CM REPORT

of Recent Decisions

2020 • Vol. 2

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California's Second Appellate District Clarifies Jury Awards Involving Parties Who Previously Settled In Good Faith

Clausen Miller PC

A summary of significant recent developments in the law focusing on substantive issues of litigation and featuring analysis and commentary on special points of interest.

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SCOTUS Holds Title 7 Protects Gay and Transgender Workers: Justice Neil Gorsuch Stays True To His Word That Words Are Dispositive In Judicial Decisions

by ***Melinda S. Kollross***

Introduction

There can be no clearer example of the application of the judicial philosophy of "textualism" than the decision authored by Justice Gorsuch in *Bostock v. Clayton County, Ga*, 590 U.S. ___ (No. 17-1618, 6/15/20). Textualism is the view that constitutions and statutes must be construed and enforced according to the plain and unambiguous words used in their various provisions. Constitutions and statutes should not be expanded by going beyond the plain words used. Justice Gorsuch considers himself an ardent textualist and his recent opinion in *Bostock* proved the point. The notion that Gay and Transgender persons should be protected under federal law from adverse employment decisions might seem anathema to conservatives like Justice Gorsuch, but given his ardent textualism, the result was clear that Title VII prohibited those employment decisions. As Justice Gorsuch put it:

> When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

Facts

Gerald Bostock worked for Clayton County, Georgia as a child welfare advocate. He was successful at his job and the County won national awards for its work. Bostock then began participating in a Gay recreational softball league. Soon after, influential members of the local community began making disparaging remarks about Bostock's sexual orientation and his participation in a Gay softball league. Bostock was then fired from his job for conduct "unbecoming" a County employee. Bostock sued alleging unlawful discrimination under Title VII, but the Eleventh Circuit held that the law did not forbid employers from firing employees for being Gay.

Along with Bostock's case, the Court took one other involving the firing of a Gay employee (Donald Zarda) and another case involving the firing of a Transgender employee, Aimee Stephens, for no other reason than she was Transgender.

These three cases thus put one legal issue before the Court according to Justice Gorsuch: "[W]hether an employer can fire someone simply for being homosexual or transgender."

Decision

Justice Gorsuch's decision was simple and straightforward because he found the federal legislation and the words used in Title VII to be simple and straightforward. Title VII, in plain and unambiguous language, prohibits employers from taking adverse employment decision because of sex,

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and if an employer was going to fire a person for no other reason than the person was Gay or Transgender, then that person was being fired because of sex. As Justice Gorsuch explains:

> If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees."

The statute's message for our cases is equally simple and momentous: "An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex."

Learning Point: The author has participated in several cases before the United States Supreme Court. There will always be the liberal bloc of votes currently represented by Justices Ginsburg, Breyer, Sotomayor and Kagan, who also joined in Justice Gorsuch's opinion. And there will always be the conservative bloc of votes presently represented by Justices Thomas, Alito and Kavanaugh, who dissented. Based upon the *Bostock* decision, it appears that Justice Gorsuch, much like Justice Roberts who also joined in Justice Gorsuch's opinion without writing a separate opinion, cannot be neatly "pigeonholed" into either a conservative or a liberal slot. But reading the "tea leaves" on how Justice Gorsuch may vote might be easier because as *Bostock* shows, if the words in a statute are plain and unambiguous, Justice Gorsuch will vote to apply them and enforce them as written, regardless of the type of case before the Court.

Update: Florida's New Remote Notarization Law Requires A Change To The Form Of All Notary Blocks

by ***Benjamin S. Burnstine***

In today's age of continued technological advancement, the list of tasks and duties that can be performed remotely continues to grow at an exponential rate. This list can now be further expanded to include the notarization of documents in the state of Florida. Effective January 1, 2020, Florida's notary laws have changed to allow for the remote online notarization of documents. Florida notaries who meet certain qualifications may now perform remote online notarizations using audiovisual technology to communicate with a signer in a different location and will no longer have to physically (in person) witness the person signing a document requiring notarization.

In connection with the newly authorized remote online notarization process, the Florida Legislature has additionally mandated changes to the form of all notary blocks. For all documents notarized on or after January 1, 2020, the notary block must now indicate whether the person whose signature was notarized appeared before the notary by means of physical presence or remote online notarization (see below). **It is important to note that this change to the form of the notary block is required for ALL notarizations performed by Florida notaries on or after January 1, 2020, and not just those performed remotely.**

The notary block for an acknowledgment of a principal in their individual capacity should now read in relevant part as follows (the bolded portion is the newly required language):

> The foregoing instrument was acknowledged before me **by means of ☐ physical presence or ☐ online notarization**, this day of, (year) , by (name of person acknowledging) . . . .

Similarly, the notary block for an oath or affirmation should now read in relevant part as follows (the bolded portion is the newly required language):

> Sworn to (or affirmed) and subscribed before me **by means of ☐ physical presence or ☐ online notarization**, this day of, (year) , by (name of person making statement) . . . .

The appropriate form for all notary blocks as required by Florida's new remote notarization laws can be found in Florida Statutes Section 117.05. (**http://www.leg.state.fl.us/statutes/index.cfm?App_mode=Display_Statute&URL=0100-0199/0117/Sections/0117.05.html**) It is imperative that ALL documents notarized on or after January 1, 2020, contain the updated form of the notary block as required by Florida's new law in order to avoid the possible consequences of a defective notarization. Should you have any questions regarding Florida's new remote notarization laws, please contact Benjamin Burnstine at **bburnstine@clausen.com**.

Benjamin S. Burnstine
is a senior associate with Clausen Miller based in the firm's Orlando office. Ben brings to the firm a diverse background of legal experience and prides himself on being an efficient, strategic, and aggressive advocate. Prior to joining Clausen Miller, Ben was an associate attorney at a high-volume family law practice where he represented clients in all aspects of litigation throughout the state of Florida. Ben also spent time working as a legal consultant for a prominent boutique business litigation firm in Atlanta, Georgia, where he assisted the firm in its representation of companies involved in various legal disputes. At Clausen Miller, Ben concentrates his practice primarily in the area of first-party property coverage disputes.
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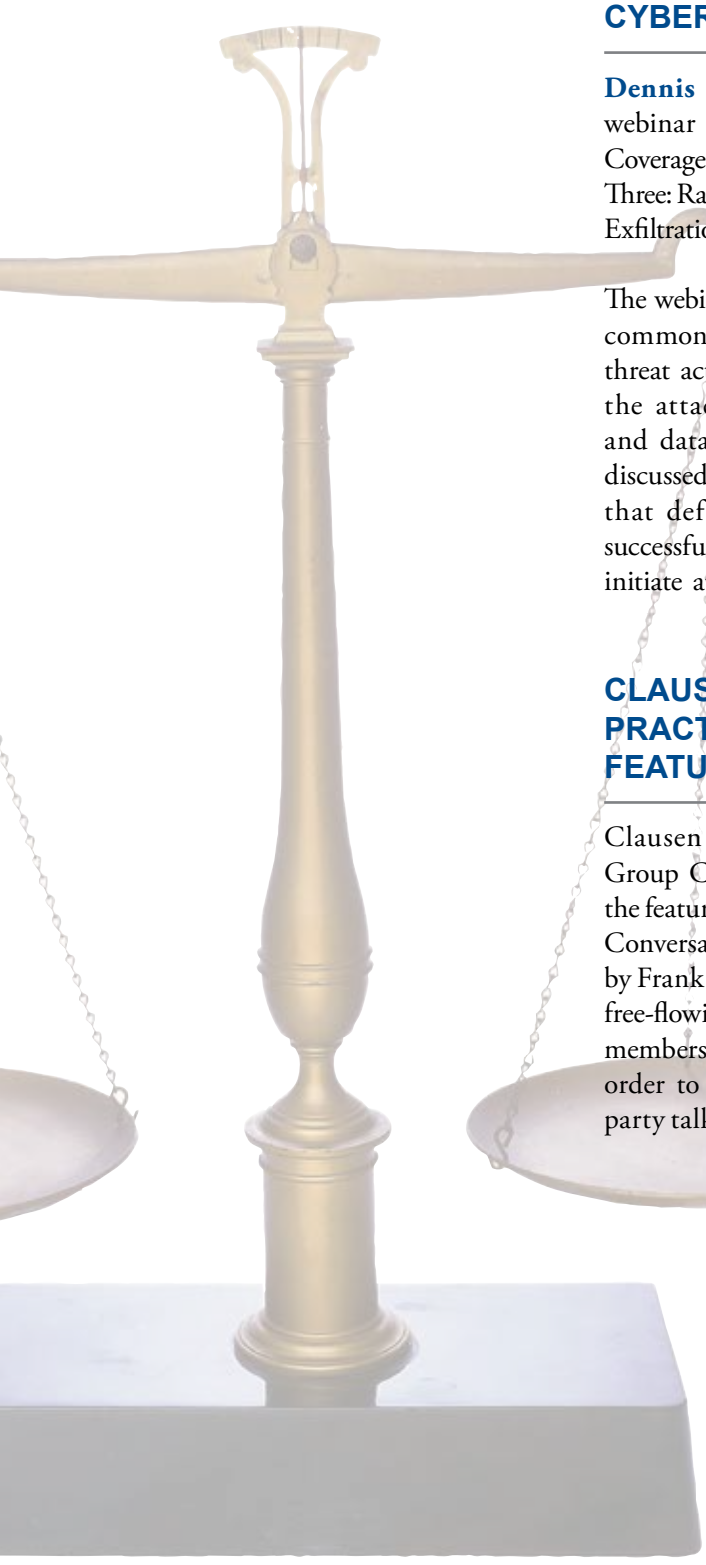

