The Update

Winter 2018

San Diego Defense Lawyers

ADDRESSING THE SUBTLE YET PERSISTENT GENDER BIAS IN LAW

By Eydith Kaufman
DUMMIT, BUCHHOLZ & TRAPP

I was recently taking the deposition of a co-defendant's client. The co-defendant was represented by a tall, stout male counsel. I am a five foot four, petite female counsel. During the deposition, the male counsel's demeanor towards me and his response to my questioning of his client, which included cutting off my attempt to make a record on an objection dispute, folding his arms and making audible sighs as if my questions were stupid, led the court reporter to say, after this attorney left the room, "You know, that never would have happened if you were a male attorney." Whether this co-defense counsel was motivated by a gender bias or some other factor, I will never know. But what I do know is that the perception was that he was acting differently towards me because I was female, and while we all know perception may not always be the reality, perception is important nonetheless.

Gender bias and discrimination takes many forms and has continued to persist in the legal field despite efforts to equalize treatment of female and minority attorneys. It can run the gamut from overt statements intended to intimidate, harass or bully, to subtle and innocent, but nonetheless annoying statements, like when a female attorney who has only a notebook in her hand and no electronic equipment is asked if she is the court reporter. The women I have spoken with about the issue of gender harassment, discrimination and/or bias usually had at least one example, but most had many examples, of some incident or statement that they perceived as being inappropriate. This includes a female attorney who was recently asked, after a side discussion involving accusations of sexual harassment against a famous star where this discussion occurred in a professional setting with opposing counsel and others present, how she would feel if she was asked to "lift her shirt right now". While probably not intended as an insult or harassment, this statement, which singled the attorney out based on her gender, put her in an uncomfortable position. Despite playing off the comment as a joke, she realized how inappropriate it was when she later told her husband, who became incensed.

Gender bias and discrimination has existed for years and is deep rooted in the history of the legal profession. Despite the first females being admitted to practice law before 1880, female attorneys have had a slow progress towards equality. Justice Sandra Day O'Connor was a top graduate from Stanford Law in 1952, yet a large California firm offered her only a secretarial position because the clients wouldn't tolerate a female lawyer in their opinion. O'Connor refused the secretarial position and instead became a deputy county attorney, as well as the first female U.S. Supreme Court Justice. Justice

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President's Message

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

Welcome to the 34th year of the San Diego Defense Lawyers Association! We're already off to a great start this year with our wildly successful Installation Dinner in January. It was a fantastic event and served to remind me, once again, why the SDDL is such a special group. Ben Howard from Neil Dymott did an amazing job as Emcee and, despite some technical difficulties with the microphone (which appeared to occur only when he was using the microphone), he still managed to control the crowd, entertain the masses, and even dig up a video from my younger days of breakfast cereal related fame. Congratulations again to our Lawyer of the Year Award recipient, Kim Oberrecht, and our Bench and Bar Award recipient, Judge Pressman (Ret.). The awards were well-deserved and both recipients delivered memorable speeches. A fun fact: Judge Pressman also received the Consumer Attorney's Judicial Award, presented on February 16th, making him the first Judge to receive that award from both the Plaintiffs' and Defense bar in the same year!

As I've said for many years now to anyone who will listen, I believe the SDDL is the best bargain one can find as far as professional associations go. SDDL membership provides you access to twenty hours of high-quality MCLE programming each year; access to a very successful and highly-utilized list-serve, and thus quick access to the sharp minds of our membership; charity golf tournaments; a national mock-trial competition; our quarterly publication "The Update"; and the list goes on.

As I grab the reins of the organization, however, I'm reminded of when I first joined the SDDL and the "value" of the organization I perceived as a younger lawyer. At the time, the SDDL was a way for me to connect to the defense community; a vehicle for me not only to "network", but to meet and learn from both experienced trial lawyers to other newly minted associates. Sometimes, admittedly, the SDDL was also a way to get my firm to pay for a few beers at a social event. The point is, the social aspect of the organization was more than simply being social, but a way for us all to stay connected, share ideas, and perhaps a few laughs.

You are going to see a renewed emphasis on our social events this year and, if it has been several years since you've attended one of our happy-hours, or the annual baseball game, or watched David Cardone is his perennial, Olympic-style quest for a trophy at our Trivia Night, expect a call this year asking you to join us. We'll start with our first 2018 Happy Hour on March 21, 2018 from 5:30 – 7:30 at "Prep Kitchen" in Little Italy. I strongly encourage you to make time for this event! There will be food, drinks, friends, and perhaps you'll get a coveted photo spot on the SDDL's recently unveiled Instragram or Facebook page! Please join us on the 21st to meet the 2018 Board and remind yourself why the SDDL is such a great organization. Thanks for being a valuable part of our group. ■

Attention!

SDDL is now on social media! Please follow ***sddlboard*** on LinkedIn, Instagram and Facebook for current information and events

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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MCLE LUNCH AND LEARN

When Cars Talk - An Overview of Forensic Data in Vehicles

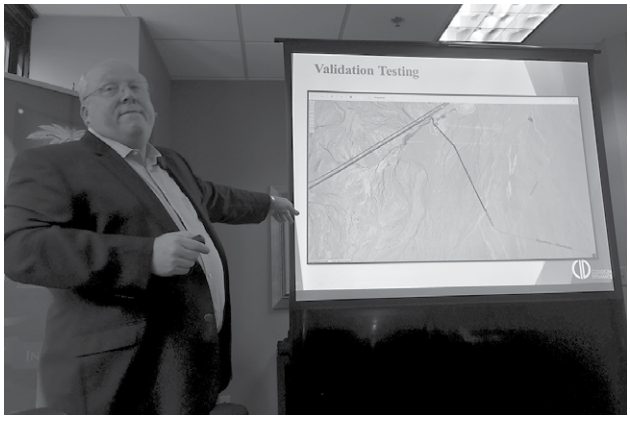
By Evan Kalooky
DUMMIT, BUCHHOLZ & TRAPP

On November 14, 2017, SDDL presented a well-attended MCLE regarding vehicle forensic data presented by Wesley Vandiver of Collision and Injury Dynamics. Mr. Vandiver has been investigating traffic collisions since 1989, including over seventeen years with the California Highway Patrol and its team that is responsible for the reconstruction of fatality collisions across California. In 2006, Mr. Vandiver joined the Orange County District Attorney's Office and was instrumental in the forming of its Vehicular Homicide Unit, for which he was responsible for the technical analysis in over 500 felony manslaughter and vehicular murder cases.

The presentation included a review of both the traditional and cutting edge issues in vehicle forensics, with Mr. Vandiver also providing examples of real-life crash data from his cases. He addressed the potential methods of recovering and analyzing evidence from event data recorders, and stressed that it is critical to obtain such information promptly after a crash to avoid it being overwritten or otherwise lost. The information captured by event data recorders varies depending on the specific brand and model of vehicle, but there is a wealth of information that can confirm or impeach a driver's recollection of the events leading up to an accident.

Mr. Vandiver also discussed the astounding amount of information that can be obtained from electronic systems like navigational and Bluetooth devices. He warned that rental car users should never connect their cell phones as the vehicles often retain a large amount of information even after you disconnect and delete your phone profile. Indeed, Mr. Vandiver was able to download information from the last seventy rental car users, ranging from personal contacts and addresses to actual text messages sent while driving.

While modern cars may offer convenience in terms of connectivity with electronics, they also retain substantial information relating to the driver's conduct and device usage. The information that can be gleaned through vehicle forensics may not only assist in an accident case, it can even be dispositive in terms of proving liability by recreating the events that led to an accident. ■



Bottom Line

Title: Donald Patton v. Jaleh Hanassab, First Light Property Management, Inc., et al.

Case No.: 14-CV-1489 AJB WVG

Judge: Hon. Anthony J. Battaglia - United States District Court, Southern District of California

Type of Action: Housing Discrimination

Type of Trial: Jury

Length of Trial: 12 days

Factual Information: This housing discrimination case involved causes of action pursuant to (1) the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, et seq., (2) the California Fair Employment and Housing Act ("FEHA"), Cal. Gov. Code § 12955, and (3) the Unruh Civil Rights Act, Cal. Civil Code § 54.1. Plaintiff, an American Indian, claimed he was discriminated against based on race when the property management company and owner of a small apartment complex located in Hillcrest attempted to terminate his tenancy due to continued complaints by other tenants. Plaintiff is a diagnosed paranoid schizophrenic. The defendants, the property owner and property management company, claimed they attempted to terminate the tenancy for other legitimate business purposes including the fact they wanted to end the Section 8 housing program at the complex and because Plaintiff was a problem tenant.

Verdict: Defense

Plaintiff's Counsel: Amy Lepine

Defense Counsel: Elizabeth Skane and Ron Lauter, Skane Wilcox LLP

Damages and/or injuries claimed: Plaintiff claimed emotional distress damages and attorney fees in an amount that exceeded $1 million.

Plaintiff's Settlement Demand: $700,000

Plaintiff's Request at Trial: $1 million

Defendant's Settlement Offer: $100,000 ■

When is the Open and Obvious Doctrine a Complete Defense?

By Leslie Price, Esq.
TYSON & MENDES

A recent decision of the Court of Appeal addressed the application of the Open and Obvious Doctrine in a premises liability case. In *Jacobs v. Coldwell Banker Residential Brokerage Company* (2017) 14 Cal. App.5th 438, 221 Cal.Rptr.3d 701, the Second District Court of Appeal affirmed summary judgment in favor of a defendant landowner sued for negligence by a plaintiff who was seriously injured after falling into an empty pool. If there is an "open and obvious" issue, can the defendant successfully argue there is no triable issue of fact, thereby avoiding a jury trial, or will the court determine "open and obvious" is a jury question to be decided under the doctrine of comparative negligence?

IT IS NOT ALWAYS OBVIOUS THE CONDITION IS OPEN AND OBVIOUS

The Open and Obvious Doctrine presupposes the existence of a dangerous condition. Whether a dangerous condition exists is usually a question of fact to be determined by the jury. (See *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 810, 205 Cal.Rptr. 842, 685 P.2d 1193.) However, the issue can be decided by the court as a matter of law, thereby precluding a jury trial, if the facts are undisputed and "only where reasonable minds can come to only one conclusion." (See *Huffman v. City of Poway* (2000) 84 Cal. App.4th 975, 991, 101 Cal.Rptr.2d 325, 337.)

