

FOCUS

on torts

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Fall 2015

National Action Filed in Volkswagen Debacle

Our firm is proud to join others around the country in the prosecution of cases stemming from Volkswagen's fraudulent practices in connection with its "clean diesel" vehicles. Though litigation and discovery are in their initial stages, it is clear that the automaker has engaged in one of the largest and most widespread cases of criminal and civil fraud in history. The Volkswagen Group of America's mission statement is to "bring vehicles to the U.S. that marry the science of engineering and the art of styling, with the goal of offering attractive, safe, and eco-conscious automobiles that are competitive and set world standards in their respective classes."

On September 18, 2015, the United States Environmental Protection Agency

issued a notice of violation of the Clean Air Act to Volkswagen, after it was determined that the automaker had intentionally programmed diesel engines to activate certain electronic exhaust controls only during laboratory emissions testing. The unlawful programming caused the vehicles' nitrogen oxide (NOx) output to meet U.S. standards during testing, but produce up to 40 times higher output in real-world driving. Model years 2009 through 2015 are affected.

In the United States, the "clean diesel" market segment was essentially created, designed and cultivated by Volkswagen. While less than 1% of automobiles sold domesti-



cally are powered by diesel engines, approximately 23% of automobiles sold by Volkswagen are diesels. Their diesel cars constitute the substantial majority of small diesel automobile sales in the U.S. In addition to touting the low emissions of these cars, Volkswagen extolled their fuel efficiency, claiming that some could achieve over 40 miles per gallon of fuel and travel over 800 miles on a tank.

Walkup partners Mike Kelly and Khaldoun Baghdadi, along with a consortium of trial

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Rich Schoenberger Named Best Lawyers "Lawyer of the Year"

We are pleased to announce that all six of our partners have been selected by the prestigious *U.S. News / Best Lawyers* publication for inclusion in their 2016 "Best Lawyers" list. Even more impressively, Rich Schoenberger was selected by his peers as "Lawyer of the Year" for Northern California in the specialty of Personal Injury.

A Past-President of the San Francisco Chapter of ABOTA, Rich has accumulated a superior record of seven and eight-figure verdicts and

settlements across a wide spectrum of case types. His work in the courtroom has previously earned him the coveted San Francisco Trial Lawyers "Trial Lawyer of the Year" Award. Recognized as one of the premiere advocacy skills teachers in the country, his volunteer work includes countless hours teaching at local law schools and for the National Institute of Trial Advocacy (NITA).

Inclusion in *Best Lawyers* is based entirely on peer-review. The methodology is designed to capture, as accurately as possible, the consensus opinion of leading lawyers about the professional abilities of their colleagues within the same geographical area



Walkup "Best Lawyers"

Seated, L-R: Khaldoun Baghdadi, Matt Davis, Rich Schoenberger;

Standing, L-R: Doug Saeltzer, Doris Cheng, Michael Kelly

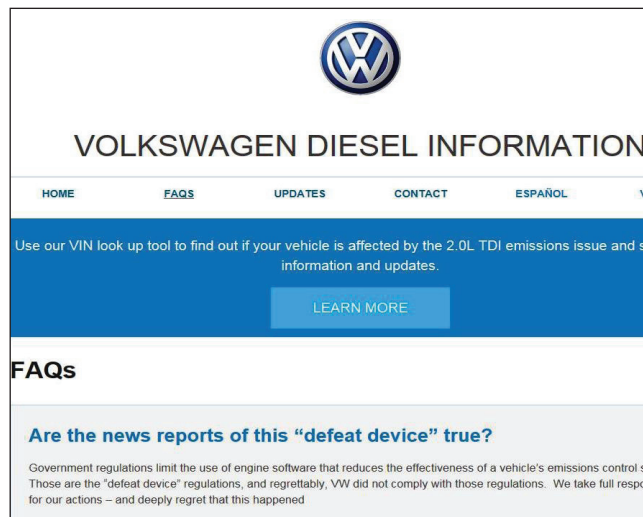
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National Action Filed in Volkswagen Debacle

Continued from page one

lawyers across the nation, have filed a class action complaint in the United States District Court in New Jersey, where Volkswagen is headquartered. Our complaint alleges that since 2009, over 482,000 Volkswagen and Audi diesel vehicles were sold with an electronic “defeat code” to create the impression of high fuel efficiency and performance, along with extremely low emissions. Volkswagen aggressively marketed these vehicles as environmentally friendly. In truth, these performance characteristics could only be achieved by way of the unlawful and fraudulent defeat code. Our clients are some of the countless consumers across the country who purchased a VW diesel vehicle for the specific reason that they were led to believe it was environmentally friendly. Our complaint seeks monetary damages, as well as injunctive relief to prevent Volkswagen from continuing its unlawful practices.

