SAN DIEGO DEFENSE LAWYERS

THE UPDATE

FALL 2015

SDDL Helps in the Fight Against Childhood Diabetes

By Robert Mardian
HENDERSON CAVERLY PUM & CHARNEY LLP

The San Diego Defense Lawyers held their annual golf tournament on July 24, 2015, at the Country Club of Rancho Bernardo to benefit the Juvenile Diabetes Research Foundation. "The event is a win-win-win for everyone who takes part," explained event Co-Chair, Patrick Kearns. "The golfers win by getting to play hooky on a Friday afternoon and enjoy the comradery with friends and colleagues on this beautiful course. The sponsors win by getting to network with their customers while supporting a very worthy cause. And JDRF wins by receiving some much needed dollars to help find a cure for kids with diabetes."

The foursome from CPT Group scored the best round of the day with a 54. In addition to awards given to the top three teams, prizes were also handed out to golfers for the longest drive and closest to the pin. So as not to leave out those participants of unremarkable golfing prowess, prizes were given out completely at random to some of those brave enough to purchase a raffle ticket.

In addition to the usual clever giveaways by the sponsors and the abundance of a creative variety of spirited refreshments, this year featured a first time treat for SDDL golfers: Charger Girls. Through the efforts of Tim Valine Construction, the San Diego Chargers were kind enough to send Charger Girls to cheer on the golfers and support JDRF. So… absent scoring a touchdown for the Chargers, the best way to experience the exhilaration of the Charger Girls cheering you on is to play in the SDDL Golf Tournament.

Ben Cramer tees off with Charger Girls Tyler & Teran cheering him on.

The Golf Tournament is a great excuse to have fun, but it also has a very meaningful purpose: to help find a cure for juvenile diabetes. Juvenile (or Type 1) diabetes is a chronic condition where the pancreas produces little or no insulin. An insulin deficiency prevents the body's cells from converting sugar into the energy they need to operate. Juvenile diabetes affects both children and adults. While insulin is available to treat diabetes, it is not a cure. Even with insulin treatment, people with

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President's Message

By Alexandra "Sasha" N. Selfridge
THE LAW OFFICES OF
KENNETH N. GREENFIELD

SDDL's 2015 Golf Tournament and Juvenile Diabetes Research Foundation Benefit was a huge success! Thank you to all of SDDL's members, our sponsors, and the rest of the San Diego legal community for your contributions to this event. It was a beautiful day, filled with fun, friends, and even some golf, all for a great cause. I would also like to specially thank Patrick Kearns and Ben Cramer for organizing this amazing event.

It was great to see so many SDDL members at our Annual Tailgate and Padres Game. We had some great tacos, and SDDL was able to donate 10 game tickets to the Boys and Girls Club. For our next social hour, we will be bringing back SDDL's popular Trivia Night. Details will be coming soon!

One of the ways SDDL tries to support the legal community and provide value to our members is through our Lunch & Learn and evening MCLE programs. Since the last edition of the Update, we have sponsored seminars by Brian Rawers, Christina Bernstein, Johanna Schiavoni, Robert Shaughnessy, Bill Kammer, Christopher Todd, Mark Remas, Hon. Steven R. Denton (Ret.), Judge Joan Lewis, and Marilyn Moriarty. Don't miss the next one on October 13, by Assistant Presiding Judge Jeffrey B. Barton and Judge Keri G. Katz, entitled "Everything You Wanted to Know about Becoming a Judge Pro Tem."

I want to thank all those who volunteered as a judge for SDDL's Annual Mock Trial Competition. This year there were 20 teams representing different law schools from all over the United States. The level of talent displayed by so many of these students was amazing, and I am always inspired after judging in this competition. Gathering enough volunteer judges to provide the experience these hard-working student competitors deserve is never easy. SDDL could not make this competition work without all of you, who so generously volunteer your time. ◆

SDDL 2015 Calendar of Upcoming Events

Nov. 10, 2015	Lunch & Learn CLE: Hon. Kenneth J. Medel on "The Courtroom as Theater"
Nov. 19, 2015	MCLE Evening Program: Jack Philips on DUI's (Competence CLE Credit)
Dec. 8, 2015	Lunch & Learn CLE: Hon. Cathy A. Bencivengo & Hon. Randa Trapp on "Perspectives from the Federal and State Court Benches"
Jan. 30, 2016	SDDL Installation Dinner at U.S. Grant

MEMBERSHIP INFORMATION

Membership is open to any attorney who is primarily engaged in the defense of civil litigants. Dues are $160/year. The dues year runs from January 1 to December 31. Applications can be downloaded at: sddl.org

THE UPDATE

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LUNCH AND LEARN

Trial Skills – Covering All Bases

By Alexandra "Sasha" N. Selfridge
LAW OFFICES OF KENNETH N. GREENFIELD

On August 18, 2015, Judge Joan Lewis and Hon. Steven Denton (Ret.) presented this evening seminar to a record-breaking crowd of nearly 60 attendees. These two long-standing members of the San Diego Superior Court bench discussed procedural and performance tips and mistakes made by attorneys both before and during trial, strategies from the Trial Readiness Conference to verdict, and best practices for trial lawyers.

Judge Lewis emphasized the importance of preparing for the Trial Readiness Conference jointly, and in person. With respect to the Joint Exhibit List, attorneys are urged to follow the grids format. Both judges stated that inserting "objections 2-9" as a blanket objection to the opposing party's exhibits would be deemed a waiver of any objections to those exhibits. Any witness problems or anticipated Evidence Code 402 hearings should be brought to the attention of the trial judge at trial call.

With respect to special jury instructions, Judge Lewis stressed the need to be accurate with our legal support. The biggest generators of reversal on appeal are special jury instructions which are unsupported by law. She also highlighted the significance of carefully preparing special verdict forms in advance of trial, and to prepare multiple versions if necessary.

The judges reminded us that Motions in Limine serve a specific purpose – the exclusion of prejudicial evidence. Filing excessive, unnecessary Motions in Limine will only serve to upset – or even abuse – our judges. It is important to remember that Motions in Limine are not Motions for Summary Judgment in disguise. If we wish to educate the judge regarding causes of action which should be precluded, those arguments should be set forth in our trial briefs, not a Motion in Limine.

Judge Denton advised that clients should always attend trial, because jurors notice and care. He also discussed the importance of preparing clients for trial, with respect to both appearance ("no spandex!") and demeanor (no eye-rolling, no loud sighs, or excessive whispering).

The judges discussed the "lost art" of jury selection. It is our first chance at persuasion, which is acceptable, while preconditioning and self-ingratiating are not. Judge Lewis strongly suggested that we consider asking the judge to ask certain questions during voir dire, including sensitive areas such as sexual abuse or financial problems. The jury might be more likely to answer the questions truthfully.

With respect to opening statement, the judges cautioned against the use of too much information in power point slides. Studies have shown that doing so can result in the jury actually absorbing less information. At the same time, they have seen photographs of witnesses used very effectively during opening statement, especially during longer trials. One way to do this is by including the photographs in a notebook in which the jurors can use to take notes. This makes it much easier for the jury to remember the road map given in opening statement as the trial progresses.

As always, the SDDL's Evening Seminars are free to SDDL members and a catered dinner and beverages are provided. We hope to see you at the next presentation in November! ◆

Bottom Line

Case Title: Megan F. Isbell v. University of California San Diego Health System; Rady Children's Hospital – San Diego, Rady Children's Specialists of San Diego, AMG, Inc., a corporation, Karen Kling, M.D., Michael Levy, M.D., Robert Lark, M.D., Hal Meltzer, M.D., Peter O Newton, M.D. Burt Yaszay, M.D., Tamara K. Zagustia

Case No. : 37-2011-00094646-CU-MM-CTL

Trial Judge: Hon. Frederic L. Link; Dept. C-26

Type of Action: Medical Malpractice – Alleged Negligent Spine Surgery

Type of Trial: Court/Jury Trial

Trial Length: 11 Days

Verdict: Defense Verdict with a finding of no negligence

Attorneys for Plaintiff: James J. Filicia, Esq. Law Office of James J. Filicia

Attorneys for Defendants: Daniel S. Belsky, Esq. and Bruce W. Boetter, Esq. for Peter Newton, M.D. and Children's Specialists of San Diego; and Richard D. Carroll, Esq. and Natalie J. Buccini, Esq. for Hal Meltzer, M.D. and The Regents of the University of California

Damages and/or Injuries: Cauda equina compressive symptoms with low back and lower extremity pain and lower extremity weakness.

Settlement Offer: C.C.P. §998 Offers for zero dollars and a waiver of costs were served on Plaintiff in May 2014 by Dr. Newton and CSSD.

Plaintiff Attorney Asked the Court for: In final argument, Plaintiff asked the jury for $517,000 in non-economic damages against Dr. Newton/CSSD; and for $417,000 against Dr. Meltzer/The Regents of the University of California. ◆

CORRECTION:

The last issue of the Update featured an article entitled *Trailer Towing Basics: Part 1* attributing authorship to David King, PE. While Mr. King provided the article to SDDL, he did not author it. The article was actually authored by James V. Bertoch, MS PE. We apologize to Mr. Bertoch and our readers for the error.

Capture More Billable Time and Stress Less

By Jacqueline Vinaccia
LOUNSBERY FERGUSON ALTONA & PEAK LLP

Filling out a daily timesheet or inputting time into your firm's billing software can certainly be aggravating, even stressful. The annoying timer. The big blank timesheet. The blinking cursor on the computer screen that greets you every morning. It constantly shows if we are working too hard to enjoy life, working too little to make our minimums, or working inefficiently.

Don't Let It Be a Headache

Nearly every law firm has a minimum billable hour requirement, typically 1,800 to 2,000 hours per year. This means a goal of approximately 7.7 billable hours per day — if you don't take a vacation, get sick or work weekends. Research shows that as much as two hours per workday is lost to non-billable tasks. So a lawyer needs to be at work 9.7 hours per day to bill 7.7. This makes capturing billable time incredibly important.

How can you reduce the stress? Here are some strategies.

1. Don't think of it as "doing my time." In nearly every case, recording the time you spend working is how you are compensated. You are paid for providing a service. If you are satisfied with the service you provide, be comfortable billing the client for the service. Does your mechanic feel bad for spending two hours replacing your radiator? I have never had a mechanic feel bad about taking my payment for labor.

2. Record time spent when it's performed. Don't aggregate time at the end of the day. It takes approximately 10 seconds to input a time entry at the time the service is performed. Waiting until the end of the day or, worse, the week or month, requires an investment of non-billable time as a data-entry person. Not to mention the time lost trying to remember everything you did. Studies show that when time is recorded contemporaneously, the total time billed increases. I'm not talking about bill padding. This is a billable event recorded at the time the service is rendered, when it is most likely to be accurate.

3. Record the interruptions in long projects as they occur. Most workdays involve a series of long projects and the short tasks that occur as interruptions to a longer project: phone calls, emails, etc. If you record the interruptions as they occur, the time can be subtracted from the total time spent working to provide actual time devoted to the long project.

4. Create a distraction-free zone for larger projects. Writing motions, briefs and legal opinions requires focus. Phone calls, emails and staff conferences interrupt that focus, requiring you to refocus every time you return to the project. It can lead to incorrect self-editing of time spent on a project at the end of the day. It probably did not take a full four hours to write that much of your argument. However, dealing with intermittent interruptions can cause you to lose several hours of productive time every day. So, when working on a large project, close your door, turn off email alerts, put a do-not-disturb message on your phone, silence your cell phone, and tell your secretary to interrupt you only for things that truly cannot wait. A good, focused three to four hours will provide quality work product, then give you time to

respond to emails and phone calls afterward — maximizing your productivity.

5. Keep a notepad for writing down tasks that occur away from the office. Meetings, court appearances and depositions out of the office are, of course, billable. But you also check messages and answer calls and respond to emails when you are out. Keeping a notepad handy to write down all tasks performed when you are out of the office can assist in capturing billable time that could otherwise be forgotten.

6. Review your firm's time and billing program. Is it as efficient as it can be? Several programs now have the ability to capture and record time remotely using your smartphone or tablet, allowing you to input time directly into the billing program (without the need for a paper notepad). This is especially useful for litigators who are often out of the office.

7. Review the efficiency of your staff. Are you spending time on non-billable work when it could be performed by staff? I learned the importance of a good litigation secretary and paralegal when I first started at the firm where I now head the litigation team. Before I started at my firm, I had only ever worked with litigation secretaries and paralegals. The amount of information I did not know about non-billable clerical tasks such as service requirements, filing deadlines, subpoenas, deposition schedules and court forms was staggering. If you find that you are spending a regular portion of your day on non-billable clerical tasks, review your situation and figure out how to pass these tasks to paraprofessionals or clerical staff. If your staff is not able to handle these tasks, figure out why and fix the problem, whether through education, increased staffing or even replacing underqualified staff.

8. Communicate with the client regularly. While large corporations often have regular reporting requirements for outside counsel, most of the rest of us do not and often avoid repeated reporting to prevent incurring fees for unnecessary letters, emails or phone calls. However, keeping the client informed of the status of a case and the amount of the invoice on a regular basis will reduce stress for both of you. Your client won't be surprised by the bill if the running total is regularly communicated. And, if necessary, you can strategize together about ways to manage the potential cost while there is still time to do something about it.

9. Consider alternative billing arrangements. It is true that the billable hour model does not promote efficiency. Flat fees may promote efficiency, but they don't work for all legal services. Litigation is a classic example. The amount of time and effort expended on a case often depends on the actions of your opponent. An inexperienced or obstreperous opponent can cause legal bills to rise exponentially. But a hybrid approach to legal billing can work in many instances. For example, you might determine a flat fee for initial work, and then identify specific events for which you will charge additional fees, or switch to an hourly arrangement. Alternatives like this can take the stress out of billing for both client and attorney.

These are only a few recommended strategies for reducing the stress associated with billing. What strategies have worked for you?

Jacqueline S. Vinaccia is a partner and the lead litigator at Lounsbery Ferguson Altona & Peak LLP, a municipal law, business and real estate law firm in Escondido, CA. She has written several articles and presented seminars on proper billing techniques throughout the country. Article Reprinted from attorneyatwork.com with author's permission. ◆

Bottom Line

Case Title: Steven Rempell and Marcia Rempell v. Robert Theodore Hofmann, O.C. Jones and Sons, Inc.

Case Number: CIV1302527

Judge: Geoffrey Howard

Plaintiff's Counsel: Neil D. Eisenberg, Eisenberg Law Office, San Francisco, CA; Stephen J. Gorski, San Francisco, CA.

Defendant's Counsel: Robert F. Tyson, Jr. Tyson & Mendes LLP, San Diego, CA.

Mina Miserlis, Tyson & Mendes LLP, San Diego, CA.

James E. Sell, Larkspur, CA.

Type of Incident/Causes of Action: Motor Vehicle/Personal Injury, Loss of Consortium

Settlement Demand: Before trial, $27,000,000

Plaintiffs' CCP: § 998 Offer: $2,000,000

Defendant's Settlement Offer: Before trial, CCP § 998 Offer: $250,000

First offer: CCP § 998 Offer: $175,000

Trial Type: (Jury/Judge) Jury

Trial Length: 21 days

Verdict: As to Plaintiff No.1: $26,775
As to Plaintiff No.2: $0 ◆

Attorney Fees Pursuant to Contract: Can You Actually Recover Under Your Choice of Law?

