# *IMPORTANT NEW 2022 CIVIL CASE DECISIONS*


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# *CALIFORNIA SUPREME COURT*


Attorney Fees

*Pulliam v. HNL Automotive, Inc.* (2022) 60 Cal.App.5th 396: The California Supreme Court affirmed the rulings of the trial court and the Court of Appeal awarding plaintiff attorney fees of $169,602 after a jury found for plaintiff in her action for breach of the implied warranty of merchantability under the Song-Beverly Consumer Warranty Act (Civil Code, section 1790 et seq.) and awarded her $21,957.25 in damages. Resolving a dispute among the Courts of Appeal, the California Supreme Court ruled that the FTC's Holder Rule, requiring consumer credit contracts to include language permitting a consumer to assert against third party creditors all claims and defenses that could be asserted against the seller of a good or service, and stating that "recovery hereunder by the debtor shall not exceed amounts paid by the debtor hereunder" (16 C.F.R. section 433.2(a) (1975)), does not prevent a prevailing consumer from recovering attorney fees to the full extent allowed by state law. The California Supreme Court disapproved of the contrary decisions of *Lafferty v. Wells Fargo Bank, N.A.* (2018) 25 Cal.App.5th 398, 418–419, and *Spikener v. Ally Financial, Inc.* (2020) 50 Cal.App.5th 151, 159–163. (May 26, 2022.)

# *CALIFORNIA SUPREME COURT*


Civil Code

*Brennon B. v. Superior Court of Contra Costa County* (2022) 13 Cal.5th 662: The California Supreme Court affirmed the Court of Appeal's denial of a writ petition seeking to overturn the trial court's order sustaining a demurrer, without leave to amend, to plaintiff's (a special-education high school student) cause of action against defendant West Contra Costa Unified School District (the District) for violation of the Unruh Civil Rights Act (the Unruh Civil Rights Act; Civil Code, section 51), arising from plaintiff repeatedly being sexually assaulted in high school by other students and by a school-district staff member. (Plaintiff also alleged several other causes of action including negligence, negligent hiring and supervision, intentional infliction of emotional distress, and violation of the right to petition.) Despite the fact that the parties had already settled, the California Supreme Court granted review to decide two issues of continued statewide importance. It concluded that (1) the school district was not a "business establishment" for purposes of the Unruh Civil Rights Act when it provided educational services to plaintiff; and (2) a school district cannot be sued under the Unruh Civil Rights Act where the alleged discriminatory conduct is actionable under the Americans with Disabilities Act (ADA; 42 U.S.C. § 12101 et seq.). Civil Code section 51(f) means that any violation of the ADA by a business establishment is also a violation of the Unruh Civil Rights Act. (August 4, 2022.)

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# *CALIFORNIA SUPREME COURT*


Civil Code

*Hoffmann v. Young* (2022) 13 Cal.5th 1257: After the landowners' son invited plaintiff to come to the property, plaintiff was injured while riding a motorcycle on a motocross track built on the property. The California Supreme Court reversed the Court of Appeal's decision holding that an invitation by a landowner's live-at-home child operated to activate the exception, under Civil Code section 846(d)(3), to the recreational use immunity under Civil Code section 846(a), unless the child had been prohibited from making the invitation. The California Supreme Court ruled that a plaintiff may rely on the recreational use immunity exception, under section 846(d)(3), and impose liability if there is a showing that a landowner, or an agent acting on his or her behalf, extended an express invitation to come onto the property. In this case, the record did not show that the son was authorized to extend an invitation on behalf of his parents. The case was remanded for the Court of Appeal to review plaintiff's arguments that the trial court erred by denying her motion for a new trial on the negligence and premises liability claims. (August 29, 2022.)

