

Appellate Reports and Cases in Brief

Recent cases of interest to members of the plaintiffs' bar

By Jeffrey Isaac Ehrlich

DC v. Oakdale Joint Unified School Dist.

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

Who needs to know about this case: Attorneys seeking to present late claims to public entities under the California Government Claims Act.

Why it's important: Holds that the statutory requirement that the public entity provide an applicant with "written notice" of its board's action on the application for leave must include the date on which the board's action was taken. Failure to include this information will allow an applicant to plead and attempt to prove that the public entity is estopped from relying on the six-month limitation as a defense to the claim.

Analysis: Government Claims; notice of denial of application to submit late claim.

Under the California Government Claims Act, a plaintiff who has missed the six-month claim-filing deadline in the Act may apply for leave to file a late claim. (Gov. Code, § 915, subd. (a).) That application must be presented to the public entity's board within a reasonable time not to exceed one year after the accrual of the cause of action, and shall state the reason for the delay in presenting the claim. (§ 911.4, subd. (b).) The board shall grant or deny the application for leave within 45 days after it is presented to the board, or within such further time as the parties may agree in writing before the expiration of the 45-day period. (§ 911.6, subd. (a).) If the board fails or refuses to act on the application for leave to present a late claim, the application is deemed denied on the 45th day or the last day specified in the written extension agreement of the parties. (§ 911.6, subd. (c).) After the board has denied an application to present a late claim, section 918.8, subd. (a) requires that "[w]ritten notice of the board's action upon the application [for leave] shall be given [to the appropriate party]" and that the notice must contain a warning advising the applicant of the need to petition a court for an order relieving the applicant from the claims-presentation requirement in the statute, and that such petition "must be filed within six-months after the application to the board is denied or deemed to be denied."

Here, the applicant presented the Board with his application for leave to present a late claim on April 28, 2010. On June 9, 2010, the district sent the applicant's counsel a denial letter. On December 3, 2010, within six months of June 9, 2010, the applicant filed a petition for relief in court. The district's opposition to the petition included a declaration from the district's superintendent stating that the Board had rejected the application at its regular meeting on May 10, 2010. The court denied the petition, because it was filed more than six months after the denial. Reversed. Because the Board failed to state in its denial letter the date that the application had been denied, its letter would not be deemed to comply with the requirement that the Board give "written notice" of the action. The purpose of the written-notice requirement is to give the petitioner sufficient information to know when to file a timely petition for relief. Moreover, the notice given by the Board could be expected to mislead applicants into believing that the date of the action taken was the date of the notice. Therefore, "Unless the date of the board's action is contained in the denial notice, we conclude that in appropriate circumstances a public entity might be estopped from relying on the section 946.6, subdivision (b) limitation."

C.A. v. William S. Hart Union High School

(2012) 54 Cal.4th 861 (Cal. Supreme)

Who needs to know about this case: Lawyers pursuing claims against public schools on theories of negligent hiring, retention, and supervision.

Why it's important: Holds that school personnel owe a duty of care to protect students from injury at hands of third parties; and that a school district may be held vicariously liable for negligence in hiring or supervising employees who commit sexual abuse (as opposed to vicariously liable for the acts of an employee who commits sexual abuse, which is outside the scope of employment).

Synopsis: C.A. claimed that as a student at Golden Valley High School in the William S. Hart Union High School District, he was sexually harassed and abused by Roselyn Hubbell, the school's head guidance counselor. C.A.'s suit alleged that defendants knew that Hubbell had previously engaged in sexual misconduct with minors, and knew or should have known of her propensity or predisposition to engage in sexual abuse. C.A. claimed that the district's records showed prior incidents involving Hubbell, both on and off campus. And it claimed that his injuries were due not just to the abuse by Hubbell, but to the negligence of the District's employees and administrators in failing to properly hire, train, and supervise Hubbell and in preventing her from harming him.

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The trial court sustained the district's demurrer without leave to amend, and a divided panel of the Court of Appeal affirmed, holding that the alleged sexual misconduct was not within the scope of Hubbell's employment, that public-entity immunity precluded direct liability for the district's alleged negligence, and statutes defining a guidance counselor's alleged torts did not authorize claims against public entities. The Supreme Court reversed in a unanimous opinion:

> We conclude plaintiff's theory of vicarious liability for negligent hiring, retention and supervision is a legally viable one. Ample case authority establishes that school personnel owe students under their supervision a protective duty of ordinary care, for breach of which the school district may be held vicariously liable. (See, e.g., *Dailey v. Los Angeles Unified Sch. Dist.* (1970) 2 Cal.3d 741, 747; *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1458-1461.) If a supervisory or administrative employee of the school district is proven to have breached that duty by negligently exposing plaintiff to a foreseeable danger of molestation by his guidance counselor, resulting in his injuries, and assuming no immunity provision applies, liability falls on the school district under section 815.2. Accordingly, we reverse the judgment of the Court of Appeal.

