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DEFENSE COMMENT

Association of Defense Counsel of Northern California and Nevada – *Serving the Civil Defense Bar Since 1959*

Vol. 30, No. 1 / Spring 2015

In This Issue:

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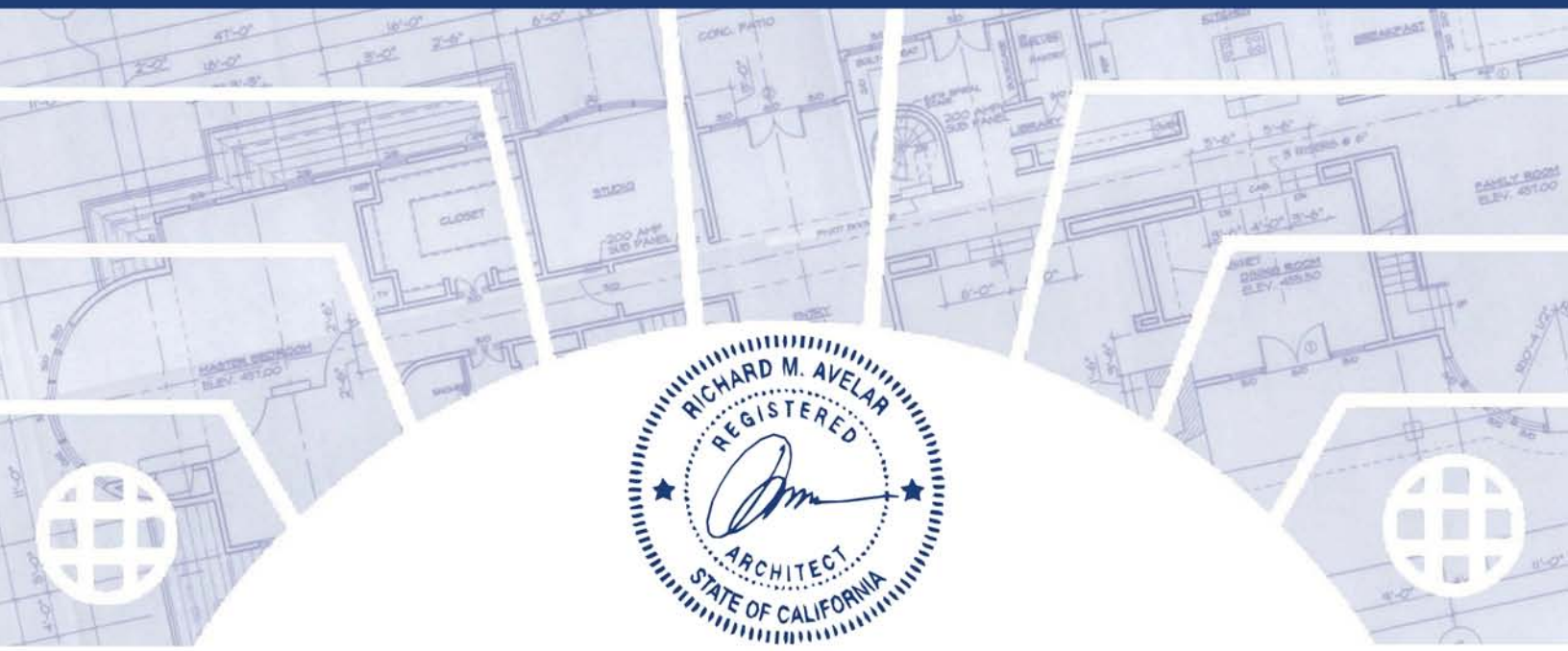





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A·D·C VERITAS DEFENSE COMMENT

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FEATURES

DEPARTMENTS

Defense Comment would be pleased to consider publishing articles from ADC members and friends. Please send all manuscripts and/or suggestions for article topics to: David A. Levy, Office of San Mateo County Counsel, 400 County Center 6th Floor, Redwood City, CA 94063. Phone: (650) 363-4756; Fax: (650) 363-4034; E-mail: *dlevy@smcgov.org.*

Michael C. Kronlund
2015 President

To a Bright Future

It is my privilege and honor to serve as the 2015 President of the Association of Defense Counsel of Northern California and Nevada. I look forward to this year knowing that lawyers in California and Nevada will face significant challenges that include not only limited court funding, but also continued efforts by the plaintiff's bar to expand liability and damages. The ADC will continue to meet these challenges through timely education programs, newsflashes, use of E-mail groups which allow our members to share information, as well as through the California Defense Counsel which presents the ADC's voice in Sacramento.

The 55th Annual Meeting in December 2014 was a great success, thanks in large part to our Vice President, Dave Daniels. The program featured presentations on a wide variety of topics with top-notch panelists and included the inspirational thoughts of "super-agent" Leigh Steinberg as well as the riveting story of life and heroism presented by Congressional Medal of Honor Recipient, Salvatore Giunta. A number of color photographs from the meeting can be found on the last page of the magazine. I thank all who attended, and made presentations, and look forward to seeing you at upcoming ADC events.

At the Annual Meeting, we welcomed five new members to the Board of Directors:

- **Ellen Arabian-Lee** (Employment and Magazine);
- **Nolan Armstrong** (Bench Bar / Judicial Liaison and Public Entity);
- **Mark Berry** (Insurance and Transportation);
- **Ryan Plotz** (Young Lawyers); and,
- **Holiday Powell** (Litigation, Business Litigation and Law Firm Management).

Each of these new board members, as well as the continuing board members are committed to making certain the organization keeps our members informed and connected.

Our continuing education calendar is full of events throughout the year. On February 27th, our first education program was presented in San Francisco. There was an Employment Law update, focusing not only on recent legislation such as AB 1522, but other recent legislation and recent case law.

Board members Keith Chidlaw, Nolan Armstrong and Ryan Plotz organized a Young Lawyers seminar in Sacramento entitled: "Unraveling the Mysteries of Law and Motion: Beyond the Practice Guides And Into Chambers." This was followed by a judicial reception, featuring numerous state and federal judges, including Supreme Court Chief Justice Tani Cantil-Sakauye, after this magazine went to press. A full story will appear in our summer issue.

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Michael D. Belote
California Advocates, Inc.

Defense Practice Squarely at Issue in 2015

With literally thousands of registered lobbyists in Sacramento, a person would be very hard-put to identify any significant area of commerce, education, local government or public interest not active in the halls of the Capitol. The number of organizations whose exclusive mission is to represent civil defense practitioners, however, is exactly one, the California Defense Counsel. "CDC" is jointly funded by the Association of Defense Counsel of Northern California and Nevada, and the Association of Southern California Defense Counsel. Members of each organization are therefore automatically members of CDC.

Representation of defense lawyers will be particularly significant in the California Legislature this year. Several issues relating squarely to defense lawyers will be at issue. Probably the most important discussion relates to demurrers. Concerns have been expressed in some circles that repetitive and unnecessary demurrers are clogging law and motion departments in some courts; some have even called for elimination of demurrers.

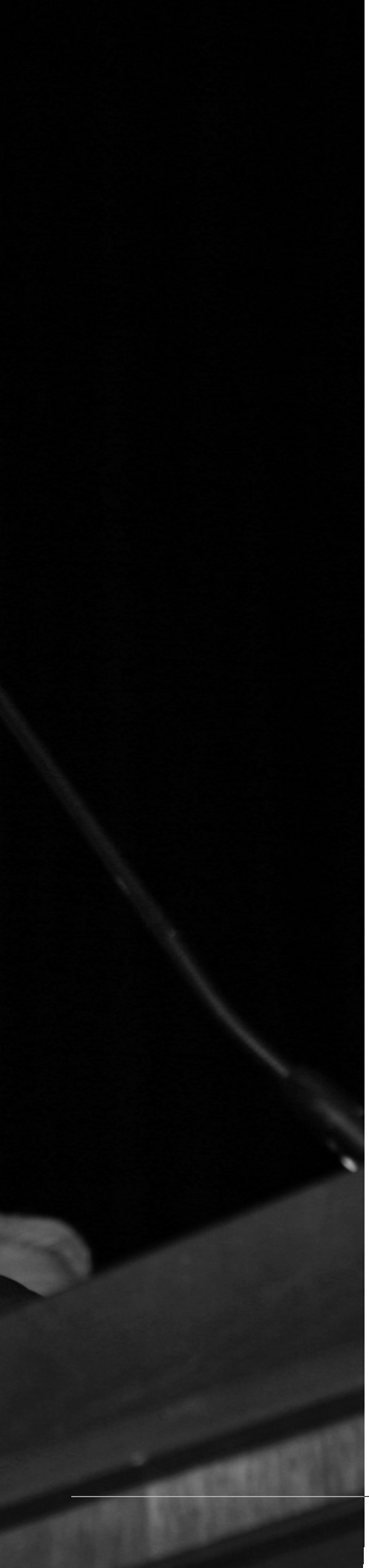
A bill will be introduced by Senator Bob Wieckowski (D-Fremont) to address the issue. This is *not* a situation where Senator Wieckowski is introducing a bill trying to eliminate demurrers; in fact, the bill expressly is being introduced to foster the discussion and to look for consensus among the plaintiffs, defense and judges. But the discussion, particularly on a working group established by the Judicial Council's Civil and Small Claims Advisory Committee, is wide-ranging and has touched on proposals which would allow demurrers to be summarily overruled, potentially without due consideration.

As a member of the demurrers working group within the Judicial Council, Peter Glaessner has been ably representing defense practitioners. Peter served as both ADC and CDC President, and knows this issue very well. The CDC position is clear: we will not attempt to justify duplicative and unnecessary demurrers, but believe strongly that demurrers are an essential defense tool to refine overpled causes of action. In this regard demurrers contribute to judicial economy. We are working in good faith on the issue, and will keep the membership well informed as the discussions proceed.

A second issue presently under discussion relates to expedited jury trials. When authorized by the Legislature a few years ago, there was great hope that "EJTs" could both contribute to judicial economy, particularly for small cases, and provide important trial opportunities for young lawyers. The authorizing legislation is scheduled to "sunset" at the end of this year, however, and by all accounts the number of EJTs conducted around the state has been quite small.

Continued on page 32


Michael



Introducing Mike Kronlund, 2015 ADC President

By Linda J. Lynch,
ADC Immediate Past President, Lynch & Shupe, LLP

As a member of the ADC, you may well have received a call at some point from Mike Kronlund about one of many possible topics, such as alerting you to an upcoming "not to be missed" educational program, or asking for your help in putting on a program. In fact, knowing Mike, you may well have, over the years, received multiple such calls. Those calls are but small examples of Mike's dedication to the ADC and all it has to offer. It is his dedication and hard work that have resulted in his 2015 presidency of the ADC. So who is this man and what makes him tick? I introduce your President, Mike Kronlund.

Mike was born and raised in the Sacramento area. He has not strayed far from those roots. Mike practices law and has settled to raise his family in the Stockton area.

Mike's mother was born and raised in Sweden. As a result, he had a chance to spend significant amounts of time in Sweden. In fact, Mike understands and speaks the Swedish language. Mike offered a disclaimer on his proficiency stating that he had become rusty with the passage of time.

When Mike was very young his parents divorced. He grew up living with his mom, a veterinarian at UC Davis. When Mike was in sixth grade his mother remarried and he was thereafter raised by his mother and step-father on the family's ranch in Elk Grove. It was a working ranch. They ran cattle, had horses, and grew hay. It was life on the family ranch where Mike learned the importance of hard work and self-reliance. (You can see some photographic evidence of his familiarity

Continued on page 6

with animals.) As a youth, Mike was equally at home on the back of a horse or on a tractor. In fact, Mike spent a fair amount of his time growing up riding horses and even breaking them for the race track. His family ran race horses on the fair circuit throughout California. He also spent probably too much time on the back stretches of race tracks. He refers to this as an "interesting education" for a teenager, although he doesn't elucidate.

Mike first thought about going to law school while he was in high school. He considered several professions, including becoming a veterinarian, law enforcement, military (pilot) and lawyer. By college he had narrowed it down to pilot or lawyer. At 19, he sustained a severe eye injury. The injury led to litigation, which fascinated him and cemented the decision to go to law school and probably to be a civil trial lawyer.

Mike paid for his college education and elected to stay close to home. He majored in Government, working his way through college at Cal State University, Sacramento, engaged in not only ranch work, but construction work as well, while living at home. While busy with studies and work to pay for school, he still found time to enjoy the outdoors, including rowing, golf, fishing, and travel. Mike still goes on an annual camping trip with college friends he has known for more than 20 years, and often goes to Arizona for spring training or to the NCAA basketball tournament with the same group.

After graduating from CSU, Sacramento, Mike attended the University Of Pacific, McGeorge School Of Law. He graduated in 1989. Mike remembers well his first day of law school in 1986. Mike recounted that the first day of law school, he had left Sweden the day before and got off an airplane in San Francisco at 1:30 in the morning, arriving home at 3:30 a.m. and being in his first class (real property) in Sacramento at 8:00 a.m. Luckily, Mike wasn't called on that day. That experience taught him a lesson – you need to be prepared. It is a lesson which Mike has continued to live by to this day. Mike realized quickly that day he was no longer in college and that the "playing field" had changed considerably.

It was at McGeorge that Mike met fellow law student, Barbara Ahmad, destined to become Mike's wife. They served on the Law Review together and got to know each other better. They dated in law school and graduated together in 1989. They studied together and sat for the Bar exam at the same time. Mike and Barbara were married between sitting for the bar and getting the bar results. The day they would get their results was memorable; Mike received his bar results three hours before Barbara, which he described as possibly the longest three hours of his life.

But, of course, it was all good news. Mike's wife went on to become a prosecutor, and now, Judge Barbara Kronlund presides over a civil department in San Joaquin Superior Court.

Mike and his wife enjoy raising their two children, Chris, age 14 and Bethany, age 11. Both kids are very active and involved with sports, and Mike can often be found at many of their activities. By way of example, both kids are brown belts in Taekwondo.

Chris is a Boy Scout working towards his Eagle rank. Mike has been involved in scouting and has participated in all types of scouting adventures, including snow camping at 7,500 feet in February and backpacking and hiking at 9,000 feet. Mike also enjoys fishing when his kids let him.

Bethany is an excellent piano player. She is also active in fast pitch softball where she serves as a pitcher and shortstop. Mike is, and will continue to be, involved in coaching her softball team.

Mike looks forward to both of his kids starting high school. He is committed to remaining involved and fostering the great futures he anticipates for both of them.

While in law school, Mike clerked at Kroloff Belcher Smart Perry & Christopherson located in Stockton. After passing the bar, he joined that firm. There, he handled primarily civil litigation, and in particular, defense work. While at the Kroloff law firm, Mike was temporarily "leased" to the Sacramento District Attorney's office, prosecuting mostly Driving Under the Influence and Burglary cases, and giving him some valuable trial experience.

Continued on page 7

In 1995, Mike had an opportunity to leave that firm and start a law practice with one of the senior partners, former ADC President Dan Quinn (1994). Thereafter, Mike became a partner in the Law Office of Daniel F. Quinn, now known as Quinn & Kronlund, LLP.

Mike's general practice area started in classic insurance defense and medical malpractice defense matters. Over the years, his practice has evolved, and he now concentrates on the defense of commercial trucking, excess claims and business litigation matters.

Mike has been a member of ABOTA for over ten years. He has also served as a member and on the Executive Council/ Board for the Association of Defense Trial Attorneys. Mike's volunteer activities include having been on the Board of Directors for the Stockton Shelter for the Homeless for 15 years, and serving as a judge in the High School Mock Trial Competition.

Mike prides himself on being a trial lawyer and has tried numerous cases to verdict. He thoroughly enjoys trial work, and particularly the competitive nature of trial. Mike described his continued interest in and enjoyment of the practice of law:

> "I thoroughly enjoy the aspects of trial work and particularly the competitive nature of trial. By my nature, I am a very competitive person and I believe that is one of the things that drew me to doing trial work. I enjoy my job and my work. Where else would you one day be able to learn about how and why an oil refinery blew up, the next day the aspects of reconstructing an accident involving multiple big rigs, and the following day how a complicated medical procedure is performed?"

Mike has been a member of the ADC since becoming a lawyer in 1989. He has missed only one Annual Meeting since that time, because he was in trial.

Dan Quinn, Mike's law partner, early on had a philosophy of work hard, play hard. Mike wholeheartedly embraced and lives by that motto. Mike is an incredibly dedicated hard worker. However, he enjoys life and all that it offers. He may be headed to trial in less than a week, but always has time to lend an ear or hand, whether it be an issue regarding the ADC or on the intricacies of the *Howell* doctrine. Not only is Mike Kronlund dedicated to the ADC, he is a genuinely nice person. We are lucky to have him as our President.

Mike's plans for the upcoming year for the ADC include getting the Business Litigation section up and running; getting the framework set for the Trial Academy; and marketing both the ADC and its members in an effort to make this a successful year for both. His first President's Message details more of his plan and appears in this issue on page 2.

Linda Lynch

Linda J. Lynch is the ADC Immediate Past President and a partner at Lynch & Shupe, LLC, in Burlingame.

Howell and Beyond: What of the Issue of Reasonableness?

By Jonathan L. Lee, *Robinson & Wood, Inc.*

Have you seen the situation where plaintiff seeks medical treatment on a lien basis and the lien holder demands payment for the entire "usual and customary" charge? Has this occurred when there is an available source of payment to reduce the cost of such treatment, such as Medi-Cal, a health insurer, or a program established by the healthcare provider to allow reduction or waiver, based upon an ability to pay? Is a Medical Finance Company involved? What about attorney directed treatment based upon an exorbitant lien?

If these situations appear in a present case or perhaps in the future, then this article, and a case called *Ochoa v. Dorado,*[1] might be helpful.

HOWELL AND ITS PROGENY

First, a brief review. As most of us toilers in the field of personal injury know, the playing field of claimed damages for medical treatment received an adjustment, to a degree, with the seminal case of *Howell v. Hamilton Meats & Provisions, Inc.*[2] *Howell* limited the amount of money that could be claimed for medical treatment to what had been paid for such treatment, assuming the bills had been paid. The Supreme Court in *Howell* also confronted the situation where the medical bills remained unpaid, saying in essence: Tough Luck Defendants! A person in that situation may get a greater recovery, although the court did endorse the idea that a medical bill must be both incurred and reasonable. This "Tough Luck" conclusion left some pathways open, perhaps pathways not intended by the high court.

The *Howell* case left the door open to the admissibility of the initial bill, sometimes called the usual and customary charges, or as the Supreme Court referred to it in *Howell,* the Chargemaster bill, for purposes other than proving the amount of past medical bills. That door was seemingly slammed shut, however, by the decision in *Corenbaum v. Lampkin,*[3] where Justice Croskey held the "usual and customary" bill was not relevant on any theory or issue, including emotional distress and future costs of care. After that, *State Farm v. Huff*[4] told us that plaintiff had the burden of proving reasonable medical treatment costs and that such proof could not be accomplished with the mere admission of a bill. Without evidence of reasonableness, the plaintiff in *Huff* failed to carry its burden of proof.

To be fair, the requirement to prove the reasonableness of a bill has been around for decades. The Book of Approved Jury Instructions, (BAJI), Instruction 14.10, told juries to award the "reasonable value of medical care ... reasonably required and actually given." The authors of California Civil Jury Instructions (CACI) continued to incorporate that language in CACI 3903A, saying "Plaintiff must prove the *reasonable* cost of reasonably necessary medical care that he/she has received."

After *Howell*, a decision that mentioned reasonableness but gave life to the idea that unpaid bills could be treated differently, perhaps some of you are now seeing what football aficionados might call the "end around play."[5] Some plaintiffs are not paying for medical treatment and incurring large amounts of treatment on lien. Some healthcare providers are not submitting bills to a payment source such as a government sponsored plan like Medi-Cal, or even a private health insurer. Instead, these entities are simply placing a "Hospital Lien"[6] on their patient's pending lawsuit. This effort is directed to seeking a higher level of compensation, either for the healthcare provider, or the plaintiff, or both.

A new question is triggered: Can these methods of treating a bill as outstanding be used successfully to increase the amount awarded for medical treatment in a personal injury case? Are there any impediments to these practices? What are the arguments to be expected on either side and what are the potential outcomes?

A recent case, *Ochoa v. Dorado,* decided in 2014, may provide assistance in opposing these tactics, although it is probably best to be treated as helpful, but not controlling authority. In *Ochoa v. Dorado*, the court first confronted the issue of whether the appeal was actually premature and decided that it was indeed too hasty, so the court sent the case back to the trial court for decisions on the post trial motions. After that, Justice Croskey, the same Appellate Court Justice who wrote the opinion in *Corenbaum,* went on to discuss some of the issues that were to confront the trial court on remand. As those issues were

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briefed by the parties, the court did not stop there.

First, dealing with the issue of unpaid medical bills, the court held that the *Howell and Corenbaum* cases, taken together, held that the full amount of the bill was not relevant to a determination of the value of past medical services or future medical services. Justice Croskey went on to opine that this rule is not limited to the circumstance where the medical providers had previously agreed to accept a lesser amount as full payment for the services provided. Instead, logic and reason compelled the same result, even where there is no prior agreement for payment in place.

Relying on *State Farm v. Huff,* where the unpaid hospital bill based upon the provider's "standard charges" was not an accurate measure of the reasonable value of the services provided, the *Ochoa* court went on to quote older cases for much the same idea, although there was a split of authority. Justice Croskey adopted the view that an *unpaid* medical bill is not evidence of the reasonable value of the services provided, instead implying that there must be evidence that the bill is reasonable.

IS *OCHOA* CONTROLLING?

