ASCDC VERDICT

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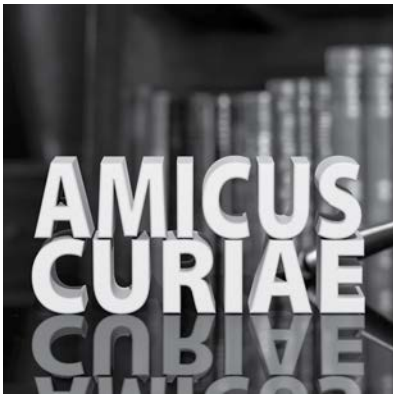

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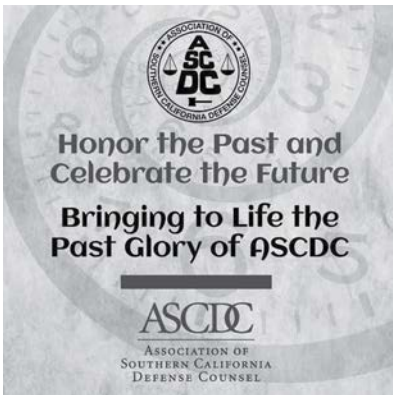

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PRESIDENT'S MESSAGE

MARTA A. ALCUMBRAC
2022 President

Court Reporter Crisis – Change is Coming

We are faced with a critical shortage of court reporters. Our membership must be prepared for changes to the statutory framework governing the reporting of court proceedings in order to adjust to the alarming decline in available reporters.

Preserving an official written record of a court proceeding is essential to the administration of justice. Deposition transcripts are used at trial as evidence of the case being presented to the trier of fact, especially if a witness becomes unavailable. In addition, without a transcript of a hearing or trial, an appeal may not be possible because when there is no record, "all presumptions in favor of the trial court's action will be made by the appellate court." (*Bennett v. McCall* (1993) 19 Cal.App.4th 122, 127.)

Having a verbatim record available to everyone has long been recognized as an access to justice issue; California Government Code section 68086 specifies that fees are waived for an official reporter at hearings and trial for those who qualified for an initial fee waiver. Further, court reporters are statutorily mandated in felony criminal and dependency and delinquency proceedings.

Despite the well-accepted need for all litigants to have a record of proceedings, the court reporter work force has declined at an astonishing rate. The alarm bells have been ringing for some time. In a 2014 report commissioned by the National Court Reporters Association (NCRA), it was announced that within 10 years, the number of court reporters – nationwide – would decrease by half. That estimate may be somewhat self-serving given the source, but it was also reported in 2019 that while over 1,110 court reporters retire annually, there are only approximately 200 new court reporters entering the profession. Other information provided by the NCRA is that young people are not entering the profession; the average age of a court reporter is 55 years old.

Court reporting schools are reportedly closing at a rapid pace, and as of March 2022 in California, only 12% of the students that enrolled in the nine remaining California court reporter schools graduated. In 2021, only 36 new court reporters were admitted in California and, in contrast, almost 4,000 attorneys passed the California Bar Exam that year. Even with competitive pay and enticing incentives to join courts throughout the state, the shortage persists.

In short, there are not enough court reporters to meet the demand. And dramatic pricing increases for appearance fees reflect the supply-side problem.

Many of you may have been asked to stipulate to the use of a "certified digital reporter." While many court reporter services are offering a "digital reporter" because reporters are not available, there are consequences. ASCDC has long supported court reporters, however, we must recognize that the persistent shortage is affecting our ability to fairly and adequately represent our clients, and we must examine new and effective electronic recording technology to capture and record proceedings. Many other jurisdictions have found electronic recording solutions to be a viable option, and there may be some subset of proceedings that are particularly suited to that option, especially in light of the latest technological advances. We intend to work with the legislature to effectuate reasonable, and ultimately necessary, statutory changes.

As this is my last President's Message, I must thank the executive committee, Ninos Saroukhanioff, Eric Schwettmann, Lisa Collinson and Diana Lytel for all the work and support given to me and ASCDC throughout my tenure. To the board members, thank you for your labors in continuing to offer excellent "best defense practice" training for our members. To the amicus committee, your extraordinary efforts in constantly evaluating appellate opinions in order to determine the best interests of our members and their clients,

Continued on page 39

CAPITOL COMMENT

MICHAEL D. BELOTE
Legislative Advocate, California Defense Counsel

Tectonic Shifts, Political Category

Following the November general elections, Monday, December 5, 2022 marked the beginning of the 2023-2024 two-year session of the California legislature. The full Assembly and Senate were sworn into office by new Chief Justice of California Patricia Guerrero. In some important ways the 2023 classes of the two houses were much like 2022. For example, domination of the elections by Democrats continued in full force in California. Whatever "red wave" may or may not have occurred nationally, in California Democrats actually increased their domination of the Assembly and Senate. In the eighty-member Assembly, the ratio of Democrats to Republicans is now 62-18, for a Democratic supermajority of 77.5%. In the 40-member state Senate, the ratio is 32-8, for an astonishing 80% supermajority.

Democratic domination of statewide constitutional offices in California continued as well. Every statewide constitutional office was won by Democrats; Republicans have not won a statewide constitutional office since Arnold Schwarzenegger in 2006. And that only occurred because Mr. Schwarzenegger initially took office after an extremely rare recall of the governor.

In other ways the political landscape in California is changing dramatically. For example, an entire generation of older Democratic officials are transitioning or have already transitioned out of office, creating opportunities for younger, ambitious politicians. Iconic figures like Jerry Brown, Barbara Boxer, Nancy Pelosi, likely Diane Feinstein, and others have or will be leaving office in the near-term, and replacements are jockeying for position. Current Congresswoman Katie Porter has already announced her candidacy for the Feinstein U.S. Senate seat, and this promises to be a very crowded field next year.

In a sort of political "trickle-down" effect, changes at the national level are certain to affect the California legislature. If a current member of Congress such as Katie Porter or Adam Schiff wins election to the Senate, many members of the California legislature are likely to run to replace them. This will contribute to an atmosphere of great change in Sacramento. When the "musical chairs" effect is combined with pandemic burnout and other factors, we are now seeing wholesale changes in the makeup of the Senate and Assembly. Thirty-one Senators and Assembly members are brand-new in 2023, and another one-third of the combined 120 seats will change in 2024. This means that by the beginning of 2025, nearly two-thirds of the California legislature will be brand-new or nearly-new.

We are also seeing leadership changes on the horizon of the two houses. In the Assembly, Speaker Anthony Rendon from Lakewood is scheduled to be succeeded in July by new "Speaker-Designee" Robert Rivas from Hollister in San Benito County. This is a major change: Mr. Rendon is the second longest-serving speaker in California history, behind only Willie Brown. His successor is the first speaker from an agricultural area in many decades.

Finally, we are seeing major changes in the California fiscal climate. Due primarily to "corrections" in the stock market, the California Legislative Analyst estimates that the state will move from a whopping $97.5 *billion* budget surplus in the current fiscal year to a deficit of at least $24-26 billion in the upcoming fiscal year. Interestingly, not a single member of the current Assembly or Senate was serving in the legislature during the Great Recession, so there is little or no institutional experience with multi-billion dollar deficits.

This destabilized environment is more than idle chatter. Big issues loom for the court system where ASCDC members practice, including remote appearances, court reporter availability, the future of informal discovery conferences, and many more. Issues loom as well for law

Continued on page 39

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— September-January

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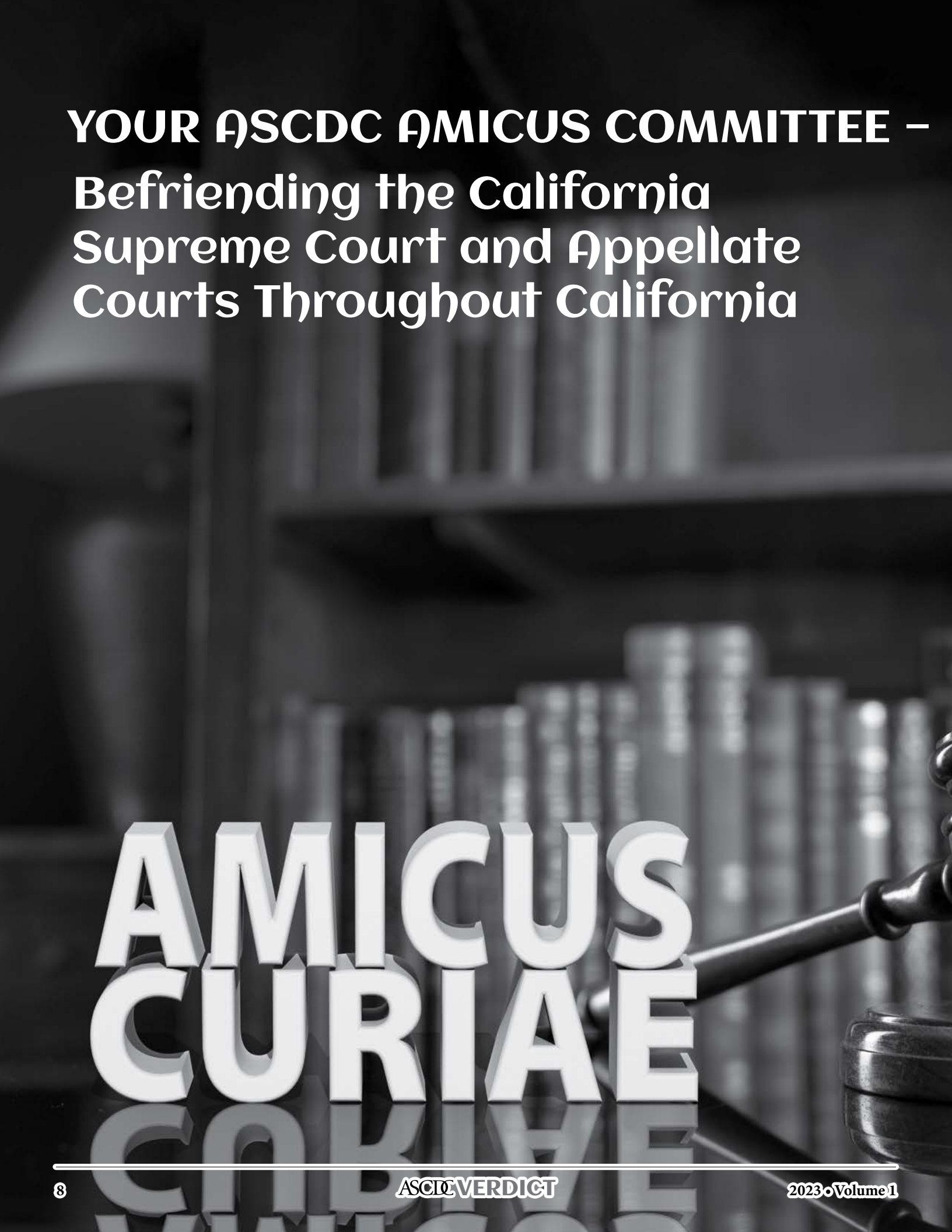
See page 34 for a spotlight on some of our Newest Members.

YOUR ASCDC AMICUS COMMITTEE – Befriending the California Supreme Court and Appellate Courts Throughout California



In this issue of *Verdict* magazine, we are highlighting just some of the briefing projects your ASCDC amicus committee has undertaken in the latter half of last year alone. The committee evaluates dozens of opinions each year, examining whether favorable unpublished decisions warrant a publication request, whether to seek decertification or support review of ill-advised published decisions, and whether to provide briefing on the merits in support of defense interests at the intermediate Court of Appeal or the California Supreme Court. Following are excerpts from a few amicus filings for your edification.

If you'd like copies of the public record amicus filings in these cases, or would like to discuss the nuances of these cases, feel free to reach out directly to the authors listed for each case.

If you received an opinion in a case you are handling that you think the committee should consider, contact co-chairs Steve Fleischman (*SFleischman@HorvitzLevy.com*) and Ted Xanders (*EXanders@GMSR.com*). Likewise, if you come across an opinion in a case you are not involved in, the amicus committee is interested to hear your views on ASCDC's potential involvement.

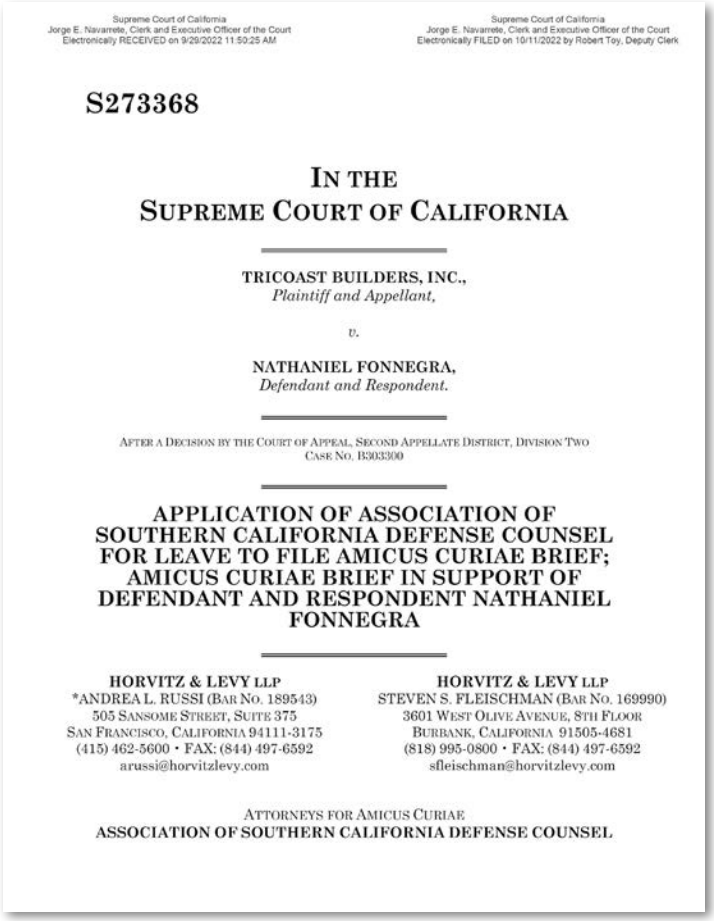
Finally, if you'd like to join the amicus committee, speak up! You need not be an appellate specialist – if you enjoy legal writing and analysis, or you have a particular interest in a practice area on which you'd like to make an impact at the appellate court level, the committee members will provide all the guidance you need.

Tricoast Builders, Inc. v. Fonnegra

In *Tricoast Builders, Inc. v. Fonnegra* (case no. S273368), the Court of Appeal affirmed a trial court decision that a party had waived its right to a jury trial and was not entitled to relief. After the California Supreme Court granted review, ASCDC submitted an amicus brief on the merits authored by Andrea Russi and Steve Fleischman.

Continued on page 10

Their brief discusses the factors that a court should consider when deciding whether to relieve a party from a waiver of a jury. The brief also discusses the approach appellate courts should take when deciding what remedy, if any, is appropriate when a trial court errs in denying relief. The parties have completed their briefing in the Supreme Court, and are awaiting the scheduling of oral argument.



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S273368

IN THE
SUPREME COURT OF CALIFORNIA

TRICOAST BUILDERS, INC.,
Plaintiff and Appellant,

v.

NATHANIEL FONNEGRA,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION TWO
CASE NO. B303300

APPLICATION OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT NATHANIEL FONNEGRA

HORVITZ & LEVY LLP
*ANDREA L. RUSSI (BAR NO. 189543)
505 SANSOME STREET, SUITE 375
SAN FRANCISCO, CALIFORNIA 94111-3175
(415) 462-5600 • FAX: (844) 497-6592
arussi@horvitzlevy.com

HORVITZ & LEVY LLP
STEVEN S. FLEISCHMAN (BAR NO. 169990)
3601 WEST OLIVE AVENUE, 8TH FLOOR
BURBANK, CALIFORNIA 91505-4681
(818) 995-0800 • FAX: (844) 497-6592
sfleischman@horvitzlevy.com

ATTORNEYS FOR AMICUS CURIAE
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

ASCDC's members recognize the need for clearly established rules governing the statutory waiver of jury trials in civil actions. Through this proposed amicus brief, ASCDC provides additional reasons to reaffirm the rule set forth in the Court of Appeal's decision in *TriCoast Builders, Inc. v. Fonnegra* (2022) 74 Cal. App.5th 239 (TriCoast). This amicus brief provides a closer look at the statutory language and legislative history of Code of Civil Procedure section 631 (section 631). It also addresses the long-standing split of authority as to whether a trial court's discretionary decision to deny relief from a statutory waiver of a jury trial constitutes a structural error requiring automatic reversal. ASCDC provides supplemental arguments supporting respondent Fonnegra and the Court of Appeal, while rebutting the arguments against them advanced by TriCoast.

Miller v. Roseville Lodge

The Third District issued its opinion in *Miller v. Roseville Lodge* (2022) 83 Cal.App.5th 825, applying the *Privette* doctrine to affirm an order granting summary judgment for the defense. The opinion was originally not designated for publication, but David Shultz at Polsinelli LLP authored a letter successfully seeking publication, which was granted on September 28.

