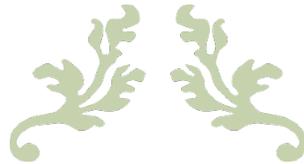




STONE | DEAN LLP
ATTORNEYS AT LAW



SUMMARY OF 2016 CALIFORNIA CASE LAW

By Kori Macksoud, Law Clerk



FIRST QUARTER

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SUMMARY OF 2016 CALIFORNIA LAW
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Anti-Strategic Lawsuit against Public Participation (Anti-SLAPP)

Karnazes v. Ares
(2016) 244 Cal.App.4th 344
filed January 27, 2016

Elizabeth Karnazes brought suit against Tyler Ares and others alleging negligence, fraud, breach of contract, common counts, and exemplary damages in relation to asset investments. The trial court granted a special motion to strike the complaint. Karnazes appealed, contending (1) the trial court violated the law by failing to provide appellant with a copy of the tentative ruling that was provided to respondent prior to oral argument on the anti-SLAPP motion; (2) respondent's motion was untimely and should have been denied for that reason; (3) respondent's motion should have been denied because respondent is a person primarily engaged in the business of selling services under the statutory exception set forth under *Code of Civil Procedure* § 425.17(c); and (4) respondent's actions were illegal as a matter of law and thus were not subject to the protections of *Code of Civil Procedure* § 425.16.

The Court of Appeal affirmed, holding that although the anti-SLAPP motion was filed more than 60 days after the complaint, the motion was timely because a change of venue extended the time to file and a delay in scheduling the hearing cannot be a ground for denial. The motion was properly granted because discussing litigation and settlement is a protected activity and a probability of prevailing was not shown. The trial court was not required to provide an electronic copy of its tentative ruling to a party who appeared telephonically for the hearing without notice. The commercial speech exception was inapplicable to an attorney's communications in anticipation of litigation.



Arbitration

Gastelum v. Remax International, Inc.
(2016) Cal.App.4th 1016
filed Feb. 11, 2016

Amparo Gastelum sued Remax International Inc. and Jose Garcia-Yanez, alleging that Remax and Garcia-Yanez, a broker for Remax, violated the Fair Employment and Housing Act. Gastelum asserted claims for sex and gender harassment, sex and gender discrimination and sex and gender retaliation. Gastelum also asserted causes of action for violation of the Unruh Civil Rights Act and the Unfair Competition Law, *Business and Professions Code* §17200, and claims for intentional and negligent interference with prospective economic relations, breach of contract and the implied covenant breach, defamation, intentional emotional distress infliction, retaliation and wrongful termination. The trial court granted the Remax's motion to compel arbitration and stayed the litigation in the judicial forum, but it denied Garcia-Yanez's motion to compel arbitration. Gastelum requested that Remax pay the arbitration filing fee, but the Remax refused. The arbitration provider dismissed the arbitral proceeding after no arbitration costs were paid. The trial court granted Gastelum's motion to lift the litigation stay. Remax and Garcia-Yanez appealed.

The Court of Appeal dismissed the appeal concluding that Remax and Garcia-Yanez were appealing from a non-appealable order. An order lifting a stay of litigation under *Code of Civil Procedure* § 1281.4, is reviewable on appeal, but only when there is another appealable order or judgment. Defendants identified no other appealable order or judgment. Because the order lifting the litigation stay was not appealable, the appeal was subject to dismissal.

Monschke v. Timber Ridge Assisted Living, LLC
(2016) 244 Cal.App.4th 583
filed January 29, 2016

Valerie Monschke, acting as personal representative for the estate of her mother, Marjorie Fitzpatrick (decedent), filed this suit for wrongful death and elder abuse against defendant Timber Ridge Assisted Living, LLC. Defendant petitioned to compel arbitration on the ground plaintiff, on behalf of decedent, signed an agreement with an arbitration clause before enrolling decedent in defendant's facility. The trial court denied the petition, finding the wrongful death claim had been brought on behalf of decedent's surviving children, and the children were not parties to the arbitration agreement. The trial court also declined to submit the elder abuse claim to arbitration because of the possibility of conflicting rulings. Defendant now appealed, arguing the trial court erred in finding plaintiff was not bound by the arbitration agreement. Among other things, defendant contends plaintiff stepped into the shoes of decedent by filing this action as personal representative of decedent's estate.



The Court of Appeal affirmed the order denying defendant's petition to compel arbitration. The trial court did not err in finding plaintiff was not bound by the residency agreement. While plaintiff signed the residency agreement, she did so as the decedent's power of attorney, not in her personal capacity. Thus, the only parties to the residency agreement were defendant and the decedent. As personal representative of the decedent's estate, plaintiff was asserting the wrongful death claim on behalf of the decedent's heirs, not the decedent.

Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.
(2016) 244 Cal.App.4th 590
filed January 29, 2016

The trial court confirmed an arbitration award in favor of a Sheppard, Mullin, Richter & Hampton, LLP for unpaid fees, thereby denying their former client, J-M Manufacturing Co., Inc.'s motion to vacate the award, in which J-M Manufacturing Co., Inc. argued the entire agreement was unenforceable because the firm had a conflict of interest.

The Court of Appeal reversed and remanded, holding that because a challenge to the legality of a contract as a whole must be decided by the court rather than by an arbitrator, the trial court erred by deferring to the arbitrator's determination of legality. An advance waiver of potential conflicts was insufficient because the firm did not inform the client when an actual conflict arose. The conflict of interest rendered the fee agreement illegal and unenforceable on public policy grounds. A remand was necessary to resolve a fact issue about when the actual conflict began.