DENNIS FITZPATRICK PRESENTS CYBER INVESTIGATION WEBINAR

Dennis Fitzpatrick co-presented a webinar entitled "Investigations and Coverage Impacts Surrounding the Big Three: Ransomware, Phishing, and Data Exfiltration" on Friday, May 29, 2020.

The webinar addressed the three most common actions that allow for the threat actors to initiate and complete the attack: phishing, ransomware and data exfiltration. The speakers discussed the three actions in scenarios that define how the threat actors successfully utilize various methods to initiate attacks, responses which may include payment to obtain access to data and the potentials of an exfiltration of data from the network.

Dennis is the Firm President and a Shareholder with Clausen Miller P.C., handling first-party property insurance, coverage and defense, including All-Risk, Energy, Builders Risk, Boiler and Machinery, and cyber risk coverage, as well as professional liability defense, premises liability defense, construction litigation and subrogation matters.

CLAUSEN MILLER APPELLATE PRACTICE GROUP CHAIR MELINDA KOLLROSS FEATURED ON DRI PODCAST

Clausen Miller Appellate Practice Group Chair **Melinda Kollross** was the featured guest recently on DRI's "A Conversation With…" podcast hosted by Frank Ramos. The podcasts feature free-flowing conversations with leading members of the DRI community. In order to promote a casual "cocktail party talk" vibe, no scripted questions are prepared or provided beforehand. Listen to Melinda chat about her national appellate practice, litigating before the United States Supreme Court, and the impact of COVID-19 on appellate advocacy at **https://www.spreaker.com/user/9757333/melinda-kollross**.

CM ATTORNEYS DEFEAT CLAIMS AGAINST LITTLE LEAGUE IN TRIAL AND APPELLATE COURTS

Clausen Miller attorneys **Jim Bigoness** and **Paul Esposito** notched an important defense victory in ongoing litigation that's made national news. Jackie Robinson West was a little league team of all African-American players. After winning the 2014 U.S. Little League title (they lost the international title to a South Korean team), their title was stripped because several players were allegedly ineligible. The team players and their parents sued the corporate team, its officers, and others on claims including negligent and intentional infliction of emotional distress, false light, and civil conspiracy.

In the Circuit Court of Cook County, Jim won dismissal of nearly all claims against the team and its officers as unfounded under the law and facts. Paul successfully defended the trial court judgment in the Illinois Appellate Court. *Benton v. Little League Baseball, Inc.*, 2020 IL App (1st) 190549. With these victories, the parents' claims against Clausen's clients are completely out of court, and only one claim by the minors against them remains.

If you'd like to know more, feel free to contact Jim (**jbigoness@clausen.com**) or Paul (**pesposito@clausen.com**) about the case.

KOLLROSS SECURES AFFIRMANCE OF DEFAULT VACATUR FROM NEW YORK APPELLATE DIVISION, SECOND DEPARTMENT; PERRI TO HANDLE TRIAL COURT DEFENSE

Clausen Miller Appellate Practice Group Chair **Melinda Kollross** recently defeated plaintiff's attempt to elevate form over substance in an appeal to the New York Appellate Division, Second Department. A default judgment had been entered against defendant due to the inadvertent law office failure of prior defense trial counsel. It was an e-filed case, and prior trial counsel relied upon certain e-filed summary judgment documents to support the "meritorious defense" prong of his motion to vacate, without re-filing the documents or serving hard copies. Plaintiff then omitted these e-filed documents from the record on appeal, claiming they could not properly have been considered by the trial court and thus the court abused its discretion in vacating the default. The Second Department flatly rejected this argument, holding that "Defendants were not required to attach their pending summary judgment motion to the motion to vacate, as it had already been e-filed with the court." CM shareholder **Carl Perri** will handle the defense moving forward in the New York trial court.

Illinois Supreme Court Confirms That Post-Trial And Appellate Litigation Is A Minefield That Should Only Be Navigated By Experienced Post-Trial And Appellate Lawyers

by ***Melinda S. Kollross***

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Introduction

For over 25 years, my practice has focused primarily on post-trial and appellate litigation. I have seen the intricacies and "traps" presented by various state and federal rules on how to properly prosecute post-trial matters and preserve issues for appeal. I have accordingly counseled clients to utilize attorneys trained in post-trial and appellate litigation to handle such matters because of the minefield the practitioner must navigate to successfully prosecute/defend post-trial and appellate proceedings. The Illinois Supreme Court's recent decision in *Crim v. Dietrich*, 2020 IL 124318 confirms this wisdom of only employing experienced post-trial and appellate attorneys to handle these litigation stages.

Facts

Plaintiffs filed a two-count medical malpractice action arising from injuries suffered by a baby during birth. One count alleged failure to obtain the mother's informed consent to perform a natural birth versus Caesarean section, and the other count alleged negligence in delivering the child. The case went to trial on both counts. Defendant moved for and received a directed verdict on informed consent based upon the legal argument that plaintiffs failed to proffer expert testimony that a reasonable person would have acted differently had she been properly informed. The negligence count went to the jury with the jury finding in favor of defendant. Following the verdict, plaintiffs did not file any post-trial motions, but instead filed a timely appeal. Plaintiffs' appeal was limited just to the informed consent issue. The Appellate Court (*Crim I*) reversed the informed consent directed verdict but did not address any other issues. The Appellate Court mandate reversed the order of the trial court and remanded the case back for such proceedings as required by the Appellate Court's decision.

On remand, defendant moved to bar any reference during retrial to the negligence count contending that plaintiffs forfeited their right to retry this count because of their failure to file a post-trial motion directed to the jury's original finding in defendant's favor on negligence. Plaintiffs contended that they preserved their right for a new trial on all issues including negligence because they asked for a new trial in their notice of appeal and appellate brief. The trial court denied defendant's motion but certified an order for immediate appeal on whether the appellate court's decision required a new trial on all claims. On appeal again, the Appellate Court (*Crim II*) ruled that plaintiff was entitled to a new trial on all claims.

The Illinois Supreme Court thereafter granted review.

Analysis

On appeal, the Supreme Court held that the ruling in *Crim I* could not require a new trial on all issues including negligence because of plaintiffs' failure to file a post-trial motion challenging the jury's verdict on the negligence count as required by Section 1202 of the Illinois Code of Civil Procedure which sets forth "strict rules" for filing such motions in jury cases. In so holding, the Court rejected several of plaintiffs' attempts to circumvent Section 1202's penalty for failing to file a post-trial motion—the waiver of the right to apply for a new trial.

Plaintiffs first argued that since the court granted a directed verdict on informed consent, they were under no obligation to file a "futile and meaningless" post-trial motion on the remaining negligence claim. But the court ruled the only time such a post-trial motion is not required is when a trial court grants a directed verdict as to the "entire" case. A post-trial motion is still required in instances of partial directed verdicts.

Plaintiffs next argued that the informed consent claim and negligence claim were so "intertwined" that the directed verdict on informed consent "materially altered the tenor" of the remaining case and affected the jury's verdict on the negligence count. But the Court found that the problem here was plaintiffs' failure to file a timely post-trial motion in which plaintiffs could have argued that the trial court erred by letting the case go to the jury on negligence after directing a verdict on informed consent. Plaintiffs' argument now was too late, according to the Court. Indeed, the Court found that plaintiffs' argument highlighted exactly the reasons why a timely post-trial motion is necessary: to allow the trial court to address any such errors immediately, instead of years later.

Finally, the Court rejected plaintiffs' contention that their notice of appeal and appellate brief preserved all issues for review. According to the Court, the adoption of plaintiffs' argument would render meaningless the post-trial motion requirements of Section 1202, an outcome the Court stated it was "compelled to avoid".

