association of southern california defense counsel

verdict

Volume 2 • 2013

INSIDE:

- Judges' tips on trial exhibits
- Trade secret damages
- Insurance coverage
- Assumption of Risk
- ASCDC President, N. Denise Taylor, in her own words

Long Beach's Perfect Conference Center


Headquarters—
Video Conferencing Center


Sunrise Room


Coast Room


Grand Room


Marina Room


Harbor Room

DEPOSITIONS, MEDIATIONS, ARBITRATIONS, INTERVIEWS, AND MEETINGS, Kusar's Long Beach headquarters is the ideal place. Whether you attend in person and enjoy the hospitality of our Long Beach conference rooms showcased here, or by videoconference or web conference from one of our many locations, ***Long Beach Video Conferencing Center®*** has the meeting place you need - anywhere! Kusar Court Reporters is a full-service court reporting and litigation support company covering the California, National and International markets.

"Keeping Your Word is Our Business℠"
visit **www.kusar.com**

Long Beach Conference Rooms Showcased Here!

National Headquarters
111 W. Ocean Blvd.
Suite 1200
Long Beach, CA 90802

- Seating up to 40
- Breakout Rooms
- Videoconferencing
- Document and X-ray Cameras
- Court Reporters and Interpreters
- Legal Video & Synchronization
- Depositions, Mediations, Arbitrations
- Business Meetings and Interviews
- Records Retrieval
- Online Scheduling & Transcripts
- Administrative & Catering Services
- LCD Projector & Screen
- Free WiFi
- ISDN and IP Connections

Certified WBENC

Kusar®

Court Reporters & Legal Services, Inc.

Call **800.282.3376** or email **calendar@kusar.com**

CALIFORNIA • NATIONAL • WORLDWIDE

the association of southern california defense counsel

verdict

2520 venture oaks way • suite 150 • sacramento, ca 95833

features

10 How (Not) to Handle Exhibits In Trial
Judge Kathleen M. White & Judge Daniel P. Maguire

13 The "Metaphysical Moment" When a Pipe Begins to Leak Is Not a "Sudden" Discharge Where Damage Only Results From a Gradual or Continuous Process
Gary J. Wax & Robert A. Olson

17 Trade Secret Misappropriation Damages, and the Underused "Head Start" Doctrine Defense
H. Thomas Watson & Karen M. Bray

21 "I'm Very Bullish on This Organization" ASCDC President Denise Taylor Talks Candidly About the Changes in the Courts, Building Membership and the Year's Events
Carol A. Sherman

25 *Gregory v. Cott:* California Supreme Court to Further Clarify the Primary Assumption of Risk Doctrine
Jeffrey M. Lenkov and Steven J. Renick

30 10 Legal Writing Tips For the Young Associate
Hannah L. Mohrman

departments

2 Index to Advertisers

3 President's Message *by N. Denise Taylor*

5 Capitol Comment *by Michael D. Belote*

6 New Members

9 What We Do *by Patrick A. Long*

29 2013 Hall of Fame Photos

32 Defense Verdicts

33 Amicus Committee Report

35 Membership Application

36 Executive Committee / Board of Directors

Exhibits, 10

Metaphysical Moment, 13

Trade Secrets, 17

N. Denise Taylor, 21

index to advertisers

ADR Services, Inc.	8
Arrowhead Evaluation Services	37
Biomechanical Analysis	31
Ed Fernandez	12
Executive Presentations	28
Fields ADR	34
First Mediation Corp.	32
Forensis Group	7
Greines, Martin, Stein & Richland LLP	26
Jack Daniels	24
Judicate West	8
KGA, Inc.	14
Kusar Court Reporters	Inside Front Cover & 16
Phillip Feldman, Law Offices	30
PMA Dispute Resolution	15
Pro/Consul, Inc.	4
Thon Beck Vanni Callahan & Powell	24
Alternative Resolution Centers	27

verdict

2520 venture oaks way • suite 150 • sacramento, ca 95833

— staff —

editor
Lisa Perrochet

executive director
Jennifer Blevins

art director
John Berkowitz

contributors
Michael D. Belote
Karen M. Bray
Jeffrey M. Lenkov
Patrick A. Long
Robert A. Olson
Judge Daniel P. Maguire
Hannah L. Mohrman
Carol A. Sherman
Steven J. Renick
N. Denise Taylor
H. Thomas Watson
Gary J. Wax
Judge Kathleen M. White

printing
Sig-1 Printing

association of southern california defense counsel

For advertising information, contact the ASCDC, below

— executive offices —

2520 Venture Oaks Way, Suite 150
Sacramento, CA 95833
800-564-6791 • *ascdc@camgmt.com* • *www.ascdc.org*

president's message

N. Denise Taylor
ASCDC 2013 President

It's hard to believe that it is late summer already! The year is flying by, and I am so pleased with the work that your ASCDC board has already done this year. The enthusiasm for our new member outreach has been gratifying. Our Amicus Committee is as busy as ever in their search for righteous positions to support on behalf of the defense. Our seminar and webinar committees are planning a variety of educational programs to benefit you, our members.

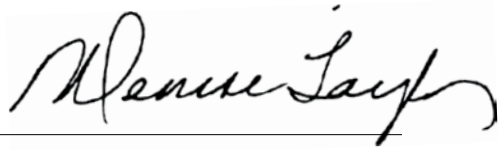
The budget cuts to the courts have been the topic of conversation for over a year, particularly in Los Angeles where the hard hit cutbacks required an overhaul of the system with respect to personal injury cases earlier this year. ASCDC stands for the Association of Southern California Defense Counsel, and what happens in Los Angeles county affects the practice of virtually all of our members in the whole Southern California area, even those as far south as San Diego, or as far north as Bakersfield. I am very pleased to report, having just successfully completed my own first jury trial in the PI court system, that so far everything is going better than anyone could have predicted. As of this writing, every single PI case that has "answered ready" for trial in Department 91, 92 or 93 has been sent out to trial that same day. We have not seen the predicted delays; at least not yet. For this we can thank Judge Dan Buckley for his leadership and vision; Judge Amy Hogue in Department 1 who has, in her steady way, administrated the assignments to the trial courts; Judges Beaudet, Jessner, Onkonkwo, and Weinbach who have handled the FSC's, motions, and hearings in the PI departments with fairness and efficiency; and most importantly, the court clerks and staff who have managed the chaos that often is present in the PI departments with skill, patience and good humor.

ASCDC hosted a well-attended "hot topics" seminar in July, with an update on the Los Angeles Superior court offered by Judges Buckley, Hogue and Beaudet, as well as two of the trial judges, Judge Marc Marmaro from the Mosk courthouse downtown and Judge Bobbi Tillman from Santa Monica. Their candid remarks helped those in attendance gain a better understading of and appreciation for the PI courts. ASCDC continues to support the courts in any way we can, and will continue to keep our members informed about the changes, so that we can continue to achieve justice for our clients in these challenging times.

Our Hall of Fame gathering at the Biltmore Millenium Hotel was, as predicted, an unqualified success with a sell-out crowd of "Who's Who" of the Southern California civil plaintiff and defense bar and members of the judiciary. If you didn't make it, you missed a great evening of across-the-aisle fellowship, with heartfelt and humorous tributes to three icons of our legal community. Our inaugural Hall of Fame member Wally Yoka introduced Judge Bill MacLaughlin as our Judge of the Year, who accepted with his usual class and grace. David O'Keefe, also a prior recipient of our Hall of Fame award, introduced his old friend and classmate Tom Girardi, the recipient of our Civil Advocate Award. Tom, of course, accepted the award with humor and civility. Phil Baker's introduction of his dad, our 2013 Hall of Fame Award recipient Bob Baker, was both entertaining and poignant, with Bob's acceptance a perfect ending to the evening. Special thanks to our officers, Tribute Book sponsors and to Rick Kraemer at Executive Presentations for his invaluable assistance in making this a truly memorable event.

I would like to personally invite all of you to come to our Santa Barbara seminar in September. With a professional liability focus, this seminar has been my "baby" for a long time and bringing it back last year was gratifying, especially when it was so successful. This year Clark Hudson from San Diego has capably taken the helm and has put together an exciting program which will not only provide lots of MCLE credit on September 20 and 21, but will be interesting and informative. Followed by our optional lunch and wine tasting tour in the Santa Ynez valley on Saturday, it's a weekend that should not be missed.

Take a look at the back cover of this edition of Verdict for other upcoming ASCDC events and please consider attending. My door is open; please call or e-mail me if you have any suggestions or want to contribute in any way to the success of your organization, the ASCDC.



Half-Empty, Half-Full

Michael D. Belote
Legislative Advocate
California Defense Counsel

After what seemed like a never-ending pattern of state budgets delayed past the beginning of the next fiscal year, California has now entered a period of reliably on-time spending plans. Several factors are at play, including overwhelming majorities in each house for Democrats, a constitutional change reducing the required budget vote from 2/3 to simple majority, and even though it perhaps is impolite to suggest it, a provision which permanently forfeits legislative pay for late budgets.

CDC spent many months working with a large number of bar groups in the Open Courts Coalition, seeking to increase budget allocations for the judicial branch. The final spending plan increased spending for the judicial branch by $63 million, composed of $60 million for the trial courts and the balance dedicated to the Supreme Court, courts of appeal, and Habeas Corpus Resource Center. The final total was reduced from the $100 million recommended in both the Senate and Assembly, leading to a debate about whether the result was a win or a loss.

Clearly the principal cause for reducing the increased allocation from $100 million to $63 million was the insistence by the governor's office on more conservative revenue projections. Obviously estimating revenues for an enterprise the size of California state government is as much art as science, and because revenues depend in large measure upon capital gains in our boom and bust economic cycles, California's revenue is notoriously difficult to predict. For a variety of reasons, Governor Brown predicted lower revenues than did the legislature, and when lower revenue projections were agreed upon, spending augmentations declined as well.

Even with reinvestment of the $63 million, courts have continued to absorb painful cuts. Shortly after the budget enactment, Los Angeles was forced to lay off approximately 175 more court employees. Court ADR services in LA have been eliminated, and very significant changes have been necessary in court processing of personal injury cases. Statewide, sixty-one *courthouses* have been closed, potentially forever. Viewed in this light, the $63 million is woefully short of the need.

On the other hand, 2013 represents the first year that budget allocations to the courts have begun to turn around. Legislators from both parties in both houses agreed that courts have been cut too deeply, causing unacceptable losses in access to justice. Lawmakers of completely disparate philosophies described the $63 million as a "down payment" on what must be done for the judicial branch. Significantly, the issue has been articulated as one not just affecting lawyers: the interests of single mothers, traffic violators, juveniles in crisis, and the general business community which counts on courts to efficiently resolve disputes, are among the needs which are frequently mentioned.

Beyond the court budget, CDC has been involved in a wide range of civil issues this year. AB 715, for example, would have enacted a de novo standard of appellate review for evidentiary rulings on summary judgment motions. With CDC and others opposing, this proposal will not be enacted this year. CDC also helped shelve AB 788, which could have interfered with the ability of counsel to provide transcripts to clients and insurers, and we obtained amendments to AB 648, relating to court reporter fees for short-cause matters.

Looking ahead to the final six weeks of the legislative year, which will adjourn on September 13, it is very likely that other key issues relating to civil procedure will be debated. In fact, it is often not until just days before the end of session that attempts are made to raise controversial subjects. It is entirely possible, for example, that MICRA limit increases will be proposed between now and September 13, even though the chances of success on the issue are considered quite low. The next issue of Verdict will describe what could be a hectic period at the end of the legislative year.

new members march – july

Archer Norris
Kayla S.S. Betbout
Mark Furuya
Jean Lantz
Daniel McKenzie
Brian C. Merges

Beam, Brobeck, West, Borges & Rosa
Louise M. Douville
Sponsoring Member: David J. Brobeck

Blau & Associates
David Blau
Sponsoring Member: Joyia Greenfield

Bonne, Bridges, Mueller, O'Keefe & Nichols
Eric E. Hartmans
Sponsoring Member: Brian L. Hoffman

Booth LLP
Jason M. Booth
Theodore V. Kreps
Sponsoring Member: Margaret Drugan

Boyce Schaeffer LLP
Karen A. Newcomb
Sponsoring Member: James C. Schaeffer

Buchalter Nemer P.C.
Robert Dato
Sponsoring Member: Harry W.R. Chamberlain

Callahan Thompson Sherman & Caudill, LLP
Denise M. Calkins

Carroll, Kelly, Trotter, Franzen & McKenna
Blakeny A. Boggs
Sponsoring Member: David Pruett

Chapman, Glucksman, Dean, Roeb & Barger
Zachary Marks
Sponsoring Member: Glenn Barger

Coleman & Horowitt, LLP
Laurence Yee Wong
Sponsoring Member: Robert Risbrough

Collins, Collins, Muir & Stewart
Howard Franco

Collinsworth, Specht & Calkins
Scott D. Calkins

Daniels, Fine, Israel, Schonbuch & Lebovits
Jaime Zagoria

Dimalanta Clark, LLP
Zubin Farinpour

Doherty & Catlow
John Doherty

Dorsey & Whitney LLP
Kent J. Schmidt

Dowling Aaron Incorporated
Daniel K. Klingenberger
Micah K. Nilson
Sponsoring Member: Thomas Feher

Engle, Carobini & Coats
Daniel J. Carobini
Jennie A. Hendrickson
Sponsoring Member: Benjamin F. Coats

Ericksen Arbuthnot
Paul A. Green
Sponsoring Member: Mark Kiefer

Fidone & Motooka
Marjorie Motooka

Ford, Walker, Haggerty & Behar
Alexander J. Behar
Sponsoring Member: Jeffrey S. Behar

Fredrickson, Mazeika & Grant
Elliot Heller

Greines, Martin, Stein & Richland
Meehan Rasch
Barbara Ravitz
Sponsoring Member: Robert Olson

Haight, Brown & Bonesteel
Mary Beth Sipos
Sponsoring Member: S. Christian Stouder

Harrington, Foxx, Dubrow & Canter
Erika N. Brenner
Derek A. Earley
Julee Fritsch
Michael Jenkins
Sponsoring Member: Edward R. Leonard

Higgs, Fletcher & Mack
Virginia L. Price
Sponsoring Member: Peter Doody

Iverson Yoakum Papiano & Hatch
Patrick McAdam

Joseph W. McCarthy, A Law Corporation
Joe McCarthy

LaFollette, Johnson, DeHaas, Fesler & Ames
Michael E. Bauer
Sara Greco
Thien T. Nguyen

Lennar Corp.
Kelly Given
Julie Holley
Lorber, Greenfield & Polito LLP
Erin Kennedy Clancy
Sponsoring Member: Joyia Z. Greenfield

Lewis, Brisbois, Bisgaard & Smith
Daniel C. DeCarlo
Thomas S. Kiddé
Sponsoring Member: Deborah Sirias

Manning & Kass, Ellrod, Ramirez, Trester LLP
Johnna J. Hansen
Joshua Shayne
Sponsoring Member: Lou Pappas

Maranga Morgenstern
Sandor K. Carrasco
Patricia M. Ford
Sponsoring Member: Robert Morgenstern

McKay, deLorimier & Arain
Nancy A. Ramsey
Sponsoring Member: Paul A. de Lorimier

Menekshe Law Firm
Catherine Adams

Meredith, Weinstein & Numbers, LLP
Charles H. Numbers

Meyers McConnell Reisz Siderman
Frederick S. Reisz
Sponsoring Member: John W. McConnell, III

Neil, Dymott, Frank, McFall & Trexler
Sezen Oygar
Sponsoring Member: Clark R. Hudson

Newmeyer & Dillion
Leonard Polyakov
Sponsoring Member: Mark Himmelstein

Offices of Adrienne D. Cohen
Danielle M. Dalton
Temre L. Fischer
Sponsoring Member: Adrienne D. Cohen

Offices of Larry Kent
Larry Kent

Palumbo & Bergstrom
David S. Martucci
Kevin T. Meade

Reback, McAndrews, Kjar, Warford, Stockalper & Moore, LLP
Cindy Shapiro
Sponsoring Member: Patrick Stockalper

Richardson Harman Ober PC
Dennis Althouse

Robertson & Associates, APC
Les W. Robertson

Rosen Saba LLP
Momo E. Takahashi

Ryan Mercaldo LLP
Jeffrey P. Carvalho
Norman Ryan
Alicia M. Zimmerman

Schumann Rosenberg, LLP
Kim Schumann
Sponsoring Member: Christopher Faenza

Slaughter & Reagan, LLP
Megan Winter
Sponsoring Member: William Slaughter

Springel & Fink
Richard Kott

Taylor Blessey LLP
Anna Chung
Jordan R. Gaskins
Brent Lehman
Bassil Madanat
Shannon Wainwright
Sponsoring Member: N. Denise Taylor

Tressler, LLP
Mohammed S. Mandegary
Mary E. McPherson
Sponsoring Member: Linda B. Morrison

Varner & Brandt
Brendan W. Brandt
Andrew Ross

Watkins & Letofsky, LLP
Brian Letofsky

Watten, Discoe, Bassett & McMains
Tony Discoe
Katie Mailey

Waxler Carner Brodsky LLP
Gretchen S. Carner
Andrew J. Waxler
Sponsoring Member: Harry Chamberlain

Wilson, Elser, Moskowitz, Edelman & Dicker
Peter Hughes
Kelly A. Van Nort

Winget Spadafora & Schwartzberg LLP
Brandon S. Reif

Yoka & Smith
Lauren M. Pisieczko
Brandon L. Wyman
Sponsoring Member: Walter Yoka

Answering Ready, or Maybe Not

Patrick A. Long

Along with most members of our association, I belong to a rather large number of other bar groups, DRI, IADC, ADTA, FDCC, ABA, OCBA – okay, that's enough with the acronyms. But aside from getting together with fellow members of our Association of Southern California Defense Counsel (notice I didn't use an acronym here), one of my favorite other groups to hang with is the American Board of Trial Advocates, acronymically known as ABOTA. One of the reasons, certainly not the most important, is that I often find colleagues in ABOTA with lower bar numbers than mine. Yep, as you may know, ABOTA has certain prerequisites to membership, one of which is that an applicant must have tried a certain number of jury trials.

