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Court of Appeal, Second District, Division 3, California.
METHODIST HOSPITAL OF SOUTHERN CALIFORNIA et al., Petitioners,
v.
The SUPERIOR COURT of Los Angeles County, Respondent;
Kathleen De RUYTER, Real Party in Interest.
No. B134748.
(Super.Ct.No. BC186332).

March 29, 2002.

Employee sued religiously-affiliated hospital under state Fair Employment and Housing Act (FEHA) for employment discrimination because of sex, sexual harassment, and retaliation and for common-law causes of action for sexual battery and intentional infliction of emotional distress. The Superior Court, Los Angeles County, No. BC186332, Alan G. Buckner, J., denied hospital's motion for summary adjudication. Hospital petitioned for writ of mandate. On remand from the Supreme Court with directions to vacate previous order denying the petition, the Court of Appeal, Kitching, J., held that: (1) hospital fell within FEHA's religious-entity exemption; (2) amendments to FEHA that narrowed and limited the religious-entity exemption did not apply retroactively; (3) FEHA's religious entity-exemption did not violate Free Exercise and Establishment Clauses of Federal and State Constitutions; (4) hospital could not be held vicariously liable under theory of respondeat superior for alleged sexual battery and intentional infliction of emotional distress by employee's supervisor; and (5) allegations that hospital denied employee a transfer in response to her complaints of sexual harassment, while allowing supervisor to continue working in same area, did not support claim for intentional infliction of emotional distress.

Petition granted.

West Headnotes

[1] Civil Rights 78 1114

78 Civil Rights
78II Employment Practices
78k1108 Employers and Employees Affected
78k1114 k. Exemptions. Most Cited Cases
(Formerly 78k143)
Religiously-affiliated hospital fell within provision of state Fair Employment and Housing Act (FEHA) that excluded from definition of "employer" a religious association or corporation not organized for private profit, and therefore hospital was exempt from employee's FEHA claims for employment discrimination because of sex, sexual harassment in employment, and hospital's alleged retaliation for her complaints about sex discrimination and harassment. West's Ann.Cal.Gov. Code §§ 12926, subd. (d), 12940, subds. (h), (j)(1).

[2] Civil Rights 78 1106

78 Civil Rights
78II Employment Practices
78k1102 Constitutional and Statutory Provisions
78k1106 k. Retrospective Application. Most Cited Cases
(Formerly 78k102.1)
Amendments to state Fair Employment and Housing Act that narrowed and limited the religious-entity exemption from definition of an "employer" do not apply retroactively. West's Ann.Cal.Gov. Code §§ 12922, 12926, subd. (d), 12926.2, subd. (c).

[3] Civil Rights 78 1105

78 Civil Rights
78II Employment Practices
78k1102 Constitutional and Statutory Provisions
78k1105 k. Power to Enact and Validity. Most Cited Cases
(Formerly 78k103)

Constitutional Law 92 1339(1)

92 Constitutional Law
92XIII Freedom of Religion and Conscience
92XIII(B) Particular Issues and Applications
92k1327 Religious Organizations in General
92k1339 Labor and Employment in General
92k1339(1) k. In General. Most Cited Cases
(Formerly 92k84.5(12))
Provision of state Fair Employment and Housing Act that excluded from definition of "employer" a religious association or corporation not organized for private profit did not violate Free Exercise and Establishment Clauses of Federal and State Constitutions; exemption had secular purpose of preventing Legislature from abandoning religious neutrality and acting with intent of promoting a particular point of view in religious matters, it neither advanced nor inhibited religion, and it did not foster excessive government entanglement with religion. U.S.C.A. Const.Amend. 1; West's Ann.Cal. Const. Art. 1, § 4; West's Ann.Cal.Gov. Code § 12926, subd. (d)

[4] Labor and Employment 231H 2937

231H Labor and Employment
231HXVII Employer's Liability to Employees
231HXVII(D) Fellow Employees
231Hk2934 Willful Acts and Gross Negligence of Fellow Employees
231Hk2937 k. Sexual Misconduct. Most Cited Cases
(Formerly 148Ak114 Employers' Liability)
Hospital could not be held vicariously liable under a theory of respondeat superior on employee's common-law claim for sexual battery arising from conduct of employee's supervisor in catheterization laboratory; alleged sexual battery was not within the scope of supervisor's employment.

[5] Damages 115 57.59

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.50 Labor and Employment
115k57.59 k. Privilege or Immunity; Exercise of Legal Rights. Most Cited Cases
(Formerly 115k50.10)
If conduct prohibited by state Federal Employment and Housing Act meets the degree of outrageous conduct required for a claim of intentional infliction of emotional distress, FEHA's religious-entity exemption will not exempt an employer from liability for that non-statutory cause of action. West's Ann.Cal.Gov. Code §§ 12940 et seq., 12926, subd. (d)

[6] Damages 115 57.55

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.50 Labor and Employment
115k57.55 k. Sex and Gender. Most Cited Cases
(Formerly 115k50.10)
Hospital could not be held vicariously liable on common-law claim of intentional infliction of emotional distress arising from alleged sexual harassment of employee by her supervisor in catheterization laboratory; supervisor's alleged conduct did not come within scope of his employment.

[7] Damages 115 57.55

115 Damages
115III Grounds and Subjects of Compensatory Damages
115III(A) Direct or Remote, Contingent, or Prospective Consequences or Losses
115III(A)2 Mental Suffering and Emotional Distress
115k57.50 Labor and Employment
115k57.55 k. Sex and Gender. Most Cited Cases
(Formerly 115k50.10)
Allegations by hospital employee, that as a result of her complaints of sexual harassment by her

supervisor, hospital denied her a transfer and repeatedly denied her the opportunity to work in catheterization lab while supervisor was permitted to remain there, did not demonstrate outrageous conduct beyond bounds of human decency, but merely pleaded personnel management activity, and thus did not support a claim for intentional infliction of emotional distress.

ORIGINAL PROCEEDINGS in mandate. Alan G. Buckner, Judge. Petition granted.
O'Flaherty, Cross, Martinez, Ovando & Hatton, Robert M. Dato, Todd E. Croutch, Daniel K. Dik; Greines, Martin, Stein & Richland and Robert A. Olson for Petitioner.
No appearance for Respondent.
Smith & Warren and David P. Warren for Real Party in Interest.

