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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

JOHN CHURCH, Plaintiff and Appellant, v. DANIEL O. JAMISON et al., Defendants and Respondents.	F048224 (Super. Ct. No. 04CECG01258) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Alan M. Simpson, Judge.

Motschiedler, Michaelides & Wishon and Russell K. Ryan for Plaintiff and Appellant.

McCormick, Barstow, Sheppard, Wayte & Carruth, Scott Harkless, Anil Pai and Marshall C. Whitney for Defendants and Respondents.

Baker, Manock & Jensen and Glenn J. Holder on behalf of Wilcox, Hokokian & Jackson and Keith Wilcox as Amici Curiae.

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*Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of the SUMMARY OF ISSUES AND CONCLUSIONS, and parts I.-VI. and VIII.A. of DISCUSSION.

John Church sued his former employer for breach of contract, misrepresentation, and various Labor Code violations. We will call that lawsuit, which is not on appeal here, the "employment case." The superior court in that case sustained a demurrer to the Labor Code claims on the ground they were barred by the applicable statute of limitations.

Subsequently, Church brought a second action, which is the subject of the current appeal and which we will call the "malpractice case." It is a suit for legal malpractice against the attorney who filed the lawsuit in the employment case, respondents Daniel O. Jamison and the Law Offices of Daniel O. Jamison.[1] Church alleged Jamison's failure to file the complaint in the employment case sooner resulted in Labor Code claims being time-barred. Jamison filed a motion for judgment on the pleadings in the malpractice case on the ground that he did not commit malpractice in the employment case because the Labor Code claims were either time-barred before he was retained or, alternatively, were not time-barred when he filed the complaint in that case. The latter of these alternate arguments directly contradicts the superior court's order sustaining the employer's demurrer to the Labor Code claims in the employment case.

In the malpractice case, the superior court granted Jamison's motion for judgment on the pleadings based on its conclusion that Jamison could not be held liable for legal malpractice because he had timely filed the complaint in the employment case. Thus, the superior court judge in the malpractice case disagreed with the superior court judge in the employment case. Church appeals the judgment in favor of Jamison in the malpractice case. The employment case is still pending, on the remaining claims of breach of contract and misrepresentation. The defendants in that case, Keith Wilcox and Wilcox, Hokokian & Jackson, have appeared here as amici curiae.

The judgment is reversed. We publish that portion of this opinion that addresses vested vacation because our analysis conflicts with the analysis adopted in *Sequeira v.*

[1] Further references to Jamison in the singular include both respondents.

Rincon-Vitova Insectaries, Inc. (1995) 32 Cal.App.4th 632 (*Sequeira*) and the position taken by California's Division of Labor Standards Enforcement (DLSE) regarding a "look-back" application of the statute of limitations.

SUMMARY OF ISSUES AND CONCLUSIONS[*]

The following summarizes the various questions presented in this case, which necessarily relate also to the employment case, and our conclusions.

Business Expense Reimbursement. First, when does an employee's claim under Labor Code section 2802 for reimbursement of business expenses accrue for statute of limitation purposes?[2] Answer: The date the employee incurs the particular expense. Second, which statute of limitations applies to claims for business expenses brought under Labor Code section 2802? Answer: The three-year limitations period applies because the employer's liability under Labor Code section 2802 for business expenditures is "a liability created by statute." (Code Civ. Proc., § 338, subd. (a).) Here, some of Church's claims under Labor Code section 2802 may have become time-barred after Church hired Jamison to represent him on August 13, 2001, and before Jamison filed the complaint in the employment case on April 30, 2002. Therefore, the allegations in the complaint for malpractice are sufficient to state a theory of recovery relating to time-barred Labor Code claims for business expense reimbursement.

Unpaid Wages. First, which statute of limitations applies to Church's Labor Code claims for unpaid wages? Answer: The two-year statute of limitations applicable to oral contracts. Second, when did the claims accrue for statute of limitations purposes? Answer: The date the Labor Code requires the wages to be paid. In this case, Labor Code section 204 required that the wages be paid twice each month—labor performed

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[*]See footnote, *ante*, page 1.

[2]Subdivision (a) of Labor Code section 2802 states: "An employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties, or of his or her obedience to the directions of the employer, even though unlawful, unless the employee, at the time of obeying the directions, believed them to be unlawful."

during the first 15 days of the month must be paid no later than the 26th of that month and wages from the last half of the month must be paid no later than the 10th of the following month. Third, do the facts alleged in the malpractice case support the possibility that the statute of limitations in the employment case may have been suspended under the doctrine of equitable estoppel? Answer: Yes. Thus, it is possible that some of Church's statutory claims for unpaid wages became untimely after Church retained Jamison and before Jamison filed the complaint in the employment case. The allegations in the malpractice case were sufficient to state this theory of recovery.

Vested Vacation. First, when does an employee's claim under Labor Code section 227.3[3] for payment of vested but unused vacation time accrue for statute of limitations purposes? Answer: The day the employee is terminated. Second, which statute of limitations applies to such a claim? Answer: We need not decide this issue because Church's malpractice case was filed within one year of the date of termination and is timely under any of the potential statutes of limitations. Third, does the statute of limitations apply a second time, but in reverse from the date of termination, to limit the employer's liability for vacation time to only that which vested within but not before that period? Answer: No. The creation of a look-back period that limits an employer's liability for vested vacation is contrary to the fundamental principles of law governing statutes of limitations and is contrary to the text of Labor Code section 227.3. Accordingly, Church's claim under Labor Code section 227.3 was not time-barred and, therefore, Jamison did not act negligently in handling it.

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[3]Labor Code section 227.3 states: "Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, all vested vacation shall be paid to him as wages at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness."

FACTS AND PROCEEDINGS

The facts stated here were taken from the pleadings in the malpractice case and documents subject to judicial notice, such as the pleadings and other documents filed in the employment case.

Church discussed the prospects of working for Wilcox, Hokokian & Jackson (WHJ), an accountancy corporation that maintains its principal place of business in Fresno County. Church alleges that Keith Wilcox and Rick Jackson represented to him that, if he moved from South Carolina to Fresno, he would be employed by WHJ on the following terms: (1) compensation at a rate of $8,500 per month, (2) termination only for good cause, (3) merit-based bonuses based on production, and (4) at the conclusion of one year of employment he would unconditionally become a shareholder in the corporation and share in its profits. In addition, Church and the corporation agreed that his compensation for the first year of employment would be deferred and considered his buy-in into WHJ, which would be considered paid at the end of his first year of employment. If Church did not want to purchase an ownership interest at the end of his first year, he would then be paid an amount equal to his salary for the first year.

Based on these and other terms, Church was employed by WHJ from May 1, 1998, through May 1, 2001, to provide auditing and health care consultancy services. In May 1999, Church and WHJ failed to reach an agreement for his purchase of an ownership interest in the corporation. Instead, they made a second oral agreement. This second agreement provided that (1) the deferred compensation from the first year would be treated as Church's purchase of an ownership interest in WHJ in May 2000, (2) the parties would agree to the final terms of Church's buy-in by the end of May 2000 with the deferred compensation being applied to the purchase price, (3) Church would immediately be paid the deferred compensation if no agreement was then reached on his purchase of an ownership interest in WHJ, and (4) Church's salary for his second year would be paid on a monthly basis.

In May 2000, the parties again failed to reach an agreement on the terms of Church's purchase of an ownership interest and they agreed the deferred compensation would be paid in June 2000. Church demanded payment in June, but WHJ did not pay him. Church alleges that WHJ has still not paid him for his first year of work.

On August 13, 2001, Church retained Jamison to act as his lawyer and represent his interests in his dispute with WHJ. On April 30, 2002, Jamison filed a complaint for Church and against WHJ in the Fresno Superior Court. Slightly more than two months later, Jamison executed a substitution of attorney form which ended his representation of Church in the employment case against WHJ.

On July 3, 2002, new attorneys representing Church filed a first amended complaint in the employment case. They filed a second amended complaint two months later, and the superior court sustained a demurrer to the second amended complaint with leave to amend. The attorneys filed a third amended complaint against WHJ—for breach of contract, intentional misrepresentation, negligent misrepresentation, Labor Code violations, and unjust enrichment—in December 2002. WHJ filed another demurrer and the hearing was set for April 4, 2003.

