



# Litigation Update

Litigation Section News

January 2014

## Foiled Again By The FAA!

*Labor Code* sections 98 through 98.8, provide an administrative statutory scheme for an employee to seek relief from the Labor Commissioner for a wage dispute. This method of dispute resolution is called a Berman hearing. In *Sonic-Calabasas A, Inc. v. Moreno* (2011) 51 Cal.4th 659, [247 P.3d 130; 121 Cal.Rptr.3d 58] (*Sonic I*), the California Supreme Court held it was contrary to public policy and unconscionable for an employer to require an employee to waive the right to a Berman hearing as a condition of employment, and that such hearings are not preempted by the Federal Arbitration Act [FAA]. The U.S. Supreme Court vacated the judgment and remanded the case for the California Supreme Court to consider it in light of *AT&T Mobility LLC v. Concepcion* (2011) 131 S.Ct. 1740, [179 L.Ed.2d 742]. After reconsidering the matter in light of *Concepcion*, as directed, the California Supreme Court concluded “that because compelling the parties to undergo a Berman hearing would impose significant delays in the commencement of arbitration, the approach we took in *Sonic I* is inconsistent with the FAA. Accordingly, we now hold, contrary to *Sonic I*, that the FAA preempts our state-law rule categorically prohibiting waiver of a Berman hearing in a predispute arbitration agreement imposed on an employee as a condition of employment. [¶] At the same time, we conclude that state courts may continue to enforce unconscionability rules that do not “interfere [ ] with fundamental attributes of arbitration. [Citation] Although a court may not refuse to enforce an arbitration agreement imposed on an employee as a condition of employment simply because it requires the employee to bypass a Berman hearing, such an agreement may be unconscionable if it is otherwise unreasonably one-sided in favor of the employer.” (*Sonic-Calabasas A, Inc. v. Moreno* (Cal. Sup. Ct.; October 17, 2013) 57 Cal.4th 1109.)

## Statement Of Decision When Ruling Was By Piecemeal.

After a jury returned a complicated special verdict, the court heard argument on the equitable causes of action. After announcing the decision, the trial court stated that it did not intend its ruling to be final until it had made a decision on the issue of interest. A few months later, the court made a decision on the interest, but asked for briefing on whether or not a receiver should be appointed. Several weeks later, the court made its decisions vis-à-vis a receiver. Eight days after the receiver decision, a party filed a written request for a statement of decision on the equitable issues tried by the court, which request the court denied as untimely. The trial judge later became unavailable and the case was assigned to another judge. The appellate court determined there was no dispute that the party had timely requested a statement of decision pursuant to *Code of Civil Procedure* section 632, and that the trial judge erred in not issuing one, stating: “We conclude that the only reasonable and workable interpretation of the statute is that the time to request a decision runs from the time the trial court completes the announcement of its decision on all reserved issues.” Because the trial judge was no longer available, the case was remanded for a new trial on the equitable issues. (*Wallis v. PHL Associates, Inc.* (Cal. App. Third Dist.; October 17, 2013) 220 Cal.App.4th 814.)

## Rent-Control Intricacies And Complications.

A mobile home park owner attempted to raise rents in a rent-controlled area, and the City’s Mobilehome Park Rental Review Board approved increases, but not in the amount sought. The mobile home park owner filed suit in federal court asserting facial and as-applied takings and due process claims. The federal trial court concluded the facial takings and due process claims were time-barred, and the as-applied takings claim was unripe. The feder-

al court further concluded the park owner’s substantive due process claim fails because there is no fundamental constitutional right to raise rents, “and the Board’s actions did not amount to egregious or shocking official conduct lacking a legitimate government interest.” The state trial court denied the mobile home park’s petitions for writ of administrative mandate. The state court also struck the park’s attempt to reserve its federal claims under *England v. Medical Examiners* (1964) 375 U.S. 411, which holding provides that a state court determination may not be substituted, against a party’s wishes, for his right to litigate federal claims fully in federal courts. The state appellate court affirmed the state trial court’s decision denying the petitions for extraordinary relief because substantial evidence supported the determination that the rent levels set by the Board provided the mobile home park a fair return. But the appellate court reversed the trial court’s striking the mobile home park’s reservation of its rights to make another federal claim when the issue is ripe. (*Colony Cove Properties, LLC v. City of Carson* (Cal. App. Second Dist., Div. 4; October 21, 2013) (As Mod. November 18, 2013) 220 Cal.App.4th 840.)

## State Bar Court Recommends Disbarment.

A lawyer admitted to practice law in California, but not in any other state was recommended to be disbarred by the California State Bar Court for the unauthorized practice of law in nine other states. He performed contract work for consumer debt companies which advertised through television and radio ads in a number of states. Clients were required to make monthly payments into the companies’ “client trust accounts,” and the companies represented that the clients’ accounts would be “handled by our legal counsel.” The lawyer contended all of the work he did for out of state clients was performed in California. The State Bar Court stated its reasons

were “to protect the public, the courts, and the legal profession.” (*In the Matter of Richard Allen Lenard* (April 15, 2013) Case Nos. 09-O-11175 (09-O-13870; 09-O-14231; 09-O-16534; 09-O-16777; 09-O-18627; 10-O-00425; 10-O-09953); 10-O-02737 (10-O-05950; 10-O-07962; 10-O-10524; 10-O-11144) (Cons.))