INTRODUCTION

KITCHING, J.
***1** An employee sued her employer, a hospital, for statutory causes of action based on violations of the California Fair Employment and Housing Act ("the FEHA") and for common law causes of action for sexual battery and intentional infliction of emotional distress. After the trial court denied the employer hospital's motion for summary adjudication, the hospital filed a petition for writ of mandate in this court.

The California Supreme Court has decided that the hospital qualifies for the religious-entity exemption of the FEHA. The FEHA therefore does not classify the hospital as an "employer." Later statutes narrowed the religious-entity exemption, but those statutes took effect after this complaint was filed and do not apply to this case. The religious-entity exemption, moreover, does not violate the prohibitions against the establishment of religion in the First Amendment of the United States Constitution or in article I, section 4 of the California Constitution. Therefore plaintiff's FEHA causes of action as to the hospital must be dismissed.

Plaintiff's sexual battery and intentional infliction of emotional distress claims allege sexual discrimination and harassment by another hospital employee. Because the employee's conduct lies outside the scope of his employment, the employer-hospital is not vicariously liable for that misconduct and these common law claims must be dismissed as to the hospital. The intentional infliction of emotional distress claim additionally alleges that the employer-hospital refused to transfer plaintiff's work assignment to a department where she wanted to work. This personnel management decision does not constitute the extreme and outrageous conduct beyond the bounds of human decency which must exist to support this cause of action.

We therefore grant the petition.

FACTS AND PROCEDURAL HISTORY

On February 20, 1998, plaintiff Kathleen De Ruyter filed a complaint for damages against **Methodist Hospital** of Southern California (" **Methodist Hospital**") and Scott Cochran. The complaint alleged that during De Ruyter's employment in the **Methodist Hospital's**catheterization laboratory, Cochran was the laboratory manager and De Ruyter's supervisor. The complaint alleged that Cochran harassed, intimidated, and sexually discriminated against De Ruyter, caused her severe emotional distress, and created an intolerable working environment by his repeated sexual innuendo, harassment, and sexual comments and advances toward her.

As against Cochran and Methodist Hospital, De Ruyter's complaint contained causes of action for employment discrimination and for retaliation in violation of the FEHA (§ 12940, et seq.),[FN1] for sexual battery, and for intentional infliction of emotional distress. As against Methodist Hospital only, De Ruyter's complaint contained a cause of action for breach of the implied covenant of good faith and fair dealing.

> FN1. Unless otherwise specified, statutes in this opinion will refer to the Government Code.

De Ruyter, a nurse, began working for Methodist Hospital in 1974. She began working in the Methodist Hospital catheterization laboratory in January 1995. The complaint alleged that Cochran, a senior radiology technician and manager of the catheterization laboratory, supervised De Ruyter. De

Ruyter's first cause of action for discrimination in employment under section 12940 alleged that from January 1995 through May 1996, Cochran sexually harassed, intimidated, and discriminated against her. It alleged that Cochran on multiple occasions inappropriately and offensively touched De Ruyter, made inappropriate comments to and about her and her husband, and was manipulative, intimidating, and controlling in violation of former section 12940, subdivisions (f)(1) and (h)(i) (now subdivisions (h) and (j)(1)).

***2** De Ruyter's third cause of action alleged that Methodist Hospital violated former section 12940, subdivision (f) (now subdivision (h)) by retaliating against her for complaining about Cochran's conduct. The complaint alleged: "Plaintiff's complaints resulted in a perpetual and ongoing refusal to transfer Plaintiff to the Catheterization Lab or to allow Plaintiff to work in the Catheterization Lab while Cochran continued to work there despite his conduct."

On May 14, 1999, **Methodist Hospital** and Cochran moved for summary adjudication. Regarding the two FEHA causes of action, defendants argued in part that the FEHA exempted **Methodist Hospital**, as a religious organization, from liability under section 12940 for sexual harassment and discrimination or for retaliation. **Methodist Hospital** relied on section 12926, subdivision (d), stating that an "employer" for purposes of FEHA "does not include a religious association or corporation not organized for private profit."In the trial court, the parties disputed whether **Methodist Hospital** was a religious and non-profit corporation. However, the California Supreme Court has since held that **Methodist Hospital** qualifies for the religious-entity exemption and is not an "employer" covered by the FEHA. (*Kelly v. **Methodist Hospital** of So. California* (2000) 22 Cal.4th 1108, 1111, 1126, 95 Cal.Rptr.2d 514, 997 P.2d 1169 (hereafter *Kelly*).)

Methodist Hospital's summary adjudication motion alleged that De Ruyter's fourth cause of action for battery lacked merit because **Methodist Hospital** was not liable for its employees' sexual torts under the respondeat superior doctrine, and because **Methodist Hospital** was not subject to liability for battery as a religious organization exempt from FEHA. **Methodist Hospital's** summary adjudication motion alleged that De Ruyter's fifth cause of action for intentional infliction of emotional distress lacked merit because the first, third, and fourth causes of action against **Methodist Hospital** had no merit.

The trial court denied the summary adjudication motion. This court denied **Methodist Hospital's** subsequent petition for writ of mandate. **Methodist Hospital** filed a petition for review in the California Supreme Court, which dismissed the petition and remanded the cause to this court with directions to vacate the order denying the petition for writ of mandate. This court issued an order for the parties to show cause why the relief requested in the petition should or should not be granted. Defendant Cochran is not a party to this petition.

STANDARD OF REVIEW

Under summary judgment law, any party to an action may move the court for summary judgment in his favor on a cause of action or defense. The court must grant the motion if all the papers submitted show no triable issue exists as to any material fact: that is, no issue requires a trial as to any fact necessary under the pleadings and the law and that the moving party is entitled to a judgment as a matter of law. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843, 107 Cal.Rptr.2d 841, 24 P.3d 493 (hereafter *Aguilar*).)

