SUMMARY OF CALIFORNIA APPELLATE DECISIONS

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HOW TO USE THIS CASE SERVICE

When you receive your summaries, each page will have an alphabetical letter located in the upper right-hand corner. Each alphabetical letter corresponds to a separate subject matter category. For a description of the subject matter included within each letter category, consult the Table of Contents in the binder previously received by you. Each page of the summaries should simply be filed behind the appropriate letter category for future reference.

EXAMPLE:

K

DAMAGES; EMOTIONAL DISTRESS; DILLION V. LEGG PRINCIPLE

Jones v. Smith
82 Cal.App.3d 145

The example cited above deals principally with damages and, therefore, is filed under Category K.

Good luck and pleasant reading!

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C

INSURANCE; BAD FAITH; GENUINE DISPUTE DOCTRINE

Paslay v. State Farm General Insurance Co.
(2016) 248 Cal.App.4th 639 203 Cal.Rptr.3d 785

FACTS:

State Farm issued a homeowners policy to Paslay, the insured. A rainstorm occurred and there was various water damage inside the house. The claim was that water infiltration caused damage to various sections of the house. State Farm did an inspection and first advanced $25,000 for damage; later, State Farm advanced money for additional living expenses. The Paslays, using their own contractor, came to the conclusion that water infiltration had done substantial damage to the master bathroom and to the drywall in the ceilings throughout the house. They removed the drywall and other materials before State Farm could make an assessment as to whether water infiltration had indeed been the cause of the problem. Ultimately, however, State Farm paid approximately $240,000 for the total claim, but the Paslays demanded more than $350,000. The Paslays brought suit for bad faith. State Farm obtained a summary judgment on the bad faith claim, with the trial court finding that a "genuine dispute" on coverage existed between State Farm and the Paslays, and that the Paslays' conduct had prevented State Farm from doing a proper investigation. A claim was also made that State Farm had violated the Elder Abuse Act. The trial court dismissed this as well.

APPELLATE COURT DECISION:

Affirmed. In this unusual case, the conduct of the insured in removing the drywall in all the ceilings and bringing the bathroom down to studs, before State Farm could investigate the matter and whether water infiltration caused this damage (the repair by the insureds and their contractor was done within a matter of days) prevented State Farm from doing a proper investigation. At least on the bad faith claim, a "genuine dispute" therefore exists, precluding the Paslay bad faith claim. Since a finding of no bad faith was proper, it means that there was no wrongful withholding of benefits, and the bad faith decision is dispositive as to the elder abuse claim, which should also be dismissed.

COMMENT:

The *Wilson* case from the California Supreme Court several years ago severely limited the use of the "genuine dispute" claim by an insurer seeking to get summary judgment on a bad faith claim, even though contractual benefits may have been owed. In this ***Paslay*** case, there is conduct by the insured preventing the insurer from doing its proper investigation, thereby supporting the no bad faith finding.

C

INSURANCE; BAD FAITH; PRIMARY AND EXCESS INSURERS; EQUITABLE SUBROGATION

RSUI Indemnity Co. v. Discover P & C Insurance Co.
(2016) 649 Fed.Appx. 534 (9th Cir.)

FACTS:

This is a very interesting insurance bad faith case dealing with disputes between primary insurers and excess insurers and the doctrine of equitable subrogation. The insured had a primary policy and an excess policy. The primary insurer refused to pay settlement demands for the primary limits. Therefore, the excess insurer stepped in with the insured and settled the case, with the excess insurer paying the primary insurer's limits plus money from its own [excess] policy. The underlying case having settled, there never was "excess" judgment against the insured. The excess insurer then sued the primary insurer for bad faith under the equitable subrogation doctrine. The trial court ruled that under California law, the California Supreme Court would not allow such a claim in the absence of an actual litigated excess judgment against the insured.

NINTH CIRCUIT DECISION:

Reversed. The Ninth Circuit holds that in an equitable subrogation action, the existence of a litigated judgment in excess of the primary limits is not a necessary prerequisite to an equitable subrogation action. The Court had to distinguish the California Supreme Court decision of *Hamilton v. Maryland Casualty*. In *Hamilton*, the Court said that a litigated excess judgment against the insured was a necessary prerequisite to a bad faith action brought by the insured and the claimant against the non-settling insurer. But this rule was meant to prevent collusive settlements. There is no such risk in the situation like the present where an excess insurer steps in and resolves a claim and then seeks to recover against the alleged non-performing primary insurer. This promotes important public policy objectives of California State law pertaining to insurance claims and, therefore, an equitable subrogation action can be brought.

COMMENT:

There really is no California State case on this issue insofar as an <u>equitable subrogation action between insurers</u> is concerned. Primary insurers will argue that the *RSUI* case is not proper California law. The excess insurers will, of course, argue the contrary.

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C

INSURANCE; BAD FAITH; POLICY LIMITS DEMAND

Barickman v. Mercury Casualty Co.
(2016) 2 Cal.App.5th 508, 206 Cal.Rptr.3d 699

FACTS:

The insured was drunk and ran a red light, crashing into some pedestrians. The insured was insured by Mercury Casualty (Mercury) with a $15,000 policy limit. Shortly after learning of the accident from the attorney for the pedestrians, Mercury offered its policy limits. The attorney for the pedestrians sent back the release that Mercury had provided, inserting additional language on the release to the effect that the settlement did not affect the right of the pedestrians to criminal restitution. The insured was ultimately found criminally responsible and received a criminal sentence. As part of the criminal proceedings, the insured was ordered to pay $165,000 to the pedestrians for restitution.

When the pedestrians' attorney sent back the release with the language inserted about restitution, Mercury was told that it only had five days to make payment. Mercury refused to accept the additional language on the release pertaining to restitution. California law does provide that settlement of a civil claim does not affect the injured party's right to restitution. California law also provides that the insured would be entitled to a "set off" from the $165,000 restitution order, and the set off would be in the amount of $15,000, the amount that Mercury was prepared to pay. Mercury had been assured by the attorneys on the other side that the insured's rights to set off would not be affected.

Ultimately, Mercury did not accept the offer within the time period. The insured then stipulated to a judgment in excess of $3,000,000 with no personal liability and there was an assignment of rights against Mercury.

In the ensuing bad faith claim, a referee found that Mercury had acted unreasonably and in bad faith.

APPELLATE COURT DECISION:

Affirmed. Since the law provided that the insured would be liable for restitution even if that issue had not been treated in the release, Mercury should have told the opposition attorneys that the language in the release would not affect the insured's rights to set off the settlement amount from the restitution that had been ordered. The referee who tried the underlying case, therefore, properly held that under the totality of the circumstances, Mercury had acted unreasonably.

C

INSURANCE; BAD FAITH; EQUITABLE SUBROGATION; EXCESS INSURANCE; PRIMARY INSURANCE

Ace American Insurance Co. v. Fireman's Fund
(2016) 2 Cal.App.5th 159, 206 Cal.Rptr.3d 176

FACTS:

A worker at Warner Brothers (movies) was seriously injured during an action sequence. A lawsuit was filed against Warner Brothers. Warner Brothers had primary insurance with Fireman's Fund in the amount of approximately $3,000,000. Ace American (Ace) provided excess insurance in the amount of $50,000,000. The worker offered to settle the claim for the primary insurer's limits, but this was not consummated. Ultimately, the case did settle with Fireman's Fund and Ace contributing to the settlement. At this stage, Ace secured from the insured an assignment of the insured's rights, and then Ace sought to assert those rights under an equitable subrogation theory against Fireman's Fund. The theory was that if Fireman's Fund had complied with its duty to settle, then Ace would never have been exposed, would not have had to pay anything, and Ace was entitled to recover against the primary carrier, Fireman's Fund.

The trial court sustained the demurrer of Fireman's Fund without leave to amend; the principal basis of the ruling being the fact that there was never any excess judgment entered against the insured and, therefore, the excess insurer never had any exposure to "damages." Stated another way, Ace could not demonstrate that it had suffered "damages" as a result of failure of Fireman's Fund to pay its policy limits.

