Civil Case Update

CCCBA MCLE Spectacular 2024

Justice Mark Simons, California Court of Appeal, First Dist., Div. 5
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Case Name	Topic	Description
1. *In re Marriage of Lietz* (2024) 99 Cal.App.5th 664 (Fourth Dist., Div. 3).	*Sanchez*	In *People v. Sanchez* (2016) 63 Cal.4th 655, the California Supreme Court ruled that when it comes to case-specific facts, experts must satisfy hearsay requirements before they can give their opinions resting on such facts. In the first published *civil* case applying *Sanchez*, the Court of Appeal held that: (1) the proffered testimony of wife's appraisal expert that lot size where marital home was situated was 10,400 square feet and not 9,000 square feet indicated in county property records was inadmissible hearsay; and (2) the district court did not abuse its discretion in excluding expert's proffered testimony based on city plat map that purportedly would have proven with "basic arithmetic" and "simple geometry" that lot size was larger than 9,000 square feet indicated in county records. Affirmed.

2. *Gorobets v. Jaguar Land Rover North America, LLC* (2024) 2024 WL 4456864 (Second Dist., Div. 2).	CCP 998 Offers	Code of Civil Procedure section 998 is designed to "encourage both the making and the acceptance of reasonable settlement offers" prior to trial. (*Scott Co. of Cal. v. Blount, Inc.* (1999) 20 Cal.4th 1103, 1114.) To be effective, a 998 offer must, among other things, be "sufficiently certain," "specific" or "definite" in its terms and conditions. (*Fassberg Construction Co. v. Housing Authority of City of Los Angeles* (2007) 152 Cal.App.4th 720, 764-765.) This appeal presents two questions: (1) Is a 998 offer sufficiently certain if it consists of two offers made at the same time to the same party and leaves it to the offeree which offer to accept; and (2) Is a 998 offer sufficiently certain if it promises to pay the offeree for the categories of damages to which the offeree is statutorily entitled (plus some categories to which it is not), agrees to immediately pay any undisputed amounts for those categories, and shunts any disputed amounts to a third-party mechanism for resolution? The answer to both questions is "No." Although the offeror in this case made two simultaneous offers (which would render both of them ineffective), only one of those two offers was *itself* invalid; as a result, the offeror's 998 offer in the end consisted of a single valid offer such that the trial court's orders and resulting amended judgment were correct in limiting the offeree to pre-offer costs and attorney fees and awarding the offeror post-offer costs based on the offeree's failure to obtain a more favorable award at trial than the single, valid offer it had received. Affirmed.
3. *Greisman v. FCA US, LLC* (2024) 103 Cal.App.5th 1310 (First Dist., Div. 2).	CCP 664.6 Stipulated Settlements	Code of Civil Procedure section 664.6(a) states: "If parties to pending litigation stipulate, in a writing signed by the parties outside of the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." Must a *party* personally sign, or orally stipulate in court, to settle a case? Held: No. An oral stipulation by both *attorneys* to settle the case (including one made by Zoom), is sufficient.

4. *People v. Tidd* (2024) 104 Cal.App.5th 772 (First Dist. Div. 3).	*Sargon Update*	Following denial of his pretrial motion to exclude expert testimony of firearms toolmark analyst, defendant was convicted of assault with a semiautomatic firearm and discharging a firearm from a motor vehicle. Defendant appealed. Held: (1) prosecution did not provide adequate foundation to support reliability of firearms toolmark analyst's expert opinion testimony that bullet case found at scene of shooting matched a test cartridge fired from defendant's gun; and (2) trial court's error in admitting the challenged expert testimony of the firearms toolmark analyst was prejudicial. Reversed.
5. *Onglyza Product Cases* (2023) 90 Cal.App.5th 776 (First Dist., Div. 4).	*Sargon Update*	Users of diabetes medications brought action against manufacturers and distributors of medications for personal injuries. The superior court granted defendants' motion to exclude users' general causation expert, granted summary judgment in favor of defendants, and denied users' request to enlarge discovery deadlines to identify new causation expert. Users appealed. Held: (1) general causation opinion of proffered expert, who was cardiologist, was not based on reliable methodology, precluding its admission; (2) proffered expert opinion of biostatistician that data showed association between medication and significant increase in risk of hospitalization for heart failure was insufficient to raise triable issue as to causation; (3) whether a diabetes medication was capable of causing heart failure was required to be proven by expert testimony; and (4) trial court acted within its discretion in denying users' request to enlarge discovery deadlines to designate new causation expert.