Learning Point: The Illinois Supreme Court's decision again shows why trained and experienced post-trial and appellate counsel should be brought into the case at the very latest when a verdict or judgment is rendered—to make sure all rights are being preserved. In this case, the plaintiffs would have been wise to have even added appellate counsel when the partial directed verdict was entered, to preserve all arguments about how the claims might be intertwined. But certainly, following verdict, it was necessary to bring on post-trial and appellate counsel to avoid the waiver plaintiffs faced here. ♦

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Allocation Of Fault/Settling Tortfeasors: Upset By The Offset? California's Second Appellate District Clarifies Jury Awards Involving Parties Who Previously Settled In Good Faith

by ***Ian R. Feldman and R. Mick Rubio***

In *Shuler, et al. v. Capital Agricultural Property Services, Inc., et al.* (2020) 49 Cal.App.5th 62, the Second Appellate District Court of California revisited California law on joint and several liability, and the proper allocation of jury verdict awards involving previously settled joint tortfeasors who settled in good faith pursuant to California Code of Civil Procedure § 877.6.

Facts

Plaintiffs owned a 22-acre ranch in Somis, California. Plaintiffs shared a common boundary with a farm owned by Sunshine Agriculture, Inc., and managed by Capital Agricultural Property Services, Inc. (CAPS) and Sierra Pacific Farms (collectively "Defendants"). Defendants expanded their agricultural operations onto a hillside above Plaintiffs' property. In March 2011, the hillside collapsed onto Plaintiffs' property causing damage.

Initially, Plaintiffs filed suit in California Superior Court against Defendants and Haejin Lee, an employee of the Natural Resource Conservation Service (NRCS), a division of the United States Department of Agriculture. Plaintiffs alleged that Defendants and Lee disrupted the subterranean grading, causing damage to the Plaintiffs' property. The trial court held that NRCS was a necessary and indispensable party, and concluded that NRCS could not be joined to the state action, because it is a Federal agency. The trial court dismissed the action without prejudice and Plaintiffs filed suit in Federal District Court against Defendants and the United States.

In 2015, Plaintiffs accepted a $50,000 offer of judgment from the United States. That settlement was incorporated into a judgment and acted to release and discharge the United States, and all past and present officials, employees, representatives, and agents of the United States, from any claims that were or could have been alleged by Plaintiffs in the action. The Federal District Court granted an application of good faith settlement under California Code of Civil Procedure § 877.6, which operated to bar any other joint tortfeasor or co-obligor from any further claims against the settling tortfeasor or co-obligor for equitable comparative contribution, or partial or comparative indemnity, based on comparative negligence or comparative fault.

In July 2015, Plaintiffs filed a new state court action against Defendants which included claims for negligence and trespass. The jury returned a verdict for Plaintiffs on their negligence

claim. The jury also found that two unnamed parties Haejin Lee and Travis Godeaux, another engineer and employee of NRCS, were negligent. The jury allocated negligence as follows: Sierra (defendant farm manager): 10%; CAPS (defendant farm manager): 10%; Sunshine (defendant farm owner): 10%; Plaintiffs: 2%; Travis Godeaux (engineer with NRCS): 34%; Haejin Lee (engineer with NRCS): 34%. Thus, the Defendants were responsible for 30% of the total negligence, while Godeaux and Lee accounted for 68% of the total negligence and causation. The jury awarded Plaintiffs economic damages of $1,756,499.99, and noneconomic damages of $50,000. The trial court held that the Defendants were not liable for the conduct of the Federal Government and its employees based on the preclusive effect of the Federal Court judgment. Therefore, as to economic damages, the court ordered that the Defendants were jointly and severally liable to Plaintiffs only for their own 30% share of the negligence—$526,950, minus an offset of 2/3 of previous settlement amounts ($66,666.67) for amounts previously paid by settling tortfeasors. Accordingly, Defendants' joint and several liability for economic damages was reduced from $1,756,499.99 to $460,283.33.

Analysis

California's Second Appellate Court determined this reduction to be in error. The Appellate Court observed that with a settling tortfeasor who has made a good faith settlement under Code of Civil Procedure § 877.6 (*i.e.*, the United States and its employees Godeaux and Lee), the California Legislature has statutorily adopted the approach of a setoff *without* contribution by the settling tortfeasor to the non-settling tortfeasor under California Code of Civil Procedure §§ 877, 877.6(c). This means that the non-settling tortfeasors may receive a **credit** in the amount paid by the settling tortfeasor, but not **contribution** from the settling tortfeasor.

Defendants attempted to argue that *res judicata*, or claim preclusion, operated to prevent any recovery against the Defendants for any of the conduct by NRCS and its employees. The Appellate Court rejected this argument on the basis that in the prior settlement with the United States, Plaintiffs did not waive their right to seek full compensation for their loss from other tortfeasors under California's rule of joint and several liability, but they did waive their right to seek further compensation from the United States and its employees. The Appellate Court also rejected Defendants' arguments that Plaintiffs were obtaining a duplicative recovery from both NRCS and Defendants, concluding that the Defendants' conduct was distinct from that of NRCS and its employees.

Therefore, the Appellate Court held that the trial court's order reducing the economic damages award by 68% was erroneous, and vacated the trial court's decision. The judgment was modified to award Plaintiffs economic damages in the amount determined by the jury—$1,756,499.99, minus the amount allocated for Plaintiffs' own contributory negligence, and minus the credits attributable to previously settled parties.

Learning Point: *Shuler* is an important reminder to litigants involved in multi-party complex litigation. In cases involving numerous defendants, it is often easy to overlook the myriad of co-defendants' applications and motions for good faith settlement. Nevertheless, it is necessary to assess to what extent these settlements may affect your own client's ability to settle, and to what extent the settling parties will be determined to be liable for a singular tort. Indeed, if it is determined that the extent of the settling parties' liability is such that they account for a significant amount of possible injury or damages in a verdict, it might be prudent to challenge a good faith settlement and query whether the proposed settlement amount does indeed come within the "ballpark" of a good faith settlement figure. *See Tech-Bilt, Inc. v. Woodward-Clyde & Associates* (1985) 38 Cal.3d 488. Otherwise, if a co-defendant settles for a nominal amount which is not contested at the time of an application or motion for good faith settlement, and a subsequent high verdict is found attributing significant proportions of liability to the now-settled-co-defendant, your client can be left on the hook for the remainder of the amount, minus a nominal credit for the previously unchallenged "low-ball" settlement amount. Clausen Miller's California litigation team have years of experience litigating complex multi-party matters, and are staffed with practitioners who have keen and careful eyes to ensure that clients are not left paying a disproportionate amount of damages. ♦

California Appellate Court Holds Ride Share Company Not Liable For Off-Duty Driver's Negligence In Company Vehicle

by ***Tyler M. Costanzo***

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In *Marez v. Lyft, Inc.* (2020) 48 Cal.App.5th 569, California's First Appellate District analyzes vicarious liability issues pertaining to negligence by an employee of popular rideshare service, Lyft, when using a company vehicle for personal activities. In affirming summary judgment in favor of Lyft, the Court clarified the tests which define the "scope of employment" in cases of alleged vicarious liability.

Facts

Defendant Lyft, Inc. ("Lyft") employed Jonathan Gaurano ("Gaurano") as a driver for its rideshare service. Gaurano rented a vehicle through Lyft's "Express Drive Program," which allowed him to rent a pre-approved vehicle from a rental service to use for rideshare driving. In this case, Gaurano rented a vehicle from The Hertz Corporation ("Hertz") which he used both for personal driving and for his Lyft rideshare driving. The Express Drive Program provides incentives including allowing the cars to be used for personal use. Additionally, the program's "Express Drive Insurance" provision provides that Lyft is responsible for primary auto liability coverage when the driver is logged into the "driver mode" in the Lyft app. When not logged into "driver mode," the program states that Hertz will provide primary coverage, and all auto insurance is covered under the driver's rental agreement with Hertz.

On the date of accident at issue, Gaurano used his rental vehicle to drive to another job. He parked the vehicle in a parking space, spent a number of hours working this non-Lyft job, and returned to the vehicle to drive home. On the drive home, Gaurano collided with the vehicles of the two Plaintiffs in this action. The police report identified Gaurano as the party responsible for the collision because he was driving at an unsafe speed and had been using his cell phone shortly before the incident.

Plaintiffs sued Lyft under a theory of vicarious liability for Gaurano's negligence, arguing that he was within the scope of his employment with Lyft at the time of the accident. Lyft won summary judgment on the ground that Gaurano was engaged in purely personal activities at the time of the accident and was therefore not within the scope of his employment. Plaintiffs appealed. The First Appellate District recently affirmed this judgment and provided additional analysis of the tests California courts use in analyzing the scope of employment in vicarious liability cases.

