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August 19, 2014

ELECTRONICALLY FILED

Honorable Judith McConnell, Presiding Justice
and the Associate Justices
California Court of Appeal
Fourth Appellate District, Division One
Symphony Towers
750 B Street, Suite 300
San Diego, CA 92101

<p>Court of Appeal Fourth Appellate District FILED ELECTRONICALLY 08/20/2014 Kevin J. Lane, Clerk By: Alissa Galvez</p>
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Re: ***Straass, et al. v. DeSantis, et al.***
Case No. D064040
Opinion Date: July 31, 2014
Request for Publication

Dear Presiding Justice McConnell and Associate Justices:

We write on behalf of the Association of Southern California Defense Counsel (ASCDC or Association) to request publication of this court's decision filed on July 31, 2014.

ASCDC is the nation's largest and preeminent regional organization of lawyers devoted to defending civil actions, comprised of approximately 1,100 attorneys in Southern and Central California. ASCDC is actively involved in assisting courts and the trial bar in addressing legal issues of interest to its members and the public.

In addition to representation in appellate matters, the Association provides members with professional fellowship, specialized continuing legal education, representation in legislative matters, and multifaceted support, including a forum for the exchange of information and ideas focusing on the improvement of the administration of justice, trial, and litigation practice.

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Association members routinely represent professional clients (e.g., attorneys, accountants, insurance, financial services, and health care providers) in the defense of civil actions alleging a variety of tort claims. ASCDC has been actively involved for many years assisting courts in the resolution of legal issues of interest to its members and the clients they represent, including appearance as amicus curiae in numerous cases, including, *Howell v. Hamilton Meats & Provisions* (2011) 52 Cal.4th 541, *Cassel v. Superior Court* (2011) 51 Cal.4th 113, *Reid v. Google* (2010) 50 Cal.4th 512, *Kibler v. Northern Inyo County Hospital District* (2006) 39 Cal.4th 192, *Viner v. Sweet* (2003) 30 Cal.4th 1232, and *Summit Financial Holdings v. Continental Lawyers Title* (2002) 27 Cal.4th 1160.

Consequently, the Association and its constituent members have a substantial interest in publication of decisions pertinent to the standards applicable to claims of professional malpractice, including the circumstances in which expert testimony is required and the qualifications needed by persons claiming to be experts. ASCDC asserts the *Straass* decision should be certified for publication because it “[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions” and explains an existing rule of law. (Rule 8.1105(c)(2), (3).) Further, the decision “[i]nvolves a legal issue of continuing public interest.”

REASONS WHY DECISION SHOULD BE PUBLISHED

A. Expert Testimony Needed to Support Professional Negligence

The decision provides analytical guidance regarding the circumstances in which expert testimony is needed to support a plaintiff’s claim of professional negligence. The analysis includes distinguishing circumstances in which expert testimony is not required, such as this court’s example of the decision in *Day v. Rosenthal* (1985) 170 Cal.App.3d 1125, where expert testimony was not required because, among other reasons, that case “ooze[d] with attorney-client conflicts of interest, clouding and shading every transaction and depriving [the clients] of the independent legal advice to which they were entitled.” (Slip Op., p. 13.)

In deciding expert testimony was required under the circumstances of the action, this court’s decision starts its analysis explaining “[i]t would not be within a lay person’s common knowledge to consider what conduct was required” of a lawyer in assessment of the statute of limitations, particularly where the relevant statute provides for two different time limits, including one based upon the presence of

foreign objects (surgical clips) and the possibility that the client's own delay after alleged "discovery" of a basis to suspect negligence caused the statute to expire before consultation with an attorney. (Slip Op., pp. 14-15.) Further, the decision efficiently explains why expert testimony would be required to assess an attorney's alleged failure to include other causes of action, the inclusion or omission of other defendants/ respondents, whether to seek opinions from expert witnesses, the propriety and tactical considerations of a demand for settlement, and whether to accept or object to the assignment of a particular arbitrator. In reaching its decision in this case, the court distinguishes from other authorities, in which circumstances were described allowing claims of legal malpractice to proceed without supporting expert testimony. (Slip Op., pp. 13-20.)

This court's decision also applies these principles to related theories of liability, including a spouse's claim for loss of consortium, and a claim for breach of fiduciary duty. (*Id.* at 20-22.)

