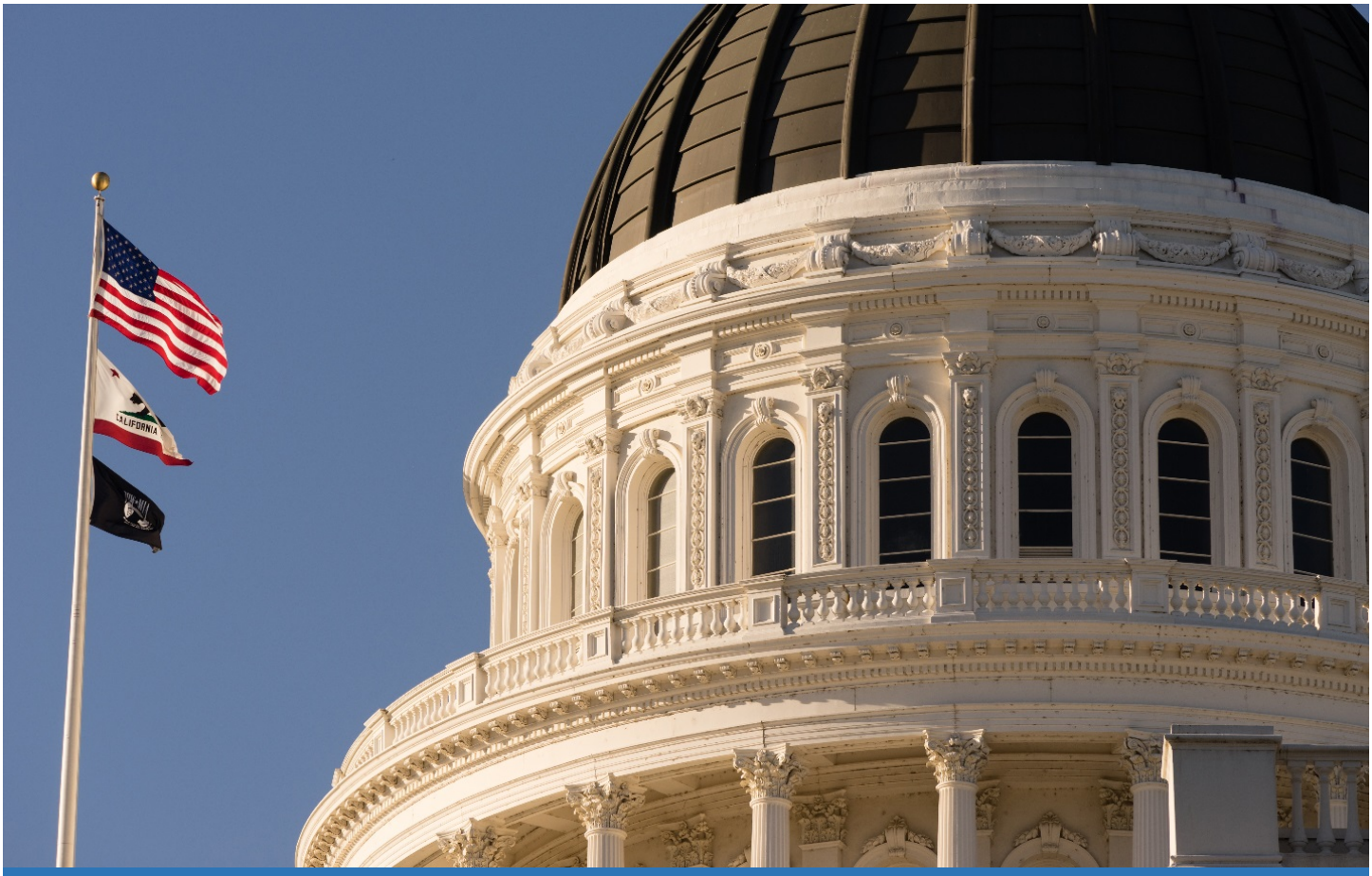
Summary of 2016 California Case Law

QUARTER 2 — APRIL TO JUNE 2016



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SUMMARY OF CALIFORNIA LAW
APRIL TO JUNE 2016

TABLE OF AUTHORITIES

Anti-SLAPP (Strategic Lawsuit Against Public Participation)

Hyan v. Hummer
June 14, 2016
(2016) 825 F.3d 1043

J.P. Hyan sued multiple defendants, alleging that they stymied his efforts to collect on a California state court legal malpractice judgment. The District Court granted a motion filed by a defendant, appellee Rosslyn Beth Hummer, to strike Hyan's claims under California's anti-SLAPP statute, and Hyan appealed.

The Court held that granting an anti-SLAPP motion was not a "final decision" over which the court could exercise jurisdiction because the order dismissed two of the defendants, but one defendant remained in District Court. Although the grant of an anti-SLAPP motion to strike is treated as final in California courts, under the Erie doctrine, federal courts sitting in diversity must apply state substantive law to resolve claims under state law but must apply federal procedural law. Grant of an anti-SLAPP motion is not reviewable under the collateral order doctrine because the grant of an anti-SLAPP motion to strike is fully reviewable on appeal from final judgment.

J-M Manufacturing Company, Inc. v. Phillips & Cohen LLP
May 2, 2016
(2016) 247 Cal.App.4th 87

Phillips & Cohen LLP, a law firm, was sued by J-M Manufacturing Company, Inc. for defamation and trade libel based on a celebratory post-litigation press release under the False Claims Act. The trial court denied the law firm's motion to strike under *Code of Civil Procedure* § 425.16, the anti-SLAPP statute.

The Court of Appeal reversed the trial court order denying the special motion to strike and remanded with directions, finding that J-M Manufacturing, the defendant in the underlying false claims act litigation, failed to establish a likelihood it would prevail on the merits, as the firm's press release fell within the permissible degree of flexibility and literary license under the fair report privilege (*Civil Code* § 47, subd. (d)). The Court further held that even if the Phillips & Cohen LLP was guilty of self-promotion and puffery, the press release was accurate in describing the evidence and special verdict regarding J-M Manufacturing's knowing misrepresentations to governmental entities over a 10-year period that its polyvinyl chloride (PVC) pipe had been manufactured and tested in a manner that assured it had the required strength and durability. Although the adjective "faulty" in the headline could, considered in isolation, have suggested that the pipes contained manufacturing flaws that made them unserviceable, that inference was not reasonably supportable when the headline was read and considered with the press release as a whole.

Rand Resources LLC v. City of Carson
May 31, 2016
(2016) 247 Cal.App.4th 1080

Pursuant to *Code of Civil Procedure* § 425.16, the trial court granted the City of Carson's anti-SLAPP motions against Rand Resources, LLC in an action for breach of, and interference with, their contract to build a sports/entertainment complex as well as other related causes of action.

The Court of Appeal reversed the trial court's order and remanded for further proceedings. The court concluded that the trial court erred by granting defendants' anti-SLAPP motions because defendants' actions did not arise from an act in furtherance of their right of free speech or to petition for redress of grievances and were not in connection with an issue of public interest, and therefore fell outside the scope of the anti-SLAPP statute. Plaintiff's tortious breach of contract cause of action was not premised upon protected activity, but upon the city's conduct in carrying out (or not) its contract with plaintiff. To the extent plaintiff's cause of action for fraud pertained to any communications, they were separate from any public issue and were instead unrelated private commercial conduct. Given that none of plaintiff's causes of action fell within the scope of the anti-SLAPP statute, the Court of Appeal did not need to address plaintiff's probability of success.

Arbitration

Espejo v. Southern California Permanente Medical Group
April 22, 2016
(2016) 246 Cal.App.4th 1047

Jay Espejo, M.D. sued Southern California Permanente Medical Group ("Employer") for wrongful termination and whistleblower retaliation. The trial court denied Employer's petition to compel arbitration (*Code of Civil Procedure* § 1281.2) pursuant to the employment agreement and associated documents, finding that the Employer failed to establish the existence of an enforceable arbitration agreement.

The Court of Appeal reversed and remanded, holding that the Employer satisfied the initial burden of establishing the existence of the agreement as required by *California Rules of Court*, rule 3.1330 by attaching a copy to their petition and were not required to establish the authenticity of Dr. Espejo's electronic signature until the he challenged it; thus, their supplemental declaration did not have to be filed by the deadline for a party's moving papers (*Code of Civil Procedure* § 1005, subd. (b)). As such, the supplemental declaration sufficiently authenticated the signature (*Evidence Code* § 1401; *Civil Code* § 1633.9, subd.(a)) as an electronic signature with legal effect (*Civil Code* § 1633.7) by describing Employers' secure procedures for signing documents and concluding that the Dr. Espejo must have signed the agreement.

