

THE UPDATE

SUMMER 2018



SAN DIEGO
DEFENSE LAWYERS

California Supreme Court Drastically Redefines Independent Contractor Requirements

By Lauren Bushman
TencerSherman LLP



Dynamex Operations W. v. Superior Court (April 30, 2018) 4 Cal. 5th 903 - After nearly two decades of litigation, the California Supreme Court pronounced a new standard for determining whether a worker is categorized as an employee or independent contractor. In this decision, delivery drivers who were once categorized as employees and later reclassified as independent contractors filed suit alleging they performed the same tasks despite their classification change.

The new test is a short and sweet 3-prong standard, which makes it drastically more difficult for businesses to classify their workers as independent contractors. To properly categorize a worker as an independent contractor, an employer must be able to show **all three** of the following requirements under the new “ABC” test:

A. The worker is free from the control and direction of the hirer in connection with the performance of the work;

This prong of the ABC test is the most similar to the now expired standard for independent contractor status. Simply put, if a worker is subject

to the type and degree of control a business normally exercises over its employees, the worker should also be categorized as an employee. However, it is now the business’ obligation to prove this fact.

B. The worker performs work that is outside the usual course of the hirer’s business; and

Prong B is where the game really changes. The Court concluded that if a worker’s services are provided within the usual course of business and others would view

the worker’s services as performing work typical of that business, then the worker is an employee. This logically expands the definition of an employee to include anyone who is engaged in the same business as the hiring entity.

The Court painted this picture: if a retailer hires a plumber or electrician to perform maintenance at their establishment, an independent contractor relationship is created. If a bakery hires a cake decorator, or a clothing manufacturer hires a seamstress that works at home, these workers are employees.

C. The worker is customarily engaged in an independently established trade, occupation, or business of the same natures as the work performed for the hirer.

While Prong C does not require a worker to obtain licensing as a business entity, the worker must have taken some steps

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President's Message

By Patrick J. Kearns, Esq.
WILSON ELSER MOSKOWITZ
EDELMAN & DICKER LLP

So far, 2018 has been a busy year for the SDDL and its members, and there is no sign of slowing. As I'm writing this we are putting the final touches on the fifth "Lunch and Learn" MCLE presentation of the year that focuses on taking depositions. We've already had presentations on everything from tips on making and preserving a record for appeal; liability insurance; litigating delay claims on construction projects; and a fantastic update on *Howell v. Hamilton Meats* presented by Tyson Mendes. All of this, and yet, that is just our lunch-time programs.

The SDDL also recently joined the Lawyers Club of San Diego in a joint-event for our first evening program of the year, where former SDDL Board Member and attorney extraordinaire, Deborah Dixon, gave a compelling two-hour presentation entitled "Why #Youtoo Should Care about #MeToo". I'm sure those in attendance with me would agree it was a fascinating program - one that kept everyone thinking long after it ended. I'm hopeful we'll begin to see joint events with the Lawyer's Club become a regular occurrence.

We've also already held the first of our quarterly social events for the year, which was a resounding success. SDDL Members joined each other at "Prep Kitchen" in Little Italy for a few hours of appetizers, drinks, and good times. It was great to see so many old colleagues as well as many new faces at these valuable gatherings. In addition, we held a joint social with both the SDDL and the Consumer Attorneys on May 17, 2018 at Basic Pizza in the East Village. This event is a perennial favorite that allows us to relax and mingle with friends from the other side of the aisle, and did not let anyone down this year. We also held our second quarter Happy Hour Social Event on June 29, 2018 at Hotel Republic; a great chance to meet and have a few drinks with your fellow SDDL Members.

The SDDL is about connecting; it's about involvement and community. We have an amazing defense community here in San Diego, which is illustrated each time we hold



one of our many social events. If you haven't made it to one in a while, don't worry. We have many more on the horizon. Also be sure to mark your calendars for our Annual Padres Tailgate party on **August 10, 2018**, and our annual Charity Golf Event taking place on **October 5, 2018** at Encinitas Ranch golf club. Every year the golf tournament tops my list of "must-attend" SDDL functions. You don't want to miss it.

We're off to a great start! ■

Upcoming Events

- | | |
|---------------------|------------------------------------|
| July 10 | Lunch-and-Learn
MCLE |
| August 10 | Padres Tailgate
Party |
| August 14 | Lunch-and-Learn
MCLE |
| September 11 | Lunch-and-Learn
MCLE |
| October 5 | Charity Golf
Tournament |
| October 11 | Mock Trial
Competition |

Please follow @sddlboard on LinkedIn, Instagram and Facebook for further information.

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MEMBERSHIP INFORMATION

Membership is open to any attorney or paralegal who is primarily engaged in the defense of civil litigants, as well as retired defense attorneys. Dues are \$125.00 for new members for the first year and \$160.00 per year for renewing members. The dues year runs from January 1 to December 31. Applications can be downloaded at: sddl.org.

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EVENING SEMINAR

Deborah Dixon, Esq. Highlights the Importance and Impact of Gender Diversity

By Christine Polito

PETTIT KOHN IGRASSIA LUTZ & DOLIN

On April 24, 2018, the SDDL held its first “Evening Seminar” of 2018 and it will be a tough act to follow. The SDDL joined with the Lawyer’s Club of San Diego to put on a remarkable 2-hour presentation on the importance of gender diversity in the law. Deborah Dixon, former SDDL Board Member and Past President of the Lawyer’s Club of San Diego, gave a phenomenal presentation entitled “Why #YouToo Should Care about #MeToo: A Recap of Sexual Harassment Issues and a Discussion on the Benefits of Inclusion Policies.”

Attendees poured in to hear Deborah discuss the emerging #MeToo movement and the importance that greater visibility of these issues have on the practice of law. She highlighted statistical studies confirming that an increase in diversity in a legal team corresponds directly with an increase in overall happiness and job satisfaction; overall production; and thus an increase in profits. Deborah also noted the many large companies (e.g. clients and potential clients) who have gone on public record stating they will no longer hire law firms whose teams do not include women or who otherwise cannot demonstrate a commitment to diversity.

Deborah deftly spoke about the complex nature of implicit biases as well as the true “cost” of discrimination, seen not only in the failure to capitalize on the benefits discussed above, but the realistic costs, for example, of defending a labor code violation versus equalizing pay gaps. (To that point, Deborah



also provided shocking, published statistics of the true pay gaps still evident today). She concluded with a valuable discussion on how YOU can make a difference, including encouraging attendees (and those reading this) to be a “silence breaker;” to talk about, develop, and implement real plans for inclusion policies in your firm; to take steps to improve your firm culture and increase communication about these

important issues and many more. There is little doubt that everyone in attendance not only learned something valuable from the presentation, but were thinking about it after they left.

As noted, the event was jointly presented with the Lawyer’s Club of San Diego and was a huge success. If you were not able to make it, don’t worry as SDDL is hoping to make a joint event with the Lawyer’s Club a regular occurrence. The event was also graciously sponsored by Centext Legal Services - a women-owned, women-dominated company with more than 65% female employees currently.

Deborah Dixon recently opened her own firm, Dixon, Diab & Chambers (www.theddfirm.com). The firm not only specializes in discrimination issues, but handles a wide array of business litigation and contract disputes (for both plaintiff and defense), complex litigation, and personal injury. ■

Bottom Line

Title: 9826 LFRCA, LLC v. HURWITZ, et al.

Case No.: 13-cv-01042-L-JMA

Judge: U.S. District Court, Southern District of California, before Senior Judge M. James Lorenz, Dept. 5B

Attorneys for Plaintiff: Paul S. Metsch and J. Scott Scheper

Attorneys for Defense: Jason M. Murphy and Kathryn Holbert of Farmer Case & Fedor

Summary: This case arose from the 2011 sale of a high value residential property located above Blacks Beach known as the “Razor House.” Donald A. Burns was the purchaser who transferred title to the Plaintiff at the end of escrow. The seller of the property was a bankruptcy trustee who utilized the services of Defendants Robert A. Hurwitz, a real estate agent/broker, and Hurwitz James Company to broker the sale of the Property. Defendants represented to Burns the Property “features private access to Black’s Beach.” After a couple rounds of offers and counter offers, the parties entered into a purchase agreement on December 5, 2011 pursuant to which Burns would pay \$14,097,000 for the property. Escrow closed December 20th. Plaintiff filed suit claiming in excess of \$1,000,000 for fraud, misrepresentation, concealment and negligence related to beach access and the advertising and promotion of the home.

A jury trial on the issues took place from February 26 through March 2, 2018. The defense argued the lack of liability due to comparative fault by the Plaintiff and the managing agent of the LLC, Donald Burns. In addition, the defense expert opined the Defendant met the standard of care for their actions in the transaction. Plaintiff’s counsel asked the jury to award in excess of \$800,000 for damages, and an additional \$800,000 for punitive damages.

The jury agreed with the defense 9-0 on all four claims, and awarded \$0 to the Plaintiff. Judgment in favor of Defendant was entered on March 6, 2018. ■

Proposed Revisions to the Mediation Privilege

By Valerie Garcia Hong

PETTIT KOHN IGRASSIA LUTZ & DOLIN

We often recommend mediation to our clients as an alternative dispute resolution option for a neutral party to facilitate settlement discussions between parties. California's mediation privilege, framed by California Evidence Code §§ 1115-1128, has been in place for over twenty years. Section 1119(a) provides in part that no evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to, a mediation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled, in any civil action. Uninhibited, candid, and protected communications during mediation have been crucial to effective dispute resolution. For many of our clients, the mediation privilege provides a degree of assurance that what we say in mediation will not be later used to our detriment if we are unable to resolve the dispute.

However, within the more recent years, there has been a serious debate about whether all communications and matters that occur in the mediation context should be privileged. Specifically, there has been interest from lawyers and legislators about limiting the scope of the mediation privilege; namely providing an exception to the privilege where there are allegations of lawyer misconduct.

This inquiry arose from the Supreme Court's decision in *Cassel v. Superior Court* (2011) 51 Cal.4th 113. In *Cassel*, the plaintiff hired his lawyers to represent him in a trademark infringement dispute over a clothing label. He later sued his lawyers claiming they pressured him to accept a settlement offer that he did not want. The trial court granted the lawyers' motion in limine to exclude any evidence of communications that were related to the mediation, including



matters discussed leading up to the mediation in preparation for mediation and while the mediation occurred. The Supreme Court agreed with the trial court and held the statutory purpose of mediation confidentiality was to promote candid and informal exchange.

After *Cassel*, supra, the California Law Revision Commission ("Commission") was tasked with providing research and recommendations to the Legislature about whether to create an exception to the mediation privilege based on the competing interests between assuring candid disclosures at mediation against the difficulties of properly assessing attorney misconduct. The Legislature requested the Commission to evaluate the "relationship under current law between mediation confidentiality and attorney malpractice and other misconduct..."

In December 2017, the Commission completed its research and issued its Final Recommendation, which can be found at <http://www.clrc.ca.gov/pub/Printed-Reports/RECcp-K402.pdf>. The Commission recommended an exception known as proposed Evidence Code § 1120.5 to California's mediation confidentiality law which would carve out the privilege related to attorney misconduct claims. The Commission states the exception would "focus on holding attorneys accountable for mediation misconduct, while also allowing attorneys to effectively rebut meritless misconduct claims." (See proposed Evidence Code § 1120.5 & Comment.)

The Commission states that proposed Evidence Code § 1120.5 would not be used to undo a settlement and would protect against claims based on buyer's remorse. The exception would only apply in a State Bar disciplinary proceeding, a claim for damages due to legal malpractice, or an attorney-client fee dispute. It is only applicable where there has been a claim that an attorney breached a professional obligation that occurred in a mediator context.

It is not applicable to attorneys acting in roles as mediator. At this time, mediators cannot be called to testify or produce certain documents in the malpractice claim. The full breadth of the proposed Evidence Code § 1120.5 can be found in the Final Recommendation.

Last April, the Senate Judiciary Committee heard the Commission's recommendations and approved the yearly resolution to continue to do more work on the mediation confidentiality study. However, because of the opposition to the proposed Evidence Code § 1120.5, there has been no legislator that has agreed to introduce the Commission's recommendation. Thus, there has been no bill to make the proposed Evidence Code § 1120.5 effective at this time.

The Conference of California Bar Associations remains on record in support of it and intends to try to introduce it or a similar bill in coming sessions. More than 90% of the Commission's recommendations are eventually enacted into law. Notably, other jurisdictions including District of Columbia, Hawaii, Idaho, Illinois, Iowa, Nebraska, and New Jersey have implemented the Uniform Mediation Act ("UMA"), which includes a carve-out provision that directly addresses the intersection of mediation confidentiality and professional misconduct. (See Uniform Mediation Act § 6(a)(6).)

Although no bill has been enacted to make the proposed Evidence Code § 1120.5 or similar law effective, the legal practitioner needs to be prepared if, and more likely, when the mediation privilege is narrowed. The San Diego County Bar's Civil Litigation Committee addressed these proposed revisions to the mediation privilege and how to address it in practice during one of its panels at its half-day program on June 13, 2018. ■

Virginia Tech Shooting and Its Legacy Loom Large Over a Recent California Supreme Court Decision

By *Branden Sigua*
 TYSON & MENDES

On April 16, 2007, a 23-year-old student killed 32 students and faculty members, while wounding 17 more. He undertook two separate attacks to reach this ghastly number. To this day the Virginia Tech Shooting is known as the third-deadliest mass shooting by a single gunman in U.S. history.