By Daniel P. Fallon
TYSON & MENDES

Congratulations! You just entered into an agreement with another business to purchase its most valuable asset at a discount. Of course, no one anticipates any problems, but, just in case, you feel it is appropriate to draft a contract to memorialize the transaction and establish the duties and obligations of the respective parties. Your business is located in California, but the other business is in New York, so what law governs the contract? You can choose, but choose wisely, as your choice of law can greatly impact your chances for recovering attorney fees on a any future dispute.

A choice of law provision in a contract dictates what law will govern disputes arising under the contract. It is a critical consideration, as different state laws can bring about different results. This is particularly true in the context of attorney fees. To discourage breaches and disputes, contracting parties often include a clause awarding the prevailing party its attorney fees and costs incurred in resolving a dispute. Depending on the nature of the dispute, such fees and costs can be substantial. But will the prevailing party actually be able to obtain a court order awarding such damages? As with most legal questions, the answer is – it depends. And it depends in large part on the law chosen to govern the contract and its attorney fees clause.

Where two similarly situated parties include a choice of law provision in their contract, California law generally favors enforcement of such choice. *Nedlloyd Lines B.V. v. Sup. Ct.* (1992) 3 Cal.4th 459, 464-465. But, in order to decide whether to enforce the provision and apply the law chosen by the contracting parties, courts conduct a two-part analysis. First, the court considers whether there is any reasonable basis for the parties' selection of the particular state law governing the contract, including the state's relationship to the parties or subject matter of the contract. *ABF Capital Corp. v. Berglass* (2005) 130 Cal. App.4th 825, 834. Second, the court considers whether application of the chosen state's law might contravene any fundamental public policy of the state whose law would otherwise apply absent the choice of law provision, and which state has a materially greater interest in the matter than the chosen state. *Id.*

With respect to the first prong of the analysis, if one of the contracting parties resides in the state whose law was chosen to govern the dispute, such choice of law is inherently reasonable. *Hughes Electronics Corp. v. Citibank Delaware* (2004) 120 Cal. App.4th 251, 258. The same is true where a third party beneficiary of the contract resides in the chosen state. *Berglass, supra.,* 130 Cal. App.4th at 834. Accordingly, it is relatively easy to meet the first prong of the analysis, at which point courts are typically determining whether there was a seemingly random choice of law that was actually a strategic decision by one party in hopes of obtaining favorable results on future, perhaps anticipated, contract disputes.

With respect to the second prong of the analysis, the court can reach a quick decision if the law of the chosen state would apply to the dispute even without the specific choice of law provision in the underlying contract. In that situation, there is no possible contravention of state policies. *ABF Capital Corp., supra.,* 130 Cal.App.4th at 834. However, this is rarely the case. More frequently, the parties have included a choice of law provision in the contract specifically to draft around the otherwise applicable state law. In that situation, the court must analyze the effect of the application of the chosen law compared to application of the law had the parties not included a choice of law provision.

To determine the otherwise applicable law, a court will consider what state has the most significant relationship to the parties and transaction. *Nedlloyd Lines B.V., supra.,* 3 Cal.4th at 465. In its analysis, the court considers where the parties negotiated and drafted the contract, where the contract is to be performed and the location of the parties. *Rest.2d, Conflict of Laws,* § 188. If the contract was performed and negotiated in the same location, that forum's law typically applies. *Id.* at § 188(3). Once the court decides the state law that would be applied to the dispute absent a choice of law provision, it next looks to any conflict between that law and the contractually chosen state law.

With respect to attorney fees, California Civil Code § 1717(a) mandates reciprocal attorney fees despite contractual language to the contrary. Other state laws vary greatly. For instance, New York law strictly interprets the contractual language to avoid imposition of terms the parties did not intend to create. *Oscar Gruss & Son, Inc. v. Hollander* (2nd Cir. 2003) 337 F.3d 186, 199. So too does Pennsylvania law. *Ribbens Intern. S.A. de C.V. v. Transport Intern. Pool, Inc.* (C.D. Cal 1999) 47 F.Supp.2d 1117. Accordingly, application of different laws as to attorney fees can have a substantial impact on your case. Where there is such conflict between state laws, which state can assert a materially greater interest in having its law applied to the dispute?

In *ABF Capital Corp. v. Berglass, supra.,* the court compared California and New York law on attorney fees and found California had a "significant interest in the issue." At 839. However, the court declined to find that "California's interest is materially greater than New York's," which was the decision set forth in *ABF Capital Corp. v. Grove Properties* (2005) 126 Cal.App.4th 204, 219-220. Instead, the court found both states had equal interest on the issue and the California court would have no problem applying New York law. *Berglass, supra.,* at 839. This was an easy decision for the court because it had already determined New York law would apply in any event, such that it was "immaterial whether the application of New York law to the attorney's fee issue would contravene a fundamental policy of California." *Id.*

So, what happens when your court determines California law would otherwise apply to your dispute arising out of a contract with a foreign state law provision? Will the court find California policy on attorney fees is materially greater than that of the foreign state? Well, it depends, and the current split of authority does not provide concrete guidance. Be aware, sometimes signing a contract is just the beginning of the battle. ◆

Insurance Law Update

By James M. Roth
THE ROTH LAW FIRM, APC

A variety of insurance case law from both state and federal courts have addressed the issues of the rights of a subrogee in litigating a subrogation claim; an insured's subjective belief when seeking coverage relative to alleged intentional conduct; and whether a mortgagee who was not named under a homeowner's policy until after the insured premises was destroyed by fire, had any right to policy proceeds.

ALLEGEDLY DEFAMATORY STATEMENTS INTENTIONALLY MADE BY A CANDIDATE DURING THE COURSE OF A CAMPAIGN WERE NOT POTENTIALLY COVERED BY HER HOMEOWNERS INSURANCE POLICY.

In the case signed January 5, 2015 and styled *Grange Insurance Association v. Lintott* (2015) 77 F.Supp.3d 926, the United States District Court, N.D. California, held that under California law, statements made by an insured during the course of her re-election campaign for county district attorney, that an individual had made an improper campaign contribution to her challenger had a pending felony case against him, were not accidental and, thus, the insured's alleged defamation did not constitute "bodily injury" caused by an "occurrence," and was neither covered nor potentially covered by her homeowner's insurance policy.

In 2010, Lintott was running for re-election as the incumbent District Attorney for Mendocino County. During her campaign, she "prepared" and "approved" three radio advertisements. One of those radio advertisements accused her challenger, David Eyster, of accepting improper campaign contributions from Robert Forest and others with pending criminal cases. That advertisement said: "Eyster has also failed to tell you about the cash gifts to his campaign from men with pending felony cases.... The most alarming, $10,000, comes from a man who assaulted an unarmed man with a loaded gun. Seeking a concealed weapons permit he petitioned the court and was opposed by Lintott. The courts agreed with Lintott. Eyster has pocketed a $10,000 donation." Lintott also made comments about the man behind the $10,000 contribution during a debate. Although none of the statements reference Forest by name, the comment about the "most alarming" donation was about him and his identity was known to Lintott when she approved the advertisements. Lintott based all of the statements about the impropriety of Forest's donations to her opponent's campaign on her "personal knowledge and inquiry regarding Mr. Forest."

Grange issued a "Homeowners with HomePak Plus" insurance policy (the "Policy") to Lintott. The Policy provided coverage in the event of "bodily injury" or "property damage" caused by an "occurrence." The Policy defined an "occurrence" as "an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period, in: a. 'Bodily injury'; or b. 'Property Damage.'" "Property Damage" was defined as "physical injury to, destruction of, or loss of use of tangible property" and "bodily injury" was defined as "bodily harm, sickness or disease, including required care, loss of services and death that results." The Policy further defined the phrase "bodily injury" to include "personal injury," which was defined as including, in part, "injury arising out of one or more of the following offenses: ... 2. Libel, slander or defamation of character; ...." Thus, the Policy required an "occurrence" resulting in bodily injury or property damages, as those phrases were defined by the Grange Policy.

The district court noted that the statements by Lintott were not accidental – they were neither unintentional nor unexpected acts – because Lintott made the allegedly defamatory statements on more than one occasion, that she approved their dissemination on the radio during her re-election campaign, and that she had researched and authored the statements. Indeed, Lintott's alleged subjective intent, that is, that she believed the statements to be true and did not intend to cause harm to the individual in question, was irrelevant for purposes of this insurance coverage analysis. Because the statements were under no interpretation an "accident" as required by Lintott's homeowner's insurance policy, her actions could not therefore constitute "bodily injury" caused by an "occurrence."

MORTGAGEE WHO WAS NOT NAMED UNDER A HOMEOWNER'S POLICY UNTIL AFTER THE INSURED PREMISES WAS DESTROYED BY FIRE HAD NO RIGHT TO POLICY PROCEEDS.

In the case signed January 9, 2015 and styled *Zaghi v. State Farm General Insurance Company* (2015) 77 F.Supp.3d 974, the United States District Court, N.D. California, held that under California law, a mortgagee who was named an additional insured under a homeowner's policy only after the insured premises was destroyed by fire was not covered by the policy and had no right to the policy proceeds and the policy's standard loss-payable clause did not render him a party to the policy.

This case arises out of the parties' dispute over insurance proceeds paid by State Farm to its insureds, Karapet Gayanya and Karine Osmanyen ("the insureds"), following the destruction of their house by fire on January 4, 2014. The insureds purchased the house by means of a hard money mortgage from plaintiff, Farhad Zaghi ("Zaghi"), secured by a deed of trust on the property. The house was insured by a policy issued by State Farm ("the Policy"). As of the date the fire occurred, Zaghi was not listed on the Policy, despite a contractual requirement in the deed of trust held by Zaghi that the insureds name Zaghi as an additional insured.

Zaghi alleged in his suit that on January 13, 2014 – 9 days after the fire occurred - following a conference call with Zaghi and the insureds, an agent for State Farm agreed to and issued an amended declaration page designating Zaghi as a mortgagee and an additional insured under the Policy. The complaint alleged that State Farm subsequently received a fire report stating that Zaghi was the first mortgagee on the property and made a written notation in their file confirming that Zaghi had been added as an additional insured and that Zaghi had a hard money loan secured by a deed of trust on the property. On March 10, 2014 State Farm issued a check in the amount of

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$2,850,000.00 to the insureds alone, without including Zaghi's name.

The district court noted that under California law, a mortgagee such as Zaghi who was not named in a homeowner's policy at the time the insured premises was destroyed by fire did not have an equitable lien on the policy proceeds, even though a deed of trust that secured the mortgage required the mortgagors (*i.e.,* the insureds) to name the mortgagee (*i.e.,* Zaghi) as an additional insured and the insureds failed to do so. In California, recovery of proceeds under an insurance contract is generally limited to the named insureds, since insurance does not insure the property covered thereby, but is a personal contract indemnifying the insureds against loss resulting from the destruction of or damage to their interest in that property. Accordingly, any claim for entitlement to the loss proceeds must be brought directly against the insureds through contract claims, which are not a covered loss under the Policy.

TESTIMONY BY TIRE DEFECT EXPERT WITNESS REGARDING DEFECTS NOT IDENTIFIED IN UNDERLYING ACTION WAS ADMISSIBLE IN CONTRACTUAL SUBROGATION ACTION.

In the case filed February 4, 2015 (and as Modified on Denial of Rehearing March 5, 2015) and styled *National Union Fire Insurance Company of Pittsburgh, Pa. v. Tokio Marine and Nichido Fire Insurance Company* (2015) 185 Cal.Rpt.3d 1348 296; 233 Cal. App.4th 1348, the Court of Appeal, Second District, Division 5, held that a tire defect expert witness could testify in a contractual subrogation action as to defects in a tire which failed and caused a rollover accident, even though the defects were different than the defects identified in the tire buyer's underlying personal injury action against the seller and the manufacturer.

National Union Fire Insurance Company of Pittsburgh, Pa. (National Union), as excess insurer of Costco Wholesale Corporation (Costco), filed this lawsuit against Yokohama Tire Corporation (Yokohama) and its primary and excess insurers Tokio Marine & Nichido Fire Insurance Co., Ltd. (U.S. Branch) and Tokio Marine & Nichido Fire Insurance Co., Ltd., respectively (together, Tokio Marine) to recover sums it expended in settlement of a personal injury claim allegedly resulting from, among other things, material and design defects present in a tire manufactured by Yokohama and sold by Costco to Jack Daer, the plaintiff in the underlying case. Costco and Yokohama individually settled with Daer on the first day of trial, Costco for $5.5 million and Yokohama for $1.1 million. In this lawsuit, National Union sought to recover the $4,312,681.96 it paid on behalf of Costco to settle that lawsuit. National Union, as subrogee of Costco, sought recovery against Yokohama based on an express indemnity provision in the supplier agreement between the two companies, as well as an alleged breach of Yokohama's contractual insurance obligations. In addition, it sued Tokio Marine for indemnity (on its own behalf and as subrogee of Costco) and contribution (on its own behalf). The trial court ruled in limine that National Union's proof of a tire defect would be limited to the opinions of the expert designated by Daer in the underlying case. National Union's retained expert could not opine, based solely on the opinions of Daer's expert, that the tire contained a defect in design or manufacture which caused Daer's injuries. Consequently, after National Union made its opening statement in a bifurcated proceeding to determine whether a defect in the Yokohama tire was a cause of Daer's accident, the trial court entered a judgment of nonsuit on National Union's express indemnity claim. Having determined that the tire was not defective, the trial court, among other rulings, granted summary adjudication as to the causes of action based on Tokio Marine's refusal to defend Costco in the Daer action, as well as the claim that Yokohama breached its insurance obligations under its supplier agreement with Costco. The trial court then awarded Yokohama $863,706.75 in attorney fees as the prevailing party on the contractual indemnity claim.

The issue addressed by the appellate court was whether an indemnitee which settles a third party claim can present evidence acquired post-settlement, or instead is limited to the underlying plaintiff's evidence of liability. When a trial court erroneously denies all evidence relating to a claim, or essential expert testimony without which a claim cannot be proven, the error is reversible *per se* because it deprives the party offering the evidence of a fair hearing and of the opportunity to show actual prejudice. The appellate court found that "the error was undoubtedly prejudicial." Cottles was National Union's sole witness on tire defects. Both parties agreed that, based on the trial court's ruling, National Union could not prove that a defect in the tire caused it to fail, a requisite element of its contractual indemnity claim. Had the trial court permitted Cottles to testify to all of the defects he had identified in the tire, it is reasonably probable that the trial court would not have granted Yokohama's motion for nonsuit, a result more favorable than the one National Union obtained at trial.

ALLEGED INTENTIONAL TORTS RELATED TO A SEXUAL ASSAULT WERE POTENTIALLY AN "OCCURRENCE" COVERED UNDER AN UMBRELLA LIABILITY POLICY BECAUSE THE DEFINITION OF "OCCURRENCE" DID NOT REQUIRE AN "ACCIDENT."

In the case filed February 5, 2015 and styled *Gonzalez v. Fire Insurance Exchange* (2015) 184 Cal.Rptr.3d 394, 234 Cal.App.4th 1220, the Court of Appeal, Sixth District, held that a liability policy which did not include the term "accident" in the definition of an "occurrence," raised the potential for coverage to a suit alleging an insured's acts of failing to rescue an unconscious minor from a sexual assault when the insured was one of ten men in a room with the minor at a party, placing himself so as to prevent the minor's departure or rescue, cheering or photographing the assault, or falsely asserting after the assault that the minor had consented.