Analysis

The Court cited *Moreno v. Visser Ranch, Inc.* (2018) 30 Cal.App.5th 568, which identified two tests California courts use for determining "scope of employment under the respondeat superior doctrine." Under one test, "the employer is liable if the activities that caused the employee to become an instrument of danger to others were undertaken with the employer's permission and were of some benefit to the employer, or in the absence of proof of benefit, the activities constituted a customary incident of employment." *Purton v. Marriott Internat., Inc.* (2013) 218 Cal.App.4th 499, 509 (the "Purton test"). The second test provides that "an employee's conduct is within the scope of employment if (1) the act performed was either required or incident to his duties or (2) the employee's misconduct could be reasonably foreseen by the employer in any event." *Id.*; *Halliburton Energy Services, Inc. v. Department of Transportation* (2013) 220 Cal.App.4th 87, 93-94 (the "Halliburton test"). The *Halliburton* court also noted that California courts employ the "going and coming rule," which holds that an employee's travel to and from work is typically considered to be outside the scope of employment. An exception exists when the employer derives some incidental benefit from the employee's use of the vehicle. *See Lobo v. Tamco* (2010) 182 Cal.App.4th 297, 301.

The *Visser Ranch* court noted that "even if a prong of the scope of employment described in [the Halliburton test] had been established, an exception to the test existed for purely personal business." Here, nothing in the record demonstrated that Lyft required drivers to use rentals, nor does the record support Plaintiffs' claim that driving the rental for personal purposes was "incident to [Gaurano's] duties." The undisputed facts established that Gaurano had not worked for Lyft on the day of the incident, nor did he have any intention of doing so. He used the vehicle to commute to another job, and Lyft did not control or dictate how he did so. The court therefore concluded that he was engaged in a purely personal activity.

For that reason, Gaurano's negligence was not foreseeable to Lyft. "[T]here must be 'a nexus between the employee's tort and the employment to ensure that liability is properly placed upon the employer.'" *Halliburton*, *supra*, at 95. There was no connection here between Gaurano's commute home from another job and Lyft's business. The mere fact that Gaurano *could* have opted to drive for Lyft that day does not create such a nexus.

The Purton test, promoted by Plaintiffs, requires a showing of both permission by, and benefit to, the employer. Plaintiffs contend Lyft gave permission to Gaurano to use the rental vehicle for personal driving, and such driving benefitted Lyft because it made Gaurano "available" to log onto the Lyft platform. The court agreed there was permission, but denied any benefit to Lyft based on this tenuous argument.

Learning Points: *Marez* clearly lays out the applicable tests and standards for determining when an employee can be considered to be acting within the scope of employment for purposes of imposing vicarious liability. When an employee is purportedly engaged in a "purely personal activity," plaintiffs have a substantial burden to show that the activity is in fact performed with the permission of the employer and provides a benefit to the employer; or that the act performed was either required or incident to the employee's duties or that the misconduct was foreseeable to the employer. Both the Halliburton test and the Purton test require a substantial nexus between the employee's conduct and some kind of benefit to, or permission from, the employer. Without this connection, employers are largely protected from claims of vicarious liability for personal activities of employees. ♦

"Disinterested" Appraiser Question Certified To Florida Supreme Court

by ***Anne E. Kevlin***

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On April 15, 2020, Florida's Third District Court of Appeal certified to Florida's Supreme Court the following question deemed to be of great public importance:

> CAN A FIDUCIARY, SUCH AS A PUBLIC ADJUSTER OR APPRAISER WHO IS IN A CONTRACTUAL AGENT-PRINCIPAL RELATIONSHIP WITH THE INSUREDS AND WHO RECEIVES A CONTINGENCY FEE FROM THE APPRAISAL AWARD, BE A DISINTERESTED APPRAISER AS A MATTER OF LAW?

State Farm Fla. Ins. v. Sanders, 2020 Fla. App. LEXIS 5033 (Fla. 3d DCA 2020).

Background

Insurers in Florida have grappled with the question in recent years, with public adjusters increasingly naming themselves as appraisers, leading to litigation over an alternative dispute resolution process designed to avoid litigation. The answer to the question will significantly impact the future of appraisal in Florida.

In Florida and in other states, an appraisal clause in most property insurance policies provides an alternative to litigation for insurers and policyholders who disagree about the value of a property insurance claim. The premise is straightforward: rather than litigate a breach of contract dispute in court, either party can invoke appraisal. Generally, each party then names its own appraiser. The policy requires that each appraiser must be competent and either "disinterested" or "impartial." The disinterested or impartial appraisers work together to reach agreement about the value of the claim. Absent agreement between the two appraisers, they select a neutral umpire who reviews the appraisal information. An appraisal award signed by the umpire and at least one of the two appraisers is binding on the insurer and policyholder.

Sounds fair, but property insurance appraisals too often have become a cottage industry with public adjusters advising their policyholder clients at the outset of a claim that they will pursue appraisal. Why? With limited procedures for courts to review and oversee appraisals, appraisals are prone to untested damage theories and egregiously excessive repair estimates, combined with obscure and inconsistent appraisal processes, resulting in plethoric appraisal awards. This is particularly true in Florida, where appraisals are not limited to determining damage scope and amount, but also determine questions of coverage:

> *[Appraisal] necessarily includes determinations as to the cost of repair or replacement* ***and whether or not the requirement for a repair or replacement was caused by a covered peril or a cause not covered, such as normal wear and tear, dry rot, or various other designated, excluded causes.*** *(emphasis added).*

State Farm Fire & Cas. Co. v Licea, 685 So.2d 1285 (Fla. 1996).

Insurers in Florida have cried foul when policyholders name their public adjusters as their appraisers. Pursuant to Florida Statute § 626.854, public adjusters receive a commission fee of 20 percent of the insurance claim payment—so the higher the insurance claim payment, the higher the public adjuster fee. This, insurers argue, renders a public adjuster not disinterested or impartial in the outcome of the appraisal.

Analysis

The concurring opinion in *Sanders*, *supra*, discusses the evolution of this issue in Florida courts, leading to a split among appellate districts as well as Florida federal courts, citing *Rios v. Tri-State Ins.Co.*, 714 So. 2d 547 (Fla. 3d DCA 1998) and *Galvis v. Allstate Ins. Co.*, 721 So. 2d 421 (Fla. 3d DCA 1998); *State Farm Florida Ins. Co. v. Cadet*, 2020 Fla. App. LEXIS 2153 (Fla. 5th DCA 2020), and *State Farm Florida Ins. Co. v. Crispin*, 2020 Fla. App. LEXIS (Fla. 5th DCA 2020), as well as the decision in *State Farm Florida Ins. Co. v. Valenti*, 285 So. 3d 958 (Fla. 4th DCA 2019), regarding the disqualification of a party's appointed appraiser with a financial interest in the outcome. Recently, the Fourth and Fifth District Courts of Appeal of Florida have held that a public adjuster is not a "disinterested" party and may not serve as a disinterested appraiser for the policyholder. *Valenti*, 285 So.3d 958; *Crispin*, 290 So.3d 150 (when a policyholder's public adjuster is entitled to collect a contingency fee or percentage based on recovered insurance proceeds, the public adjuster may not serve as a "disinterested appraiser."). *See also Florida Ins. Guar. Ass'n v. Branco*, 148 So.3d 488 (Fla. 5th DCA 2014) (A "disinterested" person is one who is free from prejudice, bias, or partiality and does not have a pecuniary interest).

However, the Third District Court of Appeal of Florida is bound by decades-old precedent in *Rios*, 714 So. 2d 547 and *Galvis*, 721 So. 2d 421. At the time *Rios* and *Galvis* were decided, the Code of Ethics for Arbitrators in Commercial Disputes stated "persons who are requested to serve as arbitrators should before accepting, disclose (1) any direct or indirect financial or personal interest in the outcome of the arbitration…" As such, the Third District concluded that a policyholder's public adjuster can serve as the policyholder's appraiser as long as the financial interest of the appraiser is fully and voluntarily disclosed. But the Florida Supreme Court has since stated that there is a clear difference between appraisal and arbitration and consequently the procedures followed in the arbitration code do not govern the procedures of an appraisal. *Allstate Ins. Co. v. Suarez*, 833 So. 2d 762 (Fla. 2002).

