

THE UPDATE

WINTER 2022 | ISSUE 6



SAN DIEGO
DEFENSE LAWYERS





OUTGOING PRESIDENT'S MESSAGE

Friends and Colleagues,

As we move on from yet another year of hopes, uncertainty, and constant change, I have continued to feel such pride and honor in the conduct of our legal community. We've learned how to Zoom depose and Zoom mediate. We've figured out virtual backgrounds and gotten locks on our home offices to keep kids and animals from joining proceedings without invitation. And through it all, I've seen civility and cooperation. I am so proud to be a member of this community.

I want to thank all of you for the ongoing commitment you've had to our dear organization. Notwithstanding it all, you made it our to our happy hours, our San Diego Padres Tailgate event, and our Golf Tournament. Our CLE attendance is showing record numbers as we've balanced eating lunch from our desks and listing in on Zoom presentations. We did it and we continue to do it every day as the new normal. Again, I am so proud.



As the most recent wave of the Pandemic is proving once again that the only constant is change, we remain incredibly hopeful for our 2022 Installation Dinner. We will be honoring Defense Attorney of the Year, Alan Brubaker, and Bench and Bar Honoree, Judge Eddie Sturgeon. My most sincere congratulations to them both! I am very much looking forward to seeing you all in person, hopefully mask-free,

to share a drink, break bread, and celebrate. We will be conducting a silent auction with wonderful prizes with the goal of raising money for our main philanthropy, Juvenile Diabetes Research Foundation (JDRF). Please do join us!

I leave this organization in the very capable hands of a woman who has been a presence and active force with SDDL for many years, first as a volunteer and later, a board member. Christine Dixon has a vision and drive to continue to raise the stakes and bring this organization to its full potential. I challenge you all to be a part of that and join her and the amazing 2022 board in their endeavors the months to come!

Be kind, be well, and stay safe!

Sincerely, Vanessa C. Whirl-Grabau, Esq.

SDDL President, 2021

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MEMBERSHIP INFORMATION

Membership is open to any attorney or paralegal who is primarily engaged in the defense of civil litigants, as well as retired defense attorneys. Dues are \$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**

2021 SDDL UPDATE

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www.aprilwdesign.com

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Judgment Stemming from a Section 998 Offer Without a Written Acceptance Provision Is Void

By Arezoo Jamshidi, Stevie B. Baris & Lawrence S. Zucker II
HAIGHT

In *Mostafavi Law Group, APC v. Larry Rabineau, APC* (B302344, Mar. 3, 2021), the California Court of Appeal, Second Appellate District (Los Angeles), addressed an issue of first impression: whether the purported acceptance of a Code of Civil Procedure section 998 (“section 998”) offer lacking an acceptance provision gives rise to a valid judgment. The appellate court held that a section 998 offer to compromise (“998 Offer”) without an acceptance provision is invalid and any judgment stemming from it is void.

In *Mostafavi Law Group*, plaintiffs sued defendants for defamation per se, among other claims, which was litigated at-length over several years. Defendants served plaintiffs with a written 998 Offer,



offering to settle the action for the sum of \$25,000.01. The 998 Offer did not specify the manner in which plaintiffs were to accept the offer.

Within the statutory time period for acceptance, plaintiffs’ counsel hand-wrote the following onto the 998 Offer: “Plaintiff Mostafavi Law Group, APC accepts the offer.” That day, plaintiffs also filed a notice of acceptance of the 998 Offer, along with proof thereof, and sent a copy to defendants. The next day, having received the notice of acceptance, defendants advised plaintiffs that they would “draft and send . . . a settlement

agreement for . . . signature” before paying the settlement funds.

A week later, the trial court entered judgment in favor of plaintiffs pursuant to section 998. Shortly thereafter, the parties

disagreed as to whether plaintiffs could enforce the judgment entered by the trial court, thus requiring defendants to pay the \$25,000.01 sum set forth in the 998 Offer, despite the fact that the parties had not executed any proposed settlement agreement. Unable to resolve the issue, defendants moved to set aside the judgment pursuant to Code of Civil Procedure section 473, subdivision (d), arguing, in pertinent part, “The [section] 998 [offer] [plaintiffs] accepted did not have an acceptance provision and is therefore invalid. As such, the judgment

that was entered pursuant to [plaintiffs'] acceptance of the [section] 998 [offer] is void."

The trial court granted defendants' motion to set aside the judgment. The trial court noted a lack of case law addressing the issue where a defective 998 Offer was actually accepted, rather than being rejected or otherwise lapsing. Without authority otherwise, the trial court relied upon the rule set forth in *Puerta v. Torres* (2011) 195 Cal.App.4th 1267, 1273, which held that "the manner of acceptance [of a 998 Offer] must be indicated in the offer," and where a 998 Offer is found to be invalid, any portion of a judgment that results from the 998 Offer is similarly invalid. Plaintiffs timely appealed.

In affirming the trial court's decision, the Court of Appeal followed *Puerta* and held that a 998 Offer without an acceptance provision is invalid. Therefore, an offeree's failure to accept the offer does not trigger section 998's cost-shifting provisions. According to the appellate court, the application of *Puerta* and its progeny, involving the rejection of 998 Offers, was a "logical extension" of those holdings involving acceptance of such an offer.

The Court of Appeal also determined the trial court's ruling was consistent with section 998's language and structure, which sets forth mandatory requirements that an offer and acceptance must satisfy to be valid. The Court reasoned that, where a 998 Offer "is invalid based on its failure to satisfy all of the 'statutorily required elements[,] . . . there is nothing for the receiving party to accept' in the first place." (Citing *Perez v. Torrez* (2012) 206 Cal.App.4th 418, 426.) Rejecting plaintiffs' argument that an acceptance provision should not be required, the Court emphasized that adherence to a bright-line rule, and consistent application of such rule, served to add "consistency and predictability to section 998's operation," thus encouraging settlement.

