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verdict

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YOUNG GUNS: STARS OF THE WILD WEST

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Clark R. Hudson
ASCDC 2017 President

Young Guns

The cover for this edition of the *Verdict* magazine is intended to showcase some of the Association's outstanding young leaders. Within the ASCDC Board, I have fondly referred to our young leaders as the Association's "Young Guns." The description was never intended to imply they were ruffians, thugs or some other type of ne'er do well. My view of these individuals is quite the opposite. They are some of the best and brightest leaders in this organization.

The definition of "Young Gun" in the Merriam-Webster dictionary is "A young person who is successful or who is expected to be successful." Coincidentally, the example of "young gun" provided in the dictionary is: "He/she is one of the young guns at the law firm."

Alice, Anthony, Diana, Ben, Lauren and Eric are an amazingly accomplished group of young attorneys that work very hard for the Association of Southern California Defense Counsel. They are fearless, talented and their moral compass is always pointing in the right direction. Whether they're asked to coordinate conferences in cities across Southern California, work jointly on the Litigation Conference with Consumer Attorneys Association of Los Angeles (CAALA), set up young attorney meetings, comment on laws effecting the workplace or assist in planning of our annual conference – these individuals are goal oriented and achieve fantastic results.

So, where I am going with the comments regarding "young guns" and our amazing young leaders? The stereotypes of the younger generation of lawyers' work ethic and productivity has not been favorable. Self-centered, entitled, having a gnat's attention span, and wanting a trophy just for showing up are some of the labels given to young attorneys. Alice, Anthony, Diana, Ben, Lauren and Eric shatter any stereotype of young attorneys. They are energetic, dedicated, cordial and a fun group to work with. In short, the future of our organization looks pretty bright.

From L to R: Ben Howard; Lauren Kadish; Anthony Kohrs; Alice Chen Smith; Eric Schwettmann; Diana Lytel

Cover photo and "Young Guns" head shots by Jeff Gold, President of Centex Gold Trial Solutions, Full-Service Litigation Support

CENTEXT GOLD TRIAL SOLUTIONS

Should Be Some 2018

Michael D. Belote
Legislative Advocate
California Defense Counsel

The California Legislature operates in two-year sessions, and returns to Sacramento on January 3 for the second year of the 2017-2018 session. The year should be a humdinger, whatever a humdinger is, for a variety of reasons both policy and political. And issues of critical importance to defense practice will carry over from 2017, to be addressed very shortly after the session recommences in January.

Sexual Harassment: Two sitting California legislators have now resigned over allegations of sexual harassment, two others are being investigated, and rumors abound in the Capitol that other legislators will face accusations. The resignations have at least temporarily reduced the Democratic majority in each house below the coveted two-thirds threshold, above which taxes can be raised, initiatives placed on the ballot, and vetoes overridden without Republican votes. The longer-term question is whether this issue blows over, or causes a real (and overdue) cultural shift in the Capitol.

The sexual harassment issue in Sacramento also is very likely to result in proposals relevant to defense practice. At the very least, we should expect bills which would lengthen the statute of limitations on these sorts of claims, prohibit arbitration of sexual harassment claims, and prohibit confidential settlements in this area.

Federal Tax Reform: Obviously California is among a handful of high-tax states which are uniquely affected by the recently-enacted federal tax reform. The limitation on state and local tax deductibility (SALT) is going to put a laser-focus on our state's 13.3% top marginal personal income tax rate, at a time when income taxes make up as much as 70% of the state revenue pie, and the top 1% of taxpayers pay approximately half the state's income taxes. The obvious fear is that wealthy residents will redouble efforts to shift income out of state.

Heightened sensitivity to income taxes is certain to lead to discussion about other tax sources. There is talk of a ballot initiative to modify Proposition 13 property tax rules to provide for a "split roll," where residential and commercial properties are treated differently for purposes of reassessment. For CDC, the question is whether past proposals to extend sales taxes to services will be resurrected, and how such proposals would affect our increasingly services-based economy. And for CDC members who often pay both personal and firm-based income taxes, will California attempt to blunt the impact of federal tax reform with a shift towards higher payroll taxes?

Elections: Pitched battles are coming in the June primary elections for governor, lieutenant governor, attorney general, and perhaps more. All polls suggest that current Lieutenant Governor Gavin Newsom currently is the frontrunner for governor, but the race appears to be tightening. In the attorney general race, incumbent AG Xavier Becerra will face a challenge within his own party from Insurance Commissioner Dave Jones. It is possible if not likely that in all three high-profile races, no Republican candidate will even make the ballot in our "top-two" system.

We also should expect sharp knives in the 2018 elections, as Democrats seek to hang President Trump and federal tax reform around Republican candidates, and Republicans seek to remind voters about gas tax and car registration increases. Third party, anyone?

Carry-Over Issues: As noted above, issues of major importance to defense practitioners will carry over from 2017 to 2018. Two of the most important are AB 889 on products and environmental claims, and SB 632 on asbestos depositions. Both are likely to see action early in the New Year.

AB 889 would limit the ability of courts to issue orders restricting the disclosure of factual information in causes of action for defective products or environmental conditions which pose a danger to public health or safety. The bill was approved by the Assembly Judiciary Committee over heavy opposition from judges, CDC, and other business organizations, and if approved by the full Assembly prior to January 31, 2018 will move on for consideration in the state senate.

In the asbestos area, SB 632 would limit depositions in mesothelioma cases to seven hours (instead of the 20 hours generally provided in local case management orders) unless the judge makes a finding that the plaintiff would not be harmed by longer depositions. The bill has passed the full Senate and the Assembly Judiciary Committee, and is awaiting action on the Assembly floor. CDC and other groups are strenuously opposed.

new members august – december

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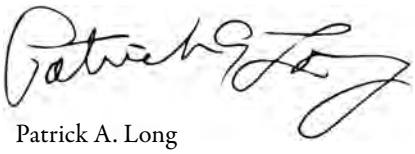
Let's Celebrate Music

Patrick A. Long

I hate Aaron Burr,



Patrick A. Long
palong@ldlawyers.com

Perhaps this iteration of "What We Do" should be more appropriately titled "What We *Don't* Do." We don't buy much music anymore. We sure used to buy loads of music. Looking back over the decades that our membership includes we started out buying vinyl (you know, 78s, 45s, 33 & ⅓s), then tape cassettes, and finally CDs. We don't much do any of that anymore. The sales of CDs has plummeted in the last twenty years. Do musical artists still put out music CDs? Yes, of course they do. They just don't sell very many anymore. Most artists seem to use their CDs for radio promotion, YouTube, etc.

The big money for most musical artists today comes through public appearances at concerts, clubs, arenas, videos, and often through individual songs downloaded onto phones and other mobile devices. Streaming services like Pandora and Spotify abound. I spoke with nine of our members, with bar numbers ranging from reasonably low to very recent. What I discerned from these conversations was that as our membership grows older they tend to buy less and less music, regardless of the mode in which it is sold. I'm not quite sure why this happens. Older folks tend to still *like* music, most especially stuff that was popular when they were young. They just don't buy it much anymore.

Now, let me digress for a moment and describe for you a recent experience wherein people paid a great deal of money to hear some music, music that was quite unlike anything else in the genre in which it was involved, and perhaps most importantly, the spectrum of ages listening to it ranged from, at least in my line of vision, from seven or eight years old to seventy or eighty years old, and all ages in between. Honestly, this is all true. This is how it happened. My wife ordered me to obtain tickets to see "Hamilton."

I'm not even going to tell you how much we paid for our tickets. Suffice it to say, hundreds of dollars. Let me address the music issue. Actually I'm not exactly sure how to describe it. Was it hip-hop, rap, blues, jazz? Could parts of it actually have been rock? I'm just not sure. But I'm absolutely sure what it was not. It was not "South Pacific," "West Side Story" or "Carousel." While I can't accurately describe the music, I can tell you this. Everyone there was wild about it. The crowd went crazy, even though it was more like an opera than the traditional musical. Let me be a little more specific. It was more like an opera in the sense that there were essentially no spoken lines. Everything was sung. Of course there was also crazy good dancing.

The newspapers and periodicals I read from around the country tell me that the audience's reactions in Los Angeles were similar to reactions to "Hamilton's" performances throughout the country. A moment ago I mentioned the wide age range among the attendees. My wife and I spoke with one young woman who said she was 13. She was there with her father – for the third time! There were many other young boys and girls in their teens and younger throughout the theater.

The ecstatic reception "Hamilton" has received across the country gives hope and reason to believe that we are still music lovers, regardless of our age, and that we'll spend as much as we can afford to listen, in one form or another, to the music we love. Even at my advanced age I'm still into jazz and rock, and folk from the '60s. Someday perhaps *Verdict* can do a survey of our membership to determine our collective musical tastes.

YOUNG GUNS: STARS OF THE WILD WEST

WANTED

Ben "Buckeye" Howard

Ben Howard was born in Brainerd, Minnesota, and raised in Cedar Falls, Iowa. As a teenager he worked summers detasseling corn ("The hardest work I've ever had to do") and "roguing" bean fields. He was an active Boy Scout, attaining the rank of Eagle, where he developed a lifelong love of the outdoors ("Despite the Army later trying to beat it out of me").

To pay for college, he enlisted as a private in the U.S. Army Reserves in 1991. Before attending boot camp, he accepted an appointment to the U.S. Military Academy at West Point, NY, where he was commissioned as a Second Lieutenant in 1996. Ben served as an infantryman for six years, and is a recipient of the Airborne and Air Assault Badges, the Expert Infantryman's Badge, and the Ranger Tab. He received an honorable discharge as a Captain in 2002.

Prior to his discharge from the Army, Ben decided to go into the law. He was recruited by several Fortune 500 headhunters, but explains, "After the bureaucracy of the military, I wanted to be my own boss as soon as possible." He studied for the LSAT during field problems, and took the test at the University of Munich while stationed Germany. He returned to Iowa for law school, and after graduation asked his wife where she wanted to live. "Jeanne followed me around in the military for a number of years, so I owed it to her. She picked San Diego, so I started looking for jobs there."

Ben found work with San Diego's Neil Dymott APLC, clerking there before joining as an associate in 2005. He was recognized by the San Diego Daily Transcript as a "Top Young Attorney" in 2007 and 2010, and in 2008, he was awarded the "Distinguished Young Attorney Award" by the San Diego Defense Lawyers. In 2010, he was elected to serve on the San Diego Defense Lawyer's Board of Directors, and was elected as the organization's president in 2013, the same year he became a Shareholder with Neil Dymott.

Ben defends general and professional liability matters, specializing in medical malpractice claims. He has tried four civil jury trials to verdict, co-tried a case to verdict, and second-chaired another two civil jury trials to verdict. He said he would love to try more cases, and is "always looking for another trial!"

He and Jeanne have been married for nineteen years, Jeanne, and they have three children: Hayden (13), Sadie (10), and Heidi (7). Ben volunteers with the Boy Scouts of America as an Assistant Scoutmaster in Point Loma, leading Summer Camp treks between 2007-2010 and 2016-2017. His hobbies include listening to Bruce Springsteen, reading, history, and backpacking. He completed the John Muir Trail (from Yosemite National Park to Mt. Whitney) in 2005, Yosemite National Park's North Rim in 2010, the Grand Canyon in 2013 and 2014, Zion's West Rim in 2015, and Zion's Virgin River narrows in 2017.

Hayden Ben Heidi Jeanne Sadie

WANTED

LAUREN "THE LASSO KID" KADISH

Born and raised in Virginia Beach, Virginia, Lauren moved to California in 2007 to attend law school at Pepperdine School of Law in Malibu. After graduation, she joined the firm of Chapman Glucksman Dean Roeb & Barger, located in West Los Angeles. Over the past seven years, Lauren has focused on litigating and defending professional liability matters, with an emphasis on accounting and legal malpractice. Lauren also defends clients in employment disputes, personal injury, wrongful death, product liability, right of publicity, and defamation claims. She practices throughout Southern California, including Los Angeles County, Orange County, Riverside County, San Bernardino County, Kern County, Santa Barbara County and San Diego County. In 2016 and 2017, Lauren was selected as a Super Lawyers Southern California "Rising Star."

Lauren joined as a member of ASCDC in 2010 and quickly became active as a co-chair for the Young Lawyers Committee, taking the initiative to plan mixers in downtown Los Angeles, Santa Monica, Orange County and San Diego. With the support of our vendors, the Young Lawyers Committee puts on 3-4 mixers per year, allowing an opportunity for younger attorneys to interact with other professionals, judges and mediators in their respective locales.