The tentative ruling stated that the general demurrer to the Labor Code claims on the grounds they were untimely would be overruled because Church's allegations were sufficient to raise the possibility that WHJ was estopped from raising the statute of limitations as a defense. In addition, the tentative ruling stated that the general demurrer to the count containing the Labor Code violations would be sustained with leave to amend so that Church could allege whether he resigned or was discharged. (See Lab. Code, §§ 201 [discharged employee shall be paid final wages within 72 hours], 202 [when final wages are due to employee who resigns].)

After hearing argument, however, the superior court changed its tentative ruling and on April 30, 2003, sustained the general demurrer to the claims included in the fourth and fifth counts of the third amended complaint "without leave to amend on the basis that the cause of action is barred by the applicable statute of limitations."

On April 27, 2004, less than one year after the general demurrer to Church's claims under the Labor Code in the employment case was sustained, Church filed a complaint for legal malpractice against Jamison. The malpractice complaint alleged that, had Jamison exercised proper care and skill in the lawsuit against WHJ, Church "would have been able to recover from Wilcox for violations of the Labor Code including, but not necessarily limited to, reimbursement for business expenses required by Labor Code §2802, failure and refusal to pay [Church] when his wages became due and payable under Labor Code §202, interest on all due and unpayable [*sic*] wages under Labor Code §218.6, waiting time penalties under Labor Code §203 and attorney fees pursuant to Labor Code §218.5."

Jamison responded to the malpractice complaint by filing a demurrer on the ground that the action against him was not brought within the one-year period of limitations contained in Code of Civil Procedure section 340.6. Specifically, Jamison argued that Church should have discovered Jamison's malpractice, allegedly based on the failure to timely file the Labor Code claims, when WHJ filed any one of its three demurrers that raised the statute of limitations defense. Jamison also argued that Church suffered actual injury, for purposes of Church's legal malpractice claim, as soon as Church incurred attorney fees contesting the demurrers of WHJ that raised the statute of limitations defense in the employment case.

In October 2004, the superior court overruled the demurrer filed by Jamison to the malpractice complaint and stated, "It is simply too early to decide that [Church]'s claims are time-barred." The superior court was unwilling to draw factual inferences about what Church knew or should have known and when he actually incurred attorney fees.

Jamison answered Church's first amended complaint for malpractice and breach of contract. On December 29, 2004, Jamison filed a motion for judgment on the pleadings in which he asserted that he could not have committed malpractice because the statute of limitations applicable to Church's Labor Code claims had either expired before his representation started or, alternatively, had not yet expired before he filed the complaint

against WHJ. Expressly disagreeing with the rulings made in WHJ's favor on WHJ's demurrer in the employment case, the superior court in the malpractice case granted Jamison's motion for judgment on the pleadings.

Church appealed in the malpractice case, which appeal we currently consider. Trial of the remaining claims by Church against WHJ, in the employment case, remains pending.

DISCUSSION

I. Motion for Judgment on the Pleadings—Standard of Review*

Jamison brought his motion for judgment on the pleadings on the ground that "[t]he complaint d[id] not state facts sufficient to constitute a cause of action against [them]." (Code Civ. Proc., § 438, subd. (c)(1)(B)(ii).) Our primary task in reviewing the order granting the motion is to determine whether the facts alleged provide the basis for a cause of action against Jamison *under any theory*. (*Alliance Mortgage Co. v. Rothwell* (1995) 10 Cal.4th 1226, 1232.)

Appellate courts independently determine whether a cause of action was stated. (*Hoffman v. State Farm Fire & Casualty Co.* (1993) 16 Cal.App.4th 184, 189.) The court's review uses the same rules applied to general demurrers. (*Smiley v. Citibank* (1995) 11 Cal.4th 138, 146.) "[W]e treat the properly pleaded allegations of [the] complaint as true, and also consider those matters subject to judicial notice. [Citations.]" (*Alliance Mortgage Co. v. Rothwell*, *supra*, 10 Cal.4th at p. 1232.) Furthermore, the allegations must be liberally construed with a view to attaining substantial justice among the parties. (*Ibid*.) A liberal construction of the allegations means that a reviewing court also assumes the truth of all facts that may be inferred reasonably from (1) the facts pled, (2) the facts contained in exhibits to the complaint, and (3) the facts that are judicially noticed. (See *Neilson v. City of California City* (2005) 133 Cal.App.4th 1296, 1305 [inferences drawn in reviewing a demurrer]; Code Civ. Proc., § 452 [liberal construction

*See footnote, *ante*, page 1.

of allegations].) Although we assume the truth of these facts, we do not assume that they all will be proven at trial. Consequently, we must determine if a cognizable legal theory has been stated under any of the various factual scenarios that could arise if some facts alleged are proven and other facts alleged are not.

II. Factors Complicating this Appeal*

The question whether Church can sue Jamison for malpractice based on Church's loss of some or all of his Labor Code claims against WHJ is complicated by at least three factors.

First, the procedural posture of both this legal malpractice case and the underlying employment case makes this appeal akin to reviewing a "demurrer within a demurrer."[4] This demurrer-within-a-demurrer aspect creates the potential for different judges of the superior court reaching different conclusions. Also, the dual application of the "any legal theory" standard opens up a wide array of possibilities. In applying that standard, we first determine if there is any legal theory for a Labor Code claim that can no longer be asserted in the employment case. If any such theories are identified, we must determine whether a malpractice cause of action can be stated under any legal theory concerning a lost Labor Code claim.

Second, the underlying employment case is still pending. Thus, there are no findings by the trier of fact in the underlying lawsuit that would narrow the factual scenarios presented by the pleadings filed in both cases.

Third, the underlying employment case includes allegations regarding three oral contracts that Church asserts he entered with WHJ. The uncertainty over whether one or

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*See footnote, *ante*, page 1.

[4]This phrase is comparable to the "trial-within-a-trial" aspect of some legal malpractice actions. (See *Jalali v. Root* (2003) 109 Cal.App.4th 1768, 1773-1774 [discussing the trial-within-a-trial approach].) We refer to this appeal as a "demurrer within a demurrer" even though this appeal concerns a motion for judgment on the pleadings because the standard of review applied to the motion is the same as if it were a general demurrer. (*Smiley v. Citibank, supra*, 11 Cal.4th at p. 146.)

more of those contracts were formed and, if so, what terms were or were not included in them, creates many different factual possibilities. The search for any legal theory of malpractice among these many different factual possibilities is complicated because of the sheer volume of factual possibilities and corresponding legal theories.

III. Ripeness of Malpractice Action*

A. A Bright-line Rule Would Eliminate Complications

When confronting the complications of this appeal, one might ask whether the malpractice case is ripe—that is, has Church's cause of action for legal malpractice accrued. (See Code Civ. Proc., § 312 [civil action can be commenced only after cause of action has accrued].) Many of the complications previously described would be eliminated by ruling that the malpractice case against Jamison was not ripe when filed.

For instance, a rule of law "recognizing that 'actual injury' in missed-statute malpractice cases involving an underlying action occurs at the point of disposition of plaintiff's underlying lawsuit, whether by settlement, dismissal or adverse judgment" would provide more certainty for clients, attorneys, companies providing malpractice insurance, and the court system. (*Adams v. Paul* (1995) 11 Cal.4th 583, 600 (dis. opn. of Lucas, C.J.).) This rule of law has been rejected by the California Supreme Court.

In *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison* (1998) 18 Cal.4th 739 (*Jordache*), which came three years after *Adams v. Paul*, a majority of the court concluded that "actual injury" occurs for purposes of commencing the statute of limitations applicable to a legal malpractice claim "when the client suffers any loss or injury legally cognizable as damages in a legal malpractice action based on the asserted errors or omissions." (*Jordache, supra*, 18 Cal.4th at p. 743.) Bound by this precedent, we will not adopt a rule of law that renders Church's malpractice case against Jamison unripe.

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*See footnote, *ante*, page 1.

B. Issue Regarding Timeliness of Legal Malpractice Claim

Jamison did not argue that the malpractice case was filed too early. Instead, he demurred to Church's malpractice complaint on the grounds that it was filed too late and, therefore, was barred by the statute of limitations. Code of Civil Procedure section 340.6, subdivision (a) provides that a legal malpractice case must be commenced within one year after the plaintiff discovers, or should have discovered, the facts constituting malpractice. The one-year period is tolled during the time the "plaintiff has not sustained actual injury." (Code Civ. Proc., § 340.6, subd. (a)(1).) Under the *Jordache* requirement for a "loss or injury legally cognizable as damages" (*Jordache, supra,* 18 Cal.4th at p. 743), determining when an actual injury occurred poses a question of fact, unless the facts are undisputed so that the court may make the determination as a matter of law. (*Id.* at p. 751.)