ASCDC
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

2520 Venture Oaks Way, Suite 150 • Sacramento, CA 95833
(800) 564-6791 • (916) 239-4082 • (916) 924-7323 – Fax
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September 21, 2022

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Acting Presiding Justice Louis Mauro
Associate Justice Elena J. Duarte
Associate Justice Laurie M. Earl
California Court of Appeal
Third Appellate District
914 Capitol Mall
Sacramento, CA 95814

Re: *Miller v. Roseville Lodge No. 1293, et al.*
Court of Appeal Case No. C090751
Request for Publication
Opinion filed September 2, 2022

Dear Presiding Justice and Associate Justices:

Pursuant to California Rules of Court, rule 8.1120 (a), the Association of Southern California Defense Counsel (hereinafter "ASCDC") request that this Court publish its September 2, 2022 opinion.

As discussed below, we believe the opinion should be published because it provides guidance concerning the proper application of the *Privette* doctrine and its exceptions, and how legal presumptions should be applied when courts evaluate the parties' respective burdens on motions for summary judgment.

INTEREST OF THE ASCDC

The ASCDC is among the nation's largest and preeminent regional organization of lawyers who routinely defend civil actions. It is comprised of more than 1,100

Document received by the CA 3rd District Court of Appeal.

REASONS WHY THE OPINION SHOULD BE PUBLISHED

California Rules of Court, rule 8.1105(c) provides that an "opinion of a Court of Appeal ... *should* be certified for publication in the Official Reports" if the opinion falls within any *one* of nine categories. (Emphasis added.) Here, the Opinion satisfies several of the enumerated criteria. As discussed below, publication is warranted because it "explains, or criticizes with reasons given,

Continued on page 11

an existing rule of law;" "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions;" "[i]nvolves a legal issue of continuing public interest;" and "[m]akes a significant contribution to legal literature" by reviewing and discussing the law on important and recurring issues. (Rule 8.1105(c) (2), (3), (6) and (7).)

First, this Court provides helpful guidance on the parties' burdens when moving for summary judgment in cases involving legal presumptions such as the *Privette* doctrine. (Typed Opn. at pp. 8-9.) In this regard, the analysis on pages 8-9 of the *Miller* Opinion also creates harmony and uniformity when it discusses the "burden shifting analysis" by the Second Appellate District in *Alvarez v. Seaside Transportation Servs. LLC* (2017) 13 Cal. App.5th 635, 642, 644.) The initial burden when moving for summary judgment is often litigated and the subject of dispute when cases are argued in the trial court and appellate court. It need not be, for litigants or courts. The ASCDC believes that publishing this Court's Opinion will reduce disputes by providing appropriate guidance for all when applying legal presumptions such as the *Privette* doctrine when it is raised in motions for summary judgment. This will also serve the overall purposes of motions for summary judgment, which is "no longer called a 'disfavored remedy'" because it provides parties with an efficient manner to resolve cases short of trial. (*Bozzi v. Nordstrom, Inc.* (2010) 186 Cal.App.4th 755, 760–61.)

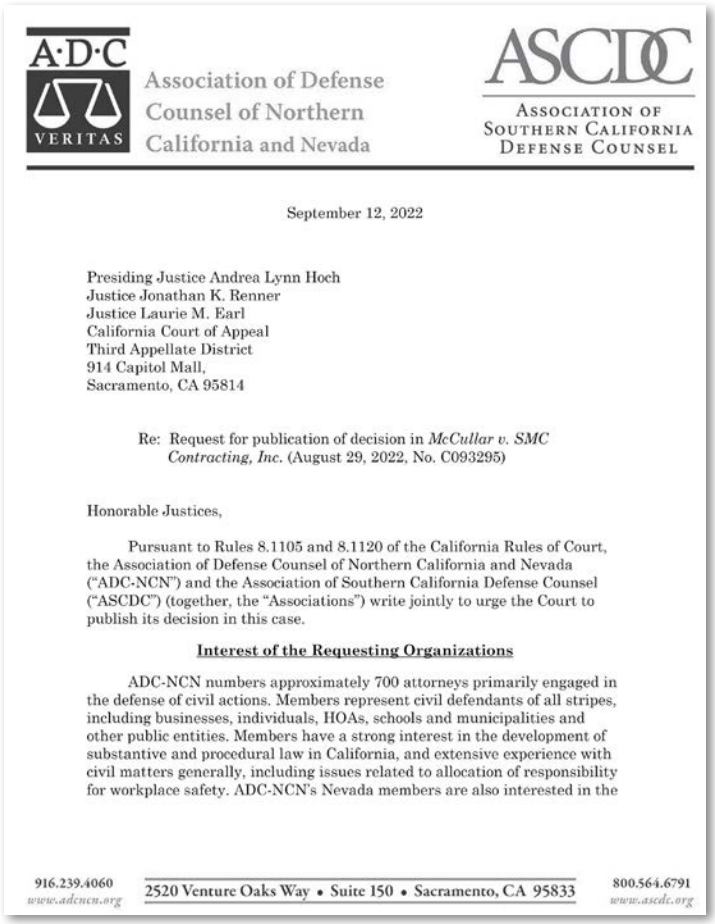
Second, this Court's Opinion provides clarity and guidance on the "two exceptions to the *Privette* doctrine referred to as *"the retained control exception"* and *"the concealed hazard exception."* (Typed Opn. at p. 8; italics in original.) The Opinion provides a clear, concise and thorough legal discussion of the governing rules for these exceptions and how they are properly applied to factual situations such as those involved in *Miller.* (Typed Opn. at pp. 9-18.) This analysis should not be lost in an unpublished opinion. Rather, it should be published so that litigants and trial courts can have the benefit of such for purposes of discovery, settlement, resolution, and motions for summary judgment.

Third, this Court's Opinion helps to clarify the law on the retained control exception when discussing that a hirer is not liable when a contractor's employee is injured from their voluntary use of the hirer's equipment. As this Court discusses, there is an important distinction "between *asking* a contractor to use your equipment and *allowing* a contractor to use your equipment." (Typed Opn. at p. 13.) The Opinion also clarifies that, when a claim is based on "merely permit[ting] a dangerous work condition or practice to exist," that is not sufficient to establish liability under the retained-control exception. (*Ibid.*) That is an oft-asserted claim, as illustrated by this case.

Fourth, this Court's discussion of *McKown v. Wal-Mart Stores, Inc.*, (2002) 27 Cal.4th 219, provides helpful guidance to explain that a claim for "furnishing unsafe equipment is simply one example of exercising retained control, rather than its own separate exception to the *Privette* doctrine." (Typed Opn. at pp. 9-11.) Parties often attempt to expand potential liability by blurring or blending legal concepts when making arguments under the retained-control exception and *McKown.* This Court's Opinion makes a significant contribution to the development of the law by providing needed clarity on this issue and the others discussed above.

McCullar v. SMC Contracting

McCullar v. SMC Contracting (2022) 83 Cal.App.5th 197, review pending, is another case affirming summary judgment under the *Privette* doctrine in an opinion that was originally unpublished. Don Willenburg at Gordon & Rees penned a successful letter seeking publication on the ground that the opinion insightfully disagrees with a badly reasoned older Court of Appeal decision (*Tverberg II*). The opinion explains that Tverberg II is inconsistent with the California Supreme Court's decision in *Gonzalez v. Mathis* (2011) 12 Cal.5th 29.



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

ASCDC Association of Southern California Defense Counsel

September 12, 2022

Presiding Justice Andrea Lynn Hoch
Justice Jonathan K. Renner
Justice Laurie M. Earl
California Court of Appeal
Third Appellate District
914 Capitol Mall,
Sacramento, CA 95814

Re: Request for publication of decision in *McCullar v. SMC Contracting, Inc.* (August 29, 2022, No. C093295)

Honorable Justices,

Pursuant to Rules 8.1105 and 8.1120 of the California Rules of Court, the Association of Defense Counsel of Northern California and Nevada ("ADC-NCN") and the Association of Southern California Defense Counsel ("ASCDC") (together, the "Associations") write jointly to urge the Court to publish its decision in this case.

Interest of the Requesting Organizations

ADC-NCN numbers approximately 700 attorneys primarily engaged in the defense of civil actions. Members represent civil defendants of all stripes, including businesses, individuals, HOAs, schools and municipalities and other public entities. Members have a strong interest in the development of substantive and procedural law in California, and extensive experience with civil matters generally, including issues related to allocation of responsibility for workplace safety. ADC-NCN's Nevada members are also interested in the

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WHY THE COURT SHOULD ORDER PUBLICATION

A pillar of law applicable to the activities of hirers and independent contractors is that the contractors are generally responsible for the safety of their own workers. (*Privette v. Superior Court* (1993) 5 Cal.4th 689.) The rule governs nearly every construction project in the state. It applies in many other contexts as well, including to limit the liability of homeowners who hire professionals for maintenance and other projects, and reasonably expect the professionals to be responsible for conducting themselves safely.

This Court's decision in *McCullar* clarifies that responsibility for protecting against a known hazard lies with the contractor, not the hirer, even where the hirer may have contributed to the hazard. The excerpt below, in which this Court declines to follow another Court of Appeal decision based on intervening Supreme Court precedent, itself demonstrates why courts, counsel and litigants would benefit from publication:

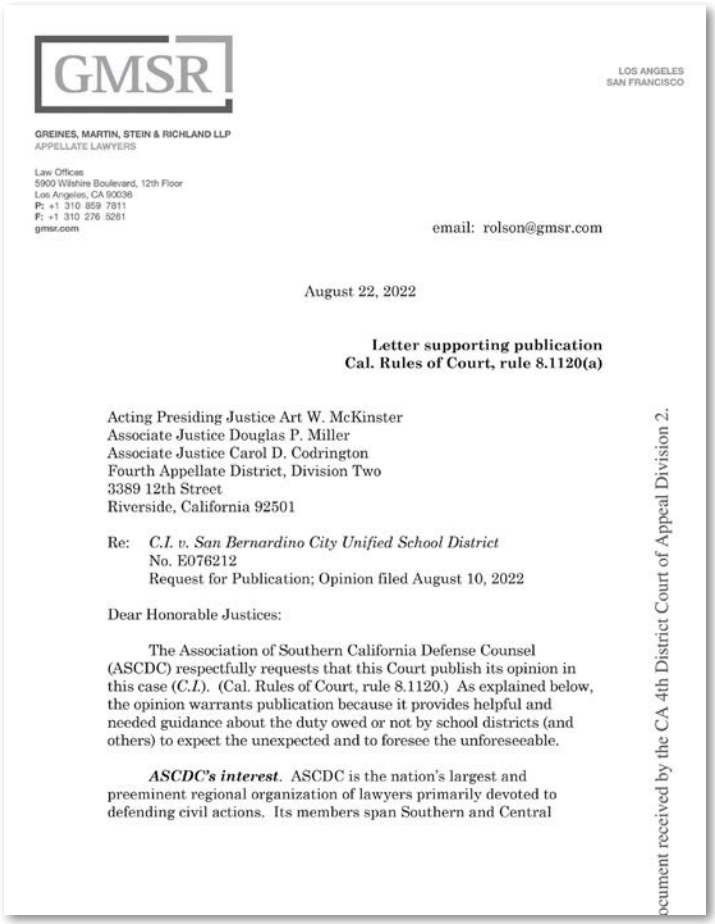
> According to McCullar, *Tverberg II [Tverberg v. Fillner Constr.* (2012) 202 Cal.App.4th 1439] is "analogous." Focusing on the first of the court's three reasons for finding a triable issue of fact, McCullar contends *Tverberg II* is similar because SMC created a hazardous condition and then, after learning of it, nonetheless told him to go back to work without providing direction on how to address the hazard. But to the extent the *Tverberg II* court believed the *Hooker* [*v. Department of Transportation* (2002) 27 Cal.4th 19] exception could apply on these types of facts, we decline to follow it. The *Tverberg II* court, again, found the general contractor might be liable under *Hooker* because it created a workplace hazard (namely, holes in the ground) and then "requir[ed] Tverberg to conduct unrelated work near [the hazard]." (*Tverberg II*, supra, 202 Cal.App.4th at p. 1448.) But in *Gonzalez* [*v. Mathis* (2021) 12 Cal.5th 29], our Supreme Court reached the opposite conclusion on facts that were not too different. Similar to the general contractor in *Tverberg II*, the hirer in *Gonzalez* was responsible for the presence of a workplace hazard (namely, a slippery roof) and asked the contractor to perform unrelated work on the roof. (*Gonzalez, supra*, 12 Cal.5th at pp. 39-40.) Yet the court still, at the summary judgment stage, found the hirer was not liable when the contractor fell from the roof and suffered injuries. (*Id.* at pp. 56-57.) Following our Supreme Court's reasoning, rather than the Court of Appeal's reasoning in *Tverberg II*, we apply similar logic to reject McCullar's negligence claim here.

(Typed opn., pp. 16-17.) This analysis of why *Tverberg II* was wrongly decided, with the benefit of the intervening decision in *Gonzalez*, justifies publication – if for no other reason than as fair counterpoint to *Tverberg II*, which otherwise binds superior courts.

Publication would also allow courts and counsel to have this clear statement of the rule: "[I]t is the contractor's responsibility, not the hirer's responsibility, to take the necessary precautions to protect its employees from a known workplace hazard. And should the contractor fail to take the necessary precautions, as Tyco did in this case when it simply told McCullar to " '[g]et the job done' " despite the ice, its employees cannot fault the hirer for the contractor's own failure." (Typed opn., p. 11.)

C.I. v. San Bernardino

C.I. v. San Bernardino (2022) 82 Cal.App.5th 974, involved a school district shooting in which a man entered the classroom of his schoolteacher wife, and shot and killed her and a student before killing himself. Notwithstanding the tragic circumstances of the case, the Court of Appeal opinion recognized that the school district owed no duty to protect the victims from the unforeseeable event as a matter of law. Notably, the court rejected the plaintiff's hindsight claim that locks on front office and classroom doors should have



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gmsr.com

email: rolson@gmsr.com

August 22, 2022

Letter supporting publication
Cal. Rules of Court, rule 8.1120(a)

Acting Presiding Justice Art W. McKinster
Associate Justice Douglas P. Miller
Associate Justice Carol D. Codrington
Fourth Appellate District, Division Two
3389 12th Street
Riverside, California 92501

Re: *C.I. v. San Bernardino City Unified School District*
No. E076212
Request for Publication; Opinion filed August 10, 2022

Dear Honorable Justices:

The Association of Southern California Defense Counsel (ASCDC) respectfully requests that this Court publish its opinion in this case (*C.I.*). (Cal. Rules of Court, rule 8.1120.) As explained below, the opinion warrants publication because it provides helpful and needed guidance about the duty owed or not by school districts (and others) to expect the unexpected and to foresee the unforeseeable.

ASCDC's interest. ASCDC is the nation's largest and preeminent regional organization of lawyers primarily devoted to defending civil actions. Its members span Southern and Central

ocument received by the CA 4th District Court of Appeal Division 2.

Continued on page 13

been installed. Bob Olson and Ted Xanders at Greines, Martin, Stein & Richland authored a letter persuading the Court of Appeal in Riverside to publish its thorough analysis.

WHY THE OPINION SHOULD BE PUBLISHED

Duty is a critical legal question. Duty is not simply retrospective, determining when a particular defendant might be liable. It is *prospective*, informing persons similarly situated to the defendant just what measures they must undertake or they need not incur the expense and dislocations to undertake.

At issue in *C.I.* was a teacher's spouse – whom the school did not know was estranged – coming on campus, as he had done before without incident, and shooting and killing the teacher, a student, and himself. The *C.I.* opinion holds that the school owed no duty to somehow forecast and prevent this tragedy.

Here, the well-reasoned *C.I.* opinion applies the duty analysis in a factual context that is both significantly different from those stated in published opinions and, unfortunately, of continuing and currently heightened public interest and importance: school shootings. As such, it falls squarely within the standards for publication of appellate opinions. (Cal. Rules of Court, rule. 8.1105(c)(2) & (c)(6).) Our research reflects that *no* published California appellate opinion addresses the duty of a school to prevent shootings on its campus by adults legitimately on premises and not known to pose a danger – essentially random acts of violence. The *C.I.* opinion, to our knowledge, is the *first* to apply the *Rowland* analysis (see *Rowland v. Christian* (1968) 69 Cal.2d 108, 112-113) to such a circumstance or any similar circumstance. (Cf. *Regents of University of California v. Superior Court* (2018) 4 Cal.5th 607, 627-628 [university owes duty to protect against violence by *students* that it *knows or should know* pose a danger].)

