

The Update

Fall 2007

San Diego Defense Lawyers

In This Issue

Presidents's Message	2
Bottom Line	2
June Evening MCLE Summary	3
Edifications	4
Member Spotlight	5
Insurance Law	6 – 9
Employment Law	10 – 11
Remembering Judge John S. Rhoades	11
June Brown Bag Summary	12
July Brown Bag Summary	13
Did You Know. . .?	15
SDDL Golf Benefit Recap	16
Words, Words, Words	19
Hidden Liability for Customer's Attorney Fees in Standard Vehicle Sales Contracts	20 – 21
Super Lawyers of San Diego 2007	22 – 23
SDDL Member "Summer Fun" Photos	24 – 25
Leave Your Bar Card at the Door, Or Jury Duty is No Place for a Lawyer	26 – 27
Stutz Artiano Shinoff & Holtz Protect the Tort Claims Act from the Sexual Abuse Revival Statutes	28 – 29
Members in the News	30

The Bottom Line

Case Title: Espie v. Farrell

Case Number: N/A

Judge: (Arbitrator) William Tucker

Plaintiff's Counsel: Frank Cuykendall

Defendant's Counsel: Matthew Butler,
Nicholas & Butler LLP

Type of Incident/Causes of Action: Real Estate Sales. Claimant purchased rental property from Ceasar Farrell in 2004. Claimant asserted that Mr. Farrell failed to disclose and/or misrepresented the condition of the roofs of the two buildings on the property, the plumbing in both buildings, and the windows of the buildings. In addition Claimant asserted that Mr. Farrell failed to disclose dry rot in one of the buildings. Mr. Farrell contended that he adequately disclosed the condition of the property, and that the Claimant suffered no damage.

Settlement Demand: \$50,000

Settlement Offer: None

Trial Type: Arbitration

Trial Length: 1 day

Verdict: Defense. Arbitrator awarded attorneys fees and costs in accordance with the real estate purchase agreement.

Case Title: Lindsey Kalal v. Roger A. Barnes, M.D. et al

Case Number: GIC 855813

Judge: Honorable Judith Hayes

Plaintiff counsel: David D. Miller

Defendants' counsel: James D. Boley of Neil Dymott Frank McFall & Trexler and James J. Wallace (Dr. Fenn)

Type of Incident/Causes of Action: Medical Malpractice/Informed Consent - Administration of general anesthesia during KTP turnbinoplasty/septoplasty

Settlement demand: \$250,000

Settlement offer: None

Trial Type: Jury trial

Trial length: 6 days

Verdict: Defense verdict for both physicians

PRESIDENT'S MESSAGE



We have a couple of important events coming up in October in which I hope our members will participate. The first event is the annual Mock Trial Competition. Every year this competition has grown bigger and bigger. This year we literally have a National flavor as we have teams from across the country participating. As always, we are looking for defense attorneys to help judge. We look for any and all volunteers to help ensure every competition is properly judged. This year's competition is October 11 through October 13, 2007. If you can help judge, please contact Sandee Rugg at 619-744-0569 or srugg@waltonbiz.com.

The next event available to our members is actually a joint program with the Association of Southern Defense Counsel. We are sponsoring an educational seminar on defending high exposure cases. Robert Baker (who defended O.J. Simpson as well as many other high exposure cases) has agreed to be one of our speakers. Rounding out our panel of speakers are Glynn Bedington (Presentation Consultant), Linda Olzack (Life Care Planner) and Pat Farber (from Ringler & Associates).

This seminar will be held on October 27, 2007 at the Temecula Creek Inn. We have secured a block of rooms for Friday evening, October 26, 2007 for individuals who do not want to drive up for a Saturday morning seminar. A cocktail reception hosted by Ringler & Associates will be held on Friday evening. We have also blocked off tee times for those interested in hanging around the resort following the MCLE. If you are interested in attending this program, please contact Sandee Rugg at srugg@waltonbiz.com or 619-744-0569. Further, you can book your room directly with Temecula Creek Inn at (951) 694-1000.

Lastly, we are reaching that time of year where we will elect a new board for the San Diego Defense Lawyers. You should expect to receive your nomination forms in a few months. If you, or someone you know, should be on the board, please make sure to submit the nomination. It is a rewarding experience.

Clark Hudson

23rd Annual Red Boudreau Trial Lawyers Dinner

This year's dinner was held at the U.S. Grant Hotel and will benefit Children's Services at St. Vincent de Paul Village and programs at Toussaint Academy of the Arts and Sciences. This annual affair is hosted by San Diego Defense Lawyers, Consumer Attorneys of San Diego, American Board of Trial Advocates and Association of Business Trial Lawyers. Attorney Cynthia Chihak was awarded the Daniel T. Broderick III Award. Several board members were in attendance.



Front row from left to right: Brian and Kim Rawers, Ken Greenfield and Sylvia Palomo, Randy and Molly Nunn
Back row from left to right: Jim Boley, Lori and Bill Guthrie, Eric Miersma and Julia Cline

SDDL June 27th Evening MCLE "Crunchtime, Trial Preparation for the Young Attorney"

By: Andrew Chivinski, Esq. of Neil, Dymott, Frank, McFall & Trexler

On June 27th, a spirited panel of experienced attorneys and the Honorable Wayne L. Peterson (Ret.) shared strategies and

advice on trial preparation with a focus on the critical thirty days before trial call. Defense attorneys Craig Mann and Jim Boley and Consumer attorney Sean Simpson gave varying perspectives from both sides of the podium, discussing trial notebooks and exhibits, client and witness preparation and other tips designed to keep the trial lawyers organized and looking his or her best before the Court and the jury. Sean Simpson shared his Model Trial Notebook, in which he compiles exemplars, outlines and articles pertaining to each phase of the trial. He also provided advice to ensure that the attorney has the "command of information" necessary to save precious time when appearing in the courtroom. In trial, seconds count and an inability to find something, either testimony or a document, will result in a lost opportunity. Jim Boley discussed client preparation from both substantive and procedural standpoints. Every client must understand the key substantive issues at stake and be versed in what will take place inside the courtroom. All eyes will be on the client and he or she should understand that they are "on stage" while testifying, but also while sitting at counsel table. Craig Mann explained the importance of preparing lay or percipient witnesses, who generally have a limited understanding of why they are even needed at trial. One challenge may be getting such a witness down to the courthouse. These witnesses may need to be coaxed or forced to testify, which raises a whole new set of issues. Judge Peterson discussed the trial readiness conference and the importance of taking it "seriously". The TRC report is a foundation for trial, much like a concrete floor for a

newly built home. Careful thought and attention to detail will bode well for the lawyers, as every judge knows who the lawyers are that spend the time necessary to truly comply with the Courts' orders. A realistic list of witnesses and exhibits will assist the Court in its efforts to properly manage the case and place it in perspective with the entire case load. Judge Peterson also explained that motions in limine should be carefully selected and not just filed for the sake of filing them. Standard motions in limine (such as on insurance information of the parties) should not be filed and will only serve to identify the attorney as inexperienced.

Judge Peterson discussed the role of expert witnesses and their "overuse" in many actions. Evidence Code section 801 defines the scope of expert testimony as testimony that is "sufficiently beyond common experience" of lay persons. Accordingly, expert witnesses should not be used in every case, merely as a means of bolstering lay evidence. Much material was covered in an evening program, but all agreed that the panelists did a great job of offering useful and practical advice. Thanks again to all of the panelists!

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The Bottom Line

Case Title: Jimmie Martin vs. Lorenzo Hurtado Suarez, M.D., and Imperial Valley Family Care Medical Group and Does 1-100, Inclusive

Case Number: ECU03178

Judge: Honorable Christopher W. Yeager

Plaintiff's Counsel: Joseph and Beverly Nemetz

Defendant's Counsel: Sheila S. Trexler, Esq. and Jessica Mitchell, Esq. of Neil Dymott Frank McFall & Trexler

Type of Incident/Causes of Action: Medical Malpractice - Failure to Diagnose Colon Cancer

Settlement Demand: None

Settlement Offer: None

Trial Type: Judge

Trial Length: 4 days

Verdict: A motion for non-suit was granted. Plaintiff's causation expert, Dr. Sabina Wallach, presented testimony consistent with a last chance theory which is not recognized in California.

Case Title: Hamzey v. Berger

Case Number: GIC870587

Judge: Honorable Jay Bloom

Plaintiff's Counsel: James J. Filicia, Esq.

Defense Counsel: Clark Hudson, Esq. of Neil, Dymott, Frank McFall & Trexler

Case Type: Alleged Medical Negligence, Lack of Informed Consent and Battery arising from Orthognathic surgery for sleep apnea.

Trial Type: Jury

Length of Trial: 7 Days

Verdict: Defense 12-0 Medical Negligence, 11-1 Lack of Informed Consent, and 10-2 Battery.

Case Title: Holley v. Cassidy Medical Group

Case Number: GIN053109

Judge: Honorable Lisa Guy-Schall

Plaintiff's Counsel: Joseph Maiorano, Esq.

Defendant's Counsel: Michael J. Grace, Esq., Grace Hollis Lowe Hanson & Schaeffer, LLP

Type of Incident/Causes of Action: Medical negligence

Settlement Demand: 998 demand- \$249,999; second 998 issued one month before trial- \$149,000

Settlement Offer: 998 offer- dismissal in exchange for waiver of costs

Trial Type: Jury

Trial Length: 5 days

Verdict: Defense

Edifications

What's In A Name (A rose is a rose is a rose, or something like that)

by Lori J. Guthrie, Esq., Editor

A few weeks ago, I was at a party and my husband mentioned he had read an article in the UT about names and trends in baby naming. One thing he mentioned about the article was that the author said people named Lori are likely to become lawyers. Being that my name is Lori and I am a lawyer, my interest was piqued. I promptly went home and attempted to locate the article in our recycling bin, but being ever so efficient, it had already been recycled and I was not about to go dumpster diving for something I could likely easily find on the internet. So my search began.

I was able to find the article, titled "Say goodbye, George and William" (William (Bill) is my husband's name) by David Brooks from The New York Times. The actual quote from the article is "People named Lawrence or Laurie are disproportionately likely to become lawyers." While I am not sure what that is based on, or if there is any merit to it, I thought I'd check out the California Bar's website to see just how many lawyers were named Laurie (210), or Lori (304), or Lauri (22), or Lorie (17), or Lory (3), or Laura (759), or Lauren (221), or Lauren (84)), for a grand total of 1,707. This doesn't seem like that big of a number to me considering there are 211,782 members of the California State Bar (I did not distinguish between active/inactive/deceased). But then there were an almost equal number of lawyers named Lawrence (1,045) or Larry (445). However there are 5,807 members named William, Will, Wil, Bill or Billy. So I'm not sure why the author is saying goodbye to William.

I also searched the internet to see what my name "meant." Behindthename.com said Lori is a "pet form" of Laura and Lorraine. The same website said Laura means "laurel." In ancient Rome, laurel tree leaves were allegedly used to create garlands for victors. Also, apparently St. Laura was a 9th century Spanish nun "who was thrown into a vat of molten lead by the Moors". I also found another website called babynamaddicts.com which appears to be some type of website where users "vote" on certain characteristics about a name. When I put in my name, 27 of 45 responses said they "loved" the name; 10 of 45 said they envisioned the age group as 40-44 (this was the most chosen response, and in my case is correct). Interestingly, the most chosen profession for this name was doctor/nurse (5 of 45) (only 1 out of 45 responses chose lawyer, which seems odd in light the above-mentioned article). When I did the same thing for the name Laurel, only 3 out of 35 thought the age group was 40-44, with the most (7 of 35) choosing ages 15-19. The most chosen occupation for this one (at 5 of 35) was . . . a stay at home mom. Not likely for a person who is destined to be a lawyer.

P.S. No one sent me any songs they like containing lyrics regarding lawyers, so I've nothing to print about that. However, if you feel the need to vent about anything you see in The Update, please email me at lguthrie@gracehollis.com.



Office: 619-624-0405
1565 Hotel Circle South #380
San Diego, CA 92108

Offices in Mission Valley
Rancho Bernardo & Del Mar

www.cprgrouphomes.com
cprgroupre@aol.com

Paul Smith
President/CEO
Realtor

Cell: 619-300-3255



David Hallett

Current Firm: Grimm Vranjes McCormick & Graham, LLP

Education: B.A. Economics (minors in Philosophy and English Literature) - University of California, San Diego (1997); J.D. - California Western School of Law (Magna Cum Laude) (2002)

Practice Areas: Insurance Coverage Analysis/Litigation; Civil Litigation - construction related accidents, premises liability, general personal injury, professional liability, and employment/wrongful termination.

Professional Affiliations: San Diego Defense Lawyers, San Diego County Bar Association, Christian Legal Society, State Bar of California, and the Southern and Central United States District Courts.

Favorite Website: I Google everything.

Favorite authors: Since we had our son, my reading activity has changed slightly. Currently, I'd have to say "Bedtime with Nightlight" by Susan Lingo is a top contender.

Favorite TV shows: Last Comic Standing, Scrubs

Favorite activities: Playing with my son, travel and anything in the water.

Personal: I am a native Southern Californian. I come from a large family, born the second oldest of six siblings. I have five lovely sisters (yes, the only boy!). I recently celebrated my five year wedding anniversary with my wonderful wife, Jaime. My son, Josiah, was born 15 months ago and my wife and I expect the next addition to the family at the end of November. The best part of my day is when I arrive home and hear my son squeal, "Daddy" as he runs to the door to greet me . . . of course, as I'm sure you can imagine, law and motion is a close second.

**Elizabeth Skane**

Current Firm: Jampol Zimet Skane & Wilcox, L.L.P. (Partner)

Education: B.S. Foreign Service – Georgetown University (1993); J.D. – University of San Diego (1996)

Practice Areas: Insurance Defense (primarily bodily injury and construction defect)

Professional Affiliations: San Diego County Bar Association; State Bar of California; State Bar of Nevada; Nevada Trial Lawyers Association; American Bar Association; Association of Southern California Defense Counsel; San Diego Defense Lawyers

Favorite authors: Too many to list

Favorite T.V. shows: Reality T.V. shows (I am embarrassed to disclose my favorite)

Favorite websites: youtube.com (I can surf there for hours)

Favorite activities: Travel and running

Favorite Travel Destination: Any place most people consider more "exotic." We recently went to Mozambique, on the coast of Africa. Last year we also spent time in India, Botswana, Zambia, South Africa and Zimbabwe.