Lauren has since increased her commitment to ASCDC by joining the Board of Directors and assisting in the planning of some of the organizations biggest events. In May, Lauren worked closely with board members of CAALA and ABOTA to plan and present the annual Joint Litigation Summit. She played an integral part in coordinating speakers, panel discussion topics, as well as vendor support for this joint event, which addressed the always relevant topic of civility. The annual event presents a unique opportunity for members of these distinguished organizations to interact together and alongside judges and mediators to promote civility and professionalism in the courtroom. Currently, Lauren is extremely involved in planning ASCDC's Annual Seminar, set to take place at the JW Marriott at LA Live on February 8-9, 2017.

Outside her professional career, Lauren is the mother of a lively, smart and opinionated three-year old boy named Connor. Her husband Chris Kadish is also an attorney, and an associate with the firm Eisner Jaffe in Beverly Hills. A family of two litigators presents its own scheduling challenges, yet Lauren has managed to juggle a demanding work load, maintain a presence in the legal community, and be an active member of ASCDC, all while remaining a loving and attentive mother and wife.

A final fun fact is that Lauren is a classically trained soprano. She earned her Bachelor of Music from Catholic University of America in Washington DC, with a major in vocal performance (or opera). While she admittedly does not always have enough time to devote to her passion, she has enjoyed some incredible opportunities in the past year, singing the National Anthem at Dodgers stadium in front of 40,000 people and in other sporting venues throughout Southern California.

WANTED

ANTHONY "COYOTE" KOHRS

Anthony was raised to be a trial lawyer from a young age. His father is renowned trial lawyer Conrad Kohrs, who has tried more than 200 cases to verdict and continues to try cases at the age of 84. Following in his father's footsteps, Anthony has built a reputation as an aggressive trial lawyer, trying cases to verdict throughout California. He practices business litigation with the Marina del Rey firm Hennelly & Grossfeld, focusing on contract disputes, securities, entertainment, and intellectual property disputes.

Anthony Kohrs was introduced to the Association of Southern California Defense Counsel by former President Michael Schonbuch, who gave him his first job and with whom he tried many cases (all defense verdicts). Since his appointment to the ASCDC board in 2014, Anthony has spoken on or moderated numerous panels at various seminars, and co-chaired the Young Lawyers Committee.

As a business litigator, Anthony considers the role of defense lawyers, and ASCDC in particular, indispensable to protecting business interests in California's hostile business climate. ASCDC offers him a unique opportunity to collaborate with defense bar leaders in shaping the future of the courts and the future of the profession.

Born and raised in Malibu, Anthony could not be bothered to leave even for law school, attending Pepperdine University School of Law. He continues to reside in Malibu, and spends the vast majority of his free time at Malibu La Costa Beach Club with his German Shepherd, Baron (pictured). Anthony also provides pro-bono civil rights legal advice, and is an occasional contributor to Breitbart News on matters of constitution law.

WANTED

Diana Lytel's practice focuses on business, insurance, professional conduct and commercial litigation with an emphasis on retail, premises liability, commercial transportation, real estate and general liability matters. She has aggressively defended a wide variety of high profile clients including Fortune 500 companies, financial institutions and insurance companies in complex general litigation matters and tort cases.

Diana has been recognized for her legal excellence by Super Lawyers® and with an AV® Rating, holding the highest *"Preeminent* 5.0/5.0" in her profession. As a seasoned attorney with considerable jury trial experience, her clients have benefited from her impressive record of courtroom successes and the myriad of positive outcomes in mediation and arbitration.

Diana previously worked in Morgan Stanley's litigation department and has also held senior litigation roles with prestigious law firms recognized by Super Lawyers®, Best Lawyers in America and AV Rating. She received her B.A. in Political Science from the University of California, Los Angeles (UCLA) where she also minored in Anthropology. Ms. Lytel received her J.D. in 2006 from Loyola Law School, Los Angeles.

Diana is actively involved with ASCDC by serving as a Board Member for many years and as Co-Chair for both the General Liability/Premises Liability Committee and Diversity Committee. Diana also had the honor of being last year's recipient of the ASCDC President's Award. Diana was recently appointed to ASCDC's Executive Committee where she will serve as Secretary/Treasurer for 2018. Diana is also actively involved with DRI where she currently serves as Co-Chair of Membership with DRI's Retail & Hospitality Committee.

Diana finds time to be active in her local community. She is a Board Member with the Santa Barbara Women's Foundation and a 2018 Board Member for Santa Barbara Women Lawyers. She provides pro-bono services to the communities of Ventura and Santa Barbara in the capacity of serving as a Judge for the Teen Court Program and attorney scorer for Mock Trial Competitions.

Diana and her husband Kipley live with their young daughter in Santa Barbara, California. Her recreational passions are hiking, family time, champagne, and international travel.

Diana "Dynamite" Lytel

WANTED

ERIC "SURE SHOT" SCHWETTMANN

Eric Schwettmann was destined to be a lawyer from the time his eighth grade vocational aptitude test results were "95% lawyer, 3% politician, 2% other." Why would they give the exam if it was designed to lie about the future?

After four glorious (from what anyone can mostly remember) years of college at the University of California, Santa Barbara and graduating from Southwestern University School of law, Eric started his career as a Research Attorney for the Los Angeles Superior Court. He assisted Judge (now Justice) Madeleine Flier, Judge Richard Kalustian, and Judge Richard Hubbell with all things law and motion and trial-related. This proved to be an incredibly valuable experience as it provided him with a keen insight into the inner workings of the judicial system, the practice of law from the inside and out, and how to not matter what, at all costs, always be civil, polite, and charming to the court staff.

Eric joined Ballard Rosenberg Golper & Savitt as an associate in November 2000 and became partner in April, 2006. Over his 17 years with the firm, he has built a thriving practice in the defense of all types of employment-related lawsuits. He counsels employers regarding day-to-day personnel management decisions, complaint investigations, best policies and practices, and compliance with state and federal law.

Eric represents employers ranging from large, nationwide corporations to those with only a few employees. He focuses on matters involving the Fair Employment and Housing Act, whistleblower retaliation, discrimination, harassment, wage and hour violations. Being a versatile fellow, he does this for private employers and public entities before governmental agencies and in state and federal court. As he likes to say, "when you're right, you fight. When you're wrong, fix it fast and fair."

Eric is proud to serve on the ASCDC Board, following in the (very large) footsteps of his partner and mentor, 2010-2011. Past President Linda Miller Savitt. As co-chair of the Employment Law subsection, and as a member of the Amicus Committee (i.e. really smart lawyers club), he has been told that he is valued for far more than his one-liner quips, which might be a bit of a stretch.

Eric is married to his wife of 18 years, Megan O'Brien, a recovering lawyer who is Executive Vice President, Business Affairs, for Fox Searchlight. They have a daughter, Emma (15), who is just embarking on her high school adventure and all of the amazing things that entails. In his "spare time," he loves watching Emma play volleyball, going to the beach and getting seriously sunburned, reminding all who will listen that the San Francisco Giants have more World Series rings in recent memory than "other local teams" (sorry Dodgers fans) and avoiding his wife's reality television binge watching at all costs. Most of all, he is delighted to be included as a "young" gun with his friends and co-Board members featured in *Verdict* magazine.

WANTED

"Amarillo Alice" Chen Smith

Alice Chen Smith is an experienced civil litigator at Yoka & Smith, LLP who has successfully tried many cases to jury verdict. She was the youngest attorney to be made a partner at her firm after practicing law for seven years. Her notable results in the courtroom include defense verdicts in cases brought by prominent plaintiff firms in Los Angeles. Clients have retained her on many occasions to substitute as trial counsel just prior to trial. Most recently in 2017, Alice was retained as trial counsel one month before trial and obtained a defense verdict on an admitted liability case where plaintiff demanded $2 million in damages. She has also successfully briefed and argued on appeal in the published opinion *Anderson v. Fitness International, LLC* (2016) 4 Cal.App.5th 867.

Alice's primary focus is litigating and defending personal injury cases, with an emphasis on premises liability, product liability and catastrophic injury/wrongful death cases. She practices in all courts in the State of California. Her great results and vigorous representation of her clients has led to her selection as a Super Lawyers – Southern California Rising Star consecutively since 2012.

Alice has served on the Board of Directors for the Association of Southern California Defense Counsel since 2015 and is currently the board member representing Los Angeles County. She also serves on the Diversity Committee and has helped put on several programs for ASCDC members on diversity issues. Alice was a moderator/speaker at the 2016 Annual Seminar First Year Track on Pretrial Preparations; in 2017 she moderated the "Putting the 'How' in Howell" seminar; and she will speak at the upcoming 2018 Annual Seminar on "The Back Bone is Connected to the…,"providing a tutorial on spine and orthopedic injuries and how to examine medical experts at trial.

Outside the courtroom, Alice uses her cross-examination skills on her two spirited children, ages 4 and 1, the eldest of whom has already decided that she wants to be a lawyer like her mother. Alice is married to fellow defense attorney, Andrew Smith, who is a managing attorney of the Los Angeles office of Pettit Kohn Ingrassia Lutz & Dolin. When they are not cross-examining their children, the Smiths enjoy cooking, eating and traveling.

California Supreme Court Holds Property Owner Has No Duty to Protect Invitees Crossing Adjacent Street

by Mitchell C. Tilner, Eric S. Boorstin, & Lacey L. Estudillo

The general rule is that a landowner has no duty to protect visitors from *off-premises* dangers the landowner does not create or control. (See *Sexton v. Brooks* (1952) 39 Cal.2d 153, 157-158; *Seaber v. Hotel Del Coronado* (1991) 1 Cal.App.4th 481, 493.) In recent years, plaintiffs have asked courts to extend the traditional boundaries of premises liability by expanding what it means for landowners to "create the danger" on adjacent property. (E.g., *Annocki v. Peterson Enterprises, LLC* (2014) 232 Cal.App.4th 32, 38-39 [duty to design exit from property so as not to impede visibility of adjacent highway].) The California Supreme Court, however, has clarified that even a foreseeable risk of off-site harm to persons visiting a landowner's premises does not generally create a duty to protect against that off-site harm.

In *Vasilenko v. Grace Family Church* (Nov. 13, 2017, S235412) _ Cal.5th _ [2017 WL 5243812] (*Vasilenko*), a motorist struck a church attendee as he crossed a public street between the church's premises and its off-site, overflow parking lot. The attendee sued the church, arguing that the church owed him a duty of care to assist him in safely crossing the street because the church "created the danger" by locating its overflow parking lot across the street.

The Court performed a full analysis of the factors laid out in *Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113, which require courts to balance several public policy considerations to determine whether a particular duty should be imposed. The Court first noted that, generally speaking, it is "foreseeable" that a visitor to a landowner's premises may be injured when traversing adjacent property after parking offsite. The Court recognized, however, that a certain fortuity is involved in such a scenario: "the occurrence of injury results from the confluence of an invitee choosing to cross the street at a certain time and place and in a certain manner, and a driver approaching at that moment and failing to avoid a collision," such that "the landowner's conduct bears only an attenuated relationship to the invitee's injury."

Moreover, the Court reiterated the often stated but sometimes overlooked principle that foreseeability alone is not enough to create an independent tort duty. The Court noted that imposing a duty under the circumstances would saddle landowners with the substantial burden to investigate, monitor, and evaluate dangers on adjacent property, and yet landowners' ability to reduce the risk of injury from crossing a public street is limited. First, property owners have no authority to direct traffic on public streets, for example. Second, posting signs would not realistically alert pedestrians to dangers that are not already clear; indeed, " 'to require warnings for the sake of such persons would produce such a profusion of warnings as to devalue those warnings serving a more important function.' " Third, a duty cannot be based on the possibility of installing lights: it is "debatable whether illuminating a landowner's premises would serve to distract drivers more than it would alert them to crossing pedestrians." Finally, basing a duty on the idea that landowners should simply provide on-site or "safer" nearby parking would require analyzing a host of complex considerations, unduly colored by the fact that a trier of fact will assume the parking option that was chosen must be unsafe, given the occurrence of the accident. The Court recognized the problem of such "hindsight bias," which is the " 'recognized tendency for individuals to overestimate or exaggerate the predictability of events after they have occurred.' "

In sum, the burdens of imposing a duty to take any of these steps outweighs any benefit to visitors, who the Court found are in the best position to protect against

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***Vasilenko* –** continued from page 15

obvious dangers on a public street, as are the government landowners who actually control the street where an injury occurs, and the third parties (in this case, the driver) who caused the injury. Those who are "most directly involved" in any given accident are best able to guard against injury. As the Supreme Court explained in conclusion:

"In light of the limited steps the landowner can take to reduce the risk to its invitees, especially when compared to the ability of invitees and drivers to prevent injury, and in light of the possibility that imposing a duty will discourage the landowner from designating options for parking, we hold that a landowner who does no more than site and maintain a parking lot that requires invitees to cross a public street to reach the landowner's premises does not owe a duty to protect those invitees from the obvious dangers of the public street."