# *CALIFORNIA SUPREME COURT*


Civil Procedure

*Geiser v. Kuhns* (2022) 15 Cal.5th 1238: The California Supreme Court reversed the Court of Appeal decision concluding that a sidewalk picket protesting a real estate company's business practices after the company evicted two long-term residents from their home was beyond the scope of anti-SLAPP protection (Code of Civil Procedure section 425.16) because it did not implicate a public issue and concerned only a private dispute between the company and the residents it had evicted. In its recent decision of *FilmOn.com Inc v. DoubleVerify Inc.* (2019) 7 Cal.5th 133, 143 (*FilmOn*), the Supreme Court articulated a two-step inquiry for deciding whether the activity from which a lawsuit arises falls within Code of Civil Procedure section 425.16(e)(4)'s protection: first, the court should ask what public issue or issues the challenged activity implicates, and second, it should ask whether the challenged activity contributes to public discussion of any such issue. (*FilmOn*, *supra*, 7 Cal.5th at pp. 149–150.) If the answer to the second question is yes, then the protections of the anti-SLAPP statute are triggered, and the plaintiff in the underlying lawsuit must establish "a probability" of prevailing before the action may proceed. (section 425.16(b).) Applying both steps of the *FilmOn* analysis, the Supreme Court held that the sidewalk protest constituted protected activity within the meaning of section 425.16(e)(4). (August 29, 2022.)

# *CALIFORNIA SUPREME COURT*


Civil Procedure

*Olson v. Doe* (2022) 12 Cal.5th 669: The California Supreme Court granted review to decide under what circumstances the litigation privilege of Civil Code section 47(b) applies to contract claims, and whether an agreement following mediation between the parties in an action for a civil harassment restraining order under Code of Civil Procedure, section 527.6, in which they agree not to disparage one another, can lead to liability for statements made in a later unlimited civil lawsuit arising from the same alleged misconduct. The California Supreme Court held that the mediation agreement as a whole and the specific context in which it was reached — a section 527.6 proceeding — precluded defendant/cross-complainant's broad reading of the nondisparagement clause. As a result, in opposing plaintiff/cross-defendant's anti-SLAPP motion to strike his cross-complaint, defendant/cross-complainant could not show the requisite "minimal merit" on a critical element of his breach of contract claim — plaintiff/cross-defendant's obligation under the agreement to refrain from making disparaging statements in litigation — and therefore he could not defeat plaintiff/cross-defendant's anti-SLAPP motion. (January 13, 2022.)

# *CALIFORNIA SUPREME COURT*


Civil Procedure

*Segal v. ASICS America Corp.* (2022) 12 Cal.5th 651: The California Supreme Court granted review to resolve a conflict among the Courts of Appeal regarding whether costs incurred in preparing photocopies of exhibits and demonstrative aids for trial are recoverable under Code of Civil Procedure section 1033.5 even if they were not ultimately used at trial. It held that costs related to unused photocopies of trial exhibits and demonstratives are not categorically recoverable under section 1033.5(a)(13), but they may still be awarded in the trial court's discretion pursuant to section 1033.5(c)(4). It affirmed the decision of the Court of Appeal, but on slightly narrower grounds. (January 13, 2022.)

# *CALIFORNIA SUPREME COURT*


Employment

*Lawson v. PPG Architectural Finishes, Inc.* (2022) 12 Cal.5th 703: The California Supreme Court, answering a question posed by the Ninth Circuit Court of Appeals, determined the proper method for presenting and evaluating a claim of whistleblower retaliation under Labor Code section 1102.5. Once an employee-whistleblower establishes by a preponderance of the evidence that retaliation was a contributing factor in the employee's termination, demotion, or other adverse action, the employer then bears the burden of demonstrating by clear and convincing evidence that it would have taken the same action "for legitimate, independent reasons." (Labor Code, section 1102.6, added by Stats. 2003, ch. 484, § 3, pp. 3518–3519.) Under Labor Code section 1102.6, employees need not satisfy the burden shifting framework borrowed from the United States Supreme Court's decision in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792 to make out a case of unlawful retaliation. (January 27, 2022.)

# *CALIFORNIA SUPREME COURT*


Employment

*Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93: The California Supreme Court reversed in part and affirmed in part the decision of the Court of Appeal in a wage and hour action. Disagreeing with the Court of Appeal, the California Supreme Court held that the extra pay for missed meal and rest breaks constitutes "wages" that must be reported on statutorily required wage statements during employment (Labor Code, section 226) and paid within statutory deadlines when an employee leaves the job (*id.*, section 203). Agreeing with the Court of Appeal, the California Supreme Court ruled the prejudgment interest rate that applies to amounts due for failure to provide meal and rest breaks is the 7 percent default rate set by the California Constitution (See California Constitution, article XV, section 1.) (May 23, 2022.)