		Affirmed.
6. *Garner v. BNSF Railway Co*. (2024) 98 Cal.App.5th 660 (Fourth Dist., Div. 1).	*Sargon Update*	Son brought survival and wrongful death action under Federal Employers' Liability Act (FELA) against father's former employer, alleging that father's occupational exposure to toxic levels of numerous materials during four decades as trainman for employer's railroad, was a cause of father's development of non-Hodgkin's lymphoma after his retirement. After denial of employer's MSJ, the superior court granted employer's motions in limine to exclude opinions of son's experts on liability and causation, and dismissed the action. Son appealed. Held: (1) epidemiological or other scientific studies that had already stated that diesel exhaust and its constituents were more likely than not a cause of non-Hodgkin's lymphoma were not necessary for sufficient reliability of an expert's opinion on general causation; (2) it was appropriate for another causation expert to rely on all-cancer epidemiological studies; and (3) causation experts were not required to identify exact dose of diesel exhaust at which exposure became toxic. Reversed and remanded with instructions.
7. *Williams v. J-M Manufacturing Company, Inc*. (2024) 102 Cal.App.5th 250 (First Dist., Div. 2).	*Corporate Witness Testimony*	Worker's brother who had been diagnosed with cancer but who had not lived with worker brought personal injury action against supplier based on brother's secondary exposure to supplier's asbestos-cement pipe, alleging strict liability based on theories of design defect and failure to warn. The superior court denied supplier's motion for directed verdict, and following a jury verdict in favor of brother, denied supplier's JNOV motion. Supplier appealed. Held:

		(1) As a matter of first impression, limitation on employers' and premises owners' duty of ordinary care to prevent take-home exposure to asbestos, which was limited to worker's household members for purposes of negligence claims, did not foreclose strict products liability cause of action; (2) trial court did not abuse its discretion in excluding lay witness testimony lacking personal knowledge, and corporate representatives/persons most knowledgeable are, absent other circumstances, still lay witnesses; and (3) with respect to the official records exception, Evid. Code § 1280, trial courts can, in the absence of otherwise sufficient indications of a document's identity and mode of preparation, *still require* actual witness testimony to establish the document's trustworthiness; and (4) unlike the official records exception, which gives courts latitude in determining whether a document's trustworthiness is established (such as by method and timing of preparation, etc.); the business records exception, Evid. Code § 1271, requires witness testimony as to identity of the business record and its mode of preparation in every instance (including all separate parts/sections of the purported business record). Affirmed.
8. *Lynch v. Peter & Associates* (2024) 104 Cal.App.5th 1181 (4th Dist. Div. 3).	*Duty of Care; Evidence*	Property owner brought action against soils engineering firm for professional negligence and nuisance, alleging that firm performed very cursory geotechnical inspection of excavated footing trench on her property for home remodeling project. The superior court granted firm's motion for summary judgment. Property owner appealed. Held: (1) firm failed to meet its burden to show that nuisance claim had no merit; (2) firm owed property owner a duty of care to perform its inspection with skill expected of professional in its position, even though firm was not in contractual privity with property owner;

		(3) trial court's decision to raise on its own the ground that nuisance claim was identical to or duplicative of professional negligence claim raised serious due process concerns, and thus trial court was required to provide opportunity to property owner to respond to that ground; (4) trial court's decision sustaining firm's objections to property owner's and her expert's declarations constituted impermissible blanket ruling on objections; (5) averment in property owner's declaration stating that on certain date property owner and her husband retained firm through their general contractor to provide geotechnical services and to inspect trenches was relevant and thus could be considered by trial court; (6) such averment did not lack foundation; and (7) such averment did not constitute hearsay. Reversed and remanded with instructions.
9. *Quach v. California Commerce Club Inc.* (2024) 16 Cal.5th 562.	Arbitration Enforcement	Former employee brought action against former employer for wrongful termination, age discrimination, retaliation, and harassment. After approximately 13 months of discovery, employer petitioned to compel arbitration, asserting that it had recently located arbitration agreement signed by employee while he was employed. The superior court found that employer waived its right to arbitration and denied motion. The Court of Appeal reversed and remanded. The Supreme Court granted review and held: (1) court considering waiver of right to arbitration should treat the arbitration agreement as it would any other contract, without applying any special rules based on a policy favoring arbitration; (2) it was "highly probable" that employer was aware of its right to compel arbitration; and

