

The Update

September, 2004 - Volume 8, Issue 3

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The Bottom Line

Case Title: William Wohlwend v. City of San Diego, a public entity; San Diego Grand Prix, LLC; Percy Walters, individually, and dba Asphalt Repair and Maintenance; Jorge Cambranis, an individual.,

Case Number: GIC 776873

Judge: Honorable William R. Nevitt, Jr.

Counsel for Plaintiff(s): Catherine A. Richardson of Thorsnes Bartolotta & McGuire

Counsel for Defendant(s): Stuart D. Hirsch of The Kennedy Law Firm

Type of Incident: Wrongful Death

Cause of Action: A wrongful death action was brought by William Wohlwend, in relation to the death of his son Paul Wohlwend. Paul Wohlwend had been killed when he was struck in the head by one of the components of a pedestrian walkway bridge that was being erected for the San Diego Grand Prix automobile race. The pedestrian walkway was in the process of being constructed by Statewide Seating, Staging & Scaffolding, when it was struck by a forklift being operated by Jorge Cambranis.

Mr. Wohlwend alleged that the City of San Diego was responsible for maintaining a dangerous condition on public property. Mr. Wohlwend also contended that the San Diego Grand Prix Association and Percy Walters, individually, and dba Asphalt Repair and Maintenance were negligent and that they were also responsible as being the employers of the forklift operator, Mr. Cambranis. The City, the Grand Prix and Mr. Walters denied these allegations, and contended that the accident resulted from the negligence of the bridge company, Statewide. Prior to trial, the Grand Prix settled a cross-action with the company that rented the forklift, resulting in a \$25,000.00 set-off, and the bridge company, accepted a \$450,000.00 Section 998 settlement demand from the plaintiff.

Settlement Demand: \$950,000.00 (998 offers)

Settlement Offer: \$350,000 (998 offer)

Trial Type: Jury

Trial Length: 9 days

Verdict: The jury deliberated for 2 ½ days, following an 9 day trial during which 24 witnesses were called. The jury found that the City of San Diego was not at fault under the Government code. Further, the jury found that the San Diego Grand Prix and Percy Walters were not negligent; however, the jury did find that the forklift operator was an employee of the Grand Prix. The jury found that the bridge company, Statewide, and the forklift operator, Mr. Cambranis, were both negligent. The jury awarded \$360,000.00, and apportioned 85% of the liability to Statewide, and 15% of the liability to Mr. Cambranis. After the \$25,000.00 set-off mentioned above, the San Diego Grand Prix will be held responsible for \$29,000.00, as the employer of Mr. Cambranis.

President's Message



Billie Jaroszek

Summer has come and gone and it is time to focus on fall beginnings. For SDDL members that means a jammed packed fall schedule. To begin with, there is the long planned and eagerly awaited joint seminar between DRI and SDDL. This two-hour MCLE seminar, titled "TOP 10 DEFENSE PRACTICE CHANGES -- LEGISLATION AND CASE UPDATE", is scheduled for September 23, 2004 and will be held at the U.S. Grant Hotel from 5:30 – 8:00 p.m. This program should be of great interest to each of you.

Next is time for some fun. That means golf. Specifically, the SDDL Third Annual Golf Benefit which will be held October 1, 2004 at TheAuld Course in Chula Vista. This is a great event and an opportunity for you to network with your peers, as well participate in benefitting the Juveniles' Diabetes Foundation. So come play and enjoy the afternoon. Please use the flyer on the back cover of this newsletter to register.

The event planned for October 9, 2004, is as formal as the golf tournament is casual. This is the date of the annual Red Boudreau dinner. As you know, the proceeds benefit the St. Vincent de Paul Society and the Daniel Broderick award will be presented to one of our distinguished colleagues. This year the awardee is David Casey, Jr

October 21 – 23 will be our 14th Annual Mock Trial Competition. Michelle Van Dyke and Martha Dorsey head up this year's committee and have already received commitments from Whittier, Pepperdine, USD, Thomas Jefferson and Brooklyn Law School. You will soon receive an invitation to serve as judge for this competition and we hope you will accept.

Just as we catch our breath, it is time to vote for the incoming Board of Directors. Ballots will be sent out for each of you to nominate and vote for the person of your choice for the new board to be installed in January of 2005. Also in December, we will hold our final two-hour seminar of 2004. The Board is hard at work considering topics and speakers that will make the last seminar of the year unforgettable.

Billie Jaroszek

Thank You

San Diego Defense Lawyers would like to thank
Brenda Peterson of Peterson & Associates
for sponsoring our Brown Bag Luncheon programs
held in her offices at:

530 "B" Street · Suite 350 · San Diego · CA · 92101

CPR AS A CONSTRUCTION DISPUTE RESOLUTION TOOL

By: John P. Olin of P.K. Schrieffer, LLP



At a recent seminar on construction defect law, a respected mediator and attorney addressed the collected crowd in a keynote address. Making it clear his comments were for both the defense and the plaintiff's bar, he stated that he present "health" of the construction dispute industry was grave at best. With ever escalating expert, insurance, defense and litigation costs, construction defect cases were and are on the brink of collapse from its own weight. Such a collapse would result in a lose/lose scenario for all involved. Without a change in the way the industry as a whole reacts to insurance defect litigation, both sides of the bar would soon find themselves with dwindling returns. Clearly a new way is needed. That new way may be CPR.

CPR is a dyslexic acronym for the California Construction Defect Dispute Resolution Protocol as developed by various major insurers in 1997. While other methods for dealing with construction defect cases have been legislatively implemented, such as the *Calderon* statutes, they have fallen short of their goals. CPR seems to be a possible strategy given the right set of players. Since CPR is not limited by statute to certain types of cases, it can be utilized in all types of construction defect cases.

At first the very premise of CPR seems foreign. Although its exact use may vary from case to case, CPR is founded on the premise of cooperation between the plaintiff's counsel and the developer's counsel as well as an effective and experienced mediator. One of the goals of CPR is of course, to save money. Rather than follow the usual procedure of complaint followed by cross complaint against a vast array of subcontractors followed by involvement of dozens of defense attorneys, CPR attempts to limit the actual damage evaluation process to only two attorneys.

Generally, in a CPR case, once the complaint is filed and served developers

counsel will file a cross complaint but will not serve it. Such delay should only be undertaken with the blessing of the court and under a case management order. Counsel for the developer will then tender the matter to not only his own clients' insurers, but to all subcontractors' insurers. Developer asks each of the carriers to participate equally in the defense of the developer on an equal share basis per trade (or any of a number of sharing agreements most of the readers are familiar with). In essence, the developer is acting as defense counsel for each of the subcontractors and therefore is not likely to simply "pass through" plaintiffs' numbers and damages. Also, participation of the subcontractors' insurers is without regard to any additional insured status as the insurer is simply paying a portion of what they would have paid in the first instance in defending their named insured. Naturally, any carrier without a contractual obligation to their named insured would not generally participate. Indeed, no carrier waives their coverage defenses and all rights are reserved. However, as demonstrated below, by the end of the process, economics mandate often paying the agreed sum and walking away from the matter.

To achieve this, developer and plaintiff experts are encouraged to share information early on and attempt to reach an agreed upon fix to present to all of the insurers. The sharing of information results in a reduced projected settlement figure and reduced involvement of counsel. While this process is going on, individual subcontractors insurers have the ability to retain their own experts, who again, are asked to share an open dialog with plaintiff and developer's experts.

