

The Update

July, 2004 - Volume 8, Issue 2

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THE BOTTOM LINE

Jeffery Kriesman v. Samuel Winner, M.D.,
San Dieguito Surgeons Medical Group,
Charles Hewel, M.D., and La Jolla
Radiology

Case Number: GIN 024768 (North County)

Judge: Honorable Yuri Hoffman

Plaintiff Counsel: Samuel Kelsall V, Esq.

Defense Counsel: Clark Hudson, Neil, Dymott,
Perkins, Brown & Frank, for Dr. Winner
and SDSMG; Mark Brandon, Grace,
Brandon & Hollis, LLP for Dr. Hewel and
LJR

Type of Incident/Causes of Action: Medical
malpractice, lack of informed consent, and
negligent infliction of emotional distress.

Settlement Demands: \$1,000,000 raised to
\$2,000,000

Settlement Offers: Waiver of Costs

Trial Type: Jury

Trial Length: 14 days

Verdict: Defense verdicts (12-0) on both
malpractice and lack of informed consent.
Non-suit on the negligent infliction of
emotional distress claim

Toni Darling and Mike Darling v. Glenn A.
Kawesch, M.D., an individual

Case Number: GIC 795749

Judge: Honorable Joan M. Lewis

Plaintiff Counsel: Alan N. Fenton, Esq. of Law
Offices of Alan N. Fenton

Defense Counsel: Daniel S. Belsky, Esq. of
Belsky & Associates

Type of Incident/Causes of Action: Medical
Malpractice/Informed Consent

Settlement Demands:

Settlement Offers: Defendant served plaintiffs
with a CCP §998 offer for zero dollars and
a waiver of costs

Trial Type: Jury

Trial Length: 6 days - deliberations 1 hour

Verdict: Defense

President's Message

Billie Jaroszek

Dear Members:

Here it is the beginning of summer and I cannot believe how the time is flying. We have had five one-hour brown bag seminars and two two-hour seminars which were all a huge success, thanks to you, the members. In addition, we are slowly and surely moving towards the goal of increasing our membership. Now, however, it is time to have some fun. As you know from prior copies of The Update, about three years ago SDDL decided to use its talents to benefit a charity of its choice, namely the Juvenile Diabetes Foundation. To accomplish our goal, it was decided that SDDL would hold an annual golf benefit. SDDL's golf benefit has now been scheduled for October 1, 2004 and will be held at The Auld Course in Chula Vista. SDDL's annual golf benefit is an opportunity for our members to network with each other, conduct business development, have fun, and hopefully, make a difference with our contribution to the Juvenile Diabetes Foundation.

This year, the golf benefit promises to be bigger and better than ever. We have been successful in obtaining sponsors who will contribute a car for a hole in one, golf paraphernalia, TVs, DVDs, wine, and, those ever popular, dinner tickets.

Please mark your calendar and do not miss this event. In addition to benefiting a worthy charity, I guarantee that each and every one of you that participates will have a good time.

Billie Jaroszek

Anniversary Sale . . .

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Shifting the Causation Burden of Proof in Legal Malpractice Actions

Courts are applying doctrines taken from other types of cases and placing the burden on defendant attorneys on the basis of public policy considerations

By Alan E. Greenberg, Lewis, Brisbois, Bisgaard & Smith LLP

The well-known elements of a cause of action for legal malpractice are: (1) the attorney's duty to use the skill, prudence and diligence that others in his or her profession commonly possess and exercise; (2) acts that constitute a breach of that duty; (3) injury, damage or loss to the plaintiff; and (4) a proximate causal connection between the conduct constituting the breach of duty and injury, damage or loss. The plaintiff usually has the burden of establishing each of these essential elements, including causation.¹

Clients alleging that their attorney was negligent in connection with litigation have the burden of proving that damages resulted, this burden involving, usually, the difficult task of demonstrating that the attorney's negligent investigation, advice or conduct of the client's affairs was a substantial factor in causing an unfavorable result, including the loss of the client's meritorious claim. Proof that the client would have prevailed or achieved a better result in the underlying action generally requires trial of a "suit within a suit," that is, a determination of the merits of the underlying action in the malpractice trial. This is sometimes also referred to as the "case within the case" requirement.²

BUT NOW THERE'S A SHIFT

When the attorney's alleged negligence impacts an underlying personal injury or products liability suit, the courts in California have begun to wrestle with the proper application of doctrines that have been applied in non-legal malpractice contexts. In negligence and products liability cases, for example, the doctrine has evolved that the burden of proof on the issue of causation may be shifted to the defendant when demanded by public policy considerations.³ "On rare occasions," the California Court of Appeal stated in *National Council Against Health Fraud, Inc. v. King Bio Pharmaceuticals, Inc.*, "the courts have

altered the normal allocation of the burden of proof."⁴

As the California Supreme Court stated in *Haft v. Lone Palm Hotel*: [T]he shift of the burden of proof . . . may be said to rest on a policy judgment that when there is a substantial probability that a defendant's negligence makes it impossible, as a practical matter, for plaintiff to prove "proximate causation" conclusively, it is more appropriate to hold the defendant liable than to deny an innocent plaintiff recovery, unless the defendant can prove that his negligence was *Not* a cause of the injury.⁵

The essential principle underlying the narrow exception to the usual allocation of proof in negligence and product liability actions is that the burden of proving an element of a case is more appropriately borne by the party with a greater access to information. For example, in *Harris v. Irish Truck Lines, Inc.*, the California Supreme Court stated that a "defendant who is in a better position to discover and preserve . . . evidence should not be permitted to profit from the plaintiff's inability to produce it."⁶

SOURCE OF THE SHIFT

There is no definitive or "general rule" that clarifies the circumstances under which the defendant in a personal injury or products liability case must prove non-causation of the plaintiff's injuries. The most commonly cited formulation of the factors to consider is in *McGee v. Cessna Aircraft Co.*, in which the California Court of Appeal quoted the following reasons from the California Law Revision Committee's comment to section 500 of the state's Evidence Code, that a shift in the normal allocation of the burden of proof is based on consideration of a "number of factors: the knowledge of the parties concerning



Alan E. Greenberg

the particular facts, the availability of the evidence to the parties, the most desirable result in terms of public policy in the absence of proof of the particular fact, and the probability of the existence or non-existence of the fact."⁷

Generally, in the relatively few non-legal malpractice cases where the burden of proof for causation was shifted, the courts found that it was impossible for the plaintiff to prove its case otherwise.⁸

APPLICATION TO LEGAL MALPRACTICE

The *McGee* factors were applied by California courts in two legal malpractice cases involving underlying products liability actions, with different results. In *Thomas v. Lusk*,⁹ the California Court of Appeal held that the trial court committed prejudicial error in instructing the jury that the burden of proof of causation was shifted to the attorney on a showing of the attorney's negligence. In *Galanek v. Wismer*,¹⁰ another district of the Court of Appeal held that the trial court committed error by granting a non-suit to the attorney because, under the facts of the case, the burden of proof on causation should have been shifted to him.

Continued on page 10

The Bottom Line

Lisa Glossinger; Shelby Glossinger, a minor, by and through her Guardian Ad Litem, Linda McKaig, and Wyatt Glossinger, a minor, by and through his Guardian Ad Litem, Linda McKaig v. Mily Le; Minh Nhat Nguyen; State of California, Department of Motor Vehicles; Schumacher Company, an unknown business entity; Bruce Lasker, M.D., and DOES 1 Through 100, Inclusive

Case Number: GIN 028755

Judge: Honorable Michael B. Orfield

Plaintiff Counsel: J. Michael Vallee, Esq. of Law Offices of J. Michael Vallee

Defense Counsel: David G. Brown, Esq. and Bonny Hsu, Esq. of Neil, Dymott, Perkins, Brown & Frank

Type of Incident/Causes of Action: Medical malpractice; wrongful death

Settlement Demands: \$299,999

Settlement Offers: \$29,999.00 per CCP 998; \$100,000.00 during trial

Trial Type: Jury

Trial Length: 6 days - 1 day deliberation

Verdict: Defense

Balestreri v. Neighborhood Healthcare

Case Number: GIC 807852

Judge: Honorable Judith Hayes

Plaintiff Counsel: Gideon Sinasohn, Esq. of Law Offices of Gideon E. Sinasohn

Defense Counsel: Daniel S. Belsky, Esq. of Belsky & Associates

Type of Incident/Causes of Action: Medical Malpractice/failure to diagnose spinal tumor

Settlement Demands:

Settlement Offers: Plaintiff made CCP 998 offer for \$229,999

Trial Type: Jury

Trial Length: 9 days

Verdict: Defense

Courtroom Conduct

By: Shari Weintraub, Fredrickson, Mazeika & Grant

On March 25, 2004, the Honorable Wayne L. Peterson (Ret.) and the Honorable Robert J. O'Neill (Ret.), presented the first evening SDDLA seminar of the year, "Courtroom Conduct (Tips on Making a Horrible Impressions.)" The tongue-in-cheek title did nothing to diminish the importance of the subject-matter: respect and professionalism in the courtroom is a must. In sum,

1. Be prepared, whether for trial, hearings, or other meetings with court. Directly address the court's questions and comments. To do the contrary is a waste of everyone's valuable time. Clear, concise, cogent answers which focus on the issue, will assist everyone in moving forward efficiently and effectively.