Business and Corporate Law

Speirs v. Bluefire Ethanol Fuels, Inc.

(2016) 243 Cal.App.4th 969

filed December 15, 2015, publication ordered January 12, 2016

James G. Speirs et. al., (“Warrant Holders”) sued Bluefire Ethanol Fuels, Inc. (“Company”) which issued the warrants for breach of contract and declaratory relief after the company refused to apply the warrants’ anti-dilution provision to an agreement under which present and future stock issues were required in exchange for present and future cash received. The warrant holders also sued two of the company’s officers for breach of fiduciary duty. Following a bench trial, the trial court rejected the breach of fiduciary duty claim, ruled that the company did breach the warrants, reduced the exercise price for the warrants from \$2.90 per share to \$0 per share, and authorized the warrant holders to immediately exercise the warrants.

The Court of Appeal reversed and remanded. The Court determined that the breach of fiduciary duty cause of action was not meritorious as a matter of law because a corporation’s officers do not have a fiduciary duty to warrant holders. The Court agreed with the trial court that the anti-dilution provision in the warrants applied to the agreement and stock issuances resulting from that agreement. The company therefore breached the warrants by failing to notify the holders of a reduction in the exercise price of the warrants following the execution of the agreement. However, substantial evidence did not support the trial court’s decision to reduce the exercise price of the warrants to \$0. The anti-dilution provision did not mean that only money directly paid in exchange for securities should count toward establishing a new exercise price; rather the phrase “adjusted to equal the consideration paid” per share was that consideration might include any number of things, including the present value of a commitment to provide up to \$10M in capital in the future.



Civil Procedure

Ardon v. City of Los Angeles
(2016) Cal. LEXIS 1572
filed March 17, 2016

In civil discovery proceedings during the course of litigation between plaintiff Estuardo Ardon and defendant City of Los Angeles (“City”), the trial court determined that certain documents City possessed were privileged under the attorney-client privilege or the attorney work product doctrine under *Business & Professions Code* §6068(e), and City withheld them from plaintiff. Years later, plaintiff filed a request under the *California Public Records Act (Government Code, § 6250)* seeking to obtain documents relating to the subject matter of the litigation. In response, City’s administrative office inadvertently provided plaintiff with some of the privileged documents. The trial court denied the City’s motion for an order compelling the return of documents inadvertently disclosed, and the Court of Appeal affirmed. The Supreme Court of California granted review to decide whether the release of privileged documents under such circumstances waives the privilege thereby allowing plaintiff to retain and use the documents and to disseminate them to others.

The Supreme Court of California reversed and remanded, holding that the City’s inadvertent disclosure did not waive the exemption from disclosure for material privileged by statute because the waiver provision, considered in the broader statutory context and in light of the legislative history and purpose, does not apply to inadvertent disclosures. Although statutory ambiguities generally must be resolved in favor of greater access to public records, this rule of construction does not require resolving every conceivable ambiguity in favor of greater access, no matter how implausible that result.

Austin v. Los Angeles Unified School District
(2016) 244 Cal.App.4th 918
filed January 25, 2016

The trial court denied an Nina Austin’s post-judgment motion for relief after granting an unopposed motion for summary judgment filed by the Los Angeles Unified School District and two of its employees in Austin’s lawsuit alleging wrongful discharge in violation of California’s whistleblower statute; discrimination based on race, gender and age in violation of California’s Fair Employment and Housing (“FEHA”); and unlawful harassment in violation of FEHA. Austin contended that the trial court erred when it denied her motion under *Code of Civil Procedure* § 473(b), because the motion had not been signed under penalty of perjury and, as a result, failed to exercise its discretion to decide whether the judgment and order granting summary judgment should be set aside.



The Court of Appeal reversed and remanded. The Court held that the trial court acted within its authority in considering the motion as a request for relief based on excusable neglect or mistake, although it was labeled as a motion for reconsideration, because the nature of a motion is determined by the relief sought and because the statement of grounds for the motion made clear what relief was requested. In light of the express statutory language that no affidavit or declaration of merits is required, the trial court erred in refusing to consider the merits of the motion because it was not signed under penalty of perjury. The error was prejudicial because the evidence supporting the motion made at least a prima facie case for excusable neglect or mistake. The motion substantially complied with the procedural requirements, although it lacked a proposed pleading.

James Bae v. T.D. Service Company of Arizona
(2016) 245 Cal.App.4th 89
filed Feb. 25, 2016

James Bae and a corporation related to him asserted claims arising from a foreclosure sale against several defendants, including T.D. Service Company of Arizona (“T.D. Service”) which filed an unchallenged declaration of nonmonetary status under *Civil Code* § 2941 asserting that it had been named as a defendant solely in its capacity as trustee under the pertinent deed of trust, and not due to any wrongful conduct in its performance as trustee. After T.D. Service filed no answer in the action, the clerk entered its default, and the trial court issued a default judgment against T.D. Service awarding Bae \$3M in damages. T.D. Service then filed a motion for relief from the default and default judgment, which the trial court granted. Bae appealed contending that the court erred in setting aside the default and default judgment.

The Court of Appeal affirmed, holding that entering a default and default judgment against T.D. Service was in error because it filed a declaration of nonmonetary interest, which had not been set aside and therefore exempted it from any requirement to file an answer or otherwise participate in the action. T.D. Service established its diligence in seeking equitable relief based upon extrinsic mistake because its counsel had not been served with notice of the default proceedings and because T.D. Service, upon receiving the request for entry of default, was entitled to rely on its declaration of nonmonetary status and to believe no default or default judgment could be entered against it.