**No Governmental Claim Required Prior To Filing Under The Whistleblower Protection Act Against Governmental Agency.** Plaintiff worked for the Department of Social Services. She reported certain “improper governmental activity” within the Department. Thereafter, she alleges in an action against the Department, pursuant to the Whistleblower Protection Act [WPA; *Government Code* section 8547], she was subjected to retaliation and discrimination. The trial court dismissed her action for failure to file a governmental claim. In reversing, the appellate court stated: “Analogizing to the California Fair Employment and Housing Act (FEHA), plaintiff contends the WPA is not subject to the Claims Act because it has a comprehensive administrative procedure that satisfies the purposes of the presentation procedure in the Claims Act. We agree.” (*Cornejo v. Will Lightbourne, as Director of Department of Social Services* (Cal. App. Third Dist.; October 22, 2013) 220 Cal.App.4th 932.)

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## No Facts In Opposition To Motion For Summary Judgment.

A police department solicited bid proposals for its official police towing and storage. A towing company who did not get the bid brought an action against the city and three city council members, claiming the city council members had a conflict of interest and should not have voted on the bid. The trial court granted summary judgment in favor of defendants. In affirming, the appellate court pointed out the dearth of any facts or argument plaintiff had in its opposition to the motion, noting, “According to [the towing company], it simply ‘needs to go through the discovery process in order to get that proof.’” With regard to plaintiff’s cause of action against the city council members for violation of the Political Reform Act of 1974 [*Government Code* section 81000], the appellate court stated: “[A]s a matter of law the \$250 or more in campaign contributions [the council members] received in an earlier election cycle do not create a conflict of interest.” (*All Towing Services LLC v. City of Orange* (Cal. App. Fourth Dist., Div. 3; October 22, 2013) 220 Cal.App.4th 946, [163 Cal.Rptr.3d 626].)

## Trustee Personally Liable For Torts Only If Personally At Fault.

Plaintiff rented a room in an attached garage. The property was owned by a trust. She fell when exiting the house on some steps at night, and claimed the steps were in a dangerous condition because of a lack of lighting. The trustee brought a motion for summary judgment on the ground of lack of personal liability because there was no evidence the trustee intentionally or negligently acted in a manner that establishes fault. While arguing a resident of the house, who was allegedly negligent, was an agent of the trustee, plaintiff submitted no evidence of the existence of an agency relationship. With regard to plaintiff’s cause of action for dangerous condition of the property, defendant’s motion contained evidence there was a functioning light which was not turned on at the time plaintiff fell, which evidence plaintiff did not refute in her opposition. The appellate court affirmed the trial court’s grant of the motion. (*Castellon v. U.S. Bancorp* (Cal. App. Second Dist., Div. 2; October 23, 2013) 220 Cal.App.4th 994, [163 Cal.Rptr.3d 637].)

## Demand Futility Not Adequately Alleged.

Plaintiff filed a shareholder derivative action against officers and directors of a publicly traded company incorporated in Delaware. The trial court sustained his demurrer without leave to amend for failure to allege facts to allege demand futility with the particularity required by Delaware law. The appellate court affirmed, stating that “plaintiff failed to plead particularized facts manifesting a reasonable doubt that the board could not have exercised its independent and disinterested judgment in responding to his demand, had he made one at the time he brought the action.” (*Leyte-Vidal v. Semel* (Cal. App. Sixth Dist.; October 23, 2013) 220 Cal.App.4th 1001, [163 Cal.Rptr.3d 641].)

## Class Action Fairness Act Case Properly Removed.

In 2011, 137 named plaintiffs brought an action against 25 financial institutions in state court for deceptive mortgage lending, asserting various causes of action, including violation of the Class Action Fairness Act of 2005 [CAFA; Pub.L. No. 109-2, 119 Stat.4 (2005)]. Relying on CAFA and 28 U.S.C. § 1332 (d)(11)(B)(i), one of the defendants removed the case to federal court, arguing it was removable as a “mass action.” In 2012, the district court remanded the case to state court after concluding it lacked jurisdiction under CAFA. The Ninth Circuit reversed, stating: “The district court misinterpreted CAFA. In construing the provisions of a statute, ‘our inquiry begins with the statutory text, and ends there as well if the text is unambiguous.’ [Citations.] CAFA’s text is unambiguous in this respect. [B]y its plain language, CAFA’s ‘mass action’ provisions apply only to civil actions in which ‘monetary relief claims of 100 or more persons are proposed to be tried jointly.’ [Citations.] Because Plaintiffs proposed a joint trial in state court, Defendants properly removed this case.” (*Visendi v. Bank of America* (Ninth Cir.; October 23, 2013) 733 F.3d 863.)