Sadly, this tale of school violence was not the first of its kind in U.S. history. Headlines are all too frequently filled with tragedies where some individual ventures onto school grounds to exact untold damage on those seeking only an education. Such was the situation the California Supreme Court recently found themselves facing.

In *Regents of University of California v. Superior Court* (“*Regents*”), a young man with mental health issues stabbed Katherine Rosen in the chest and neck with a kitchen knife, without warning or provocation. With the recent spate of school violence likely fresh on its mind, the California Supreme Court held universities have a duty, under certain circumstances, to protect or warn students from foreseeable violence in the classroom or during curricular activities. (*Regents*, No. S230568, 2018 WL 1415703, at *1 (Cal. Mar. 22, 2018).)

The Special Relationship Between College and Student

Special relationships create a duty of care owed to a limited community, not the public at large. Because a special relationship is limited to specific individuals, the defendant’s duty is less burdensome and more justifiable than a broad ranging duty would be. Further, while relationships often have advantages for both participants, many special relationships especially benefit the party charged with a duty of care.

The Court in *Regents* found the university-student relationship to be a special relationship. The Court reasoned students are comparatively vulnerable and dependent on their colleges for a safe environment. Colleges also have a superior ability to provide

safety with respect to activities they sponsor or activities they control. Colleges do not have a special relationship with the world at large, but only with their enrolled students. The Court further emphasized the special relationship was limited to activities tied to the school’s curriculum, not to student behavior over which the university has no significant degree of control.

Rowland Factors

The Court recognized a “fundamental public policy favoring measures to ensure the safety of California’s public school students.” (*Id.* at 10, citing *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 870.) However, the Court identified several factors that could justify excusing or limiting a defendant’s duty of care. (See, *Rowland v. Christian* (1968) 60 Cal.2d 108, 113, 117-119.) The *Rowland* factors fall into two categories. The first factor involves foreseeability and the related concepts of certainty and connection between the plaintiff and defendant. The second embraces the public policy concerns of moral blame, preventing future harm, burden, and insurance availability. The Court concluded violence against students in the classroom or during curricular activities, while rare, is a foreseeable occurrence. As such, considerations of public policy do not justify categorically barring an injured student’s claims against the university.

Foreseeability

In examining foreseeability, the Court’s task is not to decide whether a particular plaintiff’s injury was reasonably foreseeable in light of a particular defendant’s conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed. (*Id.* at *11, citing *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 772.) The Court stated violent unprovoked attacks by and against college students, while still

relatively uncommon, are happening more frequently.

The Court found the Virginia Tech shooting to be a noteworthy turning point. In April 2008, almost exactly one year after the Virginia Tech shootings, a special review task force of the International Association of Campus Law Enforcement Administrators published a “Blueprint for Safer Campuses.” The Blueprint contained several recommendations for assessing and responding to potential threats. Thus, especially after the Virginia Tech shootings focused national attention on the issue, colleges have been alert to the possibility that students, particularly those with mental health issues, may lash out violently against those around them.

The second factor of foreseeability was certainty. Certainty was not an issue here because this matter involved physical injuries, and not intangible emotional harm.

The third factor of foreseeability was “the closeness of the connection between the defendant’s conduct and the injury suffered.” (*Id.* at *12, citing *Rowland* at 113.) The Court reasoned, when circumstances put a school on notice a student is at risk to commit violence against other students, the school’s failure to take appropriate steps to warn or protect foreseeable victims can be causally connected to injuries the victim suffer as a result of said violence.

Public Policy

The first factor of the public policy analysis concerned moral blame. The Court reasoned, colleges will typically have access to more information about potential threats than students, and a superior ability to control the environment and prevent harm.

The second factor, involved an overall policy of preventing future harm. The Court recognized imposing a duty might cause colleges to change their policies concerning how they deal with and treat students with

San Diego Defense Lawyers

2018 Juvenile Diabetes Research Foundation Benefit



SAVE THE DATE!

Friday, October 5, 2018 at 1:00 p.m.



Mark your calendars! On Friday, October 5, 2015 at 1:00 p.m., the San Diego Defense Lawyers will show off our finely-tuned golf skills and enjoy an afternoon filled with friends, colleagues and mulligans at Encinitas Ranch. A portion of the proceeds will benefit the Juvenile Diabetes Research Foundation.

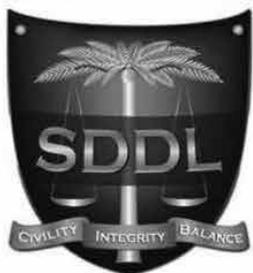
Sign-up information and details to follow.

Please email sandiegodefenselawyers@gmail.com for sponsorship opportunities.



Event Chair—Ben Cramer
Direct Line—619.719.4704

Sponsorship Opportunities are available. Contact Ben Cramer, bcramer@ljdffa.com, or Dianna Bedri-Burke, diannabedri@gmail.com, for additional information.



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SDDL is Proud to Support the Juvenile Diabetes Research Foundation Which Makes a Difference in Lives Everyday

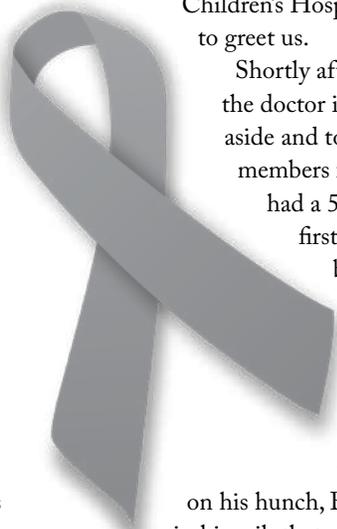
SDDL has a long history of supporting the Juvenile Diabetes Research Foundation, and is pleased to share just one of the countless stories of families that JDRF has helped through the years:

Baby X's Type One Diabetes Story

In late December of 2016, Xavier (baby X) had what we thought was his first encounter with the flu. After doing our best to care for him at home, he became lethargic, pale, and lost his appetite. At the risk of seeming like over-worrisome new parents, we took our 14 month old to the doctor. Our pediatrician was out on holiday, so we met a very nice pediatrician who was taking care of our doctor's patients in his absence. He thought X had a virus, told us to take him home, and give him Pedialyte because he seemed to be dehydrated as well. On our way out of the office, the doctor came out and encouraged us to visit the emergency room so X could get IV fluids and so they could run a full blood panel, just in case.

Words we heard that night that we will NEVER forget: "Type one diabetes," "specialty hospital," "emergency ambulance transport," "intensive care unit," "call your family."

The ER visit was fast, confusing, and scary. Our doctors and nurses were angels throughout. They told us baby X had type one diabetes (T1D). We didn't even know what that meant. We had to get X to a specialty hospital with an ICU with intravenous insulin drip capability. Ambulance ride to CHOC



Children's Hospital. More angels were there to greet us.

Shortly after checking into the ICU, the doctor in charge pulled my husband aside and told him to call family members for support, since Baby X

had a 50% chance of surviving that first night, due to how high his blood sugar levels had been for days or weeks without anyone knowing. Upon checking out of the ICU and into the hospital, the ICU doctor told us that if the Pediatrician hadn't acted

on his hunch, Baby X would have died in his crib that very night from Diabetic Ketoacidosis. He saved our baby boy's life.

Outside of the miracle of complete healing we pray for daily, our baby boy will be insulin dependent for the rest of his life. X doesn't understand why we have to make his perfect little fingers bleed and inject him with insulin at least 4 times per day. It hurts. He's tough, but he still cries (don't tell him I told you that). He was diagnosed far younger than most at 14 months old, so things are constantly out of balance for him.

But there is good news! We got to bring X home after our stay with our CHOC angels! One thing you quickly realize after spending a day or two in the ICU is that there are children who never leave that place. We were so blessed to be able to leave there WITH HIM. Our beautiful baby boy is happy, loving, and kind. He brings joy to EVERYONE he meets. He's also tough as nails ;).

Through this tumultuous time, our friends, family, and firm have rallied around us and X like we could never have imagined. We met JDRF and were blown away at the support so

Bottom Line

Title: Johnson v. Murillo, et al.

Case No.: LASC

Case No.: BC657353

Judge: Hon. Randolph A. Rogers, A15, Lancaster

Typen of Action: Intersectional rear-ender by commercial truck

Type of Trial: Jury

Length of Trial: 7 days

Verdict: \$270,000, comprised of \$170,000 in past medicals, \$50,000 for past non-economic damages, \$10,000 in future medicals and \$0 for future non-economic damages

Attorneys for Plaintiff: Todd Bloomfield, Bloomfield & Rice, Encino; Keith M. Krupka, Encino

Attorney for Defendant: John T. Farmer and Olivia J. Miner, Farmer Case & Fedor

Damages and/or injuries: Neck, back, chest and injuries with headaches. Extensive chiropractic and imaging studies, two cervical and two lumbar epidurals, cervical laminotomy and foraminotomy and projection for future cervical and lumbar fusions and repeat fusions for anticipated adjacent level disease, as plaintiff is 40 years of age

Settlement Demand: Separate CCP 998 offers of \$949,999 to defendant driver and defendant business owner

Plaintiff's Request at Trial: \$6,000,000

Settlement Offer: CCP 998 offer of \$50,000 ■

many wonderful people provide to making T1D disappear. So much has been done by these amazing individuals and organizations and we are honored to join them in this fight to find a cure for T1D. We are immensely grateful for your prayers and support for Baby X and other children just like him. Though his battle with T1D never sleeps, we believe that battle is offset by the love and prayers he receives from so many loving supporters of him and our family. ■

Litigation Privilege Not Applicable to “Bluffing” Demand Letters Says *Dickinson v. Cosby*

By Rada Feldman

PETTIT KOHN IGRASSIA LUTZ & DOLIN

Your longtime client and America’s once-beloved entertainer Carvey Billstein walks into your law office and asks you to assist him with a demand letter threatening litigation. Ever since #MeToo went viral, several women have come forward with decades-old accusations of Carvey drugging and sexually assaulting them. In just a matter of hashtags your client has changed from a beloved TV dad to an accused rapist in the public conscience.

A year ago, you represented Carvey in negotiating a deal with Netflix for a comedy special which is due to air on Independence Day. Despite the controversy, Netflix announced it was planning to release the comedy special as scheduled.

Two days ago Rainy Daniels, a well-known supermodel and TV personality, publicly accused your client of sexually assaulting her. Rainy appeared on Entertainment Tomorrow (ET) and said that Carvey drugged and raped her in 1982. Rainy also claimed that the rape story was not in her 2002 autobiography because Carvey and his lawyers pressured the publisher to remove it.

Since the airing of Rainy’s interview, several media outlets have contacted your client indicating an intention to run follow-up stories and seeking Carvey’s comment. Your client hires you to represent him in responding to the media outlets with a demand that they stop the release of Rainy’s fabricated rape story and threat of litigation. Your client claims that Rainy’s rape story is a lie and contradicts what she wrote in her own book. The only story Rainy gave 16 years ago



in her autobiography was that she refused to sleep with Carvey and he blew her off.

Netflix just advised you that it will pull the plug on the comedy special if the scandal grows. Your client wants to dissuade the media outlets from running the story before the Independence Day release, although he does not want to sue if any do run the story.

Should you write the demand letter?

In light of the new published holding in *Dickinson v. Cosby* (2017) 17 Cal.App.5th 655, lawyers should be careful about sending a demand letter suggesting that accusations against their clients are “lies.” As most are aware, California’s Civil Code section 47(b) litigation privilege may bar claims based on pre-litigation demands made in anticipation of litigation and logically related to the action. The litigation privilege’s broad protection applies to a pre-litigation communication so long as litigation was actually contemplated. But the court of appeal’s holding in *Dickinson* is an instructive warning on just how high the bar is for showing that “litigation was contemplated in good faith and under serious consideration” when the demand letter was sent.

In *Dickinson*, former supermodel and TV personality Janice Dickinson sued Bill Cosby and his lawyer for defamation based on demand letters from Cosby’s attorney, on behalf of Cosby, sent to several news media outlets suggesting that Dickinson was a liar. In 2014, Dickinson accused Cosby of drugging and raping her in 1982 in an interview on Entertainment Tonight (ET). ET also ran a story that said Dickinson claimed the publisher omitted the rape story

from her 2002 autobiography because of pressure from Cosby and his lawyers. Cosby’s attorney sent a demand letter to media outlets who indicated an intent to run follow-up stories to Dickinson’s interview on ET. The letterhead read: “CONFIDENTIAL LEGAL NOTICE” and “PUBLICATION OR DISSEMINATION IS PROHIBITED.” The demand letters stated that Dickinson’s rape allegations were a “fabricated” and “defamatory lie,” and explicitly threatened litigation if the media outlet ran Dickinson’s rape story.

The *Dickinson* court rejected the argument made by Cosby and his (now former) lawyer in their anti-SLAPP motions that the demand letter was a pre-litigation communication protected by the absolute litigation privilege. The demand letters were sent only to media outlets which had not yet run the story but indicated an intention to do so. And Cosby never sued any media outlets which ran the story. Thus, the demand letters were simply a “bluff” intended to scare the media outlets into silence, “but with no intention to go through with the threat of litigation if they were uncowed.” (*Dickinson, supra*, at p. 684.) Dickinson’s defamation lawsuit against Cosby and his lawyer is presently active in trial court. In March 2018, the California Supreme Court denied Cosby’s petition for review.