The Court's unanimous opinion by Justice Goodwin Liu comes with some caveats: a duty may be found if the off-site hazard is "obscured or magnified by some condition of the landowner's premises or by some action taken by the landowner."

Defending against premises liability claims

Vasilenko should facilitate early resolution of premises liability actions by demurrer or motions for summary judgment on duty grounds, and thus eliminate the need for jury trials in many of these cases.

Defense counsel should present evidence, through the testimony of defense witnesses and the cross-examination of plaintiff's witnesses, establishing that there was no condition on the landowner's property – such as shrubbery or a configuration on the property impeding visibility – that magnified or obscured the off-premises dangers.

Questions Left Open

Now that the Supreme Court in *Vasilenko* has clarified the scope of a landowner's duty, the California Courts of Appeal will have to address what it means for conditions on a landowner's premises to "obscure" or "magnify" dangers on adjacent property. The Supreme Court also left open whether landowners owe a duty to invitees whom the landowner knows or should have known may not appreciate the danger of public streets, such as unaccompanied children. Finally, the Court said it was not considering a theory not raised in the trial court: whether the defendant had voluntarily assumed a duty that did not otherwise exist. Given the importance of these issues and the distinct possibility that the Courts of Appeal will develop various and conflicting approaches in order to resolve them, it is conceivable that these issues could return to the California Supreme Court for further refinement.

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Mitch Tilner, Eric Boorstin, and Lacey Estudillo from Horvitz & Levy submitted an amicus brief on behalf of the Association of Southern California Defense Counsel, joined by Don Willenburg from Gordon & Rees for the Association of Defense Counsel of Northern California and Nevada.

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:

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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.

ATTORNEY FEES AND COSTS

Asserting an affirmative defense is not the same as bringing an "action" or "proceeding" that allows the prevailing defendant to recover contractual attorney fees.

Mountain Air Enterprises, LLC v. Sundowner Towers, LLC (2017) 3 Cal.5th 744.

In this dispute arising out of a real estate transaction in which the defendant buyer ultimately did not purchase the property, the defendant asserted an affirmative defense of novation as a ground for avoiding liability for the non-sale. The trial court entered a defense judgment, but denied contractual attorney fees, finding that the purchase agreement's authorization of attorney fees to the prevailing party for having to bring a "legal action" or "proceeding" to enforce the agreement did not encompass the defendant's assertion of an affirmative defense. The Court of Appeal (First Dist., Div. One) reversed the denial of fees, holding that asserting the novation affirmative defense sufficiently qualified as bringing a proceeding to enforce the option agreement.

The California Supreme Court affirmed the Court of Appeal's judgment, but on different grounds. Assertion of an affirmative defense does not, by itself, constitute an "action" or "proceeding" for purposes of recovering attorney fees. Nevertheless, the defendant was entitled to fees because the parties' contract additionally allowed for fees incurred "because of an alleged dispute . . . in connection with" the agreement, and the lawsuit was brought because of a dispute that was inherently connected to the agreement.

City could recover costs under CCP 998 from an unsuccessful plaintiff in FEHA and POBRA action.

Sviridov v. City of San Diego (2017) 14 Cal.App.5th 514.

Police officer sued City and others for wrongful termination under the Fair Employment and Housing Act (FEHA). The defendants served multiple Code of Civil Procedure section 998 offer of compromise before trial, which the officer rejected. The officer won at trial, but on appeal the City won reversal with directions for judgment in its favor. The officer moved to strike the City's subsequent cost bill, contending that defendants in FEHA actions cannot recover costs unless the unsuccessful plaintiff's claims were objectively groundless, and that the Public Safety Officers Procedural Bill of Rights Act (POBRA) similarly prohibited an award of costs to a defendant unless the action was frivolous or brought in bad faith. The trial court denied the officer's motion to strike and awarded the City its costs.

The Court of Appeal (Fourth Dist., Div. One) affirmed. Neither FEHA nor POBRA bars defendants from recovering costs pursuant to CCP 998. Finding otherwise "would erode the public policy of encouraging settlement in such cases."

See also *Miller v. City of Portland* (9th Cir. 2017) 868 F.3d 846 [FRCP 68 offers of judgment are analyzed in the same manner as any contract, so a plaintiff who accepts an offer of judgment that expressly provides for an award of reasonable attorney fees is entitled to such fees even if the plaintiff would not otherwise be entitled to fees.]

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ARBITRATION

California procedures apply to a California state court motion to compel arbitration under an agreement that contains no choice-of-law provision or express incorporation of the FAA's procedural provisions.

Los Angeles Unified School District v. Safety National Casualty Corporation (2017) 13 Cal.App.5th 471.

School district sued 27 liability insurers alleging breach of contract and insurance bad faith. One insurer moved to compel arbitration and to dismiss or stay the action based on an arbitration clause in its policy. Although the agreement did not mention the Federal Arbitration Act (FAA), the insurer contended that the FAA applied as a matter of law because the policy involved interstate commerce. The trial court denied the motion; while the FAA's substantive provisions governed, California procedural rules governed in the state court action. And under those rules, the trial court declined to compel arbitration to prevent inconsistent rulings in pending litigation with the other insurers (Code Civ. Proc., § 1281.2(c)).

The Court of Appeal (Second Dist., Div. Eight) affirmed. Where an arbitration agreement has no choice-of-law provision and no provision stating the FAA's procedural provisions govern the arbitration, "California procedures necessarily apply." The trial court did not abuse its discretion when it denied arbitration under section 1281.2(c) because "[t]here certainly is a possibility of conflicting rulings" if the arbitration were to proceed concurrently with the school district's case against the many other insurers.

Arbitration agreement signatory's death before the end of the 30-day rescission period under CCP 1295 does not render agreement unenforceable.

Baker v. Italian Maple Holdings (2017) 13 Cal.App.5th 1152.

Heirs of deceased nursing facility resident sued nursing facility alleging wrongful death and various other tort claims. The nursing facility moved to compel arbitration based on two agreements decedent executed before she died. The trial court denied the petition, concluding that because decedent had passed away before the expiration of the 30-day period that Code of Civil Procedure section 1295, subdivision (c), provides for a party to an arbitration agreement in a medical services contract to rescind it, the arbitration agreements could not be given effect.

The Court of Appeal (Fourth Dist., Div. One) reversed, expressly disagreeing with Rodriguez v. Superior Court (2009) 176 Cal. App.4th 1461, 1469 (Second Dist., Div. 7), which held that death prior to the expiration of the 30-day period "rendered it impossible to establish that an arbitration agreement exists that is enforceable under section 1295." The court in Baker held, The plain meaning of the statute "is that a medical services agreement is effective upon execution by the parties and remains in effect until or unless a party rescinds within the 30-day period." The death of one party during the rescission period does not make the arbitration agreement unenforceable.

A defendant in a putative class action can waive its right to compel arbitration against absent class members by deciding not to seek arbitration against the named plaintiff.

Sprunk v. Prisma LLC (2017) 14 Cal.App.5th 785.

Plaintiff brought a wage and hour class action against the bar where she worked. Plaintiff and all other class members had signed arbitration agreements. Plaintiff had signed one version of the contract that did not specifically address class arbitration, and other class members had signed a version containing an express waiver of the right to class arbitration. Defendant moved to compel individual arbitration, but then withdrew its motion because it feared that, under state law at the time, the court might order classwide arbitration. The parties then proceeded with pleading and discovery. Nearly three years after filing the complaint, plaintiff moved for class certification, which the trial court granted. Defendant then filed two separate motions to compel arbitration directed to the class members who signed the two different versions of the arbitration agreement. The trial court denied both motions, concluding that defendant had waived its right to compel arbitration based upon its four-year delay in seeking arbitration.

The Court of Appeal (Second Dist., Div. One) affirmed. Assuming (without deciding) that a motion to compel arbitration against unnamed class members would have been premature until a class was certified, the court found that the trial court could properly determine that defendant's delay in moving to compel arbitration against the named plaintiff had waived its right to arbitrate against the unnamed class members. "An attempt to gain a strategic advantage through litigation in court before seeking to compel arbitration is a paradigm of conduct that is inconsistent with the right to arbitrate."

CIVIL PROCEDURE

An informal notice of intent to sue a healthcare facility operates as legal notice for purposes of CCP 364; a later formal notice cannot trigger tolling of the statute of limitations.

Kumari v. The Hospital Committee for the Livermore-Pleasanton Areas (2017) 13 Cal.App.5th 306.

After plaintiff fell at a health care facility, she sent a letter to the facility describing her injury and her belief that a nurse negligently failed to attend her, and threatening to "move to the court" if the facility did not pay her $240,000 within 20 days. The facility denied the claim. Plaintiff then hired a lawyer who sent the facility a formal notice of intent to sue under Code of Civil Procedure section 364 (requiring 90 days' notice of intent to sue for medical malpractice, and tolling the statute of limitations for 90 days if the notice is served within the last 90 days of the applicable statute). The lawyer served that letter one day before the one-year anniversary of the plaintiff's injury. Plaintiff sued three months later, and in response to the facility's summary judgment motion based on the one-year statute of limitations, plaintiff argued her lawyer's formal notice of intent to sue served within 90 days of the expiration of the one-year statute of limitations, tolled the statutory period. The trial court disagreed and granted summary judgment.

The Court of Appeal (First Dist., Div. Five) affirmed. A notice of intent to sue under section 364 need not take any particular form nor be subjectively intended to operate as legal notice. The plaintiff's initial demand letter recited the factual and legal basis for her claim and described her injury, so constituted notice of intent to sue. That letter was the served more than 90 days before the expiration of the statute of limitations, so section 364 tolling did not apply.

A malicious prosecution claim is barred if the underlying case survived summary judgment, even if the underlying case was ultimately determined to have been brought in bad faith.

Parrish v. Latham & Watkins (2017) 3 Cal.5th 767.

In this misappropriation of trade secrets case, the trial court denied defendants' motion for summary judgment, finding the lawsuit "had sufficient potential merit to proceed to trial." Posttrial, however, the trial court determined that the case actually lacked an evidentiary basis and that plaintiffs had therefore brought the case in bad faith. Defendants sued plaintiffs for malicious prosecution. The Court of Appeal (Second Dist., Div. Three) held the action was barred as a matter of law under the "interim adverse judgment rule"—the rule that a malicious prosecution action is foreclosed if the underlying action succeeds after a hearing on the merits, even if it later fails under a subsequent ruling. The trial court's denial of summary judgment established plaintiffs had probable cause for bringing the trade secret misappropriation lawsuit, even if the trial court later found the suit was brought in bad faith.

The California Supreme Court affirmed. Where the standard for "bad faith" is that the action was specious, and *not that any reasonable attorney would agree the action is totally without merit*, a posttrial finding that a suit was brought in "bad faith" does not vitiate an earlier finding that the suit had some arguable merit for purposes of barring a malicious prosecution claim.

Trial court properly exercised its discretion to grant summary judgment where plaintiffs failed to submit adequate separate statement.

Rush v. White Corporation (2017) 13 Cal.App.5th 1086.

Several plaintiffs bought high-end cabins in a development built by the defendant developer. The plaintiffs sued the defendant for fraud, construction defect, and failure to properly remediate the soil. The developer moved for summary judgment on various grounds, submitting 338 separate undisputed material facts. Plaintiffs responded with a 155-page responding separate statement that did not comply with the Rules of Court and relied on undisputed facts that were "supported by multiple paragraphs of multiple declarations, at times by every paragraph of nearly every declaration on file." Plaintiffs failed to cure these deficiencies – specifically, to resubmit a separate statement that showed which material facts were disputed by reference to specific evidence – after the trial court gave them the opportunity to do so. The trial court exercised its discretion to grant summary judgment based on plaintiffs' noncompliance with the procedural requirements for opposing the motion.

The Court of Appeal (First Dist., Div. Two) affirmed. The trial court had discretion to grant summary judgment based on plaintiffs' failure to oppose the motion with a separate statement of undisputed facts that complied with the rules of court.

Trial courts have discretion to consider new evidence submitted with a reply in support of summary judgment.

Jacobs v. Coldwell Banker Residential Brokerage Company (2017) 14 Cal.App.5th 438.

While plaintiff was viewing a home listed by defendant real estate brokerage company, he decided to stand on the base of a diving board over an empty pool to look over the fence. The base collapsed and plaintiff was injured when he fell into the empty pool. He sued, alleging that the brokerage failed to warn him about the defective diving board. Defendant moved for summary judgment due to lack of any evidence of a discoverable defect. In opposition, plaintiff abandoned the diving board defect theory and argued for the first time that defendant was liable for failing to protect him from the "gaping wide abyss" of the empty pool. Defendant submitted additional evidence in reply to respond to this new theory, and plaintiff did not object. The trial court granted summary judgment.