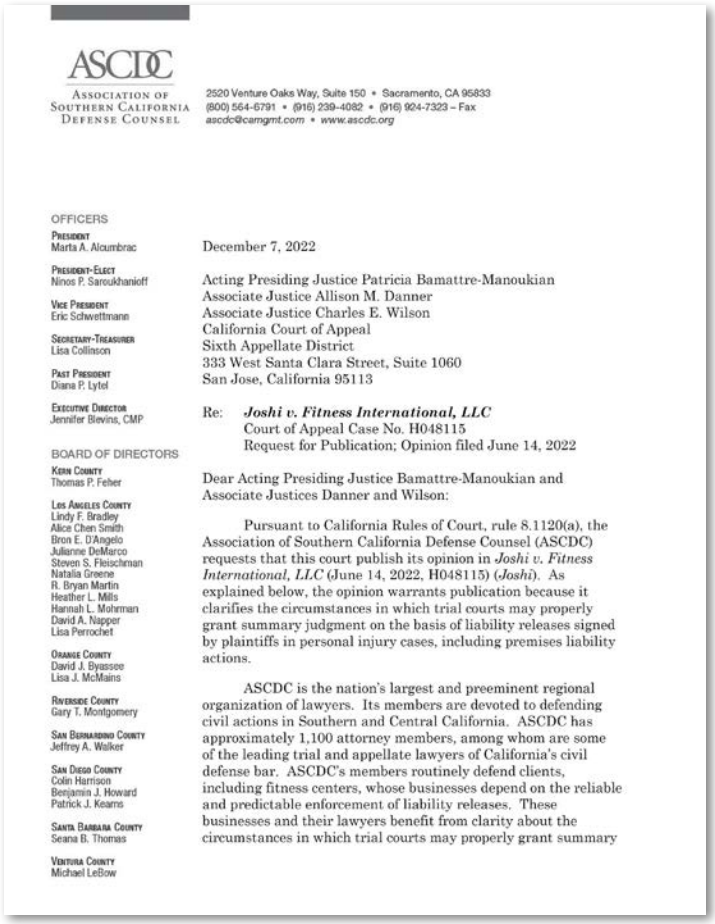
Critically, the *C.I.* opinion properly holds that a school (and by extension other public entities or landowners) need not take onerous or extraordinary measures to protect against every conceivable danger. The duty question is *reasonable* foreseeability, not protecting against all imaginable wrongdoings.

C.I. confronts the sort of tragic incident that sometimes appears on the news, but is rare and unexpected in any particular location, as the opinion recognizes.

Importantly, the opinion *rejects* the plaintiffs' argument that schools must predict and protect against *all* conceivable forms of violence that occur on their premises. The opinion presents the plaintiffs' argument verbatim as: "'[T]he question here is not whether [the district] could predict that [Anderson] would [shoot] [Smith] in [her classroom and in front of her students]. It is whether a reasonable [school district] could foresee that its negligent failure to control a potentially violent ['outsider'], or to warn students who were foreseeable targets of his ire, could result in harm to one of those students. Violent unprovoked attacks by and against [ ] students, while still relatively uncommon, are happening more frequently.' Plaintiffs argue the prevalence of school shootings and the frequency of domestic violence "are *likely enough in the setting of modern life that a reasonably thoughtful* [*person*] *would take account of it in guiding practical conduct.*'" (Opn, at 14, original italics.) This Court's response: "We disagree." (*Ibid.*) And the *C.I.* opinion cogently explains why. Mere hypothetical possibility is not enough. A school (or other defendant) need not presume that every individual is a ticking time bomb about to violently go off. V

Joshi v. Fitness International

In *Joshi v. Fitness International* (2022) 80 Cal.App.5th 814, the Sixth District Court of Appeal in San Jose interpreted a written release in gym membership contract to bar liability for a slip-and-fall in a sauna. Affirming summary judgment, the court rejected the plaintiff's



ASCDC
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2520 Venture Oaks Way, Suite 150 • Sacramento, CA 95833
(800) 564-6791 • (916) 239-4082 • (916) 924-7323 – Fax
ascdc@camgmt.com • www.ascdc.org

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December 7, 2022

Acting Presiding Justice Patricia Bamattre-Manoukian
Associate Justice Allison M. Danner
Associate Justice Charles E. Wilson
California Court of Appeal
Sixth Appellate District
333 West Santa Clara Street, Suite 1060
San Jose, California 95113

Re: ***Joshi v. Fitness International, LLC***
Court of Appeal Case No. H048115
Request for Publication; Opinion filed June 14, 2022

Dear Acting Presiding Justice Bamattre-Manoukian and Associate Justices Danner and Wilson:

Pursuant to California Rules of Court, rule 8.1120(a), the Association of Southern California Defense Counsel (ASCDC) requests that this court publish its opinion in *Joshi v. Fitness International, LLC* (June 14, 2022, H048115) (*Joshi*). As explained below, the opinion warrants publication because it clarifies the circumstances in which trial courts may properly grant summary judgment on the basis of liability releases signed by plaintiffs in personal injury cases, including premises liability actions.

ASCDC is the nation's largest and preeminent regional organization of lawyers. Its members are devoted to defending civil actions in Southern and Central California. ASCDC has approximately 1,100 attorney members, among whom are some of the leading trial and appellate lawyers of California's civil defense bar. ASCDC's members routinely defend clients, including fitness centers, whose businesses depend on the reliable and predictable enforcement of liability releases. These businesses and their lawyers benefit from clarity about the circumstances in which trial courts may properly grant summary

Continued on page 14

argument that there was a triable issue of fact on a theory of gross negligence. Scott Dixler and Steve Fleischman at Horvitz & Levy submitted a letter on ASCDC's behalf explaining that the opinion should be published to assist litigants and lower courts in evaluating whether, at the summary judgment stage, the defendant has negated pleaded but factually unsupported theories to vitiate a release.

> As this court correctly recognized, a release of liability bars claims for ordinary negligence but does not bar claims for gross negligence. (Typed opn. 10–11.) Gross negligence is "either a 'want of even scant care' or 'an extreme departure from the ordinary standard of conduct.' " (*City of Santa Barbara v. Superior Court* (2007) 41 Cal.4th 747, 754.) The Supreme Court has "emphasize[d] the importance of maintaining a distinction between ordinary and gross negligence, and of granting summary judgment on the basis of that distinction in *appropriate circumstances*." (*Id.* at p. 767, emphasis added.) Indeed, " 'In cases arising from hazardous recreational pursuits, to permit released claims to be brought to trial defeats the purpose for which releases are requested and given, regardless of which party ultimately wins the verdict.' " (*Buchan v. United States Cycling Federation, Inc.* (1991) 227 Cal.App.3d 134, 147.) Nonetheless, uncertainty has persisted regarding the circumstances in which summary judgment based on a release is appropriate.
>
> Several cases discerning no triable issues of fact as to gross negligence have highlighted the precautions taken by the defendants, which illustrated that the defendants exercised more than scant care. (E.g., *Brown v. El Dorado Union High School Dist.* (2022) 76 Cal.App.5th 1003, 1027–1034, review den. June 22, 2022 [no gross negligence in football injury case where coaches undertook a number of safety measures]; *Willhide-Michiulis v. Mammoth Mountain Ski Area, LLC* (2018) 25 Cal.App.5th 344, 362–364 [no gross negligence in light of precautions taken]; *Grebing v. 24 Hour Fitness USA, Inc.* (2015) 234 Cal.App.4th 631, 639 (*Grebing*) [no gross negligence in case arising from injury caused by exercise equipment where defendant fitness center "took several measures to ensure that its exercise equipment and facility were well maintained"].) Nonetheless, courts and litigants have struggled to ascertain whether particular precautions that were ultimately unsuccessful in preventing injury defeat allegations of gross negligence as a matter of law. (See, e.g., *Jimenez v. 24 Hour Fitness USA, Inc.* (2015) 237 Cal.App.4th 546, 557 [finding a fitness center's precautions inadequate to support summary judgment based on release].) Given the factual differences inherent in all personal injury cases, the specific precautions taken in each case differ, and both courts and litigants thus benefit from published authority clarifying when summary judgment is appropriate. If published, this court's opinion in *Joshi* will provide future courts and litigants with an instructive example of circumstances warranting summary judgment.
>
> The plaintiff in *Joshi* based her allegations of gross negligence on evidence suggesting the sauna in which she fell was inspected at some point on the day of the accident and the alleged dangerous condition in the sauna was discovered but not remedied. (Typed opn. 17–20.) This court found this evidence insufficient to create a triable issue of fact as to gross negligence, noting (1) the lack of evidence showing the fitness center was aware of the alleged burned-out lightbulb before the plaintiff was injured and (2) the fitness center's safety precautions, including weekly inspections. (*Ibid.*) These holdings will assist courts and litigants in future cases in evaluating whether a defendant's alleged safety precautions or lack of notice of a dangerous condition suffice to defeat a claim of gross negligence. While the decision in *Grebing* addressed a fitness center's efforts to ensure the safety of its exercise equipment (*Grebing, supra,* 234 Cal.App.4th at p. 639), the decision in *Joshi* extends *Grebing's* reasoning to cover the entire facility, including a locker room sauna (typed opn. 17-20). *Joshi* thus satisfies multiple criteria for publication. (See Cal. Rules of Court, rule 8.1105(c)(2), (3) & (6).)

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

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MSJ DEADLINES

Cole v. Superior Court of San Diego County, No. D081299

Victoria C. Colca

On December 30, 2022, the Fourth District Court of Appeal, Division 1, issued its decision in *Cole v. Superior Court of San Diego County* (Cal. Ct. App. Dec. 30, 2022, No. D081299), 2022 WL 17999483. The Fourth District ruled that a summary judgment motion electronically served 107 days before trial was timely under Code of Civil Procedure § 437c. The court also ruled that neither the trial court's compacted calendar nor the moving party's election to wait until the deadline before reserving a motion for summary judgment hearing date vitiate the moving party's right to have a motion timely within the limits of Code of Civil Procedure § 437c heard before trial.

The opinion provides guidance on the deadline for filing summary judgment motions served electronically and affirms the right to have a timely motion for summary judgment heard before trial irrespective of a trial court's local practice or local rule to the contrary. (*Cole*, *supra,* citing *Sentry Ins. Co. v. Superior Court* (1989) 207 Cal.App.3d 526, 529; *First State Inc. Co. v. Superior Court* (2000) 79 Cal.App.4th 324, 330 [invalidating case management order to the extent it precluded filing motions pursuant to section 437c]; *Wells Fargo Bank v. Superior Court* (1988) 206 Cal.App.3d 918, 923 [local court rule that required a party filing a complex summary judgment motion to bring the motion six months before the date set for trial held void and unenforceable as inconsistent with section 437c].)

This published opinion is based on a breach of contract and warranty action filed in January 2019 by Matt Zeiner dba West Coast Trailers against Geoff Cole and Admiral's Experience, Inc. arising from the parties' dispute over the destruction of a trailer Cole rented from Zeiner. On September 29, 2020, Zeiner added Carr Electric as a doe defendant. Carr filed a cross-complaint against defendant Cole on January 11, 2021 and Cole, after seeking and obtaining leave, filed an amended cross-complaint against Carr on May 2, 2022. On April 29, 2022, the trial date, pursuant to stipulation, was continued to January 20, 2023.

On October 5, 2022 – 107 days before the scheduled trial date of January 20, 2023 – Cole reserved the first available hearing date for a motion for summary judgment and then electronically filed and served the motion. January 27, 2023 (a week *after* the scheduled trial date) was the first available hearing date on trial court's calendar as of Cole's filing more than three months earlier. With no other option, Cole reserved January 27 for the summary judgment motion hearing. On November 9, 2022, Cole filed an ex parte application seeking to specially set an earlier hearing date in advance of trial or, in the alternative, to continue the trial date until after the motion for summary judgment could be heard.

The trial court denied Cole's ex parte application, referencing Cole's last minute (but timely) reservation of a hearing date for the motion, as well as unavailability on the trial court's calendar at the time Cole's ex parte application was under the trial court's review: "*This is a 2019 case and the moving party waited until right before scheduled trial … to schedule a Motion for Summary Judgment.*" Cole moved for reconsideration with a renewed request for a trial continuance to allow the motion, which the court also denied.

On December 6, 2022, Cole promptly petitioned for a writ of mandate directing the trial court to continue trial until after a hearing on the motion for summary judgment. Cole contended that "*despite any calendaring issues in the trial court, a hearing [on the] timely motion for summary judgment must be set before the start of trial.*" The cause was submitted on December 30, 2022.

The Court of Appeal reviewed the following issues:

1. Whether a motion for summary judgment served by electronic means 107 days before the trial date is timely under Code of Civil Procedure section 437c; and

2. Whether a party that has filed and served a motion for summary judgment within the time limits set by section 437c has the right to have the motion heard before the start of trial irrespective of unavailability on the trial court's calendar.

Under Code of Civil Procedure section 437c, subdivision (a), a moving party's *"[n]otice of motion and supporting papers shall be served on all other parties to the action at least 75 days before the time appointed for hearing."* *Cole*, citing § 437c, subd. (a). *"The motion shall be heard no later than 30 days before the date of trial, unless the court for good cause orders otherwise."* (*Id.*) However, "*section 437c extends the 75-day noticing period required for motions for summary judgment based on the method of service." Cole*, citing § 437c, subd. (a)(2) (Emphasis added.)

For service of the motion papers by mail, the time is extended by five days if the place of address is within the State of California, 10 days for service in the United States [and] 20 days for service outside the country. (*Cole,*

Continued on page 18

supra, citing Code of Civil Procedure § 437c, subd. (a)(2).) As to service by facsimile or express or overnight mail, "*the required 75-day period of notice shall be increased by two court days*." (*Ibid.*) (Emphasis added.)

While section 437c does not expressly reference extension of the notice period for *electronic service*, Code of Civil Procedure "*section 1010.6, ... provides that: 'If a document may be served by mail, express mail, overnight delivery, or facsimile transmission, electronic service of that document is deemed complete at the time of the electronic transmission of the document or at the time that the electronic notification of service of the document is sent.*'" (Code Civ. Proc. § 1010.6, subd. (a)(3).) Section 1010.6 "further provides that '[a]ny period of notice ... which time period or date is prescribed by statute or rule of court, *shall be extended after service by electronic means by two court days*,'" subject to three exceptions not applicable here (i.e., notices of appeal, of intent to vacate judgment or of intent to move for new trial). (*Cole*, citing Code Civ. Proc. § 1010.6, subd. (a)(3)(B).)

Providing "*guidance on the deadline for filing a summary judgment motion that is served electronically*," the Fourth District clarified that when a party elects to serve a motion for summary judgment electronically, the motion and supporting papers must be served "*at the latest, 107 days before trial*," not 105 days before trial. In particular, the Fourth District noted that Cole's calculation of 105 days "*does not account for the two-day extension* of the noticing period that applies to motions for summary judgment that are served electronically." In light of that extension, Cole was required to, and did, "serve their motion for summary judgment, at the latest, 107 days before trial." Since Cole, in fact, served the motion papers on October 5, 2022, 107 days before the scheduled start of trial, the motion was "*timely, but with no time to spare*."

Recognizing that a summary judgment motion "*is potentially case dispositive and usually requires considerable time and effort to prepare*," the Fourth District rejected the contention that Cole's delay in reserving an earlier hearing date on the calendar had any bearing on Cole's right to have the motion heard before trial. (*Cole, supra*, citing *MacMahon v. Superior Court* (2003) 106 Cal.App.4th 112, 117-118 [acknowledging that while courts have "inherent authority to manage their calendars and control proceedings before them, [given] the express statutory language, trial courts do not have authority to shorten the minimum notice period for summary judgment hearings."].)

In conclusion, the Fourth District ruled: "*the fact remains that the motion was timely filed, and calendaring issues are not a basis on which the trial court can refuse to hear a timely filed summary judgment motion, absent an indication that it was defective under section 437c*." Finding that Cole properly preserved the issue by "*alert[ing] the trial court that the motion was timely filed under section 437c, and that the motion needed to be heard before the trial start date*," the Court of Appeal granted the petition for writ of mandate commanding the trial court to immediately enter an order setting Cole's motion for summary judgment for hearing no later than the trial start date on receipt of the writ and directing the trial court to vacate that portion of its prior order refusing to calendar Cole's timely motion for summary judgment.

By its decision, the Fourth District clarifies the deadline for filing a summary judgment motion that is served electronically. In addition, the court affirms the right to have a motion for summary judgment heard before trial, irrespective of the trial court's local rules or local practices or impacted calendar, as long as the motion is timely within the time limits set by section 437c. *Cole, Sentry Ins. Co. v. Superior Court* (1989) 207 Cal.App.3d at 529-530; *First State,* 79 Cal.App.4th at 330; *Wells Fargo,* 206 Cal.App.3d at 923. It may be a good practice not to wait until the last possible day to reserve a hearing date, but doing so is not a violation of any rule or statute, and trial courts have no discretion to deprive a party of the statutory right to pursue a *timely filed* dispositive motion based on what the court may perceive to be undue procrastination.

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Bringing to Life the Past Glory of ASCDC

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President's Welcome

Welcome to the Association of Southern California Defense Counsel's 62nd Annual Seminar at the JW Marriot in DTLA. This two-day event is our biggest event of the year, showcasing the extraordinary talent of our members, colleagues, and judges, who will deliver the most up-to-date information on a variety of hot topics affecting our defense practices. Beyond the educational component of the Annual Seminar, there will be many opportunities to network with friends, colleagues, representatives from the insurance industry, current and retired judges, mediators, members of the plaintiff's bar, as well as many exhibitors and sponsors who bring ease to our day-to-day life as litigators.

