

# THE UPDATE

SPRING 2020 | ISSUE 1



SAN DIEGO  
DEFENSE LAWYERS





2020 SDDL Board of Directors

# PRESIDENT'S MESSAGE

What a start to 2020! Before I address the elephant in the room, let me first say that I am honored to serve as the President of San Diego Defense Lawyers. I am grateful to work alongside such a dedicated board serving our members and the community.

We started the year with a few excellent MCLE lunch & learn programs. In January, Brian Rawers gave an entertaining seminar on "The Ins & Outs of Taking A Deposition." In February, Clint Modesitt from Innovative Discovery Digital provided us with some interesting intel on "Mobile Collections and Managing Other Non-Traditional Data Types." In March, Ian Fusselman from ADR Services, Inc. gave our members that elusive competence credit when he presented on "The 'Other' Bar - An Analysis of Alcohol and The Law."

We also had a few evening programs on calendar, which will be rescheduled - Robert F. Tyson, Jr., Steven S. Fleischman, Mina Miserlis, and Robert H. Wright on "Howell: Still Under Attack Nine Years Later" and a joint program with CASD that included Judge Timothy Taylor, Douglas Pettit, and Steven Vosseller presenting on "Critical Evidentiary Issues And Strategies Of 2020." Our first Happy Hour of the year at Craft & Commerce was slated to go forward with a bevy of delicious appetizers and specialty drinks. We will get all these fun events back on calendar as soon as we can.



In mid-March, the COVID-19 Pandemic hit and everything is on hold. We are all trying to figure out how to best represent our clients, support our office staff, manage child care, and protect our most vulnerable. There is no part of our lives that has not been impacted by this crisis. As we navigate these uncharted waters, I encourage all of you to be kind to one another. Grant that extra discovery extension, agree to reschedule a deposition (or support our local court reporters and do it via Zoom sans pants), and be understanding when opposing counsel seems a little more stressed than normal.

As I said at the Installation Dinner, we are all very fortunate to be living and practicing law in San Diego. While SDDL primarily serves lawyers, we also serve our communities. Many are suffering from the financial impact of this pandemic and especially need our assistance right now. I encourage you to consider what you can do for the local foodbanks, blood bank, and other charitable organizations that will see a tremendous strain on their resources. To that end, a few weeks ago, San Diego Defense Lawyers partnered with Consumer Attorneys of San Diego to do a Virtual Food Drive - <https://www.fooddriveonline.org/sandiegofoodbank/index.php?s=CASDandSDDL>

Please be safe, take care of yourself, and take care of your family. The second half of 2020 will be loaded with many events for our members. We will get through this together and ultimately come out stronger than ever!

~ N. Ben Cramer, Esq.

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## MEMBERSHIP INFORMATION

Membership is open to any attorney or paralegal who is primarily engaged in the defense of civil litigants, as well as retired defense attorneys. Dues are \$125.00 for new members for the first year and \$160.00 per year for renewing members. The dues year runs from January 1 to December 31. Applications can be downloaded at: [sddl.org](http://sddl.org).

The Update is published for the mutual benefit of the SDDL membership, a non-profit association composed of defense lawyers in the San Diego metropolitan area. All views, opinions, statements and conclusions expressed in this magazine are those of the authors, and they do not necessarily reflect the opinions or policies of the SDDL or its leadership. The SDDL welcomes the submission of articles by our members on topics of general interest to its membership.



**SAN DIEGO  
DEFENSE LAWYERS**

## 2020 SDDL UPDATE

Editors-in-Chief | David Hoynacki, Rachel Fisher, Codie Dukes

Design | April Woodard Design  
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Nicholas Schechter  
Tyson Mendes

**SDDL UPDATE** c/o David Hoynacki  
Wilson Elser, 401 West A Street, Suite 1900,  
San Diego, CA 92101  
P: 619.321.6208  
[david.hoynacki@wilsonelser.com](mailto:david.hoynacki@wilsonelser.com)

# C VID-19

## WHAT CALIFORNIA EMPLOYERS OUGHT TO KNOW

By Kyle Maland

The federal government just passed the Families First Coronavirus Response Act (the “Act”) to help employees and businesses facing challenges related to the coronavirus. The law becomes effective 15 days after President Trump signs the bill, which will make the bill effective no later than April 2, 2020. In sum, the Act guarantees free coronavirus testing, secures paid emergency leave, expands FMLA leave, and enhances Unemployment Insurance.

The following are some of the key provisions affecting employers across jurisdictions that all should be aware of.

### **Prohibition Against Discrimination and Retaliation:**

As an important initial point, the FFCRA makes it unlawful to discharge, discipline, or in any manner discriminate (including retaliation) against any employee who takes leave under the act. This very likely also includes employees who request leave under the act, who filed a complaint or initiated any proceeding under this act (including a proceeding to enforce this act) or has or is about to testify in any such proceeding.

Given the tumultuous times and lack of current and updated information provided to qualified businesses and employers, we anticipate due to the uncertainty, claims of discrimination and retaliation will arise in response to required actions and inactions based on the new leave requirements and



layoffs happening across many sectors of our society.

### **Emergency Paid Sick Leave:**

The emergency paid sick leave provision of the act would be the first federal law requiring private employers to provide paid sick leave if the parameters

for qualification are met.

Of importance, the bill appears to allow employers who already provide their employees sick leave covering the types of COVID-19 absences described below to apply their existing voluntary sick leave policies to fulfill the mandated emergency leave requirements. For employers who proactively implemented COVID-19 sick leave policies that are equal to, or more generous than, FFCRA, this new bill will serve as the foundation for applying sick leave.

**As an important initial point, the FFCRA makes it unlawful to discharge, discipline, or in any manner discriminate (including retaliation) against any employee who takes leave under the act.**

The Act hold employers with fewer than 500 employees and government employers (with at least one (1) employee

are required to provide two weeks (80 hours for full time employees and a typical number of hours for a typical two week period for part-time employees) of paid sick leave to any employee who is unable to work, or telework, because of any of the following:

- a) The employee is subject to a Federal, State, or local quarantine or isolation order related to coronavirus;
- b) The employee has been advised by a health care provider to self-quarantine due to concerns related to coronavirus;
- c) The employee is experiencing coronavirus symptoms and seeking a medical diagnosis;
- d) The employee is caring for an individual who is subject to an order as described in reason (a) or has been advised as described in reason (b).
- e) The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to the coronavirus.
- f) The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Employees who go on paid sick leave for reasons outlined in subsection (a), (b), or (c) will be paid at their regular rate of pay. Employees who use their leave for reasons outlined in subsections (d), (e), or (f) will be paid at two-thirds the employee’s regular rate of pay. In no event, however, shall the paid sick leave exceed \$511.00

per day and \$5,110.00 in the aggregate for reasons outlined in subsection (a), (b), or (c), or \$200.00 per day and \$2,000.00 in the aggregate for subsections (d), (e), or (f).