In 2007, plaintiff Jessica Gonzalez alleged she was sexually assaulted by Stephen Rebagliati and nine other members of the De Anza College baseball team. A year later, Gonzalez filed a civil lawsuit against her purported assailants. Rebagliati sought insurance coverage for his defense against Gonzalez's claims through his parents' homeowner's and personal umbrella policies, issued by respondents Fire Insurance Exchange ("Fire") and Truck Insurance Exchange ("Truck"), respectively. Both companies denied coverage. Eventually, Rebagliati settled with Gonzalez, assigning Gonzalez his rights against Fire and Truck. Gonzalez subsequently filed a complaint against the insurers for breach of the duty of good faith and fair dealing and breach of contract. She also sought recovery of judgment pursuant to Insurance Code section 11580. Fire and Truck both moved for summary judgment, arguing they had not owed Rebagliati a duty to defend. The trial court granted their motion for summary judgment.

The Fire homeowner's policy contained the following agreement: "We pay those damages which an insured becomes legally obligated to pay because of bodily injury, property damage or personal injury resulting from an occurrence to which this coverage applies. Personal injury means any injury arising from: [¶] (1) false arrest, imprisonment, malicious prosecution and detention. [¶] (2) wrongful eviction, entry, invasion of rights of privacy. [¶] (3) libel,

slander, defamation of character. [¶] (4) discrimination because of race, color, religion or national origin. Liability prohibited by law is excluded. Fines and penalties imposed by law are covered. [¶] At our expense and with attorneys of our choice, we will defend an insured against any covered claim or suit." As defined by that policy, "[o]ccurrence means an accident including exposure to conditions which results during the policy period in bodily injury or property damage. Repeated or continuous exposure to the same general conditions is considered to be one occurrence. [¶] Occurrence does not include accidents or events which take place during the policy period which do not result in bodily injury or property damage until after the policy period." The Fire policy set forth certain exclusions. It specifically provided coverage exclusions for "bodily injury, property damage or personal injury ... caused intentionally by or at the discretion of an insured" or resulted "from any occurrence caused by an intentional act of any insured where the results are reasonably foreseeable." The policy also stated it would not "cover actual or alleged injury or medical expenses caused by or arising out of the actual, alleged, or threatened molestation of a child by: [¶] 1. any insured; or [¶] 2. any employee of any insured; or [¶] 3. any volunteer, person for hire, or any other person who is acting or who appears to be acting on behalf of any insured." Additionally, the policy excluded coverage for personal injury "caused by a violation of penal law or ordinance committed by or with the knowledge or consent of any insured."

The Truck umbrella policy listed the Fire homeowner's policy on its schedule of underlying insurance. Truck's policy stated it would pay damages resulting from an "occurrence," and it would "defend any insured for any claim or suit that is covered by this insurance but not covered by other insurance." The Truck policy defined an "occurrence" as "a. with regard to bodily injury or property damage, an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results in bodily injury or property damage during the policy period; or [¶] b. with regard to personal injury, offenses committed during the policy period, even if the resulting injury takes place after the policy expires." Bodily injury was defined as "bodily harm to, sickness or disease of any person. This includes death, shock, mental anguish or mental injury that result from such bodily harm, sickness or disease." Personal injury was defined as injury arising out of several enumerated torts, including "a. false arrest, wrongful detention or imprisonment, or malicious prosecution; [¶] b. wrongful eviction, wrongful entry, or invasion of the right of private occupancy; or [¶] c. libel, slander, defamation of character or invasion of privacy." The Truck policy stated "[i]f a claim is made or suit is brought for damages excluded from coverage under this policy, we have no obligation to defend such claim or suit. If underlying insurance does not cover damages covered by this policy, we will: [¶] ... defend the insured against any covered claim or suit." The Truck policy included exclusions similar to those set forth in the Fire policy. The Truck policy excluded damages "[e]ither expected or intended from the standpoint of an insured." The policy also excluded damages "[a]rising out of corporal punishment, molestation or abuse of any person by any" insured individual. It also excluded coverage for "personal injury arising out of oral or written publication of material when a willful violation of a penal statute or ordinance has been committed by or with the consent of the insured."

In affirming that the trial court did not err in granting Fire's motion for summary judgment under the homeowner's liability policy, the appellate court concluded that the personal injury coverage under Fire's policy was limited to injuries resulting from "an accident including exposure to conditions which results during the policy period in … injury or … damage." An "accident," within the meaning of the Fire policy, is never present when an insured performs a deliberate act unless some additional, unexpected, independent, and unforeseen happening occurs that produces damage. Intentional acts are not "accidents" within the coverage under a liability policy, even if the acts cause unintended harms. Here, the insured's alleged injury or damage did not constitute an "accident" within the coverage of the Fire policy, where the minor's underlying complaint alleged intentional acts and did not allege accidental acts such as mistakenly blocking her exit.

In reversing the trial court's granting summary judgment in favor of Truck, the appellate court found that Truck failed to conclusively demonstrate that its policy exclusions eliminated all potential for coverage because that policy did not require an "accident" to "occur" resulting in losses covered under that policy. Examining the policy language, the appellate court found that the umbrella policy's exclusion from coverage for sexual molestation by the insured or by any "person who is acting or who appears to be acting on behalf of an insured" did not automatically negate Truck's duty to defend claims against its insured for the alleged false imprisonment, slander per se, and invasion of privacy to the acts or omissions claimed against the insured. Even an act which is intentional or willful within the meaning of traditional tort principles will not exonerate the insurer from liability under Ins. Code § 533 for damages that are either "expected or intended from the standpoint of the insured" unless it is done with a preconceived design to inflict injury. It is the insured's subjective belief as to whether his or her conduct would cause the type of damage claimed that excludes coverage under the statutory exclusion for damages that are either "expected or intended from the standpoint of the insured" unless it is done with a preconceived design to inflict injury. ◆

On the Move

◆ **Kevin C. Murphy**

Congratulations to Kevin C. Murphy of Murphy Jones LLP for being named one of San Diego County's Top Attorneys by the San Diego Daily Transcript for 2015 in the category of Municipal and Government Law. Mr. Murphy was recognized for his work defending professional licensees.

◆ **Kate Greenfield**

Kate Greenfield recently joined the Law Offices of Kenneth Greenfield. Ms. Greenfield practices civil litigation with an emphasis on insurance bad faith and insurance coverage matters. ◆

LUNCH AND LEARN

Preparing a Case for an Appeal

By Beth Obra-White
LORBER, GREENFIELD & POLITO, LLP

"When practicing appellate law, there are at least three immutable rules: first, take great care to prepare a complete record; second, if it is not in the record, it did not happen; and third, when in doubt, refer back to rules one and two." (*Protect Our Water v. County of Merced* (2003) 110 Cal.App.4th 362.) This is just one of many valuable pieces of advice given by Christina Bernstein, Esq., Johanna Schiavoni, Esq. and Robert Shaunessy, Esq. during their seminar "Preparing a Case for an Appeal".

Ms. Bernstein is a shareholder at Pettit, Kohn, Ingrassia & Lutz and practices in the areas of professional liability, commercial litigation and appeals. Ms. Schiavoni is the principal of the Law Office of Johanna S. Schiavoni and regularly handles high stakes cases in the Ninth Circuit, California Courts of Appeal and other appellate courts. Mr. Shaughnessy is a shareholder at Duckor, Spradling, Metzger & Wynne where he chairs the firm's appellate practice group, primarily focusing upon on business litigation, civil writs and appeals. Together, they have over 30 years of experience in appeals.

Mr. Shaughnessy began by discussing the best practices for preserving issues on appeal related to motions, including discovery issues and appealable pretrial orders. The panelists also touched upon the impact of *Reid v. Google* (2010) 50 Cal.4th 512, finding that evidentiary objections made in writing or orally at the hearing are deemed "made at the hearing" under Code of Civil Procedure section 437c(b)(5) and (d), must be ruled on by the trial court, and if not ruled on by the trial court are presumed to have been overruled and are preserved for appeal – when California Courts of Appeal previously held that objections made in writing were waived if not raised by the objector at the hearing and ruled on by the court.

The second part of the seminar focused upon the steps for preservation of an appeal related to trials including how to make a clear record of sidebars/in-chambers discussions and the use of technology in the courtroom. Interestingly, Ms. Bernstein revealed that many court reporters will not transcribe video-taped deposition testimony that is played in court. Therefore, to ensure that this testimony makes it into the record, it is important to present the transcript of the testimony played into evidence. The panelists also provided various tips to ensure an accurate record regarding trial exhibits, jury instructions, verdict forms, objections to statements of decision in bench trials, and post-trial motions, as well as types of appealable arbitration orders.

During the final potion of the presentation, Ms. Schiavoni provided essential briefing tips and addressed the type of things to consider in deciding whether to appeal, such as the length of time in the court of appeal, whether the judgment or order is appealable, cross-appeal issues, and the differences between a writ and an appeal. Financial considerations on appeal are the costs, transcripts, posting a bond and accrued interest on a judgment. The panelists also tackled the challenge of calculating deadlines when there is no Notice of Entry of Judgment on file and/or when a motion for new trial or JNOV has been brought. ◆

San Diego Defense Lawyers

Accepting Nominations for the 2015 "Outstanding New Lawyer" Award

In the past, SDDL has presented an "Outstanding New Lawyer" award to an exceptional new lawyer in the community. This year, we are renewing that tradition, and we are looking for nominations for this year's "Outstanding New Lawyer."

The Criteria

The award will be given to a new local attorney, with one to five years in the practice of law, who demonstrates a significant service to the legal profession, and exemplifies a strong commitment to the purpose of our organization, which is to promote civility, integrity, and balance. The nominee must be a current member of SDDL.

Nominating Process/ Presentation of the Award

If you would like to nominate an attorney for this award, please e-mail your nominations to SDDL's Treasurer, Beth Obra-White, at bco@lorberlaw.com.

Nominations must include:

1. The nominee's name.
2. A narrative supporting your nomination in 250 words or less.

The award will be presented at SDDL's annual Installation Dinner on January 30, 2016, at the US Grant Hotel.

Any nominations received after November 10, 2015 will not be considered.

For any questions or additional information, please do hesitate to contact Beth Obra-White via e-mail or at 858-513-1020.

Court of Appeal Offers Guidance on Balancing the Equities in a Claim for Equitable Subrogation

By Erin Benler-Ward
BALESTRERI, POTOCKI & HOLMES

The Fourth District Court of Appeal's decision in *Valley Crest Landscape Development, Inc. vs. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468 ("*Valley Crest*") can be helpful to those seeking to enforce an equitable subrogation claim.

Jeffrey Epp suffered severe injuries after diving into a swimming pool at the St. Regis Resort. Epp sued the hotel owner, and those involved in design and construction of the pool.1 Valley Crest was the general contractor for all exterior improvements at the hotel.2 Valley Crest subcontracted with Mission Pools to build four pools, including the associated plumbing and mechanical equipment.3 The subcontract between Mission Pools and Valley Crest contained the following indemnity provision:

> [Mission Pools] indemnifies and holds [Valley Crest] harmless from and against any and all claims, demands or actions made by any person or entity, whether valid or not, arising out of the performance by Subcontractor…[¶] [Mission Pools] specifically obligates itself to [Valley Crest] in the following respects…[¶]…[¶]… [Mission Pools] shall protect, hold free and harmless, defend and indemnify [Valley Crest] and Owner…from all liability, penalties, costs, losses, damages, expenses, causes of action, judgments or other claims resulting from injury to or death sustained by any person…, which injury [or] death… arises out of [Mission Pools]'s performance of work under this Subcontract. [Mission Pools]'s aforesaid indemnity and hold harmless obligation shall apply to any act or omission, willful misconduct or negligent conduct, whether active or passive, on the part of Subcontractor or its agents, sub-contractors or employees.4

National Union insured Valley Crest in 2007 with a policy providing coverage for those sums Valley Crest "becomes legally obligated to pay as damages because of 'bodily injury' or 'property damage' to which this insurance applies."5 Mr. Epp was injured in late 2007 and filed suit in early 2008. In May 2008, Valley Crest tendered its defense and indemnification to Mission Pools, but Mission Pools never responded.6 In July 2008, Valley Crest Cross-Complained against Mission Pools for express indemnity. A series of settlements and motions for summary judgment reduced the litigation to Valley Crest's Cross-Complaint against Mission Pools.7 In July 2012, Valley Crest's insurer, National Union, intervened and was added as a Cross-Complainant. The First Amended Cross-Complaint alleged causes of action for express indemnity, equitable subrogation, declaratory relief; and contribution. It alleged that Valley Crest was obligated to defend the hotel owner in the underlying action, incurring $202,096.61 in attorney's fees and costs. It also alleged that Valley Crest incurred $419,064.93 in attorney's fees and costs defending itself and $50,000 in settlement.8 Pursuant to the terms of the National Union policy, Valley Crest paid the first $250,000 in losses as an SIR. The First Amended Complaint sought to recover $671,161.54 in total from Mission Pools.9

Trial was held in two phases; phase one tried National Union's equitable subrogation claim. There, the trial court found that by failing to accept the tender of defense, Mission Pools forfeited its right to seek allocation of the claimed fees and costs between claims related to its work and unrelated claims. The court awarded National Union the full amount it paid defending Valley Crest and the fees incurred by hotel owner in its defense pursuant to the AIE.10 Phase two tried Valley Crest's claim for express indemnity. Mission Pools requested a jury trial but the trial court decided the express indemnity claim was, effectively, for specific performance of the indemnity provision (and not for damages), and, therefore, was an action in equity thus Mission Pools was not entitled to a jury trial. The trial court found that under the terms of the indemnity provision, Valley Crest was entitled to recover its entire $250,000 SIR.11

On appeal, Mission Pools presented three arguments: 1) Valley Crest's claim for express indemnity was time-barred under Civil Procedure section 337.1(a); 2) National Union was not entitled to equitable subrogation because its position was inferior to Mission Pools'; and 3) that the court erred in denying Mission Pools a jury trial on the express indemnity claim.

Statute of Limitations

The Court of Appeal did not find Mission Pools' statute of limitations defense persuasive. It noted that section 337.1(a) was inapplicable because Valley Crest was not seeking recovery under any of the grounds provided in the statute but, instead, brought an action on the contract. "When, as here, the parties have expressly contracted with respect to the duty to indemnify, the extent of that duty is determined from the contract."12 It found that an action for indemnity was not included in section 337.1(a)'s definition of 'action', and the legislature did not intend to include an action for indemnity within the statute's provisions. Additionally, it distinguished *Wagner v. State of California* (1978) 86 Cal. App.3d 922 ("*Wagner*"), upon which Mission Pools relied. The Court of Appeal noted that *Wagner* didn't consider section 337.15, which defines "action" to include an action for indemnity, unlike section 337.1(a); it also noted that *Wagner* dealt with an equitable indemnity claim whereas Valley Crest's claim was for express indemnity; lastly, the Court found that the *Wagner* holding runs afoul of the principle that a defendant retains the right to equitable indemnity from another tortfeasor even if the statute of limitations bars the plaintiff's action against the cross-defendant.

Balancing the Equities

The trial court found that National Union stood in the place of Valley Crest to the extent of its payments for defense and settlement and, therefore, could recover under the subcontract's express indemnity provision. On appeal, Mission Pools argued that National Union was not entitled to equitable subrogation because its equitable position was inferior. No easy formula exists "for determining superiority of equities, for there is no formula by which to determine the existence or nonexistence of an equity except to the extent that certain familiar fact

combinations have been repeatedly adjudged to create an equity…"13. Nonetheless, the *Valley Crest* court said the decision in *Interstate Fire & Casualty Ins. Co. v. Cleveland Wrecking Co.* (2010) 182 Cal.App.4th 23 ("*Interstate Fire*"), provides guidance in balancing the equities in cases with similar facts.