DeSaulles v. Community Hospital of the Monterey Peninsula
(2016) 62 Cal. 4th 1140
filed March 10, 2016

A trial court awarded defendant Community Hospital of the Monterey Peninsula costs of \$12,731.92 and denied former employee and plaintiff Maureen DeSaulles’ request for costs after defendant obtained a judgment denying plaintiff relief following her voluntary dismissal of her two of her seven causes of action with prejudice in exchange for a payment of \$23,500 from defendant. The Court of Appeal, Sixth District reversed concluding that plaintiff obtained a net



monetary recovery and was therefore the prevailing party for purposes of *Code of Civil Procedure*, § 1032(a)(4).

The Supreme Court affirmed the judgment of the Court of Appeal. The Court held that a dismissal pursuant to a monetary settlement is not a dismissal in the defendant's "favor" as that term is used in *Code of Civil Procedure*, § 1032(a)(4). The Court further held that a plaintiff who enters into a stipulated judgment to be paid money in exchange for a dismissal has obtained a "net monetary recovery" within the meaning of the statute, whether or not the judgment mentions the settlement.

Gaines v. Fidelity National Title Insurance Company
(2016) 62 Cal. 4th 1081
filed February 25, 2016

Fannie Marie Gaines and her husband, Milton, owned a home in Los Angeles. The Gaineses fell behind in their mortgage payments to Countrywide Home Loans, Inc. ("Countrywide") and received two notices of default. Facing foreclosure, they agreed to sell the property to Tornberg, Johnson, and Ray Management ("Tornberg") with an option to lease the property and repurchase it. Tornberg obtained loans that were secured by the property and subsequently transferred to various entities. The complaint here alleges that Tornberg and others involved in the transaction deceived the couple into selling their home under threat of foreclosure. Mrs. Gaines filed a complaint in 2006 seeking rescission and cancellation of the deed transferring ownership of the property. Once begun, the suit followed an involved procedural journey. Amended complaints and answers were filed and defendants were substituted. In 2009 Mrs. Gaines died and her son, Milton Howard Gaines, was substituted as successor in interest. In 2012, Fidelity National Title Insurance Company moved to dismiss for failure to bring the action to trial within the five-year time frame required by *Code of Civil Procedure*, § 583.360. When the motion was filed, the case had been pending for approximately five and a half years. A trial date was scheduled for August 6, 2012. At no time did Gaines move to advance the trial date.

The trial court concluded that § 583.340 did not apply to this period because there was not a complete stay of the prosecution as required under that exception. It further concluded that the mediation stay did not create a circumstance of impossibility, impracticability, or futility under § 583.340. The stay was requested by plaintiff and was not a circumstance beyond plaintiff's control. It was to last only 120 days and did not affect previously served and outstanding written discovery. Further, plaintiff did not demonstrate diligence during the period in question. The Court of Appeal affirmed the trial court's dismissal.

The Supreme Court of California affirmed the judgment of the Court of Appeal. The Court held that because an agreed order providing for some discovery and for mediation outside the automatic tolling period was not a complete stay stopping prosecution of the action altogether, the time was not excluded from the five-year period. Equitable estoppel did not apply because the parties' agreement made no reference to tolling the five-year period. The trial court was



within its discretion to conclude that bringing the case to trial was not impossible, impracticable, or futile in light of the voluntary nature of mediation. An excludable period of trial court reassignment after a peremptory challenge did not add enough time to avoid dismissal.

Mountjoy v. Bank of America, N.A.
(2016) 245 Cal.App.4th 266
filed February 29, 2016

In seeking an attorney's fee award, plaintiffs Calvin and Tracy Mountjoy sought a lodestar sum of \$308,425 for 760.70 hours of attorney and law student work billed at hourly rates ranging from \$450 to \$200. Concluding that "well over 70% of the billing entries" submitted in support of the attorney's fee request were flawed in one or more respects, the trial court reduced the number of hours claimed by 70%, to 228.21. Thereafter, applying a "blended" billing rate of \$260 per hour to the reduced number of hours, the court awarded the Mountjoys \$59,334.60 in attorney's fees.

The Court of Appeal reversed and remanded. The Court determined that the trial court did not err in determining a reasonable hourly rate, comparing the time billed to defense counsel's hours, not considering an upward adjustment to the lodestar after withdrawal of a request for a multiplier, and concluding that excessive time was billed for preparing filings and that some services were duplicative; however, the record did not support findings of block billing and excessive time billed for reviewing the answer. Although the trial court was not obligated to perform a precise calculation of the non-compensable hours upon finding that a high percentage of the time entries had some flaw, an across-the-board reduction of hours by that same percentage was clear error because the trial court did not consider the number of hours actually included in the flawed entries.

People ex rel. Government Employees Insurance Company v. Cruz
(2016) 244 Cal.App.4th 1184
filed January 22, 2016

Government Employees Insurance Company, Geico General Insurance Company, Geico Casualty Company, and Geico Indemnity Company (collectively, "Geico"), as relator, brought a qui tam action asserting statutory and common law claims for damages and civil penalties against Dr. Janice Cruz (and others) arising from her alleged involvement in an insurance fraud conspiracy. The trial court granted Dr. Cruz's motion to bind Geico to certain interrogatory responses, then granted her summary judgment motion on the basis those responses established Geico was unable to prove its claim against Dr. Cruz which alleged that she paid an unlawful referral fee in the form of percentage rent and submitted false claims with fraudulent intent. Geico appealed contending that the court erred by (1) binding Geico to its earlier interrogatory responses, (2) excluding additional evidence offered in opposition to the summary judgment motion, and (3) granting summary judgment on its statutory claim.



