WALKUP, MELODIA, KELLY & SCHOENBERGER

FOCUS on torts

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WALKUP TEAM OBTAINS FIRST ASR HIP VERDICT

On August 21, 2013, final judgment, including post-trial costs and interest, was entered in Los Angeles Superior Court Action No. BC456086 in the total amount of $8,885,790.85 against DePuy Orthopaedics on behalf of Bill Kransky, a 65-year-old Montana Vietnam veteran whose case was tried by Walkup partners Mike Kelly, Matt Davis and Khaldoun Baghdadi, in association with Los Angeles' Panish, Shea & Boyle, and San Diego's Gomez Iagmin law firms. Kransky was the first of more than 10,000 DePuy cases filed nationally to go to trial.

Attorney Michael Kelly describes the ASR hip implant during the trial in January.

Since the original recall of the defectively designed metal-on-metal hip replacement, Walkup lawyers have been at the forefront of the litigation. Even before the defective hips were recalled on August 24, 2010, Walkup lawyers were already representing clients who had sustained injury, disability, or the need for premature revision because of the failed metal-on-metal technology.

When it was introduced, DePuy (a subsidiary of Johnson & Johnson) promised doctors and patients that the ASR would provide substantial improvement in durability when compared to metal-on-polyethylene devices that had been on the market for years. But after marketing the ASR for less than five years, the product was off the market. It produced previously unseen injury and disability at a rate higher than anything else ever marketed. Post-marketing safety data from around the world showed that the hip's peculiar design features caused it to shed metal debris in and around the implant site, leading to high levels of cobalt and chromium in the patient's circulating blood. Revision rates for the device, as forecasted in 2011 by the British Orthopaedic Association, suggested a staggering 49% revision rate within six years of implantation.

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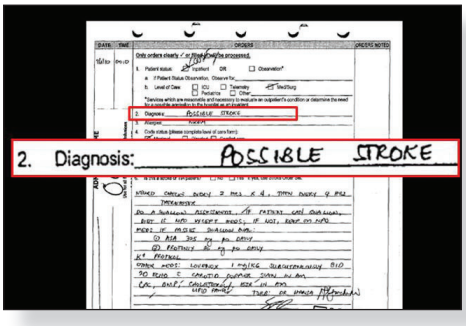
Firm Obtains Record $38 Million San Francisco Verdict

Melinda Derish and Conor Kelly recently obtained a verdict of $38.6 million dollars in San Francisco Superior Court on behalf of a young man who sustained incomplete quadriplegia as a result of his doctor's failure to diagnose and treat an evolving ischemic stroke. The verdict in Myrick v. Hansa, M.D. (S.F. Superior Court Case No. CGC-11-515329) is believed to be the largest single plaintiff personal injury verdict in Northern California in 2013 and the largest medical malpractice verdict ever returned in San Francisco Superior Court.



On the evening of July 31, 2010, 19-year-old Kody Myrick was herding cattle outside of Bakersfield when he suddenly slumped over. His father immediately drove him to the emergency room at a local community hospital. The father did not know that this hospital had to transfer patients who needed stroke treatment to a medical center in Los Angeles.

Kody was triaged in the E.R. The nurse charted a primary complaint of "possible stroke." The E.R. physician examined him and found profound neurologic deficits. The E.R. physician ordered a non-contrast brain CT which showed a small infarct deep in the brain. Despite this abnormal finding the E.R. physician failed to obtain a neurology consult or to activate the hospital's stroke protocol.

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KELLY & SCHOENBERGER ELECTED TO HONOR SOCIETIES

Walkup partners Michael Kelly and Richard Schoenberger were both recently recognized with selection to honorary legal societies.

Mike was elected to membership in the prestigious Inner Circle of Advocates, which limits its membership to the 100 top plaintiff trial lawyers in the nation. Firm founder, Bruce Walkup, was among the original Inner Circle founding members. Rich was inducted as a member of the International Academy of Trial Lawyers at the group's July meeting in Chicago. Membership in the Academy is by invitation only and is limited to 500 active fellows from the United States, as well as 30 countries throughout the world.

Admission standards to both societies are extremely high and include confidential questionnaires completed by lawyers and judges.

Mike's $8,340,000 verdict this year in the first DePuy ASR trial set the standard for verdicts in the nationwide metal-on-metal artificial hip litigation. He has consistently been selected by Super Lawyers Magazine as one of the Top Ten lawyers in Northern California. Last year he was honored by the Consumer Attorneys of California with the Robert E. Cartwright Award given to a member of the association for contributions to the teaching of trial advocacy. The previous year he was honored by the National Institute of Trial Advocacy for his pro bono contributions to advocacy teaching.