Personal: Born in Kampala, Uganda, East Africa, the youngest of nine (9) children. We lived in many countries in Africa due to my dad's employment with Exxon. When he retired, we moved back to the U.S. I am married to a wonderful man, South African by birth, American by choice, named Ryan Clive-Smith. I have a beautiful daughter named Lindsay, who just turned one (1).

**Deanna Wallace**

Current Firm: Lorber, Greenfield & Polito, L.L.P.

Education: B.S. Business Administration – California State University, Fresno (cum laude, 1999); J.D. – University of San Diego (2004)

Practice Areas: Construction Defect

Professional Affiliations: San Diego County Bar Association; State Bar of California; American Bar Association; San Diego Defense Lawyers

Favorite authors: Ann Rule, John Grisham

Favorite T.V. shows: The Shield, CSI, Two and a Half Men

Favorite websites: snopes.com, msnbc.com

Favorite movies: Pulp Fiction, Good Will Hunting, Bull Durham

Favorite activities: Baseball/softball, playing with my English Bulldog Huckleberry, hanging out with friends and family

Personal: Born and raised in Orange County, California. I met my husband while we were both Resident Advisors in the dorms at CalState Fresno. I live in San Diego with my husband—our first child is due in December.



Member Spotlight



The Bottom Line

Case Title: Ghobrial, Karim vs. Wawanesa General Insurance Company

Case Number: GIC867533

Judge: Honorable Joan M. Lewis

Plaintiff's Counsel: Charles Woods, Esq.

Defendant's Counsel: Kenneth N. Greenfield, Esq. and Alexandra N. Selfridge, Esq., Law Offices of Kenneth N. Greenfield

Type of Incident/Causes of Action: Insurance- Alleged Breach of Contract, Insurance Bad Faith, Fraud

Settlement Demand: \$280,000 (highest demand)

Settlement Offer: \$15,000 (highest offer)

Trial Type: Jury

Trial Length: 8 days

Verdict: Defense (11-1)

Other: One of the tasks given to the jury was to determine whether or not "wind" was the efficient proximate cause of the loss. Having found that the efficient cause of the loss was NOT "wind," the jury was required under the Special Verdict Form to sign and date the form and return it to the Court.

Case Title: Breckenridge, William vs. Christopher Morales

Case Number: GIC866678

Judge: Honorable Richard E.L. Strauss

Plaintiff's Counsel: Robert W. Harrison, Esq. of Koeller, Nebeker, Carlson & Haluck

Defendant's Counsel: Scott D. Schabacker, Esq. of Law Offices of Scott D. Schabacker

Type of Incident/Causes of Action: Personal injury/negligence (automobile accident)

Settlement Demand: \$50,000

Settlement Offer: \$10,001

Trial Type: Jury

Trial Length: 4 days

Verdict: Defense

Case Title: Zurcher v. Saenz, M.D.

Case Number: GIC 846395

Judge: Honorable Ronald S. Prager

Plaintiffs' Counsel: Alan Geraci, Esq. and Stephen F. Lopez, Esq.

Defendant's Counsel: Daniel S. Belsky, Esq. of Belsky & Associates

Type of Incident/Causes of Action: Medical Malpractice / Wrongful Death

Settlement Demand: N/A

Settlement Offer: N/A

Trial Type: Jury

Trial Length: 8 days

Verdict: Defense (09/10/07)

INSURANCE LAW



James R. Roth, Esq.
The Roth Law Firm

In this edition we review recent case law which affirms that there is no coverage when the loss is only economic, that automobile insurance policies obligating the carrier to repair the damaged vehicle to

pre-accident condition does not require the auto carrier to provide repairs based on the insured's view of "industry standards," that an umbrella carrier has no duty to drop down and defend the insured in a construction defect suit when there is at least one primary carrier available to defend (even though the prior property damage was not covered under primary carrier's policy), and affirmation of the well established principle that an insurer must defend a suit which potentially seeks damages within the coverage of the insurance policy.

INSURER HAD NO DUTY TO INDEMNIFY INSURED COMMERCIAL LANDLORD UNDER CGL POLICY'S "OCCURRENCE" BASED COVERAGE, WITH REGARD TO LESSEE'S ACTION AGAINST INSURED FOR BREACH OF LEASE; COVERAGE DEPENDS ON THE EXISTENCE OF SOME PROPERTY DAMAGE, BUT ALLEGATIONS IN LESSEE'S COMPLAINT RESTED ENTIRELY ON INSURED'S ALLEGED BREACH OF THE LEASE AND THE RESULTING ECONOMIC DAMAGE. *In Golden Eagle Insurance Corp. v. Cen-Fed, Ltd.* (2007) 148 Cal.App.4th 976, 56 Cal.Rptr.3d 279, the Second District Court of Appeal, affirmed a trial court judgment finding the insurer had no duty to defend or indemnify its insured in an action brought by a lessee against the insured lessor. Cen-Fed, Ltd., the insured of Golden Eagle, leased commercial building property to Washington Mutual Bank ("WaMu" – is it just me or is that name kinda cool). The leased premises included the first floor and portions of the basement. In part, the lease required Cen-Fed, Ltd. to maintain the structural elements of the building in a first class condition, keep the leased premises and the common areas in a clean and sanitary condition, and maintain, for WaMu, a certain number and type of parking spaces. Under the lease, WaMu was entitled to cure or cause to be cured any failure by Cen-Fed, Ltd. to comply with its lease obli-

gations, and deduct that cost from WaMu's rental obligation. Like all well drafted lease agreements, there was an attorney's fee clause. WaMu sued Cen-Fed, Ltd. for breach of the lease and declaratory relief, alleging that Cen-Fed, Ltd. had "failed to maintain and repair the [leased premises] in accordance with the terms and conditions of the lease" thereby depriving WaMu of a part of its leased space, which required WaMu to move its safe deposit boxes from the basement to the first floor, thereby decreasing the number of boxes WaMu was able to rent out, and further deprived WaMu of the use of that first floor space for other purposes. WaMu's complaint also alleged that the air conditioning, elevator service, and basement restrooms were not in good working order; the landscaping, common areas, interior walls and painting were not maintained to the extent required by the lease; and Cen-Fed, Ltd. did not meet its obligations regarding parking.

The Court of Appeal upheld the trial court's decision that Golden Eagle had no duty to indemnify Cen-Fed, Ltd. because WaMu's allegations against Cen-Fed, Ltd. did not claim "property damage" or "physical injury to tangible property." Rather, the entire claim rested on Cen-Fed, Ltd.'s alleged breach of lease and the resulting economic damages as evidenced by the jury's finding of diminution in the value of the lease. Additionally, the Court held that the acts of Cen-Fed, Ltd. which led to its failure to fulfill the lease were not the result of a fortuitous accident and thus could not have resulted in an "occurrence." The Court also upheld the trial court's finding that there was no "personal injury" coverage for wrongful eviction/entry into/invasion because it only applies to "persons" occupying the premises and not "persons and/or organizations." The Court reversed the trial court's finding that because Golden Eagle had defended Cen-Fed, Ltd., it had an obligation to pay those costs of suit despite its finding that there was no coverage under the policies and no duty to defend. The Court held that the trial court was incorrect because WaMu's pleadings in the underlying action did not raise a potential for coverage and no claims were asserted at any time except those for breach of lease and the resulting contract damages. Because Golden Eagle never had any duty as a matter of law to indemnify Cen-Fed, Ltd. for the claims by WaMu, it likewise never had any duty to defend the action.

INSURANCE LAW cont.

UNDER A CONTRACT OF PROPERTY INSURANCE, THERE MUST BE LOSS OF, OR DAMAGE TO, INSURED PROPERTY; DETRIMENTAL ECONOMIC IMPACT UNACCOMPANIED BY A DISTINCT, DEMONSTRABLE, PHYSICAL ALTERATION OF THE PROPERTY, IS NOT COMPENSABLE UNDER A CONTRACT OF PROPERTY INSURANCE. In Simon Marketing v. Gulf Insurance Company (2007) 149 Cal.App.4th 616, 57 Cal.Rptr.3d 49, the Second District Court of Appeal affirmed an order of the Los Angeles County Superior Court granting summary judgment in favor of the two insurers, holding the “covered property” provisions of the policies did not cover detrimental economic harm to the insured caused by the dishonest acts of an employee where such harm was unaccompanied by a distinct physical loss of property. Gulf Insurance Company (let’s call them “Gulf”) issued an insurance policy to Simon Marketing, Inc. and Simon Worldwide, Inc. (we’ll call them both “Simon”) providing that Gulf would “pay for loss of, and loss from damage to, Covered Property, resulting directly from the Covered Cause of Loss.” Federal Insurance Company (we’ll call these guys “Federal”) issued a similar insurance policy to Simon providing that Federal would be liable for “direct losses of money, securities or other property caused by theft or forgery by any Employee of any Insured.” Simon was in the marketing and promotional business, and did so for McDonald’s Corporation including designing the games “Who Wants to Be a Millionaire” and “Monopoly.” From 1988 to 2001, Simon’s director of security, Jerome Jacobson, was responsible for placing throughout the U.S. McDonald’s winning game tickets. Without Simon’s knowledge, employee Jacobson organized a scheme to provide specific individuals with the winning tickets. (And we’re to believe that nobody saw that coming.) Simon argued that Jacobson stole winning tickets valuing \$21 million and received kickbacks from the winners. After Jacobson’s conduct was exposed, Simon was involved in various lawsuits. Simon filed an action against Gulf and Federal seeking coverage under the policies for losses to property caused by theft or forgery committed by Simon’s employees.

In affirming the trial court’s decision, the Court of Appeal explained that the “threshold requirement for recovery under a contract of property insurance is that the insured property has sustained physical loss or damage.” The

Court clarified that the trial court’s reference to “direct losses” meant “physical damage to insured property.” The Court further explained that the requirement that loss by “physical damage” precluded claims for detrimental economic impact unaccompanied by a distinct, demonstrable, physical alteration of the property. The Court held that the termination of Simon’s business, its settlement payments, defense costs and the costs of winding up its business did not constitute “physical damage to property” and that most of Simon’s claimed damages were excluded under both policies’ loss of income exclusion.

AUTOMOBILE INSURANCE POLICY OBLIGATING INSURER TO REPAIR INSURED’S DAMAGED VEHICLE TO PRE-ACCIDENT CONDITION DID NOT REQUIRE INSURER TO PROVIDE REPAIRS BASED ON INSURED’S VIEW OF “INDUSTRY STANDARDS.” In Levy v. State Farm Mutual Automobile Insurance Co. (2007) 150 Cal.App.4th 1, 58 Cal.Rptr.3d 54, the Fourth District, Division 3, of the Court of Appeal upheld a demurrer without leave to amend on an attempted class action lawsuit filed against State Farm Mutual Automobile Insurance Company (yep, we’ll call them “State Farm”) for omitting certain labor and material costs from its automobile repair estimates, and using its own contracted repair shops in its survey to determine prevailing competitive repair labor rates used in its estimates. Levy, a California resident, purchased a State Farm auto insurance policy that obligated State Farm to pay the cost of repair or replacement for covered vehicles if damaged. The policy provided that the cost of repair or replacement was based on one of the following: “1. the cost of repair or replacement agreed upon by [the insured] and [State Farm]; [¶] 2. a competitive bid approved by us; or [¶] 3. an estimate written based upon the prevailing competitive price. The prevailing competitive price means prices charged by a majority of the repair market in the area which the car is to be repaired as determined by a survey made by [State Farm]. If you ask, [State Farm] will identify some facilities that will perform the repairs at the prevailing competitive price....” Levy’s car was involved in an accident and suffered damage to its right front wheel, right front fender, right front bumper, steering box, suspension, and lower body. Levy brought the damaged vehicle to a State Farm facility, where an employee estimated the cost of repair using State Farm’s software. The estimator then offered to pay Levy \$550.70, less the policy’s

\$250 deductible, instead of having the vehicle repaired. Levy accepted the payment. Battle, the other named plaintiff, also purchased a State Farm auto insurance policy containing a repair or replacement provision similar to Levy’s policy. When an accident damaged the left front end and left fender of Battle’s car, Battle took her car to a State Farm estimating facility, and at State Farm’s request, had her car repaired at a State Farm-contracted repair shop. Believing State Farm’s repair estimates were inadequate, Levy and Battle sued State Farm on behalf of themselves and others similarly situated. After several State Farm demurrers were sustained with leave to amend, plaintiffs filed their fifth amended complaint, seeking damages, restitution, and declaratory and injunctive relief. The fifth amended complaint alleged in part that State Farm provided its policyholders repair estimates which did not meet industry standards as defined by automobile manufacturers, the Inter-Industry Conference on Auto Collision Repair (I-CAR), or the National Institute for Automotive Service Excellence (ASE). That complaint further alleged that State Farm contracted with repair shops to follow State Farm’s estimate of necessary repairs, even if the shop’s professionals might believe additional repairs were required. State Farm refused to pay for repairs not specified in State Farm’s estimate.

The Court of Appeal first analyzed plaintiffs’ complaint allegations and held that they failed to adequately allege that State Farm breached any insurance policy terms. The Court noted that the policy did not require State Farm to provide repairs based on plaintiffs’ conception of industry standards. The Court further held that the relevant insurance policy language only required State Farm to “restore the vehicle to its pre-loss condition,” and that this meant in an insurance contract the “preaccident safe, mechanical, and cosmetic condition.” The Court then held that California Code of Regulations, title 16, section 3365 (relating to accepted trade standards for auto body and frame repairs) (1) did not purport to apply to insurers, (2) did not provide any minimum standard for repairs required to return a vehicle to its pre-collision condition, and (3) did not adopt any particular repair standard, whether set forth by manufacturers, I-CAR or ASE. The Court next held that nothing in the policy prevents State Farm from surveying only shops which agree to its rates, and that although some states prohibit insurers from including contracted repair shops in

The Bottom Line

Case Title: Santisi, Susan vs. Gregory Babikian, M.D.

