WALKUP, MELODIA, KELLY, WECHT & SCHOENBERGER

FOCUS on torts

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FIRM ANNOUNCES NEW PARTNERS

We are pleased to announce that Doug Saeltzer and Matthew Davis have been elevated to partner status. Both are skilled advocates who have demonstrated superior litigation skills across a wide variety of case types.

Doug originally joined our firm in 1998, following a distinguished career with the United States Army Judge Advocate General Corps. Assigned to the 82nd Airborne Division (based at Fort Bragg, North Carolina), Doug amassed substantial litigation experience in the prosecution of a variety of criminal cases ranging from drug offenses, arson, rape and attempted homicide. While in the military, Doug received the Meritorious Service Medal for his work as a prosecutor.

Doug Saeltzer

After joining our firm, Doug assumed responsibility for a case load that included government liability, product liability, medical negligence and premises liability cases. Among the cases he has successfully tried is Brock v. Bonifacio, which involved issues of vehicular negligence. The plaintiff, who suffered degloving injuries to her left arm, as well as multiple fractures and lacerations, was awarded $2,800,000 following a three week trial in San Francisco Superior Court.

Doug most recently obtained a verdict against CalTrans in a dangerous condition of public property case involving the HOV (high occupancy vehicle) lanes at the San Francisco - Oakland Bay Bridge Toll Plaza. His 6-figure verdict in that case came in the face of a nominal offer.

Matthew Davis

Doug has also tried medical negligence and premises cases. In addition to his significant trial results, he has also obtained 7-figure settlements for clients injured because of auto defects (including rollovers and crashworthiness), high school and junior high school students paralyzed during school-related activities, and patients who have been the victims of significant medical negligence, including untimely diagnoses and botched surgeries.

In 2001, Doug received an appointment as an Adjunct Professor at U.C. Hastings College of Law, where he currently teaches a 2-unit class entitled "Personal Injury Litigation." He has also taught on the faculty of the Western Regional Trial Skills Program for the National Institute of Trial Advocacy.

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PFIZER TAKES BEXTRA OFF MARKET

Guidant Recalls Defective Defibrillators

At the request of the Food & Drug Administration, Pfizer has removed Bextra from the market. This follows Merck's withdrawal of Vioxx from the U.S. and worldwide markets due to safety concerns of an increased risk of cardiovascular events, including heart attack and stroke. Pfizer's action came on the same day that the FDA requested the withdrawal. Although it said it "respectfully disagrees" with the FDA that Bextra is too risky to continue selling, Pfizer advised current Bextra users: "For now, patients should stop taking Bextra and contact their physicians about appropriate treatment options."

This most recent recall follows the February 2005 action by the FDA recommending that people who depend on Bextra and Vioxx be allowed to continue the drugs despite the health risks – although at that time the agency only narrowly backed Bextra. The panel said that Vioxx posed the greatest heart risk and that Celebrex

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FIRM ANNOUNCES NEW PARTNERS

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Born and raised in Sacramento, Doug obtained his undergraduate degree from UCLA, and graduated from Hastings in 1994.

Matthew Davis, who joined our firm in 2001, attended Boston University and obtained his law degree from Hastings in 1989. Matthew practiced in a commercial litigation boutique until 1992, when he was recruited by the San Francisco City Attorney's Office to assist then-City Attorney Louise Renne in the prosecution of the office's Consumer Protection and Government Fraud lawsuits.

While with the City Attorney's Office, Matthew was co-counsel in an action against Bank of America which recovered $1,870,000.

In 1997, he was lead counsel in actions brought by the City against California's largest title insurers, alleging that consumers had been defrauded. Those cases resulted in verdicts and settlements totaling more than $75,000,000.

In 2002, one year after joining our firm, Matthew and John Echeverria successfully concluded a class action case against the Reno Hilton, obtaining compensatory and punitive damages in excess of $25,000,000 from a Nevada jury. The action, brought on behalf of more than 1,000 Reno Hilton guests, obtained damages for the casino's violation of state sanitation laws and illnesses produced as a result.

In 2003, together with Rich Schoenberger, Matthew obtained a 7-figure verdict in San Joaquin County on behalf of a client whose back was fractured.

In 2005, he concluded settlements in two different wrongful death actions, each in excess of $2,500,000. Matthew has also been active in pro bono matters, most recently representing a group of concerned citizens in a threatened taxpayer action against the City and County of San Francisco to compel the City to follow through on pledges for the reconstruction of Laguna Honda Hospital.