At a September 21, 2015, press conference for the launch of the 2016 Passat, the



head of Volkswagen U.S. operations admitted that “we were dishonest to our customers,” and “we totally screwed up.” Two days later, Volkswagen Group CEO Martin Winterkorn resigned as a result of the disclosure. VW’s head of brand development Heinz-Jakob Neusser, as well as Audi research and development head Ulrich Hackenberg, were suspended.

Volkswagen has announced plans to spend U.S. \$7.3 billion on rectifying the emissions issues, and plan to refit the affected vehicles as part of a recall campaign. The company also says it is trying to determine whether even more of its cars than previously thought were fitted with software used to cheat on U.S. emissions tests. The automaker previously maintained that the defeat device was installed on cars with variants of the EA 189 diesel engine built to the “Euro 5” emissions standard. The company is now checking whether models with the EA 288 diesel motor built to the same emis-

sions standard may also contain the defeat code. All told, it is estimated that 11 million cars worldwide are affected.

In light of our unique experience and history in automotive product defect cases, we look forward to putting that experience to work on behalf of consumers as this case unfolds. ▲

Firm Appointed to Leadership Position in Bard IVC MDL

On October 29, 2015, the first status conference took place in IN RE: Bard IVC Filters Products Liability Litigation in the US District Court for the District of Arizona. Present at the hearing were Walkup partners Mike Kelly, Doug Saeltzer and Matt Davis, who attended in their capacity as members of the plaintiffs’ steering committee. The hearing followed a reference in August 2015 by the Judicial Panel on Multidistrict Litigation to Judge David Campbell for consolidation of all cases against Bard.

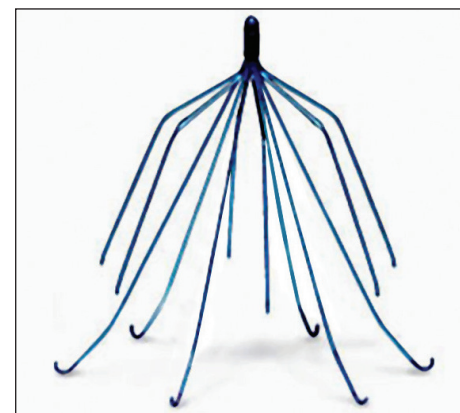
IVC filters are designed to filter or “catch” blood clots that originate in the legs and prevent injury and/or death before clots reach the lungs. The usual therapy for a patient at risk for blood clots traveling from the legs to the lungs

is anticoagulation drug therapy, such as Heparin or Coumadin. IVC filters are inserted in patients when medications to dissolve clots cannot be used, or are ineffective.

Investigators in several studies have found that the prolonged presence of certain retrievable IVC filters are linked to serious, even fatal, complications including:

- device fracture
- device migration, and migration of fracture fragments
- perforation of arteries or organs, and
- serious complications from retrieval surgeries necessitated by a device malfunction

The removal of IVCs requires invasive surgery and can pose significant risks. A report published in 2015 found that the prolonged presence of IVC filters was associated with retrieval failure rates higher than 40%. In a 2014 safety communication, the FDA recommended



that physicians responsible for the care of patients with retrievable IVC filters consider removing the filter “as soon as protection from pulmonary embolism is no longer needed.” The FDA further noted that the risk/benefits of IVC filters “begin to favor removal of the IVC filter between 29 and 54 days after implantation.”

Counsel wishing to refer or associate with us in the prosecution of Bard IVC filter cases should contact Doug Saeltzer. ▲

FATAL FLAW IN KAISER
PHONE SYSTEM RESULTS
IN \$2.4M VERDICT

Walkup attorneys Michael A. Kelly and Valerie Rose obtained a binding arbitration award of \$2,400,000 in favor of the surviving family members of a 42-year-old Alameda County woman who died when her messages for help to a Kaiser advice nurse were never given to her doctors.

The Arbitrator's verdict followed five days of evidence and testimony and came after Kaiser refused to negotiate with the family or make any pre-trial offer of settlement. At issue was Kaiser's practice of using telephone advice nurses for screening and then keeping the information obtained by them secret from treating doctors in order to save time and money. By statute the health care giant must record such telephone calls, but the for-profit Permanente Medical Group decided that involving patients' doctors in the information review process would take too much of their time.

The patient had twice called with complaints of worsening symptoms of cough and chest pain consistent with pneumonia. Instead of directing her to an emergency room, she was routed to yet another telephone evaluation with a Kaiser internal medicine physician who decided (without a physical examination) that she did not need to be seen. He knew nothing of her prior calls to advice nurses or her worsening complaints. For that reason he missed the fact she had a rapidly developing strep pneumonia which worsened over the next 24 hours. By the time she was seen in the ER on the fifth day of her illness, she was in irreversible septic shock which claimed her life. Kelly commented after the verdict, "This advice nurse system is supposed to be the front door to the Kaiser system - the problem is, once you're through the door, the doctors have no idea what information the patient has given to the gatekeeper."