Aye, there's the rub. In the old days folks with bar numbers like mine could try a case or two, or more, *per month*, month in and month out. Of course almost all of those cases were automobile accidents, slip and falls and perhaps the occasional medical or dental malpractice. But as we will discuss in a moment, there may not be as many cases getting to trial, and so many that do go to trial now are not the type that younger, less experienced attorneys would be authorized by a client to try, at least as first chair (and in the old days there was no first and second chair, just the only chair). Meeting ABOTA's membership requirements isn't getting any easier for the younger crowd.

Recently I sat down for dinner at an ABOTA function in Orange County. It's always a pleasure and honor to sit with folks whom I've admired most of my legal life, and talk with them about the law, today's law firm financial issues, client problems, marketing, problematic judges (of course I personally don't know any of those), good restaurants and great saloons.

At our table the discussion turned to the Friday edition of the *Los Angeles Daily Journal's* summary of recent verdicts and settlements throughout the state. Most of us pay pretty close attention to the "Verdicts & Settlements" recap, checking to see what kinds of cases are going to trial, the damage awards and settlements in cases similar to ones we are handling, who's winning and who's losing among the attorneys we know, and how judges are ruling on motions for summary judgment, etc. That "Verdicts & Settlements" section always draws a lot of attention among our ASCDC membership and ABOTA folks as well.

My ABOTA dinner companions unanimously thought there has been a dramatic shift in the nature of the cases now being taken to trial, with a much increased emphasis on IP cases, trademark infringement, trade secrets, breach of contract, class actions, partnership disagreements, and other essentially business-related matters. Oh, there are still the occasional rear-end auto collisions, slip and falls and the like, but they apparently are being tried in much diminished numbers from years past. There are probably a number of reasons for this, but our group agreed that the primary reason is that it is now simply too expensive for a plaintiff's attorney (and sometimes a defendant) to take a case to trial unless the alleged damages exceed $100,000, $200,000 or more. The costs of trial seem to have outraced the general economy. Consider the average current cost of a medical doctor's testimony – $5000 per half day (and similar amounts for deposition testimony and reviewing records), plus human factors and accident recon experts, court reporters, audio-visual expenses – and pretty soon plaintiff's counsel needs to segue from Macallan 25 to Dewar's after a hard day's work.

One of my ABOTA colleagues wondered, when he sees a verdict in an automobile case in "Verdicts & Settlements" for $50,000, how much the plaintiff and his or her attorney put in their pockets. In terms of verdicts, today's $50,000 is the new $5,000. Our group seemed to feel that the same number of cases are going to trial as in the "old" days, but most of today's cases involve squadrons of counsel on each side, and take weeks or more to try.

No one at our table had any answers, but one in our group made an interesting suggestion, i.e, revamp the concept of "small claims" to encompass amounts up to $75,000, and allow attorneys to appear, but modify the rules to permit testimony by affidavit, etc. (And yes, the current concept of expedited jury trials was discussed.)

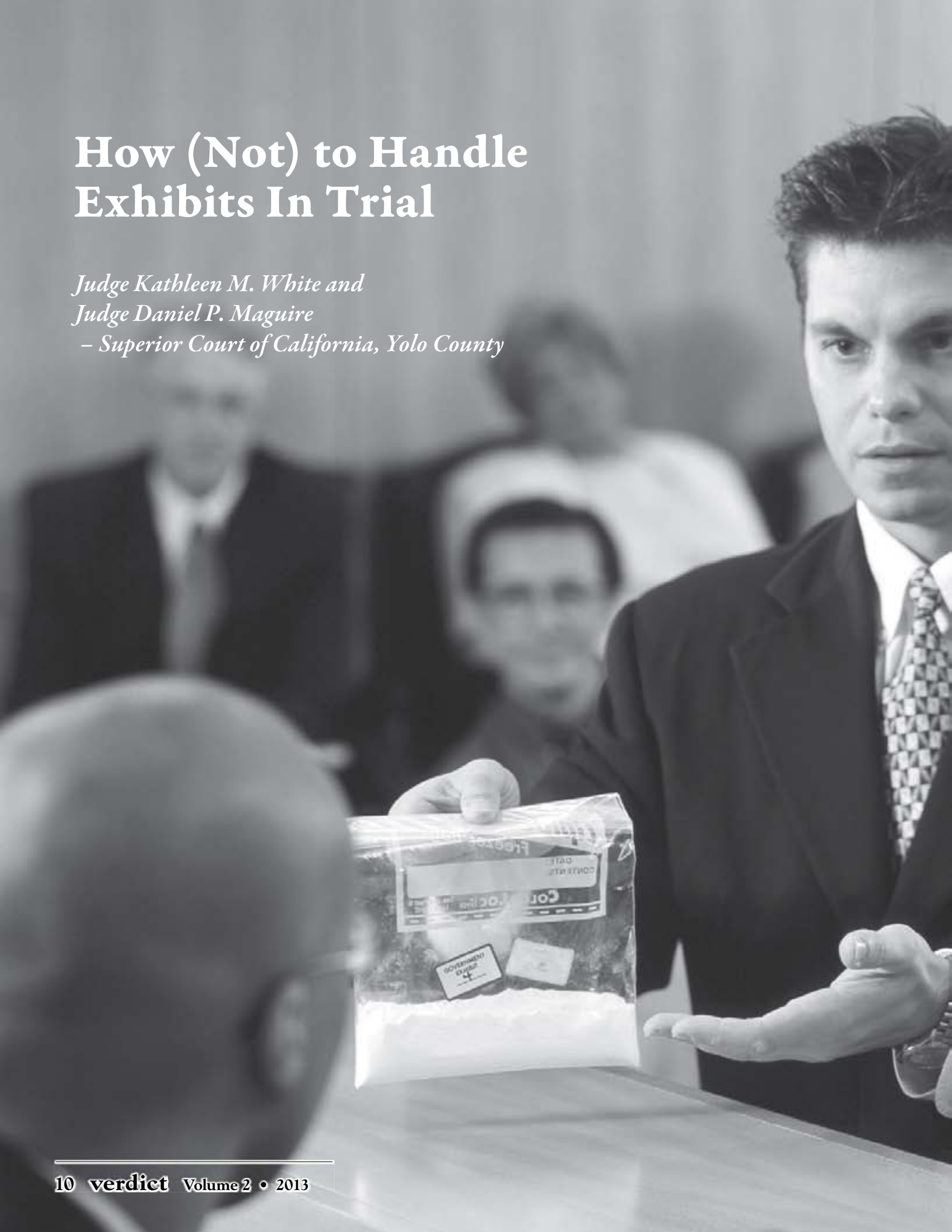
Times are changing, and have changed, and suffice it to say that the key word, as always, is *adaptability*. As is often repeated, the dinosaurs didn't have that characteristic. Let's make sure we do. Maybe I'll start medical school in September.

Primum non nocere.

Patrick A. Long
palong@ldlawyers.com

How (Not) to Handle Exhibits In Trial

Judge Kathleen M. White and
Judge Daniel P. Maguire
– Superior Court of California, Yolo County



There comes a moment in every trial or hearing when it is revealed to the judge whether the lawyer is a skilled trial professional or a bumbling tyro. That moment is not in the pretrial motions, the trial brief or the opening statements. It doesn't matter whether the trial is criminal or civil. That moment in all trials is the presentation of the first document as an exhibit. If you already know how to mark, organize and present exhibits, we thank you. Read no further. But if you want to know how to irritate the clerk, frustrate the judge, baffle opposing counsel, muddy the record, delay the process, and exasperate your client, read on:

1 **Don't ask the judge or clerk before the hearing how they want exhibits handled.** Pay no attention to the court's local rules regarding exhibits, don't ask the clerk if the exhibits can be pre-marked, and above all, appear five minutes before trial with voluminous unmarked exhibits. Be sure they are not in the order you will use them at trial.

2 **Don't give the clerk an exhibit log** that lists each exhibit in order, has a description of the exhibit, and a column for "marked," "admitted" and "comment." Don't ask if the clerk has a preferred format for the exhibit log. This ensures that the clerk will have difficulty tracking the exhibits and making a clear record. This also ensures that you will not be able to track your exhibits during trial, too.

3 **Don't describe each exhibit specifically on the exhibit log**, so the clerk cannot discern one exhibit from the other. For example, if you have several deeds of trust, just make multiple entries of "Deed of Trust" on the exhibit log and don't distinguish them by date or other identifier. This ensures a confusing record and extends the examination of witnesses as the judge and other lawyer constantly interrupt you to ask which deed of trust you have placed before the witness. This is especially helpful for muddying the record and lengthening proceedings when there is no court reporter.

continued on page 12

How (Not) to Handle Exhibits in Trial – continued from page 11

4 Aggregate exhibits so there is more than one photograph on a page, or more than one document per exhibit, and be sure to use only one exhibit number for the aggregated exhibit. This guarantees that you will spend lots of time asking the witness to examine the third picture on the fourth row of the second page, and explaining to the judge what document you are using. Do not simplify it by using sub- numbers or sequential page numbers so that each page or image has a unique alphanumeric identifier.

5 When you introduce the exhibit to the witness, do not state on the record the exhibit number, or that it has been marked (or pre-marked) for identification. Do not say "I am presenting what's been (pre)marked as Exhibit A for identification to the witness." Just ask the witness to look at the paper in your hand, without referencing what it is or its exhibit number. This will guarantee that the judge and the other attorney will have no idea what you are talking about, the clerk will not note the introduction of that exhibit, and the record will not reflect what the witness' testimony covers.

6 Do not have your exhibits organized into folders, binders or any system that allows the orderly introduction of exhibits. As the witness examines the original exhibit, do not give the court or opposing counsel copies of the exhibits that you are using on the stand, either beforehand in a binder of pre-marked exhibits, or one exhibit at a time as you introduce them. Don't keep a copy for yourself. Again, this will ensure the ignorance of all in the courtroom as to what your examination covers.

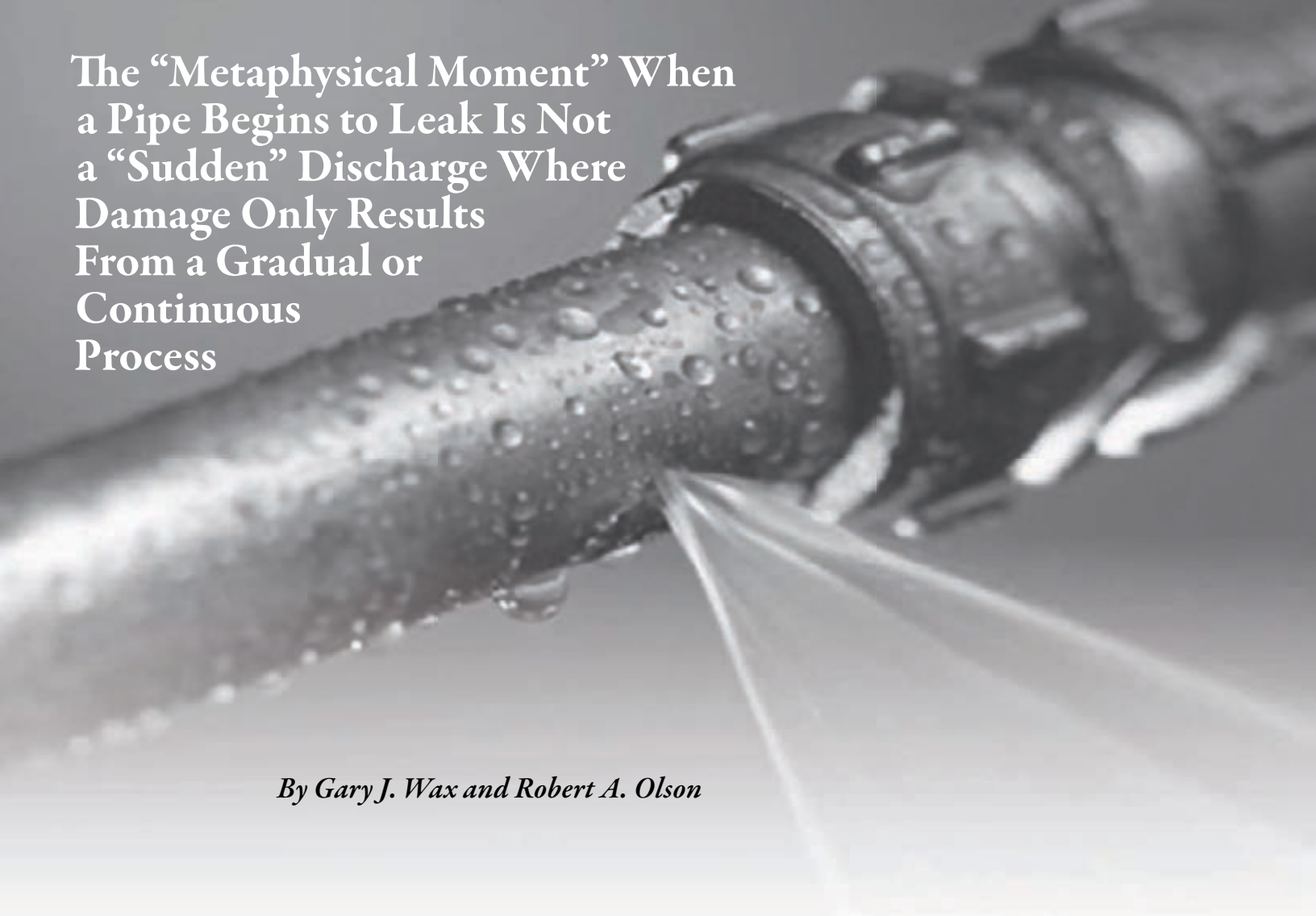
7 If you are using an "elmo" or blow-ups of a document, don't enlarge it enough so that jurors (and judges) who need reading glasses can see it easily. Make them squint.

8 When you are finished using a marked exhibit, don't give it back to the clerk. The clerk is responsible for the safekeeping of all marked exhibits. Once marked, the exhibit must be retained by the clerk for the record. The clerk expects you to return the exhibit to him or her after you finish using the exhibit with each witness. For maximum inefficiency, do not return the marked exhibits to the clerk, and remove them from the courtroom at recesses.

9 At the close of your case in chief (if not earlier), do not review on the record the exhibits that you have introduced and move them into evidence. This should be easy because you did not give the clerk or yourself an exhibit log, so you will not be able to track the exhibits you used anyway, and you will not ensure that the exhibits critical to your case have been admitted.

10 Swap Out Exhibits During Trial. Changing or altering exhibits during trial is a sure-fire way to confuse everyone. So when you discover that your exhibit is missing a page, or contains personal information that should have been redacted, or is a draft rather than the final version, then simply bring the new corrected exhibit to court but continue using the old number. Having two distinct exhibits with the same exhibit number will spur interesting witness examination of the "Who's on First" type, such as "Please review the new version of exhibit 3, which actually pre-dates the old exhibit 3, and tell me which came first?" After all, numbers are scarce and should be recycled rather than wasted by giving each distinct exhibit its own number.

Follow these ten rules and you will develop a reputation in your local court – just not the one you want.



The "Metaphysical Moment" When a Pipe Begins to Leak Is Not a "Sudden" Discharge Where Damage Only Results From a Gradual or Continuous Process

By Gary J. Wax and Robert A. Olson

What is "sudden?" Relative to the history of the universe, human evolution is sudden. Occurring over millennia, it only registers as a mere blip on the universe's overall time continuum. By contrast, the blink of an eye is anything but sudden compared to the lifespan of certain subatomic particles. When a small crack in a dam appears instantly, growing in size over a period of years until the entire dam slowly erodes away, does the presence of the initial small crack mean the dam failed "suddenly?" These philosophical musings have practical significance when it comes to interpreting insurance policies, which often cover "sudden and accidental" events. The meaning of "accidental" has been the subject of much judicial ink; the meaning of "sudden," less so. Even then, the term has generally been interpreted in the context of a pollution exclusion exception. There, the typical construction of "sudden" has been an event that occurs immediately, quickly, or abruptly. But the meaning of "sudden" is equally important in the more mundane circumstance of leaking water pipes.

A newly reported decision by the California Court of Appeal, Second District in *Brown v. Mid-Century Ins. Co.*, 215 Cal. App. 4th 841 (2013), holds that a water leak from a home's plumbing system is not "sudden" where it continues constantly and gradually over a period of time, even if the first drip began at a single moment in time. Accordingly, a slow leak – even if commencing in a microscopically-measurable instant – is not covered by a first-party homeowners' insurance policy providing water-damage coverage only where a leak is caused by a "sudden and accidental discharge" from a plumbing system.

Condensation, mold and a pond of water under the house.

In *Brown* the insured homeowners began noticing condensation throughout the interior walls and windows of their house, and, soon thereafter, mold. 215 Cal. App. 4th at 844, 847. Every day for a month they tried to wipe the moisture off, but it continuously reappeared. *Id.* at 844. Eventually, they hired a plumber to investigate. *Id.* at 845. He looked under the house and discovered a significant pond of water – 2 feet deep and about 4 to 5 feet wide and 10 to 15 feet long. *Id.* at 844-45. He also found the source of the leak – a hot, pressurized water pipe had corroded over decades due to being improperly encased in the house's concrete-slab foundation and eventually formed one or two small holes (no larger than 1/8" x 1/32"). *Id.* at 845, 848-49. Through these tiny holes, water had leaked or sprayed over a period of time, eventually accumulating enough water to form the sub-foundation pond. *Id.* at 847-50.