In the hypothetical situation here, your client advised you that he does not want to sue media outlets and the letter is only intended to dissuade the outlets from running the story. In light of this new published holding, in such a scenario the demand letter may not qualify for protection under the litigation privilege. If there is any doubt as to whether a pre-litigation demand on behalf of a client is a serious threat of litigation, as opposed to just a settlement “bluff,” be careful about clicking “send.” ■

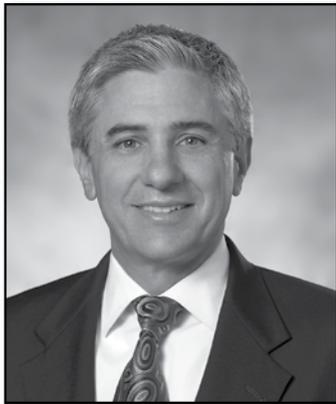
BALESTRERI POTOCKI & HOLMES

ANNOUNCEMENTS

The law firm of Balestreri Potocki & Holmes is pleased to announce that **Thomas A. Balestreri, Jr., Joseph P. Potocki and Karen A. Holmes** have been selected as 2018 Super Lawyers. Super Lawyers recognizes attorneys who have distinguished themselves in their legal practice. Their selection process is rigorous and results in third-party validation of the attorneys' professional accomplishments. The Super Lawyer honor is limited to no more than five percent of the attorneys within the state.

Mr. Balestreri has been selected to the Super Lawyers list in the areas of Construction Litigation and Real Estate. Mr. Balestreri has dedicated most of his 30 plus years in practice to the representation of developers, property owners, and general contractors in litigation, negotiations, and risk management. A seasoned trial lawyer, he has tried a number of high exposure cases with great success. His professional awards and honors includes the Top San Diego Lawyers, Construction, San Diego Daily Transcript, and San Diego Super Lawyers.

Selected as a Super Lawyer in the area of Construction Litigation, **Mr. Potocki's** practice concentrates on litigation, transactional matters and construction contract drafting and negotiation. His extensive litigation experience involves high-value disputes relating to a wide variety of issues in the real estate, business and construction arenas. His professional awards



and honors include the Top 25 Attorneys in Construction and Real Estate Law, San Diego Daily Transcript, and San Diego Super Lawyers.

Ms. Holmes was selected to the Super Lawyers list in the areas of Construction Litigation, Civil Litigation, and Personal Injury-General. Ms. Holmes won this honor in advance of her retirement in May 2018. Ms. Holmes spent the last 16 years of her 35-year career with the firm as a successful trial attorney and litigator focusing on civil litigation and professional liability defense matters. Over the years, she has handled contract negotiations, risk management and pre-litigation resolution for the firm's professional clients and she successfully defended business and tort cases for a variety of the firm's clients.

Ms. Holmes attended San Diego State University and then graduated from California Western School of Law in 1983. She began her practice as an associate at the law firm of Alford & MacLeod. After cutting her teeth as a lawyer at the small civil litigation firm, Ms. Holmes went on to be a partner at the law firm of Edwards, Sooy & Byron, and later partner of the law firm Jarozsek Roth & Kennedy. She joined the firm in 2001 and became a shareholder the following year.

A Martindale-Hubbell AV rated attorney, Ms. Holmes served as Judge Pro Tem as well as arbitrator and mediator for the San Diego Superior Court. Her legal

accomplishments were reflected in the many awards and accolades she received during her career, including "Top 10 Attorneys in Construction & Real Estate Law," "Top San Diego Lawyers, Construction," "Top Lawyers, Professional Liability," "Super Lawyers," and "Top 25 Women Lawyers."

During her career, Ms. Holmes has presented on a variety of topics to a wide array of audiences including the Defense Research Institute, DPRCG Loss Prevention Convocation, and Lorman Educational Services. Very active in legal, industry and community organizations,

Ms. Holmes was a Board member and Vice President of the San Diego County Bar Association, where she also served as Chair of the Community Service Committee. She was a Board member and first woman president of SDDL, Vice Chair of the Trial Tactics Committee of the Federation of Defense and Corporate Counsel, and past Chair of the Construction Law Committee of the Defense Research Institute. Other groups of which she was a member include: Lawyers Club, Association of Southern California Defense Counsel, Louis B. Welsh Chapter of the American Inns of Court, Women's Construction Coalition, and the Professional Liability Defense Federation, where she was selected Vice Chair of the Construction Design Committee.

"Karen Holmes will be greatly missed at the firm," said Managing Shareholder, Tom Balestreri. "She brought a positive energy and a great spirit to the firm. She was committed to the continuing education of everyone at the firm and fostered the development of our younger attorneys. We wish her the very best in her retirement." Ms. Holmes will be pursuing her love of travel and enjoying time with friends and family after a lengthy and successful career in the law. ■



Dunn Desantis Walt & Kendrick Attorney Beth Dunn Named as 2018 Super Lawyer



The law firm of Dunn DeSantis Walt & Kendrick is pleased to announce that **K. Elizabeth (Beth) Dunn** has been selected as a 2018 Super Lawyer in the areas of Employment Litigation, Employment & Labor, and Business Litigation. Her practice of over 30 years focuses on complex business litigation with an emphasis on employment litigation, workplace investigations, risk management, regulatory matters and union negotiations and grievances. Ms. Dunn also provides employment law compliance advice and business management counseling and training to the firm's diverse client base. ■

COVER STORY CONTINUED FROM
PAGE 1

to create their independent business. The Court will evaluate whether it was the worker's decision to go into business independently or whether the hirer made this decision for the worker.

While some businesses prefer to categorize workers as independent contractors to avoid paying taxes and sidestep an ever-expanding body of minimum wage and overtime law, the risks now may be enough to encourage businesses to gladly accept previously avoided consequences of categorizing a worker as an employee. All businesses which define workers as independent contractors should perform an evaluation to determine whether such contractors fit into the new ABC test. Businesses' exposure for improperly categorizing employees certainly increases under the new ABC standard. ■

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California Case Summaries

By Monty McIntyre
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CALIFORNIA SUPREME COURT

Appeal

Hernandez v. Restoration Hardware, Inc. (2018) _ Cal.5th _ , 2018 WL 577716: The California Supreme Court affirmed the Court of Appeal's decision and ruled that unnamed class members do not become parties of record under Code of Civil Procedure section 902 with the right to appeal the class settlement, judgment, or attorney fees award unless they formally intervene in the class litigation before the action is final. (*Eggert v. Pac. States S. & L. Co.* (1942) 20 Cal.2d 199, 201.) (January 29, 2018.)

Attorneys

Heller Ehrman LLP v. Davis Wright Tremaine LLP (2018) _ Cal.5th _ , 2018 WL 1146649: The Supreme Court answered the following question from the Ninth Circuit Court of Appeals: Does a dissolved law firm retain a property interest in such legal matters that are in progress – but not completed – at the time of dissolution? Under California law, a dissolved law firm has no property interest in legal matters handled on an hourly basis, and therefore, no property interest in the profits generated by its former partners' work on hourly fee matters pending at the time of the firm's dissolution. The partnership has no more than an expectation that it may continue to work on such matters, and that expectation may be dashed at any time by a client's choice to remove its business. As such, the firm's expectation — a mere possibility of unearned, prospective fees — cannot constitute a property interest. To the extent the law firm has a claim, its claim is limited to the work necessary for preserving legal matters so they can be transferred to new counsel of the client's choice (or the client itself), effectuating such a transfer, or collecting on work done pretransfer. (March 5, 2018.)



Civil Procedure (Anti-SLAPP)

Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism (2018) _ Cal.5th _ , 2018 WL 1415578: The Supreme Court affirmed the decision of the Court of Appeal and ruled that anti-SLAPP motions to strike under Code of Civil Procedure section 425.16 must be filed within 60 days of service of the earliest complaint that contains the cause of action being attacked, subject to the trial court's discretion under section 425.16(f) to permit a late filing. (March 22, 2018.)

Construction

United Riggers & Erectors, Inc. v. Coast Iron & Steel Co. (2018) _ Cal. 5th _ , 2018 WL 2188916: The Supreme Court affirmed the decision of the Court of Appeal. The "dispute exception" to prompt payment in California Civil Code section 8814(c) excuses payment only when a good faith dispute exists over a statutory or contractual precondition to that payment, such as the adequacy of the construction work for which the payment is consideration. Controversies concerning unrelated work or additional payments above the amount both sides agree is owed will not excuse delay. A direct contractor cannot withhold payment where the underlying obligation to pay the specific monies is undisputed. (May 14, 2018.)

Employment

Alvarado v. Dart Container Corp. of California (2018) _ Cal.5th _ , 2018 WL 1146645: The California Supreme Court reversed the decision of the Court of Appeal, which had affirmed the trial court's summary judgment for defendant on the basis that there was no valid California law or regulation explaining how to factor a flat sum bonus into an employee's regular rate of pay for purposes of calculating the employee's overtime compensation. The California Supreme Court ruled that the way an employee's overtime pay

rate should be calculated when the employee has earned a flat sum bonus during a single pay period should be as follows: the divisor for purposes of calculating the per-hour value of the bonus should be the number of non-overtime hours the employee worked during the pay period.

CALIFORNIA COURTS OF APPEAL

Accountants

Lederer v. Schneider (2018) _ Cal.App.5th _ , 2018 WL 1870153: The Court of Appeal reversed the trial court's order granting summary judgment on the basis that the action was barred by the two-year statute of limitations for accounting malpractice in Code of Civil Procedure section 339(1). Plaintiff Joyce Lederer (Lederer) hired defendants to manage her finances and directed them to purchase insurance for family members, including uninsured/underinsured auto coverage of \$5 million. Defendants only purchased \$1.5 million of such coverage. Lederer's son Jonathan (also a plaintiff in the action) was seriously injured in a motorcycle accident in February 2010. Plaintiffs learned in 2010 that their uninsured/underinsured coverage was only \$1.5 million. In January 2012 Jonathan settled with the other driver for her \$15,000 policy limits. In June 2012 Jonathan received the underinsured limit of \$1.5 million. Plaintiffs filed their lawsuit in March 2013. The Court of Appeal ruled that the action was timely because Jonathan did not suffer actual damages as a result of the negligence of defendants until he received the payment of the underinsured policy limits in June 2012. (C.A. 2nd, April 19, 2018.)

Arbitration

Avila v. Southern Cal. Specialty Care, Inc. (2018) _ Cal.App.5th _ , 2018 WL 1044668: The Court of Appeal affirmed the trial court's order denying a petition to compel arbitration in a case alleging negligence, elder abuse and wrongful death. The trial court properly ruled that the wrongful death claim was not subject to arbitration, and it properly exercised its

discretion, under Code of Civil Procedure section 1281.2(c), to refuse to enforce the arbitration agreement as to the remaining claims due to the risk of inconsistent judgments. (C.A. 4th, February 26, 2018.)

Baker Marquart LLP v. Kantor (2018) _ Cal.App.5th _ , 2018 WL 1940490: The Court of Appeal reversed the trial court's order denying a petition to vacate an arbitration award regarding attorney fees. Petitioner represented respondent in a contingency matter. After the matter concluded, respondent demanded fee arbitration. Before the arbitration, respondent submitted an ex parte "confidential arbitration brief" that was not served on petitioner. The confidential brief raised and argued additional claims not presented in the arbitration demand. A majority of the arbitration panel ruled in respondent's favor and awarded him a refund of a portion of the fees he had paid to petitioner, relying on claims respondent raised in the confidential brief. Because petitioner had no true opportunity to respond to the new claims raised in the confidential brief, the arbitration award was vacated because it was procured by "undue means" in violation of Code of Civil Procedure section 1286.2. (C.A. 2nd, April 25, 2018.)

Benaroya v. Willis (2018) _ Cal.App.5th _ , 2018 WL 2252631: The Court reversed the trial court's orders denying petitioners' petition to vacate an arbitration award and granting respondents' petition to confirm the arbitration award. The arbitration proceeding concerned breach of contract claims by respondents, including actor Bruce Willis. During the arbitration, respondents moved to amend their arbitration demand to name petitioner Michael Benaroya (Michael) individually, even though he was not a party to the contract, on the ground that he was the alter ego of petitioner Benaroya Pictures (Benaroya). The arbitrator granted the request, found Michael to be Benaroya's alter ego, and awarded damages to respondents against both petitioners. The trial court erred in denying the petition to vacate the arbitration award because Michael was a nonsignatory to the arbitration agreement. Only the court, not the arbitrator, had authority to determine whether Michael was compelled to arbitrate as the alter ego of Benaroya. (C.A. 2nd, May 17, 2018.)

Douglass v. Serenivision, Inc. (2018) _ Cal. App.5th _ , 2018 WL 774085: The Court of Appeal affirmed the trial court's order granting defendant's petition to confirm an arbitration award and denying plaintiff's lawsuit seeking to vacate the arbitration award. The matter was subject to arbitration because plaintiff clearly and unmistakably consented to have an arbitrator decide his own jurisdiction by not objecting to the arbitrator's jurisdiction in his answer to the arbitration petition, by informing the arbitrator that he was voluntarily submitting to the arbitrator's jurisdiction, by appearing at multiple prehearing conferences, and by formally asking the arbitrator to impose a bond requirement on the opposing party. Only after the arbitrator denied the request did plaintiff state that his submission to jurisdiction was conditional on obtaining the bond. The arbitrator did not err in finding that plaintiff was liable as a guarantor. (C.A. 2nd, February 8, 2018.)

