Summary of California Case Law

Quarter 3 — July to September 2016

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SUMMARY OF CALIFORNIA LAW
JULY TO SEPTEMBER 2016

TABLE OF AUTHORITIES

Anti-SLAPP (Strategic Lawsuit Against Public Participation)

JAMS, Inc. v. Superior Court (Kinsella)
July 27, 2016
(2016) 1 Cal.App.5th 984

Kevin Kinsella filed suit against JAMS, Inc., a provider of private alternative dispute resolution ("ADR") services and the Honorable Sheila Prell Sonenshine (Retired), alleging he relied upon certain representations made on JAMS's website when he agreed to stipulate to hire Sonenshine as a privately compensated judge to resolve issues related to his marital dissolution case and later discovered the representations were either untrue or misleading. JAMS and Sonenshine filed an anti-SLAPP (*Code Civil Procedure*, § 425.16) motion to strike the complaint. The trial court found the action exempt from the anti-SLAPP procedure under the commercial speech exemption of § 425.17, subd. (c), and denied the motion.

The Court of Appeal denied JAMS, Inc. and Sonenshine's petition for writ of mandate or other relief. The Court held that the commercial speech exemption applied and precluded the use of the anti-SLAPP procedure. The commercial speech exemption is not limited to exclude from the anti-SLAPP statute only causes of action arising from positive assertions of facts. Kinsella's causes of action arose from statements posted on JAMS's website regarding the Sonenshine's background and qualifications to provide ADR services as well as general statements about how JAMS conducted its business in providing ADR services. The representations made in Sonenshine's biography were representations of fact. Whether those facts were true or whether she should have included additional facts to ensure the representations were not misleading went to the issue of whether or not the client could prevail on his claim, not to whether the statements qualified as commercial speech subject to the exemption of § 425.17, subd. (c). The Court went on to state that Kinsella's claims were the kind the Legislature intended to exempt from the scope of the anti-SLAPP statute.

Suarez v. Trigg Laboratories, Inc.
September 7, 2016
(2016) 3 Cal.App.5th 118

Rafael Suarez, a business consultant, filed an action against Trigg Laboratories, Inc**.** ("Trigg"), seeking rescission of a settlement agreement he and Trigg had entered into in his prior litigation against Trigg, based on Trigg's fraudulent concealment of the prospects for sale of the company and quantum meruit. The trial court granted Trigg's special motion to strike pursuant to *Code of Civil Procedure*, § 425.16, the anti-SLAPP statute, finding that Suarez's causes of action arose from litigation activities protected by the anti-SLAPP statute and that he failed to make a showing of likelihood of success on the merits.

The Court of Appeal affirmed the order. The Court held that the activity upon which Suarez premised his action was Trigg's concealment of and failure to disclose the existence of a letter of intent to purchase the company in order to prevent Suarez from obtaining a more favorable settlement in the underlying litigation. The claim arose from Trigg's litigation activity, to keep the

information within the attorney-client privilege for purposes of the underlying litigation and from Trigg's protected right of free speech, or, in this case, the right not to speak. Therefore, the Court determined that the first prong of the anti-SLAPP statute had been satisfied.

Travelers Casualty Insurance Company v. Hirsh
August 3, 2016
(2016) 831 F.3d 1179

In this diversity suit, Robert W. Hirsh appealed the denial of his special motion under the anti-SLAPP statute, *Code of Civil Procedure* § 425.16, to strike the second amended complaint filed by Travelers Casualty Insurance Company of America ("Travelers"). Hirsh alleged that Travelers' claims arose out of his representation of Travelers' insured, Visemer De Gelt, as cumis counsel; and his activity was therefore protected under the anti-SLAPP statute.

The Court of Appeal held that because Travelers' causes of action for declaratory judgment, unjust enrichment, breach of *Code of Civil Procedure* § 2860(d), and concealment were not based on an act in furtherance of Hirsh's right of petition or free speech, they did not "arise from" protected activity. The Court also held that Travelers established a probability of prevailing on the merits sufficient to survive a motion to strike. The Court further held that California's litigation privilege, *Code of Civil Procedure* § 47(b), did not bar the suit because the causes of action arose from Hirsh's post-settlement conduct, not his communications with De Gelt in settling a prior lawsuit. Finally, the Court held that it did not have jurisdiction to review Hirsh's challenge to the District Court's striking count two, alleging breach of a defense handling agreement, because the denial was without prejudice, and there was no final order as to the claim.

Arbitration

Esparza v. Sand & Sea, Inc.
August 22, 2016
(2016) 2 Cal.App.5th 781

January Esparza sued Sand & Sea, Inc., her employer, for sexual harassment, sex discrimination, wrongful termination, and intentional infliction of emotional distress. The trial court denied Sand & Sea's petition to compel arbitration under *Code Civil Procedure*, § 1281.2 holding that there was no agreement to arbitrate and that the Arbitration Policy Acknowledgement signed by Esparza did not impose an obligation to arbitrate nor was the arbitration provision in the handbook incorporated by reference especially in light of the fact that the acknowledgement states that the handbook is not an employment agreement. Sand & Sea timely appealed.

The Court of Appeal affirmed the trial court's order. The employee handbook did not create an enforceable agreement to arbitrate. The welcome letter in the handbook indicated that the handbook was not intended to establish an agreement, undermining the argument that the handbook and its arbitration provision were intended to create a legally enforceable obligation to arbitrate. Further, the policy acknowledgement that Esparza signed did not state that she agreed to abide by the arbitration agreement within the handbook, and it explicitly recognized that she had not read the handbook yet.

Martin v. Yasuda
July 21, 2016
(2016) 829 F.3d 1118

Defendant Amarillo College of Hairdressing, Inc., doing business as "Milan Institute" and "Milan Institute of Cosmetology" (collectively, "defendants"), is a group of nationally accredited private colleges offering career training in cosmetology. The plaintiffs are individuals who enrolled in a cosmetology program at Milan Institute (collectively, "plaintiffs"). As part of their enrollment, each of the plaintiffs signed an Enrollment Agreement that contained a binding arbitration provision. The plaintiffs filed a class action lawsuit alleging that the defendants violated state labor laws and the Fair Labor Standards Act. Nearly seventeen months after the start of the case, defendants moved to compel individual arbitration. Plaintiffs opposed the motion by arguing that the defendants waived their right to compel arbitration and that the terms were unconscionable and unenforceable. Applying the three factor waiver test employed in the 9th Circuit, the District Court denied the defendants' motion to compel individual arbitration. The District Court held that all the factors were satisfied because: (1) it was indisputable that the defendants had knowledge of their existing right to compel arbitration, (2) the defendants engaged in acts inconsistent with that right by delaying their motion to compel and deciding to actively participate in the litigation for seventeen months (including the resolution of a motion to dismiss on the merits), and (3) granting the motion to compel seventeen months after the start of litigation and after a ruling partly in favor of the plaintiffs on the motion to dismiss would result in prejudice to the plaintiffs. Defendants timely appealed.