Rich is the 2011 winner of the prestigious San Francisco Trial Lawyer's "Trial Lawyer of the Year" Award. In 2012, he obtained his ninth million, or multi-million, dollar jury verdict. Rich is an invited member of the most prestigious trial lawyer organizations in the country. These include the American College of Trial Lawyers, the International Society of Barristers and the American Board of Trial Advocates, for whom he will serve as President of the San Francisco Chapter in 2014.

We congratulate both Mike and Rich on these impressive achievements.

INTERNATIONAL ACADEMY OF TRIAL LAWYERS

THE INNER CIRCLE OF ADVOCATES
100 OF THE BEST PLAINTIFF LAWERS IN THE U.S.

What's Your Question?

Question: I have a case where my client was badly injured when his bicycle tire dropped into a pothole and he was vaulted forward. I am concerned about proving notice to the city under government code section 835. Do you have any suggestion?

Answer: Other than dealing with the defense of "approved plan and design" under California Government Code section, the biggest problem that our associate and referring counsel call us about in dangerous condition of public property claims is the question of notice.

To establish liability for a dangerous condition of public property under Government Code Section 835, the plaintiff must prove that either the dangerous condition was created by "a negligent or wrongful act or omission of an employee of the public entity acting within the scope of his employment" or that the public entity had "actual or constructive notice" of the condition, had sufficient time to fix it, and failed to do so. Cal. Gov. Code 835 & 835.2.

In the vast majority of property defect cases the hazard was not created at the time of construction, or produced by some act or omission of the public entity. Most commonly we must rely upon constructive knowledge, that is, a reasonable inspection of the property would have revealed a hazard which should have been repaired. Proof of constructive notice is difficult because evidence of notice is either memorialized in documents maintained by the public entity (which frequently are "lost" prior to discovery) or not maintained at all. We search for tools outside of the defendant's records to find the proof, such as public reporting records. For instance, www.SeeClickFix.com is a website intended as "a communications platform for citizens to report non-emergency issues, and governments to track, manage, and reply--ultimately making communities better through transparency, collaboration, and cooperation." SeeClickFix has a mobile app suite (iPhone, Android, Windows Phone, BlackBerry) as well as a web platform. Advances in handheld technology have made it possible for the public at large, using smart phones, to snap a photo of a pothole, document a broken section of sidewalk, a leaking pipe or a defective public fixture, burned-out streetlamp or roadway hazard. SeeClickFix keeps a running list of all reported issues, which can be filtered by date and geographic region. Users can "vote" to show concern and/or support for issues posted on the site. Importantly for purposes of dangerous condition cases, the website permits enrolled local government entities to "acknowledge" issues, indicating that the entity is aware of the report.

We Provide Answers...

For a given geographic area, SeeClickFix provides a list of the government agencies, entities or departments that monitor the website. For San Francisco, the SF311 program, the San Francisco Police Department and the South San Francisco Department of Public Works are participating entities. SF311 has an account that monitors SeeClickFix, acknowledges and assigns request ID numbers to new reports, and posts an update if/when defective property, roadways or city buildings have been fixed.

SeeClickFix serves as a powerful tool for enhancing public safety and determining if a public entity was aware of a dangerous condition prior to a citizen's injury. The deposition of a "person most knowledgeable" within the public entity relating to SeeClickFix is one way to establish actual notice, or alternatively, constructive notice by proving that the public entity was negligent in failing to comply with its established program for monitoring the website.

WALKUP TEAM OBTAINS FIRST ASR HIP VERDICT

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The failure of the ASR is a prime example of drug and device manufacturers' decision to place profit ahead of patient safety. The market for total hip replacement surgery is large and growing. It is estimated that there are 300,000 hip replacement surgeries each year in the United States. Competition among manufacturers of prostheses is particularly keen.

All hip replacement devices wear out in time. Orthopedic surgeons are always looking for a device that will last longer. The optimal hip prosthesis is one that relieves pain, restores function, and lasts for the balance of the patient's life. In trying to fulfill these goals, Johnson & Johnson touted the ASR as a "major innovation," with less wear than any device ever produced.

The device was sold without undergoing a controlled clinical trial in the U.S. The absence of clinical data left critical gaps in DePuy's understanding of how the device would perform. Its scientists and designers relied entirely on simulator testing.