EHM Productions, Inc. v. Starline Tours of Hollywood, Inc. (2018) _ Cal.App.5th _ , 2018 WL 1516828: The Court affirmed the trial court's confirmation of a cost award of \$41,429.92 that was granted following the confirmation of the initial arbitration award. Defendant's sole contention on appeal was that the trial court erred by entering two consecutive judgments resulting from the same arbitration. The Court of Appeal ruled that confirmation of the cost award was not precluded by the one final judgment rule or principles of waiver or estoppel. (C.A. 2nd, March 28, 2018.)

Muro v. Cornerstone Staffing Solutions (2018) _ Cal.App.5th _ , 2018 WL 1024168: The Court affirmed the trial court's order denying defendant's motion to compel arbitration in a proposed class action alleging wage and hour and other Labor Code violations. The arbitration agreement included a class action waiver. The trial court properly ruled that, under *Garrido v. Air Liquide Industrial, U.S. LP* (2015) 241 Cal.App.4th 833, the Federal Arbitration Act did not apply because plaintiff was a transportation worker. *Gentry v. Superior Court* (2007) 42 Cal.4th 443 (Gentry) (overruled on other grounds in *Iskarian v. CLS Transportation, Los Angeles, LLC* (2014) 59 Cal.4th 348) provided the framework for evaluating whether the class waiver provision in the contract was enforceable under

California law. The Court of Appeal held there was substantial evidence supporting the trial court's factual findings, and the trial court did not abuse its discretion in ruling that the class action waiver was unenforceable under Gentry. (C.A. 4th, February 23, 2018.)

Sabeli v. White Memorial Medical Center (2018) _ Cal.App.5th _ , 2018 WL 1312501: The Court reversed the trial court's order denying defendants' motion to compel arbitration of plaintiff's claims under the Ralph Act (Civil Code section 51.7) and the Bane Act (Civil Code section 52.1). The Court ruled that the trial court erred in its interpretation of the arbitration agreement. It also ruled that the Ralph Act's and Bane Act's special requirements for arbitration agreements are preempted by the Federal Arbitration Act. (C.A. 2nd, March 14, 2018.)

Weiler v. Marcus & Millichap Real Estate Investment Services (2018) _ Cal.App.5th _ , 2018 WL 2011048: The Court of Appeal reversed the trial court's order granting summary judgment to defendants in a declaratory relief action by plaintiff seeking an order from the superior court that defendants must either (1) pay plaintiff's share of the costs in the previously ordered arbitration, or (2) waive their contractual right to arbitrate the underlying claims and allow them to be tried in the superior court. The Court reversed the trial court because, under *Roldan v. Callahan & Blaine* (2013) 219 Cal.App.4th 87, there were triable issues of material fact regarding plaintiff's ability to pay her agreed share of the anticipated costs to complete the arbitration. (C.A. 4th, April 30, 2018.)

Attorney Fees

Garcia v. Mercedes-Benz USA (2018) _ Cal. App.5th _ , 2018 WL 1633322: The Court of Appeal affirmed the trial court's order denying plaintiff's motion for attorney fees, but modified the judgment to award plaintiff \$750 in costs in an action under the Song-Beverly Consumer Warranty Act (the Act; Civil Code, section 1790 et seq.). There is a split of authority on how to determine the prevailing party in an action under the Act. The Court of Appeal followed the more numerous line of decisions requiring plaintiff to prove they obtained their litigation objectives, not just a monetary recovery. The trial court properly denied fees because plaintiff had filed suit

**CALIFORNIA CIVIL LAW UPDATE
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against defendant, not the auto dealership, to recover dealer add-ons that she was not entitled to recover from defendant under the Act. Plaintiff's confidential settlement after the lawsuit was filed also made it impossible for the trial court to determine whether plaintiff had obtained her litigation objectives. Moreover, plaintiff was not the prevailing party if her action under the Act was brought only to recover attorney fees. Plaintiff was, however, entitled to her costs. She was the prevailing party under Code of Civil Procedure section 1032 because she obtained a net monetary recovery. (C.A. 2nd, April 5, 2018.)

La Mirada Ave. etc. v. City of Los Angeles (2018) _ Cal.App.5th _, 2018 WL 2057465: The Court affirmed the trial court's order awarding petitioner La Mirada Avenue Neighborhood Association of Hollywood attorney fees of \$793,817.50 and petitioner Citizens Coalition Los Angeles attorney fees of \$180,320. The trial court properly awarded attorney fees under Code of Civil Procedure, section 1021.5 because petitioners had

prevailed at trial and obtained a judgment that a construction project violated the zoning laws in existence at the time. Real party in interest Target Corporation later successfully changed the zoning laws, and legal challenges to the project under the revised zoning laws were not yet concluded. The attorney fee awards were proper because petitioners had obtained a final judgment in their favor on the merits under the law in existence at the time and what remained to be finally adjudicated is the validity of the project under the law as subsequently amended. (C.A. 2nd, May 3, 2018.)

Marina Pacific Homeowners Assn. v. Southern Cal. Financial Corp. (2018) _ Cal.App.5th _, 2018 WL 703011: The Court affirmed the trial court's order denying both parties fees and costs. If neither party achieves a complete victory on all the contract claims, it is within the discretion of the trial court to determine which party prevailed on the contract or whether, on balance, neither party prevailed sufficiently to justify an award of attorney fees. Regarding the costs issue, the case did

not simply involve a monetary award, it also involved declaratory relief in plaintiff's favor. And under those circumstances the court was given the discretion to allow costs or not. (C.A. 2nd, February 5, 2018.)

New Cingular Wireless PCS v. Public Utilities Commission (2018) _ Cal.App.5th _, 2018 WL 1532332: The Court of Appeal granted a writ petition ordering that respondent review its remand decisions, made following the decision in *New Cingular Wireless PCS, LLC v. Public Utilities Com.* (2016) 246 Cal.App.4th 784, that awarded all attorney fees claimed by intervenors, The Utility Reform Network (TURN) and the Center for Accessible Technology (CforAT), under Public Utilities Code section 1803. While respondent did make an attempt to identify orders or decisions adopted by respondent and link them to contentions or recommendations advocated by TURN and CforAT, there was no effort to trace the amounts of fees and costs incurred to the specific orders or decisions so identified. If it is not feasible to trace time and costs billed by TURN and CforAT with precision to an order or decision, then respondent must make an effort to discount



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the claimed amount for that lack of precision. (C.A. 1st, filed March 13, 2018, published March 29, 2018.)

Prince v. Invensure Ins. Brokers (2018) _ Cal.App.5th _ , 2018 WL 2276603: The Court of Appeal affirmed in part and reversed in part a judgment, following a jury trial, for plaintiff in the sum of \$647,706.48. The judgment was affirmed but two post-judgment orders were reversed. The trial court erroneously granted a motion to tax costs and erroneously found that plaintiff's settlement offer under Code of Civil Procedure section 998 was ambiguous. The Court ruled that, in the context of this case, where two sophisticated parties were represented by counsel, allowing an offer to compromise to be clarified in writing after the offer was made served the purposes of section 998 and such clarification encourages reasonable settlement offers to be accepted. The trial court also erroneously denied plaintiff and cross-defendant's motion for attorney fees under Penal Code 502. The Court of Appeal ruled that the causes of action in the cross-complaint all related to a common core of facts, and therefore attorney fees did not need to be apportioned. (C.A. 4th, May 18, 2018.)

Shapira v. Lifetech Resources (2018) _ Cal.App.5th _ , 2018 WL 1804993: The Court reversed the trial court's order awarding defendant attorney fees of \$137,000 after the court found for defendant following a bench trial. Before plaintiff submitted his closing brief he requested that the trial court dismiss the case pursuant to Code of Civil Procedure section 581(e). The trial court erred in denying this request to dismiss, and therefore the award of attorney fees was erroneous under Civil Code section 1717(b)(2). (C.A. 2nd, April 17, 2018.)

Timed Out LLC v. 13359 Corp. (2018) _ Cal.App.5th _ , 2018 WL 1514226: The Court affirmed the trial court's order awarding plaintiff its attorney fees incurred only before the settlement offer made by defendant under Code of Civil Procedure section 998. Plaintiff sued for the violation of her right of publicity under the common law and Civil Code section 3344. Section 3344 allows the prevailing party to recover attorney fees and costs. Defendant served a 998 offer to pay the total sum of \$12,500 "exclusive of reasonable costs and attorney fees, if any." After a bench trial, the trial court awarded plaintiff damages

of \$4,483.30. Both parties requested attorney fees and costs. The trial court properly ruled that plaintiff did not obtain a result better than the 998 offer, and properly awarded plaintiff her pre-998 offer attorney fees and costs and awarded defendant their post-998 attorney fees and costs. Defendant was awarded net attorney fees of \$1,575, plaintiff was awarded pre-offer costs of \$480, and defendant was awarded post-offer costs of \$15,757. (C.A. 2nd, filed February 27, 2018, published March 27, 2018.)

Civil Code

Brown v. Cal. Unemployment Ins. Appeals Bd. (2018) _ Cal.App.5th _ , 2018 WL 1081372: The Court of Appeal ruled that the trial court erred when it awarded 7% interest on unemployment benefits that had been wrongfully withheld by the Employment Development Department and the California Unemployment Insurance Appeals Board. The interest rate to be charged is the rate of 10% from the date that each benefit payment was due, in accordance with Civil Code section 3289(b). (C.A. 1st, February 28, 2018.)

Civil Procedure

Area 51 Productions v. City of Alameda (2018) _ Cal.App.5th _ , 2018 WL 948499: The Court affirmed in part and reversed in part the trial court's orders denying an anti-SLAPP motion to strike and sustaining a demurrer to a complaint alleging several causes of actions against a public entity and individual defendants. The lawsuit arose after defendant City of Alameda (City) ceased doing business with plaintiff. Plaintiff's complaint alleged six causes of action: breach of contract and breach of the implied covenant of good faith and fair dealing, tortious interference with plaintiff's third-party contracts, intentional interference with prospective economic relations, negligent interference with prospective economic relations, unfair competition and negligent misrepresentation. The Court of Appeal ruled that the first five causes of action against the City did not arise from protected activity. Those causes of action against the non-City defendants, however, did arise from protected activity under Code of Civil Procedure section 425.16(e)(2). The sixth cause of action also arose from protected activity. Plaintiff failed to show a probability of prevailing on the merits as to the non-City defendants on the first five causes of action and failed to show a

probability of prevailing against any defendant on the sixth cause of action. The non-City defendants were prevailing parties for attorney fees and costs, the City might be a prevailing party for attorney fees and costs, and plaintiff was not entitled to fees and costs. (C.A. 1st, February 20, 2018.)

Bel Air Internet, LLC v. Morales (2018) _ Cal.App.5th _ , 2018 WL 1045222: The Court reversed the trial court's order denying an anti-SLAPP motion to strike under Code of Civil Procedure section 425.16. When a plaintiff's complaint shows that a claim arises from communications that are protected under the statute, a moving party may rely on the plaintiff's allegations alone in arguing that the claims arise from an act in furtherance of the person's right of petition or free speech. (C.A. 2nd, February 26, 2018.)

Fox v. Superior Court (2018) _ Cal.App.5th _ , 2018 WL 1392333: The Court of Appeal granted a writ petition and reversed the trial court's order denying a motion for trial preference under Code of Civil Procedure section 36(a). Plaintiff, who filed an action for personal injuries due to asbestos exposure, sought trial preference because she suffered from stage IV lung cancer and various related ailments. The trial court erred in requiring plaintiffs to support the motion by clear and convincing proof, which is required for motions seeking discretionary grants of preference under section 36(d), but does not apply to motions seeking mandatory preference under section 36(a). The trial court was ordered to set the trial within 120 days. (C.A. 1st, March 20, 2018.)

Hedwall v. PCMV, LLC (2018) _ Cal.App.5th _ , 2018 WL 1870543: The Court affirmed the trial court's cancellation of a second amended cross-complaint filed without court authorization before a demurrer to the first amended cross-complaint was heard, its order sustaining the demurrer to the first amended cross-complaint without leave to amend, and a later order granting a motion for judgment on the pleadings on the one remaining cause of action in the first amended cross-complaint. The Court of Appeal ruled that under Code of Civil Procedure section 472 the right to amend the complaint is limited to the complaint originally filed. The trial court properly denied leave to amend the



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**CALIFORNIA CIVIL LAW UPDATE
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first amended cross-complaint. (C.A. 2nd, April 19, 2018.)

Walt Disney Parks & Resorts U.S., Inc. v. Superior Court (2018) _ Cal.App.5th _ , 2018 WL 1081223: The Court of Appeal granted a writ petition and ordered the trial court to consider a motion to transfer venue on the merits. The trial court erred in determining that the motion was time-barred. The strict time requirements of Code of Civil Procedure, section 396a did not bar petitioner's motion under Code of Civil Procedure section 397. Moreover, the failure to comply with section 396b does not automatically waive a party's rights. (C.A. 2nd, filed February 28, 2018, published March 26, 2018.)