In *Interstate Fire*, a construction worker was injured at the project and sued the general contractor (Webcor) and a negligent subcontractor (Cleveland). The suit settled and Webcor's insurer brought a subrogation claim in a separate action against Cleveland, which had denied Webcor's tender in the underlying action. The trial court sustained Cleveland's demurrer and the insurer appealed. The Court of Appeal reversed, concluding that the insurer's equitable position was superior to Cleveland's, based on several factors.

First, Cleveland was alleged to have caused the loss in addition to its alleged liability under the express indemnity provision of the subcontract. The insurer's Complaint alleged that Cleveland's negligence caused the underlying lawsuit *and* the present lawsuit between Webcor and Cleveland, making necessary for Webcor to incur defense and settlement costs. It was not alleged that the insurer or Webcor was at fault, thus giving rise to the inference that Cleveland should cover Webcor's defense and settlement costs.14

Second, the *Interstate Fire* court looked at the nature of the agreements to indemnify Webcor. It found that Cleveland agreed to indemnify Webcor in the contract for the project from which the underlying injury arose; whereas the insurer was a third party uninvolved in the project. Cleveland agreed to indemnify and hold harmless Webcor from all claims arising out of its work. The insurer, in contrast, covered Webcor for amounts it became legally obligated to pay because of bodily injury to which the insurance applied, without limitation to liability arising out of Cleveland's work at the project. The two did not agree to indemnify for the same loss. Thus, the equities fell in the insurer's favor because Cleveland agreed to indemnify Webcor specifically against the type of loss incurred.15

Third, the *Interstate Fire* court considered public policy. It reasoned that rewarding parties who refuse to fulfill their indemnification obligations, especially on the basis that they're in a stronger equitable position than an insurer which did fulfill its obligation, is not a good idea. It is better public policy to allow subrogation, and encourage the indemnitor to step up in the underlying case. "If permitting subrogation to the insurer in any way results in a windfall (because the insurer that accepted premiums to insure against the loss may now shift the loss to the other indemnitor,) it would be better for the windfall to go to the one that indisputedly fulfilled its contractual obligations, rather than to the one that allegedly breached them."16 Cleveland did not fulfill its obligation despite allegedly contributing to the loss, whereas the insurer, having contributed nothing to the loss, fulfilled its contractual obligation. Thus, the equities balanced in favor of the insurer and against Cleveland.17

Application to Valley Crest

Turning to the case at bar, the Court of Appeal considered the factors articulated in *Interstate Fire*.18 First, the court considered the cause of the loss. National Union, as Valley Crest's insurer, did not cause the loss or plaintiff's injuries. But evidence concerning Mission Pools' liability was quite minimal as well. Only one of plaintiff's theories potentially implicated Mission Pools' work and the trial court's Statement of Decision was silent as to whether Mission Pools contributed to plaintiff's injuries.

Second, the *Valley Crest* court looked at the indemnity agreements. It noted "Mission Pools agreed to indemnify Valley Crest specifically against the type of loss incurred, while National Union provided general liability insurance."19 Moreover, National Union's decision to accept the owner's tender was based not only on its own policy but also on the indemnity provision of the prime contract and the obligation imposed by *Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541.20

At this point, the equities were balanced between National Union and Mission Pools. What tipped the scales in National Union's favor was Mission Pools' failure to comply with its obligations under the subcontract: it did not defend and indemnify Valley Crest nor did it respond to Valley Crest's tender.21 On the other hand, National Union "did everything it was supposed to do to fulfill its obligations under the terms of the policy."22 The contractual duty to defend and indemnify was triggered by allegations that Mission Pools' negligence contributed to the damages suffered by the plaintiff.23 Thus it had an obligation to accept Valley Crest's tender and provide a defense, at least up to the point at which the trial court granted Mission Pools' motion for summary judgment against plaintiff.24 Furthermore, the subcontract required Mission Pools to obtain and maintain in force an insurance policy with Valley Crest as an additional insured but Mission Pools' insurer denied the tender on the basis the policy was cancelled (and coverage was only triggered by injury caused by an occurrence within the policy period).25 This failure to maintain the requisite insurance supported a finding that National Union was in the superior equitable position.

Finally, the Valley Crest court addressed Mission Pools' reliance on *Patent Scaffolding Co. v. William Simpson Constr. Co.* (1967) 256 Cal.App.2d 506, 512 (*Patent Scaffolding*). There, a general contractor hired a subcontractor to perform work on a building.26 The general contractor failed to obtain fire insurance on the subcontractor's property at the jobsite as required by their contract. A fire destroyed some of the subcontractor's property. 27 The subcontractor's insurers paid for the loss and sought to subrogate to the subcontractor's rights against the general contractor for its failure to obtain insurance.28 The trial court allowed subrogation on the ground that the general contractor had agreed not only to obtain fire insurance but also to indemnify the subcontractor against fire loss (despite the absence of an express indemnification provision in the contract).29 The Court of Appeal reversed, holding that the insurers were not entitled to subrogation because the general contractor did not cause the fire and the insurers were merely paying a loss that they had agreed to insure.30 The Court of Appeal held that when "two parties are contractually bound by independent contracts to indemnify the same person for the same loss, the payment by one of them to his indemnitee does not create in him equities superior to the nonpaying indemnitor, justifying subrogation, if the latter did not cause or participate in causing the loss."31 Adding that "[i]f subrogation were permitted, the insurers who have accepted premiums to cover the very loss which occurred receive a windfall."32

Mission Pools argued that *Patent Scaffolding* was analogous because it didn't cause the loss and National Union had accepted premiums to cover the loss. The *Valley Crest* court disagreed with Mission Pools and with the holding in *Patent Scaffolding*, pointing out that age and subsequent decisions have not been kind to the case.33 At least three subsequent appellate court cases, including *Interstate Fire*, had distinguished or criticized its holding. The *Valley Crest* court stated that "[t]o whatever extent *Patent Scaffolding* might be relevant here, we decline to follow it."34

Jury Trial on Express Indemnity Claim

Lastly, the court considered Mission Pools argument that it was entitled to a jury trial on the express indemnity claim. Here, the Appellate Court held that Mission Pools was entitled to a jury trial.35 Valley Crest alleged that Mission Pools breached the contract

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California Civil Law Update

By Monty McIntyre
ADR SERVICES, INC.

CALIFORNIA SUPREME COURT

Attorneys

Lee v. Hanley (2015) _ Cal.4th _ , 2015 WL 4938308: The California Supreme Court affirmed the Court of Appeal's judgment reversing the trial court's order sustaining defendant's demurrer. The Supreme Court held that the one-year statute of limitations in Code of Civil Procedure section 340.6(a) applies to a claim when the merits of the claim will necessarily depend on proof that an attorney violated a professional obligation in the course of providing professional services. Because plaintiff's complaint could be construed to allege conversion for failing to return unused attorney fees, the demurrer should have been overruled. (August 20, 2015.)

Employment

Poole v. Orange County Fire Authority (2015) _ Cal.4th _ , 2015 WL 4998965: The California Supreme Court reversed the decision of the Court of Appeal. Under the Firefighters Procedural Bill of Rights Act (Government Code section 3250 et seq.), a firefighter has the right to review and respond to any negative comment that is "entered in his or her personnel file, or any other file used for any personnel purposes by his or her employer." (see section 3255.) The California Supreme Court ruled that section 3255 does not give an employee the right to review and respond to negative comments in a supervisor's daily log, consisting of notes that memorialize the supervisor's thoughts and observations concerning an employee, which the supervisor uses as a memory aid in preparing performance plans and reviews. Because the log was not shared with or available to anyone other than the supervisor who wrote the log, it did not constitute a file "used for any personnel purposes by his or her employer" and section 3255 did not apply. (August 24, 2015.)

Insurance

Fluor Corporation v. Superior Court (Hartford Accident and Indemnity Company) (2015) _ Cal.4th _ , 2015 WL 4938295: The California Supreme Court reversed the decision of the Court of Appeal, and overruled the earlier Supreme Court decision of *Henkel Corp. v. Hartford Accident & Indemnity Co.* (2003) 29 Cal.4th 934 (*Henkel*). The Supreme Court ruled that Insurance Code section 520 applies to third-party liability insurance. Under section 520, after personal injury (or property damage) resulting in loss occurs within the time limits of the policy, an insurer is precluded from refusing to honor an insured's assignment of the right to invoke defense or indemnification coverage regarding that loss. The contrary conclusion announced in *Henkel* was overruled to the extent that it conflicts with section 520 and this decision. (August 20, 2015.)

CALIFORNIA COURTS OF APPEAL

Arbitration

Carlson v. Home Team Pest Defense, Inc. (2015) _ Cal.App.4th _ , 2015 WL 4881994: The Court of Appeal affirmed the trial court's order denying a petition to compel arbitration. The trial court properly found the arbitration agreement to be both procedurally and substantively unconscionable. The Federal Arbitration Act did not preempt state law rules. Under *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, after the decision in *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___, 131 S.Ct. 1740, California courts may continue to enforce contractual unconscionablity rules because they apply to all contracts, not just arbitration contracts. (C.A. 1st, August 17, 2015.)

Pinela v. Neiman Marcus Group, Inc. (2015) _ Cal.App.4th _ , 2015 WL 3955254: The Court of Appeal affirmed the trial court's order denying a motion to compel arbitration. The trial court originally granted most of the motion to compel arbitration. The trial court later reconsidered its ruling and denied the motion to compel arbitration. The Court of Appeal found the trial court had jurisdiction to reconsider its earlier order. The Court of Appeal ruled that the delegation clause, and the agreement as a whole, were procedurally and substantively unconscionable. (C.A. 1st, June 29, 2015.)

Universal Protection Service, LP v. Superior Court (Parnow) (2015) _ Cal.App.4th _ , 2015 WL 4930944: The Court of Appeal denied a writ petition by the employer after the trial court denied the employer's petition to compel individual arbitrations. The Court of Appeal concluded that the agreements' incorporation by reference of the American Arbitration Association's National Rules for the Resolution of Employment Disputes (AAA Rules) vested the arbitrator with the power to decide whether or not class action relief was available. (C.A. 3rd, August 18, 2015.)

Attorneys

Castaneda v. Superior Court (Perrin Bernard Supowitz, Inc.) (2015) _ Cal.App.4th _ , 2015 WL 3892154: The Court of Appeal granted a writ petition challenging the trial court's order denying a motion to disqualify a law firm. When an attorney serves as a settlement officer in a mandatory settlement conference conducted by a judge and two volunteer attorneys, if the attorney receives confidential information from one of the parties to the action that attorney's law firm may not subsequently agree to represent an opposing party in the same action, regardless of the efficacy of the screening procedures established by the law firm. (C.A. 2nd, June 24, 2015.)

Attorneys' Fees

James L. Harris Painting and Decorating, Inc. v. West Bay Builders, Inc. (2015) _ Cal. App.4th _ , 2015 WL 5049759: The Court of Appeal affirmed the trial court's ruling denying attorney fees on the basis that there was no prevailing party at trial. The Court of Appeal concluded that, under Business and Professions Code section 7108.5 and Public Contract Code sections 7107 and 10262.5, the trial court has discretion to determine there is no prevailing party in an action. In this case, the trial court did not abuse its discretion in concluding there was no prevailing party. (C.A. 3rd, August 27, 2015.)

Royal Pacific Funding Corporation v. Arneson (2015) _ Cal.App.4th _ , 2015 WL 4572292: The Court of Appeal reversed the trial court's order denying the former employee's motion for attorney fees. The trial court denied all fees on the theory that there must be a court award under Labor Code section 98.2 before a party can collect its fees. The Court of Appeal disagreed, concluding that the former employee prevailed when the former employer decided to withdraw with prejudice its appeal of a wage claim award by the Labor Commissioner. (C.A. 4th, filed July 28, 2015, published August 24, 2015.)

Civil Procedure

Alamo Recycling, LLC v. Anheuser Busch Inbev Worldwide, Inc. (2015) _ Cal.App.4th _ , 2015 WL 5002888: The Court of Appeal affirmed the trial court's order sustaining a demurrer without leave to amend. Recycling Center plaintiffs sued defendants alleging they knowingly and falsely labeled beverage containers sold both inside and outside California with "CA CRV," "California Redemption Value," or similar labels. Plaintiffs

sought to permanently enjoin defendants from selling beverage containers in California as long as they continued to label containers sold outside California with "CA CRV" or other California redemption marks. Plaintiffs also sought damages. The trial court properly concluded that the injunctive and compensatory relief plaintiffs sought could not be awarded by a California court because it would violate the "dormant" commerce clause of the federal Constitution. (C.A. 4th, filed July 23, 2015, published August 24, 2015.)

Animal Legal Defense Fund v. California Exposition and State Fairs (2015) _ Cal. App.4th _ , 2015 WL 5050255: The Court of Appeal affirmed the trial court order sustaining a demurrer without leave to amend. Plaintiffs brought a Code of Civil Procedure section 526a taxpayer action against defendants based on allegations that defendants committed animal cruelty every summer by transporting pregnant pigs and housing them in farrowing crates at the state fair. The trial court properly ruled that plaintiff lacked standing to bring a taxpayer action. (C.A. 1st, August 27, 2015.)

Auffret v. Capitales Tours, S.A. (2015) _ Cal. App.4th _ , 2015 WL 4967911: The Court of Appeal reversed the trial court's dismissal of the action. The case arose out of a 2009 bus accident involving 34 French tourists and their guide, which resulted in a consolidated action brought by most of the passengers or their families against defendant Capitales Tours, S.A. and others. The trial court stayed the action for one year under the doctrine of forum non conveniens pursuant to Code of Civil Procedure section 410.30. That decision was upheld in an earlier appeal. Two years after the stay, the superior court dismissed the action, finding that plaintiffs had failed to pursue their claims in France and had opposed the assumption of jurisdiction by the French courts. The Court of Appeal concluded that the continuing uncertainty of the parties' status in the French judicial system required further determination before it could be affirmatively demonstrated that France would hear the issue of Capitales Tours' liability to plaintiffs for the 2009 bus accident. (C.A. 6th, August 21, 2015.)

Association for Los Angeles Deputy Sheriffs v. Los Angeles Times Communications LLC (2015) _ Cal.App.4th _ , 2015 WL 4456068: The Court of Appeal affirmed the trial court's order granting an anti-SLAPP motion. The union representing deputy sheriffs in the Los Angeles County Sheriff's Department sued to enjoin the Los Angeles Times from publishing news reports about the Department's hiring of officers who used to work for the County's Office of Public Safety. The trial court correctly held that the complaint arose from a protected activity, news reporting, and also properly concluded that the injunction requested by plaintiff would be an unconstitutional prior restraint. (C.A. 2nd, filed July 21, 2015, published August 19, 2015.)

Barker v. Fox and Associates (2015) _ Cal. App.4th _ , 2015 WL 5285669: The Court of Appeal reversed the trial court's order denying an anti-SLAPP motion by defendants. The trial court properly found that defendants had satisfied their burden under step one of the anti-SLAPP analysis, but erred in finding that plaintiff had met his burden under the second step because plaintiff failed to demonstrate a likelihood of prevailing on the merits. (C.A. 1st, September 10, 2015.)