2. Never ignore the local rules, including the court's own courtroom rules, and do not ignore the time constraints.

3. In the face of adversity, always maintain your composure. Never speak directly to your adversary, only the court, and allow your opponent to complete their thought before stating your position. Once the court has ruled, do not continue to argue with the court. During argument, do not put the court on the defensive, especially by letting the court know that his/her ruling has a shelf life equal to the time it takes to file a writ/appeal.

4. If your points and authorities contain errors, take responsibility, correct it, and move on. It is an attorney's ethical obligation to be candid with the court.

5. Always be prepared for court by knowing the facts of your case and the applicable law. Do not draw attention away from your case by failing to dress or act professionally, and make sure your client understands that they, too, should dress appropriately.

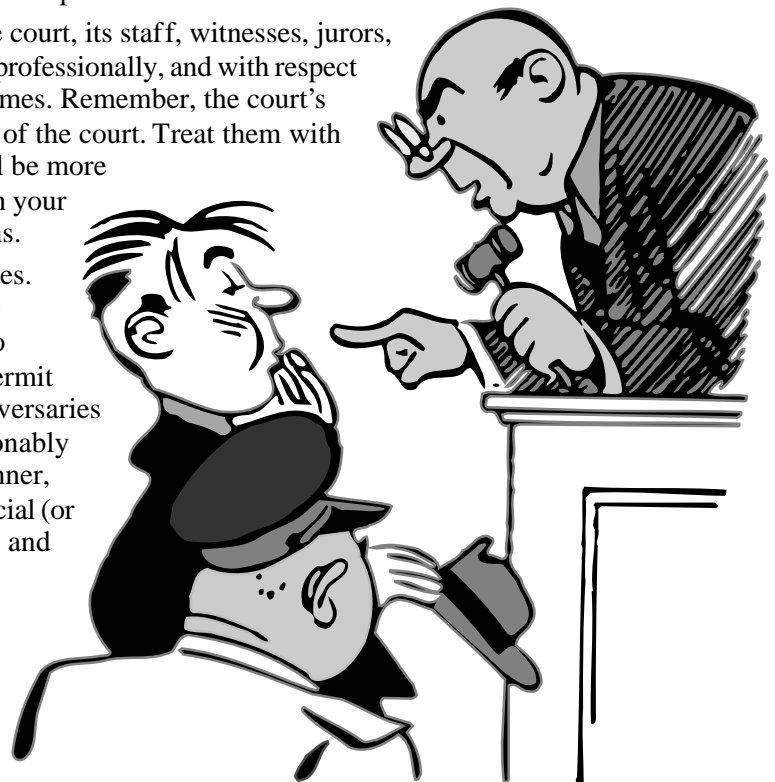
6. Do not engage in ex parte communications with the court.

7. Do not "blind-side" your adversary by proposing stipulations in open court without first discussing them with opposing counsel.

8. Always be reasonable when accommodations are sought. Do not abuse witnesses. In both instances, failure to act reasonably reflects poorly on the advocates and their clients, and is unprofessional.

9. Always treat the court, its staff, witnesses, jurors, and counsel, civilly, professionally, and with respect and courtesy at all times. Remember, the court's staff is an extension of the court. Treat them with respect and they will be more apt to assist you with your questions or concerns.

10. Play by the rules. It does not help your client's position to do otherwise. It does permit the court and the adversaries to proceed in a reasonably and professional manner, without wasting judicial (or the advocates') time and resources.



Construction Law



John P. Olin, Esq.
P.K. Schrieffer, LLP

Mesa Vista Case Blurs the Effects of AAS

The California
Fourth District Court
of Appeal recently

handed down a decision that effectively punted a hole in the *Aas* doctrine of requiring appreciable nonspeculative present injury in a construction defect action. In *Mesa Vista South Townhome Assn. V. Portland Cement Co.*, (2004) [No. G031082. Fourth Dist., Div. Three. May 4, 2004] the court in essence created a somewhat artificial exception to *Aas* that should prove problematic both from a legal point but also to the extent it may rekindle interest in homeowners bringing sulfate attack actions, which had been tailing off due to the difficulty of proof and the questionable nature of the claims.

In *Aas v. Superior Court*, 24 Cal.4th 627 (2000) the California Supreme Court appeared to have given the final word (absent legislative intervention) on the recoverability by a homeowner or homeowners association of damages in an action sounding in negligence from the developer, contractor or subcontractors where there were construction defects that had not caused property damage. The court held that only under strict guidelines may such strictly economic damages be recovered and recited a 6 point test that required an examination of: (1) the extent to which the transaction was intended to affect the plaintiff (2) the foreseeability of harm to plaintiff (3) the degree of certainty that the plaintiff has suffered injury (4) the closeness of the connection between the defendant's conduct and the injury suffered (5) the moral blame attached to the defendant's conduct, and (6) the policy of preventing future harm.

The *Aas* court held that under the circumstances of that case, where several of the defects were simply building code violations not resulting in any property damage, claims sounding in negligence were not recoverable. This

was because the third factor noted above of certainty of injury was not met.

In *Mesa Vista* the court took a rather myopic view of this rule. In that case defendant Portland Cement supplied cement for the slab of a condominium complex with a cement to water ratio insufficient to protect the slab from sulfate attack. After finding that Portland knew or should have known of the proper cement to water ratio Portland challenged the action against it on the basis that the damages sought were purely economic in nature and lacked evidence of a sufficient degree of certainty that plaintiff had suffered injury. The trial court disagreed and entered a judgment against Portland in excess of \$5 million.

The fourth district on appeal pointed to evidence that the slab suffered from "submicroscopic damage from sulfate attack." In the mind of the appeals court, such damage was enough to meet the third standard set forth in *Aas* and its progeny that there was sufficient certainty of damage to the plaintiff. While this may be technically correct, the court failed at all times to take into account the minimal nature of this alleged damage. As many of the readers are aware, sulfate claims, even when damage is readily apparent, takes years to cause any actual damage. Indeed, often the estimate for degradation of the slab to reach critical mass is beyond the useful expected life of the building.

The court further ignored the directive of *Aas* that there must be appreciable harm to the plaintiff. The court explicitly found that the submicroscopic damage was not shown to have yet caused any damage whatsoever to other property. The decision in *Mesa Vista* opens up an entire new challenge to the defense bar in construction defect cases. If followed, the damages in *Aas* itself would have been followed if cleverly phrased. The decision also will act to fuel additional questionable sulfate attack claims. Since damages of this type are not generally covered by a subcontractor's general liability policy because it is their work or their product, the costs of future judgments will fall solely on the construction trades.

Whether or not an appeal to the California Supreme Court will be taken in this case remains to be seen. Since enough interest was garnered in the case to draw amici curiae briefs from cement trade associations, it would seem likely.

John P. Olin is an associate with P.K. Schrieffer, LLP working in both the Los Angeles and San Diego offices. Mr. Olin's primary area of practice is insurance law and construction defect law. His entire legal career has been devoted to the insurance industry.