Case Number: GIC833635

Judge: Hon. Lillian Lim

Plaintiff's Counsel: Craig Fuller, Esq. and Eric Jenkins, Esq.

Defendant's Counsel: Robert W. Frank, Esq. of Neil, Dymott, Frank, McFall & Trexler

Type of Incident/Causes of Action: Medical Malpractice/Wrongful Death (alleged failure to timely diagnose and treat bladder cancer); Plaintiff sought \$2.5-5 million in lost income from her husband's successful intellectual property law practice.

Settlement Demand: \$450,000

Settlement Offer: C.C.P. 998 offer of \$250,000, withdrawn prior to trial

Trial Type: Jury

Trial Length: 7 days

Verdict: Defense verdict 12-0 (after 5 hours of deliberation)

Case Title: The Gifted School et al. v. Grahovac et al.

Case number: GIC 840032

Judge: Honorable Randa Trapp

Plaintiffs' Counsel: Steve McAvoy, Esq. & Richard L. Boyer, Esq.

Defendants' Counsel: Dave Molinari, Esq. of Bremer & Whyte for Grahovac Construction; Karen Holmes, Esq. of Balestreri Pendleton & Potocki for Urbon Architecture; Michael Sullivan, Esq. of Morris & Sullivan, and Steve Parker, Esq. of Brady Vorwerk, Ryder & Caspino for P. Texiera Construction.

Type of Incident/Causes of Action: Construction defect claim involving a private Pre-School in Encinitas, CA. Plaintiffs sued Grahovac for breach of contract, breach of warranty and negligence. Plaintiffs sued Urbon Architecture for professional negligence. Grahovac sued P. Texiera for indemnity.

Settlement demand: As against Grahovac \$1,750,000.00; As against Urbon \$250,000; Plaintiffs asked jury to award \$2.8 million in cost to repair as well as \$260,000 in Stearman fees.

Settlement offers: 998 offer by Grahovac for \$605,000.00. 998 offer by Urbon for \$50,001.00; P. Texiera offer not reported.

Trial Type: Jury

Trial Length: 6 ½ weeks

Verdict: \$209,000 for costs to repair and \$230,000 in Stearman as against Grahovac only; Defense verdict for Urbon; Defense verdict for Texiera.

INSURANCE LAW cont.

automobile repair labor rate surveys, California did not. As to the cause of action for breach of the implied covenant of good faith and fair dealing, the Court held that most of the allegations were duplicative and addressed already in connection with the dismissal of the breach of contract cause of action. The Court further held that plaintiffs' allegations relating to fraudulent non-disclosure, i.e., failing to tell insureds that it routinely omitted necessary repairs from repair estimates and failing to tell insureds that it used only data from shops that agreed to omit necessary repairs in determining the prevailing competitive prices for repairs – were not deceitful because plaintiffs failed to cite any law or policy provisions requiring State Farm to follow "industry standards." So no matter what you may think, I guess you're in good hands after all.

UMBRELLA LIABILITY INSURER DURING FIRST PERIOD OF CONTINUOUS PROPERTY DAMAGE OVER FOUR POLICY PERIODS WAS NOT REQUIRED TO DROP DOWN AND DEFEND UNDERLYING SUIT WHEN OTHER INSURANCE REMAINED AVAILABLE FOR INSURED'S DEFENSE.

In Padilla Construction Company v. Transportation Insurance Company (2007) 150 Cal. App.4th 984, 58 Cal.Rptr.3d 807, the Fourth District, Division 3, of the Court of Appeal affirmed the trial court and held that an excess insurer does not have a duty to drop down and defend in an underlying action prior to exhaustion of the defending insurer's primary policy. The Court also held that as a matter of first impression, an excess insurer with an "other insurance" clause irrespective of whether it includes a specific reference to self-insurance has no duty to drop down until the self-insured retention ("SIR") is exhausted. An underlying continuous damage construction defect suit filed in June 2002 by two homeowners against the developer of their property alleged, in part, that foundation vents were blocked with stucco, which stucco work was done by the insured, Padilla Construction, in 1995. Padilla Construction was brought into the suit two months later by way of cross-complaint by the developer. Padilla Construction had four successive primary liability policies from January 1995 until March 1, 2003: from the beginning of 1995 to end of 1996 its carrier was Transcontinental Insurance; from the beginning of 1997 to end of 1997 its carrier was Reliance Insurance; from the beginning of 1998 to March 1, 2001 its carrier was Legion Indemnity; and from March 1, 2001 to

March 1, 2003 its carrier was Steadfast Insurance. Additionally, concurrent with Transcontinental's primary policy (January 1995 through the end of 1997), Padilla Construction had two yearly commercial umbrella policies issued by Transportation Insurance. Of the four primary insurers, only two were available to defend Padilla Construction. Both Reliance and Legion became insolvent, and the parties assumed that nothing was available from either carrier by way of a defense. Padilla Construction initially requested only Transcontinental to provide it a defense of the underlying suit. However, after Transcontinental accepted the request for a defense under a reservation of rights, and hired a firm to defend the insured, the newly hired defense counsel then requested a defense from Steadfast. The request for a defense, however, was routed through Padilla Construction's third party claims administrator. In April 2003 the third party claims administrator took the position, on Padilla Construction's behalf, that it "elect[ed]" not to trigger Steadfast's policies, at least in part because Steadfast's policies had a \$25,000 self-insured retention. However, in June 2003, just a few months after Padilla Construction's (at least putative) election not to trigger Steadfast's policies, Transcontinental notified Padilla Construction that, because of numerous other claims against Padilla Construction, its policies were nearing exhaustion. In response, Padilla Construction reiterated its position that it elected not to trigger Steadfast's policies, and requested its defense attorney to "tender the defense and indemnity" to Transportation. Transportation declined the tender on the ground that Steadfast's policies had not yet exhausted. Transcontinental's exhaustion formally occurred on December 30, 2003. Along with the exhaustion came a formal notification to Padilla Construction that Transcontinental's defense was being entirely withdrawn. Padilla Construction then assumed its own defense, and, at some point in 2005, reached a settlement with the developer. The settlement was presumably \$60,000 or less, to which Steadfast contributed. Thereafter, the coverage litigation between Padilla Construction and Transportation ensued, Padilla Construction's theory being that Transportation had a duty to "drop down" and defend (and if necessary indemnify) Padilla Construction once Transcontinental's limits were exhausted.

INSURANCE LAW cont.

The Court of Appeal affirmed the trial court's decision. The Court first held that an excess insurer does not have a duty to drop down and defend an underlying action where primary coverage still exists, even if there are gaps in the primary coverage during the alleged continuous property damage. The Court relied upon the profound decisions of Buss v. Superior Court (1997) 16 Cal.4th 35 and Aerojet-General Corp. v. Transport Indemnity Co. (1997) 17 Cal.4th 38. By extending the Aerojet holding to apply to property damage occurring prior to inception of a primary policy, the Court held Steadfast was obligated to defend Padilla against all claims even though the prior property damage was not covered under the Steadfast policy. The Court also held Transportation was not obligated to drop down and defend Padilla until the SIR was exhausted even though the "other insurance" clause did not reference the SIR. The Court noted that the SIR cannot be meaningfully separated from the Steadfast policy, as this defeats the reasonable expectations of all parties, including Padilla Construction, and "obliterates the distinction between primary and excess insurance." To hold otherwise, stated the Court, would present the anomaly of requiring an earlier excess insurer to drop down and defend a claim "beneath" the coverage of a later primary policy. Further, the Court noted the substantial disparity in premiums charged under the Steadfast primary policy and the Transportation umbrella policy was reflective of the parties' expectations as to the obligations of each insurer.

ASSAULT VICTIM'S COMPLAINT AGAINST INSURED HOMEOWNER ALLEGED A CLAIM THAT WAS POTENTIALLY A COVERED "OCCURRENCE" UNDER THE HOMEOWNER'S INSURANCE POLICY, TRIGGERING INSURER'S DUTY TO DEFEND (INSURED HOMEOWNER ASSIGNED BAD FAITH INSURANCE CAUSE OF ACTION TO ASSAULT VICTIM AS PART OF SETTLEMENT). In Delgado v. Interinsurance Exchange of the Automobile Club of Southern California (2007) 152 Cal. App.4th 671, 61 Cal.Rptr.3d 826, the Second District Court of Appeal, after granting a petition of rehearing on its earlier opinion, reversed a trial court order sustaining a demurrer without leave to amend and dismissing a complaint for breach of contract, breach of the covenant of good faith and fair dealing and recovery of a stipulated judgment pursuant to Insurance Code

§11580(b)(2). The Court of Appeal held that a complaint that alleged an intentional assault and, in the alternative, alleged the insured had negligently engaged in self-defense, gave rise, as a matter of law, to a potential for coverage. Reid, the insured homeowner, kicked Delgado and struck him in the nose while the two were standing on the sidewalk across the street from Reid's residence. Delgado sustained physical injury as a result. Through his guardian ad litem, Delgado filed the underlying action against Reid, alleging two causes of action. In the first, he alleged that Reid had "in an unprovoked fashion and without any justification physically struck, battered and kicked . . . Delgado repeatedly causing serious and permanent injuries." In the second, Delgado alleged that Reid had "negligently and unreasonably believed and [sic] that [Reid] was engaging in self defense and unreasonably acted in self defense when [Reid] negligently and unreasonably physically and violently struck and kicked ... Delgado repeatedly causing serious and permanent injuries." In addition, Delgado alleged that Reid had acted "intentionally [sic] and with malice and oppression, violently struck, battered and kicked ... Delgado in an unprovoked fashion and without justification...." That allegation was obviously included to trigger a claim for punitive damages which Delgado also sought in his pleading. Reid had a homeowner's policy providing \$100,000 liability coverage with Automobile Club of Southern California (in a weak effort to save trees, we'll refer to them as "ACSC") and tendered Delgado's complaint to it for a defense. ACSC denied coverage and refused to provide a defense for two reasons: (1) there was no "occurrence," as that term was defined in the policy, since an intentional unprovoked attack could not be considered an accident; and (2) Reid's conduct, as alleged in the complaint, arose out of his intentional acts, triggering the policy's intentional acts exclusion or the statutory "willful acts" exclusion that is incorporated into every policy of liability insurance pursuant to Insurance Code § 533. Thereafter, Reid and Delgado reached a settlement of the underlying action. The parties stipulated on the record that Reid's use of force constituted a negligent use of excessive force in the exercise of his right of self-defense. The stipulation was accepted by the trial court. As part of the settlement, Delgado dismissed the intentional tort cause of action. Judgment in the amount of \$150,000 on the negligence claim was then entered in the underlying action. Reid agreed to pay Delgado \$25,000 and

assigned to him all of his (i.e., Reid's) claims against ACSC arising out of ACSC's refusal to provide a defense under the policy. In return, Delgado gave Reid a partial satisfaction of judgment and a covenant not to execute on the remainder of the \$150,000 judgment. Delgado then filed this action against ACSC seeking for declaratory relief, damages for bad faith, and recovery on his stipulated judgment under the provisions of Insurance Code § 11580, subdivision (b)(2). Delgado also sought a declaration that ACSC owed a duty to defend Reid in the underlying action and to indemnify Reid for the resulting judgment.

The Court of Appeal determined that ACSC had a duty to defend, particularly where there was no claim the carrier had any extrinsic facts that eliminated the potential for coverage. The Court noted that the central question was whether "the underlying complaint or other facts available to the insurer gave rise to a potential liability under the policy." The Court concluded that the case was similar to the landmark case of Gray v. Zurich Ins. Co. (1966) 65 Cal.2d 263, 275, in which the California Supreme Court held that where a complaint alleging intentional excluded conduct could have been amended to allege negligent conduct within the scope of coverage of the policy, there was a duty to defend. The Court thus concluded that the amended complaint alleged the potential for liability for "unintentional conduct." The Court reasoned that acts in self-defense are non-intentional tortious conduct and a form of negligence. The Court also held the trial court erred in concluding, on demurrer, the stipulated judgment was "contrived." Citing Pruyn v. Agricultural Ins. Co. (1995) 36 Cal.App.4th 500, the Court noted that an insured that has been abandoned by its carrier is entitled to make the best settlement it can, including one that involves a stipulated judgment in exchange for a covenant not to execute. If the settlement is reasonable and free from collusion and fraud, the settlement operates as presumptive evidence of the insured's liability and the amount of that liability.

Employment Law



By Lori J. Guthrie, Esq.
Grace Hollis Lowe Hanson & Schaeffer

Arias v. Superior Court (Angelo Dairy), 153 Cal. App. 4th 777 (July 24, 2007)

The California Court of Appeal, Third District recently ruled that representative claims under the Labor Code's Private Attorney General Act ("PAGA") need not comply with the class action requirements set for in Code of Civil Procedure

section 382. In Arias, plaintiff's complaint alleged various Labor Code violations against his employer. He sought relief on his own behalf, and as a representative of other employees of the employer. He also claimed violations of Business & Professions Code section 17200, et seq. (Unfair Competition Law or "UCL") The defendant employer, Angelo Dairy, moved to strike these two representative actions on the grounds that plaintiff did not comply with the pleading requirements for a class action. The court granted the motion and plaintiff sought writ relief.

The court evaluated the effect of Prop. 64, passed by the voters in 2004, on an individual's ability to file a representative action if there was no injury to the plaintiff. The court confirmed that a UCL claim requires that a plaintiff suffer damages. Further, the court read Business & Professions Code section 17204 to mandate compliance with the class action requirements set forth in Civil Procedure section 382, although it does not expressly state such a requirement. As such, the court of appeal upheld the trial court's ruling on the granting of the motion to strike with respect to the UCL claims.

However, the court came to a different conclusion when it evaluated the Labor Code PAGA claims. The court held that Labor Code section 2699(a) specifically provides for an "aggrieved employee" to bring an action on behalf of others. Basically, the PAGA provides for civil penalties to be issued against offending employers. The court seemed to focus on the fact that the PAGA is an enforcement action, designed to protect the public and "penalize the defendant for past illegal conduct." The court concluded that the plain language of the PAGA statute, coupled with the legislative intent, provides that enforcement of these Labor Code violations may be brought as a representative action and not as a class action. Therefore, plaintiff need not meet the requirements set forth in C.C.P. § 382. As such, the court of appeal vacated the order granting the motion to strike this cause of action and provided plaintiff 30 days leave to amend the complaint.