The superior court considered the principles adopted in *Jordache* and overruled Jamison's demurrer. In its October 2004 ruling, the superior court stated it was "simply too early to decide that [Church's malpractice] claims are time-barred." In December 2004, Jamison filed his notice of motion for judgment on the pleadings, which did not rely on Code of Civil Procedure section 340.6.[5]

This appeal concerns only Jamison's motion for judgment on the pleadings and we limit our review to issues raised by that motion. We do not reach the question whether Church suffered an actual injury from the alleged malpractice more than one year prior to filing the malpractice case or any other question regarding the application of Code of Civil Procedure section 340.6.

[5]Because the motion for judgment on the pleadings raised issues different from those raised in Jamison's demurrer, we reject Church's argument that the motion for judgment on the pleadings was, in effect, a motion to reconsider the demurrer.

IV. Overview of Analytical Approach*

The complexities inherent in this demurrer within a demurrer have caused us to limit our approach to analyzing the Labor Code claims for (1) reimbursement of necessary business expenditures and (2) payment of wages past due.

First, we will identify a single factual scenario that might have been proven during the trial of such a claim.

Second, we will decide the legal issues that must be resolved to apply the statute of limitations to the Labor Code claims under that factual scenario. This step will be defined in part by certain fundamental rules of law regarding the accrual of a cause of action for purposes of applying the statute of limitations. In particular, a cause of action generally accrues at "the time when the cause of action is complete with all of its elements[.]" (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397 (*Norgart*).) The accrual of the cause of action also is the date its statute of limitations begins to run. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806.)

Third, we will set forth our analysis of how our conclusions of law apply to the factual scenario and determine if any Labor Code claims became time-barred after Jamison was retained by Church and before Jamison filed the complaint in the employment action.[6]

V. Expense Reimbursement*

A. One Factual Scenario Presented by Pleadings

Church's malpractice complaint alleged that Jamison's failure to exercise proper care and skill in the lawsuit against WHJ resulted in the loss of his claims against WHJ for "reimbursement for business expenses required by Labor Code §2802[.]"

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*See footnote, *ante*, page 1.

[6]We recognize that other theories of malpractice exist, but will focus on the theory that Labor Code claims were lost because the complaint in the employment case was not filed sooner.

*See footnote, *ante*, page 1.

In the employment case, Church alleged that he was not reimbursed by WHJ for business expenses and that those expenses included the use of his personal computer and printer. Church also alleged that WHJ and he agreed that he would use his own computer and printer.

Under Church's allegations regarding the initial agreement and the topic of computer and printer expenses, we conclude that it would be possible for the trier of fact to find that (1) Church and WHJ did form an enforceable employment contract covering the period from May 1998 through April 1999, (2) the initial contract did not include any terms regarding the reimbursement of business expenses,[7] and (3) the claim is limited to expenses incurred during the first year of employment.[8] Under this factual scenario, any right Church had to the reimbursement of business expenses incurred during the first year would be purely statutory.

B. Legal Issues

The primary legal issues concerning the claim for the reimbursement of necessary business expenditures under Labor Code section 2802 are (1) which statute of limitations applies to the expense claims and (2) when did the claims accrue for purposes of commencing the statute of limitations?

Labor Code section 2802, subdivision (a) provides that an "employer shall indemnify his or her employee for all necessary expenditures or losses incurred by the employee in direct consequence of the discharge of his or her duties …." Subdivision (b)

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[7]For example, the trier of fact could determine that the discussions between Church and WHJ regarding expenses were so ambiguous that a mutual understanding was never reached on that topic. Our choice of this factual scenario is based on our legal conclusion that terms regarding expenses are not "essential" or "material" to the formation of a contract such that the failure to agree on the topic would render the entire contract unenforceable due to uncertainty. (See *Alexander v. Codemasters Group Limited* (2002) 104 Cal.App.4th 129, 141-142 [Ct. App., Fifth Dist. discusses certainty requirement in context of employment contract].)

[8]By addressing a factual scenario that involves only expenses incurred during the first year, we need not address an ambiguity in paragraph 31 of the third amended complaint that creates the possibility that Church also sought to recover some expenses incurred after April 1999.

of that section provides that "[i]nterest shall accrue from the date on which the employee incurred the necessary expenditure or loss."

1. Statute of limitations

The choices for applicable statutes of limitations are the three-year statute of limitations for claims based "upon a liability created by statute" (Code Civ. Proc., § 338, subd. (a)) or the two-year statute of limitations for claims based on oral contracts (*id.*, § 339, subd. 1). (See *Cuadra v. Millan* (1998) 17 Cal.4th 855, 859 [different statutes of limitations applicable to various wage claims], disapproved on other grounds in *Samuels v. Mix* (1999) 22 Cal.4th 1, 16, fn. 4.)

In the situation analyzed here, the only source of WHJ's liability for Church's business expenditures is Labor Code section 2802. Consequently, the liability arising in this situation is comparable to the liability for wages necessary to bring an employee's compensation up to minimum wage or to the liability for overtime wages. (See *Cuadra v. Millan*, *supra*, 17 Cal.4th at p. 862 [applying three-year statute to hypothetical example where pay was below legal minimum]; *Aubry v. Goldhor* (1988) 201 Cal.App.3d 399, 404 [liability for overtime compensation created by statute and subject to three-year limitations period].)

Furthermore, we conclude that the "gravamen" of the claim is not contractual. (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 22-23.) The liability exists because of the statute, regardless of what the parties agreed. If a contract provision expressly states that the employer shall not be liable for business expenditures incurred by the employee, the contract provision is void because the Labor Code provides that any contract or agreement made by an employee to waive the benefits of Labor Code section 2802 is null and void. (Lab. Code, § 2804.) Thus, the employer liability created by Labor Code section 2802 is firmly within the statutory realm.

Accordingly, we conclude the claims under Labor Code section 2802 that were eliminated by the demurrer in the employment case must be regarded as an "action upon a liability created by statute" for purposes of Code of Civil Procedure section 338,

subdivision (a). Therefore, the three-year limitations period applies to Church's claims for expense reimbursement under Labor Code section 2802.

2. Accrual date

Labor Code section 2802 does not specify when an employer must indemnify the employee for necessary expenditures incurred in the discharge of the employee's duties or otherwise identify when a claim for business expenses accrues. Labor Code section 2802, subdivision (b) does, however, state that a business expenditure begins to accrue interest from "the date on which the employee incurred the necessary expenditure or loss." From this provision, it is a small step to infer that a claim for business expenses accrues on the same date. In other words, a cause of action brought under Labor Code section 2802 "is complete with all of its elements" (*Norgart*, *supra*, 21 Cal.4th at p. 397) once the necessary expense has been incurred.[9]

Therefore, we conclude that a claim under Labor Code section 2802 for the reimbursement of business expenditures accrues when the expenditure is incurred.

C. Application of Limitations Period and Accrual Date to Facts Alleged

Church's third amended complaint against WHJ in the employment case does not allege the dates on which particular business expenses were incurred by him. Viewing both that complaint and his complaint against Jamison in the present case in the light

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[9]We recognize that one could argue that no wrong has occurred, and thus no cause of action has accrued, until the employer has refused to pay the necessary business expenses. During oral argument, counsel suggested the possibility that the statute impliedly contains a requirement that the employee demand payment (perhaps within a reasonable time of incurring the expense) and a further requirement that the employer be given a reasonable amount of time to respond to the demand for payment. The question of implied requirements was not addressed in the briefing and no legislative history was presented to this court to support such an implied requirement. Thus, our rejection of any implied requirements does not necessarily preclude the further development of the issue in future cases.

Nor does it resolve the possible impact on the accrual of the statutory claim of a contract provision that specifies the time for reimbursement. Here, Church's allegations do not address (1) whether WHJ agreed to reimburse his business expenses by a particular date if he chose not to acquire an interest in WHJ or (2) whether he agreed to notify WHJ after incurring business expenses.

most favorable to Church, we infer that the expenses may have been incurred shortly after Church began his employment on May 1, 1998, and were incurred from time to time thereafter.[10] In other words, this possibility is one of the factual scenarios presented by the allegations of Church's complaint against Jamison, interpreted in conjunction with the documents that have been judicially noticed.