Collier v. Harris (2015) _ Cal.App.4th _ , 2015 WL 5121082: The Court of Appeal reversed the trial court's order denying an anti-SLAPP motion. Plaintiff and defendant actively supported competing candidates in a local school board election. Defendant registered plaintiff's name, and the name of an advocacy group she formed as domain names, and then redirected all Internet users who visited those Web sites to the Web sites for the candidates defendant supported. Plaintiff sued, alleging defendant registered the domain names and illegally used them to mislead the public into thinking plaintiff supported defendant's candidates. The trial court found that defendant had failed to show plaintiff's claims arose from free speech activities protected by the anti-SLAPP statute. To be protected by the anti-SLAPP statute, the conduct does not have to constitute free speech, but need only help to advance or assist a person in the exercise of his or her free speech rights. The Court of Appeal concluded that registering the domain names and redirecting Internet users to the other Web sites assisted defendant in exercising his free speech rights because those acts provided him with additional forums to reach the public with information about the school board candidates. The trial court erred in denying the motion without determining whether plaintiff had presented evidence establishing a probability of prevailing on the merits. (C.A. 4th, filed August 5, 2015, published September 1, 2015.)

Colonies Partners, L.P. v. Superior Court (The Inland Oversight Committee) (2015) _ Cal.App.4th _ , 2015 WL 4882566: The Court of Appeal granted a writ petition by Colonies Partners after the trial court overruled a demurrer by Colonies Partners. Plaintiffs, the Inland Oversight Committee (IOC) and Citizens for Responsible Equitable Environmental Development (CREED), brought a suit challenging a November 2006 settlement agreement between Colonies Partners and the County of San Bernardino and San Bernardino County Flood Control District (County), pursuant to which County paid Colonies $102 million. Plaintiffs sought to have the settlement agreement declared void under state law governing conflicts of interests of government officials, and to force Colonies to disgorge any money already paid pursuant to the agreement. The trial court erred in overruling the demurrer because plaintiffs' complaint suffered from two fatal pleading defects: lack of standing, and the effect of a 2007 validation judgment. (C.A. 4th, August 17, 2015.)

Eckler v. Neutrogena Corporation (2015) _ Cal.App.4th _ , 2015 WL 3989142: The Court of Appeal affirmed the trial court's order in one action sustaining a demurrer without leave to amend, and its order in another action granting judgment on the pleadings. Plaintiffs filed separate actions against respondent Neutrogena Corporation alleging that their sunscreen products were misleadingly labeled and marketed in violation of California consumer protection statutes. The trial court properly concluded that the claims were preempted by the federal Food, Drug, and Cosmetic Act (21 U.S.C. § 379r) and implementing FDA regulations. (C.A. 2nd, filed June 9, 2015, published July 1, 2015.)

Finton Construction, Inc. v. Bidna and Keys, APLC (2015) _ Cal.App.4th _ , 2015 WL 3947116: The Court of Appeal affirmed the trial court's order granting an anti-SLAPP motion against plaintiff for its complaint filed against attorneys based on their refusal to relinquish to the opposing parties evidence delivered to the attorneys by their clients in a trade secrets case. The Court of Appeal ruled the attorneys' conduct was protected, and plaintiff was unable to demonstrate a probability of prevailing on its claim. The Court of Appeal decided to publish the case, after it was notified the case had settled, as "an example to the legal community of the kind of behavior the bench and the bar together must continually strive to eradicate." (C.A. 4th, June 29, 2015.)

First American Title Insurance Company v. Spanish Inn, Inc. (2015) _ Cal.App.4th _ , 2015 WL 4776337: The Court of Appeal affirmed the trial court's order granting summary judgment to plaintiff title insurer. Plaintiff sought contractual indemnity from the project developers for legal expenses incurred in defending the project's construction lender against mechanic's lien foreclosure actions. The trial court properly concluded that there were no triable issues of material fact regarding whether the

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and sought money damages in the form of reimbursement. It did not seek specific performance and the trial court rendered a Judgment for money damages only. By seeking money damages, Valley Crest's claim was categorically legal, not equitable in nature.36 Furthermore, Valley Crest's Cross-Complaint did not allege inadequacy of legal remedy, which is required for specific performance.37 Because Valley Crest had an adequate legal remedy (reimbursement) it was not entitled to specific performance.38 The Appellate Court reversed and remanded as to Valley Crest's claim for express indemnity, and in all other respects affirmed the judgment.

What To Take Away from Valley Crest and Interstate Fire Decisions?

Practitioners in the field of construction must always be cognizant of the impact that indemnity and defense obligations of the parties, and the effect of tenders and responses to same—not only for their clients, but for the insurers involved as well. By failing to accept the tender, Mission Pools forfeited its right to allocate the fees Valley Crest incurred between claims related to its work and unrelated claims. It also could have controlled the defense of Valley Crest in the underlying lawsuit, preventing missteps which increased Valley Crest's liability. Had Mission Pools (and its carrier) properly addressed the tender, an entirely different result may have been reached.

(Endnotes)

1 *Valley Crest, supra*, 238 Cal.App.4th at p. 472.
2 *Id.* at p. 473.
3 *Id.* at p. 473-474.
4 *Id.* at p. 474.
5 *Ibid.*
6 *Id.* at p. 475.
7 *Id.* at p. 476.
8 *Id.* at p. 477.
9 *Ibid.*
10 *Ibid.*
11 *Id.* at p. 478.
12 *Id.* at p. 479 citing *Rossmoor Sanitation, Inc. v. Pylon, Inc.* (1975) 13 Cal.3d 622, 633.
13 *Id.* at p. 484, citing to *State Farm General Ins. Co v. Wells Fargo Bank, N.A.* (2006) 143 Cal.App.4th 1098, 1112.
14 *Id.* at p. 485-486.
15 *Id.* at p. 486.
16 *Interstate Fire, supra*, 182 Cal.App.4th at p.47.
17 *Valley Crest, supra*, 238 Cal.App.4th at p. 487.
18 Both *Interstate Fire* and *Valley Crest* considered and dismissed a fourth factor, that the insurers had accepted premiums in exchange for the risk of loss. (See *Interstate Fire, supra*, 182 Cal.App.4th at p. 45 and *Valley Crest, supra*, 238 Cal.App.4th at p. 488.) As both cases found this factor non dispositive, we omit it from our discussion.
19 *Valley Crest, supra,* 238 Cal.App.4th at p. 488.
20 *Ibid.*
21 *Id.* at p. 489.
22 *Ibid.*
23 *Ibid.*, citing *Crawford v. Weather Shield Mfg., Inc., supra,* 44 Cal.4th at pp. 547, 568.
24 *Ibid.*
25 *Ibid.*
26 *Patent Scaffolding, supra,* 256 Cal.App.2d at p. 508.
27 *Ibid.*
28 *Ibid.*
29 *Id.* at p. 508-509.
30 *Id.* at p. 512.
31 *Id.* at p. 514.
32 *Id.* at p. 516.
33 *Valley Crest, supra,* 238 Cal.App.4th at p. 489.
34 *Id.* at p. 491.
35 *Ibid.*
36 *Id.* at p. 492.
37 *Ibid.*, citing 5 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 803, p. 219.
38 *Ibid.*, citing *Canova v. Trustees of Imperial Irrigation Dist. Employee Pension Plan* (2007) 150 Cal.App.4th 1487, 1497. ◆

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mechanic's lien claims were covered by the title policy, and the amount of the title insurer's damages. (C.A. 4th, filed July 16, 2015, published August 14, 2016.)

Hewlett-Packard Company v. Oracle Corporation (2015) _ Cal.App.4th _ , 2015 WL 5047682: The Court of Appeal affirmed the trial court's order denying an anti-SLAPP motion on the basis that it was untimely. The trial court properly ruled that the anti-SLAPP motion was filed long after expiration of the 60-day time prescribed by the anti-SLAPP statute in Code of Civil Procedure section 425.16(f), and defendant failed to furnish a sound justification for its late presentation. (C.A. 6th, August 27, 2015.)

Kahn v. Dewey Group (2015) _ Cal.App.4th _ , 2015 WL 5227645: The Court of Appeal reversed the trial court's order denying a motion to tax costs and allowing certain defendants expert witness costs. Plaintiff sued 20 defendants alleging they were jointly and severally liable for causing him to suffer personal injury. Before trial, all 20 defendants jointly made a Code of Civil Procedure section 998 offer to settle the action for $75,000. Plaintiff did not accept the offer. The trial court later granted a nonsuit as to 14 of the 20 defendants, and judgment was entered as to them. The case against the remaining six defendants was tried, the jury was unable to reach a verdict, the court granted a mistrial, and a retrial is pending. If multiple defendants jointly make a section 998 offer to settle, whether the offer exceeds the judgment cannot be determined by comparing it to a judgment (or judgments) entered against only some of the offering defendants. Instead, the offer must be compared to the judgment(s) obtained against all defendants. Because in the present case no judgment has yet been entered with regard to six of the 20 defendants on whose behalf the section 998 offer was made, the trial court erred in awarding expert witness fees to the 14 dismissed defendants. (C.A. 2nd, September 8, 2015.)

L.A. Taxi Cooperative, Inc. v. The Independent Taxi Owners Association of Los Angeles (2015) _ Cal.App.4th _ , 2015 WL 4970092: The Court of Appeal affirmed the trial court's order denying an anti-SLAPP motion. Plaintiff sued defendants for false advertising on the internet. The trial court correctly denied the anti-SLAPP motion because the conduct alleged constituted purely commercial speech, and plaintiffs also met their burden of demonstrating the applicability of the commercial speech exemption of Code of Civil Procedure section 425.17. The anti-SLAPP motion was frivolous because no reasonable basis existed for asserting that the allegedly false advertisements constituted conduct in connection with an issue of public interest. The Court of Appeal therefore concluded that plaintiffs should recover their attorney fees. (C.A. 2nd, August 20, 2015.)

Lattimore v. Dickey (2015) _ Cal.App.4th _ , 2015 WL 4970057: The Court of Appeal reversed in part, and affirmed in part, summary judgments for defendants granted by the trial court in a medical malpractice wrongful death case. The trial court erred in ruling that a declaration from plaintiff's physician expert was insufficient to raise a triable issue of fact on the issue of the standard of care applicable to physicians and surgeons. Although plaintiff's doctor declaration did not disclose any specific training or experience as a gastroenterologist or a general surgeon, his qualifications in emergency medicine, liberally construed, were sufficient to demonstrate skill and experience in treating patients who may be experiencing internal bleeding or are otherwise in need of immediate treatment. The Court of Appeal reversed the summary judgment granted for the gastroenterologist because he had only argued that plaintiff could not prove a violation of the standard of care. The summary judgment for the general surgeon was affirmed because his motion also argued that plaintiff could not prove causation, and this issue was not rebutted. The summary judgment for the hospital was affirmed because plaintiff's expert declaration did not raise a triable issue of fact on the standard of care applicable to nurses and hospitals. (C.A. 6th, August 21, 2015.)

Litt v. Eisenhower Medical Center (2015) _ Cal.App.4th _ , 2015 WL 3799523. The Court of Appeal reversed that part of the trial court's order denying costs and expert witness fees to Eisenhower Medical Center (EMC) after it beat its 998 offer, because the costs and expert fees were paid by another defendant Compass Group USA, Inc. (Compass) under an indemnity agreement between EMC and Compass. Code of Civil Procedure sections 998 and 1033.5 authorize the recovery of costs and expert fees that were incurred by the prevailing party, even if that party did not pay the costs. (C.A. 4th, June 19, 2015.)

Munoz v. City of Tracy (2015) _ Cal. App.4th _ , 2015 WL 3958324: The Court of Appeal reversed the trial court's order granting a motion to dismiss for failure to bring the case to trial within five years. The parties signed a written stipulation that continued the trial to a specific date outside of the five-year period. The Court of Appeal found the stipulation properly extended the five-year period, and there was no need for the City to "expressly waive" the benefit of Code of Civil Procedure section 583.310. (C.A. 3rd, June 30, 2015.)

Nosal-Tabor v. Sharp Chula Vista Medical Center (2015) _ Cal.App.4th _ , 2015 WL 4608224: The Court of Appeal reversed the trial court's summary judgment for defendant. Plaintiff sued defendant after she was terminated, alleging wrongful termination and causes of action premised on claims of improper workplace retaliation. Plaintiff was terminated because she objected to doing heart stress tests without a doctor present on the basis that stress testing constituted the practice of medicine, and defendant had not adopted legally adequate standardized procedures to permit its nurses to perform such tests. The trial court granted defendant's motion for summary judgment, ruling that

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plaintiff presented no credible evidence that the standardized procedures in place at the time of her termination were insufficient. The Court of Appeal disagreed, ruling that the trial court erred in granting summary judgment for defendant. The documents that defendant maintained constituted its standardized procedures did not contain several elements that were required by guidelines promulgated by the Board of Registered Nursing and the Medical Board of California. In light of these deficiencies, a reasonable juror could find that defendant improperly retaliated against and wrongfully terminated plaintiff when she complained about, and refused to perform, nurse-led stress testing. (C.A. 4th, filed August 3, 2015, published August 27, 2015.)

Park v. Board of Trustees of The California State University (2015) _ Cal.App.4th _ , 2015 WL 5049636: The Court of Appeal reversed the trial court's denial of an anti-SLAPP motion to strike. Plaintiff sued his former employer alleging that it discriminated against him based on his national origin when it denied his application for a tenured faculty position and consequently terminated him. The complaint sought damages and an injunction awarding plaintiff a tenured position. The trial court denied defendant's anti-SLAPP motion to strike concluding that plaintiff's claims did not arise from defendant's communicative conduct related to the tenure review process, but rather from its allegedly discriminatory denial of tenure. The Court of Appeal disagreed and concluded the gravamen of the complaint arose from protected activity. The Court of Appeal reversed and remanded with directions to the trial court to determine whether plaintiff could demonstrate a reasonable probability of prevailing on the merits. (C.A. 2nd, August 27, 2015.)

Parrish v. Latham & Watkins (2015) _ Cal.App.4th _ , 2015 WL 3933988 : The Court of Appeal affirmed the trial court's order granting an anti-SLAPP motion by defendants, but for a different reason. Latham & Watkins had filed an anti-SLAPP motion to a malicious prosecution complaint, arguing that the action was untimely under the one-year statute of limitations in Code of Civil Procedure section 340.6, and alternatively arguing that the interim judgment rule precluded a finding of the lack of probable cause. The trial court granted the anti-SLAPP solely on the statute of limitations issue. During the appeal, however, the Court of Appeal ruled in *Roger Cleveland Golf Co., Inc. v. Krane & Smith, APC* (2014) 225 Cal. App.4th 660 that the statute of limitations for malicious prosecution was two-years under Code of Civil Procedure section 335.1. On appeal defendant conceded the complaint was timely under section 335.1. Plaintiffs argued the interim adverse judgment rule did not preclude the malicious prosecution action because the trial court had made a finding of bad faith after a bench trial in the underlying action, and this negated the trial court's prior ruling denying summary judgment. The Court of Appeal concluded that this hindsight approach was inconsistent with a core principle of the interim adverse judgment rule—that an interim ruling on the merits establishes probable cause in the underlying action, even though that ruling is later reversed by the trial court, a jury, or an appellate court. (C.A. 2nd, filed June 1, 2015, published June 26, 2015.)

PegaStaff v. Pacific Gas and Electric Company (2015) _ Cal.App.4th _ : The Court of Appeal reversed the trial court order granting motions for judgment on the pleadings on the basis that the court lacked subject matter jurisdiction under Public Utility Code section 1759, and granted a separate writ petition on the same issue. Plaintiff, a temporary staffing agency, sued several defendants alleging numerous causes of action alleging damages as a result of the adoption of a General Order by the California Public Utilities Commission to encourage and develop the use of women-, minority-, and disabled veteran-owned business enterprises within the public utility sector. The trial court erred in concluding that section 1759 deprived it of subject matter jurisdiction. (C.A. 1st, August 28, 2015.)