The Court of Appeal reversed and remanded, holding that whether the company showed substantial justification for its initial responses and binding the company to those responses was in error because the record did not support findings of substantial prejudice or that any prejudice could not have been cured. Because erroneously excluded evidence and expert opinions showed triable issues of fact, the company’s statutory fraud claim could not be resolved on summary adjudication. Even if the company incurred no damages as the doctor argued, liability was not thereby precluded, and issues of improper coding and fraudulent intent were for a jury to decide.

Perry v. Bakewell Hawthorne, LLC
(2016) 244 Cal.App.4th 712
filed February 3, 2016

Wilson Dante Perry sued for injuries he sustained when he fell on an exterior stairway on property owned by Bakewell Hawthorne, LLC (“Bakewell”) and occupied by former defendant JP Morgan Chase Bank, NA (“Chase”). In the operative first amended complaint, Perry alleged that Bakewell and Chase were negligent in designing, developing, operating, and maintaining the stairway, causing plaintiff to fall and sustain injuries. Chase served a demand for exchange of expert witness information pursuant to *Code of Civil Procedure* § 2034.210. In response, Perry served an objection to the demand on the ground that it was untimely. Bakewell and Chase exchanged expert witness information, however, Perry did not participate in the exchange and did not designate any expert witnesses. Bakewell thereafter moved for summary judgment on the ground that Perry could not satisfy his burden of proving the existence of a dangerous condition at the property or that Bakewell had knowledge of such a dangerous condition. The trial court granted the motion for summary judgment.

The Court of Appeal affirmed, holding that because Bakewell complied with its obligation to exchange expert witness information, Bakewell had standing to object that Perry unreasonably failed to comply, although the party who made the demand was Chase. By excluding Perry’s declarations from evidence, the trial court implicitly found that Perry had unreasonably failed to disclose expert witnesses, which was not an abuse of discretion because the Perry’s objection to the timeliness of the demand did not excuse failing to comply without seeking a protective order. A trial court’s authority to exclude evidence is not limited to evidence at trial and encompasses excluding an expert opinion in a summary judgment proceeding.

Younessi v. Woolf
(2016) 244 Cal.App.4th 1137
filed February 16, 2016

Michael Younessi and Alea Investments, LLC (“plaintiffs”) sued their previous attorneys, Camhi, Woolf, and Ronan Cohen (“defendants”), alleging that a judgment rendered against them



was the result of ineffective representation. Defendants filed an *ex parte* application to dismiss the action because plaintiffs failed to timely file an amended complaint which was granted. Plaintiffs moved to set aside the dismissal on grounds of excusable neglect and attorney fault. All three defendants opposed the motion, but the court granted it. When asked the basis for the ruling, the trial judge stated she relied on *Code of Civil Procedure* § 473(b)'s “discretionary” provision.

The Court of Appeal affirmed the order vacating the judgment of dismissal and remanded the matter to the superior court with directions to set a hearing on the amount of legal fees and costs appellants are entitled to recover. The Court held that because the written order of dismissal, signed and filed was an appealable final judgment, the trial court's order setting aside the dismissal was appealable as an order made after judgment. Substituting counsel did not provide good cause to excuse untimely filing of the respondents' brief. Without adequate explanation for a lengthy delay in seeking to set aside the dismissal, the diligence requirement for discretionary relief was not met; however, vacating the judgment of dismissal was appropriate under the mandatory attorney-fault provision because counsel's inexcusable failure to timely file an amended complaint amounted to a procedural default.



Insurance

AMCO Insurance Company v. All Solutions Insurance Agency, LLC
(2016) 244 Cal.App.4th 883
filed February 8, 2016

Hideyo Ogawa and Myong Echols sued their neighbor Amarjit Singh over their property and business losses caused by a fire that resulted from Singh's negligence. Singh tendered claims to his insurance company AMCO Insurance Company, but the AMCO denied his claims because there was no policy in effect on the date of the fire. The following year, Singh stipulated to a judgment of about \$194,200 and agreed to assign his claims against insurance broker All Solutions Insurance Agency, LLC for allegedly failing to obtain fire coverage for his property. All Solutions moved for summary judgment, alleging that Singh couldn't assign his negligence claims under California law and that its conduct didn't fall below the standard of care for an insurance broker, and further contended that the Echols' and AMCO's negligence claims were precluded by the so-called superior equities doctrine because their losses weren't caused by All Solutions' purported failure to secure fire coverage for Singh. The trial court granted the summary judgment.

The Court of Appeal reversed the judgment. California recognizes the assignability of a client's causes of action against an insurance broker or agent for failing to obtain insurance. The contractual assignments of the client's claims were not subject to the rule of superior equities because the assignees did not issue an insurance policy to the client and therefore were never potential equitable subrogees of the client.

