A·D·C VERITAS

DEFENSE COMMENT

Volume 39 #2
Summer, 2024

Association of Defense Counsel of Northern California and Nevada ■ *Serving the Civil Defense Bar Since 1959*

Trial Tales:

The Horses, the Doctor, and the Reptile

— page 5

MEDIATOR

Mitchell M. Tarighati, Esq.

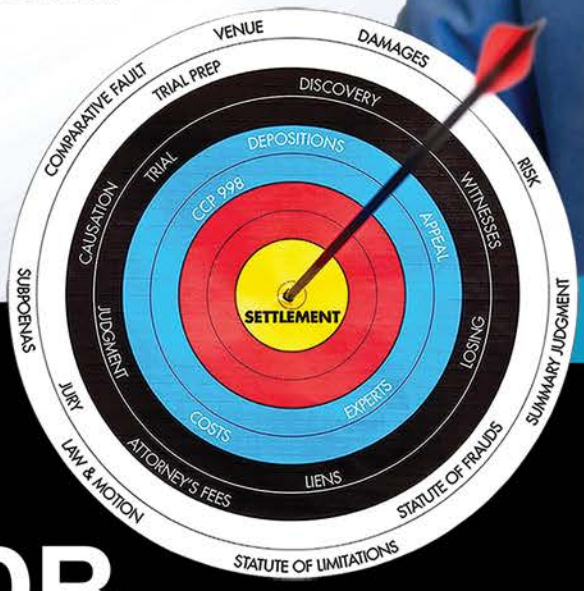
AVAILABLE STATEWIDE

Personal Injury

- Catastrophic Injuries
- Wrongful Death
- Vehicles & Motorcycles
- Rideshare & Gig Economy
- Transportation
- Premises Liability
- Habitability
- Public Entities
- School Liability

Employment

- Wrongful Termination
- Discrimination
- Harassment
- Retaliation



"I strive to be the voice of reason."

- Reputation for being a "Closer"
- Expertise in online dispute resolution
- Highly endorsed by plaintiff & defense attorneys
- Trusted by insurance & claims professionals
- Known for his accessibility & thorough follow-ups

ADR℠ SERVICES, INC.

(310) 201-0010

www.MitchTarighati.com

STAFF

CO-EDITORS-IN-CHIEF
Matthew Constantino George A. Otstott

ASSOCIATE EDITORS
Heather Barnes Tyler Paetkau
Alison Kertis Brittany Rupley Haefele
Jeffrey Long Xenia Tashlitsky
Crystal L. Van Der Putten

EDITORIAL / ART DIRECTION
John Berkowitz

CONTRIBUTORS
Michael D. Belote Xenia Tashlitsky
David E. Hackett Edward P. Tugade
David A. Levy Crystal L. Van Der Putten
Nicholas H. Rasmussen Jonathan Varnica
Katrina Rusinas James V. Weixel
Michon M. Spinelli Yakov P. Wiegmann
Don Willenburg

ADC HEADQUARTERS OFFICE
2520 Venture Oaks Way, Suite 150
Sacramento, CA 95833
(916) 239-4060 / Fax: (916) 924-7323
E-mail: *info@adcnc.org*
www.adcncn.org

ADC HEADQUARTERS STAFF

EXECUTIVE DIRECTOR
Jennifer Blevins, CMP
jennifer@camgmt.com

John Berkowitz
Publications Director / Graphic Design
john@camgmt.com

Michael Cochran
Webmaster / IT Manager
michael@camgmt.com

Kelly Hoskins
Advertising
kelly@camgmt.com

Kim Oreno
Membership / Education
kim@camgmt.com

Stephanie Schoen
Special Projects
stephanie@camgmt.com

Tricia Schrum, CPA
Accountant / Controller
tricia@camgmt.com

The price of subscription is included in the membership dues. All other subscriptions are $100.00 per year.

A·D·C VERITAS

DEFENSE COMMENT

FEATURES

DEPARTMENTS

DEFENSE COMMENT would be pleased to consider publishing articles from ADC members and friends. Please send all manuscripts and/or suggestions for article topics to:

- **George A. Otstott**, Demler, Armstrong & Rowland, 101 Montgomery Street, Suite 1800, San Francisco, CA 94104. Phone: (415) 949-1900; Fax: (415) 354-8380; E-mail: *ots@darlaw.com,* and
- **Matt Constantino**, Clapp Moroney Vucinich Beeman Scheley, 5860 Owens Drive, Suite 410, Pleasanton, CA 94588. Phone: (925) 734-0990; Fax: (925) 925-0888; E-mail: *mconstantino@clappmoroney.com.*

PRESIDENT'S MESSAGE

EDWARD P. TUGADE
2024 President

The State of the ADC

The state of the ADC is strong. Thanks to the hard work of your Board of Directors and its mission to support and promote our members, this 65th year of the Association of Defense Counsel of Northern California and Nevada ("ADC") has already lived up to its expectations in many ways. Our collective goal from the very beginning of the year was for our members to come away with new perspectives, fresh ideas, and a renewed connection with our fellow practitioners, and embrace myriad opportunities to make lasting memories with colleagues and friends. I am pleased to report that we remain well on target to meeting our goal.

We kicked off the year by electing our 2024 ADC Officers and Board of Directors, each of whom immediately commenced their hard work for you. Thanks to their efforts, the ADC continues to provide top-notch, unparalleled educational seminars and insight from dynamic speakers addressing the myriad of important issues defense attorneys face on a regular basis, as well as avenues to explore emerging appellate, legislative, and cutting-edge topics affecting California and Nevada defense practitioners: all hot topics of equal interest to our newest members of the Bar and to the most seasoned trial and appellate specialists who defend a variety of civil lawsuits.

We look forward to the 2024 Summer Session at the picturesque Everline Resort & Spa in Lake Tahoe on August 2 and 3, 2024. This is a "Do Not Miss" opportunity.

The ever-popular Do's and Don'ts Seminar and Judicial Reception at the Sutter Club in Sacramento has now become a well-known tradition of the ADC. As always, luminaries of the judiciary shared with us their stories and experiences from the bench, including invaluable practice pointers for each of us to employ and succeed in court. Thank you to Honorable Bunmi Awoniyi and Honorable Steven Gevercer for presenting the State of the Sacramento County Superior Court; Honorable Awaniyi for speaking on trial statistics; Honorable Gevercer for discussing the implementation of electronic filing and rebuilding our civil division capacity with new appointments; and Honorable Kronlund, Honorable Sueyoshi, and Honorable Hirashima for presenting on Law & Motion. Honorable Kronlund also addressed the topic of Settlement Conferences and provided our younger lawyers with some tips in that regard. To top everything off, and thanks to the tenacious efforts of Mr. Mike Belote, this year's event included a special guest at the Judicial Reception, Lieutenant Governor, Eleni Kounalakis, former U.S. Ambassador of Hungary and the first woman elected Lieutenant Governor of California.

We followed the successful judicial program with a variety of member engagement events, including the first-ever Spring Mixer held in Pleasanton, California, where members and their guests had the opportunity to mingle and win fantastic prizes. The ADC's Membership Committee also produced the Inaugural Top Golf Event in Roseville, California, a smash hit resulting in rave reviews by the great number of members and non-members in attendance. The ADC is also excited to announce yet another get-together on September 19, 2024. Thanks to the efforts of Membership Committee Vice-Chair, Jeffery C. Long, Esq., we look forward to seeing everyone at the ballpark in Sacramento as the hometown River Cats take on

Continued on page 35

CALIFORNIA DEFENSE COUNSEL REPORT

MICHAEL D. BELOTE
California Advocates, Inc.

2024 Shaping Up As a Big Year

2024 may be just over half-complete according to the calendar, but in Sacramento "legislative time" the year is much further along. As of this writing, only 21 legislative days remain for 2024, the second year of the current 2023-2024 two-year legislative session. Under the state constitution, in even-numbered years such as this one, the two-year session must adjourn by midnight, August 31. And you don't have to be too old to remember times when the legislature literally would stop the clock at 11:59 p.m. to continue working on bills. Now, with the advent of cell phones, time-stamps and the like, the midnight deadline is observed precisely.

While much can still change in 21 days, at this point the year is shaping up to be quite consequential for defense lawyers. The biggest news, not only for ADC lawyers specializing in employment, but for ADC members as employers, is PAGA reform. Much has and will be written about the nature and impact of SB 92 (Umberg), but the short story is this: fed up with legislative inaction on PAGA abuses, a coalition of large organizations, including the CalChamber, new car dealers, restaurants and others, qualified an initiative by successfully gathering signatures for the November ballot. Investing millions of dollars in the effort, the very far-reaching language would have basically taken the "P" off of PAGA, essentially returning enforcement of the Labor Code to the state labor agency.

Because California's initiative laws were changed some years ago to allow proponents to remove items from the ballot, even *after* qualifying the proposals, if the proponents believe that the legislature has acted to fix the problem, several intense months of negotiations ensued over PAGA. Of course, both sides have an incentive to "come to a deal" to avoid spending potentially tens of millions on an uncertain ballot result. And the legislature absolutely *loves* it when two powerful sides of a contentious issue walk into the Capitol and announce that they have an agreement. By the way, this is exactly what happened two years ago on the issue of MICRA reform.

The primary negotiators on the PAGA issue were the CalChamber and the California Labor Federation, and SB 92 was the result. Governor Newsom signed the bill on July 1, which took effect immediately upon his signature. That day was pretty much the last possible day to remove initiatives from the ballot. This sort of brinksmanship, white smoke/black smoke, last-minute action is becoming increasingly accepted, as organizations make political calculations about investing in initiatives to force action on longstanding issues. PAGA certainly will not be the last time this strategy is employed by well-heeled groups.

The text of SB 92 is available through the ADC website. While the compromise did not remove the P from PAGA, the reforms are nonetheless extremely significant. And remember, the law is in effect *now.*

Still to come before the end of session is the outcome of AB 2049 (Pacheco), relating to summary judgment timelines. Co-sponsored by the California Defense Counsel, along with the California Judges Association and the Conference of California Bar Associations, AB 2049 proposes to add 6 calendar days to each of the three major deadlines. The deadline to notice an MSJ would change from 75 days prior to the hearing to 81, oppositions would be due 20 days prior to the hearing instead of 14, and replies would move from 5 to 11 days prior. The objective is to make summary judgment more effective by giving judges more time to thoughtfully review the papers, an objective long sought by the bench.

Continued on page 36

TRIAL TALES: The Horses, the Doctor, and the Reptile

David A. Levy

David Levy is a semi-retired trial attorney, who tried nearly 50 jury trials, primarily in medical malpractice, police cases and motor vehicle cases. He currently does some ADR and hearing officer work and is a former member of the ADC Board of Directors, and past Editor-in-Chief of ADC *Defense Comment*. This is a true story of his last jury trial, in 2016, with only the names of witnesses and parties changed.

This was a hard-fought trial, against two attorneys from one of the top plaintiffs' firms in San Francisco. There were a number of interesting – and instructive (at least, to me) – things that occurred. It is also hard to believe that this case happened on Interstate-280 on the Peninsula, as opposed to I-5 or Highway 99 in the Central Valley.

FOUR ESCAPED HORSES

Around 4:30 am in mid-December, one of the shortest days of the year, four horses escaped from Q Ranch Stables in Portola Valley, not far from Stanford University. The outer gate was unlocked, although no one could figure out whether it had been left unlatched or someone had unlatched it. A citizen saw the horses walking together on a surface street and called 9-1-1. San Mateo County Deputy Sheriff Louis Grant was dispatched to where the horses were last seen, but by the time he arrived, they were no longer there. Deputy Grant had graduated from the Police Academy six months earlier and worked with a Field Training Officer to prepare him to be able to patrol on his own. He passed the training just a week before this incident. Since this was near the end of the shift, he decided to return to the main office in Redwood City and took the onramp onto I-280. Little did he know what awaited him....

A few minutes before, the horses were walking along the center lanes of Highway 280. It was pitch black, and there are no lights anywhere along this 4-lane freeway. It was well before the commute hour, so traffic was very light, generally one car every minute or two. An unsuspecting motorist, Jones, never saw them and struck three of the horses. Two of the horses fell on the spot, primarily in the #2 lane,

Continued on page 6

while a third horse took several steps, and died in the #4 lane, partially occupying the shoulder. The fourth horse was miraculously unharmed but was pacing off the shoulder of the highway. Jones' auto was badly damaged (not too surprising when you collide with objects weighing nearly two tons) and he sustained some relatively minor injuries; however, he was able to drive his car off the shoulder near the three downed animals.

Another car was coincidentally behind Jones, and the driver, King, followed Jones off the highway. King had the presence of mind to maneuver his vehicle perpendicular to the horses and shine his headlights on the two horses in the #2 lane. The headlights did not dramatically spotlight the horses, but provided a bit of potential notice to other drivers who might happen onto the scene. King called 9-1-1 at about 4:55 am to report the horses, as well as Jones' accident.

Fortuitously, two women were walking in the area, when they heard the noise and screams of horses on the freeway, and climbed up a small hill to the shoulder, where they encountered the fourth horse. He was clearly upset (unsurprisingly, given that three of his brethren were struck down in his presence, and were in the throes of dying). The women tried to grab the horse, to prevent him from running into the roadway, but it was not that easy: the horses had been stabled the evening before and had no reins or bridle. Corralling that large horse without anything to grab onto was essentially impossible. They were about 500 feet from the downed horses.

DEPUTY GRANT ARRIVES AT THE SCENE

Almost immediately after entering the freeway, Deputy Grant, alone in the patrol car, noticed the women attempting to secure the fourth horse, but could not see further up the highway to the carnage ahead. He called into dispatch, which had just received the call from King, and pulled his car onto the shoulder, in the vicinity of the women and the fourth horse. According to the CAD, Deputy Grant arrived on the scene at 4:59:59. He did the

following: activated the flashing lights on his patrol car, attempted to help the women with the fourth horse, to no avail, received the information from the women about the downed horses ahead (which he started to be able to visualize), then returned to the car, assessed the best way to direct traffic, activated the directional arrows on the light bar above the roof to encourage traffic to move to the left (towards the #1 lane and center median), rather than between the two downed horses in the #2 lane and the single downed horse in the #4 lane, which also encroached into the right shoulder. Deputy Grant then popped the trunk of the patrol car and grabbed three emergency flares. He lit and placed one between lanes #2 and 3, walked about 20 yards forward, lit and placed a second flare in the #3 lane (he had to move back as another car approached, and waved his flashlight up and down to help get that driver's attention, and slow him down), then placed a third flare another 20 yards ahead, slightly to the left of the prior flare, to guide motorists towards the left of the downed horses in the #2 lane. The plaintiff's Mercedes then came quickly towards him.

PLAINTIFF DR. JESSICA MASON

Dr. Mason was a 61-year-old vascular surgeon and was driving from her home to the hospital to perform an appendectomy, which she described as a "non-emergency." She said she was driving below the posted speed limit of 55 mph, and she saw some flares and a patrol car on the side of the road, but did not see Deputy Grant, nor saw him wave his flashlight. She thought the flares directed her to drive in the #2 lane, so she moved into that lane, and did not slow down. She never saw the two downed horses before striking them. Her car went airborne, and landed on the roadway, then she blacked out briefly, coming to after her car knocked down a cyclone fence about 20 feet east of the highway shoulder, coming to rest another 40-50 feet east of the fence. She was in tremendous pain (she suffered L-5 and L-6 fractures). Deputy Grant called in her crash to Dispatch; according to the CAD that was at 5:03:00 am. In other words, Dr. Mason passed by Deputy Grant less than three minutes after he arrived on the scene.

PRE-TRIAL MANEUVERS

Initially plaintiff sued only the Q Ranch. The parties took the depositions of King and Jones, almost every first responder, plaintiff and Ranch personnel. Suddenly, counsel for the Ranch decided to take the deposition of Deputy Grant and subpoenaed him. I was asked to look at the case by the Sheriff's Office to see whether he should be represented during deposition, or whether he could simply sit for deposition by himself. It took me about 5 seconds to see that he needed representation. I contacted the Ranch's defense attorney, and asked to reset the deposition, inasmuch as I was going to be representing him during the deposition, and it was the day before my daughter was getting married out of town. Somewhat unbelievably, the defense counsel refused, saying he needed this testimony, and didn't want to have to re-serve the deposition subpoena (without explaining why he

Continued on page 7

waited about six months after suit was filed and 10 other depositions were taken). I told him that reason was not more valid than my daughter's wedding, that I would find a mutually convenient date within a couple of weeks, and that if he insisted on another deposition subpoena, I would accept service on behalf of the Deputy. Well, that wasn't good enough for him, so he made a motion to compel the deposition, and sought sanctions. The Law and Motion Judge was not amused, did not award sanctions, and because of this needless motion to compel, he ended up taking the Deputy's deposition about a month later than he would have had he simply agreed to a new date.

Deputy Grant outlined all the steps he took in that three-minute period, but counsel for the Ranch as well as plaintiff's attorney kept asking him about his placement of the flares, and why he directed plaintiff into the downed horses in the #2 lane (which he had not). He kept his cool, and despite his youth (and never having given a deposition or been involved in any litigation) was a good witness. It seemed as if both opposing counsel were angling to bring in the County as a defendant, and deliberately waited until everyone else had testified, perhaps catching the County under-prepared.

The Ranch then filed a government tort claim, seeking indemnity from possible liability and damages that might be rendered against it. And a couple days later, plaintiff's counsel filed a government claim, seeking to add the County as a Doe defendant. Both attorneys were falling over themselves, apologizing that they really didn't have any choice, the Ranch because it only had a $4 million liability insurance policy, and plaintiff because if the Ranch sued, plaintiff needed to do so as well.

As soon as a trial date was set, the Ranch and plaintiff agreed to settle for the Ranch's policy limits. The Ranch made a motion to confirm a good faith settlement, but I did not object. It would probably have been granted, and honestly, I figured that trying this case would be a lot cleaner if the Ranch was an empty chair, rather than its attorney helping plaintiff to impose some degree of fault on my client.

Settlement was not likely, unless we were willing to pay about $10 million (more than double what the Ranch had paid – the County's pockets were obviously deeper). We viewed this as a very defensible case. On to trial….

JURY SELECTION

I have always felt least confident in my ability to choose a jury; I have by and large been fortunate, as most of my clients got good results. But there was a twist: our trial judge insisted on "mini-opening statements." These were authorized by CCP section 225(d) approximately 15 years ago. I had heard about them at an annual meeting, but really didn't know much about them, or how best to actually utilize them. Rather than craft a Pre-Voir Dire Statement, the trial judge gave us each 5-10 minutes to give our own "mini opening" to give the proposed jurors our view of the issues. I was pretty skeptical, having no experience with it, and armed with my long-standing belief that opening statements were generally more beneficial to plaintiffs' counsel, who could predispose a jury before the first witness was called. However, I think I was able to turn that proposition on its head in this case.

Plaintiff's mini opening lasted eight minutes, and was filled with colorful prose about the terrible danger that Deputy Grant created, how he lured Dr. Mason into driving straight into the downed horses, all the injuries which resulted from his carelessness, and the millions of dollars she would lose from being unable to perform vascular surgeries. I spoke briefly, described the pitch-black scene that Deputy Grant encountered, and all the actions he took to try to assist the women in corralling the live horse, lighting up the patrol car, walking to get flares, lighting three of them, setting them out 50-60 feet apart, avoiding oncoming traffic, and using his flashlight to try and slow down motorists, until plaintiff zoomed by him and drove into the horses. And then, I said, "Oh, I forgot to mention he did all this within three minutes, which is less than half the time that the other lawyer just spoke to you." I don't think the prospective jurors audibly gasped, but the impact of all he had to do, in such a short time, was not lost on any of them. From that moment on, I knew it would be a tough trial, but I felt that we had a bit of a prevailing tailwind.

TRIAL TACTICS

Most of the trial (14 days) proceeded as one would expect. Plaintiff's attorneys called some of the percipient witnesses, reveled in damages witnesses, who described her spinal fractures, and blackboarded millions of dollars in lost wages, health attendants, future surgeries, etc. They called a standard of care expert, retired CHP officer Thompson, who criticized Deputy Grant, saying he had more time

Continued on page 8

to lay flares, and should have laid a clearer path for Dr. Mason. That was a tactical error, because I cross-examined him on his "reconstruction," of which he did not testify about on direct. It was really misleading, and frankly, made him look devious, and a little foolish.

Thompson had set up a video camera on a deserted private road, high in the Marin hills, during broad daylight. The video showed him driving and parking his car. He then walked directly to his trunk, took out five flares, pretended to light them, and placed cones where he would have dropped the flares. And then he showed he could have done that in – voila – 90 seconds, and it would have (in his opinion) outlined a much clearer path, and undoubtedly, Dr. Mason would have slowed down, and driven around the downed horses, rather than crashing into them. So, I introduced the video and showed it to the jury, and had the following colloquy:

Q. This was a deserted two-lane dirt road, correct?

A. Yes.

Q. It was not a four-lane interstate highway, was it?

A. No.

Q. And you did this demonstration during mid-day?

A. Yes.

Q. And this video accurately depicts how bright and sunny it was?

A. Yes.

Q. Great visibility, correct?

A. Yes.

Q. There was no horse pacing along the edge of the road, was there?

A. No.

Q. And you did not demonstrate how Deputy Grant attempted to assist the ladies with that horse, did you?

A. No.

Q. Nor did you activate the flashing lights on the patrol car?

A. No.

Q. Nor did you activate directional arrows on the lightbar, did you?

A. No.

Q. There were no motorists traveling by you while you were placing the flares?

A. No.

Q. And you were not using your flashlight to alert those motorists to slow down, did you?

A. No.

Q. No further questions.

I sat down; the entire cross-examination, including introducing the video into evidence, took about five minutes.

Both sides had accident reconstructionists, but surprisingly, they couldn't shed much light on the speed of the Mercedes at the moment of impact. They both thought she struck the horses at approximately 50 mph but couldn't do any better than that. There are no real studies about cars crashing into horses or other large creatures, much less going airborne, then making a sharp right turn, and traveling over several lanes of blacktop, over the shoulder, through a metal fence, and then another 50 feet or so over a dirt field.