***3** The party moving for summary judgment bears the burden of persuasion that no triable issue of material fact exists and that it is entitled to judgment as a matter of law. A triable issue of material fact exists only if the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof. A plaintiff bears the burden of persuasion that each element of the cause of action in question has been proved, and that there is no defense thereto. (*Aguilar, supra*, 25 Cal.4th at p. 850, 107 Cal.Rptr.2d 841, 24 P.3d 493;Code Civ. Proc., § 437c, subd. (o)(1) and (2).)

The party moving for summary judgment bears an initial burden of production to make a prima facie showing that no triable issue of material fact exists. If the moving party carries its burden, the burden of production shifts to the opposing party to make a prima facie showing by producing evidence that a

triable issue of fact exists. A prima facie showing is one sufficient to support the position of the party in question. (*Aguilar, supra*, 25 Cal.4th at pp. 850-851, 107 Cal.Rptr.2d 841, 24 P.3d 493;Evid.Code, §§ 115; 602.)

A defendant moving for summary judgment must present evidence, and not simply argue, that the plaintiff does not possess and cannot reasonably obtain needed evidence of at least one essential element of plaintiff's cause of action. (*Aguilar, supra*, 25 Cal.4th at pp. 853-855, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

In a summary judgment proceeding, if a party moving for summary judgment would prevail at trial without submission of any issue of material fact to a trier of fact for determination, the trial court should avoid a trial and grant summary judgment in that moving party's favor. (*Aguilar, supra*, 25 Cal.4th at p. 855, 107 Cal.Rptr.2d 841, 24 P.3d 493.)The trial court may not sit as a trier of fact and may not weigh the plaintiff's evidence or reasonable inferences drawn from that evidence against the defendant's evidence or reasonable inferences drawn from it. Nonetheless it must determine what any evidence or inference could show or imply to a reasonable trier of fact, under the applicable standard of proof. "In so doing, it does not decide on any finding of its own, but simply decides what finding such a trier of fact could make for itself." (*Id.* at p. 856, 107 Cal.Rptr.2d 841, 24 P.3d 493.)

This court may review an order denying a motion for summary adjudication by way of a petition for writ of mandate. (§ 437c, subd. (*l*).) This court reviews an order denying summary adjudication of issues using the same "de novo" standard as that applied to summary judgments. Where the erroneous denial of the motion will result in trial on nonactionable claims, a writ of mandate will issue. (*West Shield Investigations & Security Consultants v. Superior Court* (2000) 82 Cal.App.4th 935, 946, 98 Cal.Rptr.2d 612.)

ISSUES

With regard to the two FEHA causes of action, this petition presents the issues:

1. Whether the trial court correctly denied summary adjudication based on its finding that Methodist Hospital did not qualify for the religious-entity exemption;

***4** 2. Whether statutes which narrow the religious-entity exemption and which became effective after De Ruyter filed her complaint apply to this case; and

3. Whether the religious-entity exemption violates the prohibition against the establishment of religion in the First Amendment and the California Constitution.

With regard to remaining causes of action for sexual battery and intentional infliction of emotional distress, this petition presents the issues:

4. Whether **Methodist Hospital** is vicariously liable for a co-employee's sexual battery of De Ruyter; and

5. Whether **Methodist Hospital** liable, vicariously or directly, for intentional infliction of emotional distress.

DISCUSSION

I. *The Trial Court Erroneously Denied **Methodist Hospital's** Motion for Summary Adjudication of De Ruyter's Two FEHA Causes of Action*

A. *The California Supreme Court Has Held That the Religious-Entity Exemption Applies to **Methodist Hospital**, Which Is Therefore Not an Employer Covered by the Fair Employment and Housing Act*

The FEHA bars discrimination by employers on grounds enumerated in that Act. Although legislation effective beginning in 2000 changed the scope of the religious-entity exemption, at the time of this proceeding the FEHA exempted religious associations from its coverage. Under section 12926, subdivision (d), the term "employer" excluded "a religious association or corporation not organized for private profit."[FN2]In *Kelly, supra*, 22 Cal.4th 1108, 95 Cal.Rptr.2d 514, 997 P.2d 1169, the California Supreme Court held that Methodist Hospital of Southern California, the same defendant named in De Ruyter's suit, qualified for the religious-entity exemption of the FEHA in effect at that time. (*Id.* at

pp. 1111, 1126, 95 Cal.Rptr.2d 514, 997 P.2d 1169.)

> FN2. The prohibition against harassment in section 12940, subdivision (j)(1) formerly contained a religious-entity exemption in section 12940, subdivision (j)(4)(B). This exemption was amended effective January 1, 2002, to incorporate section 12926.2. (Stats.2001, ch. 909 (Assem. Bill No. 1475).).

Like De Ruyter, the plaintiff in *Kelly* was a nurse employed by Methodist Hospital. Methodist Hospital discharged plaintiff Kelly from employment when she was fifty years of age. Kelly did not bring a statutory action pursuant to the FEHA. Instead, Kelly brought a common law *Tameny*[FN3] action for wrongful discharge, claiming that the discharge violated a fundamental public policy grounded in the FEHA prohibition against discrimination in employment because of age. (*Kelly, supra*, 22 Cal.4th at pp. 1111-1112, 95 Cal.Rptr.2d 514, 997 P.2d 1169.)*Kelly* held that because Methodist Hospital was exempt from the FEHA, it was also exempt from a claim for wrongful termination in violation of a public policy expressed in the FEHA. Therefore *Kelly* affirmed the entry of summary judgment against plaintiff Kelly and in favor of defendant Methodist Hospital. (*Kelly*, at p. 1126, 95 Cal.Rptr.2d 514, 997 P.2d 1169.)

> FN3. *Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167, 164 Cal.Rptr. 839, 610 P.2d 1330.