Class Actions

Charles v. Sutter Home Winery, Inc. (2018) _ Cal.App.5th _ , 2018 WL 2126987: The Court affirmed the trial court's order sustaining a demurrer, without leave to amend, in a putative class action alleging that defendant winemakers violated the California Safe Drinking Water and Toxic Enforcement

Act of 1986 (Health & Safety Code, section 25249.5 et seq.; Proposition 65 or the Act) in their Proposition 65 warnings for wines that purportedly contain unsafe levels of inorganic arsenic. The trial court properly ruled that disclosure of chemical ingredients in alcoholic beverages is not a requirement of the Act, and compliance with Proposition 65 is established as a matter of law where the "safe harbor" warning for alcoholic beverages (California Code of Regulations, title 27, section 25603.3(e)(1)) was provided to consumers of defendants' wines. (C.A. 2nd, May 9, 2018.)

Consumer Protection

Davidson v. Seterus, Inc. (2018) _ Cal. App.5th _ , 2018 WL 1281873: The Court reversed the trial court's order sustaining a demurrer, without leave to amend, to a complaint alleging violations by mortgage servicers of the Rosenthal Fair Debt Collection Practices Act (the Rosenthal Act; Civil Code section 1788 et seq.). The Court of Appeal ruled that, to the extent that the statutory language is ambiguous, the statute should be construed broadly in favor of protecting the public, and the fact that the Rosenthal Act's definitional language is

sufficiently broad to include mortgage lenders and/or mortgage servicers within its purview, mortgage lenders and mortgage servicers can be "debt collectors" under the Rosenthal Act. (C.A. 4th, March 13, 2018.)

Employment

Hernandez v. Rancho Santiago Community College District (2018) _ Cal.App.5th _ , 2018 WL 2057468: The Court of Appeal affirmed the judgment for plaintiff in the sum of \$723,746, following a bench trial. Plaintiff, who was a probationary employee for one year, was terminated while she was on disability leave because her performance had not been reviewed. She sued under the California Fair Employment and Housing Act (FEHA; Government Code section 12940(m),(n)) contending that defendant failed to make reasonable accommodation for her medical condition and failed to engage in an interactive process. The trial court properly ruled that defendant could have accommodated plaintiff by extending her probationary period, by deducting the four months she was on disability leave from her probationary period, or by adding the time away from work to the probationary period. (C.A. 4th, May 3, 2018.)

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Hurley v. California Dept. of Parks and Recreation (2018) _ Cal.App.5th _ , 2018 WL 989506: In this employment action the Court of Appeal affirmed the judgment for defendants, following a jury trial, on plaintiff's causes of action for sexual orientation discrimination, sex discrimination, sexual harassment, retaliation, and failure to prevent discrimination, harassment, and retaliation in violation of the Fair Employment and Housing Act (Government Code section 12900 et seq.). It also affirmed the judgment for plaintiff against defendants on her causes of action for violation of the Information Practices Act (IPA; Civil Code section 1798 et seq.), and against defendant Leda Seals, her former supervisor, for intentional infliction of emotional distress and negligent infliction of emotional distress. However, it reversed the jury's award of \$19,200 in past economic damages under the IPA against defendant California Department of Parks and Recreation because it was barred by the two-year statute of limitations in Civil Code section 1798.49. (C.A. 4th, February 21, 2018.)

Terris v. County of Santa Barbara (2018) _ Cal.App.5th _ , 2018 WL 915128: The Court affirmed in part and reversed in part the trial court's order granting summary judgment to defendant in an action for wrongful termination and employment discrimination. The Court of Appeal ruled that Labor Code section 244 applies only to claims before the Labor Commissioner and has no effect on the rule in *Campbell v. Regents of University of California* (2005) 35 Cal.4th 311 holding that public employees must pursue appropriate internal administrative remedies before filing a civil action against their employer. The trial court properly granted summary judgment but erred in awarding defendant costs on plaintiff's unsuccessful Fair Employment and Housing Act claim. (C.A. 2nd, February 16, 2018.)

Evidence

Apple Inc. v. Superior Court (2018) _ Cal. App.5th _ , 2018 WL 579858: The Court of Appeal granted a writ petition directing the trial court to vacate its order granting plaintiffs' motion for class certification and reconsider the motion under the proper governing legal standards. In an issue of first impression, the Court ruled that the California Supreme Court's analysis of the admissibility of expert opinion evidence in *Sargon Enterprises, Inc. v. University*

of Southern California (2012) 55 Cal.4th 747 applies when a trial court considers a motion for class certification. A trial court may consider only admissible expert opinion evidence on class certification. (C.A. 1st, January 29, 2018.)

Torts

Day v. Lupo Vine Street (2018) _ Cal. App.5th _ , 2018 WL 1736790: The Court affirmed the trial court's summary judgment for defendant landlord in a wrongful death action arising from the death of a customer who suffered a heart attack at a boxing health club. The club did not have an automated external defibrillator (AED) on the premises as required by Health and Safety Code section 104113. The Court of Appeal ruled that a commercial landlord who leases space to an operator of a health studio does not owe a duty under either the statute or the common law to acquire and maintain an AED at the space or ensure that the health club tenant does so. (C.A. 2nd, April 11, 2018.)

Novak v. Continental Tire North America (2018) _ Cal.App.5th _ , 2018 WL 1764173: The Court affirmed the trial court's order granting defendants' motion for summary judgment in a wrongful death action. Plaintiff brought the action against a tire manufacturer defendant and an auto mechanic defendant (collectively defendants). Plaintiff alleged defendants failed to warn decedent about the dangers of rubber degradation in old tires, which led to a tire blowout in 2005 that injured decedent, plaintiff's father. Plaintiff alleged that those injuries impaired decedent's mobility, necessitated his use of a motorized scooter with limited maneuverability, and led to his death in 2011 after his scooter was struck by a vehicle in a crosswalk. The trial court properly found the evidence was insufficient to establish a causal link between defendants' conduct alleged to have caused one traffic accident and decedent's death years later following a separate traffic accident. (C.A. 1st, filed March 20, 2018, published April 12, 2018.)

O'Malley v. Hospitality Staffing Solutions (2018) _ Cal.App.5th _ , 2018 WL 632266: The Court reversed the trial court's order granting defendant's motion for summary judgment on the basis that no duty was owed to plaintiffs. Plaintiffs' complaint alleged a "negligent undertaking" theory of liability

(*Paz v. State of California* (2000) 22 Cal.4th 550, 558-559 (Paz)) claiming that defendant's maintenance worker was negligent in checking the room where the plaintiff wife was staying and delayed the discovery that she had suffered a brain aneurysm. The Court ruled there were triable issues of material fact, and the trial court improperly granted summary judgment. (C.A. 4th, January 31, 2018.)

FEATURED DECISION

Pebble v. Santa Clara Organics (2018) _ Cal.App.5th _ , 2018 WL 2112307: The Court of Appeal affirmed a judgment of \$3,644,000 (including \$269,000 for past medical expenses and \$375,000 for future medical expenses) following a jury trial, but it reduced the judgment by \$1,063 because the jury improperly awarded this amount as the amount billed by two medical providers instead of the amount paid to those providers by an insurance company. Plaintiff had insurance coverage but chose to obtain most of his medical services outside his insurance plan. The Court of Appeal ruled that such a plaintiff should be considered uninsured for the purpose of determining economic damages, and therefore the rule in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541 did not apply. The trial court properly allowed plaintiff to introduce his medical bills into evidence along with expert testimony confirming that the bills represented the reasonable and customary costs for such services in the Southern California community. The trial court properly allowed defendants to present expert testimony that the reasonable and customary value of the services was substantially less than the amounts actually billed. Except for the reduced amount of \$1,063, the jury did not err in rejecting defendants' expert evidence and awarding plaintiff the billed amounts. (C.A. 2nd, May 8, 2018.) ■

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The Grey Area Between Retained Designated Experts and Percipient Non-Retained Experts

By Kammann Cole

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We've all been in situations where plaintiffs' counsel attempts to sneak in a percipient witness for extra opinion testimony, thus blurring the lines between a retained designated expert and a "non-retained expert." One common example is designating a plaintiff's treating physician as a "non-retained expert," but then soliciting opinions from that physician that would otherwise go beyond their percipient knowledge. Left unchecked, this would allow plaintiffs to provide "opinion" testimony at trial while avoiding the requirements and procedures set forth in the Code of Civil Procedure for experts, and could put you and your clients at a disadvantage. California courts, however, are amenable to challenges to exclude expert testimony due to a mischaracterization of an expert's "status." Therefore, defense attorneys need to be both vigilant and diligent to ensure the framework for a successful challenge is constructed as early as possible.

Retained Designated Experts vs. Non-Retained Percipient "Experts"

Treating physicians can become invaluable assets to plaintiffs as they are generally permitted to offer opinions regarding plaintiffs' injuries, past and future medical care, and/or the costs of such, provided the testimony falls within the witnesses area of training, specialized knowledge and experience. The key distinction between a treating physician from a retained expert is not the content of their testimony, but "the context in which he or she became familiar with the plaintiff's injuries that were ultimately the subject of litigation, and which form the factual basis for the medical opinion." (*Ochoa v. Dorado*, 228 Cal. App. 4th 139 (2014).) A retained expert is described as one "retained by a party for the purpose of forming and expressing an opinion in anticipation of the litigation or in preparation

for the trial of the action." (*Easterby v. Clark*, 171 Cal. App. 4th 772 (2009).) A treating physician, therefore, is not consulted for litigation purposes, but rather learns of the plaintiff's injuries and medical history because of the underlying physician-patient relationship. (*Schreiber v. Estate of Kiser*, 22 Cal. 4th 91 (1999).) Consequently, a treating physician can remain a non-retained expert only so long as that physician is aware of the plaintiff's injuries as a result of the underlying physician-patient relationship. Treating physicians, therefore, may be transformed into retained experts in the course of litigation by plaintiffs' counsel providing the physician information and or documents (i.e. medical records) related to the lawsuit.

If the treating physician receives additional materials to enable him or her to testify to opinions on a subject on which he or she had formed no opinions in connection with the physician-patient relationship, their role turns to that of a retained expert which requires an expert witness declaration. On the contrary, to the extent a treating physician acquired personal knowledge of the facts independent of the litigation during his or her treatment of the plaintiff, no expert witness declaration is required, and he or she may testify regarding any opinions formed on the basis of facts independently acquired and informed by his or her training, skill, and experience, including opinions regarding causation and standard of care. (*Schreiber v. Estate of Kiser*, 22 Cal. 4th 31, 39-40 (1999).) This allows plaintiffs to offer expert opinion testimony into evidence at trial on any matter, without serving a declaration setting forth the scope of his or her testimony and expertise, or requiring production of prior reports, and without requiring the offering party to make the non-retained expert available for deposition.

If a party fails to submit an expert witness declaration, produce reports and writings of the expert witness, or make the expert available for deposition, then on objection the trial court should exclude the expert's opinion from trial. As such, if a non-retained expert

is transformed into a retained expert after initial disclosures (by being given additional information or documentation from the employing party), and without appropriate law and motion, the result can be the exclusion of all opinions based upon the litigation-derived information. Therefore, if plaintiffs' counsel carelessly or intentionally provides information or documents to the treating physician that cause the transformation, you act!

Defense Tips

The first line of defense should be to depose all significant treating physicians and confirm any and all contact with the plaintiff's counsel; whether discussions or the exchange of documents. Confirm at the deposition the scope of the physician's testimony, and whether he or she reviewed any materials aside from his or her own file; and whether he or she has been asked to review anything further. It is often beneficial to ask whether the physician "intends" to offer any opinions at trial; the scope of those opinions and the basis for any opinions.

If Plaintiff's counsel, or the treating physician, makes a claim of privilege when asked about what materials they have reviewed in preparation of their testimony, this is an indication that "back-door" opinions may be forthcoming at trial. Make sure the witness explains, in detail, the scope of any such objection, or otherwise force counsel to do so on the record (i.e. an oral privilege log). The goal of defense counsel should not only be to "discover" who may be intending to provide opinions at trial, but also to limit or exclude that testimony.

In addition, San Diego Local Rule of Court, Rule 2.1.11, is a valuable tool. Rule 2.1.11 states in pertinent part: "[i]t is the policy of the court that parties are **limited to one expert per field of expertise per side**, pursuant to Evidence Code section 723 . . ." This provides you a basis to either seek to exclude opinion testimony from a percipient physician (if, for example, a standard of

CONTINUED FROM PAGE 5:

care expert has also been designated), or sometimes even exclude their designated expert if circumstances are correct (e.g. if the physician testifies first).

Lastly, counsel should press the issue immediately after the designation of experts and assert challenges where appropriate. A treating physician, for example, must be identified by name and address, not simply referred to in the designation as “all past or present examining and/or treating physicians,” if plaintiff intends on calling the treating physician as an expert for opinion testimony. (*Kalaba v. Gray*, 95 Cal. App. 4th 1416 (2002).) In sum, California precedent holds that if plaintiffs do not designate the treating physician to testify at trial, by listing the physician by name and address, the physician cannot offer any opinions at trial. Therefore, it is crucial that defense counsel closely examine a plaintiff’s witness designation list to determine whether the statutory requirements have been met. ■

mental health issues. Yet, the Court also realized the American with Disabilities Act limited the decisions that universities could make. Further, the Court stated market forces drove colleges to implement sophisticated prevention protocols in the wake of the Virginia Tech incident. As such, the Court believed finding a duty of care would not appreciably change this landscape.

