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NEWcases

of BUSINESS LITIGATION INTEREST

Orange County Bar Association • Business Litigation Section

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S T A T E

Litigation—Admissions— Conditions of Withdrawal— Attorneys' Fees

CCP section 2033.300 authorizes a court to permit withdrawal of an admission upon a showing of mistake, inadvertence, or excusable neglect, and states that the court “may impose conditions on the granting of the motion that are just, including, but not limited to . . . [a]n order that the costs of any additional discovery be borne in whole or in part by the party withdrawing or amending the admission.” Does the trial court have authority to impose attorneys’ fees as a condition for withdrawal under this statute? Yes. *Rhule v. WaveFront Technology, Inc.*, 8 Cal.App.5th 1223, 214 Cal.Rptr.3d 586 (2017). The court of appeal in *Rhule* held that costs include reasonable attorneys’ fees. Moreover, by its express terms, section 2033.300 gives discretion to impose any “just” conditions. “An award of attorney fees that is reasonable in light of the conditional relief granted can accordingly be such a condition.”

Litigation—Continuances— Limits on Trial Court’s Discretion

Trial courts have broad discretion over their calendars, including whether or not to grant continuances of hearings and trial. But as the decision in *Hamilton v. Orange County Sheriff’s Department*, 8 Cal.App.5th 759, 214 Cal.Rptr.3d 151 (2017) shows, that discretion is not unlimited. There, citing plaintiff’s lack of diligence, the trial court refused to continue a summary judgment hearing to allow plaintiff to depose the witnesses who submitted declarations in connection with the summary

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judgment motion. Plaintiff initially noticed the depositions before the opposition due date, but agreed to postpone them because defense counsel was in trial. After refusing to grant a continuance to reschedule the depositions, the trial court granted an uncontested summary judgment. The court of appeal reversed. Although recognizing that plaintiff “was not optimally diligent” in, among other things, resetting the depositions, the court held that plaintiff’s “relatively minor lack of diligence did not justify the substantial injustice the court’s order created.” In such circumstances, “the policy disfavoring continuances must give way” to the policy of deciding cases on the merits.

Litigation—Judgment—Res
Judicata—Effect of Alternative
Grounds

If a trial court grants summary judgment on two alternative grounds (A and B), and the court of appeal affirms on one ground (A), but declines to reach (B), does ground B retain any res judicata effect? That was the question in *Samara v. Matar*, 8 Cal.App.5th 796, 214 Cal.Rptr.3d 346 (2017). There, plaintiff sued two doctors for dental malpractice, Dr. Nahigian on direct theories of negligence and Dr. Matar on a theory of vicarious liability. The trial court granted summary judgment in favor of Nahigian on two separate grounds—statute of limitations and lack of causation; on review, the court of appeal affirmed solely on the limitations ground, declining to rule on causation. Later, Dr. Matar moved for summary judgment, arguing that since Nahigian’s nonliability had been conclusively determined, Matar was entitled to summary judgment on vicarious liability. The trial court granted summary judgment based on res judicata, but the court of appeal reversed. As to issue preclusion, the court held “it is not proper to give conclusive effect under the doctrine of issue preclusion to a ground we expressly declined to reach in our review of the judgment.” The court emphasized, however, that “the reasons for finding collateral estoppel/issue preclusion inapplicable to grounds not passed on by the appellate court do not apply in the claim preclusion context.” Nonetheless, claim preclusion could not apply because plaintiff had not asserted “separate or successive lawsuits.” The court recognized that had plaintiff asserted her vicarious liability claim against Matar in a separate lawsuit, claim preclusion might well apply based on an

Litigation—Summary
Judgment—Experts—Trial
Court’s Role as Gatekeeper

old Supreme Court decision, which the court of appeal noted “the Supreme Court might want to address.”

Because the rules governing expert witnesses apply equally to expert declarations submitted in connection with summary judgment, the trial court maintains its role as gatekeeper to exclude speculative or irrelevant opinion. The court of appeal’s decision in *Sanchez v. Kern Emergency Medical Transportation Corp.*, 8 Cal.App.5th 146, 213 Cal.Rptr.3d 830 (2017), illustrates how rigorous this gatekeeper function can be. There, plaintiff who sustained injuries during a high school football game sued the company that provided ambulance services on the theory that the ambulance crew unreasonably delayed transporting plaintiff to the hospital. In opposing summary judgment, plaintiff submitted an expert declaration stating that the delay increased the damage caused by plaintiff’s brain injury. In granting summary judgment, the trial court sustained objections to much of the expert’s testimony, and the court of appeal affirmed. The court held that the trial court properly measured the expert’s opinion against the facts and medical literature set forth in the moving papers to conclude that the expert’s declaration did not set forth a sufficient foundation for his opinion. “In light of the facts and supporting medical literature set out in or accompanying the expert declarations submitted by defendant, . . . [plaintiff’s expert’s] declaration failed to demonstrate his opinions were based on matters that experts reasonably rely on in forming such opinions and failed to include a reasoned explanation connecting the factual predicates to the ultimate conclusion.”

Litigation—Trial—Jury Trial—
Waiver—Choices of Law

In 2005, the California Supreme Court held that a predispute waiver of jury trial in favor of a court trial was unenforceable. *Grafton Partners v. Superior Court* (2005) 36 Cal.4th 944. In *Rincon EV Realty LLC v. CP III Rincon Towers, Inc.*, 8 Cal.App.5th 1, 213 Cal.Rptr.3d 410, the court of appeal looked at this issue through the lens of a contract between sophisticated parties calling for New York law to be applied where such a waiver is enforceable. The court held New York did have a substantial connection to the transaction, but the court refused to enforce the waiver. It held that enforcement of

a contractual jury waiver not consistent with the methods specified by the Legislature would be contrary to fundamental California policy and that California had a greater interest than New York in determining the enforceability of the jury waiver. The court also confirmed the rule that denial of jury trial is a structural error, reversible without a showing of prejudice as to legal causes of action. The court refused to reverse the entire judgment, which also dealt with equitable claims for which a jury was not a matter of right.

Litigation—Trial—Five Year Rule Under CCP § 583.310 an action must be “brought to trial” within five years of the filing of a civil complaint. But what does “brought to trial” mean? Cases have interpreted it to mean that in an action tried to a jury, “the action is brought to trial when the jury is impaneled and sworn.” In *Stueve v. Nemer*, 7 Cal.App.5th 746, 213 Cal.Rptr.3d 159 (2017), the five year period expired after the panel of prospective jurors had been sworn, but before the final jury had been selected, sworn, and impaneled. Should the case be dismissed? No. The court held the action had been brought to trial when the panel of prospective jurors had been sworn; it was unnecessary to have completed jury selection and actually have impaneled the jury that would hear the trial.

Securities—Promissory Notes *People v. Black*, 8 Cal.App.5th 89, 214 Cal.Rptr.3d 402 (2017) provides a thorough discussion of the two tests used by California courts to determine when a promissory note is really a “security” for the purposes of the corporate securities laws. Here Black was charged with making false statements in the offer or sale of a security in connection with a land deal in which he had given a “lender” a promissory note in return for various promises, including real property in the project if it were developed. The People argued that the note was a security, pointing to the nature of the investment, the expectation of profit, the lack of control over the deal, and inadequate collateral necessary to repay the loan. Ultimately, however, the court concluded that “however problematic Black’s conduct in arranging and maintaining [the] investment, the promissory notes do not constitute securities within the meaning the Corporate Securities Law.”