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ANTI-SLAPP

Ninth Circuit Confirms That the Denial of Anti-SLAPP Motion in Federal Court is Subject to Interlocutory Appeal. *DC Comics v. Pacific Pictures Corp., et al.* (9th Cir. Jan. 10, 2013, No. 11-56934) ___ F.3d ___ [2013 WL 119716].

In *Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, the Ninth Circuit held that denial of a motion brought in federal court under California's anti-SLAPP statute is subject to interlocutory appellate review as a collateral order. Six years later, the United States Supreme Court in *Mohawk Industries, Inc. v. Carpenter* (2009) 558 U.S. 100 [130 S.Ct. 599], limited the scope of collateral order review, holding that orders to produce potentially privileged documents are no longer subject to interlocutory appellate review as collateral orders. In *DC Comics*, the Ninth Circuit re-affirmed its earlier holding in *Batzel*, finding that *Mohawk Industries* did not affect whether anti-SLAPP orders qualify for interlocutory appellate review because anti-SLAPP orders are different from orders to produce privileged documents.

This case serves as an important reminder that litigants can take advantage of California's anti-SLAPP statute to defeat state law claims brought in federal court and seek immediate interlocutory appellate review if the motion is denied.

California Court of Appeal Applies Anti-SLAPP Protection to Hospital Sued By Doctor Dissatisfied With Peer Review Decision. *Nesson v. Northern Inyo County Local Hospital Dist.* (2012) 204 Cal.App.4th 65.

In *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, the California Supreme Court held that hospital peer review procedures constitute an "official proceeding authorized by law" and therefore lawsuits challenging peer review decisions are subject to early dismissal under the anti-SLAPP statute.

In *Nesson*, plaintiff doctor sued the defendant hospital for breach of contract, breach of the covenant of good faith and fair dealing, violation of

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Health and Safety Code section 1278.5, violation of the Unruh Act, and violation of the Fair Employment and Housing Act (FEHA), seeking damages arising from the adverse peer review process. (*Nesson*, *supra*, 204 Cal.App.4th at p. 75.) The Court of Appeal concluded that these claims all arose from the summary suspension of Nesson's privileges through the peer review process and are therefore covered by the anti-SLAPP statute. (*Id.* at pp. 88-89.)

APPELLATE PROCEDURE

10 Things to Know About California Appellate Law

1. **The deadline to appeal is jurisdictional.** The deadline cannot be extended by the trial court, Court of Appeal, or stipulation of the parties. If a notice of appeal is not timely filed, the right to appeal is lost.

2. **If it's not in the trial court record, it doesn't exist.** The appellate courts will not consider new evidence. All evidence must be presented in the trial court and offers of proof must be made for any evidence the trial court excludes.

3. **Waiver can be a landmine.** Arguments on appeal may be waived if (a) they are not made in the trial court, (b) an inadequate record is procured for appeal, (c) insufficient argument and/or authority is presented in an appellate brief, or (d) an appellate brief fails to cite to the trial court record.

4. **The standard of review can make or break an appellate issue.** The Court of Appeal independently reviews questions of law, but will affirm factual findings supported by the record (disregarding conflicting evidence) and will largely defer to the trial court on discretionary rulings (e.g., evidence admissibility). The standard of review should inform the decision whether to make an argument and how to present it.

5. **Error is not enough.** To prevail on appeal, a party must demonstrate not only error in the trial court, but prejudice—i.e., a reasonable probability the party would have achieved a more favorable result absent the error.

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6. **Well-written briefs are key.** Appellate briefs are the primary means of communicating a party's position on appeal, as the appellate courts will have the briefs months before any oral argument, and oral argument time is limited. Appellate briefs should not regurgitate trial court briefs, and should be carefully crafted with the applicable standard of review in mind.

7. **Oral argument should be used to answer questions from the court.** Argument time is limited and, although counsel should prepare an outline of key points to discuss, counsel should focus primarily upon answering questions posed by the court and responding to opposing counsel's arguments.

8. **Writ petitions are rarely granted.** The Court of Appeal grants immediate relief by means of a writ petition only in the most extraordinary circumstances, not merely because the trial court made an erroneous ruling.

9. **Petitions for rehearing are not motions for reconsideration.** Petitions for rehearing from a Court of Appeal decision should not re-argue a party's appeal. Such petitions should address only material factual errors in the court's opinion, the resolution of an unbriefed issue, a mistake in the law recited in the opinion, a jurisdictional defect, or a procedural defect in the appellate process.

10. **Grounds for granting petitions for review are narrow.** The Supreme Court does not grant review merely to correct an erroneous appellate decision. Rather, the Court generally grants review only when an appellate decision creates a conflict in the law among the Courts of Appeal or presents a significant institutional or public policy issue.

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ARBITRATION

U.S. Supreme Court Applies Federal Arbitration Act Preemption Standards to State Court Proceedings Arising Out of Employment Contracts. *Nitro-Lift Technologies, L.L.C. v. Howard* (2012) 568 U.S. ___ [133 S.Ct. 500, 184 L.Ed.2d 328] (*Nitro-Lift Technologies*).

The U.S. Supreme Court, applying *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. ___ [131 S.Ct. 1740, 179 L.Ed.2d 742] (*Concepcion*), has held that where an employer and an employee agreed to arbitrate the enforceability of a covenant not to compete in an employment contract, a state court could not pass on the enforceability of the non-compete clause, but must instead send that issue to the arbitrator. The Court held the Federal Arbitration Act preempted Oklahoma court decisions permitting a state court rather than an arbitrator to determine the enforceability of the non-compete clause. The Oklahoma decisions had concluded that a state law embodying Oklahoma public policy against non-competition agreements governed over the more general federal law favoring arbitration.

While some have argued that *Concepcion* does not apply in state proceedings, *Nitro-Lift Technologies* is the second case in which the Supreme Court has applied *Concepcion* to state courts. Additionally, while some have asserted that Concepcion applies only to consumer contracts, *Nitro-Lift Technologies* applied *Concepcion* to employment contracts.