The third factor concerns the burden a tort duty would impose upon the defendant and the community. The Court brushed aside UCLA’s arguments, and found a duty would not impose a burden that would be prohibitively expensive, in recognition of the sophisticated system already in place to identify and defuse potential threats to student safety.

The final factor is the availability of insurance for the risk involved. The Court found UCLA had not offered any reason to doubt colleges’ ability to obtain coverage for the negligence liability under consideration.

Duty

The Court ruled an analysis of the *Rowland* factors in this instance did not persuade them to depart from the finding of a duty. The Court found universities have a duty to act with reasonable care when aware of a foreseeable threat of violence in a curricular setting. The Court recognized, however, some

assaults may be unavoidable despite a college’s best efforts to prevent them.

Guiding Dicta

While it determined there was a duty, the Court emphasized it did not reach the question of breach of said duty or whether the university was immune under the relevant immunity statutes. The Court’s opinion is full of persuasive dicta regarding breach, but it only serves as a guide for unresolved questions.

The Court stated case-specific foreseeability questions are relevant in determining the applicable standard of care or breach in a particular case. The Court also advised the reasonableness of a school’s actions in response to a potential threat is a question of breach. Generally, the Court recognized the appropriate standard of care for judging the reasonableness of a university’s actions remains an open question. The Court further acknowledged UCLA’s argument that there was little more it reasonably could have done to prevent the assault, could be relevant to this determination.

Conclusion

Universities in California Courts now have a newly recognized legal duty. But, this is by no means a death sentence. The questions of the standard of care, breach and immunity in these situations are still open to litigation. As such, liability is not a foregone conclusion. ■

CLE Update on *Howell v. Hamilton Meats*

On March 13, 2018, SDDL members were treated to a presentation by Bob Tyson and Kristi Blackwell—partners at the law firm of Tyson & Mendes—entitled “*Howell v. Hamilton Meats: Five Years Later, where are we now?*” If you haven’t heard of the *Howell* decision, which was handled by Tyson & Mendes, there is a chance you might be living under a rock. The decision and its progeny have become an established part of the defense attorney’s lexicon and remain an important consideration in virtually any case involving damages for personal injury.

Bob and Kristi provided our members with an instructive, informative, and at times hilarious presentation on the

background of the *Howell* case, some of the subsequent law which has impacted *Howell* considerations, and provided a list of valuable tips for litigating the damages aspect of your case. Among the many things they do, Bob Tyson and his firm specialize in damages-only litigation.

The expert pair discussed both “good and bad” recent case law, including, among others, the *Bermudez v. Ciolek* matter, (2015) 237 Cal. App. 4th 1211, where that Court found full medical bills admissible to prove the reasonable value to an uninsured Plaintiff; as well as the *Cuevas v. Contra Costa County case*, (2017) 11 Cal. App. 5th 163, which held that future care benefits available through the ACA are admissible.

Bob and Kristi also discussed tips and advice on handling “lien” issues in litigation, including a focus on billing and damages issues at the outset of the case; tips for “damages” depositions, and damages expert considerations. It was indeed a valuable presentation for all of those who were in attendance.

Tyson & Mendes has over 100 lawyers in more than nine offices around the country and, having litigated the *Howell* decision, are experts in the area. The San Diego office is also a strong supporter of the San Diego Defense Lawyers association and currently has over 45 members! Our thanks to Bob Tyson and Kristi Blackwell for their presentation and continued support. ■

Insurance Law Update

By Jim Roth

THE ROTH LAW FIRM

IN A SUIT OVER INSURANCE COVERAGE, AN INSURER'S DENIAL OF A BASIS FOR COVERAGE IN RESPONSES TO REQUESTS FOR ADMISSIONS COULD NOT BE USED TO SHOW INCONSISTENCY WITH THE INSURER'S CLAIMS MANAGER'S PRIOR DETERMINATION OF POTENTIAL FOR COVERAGE BECAUSE REQUESTS FOR ADMISSIONS ARE NOT ADMISSIBLE EVIDENCE AND, SEPARATELY, THE TRIAL JUDGE MAY NOT INTERROGATE A WITNESS IN FRONT OF THE JURY

In the case styled *Victaulic Company v. American Home Assurance Company* (2018) 20 Cal.App.5th 948, 229 Cal.Rptr.3d 545, the Court of Appeal, First District, Division 2, held on February 26, 2018, that in a suit over insurance coverage, a trial court prejudicially erred in admitting into evidence an insurer's responses to requests for admissions, in which the insurer denied a basis for coverage. The requests for admissions were not admissible to show an inconsistency between a claims manager's prior determination of a potential for coverage and her denial in the requests for admissions that there was a basis for coverage. Denials in responses to requests for admissions are not admissible because they state a party's legal position, rather than a fact. The appellate court further found that the trial judge committed error by interrogating the claims manager in front of the jury.

Factually, Victaulic Company ("Victaulic") is a manufacturer of plumbing products, which it sells worldwide. Victaulic obtained products liability insurance coverage from AIG. Beginning in March 2012, nine claims were brought against Victaulic, which resulted in lawsuits, eight of which were either settled or decided adversely to Victaulic. AIG provided defense counsel for all of those lawsuits.

Victaulic later filed suit, alleging, *inter alia*, that AIG failed to fulfill its coverage responsibilities. Victaulic sought to recover for breach of contract, bad faith, intentional misrepresentation, and sought declaratory relief. AIG filed a cross-complaint, contending that it was not required to provide indemnification to all of the claims. During a portion of the trial, Victaulic focused its argument on the manner in which the underlying claims had been handled. Victaulic called AIG's director of complex claims (the "claims manager"), Nancy Finberg, as an adverse witness. In her role as claims manager, she determined that there was potential coverage for the nine claims and thus AIG had provided attorneys to defend the claims. However, in the litigation over coverage, in her role as "person most knowledgeable," she had signed, under penalty of perjury, AIG's responses to Victaulic's requests for admissions ("RFAs"), which were prepared by AIG's attorneys, and which denied that the policies provided coverage. The trial court allowed Victaulic's counsel to question Ms. Finberg as to a purported inconsistency between her determination of a potential for coverage and the RFA denials of a basis for coverage. In addition, the trial court aggressively questioned her on the purported inconsistency in front of the jury. During closing argument, Victaulic's attorney focused on her testimony, which the attorney characterized as an admission to lies in the RFAs. The jury found in favor of Victaulic and awarded contract damages, attorneys' fees, and punitive damages.

On appeal, the appellate court reversed, concluding that the RFAs were inadmissible and the interrogation by the trial court was in error. In finding that the RFAs were inadmissible, the appellate court explained that "denials to RFAs are not admissible evidence at trial: 'The purpose of [RFAs] is to narrow the issues for trial by "identifying those issues and facts as to which proof will be necessary.'" [Citation.] A denial ... is not a statement of fact; it simply indicates that the

responding party is not willing to concede the issue and, as a result, the requesting party must prove the fact at trial. [Citations]."

Although admissions have binding effect, denials do not have such an effect and cannot be introduced in evidence. Therefore, the trial court incorrectly concluded that a denial of a request for admission is admissible as a prior inconsistent statement to impeach a witness at trial. This was, explained the appellate court, precisely Ms. Finberg's position here: she signed at the direction of the insurers' counsel when she verified the denials, responses that represented her employer's "legal position." As such, the RFA denials are inadmissible—they do not rest on whether the denial is consistent or inconsistent with the trial testimony, but on the fact that RFA responses represent legal strategy.

In finding that the interrogation by the trial court was in error, the appellate court observed that "The insurers assert that in addition to allowing use of the responses to RFAs, the trial court committed a series of prejudicial errors in how it handled Finberg, beginning with the argument that the court "improperly assumed the role of advocate and impugned Finberg's integrity before the jury." Describing the court's conduct with verbs and adjectives not generally seen in appellate briefs—at least not in briefs from respected counsel, which all three of the insurers' counsel are—the insurers assert that the trial court acted most inappropriately in the manner in which it questioned Finberg, "assuming the role of cross-examiner, questioning Finberg in a way that was overtly hostile and sarcastic, and ultimately accusing her of perjury in front of the jury." Concluded the appellate court, there is no question the trial court has the power to examine witnesses. (Evid. Code, § 765, subd. (a). But in such examination the trial court cannot "become an advocate for either party or cast aspersions ... upon a witness" [Citation.] "The reason, of course, is the significance of the court in the eyes of the jury, the influence it has. Thus the admonition from long ago is still valid today: a trial court 'should exercise great caution in the examination of witnesses, lest by the nature or form of the questions asked he throw the weight of his influence to the one side or the other' [Citation.] In sum, any interrogation by the court must be 'done with care,' for if it is not, the jury might 'because of the court's intervention, ... alone, indulge in adverse

inferences and conclusions....” [Citation.]

CALIFORNIA'S AMENDED LIMITED LIABILITY STATUTE ALLOWING WINDING UP (INCLUDING PROSECUTING LITIGATION) AFTER CANCELLATION DID NOT APPLY TO AN INSURED WITH “UNCLEAN HANDS” IN ITS SUIT AGAINST ITS INSURER WHEN IT CONCEALED ITS CANCELLATION FROM ITS INSURER IN ITS SUIT AGAINST IT, AND THEN STALLED THE PROCEEDINGS UNTIL THE AMENDED LAW TOOK EFFECT

In the case styled *DD Hair Lounge, LLC v. State Farm General Insurance Co.* (2018) 20 Cal.App.5th 1238, 230 Cal.Rptr.3d 136, the Court of Appeal, Second District, Division 8, held on March 2, 2018, that an amended statute that allowed a limited liability company (“LLC”), beginning in 2016, to prosecute court actions after filing a certificate of cancellation was not applied to an LLC that concealed the existence of its certificate of cancellation from its commercial general liability carrier, then stalled the proceedings by disingenuously challenging the certificate’s authenticity. Although the amended statute had limited retroactive effect, the “unclean hands” doctrine applied to prevent its application to the LLC.

Factually, DD Hair Lounge (“DD Hair”), a limited liability company, was formed in 2013 by a principal who had previously formed another LLC and was familiar with the LLC process. DD Hair filed a complaint against State Farm General Insurance Company (“State Farm”) in 2014, alleging that the insurer did not pay a burglary loss. Ten months later DD Hair filed a certificate of cancellation for the LLC, and the principal signed the certificate as “president.” Consistent with the LLC law at that time, the form stated that the LLC’s registration would be cancelled on the effective date of the certificate, and that its powers, rights, and privileges would cease in California. DD Hair did not inform State Farm or the court that the certificate of cancellation was filed. State Farm discovered it in September 2015, ten months later. State Farm filed a motion for judgment on the pleadings, arguing the law in effect at the time deprived DD Hair of the power to pursue its case against State Farm after its LLC status was cancelled. In opposition, DD

Hair argued that the principal’s signature on the certificate of cancellation was forged, and it sought reinstatement. An evidentiary hearing was held by the court in January 2016 to determine whether the certificate of cancellation was authentic. The court concluded that the signature was genuine, the certificate of cancellation was validly filed, and DD Hair could not maintain the action against State Farm. Accordingly, the court dismissed the action with prejudice.

On appeal, DD Hair relied on a 2016 amendment to Corporations Code §17707.06, which provided that an LLC that files a certificate of cancellation may continue to exist for the purpose of winding up its affairs, including prosecuting and defending court actions. Previously, the LLC statutes as revised in 2014 provided that an LLC’s powers ended with cancellation. The 2014 revised statutes also included Corporations Code §17713.04, which applied the revisions to LLC’s existing as of January 1, 2014, and to all acts or transactions undertaken on or after that date.

The court of appeal affirmed summary judgment for State Farm, declining to apply §17707.06 to authorize DD Hair’s right to pursue the case against the insurer. Although the legislature must have intended the 2016 amendments in §17707.06 to have a limited retroactive effect to acts undertaken on or after January 1, 2014, as provided in §17713.04, the court concluded that the “unclean hands” doctrine applied to prevent application of the amendments to DD Hair. The appellate court noted that DD Hair’s principal concealed the certificate of cancellation for almost a year, then when State Farm discovered it, claimed that the certificate was forged. The forgery claim forced the trial court to hold an evidentiary hearing, which prolonged the proceedings into 2016, after the change to §17707.06 became effective. By concealing the certificate of cancellation for nearly a year and then engaging in the time-consuming charade of disingenuously challenging the certificate’s authenticity, DD Hair effectively stalled the case to a point at which it could arguably have obtained relief. Had DD Hair acted with “clean hands,” however, its claim would have properly been extinguished long before the effective date of the amendment to §17707.06, the appellate court determined. It would accordingly be unfair to State Farm to reward DD Hair’s behavior by retroactively

applying the provision to revive its right to pursue the case.

AN EXCESS INSURER HAD NO DUTY TO DEFEND OR INDEMNIFY THE PRIMARY INSURER FOR AMOUNTS THE PRIMARY INSURER PAID TO SETTLE A PERSONAL INJURY LAWSUIT BECAUSE THE PRIMARY INSURANCE POLICIES FAILED TO CONTAIN ANY ANTI-STACKING LANGUAGE, AND THE SETTLEMENT DID NOT EXCEED THE “PER OCCURRENCE” LIMITS THAT APPLIED ACROSS THE MULTIPLE PRIMARY POLICY PERIODS INVOLVED IN THE LAWSUIT

In an unpublished opinion styled *Atain Specialty Insurance Co. v. Sierra Pacific Management Co.* (2108) 2018 WL 1280904, the United States Court of Appeals, Ninth Circuit, held on March 13, 2018, that an insurer’s “Real Estate Property Managed” endorsement was an excess clause that rendered its coverage excess to the primary insurance of landlords and a property management company. The excess insurer had no duty to defend or indemnify the primary insurer for amounts the primary insurer paid to settle a personal injury lawsuit brought by the landlords’ tenant. The primary insurance contained no anti-stacking language, and the settlement did not exceed per occurrence limits that applied across six policy periods involved in the lawsuit.

