Intentional Actions of Employee Do Not Necessarily Bar Liability Coverage to Employer

By Daniella S. Ward, Esq.
Balestreri Potocki & Holmes

The California Supreme Court recently held that deliberate acts of an employee do not bar coverage under general liability policies for an employer’s liability for claims of negligent hiring, retention and supervision. See, Liberty Surplus Ins. Corp. v. Ledesma & Meyer Construction Co., Inc. (June 4, 2019) 5 Cal.5th 216.

In this significant case, Ledesma & Meyer Construction Company (“L&M”) tendered its defense to Liberty Surplus Insurance (“Liberty”) after a 11-year-old student filed a lawsuit alleging that L&M’s employee had sexually abused her while he was supervising a construction project at her school. Jane Doe alleged causes of action against L&M for negligent hiring, retention, and supervision of the employee. After agreeing to defend L&M under a reservation of rights, Liberty filed an action in Federal Court contending that it was not obligated to defend or indemnify L&M. Concentrating on the intentional acts of the employee, Liberty argued that Ms. Doe’s injury was not caused by an “incurrence” defined in the policy as an “accident.”

In its review, the California Supreme Court focused on the negligent actions of the employer, not the intentional acts of the employee, to analyze Liberty’s coverage obligations. The Court noted that L&M’s hiring, retention, and supervisory conduct were separately and distinctly tortious from the intentional acts of the employee. It is that conduct of L&M that formed the basis for coverage under the Liberty policy.

The Court poignantly noted that “employers may legitimately expect coverage for such claims under comprehensive general liability insurance policies, just as they do for other claims of negligence.” Consequently, insureds may look to their general liability policies to cover their separately tortious part in an injury despite the fact that the underlying tort action is uninsured.

Daniella Ward has been an attorney with Balestreri Potocki & Holmes since 2010, and has concentrated her law practice on the insurance aspect of construction litigation for the firm’s developers, general contractors, and subcontractor clients.

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President’s Message

By Colin M. Harrison, Esq.
WILSON GETTY LLP

Welcome to 35th year of the San Diego Defense Lawyers Association! Thank you to all those who attended our annual Installation Dinner in January, and a special thank you to Ben Howard for another great year of displaying his Emco skills. Congratulations again to our Defense Lawyer of the Year Award recipient, Peter Doody, and our Bench and Bar Award recipient, Judge Lewis (Ret.). The awards were well-deserved and both recipients delivered memorable speeches.

Two things about the speeches really stood out to me. First, Judge Lewis quoted past SDDL President, Kenneth Greenfield, stating “we are San Diego’s defense lawyers. We are an essential part of the legal system. Although we rarely, if ever, get the kind of glory that consumer attorneys get with their million dollar verdicts, we do something equally important. We provide the balance. We temper the system by rejecting the frivolous claims, and we provide the funds to respect the genuine ones.” This is something to be truly proud of.

Second, Peter Doody talked about how SDDL is more than just about our core values of Civility, Integrity, and Balance. It’s also about “creating and fostering friendships.” This is so true. Since joining this organization, I have created numerous friendships and made lasting memories. I am now extremely honored to serve as this year’s SDDL President and hope to continue creating new friendships.

This year, we will continue providing our membership with the benefits of the List Serve, our monthly CLE presentations, our annual charity golf tournament, national mock trial competition and numerous social events. We will also increase our efforts to hold joint events with the Consumer Attorneys of San Diego and other local attorney organizations. This will include social events and greater opportunities for our membership to engage in community outreach.

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MEMBERSHIP INFORMATION

Membership is open to any attorney or paralegal who is primarily engaged in the defense of civil litigants, as well as select 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: sdl.org. For questions, please call (619) 232-7734 or send email to membership@sddl.org.

Upcoming Events
March 12 Lunch-and-Learn MCLE
March 1st 1st Quarter Happy Hour
April 9 Lunch-and-Learn MCLE
May 14 Lunch-and-Learn MCLE
June 2nd Quarter Happy Hour
July Padres Tailgate
September 27 Charity Golf Tournament

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

SDDL Recognition of Law Firm Support

The Update traditionally included a list of current SDDL members at the end of each edition. As part of the SDDL Board’s proactive efforts to protect the privacy of its members, the Update will no longer include a list of current members. We have observed over the last several years an increasing number of requests from vendors and other bar organizations to hand over the contact information of our members. In each case, we have rejected the request. The SDDL Board is concerned that third parties may use other means to identify our members to target them for the marketing purposes. Because the Update is published online and searchable through Google (and other search engines), the decision has been made to discontinue the identification of the entire membership in the Update. In place of the membership list, the SDDL Board will instead recognize the top 20 law firms in regard to SDDL membership. If there are any errors in the information provided, please email evan.kalokky@sddl.org so that corrections can be made for the next edition.

#1 Tyson & Mendes – 50 members
#2T Farmer Case & Fedor – 18 members
#2T Niel, Dymott, Franck, McFall, Tepley, McCabe & Hudson – 18 members
#4 Balistreri Potecki & Holmes – 17 members
#5 Wilson Elser Moskowitz Edelman & Dicker LLP – 15 members
#6T Grimm Vanries & Greer LLP – 12 members
#6T Wisniewski, Gayer, Crollton & Hodges – 12 members
#8 Horton, Obernicht, Kirkpatrick & Martha, APC – 10 members
#9 Loehr Greenfield & Polito, LLP – 9 members
#9 Pettit Koh Ingrassia Lust & Dolin – 9 members
#11T Lincoln, Gustafson & Cercos – 7 members
#11T Ryan Carvalho LLP – 7 members
#13T Dunn DeSantis Walt & Kendrcik, LLP – 6 members
#13T Lota Doggett & Rawers LLP – 6 members
#13T Wingert, Grebing, Brubaker & Justice, LLP – 6 members
#16 Walsh McKean Purcell LLP – 5 members
#17T Carroll Kelly Trotter Fransen & McKenna – 4 members
#17T Davis Gross Goldstein & Finlay – 4 members
#17T Higgins, Fletcher & Mack – 4 members
#17T Hughes & Nunn, LLP – 4 members
#17T Klinekrist, PC – 4 members
#17T LaFollette Johnson DeHau Fesler & Amun – 4 members
#17T Tumer Shermam – 4 members
#17T Wolfenstein Rolfe – 4 members

2018 SDDL Board of Directors (from left to right): Patrick Keane, Christine Dixon, Evan Kalokky, Vanessa Whirl, Colin Harrison, Christine Polito, Zachariah Rowland, Laura Dulan, Gabriel Benrubbi, Dianne Rodri (Executive Director), Ken Oram and Eric Dolez. (not pictured)
California Supreme Court Does the Math on Overtime Calculations for Flat Sum Bonuses

By Jeremy Freedman
TYSON & MENDES

In responding to mathematical questions, often hear attorneys respond “I did not go to law school to do math.” In actual practice, however, this is a misconception and a major mistake. Like it or not, successful attorneys are in the business of mathematics. In almost every case, regardless of liability, the calculation of damages presented to a jury, mediator, or arbitrator is highly disputed. While not the only qualification, successful attorneys know their client’s “number.” More importantly, they are able to explain how they calculated that number and provide a compelling explanation for such calculation that leaves in the theme of their case.

In employment cases, by knowing wage and hour violations of the California Labor Code and Private Attorneys General Act (“PAGA”), determining damages or whether a violation in fact occurred is wholly based on the method of mathematical calculation. The calculation can often be highly contentious in class action litigation. This may be more prevalent with regard to larger classes where calculations are based on a small sample of payroll records, the method of sampling, and the method and/or quality of how the employee records are kept by the employer. For plaintiffs, the method of calculation and/or sampling can establish liability and bolster damages into multi-million dollar settlements or jury verdicts based on back wages, unpaid overtime, and penalties under the Labor Code and PAGA, to name a few. For employers, it provides ample grounds to contest liability, argue damages, and contest plaintiff’s method of calculating damages. In either event, the process is likely to entail extremely complicated, intricate and detailed conversations with opposing counsel regarding mathematical calculations related to liability and damages.

Alvarado v. Dart Container Corp. of California
California has a comprehensive legislation scheme under the Labor Code. Over the past several decades, the courts have provided important guidance regarding calculations pursuant to the Labor Code and PAGA.

Where the courts have not been afforded the opportunity to weigh in, the California Division of Labor Standards Enforcement (“DLSE”) manual has attempted to fill in the gap and provide guidance. See, The 2002 Update of the DLSE Enforcement Policies and Interpretations Manual (Revised April 2017). Despite this progress, ambiguity, uncertainty, and therefore opportunity for error exist for both plaintiffs and employers.