Of importance, employers cannot require employees to use other forms of paid leave provided by the employer before using Paid Sick Leave under the Families First Coronavirus Response Act. Employers with existing sick leave policies must provide paid sick leave under the Families First Coronavirus Response Act in addition to the existing leave available. Employers may receive a payroll tax credit for the qualified sick leave wages paid out by the employer, subject to limitations.

The Act also authorizes the Secretary of Labor to exclude certain health care providers and emergency responders from providing the paid sick leave. Businesses employing less than 50 employees may also be excluded if the leave “would jeopardize the viability of the business.” It remains unclear what businesses must do to receive an exemption under this section, however. We expect clarification as to this in the coming days/weeks.

### **Expanded Family and Medical Leave (FMLA)**

The FFCRA also expands certain FMLA leave through the end of the year, December 31, 2020, for employers with fewer than 500 employees, subject to certain requirements. Employees who have been on the job for at least 30 days are eligible for *12 weeks* of paid family and medical leave if the employees are unable to work due to a need for leave to care for a child if the child’s school or place of care has been closed or if the child care provider is unavailable, due to the coronavirus.

The first 10 days of the leave may be unpaid. However, employees may choose to use any accrued paid time off, including vacation and/or sick leave, to cover this initial 10-day period. If an employee needs leave beyond the initial 10-day period and continues to meet the requirements for paid leave as previously described, then the employee will be paid no less than two-thirds of the employee’s regular rate of pay for the regular hours worked. In

no event, however, shall the paid leave exceed \$200.00 per day and \$10,000.00 in the aggregate. If an employee’s scheduled hours are uncertain due to variance in weekly hours, the employer should use the average number of hours scheduled over the prior six (6) month period, or the reasonable number of expected hours at the time of hiring, if the employee did not work the prior six months.

Employers will also receive a payroll tax credit for the qualified sick leave wages paid out by the employer, subject to caps based on the reason for the leave and daily maximums.

Employers are required to restore employees to their same or similar position *unless*:

- (1) The employer has fewer than 25 employees;
- (2) The position held by the employee no longer exists due to economic or other operating conditions that affect employment and are caused by the public health condition;
- (3) The employer attempts to restore the employee to a similar position; or
- (4) The attempts to restore to a similar position fail, and the employer contacts the employee if such a position becomes available.

The Act also authorizes the Secretary of Labor to exclude certain health care providers and emergency responders from providing the paid sick leave. Businesses employing less than 50 employees may also be excluded if the leave “would jeopardize the viability of the business.” It remains unclear what businesses must do to receive an exemption under this section. WE will update this section as new information to this end becomes available.

### **COVID-19 Testing**

The FFCRA requires all private health plans to provide coverage for COVID-19 diagnostic testing, including the cost of a provider, urgent care, and emergency room visits in order to receive testing. Coverage for testing must be provided at no cost to the consumer.

### **Next Steps**

The FFCRA’s expansion of the existing FMLA requirements by guaranteeing the above referenced leave benefits create a number of unanswered questions as to important issues related to required medical certification for school closures and/or quarantining, notice requirements to qualified employees regarding these new/temporary benefits, how other eligible state leave programs are affected by the Act, whether backpay is necessary to employees already on leave, and whether eligible employees who are laid off prior to the effective date of the Act are entitled to leave and/or restoration rights under the Act.

We recommend employers begin implementing protocols for notice to employees as to the above program changes/additions and immediate compliance with these provisions to mitigate against potential abuses as well as lawsuits for discrimination and retaliation down the road. Employers should also closely monitor new developments as this is a rapidly changing area of the law. We will provide updated information and recommendations as the situation as to the above develops.

If you have any questions related to the provisions of the Families First Coronavirus Response Act and/or other State and Federal Leave laws, or questions regarding compliance procedures for layoffs, please contact our Tyson & Mendes’ Labor and Employment attorneys whose information is listed below.

*Regina Silva, Director of Employment Practices*  
[rsilva@tysonmendes.com](mailto:rsilva@tysonmendes.com)

*Kyle R. Maland*  
*Labor & Employment Attorney*  
[kmaland@tysonmendes.com](mailto:kmaland@tysonmendes.com)

*Kathryn Lee-Colgan, Senior Counsel*  
[klee@tysonmendes.com](mailto:klee@tysonmendes.com)

*Andrew L. Smith*  
*LA Branch Managing Attorney*  
[asmith@tysonmendes.com](mailto:asmith@tysonmendes.com)

*Emily C. Meeson*  
*Labor & Employment Attorney*  
[emeeson@tysonmendes.com](mailto:emeeson@tysonmendes.com)

# Spread of Novel Coronavirus Risks Potential Future Claims for Negligent Exposure

By Ian R. Friedman, Esq.

Although the health and economic effects of the Coronavirus (COVID-19) are still not fully understood, one certainty is that once Court's re-open and life gets back to normal, a barrage of legal claims will follow. One subset of claims will likely seek to impose liability on individuals and businesses for exposing others to the harmful effects of this deadly disease.

As businesses and individuals seek to mitigate future exposure it is important to know there is legal authority potentially supporting these types of claims in California. (See e.g., *John B. v. Superior Court* (2006) 38 Cal.4th 1177.) Much of the authority governing liability flowing from the transmission of infectious diseases arises in the context of the sexually transmitted diseases.

In *John B*, the California Supreme Court analyzed the issue of whether an ex-wife could sue her ex-husband for bringing HIV into the marriage. The ex-husband argued he should only be liable for disease transmission if his ex-wife could prove he actual knew he was infected contending this had to be "established only by a positive HIV test from an accredited laboratory or a medical diagnosis of HIV or AIDS." (*Id.* at p. 1188.) The Supreme Court disregarded this argument and held *actual knowledge of infection is not required.*

The Court reasoned "limiting tort defendants to those who have actual knowledge they are infected with HIV would have perverse effects on the spread of the virus. If only those who have been tested are subject to suit, there may be 'an incentive for some persons to avoid



diagnosis and treatment in order to avoid knowledge of their own infection.' (Gostin & Hodge, *Piercing the Veil of Secrecy in HIV/AIDS and Other Sexually Transmitted Diseases: Theories of Privacy and Disclosure in Partner Notification* (1998) Duke J. Gender L. & Poly. 9, 40.) Extending liability to those

with constructive knowledge of the disease, on the other hand, 'will provide at least a small incentive to others to use proper diagnostic techniques and to alter behavior and procedures so as to limit the likelihood of HIV transmission.' (Hermann, Torts: *Private Lawsuits about AIDS in AIDS and the Law: A Guide for the Public* (Dalton & Yale AIDS Law Project edits., 1987) p. 172 (Hermann).)" (*Id.* at p. 1190.)

Accordingly, the Supreme Court in *John B* concluded "the tort of negligent transmission of HIV does not depend solely on actual knowledge of HIV infection and would extend at least to those situations where the actor, under the totality of the circumstances, has reason to know of the infection. Under the reason-to-know standard, 'the actor has information from which a person of reasonable intelligence or of the superior intelligence of the actor would infer that the fact in question exists, or that such person would govern his conduct upon the assumption that such fact exists.' (Rest.2d Torts, § 12, subd. (1).) In other words, 'the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist.' (*Id.*, § 12, com. a. p. 20)."