The Inland Oversight Committee v. County of San Bernardino (Colonies Partners, L.P.) (2015) _ Cal.App.4th _ , 2015 WL 4882570: The Court of Appeal affirmed the trial court's order denying Colonies Partners' anti-SLAPP motion to strike. Colonies Partners claimed that plaintiffs' single cause of action, for violation of Government Code section 1090, fell within the scope of the anti-SLAPP statute's protections. The Court of Appeal ruled that plaintiffs' action was not subject to an anti-SLAPP motion because it fell within the public interest exception to the anti-SLAPP statute provided in Code of Civil Procedure section 425.17. (C.A. 4th, August 17, 2015.)

San Bernardino County v. Superior Court (The Inland Oversight Committee) (2015) _ Cal.App.4th _ , 2015 WL 4882569: The Court of Appeal granted a writ petition by San Bernardino County (County) after the trial court overruled its demurrer. Plaintiffs, the Inland Oversight Committee and Citizens for Responsible Equitable Environmental Development, brought a suit challenging a November 2006 settlement agreement between Colonies Partners, the County and the San Bernardino County Flood Control District, pursuant to which the County paid Colonies $102 million. Plaintiffs sought to have the settlement agreement declared void under state law governing conflicts of interests of government officials, and to force Colonies to disgorge any money already paid pursuant to the agreement. The trial court erred in overruling the demurrer because plaintiffs' complaint suffered from one fatal pleading defect: lack of standing. (C.A. 4th, August 17, 2015.)

Warren v. Warren (2015) _ Cal.App.4th _ : The Court of Appeal reversed the trial court's order denying defendants' motion to set aside a default and default judgment in an action for an accounting. One line of cases concludes that notice of damages must be given before a default is entered in an accounting action. Another line concludes notice need not be given. Plaintiff did not give notice of damages. The Court of Appeal ruled that, when a plaintiff knows what his damages are and defendants did not have access to that information, notice of damages must be given before default is entered. (C.A. 2nd, September 11, 2015.)

WA Southwest 2, LLC v. First American Title Insurance Company (2015) _ Cal. App.4th _ , 2015 WL 5175472: The Court of Appeal affirmed the trial court's ruling sustaining demurrers without leave to amend. In 2012 plaintiffs sued regarding real property purchased in late 2005 and early 2006. Claims were made against a title insurance company, law firm, and a broker. The allegations included breach of fiduciary duty, fraud, legal malpractice, and conversion. The trial court properly concluded that plaintiffs failed to plead the application of the delayed discovery rule. (C.A. 4th, September 4, 2015.)

Class Actions

Falk v. Children's Hospital Los Angeles (2015) _ Cal.App.4th _ , 2015 WL 3895464. The Court of Appeal reversed, in part, the trial court's order granting summary judgment to defendant on wage and hour claims after it rejected plaintiff's argument that the filing of a prior class action tolled the limitations periods under *American Pipe & Construction Co. v. Utah* (1974) 414 U.S. 538 (American Pipe). On May 1, 2007, Thomas Palazzolo filed a class action against his former employer Children's Hospital Los Angeles (Children's). On April 7, 2009, the trial court granted summary judgment in favor of Children's without addressing either class claims or class certification. Class certification

was not raised or addressed on appeal. The court of appeal affirmed the trial court judgment and remittitur issued on February 3, 2011. Denise Mays filed a class action complaint against employer Children's on January 27, 2012. Falk's class action was filed on December 3, 2012. Under *American Pipe*, if class certification in an initial class action is denied, the statute of limitations is tolled from the time of commencement of that suit to the time of denial of certification for all purported members of the class who either make timely motions to intervene in the surviving individual action or who thereafter timely file their own individual actions. The Court of Appeal found that claims asserted in the earlier Palazzolo class action, although stated with less precision than Falk's claims, gave Children's notice of Falk's claims. Falk's claims were therefore tolled from May 1, 2007 until February 3, 2011, the date that remittitur issued in the Palazzolo case. Because 249 days had already run on Falk's claims by the time the Palazzolo case was filed, she only had 116 days left to file her complaint to preserve any cause of action subject to a one-year limitations period. Even assuming that the Mays case started a new tolling period, 116 days from February 3, 2011 expired before Mays filed her class action on January 27, 2012. Falk's wage statement claim, which was subject to a one-year limitations period, was therefore time-barred. But her remaining claims, which were subject to a three-year or four-year limitations period, were timely. (C.A. 2nd, filed June 3, 2015, published June 24, 2015.)

Munoz v. Chipotle Mexican Grill, Inc. (2015) _ Cal.App.4th _ , 2015 WL 3958999: The Court of Appeal dismissed an appeal. The Court of Appeal concluded that the trial court's order denying plaintiffs' class certification motion and granting defendant's motion to deny class certification was a nonappealable order because PAGA claims remained in the trial court. The "death knell" doctrine did not apply under these circumstances. (C.A. 2nd, June 30, 2015.)

Construction

Judicial Council of California v. Jacobs Facilities, Inc. (2015) _ Cal.App.4th _ , 2015 WL 4967258: The Court of Appeal reversed the trial court's denial of plaintiff's motion for judgment notwithstanding the verdict (JNOV) after the jury found for defendants, and remanded for a substantial compliance hearing under Business & Professions Code section 7031(e). Plaintiff entered into a contract with defendant Jacobs Facilities, Inc. (Facilities), a wholly owned subsidiary of defendant Jacobs Engineering Group Inc. (Jacobs). Facilities was properly licensed under the Contractors' State License Law when it commenced work. Later, Jacobs, as part of a corporate reorganization, transferred the employees responsible for performing the contract to another wholly owned subsidiary. Jacobs caused the new subsidiary to obtain a contractor's license and allowed the Facilities license to expire. Despite the lapse of its license, Facilities remained the contract signatory until nearly a year later, when the parties entered into an assignment of the contract to the licensed subsidiary. The trial court erred in denying the motion for JNOV. If a contractor is unlicensed for any period of time while delivering construction services, the contractor forfeits all compensation for the work, not merely compensation for the period when the contractor was unlicensed. The Court of Appeal concluded that defendants were entitled to an opportunity to prove substantial compliance under section 7031(e), and remanded for a hearing on that issue. If defendants successfully demonstrate statutory substantial compliance, the trial court will reinstate the judgment. If defendants are unsuccessful, the trial court will enter judgment against defendants in the amount of $18,331,911, plus taxable costs and interest, if appropriate. (C.A. 1st, August 20, 2015.)

Consumer Protection

Benson v. Southern California Auto Sales, Inc. (2015) _ Cal.App.4th _ , 2015 WL 5047611: The Court of Appeal affirmed the trial court's order denying plaintiff's motion for attorney fees following a settlement. The trial court properly ruled that defendant gave plaintiff an appropriate correction, repair, replacement or other remedy under Civil Code section 1782(b) of the Consumer Legal Remedies Act (CLRA). The Court of Appeal further ruled that if a suit for damages cannot be maintained under the CLRA because a merchant offered an appropriate correction in response to a consumer's notice, then a plaintiff cannot collect attorney fees for such a suit. (C.A. 4th, August 27, 2015.)

Employment

Cifuentes v. Costco Wholesale Corporation (2015) _ Cal.App.4th _ , 2015 WL 3932948: The Court of Appeal reversed the trial court ruling that under *Lisec v. United Airlines, Inc.* (1992) 10 Cal.App.4th 1500, 1507 (*Lisec*), Costco had improperly withheld federal and state payroll taxes when it paid plaintiff's judgment for wages against his former employer. The Court of Appeal observed that in the 23 years since *Lisec*, the Internal Revenue Service and the vast majority of federal appellate courts had broadly interpreted the applicable Internal Revenue Code provisions as requiring an employer to withhold payroll taxes for all "wages" arising from the employer-employee relationship, even after that relationship has terminated. Persuaded by these authorities, the Court of Appeal concluded that Costco properly withheld the payroll taxes. (C.A. 2nd, June 26, 2015.)

In re Acknowledgment Cases (2015) _ Cal.App.4th _ , 2015 WL 5098224: In a coordinated case, the Court of Appeal reversed the trial court judgment against police officer defendants, and directed the superior court to enter judgment in favor of all police officer defendants on the complaint for breach of contract and quantum meruit. To reduce the attrition of police academy trained officers who found other employment, the City of Los Angeles (City) enacted Los Angeles Administrative Code section 4.1700 (section 4.1700), requiring police officers to reimburse the City a prorated portion of the cost of training at the academy if they leave the Los Angeles Police Department (LAPD) after serving less than 60 months following graduation. Section 4.1700 further required police officer applicants to sign an agreement stating that they intended to maintain employment with the LAPD for at least 60 continuous months and agreeing to reimburse the City for the direct and indirect costs of training if they leave the LAPD within five years after graduation. The agreement is called "the acknowledgment." The Court of Appeal ruled that LAAC section 4.1700 violated Labor Code section 2802, and the acknowledgment was void pursuant to Labor Code section 2804. (C.A. 4th, filed August 12, 2015, published August 31, 2015.)

Pasadena Police Officers Association v. Superior Court (City of Pasadena) (2015) _ Cal.App.4th _ , 2015 WL 5281818: The Court of Appeal denied a writ petition seeking to prevent any disclosure of a report investigating a police officer shooting and killing of an unarmed teenager. The trial court properly concluded that the report was a public document, properly concluded that portions of the report were exempt from disclosure as peace officer personnel records, but inappropriately redacted material, including analyses of the police department's administrative investigation and departmental policies, descriptions of the police department's responsiveness (or the absence thereof), and recommendations. (C.A. 2nd, September 10, 2015.)

Evidence

Cooper v. Takeda Pharmaceuticals America, Inc. (2015) _ Cal.App.4th _ , 2015 WL

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4768097: The Court of Appeal reversed the trial court's order striking the plaintiffs' expert's testimony, and later order granting a motion for judgment notwithstanding the verdict for the defendant, after the jury returned a verdict for plaintiffs that awarded $5 million to plaintiff and $1.5 million to his wife for loss of consortium. The trial court erred in striking the expert's testimony. By requiring the expert to rule out all other possible causes for plaintiff's bladder cancer, even where there was no substantial evidence that other such causes might be relevant, the court exceeded the proper boundaries of its gatekeeping function in determining the admissibility of the complex scientific testimony. The Court of Appeal also concluded that the evidence supported giving a jury instruction on multiple causation. The Court of Appeal reversed the judgment notwithstanding the verdict and the order granting a new trial, as well as the subsequent judgment entered in favor of defendant, and remanded the matter to the trial court with directions to enter a new judgment based on the jury's verdict. (C.A. 2nd, filed July 16, 2015, published August 13, 2015.)

Diamond v. Reshko (2015) _ Cal.App.4th _ , 2015 WL 4940372: The Court of Appeal reversed a judgment of $406,698.00 for plaintiffs following a jury verdict finding defendant Reshko was 60% at fault. Plaintiffs sued for an injury that Christine Diamond suffered while riding as a passenger in a taxi that was involved in a collision with another car driven by Reshko. Plaintiffs sued the drivers and owners of each car. Plaintiffs settled with the taxi driver and the taxi owner, Yellow Cab. The settlement agreement required Yellow Cab to attend and participate in the trial. The trial court excluded evidence of the settlement. The Court of Appeal, however, concluded it was an abuse of discretion for the trial court to exclude evidence of the Diamond/Yellow Cab settlement, including the clause that required Yellow Cab to attend and participate in the trial. (C.A. 1st, August 20, 2015.)

Government

Walker v. City of San Clemente (2015) _ Cal. App.4th _ , 2015 WL 5093247: The Court of Appeal affirmed the trial court's order requiring defendant to refund approximately $10.5 million in unexpended Beach Parking Impact Fees (Fees) to the current property owners on which the fees were imposed. The Court of Appeal affirmed because defendant failed to make the five-year findings required by the Mitigation Fee Act (Government Code section 66000 et seq.; Act) and the statutorily-mandated remedy for that failure is the refund of all unexpended Fees. Defendant did not satisfy the Act's requirement of five-year findings when it received and filed a 2009 staff report because the report's findings were mere conclusions, not the specific findings required under the Act. (C.A. 4th, August 28, 2015.)

Insurance

Sequeira v. Lincoln National Life Insurance Company (2015) _ Cal.App.4th _ , 2015 WL 5097794: The Court of Appeal reversed the trial court's order granting summary judgment for defendant regarding supplemental life insurance policy benefits. Defendant issued both a basic and a supplemental life insurance policy, effective January 1, 2010. The parties agreed that employee Donald Sequeira (Sequeira) was eligible on January 1 under the supplemental policy, but he did not work that day because it was a paid holiday. Tragically, he was hospitalized the next day with a sudden illness and died on January 6 without ever returning to work. The trial court ruled that Sequeira's widow was not entitled to benefits because the policy required her husband to be "on the job, at his employer's place of employment, performing his customary duties" between January 1 and his death. The Court of Appeal reversed, finding the policy was ambiguous regarding whether Sequeira needed to perform his work responsibilities on New Year's Day or anytime after that in order for his wife to receive benefits. The Court of Appeal therefore interpreted the policy in favor of Sequeira's reasonable expectations, which were that he should not have to work on New Year's Day or when he is sick in order to receive coverage that he had paid for. (C.A. 1st, August 31, 2015.)

21st Century Insurance Company v. Superior Court (Tapia) (2015) _ Cal.App.4th _ , 2015 WL 5285822: The Court of Appeal reversed the trial court's ruling denying defendant's motion for summary judgment in a bad faith action. Defendant's writ petition was granted, and the trial court was ordered to enter summary judgment for defendant. The underlying action was a personal injury/wrongful death action. Defendant offered to settle for the policy limits of $100,000. Plaintiff believed there were two additional $25,000 policies also issued by defendant that might be applicable, and offered to settle for $150,000. Defendant denied getting this offer. Defendant later, however, made an offer to settle for $150,000. Plaintiff then served a Code of Civil Procedure section 998 offer for $3,000,000 for the decedent plaintiff and $1,150,000 for his mother. The insured, who was being defended by the carrier, agreed to the entry of a stipulated judgment in the amounts demanded by plaintiffs. The Court of Appeal ruled that defendant was entitled to summary judgment because, when the insured goes behind an insurer's back and enters into a stipulated judgment, a defending insurer cannot be bound by a settlement made without its participation and without any actual commitment on its insured's part to pay the judgment. (C.A. 4th, September 10, 2015.)

Judges

Warner v. California Public Employees Retirement System (2015) _ Cal.App.4th _ , 2015 WL 4881816: The Court of Appeal affirmed the trial court's order denying a writ petition by Christopher J. Warner (Judge Warner). The trial court properly ruled that, under the Judges' Retirement System II Law (Government Code sections 75500 et seq.), which establishes retirement benefits for California judges first elected or appointed to judicial office on or after November 9, 1994, Judge Warner was entitled to receive only a disability retirement allowance. (C.A. 4th, August 17, 2015.)

Judgments

Chodos v. Borman _ Cal.App.4th _ , 2015 WL 4911849: The Court of Appeal affirmed and modified a judgment for attorney fees. Plaintiff, an attorney, obtained a judgment for attorney fees of $7.8 million on September 19, 2013. The Court of Appeal reversed this judgment and ordered the trial court to enter a new judgment for $1,717,921. The trial court did this, but declined to award postjudgment interest from the date of the original judgment, and declined to award the attorney's trial costs and interest on those costs from September 19, 2013. The Court of Appeal ruled that interest ran on the $1,717,921 judgment from the date of the original judgment on September 19, 2013, and that plaintiff was entitled to the costs claimed and interest on those costs from that date. (C.A. 2nd, August 18, 2015.)