The homeowner's standard insurance policy covers "sudden and accidental" water discharges, but not slow, continuous water leaks.

The standard homeowners' policy at issue covered damage caused by a "sudden and accidental" discharge of water from a

continued on page 14

plumbing system, but expressly did not cover damage occurring "'over a period of time from any constant or repeating gradual, intermittent or slow discharge, seepage, leakage, trickle, collecting infiltration, or overflow of water from any source.'" *Id*. at 846.

The carrier denied coverage.

The insureds claim that every pipe leak starts suddenly.

The homeowners sued for breach of contract and bad faith, alleging that the "'home was damaged when a plumbing pipe *burst* causing Plaintiffs substantial loss.'" *Id*. at 848 (emphasis added).

In opposing summary judgment, the homeowners did not dispute that corrosion slowly wore away at the pipe causing the leak or that the pipe continuously leaked over a period of months underneath their house (although they argued that the pipe leaked for 1 to 2 months versus the carrier's 5-month estimate). *Id*. at 849. Instead, they relied on the investigating plumber's colloquial use of the word "burst" and on their expert's declaration opining that "'the pipe burst *suddenly* – in a "nano-second," spraying water in the crawlspace'" and therefore the water-discharge event could be "'best described as a *sudden* breach of the pipe.'" *Id*. at 845 n.1, 849, 851 (emphasis added). In the expert's view, "'[i]t would have taken a mere fraction of [a] second'" – i.e., a "nano-second" – "'between the water tight and non[-]water tight condition of the pipe'" and therefore, the leak *must* have occurred "'suddenly.'" *Id*. at 849-50.

The trial court rejected the expert's theory, concluding that there was no coverage as a matter of law and entered summary judgment to that effect. *Id*. at 850.

The California Court of Appeal, rejecting plaintiffs' "metaphysical moment" argument, holds that a leak that only causes damage through a gradual or ongoing process is not "sudden."

On appeal, the homeowners again relied on their expert's conclusion that "'the pipe burst *suddenly* – in a "nano-second"'" when it changed from a water-tight to a leaking condition. *Id*. at 851 (emphasis added). The California Court of Appeal rejected that argument. *Id*. at 851-54.

Relying on three decisions from Texas, *Saint Paul Surplus Lines Ins. Co. v. Geo Pipe Co*., 25 S.W.3d 900, 905 (Tex. Ct. App. 2000); *SnyderGeneral Corp. v. Century Indem. Co*., 907 F. Supp. 991, 1001 (N.D. Tex. 1995); *Mesa Operating Co. v. Cal. Union Ins. Co*., 986 S.W.2d 749, 757 (Tex Ct. App. 1999), and one from New York, *Am. Ins. Co. v. Fairchild Indus., Inc.*, 852 F. Supp. 1173, 1182 n.18 (E.D.N.Y. 1994), the court rejected what it labeled the homeowners' "metaphysical moment" theory, a term it borrowed from those cases. *Id*. at 853-54. It acknowledged that there may be some micro-analyzed instant in time when a pipe goes from a water-tight to non-water-tight condition: "A gradual process, viewed through an electron microscope that can show physical changes occurring in nanoseconds, can appear sudden at certain points in time. Given a small enough time interval, even a slow gradual leak is sudden." *Id*. at 854. But it rejected the use of such philosophical speculation in the context of insurance policy language interpretation. Under the logic of the insureds' theory "'every event or condition not existing from the dawn of time would be considered "sudden" because at one moment it did not exist and the next moment it did.'" *Id*. at 853. Interpreting "sudden" in such a way would impermissibly read the temporal component of the term out of the policy. *Id*. at 853-54.

For the mathematically inclined, the court offered an equation to explain why the homeowners' argument failed: "There is always a time, t^1, before the first water molecule breaches the surface of a corroding pipe, and a time, t^2, after the first water breaches the surface, such that the breach can appear sudden if $t^2 - t^1$ is small enough. Such a calculus, however, does not make a gradual release of water sudden." *Id*. at 854.

continued on page 15

The "Metaphysical Moment" – continued from page 14

Brown's holding suggests that the initial "sudden" discharge must cause associated damage *by itself*, rather than gradually over time. If a small leak's first drop or spray does not cause damage over a relatively short time (in the context of human experience) but only the build-up of discharged water over a period of time causes damage, that's not a covered "sudden" discharge under the "sudden and accidental" provision. See *id*. at 852-54. By contrast, *Brown* noted, "[a] dishwater hose breaking in mid-cycle, a water heater giving out and flooding a room, or an overflowing toilet" would be a "sudden" discharge. *Id*. at 853. In each of these examples, the initial water discharge causes a substantial amount of water to escape – enough water to cause *immediate* damage. On the other hand, a process that occurs "'slowly and incrementally over a relatively long time'" before causing damage, like the one described in *Brown*, cannot reasonably be called "sudden." *Id*. at 852. It doesn't matter if a plumber labels the pipe leak as a "burst" or an expert declares that the leak began "suddenly" in a "nano-second." What matters is whether, in the context of common human experience, the damaging quantum of water discharged gradually or continuously over an extended period of time causing damage.

Brown and the rest of the country.

Many homeowners' policies include language similar to that in *Brown*, either in a restricted coverage grant or by way of exclusion or an exception to an exclusion. Although it may surprise many homeowners and judges, most standard homeowners' policies simply do not cover slow water leaks.

Surprisingly, there is a dearth of reported decisions addressing coverage for slow water pipe leaks, not just in California, but across the country. *Brown* appears to come up with the correct rule: If damage does not result unless water leaks over an extended period of time, there is no coverage, no matter how "sudden" the first drop might be conceptualized. That, at least, is the answer in California for now. Any other rule, nonsensically, would suggest that *all* pipe leaks are covered, for there will always be a moment in time – if measured in small enough increments – when a pipe goes from a watertight to a non-watertight condition.

Gary Wax joined the civil appeals firm Greines, Martin, Stein & Richland LLP in 2010 after a decade-long career as an executive in the film industry. Gary specializes in briefing and arguing civil appeals in California and federal courts.

Robert Olson is a partner in the civil appeals firm Greines, Martin, Stein & Richland LLP. He is the Association of Southern California Defense Counsel's President Elect, co-chair of the Association's amicus committee and a long-time presenter of the "Year in Review" program at the Association's Annual Seminar.

"Keeping **Your Word** Is Our Business℠"

Our Services

Nationwide Court Reporting Services

- Certified court reporters - realtime and LiveNote
- Nationwide full-service scheduling
- Online 24/7 virtual office
- Free downloads at www.kusar.com
- Mobile transcripts

Video Conferencing and Web Conferencing

- Worldwide video conferencing
- Remote multi-video attendance powered by Legal Net Connect
- Conference and meeting rooms

Video and Multimedia Services

- CLVS videographers nationwide
- Video and text synchronization
- Media archived indefinitely
- Trial preparation and presentation

Interpreters and Translators

- All languages available

Transcription Services

- All audio and video media
- Certified by Court Reporter

Records Retrieval and Subpoena Services

- Nationwide services
- Online ordering, viewing, printing
- Court filings

Schedule Services

- Online at www.kusar.com
- Email your notice to calendar@kusar.com
- 800.282.3376

Kusar®
Court Reporters & Legal Services, Inc.
800.282.3376 www.kusar.com

Certified WBENC Women's Business Enterprise

*"You Have **Our Word** On It!"*

CALIFORNIA • NATIONAL • GLOBAL

Trade Secret Misappropriation Damages, and The Underused "Head Start" Doctrine Defense

H. Thomas Watson and Karen M. Bray

There seems to be a surge in trade secret litigation in California, with plaintiffs seeking extensive monetary and injunctive relief. However, under the "head start" doctrine, the recovery on plaintiffs' claims should be limited to the relief needed to eliminate any "head start" in competition that the defendants gained by misappropriating trade secrets. That is, the relief available should not allow the plaintiff to recover based on the assumption that all competition by the defendant is wrongful, but should instead reflect no more than the profits lost by the plaintiff (or the unjust enrichment gained by the defendant) during the time it would have taken the defendant to discover or develop the trade secret independently, by proper means.

Unfortunately, neither the language of the relevant statutes nor the standard jury instructions on trade secret misappropriation claims clearly reflect the "head start" limitation on the scope of available relief. Accordingly, counsel defending against trade secret misappropriation claims should understand and assert the "head start" doctrine as a limitation on any court-imposed injunctive relief, and propose jury instructions tailored to account for this limitation on the scope of any damages award.

Asserting the "head start" defense to limit the relief available for misappropriation of trade secrets is important because California's statutory cause of action "preempts common law claims that are 'based on the same nucleus of facts as the trade secret misappropriation claim for relief,'" including "breach of confidence, interference with contract, and unfair competition" (*K.C. Multimedia, Inc. v. Bank of America Technology & Operations, Inc.* (2009) 171 Cal.App.4th 939, 954, 957-960), and it also preempts other general statutory causes of action, such as a claim under Business and Professions Code section 17200, based on the misappropriation of a trade secret (*Digital Envoy, Inc. v. Google, Inc.* (N.D.Cal. 2005) 370 F.Supp.2d 1025, 1034-1035 [applying California law]). (See Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2012) ¶¶ 14:81.5 to 14:81.7, p. 14-10.) Accordingly, if certain claimed damages or injunctive relief is unavailable under California's statutory cause of action for misappropriation of trade secrets, that relief cannot be obtained simply by asserting a different legal theory.

The statutory backdrop.

In 1979, the Commissioners on Uniform State Laws approved the Uniform Trade Secrets Act (UTSA). (14 West's U. Laws Ann. (1998) U. Trade Secrets Act with 1985 Amendments.) In 1984, California enacted its version of the UTSA (CUTSA), which is codified at Civil Code sections 3426 et seq. (See 13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, §§ 86-90, pp. 382-389 [summarizing the history of provisions of the CUTSA].) The CUTSA closely tracks the UTSA.

	UTSA	CUTSA
DEFINITION OF TRADE SECRET	UTSA, § 1, subd. (4)	Civ. Code, § 3426.1, subd. (d)
INJUCTOVE RELIEF	UTSA, § 2	Civ. Code, § 3426.2
DAMAGES	UTSA, § 3	Civ. Code, § 3426.3

The CUTSA allows plaintiffs to recover several types of damages, none of which are expressly limited by the "head start" doctrine. First, the CUTSA allows plaintiffs to "recover damages for the actual loss caused by misappropriation" and "for the unjust enrichment caused by misappropriation that is not taken into account in computing damages for actual loss." (Civ. Code, § 3426.3, subd. (a).) Where "neither damages nor unjust enrichment caused by misappropriation are provable, the court may order payment of a reasonable royalty for no longer than the period of time the use could have been prohibited." (Civ. Code, § 3426.3, subd. (b).) Finally, where "willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made" under the above provisions. (*Ibid.*) At the time the

continued on page 18

CUTSA was enacted, the UTSA similarly allowed plaintiffs to recover for actual losses, unjust enrichment, and exemplary damages, and in 1985 the UTSA was amended to allow for recovery of a reasonable royalty where actual loss or unjust enrichment could not be established. (14 U.L.A. (1985) U. Trade Secrets Act, § 3, pp. 455-456.)

The CUTSA does not expressly mention the "head start" doctrine as a limitation on the scope of available relief for the misappropriation of trade secrets, and there is scant legislative history on California's enactment of the CUTSA. The standard jury instructions governing relief available for the misappropriation of trade secrets (CACI Nos. 3903N, 4409 & 4410) are likewise silent regarding the head start doctrine. However, because the CUTSA was closely modeled on the UTSA, history regarding the enactment of the UTSA provides guidance regarding the meaning of the CUTSA. (See *Hoechst Celanese Corp. v. Franchise Tax Bd*. (2001) 25 Cal.4th 508, 519 ["Where the Legislature adopts a uniform act, the history surrounding the creation and adoption of that [uniform] act is also relevant"].) And the history of the UTSA clearly reflects a "head start" limitation on the scope of relief available in actions based on the misappropriation of trade secrets.

The UTSA incorporates the head start limitation on relief.

That the "head start" doctrine limits the relief available for the misappropriation of a trade secret is demonstrated in the official comment on the addition of the UTSA to the Uniform Laws. With respect to *injunctive relief*, the official comment states that "this act adopts the position of the trend of authority limiting the duration of injunctive relief to the extent of the temporal advantage over good faith competitors gained by a misappropriator. See, e.g., *K-2 Ski Co. v. Head Ski Co., Inc*. [(9th Cir. 1974) 506 F.2d 471 (*K-2 Ski Co.*)] (maximum appropriate duration of both temporary and permanent injunctive relief is period of time it would have taken defendant to discover trade secrets lawfully through either independent development or reverse engineering of plaintiff's products)." (14 U.L.A. (1985) U. Trade Secrets Act, § 2 cmt., p. 450; see *K-2 Ski Co.* at p. 474 ["We are satisfied that the appropriate duration for the injunction should be the period of time it would have taken Head, either by reverse engineering or by independent development, to develop its ski legitimately without use of the K-2 trade secrets"]; accord, *Lamb-Weston, Inc. v. McCain Foods, Ltd*. (9th Cir. 1991) 941 F.2d 970, 974 ["An injunction in a trade secret case seeks to protect the secrecy of misappropriated information and to eliminate any unfair head start the defendant may have gained"]; *Winston Research Corp. v. Minnesota Mining & Mfg. Co.* (9th Cir. 1965) 350 F.2d 134, 142 [injunction properly limited to the "approximate period it would require a legitimate ... competitor to develop [the trade secret] after public disclosure of the secret information"]; see also Torts: *Review of 1984 Selected California Legislation* (1984) 16 Pacific L.J. 725, 733, fn. 19 ["The modern trend is to issue a limited injunction for the approximate period a competitor would require to legitimately produce a copy after public disclosure of the secret"].)

With respect to *monetary relief*, the official comment states that, "[l]ike injunctive relief, a monetary recovery for trade secret misappropriation is appropriate only for the period in which information is entitled to protection as a trade secret, plus the additional time, if any, in which a misappropriator retains an advantage over good faith competitors because of misappropriation. Actual damages to a complainant and unjust benefit to a misappropriator are caused by misappropriation during this time alone." (14 U.L.A. (Master Ed.) com. to § 3, p. 456 [citing *Conmar Products Corp. v. Universal Slide Fastener Co*. (2d Cir. 1949) 172 F.2d 150; *Carboline Co. v. Jarboe* (Mo. 1970 454 S.W.2d 540].)

In addition to the UTSA official comment, the transcript of the commissioner's discussions at the National Conference of Commissioners on Uniform State Laws reveal the commissioners' intent to adopt a head start limitation on the available remedies. For example, the commissioners identified the limited nature of trade secret protection. During the initial conference in 1972, a commissioner explained that "[t]he tentative proposal of the Special Committee is to limit the remedies available against such a misappropriator to those which will deprive him of the benefit of the time and expense saved by his misappropriation." (1972 RT 22.) "[W]here you have a misappropriation, so someone has a short cut over his competitors in terms of being able to practice the trade secret ... [¶] [w]hat is often done in this situation is a so-called lead time injunction ... so the injunction would be for the ... period [ ] to take away this lead time." (1972 RT 23.) "[T]he defense exists from that time that a trade secret becomes readily ascertainable by proper means, by persons other than a prior misappropriator." (1972 RT 24.) "[T]he kind of remedy that is given in this kind of case is an injunction against lead time in the development of a product from a trade secret, say, because of misappropriation." (1972 RT 38.)

Similarly, during the next conference in 1978, commissioners explained that the UTSA seeks "to eliminate whatever commercial advantage had been acquired through the misappropriation, which involves the concept of the lead-time injunction" but that "no permanent injunction may issue." (1978 RT 7-8.) Instead, "[t]he injunction should be limited to the period of reverse engineering." (1978 RT 37.) In other words, the period of time required for reverse engineering "would be the duration of the relief, the head-start period you gain through misappropriation." (1978 RT 40-41.)

Then, during the final conference in 1979, a commissioner said the UTSA proposed official comment was "intended to indicate that the damages caused by misappropriation, which is a limitation on both damages and profits, is tied to the section" limiting the duration of the injunctive remedy. (1979 RT 66.) Another commissioner questioned whether, for "purposes of arriving at an unjust enrichment recovery, would the reverse engineering period that's referred to in Section 2 be used to provide a cut-off of that recovery period?" (1979 RT 68.) The response was in the affirmative. (1979 RT 68.) The same

continued on page 19

green sheets

NOTES ON RECENT DECISIONS

Lisa Perrochet

The Green Sheets, although published later than most current advance sheets because of copy deadlines, should serve as a useful review of recent important decisions. Readers are invited to suggest significant decisions for inclusion in the next Green Sheets edition. Please contact:

LPerrochet@horvitzlevy.com

To make the Green Sheets a useful tool to defense counsel, they are printed in green and inserted in the middle of *Verdict* magazine each issue. They can be easily removed and filed for further reference. Of course, the Green Sheets are always one attorney's interpretation of the case, and each attorney should thoroughly read the cases before citing them or relying on this digest. Careful counsel will also check subsequent history before citing.

CIVIL PROCEDURE

Trial court abuses its discretion by permitting plaintiff to amend complaint absent showing of excuse for delay, where delay prejudiced defendant's trial preparation.

Duchrow v. Forrest (2013) 215 Cal.App.4th 359

In this action by an attorney against his former client (also an attorney), the plaintiff attorney claimed his client had caused him $44,000 in damages. At the close of trial, he moved to amend to conform to proof, claiming damages of over $300,000, based on a new liability theory that turned on a retainer agreement provision that had not been pleaded in the complaint. The judge allowed the amendment, and the jury awarded $140,000.