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# *CALIFORNIA SUPREME COURT*


## Evidence

*Berroteran v. Superior Court* (2022) 12 Cal.5th 867: The California Supreme Court reversed the Court Appeal's decision concluding that discovery deposition testimony in an earlier action was admissible under the hearsay exception in Evidence Code, section 1291(a)(2). Although the parties had settled the case, the California Supreme Court exercised its discretion to proceed to decide the matter. Finding the Court of Appeal's reasoning to be unpersuasive, the California Supreme Court concluded that section 1291(a)(2) creates a general rule against admission of testimony from a prior civil discovery deposition. When ruling on the admissibility of such prior testimony, the trial court should take the following approach. It should determine whether the parties intended, at the outset, that the deposition would serve as trial testimony. It should determine whether the parties subsequently reached agreement concerning use of the deposition at trial in that case, or in other cases. Other key practical considerations are the timing of the deposition within the context of the litigation and special circumstances creating an incentive for cross-examination; the relationship of the deponent and the opposing party, the anticipated availability of the deponent at trial in the proceeding in which the deposition was taken, and the statutory context; conduct at, and surrounding, the deposition — and the degree of any examination conducted by the opposing party; the particular designated testimony; and the similarity of position. (March 7, 2022.)

# *CALIFORNIA SUPREME COURT*


Medical Malpractice

*Lopez v. Ledesma* (2022) 12 Cal.5th 848: The California Supreme Court, affirming the decisions of the Court of Appeal and the trial court, held that Code of Civil Procedure, section 3333.2, which limits non-economic damages to $250,000 in a medical malpractice case, applies to a physician assistant who has a legally enforceable agency relationship with a supervising physician and provides services within the scope of that agency relationship, even if the physician violates his or her obligation to provide adequate supervision. (February 24, 2022.)

# *CALIFORNIA SUPREME COURT*


Partnerships

*Siry Investment, L.P. v. Farkhondehpour* (2022) 13 Cal.5th 333: The California Supreme Court affirmed in part, and reversed in part, the Court of Appeal's decision in plaintiff's (plaintiff was a limited partner) action alleging fraudulent diversion of partnership profits. After a prior appeal, the case was remanded to the trial court. Defendants failed to respond to discovery responses, even after being ordered to do so. The trial court issued an order granting terminating sanctions striking defendants' answers and entering their default. The trial court later issued a default judgment against defendants in the total sum of $12,023,067.10 (compensatory damages, with interest, of $956,487; treble damages of $2,869,461 pursuant to Penal Code section 496(c); punitive damages of $4 million (plus $1 against only against defendant 416 South Wall Street); attorney fees totaling $4,010,008.97; and costs of $187,109.13). The California Supreme Court, addressing conflicts in the Courts of Appeal, ruled that (1) a party in default has standing to file a motion for a "new trial" asserting legal error relating to calculation of damages and (2) a trial court may award treble damages and attorney fees under Penal Code section 496, subdivision (c) in a case involving, not trafficking of stolen goods, but instead, fraudulent diversion of a partnership's cash distributions. Treble damages and attorney fees are available under Penal Code section 496(c) when property has been obtained in any manner constituting theft, and the Supreme Court concluded that the statute's unambiguous words apply to fraudulent diversion of partnership case distributions. (July 21, 2022.)

# *CALIFORNIA COURTS OF APPEAL*


## Arbitration

*Aronow v. Superior Court of San Francisco County* (2022) 76 Cal.App.5th 865: The Court of Appeal granted a writ of mandate directing the trial court to vacate its order denying plaintiff's motion for arbitration fees and costs waiver or alternatively to lift the court stay of trial court proceedings pending the conclusion of an arbitration hearing. The trial court had previously granted defendants' petition to compel arbitration in plaintiff's action for legal malpractice against his former law firm and attorneys. Recognizing there was a split of authority, the trial court followed the appellate opinion that held a trial court does not have jurisdiction to lift a stay despite a plaintiff's claim that he cannot afford to pay arbitration fees. (See *MKJA, Inc. v. 123 Fit Franchising, LLC* (2011) 191 Cal.App.4th 643, 658–659.) The Court of Appeal ruled that a trial court that grants a defendant's petition to compel arbitration has jurisdiction to lift the stay of trial court proceedings when a plaintiff demonstrates financial inability to pay the anticipated arbitration costs, and the trial court may then require the defendant to either pay plaintiff's share of the arbitration costs or waive the right to arbitration. (C.A. 1st, March 28, 2022.)