Professional Licensing

Sternberg v. California State Board of Pharmacy (2015) _ Cal.App.4th _ , 2015 WL 5031230: The Court of Appeal affirmed the trial court's order denying a writ petition by petitioner seeking to reverse a decision by the California State Board of Pharmacy (Board) revoking his pharmacist's license, but staying the revocation and placing his license on probation for three years with specific conditions, following the discovery of an employee's widespread theft of a dangerous drug from the pharmacy that petitioner supervised as the pharmacist-in-charge.

During a two-year period while petitioner supervised a Target pharmacy, a pharmacy technician employee stole at least 216,630 tablets of Norco from the pharmacy, with an estimated retail value of up to $1.50 per tablet or $324,945, and a street value of up to $5 per tablet or $1,083,150. The Court of Appeal concluded that the trial court properly denied the writ petition because the evidence supported the Board's findings, those findings supported the Board's decision, and the Board did not abuse its discretion in imposing discipline. (C.A. 2nd, filed August 6, 2015, published August 26, 2016.)

Real Property

Coppinger v. Rawlins (2015) _ Cal.App.4th _ , 2015 WL 4878817: The Court of Appeal affirmed the trial court's ruling sustaining, without leave to amend, demurrers by defendants. Prior owners subdivided their land into two parcels, dedicating narrow lots "A," "B," and "C," to defendant County of Riverside (County) for public road and utility purposes. The County accepted the dedication in 1980, with the proviso that Lots "B" and "C" would not immediately become part of the county-maintained road system. In 1984, plaintiffs purchased one parcel. Defendants Rogelio and Maria Rawlins (defendants) purchased the other parcel, and used Lot "C" for ingress and egress. Plaintiffs erected a gate to prevent the defendants from using Lot "C," and eventually filed a lawsuit against defendants and the County for quiet title, trespass, injunctive relief, and declaratory relief. The trial court properly found that the complaint failed to state facts sufficient to constitute a cause of action because the County's acceptance of the offer of dedication was absolute, and the complaint failed to state facts sufficient to constitute a cause of action under Code of Civil Procedure section 771.010. (C.A. 4th, August 14, 2015.)

Mak v. City of Berkeley Rent Stabilization Board (Ziem) (2015) _ Cal.App.4th _ , 2015 WL 5145108: The Court of Appeal affirmed the trial court's denial of a writ petition by plaintiffs. Plaintiffs sought to overturn a decision by the Berkeley Rent Stabilization Board (Board) limiting the rent charged to a new tenant. Plaintiffs had served a tenant of 28 years with a 60-day eviction notice, claiming that plaintiff Jason Mak intended to occupy the apartment. The tenants and plaintiff later entered into a written agreement for the tenant to vacate the apartment, stating that she was not doing so pursuant to the 60-day notice. After the tenant vacated the apartment, plaintiffs rented it for more than double the previous rent. The trial court properly ruled that plaintiffs had failed to present evidence to rebut a Board regulation creating a rebuttable presumption that a tenant, who moves out within one year of service of an owner move-in eviction notice, has moved out pursuant to that notice. (C.A. 1st, September 2, 2015.)

McMillin Albany LLC v. Superior Court (Van Tassell) (2015) _ Cal.App.4th _ , 2015 WL 5029324: The Court of Appeal granted a writ petition by McMillin Albany that it filed after the trial court denied its motion to stay proceedings in a construction defect case until real parties complied with the statutory nonadversarial prelitigation procedures of the "Right to Repair Act." (Act, California Civil Code sections 895 et seq.) Plaintiff's counsel in the underlying action dismissed the one specific cause of action alleging violations of the Act, and persuaded the trial court that the Act therefore did not apply. The Court of Appeal disagreed, concluding that, because the complaint alleged residential construction defects in components or functions for which standards have been established in the Act, the claims fell within the scope of the Act, and the motion to stay should have been granted. (C.A. 5th, August 26, 2015.)

Save Our Schools v. Barstow Unified School District Board of Education (2015) _ Cal. App.4th _ , 2015 WL 5147347: The Court of Appeal reversed the trial court's denial of a writ petition challenging the decision of the Barstow Unified School District Board of Education (District) to close two elementary schools and transfer their students to other District "receptor" schools. The administrative record had insufficient evidence of the original student capacity, or total enrollment before the transfers, of any of the receptor schools. It was therefore impossible for the District to determine that the closures and transfers would not increase the total student enrollment of any of the receptor schools beyond the levels allowed under the minor additions categorical exemption to the California Environmental Quality Act. (C.A. 4th, September 2, 2015.)

Schafer v. City of Los Angeles (Triangle Center, LLC) (2015) _ Cal.App.4th _ , 2015 WL 3824134: The Court of Appeal affirmed the trial court's peremptory writ of mandate directing the City to set aside a decision by the City's planning commission that upheld a building permit allowing the restriping of a parking lot owned by Triangle Center, and to reinstate a decision by the City's zoning administrator that denied the permit. Triangle Center and the City argued the evidence supported the planning commission's decision that the City was equitably estopped from disallowing use of the property as a parking lot. The Court of Appeal concluded that the circumstances of this case did not justify an equitable estoppel against the City. This was not one of the rare and exceptional cases in which denying equitable estoppel would result in grave injustice. Allowing Triangle Center to establish land use rights contrary to the zoning restrictions and despite its failure to comply with the normal land use approval process would adversely affect public policy and the public interest. That adverse impact outweighed any unfairness to Triangle Center resulting from the failure to apply equitable estoppel. (C.A. 2nd, filed May 20, 2015, published June 19, 2015.)

Scher v. Burke (2015) _ Cal.App.4th _ : The Court of Appeal reversed the trial court's finding that two roads had been dedicated as public streets, and that plaintiffs had an implied easement over the roads for access to their property. Civil Code section 1009 bars all use of non-coastal private real property from ever ripening into an implied dedication to the public after the effective date of that statute. Hence, the trial court erred in considering evidence about use of the subject roads after March 4, 1972 to support its finding that the roads were impliedly dedicated to public use. In the unpublished portion of the opinion, the Court of Appeal held that the trial court misapplied the law when it ruled that plaintiffs had an implied easement that arose before 1902, while the land was still owned by the federal government. The trial court also erred in ruling that the two roads were dedicated to public use during that time. There was no evidence of the roads' use before 1972 such as would support a finding that they were impliedly dedicated as public streets. (C.A. 2nd, September 11, 2015.)

Tribeca Companies, LLC v. First American Title Insurance Company (2015) _ Cal. App.4th _ , 2015 WL 5026901: The Court of Appeal affirmed the judgment for defendant following a bench trial. Plaintiff sued after defendant refunded a $1 million deposit to a real estate investor out of an escrow account that plaintiff had opened, alleging claims for breach of contract, breach of fiduciary duty, fraud, and negligence. The trial court properly found that plaintiff failed to prove damages because the escrow deposit was made by an individual, not a member of the limited liability company joint venture, and the individual never lost title to his funds. Defendant was not liable for liquidated damages because it was not a signatory to the joint venture agreement. The trial court also properly concluded that plaintiff failed to prove any of the asserted causes of action. (C.A. 1st, August 26, 2015.)

Wells Fargo Bank v. 6354 Figarden General Partnership (2015) _ Cal.App.4th _ , 2015

continued on page 22

CALIFORNIA CIVIL LAW UPDATE CONTINUED FROM PAGE 21:

WL 3978700 : The Court of Appeal affirmed the trial court's calculation of the redemption price for real property sold by judicial foreclosure. The Court of Appeal construed Code of Civil Procedure section 729.060(c), which states: "Rents and profits from the property paid to the purchaser or the value of the use and occupation of the property to the purchaser may be offset against the amounts [included in the redemption price pursuant to] subdivision (b)." The trial court's finding that the purchaser's use and occupation of the unleased portion had no value was supported by substantial evidence so the trial court did not err in reducing the redemption price only by the rents paid. The Court of Appeal concluded that section 729.060(c) refers to net rents. Consequently, the redemptioner suffered no prejudice when the trial court subtracted the management fees and operating expenses related to the business of the renting units of the property from the redemption price. (C.A. 5th, July 1, 2015.)

Wong v. Stoler (2015) _ Cal.App.4th _ , 2015 WL 3862525: The Court of Appeal reversed the trial court's judgment denying plaintiffs rescission of a real estate purchase contract due to fraud. The potential hardship that the sellers might suffer if the real estate contract was rescinded was not a proper basis for denying rescission due to the sellers' fraud. (C.A. 1st, filed May 26, 2015, published June 23, 2015.)

Settlement

Epic Communications, Inc. v. Richwave Technology, Inc. (2015) _ Cal.App.4th _ , 2015 WL 3862491: The Court of Appeal reversed the trial court's summary judgment for defendants who were strangers to the settlement agreement. Several provisions of the settlement agreement containing the release clause were not easily reconciled with its seemingly broad release language. The subsequent conduct of the contracting parties also appeared to be inconsistent with an intent to extend the release to unaffiliated third parties. The Court of Appeal concluded that in view of these ambiguities, the trial court erred by granting summary judgment in favor of strangers to the contract who raised the release as a defense. (C.A. 6th, June 23, 2015.)

RSL Funding, LLC v. Alford (2015) _ Cal. App.4th _ , 2015 WL 4919874: The Court of Appeal reversed the trial court's order directing the transfer of structured settlement payments to plaintiff and respondent, RSL Funding, LLC. The Court of Appeal concluded that the trial court erred in entering an order that required State Farm to divide payments because the Structured Settlement Protection Act provides that an annuity issuer may not be required to do so. (California Insurance Code section 10139.3(e).) (C.A. 4th, August 18, 2015.)

Torts

Bermudez v. Ciolek (2015) _ Cal.App.4th _ , 2015 WL 3826842 : The Court of Appeal affirmed the trial court judgment of $3,751,969 for plaintiff, but reduced the judgment by $46,175.41 of damages that were not supported by substantial evidence. Two cars crashed in an intersection as the light transitioned from green to yellow to red. Ciolek was turning left. Heacox was going straight. Ciolek's car pushed Heacox's car into plaintiff who was waiting on his bike on the sidewalk. The jury found both defendants Ciolek and Heacox were negligent, but concluded only Ciolek was "a substantial factor in causing harm" to plaintiff. The jury was entitled to conclude that Heacox slightly exceeded a reasonable speed when he entered the intersection, but that his speed was not a substantial factor in causing plaintiff's injuries. (C.A. 4th, June 22, 2015.)

Navarrete v. Meyer (2015) _ Cal.App.4th _ , 2015 WL 3826660: The Court of Appeal reversed the trial court's order granting summary judgment for defendant Meyer. Defendant Meyer's act of telling the driver to drive faster raised triable issues for a jury as to whether to impose joint liability on Meyer for her conduct on the night in question on a theory of concert of action or conspiracy, and also as to whether she unreasonably interfered with the safe operation of a vehicle within the meaning of Vehicle Code section 21701. (C.A. 4th, June 22, 2015.)

Castro v. City of Thousand Oaks (2015) _ Cal.App.4th _ , 2015 WL 5097856: The Court of Appeal reversed the trial court's order granting summary judgment for defendant. Defendant was not entitled to government design immunity (Government Code section 830.6) regarding a pedestrian warning beacon because it was not part of a public works plan or design approved by defendant, but instead was an "add on" installed after the public works project was approved. Moreover, the Court of Appeal concluded there were material triable issues of fact as to whether the crosswalk/street intersection was a dangerous condition. (C.A. 2nd, August 31, 2015.)

Johnson v. United States Steel Corporation (2015) _ Cal.App.4th _ , 2015 WL 5120242: The Court of Appeal reversed the trial court's summary judgment for defendant U.S. Steel Corporation (U.S. Steel). Plaintiffs David and Laura Johnson filed a products liability action against suppliers, manufacturers and retailers of various products containing benzene, alleging that David's chronic exposure as an auto mechanic to benzene-containing products caused him to develop acute myeloid leukemia (AML). U.S. Steel was sued for supplying a fabricator with a benzene-containing coal residue called "raffinate" that was once the principal ingredient in the fabrication of Liquid Wrench, a solvent for loosening rusted bolts and machine parts. The Court of Appeal agreed with the trial court that the supplier of a raw material used in the manufacture of another product can be held liable for a design defect under the consumer expectations test only if the raw material is itself inherently defective. The trial court erred, however, in granting summary judgment because the record did not contain evidence negating the existence of a design defect of the coal raffinate produced and sold by U.S. Steel. (C.A. 1st, September 1, 2015.)

Shiffer v. CBS Corporation (2015) _ Cal.App.4th _ , 2015 WL 5244659: The Court of Appeal affirmed the trial court's summary judgment for defendant. Plaintiffs failed to produce evidence raising a triable issue that James Shiffer suffered bystander exposure to Westinghouse asbestos when he worked at a plant in 1969 and 1970. The trial court also properly denied plaintiffs' motions for reconsideration and a new trial, because evidence of potential harm from re-entrainment of asbestos was not new and could have been presented in opposition to the original summary judgment motion. (C.A. 1st, September 8, 2015.)

Puskar v. City and County of San Francisco (2015) _ Cal.App.4th _ , 2015 WL 5050135: The Court of Appeal affirmed the trial court's order granting summary judgment for defendant. Plaintiff sued alleging he was injured by a dangerous condition of public property. The alleged dangerous condition was the absence of a fire extinguisher from the residence plaintiff rented from defendant. The trial court concluded liability was precluded by the immunity accorded to a public entity for failing to provide or maintain fire protection facilities or equipment. The Court of Appeal concluded that the trial court properly applied the immunity statute. (C.A. 5th, August 27, 2015.)

Monty A. McIntyre is a full-time mediator, arbitrator, referee and special master at ADR Services, Inc., with 35 years of extensive civil trial experience representing both plaintiffs and defendants in a wide variety of business, insurance, real property and tort cases, and over 30 years of experience as an arbitrator and mediator. Mr. McIntyre handles cases in the following areas: business, commercial, construction, employment, insurance, professional liability, real property and torts.

Trailers Part 2 - Trailer Sway Investigation and Reconstruction

By James V. Bertoch, MS PE
MEA FORENSIC ENGINEERS & SCIENTISTS

Introduction

In Part 1 of this article, I discussed trailer types, trailer equipment, load ratings and trailer towing. In Part 2, I will discuss trailer sway.

Trailer sway is a side-to-side oscillation of the trailer (Figure 1) that can lead to a control loss and, in some cases, a crash or rollover. If you've seen a trailer weaving from side-to-side on the freeway, then you've probably witnessed 'trailer sway.' Trailer sway can be induced by a sudden steering maneuver, lane change, a wind gust or by the wind off a passing vehicle. The resulting trailer sway will often diminish and cause no harm; however, if the tow vehicle is too small, moving too fast, or the trailer is not loaded correctly, then the sway may amplify with each oscillation and lead to a loss of control.

It is estimated that more than 50,000 crashes involving passenger vehicles towing trailers occurred in the United States in 2007. These crashes generated about 389 deaths and over 12,000 injuries in addition to other vehicle and property damage.