In *Jacobs, supra,* 14 Cal.App.5th 438, 221 Cal.Rptr.3d 701, 708, the Court of Appeal and the parties assumed the danger of the empty swimming pool "was obvious to any adult." The issue is not always undisputed. In *Kasparian v. AvalonBay Communities* (2007) 156 Cal.App.4th 11, 25, 66 Cal.Rptr.3d 885, 895, the Court of Appeal reversed summary judgment, finding a recessed drain gate in an apartment complex walkway was not open and obvious after reviewing the same evidence the trial court reviewed in reaching the opposite conclusion.

Whether a dangerous condition is open and obvious appears to be determined under the "reasonable person" standard, though the standard is adjusted where the context of the encounter between the plaintiff and the condition is unusual. For example, in *Bunch v. Hoffinger Industries, Inc.* (2004) 123 Cal. App.4th 1278, 1300 20 Cal.Rptr.3d 780, 796, the Court of Appeal surveyed decisions nationwide before deciding in a products liability case the awareness of the danger of diving into shallow water was not open and obvious to a 14-year-old plaintiff. The cases surveyed were split as to whether the danger was open and obvious to adults, an issue the Court of Appeal declined to decide.

OPEN AND OBVIOUS AS AN ISSUE TO BE DETERMINED BY THE COURT

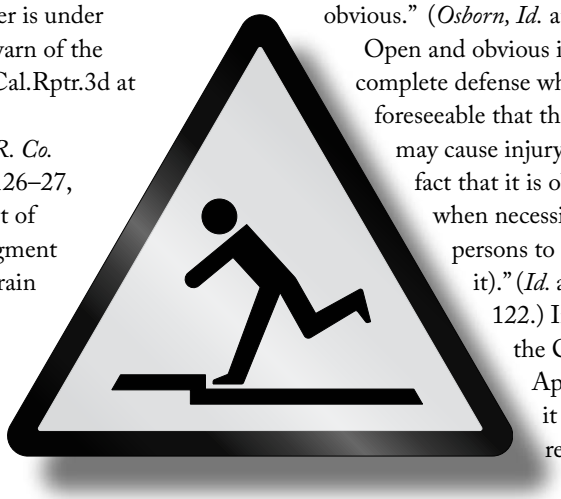
In *Jacobs,* plaintiff was a prospective home buyer who wanted a better view over the backyard fence so he stepped up on the diving board. The diving board base collapsed, causing his fall into the empty pool. The Court of Appeal noted, "Generally, if a danger is so obvious that a person could reasonably be expected to see it, the condition itself serves as a warning, and the landowner is under no further duty to remedy or warn of the condition." (*Jacobs, supra*, 221 Cal.Rptr.3d at p. 708.)

In *Christoff v. Union Pacific R. Co.* (2005) 134 Cal.App.4th 118, 126–27, 36 Cal.Rptr.3d 6, 13, the Court of Appeal affirmed summary judgment after plaintiff was struck by a train while walking on a railroad bridge. Plaintiff admitted he was aware generally of the hazard of walking on a railroad bridge, but unsuccessfully attempted to avoid summary judgment by claiming he was not aware the walkway on the bridge was so narrow he did not know he could not avoid the train.

Similarly, in *Danieley v. Goldmine Ski Associates, Inc.* (1990) 218 Cal.App.3d 111, 121–22, 266 Cal.Rptr. 749, 755, the Court of Appeal affirmed summary judgment in favor of the defendant ski run operator where the plaintiff skier was injured after colliding with a tree, noting the danger was so obvious the landowner was not obligated to warn of the danger.

OPEN AND OBVIOUS AS AN ISSUE TO BE DETERMINED BY THE JURY

The issue of "open and obvious" will be submitted to the jury if the court concludes it is foreseeable the dangerous condition may still cause injury despite the fact it is open and obvious. In that case, the landowner may have a duty to remedy the dangerous condition. In *Osborn v. Mission Ready Mix* (1990) 224 Cal.App.3d 104, 121-122, 273 Cal.Rptr. 457, the plaintiff, who was making a delivery, was injured while walking through an area which consisted of dirt mixed with broken pieces of concrete. There was evidence plaintiff's job required he walk through the area. The Court of Appeal reversed the jury's verdict in favor of defendant, remanding the case for another trial, based on error in instructing the jury (as requested by the defendant) that the defendant "cannot be held liable for an injury resulting from a danger which was obvious." (*Osborn, Id.* at p. 115.)



Open and obvious is not a complete defense when "it is foreseeable that the danger may cause injury despite the fact that it is obvious (e.g., when necessity requires persons to encounter it)." (*Id.* at p. 122.) In *Jacobs,* the Court of Appeal noted it "was not reasonably

foreseeable that [plaintiff] would expose himself to the risks associated with the empty pool, as he was neither required nor invited to do so." (*Jacobs, supra*, 221 Cal.Rptr.3d at p. 709.)

Notably, the approved, standard jury instruction CACI 1004 on the issue states only that the landowner does not have a duty to warn of an obvious dangerous condition. The use note cites *Osborn* for the proposition the landowner may still have a duty to take precautions against the risk.

The Court of Appeal in *Krongos v. Pacific Gas & Electric Co.* (1992) 7 Cal.App.4th 387, 394, 9 Cal.Rptr.2d 124, 128, similarly reached the conclusion the injury was foreseeable when reversing summary judgment in favor of the landowner where a contractor working on a boom truck was electrocuted when he came into contact with overhead electrical lines. The Court noted the practical necessity of using the boom truck to move materials made it foreseeable a worker could reasonably choose to the encounter the risk.

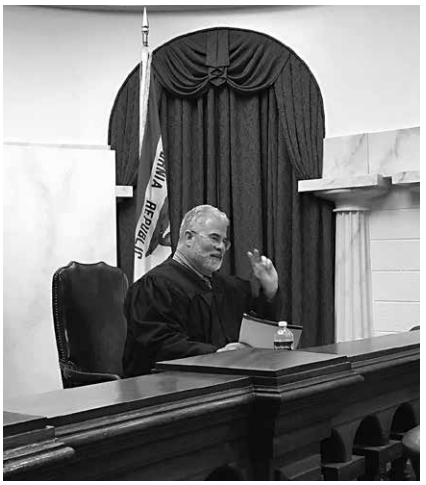
It is important to note the Court of Appeal did not determine the landowner breached its duty to the deceased worker. The Court decided generally under the circumstances a duty existed but it was up to the jury to decide under the facts specific to the case whether the defendant breached its duty to the decedent by not taking precautions or providing additional warnings. (*Id.* at p 395.)

CONCLUSION

Foreseeability and reasonableness in the context of the case are the primary issues to consider in determining the probability of prevailing on a motion for summary judgment based on the argument defendant owed no duty of care to the plaintiff who chose to encounter a condition which was open and obvious. If the condition existed in a location where one would not expect a reasonable person to encounter the risk, summary judgment may be warranted. On the other hand, if the condition existed in a location where plaintiff would reasonably encounter the risk, is much more likely the court will allow a jury to determine whether the defendant was negligent and, if so, whether the plaintiff was comparatively negligent for encountering the risk. ■

SDDL CONGRATULATES THE TEAMS THAT PARTICIPATED IN THE 2017 MOCK TRIAL COMPETITION

In addition to the participating teams and coaches, the SDDL Board of Directors would like to thank all of the judges and lawyers who took time out of their busy schedule to volunteer as judges in the SDDL Mock Trial Competition held on October 19-21, 2017. The Competition was a rousing success with all of the participating law schools and guests expressing their appreciation for the volunteer judges and support staff. The participants gained valuable experience presenting their cases through opening statements, witness examination and closing arguments.



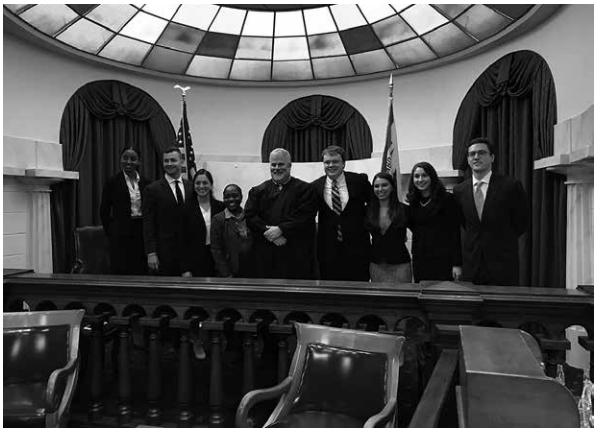
Hon. Kenneth Medel Imparting Wisdom to the Participants

SDDL offers special congratulations to the team from the University of North Carolina which won this year's Competition as first-time participants. The Board also congratulates this year's runner up team from Thomas Jefferson School of Law, as well as the other two semi-final round teams from Kansas University and a second group from Thomas Jefferson School of Law.

Judge Medel with the Winning Team from UNC-CH School of Law

SDDL also thanks the San Diego Superior Court personnel, Sheriff's Department and Security for allowing us the use of the courtrooms and premises on Thursday and Friday evenings, and the University of San Diego School of Law for the use of their courtroom, classroom and Faculty Reading Room for Saturday's semi-final and final rounds.

Outstanding job by everyone, we look forward to having all of you back next year! ■



The Finalists Celebrating a Job Well Done

California Legislative Update – Motorcycle Lane Splitting

By Kevin Yee, Esq.
TYSON & MENDES

Motorcycle lane splitting has long been a controversial topic across America. State laws throughout the country differ on whether lane splitting is legal and how lane splitting is analyzed in personal injury litigation. From a policy perspective, many view the practice of traveling between lanes in heavy traffic as inherently dangerous behavior, while others focus on the benefits of lane splitting to the flow of traffic in congested areas.

Until recently, lane splitting occupied a grey area in California where the practice was neither expressly authorized nor permitted. To add to this confusion, drivers visiting California's DMV website would view the following: "California law does not allow or prohibit motorcycles from passing other vehicles proceeding in the same direction within the same lane, a practice often called 'lane splitting,' 'lane sharing' or 'filtering.'"

In August 2016, California became the first state to expressly authorize the practice of motorcycle lane-splitting. California Assembly member Bill Quirk introduced Assembly Bill AB51 in an attempt to clarify California law regarding lane splitting.

Governor Jerry Brown signed AB51 into law on August 19, 2016, officially enacting Vehicle Code section 21658.1 which went into effect on January 1, 2017. With this step, California now has an official definition of the practice of lane splitting: "driving a motorcycle… that has two wheels in contact with the ground, between rows of stopped or moving vehicles in the same lane, including on both divided and undivided streets and highways."

