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Clark R. Hudson
ASCDC 2017 President

Behind the Curtain

There are probably few people that read this magazine that have a full understanding of everything that ASCDC does to support its members and the Bar in Southern California. Some of the work that ASCDC does is very visible, and probably needs no comment for the membership to recognize the value provided. However, there are several committees and groups that spend countless hours of work every month just to make sure that ASCDC accomplishes the goals which have been set by its Board of Directors.

Almost every single week our amicus committee is reviewing cases to determine appellate issues that should be addressed. The committee, headed by Steve Fleischman and Ted Xanders, are working (on their own time) to identify cases of significance. Whether it be to file an amicus letter in support of a petition for review, to seek publication or depublication of appellate decisions, to file an amicus brief on the merits, or even to present argument as amicus curiae in the appellate courts, the committee's activity is the result of reviewing dozens of cases every month, with action being taken to ensure the membership is appropriately represented.

Members of the Board of Directors also take on leadership roles in putting together conferences on behalf of the Southern California Bar. This year ASCDC, the Consumer Attorneys Association of Los Angeles (CAALA) and the American Board of Trial Advocates (ABOTA) joined together to sponsor the Joint Litigation Seminar on May 24, 2017 at the LA Hotel. ASCDC Los Angeles Board Member Lauren Kadish and Immediate Past President Glenn Barger were responsible for organizing this event. Both the litigation conference and the cocktail reception that followed immediately after were well attended by the Plaintiff's Bar, Defense Bar and local Judiciary. As everyone in attendance expected, the content of the program was outstanding.

Our CACI Jury Instruction Committee is headed up by Patricia Daehnke and David Pruett. Every year the Judicial Council revisits jury instructions, and seeks comment regarding the jury instruction language. This year Patricia and David volunteered to chair the committee for ASCDC to help work on the CACI jury instructions. Patricia and David had to start the committee from scratch – as there was no prior committee to offer recommendations from ASCDC. If you are aware of any problematic jury instructions, both Patricia and David would love to hear from you.

Everyone knows that our courts are underfunded and the judges are overworked. This Spring, the Los Angeles Superior Court in association with ASCDC, ABOTA, and CAALA joined together for the PI Mandatory Settlement Conference pilot program. For each mandatory settlement conference, there was one settlement officer from the plaintiffs' bar and one defense settlement officer. Given the huge success the pilot program enjoyed, the LA Superior Court decided to expand the program for two additional months. The organization of the pilot program on behalf of ASCDC was managed singlehandedly by Marta Alcumbrac.

Enough cannot be said about the contribution of these Board Members and/or Committee Chairs. The countless hours they donate for our benefit is amazing. While their efforts go far to help improve our profession, recognition for their hard work is rarely given. Therefore, the next time you see Steve, Ted, Lauren, Glenn, Patricia, David or Marta, give them a pat on the back and thank them for supporting our organization.

Beware What You Wish For

Michael D. Belote
Legislative Advocate
California Defense Counsel

If your job is Speaker of the Assembly or President pro Tem of the Senate in true-blue, electric-blue, neon-blue California, your mission is to elect Democrats, the more the better. Achieving two-thirds supermajorities, which occurred this past November in both the Assembly and Senate, confers vast power, at least theoretically. With two-thirds, taxes can be raised, propositions placed on statewide ballots, and governor's vetoes overridden, all without any Republican support whatsoever.

As Republican numbers have dwindled in the legislature in California, there is less at stake for the two parties to fight each other. So what do they do? Well, they fight amongst themselves! The Assembly Speaker is being threatened with recall from the left, for shelving an outrageously expensive and unfunded single-payer health care bill, and the Assembly Minority Leader is in danger of ouster from the right, for helping pass an extension of California's "cap and trade" program, even though the extension bill was supported by the Chamber of Commerce and a host of other business groups.

More practically speaking on the ground in Sacramento, Democratic dominance in the legislature makes it measurably more difficult to kill bills proposed by Democrats, or to pass bills proposed by Republicans. The simple arithmetic in the Assembly looks like this: with a majority vote bill requiring 41 affirmative votes out of the 80-member body, killing a Democratic bill requires "holding" all of the 25 Republicans, and convincing at least 14 Democrats of the 54 (there is currently one vacancy which also will be filled by a Democrat) to either vote "NO" or not vote.

Fortunately, not all bills in Sacramento are as polarized as you might think, and often we are able to obtain amendments to bills to address defense counsel concerns. A good example is AB 1250, which proposes very significant restrictions on counties' ability to engage independent contractors. The bill is really targeted at counties "contracting out" core public functions, but an unintended effect would have been to make it well-nigh impossible for counties to contract for defense counsel services, which might be critically important in high-profile or specialized cases.

AB 1250 contains an exemption for lawyers retained on a contingent fee basis, and at California Defense Counsel request, has also been amended to exempt lawyers retained on hourly contracts. Given the controversy surrounding the bill, this might seem like a minor point, but it matters to firms doing public entity work and the clients they serve.

More controversial are bills pending in the areas of secrecy in products and environmental claims, and limitations on deposition length in asbestos cases. In the view of California Defense Counsel Board members, AB 889 would make it effectively impossible to obtain a protective order in cases involving alleged defective products or environmental harm. The bill would require judges to make an independent finding, not based in whole or in part on stipulations, that a presumption in favor of disclosure is clearly outweighed by a "specific and substantial overriding interest in maintaining the confidentiality of the information."

CDC opposes AB 889, along with the California Judges Association and others, and thus far the bill has been held on the Assembly floor. Of more immediate concern is SB 632, which would apply the current seven-hour deposition limit for certain tort cases to asbestos claims. The limit would apply in mesothelioma cases in which the plaintiff is either 70 years of age or more and would be jeopardized by longer depositions, or of any age when survival past six months is in doubt. Judges would be authorized to allow up to 14 hours (not the 20 hours currently contained within the Los Angeles Superior Court asbestos case management order, for example) if the judge makes a finding that the plaintiff's health would not be jeopardized. Note that the limit of seven hours would apply to total deposition testimony, regardless of the number of defendants.

SB 632 is presently on the Assembly floor, and could pass and be sent to the governor in the final weeks of session.

The reality is that bills pending in Sacramento affect both the practice of law, and the ability to substantively defend clients. CDC is fighting every day to protect the interests of civil defense lawyers.

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Gulliver Wasn't the Only Guy Who Traveled.

Patrick A. Long

We like to travel. We travel a lot. I'm talking not only members of this association, or our judges here in California, but attorneys in general across the country. However, as you will note below, the attitudes and travel-needs of our colleagues here in California differs dramatically from our colleagues in the mid-West and North-East. I'll see if I can explain why.

As is my habit and custom, I conducted some informal surveys of our members to discern their habits concerning travel. Our membership is all over the place when it comes to travel, Europe, the Far East, South America, Canada, especially Nova Scotia, and of course various parts of our own country. These are just the more favored places. Truly, our members travel all over the world. But my survey pretty much demonstrated the true favorites among our membership to be certain parts of France, Scotland, Ireland, the Cinque Terre in Italy, and perhaps Rome.

We in the legal profession have something of an advantage over other professions when it comes to travel. We have the option to divide our travel time between completely unrestricted travel, a true vacation, and more business-related trips like the Federation Of Defense And Corporate Counsel's meeting at the end of last July in Switzerland. While there's nothing like a pure vacation, these seemingly never-ending business-related trips come in a very close second. Spouses generally have completely unrestricted time to enjoy the environs, and plenty of time is almost always set aside for the attending attorneys to frolic as we would on a true vacation. And much of the expenses associated with a business-related trip may be tax deductible.

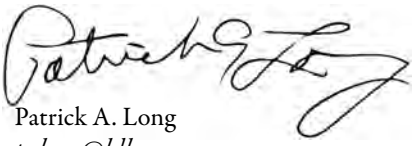
Some few of the other professions do conduct business-related meetings in far-away places, but I suggest to you that they do not do so in numbers comparable to the legal professions. Good for us.

But now let me discuss for a moment the rather significant differences concerning travel between how we in our association, and we here on the West Coast, differ dramatically from our brothers and sisters in the Mid-West and North-East. As I need not tell you, we along or close to the coast live in paradise. We experience fine, or at least acceptable weather, almost every day. The same is not true of our colleagues in the Mid-West and North-East. I once took depositions in Chicago for four days in January. The warmest of those four days was 12 degrees. There were ropes strung down Michigan Ave. so we could walk hand over hand into the wind blowing with great force. The Windy City indeed.

We here on the coast are more willing to travel anywhere in the world despite what weather conditions we may encounter as we tend to recognize that at the end of our trip we will be returning to paradise, where the weather is near perfect much of the time. A few years back I had several depositions to take in London in mid-December. On the last day of the depositions my wife flew to join me, and we went from London to the west coast of Ireland where we spent five days. It rained and snowed every day we were there, but we never had a more enjoyable or fun trip in our lives. We didn't care about the weather. We knew that soon we would be returning to paradise.

The bottom line for this is that we here in our association need to recognize and keep in mind certain significant differences between how we organize our travel arrangements and how our sisters and brothers back east do so. Weather is very very important to them, and they think about it more than we do. Of course in many situations weather can be important to us as well, but we tend to think about it much less. Don't get me started on earthquakes. We got'em, and they pretty much don't, and earthquakes scare the (bad word here) out of me.

I hope you travel well and often. Slainte'.



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Alternative Finance Malpractic Law F

by Stuart

Litigation and the e Risks for irms

Pattison

Alternative Litigation Finance ("ALF") is an emerging area of litigation risk for law firms and a subject that generates differing views in the rapidly growing area of litigation financing. As a professional liability insurer, we have identified potential issues that firms on both sides of the litigation should consider when the plaintiff is considering a litigation funding arrangement.

WHAT IS ALF?

ALF involves the funding of litigation expenses by third parties other than the litigants themselves, their counsel, or other parties with a preexisting contractual relationship, such as an insurance company. These transactions are normally between a party to litigation and a funding entity with an assignment of an interest in proceeds awarded in the lawsuit in exchange for an agreed amount to fund expenses and fees incurred during the pendency of the lawsuit.

ETHICAL AND OTHER ISSUES

Many plaintiffs' firms prefer not to take on a prospective client who wants to use ALF because they see this as an indication that the client does not have the ability to afford their fees and the expense of litigation. However, some promising cases would founder without an investment by an ALF funder, providing access to the justice system for those who cannot otherwise afford legal representation. A firm or its client may appreciate an ALF funder's unbiased analysis of a plaintiff's likelihood of success. And in some cases a firm may find that ALF effectively spreads the firm's risk of taking on a contingency fee case. Concerns about these arrangements include:

- The prospect that litigation financing undermines the civil system by encouraging frivolous law suits;
- The potential that funders will meddle with the conduct of the litigation;
- Uncertainty whether funders will live up to their obligations to fund the costs of litigation as the law firm's bills become due;
- Potential conflicts of interests between a firm's duties to the client and to the funder, particularly if the funder directed or influenced the decision to engage the law firm. This is compounded if the firm handles both the litigation and advises the client in connection with the funding.
- Criticism that the arrangement will actually raise the costs of litigation and settlements, thus making settlements more difficult to achieve.

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- The protection of attorney-client communications where the funder is receiving information directly from the firm or through the client.

The American Bar Association: Commission on Ethics 20/20 report on alternative litigation finance provides a more detailed view of the merits of ALF, and that, on balance, ALF is ethical. In addition, the ABA report provides lawyers with a high-level outline of ethical duties to guide their actions.

FUNDING CONCEPTS AND CRITERIA

It is common that third party funding is set-up as an investment vehicle, arranged by private equity firms and hedge funds with target returns as high as 300% if their client is successful. However, the funds advanced to finance litigation are non-recourse, so the funder takes on some of the risk that the client will not come into possession of the expected proceeds from the litigation and, in such cases, absorbs the part of the litigation costs subject to its funding.

In deciding whether to advance funds, the funder needs to assess the chances of success of the case, as well as the liquidity of the defendants, which can include an analysis of available insurance coverage. The funder will also determine the reputation and relevant experience of counsel, and could rely on the firm's opinion as to the likelihood of success in the litigation based on the facts and legal issues. Funders generally turn down a high percentage of requests for funding and seek out only those cases that are both high on merit and economically viable.

Some funders prefer litigation between corporations in matters such as breach of contract, patent infringement, securities, international arbitration and antitrust disputes. These cases generally result in damages that can be readily measured compared to cases that involve injunctive relief, seek business solutions or emotional matters such as divorce cases.

Leading funders often look for large cases that involve at least $10 million in potential damages, with litigation investments starting at $2 million. A sufficient valuation threshold is important because any recoveries normally inure to the funder first, and a successful outcome with little recovery by the client may mean that the economic ends are not properly aligned. Of course, this threshold assessment by the funder may force up the cost of settlement as the client may not accept a modest settlement below or close to the amount they have agreed to pay the funder.

POTENTIAL SCENARIOS AND ASSOCIATED MITIGATION STRATEGIES

1) A firm agrees to defend a client (or defends itself, if a defendant) and the firm is aware the plaintiff has received ALF.

Consideration may be given to advising the client-defendant as to whether it would be useful to challenge the arrangement (see, for example, *Miller UK Ltd and Miller International Ltd. v. Caterpillar, Inc.*, No. 10-cv-03770, (U.S Dist. Ct. N.D. Illinois, Eastern Division (2014)). Potential areas of inquiry to challenge an ALF arrangement include:

a) What information disclosed by the plaintiff or his or her counsel in discussions with the funder (consider, for example, that the routine task of the firm issuing invoices for costs and expenses may contain confidential information that could result in a waiver issue if disclosed to a funder);

b) Does the funder's interest in the outcome make the funder a party at interest, subject to discovery and other rules applicable to parties;

c) Are the relationships created by the funding arrangement subject to rules applicable to insurance;

d) Does attorney client privilege apply, and has it been waived if documents (including fact investigations and opinions about the strengths and weaknesses of the case) have been shared with a third party funder;

e) Is a non-disclosure agreement and/or the common interest doctrine sufficient to maintain the protections afforded by the attorney-client privilege or work product doctrine;

f) Is the funding agreement itself potentially relevant and discoverable; and

g) Is the funding contract void due to application of the doctrines of champerty or maintenance;

The legal defense of champerty is an old, common-law legal principle intended to prevent third parties from funding litigation in which they are not a party and discourage frivolous cases. However, challenges to ALF arrangements seeking to void such agreements are rarely successful. In order to avoid application of this doctrine, funders typically do not initiate the suit; they review all available information to avoid cases without merit, they do not control the defense nor the appointment of the law firm handling the claim, and they try to structure the funding so that the interests of funder and client are aligned. Only if these elements are missing would there be a basis for a reasonable objection to the funding contract on champerty grounds. However, it

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is typically only the contracting party to the agreement that has legal standing to raise the argument. For an example of a case where the adverse party did have standing, see *Toste Farm Corp. v. Hadbury, Inc.*, 798 A.2d 901 (R.I. 2002).