DEFANGING THE REPTILE

Lieutenant Ken Wilson was designated as the Sheriff's PMQ. Prior to deposition, I reviewed with him the factual issues and relevant departmental policies, but of equal importance I schooled him on the Reptile Theory, that is, plaintiff's attempt to make it appear that defendant does not provide adequate attention to safety of the public. In the deposition, plaintiff's counsel paid only scant attention to the idea that the Sheriff's Policies and Procedures did amply train its personnel to make public safety a paramount goal. At trial plaintiff's attorney focused on painting the departmental training and policies as being insufficiently designed to protect the public. He made no headway; Lieutenant Wilson was well prepared for this line of questioning, and effectively defended Deputy Grant, testifying that what he did under very trying circumstances balanced the need to protect the other civilians on the scene, other motorists, the live horse, and the Deputy himself. For example, when asked whether improperly placing flares and luring plaintiff into the path of the downed horses was an acceptable safety policy, the Lieutenant told the jury that the placement of flares in the pitch darkness was designed to catch the attention of motorists, that that alone should have suggested to Dr. Mason to slow down, and that in conjunction with all the other steps Deputy Grant took (flashing patrol lights, directional arrows on the patrol car light bar, utilizing his flashlight) were designed to slow her down and make her safer, but she apparently chose to ignore them. The reptile was de-clawed, and it was a strong moment for the defense.

CLOSING ARGUMENTS

As noted above, the trial lasted nearly three weeks. Plaintiff's counsel did a good job in arguing his case, pointing out some ambiguities, and blackboarded millions of dollars in economic damages (claimed wage loss, home health care and past and future medicals). He suggested that Q Ranch was only minimally responsible because the situation had stabilized (no pun intended) by the time that Deputy Grant arrived on scene and took the actions he did. He claimed that plaintiff was not comparatively negligent, and if she was, it was less than 10%.

It was my turn for closing argument, and I made a strategic decision to barely talk about damages. It's always a risk for

Continued on page 9

defense counsel to avoid the topic, because if the jury decides to award damages, no lower, more reasonable number has been suggested. But I was in a bit of a procedural bind; Proposition 51, entitled the "Fair Responsibility Act," codified in Civil Code section 1431.2, provided that a defendant who was found even 1% liable to plaintiff could be responsible for 100% of the economic damages, less any comparative negligence on the part of plaintiff (but only responsible for its percentage of negligence for non-economic damages). So, for example, if a jury awarded $20 million in economic damages, and $5 million in non-economic damages, and if the jury found plaintiff 50% responsible, the County 10% responsible, and Q Ranch 40% responsible, the County would be liable for *$7.3 million.* The settlement conference judge made it clear that plaintiff would not take less than $5 million to settle the case, which wasn't that much better than the above hypothetical verdict. Rather than trying to attack every exaggeration, or quibble over every element of damages, I decided to simply focus on liability.

The themes of the closing argument were (1) that plaintiff herself caused the accident due to her inattention, and (2) that Deputy Grant was not negligent, further buttressed by the ancient Doctrine of Imminent Peril. Simply put, if a defendant finds himself in a sudden emergent situation, in which someone was in actual or apparent danger of immediate injury, and the defendant did not cause the emergency, he is not negligent, so long as he acted as a reasonable person would have acted under similar circumstances, even if it later appeared that a different course of action might have been safer. In other words, Deputy Grant was held to the standard of reasonableness at 5:00 am on a pitch-black highway, not the broad daylight on a deserted private road scenario posited by plaintiff's expert Thompson.

As to plaintiff's own conduct as the cause of the accident, I put a red tape flag on every place on the large scene diagram where there was a flare, Officer Grant, the patrol car with the flashing arrows and flashing lights, the King auto with the headlights trained on the downed horses, and asked, "Why did Dr. Mason choose to ignore all these signs and maintain her freeway speed?" Her refusal to pay any attention to these multiple warnings was the cause of her injuries.

VERDICT

The jury took 30 minutes to reach a defense verdict. Instead of taking the $4 million settlement from the Ranch, plaintiff and her counsel spent another $500,000, plus at least 800 attorney hours in trial preparation, and the trial itself.

The main takeaways for me:

- When parties want to depose a non-party witness, such as Deputy Grant here, there should be a presumption that he needs representation at the deposition, and should be well schooled on the applicable facts, law and Reptile Theory;
- Get good experts early on a case of this magnitude. Too many attorneys try to delay retaining an expert to save a few dollars. Spend the time and money, rather than being penny-wise and pound-foolish;
- Look into mini-opening statements for voir dire. I truly believe that in this case we started out with a jury with healthy skepticism of plaintiff's case, despite her serious injuries and very large damages on the blackboard, due to an effective mini-opening statement. And the code gives every attorney the right to request it, not just rely on the trial judge to put it into play;
- The Reptile Theory can be a potential game-changer for plaintiffs, but if defense counsel and their witnesses are prepared to take it on, prior to deposition, as well as prior to trial testimony, much of the effect can be blunted;
- Keep cross-examination short and to the point, and don't spend extraneous time on direct, either. Jurors' attention, especially during a multi-week trial, is more likely to be focused on your key messaging.

I hope you have the opportunity to enjoy jury trials as much as I have over the years.

ENDNOTES

1 Computer Assisted Dispatch. The Emergency Call Center personnel receive 9-1-1 calls and type a brief summary of the call. The description is sent to all first responders in the jurisdiction and each entry is time stamped – to the nearest second. The call from King reporting the downed horses was received at 4:54 am, but not yet typed and entered when Deputy Grant arrived on the scene.

2 Not the two Good Samaritan women, who left before being identified, and were never located.

3 Obviously not a member of ADCNCN.

4 Fortunately, I was an experienced defense attorney. Otherwise, the downpour of crocodile tears shed by each of them might have drowned me.

5 Thank you, Mike Belote.

6 He couldn't just drop lighted flares, as it was bright and sunny out, and no one could have seen the flames….

7 In Professor Irving Younger's *Ten Commandments of Cross-Examination*, the most important is "Sit Down!" As in, "Don't do a lengthy cross; make your point(s), and stop."

8 The calculations: Economic damages of $20M, less $10M (50% comparative negligence on plaintiff), less another $3.2M attributable to Q Ranch (its $4M settlement would be broken down in the same proportion of economic v. non-economic damages rendered by the jury, that is 80% of settlement = $3.2M in economic damages and $800,000 in non-economic damages) means net responsibility to the county of **$6.8M** for economic damages, plus 10% of the non-economic damages of $5M = **$500,000**, or total financial responsibility of **$7,300,000**. You would be surprised how many judges, attorneys and mediators do not understand how to do these calculations, but of course, they are not members of ADCNCN….

9 The jury instruction is CACI 452, also referred to as a "Sudden Emergency," although "Imminent Peril" sounds more dramatic. And this was not the first case where I invoked this doctrine; my other case was tried in 1990. In both cases, I requested and received the jury instruction, and received a defense verdict.

Hodson P.I.
Investigative Solutions

WE DELIVER SWIFT, ACCURATE **INVESTIGATIONS** TAILORED FOR **INSURANCE DEFENSE** IN **NORTHERN CALIFORNIA**

SURVEILLANCE
BACKGROUND CHECKS
FRAUD INVESTIGAGIONS
COURT READY CAPTURE™

SCAN HERE FOR YOUR **FREE HODSON INVESTI-GATOR**

www.HodsonPI.com

714 646 4545

CA PI 23796

Right Time, Wrong Place:
Can a Subcontractor Equitably Toll the Miller Act Statute of Limitations after Suing in the Wrong Court?

Xenia Tashlitsky Fennemore

The construction industry is notorious for payment disputes between general contractors and their lower-tier subcontractors and suppliers. One of the strongest weapons for an underpaid subcontractor or supplier on a federal project is a Miller Act payment bond claim. Such a claim has one major caveat: it is subject to the exclusive jurisdiction of the federal courts. This creates a trap for unwary plaintiffs who mistakenly sue in state court and do not realize their error until the statute of limitations has run. Can such a plaintiff successfully argue that the one-year statute of limitations on Miller Act claims should be extended based on equitable tolling or equitable estoppel?

THE MILLER ACT

The Miller Act's purpose is "to protect persons supplying materials and labor for federal projects." *United States ex rel. Martin Steel Constructors, Inc. v. Avanti Constructors, Inc.*, 750 F.2d 759, 761 (9th Cir. 1984). As explained in guidance from the U.S. General Services Administration, the Miller Act, 40 U.S.C. § 3131 *et seq.*, requires prime contractors for the construction, alteration, or repair of federal buildings in excess of $100,000 to furnish a payment bond as security for the payment of lower-tier parties. Failure by a contractor to pay its subcontractors and suppliers gives them the right to sue the contractor in U.S. District Court for the unpaid amount at least 90 days after, but no later than one year after, the last labor was furnished or materials supplied. A federal subcontractor that sues directly on the subcontract can do so in state court. *U.S. for Use & Benefit of M. G. M. Const. Co. v. Aetna Cas. & Sur. Co.*, 38 F.R.D. 418, 420 (N.D. Cal. 1965) (citing *Voelz v. Milgram Contracting Co.*, 272 Wis. 366, 75 N.W.2d 305 (1956)). However, if the federal subcontractor wishes to sue on the bond or against the surety, it must submit to the exclusive jurisdiction of the federal courts under the Miller Act. *M. G. M. Const.*, 38 F.R.D. at 420 (citing *Blanchard v. Terry & Wright, Inc.*, 331 F.2d 467 (6th Cir. 1964)). The obligation of a surety on a Miller Act bond "must be determined by federal law." *United States ex rel. IBM v. Hartford Fire Ins. Co.*, 112 F. Supp. 2d 1023, 1030 (D. Haw. 2000) (quoting *American Auto Insurance Co. v. United States ex rel. Luce*, 269 F.2d 406, 408 (1st Cir. 1959)).

PRIME FACIE CASE

To establish a prima facie case under the Miller Act, a subcontractor or supplier must show that: (1) the labor or materials were supplied in the prosecution of work under the contract; (2) the subcontractor or supplier has not been paid; (3) the subcontractor or supplier has a good faith belief that the labor or materials were intended for such work; and (4) the jurisdictional requisites have been met. *United States ex rel. Martin Steel Constructors, Inc. v. Avanti Constructors, Inc.*, 750 F.2d 759, 761 (9th Cir. 1984).

The jurisdictional requirement refers to the statute's time limitations on notice and filing. *See United States ex rel. Hawaiian Rock Prods. Corp. v. A.E. Lopez Enters.*, 74 F.3d 972, 975 (9th Cir. 1996) (finding Miller Act jurisdictional requirements met by timely notice and filing). The case must be brought in federal court "no later than one year after the day on which the last of the labor was performed or material was supplied by the person bringing the action." 40 U.S.C. § 3133(b)(4). Filing in state court does not meet this requirement.

EQUITABLE TOLLING

Resolving a previous intra-circuit split, the Ninth Circuit held that "the Miller Act's statute of limitations is a claim-processing rule, not a jurisdictional requirement." *U.S. ex rel. Air Control Techs., Inc. v. Pre Con Indus., Inc.*, 720 F.3d 1174, 1178 (9th Cir. 2013). As a result, a complaint cannot be dismissed on a Rule 12(b)(6) motion on the grounds that the Miller Act statute of limitations has run unless this fact is apparent on the face of the complaint. *Id.* Thus, it is theoretically possible for a subcontractor or supplier who misses the Miller Act statute of limitations to avoid dismissal on a theory of equitable tolling or equitable estoppel. However, based on several subsequent unpublished cases, the subcontractor or supplier will face an uphill battle – particularly if nothing the general contractor said or did caused it to miss the statute of limitations.

AJ Acosta Co., Inc. v. Allstate Eng'g addressed this very issue. In this case, the plaintiff filed its complaint in state court, but

Continued on page 12

realized that federal courts have exclusive jurisdiction over Miller Act claims and attempted to work its way into federal court, first by filing an unsuccessful motion to remove, and then by filing a motion to intervene. No. CV1301438DDPJCX, 2014 WL 12576809, at *1 (C.D. Cal. July 25, 2014). Since "it is apparent from the face of the complaint that the one year statute of limitations ran prior to [the plaintiff] filing the Motion," the court denied the motion. However, "because it is not clear that [the plaintiff] could not plead further facts to demonstrate that its complaint should be considered timely based on equitable considerations" – equitable tolling or equitable estoppel – the court did so without prejudice. *Id.* at *2.

In *United States of Am. for the use & benefit of Ec Power Sys. Elec. Constr. Co. dba EC Co. v. Ins. Co. of the State of Pennsylvania*, the plaintiff argued that the doctrines of equitable estoppel or equitable tolling should rescue his claim under the Miller Act because he engaged in discussions with the defendants leading up to the filing of the complaint. No. C15-5326 BHS, 2016 WL 1436136, at *4 (W.D. Wash. Apr. 12, 2016). Regarding equitable estoppel, the court held that "[the plaintiff] has not shown that [the defendant] misrepresented the statute of limitations period, agreed to settle [the plaintiff's] delay claim in return for a promise not to sue, or made similar representations or promises." *Id.* at *6. Regarding equitable tolling, the court held that "[a]lthough [the plaintiff] may have believed its delay claim was not a virtual certainty because it was not yet 'ripe,' the evidence shows that [the plaintiff] nevertheless knew it had a *possible* delay claim well before the statute of limitations ran." *Id.* at *7. As a result, the court granted the defendant's motion to for summary judgment. *Id.*

Likewise, in *Cosco Fire Prot., Inc. v. NEI Contracting & Eng'g, Inc.*, the plaintiff argued that the doctrines of equitable estoppel or equitable tolling should save his claim under the Miller Act because he made a claim to the defendant's bonding company within the statute of limitations. No. 17-CV-2078-BTM-RBB, 2018 WL 3436968, at *2 (S.D. Cal. July 17, 2018). The court held that "[t]he Ninth Circuit's holding [in *Air Control Techs.*] does not change the one-year statute of limitations for filing an action under the Miller Act," and that "it is apparent from the Complaint that Plaintiff failed to file this action within the Miller Act's one-year statute of limitations." *Id.* As a result, the court granted the defendant's motion to dismiss the claim. *Id.*

The courts have extended this logic to failure to meet the jurisdictional requirements for reasons aside from exceeding the statute of limitations. In *United States for use of Morgan v. Harry Johnson Plumbing & Excavation Inc.*, the defendants moved for summary judgment, arguing that a subcontractor had no legal basis to bring a Miller Act claim because Mark A. Morgan d/b/a Morgan Industries Paving and Landscaping ceased performance more than one year after the action was filed (after which performance was completed by M Industries, LLC d/b/a Morgan Industries Paving and Landscaping, allegedly a continuation of the original subcontractor), which rendered the action untimely. No. 4:18-CV-05158-SMJ, 2020 WL 12833584, at *4 (E.D. Wash. Apr. 3, 2020).

The court considered the plaintiff's argument that that "Miller Act case law on equitable tolling of the statute of limitations may be instructive." *Id.* at *5. The court continued the trend of rejecting such arguments, whatever the nature of the failure to meet the jurisdictional requirements, because the plaintiff "presented no evidence of [the defendant] engaging in misleading conduct, no less evidence of how such conduct resulted in [the plaintiff] failing to file suit." *Id.* For example, the plaintiff presented no evidence of when the defendant became aware that M Industries, LLC rather than the original subcontractor was performing under the contract. Since the plaintiff did not show that equitable estoppel applied, the court granted summary judgment for the defendant. *Id.*

In sum, under the Ninth Circuit's holding that the Miller Act statute of limitations is a claim-processing rule, not a jurisdictional requirement, avoiding dismissal for failing to meet the jurisdictional requirements based on equitable tolling or equitable estoppel is theoretically possible, but practically unlikely. In particular, if it is the plaintiff's own error, and not anything the defense said or did, that causes it to miss the statute of limitations, it is a long shot for the plaintiff to prevail. That said, the defense will likely need to move for summary judgment as opposed to Rule 12(b)(6) dismissal unless it is apparent from the face of the complaint that the Miller Act statute of limitations has run. Overall, this highlights the importance for defense counsel to explore all grounds for a jurisdictional challenge to a Miller Act claim – not just for failing to timely file, but also for failing to timely file *in the right court*.

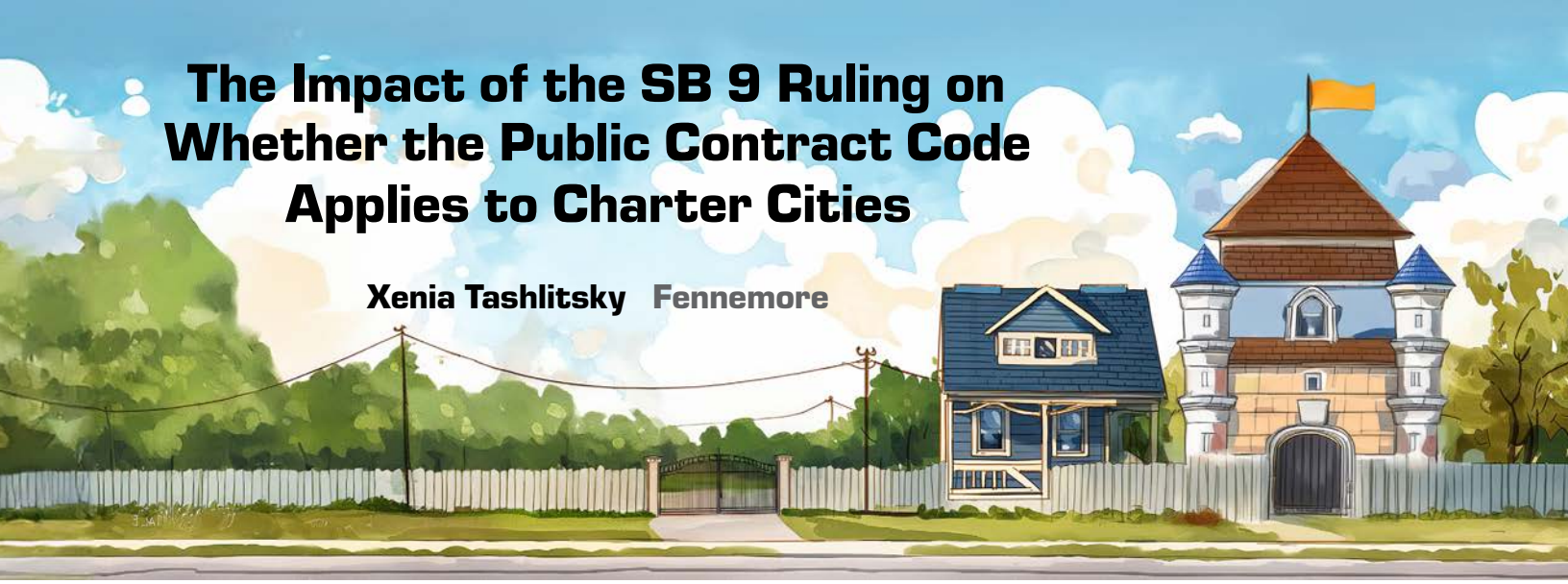
ENDNOTES

1 https://www.gsa.gov/system/files/miller_brochure.pdf

2 There do not appear to be any published cases addressing this issue.

The Impact of the SB 9 Ruling on Whether the Public Contract Code Applies to Charter Cities

Xenia Tashlitsky Fennemore



A man's home may be his castle, but a man in California is lucky to afford a studio. In an effort to address the housing crisis, the State passed Senate Bill (SB) 9 (codified as Government Code Sections 65852.21 and 66411.7) in 2021. SB 9 streamlines the process of approval for lot splits of up to two parcels and duplexes of up to four units for qualifying properties in single-family zoning districts. Specifically, SB 9 dispenses with the need for public hearings and CEQA review by allowing for ministerial approval of such properties. It appears that the theory behind this bill is that if the supply of housing increases, the price of housing will drop. However, although most applicants for an SB 9 lot split must sign an affidavit stating that they intend to occupy one of the split units for at least three years, and none of the split units may be used as a short-term rental, there is no requirement that the split units be affordable.

Five charter cities (Redondo Beach, Carson, Torrance, Whittier, and Del Mar) challenged the law under the "home rule" doctrine. This doctrine recognizes that Article XI, Section 5 of the California Constitution permits charter cities to legislate regarding their municipal affairs, but requires them to defer to state laws that are "reasonably tailored to the resolution of a subject of statewide concern." *California Fed. Savings & Loan Assn. v. City of Los Angeles*, 54 Cal.3d 1, 5 (1991). On April 22, 2024, the Los Angeles County Superior Court applied the "home rule" doctrine in *City of Redondo Beach, et al. v. Rob Bonta*, Case No. 22STCP1143 (2024), to hold that charter cities are not subject to SB 9 because it violates their authority to manage their local affairs, notwithstanding that SB 9 expressly states that it applies to charter cities.

This ruling is only currently binding on the five petitioner cities. However, it ultimately could impact the ability of the State to enforce SB 9 in all of its nearly 125 charter cities. On May 1, 2024, the five petitioner cities requested a proposed judgment declaring that SB 9 is unconstitutional as applied to all charter cities and a peremptory writ of mandate directing the Attorney General to stop enforcing SB 9 against all such cities. On May 10, 2024, the Attorney General objected to the proposed judgement, arguing that the court lacks jurisdiction over non-party cities, and therefore should not enjoin the Attorney General from enforcing SB 9 against non-parties. A decision on whether SB 9 runs afoul of the "home rule" doctrine across the board is expected in the next few months. In the meantime, there seems to be nothing to stop other charter cities from challenging SB 9 in their own petitions on the same grounds.

This ruling is significant not only for clarifying the patchwork of state and local zoning laws, but also for addressing the more general issue of when state law applies to charter cities. Tension can arise between state and municipal law in a variety of contexts, from taxes to building code enforcement. *See, e.g., City and County of San Francisco v. Regents of University of California*, 218 Cal.Rptr.3d 466 (2019); *Lippman v. City of Oakland*, 229 Cal.Rptr.3d 206 (2017). One type of dispute where the question of whether state law binds charter cities can make or break the case is a claim for owner-caused delays by a contractor on a public construction project. Public Contract Code Section 7102 prohibits a public owner from requiring the contractor to agree in a contract that the public entity need not pay the contractor's damages if the public entity delays a project. Many contractors assume the Public Contract Code applies to public projects as a matter of course, without pausing to consider whether the public owner is a charter city.

In *Howard Contracting, Inc. v. G.A. MacDonald Constr. Co.*, 71 Cal. App. 4th 38 (1998), the City of Los Angeles challenged the application of Section 7102 based on its status as a charter city. *Id.* at 44. The City argued that it was immune from state statutes regulating contracts because a public works contract is a municipal matter that falls under the "home rule" doctrine. *Id.* at 51. The court held that the two-prong test on whether the state has infringed on a charter city's sovereignty under the "home rule" doctrine is: (1) where there is an actual conflict between a state statute and a local measure, and (2) only if the first prong is met, whether the subject matter of the statutory enactment is more properly characterized as a local or statewide concern. *Id.*, citing *California Fed. Savings & Loan Assn. v. City of Los Angeles*, 54 Cal.3d 1, 5 (1991).