This year, ASCDC will honor the past leadership of this organization, while celebrating the future. The Annual Seminar Committee, chaired by ASCDC's next President, Ninos Saroukhanioff, put together an outstanding program. ASCDC takes great pride in preparing insightful programs, providing in-depth discussions about changes to applicable laws and statutes, and giving members strategies to improve their practices. There is something for everyone; whether you are new to the practice or a seasoned defense attorney, the wide breadth of topics featured during the seminar ensures that all attendees will learn from the expert panelists.

As always, we will begin our program with the crowd favorite, "Year in Review," presented by ASCDC Past President Robert Olson and member David Hackett, summarizing notable appellate decisions which impact the defense bar. We then move to our trial track programming which begins with a discussion on time-limited settlement demands, and an expert panel comprised of trial and appellate lawyers to discuss the recent changes to MICRA. The afternoon sessions focus on reforming discovery practices and the great need for civility in our practice, and our final sessions of the day will focus on neutralizing an opponent's expert witness testimony and how to best combat lien-based medical treatment.

At the day's end, we will enjoy a complimentary cocktail reception with all attendees, and other notable guests, including mediators and judges from many counties throughout Southern California. Following this reception, there is another event at Lucky Strike, located within LA Live, where members can continue visiting with friends, and maybe even bowl a few frames.

The final day of the Annual Seminar will begin with an update from California Defense Counsel's legislative advocate, Mike Belote, who will discuss the current status of new and pending legislation impacting the defense practice in California. Following Mr. Belote, there will be a "medicine for dummies" panel, followed by a continuation of the trial track programming, with an expert panel discussing best practices for trial preparation, and another panel taking a deep dive into the presentation of evidence while in trial.

For Friday's luncheon, our keynote speaker is one of America's most highly decorated combat veterans and a *New York Times* best-selling author, Rob O'Neill. Mr. O'Neill will discuss his remarkable career, and in particular, performing extraordinarily difficult tasks under the most challenging circumstances.

As my term as President of ASCDC draws to a close, I must give thanks to several people that I leaned upon during the last year. To Jennifer Blevins and her team – thank you for all you do for ASCDC. Mike Belote – I am grateful for all that you do for our membership and their clients. To the executive committee, board members, and Past Presidents, it was a privilege to have worked alongside each of you. Thank you for allowing me to serve this phenomenal organization.

Thank you for supporting ASCDC. I look forward to seeing you at the seminar.

Marta A. Alcumbrac, 2022-2023 President

Honor the Past and Celebrate the Future

Bringing to Life the Past Glory of ASCDC

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Association of Southern California Defense Counsel

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Thursday, February 9, 2023

7:30 am – 6:30 pm *Diamond Foyer*
Registration Open

7:30 am – 8:30 am *Diamond Foyer*
Continental Breakfast in the Vendor Faire Area

7:30 am – 4:30 pm *Diamond Foyer*
Vendor Faire Open

8:30 am – 8:45 am *Diamond 5*
Annual Business Meeting

8:45 am – 10:15 am *Diamond 5*
"A Year in Review" – Case Highlights of 2022

(MCLE – 1.5 hour of General Credit)

A review of some of 2022's most impactful decisions for the defense bar.

Robert A. Olson
Greines, Martin, Stein & Richland

David E. Hackett
Greines, Martin, Stein & Richland

10:15 am – 10:30 am *Diamond Foyer*
Vendor Break

MCLE Credit

This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 9.0 hours, including 1.25 hours of Legal Ethics credit.

The Association of Southern California Defense Counsel certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

Please make sure to include your State Bar I.D. number on the registration form in order to receive your MCLE credits.

Additionally, please make sure you sign the attendance sheet located in the Diamond Foyer and retain the Certificate of Attendance for your records.

Register Online at www.ascdc.org

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Thursday, February 9, 2023 – *continued*

TRIAL SCHOOL TRACK

10:30 am – 12:00 noon *Diamond 5*
Panel Discussion Regarding Time-Limited Settlement Demands

(MCLE – 1.5 hour of General Credit)

A panel discussion addressing considerations and strategy for handling of time-limited settlement demands, with comments concerning application of California SB 1155 (Code of Civil Procedure §§ 999-999.5) effective January 1, 2023. The panel will be moderated by Freddy Fonseca, Managing Attorney of American Family Mutual Insurance Company, and include insurance coverage counsel Matthew S. Foy of Gordon & Rees; insurance defense counsel David J. Byassee of Plain Legal PC; claimant's counsel Shawn McCann of BD&J; insurance claim representative Tim Reichwald; and appellate counsel Karen M. Bray of Horvitz & Levy LLP.

Freddy Fonseca
American Family Mutual Insurance Company, S.I.

Karen M. Bray
Horovitz & Levy LLP

David J. Byassee
Plain Legal PC

Matthew S. Foy
Gordon & Rees

Shawn McCann
BD&J

Tim Reichwald
American Family Mutual Insurance Company, S.I.

10:30 am – 12:00 noon *Diamond 1-3*
What Every Defense Lawyer Needs to Know about the New MICRA Statutes

(MCLE – 1.5 hour of General Credit)

An overview of the new MICRA amendments, including how they apply in various situations and the issues that may need to be litigated.

Lacey L. Estudillo
Horvitz & Levy LLP

John C. Kelly
Carroll, Kelly, Trotter & Franzen

N. Denise Taylor
Taylor DeMarco, LLP

H. Thomas Watson
Horvitz & Levy LLP

12:00 noon – 1:30 pm **Lunch On Your Own**
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Lisa Perrochet

Notes on Recent Decisions

Emily Cuatto

The Green Sheets, although published later than most current advance sheets because of copy deadlines, should serve as a useful review of recent important decisions. Readers are invited to suggest significant decisions for inclusion in the next Green Sheets edition. Please contact: ***LPerrochet@horvitzlevy.com*** or ***ECuatto@horvitzlevy.com***

To make the Green Sheets a useful tool to defense counsel, they are printed in green and inserted in the middle of *Verdict* magazine each issue. They can be easily removed and filed for further reference. Of course, the Green Sheets are always one attorney's interpretation of the case, and each attorney should thoroughly read the cases before citing them or relying on this digest. Careful counsel will also check subsequent history before citing.

PROFESSIONAL RESPONSIBILITY

An attorney's communications to a client stating an intention to withdraw were too equivocal and prospective to start the clock on the malpractice statute of limitations.

Wang v. Nesse (2022) 81 Cal.App.5th 428.

Plaintiff filed a malpractice complaint against her attorney on December 21, 2015. The attorney moved for summary judgment on the ground the one-year statute of limitations for malpractice actions had run. Although the parties executed a substitution of attorney on December 30, 2014, the attorney maintained that his representation of the plaintiff actually terminated on or before December 15, 2014, after plaintiff had repeatedly failed to respond to his emails advising that he would not continue to represent her if she did not pay all outstanding fees – the last of which advised that he would be withdrawing as counsel and included a substitution of counsel – and after plaintiff started taking actions in pro per. The trial court granted the motion.

The Court of Appeal (Sixth Dist.) reversed. The attorney had not established as a matter of law that he had withdrawn or been discharged. The attorney's communications that he would be withdrawing were conditional and prospective, and were thus equivocal about whether he was still representing plaintiff. That gave rise to triable issues about whether a reasonable client in plaintiff's position would have understood the representation to have ended at that time. Further, the attorney had signed a stipulation on December 17. Although the attorney maintained it was done as a courtesy, that gave rise to triable issues whether plaintiff had discharged the attorney prior to that date by failing to respond to his communications and taking actions in pro per. On the latter point, a client taking in pro per action does not necessarily mean the client has intended for the representation to end; a reasonable inference could be made that the client was simply trying to save money.

ATTORNEY FEES AND COSTS

A trial court may not make an interim award of contractual attorney fees under Civil Code section 1717 while non-contract causes of action remain unresolved.

Chen v. Valstock Ventures LLC (2022) 81 Cal.App.5th 957.

In this landlord-tenant dispute raising contract and tort claims, the tenants prevailed on summary judgment on their contract-based cause of action. The other claims, including for civil conspiracy, remained pending for further litigation. The tenants then moved for $2.1 million in attorney fees, of which the trial court awarded $1.1. million. The landlord appealed from the fee order. In the meantime, the tenants sought to enforce the award. The trial court denied the tenants' motion to enforce on the ground the order was automatically stayed by the appeal.

The Court of Appeal (First Dist., Div. Four) reversed the fee order. An award of fees under section 1717 must await conclusion of the litigation as whole. Although the statute does not expressly address when a fee award can be made, the statutory language referring to fees "in addition to other costs" and referencing the right to fees belonging to the part with the greater "recovery" in the "action" supports the conclusion that the Legislature intended the fees to be awarded only at the conclusion of the entire case. Any other result would allow immediate collection efforts that might be difficult to undue if the fee award is undermined by later events in the litigation, and would lead to interim appeals to stay execution of the judgment (which would eliminate the value of the interim award in the first place). It would also be incompatible with the rule that summary adjudication rulings are not appealable.

CIVIL PROCEDURE

Issue preclusion (collateral estoppel) requires an identity or community of interest, not mere agency.

Grande v. Eisenhower Medical Center (2022) 13 Cal.5th 313.

A temporary staffing agency assigned plaintiff to work as a nurse at a medical center. She was named as a plaintiff in a wage and hour class action against the staffing agency brought on behalf of agency employees assigned to hospitals throughout California. The staffing agency settled with the class, including plaintiff who executed a release, and the trial court entered a judgment incorporating the settlement agreement. A year later, plaintiff brought a second class action alleging the same labor law violations against the staffing agency's client, the medical center who was not a party to the previous lawsuit. The staffing agency intervened in the action asserting plaintiff could not bring a separate lawsuit against the medical center because she had settled her claims in the prior class action. The appellate court (Fourth Dist., Div. Two) affirmed a trial court's ruling that the medical center was not a released party under the settlement agreement and could not avail itself of the doctrine of res judicata because the medical center was neither a party to the prior litigation nor in privity with the staffing agency.

The California Supreme affirmed. Preclusion requires the party to be precluded be identical to, or in privity with the party to the prior litigation. Thus, an employer's claim preclusion defense "can be asserted only by a party in the first action or someone in privity with a party in the first action." " '[P]rivity' is not merely a term that describes a close relationship between two entities; it implies that a judgment against one could have been used against the other, even though that entity was not a party to the judgment." Here, the staffing agency and the employer had "different legal interests." There agency relationship was insufficient to create privity. The court further noted that "the broader notion that a client is an 'agent' of a staffing agency is not free from doubt."

Trial courts retain discretion to preclude or limit mini openings before voir dire despite statute providing that mini openings "shall" be allowed.

D.D. v. Pitcher (2022) 79 Cal.App.5th 1047.

In this personal injury action, the plaintiff (a child) alleged that his neighbor (an adult) hit him with a bicycle, breaking his leg. Plaintiffs' counsel requested to make a mini opening statement before voir dire, per Code of Civil Procedure section 222.5, which states that the court "shall allow a brief opening statement" prior to voir dire questioning. The court ordered plaintiff's counsel to submit his proposed mini opening in writing. The court then precluded plaintiff's counsel from giving the mini opening on the ground it was improperly argumentative and denied plaintiff's counsel the time to resubmit a revised version. After trial, the jury found for defendant. Plaintiff appealed, arguing that the voir dire process was cumbersome and prejudicial to him without the mini opening.

The Court of Appeal (Fifth Dist.) affirmed. A trial court has discretion to restrict the content of a pre-voir dire mini opening statement despite that the statute says that the court "shall allow a brief opening statement." The statute and its history indicate "the trial judge retains the discretion to disallow a brief opening statement if it contains objectionable matter. Any other result would allow abuse of the litigation process.

RECENT CASES

The 45-day time period to file a motion to compel further responses to interrogatories is triggered by service of a verification, even if some of the responses contain only objections and need not be "verified."

Golf & Tennis Pro Shop v. Superior Court (Frye) (2022) 84 Cal.App.5th 127.

Defendant served interrogatories on plaintiff on January 4, and plaintiff served unverified responses February 5. Some of the responses were factual, and some contained only legal objections. Plaintiff provided verifications on March 17. After an unsuccessful meet and confer effort, defendant filed a notice of intention to move to compel further responses on May 5 and supplemented that filing with points and authorities and other documents on August 23 (in order to get them filed within the statutory time before the hearing). Plaintiff opposed, arguing that the motion to compel was untimely under Code of Civil Procedure section 2030.300, subdivision (c), which requires a motion to compel further responses to written discovery be filed 45-days after the service of the "verified" response. The trial court concluded it lacked jurisdiction to rule on the untimely motion. Defendant sought a writ of mandate, arguing that it sought further responses to those responses containing only objections and, since objections-only responses need not be "verified," the 45-day time limit did not apply.

The Court of Appeal (Fourth Dist., Div. Three) issued an order to show cause and denied the petition on the merits. The legislature added the word "verified" to the statute to prevent the 45-day time period from being triggered by a response that did not contain the required verifications. Although objections-only responses need not be "verified," the responses here were mixed, including both objections and substantive responses. In that circumstance, a verification is required and the service of the verification triggers the 45-day time period to move to compel further responses. The court left open the question whether the 45-day time period runs from the date of service of responses that contain only objections and do not need to be "verified." Further, service of a notice of intention to move to compel, without including information about the interrogatories at issue and what was allegedly deficient about them, is insufficient to comply with Code of Civil Procedure section 1010 [notice statute].

A plaintiff cannot accept an otherwise unexpired Code of Civil Procedure section 998 offer after the court has granted of summary judgment.

Trujillo v. City of Los Angeles (2022) 84 Cal.App.5th 908.

Plaintiff sued the defendant city for personal injuries she suffered after tripping on a sidewalk. Defendant moved for summary judgment on the ground the sidewalk was not in a dangerous condition. A few days before the hearing, defendant also served a Code of Civil Procedure section 998 offer on plaintiff. At the hearing, the court orally granted summary judgment. Immediately afterwards, plaintiff accepted the 998 offer. Plaintiff then sought to have judgment entered based on the accepted 998 offer. The trial court declined to enter judgment for plaintiff and instead entered judgment for defendant.

The Court of Appeal (Second Dist., Div. Two) affirmed. Once a court grants summary judgment, there is no longer a dispute capable of resolution under section 998. The grant of summary judgment thus automatically results in expiration of any outstanding 998 offer, even though the statutory 30-day time period for acceptance has not run. Any other result would encourage a "wait and see" approach to summary judgment, which would be contrary to the purpose of section 998 to result in prompt resolution of cases. Notably, the court did not accept the argument that commencement of the summary judgment hearing constituted the commencement of "trial" for purposes of section 998.

See also *Siri v. Sutter Home Winery* (2022) 82 Cal.App.5th 685 [Trial court erred in dismissing case based on accepted Code of Civil Procedure section 998 offer where the plaintiff's acceptance reserved the right to seek prejudgment interest, and was thus a conditional acceptance; parties might have had an enforceable settlement agreement, but it could not be enforced under section 998 procedures].

The availability of remote testimony is not a ground for denying a motion to transfer venue.

Rycz v. Superior Court (2022) 81 Cal.App.5th 824.

An intoxicated San Diego college student called an Uber but was kicked out of the vehicle when she vomited. She called a second Uber, but apparently did not get in the vehicle after the driver failed to identify himself. She was then struck and killed while walking on a freeway. Her heirs sued Uber and the drivers, who cross-complained against the drivers who hit decedent and others who had supplied decedent with alcohol. The lawsuit was filed in San Francisco. One of the freeway drivers moved to transfer venue to San Diego, where nearly all the witnesses were located. The trial court denied the motion, reasoning that the fact the witnesses were in San Diego was minimally relevant given the availability of remote testimony.

The Court of Appeal (First Dist., Div. Five) reversed. While Code of Civil Procedure section 367.75 (implemented by California Rule of Court 3.672) creates a presumption in favor of remote proceedings through July 2023, nothing in the legislative history indicates that the Legislature intended courts to assume all testimony will be remote for purposes of adjudicating motions to transfer venue under Code of Civil Procedure section 397, subdivision (c). The court observed that "there is no basis to conclude the adoption of section 367.75 and rule 3.672(3) reflects a legislative determination that remote testimony is always an adequate substitute for in-person testimony at trial." While there are benefits to remote proceedings, the ability to observe a witness's body language and demeanor in person is an important aspect of the truth-finding process. Interacting with witnesses in person during trial and showing them exhibits can also be important. The mere fact remote testimony is an option does not override the requirement the court consider whether a motion to transfer should be granted given the location of the witnesses. V

EVIDENCE

The public records exception to the hearsay rule allows for the admission only of recorded facts, not opinions of public employees.

McNeal v. Whittaker, Clark & Daniels (2022) 80 Cal.App.5th 853.

In this asbestos personal injury action, the plaintiff claimed he developed mesothelioma from exposure to various products including talc supplied by defendant, which plaintiff used until 1980. Plaintiff claimed defendant's talc was contaminated with trace amounts of asbestos, and that defendant's executives acted with malice, fraud, or oppression because they knew that asbestos in talc was dangerous. The jury ultimately found for plaintiff an awarded $3 million in punitive damages. Defendant appealed.