B. Burden Met By Showing Plaintiff's Inability to Establish Element

Moreover, this court's decision explains that summary judgment may be granted based upon a showing that a party cannot muster evidence, such as needed expert testimony, to support a claim. Notably, the decision explains how the defendant in *Straass* met his burden of persuasion to "establish that an element of the claim cannot be established" by presenting evidence to show that plaintiff's only expert witness "was unqualified or unable to offer expert legal opinion supporting the Straasses' claims" and that "this evidence was sufficient to shift the burden to the Straasses to establish [the purported experts] qualifications." (Slip Op., pp. 23, 11.) Bringing this point home, *Straass* holds: "The fact that this argument did not raise a substantive defense to the Straasses' claims (e.g., that DeSantis was not negligent) is irrelevant because DeSantis established another way in which the Straasses would be unable to establish their claims: they lacked a qualified legal expert witness." (Slip Op., p. 23.)

C. Plaintiff's Failure to Demonstrate Qualification of "Expert"

Going on, this decision gives an example of a circumstance when expert testimony was properly excluded based upon the lack of expert qualification, and the application of the rule in the context of a motion for summary judgment. (Slip Op., pp. 24-25.) Ultimately, the court's assessment of the background and qualifications of the purported expert provides needed guidance for assessments of the sufficiency of the qualifications of persons asserted to be experts, including the

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requirement of demonstrating special knowledge in the particular field of expertise involved in the case and whether the depth of study and exposure is sufficient to show qualification. (Slip Op., pp. 27-28.)

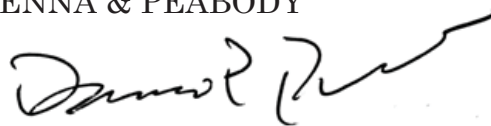
The court's opinion in this case provides crucial guidance to practitioners and the trial courts on boundary distinguishing between qualified and unqualified, opinions from purported experts. Although there are many published opinions explaining why challenges to the qualifications of experts in those cases did not justify exclusion of those experts' opinions, the *Straass* decision provides a rare appellate decision reaching the conclusion that a purported expert's lack of qualifications justified exclusion. (Compare with *People v. Jones* (2012) 54 Cal.4th 1, 57; *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 37; *Brown v. Colm* (1974) 11 Cal.3d 639, 645; *Avivi v. Centro Medico Urgente Medical Center* (2008) 159 Cal.App.4th 463, 472; *Sinaiko v. Superior Court* (2004) 122 Cal.App.4th 1133; *Jeffer, Mangels & Butler v. Glickman* (1991) 234 Cal.App.3d 1432, 1443-1444; *Jutzi v. County of Los Angeles* (1987) 196 Cal.App.3d 637, 652.)

For these reasons, the Association respectfully requests that the court publish its decision in *Straass v. DeSantis*.

Respectfully submitted,

CARROLL, KELLY, TROTTER, FRANZEN,
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By



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cc: See attached Service List

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 111 West Ocean Boulevard, 14th Floor, Long Beach, CA 90802-4646. On August 19, 2014, I served a true and correct copy of the following document(s) on the attached list of interested parties:

REQUEST FOR PUBLICATION

() **By United States Mail** (CCP §§1013a, et seq.): I enclosed said document(s) in a sealed envelope or package to each addressee. I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with the firm's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, with postage fully prepaid.

(X) **By Overnight Delivery/Express Mail** (CCP §§1013(c)(d), et seq.): I enclosed said document(s) in a sealed envelope or package provided by an overnight delivery carrier to each addressee. I placed the envelope or package, delivery fees paid for, for collection and overnight delivery at an office or at a regularly utilized drop box maintained by the express service carrier at 111 West Ocean Boulevard, Long Beach, California.

() **By Messenger Service**: I enclosed said document(s) in a sealed envelope or package to each addressee. I provided them to a professional messenger service (Signal Attorney Service) for service. An original proof of service by messenger will be filed pursuant to California Rules of Court, Rule 3.1300(c).

I declare under penalty of perjury under the laws of the State of California and of the United States that the above is true and correct. I declare that I am employed in the office of a member of the Bar of the within court at whose direction this service was made.

Executed on August 19, 2014, at Long Beach, California.



LAURIE THEOBALD

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Re: *Straass, et al. v. DeSantis, et al.*; Case No. D064040

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