*John B* makes clear the “constructive knowledge” standard adopted “means knowledge ‘that one using reasonable care or diligence should have, and therefore is attributed by law to a given person’ (Black’s Law Dict. (7th ed.1999) p. 876), encompasses a variety of mental states, ranging from one who is deliberately indifferent in the face of an unjustifiably high risk of harm (see *Farmer v. Brennan* (1994) 511 U.S. 825, 836–840) to one who merely should know of a dangerous condition (see [*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1208–1209]).” (*Id.* at pp. 1190-1191.)

While the Court in *John B* somewhat attempted to limit its analysis to the facts of that case, its holding should cause real caution during the current global pandemic as there is arguably no requirement that someone be diagnosed with COVID-19 in order for liability to flow from its transmission.

The CDC says the disease spreads through close contact with persons or surfaces and that it first manifests

itself as fever, cough and shortness of breath appearing within 2-14 days of exposure (See <https://www.cdc.gov/coronavirus/2019-ncov/symptoms-testing/symptoms.html>). Plaintiff lawyers will argue persons and businesses were on constructive notice of potential infection once the first symptoms appear in an

procedures so as to limit the likelihood of [] transmission.” To the extent businesses or individuals do not take immediate action to limit spread upon constructive notice of contact with or contraction of this disease, there is real danger of future claims for negligently exposing others to this deadly disease.

**Like the virus itself, we are just learning about the worldwide economic damages that will follow this outbreak. Do what you can now to protect yourself and your business in the future.**

employee or even once the employee learns they encountered someone exposed to the disease. Likewise, businesses could be on constructive notice once they knew or should have known someone exposed to the disease visited their establishment.

There is no question the clear current public policy supporting potential liability mirrors the policy relating to the spread of HIV such that it is designed to “incentive to others to use proper diagnostic techniques and to alter behavior and

Like the virus itself, we are just learning about the worldwide economic damages that will follow this outbreak. Do what you can now to protect yourself and your business in the future.

*Wingert Grebing Brubaker & Juskie, LLP wants to be your partner in understanding and defending these challenges together. Learn more about our firm at [www.WingertLaw.com](http://www.WingertLaw.com). Contact Ian Friedman at [ifriedman@wingertlaw.com](mailto:ifriedman@wingertlaw.com).* 



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**MEDIATION**

With years of experience representing employees and companies in a wide range of employment law matters, Kristin’s unique background informs a deep understanding of both parties’ perspectives. Kristin is available to mediate all employment matters.

**To schedule a mediation, please contact Kathy Purcell at 619.238.7282, or [KPurcell@westcoastresolution.com](mailto:KPurcell@westcoastresolution.com)**



**WORKPLACE INVESTIGATION**

As a neutral with a background in employment litigation and advisory work, Kristin brings demonstrated commitment, detail, and sensitivity to every workplace investigation. Kristin is available to conduct prompt, thorough, and impartial investigations.

**To schedule a workplace investigation, please contact Kristin Rizzo at 619.333.0949, or [Rizzo@RizzoResolution.com](mailto:Rizzo@RizzoResolution.com)**

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# Plaintiff Dies After Accepting Defendant's Settlement Offer: A Synopsis of California's Survival Statutes

By Jeremy Freedman

As with any lawsuit, it all begins with a plaintiff filing a lawsuit. After extensive litigation, and on the heels of a case altering event - whether it be a dispositive motion, discovery motion or expert designation, plaintiff's deposition, or immediately before trial call - defendant makes an offer to settle. After several back and forth negotiations over the phone the parties reach a verbal settlement. Hurrah says all parties! That same evening, after accepting defendant's offer, plaintiff passes away due to unrelated medical issues leaving behind two heirs. What now? What of the lawsuit, settlement and valuation of plaintiff's case?

## I. California's Survival Statute

In California, a survival action can only be brought if the decedent did not die from their injuries for which they seek damages in the underlying lawsuit. In the event decedent dies from his injuries, dismissal of the pending action and the filing of a wrongful death action by the decedent's heirs, representatives or successors in interest within the statute of limitations might be appropriate.

The handling of a survivor action depends on the status of the lawsuit, whether it is pre-trial litigation or after trial has commenced. If a plaintiff dies prior to or after commencing an action and before trial, the court must allow the pending action to proceed by the decedent's personal representative or successor in interest, if one exists. A survivor action must be brought before the later of: 1) two years from the date of the wrongful



conduct; or 2) six months from the date of decedent's death.

Prior to trial, if an heir, personal representative, or successor in interest for plaintiff does exist, they may file an affidavit or declaration to continue the litigation, subject to certain limitations regarding damages discussed below.

Substitution of the personal representative or successor in interest for decedent does not require amendment of the complaint. A person who seeks to commence an action or proceeding, or to continue a pending action or proceeding, as the decedent's successor in interest, must execute and file an affidavit or declaration under penalty of perjury under the laws of the State of California stating all of the following:

- (1) the decedent's name;
- (2) the date and place of the decedent's death;
- (3) that no proceeding is now pending in California for administration of the decedent's estate;
- (4) if the decedent's estate was administered, a copy of the final order showing the distribution of the decedent's cause of action to the successor in interest;
- (5) either that (a) the affiant or declarant is the decedent's successor in interest (as defined in Code Civ. Proc., § 377.11) and succeeds to the decedent's interest in the action or proceeding, or (b) the affiant or declarant is authorized to act on behalf of the decedent's successor in interest (as defined in Code Civ. Proc., § 377.11) with respect to the decedent's interest in the action or proceeding, whichever is appropriate and with facts in support of the statement;

(6) that no other person has a superior right to commence the action or proceeding or to be substituted for the decedent in the pending action or proceeding;

(7) that the affiant or declarant affirms or declares under penalty of perjury under the laws of the State of California that the foregoing is true and correct; and

(8) a certified copy of the decedent's death certificate must be attached to the affidavit or declaration pursuant to California Code Civil Procedure § 377.32(c).

If no heir, representative or successor in interest exists or comes forward, game over and the lawsuit should be dismissed. Further, where plaintiff dies before judgment is entered but after the jury's verdict, or after the case has been submitted for trial in a nonjury trial, the court may still render judgment subject to the limitations on damages, discussed below.

## II. Permitted Damages in Survival Actions

Damages that can be recovered by the heirs or successor in interest for decedent's pre-death injuries are limited to "the loss or damage that the decedent sustained or incurred before death, including economic damages, penalties or punitive damages that the decedent would have been entitled to recover had the decedent lived. This does not include damages for pain, suffering, or disfigurement." However, if a bench trial has commenced, the court may invoke its inherent power to enter a judgment nunc pro tunc to a date before plaintiff's death, thus preserving pain and suffering damages, as long as the death occurred after the verdict was rendered or the case was submitted to the judge for decision.

## III. Enforcing Settlement Terms Against Decedent

Under normal circumstances, a court may only enforce the terms of settlement where parties to pending litigation stipulate, in a writing signed by the parties outside the presence of the court or orally before the court, for settlement of the case. Whether an oral settlement agreement, never confirmed in writing, is enforceable may depend on the court. Some Courts

# Meet Your New Board Members



**Ian Friedman**

Q: What firm do you work with?