Estrada v. FedEx Ground Package System, 2007 Cal. App. LEXIS 1302 (August 13, 2007)

The California Court of Appeal, Second District recently confirmed that the FedEx delivery drivers are employees entitled to reimbursement for expenses and not independent contractors.

This is the third published opinion in a case that has been ongoing for some eight (8) years (the case was filed 5/11/99). Essentially, plaintiff Estrada, on his own behalf and on behalf of others similarly situated, sued his employer FedEx Ground Package System for reimbursement of work-related expenses under Labor Code section 2802. The case has an interesting history and is worth a read if you have the time.

The long and the short of it is that FedEx had what they called an

"Operating Agreement" ("OA") with their single work area drivers (this is the group of drivers for which the class was certified). Basically the agreement provided that the driver purchase their own trucks, paint the trucks FedEx white, paint the FedEx logo on the truck and only work for FedEx. In addition, the OA provided that the drivers would be responsible for "all costs of operating and maintaining the truck (including repairs, cleaning, fuel, tires, taxes, licenses and insurance). This only marked the beginning of FedEx's control over these drivers. When the court of appeal reviewed the Borello factors to determine whether the drivers were independent contractors or employees, the evidence overwhelmingly showed they were employees. The Borello factors are:

1. whether the worker is engaged in a distinct business
2. whether the work is done under the principal's direction or by a specialist without supervision
3. the skill required
4. whether the principal or worker provides the tools, instrumentalities and place of work
5. the length of time that services are provided
6. method of payment, whether by time or by job
7. whether the work is part of the principal's regular business
8. whether the parties agree they creating an employer-employee relationship

S.G. Borello & Sons, Inc. v. Department of Industrial Relations (1989) 48 Cal. 3d 341, 350-351)

FedEx did not disagree that the Borello test was the correct test to use. However, it claimed the trial court misapplied it. The court of appeal disagreed with FedEx.

FedEx claims the OA specifically sets forth that the driver has discretion in the "manner and means" in which they work and that FedEx does not have "authority to impose any term or condition". However, both the trial court and the appellate court found that FedEx's actions "spoke louder than its words."

FedEx also claimed that the OA provides for termination with cause. However, the court noted that the OA also provided for "nonrenewal without any cause" and further evidence at trial showed that FedEx regularly discharged drivers at will.

The court also found several instances where FedEx's control over the drivers went to the most mundane detail. For example, drivers could not wear white shoes or socks, men could not wear earrings or ponytails and were sometimes even told they had to shave or get a haircut. In addition to the manner of appearance, FedEx also required the drivers to be at the terminal at regular times for sorting and packing, as well as attend mandatory meetings which they could not leave until they were finished. The customers are FedEx's customers, not the drivers' customers. The court found the drivers were not engaged in a separate business, but rather they are paid weekly by FedEx. Interestingly, the court commented that the drivers of other competitors, including a FedEx sister company, classified their drivers as employees.

To sum it all up, the court commented the "essence of the trial court's statement of decision is that if it looks like a duck, walks like a duck, swims like a duck, and quacks like a duck, it is a duck." As such, the court affirmed the trial courts ruling the drivers were employees and not independent contractors.

Employment Law cont.

There were several other issues decided by the court in this case including FedEx's appeal to class certification. FedEx challenged the finding of commonality of issues. The court held that the common issue of whether the drivers were employees predominated. FedEx also challenged the ruling that the class was ascertainable. The court rebuffed the notion that each member of the class had to be identified at the outset. Rather the court noted that the class was ascertainable through discovery and from FedEx's records. Ultimately, the class was limited to "single work area drivers who drive (or had driven) full time and who do not (or did not) subcontract their service area out to others for reasons than vacation, sick leave, or other commonly excused employment absences."

FedEx further claimed that assuming these drivers were employees, they had already been reimbursed as provided in their OA. However, the OA provides that drivers are to "bear all costs and expenses incidental to operation" of the trucks. Furthermore, upper management testified that the drivers bore their own costs. As such, these employees are entitled to indemnity for expenses under Labor Code section 2802.

FedEx successfully argued that the attorney fee award could not stand. The trial court had awarded approximately \$7 million in fees and costs (attorneys fees alone were \$5 million) and used a multiplier of 2 for "delay and contingency" to come up with a total fee award of \$12,373,872 (fees were awarded under C.C.P. §1021.5). The court of appeal affirmed that an attorney fee award was proper, but that the amount was excessive, holding that "dual use of the same reasons to both calculate the fee and justify the multiplier created a windfall." The court of appeal remanded the case to the trial court for the recalculation of fees.

Plaintiff also appealed several rulings in this case. Of interest, he appealed the court's ruling that FedEx must reimburse the drivers for the costs involved in purchasing their trucks. After reviewing several Division of Labor Standards Enforcement (DLSE) opinion letters, the court determined FedEx need not reimburse these costs.

Also of interest, plaintiff argued that FedEx should reimburse the drivers for their "work accident insurance." The OA required each driver to maintain "work accident and/or workers compensation insurance." Due to a technical error in the class certification order, only "workers compensation" was listed as a reimbursable expense. The court held that the failure to correct the order to also include "work insurance" does not justify giving FedEx a windfall. As such, the court concluded that the drivers are entitled to reimbursement for their work accident insurance premiums.

Remembering District Court Judge John S. Rhoades, 2003 San Diego Defense Lawyers Honoree

By, Michael I. Neil, Esq., Neil, Dymott, Frank, McFall & Trexler

Before Judge John Rhoades went on the federal bench in 1985 he was the consummate defense attorney. After leaving the City Prosecutor's office in 1964 he joined with John Holt to form Holt, Macomber & Rhoades and began a career defending the interests of insurance companies and public entities. He took a special interest in malpractice matters. He was considered by all he represented to be a compassionate attorney who really cared about the interests of his clients. He became close friends with many doctors he represented over the years. He taught young associates to take an interest in their clients and how to craft a defense under the most difficult facts. He was imaginative and innovative and he taught young lawyers to "think outside the box".

When I lost my first big case, he was the first one to offer encouragement. While I was devastated he said: "When others read about this case, they will know you must be a good attorney to have tried such a big case and they will send you business". John was never too busy to help a young lawyer. If he reviewed a file, he always had a list (called the green sheet) of things for you to do. He would see issues others would overlook. Plain and simple, he was the smartest lawyer I ever worked with on a case.

He was a member of ABOTA and while on the bench he never became imperialistic. He always remembered the burdens of the trial lawyer. He agonized over difficult decisions he would have to make as he wanted to follow the law and yet be fair. He was polite and courteous to all. He loved life and people. Chuey's was his home away from home for years. In fact, after he was sworn in as a judge, he held his reception at Chuey's rather than at a stuffy hotel. Norwegian by ancestry, he was Mexican at heart. He loved mariachi's, good martini's, and his many friends and family. Reading was his passion. Intellectual without snobbery and an understanding of human frailty were among his many traits.

John was a Naval pilot in WWII and attended Stanford and the Hastings Law School. He was married to his beloved wife, Carmel, for over 55 years. Her death last year was very difficult for him. They had 5 sons all living in San Diego County.

He was a mentor, a counselor, a role model, and most of all just a real good pal. While I knew in my heart it was not true, I thought he would live forever. He left too soon. I miss him.



Mike Neil, Judge Rhoades

Brown Bag Series Summary - June

Unlocking the Mysteries to Successful Opening Statements



By: *Arlene D. Luu, Esq.,
Liedle, Getty & Wilson, LLP*

Presented by:

*Brian Rawers, Esq. of Lewis Brisbois Bisgaard & Smith
(for the defense)
Ben Bunn, Esq. of Hulburt & Bunn LLP (for the plaintiff)*

The Brown Bag series this month featured Brian Rawers, Esq. of Lewis Brisbois Bisgaard & Smith for the defense and Ben Bunn, Esq. of Hulburt & Bunn LLP for the plaintiffs providing their secrets to successful opening statements.

Here are their tips:

1. Where to position yourself

Mr. Bunn likes to deliver his opening statement from the well. He tries to stay away from the podium but also stressed the importance of doing what you feel is right for you. Mr. Rawers believes starting at the podium is acceptable because it can give the appearance of authority. Although he does not mind beginning at the podium, he likes to move around during his opening. He also recommends not putting your hands in your pocket while speaking and removing everything from your pockets so that you are not tempted to play with the change in your pocket.

2. What to discuss in your opening

Mr. Bunn begins his opening statement by explaining his background to the jurors. Next, he tells the story behind his case to try to humanize his client. He advised against saying "everything I say in my opening is not evidence" because the jurors will immediately stop listening after that remark. He recommends being brief and making the opening statement no longer than 30 to 40 minutes in length. Further, he advises, trust in yourself because it is important that you be "real".

To start off his opening statement, Mr. Rawers educates the jurors on the procedural, substantive and "reminders" to his case. For the procedural portion, he explains the procedure and sequence for the trial so the jurors know what to expect. For the substantive portion, he likes to give an analogy regarding the opening statement. He usually tells the jurors that an opening statement is like putting together a puzzle in which the trial process provides the pieces to the puzzle. He also uses the analogy that a trial is like a play or film where the jurors are the editors. Further, he will state the issues to be decided in the case, what the plaintiff wants, what the plaintiff is alleging and what the defense believes. While educating the jurors regarding the substantive issues, Mr. Rawers recommends framing the issues in a way most favorable your case. As for the "reminders", Mr. Rawers "reminds" the jurors what was said in voir dire, that there are two sides to the story, to set aside their empathy/sympathy and decide based upon the facts and that the law will not be provided to them until the end by the judge.

3. An Exercise in Sequencing

Mr. Bunn performed an exercise with the audience that demonstrated the importance of the sequence of a story in the opening statement. He told the attendees a story about a typical day of a man as he prepared for work, came to work but later decided to leave a little early from work to see his sick wife. On the way home the man's car was struck by a young man driving under the influence of alcohol. Mr. Bunn then asked the audience

to list the first thing that came to their minds about the man in the story after the statement "if only he had..." Most of the attendees wrote statements such as: "if he had not left early" or "he had not taken a different route". One participant even blamed the wife by writing: "if only she was not sick". Only two participants wrote "if only the kid had not driven drunk". This exercise was to remind the audience of the profound impact of who you choose to begin the story of your case with. Here, had the story started with the young man spending his day drinking with his buddies, then getting into his car and driving recklessly before crashing into the man, than the jurors would likely not blame the wrong or unintended person for the accident. This phenomenon is called the "availability bias" and demonstrates that people will usually assess responsibility to the first thing available, in this case the man struck by the drunk driver. Mr. Bunn pointed out that this was the most important secret he could impart because for the most part, sympathy for the plaintiff is dead and there tends to be more sympathy bias for the defendant's conduct nowadays.

4. What about a dollar amount

Mr. Bunn as a plaintiffs' attorney, will generally explain to the jurors what general damages are and state what the plaintiff is asking for in general terms. He will rarely state a specific amount of money that his client is seeking. He recommends discussing this early on and in voir dire. Mr. Rawers, however, will state the dollar amount that plaintiff is seeking, particularly if it is high.

5 Objections

Objections should rarely be made by the opposing side during the opening statement because it is rude and the jurors do not like the interruptions. Further, don't make the objection, "misstatement of the facts" because it might be to your advantage if the facts are misstated.

6. Demeanor while opposing party delivering the opening

While a party is delivering the opening statement, the other party should be attentive, polite and avoid taking notes. It is also important to advise your client beforehand regarding proper courtroom demeanor, including such seemingly trivial things as sitting up straight. This time also provides a good opportunity to observe the demeanor and reactions of the jurors.

7. Addressing the weaknesses in your case

Any weaknesses in your case should be dealt with during the opening. By addressing weaknesses, it can humanize your client. Further, it is always better for the jurors to hear about your weaknesses from you rather than from your opponent. A good lead into this suggested by Mr. Bunn would be to say: "I am going to tell you the good, bad and the ugly". The bad facts should be handled early on, and even in voir dire. For example, the jurors should be shown the gruesome pictures of plaintiff's injuries.

8. When you run out of time

When you have run out of time, it is best to apologize to the jurors, explain to them that you have made a mistake in your timing and then ask the judge for a few more minutes to quickly finish up. Once the judge allows for the extra time, stick to the time allotted, otherwise you can lose credibility not only with the judge, but with the jury.

9. Demonstrative evidence

Mr. Bunn encourages the use of demonstrative evidence because they can help to keep the jurors' attention. Mr. Rawers does not like to use complicated high tech gadgets because he has seen them malfunction and attorneys taking up court time to figure out the equipment. He may occasionally use a poster board to display photos and diagrams, but never anything too technical or complicated.

Brown Bag Series Summary – July



By: Jonathan Rose, Esq.
of Grace Hollis Lowe Hanson & Schaeffer



There was a strong SDDL turnout on July 17, 2007 for the July installment of the SDDL 2007 Brown Bag Seminar Series. The topic was the “Presentation of Evidence at Trial: Old School v. New School.”

Representing the “old school” was Karen Holmes, Esq. a principal at the law firm of Balestreri Pendleton & Potocki. On the “new school” side of the aisle was Neil Rockwood, Esq. a partner at the law firm of Rockwood & Noziska LLP. Missy Szymanski, communications project manager at Peterson Reporting, balanced out the panel to discuss the relationship between the attorney and the technology.

Old School

Blow-up exhibits mounted to poster board is old school. The consensus of the panel, and judging from the questions of those in attendance, is that even the ELMO has reached “old school” status as a presentation device. The ELMO of course is essentially a high-tech overhead projector. It allows the user to place a document down on the machine, be able to look at that document, and be able to draw the attention of the jury to a specific portion of the document. All of this is done live. The jury views the document on a screen in the court room.

There are many very legitimate benefits to sticking with a series of poster board blow-up exhibits or an ELMO as a way to present key portions of your case to the jury: (1) the flow of the presentation and your questioning will not be disturbed by the common pit-falls of technology, (2) the document is in your hand, (3) you do not have to search for the document, (4) the document will not “crash,” and (5) more often than not the “old school” is less expensive.