Factually, California Capital Insurance Company (“California Capital”) insured the landlords of an apartment building and the building’s management company. The management company also had its own insurance through Atain Specialty Insurance Company (“Atain”). California Capital sought contribution from Atain for the costs it incurred in settling a personal injury lawsuit brought by an apartment tenant. Atain filed for a declaratory judgment that it had no duty to defend or indemnify the management company in the personal injury suit. California Capital counter-claimed for breach of contract and the implied covenant of good faith and fair dealing, for a declaration that Atain had a duty to defend and indemnify, and for equitable contribution and indemnity from

INSURANCE LAW UPDATE
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Atain. California Capital also alleged that its policy had an anti-stacking provision that limited its policy coverage to \$1 million over six policy periods. California Capital filed a third-party complaint against the landlords to recover the \$900,000 it paid over the annual policy limit.

The district court granted Atain's and the landlords' motions for summary judgment, determining that Atain's "Real Estate Property Managed" endorsement was an excess clause that rendered its insurance excess to California Capital's insurance. The coverage was excess in one particular situation—when liability arose out of the property management company's property management activities. Atain accordingly had no duty to defend or indemnify the management company. The court also determined that the California Capital policies did not contain an anti-stacking provision, and that the insurer's consecutive policies provided more than enough coverage for the settlement in the personal injury lawsuit.

The U.S. Court of Appeals for the Ninth Circuit affirmed, concluding that the Atain policy was intended to be excess to the landlords' underlying insurance policies, declining to order equitable contribution by Atain. The appellate court rejected California Capital's arguments that Atain's excess clause was unenforceable because it was an "escape clause" that attempted to shift the burden of coverage away from Atain to other insurers, and because it conflicted with an excess insurance clause in its own policy. The appellate court noted that in California, excess clauses in otherwise primary insurance policies are enforceable in the limited circumstance of a narrow clause declaring the policy to be excess in the situation where the parties and insurers are most likely to intend that result. Atain's coverage was excess in the "specific instance" of when the property management company's liability arose out of its property management operations. That language, and the comparatively low premiums for property management in the Atain policy, suggested that the policy was intended to be excess to the landlords' underlying insurance policy.

The Ninth Circuit also determined that California Capital's policies did not contain anti-stacking language. The insurance policy's \$1 million limit for bodily injury arising out of any occurrence applied separately to each consecutive annual period. The policies did not indicate that the per-occurrence limit applied across policy periods. California Capital issued six policies to the landlords with a \$1 million limit per policy, and those policies stacked to create a coverage limit equal to \$6 million. Because the \$1.9 million that California Capital paid to settle the personal injury claim did not exceed that amount, Atain was not liable as an excess insurer.

**TRIAL COURT DID NOT ABUSE
 ITS DISCRETION IN STRIKING
 INSURED'S EXPERT BECAUSE
 INSURED MISSED THE DEADLINE
 FOR DISCLOSING EXPERT REPORTS,
 AND HE DID NOT TIMELY OPPOSE
 THE INSURER'S MOTION TO STRIKE
 THE INSURED'S EXPERT**

In the case styled *Elhouty v. Lincoln Benefit Life Company* (2018) 886 F.3d 752, the United States Court of Appeals, Ninth Circuit, held on March 27, 2018, that the district court did not abuse its discretion in striking an expert witness for the insured in his action against his life insurer when the insured missed the deadline for disclosing expert reports and he failed to oppose his insurer's motion to strike that expert.

Factually, during declaratory relief litigation filed by an insured against his life insurer, the district court issued a scheduling order that included a deadline for designating expert witnesses. Under Federal Rule of Civil Procedure 26(a)(2)(B), expert designations had to include the expert's report. Although Elhouty designated his proposed expert by the deadline, he did not include his expert's report. The expert had not yet prepared one. When Lincoln Benefit Life Company ("Lincoln Benefit") moved to strike the designated expert, Elhouty did not file an opposition. The district court struck the expert designation. In so doing, the court noted that Elhouty had not explained his failure to comply with the discovery order, shown that his failure to comply was substantially

justified or harmless, or given his expert enough materials to consider in preparing a report. Elhouty moved for reconsideration of the order to strike, but he did not produce a report from the proposed expert witness or sufficiently explain his failure to oppose the motion to strike. The district court denied his motion for reconsideration.

On appeal, the appellate court summarized its view as follows: "Elhouty argues that the district court abused its discretion in striking his expert witness. But he missed the deadline for disclosing expert reports, and he did not timely oppose the motion to strike. The district court did not abuse its discretion in deciding to strike Elhouty's expert report. And Elhouty has not shown how an expert opinion could have helped his case. To this day, we know only the general subject matter his expert would have addressed. The district court therefore did not abuse its discretion in denying Elhouty's motion to reconsider."

**WHILE A LIABILITY INSURER
 OWES A BROAD DUTY TO DEFEND
 ITS INSURED AGAINST CLAIMS
 THAT CREATE A POTENTIAL FOR
 INDEMNITY, AN INSURER'S DEFENSE
 DUTY IS OBIATED WHERE THE
 FACTS ARE UNDISPUTED AND
 CONCLUSIVELY ELIMINATE THE
 POTENTIAL THAT THE POLICY
 PROVIDES COVERAGE FOR THE
 THIRD PARTY'S CLAIM**

In the case styled *All Green Electric, Inc. v. Security National Insurance Co.* (2018) 2018 WL 1833271, the Court of Appeal, Second District, Division 8 held on April 19, 2018, that the allegations in a negligence complaint by a customer that the insured, which was an electrical contractor, failed to install a bolt and other electrical components in an electrical cabinet for that customer's medical office, leading to the loss of use of that customer's mammography unit, fell within the impaired property exclusion of the insured's commercial general liability ("CGL") policies, stating that the policies did not apply to damage arising out of a "defect, deficiency, inadequacy or dangerous condition in your product or your work," and thus there was no possibility of coverage under those policies

for the customer's claims, notwithstanding the insured's assertions that its insurer should have considered its denials of liability or evidence that it acted with due care.

Factually, in 2012, J. Bruce Jacobs, a medical doctor, hired All Green Electric, Inc. ("All Green") to perform electrical work as part of the construction of Jacobs's MRI and X-ray facility, including running power and outlets to a room in which a mammography unit was to be installed by Hologic, Inc. (Hologic). Hologic installed the unit but then discovered it was not operating correctly due to a magnetic field in the room. Hologic advised Jacobs to install the unit in a different room, and Jacobs retained All Green to run power to that room as well. Despite the move to the second room, the magnetic field persisted, and the unit continued to malfunction. Jacobs hired MRI Corporation to install steel shielding in the second room, but the magnetic field continued to interfere with the

operation of the unit. Jacobs then hired an electromagnetic field expert who determined that the magnetic field was caused by a loose bolt in an electrical cabinet installed by All Green. When the bolt was tightened, the magnetic field instantly disappeared.

Jacobs filed suit. All Green tendered defense of the lawsuit to its insurer, Security National Insurance Co. ("SNIC"), under its CGL policies covering bodily injury and property damage liability. All Green denied the allegations of negligence, stating that all bolts had been properly tightened and that its work had passed two inspections. SNIC denied the claim citing the "impaired property" exclusion.

The court of appeal affirmed summary judgment, holding that SNIC had no duty to defend. If Jacobs's allegations were found true, SNIC would not have to indemnify, nor would SNIC have to indemnify if, as All

Green contended, it was not responsible for the loose bolt. Observing the well-established principal that a liability insurer owes a broad duty to defend its insured against claims that create a potential for indemnity, the appellate court further observed that an insurer's defense duty is obviated where the facts are undisputed and conclusively eliminate the potential the policy provides coverage for the third party's claim. As such, an insurer is entitled to summary judgment that no potential for indemnity exists if the evidence establishes no coverage under the policy as a matter of law. ■



SDDL First Quarter Happy Hour at Prep Kitchen

On March 21, 2018, SDDL hosted its first happy hour of 2018 at Prep Kitchen in Little Italy, which was sponsored by Litivate reporting and trial services. This well-attended event saw members and their friends enjoy complimentary food and drinks in a great atmosphere for socializing. SDDL thanks our gracious sponsor and everyone who attended to make this a great event, and we look forward to seeing you at upcoming happy hours the rest of this year. ■



News and Verdicts

COURT OF APPEAL REJECTS PROPOSITION 218 CHALLENGE TO CITY CELL PHONE TAX

Gonzalez v. City of Norwalk, 17 Cal. App.5th 1295, Cal. App. 2 Dist., Dec. 04, 2017, as modified on denial of rehearing (Jan 03, 2018), review denied (Mar 14, 2018)

Scott Noya and Lee Roistacher of Daley & Heft, LLP prevailed for the City of Norwalk in a class action challenge to its voter-approved utility user tax (UUT) on cell phone usage alleging violations of Proposition 218 and Proposition 62. The Court of Appeal decision has potentially significant benefits for other cities with similar cell phone tax ordinances.

The City of Norwalk first adopted the UUT in 1992 and the voters ratified and approved the 5.5% UUT at an election in 2003. For administrative convenience, like many other California cities, the 2003 ordinance incorporated definitions from the Federal Excise Tax (FET) and provided that persons who were exempted from the FET were also exempt from the City's UUT. In 2006, the IRS issued a notice declaring the FET was unlawful as it applied to long distance telephone plans which charged customers according to the length of the call without regard to distance (such as cell phone plans). In response, like many other cities, the City adopted an ordinance in 2007 deleting the FET reference from the City's UUT ordinance.

In the lawsuit, Plaintiffs contended that the 2006 IRS notice invalidated the UUT and that the City's 2007 ordinance violated Proposition 218 and Proposition 62 because it "imposed, increased or extended" the UUT without voter approval. After the lawsuit was filed against City of Norwalk, in November 2014, voters again resoundingly approved the UUT at another election at the same 5.5% rate.

In a published decision issued on December 4, 2017, the Second District Court of Appeal upheld the trial court's judgment and held that the City's deletion of the FET reference did not "impose, extend, or increase" the UUT and, therefore, did not violate Proposition 218

or Proposition 62. The California Supreme Court denied review of the decision.

Gonzalez v. City of Norwalk is the first published California appellate authority rejecting a class action tax refund challenge alleging Proposition 62 and Proposition 218 violations based on City's removal from its UUT tax ordinance, without voter approval, the FET limitations on the scope of taxable telephone charges.

JURY FINDS OBSTETRICIAN-GYNECOLOGIST ADEQUATELY SCREENED FOR AND DID NOT DELAY IN DIAGNOSING PATIENT'S RARE AGGRESSIVE BREAST CANCER

Case Name: *Lipner v. IGO Medical Group, AMC*

Defense Attorneys: Clark Hudson, shareholder, and Elizabeth Harris, associate, Neil, Dymott, Frank, McFall, McCabe & Hudson; San Diego, CA

Trial Summary: On January 19, 2018, Neil Dymott obtained a defense verdict on behalf of a women's health medical group. The case concerned a 38-year-old plaintiff who was diagnosed with Stage IIIB inflammatory invasive ductal carcinoma, a rare and aggressive form of breast cancer. Plaintiff claimed her long-time obstetrician-gynecologist, who was employed by the medical group, negligently failed to diagnose her breast cancer in the 10 months leading up to her diagnosis in April 2015. She argued the OB-GYN disregarded her 5-6 separate complaints of an indentation and lump in her left breast, which she made over the course of 7-8 visits with the OB-GYN starting in June 2014. The plaintiff was ultimately diagnosed after she returned to the medical group in April 2015 complaining of newly-developed inflammatory breast cancer symptoms, which had manifested in the weeks leading up to the visit.

The plaintiff also faulted the OB-GYN for not ordering more frequent breast cancer screening based on her family history of breast cancer in her sister, grandmother,

and two great aunts. Although there were many breast cancer risk assessment tools available during the time at issue, plaintiff argued the OB-GYN should have used the Tyrer-Cuzick Model to calculate plaintiff's lifetime breast cancer risk. Based on that model, plaintiff's expert testified plaintiff should have received annual screening mammograms and MRIs starting 10 years before the anniversary of her youngest family member's diagnosis.

The defense argued the plaintiff treated with several different healthcare providers for a variety of specific complaints from June 2014 until April 2015. None of the medical records from the providers documented a single breast-related complaint. Further, all of the healthcare providers who treated plaintiff from April 2015 onward consistently documented her earliest breast symptom – increased size in her left breast – occurred just a few months prior to diagnosis and was so subtle that she dismissed it as an issue with her bra at the time. Additionally, the plaintiff had only two visits with the OB-GYN in 2014 and one visit in 2015 – none of which concerned any breast-related issues.