# *CALIFORNIA COURTS OF APPEAL*


## Arbitration

*De Leon v. Juanita's Foods* (2022) 85 Cal.App.5th 740: The Court of Appeal affirmed the trial court's order, after the commencement of arbitration proceedings between plaintiff and defendant, concluding that defendant materially breached the arbitration agreement when it failed to pay its share of the arbitration fees within 30 days after they were due, and allowing plaintiff to proceed with his claims against defendant in court. The Court of Appeal concluded that the trial court correctly ruled that defendant was in material breach of the arbitration agreement. (Code of Civil Procedure, sections 1281.97(a)(1); 1281.98(a)(1).) (C.A. 2nd, November 23, 2022.)

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# *CALIFORNIA COURTS OF APPEAL*


Attorney Fees

*Cell-Crete Corp. v. Federal Ins. Co.* (2022) 82 Cal.App.5th 1090: The Court of Appeal reversed the trial court's order denying defendant's motion for attorney fees and taxing its request for costs. Defendant carrier was the prevailing party in a lawsuit plaintiff brought seeking to recover against defendant on a payment bond. After dismissal, the trial court denied defendant's request for attorney fees and taxed its costs on the ground that defendant did not incur any fees or costs because a third party, Granite Construction Company (Granite), paid the fees and costs of defendant's defense under an indemnity agreement between defendant and Granite. The Court of Appeal disagreed, concluding that defendant, as the prevailing party, was entitled to recover their reasonable attorney fees and costs anyway. (Civil Code, section 9564(c); Code of Civil Procedure, sections 1032(b), 1033.5(c)(1).) A party represented by counsel in an attorney-client relationship is entitled to an award of fees and costs even if they have been or will be borne by a third party. (C.A. 4th, September 8, 2022.)

# *CALIFORNIA COURTS OF APPEAL*


Attorney Fees

*Melendez v. Westlake Services, Inc.* (2022) 74 Cal.App.5th 586: The Court of Appeal affirmed the trial court's order awarding plaintiff attorney fees of $115,987.50 against defendant Westlake Services, LLC, doing business as Westlake Financial Services (defendant), after plaintiff and defendant agreed to settle plaintiff's complaint alleging causes of action including violation of the Consumer Legal Remedies Act (CLRA; Civil Code, section 1750 et seq.), the Song-Beverly Consumer Warranty Act (Civil Code, section 1790 et seq.), and the unfair competition law (Business & Professions Code, section 17200 et seq.) for $6,204.68 (representing a $2,500 down payment and $3,704.68 plaintiff paid in monthly payments). The settlement provided that plaintiff could file a motion for attorney fees, costs, expenses and prejudgment interest with respect to his claims against defendant; plaintiff was the prevailing party on all claims; defendant was not precluded from disputing plaintiff's entitlement to attorney fees and the other items; and defendant was entitled to assert all available defenses to plaintiff's motion, "including the defense that no fees at all should be awarded against it as a Holder as that term is defined at law." The Court of Appeal held that the "holder rule" cap on the debtor's recovery from the holder, to the amount paid by the debtor under the contract, did not preclude recovery of attorney fees, costs, nonstatutory costs, or prejudgment interest. (C.A. 2nd., January 28, 2022.)