A: Wingert Grebing Brubaker & Juskie, LLP

Q: What area

of law do you practice?

A: Professional Liability Defense and General Civil Litigation

Q: What is your favorite thing about San Diego?

A: Padres (for better or worse)

Q: What is a secret skill that you have? It will no longer be a secret...

A: Juggling

Q: What is your favorite thing about being a lawyer?

A: Learning about other lawyer's practice areas to be able to defend them

**Nicholas Schechter**

Q: What firm do you work with?

A: Tyson & Mendes.

Q: What area of law do you practice?

A: Catastrophic personal injury defense, employment practices litigation defense, the defense of entity defendants where sexual torts are alleged, and medical malpractice defense.

Q: What is your favorite dish? And, can you cook it?

A: Homemade mac 'n cheese with slice tomatoes on top...and yes.

Q: Favorite series on Netflix?

A: Arrested Development (technically a Netflix semi-original since it started on Fox). It's a great show to watch over and over, and there's nothing like a good Tobias Funke or Gob Bluth line to brighten up the day.

Q: What is your spirit animal?

A: I went to Cal so I must say, Go Bears!



**Danielle Hicks**

Q: What firm do you work with?

A: Dummit Buchholtz & Trapp

Q: What area of law do you practice?

A: Mainly medical malpractice with some general liability

Q: Favorite series on Netflix?

A: Schitt's Creek

Q: What is your favorite thing about San Diego?

A: The abundance of dog-friendly craft breweries with beautiful outdoor patios.

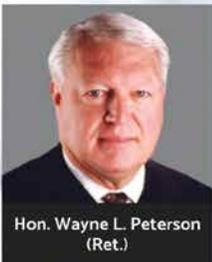
Q: What would be your Olympic sport (winter or summer)?

A: Curling



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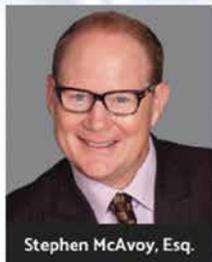
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MEDIATORS**



Hon. Wayne L. Peterson  
(Ret.)



Steven H. Kruis, Esq.



Stephen McAvoy, Esq.



Monty A. McIntyre, Esq.



James F. Pokorny, Esq.



Ana Sambold, Esq.

225 Broadway, Suite 1400, San Diego, California 92101

(619) 233-1323

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January 25th, 2020





# CALIFORNIA COURT OF APPEAL AGAIN INDICATES THAT ENTITIES MUST HAVE ACTUAL NOTICE OF THEIR EMPLOYEE'S ACTIONS BEFORE THEY CAN BE HELD LIABLE

By Raymond K. Wilson Jr.

In defending entities whose employees have been accused of sexually assaulting someone, often the strongest defense is that there was no notice that the employee was a bad actor before he or she assaulted the plaintiff. The argument then devolves into what constitutes “notice”. California law has long held that actual notice of sexual misconduct is required to hold the employer liable for its own negligence in failing to properly supervise, hire, train and/or retain its employees. The California Court of Appeal recently reviewed this issue and again held that actual notice, not a “knew or should have known” standard, should be applied.

## I. THE CASE

In *Doe v. Department of Children and Family Services* (2019) 37 Cal.App.5th 675, Jane Doe was a 17 year old girl who was assigned to foster care in the home of Stephanie Sykes from March through September of 2009. While living there, Doe entered into a relationship with her foster parent’s 27 year old son, Dwayne Winston, and became pregnant with his child. Doe kept her relationship with Dwayne a secret and told nobody that her child was Dwayne’s until after the baby was born.

At the end of May 2009, Ms. Sykes had to attend an out of town funeral and asked her younger son, Clifford Winston, then 22 years old, to look after Doe. She did not inform the social worker that she



was leaving town. Clifford took Doe to his house and raped her. Doe did not report the rape because Dwayne convinced her to keep it a secret so his mom would not lose her license and so his brother would not get into trouble. Four months later, Doe informed her social worker and was immediately removed from the Sykes home.

In April of 2011, Doe sued Sykes, Dwayne, Clifford, the County of Los Angeles Department of Child and Family Services (“DCFS”), her county social worker – Valarie Arnold, Children’s Institute, and the Director of Foster Care at Children’s Institute.<sup>1</sup> The case proceeded to trial after Doe rejected a Code of Civil Procedure § 998 offer to compromise at \$100,000. The trial ended in a mistrial and a second trial commenced in 2016. At the close of Plaintiff’s case in chief, DCFS moved for non-suit which was granted because Doe failed to show that DCFS had any actual notice of the assaultive propensities of either Dwayne or Clifford prior to the assaults happening.

## II. THE HOLDING

The Court of Appeal began its analysis by again making it clear that a defendant does not owe a legal duty to protect against third party conduct, unless there exists a special relationship between the defendant and the plaintiff. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224,

<sup>1</sup> Children’s Institute is a non-profit that screens foster parents, certifies foster homes, and monitors foster homes. Children’s Institute certified Sykes, placed Doe at her home, and assigned one of its social workers to monitor the home while Doe was there.

235.) In that circumstance, “[i]n addition to the special relationship ..., there must also be evidence showing facts from which the trier of fact could reasonably infer that the [defendant] had prior *actual knowledge*, and thus *must have known*, of the offender’s assaultive propensities.” (*Romero v. Superior Court* (2001) 89 Cal. App.4th 1068, 1084 (*Romero*)). In short, the third party’s misconduct must be foreseeable to the defendant. (*Delgado, supra*, 36 Cal.4th at p. 244; *Romero, supra*, 89 Cal.App.4th at p. 1081; *Doe v. Los Angeles County Dept. of Children & Family Services* (2019) 37 Cal.App.5th 675, 682–683.)

The Court of Appeal then went on to cite multiple other cases in which actual notice was the applicable standard:

In *J.L. v. Children’s Institute, Inc.* (2009) 177 Cal.App.4th 388, 391–393, 99 Cal.Rptr.3d 5 (*J.L.*), for example, a minor referred to a home day care by the Children’s Institute<sup>6</sup> was sexually assaulted by the grandson of the day care provider. The Court of Appeal affirmed the summary judgment granted in favor of Children’s Institute, finding there was no evidence it knew of the grandson’s assaultive tendencies. (*Id.* at pp. 395–399, 99 Cal.Rptr.3d 5; see also *Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 902, 189 Cal.Rptr.3d 570 [county had no prior knowledge of the social worker’s propensity to sexually assault children]; *Doe v. Superior Court* (2015) 237 Cal.App.4th 239, 245, 187 Cal. Rptr.3d 791 [a summer camp had a special relationship with “the foreseeable victim” of its employee]; *Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141, 156–157, 42 Cal.Rptr.3d 519 [no liability

for negligent supervision where mother who hosted sleepover of daughter's friends did not know the plaintiff left with the male assailants, knew who they were, or knew they had any propensity to commit sexual assault]; *Romero, supra*, 89 Cal. App.4th at p. 1080, 107 Cal.Rptr.2d 801 ["For reasons we shall explain, we hold that notwithstanding the special relationship between the Romeros and the teenage invitees, the Romeros did not owe a duty of care to supervise Ryan at all times during her visit, to warn her, or to protect her against Joseph's sexual assault, because there is no evidence from which the trier of fact could find that the Romeros had prior actual knowledge of Joseph's propensity to sexually assault female minors."]; *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 395, 97 Cal.Rptr.2d 12 [rejecting claim against Boy Scouts for negligent "selection, supervision and retention" of scoutmaster where there was no information accessible to the Scouts that would cause them to suspect that the scoutmaster "had a propensity to molest children"].)