The next issue is whether the language of *Ochoa* is persuasive authority. Since the court ruled the motions for new trial and JNOV were premature and no judgment had been entered, one could conclude that the court's ensuing discussion about medical billing was mere dictum. The doctrine of stare decisis extends only to the "ratio decidendi" of an opinion, meaning the principle or rule that constitutes the basis of the decision, such that appellate court dictum, not essential or relevant to the court's decision on the merits, has no precedential effect.[7]

That said, why are we able to rely on Supreme Court dictum as highly persuasive authority per one court's view,[8] while similarly persuasive statements of learned people whom we call "Justice" and sit upon California Courts of Appeal are to be shelved? As one case put it with reference to Supreme Court dictum, such language is not meant to be ignored.[9] Shouldn't a similar standard be applied to a Court of Appeal decision?

On the other hand, it might be argued that since these issues were fully briefed for the court, the doctrine of stare decisis should apply. As these billing issues were raised by the briefs, this was *not* the situation where "An opinion is not authority for a point not raised, considered or resolved therein."[10] Whether you call it advisory, instructive, somewhat persuasive, persuasive or just helpful, a decision by the same Justice who wrote the opinion in *Corenbaum* can't hurt. Logically and reasonably, the opinion in *Ochoa* is the analysis of a court that has examined these issues at some length.

WHAT NOW?

The proof of reasonableness of any medical bill is clearly required, per the jury instructions and *State Farm v. Huff*. If the gross bill is not relevant, then can treatment providers simply testify that their "usual and customary" bill is reasonable? Can they make this argument with a straight face? Is it permissible to show they often accept far lesser amounts as payment in full? In this author's view, under most circumstances, such evidence should be admitted, but there may be exceptions.

When a treatment provider seeks recovery under the Hospital Lien Act for emergency services and chooses to simply stay with the usual and customary charges, the Hospital might argue successfully that it has the right to charge a higher rate and not seek a low governmental recovery, such as in the case of Medi-Cal. This may be especially true if the hospital is a Type 1 or Type 2 trauma center, since such facilities must maintain skilled physician coverage for dire medical circumstances. When faced with this situation, the plaintiff is powerless to mitigate damages when he or she is not in control of the billing practices of the hospital. Hospitals will argue they have the right to make negligent parties pay more, and the legislature has given them the Hospital Lien Act to have direct rights of action against such defendants. Whether those defendants can seek to admit evidence that the bills are unreasonable in this setting may be problematic when the patient still owes the bill for emergency medical treatment.

While this argument might have some merit for emergency services under some circumstances, the practice of medical finance companies of paying bills at lower rates and then claiming the larger amounts are still owed in the third party lawsuit would still appear to be subject to attack as unreasonable, as would treatment through a lien when such treatment was questionable and the bills exorbitant. I'm speaking now of the situation where attorneys are involved in directing clients to particular treatment providers who charge stratospheric rates for services. Clearly evidence of the reasonableness of the bill is essential in that setting.

The issues of the reasonableness of the bills should be raised in an action between the patient and the hospital in the situation where an emergency treatment provider is seeking a large recovery for its services directly from the patient.

The evidence of what constitutes a reasonable bill can come from the treatment providers themselves or a qualified expert. After *Howell,* trial courts have allowed expert testimony on the issue of what constitutes a reasonable medical bill.

CONCLUSION

Resolution of the issue of how evidence of "reasonableness" interacts with the presence of an unpaid medical bill remains "hazy."[11] The evolution of the treatment of unpaid medical bills as an element of personal injury damages post *Howell* continues.

Jonathan L. Lee

Jon Lee is a shareholder at Robinson & Wood in San Jose, specializing in the defense of personal injury cases. He received his Bachelor's and law degrees from Pepperdine University.

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ENDNOTES

1 *Ochoa v. Dorado* (2014) 228 Cal.App.4th120.

2 *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541.

3 *Corenbaum v. Lampkin* (2013) 215 Cal. App.4th 1308.

4 *State Farm Automobile Insurance Company v. Huff* (2013) 216 Cal.App.4th 1463.

5 The **end-around** is a play in American football in which a wide receiver crosses the backfield towards the opposite end of the line and receives a handoff directly from the quarterback. The receiver then may proceed to do one of two things: he either runs the ball towards the line of scrimmage in order to gain yardage, or more rarely, attempts to pass to another eligible pass receiver.-Wikipedia.

6 See Civil Code § 3040, et seq.

7 *Western Landscape Construction v. Bank of America National Trust and Savings Association* (1997) 58 Cal.App.4th 57, at 61.

8 *Rodrigo v. Koyro Martial Arts* (2002) 100 Cal.App4th 946, at 956.

9 *California Apartment Association v. City of Stockton* (2000) 80 Cal.App.4th 699, at 710.

10 *Styne v. Stevens* (2001) 26 Cal. 4th 42, at 57.

11 An answer found on the "Magic 8 Ball" manufactured by Mattel.

Defending Legal Malpractice Claims in California and Nevada – A Day at the Beach or Stranded in the Desert?

By William A. Muñoz,
Murphy, Pearson, Bradley & Feeney

Let's face it, the last thing we want to deal with is a legal malpractice claim by a disgruntled former client who has gone the extra mile and sued, claiming that our conduct fell below the applicable standard of care and that he or she was damaged as a result. We would rather sit in the dentist's chair getting a root canal, which would be cheaper and a lot less painful. If you have the misfortune of facing a legal malpractice claim that could conceivably be brought in either California or Nevada, the odds are that California is the more favorable venue.

Generally speaking, California and Nevada law on legal malpractice track each other pretty closely. For instance, the applicable statute of limitation applies not only to legal malpractice claims, but breach of contract and breach of fiduciary duty claims arising out of the provision of legal services.[1] Additionally, a plaintiff claiming that his or her defense attorney botched a criminal matter must demonstrate that he or she has obtained post-conviction relief or reversal of the conviction (i.e., actual innocence) before a legal malpractice action will lie.[2] Similarly, neither state permits assignment of legal malpractice actions.[3] But this is where the similarities end.

There are significant differences that weigh heavily in favor of California if you have to defend the claim. This article will highlight the key issues that arise in virtually every malpractice claim, how they differ between California and Nevada, and what you as the practitioner or the attorney defending the legal malpractice claim can do to enhance your ability to defend successfully against the claim. Legal malpractice law has many nuances that can be a trap for the unwary practitioner. Knowing these nuances can be the difference between getting out on summary judgment (or defense verdict) and a significant jury verdict.

LEGAL MALPRACTICE IN GENERAL

Whether California or Nevada, there are certain issues in the context of legal malpractice claims that appear over and over again. As noted above, on many of the issues, the two jurisdictions align. However, there are a few key issues, such as scope of duty, causation, statute of limitations, and comparative fault that are significantly different. On other issues such as judgmental immunity,[4] which is an absolute defense to a legal malpractice claim, or collectability of the underlying judgment, there is no Nevada case law that addresses this defense. Not to worry, Nevada courts routinely look to California law on issues of first impression.

In order to establish a claim for legal malpractice, plaintiff must prove: (1) duty of the [attorney] to use such skill, prudence, and diligence as other members of [the] profession commonly possess and exercise; (2) a breach of that duty; (3) a proximate causal connection between the negligent conduct and the resulting injury; and (4) actual loss or damage resulting from the [attorney's] negligence.[5] Additionally, in the context of litigation malpractice, plaintiff must establish that proper management of the underlying matter would have resulted in a favorable verdict and collection of the same.[6]

DUTY

In the context of legal malpractice, the duty owed to a client arises from the contractual nature of the attorney-client relationship, express or implied.[7] In other words, the attorney-client relationship cannot be forced unilaterally upon the attorney. While California is among a number of jurisdictions that has relieved the malpractice plaintiff of strict privity rules in pursuing an attorney (i.e., only the client can sue the attorney for malpractice), the courts narrowly construe the exceptions to the strict privity rule.

For instance, in *Lucas v. Hamm*,[8] the California Supreme Court held that an intended beneficiary of a will may pursue a claim against the attorney who negligently drafted the will where the beneficiary's interest was diminished and/or lost due to the drafting error.[9] However, that same intended beneficiary could not state a claim against the attorney for malpractice, where the claim was that the attorney failed to amend a will or trust to increase the beneficiary's share, [10] or if imposing a duty upon the attorney would create a conflict with the attorney's actual client (i.e., the testator).[11]

Conversely, while the case law is sparse, strict privity appears still to be the rule

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in Nevada.[12] In *Charleson v. Hardesty*,[13] the Nevada Supreme Court, relying upon California case law, held that an attorney representing a trustee assumes a duty to the beneficiaries of the trust. While *Charleson* speaks to the issue of duty to a third party who is not the client, it is in the context of the attorney representing the trustee, not the testator, which is generally the situation that arises in this context. In fact, the Ninth Circuit Court of Appeals in *Ladonicolas v. Beury*[14] noted this point finding that the language in *Charleson* suggesting an abrogation of the strict privity rule was mere dicta.[15]

While strict privity is a significant advantage, it is not fully developed and the *Charleson* court appears to be moving away from it. This is important for Nevada because a fair number of legal malpractice claims arise from estate planning issues largely brought by beneficiaries of trusts and/or wills for negligently drafting of estate planning documents.[16]

CAUSATION

Originally, California made a distinction between transactional and litigation malpractice in terms of causation. In this regard, courts held that the malpractice plaintiff did not have to show the harm would not have occurred but for the attorney's negligence in the transactional setting, but had to do so in the litigation setting.[17] That changed in 2003, when the California Supreme Court in *Viner v. Sweet*[18] held that "but for" causation applied to transactional and litigation malpractice, finding the prior distinction to be artificial given that the purpose of "but for" causation was to weed out conjectural and speculative claims.[19] Regardless of the nature of the malpractice claim, the court or jury must answer the same question: what would have happened in the absence of the alleged malpractice?

In California, the method of proving "but-for" causation is through the "trial-within-a-trial" methodology.[20] In other words, in order to show that the attorney's negligence caused the plaintiff harm, plaintiff will need to re-try the underlying case or reconstruct the transaction to show what would have happened without the alleged negligence. If the result is the same, then there is no malpractice as a matter of law because the attorney's alleged negligence did not cause the alleged harm.

However, if the result in the underlying action was better than what occurred with the attorney accused of malpractice that is not the end of the story. The next phase is the malpractice component where plaintiff must prove the remaining elements of his/her malpractice claim – duty, breach, causation (i.e., the different result was due to the attorney's negligence), damages and collectability.

Nevada courts, on the other hand, keep the artificial distinction between transactional and litigation malpractice. Regarding the latter, Nevada requires that the underlying matter in which the alleged malpractice has occurred be finally adjudicated because, until that time, plaintiff's damages are inherently speculative. There is no case law addressing the standard at trial for causation in the transactional context leaving defense counsel to guess how the Court would rule on this issue in a transactional malpractice action.

A classic example of a routine causation issue that arises in both transactional and litigation malpractice claims is the "settle and sue" case where the malpractice plaintiff settles the underlying lawsuit or dispute before a final adjudication leaving the question open whether the result would have been different had the matter been fully adjudicated.[21] In California, these types of cases are routinely disposed of on summary judgment given the difficult burden plaintiff must establish to prove the attorney's alleged negligence caused harm. Even if the matter is not disposed of on summary judgment, the plaintiff must establish this causation component at trial through the "trial-within-a trial" framework.[22]

There is no case law in Nevada addressing whether it adopts the "trial-within-a-trial" approach to proving causation in a legal malpractice action. However, in light of the courts' view regarding litigation malpractice and accrual of said claim, Nevada's requirement that the underlying case be finally adjudicated is the functional equivalent of the "trial-within-a-trial" approach to proving causation, albeit in the underlying matter as opposed to the subsequent legal malpractice action. This begs the question: if the attorney who committed malpractice takes the underlying case through final adjudication, how does the plaintiff show that he or she would have obtained a better result without re-trying the underlying case in the malpractice action?

The difficulty in Nevada's approach to this particular issue is that the "wait and see" approach as to the underlying action, to determine if there is resulting damage from the alleged malpractice, leaves the attorney in the untenable situation of not having the benefit of discovery and being required to obtain information informally in order to defend against the malpractice claim. With the underlying action ongoing, the parties to the underlying action may not be inclined to provide any information. Thus, if the litigation must be finally adjudicated through appeal before the claim accrues, the ability to preserve documentary evidence may be compromised and witness memories may fade, further complicating the attorney's ability to defend himself or herself in a subsequent malpractice claim in the event of an adverse decision in the underlying litigation.

STATUTE OF LIMITATIONS

The statute of limitations is perhaps the single most discussed issue in the case law involving legal malpractice claims. California's statute of limitations for legal malpractice is codified at California Code of Civil Procedure section 340.6, which provides that all claims against attorneys arising out of the provision of legal services, with the exception of actual fraud, must be commenced within one year from the time that plaintiff knew or should have known with reasonable diligence facts giving rise to the malpractice claim, or four years from the date of the alleged malpractice, whichever occurs first.[23]

The statute of limitations is tolled if: (1) plaintiff has not sustained actual injury; or (2) the attorney continues to represent the

Continued on page 13

plaintiff on the specific subject matter of the alleged malpractice.[24] If the attorney actively conceals the facts giving rise to the malpractice claim, the four-year, but not the one-year, statute of limitations is tolled.[25]

Significantly, the courts have broadly construed "actual injury" for purposes of tolling to include the loss of any right, title or interest as a result of the attorney's alleged malpractice.[26] The amount of damage is not the determining factor. Rather, it is the fact that plaintiff has sustained appreciable damage that is sufficient to start the statute of limitations.[27] Examples of actual injury sufficient to start the statute of limitations include, but are not limited to, incurring attorney's fees to "correct" the alleged malpractice,[28] loss of development rights,[29] or the date the client entered into a binding agreement.[30]

Similarly, continuous representation can toll the statute of limitations provided the attorney continues to represent the client on the specific subject matter of the alleged malpractice.[31] The idea behind this is to "avoid the disruption of an attorney-client relationship by a lawsuit while enabling the attorney to correct or minimize an apparent error, and to prevent an attorney from defeating a malpractice cause of action by continuing to represent the client until the statutory period has expired."[32] For example, if an attorney is representing a client in a personal injury action and also handles the client's estate planning needs, the fact that the attorney continues to represent the client regarding his or her estate planning does not toll the statute of limitations if the attorney is sued for malpractice for missing the statute of limitations for filing the personal injury action. Conversely, where the attorney represented the client with regard to the sale of his or her partnership interest that involved cash and carryback note, re-negotiating the note constitutes continuous representation sufficient to toll the statute of limitations.[33]

Nevada's statute of limitations, however, is longer than California's and is codified at Nevada Revised Statute section 11.207. Section 11.207 provides that the claim, "whether based on breach of contract or breach of duty must be commenced within 4 years after the plaintiff sustains damage or within two years after the plaintiff discovers or through the use of reasonable diligence should have discovered the material facts which constitute the cause of action, whichever is earlier."[34]

By the express language of the statute, section 11.207, like its California counterpart, provides for tolling until the former client discovers the facts giving rise to the malpractice claim. Unlike California, there is no continuous representation tolling provision. Nevada's "actual injury" equivalent tolling provision for litigation malpractice claims is highly unfavorable for the defendant attorney because the Nevada Supreme Court has interpreted section 11.207 to toll the statute of limitations in the litigation malpractice context until the underlying action has concluded.[35]

Subsequently, in *Kopicko v. Young*,[36] the attorney dismissed the original products liability action with prejudice after discovering the correct manufacturer of the defective product. The attorney advised the client that a claim against the correct manufacturer may be time-barred and requested that the attorney nonetheless pursue a claim against the correct manufacturer. The manufacturer successfully moved to dismiss the claim on statute of limitations grounds. The *Kopicko* Court held that even though plaintiff had knowledge of the facts giving rise to the malpractice claim more than four years before the malpractice claim was filed, the malpractice claim had not accrued until the federal district court dismissed the underlying products liability action on statute of limitations grounds.[37]

Unlike its California counterpart, Nevada makes the artificial distinction between transactional and litigation malpractice for purposes of the statute of limitations. In a footnote, the *Kopicko* court suggested that a two-year statute of limitations applies to transactional malpractice claims and the four-year statute applies to litigation malpractice.[38] However, as noted above, requiring the underlying case to go to completion, including an appeal, before the malpractice claim accrues raises serious concerns about the counsel's ability to defend a malpractice claim at that point given the passage of time. Waiting until resolution of the underlying case in the hopes that the outcome may be dispositive of the legal malpractice claim is nothing more than wishful thinking.

A longer statute of limitations and unfavorable tolling provisions, particularly for litigation malpractice, make Nevada a less desirable venue to defend a legal malpractice action where there is a potential statute of limitations defense.

COMPARATIVE FAULT

Lastly, California and Nevada differ as to comparative fault issues. California follows the pure comparative fault approach, reducing plaintiff's recovery in proportion to plaintiff's negligence, regardless of whether plaintiff is 1% or 99% negligent. Along the same lines, through Proposition 51, California joint tortfeasors are joint and severally liable for all economic damages and severally liable for noneconomic damages.[39]

Nevada, on the other hand, takes the pure contributory negligence approach that provides that if plaintiff's negligence is greater than that of the defendant's, then plaintiff may not recover.[40] Similarly, Nevada does not provide for joint and several liability. Rather, defendants are severally liable for their proportionate fault.[41]

On this point, Nevada law is preferable since plaintiff's contributory negligence provides for a complete defense to a malpractice claim.

PRACTICAL CONSIDERATIONS

California is the more favorable venue when it comes to defending a legal malpractice action. There is well-established case law on most, if not all, of the daily issues that arise in these cases with a good majority of the cases favorable to attorneys. However, if faced with defending a legal malpractice claim in Nevada, with the longer statute of limitations and potentially lengthy underlying litigation before the malpractice claim is actually litigated, the Nevada

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practitioner can take a few steps to provide defense counsel with best available evidence to defend against the claim. Those steps include:

1 Having a well-defined legal services agreement with the client that clearly identifies who the client is and the scope of legal services provided. Most important, stick to it! With Nevada case law suggesting strict privity for malpractice claims, a well-defined legal services agreement that clearly identifies the client can be the difference between prevailing on a motion to dismiss and protracted litigation at least through summary judgment;

2 Taking meticulous notes of communications with the client and follow up with confirming letters on important issues such as advice provided on actions taken or not taken and why, settlement authority, and other important events throughout the representation. The longer the underlying case drags out, the more memories fade. Thus, a well-documented file that memorializes the case in writing will enable the attorney to recount events and advice that may otherwise be lost with the passage of time.

3 Maintaining detailed billing records. This means one entry for each task performed and no block billing. Individual entries do not allow opposing counsel to question the amount of time on a given task that would otherwise be susceptible to challenge if block billed. More important is the fact that detailed billing entries provide further evidence of work performed or discussions with the client and others that may not otherwise be documented.

4 Having policies and procedures in place to maintain hard and electronic copies of the client's file. If the client demands his or her file back, make sure that you make a complete copy to ensure that you have the complete universe of documents from your representation of the client.

Legal malpractice claims are second-generation lawsuits where the facts and circumstances giving rise to the claim have typically occurred years before the malpractice lawsuit is filed. In Nevada, with its four-year statute of limitations for litigation malpractice, the defendant attorney can be looking at six to seven years before a malpractice claim is filed. A well-documented file will help reduce the impact of faded memories of significant events that occurred during the attorney's representation and greatly enhance defense counsel's ability to successfully defend against a malpractice claim.

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ENDNOTES

1 *See Stalk v. Mushkin*, 125 Nev. 21, 29 (2009); *Khodayari v. Mashburn*, 200 Cal.App.4th 1184, 1190-1191 (2d Dist. 2011).

2 *See Morgano v. Smith*, 110 Nev. 1025, 1029 (1994); *Coscia v. McKenna & Cuneo*, 25 Cal.4th 1194, 1201-1202 (2001).

3 *Chafee v. Smith*, 98 Nev. 222, 223-224 (1982); *Goodley v. Wank & Wank, Inc.*, 62 Cal.App.3d 389, 395 (2d Dist. 1976).

4 The judgmental immunity doctrine "relieves an attorney from a finding of liability even where there was an unfavorable result if there was an "honest error in judgment concerning a doubtful or debatable point of law …" *Blanks v. Shaw*, 171 Cal.App.4th 336, 378 (2d Dist. 2009).

5 *Hecht, Solberg, Robinson, Goldberg & Bagley, LLP v. Superior Court*, 137 Cal.App.4th 579, 590 (6th. Dist. 2006); *Day v. Zubel*, 112 Nev. 972, 976 (1996).

6 *Campbell v. Magana*, 184 Cal.App.2d 751, 754 (2d Dist. 1960).

7 *Fox v. Pollack*, 181 Cal.App.3d 954, 959 (1st Dist. 1993).

8 56 Cal.2d 583 (1961).

9 *Id.* at 591.

10 *Chang v. Lederman*, 172 Cal.App.4th 67, 81 (2d Dist. 2009).

11 *Goodman v. Kennedy*, 18 Cal.3d 335, 345 (1976).

12 *See, e.g., Hartford Accident & Indem. Co v. Rogers*, 96 Nev. 576, 580-581 (1980); *Warmbrodt v. Blanchard*, 100 Nev. 703, 706-707 (1984).

13 108 Nev. 878 (1992).

14 1994 U.S. App. LEXIS 6950 (9th Cir. 1994).

15 *Id.* at *8-10.