U.S. Supreme Court Grants Certiorari to Decide Whether Parties' Intent to Allow Class Arbitration Can Be Inferred From A Broadly Worded Arbitration Agreement. *Sutter v. Oxford Health Plans, LLC* (3rd Cir. 2012) 675 F.3d 215, cert. granted *sub nom. Oxford Health Plans, LLC v. Sutter* (Dec. 7, 2012, No. 12-135) ___ U.S. ___ [133 S.Ct. 786] (*Oxford Health Plans*).

The United States Supreme Court has granted certiorari in *Oxford Health Plans,* to decide an issue left open by its earlier decision in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* (2010) 559 U.S. ___ [130 S.Ct. 1758] (*Stolt-Nielsen*), which held that under the Federal Arbitration

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Act, "a party may not be compelled . . . to submit to class arbitration unless there is a contractual basis for concluding that the party agreed to do so." The new case will determine what "contractual basis" suffices to authorize class arbitration.

The arbitrator in this case decided that the breadth of the parties' arbitration agreement, along with the absence of any express prohibition on class arbitration, showed that the parties intended to allow arbitration on a classwide basis. The Third Circuit held that the arbitrator's decision was within the scope of his powers under the parties' agreement, and expressly agreed with the Second Circuit, widening an existing split with the Fifth Circuit regarding what contractual basis an arbitrator must identify to order class arbitration under the FAA.

The Supreme Court will likely hear oral argument in the case in March or April of 2013, with a decision expected by the end of June 2013.

Ninth Circuit Holds Federal Arbitration Act Preempts California Rule That Claims for Public Injunctive Relief Cannot Be Arbitrated. *Kilgore v. KeyBank, Nat. Ass'n.* (9th Cir. 2012) 673 F.3d 947, rehg. granted (2012) 697 F.3d 1191 (*Kilgore*).

In *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066 and *Cruz v. Pacificare Health Systems, Inc.* (2003) 30 Cal.4th 303, the California Supreme Court held that California public policy prohibits arbitration of claims for public injunctive relief brought under the Unfair Competition Law or the Consumers Legal Remedies Act, and that the Federal Arbitration Act (FAA) does not preempt this state public policy.

These decisions were recently called into question by *Concepcion*, *supra*, 131 S.Ct. 1740, where the United States Supreme Court held that the FAA does preempt state laws (such as bans on class arbitration waivers) that prohibit outright the arbitration of a particular type of claim or that otherwise stand as an obstacle to the FAA's objective to ensure that arbitration agreements are enforced according to their terms.

In *Kilgore*, *supra*, 673 F.3d 947, the Ninth Circuit held that the California anti-arbitration rule announced in *Broughton* and *Cruz* does not survive *Concepcion*, and that the state public policy of prohibiting

arbitration of public injunctive relief claims is preempted by the FAA. (Note that the Ninth Circuit has granted *en banc* review of the decision in *Kilgore*.)

Trial Court Cannot Compel Class Arbitration Where An Arbitration Agreement is Governed by the Federal Arbitration Act and There is No Evidence the Parties Agreed to Such Arbitration. *Kinecta Alternative Financial Solutions, Inc. v. Superior Court* (2012) 205 Cal.App.4th 506.

Plaintiff signed an agreement that required her to arbitrate all disputes arising out of her employment. This arbitration provision neither authorized nor prohibited class arbitration, and was governed by the Federal Arbitration Act (FAA). After plaintiff filed a wage and hour class action, her employer moved to compel her to arbitrate her individual claims and to dismiss her class claims. The trial court granted the employer's motion to compel arbitration but denied the employer's motion to dismiss the class action allegations.

The Court of Appeal ordered the trial court to dismiss the class action allegations. The appellate court concluded that by granting the motion to compel arbitration but denying the motion to dismiss the class allegations, the trial court erroneously imposed class arbitration, contrary to the requirements of the U.S. Supreme Court's decision in *Stolt-Nielsen*, *supra*, 130 S.Ct. 1758. *Stolt-Nielsen* held that, where an arbitration agreement is governed by the FAA, a party may not be compelled to submit to class arbitration unless the agreement provides a basis for concluding that the parties agreed to class arbitration. The Court of Appeal decided that because the arbitration provision here expressly limited arbitration to disputes between plaintiff and her employer, the provision did not authorize class arbitration.

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ATTORNEY FEES

California Supreme Court Confirms That Attorney Fee Awards to Prevailing Defendants Under Civil Code Section 55 Are Mandatory and Are Not Preempted By the Americans With Disabilities Act. *Jankey v. Song Koo Lee* (2012) 55 Cal.4th 1038.

Civil Code section 55 (section 55), part of the California Disabled Persons Act (Civ. Code, § 54 et seq.), provides for an award of attorney fees to the prevailing party in an action to enjoin disability access violations. The California Supreme Court has confirmed that a defendant who prevails in such an action is entitled to a mandatory award of attorney fees. The Court further held that the Federal Americans with Disabilities Act (ADA) (42 U.S.C.A. § 12101 et seq.) does not preempt section 55.

The Court explained that the plain language of section 55, which provides that "[t]he prevailing party in the action shall be entitled to recover reasonable attorney's fees," makes clear that such fees are mandatory for any prevailing party, including a prevailing defendant. The Court further explained that, while the discretionary fee provision of the ADA allows defendants fees only for responding to "frivolous" claims, the ADA does not preempt state laws that afford protection equal to or better than that afforded by ADA. The Court reasoned that section 55 qualifies as a state law that affords, in at least some respects, greater protection than its federal counterpart.