# *CALIFORNIA COURTS OF APPEAL*


Civil Procedure

*Cam-Carson, LLC v. Carson Reclamation Authority* (2022) 82 Cal.App.5th 535: The Court of Appeal reversed the trial court's order sustaining defendant's demurrer, without leave to amend, to plaintiff's complaint alleging that defendant City of Carson (City) was liable in equity under alter ego principles for the breach of a contract between plaintiff and defendant Carson Reclamation Authority (CRA) and breach of the implied covenant of good faith and fair dealing. The Court of Appeal held that the alter ego doctrine may be applied to government entities where the facts justify an equitable finding of liability, and concluded that the allegations in plaintiff's second amended complaint were sufficient to survive the City's demurrer. The trial court erred in sustaining the City's demurrer to plaintiff's breach of contract claim. The trial court also erred in sustaining the City's demurrer to the breach of implied covenant claim. Apart from alter ego liability, the trial court failed to consider plaintiff's allegations that the City breached the implied covenant in connection with a development agreement to which the City was a party. (C.A. 2nd, August 23, 2022.)

# *CALIFORNIA COURTS OF APPEAL*


Civil Procedure

*Cole v. Superior Court of San Diego County* (2022) _ Cal.App.5th _ , 2022 WL 17999483: The Court of Appeal granted a petition for writ of mandate directing the trial court to vacate the portion of its orders refusing to calendar defendants' motion for summary judgment for a hearing before the start of trial, and to enter a new order setting the motion for a hearing no later than the trial start date. Defendants timely (but just barely) filed the motion for summary judgment. The trial of the case was scheduled to start on January 20, 2023. The earliest date the trial court could schedule the motion for summary judgment was on January 27, 2023. Because defendants' motion for summary judgment was filed within the time limits set by Code of Civil Procedure, section 437c, they had a right to have their motion heard before the start of trial. (C.A. 4th, December 30, 2022.)

# *CALIFORNIA COURTS OF APPEAL*


Civil Procedure

*Thai v. Richmond City Center, L.P.* (2022) _ Cal.App.5th _ , 2022 WL 17665055: The Court of Appeal reversed the trial court's order granting plaintiff's motions to compel compliance with consumer subpoenas and production of records. Plaintiff served a consumer subpoena for deposition and production of documents on non-party Ha Mach, the property manager of Richmond City Center, LP et al. (Richmond), and a subpoena for production of business records on Tien Van, Richmond's accountant. Richmond served objections to both subpoenas and no documents were produced. Plaintiff filed motions to compel under Code of Civil Procedure section 2025.480 almost two months after the objections were served. Ruling on an issue of first impression, the Court of Appeal held that a subpoenaing party must bring a motion to enforce the subpoena within 20 days after the objection (section 1985.3(g)). After this 20-day deadline expires, the subpoenaing party cannot move to enforce the subpoena over the objection through a motion to compel under section 2025.480, which has a 60-day deadline. (C.A. 4th, December 14, 2022.)

# *CALIFORNIA COURTS OF APPEAL*


Civil Procedure

*Trujillo v. City of L.A.* (2022) 84 Cal.App.5th 908: The Court of Appeal affirmed the trial court's order granting defendant's motion for summary judgment and entering judgment in favor of defendant. Defendant, who was sued for negligence, moved for summary judgment. A few days before the hearing, defendant made a $30,000 settlement offer pursuant to Code of Civil Procedure section 998 (998 offer). Minutes after the trial court orally granted summary judgment, plaintiff sent an email to defendant purporting to accept the 998 offer. The Court of Appeal, agreeing with the trial court, concluded that 998 offer automatically expires when a trial court orally grants the offeror's summary judgment motion. (C.A. 2nd, October 27, 2022.)

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# *CALIFORNIA COURTS OF APPEAL*


Employment

*LaFace v. Ralphs Grocery Co.* (2022) 75 Cal.App.5th 388: The Court of Appeal affirmed the trial court's judgment for defendant, following a bench trial, in plaintiff's action under the Private Attorneys General Act (PAGA; Labor Code, section 2698, et seq.). The trial court properly concluded that the PAGA action was equitable and plaintiff was not entitled to a jury trial, and that defendant was not required to provide seating for its cashiers. (C.A.2nd, February 18, 2022.)