After the device was put on the market in the United States in 2006, and before the recall in 2007, DePuy received notification from doctors across the globe that the device was not performing well. In May of 2006 one of its "key opinion leaders" in Ireland stopped using the device. In the fall of 2007, DePuy had received a sufficient number of complaints such that it was investigating ways to redesign the ASR. By the spring of 2008, the device's designer admitted in an email that the prosthesis had a propensity to cause extreme metal ion levels.

The plaintiff in the Los Angeles Superior Court case was Bill Kransky, who was granted advanced priority trial setting because of his unrelated terminal health condition. At the time of trial, Bill was suffering from cancer and his life expectancy was uncertain. He had been implanted with the device at a Veteran's Administration Hospital in Montana in 2007. Following the recall in 2010, he was notified about the recall and followed up with his primary care physician who believed that the ASR XL was harming him and advised him to have it removed. The orthopedic surgeon who removed the device described the operative site as being blackened with metal wear debris. The surgeon described "extreme metallosis with a grayish-blackish synovial infiltrate."

Following removal of the ASR XL, Mr. Kransky's health improved dramatically. His pain was gone, his appetite returned, his mobility improved, and he was able to once again enjoy family activities. However, in the summer of 2012, his health took a turn for the worse as a result of a recurrence of his pre-existing, unrelated cancer.

The Honorable Richard A. Kramer of the San Francisco Superior Court expedited the trial date and ordered the trial to be held in Los Angeles Superior Court before the Honorable J. Stephen Czuleger. The trial consumed almost two months with the jury deliberating for six days. Prior to trial, DePuy had offered next to nothing in settlement. The verdict was a resounding win for all ASR XL victims.

Currently, the second California "bellwether" trial is scheduled to take place in San Francisco Superior Court. Only one other ASR case has proceeded to verdict. That case was tried in Illinois. The verdict there was in favor of DePuy. The defense in that case argued that the plaintiff demonstrated "metal hypersensitivity" and that it was her peculiar personal biology which caused the failure.

The story of the ASR, the harm it has caused, and the insensitivity of DePuy and Johnson & Johnson is not yet over. Additional trials appear necessary since neither DePuy nor Johnson & Johnson have shown an inclination to participate in a fair and reasonable approach to resolving the claims of more than 10,000 innocent patients.

Mike Kelly, Matthew Davis, Doug Saeltzer, Khaldoun Baghdadi, and Valerie Rose of our office have been relentless in their pursuit of a fair resolution on behalf of ASR victims. Perhaps after the next round of trials in California, Illinois, Florida, and Ohio, Johnson & Johnson will take steps to bring this chapter in its history to a fair and reasonable conclusion.

CPSC ORDERS CHILDREN'S PAJAMA RECALLS

The U.S. Consumer Product Safety Commission has ordered the recall of three styles of The Children's Place bunny-themed one-piece cotton footed pajamas. One style is pink with dark pink bunnies and a ruffle at the neck. It was sold in size 9-12 months. Another style has bunnies with eyeglasses. The other has bunnies and yellow chicks. "Made with love by PLACE" with a heart outline is printed at the neck of the pajamas. The pajamas failed to meet the federal flammability safety standard. The garments were manufactured in China and were sold exclusively at The Children's Place stores nationwide and online at www.childrensplace.com from January 2012 through May 2013 for about $15. Consumers should immediately take the recalled pajamas away from children and return them to any The Children's Place store for a full refund.

Manufacturer KleverKids, of Washington, D.C. has also been required to recall children's pajamas because they fail to meet federal flammability standards for children's sleepwear, posing a risk of burn injuries. Those pajamas were manufactured in Peru. The recall involves KleverKids children's 100% Pima cotton pajama sets and nightgowns sold in boys and girls sizes 2 through 8. The sets were sold in multiple prints including shark print, ballerinas, black and blue skeletons, a two-toned set with navy and blue striped monster print, and a paisley print. All the garments have a printed label at the neck that reads "KleverKids Live ❤ Laugh ❤ Love." Some of the pajamas sets are labeled as "flame resistant sleepwear" by a sewn-in garment label along the shirt's bottom right side seam. The sleepwear was sold at children's boutiques and specialty stores nationwide from September 2012 through March 2013 for between $32 and $82.

CHRYSLER RECALLS JEEPS

After an initial standoff between Chrysler and NHTSA, the manufacturer has now agreed to recall and modify more than 1.5 million Jeeps as a result of an alleged fire hazard. Chrysler dealers will inspect and, if necessary, make changes in Grand Cherokee and Liberty vehicles made between 1993 and 2007 to remedy the problem.