The Court of Appeal also determined that basic contract principles—the existence of an unambiguous offer, a clear and unqualified acceptance, and the parties' intent to enter into an agreement—does not support a finding that the offer was

valid and capable of giving rise to an enforceable judgment under section 998. The California Supreme Court previously clarified that general contract principles should not apply where, as here, their "application would conflict with section 998. . . ." (Citing *Martinez v. Brownco Construction Co.* (2013) 56 Cal.4th 1014, 1020.) Further, Code of Civil Procedure section 1654, regarding contract interpretation in cases of ambiguity, did not apply because plaintiffs admitted the offer was unambiguous.

Finally, the Court of Appeal disagreed with plaintiffs that principles of equity should prevent defendants from unfairly benefitting from their drafting error. Instead, the Court stressed, adherence to the "clear statutory requirement of an acceptance provision" triumphs over party tactics or case-specific details.

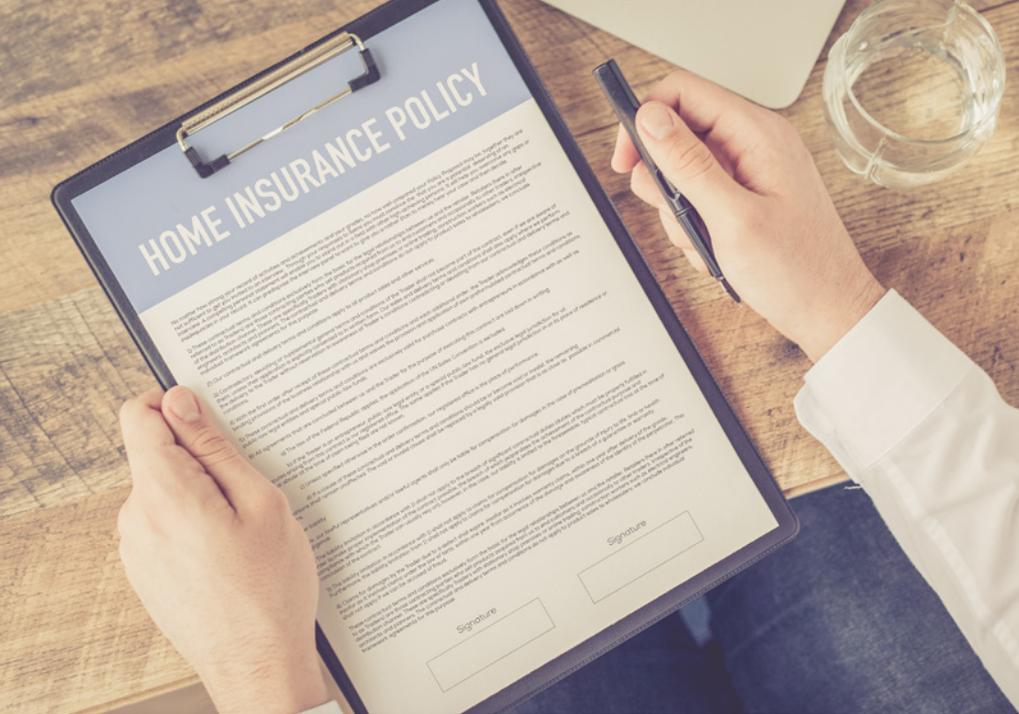
Mostafavi Law Group not only clarifies the need to include a provision for acceptance in any 998 Offer, but also serves as a firm reminder of the need to adhere to the strict requirements at play when making, and responding to, 998 Offers. 

This document is intended to provide you with information about general liability law related developments. The contents of this document are not intended to provide specific legal advice. If you have questions about the contents of this alert, please contact the authors. This communication may be considered advertising in some jurisdictions.

UPCOMING EVENTS

**January 22, 2022 –
Installation Dinner
at Loews Coronado**

**January 25, 2022 at 12 pm –
Lunch & Learn
"The Three Secrets to a
Successful Opening Statement"
with Brian Rawers, Esq.**



Insurer Gets Burned After Denying California Fire Claim – Maybe...

By Robert G. Bernstein,
Senior Counsel
TYSON & MENDES

Introduction

If your insurance policy lapses but the insurer allows you to reinstate it, is a loss that occurred during the lapse period covered? A California Court of Appeal recently examined this situation and concluded the policy holder may be entitled to coverage.¹

Insurance is a necessity in modern society. Not only does the state require minimal automobile liability coverage, but if you buy a vehicle with borrowed money, your lender also requires the purchase of insurance to protect the vehicle's value and will demand annual proof of coverage. In similar fashion, lenders who finance home loans also require proof of sufficient coverage to protect their investment. Because many members of the public are required to purchase one or more types



of insurance and because insurers draft policies and set premiums, public policy, the California Insurance Code, and many court decisions protect and favor policy holders.

A recent case shows why insurers must explicitly communicate their intent to policy holders and thoroughly document the basis of their activities.

Just The Facts

Until it was surpassed by the devastating Camp Fire in 2018, the October 2017 Tubbs Fire, which burned large swaths of Napa, Sonoma, and Lake counties and devastated parts of the City of Santa Rosa, was the largest wildfire in California history. Ted and Susie Anotopolous ("plaintiffs") lost their Santa Rosa home in the Tubbs Fire.² They promptly submitted a claim to their homeowner's insurer, Mid-Century Insurance Company

("Mid-Century"). Mid-Century denied the claim on the grounds the policy had lapsed six days prior to the fire loss (and for a total of nine days), due to non-payment of a premium payment. There was no dispute plaintiffs received multiple payment due notices prior to the deadline.³

Upon learning of Mid-Century's denial, plaintiffs immediately paid the full premium amount.⁴ Mid-Century accepted the premium and reinstated the policy. However, it continued to deny plaintiffs' claim, asserting the policy had lapsed at the time of the loss. Mid-Century did not, however, communicate expressly that "reinstatement" of the policy did not also retroactively provide coverage for the lapse period and thereby provide coverage for the fire loss. In accepting payment from plaintiffs, Mid-Century did not change the premium amount, but did add nine days to the end of the former policy period. It later contended that extending the policy period for the same duration as the coverage lapse established the policy was not in fact reinstated to the date of cancellation. As noted, however, it did not expressly communicate this in writing to plaintiffs.⁵

