

THE UPDATE

SUMMER 2021 | ISSUE 4



SAN DIEGO
DEFENSE LAWYERS





PRESIDENT'S MESSAGE

Here we are! I am so excited and honored to take on this year as President of the San Diego Defense Lawyers. This community has always been very dear to me. As a brand-new lawyer, SDDL gave me resources and colleagues I could turn to for advice, encouragement, and support. I continue to utilize this amazing organization for that purpose daily even today.

While this year may not look like years past, your Board is already working very hard for you to adapt. We are working on virtual social events, continuing our Zoom CLEs which will be recorded and accessible to members for free on our website, and planning social events to take place IN PERSON as soon as it is safe and healthy to do so. We trust that if we stay the course with social distancing and safety measures, we will all be able to arise together in a safer world; SDDL is doing what it can to encourage that while maintaining our sense of community.



We have all faced significant changes recently: professionally and personally. For my family, who is a proud military family of over 16 years, we received unexpected orders out of San Diego. While we anticipated spending the remaining 3.5 years of my husband's enlistment in San Diego, COVID changed our plans as it did to millions of other families. As such, we are in the process of relocating to Pensacola, Florida,

where I (very fortunately) will be able to continue working remotely as many of have been doing for several months. I am saddened to be away from the city and legal community I love so much, but I am honoring my duties to my family. I am grateful to work for a firm that is accommodating my relocation with such grace, and to have amazing Board members that support my transition as well. I never expected to be the President of San Diego-based organization from across the country, but we adapt and persevere. I vow to be present in every way possible; you will see me at key events through the year so long as travel remains safe, and I will remain available to all members of SDDL and the San Diego legal community for all purposes.

Friends and colleagues, I want to thank you for your ongoing support of SDDL, especially in the past 12 months. We have

IN THIS ISSUE

4. California Federal Court Dismisses Wife's COVID-19 Civil Suit Against Husband's Employer
5. MCLE Lunch-and-Learn Recaps
6. In California, Alleged Defects Caused By Continuing Loss May Be Question of Fact
8. Palos Verdes' Failure to Warn of Dangerous Condition Not Protected by Design Immunity Statute
10. A Tell-All Article on Written Discovery Objections

continued to be able to raise money for our main philanthropy, Juvenile Diabetes Research Foundation (JDRF), notwithstanding the significantly limited activity we had compared to the past. This was possible through the dues or sponsorships you paid and your participation in the 2020 Golf Tournament in the middle of a very difficult year. Be assured we are working to prepare for our 2021 Golf Tournament to provide a safe, outdoor environment for socialization with colleagues and a full day of fun in the beautiful San Diego weather. Your Board and I cannot wait to see you all virtually and/or in person very soon!

Be kind, be well, and stay safe!

Sincerely,

Vanessa C. Whirl-Grabau, Esq.

SDDL President, 2021

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 \$160.00 for new members for the first year and \$175.00 per year for renewing members. The dues year runs from January 1 to December 31. Applications can be downloaded at: sddl.org.

The Update is published for the mutual benefit of the SDDL membership, a non-profit association composed of defense lawyers in the San Diego metropolitan area. All views, opinions, statements and conclusions expressed in this magazine are those of the authors, and they do not necessarily reflect the opinions or policies of the SDDL or its leadership. The SDDL welcomes the submission of articles by our members on topics of general interest to its membership.



SAN DIEGO
DEFENSE LAWYERS

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California Federal Court Dismisses Wife's COVID-19 Civil Suit Against Husband's Employer

By David Kahn
TYSON & MENDES

California federal court has dismissed a lawsuit filed by the wife of a construction worker who claimed her husband contracted COVID-19 at work and brought the virus home infecting her as well. The court held workers' compensation exclusivity barred the wife's claim.

Although the court granted plaintiff leave to amend, the attorney for the husband's employer does not believe the wife will be able to allege facts sufficient to overcome the legal principles informing the court's ruling. The case is *Kuciemba et. al. v. Victory Woodworks, Inc.* and is currently pending in the U.S. District Court for the Northern District of California.



Facts

Plaintiff Corby Kuciemba (age 65) sued her husband's employer Victory Woodworks, Inc. ("Victory") claiming she contracted COVID-19 from her husband who contracted the virus at work. The Complaint alleged Victory knew or should have known

its employees at a construction site in Mountain View, California had been potentially exposed to the virus but did not require quarantine in violation of local health orders. The Complaint alleged Robert Kuciemba was forced to work with at least one worker who had been exposed. Mr. and Mrs. Kuciemba tested positive for the virus on July 16, 2020 and were hospitalized for several weeks of treatment. Mr. Kuciemba filed a workers' compensation claim against his employer and was receiving benefits.