The Court of Appeal (Second Dist., Div. Eight) reversed the punitive damages award for insufficiency of the evidence. Although defendant's executives knew that asbestos was dangerous, there was no scientific evidence that the trace amounts of asbestos present in talc caused harm until 1980. Medical or scientific developments years after plaintiff's injury cannot establish defendant's executives knew of "probable dangerous consequences" of contaminated talc before plaintiff's injury. Among the items of evidence, the plaintiffs had relied upon to establish at trial that defendant's executives knew, during the relevant time period, that trace levels of asbestos contamination in talc created a risk of "probable dangerous consequences," was a memorandum from an FDA official criticizing defendant's testing efforts. The appellate court held that the trial court abused its discretion in admitting this evidence under the public records exception to the hearsay rule (Evid. Code, § 1280) because that exception applies only to the record of an "act, condition, or event," and not the personal opinions of a government employee. V

TORTS

Landlord had no duty to remedy obvious danger because it was not foreseeable that tenant would choose to encounter it.

Montes v. Young Men's Christian Association of Glendale, California (2022) 81 Cal.App.5th 1134.

While intoxicated, the defendant's tenant accessed the sloped roof of defendant's apartment building and then fell or jumped to the street below, resulting in his death. The tenant's heirs brought a wrongful death action alleging negligence and premises liability claims. The building owner moved for summary judgment and the trial court granted the motion on the ground that the defendant owed no legal duty to warn of or remedy an open and obvious danger unless there is a foreseeable practical necessity requiring the injured party to encounter the danger.

The Court of Appeal (Second Dist., Div. Four) affirmed. There was no necessity or any other circumstance that made it foreseeable the tenant would choose to access the dangerous roof. The tenant was not invited to access the roof, his voluntary state of intoxication could not be used to claim ignorance of the obvious danger, and there is a limit as to how far society should go to protect individuals from their own daring or self-destructive impulses. V

RECENT CASES

Employer not liable for intoxicated employee's drowning death after consuming wine and drugs provided by employer's personal chef.

Musgrove v. Silver (2022) 82. Cal.App.5th 694.

A Hollywood producer took his entourage, including his personal assistant and his personal chef, to Bora Bora, largely for recreational purposes. Late one evening, the assistant met up with the chef in her private bungalow. The chef provided alcohol and cocaine. The assistant then went swimming and drowned. The assistant's parents sued the producer for wrongful death, but the trial court granted summary judgment for the producer.

The Court of Appeal (Second Dist., Div. Two) affirmed. The producer was not directly liable for his assistant's death because: (1) California law protects individuals from tort liability for furnishing alcohol to other adults (Civ. Code § 1714, subd. (c); (2) he did not personally employ the assistant, who was employed by his production company; and (3) his assistant was not working when she consumed the alcohol late at night and a time when she had no ongoing employment responsibilities. The producer was not vicariously liable for his chef's conduct, either, because (1) the chef's decision to meet the assistant late at night in her private bungalow to drink and do drugs was not an inherent risk of employment as a family chef; (2) furnishing the drugs and alcohol was not a foreseeable risk of the chef's employment; (3) the producer did not benefit as an employer by having his chef provide the drugs and alcohol; and (4) it was inequitable to shift the losses associated with the assistant's death to the producer who did not benefit from the chef's behavior which was far removed from his job duties.

Parents who did not authorize son to invite friend over were entitled to recreational use immunity against liability for the friend's injury.

Hoffmann v. Young (2022) 13 Cal.5th 1257.

Defendants' teenage son invited plaintiff to defendant's home to ride motorcycles on a track in defendants' backyard. Plaintiff was injured, and sued defendants, alleging negligent design of the track. Defendants asserted recreational use immunity based on Civil Code section 846, under which a landowner generally owes no duty of care to a person who enters or uses the property for a recreational purpose. In opposition, plaintiff invoked the express invitee exception, which eliminates immunity when the landowner expressly invites the plaintiff to enter her land. The trial court ruled that the exception did not apply because there was no evidence defendants personally invited the plaintiff to their land. The Court of Appeal (Second Dist., Div. Six) reversed, holding that an invitation by the landowners' live-at-home child operated as an invitation from the landowners triggering the exception, unless the child was prohibited from making the invitation.

The California Supreme Court reversed the Court of Appeal. A plaintiff claiming the express invitee exception must show that the landowner, or an agent authorized to extend an invitation, expressly invited the plaintiff to enter the property. Plaintiff failed to show defendants authorized their son to invite plaintiff to their house so was not entitled to rely on that exception.

Plaintiffs' "reasonable" explanation for how liquid might have spilled on defendant's floor supported plaintiff's verdict in slip-and-fall case.

Perez v. Hibachi Buffet (2022) 82 Cal.App.5th 812.

Plaintiff sued a restaurant after slipping and falling on wet tile. The parties agreed there was liquid on the floor where plaintiff slipped but did not agree how the liquid got there. Plaintiff alleged the liquid was from a restaurant worker transporting dirty dishes on a cart. The restaurant admitted that its employees used the hallway to transport dishware but discounted plaintiff's theory with testimony that employees used a different hallway to transport dish carts and had never seen liquid leak from the carts. The jury awarded $850,000 in damages. The trial court granted judgment notwithstanding the verdict and a new trial on grounds that the inference the restaurant employees spilled the liquid was impermissibly speculative. Plaintiff appealed.

The Court of Appeal (Second Dist., Div. Eight) reversed. Given the size and pattern of the liquid spill and the restaurant's admission that its staff used the hallway to transport dishes, the inference that a restaurant employee spilled the liquid while taking dirty dishes from the dining area to the kitchen was permissible because it was "logical" and "made sense." The restaurant's explanation – that the spill could have been caused by a customer with a drink or someone rushing to the restroom – "made little sense," and the more "reasonable explanation wins."

Peace officer owed no legal duty to protect hostages.

Golick v. State of California (2022) 82 Cal.App.5th 1127.

A troubled veteran who had been terminated from a mental health services program drove to the program facility armed with a semi-automatic rifle, held three employees hostage, and shot and killed them. Prior to killing the three employees, the veteran exchanged gunfire with a County sheriff's deputy. The employees' families sued, alleging that, through the actions of the deputy, the County breached its duty to protect the employees from harm. The trial court dismissed the case, holding that the plaintiffs did not allege facts establishing a duty of care.

The Court of Appeal (First Dist., Div. Three) affirmed. The deputy's duty to act reasonably when using deadly force did not include a duty to prevent the veteran from shooting the employees, and the facts as alleged did not show that the deputy's actions increased the employees' risk of harm. Additionally, there was no special relationship between the employees and the deputy because the deputy gave no assurances to the employees about their safety.

See also *C.I. v. San Bernardino City Unified School District* (2002) 82 Cal.App.5th 974 [school had no duty to prevent teacher's husband from shooting teacher where no one had reason to believe he posted a danger when he came to visit his wife at school: while schools have a special relationship with their students giving rise to a duty to protect them, "guided by the *Rowland* factors, and principally by the unforeseeability of this sole and tragic event at the school, we decide that imposing on a school district a duty to ensure that its school is safe from every trusted visitor would be entirely unfounded and unfair"]. V

Manufacturer could be liable for personal injury caused by authorized dealer's negligence in assembly of product.*

Defries v. Yamaha Motor Corp. (2022) 84 Cal.App.5th 846.

Yamaha shipped a partially assembled motorcycle to an authorized dealer. The dealer negligently installed the handlebar. After plaintiff was injured in a crash, he sued the dealer and Yamaha. At trial, he withdrew his strict liability claims and elected to pursue only a negligence theory. He requested the court instruct the jury with CACI 3713 on nondelegable duty in support of his theory that Yamaha, as a product manufacturer, had a nondelegable duty to sell a safe product and could not delegate that duty to the dealer. The trial court refused the instruction. The jury found for Yamaha and plaintiff appealed.

A majority of the Court of Appeal (Fourth Dist., Div. Two) reversed. A manufacturer has a nondelegable duty to ensure the products sold by its authorized dealers are safe, so the instruction was appropriate and should have been given consistent with plaintiffs' theory of the case. The failure to give the instruction was prejudicial because without it, the jury was not informed that negligence by the dealer was attributable to Yamaha.

A dissenting justice argued that no case had previously held a manufacturer could be held to be negligent for distributing a product that had no defects when it left the manufacturer's control.

* Petition for review pending as of Jan. 25, 2023, California Supreme Court case no. S277578. V

HEALTHCARE

Hospital not liable as a matter of law under Elder Abuse Act for injuries to elderly plaintiff sustained during negligently performed medical screening exam, which was not custodial or in the nature of caretaking.

Kruthanooch v. Glendale Adventist Medical Center (2022) 83 Cal.App.5th 1109.

An elderly plaintiff sued an acute care hospital under the Elder Abuse Act for injuries he sustained during electrocardiogram and MRI screening exams. A jury found the hospital liable for elder abuse but awarded no damages. The hospital moved for judgment notwithstanding the verdict on the ground that the facts did not trigger the Elder Abuse Act to begin with. The trial court granted JNOV.

The Court of Appeal (Second Dist., Div. Three) affirmed. Under *Winn v. Pioneer Medical Group, Inc.* (2016) 63 Cal.4th 148, the Elder Abuse Act does not apply unless the defendant healthcare provider had a "substantial caretaking or custodial relationship, involving ongoing responsibility for one or more basic needs" with the elder patient. Here, there was no such relationship, as the hospital's attention to the plaintiff's basic needs was not part of a caretaking or custodial relationship but was rather "incidental to" the hospital's professional medical services. As a result, the hospital's conduct did not fall within the definition of neglect under the Elder Abuse Act, and plaintiff's action instead concerned professional negligence. V

Hospital not vicariously liable for medical negligence by personal physician with staff privileges at hospital.

Franklin v. Santa Barbara Cottage Hospital (2022) 82 Cal.App.5th 395.

Plaintiff needed spinal surgery. His primary care physician referred him to Dr. Park, who had staff privileges at the defendant hospital under a "Physician Recruitment Agreement" explicitly stating that no employer-employee relationship existed between them, the physician was an independent contractor, and the hospital had no control over how the physician provided professional services, including how to treat patients. Plaintiff did some research on Dr. Park plaintiff signed a consent form expressly stating that the physicians providing services were not hospital agents or employees, The surgery did not go well, and plaintiff sued Dr. Park (who settled) and the hospital. The hospital moved for summary judgment, arguing that Dr. Park was neither its actual nor its ostensible agent and accordingly could not be liable for his professional negligence. The trial court granted the motion.

The Court of Appeal (Second Dist., Div. Six) affirmed. The staff privileges agreement expressly disclaimed any actual agency relationship. Further, Dr. Park was not the hospital's ostensible agent because plaintiff chose the physician based on a referral from his primary care doctor, and Dr. Park personally arranged for the surgery to be performed in the manner it was. Moreover, so plaintiff had actual notice that Dr. Park was not a hospital employee. The court went on to determine that the hospital's public communications about the physician, the physician's presence on the hospital's website, and the location of the physician's office near the hospital did not show the hospital engaged in conduct that would cause plaintiff to believe the physician was the hospital's agent. The court also found plaintiff did not rely on an apparent agency relationship between the hospital and the physician because plaintiff sought surgical services from his personal physician rather than from the hospital and, even though plaintiff signed the consent form, plaintiff admitted he had not considered the legal relationship between the hospital and the physician.

See also *Magallanes v. Doctors Medical Center of Modesto* (2022) 80 Cal.App.5th 914 [Plaintiff could not claim her personal physician whom she selected to perform surgery at hospital was the hospital's ostensible agent]. V

ANTI-SLAPP

Attorney's claims against his clients for breach of contract and intentional inference with his services were barred by the anti-SLAPP statute.

Bowen v. Lin (2022) 80 Cal.App.5th 155.

Victor and Yvonnne Li owned property out of which Victor and his son Calvin practiced medicine. Victor and Yvonne's daughter Gail was an attorney. The Li property was damaged by a neighbor and Mr. and Mrs. Li hired attorney Bowen to represent them in seeking to have the neighbor pay for the damage. Bowen was unable to settle the dispute and recommended the Lis file a lawsuit against the neighbor, which they did. The costs of litigating the case mounted and the Lis advised Bowen to stop work pending their daughter's attempt to negotiate a settlement. Bowen refused to cease work then while he was still counsel of record. Gail substituted in an settled the case. Bowen sued the Lis to recover unpaid fees. Mr. and Mrs. Li and Calvin cross-complained against Bowen for malpractice and breach of fiduciary duty. Bowen then cross-complained against Calvin and Gail, alleging that Calvin breached his contract with Bowen and that Calvin and Gail interfered with Bowen's representation of their parents. Bowen alleged all the Lis engaged in fraud in inducing him to provide legal services knowing that Gail would settle the case on the eve of trial without Bowen having received more than minimal payment. The Lis filed anti-SLAPP motions against Bowen's cross-complaint. The trial court granted Gail's motion on the ground the actions she took as her parents' and brother's attorney were protected litigation activities, but the trial court denied the other parties' motions.

The Court of Appeal (Second Dist., Div. Six) affirmed the order granting Gail's anti-SLAPP motion and reversed the order denying the others' motions. Attorney Bowen's claims against Calvin arising out of Calvin's alleged breach of contract were based on Calvin's communications with Bowen about legal services and as such were "squarely protected" by the anti-SLAPP statute. The interference and fraud claims were also based on protected activity directly related to the Lis' resolution of the underlying lawsuit. The court observed that unlike a malpractice action, which is not subject to the anti-SLAPP statute, "an attorney threatening litigation against former clients for decisions they made while the attorney represented them *would* chill the constitutional right of petition by preventing the clients from fully and openly discussing litigation matters among themselves, with that attorney, or with another attorney. [Citation.] Such acts are at the very heart of the anti-SLAPP statute's protections."

See also *Manlin v. Milner* (2022) 82 Cal.App.5th 1004 [Managing member of LLC and his attorneys' conduct in allegedly misappropriating funds to finance litigation against other LLC member was not protected litigation activity]. V

ARBITRATION

Providing paratransit services for disabled persons in parts of Los Angeles County involved interstate commerce for purposes of determining whether arbitration agreement fell within the terms of the Federal Arbitration Act's protection against rules hostile to enforcement of such agreements.

Evenskaas v. California Transit (2022) 81 Cal.App.5th 285.

In this purported wage-and-hour class action brought by a Los Angeles County paratransit driver, the defendants moved to compel individual arbitration and dismiss a driver's class claims pursuant to an arbitration agreement with a class action waiver. In support of the motion, the defendants relied on the Federal Arbitration Act's (FAA) requirement that arbitration acts should be enforced according to their terms. The trial court denied the motion, concluding that the FAA did not apply because section 2 of the FAA provides that the FAA applies only to contracts involving interstate commerce, and here, the defendants had not shown that they provided services outside California.

The Court of Appeal (Dist. Two, Division 7) reversed. The arbitration agreement involved interstate commerce for several reasons. First, the defendants provided paratransit services to comply with the federal Americans with Disabilities Act, which was enacted based on Congress' authority to regulate interstate commerce. Second, drivers working for the defendants almost certainly used highways, which were instrumentalities of interstate commerce, and used vehicles that at some stage in their history had traveled across state lines. The court noted that it was not addressing whether the driver fell outside the FAA's scope pursuant to an exemption, codified in section 1 of the FAA, for transportation workers engaged in interstate commerce, since the driver never argued that the exemption applied to him. The court emphasized that other cases had held that "local rideshare drivers and delivery drivers" were "not 'engaged in interstate commerce' for purposes of section 1, even though their activities more broadly involved and affected interstate commerce" for purposes of section 2. V

INSURANCE

Allegations that the COVID-19 virus was present on an insured's property and caused damage were sufficient to survive demurrer in business interruption coverage case.

Marina Pacific Hotel & Suites, LLC v. Fireman's Fund Ins. Co. (2022) 81 Cal.App.5th 96.

To recoup business losses suffered during the COVID-19 pandemic, a group of hotels sued Fireman's Fund seeking insurance coverage under their first-party property policy. The policy covered losses resulting from "direct physical loss of or damage to" the hotel properties. The policy further provided "communicable disease coverage, providing that Fireman's Fund would pay "for direct physical loss or damage" to insured property "caused by or resulting from a covered communicable disease event," including costs necessary to repair or rebuild insured property damaged or destroyed by the communicable disease and to "[m]itigate, contain, remediate, treat, clean, detoxify, disinfect, neutralize, cleanup, remove, dispose of, test for, monitor and assess the effects [of] the communicable disease." The policy excluded coverage for losses due to "[m]ortality, death by natural causes, disease, sickness, any condition of health, bacteria, or virus." Fireman's Fund demurred to the hotels' complaint on the ground that the mere inability to use the hotels was not a physical loss or damage required to trigger coverage, and the policy excluded coverage for losses caused by a virus. The superior court sustained Fireman's Fund's demurrers.