Even when an insurance policy does not define "disinterested" or "impartial," an appraiser should not have a vested financial interest in the policyholder's possible recovery from the insurer. In *Verneus v. Axis Surplus Ins. Co.*, 2018 U.S. Dist. LEXIS 147100 (S.D.Fla. 2018), the court declined the policyholder's first selection of its public adjuster as its appraiser. The court held that it would be highly unlikely that the appraiser would now reach a different conclusion from the work product he previously produced in his role as the public adjuster. And, when the policyholder next selected its expert witness as its appraiser, the court turned to the Black's Law Dictionary definition of "impartial":

> [n]ot favoring one side more than another; unbiased and disinterested; unswayed by personal interest.

Impartial, Black's Law Dictionary (10th ed. 2014). The court held that the expert witness, who had already given a plaintiff-paid expert report, was neither unbiased nor disinterested and would likely not be unswayed by personal interest, and as such, was not impartial.

However, in *Brickell Harbour Condo. Ass'n v. Hamilton Specialty Ins. Col*, 256 So. 3d 245 (Fla. 3d DCA 2018), the court mysteriously concluded that "*impartiality* means something other than the "dictionary definition' as it relates to appraisers appointed and paid by the parties." The certified question in *Sanders*, *supra*, seeks the Florida Supreme Court's determination of the meaning of "disinterested" appraiser, and not the meaning of "impartial" appraiser.

Learning Point: Until Florida courts provide clarity regarding who can serve as an impartial or disinterested appraiser, the appraisal process will remain riddled with disputes that must be litigated, adding time and expense to what should be a fair and reasonable dispute resolution mechanism. ♦

Pennsylvania Supreme Court Finds Duty To Defend Estate For "Accidental" Shooting In Course Of Murder-Suicide

by ***Henry T. M. LeFevre-Snee***

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In *Erie Ins. Exch. v. Moore*, No. 20 WAP 2018, 2020 Pa. LEXIS 2239 (Apr. 22, 2020), the Supreme Court of Pennsylvania held in a 4–3 decision that there was a duty to defend the estate of a man who broke into his estranged wife's house, murdered her, dragged her boyfriend into the house, assaulted him and shot him in the face, and then killed himself.

Facts

The underlying complaint alleged that Harold Eugene McCutcheon, Jr. wrote a note to his adult children that he intended to break into the home of his ex-wife, Terry McCutcheon, shoot and kill her, and then kill himself. McCutcheon followed through, first breaking into Terry's home, and then killing her. Richard A. Carly, Terry's boyfriend, then arrived at the front door of her house, and rang the doorbell. Carly placed his hand on the doorknob "and the door was suddenly pulled inward by [McCutcheon] who grabbed [Carly] by his shirt and pulled him into the home." McCutcheon was "screaming, swearing, incoherent, and acting 'crazy.'" "[A] fight ensued between the two and at the time, [McCutcheon] continued to have the gun in his hand". During this "struggle", McCutcheon was "knocking things around, and in the process [he] negligently, carelessly, and recklessly caused the weapon to be fired which struck [Carly] in the face". "[O]ther shots were carelessly, negligently and recklessly fired" by McCutcheon, "striking various parts of the interior of the residence and exiting therefrom." McCutcheon then killed himself. Carly sued McCutcheon's Estate.

Policy Language

The Estate sought coverage under two policies issued to McCutcheon by Erie Insurance Exchange ("Erie"), the Erie Insurance Home Protector Policy ("Homeowner's Policy") and the Erie Insurance Personal Catastrophe Liability Policy ("Catastrophe Policy").

The Homeowner's Policy provided coverage for "all sums . . . which anyone we protect becomes legally obligated to pay as damages because of bodily injury . . . caused by an occurrence . . ." The Homeowner's Policy defined an "occurrence" as "an accident, including continuous or repeated exposure to the same general harmful conditions."

The Catastrophe Policy provides coverage for amounts an insured becomes legally obligated to pay due to personal injury resulting from an "occurrence," and defined an "occurrence" as "an accident, including continuous or repeated exposure to conditions, which results in personal injury or property damage which is neither expected nor intended."

Both policies also excluded coverage for "bodily injury, property damage or personal injury expected or intended by anyone we protect." The Homeowner's Policy further stated that expected or intended injury is excluded even if "the degree, kind or quality of the injury or damage is different than what was expected or intended," or "a different person, entity, real or personal property sustained the injury or damage than was expected or intended."

The Decisions Below

Erie concluded that Carly's injuries were not caused by an "occurrence" and were "expected or intended" by McCutcheon, and filed a declaratory judgment action against The Estate.

The trial court granted Erie summary judgment, holding that Erie had no duty to defend The Estate, and reasoning that "[t]he shooting of Carly plainly resulted from human agency. Moreover, the prospect of injury from a gun firing during a physical struggle over that gun was no less plainly and reasonably anticipated." Accordingly, there was neither an "accident", nor an "occurrence".

Further, the use of the terms "negligently, carelessly, and recklessly" in the complaint were superseded by the lack of any "evidence that the shooting was accidental or negligent." McCutcheon "forcibly pulled Carly inside," and after Carly was shot, McCutcheon "did not verbally indicate that he did not mean to injure Carly nor did he attempt to assist Carly in any way." McCutcheon therefore "intended to cause serious harm to Carly."

The Estate appealed.

On appeal, the Superior Court reversed, observing that "gunshot wounds commonly are inflicted deliberately", but "not all injuries from gun violence are intentional." The panel discounted what it characterized as "abstract notions about the reasonably foreseeable results of gun violence" and focused instead on "the specific events that gave rise to Carly's injuries as a result of McCutcheon's brandishing of a firearm." While conceding that the complaint's "legal terminology" of negligence and carelessness "cannot control the outcome," the court nonetheless held that allegations "fairly portray a situation in which injury may have been inflicted unintentionally." Accordingly, Erie had a duty to defend.

Erie then filed a petition for allowance of appeal to the Supreme Court of Pennsylvania.

Analysis

The Supreme Court's majority opinion, joined by three justices, held that the complaint alleged an accidental shooting. The allegations were not mere "artful" pleading designed to present intentional acts as accidental for purposes of insurance coverage, and did not make it "crystal clear" that McCutcheon shot Carly on purpose. The Court also refused to infer that McCutcheon "expected or intended" to cause Carly's injuries.

The Court rejected what it characterized as Erie's presumption that possession of a firearm precludes coverage of a negligent or accidental discharge. The Court also rejected arguments that finding a duty to defend would ignore that "fortuity" is essential to a valid transfer of risk, and that providing coverage for McCutcheon would incentivize criminal activity. The allegations did not preclude the possibility that McCutcheon accidentally shot Carly. Denying a duty to defend would not deter crime, and would unnecessarily withhold compensation to tort victims.

The dissent, joined by two justices, argued that the alleged discharge of the gun could not "reasonably be interpreted as an unexpected or fortuitous event". While in the process of effecting a murder-suicide, McCutcheon physically pulled Carly into the home, and engaged in a physical struggle while holding and discharging a firearm. The dissent further argued that, even if the gunshot wound itself were unintended, the complaint did not suggest that McCutcheon did not expect injury to occur. This was not an "impermissible inference", because to ignore the context of the shooting ran contrary to viewing the "complaint as a whole."

Learning Points: Pennsylvania law is generous to insureds in focusing on the specific action that causes the injury for which coverage is sought, rather than the broader factual context. Accordingly, Pennsylvania courts will find coverage under common "occurrence" and "expected or intended" exclusion language if it is not "crystal clear" that the specific act was purposeful and the specific injury was expected or intended. ♦

Subcontractors Who Failed To Defend General Contractor Must Reimburse Insurer For Defense Costs In Equitable Subrogation Action

by ***R. Mick Rubio and Kris K. Spiro***

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In *Pulte Home Corporation v. CBR Electric, Inc., et al.*, 2020 Cal.App. LEXIS 219, California's Fourth Appellate District addressed whether an insurer who provided an additional insured defense to a general contractor may pursue reimbursement of defense costs under an equitable subrogation theory against subcontractors who were required to defend the general contractor in suits involving allegations related to the subcontractors' work. In reversing the trial court's ruling in favor of the subcontractors, the Appellate Court held that a cause of action based on equitable subrogation allows an insurer to step into the shoes of its insured and recover what the insured would be entitled to recover from the subcontractors.

Facts

Pulte Home Corporation ("Pulte") was the developer, owner and general contractor of three single-family residential developments. Pulte hired the defendant subcontractors to work on the developments. The subcontracts between the defendant subcontractors and Pulte required the defendant subcontractors to defend and indemnify Pulte against "all liability, claims, judgments, suits or demands for damages to persons or property arising out of, resulting from, or relating to" each of the defendant subcontractor's scope of work.