The *Howard* court noted that the purported conflict with a state statute did not relate

Continued on page 14

to a charter provision or municipal enactment, but to a "no damage for delay" clause in the contract between the contractor and the City. *Howard*, 71 Cal. App. 4th at 51. As a result, the City failed to establish the first prong of the "home rule" test: a conflict between the Public Contract Code and a local measure. Therefore, Section 7102 applied, and the contractual provision exculpating the City from liability for damages for the delays it caused was unenforceable under that section. *Id.* In sum, *Howard* stands for the proposition that local law only prevails over the Public Contract Code if there is a conflict, and a provision in a contract is insufficient to create a conflict. This is good news for contractors seeking compensation for delays on public projects.

The recent ruling on SB 9 does not affect the holding in *Howard*. In contrast to *Howard*, the *City of Redondo Beach* court easily held that the cities showed the first prong of the "home rule" test because they demonstrated the existence of a conflict between state law and local zoning. As a result, it proceeded to the second prong of the "home rule" test and considered the statewide concern at issue. The court held that the state law must be reasonably related or narrowly tailored to addressing a statewide concern. *City of Redondo Beach, et al., v. Rob Bonta*, Case No. 22STCP1143, at 6-7 (2024); *see also California Fed. Savings & Loan Assn. v. City of Los Angeles*, 54 Cal.3d 1, 5 (1991). In this case, the bill was not narrowly tailored to the stated purpose of ensuring access to affordable housing since the Attorney General presented "no evidence to support the assertion that the upzoning permitted by SB 9 would result in any increase in the supply of below market-rate housing." *Id.* at 10-11.

In the wake of *City of Redondo Beach*, it seems clear that the holding in *Howard* still stands, and so long as the only conflict between a local law and the Public Contract Code is a "no damages for delay" clause in a contract between a contractor and a charter city, the contractor is entitled to damages if the city delays the project. However, no California court has yet considered whether Public Contract Code Section 7102 would prevail if a savvy charter city did include a prohibition on damages for delay in a charter provision or municipal enactment. In theory, it appears that the charter city would be able to meet the first prong of the "home rule" test and would have a compelling argument under the second prong that the construction of a local building under a contract with the city itself is a matter of local concern. The contractor could perhaps argue that the unavailability of damages for delay under one construction contract (particularly a multi-million-dollar contract) could have a ripple effect on the construction industry throughout the state, but the success of such an argument is uncertain. As cities become more sophisticated, this is something for public contractors to keep on their radar.

AUGUST 2 & 3, 2024

EVERLINE RESORT & SPA

A·D·C VERITAS

Association of Defense Counsel of Northern California and Nevada
2520 Venture Oaks Way, Suite 150
Sacramento, CA 95833

FIRM SPOTLIGHT

Crystal L. Van Der Putten Livingston Law Firm

Over 20 years ago Robert Tyson and Patrick Mendes teamed up to start Tyson & Mendes LLP, a small insurance defense and civil litigation firm. Since then, the firm has grown to 250 lawyers and counting (with a goal of adding more lawyers this year) with 22 offices (five in California) serving 21 states.

Tyson & Mendes LLP began its exponential growth following its win at the California Supreme Court level in *Howell v. Hamilton Meats & Provisions* (2011) 52 Cal.4th 541 – a landmark decision with continuing relevance and importance in personal injury actions which limits the damages a plaintiff can recover. Though not an appellate lawyer, Bob Tyson (who handled the case at the trial level), along with Bob Olsen, saw the case through all the way to the top California court, argued the matter, and prevailed. In fact, the firm still gets calls from outside attorneys about the case over a dozen years later and the case (along with its many progeny) is still heavily relied on by defense counsel. The firm experienced another growth spurt approximately four years ago after founding partner Bob Tyson published a how-to book for limiting exposure at trial called "Nuclear Verdicts: Defending Justice for All" – which remains a #1 bestseller in Litigation Procedures on Amazon.

Tyson & Mendes LLP breaks the mold of how insurance defense firms typically operate. Its singular goal is to be the best insurance defense firm in the country. While there is no definitive metric to dictate what constitutes the best, Tyson & Mendes LLP attorneys are continuously striving to be better. And the firm supports those efforts with a number of its experienced attorneys focused on education, consistency in how cases are tried, quality of work, and compliance with client guidelines and expectations instead of billable hours. In other words, Tyson & Mendes LLP does not just talk the talk – it walks the walk.

The firm engages in a multi-layered approach to being the best and its approach begins with education. Tyson & Mendes LLP invests in educating its attorneys, from young to experienced, and has its own in-house education department which offers courses about insurance defense-related topics (for example taking depositions) as well as Tyson & Mendes University, a comprehensive hands-on education program (from client service skills to trial strategy) based on Bob and Pat's work and led by partners and senior attorneys. Dedicated to being the best trial lawyers, the firm also established an internal Trial Academy, which is an intensive, eight-week-long course designed to equip the firm's next generation of trial lawyers with targeted skills and training for the courtroom, in addition to TM AIR (Attorneys in Residence), an educational initiative for attorneys within their first three years of practice designed to bridge the gap between law school and practice. The firm commits time and money to develop its attorneys and teach the Tyson & Mendes LLP methods for case handling, which offers consistency to firm clients across the country.

Being the best also involves happy employees and diversity, equity and inclusion. In 2019, Tyson & Mendes LLP was one Law360's best law firms for women and for minorities. In fact, Tyson & Mendes LLP is number 1 in the country for firms of 100+ attorneys with regard to female equity partners. The firm's Administrative Partner, Cayce Lynch, leads the charge on these efforts and drives the formulation, development, and execution of firmwide administrative functions. Most recently, U.S. News and World Report named Tyson & Mendes LLP one of the best law firms to work for (based on quality of pay and benefits, work/life balance and flexibility, job and company stability, physical and psychological comfort, belongingness and esteem, and career opportunities and professional development). The firm includes a Women's Initiative, Young Professionals Group and Diversity and Inclusion Committee (all founded by Cayce Lynch), all of which support inclusivity and work to recruit and retain diverse attorneys.

But the above is just the beginning. Tyson & Mendes LLP believes change is necessary to not only be the best insurance defense firm but also to defeat the rise of Nuclear Verdicts® in California and across the country. Rather than keep what they have learned to themselves, Tyson & Mendes LLP began The Nuclear Verdicts® Defense Institute and has its third annual trial academy beginning in July 2024. Tyson & Mendes LLP's goal is to share its methods on stopping Nuclear Verdicts®

Continued on page 17

with experienced defense counsel from all over the country during its four-day program. New this year is the ability for claims professionals to attend with their counsel, offering insurers the opportunity to gain hands-on education surrounding the firm's proven Nuclear Verdicts® Defense Methods. During the program, Bob Tyson, Cayce Lynch, and others will explain the Tyson & Mendes methods for defeating Nuclear Verdicts®, show the methods in practice and allow attendees to practice those methods in a safe space.

In addition, Bob Tyson is working on his next bestseller in partnership with Cayce Lynch – tentatively titled "Nuclear Verdicts®: Break the Pattern." The team has analyzed 100 cases that resulted in Nuclear Verdicts® and will share the pattern driving these outsized awards, and what the defense can do to break it.

With so many amazing things happening at Tyson & Mendes LLP, it surely seems to be well on its way to being the best insurance defense firm in the country by any metric.

Bob Tyson

Pat Mendes

Firm spotlights are new and a great membership benefit. In each issue of the ADC's magazine, *Defense Comment*, 1-2 law firms will be featured in recognition of their support of the ADC, with the goal of expanding the spotlights to more firms through eblasts and the ADC's website. Contact the ADC if you would like a membership firm to be among a select group to be highlighted.

JUDICATE WEST CELEBRATING 30
Alternative Dispute Resolution

THE GOLD STANDARD

– in Private Dispute Resolution –

Judicate West is proud to feature our Northern California neutrals.


Hon. David W. Abbott, Ret.

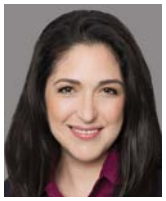

Melissa Blair Aliotti, Esq.


Alan R. Berkowitz, Esq.


Sarah F. Burke, Esq.


Hon. David de Alba, Ret.


Douglas deVries, Esq.


Rachel K. Ehrlich, Esq.


Susan G. Feder, Esq.


Rebecca Grey, Esq.


Jeffrey A. Harper, Esq.


Hon. Judy Hersher, Ret.


Hon. Russell L. Hom, Ret.


Robert Jacobs, Esq.


Diana B. Kruze, Esq.


Hon. Kendall J. Newman, Ret.


Robert J. O'Hair, Esq.


Jeffery Owensby, Esq.


David L. Perrault, Esq.


David Sarnoff, Esq.


Daniel I. Spector, Esq.


Hon. Donald J. Sullivan, Ret.


Lauren E. Tate, Esq.


Bradley S. Thomas, Esq.


Peter Thompson, Esq.


Hon. Emily E. Vasquez, Ret.


Russ J. Wunderli, Esq.

Learn More About Our Experienced Neutrals

JudicateWest.com

SUMMARY OF SELECTED CALIFORNIA SUPREME COURT AND APPELLATE CASES

Editor's Note: As always, remember to carefully check the subsequent history of any case summarized as the reported decisions may have been depublished or have had review granted.

DON WILLENBURG
Gordon Rees Scully Mansukhani, LLP

U.S. SUPREME COURT

FAA EXEMPTION FOR INTERSTATE COMMERCE WORKERS NOT LIMITED TO TRANSPORTATION INDUSTRY

Bissonnette v. LePage Bakeries Park St., LLC (2024) 601 U.S. 246

The FAA exemption for "any class of workers engaged in foreign or interstate commerce" is not limited to workers whose employers are in the transportation industry. Thus, it applied to workers in the "bakery industry" who delivered baked goods.

The employer said this broad interpretation would mean "that virtually all workers who load or unload goods – from pet shop employees to grocery store clerks – will be exempt from arbitration." SCOTUS rejected this doomsday scenario. "We have never understood §1 to define the class of exempt workers in such limitless terms .... [A] transportation worker is one who is actively engaged in transportation of ... goods across borders via the channels of foreign or interstate commerce ... In other words, any exempt worker must at least play a direct and necessary role in the free flow of goods across borders."

FAA CASES ORDERED TO ARBITRATION MUST BE STAYED UPON REQUEST, AND COURT CANNOT DISMISS THE UNDERLYING CLAIMS

Smith v. Spizziri (2024) __ U.S.__, 2024 WL 2193872;

"Section 3 of the FAA specifies that, when a dispute is subject to arbitration, the court 'shall on application of one of the parties stay the trial of the action until [the] arbitration' has concluded. 9 U. S. C. §3. The question here is whether §3 permits a court to dismiss the case instead of issuing a stay when the dispute is subject to arbitration and a party requests a stay pending arbitration. It does not."

The district court had dismissed the action, and the Ninth Circuit affirmed. SCOTUS reversed:

Here, as in other contexts, the use of the word "shall" "creates an obligation impervious to judicial discretion." … [¶] Just as

Continued on page ii

this case continued from page i

"shall" means "shall," "stay" means "stay." Respondents insist that "stay" in §3 "means only that the court must stop parallel in-court litigation, which a court may achieve by dismissing without retaining jurisdiction." There are, however, two significant problems with that reading. First, it disregards the long-established legal meaning of the word "stay." Even at the time of the enactment of the FAA, that term denoted the "temporary suspension" of legal proceedings, not the conclusive termination of such proceedings. Black's Law Dictionary 1109 (2d ed. 1910) ("Stay of proceedings"). Second, respondents' attempt to read "stay" to include "dismiss" cannot be squared with the surrounding statutory text.

NINTH CIRCUIT

INDIVIDUAL PAGA CLAIMS MAY BE FORCED TO ARBITRATION, WHILE COLLECTIVE CLAIMS PROCEED IN COURT

Johnson v. Lowe's Home Centers, LLC (9th Cir. 2024) 93 F.4th 459

California courts rule on questions of California law, even when contrary to SCOTUS!

The district court compelled arbitration of an individual PAGA claim and, pursuant to SCOTUS's Viking River, dismissed the claims brought on behalf of others.

The Ninth Circuit affirmed as to the individual claim, but "vacate[d] the district court's order dismissing Johnson's non-individual PAGA claims. When the district court dismissed those claims, its dismissal was consistent with California law as then interpreted by the United States Supreme Court in Viking River. While this case was on appeal to us, the California Supreme Court in *Adolph* corrected that interpretation of California law. We remand Johnson's non-individual PAGA claims to allow the district court to apply California law as interpreted in *Adolph*."

BRIEF STRICKEN FOR MISREPRESENTING CASES, AND AI MAKES A COUPLE UP

Grant v. City of Long Beach (9th Cir. 2024) 96 F.4th 1255

The Ninth Circuit struck a brief and dismissed the appeal.

"Appellants filed an opening brief replete with misrepresentations and fabricated case law .... [¶] Unfortunately, Appellants not only materially misrepresent the facts and holdings of the cases they cite in the brief [the decision identifies a dozen and highlights two], but they also cite two cases that do not appear to exist. *See Smith v. City of Oakland*, 731 F.3d 1222, 1231 (11th Cir. 2013); *Jones v. Williams*, 791 F.2d 1024 (9th Cir. 1986). In light of the magnitude of Appellants' citations to apparently fabricated cases, we issued a focus order before argument directing counsel to be prepared to discuss these cases." Argument, which must have been uncomfortable for all except maybe defense counsel, did not help appellants.

"Appellants' brief includes only a handful of accurate citations, almost all of which were of little use to this Court because they were not accompanied by coherent explanations of how they supported Appellants' claims.... These deficiencies violate Federal Rule of Appellate Procedure 28(a)(8)(A)."

AIRLINE ENFORCED THIRD-PARTY BOOKING WEBSITE'S ARBITRATION PROVISION AS A MATTER OF EQUITABLE ESTOPPEL

Herrera v. Cathay Pacific Airways Limited (9th Cir. 2024) 94 F.4th 1083

The trial court denied the nonsignatory's motion to compel arbitration. The Ninth Circuit reversed. First it ruled, as a matter of first impression, that an order denying a motion to compel arbitration based on the doctrine of equitable estoppel is reviewed de novo. Second, it ruled that passengers were equitably estopped from avoiding the arbitration provision in the vendor's terms and conditions. "We focus our inquiry on whether the Herreras' breach-of-contract claim against Cathay Pacific is 'intimately founded in and intertwined with' ASAP's Terms & Conditions containing the arbitration clause." The court ruled that

Continued on page iii

this case continued from page ii

the claims were intertwined, so it enforced the arbitration clause. "Because the Herreras' allegations that Cathay Pacific breached the GCC is "intimately founded in and intertwined with" ASAP's alleged conduct under the Terms & Conditions, it is appropriate to enforce the arbitration clause contained in the Terms & Conditions." While some elements of the claim were independent of the agreement, "California law does not require that every allegation in the complaint be intertwined with the contract containing the arbitration clause for equitable estoppel to apply."

TERMINATING SANCTIONS PROPER WHERE PLAINTIFF COORDINATED DELETION OF TEXTS WITH CO-WORKERS

Jones v. Riot Hospitality Group LLC (9th Cir. 2024) 95 F.4th 730

"During discovery, Riot obtained text messages exchanged between Jones, her friends, and co-workers between December 2015 and October 2018. Riot identified instances where Jones appeared to have abruptly stopped communicating with people she had been messaging almost daily. In response to a subpoena, Jones' third-party imaging vendor produced a spreadsheet showing that messages between Jones and her co-workers had been deleted from Jones' mobile phone. In subsequent depositions, two of the co-workers, both of whom Jones had identified as prospective trial witnesses, testified that they had exchanged text messages with Jones about the case since October 2018." The court ordered a third-party forensic review. That expert "concluded, after comparing the volume of messages sent and received between phone pairs, that 'an orchestrated effort to delete and/or hide evidence subject to the Court's order has occurred.'" The district court dismissed the case with prejudice, and the Ninth Circuit found no abuse of discretion.

"If the district court finds the loss prejudicial, it 'may order measures no greater than necessary to cure the prejudice.' Fed. R. Civ. P. 37(e)(1). But, if the court finds that an offending plaintiff 'acted with the intent to deprive another party of the information's use in the litigation,' dismissal is authorized. Fed. R. Civ. P. 37(e)(2)." The court reasonably concluded based on the circumstantial evidence that plaintiff had acted with that intent.

NO IMMUNITY FOR SOCIAL WORKERS WHO MADE MISREPRESENTATIONS TO COURT AND FAILED TO PROVIDE PARENTS WITH NOTICE OF HEARING

Rieman v. Vazquez (9th Cir. 2024) 96 F.4th 1085

After social workers removed a child from home, the mother and child sued. Social workers claimed absolute and qualified immunity.

There was no absolute immunity for this decision. "In this case, had the Riemans sued Vazquez and Johnson for their discretionary decision to institute juvenile dependency proceedings to take custody of K. B. away from Ms. Rieman, they likely would have been entitled to absolute immunity since that decision is inherently prosecutorial. *See Miller*, 335 F.3d at 898. However, the Riemans' suit did not challenge that quasi-prosecutorial decision. Rather, the Riemans sued Vazquez and Johnson for their failure to provide Ms. Rieman with notice of the detention hearing, despite knowing how to contact her and her parents, and their acts of judicial deception regarding Ms. Rieman's whereabouts."

There was also no qualified immunity, because they should have known that the parent had a "clearly established" right to notice, and to "be free from deception in the presentation of evidence during juvenile dependency proceedings."

ORDER COMPELLING ARBITRATION IS APPEALABLE, AND AFFIRMED WHERE NO CONSENT TO ARBITRATE PAGA CLAIMS, BUT CLEAR WAIVER OF CONSOLIDATED, CLASS, OR COLLECTIVE ACTIONS

Diaz v. Macys West (9th Cir. 2024) – F.4th –, 2024 WL 2098206

A former employee, Diaz, sued her former employer, Macy's. "We agree with Macy's that under the parties' arbitration agreement, only Diaz's individual PAGA claims should be arbitrated. But the California Supreme Court's recent decision in *Adolph v. Uber Technologies, Inc.*, 532 P.3d 682 (Cal. 2023), forecloses Macy's request that the non-individual claims be dismissed. [¶] We therefore affirm the district court's order in part and vacate in part. Diaz's individual PAGA claims were properly ordered to arbitration, but we vacate that portion of the order compelling arbitration of the non-individual claims."

The court declined to assess arbitrability of the 2012 agreement in light of 2022's *Viking River*, because "[w]e must interpret the arbitration agreement free from such after-acquired developments, looking rather to the terms of the agreement and any indication of their meaning at the time the parties entered it."

Based on that language, "the parties consented only to arbitration of claims relating to Diaz's own employment. The agreement is replete with references to the employee herself and disputes "relating to [her] employment." Diaz was told that the arbitral process is available for "your dispute[s]" based on "your situation." The agreement also discusses disputes as "asserted by the Associate against the Company." These are but a couple of examples of the bilateral relationship between employer and individual employee that the arbitration agreement presumes will frame all arbitrable claims. Our conclusion is reinforced by the exclusion of class and collective actions from arbitration.

Continued on page iv

this case continued from page iii

Although the waiver does not specifically reference non-individual PAGA claims, it does no violence to the agreement to read non-individual PAGA claims as an instance of a class or collective action."

QUALIFIED IMMUNITY TO OFFICERS ACTING AT DIRECTION OF MEDICAL PERSONNEL; NONCOMPLIANCE WITH TRAINING DOES NOT GIVE RISE TO *MONELL* CLAIM

Perez v. City of Fresno (9th Cir. 2024) 98 F.4th 919

"In 2017, at the direction of a paramedic, law enforcement officers used their body weight to hold down and restrain Joseph Perez while he was prone in order to strap him to a backboard so he could be transported to a hospital for mental-health treatment. Perez asphyxiated and died."

The district court granted summary judgment on grounds of qualified immunity, and the Ninth Circuit affirmed.

"At the time of Perez's death, the law did not clearly establish, nor was it otherwise obvious, that the officers' actions, directed by medical personnel, would violate Perez's constitutional rights." The court distinguished this from other cases involving excessive force because the officers were deferring to the medic.

"Likewise, the paramedic involved was acting in a medical capacity during the incident, and the law did not clearly establish that medical personnel are liable for constitutional torts for actions taken to provide medical care or medical transport. Thus, the officers and the paramedic are entitled to qualified immunity."

The Ninth also affirmed dismissal of the claims against the City and County based on a failure-to-train theory. "Municipalities and local governments can be sued under § 1983 for constitutional deprivations caused by governmental policy or custom. *Monell*, 436 U.S. at 690. *Respondeat superior* liability, however, does not exist under § 1983." "[T]o the extent Plaintiffs rely on the officers' noncompliance with their training, their theory of liability against the City and the County impermissibly rests on the mere existence of an employer-employee relationship, rather than a governmental policy or custom."

CALIFORNIA SUPREME COURT

MUST PAY EMPLOYEES FOR TIME PASSING THROUGH SECURITY AND EATING LUNCH IN DESIGNATED SPACE

Huerta v. CSI Electrical Contractors (2024) 15 Cal.5th 908

The California Supreme Court responded "yes" to each of three questions posed by the Ninth Circuit:

"Is time spent on an employer's premises in a personal vehicle and waiting to scan an identification badge, have security guards peer into the vehicle, and then exit a Security Gate compensable as 'hours worked' within the meaning of … Wage Order No. 16?" The employer is controlling the employee's actions, even if in the employee's personal vehicle.

"Is time spent on the employer's premises in a personal vehicle, driving between the Security Gate and the employee parking lots, while subject to certain rules from the employer, compensable as 'hours worked' or as 'employer-mandated travel' within the meaning of …. Wage Order No. 16?" The answer is yes, "if the Security Gate was the first location where the employee's presence was required for an employment-related reason other than the practical necessity of accessing the worksite."

"Is time spent on the employer's premises, when workers are prohibited from leaving but not required to engage in employer-mandated activities, compensable as 'hours worked' within the meaning of … Wage Order No. 16, or under California Labor Code Section 1194, when that time was designated as an unpaid 'meal period' under a qualifying collective bargaining agreement?"