The Court also disagreed with the Ninth Circuit's decision in *Hubbard v. SoBreck, LLC* (9th Cir. 2009) 554 F.3d 742, which held that federal conflict preemption principles foreclose a mandatory fee award under section 55 where parallel state and ADA claims are filed and the work in defending the two claims overlaps. The Court explained that the defendant here would have been entitled to attorney fees whether or not the plaintiff pleaded an ADA claim, and that the award was a consequence of the plaintiff's voluntary decision to seek additional state remedies. The Court further held that, because section 55's mandatory fee provision applies only to the state law remedy, it does not stand as an obstacle to congressional objectives.

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Plaintiff has filed a petition for certiorari which is pending with the U.S. Supreme Court.

Horvitz & Levy represents Song Koo Lee, defendant and respondent in this case.

CIVIL PROCEDURE

California Supreme Court Overturns Common Law Rule Releasing Joint Tortfeasors. *Leung v. Verdugo Hills Hospital* (2012) 55 Cal.4th 291.

A minor plaintiff sued his pediatrician and the hospital where he was born for medical negligence. Prior to trial, the plaintiff and the pediatrician agreed to settle for the $1 million limit of the pediatrician's professional liability insurance policy, in exchange for a release, even though the trial court had ruled that the settlement amount was not in good faith because it was "'grossly disproportionate to the amount a reasonable person would estimate' the pediatrician's share of liability would be."

At trial, the jury found both the pediatrician and hospital were negligent, awarded approximately $15 million in damages, and apportioned 55 percent of the fault to the pediatrician, 40 percent to the hospital, and 2.5 percent to each of the plaintiff's parents. The judgment imposed liability against the hospital for 95 percent of the jury's economic damages award, subject to a setoff of $1 million. The Court of Appeal reversed, holding that under the common law release rule, plaintiff's release of liability claims against the pediatrician also released the nonsettling hospital from liability for plaintiff's economic damages.

The Supreme Court reversed, holding that California would no longer follow the common law release rule. Accordingly, notwithstanding the plaintiff's pre-trial release of a joint tortfeasor, the plaintiff may continue to litigate against non-settling defendants. The Supreme Court also adopted a "set off with contribution" approach to apportioning liability among joint tortfeasors in the absence of a good faith settlement determination. Under this approach, "the money paid by the settling

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tortfeasor is credited against any damages assessed against the nonsettling tortfeasors, who are allowed to seek contribution from the settling tortfeasor for damages they have paid in excess of their equitable shares of liability."

CONTRACTS

California Supreme Court Overturns Prior Case Law Regarding Fraud Exception to Parol Evidence Rule. *Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Association* (Jan. 14, 2013, S190581) __ Cal.4th __ [2013 WL 141731] (*Riverisland*).

In *Riverisland*, the California Supreme Court has overruled *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258 (*Pendergrass*), which held that the fraud exception to the parol evidence rule (Code of Civil Procedure section 1856, subdivision (f)), did not apply when the party asserting fraud claimed a promise "directly at variance with the promise of the writing." Although the *Pendergrass* rule has remained intact for over 75 years, the Supreme Court noted that courts have followed the rule "with varying degrees of fidelity." Given mounting criticism, the California Supreme Court concluded *Pendergrass* should be set aside in favor of allowing fraud claims to be made even when they are at variance with the terms of a written integrated agreement.

EXPERT TESTIMONY

Trial Courts Must Act As "Gatekeepers" in Deciding Whether to Exclude Expert Testimony. *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747.

The California Supreme Court has confirmed that under the California Evidence Code "the trial court acts as a gatekeeper to exclude speculative or irrelevant expert opinion." The Court expressly agreed with the California Court of Appeal's earlier decision in Lockheed Litigation Cases (2004) 115 Cal.App.4th 558, a case in which Horvitz & Levy LLP represented the prevailing defendants.

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The Court explained that in fulfilling its gatekeeping function the trial court "must not weigh an opinion's probative value or substitute its own opinion for the expert's opinion. Rather, the court must simply determine whether the matter relied on can provide a reasonable basis for the opinion or whether that opinion is based on a leap of logic or conjecture. The court does not resolve scientific controversies. Rather, it conducts a 'circumscribed inquiry' to 'determine whether, as a matter of logic, the studies and other information cited by experts adequately support the conclusion that the expert's general theory or technique is valid.' "

"[T]he gatekeeper's role 'is to make certain that an expert, whether basing testimony upon professional studies or personal experience, employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field,' " and that "[t]he goal of trial court gatekeeping is simply to exclude 'clearly invalid and unreliable' expert opinion."

FIRST AMENDMENT

Supreme Court Narrows State Constitutional Right to Protest on Certain Private Property. *Ralphs Grocery Co. v. United Food and Commercial Workers Union Local 8* (2012) 55 Cal.4th 1083.

The California Supreme Court has concluded that union protesters have no constitutional right to picket on the privately owned walkway in front of the customer entrance to a supermarket. The court held there was no such right here because, unlike the common areas of a mall, the entrance to a store is not a public forum. This decision represents a limitation on the court's prior holding in *Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899, and clarifies that private shopping centers can exercise greater control of speech activities in those areas of the mall that are not "designed and furnished in a way that induces shoppers to congregate for purposes of entertainment, relaxation, or conversation." Note, however, that the court did remand the case for further consideration as to whether there was a statutory basis to permit the challenged speech.

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HOSPITAL PEER REVIEW

California Supreme Court Agrees to Review Whether Doctors May Avoid Hospital Peer Review Proceedings by Filing Whistleblower Lawsuits. *Fahlen v. Sutter Center Valley Hospitals* (2012) 208 Cal.App.4th 557, review granted Nov. 14, 2012, S205568.

The Supreme Court has agreed to review a significant issue affecting hospital peer review proceedings: may physicians bypass peer review and avoid the exhaustion of remedies requirement by pursuing a whistleblower suit alleging retaliation?