Trial Court Proceedings

Plaintiffs sued Mid-Century for breach of contract and breach of the implied covenant of good faith and fair dealing.⁶ The parties filed cross motions for summary judgment or summary adjudication. Mid-Century argued undisputed facts established the policy had lapsed, it did not owe a duty to cover the fire loss, and it had not breached the insurance contract or the implied covenant of good faith and fair dealing. Plaintiffs asserted Mid-Century reinstated their policy without a lapse in coverage and was obligated to cover the fire loss. The trial court sided with plaintiffs, finding that Mid-Century reinstated the policy without a lapse in coverage because it failed to articulate the nature and scope of reinstatement. It denied Mid-Century's motion for summary judgment/adjudication, granted plaintiffs' cross motion and entered judgement in favor of

plaintiffs. Mid-Century appealed.⁷

Court of Appeal Analysis

The case came before California's First District Court of Appeal, Division Two, in Sonoma County.⁸ Mid-Century argued the loss-in-progress rule precluded coverage for the loss, as a matter of law. It also asserted that, even if the rule did not apply, undisputed facts established that Mid-Century did not reinstate the policy retroactively and the policy was not in effect for nine days during which Plaintiffs lost their home.⁹

The Court of Appeal first examined the loss-in-progress rule, also known as the "known loss rule."¹⁰ This rule, which is often inserted as an exclusion in commercial general liability policies, states an insurer is not obligated to cover losses which precede the policy period. Courts and policy makers recognize that insurers provide protection against "risk," which may or may not ultimately manifest, but do not obligate themselves to cover losses which occur prior to the policy period. "[I]t is the general and quite well settled rule of law that the principles of estoppel and implied waiver do not operate to extend the coverage of an insurance policy where such coverage did not originally exist."¹¹ This rule essentially states that an insurer is obligated to cover a defined loss over a specified period. Other kinds of non-covered losses, or losses which occur prior to inception of the policy, are not covered.

The Court of Appeal, following the trial court's lead, rejected Mid-Century's attempt to rely on the loss-in-progress rule as a valid basis for rejection of plaintiffs' claim.¹² The Court observed a long history of cases presented by Mid-Century, in which insurers were affirmed in their decisions to deny coverage, involved losses which preceded the policy period and did not involve an ongoing policy which had been suspended for non-payment of a periodic premium and thereafter reinstated by the insurer.¹³ The Court drew a significant distinction between a policy which has yet to commence and an existing policy which is suspended, even for non-payment of a periodic premium. It implied the insurer with an ongoing coverage

obligation is subject to a heightened duty to communicate explicitly to the insured customer its intentions when suspending and reinstating the policy.¹⁴

Viewing the dispute in a manner most favorable to the insured as dictated by public policy, the Court of Appeal also concluded Mid-Century had, at all times, the ability to reinstate plaintiffs' policy without a lapse in coverage and could, by its actions and representations, be found to have waived the right to assert a lapse in coverage.¹⁵ The Court held Mid-Century's reliance on the *Monteleone* case was misplaced. In *Monteleone*, the insurer offered to reinstate a policy which lapsed just prior to an otherwise covered loss with an explicit representation the reinstatement included "a short lapse in coverage."¹⁶ Mid-Century failed to provide such explicit notice that reinstatement of plaintiffs' policy did not retroactively cover the period during which their home was destroyed.¹⁷ The Court reached this finding despite Mid-Century adding nine days to the end of plaintiffs' annual policy period and its contention that this extended policy expiration, coupled with no change in the policy premium, evidenced its intent to commence a new policy period of the same duration as the former one immediately upon receipt of the premium and after the coverage lapse.¹⁸

Mid-Century: Down, But Not Out

Although Mid-Century did not prevail in its effort to reverse the trial court and secure judgment in its favor, it did secure a partial victory at the Court of Appeal.¹⁹ After first affirming the trial court's ruling that Mid-Century was not entitled to summary judgment, the Court of Appeal ruled that triable issues of fact exist regarding Mid-Century's intent as to plaintiffs' policy at the time it accepted the late premium and reinstated the policy. The Court held Mid-Century's intent in "reinstating" coverage was impossible to determine from the conflicting evidence submitted, with some evidence supporting a policy lapse when the loss occurred and additional evidence suggesting Mid-Century intended to fully reinstate the policy retroactive to the date of cancellation. The Court of Appeal sent

the case back to the trial court for further proceedings related to the basis of Mid-Century's denial of the claim.²⁰

The Takeaway

While public policy offers insurers some fundamental protections, such as the power to disclaim coverage for losses occurring prior to policy inception, this case reminds insurers of their obligations to take great care and to communicate fully and explicitly to customers their positions regarding the extent and periods of coverage, the consequences of late premium payments and the scope and terms of coverage reinstatement when a policy lapses. If they fail to adhere closely to any of these practices, they may well find their denial of a claim under review by a court and they may be compelled to coverage a loss which could have been justifiably denied. 

¹ *Ted Antonopoulos, et al. v. Mid-Century Ins. Co.* (2021) 63 Cal.App.5th 580.

² *Antonopoulos v. Mid-Century* (2021) 63 Cal. App.5th 580.

³ *Id.*

⁴ *Antonopoulos v. Mid-Century* (2021) 63 Cal. App.5th 580.

⁵ *Id.*

⁶ *Antonopoulos v. Mid-Century* 63 Cal.App.5th 580.

⁷ *Id.*

⁸ *Antonopoulos v. Mid-Century* 63 Cal.App.5th 580.

⁹ *Id.*

¹⁰ *Antonopoulos v. Mid-Century* (2021) 63 Cal. App.5th 580.

¹¹ *Aetna Casualty & Surety Co. v. Richmond* (1977) 76 Cal.App.3d 645, 653

¹² *Antonopoulos v. Mid-Century* 63 Cal.App.5th 580.

¹³ See, e.g. *Monteleone v. Allstate Ins. Co.* (1996) Cal.App.4th 509

¹⁴ *Id.*

¹⁵ *Antonopoulos v. Mid-Century* 63 Cal.App.5th 580.