16 A 2012 study by the American Bar Association's Standing Committee on Lawyers Professional Liability demonstrated that estate planning was ranked fourth in terms of legal malpractice claims by practice area. Ewins and Vail, *Profile of Legal Malpractice Claims 2008-2011*, American Bar Association Standing Committee on Lawyers Professional Liability.

17 *California State Auto Ass'n Inter-Ins. Bureau v. Parichan, Renberg, Crossman & Harvey*, 84 Cal.App.4th 702, 711 (1st Dist. 2000).

18 30 Cal.4th 1232 (2003).

19 *Id.* at 1241.

20 *Piscitelli v. Friedenberg*, 87 Cal.App.4th 953, 970 (4th Dist. 2001).

21 *Filbin v. Fitzgerald*, 211 Cal.App.4th 154, 166-168 (1st Dist. 2012).

22 *Mattco Forge, Inc. v. Arthur Young & Co.*, 52 Cal.App.4th 820, 832-834 (2d Dist. 1997).

23 Cal. Code Civ. Proc. § 340.6(a).

24 *Id.* at § 340.6(a)(1) & (2).

25 *Id.* at § 340.6(a)(3).

26 *Adams v. Paul*, 11 Cal.4th 583, 589-591 (1995).

27 *Laird v. Blackler*, 2 Cal.4th 606, 625 (1992).

28 *Jordache Enterprises, Inc. v. Brobeck, Phleger & Harrison*, 18 Cal.4th 739, 743-744 (1998).

29 *Foxborough v. Van Atta*, 26 Cal.App.4th 217, 227 (1st Dist. 1994).

30 *Hensley v. Caietti*, 13 Cal.App.4th 1165, 1175 (3d Dist. 1993).

31 *Crouse v. Brobeck, Phleger & Harrison*, 67 Cal.App.4th 1509, 1528 (4th Dist. 1998).

32 *Beale Bank, SSB v. Arter & Hadden*, 42 Cal.4th 503, 511 (2007).

33 *Id.* at 1528-1531.

34 Nev. Rev. Stat. § 11.207(1).

35 *K.J.B., Inc. v. Drakulich*, 107 Nev. 367, 370 (1997).

36 114 Nev. 1333 (1998).

37 *Id.* at 1336-1337.

38 *Id.* at 1337 fn. 3.

39 Cal. Civ. Code §§ 1431, 1431.2.

40 Nev. Rev. Stat. §41.141(1).

41 Nev. Rev. Stat. §41.141(4).

The Inherent Power of the Federal Court: A Rarely-Used Missile Against the Intentionally-Deceitful Plaintiff

By Thomas Beko,
Erickson, Thorpe & Swainston, Ltd.

As a fledgling defense attorney, I recall being completely stunned by the ease with which plaintiffs ignored the oath which they took, swearing, under penalty of perjury, to tell the truth, the whole truth, and nothing but the truth. Over the next couple of decades, I struggled to find the best way to use evidence of intentionally-falsified deposition testimony and discovery responses which were obviously tailored to avoid disclosure of damaging evidence. Inevitably, I reached the same conclusion: save it for impeachment at trial or try to use it in dispositive motions. For innumerable reasons, this strategy, while often very effective, left me feeling as though Lady Justice had been pummeled in the process.

One of the primary reasons why these strategies proved less than attractive was because they were deployed late in the litigation process. To reach the point where they became effective required the expenditure of thousands of dollars in litigation expenses. Several years ago, however, I stumbled across a Ninth Circuit decision where the court employed an inherent power to dismiss a case where the plaintiff had intentionally falsified testimony and discovery responses. Over the years, I then filed a number of motions seeking dismissal of cases wherein the plaintiff clearly had proffered perjured deposition testimony. Most often, the motions resulted in quick settlements, usually before the briefing process was even completed. However, in the Fall of 2014, one of these cases finally resulted in a published decision.

In *Huntley v. City of Carlin*, 2014 WL 406027 (D. Nev.), the plaintiff brought a §1983 Civil Rights lawsuit against the City of Carlin, Nevada, and two law enforcement officers. The plaintiff claimed that he had been injured by one of the officers during a scuffle that ensued when the plaintiff refused to produce his identification. The plaintiff claimed that during the altercation he suffered a torn rotator cuff, which required surgical intervention. Initial written discovery was served which sought information about previous injuries and related conditions. The plaintiff responded to the discovery requests by unilaterally restricting the inclusive dates. Based upon information that the officers received from the plaintiff's family on the evening in question, it was believed that the plaintiff had a significant preexisting condition and his discovery responses were intentionally limited as a means of avoiding disclosure of the damaging evidence.

Following receipt of the written discovery responses, plaintiff's deposition was taken. Special care was taken at the beginning of the deposition to ensure that the plaintiff fully understood the oath he had taken and the consequences of false testimony. Despite these warnings, the plaintiff testified that he had no preexisting medical problems with his shoulder. Subsequent discovery revealed the inaccuracy of his testimony. When the time period passed for the plaintiff to make corrections to his deposition transcript, a motion to dismiss was filed. In that motion, the defendants moved for dismissal both under FRCP 37 and pursuant to the inherent power of federal courts to levy sanctions for abuse of the litigation practices.

The District Court granted the motion, first noting that it had the authority to sanction a party who had provided falsified testimony both under Rule 37, and under the court's inherent power. The court expressly chose the latter, most likely because no prior discovery-related

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motions had been filed and the court had never issued any previous orders directing the plaintiff to provide proper discovery responses. Relying primarily upon the Ninth Circuit's decision in *Anheuser–Busch, Inc. v. Natural Beverage Distributors*, 69 F.3d 337, 349 (9th Cir.1995), the District Court concluded that "[i]t is well settled that dismissal is warranted where ... a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings: 'courts have inherent power to dismiss an action when a party has willfully deceived the court and engaged in conduct utterly inconsistent with the orderly administration of justice.'" (*Id.* at 348, quoting *Wyle v. R.J. Reynolds Indus., Inc.*, 709 F.2d 585, 589 (9th Cir.1983) (upholding dismissal of complaint pursuant to court's inherent power where plaintiff's denials of material fact were knowingly false and plaintiff willfully failed to comply with discovery orders); see also *Combs v. Rockwell Int'l Corp.*, 927 F.2d 486 (9th Cir.1991), cert. denied, 502 U.S. 859 (1991) (affirming dismissal under the court's inherent power as appropriate sanction for falsifying a deposition); *Halaco Engineering Co. v. Costle*, 843 F.2d 376, 380 (9th Cir.1988).)

The District Court noted five factors that the court should consider when deciding whether sanctions as severe as dismissal should be ordered. Those factors include "(1) the public's interest in expeditious resolution of litigation; (2) the court's need to manage its dockets; (3) the risk of prejudice to the party seeking sanctions; (4) the public policy favoring disposition of cases on their merits; and (5) the availability of less drastic sanctions." (*Anheuser–Busch,* 69 F.3d at 348.) Additionally, the court noted that in order for dismissal to be proper pursuant to the court's inherent authority, the sanctionable conduct must be due to willfulness, fault or bad faith. In this regard, the court stated that a "fraud on the court" occurred where it can be clearly and convincingly demonstrated that "a party has sentiently set in motion some unconscionable scheme calculated to interfere with the judicial system's ability impartially to adjudicate a matter by improperly influencing the trier or unfairly hampering the presentation of the opposing party's claim or defense."

The court cautioned that perjury should not be confused with inconsistencies in a party's deposition and trial testimony, and that the subject of the perjury must not be on a "peripheral" matter.

After reviewing each of the *Anheuser-Busch* factors, the court concluded that the dismissal was appropriate because the plaintiff deliberately and in bad faith offered false testimony under oath on issues central to this case. In reaching this conclusion, two of the court's findings are particularly important. First, the court found that while public policy favored disposition of cases on their merits, the plaintiff's own litigation tactics undermined the very judicial process that he himself invoked. The court found that public policy would not be served by allowing the plaintiff's fraudulent action to proceed. Next, the court rejected the plaintiff's argument that dismissal would be improper because the court never had issued any discovery-related order with which he failed to comply. The court rejected the plaintiff's suggestion that the defendant was obligated to demand further responses, and then seek a court order compelling such responses if they were not forthcoming.

In reaching this conclusion, the court again relied upon the *Anheuser-Busch* decision holding that explicit warning was not always necessary. (*See, also, Valley Engineers Inc. v. Electric Engineering Co.* 158 F.3d 1051 (9th Cir. 1998).) In this regard, the District Court specifically found that the plaintiff could not "seriously maintain that his willful and egregious abuse of the discovery process should be sanctioned by a mere slap on the wrist and a court order directing him to go back and tell the truth when under oath."

Citing to the *Valley Engineers,* decision, the court in *Huntley* commented that "[T]here is no point to a lawsuit, if it merely applies law to lies. True facts must be the foundation for any just result." (*Id.* at 1058.) The court concluded its decision by quoting the following passage from *Arnold v. County of El Dorado,* 2012 WL 3276979 (E.D. Cal.):

> Perjury is much more than simply a "gotcha," harmful in effect only for the reason that one got caught. Litigation is not a game in which perjury warrants a five yard penalty for a minor untruth, fifteen yards if the perjury was really serious. Rather, perjury on any material fact strikes at the core of the judicial function and warrants a dismissal of one's right to participate at all in the truth seeking process. If one can be punished for perjury with up to five years imprisonment, 18 U.S.C. § 1621, it should not seem out of place that a civil action might be dismissed for the same conduct.

Finding that the case was the quintessential case in which a litigant's abusive litigation practices threatened the orderly administration of justice, the court found that dismissal with prejudice was the only appropriate sanction.

While it is likely that not every instance of perjured testimony will warrant an outright dismissal of a plaintiff's case, false testimony on issues which are central to the case can certainly warrant the imposition of such a harsh penalty. Additionally, the existence of other examples of abusive litigation tactics, or intentionally evasive discovery responses, may make such a penalty far more palatable to the court. Therefore, instances of such misconduct should also be brought to the court's attention.

From the foregoing, one can see that the inherent power of the court to protect the integrity of the judicial process can be a very powerful tool to defeat the claims of a deceitful litigant. Used sparingly, it may prove to be a very useful defense strategy.

Thomas Beko

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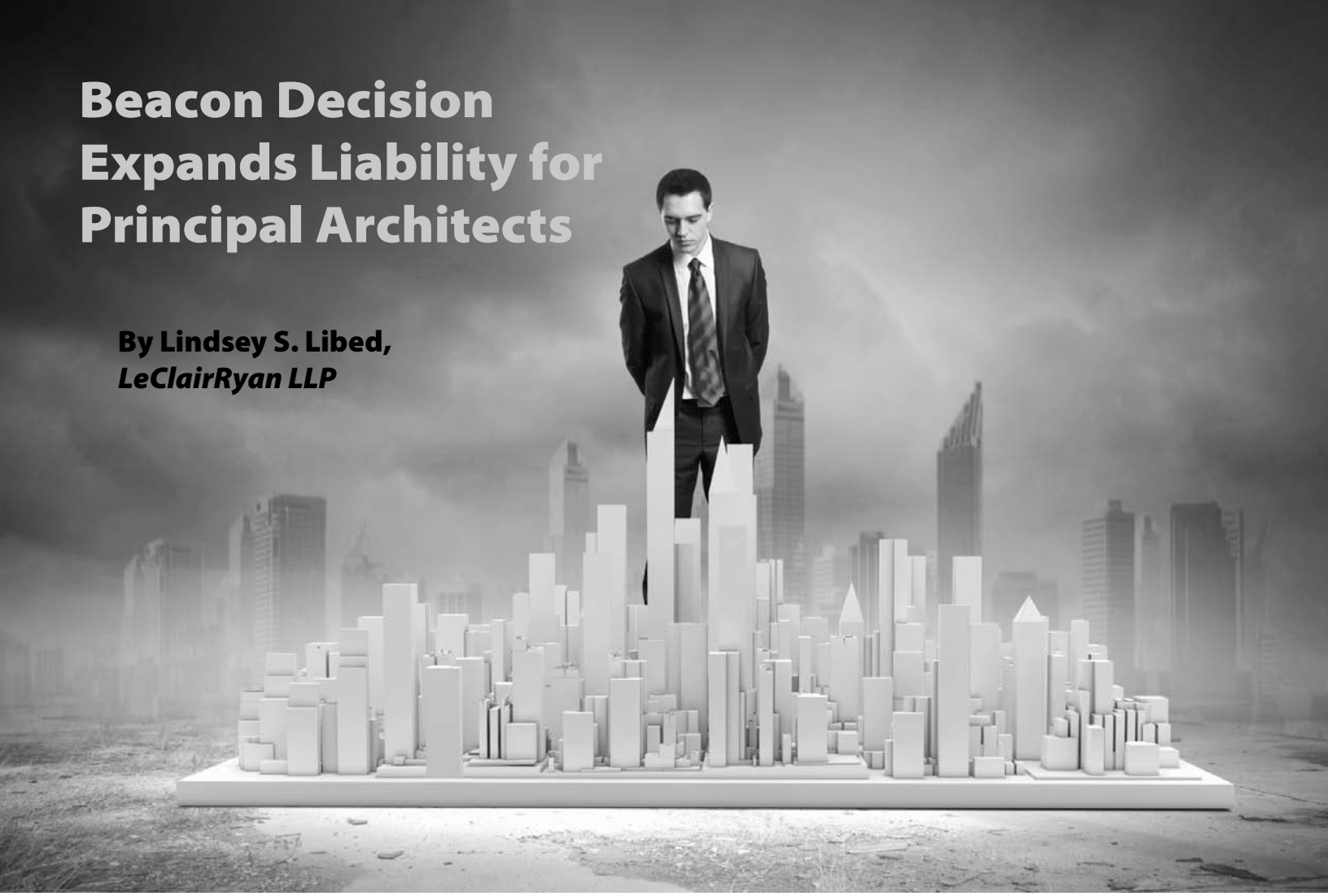
Beacon Decision Expands Liability for Principal Architects



By Lindsey S. Libed,
LeClairRyan LLP

On July 3, 2014, the Supreme Court issued an opinion in *Beacon Residential Community Association v. Skidmore, Owings & Merrill LLP.* (2014) 59 Cal.4th 568 that dramatically changes the landscape of liability for architectural firms in California. The Supreme Court held that "an architect owes a duty of care to future homeowners in the design of a residential building where, as here, the architect is a *principal* architect on the project – that is, the architect, in providing professional design services, is not subordinate to other design professionals. The duty of care extends to such architects *even when they do not actually build the project or exercise ultimate control over construction.*" (*Emphasis added.*)

This decision is especially important in California, where there are currently 22,000 licensed architects and approximately 11,000 candidates who are in the process of meeting examination and licensure requirements, according to the California Architects Board.[1] In fact, as of 2013, California has the largest number of licensed architects in the United States.[2] Since 74% of architects practice in architecture firms, the *Beacon* decision is pivotal for architects as well as the companies that employ them.[3]

FACTS

The Beacon homeowners association, a collection of 595 condominium units and associated common areas located in the swanky and modern Mission Bay district in San Francisco, sued several business entities designated as the original owners and developers of the condominium, as well as Skidmore, Owings & Merrill LLP ("SOM") and HKS Architects, Inc. ("HKS").

SOM and HKS, the only architects on the project, had contracted with the owners and developers for architectural services. They were named in the first cause of action (Civil Code Title 7 – Violation of Statutory Building Standards for Original Construction), the second cause of action (Negligence Per Se in Violation of Statute), and the fifth cause of action (Negligence of Design Professionals and Contractors). Plaintiff alleged that SOM and HKS' negligent architectural design work resulted in extensive water infiltration, inadequate fire separations, structural cracks, and other safety hazards. The principal defect alleged was solar heat gain, which made the condominium units uninhabitable and unsafe during certain periods due to high temperatures. Plaintiff alleged that, contrary to state and local building codes, Defendants negligently approved less expensive, substandard windows and a building design that lacked adequate ventilation, resulting in solar heat gain.

The Supreme Court emphasized that SOM and HKS were paid more than $5 million for their architectural and engineering services, and they "played an active role throughout the construction process, coordinating efforts of the design and construction teams, conducting weekly site

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visits and inspections, and recommending design revisions as needed, and monitoring compliance with design plans."

TRIAL COURT AND APPELLATE COURT RULINGS

The trial court initially sustained the architects' demurrer, and held that "an architect who makes recommendations but not final decisions on construction owes no duty of care to future homeowners with whom it has no contractual relationship." The trial court reached this ruling by applying the holding and rationale from the decision in *Bily v. Arthur Young & Co.* (1992) 3 Cal.4th 370 and relying on *Weseloh Family Ltd. Partnership v. K.L. Wessel Construction Co., Inc.* (2004) 125 Cal.App.4th 152. The trial court held that "[t]he allegations do not show that either of the architects went beyond the typical role of an architect, which is to make recommendations to the owner. Even if the architect initiated the substitutions, changes, and other elements of design that Plaintiff alleges to be the cause of serious defects, so long as the final decision rested with the owner, there is no duty owed by the architect to the future condominium owners, in the court's view. The owner made the final decision according to the third amended complaint." The trial court granted Plaintiff leave to amend the complaint to allege that Defendant architect "actually dictated and controlled the decision to eliminate [ventilation] ducts, acting in a manner that was contrary to the directions of the owner, or that ignored the owner's directions." Notably, Plaintiff declined this opportunity to amend.

The appellate court reversed, and held that, under common law and the Right to Repair Act (Civ. Code § 895 *et seq.*), Defendants owed a duty of care under the circumstances presented in this case. Specifically, the court applied the factors set forth by the Supreme Court in *Biakanja v. Irving* (1958) 49 Cal.2d 647, 650 for determining whether a party owes a duty of care to a third party and concluded that Defendants owed a duty of care to the Association in this case. In *Weseloh*, the court found that a design engineer owed no duty of care to a commercial property owner. The court distinguished *Weseloh,* on the grounds that *Weseloh* was decided on summary judgment rather than demurrer and that the *Weseloh* court expressly limited its holding to its specific facts. Finally, the court concluded that the Right to Repair Act expressed a legislative intent to impose on design professionals a duty of care to future homeowners. (Civ. Code, § 895 *et seq.*)

SUPREME COURT RULING

The Supreme Court considered the issue of "whether design professionals owe a duty of care to a homeowners association and its members in the absence of privity." The court extensively reviewed cases standing for the proposition that privity is of declining significance in construction law. It further discussed cases which recognized liability for negligent construction resulting in property damage, the scope of duty of care, and application of third party liability principles to architects in personal injury and property damage matters.

It concluded that the architects owed such duty of care to the homeowners association, applying *Bily* and *Biakanja. Bily* stands for the proposition that auditors do not owe a duty of care to its clients' investors. In *Bily*, investors in a computer company sued the accounting firm that the company had hired to conduct an audit and issue audit reports and financial statements. The investors claimed that the accounting firm, had committed negligence in conducting the audit and reporting a $69,000 operating profit rather than the company's actual loss of more than $3 million, claiming injury from reliance on the allegedly negligent audit.

The court discussed three controlling factors that influenced the decision in *Bily*: (1) the client controls the information base for the audit and therefore, the auditor faces potential liability that is out of proportion to its potential fault; (2) in auditor liability cases, plaintiffs are generally more sophisticated and more apt to adjust risks via "private ordering"; and (3) exposing auditors to third-party negligence lawsuits would not necessarily improve the quality of audits, in light of the inherent dependence of the auditor on the client to furnish information and labor-intensive auditing process.

The court distinguished *Bily* from *Beacon*, asserting that, here: (1) there is a close connection between Defendants' allegedly negligent design and Plaintiff's injury; (2) there is a limited and wholly evident class of persons and transactions that Defendants' conduct was intended to affect; and (3) there were no "private ordering options" that would more efficiently protect homeowners, and the prospect of private ordering as an alternative to negligence liability was far less compelling in this case than in *Bily*.

The court also distinguished *Weseloh*, explaining that unlike the design professionals who computed earth

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Summary of Selected Federal and California Supreme Court and Appellate Cases

By Michael J. Brady
Ropers, Majeski, Kohn & Bentley

Editor's Note: As always, remember to carefully check the subsequent history of any case summarized as the reported decisions may have been depublished or have had review granted.

CALIFORNIA SUPREME COURT

RESPONDEAT SUPERIOR; VARIOUS LIABILITY; SEXUAL HARASSMENT; FRANCHISOR AND FRANCHISEE

Patterson v. Domino's Pizza, LLC
(2014) 60 Cal.4th 474 (California Supreme Court)

FACTS: Domino's Pizza had thousands of establishments under a franchise arrangement. Domino's was the franchisor. Poff had a franchise in Southern California. Under the contracts and arrangements, the franchisee had control over the day-to-day operations of the franchise. Poff had no written sexual harassment policy, but did inform employees that at Poff's place "zero tolerance" prevailed and that any complaints were to be reported to Poff about sexual harassment. Poff hired an assistant manager named Miranda. Miranda harassed plaintiff, another employee. When Poff found out about it, Poff called Lee, an area manager for Domino's (franchisor), and Lee remarked "you'd better get rid of him." Miranda did not show up at work again, and Poff regarded him as "self-terminating."

Plaintiff sued, among others, Domino's itself, claiming vicarious liability and that Miranda should be treated as the employee of Domino's; plaintiff claimed that, therefore, Domino's would be liable for the sexual harassment. The trial court disagreed with plaintiff, granting summary judgment for Domino's.

APPELLATE COURT DECISION: The Court of Appeal reversed, saying there were triable issues of fact as to whether an employment relationship existed, and the Court was also influenced by the fact that Poff had called Lee, the area manager, and could be viewed as following Lee's direction.