Under the scenario that Church began to incur business expenses shortly after he was hired in 1998 and continued to incur them from time to time thereafter, those expenses will fall within three relevant time periods. The dates that divide the time periods are created by subtracting the three-year limitations period from (1) the date Jamison was retained to represent Church (Aug. 13, 2001) and (2) the date on which Jamison filed the complaint against WHJ in the employment case (Apr. 30, 2002).

Under a strict application of the three-year statute of limitations, (1) claims for expenses incurred during the first time period (pre-Aug. 13, 1998) would have been time-barred before Church retained Jamison, (2) claims relating to the second time period (Aug. 13, 1998–Apr. 30, 1999) would have become time-barred after Church retained Jamison and before Jamison filed the complaint against WHJ in the employment case, and (3) claims relating to the third time period (post-Apr. 30, 1999) would have been timely when Jamison filed the complaint. Thus, Jamison may have committed malpractice with respect to Church's claims for expenses incurred between August 13, 1998, and April 30, 1999, because those claims may have become time-barred while Jamison was representing Church.

We recognize that what actually happened between Church and WHJ may be different from the factual scenario that we have analyzed here and that a change in the facts may shift the date on which an expense claim became time-barred. For example, the trier of fact might find that, although the initial agreement did not address expenses,

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[10]We do not address the scenario where the expenses could be conceptualized as continuing in nature and thus the "theory of continuous accrual" might apply. (*Howard Jarvis Taxpayers Assn. v. City of La Habra* (2001) 25 Cal.4th 809, 822.)

the second and third contracts included terms under which Church and WHJ agreed that the liability concerning expenses would be resolved at a later date. If the trier of fact made those findings, then the date on which the limitations period expired could change based on the terms of the agreement itself or the doctrine of equitable estoppel. (See parts VI.C.1 & VI.C.5, *post*.)

In summary, Church has alleged facts sufficient to state a claim for legal malpractice against Jamison based on certain claims for expense reimbursement under Labor Code section 2802 becoming time-barred after Jamison was hired and before he filed the complaint against WHJ.

VI. Unpaid Wages*

A. Introduction

In the employment case, Church asserted that WHJ violated the Labor Code by failing to pay his wages when they became due and payable under the code's terms. The superior court sustained WHJ's demurrer to the Labor Code claims on the ground they were time-barred by the applicable statute of limitations.

Church sued Jamison for malpractice contending, among other things, that Jamison's negligence in not filing his statutory claims for unpaid wages before April 30, 2002, was the reason he lost the right to pursue some or all of those claims. In the malpractice case, the superior court granted Jamison's motion for judgment on the pleadings based on its conclusion that the statutory claims for unpaid wages were timely filed.

B. One Factual Scenario in Pleadings Regarding First Year Wages

The facts specified in the following three paragraphs, which the trier of fact might find to be true, will form the foundation of the factual scenario used to analyze Church's allegations that Jamison committed malpractice with regard to his statutory claims for unpaid wages.

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*See footnote, *ante*, page 1.

First, Church and WHJ did form an enforceable employment contract covering the period from May 1998 through April 1999.

Second, the initial employment agreement reached by the parties omitted any terms that specified when Church would be paid his wages. One way the trier of fact might make this finding is to determine that the discussions between Church and WHJ regarding deferral or other provisions for timing of payment were so ambiguous that a mutual understanding was never reached on that aspect of their relationship.[11]

Third, in 1999 Church and WHJ agreed to postpone for approximately 12 months their resolution of WHJ's liability to Church that was created during Church's first year of employment.

C. Legal Issues

Our analysis of whether a malpractice claim exists with respect to Church's statutory claims for unpaid wages requires us to address (1) when the Labor Code required WHJ to pay Church his wages, (2) which statute of limitations applies to the statutory claims for unpaid wages, and (3) whether the statute of limitations may have been suspended from running by equitable estoppel. Also, before we address those legal issues, we will discuss the impact Labor Code section 219 has in the factual scenario we are using to analyze the malpractice claim.

1. Impact of Labor Code section 219

Subdivision (a) of Labor Code section 219 allows for the payment of wages on a more frequent interval than specified by statute, but also provides that "no provision of

[11]In other words, Church and WHJ entered an oral agreement for Church to work for WHJ as an employee for one year but the parties did not have a meeting of the minds as to when payment would be made. On the legal question whether terms specifying when wages became due are "essential" or "material" to the formation of a contract, we conclude they were not. Thus, the lack of mutual assent on this topic does not render the entire contract unenforceable due to uncertainty. (See *Alexander v. Codemasters Group Limited*, *supra*, 104 Cal.App.4th at p. 141-142.)

this article can in any way be contravened or set aside by a private agreement, whether written, oral, or implied."

Amici curiae have argued, both here and as a party in the employment case, that (1) the alleged agreement not to pay Church for his first year of labor and to apply the amount earned as his buy-in to the accountancy firm violated the requirements of Labor Code section 204 regarding when wages must be paid; (2) the provisions to defer payment of compensation were illegal by operation of Labor Code section 219; and (3) the illegal provisions were unenforceable and, as a matter of law, Church could not reasonably rely on the provisions as a basis for delaying the filing of his statutory claims for unpaid wages. Based on this argument, amici curiae conclude that they cannot be estopped from raising the statute of limitations as a bar to Church's Labor Code claims for unpaid wages.

We conclude that Labor Code section 219 has no application to the factual scenario we are analyzing here. Specifically, under the factual scenario where the terms for when compensation would be paid were, in effect, left blank, the Labor Code would provide the missing terms under the principles that (1) all applicable laws in existence when the agreement is made become part of the agreement as if they were incorporated by reference (see 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 752, pp. 842-843, and cases cited therein) and (2) contracts should be interpreted to be lawful, operative and capable of being carried into effect (Civ. Code, § 1643). In this factual scenario, there can be no conflict between the contract terms and Labor Code section 204.

Next, Labor Code section 219 was not necessarily applicable to the agreement reached by the parties in May 1999 to defer resolution of the liability arising from Church's first year of employment until May 2000. Conceptually, the May 1999 agreement appears to have been an agreement to settle the liability (whether statutory, contractual, or a combination of both) arising out of the first year of the employer-employee relationship. No authority cited to us, or of which we are aware, convinces us

that such an agreement to settle a liability that predates the agreement would necessarily violate the terms of Labor Code section 219. Thus, we conclude that the May 1999 agreement was not unenforceable as a matter of law.

In summary, even were we to assume that Labor Code section 219 could be used to protect an employer from liability for failing to pay wages when due, it could not be used to protect WHJ in all of the factual scenarios presented by this case.

2. Accrual and when wages became due under the Labor Code

The appellate briefs of Church and Jamison discuss how the provisions of Labor Code section 204 should be applied to determine when amounts allegedly owed to Church as wages became due and payable.

Labor Code section 204 includes the general rule that wages can be paid twice a month. Labor done on or before the 15th of a month must be paid between the 16th and 26th of that month. Labor done during the last half of the month must be paid between the 1st and 10th of the following month.

Labor Code section 204 also includes an alternative that acts as an exception to the general rule of semimonthly payments. When certain conditions[12] are met, wages "*may* be paid once a month on or before the 26th day of the month during which the labor was performed[.]" (Lab. Code, § 204, italics added, § 15 ["'may' is permissive"].) In this case, however, there are no allegations that WHJ actually implemented (or agreed to implement) the permissive alternative during Church's first year of employment and paid Church's monthly wages during that period by the 26th of each month.

[12]The statutory text contains three conditions. First, the wages must be "salaries." (Lab. Code, § 204.) Second, the employees must be administrative, management or professional. (*Ibid*.) Third, the employer must be covered by section 13(a)(1) of the federal Fair Labor Standards Act. (Lab. Code, § 204; see 29 U.S.C., § 213(a)(1).)

Accordingly, the general rule of two payments per month, rather than the exception that allows for one payment per month, applies to the factual scenario analyzed here.[13]

"A cause of action for unpaid wages *accrues* when the wages first become legally due[.]" (*Cuadra v. Millan*, *supra*, 17 Cal.4th at p. 859, italics in original.) Because the provisions of Labor Code section 204 determine when Church's wages became due, those provisions also determine when Church's cause of action to recover the unpaid wages accrued. For example, the payment owed Church for the first 15 days of May 1998 became due no later than May 26, 1998. Therefore, Church's cause of action for his first semimonthly payment of wages accrued on May 26, 1998. Similarly, the last semimonthly wage payment owed Church for his first year of employment concerns the last half of April 1999. That payment would have been due and payable no later than May 10, 1999.

