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I Get By With a Little Help From My Friends

Just as in almost all professional organizations, the ADC’s Board of Directors consists of a group of dedicated volunteers. Each year, thirty or so dedicated Board members devote approximately 150 hours of their time, on average, to present the high quality programs and projects, culminating in each year’s annual meeting. As we start a new year, and several Board members take on new roles, I want to introduce them and highlight their present assignments.

Defense Comment’s new editor, Andrew Weiss, is eager to put his own imprint on the magazine. Andy is now in his fourth year on the Board and is a medical malpractice defense lawyer in the Baker Manock & Jensen firm in Fresno. In addition to an officers’ roundtable, this issue features a thought provoking article by retired Superior Court Judge James Trembath discussing his recent service as a juror in a civil trial.

Andy welcomes articles from members on all civil litigation topics. Although we are blessed to have some regular contributors, Andy would like to hear from anyone who can find the time to write a timely article for the magazine. No law review tomes are needed – just topical, easy-to-read articles. Keep in mind the magazine is mailed to all federal and state trial judges with civil assignments, as well as the appellate courts. Expressing a cogent defense viewpoint not just for our members, but also for the judiciary, is essential. We will continue to publish your jury trial results as well as produce “trial focus” articles. Recognition of our members’ achievements is important! In order to continually produce a high quality magazine, we need this information from you. Please forward information directly to Andy (arw@bmj-law.com). Also, assisting Andy in the publications is a new Board member, Stephen Schram of Sedgwick, Detert, Moran & Arnold (stephen.schram@sdma.com).

I next introduce Sarah Burke whose practice with Drath, Clifford Murphy & Hagen in Oakland focuses on construction law. She has chaired or co-chaired many of the ADC’s excellent construction programs in recent years. In her current role, Sarah communicates regularly with each of the substantive law chairs, helping them plan educational programs, brown bag seminars, and increase the membership of these committees.

Fresh topics for seminars and brown bag programs sometimes germinate from a trial, a particular expert witness, jury instructions, or something outside of the ordinary that occurred in a recent trial or case. Share that topic or experience with Sarah (or one of the sub-law chairs), so that we can educate members and devise defense strategies for the “next case.” Or, if you see a way that any of these committees can work better, have someone in your firm who needs to get hooked up to a committee, or if there is some important topic...
Courts are “Infrastructure,” Too

If there is not an old Chinese proverb like this, there should be: beware of having money to spend. From a public policy standpoint, being short of money causes all sorts of problems, but the truth is, deciding that it is time to spend money carries complications as well. In the current Sacramento political environment of “all bonds, all the time,” we are likely to see these complications play out over the next several months.

Having experienced a very public shellacking in the November elections, Governor Schwarzenegger has obviously decided that the hallmark of his agenda for 2006 is an aggressive program of infrastructure investment. He is absolutely correct that the state has suffered from years, if not decades, of neglect in this area. But his proposals for massive capital investment, in amounts perhaps exceeding $200 billion, will run through a contentious legislative minefield. Republicans want more “pay as you go” financing, and the Senate President Pro-Tem is now trumpeting his own “Perata Plan” for infrastructure investment.

So the issues are legion: whether to do bond financing, how much debt to incur, whether to present the issue to voters once or over several elections, and most importantly, where to spend the money. While it is possible to have all of these issues ironed out in time for the June primary election, the “drop-dead date” for ballot pamphlet preparation is probably sometime in late March. The November ballot is more likely.

The big question for the legal community is whether courts will be part of the eventual bond compromise. The good news was that Governor Schwarzenegger specifically mentioned courts in his January State of the State address, although he quoted a figure of $1.7 billion to address what the courts identify as approximately $10 billion in need. The bad news is that polls suggest public support for bonds in the following descending order: schools, roads, prisons, and so far down the list to barely register, courts. The psychology is not complicated: schools and roads touch many voters every day, courts rather infrequently.

The Chief Justice has very publicly put courthouse construction near the top of his agenda for 2006. And he has legislators willing to help, particularly Senate Judiciary Committee Chair Joe Dunn, who spoke at the ADC Annual Meeting in December. But in a legislature containing ever-fewer lawyer members, it is unclear whether courts ultimately will make the cut.

For his part, Senator Dunn describes the mission as nothing less than a “call to arms” for the legal community. Courthouses are in an absolutely appalling state of disrepair around the state. Many are seismically unsafe, while others lack basic security. In some
The following roundtable discussion was held on December 1, 2005, during the ADC Annual Meeting at the St. Francis Hotel in San Francisco. Participants were the four ADC officers for 2006: Peter O. Glaessner, President; Jonathon C. Bacon, First Vice-President; Patricia Tweedy, Second Vice-President; and Mark G. Bonino, Secretary-Treasurer.

DEFENSE COMMENT: The defense practice has evolved dramatically over the past five to ten years. How has the ADC evolved to meet the needs of today’s defense practitioner?

MR. GLAESNNER: I’ll start on that topic. Our educational programs have developed in response to a number of trends in the law. We’ve now focused on doing “hot topic” programs for members when there are important new Supreme Court decisions or other changes in the law, such as the CACI jury instructions, and getting those topics before our members as quickly as possible.

Another area is in trial practice and technology. We put on several programs last year in Napa and Reno on how to use PowerPoint and other kinds of computer-generated demonstrative evidence, and we’re going to continue that this year with a “brown bag” program on creating and using PowerPoint in the courtroom.

MS. TWEEDY: The organization is focused on making a defense attorney’s job easier and better, so we can all better serve our clients. Examples are programs the organization put on at the annual meeting this year, one involved C.C.P. § 998 offers to compromise and how to avoid losing when you’ve really won. The other involved winning motions for summary judgment.

MR. BACON: And also the practice has changed. Some of the traditional general liability practice, slip-and-fall and auto-accident cases, the bread and butter of defense firms for so long, has begun to evaporate for various reasons. I think we’ve done a good job developing substantive law committees and honing in on specific areas of law that are a bit beyond the traditional, focusing on those members who practice in the areas of employment law, toxic torts and construction, for example. Being

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1 Mr. Bonino was actually not able to attend the Roundtable discussion because of a last-minute conflict which required him to appear for an oral argument before the Sixth District Court of Appeal. That also explains why he is conspicuously absent from all of the photographs. His comments in this discussion were added later.
responsive and adaptable to changes in practice areas, and developing new substantive law committees and seminars that will address our members’ interest in moving their practices into different areas, are essential.

MR. BONINO: In this new world with everyone hunched over their computer terminals sending e-mail and leaving voicemails, there is a lot of transmission of information, but not as much “communication” and certainly not as much social interaction as there used to be. The growth in educational programs and practice management and technology are ways in which the ADC is keeping its members informed, but the organization is also trying to not lose sight of the importance of enjoyable collegial interaction. The annual meetings have always been an example of that. The golf tournament, which was a big success last year, and this year is again scheduled for Harding Park on September 8, is another opportunity to foster those relationships. This Board will continue those efforts, as well.

DEFENSE COMMENT: How do you answer the critics of the ADC who contend that the ADC simply promotes the interests of the insurance industry?

MR. GLAESNER: That is not the current state of this organization. The ADC, maybe 25 years ago, was tethered very closely to the insurance industry, but for many years and for many reasons, and through many conflicts with insurers, our membership by and large has, of necessity, become an organization of defense lawyers who are not tethered to the insurance industry. We have clients that are self-insured with large self-insured retentions. We have clients who are not insured at all for certain types of risks. And I know for most firms in this organization, those types of clients have certainly become a significant percentage of their business, if not the bread and butter of their law firms.

MS. TWEEDY: I would give an example. As people probably know by now, there was a move afoot in the Legislature to force attorneys to represent more than one client that would have put attorneys in an impossible conflict-of-interest; for example, an attorney representing a contractor and several subs, or a contractor and an owner, or a contractor and an architect. The ADC vigorously opposed that bill. We explained to the representatives how that type of arrangement would violate our canons of ethics, and the bill that was passed did not have that clause in it. The insurance industry would have taken a different view because the bill would have saved significant defense costs. That’s a specific example that demonstrates that we’re here to protect the attorneys and the clients, and are not a mouthpiece of the insurance industry in any way, shape or form.

MR. BACON: I agree with Pat’s comments, and Peter’s too. We are not an extension of the insurance industry, and the organization is still trying to shake this image that we are somehow wedded or tied to the insurance industry. The organization is for civil defense practitioners, not “insurance defense” practitioners, solely. It’s for people from all walks of civil defense practice. And I think anyone who’s been paying attention to what the ADC has been doing lately, particularly by way of legislative and lobbying efforts that we engage in, would agree that it’s really something well beyond just an insurance defense-related organization. Clearly much of our membership continues to work in insurance practice and we can’t ignore or discount that. But to say that this is an insurance-specific organization is just not true anymore, and the organization is evolving accordingly.

MR. BONINO: I’m told that in the old days, even before the memory of Doug Sears, the ADC was actually created to promote the interests of a strong civil defense bar at a time when it was under attack. One of the main purposes was to educate the clients, who were largely institutional, as to the value of an independent bar. The interests of the clients and lawyers have, over the years, been aligned on most issues. Occasionally, however, they diverge and under those circumstances the ADC has always attempted to promote the interests of its members which, in the long run, are also in the best interests of the clients.

DEFENSE COMMENT: Why should today’s busy defense practitioner join the ADC?

MS. TWEEDY: I’d like to answer that by citing to my own experience. Prior to becoming a member of the Board, my involvement with the ADC was limited to attending the occasional educational meeting and the Annual Meeting. In doing so, I really did not get an understanding of what the ADC does; the important work the ADC does. That work includes advising the Judicial Council about rule changes and forms that they’re considering. We have an active role in bringing to the attention of the Supreme Court the issues that most affect our practice. And I hate to keep harping on this 998 issue, but I think all practitioners have an interest in getting some certainty in the law there. We’re very active in working with the Judicial Council and the Supreme Court on that. And the lobbying efforts, we have a wonderful lobbyist, Mike Belote, who is in the Legislature watching for bills that may affect our practice. I didn’t know these things, but I do now, and I just now see where a good portion of our dues are going.
and they’re going to efforts that greatly enhance our practice. Conversely, if the ADC was not there doing these things, the laws that would affect our practice would pass without notice or opposition.

MR. BACON: Real simply, from my standpoint, I think there is no other organization, certainly in California, and maybe not even nationally, that does as much behind the scenes to promote and protect the defense practice than the ADC. Through the fine efforts of our lobbyist, Mike Belote, our Board, and the efforts of the CDC with whom we work closely, we have developed some real recognition with the Legislature. I also think our MCLE seminars are among the best offered by any organization. They provide tremendous bang for the buck.

MR. GLAESSNER: What other organization is going to protect civil defense lawyers in Northern California and Nevada? There is no other organization. There are some fine defense organizations in this country on a national level that speak to national issues, but this organization is the only one that is going to protect the practices of our 1,000+ members. I think if there’s a criticism of our organization, it may be that at times we don’t do the best job of communicating exactly what it is that we are doing to protect their practices. If someone is a busy defense lawyer, they probably have little time to keep abreast of what it is that’s going on in the Legislature or with the Judicial Council that will have a direct impact upon their practice of law.

Membership in this association is the vehicle by which you help guard against intrusions on the right to practice law in the way that we need to practice it – skillfully and ethically.

MS. TWEEDY: There was an attempt this year to enact a rule prohibiting blanket objections to interrogatories, and I think every defense practitioner out there has received that set of interrogatories or that request for production of documents where every single question is impossible to answer for the same reason. The Board of Directors gathered up some representative sets of these interrogatories and provided them to our lobbyist, Mike Belote, who sent them to the Judicial Council. Had the ADC not been here to do this sort of thing, we would have a new rule of court and we’d be trying to figure out how to not make a blanket objection, or how to make it not look like a blanket objection when each interrogatory was appropriately objectionable in the same way as the previous one.

MR. GLAESSNER: There is a defense viewpoint every time a bill is proposed in the Legislature, or every time a rule of court is proposed through the Judicial Council. The busy defense lawyer usually doesn’t have the time to keep track of those proposed changes in legislation or court rules, yet that’s exactly what we are doing in order to make sure that things don’t slip through the cracks, and to make sure that a defense viewpoint is expressed.

MR. BONINO: For all the reasons that Peter, Pat and Jon have outlined, and to provide an opportunity for some social interaction and even fun. As King Canute learned almost one thousand years ago, and as Texas Tech learned on January 2nd of this year, you cannot stem the tide, but that doesn’t mean that you cannot bring part of our focus back to holding events that are both educational and enjoyable and, in some cases, just enjoyable.

DEFENSE COMMENT: What influence does the ADC have, and where?

MS. TWEEDY: Well, the ADC is one of the organizations that the Judicial Council comes to for comments, for example, in the drafting of the new jury instructions. We typically meet with the Chief Justice of the Supreme Court every year, talk about things that are important to us and to the Court. Mike Belote is an excellent lobbyist for our interests in the Legislature. With local courts, when local rules are being developed, or local judges need information about our practices, I think we have some influence with those folks as well.

MR. GLEASSNER: One area we haven’t talked about in which the ADC certainly voices a viewpoint is in the area of amicus briefing filed with the courts. When we select a case, we’re looking for issues that we feel have significant impact either on the practices of defense lawyers, or ethics, or, perhaps, on the proper administration of the civil justice system. Too often we only learn of cases with issues once they are on appeal, or after an appellate court has already issued an opinion. I wish that our membership would bring us more cases on which they want us to voice an opinion, to weigh in, and to allow us to get involved earlier in the case. I think it’s an area that we are somewhat underutilized by our membership, but yet a very important area of potential influence.

DEFENSE COMMENT: What do you consider to be the hot issues facing defense attorneys today, and what is the ADC doing to address them?

MR. BACON: I’ll jump in on this one, if you like. An area of practice near and dear to my heart is construction defect litigation. There have been a number of attempts by various interests within the construction industry to make changes that could significantly affect our practice, like revisiting indemnity agreements and trying to force so-called “cooperative defense agreements” on subcontractors,

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where the defense of multiple issues in a case would be undertaken by a lead attorney and a lead or core group of insurance carriers. ADC resisted these agreements not for purely selfish, practice-related reasons, but because they raised a number of serious ethical issues and because they infringed upon the rights of parties to defend themselves in the manner they see fit. The ADC was very much involved in the debate over cooperative defense agreements and will continue to participate in the various advisory or exploratory efforts to be undertaken on this issue in the coming years.

Most recently, we’ve seen the passage of Assembly Bill 758, which has essentially wiped out Type 1 indemnity provisions in construction contracts, which is a major positive development in construction defect practice. The Construction Law Committee of the ADC and Mike Belote led the charge on a number of these issues that directly impacted construction defect practice and our own ability to properly and vigorously represent our clients. These are just examples from the construction defect practice standpoint where the ADC has been a true player in hot issues affecting defense practice.

**MS. TWEEDY:** A hot issue facing defense attorneys right now is trying to balance the needs of our business against or with keeping our clients happy, keeping people who pay our bills happy. I think another hot issue facing defense practitioners is trying to minimize stress in our practice, keeping current on the law while we’re keeping current on our files. I think those are all topics that the ADC is attempting to address. At the annual meeting, we had a very good presentation on the elimination of stress. We had a great law firm management seminar in July, and that’s a program we put on every year. And so I’d say that the manner in which we practice, indeed our practice itself, is something that the ADC is very much clued in to.

**MR. GLAESNER:** I think for many defense lawyers simple procedural rule changes can be hot issues. Our members are quite upset about the change in the summary judgment notice period. It’s the one piece of legislation in recent years that directly affects all of our practices. Unfortunately, we were unsuccessful in stopping that train from going down the tracks in Sacramento, not because we didn’t try, but because the bill was leveraged against construction defect reform legislation. Summary judgment was horse-traded at the eleventh hour, and it was beyond our control to stop it. Our members should know that the ADC has consistently attempted to go back and reform that legislation to allow for a good cause exception to the summary – to the 75-day period, but we’ve not been successful to date.

A few years ago we were very successful with the Judicial Council in modifying how fast track rules were being enforced for trial settings. That was a hot issue. I think in most venues today, the rules are now being applied in a much more discretionary fashion without the rigidity

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that was causing a lot of hardship for all of us in our practices.

Those are hot issues that our members expect us to be aware of, to take a stand on, and to do whatever we possibly can to protect the practices of our members.

**MR. BONINO:** The very nature of a hot issue is that it often arises unexpectedly. As you can see from all of the issues that have been discussed, these are things that have arisen suddenly and the organization, on behalf of its members, has attempted to deal with these issues often before the members even knew what issue was looming. A partnership with the CDC will continue to monitor all areas – legislative, judicial, and procedural – so we can move on those matters quickly.

**DEFENSE COMMENT:** What can the ADC do better for its members?

**MR. GLAESNNER:** I always think we can communicate better, more often and more effectively. We have some great publications, including *Defense Comment* and our directory, and we’re continually improving our web site.

We have list serves for most of the substantive law committees where people can exchange ideas and information, but we are working to get our web site to a further stage so that each substantive law committee will host a members-only bulletin board on the web site.

**MS. TWEEDY:** For 2006, one of the goals is to make sure each member knows how to reach the organization immediately with a phone call or an e-mail so that if there’s something that they need in their practice right now, they know what we can help them with. We want attorneys to know how to reach us quickly, so we can figure out quickly how to best respond to whatever it is they need.

**MR. BACON:** Accessibility, I think, is really a key thing. There’s still a perception that this is an insiders’ organization, and that is not the case. The ADC is here for the benefit of every member. Among the other things we do, I think we need to make sure the members understand how much we do with the Legislature and how important that is. I talk to people who are surprised to hear that we are that involved with legislative efforts and that we have somebody in Sacramento that looks after our interests at that level. Many see the ADC as a purely social organization or a marketing forum. We are far beyond that and we have to get that message out to all civil defense practice firms. So, I agree, accessibility to the organization is key.

**MR. BONINO:** I don’t want to be accused of being the social chairman, but real communication, as opposed to transmission, through a reasonable number of events that allow the members to get together.

**DEFENSE COMMENT:** What can the members themselves do to help the ADC better represent their interests?

**MR. GLAESNNER:** To follow up on Jon’s comment, I think all members should understand that this group of officers and our Board of Directors really view this as a service organization. We are here to serve our members in various ways. But one of the most important things that members can do is simply bring issues of concern to the Board’s attention. If you have a case that you think involves some significant issue that requires amicus briefing, we need to know about it. We may not find out about it unless you bring it to our attention.

**MS. TWEEDY:** One of our Nevada members in 2005 had such a case, and requested the ADC’s assistance on an expedited basis. Within a week, the ADC was able to file an amicus brief with the Nevada Supreme Court. And we haven’t said a whole lot in this conversation about the Nevada members, but we are an organization that serves that state as well, and one of the amicus briefs we did this year was in a Nevada case.

**MR. BACON:** Since MCLE is a lot of what we do, I think it would be helpful to learn from the membership what topics they would like us to cover. We are always struggling to come up with topics that are timely, that deal with issues that are of real concern to the membership, and the members need to communicate their ideas about that to us. Our Board members practice in a variety of different substantive areas and we may be oblivious to something that is a big issue to specific segments of the membership, so it needs to be communicated.

I would like to hear more from our Nevada members about how to boost their membership and how this organization can be more relevant to them. We want to be responsive to them and we need to hear from them.

**MR. GLAESNNER:** We have been grappling recently with how best to recruit more members from Nevada – Las Vegas in particular – as well as discussing what type of educational programs might be important to Nevada lawyers, whether or not they’re currently members of our organization. So I think Jon is exactly right in saying that we can plan programs, but without hearing from members who are engaged in particular practices, or live in certain communities,
The second goal is to continue to improve on our substantive law committees. We have seven of them, and some have been functioning at a very high level by putting on educational programs, brown-bag lunches, and things of that sort. But I know that we haven’t achieved consistency in all of these committees. Those committees should fuel the growth of membership in this organization. We’ve seen that with our Toxics Committee, and we’ve seen it with our Construction Committee over the years, but it definitely requires great leadership and people who are willing to commit time to lead those committees, and then you start to see some of the fruits of their hard work.

I think the third thing is a commitment to working closely with Mike Belote and the California Defense Counsel on these lobbying issues, whether it’s legislation in Sacramento or matters that come before the Judicial Council. 2005 was an off year in terms of elections, but 2006 is likely to be a much more active year. It’s clear that California has been targeted by those who want to promote tort reform, and we, as an organization, need to be prepared to articulate positions about tort reform that we believe are factually accurate and not simply rhetorical or knee-jerk positions. When anyone takes positions that are not accurate or which misstate the nature of California’s tort system or civil justice system, we, as defense lawyers, can’t stand by mute and let that happen.

The Construction Defect Committee has done that, and has produced a CD at their last large seminar that included in limine motions, jury instructions and briefs on basic issues that are tremendously helpful. This type of thing could be expanded into all of the different substantive law committees.

I think it’s also incumbent upon us to have hot topic seminars that are really responsive to the needs of the membership, and also to continue to work on improving the service orientation that we have developed through the substantive law committees, like developing brief banks and developing canned jury instructions for particular areas of law or particular types of trials.

The second goal is to continue to improve a DC officers’ roundtable where they get themselves known in the welcome and we encourage the members we’re on target or not. It’s very hard sometimes to know whether we have seven of them, and some have been functioning at a very high level by putting on educational programs, brown-bag lunches, and things of that sort. But I know that we haven’t achieved consistency in all of these committees. Those committees should fuel the growth of membership in this organization. We’ve seen that with our Toxics Committee, and we’ve seen it with our Construction Committee over the years, but it definitely requires great leadership and people who are willing to commit time to lead those committees, and then you start to see some of the fruits of their hard work.

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Obviously, we also live and die by membership. The more we can promote membership and boost the membership ranks, the more talent we can attract, and the more operating revenue we can generate, the healthier the organization will be.

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Speaking from a medical malpractice attorney’s standpoint, I would say that that might be an excellent goal for the Health Care Committee because the new jury instructions fall short of what we need in trial, and we’re always reinventing the wheel in every case, trying to come up with jury instructions that – that meet our needs, follow the law. If we had a jury instruction bank that we could all share, it would be a great service to the members of our community.

Any final thoughts?
Meet ADC’s New President
Peter Glaessner

By D. Lee Hedgepeth, Curtis & Arata

The umpiring of America’s national pastime, baseball, is in many ways an allegory for the legal system’s role in society – actions are judged as being fair or foul. It is therefore fitting that umpiring is a favorite activity of one of Northern California’s leading defense lawyers in the field of employment law, the Association’s newly elected President, Peter Glaessner.

Peter, a partner with the Oakland law firm of Lombardi, Loper & Conant, LLP, was elected to the Presidency at the Annual Meeting in early December, after having served in various positions on the Board of Directors for the past eight years.

Born and raised in St. Louis, Peter contemplated a career in journalism and began studies in that field at Northwestern University. In his sophomore year, he transferred to and later graduated from UCLA, with majors in Communications Studies and Political Science. (As it develops, Peter’s early interest and training in journalism served the ADC well during his two years’ service as the Editor-in-Chief of Defense Comment.)

Peter attended law school at the University of San Diego, graduating in 1980, and thereafter accepted a clerking position with the Fourth Judicial District in San Bernardino. During a two year stint there, he clerked for Justice Robert Gardner and later Justice Marcus Kaufman, who was later elevated to the California Supreme Court.

Peter moved to the Bay Area in 1982, taking a position with the firm of Fisher & Hirst in San Francisco. A resident of the Oakland Hills, he moved to Hardin, Cook, Loper, Engel & Bergez in November, 1991. Eventually, Peter joined four other partners in that firm to found Lombardi, Loper & Conant, LLP in September, 1999. His practice emphasizes the defense of employment matters for both public and private employers, as well as the representation of insurance brokers and agents in professional negligence matters.

It was in Northern California that Peter met his wife, Katherine, who is a graduate of the University of California. Peter and Katherine have three children, Patrick (17), Emily (14) and Parker (11). The family is a close-knit one, and enjoys traveling, both domestically and internationally.

The home in which the family was living in 1991 was, sadly, destroyed in the Oakland Hills fire. From that tragedy, however, comes a vignette which tells much about Peter.

Peter and his wife had approximately 15 minutes notice of the fire’s approach to their home. After seeing to it that Katherine (who was then seven months pregnant with their second child) was safely away in one of the family cars, Peter hurriedly gathered a few photographs and other keepsakes into a suitcase, as embers were literally swirling in the area, and with trees on their lot already ablaze.

Throwing the suitcase into the family’s other car (which was in the garage), Peter found that power to the house had by that time been interrupted and the garage door would not open. Reasoning that the garage door was of little consequence given that the entire home was about to be consumed by fire, Peter simply drove through the garage door, and rejoined his wife a few hours later.

Peter’s favorite leisure activities involve sports, including basketball, a sport he played in high school, and golf, although he admits to being a “bad golfer.” He umpires baseball games for the North Oakland/South Oakland Little Leagues. He also referees youth soccer for the Jack London Youth Soccer League. “I enjoy watching the competition up close. Knowing many of the players and their families makes it special, and the best satisfaction is leaving the field and both teams saying you called a good game.” When pressed, he allows (with apologies to his colleagues at Lombardi, Loper & Conant) that his “dream job” would be that of a sports announcer.

Notwithstanding his impressive credentials, those who know Peter recognize that his strength lies principally in his wholly human, unassuming and self-effacing way. When asked, for example, whether he would provide a photograph of himself umpiring a baseball game for this profile, he observed that he avoids posing for such photographs since he looks much like the Michelin Man (only in blue).