[1] De Ruyter was not terminated from her employment, and does not bring a *Tameny* common law wrongful discharge action. Instead De Ruyter brings statutory causes of action based on conduct the FEHA prohibits: employment discrimination because of sex, sexual harassment in employment, and the employer's retaliation for her complaints about sex discrimination and harassment. Despite the differences between De Ruyter's causes of action and the cause of action in *Kelly*, the holding in *Kelly* governs this petition. An employer beyond the scope of the FEHA is not liable for conduct violating that Act. (*Jennings v. Marralle* (1994) 8 Cal.4th 121, 125, 130, 32 Cal.Rptr.2d 275, 876 P.2d 1074; *Phillips v. St. Mary Regional Medical Center* (2002) 96 Cal.App.4th 218, 227-228, 116 Cal.Rptr.2d 770.)By excluding "a religious association or corporation not organized for private profit" from the definition of "employer," section 12926 exempted Methodist Hospital from liability for statutory FEHA causes of action in this proceeding.

B. *Amendments to the Religious-Entity Exemption of the FEHA Do Not Apply Retrospectively*

***5** [2] De Ruyter does not argue that the facts in her case provide any basis for distinguishing or departing from the holding in *Kelly*, nor do we think such facts exist. De Ruyter does argue, however, that amendments to the FEHA which took effect after she filed her complaint should be applied retroactively. We disagree.

As *Kelly* acknowledges, in 1999 the California Legislature revised the religious-entity exemption by adding sections 12922 and 12926.2 to the FEHA. (*Kelly, supra*, 22 Cal.4th at p. 1111, fn. 2, 95 Cal.Rptr.2d 514, 997 P.2d 1169 .)These statutes, quoted in a footnote,[FN4] narrowed and limited the religious-entity exemption. They became effective January 1, 2000.(*Ibid.*)

> FN4.Section 12922 provides that "an employer that is a religious corporation may restrict eligibility for employment in any position involving the performance of religious duties to adherents of the religion for which the corporation is organized."Section 12926.2 defines the terms "religious corporation," "religious duties," and "employer." Section 12926.2, subdivision (c) further provides that "employer" covered by the FEHA "includes a religious corporation or association with respect to persons employed by the religious association or corporation to perform duties, other than religious duties, at a health care facility operated by the religious association or corporation for the provision of health care that is not restricted to adherents of the religion that established the association or corporation."

The discharge in *Kelly* occurred in 1991. (*Kelly, supra*, 22 Cal.4th at p. 1111, 95 Cal.Rptr.2d 514, 997 P.2d 1169.)The FEHA violations in De Ruyter's complaint allegedly occurred between January 1995

and May 1996. Thus, as in *Kelly,* the events giving rise to De Ruyter's FEHA causes of action occurred before sections 12922 and 12926.2 became effective on January 1, 2000.*Kelly* adjudicated the scope of the religious-entity exemption before enactment of these statutes, and did not apply them retroactively. We see no reason why this court should diverge from the practice in *Kelly.*(See also *Phillips v. St. Mary Regional Medical Center, supra,* 96 Cal.App.4th at p. 229-230, 116 Cal.Rptr.2d 770.)

De Ruyter relies on *Hoffman v. Board of Retirement* (1986) 42 Cal.3d 590, 229 Cal.Rptr. 825, 724 P.2d 511 for her argument that the statutes are retroactive because they merely clarify the law. "As a general rule, statutes that affect an employee's substantive rights are construed to operate prospectively. [Citation.] We will not give retroactive effect to a statute affecting a substantive right unless the Legislature expressly and clearly declares its intent that the statute operate retroactively. [Citation.] However, an exception to this rule applies when the legislation operates to clarify existing law, rather than to change it." (*Id.* at p. 593, 229 Cal.Rptr. 825, 724 P.2d 511.)

Sections 12922 and 12926.2 contain no express declaration of the Legislature's intent that the statutes operate retroactively. (Assem. Bill No. 1541, Stats.1999, ch. 913, §§ 1, 2, 3.) The court should not apply statutes retrospectively unless the Legislature has clearly declared its intent to do so. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207, 246 Cal.Rptr. 629, 753 P.2d 585.)

Sections 12922 and 12926.2, moreover, did not merely clarify an ambiguous statute. Instead these statutes changed the substance of the religious-entity exemption. (*Phillips v. St. Mary Regional Medical Center, supra,* 96 Cal.App.4th at p. 230, 116 Cal.Rptr.2d 770.)Before the statutes became effective, the religious-entity exemption meant that the FEHA did not define a religious corporation or association as an "employer" covered by that Act. After enactment of sections 12922 and 12926.2, the FEHA did define a religious corporation or association as an "employer" in relation to specific employees. Pursuant to section 12926.2, subdivision (c), a religious corporation or association became an "employer" within the scope of FEHA when it operated a facility to provide health care, did not restrict admission to adherents of its religion, and employed persons to perform duties, other than religious duties, at that health care facility.

***6** Thus the sections 12922 and 12926.2 did not leave the true statutory meaning unaltered; they changed the substance of the FEHA. These statutes gave statutory rights to employees who formerly did not have them. These statutes also imposed new obligations and potential liability on entities which, because the Act had not classified them as "employers," formerly remained outside the scope of the FEHA. That these statutes affected the rights of a large percentage of Methodist Hospital's employees seems clear. Just as clearly, these statutes expanded Methodist Hospital's potential liability under the FEHA by re-classifying it as an employer with respect to those employees.

Finally, before sections 12922 and 12926.2 became effective, Methodist Hospital and similar religious entities operating health care facilities relied on the religious exemption in conducting their affairs. When new statutes alter statutory substance, this change to rules on which religious entities formerly relied makes it unfair to apply new statutes to events occurring before those new statutes took effect. (*Evangelatos v. Superior Court, supra,* 44 Cal.3d at p. 1194, 246 Cal.Rptr. 629, 753 P.2d 585.)Applying sections 12926 and 12926.2 retrospectively would mean that Methodist Hospital and similar religious entities would have received no notice of the amended law affecting past conduct. (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 783, 72 Cal.Rptr.2d 624, 952 P.2d 641.)These considerations of fairness and due process support application of the 1999 statutes prospectively.

For these reasons we find no basis for applying sections 12926 and 12926.2 to the religious-entity exemption of the FEHA retrospectively.

C. *The Religious-Entity Exemption Does Not Violate the Religion Clauses of the United States or of the State of California*

In denying Methodist Hospital's motion for summary adjudication as to the two FEHA causes of action, the trial court made findings regarding Methodist Hospital's claim of exemption from the FEHA as a religious organization and whether the FEHA

religious-entity exemption violated clauses in the California and United States constitutions prohibiting the establishment of religion and protecting the free exercise of religion.