This result is an entirely predictable extension of the court's decision in *Frlekin v. Apple Inc.* (2020) 8 Cal.5th 1038, which held that time that Apple employees spent on Apple's premises "waiting for, and undergoing, required exit searches of packages, bags, or personal technology devices voluntarily brought to work purely for personal convenience by employees" is compensable as "'hours worked.'"

AGREEMENT TO ARBITRATE IS NOT WITHIN HEALTHCARE AGENT'S AUTHORITY AND SO WILL NOT BE ENFORCED

Harrod v. Country Oaks Partners, LLC (2024) 15 Cal.5th 939

A healthcare agent signed two contracts with a skilled nursing facility. One secured the principal's admission to the facility. The other, which made arbitration the exclusive pathway for resolving disputes with the facility, was optional and had no bearing on whether the principal could access the facility or receive care. The Superior Court denied defendants' motion to compel arbitration. The Court of Appeal affirmed, and then so did the California Supreme Court, thereby resolving a split between *Logan v. Country*

Continued on page v

RECENT CASES

this case continued from page iv

Oaks Partners, LLC (2022) 82 Cal.App.5th 365 (not a health care decision) and, e.g., *Garrison v. Superior Court* (2005) 132 Cal.App.4th 253 (part of the health care decisionmaking process).

The court ruled that the second contract was not a health care decision within the health care agent's authority. The facility therefore could not rely on the agent's execution of that second agreement to compel arbitration of claims arising from the principal's alleged maltreatment. "[D]efining the term 'health care decision' to include a standalone arbitration agreement would not be 'in concert with' [citation omitted] the items listed and, therefore, with the apparent intent evidenced by the definitional provisions of Logan's power of attorney or the Health Care Decisions Law it invokes."

The decision also rejected defendants' arguments that the general law of agency (Civ. Code § 2319) compelled arbitration as a matter of implied authority.

Would the result be different if the arbitration provision was in the admissions agreement? Maybe, though that option is not available to many facilities. (42 C.F.R. § 483.70(n) (2019) [facilities participating in Medicare and Medicaid "must not require any resident or his or her representative to sign an agreement for binding arbitration as a condition of admission"].) "[C]hoosing a dispute resolution method does not similarly serve the purpose of making 'health care decisions' when that choice is contained in a side agreement with no impact on health care or who administers it. The authority to make health care decisions – here, the authority to obtain skilled nursing care – could be 'fully performed' without reference to that side agreement." "We therefore cannot, and do not, equate all agreements between a patient and a health care facility, regardless of their circumstances and their relation to obtaining health care, with health care decisions."

The decision noted that this result is consistent "with the published opinions of numerous other state courts that – after reviewing powers of attorney formed under state statutes akin to the Health Care Decisions Law – conclude an agreement to arbitrate, particularly when optional and separate, is not a health care decision within an agent's power."

EMPLOYER'S GOOD FAITH BELIEF WILL BAR PENALTIES FOR A "KNOWING AND INTENTIONAL" FAILURE TO REPORT THE UNPAID WAGES OR OTHER REQUIRED INFORMATION ON A WAGE STATEMENT

Naranjo v. Spectrum Security Services (2024) 13 Cal.5th 93;

"Under long established law, an employer cannot incur civil or criminal penalties for the willful nonpayment of wages when the employer reasonably and in good faith disputes that wages are due. [Citations.] But courts are divided over whether an employer's good faith belief will also bar Labor Code section 226 penalties for a knowing and intentional failure to report the same unpaid wages, or any other required information, on a wage statement. We now conclude that if an employer reasonably and in good faith believed it was providing a complete and accurate wage statement in compliance with the requirements of section 226, then it has not knowingly and intentionally failed to comply with the wage statement law. We affirm the judgment of the Court of Appeal, which reached the same conclusion."

CALIFORNIA COURT OF APPEAL

SANCHEZ PROHIBITS EXPERT FROM TESTIFYING ABOUT CONTENTS OF PUBLIC RECORD NOT ADMITTED INTO EVIDENCE

In re Marriage of Lietz (2024 4th Dist. Div. 3) 99 Cal.App.5th 664;

In this divorce case, "Diana contends the trial court erred by precluding her from eliciting testimony from her appraiser that the home's lot size exceeded 9,000 square feet and from cross-examining Andreas's appraiser with evidence which, she claims, showed the appraisers used an incorrect lot size. We affirm. The trial court did not err because Diana failed to present competent evidence independently proving her assertion that the lot size exceeded 9,000 square feet. Without such evidence, testimony from her appraiser on that topic was inadmissible hearsay."

"The square footage of the lot on which the home is situated was without doubt a case-specific fact. Thus, during redirect examination when Diana's counsel asked Burke if the lot size was larger than 9,000 square feet, counsel was eliciting case-specific facts. The trial court pointed out that Burke's testimony would relate to hearsay statements. Counsel did not disagree, but claimed the information was in public records. Under *Sanchez*, Burke could not be permitted to testify that the lot size was larger than 9,000 square feet unless counsel produced and was able to admit into evidence the public record or other evidence that would have independently proven that fact."

"Counsel did not identify or produce the public record. Counsel argued she should be able to ask Burke if she had reviewed the public record. That question would have violated *Sanchez*. The trial court correctly applied Sanchez by sustaining an objection on the ground Diana had not produced the public record."

TIMELINESS OF PAYMENT TO ARBITRATOR IS NOT EXTENDED BY SECTION 1010.6 EXTRA TWO DAYS

Suarez v. Superior Court of San Diego County (Rudolph & Sletten, Inc.) (2024 4th Dist. Div. 1) 99 Cal.App.5th 32;

"[S]ection 1010.6 simply does not apply to the e-mail transmission of a JAMS fee invoice. By its terms, the statute governs the *service* of documents *in an action filed with the court*. An arbitration proceeding is not 'an action filed with the court,' and the invoice required by section 1281.97 is 'provided' to the parties but is not 'served.'"

"Because the employer wrongly relied on the extra two days, the invoice was untimely. Failure to pay the invoice timely is a material breach, so the employee has the option to proceed in court instead. Which plaintiff in this case did."

"After plaintiff Onecimo Sierra Suarez sued his employer for alleged wage and hour violations, the employer successfully moved to stay the court action and proceed to arbitration as provided in the employment agreement that the employer drafted. When the employer waited more than 30 days to pay its share of the arbitrator's initial filing fee, Suarez unsuccessfully moved to vacate the arbitration stay. He now seeks writ relief directing the trial court to find that the employer has waived its right to arbitration pursuant to Code of Civil Procedure sections 1281.97 *et seq*. We agree and grant the petition."

BECAUSE A CITY IS AUTHORIZED BY STATUTE TO REGULATE STREET USE BY HEAVY VEHICLES, THE CITY IS IMMUNE FROM SUIT FOR NUISANCE FROM RESULTING TRAFFIC

City of Norwalk v. City of Cerritos (2024 2d Dist. Div. 2) 99 Cal.App.5th 977

"This is a tale of two cities." The City of Cerritos amended its ordinance limiting commercial and heavy truck traffic through the city, whereupon the neighboring City of Norwalk sued, claiming that the ordinance's restrictions constitute a public nuisance by shunting extra truck traffic a through Norwalk with related adverse effects.

"Because a city is immune from public nuisance liability for any acts 'done or maintained under the express authority of a statute' (Civ. Code, § 3482), and because two sections of the Vehicle Code – namely, sections 35701 and 21101 – explicitly authorize cities to regulate the use of their streets by commercial or heavy vehicles, this appeal presents the question: Is Cerritos immune from liability for the public nuisance of diverting traffic into Norwalk? Yes, because the immunity conferred by Civil Code section 3482 applies not only to the specific act expressly authorized by statute (namely, enacting an ordinance designating routes for commercial vehicles and those exceeding weight limits), but also to the inexorable and inescapable consequences that necessarily flow from that act (namely, that drivers unable to use those routes will take different routes, thereby causing adverse effects of heavier traffic on those other routes). Where, as here, the authorized act and its consequence are flip sides of the same coin, immunity applies to both, and a public nuisance claim fails as a matter of law. We accordingly affirm the judgment after demurrer for Cerritos."

COSTS IN DEFENDING FEHA ACTION ONLY RECOVERABLE BY MOTION, NOT COST MEMORANDUM

Neeble-Diamond v. Hotel California by the Sea, LLC (2024 4th Dist. Div. 3) 99 Cal.App.5th 551

An employer that won a defense verdict lost its cost award by improper paperwork. Don't let this be you!

While the prevailing defendant in an ordinary civil case is entitled to an award of statutory costs as a matter of right – and the filing of a cost memorandum is the proper means of securing a cost award in such cases – a different rule applies to a defendant in a FEHA case: the court has discretion to make such an award, but it must first make a finding that the plaintiff's FEHA claims are frivolous.

Here, Hotel California recognized it needed to file a noticed motion asking the court to award it discretionary attorney fees, but it made no similar motion to obtain an award of discretionary costs. Instead, Hotel California filed a cost memorandum, which operated as a request for the court clerk to enter a mandatory cost award and provided no opportunity for the court to exercise its discretion. The cost memorandum was an ineffective means of requesting a discretionary award of costs, and Neeble-Diamond was under no obligation respond to it. Since Hotel California failed to file a noticed motion requesting a discretionary cost award, the trial court erred when it ordered that costs be added to the judgment.

In *Williams*, the court explained "that in awarding attorney fees and costs, the trial court's discretion is bounded by the rule of *Christiansburg* [*Garment Co. v. EEOC* (1978) 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648]" (*Williams, supra,* 61 Cal.4th at p. 99, 186 Cal.Rptr.3d 826, 347 P.3d 976); thus, "an unsuccessful FEHA plaintiff should not be ordered to pay the defendant's fees or costs unless the plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit" (*Williams, supra*, at p. 99-100, 186 Cal.Rptr.3d 826, 347 P.3d 976 (footnote omitted)).

Government Code section 12965, subdivision (c)(6), codifies the *Williams* rule: "In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including

Continued on page vii

this case continued from page vi

the department, reasonable attorney's fees and costs, including expert witness fees, except that, notwithstanding Section 998 of the Code of Civil Procedure, a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so."

P.S. The employer had filed a proper motion for attorney fees, which are governed under the same standard, and the trial court denied the motion, finding the requisite showing had not been met.

JUDGMENT PARTLY GRANTING MANDAMUS PETITION BUT REMANDING FOR FURTHER DETERMINATION NOT APPEALABLE, PLUS "MATHEMATICAL EQUATIONS AND THEOREMS ARE A PROPER SUBJECT OF JUDICIAL NOTICE."

Jackson v. Board of Civil Service Commissioners of City of Los Angeles (2024 2d Dist. Div. 7) 99 Cal.App.5th 648

Jackson filed a petition for writ of administrative mandate, seeking an order directing the Board to set aside its decision and to award him back pay. The court granted the petition in part, but also remanded for the Board to make further determinations.

Dhillon v. John Muir Health (2017) 2 Cal.5th 1109 ruled in a similar situation that the "split decision" in that case resulted in an appealable order. Not so in this case, which the Court of Appeal found dispositively different than *Dhillon*.

"The Supreme Court's first reason for concluding the judgment in *Dhillon* was appealable applies here. The trial court granted (in part) Jackson's claim for a writ of administrative mandate and did not reserve jurisdiction to consider any other issues. Nothing remained to be done in the trial court – at least not unless and until on remand the Board imposed a new disciplinary penalty and Jackson filed another petition for administrative mandate."

"But the second reason – that the issues raised on appeal may effectively evade review if there is no right to immediate appeal – does not apply here. As discussed, Jackson challenges the findings on each of the four counts and argues he was entitled to back pay because the City violated his *Skelly* rights. On remand, because the trial court set aside the Board's decision, the Board will reconsider the finding on count 1 (reporting late) and the appropriate disciplinary penalty for all counts, as well as whether the City violated Jackson's *Skelly* rights in connection with count 2 (reporting unfit/reporting not in uniform). If the Board imposes different discipline or declines to award Jackson back pay, Jackson may file a new or supplemental petition for writ of mandate and, if unsatisfied with the outcome, can appeal from the ensuing judgment."

An interesting side note:

"We issued an order notifying the parties of our intent to take judicial notice of the proposition that the equation for calculating the area of a parallelogram is base multiplied by height (A = (base x height)) and the equation for calculating the area of triangle is one-half base multiplied by height (A = one-half (base x height)). We take judicial notice of those propositions. (Evid. Code, §§ 451, subd. (f), 459.) Mathematical equations and theorems are a proper subject of judicial notice. (*People v. Bradley* (1982) 132 Cal.App.3d 737, 743, fn. 6.)"

VEHICLE MANUFACTURER CANNOT INVOKE ARBITRATION CLAUSE IN CONTRACT BETWEEN DEALER AND BUYER

Davis v. Nissan North America (2024 4th Dist. Div. 1) 100 Cal.App.5th 825

In this lemon law case, "[t]he trial court ruled that the Nissan defendants, who were not parties to the sale contract between plaintiffs and the dealership containing the arbitration clause, could not invoke the clause to compel arbitration based on the doctrine of equitable estoppel. In so ruling, the trial court declined to apply the holding of *Felisilda v. FCA US LLC* (2020) 53 Cal. App.5th 486 (*Felisilda*). Since the trial court's ruling, four published Court of Appeal decisions have rejected *Felisilda* and the Supreme Court has granted review to resolve the conflict. We now join the more recent line of authorities. Accordingly, we affirm the order denying Nissan's motion to compel arbitration."

Nissan abandoned its third-party beneficiary theory on appeal, but pressed *Felisilda* (from the Third Appellate District) and equitable estoppel. "[E]quitable equitable estoppel does not apply here because plaintiffs are not relying on the terms of the sale contract to impose liability on Nissan.... Plaintiffs' complaint does not allege that Nissan breached any obligations under the sale contract between them and the dealership. Rather, the complaint alleges violations of manufacturer warranties under the Song-Beverly Act and a related tort claim."

I predict the same result in *Ford Motor Warranty Cases* (2023) 89 Cal. App.5th 1324, review granted July 19, 2023, S279969.

BUSINESS AND PROFESSIONS CODE SOLE GUIDE FOR HOSPITAL PEER REVIEW, AND "FAIR PROCEDURE" DOCTRINE DOES NOT APPLY

Asiryan v. Medical Staff of Glendale Adventist Medical Center (2024 2d Dist. Div. 1) 100 Cal.App.5th 947

"We hold that the trial court correctly concluded the code is the sole source of procedural protections in connection with hospital peer review, and that the common law doctrine of fair procedure does not supplant those protections with additional guarantees. Based on this interpretation, we conclude the court correctly granted the nonsuit on Asiryan's common law peer review claims and correctly rejected her proposed jury instructions regarding peer review. We further hold that the court did not reversibly err in denying Asiryan leave to amend. For these reasons, we affirm the judgment.

We reach a different conclusion regarding Asiryan's appeal from the order awarding attorney fees. Given the court's rulings denying certain portions of defendants' summary judgment and nonsuit motions as to the Medical Staff, we conclude a hypothetical reasonable attorney could have deemed Asiryan's peer review claims against the Medical Staff tenable and reasonably decided to take them to trial. This same logic does not apply to the fees awarded to GAMC, because the court disposed of the claims against GAMC on summary judgment. We therefore reverse the court's fee order to the extent it awards fees to the Medical Staff, but affirm the order as it applies to GAMC."

UNIVERSITY STUDENT GOT FAIR PROCEDURE BEFORE EXPULSION FOR PARTNER VIOLENCE

Boermeester v. Carry (2024 2d Dist. Div. 8) 100 Cal.App.5th 38

The Rose Bowl hero kicker for the football team was expelled for intimate partner violence. On remand from the California Supreme Court, the same panel that had ruled for the player the first time around ruled against him on three issues.

(1) Whether USC's policy was unfair because the Title IX investigator held the dual roles of investigator and adjudicator. Held, no. "While it is possible that a specific combined investigator-adjudicator process could be structured in an unfair manner, a holding that a combined investigator-adjudicator process can never be fair would be inconsistent with current California law, which has recognized that a combined investigatory and adjudicative model does not, without more, deprive an accused student of a fair hearing."

(2) Whether substantial evidence supported USC's findings that the ex-student violated its intimate partner violence policy. Held, yes, as so often on substantial evidence review. Here's a point that is bound to come up in your cases: "As we have previously explained, there is nothing questionable about choosing to find a victim's initial statement more credible than a later recantation of that statement, particularly in domestic violence cases."

(3) The ex-student's claim that USC's limited appellate review did not provide a check on the investigative process. The court noted that this student now had, between USC and court proceedings, seven levels of review.

INTERIM ADVERSE JUDGMENT RULE APPLIED TO MALICIOUS PROSECUTION CLAIM WHERE PLAINTIFF'S MOTION FOR ACQUITTAL IN RELATED CRIMINAL CASE DENIED

Jackson v. Lara (2024 4th Dist. Div. 1) 100 Cal.App.5th 337

A nightclub patron got into an altercation with staff. Staff called the police and pressed charges for battery. The trial court denied the patron's motion for acquittal, but the jury ultimately found him not guilty.

The patron sued the club for malicious prosecution. The club won summary judgment, and the Court of Appeal affirmed. "[U]nder the interim adverse judgment rule, the denial of Jackson's motion for acquittal establishes that Lara had probable cause as [a] matter of law. Because the lack of probable cause is a required element of malicious prosecution, there was no error in granting summary judgment on that cause of action." The decision noted that it appeared to be the first court to apply the rule to a motion for acquittal.

Jackson shouldn't have moved for acquittal, and maybe he would have won his civil case!

BROWSEWRAP NOT ENOUGH FOR ASSENT TO ARBITRATION, BUT CLICKWRAP CAN BE

Weeks v. Interactive Life Forms, LLC (2024 2d Dist. Div. 1) 100 Cal.App.5th 1077

"'[B]rowsewrap' provisions on a website, which deem a consumer to have agreed to the website's terms of use simply by using the website and without taking any affirmative steps to confirm knowledge and acceptance of the terms of use, generally do not form an enforceable agreement to arbitrate." *Weeks* followed that precedent.

The court distinguished browsewrap from clickwrap. "Courts have generally enforced agreements to arbitrate formed via 'clickwrap,'

Continued on page ix

this case continued from page viii

where an internet user accepts a website's terms of use by clicking an "I agree" or "I accept" button, with a link to the agreement readily available ....' Clickwrap agreements have been held to manifest assent, even on consumers who did not read them, because "the website [has] put[ ] the consumer on constructive notice of the contractual terms."

PLAINTIFFS GET ATTORNEY FEES FOR LABOR CODE VIOLATIONS EVEN IF ACTUAL RECOVERY IS MINISCULE, WITHIN LIMITS FOR LIMITED CIVIL CASE; LABOR CODE CONTROLS BECAUSE MORE SPECIFIC AND LATER-ENACTED

Gramajo v. Joe's Pizza on Sunset, Inc. (2024 2d Dist. Div. 8) 100 Cal.App.5th 1094

After nearly four years of litigation and extensive discovery, a former pizza deliverer won about $7,000 in unpaid wages and overtime – $12,000 including interest and penalties. Plaintiff's counsel sought almost $300,000 in fees at $650 per hour, and $27,000 in costs. The trial court denied the fees and costs in full under Code of Civil Procedure section 1033, subdivision (a): "Costs or any portion of claimed costs shall be as determined by the court in its discretion ... where the prevailing party recovers a judgment that could have been rendered in a limited civil case."

The Court of Appeal reversed. "[E]mployees who prevail in actions to recover unpaid minimum and overtime wages are entitled to their reasonable litigation costs under Labor Code section 1194, subdivision (a), irrespective of the amount recovered." Because "one statute gives the trial court discretion to deny litigation costs based on the amount recovered while the other provides for a mandatory cost award regardless of that amount," the court was required to determine which statute controlled.

The court found that the Labor Code provision controlled for two reasons: it is more specific, and was enacted later. The California Supreme Court had come to the same conclusion about section 1033 and FEHA recovery. (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970 [allowing $870,000 fee claim on $11,500 retaliation recovery].) Accordingly, the Court of Appeal remanded for determination of reasonable fees and costs.

COVID LOSSES MAY BE COVERED BY INSURANCE

Brooklyn Restaurants, Inc. v. Sentinel Insurance Company, Ltd. (2024 4th Dist. Div.1) 100 Cal.App.5th 1036

An insured alleged direct physical loss from COVID, and pointed out that the policy contained "a unique provision specifically covering losses attributable to a virus" under which "physical loss includes simply cleaning an area infected by the coronavirus." The insured also alleged that exclusions and conditions to these coverage grants rendered the policy illusory. The trial court granted the insurer's motion for judgment on the pleadings.

The Court of Appeal reversed. "Brooklyn has pled that the coronavirus was present at its premises, and it engaged in sanitization efforts to remove the virus and remain, at least, partially open. Consequently, this is one of those rare cases where we conclude an insured has adequately alleged a direct physical loss or damage under the subject policy, at least raising the specter of coverage under that policy." The court also ruled that the insured had "done enough to raise the issue that its policy is illusory, which in turn raises factual questions that require discovery and the marshalling of evidence."

SLAPP RULING IN ONE ACTION NOT BINDING IN SUBSEQUENT ACTION THAT CONTAINED DIFFERENT FACTUAL ALLEGATIONS

Williams v. Doctors Medical Center of Modesto (2024 5th Dist.) 100 Cal.App.5th 1117

A doctor sued after a peer review process resulted in limitations on his medical practice. The defense filed an anti-SLAPP motion. The doctor dismissed without prejudice, and the trial court awarded the defense attorney fees.

The doctor then sued a second time, for a subset of the causes of action in the first action. The new complaint alleged that "Williams decided to voluntarily dismiss the First Lawsuit because he believed that the suit's focus on peer review and speech activities would not survive the anti-SLAPP motion. The FAC further explained that the Second Lawsuit is based on actions by Respondents other than false speech and peer review, such as restricting Williams's privileges at DMCM without following due process and limiting his access both to his patients who were admitted to DMCM and to his patients' records." The trial court granted defendants' anti-SLAPP motion, holding that issue preclusion (based on the fee order, since there was no judgment on the merits in the first action) established that the first prong of section 425.16 was met, relying on *South Sutter LLC v. LJ Sutter Partners, L.P.* (2011) 193 Cal.App.4th 634 (issue preclusion applies when both actions involve same primary right).