The DLSE manual, however, has not been viewed favorably by the courts. Indeed, the Supreme Court of California held in Tidewater Marine Western, Inc. v. Bradshaw that the DLSE manual contains rogue and “underground regulations.” (Bd., 14 Cal.4th 557, 571.) Despite the holding in Tidewater, employers and plaintiffs alike continue to refer to, cite, and argue the applicability and/or inapplicability of the DLSE manual based on the method of mathematical calculation. The calculation can often be highly contentious in class action litigation. This may be more prevalent with regard to larger classes where calculations are based on a small sample of payroll records, the method of sampling, and the method and/or quality of how the employee records are kept by the employer. For plaintiffs, the method of calculation and/or sampling can establish liability and bolster damages into multi-million dollar settlements or jury verdicts based on back wages, unpaid overtime, and penalties under the Labor Code and PAGA, to name a few. For employers, it provides ample grounds to contest liability, argue damages, and contest plaintiff’s method of calculating damages. In either event, the process is likely to entail extremely complicated, intricate and detailed conversations with opposing counsel regarding mathematical calculations related to liability and damages.

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California Social Events

SDDL Social Events

SDDL and CASD May Mixer at Bar Basic
On May 17, 2018, SDDL co-hosted the annual Joint Mixer with the Consumer Attorneys of San Diego (CASD) at Bar Basic in San Diego. As it is always the case for this annual event, we had a good turnout from members of both of these professional organizations. Fun times were had by all and it proved to be a great opportunity to share in civility and interactions with our colleagues on the other side. Keep a look-out for upcoming social events to make the most of your SDDL membership, and do not forget to provide feedback on so that we can continue to tailor these events for membership.

SDDL Second Quarter Happy Hour at Hotel Republic
On June 29, 2018, SDDL hosted its second quarter happy hour at the Vero Club Lounge located at the Hotel Republic in San Diego. This fun event was graciously sponsored by Vertient Legal Solutions, and members enjoyed food and drinks while taking in views of downtown from the rooftop terrace. SDDL is proud to provide a variety of both social and educational experiences for its members, and the quarterly happy hours are great opportunities to mingle with your peers from across various practice areas. Thank you for all those who attended to make this a memorable occasion and we hope to see you again at future events!

7th Annual SDDL Tailgate and Padres Evening
On August 10, 2018, SDDL hosted a pre-game tailgate at the Mission Brewery and then members and their families watched the Padres beat the Philadelphia Phillies at Petco Park. The tailgating was highlighted by a delicious taco bar from Paterno Tacos and a bevy of craft beers from Mission Brewery. The seventh iteration of this well-attended annual event was another roaring success and our members helped cheer the Padres to a shut-out win. Thank you to all those members who took this opportunity to socialize with their families and friends and enjoy a lovely night out downtown. We would also like to thank U.S. Legal Support for graciously sponsoring the event and we hope to see you all again next summer!

SDSL Third Quarter North County Happy Hour at Searssucker Del Mar
On September 12, 2018, SDDL was pleased to host its third quarter happy hour – tailored to North County members – at Searssucker Del Mar. This outstanding event was sponsored by Centex Legal Services and provided an upscale locale for members from around the county to socialize while pertaking in delicious food and drinks. The atmosphere was amazing and the board was thrilled to put on an event close to many of our members who work in North County. Thank you to Centex for graciously hosting this event and the members who made it such a fun occasion. Keep an eye out for future social events to help achieve a work-life balance that is so important to our profession.
in a pay period from step one with the overtime premium from step three.

Alvarado, however, favored a different calculation. As one might expect, Alvarado’s method of calculation resulted in slightly higher overtime wages as follows:
1. Calculate Overtime Wages Attributable to Hourly Wages: Multiply the employee’s straight time pay by 1.5, and multiply that by the number of hours of overtime worked.  
2. Calculate Overtime Wages Attributable to the Flat Rate Bonus: a) Divide the flat rate bonus by the total number of regular hours worked in the pay period.  
   b) Multiply the result in subsection (a) by 1.5 and then multiply by the number of overtime hours worked in the pay period.  
3. Calculate Overtime Pay: Add the results from steps 1 and 2 together.

In opposing Dart’s motion for summary judgment, Alvarado argued that his method of calculating overtime was consistent with the holding in Marin. (Supra, 169 Cal.App.4th 804.) In Marin, the California Supreme Court laid out the proper method for calculating overtime wages as follows: An employee receives a one-time longevity bonus. Alvarado further argued, the DLSE enforcement policy reflects an DLSE’s knowledge, expertise, and expertise, such that its policies should be given weight.

The trial court granted Dart’s motion for summary judgment. In doing so, the trial court agreed there was no valid state authority on point. The DLSE enforcement policy was void. The Marin case upon which Alvarado relied was distinguishable from this case. As such, the trial court held Federal Regulations on point must be followed. The Court of Appeal determined adopting the trial court’s reasoning and plaintiff appealed to the California Supreme Court.

On appeal, the California Supreme Court considered how to calculate an employee’s overtime rate of pay when the employee has earned a flat rate bonus. Of significance is the Court concurred the proper division to calculate the per hour value of the flat rate bonus. The Court considered three alternatives: (1) the number of hours the employee is actually worked during the pay period, including overtime hours; (2) the number of non-overtime hours the employee worked during the pay period; and (3) the number of non-overtime hours (40 hours)

that exist in the pay period, regardless of the number of hours actually worked.

The Supreme Court’s Calculated Decision
In California, the requirements imposed by the Labor Code and California Wage Order No. 1 regarding the payment and calculations of overtime are more protective than federal law. (See, Tidewater, supra, 14 Cal.4th at 566–68. See also, Martindale v. Royal Packing Company (2000) 22 Cal.4th 575, 592, Skifline Homes, Inc. v. Department of Industrial Relations (1993) 165 Cal.App.3d 239, 250–51.) Furthermore, state labor laws must be liberally construed in favor of worker protection. (See e.g., Mendosa v. Nordstrom, Inc. (2017) 3 Cal.5th 1074, 1087.) With this legislative framework, it should not come as a surprise that the Supreme Court agreed with plaintiff and overturned the Court of Appeal and trial court decisions. Because the issue was expressly resolved in plaintiff’s favor by the DLSE manual, the Court first addressed whether the DLSE manual is controlling and, if so, whether a court can nonetheless agree with and follow the DLSE enforcement policy. In Tidewater, the Supreme Court previously held the DLSE manual contained void underground regulations because they failed to comply with the APA. (Tidewater, supra, 14 Cal.4th at 571.) The term void, however, does not necessarily mean wrong in this context. The Court explained that, where the policy is merely interpretive of a governing statute or regulation, it should not be rejected as void just because it failed to follow the APA. In Yamaha, 20 months after Tidewater, the Supreme Court noted the DLSE’s underground interpretive regulation should not be afforded any special weight or deference. (See, Yamaha Corp. of America v. State Bd. of Equalization (1996) 19 Cal.4th 3, 11 and 13–14.) However, it is something a court may consider, if persuaded, may adopt the DLSE’s interpretation on its own.

In response to the Supreme Court’s holding in Yamaha, the DLSE added, where appropriate, references to prior case law that supported the various enforcement policies the manual set forth. The DLSE did not, however, disclaim enforcement policies in the DLSE manual that were not supported by prior case law and that were void underground regulations. In this respect, the Supreme Court held enforcement policies that do not comply with the APA are void underground regulations and not entitled to any special deference. However, the interpretation in the enforcement policy may still be valid. So long as the court exercises its independent judgment, it may consider and adopt the DLSE’s interpretation and reasoning in support of its policy if the court is persuaded it is correct. In doing so, a court may consider the regulation and specific competence of the DLSE and the fact the DLSE manual is a “formal compilation that evidences considerable deliberation at the highest policy making level.”

Applying these principles to the case at hand, the Supreme Court held the applicable DLSE policy section 492.4.2 is void under underground regulation. However, the Court ultimately agreed with the DLSE’s interpretation on how to calculate overtime pay where the employer receives a flat rate bonus.

In considering the three alternatives discussed above, the Supreme Court held that the proper divisor is the number of non-overtime hours actually worked by the employee during the pay period. The Court reasoned that if the divisor were based on 40 hours in a week, a part time employee’s overtime pay would be diluted by the number of hours not worked in a 40-hour work week. Further, if the divisor included all hours worked, including overtime hours, the employee’s overtime pay would be diluted by working additional overtime hours. Either of these two options would thus contradict the State’s labor laws which must be liberally construed in favor of worker protection.