More importantly, the California Highway Patrol (CHP) is now authorized to "develop educational guidelines relating to lane splitting in a manner that would ensure the safety of drivers and passengers or the surrounding vehicles." In effect, section 21658.1 legalizes lane splitting.

If and when the CHP releases official guidelines, they could fundamentally change the analysis of motorcycle accident personal injury cases throughout the State. Motorcyclist defendants will likely argue they were not negligent because they met the standard of care by complying with the CHP guidelines for lane splitting. On the other hand, a plaintiff may argue a motorcyclist defendant is liable under a theory of Negligence Per Se for failure to meet CHP guidelines.

Ultimately, it is uncertain what effect new CHP Guidelines would have on personal injury actions in California, but there is no shortage of motorcycle litigation coming from California Highways. When the new guideline does come out, the effects will be felt immediately. ■

MCLE LUNCH AND LEARN

Eric Ganci DUI Presentation

In October 2017, SDDL hosted an enjoyable MCLE regarding Driving Under the Influence presented by Eric Ganci of Ganci, Esq., a criminal defense firm that focuses on DUI defendants. Mr. Ganci is a frequent presenter for SDDL and we appreciate his entertaining and valuable seminars which provide the specialty CLE credits that we all need.

By way of background, Mr. Ganci is the only San Diego attorney trained on DUI blood testing (called gas chromatography) per the American Chemical Society and through the foremost experts in this science, Drs. Harold McNair and Lee Polite. Through this training, Mr. Ganci earned the Lawyer-Scientist Designation recognized by the Chemistry and the Law Section of the American Chemical Society, and he is one of the select few in the world to earn this designation. As such, Mr. Ganci is well-versed not only on the law but also the science involved in DUI cases. The CLE was both informative and engaging, and SDDL thanks Mr. Ganci for his continued support of the organization. ■

Howell Update: Class Certification Denied in Action Seeking Declaratory Relief that Hospital "Chargemaster" Rates are Unreasonable

By Emily Berman, Esq.
TYSON & MENDES

A recently published decision reinforces the importance of the *Howell* rule and the huge discrepancy between billed vs. paid amounts: *Artur Hefczyc v. Rady Children's Hospital-San Diego*, 2017 WL 5507854 (filed 11/17/17 and certified for publication). In this case, a plaintiff sought declaratory relief (on behalf of a proposed class) to establish that, among other things, a hospital was only authorized to charge self-pay patients for the reasonable value of its services, and that it was not permitted to bill based on a master list of itemized charge rates. The Court declined to issue the relief because it found the issues were inappropriate for class action litigation.

Overview of Hefczyc

This case involved an appeal from an order denying a request for class certification in a lawsuit against Rady Children's Hospital-San Diego (Rady). On behalf of the proposed class, Plaintiff/Appellant Arthur Hefczyc sought declaratory relief to establish that Rady's form contract for ER patients authorized Rady to charge only for the reasonable value of its services. This would mean Rady was not authorized to bill self-pay patients based on its master list of itemized charge rates, commonly referred to as the "Chargemaster" schedule of rates. Hefczyc alleged this list was "artificial" and "grossly inflated."

On appeal, Hefczyc argued that since the complaint sought only declaratory relief, he was not required to establish the existence of the factors normally required for class certification: "ascertainability," "predominance," and "superiority." The Court of Appeal disagreed and affirmed the trial court's order denying the class certification.

Factual Background and Decision

Hefczyz's minor child was treated at Rady's emergency room. Hefczyc had no insurance or other outside source of payment for the ER visit, and thus was a "self-pay" guarantor of his child's financial obligation to Rady.

The total amount that Rady billed to Hefczyc for the visit was $9,831.34. According to Hefczyc, this bill was based on "Chargemaster" rates that Rady developed. A "Chargemaster" is a spreadsheet which includes code numbers, descriptions and gross charges for the thousands of items that are provided to patients. It provides a convenient reference point for negotiating contracts and pricing schedules with commercial insurance carriers and non-emergency care patients seeking elective treatment and service, but is not, according to Hefczyc, a pricing schedule which patients are expected to pay.

The California Supreme Court explained in Howell that a Chargemaster is a 'uniform schedule of charges represented by the hospital as its gross billed charge for a given service or item, regardless of payer type.' Hospitals are required to make their Chargemasters public and to file them with the Office of Statewide Health Planning and Development. (Health & Saf. Code §§ 1339.51, subds. (a)(1), (b)(1), (b)(3); 1339.55, subd. (a); Howell, 52 Cal.4th 541, 561, fn. 7.) By regulation, hospitals "offering emergency and/or outpatient services" are required to "make available, upon request of a patient, a schedule of hospital charges. (Cal. Code Regs., tit. 22, § 70717, subd. (b).) Further, "In California, medical providers are expressly authorized to offer the uninsured discounts, and hospitals in particular are required to maintain a discounted payment policy for patients with high medical costs who are at or below 350% of the federal poverty level. (Bus & Prof. Code § 657, subd. (c); Health & Saf. Code, § 127405, subd. (a)(1)(A); Howell at 561.) Rady explained that based on the operation of these statutes, all patients are initially billed at the Chargemaster rates, the non-discounted rates for services, and then some individuals receive discounts depending on factors such as whether they are insured.

When a patient seeks care in Rady's ER, all guarantors of the patient are required by Rady to sign an agreement titled "Conditions of Treatment/Admission" (the COTA). The COTA states, "Hospital charges will be in accordance with the Hospital's regular rates and terms." According to Hefczyz, each patient is requested to sign the COTA regardless of whether the patient is a Medicaid, privately insured, HMO or self-pay patient. He alleged the actual pricing terms that determine reimbursement rates of the hospital vary by category of patient and depend on "governmental regulations and privately negotiated contracts." However, unlike other categories of patients, self-pay patients were billed at the Chargemaster rates which were "artificially inflated" and "unconscionable." According to Hefczyc, the fact all patients were subject to the same pricing guarantee, despite the fact that each category of patient was charged differently, showed the term "regular rates and terms" was inherently vague, ambiguous and meaningless. Hefczyc argued because the COTA contained no pricing term for self-pay patients that could be made certain, applicable law implied a contractual obligation to pay the reasonable value of the services and treatment rendered, and Rady was authorized to charge guarantors of self-pay patients no more than that reasonable value.

Hefczyc brought the action on behalf of himself and a class which he defined as "the guarantors of all persons who within the last four years, had one or more 'eligible patient hospital visits' to Rady's emergency ER." He sought a declaration with respect to payment obligations to Rady, specifically finding that

the COTA contained an 'open price' term and did not permit Rady to bill self-pay ER patients based on Chargemaster rates, as well as a declaration these self-pay patients would be liable to Rady for no more than the reasonable value of the treatment/services provided. The Complaint alleged while a declaratory judgment would not, in itself, determine the reasonable value of the medical services rendered, it would allow a patient to dispute Rady's unreasonable demands and provide the ability to negotiate an appropriate payment amount and reasonable payment terms.

Under California class certification criteria, the trial court concluded class certification was inappropriate here. The Court of Appeal agreed. Most of the opinion was dedicated to a discussion of the requirements for class certification. One such requirement is "predominance of common issues" among the proposed class of persons. (Lockheed Martin Corp. v. Superior Court (2003) 29 Cal.4th 1096, 1108.) In analyzing whether this requirement has been met, "the court must examine the allegations of the complaint and supporting declarations… and consider whether the legal and factual issues they present are such that their resolution in a single class proceeding would be both desirable and feasible." (Brinker Restaurant Corp. v. Superior Court (2012) 53 Cal.4th 1004, 1021-1022.) The Court here felt the declaratory relief sought by Hefczyc was far more complicated than interpreting a single contract provision.

Specifically, the Court found declaratory relief sought (a declaration that the COTA either "does not permit" or does not "allow" Rady to bill at Chargemaster rates) actually would require the Court to decide whether the Chargemaster rates represent the reasonable value of Rady's services. This was not an issue amenable to class treatment. The Court looked to other cases where plaintiffs sought to certify a class to challenge the reasonableness of Chargemaster rates, and noted that courts have recognized that reasonableness is an issue that requires individual determination on a case-by-case basis, rather than presenting a common question suitable for class determination. (Hale v. Sharp Healthcare (2014) 232 Cal. App.4th 50, 61-67; Kendall v. Scripps Health (2017) 16 Cal.App.5th 553, 573.) The reasonableness of Rady's Chargemaster rates is a highly individualized and fact-intensive inquiry, unique to each class member. As such, in this opinion the Court reinforced that the reasonable value of medical services is a complicated issue requiring individual determination on a case-by-case basis, rather than presenting a common question suitable for class determination. ■

Defamation – Immunity Under the Communications Decency Act For Republishers or Reposters Absent Material Modification

By Terra Davenport, Esq.
TYSON & MENDES

With the increasing use of the Internet and postings to Facebook, Twitter, Blogs, and other electronic sources, do reposters and republishers who forward and share links to internet content need to be worried about potential liability for defamation? The short answer is "No" as long as no material changes or defamatory modifications were made to the original content.

The Communications Decency Act ("CDA") of 1996, Section 230 (codified at 47 U.S.C. section 230) is a key piece of legislation for protecting freedom of speech on the internet. 47 U.S.C. section 230(c)(1) states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." Pursuant to section 230(e)(3), "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section."

Do reposters and republishers who forward and share links to internet content need to be worried about potential liability for defamation?

One is immune under the CDA if (1) he is a user of an interactive computer service, (2) he did not act as an information content provider with respect to the information that was posted, and (3) the asserted claims treat him as a publisher or speaker of information originating from a third-party. (*MCW, Inc. v. Badbusinessbureau.com, LLC* (N.D. Texas, 2004 WL 833595).)

By its terms, section 230 exempts internet users from defamation liability for republication. (*Barrett v. Rosenthal* (2006) 40 Cal. 4th 33, 62.) These provisions have been widely and consistently interpreted to confer broad immunity against defamation liability for those who use the Internet to publish information that originated from another source. (Id.)

The U.S. Court of Appeals for the Ninth Circuit held that when a user of an online bulletin board posted an e-mail that she had received from a third party, which allegedly defamed an art dealer, the woman who posted the e-mail message could not be held liable for the content of the e-mail that "originated from another content provider." (*Batzel v. Smith*, 333 F.3d 1022, 1034-35 (9th Cir. 2003) [posting accusing plaintiff of art theft was not created or developed in whole or in part by website moderator, who added a statement that "the FBI has been informed of the contents of [the] original message"]; see also *Phan v. Pham* (2010) 182 Cal.App.4th 323 [holding that a person who forwards an email, introducing it with language of his own, is entitled to immunity under § 230 for the allegedly defamatory content in the forwarded email].)