Continued on page x

this case continued from page ix

The Court of Appeal reversed. "[I]ssue preclusion does not apply because the Fee Order and the SLAPP Order involve different issues, and it cannot adequately be determined what issues were actually [or necessarily] decided in the Fee Order." The court also rejected *South Sutter's* discussion of issue preclusion as unsound and incompatible with subsequent California Supreme Court authority, Baral v. Schnitt (2016) 1 Cal.5th 376 and *Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995. These cases emphasize that the SLAPP inquiry is not about the "primary right involved," but "based only on the particular factual allegations that form the basis of the cause of action or claim." Because the second lawsuit no longer contained peer review allegations, they could not form the basis of a SLAPP challenge.

The court also rejected the defense claim that this effectively allowed the plaintiff to amend his complaint, which the SLAPP statute prohibits. The court pointed out that he dismissed his complaint and filed a new one.

FRAUDULENT RESPONSE TO LETTER SAYING "DON'T MAKE US LITIGATE TO COLLECT DEBT" IS NOT SLAPP-PROTECTED AS "IN CONNECTION WITH LITIGATION"

Medallion Film LLC v. Loeb & Loeb (2024 2d Dist. Div. 8) 100 Cal.App.5th 1272;

Medallion sought to recover monies it thought were owing from an entity called Clarius "in a letter saying 'What can you do to assist us here in collecting what is due to us.... As you know our financial models were provided to you ... [¶] Let us know so we don[']t have to litigate and can resolve the matter in an amicable fashion.'" The recipient said he worked for a different company altogether, Aviron. A Loeb & Loeb attorney, representing Aviron, wrote a letter to the same effect: "Aviron has no legal connection to Clarius Capital Group, LLC whatsoever. It is not a successor in interest and there is no common ownership between the two companies."

Medallion learned this was false and sued for fraud and related claims. Loeb filed an anti-SLAPP motion, arguing that the letter arose from protected activity, because it was in response to a possible litigation threat, and that it was protected by the litigation privilege. The trial court granted the motion, but the Court of Appeal reversed.

The Court of Appeal rejected the claim that the Loeb & Loeb letter arose from protected activity. "From the first sentence of its appellate brief, Loeb & Loeb repeatedly and hyperbolically describes the email to which Given responded as an explicit threat of litigation conclusively establishing Given's letter as anticipating litigation. But the actual message to which Given was responding was nothing of the sort. This was not a demand letter or litigation threat … The email demonstrates the plaintiffs just wanted to be paid, and they were appealing to whomever they thought would be influential in persuading Sadleir to pay them without having to resort to litigation. This is the exact *opposite* of a threat of litigation."

"[W]here one party to a contract requests the other party to perform its duties under the agreement," the "possibility of litigation in the event of nonperformance is not enough to conclude the claim is made in anticipation of litigation contemplated in good faith and under serious consideration."

This analysis also informed the Court of Appeal's rejection of Loeb's merits challenge on the grounds that its actions were protected by the litigation privilege. "A prelitigation communication is privileged only when it relates to litigation that is contemplated in good faith and under serious consideration." "At most, the email alerted Given to a potential dispute with plaintiffs that at some point, if not resolved through negotiation and mutual agreement, could possibly develop into a lawsuit. That is not enough to invoke the litigation privilege." The privilege "does not apply to statements made 'simply as a tactical ploy to negotiate a bargain.'"

PLAINTIFF THEORY THAT HOUSEKEEPER BROKE OR WAS AWARE OF BROKEN SHOWER WAND INSUFFICIENT TO DEFEAT MSJ WHERE NO EVIDENCE OF EITHER; EXPERT OPINIONS TO SAME EFFECT PROPERLY EXCLUDED AS SPECULATIVE

Howard v. Accor Management US, Inc. (2024 2d Dist. Div. 8) 101 Cal. App.5th 130

INITIALLY UNPUBLISHED: PUBLISHED AFTER LETTER REQUESTING PUBLICATION from ASCDC and ADC-NCN

Plaintiff provided evidence that the hotel's shower wand was not broken when she used it in the morning, but broke or was broken when she used it in the afternoon, and that the hotel housekeeper had cleaned the room in the interim. The trial court granted summary judgment on the ground that there was no evidence the housekeeper had broken the wand, and because both the arguments of counsel and the opinions of plaintiff's expert (yes, Brad Avrit) were merely speculative. The Court of Appeal affirmed, "because Howard failed to mount a triable issue of material fact on the key issue of notice and failed to establish the applicability of a venerable but inapt doctrine – *res ipsa loquitur*."

Plaintiff argued that "the only reasonable inference is the housekeeper did something to break this wand or at least noticed its poor condition. We therefore must conclude it was more likely than not [the hotel] knew of the shower wand's unsafe condition. [ ] Howard's problem is nothing shows the housekeeper did

Continued on page xi

this case continued from page x

anything to break the shower wand." Expert Avrit's opinions were based on this same misguided "inference," and were properly excluded as speculative because:

1. Avrit did not question the housekeeper or examine any statements by her;
2. he covertly inspected the hotel room more than one year after the incident but made no attempt to explain how the shower fixtures and conditions then mirrored those when Howard was injured;
3. he apparently never examined the broken shower wand and relied instead on pictures and a witness statement that the shower head was made of plastic;
4. Howard conceded that "countless" varieties of plastics are used for consumer products, but Avrit failed to explain how he knew the properties of this particular product; and
5. Avrit based his conclusion the wand was sheared or broken after Howard's morning shower but before her afternoon shower largely on Howard's and her boyfriend's statements.

As to *res ipsa*, "[t]he doctrine has three requirements: (1) the accident was of a kind that ordinarily does not occur absent someone's negligence; (2) the instrumentality of harm was within the defendant's exclusive control; (3) the plaintiff did not voluntarily contribute to the harm. [] Two elements are missing here. First, as addressed above, it is not apparent hotel shower heads only fall apart due to the hotel's negligence. Second, [plaintiff's] deposition testimony suggests her grabbing action could have caused the break."

EMAILS INSULTING NEIGHBORS NOT IN CONNECTION WITH PUBLIC ISSUE, AND NOT ALL HOA TIFFS ARE EITHER

Dubac v. Itkoff (2024 2d Dist. Div. 8) 101 Cal.App.5th 540

Neighbors and co-members of a single-building HOA feuded. Defendants asserted, in emails to other the four other HOA members, residents, and others (including an insurance carrier) that plaintiff was a racist, a "Karen," and a pathological liar. The trial court denied defendants' anti-SLAPP motion as to most claims.

The Court of Appeal affirmed. "The general public did not and could not know about this intra-building tiff. The audience was always tiny. It was never the 'public.'"

The decision has a good summary of other HOA/SLAPP decisions:

Some lower courts have treated some decisionmaking by large homeowners associations as "public." (*E.g., Damon v. Ocean Hills Journalism Club* (2000) 85 Cal.App.4th 468, 478-479 [association issue affecting over 3,000 people was "public"]; *Ruiz v. Harbor View Community Assn.* (2005) 134 Cal.App.4th 1456, 1461, 1468–1469 [523 lots]; *Cabrera v. Alam* (2011) 197 Cal.App.4th 1077, 1081–1082, 1091 [228 condominiums]; Lee v. Silveira (2016) 6 Cal.App.5th 527, 539, 549 [440 town houses]; *Colyear v. Rolling Hills Community Assn. of Rancho Palos Verdes* (2017) 9 Cal.App.5th 125, 132-134 [about 755 households].)

Case law rejects the notion, however, that every issue within a homeowners association is a public issue. (*Talega Maintenance Corp. v. Standard Pacific Corp.* (2014) 225 Cal.App.4th 722, 734 ["the issue of who was to pay for the repairs, which was of interest to only a narrow sliver of society, was not a public issue"].)

The decision then identified a slew of decisions holding that a dispute communicated to only a small group of people is not a matter of public interest. (*E.g., Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122 [dispute communicated only to 700-member organization not a matter of public interest]; *Abuemeira v. Stephens* (2016) 246 Cal.App.4th 1291 [road rage incident; "unseemly private brawl" involved "private, anonymous" parties and raised no public issue]; *D.C. v. R.R.* (2010) 182 Cal.App.4th 1190, 1199 & 1226 [one student posted hateful and threatening online comments about another; no public issue]; *Bernstein v. LaBeouf* (2019) 43 Cal. App.5th 15, 19, 24 [drunken patron insulted bartender; no public issue]; *Workman v. Colichman* (2019) 33 Cal.App.5th 1039, 1042 [plaintiff accused defendant of torpedoing a planned home sale by emailing real estate agent that he was planning an addition that would interfere with the view from plaintiff's house; SLAPP rejected because "[i]nformation about the views from a private residence affecting only those directly interested in buying or selling that house is not an issue of public interest"]; *Jeppson v. Ley* (2020) 44 Cal.App.5th 845 [fight between owners of dog and cat]; *Woodhill Ventures, LLC v. Yang* (2021) 68 Cal.App.5th 624, 627 [customer unhappy with a birthday cake unleashed a tirade against the bakery that culminated in death threats to the bakers].)

SUIT SURVIVES SLAPP WHERE NOT BASED ON PROTECTED SPEECH, BUT ON CONDUCT THAT FOLLOWED THEREAFTER

Gazal v. Echeverry (2024 2d Dist. Div. 8) 101 Cal.App.5th 34

A parishioner was moved by a deacon's homily about a needy family. After further conversations, the parishioner donated over $1 million to buy the family a house and car. He later found that the house was purchased, not in the family's name, but in the name of a nonprofit run by the deacon's wife. He sued for fraud, elder abuse, and breach of contract.

"Here, the problem for defendants is that plaintiff's claims do not arise from the homily. His claims arise from the alleged misconduct that occurred after delivery of the homily. Conduct

Continued on page xii

this case continued from page xi

does not become protected activity simply because it follows protected activity. (*See City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78, ... ["That a cause of action arguably may have been triggered by protected activity does not entail that it is one arising from such."])"

"As the trial court observed, the homily "set in motion a series of events that resulted in the claimed misconduct." Certainly, the homily inspired plaintiff to offer to buy a car and a house for the destitute family described in the homily. But that is as far as it goes. Plaintiff would have no claims were it not for the conduct he alleged in seven of his causes of action: defendants' conduct of buying the house in SOFESA's name rather than in the name of the family and using the donation for items never discussed or agreed upon. The homily does not supply an element of any of those claims."

NO MALICIOUS PROSECUTION CLAIM BECAUSE CRIMINAL CHARGES RESULTED FROM INDEPENDENT POLICE INVESTIGATION, NOT EMPLOYER'S POLICE REPORT

Lugo v. Pixior, LLC (2024 2d Dist. Div. 8) 101 Cal.App.5th 511

Lugo sued her former employer and some employees for malicious prosecution, claiming it had given a false report about her to police, which triggered a criminal prosecution against her that she defeated. In response, the defendants filed a SLAPP motion to strike. The trial court denied the motion, but the Court of Appeal reversed. "As a matter of law, Pixior had a winning defense: criminal prosecutors acted only after an *independent* investigation. It was error to deny Pixior's motion." The prosecution was a result of that investigation, not the initial faulty report.

"A separate investigation that is independent protects a complainant from liability for malicious prosecution. (*Werner v. Hearst Publications, Inc.* (1944) 65 Cal.App.2d 667, 670–673.)"

TWO VAULT BREACHES THE SAME NIGHT BY A SINGLE GROUP WERE A SINGLE OCCURRENCE

Apex Solutions, Inc. v. Falls Lake Ins. Mgmt. Co., Inc. (2024 1st Dist. Div. 4) 100 Cal.App.5th 1249

A cannabis facility was victimized on a night of civil unrest. No question as to coverage for the loss: the only question is policy limits per occurrence. The insured naturally argued two breaches means two occurrences. The trial court disagreed and granted summary judgment. The Court of Appeal affirmed.

"The middle-of-the-night setting suggests only one plausible scenario: Based on the narrative in the police report on June 2 – which describes a group of people being directed by a leader, responding to directions, and working together – this was a coordinated raid by a group of unknown persons, working on a single heist, which is what Apex initially reported to the police. Given the fortified nature of the vaults involved and their secured locations (see ante, fn. 6.), the idea that there were two separate opportunistic, spur-of-the-moment vault breaches is implausible. What happened here was hardly a smash-and-grab operation. According to photo stills and an unrebutted declaration submitted by Falls Lake below, the surveillance video showed that the facility was continuously occupied – if not by exactly the same people, at least by people working in coordinated fashion."

WITHDRAWING COUNSEL CAN'T ESCAPE SANCTIONS FOR DISCOVERY ABUSE; DON'T BE UNCIVIL

Masimo Corporation v. The Vanderpool Law Firm, Inc. (2024 4th Dist. Div.3) – Cal.App.5th –, 2024 WL 1926197

The court sanctioned counsel $10,000 for discovery abuse. Counsel should have paid, but instead appealed and got a published decision thrashing his reputation. Yes, the Court of Appeal affirmed.

1. That the firm withdrew as counsel before the motion to compel was filed does not exempt it from liability for sanctions for crummy discovery responses made while it was counsel of record.

2. The court found counsel "woefully uncivil." One email: "Your remedy is elsewhere, and an attorney with your billing rate should know that. We are not here to educate you." Another, in response to the motion to compel, had the subject line, "You are joking right?" The body of the email: "In 30 years of practice this may be the stupidest thing I've ever seen. Robert is this really why you went to law school? Quit sending us paper. You know we are out of the case so just knock it off and get a life. Otherwise, we're going to be requesting sanctions against your firm for even bothering us with this nonsense." Needless to say, that sanction request was denied.

"Incivility is the adult equivalent of schoolyard bullying and we will not keep looking the other way when attorneys practice like this. They will be called out and immortalized in the California Appellate Reports." Ouch.

RECENT CASES

MUST GET EXPRESS CONSENT OF BOTH PARTIES FOR EXTENSION OF TIME TO PAY ARBITRATOR FEES AND COSTS; FAILURE TO OBJECT IS NOT CONSENT

Reynosa v. Superior Court (Advanced Transportation Services, Inc.) (2024 5th Dist.) – Cal.App.5th –, 2024 WL 1984884

After stipulating to arbitration, a prior employee filed a motion to withdraw from arbitration when the employer twice failed to pay fees and costs timely. The trial court denied the motion on the ground that the arbitrator had extended the deadlines, and the employee did not object.

The employee filed a writ petition, and the Court of Appeal ordered the trial court to grant the motion to withdraw. The court held that Section 1281.98, requiring payment within 30 days after the due date, controls. "The clear and unequivocal language of section 1281.98, subdivision (a)(1) 'establishes a simple bright-line rule that a drafting party's failure to pay outstanding arbitration fees within 30 days after the due date results in its material breach of the arbitration agreement.'"

The court further held that the arbitrator extending deadlines to which the employee did not object at the time was not the employee "agreeing" to the extension. "[T]he statute was amended to prohibit an arbitration provider, which 'may be financially interested in continuing the arbitration and in pleasing regular clients' [citation] from implementing a due date extension without first affording the consumer or employee claimant the opportunity to give input thereon and then obtaining the consent of all parties (including said claimant) thereto." The employer and trial court's position "undermines the legislative intent: by letting a claimant's silence, failure to object, or other seemingly acquiescent conduct (not amounting to direct expression) constitute a sufficient manifestation of his or her agreement to an extension, the need for the arbitration provider or the business/employer to actively procure such consent – *e.g.*, by having the claimant sign an acknowledgement form – is obviated."

PLAINTIFFS SEEKING ATTORNEY FEES INCURRED SEEKING COVERAGE WAIVE THE ATTORNEY-CLIENT PRIVILEGE AS TO DOCUMENTS SUPPORTING THE FEE CLAIM

Byers v. Superior Court (USAA General Indemnity Co.) (2024 1st Dist. Div. 5) – Cal.App.5th –, 2024 WL 2006044

Plaintiffs sued their insurer and sought *Brandt* fees. The trial court granted the insurer's motion to compel production of fee agreements, invoices, billing records, receipts and the like. The Court of Appeal agreed. Plaintiffs' "admission that they are seeking *Brandt* fees ... is an implied waiver of the attorney-client privilege, at least as to the attorney free documents they plan to rely upon to p[rove the amount of fees they reasonably incurred."

PARENTS BOUND BY DECEDENT'S ARBITRATION AGREEMENT, INCLUDING FOR WRONGFUL DEATH CLAIM

Holland v. Silverscreen Healthcare (2024 2d Dist. Div. 2) -- Cal.App.5th ----, 2024 WL 2106000

A resident of 24-hour skilled nursing facility signed an arbitration agreement providing "that any dispute as to medical malpractice" and "any dispute ... that relates to the provision of care, treatment and services the Facility provides to the Resident ..., including any action for injury or death arising from negligence, intentional tort and/or statutory causes of action (including all California Welfare and Institutions Code sections), will be determined by submission to binding arbitration," and that the agreement "is binding on all parties, including the Resident's representatives, executors, family members, and heirs."

The trial court found that the agreement covered the parents' causes of action for dependent adult abuse, negligence, and violation of residents' rights. However, the agreement did not cover wrongful death, on the rationale that the claim was based on elder abuse, not medical malpractice, citing *Avila v. Southern California Specialty Care, Inc.* (2018) 20 Cal.App.5th 835.

The Court of Appeal reversed, finding that the issue is governed by *Ruiz v. Podolsky* (2010) 50 Cal.4th 838. "Ruiz concluded 'that section 1295, construed in light of its purpose, is designed to permit patients who sign arbitration agreements to bind their heirs in wrongful death actions.'" The wrongful death claim "sounds in professional negligence:" that it could also give rise to an elder abuse claim does not change that fact, in part because only the decedent or his estate can assert that claim, not the parents.

WORKERS COMP APPLIES TO TRAVEL FROM REMOTE FIRE CAMP FOR CELL SERVICE

3 Stonedeggs v. WCAB (Nanez) (2024 3d Dist.) – Cal.App.5th –, 2024 WL 2105987;

Under the "commercial traveler" rule in workers' compensation law, an employee traveling on the employer's business is regarded as acting within the course of employment during the entire period of travel. Thus, coverage applies to injuries the employee sustains during the travel itself and during the course of other personal activities "reasonably necessary for the sustenance, comfort, and safety of the employee," such as procuring food and shelter, but not to personal activity not reasonably contemplated by the employer.

The Board determined that under the commercial traveler rule, workers' compensation coverage applied to injuries worker Nanez sustained in an auto accident while he was off work and away

Continued on page xiv

this case continued from page xiii

from his job at a remote fire base camp. He drove approximately 70 miles away from camp to obtain cellular service. The Board determine this was conduct reasonably expected by his employer to be incident to its requirement that Nanez spend time away from home where cellular service was not adequately provided at the camp.

The employer expected employees not to leave the job site and to notify a manager if they did. Nanez did not do so. The employer argued that because of this and the purpose of the trip, the trip was a material deviation from his employment.

The Board concluded that Nanez's travel was for comfort and leisure and was not a distinct departure from his employment. The Court of Appeal found that substantial evidence supported this conclusion and so affirmed.

EMPLOYER WAIVED RIGHT TO ARBITRATE BECAUSE IT DID NOT BRING MOTION TO COMPEL SOON ENOUGH

Semprini v. Wedbush Securities Inc. (2024 4th Dist. Div. 3) 101 Cal.App.5th 518

Employer moved to compel arbitration of individual PAGA claims based on the change in law wrought by *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639. But the employer waited until 9 months after that decision, 5-6 months after select class members signed new arbitration agreements, and only 5 months before trial. The trial court denied the motion to compel arbitration, and the Court of Appeal affirmed, skipping over whether *Viking River* or the new agreements gave the employer new rights to arbitration, because substantial evidence supported a finding of unreasonable delay.

EMPLOYEE CAN BRING PAGA CLAIM WITHOUT AN INDIVIDUAL CLAIM, BECAUSE *ADOLPH* SUPERSEDES *VIKING RIVER*

Balderas v. Fresh Start Harvesting, Inc. (2024 2d Dist. Div.6) 101 Cal.App.5th 533

The trial court, on its own motion, dismissed a PAGA complaint based on the ruling in *Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639: "When an employee's own dispute is pared away from a PAGA action, the employee is no different from a member of the general public, and PAGA does not allow such persons to maintain suit."

The Court of Appeal reversed, because *Viking River* was famously superseded on this point by the California Supreme Court's decision in *Adolph v. Uber Technologies, Inc.* (2023) 14 Cal.5th 1104. *Adolph* "concluded that the *Viking River* requirement of having to file an individual PAGA cause of action to achieve standing to file a representative PAGA suit was incorrect. There are only two requirements for PAGA standing. The plaintiff must allege that he or she is (1) someone who was employed by the alleged violator and (2) someone against whom one or more of the alleged violations was committed."

"[A]n employee who does not bring an individual claim against her employer may nevertheless bring a PAGA action for herself and other employees of the company."

BEING SPOUSE OF A POLITICAL CANDIDATE DOES NOT MAKE YOU A LIMITED PURPOSE PUBLIC FIGURE

Bui v. Ky (2024 4th Dist. Div.3) __ Cal.App.5th __, 2024 WL 2044798

Plaintiff sued for defamation on a YouTube channel aimed at the local Vietnamese American community about whether plaintiff and her family had been communists.

Defendants won a SLAPP motion to dismiss. They argued that plaintiff was a limited purpose public figure because her husband was running for state assembly. Therefore, her claim required a showing of actual malice, on which she had not made even a *prima facie* case. Her sole evidence contested the truth of the defamatory statements.

The Court of Appeal reversed. One of the elements necessary to characterize someone as a limited purpose public figure is that "the plaintiff must have undertaken some voluntary act through which he or she sought to influence resolution of the public issue." Defendants argued that "[a] candidate does not run in isolation; in making [the decision to run for office] he or she brings the candidate's family into the public eye." The Court of Appeal rejected this: "To the extent this is an urge for us to find any political candidate's family members to be limited purpose public figures simply by reason of the candidate's choice to run for public office, we decline to so hold." "[D]oing so would effectively turn family members of a political candidate, including children, into public figures through no purposeful action of their own."

The court found the other evidence also insufficient. "The one-time carrying of a campaign poster with an unknown message by the wife of a political candidate at a cultural event, standing alone, does not amount to the type of voluntary injection in a public controversy at which the limited purpose public figure jurisprudence is aimed."

RECENT CASES

ONLY ARBITRATOR, NOT TRIAL COURT, CAN DISMISS CLAIMS AFTER ARBITRATION ORDERED

Lew-Williams v. Petrosian (2024 2d Dist. Div. 3) 101 Cal.App.5th 97

The trial court granted a defense motion to compel arbitration. After plaintiffs failed to initiate arbitration proceedings, the trial court dismissed their claims for failure to prosecute.