APPELLATE COURT DECISION:

Reversed. Much of the Appellate Court's discussion revolved around the California Supreme Court case of *Hamilton v. Maryland Casualty* in which the California Supreme Court had said that the insurer could not be liable unless an excess judgment had been rendered against the insured. But in the *Hamilton* case, the insured itself had not contributed to a settlement. In the present case, both the primary insurer and the excess insurer (Ace) ultimately contributed to the settlement, and Ace had a valid argument that established "damages" in the bad faith claim and under the equitable subrogation claim, despite the fact that there never had been a litigated excess judgment against the insured. Therefore, this Appellate Court holds that the presence of a litigated excess judgment against the insured is not a necessary perquisite to a bad faith action being filed by the excess against the primary for the primary's failure to accept a reasonable settlement offer within policy limits at an earlier point in time. The excess carrier adequately establishes damages by proving that it

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contributed to the ultimate settlement of the case when this would not even have occurred if the primary carrier complied with duty to settle reasonable demands.

D

MEDICAL MALPRACTICE; ORDINARY NEGLIGENCE VERSUS PROFESSIONAL NEGLIGENCE; STATUTE OF LIMITATIONS

Flores v. Presbyterian Intercommunity Hospital
(2016) 63 Cal.4th 75, 201 Cal.Rptr.3d 449 (California Supreme Court)

FACTS:

Plaintiff was in defendant's hospital. Her doctor had dictated that the bedrails were to be raised in light of plaintiff's particular condition. There was something wrong with the latches associated with the bedrails. Plaintiff was attempting to get out of bed and the latch broke, causing plaintiff to fall to the floor. Plaintiff sued the hospital just short of two years after the injury. The hospital demurred, contending that the statute of limitations was the one-year statute of limitations and C.C.P. section 340.5 (for professional negligence); plaintiff contended that the governing statute was C.C.P. section 335.1, which says that in suits for ordinary negligence, the statute of limitations is two years.

The trial court agreed that the suit was not timely filed since it was filed almost two years after the injury. The Appellate Court reversed the trial court.

SUPREME COURT DECISION:

Court of Appeal reversed. This is an action for professional negligence, not ordinary negligence, and therefore the statute of limitations is one year, and the suit was therefore not timely filed. In this case, the doctor was involved with the decision as to whether the bedrails should be raised. This transforms the matter into a professional negligence claim, and the negligent maintenance of the hospital's facilities (failure to maintain the bedrails properly, causing the latch to break) becomes part of that professional negligence, and the statute of limitations is one year.

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D

ELDER ABUSE; IMMUNITY FOR REPORTING

Santos v. Kisco Senior Living, LLC
(2016) 1 Cal.App.5th 862, 205 Cal.Rptr.3d 585

FACTS:

The defendant was the executive director of a nursing home. The nursing home had been experiencing thefts of money and property from the rooms of residents. Defendant placed video cameras in the rooms. Plaintiff was an employee of the nursing home and was seen on the video touching a box where money had been placed as "bait" for any suspected thief. The defendant filled out a citizen's arrest form. The police searched the plaintiff, but did not find money. Charges against the plaintiff were subsequently dropped. The plaintiff sued for false arrest, emotional distress, and other claims. All claims except for false arrest and emotional distress were dropped and dismissed by the trial court. The jury on the false arrest and emotional distress claims returned a verdict for more than $60,000. The trial court refused to grant JNOV.

APPELLATE COURT DECISION:

Reversed. The defendant was subject to absolute immunity under the Elder Abuse Reporting Act, which is designed to encourage those having custody or control of elderly patients to report any suspected abuse. This was exactly what the defendant had done and, therefore, any arrest or charges arising out of that reporting cannot be used to establish liability against the reporting person.

D

MICRA; ONE-YEAR STATUTE OF LIMITATIONS; RENDITION OF PROFESSIONAL SERVICES

Aldana v. Stillwagon
(2016) 2 Cal.App.5th 1, 205 Cal.Rptr.3d 719

FACTS:

The defendant was a licensed paramedic. He sometimes drove an ambulance. On the day in question, the defendant was driving his own pickup and was on the way to assist a fall victim who was being attended to by some other EMT personnel (defendant was a supervisor). Defendant failed to stop at a red light and collided with plaintiff who had the green light. A lawsuit was filed a year and a half after the accident. Defendant successfully convinced the trial court to dismiss plaintiff's case on grounds that the one-year statute of limitations provided by MICRA applied and the suit was untimely. Defendant had argued that he was on his way to render assistance in connection with the rendition of professional services.

APPELLATE COURT DECISION:

Reversed. The MICRA one-year statute of limitations does apply to negligence in connection with the rendition of professional services by one who is licensed to do so. It must be shown that the defendant acted within the scope of his license. The defendant in this case was driving his own truck on the way to render assistance to a fall victim. This would not be considered to be the rendition of professional services within the scope of the license. MICRA does not apply to every act of ordinary negligence that is committed by someone who has a paramedic license. The MICRA statute of limitations does not apply.

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D

PROFESSIONAL LIABILITY; MEDICAL; MICRA STATUTE OF LIMITATIONS; RENDITION OF PROFESSIONAL SERVICES

Nava v. Saddleback Memorial Medical Center
(2016) 4 Cal.App.5th 285, 208 Cal.Rptr.3d 585

FACTS:

Plaintiff was being transferred from a hospital by ambulance. The gurney on which plaintiff had been placed tipped and plaintiff fell from the gurney, injuring himself. Suit was filed against the hospital and the ambulance company. The suit was filed less than two years after the fall. The trial court dismissed the suit, ruling that the one-year statute of limitations under MICRA applied and that the case arose out of the rendition of professional services.

APPELLATE COURT DECISION:

Affirmed. The transfer on the gurney was the product of a medical directive having to do with plaintiff's diagnoses and treatment. Hence, the matter arose out of the rendition of professional services, and the special one-year statute of limitations in MICRA applies, not the regular two-year statute of limitations for personal injury.

COMMENT:

This is a difficult area: see *Flores v. Presbyterian Inter-Community Hospital* (2016) 63 Cal.4th 75.

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E

GOVERNMENT LIABILITY AND IMMUNITY; NATURAL CONDITION OF UNIMPROVED PUBLIC PROPERTY; DANGEROUS CONDITION OF PUBLIC PROPERTY

Daza v. Los Angeles Community College District
(2016) 247 Cal.App.4th 260, 202 Cal.Rptr.3d 115

FACTS:

Plaintiff was a guidance counselor at defendant Community College District. An adult student sued plaintiff and the District claiming that plaintiff had sexually assaulted (among many other claims) the adult student. Although plaintiff requested the District to defend him under the California Tort Claims Act, the District refused. The District then settled the case without admitting liability and without any determination that plaintiff had been acting within the scope of his employment when the alleged assault occurred. Plaintiff had denied that there was any assault at all.

In the cross-complaint for "reimbursement" filed by the guidance counselor against the District in seeking reimbursement, plaintiff conceded that he was not any longer seeking "indemnity" since the District had settled the case without plaintiff having to pay anything. But plaintiff did seek reimbursement for his defense costs in defending against the original claim for sexual assault. The District demurred, contending that plaintiff was acting outside the scope of his employment and, therefore, was not entitled to reimbursement for defense costs. The trial court agreed and sustained the demurrer and dismissed the claim.

APPELLATE COURT DECISION:

Reversed. At the demurrer stage, the court must accept as true the allegations of the plaintiff. Plaintiff is not limited by the complaint that was brought against him by the adult student alleging sexual assault. Plaintiff denied outright the claim of sexual assault at all. That being true, the issue as to whether he was within the scope of his employment is irrelevant. When employees deny claims of assault, were the employer able to refuse to defend and then the employer settles the case without admitting liability and without any determination as to scope of employment, this would encourage employers to leave employees in the lurch without any protection or defense.