The actual mediation itself commences in two phases. Phase one involves plaintiffs and developer attempting to reach an agreed upon price. In phase two, the subcontractor's insurers attempt to agree on and then allocate the proposed settlement. While this phase is the most difficult, a reduced demand, accompanied by incurred savings in defense costs often persuades insurers and subcontractors to pay the demands. The alternative is a new flurry of experts and no doubt finding more defects, real or imagined.

The CPR approach may seem naïve to many, but it can work. Although I cannot cite to the exact cases because of privacy reasons, allow me to give an example of how CPR might stack up against traditional mediations. Let us take the example of the fictional Los Nachos condominiums. Los Nachos One, "LN1", was subjected to traditional mediation while the identical but neighboring Los Nachos Two, "LN2", went to CPR mediation with 80% participation by subcontractors and their insurers.

In LN1 developer **alone** incurred \$750,000 in defense costs. It is estimated that the individual subcontractor insurers paid between \$15,000 and \$50,000 each in defense costs with some paying even more depending on the trade involved. In addition, the average subcontractor contribution for additional insured payment toward the developers' defense was \$25,000. In the end, the matter settled for \$2,500,000.

Meanwhile down the road in LN2, defense costs ran at only \$400,000. Given the high rate of participation by the forward thinking subcontractors insurers, each subcontractor paid \$20,000 for the entire defense of the matter. In the end, the case settled for \$2,100,000 and settled in less than half the time of its' companion case.

While Los Nachos condominiums may be fictitious, they do represent the general outcome of a well-run CPR. With the proper trust between the parties and a mediator that knows the process, quick economical settlements can be reached. In the event the CPR process fails, generally speaking, no more money has been spent than normally would have, and the information can be used as the case goes back to the judicial process. Although CPR mediation means less work for attorneys who regularly represent subcontractors, it also represents a way to prevent the entire industry from collapse.

John P. Olin is an associate with P.K. Schrieffer, LLP working in both the Los Angeles and San Diego offices. Mr. Olin's primary area of practice is insurance law and construction defect law. His entire legal career has been devoted to the insurance industry.

The Bottom Line

Case Title: Moe Salem v. Hot Dogger Tours, Inc.

Case Number: GIE017245

Judge: Honorable William C. Pate

Plaintiff's Counsel: Joseph A. Howell, Esq. of the Law Offices of Joseph A. Howell

Defendant's Counsel: Sean T. Cahill, Esq. of Balestreri, Pendleton & Potocki

Type of Incident: Claimed negligence as to cervical, lumbar and shoulder injuries along with property damage based on a tour bus versus automobile accident occurring at Barona Casino in May of 2002.

Defense experts: Dr. Kenneth Soloman-Biomechanical/Accident reconstructionist and Dr. William Bowman-Orthopaedist

Plaintiff Expert: Victor Krauss, D.C.

Settlement Demand: \$50,000.00

Settlement Offer: Defendant served Plaintiff with a CCP 998 Offer in the amount of \$4,500.00.

Trial Type: Jury

Trial Length: 3 days

Verdict: Defense

Appellate Court Takes A New Look At The Definition of Product and The Application Of The Economic Loss Rule

By: Coleen Lowe of Grace Brandon Hollis, LLP



The economic loss rule has been the focus of much debate and case law over the last 7 or 8 years particularly in the construction defect arena. However, the focus of that debate and most of the case law has been on the application of the economic loss rule to claims against subcontractors and developers. The issue has been brought to the forefront again by the decision earlier this year in the case of Mesa Vista South Townhome Assn. v. California Portland Cement Company (2004) 118 Cal.App.4th 308 and the effect that decision has on

what has been the controlling case on the issue- Aas v Superior Court (2000) 24 Cal.4th 627. A discussion of the potential impact of the Mesa Vista case can be found in the July issue of The Update.

There have, however, been a separate line of cases that dealt with the application of the economic loss rule to damage claims against manufacturers of products found within those homes. Until recently whether a tort claim could be pursued against a product manufacturer was a fairly easy analysis. With the finding in Fieldstone Company v. Briggs Plumbing Products, Inc. (1997) 54 Cal.App.4th 357 the definition of a product and the import of the economic loss rule as applied to a product used as a component in the construction of a structure seemed clear cut and settled.

In that case Fieldstone sued Briggs for reimbursement of costs expended to replace sinks manufactured by Briggs that had prematurely rusted and/or chipped. The court found in favor of Briggs, stating that a manufacturer may be strictly liable for physical injuries caused to persons or property but not for purely economic losses. The line between physical injury and economic loss reflects the line of demarcation between tort theory and contract theory. With economic loss defined as damages for inadequate value, costs of repair and replacement of the defective product or consequential loss of profits without any claim of injury or damage to other property. The court rejected Fieldstone's arguments that defects found in the sinks had caused damage to other nondefective portions of the sinks and found that as a matter of law Fieldstone had not suffered the requisite property damage to sustain its strict liability claim against Briggs and that if it had any claim to pursue it was a warranty claim.

In the recent case of KB Home v Superior Court (2003) 112 Cal.App.4th 1076 the court of appeal (Second District, Division 7) took another look at how the term product is defined for application of the economic loss rule, as well as, whether the issue is one to be decided as a matter of law or an issue for the trier of fact. The KB Home case involved a claim brought by various KB entities (KB) against Consolidated Industries Corp. (Consolidated) among others for the cost of repairing and replacing allegedly defective furnaces manufactured by Consolidated. Consolidated's defense in the case was that as the damage alleged was solely as to the product itself KB's claims against it were barred by application of the economic loss rule. The trial court sided with Consolidated, finding as a matter of law and without the introduction of evidence by either party that the furnace itself was a single integrated product and damage alleged to have been caused by the furnace's emission control device to different components of the furnace did not constitute damage to other property within the meaning of the economic loss rule. Thus precluding KB Homes claims for negligence and strict liability.

The court of appeal found that the trial court had erred in finding, as a matter of law, that the threshold issue of "damage to other property" had not been met. The court not only found that resolution of the issue should be left to the trier of fact but further found that based upon the reasoning in Jimenez v Superior Court (2002) 29 Cal. 4th 473 a

detailed analysis needed to be undertaken to determine exactly what the product at issue is for a particular case.

In Jimenez owners of a home brought suit against the manufacturers, suppliers and installers of windows found in the home. The manufacturers in that case put forth the argument that the product at issue was the entire house and as there had been no allegation of damage outside the structure of the house the plaintiff's claims were barred. The Court rejected this argument, as the same argument had likewise been rejected in a prior case- Stearman v. Centex Homes (2000) 78 Cal.App.4th 611. The Court opined that the economic loss rule does not necessarily bar recovery in tort for damage that a defective product (a window) causes to other portions of a larger product (a house) into which the former has been incorporated. The Court went on to observe that the concept of recoverable physical injury or property damage has over time expanded to include damage to one part of a product caused by another, defective part.

The Court then went on to hold that the manufacturer of a defective window installed in a mass produced home could be held strictly liable in tort for damage caused by the window's defects to other parts of the home. The Court also went on to say that it was not addressing the issue of whether defective raw materials should be treated the same as component parts or whether the economic loss rule would bar recovery for damages that a defective component part causes to other portions of the finished product into which it is installed.

The appellate court in the KB Home case sought to take up where the Court left off in Jimenez and address the issue of damages caused by a defective component part to other portions of the product in which it has been installed. The court declared that distinguishing between other property and the defective product itself in a case involving component to component damage requires a determination of whether the defective part is a sufficiently discrete element of the larger product that it is not unreasonable to expect its failure to damage other portions of the finished product. If that is the case, permitting tort recovery when the defective part causes physical injury to other components is consistent with the underlying principle recognizing a manufacturers liability in tort. If not, damages are reasonably limited to those available under the law of contractual warranty.