The trial court found that although there was no controlling California authority, other jurisdictions provided authority for requiring a balancing to determine whether the civil rights to be protected can be protected without excessive entanglement with religion under the Free Exercise Clause. The trial court also found that if De Ruyter's FEHA claims could be determined without excessive entanglement with religion, dismissal of her FEHA claims would violate the Establishment Clause of the First Amendment of the United States Constitution.

Methodist Hospital argues that by extending the religious-entity exemption to both religious and non-religious jobs, the Legislature intended to avoid government interference in the internal affairs of a religious organization. Moreover, federal courts recognize that exempting religious organizations from a state law that regulates, licenses, or taxes does not impermissibly establish religion. Methodist Hospital also argues that the FEHA religious-entity exemption meets the three criteria for a constitutionally valid accommodation of religion: (1) it has a secular purpose; (2) it does not advance or inhibit religion as its principal effect; and (3) it does not excessively entangle government and religion.

***7** De Ruyter responds that because her employment duties were entirely secular and contained no religious or doctrinal requirements, the courts can enforce the FEHA without entangling itself in religious and doctrinal issues. De Ruyter argues that failure to protect important civil rights violates the Establishment Clause because failing to enforce civil rights violations by religious entities aids those religious organizations.

1. *The Religion Clauses of the State and Federal Constitutions*

The free exercise and establishment clauses of the First Amendment to the United States Constitution provide: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...."

California Constitution, article I, section 4 states: "Free exercise and enjoyment of religion without discrimination or preference are guaranteed. This liberty of conscience does not excuse acts that are licentious or inconsistent with the peace or safety of the State. The Legislature shall make no law respecting an establishment of religion."

As we have seen, under the religious-entity exemption as it existed during this proceeding, the term "employer" excluded "a religious association or corporation not organized for private profit."(§ 12926, subd. (d).) Thus this exemption excluded these entities from the FEHA.

Kelly did not decide the constitutionality of the religious-entity exemption. (*Kelly, supra,* 22 Cal.4th at p. 1111, fn. 3, 95 Cal.Rptr.2d 514, 997 P.2d 1169.)The California Supreme Court, however, recently addressed these issues in relation to a state law which granted religiously affiliated organizations the authority to declare themselves exempt from historic preservation laws. (*East Bay Asian Local Development Corp. v. State of California* (2000) 24 Cal.4th 693, 698, 102 Cal.Rptr.2d 280, 13 P.3d 1122.)In so doing, it set forth a framework for analyzing the religious-entity exemption of the FEHA.

2. *The Religious-Entity Exemption Has a Secular Purpose, Neither Advances Nor Inhibits Religion, and Does Not Foster Excessive Government Entanglement With Religion*

The case law requires an examination of a statute challenged as violating the prohibition against establishment of religion to ascertain whether that law furthers any of the evils against which the establishment clause protects. These evils are the " ' "sponsorship, financial support, and active involvement of the sovereign in religious activity." ' " (*East Bay Asian Local Development Corp. v. State of California, supra,* 24 Cal.4th at p. 705, 102 Cal.Rptr.2d 280, 13 P.3d 1122, quoting *Walz v. Tax Commission* (1970) 397 U.S. 664, 668, 90 S.Ct. 1409, 25 L.Ed.2d 697.)*Walz* states the general principle drawn from the First Amendment and cases interpreting it: "[W]e will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is

room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference. [¶] Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so." (*Id.* at pp. 669-670.)

***8** *East Bay Asian Local Development Corp.* applies the three-part "*Lemon* " test used by the United States Supreme Court to determine whether a statute violates the religion clauses of the First Amendment. (*East Bay Asian Local Development Corp. v. State of California*, *supra*, 24 Cal.4th at p. 708, 102 Cal.Rptr.2d 280, 13 P.3d 1122.)Such a statute, first "must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion, [citation]; finally the statute must not foster 'an excessive government entanglement with religion.'[Citation.]" (*Lemon v. Kurtzman* (1971) 403 U.S. 602, 612-613, 91 S.Ct. 2105, 29 L.Ed.2d 745.)

With regard to the first *Lemon* test-whether the religious-entity exemption to the FEHA has a secular legislative purpose-the purpose of this requirement is to prevent the Legislature from abandoning religious neutrality and acting with the intent of promoting a particular point of view in religious matters. (*Corporation of Presiding Bishop v. Amos* (1987) 483 U.S. 327, 335, 107 S.Ct. 2862, 97 L.Ed.2d 273 (hereafter *Amos*).) Thus "it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions."(*Ibid.*) In *Amos*, the religious exemption from a statute prohibiting employment discrimination extended to all employment, of both a religious and a non-religious nature.[FN5]*Amos* states: "[I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and ... the way an organization carried out what it understood to be its religious mission."(*Id.* at p. 336, fn. omitted.)

FN5. The exemption in *Amos* concerned section 702 of the Civil Rights Act of 1964 (78 Stat. 255, as amended, 41 U.S.C. § 2000e-1), which provided: "This subchapter ... shall not apply ... to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."(*Amos, supra,* 483 U.S. at pp. 329-330, fn. 1.)

Amos concluded that a statute relieving a religious organization of this burden had the secular purpose of minimizing governmental interference with the decision-making process in religions. (*Amos, supra,* 483 U.S. at p. 336.)We conclude likewise regarding the religious-entity exemption in FEHA. The broad scope of the religious-entity exemption, excluding Methodist Hospital from the definition of "employer" for purposes of the FEHA, removed government interference with that religious entity's operation of its enterprise."[G]overnmental actions primarily aimed at avoiding violations of the Establishment Clause have a legitimate secular purpose."(*Vernon v. City of Los Angeles* (9th Cir.1994) 27 F.3d 1385, 1397.)

