



# Appellate Reports and Cases in Brief

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

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## ***Collins v. Sutter Memorial Hospital***

(2011) \_\_ Cal.App.4th \_\_ (3d Dist.)

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

Lawyers seeking (or opposing) new-trial motions, particularly after a motion for summary judgment

**Why it's important:** Clarifies the timing and procedures governing new-trial motions.

**Synopsis:** Plaintiff sued Sutter for medical malpractice. Sutter sought and obtained summary judgment, and served a "notice of entry of judgment" upon entry of the order granting summary judgment – but before entry of the actual judgment. Plaintiff filed a notice of intent to move for new trial 15 days after service of the notice. The notice of intent cited only a single statutory ground, that the "decision is 'against law' as provided by Code of Civil Procedure section 657, subd. 6."

Judgment was entered on the summary judgment after the notice of intent to move for new trial, and notice of entry of judgment was entered by the defendant. Plaintiff's memorandum of points and authorities substantively argued that the trial court's order was legally erroneous. Defendants' opposition to the motion addressed this ground. Plaintiff's reply expressly cited "error of law" under

section 657, subd. (7) as a basis for the motion.

The trial court heard argument on the motion on November 9, 2009. At the hearing, plaintiff's counsel advised the court that because the notice of intent to move for new trial had been filed on September 25, 2009, the last day for the court to rule on the motion was 60 days thereafter, November 24, 2009. Sutter did not dispute this, nor did it advise the court that, in its view, the last day to rule was the day of the hearing, November 9. The trial court granted the motion by minute order dated November 18, 2009. It directed plaintiff's counsel to prepare a formal order. The next day, plaintiff's counsel advised the court by letter that the court itself was required to prepare the new-trial order. The letter again advised the court that the last day to issue the order was November 24, 2009. Sutter did not respond to the letter. The court issued an order granting the motion on November 24, 2009, stating that it was granted because the summary judgment resulted from an "error in law" under Code of Civil Procedure section 657, subd. 7.

On appeal, Sutter argued that the motion was procedurally flawed because it was granted on a ground (legal error) that was not stated in the notice of intent, which referenced only "decision against law), and because the court granted the motion more than 60 days after Sutter

contended it lost jurisdiction to do so. The appellate court rejected these arguments.

First, the court rejected Sutter's claim that its "notice of entry" concerning the summary-judgment order qualifies as a notice of entry of judgment that would trigger the 60-day period to rule on a new-trial motion. The fact that Sutter erroneously referred to the court's order granting summary judgment as a "judgment" did not make it so. The entry of the order is, however, sufficient to constitute a "rendition of a judgment" necessary to prevent a new-trial motion from being fatally premature. This is because a new-trial motion cannot be made until there is an adverse decision resulting in an aggrieved party. Hence, no intent to file a new-trial motion can be made until there is a dispositive ruling in the case, and a premature notice is void.

The order granting the summary judgment was the "rendition of judgment" that allowed plaintiff to file a notice of intent to file a new trial motion under section 659, subd. (1) "before the entry of judgment" without the notice being premature.

When notice of entry of judgment is served after the notice of intent to move for a new trial, it is the notice of intent itself that triggers the 60-day clock; not the notice of entry of judgment. Here, plaintiff filed a timely notice of intent on



September 25, 2009. The orders of November 18 and November 24 were within the 60-day period, and were timely.

The court also rejected the contention that the motion was granted on a ground not specified in the notice of intent. It explained that, although the ground stated in the notice was not the one plaintiff actually relied on, there was no basis for reversal because Sutter was fully aware as a result of plaintiff's memorandum of points and authorities that he was seeking a new trial based on "legal error" under section 659, subd. (7) and not "against law" under section 659, subd. (6). Sutter responded fully to plaintiff's substantive arguments, and could not show what it would have done differently if the ground stated in the notice had been correct. Since Sutter's opposition to the motion shows that it understood the argument that plaintiff was making, and that it responded fully to that argument, the record shows that Sutter received due notice of the basis for the motion, and therefore no basis to reverse it on that basis.

### **Kimes v. Grosser**

(2011) \_\_ Cal.App.4th \_\_ (1st Dist. Div. 1)

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

Lawyers for plaintiffs whose pets have been wrongfully injured.

**Why it's important:** Holds that a pet owner can recover the cost of care attributable to a wrongful injury to their pet, and punitive damages if the injury is found to be intentional. Plaintiffs need not prove that their pet had a market value.