¹⁶ *Monteleone v. Allstate Ins. Co.* (1996) Cal. App.4th 509.

¹⁷ *Antonopoulos v. Mid-Century* 63 Cal.App.5th 580.

¹⁸ *Id.*

¹⁹ *Antonopoulos v. Mid-Century* 63 Cal. App.5th 580.

²⁰ *Id.*



CALIFORNIA COURTS OF APPEAL

Arbitration

Chambers v. Crown Asset Management, LLC (2021) _ Cal.App.5th _, 2021 WL 4900096: The Court of Appeal affirmed the trial court's orders sustaining objections to an affidavit submitted by defendant in support of its motion to compel arbitration, and its order denying defendant's motion to compel arbitration. Plaintiff filed a putative class action for alleged violations of the California Fair Debt Buying Practices Act (CFDBPA; Civil Code, section 1788.50 et seq.). Plaintiff allegedly incurred the debt as a result of a consumer credit card account issued by Synchrony Bank (Synchrony), and Synchrony sold the alleged debt to defendant for collection purposes. Defendant filed a motion to compel arbitration, relying on an affidavit from an employee of the original creditor, Synchrony, who stated in part that "Synchrony's records" showed a credit card account agreement containing an arbitration clause had been mailed to plaintiff. The trial court properly denied the motion to compel, based upon its proper ruling that the affidavit lacked foundation and violated the secondary evidence rule and therefore did not provide admissible evidence showing the arbitration agreement had been mailed to plaintiff. (C.A. 4th, filed October 21, 2021, published November 12, 2021.)

Patterson v. Superior Court (2021) _ Cal. App.5th _, 2021 WL 4843540: The Court of Appeal granted a petition

for writ of mandate directing the trial court to vacate its order granting defendant \$6,912 in attorney fees after the court granted defendant's motion to compel arbitration in plaintiff's action alleging violations of the California Fair Employment and Housing Act (FEHA; Government Code, section 12900 et seq.) including unlawful sexual harassment/hostile work environment (section 12040(j)), unlawful retaliation (section 12940(h)) and failure to prevent harassment and retaliation in violation of FEHA (section 12040(k)). The Court of Appeal ruled that an employer's arbitration agreement may not authorize the recovery of attorney fees for a successful motion to compel arbitration of a FEHA lawsuit unless the plaintiff's opposition to arbitration was frivolous, unreasonable or groundless. (C.A. 2nd, October 18, 2021.)

Attorney Fees

California Union Square L.P. v. Saks & Company LLC (2021) _ Cal.App.5th _, 2021 WL 5027907: The Court of Appeal affirmed the trial court's order denying defendant's motion for attorney fees seeking over \$1 million in attorney fees for various ancillary litigation proceedings arising out of an arbitration in the federal and state courts. Defendant did not seek recovery of its arbitration hearing attorney fees, conceding that they were not allowed by lease paragraph 3.1(c)(iv), part of the arbitration provision for dispute

resolution which provided that attorney fees and expenses of counsel for the respective parties and witnesses shall be paid by the respective party engaging such counsel or calling such witnesses. Defendant instead sought recovery of its "court related" fees under paragraph 23.10 of the lease. The Court of Appeal concluded that each party had agreed to bear its own attorney fees for all proceedings related to settling any disagreement around Fair Market Rent pursuant to lease paragraph 3.1(c), so the trial court properly denied the motion for attorney fees defendant had incurred in judicial proceedings that were part of that process. (C.A. 1st, October 29, 2021.)

Civil Procedure

Doe v. Damron (2021) _ Cal.App.5th _, 2021 WL 4891856: The Court of Appeal reversed the trial court's order granting defendant's motion to quash service of process on the basis of lack of personal jurisdiction. Defendant was a resident of Georgia who never resided in California. However, plaintiff (defendant's former wife) sued defendant for domestic violence (Civil Code, section 1708.6), sexual battery (*id.*, section 1708.5), and gender violence (*id.*, section 52.4) based upon incidents that had occurred when the couple visited California on two occasions. The Court of Appeal concluded that, absent compelling circumstances that would make the suit unreasonable, a court may exercise jurisdiction over a non-resident who commits a tort while present in the state. (C.A. 1st, October 20, 2021.)

Kremerman v. White (2021) _ Cal. App.5th _, 2021 WL 5177428: The Court of Appeal reversed the trial court's order denying defendant's motion to vacate a default and a default judgment of \$71,823.77 against defendant in an action for breach of contract by plaintiff landlord against his former tenant. The Court of Appeal concluded that service of process was defective and therefore the trial court never had jurisdiction over the defendant. First, plaintiff never undertook diligent efforts to locate defendant. Second, the service was defective because plaintiff attempted substituted service by delivering the

summons and complaint to an employee of the Postal Annex, where defendant had a mailbox, claiming that the summons and complaint were left with “a competent member of the household (at least 18 years of age) at the dwelling house or usual place of abode of the party” but the Postal Annex employee was clearly not a member of defendant’s household. Third, Code of Civil Procedure section 415.20(c) provides that substitute service can only be effectuated on an individual by leaving a copy of the summons and complaint with a certified mail receiving agency (CMRA), “if the only address reasonably known for the person . . . is a private mailbox” and that was not true for defendant. Finally, California law requires the CMRA to place a notice or copy of the documents in the customer’s mailbox within 48 hours and to send the documents by first-class mail within five days after receipt to the customer’s address (Business & Professions Code, section 17538.5(d)(1); see also Code of Civil Procedure section 415.20(c)), but the Postal Annex employee did not mail the documents to defendant until 20-days after she received them. (C.A. 2nd, November 8, 2021.)