The 9th Circuit Court of Appeal affirmed the District Court's denial of defendants' motion to compel arbitration claims holding that the defendants waived their right to arbitration by their litigation conduct. The Court further held that the District Court properly decided the waiver issue and that the question of arbitrability was presumptively for the Court, rather than an arbitrator to decide, and the broad nature of the parties' arbitration clause did not overcome the presumption. Finally, the Court concluded that the defendants waived their right to arbitration because they engaged in acts inconsistent with this right, and the plaintiffs were prejudiced.

Mohamed v. Uber Technologies, LLC
September 7, 2016
(2016) 836 F.3d 1102

Plaintiff Abdul Mohamed began driving for Uber's black car service in Boston in 2012. Like all Uber drivers, Mohamed used a smartphone to access the Uber application while driving, which enabled him to pick up customers. In June 2014, Uber released an updated version of the Software License and Online Services Agreement and the Driver Addendum. The agreement provided that it was governed by California law. It also included a provision requiring all disputes with the company "to be resolved only by an arbitrator through final and binding arbitration on an individual basis only, and not by way of court or jury trial, or by way of class, collective, or representative action." Mohamed accepted these agreements and did not opt out. In early October 2014, Mohamed accepted a similar agreement with Rasier, a wholly owned subsidiary of Uber. In late October 2014, shortly after Rasier began driving for UberX, Mohamed's access to the app was cut off due to negative information on his consumer credit report, effectively terminating his ability to drive for Uber. Similarly, Ronald Gillette began driving for Uber in the San Francisco Bay Area in March 2013. Like Mohamed, he was required to agree to the Software License and Online Services before signing into the Uber application. In April 2014, Gillette's access to the app was cut off because of negative information on his consumer credit report. This effectively terminated his relationship with Uber.

Mohamed filed a class action in the Northern District of California against Uber, Rasier, and Hirease, an independent company that conducted background checks. Mohamed alleged that the use of his consumer credit report violated the Fair Credit Reporting Act ("FCRA"), the Massachusetts Consumer Credit Reporting Act ("MCCRA"), and the California Consumer Credit Reporting Agencies Act ("CCRAA"). Two days later, Gillette filed a separate lawsuit against Uber, also in the Northern District of California. Gillette alleged that the company's use of his consumer credit report violated the FCRA and the California Investigative Consumer Reporting Agencies Act ("ICRAA"). He also alleged that Uber had misclassified him and other employees as independent contractors in violation of California's Private Attorney General Act ("PAGA"). Uber moved to compel arbitration in both lawsuits, arguing that Gillette and Mohamed were subject to the arbitration provision in the Software License and Online Services Agreement. The District Court denied both motions and Uber appealed.

The Court of Appeal held that the District Court erred in assuming the authority to decide whether the parties' arbitration agreements were enforceable. The Court further held that the question of arbitrability as to all but Gillette's PAGA claim was delegated to the arbitrator and the terms of the agreement Gillette signed, the PAGA waiver should be severed from the arbitration agreement and Gillette's PAGA claim may proceed in court on a representative basis. The Court also held that all of Mohamad's remaining arguments, including both

Mohamad's challenge to the PAGA waiver in the agreement he signed and the challenge by both plaintiffs to the validity of the arbitration agreement itself, were subject to resolution via arbitration.

The Court affirmed the District Court's order denying the motion to compel arbitration filed by Hirease, LLC, an independent background-check company that Mohamed named in his complaint alongside Uber. The Court held that Hirease was not entitled to compel arbitration as Uber's agent.

Morris v. Ernst & Young, LLP
August 22, 2016
(2016) 834 F.3d 975

Stephen Morris and Kelly McDaniel worked for the accounting firm Ernst & Young. As a condition of employment, Morris and McDaniel were required to sign agreements not to join with other employees in bringing legal claims against the company. This "concerted action waiver" required employees to (1) pursue legal claims against Ernst & Young exclusively through arbitration and (2) arbitrate only as individuals and in "separate proceedings." The effect of the two provisions was that employees could not initiate concerted legal claims against the company in any forum including in court, in arbitration proceedings, or elsewhere.

Nonetheless, Morris brought a class and collective action against Ernst & Young in federal court in New York, which McDaniel later joined. According to the complaint, Ernst & Young misclassified Morris and similarly situated employees. Morris alleged that the firm relied on the misclassification to deny overtime wages in violation of the Fair Labor Standards Act, 29 United States Code Annotated § 201 *et seq.*, and California labor laws. The case was eventually transferred to the Northern District of California. There, Ernst & Young moved to compel arbitration pursuant to the agreements signed by Morris and McDaniel. The court ordered individual arbitration and dismissed the case.

The Court of Appeal vacated the District Court's order compelling individual arbitration and remanded to the District Court to determine whether the "separate proceedings" clause was severable from the contract. The Court held that an employer violates § 7 and § 8 of the National Labor Relations Act ("NLRA") by requiring employees to sign an agreement precluding them from bringing, in any forum, a concerted legal claim regarding wages, hours, and terms of conditions of employment. The Court held that Ernst & Young interfered with the employees' right to engage in concerted activity under NLRA by requiring the employees to resolve all of their legal claims in "separate proceedings." The Court also held that the Federal Arbitration Act did not dictate a contrary result and when an arbitration contract professes to waive a substantive federal right, the savings clause of the Federal Arbitration Act prevents the enforcement of that waiver.

Penilla v. Westmont Corporation
September 9, 2016
(2016) 3 Cal.App.5th 205

David Penilla and 60 other named plaintiffs (collectively, "Tenants") are primarily low-income mobile home owners who filed suit against Westmont Corporation doing business as Wildwood Mobile Home Country Club ("Westmont"), the mobile home park owner and its employees or agents, alleging contract, tort, and statutory causes of action. Westmont filed a motion to compel the tenants to arbitrate their claims pursuant to the arbitration provision in their land rental agreements with the owner. The trial court denied the motion to compel, finding the arbitration provision unconscionable and thereby unenforceable.