Chrysler initially argued that the vehicles were safe as designed, and that rear bumper trailer hitches installed as standard equipment provided protection for the gas tank in rear-impact crashes. Subsequently, however, the executive in charge of engineering when the Jeeps were designed told the *New York Times* that trailer hitches were not intended to provide such protection. The "fix" which Chrysler negotiated with NHTSA involves installing trailer hitches on those models which did not come with them as standard equipment.

Chrysler has argued that the Jeeps remain safe and that any fatalities which have occurred as a result of fires are due to the severity of the crashes, and that no sport utility vehicle of the same era would have performed any better. NHTSA disagrees, and has publicly stated that it believes the vehicles contain defects related to motor vehicle safety. NHTSA claims it is aware of at least 51 deaths in rear-impact crashes that resulted from fires in these vehicles.

The issue was first raised by the Center for Auto Safety who requested in 2009 that NHTSA investigate the fire issue which led to the recall. It claimed that its research identified 161 deaths in 115 crashes that involved fires resulting from rear impact collisions. Chrysler agreed to conduct a service campaign instead of a recall on 1.1 million Grand Cherokee vehicles. The company announced that it would do nothing for those models which had a factory hitch or no hitch.

Utilizing the installation of a trailer hitch to reduce the risk of fire in a rear impact is not something that has been routinely done by any auto manufacturer. NHTSA's current position is that the solution negotiated between it and Chrysler to reduce the risk of post-crash fires in these vehicles is being "adequately addressed."

Firm Obtains Record $38 Million San Francisco Verdict

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Four hours after the onset of symptoms, the E.R. physician telephoned an on-call hospitalist, defendant Sahaphun Hansa, M.D., to admit the patient to the hospital. Despite clear indications that Kody was in the midst of a neurologic emergency, Dr. Hansa failed to obtain a neurology consultation and decided not to come to see the patient in person. Instead, he phoned in admission orders.

That night the patient's neurologic status waxed and waned. By the next morning he experienced a sudden deterioration. An angiogram was not obtained until the afternoon. It revealed a large blood clot occluding the basilar artery, blocking blood supply to the brain stem. By the time the stroke was properly diagnosed by the defendant, Kody had suffered permanent damage to his brain stem.

Suit was filed against multiple defendants including the E.R. physician, the hospital, and the physician who directed the hospital's stroke program. Discovery was conducted for more than a year while the defendants argued that Mr. Myrick's initial presentation was too unusual and too severe for them to diagnose and treat.

One year before trial, Melinda propounded a CCP §998 demand to the defendant for his insurance policy limits. Prior to trial all of the defendants settled except defendant Hansa. His insurance carrier, The Doctors Company, refused to pay his $1,000,000 policy limit.

Melinda and Conor persuaded the jury that Hansa's negligence substantially contributed to Kody's permanent brain stem injury and quadriplegia. They argued that he had acted negligently in several respects. They established that he violated the standard of care by failing to obtain an emergency neurology consultation which would have led to obtaining a CT angiogram on an emergency basis. Through the testimony of a prominent neurointerventional radiologist they were able to explain to the jury that Kody's waxing and waning neurologic condition during the night meant that the window of opportunity was open for performing a successful thrombectomy to remove the clot, restore blood flow, and save vital brain tissue.

The jury rejected the doctor's argument that he did not know the patient was undergoing a stroke. They also rejected his argument that it would not have been possible to transfer the plaintiff to a hospital with the capability to treat the stroke even if the diagnosis had been made.

After two and one half days of deliberation, the jury returned a unanimous verdict on liability and causation. They assigned 40% of the liability to defendant Hansa. The verdict was as follows:

Past Wage Loss:	$66,000
Future Wage Loss:	$2,686,000
($1,115,000 present cash value)	
Past Medical Expenses:	$370,587
Past Attendant Care:	$130,000
Future Life Care Costs:	$33,112,000
($8,426,000 present cash value)	
Non-economic Damages:	$2,250,000
TOTAL:	$38,614,587
($12,357,587 present cash value)	

After deduction for credits from previous settlements, the application of the MICRA cap of $250,000, and the addition of prejudgment interest and litigation costs, the ultimate judgment against the internist was roughly five times his available insurance policy limit.