Peter looks forward to leading the ADC, which has meant so much to him over the past decade, and the Association will doubtless benefit from his experience, his pleasing and good-natured manner and, perhaps most importantly, his judgment at distinguishing “fair” from “foul.”
After I received a jury summons in the spring of 2005, I had what must be a unique experience for a judge, retired or not. Although it was not an “out of body experience,” it certainly was an “out of robe experience” and it seemed quite strange at first. When I responded to the jury summons, I was instructed to call in at later times and I did so. Each time I called, it seemed more likely that I would not have to appear. As further instructed, I called in again during a short break from a mediation that I was conducting. To my surprise and chagrin, I was directed to report to the jury assembly room in just over an hour.

My reaction, unfortunately, was much like most summoned jurors (something far south of joyful anticipation), and when assigned to a trial department, I dutifully prepared a written request to be excused or deferred because in the first place, who would want a judge sitting on their jury? The request was denied (now I know how it feels) and I had to reschedule my private judging work (something different than being on the government payroll). I knew that I would not survive the preemptory challenges and that this would be an exercise in futility. The next day, to my astonishment, I was sworn in as juror #12 in a civil employment case.

After I realized I would be there for the duration, I concluded that in fairness to the litigants as well as to my fellow jurors, my role should be very low-key, and at best, I should try to be simply one of the twelve. I declined the foreperson nomination and requested that I vote last on each issue. I viewed my role first as juror #12 and second as a sort of gatekeeper if jurors went astray on the evidence or the law as ruled upon or otherwise determined by the trial judge.

Reality is actually seeing how chocolate ice cream and sausage are really made. When one is not privy to what transpires behind “closed doors,” experts, self-proclaimed or otherwise, and pundits emerge espousing their theories as to what “really goes on.” In the context of juries, those theories are more appropriately referred to as MYTHS. The following are my conclusions as to these MYTHS.

**MYTH #1: As Long As Most of the Jurors Are Good for My Client, That’s Good Enough.**

One of the biggest mistakes trial counsel can make in the jury selection process is to fail to appreciate who the likely leaders will be. A majority of the jurors in this subject case leaned in one direction from the get-go. The jury was deadlocked on the most critical issue on the case 8-4. When we reconvened the following Monday, we decided to focus on the critical and pivotal issue of the case by boiling down several lines of the pertinent jury instructions to two words, and then discussing the pertinent evidence. Then each juror discussed this evidence endeavoring to be as non-adversarial and impartial as humanly possible. The resulting vote was 10-2, with six persons ultimately changing their vote. My point is: only a few articulate jurors can have an enormous impact on the outcome of a verdict.

In the late 1980’s, prior to my appointment to the bench, I served on a DUI case in Walnut Creek and my experience was the very same. Those who take the lead in deliberations have an enormous impact on the final outcome of the case. In the subject case, the initial speakers were advocating their positions, which resulted in the 8-4 majorities. There is a critical mass and enormous peer pressure on the least articulate and the least educated to go along with the rising tide.

**MYTH #2: Jurors Ignore the Judge’s General Admonitions.**

My experience was to the contrary. I was particularly focused on the jurors’ comments during recesses. Although I realized that I might be perceived as the unclothed emperor from the story “The Emperor’s New Clothes,” I made a point of meeting and talking to all of the jurors so that everyone would be relaxed and eventually reach a level of comfortable normalcy. Not once did I hear anyone say (in direct or overheard conversations) anything about the case, the parties or attorneys. There were a few comments about the trial judge that were favorable, except as to some delays (which I know, from my own experience, were not the judge’s fault).

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MYTH #3: Jurors Expect and Don’t Mind a Few Delays, and Understand That Unforeseen Things Do Occur.

Unless you are serving as a juror, you do not have a real appreciation of the stress created by taking even as little as a week or so out of your busy life. One juror, a mid-level manager for Intel, had to travel on a particular date (the day after the trial was projected to finish) for an important acquisition trip to Korea and he had to work nights during the trial to prepare. Another juror had child-care issues, and on it went. Each time a delay occurred, stress levels increased, which impacted the jurors’ ability to focus on the evidence. In my experience as a sitting trial judge, I noted that the attitude of the majority of trial lawyers is that once a jury is selected, “they are MY jurors, and MY trial is so important to me, it must therefore be likewise important to the jurors. The value of their time is secondary. They will adjust.” You may be invested in your case, but the jurors usually are not (and should not be).

Delays are jurors’ foremost complaint. In my view, most delays can either be avoided or at least minimized. I suggest that trial counsel meet and confer prior to trial and work out a reasonable schedule. Then sit down with the trial judge and establish an actual schedule for witnesses, etc. Then tell the jury and hope that the trial finishes as close to schedule as reasonably possible. During the course of the trial, time schedules may run ahead or behind at different points, however, the goal should be to finish on time. Counsel should make sure the witnesses are stacked in the event a witness completes his or her testimony earlier than expected, a witness fails to appear or, a witness is dropped for strategic reasons. During the course of this trial, counsel ran out of witnesses and we were forced to recess for the day considerably earlier than scheduled. This did not sit well with most of the jurors and they were looking for persons to blame.

MYTH #4: Jurors Understand That It’s an Adversarial Process and They Expect the Attorneys to Grandstand and Occasionally Upbraid Opposing Counsel.

It is a turn off! Whether such conduct is spurred on by a sense of self-righteousness or indignation, or as a tactic, no friendships are won nor jurors influenced (in a positive way). Although a few flare-ups occurred during the trial, it did not impact the outcome of the trial. Nevertheless, jurors do not like to witness such conduct. At the very least, all counsel, as well as the court, need to remember the practice of law is a profession and the highest ethics, civility and professionalism are expected by jurors. They are important to garner the public’s respect and confidence in the judicial system.

MYTH #5: If the Jury Doesn’t Like the Attorney, the Client Is In Trouble; or Conversely, If the Jury Likes the Attorney, It Bodes Well For the Client.

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In my recent experience as a juror, one of the attorneys was deemed by most of the jurors to be arrogant and he was not appreciated despite his several attempts at self-deprecation. Nonetheless, it was never a factor in the course of deliberation, and that particular attorney ultimately prevailed.

In observing trials from the bench, I have seen numerous similar results. I would, however, never conclude that it makes any sense to alienate jurors. In a close case, who knows what will be consciously or subconsciously factored into the ultimate decision.

**MYTH #6:** If The Jury Does Not Like the Client, It Bodes Badly For That Client; Or Conversely, If the Jury Likes the Client It Bodes Well For The Client.

Unlike popularity, or lack thereof, as it relates to trial counsel, the client’s likeability most definitely has an impact on a jury. While the disliked party prevailed in this instance, the jury could have very well gone the other way. The jurors were highly critical of this party. At one point, the jury was deadlocked at 8-4 against that party on the most critical issue of the case. Ultimately, after intense discussion and analysis of the evidence, the final vote on that key issue was 10-2 in favor of that party.

**MYTH #7:** Once In Deliberation, the Jury Observes the Trial Court’s Instructions to Be Impartial Judges and Not Advocates For a Particular Point of View.

In my experience, the first speakers generally advocate a particular view. In the two instances in which I served as a juror, the verdicts would have been different but for the fact that ultimate leaders emerged who adhered to the court’s instructions and confined themselves to the admissible evidence.

**MYTH #8:** When the Court Gives Admonitions Not to Consider Certain Evidence, One Should Generally Expect That the Jury Will Comply.

Precise and clear in limine rulings are the best alternatives to avoid the necessity of attempting to “un-ring the bell” by the court’s instructions of admonishment, etc. In the subject case, an administrative body decided the merits of a primary issue to be decided by this jury. The court quite properly ruled that this evidence was inadmissible and admonished the jury to disregard it. Although a curative admonition had been given by the court which made it unquestionably clear that this could not be considered as evidence, it was nevertheless discussed by the jury until a certain unnamed juror informed the others that it was improper and could not be discussed or considered. Ultimately, this excluded evidence did not impact the final verdict of the jury.

*Continued on page 17*
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Summary of Selected Federal and California Supreme Court and Appellate Cases

By Michael J. Brady, Ropers, Majeski, Kohn & Bentley – Redwood City

Editor’s Note: The summaries in Defense Comment do not include all of the California cases summarized by Mike Brady, as the ADC is limited by the expense of printing and mailing all cases summarized. However, all cases summarized by Mike Brady (approximately 40% more than published in some issues) can be found on the ADC website (www.adcnccom). Just another reason to use the web site!

Also, as always, remember to carefully check the subsequent history of any case summarized as the reported decisions may have been depublished or review granted.

ARBITRATION; FEDERAL PREEMPTION

Cronus Investments, Inc. v. Concierge Services (2005) 35 Cal.4th 376, 25 Cal.Rptr.3d 540

FACTS: The underlying dispute was complex. Multiple parties and cross claims were involved. Some of the claims, but not all, were subject to binding arbitration; some of the parties, but not all, were parties to the arbitration agreements. Under C.C.P. § 1281, the California Superior Court has discretion to take various steps under such circumstances. In this case, the court exercised its discretion to stay the arbitration (to avoid conflicting results) until the litigation was first resolved. This was attacked as violative of the Federal Arbitration Act, which would have precluded such a ruling.

SUPREME COURT DECISION: The Supreme Court held that federal preemption did not apply under the circumstances of the trial court’s ruling. The contracts stated that California law was to govern, and this meant that California law would prevail to the extent it was not in conflict with the requirements of the Federal Arbitration Act. Generally, the Federal Arbitration Act applies in federal courts, not state courts, where this action was vendue. The parties had also expressed their intent that California law would govern.

COMMENT: The court noted that the real intent of the Federal Arbitration Act is that the private wishes of the parties with respect to the scope of the arbitration, was to be honored and could not be displaced by state statutes or rules. Accordingly, if parties wish to be bound by the Federal Arbitration Act, they can indicate in their agreements that the arbitration is to be governed by the Federal Arbitration Act (FAA) to the exclusion of state law. However, this agreement did not contain any such language.

MEDICAL LIENS; HOSPITALS

Parnell v. Adventist Health System/West (2005) 35 Cal.4th 595, 26 Cal.Rptr.3d 569, 109 P.3d 69

FACTS: Parnell was in an automobile accident caused by a negligent driver. He was a member of a health plan. Parnell was treated at a hospital, which had agreed with the health plan to receive “discounted” payments from the health plan for the medical services provided to Parnell. The hospital in turn had agreed with the health plan that Parnell’s obligations would be deemed satisfied in full on receipt of the discounted payments from the health plan. Parnell filed suit against the tortfeasor. The hospital asserted a lien for the difference between the reasonable value of the services provided and the discounted amount the hospital had accepted from the health plan. Parnell sued the hospital for unfair business practice under Business and Professions Code § 17200.

The trial court ruled in favor of the hospital; the court of appeal reversed the trial court.

SUPREME COURT DECISION: Court of appeal affirmed. Because the hospital had agreed that the discounted payments would be treated as “full satisfaction” of Parnell’s obligations, there was no underlying “debt” on which the hospital could sue. The hospital remains free to contract for such a “difference” but they had not done so here.
INSURANCE COVERAGE; EFFICIENT PROXIMATE CAUSE; WEATHER CONDITIONS


FACTS: The policyholder lived in a hilly area. There was a period of heavy rains; this caused one of the slopes to fail, which in turn caused the landslide. This caused a tree to fall on the insured’s home. The insured submitted a claim to his homeowner’s insurer (Hartford). Hartford denied the claim based upon the “weather conditions” provision of the policy. The policy in essence excluded coverage if weather conditions interacted with any other excluded peril (including landslide) to cause the loss. The policy was an all-risk policy, which did provide coverage for weather-related events except as qualified.

The trial court granted summary judgment for the insurer based upon the exclusionary language. The court of appeal affirmed.

SUPREME COURT DECISION: Affirmed. Even though the policy does provide coverage for certain weather conditions, the company is entitled to qualify that by indicating when weather conditions interact with another excluded peril (landslide), there will be no coverage. For example, if the policy generally provided coverage for damage caused by freezing, the policy at the same time could preclude coverage for damage caused by freezing to plumbing. This decision is limited to the facts and circumstances of this case; for example, if the excluded cause (landslide) was only a remote cause of the loss, the result may well be different.

MEDICAL MALPRACTICE; STATUTE OF LIMITATIONS

Fox v. Ethicon Endo-Surgery, Inc. (2005) 35 Cal.4th 797, 27 Cal. Rptr.3d 661

FACTS: Plaintiff had gastric surgery and developed severe complications. She filed an action for medical malpractice against the doctors. She did not state a cause of action at the same time against the manufacturer of the staples involved in the surgery, which she found out had been allegedly defective. She actually found out about the staples when a deposition was taken, and then she stated a cause of action against the manufacturer. The medical device manufacturer successfully demurred based upon the statute of limitations. The trial court based its ruling in the case of Bristol-Myers Squibb Co. v. Superior Court (1995) 32 Cal.App.4th 959, 966, which held to the effect that when the statute of limitations in the medical malpractice action began to run against one defendant, it began to run as to all (the “bright line test”).

The court of appeal reversed saying that plaintiff should be allowed to amend her complaint to state that she had no reason to discover at an earlier date the basis of her products liability claim.

SUPREME COURT DECISION: Court of appeal affirmed. The Bristol-Myers case is disapproved. The cause of action against the medical device manufacturer does not start to run until plaintiff knows or should know that she has a claim against them. Plaintiff is required to plead that a reasonable investigation, when she filed her original complaint, would not have revealed a cause of action for products liability. In the present case, it appears that the information concerning the potential product defect came out during a deposition, which was taken after the filing of the original complaint. Accordingly, plaintiff should be allowed to amend her complaint.

COMMENT: This decision could create some difficulty in medical malpractice/medical device cases (the “long tail” effect).

ARBITRATION; PREEMPTION; CALIFORNIA’S DISCLOSURE AND DISQUALIFICATION RULES FOR ARBITRATORS

Jevne v. Superior Court (2005) 35 Cal.4th 935, 28 Cal.Rptr.3d 685

FACTS: This case presents a classic conflict between the new California rules for disclosure and disqualification imposed upon private arbitrators and the special rules dealing with disclosure and disqualification in binding arbitrations in broker/dealer disputes governed by the National Association of Securities Dealers (NASD). NASD arbitrations are governed by procedures that must be approved by the SEC.

SUPREME COURT DECISION: The California Supreme Court rules that in an arbitration under NASD rules, the California disclosure and arbitration standards will not apply and are preempted by federal law (the SEC), which is supreme. The California disclosure requirements are more stringent than the federal, as are the California disqualification requirements. Since the two conflict, federal law preempts California law in NASD arbitration disputes.

COMMENT: For another case to the same effect see the recent Ninth Circuit decision Credit Suisse First Boston Corp. v. Grunwald 400 F.3d 1119 (Ninth Circuit, 2005).

NEGLIGENCE; AMUSEMENT PARK; COMMON CARRIER

Gomez v. Superior Court (2005) 35 Cal.4th 1125, 29 Cal.Rptr.3d 352, 113 P.3d 41

FACTS: Moreno died while riding the Indiana Jones amusement park ride at Disneyland. The heirs filed suit against Disneyland alleging that the ride shook violently creating various stresses that caused bleeding of the brain leading to the death of decedent. Allegations were made that the ride constituted a “common carrier” under Civil Code § 2100 and that there was a heightened duty of care. Causes of action for strict liability were also stated.

SUPREME COURT DECISION: In favor of the plaintiff. The amusement park ride can be denominated as a “common carrier” subject to the duty to provide utmost care.

COMMENT: An interesting decision: this is not a ride which collapsed or was defective; it did exactly what it was meant to do, and it appears that we had an “eggshell plaintiff” who had a brain injury due to the shaking of the ride. What effect will this have on other similar rides at amusement parks?
NEGLIGENCE; LANDOWNER LIABILITY; BARTENDERS AND RESTAURANTS; CRIMINAL ACTS

Delgado v. Trax Bar & Grill (2005) 36 Cal.4th 234, 30 Cal.Rptr.3d 145

FACTS: The plaintiff and his wife were at the Trax Bar & Grill in Turlock, California. For more than an hour five men in the bar continued to stare at the plaintiff. There was a security guard in the bar, and he noticed this and cautioned the group about any altercations and encouraged plaintiff to leave. Plaintiff and his wife got up to leave and were walked to the door by the security guard. A guard who was outside the restaurant was not there at the time, and plaintiff and his wife walked to their car alone. A gang of 20 then approached and severely beat plaintiff. Plaintiff filed suit against the bar and a jury awarded plaintiff more than $81,000. The court of appeal reversed.

SUPREME COURT DECISION: Court of appeal reversed. In a complicated decision (heavily “nuanced”), the Supreme Court clarifies its previously expressed rules dealing with when property owners, particularly bars, restaurants, and shopping centers, will be liable for criminal acts committed by others. A special relationship exists between a bar owner and patron, creating a heightened sense of foreseeability. In the present case, employees of the bar were actually on notice of problem and actually sought to do something about the problem, and therefore, some foreseeability was present, although not necessarily simply because it should have anticipated that 20 members of a gang would meet plaintiff and his wife in the parking lot. There is not an absolute requirement to have security guards; but when the special relationship exists, there may be certain minimal steps that the defendant should take; including walking plaintiff to plaintiff’s car, calling 911, etc.

COMMENT: The Supreme Court does emphasize however, that just because a property owner goes to the trouble of furnishing security guards does not automatically create a duty to protect against criminal activity. This decision however, must be viewed as somewhat of a step back from past decisions denying landowner liability for criminal assaults. The Delgado case clouds issues of liability and duty and will make it easier for plaintiffs to get to the jury. In Delgado itself the case was remanded to the court of appeal for determination of the sufficiency of plaintiff’s case to establish the existence of a duty and whether the duty was breached.

NEGLIGENCE; LANDOWNER LIABILITY; CRIMINAL CONDUCT ON PREMISES

Morris v. De La Torre (2005) 36 Cal.4th 260, 30 Cal.Rptr.3d 173

FACTS: Plaintiff went to Victoria’s Mexican Food restaurant with his friends. Plaintiff had a stomachache and did not want anything to eat and decided to wait in the parking lot for his friends. He was approached by a gang who started a fistfight with him. The restaurant employees inside the building observed this. Then one of the gang members came in the restaurant and demanded a knife; the gang member walked out of the kitchen with a 12" kitchen knife, went outside and stabbed plaintiff once. The restaurant’s employees observed this and did nothing. The gang members then followed plaintiff down the parking lot and stabbed plaintiff repeatedly. The entire incidence of violence took about seven minutes.

In a suit filed by plaintiff, the trial court granted summary judgment for defendant, but the court of appeal reversed.

SUPREME COURT DECISION: Court of appeal affirmed. As in Delgado, the restaurant has a special relationship and a heightened degree of foreseeability is imposed. Here the restaurants employees did nothing, even though they were observing the entire incident. To impose the duty to at least call 911 would not be unduly burdensome. Furthermore, plaintiff was an invitee since he was a prior customer; therefore a duty would be owed.

The case was remanded to the trial court; in the trial court, the restaurant will have the opportunity to prove that there were extenuating reasons as to why no call to the police was made; for example, the restaurant could demonstrate that there was fear on the part of the patrons in the restaurant and the employees of the restaurant that if a call was made to the police, the gang would retaliate against them.

COMMENT: Again, an expansion of landowner liability in the criminal assault area. This will complicate life for property owners.

INSURANCE; MISREPRESENTATIONS AND APPLICATIONS; INSURANCE AGENTS


FACTS: Amy O’Riordan and her husband applied for life insurance. They dealt with an independent agent (agent). The application asked whether she had smoked cigarettes during the preceding 36 months. She either said no or told the agent that she had smoked a few. The agent told her that the question on the application meant whether she was a habitual smoker. The policy was issued; shortly thereafter she was diagnosed with breast cancer and she died two years later. Before that, the agent actually became a Kemper agent instead of an independent agent.

Kemper rescinded the policy triggering a lawsuit. The trial court ruled in favor of the insurer on summary judgment on grounds of the misrepresentations in the application.

SUPREME COURT DECISION: Reversed. Under the California Insurance Code § 332 deals with material misrepresentations. Smoking a few cigarettes over the past three years should not be construed as a material misrepresentation. Furthermore, the wife (Amy) had various conversations with the soliciting agent; he understood what she was saying. This agent later became a full time agent and employee with Kemper and his prior knowledge is imputed to Kemper.

The matter was remanded to the lower courts for determination of factual issues concerning the degree and facts concerning the wife smoking, the medical evidence, and the understanding as to the meaning of the language in the application.
EMPLEYMENT TORTS; SEXUAL HARASSMENT; RETALIATION

Miller v. Department of Corrections (2005) 36 Cal.4th 446, 30 Cal.Rptr.3d 797, 115 P.3d 77

FACTS: Plaintiffs were employed in the prison system. The deputy warden of the prison was having sexual affairs and relationships with a number of other female employees; he was giving them favorable treatment and they were also being promoted and getting other benefits, whereas the women who were not his paramours were passed over. Plaintiffs complained, and they complained that they were then retaliated against. Plaintiffs did not complain of direct sexual harassment however, but in their complaint they alleged that what was going on created a hostile work environment.

The trial court granted summary judgment; the court of appeal affirmed.

SUPREME COURT DECISION: Reversed. Plaintiffs have sufficiently alleged that what was going on created a hostile work environment and that it created an environment where women were portrayed as “play things” and that the only way for advancement under this system was to have an affair with the deputy warden. No direct sexual harassment is required under these circumstances. Plaintiffs also adequately set forth triable issues of fact concerning the retaliation claim.

PRODUCTS LIABILITY; CALIFORNIA LEMON LAW; AUTOMOBILE SALE


FACTS: In this case, the California Supreme Court holds that the California “Lemon Law” only applies to motor vehicles which are sold in the state. Plaintiffs’ claim was thrown out because the motor home was purchased in Idaho.

ARBITRATION; COST SHARING

Boghos v. Certain Underwriters at Lloyd’s of London (2005) 36 Cal.4th 495, 30 Cal.Rptr.3d 787, 115 P.3d 68

FACTS: A dispute arose between the policyholder and the insurer concerning payment of disability benefits. The policyholder sued in court. The policy contained a binding arbitration provision. The policy also contained a clause indicating that the insurer agreed to submit to the jurisdiction of any competent court in the United States (including matters having to do with arbitration and enforcement of arbitration). Finally, the arbitration provision required that the policyholder share in the costs of the arbitration (including arbitrator’s fees).

The trial court held that the arbitration clause was invalid since the “service of suit” clause conflicted with the arbitration clause and any such conflict had to be construed in favor of the policyholder; the court of appeal agreed and added that the cost sharing provision rendered the arbitration agreement unconscionable.

SUPREME COURT DECISION: Reversed and remanded. Firstly, the “service of suit” clause [whereby the insurer agreed to submit to the jurisdiction of any competent court in the country] does not conflict with the arbitration clause since it expressly refers to arbitration, among other things. Furthermore, under the Federal Arbitration Act, there is a presumption in favor of arbitration, and that overrides the argument that any conflict is to be construed in favor of the policyholder. With respect to the cost sharing arrangement, these are not always invalid; the matter is remanded for further hearings on issues of unfairness, unconscionability, etc. based upon the facts.

WRONGFUL DEATH; MEDICAL LIEN

Fitch v. Select Products Co. (2005) 36 Cal.4th 812, 115 P.3d 1233, 31 Cal.Rptr.3d 591

FACTS: Elan Fitch became ill with cancer while working as a diesel mechanic. He died and a wrongful death action was filed by his heirs. The action was filed against a product manufacturer who had made a product that allegedly caused the cancer. Various medical benefits had been provided to Fitch during his lifetime by Medi-Cal. The heirs recovered a large verdict in a wrongful death case and Medi-Cal asserted a lien against the recovery.

The California Supreme Court holds that Medi-Cal cannot assert a lien under the circumstances of this case; the wrongful death action was brought by the heirs who were seeking damages, which belonged to them. Damages for Fitch’s own medical expenses could not even be sought in the wrongful death case, and therefore, the verdict necessarily does not include Fitch’s medical expenses. Therefore, Medi-Cal has no right to assert a lien unless the verdict necessarily includes medical expenses for the person compensated by Medi-Cal.

Medi-Cal could have sued the tortfeasor (product manufacturer) on the theory that the manufacturer caused the injuries to Fitch, and therefore was responsible for the medical bills. But that is not the case here.

DISCRIMINATION; UNRUH ACT; DOMESTIC PARTNERS; PRIVATE CLUBS


FACTS: California has a domestic partner law, allowing persons of the same sex to register as domestic partners. When this occurs, the persons are basically entitled to the same benefits as married couples. Plaintiffs were a lesbian couple who had registered as domestic partners. The defendant country club, which had granted membership to one of the partners, refused to allow the other partner to play golf, despite the fact that married couples had full golfing privileges. In a lawsuit based upon the Unruh Act, the trial court ruled against plaintiffs. The appellate court affirmed but remanded for further determination.

SUPREME COURT DECISION: The Supreme Court ruled in favor of the plaintiffs. The Unruh Civil Rights Act (Civil Code § 51) is broadly construed and includes protection against
discrimination with respect to groups or classifications of people who are not specifically mentioned in the Act.

EMPLOYMENT TORTS; DISCRIMINATION; RETALIATION

Yanowitz v. L’Oreal USA, Inc. (2005) 36 Cal.4th 1028, 32 Cal. Rptr.3d 436

FACTS: Plaintiff had worked for L’Oreal for 18 years and had been a regional sales manager for about five years. Plaintiff’s immediate boss instructed plaintiff to fire a certain female employee who was dark-skinned because she was unattractive and the boss told plaintiff to hire somebody who was “hot.” The two were then walking through the store and the boss passed a blonde woman. The boss said “God damn it, get me one that looks like that.” Plaintiff (a woman) asked the boss for justification, but none was given. Plaintiff refused to fire the employee in question, but plaintiff never specifically complained to her boss or anyone at L’Oreal about her belief that this was all discriminatory conduct. Plaintiff alleged that she then began to experience adverse employment consequences for her decision, including increased scrutiny; more interviews with employees whom plaintiff supervised asking about negative information about plaintiff; adverse written evaluation forms prepared by the employer (even though plaintiff in the past had received commendations and promotions and awards). Plaintiff brought an action for retaliation under the FEHA.