The Court of Appeal (Second District, Division One) reversed, observing that plaintiff "offered no reason for the delay in seeking the amendment; the amendment changed the relevant facts and the theory of liability, significantly increasing the damages requested, warranting additional discovery and the use of an expert witness on attorney fee awards, making representation by counsel all the more important, and requiring research to determine the enforceability of paragraph 9; and the amendment resulted in prejudice."

Where a party fails to obtain a judgment more favorable than either of two section 998 settlement offers, expert witness fees may be **recovered from the date of the first offer.**

Martinez v. Brownco Construction Co. (2013) 56 Cal.4th 1014

Under Code of Civil Procedure section 998, a prevailing party may recover the fees of its expert witnesses (which ordinarily are not recoverable as costs) if, before trial the prevailing party made a section 998 settlement offer that was not accepted by the other side, and the party later obtains a better result at trial. The question in this case was how this rule works when a party made two pretrial offers, both of which were more favorable to the other side than the result the party reached at trial.

The Supreme Court held that the offering party may recover its expert fees incurred from the date of the earlier of the two more favorable settlement offers. The court reasoned that using an earlier date for cost-shifting would foster the goal of encouraging the making and accepting of settlement offers. The court left in place prior lower court decisions holding that where a party makes an initial offer, followed by a second offer, and the prevailing party obtains a judgment that is more favorable than the second offer but *not* the first, the second offer extinguishes the first offer for purposes of section 998. (See *Wilson v. Wal-Mart Stores, Inc.* (1999) 72 Cal. App.4th 382; *Distefano v. Hall* (1968) 263 Cal.App.2d 380.)

continued on page ii

continued from page i

See also ***Mon Chong Loong Trading Corp. v. Superior Court*** (2013) 218 Cal.App.4th 87 [Second Dist., Div. Three: "a voluntary dismissal constitutes the conclusion of the action and is therefore an appropriate precipitating event triggering the trial court's discretion as to the assessment of expert witness fees under section 998"].

Settling parties may resolve primary dispute with a voluntary dismissal of the action by plaintiff, while reserving "prevailing party" status for later determination by the court to make a statutory fee award.

Khavarian Enterprises, Inc. v. Commline, Inc. (2013) 216 Cal.App.4th 310

Plaintiff sued for trade secret misappropriation, after which the parties entered into a settlement agreement that allowed plaintiff to move, pursuant to Civil Code section 3426.4, for attorney fees and to file a memorandum of costs pursuant to Code of Civil Procedure section 1033.5. The parties agreed that the Superior Court would retain jurisdiction pursuant to Code of Civil Procedure section 664.6 to enforce the settlement agreement. Finally, the parties agreed to mutual dismissal of the case in its entirety and to mutual releases. They then filed a joint notice of complete settlement, "reserving only the issue of Plaintiff's costs and attorney's fees, which shall be submitted to the Court." The parties dismissed the action, noting, "Plaintiff to separately seek recovery of fees and costs, subject to opposition." Plaintiff filed a memorandum of costs and fee motion. The trial court denied the motion and granted the defendant's motion to strike the cost memo, finding that the court could not properly decide either motion because the matter was resolved by settlement agreement prior to trial.

The Court of Appeal (Second District, Division Four) reversed, concluding that "parties to a settlement agreement can validly specify that one party is potentially a prevailing party and reserve for later determination by the trial court whether that party did prevail, as well as other factual matters involved in making an award of statutory attorney fees." The court remanded to the trial court to consider the motions.

Trial court's "gatekeeper" authority to exclude expert opinion offered in opposition to summary judgment is more limited than at trial.

Garrett v. Howmedica Osteonics Corp. (2013) 214 Cal.App.4th 173.

In this personal injury action asserting a product liability in a prosthetic device, the defendant moved for summary judgment due to lack of competent evidence of any defect. Plaintiff opposed the motion with the declaration of a metallurgical expert who opined that the device had fractured because the defendant manufacturer used materials that failed to meet unspecified "industry standards," but the expert did not explain the basis for that opinion aside from recounting generic names of tests performed. The trial court rejected portions of the expert's declaration and granted summary judgment.

The Court of Appeal (Second Dist., Div. Three) reversed. The court held that trial courts' authority to exclude expert opinions is more limited in connection with a motion for summary judgment than it is at trial. "In our view, Kashar's failure to describe the particular testing processes that he used to arrive at his conclusions ... and his failure to more particularly describe the results of that testing do not in any manner indicate that his conclusions are speculative, conjectural or lack a reasonable basis. Whatever shortcomings that cross-examination may or may not reveal in Kashar's testing methods and opinion, we believe that the absence of more specific information as to the testing methods used and the results obtained would not provide any grounds for the trial court to conclude that there was no reasonable basis for Kashar's opinion." The court acknowledged the recent California Supreme Court decision in *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, which called upon trial court to exercise a greater "gatekeeping" role in excluding unfounded expert opinions. However, the court restricted *Sargon* it to its procedural posture, which concerned an Evidence Code section 402 hearing in the context of a trial.

Parties may challenge court reporter's rates for deposition transcripts, but must take appropriate steps in the pending action to avoid waiver of that challenge.

Las Canoas Co. v. Kramer (2013) 216 Cal.App.4th 96

The plaintiff in this case had been a party in earlier litigation, and in this putative class action, contended the court reporting service had overcharged for deposition transcripts, in violation of Government Code section 2025.510 and the Unfair Competition Law (UCL). The plaintiff had not, however, raised the overcharging claim before the court in which the prior litigation was pending. The trial court sustained the defendant's demurrer on the ground it lacked subject matter jurisdiction over the controversy.

Te Court of Appeal (Second District, Division Six) affirmed. The court confirmed that a trial court has statutory authority to determine the "reasonable rate" a court reporter may charge a "non-noticing party" for copies of deposition transcripts in a pending action. (See *Serrano v. Stefan Merli Plastering Co., Inc.* (2008) 162 Cal.App.4th 1014.) However, the court ruled, "a non-noticing party who does not move for such an order in the pending action may not bring a subsequent action to obtain restitution for "unreasonable" copy charges or obtain injunctive relief setting a "reasonable rate" to be charged by that court reporter in all future actions."

PRODUCT LIABILITY

Strict product liability depends on the foreseeability of risk of injury, without regard to whether the source of the risk (such as a criminal act by a third party) is foreseeable.

Collins v. Navistar, Inc. (2013) 214 Cal.App.4th 1436.

This product liability action arises from an injury sustained when a chunk of concrete thrown off an overpass crashed through the windshield of a big rig truck and struck the driver's head, leading to his death. The juvenile who threw the concrete pleaded guilty to assault with a deadly weapon and received a prison sentence. The driver's widow sued the truck manufacturer, arguing the windshield could have been designed in a way that would have made it less

continued on page iii

continued from page ii

vulnerable to penetration by flying debris, and it was therefore defectively designed. The trial court instructed the jury to determine, as a threshold issue, whether the juvenile's criminal conduct was an unforeseeable, supervening cause of the driver's injury. The jury answered yes to that question, and therefore reached a defense verdict without evaluating the elements of strict products liability.

The Court of Appeal (Third District) reversed, holding the trial court improperly instructed the jury on whether the manufacturer would have foreseen the juvenile's criminal conduct. The court reasoned that "[s]trict products liability does not depend on the criminal or noncriminal nature of the source of the risk but on its foreseeability." The court explained that flying debris is an ordinary and foreseeable road hazard, and that the purpose of a windshield is to protect vehicle occupants against the risk of being hit by such debris. A manufacturer therefore has a duty to design its windshields to be reasonably capable of performing that intended function. It was immaterial that the rock which penetrated the windshield in this particular case was thrown intentionally. The court remanded the case for a new trial.

Rule barring strict product liability claims against manufacturer whose product caused injury when used in conjunction with another manufacturer's product bars a claim for injury caused during unintended use of product, even if plaintiff alleged the design would also have caused injury if used in an intended manner.

Sanchez v. Hitachi Koki Co., Ltd. (2013) 217 Cal.App.4th 948.

The plaintiff tried to cut an automobile tire using a grinder manufactured by the defendant and a separately purchased saw blade to use with the grinder, contrary to the safety instructions and manual for the grinder warning that saw blades should never be used with the grinder. When the saw blade came into contact with the tire, plaintiff lost control, and the saw blade cut plaintiff's hand. The defendant moved for summary judgment, relying on *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, in which the California Supreme Court held that "a product manufacturer may not be held liable in strict liability or negligence for harm caused by another manufacturer's product unless the defendant's own product contributed substantially to the harm, or the defendant participated substantially in creating a harmful combined use of the products." The trial court granted summary judgment.

The Court of Appeal (Second Dist., Div. Four) affirmed. "Like the plaintiff in *O'Neil,* Sanchez sued one manufacturer for the harm caused by another manufacturer's product. And as in *O'Neil*, Sanchez's injuries arose when the product used with the defendant-manufacturer's product caused him harm." The manufacturer of the grinder was not liable because (a) "Sanchez was not injured by any intended use of the grinder ... Imposing liability under the circumstances here would convert strict liability into "absolute liability" for product manufacturers"; (b) "no evidence suggests that the grinder would inevitably cause personal injury when used as directed"; (c) "no evidence shows that respondents specifically designed the grinder to be used in proximity to or in combination with saw blades," and (d) "respondents were under no duty to warn of the consequences of attaching to the grinder an accessory with which it was never intended to be used...." It did not matter that plaintiff alleged the grinder was dangerous even when used properly: plaintiff "may not predicate his claims on the speculative harm that might have befallen someone else, putting the grinder to its intended use."

PROFESSIONAL RESPONSIBILITY

Attorney disqualification order is an abuse of discretion absent a showing that prior attorney-client relationship with opposing party in similar litigation exposed attorney to confidences that would be material to the present litigation.

Khani v. Ford Motor Co. (2013) 215 Cal.App.4th 916.

In this "Lemon Law" case, the defendant successfully moved to disqualify the plaintiff's attorney on the ground that the attorney had previously represented the defendant in 150 matters, including similar Lemon Law cases. The defendant's counsel offered evidence to support a "playbook" theory of disqualification, i.e., that the attorney was "privy to confidential client communications and information relating to the defense of" such cases, as well as to "pre-litigation strategies, tactics, and case handling procedures," and that he "provided unspecified 'input' to [defendant's] Office of General Counsel and Consumer Affairs and communicated regularly with [defendant] about lemon law cases." The attorney appealed the disqualification order.

The Court of Appeal (Second District, Division Four) reversed. Applying the "substantial relationship" test for assessing a claim of an attorney's breach of the duty of confidentiality based on successive representation, the court held the defendant's "bare bones" showing was insufficient, in that it "does not show that Ford had any policies, practices, or procedures generally applicable to the evaluation, settlement or litigation of California Lemon Law cases at the time [the attorney] represented [defendant], or that any such policies, practices, or procedures continued in existence unchanged between 2007 and 2011. Nor does it show that the same decision makers that were involved in cases [defendant] handled for Ford are involved in this case. The trial court abused its discretion in concluding that the prior cases were substantially related to the current case just because they involved claims under the same statute. The substantial relationship test does not subject an attorney to automatic disqualification on this ground alone." Under this analysis, a "playbook" theory of disqualification would prevail if a more detailed showing as outlined by the court were made.

Attorney disqualification order is an abuse of discretion absent evidence that the attorney's prior relationship with opposing party's expert exposed attorney to confidences that would be material to the present litigation.

DeLuca v. State Fish Co., Inc. (2013) 217 Cal.App.4th 671.

After the plaintiff in this business dispute disclosed an expert witness to be called at trial, the defendant successfully moved to disqualify plaintiff's counsel on the ground that counsel had obtained confidential information from an expert who had testified on behalf of the defendant in a prior trial in this same litigation, and who possessed confidential attorney-client and work product information, learned when retained on behalf of the defendant. Plaintiffs' counsel appealed.

The Court of Appeal (Second District, Division Three) reversed. First, information obtained by an expert *retained to testify at trial* is not confidential. While testimony that may have been obtained at a time when the expert was retained *in a consulting capacity* may have been confidential, the court found those two categories of information could not be separated once the expert was designated to testify: "Once that occurred, any confidentiality with respect to both categories of information was waived." Moreover, the court found that even if some information obtained by the expert were confidential, "such information could only provide a basis for a disqualification motion if it was materially related to the pending proceedings."

Attorney disqualification order based on simultaneous representation of parties with potentially conflicting interests is an abuse of discretion absent any actual conflict or reasonable likelihood such a conflict would arise.

Havasu Lakeshore Investments, LLC v. Fleming (2013) 217 Cal.App.4th 770.

The trial court disqualified a law firm from simultaneously representing a limited liability company, its managing member (a partnership), and the person who managed that partnership (who was not himself a member of the company) as plaintiffs in a lawsuit against two of the company's minority members. The court found that the interests of the company and the nonmember individual potentially conflicted, and concluded the law firm could not jointly represent the company and the nonmember individual against the company's minority members. The court based its ruling on rule 3-310(C) of the State Bar Rules of Professional Conduct, which concerns lawyers' duty of loyalty to existing clients.

The Court of Appeal (Fourth District, Division Three) reversed, finding "no actual conflict of interest existed between the company and the individual who managed the company's managing member, and there was no reasonable likelihood such a conflict would arise." The court noted that rule 3-600(E) expressly permits counsel to represent an organization and its constituents in appropriate circumstances, and distinguished the facts of this case from "authority that "forbids dual representation in a derivative suit alleging fraud by the principals, because the principals and the organization have adverse, conflicting interests." The opposing party articulated what the court described as a risk "that [the firm] may spread itself too thin, become distracted, or prioritize one matter over the other. This is not the type of conflict addressed by rule 3-310(C). Even if it were, [defendant] lacks standing to raise this concern as he 'cannot show any legally cognizable interest that [was] harmed by [HKC's] joint representation of [the Flemings'] adversaries.'"

See also ***Castleman v. Sagaser*** (2013) 216 Cal.App.4th 481 [Fifth Dist.: claim by former client against attorney that attorney breached duties of loyalty and confidentiality did not implicate attorney's free speech rights, so trial court properly declined to dismiss action under anti-SLAPP statute].

OTHER TORTS AND DAMAGES

Primary assumption of risk doctrine bars suit by plaintiff injured in weight room accident, while engaged in recreational pursuits.

Cann v. Stefanec (2013) 217 Cal.App.4th 462 [petition for review pending].

This negligence action arises out of an injury sustained when, during weight training exercises for a college swim team, the defendant lost her balance and dropped the weight she was lifting. Her teammate – plaintiff – was doing push-ups nearby, and alleged in this actin that the weight hit her in the head. Plaintiff sued for personal injuries, alleging defendant was negligent. The trial court granted summary judgment for the defendant on the ground of primary assumption of risk.

The Court of Appeal (Second District, Division Five) affirmed. The court held that by participating in strength training together with defendant, plaintiff assumed the risk of being injured by a dropped weight, even though she was engaged in a different exercise at the time of the accident. The court rejected plaintiff's argument that she was not a co-participant in a sport, concluding that "it is of no moment whether the [weight] training is characterized as a sport or recreation, as the doctrine of primary assumption of the risk applies to both types of activity."

City is entitled to statutory immunity for injury on a recreational trail, even if the trail was sometimes used (and was used by plaintiff at the time of injury) for non-recreational activity.

Montenegro v. City of Bradbury (2013) 215 Cal.App.4th 924.

A plaintiff who tripped over a protruding tree trunk on a city pathway sued on a premises liability theory. The trial court granted summary judgment for the city on the ground that the pathway was a "recreational trail" within the meaning of Government Code section 831.4, subdivision (a), which provides that public entities are not liable for injuries caused by the condition of trails used for certain recreational purposes, including "hiking" and "riding, including animal and all types of vehicular riding," or for access to such recreation.

The Court of Appeal (Second District, Division Four) affirmed. Although plaintiff disputed that the pathway on which she fell was a recreational trail (arguing it was essentially a sidewalk), that did not create a triable issue of fact to defeat the City's showing

continued on page v

continued from page iv

that the trial was recreational: "The fact that a trail has a dual use – recreational and non-recreational – does not undermine section 831.4, subdivision (b) immunity.

See also ***Rybicki v. Carlson*** (2013) 216 Cal.App.4th 758 [Second Dist., Div. Four: Civil Code section 1714 "social host" immunity applies to passengers in car who allegedly had provided alcohol to the underage driver, and who were later sued by bicyclist who was injured by actions of the car's driver; statutory exception allowing liability against those who supply alcohol to minors in the supplier's home did not apply because here the alcohol was provided by defendant passengers while they were in someone else's home].

See also ***Freeny v. City of San Buenaventura*** (2013) 216 Cal. App.4th 1333 [Second Dist., Div., Six: "public employees' tort immunity for legislative decision-making applies even when that decision-making is also alleged to involve the making of misrepresentations motivated by 'actual fraud, corruption or actual malice.' (§ 822.2) For this reason and others, we affirm the dismissal of plaintiffs' suit against a city and five city council members for nearly $2 million in compensatory damages, plus punitive damages, for voting against an application for building permits and variances"].

Hospital Medical Executive Committee's delegation of certain authority relating to staff privileges, even if in violation of hospital bylaws, does not necessarily provide grounds to annul decision to withhold staff privileges.

El-Attar v. Hollywood Presbyterian Medical Center (2013) 56 Cal.4th 976.