New School Technology

Juries understand the facts of the case from seeing the presentation of evidence. The proper use of visual aids is an effective way to maintain the jury’s attention. There are a number of software suites on the market that can help you organize and present a case. These programs allow you to (1) enter and link the names of all the parties and witnesses or potential witnesses with documents related to that witness, (2) identify issues and plan questioning based on linked statutes, jury instructions, or case law, (3) identify the pertinent facts of a case and determine whether they are disputed or undisputed- a tool that becomes very valuable when filing a motion for summary judgment or adjudication, (4) link case facts to specific documents either proving or disproving a particular point, (5) synchronize video taped deposition testimony to the transcript of that same deposition-which brings a whole new very powerful dynamic to impeaching a witness. What is more powerful impeachment than the witnesses own words from the witnesses own mouth? With the synchronized video you can break-out a particular issue or document. This allows you to pull up that text and video clip quickly without breaking the flow of questioning. The benefits of these software tools are best maximized if you use the software from the very beginning of a case. The information is cumulative and becomes harder and far more time consuming to compile, say two months before trial.

Caution: Technology may allow you to present the facts and issues of your case in a more professional and polished manner; but only if it works. Computers can crash when you need them the most. Understand the pros and the cons of using the “new school” technology to present your case. Practice with the technology; and always bring a back-up computer or at least a back-up hard drive that you can swap out if need be.

At least one company has made the business decision to give away the presentation software for free – the assumption being that you will need to retain someone to operate the software while you are trying your case. Other companies charge hefty sums of money to purchase a license for their software suites.

If you decide to present your evidence digitally, you will need to plan ahead. Will you operate the computer? Or will you hire someone from a court reporting service to tend to the computer while you present the case?

Old School and New School Common Ground

Always maintain a hard copy of your outlines, of depositions, and all exhibits.

Technology should never be considered a substitute for an actual exhibit. Regardless of what technology you want to use to assist you in trying your case there are some things that are very “old school” but are necessary. Exhibit binders need to be made for the judge the witness, the court clerk, and opposing counsel. The rules of evidence remain the same regardless of what technology you may or may not be using. A document must still be authenticated and marked for identification prior to “broadcasting” it to the jury whether you are using an ELMO, a blow-up, or computer presentation software.

The Courts

Since presenting a case through the use of technology can significantly increase the cost of trying a case the issue of how much of that expense is recoverable is very relevant to your decision whether or not to use the technology.

In 1995, the Fourth Appellate District, Division One made a distinction between costs that were reasonably necessary to conduct litigation as opposed to those costs incurred for convenience of counsel. (*Science Applications International Corp. v. Superior Court*, (1995) 39 Cal. App. 4th 1095). The court did not allow cost recovery for the use of a document control database, laser disks, and a graphic communication system that stored trial exhibits. (Id). The court held that while the technology did benefit the litigation its primary purpose was for the convenience of counsel and was therefore not compensable.

Compare the *Science Applications* holding with the holding seven (7) years later from the Second Appellate District, Division Four allowing recovery for costs similar to those denied in *Science Applications*. Cost recovery was allowed where the “high-tech” methods of presenting the case had been “specifically approved by the trial court, which found them to be highly effective, efficient, and commensurate with the nature of the case.” (*Am. Airlines v. Sheppard*, (2002) 96 Cal. App. 4th 1017, 1056).

Judges are becoming more and more comfortable with the use of technology to present a case. The federal judicial center published a reference manual for judges that can be very instructive to the attorney. The reference manual can be found on the internet at http://www.fpdct.org/reference/courtroom_tech_guide.pdf

Old School v. New School – The Attorney is not obsolete

Technology can be a strong tool in a complex trial. But for the time being it is still the attorney who takes a case to trial. Even the most polished presentation will not replace the facts of the case and the way a good trial lawyer can use those facts to the benefit of her/his client.

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By: Mark Angert, Esq. of
Grace Hollis Lowe Hanson &
Schaeffer
mangert@gracehollis.com

Hello everyone, this will be a new section featured in THE UPDATE aimed to shine light on things that may escape us in our everyday busy practices.

Some pointers, know-how's and simple suggestions which may help each and everyone one of us by simplifying our daily practice. What may be obvious to some, may have completely escaped other's attention, and hopefully this editorial can be used to share your individual "tricks of the trade" to help your fellow members. I encourage you to email me with any suggestions or tips for the next editorial at mangert@gracehollis.com .

1. Did you know that that California Rules of Court 3.1350(i) states that " On request, a party must within three days provide to any other party or the court an electronic version of its separate statement. The electronic version may be provided in any form on which the parties agree. If the parties are unable to agree on the form, the responding party must provide to the requesting party the electronic version of the separate statement that it used to prepare the document filed with the court. Under this subdivision, a party is not required to create an electronic version or any new version of any document for the purpose of transmission to the requesting party. "

This simple request can save both you and your assistant a lot of time in having to retype, format and proofread the opponents separate statement in support of Motion for Summary Judgment and Motion for Summary Adjudication.

p.s. Just make sure that the electronic copy conforms to the actual copy filed with the court, I mean not everyone is as honorable as us defense attorneys.

2. Speaking of Motions for Summary Judgment/Adjudication, did you know that just because the opposing side was able to obtain a declaration from an expert to oppose your expert, this does not mean you have no chances of prevailing on the motion. I

was in court last week and heard the judge criticize one of the parties for the declaration submitted in their opposition and ultimately grant the motion.

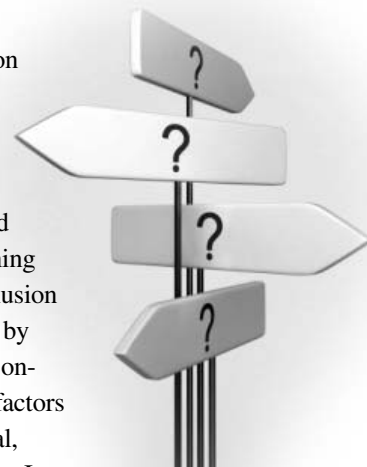
The fact is, "The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed. Where an expert bases his conclusion upon assumptions which are not supported by the record, upon matters which are not reasonably relied upon by other experts, or upon factors which are speculative, remote or conjectural, then his conclusion has no evidentiary value. In those circumstances the expert's opinion cannot rise to the dignity of substantial evidence. When a trial court has accepted an expert's ultimate conclusion without critical consideration of his reasoning, and it appears the conclusion was based on improper or unwarranted matters. Then the judgment must be reversed for lack of substantial evidence." Pacific Gas & Electric Co. v. Zuckerman, (1987) 189 Cal. App.3d 1113, 1135.

Further, "[E]ven when a witness qualifies as an expert, he or she does not possess a carte blanche to express any opinion within the area of expertise... an expert's opinion based on assumptions of facts without evidentiary support, or on speculative or conjectural factors, has no evidentiary value and may be excluded from evidence..." Jennings v. Palomar Pomerado Health Systems, Inc., (2003) 114 Cal.App.4th 1108, 1117.

So next time an expert appears to have fallen out of space, you can use the above case law to convince the judge to send the expert back to his or her planet.

3. Did you know that when a tree falls in the woods and there is no one around to hear it, it still make a noise? Or does it?

Aside from number 3, if while reading this you found yourself imitating Ed McMahon in saying "I was not aware of that !", then I am sure so did others and that is the entire purpose of this new section of The Update. Until next time, I look forward to seeing your suggestions and comments, and who knows we just may learn something.





Coleen Lowe and Danielle Nelson selling raffle tickets and registering guests



Ken Greenfield and Dave Clingman



Eric Miersma



Darin Boles exhibits the Taylor Made contributions



Elliot Heller, Pete Gregorovic and Bob Harrison appreciate the auction items

SDDL GOLF TOURNAMENT HUGE SUCCESS

By: "SDDL Staff Writer, Tiger Woods"

By all accounts, this year's San Diego Defense Lawyer's Golf Tournament benefiting the Juvenile Diabetes Research Foundation was a tremendous success. On June 22nd SDDL members, judges, clients, sponsors and guests all turned out to Salt Creek Golf Club for a day packed with eagles, birdies, pars, and admittedly a few bogies (but only a few!). Also, weeks before the tournament, the Consumer Attorneys of San Diego and SDDL made a pact to work together in an ongoing effort to promote civility and camaraderie among the two groups. In keeping with that spirit, SDDL sent a foursome of defense lawyers to play in the CASD tournament in early June, and CASD sent a foursome of lawyers to play in the defense tournament. Fortunately, they did not win! There were many highlights throughout the day, but some of the most mentionable are as follows:

Clark Hudson hit a drive so far that the tournament director seized his driver to see if it was "corked". While Ken Greenfield insisted that his foursome shot 30 under par, the Salt Creek Golf Club rules clearly state that "turkeys" may be allowed on the golf course; they certainly are not allowed on the scorecard. Unfortunately, for Ken and his cohorts, the revised scorecard seemed to reflect that they had played two rounds of golf. Jim Boley's divots were so large that apparently he was accused of playing with a backhoe rather than a wedge on the back nine. We felt sorry for the golfers playing in the groups behind him, although we later learned that most of those divots were well off the fairway. Some of the more serious golfers, however, included Retired Judge Herbert Hoffman who turned in an impressive round of 54 with Dennis Aiken, Randy Winet and Link Ladutko.

The fun continued into the evening with a delicious barbeque and a live auction/raffle run by auctioneer extraordinaire Dino Buzunis. Thanks to the generosity of Taylor Made there were a number of state of the art golf clubs and other items which were auctioned off to lucky bidders.

Most importantly, through the efforts of SDDL a check for \$10,500 was presented to Juvenile Diabetes Research Foundation and an additional specific donation of \$500 was made by Lorber Greenfield and Polito, bringing the grand total to \$11,000. A job very well done!

Much appreciation and gratitude to the 2007 Golf Committee Chairs Jim Boley, Darin Boles and Danielle Nelson, the SDDL Board of Directors, Sandee Rugg, Presenting Sponsor Irving Hughes, Peterson Reporting, Rimkus Company, Hutchings Court Reporters, Knox Attorney Service, SLPI, Inc., Retired Judge Herbert Hoffman and Private Dispute Resolution, Kramm & Associates, Shelburne | Sherr, Cleaves & Associates, Ringler & Associates, CFI South, KPA Associates, Thorsnes Litigation Services, Honorable James R. Milliken (Ret.) and Honorable Vincent P. DiFiglia (Ret.), Continental Interpreting Services, Inc., Collision Dynamics Analysis, Torrey Pines Bank, Honorable Geary D. Cortes (Ret.), Tim Valine Construction, Ted S. Merrill & Sons, Edward A. Grochowiak Architecture, Polar Golf, Garrett Engineers, Perry Consulting, Dr. William P. Curran, Jr., Robert's Consulting Service, Honorable Wayne L. Peterson (Ret.), Dr. David G. Smith, ADR Services, Judicate West, COPOYSCAN, INC., Diamond Connection, JC Resorts, Kenneth N. Greenfield, Esq., Legal Reprographics, Pro Golf, Ron Stuart Menswear, Shari I. Weintraub, Esq., TaylorMade and the folks at Salt Creek Golf Club.

If you missed this year's tournament, mark your calendar for June 2008 and come join your colleagues in benefiting a great cause!



Daniel and Michael Gallagher playing for Irving Hughes



David Clingman, Ken Greenfield, Judge DiFiglia, Judge Peterson and Bob Harrison



Linda Riley, JDRF Executive Director



Clark Hudson, Darin Boles, Bob Harrison



Curt Yaworski and guest head toward the first tee



Darin Boles, Danielle Nelson, Jim Boley, Golf Committee



Waiting for final scores golfers recount plays of the day



Judge Hoffman, Co-Chair Jim Boley, Denny Aiken and Randy Winet



Post Play B-B-Q gets BIG raves



And the winners are.....Denny Aiken, Randy Winet, Judge Hoffman and missing is Link Ladutko



Taylor Made Raffle and Auction items



Dino Buzunis and Darin Boles auction wine



Jay Bulger and Jasen Torbett

SAN DIEGO DEFENSE LAWYERS

2007 JUVENILE DIABETES RESEARCH FOUNDATION GOLF BENEFIT

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Words, Words, Words



By: *Mary Massaron Ross, Esq. of Plunkett & Cooney, P.C.*

Words are essential to writing. As Twain famously announced, “The difference between the right word and the almost right word is the difference between lightning and lightning bug.” Mark Twain, October 1888 letter quoted in *Mark My Words: Twain on Writing*, pg. 33 (Mark Dawidziak ed. St. Martin’s Press 1996). The choice of words to use in a brief is among the most important choices a writer makes in the course of composing. And it is among the most creative choices a writer makes. When Robert Frost observed that “[a]ll the fun’s in how you say a thing,” he was right. Robert Frost quoted in *The Writer’s Chapbook: A Compendium of Fact, Opinion, Wit, and Advice from the Twentieth Century’s Preeminent Writers* (ed. from *The Paris Review Interviews* by George Plimpton, Modern Library 1999).

Although word choice is essentially a creative task, some principles exist to guide the legal writer. First, of course, the words chosen must be correct. That is, the denotation of the word should correspond with the meaning that the writer seeks to convey. This seems obvious. But words are frequently misused. And there is no quicker way to irritate a reader, or to detract from your credibility as a writer, than to misuse a word. Many sources exist for learning frequently misused words, and how to use them correctly. Strunk and White’s well-known book, *The Elements of Style*, contains a chapter listing words and expressions that are commonly misused. William Strunk, Jr. and E.B. White, *The Elements of Style*, pgs. 63-94 (The Penguin Press 2005). For example, aggravate and irritate are often confused. Strunk and White point out, “The first means ‘to add to’ an already troublesome or vexing matter of condition. The second means ‘to vex’ or ‘to annoy’ or ‘to chafe.’” Id. at pg. 63. Similarly, alternate and alternative are often confused:

The words are not always interchangeable as nouns or adjectives. The first means every other one in a series; the second, one of two possibilities. As the other one in a series of two, an alternate may stand for “a substitute,” but an alternative, although used in a similar sense, connotes a matter of choice that is never present with alternate.