Matthew currently manages the firm's class action litigation and is involved in the nationwide litigation of Vioxx claims. His area of expertise includes government liability, premises and construction site injuries, business torts and medical negligence.

We congratulate Doug and Matthew on their elevation to partner status, and look forward to their future success on behalf of the firm's clients.

FORD AND CHRYSLER ISSUE SAFETY RECALLS

The National Highway Transportation and Safety Administration has reported that Ford is recalling 359,000 model year 2000-02 Focus cars because of corrosion of the rear passenger door latches which may make the doors difficult or impossible to close. To date, there have been more than 30 reports of problems, including injuries, where doors were not completely closed.

Ford also announced that it is recalling 792,000 sport utility vehicles and pickups because of a growing number of vehicle fires due to a defective cruise control switch. The recall campaign covers model year 2000 Ford Expedition and Lincoln Navigator SUV's, as well as Ford F-150 pickup trucks and 2001 F-series SuperCrew trucks.

NHTSA opened an investigation in late 2004 into the problem after receiving 36 reports of fires, all of which occurred when the ignition was off. Ford has received an additional 63 reports of fires.

NHTSA also has announced the recall of over 25,000 model 2005 Dodge Durango SUV's because of problems with their fuel tank filler valves. After refueling, the valves may not fully close, resulting in fuel leakage and the potential for fuel-fed vehicle fires.

NHTSA has launched a preliminary evaluation of 1.27 million General Motors Corporation sport utility vehicles and pickup trucks based upon a growing number of reports of antilock brake system problems. Corrosion under the wheel speed sensor may result in unwanted ABS activation, and increased stopping problems, during low speed brake activation. So far, NHTSA has received about 120 reports of the problem, including crashes with injuries. Models covered under the preliminary evaluation include 1999-2002 Sierra, Tahoe, Yukon, Avalanche, Silverado, and Suburban vehicles.

GM recalled approximately 150,000 of these same model pickups in Canada last November due to this problem.

Finally, new research has been revealed that reinforces ongoing concerns about 15-passenger vans. That research has prompted NHTSA to reissue its consumer advisory relating to safety problems with these vans for the third time. The latest report focuses on improper tire maintenance on these larger vans after the agency determined that 75% of all 15 passenger vans had significantly misinflated tires. Previous research has shown that the risk of rollover accidents with 15-passenger vans increases dramatically as the number of occupants increases from 5 to more than 10, and the rollover risk (and handling problems) are greatly exacerbated by tire misinflation. While federal law prohibits the sale of 15-passenger vans for school-related transport of students high school age and younger, no prohibition exists for the use of these vehicles to transport college students or other larger adult passengers. NHTSA's study on tire maintenance can be found at www.nhtsa.dot.gov.

PFIZER TAKES BEXTRA OFF MARKET

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seemed to have the fewest cardiovascular side effects among the Cox-2 drugs. At that time the FDA recommended that all three prescription drugs carry strong warnings, and that more study be done to better understand their individual risks.

In addition to cardiovascular risks, Bextra's withdrawal was precipitated by an FDA finding that it also caused serious, sometimes fatal, skin reactions, a complication not shared with Celebrex or Vioxx.

Manufacturers of non-prescription (over the counter) NSAID's are also being asked to revise their labeling, and to provide more specific information about the potential cardiovascular and gastrointestinal risks of their individual products and to remind patients to take such drugs only for a limited amount of time, and only in the doses recommended by the package instructions.

Pfizer has offered to provide refunds for unused Bextra tablets via local pharmacies, or through the mail. It has also established a toll free telephone hotline for customers with questions.

Meanwhile, on June 17, Guidant Corporation issued a worldwide recall of more than 40,000 surgically implanted cardiac defibrillators because of potential malfunctions in the devices.

This is the second major defibrillator recall this year. A Medtronic Corp. recall in February has already resulted in new surgeries for more than 11,000 Americans who require the device to electrically trigger their heart back into a normal rhythm once dysrhythmias disrupt normal electrical conduction.

The Guidant recall was a surprise to patients and their doctors, as the company had been assuring consumers and medical professionals as recently as the prior week that it was not recommending replacement. The FDA had been investigating increasing reports of problems with the devices, with reports of Guidant devices being implicated in at least 45 failures and two deaths.

