



# Appellate reports

*Recent cases of interest to members of the plaintiff's bar, including Lhotka v. Geographic Expeditions, Inc. on opposing petitions to compel arbitration*

BY JEFFREY ISAAC EHRLICH

## **Catsouras v. Dep't of California Highway Patrol**

\_\_ Cal.App.4th \_\_, 2010 WL 337335 (4th Dist. Div. 3.)

### **Who needs to know about this case:**

Lawyers who sue public entities; people who manage police departments as an example of what should never, ever, be allowed to happen.

**Why it's important:** Establishes that police owe family of decedent a duty of care concerning use of photos of decedent, and that circulation by police of photos of decedent is outrageous conduct that will support a claim for intentional infliction of emotional distress.

**Synopsis:** Nicole Catsouras died in a traffic accident when she was 18 on October 31, 2006. Two CHP officers, Thomas O'Donnell and Aaron Reich, cordoned off the area and took control of her remains. They took photographs of her decapitated corpse. They were alleged to have e-mailed some of these photographs to members of their family and friends for shock value on Halloween. The photographs were then widely circulated on the internet. Worse, the photos evidently had some type of identifying information. As a result, Nicole's family was subject to taunting e-mails containing the horrific images.

The family filed a lawsuit against the CHP and O'Donnell and Reich alleging civil-rights violations (42 U.S.C. § 1983),

negligence, negligent and intentional infliction of emotional distress, invasion of privacy, tortious acts of public employees, vicarious liability of a public entity, and other claims. The trial court sustained the demurrers by Reich and O'Donnell and the CHP. The Court of Appeal reversed.

The Court held that Reich and O'Donnell could be held liable on claim of invasion of privacy, because "morbid and sensational eavesdropping or gossip serves no legitimate public interest and is not deserving of protection." The Court further held that, at the pleading stage, the allegation that the officers "directed their conduct" toward the plaintiffs with the intent to cause them to suffer emotional harm was sufficient to withstand demurrer. On the negligence claim, the court rejected a claim that the officers occupied a "special relationship" to the plaintiffs that would support a duty of care. But the court further found that, under the *Rowland v. Christian* factors, that the law should recognize a duty of care. Because the individual officers could be held liable, the CHP could be held vicariously liable, and that the CHP was not entitled to immunity under Government Code sections 815.2 and 8.21.6, because the officers' acts of transmitting the e-mails could not be considered part of their criminal investigation. The court further held that no action under 42 U.S.C. § 1983 would lie because the officers were entitled to qualified immunity.

## **Lhotka v. Geographic Expeditions, Inc.**

\_\_ Cal.App.4th \_\_, 2010 WL 325491 (4th Dist. Div. 3)

**Who needs to know about this case:** Lawyers who oppose petitions to compel arbitration

**Why it's important:** Good synthesis of factors that support a finding that an arbitration clause is unconscionable and therefore cannot be enforced.

**Synopsis:** Jason Lhotka died of altitude-related illness while climbing Mt. Kilimanjaro on an expedition arranged by Geographic Expeditions ("GeoEx"). His mother, Sandra Menefee, accompanied him on the trip. GeoEx's limitation of liability and release form, which both Menefee and Lhotka signed as a condition of participating in the expedition, released GeoEx of all liability related to the trip "to the maximum extent permitted by law," and also contained an arbitration provision, which required AAA arbitration conducted in San Francisco, and which limited the amount of recovery to the sum of the land and air cost of the trip. The provision also contained a provision requiring the claimant to pay GeoEx's defense costs and attorney's fees if he or she sued on a released claim.

Menefee sued GeoEx for wrongful death and on other claims. GeoEx moved to compel arbitration. The trial court refused to compel based on its finding that the arbitration agreement was uncon-



scionable. The Court of Appeal affirmed. The court found that the element of procedural unconscionability was present because the record showed that GeoEx led plaintiffs to understand that the terms were not negotiable, and would be the same at any travel company. The court rejected GeoEx's argument that contracts for recreational activities can never be unconscionably oppressive because a recreational customer always has the choice not to participate in the activity (unlike an agreement for medical care, or for employment). California law has already made clear that the focus of procedural unconscionability is the clause at issue, not the fact that other options were available in the marketplace.

