendant's demurrer. On appeal, the plaintiff contended the defendant's demurrer, filed 29 days after the second amended complaint [SAC] was filed, was untimely because defendant had only ten days

to file it pursuant to *California Rules of Court*, Rule 3.1320(j). *Code of Civil Procedure* section 471.5, on the other hand states: "If the complaint is amended, a copy of the amendments shall be filed . . . and a copy of the amendments or amended complaint must be served upon the defendants affected thereby. The defendant shall answer the amendments, or the complaint as amended, within 30 days after service thereof, or such other time as the court may direct, and judgment by default may be entered upon failure to answer, as in other cases." With regard to this apparent discrepancy, the appellate court stated: "*California Rules of Court*, rule 3.1320(j) provides a 10-day filing period, while the statute provides a 30-day filing period. The statute only applies when an amended complaint is filed. Therefore, to read the statute and rule in harmony, the rule must be read to apply when an amended complaint is not filed. Thus, the 10-day rule would apply when a plaintiff is granted leave to amend but elects not to amend, and the statute's 30-day period would apply when a plaintiff does amend. . . . In this case, since [plaintiff] did amend by filing the SAC, the statute's 30-day filing period applied. . . . [T]he rule applies when an amended complaint is not filed." Another issue on appeal concerned the sustaining of the demurrer on the breach of contract cause of action in the SAC, after the court had previously overruled another demurrer to the same cause of action. Once again, the plaintiff's argument failed. The appellate court stated: "[B]y filing the SAC, [plaintiff] opened the door to a demurrer to the entire SAC, including the breach of contract cause of action. The SAC superseded the FAC, which permitted a demurrer to the entire SAC to be filed." (*Carlton v. Dr. Pepper Snapple Group, Inc.* (Cal. App. Fourth Dist., Div. 2; August 14, 2014) 228 Cal.App.4th 1200, [175 Cal.Rptr.3d 909].)

You Have A Right To Remain Silent....After You Speak Up.

A criminal defendant who had been drinking and speeding caused a collision which resulted in one child's death and serious injuries to another child. During its case in chief, the prosecution gave much emphasis to the defendant's failure to inquire about the occupants of the other vehicle as evidence that he was driving without due regard for their safety. The California Supreme Court affirmed the defendant's conviction,

noting that "defendant, after his arrest but before he had received his Miranda warnings, needed to make a timely and unambiguous assertion of the privilege in order to benefit from it." In his dissent, J. Liu stated: "As anyone who has ever watched a crime drama on television knows, a suspect who is placed under arrest —has a right to remain silent,|| and —any statement he does make may be used as evidence against him.||" (*Miranda v. Arizona* (1966) 384 U.S. 436, 444 [86 S.Ct. 1602, 1612; 16 L.Ed.2d 694, 706] (*Miranda*).) The *Miranda* warnings, which —have become part of our national culture|| (*Dickerson v. United States* (2000) 530 U.S. 428, 443, [120 S.Ct. 2326, 2336, 147 L.Ed.2d 405, 419]), serve as an essential safeguard to protect the Fifth Amendment right against self-incrimination in the context of custodial interrogation. But whether interrogated or not, a suspect in custody has a right under the Fifth Amendment not to incriminate himself. And often the best way not to incriminate oneself is to say nothing." (*The People v. Tom* (Cal Sup. Ct.; August 14, 2014) 59 Cal.4th 1210, [331 P.3d 303, 176 Cal.Rptr.3d 148].)

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