A doctor filed a petition for administrative mandamus, challenging the defendant hospitall's decision to deny his application for reappointment to the medical staff. He claimed that the hospital did not provide an appropriate hearing because the hospital itself appointed the hearing officer and the members of the Judicial Review Committee who would conduct the internal review of the denial of the doctor's application. The hospital bylaws at the time required those appointments to instead be made by the hospital medical staff's medical executive committee (MEC), which delegated its authority to the hospital's Governing Board. The trial court denied the petition, finding no violation of the bylaws, but the Court of Appeal reversed, finding that the integrity of the hearing process was jeopardized, and that a new judicial review hearing was required.

The California Supreme Court reversed. The Court assumed without deciding that the Court of Appeal was correct in concluding that the MEC was not authorized to delegate its authority, but held such an act nonetheless does not necessarily mean the doctor is entitled to relief. "Not every violation of a hospital's internal procedures provides grounds for judicial intervention." The court applied the principle that "departures from an organization's procedural rules will be disregarded unless they produced some injustice." It also said that "at times the governing body may assume the role normally played by the medical staff in the peer review process without necessarily violating basic norms of fair procedure." The court did not hold that the doctor actually received a fair hearing, but held only that "the Court of Appeal erred in concluding that the MEC's delegation of the power to select the participants in the hearing and the Governing Body's exercise of this power by itself deprived Dr. El-Attar of a fair hearing." The doctor's further arguments for challenging the ruling against him were remanded for consideration by the Court of Appeal.

Evidence of medical service provider's nominally "billed" but unpaid expenses is not admissible to prove plaintiff's future medical damages or non-economic damages

Corenbaum v. Lampkin (2013) 215 Cal.App.4th 1308.

Plaintiffs suffered injuries in an auto accident and sued the other driver involved. The jury awarded damages after the trial court admitted evidence of amounts "billed" for plaintiffs' medical care, rather than the amounts actually paid and accepted as full payment by plaintiffs' medical providers, Defendant appealed, raising questions left open by the California Supreme Court in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, which refined the measure of damages for medical expenses in a personal injury case. *Howell* held an injured plaintiff "whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial." Howell did not decide whether evidence of a medical services provider's "bill," reflecting amounts never paid by the plaintiff or the plaintiff's health insurer, could be admissible for other purposes including future economic damages and non-economic damages.

The Court of Appeal (Second District, Division Three) reversed and remanded for a new trial, holding as follows: (1) The so-called billed amount is inadmissible to prove future medical expenses. The "full amount billed for past medical services is not relevant to the amount of future medical expenses for that purpose." (2) Amounts billed, but not paid, cannot form the basis for expert testimony on that issue. "Because the full amount billed for past medical services provided to plaintiffs is not relevant to the value of those services, we believe that the full amount billed for those past medical services can provide no reasonable basis for an expert opinion on the value of future medical services." (3) Evidence of amounts billed, but not paid, is not relevant to the issue of non-economic damages. Such evidence "is not admissible for the purpose of providing plaintiff's counsel an argumentative construct to assist a jury in its difficult task of determining the amount of non-economic damages."

Howell measure of damages on medical expense damages applies to preclude recovery for full "billed" amount that is paid at a reduced rate by Medicare, and cap applies before damages are reduced for plaintiff's contributory negligence.

Luttrell v. Island Pacific Supermarket, Inc. (2013) 215 Cal.App.4th 196.

A plaintiff sued a supermarket for personal injury after an automatic door malfunctioned causing him to fall. After the jury assessed the amount of medical expense damages, the trial court reduced the award to conform to the *Howell* rule that the damages could not exceed the amount actually accepted as payment in full for the medical services. The judge then reduced the award further to account for plaintiff's comparative fault as found by the jury. Plaintiff appealed, arguing the jury award should be reinstated without reduction, and that the amount of a Medicare lien for services should be added to the award.

The Court of Appeal (First District, Division Five) affirmed, holding first that the *Howell* decision is not limited to payments made by private health insurance: "Medicare and Medi-Cal had pre-existing contractual relationships with Luttrell's medical providers, by which the providers agreed to accept a sum less than their usual and customary charges as payment in full for their services. Those providers may not seek reimbursement over the amount that Medicare and Medi-Cal was contractually obligated to pay. [Citation] Because Luttrell's liability to medical providers for their past medical services is limited to the amounts Medicare and Medi-Cal actually paid, Luttrell's recovery from Island Pacific for past medical services must be limited to those amounts actually paid."; The court further held that the *Howell* "amount-paid cap" on medical expense damages applies before those damages are further reduced to account for the plaintiff's contributory negligence.

Hospital cannot prove the amount of its lien under the Hospital Lien Act by reference to full amount "billed" for services.

State Farm Mutual Automobile Ins. Co. v. Huff (2013) 216 Cal.App.4th 1463.

In this interpleader action, a hospital that provided medical services to a plaintiff who initiated a personal injury action against third parties sought to enforce its lien against any eventual judgment for plaintiff. The insurer for the defendant deposited the amount of the claimed lien with the trial court to allow the conflicting claims of the plaintiff and the hospital to be adjudicated. In asserting its rights under the Hospital Lien Act, the hospital presented evidence of its so-call "full billed" charges rather than evidence from which a jury could assess the reasonable and necessary charges for the injured person's treatment. The trial court approved this method of establishing damages, and the plaintiff whose damages were thus reduced by the amount of the lien appealed.

The Court of Appeal (Fourth District, Division One) reversed, holding that a hospital asserting a right under the Act must prove its claimed fees were reasonable and necessary. A hospital cannot establish that amount by introducing evidence of its "full billed" charges because those charges are "not an accurate measure of the value of medical services" within the meaning of the Supreme Court's decision in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541.

UNFAIR COMPETITION / CONSUMER LAW

A UCL claim may be based on violations of a federal statute, after Congress has repealed a provision of that statute authorizing civil actions for damages, so long as Congress has made plain that state laws consistent with the federal statute are not superseded.

Rose v. Bank of America, N.A. (2013) 57 Cal.4th 390

The plaintiff in this putative class action under the Unfair Competition Law (UCL, Bus. & Prof. Code, § 17200 et seq.) alleged that the defendant bank had engaged in "unlawful" conduct insofar as it violated the federal Truth in Savings Act (TISA). The federal statutory scheme had, at one time, allowed a private right of action, but the Act was later amended to omit that provision. Relying on that legislative history, the Bank demurred, arguing that Congress had expressly prohibited private rights of action under TISA. The trial court sustained the demurrer with leave to amend, which plaintiffs declined. On appeal, the Court of Appeal affirmed, reasoning that Congress's repeal of former section 4310 reflected its intent to bar any private action to enforce TISA.

The California Supreme Court reversed, agreeing with the plaintiff that the Court of Appeal erroneously failed to consider the effect of TISA's savings clause. "By leaving TISA's savings clause in place, Congress explicitly approved the enforcement of state laws 'relating to the disclosure of yields payable or terms for accounts ... except to the extent that those laws are inconsistent with the provisions of this subtitle, and then only to the extent of the inconsistency.' [Citation.] The UCL is such a state law." The Court distinguished cases in which Congress adopted a comprehensive remedial scheme that suggests an intended exclusivity for the federally defined enforcement mechanism.

The Supreme Court did not address trial courts' *discretion* to sustain a demurrer under the doctrine of judicial abstention, where the court believes the consumer's claim is not suitable for adjudication in the courts, even though the claim is legally cognizable under the UCL. As one treatise on the UCL explains, "Even if federal or state law is not sufficiently paramount as to preempt a UCL claim, courts may still abstain in deference to an administrative agency's enforcement powers."

An unfair competition claim may be based on an insurer's bad faith claims handling, regardless whether the challenged conduct is also a violation of the Insurance Code.

Zhang v. Superior Court (2013) 57 Cal.4th 364.

The plaintiff in this case claimed that his insurer violated the Unfair Competition Law (UCL, Bus. & Prof. Code, § 17200 et seq.) by promising to provide timely coverage in the event of a compensable loss, when it allegedly did not intend to pay the true value of its insureds' covered claims. The insurer contended plaintiff's claim was an impermissible attempt to plead around *Morardi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, which held that a private right of action could not be based on violation of the Unfair Insurance Practices Act (UIPA), Insurance Code section 790 et seq.

continued on page vii

continued from page vi

The California Supreme Court held that while *Morardi-Shalal* remains good law in barring private actions for violation of the UIPA – including UCL claims directly based on the UIPA – it does not preclude first party UCL actions based on grounds *independent* of the UIPA, even when the insurer's conduct may also violate the UIPA.

Potential harm to members of a class of consumers will not support a UCL action where the named plaintiff individually suffered no actual harm.

Schwartz v. Provident Life & Accident Ins. Co. (2013) 216 Cal.App.4th 607

The plaintiff in this action bought disability insurance in 1988. After his insurers settled a dispute with the Insurance Commissioner regarding charges that they had wrongfully denied benefits to some insureds, the plaintiff in this action (who had never made a claim for benefits) sued his insurers, alleging deceptive claims handling practices in violation of the Unfair Competition Law (UCL, Bus. & Prof. Code, § 17200 et seq.). He sought a partial return of premiums paid. The trial court found that the insured, who was never denied benefits, lacked standing to pursue a UCL cause of action because the insured had not "suffered injury in fact" nor "lost money or property as a result of the unfair competition." (§ 17204.) The trial court granted summary adjudication in favor of the insurers on the UCL cause of action, and plaintiff appealed.

The Court of Appeal (First District, Division Three) affirmed. "Schwartz has failed to raise a material triable issue of fact that he suffered economic injury of any kind. Schwartz paid a fixed premium for a promise of disability coverage that was never denied. He did not lose money or property by the alleged wrongful denial of benefits to other policy holders using unfair claim practices that are now enjoined by the commissioner." Rejecting plaintiff's economist's method for calculating class-wide harm, the court explained, "The posited harm is potential – not actual – because only those policyholders denied benefits actually lost money. A disabled policy holder wrongly denied income benefits would dispute the supposition that his or her economic injury was comparable to the abstract economic injury of an able-bodied policy holder who never needed or sought benefits."

A consumer has standing under the UCL to sue for misleading advertisements regarding a product's pre-sale price, in violation of a specific state statute barring that practice, where the consumer alleges he would not have purchased the product but for the misrepresentation.

Hinojos v. Kohl's Corporation (2013) 718 F.3d 1098.

The plaintiff in this putative class action sued Kohl's department store under the the Unfair Competition Law (UCL), Fair Advertising Law (FAL) and Consumer Legal Remedies Act (CLRA), alleging that Kohl's misleadingly marked up "regular" or "original" product prices in advance of a sale, so as to represent that sale mark-downs were greater than they actually were. The trial court dismissed the action, finding that plaintiff had no standing because he lost neither money nor property: he acquired the merchandise he wanted at the price that was advertised, even if the advertised price was falsely represented as a "sale."

The 9th Circuit Court of Appeals reversed. Applying the California Supreme Court's holding in *Kwikset Corp. v. Superior Court*, 246 P.3d 877 (Cal. 2011), the federal court held that when a consumer purchases merchandise on the basis of false price information (i.e., that the goods had sold at a substantially higher price at Kohl's or in the prevailing market in the recent past), and when the consumer alleges that he would not have made the purchase but for the misrepresentation, he has standing to sue under the Unfair Competition Law and Fair Advertising Law because he has suffered an economic injury. The court concluded that misinformation about a product's "normal" price is "significant to many consumers in the same way as a false product label would be, which "of course, is why retailers like Kohl's have an incentive to advertise false 'sales.' It is also why the California legislature has prohibited them from doing so."

CASES PENDING IN THE CALIFORNIA SUPREME COURT

Addressing whether the primary assumption of risk doctrine apply to a care giver suing an Alzheimer's patient for injuries caused by the patient.

Gregory v. Cott, case no. S209125, formerly published at 213 Cal.App.4th 41.

This is an action by an in-home caregiver against an Alzheimer's patient for negligence, battery, and premises liability against a patient with Alzheimer's disease, and against the patient's husband. A divided Court of Appeal held that the primary assumption of risk doctrine applied to bar the claim by a caregiver hired to provide care and supervision in a private home to an Alzheimer's patient known to be violent.

The California Supreme Court granted review on April 10, 2013 to address the following issue: Did the doctrine of primary assumption of the risk bar the complaint for damages brought by an in-home caregiver against an Alzheimer's patient and her husband for injuries the caregiver received when the patient lunged at her?

Addressing whether to adopt the "sophisticated purchaser" doctrine as a defense to a failure-to-warn claim in a products liability action.

Webb v. Special Electric Company, case no. S209927, formerly published at 214 Cal.App.4th 595.

In this products liability action, the plaintiffs (husband and wife) sued the defendant after the husband was diagnosed with mesothelioma, which he attributed to asbestos exposure. He blamed some of his exposures on Special Electric, which supplied raw asbestos to Johns-Manville, which in turn manufactured pipes with which the husband later worked. The trial court failed to rule on dispositive motions brought by Special Electric during trial, and the jury awarded over $5 million, for which it attributed 18 percent fault

continued on page viii

continued from page vii

to Special Electric, 49 percent to Johns-Manville, and 33 percent to third parties. The trial court then granted Special Electric's post-verdict motion for judgment on two grounds: First, it would be unreasonable to obligate Special Electric to require Johns-Manville to provide warnings on its products; alternatively, the bags in which the asbestos was transported to Johns-Manville bore satisfactory warnings. The court relied in part on *Johnson v. American Standard, Inc.* (2008) 43 Cal.4th 56, in which the Supreme Court held that sophisticated users of a product need not be warned about dangers of which they are or should be aware.

The Court of Appeal reversed, holding that the trial court's posttrial ruling was procedurally and substantively defective, although the court suggested an asbestos supplier's duty to warn users of its asbestos might on different facts be obviated by proof that the users needed no warning, and that its duty may be discharged by a showing of reasonable efforts to provide warnings, or by reasonable reliance upon others to do so."

The California Supreme Court granted review on April 22, 2013, to address the following issues: (1) Should a defendant that supplied raw asbestos to a manufacturer of products be found liable to the plaintiffs on a failure to warn theory? (2) Was the trial court's decision to treat defendant's pre-trial motions for nonsuit and for a directed verdict as a post-trial motion for judgment notwithstanding the verdict procedurally improper, and if so, was it sufficiently prejudicial to warrant reversal?

Addressing whether MICRA applies to actions regarding unsafe hospital premises.

Flores v. Presbyterian Intercommunity Hospital, case no. S209836, formerly published at 213 Cal.App.4th 1368.

Plaintiff sued the hospital where she was being treated, alleging she sustained injuries when a bedrail collapsed. The trial court sustained the hospital's demurrer on statute of limitations grounds, finding the action arose out of a claim of medical negligence, and thus was barred the one-year limitations period set forth in California's Medical Injury Compensation Reform Act (MICRA). The Court of Appeal reversed, holding the claims properly rested at least in part on conduct that is not "professional negligence" within the meaning of MICRA.

The case involves MICRA's one-year statute of limitations (Code Civ. Proc., § 340.5), but the issue implicates other MICRA provisions as well, including the statute limiting medical malpractice plaintiffs to a recovery of $250,000 for noneconomic damages. MICRA applies "[i]n an action for injury or death against a health care provider based upon such person's alleged professional negligence," and "professional negligence" is defined in part as "a negligent act or omission to act by a health care provider in the rendering of professional services." The *Flores* court discussed the conflicting decisions about MICRA's applicability to patient falls from hospital beds, and distinguished those that resulted from the failure to properly secure or supervise the patient while on a hospital bed or gurney," and those resulting from an equipment failure. The court concluded that the plaintiff's action, in the latter category, "sounds in ordinary negligence because the negligence did not occur in the rendering of professional services."

The California Supreme Court granted review on May 22, 2013, to address the following issues: (1) Does the one-year statute of limitations for claims under the Medical Injury Compensation Act (Code Civil Proc., § 340.5) or the two-year statute of limitations for ordinary negligence (Code Civil Proc., § 335.1) govern an action for premises liability against a hospital based on negligent maintenance of hospital equipment? (2) Did the injury in this case arise out of "professional negligence," as that term is used in section 340.5, or ordinary negligence?

Addressing whether elder abuse claim may be stated against treating doctors even if care was provided outside of a custodial, inpatient setting.

Winn v. Pioneer Medical Group, Inc., case no. S211793, formerly published at 216 Cal.App.4th 875.

After the death of their 83-year-old mother, plaintiffs sued defendant physicians for elder abuse, based on defendants' repeated decisions not to refer their mother to a vascular specialist over a two-year period during which her diminishing vascular flow worsened without treatment. Defendants argued they cannot be liable for elder abuse because they treated decedent as an outpatient, and liability for elder abuse "requires assumption of custodial obligations." They also contended the conduct plaintiffs allege constituted only professional negligence and, as a matter of law, does not amount to the "reckless neglect" required for a claim of elder abuse. The trial court agreed and sustained defendants' demurrer. The Court of Appeal reversed in a divided opinion: "The elder abuse statute does not limit liability to health care providers with custodial obligations, and the question whether defendants' conduct was reckless rather than merely negligent is for a jury to decide." One justice dissented, expressing the view that "the majority has blurred the line between the Elder Abuse and Dependent Adult Civil Protection Act (the Act) and professional negligence, despite the fact that the California Supreme Court has repeatedly noted the distinct and mutually exclusive nature of the two."

The California Supreme Court granted review on August 14, 2013, to address the following issue: Does "neglect" within the meaning of the Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15657) include a health care provider's failure to refer an elder patient to a specialist if the care took place on an outpatient basis, or must an action for neglect under the Act allege that the defendant health care provider had a custodial relationship with the elder patient?

commissioner explained that, "even though you are a misappropriator, if the trade secret later ceases to exist, the injunction should be dissolved." (1979 RT 42.) "We permit reverse engineering. Once that reverse engineering has occurred, the trade secrets would no longer exist. Even a misappropriator could obtain termination of the injunction." (1979 RT 43.)