Analysis

Victory filed a motion to dismiss, arguing workers' compensation exclusivity barred the wife's civil claim. Victory further argued an employer does not owe a duty to every off-site person who claims an employee transmitted an infection, be it the flu or COVID-19. Victory's motion averred it was speculative to contend the only place the Kuciembas could have contracted the virus was at Mr. Kuciemba's place of employment. For example, within walking distance of their home was a Rite Aid, Big Lots, Post Office, McDonalds, Home Depot, and a Lucky's Supermarket. Thus, Mr. Kuciemba, who worked eight hours a day, could have been exposed at one of these places or any other place he may have visited.

In granting Victory's motion to dismiss, the court held because Mrs. Kuciemba's injury was dependent entirely on her husband's work-related infection, worker's compensation is the only remedy.

California Labor Code § 3600 sets forth the conditions for compensation for employees who sustain an injury arising out of and during the course of employment. The statute provides what is essentially known as the workers' compensation bargain: the employer is strictly liable for workers' compensation benefits "without regard to negligence," and in exchange the employer shall not be liable "whatsoever to any person" unless one of the exceptions to the exclusive remedy applies.

California Labor Code Section 3602 provides where a worker sustains an injury arising during the course of employment, the right to recover compensation is the "sole and exclusive remedy of the employee or his or her dependents against the employer" except: (1) where the injury is caused by a willful physical assault by the employer; (2) where the injury is aggravated by the employer's fraudulent concealment of the existence of the injury and its connection with the employment; and (3) where the injury is caused by a

defective product manufactured, sold, or leased to a third party and the product is provided by the third party for the employee's use. California Labor Code Section 3706 provides an exception where the employer fails to secure workers' compensation insurance and California Labor Code Section 4558 provides the "power press" exception, which applies when the employer fails to install or remove protective guards from a power press machine.

Because Mrs. Kuciemba's situation did not fall within one of the exceptions, the court agreed with Victory and found the operation of the workers' compensation exclusive remedy statute barred her claim. Even assuming the exclusive remedy did not apply, Mrs. Kuciemba faced a significant hurdle in trying to prove causation, i.e., Victory was responsible for her husband infection at work and she in turn was infected by her husband. The impact of the court's ruling leaves Mrs. Kuciemba without remedy as she does not independently qualify for

workers' compensation benefits and does not have standing to bring a civil suit against her husband's employer. The court also dismissed Mrs. Kuciemba's public nuisance claim against Victory on the grounds she lacked standing to sue under San Francisco's health orders, which do not provide a private right of action.

Takeaway

Although the *Kuciemba* case is not yet binding precedent, the court's decision to dismiss the lawsuit is a victory for California employers and their insurers. Victory's counsel commented that plaintiffs are asking employers to keep COVID-19 from invading the home when the global public health system and pharmaceutical industry failed to do so and requiring private industry to meet that standard sets the bar too high. Claims examiners and defense attorneys should be on alert for similar claims and file the appropriate dispositive motions. 🍷

MCLE Lunch-and-Learn Recaps

January MCLE Recap

On January 26, the SDDL Board of Directors was pleased to present an MCLE by past president Brian Rawers. Brian, one of our favorite and most frequent presenters, gave an excellent presentation on the "Three Secrets to a Successful Closing Argument." Brian gave many examples of closing arguments from his long career as a trial attorney. His counsel and instruction was helpful not only to the younger attorneys but the more experienced attorneys as well. Presented via Zoom, this MCLE had an attendance of more than 50 SDDL Members. Thank you Brian, and we look forward to hearing from you in the future!

February MCLE Recap

On February 11, 2021, the SDDL Membership was treated to a presentation by Alicia Aquino of Aquino Trial Services and Shannon Bales, Manager of Litigation Support at Munger, Tolles and Olson. Their presentation, entitled *The Art and Science of Remote Trial Presentations*, was an excellent – and timely – look into our current world of remote and video based trials. They covered everything from basic tips – like how to improve your home office appearance – to dealing with professional trial presentation equipment. Their knowledgeable advice and entertaining presentation will likely be useful for the foreseeable future. Thank you again Alicia and Shannon!

March MCLE Recap

On March 9, 2021, Mr. Ray Artiano, Esq., of ADR Services, Inc., graciously presented to the SDDL Membership the topic of *Tips on Mediating Employment Cases*. Now a prominent mediator, Ray had previously litigated over 750 employment matters, and tried more than 40 cases to verdict. His presentation was thoughtful and very thorough, drawing on his own extensive experience. If you missed it, the video of his full presentation is available on the SDDL website! We encourage everyone to take a look, and gain some valuable insight. Thank you Ray! 🍷



In California, Alleged Defects Caused By Continuing Loss May Be Question of Fact

By David P. Ramirez
TYSON MENDEZ

In the recent case of *Guastello v. AIG Specialty Ins. Co.* (2021), the California Court of Appeals, Fourth District held triable issues of material fact exist which preclude summary judgment for an insurer seeking to disclaim coverage on the basis the “occurrence” pre-dated the policy period where a dispute exists as to the timing of the subject “occurrence.”

