

Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

Moody v. Bedford

(2012) __ Cal.App.4th __ (Second Dist. Div. 5)

Who needs to know about this case: Lawyers handling wrongful-death cases

Why it's important: Holds that an insurer's payment of a pre-suit settlement demand does not trigger the "one-action" rule that requires all heirs to join in a single wrongful-death lawsuit. Holds that an insurer facing a pre-suit demand must require plaintiffs to file a wrongful-death suit in order to obtain the protection of the one-action rule.

Synopsis: Plaintiffs are the five minor children of decedent, Corinthia Hood, who was killed in an auto accident in a car driven by Bedford. Hood's adult daughter and half-sister of the minor plaintiffs, Corisha Brown, tendered a policy-limits demand to Bedford's insurance carrier before any suit was filed. The insurer repeatedly requested that Brown provide the names of all of Hood's surviving heirs. Brown maintained that she was the sole surviving heir and provided the insurer with a certificate under Code of Civil Procedure section 377.22 confirming that she was Hood's successor in interest and no one had a superior right to hers. In reliance on these representations, the insurer paid Brown the policy proceeds and Brown executed a release on the insurer's behalf of all claims relating to Hood's death.

After the settlement, the plaintiffs, acting through a guardian ad litem, filed their own wrongful-death lawsuit. The trial court granted defendants summary judgment, holding that the one-action rule barred the plaintiff's wrongful-death action. Reversed. The Court held that because Brown had only made a pre-suit demand, the one-action rule was not triggered. It further held that in order for a defendant to protect itself in a similar situation, it must require the party making the demand to actually file a wrongful-death action, which can then be settled. Defendants who follow this procedure will be protected by the one-action rule; and those who choose not to follow it will not be protected.

Short(er) takes

Labor law; overtime; administrative exemption; administrative/production dichotomy: *Harris v. Superior Court* (*Liberty Mutual*) (2012) __ Cal.4th __ (California Supreme)

Claims adjusters for two insurance companies brought class actions against their employer to recover unpaid overtime. They claimed in their suits that they had been erroneously classified as "administrative" employees, who were exempt from overtime-pay requirements. The trial court originally certified a class, but later granted a motion to partially de-certify the class and denied plaintiff's motion for summary adjudication on the defendants' affirmative defense. The Court of Appeal reversed, finding in favor of plaintiffs. The Supreme Court granted review, and reversed the Court of Appeal. The Court held that the Court of Appeal has put too much reliance on the so-called "administrative/production worker dichotomy," in which courts determined whether workers were employed in the "production" of the employer's principal product, and therefore not engaged in administrative work. The Court held that the dichotomy had been effectively superseded by later statutory and regulatory enactments. The Court held that the prior *Bell v. Farmers* decisions, on which the appellate court relied, were distinguishable for two reasons: (1) they had been limited to their facts – where the employer had admitted that the employees at issue were engaged in "routine and unimportant" work; and they were based on a pre-2001 version of the wage order at issue that defined "administrative" work. The Court cautioned that relying on the particular role of employees in one enterprise to deduce a rule applicable to another type of business is difficult, and likely to produce the wrong outcome.

New trial motions; grounds: *Santillan v. Roman Catholic Bishop of Fresno* (2012) __ Cal.App.4th __ (Second Dist., Div. 8.)

George Santillan and his brother, Howard Santillan, sued the Roman Catholic Bishop of Fresno for childhood sexual abuse by a former priest, Anthony Herdegen. The jury found that the plaintiffs had been abused as boys, but that the diocese did not know or have reason to know that Herdegen had committed the abuse while the abuse was still occurring. Because this resolved the statute-of-limitations issue in favor of the church, the jury did not make other findings. While the jury was deliberating, George's lawyer received a phone call from a man who said he had been an altar boy at the same parish and had been inappropriately touched by Herdegen. When his mother had reported this to the principal of the

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parish school, he was expelled. Based on this information, the plaintiffs brought a motion for new trial based on newly-discovered evidence. The trial court granted the motion as to Howard, because the new witness said he reported the incident in 1967, at a time when Howard was still being molested by Herdegen. The motion was denied as to George, because the evidence showed his abuse had stopped in late 1965. The Court of Appeal affirmed. It rejected the church's claim that Howard had not been diligent in failing to report the new evidence to the court immediately. The court noted that the cases the church relied on all involved bench trials, or situations where new evidence was discovered during the trial, but not raised until after the decision. Here, the new evidence was not available until the jury was already deliberating. The plaintiffs were not required to bring the evidence to the court's attention during deliberations. The court found that the new evidence was material and supported the trial court's decision to grant Howard a new trial.