The head start limitation is also expressed in the Restatement of the Law, which explains that "injunctive relief should ordinarily continue only until the defendant could have acquired the information by proper means." (Rest.3d Unfair Competition, § 44, com. f.) "Monetary remedies, whether measured by the loss to the plaintiff or the gain to the defendant, are appropriate only for the period of time that the information would have remained unavailable to the defendant in the absence of the appropriation." (*Id.* § 45, com. h.)

Thus, both the legislative history leading to the enactment of the UTSA by the National Conference of Commissioners on Uniform State Law and the Restatement of the Law firmly support the imposition of a head start limitation on the scope of relief available in trade secret misappropriation actions.

Moreover, such a head start limitation is consistent with the UTSA goal of *encouraging* widespread use of new innovations. When enacting the UTSA, the National Commissioners explained that the UTSA was not designed to protect trade secrets: A "trade secret is not protected or withheld from the public. What is protected here is the trade secret from misappropriation, and that's all that's being protected. You can learn of the trade secret and use it by proper means, which is not the case in patent law. You have an absolute right during the patent period in the patent case. If you should discover independently the patented process, you can't use it. In trade secrecy, you can. All that's being protected against here is the misappropriation under this tort theory." (1979 RT 21.)

The commissioners expressed concern about the "chilling effect" of trade secret litigation and the need to encourage widespread use of new innovations that benefit the public, stating "[i]f you don't want to go under the patent or copyright law, then you do run the risk that somebody is liable to find out about this information, *and that's what we want*. We want people to know about things." (1979 RT 17, emphasis added.) "Every time we protect a trade secret we're giving a cost to the consumer." (1978 RT 12; see *American Can Co. v. Mansukhani* (7th Cir. 1984) 742 F.2d 314, 329 ["The primary purpose of trade secret law is to encourage innovation and development, and the law should not be used to suppress legitimate competition. [Citation.] Broader protection would stifle legitimate competition by prohibiting competitors from using their own independent discoveries, public information and reverse engineering"].)

The National Commissioners' conscious decision to limit the scope of relief available in trade secret litigation to avoid chilling innovation and driving up consumer costs is consistent with California public policy in favor of open competition and employee mobility. "[I]n 1872 California settled public policy in favor of open competition...." (*Edwards v. Arthur Andersen LLP* (2008) 44 Cal.4th 937, 945.) "The law protects Californians and ensures 'that every citizen shall retain the right to pursue any lawful employment and enterprise of their choice.' " (*Id.* at p. 946.) "It protects 'the important legal right of persons to engage in businesses and occupations of their choosing.' " (*Ibid.*) One aspect of California's policy in favor of nurturing open competition is the rule of law protecting employee mobility. (See *Silguero v. Creteguard, Inc.* (2010) 187 Cal.App.4th 60, 69 [" ' "[t]he interests of the employee in his own mobility and betterment are deemed paramount to the competitive business interests of the employers, where neither the employee nor his new employer has committed any illegal act accompanying the employment change" ' "].) California law fosters employees' ability to compete with their former employers using the skills and the general knowledge gained from their prior employment. (E.g., Rest.3d Unfair Competition, § 42 coms. d, f.) Applying the head start doctrine is consistent with California's strong public policy in favor of competition and employee mobility.

Finally, the head start doctrine is consistent with the basic tort principle in California that a "plaintiff is not entitled to be placed in a better position than he or she would have been in had the wrong not been done." (6 Witkin, Summary of Cal. Law, *supra*, Torts, § 1548, p. 1022; accord, *Metz v. Soares* (2006) 142 Cal.App.4th 1250, 1255.) By definition, the head start doctrine is designed to eliminate only the unfair advantage gained by a person who has misappropriated a trade secret. Once that advantage is eliminated, open competition is allowed and even encouraged. Awarding damages or injunctive relief based on the plaintiff's need to compete with the defendant after the head start period has elapsed would provide the plaintiff with an unwarranted windfall, by placing the plaintiff in a better position than the plaintiff would have enjoyed had no misappropriation taken place.

Asserting the "head start" doctrine as a defense.

If a plaintiff in trade secret misappropriation litigation seeks damages for loss of income spanning many years, or injunctive relief seeking to prohibit the alleged misappropriator from engaging in the competing business, defense counsel should assert the head start doctrine as a defense that limits the scope of the available monetary and injunctive relief.

continued on page 20

First, it probably is prudent, but not necessary, to plead the head start limitation as an *affirmative defense* in the answer. A general denial of the damages and other relief claimed by the plaintiffs (to which the plaintiff bears the burden of proof) should be adequate to preserve the issue. If counsel pleads the head start doctrine as an affirmative defense, counsel should be careful not to suggest that the burden is on the defense to *disprove* the damages or other relief the plaintiff is seeking.

Second, because California's statutory cause of action for misappropriation of trade secrets generally preempts all other causes of action based on the same nucleus of facts (see Chin et al., Cal. Practice Guide: Employment Litigation, *supra*, ¶¶ 14:81.5 to 14:81.7, p. 14-10), defense counsel should file a demurrer to any other causes of action, or seek summary adjudication of them, based on statutory preemption.

Third, counsel defending against trade secret misappropriation claims should, by motion in limine, object to any evidence or argument that suggests damages may be extrapolated into the future, without regard to the fact that, at some point, the defendant will have gained access to the claimed secrets through proper means.

Fourth, defense counsel should present evidence, through the testimony of defense witnesses and the cross-examination of plaintiffs' witnesses, establishing how long it would have taken the defendant to discover the trade secret, either by reverse engineering or other proper means. Counsel also should educate their expert witnesses on the head start doctrine to ensure that, in the event the plaintiff prevails on the issue of liability, the testimony provides an adequate basis for the jury's determination of damages, and/or the scope of the court's injunction, consistent with the head start limitation.

Finally, counsel should propose either special jury instructions or modifications to the standard CACI instructions modeled after the Restatement's limitation on damages under the head start doctrine. For example, CACI Nos. 4409 and 4410 could be modified as indicated in boldface below:

4409. Remedies for Misappropriation of Trade Secret

If [*name of plaintiff*] proves that [*name of defendant*] misappropriated [his/her/its] trade secret[s], then [*name of plaintiff*] is entitled to recover damages if the misappropriation caused [[*name of plaintiff*] to suffer an actual loss/ [or] [*name of defendant*] to be unjustly enriched].

[However, your award of damages, whether measured by the loss to the plaintiff or the gain to the defendant, are limited solely to the time that the information would have remained unavailable to the defendant in the absence of the misappropriation. Damages cannot be awarded to compensate for losses to the plaintiff or enrichment by the defendant that would have occurred after the defendant could have discovered or obtained the information by proper means.]

[If [*name of defendant*]'s misappropriation did not cause [[*name of plaintiff*] to suffer an actual loss/ [or] [*name of defendant*] to be unjustly enriched], *[name of plaintiff]* may still be entitled to a reasonable royalty for no longer than the period of time the use could have been prohibited. However, I will calculate the amount of any royalty.]

4410. Unjust Enrichment

[*Name of defendant*] was unjustly enriched if [his/her/its] misappropriation of [*name of plaintiff*]'s trade secret[s] caused [*name of defendant*] to receive a benefit that [he/she/it] otherwise would not have achieved.

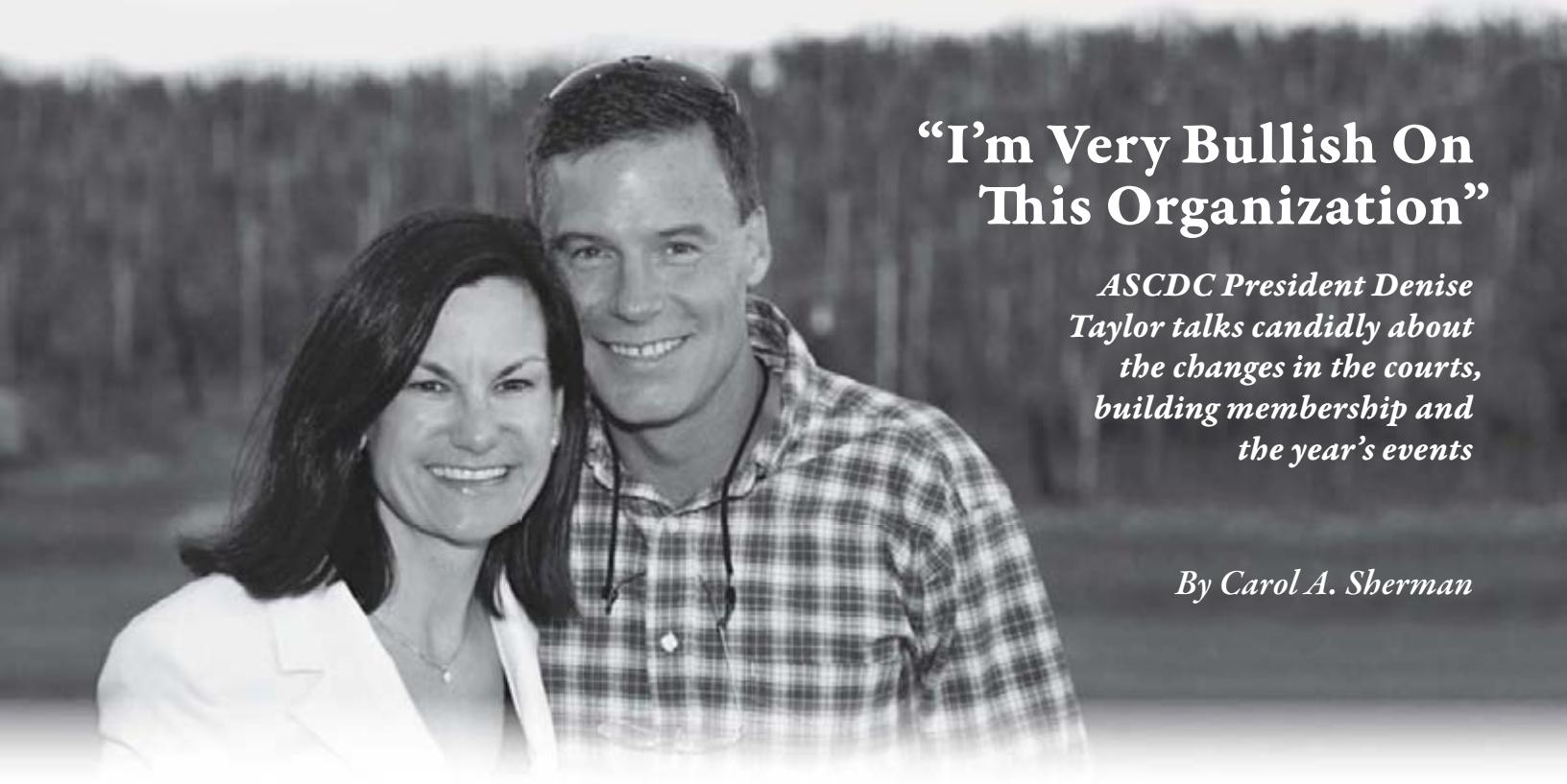
To decide the amount of any unjust enrichment, first determine the value of [*name of defendant*]'s benefit that would not have been achieved except for [his/her/its] misappropriation. Then subtract from that amount [*name of defendant*]'s reasonable expenses[, including the value of the [specify categories of expenses in evidence, such as labor, materials, rents, interest on invested capital]]. [In calculating the amount of any unjust enrichment, do not take into account any amount that you included in determining any amount of damages for [*name of plaintiff*]'s actual loss.] **[Also, do not award unjust enrichment damages for any period after the defendant could have discovered or obtained the information by proper means.]**

(See Rest.3d Unfair Competition, § 45, com. h.)

Conclusion

In sum, the history of the UTSA clearly supports a "head start" limitation on the scope of relief available in trade secret misappropriation actions, both in the form of an injunction and monetary damages. But unless defense counsel assert the "head start" doctrine, that valuable defense will be waived.

H. Thomas Watson and Karen M. Bray are partners at Horvitz & Levy LLP, an appellate boutique that specializes in handling civil appeals and writ proceedings in jurisdictions across the nation, and who consult regularly with trial counsel on cutting-edge legal issues to enhance the odds of prevailing at trial and to preserve issues for eventual appellate review.



"I'm Very Bullish On This Organization"

ASCDC President Denise Taylor talks candidly about the changes in the courts, building membership and the year's events

By Carol A. Sherman

N. Denise Taylor is as passionate about the Association of Southern California Defense Counsel (ASCDC) as she is about her law practice. Taylor credits the organization for playing a pivotal role in her 30-year career as a successful civil defense attorney.

"By being active in ASCDC and serving on the Board of Directors, I became better known as a lawyer. I was able to start my own firm in part because of the networking I did with ASCDC members," said Taylor, one of two founding partners of the Los Angeles medical malpractice firm of Taylor Blessey LLP.

Taylor joined ASCDC as a new attorney with the defense firm Bonne, Jones, Bridges, Mueller & O'Keefe. She joined the firm after receiving her law degree from Pepperdine University in 1981, and remained there until 2006 when she formed her own firm with law partner Ray Blessey.

"It wasn't long after joining the Bonne firm that I started attending ASCDC's Annual Seminar for its educational value and the opportunity to network with clients." In 1998, she was asked to serve on the Association's Board of Directors.

"I've made some of my best friends in the legal community by being a member of the Association and serving on its Board."

She tells young attorneys, "I was where you are. You have to put yourself out there. Talk to the person next to you. Look for opportunities to network with attorneys and meet judges. ASCDC will help open those doors. It has for me. I'm very bullish on this organization."

With the strong support of this year's Board, Taylor is determined to increase the Association's membership, not only from the ranks of the traditional member firms, but from non-traditional firms and counties outside Los Angeles. "There has never been a better time than now to be a part of the voice of all civil defense attorneys. We have the opportunity to work together to adjust to the changes in the courts in response to the state budget crisis," she said.

Since assuming leadership of ASCDC at the 52th Annual Seminar in March, Taylor has been keenly aware of the challenges civil defense attorneys are facing with the new streamlined Personal Injury (PI) courts. With Los Angeles County heaviest hit, the response to the state budget crisis has greatly altered the way civil defense attorneys handle PI cases.

"We're all still trying to figure out how the new system will work," explained Taylor, who defends doctors and hospitals in medical malpractice cases. "The majority of our members are affected by the changes because of the sheer number of cases filed in Los Angeles County."

Looking on the bright side, Taylor noted, "Parties who really want to get their day in court are still going to have it, maybe even more efficiently if you're a personal injury attorney in the new PI system. So far, after just a few months, every case that has been ready to go to trial has been assigned a trial court. However, if you need a continuance because you or your client or expert isn't available, or the parties agree that more time is needed for pre-trial discovery, at least for now, the judges are being more accommodating."

Taylor credits Judge Dan Buckley, a former ASCDC member and supervising judge of the Los Angeles civil courts, for his efforts in spearheading the new system for segregating PI cases. "He's selected very good judges for the personal injury courtrooms. The staff is also excellent; they are very competent and positive. Everyone is working together even though things are still in crisis mode."

While the impact is greatest on personal injury cases, attorneys who handle other types of cases, such as employment and construction defect cases, are also feeling the impact of the budget cuts. In addition to staff reductions, independent calendar courts

continued on page 22

are no longer handling PI cases and therefore, have had to take on more time-consuming cases. Taylor explained that the idea behind the segregation of PI cases stemmed from the notion that PI lawyers don't file as many motions, demurrers, or motions for summary judgment, all requiring court appearances that extend the life of the case and require court staff attention. "As a result, independent calendar judges are responsible for even more of the time-consuming, labor-intensive cases. Delays in those courtrooms will inevitably happen."

In terms of whether the changes to the courts will impact clients, Taylor said it's too soon to tell. "If there are delays, they add to the cost by forcing the attorneys and experts to repeatedly have to prepare for trial, only to have the trial date pushed back. Not only the expense of litigation, but also the uncertainty, inconvenience and stress it causes have a very real affect on defendants."

As a part of her mission as ASCDC president, Taylor is focused on increasing membership by drawing from firms who represent non-insurance clients, as well as working on increasing the membership ranks of defense attorneys practicing in counties outside Los Angeles. "Most of our members are in Los Angeles County. But our membership reaches as far south as San Diego and north to Bakersfield."

Always the optimist, she's thrilled with the high caliber of this year's Board. "They make me very optimistic about this organization. They're very proactive and bring tons of enthusiasm. We have an incredible group of leaders coming up in the chairs."

"There's no one magic bullet to increasing membership," she admitted. "Strong leadership is important along with an energetic, proactive Board that draws from different practice areas and different counties. This year we have added two intellectual property lawyers to participate on our Board. We have very enthusiastic up-and-coming attorneys working on our membership committee and we have a young lawyers committee tasked with attracting young members. We also have added well

continued on page 23

Happy Endings

By Carol A. Sherman

When Denise Taylor says she has a very interesting family story, she is not exaggerating. In fact, her life has played out like a made-for-TV movie about a smart, ambitious single career woman who has it all – a successful law practice, great friends and family, first-class world-wide travel adventures – except that one special person to share it with. Like all good romances, this one has a very happy ending. What Denise could never have dreamed in the first 25 years of her law career was how she would meet her husband, and how the law played a part.

At an early age, Denise knew she would become a lawyer. "I was a big talker. From the time I was a little kid anyone who knew me said I was going to be a lawyer when I grew up. In my family, you were expected to become a professional. My dad is a surgeon and my mother was a nurse. My aunts and uncles are all nurses, doctors and dentists. So of course medicine was something I was guided towards, but I was never good at science and even worse at math, and I hated the sight of blood."