Background

In 2003 to 2004, C.W. Poss, a subcontractor, built a retaining wall which collapsed years later in January 2010 causing damage to a nearby residential lot. The homeowner, Thomas Guastello (“Guastello”), sued the subcontractor, obtained a default judgment, and then sued the subcontractor’s insurance company, AIG Specialty Insurance



Company (“AIG”) to enforce the default judgment.

Guastello initially sued the subcontractor alleging negligent design and construction seeking various damages, including diminution in value of his property. The subcontractor

had an “occurrence” policy with AIG with an effective period of 2003-2004. AIG denied any duty to defend or indemnify the subcontractor on the basis the property damage occurred in January 2010 and was therefore outside of the policy period of 2003-2004.

Shortly after AIG’s denial, Guastello obtained a default judgment against the subcontractor and filed a direct action against AIG for enforcement of the default judgment, breach of the covenant of good faith and fair dealing, and declaratory relief pursuant to Insurance Code §11580. AIG filed a motion for

summary judgment contending Guastello did not suffer any property damage until the retaining wall collapsed in 2010, thus the occurrence did not take place until seven years after expiration of the policy.

Guastello’s opposition to AIG’s motion included a declaration by a civil engineering expert which set forth a latent construction defect theory. The expert opined the contractor’s negligent construction of the retaining wall began to cause damage to the wall itself and to Guastello’s property within months of the wall’s substantial completion in 2003 by way of continuous and progressive destabilization to Guastello’s lot beginning before the end of November 2004. The engineer opined the continuous and progressive destabilization eventually led to the complete collapse of the wall in 2010.

The trial court granted AIG’s motion for summary judgment, finding Guastello did not experience property damage until after the policy’s expiration and the action was

predicated on AIG's wrongful refusal to satisfy the judgment. Guastello appealed the trial court's decision contending a triable issue of material fact existed as to whether the property damage took place during the coverage period of the AIG policy.

Rationale

The Court of Appeals first discussed the general principles of law applying to liability insurance. The court distinguished a "claims made" policy, which provides coverage if the claim is made during the policy period, from an "occurrence" policy, which provides coverage for damages which occur during the policy period, even if the claim is made after the policy expired.

The AIG policy defined "occurrence" as *"an accident, including continuous or repeated exposure to substantially the same general harmful conditions. Where 'continuing or progressive' property damage is at issue, the 'property damage' shall be deemed to be one 'occurrence' and shall be deemed to occur when such...; 'property damage' first commenced."*

Moreover, the AIG policy defined "property damage" as *"a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that caused it; or b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the 'occurrence' that caused it."*

Based on the language of the policy and the substance of the declaration of Guastello's expert, the Court of Appeals found timing of the "occurrence" — the alleged damage to Guastello's property — was "plainly a disputed issue of material fact."

AIG argued the engineer's declaration was inadmissible under Evidence Code §720 because it lacked foundation and was speculative and conclusory because he did not personally inspect the retaining wall or affected property. Guastello had offered the expert's opinions to rebut his own declarations as to the damages he had sustained.


The Court of Appeals rejected AIG's argument as to admissibility of the declaration, pointing to AIG's failure to make an evidentiary objection to the declaration in the trial court and thereby waiving the objection. The Court of Appeals found the declaration was sufficient as the declarant set forth his education, training, and experience and stated the bases for the opinions he gave.

Further, the Court of Appeals held AIG's arguments as to the validity of the expert's opinions went to the weight of his testimony, which is a factual issue for a jury and not a legal issue for the court as to admissibility. AIG further contended Guastello's evidence in support of the default against the subcontractor established the alleged damage took place no earlier than 2010 and directly conflicted with the expert's declaration the damage began before the end of November 2004.

The Court of Appeals disagreed with AIG, stating the evidence submitted with the default motion was not necessarily inconsistent with the latent construction defect theory of liability proffered by the expert engineer and was arguably consistent with the latent construction defect theory. Thus, the Court of Appeals stated, "Again, this is a contested issue of material fact."

Takeaway

Overall, this case illustrates the issue of a "question of fact" when dealing with "latent defects." If the alleged defect is caused by a continuing loss, then it may be a question of fact as when the damages actually occurred. It is important to object to declarations submitted at the trial court level. By not doing so, you then waive any objection to the declaration at a later date.