(*Doe v. Los Angeles County Dept. of Children & Family Services* (2019) 37 Cal. App.5th 675, 682–683.)

The Court of Appeal then determined that because Plaintiff was unable to prove prior actual knowledge on the part of DCFS, the case was appropriately dismissed on a non-suit motion. The California Supreme Court declined to review this case.

### III. THE TAKEAWAY

Because of the influx of hundreds of sexual assault cases as a result of the passage of AB 218 last year which extended the statute of limitations for childhood sexual assault and the passage of AB 1619 the year before which extended the statute of limitations for adult sexual assault, these types of cases are becoming increasingly common.

Plaintiff's counsel have been persistent

## MCLE LUNCH-AND-LEARN RECAPS

### February MCLE Recap

On Tuesday, February 18, 2020, Clint Modesitt from Innovative Discovery Digital presented to SDDL members on "Mobile Collections and Managing Other Non-Traditional Data Types." Mr. Modesitt explained the ins and out of how to make sure lawyers identify and collect all relevant data when putting together a discovery plan.

Mr. Modesitt discussed traditional and emerging data types, the ever-changing landscape of mobile devices and social media, the spectrum of evidence collection methodology, the processes and procedures used to collect non-traditional evidence, and the benefits of being proactive versus reactive.



### March MCLE Recap

On March 10, 2020, SDDL welcomed Ian Fusselman, Esq, a mediator with ADR Services, Inc., to present on The "Other" Bar – An Analysis of Alcohol and The Law." This presentation, which provided SDDL members with a rare competency credit, shared the unfortunate statistics of alcoholism amongst members of the legal profession. In fact, the California State Bar's definition of a functional alcoholic is not far off from someone who enjoys a nightly glass or two of wine, every night. However, Mr. Fusselman took SDDL members step by step through the questions asked by the California State Bar to come to that determination, and it turns out, the applicable definitions are subject to several different interpretations. Nonetheless, Mr. Fusselman presented members with the information they need to be sure they are able to manage the stressors of our profession while still drinking responsibly. If you or another lawyer you know suffer from stress, burnout, depression or chemical dependency, call 877- LAP 4 HELP (877-527-4435). 

in attempting to convince trial courts that constructive notice (knew or should have known) is the standard for holding entity defendants liable. Beyond citing to the appropriate law, any insurer and all defense attorneys need to be particularly aggressive in exploring notice issues for allegations of negligence against entity employers for the sexual torts of their employees. It is critical to show a complete lack of knowledge that the employee was a danger to people like the individual plaintiff (background checks, interviews, references, no records reflecting prior

sexually assaultive tendencies), and that there was no indication that the abuse of plaintiff was happening. (i.e.: Plaintiff kept it a secret; happened offsite; plaintiff did not tell anyone prior to a specific event.)

In this era of expanding rights for the victims of sexual assault, California Courts have reiterated that entity employers can only be held liable for things they actually knew about. Do not relinquish that defense if at all possible. 

# HOW TO AVOID PLAINTIFF'S ATTEMPT OF A SECOND BITE AT THE APPLE

## Proactively Addressing *Amos v. Comm'r* in Settlement Agreements

By *Vanessa Whirl*

Although decided in 2003, *Amos v. Comm'r*, (2003) Tax Ct. Memo LEXIS 330, is not a common discussion once parties have reached a settlement agreement.

If fact, it's not a common discussion at all. However, more recently – whether based on a recent Plaintiff CLE or otherwise – Plaintiff attorneys are starting to address *Amos* after a settlement value has already been reached, while the parties negotiate the formal settlement agreement.

The *Amos* decision as we know it, is based on a personal injury sustained by a cameraman at a basketball game after Dennis Rodman ran into him on the sidelines. The cameraman retained counsel and eventually ended up in a settlement agreement with Rodman for \$200,000. Among the routine language we all see in settlement agreements, the agreement between Rodman and the cameraman addressed confidentiality as follows:

*"It is further understood and agreed that, as part of the consideration for this Agreement and Release, the terms of this Agreement and Release shall forever be kept confidential and not released to any news media personnel or representatives thereof or to any other person, entity, company, government agency, publication or judicial authority for any reason whatsoever except to the extent necessary to report the sum paid to*



*appropriate taxing authorities or in response to any subpoena issued by a state or federal governmental agency or court of competent jurisdiction..."* [a lot of good this provision did keeping the settlement confidential, right?!?]

Because of the *Amos* decision, some Plaintiff

attorneys are seeking separate consideration for confidentiality and/or non-disparagement clauses, after the parties have already reached a settlement value. There is nothing worse than having to go to a client after he's already reluctantly agreed to pay Plaintiff for a claim the client does not think is valid, and ask for more money if the client wants the settlement to be kept confidential. This article is intended to provide some pointers or options on how to avoid this uncomfortable position. Since this is not something we see often, many of you many not have even thought about this until now.

First, the clear and obvious argument is the language from the settlement agreement in *Amos* said "as part of the consideration for this Agreement and Release, the terms of this Agreement and Release shall forever be kept confidential..." A strict reading of this language tells the IRS: "part of the \$200,000 paid in settlement is to secure this agreement." Of course the IRS is going to determine that to mean some portion of the \$200,000 is



not compensation for personal injuries and thus taxable income! What does this tell us? Make it clear that confidentiality is secured by consideration separate from the settlement monies paid. Most attorneys (myself included) rely on a mutual agreement between the parties of confidentiality as consideration. That's what I've been doing for years.

Now, if Plaintiff's counsel sees the mutual agreement term as consideration and scoffs that it still won't do – based on some speculative statement that the IRS isn't bound by that or can reallocate the settlement funds if it sees fit – counsel may suggest you execute a separate agreement for confidentiality and/or non-disparagement. I personally don't like the option for several reasons. 1) you could be creating a Parole Evidence Rule violation down the road since it would be a contemporaneous agreement; 2) it could be argued that you are taking part in helping Plaintiff dodge paying taxes... not something I want to get myself or my client involved in; and 3) what would

the consideration be for the separate agreement? If the mutual agreement of confidentiality was not enough for counsel to include it in the settlement agreement in the first place, it won't suffice in a separate agreement. Then you're back where you started with having to pay more money to secure the separate agreement of confidentiality and non-disparagement.