The oldest of four children, Denise has two brothers and a sister. She was born in Indianapolis where her father was completing his surgical residency. When she was three, her family moved to Fort Benning Georgia where her father, a Captain in the Army, was stationed. Her family then moved to Phoenix, Arizona, where she attended elementary and high school. According to Denise, her father took care of the chimpanzees during Project Mercury, NASA's first human space-flight program that used animals to test human flight. Her father turns 85 this year; her mother passed away earlier this year after a long illness.

Raised a Seventh Day Adventist, she attended Pacific Union College in Napa Valley. She laughed, recalling that during her first semester, her major was social work. "Anyone who knows me will laugh at this. I think I was being a little rebellious. After my first semester I changed my major to history, knowing I was going to go to law school."

A member of Pepperdine Law School's first graduating class that completed all three years at the Malibu campus, Denise excelled in civil procedure and torts. "I didn't much care for criminal law, contracts or real property, so when I was looking for my first job, I thought, okay, I'm good at torts and civil procedure, and everybody in my family is in the medical field, so maybe medical malpractice firms would be a place to start." Growing up, Denise had worked in her father's office. "I had done just about everything there was to do in a doctor's office except see patients."

She recalled telling Ken Mueller in her interview with Bonne, Jones, Bridges, Mueller & O'Keefe, "I want to defend doctors in malpractice cases." She joined the firm as a law clerk in her third year of law school. In November 1981, she started practicing after passing the state bar. She successfully tried her first case within the first nine months, became a shareholder in year five, and remained with the firm until May 2006 when she started her own firm.

"Other than choosing medical malpractice defense as my area of specialty, the best professional decision I ever made was to start my own firm, with Ray Blessey as my law partner." In 2006, they formed Taylor Blessey LLP. "Ray and I both have a huge work ethic, but we're completely different in ways that complement each other in our practice."

"I was a career woman, and always a real go-getter, but by the time we started Taylor Blessey I had given up on marriage," said Denise, admitting that she had always put her career first. When she talks about her family, she lights up. "I have an incredible extended family and wonderful friends. Both my brothers lived with me at different times, as did two of my nephews and two of my nieces. Right now I have one of my nieces living with me and working at the office. My youngest nephew is three and my oldest nephew is 30, and he has two children now. They all call me Auntie Nise. I've had a very close relationship with all of my siblings' kids and have traveled with them throughout the world."

As is often the case in life, good things happen when they are least expected. "I would tell any single professional person that it's important to be happy and to be positive. Looking back, the turning point in my life came when I started my own firm. That gave me a freedom and confidence that allowed me to be open to meet someone like my future husband."

In the late 1990s, Denise, a member of the American Board of Trial Advocates, started going on the

continued on page 23

N. Denise Taylor – continued from page 22

international ABOTA trips. "As a single woman, this was a great way for me to travel with a group of people I knew." Active in ABOTA, Taylor served on the National Board along with San Francisco defense attorney Will McDowall. A widower, Will would bring his daughter Amy on the ABOTA trips. "Amy is so much fun and Will is the salt of the earth. We became great friends."

Looking back, Denise recalls a conversation with Amy that took place while on safari in Africa in 2006. Denise, solely focused on her law career, described her perfect man. "He would have to be someone who wasn't a lawyer and lived an hour flight away, so we could see each other on weekends and I could bring him to my social functions. And it would be great if he was a contractor." Denise owns a 1920s home that she affectionately refers to as "the money pit."

Ironically, Denise had just described Amy's brother Doug, a contractor who lived in Sacramento, whom Denise had never met.

The next year, Denise and Doug met on the 2007 ABOTA trip. "We met at the Atlanta airport on our way to Milan and Lake Como, which was the first stop on the trip. Although it's hard to admit, there was a spark between us right from the start." She remembered that at that time he "shopped" at used clothing stores and had a shoestring tied to his reading glasses. "He was a kayaker and a man's man." She laughed, "But he cleans up very nicely."

"By the middle of the Mediterranean cruise, we were pretty much an item. By the time we docked in Monte Carlo, we were in love." They had known each other for all of 10 days.

Over the next year the relationship blossomed. Doug began commuting to Los Angeles most weekends.

"At first my family was a little suspicious. My father, brothers, and many of my friends were very protective of me, but when they met Will, Doug's father, they relaxed. And once they got to know Doug, they realized how well we were suited." Soon, Doug rented out his Sacramento home and moved to Los Angeles.

They were married on May 14, 2011, at her father's home in Paradise Valley. Their good friend Bob Savitt, husband of ASCDC colleague Linda Savitt, officiated the wedding ceremony.

"I was 49 years old when I met Doug. We've been married just over two years. He was married once and I have a 24 year old stepson, Blake, who I love to death. And my relationship with Doug's family is as close as my relationship with my own family. I am really lucky."

They make their home in Hancock Park at a wonderful older home that Denise has owned for 20 years, with their two dogs. "Officially Doug's retired, but he enjoys working with his hands doing carpentry and other remodeling. Currently, he is overseeing the remodeling of the back house on the property; his 'man cave.'"

Denise said that they are perfect for each other but confessed, "If I had met him 10 years earlier we probably wouldn't have meshed. We met at a really good time for both of us."

Like every good movie, there's a lesson to be shared.

"I believe that it's hard to have it all. For example, I always wanted kids of my own. But looking back it's probably good I didn't, because I am that special person to all my nieces and nephews. I think that that's what I was meant to do. There are many paths that women professionals can take. I just feel blessed that both my career and family have turned out so well."

known and respected defense attorneys from the outlying counties to the Board to get our message out to prospective members in their geographic areas."

On the legislative front, Taylor praised the efforts of California Defense Counsel (CDC) and its lobbyist Mike Belote. "Mike continues to do a wonderful job for us, ensuring that our best interests are represented in the state Legislature, especially now that there's a super majority of members from one party. It's particularly important as an organization this year that we stand by our insurance clients in the efforts being made on the part of the plaintiff's bar to change limits set forth in the Medical Insurance Compensation Reform Act of 1975, signed by Governor Jerry Brown during his first term."

Outside the legislative arena, relations with the plaintiff's bar remain positive. ASCDC continues the tradition of reaching across the aisle to connect with members of the Consumer Attorneys of Los Angeles. The recent Hall of Fame Dinner is a great example, with plaintiff attorney Tom Girardi included among the honorees. The Hall of Fame, held at the Millennium Biltmore Hotel in downtown Los Angeles, has become one of ASCDC's most popular events. "This year, we honored our 1989 President Bob Baker, an icon in the defense community, in addition to Tom Girardi and the Honorable Bill MacLaughlin." Taylor said. "It was a fantastic evening attended by the 'who's who' in the legal community."

Taylor is looking forward to another Santa Barbara Seminar. She served as chairperson for last year's seminar, adjusting the event to keep what had been working in the past and change what wasn't. The seminar starts on Friday afternoon with three hours of meetings followed by a cocktail reception. Meetings resume Saturday morning, followed by an optional wine tour and lunch. "We encourage members to invite their clients. It's a great weekend and Santa Barbara is such a wonderful location. The seminar is not only educational, but it's another way to build camaraderie and just have fun."

continued on page 24

N. Denise Taylor – continued from page 23

Another event that was brought back this past spring was a Board meeting and retreat in Ojai with spouses included, which used to be a mainstay of the ASCDC Board, but was discontinued a few years ago, until this year. "When I first started dating my husband, I invited him to Ojai, so I have very fond memories of being there. It's a great way for our Board members to bond at the beginning of the year, especially new members."

Taylor will remain at the helm of ASCDC through February 2014, when the leadership role passes to Vice President Robert Olson.

Gregory v. Cott:

California Supreme Court to Further Clarify the Primary Assumption of Risk Doctrine

Jeffrey M. Lenkov and Steven J. Renick

In its very last decision of 2012, the California Supreme Court brought some desperately needed clarity to the primary assumption of risk doctrine, firmly establishing that "the primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities 'involving an inherent risk of injury to voluntary participants ... where the risk cannot be eliminated without altering the fundamental nature of the activity.'" (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156.) Now the high court is poised to determine the extent to which the doctrine applies to activities beyond sports and recreation. The Court has granted review in the case of *Gregory v. Cott,* Case No. S209125, to address whether the doctrine of primary assumption of the risk bars the claim of an in-home caregiver against an Alzheimer's patient and her husband for injuries the caregiver received when the patient lunged at her.

Primary assumption became law in California in 1992 with the Supreme Court's twin decisions of *Knight v. Jewett* (1992) 3 Cal.4th 296 and *Ford v. Gouin* (1992) 3 Cal.4th 339. The Court explained that primary assumption of risk involves activities "where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury." (*Knight, supra,* 3 Cal.4th 296, 314-315.) Unfortunately, the lower courts immediately began disagreeing as which types of activities were subject to the new doctrine.

Two lines of appellate cases developed, one limiting the application of the primary assumption of risk doctrine to active sports (see, e.g., *Record v. Reason* (1999) 73 Cal. App.4th 472), and the other applying the doctrine to a variety of activities – beyond just active sports – that present inherent risks to the participants. (See, e.g., *Beninati v. Black Rock City, LLC* (2009) 175 Cal. App.4th 650.)

This issue was confronted head-on by the justices of the Sixth Appellate District in the case of *Nalwa v. Cedar Fair*, which arose from an injury the plaintiff suffered while riding a bumper car at an amusement park. The trial judge had granted the defendant summary judgment under the primary assumption of risk doctrine. The two-judge majority reversed, holding that riding a bumper car was not a sport and thus was not subject to the primary assumption of risk doctrine. In dissent, Justice Wendy Clark Duffy argued that the doctrine applies to more than just active sports, and was properly applied to this incident. The defendant sought review in the California Supreme Court, which agreed to hear the case.

The Supreme Court in *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148 reversed the Court of Appeal. While the Court did not "expand the doctrine to any activity with an inherent risk" (*id.* at 1157), it did conclude that "the primary assumption of risk doctrine is not limited to activities classified as sports, but applies as well to other recreational activities 'involving an inherent risk of injury to voluntary participants ... where the risk cannot be eliminated without altering the fundamental nature of the activity.'" (*Id.* at 1156.) The Court explained that:

"The policy behind primary assumption of risk applies squarely to injuries from physical recreation, whether in sports or nonsport activities. Allowing voluntary participants in an active recreational pursuit to sue other participants or sponsors for failing to eliminate or mitigate the activity's inherent risks would threaten the activity's very existence and nature.... The doctrine thus applies to bumper car collisions, regardless of whether or not one deems bumper cars a 'sport.'" (*Ibid.*)

continued on page 25

Gregory v. Cott: – continued from page 25

The Supreme Court has now definitively put to rest the notion that the primary assumption of risk doctrine is limited to activities that can be labeled "sports." But while providing this sorely needed clarity to the scope of the doctrine, the Court left unresolved the question of whether the doctrine can apply to activities other than sports or recreation. While the Court's opinion cannot be read as expressly encouraging such an expansion, it also did not preclude the application of the doctrine to non-recreational activities. In fact the doctrine, in specialized forms, has already been applied in non-sports or recreation contexts, especially in the occupational context. "[W]e have explained the 'firefighter's rule' and 'veterinarian's rule,' precluding certain suits by workers in those occupations for the negligent creation of hazards inherent in their work, as applications of the primary assumption of risk doctrine." (*Id.* at 1155, fn. 1.) This very question is at the heart of *Gregory v. Cott*.

In *Gregory,* Mr. Cott contracted with a home care agency to provide in-home care to his wife, who had suffered from Alzheimer's disease for at least nine years. Plaintiff Gregory was assigned to the defendants' home to provide the contracted caregiver services. Plaintiff acknowledged that she had training in dealing with clients suffering from Alzheimer's disease and had provided services for Alzheimer's patients in the past. When plaintiff started working for the defendants she was aware that Mrs.Cott had Alzheimer's and knew that Alzheimer's patients could become violent. Gregory had been injured by an Alzheimer's patient in the past, and was told by Mr. Cott at the outset that his wife was combative and engaged in "biting, kicking, scratching, [and arm] flailing." (*Gregory v. Cott* (2013) 213 Cal.App.4th 41, 44; superseded by grant of review.)

As time went on and as Mrs. Cott's disease progressed, she became more combative. She was aggressive with other people and even struck somebody. The plaintiff alleged that Mrs. Cott "had violent tendencies" and occasionally she injured the plaintiff, but Gregory never asked her employer to reassign her because, according to the plaintiff, she "could handle the job." Finally, in 2008, while the plaintiff was washing dishes and had a knife in her hand, Mrs. Cott made contact with plaintiff and reached for a knife that plaintiff was holding. The plaintiff was cut on the wrist by the knife, suffering very significant injuries. (*Ibid.*)

The plaintiff sued Mrs. Cott for battery, negligence, and premises liability, and sued her husband for negligence and premises liability. The defendants moved for summary judgment, which motion the trial court granted, holding that the plaintiff's claims were barred by the primary assumption of risk doctrine. (*Id.* at 44, 50.) Division Five of the Second District Court of Appeal, in a two-to-one decision, affirmed.

continued on page 27

The two-judge majority noted that the Supreme Court in *Nalwa* had not ruled out the application of primary assumption of risk to non-sports and recreation activities (*id.* at 46) and observed that the California courts had in fact already approved the use of the doctrine in relation to a number of such non-sports and recreation activities, including the care of Alzheimer's patients (*Herrle v. Estate of Marshall* (1996) 45 Cal.App.4th 1761).

Although in *Herrle* it was a nurse's aide in a convalescent hospital who was injured by an Alzheimer's patient, the majority concluded that "there is no meaningful distinction between undertaking to care for an Alzheimer's patient in a convalescent hospital or other care facility and undertaking to care for such a patient in a private residence." (*Id.* at 49; citation omitted.) "Having been a caretaker for [Mrs. Cott] for several years, plaintiff could not have been under any illusions concerning [her] condition or the premises." (*Id.* at 50.) Accordingly, the majority agreed that the plaintiff's claims were barred by the doctrine of primary assumption of risk. (*Ibid.*)

The dissenting justice reached the opposite conclusion, concluding that "the simple fact that plaintiff was paid to provide in-home care to Mrs. Cott does not bring this case within the holding of *Herrle*." (*Id.* at 60.) Justice Armstrong argued that, unlike *Herrle*, the plaintiff here was not treating a "patient":

"Mrs. Cott was not placed in plaintiff's care, first and foremost because, having no medical or nursing license or certification, plaintiff was completely unqualified to provide medical care to Mrs. Cott. Rather, plaintiff provided housekeeping and personal care services to the Cotts, duties which required virtually no training or specialized skill or knowledge. And she provided these services in the Cotts' home, which afforded none of the protections available in an institutional setting such as the convalescent hospital in *Herrle*. ... Given this increased risk of harm to Mrs. Cott's in-home caregivers, fairness demands that defendants bear responsibility for that risk, and not shift the burden of loss to the hapless worker who happened to be assigned to the home of one suffering from Alzheimer's disease, rather than, for instance, one recovering from foot surgery." (*Id.* at 59.)

Note that Justice Armstrong's disagreement with the majority was with more than just its conclusion that the rule laid down in *Herrle* could be applied to the present case. He did not believe that *Herrle* reflected an appropriate expansion of the primary assumption of risk doctrine. He argued that the cases in which primary assumption has been applied to non- sports or recreational activities can be grouped together under the label "'occupational assumption of the risk.' These cases have their genesis in the firefighter's rule." (*Id.* at 53.)

"The undergirding legal principle of the [firefighter's] rule is assumption of the risk .... Firefighters, whose occupation by its very nature exposes them to particular risks of harm, cannot complain of negligence in the creation of the very occasion for [their] engagement. [T]he [firefighter's] rule is based on a principle applicable to our entire system of justice – one who has knowingly and voluntarily confronted a hazard cannot recover for injuries sustained thereby." (*Id.* at 53-54; citations and internal quotation marks omitted.)

Justice Armstrong argued that the policy rationale for the firefighter's rule was not present in *Herrle*. "[P]ublic safety employees receive special public compensation for confronting the dangers posed by the defendants' negligence.... [A]s a matter of fairness, police officers and firefighters may not complain of the very negligence that makes their employment necessary." (*Id.* at 57; citation and internal quotation marks omitted.)

"The need to provide care to Alzheimer's sufferers who are unable to care for themselves can hardly be equated with the public safety imperative to extinguish fires. Moreover, the persons employed to provide that care are likely low-wage workers who receive no special public compensation for

continued on page 28

confronting the dangers posed by negligent individuals. Nor does fairness demand that those who provide the most mundane, intimate and consistent care to incapacitated patients – orderlies and aides with the barest of medical training who bathe, dress and feed their charges and provide a clean and comfortable living space – suffer the consequences so that those who caused them harm can avoid financial responsibility." (*Id.* 57-58; citation and internal quotation marks omitted.)

When the Supreme Court takes up *Gregory,* it will thus be confronted with a choice to either affirm that the primary assumption of risk doctrine can be applied in "occupational assumption of the risk" cases – i.e. when an employee suffers an injury from a risk inherent in a particular occupation – or only whether the doctrine's application in the employment field is generally limited to cases involving the unique circumstances relating to public safety employees. A ruling in favor of the plaintiff in this case will probably signal to the lower courts that

primary assumption is to be limited, almost exclusively, to the sports and recreation context.

However, a ruling in favor of the defendants will indicate that the Supreme Court is open to a logical application of the primary assumption of risk doctrine in all situations that fit the basic rationale for the doctrine: "whether the defendant's conduct at issue is an inherent risk of the activity such that liability does not attach as a matter of law." (*Id.* at 45; citations and internal quotation marks omitted.)