The trial court granted summary judgment for L’Oreal; the Court of Appeal reversed.

SUPREME COURT DECISION: Court of Appeal affirmed. Plaintiff raised triable issues of fact as to whether she was engaged in protected activity and whether an adverse employment effect had resulted. Hence, it was improper to grant summary judgment.

Protected activity: under the FEHA, the employee, to have a claim, must be engaged in “protected activity.” That includes opposition to the employee to discriminatory conduct, which the employee reasonably and in good faith believes is occurring, even though the plaintiff does not formerly charge that such occurred. The plaintiff in this case, inter alia, claimed that she had never been asked to fire someone on this basis (unattractiveness) and that she had certainly never heard such references to male employees, as distinguished from female employees, suggesting a different standard. Just because plaintiff did not explicitly complain about her beliefs that discrimination was occurring does not mean that she was not engaged in a protected activity for purposes of a retaliation claim. There were triable issues of fact as to whether plaintiff had presented enough evidence to indicate that her employer knew that plaintiff had a subjective belief that what she was being asked to do was wrong.

Adverse employment action does not have to be a series of sudden and definite actions that harm plaintiff. Instead, this can occur over a long period of time, and the effects may be subtle, as distinguished from dramatic. Nor must economic injury or psychological injury be suffered. It can constitute actions that affect plaintiff’s job performance or opportunities for advancement. Here plaintiff raised triable issues of fact as to whether such acts took place, thereby constituting adverse employment effects.

COMMENT: This decision is definitely a setback for employers and will make it more difficult to obtain summary judgment in alleged retaliation cases.

INSURANCE COVERAGE; ENVIRONMENTAL COVERAGE

Powerline Oil Company v. Superior Court (2005) 37 Cal.4th 377, 33 Cal.Rptr.3d 562

FACTS: In 2001, the California Supreme Court decided Certain Underwriters at Lloyd’s of London v. Superior Court. 24 Cal.4th 945. In that case, the court decided that an insurance policy which protected the insured against exposure to “damages” did not obligate the insurer to pay for administrative claims by the government to clean up environmental sites, since no lawsuit was on file. Earlier (in 1998), in the case of Foster-Gardner v. National Union Fire Insurance Company 18 Cal.4th 857, the court decided that insurers had no duty to defend against such administrative governmental cleanup proceedings, since such proceedings were not “suits” and the language of the policies in question of Foster-Gardner limited the duty to defend to “suits.”

The present case, the court was dealing with seven excess policies. These excess policies promised to pay for “damages” or “expenses” within the “ultimate net loss” clause. The ultimate net loss clause included language referring to payment for compromises or settlements of “claims” or suits.

The government brought administrative proceedings against the policyholder seeking to require the policyholder to pay for cleanup of toxic sites. The trial court granted summary judgment for the excess insurers. The court of appeal reversed.

SUPREME COURT DECISION: Court of appeal affirmed. The fact that the excess insurers promised to pay for “expenses” as well as “damages” means that the term “expenses” must mean something different than “damages” and broadens the scope of coverage. The term could encompass the costs of complying with government-ordered cleanup measures. Furthermore, the ultimate net loss clause refers to compromise settlement of “claims” and is not limited just to “suits;” government mandated cleanup orders could be denominated as “claims.”

COMMENT: These were older policies (1975-1983). Policy language generally may have been cleaned up since then. The critical thing to note is that the problems created by this case can be remedied by careful drafting of the policy language, since our Supreme Court has shown great respect for the freedom of contract, even with insurance policies!
Recent Cases

INSURANCE COVERAGE; ENVIRONMENTAL COVERAGE; GOVERNMENT CLEANUP ORDERS

County of San Diego v. ACE Property & Casualty Insurance Co. (2005) 37 Cal.4th 406, 33 Cal.Rptr.3d 583

FACTS: In this Supreme Court decision, the court holds that an insurance policy that undertakes to protect the insured from exposure from “damages” does not provide coverage for government-ordered cleanup costs of environmental sites.

998 COSTS; SETTLEMENT OFFERS; UNINSURED MOTORISTS ARBITRATIONS


Review granted by the Supreme Court; the issue concerns whether 998 costs and pre-judgment interests can be awarded in uninsured motorist arbitrations and can this take place when to do so would bring the award over the policy limits?

INSURANCE COVERAGE; REINSURANCE; FINANCIAL CONDITION


Review granted by Supreme Court; issue concerns the propriety of discovery of information concerning the financial condition of reinsurers.

EMPLOYMENT TORTS; DISABILITY


FACTS: Issue is whether under an FEHA case, does the employee have the burden of showing that he is not capable of performing the essential duties of the job, or does the employer have the burden of showing that the employee is capable of doing this.

EMPLOYMENT TORT; DISCRIMINATION; MARIJUANA

Ross v. Ragingwire Telecommunications, Inc. S138103; 132 Cal. App.4th 590

FACTS: Review granted by Supreme Court; plaintiff was fired for using marijuana for medical purposes under California’s Companionate Use Act; use of medical marijuana is prohibited by federal law. Does employee have a valid action under the FEHA for unlawful discrimination or on the basis of “disability” in a tort claim for wrongful termination?

Settlement; C.C.P. § 998 OFFER

Marina Arias v. Katella Townhouse Homeowners Assoc. (2005) 127 Cal.App.4th 847, 26 Cal.Rptr.3d 113

FACTS: In a dispute between a homeowner and the homeowners’ association arising over failure to repair common areas and ameliorate the growth of mold, the defendant association made a 998 offer for $50,000, which was not accepted. Ultimately, plaintiff recovered from a jury about $7,000; however, the condominium association voluntarily agreed to undertake extensive repairs pursuant to a stipulated set of agreements, including storage of plaintiff’s property in the interim.

The trial court determined that the amount of the jury verdict plus the value of what the association did for the plaintiff, exceeded $50,000 and plaintiff therefore obtained a more “favorable verdict” than the offer, entitling plaintiff to attorney fees.

ARBITRATION; PURCHASING COMPANY


FACTS: An employee sued for back wages, for tort and for breach of the employment contract. His original employer had a binding arbitration agreement with the employee; however, the company had been purchased by another company. The new company attempted to enforce the binding arbitration agreement, but the trial court refused, holding that the purchasing company had no standing.

APPELLATE COURT DECISION: Reversed. Since the dispute was intimately related to the employment relationship, principles of equitable estoppel required arbitration.

CALIFORNIA COURT OF APPEALS
APPELLATE COURT DECISION: Affirmed. The other significance of this ruling is that plaintiff was awarded $98,000 in attorney fees because of the “prevailing party rule;” a plaintiff gets attorney fees under the CC&Rs and under the Davis-Stirling Act governing relationships between homeowners' associations and their members.

DEFAMATION; ANTI-SLAPP STATUTE

Vogel v. Felice (2005) 127 Cal.App.4th 1006, 26 Cal.Rptr.3d 350

FACTS: The two plaintiffs had been candidates for public office. They sued the defendant for defamation claiming various defamatory statements on a website, including that plaintiffs were “dumb asses”; references to one plaintiff as “dead beat dad” who was wanted for child support payments; called another defendant bankrupt and a drunk who chewed tobacco and also referred to criminal and immoral conduct (presumably related to failure to pay child support). The defendant filed a motion to strike under the Anti-SLAPP statute. This was denied by the trial court.

APPELLATE COURT DECISION: Reversed. These were clearly public figures and all of this related to a public issue, and therefore, defendant satisfied two of the three prongs of the Anti-SLAPP statute. The last question was whether plaintiff had demonstrated a probability of prevailing at trial. They did not. Even though they alleged malice in conclusory form, this was insufficient and malice must be alleged when dealing with public figures on a defamation case. The other charges were incapable of being proved false. Therefore, plaintiffs failed to show they had a probability of prevailing at trial, and the defendant's Anti-SLAPP motion should have been granted.

BAD FAITH; PUNITIVE DAMAGES; EX POST FACTO LAW


FACTS: The Legislature passed C.C.P. § 340.9 which in essence revived causes of action for breach of contract, bad faith, including punitive damages, arising out of the handling of Northridge earthquake claims by insurers. In this case, the court of appeal holds that this statute does not constitute a violation of the Ex Post Facto provisions of the U.S. Constitution or the California Constitution.

PROPOSITION 64; BUSINESS AND PROFESSIONS CODE § 17200; RETROACTIVITY


FACTS: Court of appeal holds that Proposition 64 is retroactive. Note: California Supreme Court has granted hearing on this subject with respect to other cases. A ruling is expected before end of 2005.

ARBITRATION; SECOND LEVEL ARBITRATION


FACTS: Plaintiff was terminated by her employer (defendant) for allegedly whistle blowing about fraudulent sales practices. The employer demanded arbitration pursuant to the employment agreement. The employment agreement also called for a “second level arbitration” procedure after the first was completed. The arbitrator awarded $159,000 in favor of plaintiff. Defendant petitioned the Superior Court to proceed with the second level of arbitration; plaintiff petitioned the Superior Court simply to confirm the arbitration award but also argued that a second level arbitration procedure was unconscionable. The trial court allowed the second arbitration to proceed, and the second level arbitrator (acting as an “appeal” arbitrator) reversed the first award.

APPELLATE COURT DECISION: Affirmed. Plaintiff attacks the second level arbitration procedure as unconscionable. But plaintiff waived her right to so complain, since she never attacked the concept of the second level arbitration when she was initially taken into arbitration. Besides, on the facts, there was little to support a claim of unconscionability.

COMMENT: such a “second level arbitration” procedure is unusual. It appears that the contract envisioned that a second level arbitrator would act like an appellate court, reviewing the propriety of the first arbitrator’s award based upon issues of law.

STATUTE OF LIMITATIONS; NEW TWO-YEAR STATUTE FOR PERSONAL INJURY ACTION


FACTS: The suit concerns California’s new two-year statute of limitations for personal injury actions. Plaintiff was involved in an accident before California’s new statute was passed, and therefore, plaintiff’s case was governed by the old one-year statute of limitations when the cause of action accrued. The new two-year statute became effective before the old one-year expired on plaintiff’s cause of action. Plaintiff did not file the action within one year from the date of the accident, but did file it well within the two-year new statute of limitations.

APPELLATE COURT DECISION: Plaintiff was not barred. Causes of action which accrue before the new two-year statute, and when the old one-year statute has not run, plaintiff may take advantage of the new two-year statute and is not bound by the old one-year statute.

COMMENT: An interesting decision; at the time the two-year statute was written, many felt that it would only apply to accidents which happened after the effective date of the statute. This decision enlarges the class of potential plaintiffs.
INSURANCE COVERAGE; ADVERTISING INJURY COVERAGE


FACTS: The insured had an employment agency and was a franchisee of a national company. The insured invited all of its customers to a breakfast meeting and informed them that it was leaving the national company, but was staying in business and solicited the customers to stay with the insured. This information was published on the Internet and the national company sued the insured. The insured tendered the matter to Hartford, its carrier, but Hartford refused to defend or indemnify. The policy contained advertising injury coverage and, inter alia, defined advertising to include communication to a specific market segment.

The trial court granted summary judgment for the insurer on the coverage question finding no coverage.

APPELLATE COURT DECISION: Affirmed. The appellate court followed the Supreme Court case of Hameid v. National Fire Insurance of Hartford (2003) 31 Cal.4th 16, which held that advertising injury coverage did not apply unless the communication was “wide-spread.” In Hameid a beauty salon that solicited customers from a customer list was not entitled to advertising injury coverage when it was sued. Similarly, in the present case, the communication was not widespread. The presence of the special language in this policy (not present in Hameid) makes no difference, since the communication was still not widespread.

DISCOVERY; INFORMATION REGARDING THE FINANCIAL CONDITION OF DEFENDANT’S INSURER


FACTS: Hundreds of sexual abuse cases involving the Catholic Church have been consolidated. Plaintiff sought discovery information concerning the existence of insurance protecting defendant and the financial condition of each insurer, including reserves and reinsurance available to that insurer. The settlement judge ordered subpoenas to be issued to allow the taking of depositions and discovery into this information. The trial court refused to quash the subpoenas.

APPELLATE COURT DECISION: Reversed. C.C.P. § 2017(b) allows discovery of the identity of the defendant’s insurer; it in no way however, allows discovery into the financial condition of the insurer, the reserves set, or information pertaining to reinsurance available to that insurer.

COMMENT: Particularly useful is the court’s language that the claimant is not entitled to any evidence of reinsurance, since the reinsurance contract is between the insurer and the reinsurer, and plaintiff is not a party to that arrangement and is not a third-party beneficiary.

STATUTE OF LIMITATION; 10-YEAR LIMIT ON CONSTRUCTION DEFECTS


FACTS: A developer/contractor built a 50-unit subdivision. The owners filed lawsuits more than 10 years after the notice of completion was filed. The case concerned the statute of limitations under C.C.P. § 337.15(a)(1) which contains a ten-year statute of limitations, which runs from the date the notice of completion was filed. The defendant raised the statute and moved for summary judgment.

The plaintiffs opposed the motion for summary judgment by filing declarations of experts indicting that the many defects existed that would have been obvious to anyone with minimal knowledge of the construction industry practices and that therefore subsection (f) in the statute created an exception to the ten-year statute. Subdivision (f) stated that the statute would not apply if “willfulness conduct” or fraud/concealment were involved.

The trial court granted the defendant’s motion.

APPELLATE COURT DECISION: Reversed. The exception to the limitations period applies even when subcontractors of the general contractor created the “willfulness conduct.” The general contractor has a duty to supervise and inspect and therefore the conduct of the subs is imputed to the general contractor for these purposes. Plaintiffs’ declarations indicated that the measures undertaken by the subcontractors were more than negligent — they were deliberate and were “cost cutting” measures, consisting of many short cuts which would have been obvious to anyone of experience. This could well rise to the level of willful misconduct under the statute. Accordingly, triable issues of fact existed, and it was improper to grant summary judgment to the defendant.

For purpose of deciding the burden of proof, once the defendant raises the statute of limitations, the burden shifts to the plaintiff to prove the willful misconduct deception.

COMMENT: If the defects were “so obvious,” one wonders why the defendant did not claim that the defects were “patent” triggering a much shorter statute of limitations. In any event, this case could cause problems for builders. One can now imagine that plaintiffs will come into court ten years after the project has been finished with expert declarations saying that many of the construction defects were pervasive, done deliberately, done to save costs, and would have been obvious to anyone with expertise in the industry, and that a general contractor with a duty to inspect should have noticed such defects.

INSURANCE COVERAGE; UNINSURED MOTORIST COVERAGE; INSOLVENCY


FACTS: Romano was rear-ended by Perez. Perez was insured by Legion Insurance Company. Romano’s own coverage was with Mercury, and the Mercury policy provided uninsured motorist coverage to Romano. Romano promptly made a
claim against Perez and Legion. Legion was in financial trouble and had been taken over by the Insurance Commissioner of Pennsylvania. However, Legion did not technically become "insolvent" under California Department of Insurance procedures until a year after the accident. Mercury took the position that it did not owe uninsured motorist coverage because the definition of an uninsured motorist required that the carrier for that motorist must be unable to pay because of insolvency.

The trial court ruled that there was uninsured motorist coverage.

APPELLATE COURT DECISION: Affirmed. The meaning of insolvency is not technical but "substantially insolvent," which Legion was. Therefore, Perez qualified as an uninsured motorist because of the financial condition of Legion.

CLASS ACTIONS; NOTICE; OPT-IN


FACTS: Plaintiff sued Hypertouch, which had violated the Federal Communications Act for sending unsolicited faxes without proper identification of the sender. Potentially there were thousands of people affected. Actual and punitive damages were sought in addition to statutory penalties of $500 for each violation and treble that amount for each willful violation. The trial court issued an order that the class would preclude people that did not opt-into the class.

APPELLATE COURT DECISION: Writ issued to set aside the trial court order. First, the trial court did not first determine whether the action could properly proceed as a class action. Even so, giving class action status only to those who "opt-in" is not permitted under California's class action rules.

DEFAMATION; ANTI-SLAPP STATUTE


FACTS: Plaintiff sued Ampex. Ampex laid off plaintiff and 20 other employees. Ampex had a website; under the name "examplex" plaintiff posted a notice on the website that Ampex was a miserable and sleazy employer. Ampex filed a libel action. Cargle (the disgruntled employee) filed an anti-SLAPP motion under C.C.P. § 425.16. When Ampex found out that Cargle was the disgruntled employee, Ampex dismissed its libel action. The trial court then found that it had no jurisdiction to proceed with the anti-SLAPP motion and denied it. On appeal, the court of appeal reinstated the anti-SLAPP motion and remanded the matter to the trial court. At this point, the trial court found that Ampex had a probability of prevailing and denied the anti-SLAPP motion on the merits.

APPELLATE COURT DECISION: Reversed. Ampex was a public figure; the website was a matter for the posting of information that related to the "public interest." This is exactly what the anti-SLAPP statute was supposed to promote. Ampex therefore, has little probability of prevailing with its defamation claim (which it had already dismissed). Cargle therefore is the prevailing party and should be awarded attorney fees under the anti-SLAPP statute.

BUSINESS TORTS; FRAUD; CREDIT CARD COMPANIES; AIDING AND ABETTING

Schulz v. Neovi Data Corp. (2005) 129 Cal.App.4th 1, 28 Cal. Rptr.3d 46

FACTS: Plaintiff got involved with a company called EZ. EZ was promoting an illegal lottery scheme. EZ had contracted with Ginix, a credit card processing company to handle the processing of credit card purchases on the lottery. Plaintiff sued Ginix claiming that the EZ lottery was illegal, that Ginix knew that it was illegal, but that Ginix had loaned its (Ginix's) name to the enterprise to give it legitimacy.

The trial court sustained a demurrer to the complaint.

APPELLATE COURT DECISION: Reversed. Plaintiff had pleaded a proper cause of action under Business and Professions Code section 17200 for aiding and abetting a fraudulent and illegal business activity. Plaintiff had alleged direct knowledge on the part of Ginix regarding the illegality of EZ's operation.

MALICIOUS PROSECUTION; ANTI-SLAPP MOTIONS; LAW OF THE CASE


FACTS: Bergman's daughter was in an accident while driving an uninsured car. The accident report indicated that Bergman was the owner. California Casualty was the insurer for the other person involved in the accident who was hurt, and California Casualty paid that person $100,000. California Casualty then hired attorney Drum to file a complaint against the daughter, which he did. Drum also added Bergman and ultimately secured a default. Bergman took the position that she was not the registered owner and sent various documents to Drum to this effect. Bergman was successful in setting aside the default judgment. Drum appealed, but California Casualty instructed Drum to dismiss the action against Bergman, which he did. Bergman then sued Drum and California Casualty for malicious prosecution. Drum moved to dismiss under the Anti-SLAPP statute (C.C.P. 425.16). This was denied by the trial court, and the court of appeal affirmed.

Drum then moved for summary judgment in the malicious prosecution action and won.

APPELLATE COURT DECISION: Reversed. The "law of the case" doctrine compels reversal of Drum's summary judgment. The rulings on the Anti-SLAPP motion established that Bergman had "probable cause" to proceed with the malicious prosecution action.

STATUTE OF LIMITATIONS; TOLLING

FACTS: Jensen and Boyer were involved in a motor vehicle accident. Although Jensen filed suit in time (within one year) Boyer cross-complained against Jensen’s employer claiming that Jensen was in the course and scope of employment and the employer was therefore liable for Jensen’s negligence and Boyer’s injuries.

APPELLATE COURT DECISION: Even though Jensen’s action against Boyer was timely, a cross-complaint by Boyer against a different party (Jensen’s employer) was time-barred because not filed within one-year of the accident.

STATUTE OF LIMITATIONS; NORTHRIDGE EARTHQUAKE


FACTS: The claim arises out of the Northridge earthquake. When the insured initially submitted a claim, 21st Century took the position that the claim was under the deductible amount, but nevertheless made a $5,000 payment under the “other structures” provision; later, 21st Century made another payment of $1900. There was no further communication between 21st Century and the insured for eight years. The earthquake revival statute (C.C. P. § 340.9) was passed in the year 2000, allowing a one-year “re-opening” for earthquake claims. But the insured did not even file a suit within that one-year period.

When the policyholder did file suit, the trial court dismissed the matter despite the insured’s claim that the insurer was “equitably estopped” from relying on the statute of limitations. This is not true; if equitable estoppel principles can be proven by the policyholder, this will estop the insurer from relying upon the statute of limitations.

APPELLATE COURT DECISION: Trial court reversed. The insurer argues that C.C. P. § 340.9, the earthquake revival statute, is the sole and exclusive remedy for a policyholder whose claim is otherwise barred by the general statute of limitations. This is not true; if equitable estoppel principles can be proven by the policyholder, this will estop the insurer from relying upon the statute of limitations.

INSURANCE COVERAGE; UNINSURED MOTORIST COVERAGE; STATUTE OF LIMITATIONS; NEW TWO-YEAR STATUTE; RETROACTIVITY

Bullard v. California State Automobile Association (2005) 129 Cal.App.4th 211, 28 Cal.Rptr.3d 225

FACTS: The insured was in an accident with an uninsured motorist. The accident occurred while the old uninsured motorist statute was in effect, requiring suit to be filed within one year from the date of the accident. The insured did not do so. The statute was then amended extending the statute of limitations to two years. The insured argued that the amendment was retroactive and that the lawsuit, filed a few days after one year from the date of the accident, was timely.

APPELLATE COURT DECISION: In favor of the insurer; the amended uninsured motorist statute of limitations is not retroactive. If a claim was barred under the old statute, it is not “revived” when the new statute was passed.

COMMENT: However, if the claim was initially governed under the old statute when the accident occurred, and is not barred when the new statute was passed and became effective, then probably the insured gets the benefit of the new two-year statute or would at least get a statute of limitations running two years from the date of the accident. See Andonagui v. May Department Store Company (2005) 128 Cal.App.4th 435, 27 Cal.Rptr.3d 145.

NEGLIGENCE; LANDOWNER’S LIABILITY; PRIVETTE DOCTRINE


FACTS: Barclay was employed by a company which was engaged in the business of cleaning up gasoline tanks. Lange was in the gasoline distribution business and owned the tanks in question. There was an explosion in the tanks and Barclay was injured. Barclay filed a negligence complaint against Lange, alleging, inter alia, that Lange had violated various regulatory duties by failing to have fire extinguishers nearby. In the trial court, Lange was successful in moving for summary judgment on the theory that the Privette doctrine prevented liability.

APPELLATE COURT DECISION: Reversed. The owner is here sued for breach of regulatory duties, namely, fire department regulations requiring the location of fire extinguishers. The case is not governed by Privette or Hooker. If the breach of the regulatory duties contributed to the injuries, Lange could be sued even though he did not retain control and did not affirmatively participate in the operation to clean the tanks.

COMMENT: This is potentially a dangerous case for owners and contractors. It was a fire code regulation that was involved in this case. But what about the many OSHA regulations or regulations under the California Administrative Code that apply to construction and work-sites? Does this case now mean that when such regulations are “imposed” on owners or contractors (i.e., non-delegable duties), a cause of action can be stated if a failure to comply with the regulation is alleged to have contributed in some way to the injury? This is another case possibly re-opening the “safe place to work” cause of action that disappeared in the 1970s.

INTERFERENCE WITH CONTRACTUAL RELATIONS; CORPORATE OFFICERS


FACTS: Woods and Golden were high-level corporate officers of Fox, which was controlled by Saban Entertainment. They had stock option rights. Saban arranged for the sale of Fox to Disney, and this reduced the value of the Woods and Golden
stock options by $4 million. They received, however, $20 million as a result of the sale. They sued Fox for interference with contractual relations. The trial court sustained defendant’s demurrer and dismissed the case.

APPELLATE COURT DECISION: Reversed. Plaintiffs had at least stated a cause of action, and the claim was not defeated simply because Fox and Saban were all part of the same contractual relationship as plaintiffs. Duties were owed to the officers to protect their interests.

DEFAMATION; STATUTE OF LIMITATIONS


FACTS: Various Jewish groups in the San Francisco area started an oral history project. Among the people interviewed was Goldman who had been an officer of one of the groups. The transcript of his comments was placed in a bound book, which was lodged in a Bancroft Library (University of California). Plaintiff Hebrew Academy later discovered that Goldman had allegedly defamed Hebrew Academy by comments that he had made. Plaintiff filed suit, but the trial court dismissed the suit on grounds that the statute of limitations had run.

APPELLATE COURT DECISION: Reversed. The discovery rule applies to a case like this, and suit was filed within a year from the time that the plaintiff became aware of the alleged defamation.

PRODUCTS LIABILITY; STRICT LIABILITY; COMPONENT PARTS


FACTS: The plaintiff used grinding equipment for years. The grinding equipment was made up of various components, including a certain “power tool” manufactured by defendant. Plaintiff claimed that toxic dust was released as a result of product defect associated with the power tool and sued defendant manufacturer of the power tool under a theory of strict liability. The trial court sustained the demurrer of the defendant under the component parts doctrine. That doctrine holds that the manufacturer of a non-defective component part is not liable in strict liability when the larger product with the component in it proves defective.