The Court of Appeal affirmed the order. The Court held that the arbitration provision was procedurally unconscionable because it failed to disclose prohibitively expensive arbitration fees and was neither provided in a Spanish-language copy nor explained to tenants who did not understand written English. The evidence also showed that the tenants were under severe pressure to sign the rental agreements containing the arbitration provision because they signed the agreements after they had paid for their mobile homes or deposited a large amount of money toward the purchase of a mobile home. Additionally, several tenants stated in sworn declarations that they were not provided sufficient time to review the arbitration provision. The Court concluded that the arbitration provision was also substantively unconscionable because it imposed arbitral fees that were unaffordable or would have substantially deterred the tenants from asserting their claims. The provision's unreasonably shortened limitations periods for many of the asserted causes of action, and its limitation on the remedies available in arbitration for statutory claims further supported a finding of substantive unconscionability.

Royal Alliance Associates v. Liebhaber
August 30, 2016
(2016) 2 Cal.App.5th 1092

Royal Alliance Associates, Inc. ("Royal Alliance"), a securities brokerage firm, petitioned to confirm an arbitration award recommending expungement of an allegation of misconduct from the record of one of its employees, Kathleen J. Tarr. The individual who made the allegation of misconduct, Sandra Liebhaber, petitioned to vacate the same arbitration award. Liebhaber argued that the arbitrators violated the rules applicable to the arbitration and refused to hear evidence she sought to introduce and cross examination she sought to elicit. The Financial Industry Regulatory Authority, Inc. ("FINRA"), under whose auspices and rules the arbitration at issue was performed, also petitioned to vacate the award on similar grounds. The trial court denied Royal Alliance's petition to confirm the award and granted Liebhaber's and FINRA's petitions to vacate, ruling that the arbitrators exceeded their powers and that Liebhaber's rights were substantially prejudiced by the arbitrators' misconduct and refusal to hear material evidence. Royal Alliance appealed.

The Court of Appeal affirmed holding that a finding of substantial prejudice within the meaning of *Code Civil Procedure*, § 1286.2, subd. (a)(5), can be made absent a finding that the rules of the arbitral forum were violated. The arbitrators denied Liebhaber a full and fair opportunity to introduce and challenge evidence material to the expungement proceedings to which she was a party. Specifically, the arbitrators barred Liebhaber from offering oral evidence at the expungement proceeding, even though firm was given the opportunity to do so, and the arbitrators also foreclosed Liebhaber's efforts to question Tarr, who appeared and acted as a

witness by submitting oral evidence for the arbitrators' consideration. The arbitrators' refusal to hear Liebhaber's evidence and cross-examination deprived Liebhaber of a fair hearing and substantially prejudiced her rights within the meaning of § 1286.2.

Sandquist v. Lebo Automotive, Inc.
July 28, 2016
(2016) 1 Cal.5th 233

Lebo Automotive, Inc., doing business as John Elway's Manhattan Beach Toyota ("Lebo Automotive"), hired plaintiff Timothy Sandquist ("Sandquist") as a salesperson in 2000. On his first day of work, Sandquist claims he was given approximately 100 pages of preprinted forms and instructed to sign them "as quickly as possible," without any discussion, as a condition of his employment. Among the forms he signed were three separate agreements containing arbitration provisions. He claims he did not review these agreements or realize he was signing arbitration agreements.

In 2012, Sandquist sued Lebo Automotive alleging racial discrimination, harassment, and retaliation. He also brought claims for discrimination and hostile work environment under the Fair Employment and Housing Act and unfair competition on behalf of "a class of current and former employees of color." Lebo Automotive moved to compel individual arbitration under the arbitration provisions and the trial court granted the motion. The trial court further concluded that existing precedent required it to determine whether class arbitration was available. The trial court interpreted the agreements' acknowledgement as impliedly prohibiting class arbitration and, therefore, struck the class allegations. The trial court provided counsel time to identify a new class representative because Sandquist's claims were going to proceed to arbitration on an individual basis. Because all of the putative class members had signed agreements containing identical arbitration provisions, no substitute class representative could be identified and the court ultimately dismissed the class claims with prejudice. Sandquist appealed that decision. On appeal, the California Court of Appeal reversed in part and held that the question of the availability of class proceedings under an arbitration provision is a question of contract interpretation that the arbitrator must decide, not the court. The California Supreme Court granted review.

The California Supreme Court affirmed the decision of the Court of Appeal. The Court held that the arbitration provision had to be interpreted against the employer as the drafter (*Civil Code*, § 1654). Although courts determine the jurisdiction of arbitrators, the availability of class arbitration is not presumed under California law to be a question of arbitrability for courts. Case law under the Federal Arbitration Act (9 United States Code § 1 *et seq*.) does not require that a court determine whether a particular agreement allows for class arbitration, but rather indicates this is a contract interpretation matter for arbitrators (9 United States Code § 2). The trial court's error in deciding the class arbitration issue was reversible per se.

Tompkins v. 23andMe, Inc.
August 23, 2016
(2016) 834 F.3d 1019

23andMe, Inc. provides direct-to-consumer genetic testing service called Personal Genome Service, under which customers purchase DNA testing kits online. In 2013, the Food and Drug Administration compelled 23andMe to discontinue marketing the genome testing kit for

purposes of identifying health risks such as diabetes, heart disease and breast cancer until the company obtained government approval of the kit as a medical device intended to test for disease. 23andmMe stopped marketing the test for detection of health risks.

Several plaintiffs filed class action complaints against 23andMe for unfair business practices, breach of warranty and misrepresentation. The cases were consolidated into one case in the U.S. District Court for the Northern District of California. In 2014, 23andMe moved to compel arbitration. The District Court granted the motion. Class representative David Tompkins appealed on behalf of the purported class.

Tompkins argued that under California law, several facets of the arbitration agreement were unconscionable: the prevailing party clause, which is a loser-pays requirement; the California forum; the one-year statute of limitations; and the unilateral right of 23andMe to modify the arbitration provision. 23andMe responded with a motion to compel arbitration. The District Court granted 23andMe's motion and Tompkins appealed.

The Court of Appeal affirmed the District Court's order enforcing the terms of a Terms of Service agreement, and granting 23andMe, Inc.'s motion to compel arbitration. The Court held that none of the challenged portions of the arbitration provision, alone or in concert, rendered the arbitration provision unconscionable under current California law. First, concerning the arbitration provision's prevailing party clause, which provided that the arbitration costs would be borne by the losing party, the Court held that Tomkins did not carry his burden of demonstrating unconscionability of the clause where: the bilateral attorneys' fee shifting clause in the Terms of Service was not unconscionable under California law; and the arbitration fee-shifting provision was not unconscionable under the case-specific standard announced in *Sanchez v. Valencia Holding Co., LLC*, 61 Cal.4th 899, 911, 190 Cal. Rptr. 3d 812, 353 P.3d 741 (2015). Second, concerning the arbitration provisions' forum selection clause, which stated that arbitration proceedings would be held in San Francisco, California, the Court held that Tomkins had not met the burden of proving that the clause was unreasonable. Third, concerning the clause excluding intellectual property claims from mandatory arbitration, the Court held that Tomkins did not carry his burden of demonstrating that the exemption was unconscionable under current California law. The Court concluded that the arbitration agreement was valid and enforceable under the *Federal Arbitration Act*, 9 United States Code § 2.