David P. Ramirez is Senior Counsel at TYSON & MENDES, LLP, and primarily represents clients in complex litigation, including construction defect, insurance law, property disputes, and product liability. Mr. Ramirez was recently named as a "Top Lawyer" in San Diego in March 2021 by San Diego Magazine. 

¹ *Guastello v. AIG Specialty Ins. Co.* (2021) 61 Cal.App.5th 97

² *Ins. Code*, § 11580, subd. (b)(2)

³ *Carolina Casualty Ins. Co. v. L.M. Ross Law Group LLP* (2010) 184 Cal.App.4th 196, 206–207 and *Garriott Crop Dusting Co. v. Superior Court* (1990) 221 Cal. App.3d 783, 792.)

⁴ *Polk v. Ford Motor Co.* (8th Cir. 1976) 529 F.2d 259, 271.)

Palos Verdes' Failure to Warn of Dangerous Condition Not Protected by Design Immunity Statute

By Robert G. Bernstein,
Senior Counsel
TYSON & MENDEZ

A recent auto accident involving superstar golfer Tiger Woods occurred in the City of Ranchos Palos Verdes, an upscale community adjacent to the Pacific Ocean in greater Los Angeles. A 2016 accident in the same area gives rise to a recent decision of California's Second District Court of Appeal which limits the scope of design immunity afforded to public entities.¹

Tragic Accident Results In Litigation

In March 2016, Jonathan Tansavatdi was riding his bicycle southbound on busy Hawthorne Boulevard in the City of Rancho Palos Verdes. Jonathan intended to proceed through the street's intersection with Vallon Drive. At the intersection, a semi-trailer turned right and collided with Jonathan who was killed. Although some portions of Hawthorne had dedicated bike lanes, the approach to the Vallon Drive intersection did not. At trial, one of the City's engineers testified a bike lane was not installed in the accident area in order to preserve on-street parking for a nearby public park. In 2017, Jonathan's mother, Betty Tansavatdi, filed suit against the City. She asserted the intersection constituted a dangerous condition of public property under California law. She alleged the City maintained a dangerous condition by failing to provide a dedicated bike lane in the area where the accident occurred. She also alleged the City failed



to warn the public of the dangerous condition.

Relevant Law

California Government Code section 835 provides a public entity may be liable under certain circumstances for injuries caused by a dangerous condition of its property.

However, under Government

Code section 830.6, the public entity may escape such liability by raising the affirmative defense of 'design immunity.'² Government Code section 830.6 provides both a public entity and its employees are not liable for an injury caused by the plan or design of a construction of, or an improvement to, public property where the plan or design was approved by a legislative body or an employee exercising discretionary authority to give the project approval.

A public entity raising this defense must establish three elements: (1) a causal relationship between a plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design.³ The first two elements, causation and discretionary approval, involve factual questions to be resolved by a jury unless the facts are undisputed.⁴ The third element, the existence of substantial evidence supporting the reasonableness of the plan or design, is a legal matter for the court to decide.

Trial Court Ruling


Following discovery, the City filed a motion for summary judgment arguing there was a reasonable basis for the absence of a bike lane in the area of the accident. The City cited accident statistics which indicated the only serious accident that occurred at the intersection for over 10 years was the one involving Jonathan. The City asserted the accident was not related to the intersection's design and the design was approved by qualified engineers, in addition to being approved for the use of Federal Government construction funds. The City also asserted that substantial evidence related to the absence of prior accidents supported a conclusion the design was reasonable. The trial court agreed with the City, and concluded it established a right to design immunity for the accident as a matter of law. The court did not address Betty Tansavatdi's allegation the City failed to warn of the dangerous condition. Ms. Tansavatdi appealed.

Court of Appeal's Analysis

1. Design Immunity

After examining trial court records, the Second District Court of Appeal affirmed the trial court's conclusion design immunity applied to the City's potential liability for the absence of a bike lane at the intersection where the accident occurred. The Court determined Betty Tansavatdi failed to show the absence of bike lane road markings in the area of the accident was inadvertent, concluding it was an intentional component of the road's design. The Court also found the City carried its burden of proof regarding reliance on discretionary approval. A private engineering firm prepared the plans and they were approved by the City. The Court concluded the City also satisfied the third element of Government Code section 830.6 because the opinions of two qualified engineers constituted substantial evidence the plans were reasonable as implemented and were in full compliance with applicable standards of care.

continued on page 15



California Case Summaries

FREE

By  Monty A. McIntyre, Esq.™

CALIFORNIA SUPREME COURT

Landlord - Tenant

Stancil v. Super. Ct. (2021) _ Cal.5th _, 2021 WL 1727612: The California Supreme Court affirmed the Court of Appeal ruling denying defendant writ relief from the trial court's order denying defendant's motion to quash service of summons under Code of Civil Procedure section 418.10 in an unlawful detainer case. The California Supreme Court held that no defendant may use a motion to quash service of summons as a means of disputing the merits of the unlawful detainer complaint's allegations or to argue the plaintiff failed to comply with the pleading requirements specific to unlawful detainer actions set out in Code of Civil Procedure section 1166. (May 3, 2021.)