## Your Tax Dollars At Work.

Undercover agent met with defendants with a story he was a cocaine courier who transported drugs for a group of Mexican drug dealers and was unhappy with the pay he was receiving. He said he was interested in robbing those Mexican drug dealers as

retribution for his low pay. He recruited defendants to carry out an armed robbery of a fictional cocaine stash house. The defendants readily agreed and participated in planning the robbery for several days. They were arrested when they were on their way to rob the supposed stash house. After conviction, at the time of sentencing, they argued the government was guilty of sentencing entrapment because it deliberately set an amount of cocaine in the fictional robbery to ensure the defendants sentence of 10 years on the conspiracy count. The district court denied their requests to reduce the quantity of cocaine in calculating their sentence. The Ninth Circuit agreed with the trial court, concluding the defendants had not reached the “extremely high standard” of demonstrating that the facts underlying their arrest and prosecution are so extreme as to violate fundamental fairness. (*United States of America v. Black* (Ninth Cir.; October 23, 2013) 733 F.3d 294.)

**Punitive Damages In Sexual Harassment Case.** In an Arizona sexual harassment case, a woman worked for a large mining and refining company. Her supervisor refused to train or help her when she refused his romantic overtures. He is six feet, two inches and weighs 350 pounds and would stand very close to her; she was afraid he would rape her. She complained to human resources and others several times, and they said there was nothing they could do and that she had to handle it herself. Eventually she secured a promotion to another crew, but there was no functioning women’s restroom in the building and the portable toilet was covered with pornographic graffiti directed at plaintiff. That portable toilet was replaced, and the graffiti was replicated. Once again, she lodged complaints and nothing was done. She was given a different assignment, but from the start the man she was told to whom she was required to report told her “your ass is mine” and that she would be spending more time with her than his “lady.” At trial, the employer argued he was a rude bully who yelled at everyone, and “that as awful as Esquivel was toward [plaintiff], it was not motivated by her sex but instead by his general boorishness.” Eventually she quit and brought an action against the employer. A jury awarded no

compensatory damages and only one dollar in nominal damages. The jury also awarded \$868,750 in punitive damages. The district court ordered the punitive damages reduced to \$300,000. The Ninth Circuit vacated the award of punitive damages and stated: “On remand, the district court may order a new trial unless the plaintiff accepts a remitter to \$125,000.” (*Arizona v. ASARCO LLC*. (Ninth Cir.; October 24, 2013) (Case No. 11-17484).)

**The Feres Doctrine Strikes Again.** The doctor of a pregnant servicewoman created a pregnancy profile for her, which imposed a number of restrictions on her activities such as “not carry and fire weapons, move with ‘fighting loads,’ engage in heavy lifting or physical training testing, or run/walk long distances.” Her supervisors ignored her pregnancy profile. She underwent an emergency procedure in an effort to prevent premature birth. Nonetheless, and despite her doctor specifically informing Army personnel she was “high risk” and was unable to perform her normal work activities for the remainder of her pregnancy, her commanding officers continued to disregard the doctor’s instructions. Her son was born prematurely and died 30 minutes after birth. The baby’s father filed an action in federal district court asserting claims under the Federal Tort Claims Act. Pursuant to *Feres v. United States* (1950) 340 U.S. 135, [71 S.Ct. 153; 95 L.Ed. 152], the case was dismissed. Feres held “the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service.” In affirming the dismissal, the Ninth Circuit stated: “We can think of no other judicially-created doctrine which has been criticized so stridently, by so many jurists, for so long. The Feres doctrine has generated pained affirmances from this circuit. Yet, unless and until Congress or the Supreme Court choose to ‘confine the unfairness and irrationality that [Feres] has bred, we are bound by controlling precedent.” (*Ritchie v. United States of America* (Ninth Cir.; October 24, 2013) 733 F.3d 871.)

**Arbitration Agreement Unconscionable.** In her application for employment at a grocery chain, a woman signed an agreement to arbitrate any dis-

putes. One of the provisions permits the grocery chain to unilaterally modify its arbitration policy without notice. Another specifies that each party must bear its own costs and fees. Another provides for a complicated procedure for selecting an arbitrator. The district court denied the grocery chain’s petition to arbitrate and the Ninth Circuit affirmed, stating: “In addition to the problematic cost provision, [the grocery chain’s] arbitration policy contains a provision that unilaterally assigns one party (almost always [the grocery chain]. . .) the power to select the arbitrator whenever an employee brings a claim...[¶].... If state law could not require some level of fairness in an arbitration agreement, there would be nothing to stop an employer from imposing an arbitration clause that, for example, made its own president the arbitrator of all claims brought by its employees. Federal law favoring arbitration is not a license to tilt the agreement process in favor of the party with more bargaining power.” (*Chavarria v. Ralphs Grocery Company* (Ninth Cir.; October 28, 2013) 733 F.3d 916.)