Business and Corporations Law

Coles v. Glaser
August 11, 2016
(2016) 2 Cal.App.5th 384

Kevin Coles sued Barney Glaser and Fred Taylor (collectively, "Defendants") for allegedly breaching a settlement agreement the parties entered in a prior lawsuit. Coles brought the prior suit to recover an overdue loan that he had extended to a debtor and that was guaranteed by defendants. Shortly after the settlement, the debtor filed for bankruptcy, and Coles was forced to surrender most of the settlement proceeds to the bankruptcy trustee as a preferential payment. The trial court entered judgment in favor of Coles, concluding that the defendants were jointly responsible with the debtor for payment of the full sum owed under the settlement agreement and that both were liable for the shortfall because the debtor's pre-bankruptcy payment was a legal nullity to the extent it was clawed back.

The Court of Appeal affirmed the judgment. The Court held that a debt of a contractual co-obligor is not extinguished by another co-obligor's pre-bankruptcy payment to a creditor that is later determined to be a bankruptcy preference. Defendants breached the settlement agreement because the full amount owed under the settlement agreement was not paid even if none of the parties was aware of that fact at the time the settlement agreement was entered. Coles effectively by operation of law never received payment to the extent of the bankruptcy clawback. A release of claims by Coles remained a part of the unrescinded agreement and prevented him from pursuing any future claims that might be barred by it.

Civil Procedure

Aluma Systems Concrete Construction of California v. Nibbi Bros. Inc.
August 16, 2016
(2016) 2 Cal.App.5th 620

After Aluma Systems Concrete Construction of California ("Aluma") was sued by Nibbi Bros. Inc.'s ("Nibbi Bros.") employees for injuries sustained on the job, Aluma sued Nibbi Bros. for indemnification based on a specific provision in the parties' contract. The trial court sustained the Nibbi Bros.' demurrer to the Aluma's complaint, relying on the allegations in the underlying lawsuit that set forth claims only against Aluma and not against the Nibbi Bros.

The Court of Appeal reversed the judgment and remanded for further proceedings. Nibbi Bros.' demurrer to Aluma's complaint for indemnification did not establish that Aluma failed to state a claim. Aluma, like all third parties so sued, might be entitled to offset part or all of the workers' compensation benefits received by the employees if Nibbi Bros. was also at fault for the injuries. The allegations in the employee lawsuits that set forth claims only against Aluma and not against Nibbi Bros. were not determinative of Aluma's claim for indemnity. There was no basis to restrict the damages and losses so indemnified to the allegations of the employee lawsuits, rather than to the damages that Aluma was ultimately found liable for.

Gotek Energy, Inc. v. SoCal IP Law Group
October 12, 2016
(2016) 3 Cal.App.5th 1240

SoCal IP Law Group, was retained as Gotek Energy, Inc.'s ("Gotek") patent counsel, and failed to timely file patent applications. Gotek then retained another law firm, Parker Mills, to bring a malpractice action against SoCal IP Law Group. The trial court ruled that Parker Mills had not filed the action within the one-year statute of limitations under *Code of Civil Procedure* § 340.6 and entered summary judgment in favor of SoCal IP Law Group. The trial court also awarded SoCal IP Law Group attorney's fees pursuant to a legal services agreement between Gotek and SoCal IP Law Group.

The Court of Appeal affirmed the judgment and order. The Court held that, as a matter of law, the tolling of the statute of limitations under the continuous representation exception of *Code of Civil Procedure* § 340.6, subd. (a)(2), ended no later than November 8, 2012, more than one year before the filing of the malpractice action, because that was when Gotek consented to SoCal IP Law Group's withdrawal, which had been sent via e-mail the previous day, by requesting that Gotek's files be immediately delivered to replacement counsel. Gotek did not object to the withdrawal or indicate that it wanted SoCal IP Law Group to continue to represent it. Even if SoCal IP Law Group had withdrawn without Gotek's consent, the withdrawal would still have been effective based on SoCal IP Law Group's e-mail, which stated that it had to withdraw as Gotek's attorney, that its attorney-client relationship with Gotek was terminated forthwith, and that it no longer represented Gotek with regard to any matters. After receiving the e-mail, Gotek could not reasonably have expected that SoCal IP Law Group would provide further legal services. SoCal IP Law Group's possession of Gotek's files after November 8, 2012, and its transfer of the files on November 15, 2012, were not evidence of an ongoing mutual relationship, nor did they constitute activities in furtherance of the relationship. The trial

court properly found that SoCal IP Law Group was entitled to recover attorney's fees. The attorney's fees clause in the legal services agreement applied to Gotek's malpractice claim because it constituted a dispute between the parties relating to the agreement.

Hjelm v. Prometheus Real Estate Group
September 9, 2016, publication ordered Oct. 5, 2016
(2016) 3 Cal.App.5th 1155

Plaintiffs Christie and Justin Hjelm (the "Hjelms") leased an apartment in a large complex from Prometheus Real Estate Group ("Prometheus"). Their apartment became infested with bedbugs, and the complex had an ongoing raw sewage problem, the upshot of which was that the Hjelms and their children were forced to leave. The Hjelms sued Prometheus, and a jury returned a verdict for them. The trial court then awarded the Hjelms their attorney's fees based on *Civil Code* § 1717.

The Court of Appeal affirmed, observing that the notice of appeal was timely (*California Rules of Court*, rule 8.104) as to the amended judgment awarding attorney's fees, but the time to appeal the verdict had expired (*California Rules of Court*, rule 8.108(b)(1)(B)) because the original judgment awarding damages to the Hjelms was not substantially changed. Prometheus' brief improperly recited the facts favorable to itself while ignoring evidence favorable to the Hjelms (*California Rules of Court*, rule 8.204(a)(2)(C)). The Hjelms could recover contractual attorney's fees because they asserted claims that were on the contract. The Hjelms presented substantial evidence of their attorney's fees, which the trial court found reasonable. Further, the trial court's refusal of the request for a special verdict was not an abuse of discretion.