Torts

Brown v. USA Taekwondo (2021) _ Cal.5th _, 2021 WL 1218492: In a decision resolving differences between the courts of appeal in determining whether a defendant owes a duty of care to protect a plaintiff from injuries caused by a third party, the California Supreme Court affirmed the Court of Appeal's decision, in an action alleging sexual molestation of Taekwondo competitors by their coach, that overruled the trial court's order sustaining defendant USA Taekwondo's (USAT) demurrer to plaintiffs' complaint and affirmed the trial court's order sustaining the demurrer of defendant United States Olympic Committee (USOC). The California Supreme Court

ruled that whether to recognize a duty to protect is governed by a two-step inquiry. First, the court must determine whether there exists a special relationship between the parties or some other set of circumstances giving rise to an affirmative duty to protect. Second, if so, the court must consult the factors described in *Rowland v. Christian* (1968) 69 Cal.2d 108 (*Rowland*) to determine whether relevant policy considerations counsel limiting that duty. The Court of Appeal properly found that USAT did have a special relationship with plaintiffs but USOC did not. It then properly applied the *Rowland* factors and concluded that USAT's potential duty should not be limited. (April 1, 2021.)

Penal Code

Smith v. LoanMe, Inc. (2021) _ Cal.5th _, 2021 WL 1217873: The California Supreme Court reversed the Court of Appeal's decision affirming the trial court's judgment for defendant in an action alleging improper recording of a phone call in violation of Penal Code section 632.7. The California Supreme Court ruled that section 632.7 applies to both the parties to a communication, prohibiting them from recording a covered communication without the consent of all participants, and to recording by persons other than parties

("nonparties" to the communication), such as an individual who covertly intercepts a phone call and eavesdrops

upon it. (April 1, 2021.)

CALIFORNIA COURTS OF APPEAL

Arbitration

Kuntz v. Kaiser Foundation Hospital (2021) _ Cal.App.5th _, 2021 WL 1345313: The Court of Appeal affirmed the trial court's order granting defendants' motion to compel arbitration of plaintiffs' elder abuse cause of action. The Court of Appeal ruled that, to the extent that the issue of decedent's status as an enrollee in the Kaiser Foundation Health Plan, Inc. through the California Public Employees' Retirement System (CalPERS) turned on factual issues, the evidence submitted by defendants constituted substantial evidence supporting the trial court's determination. The Court of Appeal also ruled that, under the plain meaning of Government Code section 22869, information disseminated by the CalPERS Board pursuant to Government Code section 22863 was deemed to satisfy the arbitration disclosure requirements of Health and Safety Code section 1363.1. (C.A. 3rd, April 12, 2021.)

Banister v. Marinidence Opco, LLC (2021) _ Cal.App.5th _, 2021 WL 2036529: The Court of Appeal affirmed the trial court's order denying defendant's petition to compel arbitration in plaintiff's lawsuit alleging discrimination, retaliation, defamation, and other claims as a result of her termination as an employee. Defendant attached to the petition a copy of the arbitration agreement purporting to bear plaintiff's signature. However, because plaintiff challenged the validity of the signature, defendant was required to establish by a preponderance of the evidence that the signature was authentic. The Court of Appeal ruled that substantial evidence supported the trial court's conclusion that defendant failed to prove that plaintiff electronically signed the arbitration agreement. (C.A. 1st, filed May 30, 2021, published May 21, 2021.)

continued on page 14

Objection

A Tell-All Article on Written Discovery Objections

By Rachel Donnelly
TYSON & MENDES

Generally, written discovery is a party's first opportunity to seek information regarding the opposing side's claims or defenses. Written discovery is a powerful tool as it forces the other side to provide information regarding their case under oath. The different types of written discovery are interrogatories¹, requests for admissions², and inspection demands.³ Although written discovery is permissible under the Civil Discovery Act, there are reasons to object and not provide the information requested. To avoid providing a substantive response to improper discovery requests, the responding party must timely serve objections. This article explores a few valid objections a party may assert in response to unacceptable discovery requests.