Takeaway
Where the DLSE manual is not supported by prior case law, fertile ground exists for protracted litigation by both plaintiff and defendants. To this end, it is important to own your client’s number; you must become an expert in this number and the method by which it is calculated. The Supreme Court’s holding in Alvarado v. Dart Container Corp. Of California warns that calculations which result in a reduction of pay to California workers will come under strict scrutiny. This is so even where the method of calculation is based on Federal Regulation and the result of “formal compilation that evidences considerable deliberation at the highest policy making level.” It is therefore, critical to keep in mind while formulating your method of calculating wages that California labor laws will be liberally construed in favor of its workers.
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Judicate West is proud to offer the services of several experienced and talented neutrals, including:

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Hon. Linda Quinn (Ret.)
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Maureen Summers, Esq.

“Practical Cybersecurity for Law Firms” by William Kammer

On September 11, 2018, SDDL presented a well-attended MCLE regarding cybersecurity presented by William N. Kammer, a partner of Soloness Ward, Sneed & Smith, LLP. The presentation was graciously hosted by Petersen Court Reporting and provided SDDL members with insights into practical measures of cybersecurity both at home and in the office.

Mr. Kammer was able to cover a variety of important topics in the broad field of cybersecurity, including measures to protect oneself while using public Wi-Fi networks. As new issues emerge daily in the field of cybersecurity, Mr. Kammer surveyed the common threats and hot topics including hacking, passwords, and password managers, mobile device security, VPs, and social media risks.

Mr. Kammer has specialized in technology, telecommunications, and business trials with over twenty years of experience with electronic discovery matters. He heads his firm’s Electronic Discovery and ESI Services Group and advises clients, attorneys, and litigants about eDiscovery issues. Mr. Kammer is also a founder of and chairs the steering committee of the San Diego ESI Forum, and frequently lectures and writes about electronic discovery, cybersecurity and internet matters, and trial techniques. He has served as a court-appointed eDiscovery consultant as well as a stipulated expert for mobile phone and social media discovery.

SDDL thanks Mr. Kammer and Peterson Court Reporting for their continued support of our organization and for putting on this informative and practical lunch-and-learn seminar.

“Greatest Hits of Legal Malpractice” by Deborah Wolfe and Kevin DeSantis

On October 9, 2018, SDDL presented an MCLE with insights into legal malpractice from both defense and plaintiff’s perspectives. The well-attended presentation was hosted by Petersen Court Reporting and provided SDDL members with a wealth of information, including practical tips for issues such as conflict waivers and when an attorney-client relationship has been established.

Mr. Wolfe and Mr. DeSantis are both seasoned legal malpractice attorneys and provided SDDL members with their unique perspectives from both sides of the Bar. This interesting and well-received seminar included anecdotes from their collective 67 years of practice on common mistakes attorneys make that constitute malpractice, as well as what attorneys should do when facing the threat of a legal malpractice lawsuit.

Deborah Wolfe is a trial attorney with over thirty years of experience. She has been certified as a legal specialist in Civil Trial Advocacy and Legal Malpractice Law, and she is a member of the American Board of Trial Advocates. Ms. Wolfe has been named Trial Lawyer of the Year twice by the Consumer Attorneys of San Diego and Lawyer of the Year by California Lawyer Magazine. She has also served as chair of the California State Bar Advisory Commission on Legal Malpractice.

Kevin DeSantis is also a trial attorney in San Diego at Dunn DeSantis Walt & Kendrick LLP with over thirty years of experience. He too has been certified as a legal specialist in Legal Malpractice Law. In addition to legal malpractice work, Mr. DeSantis represents licensed professionals, transportation companies, and businesses facing employment issues. Mr. DeSantis holds a Martindale-Hubbell AV Preeminent Rating and has been selected by peers for inclusion in the 2017-2019 Best Lawyers in America in the fields of Legal Malpractice Law – Defendants and Professional Malpractice Law – Defendants.

SDDL sincerely thanks both presenters and Petersen Court Reporting for this engaging and informative CLE.
Effective Deposition Strategies
On May 8, 2018, SDDL, members were treated to a presentation by Brian A. Rawers entitled “So You Want to Take a Deposition... The Ins and Outs of Taking a Deposition.” Mr. Rawers, a trial attorney in San Diego for over thirty years, shared deposition insights gleaned from his vast litigation experience with over sixty jury trials and a multitude of legal areas including Professional Malpractice, Sexual Assault, Wrongful Termination, Construction Defect, Environmental Law, Product Liability, Bar Fights, Slip and Fall, Auto and other General Liability Areas. Since August 2015, Mr. Rawers has been General Counsel for Lawyers Mutual Insurance Company He is a former SDDL President (2010) and former San Diego Chapter ABOTA President (2013).

Mr. Rawers is a long-time supporter of SDDL and natural speaker who has given prior Brown Bag Luncheon presentations on various litigation topics, such as “Effective Opening Statements,” “Effective Closing Arguments,” “Everything You Want To Know About Taking a Deposition,” and “Ten Big Mistakes in the Practice of Law.” SDDL was pleased to welcome Mr. Rawers back for another highly informative CLE, which included specific methods to improve both taking and defending depositions. This well-received CLE was a great opportunity for members to obtain practical deposition skills. Our heartfelt thanks to Mr. Rawers for his presentation and continued support of SDDL.

Accident Reconstruction by David Daren of Momentum Engineering
On June 12, 2018, SDDL presented a well-attended MCLE regarding vehicle forensics presented by David Daren, Senior Engineer at Momentum Engineering. The presentation was graciously hosted by Peterson Court Reporting and provided SDDL members with a great opportunity to learn from an expert in the field of accident reconstruction.

Mr. Daren provided members with practical tips for how reconstructions and related efforts can be used to better evaluate both liability and damages in a variety of accident cases. Attendees were surprised to learn of the bevy of available information to those who utilize modern techniques such as the interpretation of surveillance videos and electronic data recorders. Mr. Daren also discussed a timeline for gathering evidence and impressed members on the importance of early investigation. Accident reconstruction is another important tool that defense attorneys can—and should make use of both prior to and during trial. SDDL thanks Momentum Engineering and Peterson Court Reporting for their continued support and for putting on this informative and interesting lunch-and-learn seminar.

Case Law and Legislative Update by Mandy McIntyre
On July 9, 2018, SDDL presented an interesting lunch-and-learn seminar provided by Mandy McIntyre and hosted by Peterson Court Reporting. Ms. McIntyre is a full-time mediator, arbitrator and referee atADR Services, Inc., who has been a California civil trial lawyer since 1999 and a member of ABOTA since 1995. He is a tremendous supporter of SDDL, including providing appellate law summaries for the Update. This MCLE was a great opportunity for members to become familiar with recent case and legislative updates relevant to the defense bar. Ms. McIntyre was able to cover a wide variety of appellate decisions during this informative lunchtime MCLE. As always, SDDL thanks those who attended this seminar, as well as Ms. McIntyre and Peterson Court Reporting for their continued contributions to our organization.

Navigating the Juror Maze by Trent Kelsey
On August 14, 2018, SDDL presented a well-received lunchtime MCLE provided by Trent Kelsey of Magna Legal and hosted by Centrat Legal Services. Our members enjoyed food and beverages while learning about the all-important topics of the juror selection and jury decision-making process. Mr. Kelsey imparted valuable insight that Magna Legal has obtained through having worked on hundreds of jury cases throughout the United States. Members also received practical tips on how to avoid jurors from being overwhelmed by the amount and complexity of the information they are inundated with at trial. In addition, the CLE included discussion of jury psychology and the key issues that determine how jurors make verdict determinations. SDDL thanks those who attended this hour-long seminar, as well as Magna Legal for putting on such an interesting presentation.

The Opied Crisis: What It Is And Where We Are
The evening of August 20, 2018, SDDL offered a MCLE with two hours of substance abuse credits which was presented by Dr. Clark Smith and hosted by Peterson Court Reporting. Dr. Smith is a Board-certified forensic psychiatrist and addiction medicine specialist who has been involved with the treatment of individuals with addictions to opioid, benzodiazepine and other controlled substances. Dr. Smith has testified in deposition and trial on the subject of opioid dependence and addiction. Our members enjoyed food and beverages while learning about this important topic that is affecting all aspects of society. Dr. Smith provided valuable insight into his experience with opioid dependence and treatment, with other counselors and professionals engaged in this time-sensitive topic. SDDL is proud to put on a diverse series of MCLEs and thanks Dr. Smith and Peterson for their support, as well as all of the members who attended this important seminar.

