



# Appellate Reports and Cases in Brief

*Recent cases of interest to members of the plaintiffs' bar*

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## Short(er) takes

**Collateral-source rule; *Howell v. Hamilton Meats*; Medicare; gratuitous write-offs; modification of judgments and timing of notice of appeal: *Sanchez v. Strickland* (2011) \_\_ Cal.App.4th \_\_ (5th Dist.)**

Personal-injury action in which trial court extended *Hanif v. Housing Authority* to apply to Medicare payments. In an unpublished portion of the opinion, the appellate court holds that this was correct under *Howell*. In the published portion of the opinion, the court held that the correction of a clerical error in the original judgment, which had failed to reduce the judgment by the amount of comparative fault assigned to the plaintiff, was a sufficiently substantial change in the judgment to restart the 60-day period to file a notice of appeal. The court also held that under *Howell*, if a medical provider gratuitously writes off a portion of its medical bill to the plaintiff, the amount of that write-off is subject to the collateral-source rule, and constitutes a benefit that may be recovered by the plaintiff.

**Respondeat superior; *Vogt v. Herron Construction, Inc.* (2011) \_\_ Cal.App.4th \_\_ (4th Dist., Div. 2.)**

Plaintiff Vogt was employed by Performance Concrete, a subcontractor on a construction project. Jessie Cruz was an employee of a framing subcontractor on the site, Herron Construction. Vogt noticed that Cruz's personal pickup truck was parked close to where Performance would be pouring concrete. He asked Cruz to move the truck. In doing so, Cruz ran Vogt over. Vogt sued Herron on a respondeat

superior theory. The trial court granted summary judgment for Herron, finding that Cruz had not been acting within the course and scope of his employment when he moved the truck. Reversed. Vogt asked Cruz to move his truck for a work-related purpose – so Performance could pour cement. Cruz moved his truck, at least in part, to facilitate the pouring of the concrete and thus to advance the overall project. And respondeat superior would still apply even if Cruz moved his truck for entirely personal reasons (to prevent damage to it). Acts necessary for the comfort, convenience, health, and welfare of an employee at work, though strictly personal and not acts of service, do not take the employee outside the scope of employment.

**Insurance, theft coverage; marijuana; *Barnett v. State Farm General Ins. Co.* (2011) \_\_ Cal.App.4th \_\_ (4th Dist., Div. 1).**

Bennett's homeowner's policy issued by State Farm included coverage for theft. It also covered trees, shrubs, or plants on the property for vandalism or theft. Officers from the Costa Mesa Police Department executed a search warrant at Barnett's residence, authorizing them to search for and seize marijuana. In executing the warrant, the officers dug up Barnett's marijuana plants from his backyard and seized two freezer bags of marijuana. Barnett maintained that he grew and used the marijuana in compliance with the provisions of the Health and Safety Code that allow cultivation and use of medical marijuana. Barnett's petition to the court to return the marijuana was denied, and the police destroyed the marijuana. Barnett filed a claim with State Farm for the marijuana that had been seized, which he valued at \$98,000. State Farm denied the theft claim, and Barnett

sued for breach of contract and bad faith. The trial court granted State Farm's summary-judgment motion. Affirmed. "Theft" involves the knowingly unlawful taking of property. Here, the police seized the marijuana in accordance with a search warrant, negating the element of intent to steal.

**"Private Attorney General" attorney's fees under Code of Civil Procedure section 1021.5; deposition transcript costs; *Serrano v. Stefan Merli Plastering* (2011) \_\_ Cal.4th \_\_ (Cal. Supreme).**

In a personal-injury action, defendant took a deposition and selected Coast Court Reporters. Plaintiff's counsel requested a copy of the deposition transcript on an expedited basis. Coast charged a fee of \$261 to expedite the transcript, in addition to a charge of \$373 for the certified copy. Plaintiffs objected to paying the extra fee, and obtained a favorable ruling in the Court of Appeal holding that trial courts have the authority to determine the reasonableness of fees charged by court reporters to non-noticing parties. The Court of Appeal refused, however, to award fees under Code of Civil Procedure section 1021.5. Reversed. Deposition reporters are officers of the court, regulated by statute, who perform a public service of considerable importance to litigants and members of the public. The reporting service here did not merely seek to vindicate its private rights; it defended its institutional interest in controlling the fees it charges, and it was found to have charged an unreasonable fee. In establishing the rule that trial courts have the authority to regulate the fees charged by court reporters, the plaintiffs secured a significant benefit for many people by enforcing an important right affecting the public interest.