SUPREME COURT DECISION: Court of Appeal reversed. Under the typical franchise relationship, which exists throughout the United States in large form, the franchisor (Domino's) exercises no day-to-day operation or control over the activities of the franchisee. All the contract language and the evidence in this case support that view. Simply because Poff talked to Lee and Lee agreed than the employee should be dismissed does not change that. This would not have been an unexpected call and an area manager would be expected to be available for general questions and advice concerning such matter. This does not change the relationship. The trial court correctly found that no employment relationship existed, and the franchisor is therefore not liable as "an employer" for the sexual harassment committed by Miranda.

Recent Cases

NEGLIGENCE; DUTY; ASSUMPTION OF THE RISK

Gregory v. Cott
(2014) 59 Cal.4th 996 (Supreme Court)

FACTS: Carolyn Gregory worked for a home health care provider. She was hired to take care of Bernard and Lorraine Cott. Lorraine was 86 and had Alzheimer's. Gregory was told by Bernard that Lorraine occasionally would become violent. Gregory was standing in front of the sink cleaning a kitchen knife. Lorraine came up behind her and knocked the knife out of Gregory's hand, causing the knife to strike her wrist, cutting the wrist and resulting in some permanent disability to the fingers. Gregory sued Bernard and Lorraine. The trial court granted summary judgment on grounds of assumption of the risk. The Appellate Court affirmed.

SUPREME COURT DECISION: Affirmed. When caring for an Alzheimer's patient, violence is within the risk encountered. Here, Gregory was aware of that risk and the trial court correctly applied the doctrine of primary assumption of the risk.

PROFESSIONAL LIABILITY; MICRA; SETTLEMENT; SET OFFS; NON-ECONOMIC DAMAGES

Rashidi v. Moser
(2014) 219 Cal. App. 4th 1170
(California Supreme Court)

FACTS: A patient sued three medical entities, including Dr. Moser. Two of the entity defendants settled. Dr. Moser did not and the case went to trial. The jury returned a substantial verdict, including more than $900,000 in non-economic damages. The trial judge cut that to $250,000. Moser then contended that he was entitled to a "set off" based upon the settlements made by the settling defendants.

SUPREME COURT DECISION: The Supreme Court holds that no set off is permitted under these circumstances. The non-economic damages are "several," meaning that Moser alone is responsible for his $250,000. Any adjustment of that $250,000 only occurs when all three defendants go to trial, rather than some defendants settling out of the case. This policy also encourages settlements which promote sound public policy.

CALIFORNIA COURT OF APPEAL CASES

EMPLOYMENT TORT; MANDATORY ARBITRATION

Cruise v. Kroger Co.
(2014) 229 Cal.App.4th 215

FACTS: Cruise went to work for Kroger. In the employment application, Cruise agreed to submit to mandatory and binding arbitration of employment disputes and the company's arbitration policy was incorporated by reference into the employment application. The company's four-page arbitration policy required mandatory arbitration of the various discrimination claims that the plaintiff was bringing. It, however, was not clear whether the procedures for the handling of those claims was in existence at the time plaintiff signed the employment application.

The trial court denied the employer's motion to compel.

APPELLATE COURT DECISION: Reversed. Mandatory arbitration of the disputes is required. The employer, however, failed to establish that the claimed procedures for the conduct of the arbitration were in existence at the time the employer signed the employment application. Under those circumstances, the provisions of the California Arbitration Act kick in and will govern. Nevertheless, mandatory arbitration is required.

EMPLOYMENT TORTS; WRONGFUL DISCHARGE

Kao v. University of San Francisco
(2014) 229 Cal.App.4th 437

FACTS: Plaintiff was a tenured professor at the University of San Francisco. He complained to University officials about the lack of diversity at the University of San Francisco campus. He had various meetings with University people; his behavior at these meetings was erratic and threatening; he yelled, he screamed, and he doubled his fists during the confrontations. Several University professors and officials complained in writing about his behavior. He and his attorney were ultimately told that plaintiff should submit to a FFD (fitness for duty) evaluation by an independent physician. The attorney initially refused. Plaintiff was then put on leave and was ultimately told that if he did not submit to an FFD examination, he would be dismissed. Plaintiff was, in fact, dismissed and sued.

The trial judge granted summary judgment for the University on the defamation charges; a jury returned a verdict in favor of the University.

APPELLATE COURT DECISION: Affirmed. There was ample evidence to support the jury's verdict. The University acted reasonably in requiring plaintiff to submit to an FFD examination and the plaintiff refused. There was substantial evidence to support the fact that his behavior was erratic and was properly viewed as a threat to others, causing the University to act as it did. The verdict is affirmed.

COMMENT: Might be interesting for employers to require everyone to submit to an FFD examination – say, every six months! The other amusing thing about this case is that the University of San Francisco has just about the most diverse faculty in the country.

Recent Cases

NEGLIGENCE; HOSPITAL LIENS; BALANCE BILLING

Dameron Hospital Association v. AAA Northern California, Nevada and Utah Insurance Exchange
(2014) 228 Cal.App.4th 1199

FACTS: Dameron Hospital provided emergency room services for individuals involved in automobile accidents. These accidents were caused by the negligence of third parties who were insured by AAA and Allstate. The injured parties were members of Kaiser, which had a special contract with Dameron Hospital providing that Dameron would bill Kaiser at a lower rate than its customary charges. Dameron did so and then sought under the "balanced billing" approach the difference by asserting a lien in the lawsuits that the injured parties filed against third party tortfeasors (who, again, were insured by AAA and Allstate). The trial court rejected this effort.

APPELLATE COURT DECISION: Affirmed. Under the contract between Dameron and Kaiser, when Dameron accepted Kaiser's payment pursuant to the reduced rate provision, this *extinguished* the overall medical debt, and Dameron thereafter had no right to assert a hospital lien. There was no special provision in the contract between Dameron and Kaiser giving Dameron the right to assert a claim or lien against the third party tortfeasors or their insurers. Accordingly, the lien is invalid under the HLA (Hospital Lien Act).

COMMENT: Decision largely based on *Parnell v. Adventist Health System West*, 35 Cal.4th 595 (2005). Very interesting result, shielding the tortfeasors and the insurers from "balanced billing" claims. But the Court suggested that this problem could be alleviated if the Kaiser/Dameron contract had continued a provision allowing Dameron to assert such balanced billing claims against the third party tortfeasors through a lien or otherwise.

EMPLOYMENT TORTS; ATTORNEY-CLIENT PRIVILEGE; WRONGFUL DISCHARGE

Chubb & Son v. Superior Court
(2014) 228 Cal.App.4th 1094

FACTS: Lemmon was an attorney employed by the Bragg law firm. She was discharged for allegedly making a misrepresentation in a declaration. She contended the discharge was because she had a disability. Lemmon filed suit for wrongful discharge. The Bragg law firm represented many insureds who were insured by Chubb. Lemmon sought discovery of material in these litigation files. This included client feedback regarding how Lemmon had done on individual cases, case reviews which would involve Bragg's evaluation of Lemmon's conduct, internal memos and emails which would contain evaluations of Lemmon's performance, and "performance reviews" to the same effect. Chubb resisted turning over most of these documents, although they did turn over some that were redacted. The trial court ruled in favor of Lemmon and against Chubb. Chubb sought a writ.

APPELLATE COURT DECISION: Writ denied. The requests for discovery were appropriate in this wrongful discharge case. The information was not to be made public; it would be shared only by the attorneys involved in the wrongful discharge case and no others. The attorney-client privilege did not bar production.

GOVERNMENT LIABILITY; TAXPAYER STANDING; BULLYING

Hector F. v. El Centro Elementary School District
(2014) 227 Cal.App.4th 331

FACTS: A child was enrolled at the defendant elementary school in defendant district. The father claimed that his child was being harassed and bullied, in violation of the bullying law because English was the second language for the child and also because he was disabled. Despite his complaints, the school district did nothing. The father sued on his own behalf and on behalf of the child. The child subsequently graduated and went to high school in a different district. The father persisted with his own claim. The district demurred on the ground that he had no standing. The trial court dismissed the suit.

APPELLATE COURT DECISION: Reversed. This is a taxpayer standing suit under C.C.P. section 529a. The father has standing to enforce a public law which is enacted for the benefit of the public and to prevent conduct such as harassment and bullying. Therefore, even though the child is no longer at the school, the father may proceed with his claim.

COMMENT: Illustrative of California's extremely liberal standing law, in contrast to the law of other states and certainly in contrast to Federal law.

PRIVACY; MEDICAL RECORDS; CONFIDENTIALITY ACT

Sutter Health v. Superior Court
(2014) , 227 Cal.App.4th 1546

FACTS: A thief broke into Sutter Health and stole a laptop computer. The computer had on it the records of 4,000,000 patients! Actions were brought for breach of the Confidentiality of Medical Information Act, permitting $1,000 in nominal damages for each plaintiff. Sutter demurred. Trial court overruled the demurrer.

APPELLATE COURT DECISION: Reversed. No breach of the Confidentiality of Medical Information Act was stated, because plaintiffs did not state that any unauthorized person had actually *viewed* the records. Without a viewing, there is no breach of confidentiality. This is an essential ingredient of the cause of action.

EMPLOYMENT TORTS; RETALIATION

Ferrick v. Santa Clara University
(2014) 231 Cal.App.4th 1337

FACTS AND HOLDING: Court of Appeal holds that an employee who is fired for reporting to her employer that her supervisor is involved in a kick-back scheme (illegal), can state a wrongful termination action; not necessary to show that the general public is harmed by the supervisor's activities; enough to show that the employer is directly harmed.

EMPLOYMENT TORTS; WRONGFUL DISCHARGE; RETALIATION

Diego v. Pilgrim United Church of Christ
(2014) 231 Cal.App.4th 913

FACTS: Diego was hired to work at a church pre-school. She was promoted up the ladder. One day, a person from Social Services showed up unannounced at the school because an anonymous caller had reported violations. None were found. The church, however, suspected that Diego was behind the anonymous call. The church attempted to schedule a meeting for August 26, but Diego had another engagement and asked for a rescheduling. (This was done by voice mail.) Diego was fired.

In the lawsuit for wrongful discharge, the trial court ruled in favor of the church.

APPELLATE COURT DECISION: Reversed. An employee can bring a wrongful discharge action when the employer fires her based upon the employer's mistaken belief that the employee had done something wrong. This is similar to a whistleblower situation (even though Diego had done nothing), and the public policy wants to encourage the reports of illegal conduct. Actions for wrongful discharge can be brought for such types of retaliation.

Recent Cases

INSURANCE;
UNDERINSURED MOTORIST COVERAGE

Elliot v. GEICO Indemnity Co.
(2014) 231 Cal.App.4th 789

FACTS: Elliot's husband was riding a motorcycle. He was hit by a drunken truck driver who had a $15,000 liability policy. The truck driver was an employee of Parson's Bar and was apparently served alcohol at the bar which caused her to become drunk.

Elliot's wife sued for wrongful death. She had a UIM policy with GEICO for $100,000. She settled with the bar for $250,000 and with the truck liability policy for $15,000. GEICO refused to pay anything, and plaintiff sued for coverage and bad faith. The trial court ruled in favor of GEICO.

APPELLATE COURT DECISION: Affirmed. Under the "limits of liability" section, GEICO is entitled to a credit for amounts paid on behalf of the dead husband from any person who is legally liable for his death. The wife received more than $200,000 from two sources, and this is a complete credit against the $100,000 GEICO limits, meaning that GEICO owes nothing.

The trial court correctly rejected plaintiff's attempt to rely on some other insurance document which allegedly created confusion. The policy is clear and unambiguous and will be enforced.

INSURANCE; BAD FAITH; FAILURE TO SETTLE

Graciano v. Mercury General Corporation
(2014) 231 Cal.App.4th 414

FACTS: The insured was involved in an auto accident. The insurer promptly opened a file. Very shortly thereafter, the victim's attorney contacted a different adjuster concerning the accident. But, the attorney referred to a policy that had been issued to the insured's father and which had been cancelled. Nonetheless, that adjuster did open a file. The victim's attorney sent a letter demanding policy limits with a 10-day time period to respond. The insurer rejected the demand on grounds that the policy under which the demand was made had been cancelled and was not in effect at the time of the accident. Then, just before the 10-day time limit expired, the insurer discovered the correct policy and contacted the attorney by voice mail, attempted fax, and by letter indicating they would accept the policy limits demand. The claimant obtained a $2,000,000 judgment against the insured, with appropriate assignments. In the trial court, a jury found bad faith on the part of the insurer.

APPELLATE COURT DECISION: Reversed. An insurer is not required to initiate settlement discussions. Instead, the insurer is entitled to await a reasonable settlement demand from the claimant and then respond. This had not occurred in this case, since the attorney had referred to a policy which was no longer in existence (had been cancelled). Furthermore, once the insurer was able to match the correct policy with the accident, the insurer promptly offered the policy limits. There was no basis for any bad faith claim whatsoever.

COMMENT: Interesting statement in the opinion that the insurer does not have an obligation to initiate settlement discussion – a statement somewhat contrary to language in recent appellate decisions, but language that most insurers will be happy to see.

INSURANCE;
EMPLOYMENT-RELATED PRACTICES EXCLUSION

Jon Davler, Inc. v. Arch Insurance Company
(2014) 229 Cal.App.4th 1025

FACTS: Jon Davler, Inc. was the employer. Arch Insurance was the general liability carrier. A supervisor at Davler found a sanitary napkin in the ladies' restroom. She made all the female employees come into the restroom and ordered them to disrobe so that she could discover who was menstruating. This resulted in a lawsuit for intentional infliction of emotional distress and false imprisonment. Davler tendered the matter to Arch, but Arch refused to defend. The Arch policy had an exclusion for "employment-related activities" which listed several specific torts, including false arrest (but not false imprisonment). It excluded claims arising out of the employment relationship. Davler sued Arch for coverage and bad faith. The trial court sustained Arch's demurrer without leave to amend and dismissed the case.

APPELLATE COURT DECISION: Affirmed. This was clearly was a claim arising out of the employment relationship. It made no difference that the tort of false imprisonment was not among the torts listed. Those that were listed were simply exemplars. The exclusion is unambiguous and applies, precluding a duty to defend. Trial court correctly dismissed the case.

INSURANCE COVERAGE; SCOPE OF EMPLOYMENT; SEXUAL ASSAULT

Baek v. Continental Cas. Co.
(2014) 230 Cal.App.4th 356

FACTS: Baek worked for a company as a massage therapist. She was accused of groping a male patient during a massage. She was sued, but her employer's insurer (Continental) refused to defend. The issue was whether Baek was "an insured" under the policy. To be an insured, Baek had to be performing duties within the scope of her employment and related to the business. The trial court ruled that there was no coverage.

APPELLATE COURT DECISION: Affirmed. Sexual assault means that Baek was not acting within the scope of her employment or for the business. Accordingly, she was not an insured and there would be no coverage.

NEGLIGENCE; PREMISES LIABILITY; DANGEROUS CONDITION; DUTY TO WARN

Annocki v. Peterson Enterprises, LLC
(2014) 232 Cal.App.4th 32

FACTS: The defendant was a restaurant owner. Plaintiff was riding down the Pacific Coast Highway when a patron of defendant's restaurant pulled out in front of him, resulting in plaintiff's death. A lawsuit was filed against the restaurant for failing to have enough parking attendants to assist drivers at this dangerous location and for failure to advise restaurant patrons that the only safe turn was a right turn only. Trial court sustained a demurrer.

APPELLATE COURT DECISION: Reversed and remanded to give plaintiff an opportunity to file an amended complaint. The essence of the claim was that the restaurant had a duty to post a sign warning patrons that the only safe turn was a right turn only at this particular location. This was a very difficult location, and the defendant arguably had a duty to guard against such accidents.

COMMENT: Watch for this case possibly to be reviewed; seems like it opens too wide a door on the "duty to warn" imposed upon property owners.

PRODUCTS LIABILITY; IMMUNITY; ALCOHOLIC BEVERAGES

Fiorini v. City Brewing Co., LLC
(2014) 231 Cal.App.4th 506

FACTS: This is an unusual case. An underage minor bought an alcoholic beverage at a convenience store. It was called Four Loko, a combination of alcohol, caffeine and several other products which allegedly quickly intoxicate the drinker and cause violent reactions. The minor got into a shoot-out with the police. His father brought suit against the manufacturer of Four Loko. The trial court granted judgment on the pleadings against Four Loko.

APPELLATE COURT DECISION: Reversed. Four Loko is not in the position of "furnishing" alcohol to a minor. Instead, it furnishes a product to the chain of distribution, including wholesaler and retailer, and is not directly involved in the sale or furnishing of the product to the ultimate consumer (the minor).

EMPLOYMENT TORTS; WRONGFUL DISCHARGE; REPORTING OF CRIME

Yau v. Santa Margarita Ford, Inc.
(2014) 229 Cal.App.4th 144

FACTS: Plaintiff worked at the Ford dealership. Plaintiff himself was involved in some fraudulent warranty claims. He ultimately reported another person at the dealership who was involved in the fraudulent warranty claims. Plaintiff was fired. He sued for wrongful termination, claiming that he had been fired simply because he advanced the public policy that the workplace should be crime-free and he reported the other Ford person as being involved in the fraud.

In the wrongful discharge claim, the dealership demurred and the trial court sustained the demurrer.

NINTH CIRCUIT DECISION: Reversed. A wrongful termination case can be sustained when the fired employee had attempted to alert the employer to fraud or crime being committed at the workplace. The public policy of the state is promoted when employees do such things. Accordingly, plaintiff stated a cause of action.

Recent Cases

PROFESSIONAL LIABILITY; LEGAL MALPRACTICE; ATTORNEY-CLIENT PRIVILEGE

Palmer v. Superior Court
(2014) 231 Cal.App.4th 1214

FACTS: Attorney Shelton was with the Edwards firm. She was representing client Mireskandari. The case was an invasion of privacy case involving a newspaper called the *Daily Mail*. Mireskandari became disappointed with Shelton's services and wrote critical emails to Shelton. Shelton talked to two attorneys in the Edwards firm. One was Swope, who was the firm's general counsel, and the other was Christman, who was the "claims counsel." They in turn talked to an attorney named Durbin asking him to keep an eye on Shelton and help supervise the pleadings in the case (the Mireskandari case). Later, Mireskandari sued for legal malpractice and sought production of the communications between Shelton, Swope, Christman and Durbin.

The trial court denied the claim of attorney-client privilege and ordered production of the communications.

APPELLATE COURT DECISION: Writ issued to deny production of the communications among Shelton, Swope and Christman, but denying the writ with respect to Durbin. Shelton's communications to claims counsel and general counsel were intra-firm communications and protected by the attorney-client privilege; not so with Durbin who did not occupy the special position that Swope and Christman occupied.

INSURANCE COVERAGE; AGENTS AND BROKERS; MISREPRESENTATION; JURY INSTRUCTIONS

Douglas v. Fidelity National Insurance Co.
(2014) 229 Cal.App.4th 392

FACTS: Douglas was the homeowner. Douglas went to a store called Cost-U-Less. This store had an insurance producer by the name of InsZone located in the store. Douglas claimed that he spoke on the phone with an InsZone person while in the store about getting homeowners insurance. According to Douglas, the InsZone person asked questions about when the house was built, the square footage. According to Douglas, no questions were asked about whether a business was operated in the home.

In fact, Mr. and Mrs. Douglas operated a residential care facility in the home. This fact would have made them ineligible for homeowners insurance provided by most companies. On the insurance application, no such information about the business was provided. A fire occurred. Douglas submitted a claim to the insurer, Fidelity (the policy had been issued by InsZone). Fidelity investigated and refused to pay based upon the fact that a residential care facility was being operated in the home and, therefore, there was no coverage. In a coverage and bad lawsuit, a large verdict was rendered for full coverage plus bad faith and punitive damages. The trial court struck the punitive damages and some of the bad faith compensatory damages. Fidelity appealed, contending that it was entitled to a new trial.

APPELLATE COURT DECISION: Jury verdict reversed. The key question in this case is whether InsZone was a broker for Douglas or an agent of Fidelity. The jury was not allowed to determine that question; they were not instructed on that issue, and no special verdicts were allowed to be given to them on that issue. This was an important issue: if InsZone was a broker for Douglas, then any misrepresentation, even though negligent, would be binding on Douglas, and the insurer would have been entitled to rescind. But if InsZone was an agent of Fidelity, then no such rescission would be allowed. The jury should have been given an opportunity to decide these critical questions and, therefore, a new trial should be afforded.

INSURANCE COVERAGE; EXCLUSION FOR CLAIMS BY ONE INSURED AGAINST ANOTHER; AUTO POLICY

Mercury Casualty Co. v. Chu
(2014) 229 Cal.App.4th 1432

FACTS: Chu was the named insured under a Mercury automobile policy. Chu owned a house. Living with Chu in the house were some college roommates, including Pham. All these roommates were "residents" of Chu's household, but they were *not* relatives. Chu was driving, Pham was a passenger, and there was an accident. Pham sued Chu and the other driver. The Mercury policy excluded coverage for claims made by an insured against other insureds, and the definition of insured included residents of the household, even if they were not relatives. Mercury defended Chu under a reservation of rights. Pham then got a judgment for $33,000 against Chu. Mercury brought a declaratory relief action contending that it did not have to pay the judgment because Pham was an insured and there was no coverage for Pham's claim against Chu because of the exclusion. The trial court ruled in favor of Mercury.

APPELLATE COURT DECISION: Reversed. The definition of "an insured" under the Mercury policy is too broad, since it includes residents who are not even relatives.