E

FEDERAL LAW; NEGLIGENCE; FEDERAL TORT CLAIMS ACT; INDEPENDENT CONTRACTOR EXCEPTION; PRISONS

Edison v. United States
(2016) 822 F.3d 510 (WL 2946347) (9th Cir.)

FACTS:

The Bureau of Prisons (BOP), a Federal agency, operated the facility in Taft, California, at the southern end of the San Joaquin Valley. This area was notorious for the disease known as Valley Fever which was spread by a fungus called cocci. The fever, if contracted, led to serious complications, including tuberculosis, meningitis, and death. The BOP contracted with a couple of independent contractors, one called CEO, and the other called MTC. These contractors were responsible for the day-to-day operations of the facility in Taft, including the administration of the health care program there. Valley Fever became epidemic in degree at Taft. The BOP itself assumed responsibility for preventative measures and deliberately did not bring CEO and MTC into the program for prevention, although the independent contractors did on their own volition undertake various preventative steps, trying to arrest the spread of the disease. African-Americans and Filipinos were particularly susceptible to Valley Fever. One person died. Lawsuits were filed against the United States on the theory that under the Federal Tort Claims Act, they were directly negligent and could have done much more to prevent the spread of the disease.

The District Court dismissed the suit.

NINTH CIRCUIT DECISION:

Reversed. A principal contention of the defendant here is that suit is barred because of the "independent contractor" exception. That doctrine provides that when the United States itself is sought to be held liable for the conduct (negligence) of an independent contractor, the liability claim will not be allowed to proceed. However, if the United States is directly responsible for claimed acts which led to the injury or death, then the independent contractor exception will not apply.

In this particular case, the United States deliberately excluded the two independent contractors from all the programs, studies, and policies meant to prevent the disease or the spreading of the disease. The two independent contractors were allowed to treat and diagnose the disease, but not to get involved in the prevention of such. In that respect, the United States acted on its own and did take certain steps, but not enough, to prevent the continued spread of the disease and the epidemic.

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Accordingly, the United States could be sued for its own negligence in failing to do an adequate job. Under the Federal Tort Claims Act, if California law would not prevent a similar claim against a landowner, then the claim will be permitted against the United States. Here, the essence of the claim against the United States is that as a property owner, it did not fulfill its duty of care, it did not manage its property reasonably, did not warn of the danger on the property, did not take the steps necessary to prevent the danger from occurring or spreading. Accordingly, there is a basis for liability of the United States. Furthermore, the United States retained control over construction of new buildings, alteration or modification of existing buildings and steps, and also asserted control over where prisoners were assigned. All of these accentuate the presence of a duty of care.

E

GOVERNMENT LIABILITY AND IMMUNITY; CLAIMS STATUTE; PLEADING

Esparza v. Kaweah Delta District Hospital
(2016) 3 Cal.App.5th 547, 207 Cal.Rptr.3d 651

FACTS:

Plaintiff filed suit for medical malpractice against a government hospital. Plaintiff alleged generally that she had complied with the government claims presentation statute. The defendant demurred, contending that no details had been provided by plaintiff in the complaint and that nothing was said about how any claim was served, when, whether the defendant rejected the claim, when, or whether the claim was deemed denied. The trial court sustained the demurrer and dismissed the case.

APPELLATE COURT DECISION:

Reversed. Plaintiff has pleaded generally that she was in compliance with the claims statute, and this is sufficient.

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E

SEXUAL ABUSE; CHILDREN; STATUTE OF LIMITATIONS; GOVERNMENT CLAIM STATUTE

A.M. v. Ventura Unified School Dist.
(2016) 3 Cal.App.5th 1252

FACTS:

Plaintiff was a second grade student. She was abused and sexually molested by other students. The school district found out about this, but did nothing. Plaintiff, through her mother, filed suit against the district. The district convinced the trial judge that plaintiff's failure to comply with the government claim statute barred her lawsuit. The case was dismissed.

APPELLATE COURT DECISION:

Reversed. Childhood victims of sexual abuse are not required to comply with the government claim statutes. (See, C.C.P. § 340.1 and Government Code § 905.) They are entitled to use the much longer and complex childhood sexual abuse statutes of limitation.

COMMENT:

This could be a significant case since many claims of child sexual abuse are brought against teachers and other school officials and districts, not to mention claims against social workers and child welfare government employees. Exposure of these persons or entities, therefore, is greatly increased when the government claim statute cannot be relied upon.

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F

DEFAMATION; ANTI-SLAPP PROCEEDING; FAIR AND TRUE REPORT

J-M Manufacturing Company, Inc. v. Philips & Cohen LLP
(2016) 247 Cal.App.4th 87, 201 Cal.Rptr.3d 782

FACTS:

J-M was the manufacturer of PVC pipe used in government water systems. Various government entities and water districts brought a "qui tam" action. This action claimed that J-M had falsely represented that its pipes complied with government and industry standards, including Underwriters Laboratory (UL) standards. The case went to trial before a jury. The jury determined that J-M had indeed falsely certified that its pipe met industry and government standards. The trial had been separated into three stages: liability, causation and damages. The instant case concerns only the liability phase, the damages and causation phases were yet to be determined.

After the jury verdict in the qui tam case, the attorney for the plaintiffs issued a detailed press release, in essence saying that the jury had determined that J-M had lied, that the pipes were the product of shoddy manufacturing processes, that the plaintiffs over a 10 year period had invested more than $2 billion in the pipes, and that J-M faced damages exposure/potential for "billions of dollars." Because of this press release, J-M sued the original plaintiffs for defamation. Those government entities moved to strike under the anti-SLAPP statute (C.C.P. section 425.16).

The trial court denied the motion, saying that there were factual issues as to whether a privilege existed.

APPELLATE COURT DECISION:

Reversed. Under the requirements of the anti-SLAPP statute, it must first be determined whether the matter involves a question of public interest or a public issue. This is plainly true in this case. After the issue of "public interest" is determined to exist, then the burden shifts to the plaintiff (J-M here) to show that it has a probability of success in pursuing its claim. But in this case, an absolute privilege exists under Civil Code section 47(d) for a "fair and true report" to a public journal of an official proceeding. In determining whether this privilege exists, some flexibility and literary license is allowed to the person (the law firm) furnishing the report. The claim here is that the jury did not <u>in fact</u> determine that J-M's product was defective or that the manufacture of it was shoddy. However, it is true that the jury determined that J-M lied and misrepresented facts as to whether it complied with industry and government standards. The press release should be viewed as a fair and true

report and is absolutely privileged. This means that plaintiff was unable, as a matter of law, to demonstrate that plaintiff had a probability of success with the defamation claim. The anti-SLAPP motion to strike should accordingly have been granted by the trial court.

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DEFAMATION; ANTI-SLAPP STATUTE; MOTION TO STRIKE

Brodeur v. Atlas Entertainment, Inc.
(2016) 248 Cal.App.4th 665

FACTS:

Plaintiff in this defamation suit claimed that he was a well-known environmental writer. He claimed that defendant produced a movie (*American Hustle*) which made false statements about his views on cooking food with microwaves, which allegedly take all the nutritional value out of the food. Defendant filed a motion to strike under C.C.P. section 425.16. The facts indicated that the movie depicted a scene with the microwave issue in it. It took place in 1978. It was a screwball, farcical presentation. There was also evidence that other experts in the area said that there was no merit to the claim that microwave cooking took all the nutritional value out of the food.

The trial court denied the motion to strike.

APPELLATE COURT DECISION:

Reversed. The trial court was directed to grant the motion to strike. Attorney fees were also awarded to defendant.

The Appellate Court held that the matter was one of public interest and plaintiff was a person in the public eye. The matter was farcical and in jest. There was also evidence that such a claim had been rebutted on the merits by other experts. It was shown that plaintiff had written an article back in the 70s making such a claim about the adverse effects of microwave cooking. Therefore, the key reason why the motion to strike should have been granted is that plaintiff did not demonstrate a probability of success with his defamation claim.