The dismissal was reversed because "[o]nce the court granted the Petrosian defendants' motion to compel arbitration and stayed the action, it retained only vestigial jurisdiction over the case as provided in the California Arbitration Act (Code Civ. Proc., § 1281 *et seq*.), and the court did not have the power to dismiss the claims for failure to prosecute. If a party fails to diligently prosecute an arbitration, the appropriate remedy is for the opposing party to seek relief in the arbitration proceeding (and, if necessary, the opposing party may need to initiate the arbitration for this purpose)."

ARBITRATION AGREEMENT TERMINATES WHEN RE-EMPLOYED WITHOUT AN ARBITRATION AGREEMENT

Vazquez v. Sanisure, Inc. (2024 2nd Dist. Div. 6) 101 Cal.App.5th 139

Plaintiff had two stints with an employer. The first time, they entered into an arbitration agreement. The second time, arbitration was not part of the parties' negotiations. After that second stint ended, plaintiff filed a class action alleging failure to provide adequate wage statements. Defendant moved to compel arbitration based on the earlier agreement. The trial court denied the motion because all the claims arose from the second stint of employment.

The Court of Appeal affirmed. "An employer and employee can agree to arbitrate claims related to their employment relationship. But termination of that relationship can revoke the arbitration agreement. And when there is no evidence that the parties agreed to arbitrate claims arising from a subsequent employment relationship, any claims arising solely from that subsequent relationship are not subject to arbitration."

PLAINTIFF WHO SUES ON CLAIMS NOT IN HIS EEOC CLAIM HAS NOT EXHAUSTED ADMINISTRATIVE REMEDIES

Kuigoua v. California Department of Veterans Affairs (2024 2nd Dist. Div. 8) 101 Cal.App.5th 499;

Plaintiff's claim with the EEOC checked the boxes for discrimination based on sex and retaliation. An EEOC officer investigated and concluded there was no evidence that plaintiff had been discriminated against because of his male gender, nor that he had been retaliated against. Once the EEOC right to sue letter was issued, plaintiff sued, alleging four causes of action: (1) sexual harassment; (2) harassment based on race or immigrant status; (3) failure to prevent this sexual and racial harassment; and (4) retaliation.

The trial court granted summary judgment on failure to exhaust grounds, and the Court of Appeal affirmed. "Filing this administrative complaint is a mandatory prerequisite to suing in court. [¶] ... [¶] ... Even in cases appropriate for judicial resolution, the exhaustion requirement can lead to settlement, can eliminate unlawful practices, and can mitigate damages. [¶] The crucial exhaustion test is this: employees satisfy the administrative exhaustion requirement if their court claims are like, and reasonably related to, the claims they stated in their administrative filing. [¶] ... [¶] Kuigoua loses because his judicial claims are not like, and are not reasonably related to, those in his administrative complaint."

TRAIL USE IMMUNITY APPLIED

Helm v. City of Los Angeles (2024 4th Dist. Div.3) __ Cal.App.5th __, 2024 WL 1691492;

At a recreational area on Diaz Lake, plaintiff tripped over a cable strung between two posts on a trail there to prevent vehicular access. The trial court granted summary judgment, and the Court of Appeal affirmed.

Plaintiff argued that it was a "pathway," not a trail, an argument that went nowhere. The court noted that the purpose of Government Code section 831.4 is to keep "recreational areas open to the public by preventing burdens and costs on public entities," and he was unquestionably in a recreational area.

The court then determined that the wooden poles and wire cable were "integral parts of that trail." (*Compare, e.g., Toeppe v. City of San Diego* (2017) 13 Cal.App.5th 921, 924 [no trail immunity where plaintiff hit by falling tree branch that was not part of any trail], with *Prokop v. City of Los Angeles* (2007) 150 Cal.App.4th 1332, 1335, 1341–1342 [trail immunity where plaintiff collided with chain link fence after exiting bike path].)

Continued on page xvi

this case continued from page xv

"Helm points out that the court in *Prokop* applied trail immunity because the bike path, the accompanying chain link fence, and its nearby gateway were all determined to be part of the integrated design of the trail. (*Prokop, supra,* 150 Cal.App.4th at pp. 1341–1342.) He then argues that the cable wire in the instant matter was not an integrated part of any trail because its stated purpose was to confine vehicular traffic to the roadway. We fail to see how this stated purpose helps Helm's argument here. The undisputed evidence was that the purpose of the wooden poles and the cable was to prevent vehicles using the pathway to access the lake. There was no intention for those same poles and cable to prohibit people from using the pathway to access the lake.... Thus, the undisputed evidence establishes that the poles and cable stretched across one of the access ways to the pathway to the lake, which, as the trial court concluded, "is similar to the fence in *Prokup*." In this sense, the wooden poles and wire cable were installed to create a defined barrier and delineate the trails to the lake. In addition, they increased safety for people walking along the pathway so that they would not have to worry about being struck by a vehicle driving down that pathway. Against this background, it is apparent that the wooden poles and wire cable were integral components of the pathway to the lake. Accordingly, the trial court did not err in applying trail immunity and granting Respondents' motion for summary judgment."

SECTION 170.6 TRUMPS SAN DIEGO LOCAL RULE GIVING ANY JUDGE THE POWER TO ACT AS A MASTER CALENDAR DEPARTMENT

Lorch v. Superior Court (Kia Motors America) (2024 4th Dist. Div.1) __ Cal.App.5th __, 2024 WL 2205292

A trial judge newly assigned to preside over a trial denied plaintiff's peremptory challenge as untimely under the master calendar rule, which requires a party to file a section 170.6 challenge "to the judge supervising the master calendar not later than the time the cause is assigned for trial." The judge then immediately began a two-day jury trial, resulting in a defense verdict. Plaintiff filed a writ petition within the statutory 10-day period.

"Lorch contends that the previously assigned judge's reassignment of her case to Judge Taylor was not a true master calendar assignment under section 170.6, and her peremptory challenge was therefore timely because it was filed before trial started." The Court of Appeal agreed. "We also conclude that Superior Court of San Diego County, Local Rules, rule 2.1.3 (rule 2.1.3), which purports to provide any superior court judge with the power to act as a master calendar department for purposes of assigning cases for trial, is inconsistent with section 170.6 and case law interpreting the statute." (*See Contractors Labor Pool v. Westway Contractors* (1997) 53 Cal.App.4th 152, 169 ["To the extent a local rule conflicts with a state statute, the rule is invalid."])

"This rule is also invalid to the extent it allows a judge to act in the capacity of a master calendar judge without notification to the parties." Here, all that happened is a voicemail from the clerk for the former judge saying the "case had 'been picked up by Judge Taylor.' There was no mention of a master calendar reassignment in the clerk's voicemail. Judge Longstreth's minute order from earlier that day also neglected to mention any master calendar reassignment."

Result: defense judgment void; new trial before a new judge.

A·D·C VERITAS
Association of Defense Counsel of Northern California and Nevada

ASCDC
Association of Southern California Defense Counsel

March 29, 2024

REQUEST FOR PUBLICATION
(Cal. Rules of Court, rule 8.1120)

The Honorable Maria E. Stratton, Presiding Justice
The Honorable John Shepard Wiley Jr., Associate Justice
The Honorable Victor Viramontes, Associate Justice
California Court of Appeal
Ronald Reagan State Building
Second Appellate District, Division Eight
300 South Spring Street
2nd Floor, North Tower
Los Angeles, California 90013

Re: *Howard v. Accor Management US, Inc.*
2d Civil Case No. B320603

Dear Honorable Justices:

Pursuant to rule 8.1120(a) of the California Rules of Court, the Association of Southern California Defense Counsel ("ASCDC") and the Association of Defense Counsel of Northern California and Nevada ("ADC-NCN") respectfully request that this Court publish its recent opinion in *Howard v. Accor Management US, Inc.* (March 13, 2024, No. B320603) (the "Opinion").

Interests of the Requesting Organizations

ASCDC is the nation's largest and preeminent regional organization of lawyers who specialize in defending civil actions. It has over 1,100 attorneys in Central and Southern California, among whom are some of the leading trial and appellate lawyers of California's civil defense bar.

ASCDC is actively involved in assisting courts on issues of interest to its members. In addition to representation in amicus appellate matters, ASCDC provides its members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas.

ADC-NCN numbers approximately 700 attorneys primarily engaged in the defense of civil actions. Its members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally. ADC-NCN's Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California.

Although ASCDC and ADC-NCN are separate organizations, they have some common members and often coordinate on matters of shared interest, such as this letter. Together and separately, they have appeared as amicus curiae in numerous cases before the California Supreme Court and Courts of Appeal across the state to express the interests of their members and their members' clients. They also routinely seek publication of cases important to the defense bar. Many of their members defend businesses against personal injury actions, such as the personal injury lawsuit against Accor Management that the Opinion addresses.

No party has paid for or drafted this letter.

Why Publication Is Warranted

An opinion "should be certified for publication in the Official Reports" if it meets any of the nine separately listed criteria in California Rules of Court, rule 8.1105(c). The Opinion meets multiple publication standards given the frequency of personal injury actions, as it relates to the doctrine of res ipsa loquitur and the issue of speculative expert testimony. In particular, it:

- "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions" (Cal. Rules of Court, rule 8.1105(c)(2)), as to the doctrine of res ipsa loquitur (Opinion, pp. 10-11);

- "explains . . . an existing rule of law" (Cal. Rules of Court, rule 8.1105(c)(3)), regarding the use of res ipsa loquitur and speculative expert testimony in attempting to meet the evidentiary requirement for opposing summary judgment and establishing a triable issue as to notice (Opinion, pp. 8-11); and

- "[i]nvolves a legal issue of continuing public interest" (Cal. Rules of Court, rule 8.1105(c)(6)), given the importance of determining actual notice—and the sufficiency of expert evidence in such a finding—in thousands of personal injury claims filed against hotels, stores, and other businesses across California (Opinion, pp. 8-10.)

This case involves a hotel patron grabbing a handheld shower head that then fell apart, cutting her and causing her to fall. The plaintiff relied primarily on expert Brad P. Avrit to attempt to establish that a hotel housekeeper broke the shower and that, in turn, gave the defendant actual notice of the unsafe condition. The trial court, and this Court, found that the plaintiff failed to produce a triable issue of material fact as to notice and the applicability of res ipsa loquitur, and therefore summary judgment for defendant was warranted.

If published, the Opinion would be beneficial in personal injury cases for two separate reasons. First, publication will provide guidance as to whether a sufficient showing has been made to apply the doctrine of res ipsa loquitur. Second, publication will aid litigants and courts in defining the scope of proper expert testimony in personal injury actions. It will allow parties facing similarly speculative expert testimony to point to published precedent in seeking exclusion. And it will increase judicial efficiency by helping experts prepare proper, better opinions and enhance their ability to explain to clients why they cannot provide a valid opinion.

Res ipsa loquitur doctrine. The Opinion provides analysis of the rarely visited doctrine of res ipsa loquitur, as applied to facts significantly different from those stated in published opinions. After explaining the existing rule of law for res ipsa loquitur, the Opinion determines that the plaintiff failed to establish the last two elements required under the doctrine—that "the instrumentality of harm was within the defendant's exclusive control" and that "the plaintiff did not voluntarily contribute to the harm." (Opinion, pp. 10-11.)

Specifically, addressing the cases the plaintiff relied on where the plaintiff may have used an item that ultimately led to an injury, the Opinion notes an important distinction: "In most of [the cases], unlike here, there was no room to conclude the plaintiff voluntarily caused the problem." (Opinion, p. 11; compare *ibid.* ["[plaintiff's] deposition testimony suggests her grabbing action could have caused the break"] with *Howe v. Seven Forty Two Co., Inc.* (2010) 189 Cal.App.4th 1155, 1162 [sufficient evidence showed customer sat on a stool in an ordinary manner]; *Emerick v. Raleigh Hills Hospital* (1982) 133 Cal.App.3d 575, 583-585 [hospital patient undergoing rigorous treatment leaning or sitting on a sink when disoriented was to be expected]; *Dennis v. Carolina Pines Bowling Center* (1967) 248 Cal.App.2d 369, 374 ["No facts [were] developed to support" contributory negligence]; *Mitzner v. Wilson* (1937) 21 Cal.App.2d 85, 87 [hotel guest was asleep when part of the ceiling fell on her], overruling recognized in *Engelking v. Carlson* (1938) 80 P.2d 96, 101, affirmed in relevant parts by 13 Cal. 2d 216 (1939).) Publishing the Opinion would guide future disputes in distinguishing between ordinary use of an item from a use that may have caused or contributed to the injury.

Speculative expert testimony. The Opinion also explains the evidentiary requirement for opposing summary judgment as applied to the recurring circumstances where the plaintiff only offers speculative, conclusory, or unreliable expert testimony to show notice. Such speculation does not "bridge the gaps" in the plaintiff's need to present a triable issue of fact because "expert speculation is not evidence that can defeat summary judgment." (Opinion, pp. 8-10.)

The Opinion is significant because it addresses and rejects the prevalent approach of an "expert" basing a conclusion on sweeping generalizations and speculation without any facts relevant to the actual incident to support such a conclusion. In determining the trial court did not abuse its discretion in excluding the expert testimony, the Opinion explains:

1. Avrit did not question the housekeeper or examine any statements by her.
2. He covertly inspected the hotel room more than one year after the incident but made no attempt to explain how the shower fixtures and conditions then mirrored those when plaintiff was injured.
3. He apparently never examined the broken shower wand and relied instead on pictures and a witness statement that the shower head was made of plastic.
4. Plaintiff conceded that "countless" varieties of plastics are used for consumer products, but Avrit failed to explain how he knew the properties of this particular product.
5. Avrit based his conclusion the wand was sheared or broken after plaintiff's morning shower but before her afternoon shower largely on plaintiff's and her boyfriend's statements."

(Opinion, pp. 9-10)

This reasoning is wholly in line with, and a helpful illustration of, the trial court's "gatekeeping role" in excluding speculative evidence, as required by the Supreme Court's decision in *Sargon Enterprises, Inc. v. University of Southern Cal.* (2012) 55 Cal.4th 747, 771-772. Even beyond clearly laying out the evidentiary requirements and why they are not met here, the Opinion also explains how to adequately present this issue for review, holding that, an appellant must "examine the trial court papers and determine which statements the trial court struck and why, and to discern why each statement should have come in despite the specific objection asserted." (Opinion, p. 9.)

Further, the introduction of speculative expert opinion evidence is becoming increasingly common in personal injury cases and is a legal issue of continuing public interest. Specifically, this type of speculative testimony has become a common practice for the expert in this case, Brad Avrit.

As numerous unpublished decisions make plain, Mr. Avrit frequently appears in personal injury cases against business owners and operators to provide speculative testimony:

- *Campbell v. Budd* (Oct. 18, 2022, No. B306687) 2022 WL 10252427, at *5-7 (nonpub. opn.) ("Avrit's declaration does not create a dispute of material fact. Aside from concluding that the risk of injury was foreseeable, he fails to explain how likely it is for a door made of annealed glass to break simply from contact with a 12 year old or any other person." And, regarding excluded portions of the declaration, "Avrit provided no foundation for parts of his opinion.")

- *Medina v. Costco Wholesale Corporation* (Feb. 22, 2018, E066387) 2018 WL 1008209, *6 (nonpub. opn.) ("Avrit merely speculated that there was some type of contaminant, which caused Medina's fall . . . . [I]t was equally speculative that Medina may have tripped over her own feet. Avrit's speculative testimony was properly excluded").

- *Rabbani v. Trader Joe's Company* (Oct. 16, 2015, B256819) 2015 WL 6122242, *7 (nonpub. opn.) ("The Avrit declaration does not establish a dispute of fact"; "Avrit never claimed to have inspected the Store himself"; "that the frequent presence of liquids on the floor was in Avrit's view 'foreseeable' does not establish a disputed issue as to whether such liquids were in fact frequently present").

- *Leiterman v. Costco Wholesale Corp.* (Sept. 17, 2013, B241885) 2013 WL 5211374, *3-4 (nonpub. opn.) ("Avrit's real expertise is testifying against Costco in food court slip and fall cases, which he has done 'on many, many occasions' . . . always working and testifying against Costco," and at times simply "narrating what he saw on the video and giving non-expert opinions").

- *Simon v. Cerritos Towne Center, LLC* (Mar. 28, 2012, B228597) 2012 WL 1022387, *8 (nonpub. opn.) ("Avrit concluded that the painted area in front of the store entrances was congested . . . and was therefore dangerous. The accident, however, did not occur in the painted area"; "Avrit's opinions were properly rejected as speculative and conjectural because they were based on dangers posed by congestion in an area where the accident did not occur").

- *Wendell v. Del Amo Fashion Center Operating Co., LLC* (July 28, 2010, B218691) 2010 WL 2930027, *3-4 (nonpub. opn.) (Avrit's statement "that respondents were on notice of the hazard presented by the subject wheel stop does not create a triable issue of fact. His conclusion is based upon inspections of 'other malls,' not the mall where [plaintiff] was injured").

These cases often avoid publication, presumably because they are fact specific. But they all address the same recurring issue—experts, like Avrit, making sweeping conclusions without factual support. Publication of this Opinion will allow the parties and the courts to point to published precedent the next time this issue arises and therefore assist both the bench and bar to ensure a level playing field.

***

For all these reasons, ASCDC and ADC-NCN respectfully urge this Court to publish its opinion.

Respectfully submitted,

By: 

Edward L. Xanders, SBN 145779
David E. Hackett, SBN 271151
Katarina Rusinas, SBN 352688
Greines, Martin, Stein & Richland LLP
6420 Wilshire Boulevard, Suite 1100
Los Angeles, California 90048

Attorneys for Association of Southern California Defense Counsel

By: 

James V. Weixel, SBN 166024
Demler, Armstrong & Rowland, LLP, 8950 Cal Center Dr, Ste 250, Sacramento, CA 95826-3225

Attorneys for Association of Defense Counsel of Northern California and Nevada

Filed 4/3/2024

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

MONIQUE HOWARD, Plaintiff and Appellant, v. ACCOR MANAGEMENT US, INC., Defendant and Respondent.	B320603 Los Angeles County Super. Ct. No. 19STCV08792 **ORDER CERTIFYING OPINION FOR PUBLICATION** **[No change in judgment]**

THE COURT:

The opinion in the above-entitled matter filed on March 13, 2024, was not certified for publication in the Official Reports. For good cause, it now appears that the opinion should be published in the Official Reports and it is so ordered.

There is no change in the judgment.

STRATTON, P. J. WILEY, J. VIRAMONTES, J.

Jan Roughan
BSN, RN, PHN, CRRN/ABSNC, CNLCP®, CCM

LIFE CARE PLANS (LCP)
- Comprehensive (Trial)
- Mini / Cost Projections (Mediation/Settlement Conference)
- Critique Opposing LCP

EXPERT TESTIMONY
- Trial
- Arbitration
- Mediation/Settlement Conference

MEDICAL RECORDS
- Review/Chronology

IME
- Attendance
- Report/Critique

REASONABLENESS
- Past Billings
- Retrospective Care

VIDEO SERVICE
- Day in Life
- Mediation/Settlement Documentary

Roughan
& ASSOCIATES

465 N. Halstead Street, Suite 120
Pasadena, CA 91107
626.351.0991 ext. 216 or 217
www.linc.biz

Roughan
& ASSOCIATES
The DNA of Damage Analysis

LIFE CARE PLANNING

LAWYERS' MUTUAL
INSURANCE COMPANY

LEVEL UP YOUR PRACTICE.

While providing the most dependable professional liability insurance in California, Lawyers' Mutual strives to assist our members and make the ease of doing business as a lawyer their sole focus.

We listen to our members and have collaborated with industry-leading vendors to source valuable benefits to level up their practices.

Complimentary with every policy:

- Fastcase legal research system
- Cyber Coverage Endorsement
- Dedicated lawyer-to-lawyer hotline
- Unlimited access to LMIC+ CLE
- 25 hours of access to OnDemand CLE with Beverly Hills Bar Association

Add value to your practice through these partnerships:

- Daily Journal exclusive member subscription offer
- MyCase case management software
- Veritext court reporting agency
- e-Legal subpoena preparation
- Online payment options

Shielding your practice is our priority
www.lawyersmutual.com

Our strength is your insurance

TECHNOLOGY CORNER

Digital Watermarks on Label AI-Generated Material

Jonathan Varnica **Vogl Meredith Burke & Streza**

Ever get the impression that the letter you just read from plaintiff's counsel was not written by a human? Pages and pages of bland legal authority without any reference to the issue at hand that seems like it was copy and pasted from a Rutter guide. Looks like the same letter you read last week from a different opposing counsel. Could there be a litigant-in-a-box available for purchase, where opposing counsel can buy pre-made discovery and pre-made meet & confer letters? Probably not, but with the ever-growing use of artificial intelligence as a bypass to effort, it's not outside the realm of possibility that the letter you just read was written by a robot. However, there is no way to confirm the suspicion.

That may change because the ambiguity surrounding artificial intelligence material is the subject of a multiple bills in Congress that aim to label "AI-generated" creations. In September 2023 the AI-Generated Content Act (Senate Bill 2765) was introduced in Congress that would require AI developers to identify content created using their products with digital watermarks or metadata. The labelling requirement would apply to any entity that generates, creates, or otherwise produces AI-generated material, which includes text, images, and audio.

More recently, in March 2024, the bipartisan Protecting Americans from Deceptive AI Act was introduced. The bill is being marketed as an effort to fight deepfakes, where someone's voice or image is manipulated for scams or misinformation. The bill's co-sponsor, Rep. Anna Eshoo representing parts of San Mateo and Santa Clara Counties, says "we've seen so many examples already, whether it's voice manipulation or a video deepfake. I think the American people deserve to know whether something is a deepfake or not."

The proposed legislation would apply not just to images or audio, but also text. Meaning that if an AI-generated material bill is passed, any letter or brief containing text generated by artificial intelligence such as ChatGPT would need to be labelled as such. In all likelihood, an AI-generated content label would merely restrain the use of artificial intelligence as a writing crutch, hopefully leading to a future where the letters we read sound a lot more human.

Amicus Corner

Don Willenburg Gordon Rees Scully Mansukhani, LLP

ADC's amicus briefs committee exists to bolster and provide institutional support for defense positions at Courts of Appeal and the California Supreme Court, and sometimes the Legislature and other bodies as well. The committee thereby provides excellent opportunities for members, like you and the smart colleagues in your office, to get involved in decisions involving important defense issues across a broad range of our practice.