Kelly also states that,

Firm Associated to Try 4th Amendment
Arkansas Police Shooting Case

On December 9, 2010, a white Little Rock, Arkansas police officer, moonlighting as security guard, shot and killed 67-year-old Eugene Ellison, an African-American Vietnam veteran, in the apartment where he had lived peacefully for 13 years. In justification of the shooting the offending officer alleged that Mr. Ellison used his walking cane as a deadly weapon. The department's homicide division conducted an internal investigation of the shooting and found no misconduct.

Michael Laux of Chicago's Laux Law Group has associated the firm to try the Ellison matter. The trial is presently set to proceed in January 2016. Doris Cheng will be the Walkup partner with lead responsibility on the case at trial.

On October 17, 2011, Mr. Ellison's son, a Little Rock police officer himself, filed a lawsuit in the Eastern District of Arkansas, Ellison v. Leshner, et al., which alleged Constitutional and state law violations. In October 2013, the trial court denied the LRPD officer's qualified immunity defense, a decision that was appealed to the Eighth Circuit Court of Appeals. In September 2015, the Court of Appeals affirmed the trial court. Amidst the recent national focus on unjustified police-involved shootings and the steady stream of news reports of police misconduct, the Eighth Circuit agreed that there were too many conflicting facts to cloak the offending officers with qualified immunity.

Evidence amassed during discovery points

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Suit against officers OK'd in 2010 death

Appeals court clears path for some claims in shooting


LINDA SATTER
ARKANSAS DEMOCRAT-GAZETTE

on Dec. 9, 2010, But Miller refused to dismiss allegations against Leshner and McCullis of illegal entry, use of unlawful force and

to not only the reckless shooting of an unarmed man, but also to an illegal, unjustified entry into his home. Though the officers claim they used pepper spray on Mr. Ellison prior to the shooting and that it had no effect on him, there was no mention of pepper spray in the official reports of the first responders, the emergency room, or the county coroner. The state crime lab found no pepper spray on Mr. Ellison's body, eyeglasses or clothing during its post-mortem examination and testing.

Mr. Ellison's family has been devastated by the shooting. To say there is great irony in the fact that Mr. Ellison, his sons, and his brothers have devoted much of their collective lives to public service in various branches of the military and the Little Rock Police Department would be an understatement. The firm is proud to represent the Ellison Family in their search for justice. 

AACC CALL DETAIL REPORT CONFIDENTIAL									
Script/Protocol Questions/Recommendation:									
Call	Date	Time	CALL ID	SEN ID	SNP ID	SNP ID	QUESTIONS	R S	RECOMMENDED P CATEGORY
JAN13	10:42	19	35432	2990			Wheezing that does not clear with cough or clearing nasal passages (may stay here if wheeze ONLY with URI, benefited from inhaler prescribed for URI in past and requests to have inhaler again, otherwise see Asthma /Wheezing protocol) [History of COPD/emphysema] (may use this protocol if ONLY sinus symptoms, otherwise see COPD/Emphysema protocol) Recent URI, now has pleuritic chest pain (sharp pain with inspiration, cough) and rapid/ shallow breathing Member requests advice for home care	N	
DURING								Y	APPOINT OFFICE HOURS TODAY:
								Y	Give Advice Advice given

"This tragedy has left a husband who will miss 40 years of his wife's love, affection, and support, and two beautiful little girls aged 6 and 9 who will miss the nurturing, mentoring, guidance and love only a mother can give." Regarding the California "MICRA" law's requirement that survivors split a total of \$250,000 in compensation for the loss of a mother and wife's love, care, comfort, society, moral support, and intimate relations, Kelly commented, "It's an insult to this family. This artificial limit makes death an affordable cost of doing business for Kaiser." 

Unanimous Appellate Panel Affirms \$38 Million Verdict

The First District Court of Appeal has finally brought to conclusion litigation which began in 2010 when 19-year-old Kody Myrick sustained incomplete quadriplegia because his physicians failed to diagnose and treat an evolving stroke. With its unpublished opinion in Myrick v. Hansa, A139810 (S.F. Sup.Ct. No. CGC-11-515329), the Court of Appeal affirmed the verdict of \$38.6 million obtained by Melinda Derish and Conor Kelly in 2013.

On July 31, 2010, 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 hospital. The father did not know this hospital had to transfer patients who needed sophisticated stroke treatment to a tertiary care 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. Four hours after the onset of symptoms, the E.R. physician telephoned the on-call hospitalist, defendant S. Nick 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. The next morning he experienced a sudden deterioration. By the time the stroke was properly diagnosed, Kody had suffered permanent damage to his brain stem.