F

COMMUNICATIONS DECENCY ACT; LIABILITY OF WEBSITE PROVIDER; FAILURE TO WARN

Doe No. 14 v. Internet Brands, Inc.
(2016) 824 F.3d 846 (9th Cir.)

FACTS:

Plaintiff was a model. Defendant operated a website which was used by models to market their talents. The website began to be used by two men who would lure the models into a situation whereby they were raped and molested in Miami. Defendant website operator became aware of this fact, but did not provide a warning on the website that could be read by the models. Plaintiff was, in fact, lured into a dangerous situation and was raped. She sued defendant under a single theory of failure to warn. Defendant obtained a dismissal of the case in the District Court under the Communications Decency Act. This Federal statute protects and immunizes the website provider from being treated as a speaker or publisher and, therefore, liable for defamatory or other objectionable content that is published by the website provider.

NINTH CIRCUIT DECISION:

Reversed. The theory here is failure to warn. This website provider became aware of the danger years before this plaintiff was attacked. But the defendant did not provide any warning of the suspicious characters that were using the website for these nefarious purposes. For the purposes of this lawsuit, defendant was not being treated as a publisher or disseminator of information, but as someone who knew of a dangerous situation and failed to warn about it.

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DEFAMATION; ANTI-SLAPP STATUTE

Manzari v. Associated Newspapers Ltd.
(2016) 830 F.3d 881

FACTS:

Plaintiff sued the *Daily Mail* newspaper, online edition, for defamation. Plaintiff's photograph was juxtaposed with a headline indicating a pornographic star had come down with HIV. Plaintiff was a star in the pornography film industry, but she did not have HIV. The newspaper filed an anti-SLAPP motion, contending that its free speech right was otherwise being undermined. The District Court denied the motion to strike.

NINTH CIRCUIT DECISION:

Affirmed. In order to defeat an anti-SLAPP motion, a plaintiff must demonstrate, at least minimally, that plaintiff has a probability of being successful. Plaintiff met that burden, since she claimed that she did not have the AIDS virus. Plaintiff is a public figure and, accordingly, must show actual malice in order to prevail. Her claims sufficiently demonstrated reckless disregard by the newspaper and, therefore, the trial court properly denied the motion.

F

ANTI-SLAPP STATUTE; PROTECTED AND UNPROTECTED ACTIVITY

Baral v. Schnitt
(2016) 1 Cal.5th 376, 205 Cal.Rptr.3d 47 (California Supreme Court)

FACTS AND HOLDING:

In this case, the California Supreme Court ruled that the anti-SLAPP statute, permitting motions to dismiss claims against the defendant, applies to things arising out of both protected and unprotected activity. In other words, the motion may still be brought even though claims arising out of unprotected activity are contained within a cause of action also arising out of protected activity.

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F

ANTI-SLAPP STATUTE; COMMERCIAL SPEECH

JAMS, Inc. v. Superior Court
(2016) 1 Cal.App.5th 984, 205 Cal.Rptr.3d 307

FACTS:

The plaintiff was engaged in a marital dissolution matter. He retained JAMS for assistance in picking a mediator/arbitrator. A biography of a temporary judge was on the JAMS website and plaintiff picked that woman as his choice. The representation on the website said that she had experience in forming/merging companies and that she had experience in forming equity companies. Plaintiff claimed that this was misleading and that her experience with merging companies resulted in fraud litigation. Various causes of action were alleged against JAMS, including negligence, misrepresentation, fraud, etc., having to do with the misleading statements about the judge on the JAMS website. JAMS filed a motion to strike under C.C.P. § 425.16. The trial judge denied the motion. JAMS petitioned for a writ.

APPELLATE COURT DECISION:

Writ denied. This entire matter falls within the "commercial speech" exemption/exception to the anti-SLAPP statute. This is contained in C.C.P. § 425.17(c) which says that a motion to strike cannot be brought for matters arising out of commercial speech. The JAMS website was intended to further the sale of judicial services and to entice consumers to select from the website judges provided by JAMS. The commercial speech exception, therefore, applies.

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G

NEGLIGENCE; DUTY OF CARE

Vasilenko v. Grace Family Church
(2016) 248 Cal.App.4th 146, 203 Cal.Rptr.3d 536

FACTS:

A church had an overflow parking lot which was across a five-lane busy street from the church itself. The church had obtained permission to use the parking lot as an overflow lot for the church from the nearby school. Plaintiff was on his way to a funeral at the church. The main lot was full and plaintiff went to the overflow lot. That was also full and the attendant (the lot was actually managed by others) told plaintiff to go across the street and park in the school lot. In the process of driving his car across the busy intersection, plaintiff was rear-ended. He sued the church for negligence, contending that they should have been more careful in directing him across the street. The church contended that it did not own or control the street where the accident happened and, therefore, was not liable. The trial court granted summary judgment for the church.

APPELLATE COURT DECISION:

Reversed. The church did have a duty of care. It could have provided plaintiff with better guidance and the allegations of negligence raised triable issues of fact. Summary judgment was improperly granted.

COMMENT:

We question the correctness of this decision. Once plaintiff leaves the parking lot and enters a busy street, how can the duty of the church continue, even though the church may have "controlled" the parking lot as its overflow lot (even though it did not manage the lot)? This decision seems a stretch in its interpretation of "duty of care."

G

NEGLIGENCE; DUTY; PRIMARY AND SECONDARY ASSUMPTION OF THE RISK

Jimenez v. Roseville City School District
(2016) 247 Cal.App.4th 594, 202 Cal.Rptr.3d 536

FACTS:

Jimenez was a 14-year-old male student at defendant's middle school. Hall was a classroom teacher. Before school, the students had been doing breakdancing in Hall's classroom, practicing for an upcoming talent show. Hall left the classroom to go to the bathroom, and the students continued breakdancing. Other students encouraged Jimenez to do a "flip," sometimes used in breakdancing. Jimenez was inexperienced in this and injured himself while attempting a flip. There was a school rule against doing flips in breakdancing, but that rule had not been communicated to Hall. There was another school rule that no activity could be conducted in the classroom when the teacher was absent.

In the trial court, summary judgment was granted for the school district, primarily on grounds of assumption of the risk.

APPELLATE COURT DECISION:

Reversed. A duty of care was owed. The school district had a duty to supervise the minor children. The school district had failed to enforce its own rules, and Hall was potentially liable for negligent supervision or failure to supervise. The primary assumption of the risk doctrine does not apply because the school district did owe a duty to the students. However, the secondary doctrine of assumption of the risk did apply, and that doctrine is simply a variant of comparative fault. There was expert testimony in the record that flips are not a regular exercise in breakdancing and are relatively rare. Therefore, it cannot be said that they are an "inherent risk" in the sport – similar to the risks encountered in baseball when being hit by a baseball or in football. If anything, the school had increased the risk by its failure to supervise. Summary judgment was improperly granted, and the case is remanded to the trial court for further proceedings.

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NEGLIGENCE; DUTY OF CARE; ASSAULT; DAMAGES

Janice H. v. 696 North Robertson, LLC
(2016) 1 Cal.App.5th 586, 205 Cal.Rptr.3d 103 (WL 3896244)

FACTS:

Defendant operated a dance club. Plaintiff, a woman, was a patron at the club and she became intoxicated. She went into the restroom, entered the stall, failed to lock the stall, and an employee of the dance club entered the stall and raped plaintiff. On busy nights, the club used security guards to patrol the area where the restrooms were located, and these security guards would also make sure that no one entered a stall after a patron had entered it. The purpose was to prevent the use of drugs, conflicts, or sexual activity in the restrooms. On the night that plaintiff was raped, however, the crowds were smaller and there were no such security guards present. Plaintiff brought suit against the employee and the dance club. The employee defaulted. Various theories were alleged against the dance club, but ultimately plaintiff dropped all theories except premises liability.