APPELLATE COURT DECISION: Reversed. The component parts doctrine is normally limited to generic products, raw materials, or off-the-shelf products, which can be used for a multiplicity of purposes. The manufacturer of such component parts has no control over what will happen with the final product. However, in the present case, the power tool here was really only suitable for this particular grinding machine, and therefore, the principles behind the component parts doctrine do not apply.

NEGLIGENCE; DUTY; SUICIDE


FACTS: Dylan was a severely emotionally disturbed 13-year-old child. He attended defendant school (AES). This was a special school for children with problems. He left school (AWOL) on several occasions, and the school did not tell his mother (Allison C.). Nor did the school tell the mother that sometimes Dylan did not take his medication. On one occasion, Dylan left school for several days and was sexually assaulted. Two months later, he committed suicide. Allison filed a wrongful death action against AES claiming that they negligently allowed Dylan to leave the school and that this caused him to be sexually assaulted which led to his suicide.

The jury returned a $5 million verdict for wrongful death and also awarded Allison $1 million for her own emotional distress.

APPELLATE COURT DECISION: Reversed. There was no foreseeability that Dylan would be sexually assaulted and that this would cause him to commit suicide. There was no causal relationship established. Furthermore, with respect to the mother’s emotional distress claim, the duty, if any, was owed to the son, not to the mother.

ANTI-SLAPP STATUTE; DEFAMATION


FACTS: Fontani was a securities broker for Wells Fargo. He was terminated by Wells Fargo; Wells Fargo was required to file a form U-5 with the National Association of Securities Dealers (NASD) explaining the reasons for the termination. On the form, Wells Fargo indicated the reasons had to do with misrepresentations of the sale of annuities. Fontani claimed that the reasons were different and asserted many causes of action including defamation, a cause of action under the whistle blowing statute, etc.

The trial court sustained in part Wells Fargo’s demurrer but overruled the demurrer in other respects.

APPELLATE COURT DECISION: Wells Fargo’s argument that the anti-SLAPP statute compels dismissal of the claim is, in part, correct. The form U-5 filing is a form of “petition” similar to a court document in furtherance of the public interest and is required to be filed by Wells Fargo before a regulatory body (NASD), which performs public functions. Therefore, a claim cannot be based upon statements in the filing. Furthermore, plaintiff could not sustain his burden of proving he had a probability of success; this was particularly true in light of the litigation privilege under Civil Code section 47.

ARBITRATION; REAL ESTATE CONTRACTS; BROKER


FACTS: Seller and buyer entered into real estate contract for the purchase of a gas station in King City, CA. Broker was the agent of both, and this was so indicated in the real estate purchase contract. Buyer later claimed fraud. Seller attempted to enforce the arbitration agreement, and broker likewise attempted to force the arbitration agreement. The trial court refused to allow the broker to enforce the
arbitration agreement on grounds that the broker had not signed the agreement or initialed it.

**APPELLATE COURT DECISION:** Reversed. The broker conceded was the agent of both the buyer and the seller. Hence, the broker was bound by the arbitration agreement and would be entitled to enforce it.

**HEALTHCARE; PREEMPTION; ERISA**


**FACTS:** Cohen was a member of an HMO. His son received treatment; some of the providers started billing Cohen and sending dunning notices. Cohen filed suit claiming this was fraudulent and constituted an unfair business practice.

The trial court dismissed the matter as being preempted by ERISA.

**APPELLATE COURT DECISION:** Affirmed. This was embraced by ERISA and therefore the state-based claims are preempted.

**ANTI-SLAPP STATUTE; DISCRIMINATION; FREE SPEECH**


**FACTS:** Ingels called in to participate in a talk show and told the screener that he was 60. The host of the talk show then started talking to Ingels on the air and insulted him, said that he was too old for the target audience and made other derogatory comments and really did not allow Ingels to speak very much at all. Ingels brought a suit under the Unruh Civil Rights anti-discrimination law. The broadcasting station moved to dismiss under the anti-SLAPP statute and the trial court granted the motion.

**APPELLATE COURT DECISION:** Affirmed. The case involves the exercise of free speech under the Constitution; although the Unruh Act does protect against age discrimination, this case is not embraced by the Unruh Act, and the purposes of the anti-SLAPP statute are served by granting the motion.

**NEGLIGENCE; CRIMINAL ACTS**


**FACTS:** Plaintiff was eating at a McDonald’s restaurant; she claimed that a man was looking at her through a window and was making rude and suggestive facial expression; he then disappeared. She reported this to a security guard on the premises and to the McDonald’s cashier. Plaintiff was then assaulted in the restroom. She sued McDonald’s, the shopping center, and the security guard service. She submitted a declaration from an expert who said that the restroom was poorly designed in that it was in a remote location accessible from the outside. The trial court struck the declaration. The trial court then granted summary judgment for the defendants.

**APPELLATE COURT DECISION:** Affirmed. The trial court properly struck the declaration since it was conclusory in nature; furthermore, plaintiff waived her right to claim error since she did not raise the issue on appeal. There was no basis for any other triable issue of fact on general negligence principles. The man had disappeared when the report was made. McDonald’s, under the circumstances, could not be expected to secure the women’s restroom or to go on a far-flung search for the man. Summary judgment was proper.

**EMPLOYMENT TORTS; PROMISSORY FRAUD**


**FACTS:** Helmer earned $5,900 a month as a parts manager for an automobile dealer. He heard about an opening at Helmer Toyota, interviewed for the job, and stated that he needed to earn at least $5,700 a month. The director said that, in essence, that would not be a problem. However, after Helmer started, and received his first paycheck, he discovered that the compensation program was much more complicated and was based upon salary, draw, and commissions. He complained, supplied proof that his old job had provided him $5,800 a month, but no changes were made. He sued for promissory fraud, alleging that he had been induced to leave his old job and relied upon the assurances from Bingham Toyota in doing so. A jury awarded plaintiff $450,913 in compensatory damages and $1.5 million in punitive damages. The punitives were reduced to $675,000 by the trial court.

**APPELLATE COURT DECISION:** Affirmed. On a theory of promissory fraud, plaintiff was entitled to recover lost future income from his prior employment that he was induced to leave because of the promises (fraudulent) of the defendant.

**EMPLOYMENT TORTS; DISCRIMINATION; PREGNANCY**


**FACTS:** Trop went to work for defendant, and Trop’s supervisor was Thomas. Trop told various employees that she (Trop) was trying to get pregnant. Problems began to develop with Trop’s work performance, and Thomas commented on this. Ultimately, Trop became pregnant but did not disclose this to Thomas. Trop was fired. After she was fired, Thomas was heard to remark “how could anyone who was pregnant work for me” and “anyone who works for me can’t have a life outside of work.” Trop sued for discrimination and firing in violation of public policy (pregnancy). The trial court granted summary judgment for the defendant.

**APPELLATE COURT DECISION:** Affirmed. There was no evidence presented that the employer knew that Trop was pregnant at the time of the firing. This was an essential gap in plaintiff’s case. The statements made after the firing do not cure the defect.
ANTI-SLAPP SUIT; EFFECT OF INJUNCTION


FACTS: Huntingdon Life Sciences, Inc. (HLS) was engaged in animal testing. Claire McDonald was an employee of HLS. The defendant was Stop Huntingdon Animal Cruelty USA (SHACC), which was engaged in the effort to drive HLS out of business. SHACC did the following things: picketed McDonald's house; put up a website advocating civil disobedience and harassment; identified McDonald specifically. Red paint was pumped on McDonald's driveway and car; her tires were punctured; "HLS scum" was written on her garage door; protestors shouted that she was a murderer and told her neighbors that she was a "puppy killer." SHACC also put on the website that McDonald's security steps were a joke and that thousands of activists know where McDonald lives.

Plaintiff filed suit. The trial court issued a TRO against defendant and later followed up with a preliminary injunction. Defendant filed a motion under the anti-SLAPP statute to strike plaintiff's complaint.

The trial court denied the motion to strike on grounds that plaintiff had shown likelihood of prevailing on the merits.

APPELLATE COURT DECISION: The complaint is subject to a motion to strike under the anti-SLAPP statute even if it involves constitutionally protected speech and other conduct, which may be illegal. The illegality of the conduct is judged on the second prong of the inquiry, namely, has plaintiff shown a probability of prevailing on the merits. Stated another way, the anti-SLAPP motion will apply even though the activity is illegal (not constitutionally protected) so long as it constitutes speech. The plaintiff can still prevail if it demonstrates a probability of success on the merits. A public street is a public forum and it makes no difference that it is in a residential neighborhood.

The fact that the trial court had issued a TRO and a preliminary injunction does not as a matter of law establish a probability of prevailing on the merits, since the issues involved in those proceedings would not be collateral estoppel on the merits.

However, plaintiff has demonstrated probability of prevailing as to various causes of action against SHACC including intentional infliction of emotional distress and the invasion of privacy action and unfair competition.

COMMENT: In malicious prosecution actions, the fact that a TRO/preliminary injunction was issued in the early stages of the proceeding has been held to constitute "probable cause" so as to defeat a later filed malicious prosecution action. Issues of "probable cause" may be different than that "probability of prevailing" tests under the anti-SLAPP statute.

NEGLIGENCE; OWNERS AND GENERAL CONTRACTORS; PRIVETTE DOCTRINE

Ruiz v. Herman Weissker, Inc. (2005) 130 Cal.App.4th 1, 29 Cal.Rptr.3d 665

FACTS: Utility had to do some work on transformers. Utility hired HWI to act as the project manager and to ensure that the project was done carefully and properly. Richards was in charge of that. The actual subcontractor, which undertook the work, had to improvise to reach the extreme height of the transformers. One of the workers who was in the process of making the changes to the transformers was electrocuted. The estate of the worker sued HWI, but the trial court dismissed the suit.

APPELLATE COURT DECISION: Affirmed. The Privette doctrine compels dismissal. Simply because Richards was hired as utility's "agent" to supervise the project does not mean that, under Hooker, Richards actively contributed to the circumstances of the accident. Hooker indicates that mere failure to carry out safety precautions, even though such a duty may be imposed, is not sufficient to impose liability when the employee's direct employer is liable to pay workers' compensation to the employee or his representatives.
Recent Cases

Furthermore, any Cal OSHA duties would only be imposed upon the direct employer under the circumstances of this case.

COMMENT: This case reinforces Privette and may also make it more difficult for plaintiffs to succeed with direct causes of action for Cal OSHA violations against entities other than the direct employer. See also the recent Barclay case, supra.

INSURANCE COVERAGE; PRODUCTS-COMPLETED OPERATION COVERAGE


FACTS: Carpet manufacturers were sued, the claim being that the latex backing on the carpets was defective. The carpet manufacturers in turn sued the policyholders, who manufactured the latex backing. The policyholder turned over the claim to its two insurers, Travelers and Wausau. Travelers defended and settled; Wausau refused to participate. Wausau provided premises operation-coverage and products-completed operations coverage. The “premises-operations” coverage precluded coverage for defects created at a described location (Commerce, California) and the complaints had alleged exactly that. After Travelers settled Travelers sued Wausau for equitable contribution, but the trial court ruled in favor of Wausau.

APPELLATE COURT DECISION: Reversed. It is not the theory of liability that is important, but the location of the damage. In the present case, the failure of the product occurred away from the policyholder’s premises, and after the manufacturing process was complete. Accordingly, the products-completed operations coverage of Wausau does apply, and Wausau should contribute with Travelers.

GOVERNMENT LIABILITY AND IMMUNITY; DNA TESTING; POLICE

Jimenez v. County of Los Angeles (2005) 130 Cal.App.4th 133, 29 Cal.Rptr.3d 553

FACTS: Jimenez was driving a vehicle that matched the description reported by a 14-year-old girl who claimed to have been raped. Jimenez was arrested and was identified in the line-up; furthermore, a scent dog tied the victim to Jimenez’s car. Charges were filed including rape. DNA samples were taken. They were not processed promptly. Jimenez was released. The test results and the time that Jimenez was released.

The trial court granted summary judgment for defendant.

APPELLATE COURT DECISION: Affirmed. There was probable cause for arrest; there is no constitutional right to a DNA test, and therefore, Jimenez was not constitutionally deprived of liberty. Furthermore, the police were entitled to qualified immunity.

FALSE IMPRISONMENT; PRIVILEGE


FACTS: Plaintiff Buchanan was in a high fashion store called Maxfield’s. Jennifer Lopez and Ben Affleck happened to be in the store as well. The store manager came up to Buchanan and asked him to leave; Buchanan asked for an explanation but was given none. The security guard then came out and repeated the request that Buchanan leave. Deputies were in the store (presumably because of Affleck and Lopez). Security asked the deputies to arrest Buchanan when he refused to leave. The deputies told the security guard to make a citizens arrest, which he did, turning Buchanan over to the deputies who handcuffed him. He was then taken out into the parking lot, which was thronged with TV trucks and cameras, and plaintiff was photographed. The store manager then changed his mind and told the deputies to release Buchanan. Buchanan sued for false imprisonment and other claims, including invasion of privacy.

The trial court sustained defendant’s demurrer, agreeing with defendant’s argument that the “communication” privilege in Civil Code § 47 applied to defendant’s actions.

APPELLATE COURT DECISION: Reversed. There was no “communication” emanating from defendant; instead it was “conduct” not communication, namely, the decision to arrest, the carrying out of the arrest, and the turning over of Buchanan to the deputies. Plaintiff stated a cause of action.

INSURANCE COVERAGE; SUBROGATION


FACTS: State Farm issued a homeowner’s policy to the insured. The insured filed a claim for water and mold damage allegedly caused by the former owner and a general contractor and a sub-contractor. While denying the mold claim, State Farm paid $150,000 for the water claim. The insured then filed suit against the former owner, the general contractor and a sub. State Farm sought permission to intervene in that lawsuit. This was opposed by the policyholder and the other defendants. The trial court denied the motion.

APPELLATE COURT DECISION: Reversed. As a matter of right, State Farm is entitled to intervene in this subrogation claim to seek to recoup its payment.

COMMENT: Note that intervention is a matter of right, not a matter of discretion for the trial court. Insurers who have made payments to policyholders probably overlook this unusual opportunity to recoup their money. They can ride on the back of the policyholder’s litigation efforts since they “stand in the shoes” of the policyholder. One can imagine an insurer agreeing to pay a small share of the policyholder’s litigation expenses, in return for a “united front” against the defendant. Insurers should therefore pay more attention to this “mandatory” opportunity.
EMployment Torts; Retaliation

Pino re v. Specialty Restaurants, Corp. (2005) 130 Cal.App.4th 635, 30 Cal.Rptr.3d 348

FACTS: Pino re went to work for a restaurant (SRC). He did not disclose to SRC that he was currently suing his former employer (a restaurant owned by a city councilman) for discrimination. When SRC found out about this, SRC encouraged Pino re to drop the lawsuit; Pino re's supervisor then started criticizing Pino re; a lawyer said that Pino re might be fired if he did not drop the lawsuit. Nonetheless, Pino re was not demoted, his wages were not reduced, and no change in his employment status occurred. Nonetheless, Pino re resigned claiming retaliation then filed an FEHA-based lawsuit.

The trial court dismissed the lawsuit.

APPELLATE COURT DECISION: Affirmed. The test is whether Pino re suffered an adverse employment relationship because of what SRC did. At most, the criticism was “nitpicking” in nature and no substantial adverse effect occurred to Pino re, whose status remained the same.

INSURANCE COVERAGE; EMPLOYEES; WHO IS “AN INSURED”


FACTS: An employee of VCP Construction was riding in a cherry picker bucket attached to a truck when the bucket fell and the employee was injured. The owner of the cherry picker had coverage under a Scottsdale Company policy. State Farm insured the owner of the truck. The employee’s action settled for $1.375 million and Scottsdale paid half. Claims for indemnification were filed and would therefore be considered an insured. The trial court dismissed the lawsuit; Pinero; a lawyer said that Pinero might be fired if he did not drop the lawsuit; Pinero’s supervisor then started criticizing Pinero; the critical was “nitpicking” in nature and no substantial adverse effect occurred to Pinero, whose status remained the same.

APPELLATE COURT DECISION: Reversed. Under Insurance Code § 11580.06, the insured must actually be sitting behind the steering wheel and operating the truck, which he was not doing. It is not enough, that under the State Farm policy, he would be considered to be “using” the truck simply by being in the cherry picker.

INSURANCE COVERAGE; LEGAL MALPRACTICE; CLAIMS MADE AND REPORTED POLICY


FACTS: This is a very interesting case involving the well-known “claims made and reported” policy typical in professional malpractice. The lawyer had a policy, which expired on Sunday, February 28, 1999. On Thursday, February 25, 1999, a reporter from a legal journal called the lawyer and asked for comment about a lawsuit that had been filed for malpractice against the attorney. The attorney knew nothing about this. On Tuesday, March 2, the attorney did read an article in the legal journal about the lawsuit and he immediately notified his insurer and the insurer who had taken on the risk after the first policy expired February 28. The first insurer denied coverage on grounds that the claim, while made within the policy period, had not been reported during the policy period (three days later). The second insurer denied coverage because the attorney was aware of the claim before the second policy inception. The attorney handled the legal malpractice action on this own and prevailed. He then brought suit against the first insurer for coverage. The trial court ruled in favor of the insurer.

APPELLATE COURT DECISION: Reversed. Under circumstances such as are presented in the present case, principles of equity will excuse a forfeiture. The attorney learned of the possible claim only a few days before the policy expired and had little opportunity to do anything about it in the way of investigation. He had also been offered no opportunity for an “extended reporting period.” A statute, Civil Code § 3275, also grants relief from such forfeitures on equitable principles. This has nothing to do with the “notice-prejudice” rule because in California failure to comply with the “made and reported” requirements does not require the insurer to show prejudice in order to properly deny coverage. On the other hand, failure to comply with a condition can be equitably excused if it works a forfeiture, such as in the present case.

COMMENT: It will be interesting to watch whether the Supreme Court grants review or depublishes this case. For example, the California Supreme Court has depublished all cases which have declared invalid the “made and reported” rule found in legal malpractice policies and the Supreme Court has let stand appellate court cases which have upheld the “made and reported” requirement. The facts of this case are somewhat sympathetic, but it does provide a way around the strict wording of the contract.

INSURANCE COVERAGE; DUTY TO DEFEND; BAD FAITH; DAMAGES


FACTS: A homeowner sued a homeowners’ association. The homeowners’ association had two insurance policies, one with Golden Eagle and one with Federal. The Golden Eagle policy was a $2 million policy, the Federal policy was a large excess $11 million policy with “wasting limits,” meaning that the defense costs reduced the indemnity limits. When the matter was tendered to Golden Eagle for a defense, there was a long delay (10 months). Federal commenced the defense. Golden Eagle ultimately paid some of the defense costs (up to about $200,000) but Federal paid most of them. The case ultimately settled with Federal paying $3.3 million. Federal expended about $600,000 in defense costs.

Federal assigned its rights against Golden Eagle to the policyholder; the policyholder brought a bad faith and breach of contract action against Golden Eagle. The policyholder claimed that the failure of Golden Eagle to defend resulted in higher premiums for the policyholder (with Federal because
of what they had to pay); the policyholder further claimed that it was entitled to Brandt Fees for the cost of proving an obligation to defend; finally the policyholder claimed that Golden Eagle was obliged to pay for the costs of affirmative cross-complaints to protect the policyholder’s interest in the underlying litigation.

The trial court ruled in favor of Golden Eagle.

APPELLATE COURT DECISION: Affirmed. The insured/policyholder really had no damage since they were fully defended by another carrier (Federal). Furthermore, millions of dollars were left in the Federal policy after they settled this case. Claims for an increase in the premiums are too tenuous to allow for recovery. Furthermore, in connection with the duty to defend an insurer has no duty to file protective affirmative cross-complaints on behalf of the policyholder (an interesting and helpful part of the court’s holding with respect to insurers’ position in these cases). Finally, Brandt fees are not in order since the policyholder had no claim for damages at all.

NEGLIGENCE; PSYCHOTHERAPIST’S DUTY


FACTS: A deranged person who had been seeing a psychotherapist shot and killed his former girlfriend’s family and then committed suicide. Before that, he had been seeing a psychotherapist but on questioning had never indicated a threat to harm anyone. In a lawsuit brought by the heirs of the decedents, the trial court granted summary judgment for the defendant psychotherapist.

APPELLATE COURT DECISION: Affirmed. For liability to exist, there must be a communication to the psychotherapist of a threat to known individuals or a discernable group. None existing, the case was properly dismissed.

NEGLIGENCE; DUTY; SECURITY GUARDS; ASSAULTS; ASSUMPTION OF THE RISK

Tilley v. CZMaster Association (2005) 131 Cal.App.4th 464, 32 Cal.Rptr.3d 151

FACTS: Homeowners’ association (the defendant) ran a gated community. Defendant hired a security guard company to police and patrol the area. Under the contract the security guards were not authorized to carry firearms and were simply to report unusual activity; the security guards were not expected to confront lawbreakers or make arrests. A wild party of young people was going on; plaintiff confronted some of the partygoers, attempted to arrest them, and was seriously injured when they attacked him. Plaintiff sued defendant alleging that they had a duty to prevent the assault.

The trial court granted summary judgment for defendant.

APPELLATE COURT DECISION: Affirmed. No duty was owed; the security guard went beyond his contract responsibility; there had been no prior violent incidents of this nature. Finally, by confronting the individuals and attempting to arrest them, the security guard assumed the risk even if a duty was owed.

PROFESSIONAL LIABILITY; MEDICAL MALPRACTICE; STATUTE OF LIMITATIONS

Arredondo v. Regents of the University of California (2005) 131 Cal.App.4th 614, 31 Cal.Rptr.3d 800

FACTS: In this case, the court of appeal clarifies the statute of limitations in medical malpractice actions when the plaintiff is a minor. The three-year statute does not start to run on discovery of the negligent cause of the injury, but on manifestation of the injury, even though plaintiff is a minor (brain damage) and her parents are not aware of the negligent cause. To similar effect see Ninth Circuit decision in Katz v. Children’s Hosp. Of Orange County (1994) 28 F.3d 1520.

PROFESSIONAL LIABILITY; LEGAL MALPRACTICE; CRIMINAL PROCEEDINGS


FACTS: The plaintiff had been charged criminally for assault and battery for being involved in a “skinhead” gang attack at a rock concert. In the criminal trial plaintiff was initially represented by the public defender and plaintiff was convicted. Later, plaintiff was successful in hiring private counsel, getting the conviction set aside, winning a new trial, and then plaintiff was acquitted. Plaintiff then sued the public defender for legal malpractice. In such an action, the plaintiff must demonstrate that he was actually innocent of the charges in order to prevail. In the legal malpractice case, the trial judge ruled that this was an issue for the court to decide, not the jury. Evidence was presented, including most of the witnesses, to the effect that plaintiff was not involved and plaintiff’s own testimony indicating that he was Jewish and would never have been involved with a skinhead gang attacking other people. Nonetheless, the trial judge ruled that plaintiff had not proven his “actual innocence” and dismissed the legal malpractice case.

APPELLATE COURT DECISION: Reversed. The issue of whether plaintiff was actually innocent is an issue of fact for the jury, not the court.

NEGLIGENCE; CONSTRUCTION DEFECT; RESOLUTION BY JUDICIAL REFERENCE; UNCONSCIONABILITY

Trend Homes, Inc. v. Superior Court (2005) 131 Cal.App.4th 950, 32 Cal.Rptr.3d 411

FACTS: A contract between various homeowners and the developer stated that in the event of a dispute, including litigation, concerning matters related to construction defects, the matter was to be handled by “judicial reference” under C.C.P. § 638 through 645. The referee was to have full authority...
to decide all matters of fact and law. The agreement did not contain any provision relating to who pays the costs of the referee or the proceeding. The trial court held that the provision was unconscionable.

**APPELLATE COURT DECISION:** Reversed. These provisions are valid. Simply because there was no reference to who pays the costs of the referee does not invalidate the agreement as unconscionable. In the event the parties cannot agree, the matter can be referred to the superior court, and the superior court will decide what is fair and reasonable as far as an apportionment of costs. In most situations, probably the bulk of the costs will be imposed upon the developer. Furthermore, the agreement is not unconscionable because of the ‘prevailing party’ rule, meaning, that whoever prevails before the referee will be the prevailing party, entitled to attorney fees. In construction defect cases, where strict liability often applies, in more cases than not, the homeowners will be the prevailing party, not the developer, therefore the unconscionability argument lacks merit.

**COMMENT:** There are now three cases on the books which have upheld these types of agreements (including Trend’s) and one case (Pardee) invalidating such a provision. It is certainly an interesting way to sidestep the judicial process in construction defect cases. In essence it turns the construction defect case into a type of mandatory arbitration case with sole power given the referee to make decisions of law and fact. The difference of course is that the referee's decision is appealable under the normal rules (whereas an arbitrator's decision is virtually impossible to upset on appeal).

This procedure could be particularly useful in venues where juries are notoriously favorable to plaintiffs, and the developer might be much more comfortable with a competent referee, expert in the field, deciding the matter.

**NEGLIGENCE; VICARIOUS LIABILITY; DRIVING; EMPLOYMENT; NEGLIGENCE ENTRUSTMENT**


**FACTS:** An employee was involved in an accident while in the course and scope of employment, resulting in injuries to the plaintiff. The evidence was that the employee had been involved in three prior accidents, which caused property damage. Lawsuit was filed against the employee, the employer and a leasing company. The employer admitted that the accident occurred in the scope and course of employment and the employer admitted that it would be liable under a theory of respondeat superior. Plaintiff also sought to proceed under a negligent entrustment theory based upon the employee’s prior accidents.

The trial court denied the employer’s motion for summary adjudication on the negligent entrustment theory. The employer petitioned for a writ.