**No Authority To Sign Arbitration Agreement.** On behalf of her deceased husband, a wife sued the operators of two skilled nursing facilities for wrongful death of her husband and various torts. The two defendants petitioned the court to send the matter into arbitration based upon an arbitration agreement signed by the wife. The trial court found the wife did not have

### Membership in the ADR Subcommittee

The Litigation Section ADR Subcommittee, which is comprised of both ADR professionals and advocates, focuses on recent case law and legislative developments in the field of alternative dispute resolution. The ADR Subcommittee also provides educational programs on ADR issues. Members of the Litigation Section who wish to join the ADR Subcommittee should send an e-mail and resume to the co-chairs of the Committee: Jeff Dasteel ([Jeffrey.dasteel@gmail.com](mailto:Jeffrey.dasteel@gmail.com)) and Don Fischer ([donald.fischer@fresno.edu](mailto:donald.fischer@fresno.edu)).

authority to sign on her husband's behalf, and that she did not sign the agreement in her individual capacity, and denied the petition. The appellate court agreed the wife did not have authority to sign the agreement on behalf of her husband, adding that this "means she was not his 'legal representative' as described in [the] arbitration agreement." The appellate court also discussed that the agreement provided that "Resident's Legal Representative agrees that he or she is executing this agreement as a party, both in his or her representative *and individual capacity*," and stated: "the fact of her signing did not cast her in that status." (*Goldman v. Sunbridge Healthcare, LLC* (Cal. App. Third Dist.; October 28, 2013) 220 Cal.App.4th 1160.)

### **No Authority To Sign Here Either.**

And, BTW, Who's Looking After Mom? An 88 year old woman patient in a skilled nursing facility was hospitalized after a stroke. She woke up one night with her catheter removed, her call button unplugged, her gown off, an unknown male assistant looking down on her naked body and saying to her "This is why I love my job." The woman developed unexplained pain and bruising to her vaginal area, inner thigh and pelvis region. She tested positive for genital herpes. She brought an action against the owners of the facility for various causes of action, all stemming from an alleged failure to provide a safe environment. When she was 90 years old, she moved the court for trial preference under *Code of Civil Procedure* section 36(a), which defendants opposed, claiming she didn't have a medical issue warranting preference and the case was not at issue. Defendants then petitioned the court to send the matter to arbitration under the arbitration agreement signed by plaintiff's daughter. The trial court denied the petition, and the appellate court agreed that the daughter lacked authority to sign the agreement for her mother. (*Young v. Horizon West, Inc.* (Cal. App. Sixth Dist.; October 28, 2013) 220 Cal.App.4th 1122, [163 Cal.Rptr.3d 704].)

**This One Goes Into Arbitration, Even The Request For An Injunction.** Plaintiffs allege a for-profit school misled prospective students in order to entice enrollment by misrepresenting the quality of education, its accreditation, the career prospects for its graduates

and the actual cost of education. In their action, plaintiffs pray for both damages and injunctive relief. Pursuant to the school's petition, based upon arbitration agreements contained in its enrollment documents, the district court ordered all but the claim for an injunction into arbitration. The Ninth Circuit reversed and directed the trial court to grant the motion to compel arbitration as to all claims, stating: "In the event that the arbitrator concludes that [the school] has violated the UCL, FAL, or CLRA, and that entry of an injunction might be appropriate, but further determines that it lacks the authority under the agreements at issue to grant the requested injunction, Plaintiffs may seek the requested injunction in court. We express no opinion about the merits of such action." (*Ferguson v. Corinthian Colleges, Inc.* (Ninth Cir.; October 28, 2013) 733 F.3d 928.)

### **No Potential For Liability Under Homeowner Insurance Policy.**

An insurance exchange petitioned the Court of Appeal for a writ of mandate directing the trial court to set aside its order denying its motion for summary adjudication in its action for declaratory relief on the ground there was no potential for coverage under a homeowners insurance policy. The same insurer also issued the homeowners a vehicle policy. The granddaughter of the homeowners, younger than two years old, was killed in the driveway when one of the homeowners ran over her. The homeowner's daughter filed a wrongful death action against him for causing the death of his granddaughter. The insurer moved for summary adjudication on the ground there was no potential for coverage. The plaintiffs argued the decedent's grandmother was independently liable for the baby's death because he placed her in a "zone of danger" by permitting her to leave the house to go into the driveway. The trial court denied the insurer's motion. The appellate court concluded the insurer "had no liability under the homeowners insurance policy as a matter of law and was entitled to summary adjudication." (*Farmers Insurance Exchange v. Sup. Ct. (Bautista)* (Cal. App. Second Dist., Div. 7; October 28, 2013) 220 Cal.App.4th 1199, [163 Cal.Rptr.3d 609].)