Id. at pg. 64. Another example from Strunk and White that this writer has seen frequently misused is “certainly.” It is often used as a synonym for “very” – “in an attempt to intensify any and every statement.” Id. at pg. 67. Adding “certainly” or “very” does not serve to increase the force of a statement – it merely serves to add unnecessary verbiage. According to the well-

known editor and lexicologist, Bryan A. Garner, certainly means and clearly and obviously, but these words have been so abused to buttress arguments that “they become weasel words and weaken those arguments.” Garner, *A Dictionary of Modern Legal Usage*, pg. 161 (Oxford University Press 1995). Another misused word is “fortuitous,” which means “what happens by chance” and not “fortunate or lucky.” Strunk and White, *supra*, at pg. 73.

One of my pet peeves is the misuse of “imply” and “infer.” These words are not interchangeable. Id. at pg. 74. “Something implied is something suggested or indicated, though not expressed.” Id. On the other hand, “[s]omething inferred is something deduced from the evidence at hand.” Id. Strunk and White illustrate the correct use of these words:

Farming implies early rising.

Since she was a farmer, we inferred that he [sic] got up early.

Id. at pg. 74. Legal writers should study lists of misused words to ensure that they are using words correctly. See e.g., Samuel R. Levin, *Shades of Meaning: Reflections on the Use, Misuse, and Abuse of English* (Westview Press 1998); Bryan A. Garner, *The Elements of Legal Style*, pgs. 99-146 (Oxford University Press 1991); Theodore M. Bernstein, *Dos, Don’ts & Maybes of English Usage* (Barnes & Noble Books 1977).

Ensuring that the words you choose are correct is only a first step – and a minimal one at that. Equally important, the writer must choose words that enhance the writer’s argument. Doing so requires careful attention to the words’ connotations. The English language is rich in synonyms. Many words may be technically correct. But some have a connotation that captures important nuances of meaning not conveyed in other word choices. Selecting from words with a correct meaning on the basis of subtle differences in connotation can help a writer immeasurably. For example, a writer might describe someone as “adamant” or “stubborn, inflexible, obstinate, [or] pigheaded.” William Drennan, *Advocacy Words: A Thesaurus*, pg. 2 (ABA Publishing 2005). Calling someone “adamant” connotes a firmness that might be admirable; calling someone “stubborn” conveys criticism of the refusal to change. Similarly, referring to someone as an “associate” conveys a different impression than calling him a “crony” or “pal.” Id. at pg. 6. A “seasoned” litigator may be desirable, but an “obsolete” or “outdated” one is to be avoided. Id. at pg. 48. Drennan’s thesaurus offers a series of examples of critical and favorable words, such as “dump” for “export, put, deposit, ship, transfer, place, put down, place down, lay, [or] lay down.” Id. at pg. 84. Another illustration is the choice of “egg on” versus to “inspire” or “encourage.” Id. A writer who selects words with an understanding of these gradations of

meaning can subtly create a picture that favors his position.

Choosing correct words with a connotation that advances advocacy messages is important – but the best writers also consider sentence rhythm, style, and tone. Strunk and White, the authors of the best single work on writing that I know, explain that by style, “we mean the sound his [the writer’s] words make on paper.” Strunk and White, *supra*, pg. 97. Achieving great style is “something of a mystery”. Id. at pg. 98. But it has something to do with rhythm, cadence, word choice, and meaning. See e.g., Thomas Whissen, *A Way With Words: A Guide For Writers*, pgs. 77-110 (Oxford University Press 1982). It is best learned by reading great writing and studying it. Lawyers should read non-legal writing as often as they can to counteract the poorly-written prose they are forced to consume by reading much of what passes for adequate writing within the profession. Strunk and White use Thomas Paine’s famous observation, “Times like these try men’s souls,” to exemplify great style. Strunk and White, *supra*, at pg. 98. The words cannot readily be re-ordered without detracting from the sentence:

How trying it is to live in these times.

These are trying times for men’s souls.

Soulwise, these are trying times.

Id. None has the force of Paine’s formulation. Achieving such clarity, force, and grace in writing takes a lifetime of practice – and we may never achieve the level of writing of a Thomas Paine or Abraham Lincoln. Hemingway said of writing that it “is something you can never do as well as it can be done.” Hemingway letter to Ivan Kashkin quoted in *Ernest Hemingway on Writing*, pg. 15 (ed. Larry W. Phillips, Touchstone 1984). Still, by reading great writing by Paine or Lincoln or Hemingway or any of the many other great writers, we can develop an ear for prose that will help us choose and order our words.

Mary Massaron Ross is head of Plunkett & Cooney, P.C.’s appellate practice group. A Fellow in the American Academy of Appellate Lawyers, she has briefed and argued hundreds of appeals in state appellate courts, including Michigan, Indiana, Ohio, and California, as well as in the Sixth Circuit and other federal circuit courts of appeal. She is a past chair of DRI’s Appellate Advocacy Committee, served as co-editor of DRI’s publication *A DEFENSE LAWYER’S GUIDE TO APPELLATE PRACTICE*, and currently serves as a national director on DRI’s Board.

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HIDDEN LIABILITY FOR CUSTOMER'S ATTORNEYS' FEES IN STANDARD VEHICLE SALES CONTRACTS

By Lane E. Webb and Alan E. Greenberg,
Wilson Elser

A recent arbitration proceeding in San Diego has highlighted the risk of liability for a prevailing customer's attorneys' fees in a standard vehicle sales contract. Despite language in the sales contract that, on its face, appeared to clearly exclude the dealer's responsibility for the customer's attorneys' fees the Arbitrator interpreted California statutory and case authority and found the dealer obligated to pay for the customer's attorney's fees after a sales transaction was rescinded.

The Sales Contract involved in the arbitration proceeding did not generally allow for attorneys' fees to either side of the transaction if there was a dispute between the parties. There was a box, however, just above the Arbitration Clause in the Sales Contract, entitled in boldface: "Rescission Rights." The four subparagraphs of that section explained that Seller may rescind the contract if unable to assign it to a financial institution. It explained that Seller may then give Buyer notice of rescission within 10 days of signing the contract and Buyer must immediately return the vehicle and receive back Buyer's consideration. Subparagraph c stated: "If you do not immediately return the vehicle, you shall be liable for all expenses incurred by Seller in taking the vehicle from you, including reasonable attorney's fees." (Emphasis added)

The proceeding in California did not involve any attempt by the dealer within 10 days of execution of the Sales Contract to rescind the contract because of an inability to assign the contract to one of its financial institutions. Instead, the proceeding involved an attempt by the customer to rescind the sales transaction based upon an alleged breach of contract and negligent misrepresentation by the dealer concerning the "towability" of the vehicle.

The matter proceeded to arbitration because of a mandatory arbitration clause in the Sales Contract. The Arbitration Clause provided, in part, as follows: "Each party shall be responsible for its own attorney, expert and other fees, unless awarded by the arbitrator under applicable law." (Emphasis added) The Arbitrator used the last part of the Arbitration Clause as the foundation to support an award of attorneys' fees to the customer.

The Arbitrator rejected the argument made by the dealer that the phrase "unless awarded by the arbitrator under applicable law" was limited to situations where a statute provided a basis for an award of attorney's fees to the customer. The Arbitrator also rejected the argument that the attorneys' fees clause in the "Rescission Rights" section of the contract was narrowly limited by its terms to a specific situation that did not occur (rescission by the Seller within 10 days of execution of the contract) and had no application to a rescission action by the Buyer.

The Arbitrator noted in his Arbitration Award that the dealer's position would be well-taken under the decision in Sciarotta v. Teaford Construction Co. (1980) 110 Cal. App.3d 444. There, a standard form building contract provided for fees to the builder if forced to sue for the contract price. The case was brought by the owners for breach of the agreement to build a house in "a substantial and workmanlike manner." Prevailing plaintiffs argued that if the builder had sued to enforce the only part of the contract benefiting it and prevailed, it would have been entitled to fees; in order to achieve equality, owners who sue to enforce the only part of the contract benefiting them should be entitled to fees and Civil Code §1717 should be interpreted accordingly to cover any action on the contract. That section provides that in any action on the contract "...where the contract specifically provides that attorney's fees and costs, which are incurred to enforce the contract, shall be awarded either to one of the parties or to the prevailing party, then the party who is determined to be the party prevailing on the contract, whether or not he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." (Emphasis added) The court rejected plaintiff's argument, limiting Civil Code §1717's reciprocity provision to the specific provisions of the contract for which attorney's fees were provided. 110 Cal. App.3d at 450, 451.

The Arbitrator held that the result in Sciarotta was essentially what the dealer was arguing for in this case— a limitation of attorney fees to the situation where seller is unable to assign the contract as required to rescind and repossess the vehicle. Sciarotta, however, the Arbitrator held is no longer the law. The Legislature (apparently agreeing with the dissenting justice who lamented that the majority's ruling permitted the party with superior

bargaining strength to thwart the salutary purposes sought to be achieved by Civil Code § 1717) amended Civil Code §1717 in 1983 to provide: "Where a contract provides for attorney's fees, as set forth above, that provision shall be construed as applying to the entire contract, unless each party was represented by counsel in the negotiation and execution of the contract, and the fact of that representation is specified in the contract." (Emphasis added)

Here, according to the Arbitrator, the dealer protected itself with the right to attorney fees in the only circumstance where it was likely to rescind the contract (otherwise, the contract would be assigned to a lender and dealer would have no further occasion for rescission). The buyer, however, was not accorded a parallel right to attorney fees in circumstances where the buyer would be likely to seek to rescind the contract.

The Arbitrator then discussed a number of recent California decisions which he believed supported his position.

In Kangarlou v. Progressive Title Co. (2005) 128 Cal.App.4th 1174, escrow instructions provided: "In the event of failure to pay fees or expenses due you [escrow company] hereunder, on demand, I agree to pay attorney's fees and costs incurred to collect such fees and expenses." A home buyer sued the escrow company for breach of fiduciary duty and prevailed on a matter unrelated to the payment of escrow fees. The Appellate Court held that because the fiduciary duty arose from the contract, the action was "on the contract." Based on the amendment to Civil Code § 1717, meaning that "parties may not limit recover of attorney's fees to a particular type of claim, such as failure to pay escrow costs," the court found the plaintiff entitled to fees and reversed the trial court. 128 Cal.App.4th at 178-179.

In Harborview Hills Comm. Ass'n. v. Torley (1992) 5 Cal.App.4th 343, the homeowner's association's 1971 CC&Rs provided for recovery of attorney fees by the prevailing party only with respect to non-payment of assessments. In 1989, the homeowner's association successfully sued a homeowner for unapproved exterior alterations. The court held that the 1983 amendment to Civil Code §1717 was intended to and did overturn Sciarotta, and manifested a clear intent "to provide complete mutuality of remedy where a contractual provision makes recovery of attorney's fees available to one party." 5 Cal.App.4th at 348-

349. The court then held that the amendment to Civil Code § 1717 applied retroactively to the CC&Rs in question.

In Frank M. Booth, Inc. v. Reynolds Metals Co. (E.D. Cal 1991) 754 F.Supp. 1441, decided under California law, where buyer and seller exchanged forms that did not agree on all terms of the contract, each party's form permitted it to recover attorney fees in specified circumstances, and the parties performed, the court held that the contract consisted of the terms on which the forms agreed and that conflicting attorney fees clauses were converted by CC § 1717 "into a clause permitting the prevailing party to recover attorney's fees for any dispute on the contract." 754 F.Supp. at 1448.

Thus, according to the Arbitrator, it was clear from these decisions that the courts interpret and apply the amendment to Civil Code § 1717 as standing for the proposition that if an agreement provides for attorney's fees for any dispute under the contract, then the agreement will be deemed as a matter of law to provide for attorney's fees for all disputes under the contract."

The Arbitrator distinguished the case of Paul v. Schoellkopf (2005) 128 Cal.App.4th 147, which was relied on by the dealer. There, in a suit brought by buyers of real property against sellers, neither the purchase agreement nor an addendum contained an attorney fees clause and the only document with such a clause was the escrow instructions granting the escrow company attorney fees for non-payment of escrow fees. The court held the amendment to Civil Code § 1717 inapplicable, as the clause addressed only the rights and obligations of the escrow holder vis-à-vis the buyer and seller and vice versa, not the rights and obligations of buyer and seller inter se (page 151). The Arbitrator believed it was notable that the author of the Paul decision, Justice Epstein, also wrote the later Kangarlou decision, supra, reiterating his statement in Paul that "thus, parties may not limit recovery of attorney's fees to a particular type of claim, such as failure to pay escrow cots." 128 Cal. App.4th at 153; 5 Cal.App.4th at 1178.

Accordingly, the Arbitrator held that under Civil Code § 1717(a), the dealer could not limit the attorneys' fees provision to its claim for repossession after rescission for inability to assign the contract, and the attorneys' fees clause was converted into an attorneys' fees clause applicable to all disputes under the contract.

The Arbitrator next rejected the dealer's argument that under the "Rescission Rights" section of the sales contract there must first be an unsuccessful attempt by the seller to assign the contract and then a notice to buyer within ten days of signing the contract, before seller can seek attorney fees. These, in the dealer's view, were "conditions precedent" to a fee award which, under Leamon v. Krajewicz (2003) 107 Cal.App.4th 424, 432, conditioned the buyer's rights as well.

Leamon involved the interaction between a bilateral attorney fees clause and a mediation provision specifically requiring either buyer or seller to mediate before resorting to arbitration or court action and expressly disallowing fees if a party commenced action without first attempting mediation. The Appellate Court affirmed the disallowance of fees to the prevailing party who successfully won a determination that the contract was invalid, but who initiated action without seeking mediation. As the court noted several times, the mediation clause was a condition precedent to the recovery of attorney fees (432, 433). "We conclude that the enforcement of the condition precedent to the recovery of attorney's fees does not conflict with the concept of mutuality of remedy under the facts of this case." 107 Cal.App.4th at 433). The clause was specifically mutual and reciprocal and applied to any dispute under the contract. On a motion for reconsideration, the court distinguished Wong v. Thrifty Corp. (2002) 97 Cal.App.4th 261 on several grounds, among them: "...the Wong case did not involve a contract established to be invalid or the satisfaction of a condition precedent completely within the control of the party requesting attorney's fees. ... Finally, the attorney's fees provision in Wong was unilateral, while the provisions in the agreement apply equally to the buyer and the seller." 107 Cal.App.4th at 435 (Emphasis added).