Dr. Brad Knight, a cardiologist and Director of Electrophysiology at University of Chicago Hospitals, was quoted in the Kansas City Star as saying "This is the device that they (Guidant officials) have been telling us is OK. We just sent a letter to patients that it was OK to not replace their devices, pending further notification. It is unusual to now have this many devices on recall."

Guidant first came under fire this spring after reports that it failed to alert physicians about potential problems with the Ventak Prizm 2 DR model defibrillator. The problems with that model prompted Guidant to redesign that device, even though the company said it still believed the originals were reliable. As of June 15, 2005, there had been 28 reports of failure, including one death in 26,000 devices built prior to the redesign.

The most recent recall includes Guidant's Ventak Prizm 2 DR model 1861 manufactured on or before April 16, 2002; Contak Renewal Model H135 and Contak 2 Renewal 2 Model H155 made on or before Aug. 26, 2004; and the Ventak Prizm AVT, Vitality AVT, Renewal 3 AVT and Renewal 4 AVT ICDs.

Guidant's problems came to light in mid-May when the New York Times reported that a man with a congenital heart defect died after his Guidant device failed to give his heart a needed jolt.

The recall raises questions whether Guidant followed federal regulations related to disclosing problems with its devices.

WALKUPDATES

Khaldoun Baghdadi was elected to the Board of the Arab Cultural and Community Center in San Francisco… Melinda Derish attended a three day conference in San Diego analyzing Brain Damaged Baby Cases sponsored by UC Davis Prenatal Health System and the American Bar Association's Tort and Trial Practice Section….Michon Herrin served as a co-chair for the San Francisco Trial Lawyers' Annual "Trial Lawyer of the Year" gala. In July, Michon will participate in the National Trial Skills program held in Louisville, Colorado…Mike Kelly has been elected to a second term on the Executive Board of the International Society of Barristers. Mike recently traveled to Tbilisi, Georgia (see picture above) where he taught advocacy skills to Georgian lawyers in conjunction with the American Bar Association's Central European and Eurasian Legal Initiative (CEELI). The Republic of Georgia is in the midst of instituting an adversary system of justice. This was the first formal litigation training any of these Georgian attorneys had received. The participants were from a cross-section of Georgian society, representing business, government and labor. In July, Mike will serve as a team leader at NITA's National Trial Skills Session at the NITA Education Center in Boulder, Colorado…Doris Cheng served as co-director for the University of San Francisco's Intensive Advocacy Program (IAP) at USF Law School. Doris also participated as a lecturer for the SFTLA at its recent motor vehicle litigation seminar, providing practical tips on persuasive opening statements. In May, Doris and Rich Schoenberger taught at Emory University Law School's Kessler Eidson Trial Techniques program…In July, Rich will participate as a faculty member at NITA's National Session, Rich's fourth invitation to participate as an instructor at NITA's premier program. In June, Rich chaired a SFTLA seminar focusing on cross-examination…For the second consecutive year, Paul Melodia was selected among the Bay Area's top 100 attorneys in the "SuperLawyers" poll. Paul also recently began his fifteenth year as a Master in the Edward McFetridge American Inn of Court…Doug Saeltzer has been reappointed as an Assistant Professor of Law at Hastings, where he continues to teach Personal Injury Litigation…Matthew Davis and his wife Karla recently welcomed a new member of the Davis family, Dashiell Matthew Davis, born on March 16, 2005. Congratulations to Matthew and Karla.

Mike Kelly lecturing ABA/CEELI Participants

Walkup Attorneys Secure Record Central Valley Verdict

Walkup attorneys Paul Melodia and Melinda Derish recently obtained the largest jury verdict for medical negligence in the history of Ceres, California. The verdict, in the amount of $1,790,000, was returned for the wrongful death of a 40-year-old legal secretary who died from complications of gallbladder surgery. The decedent underwent cholecystectomy at Oak Valley Community Hospital on August 10, 2002. The defendant general surgeon was unable to remove an obstructing gallstone from the common bile duct and was forced to abandon his laparoscopic approach and convert to an "open" procedure. Thereafter, in the process of removing the stone, he tore the patient's common bile duct. Post-operatively Mrs. Dismukes began to leak bile and pancreatic juices. Her abdomen was not completely drained and a retroperitoneal abscess developed. A second surgery, to drain the abscess and remove necrotic tissue, failed to remedy the situation. Ultimately, Mrs. Dismukes was transferred to Stanford Medical Center. Physicians there were unable to stabilize her and further post-operative complications ultimately led to multi-organ failure and her eventual death.