**Lawyers Sued For 1994 Services Rendered To Client.** A

law firm aided clients in obtaining a judgment in 1994. They contend they were not advised of the necessity to renew the judgment. After 2004, their judgment was unenforceable. The clients brought an action for legal malpractice and obtained a judgment. While faced with several creative arguments, the appellate court did not reach most of the contentions, and concluded there was no substantial evidence presented in the trial court that the judgment was collectable. (*Wise v. DLA Piper LLP* (Cal. App. Fourth Dist., Div. 1; October 28, 2013) 220 Cal.App.4th 1180.)

### **Irregularity In The Proceedings Is The Basis For Affirming Grant Of New Trial In Medical Malpractice Case.**

The surgeon tore a glove while performing a hysterectomy and prescribed an antibiotic to avoid infection. Within days, she developed vomiting and diarrhea. At a clinic, she was given IV fluids, but the diarrhea was non-stop. She was hospitalized and went into shock and a diagnosis of pseudomembranous colitis, a severe inflammation of the colon, as a result of the antibiotic, Clindamycin. Two other drugs are the known treatment for her condition but the doctor did not want to administer them until her condition was verified with a colonoscopy, but someone forgot to tell that to the person who performs them, and the colonoscopy was not done. The next morning, the procedure was started, but terminated because the woman was so weak. At that point, the drugs used to treat her condition were administered, and she died the next morning. At trial, a plaintiff's experts testified surgical removal of the colon should have been done within 24 hours, and that the woman's condition was treatable when she presented in the E.R. There was testimony it was below the standard of care to wait for the results of a

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colonoscopy before administering the drug treatment. Two infectious disease experts testified that, had she received the drugs immediately, she would have survived. After some confusing jury instructions and deliberations, judgment was entered for the doctor. The court then granted a new trial and the doctor appealed. The appellate court did not even consider the evidence, but affirmed the grant of a new trial based upon irregularity in the proceedings. (*Montoya v. Barragan* (Cal. App. Second Dist., Div. 1; October 29, 2013.) 220 Cal.App.4th 1215.)

**Employee Not A Sophisticated User.** A man worked for a few decades for the U.S. government as a boiler technician. Defendant manufactured and sold valves containing asbestos, to which plaintiff was exposed. In 2009, he was diagnosed with mesothelioma. The trial court rejected defendant's proffered instructions on a "sophisticated user" defense, and the jury awarded compensatory and punitive damages. On appeal, the appellate court affirmed, stating: "We hold that when a manufacturer provides hazardous goods to a 'sophisticated' intermediary that passes the goods to its employees or servants for their use, the supplier is subject to liability for a failure to warn the employees or servants of the hazards, absent some basis for the manufacturer to believe the ultimate users know or should know of the hazards." (*Pfeifer v.*

*John Crane, Inc.* (Cal. App. Second Dist., Div. 4; October 29, 2013) (As Mod. November 27, 2013) 220 Cal.App.4th 1270, [164 Cal.Rptr.3d 112].)

**Unlawful Prior Restraint.** The plaintiff's attorney in a personal injury case had a website advertising her success in two cases raising issues similar to those she was about to try. The trial court admonished the jury not to "Google" the attorneys or to read any articles about the case or anyone involved in it. Concerned that a juror might ignore these admonitions, the court ordered the attorney to remove for duration of trial two pages from her website discussing the similar cases. The attorney petitioned for extraordinary relief. The appellate court summarily denied the petition, and the attorney sought review in the California Supreme Court. The Supreme Court granted review and transferred the matter back to the Court of Appeal to issue an order to show cause. Meanwhile the attorney took down the two pages involved, the case was tried, and the trial was concluded. The appellate court then discharged her petition for writ of mandate, stating: "The trial court's order constituted an unlawful prior restraint on [attorney's] constitutional right to free speech. Because the order is no longer in effect, the trial court need not take any action. Having served its purpose, the order to show cause is discharged and the petition for writ of mandate is denied." It should be noted, the appellate court seemed to be piqued in that the trial court's order only related to two pages, but the attorney represented to the California Supreme Court that the order involved her entire website. (*Steiner v. Sup. Ct. (Volkswagen Group of America)* (Cal. App. Second Dist., Div. 6; October 30, 2013) (As mod., November 26, 2013) 220 Cal.App.4th 1479, [164 Cal.Rptr.3d 155].)

**Tragic Circumstances: Mandatory Duty.** Plaintiff brought an action against the State Department of State Hospitals and its administrators for breach of mandatory duty. Plaintiff's sister was raped and murdered by a man who was paroled from state prison four days earlier. Plaintiff's claim is that the perpetrator is a sexually violent predator within the meaning of *Welfare and Institutions Code* section 6600 *et seq.* The defendants demurred to

plaintiff's pleading, and the trial court overruled the demurrer. In this action, defendants sought a writ of mandate directing the superior court to sustain their demurrer without leave to amend. The writ was granted in part and denied in part. It was granted with regard to the statutory immunities, but denied insofar as the complaint alleged facts that defendants are not complying with at least one mandatory duty, namely their duty to designate two mental health professionals to conduct a full evaluation of inmates referred to them by the Department of Corrections. (*State Department of State Hospitals v. Sup. Ct. (Novoa)* (Cal. App. Second Dist., Div. 3; October 30, 2013) 220 Cal.App.4th 1503, [163 Cal.Rptr.3d 770].)