Civil Procedure

Charton v. Harkey
May 24, 2016
(2016) 247 Cal.App.4th 730

Diane L. Harkey was the prevailing party in the underlying litigation which involved causes of action including breach of fiduciary duty, breach of operating agreement, breach of promissory note, negligent misrepresentation, intentional misrepresentation, rescission, failure to produce records, unfair business practices, securities law violations, elder abuse, and declaratory relief. Under *Code of Civil Procedure* § 1032 a "prevailing party" has the right to recover its litigation costs, and the trial court awarded Harkey accordingly. Nonetheless, Lloyd Charton, as Trustee, etc., et al. ("Plaintiffs"), contend the trial court erred in awarding Harkey her costs because she was united in interest and shared costs with other defendants who did not satisfy the statutory definition of "prevailing party". In support, Plaintiffs relied on cases applying the so-called unity of interest exception, which provides a trial court with discretion to deny prevailing party status to a defendant who otherwise would be entitled to recover costs as a matter of right when that defendant is united in interest with, and asserted the same defenses in the same answer as, other defendants who did not prevail and are not entitled to recover their costs.

The Court of Appeal affirmed in part, reversed in part, and remanded. The Court held that although the prevailing defendant was united in interest with unsuccessful defendants, she was entitled to recover costs as a matter of right because the trial court had no discretion to deny prevailing party status under case law that had applied a unity of interest exception, which is no longer controlling as a result of a significant change in the statutory language. In allocating costs between the prevailing defendant and other jointly represented parties, the trial court failed to apply the proper legal standards because an across-the-board reduction does not consider the necessity or reasonableness of the costs.

Chen/Pacleb v. Allstate Insurance Company
April 12, 2016
(2016) 819 F.3d 1136

Florencio Pacleb filed a class action complaint against Allstate Insurance Company, alleging he received unsolicited automated telephone calls to his cellular telephone, in violation of the Telephone Consumer Protection Act. Taking a cue from a recent Supreme Court case, *Campbell-Ewald Co. v. Gomez*, 577 U.S. __, 136 S. Ct. 663 (2016) ("Campbell-Ewald"), on appeal Allstate deposited $20,000 in full settlement of Pacleb's individual monetary claims in an escrow account "pending entry of a final District Court order or judgment directing the escrow agent to pay the tendered funds to Pacleb, requiring Allstate to stop sending non-emergency telephone calls and short message service messages to Pacleb in the future and dismissing this action as moot." On the basis of those actions, Allstate argued the Court of Appeal should "reverse the denial of Allstate's motion to dismiss for lack of subject matter jurisdiction and remand to the District Court to order disbursement of the tendered funds to Pacleb, the entry of the judgment in favor of Pacleb and the dismissal of this action as moot."

The Court of Appeal affirmed holding that although an unaccepted offer of judgment under *Federal Rules of Civil Procedure* § 68 was in an amount sufficient to afford complete relief on individual claims alleging unlawful automated telephone calls, the offered sum had been deposited in escrow, and injunctive relief had been offered, the claims were not moot because complete relief had not actually been received. Because the Pacleb had not yet been afforded a fair opportunity to move for class certification under *Federal Rules of Civil* § 23 and did not act unreasonably by declining an offer of judgment on individual claims in order to pursue relief on behalf of members of a class, the District Court correctly declined to enter judgment over the Pacleb's objection on the individual claims, consistent with the flexibility *of U.S. Constitution Article III* requirements and the need to protect the interests of class members prior to certification.

Dietz v. Bouldin
June 9, 2016
(2016) 579 U.S. __, 136 S.Ct. 1885

Rocky Dietz sued Hillary Bouldin for negligence for injuries suffered in an automobile accident. Bouldin removed the case to Federal District Court. At trial, Bouldin admitted liability and stipulated to damages of $10,136 for Dietz' medical expenses. The only disputed issue remaining was whether Dietz was entitled to more. During deliberations, the jury sent the judge a note asking whether Dietz' medical expenses had been paid and, if so, by whom. Although the judge was concerned that the jury may not have understood that a verdict of less than the stipulated amount would require a mistrial, the judge, with the parties' consent, responded only that the information being sought was not relevant to the verdict. The jury returned a verdict in Dietz' favor but awarded him $0 in damages. After the verdict, the judge discharged the jury, and the jurors left the courtroom. Moments later, the judge realized the error in the $0 verdict and ordered the clerk to bring back the jurors, who were all in the building. Over the objection of Dietz' counsel and in the interest of judicial economy and efficiency, the judge decided to recall the jury. After questioning the jurors as a group, the judge was satisfied that none had spoken about the case to anyone and ordered them to return the next morning. After receiving clarifying instructions, the reassembled jury returned a verdict awarding Dietz $15,000 in damages. On appeal, the Ninth Circuit affirmed.

The United States Supreme Court also affirmed holding that a federal District Court has a limited inherent power to rescind a jury discharge order and recall a jury in a civil case for further deliberations after identifying an error in the jury's verdict. The District Court did not abuse that power where all of the jurors were in the courthouse when they were recalled, and all assured the judge that they had not discussed the case with anyone after discharge.

Hearn Pacific Corporation v. Second Generation Roofing, Inc.
May 2, 2016
(2016) 247 Cal.App.4th 117

Second Generation Roofing, Inc., a roofing subcontractor involved in multiparty construction defect litigation, successfully defeated indemnity and related cross-claims asserted against it by the project's general contractor, Hearn Pacific Corporation ("Hearn"). It then secured a roughly $210,000 award of prevailing party attorney's fees and costs against the Hearn, embodied in two separate orders, pursuant to a fee clause contained in the subcontract. The trial court

denied a motion to add one of the Hearn's insurers as a judgment debtor. Subsequently, it appealed maintaining that the insurer had taken an assignment of the Hearn's contractual indemnity rights during the litigation, had in fact been the entity that prosecuted the cross-claims to final judgment (in the Hearn's name), and as such was the real party in interest liable on the resulting fee award.

The Court of Appeal reversed and remanded. The Court held the admission into evidence on summary judgment of a declaration that was relevant and admissible (*Evidence Code*, § 351) did not preclude reintroducing it into evidence in support of the motion to add a party. Allegations of an unverified complaint were binding judicial admissions. *Code of Civil Procedure* § 187, was inapplicable because § 368.5 governed the course of proceedings. Refusing to add the assignee was an abuse of discretion because the assignee accepted the benefits of the underlying contracts (*Civil Code*, §§ 1589, 3521), a direct action seeking payment from policy proceeds (*Insurance Code*, § 11580) was neither a potential nor an exclusive remedy, and an untimely appeal from a previous order had not divested the trial court of jurisdiction.

Li v. Yan
May 2, 2016
(2016) 247 Cal.App.4th 56

In the course of lengthy examination of judgment debtor proceedings, a trial court ordered Demas Yan, a judgment debtor, to produce all documents responsive to Charles Li, a judgment creditor's subpoena duces tecum at the order of examination. Yan appealed arguing that: (1) service of the subpoena requiring production of documents was improper, and (2) it was error to deny his claim of privilege as to tax returns.

The Court of Appeal affirmed the order. The Court found no merit in Yan's claim of improper service of the subpoena requiring production of documents. Yan's appearance was compelled by the order of examination that was personally served, and a judgment creditor may obtain documents from a judgment debtor either by subpoena duces tecum or by a discovery request for production. The Court also concluded that Yan had to produce his tax returns. There was a strong public policy to deny the Yan's claim of privilege, beyond only leaving no stone unturned. That policy was to prevent fraud against creditors, against lenders, and perhaps against the Court. Yan's story included some claimed transfers to members of his family, who might be complicit in his machinations. Beyond that, Yan's answers at the examinations were less than forthcoming. He testified he sold his membership in a limited liability company to two persons for $650,000 but could not remember their names. He also testified that his mother provided him checks but could not remember whether the checks numbered more than a hundred, when the most recent check was received, or when his mother last worked or her last job. Moreover, his refusal to produce relevant financial information was not an isolated incident.