Each of the 24 semimonthly wage payments required pursuant to Labor Code section 204 during Church's first year of service had a separate accrual date and gave rise to a separate cause of action. (*Cuadra v. Millan*, *supra*, 17 Cal.4th at p. 859.) The accrual of the 24 separate causes of action would have been spread out from May 26, 1998, to May 10, 1999.

3. Applicable statute of limitations

The parties disagree over the question whether the claims for violation of Labor Code provisions regarding the timely payment of wages due should be regarded as contractual liabilities or statutory liabilities for purposes of determining which statute of limitations applies.

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[13]In other words, it is inaccurate to say, as do amici curiae, that Church was *required* to be paid by the 26th of each month during the first year of employment. While WHJ may have been permitted by statute to make one monthly payment, it did not do so and thus was required by Labor Code section 204 to pay Church twice each month.

If the liability is one "created by statute" (Code Civ. Proc., § 338, subd. (a)), the three-year limitations period applies. (*Cuadra v. Millan*, *supra*, 17 Cal.4th at p. 859.) For example, where an obligation to pay wages does not exist but for a statutory provision, the liability for those wages clearly is "created by statute" for purposes of Code of Civil Procedure section 338. (*Aubry v. Goldhor*, *supra*, 201 Cal.App.3d at pp. 403-404 [statute created liability for overtime wages]; see *Cuadra v. Millan*, *supra*, at p. 862 [applying three-year statute to hypothetical example involving claim to collect backpay necessary to achieve minimum wage].)

Alternatively, if the unpaid wage liability is based on an oral contract, the action must be commenced within the two-year limitations period set forth in Code of Civil Procedure section 339. (*Cuadra v. Millan*, *supra*, 17 Cal.4th at p. 859.)

> "To determine the statute of limitations which applies to a cause of action it is necessary to identify the nature of the cause of action, i.e., the 'gravamen' of the cause of action. [Citations.] '[T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code.' [Citation.]" (*Hensler v. City of Glendale*, *supra*, 8 Cal.4th at pp. 22-23.)

The California Supreme Court has stated that a "liability created by statute is one in which no element of agreement enters. It is an obligation which the law creates in the absence of an agreement. [Citations.]" (*Gardner v. Basich Bros. Construction Co.* (1955) 44 Cal.2d 191, 194 (*Gardner*).) In *Gardner*, licensed highway carriers sued to recover the difference between the amount they were paid for a trucking job and a larger amount allegedly due under minimum hauling rates established by statute. The court ruled that the two-year limitation period applicable to oral agreements applied and, as a result, concluded the carriers' claim was time-barred. (*Id*. at pp. 195-196.) The court reasoned that the statute was deemed a part of the contract and the statute only determined the amount of the liability created by the agreement of the parties, while the substantive right to payment stemmed from the performance of service under the contractual agreement.

In accordance with the reasoning set forth in *Gardner*, we conclude that the Labor Code provisions governing the timing of wage payment do not here create the substantive right to payment. That right to payment stems from the performance of labor under the employment agreement between Church and WHJ. Therefore, the liability for violating the statutory provisions concerning the payment of wages when due is a liability into which an element of the parties' oral agreement enters. Thus, based on *Gardner*, we conclude the two-year limitations period for oral contracts is applicable to Church's claims for the failure to pay wages when due under the Labor Code.

4. Application of two-year statute of limitations

When the two-year limitations period is applied to Church's 24 causes of action for unpaid wages, it leads to the following conclusions. The cause of action concerning wages due for labor performed during the first half of May 1998 became time-barred on May 26, 2000. At the other end of the spectrum, the last of Church's 24 causes of action concerns wages owed for the last half of April 1999. That cause of action accrued on May 10, 1999, and its limitations period thus expired on May 10, 2001.

Church retained Jamison approximately three months after this last limitation period expired—that is, on August 13, 2001. The next question is whether there is any basis for suspending the running of the statute of limitations applicable to the claims for unpaid wages. If the limitations period was suspended for more than three months, then some of the causes of action for unpaid wages would have become time-barred after Jamison began representing Church and before he filed the complaint in the employment case. On the other hand, without a temporary suspension of the running of the two-year limitations period applicable to the statutory wage claims, Jamison could not have committed malpractice by allowing the claims to become time-barred because the claims would have been stale when he was retained on August 13, 2001.

5. Suspending running of statute on estoppel grounds

Church contends that WHJ was estopped from raising the two-year statute of limitations as a defense to his claims concerning the failure to pay his wages when due

under the Labor Code. Church further contends that a reasonable attorney (1) would have anticipated WHJ's statute of limitations defense, (2) would have anticipated the possible application of estoppel to bar that defense as to some or all of the 24 claims for unpaid wages, and (3) would have filed the complaint in the employment case sooner.

To illustrate the effect of estoppel, if the running of the statute was temporarily suspended for exactly one year, then Church's claim for the first wage payment would not have become time-barred until after May 26, 2001, and the last wage claim would not have become time-barred until after May 10, 2002. Thus, in this example of a one-year suspension, 17 of Church's 24 claims for semimonthly wage payments would have become time-barred from the time Jamison was retained on August 13, 2001, until the time he filed the complaint in the employment case on April 30, 2002.[14]

In a 2003 decision, the California Supreme Court discussed when the doctrine of equitable estoppel may prevent a defendant from raising a statute of limitations defense to bar a plaintiff's claim. (*Lantzy v. Centex Homes* (2003) 31 Cal.4th 363, 383-385; see *Mills v. Forestex Co.* (2003) 108 Cal.App.4th 625, 652 [Ct. App., Fifth Dist. discusses equitable estoppel].) "'"'… Where the delay in commencing action is induced by the conduct of the defendant it cannot be availed of by him as a defense.'"'" (*Lantzy v. Centex Homes*, *supra*, at p. 384.) An equitable estoppel is created where a party has been induced to refrain from filing a lawsuit against the defendant where that lawsuit might have retrieved the party's position and saved the party from loss. (*Ibid*.)[15]

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[14]The last payment, which would have covered the wages earned during the last half of April 1999, was due on May 10, 1999. Thus, if the statute of limitations was suspended for at least one year, that claim was timely under the complaint filed by Jamison.

[15]Application of equitable estoppel is illustrated by the situation where an insurance company is precluded from pleading a delay as a defense because the insurance company held out the possibility of an amicable adjustment of the claim to the insured and thus caused the insured to delay in filing a lawsuit on the claim. (*Industrial Indem. Co. v. Ind. Acc. Com.* (1953) 115 Cal.App.2d 684, 690.)

Accordingly, the doctrine of equitable estoppel may apply in this case if the pleadings provide a basis for a finding that the conduct of WHJ actually and reasonably induced Church to delay in filing his suit against them. (*Lantzy v. Centex Homes*, *supra*, 31 Cal.4th at p. 385.) Usually, the application of the doctrine of equitable estoppel requires the trier of fact to resolve questions of fact. (*Mills v. Forestex Co.*, *supra*, 108 Cal.App.4th at p. 652.)

Here, we conclude that the trier of fact could find that the May 1999 agreement to postpone the resolution of the liability created by Church's first year of employment until May 2000 would justify a 12-month suspension of the running of the statute of limitations based on estoppel. The factual allegations in the record adequately present the possibility that Church was actually and reasonably induced to delay the pursuit of his legal remedies. Thus, we cannot rule at this stage of the proceedings that Church will not be able to prove an equitable estoppel theory. Accordingly, WHJ may be estopped from raising the statute of limitations defense to some or all of Church's 24 claims for wages not paid when due.

6. Summary

Church's malpractice complaint and the judicially noticed facts state a claim for malpractice against Jamison under the following legal theory: Jamison committed malpractice because claims for Labor Code violations concerning the payment of wages became time-barred after Jamison was hired (Aug. 13, 2001) and before he filed the complaint in the employment case (Apr. 30, 2002). The theory depends on the application of the doctrine of estoppel to suspend the two-year statute of limitations so that some of the 24 causes of action for unpaid wages became untimely during the relevant period.[16]

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[16]We recognize the possibility that the doctrine of estoppel could suspend the running of the statute of limitations long enough so that all 24 causes of action for unpaid wages were timely when the complaint in the employment action was filed on April 30, 2002. In that situation, Jamison would not be liable for the loss of those causes of action.

VII. Payment for Vested Vacation

A. Facts and Contentions

Church's malpractice claim relating to his Labor Code cause of action for unused vested vacation time is less factually complicated than the other Labor Code claims. In short, Church asserts that he earned vacation during his first year of employment with WHJ, he did not use that vacation time, and WHJ did not pay him for his unused vacation time after he stopped working.