1. Objection: The Definition of "You" is Impermissibly Overbroad

Code of Civil Procedure section 2020.010 provides the methods a party may use to obtain information from a person who is not a party to the lawsuit.

The methods include an oral deposition, a written deposition, or a deposition for production of business records. Many times, a party will use the term, "you" in their discovery request and define "you" to include individuals other than the party responding to the discovery.

For example, the party propounding the discovery may define the term "you" to mean the responding party and all agents, servants, employees, and representatives of responding party which were, or are, in responding party's employ. When the propounding party uses the term, "you" in discovery requests, the party is

then attempting to obtain information regarding not only the responding party who is a party to the lawsuit, but also all agents, servants, employees, and representatives of responding party which were, or are, in responding party's employ. This is unacceptable. The appropriate objection in this situation would be as follows: Propounding Party's definition of "you" is impermissibly overbroad and violates the Code of Civil Procedure §2020.010 and §2030.010 (§2033.010 for requests for admissions and §2031.010 for inspection demands).

2. Objection: Interrogatory Contains Subparts, or is Compound, Conjunctive, or Disjunctive

An objection is often missed when the interrogatory in question contains subparts or is

compound, conjunctive, or disjunctive. Code of Civil Procedure §§2030.060(f) states, "No specially prepared interrogatory shall contain subparts, or a compound, conjunctive, or disjunctive

question.” These types of interrogatories are easy to spot. Interrogatories vulnerable to this objection are those which include multiple inquiries in a single interrogatory. For example, an interrogatory such as: “Please state the time and location of the accident” includes multiple inquiries. Specially prepared interrogatories may not make more than one inquiry (as in the above example which asks for the time and location.) The propounding party must ask for the time and location in separate interrogatories. A disjunctive interrogatory is one which expresses a choice between two mutually exclusive possibilities. An example of this type of interrogatory is: “Please state whether you were stopped or driving through the intersection at the time of the motor vehicle accident.”

If discovery includes one of the interrogatories discussed above, the appropriate objection should be asserted.

3. Objection: Interrogatory is Not Full and Complete in and of Itself

Code of Civil Procedure §2030.060(d) provides, “Each interrogatory shall be full and complete in and of itself.” If a specially prepared interrogatory

requires the responding party to review another document to respond, this is an appropriate opportunity to assert this objection because the subject interrogatory is not full and complete in and of itself.

4. Objection: Interrogatory Seeks a Summary of Documents and the Burden is Substantially the Same for Propounding Party

Code of Civil Procedure section 2030.230 provides the following:

If the answer to an interrogatory would necessitate the preparation or the making of a compilation, abstract, audit, or summary of or from the documents of the party to whom the interrogatory is directed, and if the burden or expense of preparing or making it would be substantially the same for the party propounding the interrogatory as for the responding party, it is a sufficient answer to that interrogatory to refer to this section and to specify the writings from which the answer may be derived or ascertained. This specification shall be in sufficient detail to permit the propounding party to locate and to identify, as readily as the responding party can, the documents from which

the answer may be ascertained. The responding party shall then afford to the propounding party a reasonable opportunity to examine, audit, or inspect these documents and to make copies, compilations, abstracts, or summaries of them.

An interrogatory vulnerable to this objection typically asks the responding party to provide information which is included in documents within the propounding party’s possession or which the responding party can provide to propounding party. This objection should be asserted, and the response should identify the documents the propounding party can obtain to gather the information.

Conclusion

If a discovery request is improper for any of the reasons discussed above, the appropriate objections should be asserted. The decision to not provide any substantive information should be discussed with an attorney. There may be a strategic purpose in providing the requested information despite asserting valid objections. ♡

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2022 SDDL INSTALLATION DINNER



The Installation Dinner Returns for 2022!

After a year away, the San Diego Defense Lawyer's Installation Dinner will return for 2022.

This year the event will take place at new venue, Loews Coronado Bay Resort! Mark your calendars now, and stay tuned for updates on this year's Honorees and ticket information.

January 22, 2022 at 6:00 pm



Save the Date!

Sponsored by Advocate Investigative Agency, Inc.

SDDL's Annual Padres Game & Tailgate is returning on September 24, 2021! Please join the board at Mission Brewery for pre-game festivities.

Space is limited, so please reserve your tickets on the SDDL website today!