2) A law firm represents a client in litigation, and the client has secured funding without the help or advice of the law firm.

In this instance, it would be prudent for the firm if any engagement letter stipulated that the firm was not involved with the funding arrangement, that the funder is not a client, and that the firm has no obligation to consult with the funder during the course of litigation or settlement. The firm, while not opining on the funding agreement, should make clear to the client that any funding agreement does not create an obligation on the part of the law firm to consult with the funder. The firm should also consider cautioning less sophisticated clients about the risks associated with the client's disclosure of protected communications to the funder, even under a non-disclosure agreement.

3) A client has retained the law firm to handle the litigation, but not to secure the funds or be involved with drafting the funding agreement, although requests that the firm provide information about the case to the funder in order to help persuade the funder to advance funds.

The risk here is potentially waiving the attorney-client and work product privileges. The firm will need to address these risks with the client and perhaps provide a waiver or indemnity for any inadvertent breach. The firm should also secure a non-disclosure agreement with any funder or potential funder, noting to the client the risks associated with such an arrangement. Additionally, the firm should not provide a warranty regarding the accuracy or completeness of any information provided to the funder or any evaluation or opinion the firm may provide about the litigation, including the outcome, while ensuring that appropriate disclaimers are included in any funding agreement.

4) The client requests that the law firm secure financing, negotiate the terms of the financing agreement and represent the client in any dispute with the funder.

To avoid a potential conflict of interest claim (which among other things would likely involve a claim to disgorge all fees) it is most prudent for firms not to take on the litigation aspect while managing the contractual arrangement with the funder. Indeed, choosing/vetting funders and opining on the commercial value of the transaction is often better handled by independent experts in any event. Representing a client in a funding arrangement, essentially an investment advisory risk, may raise issues whether the firm's malpractice coverage would respond to any claim arising out of an issue.

One risk to a firm arises if the firm fails to secure funding, as the client could allege such failure resulted in its having to forego a viable opportunity to recover in the proposed suit. We have heard of a suit against a law firm arising from these circumstances and ironically, the client was able to secure funding to sue the firm for malpractice!

5) A funder approaches a law firm directly, offering to finance its clients in any proposed litigation.

If a firm endorses an arrangement that a funder solicits directly through the firm, the client could later allege that more competitive terms could have been secured from another company. The firm also runs the risk of being sued by the client and by the funder for any malpractice, which would raise the cost of settlement. Firms should consider making full disclosure to the client of any relationship with the funder and for the client to secure separate advice on the terms of the funding agreement from an independent party.

CONFLICT OF INTEREST

Assuming the firm represents the client and not the funder, there should never be a binding written legal obligation between a law firm representing the interests of both the client and a funder. Nevertheless the law firm could view itself as aligned with the funder for having recommended or even selected the firm, and as a potential future source of business, irrespective of whether the funder either directly or indirectly pays the firm's fees. The dynamics of the relationship may also place the firm in a conflicted position with regard to settlement opportunities if a potential settlement is advantageous to the client (as when supplying nonmonetary benefits, or relieving the client of certain risks), but not the funder. The firm's advice to the client may be subject to after-the-fact criticism by the client and/or the funder. While funders are normally extremely careful to state that they do not direct the litigation and make settlement decisions, their involvement during the course of litigation could indirectly influence client decisions.

CONCLUSION

A review of articles discussing the ethics of ALF can lead one to a conclusion that ALF, while not unethical per se, raises issues that a lawyer needs to consider. These include conflict of interest, potential waiver of privilege and interference in a law suit by a third party. Plaintiffs' firms should take into account these and other factors when accepting a client, and defense firms should consider how the involvement of an ALF entity may affect discovery and settlement strategy.

Any views or opinions expressed are solely those of the author; shall not be construed as legal advice; and do not reflect any corporate position, opinion or view of Sompo International.

Stuart Pattison

Stuart Pattison is a Senior Vice President in Sompo International's Professional Lines Insurance practice responsible for underwriting liability insurance for professional service firms, law firms and accounting firms. He has more than four decades experience in similar insurance underwriting and broker roles and is an Associate of the Chartered Insurance Institute.

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The Importance of Knowing *Sanchez*

by Ben Coats

In June of 2016, the California Supreme Court rewrote the rules of expert testimony when they published their decision in *People v. Sanchez* (2016) 63 Cal. 4th 665. In just over a year, *Sanchez* has been cited in 255 (published and unpublished) opinions in the State of California. Despite heavy reliance at the appellate level on the new law set forth in *Sanchez,* many civil practitioners are not yet taking full advantage of this change. We don't want to be caught unprepared by allowing our opponents to object to critical testimony in trial. A recent trial victory by our office demonstrated the importance of knowing the correct application of *Sanchez,* especially when your opponents are not so enlightened.

People v Sanchez involved a criminal trial in which the prosecution attempted to offer testimony of a gang expert to establish the defendant's gang status. The expert testified regarding his opinion that the defendant was a member of a criminal street gang, based on his review of documentation, including certain police reports and statements. In doing so, the expert testified to the jury about specific facts regarding the defendant's gang activities, which he derived from his review of these materials. The Supreme Court addressed the propriety of this testimony regarding "case specific" facts, concluding that such testimony is per se offered for its truth, and is therefore inadmissible hearsay unless a proper foundation can be established.

A key passage from *Sanchez* explains the interplay between the hearsay rule and the rule allowing experts some leeway in relying but not extensively recounting hearsay information:

> The hearsay rule has traditionally not barred an expert's testimony regarding his general knowledge in his field of expertise. "[T]he common law recognized that experts frequently acquired their knowledge from hearsay, and that `to reject a professional physician or mathematician because the fact or some facts to which he testifies are known to him only upon the authority of others would be to ignore the accepted methods of professional work and to insist on ... impossible standards.' Thus, the common law accepted that an expert's general knowledge often came from inadmissible evidence." [Citations.] Knowledge in a specialized area is what differentiates the expert from a lay witness, and makes his testimony uniquely valuable to the jury in explaining matters "beyond the common experience of an ordinary juror." [Citations.] As such, an expert's testimony concerning his general knowledge, even if technically hearsay, has not been subject to exclusion on hearsay grounds.
>
> By contrast, an expert has traditionally been precluded from relating case-specific facts about which the expert has no independent knowledge. Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried. Generally, parties try to establish the facts on which their theory of the case depends by calling witnesses with personal knowledge of those case-specific facts. An expert may then testify about more generalized information to help jurors understand the significance of those case-specific facts. An expert is also allowed to give an opinion about what those facts may mean. The expert is generally not permitted, however, to supply case-specific facts about which he has no personal knowledge. [Citation.]
>
> Going back to the common law, this distinction between generally accepted background information and the supplying of case-specific facts is honored by the use of hypothetical questions. "Using this technique, other witnesses supplied admissible evidence of the facts, the attorney asked the expert witness to hypothetically assume the truth of those facts, and the expert testified to an opinion based on the assumed facts...." [Citations.] An examiner may ask an expert to assume a certain set of case-specific facts for which there is independent competent evidence, then ask the expert what conclusions the expert would draw from those assumed facts. If

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> no competent evidence of a case-specific fact has been, or will be, admitted, the expert cannot be asked to assume it. The expert is permitted to give his opinion because the significance of certain facts may not be clear to a lay juror lacking the expert's specialized knowledge and experience.

(*Id.* at pp. 676-677.) The court concluded that an expert is not a means for back-door introduction of hearsay evidence that would otherwise be inadmissible:

> Once we recognize that the jury must consider expert basis testimony for its truth in order to evaluate the expert's opinion, hearsay and confrontation problems cannot be avoided by giving a limiting instruction that such testimony should not be considered for its truth. If an expert testifies to case-specific out-of-court statements to explain the bases for his opinion, those statements are necessarily considered by the jury for their truth, thus rendering them hearsay. Like any other hearsay evidence, it must be properly admitted through an applicable hearsay exception.[11] Alternatively, the evidence can be admitted through an appropriate witness and the expert may assume its truth in a properly worded hypothetical question in the traditional manner.

(*Id.* at p. 684.) The Court summarized the new rule for expert testimony as follows:

> In sum, we adopt the following rule: When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay. It cannot logically be maintained that the statements are not being admitted for their truth.

(*Id.* at p. 686.)

Our office recently tried a high exposure injury case, wherein we surmised before trial that plaintiffs' counsel was not aware of *Sanchez,* and how it would affect the manner in which experts would be allowed to testify. Some of the clues that we noticed were: No treating physicians would testify at trial, only plaintiffs' retained experts would be called to testify; no medical records were subpoenaed to trial under seal; and, certain documents which plaintiffs' technical experts had relied on, and which were an important part of the case, were inadmissible hearsay without testimony from the authors of the documents – but the authors had not been subpoenaed to trial (confirmed through a phone call) and their depositions had not been taken.

If medical records had been properly subpoenaed under seal, plaintiffs' retained experts could presumably have testified as to those records through the business records exception and a properly phrased declaration from a custodian of records. Such a problem could have been easily solved with minimal preparation, and since the medical treatment was a minor facet of the case we did not object to much of this hearsay testimony.

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Sanchez **–** continued from page 14

(Although obviously, a plaintiff could be stymied on this point in many of our trials).

For the plaintiffs in our case, the testimony and opinions of their technical experts was a significant issue. Once the experts were on the stand testifying, they were prevented, by timely hearsay and foundation objections, from reciting "case specific" facts from hearsay documents. Because their technical experts testified early in the trial, counsel was unprepared for this unexpected hurdle. Objections were consistently sustained by our trial judge, who had recently attended a seminar on *Sanchez,* presented by the opinion's author, Associate Justice Kathryn M. Werdegar. (Counsel's argument that *Sanchez* applied only in criminal cases was decidedly not persuasive.)

Numerous sidebar conferences were held, which gradually seemed to educate counsel on the problem. He eventually settled on a two pronged approach, either reading passages from documents by disguising them in "hypothetical questions," or arguing that the information was not hearsay because it was offered on the issue of notice. While the court allowed these tactics to some extent, counsel could not establish the foundational basis for his "Ahypotheticals," and his use of the materials on the basis of notice was severely restricted and subject to limiting instructions. In the end, the jury was not impressed with these strategies and returned a defense verdict. After trial, the jurors commented that they were not concerned with the fusillade of objections, and they felt plaintiffs' counsel pushed the subject too far.

TAKEAWAYS:

In answering post-mortem questions from colleagues about the trial, most of them admitted they were not aware of the new paradigm for expert testimony as set forth in the *Sanchez* case. Presumably, many of our colleagues on the plaintiff side are equally unfamiliar with the rule. In our trial, we were able to gain an advantage in trial by becoming very familiar with the opinion, and preparing for the challenges and opportunities it presented. We discussed the need for foundation with our experts, and were prepared to lay a proper foundation when expert testimony regarding "case specific" facts was necessary. We were also ready to object early and often when plaintiffs' counsel attempted to introduce unwanted hearsay evidence through his experts.

It would be well worth your time to read Justice Werdegar's opinion in *People v. Sanchez* (2016) 63 Cal. 4th 665. There is also a great deal of commentary on the internet to assist in its practical application. Using it as a shield by laying a proper foundation for your expert testimony will prevent your opponents from exploiting it against you, but it can also be used as a sword if your opponent is not familiar with the new way things are done.

Benjamin Coats

Ben Coats is a partner at Engle Carobini and Coats in Ventura, specializing in defense of medical professionals and municipalities, as well as businesses and individuals in general insurance defense matters. Ben is a member of ABOTA and the California Medical-Legal Committee, and a Southern California SuperLawyer in the field of medical malpractice defense.

DOG BITE CASES: 101

A Forensic Expert's View

by Ron Berman

Dog bites and pet related injury claims have risen substantially over the years. According to the Insurance Information Institute dog bite claims have recently shown a 76.2% increase. State Farm Insurance has stated that one third of all homeowners liability pay outs in 2014 were for dog bites.

Despite strict liability statutes in most states, which create liability in the absence of *scienter,* negligence or intentional behavior, it is still possible to successfully mount a solid defense and mitigate potential losses using in-depth forensic investigation as well as the science of canine behavior and bite wound evaluation. For example, issues of provocation can turn a case upside down and at times end with substantial comparative fault being given to the plaintiff at trial. This article attempts to shed light on specific issues commonly encountered by defense attorneys and insurance adjusters in dog bite and pet related injury cases.

EVIDENCE ABOUT THE DOG

Although there are many important sources of evidence in a dog bite or pet related injury case the two most important are the dog itself and the bite wound characteristics. Old age, illness, injury, and training can change a dog over time but it's general temperament does not change over time. That is why a forensic evaluation of a dog is valid even years after the incident.

A competent expert can explain that a non-aggressive friendly dog at the time of examination was a non-aggressive dog at the time of the incident. The same is true of other basic traits, such as territoriality. An expert can also describe what constitutes "aggression:" canine aggression involves growling, snarling, lunging, snapping and biting. Barking is *not* necessarily aggression, but based on tonality and other exhibited behaviors it may be construed as such by untrained witnesses (such as neighbors who hear the dog barking).