Ignacio v. Caracciolo
August 3, 2016
(2016) 2 Cal.App.5th 81

Yolanda Ignacio sued Marilynne Caracciolo for negligence in an auto versus pedestrian accident. Caracciolo served a *California Code of Civil Procedure* 998 offer for $75,000 plus costs in exchange for a release and dismissal of the complaint without prejudice. Attached to the offer was an agreement that released the defendant from claims or liabilities "of whatever kind and nature . . . whether now known or unknown, suspected or unsuspected, that have existed or may have existed or which do exist, or which hereinafter can, shall or may exist," including, but not limited to, claims arising from the accident. Ignacio rejected the offer and subsequently received a judgment in her favor for $70,000. Because the judgment was less than the $75,000 offer, Caracciolo sought to recover costs under the cost-shifting provisions of § 998. Ignacio opposed, arguing that the offer was invalid under § 998. The trial court ruled in favor of Ignacio and denied Caracciolo's motion to tax costs.

The Court of Appeal affirmed, holding that the offer was invalid and that its rejection did not prevent recovery of costs (*Code of Civil Procedure* § 1032) because a release submitted as part of the offer was not limited to claims arising out of the motor vehicle accident at issue but was a general release that broadly applied to any and all claims whether known or unknown, waiving the protections governing general releases (*Civil Code*, § 1542). The claimant demonstrated the impermissible breadth of the release by identifying before the trial court a claim encompassed by the release that was not accident-related and could not have been brought in

the pending lawsuit, which involved an alleged violation of privacy rights during the carrier's investigation of the claim.

Minick v. City of Petaluma
September 2, 2016
(2016) 3 Cal.App.5th 15

In a personal injury case arising from a bicycle accident on a city street, a trial court granted the bicyclist's request for relief from summary judgment, finding that the bicyclist's attorney, Joshua Watson, suffered cognitive impairment from illness and medication which led to excusable neglect under *Code Civil Procedure*, § 473, subd. (b).

The Court of Appeal affirmed the trial court's order, holding that the trial court had the discretion to grant relief after finding that the relevant neglect was the attorney's failure to appreciate his own cognitive impairment from illness and medication, rather than a failure of legal skill. Because the statutory language creating the mandatory and discretionary relief provisions of § 473, subd. (b), is significantly different, these two parts of the statute need not be read together, and the discretionary relief portion is not limited to defaults and default-equivalent conduct. Where, as in the current case, the Court finds a wholesale disintegration of an attorney's professional capacity because of a medical crisis, the availability of relief for excusable neglect is within the Court's sound discretion.

Pulte Homes Corporation v. Williams Mechanical, Inc.
August 9, 2016
(2016) 2 Cal.App.5th 267

Pulte Homes Corporation ("Pulte") sued Williams Mechanical, Inc. ("Williams") for defective performance of a plumbing subcontract. Even before the action was filed, however, Williams was defunct; first, it was suspended by the Secretary of State, and thereafter, it dissolved voluntarily. Pulte served Williams through an attorney whom Williams had designated as its agent for service of process. The attorney, however, did not notify Williams of the action; he also did not identify or notify Williams's liability insurer. Williams failed to respond to the complaint, and Pulte obtained a default judgment. Pulte then notified Williams's liability insurer of the default judgment. About four and a half months later, the insurer retained counsel to represent Williams, and Williams' counsel filed a motion to set aside the default judgment. The trial court granted the motion. Pulte appealed, arguing (1) Williams lacked the capacity to defend this action because it had been suspended; and (2) Williams failed to establish that it was entitled to relief from the default and default judgment.

The Court of Appeal reversed, holding that Williams was not entitled to relief based on mistake, inadvertence, surprise, or excusable neglect (*Code of Civil Procedure* § 473, subd. (b)) because its motion was untimely filed more than six months after entry of its default. Relief based on inadequate service (*Code of Civil Procedure* § 473.5, subd. (a)) was unavailable because Williams received actual notice when its agent for service of process was served with the summons and complaint (*Corporations Code* § 2011, subd. (b)). Williams could not obtain equitable relief on the ground of extrinsic mistake because it did not show a satisfactory excuse for not presenting a defense absent evidence that the agent had tried to notify former directors, officers, employees, or insurers of Williams but had been unable to locate them; also, the insurer's lack of diligence upon learning of the default judgment had to be imputed to Williams.

Watson Bowman Acme Corp. v. RGW Construction, Inc.
August 9, 2016
(2016) 2 Cal.App.5th 279

A trial court entered judgment on a jury verdict in favor of Watson Bowman Acme Corp. ("Watson Bowman") on a breach of contract claim against a RGW Construction, Inc. ("RGW") but denied Watson Bowman's request for prejudgment interest (*Civil Code*, § 3287, subd. (a)).

The Court of Appeal affirmed in part, reversed in part, and remanded. The Court held that the request was timely made (*Code of Civil Procedure* § 659) within the time limits for a motion for new trial or modification (*Code of Civil Procedure* § 657) because the requirement to include interest in the judgment (*California Rules of Court*, rule 3.1802) does not preclude a request for prejudgment interest after the entry of judgment and because the request complied with the procedural requirements for § 657 motions. Watson Bowman was entitled to prejudgment interest because the RGW could have determined the amount owed from reasonably available information, as shown by its possession of a quote and its failure to identify any information about price or value that was not in its possession at the time the items were delivered.

Insurance

Ace American Insurance Company v. Fireman's Fund Insurance Company
Aug. 5, 2016
(2016) 2 Cal.App.5th 159

After a film industry worker was seriously injured on a film set, he filed suit. His employer had two primary insurance policies with Fireman's Fund Insurance Company ("Fireman's Fund"), and an excess insurance policy with Ace American Insurance Company ("Ace American"). Ace American subsequently filed suit against Fireman's Fund for equitable subrogation, alleging the injured worker initially offered to settle his case within the limits of the Fireman's Fund policies, and that Fireman's Fund unreasonably rejected those settlement offers. Ace American alleged that as a result, it was required to contribute to the eventual settlement, which exceeded the limits of the Fireman's Fund policies. The trial court sustained Fireman's Fund's demurrer without leave to amend.

The Court of Appeal reversed, holding that absent facts suggesting a collusive settlement, an excess insurer can pursue an equitable subrogation action alleging that a primary insurer's unreasonable failure to settle within policy limits resulted in a settlement exceeding policy limits and that the excess insurer was damaged in an ascertainable amount by contributing to the settlement. An excess judgment is not a required element of a cause of action for equitable subrogation or breach of the duty of good faith and fair dealing because statements in the case law about a judgment in an underlying lawsuit, which were aimed at ensuring a reliable basis for allegations that damages had resulted from a breach of the duty to settle within policy limits, cannot be read to mean that a judgment is the only way to prove damages resulting from an unreasonable failure to settle within policy limits.