Suit was filed against multiple defendants. Prior to trial all of the defendants settled except defendant Hansa, whose insurance carrier, The Doctors Company, refused to pay his \$1 million policy limit.

Melinda and Conor persuaded the jury that Hansa's negligence substantially contributed to Kody's permanent brain stem injury and quadriplegia. They established that he vi-

olated 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.

During trial the doctor argued that he did not know the patient was undergoing a stroke, that it would have been impossible to transfer the plaintiff to a tertiary care center with the capability to treat the stroke even if the diagnosis had

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA	
FIRST APPELLATE DISTRICT	
DIVISION THREE	
KODY PAUL MYRICK, Plaintiff and Appellant, v. S. NICK HANSA, Defendant and Appellant.	A139810 (City & County of San Francisco Super. Ct. No. CGC-11-515329)
S. Nick Hansa, M.D., appeals a medical malpractice judgment against him, in favor of plaintiff Kody Paul Myrick. The claim arises from Hansa's failure to take	

Court of Appeal First Appellate
FILED
FEB 27 2015
Diana Herbert, Clerk
by _____ Dep

been made, and that the brain injury was already complete before defendant Hansa assumed care of the patient.

After a three-week trial, the San Francisco County jury rejected each of the doctor's arguments. They returned a unanimous verdict on liability and causation and assigned 40% of the liability to defendant Hansa.

On appeal, Hansa focused on an argument that the plaintiff had not proven causation because he "failed" to present evidence from a receiving hospital that it would have accepted the plaintiff for transfer and performed the thrombectomy.

A unanimous First District panel affirmed the judgment in its entirety. In rejecting the defendant's argument that the plaintiff "failed" to produce testimony from staff at UCLA, the court relied on Viner v. Sweet (2003) 30 Cal.4th 1232, 1242 and explained: "To meet his burden...Plaintiff was entitled

to rely on circumstantial evidence of causation." The court found this circumstantial evidence was provided by reviewing the record of the expert testimony that was presented during the plaintiff's case in chief.

The court noted the neurointerventional radiologist (from San Francisco) had testified: "both UCLA and Cedars Sinai Hospital were 'major tertiary care centers that have neurointerventional radiologists' and that, in his expert opinion, any such 'referral center' would be expected to treat acute stroke 24 hours a day, seven days a week.

"This evidence is sufficient to establish, to a reasonable degree of probability, the availability of a neurointerventional radiologist to accomplish the procedure in the early morning hours... in the Los Angeles area." The court also cited testimony from plaintiff's experts that established, to a reasonable degree of medical probability, that a neurointerventionalist at a nearby tertiary care center would have performed a thrombectomy in time to produce a better outcome for the patient, had Hansa not failed to act.

The court also agreed with the plaintiff's claim on his cross-appeal that the amount of prejudgment interest should be calculated in steps, subtracting the amounts of the settlements with the other defendants only at the time those settlement payments were received. Melinda and Conor's argument relied upon Deocampo v. Ahn (2002) 101 Cal.App.4th 758. The court agreed: "...the approach adopted in Deocampo is consistent with the purpose of [Civil Code] section 3291 to ensure that plaintiff is fully compensated for his or her loss to the extent that the negligence or fault of others has contributed to it... To ensure that plaintiff is fully compensated for his loss, prejudgment interest must be calculated based on the full amount of the jury's verdict and reduced by each settlement payment at the time that the payment was received. The Deocampo approach is also consistent with the policy favoring settlements." ▲

WALKUPDATES

Mike Kelly served as chair for the annual CAOC-SFTLA sponsored "Kaiser Seminar" held in San Francisco. The afternoon event featured eight different medical negligence practitioners who spoke on topics peculiar to the Kaiser Arbitration system. **Mike** also presented at the 360 Advocacy Las Vegas "Go Big or Go Home" program at the Wynn Convention Center. His topic was "Using Analogies and Metaphors to Maximize Damages." ...**Andrew McDevitt** served as 2015 Chair of the Bar Association of San Francisco's Delegation to the California Conference of Bar Associations. The three day conference took place in Anaheim. In April, **Andrew** spoke at AIEG's Spring Meeting focused on trucking and big rig accidents, his topic was "Driver Fatigue." Currently, **Andrew** is serving on the Executive Committee of the Bar Association of San Francisco's Barristers Litigation Section. ...**Spencer Pahlke** married Justina Sessions of Kecker & Van Nest LLP, in San Francisco

in September. **Spencer** is teaching Intensive Trial Advocacy as a lecturer at UC Berkeley this fall. His UC Berkeley Law School Trial Advocacy team won the prestigious 2015 NITA Tournament of Champions held at Baylor University. ...**Conor M. Kelly**, together with other members of his pupillage group, presented a CLE to the Edward J. McFetridge American Inn of Court concerning the applicability of California's Rules of Professional Conduct to California lawyers while they are engaged in non-work settings. **Conor** was