National Labor Relations Board: Google Employee Memo Against Diversity Initiatives Was Not Protected Activity
By Kathryn Back
DUMMIE BUCHHOLZ & TRAPP

The National Labor Relations Board ("NLRB") issued an Advice Memorandum in 2018 regarding the much publicized memorandum written by a Google employee, James Damore, whereby he opposed Google’s diversity initiatives and made statements regarding purported differences between men and women. The NLRB determined that Google did not violate the law in discharging the employee as his memorandum was not a "protected activity".

Background
Damore, a Google software engineer, was terminated in the summer of 2017 after circulating a memorandum regarding Google’s programs targeted for women employees. Damore, who started working for Google in December 2013, began attending summits, trainings and meetings regarding Google’s extensive diversity and inclusion programs. In early June 2017, he expressed verbal opposition to diversity initiatives during summit breakout sessions and in conversation with an HR manager. On July 2, 2017, Damore posted a memorandum outlining concerns about the effectiveness and necessity of Google’s programs, which was shared with other employees through August 3, 2017.

The memorandum, among other things, (1) that women were more prone to ‘harmavism’ which Damore believed may contribute to a lower number of women in high stress jobs, and (2) that men demonstrated a greater variance in IQ, thus an employee’s preference to hire from the top may result in a candidate pool with fewer females. Numerous employees complained to Google’s HR department regarding the memorandum and two female engineering candidates withdrew from consideration explicitly citing the memorandum as their reason for withdrawal.

Google determined certain portions of the memorandum were in violation of its harassment and discrimination policies, and the company decided to terminate Damore. Google also prepared talking points stating the decision was based solely on the part of the memorandum that generalizes and advances stereotypes about women versus men.

The Need to Balance Employees and Employer’s Rights
The NLRB determined that Damore’s memo contained both protected and unprotected statements. The NLRB further acknowledged its duty to balance an employee’s protected rights against an employer’s workplace rules and managerial efforts. The NLRB noted a particular deference to an employer’s efforts to enforce lawful anti-discrimination and anti-harassment policies, especially considering an employee’s duty to comply with state and federal equal employment opportunity laws.

Portions of Memo Were Not Protected
The conduct of an employee is not protected where it significantly disrupts work processes, creates a hostile work environment, or constitutes racial or sexual discrimination or harassment. In the present action, the NLRB determined that Damore’s use of stereotypes based on purported biological differences was not protected. According to the NLRB, numerous employee complaints regarding the discriminatory, offensive and unsafe nature of the memorandum demonstrated the workplace disruptions caused by the memorandum. Additionally, two female engineering candidates withdrew from consideration due to the memorandum, and the NLRB determined that the statements regarding biological differences between the sexes were so harmful, discriminatory, and disruptive as to be unprotected.

Impact of the Advice Memorandum
The NLRB found that Google did not violate federal law by terminating the employee based solely on unprotected conduct. Google’s explicit reasoning for the termination arising from explicit portions of the memorandum likely made the NLRB’s analysis easier. Specifically, Google conceded that the memorandum contained protected and unprotected statements. It acknowledged accepting different political views, but could not tolerate advancing gender stereotypes. In discussing the reasons for Damore’s termination, Google expressed that it was only related to the unprotected statements which were disrupting the workplace and putting Google at risk for allegations of a hostile work environment or failure to prevent discrimination or harassment.

Employees can learn from Google in this situation by clearly delineating the reasons for discipline or termination. Specifically pointing to unprotected activity as the sole reason for such employment actions can allow employers to manage employees consistent with the employees’ duty to comply with federal and state laws.
Preparing for and Mediating the Single Plaintiff Employment Case: Strategies for Defense Counsel

By Ray Ariano
ADR Services

Unlike many other types of litigation, employment matters are personal and the stakes can be significant. Emotions often run high. Plaintiff truly believes that he or she has been wronged and wants retribution. The employer is often equally steadfast in its position. The employer wants to eliminate the possibility of negative publicity, disruption to its workforce, loss of key employees, and financial costs. Moreover, the employer does not want to set a “precedent” that will encourage future lawsuits.

The mediation setting affords Plaintiff an opportunity to vent to a neutral third party and, for Defendant, a chance to explain the reasons for the employment actions taken. Mediation of an employment case also offers the prospect for crafting creative solutions beyond compensatory damages. This article addresses strategies that Defense counsel might consider for mediating the single Plaintiff employment case.

Preparing for the Mediation

Determining when the mediation should occur is of significance. Defense counsel has a clear advantage when it comes to assessing the merits of the case early on. Almost invariably, most of the key witnesses, with the exception of Plaintiff, are present or former employees of Defendant and immediately accessible to defense counsel. Thus, defense counsel has the opportunity to evaluate the credibility of witnesses, anticipate testimony, and documentary evidence in making an initial assessment of the substance of Plaintiff's claims. It is at least at this stage to liability.

Conversely, Plaintiff's counsel, in making an early assessment, must rely solely on the client, the client's own documents and perhaps a few favorable witnesses.

Notwithstanding this advantage, it is rare that defense counsel can intelligently assess the merits of the case without at least taking the Plaintiff's deposition, by far the most critical event in the discovery process. From the defense perspective, it is rare that a mediation will go forward before that happens, unless it appears that liability is crystal clear and that the case can only worsen for Defendant if discovery progresses.

There are a number of factors to be considered in making the decision as to when the mediation takes place. Is there enough information for Defense counsel to consider it to be able to evaluate liability and damages? Is this the type of case that will result in unwanted publicity should the case proceed to trial? Is Plaintiff still employed with the company? Should a motion for summary judgment be filed in advance of the mediation?

If attorneys are trying to close the case, does it make sense to get to mediation as quickly as possible? Finally, there must be consideration of how an unsuccessful mediation might impact the case.

While 1 may be accused by fellow mediators of heresy, I do believe that there are times when the goal of a mediation may not be resolution in just one session, but rather to educate Plaintiff to weaknesses in his or her case or strength of the defense case, so that Plaintiff will have to step back and re-evaluate his or her position. Less frequently, Defendant uses the first session to underscore how difficult it will be for Plaintiff should the case proceed to trial and to make it clear that nothing more than nuisance value will ever be offered. Typically, however, the goal of mediation is to resolve the case on the best terms possible, and if not at that session, to place the case in a better posture for future resolution.

Assuming that this is true, the odds of achieving a successful mediation increase by using a mediator experienced in employment litigation and applicable laws relating to the issues at hand. While a mediator doesn’t necessarily place a value on the case, a complete understanding of employment law may affect the mediator's view of the case and what the mediator communicates to Plaintiff's team, beyond mere numbers. More importantly, it affairs the opportunity to convey to Plaintiff and Plaintiff's attorney weaknesses in their case which they may not appreciate.

In those instances where the mediator is not totally conversant in employment law, it is imperative that the mediation brief fully outline your position and the law. This will allow the mediator to be armed with the necessary data in order to change your adversary’s mindset. While views may differ, I would also suggest that the information in the mediation brief be communicated to Plaintiff’s counsel, so that counsel will have an opportunity to digest this information and confer with the client prior to the session.

This is especially important in those instances where Plaintiff’s counsel is inexperienced in this area of the law. If there is factual information that it is to be kept confidential from Plaintiff, consider filing two separate briefs: one for the mediator and one for Plaintiff. Finally, if a motion for summary judgment is viable, it should be filed in advance of the mediation.

At the Mediation

Prior to the mediation the defense team will have discussed a best and worst case scenario should the case proceed to trial. The defense team will set goals for the mediation, including upper range for settlement. Likewise, Plaintiff comes into the immediately to cell phone calls for repairs and maintenance needed at the ranches, farms and dairies operated by defendants. There was also conflicting evidence about whether the driver was required to use the company-owned vehicle, which contained tools and spare parts, at all times so he could respond quickly to call for repairs at defendants’ various locations. Based on this evidence and other details about the driver’s job, the Court ruled that a reasonable trier of fact could find the driver was acting within the scope of his employment when the accident occurred.

(C.A. 5th, December 20, 2018.)

Willisville v. Mammoth Mountain Ski Area, Inc (2018) .... Cal. App. 5th .... 2018 WL 1354481. The Court of Appeal affirmed the trial court’s order granting summary judgment for defendant in an action for serious personal injury as a result of a snowboarder colliding with a snowcat pulling a snow-grooming tilter. The Court ruled that the trial court did not abuse its discretion in excluding expert declarations offered by plaintiff in opposition to the motion for summary judgment. Moreover, although snowcats and snow-grooming tilers are capable of causing catastrophic injury, the Court of Appeal ruled that this equipment is an inherent part of the sport of snowboarding, and the way in which the snowcat was operated in this case did not rise to the level of gross negligence. (C.A. 1st, filed June 27, 2018, published July 18, 2018.)