Barickman v. Mercury Casualty Company
July 25, 2016, publication ordered Aug. 15, 2016
(2016) 2 Cal.App.5th 508

Following a $3M stipulated judgment on the personal injury claims of two pedestrians, Laura Beth Barickman and Shannon McInteer (collectively, "Pedestrians"), Timory McDaniel, the driver who struck the Pedestrians, assigned her rights against her insurer, Mercury Casualty Company ("Mercury)", to the Pedestrians and the Pedestrians sued Mercury for breach of contract and breach of the implied covenant of good faith and fair dealing based on its refusal to agree to language in an earlier settlement for the policy limits that would have excluded court-ordered restitution from the release of claims. Following a trial by reference, judgment was entered against Mercury for $3M plus interest from the date of the stipulated judgment in the personal injury action.

The Court of Appeal affirmed the judgment. Substantial evidence supported a finding that Mercury unreasonably failed to accept the modified release or to further modify it to clarify the mutual intent of the parties (that the language would make explicit existing law and would not waive the driver's right to offset) and instead purported to place the decision whether to settle in the hands of the driver's criminal defense lawyer without providing the relevant facts. An

offering of the policy limits was not sufficient in and of itself to defeat a bad faith claim as a matter of law.

Mills v. AAA Northern California, Nevada and Utah Insurance Exchange
September 20, 2016
(2016) 3 Cal.App.5th 528

AAA Northern California, Nevada and Utah Insurance Exchange ("AAA") denied uninsured motorist coverage to Trent Mills, a third party beneficiary injured in an automobile accident with the insured's son because it had cancelled the policy before the accident occurred. Mills sued, and AAA sought summary judgment. Mills opposed, contending the cancellation was invalid because a written notice seeking information sent by the AAA to the insureds prior to cancellation was unreasonable as a matter of law, and disputed facts existed as to whether AAA mailed the notice of cancellation and actually cancelled the policy. The trial court granted summary judgment, concluding that AAA's cancellation of the insurance policy by reason of a substantial increase in the hazard (*Insurance Code*, § 1861.03, subd. (c)(1)) was lawful.

The Court of Appeal affirmed, holding that AAA's letter advising the insureds that they could either complete a form to exclude their son from the policy or call the AAA to add their son to the policy was a reasonable written request for information necessary to underwrite or classify AAA's risk (*California Code of Regulations*, tit. 10, § 2632.19, subd. (b)(1)), in light of the son's involvement in the accident while not named on the policy. Although the letter did not identify the specific information that would be necessary to add the insureds' son to the policy, it qualified as a reasonable request because it asked the insureds to provide information by telephone and did not violate the terms of the policy.

Castro-Ramirez v. Dependable Highway Express, Inc.
August 29, 2016
(2016) 2 Cal.App.5th 1028

Luis Castro-Ramirez sued his former employer, Dependable Highway Express, Inc. ("DHE") for disability discrimination, failure to prevent discrimination, and retaliation under the California Fair Employment and Housing Act (*Government Code*, § 12900 *et seq*.) after his employment was terminated for refusal to work a shift that did not permit him to be home in time for his son's dialysis. The trial court granted DHE's summary judgment motion reasoning in part that Castro-Ramirez provided insufficient evidence to show DHE's decision to terminate him was motivated by his association with his disabled son or in retaliation for his scheduling requests. Rather, the trial court concluded that at best, Castro-Ramirez showed that his new supervisor was simply not as generous in accommodating Castro-Ramirez as his prior supervisors had been.

The Court of Appeal reversed holding that there were triable issues as to whether DHE engaged in associational discrimination. Discriminatory motive could be inferred from the evidence that Castro-Ramirez's new supervisor was aware of his scheduling needs, had no reason not to schedule him for an earlier shift, and terminated his employment based on a one-time refusal, despite the availability of less severe disciplinary action. A finding that there was a protected activity for purposes of a retaliation claim was supported by evidence of Castro-Ramirez's complaints to his former and current supervisors.

Dang v. Maruichi American Corporation
September 1, 2016, publication ordered Sept. 22, 2016
(2016) 3 Cal.App.5th 604

Khanh Dang sued his former employer, Maruichi American Corporation ("Maruichi") for wrongful termination in violation of public policy, claiming he was discharged for engaging in concerted activity relating to unionizing efforts. The trial court granted summary judgment for the employer, finding that the claim was preempted by the National Labor Relations Act ("NLRA") (29 United States Code § 151 *et seq*.).

The Court of Appeal reversed the judgment and remanded for trial proceedings, holding that there was no basis to conclude that Dang's wrongful termination claim was arguably subject to the NLRA. Discharge of supervisors merely because of their participation in union or concerted activity is not unlawful because supervisors (unlike employees) are not protected by section 7 Maruichi's stated reason for the termination (that Dang mistreated employees, spurring them to consider unionizing) was not arguably likely to impact the employees' ability to engage in protected activity, and Dang's explanation for the discharge (that he asked benign questions relating to potential unionization and expressed no opinion to employees regarding the union) was, at most, participation in concerted activity, termination for which was not a basis for finding a NLRA § 7 or § 8 violation.

Hott v. College of the Sequoias Community College District
September 6, 2016
(2016) 3 Cal.App.5th 84

Lisa Hott was community college district administrator whose position was eliminated due to budget cuts. Hott filed a complaint for declaratory relief against Sequoias Community College District ("SCC"), alleging that SCC placed her in the wrong "step" on the faculty academic salary schedule because it should have given her full credit for her 15 years of administrative experience. The trial court entered judgment in favor of Hott, finding that pursuant to a handbook for administrative employees, she was entitled to year-for-year credit for her total years of employment at SCC.

The Court of Appeal reversed the judgment and remanded the matter. The Court held that Hott was not required to exhaust her administrative remedies under the Education Employment Relations Act (*Government Code*, § 3540 *et seq*.) because her claim of improper placement on the academic salary schedule did not constitute an arguably unfair practice that the Public Employment Relations Board should determine in the first instance. The Court agreed with SCC that the trial court erred in granting declaratory relief because (1) when the district eliminated Hott's position as an administrator, it offered her a new position as a faculty member pursuant to *Education Code*, § 87458; (2) Hott had no previous faculty experience and was newly hired to the district's faculty when she accepted the faculty position; (3) as a matter of law, the collective bargaining agreement between SCC and its faculty members governed the terms and conditions of the employment of SCC faculty members; and (4) under the collective bargaining agreement, as a newly hired faculty member with no previous faculty experience, Hott was entitled to a salary that gave some, but not year-for-year, credit for her service as an administrator. Accordingly, SCC correctly concluded that Hott was entitled to a maximum of five years' experience in determining her step placement on the academic salary schedule, and the trial court erred when it found that the precise terms of the handbook were to be applied and that she was entitled to year-to-year credit for her total years of employment at SCC.