Legislatively created religious exemptions are permissible if the Legislature has reason to believe that the law may impose a burden on the free exercise of religion. (*East Bay Asian Local Development Corp. v. State of California*, *supra*, 24 Cal.4th at p. 711, 102 Cal.Rptr.2d 280, 13 P.3d 1122.)It satisfies the "secular purpose" test for the government to remain neutral in religious matters by alleviating a significant governmental interference with the ability of a religious organization to carry out its religious mission. (*Id.* at p. 713, 102 Cal.Rptr.2d 280, 13 P.3d 1122 .)Viewing government action to prevent restraints on the free exercise of religion as evidence that such action constitutes the establishment of religion creates an anomaly. We conclude that the religious-entity exemption of the FEHA had a secular purpose under the *Lemon* test.

***9** With regard to the second *Lemon* test-whether the law in question has " 'a principal or primary effect ... that neither advances nor inhibits religion' "-a law is not unconstitutional simply because it allows

churches to advance religion. (*Amos, supra,* 483 U.S. at p. 336.)That is their purpose. "For a law to have forbidden 'effects' under *Lemon,* it must be fair to say that the *government itself* has advanced religion through its own activities and influence." (*Id.* at p. 337.)By exempting Methodist Hospital from the FEHA, the Legislature did not advance religion; it removed itself from the affairs of religious entities. The exemption permitted a religious entity to continue to manage its employment affairs in the manner it would have done but for the FEHA; this is not an impermissible endorsement of religion by the State of California. (*East Bay Asian Local Development Corp. v. State of California, supra*, 24 Cal.4th at p. 715, 102 Cal.Rptr.2d 280, 13 P.3d 1122; see also *Amos, supra,* 483 U.S. at pp. 336-337.)It cannot be fairly concluded that the religious-entity exemption of the FEHA caused the government of California to advance religion.

The religious-entity exemption of the FEHA passed the third *Lemon* test-the statute must not foster an excessive government entanglement with religion-for the reason it passed the first *Lemon* test. That is, the purpose of the religious-entity exemption was to preclude government interference with that religious entity's operation of its enterprise. This purpose was the opposite of entangling government in religion. (*Amos, supra,* 483 U.S. at p. 339.)The exemption benefited religious entities to the extent they did not have to expend resources to comply with the FEHA. Nonetheless the exemption did not constitute "sponsorship, financial support, and active involvement of the sovereign in religious activity."(*Walz v. Tax Commission, supra*, 397 U.S. at p. 668.)The religious-entity exemption of the FEHA provided no government financial or other aid to religion, and created no relationship between the State of California and religious entities. (*East Bay Asian Local Development Corp. v. State of California, supra*, 24 Cal.4th at p. 716, 102 Cal.Rptr.2d 280, 13 P.3d 1122.)

[3] We conclude that the religious-entity exemption of the FEHA did not violate the First Amendment of the United States Constitution. The protection against the establishment of religion in the California Constitution does not create broader protections than those of the First Amendment. (*East Bay Asian Local Development Corp., supra,* 24 Cal.4th at p. 716, 102 Cal.Rptr.2d 280, 13 P.3d 1122.)Therefore the religious-entity exemption did not violate article I, section 4 of the California Constitution. (24 Cal.4th at pp. 718-719, 102 Cal.Rptr.2d 280, 13 P.3d 1122.)

D. *Conclusion*

De Ruyter had two FEHA causes of action that named Methodist Hospital as a defendant: (1) a cause of action for employment discrimination and sexual harassment; and (2) a cause of action for employment discrimination because of retaliation. As to these causes of action, the FEHA religious-entity exemption requires reversal of the denial of **Methodist Hospital's** summary adjudication motion.

II. ***Methodist Hospital*** *Is Not Vicariously Liable for Sexual Battery*

***10** As **Methodist Hospital** acknowledged in its summary adjudication motion, De Ruyter's sexual battery cause of action was a common law claim, not one based on the FEHA. This cause of action alleged that Cochran touched De Ruyter inappropriately and offensively on numerous occasions while making inappropriate sexual comments. Methodist Hospital's summary adjudication motion argued that it was not vicariously liable for Cochran's actions, based on *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 48 Cal.Rptr.2d 510, 907 P.2d 358 (hereafter *Lisa M.)* and *Farmers Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 47 Cal.Rptr.2d 478, 906 P.2d 440.

In *Lisa M.*, plaintiff underwent an ultrasound imaging examination in defendant hospital. Tripoli, the technician conducting this procedure, sexually molested the plaintiff. Plaintiff sued Tripoli, the hospital, and others for battery and for other causes of action. Defendant hospital obtained summary judgment. *Lisa M.* addressed whether the hospital was vicariously liable for Tripoli's battery of plaintiff. (*Lisa M., supra,* 12 Cal.4th at pp. 295, 297, 48 Cal.Rptr.2d 510, 907 P.2d 358.)

The respondeat superior rule makes an employer vicariously liable for its employees' torts committed within the scope of employment. The question is what connection must exist between an employee's intentional tort and the employment to hold the employer vicariously liable. (*Lisa M., supra,* 12 Cal.4th at pp. 296-297, 48 Cal.Rptr.2d 510, 907 P.2d

358.)The "nexus" required is "that the tort be engendered by or arise from the work." (*Id.* at p. 298, 48 Cal.Rptr.2d 510, 907 P.2d 358.)For respondeat superior liability to exist, the tort must also be foreseeable from the employee's duties: "Respondeat superior liability should apply only to the types of injuries that ' "as a practical matter are sure to occur in the conduct of the employer's enterprise."' [Citation.] The employment, in other words, must be such as predictably to create the risk employees will commit intentional torts of the type for which liability is sought." (*Id.* at p. 299, 48 Cal.Rptr.2d 510, 907 P.2d 358.)

Lisa M. therefore held that defendant hospital was not vicariously liable for Tripoli's battery. Tripoli's employment as an ultrasound technician provided the opportunity for him to be alone with the plaintiff in circumstances that made the battery possible, but his employment did not engender the tort in the sense that its motivating emotions were fairly attributable to work-related events or conditions. Tripoli's acts were "unauthorized by Hospital and were not motivated by any desire to serve Hospital's interests. Beyond that, however, his motivating emotions were not causally attributable to his employment. The flaw in plaintiff's case for Hospital's respondeat superior liability is not so much that Tripoli's actions were personally motivated, but that those personal motivations were not generated by or an outgrowth of workplace responsibilities, conditions or events."(*Lisa M., supra*, 12 Cal.4th at pp. 301-302, 48 Cal.Rptr.2d 510, 907 P.2d 358.)