Whistleblowers; Labor Code section 1102.5 and Education Code section 87160. *Mize-Kurman v. Marin Community College Distr.* (2012) __ Cal.App.4th __ (First Dist., Div. 2.)

Plaintiff was an administrator at the defendant community-college district. She made certain disclosures to her supervisors, including interference in the hiring process for the director of ESL support; her concern that a proposed scholarship fund that was limited only to Latino students was unconstitutional; that the district's policy of allowing students who were in arrears on their fees to register was illegal; and that she believed that the district was violating the law in seeking residency information from students. She sued, claiming she had been retaliated against. At trial, the court gave certain instructions based on the federal whistleblower statute, which she contended included restrictions not included in the California whistleblower statutes. The jury's verdict was against her. On appeal, she asserted instructional error. Reversed. Some of the restrictions included in the court's instructions based on federal law were not a part of California law, and should not have been included. These were a requirement that the plaintiff was required to prove that any disclosures were made in good faith and for the public good, and not for personal reasons; that debatable differences of opinion concerning policy matters are not protected disclosures; and that information passed along to a supervisor in the normal course of duties is not a protected disclosure. Each of these restrictions was either erroneous under both California and federal law; or was applicable solely to the federal statute, but not to its California counterpart.

Arbitration; enforceability of arbitration clauses in employment applications: *Wisdom v. Accentcare, Inc.* (2012) __ Cal.App.4th __ (3rd Dist.)

Plaintiffs were employed by Accentcare as on-call staffing coordinators. They filed a lawsuit claiming they were not paid overtime. The defendant moved to compel arbitration. The trial court denied the petition. Affirmed. The court held that the element of procedural unconscionability was present. The contract was one of adhesion, and was given to plaintiffs when they applied for employment. The bargaining power is inherently unequal. The agreement itself implied that there was no opportunity to negotiate its terms. Rather, it required the applicant to "acknowledge your understanding of the following statements and agreements" including that disputes would be arbitrated under the rules of the American Arbitration Association. The failure to attach the rules was also evidence of procedural unconscionability. The element of surprise was also present, because the arbitration agreement was one of several forms presented to the plaintiffs when applying for employment and was not explained to the applicants.

The court also found substantive unconscionability because the agreement to arbitrate was not mutual. The only party called on to agree to arbitration under the agreement was the employee applicant. The court contrasted the form supplied to plaintiffs with post-hire arbitration form used by Accentcare, which clearly stated that "both Accentcare and I agree to forego any right we each may have had to a jury trial" and to resolve the dispute through binding arbitration.

The court rejected the defendant's reliance on *Roman v. Superior Court* (2009) 172 Cal.App.4th 1462, which held that a virtually identical form was enforceable, created only limited procedural unconscionability, and was bilateral. The court held that *Roman* had failed to explain its conclusions and was not persuasive, and that to the extent that it held that a one-sided arbitration agreement was not unconscionable, was simply wrong.

Special verdicts; interpretation: *Othopedic Systems, Inc. v. Schlein* (2012) __ Cal.App.4th __ (First Dist. Div. 4.)

Schlein, an orthopedic surgeon, created a medical device that bore his name. Defendant Othorpedic Systems, Inc. ("OSI") marketed it for years, and paid him royalties. OSI stopped paying royalties, but continued to market a device bearing Schlein's name. Schlein asserted claims for breach of contract, and commercial misappropriation of his name, among other claims. The jury awarded Schlein $616,043 in damages on his contract claim, and found on its verdict form that OSI earned $1,220,000 in profits attributable to the use of Schlein's name – but on the portion of the form titled, "total amount awarded" the jury included only the $616,043 plus the $750 in statutory damages. On appeal, Schlein argued that the award should have included the

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profits that OSI made by using his name. The Court of Appeal agreed, and amended the judgment to include this amount. The court found that, taken as a whole, and in light of the parties' claims, the special verdict form showed that the jury intended to award the profits earned by OSI. The real issue was not the interpretation of the verdict form, but rather the legal issue of whether a plaintiff whose name is misappropriated by another may recover the defendant's profits. On this issue, the court concluded that California permits such a recovery.

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