In *Phan v. Pham* (2010) 182 Cal.App.4th 323, the court examined the question: "What happens when you receive a defamatory e-mail and you forward it along, but, in a message preceding the actual forwarded document, introduce it with some language of your own?" The Court of Appeal held that "defendant Pham made no material contribution to the alleged defamation in the e-mail he received from Nguyen Xuan Due. His original language merely said, in essence: Look at this and 'Everything will come out to the daylight.' All he said was: The truth will come out in the end. What will be will be. Whatever. That is, the only possible defamatory content is to be found in the e-mail was the original content received by defendant Pham from Nguyen Xuan Due. Nothing 'created' by defendant Pham was itself defamatory." (Id. at p. 328.)

The defendant in *Phan* had no connection to the creation of the allegedly defamatory email, and therefore the act of forwarding the email, even with some commentary, did not expose him to liability for defamation because the Communications Decency Act ("CDA") applied.

Pursuant to California law, there is a single publication rule for defamatory publications. (*Traditional Cat Association v. Gilbreath*, 118 Cal.App.4th 392, 395, 399, 401 (2004).) Other jurisdictions hold the same when the republisher does not add his own material or defamatory commentary. (See *Mitan v. A. Neumann & Assocs., LLC*, Case No. Civ. 08-6154, 2010 WL 4782771 (D.N.J. Nov. 17, 2010) [holding that person who forwarded an e-mail to a group of recipients, with an introductory statement, was entitled to § 230 immunity: "as the downstream Internet user who received an email containing defamatory text and 'simply hit the forward icon on [his] computer,' ... Neumann's acts are shielded by the CDA"]; *Vasquez v. Buhl*, No. FSTCV126012693S, 2012 WL 3641581 (Conn. Super. Ct. July 17, 2012) [holding that an editor at CNBC.com was immune from defamation liability under § 230 when he posted a link to a defamatory website with an introductory message "I don't want to steal Buhl's thunder, so click on her report for the big reveal"].)

Overall, those who repost and forward potentially defamatory statements may not be liable for subsequent defamation as a republisher of defamatory content should no material alterations or new defamatory assertions be added to the original content. ■

Bottom Lines

Title: *Elena Alfonso Santana v. Roxana Mata PA-C; Jerry Kao, M.D.; North County Health Services; Tri-City Medical Center; North Coast Pathology Medical Group, Inc.; Huan A. Le, M.D.;* et al.

Case No.: San Diego Superior Court 37-2016-00017929-CU-MM-NC

Judge: Originally assigned to Hon. Timothy M. Casserly in Dept. N-31; Transferred to Hon. Richard E.L. Strauss in Dept. C-75 for purposes of trial

Type of Action: Medical Malpractice

Type of Trial: Court / Jury

Length of Trial: 7 trial days plus 1 day of deliberation

Verdict: Defense

Plaintiff's Counsel: Cynthia Chihak and Amy Rose Martel, Chihak & Martel

Defense Counsel: Clark R. Hudson and Danielle A. Eisner, Neil Dymott, for Huan A. Le, M.D., sued as Doe

Damages and/or injuries claimed: Alleged Negligent Failure to Diagnose Lung Cancer

Plaintiff's Settlement Demand: CCP 998 offer of $67,500

Defendant's Settlement Offer: Waiver of Costs; mediation and further negotiations were unsuccessful ■

Title: *George & Kathleen Pickett v. The City of Huntington Beach,* et al.

Case No.: Orange County Superior Court, Case No. 30-2014-00754342

Judge: Hon. James L. Crandall

Type of Action: Personal Injury – Automobile

Length of Trial: 9 days

Factual Information: Mr. and Mrs. Pickett were an elderly couple, Mr. Pickett in his 80s and Mrs. Pickett in her late 60s. The case involved in a T-bone auto accident at a four-way stop involving a Huntington Beach police officer. Plaintiffs claimed the police officer did not stop at the four way stop. The police officer claimed he never saw the Plaintiffs' vehicle until after the accident. Witness testimony was not consistent as to which vehicle stopped first or at all.

Verdict: The case settled for $1 million after the trial judge advised Plaintiffs' counsel that the case was not going well for the Plaintiffs.

Plaintiff's Counsel: Martin Kanarek, Carpenter Zuckerman and Rowley

Defense Counsel: Elizabeth Skane and Doug Caffarel, Skane Wilcox LLP; Brian Sullivan, Huntington Beach City Attorney's Office

Damages and/or injuries claimed: Plaintiffs went on to have a number of surgeries they claim resulted from the accident, including bilateral shoulder surgery, two lumbar back surgeries, and cervical neck surgery for Mrs. Pickett. Mr. Pickett underwent bilateral shoulder surgery, and urological issues and related surgery for an infection that developed when he underwent shoulder surgery in the hospital from placement of a catheter. Both Plaintiffs claimed traumatic brain injury.

Plaintiff's Settlement Demand: $20 million

Plaintiff's Request at Trial: $30 million

Defendant's Settlement Offer: CCP 998 offer of $480,000 ■

Title: *Board of Trustee of the Plumbers and Pipefitters Union Local 525 vs. Old Republic Home Warranty Company*

Case No.: Clark County District Court, Las Vegas, CASE NO. A-14-704846-C

Judge: Hon. Stephanie Miley

Type of Action: Recovery of Union Benefits per Statute

Length of Trial: 6 day

Factual Information: This case involves claims by the plumber Union in Nevada against Old Republic for recovery of unpaid union benefits. Those benefits were owed by a company that worked as an approved vendor for Old Republic making home warranty repairs. The contractor declared bankruptcy after the company was unable to keep current on its union obligations. Pursuant to a statute in the state that allows the unions to recover unpaid union benefits from an original contractor that hires the union, the unions sued Old Republic claiming it qualified as an original contractor. Two months prior to trial, the state legislature changed the statute pursuant to language submitted by the firm representing the union and provided that a company that does warranty work qualifies as an original contractor. Therefore, three weeks before trial the court granted summary judgement on liability and the case was tried on damages alone.

Verdict: $6,400

Plaintiff's Counsel: Bryce Loveland, Farber, Hyatt and Schreck

Defense Counsel: Elizabeth Skane and Sarai Brown, Skane Wilcox LLP

Damages and/or injuries claimed: Plaintiff claimed more than $500,000 in unpaid union benefits plus liquidated damages, interest and attorney's fees.

Plaintiff's Settlement Demand: $125,000 was the lowest pre-trial demand

Plaintiff's Request at Trial: $600,000

Defendant's Settlement Offer: $41,000 via a written offer of judgement ■

Title: *Boris Grayfer v. Wawanesa General Insurance Company*

Judge: Holly E. Kendig, Los Angeles Superior Court

Type of Action: Insurance Bad Faith

Length of Trial: 9 days

Defense Counsel: The Greenfield Law Firm

Result: After obtaining a defense verdict at trial, Defendant filed a Memorandum of Costs to recover its costs. These costs included expert witness fees since Defendant had served a Code of Civil Procedure section 998 offer that Plaintiff rejected during the course of the litigation. After the hearing on Plaintiff's Motion to Tax Costs, the Court awarded Defendant costs in the total amount of $103,939.65. ■

SDDL EXPRESSES ITS DEEP APPRECIATION FOR THE SPONSORS, GOLFERS AND VOLUNTEERS THAT MADE THE 2017 GOLF BENEFIT A SUCCESS

On September 8, 2017, SDDL hosted the annual Juvenile Diabetes Research Foundation Golf Benefit presented by Momentum Engineering. The tournament was held at the picturesque Coronado Golf Course, and you could not have asked for a more beautiful day to enjoy this important fund raising event. From the shotgun start to the dinner and awards banquet, everyone had a wonderful time and helped to raise funds to support necessary research and support services for juvenile diabetes. SDDL thanks everyone who attended and is looking forward to another successful benefit later this year! ■

California Case Summaries

By Monty McIntyre
ADR SERVICES, INC.

CALIFORNIA SUPREME COURT

Civil Code (Construction Defect)

McMillin Albany LLC v. Superior Court (2018) _ Cal.5th _ , 2018 WL 456728: The California Supreme Court affirmed the Court of Appeal's decision granting a writ petition and ordering a stay of a common law construction defect claim until completion of the pre-litigation process in the Right to Repair Act (Act; Civil Code section 895-945.5.). The Supreme Court ruled the suit for property damage was subject to the Act's pre-litigation procedures. (January 18, 2018.)

Torts

Rubenstein v. Doe No. 1 (2017) _ Cal.5th _ , 2017 WL 3691550: The California Supreme Court reversed the Court of Appeal decision finding that plaintiff had timely filed her sexual molestation claim in 2012, arising from events that occurred in 1993 and 1994. The Supreme Court ruled that a government tort claim must be presented not later than six months after the accrual of the cause of action (Government Code, section 911.2(a)), the cause of action in this case accrued at the time of the alleged molestation, and the California Legislature's 2002 amendment of Code of Civil Procedure section 340.1 did not relieve claimants from complying with the government claims statute when suing a public entity defendant. (August 28, 2017.)

T.H. v. Novartis Pharmaceuticals Corporation (2017) _ Cal.5th _ , 2017 WL 6521684: The California Supreme Court affirmed the Court of Appeal's ruling directing the trial court to sustain a demurrer but grant leave to amend in a case where plaintiff alleged that defendant manufacturer failed to properly warn about known or reasonably knowable adverse effects arising from the use of its drug. Because the same warning label must appear on a brand-name drug as well as a generic bioequivalent, a brand-name drug manufacturer owes a duty of reasonable care in ensuring that the label includes appropriate warnings, regardless of whether the end user has been dispensed the brand-name drug or its generic bioequivalent. If the person exposed to the generic drug can reasonably allege that the brand-name drug manufacturer's failure to update its warning label foreseeably and proximately caused physical injury, then the brand-name manufacturer's liability for its own negligence does not automatically terminate merely because the brand-name manufacturer transferred its rights in the brand-name drug to a successor manufacturer. (December 21, 2017.)