In the case before the Arbitrator there was no mutually reciprocal condition precedent to the recovery of attorney fees because the only provision for attorney fees was a unilateral one allowing fees to seller if required to repossess under the contract. The ten-day notice of rescission by seller was not a condition precedent to the recovery of attorney fees, but rather a condition precedent to seller's rescission rights. (The attorney fees come into play only if seller has to take action to recover the vehicle to effectuate rescission.) It is not the type of condition precedent dealt with in Leamon.

The Arbitrator stated that if the dealer's position was correct, the amendment to Civil Code § 1717 would never come into play because, by definition, the clause in question deals with a different claim, which will have different elements and, thus, different "conditions precedent" to the recovery that will trigger attorney fees. The Arbitrator felt that if the dealer's position was adopted we would be right back to Sciarotta where the "condition precedent" to attorney fees was non-payment of the builder, clearly a condition that could not be satisfied by the homeowner.

The Arbitrator concluded that the inability to assign and the ten-day notice requirements applicable to seller rescission were not conditions precedent to the recovery of attorney fees within the meaning of Leamon because they did not apply equally to buyer and seller and were not within the control of the party requesting attorney fees. (For example, a buyer of a vehicle may not learn of grounds for rescission until some weeks or months after the sale, whereas seller will know within a few days whether it can assign the contract to one of its financial institutions. The ten-day notice period would be arbitrary and unreasonable in the Arbitrator's view if applied to buyer's notification of rescission.)

Based upon the above analysis, the Arbitrator concluded that as the prevailing party on the contract, the dealer was entitled to attorney fees because by operation of law (Civil Code § 1717(a)) the limited attorney fees provision of the contract relating to seller rescission was converted to an attorney fees provision applicable to all claims under the contract, including buyer's rescission.

The moral of the story is that there are no unilateral contractual attorneys' fees provisions allowed in California, and the amendment of Civil Code § 1717 now makes the right to attorneys' fees in any part of a contract applicable for all disputes under the contract. The risk of exposure to a customer's attorneys' fees in a rescission action far outweighs any benefit the dealer may hope to obtain by including an attorneys' fees provisions in the "Rescission Rights" section of the Sales Contract. The way to avoid the result in this case (where the customer's attorneys' fees were far more substantial than the damages sought or recovered in the lawsuit) is either to eliminate the right to attorneys' fees completely in the Sales Contract or to limit the right to recover attorneys' fees to some nominal sum such as \$500.



Photos listed in alphabetical order around the page clockwise and start with Steve Amundson's photo.

Law & Politics magazine publishes Super Lawyers of San Diego 2007

23 San Diego Defense Lawyers are recognized

Steven G. Amundson, White & Oliver

Harvey C. Berger, Pope, Berger & Williams*

Douglas M. Butz, Butz, Dunn DeSantis & Bingham*

Robert C. Carlson, Jr., Koeller, Nebeker, Carlson & Haluck

John R. Clifford, Drath, Clifford, Murphy & Hagen

Peter S. Doody, Higgs, Fletcher & Mack

Robert W. Frank, Neil, Dymott, Frank, McFall & Trexler

Charles R. Grebing, Wingert, Grebing, Brubaker & Goodwin*

Steven R. Haasis, Law Office of Steven R. Haasis

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Karen A. Holmes, Balestreri, Pendleton & Potocki

Clark R. Hudson, Neil, Dymott, Frank, McFall & Trexler

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SDDL Member Summer Fun Photos - What did you do this summer?

Liz Skane of Jampol Zimet Skane & Wilcox LLP - These are three pictures that include me, my husband, and our daughter in South Africa. When we were in South Africa he ran a race called the Comrades Marathon which is 56 miles long. He ran this race as a fundraiser for a South African based charity called Starfish. He and I managed to raise in excess of \$17,000, much of which came from donations made by members of the San Diego Defense Lawyers. We were absolutely blown away by people's generosity. Each of these pictures was taken at first a grammar school and then later what is called a creche (which cares for little little babies) Each of the children in these photos (other than our child) is an AIDS orphan, and many of these children are HIV positive. Because we raised so much money, the organization arranged for us to see where the money was going, and how this money changed the lives of the most vulnerable children in the world. So this school and creche is funded by Starfish charity money.



Also shown are pictures of the bungalows we stayed in while visiting Mozambique, located in southern Africa, which until recently has been torn by civil war. This looks like a lawsuit waiting to happen and no, these guys do not have anything securing them to the roof. They are reroofing this bungalow using, yes, grass, but in a country where they worry about having enough to eat, a lawsuit would not enter their minds. And yes, the hotel is build on stilts out over the Indian Ocean. It was awesome!



Finally, we enjoyed the experience of an African safari.





Lindsay Skane enjoys her first birthday cake at La Jolla Shores.

Ken Greenfield spent time in Mexico. Following are his comments regarding the photos: "That's me and the pottery man in San Felipe, Mexico. And the other pic is of the scary army man!"



Graham Hollis fires up the BBQ at a fundraiser for the GraceHollis Foundation to raise money for the Harbor School (a school for homeless children).



Medicine Man has nothing on **Danielle Nelson** as she has "crazy fun" zip-lining over tree tops in Cancun in June.



"Three F's: Floattubing, fishing and photographing at Lake Murray" by **Jim Boley**



Ian Wood steps up to sing in a karaoke contest in Japan. Although he did not win for singing his fancy shoes and attire brought loud applause from the audience.



Matt Guthrie, Kevin Kouzmanoff of the San Diego Padres, and **Scott Guthrie**



Scott Guthrie on left (age 3), **Chris Young** of the San Diego Padres, and **Matt Guthrie** on the right (age 6)



Bill Guthrie, Lori Guthrie, Scott and Matt in July 2007 on the pier at Lauderdale by the Sea



Matt, Lori and Scott Guthrie at Spaghetti dinner night at Miramar Ranch Elementary.

LEAVE YOUR BAR CARD AT THE DOOR OR, A JURY IS NO PLACE FOR A LAWYER



By Shauna L. Hagan, Esq.,
Lewis, Brisbois, Bisgaard & Smith

The new CALCRIM jury instructions may have been designed to simplify the law for the lay juror, but for a lawyer sitting as a juror it's a different story.

I showed up for my first tour of jury duty in 30 years with the hope and expectation that no one would want me. I was called to a criminal department and sent to seat number 9 but the fact of my occupation failed to garner any questions during the attorney portion of voir dire. I was not discouraged, though, because I fully anticipated being excused at some point in the back and forth pre-emptory challenge match. After a few thank and excuse plays, I heard the dreaded words, "We have a jury." What? Me? No! But there I was, Juror Number 9. I gulped and assumed the position, consoling myself with the fact that it was only going to be a two day event. But it was two days I won't soon forget - two days that will live in infamy within my sense of professional self.

It had been a simple one and ¼ days of testimony. The charges: one count of possession of drug paraphernalia and one count of aiding and abetting the sale of a controlled substance (Meth). One undercover officer, an arresting officer, and one other officer had testified for the prosecution. They stipulated to the meth, and the defense rested without putting on any evidence. Closing arguments were brief. The prosecution's position was that the defendant was aiding a non party perpetrator (we'll call her P) to sell meth to an undercover officer and therefore acting as a broker. The defense's position was that the defendant (we'll call him D) was aiding the officer in the purchase of the meth in the hopes of getting some for himself.

We were escorted to the deliberation room (I've had bigger closets), given the rules and shown the call buttons. Everyone found a seat before me, leaving only a conspicuous-looking chair at the head of the long table and closest to the door (through which I would eventually find myself desperately wanting to escape). It would turn out to be the seat of shame. I nodded to the Hawaiian shirt two seats to my left. It began quite cordially, something along the lines of:

"Come here often?"

"No, this is my first time. I'm surprised I was not pre-empted."

That was the first sign of anyone's interest in my contribution to the process. I assumed I would have lots more to give. What a great panel, I thought: a pediatrician, two nurses, a second year law student (and part time dodge-ball referee), a marine/boat business owner, two computer-type men, an engineer (I think), a few others whose occupation I can't recall, and me, a second career insurance defense attorney, sitting on a criminal jury. I proposed that the law student/dodge-ball referee act as foreman. (Too bad he hadn't brought his whistle.) All hailed the idea. That was the last sign of anyone's interest in my contribution to the process.

The first and only blind vote resulted in unanimous guilty verdicts on the possession of drug paraphernalia, but on the aiding and abetting count it was 2 not guilty, 9 guilty, and 1 undecided. The foreman read aloud the jury instructions for aiding and abetting, specific intent and general intent. There were surprisingly few jury instructions, only 22. I was used to seeing 3-4 times that amount. We started by listing the facts upon which we all could agree which were as follows:

Undercover approached D in the park and said, "Got any?" D said, "What do you want?" Undercover said "Tweak." D said, "How much are you looking for?" (or something along those lines). Undercover said, "\$40.00." D agreed to show him where to find some. As they were walking, D asked Undercover if he could have some of whatever Undercover was able to purchase. Undercover agreed. They walked up to a park bench, where P was sitting with others. D asked P if she had \$40 worth of tweak. P pulled out a plastic bag from her notebook and asked if there was a bag to put it in. D pulled out a plastic bag and handed it to P, who then tore off a corner, filled it with meth, and exchanged the meth for Undercover's pre-marked cash. D never touched the cash or the meth given to Undercover. D then asked P, "Can I have some too?" and was given some by P. Arrest of P and D occurred within minutes. Come to think of it, those were all the facts that were in evidence.

We then turned our attention to each element of the crime of aiding and abetting. We again read the new CALCRIM jury instruction 401, which to the lawyer lobe of my brain was lacking in clarity about the law. Everyone settled into their various types of personality roles. The bully juror, taking up that role quite comfortably, announced that helping Undercover find drugs was the same as helping P sell drugs because you can't have a sale without a purchase, and therefore, D was guilty. 11 jurors quickly came to the conclusion that to help someone purchase drugs was ipso facto aiding and abetting someone to sell those drugs.

I offered that if such were true, then it would be illegal to purchase drugs, which it is not. After all, there is no such crime as aiding and abetting the purchase of drugs and you must have a crime in order to aid and abet. Therefore, it was D's intent that needed to be discussed. Bully juror announced that if D intended the transaction, the intent element was met. I said that would be true of a general intent crime, but not a specific intent crime, and that we needed to discuss whether D's purpose was directed toward P or whether D's purpose was directed toward himself and/or Undercover.

Bully would not allow further discussion past his insistence that it didn't matter whether D intended to help the buyer or intended to help the seller. His conclusion was based on the jury instruction which seemed to instruct that D's intent must be to do any act that advances P's commission of the crime of drug sales. Each time I attempted to explain my reasoning, Bully became irritated and Bully's supporter began rolling his eyes. Referee could not compete with them. This was only the first half hour of deliberations.

I didn't understand why they could not see the issue. I finally defaulted to the definition of reasonable doubt in an effort to get some discussion going.

"I have an abiding conviction that D intended to aid and abet Undercover to purchase the drugs, but I do not have an abiding conviction that D intended to aid and abet P to sell drugs; therefore, I have reasonable doubt that D intended to aid and abet P to sell drugs."

"It's the same thing!" Bully and his supporter growled in unison. That became the mantra, the sound-bite. Each attempt to discuss the issue was interrupted with that same sound bite from Bully. After a while, two or three other jurors echoed Bully's sound bite. Two or three different jurors acknowledged my point but were summarily dismissed with the same sound bite and thereafter only nodded as if in agreement when I was able to finish more than one sentence. I managed to finish more than one sentence only three times, but that was only during the times Bully was in the restroom hacking something out of his smoke-filled lungs. Well, you take the opportunities you can get.

I pointed to the fact that D asked: "can I have some too?" which is language of opportunistic hope, not language of expectation or entitlement and that If D were 'brokering' the deal, he would have used language of expectation or entitlement with the person on whose behalf he was acting (Pediatrician nods). That just led to an inane exchange with Bully about his prior experience as a real estate broker who was permitted to act on behalf of both buyer and seller in the same transaction. He missed the point that such a thing by a realtor required a waiver agreement and we had no evidence of any sort of agreement between P and D.

If you can't see the issue, you can't analyze the issue. I had to figure out how to get past this obstacle. Was I being overly nuanced? I found it easy to see the issue and wanted to analyze it. They did not. O.K., this would be a great law school essay question, but can I expect a jury to appreciate the possibility of a distinction between buyer and seller as it affects the element of aiding and abetting specific intent? Apparently not. It is not in their genes to IRAC. Or maybe I was thinking like an advocate. To me, jury instruction 401 did not accurately relate the requirements of specific intent that I remembered from law school, so I concluded it was a legal question.

Since the judge is supposed to answer the jury's legal questions, I had hoped that help was back in the courtroom. I suggested we send a question, that question being: If we believe D intended only to aid and abet the purchaser to obtain the drugs, must we then convict him of aiding and abetting the seller? Everyone agreed, and we sent the question. I was expecting some relief from being relegated to considering only Bully's sound bite. Nobody spoke while we awaited the answer. Bully and his supporter would occasionally make a snide comment directed at the ridiculous nature of my position. I was sure they'd have egg on their faces when the judge clarified the law allowing us to get past the sound bite and discuss specific intent under the facts of the case. I was wrong.

The judge sent back the answer. It went something like this: If you believe that D intended to help P sell drugs, it doesn't matter whether or not D also intended to help Undercover. (Huhh...???) The answer inverted the question! Alas, no reinforcements were galloping to my

rescue. OK, the judge didn't want to identify an issue not spelled out in the arguably oversimplified jury instruction. I gave up, abandoned the lawyer lobe of my brain and we convicted (Pontius Pilate washed his hands). The whole process took three hours. It will now be in the hands of the fine public defender's office to raise the issue of the jury instructions and the judge's answer should they decide to file an appeal.