McLean v. State of California
August 18, 2016
(2016) 1 Cal.5th 615

Janis McLean, a retired employee of the State Department of Justice, filed suit against the State and State Controller's Office on behalf of herself and a class of resigned and retired state employees who did not receive their final wages within the time period set out in *California Labor Code* §§ 202 and 203. Under these statutes, an employer must make prompt payment of the final wages owed to an employee who is "discharged" or "quits" his or her employment. The trial court sustained the State's demurrer, concluding that because McLean had "retired" from her job, she had not stated a claim for statutory penalties under § 203. The Court of Appeal reversed, holding that §§ 202 and 203 apply when an employee "quits to retire."

The California Supreme Court affirmed the judgment of the Court of Appeal, holding that the entitlement to prompt payment of final wages, although phrased in terms of discharge and quitting (*Labor Code*, §§ 201, 202), does not exclude retiring employees, who are treated as quitting employees (§ 202, subd. (a)) and can seek penalties for noncompliance. Making specific reference to retiring state employees (§ 202, subds. (b), (c)) by giving such employees the option of electing to defer payment of accrued leave wages has not excluded retiring state employees from the prompt payment statutes by implication. In light of the payroll

responsibilities of the State Controller's Office (*Government Code*, §§ 12470, 12475), the employee did not fail to state a claim by alleging that the State of California, and not solely the appointing agency, was the employer and had delayed payment of final wages.

Mitchell v. Department of Public Health
July 27, 2016
(2016) 1 Cal.App.5th 1000

The trial court dismissed a racial discrimination complaint after sustaining a demurrer on the statute of limitations (*Government Code*, § 12965, subd. (b)). Reginald Mitchell filed the complaint beyond the federal right-to-sue period, but within one year of the issuance of a letter of determination by the United States Equal Employment Opportunity Commission ("EEOC") following a deferral by the Department of Fair Employment and Housing ("DFEH") of investigation of the charges to the EEOC.

The Court of Appeal reversed, holding that Mitchell was eligible under case law for equitable tolling of the limitation period, although he was not entitled to statutory tolling (§ 12965, subd. (d)(2)). The complaint alleged sufficient facts, including an allegation of reasonable and good faith reliance based upon the DFEH's issuance of a right-to-sue notice stating that the limitation period would be tolled, to support the initial application of equitable tolling and to survive a demurrer.

Law Practice

Sese v. Wells Fargo Bank, N.A.
July 22, 2016
(2016) 2 Cal.App.5th 710

Having secured a preliminary injunction to enjoin the foreclosure sale of his residential real property, Danielo Sese moved for attorney's fees of $100,865 under *Civil Code*, § 2924.12, a provision in the California Homeowner Bill of Rights. The trial court denied the motion on the ground that § 2924.12, subd. (i), did not provide for interim attorney's fees.

The Court of Appeal dismissed Sese's appeal holding that the order was not appealable under *Code of Civil Procedure* § 904.1, subd. (a)(6), (8), (11), and (12). Instead, the Court held that an order denying interim attorney's fees under *Civil Code*, § 2924.12, is not included among appealable orders in *Code of Civil Procedure* § 904.1. The order denying interim attorney's fees was also not appealable as a collateral order. The order did not direct the payment of any money. Neither did it compel an act by or against the borrower. Instead, the order represented a denial of fees that was not appealable as a collateral order.

Torts

Aldana v. Stillwagon
August 3, 2016
(2016) 2 Cal.App.5th 1

Mike Stillwagon, a paramedic supervisor, was driving his employer's pickup truck while on his way to supervise emergency medical technicians who were responding to an injured fall victim, and, if necessary, provide assistance. At an intersection, Stillwagon collided with a vehicle driven by Gerardo Aldana. A year and a half later, Aldana sued Stillwagon for negligence. The trial court found that Aldana's suit was subject to the one-year statute of limitations contained in the Medical Injury Compensation Reform Act ("MICRA") rather than the two-year limitations period for general negligence under the *Code of Civil Procedure* § 335.1, and therefore was time-barred.

The Court of Appeal reversed the judgment. The Court concluded that the trial court erred in applying MICRA because Stillwagon was not rendering professional services at the time of the accident. While Stillwagon's status as a paramedic may have demonstrated that he was a medical professional, the automobile collision was a "garden-variety" accident not resulting from the violation of a professional obligation but from a failure to exercise reasonable care in the operation of a motor vehicle. A paramedic's exercise of due care while driving is not necessary or otherwise integrally related to the medical treatment and diagnosis of the patient, at least when the patient is not in the vehicle.

Esparza v. Kaweah Delta District Hospital
September 21, 2016
(2016) 3 Cal.App.5th 547

Emma Esparza filed a medical malpractice action against Kaweah Delta District Hospital ("Hospital") which was a division of a health care district, a public entity. Esparza's second amended complaint alleged that she was required to comply with a claims statute and had complied with applicable claims statutes. She made that allegation by checking the boxes for item 9.a on the Judicial Council form complaint for personal injury claims. A page attached to the form complaint included the additional allegation that the patient had served a claim on the hospital pursuant to *Government Code*, § 910 *et seq*., on or at December 3, 2013. The trial court granted the hospital's demurrer on the ground that the patient had failed to comply with the claims presentation requirement of the Government Claims Act (*Government Code*, § 810 *et seq*.) and entered judgment in favor of the hospital.

The Court of Appeal reversed the judgment and remanded the case. The Court concluded that the holding in *Perez v. Golden Empire Transit Dist.* (2012) 209 Cal.App.4th 1228, that the ultimate fact of compliance with the claims presentation requirement in the Government Claims Act can be pled using a general allegation, remains good law and that plaintiffs are allowed to plead compliance with the claims presentation requirement in the Government Claims Act using a general allegation. Applying the pleading requirement adopted in *Perez* to Esparza's general allegation of compliance with applicable claims statutes, her allegation was adequate under California law. Accordingly, the trial court had not held Esparza's allegations were adequate simply because they were made by checking boxes on a Judicial Council form complaint.