Mandy A. McFetridge, Esq is a full-time mediator, arbitrator and referee at ADR Services, Inc., who has been a California civil trial lawyer since 1990 and a member of ABOTA since 1995. Mr. McFetridge created California Case Summaries™ to help himself keep current with new California civil law and also help attorneys and others effectively stay current. Further information can be found at http://montymcfortridge.com/mcftridge/
consisting of ultimate facts and conclusions that are unsupported by factual detail and reasoned explanation, even if it is admitted and undisputed. Because the record must be read as a whole, it may be more accurate to say that the three judges were more interested in their own theories of negligence, summary judgment was improper. (C.A. 3d, filed May 4, 2018, published May 21, 2018.)

Settlement

The Court of Appeal affirmed in part and reversed in part the trial court’s order granting defendants’ attorneys’ in an underlying matter that was settled by APL was filed as a complaint to meet their burden on summary judgment. (C.A. 2d, filed October 1, 2018, published October 18, 2018.)

The Court of Appeal reversed in part and affirmed in part the trial court’s order sustaining defendant’s demurrer, without leave to amend, to plaintiffs’ complaint alleging wrongful death and other torts. On March 14, 2018, at approximately 5:30 a.m., defendant left his residence in Corona to ride his mountain bike up Santiago Peak in the California National Forest. The bike would be approximately 55 miles, and defendant was scheduled to arrive back home at 2:00 p.m. When defendant did not return, his wife (one of the plaintiffs) called defendant and learned he had fallen off his bike and appeared to be disoriented. Plaintiff called defendant to request a search for her husband. Defendant did not return to search that night. After learning of the fact, the wife asked friends to search for her husband. Very early the next morning, a friend of plaintiffs found defendant who had died from hypothermia. The Court ruled that plaintiffs’ complaint alleged sufficient facts to state causes of action for wrongful death, negligence, and negligent infliction of emotional distress. However, it affirmed the demurrer as to the cause of action alleging deprivation of constitutional rights. (C.A. 4th, November 20, 2018.)

The Court of Appeal affirmed the trial court’s order sustaining a demurrer, without leave to amend, in an action for violation of unfair competition law. He also sustained the cause of action for negligent interference caused by a user using the FaceTime application on his iPhone who crashed into plaintiff’s car on a Texas highway. The Court ruled that an individual did not have a duty of care. Considering the factors set forth in Randell v. Chrissis (1998) 49 Cal. 2d, the court concluded that there was not a “close” connection between defendant’s conduct and the plaintiff’s injuries and that the extent of the burden to defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach would be too great if a duty were recognized. The Court also concluded that it was not foreseeable that defendant’s design of the iPhone constituted a proximate cause of the injuries they suffered. (C.A. 4th, December 14, 2018.)

The Court reversed the trial court’s order granting summary judgment for defendant in a personal injury case where defendant was sued under vicarious liability. The driver of the car that hit plaintiff was employed by defendant to schedule deposits. She was talking on a cell phone with a court reporter who worked for the defendant’s civil counterpart, the time of the accident. Both the driver and the court reporter testified the call was a personal call and did not relate to court reporting work. Plaintiff could not offer any evidence that he had been operating within the scope of his employment at the time of the accident. Plaintiff attacked the driver’s credibility, but this was not enough to defeat the summary judgment because Code section 4490 provides that “summary judgment shall not be denied on grounds of credibility.” (C.A. 4th, September 23, 2018.)

The Court of Appeal reversed in part and affirmed in part the trial court’s order granting summary judgment to defendant in a case where plaintiff sued for injuries caused by a black widow spider bite while eating lunch at defendant’s restaurant. The Court ruled that defendant had a duty to exercise reasonable care in relation to black widow spiders that pose a risk of injury to patrons of its premises. On March 14, 2018, at approximately 6:30 a.m., defendant left his residence in Corona to ride his mountain bike up Santiago Peak in the California National Forest. The bike would be approximately 55 miles, and defendant was scheduled to arrive back home at 2:00 p.m. When defendant did not return, his wife (one of the plaintiffs) called defendant and learned he had fallen off his bike and appeared to be disoriented. Plaintiff called defendant to request a search for her husband. Defendant did not return to search that night. After learning of the fact, the wife asked friends to search for her husband. Very early the next morning, a friend of plaintiffs found defendant who had died from hypothermia. The Court ruled that plaintiffs’ complaint alleged sufficient facts to state causes of action for wrongful death, negligence, and negligent infliction of emotional distress. However, it affirmed the demurrer as to the cause of action alleging deprivation of constitutional rights. (C.A. 4th, August 13, 2018.)

The Court reversed the trial court’s summary judgment against plaintiff on the basis that he had no standing under Code of Civil Procedure section 377.60 to be a party plaintiff in a wrongful death action. Defendant died after an encounter with a deputy sheriff at the time of the accident. Both the driver and the court reporter testified the call was a personal call and did not relate to court reporting work. Plaintiff could not offer any evidence that he had been operating within the scope of his employment at the time of the accident. Plaintiff attacked the driver’s credibility, but this was not enough to defeat the summary judgment because Code section 4490 provides that “summary judgment shall not be denied on grounds of credibility.” (C.A. 4th, September 23, 2018.)

The Court reversed the trial court’s order granting summary judgment in favor of two corporation defendants in a personal injury action. Plaintiff was injured while a passenger in a golf cart involved in a rollover accident. He sued the driver (the father), the corporation that employed the driver, and an affiliated corporation that owned the golf course. The two corporation defendants required the driver to be on call 24 hours a day, seven days a week to respond to mediation with a goal and a bottom line. If it happens that the Plaintiff’s bottom line and Defendant’s upper range coincide, or are fairly close, the case will settle. It is where there is a large gap between the two ranges that the work needs to be done. Defendant has both monetary and nonmonetary tools at his disposal. If Plaintiff is still an employee, it is particularly important to allow the opportunity to tell his or her story, and that Defendant’s representative literally has the opportunity to have his/her representative’s has a chance to explain the employment actions taken. Often, this is the first time Plaintiff has heard why Defendant did what they did, and the parties can try to proceed towards bringing a settlement gap. In doing this, it is important that the “communicator” of the explanation is articulate, evokes sympathy for Plaintiff and Plaintiff’s position, and convinces as to the reasons for the actions taken.

The “communicator” should be someone likely to be well received by Plaintiff. Sometimes all that is needed for an existing employee to agree to resolution is the explanation and minor job alterations. Non-monetary tools that can be utilized include: changes as letters of the findings of the parties, changes in policy or practice. With respect to monetary offers, the typical mediation involves a series of demands and offers that hopefully results in an agreement monetary settlement. Before the mediation, there may have been demands or offers that have been made, thereby setting parameters. More often, the parties have not engaged in serious dialogue concerning settlement. At the settlement conference, could negotiations begin? It is often said that first offer should be “in the ballpark.” While this may be true in some situations, most Plaintiff lawyers expect to start with a low initial offer, and have told their clients that is what to be expected. An initial offer which is in the ballpark may establish unrealistic expectations on the part of the Plaintiff and hinder settlement possibilities. Typically Plaintiff’s demand will not be in the ballpark either. So it is important that the initial offer be responsive to Defendant’s unsuccessful demand. But Defendant has ample room to maneuver. The caveat to this is that the offer must not be so low that it is insulting and causes Plaintiff to either leave the mediation or make an equally unreasonable counter.

Bottom Line


Case No.: 2018-00015794-CU-MC-CJC

Judge: Hon. Gregory Glass

Type of Action: Medical Malpractice/ Wrongful Death

Type of Trial: Jury, 9 days

Verdict: Defense

Attorneys for Plaintiff: Roland Colton, The Law Offices of Roland Colton

Attorneys for Defendant: Dr. Scott Barber and Ms. Beckel, Wilton Getty LLP

Summary: Plaintiff Decedent presented to the Hoag Hospital ED complaining of stomach pain and shortness of breath. Plaintiff alleged he aspirated the oral contrast which had been administered for an x-ray related to his chronic respiratory insufficiency and was reanimated by Dr. Shen. Defendant was admitted to the ICU where he passed away. (Ed.)