Ordinarily, the committee's major activities are (a) requesting publication of defense-friendly unpublished decisions, (b) supporting petitions for review by the California Supreme Court, and (c) authoring amicus briefs.

SINCE THE LAST ISSUE OF *DEFENSE COMMENT*, YOUR AMICUS COMMITTEE HAS SENT LETTERS SUPPORTING SUPREME COURT REVIEW IN TWO CASES.

1 *Neeble-Diamond v. Hotel California by the Sea, LLC* involves both FEHA and non-FEHA claims. After a defense victory, the court applied the FEHA procedure and standard governing recovery of defense costs (plaintiff's action must be frivolous) to costs on non-FEHA claims. From the letter supporting review:

> Until now, the Courts of Appeal have agreed that, in cases involving both FEHA and non-FEHA claims, Code of Civil Procedure section 1032 applies to recovery of costs for the non-FEHA claims. (*See, e.g., Moreno v. Bassi* (2021) 65 Cal.App.5th 244, 261–263; *Roman v. BRE Properties, Inc.* (2015) 237 Cal.App.4th 1040, 1058–1062.) At the very least, the trial court is required to determine whether costs can be allocated between the FEHA and non-FEHA claims. (*Moreno*, at 262; *Roman*, at 1059.)
>
> The instant decision, however, changes that. The Court of Appeal held in this case that "when the defense prevails in a FEHA action, it has no automatic right to recover costs under section 1032; instead, it must move the court to make a discretionary award of such costs, based in part on a specific finding that the action was frivolous." (Slip opn. at 6.) In other words, the Court of Appeal held that the requirements of Government Code section 12965 apply to all of a prevailing defendant's claims, both FEHA and non-FEHA, and the defendant's failure to comply with section 12965 forfeits the right to recover costs for even the non-FEHA claims. The Court of Appeal's opinion ignores both *Moreno* and *Roman* and instead relies on this Court's decision in *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, but *Williams* involved only FEHA claims and therefore never addressed the applicability of Code of Civil Procedure section 1032 to non-FEHA claims.

2 *Equihua v. Chausee* is a case we got involved in more from a sense of fairness than any defense-specific benefit. Counsel declared under oath that the "fault" for his/her client's failure to adhere to discovery orders was attributable to the lawyer's material errors and omissions. The court nevertheless issued terminating sanctions resulting in a default judgment against the client.

From the letter supporting review:

> Appellants' petition for review comprehensively digests the split in authority among California appellate courts regarding whether an individual client must be "totally innocent of any wrongdoing," or whether it is enough that acknowledged attorney neglect is the substantial cause-in-fact of failures to comply with discovery. Respectfully, "total innocence" of the client is not a tenable standard.
>
> Consistent with the Legislature's intent, section 473(b) requires direct evidence of purposeful wrongdoing by clients, apart from that of their lawyer, in order to overcome the attorney's affidavit of fault for sanctionable conduct resulting in the default. Section 473 plainly provides that clients should not be held responsible for such attorney misconduct given the strong presumption in favor of deciding disputes on their merits. Accordingly, the Associations respectfully request that review be granted to resolve the conflict and conclusively settle this important question of procedural law.

WHAT CAN, AND DOES, THE ADC'S AMICUS BRIEFS COMMITTEE DO FOR YOU?

The ADC's amicus committee can help support you and your clients in a case of general defense interest in all the following ways:

1 Requests for publication or depublication of court of appeal decisions.

2 Amicus brief on the merits at the court of appeal.

Continued on page 36

Trials and Tribulations

We recognize and salute the efforts of our members in the arena of litigation – win, lose or draw.

Don Willenburg, Esq.
Gordon Rees Scully Mansukhani, LLP
Howard v. Accor

Summary judgment affirmed. Plaintiff Howard provided evidence that the hotel's shower wand was not broken when she used it in the morning, but broke or was broken when she used it in the afternoon, and that the hotel housekeeper had cleaned the room in the interim. The trial court granted summary judgment on the grounds that there was no evidence the housekeeper had broken the wand, and that both the arguments of counsel and the opinions of Plaintiff's expert (yes, Brad Avrit) were merely speculative. The Court of Appeal affirmed "because Howard failed to mount a triable issue of material fact on the key issue of notice and failed to establish the applicability of a venerable but inapt doctrine – *res ipsa loquitur*." Plaintiff argued that "the only reasonable inference is the housekeeper did something to break this wand or at least noticed its poor condition. We therefore must conclude it was more likely than not [the hotel] knew of the shower wand's unsafe condition." The Court of Appeal reasoned that "Howard's problem is nothing shows the housekeeper did anything to break the shower wand." Expert Avrit's opinions were based on this same misguided "inference," and were properly excluded as speculative because:

1. Avrit did not question the housekeeper or examine any statements by her;

2. he covertly inspected the hotel room more than one year after the incident but made no attempt to explain how the shower fixtures and conditions then mirrored those when Howard was injured;

3. he apparently never examined the broken shower wand and relied instead on pictures and a witness statement that the shower head was made of plastic;

4. Howard conceded that 'countless' varieties of plastics are used for consumer products, but Avrit failed to explain how he knew the properties of this particular product; and

5. Avrit based his conclusion the wand was sheared or broken after Howard's morning shower but before her afternoon shower largely on Howard's and her boyfriend's statements.

As to *res ipsa*, the Court of Appeal explained that "[t]he doctrine has three requirements: (1) the accident was of a kind that ordinarily does not occur absent someone's negligence; (2) the instrumentality of harm was within the defendant's exclusive control; [and] (3) the plaintiff did not voluntarily contribute to the harm. [ ] Two elements are missing here. First, as addressed above, it is not apparent hotel shower heads only fall apart due to the hotel's negligence. Second, [plaintiff's] deposition testimony suggests her grabbing action could have caused the break."

Brande Gustafson, Esq. &
James D. Weakley
Weakley & Arendt, PC
Perez, et al. v. City of Fresno, et al.

A split panel for the Ninth Circuit Court of Appeals affirmed summary judgment for the City and County of Fresno, the individual law enforcement defendants, and a paramedic in an action brought by the family of decedent Joseph Perez, who asphyxiated and died after the law enforcement defendants, at the direction of the paramedic, used their bodyweight to restrain Perez while he was prone in order to strap him to a backboard for hospital transport. The panel held that the individual law enforcement defendants were entitled to qualified immunity because the law in 2017 did not clearly establish, nor was it otherwise obvious, that the individual law enforcement defendants' actions of pressing on a backboard on top of a prone individual being restrained for medical transport, at the direction of a paramedic providing

Continued on page 31

medical care, would be unconstitutional. The panel also found qualified immunity for the paramedic and held the *Monell* claim was properly dismissed due to plaintiffs' failure to present sufficient evidence of the entities being deliberately indifferent in their duty to properly train their law enforcement officers. Additional information: James D. Weakley argued the appeal and Brande L. Gustafson filed the brief on behalf of the County of Fresno defendants/appellees.

Sarah Gosling, Esq.
Schuering Zimmerman & Doyle, LLP
Russell v. Kofoed

This matter involved an infection after a cortisone injection into the hip joint. Plaintiff developed what appears to have been a primary endocarditis, unrelated to the injection, which ultimately seeded in the compromised hip. It was Plaintiff's contention that the injection caused the infection to start in the hip and lead to the development of endocarditis; this was not supported by the defense infectious disease expert, who was the only infectious disease specialist to testify at trial. Plaintiff's expert (and subsequent treating provider) opined defendant Dr. John Kofoed was negligent in failing to recognize that Plaintiff's complaints of severe pain after the injection was performed were allegedly due to an infection. Defendant's experts opined there was no evidence of infection when Plaintiff complained of pain, and no reason for Dr. Kofoed to have suspected an infection at that time. The jury concluded Dr. Kofoed was NOT NEGLIGENT and rendered a defense verdict.

Emmett Seltzer
Lorber, Greenfield & Olsen, LLP
Anchondo, Anabella v. Roseville Joint Union High School District

After an 18-day jury trial counsel obtained a unanimous defense verdict. Plaintiff suffered a bilateral sensorineural hearing loss. She claimed that it happened as a result of loud noise from speakers at a school rally when she was a sophomore. The jury found that the client, a sound professional who provided the speakers, was not negligent after only three hours of deliberation. At closing Plaintiff requested a verdict of $30,000,000.

Peter Hirsig
McNamara, Ambacher, Wheeler, Hirsig & Gray LLP
Falbo v. Parisi

This case stems from a disputed liability wrongful death case of a 20-year-old woman on a bicycle. She entered a crosswalk and was run over by a 50,000-pound dump truck making a right turn. Liability was disputed. There was a $1,000,000 policy. Plaintiff attorney Chris Dolan requested the jury to award $50,000,000.00 at trial. The defense requested a defense verdict on the basis that Mr. Parisi was 1) not negligent and/or 2) that any negligence was not a substantial factor in causing the death. The jury returned a verdict that the defendant was not negligent.

John Mason &
Steven H. Gurnee
Gurnee Mason Rushford Bonotto & Forestiere LLP
Ricardo Gonzalez et al. v. Community Mortuary et al.

On March 20, 2020, Jose Gonzalez ("Jose") died in Tarrant County, Texas while working as a long-haul truck driver. On March 23, 2020, Jose's widow, plaintiff Celina Gonzalez met with funeral arranger Dolores Humphrey at Community Mortuary ("Community") in Chula Vista to have Jose's body returned to California for an open-casket visitation and burial. Mrs. Humphrey, in turn, arranged with a Fort Worth mortuary, Brown Owens & Brumley ("BOB"), to retrieve Jose's body from the Tarrant County Medical Examiner ("TCME"), embalm it and then ship it via air to San Diego. BOB, in turn, retained Accucare Mortuary Service ("Accucare") to pick up the body from the TCME and transport it to BOB for embalming. It appears that a TCME employee charged with making positive identification of all decedents mixed up the official tags which she attached to body bags containing the remains of Jose and another of another decedent with a similar name, Jesse Gonzales ("Jesse"), who died the day after Jose. However, that TCME employee testified she never attaches identification tags directly to bodies due to issues with COVID and decomposition, but, rather, attaches them only to the outside of body bags prior to their release. On March 23rd, TCME mistakenly released Jose's body in a bag tagged as Jesse's to the University of North Texas ("UNT") Willed Body Program per the authorization of Jesse's son. On March 26th, TCME released the bag tagged as containing Jose's body to Accucare. Upon arrival at BOB, the body was removed from the bag and the bag along with its attached official tag identifying the body as Jose's was disposed of as biological waste. An Accucare employee placed a new tag on the decedent's ankle with the name "Jose Gonzalez" and the note "ship out to California." As required for interstate transport, the body was then embalmed by BOB, packaged, and airfreighted to San Diego the next day. When the body arrived at Community, employee William Smith positively identified it as Jose's by comparing the name on the ankle tag Accucare had attached to the name on the official Texas Transit Permit and other shipping documents sent with the remains, all of which said "Jose Gonzalez." The body was then kept in refrigeration until April 23, 2020, when Mr. Smith dressed and casketed it and moved it into Community's chapel for the planned visitation. It was then that Celina and two of her children viewed the body, discovered it wasn't Jose's and that the wrong body (Jesse's) had been sent from Texas. Meanwhile, Jose's body had been deemed unusable by UNT's Willed Body Program and was cremated, thus making it impossible for Community to retrieve Jose's body for the visitation and burial the Celina had planned. Jose's cremated remains were later returned to his widow which she ultimately interred in a cemetery plot she had purchased. The litigation and contentions: Lawsuits were filed in both California and Texas by Jose's wife, children, siblings, and father. The Texas

Continued on page 32

lawsuit named TCME, UNT, Accucare and BOB, whereas the California lawsuits named only Community, Accucare and BOB. All defendants except Community either settled or were dismissed based on governmental immunity grounds. The Texas action was then dismissed, and the seven plaintiffs proceeded to trial against Community, Dolores Humprey and Robert Humprey on theories of negligence and breach of contract. Plaintiffs argued defendants were liable for failing to determine they had been shipped the wrong body when it was first received due to the absence of an "official" TCME tag attached to the body, failure to compare photographs purportedly given to Mrs. Humphrey when the arrangements were made, and failure to look for distinct tattoos on Jose's that she was told about before the body arrived in California. Plaintiffs' liability expert, Roger Lori, had testified at deposition that it was below the standard of care for Community to not alert the BOB and TCME when the body it received did not have an official medical examiner's ID tag attached. However, plaintiffs elected not to call their expert at trial, relying instead solely on the testimony of defendant's liability expert, Richard Callahan. Though he agreed that photographs as well as distinctive tattoos might be reliable sources for a mortuary to verify identification, Mr. Callahan concluded it was reasonable and within the standard of care for Community to rely on the ID tag Accucare had attached which matched the name on all the shipping paperwork and transmit permit. Defendants also argued Community's failure to fully perform its contract with Celina was excused by reason of impossibility in that the wrong body had been released by TCME and Jose's body had already been cremated before the error was discovered. Nonsuits were granted as to all claims against Robert Humphrey who was not involved in the subject arrangements, and as to all plaintiffs except Celina Gonzalez on their breach of contract claim. As for damages, plaintiffs argued that each plaintiff was a close family member of Jose and had suffered serious emotional distress by not being able to see his remains at the visitation and say a final goodbye. Despite the absence of any medical or mental health treatment for emotional distress, plaintiffs asked the jury to award a collective minimum of $13.5 million dollars for past and future mental suffering. Defendants argued that despite the error, none of the plaintiffs had proven they had suffered serious emotional distress as required by CACI 1620 and as demonstrated by their lack of treatment, the absence of lost wages or earning capacity, and evidence of their ability to cope by carrying on normal activities. Defendants suggested that the jury return a complete defense verdict but if liability were found that a collective award of $250,000 would be reasonable. The verdict: After five hours of deliberations, the jury returned its special verdict finding that by reason of impossibility, Community had not breached its contract with Celina Gonzalez, and that as to all plaintiffs none of the defendants was negligent. The jury polled 9-3 on both issues. As a result, no damages were awarded since questions concerning causation and damages were never reached.

Prior to trial, plaintiffs' lowest settlement demand was $979,000, and plaintiffs had rejected defendants' CCP §998 offers made to each of them totaling $215,007.

David Casady
Berman Berman Berman Schneider & Lowary LLP
Leidel vs. Producers Dairy Foods, et. al.

On April 16, 2024, David Casady and Lucas Shimizu of Berman Berman Berman Schneider & Lowary, LLP, obtained a 9-3 defense verdict in Sacramento Superior Court. The case involved an accident between Plaintiff's Volkswagen Jetta and Defendants' commercial bobtail delivery truck. Defendants' driver testified he was cut off by the Plaintiff who made an unsafe lane change while merging onto the freeway. Plaintiff claimed she was simply rear-ended by the larger commercial vehicle. Plaintiff, 24 years old at the time of the accident, claimed she had sustained a serious spinal injury. She presented evidence of six years of medical treatment, called four general damage witnesses, and cited multiple medical experts including two surgeons who testified she needed future surgeries to her spine. The Defense argued that despite the near 10 to 1 weight ratio of the Defendant's vehicle, the incident nonetheless amounted to a low-speed accident, and furthermore, Plaintiff had remained an avid skier who frequently enjoyed the outdoors and vacations. The trial lasted more than three weeks. At closing, Plaintiff asked for $1.6M for future medical expenses. Following two-days of deliberation the jury returned a defense verdict on the issue of liability. Prior to trial, Plaintiff had rejected Defendants' CCP §998 for $150,000.

Paul Baleria
Lewis, Brisbois, Bisgaard & Smith, LLP
Sandra McCoy and Kenneth McCoy v. Jorge A. Garcia-Young III, M.D. and Swati Andhavarapu, M.D.

The Plaintiff alleged medical malpractice for unnecessary chemotherapy and radiation therapy since she allegedly did not have invasive rectal cancer, resulting in rectal incontinence. As related to the statute of limitations, Plaintiff contended that she did not suspect wrongdoing on the part of the Defendant physicians, a medical oncologist, and a radiation oncologist, until her evaluation by a colorectal surgeon in February 2019. The Defendants denied Plaintiff's claims. They also contended that Plaintiff's lawsuit was barred by the statute of limitations since she did not timely bring her action within the one-year limitations period codified in Code of Civil Procedure section 340.5. The evidence at trial showed that Plaintiff actually suspected her harm was caused by wrongful conduct on the part of the Defendants as early as October 2018, when she was told she did not have invasive rectal cancer after undergoing the chemoradiation treatment.

The trial was only on the Defendants' statute of limitations defense. The jury returned a 12-0 defense verdict after 20 minutes of deliberation.

Continued on page 33

Ian Scharg
Schuering Zimmerman & Doyle, LLP
Orndorff v. Bechtel

After an 11-day jury trial, a San Joaquin County jury returned an 11-1 verdict on the standard of care in favor of the defense after three hours of deliberations. Plaintiffs filed a wrongful death case against defendant alleging he negligently worked up the decedent prior to performing a colostomy takedown which resulted in multiple perforations of the large bowel. They also alleged the negligent use of a temporary closure device (a wound vac) following the complication which led to additional perforations over the subsequent days. The defense put on a case that there was no reason to perform an additional work up prior to the colostomy takedown and the use of the wound vac was appropriate and did not cause any of the perforations. The jury agreed with the defense theory of the case.

Jim Weixel
Demler, Armstrong & Rowland, LLP
San Antonio Regional Hospital v. Superior Court (Musharbash)

The Amicus committees of ADCNCN and the Association of Southern California Defense Counsel recently obtained publication of the Court of Appeal's opinion in *San Antonio Regional Hospital v. Superior Court* (Musharbash), No. E082481 (4th Dist., Div. 2). The plaintiff had submitted a declaration from a surgical nurse to oppose the hospital's motion for summary judgment. The hospital had argued that physicians did not breach the standard of care in assessing and responding to a patient's traumatic brain injury which later led to his death. The Court of Appeal held that the plaintiff had failed to establish that the nurse was qualified to render an opinion on the standard of care applicable to TBI surgical responses or whether the hospital had breached it. Accordingly, the Court of Appeal reversed the trial court and ordered it to grant summary judgment. Publication was requested to amplify the case's explanation and application of the standards for admitting expert opinion testimony in the context of summary judgment, and to counter a recent trend in which the plaintiff's bar offers declarations from witnesses whose expertise is often questionable or otherwise insufficient in highly technical areas such as medical malpractice. The publication of this opinion can be expected to lend greater clarity on this issue to the trial courts and counsel.

Continued on page 36

Substantive Law Section Reports

Compiled by Kaveh Mirshafiei Clapp Moroney Vucinich Beeman Scheley

Construction

Jill J. Lifter Co-Chair
Wakako Uritani Co-Chair

The construction committee is excited to present a "show and tell" demonstration of new technology applicable to the defense of claims and litigation, including 3D Imaging, Scene Scanning, and AI tools for investigation, discovery, and trial. Join us at the ADC Annual Meeting on December 5, 2024 to discover how you can apply these new technologies.

Insurance

Michon M. Spinelli Co-Chair
Nicholas H. Rasmussen Co-Chair

In May of 2024, the California Supreme Court ruled unanimously in favor of an insurance company in a case that looked at whether property loss insurance could be applied to address economic losses from pandemic-related closure orders due to COVID-19, in the case of *Another Planet Entertainment, LLC v. Vigilant Insurance Co.*

The case was brought by Another Planet Entertainment, which operates five music venues in the Bay Area. The company claimed more than $20 million in losses after emergency orders stemming from the pandemic forced the closure of its venues in 2020. It sued Vigilant Insurance Company for breach of contract and bad faith for denying policy coverage.

California's Supreme Court ruled 7-0 in favor of the defendant Vigilant, finding that losses incurred due to a viral pandemic do not equate to property damage.

The Court noted, "[t]he mere fact that a property cannot be used as intended is insufficient on its own to establish direct physical loss to property ... Similarly, the fact that a business was forced to curtail its operations, in whole or in part, based on pandemic related government public health orders is likewise insufficient."

The Court also noted that "[a] property insurance policy does not cover a particular intended use; it covers the property itself ... Direct physical loss or damage to property requires a distinct, demonstrable, physical alteration to property."

In its holding, the Court seemingly rejected an argument from Another Planet that the property was unusable as a result of the spread of the virus, noting that such a temporary condition did not equate to actual property damage.

Other entertainment venues, restaurants, and professional sports teams were watching the case. Both the Los Angeles Lakers and Major League Baseball submitted amicus briefs supporting Another Planet's arguments.

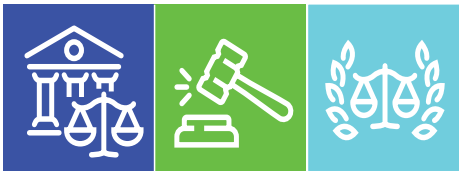
We will continue to provide new developments on legislation and other relevant cases though the ADC forums and newsflashes. Please sign up to become a member of the Insurance Sub-Law section to receive that information.

We always encourage suggestions from our members about other topics for seminars or programs they would like to see. In addition, any article submissions for the ADC Comment are greatly appreciated. Please contact Michon Spinelli (michon.spinelli@ropers.com) or Nicholas Rasmussen (nicholas.rasmussen@mccormickbarstow.com).

Toxic Torts

Edward P. Tugade Co-Chair
Yakov P. Wiegmann Co-Chair

The co-chairs of the ADC's Toxic Tort Sub-Law Committee are pleased to once again offer the Toxic Tort Series of seminars this year. The program – scheduled to take place on September 13, 2024 at Wilson Elser's San Francisco office – will feature leading legal, scientific, and medical experts, and cover cutting-edge issues in this ever-evolving litigation.



Are you interested in writing an article? Joining one or more substantive law sections? Do you have a suggestion for a topic for a seminar? We are always looking for ways to involve our ADC members, and encourage you to be active in as many substantive law committees as you are interested in. Please contact the section chairs (https://www.adcnc.org/committees) and let them know how you would like to participate.

the Sugar Land Space Cowboys. Be sure to register for your club seats now!

As part of our mission to grow together, the Board of Directors proudly announced the launch of yet another initiative, the ADC's New Affiliate Membership Program: an opportunity for those engaged in the full-time or part-time practice of mediation and arbitration to join the ADC and take advantage of its numerous core benefits, including access to the online Membership Directory, receipt of the ADC's *Defense Comment* magazine (with potential discounted advertising opportunities), priority as to vendor space and sponsorship at ADC events, and expanded eligibility to attend MCLE programs, which the ADC offers throughout the year, including free webinars during the first year of membership. In addition, Affiliate Members will receive discounted registration fees as regular members for ADC's presentations and events, including the Summer Session and the Annual Meeting.