COMMENT: The Supreme Court should look at this case. It appears to be wrong. The exclusion seems to be okay under Insurance Code section 11580.1(c)(5) which authorizes exclusion of auto liability insurance to "an insured" [in this case Pham]. This Court seems to think that the exclusion is limited to resident *relatives*. But there is nothing in the statutory language which would support that.

NEGLIGENCE; PREMISES LIABILITY

Lawrence v. La Jolla Beach and Tennis Club, Inc.
(2014) 231 Cal.App.4th 11

FACTS: The Lawrence family was vacationing at the La Jolla Beach and Tennis Club in La Jolla in an oceanfront unit. Mrs. Lawrence and her husband were at the kitchen table. She had opened the window so that they could hear the ocean. Their five-year-old son climbed upon the window and fell through the screen to the concrete below, suffering serious injuries. The window was 23 inches above the floor. The Lawrences sued the hotel for premises liability, failure to install safety devices. The trial court granted summary judgment in favor of the hotel.

APPELLATE COURT DECISION: Reversed. A higher duty is owed to a child; the existence of a duty depends on foreseeability, and foreseeability of the injury under these circumstances could be found by the jury. There was testimony that certain safety devices could have been installed which would have prevented this accident.

COMMENT: Cases run both ways in California. If you have one of these cases, consult this decision and you will find all the citations to all of the cases involving children falling from windows.

Recent Cases

NEGLIGENCE; VICARIOUS LIABILITY; AUTOMOBILES

Lobo v. Tamco
(2014) 230 Cal.App.4th 438

FACTS: Tamco was the employer of the employee. The employee left work one day in his own car intending to go home. He pulled out onto the highway and did not see three motorcycles (being driven by deputies) approaching with their lights and sirens going. There were some deaths. A wrongful death action was filed, and it was claimed that Tamco, the employer, was vicariously liable. The theory was that the employee sometimes called on customers, using his own car, and, therefore, this constituted a benefit to his employer (Tamco) and Tamco would be vicariously liable. In the first trial court proceeding, the trial judge granted summary judgment for Tamco on vicariously liability, but the Court of Appeal reversed, saying that there was a triable issue of fact as to whether a benefit was confirmed on the employer. The case was remanded and a jury trial was held.

In the second proceeding, the jury found in favor of Tamco on the vicarious liability question.

APPELLATE COURT DECISION: Affirmed. Even though the employee may have occasionally called on customers using his own car, this was rather infrequent and the evidence supported the jury's verdict that there would be no vicarious liability. On the evening in question, there was no such intention on the part of the employee, and he was simply returning home from work. Considering all of the evidence, the jury's verdict was supported by substantial evidence.

PRODUCTS LIABILITY;
SOPHISTICATED USER DEFENSE

Gottschall v. Crane Co.
(2014) 230 Cal.App.4th 1115

FACTS: In a wrongful death suit, the decedent had worked in a shipyard from 1959 to 1989. He died of mesothelioma in 2010. An action had been pending by his relatives in a Pennsylvania Federal District Court where many asbestos claims had been centered and consolidated. At the same time, there was a wrongful death action in California against the present defendant, Crane, for asbestos exposure. In the Pennsylvania case, the action was against different defendants. A Federal judge in that case ruled that General Dynamics was not liable for Gottschall's claim on grounds of the "sophisticated user" defense. The Federal judge held that the Navy was well aware of the dangers of asbestos and since the Navy was the "employer" of Gottschall, the Navy's knowledge was imputed to Gottschall for purposes of the sophisticated user defense. The sophisticated user defense was therefore attempted to be applied in the California State Court case on grounds of collateral estoppel. The trial court granted summary judgment in favor of Crane on this collateral estoppel argument.

APPELLATE COURT DECISION: Reversed. The Federal Court in Pennsylvania misinterpreted California law. When dealing with the sophisticated user defense, the knowledge of the plaintiff's employer is not imputed to the plaintiff.

PROFESSIONAL LIABILITY; MEDICAL MALPRACTICE; STATUTE OF LIMITATIONS

Larson v. UHS of Rancho Springs, Inc.
(2014) 230 Cal.App.4th 336

FACTS: Plaintiff sued a hospital and an anesthesiologist for professional negligence. Plaintiff accused the anesthesiologist of misconduct in the pre-operative procedure; that the anesthesiologist violently twisted plaintiff's arm; hurt plaintiff's chin and bruised plaintiff's face in the process of holding plaintiff's head back. Ultimately, the defendants demurred on grounds that the action was barred by the one-year statute of limitations. The trial court agreed.

APPELLATE COURT DECISION: Affirmed. Although normally the statute of limitations for personal injuries is two years, there is a special statute for actions for professional negligence, and one of the provisions provides a one-year period from commencing on the date that plaintiff knows of his injury. This provision applied, and the action was not timely filed, therefore supporting dismissal.

DAMAGES; PUNITIVE DAMAGES; PRODUCTS; FAILURE TO WARN

Colombo v. BRP US Inc.
(2014) 230 Cal.App.4th 1442, 179 Cal.Rptr.3d 580

FACTS: Two girls in their late teens wanted to ride a jet ski. They rented one. It had a warning inside that protective clothing should be worn, including a wetsuit bottom. This was to protect the participants from damage to "orifices" of the body from the jet ski thrust caused by the engine. The jet ski was rented from a company called BRP and their employee was Kohl. No personal warnings were given at the time of the rental. While the girls were jet skiing, they fell out once, got back in, and told the driver not to let that happen again. Nevertheless, he made a sharp turn and the girls fell out, suffering personal injuries from the thrust of the jet ski engine (one to the vagina). They brought suit against BRP and Kohl. They recovered compensatory damages of approximately $1.5 million and punitive damages of about $3.5 million.

APPELLATE COURT DECISION: Affirmed. The case is governed by Federal Maritime law. In the area of punitive damages, clear and convincing evidence does not have to be shown – reckless or grossly negligent conduct is enough. The warning inside the boat was inadequate; personal warnings should have been provided, in light of the known danger and the ages of the participants. The amount of the punitive damages (ratio of 3.7:1) is constitutionally acceptable and, therefore, not excessive.

DAMAGES; PUNITIVE DAMAGES; ASBESTOS

Izell v. Union Carbide Corporation
(2014) 230 Cal.App.4th 1081

FACTS: Izell had a home construction business for several decades. He was personally present when drywall was sanded which created dust. He was also personally present when many bags of plastic cement manufactured by defendants were opened, also creating dust. This dust contained asbestos. He developed mesothelioma. A lawsuit was filed against many prominent defendants, including Georgia Pacific, Union Carbide, Kelly-Moore and others. The principal theory was failure to warn.

Trial court proceedings: The case went to the jury. The jury awarded plaintiff $30 million in compensatory damages and $18 million in punitive damages. The punitives were returned only against Union Carbide. Damages were apportioned. The trial judge in post-trial motions then reduced the compensatory award to $6 million, but did not disturb the punitive award against Union Carbide.

APPELLATE COURT DECISION: Affirmed. The ultimate punitive damage award against Union Carbide was about 4.6:1, which is not constitutionally excessive.

COMMENT: But, the jury had awarded punitive damages ($18 million) against Union Carbide based upon its large compensatory award against Union Carbide which meant that the jury had awarded a much smaller ratio of punitive damages than what the trial judge ultimately allowed to stand. Stated another way, if a compensatory award is cut, that would seem to dictate that a proper course of action would be to cut the punitive award so that something close to the same ratio is maintained. Nevertheless, the Court said that the reprehensibility of Union Carbide was great and, therefore, the existing punitive damage award would be allowed to stand.

Recent Cases

NINTH CIRCUIT CASES

ALIEN TORT CLAIMS ACT; SLAVERY

Doe I v. Nestle USA, Inc. (9th Cir. 2014)
766 F.3d 1013

FACTS AND HOLDING: Ninth Circuit rules that under the Alien Tort Claims Act, corporations can be sued for aiding and abetting child slavery in the Ivory Coast in connection with farmers' production of cocoa.

DEFAMATION; WEBSITES; DUTY TO WARN

Doe No. 14 v. Internet Brands, Inc. (9th Cir. 2014)
767 F.3d 894

FACTS: The defendant operated and controlled a website. The website was designed to help models market themselves. Defendant became aware that two men were actually using material that they found on the website to lure models into certain places where they were then raped and abused. Plaintiff marketed herself on the website and was then enticed to go to the Miami area where she was drugged, raped and recorded. She sued the defendant website providers for failure to warn of this danger of which they knew.

The trial court dismissed the case on grounds of the Federal Communications Decency Act.

NINTH CIRCUIT DECISION: Reversed. The Federal act prevents the website provider from being treated like a speaker or communicator of information; therefore, the website provider cannot be sued for defamation for the publishing of offensive conduct. But, that was not the theory of this case: the theory was failure to warn of a danger known to the publisher. Therefore, the case was not properly dismissed under the Federal statute.

EMPLOYMENT TORTS; RETALIATION

Thomas v. County of Riverside (9th Cir. 2014)
763 F.3d 1167

FACTS: Plaintiff, an employee of defendant, sued defendant claiming retaliation to inhibit her First Amendment rights. She submitted evidence of numerous specific activities of the defendant. In a motion for summary judgment, the District Court granted summary judgment for the employer and classified many of plaintiff's incidents collectively as "petty."

NINTH CIRCUIT DECISION: Reversed. Plaintiff adequately raised genuine issues of fact concerning many of these violations, and the matter is remanded to the District Court for a detailed analysis of such. Even minor acts of retaliation which inhibit free speech rights can be actionable.

INSURANCE COVERAGE; USE OF VEHICLE; PULLING PASSENGER OUT OF CAR

Encompass Insurance Co. v. Coast National Insurance Co. (9th Cir. 2014) 764 F.3d 981

FACTS: Torti was driving alone and witnessed a single car accident. She stopped to help. The passenger in the car was injured, and Torti pulled the passenger from the car, allegedly resulting in a spinal injury to the passenger and rendering her a paraplegic. The passenger sued Torti. The insurance questions are as follows: was Torti entitled to coverage under her own policy? Was Tori entitled to coverage under the policy issued to the owner of the car in which the passenger was riding? Mid-Century issued the policy to Torti; Coast National issued the policy to the owner of the vehicle. Both Mid-Century and Coast National covered Torti for "use" of someone else's vehicle. Neither Mid-Century nor Coast would defend Torti. Instead, Torti was defended by Encompass Insurance Company, a policy which covered Torti under a package program. Encompass agreed to defend and they settled the passenger's claim against Torti. Encompass then sought contribution from Mid-Century and from Coast.

The trial court entered judgment in favor of Mid-Century and Coast, finding that removing the passenger from the car did not constitute "use" of the automobile.

NINTH CIRCUIT DECISION: Reversed. Insurance Code section 11580.06(g) finds "use" of the vehicle as "operating, maintaining, loading, or *unloading* of a motor vehicle. Removing the passenger from the car constituted unloading of the passenger from the car. Therefore, there was coverage for Torti under the Mid-Century and the Coast National policy.

COMMENT: The Court doesn't really address the additional requirement that has to be shown – that Torti was acting with the *permission* of the owner of the vehicle in which the passenger was riding. The case is silent on that point.

Summary of Selected Nevada Supreme Court Cases

By Mary-Ann LeBrun
Georgeson Angaran, Chtd.

CIVIL PROCEDURE

SUMMARY JUDGMENT

Renown Regional Medical Center v. Second Jud. Dist. Ct.
335 P.3d 199, 130 Nev. Adv. Op. 80, Nev., Oct. 2, 2014

The Nevada Supreme Court considered the circumstances under which a district court may grant summary judgment sua sponte.

Real party in interest, Michael Wiley, brought a putative class action against Renown regarding its lien practices and alleged that Renown breached its provider agreement with Cigna and intentionally interfered with Wiley's Cigna policy. Renown and Wiley moved for summary judgment. Wiley argued that Renown violated NRS 108.590 and NRS 449.757.

The district court denied Renown's motion but granted Wiley's motion. However, the court additionally granted summary judgment in favor of Wiley on his breach of contract and intentional interference with contract claims, even though these claims were not part of the summary judgment motions. Renown filed a petition for mandamus relief challenging the order.

The Nevada Supreme Court held that while district courts have inherent power to enter summary judgment sua sponte, the court must first provide notice to the defending party and an opportunity for that party to defend itself. The district court's grant of summary judgment without briefing, argument or notice was not proper, and the district court was ordered to vacate that portion of its order granting summary judgment.

COSTS

Copper Sands Homeowners v. Flamingo 94 Ltd.
335 P.3d 203, 130 Nev. Adv. Op. 81, Nev., Oct. 2, 2014

The HOA of an apartment complex brought suit against the Developers relating to construction defects. The Developers filed a third party complaint to bring various subcontractors into the action. The district court dismissed the HOA's claims on summary judgment and awarded the third party defendants costs. The HOA appealed as to the issue of whether a third party defendant can recover costs under NRS 18.020.

this case continued on page xv

this case continued from page xiv

Under NRS 18.020(3), the prevailing party in an action "where the plaintiff seeks to recover more than $2,500" is entitled to recover his or her costs "against an adverse party against whom judgment is rendered." The Nevada Supreme Court held that the district court has discretion to determine which party is responsible for a third party defendants' costs. The Court adopted the test used in *Bonaparte v. Neff*, 116 Idaho 60, 773 P.2d 1147 (App. 1989). In essence, the court must determine which party is the adversary to the third party defendants. If the court's judgment favors the third party defendant and disfavors the adverse party, then the third party defendant is a prevailing party.

Here, the HOA and third party defendants were adverse because the third party defendants' liability was contingent on the HOA's claims against the Developers. The claims directly impacted the third party defendants and they dedicated a large amount of resources to contest those claims. The dismissal of the HOA claims prevented the HOA from recovering damages against the third party defendants. Therefore, the third party defendants were the prevailing party and entitled to costs incurred in opposing the construction defect claim.

PERSONAL JURISDICTION

Fulbright & Jaworski v. Eighth Jud. Dist. Ct.
-- P.3d --, 131 Nev. Adv. Op. 5, Nev., Feb. 5, 2015

The Nevada Supreme Court determined the issue of whether an out-of-state law firm's representation of a Nevada client provided a basis for specific personal jurisdiction in Nevada.

Verano (the client) filed a complaint against Petitioners (a Texas law firm) for breaching fiduciary duties and engaging in self dealing. Petitioners filed a motion to dismiss based on lack of personal jurisdiction. The district court denied the motion to dismiss, and Petitioners filed a writ petition.

The Nevada Supreme Court held that "[a] court may exercise general jurisdiction over a nonresident defendant when its contacts with the forum state are so 'continuous and systematic' as to render the defendant essentially at home in the forum State." Verano argued that Petitioners were registered lobbyists in two legislative session and that seven attorneys from the firm were admitted pro hac vice in Nevada lawsuits in the past. The Court concluded these were not substantial activities that were so continuous and systematic that Nevada could be considered Petitioners' home.

Next, the Court addressed the issue of whether an out-of-state law firm's representation of a Nevada client is sufficient to subject the firm to specific personal jurisdiction. The Court held that it did not. Here, Verano reached out to Petitioners for their services related to a Texas real-estate development project. An out-of-state law firm that is solicited by a Nevada client to represent the client in an out-of-state matter does not subject itself to personal jurisdiction in Nevada by agreeing to represent the client.

The Court also considered whether Petitioner's attendance at two presentations in NV was sufficient contact to establish personal jurisdiction. The Court held that a law firm does not purposefully avail itself of the benefit of acting in the client's home state simply by meeting with the client in that state. Petitioner's contact with Nevada had no clear connection to Verano's causes of action and was not sufficient to establish personal jurisdiction.

Therefore, the Court ordered that the district court must vacate its order denying the motion to dismiss.

Recent Cases

CONSTRUCTION DEFECT

Oxbow Constr. v. Eighth Jud. Dist. Ct.
335 P.3d 1234, 130 Nev. Adv. Op. 86, Nev., Oct. 16, 2014.

An Association of condominium unit owners served the developer with notice of construction defects. The developer filed a declaratory relief action seeking a determination that NRS Chapter 40 did not apply because the units did not qualify as residences after they were rented as apartments. The Association filed a counterclaim and a motion seeking a determination that Chapter 40 remedies were available for all common elements. The developer opposed the motion and argued that the district court was required to conduct a NRCP 23 class action analysis to determine whether the Association had standing to bring claims for defects in common elements.

The district court granted the motion, determining that the Association could seek remedies for construction defects in the common elements of buildings containing a new residence. The developer filed a writ petition due to the court's failure to conduct a NRCP 23 analysis. The Association filed a writ petition seeking a finding that Chapter 40 remedies are available for all of the units.

First, the Nevada Supreme Court held that the Association had standing to bring the construction defect claims on behalf of itself and unit owners. The district court was not required to conduct an NRCP 23 analysis because nothing indicated that the Association sought to proceed as a class action.

Second, the Court determined that, under the plain language of NRS 40.630 and NRS 40.615, units that were leased as apartments were neither "residences" nor "new." Therefore, the district court correctly determined that they did not qualify for Chapter 40 remedies.

Third, the Court held that under NRS 40.615 an appurtenance is not required to be "new" to qualify for Chapter 40 remedies. Therefore, to pursue Chapter 40 remedies for construction defects in limited common elements assigned to multiple units in a common building, the plaintiff must establish that the building contains at least one unit that is a "new" residence.

Accordingly, the writ petitions of both parties were denied.

APPELLATE PROCEDURE

Valdez v. Cox Communications Las Vegas, Inc.
336 P.3d 969, 130 Nev. Adv. Op. 89, Nev., Nov. 6, 2014.

Valdez filed a class action against a number of defendants, including VIPI and Sierra Communications, alleging failure to pay wages in accordance with Nevada and federal law. The claims against defendant VIPI were severed and then resolved by an October 2013 order. Valdez did not file a notice of appeal from that order. Valdez later filed an appeal after a March 2014 order approving a class action settlement between Valdez and Sierra Communications, resolving the remaining claims in the suit. VIPI filed a motion to dismiss the appeal, arguing that Valdez failed to timely appeal the October 2013 order.

The Nevada Supreme Court noted that, under NRCP 21, when a claim against a party is severed, the claim proceeds separately from the unsevered claims. Therefore, the Court held that a judgment resolving properly severed claims is appealable. Additionally, an order resolving severed claims does not need to be certified as final before a party may file an appeal as once the claims are severed, two separate actions exist.

Here, Valdez failed to timely appeal from the October 2013 order resolving all the severed claims against VIPI. Therefore, VIPI's motion to dismiss was granted.

INSURANCE

Federal Ins. Co. v. Coast Converters, Inc.
339 P.3d 1281, 130 Nev. Adv. Op. 95, Nev., Dec. 24, 2014.

The Nevada Supreme Court determined the issues of (1) whether categorizing an insured's loss under a policy is a question of law or fact, and (2) whether determining which policy limit applies to the insured's property loss presents a question of law of or fact. The Court determined that both issues are questions of law.

Coast Converters was a manufacturer of plastic bags. It purchased a commercial all risk insurance policy from Federal Insurance Company. Coast filed a claim seeking to recover costs related to damaged machinery. A number of payments were made for the loss, a portion of which were made under the PD coverage and the majority of payments were made under the BI/EE coverage. Coast alleged that additional losses should have been covered under the PD coverage, but Federal refused to make the payments. Coast filed a complaint against Federal. The district court left the question to jury whether the loss fell under the PD or the BI/EE provision and whether the coverage limit was $2 million or $5 million. Federal appealed.

First, the Nevada Supreme Court held that the district court erred in allowing the jury to determine which policy provision, PD or BI/EE, applied to cover the loss. The question was one of contract interpretation, which is a question of law for the district court to decide.

Second, the Court stated that determining whether an insurance policy applies to ongoing property damage is decided using the "manifestation rule." This involves the application of a legal principle and presents a question of law for the court. Once the jury determined when the manifestation occurred, the Court held that the district court must apply that fact to the law to determine which policy limit applies. The district court erred by leaving the issue to the jury.

DAMAGES

D.R. Horton, Inc. v. Betsinger
335 P.3d 1230, 130 Nev. Adv. Op. 84, Nev., Oct. 16, 2014.

The Nevada Supreme Court addressed the issue of whether NRS 42.005(3) applies in a remand situation so as to require the second jury on remand to reassess whether punitive damages are warranted before that jury may determine the amount of punitive damages to be awarded.

The jury awarded Steven Betsinger compensatory and punitive damages against defendants, including DHI Mortgage. On appeal, the Court reversed the judgment as to consequential damages and reduced the compensatory damages awarded to the amount of Betsinger's actual damages. The Court concluded that the punitive damages awarded must be remanded based on that reduction. The district court then instructed the jury to decide what amount, if any, Betsinger was entitled to for punitive damages. The jury issued its award and all parties appealed.

DHI Mortgage argued that NRS 42.005(3) unambiguously states that a single jury must determine both liability for and the amount of punitive damages to be awarded. Therefore, the district court erred by permitting the second jury on remand to consider only the amount to be awarded.

The Nevada Supreme Court agreed and concluded that the plain language of NRS 42.005(3) is unambiguous. When a fact finder is limited to making a determination regarding punitive damages, the fact finder must first determine whether punitive damages are justified and then determine the amount of damages to award. Therefore, the Court reversed and remanded for a new trial.

Recent Cases

LANDLORD AND TENANT

CONSTRUCTIVE EVICTION

Mason-McDuffie Real Estate, Inc. v. Villa Fiore Development, LLC
335 P.3d 211, 130 Nev. Adv. Op. 83, Nev., Oct. 2, 2014

The Nevada Supreme Court determined whether a commercial tenant may be constructively evicted without providing the landlord notice and a reasonable opportunity to cure a defect.