Everyone was happy to get away from the jury room. I was happy to get away from Bully and his supporter, but I was also disappointed in myself for not sticking to my "abiding conviction" position. Perhaps I should have been forceful and not tolerated the interruptions. Perhaps I should have insisted on further discussion. On the other hand, perhaps I was just instinctively advocating. Perhaps nuance does not belong in jury deliberations. But IRAC and advocacy are acquired genes in the helix of a lawyer and so perhaps I just should not have been there. In the end it was the simple minded perspective that had carried the day (Ouch). I can't say that a more detailed hair splitting discussion would have resulted in a different conclusion, but I felt robbed nonetheless. The whole experience left me feeling like a pariah.

As I exited the courthouse with nose out of joint, I wondered to myself whether there should be some level of critical thinking skills as a pre-requisite for serving as a juror rather than risk diluting the law for the lay perspective. I concluded that giving so much power to individuals who may have limited analytical skills seemed dangerous. After all, if a jury has nullification power, they should possess a certain level of integrity and analytical skill shouldn't they? Do we lose something by oversimplifying the jury instructions in our efforts to make the law easier to understand by the non lawyer? But these are issues with constitutional ramifications, the pursuit of which would take way too much time away from my required billable hours, so I will just have to leave that to the law school professors and legislature. I am too small for the task and can only postulate. However, I will pay much closer attention to my requested jury instructions in my next case that goes to trial. So at least I can say I learned something, even if the misadventure left me, for the first time in my career, disappointed in the legal system and disappointed in myself. Or maybe I just need to get a life.



"Stutz Artiano Shinoff and Holtz Protect the Tort Claims Act From the Sexual Abuse Revival Statutes"



by Paul Carelli, Esq. of Stutz Artiano Shinoff & Holtz

SHIRK v. VISTA UNIFIED SCHOOL DISTRICT ___ Cal.4th ___, 2007 WL 2350649 (August 20, 2007).

1. INTRODUCTION

The California Legislature recently opened a one-year window of time permitting plaintiffs who had suffered childhood sexual abuse to file negligence suits against entity defendants, even if the statute of limitations had

long since passed. (Code Civ. Proc., § 340.1, subd. (c).) This legislation arose out of the aftermath of the problems involving the Catholic Church, after allegations had come to light that the Church may have protected priests who abused children. What was unclear, however, was whether this "revival" legislation applied to public, rather than private, entities.

Based upon this legislation, in 2003, Linda Shirk sued the Vista Unified School District (VUSD) for events she alleged occurred when she was a high-school student back in the late 1970's. In her complaint, Shirk alleged that when she was between fifteen and seventeen-years old, she had sex over 200 times with her high school English teacher over an 18-month period.

VUSD demurred to the complaint on the grounds that the one-year window did not apply to public entities, because the Tort Claims Act requires that a tort claim be submitted to the public entity within one year of the accrual of the claim involving a minor. VUSD argued that because the last bad act allegedly occurred in 1979, Shirk had until 1980 to submit a claim, and she failed to do so. The Superior Court agreed and dismissed the case. The Court of Appeal reversed.

The case went to the California Supreme Court. In a 6-1 decision, the Court ruled in VUSD's favor, holding that Shirk's claim accrued 25 years ago, and that the new legislation did not revive Shirk's claim. Accordingly, because Shirk did not submit a claim by 1980, the Supreme Court reversed the judgment of the Court of Appeal.

2. THE COMPLAINT

Plaintiff Linda Shirk was born on June 22, 1962. In September 1977, when she was 15 years old, her English teacher began flirting with her on the first day of school; in May 1978, the teacher initiated their first sexual encounter. In the ensuing months, the teacher and Shirk engaged in sexual conduct both on and off school premises. Their last sexual contact occurred in November 1979. In the following months plaintiff neither notified the School District of her abuse nor presented a claim to it.

In June 2001, when plaintiff's 15 year old daughter was attending Vista High School, plaintiff saw the teacher at high school band tournaments. That same month, having become "very upset" by her long ago molestation, she filed a report with the local sheriff's office. In February 2002, she met with the teacher and surreptitiously recorded a conversation in which the teacher admitted to sexual conduct with her

and with another student. On September 12, 2003, a licensed mental health practitioner interviewed Shirk and concluded that she was still suffering psychological injury from her sexual abuse by the teacher. That same day, plaintiff presented a claim to the VUSD District for personal injury stemming from her sexual abuse by its employee.

Based upon these incidents occurring in 1978 and 1979, Shirk sued both the teacher and VUSD on September 23, 2003. The suit alleged general negligence, based upon an allegations that VUSD knew or should have known that the teacher was unfit and a danger to his students, and that VUSD knew or should have known that the teacher was engaging in inappropriate sexual misconduct with plaintiff, but failed to do anything to protect her.

3. DEMURRER SUSTAINED; COURT OF APPEAL REVERSES

VUSD demurred to the complaint on the basis that Shirk's claims were time-barred by the Tort Claims Act (Gov. Code, § 900, et seq.), which mandates that plaintiffs, at the latest, present a claim within one year of the accrual of the claim against the public entity. Shirk opposed the demurrer on the basis that her tort claim was timely under the newly amended Code of Civil Procedure section 340.1, claiming that she fit within the one-year window that revived stale claims for childhood sexual abuse.

The trial court ruled that Shirk's claims accrued on the date of the alleged molestations, no later than November 30, 1979, and that Shirk was required to submit a tort claim in 1980. The trial court further found that section 340.1 did not trump the timing provisions of the Tort Claims Act. The Court of Appeal, Fourth Appellate District, Division One, reversed in a unanimous opinion. The Court of Appeal ruled that despite the fact that the acts occurred in the late 1970's, the 2002 amendments to section 340.1 newly permitted Shirk to sue VUSD because section 340.1 revived her 1979 stale claim for the purposes of suing a public entity like VUSD.

4. THE SUPREME COURT'S RULING IN FAVOR OF VUSD.

The Supreme Court granted VUSD's petition for review on the basis that the Fourth DCA's decision conflicted with a nearly contemporaneous decision by the 2nd DCA in the case of County of Los Angeles v. Superior Court (2005) 127 Cal.App.4th 1263, 1269. That case held that the timing provisions of Tort Claims Act must be followed by plaintiffs, and these provisions were not mooted by the statutes of limitations in the Code of Civil Procedure.

After briefing and oral argument, the Supreme Court decided the Shirk case on August 20, 2007. The decision addresses and resolves the apparent conflict between two separate statutory schemes- the statute of limitations under the Code of Civil Procedure and the California Tort Claims Act- and holds that the statute of limitations does not trump the Tort Claims Act.

A. *The Tort Claims Act Requirements.*

When a public entity is a defendant in a personal injury case, the plaintiff is required to comply with the mandates of the California Tort Claims Act. (Gov. Code, § 900, et seq.) Compliance with the Act is an element of a personal injury lawsuit against a public entity. (*State of California v. Superior Court (Bodde)* (2004) 32 Cal.4th 1234, 1241.) If compliance with the Act is not properly alleged, the suit is susceptible to demurrer. (Id.) Claimants who are minors are not excused from the Act's requirements, and must comply with its requirements, including statutory time limits. (*Whitfield v. Roth* (1974) 10 Cal.3d 874, 883 884.)

The Act currently requires that a plaintiff suing a public entity for personal injury must first submit a written claim to the entity within six months of the accrual of the claim.¹ (Gov. Code, § 911.2) If the unwitting plaintiff fails to do so, all is not lost: The plaintiff may apply to the entity to present a late claim within one year of the accrual of the claim. (Gov. Code, § 911.4.) If the claimant is a minor, the court may grant relief through the petition if and only if, the application for late claim was made within one year of the accrual of the claim, although equitable tolling doctrines may apply to toll the one-year period or postpone the time for accrual. (Gov. Code, § 946.6, subd. (c).)

So Shirk had one year from the time of the accrual of her claim to submit a tort claim to VUSD. Under the established case law, Shirk's claim accrued on the date of the last day that the alleged molestation occurred. (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 443; *Doe v. Bakersfield City School Dist.* (2006) 136 Cal.App.4th 556, 567, fn. 2; *Ortega v. Pajaro Valley Unified School Dist.* (1998) 64 Cal.App.4th 1023, 1053.)

Hence, VUSD argued that Shirk should have submitted a tort claim (or application for late claim) no later than some time in 1980.

B. *Code of Civil Procedure section 340.1, subdivision (c)*

Although Shirk acknowledged that her claim went stale in 1980, she countered VUSD's argument by asserting that the 2002 amendments to Code of Civil Procedure section 340.1 revived her claim. Interestingly, however, Shirk did not argue that equitable tolling applied to her case.

Rather, Shirk specifically pointed to language in subdivision (c) of section 340.1, which provides: "[A] claim for damages" brought against an entity that owed plaintiff a duty of care and whose wrongful or negligent act was a legal cause of injury to plaintiff resulting from childhood sexual abuse, if the cause of action "would otherwise be barred as of January 1, 2003, solely because the applicable statute of limitations has or had expired is revived" (italics added), and the revived "cause of action may be commenced within one year of January 1, 2003."

As the Supreme Court explained, "[i]n plain language, that provision expressly limited revival of childhood sexual abuse causes of action to those barred 'solely' by expiration of the applicable statute of limitations." (Slip Opn., p. 10.)

C. *The Supreme Court holds that the Legislature did not intend for section 340.1 to trump the Tort Claims Act provisions.*

The Supreme Court rejected Shirk's assertions. First the Court looked at the history of section 340.1 and the 2002 amendment in

particular, and concluded that the legislative history is "virtually silent as to its impact on a public entity defendant." (Slip Opn., p. 11.) The Court further noted that the "legislative history makes no mention of an intent to revive the deadline by which to present a claim to a public entity, nor have we found any mention of the potential fiscal impact of reviving public liability for incidents that occurred, as here, decades ago." (Ibid.) The Court emphasized that "[h]ad the Legislature intended to also revive in subdivision (c) the claim presentation deadline under the government claims statute, it could have easily said so. It did not." (Slip Opn., p. 12.) Accordingly, the Court ruled that "as of January 1, 2003, plaintiff's causes of action against the School District were barred by expiration of the time for presenting a claim to the School District." (Ibid.)

The Court also rejected Shirk's argument that her claim accrued in 2003, when she went to the mental health practitioner, who told her that the molestations caused her psychological harm. The Court explained that section 340.1 did not appear to apply to public entity defendants. (Slip Opn., p. 13.) Therefore, the Court concluded, "it seems most unlikely that the Legislature also intended revival applicable to persons who discovered only in 2003 a new injury attributable to the same predicate facts underlying a cause of action previously barred by failure to comply with the government claims statute." (Slip Opn., p. 13-14.)

Finally, the Court emphasized that its holding was consistent with the public policies underlying the Tort Claims Act. Those policies consider that tort claims (1) afford "the entity an opportunity to promptly remedy the condition giving rise to the injury, thus minimizing the risk of similar harm to others"; (2) allow the public entity "to investigate while tangible evidence is still available, memories are fresh, and witnesses can be located"; and (3) permit "early assessment by the public entity, allows its governing board to settle meritorious disputes without incurring the added cost of litigation, and gives it time to engage in appropriate budgetary planning." (Slip. Opn., p. 12.)

5. IMPLICATIONS OF THE DECISION

The Court's decision ultimately means that if the Legislature wants to permit the revival of old claims for childhood sexual abuse against negligent public entities, it must affirmatively and expressly say so in future amendments. Otherwise, plaintiffs must continue to comply with the mandates of the Tort Claims Act, meaning that absent any equitable considerations, minors have one year from the last act of molestation to submit an application for late claim with the public entity when alleging that the entity negligently permitted the abuse to occur.

FOOTNOTE

¹ At the time of the alleged molestation, 1978-79, the Act required presentation within 100 days of the accrual of the claim, under former Government Code section 911.2.

Editor's comment: Kudos to Stutz Artiano Shinnof & Holtz attorneys Daniel Shinoff, Jack Sleeth, Paul Carelli, Jeff Morris and Bill Pate who were all involved in the working up this case. Further kudos to Jack Sleeth, Paul Carelli and Daniel Shinoff who argued the case before the Supreme Court of California.

EXTRA!!! Member News EXTRA!!!



Farmer Case & Fedor is pleased to announce that **Lisa Freund** and **Stephanie Tyson** have joined the firm as associates. Lisa is practicing insurance defense, insurance coverage and subrogation, construction defect, and medical malpractice. Prior to her move to California, she practiced insurance defense, bad faith, and insurance coverage and subrogation for approximately 5 years in Indiana. Stephanie Tyson graduated from the

University of California, Davis School of Law in May 2006. Her main areas of practice include insurance defense, insurance coverage and subrogation.



DRI recently announced that **Bob Harrison** of Koeller Nebeker Carlson & Haluck, LLP has been elected Pacific Regional Director of DRI.



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Lori J. Guthrie, Editor

Grace Hollis Lowe Hanson & Schaeffer
 3555 Fifth Avenue, Suite 100
 San Diego, CA 92103
 619-692-0800
 619-692-0822 fax
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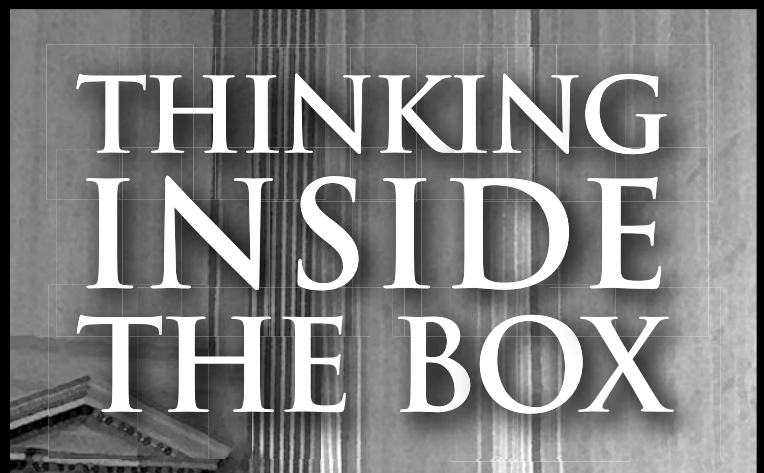
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