**Big Win On Damages Now Big Loss.** 79-year-old resident of a nursing home fell nine times in five weeks, usually while getting out of bed to go to the bathroom. The last time, he had to undergo brain surgery for a subdural hematoma suffered as a result of hitting his head, and later suffered a stroke. He filed a complaint for elder abuse. On his cause of action for violation of the Patient's Bill of Rights under *Health and Safety Code* section 1430(b), the jury found the facility was understaffed. On his negligence cause of action, the jury found comparative negligence and on his elder abuse claim, the jury found by clear and convincing evidence his injury was the result of reckless neglect. The jury awarded \$1,191,007.90 for past medical expenses, \$200,000 for future medical expenses, and \$3,000,000 in general damages. The court awarded \$7,000 as penalties [\$500 for each of the 14 deficiencies found] under § 1430(b) and \$952,142.50 in attorney fees. The appellate court concluded the court abused its discretion in admitting into evidence a citation issued by the state Department of Public Health, and reversed all damages in excess of those awarded under § 1430(b), that "the \$500 maximum in section 1430, subdivision (b) applies per civil action rather than per violation." The award of attorney fees was also reversed with instructions for the trial court to award reasonable fees on remand. (*Nevarrez v. San Marino Skilled Nursing and Wellness Centre* (Cal. App. Second Dist., Div. 4; November 4, 2013) 221 Cal.App.4th 102, [163 Cal. Rptr.3d 874].)

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## Notes In Captain's Drawer About Firefighter Are "For Personnel Purposes."

The Fire-Fighters Bill of Rights [FFBOR] found in *Government Code* section 3255 provides: "A firefighter shall not have any comment adverse to his or her interest entered in his or her personnel file, or any other file used for any personnel purposes by his or her employer, without the firefighter having first read and signed the instrument containing the adverse comment indicating he or she is aware of the comment." In this case the captain kept notes he called "daily logs" on each firefighter, including appellant, who had been a fire fighter since 1984, but only supervised by the captain for two years. At the time of the annual review, the captain took information from his daily logs and entered it onto the firefighter's review, at which point the firefighter would see it for the first time. The firefighter contended this process violated his rights under the FFBOR. The appellate court agreed, stating: "Likely many supervisors keep some sort of notes to prepare accurate annual employee reviews, but most supervisors are not operating under a statutory scheme similar to the one we have here, which requires that no adverse comment be entered into any file used for personnel purposes 'without the firefighter having first read and signed the instrument.' . . . Because the daily logs on firefighters are used for personnel purposes, we conclude they are subject to provisions of FFBOR." (*Poole v. Orange County Fire Authority* (Cal. App. Fourth Dist., Div. 3; November 4, 2013) 221 Cal.App.4th 155.)

## Case Reported Last Year In Litigation Update Heard By U.S. Supreme Court.

Last year, we reported the following:

**Warrantless Entry Into Curtilage Of Home Was An Unconstitutional Search.** Plaintiff was standing behind the gate at the entrance to her home when a police officer kicked it down and knocked her unconscious. The officer believed his warrantless entry into the curtilage of plaintiff's home was justified by his pursuit of a suspect "who had committed at most a misdemeanor offense by failing to stop for questioning in response to a police order." The district court dismissed plaintiff's case after finding the of-

ficer was entitled to qualified immunity. The Ninth Circuit reversed after concluding the officer's actions amounted to an unconstitutional search, stating: "We hold that the law at the time of the incident would have placed a reasonable officer on notice that his warrantless entry into the curtilage of a home constituted an unconstitutional search, which could not be excused under the exigency or emergency exception to the warrant requirement." (*Sims v. Stanton* (Ninth Cir.; December 3, 2012) (As Mod., January 16, 2013) 706 F.3d 954 (Reversed and Remanded).)

The United States Supreme Court granted a writ of certiorari, and reversed the Ninth Circuit's judgment, noting the police officer's actions were not "plainly incompetent." (*Stanton v. Sims* (U.S. Sup. Ct.; November 4, 2013) 134 S.Ct. 3, 187 L.Ed.2d 341.)