**Synopsis:** Plaintiff Kimes claimed that Charles or Joseph Grosser shot Kimes's pet cat, Pumkin, with a pellet gun while Pumkin was perched on a fence between the Kimes and Grosser properties. The emergency surgery to save Pumkin's life cost \$6,000. Pumkin survived but was left partially paralyzed. Kimes claimed that he incurred an additional \$30,000 in expenses in caring for the cat because of the injury. He sued the Grossers to recover these sums, and for punitive damages.

The trial court granted defendants' motion in limine to preclude admission of evidence of his expenses in caring for Pumkin, a cat they described as "an adopted stray of very low economic value" on the theory that their liability was limited to the amount that the shooting reduced Pumkin's fair-market value. After the trial court granted the motion, plaintiff refused to proceed, effectively conceding that Pumkin had no fair-market value. Kimes appealed from the judgment of dismissal entered on his failure to prosecute. Reversed.

Pets are considered the personal property of their owners, and CACI No. 3903J addresses the damages that can be recovered for injury to personal property. It states that the owner is entitled to recover the lesser of (1) the diminution of the property's market value; or (2) the reasonable cost of repairing the property. But the total costs of repair cannot exceed the pre-injury market value. In *McMahon v. Craig* (2009) 176 Cal.App.4th 1502, the court held that a pet owner could not recover damages for the loss of her dog's companionship under Civil Code section 3355, which provides that where certain property has peculiar value to a person recovering damages for deprivation thereof or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring liability, or against a malicious wrongdoer. The *McMahon* court held that the peculiar value under section 3355 referred to a property's unique economic value; not its sentimental or emotional value.

The court held that CACI 3903J has no application to prevent the proof of out-of-pocket costs incurred to save a pet's life. Rules for recovery of damages for injury to property having no market value were set in *Willard v. Valley Gas & Fuel Co.* (1915) 171 Cal. 9, which allowed a plaintiff to testify about the value to him of the loss of certain scrap books in his home, which he had accumulated and used in his occupation as a writer. The court held that when property has value, but not market value, the rule cannot be that the

owner receives no recovery. In such cases, the property's value "must be ascertained in some other rational way, and from such elements as are attainable." Here, Kimes was not plucking a number out of the air for sentimental value of Pumkin; he was seeking to present evidence of the costs incurred for Pumkin's care and treatment after the shooting – a rational way of demonstrating a measure of damages apart from the cat's market value.

In addition to the reasonable costs of care occasioned by the shooting, Kimes was permitted to recover punitive damages on a showing that the shooting was willful. Civil Code section 3340 permits the recovery of punitive damages "for wrongful injuries to animals being subjects of property, committed willfully or by gross negligence, in disregard of humanity."

### **Short(er) takes**

***FEHA claims for harassment and retaliation; intentional infliction of emotional distress.* Kelly v. The Conco Companies** (2011) \_\_ Cal.App.4th \_\_ (1st Dist. Div. 5.)

Patrick Kelly was an apprentice ironworker employed by Conco, a large concrete-construction company. Two days after Kelly began work at Conco, his supervisor, Seaman, became angry at him and unleashed an extended tirade of vulgar, sexually suggestive insults. Specifically, Seaman repeatedly stated that he would have anal sex with Kelly. The two men squared off, as if to fight, but ultimately did not come to blows. Kelly reported the incident to Conco management, who then spoke to Seaman, and made the men shake hands. After the incident, wherever Kelly worked his co-workers referred to him as a "bitch" and a "snitch" and threatened to beat him up after work. Kelly repeatedly reported the incidents to Conco management. Kelly was suspended from the union for an unauthorized absence and then dropped from the apprentice program. When he tried to find work with other employers than Conco, he was told he could not get work because of what happened at Conco. He sued Conco for sexual harassment and



retaliation in violation of the California Fair Employment and Housing Act (“FEHA”). He also sued Seaman for intentional infliction of emotional distress. The trial court granted summary judgment, and the Court of Appeal affirmed on all claims except for retaliation.

The Court held that Kelly failed to raise a triable issue of fact on his sexual-harassment claim because there was no showing that Seaman actually had some sexual interest in Kelly, and was not simply verbally abusing him with sexually-derogatory language. The court held, however, that an employer may be found to have engaged in an adverse employment action, and thus liable for retaliation under Government Code section 12940(h) — by permitting fellow employees to punish Kelly for invoking his rights when he reported the incident with Seaman and later retaliatory conduct by co-workers. It held Kelly raised a triable issue of fact on whether Conco knew or should have known of coworker retaliatory conduct and either participated and encouraged the conduct, or failed to take reasonable actions to end the retaliatory conduct.

It affirmed the dismissal of Kelly’s infliction of emotional distress claim against Seaman, finding that there was no showing that the emotional distress that Kelly ultimately suffered from being ostracized and retaliated against was caused by Seaman’s original tirade.