In discussing the case with experts, it is helpful to be aware of factors that affect the evaluation of a dog's aggressive or non-aggressive traits:

BREED. Many plaintiff attorneys litigating a dog bite case believe that if the defendant's dog is an "aggressive breed" such as an American Staffordshire Terrier or other breed commonly called a "pit bull" that their case is stronger. However, a qualified expert can explain to the jury that such generalized breed characteristics are expressed differently in each individual dog. A forensic investigation and evaluation can offer a jury a very different image of the defendant's dog than the one the opposing attorney will try to paint. And an attack on the breed as a whole may backfire if the jury comes to understand plaintiff's case as resting on unfair stereotyping.

SEX. Intact (un-neutered) **m**ale dogs are involved in 70-76% of reported dog bite incidents (Wright J.C., Canine Aggression toward people: bite scenarios and prevention. Vet Clin North Am Sm Ani Pract 1991:21(2):299-314). This fact will help some defendants and hurt others, but it's a good thing to know about while working up the case.

AGE/HEALTH. In certain breeds, males become much more aggressive between 1-3 years of age. Also, older dogs often become aggressive due to painful physical issues like hip dysplasia or eye issues like glaucoma. At the same time, claims that older dogs, in poor health, ran up to the victim and jumped up on them can typically be met with strong resistance from the defense, whose expert can explain this is not common behavior for a dog that is ailing.

EXERCISE. Dogs that are under exercised can build up tension that can lead to intense aggression in some individuals.

BEHAVIORAL HISTORY. If your client swears to you that their beloved pet is a complete sweetheart and wouldn't hurt a fly, do a forensic evaluation and find out for yourself. Owner denial, in spite of clear evidence to the contrary, is common and a prime factor in many bite incidents.

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green sheets

NOTES ON RECENT DECISIONS

Lisa Perrochet

Emily Cuatto

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 or ***ECuatto@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.

ANTI-SLAPP

The anti-SLAPP statute applies only where speech or petitioning activity is itself the wrong alleged.
Park v. Board of Trustees of the California State University (2017) __ Cal.5th __

A former assistant professor sued a state university, alleging the university discriminated against him based on his national origin when it denied his tenure application and terminated his employment. The university filed a special motion to strike under the anti-SLAPP statute, arguing the professor's suit arose from reviews and evaluations in the university's tenure review proceedings, which were protected communications. The trial court disagreed and denied the university's motion. The Court of Appeal (Second Dist., Div. Four) reversed, holding that a claim alleging a discriminatory decision is subject to an anti-SLAPP motion so long as protected speech or petitioning activity contributed to that decision.

The California Supreme Court reversed the Court of Appeal. "[A] claim is not subject to a motion to strike simply because it contests an action or decision that was arrived at following speech or petitioning activity, or that was thereafter communicated by means of speech or petitioning activity. Rather, a claim may be struck only if the speech or petitioning activity *itself* is the wrong complained of, and not just evidence of liability or a step leading to some different act for which liability is asserted."

ATTORNEY FEES AND COSTS

A district court exercising its inherent authority to sanction a litigant who has acted in bad faith may order the litigant to pay only those legal fees incurred because of the misconduct.
Goodyear Tire & Rubber Company v. Haeger (2017) __ US __

After the plaintiffs and Goodyear settled this products liability suit, the plaintiffs learned Goodyear had withheld information during discovery. The plaintiffs sought sanctions, arguing that Goodyear's discovery fraud entitled them to an award of attorneys fees and costs incurred in litigating for years against the company. The district court ordered Goodyear to pay all of the plaintiffs' legal fees incurred since Goodyear's first dishonest act, regardless of any causal link between the fees and Goodyear's misconduct.

The United States Supreme Court rejected the district court's approach. When a federal court exercises its inherent authority to sanction bad faith conduct by ordering a litigant to pay the other side's legal fees and expenses, the award must be compensatory rather than punitive. Thus, it must be limited to amounts that would not have been incurred but for the bad faith.

Defendant who achieved dismissal based on a forum selection clause in the parties' contract was not a prevailing party for purposes of Civil Code section 1717.
DisputeSuite.com, LLC v. Scoreinc.com (2017) __ Cal.5th __

In this business dispute, the plaintiff filed suit in California against the defendants for breach of contract. Defendants moved to quash on the basis of a forum selection clause in the parties' contract requiring suits to be brought in Florida. The trial court granted the motion and stayed the case to give plaintiff time to re-file in Florida. Plaintiff did so, and the trial court then dismissed the California action. Defendants then filed a motion for attorney fees in the California court, claiming they were the prevailing parties and entitled to fees under Civil Code section 1717. The trial court denied the motion and the Court of Appeal (Second Dist., Div. Two) affirmed.

The California Supreme Court affirmed. "Considering that the action had already been refiled in the chosen jurisdiction and the parties' substantive disputes remained unresolved, the court could reasonably conclude neither party had yet achieved its litigation objectives to an extent warranting an award of fees" as a prevailing party under section 1717.

CIVIL PROCEDURE

US Supreme Court confirms that California courts lack specific personal jurisdiction over claims by non-resident plaintiffs against a non-resident defendant for conduct occurring outside California.
Bristol-Myers Squibb Company v. Superior Court of California, San Francisco City (2017) __ US __

Plaintiffs, primarily non-California residents, sued Bristol-Myers Squibb (BMS) in California state court, alleging that a BMS drug had injured them. BMS is incorporated in Delaware and headquartered in New York. BMS maintains research and laboratory facilities, employs sales representatives, and engages in business activity and government lobbying in California. BMS also had $900 million in California sales of the drug between 2006 and 2012. However, BMS did not develop, market, manufacture, label, package, or seek regulatory approval for the drug in California. And the non-resident plaintiffs did not purchase the drug in California, were not injured by the drug in California, and were not treated for their injuries in California. The California Supreme Court concluded that BMS's contacts with California were enough to create specific personal jurisdiction over BMS for the non-resident plaintiffs' claims.

The United States Supreme Court reversed. Since the relevant plaintiffs were not California residents and were not claiming harm suffered in California, and all the conduct giving rise to their claims occurred elsewhere, California courts could not claim specific jurisdiction.

An order denying a motion to vacate a final judgment under Code of Civil Procedure section 663 is independently appealable.
Ryan v. Rosenfeld (2017) __ Cal.5th __

The trial court dismissed the plaintiff's case in October 2014. The plaintiff later brought a motion to vacate the judgment under Code of Civil Procedure section 663. That motion was denied in June 2015. Plaintiff filed a notice of appeal from the order denying his section 663 motion. The Court of Appeal (First Dist., Div. Four) dismissed the appeal, reasoning that the plaintiff had failed to appeal from the order of dismissal within the jurisdictional deadline to appeal, and the order denying the motion to vacate the dismissal order was not separately appealable. "To permit an appeal from an order denying a motion to vacate would effectively authorize two appeals from the same decision."

The California Supreme Court reversed the Court of Appeal. Under *Bond v. United Railroads* (1911) 159 Cal. 270, 273, a motion to vacate under Code of Civil Procedure section 663 is an appealable order after final judgment. The Legislature has never abrogated that case despite amendments to the appealability statute, Code of Civil Procedure section 904.1, so its holding remains valid to permit an appeal from an order denying section 663 motion to vacate even if the motion raised issues that could have been litigated on an appeal from the judgment.

See also *Dhillon v. John Muir Health* (2017) __ Cal.5th __ [a trial court order granting a petition for writ of administrative mandamus and remanding for proceedings before an administrative body is an appealable final judgment].

Hirer of employee from temp agency was entitled to compel arbitration of employee's wage and hour claims under an agreement between the employee and his temp agency.
Garcia v. Pexco, LLC (2017) __ Cal.App.5th __

Real Time, a temporary employment agency, hired the plaintiff and assigned him to work for Pexco. Plaintiff's employment agreement with Real Time contained a valid and enforceable arbitration agreement. When plaintiff sued Real Time and Pexco for Labor Code Violations, the two defendants moved to compel arbitration. Plaintiff disputed Pexco's right to compel arbitration because Pexco was not a signatory to the arbitration agreement. The trial court granted the motion to compel.

The Court of Appeal (Fourt Dist., Div. Three) affirmed. The plaintiff's Labor Code violation claims arose out of the employment agreement, so the arbitration provision applied. Further, the claims against non-signatory Pexco were "inextricably intertwined" with the plaintiff's claims against Real Time, so plaintiff was equitably estopped from avoiding arbitration of her claims against both defendants.

But see *Chango Coffee, Inc. v. Applied Underwriters, Inc.* (2017) __ Cal. App.5th __ [an order denying a renewed motion under Code of Civil Procedure section 1008, subdivision (b) is not appealable] [*check status of petition for review before citing this case*]

A defendant seeking to dismiss a nonresident's plaintiff's case for forum non conveniens need not show California is "seriously" inconvenient.
Fox Factory, Inc. v. Superior Court (Isherwood) (2017) 11 Cal.App.5th 197

The plaintiff, a Canadian citizen, was injured in Canada while riding a bike he had purchased in Canada but that contained some component parts manufactured in California. The plaintiff brought a personal injury action against the bike retailer in Canada, and against the parts

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manufacturer in California. The parts manufacturer moved to dismiss the California action on forum non conveniens grounds, arguing that the key witnesses were in Canada and the case against it should be tried with the case against the retailer. The trial court denied the motion because the parts manufacturer had failed to show California was a "seriously inconvenient" forum.

The Court of Appeal (Sixth Dist.) reversed and remanded for reconsideration of the motion. Where the plaintiff is not a California resident, his choice of forum is not entitled to deference, and a defendant need not show California is "seriously inconvenient" to warrant dismissal for forum non conveniens. It is sufficient to show that a suitable alternative forum exists and that, on balance, the private interests of the litigants and the interests of the public weigh in favor of dismissal.

District courts may not sua sponte remand a case based on untimely removal.

Corona-Contreras v. Gruel (9th Cir. 2017) __ F.3d __

In this breach of contract and legal malpractice case, the defendant removed the case to federal court on diversity grounds eleven months after it was filed, despite 28 U.S.C. § 1446(b) (removal must occur within 30 days of receipt of the complaint or the case becoming removable). The plaintiff did not file a motion to remand for untimely removal. Several months later, the district court sua sponte remanded the case, holding the removal was untimely.

The Ninth Circuit, holding it had jurisdiction to review a remand order entered without jurisdiction, reversed the remand order. Under 28 U.S.C. § 1447(c), removal that is defective for lack of subject matter jurisdiction may be raised at any time, but removal that is defective on procedural grounds must be challenged by the opposing party within 30 days of removal. District courts lack jurisdiction to remand based on procedural defects that the non-removing party has waived.

See also *Whidbee v. Pierce County* (9th Cir. 2017) __ F.3d __ [federal rules permitting additional time for service of process after removal did not revive an action that was barred under state law for failure to timely serve the defendant.]

CLASS ACTIONS

Putative federal class action plaintiffs cannot voluntarily dismiss their individual claims to obtain immediate appellate review of an order striking class allegations.

Microsoft Corporation v. Baker (2017) __ US __

Plaintiffs filed a putative class action seeking damages for alleged design defects in Xbox video game devices. The district court struck the class allegations, and plaintiffs sought interlocutory review under Federal Rule of Civil Procedure 23(f). When the Ninth Circuit denied plaintiffs' interlocutory petition, plaintiffs voluntarily dismissed their individual claims and then appealed, arguing that the judgment engineered by their voluntary dismissal tactic was sufficiently final to confer appellate jurisdiction. The Ninth Circuit agreed and reversed the district court's order striking plaintiffs' class allegations.

The Supreme Court reversed. Allowing plaintiffs' voluntary dismissal to create appellate "finality" would enable plaintiffs to take repeated interlocutory appeals from class certification denials, engender piecemeal appeals, undermine the carefully calibrated regime of discretionary interlocutory review of class certification orders, and unduly favor plaintiffs over defendants in class action litigation.

PAGA plaintiffs are broadly permitted to discover contact information of other potentially aggrieved employees.

Williams v. Superior Court (Marshalls of CA, LLC) (2017) __ Cal.5th __

In a Labor Code Private Attorneys General Act (PAGA) representative action alleging wage and hour claims against a retailer, the plaintiff sought to discover contact information of the retailer's other employees. The trial court compelled disclosure of the contact information only of the employees at the same store where the plaintiff worked, and held that any further discovery would require plaintiff to demonstrate the action had merit. The plaintiff sought a writ of mandate, but the Court of Appeal (Second Dist., Div. One) denied it.

The California Supreme Court reversed. Class action plaintiffs are broadly permitted to discover contact information of other potential class members without a showing of good cause. Nothing in PAGA suggests discovery should be more limited in PAGA cases than it is in class actions.

Class actions plaintiffs cannot defeat CAFA removal jurisdiction by altering the class definition post-removal.

Broadway Grill, Inc. v. Visa, Inc. (9th Cir. 2017) __ F.3d __

A class comprised of California and non-California citizens sued Visa and other companies alleging antitrust violations. Visa removed the case under the minimal diversity requirements of the Class Action Fairness Act (CAFA). The plaintiffs then amended their complaint to eliminate the non-California class members in the hope of taking advantage of the local controversy exception to CAFA removal jurisdiction, which precludes removal of cases in which two-thirds of the class are citizens of the state where the action was filed and a "significant" defendant is a citizen of that same state. Relying on *Benko v. Quality Loan Service Corp.*, 789 F.3d 1111 (9th Cir. 2015) [allowing plaintiffs to amend complaint post-removal to show local defendant was "significant" for purposes of local controversy exception], the district court permitted the amendment and remanded the case.

The Ninth Circuit reversed. Minimal diversity is determined at the time the class action complaint is removed. *Benko* provides only a very narrow exception to that rule where the amendments "amplified" the allegations relevant to federal subject matter jurisdiction—not where they changed them.

But see *Dunson v. Cordis Corporation* (9th Cir. 2017) __ F.3d __ [where the plaintiffs in several products liability cases each having fewer than 100 plaintiffs but all against the same defendant sought to consolidate the cases for pretrial purposes and a "bellwether-trial process," absent indication that the plaintiffs agreed the results of the "bellwether" trial would have preclusive effect on the plaintiffs in the other cases, removal jurisdiction under CAFA's mass action provision was not triggered.]