Haering v. Topa Insurance Company
(2016) 244 Cal.App.4th 725
filed February 3, 2016

Plaintiff and appellant Larry Haering is the owner of California Fleet, Inc., an insured under a primary insurance policy issued by State National Insurance Company, and was also an insured under an excess liability policy issued by Topa Insurance Company. The Topa policy designates the State National policy as the underlying primary policy. Haering sued Topa for breach of contract, breach of the covenant of good faith and fair dealing, and declaratory relief following a motor vehicle accident caused by a negligent, and under insured, driver that caused injury to Haering. After Topa answered, Haering filed a motion for summary adjudication of a single issue: whether the Topa policy obligated Topa to provide uninsured motorist/under insured motorist ("UM/UIM") coverage for injuries Haering sustained in an accident. The trial court denied the motion, ruling that the Topa policy covered only third party liability claims, and not a first party UM/UIM claim for benefits for injuries sustained by the insured. Haering appealed. The Court of Appeal affirmed, holding that the excess insurance policy, which had a narrowly drafted form provision and no "broad as primary" endorsement, provided no coverage for first



party UM/UIM benefits because the statutory requirement for mandatory UM/UIM coverage does not apply to excess insurance policies, and the excess policy covered third party liability claims only, while expressly excepting from incorporation those provisions of the primary policy that were inconsistent with the excess policy. The absence of an express exclusion in the excess policy had no significance because there was no coverage. There was no ambiguity in the policy, which by its plain language limited coverage to third party liability claims.

Vardanyan v. Amco Insurance Company

(2015) 243 Cal.App.4th 779

filed December 11, 2015, publication ordered January 7, 2016

Artyun Vardanyan owned a rental house covered by an insurance policy issued by Amco Insurance Company. Vardanyan submitted a claim that stated he believed there was water damage, mold and other things that caused his home to collapse. Amco denied coverage to Vardanyan, citing multiple policy exclusions. Vardanyan then filed suit against defendant, alleging breach of the insurance contract and breach of the implied covenant of good faith and fair dealing. The trial court granted Amco's motion for directed verdict as to the claims for breach of the insurance contract and breach of the covenant of good faith and fair dealing and for punitive damages.

The Court of Appeal reversed and remanded as to the causes of action for breach of contract and breach of the covenant of good faith and fair dealing, but affirmed as to the claim for punitive damages. A jury instruction that the trial court decided to give was erroneous in stating that there was coverage only if the damage was caused by perils specifically listed in the collapse coverage provision and no others because the insurer did not show, for purposes of the efficient proximate cause doctrine (*Insurance Code*, § 530), that any of the listed perils relied on by the insured, when combined with any unlisted peril the insurer contended caused or contributed to the loss, created a single peril that was a genuine peril and that a reasonable insured would readily understand to be a separate, excludable peril.



Labor and Employment

Alvarado v. Dart Container Corporation of California
(2016) 243 Cal.App.4th 1200
filed January 14, 2016

Dart Container Corporation of California (“Dart”) is a producer of food service products, including cups and plates. Hector Alvarado began working for Dart in September 2010, as a warehouse associate, and was terminated in January 2012. During Alvarado’s employment, he earned attendance bonuses during weeks he worked overtime and sometimes double time. Alvarado filed a complaint for damages and restitution, alleging Dart had not properly computed bonus overtime under California law. Dart filed a motion for summary judgment or, alternatively, for summary adjudication concluding that, since Dart’s overtime formula, as described in its employment policy manuals, complies with federal law and does not conflict with state law, it is lawful. Therefore Alvarado’s entire complaint has no merit. The trial court granted Dart’s motion for summary judgment, concluding that it lawfully used the federal formula, 29 *Code of Federal Regulations* § 778.209, for computing overtime on an hourly employee’s flat sum bonuses.

The Court of Appeal affirmed, observing that in accordance with federal law expressly permitting states to regulate overtime wages, there is no federal law preemption of California law regarding bonus overtime. California case law that relied on the policy considerations underlying a maximum workday (*Labor Code*, § 510) to adopt a state agency’s manual formula for calculating bonus overtime in the context of salaried employees working a fluctuating workweek was not dispositive with regard to hourly employees. The state agency’s manual formula was not binding law because it had not been adopted in a formal rulemaking process under the Administrative Procedure Act, nor was it persuasive because it cited no supporting legal authority. Absent a binding state formula, the employer lawfully used the federal formula.

Astorga v. Retirement Board of the Santa Barbara County Employees Retirement System
(2016) 245 Cal.App.4th 386
filed February 2, 2016

Sara Astorga applied for retirement disability, and to maintain health insurance pending the decision on her application, she elected to remain on the payroll and receive her accrued sick leave, vacation and holiday pay in small but regular increments. The Retirement Board of the Santa Barbara County Employees Retirement System (“Board”) approved Astorga’s disability retirement application. *Government Code* § 317241 states that a disability retirement may not commence until the day following the last day the applicant received “regular compensation.”



The Board determined the effective date of her retirement was the day after she received her last sick leave, vacation or holiday payment. It rejected her argument that the effective date should be calculated based on the day her sick leave, vacation and holiday pay balances would have been exhausted had she taken them in full rather than in smaller increments. Astorga petitioned for a writ of mandate challenging the calculation of the effective date of disability retirement, and the trial court denied the petition.

The Court of Appeal affirmed, holding that because Astorga agreed in the administrative and trial court proceedings that sick leave and vacation pay credits donated by other employees constituted regular compensation, that issue was waived on appeal under the doctrine of invited error. Astorga's receipt of sick leave and vacation pay during a leave of absence while the disability retirement application was pending, which was paid in small increments instead of the full amount usually received for each pay period, was regular compensation and thus the county's retirement board did not err in determining that the effective date of retirement was the day after the employee received the last payment, regardless of when such pay would have been exhausted if taken in full rather than in smaller increments.