CALIFORNIA COURTS OF APPEAL

Appeals

Diaz v. Professional Community Management, Inc. (2017) _ Cal.App.5th _ , 2017 WL 4640129: The Court of Appeal affirmed the trial court's denial of a motion to compel arbitration, with directions. Defendant and its counsel unilaterally and improperly orchestrated the issuance of an appealable order by: (1) applying ex parte, 11 days before trial, for an order shortening time to hear its motion to compel arbitration; (2) voluntarily submitting a proposed order to the trial court that not only reflected the court's denial of the ex parte application — the only ruling reflected in the trial court's own minute order — *but also included a denial of the motion on the merits*; and (3) promptly appealing from that order, which stayed the scheduled trial. The Court of Appeal concluded that defendant and its counsel acted in bad faith, generating an appealable order they knew the trial court had not intended to issue at the ex parte hearing, for the purpose of obtaining a delay of trial. Invoking its authority under Code of Civil Procedure section 909, the Court of Appeal found that because defendant acted in bad faith in connection with the motion to compel arbitration, as a matter of law, defendant waived its right to compel arbitration. As sanctions for bringing a frivolous appeal, defendant and its counsel were ordered, jointly and severally, to pay the following amounts: $8,500 to the clerk of the court; to plaintiff, an amount equal to the reasonable value of services performed by his attorney in preparing for the trial that was scheduled to commence on August 15, 2016, and in responding to this appeal, but not to include pretrial services which need not be repeated. The trial court was instructed to set a hearing and determine the amount of the sanction following remand. The defense attorneys and the clerk of the Court of Appeal were ordered to send a copy of the opinion to the State Bar of California. (C.A. 4th, filed October 17, 2017, published November 8, 2017.)

Arbitration

Baxter v. Genworth North America Corporation (2017) _ Cal.App.5th _ , 2017 WL 4837702: The Court of Appeal affirmed the trial court's order denying a motion to compel arbitration in an action alleging wrongful termination and other causes of action. Because plaintiff was required to sign the arbitration agreement as part of her continued employment, the trial court properly found procedural unconscionability. The trial court also properly concluded that a number of features of the arbitration agreement were substantively unconscionable, including default discovery limitations, a prohibition against contacting witnesses, procedural deadlines that effectively shortened the statute of limitations and precluded a meaningful opportunity for a pre-litigation FEHA investigation, and accelerated hearing procedures that infringed upon an employee's ability to adequately present his or her case. The court also properly ruled that severance of the offending provisions was not an option because the arbitration agreement was permeated by unconscionability. (C.A. 1st, October 26, 2017.)

Citizens of Humanity v. Applied Underwriters (2017) _ Cal.App.5th _ , 2017 WL 5623555: The Court of Appeal affirmed

the trial court's order denying a petition to compel arbitration. The threshold issue of whether the Federal Arbitration Act applied or was preempted by the McCarran-Ferguson Act (15 U.S.C. sections 1011-1015) and the Nebraska Uniform Arbitration Act was for the court, and not the arbitrator to decide. The trial court properly concluded that reverse preemption applied under the McCarran-Ferguson Act and that Nebraska law applied to invalidate the arbitration clause in the Reinsurance Participation Agreement with Applied Underwriters Captive Risk Assurance Company, Inc. that plaintiffs had entered into. (C.A. 2nd, November 22, 2017.)

Cortez v. Doty Brothers Equipment Company (2017) _ Cal.App.5th _ , 2017 WL 3484719: Electing not to decide several difficult jurisdictional issues, the Court of Appeal decided to treat consolidated appeals as a writ petition. The Court of Appeal granted the writ in part, and denied the writ in part, modifying the trial court's order granting a motion to compel arbitration in an action alleging wage and hour violations and a representative claim under the Private Attorneys General Act of 2004 (PAGA, Labor Code, section 2698 et seq.). The Court of Appeal granted the writ in part, finding that plaintiff's action for failure to timely pay wages upon separation from employment (Labor Code, section 203), and his unfair competition action (Business & Professions Code, section 17200), were not encompassed in the arbitration provision in a collective bargaining agreement (CBA). The rest of the writ was denied because the remaining causes of action were subject to arbitration, and the trial court's termination of class claims was proper on the ground the CBA did not authorize classwide arbitration. (C.A. 2nd, filed August 15, 2017, published September 1, 2017.)

Harshad & Nasir Corporation v. Global Sign Systems (2017) _ Cal.App.5th _ , 2017 WL 3484761: The Court of Appeal reversed the trial court's order confirming an arbitration award against respondent Friendly Franchisees Corporation (FFC) for $1,154,793.72 in damages, $702,093.86 in prejudgment interest, and $1,142,596.20 in costs, and affirmed the trial court's order vacating the award as to four affiliates of FFC (the Affiliates) who the arbitrator added as joint and several obligors under the award. The Court of Appeal ruled that the general rule, that the arbitrator's decision cannot be reviewed for errors of fact or law, did not apply because the parties had agreed to limit the arbitrator's authority by providing for review of the merits in the arbitration agreement. On the merits, the Court of Appeal ruled that substantial evidence did not support the award, and an alleged contract to be performed over a three-year period violated the statute of frauds. Further, the arbitrator exceeded his authority by deciding a claim that FFC had not agreed to arbitrate. The Court of Appeal deemed appeals from the orders regarding motions for attorney fees to be petitions for writ of mandate, and directed the trial court to vacate the orders and make different orders denying the motions. (C.A. 2nd, August 15, 2017.)

Jensen v. U-Haul Co. of California (2017) _ Cal.App.5th _ , 2017 WL 6276225: The Court of Appeal affirmed the trial court's order denying a motion to compel arbitration. Plaintiff's supervisor at work rented a truck from defendant and signed the contract that contained an arbitration clause. Plaintiff did not sign the arbitration agreement. The Court of Appeal was not persuaded by defendant's arguments that plaintiff should be bound to arbitrate the claim, even though he was not a signatory to the agreement, based upon theories of third-party beneficiary, agency, or estoppel. (C.A. 4th, December 11, 2017.)

Julian v. Glenair, Inc. (2017) _ Cal.App.5th _ , 2017 WL 5664588: The Court of Appeal affirmed the trial court's order denying defendant's motion to compel arbitration of plaintiff's claim under the Labor Code Private Attorneys General Act of 2004 (PAGA; Labor Code, section 2698 et seq.). The Court of Appeal ruled that an agreement to arbitrate a PAGA claim, entered into before an employee was statutorily authorized to bring such a claim on behalf of the state, was an unenforceable pre-dispute waiver. (C.A. 2nd, November 27, 2017.)

Lawson v. ZB, N.A. (2017) _ Cal.App.5th _ , 2017 WL 6540924: In consolidated proceedings, the Court of Appeal dismissed an appeal from an order granting a motion to compel arbitration because it was not appealable, but it granted a writ petition challenging the trial court's order. The trial court erred in bifurcating the underpaid wages portion of plaintiff's Private Attorneys General Act (PAGA, Labor Code, section 2698 et seq.) claim and ordering arbitration of that portion of the PAGA claim. (C.A. 4th, December 19. 2017.)

Melendez v. San Francisco Baseball Associates (2017) _ Cal.App.5th _ , 2017 WL 4639877: The Court of Appeal reversed the trial court's order denying a motion to compel arbitration in a putative class action by security guards alleging that defendant (owner of the San Francisco Giants) violated Labor Code section 201 by not immediately paying final wages upon each "discharge" after specific job assignments. The Court of Appeal agreed with the trial court that arbitration was not required by a collective bargaining agreement between the Giants and the Service Employees International Union, United Service Workers West of San Francisco. However, the Court of Appeal reversed the trial court's order because it found that the action was preempted by section 301 of the Labor Management Relations Act, 29 United States Code, section 185(a). (C.A. 1st, October 17, 2017.)

State Farm General Insurance Co. v. Watts Regulator Co. (2017) _ Cal.App.5th _ , 2017 WL 5898543: The Court of Appeal affirmed the trial court's order denying a motion to compel arbitration. There was no vested right to arbitration in this case where the parties had agreed to be bound by contractual terms and rules determined by a third party, a nonprofit organization called Arbitration Forums, Inc. (AF). AF provides arbitration services for insurers and self-insured companies who become members of AF by signing its "Property Subrogation Arbitration Agreement" (the AF arbitration agreement). After notice to its members in November 2014, AF changed the AF arbitration agreement, effective January 1, 2015, to exclude product liability claims from the kinds of claims subject to compulsory arbitration under the agreement. The trial court properly denied the motion because plaintiff filed its lawsuit after the change to the AF arbitration agreement. (C.A. 2nd, November 30, 2017.)

Attorney Fees

Bustos v. Global P.E.T., Inc. (2018) _ Cal. App.5th _ , 2017 WL 6947674: The Court of Appeal affirmed the trial court's order denying plaintiff's motion for attorney fees requesting

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$454,857.90 pursuant to Government Code section 12965(b) and the Supreme Court's holding in *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203. Plaintiff made the fee motion after the jury found that plaintiff's physical condition or perceived physical condition was "a substantial motivating reason" for his termination. The jury, however, also found that defendant's conduct was not a substantial factor in causing harm to plaintiff and returned a defense verdict. The Court of Appeal ruled that the trial court did not abuse its discretion in denying the motion for attorney fees. (C.A. 4th, filed December 22, 2017, published January 16, 2018.)

CA-Amer. Water Co. v. Marina Coast Water (2017) _ Cal.App.5th _ , 2017 WL 6397685: The Court of Appeal affirmed the trial court's order awarding attorney fees and costs to plaintiff and Monterey County Water Resources Agency after contracts between those parties and defendant were declared to be void. The Court of Appeal held that the trial court properly ruled that this case was an "action on a contract" for purposes of awarding attorney fees under Civil Code section 1717, and the fee award did not violate public policy. (C.A. 1st, December 15, 2017.)

Doe v. San Diego-Imperial Council (2017) _ Cal.App.5th _ , 2017 WL 4639245: The Court of Appeal reversed the trial court's order granting defendants attorney fees under Code of Civil Procedure section 340.1(q). Defendants requested attorney fees after the Court of Appeal affirmed the trial court's order sustaining a demurrer, without leave to amend, to plaintiff's complaint for sexual abuse because plaintiff had failed to file a certificate of merit as required by section 340.1. The trial court awarded fees to defendants without analyzing the statutory provision or stating the court's reasoning as to why such fees were appropriate. The Court of Appeal ruled that a defendant is eligible for an award of attorney fees under section 340.1(q) only where the litigation has resulted in a "favorable conclusion" for that defendant, and a "favorable conclusion" requires a result that is reflective of the merits of the litigation. In this case, because the dismissal of the action was the result of a procedural defect that did not reflect on the merits of the action, there was no "favorable conclusion" for defendants, and the fee award was improper. (C.A. 4th, October 17, 2017.)