The Court of Appeal (Second Dist., Div. Six) affirmed. In addition to being without merit, the empty pool theory of liability could not defeat summary judgment because it was not alleged in the complaint or in discovery responses. Further, the trial court did not abuse its discretion when it considered defendant's reply evidence, especially since the evidence was necessary to rebut a theory raised for the first time in the plaintiff's summary judgment opposition.

Failure to issue requested statement of decision can be harmless error.

F.P. v. Monier (2017) 3 Cal.5th 1099.

The trial court in this assault and battery case failed to fulfill its duty to issue a statement of decision that a party requested after a bench trial. On appeal from the trial court's judgment, the Third District Court of Appeal rejected the appellant's position that the failure to issue a statement of decision made it impossible to ascertain whether the trial court committed legal error, and thus was reversible per se. The court held the claimed error had been forfeited during trial in any event, so the failure to issue a statement of decision was of no consequence.

The California Supreme Court, in a unanimous opinion by Justice Chin, reviewed the history of the statement-of-decision statute and concluded that the failure "is subject to harmless error review." Affirming the Court of Appeal decision, the court disapproved some of its prior decisions, which suggested such error is reversible per se. The court added, "Of course, the more issues specified in a request for a statement of decision and left unaddressed by a court's failure to issue a statement, the 'more difficult, as a practical matter, [it may be] to establish harmlessness.' " and "failure to issue a properly requested statement of decision may effectively shield the trial court's judgment from adequate appellate review."

Reverse veil piercing may be available in California against a member of an LLC.

Curci Investments, LLC v. Baldwin (2017) 14 Cal.App.5th 214.

James Baldwin personally borrowed $5.5 million from the plaintiff. When Baldwin failed to make payments on the loan, the plaintiff obtained a judgment against him. The plaintiff then moved to add JBP Investments LLC as a judgment debtor. Baldwin owned 99% of the interest in that LLC and his wife owned the remaining 1%. Baldwin used the LLC to hold and invest his and his wife's cash balances. The plaintiff argued this reverse corporate veil piercing should be allowed to achieve justice, but the trial court denied the plaintiff's motion.

The Court of Appeal (Fourth Dist., Div. Three) reversed and remanded for reconsideration of whether the LLC's veil could be pierced under the circumstances. Reverse veil piercing may be available where the ends of justice require disregarding the separate nature of the LLC and its shareholders, especially where there are no members of the LLC who would not be liable on the debt.

Trial court should exercise its power to render a final appealable judgment rather than allowing cases to languish in limbo due to entry of a defective judgment.

Kurwa v. Kislinger (2017) ___ Cal.5th ___ [2017 WL 6521684].

This lawsuit began in 2004, and after an adverse ruling on his complaint, the plaintiff first appealed in 2010. The plaintiff won his appeal, but the victory was wiped out by the California Supreme Court's decision in *Kurwa I,* holding that the Court of Appeal had been without jurisdiction to hear the matter because the parties had preserve remaining claims for future litigation. After remand for further proceedings in the trial court, the defendant refused to dismiss his cross-complaint, and the trial court disclaimed any ability to act further to create an appealable judgment. When the plaintiff appealed again, the Court of Appeal held that unless and until the defendant chose to dismiss his cross-complaint, there could be no final and appealable judgment.

The California Supreme Court, in a unanimous opinion by Justice Kruger, held that the Court of Appeal was correct to dismiss the appeal, but the court offered plaintiff an escape from what the court termed "a legal cul de sac." The court said, "the trial court does indeed have the power to take action" and should allow the parties to "either proceed to judgment on the outstanding causes of action or dismiss those causes of action with prejudice."

TORTS

Primary assumption of the risk barred plaintiff's personal injury suit arising out of "endurance horseback riding" accident.

Swigart v. Bruno (2017) 13 Cal.App.5th 529

Plaintiff and defendant were both engaged in an endurance horseback riding event. Several riders were close together. Plaintiff dismounted to collect a card marking her position on the trail. Defendant's horse collided with another horse, ran off, and struck plaintiff. Plaintiff sued defendant for her injuries. The trial court granted summary judgment for defendant on the ground of primary assumption of the risk.

The Court of Appeal (Fourth Dist., Div. One) affirmed. Even if the rules of endurance horseback riding prohibit horses riding close together, the risk of horses bumping is inherent in the sport of horseback riding. Further, because the horse's conduct that caused the plaintiff's injuries was within the normal range of inherent risks of the sport, no triable issues existed on whether the defendant increased the risk or whether the horse had dangerous propensities.

Where a campsite has man-made improvements, triable issues existed on whether the campsite was "unimproved" for purposes of applying "natural condition immunity" to injuries caused by a falling tree at the campsite.

County of San Mateo v. Superior Court (Rowe) (2017) 13 Cal.App.5th 724.

A boy was catastrophically injured when a diseased tree fell on his tent at a County-owned campground. The County sought summary judgment in the boy's personal injury suit based on Government Code section 83.2, which precludes public entities from being liable for injuries caused by "a natural condition of any unimproved public property." The trial court denied the motion and the County sought a writ of mandate.

The Court of Appeal (First. Dist., Div. Two) denied the writ petition in a published opinion. The boy presented evidence that there were dozens of man-made improvements near the tree, and that the tree therefore became more susceptible to disease. Thus, there were triable issues on whether the property was "unimproved."

See also *Toeppe v. City of San Diego* (2017) 13 Cal.App.5th 921 [reversing summary judgment for city based on "trail immunity" in an action brought by a woman who alleged injury due to a negligently maintained tree, not a condition of the trail itself, and where there were triable issues on whether she was on the trail when hit by a falling branch].

The hirer of an independent contractor meets its initial burden on summary judgment to show the Privette doctrine applies by showing the plaintiff was injured at the site where his employer was hired to do work.

Alvarez v. Seaside Transportation (2017) 13 Cal.App.5th 635.

The plaintiff in this on-the-job personal injury suit was the employee of an independent contractor. He sued the hirer of the independent contractor for negligence. The hirer moved for summary judgment under *Privette v. Superior Court* (1993) 5 Cal.4th 689, which establishes a presumption that an independent contractor's hirer delegates to the contractor its tort duty to provide a safe workplace for the contractor's employees and that, accordingly, the hirer is not liable to the contractor's employees for work-related injuries unless one of the narrow exceptions to the general rule of no duty applies. The trial court granted the motion.

The Court of Appeal (Second Dist., Div. Eight) affirmed. In the summary judgment context, the defendant-hirer establishes the requisite factual foundation for the *Privette* doctrine to apply by offering evidence that it hired plaintiff's employer to provide services at its property and that the plaintiff was injured while working at the site where the services were to be performed. Once a defendant-hirer offers such evidence, the burden shifts to the plaintiff to raise a triable issue on one of the exceptions to the *Privette* doctrine.

Trip-and-fall premises claim against medical clinic not subject to MICRA's one-year statute of limitations.

Johnson v. Open Door Community Health Centers (2017) 15 Cal.App.5th 153.

A healthcare clinic patient alleged injuries after tripping on a weight scale that was moved by clinic staff during her visit. The clinic argued the suit was time barred by the Medical Injury Compensation Reform Act's (MICRA) one-year statute of limitations for negligence claims arising from "professional services." The patient argued her suit was timely under the longer statute of limitations for personal injury claims. The trial court ruled that MICRA applied because plaintiff was injured in the course of obtaining medical treatment, by equipment used to diagnose and treat medical conditions.
The Court of Appeal (First Dist., Div. Four) reversed. The longer statute of limitations for personal injury claims applied because the patient alleged she was injured when she tripped while exiting the clinic after her medical treatment, which implicated the breach of a duty the clinic owed to all members of the public visiting its facility and not a breach of a duty in rendering medical care.

Deprivation of an elder's right to autonomy in the medical decision-making process can constitute actionable "neglect" of an elder.

Stewart v. Superior Court (2017) 16 Cal.App.5th 87.

78-year old Anthony Carter was admitted to a hospital. The doctors recommended placement of a pacemaker, but Carter's authorized health care representative declined the surgery. The hospital proceeded with the surgery anyway. After the surgery, Carter went into cardiac arrest and died. Carter's representative sued the hospital and doctors alleging, among other things, causes of action under the Elder Abuse and Dependent Adult Civil Protection Act. The hospital moved for summary adjudication of several of the claims, including elder abuse under the Act. The trial court granted the hospital's motion and the plaintiff filed a petition for writ of mandate.

The Court of Appeal (Fourth Dist., Div. Two) granted the petition and reversed. Decedent's admission to an acute care facility, standing alone, was sufficient to make him a "dependent adult" entitled to the Act's protections even if he had not also qualified as an "elder" by virtue of his age. Deprivation of an his right to personal autonomy by disregarding the directions of Carter's authorized representative could constitute actionable "neglect" under the Act.

The "consumer expectations" test for product defect could apply to forklift accident involving bystander.

Demara v. The Raymond Corporation (2017) 13 Cal.App.5th 545.

While walking through a warehouse, the plaintiff was struck and injured by a forklift wheel. He sued the forklift manufacturer for strict products liability, alleging the forklift was defectively designed because the wheel was not guarded and the forklift should have had a warning light designed to catch the attention of bystanders. The defendant moved for summary judgment on the ground that the "consumer expectations" test for product defect, which asks whether the product failed to perform as safely as an ordinary consumer would expect, did not apply to the forklift because the performance and design issues involved were outside the experience of the average consumer. The defendant further argued that the plaintiff had no evidence to support liability under the alternative, applicable "risk-benefit" test for defect, which asks whether the defendant has shown that the benefits of the existing design outweigh the risks. The trial court granted the motion.

The Court of Appeal (Fourth Dist., Div. One) reversed. The consumer expectations test could apply because the circumstances that led to the plaintiff's injury – "an unguarded wheel and placement of a warning light" – were not so technical or complex that the jurors could not use their own judgment to determine whether the design violated the minimum safety expectations that would be held by pedestrians in a warehouse. Further, the defendant bears the burden of proof under the "risk-benefit" test to show the benefits outweigh the risks. Defendant's moving papers suggesting some benefits to the design were insufficient to show defendant prevailed on the risk-benefit test as a matter of law. Accordingly, defendants had not shifted the burden to the plaintiff to show a triable issue under that test.

Brand Name Drug Manufacturer Owes Duty To Warn Users of Generic Equivalent.

T.H. v. Novartis Pharmaceuticals Corp. (2017) ___ Cal.5th ___ [2017 WL 6521684].

Plaintiffs alleged they were injured in utero by their mother's use of terbutaline, a generic form of the brand name drug Brethine. Plaintiffs alleged the terbutaline label was defective because it failed to warn of the risk to fetal brain development. Plaintiffs sued Novartis, the manufacturer of Brethine, even though Novartis stopped manufacturing Brethine and sold its right to the product six years before plaintiffs' mother received generic terbutaline. Plaintiffs claimed that, because the generic manufacturer was required by law to follow the brand name warnings, Novartis had continuing liability for failure to warn about the hazards of Brethine. Novartis asserted that its duty to warn ended when it stopped manufacturing Brethine and sold its product rights.

The California Supreme Court, in a 4-3 decision, held that plaintiffs "could allege a cause of action against Novartis for warning label liability. Because the same warning label must appear on the brand-name drug as well as its generic bioequivalent, a brand-name drug manufacturer owes a duty of reasonable care in ensuring that the label includes appropriate warnings, regardless of whether the end user has been dispensed the brand-name drug or its generic bioequivalent."

Three justices dissented from the majority opinion, noting that "predecessor liability for failure to warn has never before been recognized by any court, in any jurisdiction," and "[t]o the extent the theory has been raised, courts across the country have universally rejected it." The reasoning of the majority opinion and concerns of the dissent suggest it is unlikely the opinion would be extended to other manufacturers outside the uniquely regulated context of pharmaceutical generic drugs.

Tort liability against cigarette manufacturers is not preempted by federal law.
Major v. R.J. Reynolds Tobacco Company (2017) 14 Cal.App.5th 1179.

Plaintiff's decedent smoked cigarettes from 1961 to 1989, and died of lung cancer in 1998. Plaintiff sued a variety of defendants who made or sold products containing tobacco and asbestos on a products liability theory. By the time of trial, only Lorillard Tobacco Company remained. The jury returned a verdict in favor of the plaintiff on her claim that Lorillard's cigarettes were defective because they contained high amounts of tar. Lorillard appealed, arguing the plaintiff's design defect theory amounted to a ban on cigarettes, which is inconsistent with federal law that permits them to be sold. Lorillard also argued that the trial court erred in refusing to give the additional "but for" causation language in CACI No. 430, which would have directed the jury that Lorillard's cigarettes were not a cause if the decedent would have developed lung cancer even if he had not smoked Lorillard's cigarettes.