California Case Summaries

Civil Code

Smart Corner Owners Assn. v. CJUF Smart Corner LLC (2021) _ Cal.App.5th _, 2021 WL 2010152: The Court of Appeal reversed the trial court's order granting defendant's motion for summary judgment in a construction defect case on the basis that plaintiff association failed to obtain the consent of more than 50 percent of its condominium owner members before filing the action as required by the governing declaration of covenants, conditions, and restrictions. After plaintiff filed its notice of appeal, the Legislature enacted Civil Code section 5986, effective January 1, 2020, rendering prelitigation member vote requirements null and void. The newly enacted statute abrogated the defense that noncompliance with such conditions defeats a construction defect claim. The Legislature also expressly provided the statute would apply retroactively "to claims initiated before the effective date of this section, except if those claims have been resolved through an executed settlement, a final arbitration decision, or a final judicial decision on the merits." (Section 5986(d), italics added.) The Court of Appeal concluded that a "final judicial decision on the merits" within the meaning of section 5986 (d) does not encompass a judgment that was not final on appeal as of the statute's effective date. Section 5986 therefore applied retroactively to plaintiff's claims requiring reversal of the judgment entered against plaintiff. The Court of Appeal also held, as an independent ground for reversal, that the prelitigation vote requirement at issue in this case violated fundamental state public policy by making it more difficult for the plaintiff hold defendant developers accountable for construction defects. The Court of Appeal also found the requirement to be unreasonable, unconscionable and violative of the fundamental state policy against unreasonable servitudes insofar as it required strict compliance as a precondition to suit and prohibited members from providing their consent later through a vote ratifying a board

decision to file suit. The trial court was directed to enter a new order denying defendant's motion for summary judgment. (C.A. 4th, May 20, 2021.)

Civil Procedure

Cal. Medical Assn. v. Aetna Health of Cal. Inc. (2021) _ Cal.App.5th _, 2021 WL 1660614: The Court of Appeal affirmed the trial court's order granting defendant's motion for summary judgment in plaintiff's complaint alleging several causes of action, including a claim seeking an injunction for alleged violations of the Unfair Competition Law (UCL; Business & Professions Code, § 17200), filed by plaintiff after defendant implemented a policy to restrict or eliminate patient referrals by its in-network physicians to out-of-network physicians. The Court of Appeal held that an association must sustain direct economic injury to itself and not just its members to bring a UCL claim, and evidence that an association diverted resources to investigate its members' claims of injury and advocate for their interests was not enough to establish standing under the UCL. (C.A. 2nd, April 28, 2021.)

Nunn v. JPMorgan Chase Bank (2021) _ Cal.App.5th _, 2021 WL 1975316: The Court of Appeal reversed the trial court's order dismissing the case, under Code of Civil Procedure section 583.320, for failing to bring the case to trial within three years after a remittitur was filed in trial court following an appeal. The Court of Appeal also granted a writ petition directing the trial court to vacate its order granting defendant's motion to expunge a lis pendens, directing it to reconsider the motion in light of this decision. Ruling on an issue of first impression, the Court of Appeal held that the oral agreement prong of Code of Civil Procedure section 583.330 is consistent with its written stipulation counterpart in authorizing parties to extend the statutory trial deadline by agreeing to postpone trial to a specific date beyond the statutory period. The settled statement for a hearing on May 16, 2019 provided: "Plaintiffs' counsel, Ronald Freshman, and defendants' counsel, David Harford, appeared by telephone. The plaintiffs were

in the courtroom. The court confirmed with both attorneys that the matter was ready for trial. The court suggested November 2019, but Mr. Harford indicated November would be too early because defendants intended to file a summary judgment motion and needed to take the plaintiffs' depositions before filing that motion.

The court then proposed a trial for January 13, 2020.

Employment

General Atomics v. Super. Ct. (2021) _ Cal.App.5th _, 2021 WL 2176921: The Court of Appeal granted a writ petition by petitioner (defendant in the underlying action) ordering the trial court to vacate its order denying defendant's motion for summary adjudication and enter an order granting the motion. Plaintiff filed a putative class action and a representative action under the Private Attorneys General Act (PAGA; Labor Code section 2698 et seq.). Plaintiff alleged that defendant violated Labor Code section 226(a) by providing wage statements that did not identify the correct rate of pay for overtime wages. Plaintiff maintained that the correct overtime rate was 1.5 times (1.5x) the regular rate of pay, and the wage statements provided by defendant showed only 0.5 times (0.5x) the regular rate. Plaintiff did not contend that defendant had incorrectly calculated overtime pay (or failed to pay the correct amounts), only that it did not provide compliant wage statements showing the correct hourly rate of pay. The Court of Appeal concluded that the trial court erred in determining that defendant's wage statements violated section 226. The wage statements showed the applicable hourly rates in effect and the corresponding number of hours worked at each rate. In the wage statements provided by defendant, the applicable hourly rates are (1) the standard hourly rate determined by contract or other agreement between the employee and the employer and (2) the overtime premium hourly rate, determined by statute, that must be added to the employee's standard wages to compensate the employee for working overtime. These rates were plainly shown, along with the hours worked at each rate. While other

formats might also be acceptable, given the complexities of determining overtime compensation in various contexts, the format adopted by defendant adequately conveyed the information required by statute. (C.A. 4th, May 28, 2021.)