Appellant Mason-McDuffie Real Estate, Inc. leased property from respondent Villa Fiore Development, LLC. Mason-McDuffie vacated the property and stopped paying rent after water intrusion on the property. Villa Fiore filed a complaint against Mason-McDuffie alleging it breached the lease. Mason-McDuffie filed a counterclaim alleging that it was constructively evicted due to Villa Fiore's failure to maintain the roof.

The district court found that the water instruction justified vacating the property, but that Mason-McDuffie did not provide any information or written notice about the problem to Villa Fiore. The district court found that the lease obligated Mason-McDuffie to provide written notice and 30 days to cure the problem before exercising other remedies. As Mason-McDuffie did not do so, the court entered judgment in favor of Villa Fiore. Mason-McDuffie appealed.

A party must prove three elements to demonstrate constructive eviction: "First, the landlord must either act or fail to act. Second, the landlord's action or inaction must render the whole or a substantial part of the premises ... unfit for occupancy for the purpose for which it was leased. Third, the tenant must actually vacate the premises within a reasonable time." The Nevada Supreme Court additionally held that a commercial tenant alleging that is was constructively evicted must show that it provided the landlord notice of and a reasonable opportunity to cure the defect.

Here, the Court concluded that Mason-McDuffie did not satisfy this additional element, and affirmed the district court's judgment.

MEDICAL MALPRACTICE

AFFIDAVIT

Zohar v. Zbiegien, M.D.
334 P.3d 402, 130 Nev. Adv. Op. 74, Nev., Sep. 18, 2014.

The Nevada Supreme Court considered whether an expert affidavit attached to a medical malpractice complaint, which did not identify all of the defendants by name met the requirements of NRS 41A.071. The Court held that the district court should read the complaint and affidavit together in determining whether the affidavit meets the statutory requirements.

Appellant Zohar filed a medical malpractice complaint against multiple defendants, and attached an expert affidavit pursuant to NRS 41A.071. The affidavit stated to a reasonable degree of medical probability that the staff at Summerlin Hospital breached the standard of care and specified the negligent activities of the staff. However, it did not identify any of the staff or defendants by name. The defendants filed motions to dismiss on that basis. The district court granted the motions. Zohar appealed.

The Nevada Supreme Court reversed the district court's order of dismissal. The Court held that an expert affidavit that fails to specifically name the defendants may still comply with the statute if it is clear that the defendants and the court received sufficient notice of the nature and basis of the medical malpractice claims. Here, the affidavit and complaint when read together provided sufficient notice.

TORTS

GOVERNMENTAL IMMUNITY AND OTHER TORTS

Franchise Tax Board of State of California v. Hyatt
335 P.3d 125, 130 Nev. Adv. Op. 71, Nev., Sep. 18, 2014.

The Nevada Supreme Court considered the issue of whether the exception to government immunity for intentional torts and bad faith conduct survives the adoption of the federal discretionary-function immunity test.

Respondent/cross-appellant Hyatt was making large sums of money from a computer chip patent. A tax auditor for appellant/cross-respondent Franchise Tax Board of the State of California (FTB) reviewed Hyatt's state income tax return and discovered a number of discrepancies that resulted in penalties. Hyatt filed a lawsuit in Nevada, containing seven intentional tort causes of actions committed by FTB during the audits.

Two writ petitions were filed in 2000 in which FTB sought immunity from the lawsuit. The Court determined that, under comity, FTB should be granted the same immunity that a Nevada governmental agency would receive- immunity from the negligence cause of action but not from the intentional torts. The rulings were appealed and upheld by the United States Supreme Court. The case proceeded to a jury trial, and the jury found in favor of Hyatt. FTB appealed from the district court's final judgment.

Nevada waived traditional governmental immunity from tort liability under NRS 41.031. One exception is the "discretionary-function immunity." This exception states that no action can be brought against the state or its employees "based upon the exercise or performance or the failure to exercise or perform a discretionary functions or duty on the part of the State … or of any … employees …, whether or not the discretion involved is abused." This exception applies if the actions at issue "(1) involve an element of individual judgment or choice and (2) are based on considerations of social, economic, or political policy." FTB argued that this immunity protects it from intentional tort causes of action.

The Nevada Supreme Court disagreed, holding that intentional torts and bad faith conduct are acts "unrelated to any plausible policy objective and that such acts do not involve the kind of judgment that is intended to be shielded from judicial second guessing." The "discretionary-function immunity" does not protect government employees from these acts as such misconduct "by definition, cannot be within the actor's discretion."

FTB also argued that under the principle of comity, FTB should receive the immunity it would receive under California statutes. The Court held that since a Nevada governmental agency would not receive immunity for the intentional torts at issue in Nevada, such immunity could not extend to FTB.

FTB further argued that, under comity, it should be entitled to a statutory cap on damages under NRS 41.035. The Court held that the state's policy interest in providing adequate redress to its citizens was the main factor in determining whether to provide a statutory cap to a non-Nevada governmental agency. The Court concluded that such a cap would violate Nevada's public policy.

FTB finally asked to be immune from punitive damages under comity principles. The Court agreed as punitive damages would not be available against a Nevada governmental entity under NRS 42.005 and NRS 41.035(1).

Next, FTB contested the judgment in favor of Hyatt on each of his causes of action. Significantly, the Nevada Supreme Court adopted a cause of action for the false light invasion of privacy tort. The Court adopted the elements from the Restatement (Second) of Torts: "an action for false light arises when [o]ne who gives publicity to a matter concerning another that places the other before the public in a false light ... if (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed."

Lastly, the Court considered Hyatt's intentional infliction of emotional distress claim (IIED). The Court noted that objectively verifiable evidence of emotional distress is necessary to establish the claim. However, the Court had not in the past addressed whether this requires medical evidence. The Court adopted a sliding scale approach. While medical evidence is one manner of establishing severe emotional distress, other objectively verifiable evidence may be sufficient to establish a claim when the defendant's conduct is more extreme and requires less evidence of the physical injury suffered.

Recent Cases

PARTNERSHIP LIABILITY

In re Cay Clubs
340 P.3d 563, 130 Nev. Adv. Op. 92, Nev., Dec. 4, 2014.

The Nevada Supreme Court considered whether the district court erred in granting summary judgment with regard to the Respondents' (JDI entities) liability under the "partnership by estoppel doctrine" in NRS 87.160(1).

NRS 87.160(1) provides that a person may incur partnership liability if "there is a holding out of that person as a partner, with the consent of that person being held out, and another person gives credit to the purported partnership upon believing in the representation."

The Court first held that this statute imposes partnership liability where there is a representation of a joint venture or a partnership as Nevada law provides that the principles of partnership law apply to joint ventures as well.

Second, the Court held that the consent required for partnership liability may be manifested expressly or impliedly.

Third, the Court held that the meaning of the phrase "given credit" is not limited to financial credit, but rather means giving credence to the representation of a partnership by detrimentally relying on the representation. Such reliance involves entering into a transaction, including extending financial credit.

Fourth, as a prerequisite to partnership by estoppel, the reliance on the representation of the partnership must be reasonable and accompanied by a performance of due diligence to learn the veracity of the representation.

Based on this analysis of the "partnership by estoppel" doctrine, the Court reversed the order granting summary judgment in favor of the JDI entities and remanded the matter to district court.

NEGLIGENCE

Sadler v. PacifiCare of Nevada, Inc.
340 P.3d 1264, 130 Nev. Adv. Op. 98, Nev., Dec. 31, 2014.

The Nevada Supreme Court considered the issue of whether patients who may have been affected by unsafe injection practices at health care facilities in southern Nevada may state a claim for negligence based on the need to undergo ongoing medical monitoring.

Appellant Sadler filed a complaint against PacifiCare of Nevada, Inc., asserting claims of negligence that PacifiCare failed to perform its duty to establish and implement a quality assurance program to oversee the medical providers in its network. This failure allegedly resulted in unsafe injection practices and exposed Sadler and other members of the class to HIV, hepatitis and other blood borne diseases. This exposure will allegedly require subsequent medical monitoring.

PacifiCare moved for judgment on the pleadings, arguing that the complaint failed to state a negligence claim as no actual injury was alleged. The district court granted PacifiCare's motion on the basis that a risk of exposure to infected blood was not sufficient to allege an injury. Sadler appealed.

The Nevada Supreme Court held that a plaintiff may state a cause of action for negligence with medical monitoring as the remedy without asserting that he has suffered a physical injury. A plaintiff may satisfy the injury requirement for the purpose of stating a proper claim for relief by alleging that he is reasonably required to undergo medical monitoring beyond what would otherwise be needed had the plaintiff not been exposed to the negligent act of the defendant. Further, the plaintiff must not allege that he was actually exposed to infected blood, but rather that the negligent act of the defendant caused the plaintiff to have medical need to undergo medical monitoring.

The Court, therefore, reversed the judgment on the pleadings and remanded to district court.

calculations for an engineering firm, here, the Defendants were the "sole entities" providing architectural services to the Project. The court distinguished the Defendants' architectural services in this case from the earth computations provided by Defendants Randle and Owen in *Weseloh* in that Defendants in this case "did not provide their specialized services to a client or other entity that in turn applied its own architectural expertise...." In addition, in *Weseloh*, the fee paid to Defendants was small, and there was a lack of causation between the observed damages and asserted design defects.

The court emphasized instead the *Biakanja* factors, which led the court to impose liability. In *Biakanja*, the Court held Defendant liable to a third person not in privity of contract as a matter of policy and from the balancing of various factors, including: (1) the extent to which the transaction was intended to affect the Plaintiff, (2) the foreseeability of harm to him, (3) the degree of certainty that the Plaintiff suffered injury, (4) the closeness of the connection between the Defendant's conduct and the injury suffered, (5) the moral blame attached to the Defendant's conduct, and (6) the policy of preventing harm. The Supreme Court applied the factors to the Defendants in the *Beacon* case:

> "(1) Defendants' work was intended to benefit the homeowners living in the residential units that defendants designed and helped to construct. (2) It was foreseeable that these homeowners would be among the limited class of persons harmed by the negligently designed units. (3) Plaintiff's members have suffered injury; the design defects have made their homes unsafe and uninhabitable during certain periods. (4) In light of the nature and extent of defendants' role as the sole architects on the Project, there is a close connection between defendants' conduct and the injury suffered. (5) Because of defendants' unique and well-compensated role in the Project as well as their awareness that future homeowners would rely on their specialized expertise in designing safe and habitable homes, significant moral blame attaches to defendants' conduct. (6) The policy of preventing future harm to homeowners reliant on architects' specialized skills supports recognition of a duty of care. Options for private ordering are often unrealistic for typical homeowners, and no reason appears to favor homeowners as opposed to architects as efficient distributors of loss resulting from negligent design." Duty More Significant than Privity.

Beacon illustrates the gradual erosion of the concept of privity and the expansion of non-contractual duties of lead design professionals. This expansion includes only *principal* architects on the project, who play an active role throughout the construction process, whether they actually build the project or exercise ultimate control over construction. It leaves open important questions, such as liability for non-principal architects; whether homeowners associations will pursue cases against all architects, hoping to prove that they were principal architects based on the factors considered in the *Beacon* case; and how architects, and those who insure them, will approach their business (*i.e.,* concerns regarding limiting their scope of work; regarding the processes a developer may require for resolution of defect and design claims; general dispute resolution procedures; and general liability concerns for non-principal architects). The one certain take-away from this decision is that principal architects may now expect direct claims from future homeowners, rather than from their clients alone.

Lindsey S. Libed

Lindsey Libed is an associate at LeClairRyan LLP in San Francisco, and focuses on matters involving financial institutions and services, products liability and construction litigation. She received her Bachelor's degree from Stanford and her law degree from the University of California, Hastings College of Law.

ENDNOTES

1 *www.cab.ca.gov*

2 *www.ncarb.org/en/News-and-Events/News/2013/12_2013ArchitectsSurvey.aspx*

3 *www.aia.org/press/AIAS077761*

The ABC's of the ADC

By Renée Welze Livingston,
Livingston Law Firm

It's a good time to be a young lawyer in the ADC.

Young Lawyers! Did you hear that? It is a good time to be a young lawyer in ADC. Please read on, as you need to know this to **advance your career**. You need to know this to become a **better lawyer**. You need to know this to explain to your managing partner why **your firm should support your membership in ADC**.

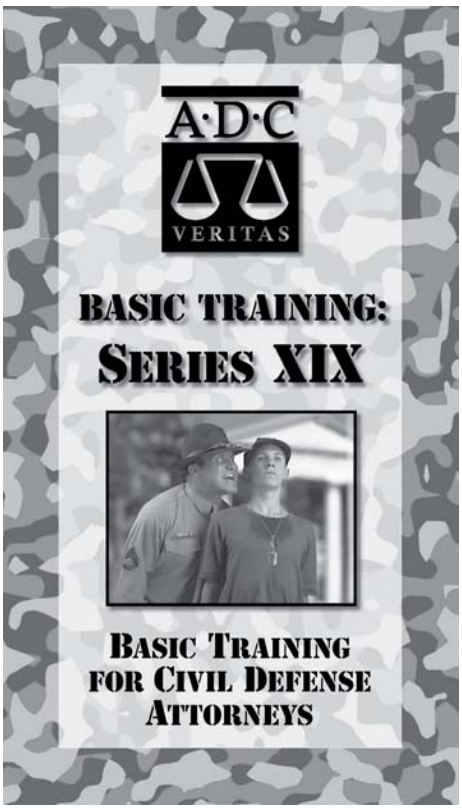
If you have been reading my column, you know I talk about the "old days" a lot. I do that for a reason. I do that because today's practice of law, today's ADC, is not what it used to be. When I was a young lawyer, my firm automatically paid my membership to ADC and asked me to show up at the Annual Meeting to meet and greet and get my CLE. It was an annual event where I got to see lawyers I worked with, attend a few seminars in between Christmas shopping, and make merry at the grand President's Reception. But that was pretty much all we did as young lawyers in ADC. But today's ADC has so much more to offer young lawyers.

Did you know, for example, ADC has a **Young Lawyers Section** that is actually chaired by a **young lawyer**? Kudos to last year's Chair Marie Trimble Holvick for her hard work leading and revitalizing that group and organizing social activities and educational programs. This year, Ryan Plotz is at the helm and his goal is to engage his fellow young lawyers in the many activities and events ADC has to offer. It's easy to join; all you have to do is be a lawyer in the first 10 years of practice and sign up. Then the learning – and the fun – begins!

The Annual Meeting is always a great place for young lawyers to learn, but this year there was an **entire program presented by the Young Lawyers section** on Winning Your Appeal at Trial: Perfecting, and Imperfecting, the Record. And there may be some special opportunities to write an article for our magazine, *ADC Defense Comment*, which you are reading right this minute, a wonderful way to write about a topic or recent case you handled, and know that it will be read by every member of ADC, plus judges in California and Nevada.

ADC will be hosting the very popular **Young Lawyers Judicial Reception** on March 27, 2015, in Sacramento where our young members can **mingle with and get to know judges** from the Sacramento Superior Court, following an educational program that afternoon. I encourage you to sign-up and get to know some of the judges who may be ruling on your cases.

The ADC held its annual Basic Training Series last fall. The series featured six sessions focusing on important issues for young lawyers, including valuing claims, communicating with insurance carriers, ADR and deposition strategies, civility, and technology. Thank you to our excellent presenters and all who attended.



Continued on page 21

This year, the program ***Basic Training Series XX*** returns to San Francisco and will teach our young lawyers many of the tools they need to **hone their craft** and **impress their supervising partners**. Ever wonder what an insurance contract actually says? Did you wish you knew how to develop a realistic business plan? Or effectively respond to a good faith motion? Come one, come all. The speakers are experts in their fields and the program always gets rave reviews.

If you haven't heard about the **ADC listservs**, now is the time to get acquainted with them. I mean *really acquainted* with them. ADC members can ask the membership general questions about mediator styles, attorneys, experts, local rules, a judge's preferred procedures and much more. It is one of the **most valuable benefits** of being a member of ADC and the sooner the young lawyers learn how to take advantage of the listservs, the more knowledgeable and impressive they will become.

It is indeed a good time to be a young lawyer in ADC.

Renée is on the ACD Board of Directors and practices in Walnut Creek.

Renée Welze Livingston

AROUND THE ADC

DIVERSITY COMMITTEE

The Diversity Committee congratulates the Honorable Mariano-Florentino Cuéllar on his nomination to the California Supreme Court and retention by the electorate in the November 2014 general election. Governor Brown swore him in on January 5, 2015.

The Diversity Committee's focus in 2015 is to promote community involvement and to provide opportunities for social and professional networking. Your ideas are always welcome and help make the ADC stronger. Contact the Diversity Committee chairs, Maria Quintero *(mquintero@hinshawlaw.com)* or William Munoz *(wmunoz@mpbf.com).*

Defense Verdicts

James J. Arendt
Weakley & Arendt
- *Hokit v. Tulare Joint Union High School District*

Alison M. Crane
Bledsoe, Diestel, Treppa & Crane LLP
- *O'Neil v. Balistreri, et al.*

Will Kronenberg
Kronenberg Law PC
- *Quijada v. Ford Motor Company*

Margie Lariviere
Gordon & Rees LLP
- *Lai v. The Northwestern Mutual Life Ins. Co.*

David A. Levy
Office of San Mateo County Counsel
- *Arden v. Kastell*

David Newdorf
Newdorf Legal
- *Golin v. Allenby et al.*

John Ranucci
Maria M. Lampasona
Lombardi, Loper & Conant, LLP
- *Koepke v. Ford Motor Company, et al.*

Christopher W. Wood
McKenna Long & Aldridge
- *O'Kelley v. CertainTeed Corp.*

George D. Yaron
Yaron & Associates
- *ProBuilders Specialty Insurance Company, RRG v. Valley Corp. B., et al.*

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DEFENSE COMMENT

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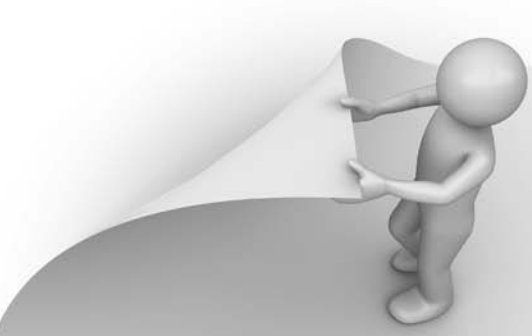

ADC Amicus Corner

By Don Willenburg, Gordon & Rees LLP

The ADC's amicus briefs committee exists to bolster and provide institutional support for the defense position at courts of appeal and the California Supreme Court. The committee also provides excellent opportunities for members (this means you or the smart colleagues at your office) to write briefs on defense-important issues of the day.

Since the last issue, the amicus committee has pursued, among others, the following activities on behalf of the defense community:

1. FILED amicus brief in *Grigg v. Owens-Illinois* A139597. There were many issues in this case. The ADC's brief focused on two related to punitive damages. First, the trial court instructed the jury that it could award punitive damages based on fraud, then awarded JNOV of the fraud claim but allowed the punitive damage award to stand. The ADC's brief addressed the definition of malice or oppression, the other possible grounds for a punitive award, and their absence in this case. Second, the ADC's brief challenged the propriety of a high punitive award ($11M) where there was already a high non-economic award ($16M), which courts sometimes conclude presumptively includes a punitive element. The substantive issue in this case is liability for "take-home" exposure (here to asbestos, at an undetermined dosage), where it is not a worker/employee but a spouse who gets sick. An additional wrinkle in *Grigg* is that the exposure was all long before any science on whether "take-home" exposure was at a level high enough to cause disease.

2. FILED amicus brief in *Varela v. Birdi* D064315. The ADC-NCN filed a joint amicus brief with the ASCDC on the question of whether the rule of the *Howell* and *Corenbaum* decisions, requiring that medical damages be calculated by amounts actually paid rather than the "billed" amounts, applies to future medical damages as well. *Howell* dealt with past medical damages and expressly reserved the issue; *Corenbaum* squarely held that the rule applies to future damages as well. An additional wrinkle in this case: plaintiff is in the Navy and will be insured for life via the Tricare program. Interestingly, disappointingly, and most unusually, the Court of Appeal declined to consider ours and all other amicus briefs in the case.

3. FILED letter supporting California Supreme Court review of *Cochran v. Schwan's Home Service, Inc.* S221319. The decision arguably requires employers to reimburse for mandatory work calls on personal devices. Unfortunately, the Court declined review.

4. FILED request for publication of *Polk v. Lowe's HIW, Inc.* H039950. The decision addressed the question of what is "severe and pervasive" in the context of a hostile work environment, correcting the often-cited misconception that a single act of harassment can be actionable in all instances. The Court of Appeal declined to designate the decision for publication.

5. *Izell v. Union Carbide Corporation* S223511. The ADC-NCN will file an amicus letter in support of a petition for Supreme Court review of this decision, which dilutes the standards for "substantial factor" causation. (Read more about the *Izell* case in the Toxic Tort substantive law committee report on page 30.)

We've had a few misses this quarter. But you'll never win if you don't get in the game, as we're very much in the game.

What can, and does, the ADC's amicus briefs committee do for you?

The ADC's amicus committee can help support you and your clients in a case of general defense interest in all the following ways:

1. Requests for publication or depublication of court of appeal decisions.
2. Amicus brief on the merits at the court of appeal.
3. An amicus letter supporting a petition for California Supreme Court review.
4. Amicus brief on the merits at the Supreme Court.
5. Share oral argument time, with court approval.
6. Help moot court advocates in advance of oral argument.