**APPELLATE COURT DECISION:** Writ issued to compel granting of summary judgment for the employer. See

**Armenta v. Churchill** (1954) 42 Cal.2d 448, 457-458. This case stands for the proposition that when the employer admits vicarious liability, it means that the employer will be liable for all the compensatory damages suffered by the plaintiff. To allow the negligent entrustment theory to proceed would mean that the jury would hear about the prior accidents, even though they might bear no relationship to the causation issues with respect to plaintiff’s injury (there was no evidence that the driver was ill or incompetent).

**COMMENT:** This is a strange decision; the Armenta case is quite old (1954). This decision probably makes sense, however, since the employer will remain fully liable for all the plaintiff’s injuries. The negligent entrustment theory could probably still be asserted if the theory was ‘ownership liability’ only under 171050 of the Vehicle Code, since under that theory the owner’s liability is limited to $15,000. If the owner were guilty of negligent entrustment, the liability would be unlimited.

**STATUTE OF LIMITATIONS; CONSTRUCTION DEFECTS CASE; LATENT DEFECTS; EFFECT OF GENERAL CONTRACTOR’S BANKRUPTCY; TOLLING**

**Inco Development Corp. v. Superior Court** (2005) 131 Cal.App.4th 1014, 31 Cal.Rptr.3d 872

**FACTS:** An action was filed by plaintiff against a general contractor for construction defects. The general contractor contended that the ten-year statute of limitations (C.C.P§ 337.15) barred the action. This statute says that an action for latent defects must be filed within 10 years after substantial completion of the project. The plaintiffs argued however that the general contractor had declared bankruptcy and there was an automatic stay in effect for 19 months and that that period must be excluded from the calculation of the ten-year period, and, if done, the present lawsuit was timely.

The trial court agreed with the plaintiff.

**APPELLATE COURT DECISION:** Reversed. Bankruptcy does not operate so as to toll the ten-year statute. Section 337.15 states when the statute will be tolled, and bankruptcy is not mentioned. Furthermore, the bankruptcy stay was lifted with two years remaining before the ten year statute ran out - plenty of time for plaintiffs to proceed.

**LIBEL; ANTI-SLAPP STATUTE**


**FACTS:** Ghafur was the superintendent for the Gateway Charter School. This had become a prominent Muslin-connected charter school in California. The Anti-Defamation League published a letter on its website indicting that Ghafur had substantial connections with Muslim terrorists. The school was subsequently suspended for fiscal reasons and other reasons. Ghafur filed a libel action against the ADL. ADL moved to dismiss under the Anti-SLAPP statute, and the motion was granted.
Recent Cases

APPELLATE COURT DECISION: Affirmed. Ghafur was a public figure, and therefore could not recover unless not only falsity but also recklessness and malice were shown. Ghafur did not adequately demonstrate a probability of success, and therefore the trial court correctly dismissed the action under the Anti-SLAPP statute.

PROFESSIONAL LIABILITY; MEDICAL MALPRACTICE; STATUTE OF LIMITATIONS; CHILD ABUSE


FACTS: David M., a minor, brought an action against a doctor for a failure to report child abuse. The allegation was that the doctor failed to report and David suffered further injuries and further abuse because of the failure. The doctor demurred on the grounds of the statute of limitations, relying upon the three-year statute of limitations applied to medical malpractice actions, even when minors are involved. Plaintiff alleges that the general statute of limitations applied and was tolled until plaintiff reached majority. The trial court agreed with the defense and sustained the demurrer.

APPELLATE COURT DECISION: Affirmed. The failure to report was included within the “ambit” of professional services, since the doctor had originally been retained to treat and examine David. Accordingly, the three-year statute of limitations set forth in CCP § 340.5 applied and starts to run from the date of the claimed negligence. The lawsuit was not filed until 11 years after the claimed negligence and was therefore barred. It makes no difference that the general statute of limitations applies to other occupations such as teachers and social workers. Physicians are entitled to the benefit of the medical malpractice statute of limitations.

PRIVILEGE; JUDICIAL IMMUNITY; REFEREES


FACTS: Price was appointed to act as a discovery referee. Price and the plaintiff’s attorney got into a disagreement and the referee allegedly falsely accused plaintiff of stealing some documents. The next day defendant’s deposition was scheduled and the plaintiff’s attorney presented the referee with a letter indicating that he was asking for a protective order to remove the referee. Plaintiff and the plaintiff’s attorney then got up to leave the deposition, but the referee blocked the door. Some skirmishing then occurred around the door, and plaintiff was injured in the shoulder and back. Plaintiff filed a complaint for false imprisonment, assault, and infliction of emotional distress.

The trial court sustained the referee’s demurrer on grounds of absolute judicial immunity.

APPELLATE COURT DECISION: Reversed. The referee was not acting in his judicial capacity. He had stepped outside of his judicial role in connection with what he was doing at the time. Although referees and mediators are entitled to judicial immunity, the facts do not justify application of the doctrine in this case. The defendant’s contention that he was trying to preserve order was rejected – you can’t physically prevent someone from leaving a deposition.

COMMENT: but see in Mireles v. Waco 502 U.S. 9, 112 S.Ct. 286 (1991) where a judge was entitled to judicial immunity for ordering police officers to seize a public defender and bring him into the judge’s chambers and excessive force was allegedly used.

DEFAMATION; ANTI-SLAPP STATUTE

Terry v. Davis Community Church (2005) 131 Cal.App.4th 1534, 33 Cal.Rptr.3d 145

FACTS: Mr. and Mrs. Terry were in charge of the youth program at Davis Community Church. The church became aware of some inappropriate conduct between Mr. Terry and a 16-year-old girl. An investigation was done, and the material in the investigation file was discussed among church leaders and members. Terry sued for defamation, alleging that the material in the report, which was discussed, was defamatory. The church moved to dismiss under the anti-SLAPP statute. The trial court granted a motion to strike the complaint.

APPELLATE COURT DECISION: Affirmed. The church’s actions were protected as involving public interest, and therefore the church had the right to move to strike under the anti-SLAPP statute. The church was entitled to consult with its leaders and other members not employed by the church concerning this matter, since all parents would have an interest. Furthermore, the Terrys’ showed no probability of prevailing with their defamation claim. Many of the statements relied upon would be protected by the “interested persons” privilege.

INSURANCE COVERAGE; AIRCRAFT POLICY; RENTERS


FACTS: McKinley rented an aircraft from Todd Aero. Under the rental agreement McKinley agreed to be responsible for all damage to the airplane. While flying the aircraft, McKinley landed it with the landing gear up, causing damage to the hull. In an arbitration proceeding, McKinley was held liable for the damage. XL Insurance Company had issued a policy to Todd Aero. The policy provided liability protection to Todd and to renters. The policy also had a first-party coverage section. XL subrogated over against McKinley seeking to recover from McKinley for the property damage to the hull. McKinley sued the insurer for bad faith claiming that he was an insured under the policy and that accordingly the insurer could not sue.

The trial court ruled for the insurer.

APPELLATE COURT DECISION: Affirmed. Although McKinley was an insured under the liability section, he was not under the first-party property damage section. Accordingly, the insurer could subrogate over against McKinley.
EMPLOYMENT TORTS; DISABILITY


FACTS: Green was a stationary engineer at defendant’s correctional facility. Part of his duty included climbing stairs and supervising prisoners. Green had Hepatitis C and the doctor indicated that he should have a minimum of physical activity. Defendant determined that Green should not go back to work unless Green produced a medical certificate from a doctor that he could return to full duty. Green refused to produce such a certificate and defendant then gave Green an application to fill out providing for disability retirement. Instead, Green brought a lawsuit for damages claiming disability discrimination.

The jury returned a verdict for $597,000 economic damages and $2 million in non-economic damages. The trial court remitted the $2 million and Green accepted that (leaving him with a net verdict of $597,000). But defendant appealed.

APPELLATE COURT DECISION: Affirmed. Substantial evidence existed to support the jury’s verdict of disability discrimination. The employer was required to show that all or substantially all similar disabled people were not able to perform the job duty as a stationary engineer. This burden was not satisfied.

COMMENT: This seems to be a harsh decision and the Supreme Court has granted review. What was wrong with the employer requiring Green to submit a report from a medical doctor (of Green’s choice) explaining how he would be able to perform his duties? There was already a medical certificate indicating that he should only engage in a minimum of physical activity, and his job did involve physical activity.

DISCRIMINATION; DISABILITY DISCRIMINATION; INFERTILITY


FACTS: Court of appeal holds that it does not constitute “disability discrimination” for the group insurance program for the school district to preclude benefits for in vitro fertilization treatment.

PRODUCTS LIABILITY; ASBESTOS; CREDIT FOR PRE-TRIAL SETTLEMENT; CONSUMER EXPECTATION TEST


FACTS: Plaintiff in 1981 was diagnosed with lung cancer. He had worked in the Navy for 27 years from 1950 to 1977. He was exposed to asbestos including valve and pump backing material manufactured by defendant Crane. He sued 42 manufacturers of asbestos products. Plaintiff settled with most of them before trial and proceeded to trial against Crane. When plaintiff before trial settled with other defendants, certain allocations of the settlement proceeds were made to loss of consortium claims, personal injury claims of plaintiff, and future economic losses. The jury found that Crane was 1.95% responsible. A total verdict approaching $4 million was entered against Crane. Disputes arose as to how to allocate the pre-trial settlements. The trial court decided to apply a complicated formula based on the jury’s allocation of fault to Crane, rather than applying the allocation formula used by plaintiff and the defendant in the pre-trial settlements.

APPELLATE COURT DECISION: Affirmed. Defendant first contends that his activities were not a “substantial factor” in causing plaintiff’s injuries. The defendant contends that each time plaintiff was exposed to defendant’s products, no more asbestos was released than is normally found in the atmosphere everyday. But it is the cumulative effect of the exposure to defendant’s product that counts, and the substantial factor test was met. The trial court properly instructed the jury on the “consumer expectations test” and the defendant would also be liable for failure to warn.

The trial court properly applied allocations based upon the jury’s verdict, instead of the allocation decided upon by the plaintiff and the settling defendants prior to trial. The result may have been different if plaintiff and the settling defendants had entered into a good faith settlement agreement that had been approved by a court, but they did not.

COMMENT: Allocation of pre-trial settlement as credits against a jury verdict is a complicated issue in these products liability cases in which Proposition 51 comes into play. This decision should be reviewed carefully by defendants since in most cases the jury’s allocation (followed by the trial judge in this case) will be more beneficial to the defense than the voluntary pre-trial allocation between the plaintiff and the settling defendants who really don’t care. Note however, that it is wise for plaintiff and the settling defendants to enter into good faith settlements and have them approved by a judge, which might make it easier for plaintiffs to convince a trial judge to follow a pre-trial settlement pursuant to an allocation agreement.

INSURANCE COVERAGE; LIFE INSURANCE; RESCISSION


Court of appeal affirms right of insurer to rescind policy when insured made misrepresentations concerning other life insurance applications pending with other companies and when insured denied that there were other life insurance policies in effect, when in fact there were.

JURISDICTION; GENERAL APPEARANCE


FACTS: Court of appeal holds that when a defendant in a trade secret case files an application to take depositions of people supporting plaintiff’s case, this constitutes a general appearance, precluding the defendant from later moving to quash for lack of jurisdiction.
SUMMARY JUDGMENT; EMPLOYMENT; REASONABLE ACCOMMODATIONS; RELIEF FROM ORDER GRANTING SUMMARY JUDGMENT

Prieto v. Loyola Marymount University (2005) 132 Cal.App.4th 290, 33 Cal.Rptr.3d 639

FACTS: Prieto worked for Loyola and had carpal tunnel syndrome, making it difficult for her to work on computers or keypunch machines. She filed for workers’ compensation and also took workers’ compensation leave. Loyola had a policy that employees would not be allowed to take leave for more than six months, but Prieto was gone three years. Loyola offered her another job as account specialist, but the doctor said that she could not do even that work. Loyola then terminated her and she sued for wrongful termination. Loyola moved for summary judgment, which was granted. Prieto’s attorney said that he had never received the motion for summary judgment, and Prieto filed an application under CCP § 473 for relief from the summary judgment. The trial court denied the request, and the summary judgment became final.

APPELLATE COURT DECISION: Affirmed. CCP § 473 cannot be used for relief from an order granting summary judgment – only from a default or a dismissal. Furthermore, CCP § 473 envisions an affidavit by an attorney indicting that he was “at fault.” Here, the affidavit of Prieto’s counsel simply indicated that he had never received the motion, not that he was at fault.

In any event, the employer (Loyola) had evidenced efforts to reasonably accommodate Prieto with her disability, and therefore summary judgment was proper.

ANTI-SLAPP STATUTE; BANKRUPTCY

Brill Media Co., LLC v. TCW Group, Inc. (2005) 132 Cal.App.4th 324, 33 Cal.Rptr.3d 371

FACTS: Court of appeal holds that anti-SLAPP motions are not available under the “freedom of petition” theory, when the petition in question is the filing for involuntary bankruptcy. This is specifically provided for in C.C.P. § 425.17(c).

EMPLOYMENTS TORTS; RACE DISCRIMINATION

Horsford v. Board of Trustees of California State University (2005) 132 Cal.App.4th 359, 33 Cal.Rptr.3d 644

FACTS: The case is one of reverse discrimination. Two white police officers and white investigators were employed by the California State University System. The police chief was black, and the police chief reported to others that he was going to “get rid of those white guys.” The three plaintiffs were transferred; one was transferred to a position where he had no law enforcement duty; another one was transferred to a position where he had no expertise; the third was rated as “mentally unstable.” They brought a lawsuit for race discrimination. The jury rendered substantial verdicts in favor of each of the three plaintiffs (more than $1 million in favor of each). The trial judge cut these verdicts substantially (reducing them by about 80%). The trial judge also refused to issue an injunction against CSU for violation of Proposition 209 (prohibiting affirmative action and racial preference). The trial judge also reduced the attorney fees from approximately $3 million to $1 million.

APPELLATE COURT DECISION: Affirmed in part, reversed in part. The verdicts are affirmed, as reduced. The trial court acted within its discretion in ruling that the non-economic damages were not as great as the jury may have perceived. The refusal to issue an injunction was also appropriate because at the time the scope of Proposition 209 was unclear and the nature of defendant’s hiring practices was complex. The trial judge however, did err in its approach to attorney’s fees. The trial court should have considered the number of hours that the plaintiff’s attorney had invested, should then have employed a multiplier; failed to consider the higher rate attributable to outside counsel brought in to assist; failed to consider the fact that during the four years the litigation was proceeding, the plaintiff’s counsel had lost the opportunity for substantial other work and had not been able to collect a fee from any source in this case.

BAD FAITH; THIRD PARTY BAD FAITH


FACTS: Coleman was injured in an accident caused by the negligence of Gonzales. Coleman and Gonzales were both insured by Infinity Insurance Company. Coleman submitted a claim to Infinity under Gonzales’ policy. With the statute of limitations about to run, Infinity told Coleman not to worry about the statute of limitations and that the claim would be settled and that there was no necessity for Coleman to consult an attorney. After the statute ran, Coleman contacted Infinity again, talked to the adjustor, and the adjustor referred Coleman to the adjustor’s superior who told Coleman that the statute of limitations barred the claim. Coleman brought a lawsuit for third party bad faith and intentional infliction of emotional distress against Infinity.

The trial court sustained Infinity’s demurrer.

APPELLATE COURT DECISION: Affirmed. The third party bad faith claim is barred by Moradi-Shalal v. Fireman’s Fund 46 Cal.3d 287 (1998). The intentional infliction of emotional distress claim is also not in order because the conduct of Infinity was not sufficiently outrageous to justify such a claim.

NEGLIGENCE; DRIVING; GOING AND COMING RULE


FACTS: Collins was an employee of Kaiser; Collins was on her way to work; she turned into the Kaiser driveway heading for the employees’ parking lot when she struck Hartline, who was walking across the driveway. Hartline sued Kaiser and Collins. He sued Kaiser under the theory of respondeat superior. The trial court granted Kaiser’s motion for summary judgment.

APPELLATE COURT DECISION: Affirmed. The “going and coming” rule bars plaintiff’s theory of respondeat superior. Collins was on her way to work at the time of the accident.
Plaintiff argues that the “premises line” exception applied in workers’ compensation cases, should apply in respondeat superior cases. In the area of workers’ compensation, if the employee is injured, for example, in the employee parking lot, workers’ comp benefits would be in order. However, respondeat superior law is more restrictive, and the premises line exception in workers’ compensation law will not apply in the tort field of respondeat superior. Accordingly, the “going and coming” rule bars the vicarious liability of Kaiser.

EMPLOYMENT Torts; Retaliation; Privilege For Reporting Criminal Acts


FACTS: Brown was a state corrections officer. He called the Office of Inspector General to report that he was being harassed and assaulted on the job. During the course of the call he allegedly issued threats against his superior officer. The operator taking the call reported this, and Brown was reported to the public authorities and was arrested. When the charges were dropped, Brown filed a lawsuit for employment retaliation in violation of Labor Code § 1202.5.

The trial court sustained defendant’s demurrer.

APPELLATE COURT DECISION: Affirmed. The conduct in reporting a suspected crime is absolutely privileged under Civil Code § 47(b) even if the report is made in bad faith. See _Hagberg v. California Federal Bank_ 32 Cal.4th 450 (2004). Everyone has the right to report a suspected crime to higher authorities. The conduct of defendant fell within this privilege.

EMPLOYMENT Torts; Wrongful Termination; Use of Marijuana Under California’s Medical Marijuana Law


FACTS: Ross was using marijuana for medical purposes for back pain. He had a prescription for such from a physician. This was being used under California’s Compassionate Use Act of 1996, which permitted the use of marijuana under certain circumstances and made users immune from prosecution if they were in compliance with the law. Ross went to work for defendant. He had to be subjected to a drug test, but he gave the person administrating the test a copy of his doctor’s recommendation on the use of marijuana. When the defendant found out that Ross tested positive for marijuana, he was fired (he had been on the job for eight days). Ross sued for wrongful termination.

The trial court sustained the defendant’s demurrer.

APPELLATE COURT DECISION: Affirmed. Federal law prohibited the use of marijuana. It was not illegal for the employer to fire Ross for violating federal law.

NOTE: Review granted by Supreme Court.

INSURANCE COVERAGE; Wrongful Eviction; Corporations


FACTS: The insurer had issued a CGL policy to the insured. The policy under the “personal injury” section provided coverage to the insured for exposure arising out of the commission of various offenses, among them, “wrongful eviction from, wrongful entry into, or any invasion of the right of private occupancy of a room, a dwelling or premises that a person occupies by or on behalf of its own landlord, or lessor.”

A tenant in the building defaulted on the rent, and the insured started the eviction process. The insured landlord locked the tenant out; the tenant then went bankrupt. The tenant brought suit against the insured/landlord, and the insurer refused to defend the landlord.

The trial court ruled that there was a duty to defend.

APPELLATE COURT DECISION: Reversed. The insurance phrase in question only provides coverage for eviction of a person, not an organization. Person means natural person, not a corporation.

COMMENT: Obviously, insureds who are landlords (particularly commercial landlords) would want protection for wrongful eviction actions brought by corporations, which are their tenants. But the plain language of the policy did not provide that protection. Insureds should check their policies carefully on this point, since many tenants are corporations.

INSURANCE COVERAGE; Statute of Limitations; Northridge Earthquake; Equitable Estoppel


FACTS: Plaintiff Doheny was a condominium association. Damage was suffered during the 1994 Northridge earthquake. The first party insurer was Truck Insurance Exchange. When Doheny submitted a damage claim, Truck wrote back and said that the damage was less than the Association’s $50,000 deductible. No further action was taken until February 2003; at that time a lawyer and an expert advised the Association that their damage was greater than $50,000. A lawsuit was filed against Truck for breach of contract fraud, bad faith and violation of § 17200 of the Business and Professions Code.

Truck demurred on the basis of its own two-year contractual statute of limitations and on the basis of a special statute of limitations created by the Legislature in C.C.P. § 340.9, called the Northridge Earthquake Claims Revival Statute. But even under that statute, all lawsuits had to be filed by December 31, 2001. The trial court sustained Truck’s demurrer and also held that there was no equitable estoppel.

APPELLATE COURT DECISION: Reversed. Firstly, Truck’s private two-years statute of limitation in its policy was valid. It starts to run when the homeowner becomes aware of appreciable damage. The homeowner does not have to know the exact extent of the damage, just that the damage...
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is appreciable. Furthermore, even though the statute is tolled while the insurance company is acting on the claim, tolling does not continue simply because the insurer does not use the term “denial” when acting on the claim. In the present case, Truck clearly told the insured that the damages did not exceed the deductible, and any reasonable person would assume that nothing was going to be paid by truck.

However, the doctrine of equitable estoppel applies here, and the case is remanded to the trial court for determination as to whether the insured reasonably relied upon Truck’s representation that the damage did not exceed the deductible. If so, then Truck would be equitably estopped to rely upon its statute of limitations or the special statute of limitations in § 340.9, C.C.P. Finally, § 340.9 does not in and of itself eliminate the doctrine of equitable estoppel.

ANTI-SLAPP STATUTE; INSURANCE; FRIVOLOUS LAWSUIT


FACTS: The case has a very interesting background: the California Legislature passed Senate Bill 841 which allows the insurance industry to take into consideration other rating factors than those authorized in Proposition 103. Governor Davis vetoed the Bill. But before that happened, plaintiffs filed a lawsuit seeking to invalidate SB 841 on grounds that it was unconstitutional. Part of the language of the complaint stated that Mercury Insurance Company contributed $841,000 to legislators and this was the only reason why the Bill had passed. Mercury intervened in the lawsuit and moved to strike the language about itself and moved to dismiss the action under the Anti-SLAPP statute, C.C.P. § 425.16. The trial court granted the motion to strike but denied the motion to dismiss the lawsuit.

APPELLATE COURT DECISION: Affirmed. The motion to strike was properly granted; the denial of the Anti-SLAPP motion was proper as well. Sanctions are also imposed upon Mercury (attorney fees for opposing the motion) for bringing a frivolous motion. Shortly after Mercury filed its motion, the Legislature amended the Anti-SLAPP statute indicating that such motions could not be filed in lawsuits involving the public interest such as the present one seeking to attack the validity of SB 841 (actions brought solely in the public interest). Mercury should have realized that the amendment would be treated retroactively so as to apply to its claim.

COMMENT: This decision seems to be harsh; Mercury was in essence being accused of bribery and therefore the court should probably have been a bit more charitable in its treatment of Mercury. Also, when Mercury’s actions were undertaken before the amendment to the Legislation was passed and became law, how can it be said that Mercury should have “anticipated” that this would happen and how can it be said that Mercury should have realized that the legislation would be retroactive such that its failure to anticipate these matters renders Mercury’s motions “frivolous?”

INSURANCE; PROPOSITION 103; EFFECT OF PRIOR INSURANCE ON GOOD DRIVER DISCOUNT


FACTS: Proposition 103, meant to further the concept of affordable automobile insurance to California drivers, allows the Legislature to amend the Proposition so long as the Amendment furthers the purposes of Proposition 103. The Legislature in 2003 passed Insurance Code § 1861.02. This section in essence provides that a good driver discount will be available to drivers who have been previously insured by another insurer. The court of appeal in the present case invalidates that statute since it does not further the purposes of Proposition 103. The effect of this statute means that those who do not have prior insurance wind up paying higher rates for automobile coverage, undermining the purposes of Proposition 103.

ARBITRATION PROVISION; HEALTHCARE; DRAFTING REQUIREMENT


FACTS: In this case, the court of appeal invalidates an arbitration provision in a health care contract by reason of Health and Safety Code § 1363.1(b) and the failure of the contract to comply with this provision. The provision requires that the arbitration clause be set forth boldly and immediately above the signature line. The clause in question did not meet these two requirements.

PRIVACY; MEDICAL RECORDS


FACTS: Plaintiff had terminated her engagement with her fiancé. But the ex-fiancé owed plaintiff money and agreed to allow plaintiff to charge items on the ex-fiancé’s credit card to repay the debt. Plaintiff went to a fertility clinic with the objective of obtaining in vitro fertilization so that she could get pregnant by someone else. She charged this on her ex-fiancé’s credit card. She told the ex-fiancé that this was for a minor surgical procedure. When the ex-fiancé found out about it, he went to the clinic and they informed him that the charge on the card was for in vitro fertilization. The ex-fiancé brought a lawsuit against the plaintiff for fraud. He subpoenaed medical records from the clinic, and the clinic turned plaintiff’s records over to the ex-fiancé’s attorney. Plaintiff then brought a lawsuit against the clinic for invasion of privacy and violation of the Confidential Medical Records Act.

The trial court ruled in favor of the clinic.

APPELLATE COURT DECISION: Affirmed in part, reversed in part. Simply because the in vitro procedure was charged on the ex-fiancé’s card did not authorize the clinic to disclose what procedure had been performed on plaintiff in the clinic. However, the release of the medical records was justified, because medical records may be released to the person
responsible for “payment” of the medical bills, and that would be the ex-fuence. Furthermore, there is another exception in the Confidential Medical Records Act, allowing for release of medical records in response to a subpoena in a legal action.

PROFESSIONAL LIABILITY; MEDICAL MALPRACTICE; INFORMED CONSENT

Quintanilla v. Dunkelman (2005) 133 Cal.App.4th 95, 34 Cal. Rptr.3d 557

FACTS: Plaintiff was complaining of pain in the vagina; she was examined by defendant doctor. He recommended surgery that was to be performed in a hospital owned by him, but done by a different doctor. Plaintiff had the surgery and complications resulted and the lawsuit was filed. There was a written consent form in the surgery file. But plaintiff took the position that she was really not informed of the risks and the side effects. She also said that the consent form was in Spanish and she did not read Spanish. The jury returned a verdict for the plaintiff.