Employment Law



Kirk D. Hanson, Esq.
Grace Brandon Hollis, LLP

*The Pros, Cons,
and Requirements of
Mandatory Arbitration
Agreements for
Employment Claims*

Pros and Cons

Employers often assume that arbitration of employment claims is always to their benefit, while employees often assume that it is always to their detriment. The truth, however, may lie somewhere in-between. For example, both the employer and the employee benefit from the speed of the arbitration process, which takes an average of 8 months from the filing of a claim as compared to an average of 2.5 years for superior court actions. Thus, the shorter time frame saves the employer fees and costs, and a successful employee will receive back pay, front pay and any other available remedies in a much quicker fashion. Recent developments in both state and federal law prohibit employers from using mandatory arbitration agreements to limit the employee's rights and remedies under anti-discrimination laws. Arbitration does benefit the employer in that it is private, and makes it less likely that an employee will receive huge punitive damage awards from the arbitrators. While this may favor the employer in a case where an employee has a particularly strong claim, an employer could face greater exposure on weaker claims, as arbitrators may feel compelled to give

Continued on page 6

The Bottom Line

Cavness v. State Farm

Case Number: No. 91141 (San Bernardino Superior Court)

Judge: Honorable Bert Swift

Plaintiff's Counsel: Michael Reznick, Esq. of Law Offices of Michael Reznick

Defendant's Counsel: Randall Nunn, Hughes & Nunn, LLP

Type of Incident/Causes of Action: Property damage to house and contents from storm; Breach of Insurance Contract and "Bad-Faith"

Settlement Demand: \$185,000

Settlement Offer: 0

Trial Type: Jury

Trial Length: 5 days

Verdict: Defense (12-0)

Caroline Murray v. La Jolla Inns of America Property Company

Case No.: GIC 787584

Judge: Honorable Vincent DiFiglia

Plaintiff's Counsel: Plaintiff Attorney: Robert J. Gaglione, Esq. of the Gaglione Law Group

Defendant's Counsel: James M. Roth, Esq. and Eydith J. Kaufman, Esq. of The Roth Law Firm

Type of Incident/Causes of Action: Breach of contract, negligence, premises liability, trespass, breach of covenant of quiet enjoyment, and battery in connection to a water leak that infiltrated the ceiling of plaintiff's antique store and caused damage

Settlement Demand: None

Settlement Offer: None

Trial Type: Judge

Trial Length: N/A

Verdict: The Court granted Defendant's Motion for Summary Judgment, finding that Defendant's commercial lease properly exculpated it from liability for any damages caused by water leaks, however caused, and noting the lease also required Plaintiff to indemnify Defendant and to carry insurance for the full replacement value of her property. Plaintiff filed a Motion for Reconsideration, then appealed, and then filed a Petition for Review with the Supreme Court, arguing the exculpatory clause was against public policy and the lease was ambiguous. The Appellate Court, in an unpublished decision, upheld the Trial Court's verdict on Summary Judgment, and the Petition for Review was denied. Defendant was awarded its attorneys' fees and costs.

Employment Law

Continued from page 5

employees a small amount of damages on weaker claims, which in turn triggers the employee's mandatory recovery of attorney's fees from the employer. It is not unusual for a plaintiff in an employment law case to receive a small amount of compensatory damages and an award of attorney's fees that is much greater.

Current State of the Law

The issue of whether an employer can require an employee to accept a mandatory arbitration agreement as a condition of employment has been a moving target over the last few years. The Ninth Circuit in *Duffield v. Robertson, Stevens & Co.* (9th Cir. 1998) 144 F.3d 1182, held that employers could not condition employment upon the employee's acceptance of an arbitration agreement covering claims under Title VII and California's Fair Employment and Housing Act (FEHA). In *Armendariz v. Foundation Health Psychcare Service Inc.* (2000) 24 Cal.4th 83, the California Supreme Court declined to follow *Duffield*, holding that there is no prohibition on imposing mandatory arbitration of employment law claims as long as certain minimum requirements are met and the agreement is not unconscionable. Thereafter, in *Little v. Auto Stiegler* (2003) 29 Cal.4th 1064, the California Supreme Court expanded the holding of *Armendariz* to cover common law claims for wrongful termination in violation of public policy. *Id.* at p. 1076. The Ninth Circuit then overruled the *Duffield* decision in order to bring itself within the majority rule allowing employers to condition employment upon the acceptance of mandatory arbitration agreements. *EEOC v. Luce, Forward, Hamilton & Scripps* (9th Cir. 2003) 345 F.3d 742, 745. Thus, the Ninth Circuit and the California Supreme Court are no longer in conflict on this issue.

In response to the *Armendariz* and *Little* decisions, recent California Assembly Bill 1715 proposed to make it an illegal practice for an employer to condition employment upon the employee accepting an arbitration agreement covering FEHA claims. This bill was vetoed by Governor Davis on

October 14, 2003. He cited concerns that AB 1715 may unfairly impact small employers. However, it is likely that bills similar to AB 1715 will resurface in the near future.

Requirements for Mandatory Arbitration Agreements

If an employer chooses to require employees to sign a mandatory arbitration agreement as a condition of employment, the employer must ensure that the agreement satisfies the requirements set forth in *Armendariz*. Compliance with *Armendariz* is a two step process. First, the arbitration agreement must meet certain minimum requirements for the arbitration of claims under FEHA, Title VII and any other state or federal anti-discrimination law. Second, the arbitration agreement must not run afoul of general California contract principles concerning unconscionability.

Armendariz sets forth the following minimum requirements for arbitration agreements in order to protect the employee's and the public's rights under anti-discrimination laws:

- Neutral arbitrators are required;
- The agreement cannot limit statutorily imposed remedies such as punitive damages or attorney's fees;
- The agreement must provide for adequate discovery sufficient to allow the employee to adequately arbitrate his or her statutory claim, ie. access to essential documents and witnesses;
- The agreement must provide for a written arbitration decision sufficient to ensure that the arbitrators comply with the requirements of the anti-discrimination statutes and sufficient to permit limited review;
- The employee cannot be required to bear any costs or fees he or she would not be required to bear if the action was brought in a civil court. In other words, the employer must pay all fees associated with the arbitration forum and must also pay the fees of the arbitrators; and
- The arbitration agreement must not prohibit the employee from submitting claims to the EEOC, DFEH or any other government agency charged with enforcing anti-discrimination laws.

In addition to the minimum requirements above, the arbitration agreement must also not be unconscionable under general principles of California contract law. *Armendariz* at p. 114. Unconscionability has both a procedural and substantive component. However, an arbitration agreement must be both procedurally and substantively unconscionable in order for a court to exercise its discretion to refuse to enforce the agreement. *Id.* at p. 114.

Procedural unconscionability relates to the unequal bargaining power between the employee and the employer and is more commonly referred to under the terminology of contracts of adhesion. In nearly every case, mandatory arbitration agreements are procedurally unconscionable because they are made a condition of employment and offered on a take-it-or-leave-it basis. In this context, the employee does not typically have the power to negotiate the terms of the agreement and must agree to arbitration or forego employment.

The procedural unconscionability inherent in mandatory arbitration agreements will not invalidate the agreement if it is not also substantively unconscionable. Substantive unconscionability is found where the agreement is overly harsh or one-sided in favor of the employer. Thus, in order to avoid a substantive unconscionability challenge, the employer must ensure that the agreement applies equally to the employee and employer, and that it does not provide any special advantages to the employer. For example, an arbitration agreement could fail on substantive unconscionability grounds if it only requires the employee to arbitrate claims against the employer, limits or shortens applicable statute of limitations, prohibits class actions, or can be unilaterally terminated or modified by the employer. See *Ingle v. Circuit City Stores Inc.* (9th Cir. 2003) 328 F.3d 1165, 1173-1179.

If an employer decides to require mandatory arbitration agreements as a condition of employment, then the employer must ensure that the agreement complies with the minimum requirements of *Armendariz* set forth above, and that the agreement is not

one-sided in favor of the employer or otherwise substantively unconscionable. If the agreement satisfies these requirements, then it will likely be upheld against any procedural unconscionability challenge on grounds that it is a contract of adhesion.

Finally, it is important to point out that the *Armendariz* requirements only apply to mandatory arbitration agreements imposed as a condition of employment. The court in *Armendariz* noted that its requirements would generally not apply to situations where an employer and employee knowingly and voluntarily agree to arbitration *after* a dispute has arisen. *Id.* at p. 103, fn. 8.