The Court of Appeal (Second Dist., Div. Eight) affirmed the verdict. The plaintiff's defect theory based on the excessive amount of tar in Lorillard's cigarettes did not necessarily implicate a total ban on cigarettes. But in any event, Congress has expressed no intent to foreclose state law tort liability against cigarette manufacturers. Also, CACI 430's substantial factor test for causation without the additional "but for" language was the appropriate causation instruction for the case. A "but for" instruction is inappropriate in cases involving multiple sufficient causes. Multiple sufficient causes exist not only when there are two causes each of which is sufficient to cause the harm, but also when, as in this case, there are more than two causes, partial combinations of which are sufficient to cause the harm.

INSURANCE

Professional services exclusion in general liability policy precludes coverage for failure to properly perform services on a construction project.
Energy Insurance Mutual Limited v. Ace American Insurance Company (2017) _____ Cal.App.5th __

Oil and gas pipeline company Kinder Morgan obtained two temporary employees from staffing company Comforce to act as inspectors on a supply line project. During the project, a gas pipeline was struck and an explosion occurred causing catastrophic injuries to workers at the site and property damage. Various plaintiffs sued Kinder Morgan and Comforce for negligence in failing to properly mark the pipeline and to properly supervise the contractors working near it. Comforce's general liability insurer denied coverage based on an exclusion for "any liability arising out of the providing or failing to provide any services of a professional nature." The trial court determined the claims against Comforce arose out of professional services and were thus excluded from coverage.

The Court of Appeal (First Dist., Div. Four) affirmed. A general liability policy is not an errors and omissions policy designed to protect against the failure to properly perform professional services. The "professional services" exclusion applied to claims arising out of allegations that the insured negligently failed to perform the services it was hired to do for the construction project. This did not render the policy illusory because the policy still covered ordinary negligence claims that do not arise out of the particular professional services the business provides, such as trip and fall claims.

See also *Los Angeles Lakers, Inc. v. Federal Insurance Company* (9th Cir 2017) 869 F.3d 795 [exclusion that broadly precludes coverage for invasion of privacy claims excludes coverage for lawsuits alleging violations of the Telephone Consumer Protection Act].

LABOR & EMPLOYMENT

IIED claims are not barred by workers' compensation exclusivity where the actionable conduct also violates FEHA.
Light v. California Department of Parks and Recreation (2017) 14 Cal.App.5th 75.

An employee sued her employer for violations of the Fair Employment and Housing Act (FEHA). She also sued her direct supervisor, alleging tort claims including intentional infliction of emotional distress (IIED). The trial court granted the defendants' motions for summary judgment, holding, among other things, that the IIED claims were barred by workers' compensation exclusivity.

The Court of Appeal (Fourth Dist., Div. One) reversed. The California Supreme Court's decision in Miklosy v. Regents of Univ. of California (2008) 44 Cal.4th 876 [broadly finding claims arising from conduct occurring at the worksite out of the normal course of the employment relationship barred by workers' compensation exclusivity] retained exceptions to the workers' compensation exclusivity rule for both conduct that violates fundamental policy and conduct that "exceeds the risks inherent in the employment relationship." "[U]nlawful discrimination and retaliation in violation of FEHA falls outside the compensation bargain and therefore claims of intentional infliction of emotional distress based on such discrimination and retaliation are not subject to workers' compensation exclusivity."

But see *Yau v. Santa Margarita Ford, Inc.* (2014) 229 Cal.App.4th 144 (Fourth Dist., Div. Three) [interpreting *Miklosy* as allowing only a single exception to the workers' compensation exclusivity rule for claims that contravene fundamental public policy and abandoning the previous exception for risks that exceed those inherent in the employment relationship].

The one-year limitations period to file a FEHA claim for wrongful denial of tenure begins to run from the last day of employment.
Aviles-Rodriguez v. Los Angeles Community College District (2017) 14 Cal.App.5th 981.

A former professor filed a lawsuit against the Los Angeles Community College District (LACCD) alleging that it had denied him tenure in violation of the Fair Employment and Housing Act (FEHA). LACCD demurred, arguing that the action was time barred because the professor had filed his complaint over a year after he learned of LACCD's decision to deny tenure. The trial court sustained the demurrer.

The Court of Appeal (Second Dist., Div. Four) reversed. Under Romano v. Rockwell Internat., Inc. (1996) 14 Cal.4th 479, the statute of limitations on FEHA claims accrues on the last day of employment. Romano could not be distinguished on the basis that it involved termination from at-will employment rather than denial of tenure because, in reaching its holding, Romano case expressly disapproved of prior case law holding that the statute of limitations for denial-of-tenure claims begins to run when the professor is notified of the adverse tenure decision.

Workers allegedly misclassified as exempt from overtime laws must show a company policy requiring overtime work to obtain class certification on claims for unpaid overtime.
Kizer v. Tristar Risk Management (2017) 13 Cal.App.5th 830.

Plaintiffs filed this wage-and-hour class action alleging their former employer misclassified them as exempt from California's overtime laws. The trial court denied class certification because plaintiffs failed to show that their employer had a policy requiring the misclassified employees to work overtime, and thus failed to show that their theory of liability was subject to common proof. The trial court rejected plaintiffs' argument that whether individual employees worked overtime were merely individualized damages issues that would not preclude class treatment on the issue of the employer's liability for misclassification.

The Court of Appeal (Fourth Dist., Div. Three) affirmed. Misclassification alone does not give rise to liability for overtime violations—the employees must have actually been required to work overtime. To show that a misclassification claim is susceptible of classwide proof, plaintiffs typically must show a policy or practice of requiring the employees to work overtime. Plaintiffs here presented no such proof.

The common law test for determining whether a worker is an employee or independent contractor applies to wage and hour disputes.
Linton v. DeSoto Cab Company, Inc. (2017) 15 Cal.App.5th 1208.

A taxicab company required drivers to pay a set "gate fee" to obtain taxicabs to drive each shift. A driver filed a claim with the Labor Commissioner's office contending that he had been misclassified as an independent contractor instead of an employee, and thus was owed reimbursement for gate fees. The Labor Commissioner held the driver was an employee. The company appealed to the superior court, which held a bench trial and concluded that the driver was an independent contractor. In so holding, the court determined that the factors set forth in *S.G. Borello & Sons v. Department of Industrial Relations* (1989) 48 Cal.3d 341 (Borello) for determining whether someone is an employer or an employee did not apply because they did not involve workers' compensation or unemployment insurance benefits.

The Court of Appeal (First Dist., Div. One) reversed. The *Borello* analysis applies not only in the workers' compensation, unemployment and disability insurance contexts, but also in the wage and hour context. Additionally, workers bringing wage and hour claims are entitled to a presumption of employment and the burden of proof is on the employer to prove otherwise.

PROFESSIONAL RESPONSIBILITY

A potential attorney-client relationship with an alleged partnership is not enough to justify attorney disqualification.

Lynn v. George (2017) 15 Cal.App.5th 630

A real estate brokerage company and its owner sued a real estate investment company and its managing member alleging, among other things, breach of an alleged partnership agreement to flip real estate. Plaintiffs moved to disqualify defendants' counsel on the ground that counsel had represented the alleged partnership, thus forming an attorney-client relationship with plaintiffs, or alternatively, that counsel had received confidential communications that created a nonclient relationship with plaintiffs warranting counsel's disqualification from representing defendants in the dispute. The trial court granted plaintiffs' motion to disqualify on both grounds. Defendants appealed.

The Court of Appeal (Fourth Dist., Div. Three) reversed. Reviewing the communications relied on by plaintiffs, all were either shared with third parties or related to plaintiffs' role as broker in the transaction. There was thus no substantial evidence any of them contained confidential information that would support a finding of a confidential nonclient relationship between defense counsel and plaintiffs. Moreover, absent a finding that there was in fact a partnership, there was no basis for the trial court to conclude defense counsel had represented the partnership. "A *potential* attorney-client relationship with an *alleged* partnership is not enough to deprive clients of their right to counsel of their choice." (Emphasis added.)

See also *URS Corporatopn. v. Atkinson/Walsh Joint Ventire* (2017) 15 Cal.App.5th 872 (Fourth Dist., Div. Three) [appeal from order disqualifying litigation counsel automatically stayed enforcement of the order disqualifying counsel under CCP 916, but did not stay all trial court proceedings, which could proceed while the appeal was pending subject to trial court's discretion to issue discretionary stay or other protections due to participation of counsel who were the subject of the disqualification order].

CA SUPREME COURT PENDING CASES[1]

Addressing whether time employees spend undergoing security searches constitutes "hours worked."

Frlekin v. Apple, case no. S243805 (Request to answer certified question of state law granted Sept. 20, 2017).

Apple requires its retail store employees to have their personal bags and packages searched before they can leave the store for the day. Certain employees brought a federal wage and hour class action seeking to collect wages for this time spent undergoing exit searches. The federal district court certified the class, and then granted summary judgment for Apple, ruling that the time employees spent having bags they brought for personal convenience searched was not compensable as "hours worked," because the time was neither "subject to the control" of the employer nor time when employees were "suffered or permitted to work."

The Ninth Circuit certified, and the California Supreme Court agreed to answer, the following question: "Is time spent on the employer's premises waiting for, and undergoing, required exit searches of packages or bags voluntarily brought to work purely for personal convenience by employees compensable as 'hours worked' within the meaning of California Industrial Welfare Commission Wage Order No. 7?"

Addressing the standard by which "hours worked" should be defined in cases potentially subject to either federal or state law rules.

Stoetzl v. State of California (2017) 14 Cal.App.5th 1256, case no. S244751, (review granted Nov. 29, 2017).

In wage-and-hour class action by correctional facility employees, the trial court entered a judgment that was based on the federal standard for determining what constituted compensable "hours worked." In a published decision, the Court of Appeal (First Dist., Div. Four), affirmed in part as to the subclass of represented employees because the parties had agreed to a memorandum of understanding (MOU) unambiguously providing that employees were working under the federal Fair Labor Standards Act (FLSA), and the Legislature approved and enacted the MOU into law. However, the court reversed with regard to the subclass of unrepresented employees, holding that California law applied because the employees' pay scale manual, which contained language from the FLSA, was not a legislative enactment and was superseded by the California Industrial Wage Commission's Wage Order No. 4.

The California Supreme Court granted review to decide: "Does the definition of "hours worked" found in the Industrial Wage Commission's Wage Order No. 4, as opposed to the definition of that term found in the federal FLSA, constitute the controlling legal standard for determining the compensability of time that correctional employees spend after signing in for duty and before signing out, but before they arrive at and after they leave their actual work posts within a correctional facility?"

Addressing enforceability of arbitration agreement in employment contract in the face of affordability challenge and claim of waiver by defendant's delay in seeking arbitration.
OTO, L.L.C. v. Kho (2017) 14 Cal.App.5th 691, case no. S244630 (review granted Nov. 29, 2017).

In *Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, the California Supreme Court held that the Federal Arbitration Act preempted state law that guaranteed an employee's right to an informal "Berman" hearing for wage-related claims before the Labor Commissioner; an employment contract may validly require arbitration of such claims. But Sonic-Calabasas suggested a waiver of "Berman" hearing rights may be unconscionable if it left the employee without an "accessible and affordable" forum for resolving wage disputes. In a published decision, the First District, Division One, ordered a trial court to grant a motion to compel arbitration because the agreement satisfied the affordability and accessibility requirements where the employer would pay the costs of arbitration and the proceeding would resemble civil litigation.

The California Supreme Court granted review to decide: "(1) Was the arbitration remedy at issue in this case sufficiently "affordable and accessible" within the meaning of Sonic II to require the company's employees to forego the right to an administrative Berman hearing on wage claims? (2) Did the employer waive its right to bypass the Berman hearing by waiting until the morning of that hearing, serving a demand for arbitration, and refusing to participate in the hearing?"

Addressing whether challenged activity furthers the exercise of constitutional free speech rights on a matter of public interest within the meaning of the anti-SLAPP statute.
FilmOn.com v. DoubleVerify (2017) 13 Cal.App.5th 707, case no. S244157 (review granted Nov. 15, 2017).

An Internet-based entertainment media provider brought suit against an authentication company for falsely classifying the provider's websites as "Copyright Infringement-File Sharing" and "Adult Content" in reports to online advertisers who later cancelled their advertising agreements with the media provider. In a published opinion, the Second District, Division Three, held: (1) the media provider's lawsuit was based on the authentication company's conduct in furtherance of its right of free speech, and (2) the authentication company's reports concerned an issue of public interest. Thus, the media provider's action was subject to an anti-SLAPP motion to strike.