In many cases, the ADC works jointly with our Southern California colleagues, the Association of Southern California Defense Counsel. That does not always happen, but getting the chance to bat around these issues with lawyers from across the state is another great benefit of being on or working with the amicus committee.

If you are involved in a case that has implications for other defense practitioners, or otherwise become aware of such a case, or if you would like to get involved on the amicus committee, contact any or all of your amicus committee: Don Willenburg at *dwillenburg@gordonrees.com;* Jill Lifter at *jlifter@rallaw.com;* Sam Jubelirer at *sjubelirer@gordonrees.com.*

Jan Roughan, RN

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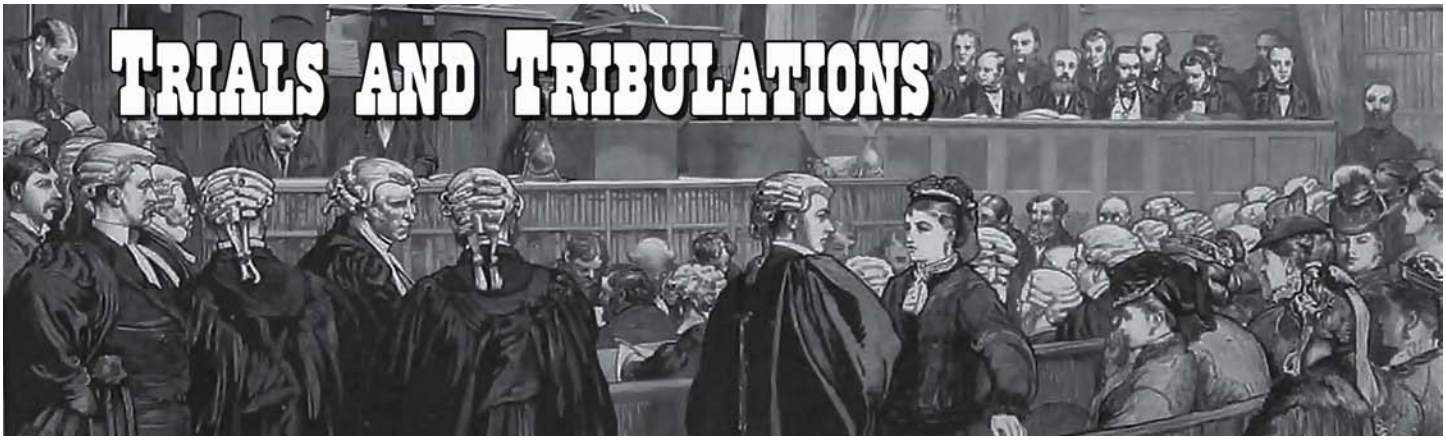

We recognize and salute the efforts of our members in the arena of litigation – win, lose or draw.

Compiled by
Ellen C. Arabian-Lee
Arabian-Lee Law Corporation
Editor, *Defense Comment*

Representing Nonprofits Insurance Alliance of California (NIAC), **Peter Glaessner** and **Lori Sebransky** of Allen, Glaessner, Hazelwood & Werth, LLP scored a victory over the Board of Equalization (BOE) in a dispute over the BOE's revocation of NIAC's property tax exemption. Following a four-day bench trial, Superior Court Judge Samuel Stevens (Ret.) ruled that NIAC proved it was entitled to tax-exempt status under the welfare exemption of the Revenue and Taxation Code. In addition to the testimony of NIAC's founder, Pamela Davis, NIAC's members and insurance professionals familiar with the marketplace for nonprofits also testified at trial. The judge ruled that NIAC, a 501(c)(3) founded 25 years ago, which now insures over 8,000 California nonprofits, provided a public benefit not just to its members, but to the community at large.

David A. Levy of the Office of San Mateo County Counsel obtained a defense verdict for the County in the Northern District Court of California. In February 2009, plaintiff Gary Arden, a manager for Smarte Carte, the company that handles the automated cart rentals at the San Francisco International Airport, was being investigated for embezzlement by Frank Kastell, a detective with the San Mateo County Sheriff's Office. Detective Kastell and his partner observed plaintiff taking money from customers (unnecessary for an automated rental system) and pocketing the cash. Plaintiff alleged that Kastell fabricated evidence that he wrote in his police report and delivered to the District Attorney, and as a result, in April 2009, Arden was prosecuted for embezzlement. However, in November 2009, the DA decided to dismiss the case "in the interests of justice." There was a SF International Airport security video, which showed plaintiff's suspicious activities, but did not conclusively show him putting money into Smarte Carte. Nor did the video conclusively show cash not going into the machine. However, plaintiff's explanations for why he had $109 in crumpled small bills in his pants pocket were unconvincing (he claimed he had gotten the bills from an ATM), and Smarte Carte personnel testified that plaintiff's job required him to roam through the airport, not stand by the busiest cart dispensing machine at the Airport, and that he was not permitted to handle cash and give out luggage carts, as he was doing. Plaintiff initially sued an airport contractor who reported the embezzlement to Smarte Carte, and the contractor settled for $45,000. He dismissed his wrongful termination claim against Smarte Carte in exchange for waiver of costs, and proceeded solely against the detective for claimed violations of his federal civil rights by fabricating evidence of Arden's guilt. The jury unanimously rendered a defense verdict after 4 hours, following a 6-day trial before Magistrate Judge Nathaniel Cousins.

James J. Arendt and **Michelle E. Sassano** of Weakley & Arendt, LLP, in Fresno, obtained a defense verdict for their client, Tulare Joint Union High School District, in Tulare County Superior Court. On December 2, 2011, plaintiff Rebecca Hokit and her husband went to watch a high school football playoff game at Bob Mathias Stadium, in the City of Tulare, located on the campus of Tulare Union High School which is part of the Tulare Joint Union High School District ("TJUHSD"). Before the game started, Mrs. Hokit went to use the restroom in a concession/restroom area underneath the bleachers. The bleachers and stairway going to the restroom are made of aluminum. When Mrs. Hokit stepped on the third step of the stairway, she slipped and fell. Mrs. Hokit alleged a dangerous condition of public property claiming that the step was slippery after being hosed off by maintenance staff, and it was bowed and bent due to constant use since the mid-1970's. Mrs. Hokit suffered a fractured femur resulting in surgery and hospitalization for three days. TJUHSD presented evidence that the stadium had not been hosed off and it was wet due to typical December weather in the Central San Joaquin Valley. Further, the step, though bent and bowed, was not a dangerous condition. Mrs. Hokit claimed damages resulting from the fractured femur and exacerbation of preexisting complex regional pain syndrome in her right leg. Due to continuing pain from her injury, Mrs. Hokit eventually resigned from her position as registrar at Kern High School District. At trial, Mrs. Hokit claimed lost future earnings of $400,000.00. Her attorney requested the jury award her $1.6 million. After a

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two week trial, the jury deliberated for approximately one hour and rendered a defense verdict.

Before trial, the Tulare Joint Union High School District made a CCP § 998 offer to compromise in the amount of $150,000.

John Ranucci and **Maria Lampasona** of Lombardi, Loper & Conant, LLP obtained a defense verdict for their client, The Hertz Corporation, in a product liability case in San Francisco Superior Court (*Koepke v. Ford Motor Company, et al.*, Case No. CGC13276217). Plaintiffs, a husband and wife, alleged that the husband was exposed to asbestos in the brakes and clutches of the vehicles in Hertz's vehicle fleet and in brakes supplied by Belnortel, which caused mesothelioma. Hertz secured summary adjudication as to plaintiffs' strict liability claims. Trial proceeded as to plaintiffs' negligence and concealment claims against Hertz, and as to plaintiff's strict liability and negligence claims against Belnortel. After twelve days, the jury found for defendants on all causes of action, and refused to award any damages, including punitive damages, to the plaintiffs.

Will Kronenberg, of Kronenberg Law PC, in Oakland, received a defense verdict in a Ford roll-over case resulting in a catastrophic injury. The lawsuit (*Edward Quijada v. Ford Motor Co.*, Sacramento Superior Case No.: 34-2010-00085696) resulted from the rollover of a 2006 Ford F-150, in February 2009 while traveling on highway 50 towards South Lake Tahoe, which rendered Mr. Quijada a quadriplegic. Plaintiffs alleged that the installation of a lift kit, and over-sized tires and wheels raised the center of gravity and created a dangerous and defective condition. They further alleged that the economic losses alone surpassed $12.5 million in past and future care and wage loss. After 5 weeks of trial and following a policy limits demand of $11 million dollars, the case went to the jury on a design defect strict products liability claim along with a request for punitive damages, which was rejected by the jury on a 10-2 vote after a day of deliberation. Plaintiffs were represented by Jason Sigel, of Dreyer, Babich, Buccola, Wood, Campora in Sacramento, and Lee Brown, of The Brown Law Firm, in Dallas.

On Nov. 24, 2014, a jury in the Northern District found in favor of defendant, Northern Mutual Life Insurance Company, in an individual total disability action (*Wong Lai v. The Northwestern Mutual Life Ins. Co.*). Northwestern Mutual was represented by **Margie Lariviere** of Gordon & Rees, San Francisco, and the Honorable Susan Illston presided. The plaintiff was a dentist who alleged that two slip-and-falls in 2004 caused mild traumatic brain injury, depression, and anxiety. After a five day jury trial and within an hour of closing arguments, the seven jurors concluded that Northwestern Mutual properly denied the plaintiff's claim for total disability benefits in late 2011, after having paid the claim for seven years. The trial included testimony from multiple doctors, including neurologists, neuropsychologists, psychiatrists, and psychologists. The Gordon & Rees trial team showed that the plaintiff had misrepresented her true functioning capabilities to her treating doctors who had certified her disability and that her claimed traumatic brain injury could not account for her symptoms. Four experts testified that the plaintiff was malingering and consciously faking symptoms for secondary gain – in this case, the tax-free receipt of monthly disability benefits. Prior to the trial, Lariviere prevailed on a motion for partial summary judgment, knocking out the plaintiff's bad faith and punitive damage claim. Plaintiff argued that Northwestern Mutual acted in bad faith by hiring biased medical experts. The Court disagreed. In its September 26, 2014 order, the Court found that Northwestern's claim handling was comprehensive and reasonable. The Court noted that Northwestern Mutual had scheduled four separate IMEs of plaintiff, who all opined that plaintiff was feigning symptoms. The Court determined that, at a minimum, a genuine dispute existed regarding whether plaintiff was disabled, defeating plaintiff's bad faith claim.

Alison M. Crane and **Nicholas J. Bernate** of Bledsoe, Diestel, Treppa & Crane LLP obtained summary judgment in favor of their clients, Foster City homeowners, after plaintiff filed a personal injury action for gunshot wounds sustained after making unauthorized entry into the family's home. The elderly homeowners were awakened by their adult son who indicated that someone was trying to break into the house. Fearing for their lives and the lives of their son and grandchildren, the homeowners provided their son with a vintage handgun to protect their family. Plaintiff was shot in the dining room within 15' of the family. Plaintiff alleged he was heavily intoxicated and mistakenly entered the home after he misidentified it for his friend's home nearby. Bledsoe filed a summary judgment motion as to plaintiff's causes of action for negligence and negligent entrustment, arguing they did not owe plaintiff an affirmative duty to protect him and that their son was competent to operate the firearm. The Court granted the motion, ruling that as a matter of law defendants did not owe a duty to forgo supplying their son the firearm to protect their family.

Christopher W. Wood of McKenna Long & Aldridge, LLP, in San Francisco obtained a defense verdict in favor of CertainTeed Corporation, in Alameda County Superior Court. After a 21 day trial and 6.5 hours of jury deliberations, the jury returned a defense verdict on warnings and state of the art issues in a products liability/asbestos exposure case. Plaintiffs' decedents claimed that their father's exposure to asbestos containing cement pipes during his career as a plumber, caused his lung cancer and death. Plaintiffs sued Wood's client, a pipe manufacturer and distributor who plaintiffs alleged supplied the asbestos containing pipes, as well as several other manufacturers and suppliers who resolved their claims prior to trial. Plaintiffs argued that defendants failed to warn workers of their asbestos containing products and the risk of developing lung cancer. Defendants disputed liability and argued that the decedent's employer was well aware of the health risks involved, and even provided

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employees with safety training to reduce their exposure to asbestos.

David Newdorf, of Newdorf Legal in San Francisco, represented the City of Palo Alto and former Palo Alto Police Detective Lori Kratzer in a civil rights and tort claim stemming from an allegedly wrongful detention for psychiatric evaluation under Welfare & Inst. Code §5150. (*Golin v. Allenby et al.,* San Mateo Superior Court, Case No. 507159.) Judge Marie Seth Weiner granted in part and denied in part the summary judgment motion filed by City of Palo Alto and Detective Kratzer on the grounds of qualified immunity. Detective Kratzer filed a petition for writ of mandate. On Dec. 30, 2014, the Court of Appeal, 1st Appellate District, Div. 1, issued an alternative writ commanding the trial court to vacate its order and grant the summary judgment motion on the grounds of qualified immunity. The trial court complied with the writ and issued an order granting summary judgment on January 12, 2015 – ending 13 years of litigation for the City and Detective Kratzer. The case had been up and down the state and federal trial and appellate courts since 2001. Other defendants remain in the case set for trial.

George D. Yaron and **James I. Silverstein** of Yaron & Associates obtained a declaration from a jury in the District Court for the Northern District of California (San Jose Division), that their client, ProBuilders, had no duty to indemnify an underlying construction defect action. Plaintiff, ProBuilders, filed the lawsuit to seek (1) rescission of its insurance policy issued to R.J. Haas Corp. and (2) a declaration that, at some point, it had no duty to defend or indemnify R.J. Haas Corp. and Ronald J. Haas ("Haas") in the underlying matter (*Ty Levine, et al. v. R.J. Haas*, et al, Santa Clara County Superior Court, Case No. 07-CV081016 ("*Levine* action")). After a bench trial in the *Levine* action, Levine obtained a $1.9 million judgment against Haas Corp. and Ronald J. Haas ("Haas") individually, in part for construction defects arising out of Haas Corp.'s construction of Levine's home in Los Gatos. In the coverage action, defendant Haas counterclaimed for (1) breach of contract/duty to defend, (2) breach of contract/duty to indemnify, and (3) breach of the covenant of good faith and fair dealing for failing to settle and pay the Levine action judgment. Defendants Ty and Karen Levine also counterclaimed for breach of the covenant of good faith and fair dealing for failing to pay the *Levine* action judgment. The jury trial considered ProBuilders' claim that it had no duty to indemnify Haas Corp. and Haas against the *Levine* action. The jury trial also considered whether ProBuilders breached the covenant of good faith and fair dealing in its handling of the *Levine* action. The jury's special verdict form asked the following question: "Is any portion of the Levine action judgment covered under the ProBuilders policy?" The jury answered, "No." This holding is an affirmation that there is no duty to settle a claim that is ultimately found not to be covered, in which a lay jury understood and applied a "deemer" clause (deeming all property damage to occur when the property damage first occurred) in a policy's insuring agreement.

SUBSTANTIVE LAW SECTION REPORTS

BUSINESS LITIGATION

William A. Muñoz, Co-chair
Holiday D. Powell, Co-chair

In its inaugural year, the Business Litigation Section is excited to help track legal developments and emerging business trends affecting our clients. We will inform about new regulations, appellate decisions, and trial outcomes, and circulate information about upcoming educational programs. Don't miss out; sign up to become a member of our Sub-Law Committee.

We highlight a recent decision from the Court of Appeal, *Kenneth Gonsalves v. Ran Li*, No. A140284, 2015 WL 164606 (Cal. Ct. App. Jan. 13, 2015). The case involves a test drive gone badly. Gonsalvez, a BMW dealership salesperson, was injured during customer Li's reckless test drive. A jury found Li liable and awarded Gonsalves $1.2 million. On appeal, Li argued that the trial court erred in allowing Gonsalves' counsel to examine Li regarding his denial of certain requests for admission. The trial court admitted into evidence the requests for admissions and related special interrogatories as well as Li's responses. In closing argument, Gonsalves' counsel argued that Li's failure to admit various requests for admission evidenced his failure to take responsibility for Gonsalves' injuries.

The Court of Appeal agreed that the trial court erred in admitting the discovery responses. It held that a party's denial of requests for admission cannot be used for impeachment purposes. It also reaffirmed that "litigation conduct is not relevant evidence at trial in the ordinary case." The decision highlights the importance of requests for admission and objecting to the introduction of discovery conduct at trial.

CONSTRUCTION

Jill J. Lifter, Co-chair
Jennifer L. Wilhelmi, Co-chair

In the Newsflash in January, we highlighted a recent decision addressing the issue of whether a plaintiff's standing to assert a claim for construction defects is an issue of law for the court to decide. In *Stofer v. Shapell* 2015 Cal.App. Lexis 34, the First District Court of Appeal held that while the court may properly determine the issue on a motion for summary judgment when the facts are undisputed, where the facts pertaining to when the cause of action accrued and who owned it at the time it accrued are in dispute, the plaintiff is entitled to a jury trial on the issue.

Our annual ADC Construction Seminar will be held on April 17, 2015 in Walnut Creek. The Construction Section will present a half-day seminar focusing on statutory and case law addressing various topics such as pre-litigation procedure, plaintiff's standing, causes of action, joint and several liability, damages, expert issues, indemnity, statutes of limitation and repose, settlement, and insurance coverage which remain the core of construction defect litigation. The Seminar will provide the latest on "Construction Defect Hot Topics" with an eye toward the "Management of Construction Defect Litigation." Please keep an eye out for the brochure and register early!

If anyone has ideas and/or recommendations for future construction seminars or articles, please contact Jill at *jlifter@rallaw.com* or Jennifer at *jwilhelmi@clappmoroney.com.*

EMPLOYMENT

Michael S. Burke, Co-chair
Ellen C. Arabian-Lee, Co-chair

The Employment Law Section continues to keep abreast of recent developments in California employment law. We recently issued an important E-Blast regarding *Mendiola v. CPS Security Solutions* (SC S212704, 1/8/15). The California Supreme Court held that, under the California wage order covering security guards, the plaintiffs were entitled to compensation for all on-call hours spent at their assigned worksites under their employer's control. The Supreme Court affirmed the Court of Appeal's conclusion that plaintiffs' on-call time constituted "hours worked" within the meaning of Wage Order 4, and was, therefore, subject to the wage order's minimum wage and overtime provisions. The Court reversed the lower court's conclusion that state and federal regulations permitted the employer to exclude sleep time from plaintiffs' 24-hour shifts. In so ruling, the Supreme Court engaged in a detailed review of sleep-time wage and hour law and cases.

There are many important new employment laws which go into effect in 2015. Some of the most noteworthy are: **Healthy Workplaces, Healthy Families Act of**

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2014 (AB 1522), which requires employers to provide all employees (employed for a minimum of 30 days) with one hour of paid sick leave for every 30 hours worked; **Harassment Prevention Training: Abusive Conduct in the Work Place** (AB 2053), which adds "abusive conduct" training obligations within sexual harassment training courses; **Labor Code §226.7 amendment** to clarify existing laws that legally mandated "rest" periods and "recovery" periods count as "hours worked," preventing employers from deducting any such time from an employee's wages (SB 1360); **Expansion of employer liability to workers obtained from third-party labor contractors** (AB 1897); **Waiting time penalties recoverable through Labor Commissioner citations** (AB 1723); **Three-year statute of limitations to recover liquidated damages claim for failure to pay minimum wage** (AB 2074); and **Employment arbitration agreements cannot waive certain civil rights claims** (AB 2617).

Please contact Michael Burke at mburke@vmbllp.com or Ellen Arabian-Lee at ellen@arabian-leelaw.com with questions, ideas for future legal updates, employment-related articles, or seminar topic ideas.

INSURANCE

Mark E. Berry, Co-chair
Gregory S. Mason, Co-chair

Our section is monitoring several cases currently before the California Supreme Court, including *Nickerson v. Stonebridge Life Ins. Co.* (Case No. S213873), *Hartford Casualty Ins. Co. v. J. R. Marketing, LLC* (Case No. S211645) and *Fluor Corp. v. Superior Court* (Case No. S205889), in order to provide the latest developments to the ADC insurance practitioners. Please accept this reminder to sign up to the Insurance section so that you can receive these updates through ADC forums and news flashes.

ADC members are encouraged to provide suggestions about topics for seminars or programs they would like to see. In addition, any article submissions for the ADC *Defense Comment* are greatly appreciated. Please contact Mark Berry *(mberry@mayallaw.com)* or Greg Mason *(greg.mason@mccormickbarstow.com).*

LANDOWNER LIABILITY

Michon M. Spinelli, Chair

The Court of Appeal, First Appellate District, took a look at an interesting wrinkle under the San Francisco Rent Control Ordinance. In *Mosser Companies v. San Francisco Rent Stabilization and Arbitration Board* (A141134, January 21, 2015), the Court held that the son of parents who years before rented a unit in landlord's building, and who with landlord's consent resided with his parents when the rental agreement was entered, is an "original occupant" within the meaning of the statute, thereby precluding the landlord from establishing a new unrestricted rental rate for the son who remained in the apartment after the parents departed.

In other landlord-tenant news, an appeal has been taken in the case of *Levin v. City and County of San Francisco*, No. 3:14-cv-03352-CRB (N.D. Cal., Oct 21, 2014). U.S. District Judge Charles Breyer struck down a San Francisco ordinance that steeply increased payments landlords were required to pay tenants evicted from properties via the Ellis Act, finding that the law was an unconstitutional taking under the 5th Amendment.