Kirk Hanson joined the firm of Grace Brandon Hollis, LLP in October of 1995. He concentrates his practice on construction defect defense, employment law (including the defense and prosecution of discrimination claims under Title VII and FEHA), business litigation, and appellate law. Kirk became a partner in the firm in April 2002.

Education Law



*Jack M. Sleeth, Jr., Esq.
Stutz, Artiano, Shinoff &
Holtz, APC*

*Recent Supreme Court
Decision Limits a
School's Duty to Protect
Its Playgrounds from
Auto Accidents*

Supreme Court Reverses *Weiner v. Southcoast Childcare Centers*

The California Supreme Court recently reversed an appellate decision that would have had a profound impact on schools and parks if it had been left unmodified. The appellate court's decision would have made it necessary for schools and parks to construct barrier walls between any playground or playing field and any nearby street. The Supreme Court reversal of the decision returns the law to its prior status. (*Weiner v. Southcoast Childcare Centers* ("Weiner") (May 6, 2004) __ Cal.4th __, __ Cal.Rptr2d __, 2004 D.J.D.A.R. 5420, <http://www.courtinfo.ca.gov/opinions/>.)

Our firm's appellate team prepared an Amicus Curiae brief in the Supreme Court on behalf of the Educational Legal Alliance of the California School Boards Association. Although the underlying case did not involve a school district, the School Boards Association was concerned because the logic of the case made it applicable to public schools — and any other landowners operating playgrounds or playing fields — and would have had a substantial adverse impact on California school districts.

The Case Is Based on Shocking and Bizarre Facts

The facts of the case are shocking, but relatively simple. A man was driving his Cadillac down the road with the intent to find some children to kill with his car. He saw children playing in a church day-care center playground. He drove his car off of the road, across the sidewalk, through the chain link fence, killing two of the children and injuring several more. Parents brought suits against the church and the day-care center. The trial court granted defendants' motion for summary judgment, and the Appellate Court—Fourth District, Division Three—reversed, holding that there was a triable issue of fact whether the church and child care center had breached their duty of care to the children by failing to erect a barrier or move the children to another location. (*Weiner v. Southcoast Childcare Centers* ("Weiner") (2003) 107 Cal.App.4th 1429, 132 Cal.Rptr2d 883.)

No Evidence of Prior Similar Incidents

There was no evidence of any prior criminal conduct that would to put the day-care center on notice that someone might drive through the fence to kill children. The general rule in civil cases involving a criminal act requires evidence of "notice" of some prior similar criminal act before the defendant will be held responsible for the attack. (*Ann M. v. Pacific Plaza Shopping Center* ("Ann M.") (1993) 6 Cal.4th 666, 678, 25 Cal.Rptr.2d 137.) But there is another case, from the California Supreme Court, that creates an exception —

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Education Law

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some have argued an aberration— involving an auto accident, as opposed to intentional misconduct, where the telephone company was found responsible for the placement of a telephone booth in which a man was injured when an automobile ran off Century Boulevard in Los Angeles and struck the phone booth. (*Bigbee v. Pacific Telephone & Telegraph Co.* (1983) 34 Cal.3d 49, 193 Cal.Rptr. 857.) The author of the opinion was Justice Rose Bird. The reasoning in this opinion has been questioned. (*See, Gray v. America West Airlines, Inc.* (1989) 209 Cal.App.3d 76, 82-83, 256 Cal.Rptr. 877; Berger, *The Impact of Tort Law Development on Insurance: The Availability/Affordability Crisis and its Potential Solutions*, 37 A. U.L. Rev. 285, 311 (Winter 1988).)

The *Weiner* Court referred to both *Ann M.* and to *Bigbee*, without much analysis, and apparently combined the rules for accidental and criminal conduct, focusing on the “virtually unprotected play area” to determine that the play area was “generally vulnerable to the hazards of adjacent traffic.” If it had not been reversed, this decision would have changed the “foreseeability” analysis for civil liability for criminal conduct, and increased the duty to protect from any “foreseeable” harm, whether or not there had been similar problems in the past. It had the effect of imposing a duty upon all supervisors of any play areas adjacent to a street to insure that the area be protected by an impenetrable barrier. When the weight of possible passing vehicles is considered (cement truck, tandem fuel tanker) the barrier would need to be strong.

Another Court Used the Authority of the Decision in a School Case

Then, before the Supreme Court accepted the case for review, another Appellate Court decided a public school case, and citing the *Weiner* decision as authority. That case is *M.W. v. Panama Buena Vista U. S. D.* (“*Panama*”) (2003) 110 Cal.App.4th 508, 1 Cal.Rptr3. 673. *Panama* involved a special education student—his disability left him with a third grade mentality —

dropped off at school by his mother before school started. The gates to the school were unlocked, but nobody was scheduled to come in to supervise students. Another student, also on campus early, lured the boy into the bathroom and sodomized him. There was no evidence of any prior criminal misconduct on campus before school. Although the other boy was a discipline problem, he had not seriously injured anyone before and had not acted out sexually.

A jury awarded over two million dollars. The appellate court upheld the decision. The court liberally cited *Wiener* and relied upon its “foreseeability” analysis to find that the attack was foreseeable, even with no prior similar criminal acts and no prior similar actions by the perpetrator. This might be viewed as changing the rule for civil liability for schools in cases involving student-on-student attacks. Defendants petitioned the Supreme Court but review was denied. *Panama* is valid authority, and the decision is correct, but for the wrong reasons. A better analysis is that schools have a duty to provide reasonable supervision (Ed. Code § 44807) and the school day begins as soon as the gates are unlocked. But, now that the Supreme Court has reversed *Weiner*— the authority upon which *Panama* appeared to be based — citation of *Panama* will create confusion.

The Supreme Court’s Decision Returns the Law to its Former Status

On May 6, 2004, the Supreme Court issued its opinion in the *Weiner* case, reversing the Appellate Court decision with instructions to affirm the summary judgment in favor of the defendants. (*Weiner* at 14.) The Supreme Court specifically stated that the case should be decided under the rule in *Ann M.*, and because there was no prior similar criminal misconduct, the defendants were not liable. (*Weiner*, at #13.) The Court did indicate that a different analysis applies to an accidental act than to a criminal act. “[A] criminal can commit a crime anywhere” “but cars

cannot crash . . . just anywhere.” (*Weiner*, at 13, quoting with approval *Robinson v. Six Flags Theme Parks, Inc.* (1998) 64 Cal.App.4th 1294, 1301.)

The New Rule Would Require a Barrier in Limited Cases

By the logic of the opinion of the Supreme Court, the rule now is: schools and parks with playing fields should have a barrier if the field fronts on a T-intersection, or below a hill, or is otherwise situated adjacent to a roadway configured in a way that would make an auto accident likely. In all other cases, no extra protection is necessary. The landowner is not required to anticipate a random criminal attack.

Jack M. Sleeth, Jr. is a shareholder of Stutz, Artiano, Shinoff & Holtz, APC. As a civil trial and appellate attorney admitted to the California and Arizona State Bars and the United States Supreme Court Bar, Mr. Sleeth’s experience includes litigation and appeals representing schools, cities, and other public entities, private businesses and individuals on issues involving school law and Special Education, police officer rights, employment law, and civil rights.

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Member News



Robert "Bob" E. Gallagher has joined **Higgs, Fletcher & Mack**, as a partner. Bob is a long-standing member of San Diego Defense Lawyers and most recently served as Vice-President. Bob is a member of the HF&M litigation department and has a trial practice which emphasizes the defense of professionals including lawyers, insurance agents and brokers; complex personal injury and business litigation; hospitality law, civil rights litigation; insurance coverage and bad faith; products liability, and the representation of public entities, including municipalities, redevelopment agencies, and educational institutions.

Bob Tyson and Pat Mendes, of **Tyson & Mendes**, have moved offices from Carmel Valley to La Jolla. The firm has also added two associates, **Matthew A. Mason** and **Richard Allen. Matt** received his Bachelor of Arts from the Plan II Honors Program at the University of Texas in 2000 and his J.D. from Duke University School of Law in 2003, where he served as Executive Editor of Duke Law & Technology Review. He also holds a Master of Laws in International and Comparative Law from Duke University and speaks fluent Spanish. He was admitted to the State Bar of California in December 2003. **Richard** is a 2000 graduate of University of San Diego's School of Law. Until recently he was a trial attorney with 21st Century Insurance's in-house counsel operation Bollington, Griffith & Swope.