APPELLATE COURT DECISION: Affirmed. Although a surgical consent form creates a presumption of consent, this may be rebutted by the plaintiff. There was sufficient evidence that there was no informed consent, and both doctors involved were responsible for making sure that there was.

ARBITRATION; UNCONSCIONABILITY; RESTRICTION ON TYPES OF DAMAGES; CLASS-WIDE ARBITRATION; SHIFTING OF COSTS

Independent Association of Mailbox Center Owners, Inc. v. Superior Court (2005) 133 Cal.App.4th 396, 34 Cal.Rptr.3d 659

FACTS: The plaintiffs were 35 franchisees in a dispute with Mail Boxes Etc. (MBE), the franchisor [whose company had been purchased by UPS]. They claim that when UPS purchased MBE, the rights of the plaintiffs were violated, and various anti-trust and trade restriction statutes had also been violated. There were arbitration agreements between the plaintiffs and the defendants. Some of these agreements prohibited class-wide group arbitration; other provisions restricted and put limits on compensatory and punitive damages. MBE moved to compel arbitration. The plaintiffs countered by seeking to consolidate all the claims into a group arbitration. The trial court granted the motion to compel; denied the motion to consolidate; refused to rule that the arbitration agreements were unconscionable; and ruled that whether costs could be shifted to the defendants was a matter for the arbitrator to decide.

APPELLATE COURT DECISION: The appellate court issued a writ to set aside the trial court rulings. Under the California Supreme Court case of Discover Bank v. Superior Court 56 Cal.4th 148, class-wide or group arbitration would be permitted. A franchise agreement is similar to a consumer agreement under the standards set forth under the Discover Bank case. The restrictions on damages that can be awarded in the arbitration make it unconscionable, since the claimants are entitled to the same damages that they would be entitled to under statute. Finally, whether costs should be shifted to the defendants was not a matter for the arbitrator to decide, but one for the court to decide (cost shifting rule allowed under the Supreme Court case of Armendariz 24 Cal.4th 83, allowing shifting of costs where litigant seeks to vindicate a statutory right that benefits the general public).

COMMENT: It is hard to understand how a franchise contract can be the same as a “consumer” [individual] contract, since most franchisees are sophisticated and probably have the assistance of counsel when they enter into complicated franchise agreements. There is a possibility that the Supreme Court will look at this decision.

NEGLIGENCE; DUTY; CRIMINAL ACTS


FACTS: Plaintiff was a member of the Boys & Girls Club of Chula Vista. The Club had a playground. Plaintiff was on the playground when plaintiff was hit by a rock thrown by a youth (unidentified) who was standing on a hill above the playground. Plaintiff sued the Club alleging breach of duty, failure to supervise, failure to provide guards, etc. The trial court granted summary judgment for the Club.

APPELLATE COURT DECISION: Affirmed. There was no evidence to support foreseeability; there had been no prior incidents of criminal or negligent behavior of this type. No duty was owed. Summary judgment was properly granted.

OVERNMENT LIABILITY AND IMMUNITY; CLAIM STATUTE; MAILING OF DENIAL OF CLAIM

Phay v. City and County of San Francisco (2005) 133 Cal.App.4th 437, 34 Cal.Rptr.3d 838

FACTS: Phay committed suicide while at San Francisco General Hospital. His parents filed a government tort claim against the City. The City denied the claim by depositing the Notice of Denial in the mail in November with a proof of service. After the six months had run, Phay filed suit. The City moved for summary judgment on grounds that the suit had not been filed within six months from the denial of the claim. Phay took the position that the Notice of Denial had never been received. The trial court granted summary judgment for the City.

APPELLATE COURT DECISION: Affirmed. The Government Code sections require that the Notice of Denial be placed in the mail, and the placement in the mail starts the running of the six-month statute of limitations. When something is mailed, the Evidence Code presumes that it has been received. Triable issues of fact are not created simply because plaintiff’s counsel alleges that the Notice of Denial was not received. Counsel knew the statute of limitations, knew that the claim had to be acted upon within 45 days, and knew of the six-month period. Counsel could have checked on such thing as a backup.
**Recent Cases**

**FEDERAL PREEMPTION; HOLOCAUST SURVIVOR CASES**


**FACTS:** California’s CCP §354.5 allows Holocaust survivors to make claims against foreign insurance companies. This decision holds that California’s laws are preempted by the national foreign policy of the United States with respect to how such claims should be handled and resolved and settled. Therefore, California litigation will be largely prohibited.

**GOVERNMENT LIABILITY AND IMMUNITY; RECREATIONAL IMMUNITY**


**FACTS:** Miller was a member of the Rancho Santa Fe Riding Association. Miller was riding her horse on the trail. A driveway owned by Weitzen crossed the trail. Weitzen had recently re-surfaced the driveway without getting a permit, and it was slippery. The Association had posted a notice about the slippery driveway, having had complaints from other riders. Miller however, did not see the notice. Miller’s horse slipped on the driveway and Miller was injured. Miller sued the Riding Association and Weitzen.

The trial court granted summary judgment for Weitzen but not for the Association.

**APPELLATE COURT DECISION:** Affirmed. Civil Code § 846 provides immunity for landowners with respect to claims for injury on the part of people who are using the landowner’s property for recreational purposes. This was true in the present case with respect to Weitzen. The Association however, is not entitled to the immunity because they had received dues from Miller, and there is an exception to the immunity in the event that “consideration” is paid.

**ARBITRATION; DISCLOSURE**


**FACTS:** APG got into a dispute with Schulman who had entered into an employment agreement with APG having to do with production of films. The employment agreement had an arbitration clause in it providing for the use of the American Arbitration Association. The arbitrator sent out a disclosure statement. The disclosure statement did not indicate that the arbitrator was then involved in considering whether to accept an offer from APG’s counsel to do an arbitration in another case involving a bank. Actually, the arbitrator later accepted the offer and did the arbitration for the bank. The arbitrator did however; send out a supplemental disclosure statement indicting this particular involvement. The arbitrator then ruled against Schulman and for APG. Schulman moved to vacate the award and the trial court did so.

**APPELLATE COURT DECISION:** Affirmed. This was a material failure to disclose. The arbitrator had failed to comply with Standard 12(b) of the California Standards adopted by the Judicial Counsel. That states that when an arbitration is pending, the arbitrator is supposed to file a declaration indicating that he will accept no new offers of employment or professional relationships from a party or a lawyer for a party in the arbitration in which he is then involved. The declaration in the present case had no such language. That being so, the arbitrator was precluded under Standard 12(c) from serving as an arbitrator. Also, the arbitrator’s actual service as an arbitrator in the bank case should have been disclosed under different standards.

**NEGligence; ASSUMPTION OF THE RISK**

*Saville v. Sierra College* (2005) 133 Cal.App.4th 857, 35 Cal.Rptr.3d 188

**FACTS:** Saville wanted to be a helicopter search and rescue pilot. In that connection, he decided to take some courses on law enforcement and enrolled at Sierra College. The course was called “Arrest, Communications, and Firearms.” Part of the course involved being instructed on “takedown” arrest procedure, and the students played the role of police officer and suspect. Saville was playing the role of the suspect when his neck struck the knee of the student playing the role of the police officer. He suffered injuries and sued the college. The trial court granted summary judgment on the grounds of assumption of the risk.

**APPELLATE COURT DECISION:** Affirmed. The doctrine is not limited to employment and sports activities, but would also include situations such as this.

**EMPLOYMENT TORTS; WRONGFUL TERMINATION; DEFAMATION**


**FACTS:** Raghavan had worked for Hughes Space Company, which was purchased by Boeing. Raghavan was in the satellite marketing division and he dealt extensively with the Russians. The Russians had a practice known as “offset”, which meant that if they dealt with American companies, the American companies were expected to deal with them. This program felt out of favor, and Raghavan was instructed by his employer not to engage in it. Nonetheless, he did so, and he was then subjected to a reprimand. Raghavan was also engaged in a whistle-blowing activity, reporting on a Lockheed employee who allegedly was doing improper things. Boeing said that it needed to do a work force reduction, and Raghavan was one of those selected to be let go. He sued for defamation and wrongful termination among other causes of action. In the defamation cause of action, the trial court granted a summary judgment on grounds that the reprimand given by Boeing to Raghavan (the defamatory statements were allegedly wrapped up in the reprimand) were true. On the wrongful termination claim, Boeing then brought a motion in limine arguing that the summary judgment on the defamation claim was determinative on the wrongful termination claim since the defamation determination indicated that the reprimand for what Raghavan was doing was justified. The jury was instructed that the material in the reprimand was true. The jury returned a defense verdict on the wrongful termination case.
APPELLATE COURT DECISION: Reversed. The determination in the defamation cause of action is not determinative with respect to the wrongful termination cause of action. The jury was improperly instructed on this point.

NEGLIGENCE; DRIVING; TRUCKS; FEDERAL VERSUS STATE STANDARDS

Weaver v. Chavez (2005) 133 Cal.App.4th 1350, 35 Cal.Rptr.3d 514

FACTS: Weaver was seriously injured when her vehicle was struck by a truck. In a lawsuit brought by Weaver, the trial judge instructed the jury in accordance with California’s basic speed law (Vehicle Code § 22350). The court refused to instruct the jury on the federal standards applicable to commercial vehicles set forth in 49 Code of Federal Regulations, § 392.14 which requires the standard of “extreme caution” in the proper operation of the tractor trailer. The jury returned a defense verdict.

APPELLATE COURT DECISION: Reversed. The federal statute says that state law will apply, except when there is a different federal law, and here there is: the standard of “extreme caution” applies when trucks are involved. The failure to give the instruction was prejudicial. Accordingly, the defense verdict is reversed.

COMMENT: This writer would wager that not many practitioners of motor vehicle accident law are aware of this more stringent federal standard. It could be very useful to plaintiffs in vehicle accident cases involving trucks.

PROFESSIONAL LIABILITY; PSYCHIATRISTS; IMMUNITIES; EARLY RELEASE FROM DETENTION


FACTS: The case concerns Welfare and Institutions Code § 5100 et seq. which allows psychiatrically disturbed persons to be detained (held) for no longer than 72 hours. The statute allows the treating psychiatrist to release the patient early, provided that the psychiatrist believes that no further evaluation or investigation is necessary. The patient in question was held and then released early based upon the approval of the psychiatrist. The patient then got involved in criminal matters on board an aircraft and this ultimately resulted in the patient and his father suing the psychiatrist for his early release. The trial court granted summary judgment for the psychiatrist.

APPELLATE COURT DECISION: Affirmed. The statute creates an immunity for the psychiatrist if the psychiatrist believes that no further evaluation or investigation is necessary. This is a subjective standard; the defendant adequately set forth the basis for triggering the immunity, and the expert declaration of the plaintiff did not create a triable issue of fact.

MEDICAL MALPRACTICE; MICRA; ELDER ABUSE; STATUTE OF LIMITATIONS; TOLLING

Smith v. Ben Bennett, Inc. (2005) 133 Cal.App.4th 1507, 35 Cal. Rptr.3d 612

FACTS: The widow of a patient in a nursing home brought an action against the nursing home under the Elder Abuse statute. The defendant demurred on grounds that the action had not been filed within the one-year statute of limitations. Plaintiff argued that she had served and filed a C.C.P. § 364 notice of claim provision under MICRA and that this operated as a 90-day tolling period, and that therefore the lawsuit was timely filed. Ultimately, the trial court sustained a demurrer and dismissed the case.

APPELLATE COURT DECISION: Affirmed. There is a one-year statute of limitations for elder abuse cases. MICRA does not govern elder abuse cases. Section 364 is a tolling statute, but is part of MICRA, and therefore only applies to actions for “professional negligence” not actions under the Elder Abuse statute which requires proof of recklessness and willfulness and also contains different measures and amounts of damages for pain and suffering and for attorney fees.
GOVERNMENT LIABILITY AND IMMUNITY; CIVIL RIGHTS; WARRANTS

San Jose Chapter of the Hells Angels Motorcycle Club v. City of San Jose (2005) 402 F.3d 962 (Ninth Circuit)

FACTS: A nightclub patrolman was murdered, and suspicious settlers on the Hells Angels. The police secured various warrants, which were extremely broad, the intent of the police being to develop evidence that would link the Hells Angels gang to the nightclub. In the process of executing the warrants, the police seized “truckloads” of evidence having to do with indica of the Hells Angels, seized a refrigerator door, broke up a sidewalk in front of the nightclub (with names of the Hells Angels on it), and killed several dogs in the process of searching the premises. Various personal property was also destroyed. This prompted a civil rights suit (42 U.S.C. 1983) by the Hells Angels.

The trial court refused to dismiss the suit even though the police were claiming qualified immunity.

NINTH CIRCUIT DECISION: The trial court was correct. The execution of the warrants was unreasonable; it appears that the information was being sought not for proof of a crime, but for purposes of gathering evidence to assist in “sentence enhancement.” The plaintiffs adequately stated a cause of action.

GOVERNMENT LIABILITY AND IMMUNITY; CIVIL RIGHTS VIOLATION

Blanford v. Sacramento County (2005) 406 F.3d 1110 (Ninth Circuit)

FACTS: Deputies received a call about a masked man wandering around a neighborhood with a sword. The man was Blanford; the deputies saw Blanford with a ski mask. The ski mask actually covered Blanford’s ears, but the deputies could not see (or hear) that Blanford was listening to loud music. Blanford did not respond to “desist” orders of the deputies. Blanford was also taking medication because he was a schizophrenic and was bipolar. Blanford starting waving his sword and was headed up the steps to a house (which, unbeknownst to the deputies was his parents’ home). The deputies ordered him to stop; he ignored them. The deputies shot once; Blanford continued; the deputies shot a second time hitting him in the wrist; Blanford headed away from the house and was shot a third time and became a paraplegic. Blanford sued for 42 U.S.C. § 1983 violations.

The trial court ruled that the deputies acted on an objectively reasonable basis and were entitled to immunity.

NINTH CIRCUIT DECISION: Affirmed. The deputies objectively and reasonably believed that Blanford was an imminent peril to someone in the house. Therefore, the claim of excessive force was properly dismissed.

INSURANCE COVERAGE; DISABILITY INSURANCE; ERISA DECISIONS; STANDARD OF REVIEW


FACTS: In this case, an employee welfare benefits plan was involved which was covered by ERISA. A disability claim was filed and the insurer denied it. The trial court held that there had been no abuse of discretion.

NINTH CIRCUIT DECISION: Affirmed. Firstly, the policy granted exclusive responsibility to the insurer to make final determinations on eligibility for benefits. Even though the word “discretion” was not used in the policy, this language is sufficient to indicate that the insurer has discretion in making its decisions. Hence, the abuse of discretion test, rather than the de novo test, is appropriate, and the district court was correct in its ruling.

Secondly, simply because the insurer was both the administrator and the funder of benefits does not create a serious conflict of interest changing the standard of review.

DAMAGES; PUNITIVE DAMAGES; FEDERAL CIVIL RIGHTS ACTION; JURY INSTRUCTIONS; OPPRESSIVE CONDUCT

Dang v. Cross (2005) 422 F.3d 800 (Ninth Circuit)

FACTS: Police officers arrested Dang charging him with operating an illegal pawnshop. They forced Dang to open the safe and thereafter struck and kicked Dang, injuring him. He was taken to a hospital and later filed suit against the police officers for his injuries, alleging violation of 42 U.S.C. § 1983, the Federal Civil Rights law. In a jury trial, the jury found excessive force and awarded $18,000 in compensatory damages to Dang. In the District Court Dang requested a punitive damage instruction stating that “acting oppressively” could be the basis for a punitive damage award. The District Court refused this requested instruction and instead gave the standard Ninth Circuit instruction (model jury instruction 7.5) that allowed juries to award punitive damages only if you find that the defendant’s conduct was malicious or in reckless disregard of the plaintiff’s rights. The jury, upon being so instructed, then returned a defense verdict on punitive damages. Attorney fees in the amount of $134,000 were awarded, but they were reduced by the trial court (hourly rate and amount of work reduced).

NINTH CIRCUIT DECISION: Reversed. The plaintiff’s requested jury instruction was proper. Acting in an oppressive manner is an accepted basis for an award of punitive damages, and the standard Ninth Circuit jury instruction does not embrace this concept.

Furthermore, the District Court’s order on attorney fees is remanded for further determination since the District Court may have abused its discretion in reducing the amount of time alleged by plaintiff’s counsel to have been expended in preparing certain claims related to the case.
COMMENT: This decision means that the standard Ninth Circuit jury instructions on punitive damages will have to be modified. On the merits, however, the court’s decision is consistent with California law on punitive damages (although this decision was not governed by California law).

EMPLOYMENT TORTS; DISABILITY; FEDERAL AND STATE LAWS CONCERNING DISABILITY DISCRIMINATION


FACTS: Procedurally, this was an involved case with many plaintiffs, all of whom were working for or seeking to work for United Parcel Service (UPS). UPS had a vision qualification test, namely, the applicant had to have some central vision and some peripheral vision in both eyes. Many of the plaintiffs had monocular vision, which would not satisfy the UPS requirements. The Ninth Circuit in a series of decisions highlights the difference between the California law of disability discrimination under the FEHA and the federal law of discrimination under the Americans with Disabilities Act (ADA).

Under the federal law, it must be shown that the disability disqualifies the plaintiff from using their eyesight as other people do for daily life activities – the test under the ADA. Therefore, these plaintiffs would not be disabled under the ADA.

But under the state law, FEHA, the plaintiffs were sufficiently limited in their major life activities by their condition to be considered as disabled. However, the employer had a defense to that even under California law, namely, the “safety of others” defense. The employer sufficiently demonstrated that drivers with this type of monocular vision were more frequently involved in accidents. The defense was therefore established.

ARBITRATION; EMPLOYMENT AGREEMENT; UNCONSCIONABILITY

Circuit City Stores, Inc. v. Mantor (2005) 461 F.3d 1060 (9th Circuit)

FACTS: In the decision of EEOC v. Luce, Forward, Hamilton & Scripps 345 F.3d 742 (9th Circuit, 2003), the Ninth Circuit did uphold the validity of arbitration clause as a “condition of employment” (meaning that the employee was required to sign the clause as a condition of the job). But in the present case, the court emphasizes the substantive and procedural rules applying to unconscionability of arbitration agreements still apply. COMMENT: this just means that the arbitration agreements have to be very carefully drafted so that they are fair, have proper cost allocations, notice requirements, etc.

PRIVILEGE; ATTORNEY CLIENT PRIVILEGE; WAIVER


FACTS: Sony was involved as a defendant in a litigation having to do with its “PlayStation.” Sony ultimately sued its insurer for breach of contract and bad faith.

A Sony employee and outside counsel had a conference in the presence of Sony’s insurance broker. The District Court held that this conference was not privileged because in the discovery dispute, Sony had produced no evidence that the presence of the broker was essential to Sony’s legal consultation with its outside lawyer. No declaration had been submitted either on the part of the broker or on the part of the Sony employee who was at the conference on this subject. Therefore, the insurer was entitled to discovery concerning this conference and it would not be insulated from discovery by virtue of the attorney client privilege.

Sony had also disclosed to a third party a communication from outside counsel to Sony. The insurer contended that this constituted a waiver of the entire attorney client privilege between Sony and the outside counsel. The District Court disagreed, holding that the attorney client privilege was waived with respect to this particular email and any follow-up emails, but the waiver of attorney client privilege was generally to be narrowly construed, and that the entire attorney client privilege was not waived.

Finally, the court held that the insurer could ask various in-house counsel of Sony what their roles were with respect to interpretation of the insurance policy, even though this might indirectly reveal information about what advice the attorneys had given.

INSURANCE COVERAGE; DISABILITY INSURANCE; STANDARD OF REVIEW; ERISA


FACTS: The issue in this case concerns the standard of review to be applied by a district court when reviewing the decision of an ERISA plan administrator concerning a claim for total disability benefits. The court holds that when the policy does not unambiguously grant discretion to the insurer to grant or deny coverage, the decision is then made, and the district court is to review the decision, the standard of review of the district court is de novo, not abuse of discretion. This is consistent with Thomas v. Oregon Fruit Products Company 228 F.3d 991 (Ninth Circuit, 2000).
INSURANCE COVERAGE; ERISA PLANS; STANDARD OF REVIEW


FACTS: The plaintiff was employed by Blue Cross; disability benefits (short and long-term) were available under ERISA policies. Although plaintiff received short-term disability benefits, long-term benefits were denied. The CNA policy had conferred discretionary review powers on the insurer who was both the administrator and the funder. The Insurance Commissioner, John Garamendi, had subsequently withdrawn the right of insurers to use such discretionary language in their policies. The U.S. District Court held that this did not change the standard of review as to the decision made by CNA to deny benefits, since it was entitled to rely upon the prior approval by the DOI.

However, CNA was both funder and administrator; this created a conflict of interest, and therefore, de novo review was in order for this reason. Under de novo review, CNA had acted unreasonably in denying coverage.

COMMENT: decision seems to be in conflict with the Ninth Circuit’s decision mentioned above.
**NEGLIGENCE; CONVICTION OF MISDEMEANOR TRAFFIC OFFENSE NOT CONCLUSIVE EVIDENCE OF CIVIL LIABILITY**

*Langon v. Matamoros, 111 P.3d 1077 (May 26, 2005):*

Matamoros was involved in an automobile accident with Langdon for which Matamoros received a traffic citation for failure to yield to the right of way. Matamoros later plead no contest, forfeited bail and paid a fine. Langdon sued Matamoros for personal injuries under negligence theory. The jury returned a verdict in favor of Matamoros and against Langdon. Langdon’s post-trial motions (JNOV and directed verdict) were denied.

On appeal, Langdon argued that Matamoros’ conviction pursuant to a no contest plea was admissible as conclusive evidence that Matamoros was liable for her injuries. Therefore, Langdon contended that the trial court erred in denying her post trial motions.

**SUPREME COURT DECISION:** Affirmed. NRS 41.133, the statute mandating that conviction of a crime resulting in an injury to the victim constitutes conclusive evidence of civil liability, does not apply to misdemeanor violations of state and local traffic codes.

**MEDICAL MALPRACTICE; EXPERT OPINION TESTIMONY ON STANDARD OF CARE**


Morsicato was experiencing rash like skin symptoms so he went to a dermatologist who prescribed lindane lotion. Morsicato took the prescriptions to Save-On to be filled at the pharmacy. Save-On improperly labeled the prescription instructions which resulted in the lotion being applied with too great of frequency. As a result, Morsicato experienced pain and significant skin irritation. Morsicato sued Save-On for personal injuries.

The trial court granted a directed verdict in favor of Morsicato on the issue of Save-On’s negligence but reserved the issue of causation, comparative negligence and damages for the jury. Morsicato offered causation evidence in the form of several experts who testified to a reasonable degree of medical probability that Morsicato’s injuries were caused by the lindane lotion. Save-On offered the testimony of a neurologist who opined that other theories, including an autoimmune response, could have caused the injury. Despite the neurologist acknowledging that his autoimmune response theory was not more likely than other causes, the neurologist was allowed to testify and the jury returned a unanimous verdict in favor of Save-On.

On appeal, Morsicatos argued that Save-On’s expert’s testimony on causation was speculative and failed to meet the requisite standard for expert testimony, thus should be been excluded/stricken.

**SUPREME COURT DECISION:** Reversed and remanded. Not all medical expert testimony must be stated to a reasonable degree of medical probability. The standard for admissibility varies depending on the nature of the expert’s opinion and purpose. However, medical expert testimony regarding standard of care and causation must be stated to a reasonable degree of medical probability to be admissible.

**LIABILITY OF SUCCESSOR AFTER PURCHASE OF ASSETS**

*Village Builders 96, L.P. v. U.S. Laboratories, Inc., 112 P.3d 1082 (June 9, 2005):*

Brannen, a sole shareholder, formed Buena Nevada, a geotechnical engineering firm/company. All of Beuna Nevada’s stock was purchased by Geofon. Brannen never acted as a shareholder, officer or director of Beuna after the sale but reserved the right to repurchase his stock. The new company was named Beuna Geofon. Brannen repurchased the stock of Beuna Geofon and sold the company’s assets and goodwill to U.S. Labs. However, he retained his stock in the company.
Before Brannen repurchased the Beuna Geofon stock, the company had submitted a proposal to Village to perform an environmental assessment. Beuna Geofon prepared the assessment report stating there were no petroleum hydrocarbons at the site which Village was to commence a construction project. Later, Village discovered hydrocarbon contamination at the site and notified Nevada Dept. of Environmental Protection who ordered Village to clean it up. Less than three weeks before Brannen repurchased Beuna Nevada and sold it to U.S. Labs, Village hired Beuna Nevada to clean up the site.

Village filed a lawsuit against the site owner to recoup its clean-up costs. After learning that U.S. Labs had purchased all of Beuna Nevada’s assets and goodwill, Village also sued U.S. Labs for breach of contract, negligence and negligence per se. U.S. Labs moved to dismiss the complaint on the grounds that it was not liable for the clean-up costs as Beuna Nevada’s successor. The trial court granted U.S. Labs motion finding, as a matter of law, U.S. Labs was not liable under successor liability theory. Village appealed.

SUPREME COURT OPINION: Affirmed. A successor is generally not liable for the acts of its predecessor. A successor who purchases assets only will be held liable for corporate debts under the de facto merger and mere continuation exceptions to the general rule of no liability. Weighing the four-factor test for defected merger and the two-factor test for mere continuation, there was no continuity of shareholders of Beuna Nevada and U.S. Labs and/or there was no continuation of the common or substantially similar ownership, thus there can be no successor liability imposed on U.S. Labs.