Paul and Melinda presented expert testimony demonstrating that the defendant physician breached the standard of care in multiple ways, including failing to appreciate (before surgery began) that there was very likely an obstructing stone present; failing to offer Mrs. Dismukes the option of having the stone removed by a different procedure; performing an overly-aggressive surgery; and failing to timely transfer her to a major medical center once she developed signs of peritoneal abscess. Paul and Melinda also claimed that the physician was negligent in the performance of the second surgery, which failed to fully drain and débride the fluid and pus collections. The defendant physician contended that it was within the standard of care not to foresee the presence of an obstructing stone in the common bile duct, that both surgeries were properly performed and the post-operative management was within the standard of care during the 28 days that he cared for Mrs. Dismukes at Oak Valley Hospital.

Additionally, the defense tried to blame Stanford, claiming the decedent was stable when transferred and that it was Stanford's inappropriate treatment which led to her death. (Stanford was not a defendant in the case, and the defense experts did not testify that Stanford breached the standard of care.)

Prior to trial, plaintiffs demanded the defendant's insurance policy limits of $1,000,000, and the doctor had given his consent to settlement. However, the insurance carrier for the doctor refused to make any settlement offer other than a waiver of costs.

On the issue of damages the jurors were unanimous. Non-economic damages were assessed at $900,000, and economic damages, representing the present cash value of lost wages and lost household support, were assessed at $891,000.

Subsequent to the verdict, the $900,000 non-economic award was reduced to $250,000, pursuant to the California statutory cap embodied in Civil Code §3333.2. Because the jurors were not told that non-economic damages in medical negligence cases are capped at $250,000, they were upset when informed of the limitation. Although the ultimate verdict exceeded the physician's policy limits, the carrier was obligated to satisfy it in full because of its earlier refusal to settle.

We congratulate Paul and Melinda on a remarkable verdict in a very conservative jurisdiction.

SUPREME COURT EXTENDS COMMON CARRIER RULE

In a 4-3 decision the California Supreme Court has ruled that operators of roller coasters and similar attractions can be classified as "common carriers," with the same duty to ensure safety as those who run buses, trains and other means of public transportation. The holding imposes the highest duty of care standard consistent with CACI jury instruction 902. (Gomez v. Superior Court (Walt Disney Co.) (2005) SC #S118489)

In reaching its decision, the Supreme Court said riders are entitled to safety on thrill rides just as they are on trains and buses. "Riders of roller coasters and other 'thrill' rides seek the illusion of danger while being assured of their actual safety," Justice Carlos R. Moreno wrote for the majority. "The rider expects to be surprised and perhaps even frightened, but not hurt."

The decision came in a lawsuit filed by the family of Cristina Moreno, 23, a tourist from Spain, who died on her honeymoon in 2000 after riding the Indiana Jones Adventure ride at Disneyland.

The trial court ruled that the Disney attraction could not be considered a common carrier. The Second District Court of Appeal disagreed, and Disney appealed to the state's highest court.

In upholding the appellate court decision, the Supreme Court said it didn't matter whether the purpose of a common carrier was transportation or entertainment. "Certainly there is no justification for imposing a lesser duty of care on the operators of roller coasters simply because the primary purpose of the transportation provided is entertainment," wrote Justice Moreno. The decision brings California in line with other states that have adopted the same rule, including Illinois, Connecticut, Alabama and Oklahoma.

Electronic Stability Control Touted By Insurance Institute

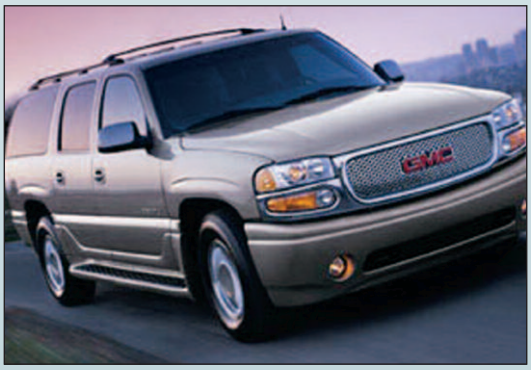
GM Will Equip Its Vehicles With StabiliTrak

Electronic Stability Control (ESC) has been determined to lower the risk of fatal, single-vehicle crashes by over 50% according to the Insurance Institute for Highway Safety. The institute compared crash rates for cars and sport utility vehicles with and without Electronic Stability Control.