Jason M. Murphy has joined **Campbell, Souhrada & Volk** as a new associate.

Farmer & Case has recently added **William E. Frazier** as an associate and opened an office at 44 Montgomery Street, Suite 810 in San Francisco.

Bacalski, Byrne, Koska & Ottoson, LLP is now **Bacalski, Bailey, Koska & Ottoson, LLP**



The law offices of **Lincoln, Gustafson & Cercos** rallied together to raise over \$75,000 to benefit the National Multiple Sclerosis Society for the 16th Annual MS Walk held on March 14. The firm hosted fund raising events such as parties, bake sales and a silent auction over the past year to earn enough money to make them the number one team in San Diego for this important cause. Multiple sclerosis is a chronic, often disabling disease of the central nervous system. Most people with MS are diagnosed between the ages of 20 and 50 but the unpredictable physical and emotional effects are lifelong. Women are affected at two times the rate of men. Symptoms such as abnormal fatigue, impaired vision, loss of balance and muscle coordination can come and go without warning. Partial or complete paralysis occurs in severe cases. Team LGC has been a dedicated sponsor and participant in the MS Walk for the past 4 years, working diligently to exceed their fund raising expectations year after year for this important cause. The firm became involved in fight against MS when their legal administrator was diagnosed with the disease.

The **Law Offices of Elizabeth A. Skane** has added **Courtney Lockhart** and **Shawn M. Robinson**. Both will assist in the firm's insurance defense practice focusing in personal injury, government tort liability, construction defect, and contractors rights and remedies.



Deuprey & Associates, LLP is pleased to announce that **David M. Daftary** has joined the firm as an associate. David graduated with honors from the Walsh School of Foreign Service at Georgetown University with a bachelor's degree in International Relations. In 2003, he received his Juris Doctorate from Notre Dame Law School. While at Notre Dame, David served as Executive Editor of the Journal of Legislation and as Vice President of Notre Dame's Federalist Society Chapter. David has worked previously at the Oceanside City Attorney's Office and at the U.S. Attorney's Office in San Diego. He will assist the firm with its representation of physicians in medical malpractice cases and with defense work in business and general liability matters.



Koeller, Nebeker, Carlson & Haluck, LLP announced that **Jerome R. Satran** has been named as a partner in the firm. Mr. Satran specializes in multi-party complex construction cases. He has represented many subcontractors, general contractors and developers in a variety of practice areas including drafting and enforcing contracts, mechanics liens, contractual disputes, real estate litigation, construction defect litigation, construction related injuries, and toxic mold claims. The firm has also added associates

Sarah H. Bawany, Sara L. Wuori and Jason W. Williams. **Ms. Bawany** graduated from the University of California at San Diego with a Bachelor's degree in Communication in June 2000 and she obtained her JD degree from the University of San Diego School of Law in May 2003. **Ms. Wuori** graduated from Portland State University with a degree in Finance and attended the University of San Diego School of Law earning her JD degree in 2002. **Mr. Williams** graduated from the University of San Diego School of Law in 2002, and became licensed in Nevada in November 2002 and in California in May, 2003.

Shifting the Causation

Continued from page 3

A. Thomas v. Lusk

Emory Thomas was injured on his job as an aircraft repairer when the metal head of a hammer disengaged from the handle, causing his left hand to come in contact with turbine blades. He sustained a severe injury to his finger. Immediately following the accident, a fellow employee retrieved the broken hammer, which was in four parts, and turned it over to Thomas's supervisor, who placed it in a locked drawer of a file cabinet in his office. The file remained locked until about eight months later when the lock on the file cabinet was broken and the file cabinet became accessible even without keys. The supervisor later was promoted and transferred to another office.

Thomas retained Benjamin Lusk, Jr. to represent him in a products liability action against the manufacturer of the hammer. Lusk learned soon after being retained that the hammer was being "stored somewhere." He did not promptly initiate any formal discovery proceedings, but he contacted the counsel of Thomas's employer a year after he was retained in an attempt to locate the hammer. The former supervisor, at the request of the employer's counsel, searched the file cabinet and consulted the acting shop foreman, but the hammer was not located.

Lusk advised Thomas that "it would be very difficult to try the case" without the hammer. Lusk was concerned that the handle of the hammer may have been modified, which would compromise Thomas's case. Lusk advised Thomas that he still believed, however, that the case had "significant settlement value."

Thomas retained new counsel and settled against the manufacturer for \$35,000. Thomas then filed a legal malpractice action against Lusk. At trial, the trial court gave the following instruction shifting the burden of proof on causation to the defense:

In order for plaintiff to recover from defendant in this case, plaintiff must prove, by a preponderance of the evidence, that the failure of the defen-

dant to gain access to the hammer . . . was negligence. If plaintiff proves that defendant was negligent, . . . it then becomes the duty of the defendant to prove, by a preponderance of the evidence, that defendant's negligent failure to obtain access to the hammer was not a legal cause of damage to plaintiff.¹¹

The jury rendered a verdict against Lusk for \$88,745. On appeal, the First District California Court of Appeal reversed and remanded for retrial. The court agreed that the evidence established that Lusk was negligent in failing to undertake any efforts to obtain the hammer until approximately one year after his retention. It also agreed that in certain circumstances it would be appropriate to shift the burden of proof in actions for legal malpractice. Nonetheless, it concluded that the trial court erred in shifting the burden of proof under the particular facts of the case.

The court based its opinion on a number of factors. First, it argued that the lost evidence was no more available to Thomas than Lusk. Since the hammer was disposed of by an unknown party, neither Thomas nor Lusk had access to it to satisfy the burden of proof on causation. At the same time, the parties still had equal access to hammers "essentially identical." Thus, Lusk had no better means of negating causation than Thomas had of proving it.

Second, the relative culpability of the parties did not make a shift in the burden of proof appropriate. Following the accident, the court noted, the hammer was preserved temporarily and therefore available to both Thomas and Lusk. While Lusk, as Thomas's attorney, was "primarily responsible during the course of the litigation for the preservation of evidence," Lusk was not "singularly responsible" for the destruction of evidence of causation. Thomas's employer had custody of the hammer and was in a position to preserve it, but failed to do so, and therefore it must share fault for the disappearance of the evidence.

Finally, and to the court the "most significant consideration," Thomas had not established a "prima facie" case or "substantial probability" of causation,

which the court viewed as a "condition precedent" to shifting the burden of proof. The court pointed out that even prompt initiation of discovery by Lusk when he was retained may not have produced the hammer.

The court also was not persuaded that preservation of the missing evidence was critical to the case. Thomas had not presented evidence suggesting that a defect in the lost hammer was only provable if the hammer had been preserved by Lusk. Acknowledging the obvious point that the burden of proving a manufacturing defect, or a foreseeable alteration of the hammer that rendered it defective, was made more difficult by the loss of the hammer, the court went on to state that the burden of proving causation is not "transferred merely upon testimony that the defendant's negligence may have compromised the plaintiff's ability to establish a product liability case."

As the court stated:

Rather, the burden of proof is shifted only "where there is a substantial probability that the defendant's negligence was a cause of an accident, and when the defendant's negligence makes it impossible, as a practical matter, for plaintiff to prove "proximate causation" conclusively."¹²

While the *Lusk* court did not cite cases from other jurisdictions as authorities for its decision, its decision and opinion is entirely consistent with a number of cases from other jurisdictions that have refused to alter the burden of proof even where the attorney's delay or failure to conduct discovery impaired the plaintiff's ability to produce evidence.¹³

B. Galanek v. Wismar

Ronald E. Mallen and Jeffrey Smith, in their treatise *Legal Malpractice*, opine that a different rule from that applied in the discovery negligence cases might be appropriate "if the attorney was responsible for the loss of evidence directly rather than as a consequence of the basic negligence [in delaying or failing to pursue discovery]."¹⁴ That was the fact situation presented in *Galanek v. Wismar*:

Stephen Wismar represented Stephanie Galanek in an underlying personal injury and products liability action arising from an automobile accident in which Galanek's car was rear-ended, causing her seat to collapse and her to suffer an alleged "contrecoup" brain injury.