With that said the true problems raised by the KB Home case become clear. The case provides no real direction on how to make a determination of "the product at issue" or whether the "product" has caused damaged to other components. The court simply lists out various factors advanced by the parties - (1) Does the defective component perform an integral function in the operation of a larger product (2) Does the component have any independent use to the consumer, some use other than as incorporated into the larger product (3) How related is the property damage to the inherent nature of the defect in the component (4) Was the component itself or the larger product placed into the stream of commerce (5) Was the component purchased from another manufacturer and added only to the product when supplied in certain areas (6) Was the larger product sold in other markets without the component (7) Can the component be easily removed from the larger product and (8) Has the component been used in other applications and listed as a separate part? After listing out possible factors for consideration the court remands the case back to the trial level, leaving the issues to be resolved by the trier of fact. Or more likely leaving the issues to be resolved by future cases down the road.

The KB Home court has taken what seemed from cases like Fieldstone and Jimenez to be a fairly simply analysis of the definition of "product" and complicated it without providing any clear answers. With the opinions set forth in KB Home product manufacturers now have to contend with a new uncertainty as to whether their product constitutes one product or many smaller products incorporated into a larger product.

Coleen H. Lowe is a partner with Grace Brandon Hollis, LLP and a former Board of Directors member of San Diego Defense Lawyers. Coleen's law practice consists primarily of the defense of products liability and construction defect actions throughout California and Nevada.

20th Annual Red Boudreau Trial Lawyers Dinner to Benefit St. Vincent de Paul Village

Saturday, October 9, 2004

Hyatt Regency Hotel
-One Market Place,
San Diego

5:30 p.m.
Hosted Cocktails

7:00 p.m.
Dinner and Program

Ticket prices start at
\$175 per seat

Sponsored by San Diego Defense Lawyers, Consumer Attorneys of San Diego, American Board of Trial Advocates and Association of Business Trial Lawyers this event will honor David S. Casey, Jr. as this year's Daniel T. Broderick III Awardee and benefits the children's programs of St. Vincent de Paul Village. Donations of any size will be gratefully accepted. Please make checks payable to St. Vincent de Paul Village. Call CASD at 619-696-1166 for reservations or information on donations.



The Bottom Line

Case Title: Shane Keiser vs Michael Slaughter and Fresno Meat Company

Case Number: PC 032491

Counsel for Plaintiff(s): Fred G. Meis, Esq. and Quinton Cutlip, Esq. of Meis & Alexander

Counsel for Defendant(s): Christopher J. Workman, Esq. and Ruben Tarango Esq of Bacalski, Bailey, Koska & Ottoson, LLP

Type of Incident/Causes of Action: Big rig truck driven by plaintiff was rear-ended by big rig truck driven by defendant Slaughter. Plaintiff sued Slaughter and his employer Fresno Meat and for negligence claiming impact caused disc herniations at C-6/7 and L5-S1. Plaintiff sought past and future medical (\$105,000) and lost earnings (\$988,000) and pain and suffering. Plaintiff also sought punitive damages based on claim that Slaughter was in violation of driving time regulations.

Settlement Demand/Offer: Initial demand by plaintiff \$950,000 – reduced to \$659,000 in 998. Defense offered \$160,000 in 998 to plaintiff. Courtroom steps: defense offer increased to \$220,000 plaintiff demand reduced to \$480,000.

Trial Type: Jury

Trial Length: 7 days

Verdict: Nonsuit in favor of defendants on punitive damages claim. Verdict \$101,100 in favor of plaintiff – \$1,100 past lost earnings, \$60,000 past pain and suffering, \$40,000 future pain and suffering, no damages awarded for future lost earnings or medical expenses or past medical expenses. Cost bills still pending.

Discovery Law



*Edith J. Kaufman,
The Roth Law Firm*

Proper Labeling Adds Support to the Eroding Attorney-Client Privilege

There are two new cases which are affecting the scope of discovery. Both 2,022 Ranch, L.L.C. v. Superior Court (Chicago Title Ins. Co.) and Rojas v. Superior Court clarify discovery issues, but both seem to go against the most recent trends. For instance, 2,022 Ranch provides a ruling that reduces the attorney-client and attorney work product privileges where attorneys are used as claims adjusters, despite the usual absolute privileges that go along with attorney-client communications. This case emphasizes how important it is for companies who use attorneys in other capacities to make sure legal advice or work product is clearly labeled as such and is kept separate or distinguishable from communications with a dominant purpose outside of legal advice.

Moreover, there have been some cases recently that have begun to erode the mediation privilege, yet Rojas expands the protection under Evidence Code § 1119 (the mediation privilege) to cover all writings, including photographs and expert reports, if they were produced for mediation. This case shows the importance of properly labeling any documents or materials you intend to be protected under the mediation privilege, too. So, check those footnotes and make sure your documents are labeled appropriately to prevent discovery disputes.

No Place To Hide.....

In-House Attorneys Not Always Covered by Privilege

In 2,022 Ranch, L.L.C. v. Superior Court (Chicago Title Ins. Co.) (4th Dist., 2003) ____ Cal.App.____, 2003 WL 22871923, a petition of mandate arose out of the trial court's denial of a motion to compel deposition testimony and to

produce documents brought by 2,022 Ranch ("Ranch") against the real party in interest, Chicago Title Insurance Company ("Chicago Title"). In December 1999, Ranch opened an escrow with Bishop Escrow, Inc. for the purchase of 2,022 acres of undeveloped land in Jamul, California. In January 2000, California Title Co., as agent for Chicago Title, issued a preliminary title report for the property, which was delivered to Bishop Escrow. The report stated California Title was prepared to issue a title insurance policy to insure against losses relating to defects and encumbrances, except for 16 identified encumbrances and exceptions. In July 2000, Chicago Title issued a title insurance policy in favor of 2,022 Ranch which listed 16 additional exceptions to coverage which were not previously disclosed. Ranch argued the new exceptions created serious financial and practical barriers to developing the property as they intended, resulting in a loss of \$17 million.

In September 2001, Ranch filed an action against Chicago Title for breach of the insurance contract and bad faith handling of its claim. Ranch served two sets of requests for production of documents on Chicago Title, seeking all documents related to Ranch's insurance policy, preliminary title report, its claim under the policy, and Chicago Title's investigation and handling of Ranch's claim. Chicago Title objected to the production of certain documents on the grounds they were protected by the attorney-client or attorney work product privileges and produced a privilege log. The majority of documents on the privilege log included correspondence amongst claims handlers, or between claims handlers and entities involved in issuing Ranch's policy, memos to the file by claims adjusters concerning the claim and transmittal of information about Ranch's claim by claims adjusters to their supervisors.

In deposition, the employee primarily responsible for Ranch's claim handling testified her job description was "claims handler" but she was also a licensed attorney. The regional claims manager for Chicago Title is also a licensed

attorney, but testified his duties were to “hire and advise and retain claims attorneys and other persons to handle claims for the company, manage the claims department...determine the policy and procedures of how the claims department operates.” Many questions were objected to during the employees’ depositions on grounds of attorney-client privilege or attorney work product.

In December 2002, Ranch brought a motion to compel production of the documents withheld by Chicago Title and to compel answers to deposition questions, arguing the dominant purpose of Chicago Title’s employees was as claims handlers, to investigate and settle claims. Ranch argued Chicago Title should not be able to shield itself from discovery by hiring attorneys to perform those jobs. Chicago Title countered its attorneys/claims handlers acted as advisors and legal advocates, not merely claims handlers, as they made coverage assessments based on their legal training.