Oakes v. Progressive Transportation Services (2021) _ Cal.App.5th _ , 2021 WL 5231688: The Court of Appeal affirmed the judgment of \$8,754.22 in favor of defendants, following a jury trial, in a personal injury action including a \$256,631.76 worker’s compensation lien and a pre-trial Code of Civil Procedure section 998 offer of \$200,000 from defendants. The jury returned a verdict in favor of plaintiff for \$115,000. The trial court initially entered judgment in favor of plaintiff. The trial court properly concluded that defendants’ 998 offer was valid. A party making a section 998 offer need not take into account a lien against the judgment when making the offer. The valid 998 offer subjected plaintiff to the statutory penalty because he recovered less at trial than the amount of the offer. Finally, the trial court properly applied section 998 before determining whether plaintiff’s counsel was entitled to attorney fees under Labor Code section 3856. The trial court erred in calculating the net judgment of \$8,754.22 for defendants. The trial court should have

entered an order awarding plaintiff \$475.98 for his pre-998 offer costs. Plaintiff’s total damage award should have totaled \$115,475.98 (\$475.98 + the \$115,000 jury verdict). The court should then have deducted from the \$115,475.98 award the \$174,830.29 in defendants’ post-998 offer costs awarded to defendants under section 998. A judgment in the resulting net amount of \$59,354.31 should then have been entered in favor of defendants. While the trial court erred in its calculation, defendants did not cross-appeal, and they did not challenge the \$8,754.22 final judgment entered in their favor. Absent such a challenge, the Court of Appeal had no basis for overturning the \$8,754.22 judgment for defendants. (C.A. 2nd., November 10, 2021.)

Evidence

Doe v. Superior Court of Los Angeles County (2021) _ Cal.App.5th _ , 2021 WL 5048205: The Court of Appeal denied a petition for writ of mandate seeking to overturn the trial court’s pre-trial ruling, in an action by plaintiff for molestation by her fourth-grade teacher, that Evidence Code section 1106 does not include evidence of sexual abuse that a plaintiff has been involuntary subjected to, and it’s ruling under Evidence Code section 783 that the probative value of the subsequent sexual abuse was not outweighed by the danger of undue prejudice. The Court of Appeal disagreed with the trial court as to Evidence Code section 1106, concluding that the term “plaintiff’s sexual conduct” includes both voluntary and involuntary sexual conduct, and evidence of a plaintiff’s sexual conduct—voluntary or involuntary—may not be admitted under section 1106 under any circumstances. Although the trial court erred in concluding that Evidence Code section 783 was inapplicable to involuntary sexual conduct, and while the question was a close call, the Court of Appeal concluded the trial court did not abuse its discretion in performing the Evidence Code section 352 analysis and admitting a subsequent 2013 molestation for purposes of impeachment. The trial court was instructed to either assess any prejudice flowing from the empaneled jury’s

exposure to the mentioning of the 2013 incident during opening statements, or begin the trial with a new jury. (C.A. 2nd, October 29, 2021.)

Insurance

Janney v. CSAA Insurance Exchange (2021) _ Cal.App.5th _ , 2021 WL 4810353: The Court of Appeal affirmed the trial court’s order granting defendant’s motion for summary judgment in plaintiff’s action alleging breach of contract and bad faith regarding the handling of a fire loss claim after plaintiff lost her house in Weed in the Boles fire in 2014. Plaintiff alleged that defendant breached the insurance policy by, among other things, failing to provide her with a complete and accurate estimate for replacing the original house, and without such an estimate plaintiff was forced to build a cheaper house than the one destroyed by the fire. The trial court properly granted summary judgment. Defendant carrier did not insist on paying plaintiff the smaller adjusted replacement cost amount initially calculated by a consultant but instead paid her the greater amount she actually spent replacing the home. Moreover, plaintiff’s evidence did not create a triable issue of material fact with respect to whether her insurance policy entitled her to more than she actually spent to build the replacement house. There was also no breach of contract for defendant’s delayed payment of landscaping costs. Any delay by defendant was inadvertent, and plaintiff presented no evidence that she suffered any damages as a result of the alleged breach. (C.A. 3rd, October 15, 2021.)

Torts

Doe v. Roman Catholic Archbishop of Los Angeles (2021) _ Cal.App.5th _ , 2021 WL 4891312: The Court of Appeal reversed the trial court’s order granting defendant’s motion for summary judgment in plaintiff’s action for sexual abuse by a priest while plaintiff was a boy attending catechism classes at church. The priest was not plaintiff’s catechism teacher. The trial court held the church did not owe a duty to protect plaintiff. The Court of Appeal



California Supreme Court Rejects Third Exception to the *Privette* Doctrine

By Jeremy Freedman, Associate
TYSON & MENDES

All too often, property owners are sued after hiring an independent contractor who 1) causes injuries, or 2) has employees who sustained an injury while performing work. Under the *Privette* doctrine, such lawsuits would generally be barred under California law doctrine because there is a strong presumption that a property owner who hires an independent contractor delegates all responsibility for workplace safety to the contractor.¹ The *Privette* doctrine applies even where the property owner was at least partially to blame due its negligent hiring and where the independent contractor is has no employees or workers' compensation insurance.²

The Supreme Court has explained the rationale for the *Privette* doctrine is threefold.³ First, property owners typically do not have any right to control an independent contractor or how they complete the work for which they



were hired.⁴ Second, contractors are able to price safety precautions and insurance coverage into the cost of the work to be completed.⁵ Lastly, contractors are hired for their expertise to complete the work competently and safely.⁶ As such, independent contractors are in a better to prevent or mitigate damages related to workplace injuries.