Under certain conditions, ESC operates to brake individual wheels automatically to keep a vehicle under control. It is designed to help the driver in the event of loss of control at high speed or on a slippery road.

A spokesperson for the Insurance Institute, Susan Ferguson, commented: "SUV's typically have high single-vehicle roll-over rates, and these crashes usually involve drivers losing control of their vehicles, so it would not be surprising if SUV's benefit more from ESC."

At almost the same time the IIHS released its report, General Motors announced that it planned to equip all of its models with its own version of ESC, called "StabiliTrak." According to a GM spokesperson, StabiliTrak will become standard on nearly all GM vehicles in the United States and Canada. It



is already standard on a number of GM full size sport utility vehicles, and its use will be extended to midsize SUV's in 2006. StabiliTrak will be standard on all remaining SUV's, as well as on vans, by the end of 2007, and by the end of 2010 it will be in place on all GM cars and trucks sold in the retail market in the United States. Anti-lock brakes and traction control, which enable ESC to perform, will also be standard.

GM has advertised StabiliTrak as one tool to help a driver maintain vehicle control during "challenging or unexpected driving conditions" such as ice, snow, or wet pavement, as well as emergency lane changes or sudden avoidance maneuvers. GM's announcement indicated that with the exception of seat belts, it has rarely seen a "technology that brings such a positive safety benefit as Electronic Stability Control."

NHTSA research has shown a 67% risk reduction in single-vehicle crashes of SUV's equipped with ESC. The Insurance Institute has estimated that if stability control were standard on all vehicles sold in the United States, as many as 40% of the 2,000,000 single-vehicle crashes that occur each year would be avoided.

Food and Drug Administration Admits Problems with Medical Device Approvals

The Food and Drug Administration has released an internal report critical of its own oversight of medical device makers.

The report confirms that the agency, over the last two years, has had "little idea" whether device manufacturers were fulfilling their obligations to conduct studies on the safety of products once they were on the market. The FDA review concluded that the agency could not find evidence that more than half the manufacturers had performed the required studies. It also found that the FDA's oversight of post-marketing studies was compromised by sloppy record keeping.

For 26 of 45 products approved during a two year window, the FDA could find absolutely no information to indicate whether the required studies had been done. In the 19 cases where information could be found, 1/3 of the studies were overdue, and two had never been started.

Dr. Daniel Schultz, the director of the FDA's Center for Devices and Radiological Health, has defended the agency's handling of the issue.

Recently, in response to a Freedom of Information Act request, the New York Times obtained a similar study, now two years old, which embodied the same criticisms.

The problem of inadequately tested devices is growing. When coupled with the FDA pre-emption created by Brown v. Superior Court, (1988) 44 C3d 1049, it bodes ill for California's medical consumers.

During the last two years we have represented multiple clients who have sustained injury from "fast-track" approved medical devices and surgical instruments. Our associate counsel who have clients with such injuries should contact our office for further information.

Recent Cases

Industrial Injuries

Henry V. v. PG&E

In Henry V. v. PG&E (S.F. Sup.Ct. No. 418050), Michael A. Kelly obtained a settlement in the amount of $7,000,000 on behalf of a 40-year-old lineman who sustained first, second and third degree burns over 50% of his body when nearly electrocuted at a job site. The plaintiff was performing "routine" telephone line replacement when a PG&E power pole fractured, causing 12,000 volts of electrical current to contact him. Discovery indicated that PG&E inspectors had recommended replacement of the pole as early as five years prior to the date of injury. Pretrial deposition testimony demonstrated that in the five years prior to the tragedy three different inspectors had failed to require that the rotted pole be removed as required by PG&E and PUC safety guidelines. The defendants claimed that the plaintiff's failure to test the pole before beginning work was the legal cause of his injuries; however, depositions of his supervisors proved that the plaintiff had been trained to test only before climbing and not when working from a bucket truck as was the case here. Additionally, all witnesses agreed that the exterior of the pole looked completely normal and gave no indication of the decay within. Past medical and wage loss exceeded $1,000,000. The matter was resolved following two days of mediation before retired San Francisco Superior Court Judge Edward Stern. As part of the settlement, SBC (the employer) agreed to waive and release any claim for reimbursement of worker's compensation benefits in excess of $1,000,000.