CONTRACTS

Whether a contract provision is an illegal penalty or an enforceable liquidated damage clause is a factual question for the trial court.

Krechuniak v. Noorzoy (2017) __ Cal.App.5th __

A brother and sister settled with each other over a failed real estate deal, including in their settlement agreement a liquidated damages provision requiring an $850,000 payment from brother to sister if brother defaulted on his obligations under the agreement to make other specified payments. Brother defaulted. Sister moved to enforce the agreement's immediate $850,000 payment provision. Brother argued the motion was premature, but did not challenge the agreement's validity. The trial court ordered the brother to pay the $850,000 and brother appealed, arguing the liquidated damages provision was an unlawful penalty.

The Court of Appeal (Sixth Dist.) affirmed. Whether a contractual provision constitutes an illegal penalty under the circumstances of the parties' agreement involves factual questions. Where the facts are disputed, the issue must be presented to the trial court in the first instance. The brother's failure to raise the issue of whether the provision was a penalty in the trial court forfeited the argument.

TORTS

Evidence of Medicaid and Affordable Care Act **benefits is relevant and admissible on the issue** of future medical expenses.

Cuevas v. Contra Costa County (2017) __ Cal.App.5th __

In this medical malpractice case, the defendant sought to introduce evidence that health insurance benefits under the Patient Protection and Affordable Care Act (ACA) (Pub.L. No. 111-148 (Mar. 23, 2010) 124 Stat. 119) would be available to mitigate plaintiff's future medical costs. The trial court excluded the evidence, and the jury awarded plaintiff damages of $9,577,000 for the present value of future medical expenses.

The Court of Appeal (First Dist., Div. One) reversed the judgment and remanded for a new trial on future medical damages. Civil Code section 3333.1, the MICRA statute allowing defendants to offer evidence of collateral source benefits in medical malpractice actions, applies not just to past medical benefits but also to future medical benefits. Also, independent of section 3333.1, evidence regarding the market value of future medical benefits including the lower negotiated rates that will be paid for future medical care under Medicaid and under privately negotiated health care agreements with insurers under the ACA was relevant.

See also *Sanjiv Goel, M.D., Inc. v. Regal Medical Group, Inc.* (2017) __ Cal.App.5th __ [Medicare reimbursement rates are properly used in determining the reasonable value of medical damages] [*check status of petition for review before citing this case.*]

Employer may be vicariously liable for accident caused by driver on his way to a company yard before going to work because such a trip may be a special errand rather than a commute.

Sumrall v. Modern Alloys, Inc. (2017) 10 Cal.App.5th 961

Before arriving at his job site, a construction company's employee drove a company truck to a company yard to pick up coworkers and materials. While en route from his home to the yard, the employee caused a vehicle accident, injuring plaintiff. Plaintiff sued the construction company, but the company obtained summary judgment on the ground the employee was commuting to work and was therefore not in the course and scope of his employment under the "going and coming" rule.

The Court of Appeal (Fourth Dist., Div. Three) reversed. Triable issues existed whether the employee's route to the yard was an ordinary commute or was instead a special business errand for the employer. If the yard trip was a special errand, the going and coming rule would not apply and the employer would be liable for the employee's negligent driving from the time he left home.

See also *Zhu v. Workers' Compensation Appeals Board and Department of Social Services* (2017) __ Cal.App.5th __ [going and coming rule did not bar workers' compensation for in-home caretaker who was injured while riding her bicycle between two client homes.]

Recreational use immunity does not apply where the plaintiff paid consideration to use the property, even if the defendant did not itself receive the consideration.

Pacific Gas & Electric Co. v. Superior Court (Rowe) (2017) __ Cal.Appl5th __

Plaintiff and his mother went camping in a county park. Mother paid a $50 camping fee to the county. While camping, a tree fell on their tent, injuring plaintiff. Plaintiff sued Pacific Gas & Electric (PG&E), who had a right to enter the park, inspect it, and maintain vegetation near the campsite under a utility agreement. PG&E moved for summary judgment under California's recreational use immunity statute, Civil Code section § 846. The trial court denied the motion, concluding that the exception to recreational use immunity for cases "where permission to enter for [recreational] purpose was granted for a consideration" applied because mother paid a fee to camp. PG&E filed a petition for writ of mandate.

The Court of Appeal (First Dist.) requested briefing and issued an opinion affirming the trial court. Payment of consideration to one defendant abrogates the immunity of all other defendants with a nonpossessory interest in the property, even if those defendants do not benefit from the payment of the consideration.

See also *Garcia v. American Golf* (2017) __ Cal.App.5th__ ["trail" immunity does not immunize a dangerous condition of a commercially operated, revenue generating public golf course.]

Jury could not consistently find over-the-counter medication defective on a negligent failure **to warn theory after rejecting strict liability failure to warn theory, nor could it properly find** the medication had a design defect under the consumer expectations test.
Trejo v. Johnson & Johnson (2017) __ Cal.App.5th __

The plaintiff suffered injuries from a rare allergic reaction to children's Motrin. A jury found Johnson & Johnson, the manufacturer of Motrin, liable for negligent failure to warn about the side effect, but rejected liability on a strict liability failure to warn theory. The jury also found Johnson & Johnson liable for design defect under the consumer expectations test, but not the risk-benefit test. The jury awarded the plaintiff over $40 million.

The Court of Appeal (Second Dist., Div. Four) reversed the jury's verdict. Both strict liability and negligent failure to warn turn on whether the manufacture knew or should have known about a risk involved in using the product. A jury cannot consistently find a manufacturer not liable under a strict liability theory yet liable on a negligence theory where the evidentiary basis for the alleged failure to warn is the same under both theories. Also, the consumer expectations test for design defect did not apply simply because people do not expect to be injured by taking Motrin. Where, as in this case, "the question of design defect involves complex questions of feasibility, practicality, risk and benefit beyond the common knowledge of jurors," only the risk-benefit test for defect applied.

A general contractor who was actively negligent was nonetheless entitled to indemnity from a subcontractor based on the parties' comparative fault.
Oltmans Construction Co. v. Bayside Interiors, Inc. (2017) 10 Cal.App.5th 355

A general contractor hired a subcontractor to assist with constructing a building. The subcontractor hired the plaintiff to install scaffolding at the construction site. The plaintiff was injured when he fell through a hole in the building's roof created by the general contractor's employee. The general contractor demanded the subcontractor indemnify it against liability to the plaintiff under the parties' contract, which provided that the subcontractor would indemnify the general contractor "except to the extent" the liability arose out of the general contractor's active negligence or willful misconduct. This language paralleled the language of Civil Code section 2782.05 (providing that contracts of indemnity between a general and sub contractor are void "to the extent the claims arise out of ... the active negligence or willful misconduct of that general contractor"). The subcontractor moved for summary judgment on the ground the general contractor's employee was actively negligent in creating and failing to secure the hole, and so indemnity was barred. The trial court agreed.

The Court of Appeal (First Dist., Div. Three) held that summary judgment was improperly granted. In providing for indemnity "except to the extent of" the general contractor's active negligence, the plain language of the contract and Civil Code section 2782.05 provides for apportionment of fault between the general contractor and the subcontractor. Thus, the general contractor's active negligence does not preclude it from recovering indemnity altogether, and instead simply limits its ability to recover indemnity to that portion of liability attributable to the negligence of others.

A "supervisor" is not necessarily a "managing agent" for punitive damages purposes.
CRST, Inc. v. Superior Court (Lennig) (2017) __ Cal.App.5th __

CRST's employee was driving a CRST truck when he collided with plaintiffs. Plaintiffs sued the employee-driver and CRST for compensatory and punitive damages. Plaintiffs based their punitive damages claim against CRST on the theory that a "supervisor" at CRST knew the employee-driver was unfit but CRST employed him anyway. CRST unsuccessfully moved for summary adjudication on the punitive damages claim. CRST petitioned for writ relief.

The Court of Appeal (Second Dist., Div. Four) concluded that the trial court should have granted CRST's motion. Under California's managing agent rule, an employer cannot be liable for punitive damages unless there is evidence that an officer, director, or managing agent of the employer authorized or ratified the misconduct. Plaintiffs had failed to present evidence that the "supervisor" had any authority to create a company policy that contributed to the accident. To qualify as a managing agent, a corporate employee has to have discretionary authority to create company policy; it is not enough that the employee has the title of "supervisor," manages a large number of employees, or implements company policy.

EVIDENCE

In ruling on reliability of expert opinion, district courts must consider the overall basis for an expert's opinion and not focus too narrowly on only certain factors.
Wendell v. GlaxoSmithKline LLC (9th Cir. 2017) __ F.3d __

Plaintiffs sued a drug manufacturer alleging that the manufacturer's products caused their son to develop a rare cancer and that the manufacturer had failed to adequately warn about the cancer risk. The defendant moved for summary judgment. The district court granted the motion, ruling that plaintiffs' causation experts' testimony was inadmissible under Federal Rule of Evidence 702 and *Daubert v. Merrell Dow Pharm., Inc.* (1993) 509 U.S. 579. The district court so held because the experts (1) had never conducted independent research on the relationship between the drugs and cancer; (2) had no epidemiological studies in support of their opinions; (3) conceded their opinions were not based on work that had been peer-reviewed and published; and (4) were unable to show that the son's underlying condition was not a risk factor for cancer.

The Ninth Circuit reversed. Given that the experts (1) were "highly qualified" doctors; (2) based their opinions on scientific and medical literature; and (3) performed differential diagnoses to conclude the drugs likely caused the son's cancer, their opinions were reliable enough to go to the jury. The district court was wrong to "put so much weight on the fact that the experts' opinions were not developed independently of litigation and had not been published" because, "[w]hile independent research into the topic at issue is helpful to establish reliability, its absence does not mean the experts' methods were unreliable." The district court was also wrong to require the experts' opinions to be peer reviewed, and to reject the opinions because they were based on case reports rather than epidemiological studies, especially where the cancer was very rare. And the district court was wrong to believe the experts had to eliminate all other possible causes to conclude that the drugs were a substantial factor.

The work product privilege is held by the law **firm that employs the attorney, not the attorney** personally.
Tucker Ellis LLP v. Superior Court (Nelson) (2017) __ Cal.App.5th __

While employed by Tucker Ellis, an attorney communicated via email with a scientific consulting firm about funding research to assist in the defense of asbestos litigation. The attorney later departed Tucker Ellis to join another law firm doing similar asbestos-related litigation. Tucker Ellis received a subpoena for its records concerning the consulting firm and produced the attorney's work product emails. Once the emails became public, the attorney had trouble continuing to work with the consulting firm and represent his clients. He sued Tucker Ellis for negligence and other claims, alleging Tucker Ellis breach a duty to protect his work product. The trial court granted summary adjudication for the attorney on the issue of Tucker Ellis' breach of duty.

The Court of Appeal (First Dist., Div. Three) issued a writ of mandate directing the trial court to reverse its ruling. Where the consultant entered into a retention agreement with Tucker Ellis, not the attorney individually, and the attorney communicated with the consultant as an employee of Tucker Ellis, Tucker Ellis was the "attorney" holder of the work product privilege concerning the emails. As the holder of the privilege, Tucker Ellis had an absolute right to waive the privilege and breached no duty to the attorney when it disseminated the emails.

See also *Behunin v. Superior Court (Schwab)* (2017) 9 Cal.App.5th 833 [attorney-client privilege did not apply to communications among a litigant, his attorney, and a public relations consultant where the litigant failed to prove the disclosure of the communications to the consultant was reasonably necessary for the legal representation.]

See also *Fiduciary Trust International of California v. Klein* (2017) 9 Cal.App.5th 1184 [former trustee may not withhold documents from successor trustee based on attorney-client privilege unless the documents relate to the former trustee's personal interests.]

LABOR AND EMPLOYMENT

Employees are entitled to one day of rest per seven-day calendar week.
Mendoza v. Nordstrom, Inc. (2017) __ Cal.5th __

Class action plaintiffs alleged they worked shifts at Nordstrom for more than six consecutive days in violation of California Labor Code sections 551, 552, and 556, which guarantee workers a day of rest for each seven days of work unless the employee has worked less than 30 hours or six hours a day. The federal district court dismissed the action, holding that under these statutes, Nordstrom must guarantee one day of rest during any seven consecutive days, but not if the employees had at least one shift of six hours or less during the period, which the plaintiffs had. The district court further held that plaintiffs' claims failed in any event because plaintiffs were not required to work without taking the rest days; they chose to do so. Plaintiffs appealed to the Ninth Circuit.

The California Supreme Court agreed to answer the Ninth Circuit's questions concerning how to apply the relevant Labor Code sections. First, the requirement for one rest day per every seven days applies on a weekly basis, meaning employees are entitled to one day off per calendar week. Second, the provision relieving employers of providing the rest day when the employee's time does not exceed 30 hours in a week or six hours in any one day applied only when the employees worked less than 30 hours total in the week or less than six hours every day of the given week. Finally, although an employer "cannot affirmatively seek to motivate an employee's forsaking rest," it is not required to prevent the employee from forgoing the rest days if they choose to forgo them.

See also *Batze v. Safeway, Inc.* (2017) 11 Cal.App.5th 343 [ratio of time employee spends on exempt versus non-exempt activities need not be determined strictly on a week-by-week basis.]

TRADE REGULATION

Agreements to waive the right to seek public **injunctive relief under the consumer protection** laws are unenforceable as against public policy.
McGill v. Citibank, N.A. (2017) __ Cal.5th __

The plaintiff brought a class action asserting claims under the Consumers Legal Remedies Act, Unfair Competition Law, and false advertising law and seeking, among other things, public injunctive relief. The plaintiff had agreed to a predispute arbitration provision that waived her right to seek public injunctive relief under those statutes. The defendant moved to compel arbitration. The trial court ordered plaintiff to arbitrate her claims except for the claims seeking public injunctive relief. The Court of Appeal (Fourth Dist., Div. Three) reversed, applying the intervening United States Supreme Court decision in *AT&T Mobility, LLC v. Concepcion,* 563 U.S. 333 (2011), which held that the Federal Arbitration Act preempted the state law rules upon which the trial court had relied to hold the claims seeking public injunctive relief were not arbitrable.