What then, you ask, is the solution? There are a few options. First, evaluate whether confidentiality and/non-disparagement are even a concern for your client. If not, kick it and move on with your life. Second, if it really is that important and you absolutely cannot get Plaintiff's counsel to cave, you are going to be stuck having that conversation with the client to secure more money as consideration for the provision. However, if you really want to avoid both of these options, the key is to be proactive on the front end. Whether in mediation, an MSC, email exchanges, a phone call, or otherwise, when you prepare to say/write that sentence, "this will confirm we have reached a settlement agreement in the amount of..." make sure that sentence includes the word "confidential." If you start your negotiations with the caveat that any offer is to secure a confidential settlement agreement, then Plaintiff's counsel cannot come back to you during the drafting phase of the formal settlement agreement and ask for more money to secure confidentiality. So, lock them in early including confidentiality as a term. That way, before you have a formal settlement agreement, you've got something in writing confirming the money you've already talked about took confidentiality into consideration. If it all falls apart down the line over the confidentiality, you've got something to sink your teeth into. (That is, of course, assuming the writing is signed by all parties to be bound so it can be enforced under C.C.P. § 664.6, but that's for another article.)



## CALIFORNIA SUPREME COURT

### Civil Code

*Scholes v. Lambirth Trucking Co.* (2020) \_ Cal.5th \_, 2020 WL 827863 : The California Supreme Court affirmed the Court of Appeal decision finding plaintiff's action for damage to his trees from a fire that started on defendant's property was untimely filed under the applicable three-year statute of limitations for trespass. The five-year statute of limitations and heightened damages provisions of section Civil Code 3346 are inapplicable to damages to timber, trees, or underwood from negligently escaping fires. (February 20, 2020.)

### Civil Procedure

*Rockefeller Technology etc. v. Changzhou SinoType Technology etc.* (2020) \_ Cal.5th \_, 2020 WL 1608906: The California Supreme Court reversed the decision of the Court of Appeal. The California Supreme Court held, consistent with United States Supreme Court authority, that the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters, November 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 (Hague Service Convention or "the Convention") applies only when the law of the forum state requires formal service of process to be sent abroad. Because the parties' agreement provided for notice and "service of process" to each other through Federal Express or similar courier, it constituted a waiver of formal service of process under

California law, and the Convention therefore did not apply. (April 2, 2020.)

### Employment

*Frlekin v. Apple Inc.* (2020) \_ Cal.5th \_, 2020 WL 727813: Responding to a request of the United States Court of Appeals for the Ninth Circuit to decide a question of California law, the California Supreme Court ruled that time spent on the employer's premises waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience by employees is compensable as "hours worked" within the meaning of Industrial Welfare Commission wage order No. 7-2001. (February 13, 2020.)

### Evidence

*Mathews v. Becerra* (2019) \_ Cal.5th \_, 2019 WL 7176898: The California Supreme Court reversed the trial court's order sustaining a demurrer, without leave to amend, to plaintiffs' complaint alleging that the amended and expanded definition of the Child Abuse and Neglect Reporting Act's (CANRA; Stats. 1987, ch. 1459.) term "sexual exploitation", approved in Assembly Bill 1775, violated the plaintiffs' patients right to privacy under the state and federal Constitutions. The California Supreme Court held that plaintiffs had asserted a cognizable privacy interest under the California Constitution and their complaint survives demurrer. This

*continued...*

holding does not mean the reporting requirement is unconstitutional. It means only that the burden shifts to the state to demonstrate a sufficient justification for the incursion on privacy as this case moves forward. The case was remanded for further proceedings to determine whether the statute's purpose of protecting children is actually advanced by mandatory reporting of psychotherapy patients who admit to possessing or viewing child pornography. (December 26, 2019.)

## Insurance

*Montrose Chemical Corp. of Cal. v. Superior Court* (2020) \_ Cal.5th \_, 2020 WL 1671560: The California Supreme Court reversed the Court of Appeal's decision affirming the trial court's denial of plaintiff's motion for summary adjudication and affirming in part the trial court's grant of defendant insurers' parallel motion in a coverage action regarding excess policy coverage for policy periods from 1961 to 1985. Plaintiff claimed it was entitled to coverage under any relevant policy once it had exhausted directly underlying excess policies for the same policy period (vertical exhaustion). Defendants claimed plaintiff could only seek excess policy coverage after it had exhausted every lower level excess policy covering the relevant years (horizontal exhaustion). The California Supreme Court agreed with plaintiff, ruling that plaintiff was entitled to access otherwise available coverage under any excess policy once it had exhausted directly underlying excess policies for the same policy period. However, it also ruled that an insurer who provided indemnification was entitled to seek reimbursement from other insurers that would have been liable to provide coverage under excess policies issued for any period in which the injury occurred. (April 6, 2020.)

## Probate

*Barefoot v. Jennings* (2020) \_ Cal.5th \_, 2020 WL 372523: The California Supreme Court reversed the Court of Appeal decision that had interpreted Probate Code section 17200(a) to only allow a currently named beneficiary to file a petition challenging the validity

of disinheriting amendments in probate court on grounds such as incompetence, undue influence, or fraud. The California Supreme Court ruled that the Probate Code grants standing in probate court to individuals who claim that trust amendments eliminating their beneficiary status arose from incompetence, undue influence, or fraud. The Supreme Court did not decide whether an heir who was never a trust beneficiary has standing under the Probate Code to challenge the trust. (January 23, 2020.)

## CALIFORNIA COURTS OF APPEAL

### Appeals

*PG&E "San Bruno Fire" Cases* (2019) \_ Cal.App.5th \_, 2019 WL 6888248: The Court of Appeal dismissed an appeal challenging the trial court's allocation of attorney fees and costs after the settlement of consolidated San Bruno Fire Derivative Cases against PG&E. The settlement agreement provided that settling plaintiffs' counsel would be paid in the aggregate \$25 million in attorney fees and \$500,000 in costs. The Court of Appeal dismissed the appeal because the operative settlement agreement unequivocally deemed the trial court's allocation determination to be final and not subject to appellate review. (C.A. 1st, December 18, 2019.)

### Arbitration

*Fabian v. Renovate America, Inc.* (2019) \_ Cal.App.5th \_, 2019 WL 6522978: The Court of Appeal affirmed the trial court's order denying defendant's petition to compel arbitration. The trial court properly denied the petition. Defendant offered no evidence about the process used to verify plaintiff's electronic signature via DocuSign, including who sent plaintiff the contract, how the contract was sent to her, how plaintiff's electronic signature was placed on the contract, who received the signed contract, how the signed contract was returned to defendant, and how plaintiff's identification was verified as the person who actually signed the contract. Defendant's DocuSign authentication argument was therefore unsupported and unpersuasive. Moreover,

by not providing any specific details about the circumstances surrounding the contract's execution, defendant's declaration offered little more than a bare statement that plaintiff "entered into" the contract without offering any facts to support that assertion. (C.A. 4th, filed November 19, 2019, published December 4, 2019.)