		(3) evidence demonstrated employer's intentional abandonment of the right to arbitrate employee's claims, and thus employer waived that right. Reversed and remanded.
10. *Naranjo v. Spectrum Security Services* (2024) 15 Cal.5th 1056.	Good Faith Belief & Labor Code Penalties	Former employee brought putative class action against former employer, alleging Labor Code violations re meal break requirements and premium pay obligations. The superior court certified class, directed verdict for class on meal break claim with respect to portion of class period before former employer had obtained written consent to its on-duty meal break policy, entered judgment following jury verdict in favor of former employer on meal-break claims with respect to portion of class period after former employer had obtained written consent, and following bench trial, awarded wage statement penalties and attorney fees to class. Parties appealed. The Court of Appeal affirmed in part and reversed in part and former employee petitioned for review. The Supreme Court, in 13 Cal.5th 93, affirmed in part, reversed in part, and remanded. On remand, the Court of Appeal, affirmed in part and reversed in part with directions. Former employee petitioned for review *again*, which was granted. The Supreme Court held: (1) former employer's objectively reasonable, good faith, albeit mistaken, belief that it provided employees with adequate wage statements precluded award of civil penalties for a "knowing and intentional" failure to report the same unpaid wages, or any other required information, on a wage statement; (2) former employer had a reasonable, good faith basis for believing it was complying with California wage and hour law, and thus could not be held liable for civil penalties; and (3) former employee's claims did not turn on content of wage orders or unfamiliarity with the wage orders as professed by former employer's vice president. Affirmed.

11. *Z.V. v. Cheryl W*. (2023) 97 Cal.App.5th 448 (First Dist., Div. 3).	Time to Appeal	Mother filed request to vacate order granting paternal grandmother visitation, and grandmother filed request for temporary emergency orders seeking to enforce visitation. Following long cause hearing, the superior court denied mother's request, modified existing visitation order to allow grandmother visitation, and denied mother's motions to vacate or for new trial. Mother appealed. Held: (1) mother's notices of motion to vacate judgment were not premature or otherwise invalid, so extended time to appeal under CRC 8.108 was available; but (2) mother's notice of appeal was filed too late even under extended time of CRC 8.108 because for motions to vacate, the "earliest of" includes "90 days after the first notice of intention to move—or motion—is filed"; and mother did not meet that deadline calculated by the *first* of multiple notices of intent she had filed. Appeal dismissed.
12. *San Antonio Regional Hospital v. Superior Court*, (2024) 102 Cal.App.5th 346 (Fourth Dist., Div. 2).	Standard of Care Proof Limitations	Health & Safety Code section 1799.110(c): (c) In any action for damages involving a claim of negligence against a physician and surgeon providing emergency medical coverage for a general acute care hospital emergency department, the court shall admit expert medical testimony only from physicians and surgeons who have had substantial professional experience within the last five years while assigned to provide emergency medical coverage in a general acute care hospital emergency department. For purposes of this section, "substantial professional experience" shall be determined by the custom and practice of the manner in which emergency medical coverage is provided in general acute care hospital emergency departments in the same or similar localities where the alleged negligence occurred. *San Antonio Regional Hospital*: Patient's father brought medical malpractice action against hospital after patient died while being treated for a traumatic brain injury. The superior court denied hospital's motion for summary judgment. Hospital petitioned for writ of mandate directing the trial court to grant it summary judgment.

		Held: (1) nurse was not competent to testify as an expert witness on applicable standard of care; and (2) nurse was not competent to testify as an expert witness on causation. Writ petition granted.
13. *Medallion Film LLC v. Loeb & Loeb* (2024) 100 Cal.App.5th 1272 (Second Dist., Div. 8).	Anti-SLAPP	Financial consultants brought action against law firm asserting claims for fraud, aiding and abetting fraud, and negligent misrepresentation arising from alleged false statements attorney made in letter denying his client's connection to film distributor that allegedly owed consultants money pursuant to agreement for consultants to help it obtain funding from credit facility. The superior court granted firm's special motion to strike under the anti-SLAPP statute, CCP section 425.16. Consultants appealed. Held: (1) attorney's letter was not protected conduct under the anti-SLAPP statute; (2) conduct underlying aiding and abetting fraud claim was not protected by anti-SLAPP statute; (3) letter was not protected by litigation privilege; (4) claims were not barred by statute of limitations; and (5) there was no absence of reasonable reliance as would bar claims. Vacated; reversed and remanded with directions.