A. Recognized Exceptions to the *Privette* Doctrine

The *Privette* doctrine is not an absolute bar of liability to property owners who hire independent contractors. Two limited exceptions to the *Privette* doctrine recognized by the California Supreme Court are set forth below:

1. Property Owner Retains Control

A property owner may be liable where they retain control over any part of the independent contractor's work and negligently exercises that retained control

in a manner that affirmatively contributes to the injury.⁷

2. Knowledge of a Dangerous Condition

A property owner may also be held liable where they knew, or should have known of a concealed hazard on the property that the contractor did not know of and could not have reasonably discovered the hazard, and the landowner failed to warn the contractor of the hazard.⁸

Recently, in the case of *Gonzalez v. Mathis*,⁹ the California Supreme Court was asked to adopt a broader third exception holding a property owner liable for injuries that result from a known dangerous condition on the property where there was no reasonable safety precautions the independent contractor could take to avoid or minimize the dangerous condition.¹⁰ As discussed more thoroughly below, the California Supreme Court rejected the adoption of a third exception based on an inability to mitigate a known dangerous condition holding it was "fundamentally inconsistent" with the *Privette* doctrine.¹¹

B. Gonzalez v. Mathis Decision

1. Underlying Facts

John Mathis owned a unique home with a flat sand and gravel roof and a skylight that regularly needed to be cleaned.¹² Mr. Mathis had also built a three-foot wall in front of a skylight on top of the roof to block view of air condition units and piping behind it. The path between the edge of the roof and the three-foot wall giving access to the skylight was only 20 inches wide.¹³

Since the 1990s, Mr. Mathis had regularly hired Beverly Hills Window Cleaning to clean his skylight.¹⁴ Mr. Gonzalez worked for Beverly Hills Window Cleaning and regularly cleaned Mr. Mathis' skylight. At some point in the mid-2000s, Mr. Gonzalez started his own window cleaning company. In approximately 2007, Mr. Mathis hired Mr. Gonzalez's company to clean the skylight.¹⁵

On August 1, 2012, at the direction of Mr. Mathis' housekeeper, Mr. Gonzalez accessed the top of the roof to inform his employees to use less water while cleaning the skylight as water was leaking into the house.¹⁶ When Mr. Gonzalez attempted to walk around the three-foot wall, he slipped and fell off the roof, sustaining serious injuries.¹⁷

Mr. Gonzalez filed a lawsuit against Mr. Mathis. Mr. Gonzalez alleged Mr. Mathis had failed to properly maintain the roof causing it to become slippery, that the roof did not have any tie off points to attach a safety harness, that the roof did not have a guardrail along the edge, and that the path between the three-foot wall and edge of the roof was unreasonably narrow.¹⁸

2. Procedural History

Mr. Mathis filed a motion for summary based on the *Privette* doctrine.¹⁹ The trial court granted Mr. Mathis' motion for summary judgment.²⁰

The Court of Appeals, however, reversed the trial court's order granting summary judgment.²¹ In doing so, the Court of Appeals, relying on dicta in *Kinsman v. Unocal Corp.*,²² held a property owner may be liable when they expose an independent contractor or its employees to a known hazard that cannot be remedied through reasonable safety precautions.²³ This Court of Appeals

further held disputed material issues existed as to whether Mr. Gonzalez could have taken reasonable safety precautions to avoid the danger, thus precluding summary judgment.²⁴

3. Holding

On appeal, the Supreme Court of California rejected the Court of Appeals' creation of a third broad exception to the *Privette* doctrine.²⁵ The Court explained a property owner does not fail to delegate responsibility to an independent contractor simply because of the existence of a known hazardous condition that cannot be mitigated by the independent contractor.²⁶ Once an independent contractor becomes aware of a dangerous condition on the premises, the property owner has properly delegated their responsibility of safety to the independent contractor.²⁷

The California Supreme Court explained to hold otherwise would vastly expand the *Privette* doctrine and would require the property owner to affirmatively assess workplace safety.²⁸ The property owner would need to assess whether to adopt reasonable safety precautions to protect against the dangerous condition.²⁹ Such a requirement would require the property owner to have specialized expertise in the type of work for which they hired the independent contractor.

C. Takeaway

The *Privette* doctrine remains a very powerful tool in challenging premises liability cases by way of a motion for summary judgment. Given the Supreme Court's reluctance to expand liability to property owners, lower courts have little room to deny motion for summary judgment, outside of such grounds provided in Code of Civil Procedure Section 437(c). As such, counsel for property owners in these types of cases must focus discovery on the independent contractor's control and expertise and rule out the two recognized exceptions to the *Privette* doctrine discussed above. 

¹ See *Privette v. Super. Ct.* (1993) 5 Cal.4th 689; *SeaBright Ins. Co. v. US Airways, Inc.* (2011) 53 Cal.4th 590.)

² See *Camargo v. Tjaarda Dairy* (2001) 25 Cal.4th 1235, 1238, *Tverberg v. Fillner Construction, Inc.* (2010) 49 Cal.4th 518, 521.)

³ *Privette v. Super. Ct.* (1993) 5 Cal.4th 689.

⁴ *Privette, supra*, 5 Cal.4th at 693.

⁵ *Id.*

⁶ *Id.* at 698-700.

⁷ *Hooker v. Dept. of Transportation* (2002) 27 Cal.4th 198, 202.

⁸ *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 664.

⁹ *Gonzalez v. Mathis*, Cal. Supreme Ct. Case No. S247677.

¹⁰ *Luis Gonzalez v. John R. Mathis* (Aug. 19, 2021) Cal. Supreme Ct. Case No. S247677, at pg. 2.

¹¹ *Id.*

¹² *Gonzalez v. Mathis*, Cal. Supreme Ct. Case No. S247677, . at pg. 3-4.

¹³ *Id.*

¹⁴ *Gonzalez v. Mathis*, Cal. Supreme Ct. Case No. S247677.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Gonzalez v. Mathis*, Cal. Supreme Ct. Case No. S247677.

¹⁸ *Id.* at pg. 4.

¹⁹ *Id.*

²⁰ *Id.* at pg. 5.

²¹ *Id.*

²² *Kinsman v. Unocal Corp.* (2005) 37 Cal.4th 659, 664.

²³ *Id.* citing *Gonzalez v. Mathis* (2018) 20 Cal. App.5th 257, 272-73 (Gonzalez).

²⁴ *Id.* citing *Gonzalez v. Mathis* (2018) 20 Cal. App.5th at 273-74.

²⁵ *Id.* at pg. 13.

²⁶ *Id.*

²⁷ *Id.* citing *Kinsman*, 37 Cal.4th at 674.

²⁸ *Id.* at pg. 13-14.

²⁹ *Id.* at pg. 14.