Wismar was the second attorney to handle Galanek's case. He was retained in September 1992, more than six months after the accident. He filed suit against the manufacturer of the vehicle (Honda) on March 11, 1993, the day before the statute of limitations ran. On the same day, Wismar sent Honda written notice that Galanek's vehicle had been sold at an auction to a third party and, therefore, Honda should inspect it forthwith.

Subsequently, in April 1993, Wismar wrote a letter to the storage facility holding the vehicle, advising it that the vehicle was critical evidence in Galanek's case. The storage facility gave Wismar permission to inspect the vehicle, but he did not send an engineer to inspect, nor did he take possession of the vehicle. Instead, he had a private investigator take photographs and measurements. The investigator also removed and took possession of the allegedly defective seat. In May 1993, Wismar learned that the storage facility had sold the vehicle to a third party, without giving the required statutory prior notice to Galanek, and that the vehicle had then been destroyed.

After Galanek replaced Wismar with new counsel, Honda moved for summary judgment on the ground that Galanek could not prove that the vehicle was defective because it had been sold to a third party and destroyed without having been adequately inspected. In opposition, Galanek presented the declaration of an engineer-accident reconstructionist, who stated that a comparison of an exemplar vehicle with photographs of Galanek's car taken after the accident would be sufficient to prove the alleged defect. The trial court granted Honda's motion for summary judgment.

It is significant that the summary judgment ruling did not state that Galanek could not prove a defect

without the car, but only that her expert's declaration in opposition to the motion failed to raise a trial issue of fact as to the existence of a defect, because the expert merely described the procedures for showing a defect without having the car. He did not state he had performed those procedures and concluded there was a defect.

Instead of seeking reconsideration or appealing the questionable summary judgment in the underlying action, Galanek filed a legal malpractice action against Wismar based on Wismar's alleged failure to take reasonable steps to prevent the destruction of the car. The trial court granted non-suit after the plaintiff's opening statement at trial on the grounds that there was a lack of scientific evidence that producing the Honda as evidence was essential to proving the alleged defect and that there was a lack of expert opinion that a failure of the car seat was a cause of her alleged brain injury.

The California Fourth District Court of Appeal reversed and remanded. In its view, the plaintiff stated sufficient facts in the opening statement to avoid a non-suit. Those facts were simply that the car was destroyed as a result of Wismar's negligence, that the car was defective, that the defect was a cause of Galanek's head injury, and that the unavailability of the car resulted in the loss of Galanek's case against Honda. Therefore, the statement included sufficient facts to prove Galanek's "case within the case" against Honda.

The opening statement also was found to allege sufficient facts to shift the burden of proof to Wismar to establish that his negligence did not cause the loss of a "meritorious products liability claim." The court's reasoning was:

If Galanek cannot prove her underlying case against Honda, it follows that she cannot conclusively prove "proximate causation" in the instant malpractice action against Wismar. Because Wismar's negligence in failing to preserve the car is what made it impossible for Galanek to prove causation, as a matter of public policy it is more appropriate to hold Wismar liable than to deny Galanek recovery, unless Wismar can

prove his negligence did not damage Galanek.¹⁵

The *Galanek* court's reasoning is questionable in numerous respects. First, it assumes that Wismar was negligent and, therefore, implicitly found that Wismar had a high degree of culpability for loss of the Honda that made a shifting in the burden of proof appropriate. The opening statement, however, did no more than make the same allegation of negligence made in every legal malpractice action. There is certainly room for expert testimony on either side of the issue of whether the standard of care requires attorneys in seat failure cases always to obtain possession of the entire vehicle. The court did not purport to find, as a matter of law, that Wismar was negligent, so any comments concerning Wismar's alleged negligence were dicta that should not have played a factor in the court's conclusion that the burden of proof should be shifted.

Moreover, with respect to the relative culpability of the parties, the *Galanek* court disregarded three factors that the *Lusk* court found significant: (1) that the Honda was equally available to both the client and the attorney for a period of time after the accident, (2) that Wismar was not "singularly responsible" for the loss of the evidence (or responsible in any respect for the preparation of the inadequate expert's declaration which resulted in the loss of the summary judgment motion or for the failure to appeal the granting of the summary judgment motion), and (3) that both parties had access to exemplar Hondas "essentially identical" to the vehicle involved in the accident.

Second, the court gave great weight to the summary judgment granted in favor of Honda in the underlying proceeding. Notwithstanding the court's recognition that the summary judgment did not state Galanek could not prove a defect without the car, by the end of the opinion the summary judgment was transmuted into prima facie evidence of the allegation in the opening statement that Wismar's "negligence in failing to

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Shifting the Causation

Continued from page 11

preserve the car” made it “impossible for Galanek to prove causation.” Moreover, even if Wismar was negligent in failing to preserve the Honda, and even if the court in the underlying action had stated in the summary judgment ruling that Galanek could not prove a defect without the car, the fact that Honda prevailed on a summary judgment motion says nothing about whether Galanek had a meritorious claim against Honda in the first place. It is difficult to see how the court considered that evidence of the summary judgment ruling in and of itself would be sufficient to establish Galanek’s “case within the case” against Honda.

Finally, the court implicitly determined (and later explicitly stated in an unpublished opinion following a second nonsuit granted in the retrial of the case) that the expert testimony of a products liability attorney to the effect that “Galanek’s action against Honda is the kind of case where products liability attorneys prevail when they have the product” would be competent and sufficient to shift the burden of proof to Wismar. This is analogous to allowing a medical malpractice attorney to testify as to what a radiologist would have been able to testify to in an underlying medical malpractice case if a lost or destroyed X-ray had been preserved as evidence. This view appears to be in direct conflict with the more current view of this California District Court of Appeal that it is error to admit expert testimony on the ultimate issue of whether the client would have succeeded in an underlying proceeding “but for” the attorney’s alleged negligence.¹⁶

It should be noted that Galanek’s “seat failure” expert, Larry Coben, never testified at the retrial that Galanek definitely would have prevailed or even that she probably would have prevailed in her case against Honda if the entire vehicle had been preserved as evidence. He was able to opine only that failing to preserve the car compromised Galanek’s ability to pursue her products liability case, exactly the type of testimony found unpersuasive by the *Lusk* court.

CONCLUSION

Defense counsel must be scrupulous in taking all reasonable steps to preserve evidence in personal injury or products liability actions that comes into their actual or constructive possession. Failure to do so may be viewed by the courts far more harshly than simply the failure to obtain evidence through discovery. To the extent courts in California or elsewhere follow *Galanek*, plaintiffs will be able to avoid nonsuits and directed verdicts and shift the burden of proof on causation to defendant attorneys in legal malpractice cases on a minimal evidentiary showing that might include adverse summary judgment rulings in an underlying proceeding, including rulings that might be erroneous, and proffered expert testimony by attorneys as to the likely causal effect in the underlying proceeding of the loss of key evidence.