Torts

Issakhani v. Shadow Glen Homeowners Assn., Inc. (2021) _ Cal.App.5th _, 2021 WL 1711584: In an action for personal injury action where a pedestrian, who decided to jaywalk across a five-lane highway at night and was struck by a car, sued the owner of the condominium complex she was trying to visit for negligence and premises liability for having too few onsite parking spaces for guests, the Court of Appeal affirmed the trial court's order granting defendant's motion for summary judgment. The Court of Appeal held that a landowner does not owe a duty of care to invitees to provide adequate onsite parking, either (1) under common law principles, or (2) by virtue of a 1978 city ordinance that rezoned the complex's specific parcel for multifamily dwellings and conditioned that rezoning on providing a specific number of guest parking spaces. (C.A. 2nd, April 30, 2021.)

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continued from page 8

Palos Verdes' Failure to Warn of Dangerous Condition Not Protected by Design Immunity Statute

2. Failure to Warn

This decision is notable because the Court of Appeal held the City was required to take reasonable steps to warn about what amounted to a dangerous condition, and it failed to do so. In reaching its holding, the Court applied a 1972 decision of the California Supreme Court. *Cameron v. State of California* involved injuries suffered when a motorist could not negotiate an "S" curve constructed with inconsistent superelevation. Superelevation is the slope or bank designed into a curve to help cars maintain contact with the road surface. In *Cameron*, the Supreme Court held a public entity may be held liable for failure to warn of a concealed dangerous condition even if the dangerous condition was covered by design immunity. In *Cameron*, the Supreme Court reversed a grant of nonsuit, concluding design immunity was inapplicable because the state failed to prove the inconsistent superelevation was part of a pre-approved design for the road. The Supreme Court found:

[W] here the state is immune from liability for injuries caused by a dangerous condition of its property because the dangerous condition was created as a result of a plan or design which conferred immunity under section 830.6, the state may nevertheless be liable for failure to warn of this dangerous condition where the failure to warn is negligent and is an independent, separate, concurring cause of the accident.

Applying *Cameron*, the Second District Court of Appeal concluded the City of Rancho Palos Verdes was entitled to design immunity, for failing to provide a bike lane does not necessarily also preclude liability for failing to warn the public. It reversed the grant of summary judgement and remanded the case to the trial court for further proceedings related to Betty Tansavadi's allegation of failure to warn.

The Takeaway

Strong protection is afforded to public entities in California for injury liability arising from alleged design deficiencies. Indeed, even in the *Tansavadi* case, the Court of Appeal found the City of Rancho Palos Verdes met its burden of proof and established a valid defense of liability for the death of Johnathan Tansavadi arising out of alleged design deficiencies. Independent of the duty to safely design public spaces, however, is a duty under the law for public entities to warn of dangerous conditions, particularly when the condition is not easily perceived. A public entity must not only follow appropriate procedures when designing works or improvement, it must take reasonable steps to warn of dangerous conditions which result from those improvements.

¹ *Betty Tansavadi v. City of Rancho Palos Verdes* (2021) 60 Cal.App.5th 423.

² *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 69.

³ *Id.* At 69.

⁴ *Alvis v. County of Ventura* (2009) 178 Cal. App.4th 536, 550.

⁵ *Cornette v. Department of Transportation* (2001) 26 Cal.4th 63, 66.

⁶ *Cameron v. State of California* (1972) 7 Cal.3d 318, 327.

⁷ *Id.* At 329, 102 Cal.Rptr. 305, 497 P.2d 777.2. Failure to Warn

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 David at david.hoynacki@wilsonelser.com so that corrections can be made for the next edition.

- #1 Tyson & Mendes - 50 members
- #2T Farmer Case & Fedor - 18 members
- #2T Neil Dymott Frank McCabe & Hudson - 18 members
- #4 Balestreri Potocki & Holmes - 17 members
- #5 Wilson Elser Moskowitz Edelman & Dicker LLP - 15 members

- #6T Grimm Vranjes & Greer LLP - 12 members
- #6T Winet Patrick Gayer Creighton & Hanes - 12 members
- #8 Horton, Oberrecht, Kirkpatrick & Martha, APC - 10 members
- #9T Lorber Greenfield & Polito, LLP - 9 members
- #9T Pettit Kohn Ingrassia Lutz & Dolin - 9 members
- #11T Lincoln, Gustafson & Cercos - 7 members
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