The California Supreme Court granted review to decide: "In determining whether challenged activity furthers the exercise of constitutional free speech rights on a matter of public interest within the meaning of Code of Civil Procedure section 425.16, should a court take into consideration the commercial nature of that speech, including the identity of the speaker, the identity of the audience, and the intended purpose of the speech?"

See also *Bonni v. St. Joseph Health System (2017) 13 Cal.App.5th 851, case no. S244148 (review granted and held Nov. 1, 2017, pending outcome of* decision of a related case, Wilson v. Cable News Network, Inc., case no. S239686) [Fourth Dist., Div. Three, held in a published opinion that a surgeon's retaliation claim against a hospital did not arise from statements made during peer review proceedings, but rather was based on an alleged retaliatory motive for undertaking peer review, and thus did not arise from protected activity under the anti-SLAPP statute; related issue to be decided in *Wilson* is, in deciding whether employment claims arise from protected activity for anti-SLAPP purposes, what is the relevance of an allegation that the employer acted with a discriminatory or retaliatory motive?].

See also *Esquith v. Los Angeles Unified School District*, case no. S244026 (review granted and held Nov. 1, 2017, pending outcome of decision of a related case, Wilson v. Cable News Network, Inc., case no. S239686) [Second Dist., Div. Four, held in an unpublished opinion that a teacher's retaliation claim against a school district did not arise from a protected employment investigation, but rather that the investigation itself was retaliatory and discriminatory, and thus the investigation was not protected activity under the anti-SLAPP statute].

Addressing the procedure for obtaining costs under Code of Civil Procedure section 998 in arbitration cases.
Heimlich v. Shivji (2017) 12 Cal.App.5th 152, case no S243029 (review granted Aug. 23, 2017).

In this attorney fee dispute, the defendant client made an offer of compromise under Code of Civil Procedure section 998. Later, the matter was resolved through arbitration. The arbitrator entered a final award less favorable to the plaintiff attorney than the client's 998 offer. Because under section 998, subdivision (b)(2), evidence of a 998 offer cannot be admitted prior to resolution of the claim, the client only then sought costs. The arbitrator refused to award the costs, however, because he lost jurisdiction over the case once he had entered his final award. The client then sought costs from the trial court, but the trial court ruled the costs issue should have been presented to the arbitrator. The Court of Appeal (Sixth Dist.) reversed in a published decision, recognizing the legal conundrum. Ultimately, it directed the trial court to either consider the costs issue itself or vacate the arbitration award so the arbitrator could consider the costs issue and suggested that, to resolve the jurisdictional problem, the arbitrator could characterize his purportedly "final" award as merely "interim."

The California Supreme Court granted review to decide: "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 whether governmental immunity may be waived for failure to assert it before trial.

Quigley v. Garden Valley Fire Protection District (2017) 10 Cal.App.5th 1135, case no. S242250 (review granted Aug. 9, 2017).

A firefighter was injured when she was run over by a fire truck while sleeping at a fire base camp. The trial court granted nonsuit in favor of the defendant fire protection districts under Government Code section 850.4's firefighting immunity, even though defendants had not raised immunity as an affirmative defense in their answer. The Court of Appeal (Third Dist.) affirmed in a published opinion, holding that (1) governmental immunity is jurisdictional and can be raised at any time and thus is not subject to the rule that failure to raise a defense by demurrer or answer waives that defense; (2) the plaintiff firefighter's injuries were covered by the immunity rule of section 850.4.

The California Supreme Court granted review to decide: "May the governmental immunity set forth in Government Code section 850.4 be raised for the first time at trial?"

Addressing the scope of governmental immunity for injuries caused by law enforcement vehicular pursuit.

Ramirez v. City of Gardena (2017) 14 Cal.App.5th 811, case no. S244549 (review granted Nov. 1, 2017).

In a wrongful death action action for the death of a passenger in a pickup truck that was the subject of a policy pursuit, the trial court granted summary judgment based on Vehicle Code section 17004.7(b)(2), which provides governmental immunity from claims resulting from law enforcement vehicular pursuit when the governmental entity has adopted and implemented an appropriate vehicle pursuit policy. The Court of Appeal (Second Dist., Div. One), held in a published opinion that the immunity statute does not require, as a prerequisite to immunity, proof of compliance or written certification of compliance by every single officer.

The Supreme Court limited review to the following issue: "Is the immunity provided by Vehicle Code section 17004.7 available to a public agency only if all peace officers of the agency certify in writing that they have received, read, and understand the agency's vehicle pursuit policy?"

Addressing which excess policy coverage applies in progressive loss cases (such as from environmental damage) with multiple layers of insurance across multiple policy years.

Montrose Chemical Corporation v. Superior Court (2017) 14 Cal.App.5th 1306, case no. S244737 (review granted Oct. 6, 2017).

In this coverage litigation arising out of environmental contamination, Montrose Chemical Company had established in an earlier stage of litigation that it was entitled to coverage for continuing, progressive environmental claims under policies from 1960 through 1986. Montrose had multiple layers of excess coverage, and at this stage of the litigation sought summary adjudication that it was entitled to access any excess policy it chose so long as all underlying primary and excess policies *for that same year* had exhausted—i.e., "elective stacking." The trial court disagreed, but ruled that the insured corporation could "horizontally stack" the policies to access higher-level excess policies when lower-level policies had been exhausted *for all policy years*. The Court of Appeal (Second Dist., Div. Three) agreed in a published decision that elective stacking was inconsistent with the policies of at least some of the excess policies at issue, but also held that the insured corporation need not horizontally exhaust the lower-lying policies at each coverage level and for each year before higher-level policies could be accessed. Rather, the sequence in which the policies could be accessed must be decided on a policy-by-policy basis, taking into account the relevant provisions of each policy.

The California Supreme Court granted review to decide: "When continuous property damage occurs during several periods for which an insured purchased multiple layers of excess insurance, does the rule of "horizontal exhaustion" require the insured to exhaust excess insurance at lower levels for all periods before obtaining coverage from higher level excess insurance in any period?"

ENDNOTE

1 Published decisions as to which review has been granted may be cited in California cases only for their persuasive value, not as precedential/binding authority, while review is pending. (See Cal. Rules of Court, rule 8.1115.)

Are you interested to know whether a legal issue you are briefing is pending before the California Supreme Court?

Check out the text-searchable list of cases found on the Court's website at *www.courts.ca.gov/13648.htm*

Click on the link for "pending issues: civil" and you will be directed to this page: *www.courts.ca.gov/documents/DEC2217civpend.pdf*

Profile of Justice Thomas M. Goethals

by Patrick A. Long

Justice Thomas Goethals of the Orange County Superior Court and I go back a long way, maybe thirty years or so, but let me be clear, I have never seen him socially, and except for one occasion which I will touch on in a minute, I've never dealt with him professionally. Let me give you a little background information on Justice Goethals. His great grandfather immigrated to this country in 1888 from the area of Belgium known as Flanders. As with most of the folks from Flanders, he spoke both Flemish and Dutch, and of course English after arriving here.

The Goethals from Flanders made their way across the country eventually settling in the Glendale area of Los Angeles County. Justice Goethals' father (Richard) was one of eight children. He was also one of what Mr. Brokaw characterized as "the greatest generation," enlisting in the United States Marine Corps in 1942, attended Santa Clara University and USC law school, and was admitted to the California Bar in 1949.

Some of you reading this with very low bar numbers may remember that Richard Goethals, father of Justice Thomas Goethals, was president of our Association in 1979. Some of you may also remember him from his years with the firm of Shell & Delamer.

Let me touch briefly on two more of Justice Goethals' many distinguished relatives. His brother Fr. Gregory Goethals is a Jesuit priest, and the current President of Loyola High School in Los Angeles, where two of my grandchildren (twins Jack and Patrick) attend. I don't know Fr. Goethals, but for a couple of years he was on the faculty at the Jesuit school in Phoenix, Brophy Prep. I had attended that school many years earlier, so our lives have intersected in a manner of speaking.

Another connection: Justice Thomas Goethals' son Patrick is currently a member ASCDC while seeking justice for clients of his firm, Carroll, Kelly Trotter, Franzen, McKenna & Peabody.

But let's talk about Justice Goethals. Justice Goethals completed his undergraduate degree at Santa Clara, and his law degree at Loyola-Marymount University. He was admitted to the California bar in December 1977 and immediately began work at the Orange County District Attorney's office in January 1978. He spent 12 years with the D.A. which is how I got to meet him. (More about that in a minute.) After leaving the D.A.'s office he was with Mark Robinson's firm for a while. He then joined forces with two very well-known trial lawyers to form the firm of Pohlson, Moorehead & Goethals. During his time with this firm he handled both criminal and civil matters until receiving his appointment to the bench in 2002.

Now let me describe the single occasion when I met Justice Goethals. It happened sometime during the 1980s, but I'll be darned if I can remember the year. I was managing the Orange County office of a Los Angeles firm when I was summoned for jury duty. I'd never been on a jury, and was excited about the possibility of being selected for a 3- or 4-day auto accident case, just to get a handle on how juries really operate, and to confirm or dispel some long-held assumptions. I figured it would make me a better defense trial lawyer. But I also knew that, as a lawyer, my chances for getting selected as a juror were remote, as most trial attorneys don't want another attorney sitting on their juries.

From the jury assembly room I was assigned out to a criminal courtroom. When our jury panel arrived at the courtroom the judge advised us that the case was a first degree murder case, and the trial estimate was approximately four months. Yikes! I said a quick prayer that my role as an attorney would prevent me from ever being selected. That's not exactly how it worked out. I was picked to sit in the jury box, and that's when we were introduced to the prosecuting D.A., a fellow named Thomas Goethals. Defense counsel was an extremely well-known criminal defense fellow whose name I recognized. Suffice it to say that both Mr. Goethals and defense counsel each believed in the merits of their side of the case; each felt I would go their way and take everybody with me; so they both kept me.

As I mentioned earlier, I've never seen Justice Goethals socially, nor dealt with him professionally except this one time, but that one occasion when I dealt with him professionally lasted four months. I was not inexperienced as a trial lawyer. I'd been a member of ABOTA for probably ten years at that time, but let me tell you, I thought I was back in law school. It was the finest example I've witnessed in the art of direct examination, cross-examination, argument to a jury, and general courtroom demeanor. I was flabbergasted, amazed, and to this day so many years later have never seen a better

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example of trial work. I remember thinking to myself, I'm sure happy this guy is a D.A. rather than a plaintiffs' personal injury attorney because I sure don't want to try cases against him.

It makes me happy to know that at least some of the folks sitting on the bench came there after a career as a truly gifted trial lawyer. Justice Goethals comes to us from an exemplary family, followed the arc of an exemplary career, and is certainly an exemplary judge.

Patrick A. Long

Patrick Long is a partner at Long & Delis, and a full-time mediator/arbitrator with Judicate West. Pat is a member of ABOTA, and a past-president of both DRI and the Association of Southern California Defense Counsel. Pat was selected as a Super Lawyer by Los Angeles Magazine every year from 2004 until 2014 when he transitioned to fulltime mediation/arbitration work. Pat taught at Loyola Law School's Journalist Law School, and at ABOTA's Masters In Trial program.

Speed Round with Judge Pauline Maxwell

by Diana P. Lytel

What is your idea of perfect happiness?
Everyone healthy, a job I love, and adventurous travels.

What was your biggest accomplishment in this position?
I am most proud of establishing Restorative Court, the County's first comprehensive program for homeless Defendants, involving law enforcement and bringing community resources directly to the courtroom to assist those charged with "lifestyle" offenses.

If you didn't have to sleep, what would you do with the extra time?
Cook. For my loved ones, for my friends, and for the homeless.

Biggest fear?
Wasting precious time.

What hobby would you get into if time and money weren't an issue?
Flying.

What do you most value in other people?
Fairness, kindness, and an appreciation of all that is good in their lives.

Who are your favorite writers?
James Michener, Leon Uris, Ken Follett, Ayn Rand, and Phillippa Gregory.

What job would you be terrible at?
Sales. Of anything.

What takes up too much of your time?
Driving.

What do you wish you knew more about?
Everything.

What are some small things that make your day better?
Smiles.

Favorite TV show?
NCIS. The original.

Favorite movie?
Fried Green Tomatoes.

What are you most looking forward to in the next 10 years?
Time with my loved ones and friends, growing professionally, and adventurous trips around the world.

Where is the most interesting place you've been?
Egypt, so far.

What's something you've been meaning to try but just haven't gotten around to it?
A parachute jump.

What book impacted you the most?
The Pillars of the Earth

What's the best and worst piece of advice you've ever received?
"If not now, when?" and "Never go to bed angry." Lost a lot of sleep over that last one!

What's the hardest lesson you've learned?
You can't please all of the people all of the time.

What do you most value in your friends?
Honesty, authenticity, and being there, even when it's hard to be there.

What do you want to be remembered for?
Treating others well and making someone's life better.