EMPLOYMENT LAW; EXHAUSTION OF ADMINISTRATIVE REMEDIES

Pope v. Motel 6, 114 P.3d 277 (June 23, 2005):

Motel 6 hired Juanita Pope as a housekeeper. She was promoted to assistant housekeeper then to head housekeeper. In her first 14 months of employment, however, Pope was written up, warned, and suspended twice for unsatisfactory job performance and tardiness. A Motel 6 manager, Inman, warned Pope about spreading gossip. Pope spread negative communications about Inman and Motel 6, thus Pope was terminated. Pope contended that after her termination Inman falsely accused her of stealing items from Motel 6. Pope, her husband and a third former employee filed discrimination claims with the Nevada Equal Rights Commission ("NERC"). The NERC charge alleged that Pope was terminated because her husband (also a former employee of Motel 6) reported an instance of sexual harassment to Motel 6 management and/or that Pope was terminated because her husband filed a NERC complaint against Motel 6 following his termination.

Pope filed claims for wrongful termination based on race, retaliatory discharge, failure to promote based on race, defamation, and emotional distress. After some pretrial discovery and a hearing, the trial court granted summary judgment in Motel 6’s favor on all claims.

SUPREME COURT OPINION: Affirmed in part. If an employee alleging discrimination files suit, she may only expand her action to include allegations of other discrimination if the new claims are reasonably related to the allegations involved in the prior administrative proceeding. Otherwise, the employee must exhaust administrative remedies for the new claims. New claims are “like” or “reasonably related” to the administrative charge if a factual relationship exists between the new claims and the administrative charge. Pope’s initial NERC complaint was based on retaliatory discharge. The NERC charge did not indicate discrimination based on race. Accordingly, Pope’s district court allegation that she was terminated because of race is not reasonably related to her charge of retaliation and she must exhaust her administrative remedies before bringing such a claim in district court.

POST-TRIAL MOTIONS; CONDITIONING NEW TRIAL ON ACCEPTANCE OF ADDITUR

Lee v. Ball, 116 P.3d 64 (July 28, 2005):

Ball sustained injuries in a car accident with Lee. Ball sued Lee for personal injuries. The case went to a court-annexed arbitration hearing. Ball was unhappy with the results of the arbitration and requested a trial de novo. Before trial, Lee served Ball with an Offer of Judgment for $8,100, which was not accepted. The jury awarded Ball $1,300. Lee moved for costs and attorney’s fees based on the offer of judgment. Ball opposed the motion and filed a motion for additur. The trial court granted the motion awarding Lee an $8,200 additur and further awarding Lee prejudgment interest. However, the trial judge failed to offer Lee the option of a new trial. Lee appealed.

SUPREME COURT OPINION: Reversed and remanded. If the damages awarded to a plaintiff are clearly inadequate and the case is one that is proper for new trial on the issue of damages, the trial court has discretion to grant a new trial unless the defendant consent’s to the court’s additur. Because the award was substantially less than the conceded proof of special damages, there was at least some indication that the jury’s award was clearly inadequate. However, the trial court abused its discretion in failing to offer Lee the option of a new trial on the issue of damages or acceptance of additur. Additur may not stand alone as a discrete remedy; rather, it is only appropriate when presented to the defendant as an alternative to a new trial on damages.

WORKERS’ COMPENSATION; PREMISES-RELATED EXCEPTION TO GOING AND COMING RULE:

MGM Mirage v. Cotton, 116 P.3d 56 (July 28, 2005):

Cotton, an employee of MGM, was walking through MGM’s parking lot 10 minutes before her scheduled...
shift. Cotton sustained a broken ankle when she tripped over a curb leading into the entrance of a MGM building. MGM denied Cotton’s workers compensation claim. A workers compensation hearing officer affirmed MGM’s determination finding that the injury occurred before Cotton was “on the clock”. The appeals officer reversed the hearing officer’s decision and awarded Cotton compensation benefits. The trial court denied MGM’s petition for judicial review and MGM appealed.

SUPREME COURT OPINION: Affirmed. Generally, under the going and coming rule, employees are not entitled to workers compensation for injuries sustained while traveling to and from work. However, we now adopt the parking lot or “premises-related exception” to the going and coming rule for workers compensation. Injuries sustained on the employer’s premises while the employee is proceeding to or from work, within a reasonable time, are sufficiently connected with the employment to have occurred “in the course of employment”. Since Cotton was injured on MGM’s premises, as she arrived for work, and within a reasonable time, it was sufficiently connected to the course of Cotton’s employment.

LABOR LAW; PUBLIC EMPLOYEES; NO CAUSE OF ACTION FOR MALPRACTICE AGAINST ATTORNEY PROVIDED BY UNION


Weiner worked for Clark County School District (“CCSD”). Weiner was a member of a union, CCASA. The collective bargaining agreement between CCASA and CCSD provided that an employee under investigation was entitled to union representation. Weiner was suspended by CCSD. CCASA hired and paid an attorney, Beatty, to represent Weiner during the investigation, interview and arbitration hearing. After the hearing, the arbitrator concluded CCSD had just cause to terminate Weiner. Unbeknownst to Weiner, Beatty was simultaneously retained by CCSD to represent CCSD’s assistant general counsel in a separate lawsuit.

Weiner sued CCASA and Beatty for malpractice. Beatty filed a motion for summary judgment. The trial court found that certain provisions of the LMRA, 29 U.S.C. §185, preempted Weiner’s suit against Beatty. The court also concluded that a lawyer representing a union, who argues on behalf of an individual union member, cannot be sued by that member for malpractice. Therefore, the court granted Beatty’s motion for summary judgment. Weiner appealed.

SUPREME COURT OPINION: Affirmed. A public-employee union member does not have an independent claim for legal malpractice against an attorney provided by his union. The employee’s remedy is an action against the union for breach of the duty of fair representation under the Employee-Management Relations Act.

SPOLIATION OF EVIDENCE; NEGATIVE INFERENCE INSTRUCTION


Bass-Davis slipped and fell on a wet floor while inside a 7-11 store. Approximately 14 months after the fall, Bass-Davis sued 7-11 alleging her injuries were caused by the negligence of the Davises, the 7-11 franchise owners. During discovery, Bass-Davis learned that the Davises could not locate the surveillance videotape and employment records from the time of the incident as well as the original incident report prepared by the employee on duty at the time of the fall. Apparently these pieces of evidence were lost sometime after they were forwarded to the Davises insurance carrier.

Bass-Davis moved for partial summary judgment on liability based upon the Davises failure to preserve evidence. The trial court denied Bass-Davis’s motion and ordered the case to proceed to trial. The jury returned a verdict for the Davises. Bass-Davis appealed arguing that the jury should have been instructed that there is a rebuttable presumption that lost evidence is harmful to the party who lost it.

SUPREME COURT OPINION: Reversed and remanded. When evidence should have been preserved for trial and is lost/destroyed, but there is no evidence of willful suppression, the jury should be instructed it may infer that the lost/destroyed evidence is unfavorable to the party who could have produced it and did not, if the evidence was under the party’s control and reasonably available to it and not reasonably available to the adverse party, and the evidence was lost or destroyed without satisfactory explanation after the party knew or should have known of the existence of a claim.

MEDICAL MALPRACTICE; EXPERT AFFIDAVIT SUPPORTING COMPLAINT NOT REQUIRED IN RES IPSA LOQUITUR CASE

Syzdel v. Markman, M.D., 117 P.3d 200 (Aug. 11, 2005):

Markam performed a breast surgery on Syzdel. At the conclusion of the procedure, a member of Markam’s nursing staff conducted an equipment count and informed Markam that one of the surgical needles was unaccounted for. After additional examination, the needle was located in the middle of Syzdel’s right breast. The needle was then removed.

Syzdel filed a complaint in state court alleging that Markam committed medical malpractice when he left the needle inside her breast and that such an act/omission constituted negligence per se under Nevada’s res ipsa loquitur statute, NRS 41A.100(1)(a). Markam filed a motion to dismiss for failure to comply with NRS 41A.071, which requires all malpractice actions to be accompanied by a medical expert’s affidavit. The trial court dismissed Syzdel’s complaint. Syzdel appealed.
Supreme Court Opinion: Reversed and remanded. The statutory requirement (NRS 41A.071) for a plaintiff to support her medical malpractice complaint with an affidavit from a qualified expert does not apply when the medical malpractice claim is based solely upon the res ipsa loquitur doctrine. It is unreasonable to require a plaintiff to expend unnecessary effort and expense to obtain an affidavit from a medical expert when expert testimony is not necessary for the plaintiff to succeed at trial.

ATTORNEY CONFLICT OF INTEREST; FORMER CLIENTS; DISQUALIFICATION


Attorney Gage represented Shustek and Del Mar in a 1999 lawsuit against several Nevada state departments. The lawsuit claimed that state personnel sexually harassed Del Mar’s female employees and sought to recover assets of Del Mar that had been “seized” by the State of Nevada as the result of Del Mar engaging in a “Ponzi scheme”. Prior to becoming the CEO of Del Mar, Shustek was the former CEO of Vestin Group.

Vestin Funds filed a lawsuit in 2002 seeking to collect on personal guarantees for an $11 million loan. Waid was one of the guarantors for the loan. In 2003, Waid hired attorney Gage as his attorney. Gage immediately served a supplemental disclosure that listed officers and employees of Vestin Funds.

Vestin Funds (affiliated with Vestin Group) filed a motion to disqualify Gage and his law firm from representing Waid. The motion was supported by an affidavit from Vestin’s in house counsel detailing Gage’s representation of “the Vestin affiliates” in the 1999 litigation. The motion further contended that Gage had obtained confidential information about Del Mar. The trial court entered an order disqualifying Gage and his firm from representing Waid in the Vestin Funds 2002 lawsuit. Gage filed a petition for writ of mandamus challenging the order disqualifying him and his firm.

SUPREME COURT OPINION: Petition denied. Under Supreme Court Rule 159, an attorney is not permitted to represent someone whose interests are materially adverse to those of a prior client if the prior representation and the current representation are substantially related. To determine whether prior and current matters are substantially related requires the court to make a factual determination concerning the scope of the former representation, evaluate whether it is reasonable to infer that the confidential information allegedly given would have been given to a lawyer representing a client in those matters, and determine whether that information is relevant to the issues raised in the prior litigation. The trial court concluded that Gage’s former representation encompassed allegations that Del Mar and its affiliates were involved in a Ponzi scheme. Consequently, it was reasonable for the court to infer that confidential and likely sensitive information was given to Gage during the prior representation. Additionally, Gage’s supplemental disclosure of witnesses itself indicated information about the Ponzi scheme, the subject of the prior representation, is relevant to the current litigation. The trial court did not abuse its discretion in disqualifying Gage and his firm.

ENFORCEABILITY OF SETTLEMENT AGREEMENTS; REQUIREMENTS; MATERIAL TERMS OF RELEASE


Anderson was driving a vehicle owned by his parents when he lost control and caused an accident. May, and three others, were passengers in Anderson’s vehicle. May died in the crash. All the parties hired counsel, including May’s parents, who hired attorney Schwartz and provided him with the authority to negotiate a settlement on their behalf. Anderson’s automobile insurer, CCIE, offered to pay the full policy limits, $300,000, to the injured parties in exchange for a general release of all claims. Schwartz wrote a letter to all parties counsel confirming that his clients, the Mays, had agreed to the settlement. However, the Mays refused to execute the release or accept payment.

The Mays then filed an action in state court against Anderson. Anderson responded asserting that the Mays claim had been released and asking the court to order specific performance of the settlement agreement. The trial court concluded that the parties had entered into a legally enforceable settlement providing for a general release of all claims and ordered judgment in accordance with the proposed settlement. The Mays appealed.

SUPREME COURT OPINION: Affirmed. As a matter of first impression, an enforceable settlement agreement cannot exist when the parties have not agreed to the essential terms of the release. The release terms constitute a material term of the settlement contract that must be agreed upon. What is considered an essential or material term of the release must be determined on a case-by-case basis. The parties to the accident agreed upon the essential terms of the release. Schwartz had the authority to negotiate on behalf of the Mays and accepted the settlement offer in writing. The fact that the Mays refused to sign the proposed release document is inconsequential to the enforcement of the documented settlement agreement.

SUMMARY JUDGMENT; “SLIGHTEST DOUBT” STANDARD REJECTED


Doe, a mentally handicapped female, was employed by Safeway as a courtesy clerk. Doe was sexually assaulted by Ronquillo-Nino, an employee of Action Cleaning, who was a cleaning subcontractor hired by
After executing the agreement, the Canforas brought a five-factor test is adopted to determine whether alternative security is warranted in Nelson's case.

**STAY OF EXECUTION PENDING APPEAL:**

**SECURITY OTHER THAN SUPERSEDEAS BOND**


Heer purchased a cabin from Nelson. Shortly thereafter, Heer discovered that a water pipe in the cabin had broken before he had purchased it. Mold tests were conducted and Heer contended the cabin was contaminated with mold. Heer sued Nelson and the court entered judgment against Nelson for $330,000 in damages, costs and prejudgment interest. The trial court granted a stay pending appeal but conditioned the stay on posting a supersedeas bond. The court refused to allow Nelson to provide security other than a bond. Nelson was unable to obtain the bond and Heer began executing on Nelson's real property and garnishing her income. Nelson filed a motion seeking that a stay pending appeal be conditioned on posting alternative security rather than a bond.

**SUPREME COURT OPINION:** Stay denied. NRCP 62(d) governing stays pending appeal generally requires the posting of a supersedeas bond to obtain a stay of execution on a judgment pending appeal. However, a trial court does have the discretion to permit security other than a bond when unusual circumstances exist. A five-factor test is adopted to determine whether unusual circumstances are present that warrant alternative security. The trial court should apply these factors to determine whether alternative security is warranted in Nelson's case.

**CLASS ACTION CERTIFICATION:**

**REQUIREMENTS; CONSTRUCTIONAL DEFECT ACTIONS**


Beazer constructed a 40 acre residential subdivision in North Las Vegas. Three homeowners, individually and as proposed class representatives, filed a complaint against Beazer alleging constructional defects in their homes. The homeowners claimed that their homes’ foundations and concrete slabs were damages by expansive soils, as well as 30 additional defects in other parts of their homes. Beazer answered the

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complaint, denying liability and asserting defenses of comparative negligence and failure to mitigate damages.

After their suit was filed, the homeowners moved for class certification pursuant to NRCP 23, asserting that the expansive soils defect issue was the predominant issue justifying class action certification. Without documenting any NRCP 23 analysis, the trial court granted class certification. After considerable discovery, Beazer filed a motion to decertify the class. The trial court denied decertification. The case proceeded to trial. The homeowners presented their case using group exhibits and summaries and extrapolated statistical inferences to project that certain defects in existence in some homes were in existence or would eventually manifest in other homes. The jury returned a verdict in the homeowners’ favor and awarded general damages in the amount of $7.8 million. Beazer appealed the denial of its motion to decertify the class.

SUPREME COURT OPINION: Reversed and remanded. The trial court erred in granting class action certification. Single family residential constructional defect cases will rarely be appropriate for class action treatment. Where specific characteristics of land parcels are concerned, uniqueness factors weigh heavily in favor of requiring independent litigation of the liability of each parcel and its owner rather than in a class action. In this case, common questions of law and fact did not predominate. The homeowners alleged that their homes were damaged by expansive soils. The homes were constructed in different phases and under different plans, the homes underlying soils required different types of preparation, the damages suffered by homes differed, and the conduct of each homeowner in relation to comparative negligence differed.

SMALL CLAIMS COURT; NO RIGHT TO JURY TRIAL


The Cheungs were injured in an automobile accident with Schlauder. Cheung retained an attorney and filed an action in small claims court seeking $5,000 for medical expenses. Schlauder filed a motion to remove the case to justice court so he could request a jury trial. The small claims court denied the motion. Further, the court found Schlauder liable for Cheung’s medical expenses and court costs. Schlauder then filed a jury demand contending he had a constitutional right to a jury trial to test the legitimacy of Cheung’s medical expenses. The justice of the peace rejected Schlauder’s contention and upheld the small claims court’s decision.

Schlauder appealed the decision to the district court, which reversed the judgment and remanded the case for a jury trial, finding that Schlauder had a constitutional right to a jury trial. Cheung filed a petition for writ of mandamus.
Although each juror was provided with a copy of the instructions, no one looked at them except for one unnamed juror. The jury was focused only on the form of special findings.

The jury instructions and form of verdict should be settled as early as possible and preferably before opening statements, even if subsequent modifications become necessary. In my experience, counsel and the court are tired and stressed at the closing phases of a trial and poor drafting leads to confusion for the jury, which could radically affect the outcome of the case. Such was my experience.

Myth #9: From the Jury’s Point of View, A Jury Instruction Is Superior In Importance to the Form of Special Finding In The Verdict.

Question #3 on the form of verdict appeared to indicate a yes vote if the answer to #2 was yes. The jury was taking that path until an unnamed juror pointed out that the form of verdict appeared to be inconsistent with the pertinent jury instruction, which quoted the applicable Government Code section. The jury was then informed that they had the right, if not the duty, to seek clarification from the judge. The clarification from the judge enabled the jury to understand that a “yes” answer to #2 did not necessarily require a yes answer to #3. Correction of this error was pivotal to the ultimate verdict.

Myth #10: If There Are Significant Gaps in the Evidence, the Jury Will Figure It Out and Do The Right Thing.

Don’t bet the farm on this one. After the jury rendered its verdict, the court apologetically volunteered that there were significant gaps in the evidence. This was the most frustrating aspect of this case for all jurors. Essential testimony and documentation apparently existed, but were not offered. Many jurors were upset with the party who had control of the witnesses and documentation. This confusion nearly caused the jury to reverse the burden of proof until one of the jurors, unnamed of course, clarified who had the burden of proof. The evidence gap was particularly distressing for me since I had become accustomed in bench trials and arbitrations to ask questions and require necessary testimony and documentation to clarify evidence and preclude “hiding of the ball.”

Myth #11: A Jury That Appears Light-hearted During Deliberations and When Returning to Render the Verdict Is Good For the Plaintiff.

This is not necessarily so, as substantiated by this case and by my experience as a judge over the years. Therefore, don’t rush to settle the case because you think there will be an adverse verdict. I once experienced a situation where the jury returned to ask for instruction on damages. The case promptly settled. It was later discovered that the jury was unable to reach a verdict on liability and decided to discuss damages.

Myth #12: After the Verdict Is Rendered and the Judge Dismisses the Jury, the Jurors Want to Go Home or Back to Work (More Likely Home) and Do Not Want to Talk to the Attorneys.

This is not necessarily so. Despite the fact that jurors may be anxious to be on their way, many may be interested in discussing the verdict with counsel. Don’t miss out on this opportunity! Although the verdict was in favor of opposing counsel, the jurors wanted to talk with losing counsel. This attorney was upset with the verdict, and instead of listening and acquiring important information, his gruffness caused the jurors to discuss the case with prevailing counsel’s associate instead. I could not stay, so I gave both counsel my telephone number and invited them to call. I never heard from either counsel (speaking of missed opportunities).

Be careful how you direct the conversation with discharged jurors. What the attorneys are told is often shy of what really occurred. This may be so because you are talking only to one or two jurors having a minority view or it may be that they only want to say what they think you want to hear, especially if you did not prevail. My suggestion is that you talk to jurors in groups as large as possible and ask general questions so that the jurors will talk openly. Only after that should you consider narrowing your questions to elicit short responses.

A FINAL CONCLUSION which is probably apparent by now: It is not a good idea to have an experienced judge on your jury unless you want strict adherence to the evidence and law, as ruled upon and otherwise determined by the trial judge.

The Honorable James R. Trembath practiced civil law for twenty-five years before being appointed to the Contra Costa Superior Court in 1990. In 1995, he was honored as the Trial Judge of the Year by the Alameda-Contra Costa Trial Lawyers Association. Since his retirement from the bench in 2003, Judge Trembath has been serving as a private judge performing arbitrations, mediations and other related services through ADR Services, Inc. in San Francisco.
“Have you ever served in the military?” This is a question that most defense attorneys ask when deposing adult plaintiffs in personal injury lawsuits. If the deponent responds in the affirmative, obtaining the plaintiff’s military records could provide a wealth of information regarding their medical history.

During the course of litigation, plaintiffs’ medical, employment, and educational records are relatively simple and straightforward to obtain. However, a plaintiff’s military records require a little more work to get hold of. The purpose of this article is to give a quick overview of the process for obtaining military records.

Generally, a veteran’s complete military service record is available to the veteran or, if deceased, to his/her next of kin. Next of kin include the widow or widower, son or daughter, father or mother, or brother or sister of the veteran. Veterans and next of kin may request records using the National Archives and Records Administration web site at www.vetrecs.archives.gov, or through a “Standard Form 180-Request Pertaining to Military Records” ("SF 180"). The SF 180 and its associated Instruction and Information Sheet (3 pages in total) are available from many on-line sources including www.military.com and www.archives.gov.

All other requests for military records should be submitted on an SF 180 or, if unavailable, through a written request. To ensure proper processing, at minimum a written request should include the following information about the veteran:

1) Complete name used while in service;
2) Service number or Social Security Number;
3) Branch of service;
4) Dates of service; and
5) Date and place of birth.

If the request pertains to a record that may have been destroyed in the 1973 fire at the National Personnel Record Center, the following information about the veteran should also be included, if possible:

1) Place of discharge;
2) Last unit of assignment; and
3) Place of entry into service.

The above information can usually be obtained through deposition or interrogatories.

For reasons of privacy, not all portions of a veteran’s service record are available to the general public. However, an authorized third party requester such as an attorney, medical professional or historian may request a veteran’s complete military service record as long as a signed and dated authorization from the veteran, or if deceased, from their next of kin is also submitted. In order to be valid, the
authorization must specify the person authorizing the release (i.e.; the veteran or the next of kin). The authorizations are valid for one year from the date of signature. Section III of the SF 180 provides an area for proper authorization. If a written request is utilized, an authorization must be included with the request.

If an SF 180 is utilized for the request, the completed form should be mailed to the appropriate custodian of records for the proper branch of the military. A complete list of addresses for the relevant custodians of records is included on the second page of the SF 180.

Written requests should be mailed or faxed to:

National Personnel Records Center
Military Personnel Records
9700 Page Avenue
St. Louis, MO 63132-5100
Fax number: (314) 801-9195

Most services provided to veterans and their next of kin are provided free of charge, however, nominal fees may apply for all others. Most of the time service fees cannot be determined in advance, however, requesting parties will be notified about any applicable fees as soon as a determination as to fees is made. The processing time for record requests vary greatly depending on the nature of the request. However, the average turn-around time is approximately 12 weeks.

Hopefully, this article was able to shed some light on the proper means for obtaining military records or at least provide the reader with some direction on how to do so. For more detailed information about obtaining military records, please refer to the following sources used for this article: www.military.com and/or the National Archives and Records Administration’s web site at www.archives.gov.

Mei-Mei Cheng is an associate of Waters, McCluskey & Boehle.

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We reserve the right to edit letters chosen for publication.
HEALTHCARE LAW COMMITTEE

Michael R. Mordaunt, Chair

The Healthcare Law Subcommittee met at the Annual Meeting with twenty members in attendance. The goals for this year were discussed and plans were approved. The Healthcare Law Committee will be putting on two brown bag luncheon events this year, one likely in the East Bay and the other likely in either San Francisco or the South Bay. One of the topics will be the representation of physicians before the Medical Board. We would like suggestions for other topics of interest for brown bag presentations.

The other major goal for the Healthcare Law Committee is to establish some means of easy communication between Committee members. We are working on setting up a listserv so members of the Healthcare Law Committee can communicate on matters of common interest and share information regarding experts, plaintiffs’ attorneys, etc. Please feel free to e-mail me with your ideas and suggestions at mmordaunt@riggiolaw.com.

TOXIC TORTS COMMITTEE

Christopher Wood, Chair

On February 3, 2006, the Toxic Tort Committee hosted a seminar entitled “California Silica Litigation 2006: For the Defense” at the St. Francis Hotel in San Francisco. The seminar was geared for those active in silica litigation in Northern California as well as those who were interested in learning about that litigation.

Speakers included Dr. James Rasmuson, who gave a presentation he delivered at the DRI Silica seminar in Atlanta, and Patrick Hessel, Ph.D., an epidemiologist from Illinois with recognized research and publications on silica and occupational pneumoconiosis diseases. Dr. Hessel is also well known for his epidemiological study of asbestos friction materials and the proof that they do not cause mesothelioma. Another speaker, Gary L. Zagelbaum, M.D., Associate Clinical Professor of Medicine, UCLA School of Medicine, spoke on the topic: “A Practical Approach to Addressing Clinical Aspects of Silica-related Disorders Including Imaging and Lung Function Abnormalities.” The program was well-attended and well-received.

For more information about other activities of the Toxic Tort Committee, please write to cwood@mckennalong.com.

TRANSPORTATION COMMITTEE

Brian Powers, Chair

The Transportation Law Committee gathered during the Annual Meeting to discuss plans for 2006. No final plans have been made, but under discussion are the possibility of a repeat of Rick Robertson’s biomechanical seminar (this time in Sacramento), a brown bag seminar focusing on trucking issues, and a seminar that will feature forensic anatomy and accident reconstruction issues. Your ideas and comments are welcome at JBP@PowersMiller.com.
INSURANCE LAW COMMITTEE

Dan Crawford, Chair

The Insurance Law Committee plans to provide stand-alone brown bag programs, content for the Annual Meeting and support to full-day programs presented by other committees. The steering committee is formulating a proposal for a break-out topic at the Annual Meeting on the basics of insurance coverage for the defense practitioner, including conflicts and Cumis issues. We are also planning a brown bag seminar on topical insurance issues and the formation of a panel to support the agenda at the construction law conference. We invite your input and suggestions at dcrawford@professionals-law.com.