*Philadelphia Indemnity Ins. Co. v. SMG Holdings, Inc.* (2020) \_ Cal.App.5th \_, 2019 WL 7790891: The Court of Appeal reversed the trial court's order denying a petition to compel arbitration. Plaintiff's insurance policy was issued to Future Farmers of America for an event it was holding inside the Fresno Convention Center. Future Farmers licensed the use of the convention center from defendant, its property manager. As part of the license, Future Farmers agreed to obtain coverage for itself and to name defendant as an additional insured. The policy provided coverage for "managers, landlords, or lessors of premises" as well as for any organization "as required by contract" and also contained an arbitration clause for coverage disputes. The Court of Appeal reversed the trial court and held defendant could be compelled to arbitrate. Defendant was an intended third party beneficiary to the contract. Defendant was estopped from claiming it was not subject to arbitration because it had previously tendered a request for defense and indemnity to plaintiff. Finally, the arbitration agreement encompassed the dispute at issue. (C.A. 3rd, filed December 31, 2019, published January 28, 2020.)

*Aldea Dos Vientos v. CalAtlantic Group, Inc.* (2020) \_ Cal.App.5th \_, 2020 WL 581464: The Court of Appeal overruled the trial court's order confirming the arbitrator's dismissal of an arbitration due to the homeowner association's failure to vote in favor of pursuing arbitration before the arbitration was commenced as required by section 7.01B of the covenants, conditions, and restrictions. The Court of Appeal found the arbitrator exceeded his power because section 7.01B contravened state statutory housing policy by giving the developer the unilateral power to bar actions for construction

defects. The Court of Appeal declined to follow *Branches Neighborhood Corp. v. CalAtlantic Group, Inc.* (2018) 26 Cal. App.5th 743 and ruled that section 7.01B violated the state policy against unreasonable servitudes set forth in the Davis-Stirling Act, which prohibits the enforcement of unreasonable provisions in the CC&R's (Civil Code, section 5975(a)). (C.A. 2nd., February 6, 2020.)

*Brooks v. AmeriHome Mortgage Company, LLC* (2020) \_ Cal.App.5th \_ , 2020 WL 1241251: The Court of Appeal affirmed the trial court's order granting plaintiff's motion for preliminary injunction and denying defendant's motion to stay proceedings pending arbitration. Plaintiff filed a written notice of wage violation claims with the Labor and Workforce Development Agency (LWDA) pursuant to the Private Attorneys General Act of 2004 (PAGA; Labor Code, section 2698 et seq.). In response defendant filed a demand for arbitration with the American Arbitration Association. Plaintiff then filed a first amended complaint alleging a single cause of action under PAGA. It did not seek individual recovery for unpaid wages, but sought only civil penalties, costs and attorney fees. The trial court properly granted the preliminary injunction. Plaintiff would likely prevail on the merits because he could not be compelled to submit any portion of his representative PAGA claim to arbitration. The trial court also properly found that plaintiff had demonstrated that the interim harm he would suffer if the injunction was denied outweighed the harm defendant would suffer if the injunction was granted. (C.A. 2nd, filed March 16, 2020, published April 8, 2020.)

### Attorney Fees

*George v. Shams-Shirazi* (2020) \_ Cal. App.5th \_ , 2020 WL 632431: The Court of Appeal affirmed the trial court's order awarding wife attorney fees of \$13,000 under Family Code section 271 for having to defend husband's repeated attempts to modify a custody order. Husband's sole argument on appeal was that wife's request was untimely because it was filed later than 60 days after the final judgment as required by Rules of Court,

Rule 3.1702(b). The Court of Appeal held that Rule 3.1702(b) does not apply to postjudgment.

*Hance v. Super Store Industries* (2020) \_ Cal.App.5th \_ , 2020 WL 373070: The Court of Appeal reversed the trial court's order awarding class action attorney fees and dividing them in accordance with an alleged fee division agreement between the attorneys. The trial court abused its discretion by enforcing the fee division agreement because the undisputed facts showed a clear violation of former rule 3-410, requiring disclosure to potential clients that one of the attorneys had no malpractice insurance, and this rendered the fee agreement unenforceable. The matter was remanded for the trial court to determine whether the uninsured lawyer should recover compensation for his attorney services on a quantum meruit basis, and, if so, how much he should recover. (C.A. 5th, January 23, 2020.)

*Caldera v. Dept. of Corrections & Rehabilitation* (2020) \_ Cal.App.5th \_ , 2020 WL \*\*\*\*\*: The Court of Appeal reversed the trial court's award of \$800,000 in attorney fees in a vigorously contested action lasting almost a decade for disability discrimination in violation of the Fair Employment and Housing Act (FEHA) that ultimately resulted in a jury award of \$500,000 in damages. Plaintiff appealed the attorney fee award. After prevailing at the jury trial and a second successful appeal, plaintiff filed a motion for \$2,468,365.00 in statutory attorney fees under the FEHA, which represented a lodestar amount of \$1,234,182.50, and a 2.0 multiplier. Plaintiff could not find a local attorney to take his discrimination lawsuit, so he hired an out-of-town firm. The trial court erred when calculating attorney fees by setting the attorney hourly rate based on a lower local rate, rather than a higher out-of-town rate. It also erred by not applying the lodestar even though it found many of the extrinsic *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1135 factors to be applicable. As a result, plaintiff's attorneys were not adequately compensated consistent with the purpose of the FEHA, the case was remanded, and the trial court

was ordered to enter a new attorney fee award consistent with this decision. (C.A. 4th, April 30, 2020.)

### Civil Code

*Hensel Phelps Construction Co. v. Super. Ct.* (2020) \_ Cal.App.5th \_ , 2020 WL 370445: The Court of Appeal denied a writ of mandate seeking an order directing the trial court to vacate its order denying petitioner's motion for summary judgment in an underlying construction defect lawsuit. Petitioner argued that the plaintiff's construction defect claim was barred by the 10-year statute of limitations in Civil Code section 941. Petitioner was the general contractor on a project. Petitioner argued that substantial completion under the statute had the same meaning as substantial completion in its construction contract with the developer. The construction defect plaintiff, however, was not a party to that contract. The Court of Appeal ruled that petitioner offered no authority for its novel proposition that certain parties may, by contract, conclusively establish the date when a limitations period begins to run on another party's cause of action. Moreover, petitioner did not show that the statute should be interpreted to adopt the provisions of the construction contract. (C.A. 4th, January 22, 2020.)

### Civil Procedure

*Dalessandro v. Mitchell* (2020) \_ Cal. App.5th \_ , 2019 WL 6872301: The Court of Appeal affirmed the trial court's order denying judgment creditor's motion to compel production of documents and imposing \$3,456.70 in sanctions against judgment creditor's attorney for discovery abuses. The Court of Appeal ruled the post-judgment order was not an appealable order but treated the appeal as a writ petition. The trial court properly denied the motion to compel, finding service of the demand to be ineffective because there was no postage affixed to the envelope. The trial court properly issued sanctions for abuse of the Discovery Act (Code of Civil Procedure, section 2023.010 et seq.). For such sanctions, there was no requirement

*continued...*

for a party to meet and confer with the opposing party to alert him to defects in his discovery requests, particularly when they were not validly served. Nor was the trial court required to make a finding of a lack of substantial justification. Finally, a separate motion was not required, nor was a separate hearing on discovery sanctions. (C.A. 2nd, filed December 17, 2019, published January 3, 2020).