also invited to lecture at the 53rd Annual CAOC Convention on the use of electronic medical records at deposition and trial. ...**Rich Schoenberger** continues to teach English, math and mock trial on a weekly volunteer basis at Bridge the Gap in Marin City, California. He was also honored with appointment to the Northern California ACTL Membership Committee Vice-Chair position. Most recently **Rich** was invited to present at the ABOTA Teacher's Law School on significant Constitutional decisions that have shaped

was appointed as a contributing editor of the Rutter Group "Claims and Defenses" guide. Sara is responsible for the medical malpractice section of the guide. She was also appointed CLE Vice-Chair of the BASF Barristers Litigation Section. ...**Khalidoun Baghdadi** celebrated his 17th year with the firm in October. He presented on the use of Daubert challenges in traumatic brain injury cases at the September 360 Advocacy Group conference in Las Vegas. He has also been asked to moderate a judicial panel on State-Federal Coordination at the upcoming California Complex Courts Symposium.

...**Doug Saeltzer** has been invited to speak at the CAOC Don Galine Seminar in Hawaii in December. **Doug** will also be teaching at the upcoming Western Regional NITA Deposition Skills Program at UC Berkeley. ...**Valerie Rose** spoke as part of a panel discussion hosted by the Boalt Hall Women's Association, discussing professional issues facing women in oral advocacy. Additionally, she co-authored an article with **Sara Peters** in *Plaintiff Magazine* on how to deal with hostile investigating police officers. ...

Doris Cheng was appointed as a

co-author of the seminal treatise on personal injury practice, the Rutter Group's California Practice Guide - Personal Injury, and succeeds former Walkup partner **Daniel J. Kelly** who was one of the three original authors of the guide. Additionally, in October **Doris** was honored with the 2016 Professional Achievement Award by her law school alma mater, the University of San Francisco. Finally, she was elected to serve next year as a representative to the National ABOTA Board on behalf of the San Francisco Chapter of ABOTA. ▲



Asher Peters (with mom Sara Peters); Jack & Kiera Polcari (with mom Emily Wecht Polcari); Violet Gosling (with mom Valerie Rose); Brynn Kelly (with dad Conor Kelly); Madison McDevitt (with dad Andy McDevitt)

our country. ...**Melinda Derish** served as Chair for an SFTLA conference, "Anatomy for Lawyers." **Melinda** joined two other MDs and two lawyers on the panel. Her topic was "Abdominal Anatomy - With a Focus on Trauma." She was also an invited panelist at the CAOC Kaiser Seminar where she spoke on "Obtaining and Using Kaiser Generated Policies, Procedures, Clinical Practice Guidelines, and Medical Literature." **Melinda** also served as faculty at this year's USF Law School Intensive Advocacy program. ...**Sara Peters**

Rich Schoenberger Named Best Lawyers "Lawyer of the Year"

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and legal practice area. Best Lawyers employs a sophisticated, conscientious, rational, and transparent survey process designed to elicit meaningful and substantive evaluations of the quality of legal services. "Lawyer of

the Year" recognitions are awarded to individual attorneys with the highest overall peer feedback for a specific practice area and geographic location. Only one lawyer is recognized as the "Lawyer of the Year" for each specialty and location.

Also honored by Best Lawyers were Mike Kelly (Mass Tort Litigation/Class Actions – Plaintiffs; Personal Injury Litigation - Plaintiffs), Matt Davis (Personal Injury Litigation - Plaintiffs), Doug Saeltzer (Personal Injury Litigation – Plaintiffs;



Product Liability Litigation – Plaintiffs), Khalidoun Baghdadi (Personal Injury Litigation – Plaintiffs; Product Liability Litigation – Plaintiffs) and Doris Cheng (Medical Malpractice Law – Plaintiffs).

We salute all of our 2015-2016 honorees. ▲

RECENT CASES

VEHICULAR NEGLIGENCE



Tennis Coach v. Local Trucker

In Tennis Coach v. Local Trucker (Sacramento Sup. Ct.), Douglas Saeltzer and Conor Kelly obtained a \$6,000,000 settlement on behalf of a 25-year-old tennis instructor who suffered major lower extremity injuries against a driver who collided head-on with the plaintiff's vehicle. The client was returning home after providing tennis lessons at a club on the Sacramento Delta. The defendant driver was returning to his company's headquarters in Rio Vista in an F-250 pickup truck. The crash was unwitnessed. After the collision the defendant denied crossing into plaintiff's lane of traffic, and told police that the plaintiff had caused the collision. Because of his injuries, the plaintiff had no recollection of the collision. Doug and Conor obtained cell phone records which showed defendant making two separate phone calls in the minutes preceding the collision. Analysis of the physical evidence also established the collision occurred on plaintiff's side of the road. Past medical specials totaled \$963,000. Following the accident plaintiff returned to college, retaining his tennis scholarship. The case settled following factual depositions, with a policy limit demand supported by four expert reports demonstrating future damages in excess of \$3,000,000.