# *CALIFORNIA COURTS OF APPEAL*


Evidence

*Kline v. Zimmer, Inc.* (2022) 79 Cal.App.5th 123: The Court of Appeal reversed a judgment for plaintiff, following a jury trial (this was the second jury trial), awarding plaintiff $80,460.19 in economic damages and $7.6 million in noneconomic damages in plaintiff's action alleging that defendant's artificial joint called the Durom Acetabular Component (Durom Cup) was a defective product. The trial judge excluded testimony from defendant's expert witness because that witness was not able to state opinions to a reasonable medical probability. The Court of Appeal held that the trial judge erred in excluding such expert testimony. The reasonable medical probability requirement applies only to the party bearing the burden of proof on the issue which is the subject of the opinion. Excluding defendant's proffered expert testimony solely because it was not expressed to a reasonable medical probability required reversal. (C.A. 2nd, May 26, 2022.)

# *CALIFORNIA COURTS OF APPEAL*


Insurance

*Apple Annie, LLC v. Oregon Mutual Ins. Co.* (2022) 82 Cal.App.5th 919: The Court of Appeal affirmed the trial court's order granting defendant carrier's motion for judgment on the pleadings in plaintiff's action for damages under the policy because its restaurants were closed by the COVID-19 pandemic. The Court of Appeal agreed with the majority of other recent Court of Appeal decisions, concluding that a business that closed pursuant to a government shut-down order had not suffered "direct physical damage to" the business's property as required under the under the business income coverage of a standard comprehensive commercial liability policy. The mere loss of use of physical property to generate business income, without any other physical impact on the property, did not give rise to coverage for direct physical loss. (C.A. 1st, September 2, 2022.)

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# *CALIFORNIA COURTS OF APPEAL*


Insurance

*Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Ins. Co.* (2022) 81 Cal.App.5th 96: The Court of Appeal reversed the trial court's order sustaining defendant's demurrer, without leave to amend, to plaintiffs' complaint alleging causes of action for breach of contract, tortious breach of contract, elder abuse and unfair competition based upon defendant's denial of coverage and refusal to pay (or to advance) commercial property insurance policy benefits for losses caused by the COVID pandemic. Plaintiffs alleged the COVID-19 virus was present on, and had physically transformed, portions of the insured properties—"direct physical loss or damage" within the meaning of defendant's first party commercial property insurance policy. The trial court sustained the demurrer concluding that the COVID-19 virus could not cause direct physical loss or damage to property for purposes of insurance coverage. The trial court also found there was a virus exclusion in the policy. The Court of Appeal disagreed, concluding that by alleging that COVID-19 not only lives on surfaces but also bonds to surfaces through physicochemical reactions involving cells and surface proteins, which transformed the physical condition of the property and forced plaintiffs to close their business on the property, plaintiffs adequately alleged direct physical loss or damage caused by the COVID-19 virus and a cause of action for breach of contract. (C.A. 2nd, July 13, 2022.)

# *CALIFORNIA COURTS OF APPEAL*


## Legal Malpractice

*Mireskandari v. Edwards Wildman Palmer LLP* (2022) 77 Cal.App.5th 247: The Court of Appeal reversed in part, and affirmed in part, the trial court's order granting defendants' motion for summary judgment to plaintiff's complaint against his former lawyers for professional negligence, breach of fiduciary duty, and breach of contract. The complaint alleged, among other things, that defendants failed to advise plaintiff of California's anti-SLAPP statute before filing a complaint on plaintiff's behalf against a newspaper publisher in California federal court. Plaintiff alleged the lawsuit predictably drew a successful anti-SLAPP motion to strike, which caused him to incur substantial attorney fees litigating and losing the motion and deprived him of discovery he intended to use in a disciplinary proceeding pending against him in the United Kingdom, ultimately resulting in the loss of his law license, substantial fines and fees, and bankruptcy. The Court of Appeal agreed with the trial court that plaintiff's damages claim based on the adverse outcome of the U.K. disciplinary proceeding was too speculative to create a question of fact for a jury, but those were not plaintiff's only damages. The trial court erred in concluding that plaintiff could not establish causation under the case-within-a-case method because he could not prove he would have prevailed in his lawsuit against the publisher but for defendants' negligence. The Court of Appeal concluded that an attorney owes a duty of care to advise a client of foreseeable risks of litigation before filing a lawsuit on the client's behalf, and therefore plaintiff alleged a viable claim that, but for defendants' negligent failure to advise him of the risks associated with a potential anti-SLAPP motion, he would not have filed his lawsuit in California and would not have incurred damages from litigating and losing an anti-SLAPP motion. (C.A. 2nd, April 8, 2022.)