Land Partners, LLC v. County of Orange (2018) _ Cal.App.5th _ , 2018 WL 345329: The Court of Appeal affirmed the trial court's order denying a motion for attorney fees under Revenue and Taxation Code section 5152 after plaintiff had prevailed on its tax refund lawsuit. A factual finding by the court that the reason the assessor did not apply a particular provision was that he or she believed it to be unconstitutional or invalid is a prerequisite to an attorney fee award under this section, and the trial court made no such finding. (C.A. 4th, filed January 10, 2018, published January 22, 2018.)

Medina v. South Coast Car Company (2017) _ Cal.App.5th _ , 2017 WL 4128076: The Court of Appeal affirmed the trial court's award of attorney fees of $128,004.20 to plaintiff in an action alleging violation of the Consumer Legal Remedies Act and other

claims as a result of the sale of a used car. The parties settled the case on the eve of trial for $8,600 and stipulated that, regarding fees and costs, plaintiff would be the prevailing party and defendants would not dispute plaintiff's entitlement to fees and costs, but defendants could dispute the reasonableness of the fees and costs and could assert all defenses to the amount of the fees and costs. The Court of Appeal ruled that the settlement agreement determined that plaintiff was entitled to fees and costs, and it rejected defendants' arguments that they should be the prevailing party under Civil Code section 2983.4 due to an early settlement offer, or that defendant Veros Credit LLC's liability should be limited to the amount of the retail installment sales contract. (C.A. 4th, filed September 19, 2017, published September 25, 2017.)

Orien v. Lutz (2017) _ Cal.App.5th _ , 2017 WL 5022364: The Court of Appeal reversed the trial court's order awarding attorney fees of $81,750 to plaintiff in a partition action. The trial court found that an attorney fee provision in an earlier settlement agreement among the parties applied to the partition action, and awarded all fees to plaintiff under Civil Code section 1717 rather than apportioning the costs of partition under Code of Civil Procedure sections 874.010 and 874.040. The trial court erred in interpreting the settlement agreement to allow recovery of attorney fees for a partition action. The parties had the right to seek partition regardless of the agreement. Regarding allocation of fees under Code of Civil Procedure section 874.010 and 874.040, the Court of Appeal observed that fees incurred by either plaintiffs or defendants in contested partition proceedings could be for the common benefit. On remand, the trial court should exercise its discretion in allocating fees. (C.A. 2nd, November 3, 2017.)

Roth v. Plikaytis (2017) _ Cal.App.5th _ , 2017 WL 4020418: The Court of Appeal affirmed in part, reversed in part, and remanded with directions the trial court's order awarding attorney fees to defendant as the prevailing party in a breach of contract action. The trial court erred when it declined to consider previously filed documents defendant incorporated by reference as part of her motion, denied fees for obtaining bankruptcy stay relief that related to the breach claim, and failed to provide an adequate justification for significantly reducing the number of hours allowed. (C.A. 4th, September 13, 2017.)

Sukumar v. City of San Diego (2017) _ Cal. App.5th _ , 2017 WL 3483653: The Court of Appeal reversed the trial court's order denying petitioner's attorney fees. Even though the trial court denied the writ petition under the Public Records Act (Government Code, section 6250 et seq.), petitioner was the prevailing party because petitioner's action resulted in respondent releasing copies of previously withheld documents. (C.A. 4th, August 15, 2017.)

Attorneys

CA Self-Insurers' Security Fund v. Superior Court (2018) _ Cal.App.5th _ , 2018 WL 561707: The Court of Appeal granted a writ petition and directed the trial court to vacate its order disqualifying Nixon Peabody LLP (Nixon Peabody) from representing plaintiff in the case. The issue arose after an attorney left Michelman & Robinson, where he had represented some of the defendants in this action, and briefly worked at Nixon Peabody. He did not work on plaintiff's case while he worked at Nixon Peabody, the Nixon Peabody lawyers working on the case stated they did not obtain confidential information from him, and Nixon Peabody indicated that it put up an "ethical" wall while the lawyer was at the firm. The trial court erred in finding that automatic disqualification was required. The Court of Appeal directed the trial court to determine whether confidential information was transmitted to Nixon Peabody, or whether, in the court's discretion, other compelling reasons dictated that the firm should be disqualified. (C.A. 4th, January 26, 2018.)

Lynn v. George (2017) _ Cal.App.5th _ , 2017 WL 4173330: The Court of Appeal reversed the trial court's order granting a motion by plaintiffs to disqualify defendant's attorney and law firm (counsel). The trial court erred in finding there had been a confidential non-client relationship between plaintiffs and counsel, and a potential attorney-client relationship with an alleged partnership. The Court of Appeal ruled that substantial evidence did not support the trial court's finding of a confidential non-client relationship. The information disclosed by plaintiffs to counsel was either shared with persons other than counsel, or was related to her role as the broker for the transaction. This evidence did not support a finding that counsel had acquired confidential information from plaintiffs or that a confidential relationship had arisen. (C.A. 4th, September 21, 2017.)

URS Corp. v. Atkinson/Walsh Joint Venture (2017) _ Cal.App.5th _ , 2017 WL 4251127: In an issue of first impression, the Court of Appeal issued a writ of supersedeas, pursuant to Code of Civil Procedure section 916, staying the enforcement of the trial court's order disqualifying the law firm Pepper Hamilton (counsel for appellants). Pepper Hamilton was disqualified because it had obtained confidential and privileged documents that would likely be used advantageously against respondent during the course of litigation. The petition for writ of supersedeas was denied to the extent that it requested a discretionary stay of all trial court proceedings. The Court of Appeal ruled that the appeal automatically stayed enforcement of the order disqualifying counsel, but not all trial court proceedings. (C.A. 4th, September 26, 2017.)

Civil Code

Cornell v. City and County of San Francisco (2017) _ Cal.App.5th _ : The Court of Appeal affirmed the jury's verdict and later judgment for plaintiff awarding damages of $575,231 ($234,007 in past economic damages, $266,224 in future economic damages, and $75,000 in past non-economic damages) and $2,027,612.75 in attorney's fees and costs, in an action for false arrest, tort, and civil rights violations arising from the arrest of an off-duty police officer when he was running one morning in Golden Gate Park. Plaintiff later lost his job as a result of the arrest. The Court of Appeal was not persuaded by any of the arguments by defendants on appeal. (C.A. 1st, November 16, 2017.)

Miller v. Fortune Commercial Corporation (2017) _ Cal.App.5th _ , 2017 WL 4003420: The Court of Appeal affirmed the trial court's order granting summary judgment to defendant in an action by plaintiff alleging violations of the Unruh Civil Rights Act (Unruh Act, Civil Code, section 51 et seq.), the Disabled Person's Act (DPA, Civil Code, section 54 et seq.) and intentional infliction

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CALIFORNIA CIVIL LAW UPDATE CONTINUED FROM PAGE 17:

of emotional distress for failing to let plaintiff bring his service dog into defendant's stores. Plaintiff could not show a violation of the Unruh Act because there was no evidence that his service dog had completed its training. Plaintiff's DPA claim failed because he did not produce substantial evidence to show that he brought his dog to the markets for the purpose of training her, or that he or his stepfather were capable or authorized to train a service dog. The emotional distress claim failed because it was based upon the Unruh Act and DPA claims. (C.A. 2nd, September 12, 2017.)

Civil Procedure

Apple, Inc. v. Superior Court (2017) _ Cal. App.5th _ , 2017 WL 6275830: The Court of Appeal granted a writ petition and directed the trial court to change its ruling overruling demurrers to the second amended complaint. In an issue of first impression, the Court of Appeal ruled that a plaintiff alleging derivative claims in an amended complaint following the grant of leave to amend must plead demand futility with respect to the board of directors in place as of the filing of the amended complaint, consistent with the rule enunciated by the Delaware Supreme Court in *Braddock v. Zimmerman* (2006) 906 A.2d 776. The trial court was directed to sustain the demurrer with leave to amend. (C.A. 6th, December 11, 2017.)

Boyd v. Freeman (2017) _ Cal.App.5th _ , 2017 WL 6505856: The Court of Appeal reversed the trial court's order sustaining a demurrer, without leave to amend, in an action for wrongful foreclosure. The trial court erred in concluding that the doctrine of res judicata barred plaintiff's claims because of a judgment in favor of defendant and against plaintiff in a prior action. Because the prior judgment was based upon the statute of limitations, it was not on the merits and res judicata did not bar plaintiff's claims. (C.A. 2nd, December 20, 2017.)

Curtis Engineering Corp. v. Superior Court (2017) _ Cal.App.5th _ , 2017 WL 4769086: The Court of Appeal granted a writ petition for writ of mandate and directed the trial court to vacate its order overruling a demurrer alleging noncompliance with the certificate requirement of Code of Civil Procedure section 411.35, and instead issue an order sustaining the demurrer without leave to amend. Section 411.35 requires the attorney for plaintiffs or cross-complainants in certain professional negligence cases to serve and file a certificate on the defendant or cross-defendant on or before the date of service of the complaint or cross-complaint declaring that he or she has consulted with and received an opinion from an expert in the field, or an adequate excuse for not doing so. The Court of Appeal ruled that a certificate filed after expiration of the statute of limitations and more than 60 days after filing the original pleading (section 411.35(b)(2)) does not relate back to the filing of the original pleading. (C.A. 4th, October 23, 2017.)

Higgins v. Superior Court (2017) _ Cal. App.5th _ , 2017 WL 4296368: The Court of Appeal granted a writ petition overturning the trial court's order denying defendant/ petitioner's motion to dismiss the action

because the complaint was not served within three years after the commencement of the action as required by Code of Civil Procedure section 583.210(a).

The trial court ruled that the three-year period had not expired, since the action had been stayed from March 13, 2014, when a codefendant filed bankruptcy, until July 29, 2016, when the bankruptcy court granted plaintiff's motion to lift the automatic stay. The Court of Appeal ruled that the automatic stay that applied to claims against the bankruptcy debtor did not apply to plaintiff's claims against nondebtor defendant/petitioner, and the trial court erred in denying the motion because the complaint was served more than three years after commencement of the action. (C.A. 4th, September 28, 2017.)