Lisa M. also found that Tripoli's assault on the plaintiff did not originate with, and was not a generally foreseeable consequence of, the ultrasound examination he was authorized to conduct. "The assault, rather, was the independent product of Tripoli's aberrant decision to engage in conduct unrelated to his duties. In the pertinent sense, therefore, Tripoli's actions were not foreseeable from the nature of the work he was employed to perform."(*Lisa M., supra*, 12 Cal.4th at p. 303, 48 Cal.Rptr.2d 510, 907 P.2d 358.)

***11** In *Farmers Ins. Group*, a male deputy sheriff, Nelson, lewdly propositioned and offensively touched three female deputy sheriffs working at the county jail. The Tort Claims Act required a public entity to pay claims and defense costs arising out of a civil lawsuit where the employee proved that the act or omission giving rise to an injury occurred in "the scope of his or her employment as an employee of the public entity."*Farmers Ins. Group* addressed whether, under the Tort Claims Act, the county employing Nelson had to indemnify him and pay his costs to defend a sexual harassment suit by the three female deputy sheriffs.[FN6]*Farmers Ins. Group* found that the county did not: "Since the deliberate targeting of an individual employee by another employee for inappropriate touching and requests for sexual favors is not a risk that may fairly be regarded as typical of or broadly incidental to the operation of a county jail, such conduct must be deemed to fall outside the scope of a deputy sheriff's employment. Consequently, the County is not obligated to indemnify the sexual harasser or his private insurer."(*Farmers Ins. Group v. County of Santa Clara*, *supra*, 11 Cal.4th at p. 997, 47 Cal.Rptr.2d 478, 906 P.2d 440.)

FN6. The procedural posture of the action in *Farmers Ins. Group* differs from *Lisa M.* and from the instant petition. In *Farmers Ins. Group*, the three female plaintiffs sued Nelson in federal court. Nelson obtained counsel paid for by his homeowners insurance carrier, Farmers Insurance Group ("Farmers"). After Nelson settled with two plaintiffs and a third plaintiff's case against Nelson was dismissed as time-barred, plaintiffs recovered a judgment for damages against the County of Santa Clara on their sexual harassment claims. After their government claims were rejected, Farmers and Nelson sued the County of Santa Clara (and others) in state court seeking indemnity for the amount Farmers paid in settling and defending the earlier action. The trial court granted the county's summary judgment motion, finding that Nelson's conduct was outside the scope of his employment as a matter of law. After the Court of Appeal reversed, the California Supreme Court granted the county's petition for review to decide whether, under the Tort Claims Act, the county properly refused to defend or indemnify Nelson because his acts of sexual harassment were outside the scope of his employment. (*Farmers Ins. Group v. County of Santa Clara*, *supra*, 11 Cal.4th at pp. 1000-1003, 47 Cal.Rptr.2d 478, 906

P.2d 440.)

Although the issue whether Nelson's conduct was within the "scope of his employment" derived from the Tort Claims Act, this issue reflects general respondeat superior principles. An employer is liable for risks "arising out of the employment," i.e., when in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. For the employer to be vicariously liable for an employee's conduct, the inquiry should be whether the risk was one that may be fairly regarded as typical of or broadly incidental to the employer's enterprise. Thus the employer's liability extends beyond his actual or possible control of the employee to include risks inherent in or created by the enterprise. (*Farmers Ins. Group v. County of Santa Clara, supra*, 11 Cal.4th at p. 1003, 47 Cal.Rptr.2d 478, 906 P.2d 440.)*Farmers Ins. Group* also adopted a foreseeability test to determine whether a risk was inherent in, or created by, an enterprise: the question was whether the actual occurrence was a generally foreseeable consequence of the activity. Specifically, the foreseeability test for respondeat superior liability asked whether, in the context of the particular enterprise, an employee's conduct was not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business. (*Id.* at p. 1004, 47 Cal.Rptr.2d 478, 906 P.2d 440.)

An employer is not strictly liable for all actions of its employees during working hours. An employer "will not be held vicariously liable for an employee's malicious or tortious conduct if the employee *substantially deviates* from the employment duties for personal purposes."(*Farmers Ins. Group v. County of Santa Clara, supra*, 11 Cal.4th at pp. 1004-1005, 47 Cal.Rptr.2d 478, 906 P.2d 440; italics in original.) In analysis particularly relevant to the facts of Methodist Hospital's petition, *Farmers Ins. Group* cited a series of cases holding that, except when on-duty police officers commit misconduct against members of the public, the employer is not vicariously liable to third parties for an employee's acts of sexual misconduct. (*Id.* at p. 1006, 47 Cal.Rptr.2d 478, 906 P.2d 440; see also *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 394, 97 Cal.Rptr.2d 12.)Such cases found no vicarious liability as a matter of law "because it could not be demonstrated that the various acts of sexual misconduct arose from the conduct of the respective enterprises. In particular, the acts had been undertaken solely for the employees' personal gratification and had no purpose connected to the employment. Moreover, the acts had not been engendered by events or conditions relating to any employment duties or tasks; nor had they been necessary to the employees' comfort, convenience, health, or welfare while at work."(*Farmers Ins. Group*, at p. 1007, 47 Cal.Rptr.2d 478, 906 P.2d 440.)

***12** [4] Under *Lisa M.* and *Farmers Ins. Group*, Methodist Hospital is not liable under respondeat superior liability for Cochran's sexual battery as a matter of law. Sexual battery substantially deviated from Cochran's employment duties. The operation of a hospital generally, and of a catheterization laboratory specifically, are not enterprises giving rise to sexual battery. Cochran's sexual battery of De Ruyter had no purpose connected to his or her employment, was not engendered by events or conditions relating to employment duties or tasks, and was not necessary to the comfort, convenience, health, or welfare of De Ruyter or other employees while they were at work. Therefore sexual battery, as a matter of law, was not within the scope of Cochran's employment. Methodist Hospital cannot be held vicariously liable for sexual battery by Cochran.