The court also found the clause substantively unconscionable because of its limitation on the amount of relief that could be awarded, because it guaranteed that a claimant would never recover full recompense for their harm. The court found that, because there were multiple elements of the agreement that were unconscionable, they could not be severed; instead, the entire clause would not be enforced.

### **Mansouri v. Superior Court**

\_\_ Cal.App.4th \_\_, 2010 WL 324403 (3rd Dist.)

**Who needs to know about this case:** Lawyers seeking to enforce, or oppose enforcement of an arbitration agreement.

**Why it's important:** Holds that the California Arbitration Act requires, as a condition to enforcement of an arbitration agreement, that the moving party plead and prove that a demand for arbitration was made, and refused.

**Synopsis:** A dispute developed between Mansouri and her condominium association after she remodeled her condo unit's patio. The association obtained a court order compelling arbitration under a provision contained in the association's CC&Rs. The trial court enforced the petition, and awarded the association fees for the expense of compelling arbitration. Mansouri petitioned for a writ, which was

granted. The court held that although the arbitration clause was enforceable, and not unconscionable, a party seeking to compel arbitration under the California Arbitration Act, section 1281.2 of the Code of Civil Procedure, must establish that it demanded arbitration under the parties' arbitration agreement and that the other party refused to arbitrate under the agreement before it is entitled to an order granting a petition to compel arbitration. Because the association here failed to make that showing, its petition to compel arbitration should have been denied. The arbitration method specified in the arbitration agreement in the CC&Rs called for an arbitration before a three-arbitrator panel. Mansouri's rejection of the association's request that she arbitrate her claim before a single pre-selected arbitrator did not qualify as a rejection of an arbitration demanded under the terms of the parties' agreement.

### **Chavez v. City of Los Angeles**

\_\_ Cal.4th \_\_, 2010 WL 114941 (Cal. Supreme)

**Who needs to know about this case:** FEHA attorneys

**Why it's important:** Holds that Code of Civil Procedure section 1033, subd. (a) gives a trial court discretion to deny attorney fees to a plaintiff who prevails on a FEHA claim but recovers an amount that could have been recovered in a limited civil case.

**Synopsis:** Robert Chavez, an LAPD officer, filed an action against the LAPD for FEHA violations. The case was filed in federal court, litigated extensively, went up on appeal, was remanded, and ultimately ordered dismissed subject to being re-filed in state court, which Chavez did. After a five-day trial, the jury ruled in his favor, but awarded modest damages of \$1,500 in economic damages, and \$10,000 in damages for emotional distress. Chavez sought costs of \$13,144, and attorneys' fees of \$436,602, which he later amended to \$870,935. The trial court denied the motion and refused to award fees. The Court of Appeal re-

versed, finding that section 1033, subd. (a) did not apply in FEHA cases. The Supreme Court granted review, and reversed the Court of Appeal.

California courts have identified factors that a trial court should ordinarily consider in exercising its discretion under section 1033, subd. (a), including the amount of damages the plaintiff reasonably and in good faith could have expected to recover and the total amount of costs that the plaintiff incurred. The Court held that there was no irreconcilable conflict between section 1033, subd. (a) and the FEHA's attorney's fee provision. While a trial court cannot deny fees under section 1033, subd. (a) merely because the plaintiff failed to recover damages in excess of \$25,000, it could deny them if it was firmly persuaded that the plaintiff's attorney had no reasonable basis to anticipate a FEHA damages award in excess of the amount recoverable in a limited civil case, and also that the action could have been fairly and effectively litigated as a limited civil case.