Lyons v. Colgate-Palmolive Company (2017) _ Cal.App.5th _ , 2017 WL 4683772: The Court of Appeal reversed the trial court's order granting summary judgment for defendant in a product liability action alleging that plaintiff developed mesothelioma from the use of Colgate's Cashmere Bouquet cosmetic talcum powder. The trial court failed to comply with Code of Civil Procedure section 437c(g), requiring a written order specifying the reasons for its determination and specifically referring to the evidence proffered in support of and, if applicable, in opposition to the motion that indicates no triable issue exists. The Court of Appeal ruled that the record contained substantial evidence creating a triable issue as to whether Colgate's Cashmere Bouquet talcum powder contained asbestos that may have been a substantial cause of plaintiff's mesothelioma. (C.A. 1st, October 19, 2017.)

Medley Capital Corp. v. Security National Guaranty, Inc. (2017) _ Cal.App.5th _ , 2017 WL 5261555: The Court of Appeal affirmed the trial court's order denying an anti-SLAPP motion to strike a complaint alleging malicious prosecution. Both parties agreed the case satisfied the first step of the anti-SLAPP analysis because it arose from protected activity. In analyzing the second step, whether plaintiff had demonstrated a probability of prevailing on the claim, the Court of Appeal agreed with the trial court that there was a favorable termination on the merits, the action was brought without probable cause, and plaintiff established malice. (C.A. 1st, filed October 17, 2017, published November 13, 2017.)

Optional Capital v. Akin Gump Strauss, Hauer & Feld LLP (2017) _ Cal.App.5th _ , 2017 WL 5493915: The Court of Appeal affirmed the trial court's order granting anti-SLAPP motions to strike a complaint against lawyers arising from their representation of their client in litigation. It is well established that the protection of the anti-SLAPP statute extends to lawyers and law firms engaged in litigation-related activity. The gravamen of plaintiff's claims against defendants was based on protected activity, defendants' representation of their client in litigation. Plaintiffs could not demonstrate a probability of prevailing on its claims because they were barred by the litigation privilege in Civil Code section 47. (C.A. 2nd, filed November 16, 2017, published December 7, 2017.)

Padron v. Watchtower Bible and Tract Society of New York (2017) _ Cal.App.5th _ , 2017 WL 5181618: The Court of Appeal affirmed the trial court's discovery order sanctioning defendant $2,000 per day for every day it did not produce responsive documents and $2,000 per day for every day defendant did not search for responsive documents. Because defendant had taken two diametrically opposed positions in two matters before the Court of Appeal, judicial estoppel prevented defendant from arguing that the trial court lacked the authority to issue the monetary sanctions. Moreover, even if judicial estoppel was not applied, the Court of Appeal ruled that the trial court had properly sanctioned defendant in the instant matter. (C.A. 4th, November 9, 2017.)

Sviridov v. City of San Diego (2017) _ Cal.App.5th _ , 2017 WL 3203271: The Court of Appeal affirmed the trial court's order awarding costs to defendant in an employment action by a former police officer. Plaintiff argued on appeal that defendant was not entitled to costs based upon Williams v. Chino Valley Independent Fire Dist. (2015) 61 Cal.4th 97, 99 and Government Code section 12965(b), because there was no proof that plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit. Plaintiff also argued that, under the Public Safety Officers Procedural Bill of Rights Act (POBRA, Government Code, section 3300 et seq.), defendant could not obtain an award of costs for the defense of plaintiff's POBRA claim unless the action was frivolous or brought in bad faith. The trial court properly awarded costs to defendant because plaintiff rejected three Code of Civil Procedure section 998 statutory settlement offers and did not obtain a more favorable result. (C.A. 4th, filed July 27, 2017, published August 15, 2017.)

Elder Abuse

Stewart v. Superior Court (2017) _ Cal. App.5th _ , 2017 WL 4544658: The Court of Appeal granted a writ petition reversing the trial court's order granting summary judgment for respondent St. Mary Medical Center on causes of action alleging elder abuse, concealment and medical battery. Petitioner, a registered nurse with an active license, held the durable power of attorney to make health care decisions during the admission of the elderly patient/decedent. After petitioner withheld consent to a proposed pacemaker surgery, the hospital's risk management department determined that the doctors could continue with the pacemaker procedure despite petitioner's objection. Petitioner was not informed that the surgery would proceed. As a result of the surgery, the patient suffered cardiac arrest and brain injury, and ultimately died. The Court of Appeal ruled that elders have the right to autonomy in the medical decision-making process, and a substantial impairment of this right can constitute actionable "neglect" of an elder within the meaning of both Welfare and Institutions Code section 15610.57(a)(1), and two of the types of neglect set forth in Welfare and Institutions Code section 15610.57(a)(2). The trial court erred in granting summary adjudication in favor of respondent hospital on the elder abuse cause of action, the concealment cause of action, and the medical battery cause of action. (C.A. 4th, October 12, 2017.)

Employment

Aviles-Rodriguez v. Los Angeles Community College District (2017) _ Cal.App.5th _ , 2017 WL 3712199: The Court of Appeal reversed the trial court's order sustaining a demurrer, without leave to amend, of a complaint alleging violation of the Fair Employment Housing Act for denial of tenure and termination based on racial discrimination. In light of *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479, the Court of Appeal ruled that the one-year limitations period

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for plaintiff to timely file a Department of Fair Employment and Housing (DFEH) complaint began to run from the last day of his employment, and because plaintiff filed his DFEH complaint within that period it was timely. (C.A. 2nd, August 29, 2017.)

Diego v. City of Los Angeles (2017) _ Cal. App.5th _ , 2017 WL 4053873: The Court of Appeal reversed a jury verdict for two Hispanic police officer plaintiffs, awarding them damages of almost $4 million, in a case where they alleged discrimination following an incident where they fatally shot a person they believed was threatening them with a gun who turned out to be a young, unarmed African-American man who was later described by his family as autistic. Plaintiffs claimed that they suffered disparate treatment because they were Hispanic and the victim was African-American. They relied on evidence of another shooting incident involving a Caucasian officer and a Hispanic victim, after which the officer involved was returned to field duty. The Court of Appeal found that plaintiffs' theory was that the jury could and should consider whether plaintiffs were treated differently, not simply because of their race, but because of the race of their victim, but this theory did not support the discrimination claim that plaintiffs brought. Jurors were not given any instruction about whether and how they should consider the race of the victim in making their assessment. The absence of such an instruction permitted plaintiffs to argue that any decision by defendant based on race—including the race of the victim—was sufficient to support a verdict in their favor. That argument was inconsistent with the law. Moreover, plaintiffs failed to provide evidence sufficient to rebut defendant's proffered justification that plaintiffs were kept out of the field because of concerns about the possible consequences to the Police Department and defendant if they were involved in a future incident. The trial court erred in failing to grant a motion for a directed verdict. (C.A. 2nd, September 14, 2017.)

Duncan v. Wal-Mart Stores, Inc. (2017) _ Cal.App.5th _ , 2017 WL 5425048: The Court of Appeal modified the trial court's post-judgment order granting Hartford Accident & Indemnity Company (Hartford) a lien on plaintiff's recovery against defendant. The trial court exceeded its authority by reducing the lien amount for lost wages because plaintiff did not seek those damages against defendant. Under Labor Code section 3856's plain language and the case law applying, Hartford was entitled to a first lien on the judgment in the amount it paid plaintiff for worker's compensation benefits. Plaintiff's choice not to seek lost wages at trial did not diminish Hartford's lien rights under the workers' compensation statutory scheme. (C.A. 4th, filed November 14, 2017, published December 13, 2017.)

Kim v. Reins International California, Inc. (2017) _ Cal.App.5th _ , 2017 WL 6629408: The Court of Appeal affirmed the trial court's order granting summary judgment to defendant in a case where plaintiff sued alleging individual and class claims for wage and hour violations, and seeking civil penalties on behalf of the State of California and aggrieved employees under Labor Code section 2698 et seq., the Labor Code Private Attorneys General Act of 2004 (PAGA). Plaintiff's individual claims were ordered to arbitration. While the arbitration was pending, plaintiff accepted an offer to settle his individual claims and dismiss those claims with prejudice. The trial court properly granted summary judgment because, after he settled and dismissed his individual claims against defendant with prejudice, plaintiff no longer had standing under the PAGA as an aggrieved employee. (C.A. 2nd, December 29, 2017.)

Settlements

Sayta v. Chu (2017) _ Cal.App.5th _ , 2017 WL 5761195: The Court of Appeal vacated the trial court's order denying a motion for enforcement of a settlement agreement under Code of Civil Procedure section 664.6. Because none of the parties ever asked the trial court to retain jurisdiction to enforce the settlement, or alternatively requested it to set aside the dismissals that had been filed, the trial court lacked jurisdiction to entertain the motion, and its order was void. (C.A. 1st, November 29, 2017.)

Viatech International, Inc. v. Sporn (2017) _ Cal.App.5th _ , 2017 WL 4325342: The Court of Appeal reversed the trial court's entry of a stipulated judgment in the sum of $300,000 after the settling defendants failed to timely pay the settlement payment of $75,000. The stipulated judgment, for more than four times the amount plaintiff agreed to accept as a full settlement, was an unenforceable penalty under Civil Code section 1671 and *Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 Cal. App.4th 495 because it bore no reasonable relationship to the range of damages the parties could have anticipated would result from defendants' failure timely to pay the settlement amount. Although defendants stipulated to entry of judgment if they did not timely pay, they never admitted liability on the underlying claims or the amount of damages allegedly caused by the breach of the underlying contract. (C.A. 3rd, filed September 29, 2017, published October 30, 2017.)

Torts

Grotheer v. Escape Adventures (2017) _ Cal. App.5th _ , 2017 WL 3772580: The Court of Appeal affirmed the trial court's order granting summary judgment to defendants in an action for damages arising from the crash landing of a hot air balloon. The trial court found the action was barred by the primary assumption of risk doctrine. The Court of Appeal affirmed, but for different reasons. It ruled that the defendant balloon tour company (company) was not a common carrier subject to a heightened duty of care; the primary assumption of risk doctrine barred plaintiff's claim that the balloon pilot negligently failed to slow the balloon's descent to avoid a crash landing; and company had a duty to provide safe landing instructions to its passengers, but the undisputed evidence regarding the crash demonstrated that any failure on company's part to provide such instructions was not the cause of plaintiff's injury. (C.A. 4th, August 31, 2017.) ■

Monty A. McIntyre, Esq. is a full-time mediator, arbitrator and referee at ADR Services, Inc., who has been a California civil trial lawyer since 1980 and a member of ABOTA since 1995. Mr. McIntyre created California Case Summaries™ to help himself keep current with new California civil case law and also help attorneys and others effortlessly stay current. Further information can be found at http://montymcintyre.com/mcintyre/

COVER STORY CONTINUED FROM PAGE 1

Ginsberg, a top graduate of Columbia Law, was also told by some law firms to apply for work as a secretary. In 1960, she was refused a legal clerkship with Justice Frankfurter despite recommendations from leading law professors because he would not hire a woman for the job.