The California Supreme Court reversed the Court of Appeal. The arbitration agreement in this case purported to preclude plaintiff from bringing claims for public injunctive relief at all, rather than simply compelling them to be arbitrated. Waivers of the right to seek public injunctive relief in any forum violate California public policy and are invalid.

PROFESSIONAL RESPONSIBILITY

Attorneys must take steps to protect the **confidentiality of opposing party's privileged** communications produced inadvertently whether produced by opposing counsel or the client himself.
McDermott Will & Emery LLP v. Superior Court (Hausman) (2017) 10 Cal.App.5th 1083

McDermott Will & Emery handled certain estate planning matters for the Hausman family. A dispute arose over management of the estate, as well as a malpractice action against McDermott. A privileged email between Dick Hausman and his personal attorney that Mr. Hausman had accidentally forwarded to a family member surfaced during discovery in both disputes. Despite Mr. Hausman's objections that the email was privileged, McDermott's counsel at Gibson, Dunn & Crutcher relied on the email. Mr. Hausman moved to have Gisbon disqualified from representing McDermott and the trial court granted the motion. McDermott filed a petition for writ of mandate.

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The Court of Appeal (Fourth Dist., Div. Three) affirmed the disqualification order. The trial court found that Mr. Hausman had not intended to waive the privilege when he forwarded the email, apparently accidentally, to his family member, who had then passed it along to the point it ended up in the opposing party's hands. The trial court's factual finding was entitled to deference. Further, "whenever a reasonably competent attorney would conclude the documents obviously or clearly appear to be privileged and it is reasonably apparent they were inadvertently disclosed ... the attorney ... must notify the privilege holder the attorney has documents that appear to be privileged, and refrain from using the documents until the parties or the court resolves any dispute about their privileged nature." That duty applies "regardless of how the attorney obtained the documents" and even if the attorney believes the privilege has been waived.

INSURANCE

A policy exclusion that requires the insured **to repay defense expenses upon a "final** determination" of the insured's willful misconduct is effective only once appellate relief has been exhausted.

Stein v. AXIS Insurance Company (2017) __ Cal.App.5th __

The insured was convicted of securities fraud in federal district court and tendered his appeal to his insurer under a policy that expressly provided coverage for appellate costs. The insurer declined the tender, claiming that, under the federal law of res judicata, the conviction constituted a "final adjudication" of willful misconduct and therefore barred coverage under an exclusion stating that if the insured committed willful misconduct, the insured would be obligated to repay the insurer any defense expenses paid on his or her behalf. The trial court agreed and dismissed the insured's complaint for insurance bad faith.

The Court of Appeal (Second Dist., Div. One) reversed. Regardless of what constitutes a "final adjudication" under federal res judicata law, "when a policy expressly provides coverage for litigation expenses on appeal, an exclusion requiring repayment to the insurer upon a 'final determination' of the insured's culpability applies only after the insured's direct appeals have been exhausted."

CA SUPREME COURT PENDING CASES

Addressing the preclusive effect of appellate **decision affirming summary judgment on one of** two possible grounds.

Samara v. Matar, case no. S240918
(review granted May 17, 2017)

In this dental malpractice suit, the trial court granted summary judgment in favor of the defendant dentist on both statute of limitations and causation grounds. The Court of Appeal (Second Dist., Div. Seven) affirmed on the statute of limitations ground without reaching causation. The dentist's employer, who had been named in the same suit as vicariously liable for the dentist's negligence but who did not have the same statute of limitations defense as the dentist, then moved for summary judgment, arguing that the claims against the dentist had been resolved in his favor and were now precluded, and so the employer could not be vicariously liable. The trial court agreed, but the Court of Appeal reversed, holding that because the prior appellate decision expressly did not reach the issue of causation and thus had not resolved the issue of liability favorably to the dentist, the claims were not precluded as against the employer.

The Supreme Court granted review of the following issue: When a trial court grants a summary judgment motion on two alternative grounds, and the Court of Appeal affirms the judgment on only one ground and expressly declines to address the second, does the affirmed judgment have preclusive effect as to the second ground?

Addressing whether a party has standing to appeal sanctions awarded against her attorney.

K.J. v. Los Angeles Unified School District, case no. S241057
(review granted June 14, 2017)

The plaintiff, a minor, brought suit against a school district alleging she had been sexually assaulted in a school bathroom. The trial court ordered the plaintiff to undergo a psychiatric evaluation and refused to impose limitations on the scope of the questioning to be performed during the examination. After the examination, the trial court found that the plaintiff's counsel improperly interfered with the examination and ultimately awarded sanctions against counsel. The plaintiff appealed. The Court of Appeal (Second Dist., Div. Three) dismissed the appeal from the order requiring counsel to pay attorneys fees and costs as a sanction, holding that plaintiff was not personally aggrieved and thus had no standing to appeal and her attorney had not appealed.

The Supreme Court granted review to address whether "the Court of Appeal lack[s] jurisdiction over an appeal from an order imposing sanctions on an attorney if the notice of appeal is brought in the name of the client rather than in the name of the attorney?"

Addressing damages available against skilled nursing care facilities.

Jarman v. HCR ManorCare, case no. S241431
(review granted June 28, 2017)

Plaintiff, a patient at defendants' health care facility, alleged claims for violations of patient rights under Health and Safety Code section 1430 (section 1430), elder abuse, and negligence. The jury returned a verdict for the plaintiff, including damages of $500 for each of 382 statutory violations, and found malice, oppression, or fraud. The trial court granted the defendants' motion to strike the punitive damage claim, holding there was insufficient evidence to support the jury's finding of malice, oppression or fraud. The Court of Appeal (Fourth Dist. Div. Three) affirmed the statutory damages award over the defendant's argument that the statutory damages were limited to $500 total regardless of the number of violations. The court reversed the order striking punitive damages and remanded for further proceedings on the amount, reasoning that the "sheer number of violations" provided a sufficient basis for punitive damages liability.

The Supreme Court granted review of the following issues: (1) Does Health and Safety Code section 1430, subdivision (b), authorize a maximum award of $500 per "cause of action" in a lawsuit against a skilled nursing facility for violation of specified rights or only $500 per lawsuit? (2) Does section 1430, subdivision (b), authorize an award of punitive damages in such an action?

Addressing validity of Industrial Wage Commission order permitting health care workers to waive meals periods.

Gerard v. Orange Coast Memorial Medical Center
case no. S241655 (review granted July 12, 2017)

In this case, health care workers brought a class action against their hospital employer for allowing its workers to waive a second meal period for shifts longer than 12 hours in violation of Labor Code section 512, subdivision (a). The employer moved for summary judgment, arguing that under Industrial Wage Commission (IWC) Order No. 5-2001, employees in the health care industry are authorized to waive a meal period on a shift longer than eight hours. The Court of Appeal affirmed, holding that the Order was authorized by the Legislature, so the conflicting Labor Code provision did not support plaintiffs' claims.

The California Supreme Court granted review of several questions, including whether the Industrial Wage Commission (IWC) Wage Order No. 5, section 11(D) partially invalid to the extent it authorizes health care workers to waive their second meal periods on shifts exceeding 12 hours, and whether the language of Labor Code section 516 regarding the "health and welfare of those workers" affects that analysis?

Addressing whether costs under Code of Civil **Procedure section 998 after entry of a "final"** arbitration award should be determined by the arbitrator or the trial court.

Heimlich v. Shivji (2017) __ Cal.App.5th __

In this attorney fee dispute, the client made an offer of compromise under Code of Civil Procedure section 998. Later, the matter was compelled to AAA arbitration. The arbitrator entered a final award less favorable to the attorney than the client's 998 offer. The arbitrator refused to award costs, however, because it believed it lost jurisdiction over the case once he entered his final award. The client then moved to confirm the award in the trial court and asked the trial court to award costs. The trial court confirmed the award but determined the costs issue should have been presented to the arbitrator.

The Court of Appeal (Sixth Dist.) reversed and remanded to the trial court to partially vacate the arbitration award and order a hearing on the 998 costs either before the arbitrator or the trial court. Under section 998, subdivision (b)(2), evidence of a 998 offer cannot be admitted prior to resolution of the claim. Thus, there is no mechanism for a party to an arbitration to raise entitlement to costs under section 998 prior to entry of the final award. But arbitrators lose jurisdiction over the parties once they have entered a final award. To resolve this conundrum going forward, "[i]f and when a party makes a section 998 post award request, an AAA arbitrator is empowered to recharacterize the existing award as interim, interlocutory, or partial and proceed to resolve the section 998 request by a subsequent award."

The California Supreme Court granted review to address this issue: When a party to an arbitration proceeding makes an offer of compromise pursuant to Code of Civil Procedure section 998 and obtains a result in the arbitration more favorable to it than that offer, how, when, and from whom does that party request costs as provided under section 998?

Addressing 998 offers and the preclusive effect of the Right to Repair Act.

Gillotti v. Stewart, case no. S242568

In this construction defect case, the trial court ruled that the Right to Repair Act barred plaintiff's common law claims for construction defect. The court also awarded expert witness fees to the defendant whose offer under Code of Civil Procedure section 998 to compromise the action contained a numerical figure tht was different from the text version of the offer amount ($39,999 instead of "Forth Nine Thousand Nine Hundred and Ninety Nine"). Plaintiff did not seek clarification of whether the "$39,999.00" contained a typographical error. The offer lapsed. The trial court determined the offer was valid despite the apparent typographical error and awarded the expert fees.

The Court of Appeal (Third Dist.) affirmed. The typographical error in the offer did not render it too vague to be evaluated. The court declined to decide if plaintiff was obliged to seek clarification. On the Right to Repair Act, the court held the Act bars common law claims for damages (including tree damages) caused by construction defects within the scope of the Act, subject to the Act's specific exclusions (e.g. fraud, personal injury, etc.). In addition, the decision addresses whether the Right to Repair Act applies to alleged defects that are not specifically identified in the Act.

The Supreme Court granted review and deferred briefing pending the outcome of *McMillin Albany LLC v. Superior Court,* S229762, in which the issue to be decided is: Does the Right to Repair Act (Civ. Code, § 895 et seq.) preclude a homeowner from bringing common law causes of action for defective conditions that resulted in physical damage to the home?

Under recent amendments to California Rules of Court rule 8.1115, this case can be cited for any persuasive value it may have while review is pending. Any citation to the Court of Appeal opinion must also note the grant of review and any subsequent action by the Supreme Court.

An early evaluation of the dog is critical. If the plaintiff demands an inspection, remember that an unscrupulous opposing expert can attempt to provoke your client's dog into an aggressive display. Do not, under any circumstances, produce your client's dog unless you have your own expert present and have arranged to record the entire evaluation from as many angles as possible.

Be aware that there are numerous *types* of canine aggression, such as dominance aggression, territorial aggression, protective aggression, maternal aggression, food aggression, etc. Each type is specific and may not relate to other types. For example, dog-on-dog aggression does not relate to dog-on-human aggression. Having evidence that the defendant's dog has attacked other dogs or animals in the past will not carry much weight if the plaintiff's case is strictly dog-on-human aggression, and the plaintiff did not have a dog with him or her at the time of the incident. Such evidence may be subject to exclusion on the ground it is not substantially similar, if an appropriate expert declaration is provided to support the motion to exclude.

SOCIALIZATION. Dogs that are not well socialized, especially as puppies, have a higher likelihood of aggression. Moreover, dogs that are kept outside and not allowed into the home are typically poorly socialized and more likely to demonstrate aggression towards strange people and dogs. Finally, dogs that have been chained for long periods of time have been shown to be three times more likely to bite, according to PETA. The defendant should be prepared for the plaintiff to ask about any chaining that occurred. On all of these issues, explore the dog's socialization history as early in the case as possible.

STRAY OR RESCUE. Many stray dogs or rescue dogs are wonderful pets but there are a fair percentage with behavior issues which may be the reason they were on the street or put up for adoption. Previous owners may not tell the rescue organization about aggression issues because they are afraid the dog will be euthanized, and current owners may not be aware of the prior issues. Explore whether the dog evaluated by the shelter or adoption agency, as a clean bill of health may provide reliable objective evidence that the dog was well socialized despite having been a stray or rescue.

TRAINING. If the defendant's dog has been professionally trained, previous aggression may be one of the main reasons why. But again, the trainer may be a neutral third party whose expertise in describing the dog as non-aggressive may be persuasive to the jury.

Leash use at the time of the incident. Most cities have leash laws but a lot of them also require a dog to be restrained on a leash not over 6 feet long. If your client's dog was being walked on a retractable leash that was extended over 6 feet, that may help the plaintiff in establishing owner/handler negligence.

EVIDENCE ABOUT THE BITE WOUND

It is essential to know whether the plaintiff's bite wound characteristics support their account of the incident. Typically the main issues in a dog bite are a) Are the plaintiff's wounds from a dog bite; 2) Is the defendant's dog the dog that bit the plaintiff; 3) Did the attack happen as the plaintiff describes; 4) Did the plaintiff provoke the dog into biting him or her?

Bite wounds are an actual physical representation of the incident. They stand as powerful evidence even if the plaintiff was the only witness and the dog has been euthanized. They typically present as punctures, lacerations, avulsions and abrasions. As bites are by nature crush injuries, deeper wounds often are accompanied by contusions (often cited as ecchymosis in the victims medical records), otherwise known as bruises, caused by broken blood vessels around the central wound.

DOG BITE OR DOG ATTACK

Although all dog bites are serious from a medical standpoint and even from an emotional standpoint due to the long term damage they can do, there is a motivational difference between offensive and defensive aggression. A dog that is provoked into defending itself may respond with a quick inhibited bite, which is qualitatively different from a dog who runs up to and attacks the victim with multiple deep punctures over different parts of the victims anatomy, and perhaps has to be pulled off the victim by the owner/handler:

DEFENSIVE AGGRESSION. Dogs can bite defensively as a reaction to pain or to "avoid" a threat from a person who has provoked them. This could be by stepping on their tail or paw, or by putting their face very close in an attempt to kiss or hug them. The dog may respond with one inhibited bite, in which the dog controls its severity. One quick bite usually succeeds in creating enough distance between the dog and the threat, so that no further aggression is displayed.