Lopez v. Watchtower Bible and Tract Society of New York, Inc.
April 14, 2016
(2016) 246 Cal. App.4th 566

Jose Lopez sued the national Jehovah's Witnesses organization, Watchtower Bible and Tract Society of New York, Inc. ("Watchtower"), which supervised the religion's local congregations and was responsible for the religion's policies and administrative matters, alleging his Bible instructor sexually abused him in 1986 when he was a child. After contentious discovery disputes, the trial court issued two discovery orders against Watchtower: (1) compelling the deposition of a long-standing member of the religion's entity known as the "Governing Body" whom the court found was a "managing agent" of Watchtower; and (2) ordering the production of documents in Watchtower's files pertaining to other perpetrators of child sexual abuse. When Watchtower failed to comply with the orders, the trial court granted Lopez's motion for monetary and terminating sanctions, struck Watchtower's answer, and entered Watchtower's default.

The Court of Appeal ordered the trial court to vacate the portion of the order requiring Watchtower to produce the governing body member for his deposition, the order granting terminating and monetary sanctions, and the entry of default and the default judgment. The Court rejected Watchtower's challenges to the document production order. The Court found that the trial court had independently reviewed Watchtower's objections to the recommendation of the discovery referee (*Code of Civil Procedure* §§ 643, 644). Further, the trial court also properly ordered the production of the person most qualified documents requested by Lopez because the document requests sought relevant information and were not overly broad and did not impose an undue burden. However, the Court concluded that the trial court erred in ordering Watchtower to produce the governing body member for his deposition because the factual record did not support its finding that he was Watchtower's "managing agent." He was not a party, nor was he an officer, director, or employee of Watchtower, and there was no evidence that he could be expected to comply with Watchtower's directive to appear. Accordingly, the trial court erred in sanctioning Watchtower for the governing body member's nonattendance at the deposition (*Code of Civil Procedure* §§ 2025.280, 2025.450). The Court also concluded that the trial court erred in issuing terminating sanctions as the initial remedial measure without first attempting to compel compliance with its discovery orders by using lesser sanctions and/or by imposing evidentiary or issue sanctions. There was no evidence that lesser sanctions would have failed to obtain Watchtower's compliance with the discovery orders.

McClatchy v. Coblentz, Patch, Duffy & Bass, LLP
May 10, 2016
(2016) 247 Cal.App.4th 368

Carlos McClatchy, the beneficiary of an irrevocable trust, filed a petition for relief from breach of trust. The petition named five former trustees, including a deceased attorney, as defendants. Subsequently, plaintiff filed an amended petition, pursuant to *Code of Civil Procedure* § 474, seeking to substitute the deceased attorney's law firm as a Doe defendant. The trial court granted the firm's motion to quash service of summons, concluding that McClatchy had known the firm's identity and the facts allegedly giving rise to its liability when the original petition was filed.

The Court of Appeal affirmed the order granting the motion to quash. The Court concluded that substantial evidence supported the trial court's determination that when plaintiff filed the original

petition, he was not ignorant of the facts on which his claims against the firm were based. Plaintiff knew of the professional relationship between the attorney and the firm when he filed his original petition, and was aware that the attorney had used the firm's office and letterhead when handling the affairs of the trust. The trial court could reasonably conclude a Securities and Exchange Commission filing "discovered" by McClatchy after he filed his original petition did not add to or subtract from the relationship between the attorney, the firm and the trust as it was understood by him.

O'Brien v. AMBS Diagnostics, LLC
April 21, 2016
(2016) 246 Cal.App.4th 942

Following a bench trial in 2014, AMBS Diagnostics, LLC ("Diagnostics") obtained a writ of execution for a judgment in its favor against Timothy O'Brien ("O'Brien") in the amount of $622,957.21. Diagnostics then served a notice of levy upon FMR, LLC/Fidelity Investments, which managed at least seven of O'Brien's investment accounts. In response, O'Brien filed a claim of exemption seeking a judicial declaration that all seven of his Fidelity Investments accounts were exempt from levy under *Internal Revenue Code* § 529: (1) three savings accounts held in his name, then valued at $54,765.39, one for each of his three children; and (2) four individual retirement accounts held fully or partially in his name, then valued at $465,350.04. The trial court granted O'Brien's claims for exemption, concluding that the § 529 savings accounts were exempt from levy and that the full amount of O'Brien's four retirement accounts was necessary to provide for him and his family upon his retirement.

The Court of Appeal reversed the ruling and remanded the matter. The Court held that a person's § 529 savings accounts are not exempt from the collection efforts under the Enforcement of Judgments Law (*Code of Civil Procedure* § 680.010 *et seq*.) of a creditor who has a valid judgment against that person. § 529 savings accounts are designed and used for educational purposes, not retirement purposes; indeed, such accounts lose their tax exempt status and are subject to penalty if they are used for anything other than educational purposes. Accordingly, the trial court erred in exempting O'Brien's § 529 savings accounts from execution. The Court also held that trial court erred in exempting the full amount of O'Brien's retirement accounts because it did not apply the proper legal standard in evaluating the exemption for private retirement accounts. The trial court refused to weigh or take into consideration what O'Brien and his wife's current wages and salaries were, and the error was not harmless given the evidence that O'Brien was still many years from retirement, was in good health, and had earned a significant salary in the past.

Patel v. Crown Diamonds, Inc.
March 30, 2016
(2016) 247 Cal.App.4th 29

A trial court entered a judgment of dismissal after granting terminating sanctions striking Rita Patel's complaint under *Code of Civil Procedure* § 128.7, which alleged claims against defendants Victor Ali, Ana Alonso, and their company Crown Diamonds, Inc. (collectively, "defendants") for fraud, false promises, negligent misrepresentations, negligent infliction of emotional distress, negligence per se, accounting, and unfair business practices. The court concluded that Patel filed the complaint for an improper purpose without evidentiary or legal

support because her claims were barred by res judicata based on her previous adversary action in federal court opposing the bankruptcy petition of Victor Ali.

The Court of Appeal reversed the judgment and order. The Court held that the trial court erred as a matter of law in applying res judicata and collateral estoppel as the basis for its sanctions award. Defendants' res judicata claim on which they premised their sanctions motion failed at the outset because they were neither parties to Patel's adversary action in the bankruptcy proceeding, nor the business partner's privies. They could not intervene in the proceeding, nor assert and control a defense nor appeal as a party or privy, because the outcome of the proceeding (Ali's bankruptcy discharge) determined his legal rights and obligations, not theirs. Patel's complaint alleged all of the defendants directly participated in committing their financial torts against her. Business partners are not in privity for purposes of subsequent preclusion, especially as in the instant case, where Patel alleged they were independently liable. In any event, the trial court's ruling failed for an additional reason, as the various, plausible bases for the bankruptcy court's dismissal of plaintiff's adversary action demonstrated it was speculative to conclude, as defendants asserted, that the bankruptcy court necessarily decided in the previous action that they bore no liability for their alleged fraud.

Ruiz v. Snohomish County Public Utility District No. 1, Jim Little, et al.
June 8, 2016
(2016) 824 F.3d 1161

Kim Milless Ruiz worked for Defendant Snohomish County Public Utility District No. 1 ("the District") from 1998 until her termination in 2010. In 2011, she sued her employer and Defendant Jim Little, the Executive Director of Employee Relations at the District, alleging sex discrimination for acts that had occurred in 2008. But, as Ruiz conceded, she failed to effect service on Little. The District Court dismissed that action "with prejudice" on two grounds: lack of personal jurisdiction and untimeliness. In 2013, Ruiz brought another action against both Defendants, alleging sex discrimination claims, under state and federal law, stemming in part from her termination in 2010. The District Court held that the earlier dismissal was res judicata and that, accordingly, it barred the action. Ruiz timely appealed.

The Court of Appeal reversed in part, affirmed in part, and remanded. The Court held, consistent with the Restatement (Second) of Judgments and at least three sister circuits, that an earlier dismissal on alternative grounds, where one ground is a lack of jurisdiction, is not res judicata. Therefore, the Court concluded that res judicata did not bar the second action. The court affirmed the dismissal of Ruiz's federal claim because Ruiz's lawyer clearly and expressly abandoned the claim. The Court affirmed the dismissal of Ruiz's state-law claims to the extent that they rely solely on events that occurred more than three years before the filing of the complaint in this case. For purposes of the motion to dismiss, at least two claims are timely: (1) Ruiz's claim alleging discriminatory firing in 2010; and (2) a hostile work environment claim founded in part on actions occurring within the limitations period.