Rather, her allegation that she had complied with applicable claims statutes was adequate because it properly pleaded an ultimate fact and thereby satisfied the pleading requirements. Therefore, Esparza was not required to specifically plead (1) the method of service used to present the claim to the hospital or (2) whether the hospital explicitly rejected the claim or, alternatively, was deemed to have rejected the claim by failing to act within the statutory period. Esparza's general allegation of compliance with the claims presentation requirement was not contradicted by or inconsistent with her allegation about service of her claim on or at a specific date. Because Esparza adequately alleged compliance with the claims presentation requirement in the Government Claims Act, the demurrer should have been overruled.

Licudine v. Cedars-Sinai Medical Center
September 29, 2016
(2016) 3 Cal.App.5th 881

Donna Licudine sued Cedars-Sinai Medical Center over complications from a 2012 gallbladder removal operation. According to testimony, a vein was nicked while inserting a tube into an incision in her abdomen, requiring more invasive surgery and eventually causing her to suffer pain and bloating as a result of adhesions, and to require use of an electronic wheelchair. Licudine subsequently finished her undergraduate education at University of Southern California and was accepted at Suffolk and New England law schools, as well as into a graduate program in public administration at Penn State. She accepted both the Suffolk and Penn State offers, and obtained medical deferments of her start date. She spent the two years following graduation from USC working as an assistant rowing coach for $1,200 a month. Her internal medicine expert testified that her difficulties were likely to become permanent and would impact her career and future education. Jurors found for the plaintiff against both defendants, and awarded $285,000 for past economic loss, $730,000 for loss of earning capacity, and $30,000 for past and future non-economic loss. On the defense motions for new trial and Judgment notwithstanding the verdict ("JNOV"), the trial court concluded that the award for past economic loss was supported by "virtually no evidence," and that the award for future economic loss was "speculative and excessive," but that the award for pain and suffering was "grossly inadequate" in the face of testimony plaintiff would have to endure "excruciating pain" every day for the rest of her life.

The Court of Appeal affirmed holding that the trial judge did not abuse his discretion. The Court explained that while California cases have not previously articulated a precise standard for fixing damages for loss of future earning capacity, the reasonable probability standard is appropriate because it is consistent with the standard used for calculating pre-injury earning capacity and for assessing lost profits in business cases, as well as with the principle that the amount of damages need not be calculated with absolute certainty where it is certain the plaintiff suffered damages. Such a standard also avoids wholly speculative awards, and "harmonizes nearly all of the patchwork of cases that specify which careers a jury may look to in assessing a plaintiff's earning capacity." Based on that standard, the awards of past and future economic loss to Licudine could not stand. Because Licudine did not prove that it was reasonably probable that she would graduate from law school, or that she would pass the bar exam, nor did she present evidence as to how much lawyers earn. The Court found that it was reasonable for the judge to grant a new trial rather than a JNOV because of two unusual circumstances: the fact that the award of non-economic damages was so small the jurors might have filled out the verdict form incorrectly, and the possibility that the plaintiff might have had time to locate better evidence had the judge ruled earlier on the request for judicial notice.

Markow v. Rosner
October 4, 2016
(2016) 3 Cal.App.5th 1027

Michael Markow ("Markow") and his wife sued Markow's pain management physician, Howard L. Rosner, M.D. and Cedars-Sinai Medical Center ("Hospital") for professional negligence and loss of consortium after Dr. Rosner's treatment rendered the patient quadriplegic. A jury found that both Dr. Rosner and the hospital had been negligent, but that only Dr. Rosner's negligence had been a substantial factor in causing Markow's severe injuries. The jury nonetheless apportioned 40% of fault to the hospital, apparently on the basis of its finding that Dr. Rosner was the hospital's ostensible agent. The trial court denied the hospital's motion for judgment notwithstanding the verdict.

The Court of Appeal affirmed the judgment with respect to Dr. Rosner but reversed the judgment with respect to the hospital. The Court agreed with the hospital's contention that, as a matter of law, Dr. Rosner could not be found to be the hospital's ostensible agent because, in the conditions of admissions forms containing a prominent disclaimer that the patient initialed and signed on 25 separate occasions, the hospital unambiguously informed the patient that all physicians furnishing services to patients were independent contractors, not agents or employees of the hospital. Under the circumstances, Markow knew or should have known that Dr. Rosner was not the hospital's agent. Markow's belief to the contrary was not objectively reasonable, and the hospital's motion for judgment notwithstanding the verdict should have been granted. The evidence was sufficient to support the jury's finding that Dr. Rosner was negligent, given Markow's experts offered reasoned explanations for how Dr. Rosner's negligence caused Markow quadriplegia. The special verdict was not hopelessly inconsistent and therefore did not warrant a new trial. Substantial evidence supported the award to Markow and his wife for the cost of future hospitalizations because the jury could reasonably find their life care planning expert's testimony on the reimbursement rate to be credible.

Regalado v. Callaghan
September 16, 2016
(2016) 3 Cal.App.5th 582

Jeffrey Callaghan was a licensed concrete subcontractor who wanted to build a dream house for his wife. Callaghan did the concrete work on the home himself and hired Dunn's Designer Pools ("Dunn's"), a landscape and pool contractor, to build a pool and spa at his home. Victor Regalado, a Dunn's employee, suffered injuries when he installed a propane fueled pool heater on Callaghan's property. Regalado sued Callaghan for negligence and premises liability. The jury found Callaghan was negligent and the trial court ultimately entered judgment against Callaghan in the amount of approximately $3M. Callaghan appealed, arguing: (1) the court erred by failing to instruct the jury that a person who hires an independent contractor was not liable for injuries to the contractor's employee unless the hirer's negligent exercise of retained control "affirmatively contributed" to the employee's injury; (2) insufficient evidence supported the jury's verdicts on both premises liability and negligence; (3) Regalado's counsel committed misconduct by urging the jury to base its verdict on protecting the community; (4) the trial court erred by permitting Regalado to recover past wages because Dunn's had continued to pay his salary after the accident; and (5) the jury's award of future medical costs had to be reduced because it was not supported by substantial evidence.

The Court of Appeal affirmed the judgment. The Court concluded that there was substantial evidence to support the judgment in favor of Regalado. Based on the evidence, a reasonable trier of fact could conclude that Callaghan negligently exercised his retained control over safety conditions in a manner that affirmatively contributed to Regalado's injuries. The trial court properly refused to instruct the jury with Callaghan's special instruction on affirmative contribution. Even if the employee's counsel committed misconduct by urging the jury to base its verdict on protecting the community, Callaghan forfeited this argument on appeal by failing to timely object. Although defendant argued the trial court erred by permitting the employee to recover past wages because the contractor continued to pay his salary, substantial evidence supported the trial court's conclusion that payments from Dunn to the employee were intended as gifts. The jury, which awarded future medical costs, could conclude it was reasonably certain that the employee would require a future spinal surgery.