Maintenance Worker v. Elevator Maintenance Company

In Maintenance Worker v. Elevator Maintenance Company (USDC No. C 03-1225 MMC ARB), Khaldoun Baghdadi obtained a settlement in the amount of $1,200,000 on behalf of a 62-year-old U.S. Marshal who was trapped in a passenger elevator at the Philip Burton Federal Building in San Francisco while the elevator was undergoing a troubleshooting exercise to locate a faulty brake mechanism. The defendant Elevator Service repeatedly ran the elevator up and down between floors, with the plaintiff trapped inside, for forty minutes. The plaintiff, who was unaware that elevator maintenance was underway, and believed that the car was violently out of control, repeatedly attempted to contact his co-workers in the building's communications center via walkie-talkie. However, no one responded, as the personnel assigned to the command center had traveled to the basement to supervise the activities of the maintenance company.

During the process of being accelerated up and down, the plaintiff sustained a traumatic aggravation of pre-existing arthritis in his back and shoulder, ultimately requiring shoulder replacement surgery. The defendant contended that the forces exerted on the plaintiff during the episode were no greater than those of a normal elevator ascent, and that plaintiff's pre-existing arthritis was the ultimate cause of his need for surgery. Plaintiff's physicians testified that he was without any significant complaints of pain from his arthritis for a number of years before this incident occurred. Ultimately, because of his injuries and disabilities, the plaintiff was forced to leave his job as a U.S. Marshal. Plaintiff claimed medical bills of $175,000 and lost wages of $245,000. The case settled after two sessions of mediation.

Product Liability

Victim v. Japanese Automaker

In Victim v. Japanese Automaker, Michael A. Kelly and Rich Schoenberger negotiated a settlement in the amount of $1,750,000 on behalf of a 46-year-old wife and mother who was paralyzed when the seat back of her late-model Japanese sedan collapsed in a rear-end accident. Plaintiff claimed that the seat back, as designed, was defective because it was unable to withstand foreseeable forces in moderate rear-end collisions. The manufacturer contended that the seat was in compliance with all federal and European safety regulations, and that the substantial force of the collision, as opposed to any flaw in the seat design, was the cause of the failure. Defendant further claimed that the sole and exclusive cause of the plaintiff's injuries was the conduct of the co-defendant drunk driver, who had a blood alcohol level of .38. The case was resolved after hearings on pre-trial motions, at which time the trial judge had issued an order permitting the jury to compare the negligence of the defendants without regard to injury causation. Settlement of the case also included a negotiated reduction of outstanding medical expenses from $660,000 to approximately 10% of this sum.

Construction Site Injuries

Joseph B. v. Regional Home Builder

In Joseph B. v. Regional Home Builder (Co.Co.County Sup. Ct.), Douglas Saeltzer negotiated a $750,000 settlement, after three sessions of mediation, on behalf of a 37-year-old truck driver who suffered bilateral lower extremity fractures at a job site. The plaintiff was injured when a forklift operator employed by a subcontractor lost control of a bundle of plywood he was offloading from the plaintiff's truck. Plaintiff was standing alongside his truck when the lumber spilled from the lift while the defendant driver made a rapid U-turn. Defendant argued that plaintiff was at fault for his injuries because he was walking near the forklift during the off-loading process. Defendant also alleged that plaintiff's employer had improperly packaged the individual plywood bundles, making them inherently unstable. Plaintiff's experts testified that the forklift in use was a "state of the art" vehicle capable of stabilizing and holding various sizes and types of loads, and that there was no reason for the operator to lose control except for the fact that he was overworked and pressed for time. Plaintiff's injuries included bilateral leg fractures and compartment syndrome, requiring four surgeries. Plaintiff contended that his injuries prevented him from returning to his job delivering material to construction sites. As part of the settlement, Doug was able to negotiate a reduction in an outstanding worker's compensation lien from $200,000 to $75,000, and further secured the carrier's agreement not to assert credit against any future medical expenses.