OFFENSIVE AGGRESSION. Offensive attacks, typically but not always, involve multiple bites and often

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to different parts of the body. They can be provoked, based on the specifics of the incident. Was the dog's level of aggression grossly out of proportion to the actions of the victim? Unprovoked, meaning the victim's actions just prior to the incident would not be considered likely to cause a dog to bite, can be referred to as vicious attacks. Absent qualified evidence supporting such an account, however, the defense may challenge any argument to the jury describing the bite incident as a "vicious attack."

There are often reasonable explanations why a particular wound pattern does not seem to add up, but the answers are typically available to attorneys through expert opinion after a thorough analysis. For example, where a stranger trying to kiss or hug a dog would clearly be provocative, the same person who is very familiar with the dog and who has kissed and hugged the dog on numerous occasions previously (with no warnings or aggressive response) may not meet the criteria of provocation due to their history with the dog accepting the behavior. An expert can explore why the dog nonetheless bit on this occasion and not on others, as undisclosed actions by the plaintiff may have caused this seemingly "abnormal" reaction.

Provocation can be intentional, like kicking or hitting a dog, or unintentional such as when a person not very familiar with the dog initiates rough play. Dog bite incidents often are the culmination of a complex interaction that on the surface can appear confusing at best.

All in all, like most cases, successful litigation in a dog bite case rests on the weight of the facts. Although the dog cannot speak in its own defense, dogs and the records and evidence they leave behind (even if they are no longer living or available) do offer a great deal of evidence to aid the trier of fact. Hopefully, this article has aided the reader in knowing where to find that evidence.

Ron Berman

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Let's Make a Difference!

by Lisa Collinson

The ASCDC has long been an organization that strives to support its members so they can be their very best while in the courtroom. Now, to help us make a difference beyond the courtroom as well, the ASCDC has started a charitable foundation. The goal of ASCDC Charitable Foundation is to make a positive difference in the lives of children and families struggling with poverty, homelessness, and domestic violence.

The ASCDC Charitable Foundation will serve charities in the communities where our members live and work--from San Diego to Santa Barbara, from Fresno to Riverside, and everywhere in between. The Foundation will hold fundraisers so we can offer financial donations to our partner charities as well as scholarships to underprivileged students. The Foundation will also provide volunteer opportunities for ASCDC members at various charities. The opportunities will include cooking for and feeding the homeless, beautification projects, speaking to and hosting BBQs for at-risk kids, clothing and school supply drives, as well as Thanksgiving and other holiday events.

The benefits of contributing to our local communities are many. Not only will our contributions improve those communities, there is a level of personal satisfaction one gets from helping those in need that is unparalleled. My firm has organized volunteer opportunities to feed the homeless, and I have found that volunteering can be infectious. I was surprised to find that even my clients have asked me how they can get involved in joining my firm's charitable efforts – some invaluable bonding occurred in the process. I find that giving back to the community helps build the respect and reputation of the individuals volunteering and also the firms who support it. It builds comradery, promotes public opinion and loyalty to a firm, while boosting morale within the firm.

There are a number of firms who already do a great job of promoting community outreach. Tucker Ellis is a great example. Each year, they celebrate their firm anniversary on what they call Tucker Ellis Day. On this day, Tucker Ellis closes their offices to allow their employees to spend time with charitable organizations and causes that are personally near and dear to them. Jones Day, O'Melveny & Myers, and Steptoe & Johnson have extensive pro bono programs providing legal services to the underprivileged in Los Angeles.

Many of you reading this have probably undertaken charitable community outreach efforts through your firms, and we'd love to collect anecdotes of your experiences (send to *Lisa@CollinsonLaw.net* and to *LPerrochet@HorvitzLevy.com*) so that we can share the news in a future issue of *Verdict* magazine.

In the meantime, we know that many people have an interest in giving back but aren't quite sure how to get started. To assist in that process, the ASCDC Charitable Foundation has arranged various volunteer opportunities for our members, their colleagues, clients, friends and/or families. To make this simple, we have pre-scheduled a number of events in different neighborhoods where our members can volunteer to make a difference in the lives of others outside of the courtroom. It's also a fun way to network outside the context of ASCDC's MCLE programs! Just click on the charity tab on the website for more information and a list of events.

I encourage you to join us in making this world a better place, whether it's helping to provide justice for our clients in litigation, or speaking to a group of at-risk high school kids about the possibilities that are open to them, or feeding the homeless and the hungry in a soup kitchen.

Can Plaintiffs Keep Site Inspections Out of Sight?

by Marc V. Allaria, Esq. & Jeffrey A. Rector, Esq.

Imagine that you are representing a grocer in a slip-and-fall action, in which the condition of the floor is at issue. You receive the plaintiff's expected notice of inspection of the premises, but at the conclusion of the notice, you are shocked to read the following assertion:

> *Defendant will not be permitted to attend or have its counsel or expert present at the site inspection, watching filming, taping, photographing or videotaping Plaintiff's expert or interfering with Plaintiff's expert examination of the subject premises. If this presents an issue for Defendant, Plaintiff would request that defense counsel advise Plaintiff's counsel, in writing, and Plaintiff's counsel will take the lead and seek a protective order.*

You let plaintiff's counsel know this does, indeed, present an issue for you. Following a protracted series of meet and confer correspondence, plaintiff's counsel moves for an order compelling the inspection on the terms in the notice.

Despite this scenario's surprising departure from the usual customs and courtesies of litigation, it has been the experience of the authors that a number of plaintiff's attorneys have begun attempting unilaterally to impose the condition on site inspections set forth above, bringing a Motion to Compel and actually seeking sanctions against defense counsel for their refusal to allow the inspection to proceed as noticed. The risks and fundamental unfairness of a plaintiff's *ex parte* inspection of your client's property are both obvious and substantial. Defense counsel must therefore be prepared to effectively assert the right to have an appropriate representative from the defense attend the inspection.

STATE OF THE LAW

Code of Civil Procedure sections 2031.010(c) and (d) provide that any party may obtain an inspection of tangible things, land, or other property that is in the possession, custody, or control of another party. Such an inspection may be conducted by the demanding party herself, "or someone acting on the demanding party's behalf." Section 2031.010 and the remainder of Chapter 14 of the Civil Discovery Act are silent on the extent to which the party making the demand can impose conditions of any sort – including a ban on the defendant property owner and the defendant's lawyers and experts from the site during the inspection. Similarly, no California appellate court has addressed the issue of whether the party upon whom a demand for inspection is made may have its attorney or expert present at the inspection.

Chapter 14's silence on the role and involvement of representatives of the party upon whom a demand for inspection is made is in contrast to the sections governing the conduct of physical and mental examinations, which provide that an attorney or the attorney's representative may be present at physical examinations, but *not* mental examinations. (Code Civ. Proc., §§ 2032.510 & 530; see also *Edwards v. Superior Court* (1976) 16 Cal. 3d 905, 910 [confirming that mental examination should normally be conducted without the presence of either side's counsel].) The Code sections governing the conduct of oral depositions likewise expressly contemplate the presence of attorneys for the parties. (See *Code Civ. Proc.*. §§ 2025.310, et seq.)

ARGUMENTS ADVANCED BY PLAINTIFF'S COUNSEL

On the occasions that the issue has been encountered by the authors, plaintiff's counsel's primary arguments that defendant's counsel and expert should be excluded from the plaintiff's inspection were essentially: (1) section 2031.010's *silence* as to the right of the party upon whom the demand for inspection is made to have counsel or another representative present should be interpreted as *precluding* the presence of such individuals; and (2) that permitting the party of whom the demand for inspection is made to observe the inspecting party's expert during the inspection would prematurely disclose the inspecting expert's opinions and work product. Both arguments can be effectively refuted.

Silence of the Statute

Usual rules of statutory interpretation weigh heavily against the conclusion that section 2031.010's silence on the presence of the defendant, defense counsel or another representative means the Legislature intended not to permit the presence of such parties and representatives. "When a

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statute is silent on a point, the courts resort to statutory interpretation." (*Waterman Convalescent Hospital, Inc. v. State Dept. of Health Services* (2002) 101 Cal.App.4th 1433, 1439.)

"The cardinal rule governing statutory interpretation is to 'ascertain the legislative intent so as to effectuate the purpose of the law.'" (*Campbell v. Arco Marine, Inc.* (1996) 42 Cal.App.4th 1850, 1856 [citations omitted].) Courts are to interpret the statute using "reason, practicality, and common sense to the language at hand." (*Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 583.) Courts must give the words of the statute a workable and reasonable interpretation keeping in mind the consequences that will flow from our interpretation. (*Watkins v. County of Alameda* (2009) 177 Cal.App.4th 320, 336.)

In interpreting the Discovery Act, the California Supreme Court has further observed, "In order to interpret any one section [of the Act] it is necessary to consider the entire article." (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355, 371 [partially superseded by statute on other grounds, as stated in *Coito v. Superior Court* (2012) 54 Cal.4th 480, 491-500.) The Court's explications of the legislative purposes of the Discovery Act are well-known, but bear repeating in the analysis of this issue:

> "[The Discovery Act] was intended to accomplish the following results: (1) to give greater assistance to the parties in ascertaining the truth and in checking and preventing perjury; (2) to provide an effective means of detecting and exposing false, fraudulent and sham claims and defenses; (3) to make available, in a simple, convenient and inexpensive way, facts which otherwise could not be proved except with great difficulty; (4) to educate the parties in advance of trial as to the real value of their claims and defenses, thereby encouraging settlements; (5) to expedite litigation; (6) to safeguard against surprise; (7) to prevent delay; (8) to simplify and narrow the issues; and, (9) to expedite and facilitate both preparation and trial.
>
> "Certainly, it can be said, that the Legislature intended to **take the 'game' element out of trial preparation** while yet retaining the adversary nature of the trial itself. One of the principal purposes of discovery was to **do away 'with the sporting theory of litigation namely, surprise at trial**.' ... [D] iscovery tends to 'make a trial **less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest possible extent**.'"
>
> (*Greyhound Corp., supra,* 56 Cal. 2d at 376 [internal citations omitted; emphasis added.)
>
> "California's pretrial discovery procedures are designed to **minimize the opportunities for fabrication and forgetfulness, and to eliminate the need for guesswork about the other side's evidence**...." (*Glenfed Dev. Corp. v. Superior Court* (1997) 53 Cal. App.4th 1113, 1119 [citing *Greyhound Corp.*, 56 Cal. 2d at 376] (emphasis added).)

Virtually all of the fundamental purposes of the Discovery Act are advanced by permitting the presence of counsel and consultants for all parties at an inspection, and would be undermined by permitting the noticing party to conduct the inspection on an *ex parte* basis. Truth-seeking and fairness are promoted by transparency and oversight. The absence of close observation by those with competing interests inevitably poses a risk of evidence tampering or falsification, and at a minimum undermines the confidence the parties will have in the opinions arising out of an *ex parte* inspection. The information obtained and opinions flowing from an *ex parte* inspection are less likely to motivate the parties to settle than information and opinions obtained from an open inspection. Finally, an *ex parte* inspection only increases the risk of surprise, if not at trial, then at the expert discovery phase of litigation.

The attempt to use section 2031.010 as both sword and shield is precisely the kind of gamesmanship the Discovery Act was designed to prevent. An inspection in which

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only one party's counsel and expert are permitted to participate inherently makes the process *less* fair, and makes the basic issues and facts *less* available to all parties. Indeed, it is difficult to identify any purpose of the Discovery Act that would be advanced by permitting an *ex parte* inspection by the noticing party. As such, it would be unreasonable, impractical, and nonsensical to construe section 2031.010's silence on the presence of representatives of the party from whom discovery is sought as an indication that the presence of such representatives is precluded.

The Discovery Act in its entirety plainly contemplates the presence and assistance of counsel and other retained consultants throughout the discovery phase of litigation. In the one instance in which counsel's presence *is* precluded (a mental examination), the Legislature clearly expressed its intent to that effect in sections 2032.510 & 530. "It is a settled rule of statutory construction that where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different legislative intent existed with reference to the different statutes." (*In re Jennings* (2004) 34 Cal.4th 254, 273.) The absence of any statement by the Legislature precluding the presence of counsel or a consultant for the party from whom an inspection is sought therefore weighs *in favor of*, not against, permitting the presence of such representatives.

Premature Disclosure of Expert Opinions

Plaintiff's counsel may also argue that permitting the defendant's counsel and expert to observe the plaintiff's expert's inspection of the property will prematurely disclose the opinions of plaintiff's experts. It is true that a consulting expert's opinions can be shielded from discovery under the work-product rule. (See, e.g., *Williamson v. Superior Court* (1978) 21 Cal.3d 829, 834.) Generally speaking, a consulting expert's identity may also be shielded from discovery until the time they are designated. (*Schreiber v. Estate of Kiser* (1999) 22 Cal.4th 31, 37.) Nevertheless, an expert's identity and opinions are discoverable prior to designation when it becomes reasonably certain that the expert will testify at trial (*County of Los Angeles v. Superior Court* (1990) 222 Cal.App.3d 647, 654), or if fairness requires it. (*Petterson v. Superior Court* (1974) 39 Cal.App.3d 267, 271.)

As an initial matter, there is no reason that mere observation of the plaintiff's expert during the inspection by the defense expert should disclose the plaintiff's expert's opinions. At best, the defense expert can observe only what the plaintiff's expert is himself permitted to do; i.e., "inspect and to measure, survey, photograph, test, or sample the land or other property, or any designated object or operation on it." (*Code Civ. Proc.,* § 2031.010(d).) This is factual data already available to the defense, not the opinion of the plaintiff's expert. At best, the defense expert could only speculate regarding the opinions of the plaintiff's expert, based on the information it appears has been gathered.