This bias, although certainly lessened, seems to be continuing into the present day. In August of 2017, former San Diego Judge Gary G. Kreep received a severe public censure from the state Commission of Judicial Performance for acts of judicial misconduct that included, among other things, commenting on the physical attractiveness of female public defenders. Although it was noted there was a significant drop in incidents of misconduct with Judge Kreep after his first year on the bench, and after he had been counseled by his supervising judges on his behavior, it did not prevent Judge Kreep from ultimately receiving the strong censure for his perceived bias.

According to one online study, at least 85% of women lawyers perceive a subtle but pervasive gender bias within the legal profession. 76% of these women reported negative bias from opposing counsel. While attorneys often become very zealous while litigating on behalf of their clients, comments and behavior towards opposing counsel should never be allowed to become personal or devolve into the gender or other personal characteristics of a counsel.

On January 12, 2016, Santa Barbara attorney Peter Bertling was ordered to pay fees and costs associated with a deposition and to contribute, as a sanction, to the Women Lawyers Association of Los Angeles Foundation for making sexist remarks to a female attorney. The opinion of U.S. Magistrate Judge Paul S. Grewal from San Francisco, addressed this overt act of gender bias by relating it to the larger issue of pervasive gender bias in the profession. (Available at https://assets.documentcloud.org/documents/2686590/Claypole-v-Monterey.pdf) In this opinion, Judge Grewal noted:

At a contentious deposition, when Plaintiff's counsel asked Bertling not to interrupt her, Bertling told her, "[D]on't raise your voice at me. It's not becoming of a woman..." There are several obvious problems with his statement but, most saliently, Bertling endorsed the stereotype that women are subject to a different standard of behavior than their fellow attorneys.

* * *

The bigger issue is that comments like Bertling's reflect and reinforce the male-dominated attitude of our profession. ... When an attorney makes these kinds of comments, "it reflects not only on the attorney's lack of professionalism, but also tarnishes the image of the entire legal profession and disgraces our system of justice."

Perceived harassment or gender bias is more likely than ever to be reported and protested. The news media has recently been exploding with stories of women coming forward to name those involved in alleged harassment and/or discrimination from the past and to speak openly about gender bias. Big name celebrities and politicians are being called to task for incidents of sexual harassment and gender discrimination that previously went unreported. One of the biggest stories has centered around movie director Harvey Weinstein, and recent lawsuits filed in both New York and California named producers and other firms and individuals with charges that they conspired to facilitate and conceal the pattern of unwanted sexual conduct by Mr. Weinstein. Although law firms Mr. Weinstein used were not named as defendants, these suits allege some lawyers played a role as co-conspirators in covering up Mr. Weinstein's alleged deeds. While some of my male friends have dismissed the Weinstein allegations and others as lacking merit or minimized the seriousness of the alleged harassment, the Weinstein cases and the fallout that is occurring in Hollywood and politics demonstrates that women are starting to act more on perceived gender bias or discrimination. This should alert all law firms to be ready to fairly assess and handle such issues as harassment, discrimination or bias, and not cover them up or deem them unimportant.

Firms should also work to address the subtle biases that prevent female and minority attorneys from achieving their highest potential. In addition to well documented retention problems, studies show women are still under-represented as equity partners, trial counsel and judges.

The American Bar Association noted in an article from July 14, 2015, that women are far less often to serve as first chair litigators than men, which they attributed to implicit bias from senior partners, clients, judges and/or opposing counsel. According to the 2017 Annual Survey from the National Association of Women Lawyers, for over a decade, women have comprised 50% of law students nationwide, yet they still make up only 19% of equity partners in law firms. (The article also addresses the continuing wage gap between male and female attorneys, with 97% of firms reporting their highest compensated partner is male.) Inherent biases and having fewer networking and mentoring opportunities have been cited as potential reasons for this inequity. I feel fortunate to have many strong mentors and an accepting, supportive environment where I work, but I hear frequently from female colleagues who still perceive, whether accurate or not, that they put up with more obstinate behavior and get less opportunity for advancement than their male co-workers. While the overwhelming majority of my experiences with opposing counsel, clients and jurists have been positive or, if negative, negative because of factors unrelated to any perceived gender bias, there are still incidents that occur to me or to my female colleagues that remind us there is still more progress to be made.

San Diego has always been a diverse and collegial area to practice law. It has made great strides in reducing harassment and bias in the legal profession, and in many ways sets an example for other jurisdictions that are much less diverse and progressive. Attorneys will undoubtably have differing opinions on the prevalence and importance of gender-related issues, but women are continuing to enter the legal field at larger numbers than ever before. As these female lawyers join our vibrant legal community in San Diego, we can continue to improve our profession by discussing and confronting any biases we may have, being conscious of the perception of bias, and ensuring female attorneys receive the same respect and professionalism provided to male attorneys. ■

New Board Member Introductions

The Update is pleased to spotlight the following new members to the SDDL Board for 2018/2019:

Christine Dixon
Dunn DeSantis Walt & Kendrick

Christine joined the SDDL Board of Directors in January 2018 for a two-year term. Christine is an attorney with Dunn DeSantis Walt & Kendrick and has focused her practice on the defense of medical and dental malpractice claims. She has practiced law for four years and, during this time, she has been a regular attender of SDDL events. Christine grew up in Northern California and obtained her undergraduate degree in her hometown at the University of the Pacific. She then moved down to San Diego to attend California Western School of Law. Christine is a new dog-mom and enjoys spending her free time with her rescue, Bodhi, as well as binge watching Netflix shows, reading, and baking.

Christine Polito
Pettit Kohn Igrassia Lutz & Dolin

Christine is a fourth year associate with Pettit Kohn Ingrassia Lutz & Dolin, where she is a member of the retail litigation team. Her practice area focuses on product liability, business litigation, and premises liability for large corporate clients. After earning her undergraduate degree from University of California, Santa Barbara, Christine attended Southwestern Law School and also studied abroad in Italy at the University of Bologna School of Law, before returning to her sunny hometown of San Diego to start her legal career. She is a current resident of Little Italy and a member of the Little Italy Association. In her spare time, she enjoys traveling, trying new restaurants, and spending time with her pug, Ollie. ■

Announcements

MEDICAL MALPRACTICE DEFENSE ATTORNEY DANIEL BELSKY APPOINTED TO THE SAN DIEGO SUPERIOR COURT BENCH

In December 2017, the Governor's Office announced that longtime San Diego defense attorney Daniel Belsky had been appointed to the Superior Court bench to fill the vacancy created by Judge Ronald S. Prager's retirement. Judge Belsky, 65, was formerly a partner at Davis, Grass, Goldstein & Finlay, a law firm that specializes in defending healthcare providers in medical malpractice cases. The firm's members have supported SDDL through the years, including current treasurer Gabriel Benrubi. Judge Belsky earned his law degree from the University of Miami School of Law and a bachelor of arts degree from Hobart College in Geneva, N.Y. Governor Jerry Brown announced this appointment along with thirty-two others across the state. SDDL is pleased to congratulate Judge Belsky on his appointment!

LA FOLLETTE, JOHNSON, DEHAAS, FESLER & AMES HAS NAMED N. BEN CRAMER A SHAREHOLDER IN THE FIRM'S SAN DIEGO OFFICE

San Diego, CA, October 3, 2017 – La Follette, Johnson, DeHaas, Fesler & Ames are delighted to announce that N. Ben Cramer has been selected to be a Shareholder effective October 1, 2017 in the San Diego office. He has been with the Firm since 2011 and was a finalist for "Top Young Attorney in San Diego" by The Daily Transcript (2010), "Rising Star" by Super Lawyers (2015, 2016, 2017), and a panelist at the ASCDC Annual Seminar in 2016. He works exclusively on civil litigation defense, with an emphasis on medical malpractice, professional liability, general liability and premises liability. Ben has obtained numerous defense verdicts/awards on behalf of various medical providers and hospitals.

Firm President, Louis "Duke" DeHaas, commented, "We are thrilled that Ben has been promoted to Shareholder. He is an exceptional attorney and person. His appointment to Shareholder is a tribute to his talents, and to the high regard we all have for him."

DUNN DESANTIS WALT & KENDRICK NAMES ZACHARIAH ROWLAND AS PARTNER

The law firm of Dunn DeSantis Walt & Kendrick is pleased to announce the addition of Zachariah Rowland as partner of the firm effective January 1, 2018. Rowland joined the growing firm in 2017. For more than ten years, he has litigated all types of commercial, employment, personal injury and construction matters on behalf of design professionals, product manufacturers, and general contractors. He also counsels clients in the areas of contract review, drafting and negotiation.

With offices in offices in San Diego, La Jolla, Irvine and Dallas, Dunn DeSantis Walt & Kendrick's services cover a broad spectrum of legal needs for its commercial clients, who range from small, local start-ups and non-profits to large, national companies. The firm's attorneys are focused on the representation of law and accounting firms, architects and engineers, general contractors and sub-contractors, transportation industry businesses, fiduciaries and other financial professionals, insurance agents and brokers, medical and healthcare professionals, manufacturers, commercial real estate developers, hotel, hospitality, retail and service industry businesses, and software and technology developers. The firm also maintains a strong commitment to its representation of public entities, charitable foundations and non-profit and religious organizations. ■

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 15 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 - Neil, Dymott, Frank, McFall, Trexler, McCabe & Hudson – 20 members

#2 - Farmer Case & Fedor – 16 members

#3 - Wilson Elser Moskowitz Edelman & Dicker LLP – 13 members

#4 - Grimm Vranjes & Greer LLP – 12 members

#5 - Winet Patrick Gayer Creighton & Hanes – 10 members

#6T - Horton, Oberrecht, Kirkpatrick & Martha, APC – 7 members

#6T - Pettit Kohn Ingrassia Lutz & Dolin – 7 members

#6T - Ryan Carvalho & White LLP – 7 members

#9T - Lorber Greenfield & Polito, LLP – 6 members

#9T - Lotz Doggett & Rawers LLP – 6 members

#9T - Wingert, Grebing, Brubaker & Juskie, LLP – 6 members

#12 - Walsh McKean Furcolo LLP – 5 members

#13T - Carroll Kelly Trotter Franzen & McKenna – 4 members

#13T - Davis Grass Goldstein & Finlay – 4 members

#13T - Hughes & Nunn, LLP – 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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