Couple v. Hauler

In Couple v. Hauler (Sonoma Sup. Ct., case number confidential), Richard Schoenberger and Matthew Davis concluded an automobile negligence case on behalf of two senior citizens who were driving down Highway 101 when a commercial truck driver made an unsafe left turn into the path of their vehicle. As a result of the crash, both plaintiffs suffered traumatic brain injuries with resulting decrease in their quality of life. Given the parties' injuries, neither the driver of the commercial truck nor the plaintiffs could remember the circumstances surrounding the accident. Thus, liability for the accident was contested. Defendant argued that the plaintiffs were driving without their headlights on. Rich and Matt secured testimony from a witness who saw the plaintiffs drive away from his home that evening with their headlights on. The site of the accident was 20 miles from that location. Rich and Matt argued that it was inconceivable that the couple would have travelled that distance at night without noticing that their headlights were turned off. The defendant was self-insured for the first \$1,000,000 with excess insurance on top of the self-insured retention. We secured a confidential seven-figure settlement for the couple.

Elderly Pedestrian v. Auto Driver

In Elderly Pedestrian v. Auto Driver (S.F. Sup. Ct.), Spencer Pahlke secured a \$1,000,000 policy limit settlement on behalf of the family of a 79-year-old woman who was fatally injured after being struck by the defendant automobile driver while she was walking as a pedestrian. Prior to her death, the decedent was hospitalized for treatment of accident related trauma and incurred substantial pre-death medical expenses. A primary obstacle to settlement were large Medi-Cal and Medicare liens which

required prolonged and extended negotiations. Ultimately, Spencer was able to reduce both liens by more than 30% in order to conclude the case in full.

Auto Passenger v. Semi-Truck

In Auto Passenger v. Semi-Truck (Central Calif., court and case number confidential), Rich Schoenberger and Sara Peters negotiated a major confidential seven-figure settlement after being associated for trial at the eleventh hour on behalf of a young man who was paralyzed in a collision between a delivery truck and the car in which he was riding as a passenger. The claim had originally been filed and prosecuted for more than a year by associating counsel. It was referred for trial with no settlement offer on the table. Rich and Sara's client was a passenger in a car driven by a friend who was speeding to avoid someone who was pursuing him. The defendant trucking company argued that plaintiff's friend, who was driving, bore 100% of the fault for the collision. Making matters more difficult, the investigating police officers prosecuted the friend/driver for speeding, running a red light, intoxication, and a hit and run because he left the scene after the accident. Rich and Sara worked intensively with experts in automobile crash reconstruction and human factors to develop proof that the delivery truck entered the intersection early (just before the light turned green) and that it would have avoided the collision altogether if it had stopped even for a second to wait for the green light. The case was settled in mediation on the eve of trial.

CIVIL RIGHTS



Dorger v. City of Napa

In Dorger v. City of Napa (U.S.D.C. No. Dist. Calif.), Khaldoun Baghdadi and Andrew McDevitt represented the family of a 60-year-old registered nurse who was shot and killed by the Napa Police Department while in a state of severe mental crisis. After a complaint from a neighbor, the deceased was contacted by the Napa Police. He agreed to come out of his residence for what was characterized as a "welfare check." When he walked out of his home he put his hands in the air as directed. Once outside he was approached by officers armed with AR-15 assault rifles, pistols, a Taser, a Sage weapon, and a bean bag shotgun. Drunk and disturbed, he became upset when he saw the officers with their weapons pointed at him. The commanding sergeant broadcasted a go-ahead to shock him with a Taser. One of the officers then yelled "Taser, Taser, Taser." At the same time a second officer fired his AR-15 striking the deceased in the head, instantly killing him. Officers claimed the decedent provoked the shooting by reaching for a gun in his waistband. No gun was ever found. Prior to trial, the City of Napa agreed to a \$700,000 settlement with the decedent's family. In addition, the city agreed to provide crisis intervention training to all patrol officers and supervisory personnel. The training will include an overview of mental illness and teach tactics to be employed to de-escalate situations where persons with mental illness are in crisis.