The trial court referred the matter to a discovery referee, who found Chicago Title’s attorney employees were not engaged in activity beyond normal claims handling and assertion of attorney-client privilege may interfere with “a clear understanding of the circumstances of this matter.” The referee also ruled the evidence was relevant, but then upheld the attorney-client and attorney work product privileges except for two documents out of 65 that he ruled were not privileged.

In April 2003, the trial court adopted the referee’s recommendation, and Ranch filed its petition. The Appellate Court began by analyzing attorney-client privilege, and noting it does not extend to individuals who are mere witnesses to the matter at issue in the litigation. The Court also examined the attorney work product and noted that core work product is absolutely protected, while general work product may be discovered upon showing of good cause.

The Appellate Court applied the “dominant purpose” test, noting that where a communication is to serve a dual purpose, one for transmittal to an attorney in the course of professional employment and one not related to that purpose, the question is which one

predominates the other. The test looks to the dominant purpose of the communication and the attorney’s work purpose. In analyzing several cases involving attorney employees, the Court stated one treatise had interpreted that attorney-client and attorney work product privileges may not be available where attorneys are hired solely to investigate or adjust a claim, or to negotiate a contract, rather than provide legal advice.

The Court also analyzed the arguments that attorney-client and work product privileges could be impliedly waived by placing the contents of the privileged communications at issue in the case. The Court went on to note that discovery of claims files in bad faith lawsuits has always been crucial, but not everything in a claims file is discoverable.

The Appellate Court rejected Ranch’s argument that the documents were all discoverable and also rejected Chicago Title’s argument they were all privileged. Instead, the Court concluded the evidence reflecting factual investigation of Ranch’s claim is subject to discovery, and only those communications reflecting the requesting of, or rendering of legal advice were protected by attorney-client, and only the attorney’s legal impressions, conclusions, opinions or legal research would be subject to work product protection.

In so ruling, the Court noted the employees for Chicago Title admitted they were primarily claims handlers, but also recognized Chicago Title’s claim that because of the unique and complicated nature of title insurance, it hired attorneys and relied on their legal expertise and training to interpret policies and provide legal advice on coverage issues. The Court rejected Chicago Title’s reliance on Aetna Casualty & Surety Co. v. Sup.Ct. (1984) 153 Cal.App.3d 467, which it claimed provided that an in-house attorney’s investigation of an insured’s claim and determination of coverage constitute legal advice. In distinguishing Aetna, the Court noted in Aetna, the insurance company retained outside counsel to determine coverage, and did not use in-house claims adjusters whose role on a day-to-day basis was to investigate claims.

The Court thus ordered the trial court to vacate its denial of Ranch’s Motion to compel documents and a response to deposition questions, and ordered the court to conduct a “particularized review of the deposition questions and documents at issue to determine which are protected by the attorney-client privilege and/or work product privileges, consistent with the conclusions expressed in this opinion.” Thus, this case will now set the standard for determining what information is discoverable where a company or insurer uses an attorney as an employee with job duties outside of just rendering legal advice.

What Happens in Mediation, Stays in Mediation

In Rojas v. Superior Court (2004) _____, Cal.App.4th _____, 2004 WL 1542239, the California Supreme Court considered the scope of Evidence Code section 1119, which provides: “No writing, as defined in Section 250, that is prepared for the purpose of, in the course of, or pursuant to, a mediation .. is admissible or subject to discovery...” The Court reversed the Court of Appeal’s judgment that certain documents created for mediation were not protected from discovery under Evidence Code § 1119.

The real party in interest Julie Coffin, owner of an apartment in Los Angeles, sued the contractors and subcontractors who built the complex, alleging water leaks had caused toxic molds and other microbes on the property. The court, with the parties consent, issued a case management order which provided that any document prepared for the purpose of, or in the course of mediation would be deemed privileged pursuant to Evidence Code § 1119. In April 1999, the litigation settled as a result of mediation. The settlement agreement stated in part that “throughout the resolution of this matter, consultants provided defect reports, repair reports, and photographs for informational purpose which are protected ... by Evidence Code §§ 1119 and 1152, and it is hereby agreed that such materials and information contained therein shall not be published or disclosed in any way without the prior consent of plaintiff or by court order.”

Continued on page 8

Discovery Law

Continued from page 7

In August 1999, several hundred tenants filed an action against the contractors and Coffin, among other entities. When the tenants began depositions, they sought each deponents "entire files" relating to the original action between Coffin and the contractors. Coffin moved to quash with another party and sought a protective order. The court ordered the subpoenas withdrawn so tenants countered by filing a motion to compel requesting photographs and expert opinions, among other things. Coffin opposed the motion, arguing the requested documents were undiscoverable under Section 1119 because they were prepared for the mediation in the original action.

The first trial judge ruled the documents were not admissible if made for mediation after the case management order. The case was reassigned to a second trial judge, and when a new discovery dispute arose, tenants filed another motion to compel. The second trial judge ruled the mediation compilations were not discoverable, but the photographs contained in the compilations were discoverable. Tenants made a motion to compel the photographs, and Coffin argued the prior judge had ruled they were not discoverable. The second judge changed his ruling and found the photographs were protected by the mediation privilege.

Tenant sought a writ of mandate in the Court of Appeal. In a split decision, the Court of Appeal granted relief, concluding Section 1119 does not protect "pure evidence" but only the substance of mediation (i.e., negotiations, admissions and discussions). The Appellate Court held Section 1119 protected mediation materials "in the same manner as the work product doctrine", so that "raw test data, photographs and witness statements" were not protected and were discoverable, while materials reflecting an attorney's impressions, conclusions, opinions or theories were absolutely protected. Finally, the Appellate Court held materials which combined factual information and attorney's thoughts, impressions or conclusions, such as

charts or compilations and reports of experts, would be "qualifiedly protected" and discoverable only upon a showing of good cause.

The Supreme Court rejected the compromising standards set by the Appellate Court, indicating one of the fundamental ways Legislature sought to encourage mediation was by enacting several mediation confidentiality provisions. Finding the Appellate Court's ruling directly contradicted the plain language of Evidence Code § 1119, the Court held photographs and witness statements were both a "writing" under Evidence Code § 250 and therefore fall under Evidence Code § 1119. The Court rejected the argument that Section 1120, which provides that evidence otherwise admissible or subject to discovery outside of mediation does not become inadmissible solely by its use in mediation, required discovery of the items at issue. Rather, the Court found Section 1119 simply clarifies that only those writings prepared for the purpose of, in the course of, or pursuant to, a mediation are undiscoverable.

The Court further opined the Appellate Court's interpretation that photographs and videotapes taken for purposes of mediation were not protected under Evidence Code § 1119 was inconsistent with recent legislative history, and was inconsistent with the overall purpose of the mediation confidentiality provisions. The Court found the Appellate Court's ruling that compilations would be qualifiedly protected was incorrect as the Legislature never enacted a "good cause" exception to Section 1119 and other mediation confidentiality provisions. The Court noted Section 1122(a)(2) permits discovery of protected communications and writings prepared by or on behalf of fewer than all mediation participants if those participants expressly agree to the disclosure, which was designed to give the participant control over whether something prepared for mediation is used in subsequent litigation. In confirming its reversal, the Court quoted the second trial judge, who had observed "the mediation privilege is an important one, and if courts start dispensing with it ... you may have people less willing to mediate."

Ms. Kaufman is an associate at The Roth Law Firm in Rancho Bernardo, California. A former associate for the Insurance Practice Group and Employment Group at Berger, Kahn, Shafton, Moss, Figler Simon and Gladstone, she primarily handles insurance defense matters, employment law, appellate work and has extensive experience in vehicle warranty defense.