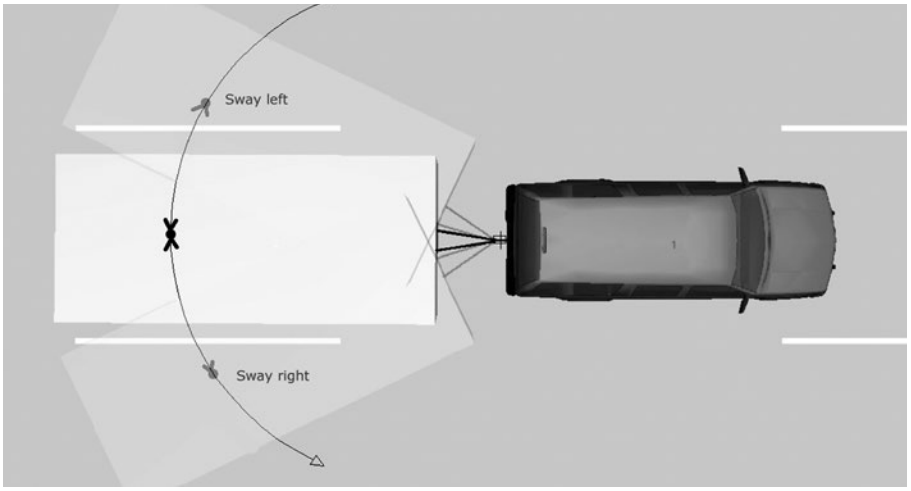

Figure 1 - Trailer sway.

Trailer sway affects trailers that attach at the rear bumper of the tow vehicle. Fifth wheel trailers, semi-trailers and other trailers that attach over the rear axle of the tow vehicle do not experience sway. The type of trailer affected by trailer sway typically have an A-frame at the front of the trailer and are called conventional travel trailers (Figure 2 and Figure 3).

Mechanical Factors Affecting Trailer Sway

The physics describing trailer sway are relatively straightforward and help us understand how and why these oscillations occur. The physics become more complicated as the size of the oscillation increases, and many experiments have been conducted to better understand how trailer sway leads to control loss.

Proper towing equipment and set up (described in detail in Part 1) is critical to reducing a trailer's tendency to sway and to recovering from sway once it starts. Below, I discuss some of the important factors and equipment that affect trailer sway.

Speed:

Every combination of tow vehicle and trailer has a 'critical speed.' Below this critical speed the trailer is considered to be stable, whereas above this critical speed the trailer is considered to be unstable. When a stable trailer starts to sway, each successive sway will decrease in magnitude until the sway disappears. For an unstable trailer, each successive sway increases until the trailer becomes uncontrollable. The faster a trailer is

Figure 2 – Conventional travel trailer showing A-frame and A-frame equipment.

Figure 3 – The A-frame of a conventional travel trailer attached to the rear of a pickup truck.

Figure 4 - The draw bar above is a 2–¼ inch drop. The draw bar below is a 6 inch drop.

traveling above its critical speed, the more unstable it is and the more rapidly it becomes uncontrollable.

The critical speed of a trailer can be increased by increasing the weight of the tow vehicle relative to the trailer, maintaining proper trailer balance and loading, using proper hitch equipment, using proper tires, and maintaining proper tire inflation. Most trailer manufacturers design their trailers to have a minimum critical speed of 55 mph when used properly, however improper use and maintenance can reduce a trailer's critical speed.

Trailer Balance:

One of the most common contributors to sway is improper balance or load distribution within the trailer. The likelihood of trailer sway increases if too little of the trailer's weight rests on the tow vehicle's hitch. For example, if the hitch weight of a tandem axle 29-foot travel trailer weighing 7500 lb. and being towed by a typical ½ ton vehicle is reduced from 10% (750 lb.) to 9% (675 lb.), the critical speed drops from 55 mph to 47 mph. This kind of weight change can easily occur if a full ice chest is placed at the rear of the trailer rather than the front of the trailer.

It is generally accepted that the hitch load for a trailer should be maintained between 10% and 15% for good results, and between 12% and 15% for best results. Some trailer manufacturers recommend the 60/40 rule: 60% of the weight forward of the trailer axles and 40% behind the trailer axles. This rule of thumb generally achieves a safe hitch load, although the distribution of the weight ahead of and behind the axles can still render a trailer loaded according to this rule unstable.

Other load-related factors can also render a trailer unstable. For instance, a load-balanced trailer with most of the weight placed at the front and rear of the trailer is less stable than one with the weight concentrated. Therefore heavy items, like all-terrain vehicles (ATVs) or ice chests, should be placed close together near the center, while ensuring that proper hitch load is maintained.

Trailer balance can also be affected if the trailer is not level. For example, a raised tow vehicle (e.g., with a lift kit) can reduce a trailer's stability if a drop hitch is not used (Figure 4).

Load Leveling:

Proper load leveling reduces the tendency for a trailer to sway. Load leveling transfers the hitch weight of the trailer more evenly between the front and rear axles of the tow vehicle. Greater weight on the front wheels means that the tow vehicle will handle better.

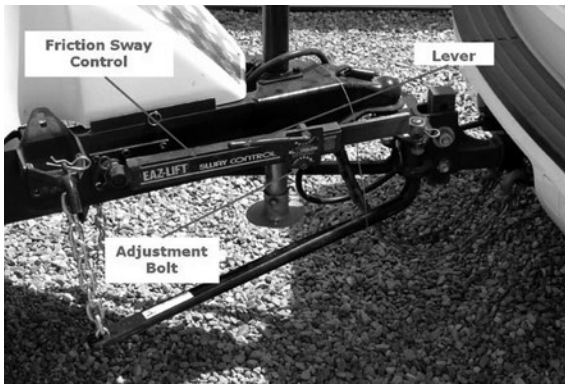

Figure 5 – Sway control bar mounted to an A-Frame. The friction on the sway control is turned on or off by turning the lever and adjusted at the bolt.

The spring bars used to achieve load leveling also help to restore the trailer's alignment behind the tow vehicle.

Trailer Weight vs. Truck Weight:

A light tow vehicle towing a heavy trailer will be less stable than a heavy tow vehicle towing a light trailer. Adding cargo to the trailer and removing cargo from the tow vehicle reduces stability even further. The best practice is to maximize the tow vehicle weight while minimizing the trailer weight, although it is also important to distribute any additional weight in the tow vehicle properly between its front and rear axles.

Tires:

Trailer sway is affected by the sidewall stiffness of trailer tires, and sidewall stiffness is affected by tire pressure. Trailer tires should be properly inflated according to the 'Tire and Loading Information' placard affixed to the front of the trailer on the left side or in the trailer Owner's Manual.

Most trailers use a special tire designed for trailer use. Some trailer owners like to put tires and rims on their trailer that match their tow vehicle, or to put off-road tires on their trailer. Using an improper tire can decrease the stability of the trailer.

Downhill Slope:

The propensity for a trailer to sway increases when traveling downhill, especially if the vehicle speed begins to increase. The balance of the trailer is affected by the shift in the trailer attitude when towing downhill, resulting in a less stable situation. Conversely, trailer stability increases travelling uphill. Increased speed during a descent also increases the likelihood of passing slower moving vehicles, and the windblast from passing a descending tractor-trailer could initiate a sway in an unstable trailer.

Sway Control:

The purpose of sway control is to resist rotation between the trailer and the tow vehicle at the hitch. This resistance can be achieved by friction (Figure 5) or cam-style devices that increase the loads in the spring bars used for load leveling. Both methods improve trailer stability and reduce trailer sway.

Driver Factors Affecting Sway

When a trailer begins to sway and the sway increases, the driver's reaction is critical. Unlike a car that is fishtailing, turning into the sway will only make the trailer sway worse. Applying the tow vehicle's brakes will also make the situation worse.

When a trailer is swaying, the best response is to hold the steering wheel as straight as possible, let off the gas and apply only the trailer's brakes. Applying only the trailer's brakes generates forces at the trailer's tires that act to counter the trailer sway and realign the trailer with the tow vehicle. This action highlights the importance of having a properly installed and adjusted trailer brake controller.

Case Studies

Case Study #1

In this incident, a Chevrolet Suburban weighing 5100 lb. was towing a 25-foot travel trailer that weighed 6500 lb. The hitch weight was 11% and the critical speed was about 55 mph. The vehicles were traveling over 60 mph

Case Study #1 – The Suburban on the left and the trailer is shown on the right. The roll over damage to the vehicles is evident.

on an Interstate when they attempted to pass a tractor-trailer while rounding a curve on a downhill grade. When the trailer began to sway, the driver attempted to stop the sway by applying the trailer brakes. The trailer brakes were ineffective and the trailer de-coupled from the tow vehicle as both vehicles rolled over.

After the collision it was discovered that the brake controller was not properly installed, resulting in a trailer with no brakes. The vehicles had traveled a significant distance without trailer brakes, however the driver did not comprehend that the difficulty in slowing the vehicles indicated a brake controller problem. When setting up the brake controller, the trailer brakes should engage just before the truck brakes.

Case Study #2

In this case, a lifted Chevrolet Suburban weighing about 4300 lb. was towing a sport utility trailer loaded with three ATVs. The vehicles were traveling down a 5% grade on an Interstate at about 55 mph. The ATV's were loaded at the rear of the trailer with the heaviest ATV at the back. This loading

Case Study #2 – The Suburban is shown above. Damage is shown at the rear door and bumper. The trailer shown in the Figure is an exemplar.

arrangement resulted in a hitch load below 7% and a critical speed of about 45 mph. As the vehicles drove through a curve, the trailer began to sway. The driver attempted to apply the trailer brakes, but was unable to recover the trailer. The truck hit a concrete barrier on the right side of the road, following which the vehicles decoupled.

The driver claimed that the trailer coupler was not placed over and locked to the hitch ball. Damage to the coupler and locking mechanism were used to demonstrate that the coupler was properly attached and locked to the hitch ball. The primary cause of this collision was the loading arrangement, which was exacerbated by the downhill slope.

Case Study #3

This case involved a Ford F-350 weighing 6700 lb. towing a 39-foot park trailer weighing 9600 lb. on an Interstate. The tow vehicle was not equipped with load-leveling bars or sway control. The vehicles were traveling 60 to 65 mph on a downgrade when trailer sway developed. As the driver corrected, the sway increased and the vehicles veered off the road into the center median before rolling over.

Case Study #3 – The truck is shown at the scene. The trailer was inspected after the incident.

An exemplar trailer was inspected and found to have a hitch weight under 8% of the trailer weight. The critical speed for the vehicles was calculated to be under 40 mph and it was concluded that the trailer was not designed correctly.

Trailer Sway Investigations

When investigating a collision that may involve trailer sway, the following data should be acquired as soon as possible following the collision:

- The axle weights of the tow vehicle, and the axle and hitch weights of the trailer.
- The weight rating and set up of the hitch equipment and tires.
- The scene evidence, including the overall road geometry, marks left by the vehicles, and vehicle rest positions and orientations.
- The driver's description of the speed, how the trailer was behaving before the collision, and what actions he/she took in response to the trailer sway.
- The owner's and driver's understanding of the various ratings for both vehicles, and whether this information was provided and presented in a proper and understandable manner.
- The installer and most recent servicer of the brake controller and other equipment.
- The driver's or other passengers' descriptions about the presence of large trucks, wind, bumps in the road or other factors that may have initiated the trailer sway.
- Documentation of the damage to the vehicles and hitch equipment; exemplar vehicles may also need to be inspected.

Conclusion:

Trailer sway is inherent to towing a trailer and the propensity for a trailer to sway varies with vehicle speed, weight distribution, tire type and inflation, road slope and hitch configuration. Trailer sway can be induced several ways, such as sudden steering, lane changes, or wind gusts. A well-balanced trailer that has been set up properly will remain controllable. When a trailer is poorly loaded, poorly set up, driven at high speeds or when a driver reacts improperly, the trailer may become unmanageable and control can be lost.

Additional Reading

Information on trailer equipment, tow vehicles, weighing your trailer and proper towing techniques can be found from several sources, some of which are listed below:

- The California DMV provides information under their 'Recreational Vehicles and Trailers Handbook' on their website at; http://www.dmv.ca.gov/pubs/dl648/dl648toc.htm
- The NHTSA provides a towing guide that can be accessed at; http://www.nhtsa.dot.gov/Cars/problems/Equipment/towing/Towing.pdf
- The National Association of Trailer Manufacturers provides safety information that can be downloaded at; www.natm.com
- The Recreational Vehicle Industry Association (RVIA) has a website at; www.rvia.org
- Other good sources for information include Trailerlife.com, drawtite.com and rveducation101.com.

Mix & Mingle

with ASCDC and SDDL Lawyers

Thursday, November 5, 2015 • 5:30 pm to 7:30 pm
Sky Terrace @ Five Thirty B
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530 B Street, Suite 350
San Diego, CA, 92101

This event is organized by the ASCDC Young Lawyers Committee and complimentary to all ASCDC and SDDL members.

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Please RSVP to Lauren Kadish at *lkadish@cgdrblaw.com* by November 4, 2015

Questions: contact the Association of Southern California Defense Counsel
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SDDL Recognition of Law Firm Support

The Update traditionally included a list of current SDDL members at the end of each edition. As part of the SDDL Board's proactive efforts to protect the privacy of its members, the Update will no longer include a list of current members. We have observed over the course of the last year or so an increasing number of requests from vendors and other bar organizations to hand over the contact information of our members. In each case, we have rejected the request. The SDDL Board is concerned that third parties may use other means to identify our members to target them for the marketing purposes. Because the Update is published online and searchable through Google (and other search engines), the decision has been made to discontinue the identification of the entire membership in the *Update*.

In place of the membership list, the SDDL Board will instead recognize some of the outstanding law firms that contribute to SDDL's success. Each edition will feature two categories for recognintion:1) The 100% Club – this recognizes law firms with two or more attorneys where all attorneys in the firm are members of SDDL; and 2) The 10 Firms with the Most SDDL Members – this recognizes firms who have the most amount of attorneys as members of SDDL. If there are any errors in the information provided, please email rmardian@hcesq.com, so that corrections can be made for the next edition.

The 100% Club

- Belsky & Associates
- Butz Dunn & DeSantis
- Gentes & Associates
- Grimm Vranjes & Greer LLP
- Hughes & Nunn, LLP
- Law Offices of Kenneth N. Greenfield
- Letofsky McClain
- The Roth Law Firm
- White Oliver & Amundson APC

The 10 law firms with the highest SDDL membership

#1 Lorber, Greenfield & Polito, LLP – 30 members
#2 Tyson & Mendes LLP – 23 members
#3 Neil, Dymott, Frank, McFall & Trexler, APLC – 18 members
#4 Grimm Vranjes & Greer LLP – 16 members
#5T Balestreri Potocki & Holmes – 12 members
#5T Wilson Elser Moskowitz Edelman & Dicker LLP – 12 members
#7 Butz Dunn & DeSantis – 11 members
#8T Farmer Case & Fedor – 9 members
#8T Dummit, Buchholz & Trapp – 9 members
#10 The Law Offices of Lincoln, Gustafson & Cercos, LLP – 8 members ◆

SDDL Board of Directors: (from left to right) Colin Harrison, Robert Mardian, Ben Cramer, Patrick Kearns, Dianna Bedri (Executive Director), Sasha Selfridge, Ken Purviance, Andrew Kleiner, Gabriel Benrubi, Eric Dietz and Stephen Sigler

COVER STORY CONTINUED FROM PAGE 1:

Juvenile diabetes still run the heightened risk of kidney failure, blindness, nerve damage and stroke.

SDDL is proud to support JDRF in its quest to find cure. Thank you to the players and sponsors who made this year's golf tournament another glowing success. Please keep an eye out next year for our save the date email regarding the SDDL Golf Tournament and be sure not to miss it. ◆

Patrick Kearns

Andy Kleiner, Tim Valine and Sasha Selfridge

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