The inspection will most likely reveal the identity of the plaintiff's expert, even if defense counsel or defense expert are not present, as the plaintiff's expert can gain access to the property only with the assistance of one or more representatives of the client. To the extent that any additional *de minimis* disclosure of the identity and "opinions" of the plaintiff's expert is effected by the presence of the defendant's counsel and expert at the inspection, such disclosure is justified. First, as a practical matter, it is at least reasonably certain that the expert conducting the inspection on plaintiff's behalf will testify at trial. Second, and most importantly, fundamental fairness in the discovery process more than justifies the defendant's right to have counsel and/or an expert present to ensure the integrity of the plaintiff's investigation.

Recommendations

It goes without saying that an attorney should not voluntarily consent to an inspection of the client's property without counsel or a defense expert present. The Code clearly does not provide the plaintiff with the right to such an inspection on its face. Prompt and aggressive meet and confer efforts based on the authorities outlined herein may be sufficient to dissuade plaintiff's counsel from pursuing the matter further, given the absence of specific, countervailing legal authority. The onus is firmly on the plaintiff to justify his position by means of a motion to compel, on which the plaintiff will bear the burden of proof. (See *Glenfed Develop. Corp. v. Superior Court* (1997) 53 Cal.App.4th 1113, 1117; *Kirkland v. Superior Court* (2002) 95 Cal.App.4th 92, 98.) Although it is not published and therefore not citable, the appellate decision last year in *Dahl v. Yee* (Cal. Ct. App., Apr. 19, 2016, No. A145370) 2016 WL 1593312, at *6 provides some indication that courts understand the proper scope of site inspections. In that case, the court rejected a plaintiff's invasion of privacy and other tort claims stemming from the act of defense counsel recording plaintiff during a site inspection: "[Plaintiff] has cited no provision preventing [defense counsel] from attending the site inspection to protect the interests of her client. (See Code Civ. Proc., § 2031.010.)"

In the unlikely event that the trial court grants a plaintiff's motion to compel an *ex parte* inspection, a writ of mandamus should be seriously considered, both to protect the client's interests and to generate case law on the issue at the appellate level.

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Using Accident Reconstruction and Biomechanics Experts to Help Win Your Auto Accident Case

by Rami Hashish, PhD, DPT

There were 6.3 million police-reported motor vehicle collisions in 2015, resulting in 2.44 million injured occupants and 35,092 fatalities – a 7.4% rise from the previous year. (NHTSA) Many of these collisions, however, were of the "low speed" variety, and there is consistent debate whether such collisions can result in vehicle occupants' claimed injuries. Understanding the roles of different types of experts in such cases can help in your efforts to litigate that central question.

Experts commonly relied upon include those in accident reconstruction, biomechanics and medicine. Whereas the accident reconstructionist uses various methodologies to calculate the physical forces involved, it is the role of the biomechanics expert to determine the potential for bodily injury from those forces, and the role of the medical expert to address whether and to what extent a particular injury exists.

ACCIDENT RECONSTRUCTION

Experts in traffic crash reconstruction use the laws of physics and engineering principles to determine the dynamics of a collision, including pre- and post-impact travelling speeds and trajectories. This analysis often aids in establishing fault for causing an accident (as distinguished from determining whether the accident caused the plaintiffs claimed injury).

Factors that experts consider during the reconstruction include scene geometry as determined by in-person measurements and analysis of roadway photographs, skid/tire mark characteristics, gouges in the roadway or impacts on adjacent trees, telephone poles and the like, and vehicle specifications and fidelity. Accordingly, it is customary for investigations to include scene and/or vehicle inspections.

It is imperative that the lawyer provide the accident reconstruction expert all pertinent accident information and documents. Clues to the direction and speed of travel, as well as the condition of the roadway and of the vehicles may lurk in: the traffic crash report; bystanders' photographs or security footage of the scene of the accident; offsite photographs taken before and after the accident of all vehicles or objects involved in the collision; and all testimony or informal accounts (such as on social media) relating to the accident.

As part of the reconstruction, experts may rely on one, or more of the following methods of analysis:

EDR

Many new vehicles nowadays are equipped with an onboard Electronic Data Reorder (EDR). The EDR tracks crash information, including vehicle travelling speed pre-collision, seatbelt use/non-use, airbag deployment, and delta-v (i.e. the change in vehicle velocity following impact). EDRs, however, do not always record data for low-impact collisions and may record only longitudinal (and not lateral or sideways) delta-v's. Bosch is arguably the world leader of Crash Data Retrieval (CDR) products. Expert may use tools such as the entry CDR Diagnostic Link Connector Kit, which includes most components needed to retrieve EDR from many vehicles readily sold in the U.S. and Canada.

Crush Analysis

Experts analyze the amount of crush damage to the vehicles, often through a 3D scan of the vehicle, direct measurements (e.g. via tape measure) and/or still photographs. Rendering a 3D model may provide more accurate crush measurements than either direct measurements or still photographs, and serve as a visually appealing trial exhibit. By assessing the crush depth, length, and angulation of impact, the expert can estimate the amount of crush energy absorbed by the vehicle or transferred to the occupants, and can work backwards from the amount of crush to calculate the delta-v leading up to the accident. Scans are also often taken of the scene to better understand relative geometries.

Momentum Analysis

The law of conservation of momentum states that for a collision occurring between one object and another, the total momentum of the two objects before the collision equals the total momentum of the two objects after the collision. Experts can use this principle, in conjunction with crush analysis findings and testimony

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regarding travelling velocities, to ascertain the delta-v of vehicles.

Software

Experts are increasingly performing accident reconstruction analyses via readily available software, such as PC Crash. Such collision and trajectory simulation tools allow for a robust analysis of vehicle dynamics and creation of animations that can serve as trial exhibits.

Upon establishing the dynamics of the accident, an expert can form opinions with a reasonable degree of accident reconstruction certainty. Typical opinions pertain to the area of impact, travelling speeds, closing velocity (i.e. the relative difference in speeds between vehicles at impact), delta-v's, and/or the Principal Direction of Force (PDOF; i.e. directionality of impact).

BIOMECHANICS

Equipped with the accident reconstruction report/findings, the biomechanics expert aims to form opinions about the experience of the vehicle occupants or pedestrians involved in an accident, and compare applied forces to established injury tolerances. The biomechanist is, in essence, a bridge between the accident reconstruction expert who describes what the scene and vehicles can tell us about what happened during the accident, and the medical expert who describes the post-accident observations of the plaintiff (i.e. subjective report) and deduces what that information can tell us about the plaintiff's medical condition. An example biomechanical systematic approach is as follows:

Accident Reconstruction

Reviewing the findings of the accident reconstructionist, the biomechanics expert extracts information pertinent to injury potential. Such information includes the area of impact, vehicle delta-v, and crash pulse duration and PDOF. While many are familiar with the established relation between delta-v and injury, what may be less understood is the influence of crash pulse duration. Crash pulse duration for traditional (non-rollover) collisions typically ranges from 80-200ms. A shorter duration indicates that the forces of the collision are applied to the body over a shorter time-period, raising a higher potential for injury.

Review of Medical Records

As the biomechanics expert will not opine on injuries, but rather injury potential, the specific diagnoses by the evaluating and treating clinicians are t determined from the medical records. It is also imperative for the biomechanist to have a thorough understanding of the patient's past medical history and physical condition to ascertain whether he/she was at an altered risk for injury relative to the general populous.

Testimony Review

With a clear understanding of the medical records and accident reconstruction in tow, aim is placed upon "filling the gaps" with the available testimony. When

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reviewing depositions, unsurprisingly the fundamental goal is to extract any potential factors that may have contributed to injury. These include, but are not limited to, the occupant's positioning within the vehicle (e.g. neck position, arm position, feet position), whether (and where) they hit any aspect of the inside of the vehicle upon impact, and seat-belt use/misuse.

Kinematics and Kinetics Analysis

Considering previously published research and crash test data, the biomechanist analyzes the crash-specific information to estimate the general kinematic trajectory of the occupant, as well as the forces applied to/experienced by the occupant. When conducting a force analysis, it is critical that the biomechanics expert examine all potential forces, such as those from the collision, internal impact(s) (e.g. between the occupant and the inside of the vehicle), the seatbelt, airbag, and intrinsic muscle contraction forces.

Injury Mechanisms and Tolerances

Injury mechanisms for the diagnosed injuries are determined via a literature review. The dynamics experienced by the occupant are then compared to known injury mechanisms. Considering known mechanisms, it is of great importance that the biomechanics expert does not relegate the analysis simply to experienced forces. Rather, the rate at which forces are applied (commonly referred to as the 'loading rate') and the directionality of those forces (as indicated by the movement of the occupant) should be considered.

Considering the debate surrounding the potential of spinal intervertebral disk injury from motor vehicle collisions, let's deliberate on the following theoretical case to better understand the role of the respective experts:

Jessica was driving a Mini Cooper on Sunset as she was trailing a Chevy Suburban. The police report indicated that the drivers claimed to have been travelling the speed limit of 30 mph. Jessica claims she heard a text message notification from her phone, but says she kept her hands on the wheel and eyes on the road. According to Jessica, seemingly all the sudden, the Suburban in front of her stopped and she could not avoid the crash despite reactively slamming on her brakes. Following the accident, Jessica complains of neck pain, and within a few days of the accident, reports pain radiating to her right hand and wrist.

ACCIDENT RECONSTRUCTION

A thorough scene investigation and an analysis of photographs taken by the police revealed a set of skid marks consistent with braking by the Suburban, confirming a pre-impact travelling velocity of 30 mph, and indicating it likely took approximately 40 feet to come to a complete stop in about 1.8 seconds.

Typical perception reaction time is approximately 1.4 seconds. Assuming Jessica was travelling 30 mph (i.e., 44 feet per second) ad was alert/oriented, it is appropriate to assume that she would have already travelled about 66 feet between the time she saw the Suburban begin to stop and the time she applied her brakes. It would take Jessica approximately another 43 feet to come to a complete stop. In other words, after seeing the Suburban begin to decelerate, Jessica's Mini Cooper would travel 109 feet in about 3.4 seconds.

In most cases, a safe following distance is about two seconds, or in this case, approximately 88 feet. Both Jessica and the driver of the Suburban testify that the Suburban was leading by approximately 100 feet prior to impact. Because it took the Suburban 40 feet to stop, it would have come to rest approximately 140 feet away from where Jessica could have conceivably perceived the Suburban beginning to decelerate.

Subsequent crush and momentum analyses further serve to determine the closing velocity (i.e., the difference in velocity between the two vehicles immediately prior to impact) as well as the PDOFs and delta-v's of the respective vehicles. The impact indicated a complete over-lap rear-end with the PDOFs directly through the front center of the Mini Cooper and rear center of the Suburban. Considering the impact pattern, and the fact the Suburban was stopped at the time of impact, the closing velocity is an approximate of the Mini Cooper's impact velocity: about 10mph, with a delta-v of 6 mph.

From these reported findings and calculations, the accident reconstructionist determines that if Jessica had reacted in the customary 1.4 seconds, the Mini Cooper would have come to a stop in approximately 109 feet after she began braking, and the forward travel of the Suburban after its driver began braking left her about 140 feet within which to brake without impact. In other words, if Jessica reacted in the customary 1.4 seconds, impact with the Suburban was avoidable.

BIOMECHANICS

Medical Records: The medical records reveal that Jessica was diagnosed with C8-

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T1 radicular symptoms, yet the treating clinicians and IME debate whether her cervical disc protrusion is acute. She has a clean past medical history and no visible bruising or gashes on her face/body following the subject accident.

Testimony Review: Jessica testifies that her back was resting on the seat-back at the time of the collision. She cannot recall whether she impacted any aspect of the inside of the vehicle. She further testifies that she was wearing her seatbelt, which was confirmed by the accident reconstructionist in their analysis of seatbelt use.

Kinematics and Kinetics Analysis: Published research indicates that during a frontal impact, the occupant initially moves frontward; forward motion is arrested by the seatbelt; after which the occupant moves rearward. Considering the PDOF, it is likely that Jessica's motion was predominately restricted to the sagittal plane (i.e. flexion and extension). Considering the kinematics, and without any visible bruising and gashing and definitive testimony, the expert concludes that Jessica did not impact any internal aspect of the vehicle.

From the accident reconstructionist's findings, the longitudinal and lateral g-forces involved of the collision are ascertained. The biomechanics expert can use previous research, as well as biomechanical modeling, to determine the g-forces experienced by Jessica's head and neck. As a form of validation, the biomechanist compares force estimates to findings reported in crash tests of similar severity. Considering movement primarily in the sagittal plane, the expert opines that the Jessica's head/neck experienced approximately 4 g's in the longitudinal direction, with calculable force to the head, and torque at the intervertebral segments.

Injury Mechanisms and Tolerances: Published research has demonstrated the tolerance levels for cervical disc prolapse to compressive and shear forces. By considering Jessica's pre-collision health, her kinematics prior and in-response to the collision, the viscoelastic properties of human tissue, and comparing the forces experienced by Jessica to such 'tolerance' limits, the risk for injury is determined with a reasonable degree of biomechanical certainty.

Considering the totality of the findings, it is ultimately opined that 1) The frontal collision was sufficiently severe to cause cervical strain 2) The frontal-collision was not sufficient in severity to cause acute cervical disc protrusion.

Through using case facts, peer-reviewed research, and established scientific processes, methods, and calculations, the accident reconstruction and biomechanics experts can determine accident dynamics and injury potential. In the example case, the accident reconstruction indicates that Jessica is liable for the subject accident, while the biomechanical analysis indicates that it is unlikely her radicular symptoms are attributed to the collision. This multidisciplinary team-based approach engenders a better understanding of the accident and injuries in question, and in doing so, may help you win your case.

(Note: The scenario described above is purely theoretical and does not reflect the opinions of the author, or any companies or institutions with which he is affiliated including, but not limited to, the National Biomechanics Institute and the University of Southern California.)