Past Presidents Event



Pictured above: Danielle Hicks, Hon. Judge Kevin Enright, Christine Dixon, David Hoynacki, Rachel Fisher, Lawrence Zucker and Joseph Kagan

On December 8, 2021, SDDL hosted its annual Past Presidents event at The Hotel Republic. This well-attended event gave past presidents the opportunity to mingle and our Board members. Every one was so excited to be together in person and share stories from their time as president that only one picture from the event was taken! Our Board is looking forward to hosting more in-person events in 2022 and getting to visit with previous members and get to know our new ones! 🍷

November 2021

“Know Your Investigator: The Importance of Lawful, Accurate, and Ethical Investigations”

By Anna Sumner and Christy Beckhart of Advocate Investigative Agency, Inc.

On November 9, 2021, SDDL hosted an MCLE covering the current law and standard relevant to investigative work presented by seasoned fraud investigators, Anna Sumner and Christy Beckhart of Advocate Investigative Agency, Inc. Ms. Sumner and Ms. Beckhart provided a summary of many potential issues that confront the agents you hire and how AIA deals with those issues with the best interests of your litigation goals in mind. They covered the California Private Investigator Act and how good investigative work must comply with the same. The presentation was sprinkled with entertaining anecdotes of their investigative work, including tracking down and serving another private investigator evading service. Their presentation is informative for anyone considering hiring a PI or whose opposition might hire a PI. 🍷

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SDDL will adhere to the County's safety guidelines and protocols.

Always Present a Defense Number Early, Often, and Without Exception

By Kiley McCarthy Connolly, Associate
TYSON & MENDES'

Plaintiff counsels are at ease asking a jury for astronomical damages. However, defense counsels do not feel the same level of comfort, therefore perpetuating the trend of “runaway” verdicts. The below case analysis highlights the importance of always giving a defense number, as emphasized by Robert Tyson, author of *Nuclear Verdicts: Defending Justice For All*,ⁱ and exhibits what happens when defense counsel fails to do so.

I. Defense attorneys across the nation will always argue damages.

Defense attorneys are well prepared to argue reasonable and necessary medical costs, future earning capacity, loss of household services, and numerous other damages claims. However, defense attorneys are often hesitant to offer an alternative number to plaintiff’s ask. Despite concerns a defense number will only encourage juries to award higher damages, history has shown the opposite to be true: failure by defense counsel to mention a number early and often will result in runaway jury verdicts, in which a jury awards whatever damages requested by plaintiff’s counsel without consideration of whether such damages are reasonable or appropriate for the case. This was particularly true in the recent case of *Zander v. Morsette*, in which a car accident case resulted in a multi-million dollar jury verdict.ⁱⁱ

a. Factual Summary

In 2015, Mr. Morsette was driving in an intoxicated state when he collided with Ms. Monson’s vehicle.ⁱⁱⁱ At the time of the incident, Mr. Morsette was traveling on the wrong side of an expressway in North Dakota.^{iv} Ms. Monson sustained severe bodily injuries and the two other passengers died at the scene of the incident.^v

b. Trial Court

Ms. Monson and the deceased passengers’ estates (“plaintiffs”) sued Mr. Morsette, seeking compensatory and punitive damages for their injuries.^{vi} At the conclusion of trial, where Mr. Morsette admitted liability, a jury awarded \$333,088,331.16 to each of the passengers’ estates, and \$470,220,819.96 to Ms. Monson in compensatory and punitive damages.^{vii} Mr. Morsette filed a motion for reduction of damages and a new trial.^{viii} Mr. Morsette’s leading arguments were: 1) the district court erred in the compensatory phase of trial by admitting evidence of his intoxication, 2) the jury’s verdict was excessive, 3) the court erred in its jury instructions, and 4) plaintiffs’ references to Mr. Morsette’s absence at trial should have been excluded.^{ix} The district court reduced plaintiffs’ total damages to \$690,397,482.28.^x However, the court denied Mr. Morsette’s motion for new trial, concluding Mr. Morsette’s intoxication was relevant at trial.^{xi}

c. On Appeal

In Mr. Morsette’s Appellant Brief, Mr. Morsette pointed out plaintiffs’ counsel asked the jury to award each plaintiff tens of millions of dollars in both past and future non-economic damages.^{xii} Mr. Morsette explained in his brief the jury awarded double the compensatory damages plaintiffs had originally requested and collectively awarded plaintiffs a total of \$885 million in punitive damages.^{xiii} Mr. Morsette argued a new trial was required because the jury’s verdict was excessive and was determined under the influence of passion and prejudice.^{xiv}

On February 2, 2021, all parties appeared and made their oral arguments.^{xv} The court has not yet released their decision.^{xvi}

II. Always Give a Number

In our society, money has always been a taboo topic. We are taught as young children not to discuss money in public, as it may be considered rude. However, when you are a juror on a personal injury civil matter, chances are high plaintiff’s counsel has brought up their damages number within the first few minutes of introducing themselves.^{xvii}

In *Nuclear Verdicts: Justice for All*, author Mr. Tyson explained why it is imperative to always give your defense number early and often throughout the trial.^{xviii} Traditionally, juries awarded “runaway” verdicts because plaintiffs’ counsels proposed a large dollar amount to the jury.^{xix} This can be seen in Mr. Morsette’s case where plaintiffs’ counsel proposed various damages worth tens of millions of dollars.