Ellins v. City of Sierra Madre
(2016) 244 Cal.App.4th 445
filed January 28, 2016

John Ellins, a city police officer, petitioned for a writ of mandate to overturn his dismissal from employment as a peace officer within the City of Sierra Madre Police Department ("Department".) Ellins challenged the timing of the Department's notice of the nature of the investigation under *Government Code*, § 3303(c). The trial court denied the Ellins' petition, finding sufficient evidence to sustain the Department's findings of the Ellins' unauthorized access to the California Law Enforcement Telecommunications System database and his insubordination in refusing to submit to an interrogation. The court also rejected the Ellins' challenge of the timing of the Department's notice of the nature of the investigation under § 3303(c).

The Court of Appeal affirmed the judgment. The Court held that *Government Code*, § 3303(c), requires a public safety officer to be informed of the nature of the investigation reasonably prior to any interrogation. Notice is reasonably prior to an interrogation if it grants the officer sufficient time to meaningfully consult with any representative the officer elects to have present during the interview, although the employing department may postpone disclosure until the scheduled time of the interview, and briefly postpone the commencement of the interview to allow time for consultation, if it has reason to believe that earlier disclosure would jeopardize the safety of any interested parties or the integrity of evidence under the officer's control. The Court concluded that the undisputed facts indicated that the Department provided the officer in the instant case with notice of the nature of the investigation reasonably prior to his interrogation. A letter the Department received from the officer's former girlfriend indicating his efforts to track her down without her consent provided good cause to postpone disclosure of the nature of the



investigation until the commencement of the interrogation to avoid any possibility of retaliation against her. Moreover, once the outside consultant running the investigation disclosed the nature of the investigation, he granted the officer and his representative the time they requested to confer, although they did not use all of that time. The officer therefore had no justification for his insubordination in refusing to submit to the interrogation.

Hughes v. County of San Bernardino
(2016) 244 Cal.App.4th 542
filed January 28, 2016

The trial court sustained, without leave to amend, a demurrer by the County of San Bernardino to an amended petition for writ of mandate and administrative mandate brought by Robert Hughes, a retired sheriff's deputy, who retired for health reasons after initiating an administrative appeal from a disciplinary action under the San Bernardino County Personnel Rules, on which no hearing was held.

The Court of Appeal reversed and remanded, holding that Hughes was not afforded an opportunity for a hearing because a tentative settlement was not enforceable, either because the Hughes' counsel lacked authority to enter into a settlement or because the county never reduced the agreement to writing. The San Bernardino Civil Service Commission did not lose jurisdiction over the administrative appeal when Hughes retired, given the absence of any local rule so providing and the unfairness of implying such a rule without a specific provision, and therefore the county was required to hold an administrative hearing on the Hughes' appeal.

USS-POSCO Industries v. Case
(2016) 244 Cal.App.4th 197
filed January 26, 2016

Floyd Case voluntarily enrolled in a three-year, employer-sponsored educational program. He agreed in writing that if he quit his job within 30 months of completing the program, he would reimburse his employer, USS-POSCO Industries ("UPI"), a prorated portion of program costs. Two months after completing the program, Case went to work for another employer. When he refused to reimburse UPI, the company sued for breach of contract and unjust enrichment. Case cross-complained, asserting the reimbursement agreement was unenforceable and UPI violated the *Labor Code* and other statutory provisions in seeking reimbursement. The trial court granted UPI's motion for summary judgment on both its complaint and Case's cross-complaint, and subsequently granted UPI's motion for attorney's fees for defeating Case's wage claims. In granting the fee motion, the court applied the version of *Labor Code* § 218.5 in effect at the time of the summary judgment proceedings, rather than the version in effect at the time it awarded fees, which permits fees to a prevailing employer only when the employee's wage claims have been brought in "bad faith."



The Court of Appeal affirmed the summary judgment, reversed the award of attorney's fees, and remanded the case. The agreement that the employee would reimburse the employer for a strictly voluntary, optional training program if he quit within 30 months of completing the program was enforceable because it was not an invalid restraint on employment under *Business & Professions Code*, § 16600, did not implicate the *Labor Code*, did not circumvent the collective bargaining process or lack consideration, and was not procedurally unconscionable or a taking of wages. In awarding attorney's fees to the employer, the trial court improperly relied on the version of *Labor Code*, § 218.5, in effect at the time summary judgment was granted, rather than the amended version in effect when fees were awarded, which required a showing that the employee's wage claims were brought in bad faith. Statutory provisions that alter the recovery of attorney's fees are deemed procedural in nature and apply to pending litigation.

Wallace v. County of Stanislaus
(2016) 245 Cal.App.4th 109
filed February 25, 2016

Dennis Wallace, a deputy sheriff, brought suit against the County of Stanislaus under *Government Code* § 12940, alleging disability discrimination based on the county's removing him from his job as bailiff and placing him on an unpaid leave of absence as a result of its incorrect assessment that he could not safely perform his duties as a bailiff even with reasonable accommodation. The trial court believed proof of animus was required and modified the version of the California Civil Jury Instruction in effect at the time to include a requirement that Wallace prove that the county regarded or treated him as having a disability in order to discriminate. Judgment was entered in favor of the county on the disability claim.

The Court of Appeal reversed the judgment and remanded the matter. The Court held that the instruction on discriminatory intent and the related question in the special verdict form contained error. Under the proper standard regarding employer intent or motivation, Wallace could prove the requisite discriminatory intent by showing his actual or perceived disability was a substantial motivating factor/reason for the county's decision to place him on a leave of absence. California law does not require an employee with an actual or perceived disability to prove that the employer's adverse employment action was motivated by animosity or ill will against the employee. Instead, California's statutory scheme protects employees from an employer's erroneous or mistaken beliefs about the employee's physical condition. The Court concluded that the instructional error was prejudicial and that a limited retrial of the disability discrimination claim was appropriate because the jury found that (1) the county regarded or treated Wallace as if he were disabled, (2) Wallace was able to perform the essential job functions of a deputy sheriff with or without reasonable accommodation, and (3) the county failed to prove Wallace's disability would increase the danger to himself or others while he performed those job functions. The Court found as a matter of law that the reason the county placed Wallace on a leave of absence was its mistaken belief that he could not safely perform the essential job functions of a deputy sheriff. The Court also found as a matter of law that the



county's decision to place Wallace on leave was a substantial factor in causing Wallace to suffer economic losses. Accordingly, the retrial could be limited to the issues related to the amount of Wallace's damages.