Recent Cases

Medical Negligence

Heirs of D. v. Valley Emergency Room

In Heirs of D. v. Valley Emergency Room (Ala.Co.Sup.Ct., Confidential Settlement), Doris Cheng negotiated a settlement in the form of cash and future annuity payments having a present value of $750,000 on behalf of the surviving wife and two children of a 41-year-old restaurant manager who died as the result of untreated overwhelming sepsis. The decedent initially presented to a Bay Area emergency room with signs and symptoms of pneumonia. The examining emergency room physician did not appreciate the severity of the problem and ignored the fact that the patient was asplenic, even though the admitting history and physical at the hospital reflected that the decedent had undergone a splenectomy many years before.

Within three days, the decedent developed overwhelming sepsis. When he finally presented to the hospital three days later, he was again sent home. He died two days later.

Experts for both parties agreed that at the time of the initial urgent care visit the decedent was suffering from early sepsis. However, the experts disagreed upon whether he could have been effectively treated at that time with broad spectrum antibiotics because of his asplenia.

The defense expert testified that because of the decedent's asplenic condition, it was unlikely that even the most aggressive antibiotic management would have saved his life, and that the statistical likelihood of his death from fulminant infection was greater than 50% no matter what treatment had been provided.

Under the terms of the settlement, the maximum amount under California law ($250,000) was paid in satisfaction of general damages suffered by the heirs, and multiple annuities were established to fund future support requirements for the children, including paying for their college educations.

Government Liability

Family v. State of California

In Family v. State of California (S.F. Sup.Ct.), Rich Schoenberger and Matthew Davis obtained a settlement in the amount of $2,730,000 on behalf of the surviving widow and children of a 39-year-old San Francisco businessman who died when his car was hit head-on by another that catapulted over the center divider on northbound Highway 101. Plaintiffs claimed that the median divider was improperly designed and placed, and failed to comply with CalTrans design warrants. The accident occurred when a Jeep, traveling in the opposite direction, lost control and climbed up and over the median, striking the faultless decedent head-on. CalTrans claimed that it had design immunity and that the median configuration was not dangerous, citing the fact that hundreds of millions of cars had traveled the roadway without a prior similar accident occurring. The settlement was contributed to by the defendant driver, her employer, and CalTrans.

In addition to fixing liability on the state, plaintiffs also sought to recover from the employer of the defendant driver. The driver of the Jeep was on her way home from work when the accident occurred. Normally, under the going-and-coming rule, an employer bears no *respondeat superior* liability when an employee has an accident during her work commute. In this case, however, plaintiffs learned during discovery that the driver's employer had asked her to drive to work so that she could run occasional errands. Plaintiffs argued that the "implied benefit" exception to the going-and-coming rule therefore applied, and argued that the employer was also therefore liable for the accident.

Jane Doe v. Public Entity Arborist

In Jane Doe v. Public Entity (Sup.Ct., Confidential Settlement), Matthew Davis obtained a settlement with a total value of $665,000 ($550,000 in cash and waiver of a $115,000 medical lien) on behalf of a young woman who sustained a burst fracture of her L2 vertebra when several limbs fell from a Monterey cypress tree during a winter storm and landed on top of her as she waited at a bus stop. She underwent a two-level surgical fusion of her spine and will have life-long pain and limitations. The plaintiff alleged that the public entity that owned and maintained the cypress had actual or constructive notice that it presented a danger to people waiting at this particular transit stop for a bus because the same tree had previously dropped large limbs and was thus prone to lose additional limbs, especially in windy weather. She also claimed that the public entity transit agency was a common carrier which owed her a duty of utmost care to provide a safe place to wait for the bus per CACI 902.

The public entity claimed that it had no notice of problems with the cypress. Plaintiff, however, learned during discovery that a report issued in 1980 warned the entity that Monterey cypresses in the area of the bus stop were aging and in danger of dropping limbs. The report also warned that many trees in the area presented potential hazards to pedestrians. Finally, the public entity knew that persons waited at the bus stop during all types of weather conditions, including storms, and plaintiff argued that the entity should have therefore paid extra attention to the trees with limbs overhanging the stop.