A jury returned an award of more than $5.3 million in non-economic damages and found the employee 60% liable and the club 40% liable

APPELLATE COURT DECISION:

Affirmed. The club clearly had a duty of care. They had employed security guards to prevent exactly what occurred to plaintiff, but those guards were not present on the evening in question, even though minimal inconvenience would have been encountered by doing what defendant had done before on busier nights. The negligence of the club was a substantial factor in bringing about the injuries. The verdict is affirmed.

G

NEGLIGENCE; DUTY; FEDERAL TORT CLAIMS ACT

Dugard v. U.S.
(2016) 835 F.3d 915

FACTS:

This is a case arising under the Federal Tort Claims Act. Under that Act, one of the tests for whether a claim will be allowed against the United State is whether a claim would be allowed under California law against a similar private individual whose conduct allegedly forms the basis for government liability. In this case, Federal parole officers were supervising the prisoner's parole. He was known for committing sexual offenses under the influence of drugs. While on parole, the prisoner was severely abusing drugs, in violation of his parole and the prohibition against using of drugs, and in violation of his duty to report periodically to the parole officers. These parole officers were aware of more than 70 violations. The prisoner and his wife kidnapped the plaintiff, an 11-year-old girl, and held her for 18 years and abused her sexually during that time period. She brought suit against the United States, contending that they violated their duty of care and their responsibility to monitor and control the parolee. The case was dismissed by the trial court.

NINTH CIRCUIT DECISION:

Affirmed. Under California law, a similar person engaged in rehabilitative activities would have no duty to the world or to the general public to prevent what happened here and, therefore, the case was properly dismissed. Since California law would not permit a similar claim to be brought, no claim can be brought against the Federal parole officials.

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NEGLIGENCE; COMMON CARRIERS; SHUTTLE BUS TO CASINO

Huang v. Bicycle Casino, Inc.
(2016) 4 Cal.App.5th 329, 208 Cal.Rptr.3d 591

FACTS:

Defendant casino operated a shuttle bus that transported the public from various restaurants and other locations to the casino to gamble. There was a large crowd waiting for the shuttle bus and there was quite a bit of scuffling for seats and for boarding. Plaintiff was knocked down and broke her hip. She sued on the theory that the casino was "common carrier" and therefore owed more than the ordinary duty of care. The trial court granted summary judgment for the defendant, taking the position that plaintiff's injury was caused by third party passengers.

APPELLATE COURT DECISION:

Reversed. There are triable issues of fact. There had been prior incidents of crowds that were too large and inadequate precautions. The shuttle bus driver could have directed that people line up for boarding the bus. A duty of care was owed, there were triable issues of fact, and the injury was foreseeable.

G

NEGLIGENCE; INDEPENDENT CONTRACTORS; *PRIVETTE* RULE; RETAINED CONTROL; AFFIRMATIVE CONDUCT

Regalado v. Callaghan
(2016) 3 Cal.App.5th 582, 207 Cal.Rptr.3d 712

FACTS:

Callaghan was an owner contractor. He was building his own custom home. He was also a concrete contractor. Again, he was acting as his own general contractor for the construction of his home. He put in a pool. To reduce the noise of the pool equipment, he decided that he would put the pool equipment and the heating equipment for the pool in an underground vault. He purchased the vault and the heating equipment (which used propane) from a separate company. These were installed underground. He had a company called Dunn do all this work, and plaintiff Regalado was a direct employee of Dunn. Defendant told the Dunn people that he had obtained the necessary permits and that the work had been inspected by the County. Propane has a quality that makes it heavier than air, such that it sits on a bottom (floor). Plaintiff was working in the vault area and had been instructed to light the heater. When he did so, the propane exploded and plaintiff was seriously injured. He was off work for about three years. He received workers compensation, but his direct employer (Dunn) paid him the difference between workers compensation and his regular salary.

Plaintiff sued defendant/contractor under theories of negligence and "retained controlled," alleging, inter alia, that defendant affirmatively contributed to the cause of the accident. A jury returned a verdict of $3,000,000 in favor of plaintiff, finding that defendant was about 40% negligent. The jury had been instructed on various standard California jury instructions, including those dealing with the hirer of an independent contractor, retained control, and affirmative contribution to the circumstances of an accident.

APPELLATE COURT DECISION:

Affirmed. This is a *Privette*-type case, in part. Normally, there is no liability on the part of the hirer of an independent contractor. But when the hirer (defendant in this case) retains control over the work site and affirmatively contributes to the circumstances of the accident, liability will exist. Affirmative conduct can consist of an <u>omission</u>; here, defendant, although representing that he had obtained permits and that the County had inspected, had not done so or arranged for such inspection. This is sufficient to constitute affirmative conduct contributing to the accident and, therefore, the hirer of the independent contractor (Dunn) was liable.

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The jury returned a verdict in favor of plaintiff for lost wages, among other damages. It was proper not to allow evidence that plaintiff had been compensated by his direct employee for the difference between workers compensation and his regular salary. To have allowed in such evidence would violate the collateral source rule.

COMMENT:

The Court's comment on omissions as constituting affirmative conduct contributing to an injury is interesting. In this case, it appeared that there were misrepresentations by the defendant as to whether permits and inspections had been done, and that could form the basis for reliance. The problem of compliance with safety regulations and permitting, etc., rules and regulations is often seen in construction accident. But the general contractor can normally delegate those (to the direct employer of the plaintiff) under most circumstances. Apparently, this was not done in the present case (although it works). There is a strong suggestion that had the permitting and inspection processes been done, this little project would not have been approved, and the accident would have been avoided.

G

PREMISES LIABILITY; LANDOWNERS LIABILITY; NEGLIGENCE; RECREATIONAL USE

Wang v. Nibbelink
(2016) 4 Cal.App.5th 1, 208 Cal.Rptr.3d 461

FACTS:

There was a group known as the Highway 50 Association (HFA). For enjoyment, they annually had an event in the foothill area involving stagecoaches and horseback riders. They would go from place to place, spending the night at lodges and using nearby land or meadows to house their horses. The event was in progress and some of the horses were being housed in a meadow near Strawberry Lodge where some of the participants were staying. Plaintiff and her husband were not participants in HFA or the event. They were on their way to Strawberry Lodge for dinner. Plaintiff was getting out of the car when she was struck by one of the horses which had been staying in the meadow. The horse had gotten loose and ran into the plaintiff. Plaintiff brought suit against the owner of the meadow.

The trial court granted summary judgment for the meadow owner on grounds of Civil Code section 846 which immunized landowner arising out of recreational use of the land.

APPELLATE COURT DECISION:

Affirmed. The statute contains broad language. There is no requirement that plaintiff be the one who is using the land for recreational purposes. If plaintiff is injured by an animal owned by someone using the property for recreational purposes, this is sufficient to trigger the statutory elimination of a duty of care on the part of the property owner (the meadow owner). Nor does it make any difference that plaintiff's injury occurred <u>off premises</u> (outside the boundaries of the meadow). The statute's protection to the meadow owner is not so limited.

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K

DAMAGES; PUNITIVE DAMAGES; *BRANDT* ATTORNEY FEES

Nickerson v. Stonebridge Life Insurance Co.
(2016) 63 Cal.4th 363, 203 Cal.Rptr.3d 23 (California Supreme Court)

FACTS:

The insured was a disabled veteran. He was being transferred to a medical facility when he was dropped, causing him to break his leg. He was taken to the V.A. Hospital. He had a medical policy which provided for hospitalization expenses for "medically necessary" treatment. The insurer would only pay for 19 days of hospitalization, even though he was in the hospital for 90 days. He filed suit for breach of contract and for bad faith. In the trial court, the trial court determined that the "medically necessary" clause in the policy was obscure and unenforceable. The jury awarded plaintiff $35,000 in compensatory damages and $19 million in punitive damages. After the verdict, the parties stipulated that the trial judge could determine the amount of *Brandt* fees (the attorney fees necessary to recover the contract damages for policy benefits). The trial judge determined that those damages were $12,500. The trial court then reduced the punitive damage award to $350,000, which meant that the punitive award was 10 times higher than the total compensatory award, including the *Brandt* fees. The Appellate Court reversed, saying that *Brandt* fees could not be included in compensatory damages for purposes of determining whether the punitive damage award was constitutionally proper and in the appropriate ratio. It was important to the Appellate Court that it was the trial judge after the verdict who had determined the *Brandt* fees, rather than the *Brandt* fees being presented to the jury before they reached the total verdict, including punitive damages.