In reaching its conclusion, the Court held that the District owed the plaintiff a duty of care concerning the hiring and supervision of employees – and that this duty extended beyond instructional personnel to administrative personnel as well. "School principals and other supervisory employees, to the extent their duties include overseeing the educational environment and the performance of teachers and counselors, also have the responsibility of taking reasonable measures to guard pupils against harassment and abuse from foreseeable sources, including any teachers or counselors they know or have reason to know are prone to such abuse."

The Court also held that it did not affect the validity of C.A.'s claims that his complaint did not identify the identity of the District's employees and administrators who failed to properly hire, train or supervise Hubbell. The Court noted, "But the District cites no statute or decision requiring a plaintiff to specify *at the pleading stage* which of the defendant's employees committed the negligent acts or omissions for which a public entity is allegedly liable under section 815.2." (Emphasis in original text.)

Baker v. Mulholland Security and Patrol, Inc.

(2012) __ Cal.App.4th __ (2d Dist. Div. 8.)

Who needs to know about this case: Lawyers litigating FEHA claims.

Why it's important: Decides a matter of first impression – that a prevailing defendant in a FEHA claim can recover expert-witness fees only when the action is frivolous, unreasonable, without foundation, or brought in bad faith.

Synopsis: Eric Baker worked as a security guard for Mulholland for 13 days and was terminated. He had been assigned to Mulholland's client, the Heschel School. In just over a week, the school had made two complaints about Baker, stating that he was making personal calls and ignoring his duties while on the phone, was rude and unprofessional, and had a bad attitude. Baker complained to his supervisor that a school employee had made racial and discriminatory comments to him. Baker sued Mulholland for retaliation and payroll-related claims. The trial court granted Mulholland's motion for summary adjudication of Baker's retaliation claim, and his remaining claims were dismissed as the result of a settlement. The trial court awarded Mulholland its expert-witness fees. Baker appealed. The court affirmed the dismissal of his retaliation claim, finding that he made a prima facie showing of retaliation, but that Mulholland was able to rebut the showing by demonstrating that he was terminated for poor performance, and he was unable to make any showing of pretext. But the court reversed the award of costs.

Code of Civil Procedure section 1032, subd. (b) entitles the prevailing party in an action to recover certain litigation costs as a matter of right. Allowable costs are specified in section 1033.5 of the Code of Civil Procedure. They include expert witness fees "ordered by the court." The FEHA permits the recovery of expert-witness fees, within a court's discretion. (Gov. Code, § 12965, subd. (b).)

It is well settled that a prevailing defendant in a FEHA action "may recover attorney fees only when the plaintiff's action was frivolous, unreasonable, without foundation, or brought in bad faith. (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 985; *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412 (*Christiansburg*).) The courts of appeal are split about whether this standard applies to an award of ordinary litigation costs to a prevailing FEHA defendant. (Compare *Perez v. County of Santa Clara* (2003) 111 Cal.App.4th 671, 681 (*Perez*) ["ordinary litigation costs are recoverable by a prevailing FEHA defendant even if the lawsuit was not frivolous, groundless, or unreasonable"] with *Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387 (*Cummings*) [*Christiansburg* standard applies when determining whether to award fees and costs to a prevailing FEHA defendant].)

No California case has specifically addressed the applicability of the *Christiansburg* standard to the recovery of expert witness fees, as opposed to ordinary litigation costs, by a prevailing FEHA defendant under Government Code section 12965, subdivision (b). The court held that the standard applicable to attorney's fees should apply to expert witness fees for a prevailing FEHA defendant. "Expert fees, just like attorney's fees, are not ordinary litigation costs which are routinely shifted under Code of Civil Procedure sections 1032 and 1033.5. Like attorney's fees, expert fees should be treated differently than ordinary litigation costs because they can be expensive and unpredictable, and could chill plaintiffs from bringing meritorious actions."

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Short(er) takes

Punitive damages; HMO bad faith; Code of Civil Procedure section 425.13. *Kaiser Foundation Health Plans v. Superior Court* (*Rahm*) (2012) __ Cal.App.4th __ (2d Dist. Div. 7.)

Rahm, a minor, experienced ongoing back pain. Her parents asked her Kaiser primary care physician to order an MRI. The physician refused, and referred Rahm for evaluations by other Kaiser physicians. Rahm's parents repeatedly requested an MRI for their daughter. After a substantial delay, when Rahm continued to experience back pain, the MRI was authorized. It showed that she was suffering from bone cancer. Rahm had to undergo surgery to remove her leg and portions of her pelvis and spine, and her prognosis is diminished because the cancer was not discovered sooner. She sued three Kaiser entities in her complaint — the medical group, the hospital group, and the health plan (HMO). The trial court denied the Kaiser entities' motion to dismiss her punitive-damages claims under section 425.13. Kaiser took a writ, which was denied. The Supreme Court granted review and transferred to the Court of Appeal. In the meantime, Rahm dismissed the punitive-damages allegations against the medical group and the hospital group.