San Diegans for Open Government v. City of San Diego
June 7, 2016
(2016) 247 Cal.App.4th 1306

San Diegans for Open Government ("SDOG"), describes itself as a nonprofit organization acting as a government "watchdog" to ensure public agencies comply with all applicable laws aimed at

promoting transparency and accountability in government. Defendants are the City of San Diego ("City") and Jan L. Goldsmith, the San Diego City Attorney (together, "defendants"). SDOG submitted a public records request to City for all e-mail communications pertaining to City's official business sent to or from Goldsmith's personal e-mail account during certain time periods. City refused to produce any e-mail communications, stating they did not qualify as public records. SDOG filed suit after confirming City would not produce any responsive records. The operative pleading claimed a violation of the Act and sought declaratory relief against defendants to compel disclosure of the e-mails. SDOG also alleged a cause of action for taxpayer waste. SDOG ultimately dismissed the waste cause of action with prejudice. The trial court issued a judgment in favor of SDOG on its claim under California Public Records Act (*Government Code*, § 6250 *et seq*. (the "Act")) and granted SDOG declaratory relief against City. A third party, League of California Cities, subsequently petitioned for a writ of mandate under the Act challenging the trial court's order. The petition was granted and remanded the matter for further proceedings. (*League of California Cities v. Superior Court* (2015) 241 Cal.App.4th 976.) On remand, the trial court determined SDOG to be the prevailing party under the Act and awarded it attorney's fees and costs. The court also denied City's request for sanctions under *Code of Civil Procedure* § 128.5. City timely appealed both orders.

The Court of Appeal affirmed in part, reversed in part, and remanded. The Court held that sanctions can be imposed in a case pending as of the statute's effective date, regardless of a previous dismissal of the cause of action alleged to be meritless. The safe harbor waiting period (*Code of Civil Procedure*, § 128.7, subd. (c)(1)) is inapplicable. The standard is whether the challenged conduct was objectively unreasonable. A party seeking sanctions has the initial burden of producing evidence (*Evidence Code*, §§ 500, 550, subd. (b)), after which the burden shifts (*Evidence Code*, § 110), ultimately remaining with the moving party (*Evidence Code*, § 115). The requester prevailed in light of evidence that clarifying information (*Government Code*, § 6253.1, subd. (b)) had not been sought.

Sanford v. Rasnick
April 25, 2016
(2016) 246 Cal.App.4th 1121

Charles Sanford was injured when his motorcycle was struck by a car owned by William Rasnick and driven by his daughter Jacy (the "Rasnicks"). Sanford sued the Rasnicks, who made a joint *Code of Civil Procedure* § 998 offer for $130,000. The offer lapsed, the case went to trial, and a jury returned a verdict for less than $130,000. The trial court held the § 998 offer valid, and ordered that the Rasnicks could recover some expert witness fees and other costs. The court also entered a separate order taxing certain of Sanford's costs.

The Court of Appeal reversed and remanded, holding that the settlement agreement condition invalidated the offer. The Court held that although there is case law allowing for releases, the settlement agreement was not described or attached, leaving the offeree to guess at the terms and making it likely that the parties would have found themselves in a disagreement over what terms could be included in the settlement agreement. Mediation costs and attorney service charges for delivering motion papers are discretionary costs (*Code of Civil Procedure*, § 1033.5, subd. (c)), which can be awarded if reasonably necessary to the conduct of the litigation, and thus the trial court erred when it failed to exercise discretion on either of these cost items because it erroneously believed it had no discretion to award such costs.

Scott v. Yoho
June 22, 2016
(2016) 248 Cal.App.4th 392

The relatives of a deceased plastic surgery patient sued defendants, a doctor and medical practice, for wrongful death, medical malpractice and survivorship. The trial court denied defendants' motion to compel arbitration under the arbitration agreements signed by the decedent, Kenisha Parker.

The Court of Appeal reversed the order denying the motions to compel arbitration, holding that the agreements were subject to limited preemptive effect of the Federal Arbitration Act (9 *United States Code* § 1 *et seq*.). The liposuction procedure involved interstate commerce, even though it was conducted wholly within California, because the practice used medical supplies shipped from out of state, advertised on the internet, communicated with out-of-state patients, and had contacts with out-of-state companies. Language in the agreements stating that California would be the jurisdiction for any court involvement necessary for arbitration and that the venue would be the Los Angeles Superior Court in Pasadena was not a generic choice of law provision placing the case outside the ambit of the Federal Arbitration Act. The fact that the patient died before the statutory 30-day rescission period elapsed did not render that agreement unenforceable. The rescission right in *Code Civil Procedure*, § 1295, subd. (c), is preempted by the Federal Arbitration Act because it applies only in the context of arbitration of medical care disputes.

Insurance

Certain Underwriters at Lloyds, London v. Arch Specialty Insurance Company
April 11, 2016
(2016) 246 Cal.App.4th 418

Certain Underwriters at Lloyds, London ("Underwriters") and Arch Specialty Insurance Company ("Arch") were both primary insurers of Framecon, Inc. over successive policy years. Framecon was sued by a real estate developer for framing and carpentry work Framecon performed on residential homes in three separate homeowner actions. Framecon tendered the claims to both Underwriters and Arch. Underwriters agreed to defend Framecon under a reservation of rights, while Arch denied a defense obligation. Arch's basis for denial was the "other insurance" language contained in the insuring agreement and in the conditions section of its policy, which stated that Arch's policy is excess if any other insurer provides a defense to Framecon for a claim; and that, when Arch's policy is excess, Arch has no duty to defend the claim. In the subsequent equitable contribution action, the trial court entered summary judgment in favor of Arch, concluding that an "other-insurance" provision in its policy had extinguished the duty to defend when "other insurance" afforded a defense.

The Court of Appeal reversed the judgment with directions, holding that the "other-insurance" provision was an unenforceable escape clause because it would require the other insurer to pay defense costs attributable to claims that arose after the "other insurer's" policy period had ended. Placing the "other-insurance" clause in the coverage section of the policy as well as the exclusions section did not make it an enforceable exception from coverage because the case law invalidating other-insurance clauses located only in the exclusions section had not discussed the location of the clause or suggested that it made any difference.

Paslay v. State Farm General Ins. Co.
June 27, 2016
(2016) 248 Cal.App.4th 639

In the underlying action, appellants Clayton and Traute Paslay (collectively, the "Insureds") asserted claims for breach of insurance contract, bad faith, and elder abuse against respondent State Farm General Insurance Company ("State Farm"), and requested an award of punitive damages. The trial court granted summary adjudication in favor of the State Farm on each claim and on the insureds' request for punitive damages.

The Court of Appeal reversed the judgment with respect to the insureds' claim for breach of insurance contract, affirmed the judgment with respect to the remaining claims and the request for punitive damages, and remanded the matter for further proceedings. The Court found that the trial court erred in granting summary adjudication in favor of the State Farm with respect to the insureds' claim for breach of insurance contract because insureds' evidentiary showing raised triable issues regarding two matters relevant to the breach of insurance contract claim, namely, the work undertaken in the master bathroom and the replacement of the drywall ceilings after flood damage. However, the insureds' bad faith claim failed under the genuine dispute doctrine, and the trial court properly granted summary adjudication on that claim. There were no triable issues regarding the adequacy of the State Farm's investigation, as the insureds

removed the damaged property before the State Farm had an opportunity to conduct a full assessment of the insured's proposals and contentions. The trial court also properly granted summary adjudication with respect to the elder abuse claim, as there was no evidence that the State Farm retained policy benefits owed to the insured with intent to defraud or by undue influence.

Encino Motorcars, LLC v. Navarro
June 20, 2016
(2016) 579 U.S. __, 136 S. Ct. 2117

Encino Motorcars, LLC ("Encino") sold and serviced Mercedes-Benz automobiles. Hector Navarro was employed there as a service advisor, which involved him greeting customers and assessing their needs as they entered the business. Navarro, along with other similarly-situated plaintiffs ("Service Advisors"), sued Encino for failing to pay overtime compensation when they worked more than forty hours a week. Service Advisors were also not paid a fixed salary or an hourly wage for their work; instead, they were paid commissions on the services they sold. Encino moved to dismiss, arguing that the Fair Labor Standards Act ("FLSA") overtime provisions do not apply because service advisors are covered by the statutory exemption in 29 United States Code § 213(b)(10)(A). The District Court agreed and granted the motion to dismiss.

The Ninth Circuit Court of Appeal reversed in relevant part. It construed the statute by deferring under *Chevron U. S. A. Inc.* v. *Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837, to the interpretation set forth by the Department in its 2011 regulation. Applying that deference, the Court of Appeal held that service advisors are not covered by the § 213(b)(10)(A) exemption.