Insurance Law



*James M. Roth,
The Roth Law Firm*

Following are some recent California decisions which will impact the insurance industry.

"OTHER

INSURANCE" CLAUSE APPLIED AMONG PARTICIPATING CARRIERS ON PRO-RATA BASIS DESPITE DIFFERING POLICY PROVISIONS: Between July 1988 and 1993, Travelers Casualty and Surety Co. issued successive CGL policies to Standard Wood Structures, Inc. The policies had a "pro rata" "other insurance" clause. Century Surety Company issued a primary CGL policy to Standard from September 1996 through September 1997. The policy contained an "excess" other insurance clause. Travelers and Century defended Standard against a construction defect action, but Century later withdrew based on its "excess" "other insurance" clause. In Travelers Casualty and Surety Co. v. Century Surety Co., (2004) 118 Cal.App.4th 1156, 13 Cal.Rptr.3d 526, the Fourth Appellate District of the California Court of Appeal affirmed the trial court's judgment finding defendant insurer had a duty to contribute on a pro-rata basis to defense and indemnity expenses incurred by plaintiff insurer in defending a common insured in a construction defect lawsuit despite an "excess" "other insurance" clause. Century contended its "excess" "other insurance" clause made its policy excess to Travelers' policy with the "pro rata" provision. The appellate court disagreed, finding that where primary policies of

two or more insurers of a common insured contain conflicting other insurance clauses, they are disregarded and the policies pro rate among each other. The appellate court distinguished the decision in Hartford Casualty Ins. Co. v. Travelers Indemnity Co., (2003) 110 Cal.App.4th 710, 2 Cal.Rptr.3d 18, which gave effect to an “other insurance” clause in a landlord’s policy which declared the policy excess “over other” “valid and collectible insurance... [if the landlord was] added as an additional insured under any other policy.”

ATTORNEY DISQUALIFIED FROM REPRESENTING PLAINTIFF AGAINST FORMER INSURER CLIENT: An attorney and his law firm were disqualified from representing an insured of Fireman’s Fund Insurance Company (FFIC) in a lawsuit against FFIC alleging “bad faith” and breach of insurance contract because the attorney had previously represented FFIC. Surprisingly, a previous relationship with the defendant insurer does not automatically result in disqualification; rather a “substantial relationship” must exist between the subject of the former representation of the defendant and the subject of the current plaintiff’s litigation. In granting the motion to disqualify, the Fifth District Court of Appeal in the case styled Farris V. Fireman’s Fund Insurance Company, (2004) 119 Cal.App.4th 671, 14 Cal.Rptr.3d 618, found the required “substantial relationship” because during the 13 year relationship with FFIC and while a member of a different law firm, the attorney (and his previous firm) provided coverage and claims handling advice to senior employees and decision makers at FFIC, including settlement, litigation and claims handling strategies in connection with coverage matters, and participated in confidential communications with top-level FFIC employees. The attorney, while with his previous firm, had also been a presenter in educational seminars given to FFIC employees on issues related to coverage disputes and bad faith actions. The Court concluded that given the factual and legal issues in the present case, the information material to the evaluation, prosecution, settlement, or accomplishment through the attorney’s earlier representation of FFIC

was also material to the evaluation, prosecution, settlement, or accomplishment of the current representation.

INFERIOR WORK PERFORMED OR DEFECTIVE IN WORKMANSHIP IS NOT COVERED “PROPERTY DAMAGE”: F&H had contracted with Contra Costa Water District in September 1994, to build a water facility pumping plant. F&H entered into a subcontract with O’ Reilly for the manufacture and delivery of A-50 grade steel pile caps. O’ Reilly instead delivered A-36 steel, which was a lesser grade of steel that had a lesser load capacity. F&H did not discover that the steel caps were of a lesser grade until it had already welded the majority of the caps into place. As a consequence F&H was required to perform modifications to reinforce the steel caps so as to provide the needed reinforcement to meet design requirements. The project was completed on time and no liquidated damages were assessed against F&H for the change in design. F&H filed suit against O’ Reilly seeking recovery of damages in excess of \$200,000 for the costs of modifying the pile caps and the lost bonus for early completion of the project. After suit was filed O’ Reilly filed a petition for bankruptcy which automatically stayed F&H’s suit. The bankruptcy court granted F&H’s petition to lift the stay for the limited purpose of pursuing the civil action to obtain O’ Reilly’s insurance assets. F&H then filed suit against Hartford, F&H’s insurer, for damages and breach of contract seeking \$243,064.37 for “property damage” under the CGL policy. In F&H Const. v. ITT Hartford Ins. Co. of the Midwest, (2004) 118 Cal.App.4th 364, 12 Cal.Rptr.3d 896, the Third District Court of Appeal held that a third party failed to establish it suffered covered “property damage” within the meaning of the insured’s comprehensive general liability insurance policy (“CGL policy”) when the loss arose from inferior work performed for the third party or defective in workmanship. In analyzing California law regarding the interpretation of “property damage” under the CGL policy, the appellate court determined that the damages claimed by F&H – “the costs of modifying the pile caps and the lost bonus for early

completion of the project” – were not recoverable as property damage because they were intangible economic damages rather than damages “to tangible property.” The court also noted that a liability insurance policy is not designed to serve as a performance bond or warranty of a contractor’s product.

INSURER’S RIGHT TO REIMBURSEMENT OF DEFENSE COSTS: The California Supreme Court has granted a petition for review of an unpublished decision styled Scottsdale Ins. Co. v. MV Transportation, Inc., et al., (2004) 2004 WL 726816, which precluded an insurer from recovering defense costs incurred in an underlying action. In the underlying action, plaintiff alleged the insured misappropriated trade secrets. Scottsdale sought to protect its right to seek reimbursement of defense fees and therefore agreed to defend under a reservation of rights. The underlying suit settled with the insured agreeing to return materials containing plaintiff’s alleged trade secrets. Neither Scottsdale nor the insured were required to pay any money to the plaintiff. Scottsdale then sought recovery of its defense fees in a declaratory action. The trial court denied Scottsdale’s motion for summary judgment, concluding it owed a duty to defend under its policies’ advertising injury coverage. The Court of Appeals agreed, concluding “advertising injury” coverage was not limited to injury from widespread promotional activities directed to the public at large, but instead included the insured’s one-on-one business solicitations. The California Supreme Court granted review, however, and remanded the matter to the Court of Appeals for reconsideration in light of Hameid v. National Fire Insurance of Hartford, (2003) 31 Cal.4th 16. On reconsideration, the Court of Appeals concluded that the claims made against the insured in the underlying suit were not covered under the policies’ advertising injury coverage and, therefore, no duty to defend was owed. However, the Court nevertheless found Scottsdale could not recover its defense fees because Scottsdale had elected to

Continued on page 10

Insurance Law

Continued from page 9

defend the insured and failed to "exercise its exit option" of withdrawal from the defense. The California Supreme Court has granted Scottsdale's petition for review of this ruling.