The Court of Appeal held that the trial court had properly denied the motion to strike the punitive-damages claim against the HMO. Based on the wording of the statute, its legislative history, and the provisions of other statutes, it appears that the Legislature did not intend HMOs – which are expressly declared not to be health-care providers by Civil Code section 3428 – to receive the protection of section 425.13. In addition, as pleaded by Rahm, the claim was that the HMO's restrictive policies caused the health-care providers to deny authorization for the MRI when it was warranted. This is not, as the HMO claims, a "derivative" claim against the HMO based on the conduct of its contracted providers. Rather, the claim, if proven, is that the providers act in the fashion they do because of policies established by the HMO. Petition denied.

Arbitration; vacating arbitration awards; ex-parte post-arbitration brief; Costs under Code of Civil Procedure section 998. *Maaso v. Signer* (2012) 203 Cal.App.4th 362. (2d Dist. Div. 2.)

Maaso sued Signer for medical malpractice, and the case was ordered to arbitration before a three-arbitrator panel. Two of the three arbitrators found that Maaso failed to prove causation, and issued an award to Signer. The trial court vacated the award as procured by "undue means" because of ex parte contact between Signer's party arbitrator and the neutral arbitrator. A second arbitration was held, which resulted in an award for Maaso. The award exceeded a section 998 offer made by Maaso, and rejected by Signer. The trial court confirmed the second award but denied Maaso costs and prejudgment interest under section 998. Maaso appealed the denial of costs and interest under section 998; Signer cross-appealed contending that the trial court erred in vacating the first award. Affirmed.

The first award was properly vacated because Signer's party arbitrator sent a post-arbitration letter brief to the neutral arbitrator but did not serve a copy on Maaso's party arbitrator at the proper address. As a result, Maaso's arbitrator was not afforded an opportunity to rebut the contentions made by Signer's party arbitrator. Such ex parte contact between a party's representative and the neutral arbitrator is improper and provides a basis to vacate the award as obtained through "undue means."

The court rejected Maaso's contention that the trial court erred in refusing to award him costs and interest under section 998. The court held that Maaso was not entitled to such an award because he failed to request them from the arbitrators. Maaso's request to the trial court to add the enhancements to the award meant that he was not seeking to "confirm" the award, but to "correct" it, and there were no grounds that permitted the trial court to take such action. The court rejected Maaso's argument that section 998 by its terms, allows an award to be made by the "court or arbitrator," and therefore the trial court could have made the award. The court held that when a case has been sent to binding arbitration, the reference in section 998 to "the arbitrator" means that the relief must be made by the arbitrator. "It is not logical to read the statute as inviting a procedure that permits a party to forum shop between the court and the arbitrator, and to bring the request to whichever forum that party believes is most likely to make a favorable award."

California anti-spam law; preemption; attorney's fees; Consumer Legal Remedies Act ("CRLA"), *Balsam v. Trancos, Inc.* (2012) __ Cal.App.4th __ (1st Dist., Div. 1.)

Balsam received several unsolicited e-mails sent by Trancos, Inc., an e-mail-marketing firm. He sued under the California anti-spam law (Bus & Prof. Code, § 17529.5) and the CRLA. The trial court dismissed the CRLA claim for lack of standing, and found in favor of Balsam under the anti-spam law, awarding $1,000 in liquidated damages for each of seven e-mails that it found violated the law, and awarding attorney's fees of $81,900 in fees. Trancos appealed, and Balsam cross-appealed on whether the CRLA claim was properly dismissed, and whether Trancos's CEO should have been held personally liable. Affirmed.

The anti-spam law makes it unlawful to send commercial e-mail advertisements with falsified header information. The court held that the e-mails sent by Trancos contained domain names in the headers that did not represent a real company, and which could not be readily traced back to Trancos. The admitted purpose for the use of the domain names was to prevent recipients of the e-mails from being able to identify Trancos as their true source. The trial court therefore correctly held that the header information in the e-mails was falsified or misrepresented under section 17529.5, subd. (a)(2). The Court also held that the federal CAN-SPAM Act did not

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preempt the California anti-spam law, and that the award of fees was proper and the amount awarded was within the trial court's discretion.

On the cross-appeal, it held that Balsam was not a "consumer" as defined in the CRLA because he did not acquire any of the goods or services advertised in the e-mails, and did not suffer any damages caused by the defendants' conduct. Finally, the court held that the evidence did not support the imposition of personal liability on Trancos's CEO, who was minimally involved in the events forming the basis of the claim. Plaintiff had no evidence that he knowingly consented to or approved any of Trancos's unlawful acts. Rather, he reasonably relied on a consultant's recommendation.



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