The United States Supreme Court The Supreme Court reversed, holding that the regulation was arbitrary and capricious for lack of even minimal supporting analysis and therefore lacked the force of law under the Administrative Procedure Act. The Court explained that the "decades of industry reliance on the Department's prior policy" meant that the Department had a "duty" to offer more than a "summary discussion" of "why it deemed it necessary to overrule its previous position." Here, "the Department offered barely any explanation" for the change and "did not analyze or explain why the statute should be interpreted" to exempt auto salesmen but not service advisors. "This lack of reasoned explication for a regulation that is inconsistent with the Department's longstanding earlier position results in a rule that cannot carry the force of law. It follows that this regulation does not receive *Chevron* deference." The Court therefore vacated the judgment and remanded for the Ninth Circuit to reinterpret the statute without *Chevron* deference.

Estate of Barton v. ADT Security Services Pension Plan
April 21, 2016
(2016) 820 F.3d 1060

Bruce Barton worked for about 20 years on-and-off for ADT and affiliated entities. His employers went through several mergers and acquisitions during the period, some of which participated in the pension plan at issue. Mr. Barton submitted a claim for pension benefits, but the plan Administrator concluded he could not establish sufficient employment with participating employers to generate a vested benefit. In particular, Barton submitted W-2 statements and pay stubs among other things. The Administrator found that the records did not show continuous employment with a participating employer, or official confirmation of his participation in the plan. The District Court found that the Administrator acted within its discretion.

The Court of Appeal reversed and remanded, holding that the District Court incorrectly placed the burden of proof on Barton for matters within ADT's control, but expressed no view on Barton's eligibility for pension benefits. The Court went on to explain that, though a claimant bears the burden of proving entitlement to ERISA benefits, this burden must shift where "the defending entity solely controls the information that determines entitlement, leaving the claimant with no meaningful way to meet his burden of proof[.]"

Flores v. City of San Gabriel
June 2, 2016
(2016) 824 F.3d 890

Danny Flores, Robert Barada, Kevin Watson, Vy Van, Ray Lara, Dane Woolwine, Rikimaru Nakamura, Christopher Wenzel, Shannon Casillas, James Just, Steve Rodrigues, and Enrique Deanda and Cruz Hernandez (collectively, "Plaintiffs") are current or former police officers employed by the City of San Gabriel, California ("City"). The Plaintiffs brought suit against the City for violations of the Fair Labor Standards Act ("FLSA"), 29 *United States Code* §§ 201–19, alleging that the City failed to include payments of unused portions of the Plaintiffs' benefits allowances when calculating their regular rate of pay, resulting in a lower overtime rate and a consequent underpayment of overtime compensation. The Plaintiffs asserted that the City's violation of the FLSA was "willful," entitling them to a three-year statute of limitations for violations of the Act, and sought to recover their unpaid overtime compensation and liquidated damages. The City claimed that its cash-in-lieu of benefits payments were properly excluded from the Plaintiffs' regular rate of pay pursuant to two of the Act's statutory exclusions and argued that it qualified for a partial overtime exemption under § 207(k), which allows public agencies employing firefighters or law enforcement officers to designate an alternative work period for purposes of determining overtime. The City denied that any violation of the FLSA was willful and that the Plaintiffs were entitled to liquidated damages. Both the City and the Plaintiffs moved for partial summary judgment. The District Court granted partial summary judgment to the police officers, ruling that the cash-in-lieu of benefits payments were improperly excluded from the police officers' regular rate of pay, except where the City made payments to trustees or third-parties; the City's FLSA violation was not willful and therefore a two-year statute of limitations applied and the City qualified for a partial FLSA overtime exemption and its liability was limited to Plaintiffs' overtime hours based on the 80-hour, 14-day work period. The City appealed the portion of the District Court's decision regarding the cash-in-lieu of benefits payments, arguing that the payments in-lieu of benefits should not be included in employees' regular rate of pay because the payments were not tied to the Plaintiffs' hours worked or the amount of services the police officers provided. Plaintiffs cross-appealed on the willfulness and partial overtime exemption issues.

The Court of Appeal held that the City's payment of unused benefits must be included in the regular rate of pay and thus in the calculation of the overtime rate for its police officers as well. Because the City took no affirmative steps to ensure that its initial designation of its benefits payments complied with the FLSA and failed to establish that it acted in good faith in excluding those payments from its regular rate of pay, the Plaintiffs are entitled to a three-year statute of limitations and liquidated damages for the City's violations. However, the Court also held that

the City demonstrated that it qualified for the partial overtime exemption under § 207(k) of the Act, limiting its damages for the alleged overtime violations.

Green v. Brennan
May 23, 2016
(2016) 578 U.S. __, 136 S.Ct. 1769

Marvin Green complained to his employer, the United States Postal Service, that he was denied a promotion because he was black, and his supervisors accused him of the crime of intentionally delaying the mail. In an agreement signed December 16, 2009, the Postal Service agreed not to pursue criminal charges, and Green agreed either to retire or to accept another position in a remote location for much less money. Green chose to retire and submitted his resignation paperwork on February 9, 2010, effective March 31. On March 22, 41 days after resigning and 96 days after signing the agreement, Green reported an unlawful constructive discharge to an Equal Employment Opportunity counselor, an administrative prerequisite to filing a complaint alleging discrimination or retaliation in violation of Title VII of the Civil Rights Act of 1964. Green eventually filed suit in federal District Court, which dismissed his complaint as untimely because he had not contacted the counselor within 45 days of the "matter alleged to be discriminatory" under *Code of Federal Regulations* §1614.105(a)(1). The Tenth Circuit affirmed, holding that the 45-day limitations period began to run on December 16, the date Green signed the agreement.

The United States Supreme Court reversed and remanded holding that the 45-day limitations period for bringing an action for constructive discharge under the Civil Rights Act of 1964 commences when the employee gives notice of his or her resignation, not on the effective date the resignation.

Harris v. TAP Worldwide, LLC
June 22, 2016
(2016) 248 Cal.App.4th 373

Dwayne Harris, filed a complaint against defendants TAP Worldwide, LLC, Eddie Rivera and Alex Dominguez (collectively, "Defendants") alleging wrongful termination and violations of the Fair Employment and Housing Act and the Labor Code. Defendants moved to compel arbitration relying upon an arbitration agreement which Harris acknowledged receiving. Harris asserted there was no arbitration agreement and alternatively argued any agreement was unconscionable. Defendants' motion to compel arbitration was denied. Defendants appealed asserting that the trial court erred because the arbitration agreement in the Employer Handbook is enforceable.

The Court of Appeal reversed the order of the trial court, holding that the arbitration agreement appended to the employee handbook was valid and not illusory. The agreement was valid even if the employee never signed it because he acknowledged receipt of both the arbitration agreement and the handbook, the arbitration agreement was specifically highlighted in the signed acknowledgement form, the employment was offered on an at will basis under the terms of the handbook, the employee unequivocally accepted by commencing work, and thus he assented to the terms of the handbook. The handbook provided that upon commencing employment, an employee who failed to execute the arbitration agreement was deemed to have

consented by virtue of acceptance of the handbook. The arbitration agreement was not illusory, even though the employer could unilaterally change the handbook, because the arbitration agreement itself contained a distinct qualified modification provision, which, as the more specific provision, was paramount (*Code of Civil Procedure*, § 1859; *Civil Code*, § 3534) and because the general modification provision was subject to the implied covenant of good faith and fair dealing.

Moyle v. Liberty Mutual Retirement Benefit Plan
May 20, 2016
(2016) 823 F.3d 948

Liberty Mutual Insurance Company ("Liberty Mutual") purchased Old Golden Eagle Insurance Company ("Golden Eagle") through a conservatorship sale and as such employees of Golden Eagle became employees of Liberty Mutual. Golden Eagle did not offer a retirement plan to its employees. Former employees of Golden Eagle/Liberty Mutual (collectively, "Employees") alleged that while the sale was underway, Liberty Mutual told them that they would receive past service credit for the time they worked with Golden Eagle under Liberty Mutual's retirement plan. However, after Liberty Mutual purchased Golden Eagle, Liberty Mutual denied the Employees' claims for past service credit. Liberty Mutual argued that it never made any representation to the Employees that they would receive past service credit for their time with Golden Eagle. Liberty Mutual also argued that under the terms of the retirement plan, the employees are entitled only to past service credit for purposes of eligibility, vesting, early retirement, and spousal benefits, and not for retirement benefits accrual. Ultimately, the Employees filed a class action against Liberty Mutual for violating the Employee Retirement Income Security Act ("ERISA"), filed a complaint which alleged the following four causes of action: (1) payment of benefits under the Retirement Plan pursuant to 29 United States Code § 1132(a)(1)(B); (2) equitable remedies under 29 United States Code § 1132(a)(3); (3) civil penalties for failure to provide documents under § 29 Code of Federal Regulations § 2560.503–1(h)(2)(iii); and (4) failure to meet the requirements for Summary Retirement Plan Descriptions as required by 29 Code of Federal Regulations § 2520.102–3(1) and 29 Code of Federal Regulations § 2520.102–2(a). The District Court granted Liberty Mutual's motions for summary judgment on all four claims.