Vehicular Negligence

Pedestrian v. Minivan Operator

Pedestrian v. Minivan Operator (San Mateo Co. Sup. Ct., Confidential Settlement), Doug Saeltzer negotiated a cash settlement of $700,000 on behalf of a 63-year-old pedestrian who suffered a comminuted tibial plateau fracture as a result of being struck by a left-turning minivan while she was crossing the street, within a marked crosswalk at the intersection of California and Trousdale Drive in Burlingame. When she was struck, the plaintiff was walking from a San Mateo County BART station to her job as a fitness instructor at a local gym. The defendant was driving her children to their first day of school after

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Recent Cases

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Christmas vacation. Plaintiff alleged she was halfway across the street when she noticed the defendant's van "appear out of nowhere" on her left side, striking her and knocking her to the ground. Defendant acknowledged striking plaintiff while she was in the crosswalk, but argued that the plaintiff was comparatively at fault for failing to notice her car as it approached in plain view from the left. The initial surgical repair of plaintiff's tibial plateau fracture failed, leading to a total knee replacement. Plaintiff is a registered nurse, and a pioneer in the field of women's physical fitness. In the early 1970s she opened one of the first dance exercise studios in the nation. She is also a published author in the field and continues to teach fitness classes, at a reduced level, to this day. The settlement included past medical bills of $57,846, the cost of a future knee revision surgery estimated at $15,000, as well as past and future wage loss. The defendant disputed the need for any future revision surgery, and argued that all future wage loss was speculative. The case settled at mediation approximately one month before trial.

Premises Liability

Family v. Property Management Co.

In Family v. Property Management Co. (Ala.Co.Sup.Ct., Confidential Settlement), Ronald Wecht and Doris Cheng negotiated a $2,000,000 cash and annuity settlement on behalf of the husband, son and sister of a 31-year-old woman who was killed in a fire at the family's rented duplex apartment. In addition to the loss of their wife and mother, the husband and son both had claims for severe burn injuries sustained while trapped in the inferno.

Plaintiffs contended that the property manager and building owner were responsible for maintenance of the unit's smoke alarms, which were found after the fire to be without batteries. Fire investigators also determined that there were no batteries in any of the smoke alarms of the unburned "mirror unit" in the duplex.

Plaintiffs claimed that the property manager and building owner each had a non-delegable duty to inspect the unit upon lease renewal, which occurred shortly before the fire, and failed to remedy the problem at that time by replacing the missing alarm batteries.

Defendants claimed that under the terms of their lease (as permitted by local ordinance), plaintiffs assumed the responsibility to inspect and maintain the smoke alarms with functioning batteries, and further, that the fire was caused by the negligence of the occupants who lit a candle prior to going to bed, and failed to extinguish it. (Fire investigators found a candle to be the cause of the fire.)

Because the smoke alarms were non-functional, plaintiffs were not awakened until the fire had consumed most of the apartment. The only exit door to the apartment was sealed shut by melted plastic from a doorbell chime. The decedent was unable to find an exit route through the thick smoke, and expired. The surviving husband and son were rescued by the fire department as they lay unconscious in the apartment.

The settlement constituted the full amount of the combined liability insurance limits of both the owner and the management company.

Insurance Coverage

Klotzbach v. State Farm Insurance

In Klotzbach v. State Farm Insurance (Ala.Co.Sup.Ct. No. 2002-059412), Khaldoun Baghdadi and Michon Herrin obtained a jury verdict against State Farm Insurance and an individual broker in the amount of $590,000 on behalf of policyholders who claimed that State Farm had failed to provide them with requested levels of underinsured motorist coverage in their primary and umbrella policies. The plaintiffs, while driving with their children, were struck by a drunk driver. Their eldest son, a second year student in the United States Military Academy at West Point, was killed in the collision. On the day of the injury, plaintiffs carried liability coverage to cover third parties in the amount of $100,000/$300,000 per accident, with a $1,000,000 umbrella. They believed that their agent had also provided them with equivalent amounts of underinsured motorist protection, and had included underinsured motorist coverage on their umbrella. Plaintiffs testified that when they purchased their coverage they asked for "equivalent" coverage to that provided by their prior carrier. State Farm claimed that there had been no such request, and that in fact, the plaintiffs had "waived" more coverage than the 30/60 UIM limits. The jury determined that the plaintiffs had not been properly advised regarding the absence of underinsured motorist coverage, but also found that they bore 51% comparative responsibility. The total amount available under the policies, had plaintiffs been sold what they requested, was $1,200,000. The net recovery, calculated by the jury, represented 49% of that sum. State Farm's pretrial offer was $25,000.

We are available for association and/or referral in all types of personal injury matters. Fees are shared with referring counsel in accord with Rule of Professional Conduct 2-200. Additionally, if there is a particular subject you would like to see discussed in future issues of ***Focus on Torts*** please contact Michael Kelly or Lisa LaRue. Visit us on the web at www.walkuplawoffice.com.

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