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Civil (mostly) Appellate Update

Justice Mark Simons, California Court of Appeal, First Dist., Div. 5
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People v. Sanchez **(2016) 63 Cal.4th 665**

- **General vs. Case-Specific information**
- **6th Amendment and Hearsay**
- **Rejects "Not in for truth"**

Sanchez:
***In re Marriage of Lietz* (2024) 99 Cal.App.5th 664**

First “true” civil case

Gorobets v. Jaguar Land Rover North America, LLC **(Oct. 10, 2024) 2024 WL 4456864 (Second Dist., Div. 2).**

(1) Is a 998 offer sufficiently certain if it consists of two offers made at the same time to the same party and leaves it to the offeree which offer to accept; and

(2) Is a 998 offer sufficiently certain if it promises to pay the offeree for the categories of damages to which the offeree is statutorily entitled (plus some categories to which it is not), agrees to immediately pay any undisputed amounts for those categories, and shunts any disputed amounts to a third-party mechanism for resolution?

The answer to both questions is “No.”

***Greisman v. FCA US, LLC* (2024) 103 Cal.App.5th 1310 (First Dist., Div. 2).**

"If parties to pending litigation stipulate, in a writing signed by the parties outside of the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." (664.6, subd. (a).)

Must a party personally sign, or orally stipulate in court, to settle a case?

Held: No. An oral stipulation by both attorneys to settle the case (including one made by Zoom), is sufficient.

***Greisman v. FCA US, LLC* (2024) 103 Cal.App.5th 1310 (First Dist., Div. 2).**

"If parties to pending litigation stipulate, in a writing signed by the parties outside of the presence of the court or orally before the court, for settlement of the case, or part thereof, the court, upon motion, may enter judgment pursuant to the terms of the settlement." (664.6, subd. (a).)

"For purposes of this section, a writing is signed by a party if it is signed by any of the following: [¶] (1) The party. [¶] (2) An attorney who represents the party. [¶] (3) If the party is an insurer, an agent who is authorized in writing by the insurer to sign on the insurer's behalf." (664.6, subd. (b).)

Why not *expressio unius est exclusion alterius*?

***Sargon Enterprises v. USC* (2012) 55 Cal.4th 747**

- **Gatekeeper: Examine Expert's Data and <u>Analysis</u>**
- **Analytical Gap: Data and opinion**
- **Speculation or Faulty Reasoning**
- **The "better reasoned" or "most reliable" opinion (at 772)**

Sargon:
***People v. Tidd* (2024) 104 Cal.App.5th 772**

Relationship between *Kelly* and *Sargon*

People v. Azcona (2020) 58 Cal.App.5th 504

Sargon:
***Onglyza Product Cases* (2023) 90 Cal.App.5th 776**

Sargon in MSJ

Court undertook close examination of expert opinion and its purported bases, ultimately ruling too great an analytic leap

Sargon:
***Garner v. BNSF Railway Co.* (2024) 98 Cal.App.5th 660**

A breach in *Sargon's* Wall?

Limits *Sargon*; deferential to experts; expert witnesses may extrapolate from whatever data is available, and opine even if there are few studies directly on point

***Williams v. J-M Manufacturing Company, Inc*. (2024) 102 Cal.App.5th 250 (First Dist., Div. 2).**

Plaintiff's brother worked with asbestos. Plaintiff saw him frequently, and won a jury verdict for asbestos-related disease he asserted came from his brother's work.

J-M argued that under *Kesner v. Superior Court* (2016) 1 Cal.5th 1132, employers and premises owners owe a duty of care to prevent secondary exposure to asbestos carried home by on-site workers, but only to members of a worker's household.

Court: *Kesner*'s negligence limits do not apply to strict liability.

***Williams v. J-M Manufacturing Company, Inc.* (2024) 102 Cal.App.5th 250 (First Dist., Div. 2).**

Various EBMUD reports, presentations, and documents related to EBMUD's purchase requirement contracts with CertainTeed and Manville for asbestos-cement pipe during the 1980s. "J-MM argued that [many of] these documents would have been authenticated by testimony from EBMUD employee Kelley Smith if he had been allowed to testify about matters outside his personal knowledge."

Ay, there's the rub. (Cf. *LAOSD Asbestos Cases* [aka *Ramirez v. Avon*] (2023) 87 Cal.App.5th 939, 947-948 [personal knowledge required for affirmative use of PMQ testimony].)