The Court of Appeal reversed the District Court's ruling as to claim (2). Employees can seek equitable relief under 29 *United States Code* § 1132(a)(3). The Court affirmed the District Court's ruling as to claims (1) and (4): Employees are not entitled to past service credit under the plain terms of the retirement plan, and Employees did not rely to their detriment on Liberty Mutual's failure to disclose information about past service credit in its Summary Plan Descriptions. The Court also found that the suit was not time-barred and that class certification was proper.

Ramos v. Garcia
June 28, 2016
(2016) 248 Cal.App.4th 778

Rogelio Ramos sued his former employers, Jose Robledo and Dora Garcia (nonparties on appeal), seeking to recover unpaid overtime, minimum wages and other compensation, and to impose statutory penalties. Ramos obtained some of the monetary recovery he requested against the two employers. Ramos also erroneously sued Manuel Garcia, an employer, and Ramos lost on all of those claims when the court found that Garcia was a manager and co-employee of the business, not an owner/employer. Following trial, the court awarded Garcia attorney's fees, as the "prevailing party."

The Court of Appeal reversed the fee order. The Court determined that the gravamen of the claims for waiting time penalties and failure to permit timely access to employment records was nonpayment of wages, as to which *Labor Code* § 218.5 but not *Labor Code* § 1194 can apply. The American rule applied (*Code of Civil Procedure,* § 1033.5, subd. (a)) to require the fellow employee to pay his own attorney's fees, although he could recover costs (*Code of Civil Procedure*, § 1032, subd. (b)), because the Ramos' success against the employers showed the claimant did not sue in bad faith, although he was mistaken about the fellow employee's role; moreover, § 218.5 was not intended to authorize an attorney's fee award against an employee who unsuccessfully sued a fellow employee on unpaid wage claims.

Rodriguez v. E.M.E., Inc.
April 22, 2016
(2016) 246 Cal.App.4th 1027

Juan Rodriguez asserted putative class claims against respondent E.M.E., Inc. ("E.M.E".) for violations of the *Labor Code*, Industrial Welfare Commission, Wage Order No. 1-2001 and the Unfair Competition Law (*Business & Professions Code*, § 17200 *et seq*.) which obliges employers to provide a 30-minute meal period for a work period of more than five hours, and rest periods accruing at the rate of ten minutes per four hours or major fraction thereof (*California Code of Regulations* tit. 8, §§ 11010(11)(A), 11010(12)(A)). The complaint's first and second causes of action asserted that appellant failed to provide meal and rest breaks. Underlying those claims were allegations that E.M.E. had contravened Wage Order 1-2001 by failing to supply the requisite 30-minute meal breaks and compelling employees "to take a single, combined rest period." The complaint's remaining claims were for failure to pay minimum wages and overtime compensation, failure to provide accurate pay statements and unfair business practices. The complaint sought compensatory damages and penalties. After granting Rodriguez's motion for class certification, the trial court granted E.M.E.'s motion for summary judgment on Rodriguez's claims.

The Court of Appeal concluded that summary judgment was incorrectly granted with respect to Rodriguez's claims relating to rest breaks. As *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 explained, under the applicable wage order provision, rest breaks in an eight-hour shift should fall on either side of the meal break, absent factors rendering such scheduling impracticable. Section 12(A) of Wage Order 1-2001 obliged E.M.E. to provide a 10-minute rest break in the middle of the work periods occurring before and after the 30-minute meal break "insofar as practicable." Therefore, there were triable issues regarding whether the rest break schedule stated in the wage order was not practicable. Because summary

adjudication was improperly granted with respect to Rodriguez's rest break claim, it was also improperly granted with respect to the derivative claims. The Court reversed the grant of summary judgment as to those claims, and remanded for further proceedings.

Seibert v. City of San Jose
May 31, 2016
(2016) 247 Cal.App.4th 1027

The San Jose Fire Department terminated the employment of firefighter/paramedic Grant Seibert based on five charges of misconduct including two charges relating to an exchange of salacious e-mails during work hours with a 16-year-old girl who had visited the station and three charges relating to alleged improper conduct toward a female coworker. The Civil Service Commission ("Commission") of the City of San Jose ("City") denied Seibert's appeal. The trial court, on petition for administrative mandamus, set aside the commission's decision on all but one of the five charges and found the remaining charge insufficient to sustain the level of discipline imposed. Both parties appealed.

The Court of Appeal reversed the judgment and remanded for further proceedings. The Court held that the trial court did not err in finding that there was insufficient evidence that a private exchange of salacious e-mails between Seibert and a willing unmarried adult would offend any existing rule or policy and that the weight of the evidence supported a finding that Seibert did not have actual or constructive knowledge of the e-mail recipient's age. However, ample evidence would also have supported a finding that Seibert knew or should have known that the e-mail recipient was a minor, and the question could be reconsidered on remand under the required strong presumption of correctness. As to the charges relating to a female coworker, the trial court should have considered the coworker's transcribed statements to an investigator under the hearsay exception for past recollection recorded. Although the coworker testified that she had no recollection of relevant events, she repeatedly said that whatever she told the investigator was true (*Evidence Code*, § 1237, subd. (a)). Further administrative proceedings following remand were ordered to take place before an administrative law judge, as mandated by the Firefighter's Procedural Bill of Rights (*Government Code*, §§ 3250–3262) because the charged misconduct arose while Seibert was performing his duties as a firefighter.

Tanner v. California Public Employees' Retirement System
June 28, 2016
(2016) 248 Cal.App.4th 743

Joseph Tanner sought to overturn a decision of defendant California Public Employees' Retirement System ("CalPERS") significantly reducing his expected retirement benefit. Specifically, Tanner argued that his retirement benefit should be set based on a base salary of $305,844, which was provided for in his final written contract with the City of Vallejo. The Board of Administration of CalPERS (also a defendant in this action) decided Tanner was not entitled to have his retirement benefit based on that figure. On Tanner's petition for a writ of administrative mandate, the trial court agreed with the board, holding that the $305,844 figure could not be used as Tanner's final compensation for purposes of setting his retirement benefit because it did not qualify as his pay rate due to the fact that the figure did not appear on a publicly available pay schedule.

The Court of Appeal affirmed, holding that a pay schedule (*Government Code*, § 20636, subd. (b)(1)) is a written or printed list, catalog, or inventory of the rate of pay or base pay of one or more employees who are members of CalPERS. Although an employment agreement and a cost analysis setting forth the city manager's salary were publicly available, neither of these documents qualified as a pay schedule from which final compensation could be determined (*Government Code*, §§ 20630, subds. (a), (b), 20636, subds. (a), (b)(1)) because they were not limited to pay information and would not have enabled a member of the public to locate the base salary of the city manager position without difficulty. Thus, the city manager was not entitled to have retirement benefits calculated based on the salary set forth in the agreement.

United Educators of San Francisco v. California Unemployment Insurance Appeals Board
June 6, 2016
(2016) 247 Cal.App.4th 1235

United Educators of San Francisco petitioned in state court for a so-called writ of administrative mandate on behalf of certain substitute teachers and paraprofessionals who were employed by the San Francisco Unified School District ("UESF"). UESF contended that these members, all of whom had been given a reasonable assurance of continued employment in fall 2011, were improperly denied unemployment benefits during summer 2011. The trial court denied the petition for writ of administrative mandate and thereby invalidated a precedent benefit decision that would have allowed such benefits.

The Court of Appeal affirmed, holding that summer school is not an academic term, as construed together with the meaning of an academic year (*Education Code*, § 37620) as the period when school is regularly in session for all students under a traditional academic calendar. Accordingly, claimants who had been provided reasonable assurance of continued employment with a school district in the fall were not eligible for unemployment benefits for days not worked during the summer, even if they had placed themselves on an on-call list for summer work as available.