# *CALIFORNIA COURTS OF APPEAL*


## Real Property

*Hobbs v. City of Pacific Grove* (2022) 85 Cal.App.5th 311: The Court of Appeal affirmed the trial court's order denying plaintiffs' motion for summary judgment as to their second claim alleging that defendant city's Ordinance No. 18-005 violated plaintiffs' right to due process by arbitrarily limiting the number of homes that could be offered as short-term rentals and by subjecting them to random selection for nonrenewal of licensure. Although the two plaintiffs no longer had standing, the Court of Appeal retained jurisdiction to decide the issue because the case presented an issue of substantial and continuing public interest that was capable of repetition. The Court of Appeal concluded the plaintiffs failed to establish that their economic interest in renting their vacation homes exclusively for transient visitors was an entitlement subject to state or federal constitutional protection as a matter of law. To the extent they asserted a "vested right" in that particular economic use of their real property, they established neither right—beyond the expressly defined terms of their license—nor vesting on the record. Nor did they establish that defendant's curtailment of short-term rental licenses was so unrelated to legitimate state interests that it could be said to infringe on substantive due process. (C.A. 6th, filed October 14, 2022, published November 14, 2022.)

# *CALIFORNIA COURTS OF APPEAL*


## Settlement

*Gormley v. Gonzalez* (2022) 84 Cal.App.5th 72: The Court of Appeal affirmed the trial court's order granting plaintiffs' motion to enforce a settlement agreement and entering judgment against defendants in the amount of $1,393,084 (the settlement amount of $575,000 plus $818,084 in liquidated damages). Plaintiffs in 20 separate medical malpractice lawsuits (plaintiffs) filed against two doctors and a medical spa and the defendants in those lawsuits (defendants) resolved the underlying lawsuits by entering into a global settlement agreement pursuant to which defendants agreed to pay plaintiffs $575,000 in two installments. If the installments were not paid on time, liquidated damages would be assessed at the rate of $50,000 per month and $1,644 per day, up to a cap of $1.5 million. The trial court rejected defendants' argument that the liquidated damages provision was unreasonable and thus invalid pursuant to Civil Code section 1671(b). The trial court properly considered all of the circumstances existing at the time the settlement agreement was negotiated, and it properly concluded defendants failed to meet their burden of establishing the liquidated damages provision was unreasonable under the circumstances existing at the time the contract was made. The parties were represented by counsel throughout the settlement negotiations, and the liquidated damages provision involved "significant negotiations" and "numerous drafts." Although the parties estimated plaintiffs' recovery at trial would be $1.5 million, defendants only had insurance for six of the 20 lawsuits, which meant plaintiffs might be unable to collect any judgments they obtained after trial. Plaintiffs thus agreed to accept a significantly reduced settlement amount ($575,000) in exchange for assurances that defendants would be able to pay that amount quickly. The liquidated damages provision was negotiated in order to incentivize prompt payment, and the damages were capped at $1.5 million, the amount the parties estimated plaintiffs would have recovered at trial. (C.A. 3rd, October 12, 2022.)

# *CALIFORNIA COURTS OF APPEAL*


## Torts

*Cleveland v. Taft Union High School Dist.* (2022) 76 Cal.App.5th 776: The Court of Appeal affirmed a judgment against defendants, following a jury trial, concluding that defendant school district employees were 54% at fault for injuries suffered by plaintiff, who was shot in the stomach by another student using a shotgun, which resulted in defendant school district being vicariously liable for $2,052,000 in damages. During the trial, and also on appeal, defendants claimed their conduct was protected by the immunity in Government Code section 855.6. The Court of Appeal, in an issue of first impression, ruled that the specific acts and omissions identified by plaintiff's expert as below the standard of care for conducting a threat assessment were properly characterized as administrative and not as a mental examination, and therefore those negligent acts and omissions fell outside the scope of the section 855.6 immunity. The Court of Appeal also concluded that substantial evidence supported the jury's finding that the negligent failure of a campus supervisor to report a conversation, about other employees who were afraid of the shooter and had escape plans, was a substantial factor in causing plaintiff's injuries. (C.A. 5th, March 25, 2022.)