Law Practice

Martin Potts & Associates, Inc. v. Corsair, LLC
(2016) 244 Cal.App.4th 432
filed January 28, 2016

Defendant Corsair, LLC hired plaintiff Martin Potts & Associates, Inc. (“plaintiff”) to provide management services for a project. When Corsair stopped paying plaintiff for those services in August, plaintiff sued Corsair for the outstanding amount owed under theories of (1) account stated, (2) open book, and (3) breach of contract. Corsair never filed a responsive pleading. The trial court then entered an order of default against Corsair as well as a default judgment awarding plaintiff \$101,760. Corsair moved to set aside the default and default judgment based on attorney fault pursuant to *Code of Civil Procedure*, § 473(b). The trial court granted relief and plaintiff timely appealed.

The Court of Appeal affirmed, holding that an attorney affidavit of fault supporting a request for mandatory relief does not have to include an explanation of the reasons for the attorney’s mistake, inadvertence, surprise, or neglect because the statute’s plain language requires no explanation and it does not matter whether the neglect is excusable or inexcusable. Although the affidavits of fault did not include an explanation of the attorney’s reasons for failing to file a responsive pleading, they provided substantial evidence that the attorney’s neglect was the sole cause of the default judgment against the client and thus were sufficient to obtain relief from default because they unequivocally stated that the attorney represented the client, received the filings, took no action, and was solely responsible for that decision and for the entry of the resulting default.

M’Guinness v. Johnson
(2015) 243 Cal.App.4th 602
December 30, 2015

James J. M’Guinness brought suit against his fellow shareholder, Steven Johnson, for breach of fiduciary duty and other claims arising out of the operation of a small construction firm, Think It, Love It, Construct It, Inc. (“TLC”). M’Guinness also named TLC in the suit. The claims against TLC included involuntary dissolution of the corporation and the appointment of a receiver. Johnson cross-complained against M’Guinness, TLC, and the third TLC shareholder, Scott Stuart. Johnson was represented by the law firm of Casas, Riley & Simonian, LLP (“Law Firm” or “Firm”).

M’Guinness, Stuart, and TLC (collectively, “Appellants”) moved to disqualify the Law Firm. They contended the Firm had been retained by TLC as its counsel in 2006, TLC had never



discharged the Firm, and the Firm had never withdrawn as counsel. Appellants argued that because of the Law Firm's concurrent representation of TLC and Johnson, the Firm had a conflict of interest that required its disqualification in this case. The court denied the disqualification motion. It found, among other things, that the evidence was insufficient to warrant automatic disqualification based upon a concurrent representation conflict of interest. The court also rejected Appellants' contention that the Law Firm should be disqualified on the ground that it had a subsequent representation conflict of interest. In their appeal, Appellants asserted that the trial court abused its discretion in denying their motion.

The Court of Appeal reversed the order and remanded the matter. The Court held that the firm should have been automatically disqualified. The undisputed facts demonstrated that the firm continued to represent the corporation through the time the lawsuit was instituted. The client agreement drafted by the firm described an open-ended engagement that set forth the circumstances under which the attorney-client relationship could be terminated. There was no evidence either party terminated the relationship. The client agreement also provided that the firm would return any of the client's funds when the engagement ended, but the firm continued to hold funds of the corporation. The firm's practice of invoicing the corporation on a monthly basis, for at least seven months after the second shareholder claimed the firm ceased representing the corporation, was further evidence the attorney-client relationship continued beyond the date the second shareholder claimed. Furthermore, as a matter of corporate law, the firm's ongoing duty to the corporation precluded its representation of the second shareholder in a lawsuit involving allegations in which the interests of the corporation diverged from those of shareholder litigants. The Court concluded that, while disqualification is a drastic measure and motions to disqualify are sometimes brought by litigants for improper tactical reasons, disqualification is not generally disfavored. When the circumstances of a disqualifying conflict exist disqualification is required.



Torts

Blackwell v. Vasilas
(2016) 244 Cal.App.4th 160
filed January 26, 2016

According to Randall Blackwell he was at the top of a ladder installing rain gutters at an investment property owned by Ray Vasilas when he stepped on scaffolding that another contractor erected at the job site, and the scaffolding collapsed. The collapse caused Blackwell to fall, and he suffered injuries when he landed on a pile of bricks approximately 10 feet below. Blackwell sued Vasilas for negligence. The trial court granted summary judgment in favor of Vasilas on the ground that he was not vicariously liable for the acts or omissions of his allegedly negligent contractor.

The Court of Appeal reversed the judgment holding that the trial court erred in granting Vasilas' motion because Vasilas did not meet his initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact.