Specifically, Church's third amended complaint in the employment case alleged that, "as of May 1, 2000, [Church] had accrued 10 days of paid time off pursuant to [WHJ's] employment policies at the rate of $49.04 per [hour] which he had not taken. As a result, [Church] is now due and owing vacation pay in the amount of $3,923.20." Church's initial complaint in the employment case alleged his employment with WHJ continued until May 1, 2001.

Church's claim for unused vested vacation was eliminated from the employment case by the April 30, 2003, order of the superior court that sustained WHJ's demurrer to his Labor Code causes of action on statute of limitations grounds. In the legal malpractice action, Church alleges that Jamison's negligence resulted in the loss of his claim for vested vacation.

Jamison contends that he filed Church's claim for vested vacation in a timely manner and, therefore, the superior court's erroneous ruling was the sole cause of Church's loss of that claim. As a result, Jamison concludes, Church cannot state a cause of action for legal malpractice regarding Church's claim for vacation pay.

B. Legal Issues

An employee's right to be paid for vacation time that has not been used when the employment ends is addressed by Labor Code section 227.3, which provides in full:

> "Unless otherwise provided by a collective-bargaining agreement, whenever a contract of employment or employer policy provides for paid vacations, and an employee is terminated without having taken off his vested vacation time, *all vested vacation shall be paid* to him as wages at

> his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served; provided, however, that an employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination. The Labor Commissioner or a designated representative, in the resolution of any dispute with regard to vested vacation time, shall apply the principles of equity and fairness." (Italics added.)

The text of Labor Code section 227.3 provides the basis for answering the legal question crucial to Church's malpractice claim—when did his statutory claim to be paid for unused vested vacation time accrue for statute of limitations purposes.

1. Accrual date of claim under Labor Code section 227.3

Under Labor Code section 227.3, an employee has the right to be paid for unused vacation only after the "employee is terminated without having taken off his vested vacation time." Thus, termination of employment is the event that converts the employer's obligation to allow an employee to take vacation from work[17] into the monetary obligation to pay that employee for unused vested vacation time. Consequently, Church's cause of action to enforce his statutory right to be paid for vested vacation did not accrue until the date his employment was terminated. Had Church filed a cause of action seeking payment for unused vested vacation before his employment with WHJ ended, that cause of action would have been dismissed as premature. (Code Civ. Proc., § 312 [civil actions can only be commenced within the applicable period "after the cause of action shall have accrued"].)

Church alleged that his employment with WHJ continued until May 1, 2001. Therefore, we conclude that his cause of action seeking payment for unused vested vacation did not accrue and could not have been filed in court any earlier than May 1, 2001.

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[17]This obligation is limited by the employer's right to impose reasonable restrictions and scheduling requirements that affect when an employee may take vacation time. (See *Henry v. Amrol, Inc.* (1990) 222 Cal.App.3d Supp. 1, 5.)

2. Applicable statute of limitations

There are three statutes of limitations that might apply to a claim by a former employee seeking payment for unused vested vacation because the claim could be characterized as one based on (1) an oral employment contract, (2) a written employment contract, or (3) a liability created by statute. A two-year limitations period applies to oral contract claims. (Code Civ. Proc., § 339, subd. 1.) A four-year limitations period applies to claims based on written contracts. (*Id*., § 337, subd. 1.) A three-year limitations period applies to an "action upon a liability created by statute[.]" (*Id*., § 338, subd. (a).)

In the employment case, Jamison filed the complaint against WHJ on April 30, 2002, which is less than one year after Church's employment was terminated on May 1, 2001. Consequently, the complaint was filed within all of the potentially applicable limitation periods and we need not decide which period applies.

C. Look-back Limitation on Right to Payment for Vested Vacation

1. Background on the DLSE's interpretation

Amici curiae urge us to conclude that Church's right under Labor Code section 227.3 to be paid for "all vested vacation … at his final rate in accordance with such contract of employment or employer policy respecting eligibility or time served" is limited by a second application of the statute of limitations—one which applies the limitations period in reverse to limit the years for which vested vacation must be paid upon termination. Church disagrees, as do we.[18]

In *Sequeira*, *supra*, 32 Cal.App.4th 632, a terminated employee filed an application with the California Labor Commissioner seeking payment for all unused

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[18]Amici curiae also argue that it is the two-year statute that applies. Therefore, we must decide the look-back issue here, in the malpractice case, because if amici curiae were correct that a two-year look-back limitation applies, then (1) Church could not recover for vacation earned in his first year of employment, from May 1, 1998, through April 30, 1999; and (2) Jamison could not be liable for malpractice based on his failure to file the complaint in the employment case in a timely fashion because the claim for unused vacation would have been barred by the time the termination from employment occurred.

vacation time that had accumulated over the 12 years he had worked for his former employer. (*Id*. at p. 634.) The Labor Commissioner limited the award to the employee to payment for unused vacation earned but not taken within the four years prior to his termination. This limit was based on the position that a claim for vacation time earned prior to that period was barred by the four-year statute of limitations applicable to written contracts. (*Ibid*.) The trial court and the appellate court agreed that the employee was barred from recovering for unused vacation that had vested more than four years before his termination.

The appellate court's rationale for limiting the employee's recovery to the last four years of his 12 years of employment was based on deference to the position taken by the DLSE in Interpretive Bulletin No. 87-7. (*Sequeira*, *supra*, 32 Cal.App.4th at pp. 635-637.) In that bulletin, the DLSE concluded that the statute of limitations begins to run as the vacation is earned or at the point when the employee is eligible to take the vacation because the employee can take an affirmative step to enforce his or her right to the vacation by simply using it. (*Id*. at p. 635.) The *Sequeira* court stated the DLSE's interpretation of the Labor Code and its conclusions regarding the application of the statute of limitations were entitled to great weight and would be disregarded only if clearly unreasonable. (*Sequeira*, at p. 635.)

After the decision in *Sequeira*, however, the California Supreme Court decided *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557 (*Tidewater*) and *Morillion v. Royal Packing Co*. (2000) 22 Cal.4th 575 (*Morillion*), which address the weight that courts should give certain interpretations by the DLSE.

In *Tidewater*, the court concluded that the DLSE interpretative policies contained in its manual were regulations and, as such, were void because they were not promulgated in accordance with the Administrative Procedure Act (Gov. Code, § 11340 et seq.). (*Tidewater*, *supra*, 14 Cal.4th at p. 572.) In *Morillion*, the court noted that it had repeatedly rejected the argument that courts should give deference to long-standing interpretative policies of the DLSE. (*Morillion*, *supra*, 22 Cal.4th at p. 581.)

In accordance with *Tidewater* and *Morillion*, we will give no weight to the interpretations that may be implied from section 15.1.9 of the Enforcement Policies and Interpretations Manual of the DLSE,[19] which states:

> "**Statute of Limitations**. The statute of limitations for recovery of vacation pay claims is two years from the time of termination on an oral contract and four years on a written contract. The California courts in [*Sequeira*, *supra*,] 32 Cal.App.4th 632 … adopted the long-standing view of the DLSE in this regard. (See O.L. 1991.02.25, written before the *Sequeira* case was decided.)"

Specifically, to the extent that section 15.1.9 of the Enforcement Policies and Interpretations Manual implies that the DLSE still takes the position that a two- or four-year period should be used to measure backward from the employee's termination date to determine how much unused vacation must be paid, we give no weight to that position. Further, because the portion of the opinion in *Sequeira* that gave great weight to the DLSE Interpretive Bulletin No. 87-7 is inconsistent with the principles set forth in *Tidewater* and *Morillion*, the *Sequeira* court's conclusion that the statute of limitations applies in reverse to limit an employee's recovery for unused vacation time no longer stands on firm ground.

In addition, the context and circumstances that produced the DLSE's creation of a look-back period detract from its convincing effect. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 8 [recognizing the situational nature of an agency's legal opinion regarding the interpretation of a statute and that the interpretation "may sometimes be of little worth"].) First, the DLSE's expertise does not extend to provisions in the Code of Civil Procedure that control the application of statutes of

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[19]By letter dated July 21, 2006, this court advised the parties and amici curiae that it would, on its own motion, take judicial notice of sections 1 and 15.1.9 of the DLSE's manual as well as Opinion Letter 1991.02.25. The manual is available at <http://www.dir.ca.gov/dlse/DLSEManual/dlse_enfcmanual.pdf> (as of Oct. 20, 2006) and the opinion letter is available at <http://www.dir.ca.gov/dlse/opinions/1991-02-25.pdf> (as of Oct. 20, 2006).

limitation.[20] Second, the DLSE's analysis never mentioned the requirement in Code of Civil Procedure section 312 that a claim cannot be commenced before it accrues and starts the limitations period running. In short, the DLSE was not operating in its area of expertise and did not consider all of the relevant rules of law.