# *CALIFORNIA COURTS OF APPEAL*


## Torts

*K.M. v. Grossmont Union High School Dist.* (2022) 84 Cal.App.5th 717: In consolidated sexual abuse cases by plaintiffs H.R., K.M. and M.L. against their former teacher and defendant school district (district), the Court of Appeal affirmed the judgment for plaintiffs awarding damages of $240,000 to H.R., $60,000 to K.M., and $69,000 to M.L., following a jury trial where the jury found the teacher was 60% at fault and the district was 40% at fault, and after the application of Civil Code section 1431.2. The Court of Appeal also affirmed the trial court's order sustaining defendant's demurrer, without leave to amend, to plaintiffs' claims for sexual harassment under Civil Code section 51.9 against the district. It affirmed the trial court's ruling that the 998 offers sent by defendant to plaintiffs were invalid. The Court of Appeal also concluded that Code of Civil Procedure section 340.1 (this section reduced procedural barriers for childhood sexual abuse claims and allowed treble damages for a claim involving a prior cover-up of abuse), enacted after the trial, was not retroactive and does not apply to school districts pursuant to Government Code section 818. The trial court properly sustained the demurrer to the Civil Code section 51.9 claim because a public school district is not a "person" under Civil Code section 51.9. The district's 998 offers agreed to pay $320,000 to H.R., $170,000 to K.M., and $110,000 to M.L. Each 998 offer included the following language:

"Plaintiff . . . agrees that all parties will bear their own costs and fees, and the parties will execute a settlement and release providing that Plaintiff will satisfy all liens, execute a Civil Code section 1542 waiver, and there will be no admission of liability by [the district]."

The 998 offers, however, did not attach a settlement and release agreement. The Court of Appeal concluded that requiring execution of a settlement and release agreement, without attaching it or at least providing detailed terms, rendered the offers invalid. (C.A. 4th, October 25, 2022.)

# *CALIFORNIA COURTS OF APPEAL*


## Trial

*Unzueta v. Akopyan* (2022) 85 Cal.App.5th 67: The Court of Appeal reversed the judgment for defendant, following a jury trial, in plaintiff's medical malpractice action. This was the second appeal in the case. In the first appeal the Court of Appeal held the trial court had erred in denying plaintiff's *Batson/Wheeler* motion under *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*) and *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*) challenging defendant's peremptory challenge of six Hispanic potential jurors, and not requiring defense counsel to offer nondiscriminatory reasons for his first four challenges. On remand, the trial court elicited the defense attorney's justifications for the six prospective jurors at issue. As to two of the jurors, the defense attorney asserted they were excused because they had a family member who was disabled, and the attorney feared the family member's disability would cause the juror to be biased in favor of plaintiff who alleged she became disabled due to defendant doctor's professional negligence. The trial court found the justifications were "race-neutral," and after analyzing all the challenges, it again denied the *Batson/Wheeler* motion and reinstated the judgment for defendant. In this appeal, the Court of Appeal ruled the trial court erred in denying the Batson/Wheeler motion upon remand as to the two prospective jurors because it was based upon protected characteristics. Historically *Batson/Wheeler* motion rulings were based upon whether the challenge was race neutral. However, in 2015 the Legislature expanded the scope of cognizable groups protected under *Batson/Wheeler* by its enactment of Assembly Bill No. 87 (2015-2016 Reg. Sess.) § 1 (Assembly Bill 87), effective January 1, 2017, which amended Code of Civil Procedure section 231.51 to specify by reference to Government Code section 11135 that peremptory challenges cannot be used to excuse prospective jurors on the basis of their sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental and physical disability, medical condition, genetic information, marital status, or sexual orientation. Nor can a peremptory challenge be based on the perception the juror possesses one of these characteristics or because of the juror's association with someone perceived to have one of these characteristics. (C.A. 2nd, November 7, 2022.)

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