CONSTRUCTION LITIGATION COMMITTEE

Don Sullivan, Chair

The Construction Litigation Committee’s meeting at the ADC Annual Meeting in December was a huge success. There was a robust discussion and our goals for the year were defined. Among other things, we plan to collaborate with another substantive law committee, probably insurance coverage, to develop the best-yet seminar for construction litigators and their clients. Look for an announcement this Spring about the Summer 2006 construction litigation conference.

Our sources in the Capitol tell us that construction defects litigation is still in the Legislature’s sights, but the discourse is not yet as heated as it was last year. You may access up-to-the-minute information about this online at the Legislature’s official website www.leginfo.ca.gov, or contact your committee chair, Don Sullivan at dsullivan@clappmoroney.com, or co-chair, Melissa Aliotti at maliotti@readaliotti.com. This committee is here to serve you, and we’ll be happy to take your questions and comments to the right people.

PUBLIC ENTITY LAW COMMITTEE

Martin Ambacher, Chair

The Public Entity Law Committee is planning several brown bag lunch seminars to discuss an interesting police excessive force case and general immunities. The Committee will be sending out periodic reviews of important or interesting cases. The Committee held its first meeting at the Annual Meeting, which was modestly attended and we are recruiting new members and more active involvement. ADC Members with an interest in public entity law are encouraged to contact Martin Ambacher at martin.ambacher@mcnamaralaw.com.
We recognize and salute the efforts of our members in the arena of litigation—win, lose, or draw.

Compiled by Andrew R. Weiss

Kevin E. Gilbert (Bradley, Curley, Asiano, Barrabee & Crawford, Larkspur) and Mark A. Jones (Jones and Dyer, Sacramento) teamed up to obtain a defense verdict in Napa County in a case where a county employee accused their clients of inappropriate touching and sexual harassment.

Mark F. Hazelwood and Linda S. Meyer (both of Low, Ball & Lynch, San Francisco) obtained a defense verdict for their client, San Francisco Bay Area Rapid Transit District, in Alameda County in a wrongful death claim where the heirs claimed the defendant was negligent for not preventing the decedent, an 86 year-old woman, from walking onto the tracks where she was struck and killed by a BART train.

A Santa Clara County jury gave a defense verdict in October to Salvatore Sunseri (Stenberg, Sunseri, Roe, Pickard & Rudy, San Jose) in a rear-end collision auto case.

An Alameda County jury awarded $4.48 million to three plaintiffs injured when their SUV was struck by a big rig on a freeway in Pleasanton. One of the defense attorneys was J. Lucian Dodson, III (McNamara, Dodge, Ney, Beatty, Slattery, Pfalzer & Borges, Walnut Creek).

David A. McDowell (Law Offices of David A. McDowell, Walnut Creek) persuaded an Alameda County jury that the truck that struck the car of an elderly woman, causing her to drive through a store window seriously injuring the woman and her husband, did not belong to his client.

In Sonoma County, a jury recently gave a defense verdict to Peter Linn (Murphy, Pearson, Bradley & Feeney, San Francisco) in a case where a tree trimmer was struck in the head by a falling truck-mounted crane.

Constance F. Morrison (Yaron & Associates, San Francisco) was part of the defense team representing the driver of a flat bed truck that was carrying steel beams that extended 20 feet past the rear end of the trailer. Plaintiffs were injured when, as the defendant stopped while making a left turn, they had to swerve to avoid the protruding beams. The jury awarded plaintiffs the sum of $336,227.00.

In Placer County, R. James Miller (Powers & Miller, Sacramento) obtained a defense verdict in a case where the plaintiff bicyclist, who was traveling through an intersection against the flow of traffic, was injured when he slammed into the side of a turning car driven by Miller’s client.

In another Placer County case, a jury awarded plaintiff $2,950 in a case of admitted liability where defendant, who was in the left of two left turn lanes, drove straight ahead striking plaintiff’s car, which was in the left turn lane immediately to defendant’s right. Plaintiff asked the jury to award damages exceeding $200,000. The case was defended by Jeremy M. Jessup (Matheny, Sears, Linkert & Long, Sacramento).

A San Francisco County jury gave plaintiff $25,735 for injuries suffered in a slip-and-fall accident in the kitchen of a church-operated shelter, even though he asked the jury to award him far more in general and special damages. The case was defended by Dwight B. Bishop (Law Offices of Dwight B. Bishop, Walnut Creek).

Raymond J. Fullerton (Geary, Shea, O’Donnell & Gratten, Santa Rosa) got mixed results from a jury in Soloma County which had to decide a breach of contract, fraud, breach of covenant good faith and fair dealing, and negligent misrepresentation claim arising out of a vineyard construction project.

A jury in San Francisco County awarded multiple plaintiffs $27,386,567 against the City and County of San Francisco, defended in part by Karen E. Kirby (City Attorney’s Office, San Francisco). The accident occurred when two 4-year-olds were walking home from pre-school...
accompanied by one girl’s mother and the other girl’s grandmother. A Muni Railway utility truck that had just collided with a sedan jumped the sidewalk, pinning one of the young girls to a pizza parlor storefront, killing her. The other girl was bruised when her grandmother pushed her out of harm’s way. The grandmother fractured her femur in the incident.

In Alameda County, Ann S. Kaplan (Buresh, Kaplan, Jang & Feller, Berkeley) obtained a defense verdict for her client against a woman who tripped on a raised crack on a sidewalk in Oakland.

D. Marc Lyde (Leonard & Lyde, Chico) obtained a defense verdict in Shasta County in a medical malpractice case wherein it was alleged that a physician’s failure to biopsy a growth on the cheek of a 58 year-old man resulted in a delay in diagnosis of melanoma and a worse prognosis.

Charles D. Cochran (Hinton, Cochran and Borba, Santa Rosa) obtained a $1.3 million verdict in Sonoma County on behalf of his client, a drywall contractor, in a defamation claim against a labor union. The verdict included a large award of punitive damages.

John S. Krug (Winters, Krug & Herman, Burlingame) successfully defended a claim in San Francisco County filed on behalf of a 48 year-old landscaper injured when a hand-held nylon string grass trimmer recoiled causing a serious injury to his left hand.

In Contra Costa County, G. Patrick Galloway (Galloway, Lucchese, Everson & Picchi, Walnut Creek) obtained a defense verdict on behalf of his medical clients who performed a pelvic reconstruction surgery on plaintiff, a 51 year-old woman suffering from a vaginal prolapse. Post-operatively she claimed that her anatomy was grossly distorted and infected.

J. Randall Andrada (Andrada & Associates, Oakland) obtained a defense verdict in Alameda County in a case where plaintiff, a 54 year old woman, slipped and fell on a wet carpet mat while entering Highland Hospital in Oakland on a rainy day.

Eugene Brown, Jr. and Ameen A. Mikacich (both of Filice, Brown, Eassa & McLeod, Oakland) successfully defended a claim in San Mateo County brought by the heirs of a 16 year-old male pedestrian who was struck and killed by a train at a grade-level railroad crossing. Plaintiffs claimed the crossing was unkempt and dangerous, with potholes that entrapped the teen’s foot as he attempted to cross. The defense argued that the teen failed to use due care and ignored the bells, lights and lowered gates that warned of the rapidly on-coming train.

In another case from San Mateo County, Jonathan L. Lee (Robinson & Wood, Inc., San Jose) obtained a defense verdict in a car-versus-motorcycle accident occurring in the Burlingame Hills. The motorcycle rider blamed the defendant driver for hitting him; the jury disagreed.

In yet another case from San Mateo County, the heirs of a 75 year-old woman, who was struck and killed while walking in a crosswalk, recovered a $375,000 verdict. The driver, represented by Lee J. Danforth (Coddington, Hicks & Danforth, Redwood City), did not know she had struck the pedestrian and dragged her body about 57 feet before stopping. Liability was admitted. The pre-trial demand was $1.5 million dollars and plaintiffs rejected a $1 million offer before trial.

Frank P. Kelly, III (Shook, Hardy & Brown, San Francisco) and his co-counsel recently obtained a defense verdict for Ford Motor Company in a products liability and negligence claim in the San Bernardino County Superior Court. The lawsuit arose from a rollover accident that occurred in 2000 involving a 1985 Ford LTD, with the plaintiff in the passenger seat. Plaintiff was rendered an incomplete quadriplegic.

In Fresno County, Anthony N. DeMaria (McCormick, Barstow, Sheppard, Wayte & Carruth, Fresno) successfully defended a claim brought by a 45 year-old woman who claimed a doorway “threshold ramp” (a ramp designed to allow a wheelchair

Continued on page 25
to roll smoothly over a door threshold) shifted as she walked on it, causing her to fall and sustain injuries.

In a 35 day jury trial in Alameda County, Keith Patrick Reyen (Oium, Reyen & Pryor, San Francisco) obtained a defense verdict for his client in a case where plaintiffs claimed that asbestos in dental tape caused their decedent to contract and die from mesothelioma.

Bradley P. Larson (Greve, Clifford, Wengel & Paras, Sacramento) successfully defended a claim in Sacramento County brought against a roofing contractor by the owner of a weekend home who claimed that a newly-installed leaking roof was the cause of mold in the structure.

In a breach of warranty case in Santa Clara County where plaintiffs made a pretrial settlement demand of $100,000, David M. McLaughlin (Ropers, Majeski, Kohn & Bentley, Redwood City) was able to keep plaintiff’s damages down to a mere $3,002. Because plaintiffs’ verdict was less than defendant’s pretrial offer of $14,502, plaintiffs were ordered to pay defendant’s attorney’s fees of $59,467 and court costs of $20,000.

Steven Werth (Low, Ball & Lynch, San Francisco) recently obtained two defense verdicts. The first, in federal court, involved an alleged dangerous condition/product defect (a generator fan) that amputated a couple of plaintiff’s fingers. The second, in Alameda County, involved a plaintiff who was hurt when a large metal grate fell on him as he was offloading a truck.

G. Patrick Galloway (Galloway, Lucchese, Eversion & Picchi, Walnut Creek) successfully defended a shoulder dystocia medical malpractice case in Fresno County. The baby weighed 10 lbs., 15 oz. at birth and suffered a permanent brachial plexus injury.

In Kern County, Robert D. Harding (Clifford & Brown, Bakersfield) obtained a defense verdict in a wrongful death medical malpractice case on behalf of his hospital client. Plaintiffs claimed that delays in treating their decedent’s gunshot wound to the chest caused his death, but the jury held otherwise.

In Marin County, a jury awarded a 15 year-old girl $337,000 for injuries she suffered in two incidents. In the first, she was hurt at school when she hit the post of a basketball hoop that was not padded. She was then injured a second time when she fell off of a medical examination table while being treated for her injuries from the first incident. The jury found the school 60 percent at fault and the medical provider 40 percent at fault. Thomas Packer (Gordon and Rees, San Francisco) represented one of the defendants.

Mark Bonino (Ropers, Majeski, Kohn and Bentley, San Jose) represented an insurer who was found liable in Santa Clara County for bad faith and fraud and ordered to pay a homeowner $1.66 million, of which $1.5 million was punitive damages. The homeowner’s home was damaged and she was instructed by the insurer to use a specific contractor to make the repairs. When the contractor made off with the first payment of $63,000, the insurer refused to make good on that amount and then denied coverage for the rest of the claim.

A San Francisco jury found for the defense in a stipulated liability case where the plaintiff claimed permanent injuries resulting from a very mild side-swipe incident. After a 4 day trial, the jury took only 9 minutes to make its decision. Daniel W. Winters (Winters, Krug & Delbon, Burlingame) was lead defense counsel.

Been in trial lately? Let us know. Send a brief synopsis to arw@bmj-law.com.
The ADC notes the accomplishments of some of its members:

Reno attorney William G. Cobb (Erickson, Thorpe & Swainston, Ltd.) published an article in the Defense Counsel Journal, the law review of the International Association of Defense Counsel (IADC), entitled “Defending the Informed Consent Case.” The article addresses issues facing attorneys defending health care providers in malpractice actions, including an analysis of the materiality of the risk the proposed health care may present, requirements of expert testimony, causation and other legal and factual issues. Cobb is a member of the IADC, Trial Attorneys of America and the Thompson Chapter of the American Inns of Court (President, 1996-97) He is a former member of the ADC Board (1983-87).

The Sacramento Valley Chapter of ABOTA is proud to have among its newest admittees ADC members Richard P. Bertolino (Sacino, Bertolino, Hallissy & Raley, Sacramento), D. Marc Lyde (Leonard & Lyde, Chico), Timothy J. Nisson (Nisson, Pincin, Sinclair, Hill & Perrin, Redding), Jesse M. Rivera (Moreno and Rivera, Sacramento) and Gary Vinson (Greve, Clifford, Wengel & Paras, Sacramento).

The San Joaquin Valley Chapter of ABOTA is pleased to announce that ADC member Benjamin L. Ratliff (Weakley, Ratliff, Arendt & McGuire, Fresno) was recently accepted as a member.

The Association of Defense Trial Attorneys, a national organization of civil trial defense attorneys, recently accepted for membership the following ADC members. The ADTA recognizes two categories of membership, prime members which are limited to no more than one per each one million residents of a city, town or municipality, and associate members who work in the prime member’s firm. Ann Asiano (Prime Member), Daniel J. Crawford (Associate Member) and Eric Gale (Associate Member) of Bradlev, Curley, Asiano, Barrabee & Crawford, Larkspur; Michael G. Descalso (Prime Member) of Green, Chauvel, Descalso & Minoletti, San Mateo; Clayton Hall (Prime Member) Hall, Heatt & Connelly, San Luis Obispo; Christopher J. Beeman (Prime Member) Clapp, Moroney, Bellagamba & Vucinich, Pleasanton; John E. Riddle (Prime Member) LaMore, Brazier, Riddle & Giampaoli of San Jose; Douglas A. Sears (Prime Member) Matheny, Sears, Linkert & Long, Sacramento; George S. Arata (Prime Member) Curtis & Arata, Modesto; and Andrew R. Weiss (Prime Member) Baker, Manock & Jensen, Fresno.
that is not being addressed, Sarah is the point person to contact (sburke@drathlaw.com). Ably assisting her is Jim Sinunu of Adams, Nye, Sinunu, Bruni & Becht (San Francisco) and a former chair of the ADC’s Toxic Torts sub-law committee, one of the most active over the past five years. Jim can be reached at jsinunu@ansbb.com.

Last but not least is Patrick Beasley, who is serving his third year on the Board. A partner with Maire & Beasley in Redding, Patrick is in his “rookie” year as the ADC’s liaison to California Defense Counsel (CDC). As you hopefully know, CDC is the lobbying organization that supports the ADC and our Southern California colleagues. Briefly, CDC proposes legislation and rule changes (such as the “fast track” changes several years ago), monitors proposed legislation introduced by others and sometimes meets face to face with legislators to give opinions and testify about legislation. CDC has become recognized as a “voice of reason” in Sacramento amidst the increasing polarized atmosphere there. CDC also submits comments to the Judicial Council about proposed rule changes and jury instructions. As I explained at the Annual Meeting, CDC was instrumental last year in providing the “defense perspective” to some rather draconian rule changes involving written discovery objections.

If you do not know Patrick, I venture to say you will in the next few months, because he will be knocking on your door, literally, asking that you or your firm make a financial commitment to continue to fund CDC in this election year. California’s former treasurer, Jess Unruh, was indeed prophetic when he intoned many years ago that: “Money is the mother’s milk of politics.” CDC spends your contributions judiciously and with an eye toward cultivating relationships with candidates who do, or hopefully will, play some prominent role in the legislation affecting our members. (Translation: We don’t spend the money on the agriculture committee.) So, you will hear from Patrick, and when you are asked to contribute, consider it an investment in protecting your practice of law.

In closing, remember: Always pick your battles, and win the ones you pick!

Best regards,

Peter Glaessner
(pog@llcllp.com)
I have come to the realization that as a defense civil litigation attorney I primarily practice facts, not law.

Sure, occasionally summary judgment motions or motions in limine present complex and interesting legal issues, but in the trenches of trial the law is usually static and watered down into standard form jury instructions—which are even then beyond the grasp of some jurors. It’s the facts that make cases different, interesting, and sometimes even fun.

I guess I should have known this in law school. The concept of proximate cause was pretty dull. It was the Rube Goldberg-like string of unlikely facts that made the Palsgraf case interesting and enjoyable reading.

(Alright. I know all you legal scholars who do practice law will quickly point out that a few years ago the California Supreme Court, in an earth-shattering decision, rejected proximate cause in favor of substantial factor. This decision obviously altered forever the way we practice tort law, thus contradicting my earlier suggestion that the law is static. But I digress.)

Early in my career, in a routine case involving an older, blue-collar type gentleman who had sustained a fall and wrist fracture, I realized facts can convert a simple case into something much more memorable and fun. In deposition, after eliciting that the injury had allegedly interfered with his favorite participant sport (bowling), I pressed for details of any other activity he claimed was hindered. I was expecting maybe difficulty in popping open the beer can.

However, in more detail than I really wanted to hear, he told me how the injury to his wrist made it difficult for him to perform a basic personal hygiene task while in the bathroom. I admit I did not follow up on the issue of possible ambidexterity.

More sophisticated and polished witnesses can provide their moments, too. In one of my partner’s cases, the plaintiff’s counsel (for some reason still unknown) was taking the deposition of his own client’s treating doctor. After suffering through some truly horrid questioning, the doctor listened to one question and said, “In thirty years of being deposed, that is absolutely the dumbest question I have ever been asked.”

A couple of questions later, the doctor responded to another mangled attempt with, “I take back what I said a couple minutes ago. This is absolutely the dumbest question I have ever been asked.”

In one of my cases, a chiropractor, apparently intent on assisting either his patient or collection of his own bill, testified the plaintiff’s pre-accident condition had completely resolved a couple of weeks before a minor auto accident, and then plaintiff sustained a new injury necessitating an entirely new type of treatment after the accident. I guess he didn’t think I read his records.

At trial, I first got to show him a poster-sized enlargement of his records, which stated two weeks before the accident: “Treatment discontinued. Health insurance benefit limits for chiropractic exhausted.” Next, Exhibits B and C were posters of numerous pre-accident and post-accident mirror-image treatment notes.

Barry Bonds makes a lot more money than I do, but he has to wait until eight other guys bat before he gets to hit back-to-back homers.

Unfortunately, sometimes the good facts don’t make it to trial—probably due to my inability to practice law. In a deposition concerning a male high school student who sustained a minor, non-displaced hairline ankle fracture in an auto accident, the plaintiff and treating orthopedist got into a shouting match.

Frustrated that the doctor would not testify the plaintiff was likely to develop post-traumatic arthritis in the future, the plaintiff’s attorney screamed, “I don’t know how you can testify he won’t develop arthritis in the future.” (I was so fascinated by the exchange that I missed an opportunity to practice law, failing to object to the form of the question.) “Then maybe you should go to medical school,” the doctor retorted to plaintiff’s counsel.

Although I could not figure out how to get that to the jury, the plaintiff in the same case had participated in the high school powder-puff football activities about six months after the accident. A friend of my client had video of the young man attired in a wig, skirt, and cheerleader sweater (complete with upper anatomy enhanced by a couple wads of cellulose material), jumping and doing intricate, ankle-straining dance steps.

The video—and the jury’s reaction to it—were the highlights of the trial.

Unfortunately, depending on good facts to keep the practice of law interesting has its down sides, too. I was bitterly disappointed and very jealous recently when a public entity client assigned a personal injury case to my female partner, instead of entrusting the case to me.

The plaintiff claimed a park restroom toilet seat shifted, causing an injury to a very private part of his anatomy. The potential for great discovery was almost limitless. I obtained some solace in the fact that my partner took full advantage of the opportunity, and (although not to be sexist), as a woman defense attorney with the proper attitude, she probably enjoyed it even more.

Although I rarely sympathize with plaintiffs’ attorneys, I now understand how one must feel upon learning a multi-million dollar case has walked into the office down the street.

Lights out.
46th ADCNCN Annual Meeting, December 1-2, 2005

Congratulations ADC Award Recipients:

ADC President’s Award
This award, presented each year at the Annual Meeting Luncheon, acknowledges an individual who has provided exemplary service to the association, the profession, and the civil justice system. Congratulations to ADC Member, Paul A. Brisso, the 2005 recipient of the President’s Award.

Nathan Holt Memorial “Friend of the ADC” Award
This award was established in 1999 to honor the memory of Nathan Holt, a claims representative with the California State Automobile Association, who was a longtime, ardent supporter of the ADC and its ideals. The award is presented at the ADC Annual Meeting Luncheon to acknowledge a non-member who has contributed significantly to the relationship between defense counsel and their clients and who has also helped to further the goals of the Association of Defense Counsel of Northern California and Nevada. Congratulations to Patrick A. Long, a member of the Southern California Defense Counsel and President Elect of DRI as the 2005 recipient of the Nathan Holt Award.
Since October 2005, 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.

Welcome, new members

Steven S. Abern
Haapala, Altura, Thompson & Abern, LLP, Oakland

Christopher Arras
Bradley Curley Asiano Barrabee & Crawford, Larkspur

Danielle A. Arteaga
Archer Norris, Walnut Creek

David Balch
Kennedy, Archer & Harray, Monterey

Jason S. Barnas
Schuering, Zimmerman & Scully, Sacramento

Elizabeth H. Baum
Howard Rome Martin & Ridley LLP, Redwood City

Jeffrey I. Bedell
Kennedy, Archer & Harray, Monterey

Rick Bradley
Bradley Curley Asiano Barrabee & Crawford, Larkspur

I. Hooshie Broomand
Gordon & Rees, Sacramento

Ronald S. Bushner
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, San Francisco

Shane Cahill
Mccormick, Barstow, Sheppard, Wayte & Carruth, Fresno

Alex P. Catalona
Morgenstein & Jubleirer LLP, San Francisco

Gary Chang
Connor & Bishop, San Francisco

Timothy C. Connor
Roger, Scott & Helmer, Redwood City

Theodore T. Cordery
Imai, Tadlock, Keeney & Cordery, San Francisco

Paul Cotter
Diepenbrock & Cotter, Sacramento

Dana B. Denno
McCormick, Barstow, Sheppard, Wayte & Carruth, Fresno

Michael Doko
Robinson & Wood, Inc., San Jose

Megan K. Dorsey
Koeller, Nebeker, Carlson & Haluc, LLP, Las Vegas

R. James Eliassen
Lombardi, Loper & Conant, LLP, Oakland

Melissa L. Exline
Perry & Spann, Reno

Michael L. Fox
Sedgwick, Detert, Moran & Arnold, San Francisco

Robin Gonzalez
Ropers, Majeski, Kohn & Bentley, Redwood City

Patricia J. Haley
McCormick, Barstow, Sheppard, Wayte & Carruth, Fresno

Monica Hans
LaPlante and Spinelli, Sacramento

Christine Hawkins
Filice, Brown, Eassa & McLeod, LLP, Larkspur

Ellen Hung
Lauria, Tokunaga, Gates and Linn, LLP, Sacramento

Todd Ison
USAA, Sacramento

Kris J. Jacobsen
Archer Norris, Walnut Creek

Michael Karatov
Connor & Bishop, San Francisco

Keith D. Kaufman
Robinson & Wood, Inc., San Jose

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Hancock Rothert & Bunshoft LLP, Las Vegas

Neal C. Lutterman
Riggio, Mordaunt & Kelly, Stockton

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Jennifer McKee
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David Miller
Morton, Lulofs & Wood, Pleasanton

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Sack, Miller & Rosendin, Oakland

Jeffrey G. Nevin
Freitas, McCarthy, McMahon & Keating, San Rafael

AiMinh T. Nguyen
Filice, Brown, Eassa & McLeod, LLP, Oakland

Lisa Pan
Safeco Insurance Company, Pleasant Hill

Aana L. Pregliasco
Williams, Pinelli & Cullen, San Jose

Jonathan Rodriguez
Sedgwick, Detert, Moran & Arnold, San Francisco

Eric Rudolph
Jon York & Associates, Berkeley

Lori A. Sebransky
Lombardi, Loper & Conant, LLP, Oakland

Leora Simanov
Lombardi, Loper & Conant, LLP, Oakland

Kime Smith
Buty & Curliano, Oakland

Leslie A. Soley
Emerson, Corey & Barsotti, Fresno

Terry S. Sterling
Spaulding, McCullough & Tansil, Santa Rosa

James C. Suits
Robinson & Wood, Inc., San Jose

Vikranth Ari Sunderraj
Buty & Curliano, Oakland

Khaled Taqi-Eddin
Buty & Curliano, Oakland

Helena S. Teav
Robinson & Wood, Inc., San Jose

Ricky Tripp
Nelson, Rozier and Bettencourt, Visalia

Jennifer Walker-O’Sullivan
Filice, Brown, Eassa & McLeod, LLP, Oakland

Anne J. Williams
Perry & Spann, Reno

Jiyon C. Yun
Archer Norris, Walnut Creek

Do you know someone who should be an ADC member? Call the ADC offices: (916) 239-4060. We’ll send them an application and membership packet. Or visit www.adcnc.org for an on-line application.
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## 2006 Calendar of Events
### Save The Dates!

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<td>Limiting Damages and Navigating Liens</td>
<td>Holiday Inn Capitol Plaza</td>
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<td>June 23, 2006</td>
<td>Construction Law Seminar</td>
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<tr>
<td>December 7-8, 2006</td>
<td>47th Annual Meeting</td>
<td>St. Francis Hotel</td>
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