A hospital declined to renew Dr. Fahlen's medical staff privileges, and that decision was upheld by the hospital's board of trustees after internal peer review proceedings. Dr. Fahlen did not seek judicial review of that administrative decision. Instead, Dr. Fahlen filed a tort action under Health and Safety Code section 1278.5 seeking relief as a whistleblower, claiming that his privileges were denied in retaliation for complaints about nursing issues. The Court of Appeal held that a tort action under section 1278.5 may proceed independent of medical staff peer review proceedings. (We described the conflict between this result and a different Court of Appeal decision in an earlier eBulletin.)

The Supreme Court will now consider whether doctor-whistleblowers must exhaust peer review procedures before filing suit. The briefing on the merits will be completed next year, and the Court will set oral argument thereafter. (Disclosure: Horvitz & Levy filed an amicus letter asking the Supreme Court to grant review in this case.)

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INSURANCE LAW

Ninth Circuit Amends Opinion Which Had Held That California Insurers Owe a Duty to Make Reasonable Settlement Offers. *Yan Fang Du v. Allstate Ins. Co.* (9th Cir. 2012) 681 F.3d 1118, opn. amended and superseded 697 F.3d 753.

In its original opinion issued on June 11, 2012, the Ninth Circuit Court of Appeals held: (1) an insurer has an affirmative duty to make, not just to accept, a reasonable settlement offer within policy limits when the insured's liability is reasonably clear; and (2) the "genuine dispute" doctrine is not available as a defense to a bad faith claim in the third-party context. Rather, the doctrine is limited to coverage disputes "in first-party insurance cases, where the court must determine whether the insurer's refusal to pay policy benefits was unreasonable or without cause."

On October 5, 2012, the court issued an amended opinion which superseded the earlier opinion. The amended opinion noted a split of authority on the two issues identified above. However, in the amended opinion, the court did not reach the merits of either issue. Instead, the court simply held that the district court did not abuse its discretion in refusing to accept the plaintiff's proposed jury instruction that an insurer acts in bad faith by failing to effectuate a settlement, because there was no factual support for the proposed instruction.

California Supreme Court Adopts "All-Sums-With-Stacking" Approach to Insurers' Indemnity Obligations in Cases of Continuing Property Damage. *State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186.

The California Supreme Court has determined the indemnity obligations of successive CGL insurers when their common insured becomes liable for continuous and progressive property damage that spans multiple policy periods. The court unanimously held:

1. Each insurer whose policy was in effect while any of the continuous property damage was occurring is obligated to pay "all

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sums" for which the insured becomes liable because of the damage, up to policy limits. The insurer's obligation is not affected by the fact that the damage was also occurring before or after the insurer's policy was in effect. The court declined to adopt a "pro rata" allocation method advocated by the insurers and adopted by courts elsewhere, finding that the policy language did not contemplate that method.

2. Absent language in the policy to the contrary, the insured may "stack" policy limits, that is, the insured may call on all the policies that were in effect while the property damage was occurring to respond to the loss, up to each policy's limits. This approach views the continuous injury "as a whole rather than artificially breaking it into distinct periods of injury." The court disapproved a prior Court of Appeal decision that had refused to permit stacking of policy limits.

Claim Against Insurer Properly Rejected on Summary Judgment Based on Insureds' False Statements Made During the Claim Process. *Hodjat v. State Farm Mut. Auto. Ins. Co.* (2012) 211 Cal.App.4th 1.

Two insureds made a claim under their State Farm policy for the alleged theft of an insured BMW automobile. The insureds provided State Farm with three different purchase prices for the automobile and also provided various accounts of the amount of pre-existing damage to the automobile. State Farm denied the claim and the insureds sued for bad faith. The Court of Appeal upheld summary judgment for State Farm because the insureds' misrepresentations and inconsistencies regarding their claim demonstrated that a genuine dispute existed regarding State Farm's denial of liability under the policy which provided there would be no coverage if the insured made any false representations with the intent to conceal or misrepresent any material facts or circumstances in connection with any claim under the policy.

Horvitz & Levy attorneys Jeremy Rosen and Steven Fleischman submitted a successful request for publication of this decision on behalf of the Association of Southern California Defense Counsel.

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LABOR LAW

PAGA Does Not Authorize Recovery of Civil Penalties Set By Wage Orders. *Thurman v. Bayshore Transit Management, Inc.* (2012) 203 Cal.App.4th 1112.

The trial court awarded the plaintiff civil penalties under the Private Attorneys General Act of 2004 (PAGA) for violations of California's Labor Code. In doing so, the court concluded that plaintiff could not recover penalties that the plaintiff claimed were set by an Industrial Welfare Commission (IWC) wage order.

The Court of Appeal affirmed the trial court's refusal to award such penalties, holding that PAGA authorizes recovery of civil penalties only for violations of the Labor Code. The appellate court concluded that although PAGA actions can serve indirectly to enforce certain wage order provisions by enforcing statutes that require compliance with wage orders, PAGA does not create a private right of action directly to enforce a wage order.

MEDICAL NEGLIGENCE

Fault May Not Be Allocated to Non-Party Treating Physician Absent Proof of All Elements of Medical Malpractice Claim. *Chakalis v. Elevator Solutions, Inc.* (2012) 205 Cal.App.4th 1557.

Plaintiff was injured when an elevator malfunctioned and fell six floors. Plaintiff sued the elevator maintenance company, the homeowners association that controlled the building where the elevator was located, the property manager, and the property manager's agent. A jury absolved the elevator maintenance company and found the homeowners association 25 percent at fault, the property manager and its agent 15 percent at fault, plaintiff 8 percent at fault, and a non-party physician 52 percent at fault.

On appeal, plaintiff challenged the apportionment of fault to the non-party physician. The Court of Appeal reversed the judgment for a

new trial, holding that "[i]n order to prevail on a defense of comparative negligence by a non-party physician, the defendant must prove . . . [all] of the elements . . . of medical malpractice." In addition, the court concluded that "a jury cannot find a non-party medical doctor comparatively at fault for the plaintiff's injuries unless the jury is instructed on the requirements of a medical malpractice claim." Because the defendants failed to prove all elements of the malpractice claim against the non-party treating physician, the trial court erred by denying the plaintiff's motion for new trial.