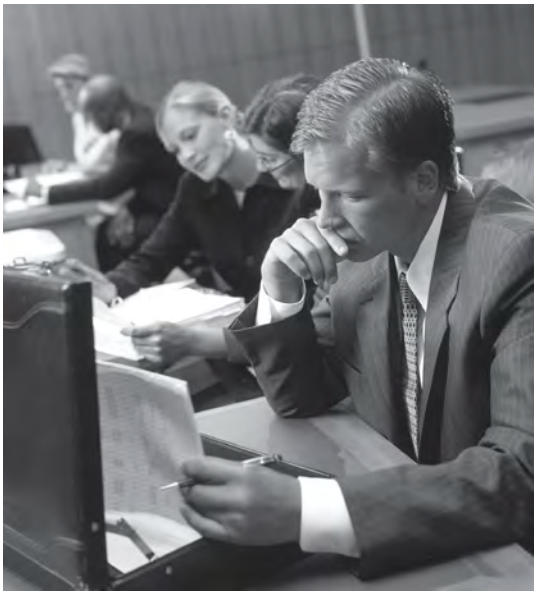
What's on Your Bucket List?
Visiting every country in the world.

What is your motto?
Be Grateful, Stay Productive, and Never Lose Your Sense of Humor.

Diana P. Lytel

Diana Lytel is a partner at Lytel & Lytel, LLP. Ms. Lytel's practice focuses on business, insurance, professional conduct & commercial litigation which includes premises liability, personal injury, commercial transportation & general ligation matters. She has aggressively defended a wide variety of high profile clients, including Fortune 500 companies, financial institutions and insurance companies, along with businesses and individuals in complex general litigation matters and tort cases.

Master Calendar Returns to Riverside Superior Court - Civil



by Diane Mar Wiesmann

On January 2, 2018, the Riverside County Superior Court will move to a Master Calendar form of case management for Civil Matters, according to the Hon. John W. Vineyard, Assistant Presiding Judge of the Civil Department. This change to a Master Calendar format will *not* affect Southwest Justice Center or Palm Springs Court.

Upon filing a civil complaint, the plaintiff will be assigned to Department 1 for Case Management, and another department for law and motion matters. All Case Management Hearings (Case Management Conferences, Orders to Show Cause, Trial Setting and Trial Call) will be heard in Department 1 before Judge Vineyard.

Case Management Conference (CMC) will be set six months from filing of the complaint. If, based upon Judge Vineyard's review of the CMC Statements, the court determines that an appearance at the Conference is not necessary, the court may issue an order that no appearance is required. Also, depending upon assessment of the type of case, the court may then set the matter for Trial Setting Conference (TSC), refer a matter to the court's Mediation Program, continue the CMC and set appropriate OSC's, or leave the matter on calendar to obtain information from the parties at the CMC.

It is helpful to the court to be diligent and as complete as possible when submitting CMC Statements: Do not "refer" to the plaintiff's CMC Statement, as the other side may not file one. Do not state that all your discovery will be performed "per Code." Give as much information as you can to assist the court in directing your matter. If the case has complex aspects that will require extensive discovery and law and motion, advise the court. If the case is amenable to early mediation, say so.

Depending on the region and the department, Trial may be set as soon as 12-24 months from the filing date. Trials will generally be set 4-5 months out from the TSC (of which there may be more than one, depending upon the case). Judge Vineyard advises parties to know their cases, their calendars and their witnesses' calendars at the TSC. Other trials set on the same day are not (necessarily) conflicts. Assume you will have a trial set at the TSC. Notify your witnesses, experts and clients as soon as possible. If you have not posted your jury fees by the TSC, you will have 5 days to do so, or you will be deemed to have waived jury.

All trials will be set on Fridays at 8:30 AM. Court-Appointed Mediators will be available for all matters that day. Have the required parties present with settlement authority. When you appear, be ready to proceed. Comply with Local Rule 3401, which requires the preparation and filing of JOINT Pre-trial documents.

If a motion to continue Trial is filed, establish good cause, make sure all parties are present at the hearing and demonstrate diligence. (Failure to recognize and avoid conflicts is not good cause.) With respect to Ex Parte Applications to continue Trial, exigent circumstances that could not have been avoided by reasonable diligence must be shown. With respect to Trial continuances, a stipulation between the parties does not constitute good cause. Assuming you stipulate and the stipulation contains/constitutes good cause, provide alternate dates to the court. Ex Parte applications to continue trial will not be heard on the date of trial.

Even though the Master Calendar format will affect case management in Southwest Justice Center or Palm Springs, Trials may still be assigned to those locations depending upon circumstances.

As the Riverside Superior Court moves to this system of Case Management on January 2, 2018, parties are advised to be diligent, know and follow the rules, and communicate with the court.

Diane Mar Wiesmann

Diane Mar Wiesmann is a partner with Thompson & Colegate LLP in Riverside, handling general liability, medical malpractice litigation and employment investigations. She is a Past President of ASCDC.

Tips for Standing Out as a Young Attorney

by Emily Berman

One common challenge facing young attorneys today is how to distinguish themselves in the workplace and the legal community amongst a constantly growing crowd.

California already ranks near the top of all states in terms of the highest numbers of active attorneys per capita, and the numbers are only growing with each passing year. The State Bar of California is currently considering lowering the minimal passing score for the bar exam, which could significantly boost the pass rate and only add to the growing number of new attorneys entering the field in the years to come. Many firms are hiring more rapidly than in the recent years past, making it more important than ever for new attorneys to focus on differentiating themselves from the pack.

In light of the fierce competition, what can new attorneys do to make a name for themselves and stand out from the crowd? Read below for some insightful tips from some seasoned practitioners in the field, based on commonly shared experiences.

Take Ownership/Initiative

Associates who take ownership of an assignment from the get-go will always stand out. This means understanding how the project at hand fits into the big picture of the case.

When you ask questions about the longer-term strategies the partners have in mind, you will likely end up with a better work product. Even if the assigning attorney does not have time to explain or give you more information than what you need to know to complete the one task, they will generally appreciate the fact that you asked and that you took ownership of the project.

Often times, ownership of a project does not end with one assignment. The research you conduct turns into the basis of a motion that you later are the one to argue; the meet and confer letter you draft leads to discovery responses you use in bigger projects. The examples are endless. In many instances, you can get on top of these things before the assigning attorney has to ask you to do so.

Taking the initiative from the beginning sets the best young attorneys apart from the rest.

Understand Your Own Limitations

While just about all attorneys are over-achievers to some extent, the pressure is especially intensified for new attorneys to say yes to every single assignment, task, request, or favor that is asked of them. A generous, can-do attitude is generally appreciated, and everyone wants to be seen as the go-to, reliable associate that rises about the rest. But nothing is more important than knowing when you physically cannot complete something that has been asked of you within the required time-frame

A failure to speak up honestly about this sets you up to disappoint your supervising attorneys, and to overwhelm yourself at best, while opening the door for blown deadlines and serious consequences in your cases (not to mention a firing offense and/or malpractice). Failing to communicate may seriously harm your client's interest.

While the situation in which you suddenly have too much on your plate cannot always be avoided, there are ways to try to prevent and manage it. Open communication is key.

For every single task that is asked of you, ask the assigning attorney for a completion deadline. This may seem futile in many occasions, as very often the response is "as soon as possible" or "as soon as you can get it done." But because calendars are always changing, it is essential to speak up about what else is on your plate. Often times supervising attorneys do not communicate with each other and may have no idea how much you are handling for someone else.

Treat Everyone with Professionalism

It seems only logical that younger associates should show an appropriate level of deference to partners and more senior associates, but respect and gratitude should be extended to both those who out-rank you and those who work under your direction. Also, do not assume you can disregard something an assigning attorney asks of you just because you are close to them in terms of "class rank." Do not assume you can complain

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or vent to someone just because they *are* of the same or lower "rank."

Courtesy should be shown in both good times and bad. Do not forget deference and professionalism are more important than ever when things go wrong. When mistakes are made, deadlines are missed, or clients are angry, it is your responsibility to step up to the plate.

Keep Perspective

Remember to practice gratitude. Each day, treat your job as a privilege (that can be taken away at any time). Inevitably, there will be times the grind gets the best of you and you may question why you ever went to law school in the first place. But remember that the opportunity to practice law is something you are lucky to have. When you exhibit this attitude toward every task you are given and toward every interaction you have with a coworker, client, or opposing counsel, you will stand out from the others and be the person with whom everyone wants to work.

Good Resources for Young Attorneys:

- SDCBA Forum for Emerging Lawyers *www.sdcba.org/index.cfm?pg=ForumforEmergingLawyers*
- ABA Young Lawyers Division *www.americanbar.org/groups/young_lawyers.html*
- California Young Lawyers Association *www.calbar.ca.gov/Attorneys/Sections/CYLA*

Emily Berman specializes in in the areas of personal injury, general liability, and civil litigation. Contact Emily at 858.459.4400 or *eberman@tysonmendes.com*.

Emily Berman

A Defense Attorney's Guide to Appeal Bonds

by Dan Huckabay

For defense attorneys, "bond" is a four-letter word in more ways than one when it comes to appeals, because appeal bonds only come into play when something didn't go right at the trial level. That being said, when the court gets something wrong and an appeal is necessary, it's extremely important to stay any enforcement of the erroneous judgment to protect the client's assets during the appeal.

What is an Appeal Bond?

Let's first take a look at what an appeal bond is and its function in the appellate process. CCP 917.1 states, "(a) Unless an undertaking is given, the perfecting of an appeal shall not stay enforcement of the judgment or order in the trial court if the judgment or order is for any of the following:

(1) Money or the payment of money, whether consisting of a special fund or not, and whether payable by the appellant or another party to the action.

(2) Costs awarded pursuant to Section 998 which otherwise would not have been awarded as costs pursuant to Section 1033.5.

(3) Costs awarded pursuant to Section 1141.21 which otherwise would not have been awarded as costs pursuant to Section 1033.5."

According to subsection (b) of CCP 917.1, "The undertaking shall be for double the amount of the judgment or order unless given by an admitted surety insurer in which event it shall be for one and one-half times the amount of the judgment or order."

Therefore, the main objective for the appeal bond (i.e. undertaking) is to maintain the status quo while the appeal is heard. The defendant protects their assets from being transferred to the plaintiff, and the plaintiff has security if the judgment is affirmed in whole or in part on the appeal. In the event the judgment is affirmed, the bond stands ready to pay the plaintiff if the judgment is not satisfied by the defendant within 30 days. There are other ways to stay enforcement (such as by depositing money directly with the court, or by a side agreement with the plaintiff to forgo enforcement, perhaps in return for some consideration), but appeal bonds are the most commonly used method for avoiding issuance of a writ of execution or lien on the defendant's assets.

Who provides Appeal Bonds?

Appeal bonds are issued by insurance companies, and as stated in 917.1(b), the surety insurer must be licensed and admitted in California.

Just about all insurers work through brokers. Appeal bonds are very niche part of the overall insurance industry. To put it in perspective, surety bonds as a whole are only 1% of the entire insurance industry, and appeal bonds represent 1% of the surety industry. As a result, it's important to work with a broker that specializes in appeal bonds.

What is Required to Obtain One?

While appeal bonds are issued by insurers and are technically an insurance product, for which the issuing surety charges a premium, it's important to understand that they function very differently from other types of insurance you may be familiar with, such as liability insurance against third party claims or property insurance against first party losses. They act and are underwritten much more like loans or other credit instruments and they benefit the judgment creditor instead of the appellant.

When surety insurers are trying to evaluate whether to provide an appeal bond and on what terms, they are looking to determine whether the appellant can and will satisfy the judgment if it is upheld. If so, the surety will never be called upon to satisfy the judgment itself. Since the surety insurer often has only a transactional interaction with the appellant rather than a long-standing relationship, they rely heavily on the financial wherewithal of the appellant in deciding whether to offer a bond at all.

The premium for the bond similarly depends on circumstances specific to the defendant: It may be a fraction of one percent of the bond amount for a very large, solvent company, or it may be several times higher for defendants who pose a greater risk. A broker who works with multiple sureties can shop around among sureties known to be interested in bonding the type of risk presented in particular cases (such as very small or very large judgments). In most cases, the premium is a recoverable cost on appeal if the defendant prevails.

If the appellant has an overwhelmingly large net worth and liquid assets relative to the bond amount required – as may be the case with publicly traded companies, financially strong private companies, high net worth individuals or municipalities – the surety may provide the bond based simply on the appellant's financial strength and an indemnity agreement. It's important to understand the relationship between the financial strength and bond size plays an important role, and even a very financially strong applicant may not qualify if the bond represents a good portion of their net worth.

Given the stringent requirements used by surety companies, most applicants for appeal bonds are required to post collateral.