INSURED'S RIGHT TO ATTORNEYS' FEES IN DEFENDING APPEAL FROM BAD FAITH JUDGMENT: Applying its interpretation of California law, the Ninth Circuit Court of Appeals held that an insured may recover attorneys' fees incurred in successfully defending an appeal from a bad faith judgment against an insurer. In *McGregor v. Paul Revere Life Ins. Co.*, (2004) ___ 9th Cir. ___, 04 C.D.O.S. 4485, after a jury found that Paul Revere Life Insurance Company breached its insurance contract with McGregor and

therefore committed "bad faith," Paul Revere unsuccessfully appealed. McGregor then moved for attorneys' fees incurred while defending against the appeal. In deciding this issue, the Ninth Circuit looked to *Brandt v. Superior Court*, (1985) 37 Cal.3d 813, 210 Cal.Rptr. 211. In *Brandt*, the California Supreme Court held that if an insured proves "bad faith" the insured may collect attorneys' fees reasonably incurred to compel payment of insurance policy benefits. The *Brandt* case was silent as to whether an insured may collect attorneys' fees incurred in successfully defending against an appeal. Treatment of that question is mixed throughout California. In predicting how the California Supreme Court would rule, however, the Ninth Circuit held that McGregor was able to collect the fees. Because McGregor proved

Paul Revere's "bad faith" at trial and McGregor would have been unable to collect her policy benefits unless she successfully defended against the appeal, the Ninth Circuit reasoned that allowing McGregor to collect attorneys' fees was consistent with the logic in *Brandt*.

James M. Roth is a shareholder in The Roth Law Firm. Mr. Roth's practice includes representing TPAs and insurance carriers in coverage, SIU, extra-contractual liability, and third party defense matters.

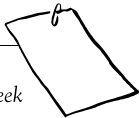


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EXTRA!!! Member News EXTRA!!!

Thank You . . .

. . . to **S.C. Wright Construction** and **MacroPro** for graciously underwriting a portion of the FIRST ANNUAL SDDL/Barrister's Club Joint Happy Hour which was a blast! The event was held on May 27th at Galileo 101 in the Harbor Club. Memorial Day was kicked off in style by members from both organizations.

Margaret Byrne has opened the **Law Offices of Margaret M. Byrne** and is located at 9747 Business Park Avenue, Suite 210, San Diego, CA 92131. The office contact info is: 858.578.8913 voice; 858.578.8919 fax and Email: mbyrne@mbyrnelaw.com

Farmer & Case is pleased to announce that **John M. Fedor**, formerly of Frank & Freedus, has joined the firm as a partner and **Alyson Taub** has joined the firm as an associate. John, who grew up in New Jersey is a 1990 graduate of the University of San Diego Law School and recent recipient of his FAA Private Pilot's License. He brings to Farmer & Case 14 years of litigation experience including areas of law including motor vehicle liability, premises liability, products liability, commercial litigation and disability access. Alyson, a recent bar admittee, holds a BA in Psychology from the University of Michigan and is a recent graduate of the University of San Diego School of Law. She has experience in construction defect, medical malpractice and employment law.

Members **Lili Mostofi** and **Thomas Byron** have opened **Byron, Hasenstab & Mostofi**, APC located at 402 W. Broadway, Ste. 1150, San Diego, California 92101. Their office contact info is: 619-400-5880 Main; 619-400-5881 Fax; www.bhmapc.com

Maxie Rheinheimer Stephens & Vrevich, LLP is pleased to announce that **Timothy H. Treadwell** has been made a partner of the firm. Tim continues to focus his practice on commercial real estate litigation, business litigation, medical malpractice and transactional work. The firm also announces the addition of two new "of counsel" to the firm. **Julian Jacobs, M.D.**, a clinical assistant professor of medicine at UCSD, joins the firm to specialize in the areas of medical and pharmaceutical malpractice, elder abuse, and medical board disciplinary actions. **David Cameron Carr**, former State Bar prosecutor, joins the firm to focus on the practice areas

of attorney errors and omissions, attorney discipline, conflicts of interest and legal ethics."

Law Offices of Kenneth A. Greenfield announce the addition of new associate **Virginia Lopez**. Virginia graduated from California Western in 1999, UCSD in 1994, and was in the United States Army and Army reserves from 1985 to 1992. Her practice focuses in civil litigation.



Neil, Dymott, Perkins, Brown & Frank is pleased to announce the addition of **Jessica Matulis** (pictured) and **Sommer Kenney** to the San Diego office as associates. Jessica joins the firm's employment law practice. She will be working on matters including administrative complaints, state and federal leave

laws, discrimination, harassment and preventative practice management. She graduated from University of San Diego School of Law and received a B.A. from Illinois State University. Sommer will focus her practice in the area of drug, medical device and biotech matters. She graduated from California Western of School of Law and received a B.A. from Florida State University.

The law firm of **Bacalski, Bailey, Koska & Ottoson, LLP** is pleased to announce that **Lane E. Webb** formerly of Lewis, Brisbois, Bisgaard & Smith, LLP, had joined the firm as a Partner. Mr. Webb will continue his practice in the areas of environmental and mass tort litigation, employment litigation, and representation of the automotive industry, in Los Angeles, Orange County and San Diego.

The Kennedy Law Firm proudly announces **Stuart D. Hirsch** and **James P. Souza** have become principles in the firm.

Maxie Rheinheimer Stephens & Vrevich, LLP opened a satellite office in North County on August 1, 2004 and is located at: 440 S. Melrose Drive, Suite 250, Vista 92081. The office contact info is: 760.536.0029. Resident attorneys this office are J. Dean Rice, Ann Marie Thompson and Alison J. Barry. The firm continues to maintain branch offices in Los Angeles and Sacramento as well as a Las Vegas affiliate, Sinkeldam & Shetler.

HOT CASES!!!



By Robert J. Walters
GRACE BRANDON
HOLLIS LLP

Since the beginning of the year, the appellate courts have rendered important decisions pertinent to SDDL members. Media-

tion work product is privileged, trial courts must do the math if it is going to award Brandt fees, and the 2-year statute of limitations that went into effect in 2003 was not to be applied retroactively. In the construction defect context, negligent performance of a contract is a contract cause of action, not a tort cause of action to which equitable indemnity may be claimed; developers may not recover attorney's fees when it did not pay the fees out of its own pocket (i.e., they were paid by subcontractors in settlement); successive home owners have standing to sue for construction defects that existed prior to purchase; sometimes resulting damage to the product itself may be enough; and express warranties may preclude an implied warranty claim (subject to further decision of the Supreme Court). In the employment law context, arbitration agreements will continue to be scrutinized closely for unconscionability and trial courts may not have authority to go beyond express statutory authorization to assist the arbitration process; and employers may be liable for sexual harassment committed by clients. In the medical malpractice context, the applicable statute of limitations based upon discovery is triggered by suspicion of

negligence; the \$250,000 cap on noneconomic damages applies to medical corporations even though they are not health care practitioners; and expert opinions not having a factual basis may not win that MSJ. A summary of these "hot" cases follows:

Cassim v. Allstate Ins. Co. (No. S109711) 2004 WL 1687866 (Cal. July 29, 2004). The insured plaintiffs brought action against homeowners' insurer to recover for bad faith failure to pay for property loss. The Los Angeles County Superior Court entered judgment on jury verdict in favor of the insureds and awarded the Cassims \$1,193,533 in fees under *Brandt v. Superior Court* without explaining how it determined the figure. The amount due on the Cassims' policy was \$40,856.40 and they agreed to pay their attorney a 40 percent contingency fee. Allstate appealed and the Court of Appeal reversed. The California Supreme Court granted review and reversed, holding that the trial court abused its discretion in failing to properly apportion award of attorney fees to insureds. The *Brandt* case established an exception to the general rule that each party is responsible for her own attorney fees. This court indicated that tort liability for damages caused by an insurer's bad faith may include the insured's cost to hire an attorney to recover under the policy. As such, the recovery was to be limited to fees attributable to the attorney's efforts to obtain the rejected payment due. That award, in a contingency arrangement, may exceed the attorney's percentage of the amount owing, because the attorney's work to recover the policy

payment may exceed her percentage under the policy. Based on this, the Cassim's award was properly not limited to 40 percent of \$40,856.40. If the award was thus limited, the Cassims would not receive the full measure of their policy benefits. However, since this court failed to determine the total hours spent on the case and the percentage of those hours spent on contract recovery, its award was an abuse of discretion.