WALKUPDATES

Rich Schoenberger has been elected as the 2014 President of the San Francisco chapter of the American Board of Trial Advocates (ABOTA). He is the fifth member of the firm to be selected as leader of the country's third-largest ABOTA chapter. No other Northern California firm has ever had more than two of its members serve as President. **Rich** was also appointed to the American College of Trial Lawyers California state membership selection committee. On the community service front, **Rich** accepted a volunteer teaching position at Bridge the Gap College Prep in Marin City…**Khaldoun Baghdadi** spoke at the American Association for Justice annual meeting on the topic of discovery in medical device cases. He also now serves on the board of the Hastings Foundation for the University of California, Hastings College of the Law. In August he resumed teaching in the trial advocacy program at Berkeley Law…**Sara Peters** coached the Stanford mock trial team that qualified for TYLA nationals…**Andrew McDevitt** was married to Kristen Edgren on June 29, 2013. In addition, he was selected as Secretary for the Bar Association of San Francisco's Delegation to the California Conference of Bar Associations, and invited to serve on the Executive Committee for the Bar Association of San Francisco's Barristers Litigation Section… **Mike Kelly** spoke to the annual meeting of the AAJ in San Francisco. **Mike** was a presenter at a 360 Advocacy Program in Las Vegas entitled "Damages: Go Big or Go Home." **Mike** also travelled to Salt Lake City in October to speak to the Utah Association of Justice on "Opening Statements: It's About Storytelling"…**Doris Chang** has been appointed as the Chair of ABOTA's Civility Matters! Programs for law schools and recently presented as a panelist at the San Mateo County Trial Lawyers Don Galine Masters Seminar… **Melinda Derish** was invited to present on the ethical and medical-legal dilemmas that confront pediatric intensive care physicians at the international 3rd Biennial Conference on Brain Injury in Children at The Hospital for Sick Children in Toronto. **Melinda** was also invited to speak on the topic "Effective Medical Expert Depositions" at the Consumer Attorneys of California annual conference in Hawaii. She was also named as a Super Lawyer by the Northern California Super Lawyers Magazine…**Spencer Pahlke's** Berkeley Law trial advocacy program won its first ever national tournament at this year's Top Gun tournament, hosted by Baylor University School of Law…**Doris Cheng, Conor Kelly**, and **Andrew McDevitt** are once again coaching the Lowell High School Mock Trial program…Congratulations are in order for **Emily Polcari** and her husband Mike who are expecting their second child, a daughter, in November… **Doug Saeltzer** completed his 11th year teaching the personal injury litigation course at Hastings College of the Law. In October he was invited to speak at the 2013 USLAW Network Client Conference in Vancouver, British Columbia, presenting to a group of national and international claims adjusters and defense attorneys on the topic of a plaintiff's attorney's perspective on deposing a defendant's 30(b)6 corporate witness.

Mighty Mouthpiece Softball Company Makes History

On a cold, foggy and windy night at Balboa Playground, history was made on September 5th when the Mighty Mouthpiece softball team won its eleventh San Francisco Lawyers' League Softball Championship. This year's championship game pitted the Mouthpiece against the Irish Jewish Alliance. The two teams have won the last 12 championships, with the "Pieces" coming out on top nine of those times.

The Lawyers' League softball competition has been a fixture in the San Francisco legal community since the early 1970s. The Mighty Mouthpiece Softball Company was founded in 1973, when Peter Dixon was the skipper of the team. Peter was followed by Kevin Domecus and then by present manager, Doug Saeltzer.

Current firm members who play on the team include Doug, Conor Kelly, Spencer Pahlke and Andrew McDevitt. Walkup lawyers "retired" from the squad include Daniel Kelly, Rich Schoenberger, Kevin Domecus, and Mike Kelly.

In this year's championship game, the Mouthpiece got down two runs in the first inning, but answered with seven runs in the first three innings. The IJA responded in the top of the fifth with a big inning, closing the lead to just one. The Mouthpiece plated seven runners in the bottom of the fifth, and then rode their traditionally stellar defense to a final winning score of 15-9.

Notable standouts for the evening were Jim Treppa and Steve DalPorto. We congratulate Coach Saeltzer, and all of the members of the team, on this milestone win!