Defense counsels must offer their own damages number to combat plaintiffs’ inevitably high number as early as *voir dire* according to Mr. Tyson.^{xx} The strategy of offering a defense damages number early relates back to the psychological tactic of “priming.”^{xxi} Mr. Tyson explains, by offering a defense number in *voir dire*, counsel may be able to influence the attention and decision-making capabilities of the jurors.^{xxii}

Mr. Tyson demonstrated the importance of repeating defense’s number often, even after *voir dire* is complete and the trial has begun.^{xxiii} When a defense counsel works their number into their opening, into plaintiff’s case in chief, into defense’s case in chief, and the defense closing, this provides the jurors various opportunities to hear why the defense number is reasonable.^{xxiv}

While many defense counsels cannot overcome the uncomfortable thought of offering a defense number in plaintiffs’ evidence, Mr. Tyson offers various

examples of how to introduce a defense number while appearing reasonable to a jury.^{xv} In implementing these examples, defense counsel will be able to introduce a defense number in every phase of the trial.^{xvii}

III. Takeaway

Runaway verdicts have become more and more frequent over the last few decades because plaintiff's counsel continue to present enormous numbers to juries.^{xvii}

Defense counsels need to combat this trend by offering their own defense number early and often throughout trial.^{xxviii} By offering a number early and often, defense attorneys can harness the power of psychological "priming" to make small, reasonable jury verdicts more appealing to the jury, and prevent the possibility of a runaway jury verdict following trial. ♥

ⁱ Robert F. Tyson, Jr., *Nuclear Verdicts Defending Justice For All* (2020).

ⁱⁱ Shayna MONSON; Jason Renschler, individually and as Executor of the Estate of Abby Renschler, deceased; and Jason Renschler and Sandra Renschler on behalf of the heirs

and next of kin of Abby Renschler, deceased; and Lee Zander individually and as Executor of the Estate of Taylor Goven, deceased; and Lee Zander on behalf of the heirs and next of kin of Taylor Goven, deceased. *Plaintiffs, v. Jordan MORSETTE, Defendant.*, 2016 WL 11647170 (N.D.Dist.); Lee Zander individually and as Executor of the Estate of Taylor Goven, deceased; and Lee Zander on behalf of the heirs and next of kin of Taylor Goven, deceased; and Jason Renschler, individually and as Executor of the Estate of Abby Renschler, deceased; and Jason Renschler and Sandra Renschler on behalf of the heirs and next of kin of Abby Renschler, deceased; and *Shayna Monson, Plaintiffs and Appellees v. Jordan Morsette, Defendant and Appellant* (appeal from Case No. 2016-CV-02137 South Central Judicial District, Burleigh County) (No full citation is yet available, as the court has not yet rendered its decision.)

ⁱⁱⁱ Zander et al. v. Morsette, Supreme Court of North Dakota, Case No. 20200211, Appellant Brief (No full citation is yet available, as the court has not yet rendered its decision.)

^{iv} *Id.*

^v *Id.*

^{vi} *Id.*

^{vii} *Id.*

^{viii} *Id.*

^{ix} *Id.*

^x *Id.*

^{xi} *Id.*

^{xii} *Id.*

^{xiii} *Id.*

^{xiv} *Id.*

^{xv} *Monson v. Morsette*, Supreme Court of North Dakota, Case No. 20200211, Docket ^{xvi} *Id.*

^{xvii} Robert F. Tyson, Jr., *Nuclear Verdicts Defending Justice For All* (2020).

^{xviii} *Id.*

^{xix} *Id.*

^{xx} *Id.*

^{xxi} *Id.*

^{xxii} *Id.*

^{xxiii} *Id.*

^{xxiv} *Id.*

^{xxv} *Id.*

^{xxvi} *Id.*

^{xxvii} *Id.*

^{xxviii} *Id.*



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FREDERIK P. SPIESS JOINS BALESTRERI POTOCKI & HOLMES

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Spiess focuses his practice on general liability matters and civil litigation, business and contract disputes, professional liability matters involving insurance and real estate professionals, legal malpractice defense and ethics, construction and real estate disputes and insurance litigation.

In addition to successfully prosecuting and defending complex and large loss matters, Spiess' varied and extensive experience includes acting as outside general counsel for various businesses, serving as a legal ethics and law practice management consultant, handling insurance defense matters, serving as cumis counsel, and representing businesses and individuals in contentious and high stakes disputes and litigation.

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California Case Summaries

disagreed, ruling that a church has a duty to protect children from sexual abuse by clergy while the children are attending religious school or participating in other church-sponsored programs. (C.A. 2nd, October 20, 2021.)

Doe v. Lawndale Elementary School Dist. (2021) _ Cal.App.5th _, 2021 WL 5578329: The Court of Appeal reversed in part, and affirmed in part, the trial court's order granting defendants' motion for summary judgment in an action for sexual assault of a minor student by a music teacher. The Court of Appeal concluded that school administrators have a duty to protect students from sexual abuse by school employees, even if the school does not have actual knowledge of a particular employee's history of committing, or propensity to commit, such abuse. Therefore, it reversed the trial court's order granting summary adjudication on plaintiff's negligence causes of action. Plaintiff also sued for breach of the mandatory duty to report suspected abuse under the Child Abuse and Neglect Reporting Act (CANRA; Penal Code, section 11164 et seq.). As a matter of first impression, the Court of Appeal held that a plaintiff bringing a cause of action for breach of the mandatory duty to report suspected abuse under CANRA must prove it was objectively reasonable for a mandated reporter to suspect abuse based on the facts the reporter actually knew, not based on facts the reporter reasonably should have discovered. Because plaintiff did not create a triable issue of material fact regarding whether any of defendant school district's employees knew of facts from which a reasonable person in a like position could suspect abuse, it affirmed the trial court's order granting summary adjudication as to the CANRA cause of action. (C.A. 2nd, November 30, 2021.) 

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SDDL Recognition of Law Firm Support

The Update traditionally included a list of current SDDL members at the end of each edition. As part of the SDDL Board's proactive efforts to protect the privacy of its members, the Update will no longer include a list of current members. We have observed over the 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
- #11T Ryan Carvalho LLP - 7 members
- #13T Dunn DeSantis Walt & Kendrick, LLP - 6 members
- #13T Lotz Doggett & Rawers LLP - 6 members
- #13T Wingert, Grebing, Brubaker & Juskie, LLP - 6 members
- #16 Walsh McKean Furcolo LLP - 5 members
- #17T Carroll Kelly Trotter & Franzen - 5 members
- #17T Davis Grass Goldstein & Finlay - 4 members
- #17T Higgs Fletcher & Mack - 4 members
- #17T Hughes & Nunn, LLP - 4 members
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