Law Practice

Baxter v. Bock
May 18, 2016
(2016) 247 Cal.App.4th 775

Attorney Joseph Baxter and his former clients, Michael and Lorie Bock, participated in arbitration under the Mandatory Fee Arbitration Act (*Business & Professions Code*, § 6200), stipulating to be bound by the result. In his decision, the arbitrator concluded the services provided by Baxter should be valued at the amount already paid by the Bocks and awarded Baxter nothing. The parties acknowledge that the arbitrator erred in stating the amount of fees paid by the Bocks. When the error was brought to his attention, the arbitrator declined to correct his award. Later, Baxter discovered the arbitrator was in the business of auditing attorney bills and had written extensively about attorney overbilling. Baxter argued unsuccessfully that the arbitration award should be vacated because the arbitrator erred in stating the amount paid and failed to disclose matters relating to bias.

The Court of Appeal affirmed the judgment confirming the arbitration award, vacated the fee award, and remanded. The Court held that the arbitrator had no obligation to disclose a consulting practice reviewing attorney's fees because the consulting practice was not devoted exclusively to one side of fee disputes and created no economic incentive to rule one way or the other. Baxter was not entitled to vacation of the award (*Code of Civil Procedure*, § 1286.2; *Business & Professions Code*, § 6203, subd. (b)) because the arbitrator's concerns about improper billing practices did not suggest a predisposition to rule against attorneys, and thus disqualification was not required. Not compensating all hours billed by the clients' counsel in the fee award was not error, but no reasonable basis was apparent for assigning a different hourly rate to attorneys with similar qualifications.

Osborne v. Todd Farm Service
May 2, 2016
(2016) 247 Cal.App.4th 43

Rebecca Osborne was employed as a stable maintenance worker at the Ojai Valley School. In May 2010, she climbed to the top of a stack of hay bales, to throw one of the upper bales down to the ground. When she inserted hay hooks into the bale to move it, the bale gave way causing her to fall 11 feet to the ground, causing severe injury. As a result, Osborne sued the distributor, Todd Farm Service, as well as one of the three possible manufacturers of the bale of hay, Berrington Custom Haystacking and Transport, Inc. and its owners Gary and Phyllis Berrington. The trial court made a ruling excluding certain evidence regarding the source of the hay. Osbornes's counsel, Glenn Murphy, attempted to elicit the excluded evidence through witness testimony multiple times. These attempts were met with objections from defendants, multiple sidebar conversations and warnings from the judge. Notwithstanding multiple warnings by the judge, when Osborne took the stand she blurted-out the excluded evidence in response to her counsel's questioning. Rather than move for a mistrial, counsel for defendant Berrington Custom Haystacking & Transport, Inc., moved for terminating sanctions as to all defendants as a result of Osborne and her counsel's clear and intentional violation of a court order

The Court of Appeal affirmed the dismissal. The Court concluded that the terminating sanction of dismissal with prejudice was an appropriate response to Osborne's counsel's repeated flagrant misconduct and consistent with the trial court's inherent authority to compel obedience to its judgments, orders and process. The Court went on to state that if Osborne's opinion testimony was offered as an expert opinion, the trial court properly excluded it based on her failure to make a timely designation of expert witnesses, and by repeatedly attempting to solicit testimony that had been excluded, Osborne's counsel was attempting to give jurors the impression that respondents were hiding the truth.

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Torts

Bertsch v. Mammoth Community Water District
June 1, 2016
(2016) 247 Cal.App.4th 1201

Brett Bertsch tragically lost his life while skateboarding in the resort town of Mammoth Lakes. Bertsch was traveling downhill at a high rate of speed without a helmet when the front wheels of his skateboard hit a small gap between the paved road and a cement collar surrounding a manhole cover, stopping the wheels and ejecting Bertsch from the board. The impact of Bertsch's skull with the pavement caused his death. Bertsch's father and brother, Richard and Mitchell Bertsch ("Plaintiffs"), brought a wrongful death action against various defendants, including Mammoth Community Water District, who was responsible for inspecting and maintaining the manhole cover and Sierra Star Community Association, the owner of the road where the accident occurred. The trial court granted summary judgment in favor of the defendants, concluding the doctrine of primary assumption of risk barred Plaintiffs' lawsuit as a matter of law. Plaintiffs appealed.

The Court of Appeal affirmed the trial court judgment. The Court held that Mammoth Community Water District, and Sierra Star Community Association were not liable (*Civil Code*, § 1714) under the doctrine of primary assumption of risk and owed no duty to use due care not to increase the risks of skateboarding, because they had no "organized relationship" with decedent.

Flores v. Presbyterian Intercommunity Hospital
May 5, 2016
(2016) 63 Cal.4th 75

Catherine Flores, a patient at defendant Presbyterian Intercommunity Hospital ("PIH Health") was attempting to get up from her hospital bed when the latch on the bedrail failed and the rail collapsed, causing her to fall to the floor resulting in injury. Just under two years later, she filed suit against PIH Health, stating causes of action for general negligence and premises liability. PIH Health demurred to the complaint arguing that the complaint was governed by *Code of Civil Procedure §* 340.5's statute of limitations for suits alleging professional negligence, that Flores had discovered the injury when she fell out of her hospital bed, and that the complaint was untimely because it was filed more than one year thereafter. In her briefs and argument in opposition to the demurrer, Flores disputed that her claim arose from professional negligence and was therefore subject to the ordinary two-year limitations period for personal injury actions (*Code of Civil Procedure,* § 335.1). The trial court sustained the demurrer without leave to amend, and dismissed the lawsuit. Flores appealed. The Court of Appeal reversed, ordering the trial court to reinstate the complaint, holding that PIH Health's alleged failure to use reasonable care in maintaining its premises and its alleged failure to take reasonable precautions to make a dangerous condition safe "sounds in ordinary negligence because the negligence did not occur in the rendering of professional services."

The Supreme Court reversed the judgment of the Court of Appeal. The Court held that the special limitations period applied because the Flores' injuries resulted from the PIH Health's

alleged negligence in the use or maintenance of equipment integrally related to the Flores' medical diagnosis and treatment. Although the special limitations period does not extend to negligence in the maintenance of equipment and premises that are merely convenient or incidental to medical care, a doctor had ordered that the bed's rails be raised following a medical assessment of the Flores' condition, and thus the negligence occurred in the rendering of professional services to the Flores.

Glennen v. Allergan, Inc.
Apr. 29, 2016
(2016) 247 Cal.App.4th 1

Ashley Glennen sued the manufacturer of a lap-band medical device that was designed to induce weight loss by limiting food consumption and was surgically implanted in Glennen's body. Her claim alleged that Allergan, Inc., the manufacturer, failed to adequately train physicians in the use of the device. The trial court sustained Allergan, Inc.'s demurrer, finding that the claim was preempted by the Medical Device Amendments to the Food, Drug, and Cosmetic Act ("FDCA".)

The Court of Appeal affirmed the judgment. The claim was expressly preempted under the FDCA because it did not parallel federal requirements. The claim was also impliedly preempted because, but for the training requirement imposed by the Food and Drug Administration in the device's premarket approval, the patient would have had no basis on which to allege the facts underlying her cause of action for negligence.

Gopal v. Kaiser Foundation Health Plan, Inc.
May 26, 2016
(2016) 248 Cal.App.4th 425

Siasmorn Gopal ("Gopal") was admitted to the emergency room at Kaiser Foundation Hospitals ("Kaiser Hospitals") and died after she was transferred to another hospital. She was not a member of the Kaiser Foundation Health Plan ("Health Plan"). Gopal's husband and trustee of Gopal's estate, sued Kaiser Hospitals, Southern California Permanente Medical Group ("SCPMG"), Health Plan, and others, alleging that Kaiser Hospitals, SCPMG, and Health Plan treated Gopal differently than they would have treated a member, in violation of California law, and that the different treatment caused her death. The trial court granted summary judgment to Health Plan.

The Court of Appeal affirmed the trial court ruling, holding that the prohibition against vicarious liability between health plans and providers (*Health & Safety Code*, § 1371.25) cannot be avoided by relying on a joint enterprise theory of liability. Health Plan was not a provider (*Civil Code*, § 3428, subd. (c); *Health & Safety Code*, § 1345, subd. (i)) but contracted with Kaiser Hospital and SCPMG (*Health & Safety Code*, § 1395, subd. (b)). Although a unity of interests or ownership existed between the Health Plan, Kaiser Hospital and SCPMG, there was nothing inequitable in requiring Gopal to seek damages from the providers subject to statutory limits (*Civil Code*, § 3333.2), which reflect public policy determinations.