Krupnick v. Duke Energy Morro Bay, L.L.C. (2004) 115 Cal.App.4th 1026, 9 Cal.Rptr.3d 767. In this case, an individual who fell on a company's premises on January 26, 2001, brought personal injury action against company on January 8, 2003. The San Luis Obispo County Superior Court sustained the company's demurrer on statute of limitations grounds and dismissed the action. The individual appealed and the Second District Court of Appeal held that statute extending limitations period for personal injury actions from one year to two years did not operate retroactively. **NOTE:** This appears to be the first case indicating that the new 2-year statute of limitations enacted in 2002 does not apply retroactively.

Construction Defect Highlights

BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc. (2004) 14 Cal.Rptr.3d 721 In this case, the Porterville Unified School District hired BFGC Architects Planners to design a new high school. The District hired Forcum/Mackey Construction and S.C. Anderson Inc. (Anderson) to act as general contractors on the project. After the school was built, Anderson demanded several million dollars for construction delays caused by BFGC's defective design. The District purportedly spent \$6.1 million on the delays. The District then sued BFGC for breach of contract and professional negligence. BFGC filed a cross-complaint against Anderson, seeking equitable indemnity for Anderson's alleged negligence. A trial court dismissed the cross-complaint, finding that BFGC failed to allege a predicate tort to support its claim. The Fourth District Court of Appeals af-

firmed and held that for the doctrine of equitable indemnity applies among defendants who are jointly and severally liable to the plaintiff there must be some basis for tort liability against the proposed indemnitor. Generally, such liability is based on a duty owed to the underlying plaintiff. There are no facts to support BFGC's contention that Anderson owed a duty to the District. BFGC merely alleged that Anderson breached its duty by failing to comply with the terms of its contract with the District, which was considered a breach of contract claim, not a tort claim. The court indicated that there is no social policy that would call for the imposition of tort remedies and BFGC cannot recover in tort for alleged misconduct that merely restates contractual obligations. Thus, the Court held that BFGC cannot support its claim for equitable indemnity.

Bramalea California, Inc. v. Reliable Interiors, Inc. (2004) 119 Cal.App.4th 468, 14 Cal.Rptr.3d 302. In this case, Bramalea California Inc., a residential real estate developer, was sued by homeowners for construction defects. Bramalea's insurer, Zurich of Canada, hired counsel to provide a defense and file a cross-complaint against Bramalea's subcontractors based on equitable indemnity and breach of the subcontractors' agreements. Both the complaint and the cross-complaint were settled except for the issue of Bramalea's right to recover attorney fees incurred after it tendered its defense to the subcontractors, but before it tendered its defense to the subcontractors' insurers. The cross-complaint was dismissed by the court after a finding that Bramalea had not actually paid the attorney fees and therefore had no standing to recover them. The Fourth District Court of Appeal affirmed the trial court's decision and held that Bramalea was not entitled to recovery of attorney fees when it did not pay the fees out of its own pocket. The Court noted that Code of Civil Procedure Section 1032 provides that a prevailing party is entitled to recover litigation costs as a matter of right and Section 1033.5

includes attorney fees. Bramalea was not seeking to recover its attorney fees as a prevailing party in litigation. Although no liability was admitted, Bramalea and the subcontractors paid the homeowners in exchange for mutual releases of liability, with the exception of the indemnity claim. Bramalea's action was therefore for breach of contract. In addition, Bramalea admitted that its fees were entirely paid for by Zurich. Although the collateral source rule allows recovery even when the injured party has been compensated from a source independent of the wrongdoer, the rule applies to tort damages, not damages for breach of contract.

Siegel v. Anderson Homes, Inc. (2004) 118 Cal.App.4th 994, 13 Cal.Rptr.3d 462. In this case, plaintiff purchased a home unaware that it had several pre-existing defects. The roof, chimney and windows were installed improperly, causing water damage when it rained. Although the damage occurred almost immediately after construction, the seller was unaware of it when he sold the home to Plaintiff. Later, Plaintiff discovered the damage and sued the builder, Anderson Homes Inc., for negligence and strict liability. Anderson argued that Plaintiff lacked standing to sue because the damage occurred earlier and, thus, the cause of action belonged to the original owner. The trial court agreed and dismissed the complaint. The Fifth District Court of Appeal reversed and held that successive homeowners have standing to sue for construction defects that existed prior to purchase. The trial court ruled that a claim for construction defects accrues when the defect starts to cause property damage and belongs to whoever owns the property at the time. By this rationale, the act of selling the property limits the liability of the builder. However, the Court of Appeal indicated that this failed to take into account the owner's discovery of the damage. Plaintiff was considered the first owner to discover the defects. A distinction was made between damage to real property and damage to the owner's interest in the property. The

seller did not know about the water damage and, thus, suffered no economic harm. Under these circumstances, the Court of Appeal indicated that it would be manifestly unjust to deprive Plaintiff of a cause of action.

Mesa Vista South Townhome Ass'n v. California Portland Cement Co. (2004) 118 Cal.App.4th 308, 12 Cal.Rptr.3d 863. In this case, Mesa Vista South Townhome Association was responsible for maintaining a 40-unit condominium complex. The complex was built on soil with a severe sulfate condition, however, the cement used on the project was mixed with too much water, making the concrete porous and vulnerable to sulfate attack. Mesa Vista sued the concrete supplier for negligence. At the time of the lawsuit, the concrete slabs had submicroscopic damage. A trial court awarded Mesa Vista \$5.4 million in damages and supplier appealed. The Fourth District Court of Appeal held that a supplier of housing concrete that sustained submicroscopic damage may be liable for negligence. The Court of Appeal indicated that the economic loss rule bars damages in a negligence lawsuit when a product defect caused physical injury only to the product itself. California Portland argued that the sole damage was the submicroscopic damage to the concrete slabs themselves. However, the concrete had begun to decay, and the foundation would deteriorate over time creating a realistic risk of structural failure. Thus, the Court concluded based upon these factors, there was appreciable harm and Mesa Vista could recover damages on a negligence theory.

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Hot Cases

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Hicks v. Superior Court (2004) 8 Cal.Rptr.3d 703. In this case, homeowners brought causes of action for strict liability, negligence, and breach of express and implied warranty against developer, seeking to recover the cost of repairing or replacing defective concrete foundations under their homes. The Los Angeles County Superior Court granted developer's summary adjudication of breach of implied warranty claim and the homebuyers petitioned for a writ of mandate. The Second District Court of Appeal granted the petition and held that written disclaimers in sales and express warranty documents provided to home owners precluded their claim for breach of implied warranty. **NOTE:** The California Supreme Court granted a petition for review on May 12, 2004.

Employment Law Highlights

Fitz v. NCR Corp. (2004) 118 Cal.App.4th 702, 13 Cal.Rptr.3d 88. In this case, Plaintiff Nancy Fitz was employed with NCR Corp. from 1981 to 2001. She was terminated as part of a reduction in force. Plaintiff filed a complaint against NCR alleging age discrimination, breach of contract, breach of the covenant of good faith and fair dealing and fraud. NCR demurred to the complaint claiming that Fitz had waived her right to pursue her claim by failing to exhaust the arbitration remedies in accordance with the terms of NCR's employee-dispute resolution policy referred to as ACT. Fitz asserted that the arbitration agreement was unconscionable. The Fourth District Court of Appeal held that the arbitration clause in plaintiff's contract was unconscionable for failure to allow adequate discovery. Because the ACT policy placed Plaintiff at a disadvantage in proving her claim while NCR was likely to possess many of the relevant documents and employ many of the relevant witnesses, the arbitration agreement was unconscionable and invalid.