Rami Hashish, PhD, DPT

Dr. Rami Hashish is a Principal at the National Biomechanics Institute and Adjunct Clinical Faculty at the University of Southern California. Dr. Hashish holds his PhD in Biomechanics, Doctorate of Physical Therapy, Diploma in Traffic Crash Reconstruction for the Forensic Engineer, and is a Certified Slip & Fall Tribometrist. Dr. Hashish specializes in assessing accident dynamics and determining injury risk and mitigation across a variety of settings, including motor vehicle accidents, slip, trip, & fall events, workplace environments, and athletic participation. To secure Dr. Hashish as an expert, please visit *www.nationalbi.com* or e-mail *info@nationalbi.com.*

Fun with *Verdict* Magazine

Clark Hudson at Lake Geneva, Switzerland.

New Pacific Regional Director and State Representative for the Defense Research Institute ("DRI")

Ninos ("Nino") Saroukhanioff recently became the DRI Pacific Regional Director covering the States of Arizona, California, Hawaii and Nevada. Glenn M. Holley of ADCNCN has become the DRI Representative for the State of California. DRI is the national association serving civil defense attorneys. Check out the DRI website, www.dri.org, to find information, resources and discussions regarding issues that confront civil defense lawyers around the country. ASCDC and ADCNCN and the DRI work toward the same goal of keeping you informed and educated regarding issues pertinent to the civil defense practice, locally and nationally.

Ninos Saroukhanioff

Nino is a partner at Maranga*Morgenstern in Woodland Hills, and a member of the ASCDC Board of Directors, Glenn is a partner at Schuering, Zimmerman and Doyle in Sacramento, and a member of the ADCNCN Board of Directors. Either Nino or Glenn can help be your connection to the DRI; please feel free to contact Nino by e-mail at *ninos@marmorlaw.com,* or by telephone at (818) 587-9146 or Glenn by e-mail at *gmh@szs.com,* or by telephone at (916) 567-0400.

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.

Please visit *www.ascdc.org/amicus.asp*

Don't miss these recent amicus *VICTORIES!*

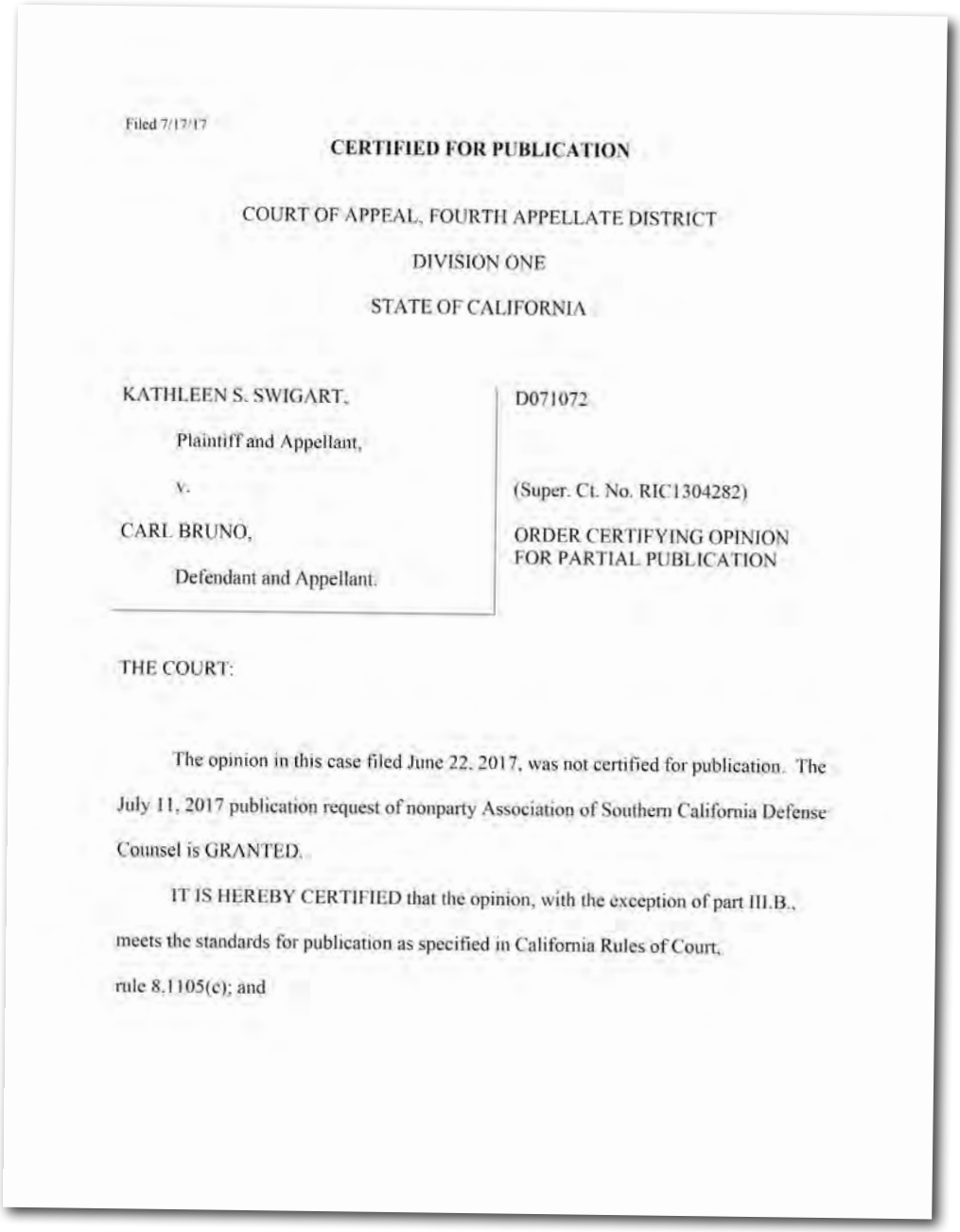
The Amicus Committee has recently participated as *amicus curiae* in the following cases:

1) *Cuevas v. Contra Costa County* (2017) 11 Cal.App.5th 163: On an issue of first impression, the Court of Appeal held that the cost of medical benefits available to the plaintiff under the Affordable Care Act (aka Obamacare) is admissible to prove the amount of future medical damages. The court also expressly reaffirmed that *Howell* applies to future medical damages. Bob Olson from Greines, Martin, Stein & Richland submitted an amicus brief on the merits on behalf of ASCDC.

2) *Jackson v. Mayweather* (2017) 10 Cal. App.5th 1240: The Court of Appeal originally issued an unpublished opinion holding that claims closely related to a defamation claim can be dismissed under the anti-SLAPP doctrine, under the surplusage doctrine which allows duplicative claims to be dismissed. Felix Shafir and Steve Fleischman from Horvitz & Levy submitted the successful publication request for ASCDC.

3) *Gillotti v. Stewart* (2017) 11 Cal.App.5th 875, petition for review pending (case no. S242568): The Court of Appeal followed its earlier opinion in *Elliott Homes, Inc. v. Superior Court* (2016) 6 Cal. App.5th 333, review granted, and held that common law construction defect claims were preempted by the Right to Repair Act. In doing so, the court expressly rejected amicus arguments advanced by the Consumer Attorneys of California. Glenn Barger from Chapman Glucksman Dean Roeb & Barger, along with Don Willenburg from Gordon & Rees, submitted the successful publication request for ASCDC.

4) *County of Los Angeles Board of Supervisors v. Superior Court (ACLU)* (2017) 12 Cal.App.5th 1264: On remand from the Supreme Court (*Los Angeles County Board of Supervisors v. Superior Court* (2016) 2 Cal.5th 282) the Court of Appeal held that time entries on bills sent by defense counsel to the County were protected by the attorney-client privilege and that only fee totals in completed cases could be ordered produced. Michael Colton wrote the successful request for publication on behalf of ASCDC.



Filed 7/17/17

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KATHLEEN S. SWIGART,

Plaintiff and Appellant,

v.

CARL BRUNO,

Defendant and Appellant.

D071072

(Super. Ct. No. RIC1304282)

ORDER CERTIFYING OPINION FOR PARTIAL PUBLICATION

THE COURT:

The opinion in this case filed June 22, 2017, was not certified for publication. The July 11, 2017 publication request of nonparty Association of Southern California Defense Counsel is GRANTED.

IT IS HEREBY CERTIFIED that the opinion, with the exception of part III.B., meets the standards for publication as specified in California Rules of Court, rule 8.1105(c); and

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Amicus Committee Report – continued from page 31

Keep an eye on these PENDING CASES!

ASCDC's Amicus Committee has also submitted *amicus curiae* briefs on the merits in the following pending case:

1) *Parrish v. Latham & Watkins* (2016) 238 Cal.App.4th 81, review granted Oct. 14, 2015 (case no. S228277): The California Supreme Court will address issue whether the one-year statute of limitations (Code Civ. Proc., § 340.6) applies to claims for malicious prosecution brought against attorneys. Harry Chamberlain from the Buchalter firm submitted an amicus curiae brief on the merits.

2) *Sandquist v. Lebo Automotive, Inc.* (2014) 228 Cal.App.4th 65, review granted Nov. 12, 2014 (case no. S220812): The California Supreme Court will address whether a court or an arbitrator has the power to decide whether class claims can proceed in arbitration, where the parties' arbitration agreement is silent on the question. The trial court granted the defendant's motion to compel arbitration of the plaintiff's claims on an individual basis, and dismissed the class claims. The Court of Appeal reversed the dismissal of the class claims, holding that, absent an express provision in the parties' agreement, an arbitrator, not the trial judge, must decide whether the named plaintiff's claims sent to arbitration can include claims for relief on behalf of a class. James W. Michalski at Riordan & McKinzie and Jerrold J. Ganzfried at Holland & Knight LLP submitted an amicus brief on the merits on behalf of ASCDC.

3) *Vasilenko v. Grace Family Church* (2016) 248 Cal.App.4th 146, review granted Sept. 21, 2016 (case no. S235412): The California Supreme Court will address whether one who owns, possesses, or controls premises abutting a public street have a duty to an invitee to provide safe passage across that public street if that entity directs its invitees to park in its overflow parking lot across the street. The Court of Appeal held that a church did owe such a duty, and could be liable to a visitor who parked in a remote parking lot when they were injured crossing the street. Mitch Tilner and Eric Boorstin from Horvitz & Levy submitted an amicus brief on the merits on behalf of ASCDC.

4) *Troester v. Starbucks,* review granted June 3, 2016 (case no. S234969): The California Supreme Court will address this question: "Does the federal Fair Labor Standard Act's de minimis doctrine, as stated in *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 692 (1946) and *Lindow v. United States*, 738 F.2d 1057, 1063 (9th Cir. 1984), apply to claims for unpaid wages under California Labor Code sections 510, 1194, and 1197?" The plaintiff filed this lawsuit alleging that his employer failed to pay him for certain store closing-time activities. The federal district court granted summary judgment for the employer pursuant to the so-called "de minimis" defense, which originated in federal wage and hour lawsuits and prevents employees from recovering for otherwise compensable time if it is de minimis. The plaintiff appealed to the Ninth Circuit, arguing that this de minimis rule is inapplicable to wage and hour claims arising under California law. The Ninth Circuit certified the question to the California Supreme Court to decide the issue. Felix Shafir and Rob Wright from Horvitz & Levy submitted an amicus brief on the merits on behalf of ASCDC.

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 favorable 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*, feel free to contact the Amicus Committee:

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defense successes april – august

Sean D. Beatty
Beatty & Myers, LLP
- *McDermott v. Toyota Motor Sales, U.S.A., Inc., et al.*

Robert T. Bergsten
Hosp, Gilbert & Bergsten
- *Ortiz v. Giron*

Benjamin Coats
Engle Carobini & Coats
- *Castro v. Nino et al.*

Kevin T. Dunbar
Matt Derossi
Dunbar & Associates
- *Lesky v. Vallarta Supermarkets*

Peter Felchlin for T-9 Enterprises
Yoka & Smith
Robert Risbrough for Michael Williams
Darling & Risbrouch
- *Courshon v. Williams et al.*

Richard S. Gower
Inglis, Legbetter & Gower
- *Nieto v. Ronald J. Hirsty, et al.*

Kenneth N. Greenfield
Law Offices of Kenneth N. Greenfield
- *Grayfer v. Wawanesa General Insurance Company*

Timothy J. Lippert
Demler, Armstrong & Rowland
- *Dominguez v. Santa Anita Shoppingtown, LLC et al.*
- *Wahba v. Westfield Valencia Town Center, et al.*

Brian P. Neill
Doherty & Catlow
- *Samkow v. Steven Brass, et al.*

Robert Packer
Paul Corson
Packer, O'Leary & Corson
- *Unzueta v. Akopyan*

Robert Packer
Vadim Braslavsky
Packer, O'Leary & Corson
- *Gilbert v. Snibbe*

Robert Packer
Packer, O'Leary & Corson
[for defendant Snibbe]
Richard Carroll
Carroll, Kelly, Trotter, Franzen, Mckenna & Peabody
[for defendant Filsinger]
- *Lewis v. Snibbe*

Stephen C. Pasarow
Knapp, Petersen & Clarke
- *Franco v. Gonzalez*
- *Romano v. Gilgan*

Patrick Stockalper
Reback, McAndrews, Kjar, Warford & Stockalper, LLP
- *Zieghami v. Soroudi*

Christopher P. Wesierski
Wesierski & Zurek, LLP
- *Frey v. Arren Babayani*
- *Sanchez v. NATEC International*

Pancy Yin
Lynberg & Watkins
- *Hardwick v. County of Orange, et al.*

CORRECTION...

Kevin Thelen
LeBeau Thelen, LLP
- *Barr v. Cook*

[In the prevous issue of The Verdict, this case was erroneously attributed to Dennis Thelen of LeBeau Thelen, LLP]

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September 22, 2017
ASCDC Santa Barbara Seminar
Fess Parker DoubleTree Resort, Santa Barbara, CA

October 10, 2017
Live Brown Bag at LASC with Presiding Judge Dan Buckley
(regarding status of the courts and civility)

February 8-9, 2018
57th ASCDC Annual Seminar
JW Marriott LA Live, Los Angeles, CA