Hospital That Performs Lab Tests for a Patient's Personal Physician is not Liable Under Ostensible Agent Theory for the Physician's Failure to Inform the Patient of the Lab Results. *Walker v. Sonora Regional Medical Center* (2012) 202 Cal.App.4th 948.

Plaintiff Amber Walker gave birth to a child with cystic fibrosis approximately one year after her personal physician, defendant Donavon Teel, M.D., failed to inform her that she tested positive as a carrier of cystic fibrosis. In the course of upholding a summary judgment for the Hospital based on its limited role in the laboratory testing and reporting process, the Court of Appeal rejected plaintiff's claim that her physician was the Hospital's ostensible agent. The following excerpt from the court's opinion presents an outline of the criteria for avoiding a finding of ostensible agency (for a different outcome on the ostensible agency issue, see *Mejia v. Community Hospital of San Bernardino* (2002) 99 Cal.App.4th 1448):

> "The evidence in this case plainly negated any possibility of ostensible agency. Amber selected and made her appointments with Dr. Teel, who became her personal physician for purposes of managing her pregnancy. She was not treated by Dr. Teel at the Hospital (in the emergency room or otherwise) or referred directly to Dr. Teel by the Hospital. Although Dr. Teel had medical staff privileges at the Hospital, he was an independent contractor. The Hospital had no property ownership or interest in Dr. Teel's office or building, nor was any of the nurses or other personnel at Dr. Teel's office employed by the Hospital. There was no evidence that the Hospital ever said or did

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> anything to lead the Walkers to believe that Dr. Teel was an agent or employee of the Hospital. Moreover, Amber signed a document at the time the laboratory test was performed acknowledging that the physicians who were on staff with the Hospital were not employees or agents of the Hospital, but were independent contractors."

"The fact that Dr. Teel was on staff at the Hospital in the sense that he had the privilege of using the Hospital facilities for certain medical purposes (e.g., to deliver babies) did not, by itself, create an inference of ostensible agency. . . . Likewise, the facts that Dr. Teel's office happened to be located in the vicinity of the Hospital and that Amber desired to eventually have her baby delivered at the Hospital, were insufficient to create a triable issue of fact. More had to be shown. Specifically, the Walkers had to show that Amber looked to the Hospital for her prenatal care (of which laboratory tests were a part) rather than to her personal physician, and that there was conduct by the Hospital that would cause a reasonable person to believe that Dr. Teel was an agent of the Hospital."

Treating Medical Professional Who Submits Patient Evaluation in Official Proceedings is Immune From Suit Based on Evaluation Itself and Conduct Related to Evaluation. *Cang Wang v. Heck* (2012) 203 Cal.App.4th 677.

A treating neurologist provided a written evaluation to the Department of Motor Vehicles (DMV), clearing one of her epilepsy patients to resume driving. Following an administrative hearing, the DMV, relying on the evaluation, reinstated the patient's license. Shortly thereafter, the patient failed to take his epilepsy medications properly, suffered a seizure while driving, and struck plaintiffs. Plaintiffs sued the neurologist for negligence and medical malpractice, claiming she had negligently cleared her patient to resume driving.

On appeal, plaintiffs conceded that the litigation privilege—California Civil Code section 47, subdivision (b), which protects litigants from tort liability based on communications in official proceedings—immunized the neurologist from any suit based on her written submission to the DMV. Nonetheless, plaintiffs argued that the neurologist's

treatment and care of her patient, which included her allegedly negligent failure to warn her patient not to drive, was independent of her submission, and, therefore, not protected by the litigation privilege. The appellate court disagreed, holding that the litigation privilege immunized the neurologist from suit because her "noncommunicative conduct prior to completing the DMV evaluation form . . . was necessarily related to the form itself" and plaintiffs "have not demonstrated that there was any wrongful act independent of" the neurologist's completion and submission of the evaluation to the DMV.

Court of Appeal Limits Application of Medical Malpractice Statute of Limitations. *Yun Hee So v. Sook Ja Shin* (2013) 212 Cal.App.4th 652.

Plaintiff sued an anesthesiologist for damages arising out of medical procedures performed after a miscarriage. Plaintiff claims she was given inadequate anesthesia, which caused her to awaken during the procedure. Following the procedure she was confronted by the anesthesiologist who allegedly engaged in tortious conduct intending to cause emotional harm. The trial court dismissed plaintiff's claims as barred by the one-year MICRA statute of limitations which governs claims against doctors providing professional services. (Code Civ. Proc., § 340.5.)

The Court of Appeal reversed and held that the plaintiff's claims were for ordinary negligence and, thus, were governed by the general two-year statute of limitations for negligence. (Code Civ. Proc., §§ 335, 335.1) "[P]laintiff alleges that Dr. Shin engaged in the alleged tortious conduct for the purpose of persuading plaintiff not to report to the hospital or medical group that plaintiff had awakened during surgery. In other words, plaintiff alleges that Dr. Shin acted for her own benefit, to forestall an embarrassing report that might damage her professional reputation—*not* for the benefit of her patient. As pled, therefore, the alleged negligence was not undertaken 'in the rendering of professional services,' and thus it does not constitute professional negligence within the meaning of section 340.5."

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PRODUCTS LIABILITY

California Supreme Court Rules That Product Manufacturers Cannot be Held Liable for Injuries Caused by Replacement Parts. *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335.

The California Supreme Court issued a unanimous opinion holding that product manufacturers cannot be held liable in strict liability or negligence for harm caused by another manufacturer's product, even if the defendant manufacturer could have foreseen that its product would be used alongside the injury-causing products.