As a result of these events and the efforts of our hardworking Membership Committee, our numbers remain strong and continue to grow. A well-deserved congratulations to Director and Membership Committee Chair, Leanna Vault, Esq., and her impressive team, on a tremendously successful start to 2024.

The ADC membership has resoundingly responded to the call to become and stay engaged. Our special gratitude goes to our esteemed ADC Past Presidents, such as Peter Glaessner, Esq. and Renée Livingston, Esq., for their continued commitment to our fine organization, including their active participation in our events, and providing their invaluable time and input during Board of Director meetings – thank you for accepting my invitations for your attendance. Members have also embraced the call to engage by participating in our inaugural monthly Defense Wins eNews to feature your successes prominently. We believe that every accomplishment, big or small, contributes to the overall success of the ADC. As such, please be sure to share any success stories or milestones that you believe deserve recognition. Simply go to our website to share your information, and we will be sure to showcase your achievement. We have received so many so far and look forward to receiving many more success stories and continuing to share the ADC's collective achievements in 2024 – KEEP THE GREAT DEFENSE RESULTS COMING!

Firm spotlights are new and a great membership benefit. In each issue of the ADC's magazine, *Defense Comment*, 1-2 law firms will be featured in recognition of their support of the ADC, with the goal of expanding the spotlights to more firms through eblasts and the ADC's website. Please contact the ADC if you would like a membership firm to be among a select group to be highlighted.

As yet another great benefit to our membership, the ADC's ListServ remains a popular way for all of us to interact, exchange ideas, and have "real time" discussions regarding experts, mediators, judges, the latest trends, the status of trials in the various jurisdictions, unique legal issues, and a whole array of other legal topics.

The ADC's webinars continue to be popular with our members. Thanks to the extraordinary efforts of Directors Rachel Leonard, Esq. and Yakov Wiegmann, Esq., the ADC accomplished a record turnout of attendees to learn about Neuropsychology After *Randy's Trucking v. Superior Court*. We followed this successful webinar with yet another highly attended webinar arranged and conducted by ADC Past President Nolan Armstrong, Esq. on the Best Practices for Efficient Handling and Resolution of Landlord-Tenant Matters.

We look forward to the 2024 Summer Session at the picturesque Everline Resort & Spa in Lake Tahoe on August 2 and 3, 2024. This is a "Do Not Miss" opportunity. This year's program features sessions including Law Practice Management: Today and Tomorrow; Neuropsychology After *Randy's Trucking v. Superior Court*; 7 Tips for Avoiding Legal Malpractice Claims and Coverage Issues That Every Defense Lawyer Needs to Know; Overview of Important Settlement Statutes; Building Your Personal Brand; and many more.

Come join us at the 31st Annual ADC Golf Tournament on September 6, 2024, at the picturesque and historical Presidio Golf Course in San Francisco. The camaraderie and fun of this annual event is incomparable – be sure to register today!

Be sure to save the date for the ADC's Basic Training Series Live Online Course. This annual favorite is crafted to give lawyers of all levels the practical tools and skills to move a case from inception to trial. This renowned online program will provide associates and those new to the defense practice an in-depth preparatory course in this specialized field. Presented by skilled local attorneys and experienced mediators, this seminar series will provide training on how to open a new file; develop and effectively communicate a litigation strategy; and navigate written discovery and depositions. In addition, our panelists will review best practices for law and motion work as well as preparing a case for mediation and trial. Upon completion of the series, participants will have gained the skills necessary to defend a client from day one to trial. Go to our website for the topics to be covered during the weeks of September 3, 10, 17, 24, October 1 and 8.

In an effort to foster relationships and improve the civility and trust in the practice, another first that we hope will become an ADC tradition are joint events between the ADC and our peers on the other side of the aisle. ADC Past President Nolan Armstrong, Esq. will spearhead the very first event with the San Francisco Trial Lawyers Association on September 25, 2024 at Per Diem in San Francisco. I encourage everyone to come join us – it's FREE to all of our members!

Our premier event of the year, the 65th Annual Meeting of the ADC, will take place on December 5 and 6, 2024 at the beautiful and historic Westin St. Francis Hotel on Union Square to once again bring us all together to celebrate our year of accomplishments and gather among family and friends during the wonderful holiday season. We are excited to see everyone, including influential professionals from

Continued on page 36

President's Message

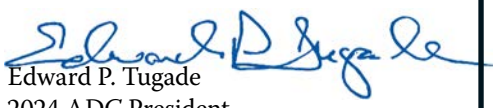
– continued from page 35

across California and Nevada. You will certainly come away with new perspectives, fresh ideas, and a renewed connection with our fellow practitioners.

My profound gratitude to the ADC's Executive Committee Officers and Board of Directors. None of what we have accomplished thus far would be possible without their hard work and dedication to you, the proud and esteemed members of the ADC. Thanks to their decisiveness and resolute actions, the ADC continues to positively evolve and grow as the only organization in Northern California and the state of Nevada devoted exclusively to representing the interests of attorneys engaged in the defense of civil litigation.

It is my great honor to serve you, and I look forward to many more of our collective triumphs. There is nothing better than harnessing the power of collective effort to drive the ADC's mission and goals; a game-changer for the ADC membership law firms and individual members alike.

Together, we will continue Exceeding Excellence!



Edward P. Tugade
2024 ADC President

CDC Report

– continued from page 3

AB 2049 would also clarify that parties may only file one summary judgment motion per case, unless leave is granted by the court for good cause. The bill would also re-state current case law concerning adding new evidentiary matter, material facts, or material in separate statements addressing matters not raised in motions or oppositions.

AB 2049 is currently on the governor's desk awaiting signature and if signed, will become effective on January 1, 2025.

Michael D. Belote
Legislative Advocate

Amicus Corner

– continued from page 29

3 An amicus letter supporting a petition for California Supreme Court review.

4 Amicus brief on the merits at the Supreme Court.

5 Share oral argument time, with court approval.

6 Help moot court advocates in advance of oral argument.

7 Taking advantage of other opportunities for amicus influence on courts, as illustrated by the committee's work this last summer on letters supporting rehearing and merits review.

In many cases, the ADC works jointly with our Southern California colleagues, the Association of Southern California Defense Counsel. The chance to bat around these issues with lawyers from across the state is another great benefit of being on or working with the Amicus Committee.

If you are involved in a case that has implications for other defense practitioners, or otherwise become aware of such a case, or if you would like to get involved on the Amicus Committee, contact any or all of your Amicus Committee members:

Don Willenburg
dwillenburg@gordonrees.com

Patrick Deedon
pdeedon@maire-law.com

Alexandria Carraher
alexandria.carraher@ropers.com

James V. Weixel
jvw@darlaw.com

Trials and Tribulations

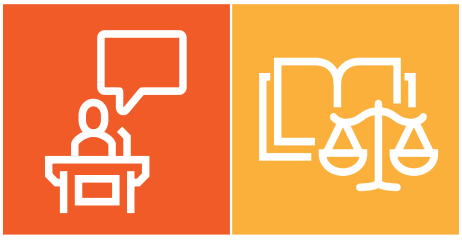
– continued from page 33

D. Marc Lyde &
Amelia F. Burroughs
Leonard & Lyde
Melvyn Varrelman, et al. v. Gansevoort Dunnington, Jr., M.D.

Marc Lyde and Amelia Burroughs of Leonard & Lyde recently obtained a defense verdict on behalf of a cardiothoracic surgeon following allegations of professional negligence with respect to the post-surgical medical management of an aortic valve replacement. Plaintiffs claimed wrongful death, with a pre-trial policy-limits demand. The jury deliberated for one and one-half hours and returned with a defense verdict.

Matthew Constantino
Clapp Moroney Vucinich Beeman + Scheley
Pearl Wong v. Liang's Remodeling, Inc.

Partner Matthew Constantino and Senior Trial Attorney Jesmin Alam of Clapp Moroney Vucinich Beeman + Scheley successfully defended their client, a general contractor, and beat their client's 998 Offer following a five-day bench trial in Alameda County. The case involved alleged construction defects related to work performed by their client on Plaintiff's residence in Oakland. Prior to trial, we submitted a 998 Offer to Plaintiff in the amount of $201,265. Plaintiff sought $1,584,483 at trial, which included repair costs as well as various past and future economic losses. The day after the parties submitted separate proposed Statements of Decision, the Court adopted and entered our proposed Statement of Decision in its entirety and awarded Plaintiff only $35,987.60. As such, our client beat its 998 Offer, entitling it to post-998 Offer costs.



A New Opportunity for Mediators, Arbitrators and Other Neutrals to Join the ASSOCIATION of DEFENSE COUNSEL of NORTHERN CALIFORNIA and NEVADA

For years, the ADR community has inquired about a means to join and take advantage of all that the ADC of Northern California & Nevada has to offer, and so the Board of Directors is excited to announce the creation of such an opportunity for those engaged in the full time or part time practice of mediation or arbitration.

Effective January 1, 2024, the ADC of Northern California & Nevada is now offering an **Affiliate Membership** for which mediators, arbitrators and other neutrals are now eligible. For an annual fee of just $395.00, Affiliate Members will enjoy numerous core ADC benefits, including access to the online Membership Directory, receipt of the ADC's Verdict Magazine (with potential discounted advertising opportunities), priority as to vendor space and sponsorship at ADC events and expanded eligibility to attend MCLE programs which the ADC offers throughout the year, including free webinars during the first year of membership. In addition, Affiliate Members will receive the same access and discounted registration fees as regular members for ADC's flagship presentations and events, including the Summer Session, Annual Golf Tournament, and the Annual Meeting, which is always the highlight of the ADC annual calendar.

We look forward to having you join the ADC of Northern California & Nevada and taking advantage of this new opportunity that the Affiliate Membership provides!

Ready to Join?

We are excited to have you on board!
Below is a link that will take you directly to the 'Join Now' link on our website:

https://adc.memberclicks.net/membership

MEMBERSHIP APPLICATION

Association of Defense Counsel of Northern California and Nevada

Membership

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

Membership Categories

Annual dues for ADC membership are based on your type of defense practice (staff counsel or independent counsel) and, for independent counsel, the length of time in practice and the number of ADC members in your firm. The following are the base fees:

☐ **REGULAR MEMBER ($395)** – Independent Counsel in practice for more than five years.
☐ **AFFILIATE MEMBER ($395)** – Full-time or part-time mediation or arbitration; no voting; not able to hold office.
☐ **ASSOCIATE MEMBER ($325)** – All staff counsel (including public entity, corporate or house counsel).
☐ **YOUNG LAWYER MEMBER ($225)** – In practice zero to five years.
☐ **LAW STUDENT MEMBER ($25)** – Currently enrolled in law school.
☐ **DUAL MEMBER ($100)** – Current member in good standing of the Association of Southern California Defense Counsel.

Information

Name:_____ Firm: _____

Address: _____

City / State / Zip:_____ Birthdate *(year optional)*: _____

Phone: _____ Ethnicity: _____

E-mail: _____ Website: _____

Law School:_____ Year of Bar Admission:_____ Bar #: _____

Years w/Firm:_____ Years Practicing Civil Defense Litigation: _____ Gender: _____

Are you currently engaged in the private practice of law? ☐ Yes ☐ No

Do you devote a significant portion of your practice to the defense of civil litigation? ☐ Yes ☐ No

Practice area section(s) in which you wish to participate *(please check all that apply)*:

☐ Business Litigation ☐ Construction Law ☐ Employment Law ☐ Insurance Law & Litigation
☐ Landowner Liability ☐ Litigation ☐ Medical Malpractice ☐ Public Entity ☐ Toxic Torts ☐ Transportation

I was referred by:

Name:_____ Firm: _____

Signature of Applicant:_____ Date: _____

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

Payment *(do not e-mail credit card information)*

Amount: _____ ☐ Enclosed is check # _____ (Payable to ADCNCN)

☐ AMEX ☐ MasterCard ☐ Visa Last 4 digits of card:_____ Name on Card: _____

Billing Address:_____ Signature: _____

(12/23)

Full Credit Card# _____ Exp: _____ CVV#: _____

Return completed form & payment by mail or fax to: **Association of Defense Counsel • 2520 Venture Oaks Way, Suite 150 • Sacramento, CA 95833 • (916) 924-7323 – fax**

For more information, contact us at: (916) 239-4060 – phone • *info@adcnc.org* • *www.adcnc.org*

WELCOME NEW MEMBERS

Since March 2024, the following attorneys have been accepted for membership in the ADC. The Association thanks our many members for referring these applicants and for encouraging more firm members to join.

Catherine Adams
Walsworth
Irvine
REGULAR MEMBER

Amanda Ashworth
Tyson & Mendes
Novato
YOUNG LAWYER MEMBER

Matthew Banashek
Banashek Irving & McNutt, LLP
Encino
DUAL MEMBER

Vicky Chan
Demler, Armstrong & Rowland, LLP
San Francisco
REGULAR MEMBER
Referred By: Edward Tugade, Demler Armstrong Rowland

Cameron Louise Cobden
Law Offices of John A. Biard
Rancho Cordova
ASSOCIATE MEMBER

Tom Crosby
Crosby ADR
Oakland
AFFILIATE MEMBER

Cassidy Cole Davenport
Cole Pedroza LLP
San Marino
DUAL MEMBER

Robert E. Davies
Davies Blakemore LLP
Folsom
REGULAR MEMBER

Erick Dimalanta
Lopez Law Group
Walnut Creek
REGULAR MEMBER
Referred By: Ed Tugade,

Sohrob Eghtessadi
Tyson & Mendes
Novato
YOUNG LAWYER MEMBER

Steven Fazzi
Jones & Dyer, APC
Sacramento
REGULAR MEMBER

Kristina Garabedian
Smith, Koyama & Costello
ASSOCIATE MEMBER

Keith F. Gallarzo
Skane Mills LLP
Los Angeles
DUAL MEMBER
Referred By: Heather L. Mills,

Ariel Marie Gozzip
Tyson & Mendes
Novato
YOUNG LAWYER MEMBER

Deb Graceffa
Graceffa Law, Inc.
Oakland
REGULAR MEMBER
Referred By: Judy Lee, Vela

Geri Lynn Green
ADR Services, Inc.
San Francisco
AFFILIATE MEMBER
Referred By: Joanna Barron,

Thomas J. Griffin
Nelson Griffin LLP
Los Angeles
DUAL MEMBER

Noah Winston Hallam
Sims, Lawrence & Broghammer
Roseville
YOUNG LAWYER MEMBER
Referred By: Bob Sims, Sims, Lawrence & Broghammer

Adrian Hern
Tyson & Mendes
Novato
REGULAR MEMBER

George C. Hernandez
ADR Services, Inc.
San Francisco
AFFILIATE MEMBER
Referred By: Joanna Brown, ADR Services, Inc.

Kelly Hill
Tyson & Mendes
Novato
REGULAR MEMBER

Derik J. Hilliard
Office of the General Counsel for Alameda-Contra Costa Transit District
Oakland
ASSOCIATE MEMBER

Royce Y. Huang
Tyson & Mendes
Frenso
REGULAR MEMBER

Magdalena Jacquez
Tyson & Mendes
Fresno
YOUNG LAWYER MEMBER

Gigi Knudtson
Longyear & Lavra, LLP
Sacramento
REGULAR MEMBER
Referred By: Van Longyear, Longyear & Lavra

Bradley Robert Larson
Sims, Lawrence & Broghammer
Roseville
REGULAR MEMBER
Referred By: Bob Sims, Sims Lawrence & Broghammer

Quyen Thi Le
Gordon Rees Scully Mansukhani, LLP
San Francisco
REGULAR MEMBER
Referred By: Marie Holvick; Don Willenburg, Gordon Rees Scully Mansukhani LLP

Margaret Lesniak
Demler Armstrong Rowland
San Francisco
REGULAR MEMBER
Referred By: Edward Tugade, Demler Armstrong Rowland

Arlen Litman-Cleper
Cesari, Werner & Moriarty, PC
Daly City
REGULAR MEMBER
Referred By: Sean Moriarty, Cesari Werner & Moriarty

Anupe Litt
Sims Lawrence and Broghammer
Roseville
YOUNG LAWYER MEMBER
Referred By: Bob Sims

Shawn Loorz
Levangie Long Loorz
Rancho Cordova
REGULAR MEMBER
Referred By: Jeffery Long, LeVangie Long Loorz

Robert Wylie Lowe
Ford, Walker, Haggerty, & Behar, LLP
Los Gatos
YOUNG LAWYER MEMBER
Referred By: Arthur J. Casey,

Taric Mansour
Kronenberg Law PC
Oakland
YOUNG LAWYER MEMBER
Referred By: William Kronenberg, Kronenberg Law PC

Dominique Marangoni-Simonsen
Wilson Elser Moskowitz Edelman & Dicker
San Francisco
YOUNG LAWYER MEMBER
Referred By: Yakov Wiegmann, Wilson Elser Moskowitz Edelman & Dicker

Angela Mariveles
Alameda-Contra Costa Transit District
Oakland
ASSOCIATE MEMBER

James Edward McDaniel
Tyson & Mendes
Fresno
REGULAR MEMBER

Geoffrey Meisner
Kern, Segal & Murray
Daly City
REGULAR MEMBER

Emily Min
Murphy Austin Adams Schoenfeld LLP
Sacramento
YOUNG LAWYER MEMBER
Referred By: Steven Lamon, Murphy Austin Adams Schoenfeld LLP

Jose A. Montalvo
Mokri Vanis & Jones, LLP
Sacramento
REGULAR MEMBER
Referred By: Todd A. Jones, Mokri Vanis & Jones LLP

Nick Niavarani
Longyear & Lavra, LLP
Sacramento
YOUNG LAWYER MEMBER
Referred By: Van Longyear, Longyear & Lavra, LLP

Continued on page 40

Courtney O'Brien
City of Oakland
Oakland
ASSOCIATE MEMBER

Chassen Palmer
Skane Mills LLP
Los Angeles
DUAL MEMBER
Referred By: Heather L. Mills,

Paul Peters
Demler, Armstrong & Rowland
San Francisco
REGULAR MEMBER
Referred By: Edward Tugade, Demler Armstrong Rowland

Dean Pollack
Demler, Armstrong & Rowland
San Francisco
REGULAR MEMBER
Referred by: Ed Tugade

Kristina L. Sager
Jacobsen & McElroy
Sacramento
REGULAR MEMBER

Gary B. Sanders
Sanders Mediation
Moraga
AFFILIATE MEMBER
Referred By: Kevin Mintz, Rankin, Shuey, Mintz, Lampasona & Harper

Michael N. Schonbuch
Daniels, Fine, Israel, Schonbuch & Lebovits
Los Angeles
DUAL MEMBER

Chloe Sherkat
Tyson & Mendes
Novato
YOUNG LAWYER MEMBER

William M. Slaughter
Slaughter, Reagan and Cole
Ventura
DUAL MEMBER

D. David Steele
Demler, Armstrong & Rowland
San Francisco
ASSOCIATE MEMBER
Referred By: Edward Tugade, Demler Armstrong Rowland

David J. Stock
ADR Services, Inc.
San Jose
AFFILIATE MEMBER

Sarah Truong
Perry Johnson Anderson Miller & Moskowitz
Santa Rosa
REGULAR MEMBER
Referred by: David Beach

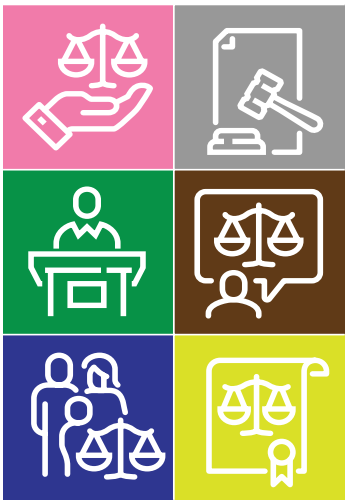
Shain Wasser
Kennedys CMK LLP
San Francisco
DUAL MEMBER

Abigail White
Mokri Vanis & Jones, LLP
Newport Beach
YOUNG LAWYER MEMBER

Wesley Aaron Wong
Wilson Elser Moskowitz Edelman & Dicker LLP
San Francisco
YOUNG LAWYER MEMBER

Jeffrey Woo
Cesari, Werner & Moriarty
Daly City
REGULAR MEMBER
Referred By: Sean Moriarty, Cesari Werner & Moriarty

Jacqueline Yee
Tyson & Mendes
Novato
YOUNG LAWYER MEMBER



2024

Calendar of Events

Save the Dates!

August 2-3, 2024	**Summer Session**	Everline Resort & Spa, Olympic Valley, CA
September 19, 2024	**Sacramento River Cats Game**	Sutter Health Park, Sacramento
September 25, 2024	**ADC/SFTLA Member Mixer**	Per Diem, San Francisco
September-October, 2024	**Basic Training Seminar**	(virtual)
October 4-5, 2024	**ADC/ASCDC Joint Board Meeting**	Monterey Plaza Hotel
December 4, 2024	**ADC President's Dinner**	Westin St. Francis, San Francisco
December 5-6, 2024	**65TH Annual Meeting**	Westin St. Francis, San Francisco

Please visit the calendar section on the ADC website – *www.adcncn.org* – for continuous calendar updates.

2024
EXECUTIVE COMMITTEE

Edward P. Tugade
President

Patrick L. Deedon
First Vice-President

Laura C. McHugh
Second Vice-President

Sean P. Moriarty
Secretary-Treasurer

Rachel Leonard
Member-At-Large

Yakov P. Wiegmann
Member-At-Large

Nolan S. Armstrong
Immediate
Past President

BOARD OF DIRECTORS

Amelia Burroughs

Lisa A. Costello

Alison M. Crane

Adrianne Duncan

Yvonne Jorgensen

Daniel F. C. Kozieja

Jeffrey E. Levine

Kevin Mintz

Priya Navaratnasingham

Darrell Nguyen

Tyler M. Paetkau

Nicholas H. Rasmussen

Bobby Dale Sims, Jr.

Michon M. Spinelli

Wakako Uritani

Crystal L. Van der Putten

Jonathan Varnica

Leanna Vault

Don Willenburg

Brandon D. Wright

Hon. Peter H. Kirwan (Ret.)

Signature Resolution welcomes Hon. Peter H. Kirwan (Ret.) to our panel of neutrals, establishing the foundation for our Silicon Valley presence.

EXCLUSIVELY AT

SIGNATURE RESOLUTION

SIGNATURERESOLUTION.COM