SUPREME COURT DECISION:

Court of Appeal reversed. Significantly, the Supreme Court says that *Brandt* fees are compensatory damages and can be added to the other compensatory damages for purposes of deciding whether punitive damages are excessive or are within an accepted ratio. In this case, a 10:1 ratio is appropriate, given the high net worth of the insurer, the insured's vulnerability and the egregious conduct of the insurer.

Also, it makes no difference that the trial judge after the jury verdict was the one who determined the amount of the *Brandt* fees. When the Appellate Court assessed the propriety of the size of the punitive award, they can simply take the *Brandt* fees into consideration. The trial judge properly added the *Brandt* fees to the other compensatory damages to come up with a total of about $35,000 in compensatory damages and then multiplied that by 10 to come up with an appropriate punitive damage award.

K

COMMENT:

Insurers can take some comfort in the fact that despite somewhat egregious facts, and a small compensatory award (even adding on the attorney fees), the Court did not venture beyond the ceiling of 10:1 as far as an appropriate ratio is concerned. There will be certain tactical considerations as to whether lawyers would prefer the judge after the jury verdict to determine the *Brandt* fees or whether they wished to place the *Brandt* fees before the jury. But it made no difference to the Court, since the Court said they can simply be used to add to the compensatory damages and then determine whether the ratio of punitives to compensatory is still appropriate.

In many cases, if the insured's attorney keeps proper records, the attorney fees can be quite sizeable, adding significantly to the total compensatory award and also to the punitive award.

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N

PRODUCTS LIABILITY; MEDICAL DEVICES; FEDERAL PREEMPTION

Glennen v. Allergan, Inc.
(2016) 247 Cal.App.4th 1, 202 Cal.Rptr.3d 68 (WL 1732243)

FACTS:

Defendant was a manufacturer of a medical device called a lap band, designed to help with the problem of obesity. The lap band was implanted pursuant to a surgical procedure. The entire matter was governed by the MDA, the Medical Device Act, which contains numerous requirements. For this particular device, a manufacturer had to provide detailed training exercises for the physician who would be implanting it, and this was specified on the labels for the device.

Plaintiff had implanted one of the lap band devices. Serious complications and injuries resulted. Plaintiff sued defendant under State law under a theory of products liability and medical negligence.

The trial court dismissed the suit on grounds of Federal preemption.

APPELLATE COURT DECISION:

Affirmed. The MDA contains an express preemption clause itself. It indicates that any State law requirements that are different from or in addition to the Federal requirements are preempted. In the present case, that problem exists. Plaintiff's claim, for example, that the training standards for physicians in this case did not measure up to what is required under State law for compliance with the duty of care on the part of physicians. But that standard is not necessarily the standard that the MDA would follow in connection with its training requirements imposed on physicians. Federal preemption applies.

N

PRODUCTS LIABILITY; SOPHISTICATED INTERMEDIARY DEFENSE

Webb v. Special Electric Co.
(2016) 63 Cal.4th 167, 202 Cal.Rptr.3d 460 (California Supreme Court)

FACTS:

Special Electric "brokered" the sale of crocidolite, a very toxic form of asbestos found in South Africa. This product in turn was supplied to Johns-Manville, the nation's largest dealer in asbestos products. Johns-Manville made concrete pipe and incorporated the subject asbestos into the pipe. The asbestos was supposed to be shipped in bags with OSHA warnings about the dangers associated with the asbestos. This rule was in place in the 1980s. But plaintiff, Webb, was a worker who was exposed between 1969 and 1979 and he became ill with mesothelioma. He brought suit against Special Electric under theories of strict liability. Special Electric obtained a judgment notwithstanding the verdict from the trial court based upon the fact that it was only a broker and had not directly handled the product, manufactured it, or distributed it. The trial court decision was reversed by the Court of Appeal, but the Court of Appeal embraced the defense called the sophisticated intermediary defense.

SUPREME COURT DECISION:

Court of Appeal decision basically affirmed. The Supreme Court in the *Johnson* case had adopted the sophisticated user defense. That gives support for the sophisticated intermediary defense which is presented here. The supplier of the raw asbestos product supplies it to a company such as Johns-Manville. Johns-Manville is a very sophisticated user of asbestos products. The supplier of the raw asbestos is not required always to provide a warning about a product to a sophisticated company such as Johns-Manville. It can often reasonably rely upon Johns-Manville to provide a warning to the <u>end user</u> of the product. If the end user is unaware of the dangers and has not been provided with any cautionary warnings, it can still be a defense for the supplier of the raw product if it can prove that its reliance upon a company such as Johns-Manville was reasonable.

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P

VICARIOUS LIABILITY; RESPONDEAT SUPERIOR; GOING AND COMING RULE

Jorge v. Culinary Institute of Am.
(2016) 3 Cal.App.5th 382

FACTS:

Da Fonseca (Da) worked as a chef for the Culinary Institute. He drove his own car to work, but was not required by the Institute to have his car on the premises. He could have come to work on public transit or by being dropped off. He occasionally did participate in offsite conferences or instructional sessions, but was not required to take his car to those functions. On the day in question, he was commuting to work from his home when he had an accident. An effort was made by the injured plaintiffs to hold the Institute vicariously liable. The trial court denied the motion for summary judgment filed by the Institute and allowed the action to go to the jury. The jury ruled for the plaintiffs on the issue of vicarious liability.

APPELLATE COURT DECISION:

Reversed, as a matter of law. Under the going and coming rule, when the employee has an accident on the way to work or returning from work, he is not considered to be within the scope of his employment and, therefore, the employer (the Institute) is not vicariously liable. All this was true in the present case and there was no evidence supporting vicarious liability. Under the "required vehicle exception" to the going and coming rule, vicarious liability can exist when the employer requires the employee to have his car at work. But this was not true in the present case. Just because some tools of his work (chef knives) were found in the car were not enough to create vicarious liability. The verdict is therefore reversed.

P

VICARIOUS LIABILITY; REPONDEAT SUPERIOR; GOING AND COMING RULE

Pierson v. Helmerich & Payne Int'l Drilling Co.
(2016) 4 Cal.App.5th 608, 209 Cal.Rptr.3d 222

FACTS AND HOLDING:

In this "going and coming" vicarious liability case, a bunch of employees had made arrangements for carpooling. At the time of the accident, one of the persons in the car was a supervisor at their company. They were all on the way home. An accident occurred while the car was being driven by one of the employees. The company itself would not be liable because the going and coming rule applied, and there were no exceptions.

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R

SETTLEMENT; PREVAILING PARTY; COSTS

DeSaulles v. Community Hosp. of the Monterey Peninsula
(2016) 62 Cal.4th 114 (California Supreme Court)

FACTS:

This is a rather complicated case involving an employee who had been terminated and who brought a lawsuit against the employer under numerous causes of action. The employer prevailed at the pleading stage on some of the causes of action, and the employee appealed. In the interim, the remaining causes of action were settled for approximately $25,000. Ultimately, the causes of action that were on appeal were resolved against the employee and in favor of the employer. The question then became who was the "prevailing party" entitled to recover costs? The employer took the position that it was the prevailing party.

SUPREME COURT DECISION:

The Supreme Court ruled that you can be a prevailing party even after a settlement, since the statutes provide that the party receiving a net monetary recovery is the prevailing party. Statute also says that a defendant who obtains dismissal of claims against it can also be a prevailing party. However, the "net monetary recovery" is the better rule.