Defendant Crane Co. manufactured and supplied valves to the Navy in the 1940's, for incorporation in to the steam propulsion systems on Navy ships. The Navy required the use of asbestos-containing gaskets and packing. The asbestos-containing insulation materials were not necessary for the valves to function, but the Navy preferred asbestos over other types of insulating materials.

Lt. Patrick O'Neil served on a Navy ship in the 1960's. The ship contained Crane Co. valves, but by the time of Lt. O'Neil's service, the Navy had removed the original gaskets and packing that Crane Co. supplied with its valves and replaced them with asbestos parts made by third parties. Decades later, O'Neil's family sued Crane Co., alleging that he was injured by his exposure to asbestos on the ship. The trial court granted Crane Co.'s motion for nonsuit, but the Court of Appeal reversed, holding that manufacturers are liable for injuries caused not only by their own products, but also by products of others that will be foreseeably used with their products.

The Supreme Court reversed the Court of Appeal. The Supreme Court recognized that the Court of Appeal's holding represented "an unprecedented expansion of strict products liability." The court ruled that public policy would not be served by requiring manufacturers to warn about the dangerous propensities of products they do not design, make, or sell. Although foreseeability is a consideration in products cases, it is not alone a basis for imposing liability.

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Horvitz & Levy represented Crane Co. in the California Supreme Court, preparing the briefs at the petition stage and the merits stage along with our co-counsel at K & L Gates.

Suppliers of Raw Materials to Manufacturers Generally Are Not Liable for Injuries Resulting From Use of Raw Materials in Manufacturing Process. *Maxton v. Western States Metals* (2012) 203 Cal.App.4th 81.

Plaintiff John Maxton alleged personal injuries as a result of working with metal products that were essentially raw materials manufactured by defendants and supplied to Maxton's employer. The trial court dismissed Maxton's claims.

The Court of Appeal affirmed based on the component parts doctrine, which provides that the manufacturer of a component part is not liable for injuries caused by the finished product into which the component has been incorporated unless the component itself was defective and caused harm. The court held that, generally, suppliers of raw materials to manufacturers cannot be held liable for negligence or strict products liability by the manufacturers' employees who sustain personal injuries as a result of using the raw materials in the manufacturing process. The court indicated that such a supplier could be held liable in extraordinary circumstances where: (1) the raw materials are contaminated; (2) the supplier exercises substantial control over the manufacturing process; or (3) the supplier provides inherently dangerous raw materials. The court found no such extraordinary circumstances in Maxton's case.

The court distinguished prior decisions that had imposed liability on suppliers of raw materials in cases involving asbestos. The court did so on grounds that asbestos is an inherently dangerous product whereas the raw materials in Maxton's case–metal products–were not inherently dangerous.

Manufacturer's Compliance With Industry Standards and Regulations Can be Relevant to Claims Alleging Negligence and Strict Products Liability Design Defect. *Howard v. Omni Hotels Management Corp.* (2012) 203 Cal.App.4th 403.

Plaintiff filed negligence and strict products liability claims against the manufacturer of a bathtub, alleging that the slip-resistant coating of the bathtub did not comply with applicable standards. The trial court granted summary judgment in favor of the manufacturer.

On appeal, plaintiff argued that the manufacturer could not defend against his claims with evidence that the manufacturer met industry customs or standards on safety. The appellate court disagreed, holding that "the admissibility of expert evidence about a manufacturer's compliance with regulations or trade custom varies with the types of theories under which liability . . . is sought." Thus, the court held that "a manufacturer's 'compliance with regulations, directives or trade custom does not necessarily eliminate negligence but instead simply constitutes evidence for jury consideration with other facts and circumstances,' ", and that, "[w]hen the plaintiff alleges strict product liability/design defect, any evidence of compliance with industry standards, while not a complete defense, is not 'irrelevant,' but instead properly should be taken into account through expert testimony as part of the design defect balancing process."

PUNITIVE DAMAGES

Court of Appeal Holds Plaintiffs Do Not Have To Satisfy Statutory Requirement of Showing Probability of Success on Punitive Damages Claim Brought Against Health Care Service Plan. *Kaiser Foundation Health Plan, Inc. v. Superior Court (Rahm)* (2012) 203 Cal.App.4th 696 (*Kaiser*).

California Code of Civil Procedure section 425.13 precludes a plaintiff from pleading a claim for punitive damages in an "action for damages arising out of the professional negligence of a health care provider" unless the plaintiff first submits evidence establishing "that

there is a substantial probability that the plaintiff will prevail on the claim. . . ."

In *Kaiser*, the Court of Appeal held, following review of legislative history, that a plaintiff does not have to comply with section 425.13 in an action brought against a health care service plan because such a plan "does not directly provide medical care to its subscribers. Instead, the Health Plan contracts with other . . . entities to deliver medical care to subscribers who enroll in its plans." A petition for review to the California Supreme Court was denied.

Published Opinion Affirms $4.5 Million Punitive Damages Award Against Defendant With Negative Net Worth. *Bankhead v. ArvinMeritor, Inc.* (2012) 205 Cal.App.4th 68.

In this asbestos personal injury action, the jury awarded $1.85 million in compensatory damages and $4.5 million in punitive damages (a ratio of 2.4 to one). Defendant ArvinMeritor appealed, challenging only the amount of the punitive damages. ArvinMeritor raised two arguments: (1) the punitive damages are excessive under state law in light of ArvinMeritor's negative net worth, and (2) the ratio of punitive to compensatory damages is unconstitutionally excessive.

In a published opinion, the California Court of Appeal (First Appellate District, Division Four) rejected both arguments and affirmed the award in full.