FOOTNOTES

- ¹ Sukoff v. Lemkin, 249 Cal.Rptr. 42 (Cal.App. 1988); Conley v. Lieber, 158 Cal.Rptr. 770 (Cal.App. 1979). In California, Section 500 of the Evidence Code provides, “Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.”
- ² Gutierrez v. Mofid, 705 P.2d 886 (Cal. 1985); Lysick v. Walcom, 65 Cal.Rptr. 406 (Cal.App. 1968); Moradi-Shalal v. Fireman’s Fund Ins. Cos., 758 P.2d 58 (Cal. 1998).
- ³ Fagerquist v. Western Sun Aviation, Inc., 236 Cal.Rptr. 633 (Cal.App. 1987).
- ⁴ 133 Cal.Rptr. 2d 207, 214 (Cal.App. 2003).
- ⁵ 478 P.2d. 465, 476 n.19 (Cal. 1970), court’s emphasis.
- ⁶ 521 P.2d 481, 484 (Cal. 1974).
- ⁷ 188 Cal.Rptr. 542, 547 (Cal.App. 1983). *See also* Lakin v. Watkins Associated Indus., 25 Cal.Rptr.2d 109 (Cal.App.1993).
- ⁸ *See, e.g.*, Summers v. Tice, 199 P.2d 1 (Cal. 1948) (plaintiff could not prove which of two hunters fired shot that struck him); Haft, 478 P.2d 465 (hotel’s failure to provide statutorily required lifeguard deprived plaintiffs of witness to establish causation); Sindell v. Abbott Lab., 607 P.2d 924 (Cal. 1980) (drug injured plaintiff in utero and fungibility of drug made causation impossible to prove); *Wolf v. Superior Court*, 130 Cal.Rptr.2d 860 (Cal.App.2003) (in cases where financial records essential to proving the contingent compensation owed are in the exclusive control of defendant, fairness requires shifting burden of proof in breach of contract action to defendant). But see *Sargent Fletcher, Inc. v. Able Corp.*, 3 Cal.Rptr.3d 279 (Cal.App. 2003) (court refused to shift burden of proof for causation from manufacturer to subcontractor in trade secrets case); *Rutherford v. Owens-Illinois Inc.*, 941 P.2d 1203 (1997) (court refused to shift burden of proof for causation to defendant where it was not impossible for plaintiff to prove causation of asbestos-related cancer).
- ⁹ 34 Cal.Rptr.2d 265 (Cal.App. 1994).
- ¹⁰ 81 Cal.Rptr.2d 236 (Cal.App. 1999), *review denied*, 1999 Cal. Lexis 1753.
- ¹¹ 34 Cal.Rptr.2d at 268.
- ¹² 34 Cal.Rptr.2d at 270, quoting from *Haft, supra*, 478 P.2d 265.
- ¹³ *See, e.g.*, Ignarski v. Norbut, 648 N.E.2d 285 (Ill.App. 1995) (failure to serve summons timely); *Dunavan v. Calandrino*, 522 N.E.2d 347 (Ill.App. 1988); *Williams v. Bashman*, 457 E.Supp. 322 (E.D. Pa. 1978); *Lewis v. Collins*, 349 So.2d 444 (La.App. 1977). *See also* *Cook v. Gould*, 440 N.E.2d 448 (Ill.App. 1982).
- ¹⁴ RONALD MALLEN & JEFFREY SMITH, LEGAL MALPRACTICE § 32.9, n.7, page 174 (4th ed. 1996).
- ¹⁵ 81 Cal.Rptr.2d at 242.
- ¹⁶ *See* *Piscitelli v. Friedenber*, 105 Cal.Rptr.2d 88 (Cal.App. 2001).

Alan E. Greenberg is a partner of the San Diego office of **Lewis, Brisbois, Bisgaard & Smith LLP** and concentrates his practice in the defense of professional liability, bad faith actions against insurers, insurance coverage, and defense of brokers and broker-dealers in arbitrations. He is a graduate of Claremont Men’s College (1973) and Columbia Law School (1977). The author participated in the trial and appeal of *Galanek v. Wismar*, a case discussed in this article.

CA Supreme Court says Punitive Damages under Elder Abuse Act not subject to Medical Malpractice Limitations

by Dan Groszkruger, JD, MPH
Of Counsel, DiCaro, Coppo & Popcke

Overview:

In a medical malpractice case following the death of a Parkinson's patient, the surviving family members alleged that the defendant nursing facility should be liable for punitive damages under the Elder Abuse Act.¹ The California Supreme Court reviewed the case, due to a split among the appellate courts regarding whether such claims for punitive damages were subject to Code of Civil Procedure § 425.13 (governing punitive damages claims in medical malpractice law suits). The high Court held that allegations of abuse justifying an award of punitive damages were not subject to CCP § 425.13. Elder abuse and medical malpractice are not the same type of misconduct.

Allegations of Fact:

The patient resided at defendants' skilled nursing facility for approximately 8 weeks. According to the pleadings, the patient suffered from Parkinson's disease and was unable to care for himself. Despite his dependence, defendants' staff left the patient in his bed for excessively long periods, providing no assistance with feeding or hydration. As a result, the patient was inadequately stimulated, became malnourished, and lost much of his body weight. Also, the patient was left to lie in his own excrement for long periods, and developed decubitus ulcers on his body that exposed muscle and bone, and became septic. Lacking adequate sustenance, he became severely dehydrated.

When the patient was transferred out of defendants' skilled nursing facility to another facility (where he died a week later), he was in such a condition that, without immediate intervention and aggressive care, he would surely die from the effects of starvation, dehydration, and infection. Rather than transfer the patient to an acute care facility,

however, defendants moved him to a 24-hour care setting where, without any care for his acute needs, he languished and deteriorated further. Defendants neither reported the patient's condition to public authorities, nor disclosed his true condition to his family members.

Analysis:

In the trial court, defendants objected to the family's attempt to add a cause of action for elder abuse with a claim for punitive damages. Under *Community Care & Rehabilitation Center v. Superior Court* (2000) 79 Cal.App.4th 787, Code of Civil Procedure § 425.13 applied to elder abuse actions in which punitive damages were sought, "whenever the gravamen of an action is *professional* malfeasance – that is, malfeasance in the provision of health care services" (*Id.*, at 797). Specifically, defendants objected that the family's attempt to amend their complaint was more than two years after the original filing date of the complaint. § 425.13(a) provides: "The court shall not grant a motion allowing the filing of an amended pleading that includes a claim for punitive damages if the motion for such an order is not filed within two years after the complaint or initial pleading is filed . . ."

The trial court ruled that the family could amend, and need not satisfy § 425.13(a), because the allegations of the amended complaint "go beyond mere or simple professional negligence." The California Supreme Court agreed with the trial judge.

Under the Elder Abuse Act (Welfare & Institutions Code § 15600, *et seq.*), the term "neglect" covers an area of misconduct distinct from "professional negligence." That is, "neglect" refers to a failure by those responsible for attending to the basic needs and comforts of the elderly or dependent adults to carry



Dan Groszkruger

out their custodial obligations. This is different from the substandard performance of medical services, or "professional negligence." The statutory definition of "neglect" does not refer to the **undertaking** of medical services, but to the **failure** to provide necessary care and services.

A custodian, responsible for attending to the basic needs and comforts of an elderly or dependent adult, may or may not be a professional provider of health care services. If the failure of the custodian is reckless, or done with oppression, fraud or malice, then the action qualifies as elder abuse. Such misconduct cannot be considered simply professional negligence. Thus, while health care professionals may violate the Elder Abuse Act, all those responsible for attending to the basic needs and comforts of an elderly or dependent adult may be found guilty of "neglect" under the Elder Abuse Act.

Similarly, elder abuse even when committed by a professional health care provider is not an injury "directly related" to the provider's professional services. "Neglect" is a failure to satisfy the custodian's responsibilities, not the substandard provision of professional services. "Claims under the Elder Abuse Act are not brought against health care providers in their capacity as providers but, rather, against custodians and care givers that abuse elders and who may or may not, incidentally, also be health care providers" (32 Cal.4th 771, 786).

Continued on page 14

Punitive Damages Under Elder Abuse

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Conclusion:

The California Supreme Court's decision is likely to have far-reaching impacts on medical malpractice law suits. One appellate court has already determined that any hospitalized patient may qualify as a "dependent adult" under the Elder Abuse Act.² Thus, whenever the injured patient was hospitalized, there is a high likelihood that the complaint will include allegations of neglect, coupled with a claim for punitive damages. Granted, it will be difficult to satisfy the heightened proof requirements associated with allegations of elder or dependent adult abuse (i.e., "clear & convincing" evidence). But, since the vast majority of medical malpractice cases are settled, it seems probable that including such allegations will "up the ante" and (if not removed by summary judgment) thereby increase the settlement value of such cases by posing the risk of liability for uninsurable damages at trial.

¹ *Covenant Care, Inc. v. Superior Court* (2004) 32 Cal.4th 771, 86 P.3d 290, 11 Cal.Rptr.3d 222.

² *Marron v. Superior Court* (2003) 108 Cal.App.4th 1049, 1066-1067.