COMMENT:

The problem in this case is that the parties had stipulated that the issue of "costs" could be resolved after the appeal was decided, and that was decided after the settlement. The Supreme Court probably decided this matter properly, simply focusing on the "net monetary recovery" rule. These factual situations are rarely encountered, and most of the time, when parties settle a case, they should include a phrase "each side to bear their own costs," which takes care of the matter without further controversy.

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U

CIVIL RIGHTS; EXCESSIVE FORCE

C.V. by and through Villegas v. City of Anaheim
(2016) 823 F.3d 1252

FACTS:

A 911 call was made by a citizen who reported that a drug deal was going on and that the man involved had a rifle and a shotgun. The police responded and told the decedent to drop the gun; when he failed to do so, the police shot, killing him. It turned out that the gun was not a shotgun, but a BB gun. A lawsuit was filed alleging Federal civil rights violations and State law violations of negligence and the use of excessive force. The case was removed to the Federal court. The U.S. District Court granted summary judgment on the Federal and the State causes of action, applying the doctrine of qualified immunity.

NINTH CIRCUIT DECISION:

Affirmed as to the Federal causes of action; reversed as to the State causes of action. Under the civil rights and Fourth Amendment violation claims, the police officers' conduct was objectively reasonable and not clearly erroneous. Therefore, the claims for a Fourth Amendment violation and the civil rights violation were appropriately dismissed and summary judgment on those claims was properly granted. Nevertheless, on the State law causes of action, summary judgment was improperly granted, since there were triable issues of fact involved. The case is therefore remanded to the District Court for further proceedings under those claims.

U

ARBITRATION; UNCONSCIONABILITY

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

FACTS:

23andMe was a company formed to provide consumers with DNA testing kits. This was supposed to help the consumers avoid the risks of certain diseases. Under the arrangement between 23andMe and the consumer, the consumer agreed to arbitrate all disputes with the exception of intellectual property disputes. Attorney fees and costs were awarded to the prevailing party; 23andMe had the right to modify the agreement; there was also a forum selection clause requiring that any dispute be arbitrated in San Francisco. The FDA forced 23andMe to discontinue offering the kits. This resulted in claims and class actions being filed against 23andMe which in turn resulted in a motion to compel arbitration.

The trial court resisted all efforts to have the arbitration clause declared invalid as being procedurally and substantively unconscionable.

NINTH CIRCUIT DECISION:

Affirmed. The Court said that under the Federal Arbitration Act (FAA), arbitration agreements could not be avoided unless both substantive and procedural unconscionability was found. This standard was not met in the present case. Existing law allowed for attorney fees to be awarded to the prevailing party; there was nothing unconscionable about exempting intellectual property from those classes of claims subject to binding arbitration. Also, the forum selection clause, requiring arbitration to be carried out in San Francisco was not unconscionable. Finally, allowing 23andMe (alone) to modify the agreement did not render it unconscionable since 23andMe under existing authority would have to act in good faith before invoking such a provision. This operated to save the provision.

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U

DISABILITY DISCRIMINATION; UNRUH ACT

Osborne v. Yasmeh
(2016) 1 Cal.App.5th 1118, 205 Cal.Rptr.3d 656

FACTS:

Plaintiff was a paraplegic. Plaintiff was traveling with his wife and stepsons. Plaintiff also had a "service dog." They all went to check into the defendant hotel. The hotel charged $80 for a room and they also charged a $300 non-refundable cleaning fee for pets. Plaintiff did not check into the room or tender any money for services. Plaintiff then brought an action for discrimination under the Unruh Act and under the ADA. The defendant demurred on grounds that plaintiff had no standing to bring the lawsuit since plaintiff had not tendered any money for the services offered by the hotel. The trial court sustained the demurrer.

APPELLATE COURT DECISION:

Reversed. The hotel could not charge this non-refundable $300 cleaning fee related to plaintiff's disability. Plaintiff adequately alleged standing without having to show that plaintiff had tendered the money for the room and for the fee. To allow the hotel to engage in such conduct would be to allow unlawful discrimination.

COMMENT:

At the risk of alienating millions of dog lovers, we raise certain questions about the wisdom of this decision. Assume that a non-paraplegic individual travels with what he/she calls a "service dog," and that the claim is that they need the dog around for their mental and emotional health, and without the dog, they would be mentally and emotionally disabled. Does this mean that the hotel cannot legitimately charge a special and non-refundable fee for cleaning? If you assume that dogs frequently leave a room in a condition that requires much extra effort in cleaning, then what is the hotel owner to do to recoup its extra costs? And does this invite everyone with a dog to escape the cleaning fee by claiming that the dog is a "service dog" necessary for the mental health of the owner?

U

ARBITRATION; ARBITRABILITY; CLASS-WIDE ARBITRATION

Sandquist v. Lebo Automotive, Inc.
(2016) 1 Cal.5th 233, 205 Cal.Rptr.3d 359 (California Supreme Court)

FACTS:

This is an important arbitration decision from the California Supreme Court. The facts were relatively simple: the plaintiff, an African-American male, took a job with an automobile dealer. He was presented with about 100 pages of documents to sign before he started work, and there were three arbitration clauses in the documents to which he agreed. Twelve years later, plaintiff filed a class action lawsuit for racial discrimination on behalf of himself and all other minority hires of the dealership.

Motions to compel arbitration were filed. The dealership contended that the arbitration agreement did not allow for class-wide arbitration and that only arbitration as to each individual would be permitted.

SUPREME COURT DECISION:

- The arbitration agreement is really silent as to whether class-wide arbitration is permitted. Under those circumstances, there is a presumption that the arbitration agreement should be construed against the drafter (the dealership);

- But the more fundamental question is whether this issue of whether class-wide arbitration is permitted is to be decided by the Superior Court or by the arbitrator. The silence in the agreement on this subject, and the parties' desire that the whole matter be arbitrated, would indicate that they intended the arbitrator to decide this question of procedural arbitrability, and that is the way in which the matter will be resolved and the case is remanded for that purpose.

COMMENT:

Arbitration agreements are contracts. Accordingly, great respect is given to the intent of the parties and the language they use, and that intent will be enforced if possible. Employers who desire to eliminate class-wide arbitration will normally insert an unambiguous clause in the arbitration agreement expressly stating that only individual arbitrations are permitted and that the arbitrator is not permitted to entertain class-wide arbitration claims. Such language has repeatedly been upheld by the U.S. Supreme Court and the string of more than a dozen cases, although the California Supreme Court has historically been hostile to the elimination

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of class-wide arbitration, but finally gave in to the U.S. Supreme Court case of *Concepcion* on this subject.

Also to be noted is the fact that the parties can indicate in the arbitration agreement whether procedural arbitrability could be decided by a court or by the arbitrator. Therefore, this agreement could have said that whether an issue is "arbitrable" is to be decided by a court, not the arbitrator. In the present case, the Supreme Court found the agreement ambiguous and silent on this subject and, therefore, "presumed" that the parties would have intended this matter to be decided by the arbitrator rather than by a court. But, again, the parties can expressly state whether they want a court or an arbitrator to decide such questions. Generally speaking, the employer or the corporation would probably prefer a court to decide this question, feeling that allowing an arbitrator to decide the question is not wise, since an arbitrator might have a vested interest in the larger arbitration which would exist if class-wide arbitration was entertained rather than arbitrating each individual claim by itself.

All of this illustrates the importance of careful drafting of an arbitration agreement, tailored to the client's individual needs, given the nature of the client's business. Such careful drafting can avoid many of the problems giving rise to the *Sandquist* case.