The original legislation required landlords to pay two years of the difference between the tenants' rent-controlled rate and the market rate, determined by a formula developed by the city controller's office. The legislation was enacted in response to complaints from tenant rights groups who claimed that the Ellis Act was used improperly to evict tenants under false pretenses (converting buildings into condominiums, selling them at a larger profit because they were vacant, or simply wait a bit and re-rent them at a higher rate once tenants have moved on).

Judge Breyer ruled the financial burden faced by landlords subject to the legislation was not proportionate to the harm. Existing city law passed in 2005 required landlords to pay tenants evicted under the Ellis Act between $5,265 and $15,795 in relocation assistance. But the plaintiffs affected under the new legislation faced a penalty of nearly $118,000.

The decision noted that "[t]he Ordinance requires an enormous payout untethered in both nature and amount to the social harm actually caused by the property owner's action." Breyer noted that San Francisco's housing issues were not created by the landlords being punished ("the property owner's decision to repossess a unit did not cause the rent differential gap to which the tenant is now exposed") and that they alone should not bear the brunt of trying to fix any problems ("less than five one-hundredths of one percent of the City's rental housing stock was affected by an Ellis Act withdrawal" in 2013).

We continue to provide new developments on this case and others through the ADC forums and newsflashes, so don't forget to sign up to become a member of the Landowner Liability Section to receive that information.

Suggestions are encouraged from members about other topics for seminars or programs they'd like to see. In addition, any article submissions for the *ADC Defense Comment* are greatly appreciated. Please contact Michon Spinelli *(michonspinelli@rmkb.com).*

LITIGATION

Erin S. McGahey, Co-chair
Holiday D. Powell, Co-chair
Michael Pintar (NV), Co-chair

The Litigation Substantive-Law Committee will offer a number of interesting programs and articles about pertinent legal developments affecting our practice this year. We kick off 2015 by discussing a recent development in a MICRA statute of limitations case, also of interest to medical malpractice lawyers. In *Coastal Surgical Institute v. Blevins* (Jan. 12, 2015, B254787) 2015 WL 138218, at

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*1, the Court of Appeal determined that the tolling provisions of Insurance Code § 11583 apply to the one-year statute of limitations for medical malpractice cases. That statute tolls a limitations period when advance or partial payment is made to an injured and unrepresented person without notifying him/her of the applicable limitations period. The limitations period is tolled from the time of payment until written notice is actually given.

In *Coastal Surgical*, the surgical facility compensated Blevins for medical expenses he incurred to treat a post-surgical infection. When it provided payment, Coastal Surgical did not give written notice of the applicable statute of limitations and Blevins was not represented by counsel. When Blevins filed suit some 15 months later, Coastal Surgical argued that the case was time-barred. The trial court and Court of Appeal disagreed, and relying on *Belton v. Bowers Ambulance Service* (1999) 20 Cal.4th 928, held that Section 11583 could extend the medical malpractice one-year limitations period up to a maximum of three years from the date of injury. Because Blevins filed after the one-year period but before the three-year maximum, his claim was timely. *Coastal Surgical*'s holding clarifies that issuing a payment without obtaining a full release or notifying of the applicable limitations period will leave the MICRA statute open for up to three years.

Please stay tuned for future updates, submit your articles of publication and let us know if you have suggestions for seminars. Holiday Powell *(hpowell@mpplaw.com),* Erin McGahey *(emcgahey@sinunubruni.com),* Mike Pintar (Nevada) *(mpintar@gplawreno.net).*

MEDICAL / HEALTHCARE

D. Marc Lyde, Co-chair
David A. Levy, Co-chair

Thanks to all for the support and input to the Medical Malpractice Sub-Law Section in 2014. We had an exceptional year with the *Electronic Medical Records* (EMR) seminar in November followed by the *Secrets of Medical Malpractice Revealed, Part II* at the December Annual Meeting. Both seminars were marked by excellent attendance and lively interaction between the attendees and panelists.

Based on input from members, expect to see a new, updated presentation of the EMR seminar at the Annual Meeting next December. A lunch seminar is under consideration to address the "*reptile*" theory currently in vogue with plaintiffs' attorneys trying tort cases.

In December, the Supreme Court modified the appellate decision in *Rashidi v. Moser, M.D.* (60 Cal.4th 718). This case was discussed in an **ADC Newflash of 10-09-14** and involved the application of prior settlements to offset a verdict against a defendant physician in a medical professional liability action. The Court refused to apply the $250,000 MICRA limitation (C.C.P. § 3333.2) on non-economic damages in the context of a settlement credit from a prior settling co-defendant. At trial, the defendant physician did not establish any percentage of comparative fault on the part of the prior settling co-defendants. After extensive review of the legislative intent behind C.C.P. § 3333.2, the Court held that a jury award reduced by the trial court to $250,000 could not be further reduced by application of settlement proceeds delineated for non-economic damages from the prior settling co-defendants, even though one of the previous settlements was with a hospital (a health care provider.) This seems contrary to the express language of C.C.P. § 3333.2(b), and will provide some support for plaintiffs' attorneys' argument that $250,000 is the maximum exposure for general damages for each separate health care defendant, not the "amount of [general] damages" referenced in the statute applicable to the "action." This may not be the last judicial word on the topic.

The Medical Malpractice Sub-Law Section welcomes all input from ADCNC members regarding their interest in the above topics, as well as other topics of current interest in medical malpractice and health care law.

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Substantive Law Sections

Hoping to tap into someone else's knowledge? Join one of the ADC's Substantive Law Sections. The current chairs for the Substantive Law Sections are as follows:

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PUBLIC ENTITY

James J. Arendt, Chair
Nolan Armstrong, Chair

The U.S. Supreme Court granted a petition for review of a Seventh Circuit Court of Appeals case to determine whether a pretrial detainee alleging a 42 U.S.C. § 1983 excessive force claim must establish the defendant officer's subjecting intent in addition to the objective unreasonableness of the force. *Kingsley v. Hendrickson*, 2014 WL 7653036.

In *Kingsley*, a jury found for the defendant officers after being instructed that the plaintiff needed to show the officers' subjective intent to cause harm and that the force was objectively unreasonable. The jury found for the defendant officers and the matter was appealed to the Seventh Circuit.

There is a split among the circuit courts, five holding that the plaintiff need not prove the subjective intent of the state actor to cause harm at the time the force was used, and five others, holding that the plaintiff must also show the officer used force against the pretrial detainee with the intent to violate his constitutional rights. The first group of circuits, including the 9th Circuit requires proof only that objectively unreasonable force was used against a pretrial detainee. Those courts do not require plaintiffs to establish the defendant officer's subjective intent. Six other circuits require a pretrial detainee plaintiff in an excessive force case to show the officer's subjective intent to violate the detainee's constitutional rights, in addition to objective unreasonableness of the force.

We will keep you updated on the outcome of this case. In the meantime, if you become aware of new cases involving public entities, please let us know so we can get an e-mail blast out. Also, if there are any cases you think appropriate for the public entity section to get involved in, please contact co-chairs Jim Arendt *(james@walaw-fresno)* or Nolan Armstrong *(Nolan.armstrong@mcnamaralaw.com).*

TOXIC TORTS

Drexwell M. Jones, Co-chair
Erin S. McGahey, Co-chair

The Court of Appeal of California, Second District, rendered an opinion in *Bobbie Izell v. Union Carbide Corporation*, (2014) 230 Cal.App.4th 1081. Plaintiff Izell owned a construction business that built approximately 200 homes in Southern California between 1964 and 1994. He did not work as a laborer or supervisor on these projects, but he regularly visited them and walked through various jobsites, but was often present when joint compounds were being mixed, sanded and applied. During the time period when joint compounds contained asbestos, Izell identified Georgia Pacific as the most common brand used, and recalled Hamilton Red Dot, Kaiser Gypsum and Paco brands of joint compounds were also in use at jobsites in the 1960's and 1970's. With respect to exterior stucco materials, Izell recalled Riverside, Colton and La Habra. Mr. Izell and his wife sued over twenty defendants, but only five defendants proceeded to trial: Union Carbide, Kaiser Gypsum, La Habra, Colton, and Riverside.

The jury returned a verdict finding all defendants liable on theories of strict products liability and negligence. They awarded plaintiffs a total of $30 million in compensatory damages, consisting of $5 million in past and $10 million in future noneconomic damages to Mr. Izell and $5 million in past and $10 million in future loss of consortium damages to his wife. With respect to comparative fault, the jury apportioned 95 percent of the fault to the five defendants at trial (65 percent to Union Carbide, 20 percent to Kaiser Gypsum, and a total of 10 percent to Colton, La Habra, and Riverside). The remaining 5 percent was apportioned to non-defendant joint compound manufacturers and asbestos suppliers. No fault was apportioned to Mr. Izell.

The jury also found Union Carbide and Kaiser Gypsum acted with "malice, oppression or fraud." Kaiser Gypsum settled before the jury was asked to decide the amount of punitive damages. After the punitive damage phase, where the parties stipulated Union Carbide's net worth was $4.2 billion, the jury awarded $18 million against Union Carbide. Union Carbide moved for JNOV and a new trial on all issues, including punitive damages. The trial court denied the JNOV motion, but conditionally granted a new trial "on the ground of excessive compensatory damages only," unless plaintiffs consented to a remittitur reducing the compensatory damage award from $30 million to $6 million. The court declined to disturb the punitive damage award, concluding Union Carbide's stipulated $4.2 billion net worth and the evidence concerning the reprehensibility of its conduct supported the amount of the award, notwithstanding the substantial reduction in compensatory damages. Plaintiffs accepted the remittitur and the court entered judgment against Union Carbide. Union Carbide appealed on the grounds the evidence was insufficient to support the jury's findings on liability, apportionment of comparative fault, the remitted compensatory damage award, and the amount of punitive damages. The Court of Appeal affirmed the judgment and the Supreme Court granted review.

The Supreme Court may elect to clarify *Rutherford v. Owens Illinois, Inc.* (1997) 16 Cal.4th 953 and the law on causation in asbestos cases. Plaintiffs have long argued that mesothelioma, cancers, asbestosis and asbestos-related pleural disease are dose-response diseases and that every dose contributes to an increased risk of that disease. Defendants, for the most part, do not dispute this principle. The primary question is whether the increase in risk attributed to a particular defendant is a substantial factor in causing a plaintiff's illness. Plaintiffs' counsel and their experts take the position that every increase of risk, no matter how small, is substantial. Defense counsel and their experts have long balked at such a proposition and have repeatedly called for plaintiffs' experts to provide credible scientific support for the proposition that there is no such thing as a trivial increase in risk. The Court of Appeal in *Izell* seemed to believe the finish line for causation was to show an increase in risk. Under *Rutherford*,

Continued on page 31

defendants argue an increase in risk is the starting point and that plaintiffs must show, to a reasonable degree of medical and scientific certainty, that their plaintiff's risk was substantially increased. Ironically, both plaintiffs' counsel and defense counsel believe *Rutherford* supports their respective positions. *Izell* may be the case that resolves this question, and the Toxic Tort section will report on that decision when it is rendered. Expect an e-blast shortly after the decision comes down, and there will likely be follow-up analysis, either in this magazine, or perhaps a seminar.

TRANSPORTATION

Renée Welze Livingston, Co-chair
Mark Berry, Co-chair

The Transportation Sub-Law Section put on a phenomenal program at this year's Annual Meeting thanks, in large part, to **John Cotter** and **Chris Johnson**, who spearheaded the effort. In the program, Motor Vehicles and "Black Box" Technology - How to Understand and Use the Data, John Steiner of Mecanica Scientific Services Corp. joined Chris and John for an interesting and informative presentation about how technology is changing the way we as trial lawyers identify, preserve and use information in all types of vehicle Event Data Recorders, not just commercial vehicles.

Following the presentation, the Transportation Sub-Law Section convened for its annual meeting and discussed ideas for new programs in 2015.

Just in time for this issue of *Defense Comment,* on January 23, 2015, the Second District Court of Appeal issued an important opinion certified for partial publication that discusses an important aspect of a motor carrier's nondelegable duty to ensure a safe workplace to an owner operator. While the case involves a trucking accident, the discussion on nondelegable duty and peculiar risk has implications beyond trucking law. Thanks to **Mark Berry** for putting together this summary of the holding in ***Vargas v. FMI, Inc.,*** 14 C.D.O.S. 861 (C.A. 2nd):

Jose Vargas and Luis Felipe Villalobos were a two-man team driving a tractor-trailer cross - country. Villalobos was driving and Vargas was in the sleeper berth when the tractor-trailer rolled over, injuring Vargas. Vargas sued FMI, Inc. (the motor carrier and trailer owner), Eves Express, Inc. (the tractor owner), Eswin Suchite (Eves's principal), and Villalobos (the driver), for negligence.

FMI is a federally licensed motor carrier that operates a shipping distribution center in San Pedro, California. It arranges transportation of goods for its customers by hiring contractors, sometimes called "owner/operators," who lease their tractors and drivers to FMI. Eves, owned by Suchite, is one such owner/operator. In January 2010, FMI was retained to deliver cargo from California to New Jersey. FMI selected Eves's tractor and two of Eves's drivers, Vargas and Villalobos, to make the trip. Vargas and Villalobos drove the tractor to FMI's yard in San Pedro, California, connected the tractor to a trailer, and then departed for New Jersey. About four hours into the drive, while Vargas was asleep in the tractor's sleeping berth, Villalobos lost control of the tractor-trailer. The vehicle hit a center divider and rolled over, injuring Vargas.

FMI and Eves filed a motion for summary judgment asserting that Vargas was an independent contractor, not an employee, of FMI and Eves. As such, neither FMI nor Eves owed plaintiff a duty to provide a safe workplace. They contended: "FMI and Eves Express implicitly delegated all workplace safety responsibilities and tort liability to Plaintiff, an independent contractor, with regard to workplace safety issues."

Vargas opposed the summary judgment motion. He admitted he was an independent contractor of FMI and Eves, but contended that his negligence claim against FMI was properly analyzed under the "nondelegable duty" doctrine. Under that doctrine, because FMI is a federal motor carrier regulated by the Department of Transportation and state law, it cannot delegate its responsibility to the public by characterizing its drivers as independent contractors. Vargas argued that FMI was liable to members of the public for the negligence of its drivers, including Villalobos. Vargas also contended that Eves was liable for Villalobos's negligence pursuant to Vehicle Code section 17150 because Villalobos was a permissive user of Eves' truck.

The trial court granted summary judgment for FMI and Eves, concluding as a matter of law that neither was vicariously liable for Villalobos's alleged negligence. Vargas appealed.

The court reversed by stating that *Privette* and its progeny have never been applied to a case like the present one, where the basis for vicarious liability is alleged to be a "franchise granted by public authority" here, a federal motor carrier's license. Moreover, federal law requires motor carriers using leased vehicles to "have control of and be responsible for" such vehicles in order to "protect the public from the tortious conduct of the often judgment-proof truck lessor operators" (*Amerigas Propane, LP v. Landstar Ranger, Inc.* (2010) 184 Cal.App.4th 981, 994-995). Finally, the defendants did not establish as a matter of undisputed fact that the tractor's owner is entitled to the protection of the so-called "Graves Amendment" which shields owners of leased vehicles "engaged in the business or trade of renting or leasing motor vehicles" from vicarious liability for the alleged negligence of their lessee's drivers. Accordingly, the trial court erred in granting defendants' motion for summary judgment.

In its analysis, the court provides an extensive survey and discussion of the Nondelegable Duty and Peculiar Risk Doctrines. The analysis is applicable to areas of the law outside this particular case and is certainly a good resource for younger lawyers who are addressing Nondelegable Duties and Peculiar Risk Doctrine issues. The opinion also provides an extensive discussion of The Federal Motor Carrier Act and California authority regarding issues of commercial trucking financial responsibility outside the application of Vehicle Code section 17150.

Mark Berry and Renée Livingston are co-chairing this section this year. We invite you to reach out to us with any ideas you have for seminars.

President's Message – *continued from page 2*

Then, on April 17th, we have the always popular Construction Defect Seminar which will take place in Walnut Creek. This is followed by the Toxic Tort series which will take place in May. The Law Firm Management seminar will be on August 28th and 29th in Monterey, and it will be chaired by Michon Spinelli, Holiday Powell and William Munoz. The seminar will provide valuable information on numerous topics that confront us in our practices on a daily basis.

We will also have the acclaimed Basic Training series for young lawyers in September and October which will be chaired by Renee Livingston and Drex Jones.

This year we have added a new sub-law section to the nine existing sections. The new section is entitled "Business Litigation," and will be chaired by William Munoz and Holiday Powell and focus on everything from business disputes to intellectual property. Remember, you can belong to as many sub-law sections as you wish.

We are adding a Trial Academy to be run by the ADC's past presidents, who have a true wealth of trial experience that they can pass on to the "journeyman lawyer" who needs to sharpen up his or her trial skills.

The ADC is an organization where members can easily get involved. The *Defense Comment* is known throughout the state as a high quality legal periodical. It is distributed not only to ADC members but also to judges in California and Nevada, and members of our sister organization, The Association of Southern California Defense Counsel. It provides a wonderful opportunity for attorneys, especially young attorneys, to publish articles. If you wish to publish an article on an interesting legal issue, please feel free to submit it to our magazine's editors: David Levy *(dlevy@smcgov.org)* and Ellen Arabian-Lee *(ellen@arabian-leelaw.com).*

Your participation in the ADC is encouraged as your input is invaluable in charting the direction of the ADC. Everyone on the Board of Directors looks forward to working hard to best serve our membership. I welcome your suggestions and invite you to contact me at mkronlund@quinnlaw.net or (209) 943-3950.

CDC Report – *continued from page 3*

CDC is participating in a working group whose mission is to fashion changes to the law which will increase the use of EJTs, and which can be incorporated into a bill to be introduced by Assembly Member Luis Alejo (D-Watsonville) to extend the sunset. Representing the defense are current ADC Director and CDC President Keith Chidlaw, and ASCDC Past President and CDC Secretary Bob Olson. Again, the discussion has been wide-ranging. Should a judge be able to order a case into EJT? If so, what types of cases and what grounds would exist to keep cases out of EJT? Should slightly longer trials be permitted, and should some appeal right be preserved?

A third bill of great interest to CDC will deal with extending the sunset on provisions of the Code of Civil Procedure which permit partial summary adjudication of issues in some circumstances, and cleaning up an inadvertent lack of parallel application in awarding costs pursuant to CCP Section 998.

Finally, CDC is very involved with SB 8 by Senator Bob Hertzberg (D-Van Nuys), which proposes to apply sales taxes to all services, except health care, education, and businesses with revenues under $100,000 per year. Senator Hertzberg, who previously served as Speaker of the Assembly, has promised a very in-depth examination of the issue, which is designed to both raise revenue and even out the volatility which exists in the state income tax structure. But the issue is also almost mind-numbingly complex and will affect different service providers very differently. The civil defense bar has a critical interest in this issue, and CDC will be at the table as these discussions occur.

That is, after all, precisely why the California Defense Counsel exists.

Defense Comment **wants to hear from you. Please send letters to the editor by e-mail to David A. Levy at *dlevy@smcgov.org***

We reserve the right to edit letters chosen for publication.

Association of Defense Counsel of Northern California & Nevada
ADC Newsletter/Directory Advertising Policies and Agreement to Advertise

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ADC Defense Comment Magazine

Published three times a year, Defense Comment is a valued resource that defense attorneys read from cover to cover and save for future use. Advertising in the Comment offers a unique opportunity to market to the defense bar-without paying the high advertising costs of larger circulation magazines and newspapers. Since many of our **2,000** readers are decision-makers for their law firms, your advertisement always speaks directly to the right readers.

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⅔ Page Vertical	(5"x10")	$715	$660	$605
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Our directory is distributed to attorneys as well as **2,000** insurance and risk management personnel throughout California. And, unlike magazine advertisements, your directory ad will be utilized every day for the whole year!

Your ADC Directory advertisement will be linked to your website and you will also receive a banner ad on the ADC Member Directory webpage.

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¼ Page Veritcal	(2¼"x3¾")	$385
Classified (text only) – Expert Witness/Vendor section		$100

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(rev. 3/15)

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Are you currently engaged in the private practice of law? ☐ Yes ☐ No

Do you devote a significant portion of your practice to the defense of civil litgation? ☐ Yes ☐ No

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3/1/10

welcome, new members

Since October 2014, the following attorneys have been accepted for membership in the ADC. The Association thanks our many members for referring these applicants and for encouraging more firm members to join.

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A·D·C VERITAS

Association of Defense Counsel of Northern California and Nevada

55TH Annual Meeting

DECEMBER 4-5, 2014

2015 Board of Directors

PRESIDENT: Michael Kronlund
PAST PRESIDENT: Linda Lynch

SPEAKER: Leigh Steinberg

KEYNOTE: Salvatore "Sal" Giunta
Medal of Honor Recipient

LUNCHEON

EDUCATION SESSION

Association of Defense Counsel
of Northern California and Nevada
2520 Venture Oaks Way, Suite 150
Sacramento, CA 95833
www.adcnc.org

2015

Calendar of Events

Save the Dates!

April 17, 2015	**Annual Construction Seminar**	Walnut Creek Marriott, *Walnut Creek, CA*
August 28-29, 2015	**Annual Law Firm Management Seminar**	Monterey Plaza Hotel, *Monterey, CA*
September 18, 2015	**22ND Annual Golf Tournament**	Silverado Resort, *Napa, CA*
December 10-11, 2015	**56TH Annual Meeting**	Westin St. Francis, *San Francisco, CA*

Please visit the calendar section on the ADC website – *www.adcncn.org* – for continuous calendar updates.