The defense also argued the OB-GYN appropriately utilized the National Cancer Institute's widely-accepted Gail Model to assess the plaintiff's lifetime breast cancer risk. The standard of care does not require any OB-GYN to use a complicated model like Tyrer-Cuzick, which tends to overestimate breast cancer risk. Based on the information known to the OB-GYN and plaintiff's lifetime risk using the Gail Model, the OB-GYN in fact exceeded the standard of care by ordering a screening mammogram when the plaintiff was 35. When the result was negative, a follow-up mammogram was not indicated until the plaintiff turned 40 or made breast-related complaints. The jury ultimately agreed with the defense that the OB-GYN performed at all times within the standard of care.

VERDICT SUMMARIES

Title: Gregory Miller, an incompetent, by and through Shirley Miller his Guardian ad Litem v. California Mentor Program; Jerry Okey; and Does 1 through 30

Case No.: San Diego Superior Court 37-2015-00012517 -CU-PO-CTL

Judge: Hon. John S. Meyer in Dept. C-64

Type of Action: Dependent Adult Abuse and Neglect, Battery, Fraud and Negligence - Alleged Mistreatment of an intellectually disabled adult by an FHA Family Home provider

Type of Trial: Jury

Length of Trial: 16 trial days plus 4 hours of deliberation

Verdict: Defense

Plaintiff's Counsel: Clarice J. Letizia and Douglas Petkoff of LETIZIA LAW FIRM

Plaintiff's Experts: Diane Morrow, LHNA, Altaville, CA; and Dr. Marc A. Norman, Ph.D, ABPP, San Diego, CA

Defense Counsel: Gabriel M. Benrubi of DAVIS, GRASS, GOLDSTEIN & FINLAY for Jerry Okey; and Douglas C. Smith, Paul Burkhardt, and Blakney Boggs of SMITH LAW OFFICES, LLP for California Mentor Program

Defense Experts: Mark Antenucci, Independent Options, Inc., Corona, CA; and David Braff, M.D., UCSD Department of Psychiatry, La Jolla, CA

Plaintiff's Settlement Demand: \$800,000.00

Defendant's Settlement Offer: No amount offered

Case Facts: Plaintiff Gregory Miller, by and through his Guardian ad Litem, Shirley Miller, filed this action on April 14, 2015 with the abovementioned causes of action. Plaintiff was an intellectually disabled adult, who through San Diego Regional Center was placed in the home of Jerry Okey who was a contracting provider with California Mentor. Plaintiff lived in the Okey home from May 6, 2013 to August 7, 2014. Mr. Okey provided family home support services for Plaintiff, including room, board, food, shelter and community/recreational activities. Gregory Miller was removed from the Okey home by his parents Shirley and Melvin Miller on August 7, 2014.

Plaintiff's Contentions: Plaintiff contended that Jerry Okey physically abused him and neglected his care throughout his stay in the Okey home. Plaintiff's allegations included assault, battery, failure to provide required medications, failure to adequately feed, clothe and assist in personal hygiene, failure to provide a safe and comfortable living environment, locking Plaintiff out of the Okey home and failing to properly supervise. Plaintiff further contended that California Mentor failed to properly screen and train Mr. Okey as a contracting family home provider, and failed to properly inspect, monitor and supervise Mr. Okey's care of Plaintiff at the Okey home. Plaintiff contended that these failures constituted violations of the Lanterman Act, Title 17 of the California Code of Regulations, and actionable under the various causes of action asserted at trial. Plaintiff claimed to have suffered physical harm, PTSD, psychological and emotional injuries as a result of Defendants' alleged conduct.

Defendants' Contentions: Mr. Okey vigorously and categorically denied each of Plaintiff's allegations against him. Mr. Okey contended that he was well trained and qualified to serve as a family home provider and at all times provided Plaintiff with a welcome, safe and comfortable living environment. Mr. Okey meticulously assisted Plaintiff in all aspects of lining in the family home, including the providing of proper food, assisting in administering prescribed medications, bathing and hygiene, and maintaining proper and clean clothing. Mr. Okey also took Plaintiff on a number of different community and recreational activities and assisted Plaintiff in his goal to become a functional and independent adult.

California Mentor contended that it provided all appropriate family support services in compliance with the Lanterman Act and Title 17 of the California Code of Regulations, and properly screened, trained, monitored and supervised Mr. Okey's services that were provided to Plaintiff at the Okey home. Defendants further contended that Plaintiff did not suffer any injury or harm when living at the Okey

home. To the contrary, Plaintiff improved in his school and vocational activities, and was at all times safe, happy and enjoyed his living with Mr. Okey in the Okey home and gated community.

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**Title:** Chea v. Loc, et al.

**Case No.:** LASC Case no. BC557190

**Judge:** Hon. Michael B. Harwin, Dept. M, Van Nuys

**Type of Action:** Intersectional accident in alleyway

**Type of Trial:** Jury

**Length of Trial:** 5 days

**Verdict:** \$8,166, including a finding that plaintiff was 51% at fault

**Plaintiff's Counsel:** Boris Briskin and Max Casillas, Ellis Law Corp., Los Angeles

**Defense Counsel:** John T. Farmer, Farmer Case & Fedor

**Damages and/or injuries claimed:** Neck and back injuries with extensive chiropractic, MRIs, epidural injections and a surgical recommendation

**Plaintiff's Settlement Demand:** CCP 998 offer of \$100,000 (policy limits)

**Plaintiff's Request at Trial:** \$224,853

**Defendant's Settlement Offer:** CCP 998 offer of \$7,500

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Title: McClellan v. Belford, et al.

Case No.: SDSC Case No.

37-2016-00037204-CU-PA-CTL

Judge: Hon. Randa Trapp, C-70, San Diego

Type of Action: Reverse rear-ender in gas station

Type of Trial: Jury

Length of Trial: 3 days

Verdict: Defense, after admitted liability

Attorney for Plaintiff: Michelle Traher Neff

Attorney for Defendant: John T. Farmer, Farmer Case & Fedor

Damages and/or injuries: Neck and back injuries with recommendations for injection therapy

Settlement Demand: CCP 998 offer of \$20,000

Plaintiff's Request at Trial: \$163,938

Defendant's Settlement Offer: CCP 998 offer of \$8,001 ■

SDDL Expresses Its Appreciation for the Sponsors and Attendees That Made the 2018 Installation Dinner an Evening to Remember

On January 27, 2018, SDDL hosted its 34th annual Installation Dinner at the Omni San Diego Hotel. The new President and Board were sworn in by the Honorable Herbert Hoffman, and SDDL was pleased to honor its Lawyer of the Year, Kimberly S. Oberrecht, and its Bench and Bar Honoree, the Honorable Joel M. Pressman (ret). In addition to the entertainment provided by emcee Ben Howard, attendees enjoyed a night of raffle prizes, music, dinner and drinks. As always, the most rewarding part of the night was SDDL's presentation of its annual donation to support the Juvenile Diabetes Research Foundation in the amount of \$10,000. SDDL was also pleased to provide a scholarship to law student Jon Robinson, who was chosen from among many worthy entries for our essay contest. SDDL would like to extend its heartfelt appreciation to all who attended and helped to make this such a special evening, we look forward to seeing everyone in January 2019 for the next Installation Dinner! ■





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TEN SULLIVAN HILL ATTORNEYS NAMED 2018 TOP LAWYERS IN SAN DIEGO

Sullivan Hill is pleased to announce that Robert P. Allenby (Insurance), Candace M. Carroll (Appellate), Jonathan S. Dabbieri (Commercial & Business Litigation), James E. Drummond (Construction), Timothy C. Earl (Insurance), John R. Engel (Business Transactions), James P. Hill (Insolvency & Commercial Bankruptcy), Joseph L. Marshall (Business Transactions), Donald G. Rez (Antitrust & Trade Regulation), and Gary B. Rudolph (Insolvency & Commercial Bankruptcy), have been listed in San Diego Magazine as 2018 Top Lawyers in San Diego. The list reflects those local attorneys who have been recognized by Martindale-Hubbell as 2018 AV® Preeminent™ Peer Review Rated attorneys.

Robert Allenby is a member of the firm's Executive Committee and chair of the Litigation practice group. He has extensive experience in all aspects of litigation, with an emphasis in construction disputes, insurance coverage litigation, employment disputes and general business litigation. He also has significant experience in anti-SLAPP, appellate, and environmental litigation and alternative dispute resolution.

Candace Carroll is a highly-regarded appellate practitioner with more than 40 years experience handling appeals in the federal, state, and bankruptcy appellate courts. Her cases have encompassed a wide range of subjects, including contract disputes, insurance and indemnity issues, wrongful termination, intellectual property, personal injury, constitutional issues, and complex family law matters.

Jonathan Dabbieri focuses his practice on litigation, including business disputes, real property and landlord tenant disputes, and matters concerning creditors' remedies and insolvency. He has advised clients in the negotiation of construction contracts, the perfection, enforcement, and defense of mechanics' liens, and other construction and

real property disputes. His bankruptcy and insolvency practice includes representing creditors, chapter 11 trustees and debtors in possession.

James Drummond has extensive experience in all phases of construction law, including contract negotiation and interpretation, construction financing, resolution of disputes arising during the construction process, prosecution and defense of collection disputes, as well as the litigation of construction contract and defect claims.

Timothy Earl is the chairman of Sullivan Hill's Insurance Coverage Practice Group and Co-Chair of the Construction Practice Group. He practices primarily in the areas of construction litigation, insurance coverage, and business litigation. His insurance coverage practice involves representation of policyholders and insurance companies in a variety of insurance coverage disputes primarily involving property damage or bodily injury arising out of construction defect and asbestos claims. He also represents policyholders and insurers in breach contract, declaratory relief, bad faith, unlawful business practices and Insurance Code Section 11580 claims.

John Engel has more than 50 years experience in corporate, real estate, commercial and business law, with particular emphasis on transactional work in the areas of corporate mergers and business acquisitions, institutional financing, real estate acquisition and development, securities regulation, organization of partnerships, and joint ventures and commercial contracts.

A founding member of the firm, member of its Executive Committee and chair of its Insolvency and Commercial Bankruptcy practice group, **James Hill** practices primarily in the areas of bankruptcy, insolvency and commercial law. His bankruptcy experience includes representation of creditors, bankruptcy trustees and select bankruptcy

debtors in Chapter 11 business reorganization cases, and he has served as a court-appointed examiner and mediator.

Joseph Marshall, a member of the firm's Executive Committee, has extensive experience in all phases of real estate, corporate, partnership and business transactions, and in tax planning, tax controversy resolution and estate planning. He represents a range of clients including landlords and tenants, lenders and borrowers, partnerships and limited liability companies, and corporations in a variety of matters such as commercial real estate ownership, mergers and acquisitions, business formations and federal and state tax disputes.

Donald Rez focuses his practice in the areas of business and commercial litigation and antitrust and trade regulation. He has handled all types of commercial lawsuits, including cases involving trade regulation and antitrust, breach of contract, franchisor/franchisee issues, lender liability cases, professional malpractice, and intellectual property. He has been involved in complex multi-district litigation, and his antitrust experience has involved claims of virtually every kind.

Gary Rudolph practices in the areas of bankruptcy and other insolvency problems, representing trustees, creditors and debtors in commercial bankruptcies. He is also a mediator for the United States Bankruptcy Court, Southern District of California. Rudolph's representation in the Bankruptcy Court includes official unsecured creditor committees, bankruptcy trustees, corporate Chapter 7 debtors, Chapter 11 debtors-in-possession, and creditors in all bankruptcy matters. He has qualified and served as a bankruptcy examiner and as an expert witness in bankruptcy matters. ■

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 last several years 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 the top 20 law firms in regard to SDDL membership. If there are any errors in the information provided, please email evan.kalooky@dbtlaw.org so that corrections can be made for the next edition.

- #1 - Tyson & Mendes - 49 members
- #2 - Neil, Dymott, Frank, McFall, Trexler, McCabe & Hudson – 18 members
- #3 - Balestreri Potocki & Holmes – 16 members
- #4T - Farmer Case & Fedor – 15 members
- #4T - Wilson Elser Moskowitz Edelman & Dicker LLP – 15 members
- #6T - Grimm Vranjes & Greer LLP – 12 members
- #6T - Winet Patrick Gayer Creighton & Hanes – 12 members
- #8 - Horton, Oberrecht, Kirkpatrick & Martha, APC – 11 members
- #9 - Lorber Greenfield & Polito, LLP – 8 members
- #10T - Lincoln, Gustafson & Cercos – 7 members
- #10T - Pettit Kohn Ingrassia Lutz & Dolin – 7 members
- #10T - Ryan Carvalho LLP – 7 members
- #13T - Dunn DeSantis Walt & Kendrick, LLP – 6 members
- #13T - Lotz Doggett & Rawers LLP – 6 members
- #13T - Wingert, Grebing, Brubaker & Juskie, LLP – 6 members
- #16 - Walsh McKean Furcolo LLP – 5 members
- #17T - Carroll Kelly Trotter Franzen & McKenna – 4 members
- #17T - Davis Grass Goldstein & Finlay – 4 members
- #17T - Higgs Fletcher & Mack – 4 members
- #17T - Hughes & Nunn, LLP – 4 members
- #17T - La Follette Johnson De Haus Fesler & Ames – 4 members ■



SDDL Board of Directors (from left to right): Patrick Kearns, Christine Dixon, Evan Kalooky, Vanessa Whirl, Colin Harrison, Christine Polito, Zachariah Rowland, Laura Dolan, Gabriel Benrubi, Dianna Bedri (Executive Director), Ben Cramer and Eric Deitz (not pictured)

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