U

ARBITRATION; UNCONSCIONABILITY

Penilla v. Westmont Corp.
(2016) 3 Cal.App.5th 205, 207 Cal.Rptr.3d 473

FACTS:

The plaintiffs were residents of a mobile home park. Defendants were the owners of the mobile home park. The contract between the two of them contained a binding arbitration clause. Almost all of the mobile home residents were Hispanic and few spoke or read English. The agreement provided that each party would bear half the arbitration costs (and the arbitration was to be by JAMS). If one of the parties did not deposit half of the anticipated fees at the commencement of the arbitration, then there would be a default. The statute of limitations was shorter than the one normally provided by law; there was a limitation on damages to one year before the claim; and punitive damages were likewise limited. When the residents filed a lawsuit, the owners moved to compel arbitration. This was denied when the trial court found unconscionability.

APPELLATE COURT DECISION:

The agreement is both procedurally and substantively unconscionable. It is an adhesion contract; a Spanish language copy of the agreement was never provided to any of the residents; most of the residents are low income, and requiring them to deposit half the fees at the beginning of the arbitration renders the agreement unconscionable. Although there are California statutes indicating parties should each pay half, there is no authorization for a "default" against a party not paying their one-half. The limitation on damages made it unconscionable (arbitration agreement should generally allow the same measure of damages as would be allowed in a court).

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V

ELDER ABUSE ACT

Winn v. Pioneer Medical Group
(2016) 63 Cal.4th 148 (2016 WL 2941968) (California Supreme Court)

FACTS AND HOLDING:

This is an important California Supreme Court decision involving California's Elder Abuse Act. This Act, protecting the elderly from neglect and abuse while in the custody and control of the defendant, provides for heightened remedies if violated. For example, pre-death pain and suffering is allowed; punitive damages are allowed; costs and attorney fees are allowed. These kinds of damages are normally not allowed in medical malpractice cases. In this particular case, the patient was an outpatient treated at defendant's clinic. The Supreme Court indicated that plaintiff would not be allowed to proceed under the Elder Abuse Act because there was no caretaking or custodial relationship between the defendant and the plaintiff. Instead, it was a more casual and limited relationship, not one where the plaintiff was under the constant care and a custodial relationship existed between the two. This is necessary in order to state a cause of action under the Elder Abuse Act.

V

UNFAIR COMPETITION LAW; UNLAWFUL ACTS, EXCESSIVE CHARGES BY HOSPITAL

Moran v. Prime Healthcare Management, Inc.
(2016) 3 Cal.App.5th 1131

FACTS:

Plaintiff, unemployed and without private or government health coverage, went into the emergency room of defendant hospital three times and was charged $10,000. Plaintiff signed documents in the emergency room under a "self-pay" provision. These documents indicated that plaintiff would be responsible for "reasonable" charges for his treatment. Later, plaintiff brought a class action alleging that the hospital charged excessive fees and violated the Unfair Competition Law and the Consumer Legal Remedies Act.

The trial court sustained defendant's demurrer and dismissed the case.

APPELLATE COURT DECISION:

Substantially reversed. Plaintiff did have standing to bring a claim alleging that defendant engaged in unlawful acts in its charges. Defendant was entitled to engage in variable charges and could not be accused of unlawful discrimination. However, the allegation is that defendant's charges were unconscionable, which would render them unlawful and an alleged violation of the UCL. Plaintiff could therefore proceed with part of the claim.

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W

DISCRIMINATION; DISPARATE IMPACT; ADA

Mendoza v. Roman Catholic Archbishop of Los Angeles
(2016) 824 F.3d 1148 (WL 1459214) (9th Cir.)

FACTS:

Plaintiff was a full-time bookkeeper for a small Catholic Church in the Los Angeles archdiocese. Plaintiff took 10 months of sick leave. During that time, the priest took over her bookkeeping duties and determined that a full-time position was not necessary and that the job could be done on a part-time basis. When plaintiff returned, the Church refused to offer her a full-time position, although they did indicate that she could work part-time. She refused and sued, claiming ADA discrimination and disparate treatment and failure to accommodate.

The District Court granted summary judgment for the Church.

NINTH CIRCUIT DECISION:

Affirmed. Plaintiff did not demonstrate that the part-time position only was a "pretext." The employer had a legitimate reason for not offering plaintiff a full-time position; only a part-time position was available at this point. There is no basis for a disparate impact claim.

W

EMPLOYMENT TORTS; WRONGFUL INTERFERENCE WITH CONTRACT; INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE; AT-WILL EMPLOYMENT

Popescu v. Apple, Inc.
(2016) 1 Cal.App.5th 39 204 Cal.Rptr.3d 302

FACTS:

In a complex business and factual setting, Popescu was a skilled aluminum worker for a company called Constellium. He was especially skilled in fabricating aluminum alloys. Apple approached Constellium about making products for Apple's smart phones. Popescu began work on the project. In the process of beginning work, he suspected that Apple was misappropriating trade secrets and manufacturing processes of Constellium. Popescu was an at-will employee with Constellium, although he had a special provision for severance pay and some benefits in case he was terminated. Apple sought to have Constellium and Popescu sign an exclusive development agreement which would prohibit Constellium from supplying other customers with alloys for five years. Popescu resisted signing this agreement. A meeting was held and Popescu inadvertently turned on his recording device during the meeting. He was discovered and the meeting was terminated. Apple then convinced Constellium to terminate the employment of Popescu. Popescu sued Apple.

In the trial court, the demurrer of Apple under various theories, including interference with contractual relationship and intentional interference with economic advantage, was sustained.

APPELLATE COURT DECISION:

Reversed. The case was remanded so that plaintiff will have an opportunity to proceed with his claim. The allegation is that Apple was seeking to gain improper market control and sought to remove Popescu in light of Popescu's unwillingness to sign the exclusive development agreement. Plaintiff suffered adverse consequences even though he was only an at-will employee. He had certain benefits which he lost under the contract; plaintiff also stated a claim for intentional interference with prospective economic advantage. Plaintiff's claims may also be brought even though Apple may not have been guilty of independent wrongful acts, although Apple's conduct was a blend of wrongful and non-wrongful acts.

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W

EMPLOYMENT TORTS; DISCRIMINATION; ANTI-SLAPP MOTION

Nam v. Regents of the University of California
(2016) 1 Cal.App.5th 1176, 205 Cal.Rptr.3d 687

FACTS:

Plaintiff was a resident doctor in the anesthesiology field. Plaintiff was disciplined by defendant University. There were positive things in his file and some complaints. An investigator concluded the probably the plaintiff had been treated improperly. Plaintiff was eventually let go from the program. Plaintiff (a woman) filed suit for sexual harassment, claiming that she had rebuffed sexual advances by defendant's people. She also claimed retaliation, wrongful termination, sexual harassment and other claims. The defendant moved to strike under the anti-SLAPP statute. The defendant claimed that all of this was part of "official proceedings" allowed to entities such as defendant. The trial court granted the motion to strike.

APPELLATE COURT DECISION:

Reversed. The question is whether the wrongful conduct arises out of protected activity. Not so here: the court is limited to what is pleaded, and what is pleaded is pure discrimination and retaliation. These are not protected activities and to rule otherwise would turn every discrimination or sexual harassment case into an anti-SLAPP case.

W

EMPLOYMENT TORTS; EMPLOYMENT AGREEMENTS; ARBITRATION; SERVICE MEMBERS

Ziober v. BLB Resources, Inc.
(2016) 839 F.3d 814 (9th Cir.)

FACTS:

Plaintiff had been in the Naval Reserve. He was employed by defendant. When plaintiff told his employer he had to return to Afghanistan, plaintiff was fired. He sued under the Federal statute protecting the rights of employed service members or returning service members who were seeking employment. There was an employment agreement between plaintiff and defendant and that had a binding arbitration clause in it. The employer moved to compel arbitration, which was granted by the District Court.

NINTH CIRCUIT DECISION:

Affirmed. There is nothing in the Federal statute that precludes the use of binding arbitration or the arbitration forum, despite the fact that the Federal statute does give the employee the right to pursue legal rights in court. The District Court order is correct.

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