Dan Groszkruger has over thirty years combined experience as a healthcare executive and trial attorney. He served as Vice President-Professional Services, for Scripps Memorial Hospital in La Jolla, CA. Since, he has practiced law as a civil litigator and a healthcare liability specialist. He is a consultant, author and educator in the fields of healthcare risk management, liability and litigation. He serves on the adjunct faculties of two San Diego area universities, where he teaches classes in healthcare management and healthcare and business law. He is a frequent lecturer and presenter, addressing healthcare law and management issues, including HIPAA Privacy compliance, managed care economics, market dynamics, practice parameters, information management, conflicts of interest, financial incentives and professional ethics.

Meet your 2004 Board of Directors - Sean T. Cahill, Director



Sean T. Cahill is a senior litigator and trial attorney at Balestreri, Pendleton & Potocki focusing in construction, real estate, business, explosives, transportation, and personal injury cases. He is an arbitrator for the Contractor State Licensing Board and Better Business Bureau in which he presides over a variety of construction and business disputes. Sean is a sought-after conference speaker, his most recent speaking engagement at the International Society of Explosive Engineers conference in New Orleans discussing topics of elimination of strict liability from explosive cases and defending blasting cases at trial.

Sean received his Bachelor of Science Degree in Finance from San Diego State University in 1984. Upon graduating from California Western Law School in 1989, he clerked at the U.S. Attorney's Civil Litigation Division prior to passing the bar and becoming an attorney.

Sean resides in the Carmel Valley area of San Diego with Tracee, his wife, Conor, his son, and Madison, his daughter. He is an avid runner, golfer and skier. He has coached and managed in the Del Mar Little League for the last five years. Sean enjoys serving on the Board of Directors and encourages his fellow attorneys to become active in donating their time to community organizations.

Meet your 2004 Board of Directors - Kenneth N. Greenfield, Director



After devoting his time to Law Review and graduating Cum Laude from California Western School of Law in 1982, Ken began his legal career at the firm of Ault, Midlam & Deuprey. After nearly six years, he left the firm to open his own Insurance Bad Faith defense practice.

Now in its 16th year, the Law Offices of Kenneth N. Greenfield continues to do what Ken began some 22 years ago under the tutelage of the likes of Kevin Midlam, Dave Danielsen, and Tom Ault - - - representing insurance carriers large and small against claims of bad faith, breach of contract, fraud, and punitive damages.

The firm prides itself on a better than 80% success rate in defending against causes of action for Bad Faith and claims for punitive damages in trials by jury. In addition to the accomplishments of attaining AV status in Martindale-Hubbell, membership in ABOTA, a listing in Best's Directory of Recommended Insurance Attorneys, and a successful civil litigation and appellate practice both here and in Los Angeles, Ken acts as a Superior Court Arbitrator and, on occasion, accepts cases as an expert witness in the fields of insurance claims handling and attorney malpractice.

SAVE THE DATE!

San Diego Defense Lawyers 3rd Annual Golf Benefit
Benefiting the Juvenile Diabetes Foundation
Friday, October 1, 2004 - The Auld Course





"Fighting the Admission of Junk Science"

SDDL Brown Bag Series, May 20th

By: Sarah H. Bawany, Esq., Koeller, Nebeker, Carlson & Haluck, LLP

"Junk Science," as Bob Carlson, founding partner of Koeller, Nebeker, Carlson & Haluck, LLP and distinguished trial attorney, refers to it consists of new or not commonly accepted scientific methods, tests, or techniques presented to prove facts and conclusions. Such evidence is most often presented by plaintiff's attorneys seeking to prove novel theories of their cases. Mr. Carlson presented "Fighting the Admission of Junk Science" on Thursday, May 20, discussing at length, through the use of examples and personal war stories, how a defense attorney might go about preventing the admission of potentially harmful "junk science" at trial.

Mr. Carlson's primary recommendation was to have any issues as to the admissibility of scientific evidence determined early on in the litigation process through the use of motions in limine. Judges will often be happy to allow early hearings on motions in limine in order to encourage settlement and narrow the issues presented at trial. Mr. Carlson also noted that it is important for a defense attorney to remain cognizant of where the burden of proof lies with respect to scientific evidence. While such evidence is often brought into issue through the use of motions in limine by the defense, the proponent of the evidence has the burden of proving its admissibility when offering it.

In California, courts serve as "gatekeepers" as to the admissibility of scientific evidence. The court in *People v. Kelly* (1976) 17 Cal 3d 24 established a three-prong test for admissibility of scientific evidence in California, which is still followed today. Evidence must be 1) generally accepted in the scientific community, 2) presented by a properly qualified expert, and 3) derived from use of correct scientific procedures. Evidence may be deemed inadmissible for its failure to satisfy any one of the three prongs of the *Kelly* test.

The first prong, consideration of whether the evidence in question has been generally accepted by the scientific community, is the most litigated of the three criteria for acceptance of evidence, according to Mr. Carlson. Publications, non-designated experts, and the opinions of scientific groups are all proper means by which to show lack of acceptance of a form of scientific evidence in the scientific community, rendering it inadmissible. An attorney seeking to exclude evidence should look, not only to whether the evidence in question has been admitted by Courts before, but also, for what purposes it has been admitted in the past. Often times, Plaintiffs will attempt to introduce a commonly accepted form of scientific evidence for a purpose that has not gained general acceptance.

The second prong of the test, the qualifications of the expert in question, is substantially more difficult to attack. Mr Carlson noted that many experts often have excellent and impressive qualifications, and that juries often suffer from the "white coat syndrome" whereby they believe any information presented to them by highly qualified individuals. However, there are a few ways to attack experts on their qualifications. It is extremely effective, for example, to show that an expert, although well-qualified in one area, is not at all qualified in the area or areas for which that expert's testimony is presented.

The third prong of the Kelly test requires that proper procedures be followed in collecting the evidence to be presented. There are many established procedures and standards to which scientific evidence must conform to be admissible. Often times, the proper procedures and standards, which might be difficult to conform to, are not followed. Experts often devise their own methods for collecting scientific data. Demonstrating that established standards and procedures haven't been followed is an effective way to argue for exclusion of the evidence

In short, it is important to keep things in perspective and remember that a Plaintiff's attorney presenting "junk science" has a very high threshold to cross. A defense attorney, properly aware of all the hurdles which must be cleared for such evidence to be admissible, may successfully argue for its exclusion.



L to R: Steve Polito, Dennis Aiken, Dino Buzunis, Scott Barber, Billie Jaroszek, Kelly Boruszewski, Martha Dorsey, Michelle Van Dyke, Sean Cahill and John Farmer. Not Pictured: Ken Greenfield

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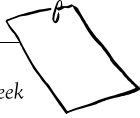
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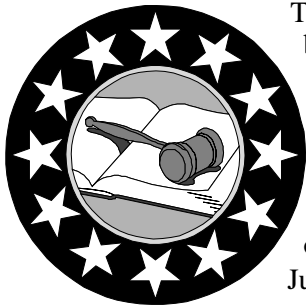
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This rule shall be effective for all demurrers, motions, and orders to show cause set for hearing on or after July 1, 2004.

Any party, or attorney for a party, who desires to have any demurrer, motion, or order to show cause set for hearing must contact the calendar clerk for the judge assigned to the case to reserve a hearing date.

Prior to the hearing, any civil department may issue a tentative ruling in a law and motion matter, in the sole discretion of the assigned judge. The

tentative ruling will be issued in conformance with the tentative ruling procedures set forth in California Rules of Court, rule 324. If a tentative ruling is issued the day before the date set for hearing, this court follows rule 324(a)(2) and no notice of intent to appear is required to appear for argument. The tentative ruling will be made available by no later than 4:00 p.m. on the court day prior to the scheduled hearing. The tentative ruling may direct the parties to appear for oral argument and may specify the issues on which the court wishes the parties to provide further argument. The tentative ruling may be obtained by calling the court tentative ruling number for the court branch the case is pending in, or by navigating to the court's website.

This rule does not preclude posting a tentative ruling the day of the hearing pursuant to rule 324(b) nor does it mandate a tentative ruling be issued on all law and motion matters.

The tentative ruling numbers are as follows:

Central: 619-531-3690
North: 760-806-6050
East: D-14 619-441-4027
D-15 619-441-4028
D-21 619-441-4029
South: 619-691-4721

Authority: California Rules of Court 981.1 and 324.

If you have any questions about how to proceed prior to the effective date of the amended rule, please contact the individual civil department directly.