The California Court of Appeal (Second. Dist., Div. Seven) reversed. The hotels alleged that the virus bonded to surfaces at the properties through chemical reactions that transformed the physical condition of the properties, requiring the hotels to suspend operations to remediate the air and surfaces or replace property. Those allegations sufficiently stated a claim for coverage for "physical loss of or damage to property," no matter how "improbable" those allegations were. In so holding, the court observed that the "communicable disease" coverage indicated that the parties contemplated that physical loss or damage could be caused by a virus. The court also expressly disagreed with United Talent Agency v. Vigilant Ins. Co. (2022) 77 Cal.App.5th 821, which rejected the notion that the virus on the premises could be property damage. Finally, the court held that the particular virus exclusion here was ambiguous because it could be read to exclude coverage only for losses related to death from a virus.

See also *Amy's Kitchen v. Fireman's Fund* (2022) 83 Cal.App.5th 1962 [Trial court erred in denying leave to amend in connection with dismissal of COVID-19 business interruption coverage suit where policy covered losses due to communicable disease events]. V

RECENT CASES

CLASS ACTIONS

A plaintiff who accepts a Code of Civil Procedure section 998 offer resolving her individual wage-and-hour claims may still have standing under PAGA to bring representative claims for the same conduct.

Howitson v. Evans Hotels, LLC (2022) 81 Cal.App.5th 475.

Plaintiff filed a putative wage-and-hour class action against her former employer. She accepted a Code of Civil Procedure section 998 offer in her individual capacity. Following the entry of judgment on the section 998 offer, she filed a new lawsuit based on the same facts as her prior lawsuit, against the same employer, pursuant to California's Private Attorneys General Act (PAGA), which permits an aggrieved employee – acting as a proxy for the state –to bring a representative law enforcement action on behalf of current or former employees to recover civil penalties for wage-related violations of California's Labor Code. The employer argued that claim preclusion (res judicata) barred the new PAGA claim because it was based on Labor Code violations that plaintiff could have asserted in the first suit. The trial court agreed and dismissed the PAGA action.

The Court of Appeal (Fourth Dist., Div. One) reversed. The requirements for claim preclusion were not met, primarily because: (1) the two actions involved different claims for different harms (the first action involved claims for harms to the plaintiff while the second involved harms to the state and general public); and (2) because the state, which is the real party in interest in a representative PAGA action, was neither a party to the prior action nor in privity with the employee. V

LABOR & EMPLOYMENT

Where employees need computers to do their work, the time spent booting up their computers is compensable time.

Cadena v. Customer Connexx (9th Cir. 2022) 51 F.4th 831.

Call center employees filed suit for overtime violations, contending that they were not paid for the time they spent booting up to their computers as required to clock in for their shifts, nor for the time they spent shutting down their computers after clocking out. The employer moved for summary judgment, arguing that turning computers on and off and clocking in and out of the timekeeping system are not integral parts of the employees' duties as call center customer service agents. The district court agreed and granted the motion.

The Ninth Circuit reversed. Booting up a computer was an integral and indispensable part of the employees' duties where the employees could not do their work – receiving calls and scheduling – without turning their computers on. The court did not decide whether powering down the computer was also an integral and indispensable part of the employees' duties, leaving that issue for remand. V

A plaintiff can establish a prima facie case of gender discrimination based on the salary differential between her and one equivalent male employee.

Allen v. Staples (2022) 84 Cal.App.5th 188.

After her position with Staples was eliminated, plaintiff brought this lawsuit alleging, among other claims, gender discrimination under the Equal Pay Act. Staples moved for summary judgment. In its motion, Staples showed that female employees holding plaintiff's position were often paid more than the male employees in that position, and that some male employees were paid less than plaintiff. Plaintiff opposed the motion, pointing out that the one male employee in her workplace with the same position she had and seniority level was paid more than she was. The trial court granted summary judgment for Staples.

The Court of Appeal (Second Dist., Div. Five) reversed. Plaintiff could establish a prima facie case of gender discrimination by showing that she was paid less than a single male comparator. Having made that showing here, the burden shifted to Staples to show bona fide factors other than gender explained the pay disparity. Staples failed to carry that burden on summary judgment by showing only generally that pay was based on seniority, experience with the particular position, and merit, without showing how those factors justified the particular disparity between plaintiff and the male comparator in this case. V

CALIFORNIA SUPREME COURT PENDING CASES

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

Addressing employer liability for take-home COVID-19 exposure.

Kuciemba v. Victory Woodworks
(Case No. S274191, certification granted June 22, 2022.)

Robert Kuciemba began working for a furniture and construction company in San Francisco after the city issued a COVID-19 shelter-in-place order in March 2020. He and his wife Corby allege that the company knowingly transferred workers from an infected construction site to Robert's jobsite without following the relevant safety procedures. Robert contracted COVID-19 allegedly at work and spread it to his wife who was hospitalized with severe complications from the virus. They sued Robert's employer alleging negligence and other claims. After the case was removed to federal court, the district court dismissed the complaint, holding that the employer's wife's claims were barred by California's derivative injury doctrine, and, in the alternative, that the company did not owe a duty to her. Plaintiffs appealed to the Ninth Circuit.

The California Supreme Court granted the Ninth Circuit's request for certification on the following issues: 1. If an employee contracts COVID-19 at his workplace and brings the virus home to his spouse, does California's derivative injury doctrine bar the spouse's claim against the employer? 2. Under California law, does an employer owe a duty to the households of its employees to exercise ordinary care to prevent the spread of COVID-19?

Addressing whether participation in litigation waives right to compel arbitration.

Quach v. California Commerce Club
(Case No. S275121, review granted Aug. 24, 2022).

The parties to this labor lawsuit engaged in extensive discovery over a period of 13 months. Defendant belatedly moved to compel arbitration, claiming it had only recently found the agreement. Plaintiff opposed, asserting that defendant's unreasonable delay in moving to compel arbitration prejudiced him because he spent time and money preparing for trial. The trial court denied the motion, reasoning that defendant had continued to litigate despite knowing about the agreement and had thus waived the right to arbitrate. Defendant appealed.

The Court of Appeal (Second Dist., Div. One) reversed in a divided opinion. The majority rejected plaintiff's argument that the rule requiring prejudice for a waiver established in *St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187 had been diluted such that plaintiff only needed to show that the delay was unreasonable to establish waiver. The appellate court observed that the cases plaintiff cited involved a showing that the party resisting arbitration had engaged in proceedings or preparation it would have avoided if arbitration had been compelled sooner. No such showing existed in this case. An additional showing beyond expenditure on litigation, such as that defendant gained information or conducted discovery that it would not have been able to obtain in arbitration, was needed. The appellate court further held that a delay in seeking arbitration is not unreasonable solely because defendant could have sought arbitration earlier; there must also be a showing of attempted gamesmanship or a negative impact on the opposing party.

The Supreme Court granted review to decide: Does California's test for determining whether a party has waived its right to compel arbitration by engaging in litigation remain valid after the United States Supreme Court decision in *Morgan v. Sundance, Inc.* (2022) ___ U.S. ___ [142 S.Ct. 1708]?

Addressing standing to pursue representative PAGA claims after the U.S. Supreme Court's decision in Viking River Cruises.

Adolph v. Uber Technologies
(Case No. S274671, review granted July 20, 2022).

When plaintiff went to work for UberEATS, he accepted an arbitration agreement governed by the Federal Arbitration Act that contained a waiver of all representative PAGA claims. He later filed a putative class action complaint against Uber, contending the company misclassified employees as independent contractors and seeking civil penalties under PAGA. Relying on *Iskanian v. CLS Transportation Los Angeles, LLC* (2014) 59 Cal.4th 348, the trial court declined to order arbitration of the PAGA claim and the Court of Appeal (Fourth Dist., Div. Three) affirmed. The representative PAGA claim could not be arbitrated without the state's consent.

After the Court of Appeal's opinion, *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906 was decided, abrogating *Iskanian* and holding that an individual could agree to arbitrate his individual PAGA claims and, once having done so, would then lack standing to pursue the representative claims in court.

The California Supreme Court granted review to consider whether aggrieved employee who has been compelled to arbitrate claims under PAGA that are "premised on Labor Code violations actually sustained by" the aggrieved employee maintains standing to pursue "PAGA claims arising out of events involving other employees" in court or another suitable forum even after his individual claims are ordered to arbitration.

Addressing whether monetary sanctions may be awarded for discovery abuse where not specifically authorized by the Civil Discovery Act.

City of Los Angeles v. Pricewaterhousecoopers, LLC
(Case no. S277221, review granted Jan. 25, 2023)

The City of Los Angeles contracted with Pricewaterhousecoopers (PWC) to modernize the City's billing system for water and power services. The City alleged that PWC's system failed to produce accurate billing, causing the City to be sued by ratepayers. One ratepayer class action was settled under circumstances indicating collusion between the City and the ratepayer. PWC sought discovery about the City's privilege log and the draft complaint in the ratepayer's action. The City failed to comply with discovery orders to produce the materials in an "egregious" abuse of the discovery process. Nine months after the case was dismissed the prejudice, PWC moved for monetary sanctions under Code of Civil Procedure sections 2023.010 and 2023.030, which, respectively, provide the definitions of discovery abuse and forms of potential sanctions. The trial court awarded $2.5 million in sanctions and the City appealed.

A majority of the Court of Appeal (Second Dist., Div. 5) reversed and remanded for reconsideration whether any specific provisions of the Civil Discovery Act authorized monetary sanctions for the specific type of discovery abuse that occurred. The trial court had jurisdiction to award sanctions even after the case was dismissed as a collateral matter. Further, the trial court had discretion to consider the motion for sanctions for violation of a prior discovery order at any time. However, "monetary discovery sanctions may be imposed under section 2023.030 only to the extent authorized by another provision of the Discovery Act. Section 2023.010 describes conduct that is a misuse of the discovery process but does not authorize the imposition of sanctions. The plain language of the statutory scheme does not provide for monetary sanctions to be imposed based solely on the definitional provisions of sections 2023.010 or 2023.030."

The California Supreme Court granted review on January 25, 2023.

See also *Guardianship of A.H.* (2022) 83 Cal.App.5th 155 ["[A] trial court can exclude evidence as a sanction for the violation of an order to exchange witness lists – even when the exclusion amounts to a terminating sanction," but only in appropriate cases where other lesser sanctions will not vindicate the court's authority].

Association of Southern California Defense Counsel
2520 Venture Oaks Way, Suite 150,
Sacramento, CA 95833
(800) 564-6791 – phone • (916) 924-7323 – fax
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Introducing the ASCDC Marketplace!

We are pleased to announce the launch of the ASCDC Marketplace. The Marketplace will be the one stop shop for attorneys to find vendors, staff and employment. We invite you to participate. All vendor listings will include a link to your website, a brief description of your services (25 words or less) and a banner ad that links to your website. The size of the banner ad is 450 pixels wide by 100 pixels tall.

View the Marketplace at www.ascdc.org/market.asp

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ASCDC 62ND Annual Seminar

February 9-10 • JW Marriott at LA Live

ASCDC
Association of Southern California Defense Counsel

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Thursday, February 9, 2023 – *continued*

TRIAL SCHOOL TRACK

1:30 pm – 2:45 pm
Diamond 5

Fixing Our Broken Discovery Culture

(MCLE – 1.25 hours of General Credit)

The manner in which much civil discovery is conducted is broken and needs to be fixed. But to do so, we all need to look into the mirror and reform the culture of civil discovery.

Carla Christofferson
Trial and Global Disputes

Hon. Samantha Jessner
Los Angeles County Superior Court

Anastasia Mazzella
Kabateck LLP

Hon. Lawrence Riff
Los Angeles County Superior Court

Stephanie Yonekura
Hogan Lovells

1:30 pm – 2:45 pm
Diamond 1-3

"Civility Matters"

(MCLE – 1.25 hours of Legal Ethics Credit)

You can be a zealous advocate and civil.

Why civility matters to your clients, the court and the legal profession.

Hear a panel of ABOTA, ASCDC, and CAALA members discuss why Civility Matters now more than ever and learn tips for dealing with lawyers (and judges) who are not civil.

Patricia Daehnke
Collinson, Daehnke, Inlow & Greco

Bruce M. Bunch
Law Offices of Bruce M. Bunch

Hon. Daniel M. Crowley
Los Angeles County Superior Court

Hon. Brian S. Currey
Second Appellate District, Division 4

Lourdes DeArmas
Omega Law Group

Traci S. Lagasse
Lagasse Branch Bell + Kinkead

Kim Oberrecht
Horton, Oberrecht & Kirkpatrick

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Thursday, February 9, 2023 – *continued*

2:45 pm – 3:00 pm
Diamond Foyer

Vendor Break

TRIAL SCHOOL TRACK

3:00 pm – 4:15 pm
Diamond 5

Expert Witnesses: Neutralizing Testimony Before Trial

(MCLE – 1.25 hours of General Credit)

A panel of the judiciary, plaintiffs bar and defense will discuss tactics for limiting expert discovery, attacking expert opinions, and preparing your experts prior to trial. Learn from seasoned trial attorneys and likely rulings from the bench pertaining to your experts.

Bron E. D'Angelo
Burger | Meyer, LLP

Angela Haskins
Haight, Brown & Bonesteel, LLP

Hon. Ruth Kwan
Los Angeles County Superior Court

Ibiere Seck
Seck Law, PC

3:00 pm – 4:15 pm
Diamond 1-3

Lien On Me: Pushing Back on Unusual, Uncustomary, and Unreasonable Charges

(MCLE – 1.25 hours of General Credit)

This all-star panel of litigators and experts will educate attendees on UCR, exchange, and market values, as well as arm defense counsel with real-world (pre)deposition and (pre)trial strategies to use with experts, lien providers, and lien-based billing PMQs.

Benjamin J. Howard
Neil, Dymott, Frank, McCabe & Hudson, APLC

Henry W. Lubow, M.D.
Injury Review, Inc.

Donna Maryanski
Mark Weiner & Associates

Steven Toschi
Toschi Collins & Doyle

4:15 pm – 4:30 pm
Diamond Foyer

Vendor Break

Honor the Past and Celebrate the Future

Bringing to Life the Past Glory of ASCDC

ASCDC
Association of Southern California Defense Counsel

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Thursday, February 9, 2023 – *continued*

4:30 pm – 5:00 pm *Diamond 5*
LASC Court Update
(MCLE – 0.5 hours of General Credit)

Hear the latest from the Los Angeles Superior Court.

Hon. Samantha Jessner
Presiding Judge
Los Angeles Superior Court

5:00 pm – 6:30 pm *Diamond 4*
Cocktail Reception

Join your fellow members and colleagues for appetizers and cocktails at the Annual Seminar Reception – an opportunity to wrap up your day and enjoy the camaraderie amongst seminar attendees.

7:00 pm – 9:00 pm *Lucky Strike Lanes, LA Live*
Bowling Party

Food • Fun • Bowling
Separate advance ticket purchase required; space is limited.

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Friday, February 10, 2023

7:30 am – 12:00 noon *Diamond Foyer*
Registration Open

7:30 am – 8:30 am *Diamond Foyer*
Continental Breakfast in the Vendor Faire Area

7:30 am – 11:00 am *Diamond Foyer*
Vendor Faire

8:30 am – 9:15 am *Diamond 5*
California Defense Counsel Legislative Update
(MCLE – 0.75 hours of General Credit)

Hear the latest from California Defense Counsel Legislative Advocate, Mike Belote, who will provide attendees with a review of new and pending legislation impacting the defense practice in California.

Michael D. Belote
California Advocates, Inc.

9:15 am – 9:30 am *Diamond Foyer*
Vendor Break

HOT TOPICS TRACK

9:30 am – 10:30 am
Presentation of Medical Evidence at Trial
(MCLE – 1.0 hours of General Credit)

MODERATOR:
Lindy Fried Bradley
Bradley, Gmelich & Wellerstein LLP

This session will focus on the presentation of medical evidence at trial from both the plaintiff's and defense's perspective. During the session, the speakers will discuss the presentation of medical evidence in two separate medical scenarios, and how the use of demonstrative medical reconstruction animation can assist a jury in understanding the details of the case and medical treatment received.

Kathryn Canale
Bradley, Gmelich & Wellerstein LLP

Thomas Johnston
Johnston & Hutchinson LLP

Kenneth R. Sabbag, M.D.
Congress Orthopaedic Associates

Cameron Thies
DK Global

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Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Friday, February 10, 2023 – *continued*

9:30 am – 10:30 am
Diamond 5

The Lead-up to Trial: Best Practices for Trial Preparation

(MCLE – 1.0 hours of General Credit)

Mary R. Fersch
Daniels, Fine, Israel, Schonbuch & Lebovits LLP

If there were one key element to success in trial, it would be preparation. This panel of accomplished trial attorneys and judicial officers will provide insight on the critical timeline for your trial preparation, essential final discovery, strategies for motions in limine and trial documents, and making the most of mock trials and focus groups.

Hon. Rupert A. Byrdsong
Los Angeles County Superior Court

Hon. Lauren Lofton
Los Angeles County Superior Court

Heather L. Mills
Skane Mills

Rahul Ravipudi
Panish | Shea | Boyle | Ravipudi LLP

10:30 am – 10:45 am
Diamond Foyer

Final Vendor Break and Prize Drawings

10:45 am – 12:00 pm
Diamond 5

When in Trial: The Nuances of Trial Practice

(MCLE – 1.25 hours of General Credit)

The panel will cover the following topics on the nuances of trial practice:

- *Sanchez* objections and when/why to stipulate;
- Admissibility of felonies/character evidence;
- Using/objecting to video depositions during opening and trial;
- Requesting special jury instructions;
- Preserving the record (when to object, motions for mistrial, curative instructions, nonsuit/ directed verdict);
- How to use discovery responses

Lisa Collinson
Collinson, Daehnke, Inlow & Greco

Hon. Stephanie Bowick
Los Angeles County Superior Court

Dana Fox
Lewis Brisbois

Christa Haggai Ramey
Ramey Law, P.C.