On the first issue, the court held that despite ArvinMeritor's negative net worth, it could afford to pay the punitive damages award. At the time of trial, it had annual sales revenue of $3.6 billion and cash reserves exceeding $343 million. The court discussed other Court of Appeal decisions which have held that punitive damages should not exceed 10 percent of a defendant's net worth. The court chose not to follow that line of authority, choosing instead to follow a separate line of cases holding that a defendant's net worth is too easily subject to manipulation, and therefore unsuitable as the sole benchmark for evaluating the defendant's ability to pay punitive damages. Those cases involved evidence that the defendants had manipulated their stated net worth to minimize their exposure to punitive damages. The *Bankhead*

court did not cite any such evidence. The defendant in *Bankhead* was a publicly traded company, and its net worth was stated in publicly available SEC filings and audited financial statements. Nevertheless, the Court of Appeal held that its net worth was not a reliable measure of its financial condition.

On the second issue, the court held that the 2.4 ratio was "well within the range for comparable cases." The opinion never addressed the U.S. Supreme Court's statement in *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 US 408 [123 S.Ct. 1513, 155 L.Ed.2d 585], repeated by the California Supreme Court in *Roby v. McKesson, Corp.* (2009) 47 Cal.4th 686, that "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." The $1.85 million punitive damages award in this case would seem to qualify as "substantial," but the court never discussed that aspect of *State Farm*.

TORT DAMAGES

After *Howell*, Will Trial Courts Admit Evidence of Medical Bills That Cannot Support An Award of Economic Damages?

In *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, the California Supreme Court held that where a health care provider has, by prior agreement with an insurer, accepted less than the billed amount as full payment for services provided to the injured insured, evidence of the full billed amount is not relevant or admissible on the issue of past medical expenses. (*Id.* at p. 567.) Trial courts now confront an issue left open in *Howell*: whether a plaintiff may introduce the provider's bills for purposes other than to prove past medical expenses.

In *Bison Builders, Inc. v. ThyssenKrupp Elevator Corp.* (Sept. 5, 2012, A131622, 131623) 2012 WL 3835095 [nonpub. opn.], the trial court allowed the plaintiff to introduce medical bills as evidence of the reasonable cost of the plaintiff's medical care. The Court of Appeal affirmed in an unpublished opinion.

In *Shimabukuro v. Ibarra* (Oct. 23, 2012, G045697) 2012 WL 5207470 [nonpub. opn.], the trial court excluded evidence of medical bills. The Court of Appeal again affirmed in an unpublished opinion, observing that plaintiff did not contend the bills reflected amounts he or his insurer had paid or were liable to pay.

Appellate courts thus appear willing to defer to trial court rulings on the admissibility of medical bills that, under *Howell*, cannot support an award of economic damages. Like most evidentiary fights, this one needs to be won in the trial court. Obtaining relief on appeal may be an uphill battle.

TORT LIABILITY

Ninth Circuit Certifies Question to California Supreme Court re Scope of a Business Owner's Duty. *Verdugo v. Target Corp.* (9th Cir. Dec. 11, 2012, No. 10-57008) ___ F.3d ___ [2012 WL6199193], review granted on a question of law Jan. 16, 2013, S207313 (*Verdugo*).

In *Verdugo*, the Ninth Circuit has posed a question to the California Supreme Court concerning the scope of a business owner's duty when a customer suffers a sudden cardiac arrest (SCA): "In what circumstances, if ever, does the common law duty of a commercial property owner to provide emergency first aid to invitees require the availability of an Automatic External Defibrillator (AED) for cases of sudden cardiac arrest?"

Verdugo is a wrongful death lawsuit filed after a woman died after suffering a SCA in a Target store that did not have an AED. The district court dismissed the action. On appeal, plaintiffs allege Target should have had an AED on site. Target argues the legislature has occupied the field with respect to which businesses must maintain AEDs (Target not being among them) and that, in any event, Target's only duty in responding to a medical emergency is to call 911.

Judges Graber and Berzon state that, because plaintiffs seek to impose "a common-law rule that would require many retail establishments across the state to acquire AEDs," the question posed

"implicates strong state interests and could have wide-reaching effects." Judge Pregerson dissented, asserting that there is a "common law duty for a business to provide emergency first aid to its invitees" and this duty "requires the availability of an AED for cases of sudden cardiac arrest."

The certification was filed on December 11, 2012. Chances are good that the Supreme Court will agree to decide the issue, as it has answered certified questions more than 65 percent of the time in recent years.

Supreme Court Holds That Primary Assumption of Risk Doctrine Applies to All Inherently Dangerous Recreational Activities, Not Only to Active Sports. *Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148 (*Nalwa*).

In *Nalwa*, the Supreme Court, in a 6-1 opinion, has held that the primary assumption of risk doctrine applies to bar an amusement park's liability for the fractured wrist sustained by a park patron after she was bumped during a bumper car ride.

In *Knight v. Jewett* (1992) 3 Cal.4th 296, the Supreme Court held that participants in some inherently dangerous activities, and specifically many active sports, can be held liable for injuries to other participants only when they increase the risk inherent in the activity. Lower courts disagreed about whether the primary assumption of risk doctrine applied outside the context of sports. In *Nalwa*, the Supreme Court held that the doctrine "applies as well to other recreational activities 'involving an inherent risk of injury to voluntary participants . . . where the risk cannot be eliminated without altering the fundamental nature of the activity.' [Citation.] . . . Allowing voluntary participants in an active recreational pursuit to sue other participants or sponsors for failing to eliminate or mitigate the activity's inherent risks would threaten the activity's very existence and nature."

The court rejected the argument that safety regulations governing amusement park rides exempted them from the primary assumption of risk doctrine. While the regulations were designed to prevent serious injuries, "[a] small degree of risk inevitably accompanies the thrill of

speeding through curves and loops, defying gravity or, in bumper cars, engaging in the mock violence of low-speed collisions."

The court also clarified that the immunity from liability applies not only to participants but also to sponsors who derive economic benefits from recreational activities. "[U]nder the primary assumption of risk doctrine, operators, sponsors and instructors in recreational activities posing inherent risks of injury have no duty to eliminate those risks, but do owe participants the duty not to unreasonably increase the risks of injury beyond those inherent in the activity."