## Employer's Lawyer Had A Conflict Of Interest When Representing Employee At His Deposition.

Plaintiff wrote a statement shortly after an accident involving a co-worker, in which plaintiff said the other worker slipped and fell on a concrete floor soaked in oil and grease, but he did not say he witnessed the fall. About an hour later, someone in management asked him to write another witness statement. In the second, he wrote that he "saw Boby slip & fall down on oil soaked floor, he was lying on his back when I came downstairs to help him up, he complainde [*sic*] of his knee & back hurt." The co-worker sued the company, and plaintiff was instructed to meet with the company's lawyer prior to his deposition. Plaintiff expressed concern about his job because he knew his testimony would not be favorable to his employer, so he asked the company's lawyer to protect him. The lawyer responded that plaintiff "was a Union Pacific employee and [the lawyer] was his attorney for the deposition; as long as [plaintiff] told the truth in the deposition, [plaintiff's] job would not be affected." When the lawyer questioned plaintiff, after the co-worker's lawyer had elicited information damaging to the employer, the company lawyer discredited plaintiff with one of his statements, but never mentioned the other one. Plaintiff was fired for being dishonest shortly after he gave his deposition. Plaintiff then brought the current action for

wrongful discharge as well as legal malpractice against the lawyer, and the trial judge granted summary judgment in favor of the employer. The appellate court reversed, stating: "Summary judgment evidence here shows a conflict between the employer and the employee (to the employee's detriment) without obtaining the employee's informed written consent. . . . We have merely applied well-recognized rules of professional conduct to the conflict of interest in this case." (*Yanez v. Plummer* (Cal. App. Third Dist.; November 5, 2013) 221 Cal.App.4th 180.)

## Due Process Lacking In Gang Injunctions.

Since 1987, California prosecutors have brought public nuisance actions to curtail the activities of street gangs. Typically the injunctions enjoin gang members from engaging in a broad swath of activities, both legal and illegal, individually and with others, in certain areas. The district court decided that due process requires that the individuals be afforded an adequate opportunity to contest whether they are active gang members before they are subjected to the injunction. The Ninth Circuit affirmed, stating "some adequate process to determine membership in the covered class is constitutionally required." (*Vasquez v. Rackauckas* (Ninth Cir., November 5, 2013) (Case No.'s 11-55795, 11-55876, 11-56126, 11-56166).)

## Accommodation Process.

Plaintiff's former significant other has sole possession of his home and he wants pos-

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session back, so he filed an action. After being denied a continuance of the trial, the significant other requested the accommodation of a continuance of trial for health reasons, under the Americans With Disabilities Act [ADA; 42 U.S.C. § 12101]. *California Rules of Court* rule 1.100, subsections (a) and (b), allows persons with disabilities to apply for accommodations to ensure full and equal access to the judicial system. Subdivision (c) provides the applicant's identity and confidential information may only be disclosed to those involved in the accommodation process. Plaintiff apparently wants to check out her story and requested to see the documents she filed with the court, but the trial court denied the request. The appellate court issued a peremptory writ of mandate, concluding plaintiff/petitioner is a person involved in the accommodation process. (*Vesco v. Sup. Ct. (Tawne Michele Newcomb)* (Cal. App. Second Dist., Div. 6; November 6, 2013) 221 Cal.App.4th 275.)

**Plaintiff Lacks The Capacity To Sue.** At a time when its corporate powers were suspended for failure to pay taxes, a corporation assigned its rights and interests to an entity. The assignee filed an action, and the trial court ordered the complaint stricken and the action dismissed. The appellate court agreed with the trial court that plaintiff lacked the capacity to sue. (*Cal-Western Business Services, Inc. v. Corning Capital Group* (Cal. App. Second Dist., Div. 7; November 6, 2013) 221 Cal. App.4th 304, [163 Cal.Rptr.3d 911].)

**Anti-SLAPP Comments On Newspaper's Website.** A newspaper has a User Agreement which provides: "The bulletin boards, chat rooms, community calendars, and other interactive areas of the Service are provided to users as interesting and stimulating forums to express their opinions and share ideas and information. We expect people to differ—judgment and opinion are subjective—and encourage free speech and the exchange of ideas. But, by using these areas of the Service, you are participating in a community that is intended for all of our users. [¶] Therefore, we reserve the right, but undertake no duty, to review, edit, move, or delete any User Content provided for display or placed on the Service, at our sole and absolute discretion, without

notice to the person who submitted such User Content." Plaintiff brought an action against the newspaper "alleging that it breached its user agreement with [plaintiff] by failing to remove comments made on their website concerning [plaintiff]." Instead of answering the complaint, the newspaper filed a special motion to strike under *Code of Civil Procedure* section 425.15, [the anti-SLAPP statute], which the trial judge granted. In affirming, the appellate court noted the gravamen of the complaint was based on protected activity. (*Hupp v. Freedom Communications, Inc.* (Cal. App. Fourth Dist., Div. 2; November 7, 2013) 221 Cal. App.4th 398, [163 Cal.Rptr.3d 919].)