Accordingly, we will decide the issue anew based on (1) the language of Labor Code section 227.3 and (2) the fundamental principles of law that govern the application of statutes of limitations.

2. Construing Labor Code section 227.3

Labor Code section 227.3 states that "all vested vacation shall be paid to [a terminated employee] as wages …." The use of the words "shall" and "all" in this phrase is not ambiguous. "Shall" is mandatory. (Lab. Code, § 15.) "All" is a word of inclusion, not exclusion. In *Dalton v. Baldwin* (1944) 64 Cal.App.2d 259, 263, the court addressed a statute's use of the word "all" as follows: "To us the word 'all' means not only 'any' right, or 'every' right, but the entire inclusiveness of the word excludes no right whatever." (Accord, *Daniels v. McMahon* (1992) 4 Cal.App.4th 48, 62, fn. 10; *LaMar v. City Council of So. S.F.* (1942) 53 Cal.App.2d 387, 390 [ordinance used "all" to mean "the whole of" or "the greatest quantity"].)

Based on the plain and ordinary meaning of the statutory language, Labor Code section 227.3 cannot be interpreted to exclude unused vacation that vested more than two or four years before the employee was terminated from the unused vacation time for which a terminated employee must be paid. (*Pratt v. Vencor, Inc.* (2003) 105

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[20]The present version of section 31.7.2.1 of the DLSE manual provides another example of the DLSE producing a questionable legal interpretation outside its area of expertise. That section cites Civil Code section 1526 and states that a "payment in full" check does not constitute an accord and satisfaction if the employee strikes out the restrictive notation on the check. Reliance on that code section has been suspect since the court in *Directors Guild of America v. Harmony Pictures* (C.D.Cal. 1998) 32 F.Supp.2d 1184 ruled that Commercial Code section 3311 impliedly repealed Civil Code section 1526 because the two were irreconcilable and Commercial Code section 3311 was enacted later. (Accord, *Woolridge v. J.F.L. Electric, Inc.* (2002) 96 Cal.App.4th Supp. 52, 59; see Maurer & Dahle, *New Law on "Payment-in-Full" Checks* (May 1999) Cal. Lawyer, p. 28.)

Cal.App.4th 905, 909 [plain meaning of unambiguous statute governs].) Neither is that plain and ordinary meaning overcome by the Supreme Court's opinion in *Suastez v. Plastic Dress-Up Co.* (1982) 31 Cal.3d 774, 778-784, which was cited in *Sequeira.* (*Sequeira, supra,* 32 Cal.App.4th at p. 636.) *Suastez* addressed the subject of vesting, a subject entirely different from that which we address here. Finally, we reject the notion that administrative inconvenience can be a basis for ignoring the plain and ordinary meaning of Labor Code section 227.3. (*Sequeira, supra,* at p. 635 ["The DLSE explained that unless the statute of limitations were applied, '[w]e would be required to review the entire employment history of the person … to determine if any vacation was owed'"].)[21]

Because Labor Code section 227.3 cannot itself be the source of a look-back period that limits the right to recover for unused vested vacation, we next consider whether such a look-back period can be derived from the principles of law governing the application of statutes of limitations.

3. Dual application of statute of limitations

The DLSE's Interpretive Bulletin No. 87-7 states that "'the obligation to use vacation arises as it is earned (so the statute [of limitations] is running) ….'" (*Sequeira, supra,* 32 Cal.App.4th at p. 635.) Based on this position, the DLSE applied "the statute of limitations twice: once at the outset of the review of the claim to limit the time within which the claim may be brought after termination, and again to limit the time—measured

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[21]This does not mean, however, that the equitable doctrine of laches could not apply to limit an employee's right to recover for vested but unused vacation. (*Sequeira, supra,* 32 Cal.App.4th at p. 637.) While statutes of limitations and the doctrine of laches do coincide in their "recognition that claims can become stale—documents may be lost and memories fade over time" (*ibid.*), it remains the case that statutes of limitations and the doctrine of laches are distinct concepts that apply in distinct ways. (See *Cortez v. Purolator Air Filtration Products Co.* (2000) 23 Cal.4th 163, 179 [laches is an equitable defense].)

Labor Code section 227.3 provides for the application of principles of equity, such as laches, but equitable principles must be applied on a case-by-case basis. Our analysis does not conflict with the result reached in *Sequeira* to the extent that it was based on an alternative rationale involving the equitable doctrine of laches. (*Sequeira, supra,* 32 Cal.App.4th at p. 637.)

from the date of termination backward—the liability of the employer exists. Both applications of the statute of limitations are to be based on whether the vacation contract (or policy) involved was written or oral. (e.g., two years or fours [*sic*] years.)" (DLSE Opinion Letter 1991.02.25, p. 2.)[22]

This unusual dual application of a statute of limitations is troubling for a number of reasons. First, aside from *Sequeira*, the parties have not cited and we have not located any other cases in which a court has adopted this unusual dual application of a statute of limitations. The approach was without precedent when the DLSE adopted it.

Second, it is based on the idea that an employee has the *obligation* to use vacation.[23] The source of this obligation is not identified. The obligation does not exist at common law, and it is not expressly created by the Labor Code. Neither have the parties identified any statutory language from which it may be implied. Finally, the source of the purported obligation to use vacation time cannot be contractual. If it were contractual, presumably the terms of the contract, which could vary from one employer-employee relationship to another, would control the specific details of the obligation. For example, an employer might choose to offer employment contracts or institute a policy that gives its employees the right to defer taking vacation for as long as they like.[24] This

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[22]The practical effect of the DLSE's approach is to create a "use it or lose it" rule that employers arguably could not have included in their vacation policies without running afoul of the statutory restriction that an "employment contract or employer policy shall not provide for forfeiture of vested vacation time upon termination." (Lab. Code, § 227.3; *Boothby v. Atlas Mechanical, Inc.* (1992) 6 Cal.App.4th 1595 ["use it or lose it" vacation policy impermissible].)

[23]This characterization of the relationship between the employee and employer with respect to vacation time earned appears to have turned the relationship on its head by transmuting the employee's *right* to take vacation time into an *obligation* to use vacation time. (See generally Hohfeld, Fundamental Legal Conceptions (Cook ed. 1919) pp. 36-38 [identifying rights as the jural correlative of obligations, i.e., duties].)

[24]Nothing in the text of Labor Code section 227.3 suggests the Legislature intended to restrict the freedom of employers and employees to contract for a right to defer or accumulate vacation time or the freedom of employers to choose to adopt a vacation policy granting such a right. Nor would a contract provision creating a right to defer taking vacation time appear unenforceable on public policy grounds.

flexibility in contracting and employment policies leads to the conclusion that the purported obligation to use vacation time is not included in *all* employment contracts as either a matter of law or of fact. In sum, we are unconvinced that all California employees who earn vacation time are subject to an obligation to take vacation. (See *Bonn v. California State University, Chico* (1979) 88 Cal.App.3d 985 [public employer may not direct employee to expend accumulated vacation].)

Third, the DLSE's dual application of the statute of limitations is based on the erroneous premise that the statute of limitations begins to run when the employee earns the vacation benefit. California's well-established principles governing when a statute of limitations commences preclude this court from agreeing with the DLSE's position. One fundamental principle is that a statute of limitations begins to run only when the cause of action has accrued and not before. (Code Civ. Proc., § 312.) A second fundamental principle is that generally "the accrual of a cause of action sets the date as the time 'when, under the substantive law, the wrongful act is done,' or the wrongful result occurs, and the consequent 'liability arises.' [Citation.]" (*Norgart*, *supra*, 21 Cal.4th at p. 397.) This date also can be described as "when the cause of action is complete with all of its elements [citations] …." (*Ibid.*; *Davies v. Krasna* (1975) 14 Cal.3d 502, 513 [the limitations "period cannot run before plaintiff possesses a true cause of action"].) Yet an employee's earning a vested vacation benefit is not the event that completes a cause of action in all of its elements—it is not the wrongful act from which liability arises.