**Wrongful death; survival actions; abatement; proper plaintiff.** *Adams v. Superior Court (Centinella Freeman Regional Medical Center)* (2011) \_\_ Cal.App.4th \_\_ (2d Dist. Div. 5.)

Plaintiff, Nancilee Adams, sued various defendants for elder abuse, negligence and wrongful death. She asserted claims as the Administrator of the Estate of James C. Adams. In bringing the action she admitted that she did not represent the decedent’s heirs. Defendants moved under sections 377.60 and 382 to abate the action, arguing that it should not proceed unless all decedent’s heirs were joined in the wrongful-death claims, either as plaintiffs or involuntary plaintiffs.

Defendants argued that the estate’s survival claims should also be abated because they were inextricably intertwined with the wrongful-death claims. The trial court granted the motion. The Court of Appeal granted plaintiff’s writ petition. The court held that, although the general rule is that all wrongful-death heirs must be joined in the wrongful-death action, this rule does not apply if the wrongful-death plaintiff is the decedent’s personal representative. Plaintiff was permitted to bring the action as the decedent’s personal representative, and would essentially act as a trustee of the proceeds recovered for the heirs. It was therefore error for the trial court to abate the action. There was accordingly no basis to abate the survival claims either.

**Labor Code section 226.7, remedies for failure to provide breaks and meal periods.** *United Parcel Service v. Superior Court (Allen)* (2011) \_ Cal.App.4th \_\_ (2d Dist. Div. 8.)

Labor Code section 226.7 requires an employer who fails to provide an employee with a meal or rest period to pay that employee an additional hour of pay “for each work day that the meal or rest period is not provided.” The issue presented is whether, if the employer fails to provide both a meal and rest period in a particular day, is it liable for one additional hourly payment, or two, under section 226.7. The trial court held that the statute should be construed to require two payments. Affirmed. The disjunctive statement in section 226.7, referring to “meal or rest period” signals that there may be two separate violations with a corresponding remedy of one additional hour of pay for each violation per day. But the reference in the statute “for each work day” suggests a single payment per work day, regardless of the violation. The statute is ambiguous, so the court looks to extrinsic sources, such as its legislative history, to determine statutory intent. The court determined that the statute’s history was not completely clear, but it does suggest that the Industrial Wage Commission’s wage orders consistently provided a separate remedy for violations of the meal-period requirements and rest-period require-

ments. If the Legislature believed that the formulation in the wage orders did not accurately reflect the statutory intent, it could have amended the statute to clarify it, but never did so. The court also determined that allowing one premium payment for each type of violation accords with and furthers the public policy underlying the meal and rest-break mandates. The court accordingly determined that it was more reasonable to construe the statute as allowing up to two additional penalty hours per day, one for failure to provide a meal break, and one for failure to provide a rest break.

**Disqualification; excessive review of privileged documents.** *Clark v. Superior Court (Verisign, Inc.)* (2011) \_\_ Cal.App.4th \_\_ (4th Dist., Div. 1.)

Clark worked for Verisign as its chief administrative officer. In conjunction with his employment he signed a nondisclosure agreement, which included a provision precluding him from removing any privileged or confidential information from Verisign, and agreeing to return such information on the termination of his employment. Clark’s employment was terminated in December 2008, and in January 2009, he filed suit against Verisign, represented by the law firm of Higgs, Fletcher, and Mack (“Higgs”). During the litigation Verisign determined, based on statements made by Higgs in correspondence that it had certain privileged documents, that Clark had taken in violation of the nondisclosure agreement. Verisign repeatedly demanded that Higgs and Clark return all privileged documents. Higgs responded that it and Clark had done nothing improper, and did not return any documents.

Clark’s response to a request for production of documents included several privileged documents, including several stamped “attorney-client privilege” or “highly confidential.” Higgs continued to refuse Verisign’s demands that it return all privileged documents and destroy all copies. Verisign then moved to disqualify Higgs. Its motion was granted, and Higgs sought a writ. The court granted an order



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to show cause, and ultimately denied the petition.

*State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644 (*State Fund*) held that an attorney who receives privileged documents without the holder of the privilege having waived it, must refrain from examining the documents more than essential to determine that they are privileged, and notify the sender that he or she possesses material that appears to be privileged. *Rico v. Mitsubishi Motors*

*Corp.* (2007) 42 Cal.4th 807 (*Rico*) extended this rule to the possession of material within the work-product privilege.

The trial court's finding that Higgs failed to comply with the standards established by *Rico* and *State Fund* was supported by substantial evidence. The disputed documents were privileged, and Higgs reviewed the materials excessively and failed to notify Verisign that it possessed the documents.



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