**Intellectual Property.** The Copyright Act of 1976 provides that all civil actions must be brought within three years after the claim accrued. [17 U.S.C. § 507(b)]. The Ninth Circuit joined the Second and Sixth Circuits in deciding a statute of limitations issue in a copyright infringement suit. At the heart of the dispute is the ownership of three motion pictures. The district court dismissed the copyright infringement action because it had been more than three years since the defendant had clearly and expressly repudiated ownership of the copyrights. In affirming, the Ninth Circuit found that an untimely ownership claim will bar a claim for copyright infringement, where the gravamen of the dispute is ownership "at least where, as here, the parties are in a close relationship." (*Seven Arts Filmed Entertainment Limited v. Paramount Pictures Corp.* (Ninth Cir.; November 7, 2013) 733 F.3d 1251.)

**No Trail To Follow.** In a wrongful death action, decedent was killed during an August 3, 2010, traffic accident caused by a drunk/drugged driver. About an hour and a half prior to the accident, a California Highway Patrol officer stopped the driver, but saw no indication of intoxication, although the driver was not licensed, the car was uninsured and had expired registration tags. At the earlier stop, the driver was given a verbal warning for speeding. After the accident, he was charged with gross vehicular manslaughter while intoxicated. Decedent's family was in contact with the liaison from the prosecutor's office over the next few months. However, no one told the family, and the police report did not mention, that the intoxicated driver

had been stopped by the CHP earlier that evening. At the May 2011 preliminary hearing, the family learned of the earlier stop. In June, they started looking for representation and retained a lawyer on July 29. On August 3, 2011, the lawyer filed an application for leave to file a late claim against the CHP, asserting the CHP's liability for failure to carry out a mandatory duty to impound the car when the driver was unable to produce a valid driver's license. The trial court denied the request due to a lack of a showing of reasonable diligence, and the appellate court reversed, stating: "The trial court does not identify what trail plaintiffs or counsel could have followed to lead to these facts within the limitations period." (*Devore v. California Highway Patrol* (Cal. App. Third Dist.; November 13, 2013) 221 Cal.App.4th 454.)

**Personal Service Effectuated By Serving UPS Store.** The trial court granted discovery motions and later a summary judgment in favor of defendants. Plaintiff's appeal contends he was not properly served. This was the situation: A self-represented plaintiff had filed a notice of change of address that lists the address of a UPS store at which he rents a mailbox and states that "all notices and documents regarding the action should be sent to [the listed] address." Delivery was made to the UPS store. *Code of Civil Procedure* section 1011, subsection (b), provides that personal service on a party to a lawsuit shall be made in the manner specifically provided in particular cases, or, if no specific provision is made, service may be made by leaving the notice or other paper at the party's residence with some person no less than 18 years of age. The Court of Appeal concluded personal service was effectuated. (*Sweeting v. Murat* (Cal. App. Second Dist., Div. 4; November 13, 2013) 221 Cal.App.4th 507.)

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**There's More Than One Way To . . .** *Labor Code* section 4605 gives employees the right to retain consulting or attending physicians at their own expense for workers' compensation proceedings. *Labor Code* section 4616.3 requires the employer to notify the injured employee of the existence of medical provider networks [MPNs], as well as the employee's right to change treating physicians within the network after the first visit. Accordingly, an employee who disputes the employer's diagnosis, or treatment provided by the MPN doctor has two choices. The employee may seek an opinion from a different MPN doctor, and if the dispute persists after seeing three MPN doctors, the employee may request an independent medical review under *Labor Code* section 4616.4, subsection (b). Or, the employee may obtain another evaluation at the employee's own expense. In the present case, the employee, after being dissatisfied with the first MPN doctor, did not ask to see a second or third MPN doctor, but sought treatment outside the network. The employer objected to the report of the non-MPN doctor at the disability hearing. The workers' compensation judge admitted the report and awarded disability benefits. The Workers' Compensation Appeals Board rescinded the judge's determination and held the admission of the non-network report was precluded under the law. Both the Court of Appeal and the California Supreme Court determined the Board was wrong, and that a party may obtain an outside report at the party's own expense and that report is admissible at the hearing. (*Valdez v. Workers' Compensation Appeals Board* (Cal. Sup. Ct.; November 14, 2013) 57 Cal.4th 1231.)

**Award Of Private Attorney General Attorney Fees Reversed.** In the trial court in a matter concerning a homeowner's request to build an addition, which had been denied in part by the Coastal Commission, the superior court issued a writ of mandate stating that the Coastal Commission's findings with respect to a bluff edge were not supported by substantial evidence. Thereafter the trial court awarded attorney fees to the homeowner pursuant to the private attorney general fees permitted under *Code of Civil Procedure* section 1021.5. The appellate court reversed,

stating: "The issuance of a peremptory writ of mandate did not confer a substantial benefit on either the general public or a large number of persons. Moreover, the financial burden of the litigation was not out of proportion to Norberg's individual stake in the matter." (*Norberg v. California Coastal Commission* (Cal. App. Fourth Dist., Div. 3; November 15, 2013) 221 Cal.App.4th 535.)

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