***Williams v. J-M Manufacturing Company, Inc.* (2024) 102 Cal.App.5th 250 (First Dist., Div. 2).**

Possible hearsay exceptions can be tough:

For official records exception (Evid. Code, § 1280), courts can require actual witness testimony to establish the document's trustworthiness, in the absence of otherwise sufficient indications of a document's identity and mode of preparation.

Unlike the official records exception, which gives courts latitude in determining whether a document's trustworthiness is established (such as by method and timing of preparation, etc.); the business records exception (Evid. Code, § 1271) requires witness testimony as to identity of the business record and its mode of preparation in every instance (including all separate parts/sections of the purported business record).

Lynch v. Peter & Associates (2024) 104 Cal.App.5th 1181 (4th Dist. Div. 3).

Soil engineering firm owed property owner a duty of care to perform its inspection with skill expected of professional in its position, *even though* firm was *not in contractual privity* with property owner.

"This case demonstrates the veracity of the California Supreme Court's observation that '[t]he declining significance of privity has found its way into construction law.'"

Trial court's decision to raise on its own the ground that nuisance claim was identical to or duplicative of professional negligence claim raised serious due process concerns, and thus trial court was required to provide opportunity to property owner to respond to that ground.

Lynch v. Peter & Associates (2024) 104 Cal.App.5th 1181 (4th Dist. Div. 3).

Trial court's decision sustaining firm's objections to property owner's and her expert's declarations constituted impermissible blanket ruling on objections.

Further, the objections were blanket, boilerplate, and wrong.

Example: objection on relevance, foundation, and hearsay to:

Averment in property owner's declaration stating that on certain date property owner and her husband retained firm through their general contractor to provide geotechnical services and to inspect trenches.

Definitely relevant; it neither lacked foundation nor was hearsay

Quach v. California Commerce Club Inc. (2024) 16 Cal.5th 562

(1) court considering waiver of right to arbitration should treat the arbitration agreement as it would any other contract, without applying any special rules based on a policy favoring arbitration (like prejudice to the other party, overruling *St. Agnes*);

(2) it was "highly probable" that employer was aware of its right to compel arbitration

(3) evidence demonstrated employer's intentional abandonment of the right to arbitrate employee's claims, and thus employer waived that right.

Naranjo v. Spectrum Security Services (2024) 15 Cal.5th 1056

(1) former employer's objectively reasonable, good faith, albeit mistaken, belief that it provided employees with adequate wage statements precluded award of civil penalties for a "knowing and intentional" failure to report the same unpaid wages, or any other required information, on a wage statement;

(2) former employer had a reasonable, good faith basis for believing it was complying with California wage and hour law, and thus could not be held liable for civil penalties; and

(3) former employee's claims did not turn on content of wage orders or unfamiliarity with the wage orders as professed by former employer's vice president.

***Z.V. v. Cheryl W.* (2023) 97 Cal.App.5th 448 (First Dist., Div. 3)**

Mother filed multiple motions re visitation, including to vacate or new trial. Appeal dismissed.

(1) mother's notices of motion to vacate judgment were not premature or otherwise invalid, so extended time to appeal under CRC 8.108 was available; but

(2) mother's notice of appeal was filed too late even under extended time of CRC 8.108 because for motions to vacate, the "earliest of" can include "90 days after the first notice of intention to move—or motion—is filed"; and mother did not meet that deadline calculated by the *first* of multiple notices of intent she filed.

San Antonio Regional Hospital v. Superior Court (2024) 102 Cal.App.5th 346; Who's qualified to opine on brain surgery?

Although "[q]ualifications other than a license to practice medicine may serve to qualify a witness to give a medical opinion," that was not enough here. "Nothing in [the nurse's] declaration establishes that her experience as a nurse anesthetist or trauma unit nurse gave her the specialized knowledge required to opine on the standard of care applicable to an intensive care unit neurosurgeon deciding whether a severe traumatic brain injury requires immediate surgical intervention, or whether that standard of care was breached."

***Medallion Film LLC v. Loeb & Loeb* (2024) 100 Cal.App.5th 1272 (Second Dist., Div. 8)**

SLAPP motion granted, then reversed on appeal for fraud claims in letter from attorney denying client's connection to recipient's debtor.

(1) attorney's letter was not protected conduct under the anti-SLAPP statute;

(2) conduct underlying aiding and abetting fraud claim was not protected by anti-SLAPP statute;

(3) letter was not protected by litigation privilege;

(4) claims were not barred by statute of limitations

(5) there was no absence of reasonable reliance as would bar claims.