Jimenez v. Roseville City School District
May 19, 2016
(2016) 247 Cal.App.4th 594

Uriel Jimenez ("Jimenez") was injured at a middle school within defendant Roseville City School District ("District"). The 14-year old Jimenez was in a classroom where fellow middle school students were purportedly practicing break dancing, but in which some were also performing "flips." This violated school rules in two ways: first, students had been ordered not to perform flips; second, the teacher who allowed the students to use his classroom for dancing violated school policy by leaving them unsupervised. Jimenez was seriously injured when other students waited for the teacher to leave them unsupervised, and then induced Jimenez to attempt a flip. The trial court granted the District summary judgment, concluding Jimenez assumed the risk of injury by participating in break dancing.

The Court of Appeal reversed the judgment holding that Jimenez had a viable negligent supervision claim, and that claim was not barred by primary assumption of the risk. Just as *Education Code*, § 44807, cannot be construed as undermining assumption of the risk in all cases involving school children, case law does not eliminate the general duty of supervision in all cases involving children when it is that duty that provides a basis for liability. Jimenez also had a claim that the school district increased the inherent risks of the activity by not properly disseminating and clearly enforcing an alleged school policy against flips.

Lopez v. Sony Electronics, Inc.
May 13, 2016
(2016) 247 Cal.App.4th 444

Dominique Lopez, at age 12, by and through her mother and guardian ad litem Cheryl Lopez, brought an action against defendant and respondent Sony Electronics, Inc. ("Sony") alleging that her mother was exposed to toxic substances while working at Sony and pregnant with Lopez which caused her to suffer birth defects and permanent injuries. Sony successfully argued in the trial court that Lopez's action was time-barred under section *Code of Civil Procedure,* § 340.4, which expressly provides that actions for prenatal injuries are not tolled during a plaintiff's minority. Lopez appealed contending the correct statute of limitations applicable to her claims is *Code of Civil Procedure,* § 340.8, under which her action would be timely.

The Court of Appeal affirmed the judgment. The Court held that § 340.8, which is applicable to tort actions for exposure to hazardous materials and toxic substances, does not replace the limitations period of § 340.4, for claims based on prenatal injuries caused by exposure to hazardous materials or toxic substances. The Court observed that § 340.8 contains no express language concerning minor plaintiffs and that the legislative history plainly demonstrated that the statute was only intended to codify the delayed discovery rule as to toxic exposure cases previously governed by the general personal injury statute. Nothing in the language or legislative history of § 340.8 suggests the Legislature perceived a need to distinguish among actions for prenatal injuries depending on whether they were caused by exposure to asbestos, or to a toxic substance other than asbestos, or not caused by any toxic exposure, and the Court declined to interpret § 340.8 in a way that would lead to such an absurd result. Accordingly, the Court held that § 340.4 governed Lopez's claims, and thus, her action was time-barred.

Nickerson v. Stonebridge Life Insurance Company
June 9, 2016
(2016) 63 Cal.4th 363

Thomas Nickerson, who is paralyzed from the chest down, broke his leg when he fell from the wheelchair lift on his van. He was taken to the Department of Veterans Affairs hospital in Long Beach, where, as a veteran, he was entitled to medical care at no cost. After being treated in the emergency room, Nickerson was admitted to the hospital and remained there for 109 days. Following his discharge from the hospital, Nickerson sought benefits from defendant Stonebridge Life Insurance Company ("Stonebridge") under an indemnity benefit policy that promised to pay him $350 per day for each day he was confined in a hospital for the necessary care and treatment of a covered injury. Some months later, Stonebridge notified Nickerson that it had completed processing his request for benefits, and determined, without consulting the views of Nickerson's treating physicians, that his hospitalization was only "medically necessary" for a portion of the time that he was hospitalized. Thereafter, Nickerson sued Stonebridge, alleging that it breached the insurance contract by failing to pay him benefits for the full 109 days of his hospital stay and breached the implied covenant of good faith and fair dealing by acting unreasonably and in bad faith in denying him his full policy benefits. The trial court granted Nickerson's motion for a directed verdict on the breach of contract cause of action and awarded him $31,500 in unpaid policy benefits. A jury also awarded Nickerson $19M in punitive damages. After the jury rendered its verdict, the parties stipulated that the amount of attorney's fees to which Nickerson was entitled was $12,500, and the trial court awarded that amount. Stonebridge then moved for a new trial seeking a reduction in the punitive damages award. The trial court granted the motion for new trial unless the insured consented to a reduction of the punitive damages award to $350,000. In calculating the permissible amount of punitive damages, the trial court did not include the $12,500 in attorney's fees. The Court of Appeal affirmed, holding that the trial court had correctly calculated the amount of compensatory damages.

The Supreme Court reversed the judgment of the Court of Appeal. The Court held that in determining whether a punitive damages award is unconstitutionally excessive, attorney's fees may be included in the calculation of the ratio of punitive to compensatory damages, regardless of whether the fees are awarded by the jury as part of its verdict or are determined by the trial court after the verdict has been rendered. The Court found no reason to exclude the amount of attorney's fees from the constitutional calculus merely because they were determined, pursuant to the parties' stipulation, by the trial court after the jury rendered its punitive damages verdict.

Ramos v. Brenntag Specialties, Inc.
June 23, 2016
(2016) 63 Cal.4th 500

Flavio Ramos, metal foundry worker who developed interstitial pulmonary fibrosis, brought an action against a variety of companies that supplied products for use in the foundry's manufacturing process, asserting that the suppliers' products, when used in their intended fashion, produced harmful fumes and dust that were a substantial cause of his pulmonary illness. Relying on *Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81, the trial court sustained the defendants' demurrer to the complaint without leave to amend and thereafter entered a judgment of dismissal. The Court of Appeal reversed, holding that the component parts doctrine was not applicable because the injury was not caused by a finished product into

which the supplied product had been incorporated but instead by the supplied product itself when used in an intended fashion.

The Supreme Court affirmed the judgment of the Court of Appeal. The Court held that the protection afforded to Defendants by the component parts doctrine does not apply when the product supplied has not been incorporated into a different finished or end product but instead itself allegedly causes injury when used in the manner intended by the product supplier. Here, Ramos' injury was not caused by a finished product into which the materials supplied by Defendants had been transformed and integrated, but instead was allegedly caused directly by the materials themselves when used in a manner intended by the suppliers. Because the trial court sustained the defendants' demurrer solely on the basis of the component parts doctrine, the Court of Appeal properly concluded that the trial court's dismissal of the action could not be upheld. The Court disapproved the decision in *Maxton* insofar as it was inconsistent with the Court's opinion.

Vasilenko v. Grace Family Church
June 17, 2016
(2016) 248 Cal.App.4th 146

Aleksandr Vasilenko was hit by a car and injured while crossing a busy five-lane road on his way from an overflow parking lot controlled and staffed by defendant Grace Family Church ("GFC" or "the church") to attend a function at the church. Vasilenko and his wife Larisa (collectively, "Vasilenko") sued GFC and others for, among other causes of action, negligence and loss of consortium, alleging that GFC acted negligently in locating its overflow parking lot in a place that required invitees like him to cross a busy street where they might be hit by a car and by failing to protect against that risk. The trial court granted GFC's motion for summary judgment on the ground that GFC owed no duty to Vasilenko because it did not own, possess, or control the public street where Vasilenko was injured. Vasilenko appealed, contending that the location of his injury is not dispositive, and that GFC failed to satisfy its burden of negating the general duty of ordinary care set forth in *Civil Code* §1714.

The Court of Appeal reversed the judgment. The Court concluded that the location of the overflow lot, which required the church's invitees who parked there to cross a busy thoroughfare in an area that the church knew lacked a marked crosswalk or traffic signal in order to reach the church, exposed those invitees to an unreasonable risk of injury off-site, thus giving rise to a duty on the part of the church to protect against that risk. The church, which controlled the overflow lot at all relevant times, created the danger, and failed to establish that the general duty of ordinary care set forth in § 1714, did not apply. The church's claim that Vasilenko could not establish the element of causation failed because a reasonable juror could infer that the invitee would not have been struck by a car crossing the busy street had the church not maintained and operated a parking lot across the street from the church. Finally, the Court held that even assuming the church's parking lot attendants were instructed to tell drivers parking in the overflow lot to cross at a particular intersection, there was a triable issue as to whether such an instruction was adequate under the circumstances.