RECENT CASES

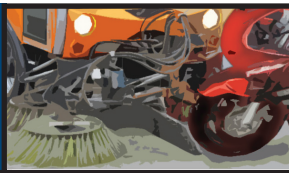
PREMISES LIABILITY



Pedestrian v. Doe Auto Storage

In Pedestrian v. Doe Auto Storage (No. Calif. Sup. Ct., court and number confidential), Richard Schoenberger and Matthew Davis negotiated a \$8,750,000 settlement on behalf of a 59-year-old woman who sustained a traumatic brain injury when she was struck by a vehicle driven by a parking lot attendant in a commercial parking garage. The defendant's employee was retrieving a car, driving at high speed, in reverse, when he struck the pedestrian at three to four times the garage's posted speed limit. The force of the impact caused complex skull fractures, a massive subdural hematoma with a midline shift, and multiple orthopedic injuries. The acute trauma and residual brain injury destroyed our client's physiological and emotional quality of life. The defendant conceded negligence but alleged significant comparative fault on the part of the plaintiff for failing to see and react to the moving vehicle. The benefit package negotiated by Rich and Matt ensures the plaintiff will receive necessary care throughout her life.

GOVERNMENT LIABILITY



Cyclist v. Caltrans Contractor

In Cyclist v. Caltrans Contractor (Bay Area Sup. Ct., court and case number confidential), Michael A. Kelly and Conor M. Kelly negotiated a cash and annuity package having a present value of \$5,000,000 on behalf of a 30-year-old school janitor who was injured while riding his motorcycle home from work on northbound Skyline Boulevard. The roadway was under construction and the plaintiff's direction of traffic had been tapered from two lanes into one. As the plaintiff entered the construction zone, he collided with a commercial street sweeper. Mike and Conor alleged that the street sweeper was performing an illegal turn at the time of the collision. Defendants argued that the plaintiff was speeding and driving recklessly. Mike and Conor retained experts in accident reconstruction, human factors and traffic engineering, and created an animation showing that the plaintiff was driving below the speed limit. The plaintiff suffered fractures to his left hip, ankle, foot and arm. He underwent four surgeries and was left with permanent activity limitations which prevented him from returning to work as a janitor. Prior to settlement the parties attended a full-day unsuccessful mediation as well as multiple failed judicially supervised settlement conferences. Ultimately, the case settled following motions in limine.

Jogger v. United States of America

In Jogger v. United States of America (U.S.D.C. No. Dist. Calif.), Douglas Saeltzer and Justin Chou obtained a \$1,000,000 cash settlement on behalf of a 39-year-old woman who was injured while on her morning pre-dawn jog when she was struck by a left turning vehicle being driven by an employee of The Presidio Trust. The accident occurred at an intersection controlled by a 4-way stop in a residential area of San Francisco. Our client was struck in a marked crosswalk as she jogged across the intersection. She testified that she was well into the intersection and did

not see defendant making his left turn until the moment before impact. Plaintiff suffered a fractured wrist and fractured ankle, both requiring surgery. Doug and Justin retained experts in accident reconstruction, biomechanics, human factors, and forensic animation to create a computer animation depicting the visibility of plaintiff as she left the curb and jogged into the crosswalk. The case settled following expert depositions.

MARITIME INJURIES



Surviving Crewman v. Vessel Owner

In Surviving Crewman v. Vessel Owner (No. Cal. State and Fed Ct.), in a maritime tort action filed in Superior Court, removed to Federal Court, and remanded back to Superior Court for trial, Conor M. Kelly successfully resolved the case of a crew member thrown overboard from a 32-foot racing yacht during the annual Farallon Islands ocean race. The plaintiff sustained major orthopedic injuries and severe emotional distress in this near-death experience. Our client claimed that the defendant vessel owner negligently sailed the vessel into shallow, unsafe waters where breaking waves capsized the boat. The defendant denied any wrongdoing and countered that the incident was caused by a freak wave which could not have been predicted. The defendant also filed a motion for summary judgment asserting the assumption of risk doctrine. Conor defeated the summary judgment motion and demonstrated through expert testimony and digital reenactment that the wreck was caused by a foreseeable wave. The confidential settlement was achieved on the first day of trial after more than three years of litigation.

UNINSURED MOTORIST

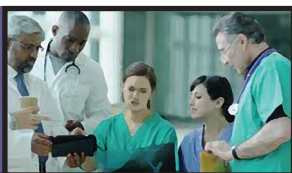


Physician v. Mercury Insurance

In Physician v. Mercury Insurance (Binding Arbitration, Ins. Code Section 11580.1), Spencer J. Pahlke and Sara M. Peters represented a radiation oncologist against Mercury Insurance. In March 2011, the plaintiff was rear-ended at low speed at a busy San Francisco intersection resulting in minimal property damage. The plaintiff hoped she had escaped injury and sought no immediate medical care. In the months thereafter, low-back pain overcame her. The pain forced her to stay home for six months to recuperate. After she returned to work, she had ongoing limitations and discomfort that limited her active lifestyle. After a \$100,000 policy limit settlement from the third party carrier, Spencer and Sara demanded arbitration under a \$250,000 UM/UIM policy issued to her by Mercury. During that litigation, the defense argued aggressively that the plaintiff (its insured) was a liar and exaggerator. Before arbitration, the settlement offer was \$25,000. At arbitration, witnesses, including physician colleagues, testified that our client was the last person in the world who would try to avoid work. The arbitrator, in an extensive opinion, concluded the plaintiff was telling the truth, and awarded her \$421,389.22.