III. *Methodist Hospital Is Not Vicariously or Directly Liable for Intentional Infliction of Emotional Distress*

De Ruyter's cause of action for intentional infliction of emotional distress ("IIED") incorporates the allegations of the first cause of action (for employment discrimination in violation of § 12940, et seq.), and alleges that Methodist Hospital and Cochran acted intentionally, or with reckless disregard of the likely consequences of their acts, to cause severe emotional distress.

[5] A plaintiff can claim IIED damages based on acts that violate the FEHA. (*Accardi v. Superior Court* (1993) 17 Cal.App.4th 341, 352-353, 21 Cal.Rptr.2d 292; *Kovatch v. California Casualty Management Co.* (1998) 65 Cal.App.4th 1256, 1277-1278, 77 Cal.Rptr.2d 217.)The IIED cause of action, however, is an action at common law. (*Murray v. Oceanside*

Unified School Dist. (2000) 79 Cal.App.4th 1338, 1362-1363, 95 Cal.Rptr.2d 28.)Thus if conduct prohibited by the FEHA meets the degree of outrageous conduct required for IIED, the religious-entity exemption would not insulate Methodist Hospital from liability for this non-statutory cause of action.

The vicarious liability analysis set forth in relation to De Ruyter's sexual battery cause of action, however, also applies to the IIED cause of action. The IIED cause of action alleges sexual harassment, discrimination and conduct by Cochran, who:

(a) made statements in the work environment of an inappropriate nature;

(b) inappropriately and offensively touched and hugged De Ruyter on multiple occasions, demanded and asked for hugs, tried to kiss De Ruyter, put his arm around her, and made statements that "I don't feel right" unless he hugged De Ruyter;

(c) made offensive and inappropriate remarks, including: "I had a dream about you," and "I know you want to kiss me;" telephoned De Ruyter at home in the morning to say "I love the way your voice sounds when you wake up in the morning;" said "I think all women should stay home" and "There's something between us;" and made comments of a sexual nature;

(d) talked about his wife and referred to her as a "bitch," asked if De Ruyter's husband was "affectionate," and with knowledge that De Ruyter's husband was Asian, made comments about interracial marriage being inappropriate;

***13** (e) tried to intimidate and control De Ruyter with inappropriate words and conduct.

[6] These allegations relate to Cochran only. Under *Lisa M.* and *Farmers Ins. Group*, Methodist Hospital is not liable for Cochran's intentional infliction of emotional distress upon De Ruyter as a matter of law. These actions and statements substantially deviated from Cochran's employment duties. The operation of a hospital generally, and of a catheterization laboratory specifically, are not enterprises giving rise to Cochran's statements and conduct forming the basis of De Ruyter's IIED cause of action. Cochran's conduct and statements to De Ruyter had no purpose connected to his or her employment, were not engendered by events or conditions relating to employment duties or tasks, and were not necessary to the comfort, convenience, health, or welfare of De Ruyter or other employees while they were at work. Therefore Cochran's intentional infliction of emotional distress upon De Ruyter, as a matter of law, did not come within the scope of Cochran's employment. Consequently Methodist Hospital cannot be held vicariously liable for IIED by Cochran.

The IIED cause of action, incorporating the first eight paragraphs of the first cause of action, includes the allegation: "As a result of Plaintiff's complaints of harassment, [defendants denied] Plaintiff a transfer and repeatedly denied the opportunity to work in the Catheterization Lab while Cochran was permitted to remain."Although ambiguous, this allegation appears to pertain to Methodist Hospital, not Cochran.

A cause of action for intentional infliction of emotional distress requires: (1) outrageous conduct, (2) intent to cause or a reckless disregard of the possibility of causing emotional distress, (3) severe or extreme emotional distress, and (4) actual and proximate cause of the emotional distress by the outrageous conduct. (*Symonds v. Mercury Savings & Loan Assn.* (1990) 225 Cal.App.3d 1458, 1468, 275 Cal.Rptr. 871.)"Extreme and outrageous conduct is that which goes beyond all possible bounds of decency so as to be regarded as atrocious and utterly intolerable in a civilized community. (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 209-210, 185 Cal.Rptr. 252, 649 P.2d 894[ ].) Insults, indignities, annoyances, petty oppressions or other trivialities will not suffice. The conduct must be such that it would cause an average member of the community to immediately react in outrage."(*Gomon v. TRW, Inc.* (1994) 28 Cal.App.4th 1161, 1172, 34 Cal.Rptr.2d 256; see also Rest.2d Torts, § 46, com. d, p. 73, quoted in *Cochran v. Cochran* (1998) 65 Cal.App.4th 488, 496, 76 Cal.Rptr.2d 540.)

[7] Denying De Ruyter a transfer, and assigning Cochran to the catheterization lab while not assigning De Ruyter to that lab, constitute personnel management by Methodist Hospital. "An essential element of [an IIED claim] is a pleading of

outrageous conduct beyond the bounds of human decency. [Citations.] Managing personnel is not outrageous conduct beyond the bounds of human decency, but rather conduct essential to the welfare and prosperity of society. A simple pleading of personnel management activity is insufficient to support a claim of intentional infliction of emotional distress, even if improper motivation is alleged."(*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 80, 53 Cal.Rptr.2d 741.)

***14** Thus De Ruyter's IIED claim as against **Methodist Hospital** must be dismissed.

DISPOSITION

The petition is granted. Let a writ of mandate issue directing the trial court to vacate its order denying the motion for summary adjudication as to **Methodist Hospital** of Southern California and to enter a new and different order granting the motion for summary adjudication as to **Methodist Hospital** of Southern California and dismissing the first, third, fourth, and fifth causes of action as to **Methodist Hospital** of Southern California. The alternative writ issued February 7, 2001, is hereby discharged. Costs on appeal are awarded to **Methodist Hospital** of Southern California.

We concur: CROSKEY, Acting P. J., and ALDRICH, J.
Cal.App. 2 Dist.,2002.
Methodist Hosp. of Southern California v. Superior Court
Not Reported in Cal.Rptr.2d, 2002 WL 479750 (Cal.App. 2 Dist.)

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