Robert Simon
The Simon Law Group

Alice Smith
Yoka & Smith

Program Schedule

All functions will be held in the Diamond Ballroom area on the third floor of the JW Marriott

Friday, February 10, 2023 – *continued*

12:00 noon – 2:00 pm
Diamond 1-4

Annual Seminar Luncheon with Keynote Speaker

Keynote Speaker:
ROBERT O'NEILL
Former SEAL Team Six Leader, Naval Special Warfare Development Group, *New York Times* Best-Selling Author

Rob O'Neill is one of the most highly-decorated combat veterans of our time and the author of the *New York Times* best-selling memoir ***The Operator: Firing the Shots That Killed Osama bin Laden and My Years as a SEAL Team Warrior.*** A former SEAL Team Six leader with the Naval Special Warfare Development Group, he deployed more than a dozen times and held combat leadership roles in more than 400 combat missions in four different theaters of war. A highly-trained Navy SEAL, he led the military's most elite and was involved in our nation's most important campaigns. With most of his career shrouded in a classified cloak, O'Neill was the man on the ground we have never heard of but know exists. He was one of the quiet professionals performing the most difficult tasks in the most difficult circumstances, serving his remarkable career in the shadows and keeping America safe in the process.

In the world of high-pressure Navy SEAL missions, instant, critical decision-making is a necessity for success. Having trained more than 800 special operations and tactical operators, O'Neill brings this unique expertise to organizations and translates his elite SEAL team training into high-impact, actionable insights on leadership, decision-making, operating in uncertain environments, and how to become the "best of the best." His mantra is "never quit," and he believes this is the single most important factor in determining success. O'Neill reminds us that the servicemen doing the dirtiest work are often making the hardest sacrifices.

O'Neill has been decorated more than 52 times with honors, including two Silver Stars, four Bronze Stars with Valor, a Joint Service Commendation Medal with Valor, three Presidential Unit citations, and two Navy/Marine Corps Commendations with Valor.

O'Neill rose to the rank of senior chief petty officer in the United States Navy and served as a team leader at DEVGRU. O'Neill has a laundry list of certifications, including instructor, physical trainer, master training specialist, special warfare sniper and breacher, diving supervisor, and survival expert. Since leaving active duty, O'Neill is a co-founder of Your Grateful Nation, which provides individualized transition support for Special Operations heroes and their families. They provide executive-level mentoring, transition services, and family stabilization support.

Honor the Past and Celebrate the Future

Bringing to Life the Past Glory of ASCDC

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Los Angeles, California

Discover unparalleled luxury, style and convenience when you stay at the JW Marriott Los Angeles LA LIVE. You will find yourself surrounded by plush amenities, irresistible cuisine and unforgettable experiences just steps from your room. The Hotel is located at 900 West Olympic Boulevard, Los Angeles, CA 90015 – near to some of the most popular attractions. Explore the Crypto.com Arena, Microsoft Theater, Grammy Museum, Club Nokia, Griffith Park and so much more. Sights that are not to be missed!

To see all the attractions, check out LA LIVE's website: *www.lalive.com*.

Parking is available at the JW Marriott Los Angeles LA LIVE with the discounted ASCDC rate.

Current Daily Rates: $26 Valet Parking
Current Overnight Rates: $49 Valet Parking
Rates do not include taxes.

A block of rooms has been reserved for ASCDC members and guests attending the 62ND Annual Seminar, but **you must reserve your room no later than January 18, 2023**. The ASCDC discounted rate is $319 plus a $30 destination fee per night. For reservations, call 213.765.8600 or 877.622.3056 or follow this link: *https://book.passkey.com/ASCDC2023*. Please indicate you are attending the Association of Southern California Defense Counsel's 62ND Annual Seminar to receive our special room rate. Please visit the hotel website for further details: *www.marriott.com/hotels/travel/laxjw-jw-marriott-los-angeles-la-live*.

DESTINATION FEE
Room rates will be subject to a non-commissionable daily destination fee of $30 plus tax per room per night. This fee will cover several amenities, which include a) daily room credit of $20 toward food and beverage in any Hotel outlet of In-Room Dining; b) enhanced in-room WiFi; c) Morning Fitness Class; d) Daily Wine Tasting Experience; e) access to the GRAMMY Museum; f) small popcorn at Regal Cinemas; and g) free bowling at Lucky Strike.

Registration Information

Advance registration for the Annual Seminar is a necessity. Registering is easy and may be done as follows:

- Online via the ASCDC website – *www.ascdc.org.*
- By mail by completing the form in this brochure and mailing it with your check to the ASCDC office in Sacramento.

REGISTRATION FEES:	on or before 1/18/23 EARLY	1/19/23 – 2/6/23 REGULAR	after 2/6/23 ON-SITE
ASCDC Members	$395	$450	$475
Claims Personnel	$185	$185	$185
Non-Member Attorneys	$505	$550	$575
Young Lawyer Member*	$305	$350	$375
Luncheon Companion Ticket	$130	$130	$130
Reception Companion Ticket	$ 95	$ 95	$ 95
Thursday Bowling Event**	$ 99	$ 99	$120

* In practice up to five years
** Advance purchase required; limited availability

The registration fee covers attendance at the seminar on Thursday and Friday, attendance at Thursday's reception, and the Annual Luncheon on Friday. A separate fee is required for Thursday's special event at Luck Strike Bowling.

REFUND POLICY – Requests for refunds must be made in writing and submitted to the ASCDC office no later than Friday, February 3, 2023. A $100 surcharge will be assessed to all cancellations received on or before this date. No refunds will be given after Friday, February 3, 2023.

GUESTS – Each person registered for the Annual Seminar is entitled to bring one guest to Thursday night's reception for an additional cost of $95, and one guest to the Friday Lunch for an additional cost of $130. All reception and lunch guests must be registered in advance.

Be sure to register early to avoid onsite fees.

Please make checks payable to the Association of Southern California Defense Counsel.

PHOTO/VIDEO DISCLAIMER – By registering for and attending this event, you agree that your image may be taken during the event and used at any time, without further notification, for printed materials, websites, social media and other marketing purposes.

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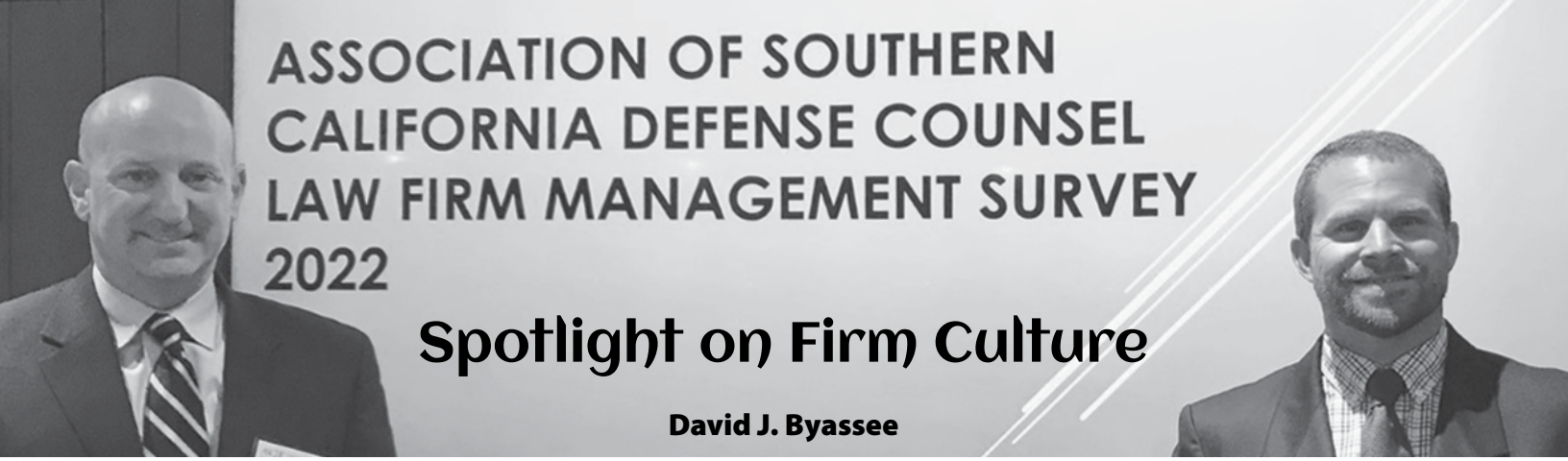

ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL LAW FIRM MANAGEMENT SURVEY 2022

Spotlight on Firm Culture

David J. Byassee

What's your law firm's culture? The question is worth considering, whether you're a managing partner or a first-year associate.

At year end, the leaders of dozens of defense law firms with offices in Southern California met at the Jonathan Club in Los Angeles to discuss this topic at the biennial 2022 ASCDC Law Firm Management Seminar presented by Thomas P. Feher of LeBeau Thelen, LLP and Matthew S. Pascale of Lewis Brisbois.

In advance, participants shared in confidence information regarding key practice metrics including, to name a few: compensation, rates, attorney/paralegal/legal assistant ratios, billable requirements, benefits, ownership and growth. Tom and Matt compiled anonymized data showing ranges and average figures in each category, highlighting areas where the figures have changed since the 2018 (pre-pandemic) seminar.

The charts and commentary spurred lively discussion, which was followed up by complementary information concerning office leasing, utilization of space, and remote work, provided by guest speaker Lalo Diaz, Vice President of Jones Lang LaSalle. Some of the takeaways put a spotlight on generational difference in attitudes toward how premises can best be tailored to productivity and professionalism. Further topics of succession planning, growth and mergers were then discussed with guest speakers Joshua R. Driscoll, Managing Partner at Lagerlof and Corey Castillo, Chief Operating Officer at Lagerlof.

A prevailing theme throughout the day was that people have a strong thirst for a fitting firm culture. This is a subjective concept but a few objective traits stood out as desirable: a culture should build a reputation in the legal community, promote transparency of compensation and opportunity for advancement, allow for flexible working arrangements while creating a collegial atmosphere conducive to in-person collaboration, and provide ample opportunities for professional development. People will flock to and remain with firms that allow them to thrive, both professionally and personally, and people will do more for colleagues whom they have come to know and respect. This is the "why" behind the importance of law firm culture.

There are myriad tools at our disposal, such as employment law SB 1162 (requiring job postings to include pay scale), Glassdoor (online reputation management), and workspace management software (like OfficeMaps, to coordinate use of hoteling offices and hybrid teams).

We hope your firm will be present with us in 2024. In the meantime, don't wait for the next seminar to reach out to other ASCDC members to find out what creative solutions they have found or are considering in the quest for success, in all the ways that we measure that term.

The Usual Suspects Seminar – Inside Insight on Opposing Experts

Mary R. Fersch

There are few ASCDC seminars that bear the label "Members Only." One of those few is the Usual Suspects Seminar offering a frank discussion of the experts regularly hired by the plaintiff's bar. This year's seminar focused on best practices for deposing plaintiff's experts, using pre-trial motions to combat plaintiff's experts, and cross-examining plaintiff's experts at trial. Our panel of seasoned trial attorneys Michael Schonbuch, Donna Maryanski, Kamil Canale, Hannah Mohrman, Lauren Lofton, and Mary Fersch provided members with valuable information on these topics.

The panel covered the basics of taking expert depositions, expert-related motions in limine and Evidence Code section 402 challenges, as well as advanced strategies for combatting the usual plaintiff experts. As those with a trial practice know, career legal experts can be adept at evading the difficult questions asked during deposition and cross examination at trial. Attendees learned how to identify common tactics used by opposing experts and how to effectively deal with them. The panelists also informed on the emerging trends being used by the plaintiff's bar through new technology, unsettled science, and questionable methodologies. At the reception immediately following, ASCDC members had an opportunity to network and collaborate, all to the further improvement of our legal practices.

Photos from the ASCDC Golf Tournament - October 17, 2022

NEW MEMBER SPOTLIGHT

Get to Know Some of Our New Members

Elham Azimy

Elham Azimy is Senior Counsel at Tyson & Mendes' Orange County office. She has previously handled a wide variety of cases involving complex personal injury, medical malpractice, contract disputes, and employment law matters. Ms. Azimy attended Western State University College of Law in 1996 and began practicing law in 2000.

Brad Deblanc

Brad Deblanc has over 25 years of civil defense litigation experience. His practice has focused on construction defect, personal injury, catastrophic injury, landlord tenant and product liability, primarily in the insurance defense context. He has successfully resolved hundreds of cases through mediation, and has conducted numerous binding arbitrations, as well as jury trials to verdict in both auto accident, construction and premises liability cases. He has also successfully argued cross-claims for contractual indemnity and post-trial motions.

Nina Hawkins

Nina Hawkins' Practice concentrates on representing corporations in personal injury and premises liability claims. Prior to joining London Fischer, she litigated fraudulent insurance claims exclusively, and prior to that she was an advocate for tenants living in housing that was subject to the Los Angeles Rent Stabilization Ordinance. When she's not at work, she can be found skiing the slopes or cruising around underwater (scuba diving).

Hon. Amy Hogue (Ret.)

Having retired from the Los Angeles Superior Court's complex litigation panel, Judge Hogue is a mediator/arbitrator with Signature Resolution with expertise in mass torts, personal injury, employment, intellectual property, insurance coverage, class actions and complex commercial litigation.

Ivette Kinkaid

Ivette Kincaid is a Partner in Kahana Feld's construction, general liability, and insurance defense practice groups with 27 years of experience representing clients in complex construction defect litigation, bodily injury litigation, catastrophic injury, and general insurance defense. She focuses on the defense of homebuilders, contractors, developers, and real estate professionals in construction defect, general liability, insurance defense, construction accident and real estate matters. In her time away from the office, Ivette enjoys dancing, yoga and spending time with family and friends.

Mandeep Rupal

Mandeep Rupal's firm primarily focuses on providing defense to small businesses in employment-related lawsuits. They also provide general counsel services to small businesses.

Matthew Schiller

Matthew Schiller is a trial attorney specializing in catastrophic liability and medical malpractice in San Diego where he lives with his wife, Emily, and son, Gabriel. He loves helping doctors and small business owners navigate the tribulations of litigation to help them maintain their honor and businesses.

Jonathan Termachi

Jonathan Termechi is senior counsel and an experienced litigator at Pettit Kohn Ingrassia Lutz & Dolin. He represents large and small commercial transportation companies and their drivers across all areas of transportation law. He also represents hospitality and nightlife establishments against claims involving premises liability and personal injury. Jonathan's successes include multiple summary judgment victories and favorable settlements for his clients.

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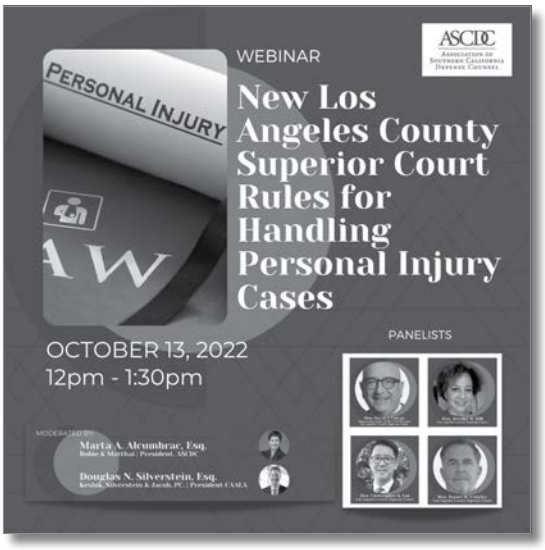


New Los Angeles County Superior Court Rules for Handling Personal Injury Cases

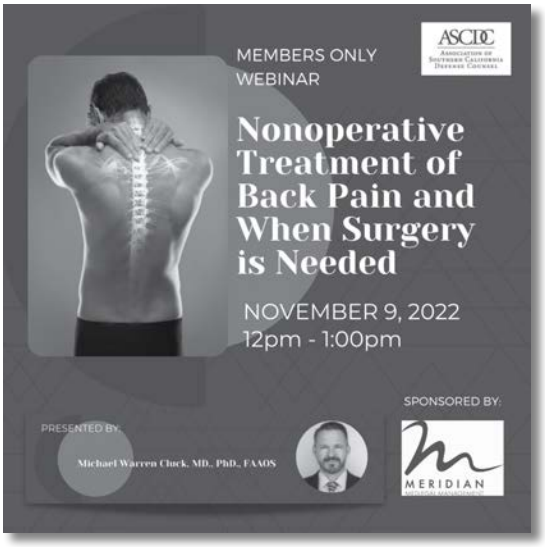
On October 13, 2022 a panel of Los Angeles County Superior Court judges discussed what to expect after October 10, 2022 concerning PI matters currently in the PI hub. The panel discussed the implementation of the plan to gradually close the Personal Injury Hub Courtrooms and transition to I/C courts and the expected pros and cons of the plan.