Rear (L-R): Conor Kelly, Andy McDevitt, Spencer Pahlke, Gus Panagotacos, Doug Saeltzer, R.J. Waldsmith, Jeff Smith, Brendan Fogarty, Steve DalPorto
Lower (L-R): Kirk Morales, Jim Treppa, Steve Gorog, Jim McPherson, Elgin Lowe

Recent Cases

Vehicular Negligence

Cycle Rider v. Petroleum Distributor

In Cycle Rider v. Petroleum Distributor (court and case number confidential), Michael Kelly and Paul V. Melodia negotiated a settlement in the amount of $4,500,000 on behalf of a 50-year-old attorney who suffered a left leg below-the-knee amputation when he was struck by a left turning semi-truck. Plaintiff was amnesic for the events of the accident. He had been traveling straight on a downtown street approaching a busy intersection. The defendant truck driver stopped for a red light, and was in the process of turning left when the collision occurred. The defendant claimed that the plaintiff was speeding without his lights on, and had been drinking as evidenced by a blood alcohol in excess of .12. Paul and Mike demonstrated through the testimony of both experts and non-party witnesses that the headlight of the motorcycle was on at the time of the accident; the defendant's view of the street on which plaintiff was approaching was unobstructed; and the post-impact trajectory of the plaintiff's motorcycle conclusively proved he was not speeding. Medical expenses exceeded $450,000. The wage loss claim was highly disputed as the plaintiff's occupation involved work in Africa and the Middle East as a human rights activist on behalf of various international NGOs. In addition to recovery from the defendant, Paul and Mike also achieved a substantial reduction (more than 50%) in the amount repaid to medial lien claimants.

Pedestrian v. Motorist

In Pedestrian v. Motorist (San Mateo Sup. Ct.), Douglas Saeltzer, Richard Schoenberger, and Matthew Davis negotiated a seven-figure partial settlement on behalf of two sisters who were crossing El Camino Real in a marked crosswalk at an uncontrolled intersection in the City of Atherton. The partial settlement was made with the vehicle driver who struck them. Both sisters sustained major orthopedic injuries, incurring more than half a million dollars in medical bills. Litigation continues against Caltrans, who is responsible for the safety of both vehicles and pedestrians on El Camino (State Route 82). The facts of the case parallel those of Liou v. State of California, a dangerous condition of public property case in which Rich and Doug obtained a $12 million verdict against Caltrans in 2010.

Cyclist v. Auto Driver

In Cyclist v. Auto Driver (San Mateo Sup. Ct.), Rich Schoenberger and Emily Polcari negotiated a $950,000 settlement on behalf of a 55-year-old bicyclist who was struck from behind by a following automobile. The force of the impact propelled the plaintiff back onto the hood and roof of the car, from which he rolled onto the roadway striking his head and sustaining a traumatic head injury. While his recovery was good, some lingering memory deficits and other evidence of mild traumatic brain injury persisted. As part of the settlement, Rich and Emily were able to negotiate an almost 50% reduction in the $261,000 in liens asserted against the recovery.

Motorist v. State of California

In Motorist v. State of California (S.F. Sup. Ct.), Douglas Saeltzer and Emily Polcari concluded a combination motor vehicle/respondeat superior claim against the State of California and a negligent automobile operator on behalf of a 37-year-old self-employed entrepreneur who sustained fractures to his legs, ribs and clavicle when he was struck while riding his motorcycle on a San Francisco street. The defendant vehicle operator who was in the course and scope of her work with San Francisco State University, was leaving her residence en route to her office when she violated the plaintiff's right of way. The defendant had a personal $100,000 automobile policy. The State claimed that her driving at the time of the collision was outside the course of her employment. The State contributed $750,000 towards final resolution. As part of the settlement, Doug and Emily were able to negotiate reduction of more than $275,000 in medical liens.

Premises Liability

Visitor v. Development Ventures

In Visitor v. Development Ventures (S.F. Sup. Ct.), Richard Schoenberger and Sara Peters represented a 19-year-old who sustained second and third degree burns over 85% of his body and endured dozens of surgeries following a fire and explosion in a vacation home in the Sierra foothills. The property owners (who were also the sole shareholders of a contracting corporation which had built homes on properties purchased by them) had only $300,000 in liability coverage and had declared personal bankruptcy. Rich and Sara brought suit against the contracting corporation under the theory that the bankrupt shareholders and their closed corporation were a joint venture which, if proved, would render the company vicariously liable for the acts of the individual defendants. The business's insurer vigorously defended this claim and began the litigation threatening a malicious prosecution action as well as demanding an immediate dismissal with prejudice. After hundreds of hours of investigation, many days of depositions and the defeat of the contractor corporation's summary judgment motion, Rich and Sara obtained a policy limits resolution in the amount of $3 million. The young plaintiff is using his recovery to obtain ongoing medical and rehabilitative care, attend college and pursue a career, consistent with his amazing and positive attitude.