Burgueno v. Regents of the University of California
(2016) 243 Cal.App.4th 1052
filed December 15, 2015, publication ordered January 13, 2016

Adrian Burgueno, a student, was fatally injured in a bicycle accident on the Great Meadow Bikeway, which is on the campus of the University of California, Santa Cruz ("UCSC"). Burgueno's mother and sister brought action against the Regents of the University of California (the "Regents"), alleging that the Regents are liable for Burgueno's death due to the dangerous condition of the Bikeway. The trial court granted the Regents' motion for summary judgment on the ground that the action was barred under the recreational trail immunity provided by *Government Code* § 831.4.

The Court of Appeal affirmed the summary judgment holding that the causes of action for dangerous condition of public property and wrongful death are barred as a matter of law because the bikeway is a recreational trail within the meaning of *Government Code* § 831.4, giving the Regents absolute immunity from liability for injuries sustained as the result of allegedly negligent design or maintenance of the Bikeway.

County of Santa Clara v. Escobar
(2016) 244 Cal.App.4th 555
filed January 29, 2016

Javier Escobar, defendant and respondent here, was injured in a traffic accident on September



23, 2009. The parties agreed that the injuries were attributable to negligent operation of a vehicle by Jose Tinoco, who was acting within the course of his employment by Fresh Express, Inc. (“Fresh Express”). Escobar received treatment at a hospital owned and operated by the County of Santa Clara. The reasonable value of the care and services provided by the County was alleged to be over \$1.2M. Escobar sued the at-fault driver and his Fresh Express and recovered a judgment for \$5,689,624.87. The County asserted a cause of action against Fresh Express for statutory liability pursuant to *Government Code* § 23004.1. The trial court sustained Fresh Express’ demurrer without leave to amend, concluding that the County’s cause of action had been extinguished by Escobar’s judgment and that the only remedy against Fresh Express was to apply to the court that rendered the judgment for assistance in enforcing the County’s medical lien.

The Court of Appeal reversed the judgment and remanded with directions. The Court held that an adjudicated tortfeasor holding disputed funds it knows are encumbered by a public hospital lien cannot avoid liability by simply turning control of the funds over to the injured person. It must instead avail itself of the procedures provided for neutral stakeholders caught between rival claimants, most obviously the device of interpleader, under which it can deposit the disputed funds in court, requiring the contestants to appear and present their claims. What it cannot do is simply shirk its statutory obligations by turning disputed funds over to the injured person in a check payable to both contestants. By doing so, it satisfies neither the judgment nor the lien, and it remains subject to statutory liability pursuant to *Government Code* § 23004.1, in favor of the County unless and until the County recovers the amount to which it is entitled under the statute. The County’s right of action under § 23004.1, survived the attachment of its medical lien and the County was entitled to revive it when the at-fault driver’s Fresh Express surrendered control of the liened funds to Escobar’s attorney. It followed that the trial court erred by sustaining Fresh Express’s demurrer and that the judgment predicated on that ruling was subject to reversal. The workers’ compensation laws posed no impediment to the County’s claims against the at-fault driver and therefore posed no impediment to the County’s claims against Fresh Express.

King v. CompPartners, Inc.
(2016) 243 Cal.App.4th 685
filed January 5, 2016

In an action arising from a workplace injury, Kirk King and his wife alleged that an anesthesiologist for a workers’ compensation utilization review company was negligent in determining that a psychotropic medication was medically unnecessary without providing any warnings concerning a gradual reduction of the dosage or continuing the worker on the medication until a step-down process was completed. The King alleged that he suffered seizures and further physical injury from the sudden cessation of the medication. The trial court sustained defendants’ demurrer without leave to amend.



The Court of Appeal affirmed the order sustaining the demurrer, reversed the denial of leave to amend, and remanded the case. To the extent that the Kings were faulting the anesthesiologist for not communicating a warning, the claims were not preempted by the Workers' Compensation Act ("WCA") because such a warning would have been beyond the medical necessity determination. The claims were preempted by the WCA to the extent the Kings were arguing that the medication was medically necessary until the worker was weaned, and thus that a particular number of pills should have been authorized for weaning, because the Kings were directly challenging the anesthesiologist's medical necessity determination. Further, given the lack of factual allegations related to duty, the scope of the anesthesiologist's duty could not be determined from the complaint.

Toste v. CalPortland Construction
(2016) 245 Cal.App.4th 362
filed March 2, 2016

In a wrongful death action, Anthony Toste, survivor, sued CalPortland Construction, CalPortland Company (collectively, "employer"), V&J Rock Transport, Inc., and Paul Michaelson ("driver".) The jury found that the driver was negligent when he backed up and hit the decedent, who was the general contractor for the road paving project, but that the driver's negligence was not a substantial factor in causing the harm suffered. The trial court entered judgment for defendants and awarded expert witness fees as a cost item based on pretrial offers to compromise under *Code of Civil Procedure* § 998.

The Court of Appeal reversed the award of costs to the driver and his employer and otherwise affirmed the judgment. The evidence supported the jury's finding that the manner in which the driver operated the truck was not a substantial factor in the death and that the accident would have happened whether or not the driver was under the influence of marijuana because the decedent was not paying attention to the hazards of the jobsite. The evidence showed that the driver looked in his mirrors and slowly backed up at about half the walking speed of an adult, and that the decedent, who was standing in a blind spot, would, if attentive, have heard the backup alarm and sensed the movement of the truck. The Court's other holdings included that (1) the driver's violation of a federal safety regulation did not establish causation as a matter of law; (2) after being presented with contradictory juror declarations, the trial court could properly discredit the declarations of two jurors and conclude that there was no juror misconduct; and (3) *Code of Civil Procedure* § 998, as amended effective January 1, 2016, applies to cases pending on appeal; therefore, expert witness fees could not be awarded to the extent they were incurred before a valid offer to compromise.