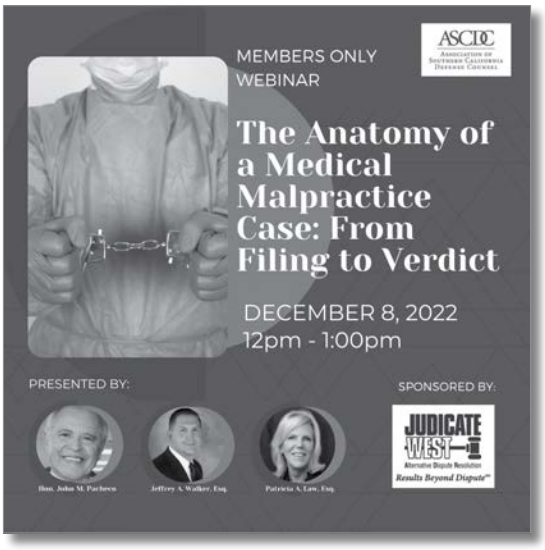
For more information contact:
Marta A. Alcumbrac, Esq. | *malcumbrac@romalaw.com*
Douglas N. Silverstein, Esq. | *dsilverstein@californialaborlawattorney.com*

Nonoperative Treatment of Back Pain and When Surgery is Needed

Michael Warren Cluck, MD, PhD., FAAOS presented on the topic of non-operative treatment of back pain and surgical intervention. Dr. Cluck focused on the fact medical legal cases typically include complex medical treatments without clear indications of why the treatments were utilized to care for the patient. Medical procedures like epidural steroid injections, radiofrequency ablation, chiropractic care, physical therapy and various medications utilized to manage pain were discussed as well as the costs generated for such procedures on claims. Dr. Cluck discussed why surgery is often recommended in medical legal cases and how it has the most significant impact on raising the cost of medical care. The procedures and reasons for such were questioned as if such were always necessary. Dr. Cluck focused on nonsurgical management of low back pain and under what conditions surgery required to treat refractory low back pain.

For more information contact:
Laura Wiegand | *laura@meridianmedlegal.com*





The Anatomy of a Malpractice Case: From Filing to Verdict

The well regarded panel presented on the niche, sophisticated, and often complicated area of California Law known as Medical Malpractice. Medical malpractice has its history founded in both statutory mandates and decades of case precedent. From rules related to notices prior to litigation, to various statutes of limitation, followed by multiple rules related to discovery, depositions, presentation of evidence, the designation and use of experts, California medical malpractice cases present a challenge even for the most sophisticated of attorneys. With MICRA changes underway as of January 2023, is the panel anticipated that there will be even more discussions ahead about how this area of law will be defined across the state. The panel included defense attorney Jeff Walker, plaintiff's counsel Patricia Law and San Bernardino Superior Court Judge John Pacheco and discussed medical malpractice cases including pre-litigation evaluations, expert retentions, statutes of limitation, retention of experts, law and motion, use of jury instructions by counsel and the court, demonstrative evidence at trial, selecting the right jury for malpractice cases, and getting a malpractice trial to verdict!

For more information contact:
Jeffrey A. Walker, Esq. | *jwalker@walkerlawllp.com*

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AMICUS COMMITTEE REPORT

ASCDC's Amicus Committee continues to work energetically on behalf of its membership. ASCDC's Amicus Committee has submitted *amicus curiae* briefs in several recent cases in the California Supreme Court and California Court of Appeal, and has helped secure some major victories for the defense bar.

Don't miss the recent amicus *VICTORY*

The Amicus Committee successfully sought publication of the following case:

1) ***Joshi v. Fitness International, LLC*** (2022) 80 Cal.App.5th 814: The Court of Appeal affirmed the granting of summary judgment in this negligence and premises liability case involving a gym. It based its holding on a written release signed as part of the membership application and the gym's lack of knowledge about a dangerous condition. Defense counsel was Alice Chen Smith, William Choi, and Christine Carol DeMetruis at Yoka & Smith. In addition to Yoka & Smith's publication request, Steven Fleischman and Scott Dixler from Horvitz & Levy submitted a successful publication request on behalf of ASCDC.

2) ***Franklin v. Santa Barbara Cottage Hospital*** (2022) 82 Cal.App.5th 395: The Court of Appeal in Los Angeles affirmed summary judgment for a hospital in a medical malpractice case, holding that a physician was not the hospital's actual or ostensible agent. David Pruett from Carroll, Kelly, Trotter & Franzen prepared a publication request that was moments away from being filed when the Court of Appeal granted the defendant's request.

3) ***C.I. v. San Bernardino City Unified School District*** (2022) 82 Cal.App.5th 974: The Court of Appeal in Riverside held that a school district did not owe a duty to the plaintiffs to prevent a school shooting, and the school's unlocked doors did not cause the plaintiffs' injuries. As Harry Chamberlain very eloquently put it: "Regrettably, we need to have published cases like this one, too. It is the circumstances of the world we live in that are regrettable, not the analysis." Bob Olson from Greines, Martin, Stein & Richland submitted a successful publication request.

4) ***Miller v. Roseville Lodge No. 1293*** (2022) 83 Cal.App.5th 825: The Court of Appeal opinion affirmed defendants' summary judgment motion under *Privette*, holding that the hirer who offered an independent contractor use of a scaffold with unlocked wheels was not liable for the contractor's fall because it did not direct him to use the scaffold, nor did it conceal the unlocked wheels. The court's decision contains a thorough analysis of *Privette* and explained why the exceptions relied on by the plaintiff did not apply. David Schultz from Polsinelli submitted a successful publication request on behalf of ASCDC.

5) ***McCullar v. SMC Contracting, Inc.*** (2022) 83 Cal.App.5th 1005: The Court of Appeal in Sacramento affirmed the granting of summary judgment in a Privette case, holding that after becoming aware of a hazard created by the hirer, it was the contractor's responsibility to protect its employees. In doing so, the court disagreed with a pro-plaintiff opinion, *Tverberg v. Fillner Constr.* (2012) 202 Cal.App.4th 1439, which held that a hirer could be liable for creating a hazard and then requiring the contractor to conduct unrelated work nearby. Don Willenburg from Gordon & Rees submitted a successful joint publication request on behalf of ASCDC and ADC. V

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

1) ***Hoffmann v. Young*** (2020) 56 Cal. App.5th 1021, revd. (2022) 13 Cal.5th 1257: Chris Hu at Horvitz & Levy requested amicus support for the defendants' petition for review. In a divided opinion, the Court of Appeal in Ventura held that an invitation to use a motorcycle track abrogated the track owner's recreational immunity defense. Don Willenburg from Gordon & Rees submitted a joint amicus letter on behalf of ASCDC and the North supporting the petition. The Supreme Court granted review, and on August 29, 2022, reversed, holding when a landowner has properly authorized an agent to extend, on his or her behalf, an invitation to enter the land, that invitation gives rise to an exception from recreational-use immunity, but the landowners' son here was not authorized by them to issue an invitation on their behalf. Thus, the exception to recreational-use immunity did not apply.

2) ***Pacific Fertility Cases*** (2022) 78 Cal. App.5th 568, review granted Aug. 17, 2022, S275134: Stephen Norris at Horvitz & Levy requested amicus support for a petition for review. The Court of Appeal in San Francisco held that a petition for writ of mandate is the exclusive means of challenging a trial court's order granting a good faith settlement motion. Ted Xanders from Greines, Martin, Stein & Richland and Don Willenburg from Gordon & Rees submitted a joint amicus letter on

Continued on page 38

behalf of ASCDC and ADC supporting the petition. The Supreme Court unanimously granted review limited to this issue: "Whether a petition for writ of mandate is the exclusive means of challenging an order approving or denying a good faith settlement under Code of Civil Procedure section 877.6."

3) ***Facey Medical Group v. Superior Court*** (B320470): Alana Rotter at Greines, Martin, Stein & Richland requested amicus support in this writ petition challenging a trial court's ruling requiring a medical group to turn over employment information regarding a physician. The issue was whether Evidence Code section 1157 bars such discovery. David Pruett from Carroll, Kelly, Trotter & Franzen submitted an amicus letter on behalf of ASCDC supporting the petition. The Court of Appeal in Los Angeles issued a very strongly-worded alternative writ and the trial court reversed its ruling.

4) ***Abelar v. Mora*** (B311451): The Court of Appeal in Los Angeles affirmed the granting of summary judgment in a medical malpractice case. The court held that the trial court did not abuse its discretion in permitting the defense to depose plaintiffs' expert, pursuant to *St. Mary Medical Center v. Superior Court* (1996) 50 Cal.App.4th 1531, prior to the normal expert discovery timeline, in order to challenge the basis of the expert's opinion opposing the summary judgment motion. Steven Fleischman from Horvitz & Levy submitted a publication request on behalf of ASCDC, which was denied. V

Keep an eye on these PENDING CASES

ASCDC's Amicus Committee has also submitted amicus curiae letters or briefs on the merits in the following pending cases:

1) ***Bailey v. San Francisco District Attorney's Office*** (2020) unpublished opinion, review granted Dec. 30, 2020, S265223: The Amicus Committee recommended, and the Executive Committee approved, submitting a brief on the merits in this employment case involving the "stray remark" doctrine. The Supreme Court granted review to address this issue: "Did the Court of Appeal properly affirm summary judgment in favor of defendants on plaintiff's claims of hostile work environment based on race, retaliation, and failure to prevent discrimination, harassment and retaliation?" Brad Pauley and Eric Boorstin from Horvitz & Levy submitted an amicus brief on the merits supporting the Court of Appeal analysis, which found no triable issue on which a jury could find that an employee's single epithet altered co-worker plaintiff's working conditions. The case remains pending.

2) ***Valenzuela v. City of Anaheim*** (9th Cir. 2021) 6 F.4th 1098, rehearing denied (2022) 29 F.4th 1093: Defense counsel Tim Coates at Greines, Martin, Stein & Richland sought amicus support from ASCDC regarding recoverable damages in a section 1983 wrongful death action. The issue presented to the 9th Circuit was whether an heir can recover for the decedent's "loss of life." There is a circuit split on this issue. Steven Fleischman, Scott Dixler, and Chris Hu from Horvitz & Levy submitted an amicus brief on the merits. On August 3, 2021, the Ninth Circuit issued a published 2-1 opinion affirming the award of loss of life damages; Judge Lee dissented. In a related case raising the same issue – *Craig v. County of Orange* (2021) 856 F.Appx. 649 – the 9th Circuit issued a memorandum disposition on August 18, 2021. On March 30, 2022, 11 Ninth Circuit judges issued a dissent from the denial of the petition for rehearing en banc in *Valenzuela*. 29 F.4th 1093. Petitions for certiorari have been filed in both cases (Nos. 21-1598, 22-187), and Steven Fleischman, Scott Dixler, and Chris Hu from Horvitz & Levy submitted an amicus brief in Valenzuela on behalf of ASCDC, supporting petitioner City of Anaheim. Both cert. petitions remain pending.

3) ***TriCoast Builders, Inc. v. Fonnegra*** (2022) 74 Cal.App.5th 239, review granted Apr. 27, 2022, S273368: The California Supreme Court has granted review to address these two issues: (1) When a trial court denies a request for relief from a jury waiver under Code of Civil Procedure section 631, and the losing party does not seek writ review but instead appeals from an adverse judgment after a bench trial, must the appellant show "actual prejudice" when challenging the order on appeal?; and (2) Does a trial court abuse its discretion when it denies a request for relief from a jury trial waiver without a showing that granting the request will prejudice the opposing party or the trial court? Steven Fleischman and Andrea Russi from Horvitz & Levy submitted an amicus brief on behalf of ASCDC supporting the defendant's position, and the case remains pending.

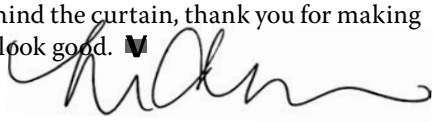
4) ***People of the State of California, ex rel. Allstate Insurance Company v. Discovery Radiology Physicians*** (B315264): Greg Pike, a past president of ADC, requested amicus support in this appeal pending before the Court of Appeal in Los Angeles. Allstate has brought an action under the Insurance Fraud Protection Act against several medical providers alleging billing fraud. Harry Chamberlain from Buchalter will be submitting an amicus brief on the merits.

5) ***Randy's Trucking v. Superior Court*** (F084849): Haight Brown & Bonesteel requested amicus support in a writ proceeding pending in the Court of Appeal in Fresno. The Court of Appeal has issued an order to show cause, so the writ proceeding will go forward on the merits. The issue relates to a trial court order requiring a defense expert to provide all the raw dates and full audio recording of an independent medical examination (IME) to plaintiff's counsel. David Schultz from Polsinelli has agreed to submit an amicus brief on the merits. V

Continued on page 39

President – *continued from page 3*

and then filing brief after successful brief is beyond commendable. To Lisa Perrochet, thank you for bringing *Verdict* magazine to life, and for being such a strong voice for the defense bar. To Mike Belote, thank you for all you do to make sure ASCDC and CDC is well-represented in Sacramento. To Jennifer Blevins and the other wizards behind the curtain, thank you for making us look good. V



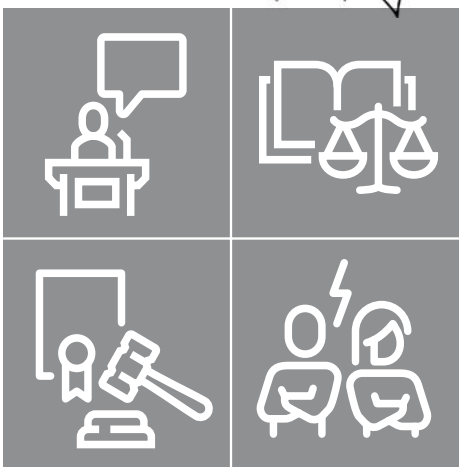
Capitol Comment

– continued from page 5

practice itself, including the possibility of paraprofessional licensing and the always worrisome prospect of extending the sales tax to services.

In the next two months, the combined California Assembly and Senate will introduce approximately 2,500 new pieces of legislation, covering virtually every possible area of defense practice. Your membership in ASCDC supports the California Defense Counsel, the lobbying arm of ASCDC and your northern counterpart, the Association of Defense Counsel of Northern California and Nevada. CDC is the only organization in Sacramento exclusively dedicated to representing the interests of civil defense practitioners.

With all of the changes, CDC will be there for you. V



Amicus – *continued from page 38*

How the Amicus Committee Can Help Your Appeal or Writ Petition, and How to Contact Us:

Having the support of the Amicus Committee is one of the benefits of membership in ASCDC. The Amicus Committee can assist your firm and your client in several ways:

1. *Amicus curiae* briefs on the merits in cases pending in appellate courts.

2. Letters in support of petitions for review or requests for depublication to the California Supreme Court.

3. Letters requesting publication of favorable unpublished California Court of Appeal decisions.

In evaluating requests for *amicus* support, the Amicus Committee considers various factors, including whether the issue at hand is of interest to ASCDC's membership as a whole and would advance the goals of ASCDC.

If you have a pending appellate matter in which you believe ASCDC should participate as *amicus curiae*, feel free to contact the Amicus Committee:

Steve S. Fleischman
(Co-Chair of the Committee)
Horvitz & Levy • 818-995-0800
sfleischman@HorvitzLevy.com

Ted Xanders
(Co-Chair of the Committee)
Greines, Martin, Stein & Richland LLP
310-859-7811 • *exanders@GMSR.com*

Susan Knock Beck
Thompson & Colegate • 951-682-5550

Harry Chamberlain
Buchalter • 213-891-5115

Scott Dixler
Horvitz & Levy • 818-995-0800

Rachel Hobbs
Selman Breitman LLP • 310-689-7048

Richard Nakamura
Clark Hill • 213-891-9100

Robert Olson
Greines, Martin, Stein & Richland LLP
310-859-7811

David Pruett
Carroll, Kelly, Trotter & Franzen
562-432-5855

Laura Reathaford
Lathrop GPM • 310-789-4648

David Schultz
Polsinelli LLP • 310-203-5325

Eric Schwettmann
Ballard Rosenberg Golper & Savitt
818-508-3740

Ben Shatz
Manatt, Phelps & Phillips • 310-312-4000

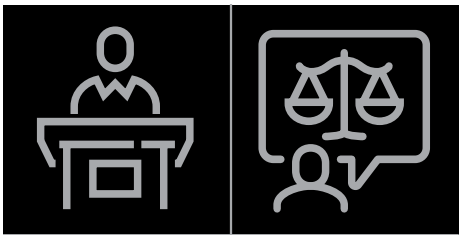
J. Alan Warfield
Polsinelli LLP • 310-203-5341

August - January

Alice Smith
Yoka Smith, LLP
Johnson v. Fitness International, LLC et al.

John C. Kelly
Carroll, Kelly, Trotter & Franzen
Tovar v. Kang, M.D.

Jeff Walker
Walker Law Group LLC
Henderson v. Yi



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