Tenant v. Landlord

In Tenant v. Landlord (Marin Co. Sup. Ct.), Conor Kelly negotiated a six-figure mediated on behalf of a 57-year-old woman who sustained second and third degree burns when the trailer home which she was renting from the defendant caught fire from unknown sources. Conor alleged that the defendant failed to adequately maintain the electrical outlets in the rented trailer, resulting in uninhabitable living conditions. Defendant alleged that the fire

resulted from plaintiff's own negligence in installing and operating a cooking burner fueled by two small propane tanks inside the trailer. The defendant further alleged that pursuant to her rental agreement plaintiff was responsible for paying for her own gas, propane and electricity, and that she had at no time advised the defendant of any shortcomings or problems with the trailer home.

PRODUCT LIABILITY

Consumer v. Nutritional Supplement Store

In Consumer v. Nutritional Supplement Store (court and case number confidential), Matthew Davis and Emily Polcari successfully resolved claims against a store and product distributor for more than $2 million on behalf of a man who purchased over-the-counter body building supplements which destroyed his liver. The injured plaintiff wanted to join the armed forces but was 10 pounds below the weight threshold for his height. He spoke to a clerk at the retailer who sold him a stack of five body building supplements. Plaintiff took the pills as the clerk instructed, gained weight and passed the physical. However, he became violently ill the night before his ship date. E.R. doctors determined he had no liver function and he was rushed for an emergency liver transplant. A toxicologist determined that the supplements contained misbranded and illegal drugs which were responsible for the liver damage. The owner of the store refused to give a deposition on Fifth Amendment grounds. His suppliers and distributors had no place of business. Matt and Emily settled the case against the store owner for his policy limits, and then located a middle-man who distributed three of the supplements, thereafter negotiating a settlement with his carrier.

POLICE MISCONDUCT

Estate and Heirs of Octogenarian v. Police Department

In Estate and Heirs of Octogenarian v. Police Department (USDC, No. Dist. Cal.), Doris Cheng and Matt Davis settled a federal civil rights case for $1.5 million on behalf of the estate and heirs of an 89-year-old man who died several months after being mauled by a police department K9 dog. During a neighborhood search for robbery suspects, police officers hoisted a K9 over a fence and into a residential backyard where the dog bit the innocent decedent on the leg. He developed gangrene and underwent an above-the-knee amputation 10 days later. The decedent endured significant pain and suffering and died of heart failure two months later. Under California state law, a claim for pain and suffering damages "dies" with the plaintiff. However Doris and Matt utilized a line of federal civil rights cases which permit a decedent's estate to claim pre-death pain and suffering damages. Matt and Doris filed suit in federal court alleging the officers violated the decedent's federally protected civil rights. The court denied defendants' motion for summary adjudication of the civil rights claim. The case settled three days before trial.

GOVERNMENT LIABILITY

Paralyzed Cyclist v. State of California

In Paralyzed Cyclist v. State of California (Alameda Co. Sup. Ct.), Richard Schoenberger and Andrew McDevitt obtained a settlement of $5,750,000 on behalf of a 25-year-old crane mechanic who sustained a spinal cord injury when he was injured while riding his motorcycle in San Leandro. The plaintiff was struck by a State employee who was making a turn across five lanes of traffic at a blind curve. The State initially denied liability for the collision, arguing that plaintiff, who was driving on a suspended license, was at fault because he was driving in excess of the 40 mph speed limit. Additionally, the defendant faulted the plaintiff for failing to timely apply his brakes. The reconstruction commissioned by Rich and Andrew demonstrated that the State employee had the best, last opportunity to avoid the collision, and that the injury would have been avoided had the driver properly scanned the roadway before driving across five lanes of traffic. During the collision, plaintiff's spinal cord was injured when his thoracic spine was compressed due to his head impacting the side of the State vehicle. He sustained fractures to his T2, T3 and C1 vertebrae and was rendered a paraplegic. The case resolved at mediation. Under the terms of the settlement, both cash and future structured payments were contributed by the State.

Sara C. v. South Bay Town

In Sara C. v. South Bay Town (Santa Clara Sup. Ct.), Michael Kelly and Spencer Pahlke resolved a dangerous condition of public property case against the Town of Los Gatos arising from an accident that occurred on Blossom Hill Road. Plaintiff was loading a child's bicycle into her SUV having parked perpendicular to the highway in a gravel parking area abutting Blossom Hill Park. A motorist who had been drinking was passing a left turning vehicle on the right and drove through the parking area striking her and causing major lower-extremity injuries. Mike and Spencer canvassed the neighborhood for witnesses to other similar incidents to prove that the negligent motorist – like many in the area – used the parking area as a passing lane. After multiple factual depositions and expert disclosure, a motion for summary judgment was granted in favor of the town on the dangerous condition issue. Mike and Spencer obtained reversal in a published decision (Cole v. Town of Los Gatos (2012) 205 Cal.App.4th 749), then resolved the matter through negotiation following an unsuccessful mediation.