In 2013 and 2014, two groups of homeowners filed lawsuits against Pulte, alleging construction defects relative to almost all aspects of the developments, including each of the defendant subcontractors' scope of work. Pulte tendered its defense to its subcontractors and their insurers, and subsequently filed a cross-complaint against the defendant subcontractors for express indemnification and breach of contract. St. Paul Mercury Insurance Company ("St. Paul") provided a defense to Pulte pursuant to an additional insured endorsement under a commercial general liability policy issued to another subcontractor. This underlying litigation ultimately settled with St. Paul paying over $200,000 in defense costs.

St. Paul then sued the defendant subcontractors for reimbursement of each subcontractor's share of the defense costs under an equitable subrogation theory, arguing that it occupied the superior equitable position because it had not breached its duty to defend Pulte. The trial court ruled in favor of the defendant subcontractors on the basis that there was no causal connection between the defendant subcontractors' failure to defend Pulte and the homeowners' filing of the lawsuits against Pulte. The trial court further held that equitable subrogation requires shifting the entire

loss, as it would be unfair to shift only each subcontractor's equitable share of defense costs. The Appellate Court reversed the judgment and remanded the matter to the trial court for a determination of the defense costs owed by each defendant subcontractor.

Analysis

In *Crawford v. Weather Shield Mfg., Inc.* (2008) 44 Cal.4th 541, the California Supreme Court analyzed an indemnitee's right to indemnification from its indemnitor, and held that when a subcontractor is required to defend and indemnify a general contractor against all claims for damages growing out of the execution of the subcontractor's work, the subcontractor must "defend, from the outset, any suit" against the general contractor insofar as the suit includes claims alleging damage or loss arising from the subcontractor's work.

Following the principles articulated in *Crawford*, the Appellate Court determined that St. Paul was subrogated to Pulte's entitlement to the portion of defense costs each defendant subcontractor owed as a result of its duty to defend Pulte.

Subrogation is a method by which an insurer is put in the position of the insured in order to pursue recovery from third parties who are legally responsible to the insured for a loss which the insurer has insured and paid. *Fireman's Fund Ins. Co. v. Maryland Casualty Co.* (1998) 65 Cal. App.4th 1279, 1291-1292. An insurer that has paid such a loss may have an equitable right of subrogation against "other parties who are legally liable to the insured for the harm suffered by the third party (such as by an indemnification agreement) under a contractual indemnity theory." *Interstate Fire & Casualty Ins. Co. v. Cleveland Wrecking Co.* (2010) 182 Cal.App.4th 23, 32.

An insurer must satisfy eight elements in order to prevail on a cause of action for equitable subrogation: (1) the insured suffered a loss for which the defendant is liable; (2) the claimed loss was one for which the insurer was not primarily liable; (3) the insurer has compensated the insured in whole or in part for the same loss for which the defendant is primarily liable; (4) the insurer has paid the claim of its insured to protect its own interest and not as a volunteer; (5) the insured has an existing, assignable cause of action against the defendant which the insured could have asserted for its own benefit had it not been compensated for its loss by the insurer; (6) the insurer has suffered damages caused by the act or omission upon which the liability of the defendant depends; (7) justice requires the loss to be entirely shifted from the insurer to the defendant, whose equitable position is inferior to that of the insurer; and (8) the insurer's damages are in a liquidated sum. *Interstate Fire*, *supra*, at 33-34.

The Appellate Court held that St. Paul satisfied all eight elements. First, Pulte suffered a loss for which the subcontractor defendants were contractually liable when Pulte incurred fees in defending against claims related to the subcontractor defendants' work. With regard to the second and third elements, St. Paul was not involved in the underlying residential developments. Instead, the defendant subcontractors were directly involved in the developments and agreed to defend Pulte in any lawsuits related to their work. The defendant subcontractors were, therefore, primarily liable for their equitable share of the defense costs. The Appellate Court further found that St. Paul satisfied the fourth element because Pulte qualified as a "protected person" under the St. Paul policy, and thus, St. Paul paid for the defense costs to protect its own interests, not as a volunteer. As for the fifth element, Pulte could have sought defense costs under the subcontracts if St. Paul had not paid those costs on Pulte's behalf. St. Paul also satisfied the sixth element because it made payments that it would not have had to make if the defendant subcontractors had not breached their duty to defend Pulte. With regard to the eighth element, St. Paul proved its damages in a liquidated sum.

As for the seventh element, the Appellate Court determined that the trial court erroneously determined that the word "entirely" required a shift of all of the costs to defendants. The Appellate Court held that while subrogation entirely shifts the *claimed* loss, the claimed loss does not have to be the *entire* loss the subrogee suffered. The Appellate Court noted that "there is no facile formula for determining superiority of equities," and considered four factors in balancing the equities: (1) cause of the loss; (2) nature and scope of the contractual promises; (3) receipt of premiums; and (4) public policy. First, the defendant subcontractors' work was alleged to have contributed to the damage,

and those allegations were what precipitated the defense costs. Second, the defendant subcontractors agreed to defend Pulte specifically against claims alleging defects in their work, whereas St. Paul's general liability policy did not relate specifically to the residential developments. Therefore, the defendant subcontractors bore a greater equitable responsibility for indemnification. Next, while St. Paul received premiums to insure the risk of loss, the defendant subcontractors were also compensated by accepting consideration for the performance of their obligations under the subcontracts. Thus, the receipt of premiums was a neutral factor. Finally, the Appellate Court determined that public policy counseled in favor of granting St. Paul's claim, as it would be unjust to reward parties who refuse to fulfill their contractual indemnification obligations.

The Appellate Court remanded the case to the trial court to determine the amount for which each of the defendant subcontractors was liable.

Learning Points: *Pulte* has significant implications for both insurance coverage and defense work.

From a defense perspective, practitioners in complex construction defect litigation must be keenly aware of the interplay between *all* parties' interests—including those interests belonging to the insurers. It is not uncommon for carriers to assign rights amongst each other, or even assign rights to their insureds to recover what would have been recoverable on an equitable subrogation basis. Thus, for the defense practitioner, a full picture of the insurance status is critical in assessing the risk to carriers and their insureds when litigating a construction defect matter. The *Pulte* holding might force carriers and/or their insureds to fully re-think and evaluate AI tenders when a construction defect claim is first initiated. If some other additional insurer "picks up" the defense, those denying subcontractors and/or their carriers could still be liable later on for defense fees on an equitable subrogation theory. Indeed, *Pulte* reinforces California's strong public policy against incentivizing subcontractors to breach their contracts with general contractors.

While the defense fees paid by St. Paul relative to the various subcontractor defendants in *Pulte* were somewhat nominal (ranging from about $1,400 to $2,200), the Appellate Court determined that those parties would still be liable for so-called "mixed" defense fees in the amount of about $102,000 which related to defense work for all subcontractors. In California, it is not uncommon on larger or luxury projects for defense fees and costs to greatly exceed this amount.

From a coverage perspective, this ruling emphasizes the need for subcontractors to ensure that they have sufficient insurance coverage that will protect them against an indemnitee's demand for an immediate defense. ♦

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APPELLATE PRACTICE

FAILURE TO CHALLENGE TRIAL COURT'S LACK OF STANDING DETERMINATION ON APPEAL PREVENTS APPELLATE REVIEW

John S. Kaminsi v. Scott Semple, AC 42288 (Conn. App.)

Plaintiff inmate sought a declaratory judgment and injunctive relief for defendant state employees' alleged failure to investigate alleged abuse inflicted on him by a corrections officer. Defendants successfully moved to dismiss the complaint, arguing in part that plaintiff lacked standing to assert a claim based on a failure to conduct a criminal investigation. Plaintiff appealed. ***Held:*** Affirmed in part and dismissed in part as moot. Plaintiff failed to challenge on appeal the trial court's determination that he lacked standing to raise some of his claims. Plaintiff, therefore, could not succeed on those claims on appeal.

AUTO INSURANCE

MISSTATEMENT IN APPLICATION VOIDS POLICY

Nationwide Mut. Fire Ins. Co v. Pusser, 2020 Ohio LEXIS 1101 (Ohio)

Insured falsely warranted in auto policy application that no other operators lived in household. ***Held:*** Insured breach resulted in insurer's voiding policy *ab initio*. Policy provided that supplying incorrect information "could void the policy from the beginning." Language's non-mandatory nature did not diminish its warning. ***Further held:*** Insurer need not void policy and return premium before filing declaratory judgment action.

CIVIL PROCEDURE

GOOD CAUSE MUST BE DEMONSTRATED TO OPEN JUDGMENT

USAA Fed. Savings Bank v. Charles Donald Gianetti, AC 42037 (Conn. App.)