Because the DLSE's look-back period is based on the statute of limitations applicable to contracts, we will use a contractual theory of liability to analyze the DLSE's premise that the statute of limitations begins to run when vacation is earned. Under a contractual theory of liability, the "wrong" that is an essential element of the claim is the defendant's breach. (*Armstrong Petroleum Corp. v. Tri-Valley Oil & Gas Co.* (2004) 116 Cal.App.4th 1375, 1391, fn. 6; *Careau & Co. v. Security Pacific Business Credit, Inc.* (1990) 222 Cal.App.3d 1371, 1388.) As a result, a breach of contract claim does not accrue until there has been a breach of the contract. In the context of an employee

earning vacation, that event—the earning of vacation—does not create a breach of contract by the employer or the employee. Therefore, no claim accrues and no statute begins to run at the time vacation is earned. In other words, if an employee filed a civil action for breach of contract on the day vacation was earned, Code of Civil Procedure section 312 would require that the action be dismissed as premature.[25]

In summary, (1) a cause of action for breach of contract accrues for statute of limitations purposes only after there has been a breach of the contract, (2) the point at which vacation time is earned cannot be equated to a breach of contract and, therefore, (3) the statute of limitations applicable to contracts does not begin to run when vacation time is earned. Accordingly, we conclude that the statute of limitations cannot be applied as a look-back period to limit an employer's statutory obligation to pay for all vested vacation time that an employee did not take before the employment was terminated.

D. Application to Facts of this Case

Jamison did not commit legal malpractice with respect to Church's claim for payment for 10 days of vacation that had been earned as of May 1, 2000, because (1) the complaint was filed within one year of the termination of Church's employment and (2) the two-year limitations period applicable to oral contracts cannot be used as a look-back period that limits an employer's statutory liability to pay for all vested vacation that has not been used at the employee's termination date.

Accordingly, the superior court in the malpractice case correctly ruled that Jamison did not commit legal malpractice with respect to Church's claim under Labor Code section 227.3 for unpaid vacation.

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[25]The same conclusion would be reached under a statutory, rather than a contractual, theory of liability. Under the statutory theory, the wrong that triggers the running of the statute of limitations is the violation of the statute. Here, earning vested vacation does not violate Labor Code section 227.3.

VIII. Collateral Review

Church argues that the superior court erred in ruling on Jamison's motion for judgment on the pleadings in the malpractice case by not deferring to the conclusions contained in the order sustaining the general demurrer to Church's Labor Code claims against WHJ in the employment case.

A. Collateral Attack of a Prior Judgment[*]

First, Church contends that a superior court may not review another superior court's decision unless the standards for an appropriate collateral attack are met. We conclude that the principles that limit collateral attacks on the judgments of trial courts do not apply to the situation presented in this appeal.

A collateral attack is an indirect procedural challenge to a judgment that is made in a proceeding other than the one in which the judgment was rendered. (8 Witkin, Cal. Procedure (4th ed. 1997) Attack on Judgment in Trial Court, § 6, p. 513.) Witkin states one of the principles applicable to collateral attacks as follows: "In a collateral attack, the judgment comes up only incidentally, and may be effectively challenged only if it is so completely invalid as to require no ordinary review to annul it. [Citations.]" (*Id*. at p. 514.)

In this appeal, Jamison's motion for judgment on the pleadings was not a collateral attack on a judgment of the superior court in the employment case because (1) there was no final judgment in that lawsuit[26] and (2) Jamison's motion for judgment on the pleadings did not seek to change how the order sustaining the general demurrer to Church's Labor Code claims affected the parties to the employment case. (See generally 8 Witkin, Cal. Procedure, *supra*, Attack on Judgment in Trial Court, §§ 6-10, pp. 513-517.) In other words, the order sustaining WHJ's demurrer in the employment case

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[*] See footnote, *ante*, page 1.

[26] A judgment, final or otherwise, has not been entered in the employment case during the pendency of this appeal because the employment case has yet to go to trial.

remained in effect (i.e., was not annulled) after Jamison was granted judgment on the pleadings in the malpractice case.

B. Judicial Finality

Church also argues that, even if Jamison's motion for judgment on the pleadings was not, strictly speaking, a collateral attack, it was an inappropriate request for judicial review and rejection of another superior court's decision. To support this argument, Church cites the concurring opinion in *Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, which makes reference to "the concept of judicial finality." (*Id*. at p. 676 (conc. opn. of Haerle, J.).)

In *Lombardo v. Huysentruyt*, *supra*, 91 Cal.App.4th 656, the individuals named as beneficiaries in an attempted amendment to a trust brought a legal malpractice case against the lawyer who drafted the trust amendment and failed to get it put into effect. The trial court granted nonsuit to the lawyer and stated that the probate court had erred in ruling the amendment invalid and that the probate court's erroneous ruling superseded the lawyer's alleged negligence as the cause of the damage to the beneficiaries. The Court of Appeal reversed the grant of nonsuit and remanded for further proceedings. (*Id*. at p. 675.) The Court of Appeal reasoned that the question of causation presented an issue of fact and it was possible that the lawyer's negligence caused the injury because a reasonable attorney in the same circumstances would have anticipated the probate court's ruling that the amendment was invalid and taken steps to avoid putting the probate court in a position to make such a ruling. (*Id*. at p. 666; see 2 Schwing, Cal. Affirmative Defenses (2006 ed.) § 48:27 [an intervening act is a superseding cause if the intervening act produces a kind or degree of harm so far beyond the risk the original tortfeasor could have foreseen that the law deems it unfair to hold the original tortfeasor responsible].)

The holding and rationale in *Lombardo v. Huysentruyt*, *supra*, 91 Cal.App.4th 656 do not support the conclusion that an attorney sued for malpractice is precluded from arguing that a trial court's decision in the lawsuit that is the basis for the malpractice case was erroneous. In addition, the parties have not cited and we are not aware of any

published decision by a California appellate court that has reached that conclusion. Finally, Church has not presented public policy arguments that have convinced us that we should be the first court to adopt such a rule. For example, Church has not explained how a rule that requires the trial court in a legal malpractice case to accept the ruling made by the court in the litigation that gave rise to the malpractice case would be consistent with the "case-within-a-case" approach used in California legal malpractice cases. (See *Salisbury v. County of Orange* (2005) 131 Cal.App.4th 756, 764.) The case-within-a-case or trial-within-a-trial approach applied in legal malpractice cases uses an objective approach to decide what *should have been the result* in the underlying proceeding or matter. (*Hecht, Solberg, Robinson, Goldberg & Bagley LLP v. Superior Court* (2006) 137 Cal.App.4th 579, 585-586.) It follows that, where the underlying proceeding was decided by a trial court's ruling, that ruling will come under scrutiny in the malpractice case when the issue of what should have been the result of the underlying proceeding is addressed.

Accordingly, we will not adopt a rule of law that limits the arguments that an attorney may raise when defending against a legal malpractice claim and forces the attorney to abide by the decision reached in the underlying action.

We recognize that the way Code of Civil Procedure section 340.6, subdivision (a) is written and interpreted will require plaintiffs, in certain circumstances, to file legal malpractice cases involving missed statutes of limitations before the underlying lawsuit has reached a final judgment or other final resolution. Sometimes, those situations will produce contradictory rulings between the superior courts involved in the underlying lawsuit and the legal malpractice lawsuit. Furthermore, the lack of finality in the underlying lawsuit adds a layer of uncertainty to the legal malpractice lawsuit that makes the legal malpractice lawsuit more complex and requires more resources from the parties and the court system. Using this case as an example, under a rule that a cause of action for legal malpractice relating to a time-barred claim does not accrue until the underlying lawsuit reaches a final judgment or other final resolution, this legal malpractice case

would not have been filed and, depending on how the underlying employment case was resolved, might not ever have been filed. Nevertheless, this court is not in a position to eliminate the waste and uncertainty inherent in California's current rules by redrafting the provisions of Code of Civil Procedure section 340.6, subdivision (a).[27] That task must be left to the Legislature.

DISPOSITION

The judgment filed April 27, 2005, is reversed. The matter is remanded to the superior court with directions to vacate its order granting the motion for judgment on the pleadings without leave to amend and to enter a new order denying that motion, except as it pertains to Church's claim for vacation pay. Church is awarded his costs on appeal.

_____
DAWSON, J.

WE CONCUR:

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HARRIS, Acting P.J.

_____
CORNELL, J.

[27]In contrast, on remand, the superior court may be able to avoid some inefficiency and uncertainty by staying the malpractice case until the employment case reaches a final resolution.