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Recent Cases

Medical Negligence

Patient v. Dermatologist

In Patient v. Dermatologist (confidential settlement), Paul Melodia negotiated a $4 million settlement on behalf of a 22-year-old computer engineer who experienced an eight month delay in the diagnosis of a malignant melanoma, which ultimately compromised both his life expectancy and his earning capacity. When the patient was initially diagnosed, his disease was staged 3C. Such a diagnosis carries a 40% chance of five-year survival. Had the patient been diagnosed in a timely fashion, Paul's expert oncology testimony established that he would have been staged 3A. Such a change in disease staging would have carried with it a 75% chance of five-year survival, and a better than 60% chance of ten-year survival. This proof, pursuant to the holding in Dumas v. Cooney (1991) 235 Cal.App.3d 1593, was sufficient to satisfy the burden of proof on injury causation. Following courses of radiation and chemotherapy, the plaintiff has returned to his employment, but continues to carry highly guarded prognosis.

Paralyzed Patient v. Emergency Physicians

In Paralyzed Patient v. Emergency Physicians (court and case number confidential), Khaldoun A. Baghdadi and Emily Polcari resolved a medical negligence claim against two emergency room physicians for $1,800,000 on behalf of a 67-year-old man who presented to the Emergency Department in a rural Southern California facility with complaints of neck and back pain and inability to walk. The patient was suffering from a rare condition (retropharyngeal phlegmon). At the Emergency Department he was treated with antibiotics that did not cover Methicillin-Resistant Staphylococcus Aureus (MRSA). He was rendered paralyzed less than 24 hours after he arrived at the hospital when the infection caused an infarct, cutting off the blood supply to his cervical spinal cord. The physician defendants argued that the standard of care did not require coverage for MRSA until after the results of blood cultures were obtained. They further argued that the patient caused his own injuries by failing to comply with his physician's order that he go to the Emergency Department several days before. Finally, they claimed that earlier administration of an antibiotic with coverage for MRSA would not have prevented the infarction because the antibiotics would have taken several days to curb the severe infection. Khaldoun and Emily successfully reached the mediated settlement during expert discovery.

Toddler v. Southern California Clinic

In Toddler v. Southern California Clinic (court and case number confidential), Khaldoun Baghdadi and Melinda Derish negotiated a seven-figure settlement on behalf of a toddler who was born with a genetic defect after health care providers failed to do proper prenatal genetic screening and counseling. The defendant clinic participated in the California Prenatal Screening Program. The program's goal is to identify pregnant women at increased risk for birth defects. The mother began prenatal care early in the first trimester and was eligible for first trimester screening. Because the mother chose to participate in the California program the defendant should have offered testing. Despite the fact that the chart indicated the mother had consented to screening, the clinic did not perform it, rationalizing that most women refuse nuchal translucency ultrasound. Khaldoun and Melinda proved that the nurse practitioner who was seeing the mother did not understand the benefits of nuchal translucency ultrasound and therefore it was impossible for her to properly counsel the patient about it.

Survivors v. Wilderness Lodge

In Survivors v. Wilderness Lodge (court and case number confidential), Khaldoun A. Baghdadi and Emily Polcari settled a wrongful death and negligent infliction of emotional distress case arising out of the death of a 61-year-old man. In September of 2011, the decedent and his family were staying at the wilderness lodge when the decedent and his daughter went on a horseback trip. While in the wilderness, the decedent had a myocardial infarction. The guide called the lodge to report the incident. The lodge owner told the family that the decedent likely had altitude sickness. Instead of calling 911, the lodge owner called a nearby utility company helicopter which happened to be in the area and asked that the helicopter bring the decedent back to the lodge. The lodge owner then directed the decedent's wife to drive him to the nearest hospital, which was over an hour away. The decedent went into cardiac arrest when the family was minutes away from the hospital. The lodge argued that calling 911 would have been futile because it would have taken an ambulance or medical helicopter too long to arrive, based on its past experiences with the County's emergency response system. Khaldoun and Emily were able to rebut this argument through depositions of County personnel and the County's records of its emergency response times. The family's goal in filing the lawsuit had been to prevent a similar incident in the future. As part of the resolution the defendant agreed to change its policies for summoning emergency medical aid.

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. Visit us on the web at www.walkuplawoffice.com.

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