Plaintiff successfully foreclosed on certain real property of defendant. Trial court then denied defendant's motion to open the judgment. ***Held:*** Affirmed. Defendant did not establish good cause for opening the judgment. Evidence below did not support defendant's allegation he could not attend hearing for medical reasons. The court did not receive any information about why or how defendant's failure to attend court that day had prevented him from making any material input to the court's decision whether to grant foreclosure.

FAILURE TO SATISFY NOTICE REQUIREMENT DEPRIVES COURT OF SUBJECT MATTER JURISDICTION IN FORECLOSURE ACTION

MTGLQ Investors, L.P. v. Kevin Hammons, AC 42750 (Conn. App.)

Plaintiff sought to foreclose on defendant's real property. Defendant opposed, arguing lack of subject matter jurisdiction due to plaintiff's failure to comply with a statutory requirement that a mortgagee provide specific notice to the mortgagor before commencing foreclosure. Plaintiff successfully argued this requirement was satisfied, relying on notice sent in a prior foreclosure action. ***Held:*** Reversed. The notice requirement is a condition precedent to the commencement of a foreclosure action and notice from a prior action is insufficient.

CONTRIBUTION AND INDEMNITY

TREE SPECIALIST NOT OBLIGATED TO DEFEND CITY

Davey Tree Expert Co. v. City of Indianapolis, 2020 Ind. App. LEXIS 167 (Ind. App.)

After falling parkway tree killed motorist, city tendered its defense to tree specialist under contractual indemnity provision. ***Held:*** Specialist did not owe duty to defend. Contract only required defense and indemnity for specialist's wrongful conduct. Allegations against city were based on direct negligence, not vicarious liability. The close relationship between city and specialist was irrelevant.

CORONAVIRUS

CORONAVIRUS QUALIFIES AS COMMUNICABLE DISEASE

Commonwealth v. Humphries, 2020 Va. Cir. LEXIS 45 (Dist. Ct. Va.)

A Virginia court examined whether a defendant's scheduled jury trial, which had commenced for speedy trial purposes, should nevertheless be continued due to the COVID-19 pandemic development. ***Held:*** The Coronavirus rises to the level of a natural disaster since it qualifies as a communicable disease of a public health threat as defined in Va. Code

Ann. 44-146.16. The pandemic was beyond the control of the court, attorneys, and the parties involved in the case and a jury trial could not be conducted without explicitly endangering the health, welfare, and safety of all parties, including, without limitation, potential and actual jurors.

DECEPTIVE PRACTICES LAW

FAILURE TO ADMIT VIOLATION NOT DECEPTIVE PRACTICE

Collazo v. Netherland Prop. Assets LLC, 2020 NY Slip Op 02128 (N.Y.)

Plaintiffs, former tenants in defendants' building, which was subject to the Rent Stabilization Law, sued for deceptive practices. Defendants had received tax benefits despite the fact many of the apartments were registered as permanently exempt, high rent vacancies. ***Held:*** Plaintiffs alleged only that defendants failed to admit they violated rent stabilization law in deregulating plaintiffs' apartments rather than any affirmative conduct that would tend to deceive consumers. Such limited allegations did not suffice to establish the existence of consumer-oriented, deceptive acts.

EVIDENCE

WHAT'S POSSIBLE IS NOT ENOUGH; CAUSATION MUST BE BASED ON PROBABILITY BEYOND MERE SPECULATION

Waller v. FCA US LLC, 48 Cal. App. 5th 888 (Cal. App.)

Plaintiff experienced repeated power loss in vehicle manufactured by defendant. Plaintiff's expert opined as to two possible causes of the power loss, one of which was a repair to the fuel pump relay. The expert testified it was possible that the fuel pump was failing, but he could not say it was probable, or more likely than not and the trial court excluded his opinion as speculative. ***Held:*** Affirmed. An expert opinion may not be based on assumptions of fact that lack evidentiary support or on speculation. The expert's opinions based on possibilities rather than probabilities, were irrelevant, and would not assist the jury in understanding the issue.

INSURANCE AGENTS/BROKERS

COMMERCIAL AVAILABILITY OF INSURANCE INSUFFICIENT TO HOLD AGENT LIABLE FOR FAILURE TO PROCURE BETTER INSURANCE

Emer's Camper Corral, LLC v. Alderman, 2020 Wisc. LEXIS 124 (Wis.)

Following hail storm loss, insured sued agent for not obtaining better deductible. ***Held in a split decision:*** Insured must prove more than commercial availability of a better policy to a hypothetical insured. Insured must also prove that an insurer actually would have offered the better policy to it. Absent that proof, insured cannot show that agent's alleged negligence caused injury. ***Further held:*** Insured failed to prove detrimental reliance. It offered no evidence it would have changed business procedures if informed of the unavailability of better insurance.

INSURANCE LITIGATION

WHETHER INSURED REASONABLY COULD HAVE DISCOVERED HAZARD IS JURY QUESTION

Mosley v. Pacific Specialty Ins. Co., 2020 Cal. App. LEXIS 451 (Cal. App.)

Plaintiffs' tenant began growing marijuana and re-routed electrical system to steal power from main utility line, causing fire and property damage. Plaintiffs' insurer won summary judgment as to coverage claims. ***Held:*** Reversed in part. An insurer is not liable for loss when a hazard is increased by any means within the control or knowledge of the insured. An insured increases a hazard "within its control" if the insured is aware of the hazard or reasonably could have discovered it through exercising ordinary care. Here, there were triable issues of fact as to whether the insured plaintiffs could have discovered their tenant's marijuana growing operation.

INSURER ENGAGED IN CONSUMER-ORIENTED CONDUCT

Plavin v. Group Health Inc., 35 N.Y.3d 1 (N.Y.)

The United States Court of Appeals for the Third Circuit asked the New York Court of Appeals to decide whether a plaintiff had sufficiently alleged consumer-oriented conduct to assert claims under New York's General Business Laws based on an insurance company's alleged material misleading representations made directly to the City of New York's

employees and retirees about the terms of its insurance plan to induce them to select its plan from among the 11 health insurance plans made available to them. ***Held:*** By providing a choice of 11 options, the City created a health insurance marketplace for the employees and retirees. Further, the insurer's summary materials contained the only information provided to employees and retirees when determining whether to select its plan. The complaint thus adequately alleged consumer-oriented conduct.

LEGAL MALPRACTICE

FAILURE TO SPECIFY DEFENDANTS' INCORRECT LEGAL ADVICE FATAL

Lloyd's Syndicate 2987 v. Furman Kornfeld & Brennan, LLP, 2020 N.Y. App. Div. LEXIS 2457 (App. Div. 1st Dep't)

Plaintiffs claimed they relied on defendant law firm's negligent advice that they could disclaim coverage of their insured in underlying malpractice action. ***Held:*** Law firm properly relied on undisputed documentary evidence. Documentary evidence whose authenticity is undisputed and contents are "essentially undeniable" is sufficient to support a motion to dismiss. Plaintiffs failed to allege the basis for defendants' advice was incorrect.

EXPERT NEEDED TO EVALUATE DEFENDANT'S ACTIONS IN LEGAL MALPRACTICE SUIT

Jenkin v. Cadore, 2020 N.Y. App. Div. LEXIS 3774 (App. Div. 2d Dep't)

In a legal malpractice action, the defendant attorney's expert opined that the attorney did not fail to exercise the ordinary reasonable skill and knowledge commonly possessed by a member of legal profession. Plaintiffs provided no countering expert and summary judgment was awarded. ***Held:*** To establish causation, a plaintiff must show that he or she would have prevailed in the underlying action or would not have incurred any damages, but for the lawyer's negligence. Here plaintiffs did not produce any expert evidence regarding the attorney's conduct, which was fatal.

LIMITATIONS OF ACTIONS

LEGAL MALPRACTICE STATUTE OF LIMITATIONS NOT TOLLED WHERE CLIENT HAS NO REASONABLE EXPECTATION OF CONTINUING SERVICES

Nguyen v. Ford, 49 Cal.App.5th 1 (Cal. App.)

Plaintiffs sued defendants concerning representation in an underlying federal lawsuit. Defendants successfully asserted the complaint was time-barred based on the applicable one-year statute of limitations, citing court documents, including an order granting defendants' motion to withdraw as counsel in the underlying lawsuit. Plaintiffs appealed. ***Held:*** Affirmed. Continuous representation tolling only applies to the attorney's representation of the plaintiff in the specific subject matter in which the alleged wrongdoing occurred. Such representation ends when a client discharges the attorney or the attorney withdraws with the court's consent, or upon completion of the tasks for which the client retained the attorney. Here no reasonable factfinder could conclude defendants continued to represent plaintiffs after defendants filed notices in the underlying lawsuit as the plaintiffs' former attorney and asserted a lien.