**Primary assumption of risk; motorcycle riding; *Amezcuca v. Los Angeles Harley-Davidson* (2011) \_\_ Cal.App.4th \_\_ (2d Dist., Div. 8).**

Plaintiffs participated in a “toy ride” organized by defendant motorcycle dealership. They did not officially register. If they had, they would have been required to sign a release form stating that they agreed to assume the entire risk of accident or personal injury resulting from their participation. Los Angeles Police escorted the procession to the freeway but did not block off the freeway for the procession. While riding on the freeway, plaintiffs were struck by a van and suffered severe injuries. The trial court granted summary judgment to the dealership. Affirmed. The court found that the claims were barred by the doctrine of primary assumption of the risk. Riding motorcycles involves physical exertion and athletic risks. The risk of being struck by another vehicle while riding in a motorcycle procession on a Los Angeles freeway is apparent. Accordingly, the doctrine of primary assumption of the risk applies.

**Forum selection clauses; Code of Civil Procedure section 410.30; *Trident Labs v. Merrill Lynch Commercial Finance Corp.* (2011) \_\_ Cal.App.4th \_\_ (2d Dist. Div. 8.)**

Trident’s loan agreement with Merrill Lynch has a forum-selection clause requiring that any suit by Trident be filed in Cook County, Illinois. Trident sued Merrill Lynch in California, and the parties vigorously litigated for 19 months. Then, Merrill Lynch moved to stay or dismiss under Code of Civil Procedure section 410.30, arguing that it could make such motion at any time. The trial court granted the motion and stayed the action. Reversed. Section 410.30 does not allow a motion to stay or dismiss to be made at any time. The

issue is not whether the defendant waived the right to enforce its forum-selection clause. It is whether the defendant decided to exercise the discretion given to it in the clause to litigate the case in California, and can then change its mind much later and invoke the clause. Section 410.30 says that the court must stay or dismiss an action “on any conditions that may be just.” When no time limits are stated, a reasonableness standard is necessarily inferred. Merrill Lynch’s actions here were not reasonable.

**Arbitration; unconscionability; *Sanchez v. Valencia Holding Co. LLC* (2011) \_\_ Cal.App.4th \_\_ (2d Dist., Div. 1.)**

Purchaser of a used Mercedes Benz at Mercedes Benz of Valencia filed an action against the dealership under the CRLA, UCL, and other theories, relating to the dealer’s fraud in the sale of a used car. The contract between the parties contained an arbitration clause. The trial court refused to compel arbitration. Affirmed. The arbitration clause is procedurally and substantively unconscionable. The arbitration clause was in the back of the contract, which was two-sided. The front side had various places for the buyer to initial, but nothing on back was initialed. Its location on the back of the last page of the contract, in a small font with reduced line spacing made it unnoticeable, and satisfied the element of procedural unconscionability. Four parts of the clause were substantively unconscionable as well: (1) a provision that a party who loses before a single arbitrator may appeal to a panel of three arbitrators if the award exceeds \$100,000; (2) an appeal is permitted if the award involves injunctive relief; (3) the appealing party must pay, in advance, the filing fee and other arbitration costs, subject to a final determination in the arbitration of a fair apportionment; and (4) the agreement

exempts repossession from arbitration while requiring that a request for injunctive relief be submitted to arbitration. While these provisions may appear neutral on their face, they have the effect of placing an unduly harsh burden on the buyer.

The right to appeal awards in excess of \$100,000 is most likely to benefit the dealer; not the buyer. The right to appeal an award of injunctive relief likewise will benefit the dealer, since the buyer would likely be seeking injunctive relief, and the provision allows the dealer to delay implementation of any injunction pending an appeal. The right to appeal if the award is zero, benefits the buyer, but the contract requires the appealing party to pay all arbitration costs in advance to appeal. This violates the CRLA, and the provision allowing reapportionment at the end of the proceeding is inadequate to address the problem. Finally, the contract leaves the dealer with the right to self help, but requires the buyer to pursue an arbitration remedy for injunctive relief. But private arbitration is not sufficient to supervise public injunctive relief.

Because the arbitration clause suffers from four defects that all tilt the arbitration unfairly in favor of the dealer, the clause is permeated with unconscionability and will not be enforced.



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