RECENT CASES

MEDICAL NEGLIGENCE



Delivering Mom v. Obstetric Hospital

In Delivering Mom v. Obstetric Hospital (Calif. Sup. Ct., court and case number confidential), Michael A. Kelly and Melinda Derish represented a 38-year-old woman who sustained a major brain hemorrhage due to untreated preeclampsia (high blood pressure). The client was admitted to the hospital for induction of labor with Pitocin. During the last three hours of labor the nurses stopped measuring her blood pressure. Suddenly the patient developed signs of a stroke. A CT scan revealed an acute hypertensive brain hemorrhage. All nurses and doctors claimed the brain hemorrhage was not preventable. During depositions Melinda developed evidence that each defendant contributed to a systematic breakdown of communication between the obstetric team members. The obstetrician's orders required the nurses to notify him for any systolic blood pressure greater than 140, but when the patient's blood pressure spiked above 140, none of the nurses notified the obstetrician. The hospital's policies required the nurses to measure the blood pressure every 15 minutes during the induction of labor, but the nurses ceased measuring the blood pressure because the patient had become uncomfortable wearing the blood pressure cuff. The case settled after the completion of fact discovery for \$5,500,000.

Professional v. General Medical Group

In Professional v. General Medical Group (No. Calif., court and case number confidential), Sara Peters negotiated a \$2,000,000 recovery on behalf of a young professional woman whose healthcare providers failed to make a timely diagnosis of ovarian cancer. The patient, a single mother who was working long hours to support both her child and her extended family, had been seen by her OBGYN for abdominal pain and symptoms. A blood test revealed that she had elevated tumor markers, and an imaging study showed abnormal findings. Despite these red flags, and despite her concern that she might have ovarian cancer, her doctor reassured her that she had nothing to worry about. Three months later, physicians discovered ovarian cancer that had metastasized and was no longer curable. The defendant argued that a three-month delay in treatment, even if negligent, would not have made a difference to the outcome.

Spouses v. Surgery Center Staff

In Spouses v. Surgery Center Staff (confidential), Khaldoun Baghdadi and Melinda Derish obtained a major settlement on behalf of a 59-year-old man who underwent neck surgery at an outpatient surgery center and ended up a quadriplegic due to the defendants' failure to timely recognize and treat a perforated esophagus, a life-threatening intraoperative injury which no one disclosed to the patient or his wife. After a few hours of post-operative care in the surgery center the patient was sent home. Over the next three days he had persistent throat pain and was unable to swallow. He began coughing up bloody mucus. His wife repeatedly called the neurosurgeon, who told her the symptoms would resolve. On the evening of the third post-op day the patient was finally hospitalized, but still the neurosurgeon did not tell the patient, the patient's wife, or

various hospital consultants about the esophageal perforation. Consequently, the perforation was not diagnosed or treated for three weeks. By then it had caused a fungal neck abscess, aneurysmal brain hemorrhage, and quadriplegia. Khaldoun and Melinda proved that the standard of care required the defendants to immediately transfer the patient to a hospital after the surgery. Had that transfer occurred the permanent injuries would have been prevented. During depositions they also developed evidence that the neurosurgeon had traditionally performed this procedure in a hospital until he purchased a part ownership in the outpatient surgery center. The center's profits depended on its doctor-owners acquiring patients who otherwise would undergo surgery in a hospital setting. Neither the neurosurgeon nor the surgery center disclosed these facts to the patient. After Khaldoun and Melinda defeated a summary judgment motion by the surgery center, the case settled for a confidential seven-figure sum.

Wife and Children v. Private Provider

In Wife and Children v. Private Provider (mandatory arbitration, confidential venue), Michael Kelly and Spencer Pahlke obtained a confidential seven-figure MICRA-capped mediated settlement on behalf of the family of a vibrant 74-year-old man who died after undergoing an endovascular aneurysm repair. The decedent agreed to have surgery to treat an abdominal aortic aneurysm based upon his physician's advice that he was a proper candidate, that the surgery was minimally invasive, and that the surgery would result in only a short hospital stay. Intraoperatively the surgeon twice performed angiography to ensure that the patient was not bleeding internally. Both times, the defendant physician wrongly concluded there was no extra-vascular bleeding. The decedent extravasated two days post-op. Plaintiffs' retained experts testified that both angiograms clearly showed that the decedent was bleeding internally and that prompt repair was feasible and would have saved his life. Although in his 70s, the decedent was still working at the time of the procedure. Mike and Spencer produced evidence that he would have continued working for at least another five years. The claim for future loss of earnings, benefits and household services accounted for the recovery in excess of the \$250,000 MICRA cap. ▲

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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