ARCHITECT MALPRACTICE ACTION MAY BE TOLLED UNDER CONTINUOUS REPRESENTATION DOCTRINE

Anderson v. Pinn, 2020 N.Y. App. Div. LEXIS 3737 (App. Div. 2d Dep't)

Client and architect entered into agreement in 2005. Project stalled in 2008 due to lack of financing and further work resumed when client obtained financing. Parties entered into another agreement in 2015, which despite the passing of 10 years, concerned the same single project. ***Held:*** Lawsuit against architect was not time barred. If plaintiff proves reliance on a continued course of services related to the original professional services provided, the statute of limitations does not begin to run until entire project is finished.

MEDICAL MALPRACTICE

ALTERNATIVE-METHODS INSTRUCTION APPROPRIATE IN BAD-BABY CASE

Barney v. Mickelson, 2020 Wisc. LEXIS 115 (Wis.)

Baby was born with neurological injuries after physician failed to change fetal monitoring techniques

during labor. ***Held:*** Alternative-methods instruction was proper. It lets juries find for physicians using reasonable care, skill, and judgment in administering recognized alternative treatment methods. Physician offered expert testimony that continued use of fetal monitor was acceptable option to using pulse oximeter or fetal electrode.

PLAINTIFFS' EVIDENCE INSUFFICIENT TO AVOID SUMMARY JUDGMENT

Wicks v. Antelope Valley Healthcare Dist., 2020 Cal. App. LEXIS 479 (Cal. App.)

Family of patient who died eight hours after release from ER sued hospital for medical negligence and negligent hiring. Hospital sought summary judgment. In opposition, plaintiffs submitted expert declarations containing possibilities as to how the nursing staff could have treated the patient. Trial court granted the hospital summary judgment and plaintiffs appealed. ***Held:*** Affirmed. The declarations of plaintiffs' physician experts were predicated on a long series of alleged dependent probabilities, which were no more than mere possibilities from a legal perspective. Accordingly, the evidence was too speculative to be admissible.

PREMATURE SET-OFF REQUIRES FURTHER PROCEEDINGS

Batchelder v. Ind. Univ. Health Care Assocs., Inc., 2020 Ind. App. LEXIS 209 (Ind. App.)

After tortfeasor settled, healthcare provider obtained full set-off satisfying provider's statutory liability under medical malpractice statute. ***Held:*** Set-off was premature. Neither a judge nor a jury had valued the injury. Because plaintiff sought millions in damages, the settlement might not relieve provider's statutory obligation. Without further proceedings, set-off could not be determined.

MOTHER CANNOT RECOVER FOR EMOTIONAL HARM FOR IN UTERO INJURY TO FETUS BORN ALIVE

Waring v. Matalon, 2020 N.Y. App. Div. LEXIS 3759 (App. Div. 2d Dep't)

Trial court granted summary judgment in medical malpractice case, holding the mother could not recover for emotional distress, which caused her to deliver a stillborn baby, since the baby was born alive but died less than 20 minutes after birth. ***Held:*** Affirmed. The New York State Public Health Law defines "live birth" as "complete expulsion or extraction from its mother or product of conception, irrespective of pregnancy duration, which, after such separation, breathes or shows any other evidence of life."

NEGLIGENCE

POWER COMPANY NOT LIABLE FOR FAILURE TO INSULATE HIGH WIRES

Indianapolis Power & Light Co. v. Gammon, 2020 Ind. App. LEXIS 188 (Ind. App.)

Worker was electrocuted while installing metal trim on building roof. ***Held:*** Electric company owed no duty to insulate wires out of general public's reach. "General public" excludes workers exposed to wires only by virtue of their employment. Injury to workers who understand dangers and need for safe practices is unforeseeable.

PLAINTIFF FAILS TO PLEAD DEFENDANT KNEW OR SHOULD HAVE KNOWN OF DRIVER'S INCOMPETENCE

Kornfeld v. Zheng, 2020 NY Slip Op 03732, ¶ 1 (App. Div. 1st Dep't)

Plaintiff was injured when livery cab driver for defendant company struck her with his vehicle. Plaintiff brought negligent entrustment and negligent hiring claims against company. ***Held:*** Plaintiff failed to plead the company knew, or in exercise of ordinary care should have known, the driver was not competent to operate the vehicle. Bare pleading of control over the driver is insufficient.

IMMUNITY FOR BAND MEMBER FOLLOWING PATRON'S FALL

Lang v. Lions Club of Cudahy Wis., Inc., 939 N.W.2d 582 (Wis.)

Festival patron tripped on electrical cord used by music band. ***Ordered in a plurality opinion:*** Band member laying cord deemed agent entitled to festival organizer's recreational immunity. Band's contract with organizer bound members severally. The leader was designated as organizer's agent. Organizer had right to control placement of its mats covering electrical cords. The dissent felt the decision opened the door to recreational immunity for suppliers far removed from the organizer and its agents.

PROVING EXACT MOMENT WHEN UNSAFE CONDITIONS STARTED UNNECESSARY TO ESTABLISH VIOLATION OF SAFE-PLACE STATUTE

Correa v. Woodman's Food Mkt., 2020 Wisc. LEXIS 123 (Wis.)

Patron slipped on unknown substance in store aisle. ***Held in a split decision:*** To prove constructive notice under the safe-place statute, proof of exact time of substance deposit is unnecessary. A patron must only show that a vigilant owner or employer would have sufficient time to discover and remedy problem. ***Further held:*** Video evidence need not be conclusive for jury to consider its different inferences in reaching decision.

PLEADINGS

COMPLAINT ALLEGATIONS THAT COULD REST ON ORDINARY NEGLIGENCE SURVIVE FAILURE TO ATTACH MEDICAL CERTIFICATION

Wendy Young v. Hartford Hosp., AC 41997 (Conn. App.)

Plaintiff sued over injuries sustained in surgery at defendant hospital when robotic surgical system camera allegedly fell on her. She claimed use and placement of camera created dangerous condition. Defendant obtained dismissal of action on ground that plaintiff failed to provide a certificate of good faith and opinion pursuant to medical malpractice statute. Plaintiff claimed court erred in determining her complaint sounded only in medical malpractice and appealed. ***Held:*** Reversed. The complaint, as drafted, did not foreclose possibility plaintiff's injuries were caused by ordinary negligence not involving the exercise of medical judgment, which would not require certificate of good faith. Some allegations might support conclusion of ordinary negligence.

PRODUCTS LIABILITY

OPERATOR'S MISUSE OF MACHINE BARS RECOVERY

Hackney v. Pendu Mfg. Co., 2020 Ind. App. LEXIS 149 (Ind. App.)

Machine operator was injured while reaching into machine to extract scrap wood. ***Held:*** Operator's multiple misuses barred recovery. Operator ignored manufacturer's warnings to read instruction manual, turn off machine, maintain proper footing, and wear proper apparel. He ignored safety training about machine's nip points. Although manufacturer warned against operating machines lacking guards, operator's many misuses were unforeseeable.

TORTS

SOVEREIGN IMMUNITY FROM LIABILITY FOR POLICE OFFICERS ACTING IN THEIR OFFICIAL RATHER THAN PERSONAL CAPACITIES

Administrator (Estate of Timothy Devine) v. Louis Fusaro, Jr., AC 42164 (Conn. App.)

Plaintiff sued defendants, four members of the tactical unit of the State Police, for the wrongful death of decedent following his suicide after a standoff with law enforcement on public property. The trial court granted defendants' motion to dismiss on the ground the action was barred by sovereign immunity since it was brought against the defendants in their official, rather than individual, capacities. ***Held:*** Affirmed. Defendants were state officials, the action against them concerned a matter in which they were representing the state and acting in the scope of their official police duties, the state was the real party in interest because the damages sought were premised entirely on injuries allegedly caused by the official acts of the defendants, and judgment against them would impact how the State Police respond to subsequent situations.

ASSISTANT'S HIPAA VIOLATIONS EXPOSE DOCTORS TO VICARIOUS LIABILITY

SoderVick v. Parkview Health Sys., Inc., 2020 Ind. App. LEXIS 211 (Ind. App.)

Accessing patient records, office assistant disclosed false information to third-party. ***Held in a split decision:*** Genuine issue existed whether wrongdoing was incidental to authorized conduct. Assistant's conduct was "of the same general nature" as her job. She intermingled wrongdoing into her duties and committed them at work. Her violation of employer policy does not preclude liability. The employment context, not assistant's subjective intent, is the proper focus. The dissent found no necessary or legitimate purpose for accessing records.

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