Settlement Demand: $4,000,000

Settlement Offer: $2,999,999 via a CCP 68994 Offer

Plaintiff’s Request at Trial: $2.5 million
Corinna Arbiter and Daniel Brass Join BALESTRETI POTOCKI & HOLMES

The law firm of Balezretri Potocki & Holmes is pleased to announce that Corinna Arbiter and Daniel A. Brass have joined the firm as associates.

Ms. Arbiter’s practice includes construction, personal injury, and real property litigation. She has a successful track record of efficiently resolving multi-party construction defects claims for her clients. Prior to becoming a lawyer, Ms. Arbiter worked in the title insurance industry. She received her B.S. from the University of Arizona in 1994 and her J.D. from Loyola Law School in 2010. She is admitted to practice in California, the District of Columbia and New Mexico.

Mr. Brass has over nine years of experience representing real estate developers and the firm represents provision to a diverse range of business complex construction-related disputes. In addition, he has extensive experience dealing with insurance issues related to construction and real estate development. Mr. Brass has represented developers and builders in all shapes and sizes, from local shops to national corporations. Immediately prior to joining the firm, Mr. Brass was staff counsel for a multinational insurance company representing its insureds in complex construction-related claims.

Balezretri Potocki & Holmes is a boutique law firm headquartered in San Diego, California. The firm provides representation to a range of business clients with an emphasis in the legal advocacy and consultation of business owners and companies working in or related to the construction, transportation and hospitality industries.

CALIFORNIA CIVIL LAW UPDATE CONTINUED FROM PAGE 17

California, following a bench trial, the trial court entered judgment against Pampa and Pedranzini for wage and hour violations. Pampa filed a bankruptcy proceeding after the entry of judgment. The trial court properly assessed civil penalties, under Labor Code sections 558(a) and 1197.1(a), individually against Pedranzini because he qualified as a person other than the corporate employer who either supervised or knowingly directed the payment of minimum wages or caused the statutory violations. However, because plaintiffs sought to recover the civil penalties under the Labor Code Private Attorneys General Act of 2004 (PAGA; Labor Code sections 2694 et seq.), the Court ruled that the penalties had to be distributed 75 percent to the Labor and Workforce Development Agency and 25 percent to the aggrieved employees according to section 2699(j).

The trial court’s judgment was modified to this. The Court also affirmed the trial court’s award of attorney fees ($15,014.04) and costs against Pedranzini.

(M.A. J.; September 28, 2018)

Martinez v. Landry’s Restaurants, Inc. (2018) Cal.App.5th, 2018 WL 4901279: The Court of Appeal affirmed the trial court’s order dismissing plaintiff’s putative class action wage and hour case for failure to bring their lawsuit to trial within five years as required by Code of Civil Procedure sections 583.310 and 583.360. The trial court properly ruled that the five-year period had been extended only a total of 1,013 days (175 days during the period of removal to federal district court and 958 days during the class certification appeal), and that the time to bring the action to trial had expired on August 26, 2015. (C.A. 3d, filed August 1, 2016, published August 28, 2018.)

Insurance

Law v. Farmers New World Life Ins. Co. (2019) Cal.App.5th, 2019 WL 5094763: The Court of Appeal reversed the trial court’s order granting summary judgment for defendant in an action by beneficiaries to recover life insurance policy proceeds. The insured purchased a whole life insurance policy with a disability rider where defendant agreed to waive the cost of the insurance while the insured was disabled if the insured provided defendant with notice and proof of her disability. The insured was diagnosed with cancer in September 2012 and became disabled as a result, but she did not provide defendant with notice of her disability and made no payments on the policy after July 2013. On May 20, 2015, defendant sent a letter to the insured telling her the premium payments received to date were insufficient to pay for the coverage and warned that the policy would lapse and terminate if defendant did not receive a payment by the end of the grace period—July 20, 2015. In September 2013, the insured died. The Court of Appeal reversed the trial court because defendant failed to show any prejudice under the notice prejudice rule. Because defendant did not assert that it was prejudiced by the delayed notice of the insured’s disability, and there is no dispute that the insured was totally disabled within the meaning of the rider, the insured was entitled to the benefit promised by the rider. (C.A. 2d, October 16, 2018.)

Maloki v. Estate of Holter (2018) Cal.App.5th, 2018 WL 6241504: The Court of Appeal reversed the trial court’s order denying plaintiff’s motion for costs. The lower court denied, in an order signed on March 15, 2017, a motion for costs by the plaintiff against an estate defendant who died before the action was brought. Plaintiff brought the action against the estate defendants under Probate Code sections 550 - 555 against the insurance carrier (Allstate) who had issued a $100,000 policy. Plaintiff made a Code of Civil Procedure section 998 offer to settle for $99,999 that was rejected by the carrier. The jury verdict was $180,613.34 for plaintiff.

While Probate Code section 554 limited the recoverable damages to the $100,000 policy limits, costs are not damages, and section 554 does not limit the recovery of costs. Because Allstate had rejected the $99,999 offer, the order denying costs from Allstate was reversed and the judgment was modified to include an award of costs in the amount of $66,037.08 in addition to $100,000 in damages. (C.A. 3d, November 29, 2018.)

Medical Malpractice

Dee v. Good Samaritan Hospital (2019) Cal.App.5th, 2019 WL 2277128: The Court of Appeal reversed the trial court’s order granting summary judgment for defendant in a medical malpractice case where plaintiff alleged he was sodomized by his roommate while he was a patient in the adolescent psychiatric unit of defendant. The moving party’s burden to show the absence of any genuine issue of material fact cannot be satisfied by an expert declaration

Continued on Page 24
Howell Update: The Importance of Rebutting Plaintiff’s Medical Claims at Trial

By Emilia Atsinian

The California Second Appellate District Court’s recent unreported decision, Rome v. Los Angeles Dodgers, is a perfect example of why the defense must be prepared to argue its case even before the trial begins.

The plaintiff, a professional baseball player, alleged that he suffered serious injuries during a game and sought compensation for his pain and suffering. The defense, however, presented evidence that the plaintiff had previously sought medical treatment for similar injuries and that the injuries were not as severe as described in the lawsuit.

The defense was able to show that the plaintiff had received several treatments and medications before the incident, and that his symptoms were not as severe as he claimed. The defense also presented medical records that showed the plaintiff’s injuries were not as serious as he had claimed.

The court upheld the defense’s argument, ruling that the plaintiff had presented no credible evidence to support his claim. The court stated that the plaintiff had not met the burden of proof required to establish his claim.

This case highlights the importance of preparing for the trial by gathering evidence and presenting it in a clear and concise manner. The defense must be ready to counter the plaintiff’s claims and present its own evidence to support its position.

This is not the only case where the defense has been able to successfully challenge the plaintiff’s medical claims. In another case, the defense was able to demonstrate that the plaintiff had not suffered the serious injuries he had claimed, and that his medical records showed he was able to return to work quickly.

The defense’s ability to present strong evidence and challenge the plaintiff’s claims is crucial in these types of cases. It is important to keep in mind that the burden of proof is on the plaintiff, and the defense must be prepared to meet that burden.

Sullivan Hill Attorneys Named 2018 Super Lawyers and Rising Stars

Sullivan Hill is proud to announce that four of our attorneys have been named as 2018 Super Lawyers, and three as Rising Stars. The attorneys, Anthony, Elizabeth, and Katrina, have been recognized for their dedication and excellence in their respective fields.

The Super Lawyers list is compiled by a rigorous selection process that identifies the top 5% of attorneys in each specialty. The Rising Stars list is reserved for attorneys who are under 40 years old and have achieved professional excellence.

Anthony, Elizabeth, and Katrina have been named as Super Lawyers in the area of construction law. They have been recognized for their expertise in handling complex construction disputes and their ability to resolve disputes efficiently.

The Rising Stars, Anthony and Elizabeth, have been recognized for their work in the areas of insurance law and construction law. They have been praised for their ability to handle complex insurance disputes and their commitment to providing excellent service to their clients.

Sullivan Hill is proud to have such dedicated and talented attorneys on our team, and we look forward to seeing them continue to excel in their respective fields.

Shirley E.參與了Sullivan Hill’s Super Lawyers and Rising Stars list for 2018. Her dedication to her practice and her commitment to her clients has been recognized by her peers and the legal community.

The list recognizes attorneys who have demonstrated excellence in their legal careers and have made significant contributions to the field of law. Shirley’s recognition on the list is a testament to her hard work and dedication to providing exceptional legal services to her clients.