## Employment

*Mathews v. Happy Valley Conference Center, Inc.* (2019) \_ Cal.App.5th \_, 2019 WL 6769659: The Court of Appeal affirmed but modified a judgment following jury and judge trials, awarding plaintiff \$900,000 in damages (including punitive damages) and almost \$1 million in attorney fees, in an action for retaliatory wrongful termination. The action alleged several theories including liability under title VII of the Civil Rights Act of 1964 (42 U.S.C. section 2000 et seq.) and the California Fair Employment and Housing Act (FEHA; Government Code, section 12900 et seq.). Plaintiff sued defendant Happy Valley Conference Center, Inc. (Happy Valley), a subordinate affiliate of defendant Community of Christ (the Church). Happy Valley hosts seminars, retreats, and camps on a 30-acre property in the Santa Cruz Mountains. Plaintiff was terminated about one month after he reported that Happy Valley's female executive director had been sending a young male employee (not plaintiff) sexually inappropriate text messages. The Court of Appeal rejected most of defendants' arguments on appeal. However, it ruled that defendants had not waived the religious entity exemption under FEHA and were not estopped from asserting the exemption, and the judgment should be modified to reflect that defendants were exempt from FEHA liability. (C.A. 6th, December 12, 2019.)

## Punitive Damages

*Colucci v. T-Mobile USA, Inc.* (2020) \_ Cal.App.5th \_, 2020 WL 2059849: The Court of Appeal modified a \$4 million punitive damages awarded by the jury to the plaintiff in an action for retaliation

in violation of the Fair Employment and Housing Act (FEHA; Government Code, section 12940(h)). The jury returned a unanimous verdict in plaintiff's favor on his retaliation claim. It awarded \$1,020,042 in total compensatory damages as follows: \$130,272 for past economic losses; \$189,770 for future economic losses; \$500,000 for past noneconomic damages and/or emotional distress; and \$200,000 for future noneconomic damages and/or emotional distress. The Court of Appeal held that substantial evidence supported the jury's finding that plaintiff's district manager Brian Robson was a managing agent whose conduct could justify an award of punitive damages against defendant. It also found that substantial evidence supported the jury's finding that Robson acted with malice or oppression. However, the Court of Appeal ruled that the amount of punitive damages was excessive and had to be reduced. The Court of Appeal concluded that a 1.5-to-1 ratio between punitive and compensatory damages was the federal constitutional maximum in this case, and it reduced the punitive damages award to \$1,530,063. In all other respects, the judgment was affirmed. (C.A. 4th, April 29, 2020.)

## Torts

*Loeb v. County of San Diego* (2019) \_ Cal.App.5th \_, 2019 WL 6838736: The Court of Appeal affirmed the trial court's order granting a nonsuit in defendant's favor on the issue of trail immunity (Government Code, section 831.4.). Plaintiff sued for personal injuries she allegedly sustained when she tripped on an uneven concrete pathway in a park. The trial court had previously denied motions for summary judgment on the basis that disputed facts existed regarding whether the pathway was used for recreational purposes. However, when plaintiff conceded during argument over the proposed special verdict forms that the pathway was used, at least in part, for recreational purposes, the trial court properly granted the nonsuit. (C.A. 4th, filed November 19, 2019, published December 16, 2019.)

*Continued from page 8*

have taken the position that once a settlement agreement has been reached, even orally, the parties may not escape their obligations by refusing to sign the settlement agreement. Other courts strictly enforce section 664.6, and thus refuse to enforce oral settlement agreements absent a writing or a stipulation in the presence of the Judge even where the parties had orally agreed to the terms of settlement.

## IV. Take Away

Despite the ease with which a survivor action may be maintained, this issue does require careful scrutiny in order to ensure the proper parties are named in place of decedent. Imagine a case where an heir, unbeknownst to the personal representative or known successor in interest, challenges a settlement or judgment. Other scenarios to be mindful of include multiple heirs filing a declaration without indicating what percentage of interest they have in decedent's claim. In such cases, it might be prudent to require judicial determination in probate. This may delay the resolution, but provide critical protection against potential disputes between heirs over their interest and rights to any potential settlement or judgment.

Absent a probate order, any settlement agreement which purports to settle decedents' claims through a survivor action should address the potential for future disputes amongst heirs. One way to potentially protect against such exposure is to explicitly require indemnification against any potential claims by unknown heirs, representatives or successor in interest or challenges by known heirs to the percentage of interest in decedents claim.

Further, immediately confirm in writing the important terms of settlement that have been reached and request opposing counsel to acknowledge same. Doing so is critical in order to seek a court order enforcing the terms of settlement. This may be especially important where multiple heirs with differing percentages of interest in the settlement amount have different opinions as to whether the settlement figure should be greater than what decedent originally agreed to.

# SDDL Recognition of Law Firm Support

The Update traditionally included a list of current SDDL members at the end of each edition. As part of the SDDL Board's proactive efforts to protect the privacy of its members, the Update will no longer include a list of current members. We have observed over the last several years an increasing number of requests from vendors and other bar organizations to hand over the contact information of our members. In each case, we have rejected the request. The SDDL Board is concerned that third parties may use other means to identify our members to target them for the marketing purposes. Because the Update is published online and searchable through Google (and other search engines), the decision has been made to discontinue the identification of the entire membership in the Update. In place of the membership list, the SDDL Board will instead recognize the top 20 law firms in regard to SDDL membership. If there are any errors in the information provided, please email [evan.kalooky@dbtlaw.org](mailto:evan.kalooky@dbtlaw.org) so that corrections can be made for the next edition.

- #1 Tyson & Mendes - 50 members
- #2T Farmer Case & Fedor - 18 members
- #2T Neil Dymott Frank McCabe & Hudson - 18 members
- #4 Balestreri Potocki & Holmes - 17 members
- #5 Wilson Elser Moskowitz Edelman & Dicker LLP - 15 members

- #6T Grimm Vranjes & Greer LLP - 12 members
- #6T Winet Patrick Gayer Creighton & Hanes - 12 members
- #8 Horton, Oberrecht, Kirkpatrick & Martha, APC - 10 members
- #9T Lorber Greenfield & Polito, LLP - 9 members
- #9T Pettit Kohn Ingrassia Lutz & Dolin - 9 members
- #11T Lincoln, Gustafson & Cercos - 7 members
- #11T Ryan Carvalho LLP - 7 members
- #13T Dunn DeSantis Walt & Kendrick, LLP - 6 members
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- #17T Carroll Kelly Trotter & Franzen - 5 members
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*SDDL Board of Directors: (left to right) Codie Dukes, David Hoynacki, Vanessa Whirl-Grabau, N. Ben Cramer, Christine Y. Dixon, Ian Friedman, Nicole Melvani, Nicholas Schechter, and Dianna Bedri-Burke*



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