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Currently, there are four main types of collateral that sureties will consider, which are cash, letters of credit from a bank, real estate, and marketable securities from non-retirement accounts.

Cash

When cash is used, it is simply wire transferred to the surety company, which makes cash one of the quickest and easiest forms of collateral to use. Some sureties offer interest on the cash deposits, but the rate is typically modest. One exclusive program available through the Commercial Surety Bond Agency provides interest that is high enough to cover the cost of the bond. As a result, the client doesn't have to pay a premium out of pocket.

Bank Letter of Credit

Letters of credit are provided by banks and simply state that the beneficiary, which is the surety insurer in this instance, can draw upon the letter of credit at any time. Generally, they are underwritten by banks just like a traditional loan. Banks sometimes charge a fee to issue a letter of credit; in that event, the fee is generally a recoverable cost on appeal, just like the premium paid to the surety.

The surety needs to approve of the bank, and each surety will have their own sample letter of credit wording that the bank needs to use. Once the bank is approved, which takes only a few hours, the timeframe for getting the letter of credit is really up to the client and the bank. Clients that have strong, established banking relationships can usually get a draft of the letter of credit within a week. Others that are starting from scratch may take anywhere from 2-4 weeks.

Sometimes banks will require collateral of their own to secure the letter of credit. If that's the case, we encourage the client to discuss it with us and evaluate whether another option may make more sense.

Real Estate

Real estate is probably one of the most important but least known forms of collateral available for use. This is because only a couple sureties in the market accept real estate as collateral for appeal bonds, and only a handful of brokers with the expertise to structure real estate transactions have access to those sureties. The types of property that can generally be considered are residential (single family and multiunit) and commercial (office and industrial). Sureties usually prefer properties with little to no debt, plenty of equity relative to the bond amount, located in good areas. They will consider using multiple properties if necessary.

When a client wants to go this route, we get some basic information on the property. The surety will review that information to determine whether there is enough equity in the property to cover the bond amount. If so, they will give a conditional approval, and from there, the surety will require appraisals and title policies, which the client will pay for. In certain limited circumstances, a surety may accept a property without an appraisal or with a recent appraisal provided by the client.

Due to the nature of real estate, the process can take anywhere from 14-60 days, but the average is in the 30-45 day range. Early planning is therefore important to make sure any temporary stay of enforcement issued by the trial court or agreed to by the plaintiff does not run out before a bond can be finalized.

Marketable Securities

There is one surety in the marketplace that will consider using a stock and or bond portfolio as collateral. It needs to be a nonretirement account, and the holdings must consist of investment grade U.S. securities.

When a client is interested in this option, they will need to provide a copy of the most recent brokerage statement so the surety can review the holdings and see if they have worked with the brokerage before. If so, it can help to reduce the timeframe significantly, which can vary from a 2-4 weeks.

What is the Process and How Long Does it Take?

For us, the first step is generally just a phone call consultation to get the basic case information like the judgment amount, potential bond amount, when the bond needs to be filed, and information on who the appellant is.

We can usually tell fairly quickly whether collateral will be required. If so, the next step is to understand what collateral the client has available and what their preferences are. We can then advise and narrow down the options based on the circumstances (particularly the timeframe in which the bond is needed). After that, we get copies of the court complaint, judgment and notice of appeal if it has been filed.

From there, we get a preliminary approval from the surety and agreement from the client on the premium and any other terms that the surety proposes. We can then start the process for getting the collateral and necessary documentation in place for the surety. The preliminary approval only takes a day or two, and the bulk of the time putting the bond together is related to the collateral, as outlined for each form above.

The average timeframe can range from 48 hours (mostly in cases with no collateral requirement or cash collateral) to 60 days (in the case of real estate).

What else should I know?

The number one thing we tell people when it comes to appeal bonds is it's never too early to start the process. Most people by nature don't want to waste others' time, and we often find that attorneys and their clients don't want to reach out until the judgment has been entered and they know for sure if they are going to appeal.

We encourage starting discussions as early as possible, often before a judgment is even entered, because what's at stake is significant (judgment creditors can freeze bank accounts as quickly as 24 hours after a judgement is entered). With a short phone conversation, we can get a preliminary idea as to how the bond can be structured and provide an estimate as to how long the bond will take to obtain. This can provide a huge head start on any initial legwork needed to get the bond in place in time.

When collateral is used to secure an appeal bond, different forms can be used in combination with one another (for example cash and real estate). Collateral can also sometimes be substituted. We've had instances where someone starts with cash due to need of getting the bond in place quickly and later substitutes it for another form of collateral like

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Appeal Bonds – continued from page 25

a letter of credit or real estate. It's important for the client to indicate their intention upfront when this is the case.

Last but not least, it's imperative to use a broker that is an expert in appeal bonds. Surety is similar to the law – there is a lot of technical expertise and specialization in certain areas. Appeal bonds are one of those areas. Brokers needs to know the requirements in each jurisdiction, what forms to use, have access to the right surety companies, and know how to get a bond and/or collateral released. With so much at stake for the client, it's incredibly important that they get the right advice to avoid making an already bad situation worse.

Dan Huckabay

Dan Huckabay is President of Commercial Surety Bond Agency (CSBA), a leading surety broker specializing in appeal bonds nationwide. He is a frequent presenter and author on the topic of appeal bonds. CSBA represents over 26 different surety companies and has exclusive programs tailored to assisting attorneys and clients obtain appeal bonds.

Fun with *Verdict* Magazine

Nick and Abby Brauns in front of the Palace of Justice in Rome. Nick is with Higgs Fletcher & Mack and is a member of ASCDC.

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) ***Parrish v. Latham & Watkins*** (2017) 3 Cal.5th 767. **It's a Win in the California Supreme Court!**

   The California Supreme Court held that plaintiffs' claims for malicious prosecution against a law firm and attorney were barred by the interim adverse judgment rule. The court declined to address whether the one-year statute of limitations (Code Civ. Proc., § 340.6) applies to claims for malicious prosecution brought against attorneys. Harry Chamberlain from Buchalter Nember submitted an amicus brief on the merits on behalf of ASCDC.

2) ***Vasilenko v. Grace Family Church*** (2017) __ Cal.5th __ [2017 WL 5243812]. **It's a Win in the California Supreme Court!**

   The California Supreme Court granted review to 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 Supreme Court held that the defendant does not owe such a duty. Mitch Tilner and Eric Boorstin and Lacey Estudillo from Horvitz & Levy submitted an amicus brief on the merits on behalf of ASCDC along with Don Willenburg of Gordon & Rees on behalf of the Association of Defense Counsel of Northern California and Nevada.

3) ***Jarman v. HCR Manorcare, Inc.*** (2017) 9 Cal.App.5th 807. **Cal Supreme Court Review of Unfavorable Opinion Granted!**

   Harry Chamberlain from Buchalter Nemer submitted an amicus letter on behalf of ASCDC in support of the defendant's petition for review, which was granted on June 28, 2017. The Court of Appeal had held that the plaintiff can seek punitive damages, despite an express Legislative intent to foreclose punitive damages. The opinion also allows serial recovery against nursing homes for violations of the resident rights statute, Health & Safety Code section 1430(b). The opinion expressly disagrees with two other recent Courts of Appeal published opinions, in which those courts decided that plaintiffs can recover only one award for up to $500. In this case, the court allowed a $95,500 recovery based on repeated violations of the same statute.

4) ***Beachcomber Management Crystal Cove, LLC v. Superior Court*** (2017) 13 Cal.App.5th 1105. **Publication of Favorable Opinion Granted!**

   The Court of Appeal held that trial court was required to determine whether managing member had access to same confidential information as law firm that had represented both managing member and LLC, such that law firm was not disqualified from representing managing member in derivative action. Allen Michel submitted the successful publication request on behalf of ASCDC.

5) ***Jacobs v. Coldwell Banker Residential Brokerage Co.*** (2017) 14 Cal.App.5th 438. **Publication of Favorable Opinion Granted!**

   The Court of Appeal held that the plaintiff could not oppose the defendant's motion for summary judgment based on a theory of liability that was not alleged in the complaint. The court held that the real estate broker did not owe a duty to the plaintiff to prevent the plaintiff from injuring himself in an empty swimming pool at a house being sold by the agent. J. Alan Warfield of Polsinelli submitted the successful publication request on behalf of ASCDC along with Don Willenburg of Gordon & Rees on behalf of the Association of Defense Counsel of Northern California and Nevada.

6) ***Nakai v. Friendship House Association of American Indians*** (2017) 15 Cal. App.5th 32. **Publication of Favorable Opinion Granted!**

   The Court of Appeal in San Francisco affirmed the granting of summary judgment in favor of the defendant in an employment case based on alleged marital status discrimination. Eric Schwettmann from Ballard Rosenberg submitted the successful request for publication along with Don Willenburg of Gordon & Rees on behalf of the Association of Defense Counsel of Northern California and Nevada.

7) ***Swigart v. Bruno*** (2017) 13 Cal.App.5th 529. **Publication of Favorable Opinion Granted!**

   The Court of Appeal held that the primary assumption of the risk doctrine barred the plaintiff's claim for negligence when plaintiff was injured during an endurance horseback riding event. Ben Shatz from Manatt Phelps submitted the successful publication request.

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8) ***Morales-Simental v. Genetech*** (Sept. 22, 2017) __ Cal.App.5th __ [2017 WL 4700383]. **Publication of Favorable Opinion Granted!**

In a "going and coming" case, the Court of Appeal affirmed the granting of the defendant's motion for summary judgment. The court held that the plaintiff did not create a triable issue of fact regarding whether the defendant's employee was on a "special errand" to invoke that exception to the "going and coming" rule. Ben Shatz from Manatt Phelps & Phillips submitted the successful request for publication with Don Willenburg of Gordon & Rees on behalf of the Association of Defense Counsel of Northern California and Nevada.

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) ***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.

2) ***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.

3. McMillin Albany v. Superior Court (2015), review granted Nov. 25, 2015 (case no. S229762).

The California Supreme Court granted review to address this issue: 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?

Glenn Barger from Chapman Glusker submitted an amicus brief on the

Amicus Committee Report – continued from page 29

merits joined by Jill Lifter from Ryan & Lifter on behalf of the Association of Defense Counsel of Northern California and Nevada. The case was argued on November 7, 2017 and an opinion is expected within 90 days.

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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Ford, Walker, Haggerty & Behar
- *Barraza v. HOF & Yates Repar, Inc.*

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Stephen C. Pasarow
Knap, Petersen & Clarke
- *Radich v. Foster*

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Hester Law Group, APC
- *Haroutunyan v. Hollywood Presbyterian Medical Center, et al.*

Terry A. Rowland
Demler, Armstrong & Rowland, LLP
- *Green v. JPI, LLC*

Terrence J. Schafer
Doyle Schafer McMahon, LLP
- *Selindh v. Shigeru Chino, M.D*
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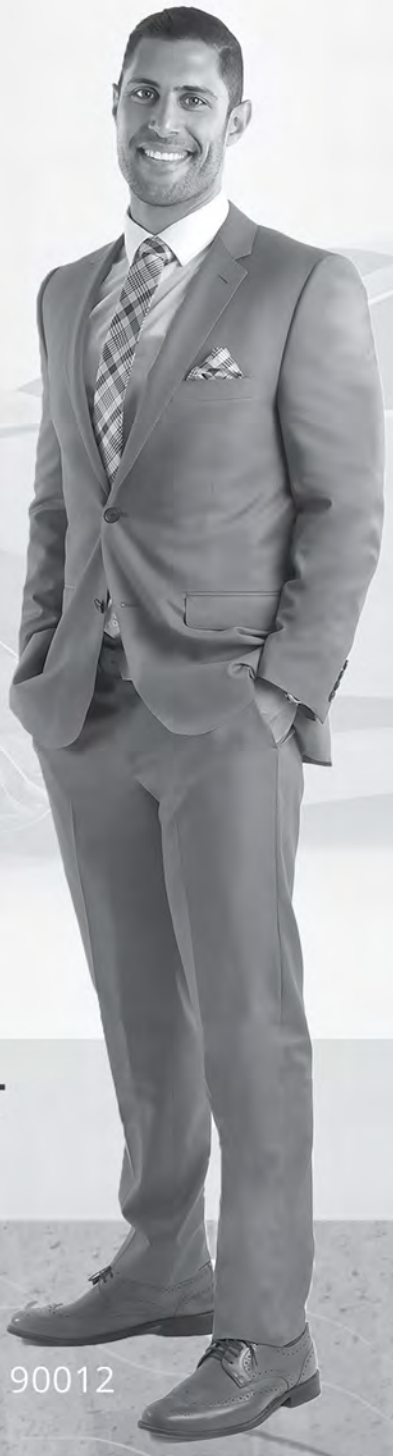

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