The attorneys at Sullivan Hill are committed to providing the highest level of legal service to our clients. We are proud to have Shirley and our other attorneys recognized on the Super Lawyers and Rising Stars list for 2018.
California Case Summaries

By Monty McIntyre
ADR SERVICES, INC.

CALIFORNIA SUPREME COURT

Attorneys: Shepardy, Mullen et al. vs. M. Miller, et al. (2018) 13 Cal.5th 65; 2018 WL 4137013 The Supreme Court affirmed the Court of Appeal’s ruling that reversed the trial court’s order confirming an arbitration award, but it reversed the judgment of the Court of Appeal insofar as it ordered disgorging profits. All of the issues raised by plaintiff-law firm. Plaintiff-law firm agreed to a manufacturing company on a federal qui tam action brought on behalf of a number of public entities. The first time period, the law firm represented one of the public entities in matters unrelated to the conflict. Both parties entered an agreement that purported to waive all such conflicts of interest, current or future, but the agreements did not specifically refer to any conflict, and the law firm did not notify either client about its representation of the other. Under the framework established in Loving v. Equitable Life Assurance Society of the United States (1963) 33 Cal.2d 680, the court found that the law firm failed to disclose a known conflict with a current client. However, the ethical violation did not categorically disqualify the law firm from recovering the value of the services it rendered to the manufacturer, and this issue was remanded to the trial court. (August 30, 2018)

Civil Code

Section 1786 et seq. in performing background checks on plaintiff and other school bus driver employees. While there is some concern over the ICRAA and the Consumer Credit Reporting Agencies Act (CCRAA; Civil Code sections 1782 et seq.), there is no underlying conflict presented in the ICRAA or the Consumer Credit Reporting Agencies Act (CCRAA; Civil Code sections 1782 et seq.) that does not render the ICRAA unconstitutionally vague when the statute’s ambiguity is otherwise unambiguous. The background investigation of defendants conducted as an investigative consumer report under ICRAA because it reported on plaintiff’s “character, general reputation, personal characteristics, or mode of living.” (Section 176.26(c).) That ICRAA also applied did not exempt defendants from the requirement that they first obtain plaintiff’s written authorization under ICRAA before conducting or procuring a background investigation. (Section 1786.16(a) (DCS) (August 20, 2018)

Civil Procedure

Section 1020.7 of the Code of Civil Procedure (2018) 3 Cal.5th 65; 2018 WL 3579840 The Supreme Court affirmed this decision, and the Court of Appeal affirmed the Court of Appeal’s decision reversing the trial court’s order granting summary judgment to defendant in a dental malpractice action. Plaintiff sued defendant and another defendant Dr. Stephen Nahigian (Nahigian) for malpractice regarding a tooth implant, claiming defendant was vicariously liable for the conduct of Nahigian. The trial court granted Nahigian’s motion for summary judgment on the basis of the statute of limitations and lack of causation. Plaintiff appealed this decision, and the Court of Appeal affirmed on the time issue but declined to address the causation issue. The trial court later granted defendant’s motion for summary judgment finding that the earlier no causation decision precluded vicarious liability against defendant. Addressing the issues of claim preclusion (collateral estoppel), the Supreme Court ruled that, when a conclusion relied on by the trial court is challenged on appeal but is not addressed by the appellate court, the preclusive effect of the judgment should be evaluated as though the trial court had not relied on the unreviewed ground. It overruled the earlier inconsistent decision of Property & Casualty (1965) 25 Cal.2d 287 (June 25, 2018)

Employment

Section 288.2 of the California Labor Code (2018) 5 Cal.5th 65; 2018 WL 6440356. The Supreme Court affirmed the decision of the Court of Appeal that had affirmed the trial court’s order granting summary judgment for defendant in a wage and hour putative class action by hospital employees alleging violations of meal period breaks. The California Supreme Court ruled that a wage order of the Industrial Welfare Commission permitting health care employees to waive a second meal period, even if they had worked more than 12 hours, did not violate the Labor Code section 1152(a) requirement that employees who work more than 12 hours must be provided with a second 30-minute meal period. (December 10, 2018)

Employment

Section 2011 of the Labor Code (2018) 5 Cal.5th 65; 2018 WL 6061719. The Court affirmed the trial court’s ruling that plaintiff was the prevailing party after defendant withdrew his subpoena, but reversed the Court of Appeal’s judgment on the issue of costs and court award of the trial court. Defendant served a subpoena in California to discover from Google the identity of a person who maintained a blog, Google notified plaintiff, who retained counsel and filed a motion to quash the subpoena. Before the hearing, defendant dismissed the matter without prejudice. Because plaintiff’s motion to quash met all of the requirements of Code of Civil Procedure Section 1797.2(a), and it was not met by plaintiff’s motion to quash, the Court of Appeal reversed the trial court’s decision. The attorney fee and cost award was reversed because the Court of Appeal could not determine whether the trial court arrived at the attorney fee and cost award reasonably and could not assess whether the trial court properly exercised its discretion. (C.A. 6th, November 20, 2018)

Employment

Section 2951 of the Civil Code (2018) 5 Cal.5th 65; 2018 WL 1387324. The Court of Appeal affirmed the trial court’s order granting a motion for judgment notwithstanding the verdict filed by defendant. The trial court’s order denying an anti-SLAPP motion to plaintiff’s complaint alleging disclosure of her private medical information, invasion of privacy, and $90,000 in noneconomic damages. The trial court properly ruled that defendants failed to establish that the allegations in the complaint arose from protected activities. (C.A. 4th, June 15, 2018)

Military

Section 605 of the Military Code (2018) 5 Cal.5th 65; 2018 WL 3435743 The Court reversed the trial court’s order granting defendant’s motion for judgment in favor of plaintiff. Only the notice of the arbitration award and motion to compel were filed and served within the 60-day period required by Code of Civil Procedure section 2025.480. The superior court had no authority to compel action. Moreover, the trial court requested $40,000 in sanctions but did not alert the opposing party of that amount until 15 court days before the sanctions hearing, which violated Code of Civil Procedure section 2023.040. (C.A. 2nd, July 17, 2018)

Corporations

Section 425.6 of the Civil Code (2018) 5 Cal.5th 65; 2018 WL 4441746. The Court reversed the trial court’s order dismissing plaintiff’s action asserting a violation of the Corporations Code after it had granted defendant’s motion to stay the proceedings and appoint appraisers to fix the value of plaintiff’s stock under Corporations Code section 2001. Once a special proceeding under section 2000 is initiated, it “supplants” the cause of action for involuntary dissolution. (See Gi o. Pacific Health Services, Inc. (2000) 79 Cal.App.4th 522, 530.) At that point, the parties give up their right to litigate the involuntary dissolution action subject to the special proceeding proceeding in section 2000, and the plaintiff can no longer dismiss the involuntary dissolution claim. Under Code of Civil Procedure section 581(e). (C.A. 4th, September 18, 2018)

Elder Abuse

Section 15619 of the Civil Code (2018) 5 Cal.5th 65; 2018 WL 3435743 The Court of Appeal affirmed the trial court’s order granting a motion for judgment notwithstanding the verdict filed by defendant. The trial court’s order denying an anti-SLAPP motion to plaintiff’s complaint alleging disclosure of her private medical information, invasion of privacy, and $90,000 in noneconomic damages. The trial court properly ruled that defendants failed to establish that the allegations in the complaint arose from protected activities. (C.A. 4th, June 15, 2018)

Estate

Section 646 of the Estates Code (2018) 5 Cal.5th 65; 2018 WL 3435743 The Court of Appeal reversed the trial court’s order granting defendant’s motion for judgment notwithstanding the verdict filed by defendant. The trial court’s order denying an anti-SLAPP motion to plaintiff’s complaint alleging disclosure of her private medical information, invasion of privacy, and $90,000 in noneconomic damages. The trial court properly ruled that defendants failed to establish that the allegations in the complaint arose from protected activities. (C.A. 4th, June 15, 2018)

Continued on page 23
CALIFORNIA CIVIL LAW UPDATE CONTINUED FROM PAGE 14:

5961742: The Court of Appeal granted a petition for writ of mandate directing the trial court to vacate its order denying defendant's cross-motion for summary judgment on the basis of a 5% statistical confidence interval, and affirmed the judgment of the trial court.

5961743: The Court of Appeal reversed the judgment of the trial court, vacating the same, and remanded the case to the trial court for further proceedings consistent with the holding of the Court of Appeal.

5961744: The Court of Appeal reversed the judgment of the trial court, vacating the same, and remanded the case to the trial court for further proceedings consistent with the holding of the Court of Appeal.