Court of Appeal Holds Primary Assumption of Risk Doctrine Applies to Home Caregiver Injured by Alzheimer's Patient. *Gregory v. Cott* (Jan. 28, 2013, B237645) __ Cal.App.4th __ [2013 WL 313960] (*Gregory*).

Under the primary assumption of risk doctrine in California, participants in some inherently dangerous activities can be held liable for injuries to other participants only when they increase the risk inherent in the activities. In *Nalwa v. Cedar Fair* (2012) 55 Cal.4th 1148, the Supreme Court held that the primary assumption of risk doctrine is not limited to active sports but applies to other inherently dangerous recreational activities. Now, in *Gregory*, a majority of the Court of Appeal has held that the doctrine also applies to bar a claim by a caregiver hired to provide care and supervision in a private home to an Alzheimer's patient known to be violent.

Defendant Had No Duty to Protect Family Members Of Workers On Its Premises From Secondary Exposure to Asbestos Used During The Course of the Defendant's Business. *Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15.

The plaintiff brought a premises liability action against Ford Motor Company. She alleged that her father and brother were exposed to asbestos while helping to construct a new assembly plant for Ford. Although the plaintiff did not work at the plant, she contracted mesothelioma and alleged her disease resulted from "take home" exposure to asbestos while doing the family laundry and shaking out her

father's and brother's dusty work clothes. Plaintiff prevailed at trial and judgment was entered in her favor.

The Second Appellate District, Division Seven, reversed. It held the defendant had no duty to protect the plaintiff from "take home" exposure. The court applied the factors enumerated by the California Supreme Court in *Rowland v. Christian* (1968) 69 Cal.2d 108 for determining the existence of a duty of care. The court found these factors weighed heavily against a duty because, in contrast to the risk of injury to those on the defendant's premises, the risk of injury to the family members of those individuals was remote. Also weighing against the imposition of a duty was the almost limitless number of potential plaintiffs who could claim secondary exposure.

UNFAIR BUSINESS PRACTICES

California Supreme Court Holds Doctrine of Continuous Accrual Applies to UCL Statute of Limitations. *Aryeh v. Canon Business Solutions, Inc.* (Jan. 24, 2013, S184929) __ Cal.4th __ [2013 WL 263509] (*Aryeh*).

In *Aryeh*, the California Supreme Court held that the statute of limitations for claims under the Unfair Competition Law (UCL), Business and Professions Code section 17200 et seq., is subject to the same accrual and equitable exception rules governing common law claims. Thus, equitable doctrines such as delayed discovery, continuing violations, and continuous accrual are applicable to the UCL. In so holding, the court resolved a split of authority among the Courts of Appeal regarding operation of the UCL's 4-year statute of limitations, and overrruled Court of Appeal decisions holding that equitable exceptions to the normal accrual rules do not apply in the UCL context.

Applying its holding to the facts of this case, the court held that the plaintiff Aryeh's UCL claim survived in part under the continuous accrual doctrine which provides that " 'when an obligation or liability arises on a recurring basis, a cause of action accrues each time a wrongful act occurs, triggering a new limitations period.' " The court held that each instance where Canon allegedly charged Aryeh for excess copies constituted an

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independent UCL violation with its own 4-year limitations period. Thus, Aryeh was allowed to seek restitution for excess copy charges Canon imposed within 4 years before the filing of Aryeh's original complaint.

WAGE & HOUR

California Supreme Court Holds Employers Need Not Ensure Employees Take Meal Breaks, and Clarifies Other Wage-And-Hour Issues. *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004 (*Brinker*).

In *Brinker*, the California Supreme Court issued a much-anticipated decision clarifying employers' obligations under California law governing meal and rest breaks. The Supreme Court held:

- Employers need not ensure their employees do no work during a meal break. Under California law, an employer need only "provide a meal period to its employees." The Supreme Court explained that an "employer satisfies his obligation if it relieves its employees of all duty, relinquishes control over their activities and permits them a reasonable opportunity to take an uninterrupted 30-minute break, and does not impede or discourage them from doing so." The court emphasized that an "employer is not obligated to police meal breaks and ensure no work thereafter is performed."

- An employer must "provide a first meal period after no more than five hours of work and a second meal period after no more than 10 hours of work." The court concluded that, beyond these obligations, the wage order governing restaurant employees like the plaintiffs in *Brinker* imposed no further meal timing requirements.

- Under the wage order governing restaurant employees, employees "are entitled to 10 minutes' rest for shifts from three and one-half to six hours in length, 20 minutes for shifts of more than six hours up to ten hours, 30 minutes for shifts of more than 10 hours up to 14 hours, and so on."

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- The wage order governing restaurant employees does not require employers to permit their employees a rest period before any meal period. As the Supreme Court explained, employers are "subject to a duty to make a good faith effort to authorize and permit rest breaks in the middle of each work period, but may deviate from that preferred course where practical considerations render it infeasible."

California Supreme Court to Review Wage and Hour Class Action Based Solely on Statistical Sampling and Class Representatives' Claims. *Duran v. U.S. Bank Nat. Assn.* (2012) 203 Cal.App.4th 12, review granted May 16, 2012, S200923).

Plaintiff brought a class action on behalf of 260 current and former "business banking officers" who allegedly were misclassified by defendant bank as "outside sales personnel" for purposes of exempting them from California's overtime laws. The trial court certified the class and entered judgment for the class after a bench trial.

The Court of Appeal reversed the judgment and ordered the trial court to decertify the class. The Court of Appeal held the trial court violated the bank's due process rights by (1) allowing plaintiffs to establish liability for overtime pay through surveys and random sampling of class members' circumstances that lacked sufficient statistical reliability; and (2) forbidding the bank from asserting defenses against absent class members. Last week, the California Supreme Court granted review.

Although *Duran* itself is limited to wage and hour liability, the Supreme Court's decision will likely have a broader impact given the due process issues it presents for class actions generally.