### **Mahach-Watkins v. Depee**

\_\_ F.3d \_\_, 2010 WL 337328 (9th Cir.)

**Who needs to know about this case:** Civil Rights lawyers

**Why it's important:** Holds that plaintiff who wins nominal damages in federal civil-rights action for excessive force by police is entitled to an award of attorney's fees.

**Synopsis:** CHP Officer Larry Depee shot and killed John Watkins during a struggle on the night of December 9, 2003. Watkins was unemployed and had a long history of schizophrenia, accompanied by drug and alcohol abuse. He survived on Social Security payments and support from his mother. Depee had stopped Watkins for riding his bicycle the wrong way in the roadway without lights. Watkins ran away, and Depee chased him. They struggled. At some point during the fight, Watkins said he needed to go home and take his medicine. Depee claimed that Watkins wrested his flashlight from him and swung it at him. After the sec-



ond swing, Depee drew his gun and shot Watkins several times.

Watkins' mother sued Depee for wrongful death and for violation of 42 U.S.C. § 1983 for use of excessive force in violation of Watkins's civil rights. The jury ruled against her on the wrongful-death claim, and awarded nominal damages of \$1 each on the two 1983 claims. The trial court awarded her attorney's fees of \$136,687. The Ninth Circuit affirmed.

There are three factors a district court should consider in determining whether a plaintiff succeeded in some way beyond the judgment for nominal damages. First, the court should consider the difference between the amount recovered and the damages sought, which in most nominal damages cases will disfavor an award of fees. Second, the court should consider the significance of the legal issue on which the plaintiff claims to have prevailed. Third, the court should consider whether the plaintiff accomplished some public goal.

On the first factor, the district court had held that, under California law, compensatory damages were not available in a section 1983 wrongful-death claim, and directed the jury that the most it could award was one dollar. Hence, the record did not show an absence of actual harm; only that it was not recoverable. On the second factor, the court stated, that, "We have difficulty imagining a more important issue than the legality of state-sanctioned force resulting in death. It is

obviously of supreme importance to anyone who might be subject to such force. But it is also of great importance to a law enforcement officer who is placed in a situation where deadly force may be appropriate. We therefore conclude that the second factor supports the award of attorney's fees." On the third factor, the court found that the lawsuit did serve a public goal of deterring Depee, and those who establish and implement official policies, from engaging in further unconstitutional conduct

### **Stein v. York**

\_\_ Cal.App.4th \_\_, 2010 WL 256504 (4th Dist., Div. 3.)

**Who needs to know about this case:** Lawyers seeking default judgments and those seeking to set them aside.

**Why it's important:** Confirms that a default judgment entered for an amount in excess of what is pleaded in the complaint is void.

**Synopsis:** Attorney Michael York represented Ruth Stein in an unsuccessful personal-injury action. Stein then sued York for legal malpractice. Her complaint did not specify the amount of damages sought. York never filed an answer, but the parties did engage in the exchange of discovery. York eventually filed a request for entry of default, specifying a dollar amount requested of "0.00." Stein offered to set aside the default if York would file an answer. He declined. At the default prove-up, the trial court noted that the complaint did not

specify the amount sought. Stein's counsel requested \$2.61 million. The trial court asked for briefing on whether a statement of damages was required, and Stein argued that it was not because her action was not for personal injuries. The trial court entered a default judgment for \$2.65 million. York's motion to modify the amount of damages was denied. The Court of Appeal reversed. Section 580, subd. (a) of the Code of Civil Procedure provides that the relief granted to the plaintiff, if there is no answer, cannot exceed the amount demanded in the complaint. Defendants have the right to elect not to answer a complaint. Section 580 ensures that a non-answering defendant is not subjected to open-ended liability, and must be strictly construed. Constructive notice of potential liability is not sufficient to satisfy section 580, and York's participation in discovery and other pretrial procedures did not waive the protections of section 580. Since the complaint did not specify the amount of damages sought, the default judgment was void.



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