5961745: The Court of Appeal reversed the judgment of the trial court, vacating the same, and remanded the case to the trial court for further proceedings consistent with the holding of the Court of Appeal.

5961746: The Court of Appeal reversed the judgment of the trial court, vacating the same, and remanded the case to the trial court for further proceedings consistent with the holding of the Court of Appeal.

5961747: The Court of Appeal reversed the judgment of the trial court, vacating the same, and remanded the case to the trial court for further proceedings consistent with the holding of the Court of Appeal.

Civil Procedure

Air Traffic Sol. v. Bids, Data Recovery Technologies (2019) 2018 Cal. App. 5th 232630. The Court of Appeal reversed the default judgment entered by the trial court, finding that the judgment was void under Civil Procedure Code sections 580a(6) and 580(5) because the trial court awarded damages in excess of the sum demanded in the complaint. (C.A.2d, filed May 25, 2018, published May 25, 2018.)

Calvert v. Bianil (2018) 2018 Cal. App. 5th 6332494. The Court of Appeal reversed the trial court's order granting a motion to vacate a $1,904,506 default judgment. The Court of Appeal ruled that the judgment was void on its face because plaintiff did not obtain service of notice in the Orange County Register as required by the court order, but instead published the notice in the Laguna News-Post. (C.A.2d, 2nd Dist., Dec. 4, 2018.)

Hearth & Home Holdings, Inc. (2018) 2018 Cal. App. 5th 5961895. The Court of Appeal affirmed the judgment of the trial court in a case involving the alleged breach of a non-disclosure agreement. The Court of Appeal held that the trial court properly concluded that the defendant had breached the agreement and that the plaintiff was entitled to damages.

Martinez v. Eleven O'clock (2018) 2018 Cal. App. 5th 5649151. The Court of Appeal affirmed the trial court's order granting a motion to vacate a default judgment. The Court of Appeal held that the judgment was void on its face because plaintiff did not obtain service of notice in the Orange County Register as required by the court order, but instead published the notice in the Laguna News-Post. (C.A.2d, 2nd Dist., Dec. 4, 2018.)

Meyer v. Elements Wellness, Inc. (2018) 2018 Cal. App. 5th 5649151. The Court of Appeal affirmed the trial court's order granting a motion to vacate a default judgment. The Court of Appeal held that the judgment was void on its face because plaintiff did not obtain service of notice in the Orange County Register as required by the court order, but instead published the notice in the Laguna News-Post. (C.A.2d, 2nd Dist., Dec. 4, 2018.)

Event

Kim v. Toyota Motor Corp. (2018) 2018 Cal. App. 5th 4057248. The Court of Appeal affirmed the trial court's order striking plaintiff's complaint for failing to state a claim upon which relief could be granted. The Court of Appeal held that the trial court properly concluded that the complaint did not state a claim for relief.

Lutter v. Sony Electronics, Inc. (2018) 2018 Cal. App. 5th 3290345. The Supreme Court affirmed the decision of the Court of Appeal that affirmed the trial court's order granting summary judgment in favor of defendant. The Supreme Court held that the trial court properly concluded that the complaint did not state a claim for relief.

Federal

Tolling v. Public Employment Relations Board (2018) 2018 Cal. App. 5th 3654148. The Supreme Court reversed the trial court's decision that the failure of the Mayor of San Diego to meet and confer with a union regarding a union's initiative to eliminate pensions for new city employees constituted an unfair labor practice under the Meyers-Miller-Brown Act (the MMBA). The Supreme Court held that the trial court erred in concluding that the MMBA's statute of limitations had run before the union filed its complaint.

Trials

Trials

Jennings v. Jiffy 2018 Cal. App. 5th 3290345. The Supreme Court reversed and remanded the Court of Appeal's decision that the trial court's order granting defendant a new trial after the opening statement by the pro-plaintiff witness. The Supreme Court held that the trial court properly concluded that the complaint did not state a claim for relief and that the trial court properly concluded that the complaint did not state a claim for relief.

Trials

Honeywell Int'l Corp. v. Morgan Clark, N.A. (2018) 2018 Cal. App. 5th 4057248. The Supreme Court reversed the trial court's order granting defendant a new trial after the opening statement by the pro-plaintiff witness. The Supreme Court held that the trial court properly concluded that the complaint did not state a claim for relief and that the trial court properly concluded that the complaint did not state a claim for relief.
as an arbitrator or mediator in another case involving the same parties or lawyers. The arbitrator violated Ethics standard 12(D) by accepting offers to serve as a neutral in eight other cases involving respondent’s attorneys but disclosing only four of them. Because the arbitrator was actually aware of the four other pending arbitrations involving counsel for respondent, the petition to vacate the award should have been granted. (C.A. 2nd, August 2, 2018.)

Howard v. Goldhagen (2018) – Cal. App. 5th. – 2018 WL 6757353: The Court of Appeal affirmed the trial court’s order denying a petition to compel arbitration in a wage and hour putative class action that included a representative action pursuant to the California Private Attorneys General Act (PAGA; Labor Code, section 2658 et seq). Defendant had an employee handbook written in English and Spanish that required arbitration of employment disputes and denied an employee’s right to bring an action under PAGA. The English version said the denial of the right to bring a PAGA action was reversible if such denial was found by a court to be unenforceable. The Spanish version provided that the PAGA waiver was not severable. The Court of Appeal ruled that the trial court properly concluded that the PAGA waiver set forth in the handbook was unenforceable as against public policy. (C.A. 2nd, July 3, 2018.)

Ramos v. Superior Court (2018) - Cal. App. 5th. – 2018 WL 5730183: The Court of Appeal granted a petition for a writ of mandate and reversed the trial court’s order granting defendant Wintone & Strauss, LLP’s motion to compel arbitration in an action by plaintiff (an experienced litigator and patent prosecutor with a doctorate in biophysics) for discrimination, retaliation, wrongful termination, and anti- fair- pay practices. The Court ruled that the arbitration agreement was unconscionable under Armendaris v. Foundation Health Psychiatric Services, Inc. (2000) 24 Cal.4th 83, and because the term of voluntariness could not be removed by severing the unlawful provisions without altering the nature of the parties’ agreement, the entire agreement to arbitrate was void. (C.A. 1st, November 2, 2018.)


disqualification order and returned the case to the trial court with directions to reevaluate its disqualification decision in light of Kord – specifically the Kord factors and whether any confidential information has actually been disclosed. (C.A. 4th, filed June 24, 2018; published, July 26, 2018.)

Rouvin v. Foster (2018) - Cal.App. 5th. – 2018 WL 3751724: The Court of Appeal reversed the trial court’s order of February 22, 2018 for a new trial after the jury awarded plaintiff economic damages of $187,810, past noneconomic damages of $250,000, and future noneconomic damages of $150,000, in an action by plaintiff against her former attorney for fraudulent concealment and breach of fiduciary duty. The court ruled in granting the motion for new trial. Claims of fraudulent concealment and intentional breach of fiduciary duty by a client against his or her attorney are subject to the substantial factor cause of law. The “best for” or “trial within a trial” cause of damage employed in cases of legal malpractice is often mandatory on appeal. The court noted the emotional distress of: consistency, shame, a sense of betrayal, and a continuing impact on personal relationships, the testimony of the plaintiff alone, was sufficient to support emotional distress damages in the absence of any expert testimony. (C.A. 4th, August 8, 2018.)

Lofsin v. Wells Fargo Home Mortgage (2018) - Cal.App. 5th. – 2018 WL 4657982: The Court of Appeal affirmed the trial court’s order denying approximately $5.5 million of attorney fees to Initiative Legal Group, APC (ILG) and instead directing the payment of this amount to class members in Lofsin v. Wells Fargo Home Mortgage (Lofsin). The trial court properly issued the subject matter of ILG concealing from the Lofsin court and its class members a $6 million settlement with Wells Fargo for payment of ILG’s attorney fees in violation of California Rules of Court, Rule 3.769(b). The Court of Appeal also directed that a copy of its opinion be sent to the State Bar of California. (C.A. 1st, September 28, 2018.)
on the basis of the court's order authorizing the defendant to sell the property. The court held that, due to the nature of the agreement, the defendant was entitled to sell the property in order to satisfy the judgment. The plaintiff appealed the decision, arguing that the court erred in granting the defendant's motion for summary judgment. The appellate court affirmed the decision, finding that the defendant was entitled to sell the property to satisfy the judgment. The plaintiff then appealed to the state supreme court, which affirmed the decision, holding that the defendant was entitled to sell the property in order to satisfy the judgment.
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