The authors jointly argued Nalwa v. Cedar Fair, L.P. *on behalf of the defendant before the California Supreme Court.*

Jeffrey M. Lenkov chairs both the Sports Law Practice Group and the Retail, Restaurant & Hospitality Practice Group of Manning & Kass, Ellrod, Ramirez, Trester LLP.

Steven J. Renick chairs the Supreme Court Practice Group of Manning & Kass, Ellrod, Ramirez, Trester LLP and is certified as an Appellate Law Specialist by the Board of Legal Specialization of the State Bar of California.

2013 Hall of Fame Photos

Congratulations **Judge William MacLaughlin,**
Recipient of the Judge of the Year Award,
Presented by Wally Yoka

Congratulations **Tom Girardi,**
Recipient of the Civil Advocate Award,
Presented by David O'Keefe

Congratulations **Bob Baker,**
Recipient of the Hall of Fame Award,
Presented by Phil Baker

10 Legal Writing Tips for the Young Associate

By Hannah L. Mohrman

As young associates, we usually relish the opportunity to be assigned a legal writing project. We see it as our opportunity to stand out and truly show our potential as attorneys. Below are writing tips I have learned:

1 **Know the Assignment**: many of us are Type A attorneys who want to do the best that we can at delivering on a project, but we are not always good at asking questions before we begin the task. Try to nail down the assignment the best you can. This means sitting down with the person who is overseeing the writing assignment and asking questions about what is expected. Does that person have a target page-count or word-count in mind? If the task is to write an objective memorandum, should it be written for internal firm use (assuming a certain amount of knowledge by the reader), or is it going to be sent to someone who needs more background and basic information to understand the conclusions in the memo? Find out how much time you are expected to spend – you will not score points if you produce a thorough treatise with the results of nationwide research if that is not what the client really needs, and half of your time has to be written off.

2 **Know the Topic**: do enough digging to be comfortable that you understand the subject the best you can. Knowing the topic's broad parameters is just as important as having the law to back up your specific arguments. I've written on a wide range of subjects ranging from grocery stores and sawmills to cars. Jumping right into a boolean search on Westlaw based on the phrasing of the assignment handed to you can cause you to miss the perspective you need to really understand the implications of the "hits" you come up with. Start off instead with a tour through secondary sources that provide an overview of any unfamiliar subject, so that you don't miss the "forest for the trees." For each topic, I try to learn as much as I reasonably can in the time available because having a good understanding of what I'm writing about makes me better able to craft analogies, spot practical strategies, and otherwise be a better writer.

3 **Keep It Simple**: using legalese, technical jargon and obscure terms does not make you a better writer and does not make you sound smarter. Try to keep in mind that the person reading your assignment, whether it's the partner or the judge, is a person just like you and will appreciate you making your arguments in a succinct and clear way that conveys what you are truly trying to say. Stay away from words like "aforementioned," "hereinafter," and "arguendo." Look for ways to use fewer words—"before" and "after" are more straightforward than "prior to" and "subsequent to," for example. Check for sentences with too many dependent clause; they can often be easier to follow if you break them up into separate sentences. And sprinkling in a few contractions is usually acceptable too, if it helps the reader absorb the point you are making.

4 **Don't Oversell Your Arguments**: arguing that a statute or decision "clearly supports" your position, or that a logical point "obviously proves" that you should prevail adds little substance to your arguments and can come off as desperate and annoying to the reader. The force of your argument will sell itself if presented in a linear, cleanly organized way,

continued on page 31

without the extra signals telling the reader what he or she should think.

5 **Have a Good Introduction and Conclusion**: the introduction and conclusion should be your strongest sections in your writing. Make sure that the introduction clearly outlines the argument that you will be raising in your writing, and make sure that the conclusion clearly identifies the relief you are seeking or the action item that you believe should be taken based on the information you have presented. It's always a good idea to go back to these sections after you have finished the entire draft, to check one last time that they capture the theme, structure, and content of the analysis in the middle of the document.

6 **Don't Include Too Many Footnotes**: footnotes impede the flow of your writing. After you have completed a draft, go through it one more time with a critical eye on the footnotes. Many of them are of only tangential interest (such as the complete text of a statute you have excerpted in the body paragraph, or a snarky note about an opponent's position). If it's important enough to include, put it in the body of your writing.

7 **Do Not Overuse Acronyms**: don't turn your writing into an alphabet soup. Overusing acronyms can be confusing for the reader. If the term is something that you are going to use throughout your writing, find a shorthand phrase that is descriptive. For example, instead of calling Acme General Hospital "AGH," call it "the hospital." If you are referring to the Uniform Act Designed To Improve Associate Writing Techniques (if only there were such a thing!), call it the "Writing Act" rather than the UADIAWT;

8 **Study Examples of Good Writing**: we all know who the "good writers" are in the office. Study their work and learn from them. Many times others will be happy to run an eye over a draft, even if only to offer reactions to the introduction or table of contents. Their fresh look can be enormously helpful in spotting gaps or offering constructive criticism.

9 **Proofread**: as a young attorney there is only so much you can control in your writing assignment. We know only what we know. We may miss an argument or a piece of evidence or a legal authority that supports your argument. However, we can control our spelling, formatting and grammar. Pay attention to those details. In long sentences, it is easy to overlook errors in subject-verb agreement. There are other "grammar demons" to watch out for, such as the misplaced "only." And a word processor's spell check feature is not foolproof, which is why re-reading your draft after putting it aside for a while can be so important. I once had a partner tell me, "Control what you can control." Spelling, formatting and grammar is something that a young attorney can control. Take the time to proofread so that you don't create the impression that you do not care about the quality of your work.

10 **Start Early**: most of us are excellent procrastinators, but a writing assignment is a good opportunity for a young associate to stand out from the pack by delivering an assignment on time, or even before it is due. This is a sign of good teamwork, as it helps the supervising attorney avoid a time crunch when reviewing the assignment before it needs to be filed or sent to the client. So take the time do a good job and start early.

defense verdicts march – july

Sean Beatty
Beatty & Myers, LLP
Brand v. Hyundai Motor America, Allen Used Cars [nonsuit at close of plaintiff's evidence]

Raymond L. Blessey
Taylor Blessey LLP
Alexander v. Paquette

Christopher E. Faenza
Yoka & Smith
Kinley v. Teasers MDR

Stephen C. Fraser
Fonda & Fraser LLP
Figueroa v. Downey Regional Medical Center

Richard S. Gower
Inglis, Ledbetter, Gower & Warriner, LLP
Crawford v. Motikov

Michael G. Hogan
Michael G. Hogan & Associates
Teagarden v. The Independent Taxi Owners Association of Los Angeles et al

John C. Kelly
Carroll, Kelly, Trotter, Franzen & McKenna
Manika v. The Regents

James J. Kjar
Reback, McAndrews, Kjar, Warford & Stockalper, LLP
Salaz v. Cannata

Limor Lehavi
Archer Norris
Farmers Insurance Exchange v. Austin et al [defense verdict on insured's cross-complaint]

Lauren A.R. Lofton
Yoka & Smith
Kinley v. Teasers MDR

Joseph J. Looney
Carroll, Kelly, Trotter, Franzen & McKenna
Tate v. Chegounchi

Douglas K. Mann
Walker & Mann, LLP
Gomez v. Koudsi

Curt Metzgar
Wade & Lowe
Hernandez v. State Farm General Ins. Co.

Michael O'Dell
Clifford & Brown
Grysko v. Berry Petroleum Company

William M. Slaughter
Slaughter & Reagan, LLP
Crastz v. Toutant et al

Patrick E. Stockalper (2)
Reback, McAndrews, Kjar, Warford, Stockalper & Moore, LLP
Borgonia v. Norwalk Community Hospital
Valenzuela v. Fallas

Daniel R. Sullivan
Sullivan, Ballog & Williams, LLP
Meza v. Boateng, et al

N. Denise Taylor
Taylor Blessey LLP
Nicolas v. Goebel, et al

Do you have a defense verdict you'd like to share with your colleagues?

Send it in today so that your name will appear in the next issue of verdict

E-mail the details of your verdict to:

ascdc@camgmt.com

amicus committee report

ASCDC's Amicus Committee continues to work energetically on behalf of its membership. ASCDC's Amicus Committee has submitted *amicus curiae* briefs in several recent cases in the California Supreme Court and California Court of Appeal, and has helped secure some major victories for the defense bar.

Recent Amicus Wins

The Amicus Committee has recently participated as amicus curiae in the following cases:

Corenbaum v. Lampkin (2013) 215 Cal. App.4th 1308: The Court of Appeal (Croskey, J.) issued a published opinion holding that, in light of *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, evidence of so-called "billed" but not paid medical expenses is inadmissible to prove future economic damages and non-economic damages. The court further held that plaintiffs' expert witnesses cannot rely upon the alleged "billed" but unpaid amounts as the basis for their opinions. Robert Olson, Greines Martin Stein & Richland, and J. Alan Warfield, McKenna Long & Aldridge, submitted an amicus brief on the merits for ASCDC, which was joined by the Association of Northern California and Nevada Defense Counsel.

Malin v. Singer (2013) __ Cal.App.4th __ [2013 WL 3717056]: The Court of Appeal held that a settlement letter written by an attorney was constitutionally protected speech and petitioning activity sufficient to invoke the anti-SLAPP statute and did not constitute extortion as a matter of law. Harry Chamberlain, Manatt, Phelps & Phillips, and Michael Colton, submitted an amicus brief on the merits on behalf of ASCDC, which was later joined by the ACLU.

Thompson v. Automobile Club of Southern California (2013) __ Cal. App.4th __ [2013 WL 3233260]: This was a class action filed against the Automobile Club challenging its practice of "backdating" late renewals. The trial court denied the motion for class certification, which was affirmed on appeal. J. Alan Warfield submitted a publication request on behalf of ASCDC, which was granted.

Flores v. Presbyterian Intercommunity Hospital (2013) 213 Cal.App.4th 1386, review granted May 22, 2013: The Court of Appeal held that a claim that the plaintiff injured her knee while in a hospital when the bed rail collapsed was governed by the general two-year negligence statute (Code Civ. Proc., § 335.1) rather than the one-year MICRA statute (Code Civ. Proc., § 340.5). David Pruett, Carroll Kelly Trotter Franzen McKenna, submitted an amicus letter in support of the defendant's petition for review, which was granted on May 22, 2013 and remains pending.

Pending Cases At The California Supreme Court and Court of Appeal

ASCDC's Amicus Committee has also submitted *amicus curiae* briefs in the following cases pending at the California Supreme Court or California Court of Appeal of interest to ASCDC's membership:

1. *Sanchez v. Valencia*, No. S199119: This case includes the following issue: Does the Federal Arbitration Act (9 U.S.C. § 2), as interpreted in *AT&T Mobility LLC v. Concepcion* (2011) 563 U. S. __, 131 S.Ct. 1740, preempt state law rules invalidating mandatory arbitration provisions in a consumer contract as procedurally and substantively unconscionable? J. Alan Warfield submitted an amicus brief on behalf of ASCDC.

2. *Kesner v. Superior Court* (*Pnumo Abex, LLC*). This case involves the issue of whether a plaintiff can maintain a "take home" asbestos claim, i.e., claiming that the plaintiff was exposed to asbestos through a family member bringing home asbestos fibers on clothing. The Court of Appeal held no in *Campbell v. Ford Motor Co.* (2012) 206 Cal. App.4th 15. The trial court in this case followed *Campbell* and dismissed the plaintiff's claims.

continued on page 34

The issue is now pending before a different district of the Court of Appeal in a writ proceeding; the court has issued an alternative writ indicating that it may disagree with *Campbell*. ASCDC joined the amicus brief submitted by Don Willenburg, Gordon & Rees, on behalf of the Association of Defense Counsel of Northern California and Nevada.

How The Amicus Committee Can Help Your Appeal or Writ Petition And How To Contact Us

Having the support of the Amicus Committee is one of the benefits of membership in ASCDC. The Amicus Committee can assist your firm and your client in several ways:

1. *Amicus curiae* briefs on the merits in cases pending in appellate courts.

2. Letters in support of petitions for review or requests for depublication to the California Supreme Court.

3. Letters requesting publication of unpublished California Court of Appeal decisions.

In evaluating requests for *amicus* support, the Amicus Committee considers various issues, including whether the issue at hand is of interest to ASCDC's membership as a whole and would advance the goals of ASCDC.

If you have a pending appellate matter in which you believe ASCDC should participate as *amicus curiae*, please feel free to contact any Board member or the chairs of the Amicus Committee who are:

Steven S. Fleischman
Horvitz & Levy
818-995-0800

Robert Olson
Greines, Martin, Stein & Richland LLP
310-859-7811

J. Alan Warfield
McKenna Long & Aldridge
213-243-6105

and **Joshua Traver**
Cole Pedroza
626-431-2787

You may also contact members of the Amicus Liaison Subcommittee who are:

Jeremy Rosen
Horvitz & Levy

Harry Chamberlain
Manatt, Phelps & Phillips

Renee Koninsberg
Bowman & Brooke

Michael Colton
Michael A. Colton, Lawyer & Counselor at Law

David Pruett
Carroll, Kelly, Trotter, Franzen & McKenna

John Manier
Nassiri & Jung LLP

Sheila Wirkus
Greines, Martin, Stein & Richland

Susan Brennecke
Thompson & Colegate

Christian Nagy
Collins Collins Muir & Stewart

ASCDC
Association of Southern California Defense Counsel

Application for Membership

NAME: _____

FIRM: _____

ADDRESS: _____

CITY/STATE/ZIP: _____

TELEPHONE: _____ **FAX:** _____

E-MAIL: _____ **WEBSITE:** _____

BAR NUMBER: _____

MEMBERSHIP in the Association of Southern California Defense Counsel is open by application and approval of the Board of Directors to all members in good standing with the State Bar of California. A substantial portion of your practice must be devoted to the defense of civil litigation.

Are you now devoting a substantial portion of your professional time to the practice of the defense of civil and business matters, including the prosecution of eminent domain proceedings? ☐ Yes ☐ No

If full-time employee of an Insurance Company, Corporation or Public Entity, give name of your employer and your title or position: _____

SPONSORING MEMBER: _____ _____
Name Firm

PRACTICE/SPECIALTY AREA SECTION(S):
In order to provide you with targeted information, please check all that apply

☐ Appellate	☐ Insurance Law & Litigation	☐ Medical Malpractice	☐ Public Entity
☐ Business Litigation	☐ Intellectual Property	☐ Personal Liability	☐ Transportation
☐ Construction Law	☐ Landowner Liability	☐ Products Liability	☐ Toxic Torts
☐ Employment Law	☐ Managing Partner	☐ Professional Liability	☐ Young Lawyer

MEMBERSHIP FEES: ☐ Regular Member: $255.00 ☐ Young Lawyer Member (in practice 3 years or less): $185.00
(New members receive a complimentary half-day education seminar & complimentary attendance at the Annual Judicial and New Member Reception in December during their first year of membership.)

PAYMENT: ☐ Check Enclosed
☐ Please Charge My Credit Card #: _____ Exp Date:_____ Security Code: _____
If paying by credit card, please fax to 916-924-7323.

If elected to membership, I agree to abide by the Bylaws of this Association.

_____ _____
Signature of Applicant Date

Contributions or gifts (including membership dues) to ASCDC are not tax deductible as charitable contributions. Pursuant to the Federal Reconciliation Act of 1993, association members may not deduct as ordinary and necessary business expenses, that portion of association dues dedicated to direct lobbying activities. Based upon the calculation required by law, 15% of the dues payment only should be treated as nondeductible by ASCDC members. Check with your tax advisor for tax credit/deduction information.

Please return this form with your payment to:

ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL
2520 Venture Oaks Way Suite 150, Sacramento, CA 95833
Toll Free: 800.564.6791 • Phone: 916.239.4082 • Fax: 916.924.7323
www.ascdc.org • ascdc@camgmt.com

(Updated 11/15/12)

executive committee

N. Denise Taylor
President

Robert A. Olson
Vice President

Michael Schonbuch
Vice President

Glenn T. Barger
Secretary-Treasurer

Diane Mar Wiesmann
Immediate Past President

board of directors

James B. Cole

Michael A. Colton

Julianne DeMarco

Peter S. Doody

Christopher E. Faenza

Thomas P. Feher

Clark R. Hudson

Dan Kramer

Edward R. Leonard

Lisa J. McMains

Gary T. Montgomery

Stephen C. Pasarow

Lisa Perrochet

Lawrence R. Ramsey

Ninos P. Saroukhanioff

John W. Shaw

Patrick Stockalper

Jeffrey A. Walker

the association of southern california defense counsel

2520 venture oaks way, suite 150
sacramento, ca 95833

800.564.6791 • *www.ascdc.org*

Arrowhead
EVALUATION SERVICES

Independent Medical Evaluations throughout Southern California.

As an independent third party, Arrowhead Evaluation Services provides a panel of ethical, experienced and qualified medical professionals to evaluate every type of injury. Our medical experts are available to provide testimony in medical / legal cases. If you are ready to schedule an evaluation, please call us at 888-888-0098 or visit arrowheadeval.com.

PROVIDING IME SERVICES
TO CALIFORNIA SINCE 1987.

ArrowheadEval.com

(888) 888-0098
call toll-free

the association of southern california defense counsel
verdict
2520 Venture Oaks Way • Suite 150 • sacramento, ca 95833

September 20-21, 2013
Santa Barbara Seminar
Santa Barbara

December 5, 2013
Construction Defect Seminar w/CD Claims Managers Association
Orange County

December 5, 2013
Orange County Judicial Reception
Orange County

December 17, 2013
Judicial and New Member Reception
Jonathan Club, Los Angeles

February 27-28, 2014
ASCDC 53rd Annual Seminar
Millennium Biltmore Hotel, Los Angeles