Martinez v. Master Protection Corp. (2004) 118 Cal.App.4th 107, 12 Cal.Rptr.3d 663. In this case, as a

prerequisite to his employment with Master Protection Corp. (FireMaster), Plaintiff Tony Martinez Jr., had to sign an agreement which provided all claims related to his employment would be subject to arbitration. Martinez was terminated. He sued FireMaster, alleging discrimination and wrongful termination. FireMaster moved to compel arbitration. The motion was granted and litigation stayed pending completion of arbitration. The American Arbitration Association refused to conduct the arbitration because the arbitration agreement did not satisfy its rules. The Los Angeles County Superior Court denied Martinez's motion to lift the stay and appointed another arbitrator. The Second District Court of Appeal reversed and held that the subject arbitration agreement was both procedurally and substantively unconscionable. The Court of Appeal also held that the lower court also lacked authority to appoint alternative arbitrator. The arbitration agreement was procedurally unconscionable because Plaintiff was required to sign it as a prerequisite to employment and had no opportunity to negotiate or refuse to sign it. The agreement was substantively unconscionable because, among other things, it lacked mutuality and it imposed costs on an employee which he would not be required to bear in a judicial forum. In addition, because the arbitration agreement required arbitration take place before an AAA forum, Code of Civil Procedure 1281.6 prohibited the trial court from choosing an alternative arbitrator.

Salazar v. Diversified Paratransit, Inc. (2004) 117 Cal.App.4th 318, 11 Cal.Rptr.3d 630. Plaintiff, a former employee, who was repeatedly sexually harassed by a passenger during course of her employment as driver of bus that transported developmentally disabled individuals, brought action against employer and supervisor, alleging sexual harassment in violation of the Fair Employment and Housing Act (FEHA), constructive discharge in violation of public policy, and intentional and negligent infliction of emotional distress. On remand, the Court of Appeal held that amendment to FEHA was clarification

of existing law, which governed former employee's action. Thus, an employer may be liable under Fair Employment and Housing Act for sexual harassment committed by clients.

Medical Malpractice Highlights

Knowles v. Superior Court (2004) 118 Cal.App.4th 1290, 13 Cal.Rptr.3d 700. In this case, on November 20, 2000, Anatalio Labo was admitted to Green Hospital and Physician Harry Knowles performed a renal arterial stenting. Labo died on November 24, 2000 while he was hospitalized. The real parties in interest (Labo's wife, daughter and sons) brought claims against Knowles for wrongful death resulting from professional negligence on November 6, 2002. Dr. Knowles moved for summary judgment claiming the actions were barred by the applicable statute of limitations, which was denied by the San Diego County Superior Court. The Fourth District Court of Appeal granted a writ and held that the statute of limitations period in wrongful death case was triggered when medical negligence was first suspected. Code of Civil Procedure Section 340.5 provides that the applicable SOL is one year after the plaintiff discovers the injury. Suspicion of negligence suffices to trigger the limitations period. Here, the plaintiffs suspected negligence associated with Labo's death shortly after he died on November 24, 2000. However, they claimed the SOL did not begin to run when they suspected the negligence, but rather, began when they specifically suspected Dr. Knowles's negligence. The Court rejected this argument because the plain language of Section 340.5 states that it is discovery of the "injury" that triggers the limitations period. Accordingly, the lawsuit against Dr. Knowles was barred because it was filed nearly two years after the negligence was suspected.

Lathrop v. Healthcare Partners Medical Group (2004) 114 Cal.App.4th 1412, 8 Cal.Rptr.3d 668. In this case, Terry and Douglas Lathrop sued HealthCare Partners and several of its

physicians alleging medical malpractice in the failure of the physicians to diagnose Terry's breast cancer. The jury found the physicians liable. Terry was awarded \$403,055 in economic damages and \$1.218 million in non-economic damages, and Douglas was awarded \$300,005 in non-economic damages, all attributable to the negligence of HealthCare. HealthCare appealed and challenged the court's decision not to apply a \$250,000 damages cap to the judgments in accordance with the Medical Injury Compensation Reform Act (MICRA). The First District Court of Appeal held that although a medical group was not a "health care provider" under MICRA, the liability of medical group, as employer of physicians, was limited under doctrine of respondeat superior to the \$250,000 cap on non-economic damages set by MICRA.

Bushling v. Fremont Medical Center (2004) 117 Cal.App.4th 493, 11 Cal.Rptr.3d 653. In this case, Patient who had experienced shoulder pain following gall bladder surgery sued surgeon and anesthesiologist for negligence. The Sutter County Superior Court granted defendants' motions for summary judgment. Patient appealed. The Third District Court of Appeal held that (1) patient's medical experts' declarations lacked evidentiary value, and (2) patient was not entitled to continuance to conduct further discovery. The Court indicated that an expert opinion may not be based on assumptions of fact without evidentiary support or based on speculative, conjectural factors. An opinion rendered without a reasoned explanation of why the facts lead to a conclusion has no evidentiary value. The experts assumed the causes from the fact of Bushling's injury. Their declarations had no evidentiary value on the question of negligence or causation. Bushling failed to establish a triable issue of material fact.

SAVE THE DATE !

Lawyers and Judges Needed for the 14th Annual San Diego Defense Lawyers Mock Trial Competition October 21 – 23rd, 2004

Save the evenings of Thursday October 21st and Friday October 22nd to support San Diego Defense Lawyers 14th Annual Mock Trial Competition! Law students from schools throughout California, and teams from as far away as New York, will be competing in this year's competition.

Attorneys and Judges are needed to serve on three judge panels at the downtown Superior Court. The Mock Trial will be a civil case with brief testimony from live witnesses. The law students are typically the finest advocates from their schools, and many perform at a remarkably high level in the courtroom. This tournament is very important to the students, and it provides an opportunity for established lawyers to help teach the art of courtroom advocacy.

Having volunteer judges is essential to the continued success of this program. If you can serve on a three judge panel please call or fax Sandee Rugg of SDDL at 858-546-5254 or srugg@waltonbiz.com. If you have any questions about the tournament, please call SDDL Board Member Michelle Van Dyke at (619) 233-8824.



L to R: Steve Polito, Dennis Aiken, Dino Buzunis, Scott Barber, Billie Jaroszek, Kelly Boruszewski, Martha Dorsey, Michelle Van Dyke, Sean Cahill and John Farmer. Not Pictured: Ken Greenfield

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Membership is open to any attorney who is primarily engaged in the defense of civil litigants. Membership dues are: \$ 90 for attorneys in practice less than one year and \$120 for attorneys in practice more than one year. Applications are available on the web at www.sddl.org.

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We welcome the submission of articles by our members on topics of general interest to our membership. Please submit material to:

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Contact Dino Buzunis at 619-238-1712 or
print out sponsor form at www.sddl.org*

*Friday, October 1, 2004 at 12:30 pm (check-in at 11:00 am)
THE AULD COURSE in Chula Vista
This is a great chance to relax and have fun with
friends and business associates. So come and bring a guest!*

*Call Dino Buzunis at 619.238.1712
for more information.*

Number of Golfers: _____ x \$125 or \$500 per foursome

Name(s): _____

Please Make Checks Payable to:

Firm/Company Name: _____

*San Diego Defense Lawyers
P.O. Box 927062
San Diego, CA 92192*

Address: _____

Telephone: _____ Fax: _____

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