



LINCOLN
GUSTAFSON
& CERCOS, LLP

EXPERIENCE. INTEGRITY. RESULTS.

ISSUE 31

A QUARTERLY PUBLICATION

October 2014

Editor: Chris Schmitthenner, Partner

LGC Prevails On Appeal Before Nevada Supreme Court

Partner [Shannon Splaine](#) and associate [James Barrington](#) prevailed on appeal before the Nevada Supreme Court in the case of [Copper Sands HOA v. Flamingo 94 LLC](#). In an issue of first impression, the Court ruled that subcontractors that are third-party defendants in construction defect litigation may be awarded costs against a plaintiff as a prevailing party even if not named directly by the plaintiff.

The Plaintiff, Copper Sands HOA, originally filed its action against the general contractor and sales broker, Plaster Development Company, alleging construction defects in a condo-conversion project. Plaster Development, in turn, filed a third-party complaint for indemnity against its subcontractors, including LGC's client.

After significant discovery and dispositive motions, the trial court dismissed all of the HOA's claims against Plaster Development. The trial court also awarded

costs to Plaster Development and the third-party defendants against Plaintiff as prevailing parties under NRS 18.020.

The Plaintiff HOA appealed nine issues, including whether third-party defendants are entitled to costs against a party that has not directly sued the third-party defendants. The Nevada Supreme Court summarily rejected eight of the HOA's appealable issues, and felt only the issue relating to third-party defendant costs warranted extended discussion.

LGC took the lead on briefing the cost issues on behalf of the third-party defendants and argued that Plaster Development's third-party complaint was a direct pass-through, via indemnification, of the Plaintiff HOA's claims of construction defects. As a result, the third-party defendants' defense of the third-party complaint was entirely a defense of the allegations set forth in the Plaintiff's complaint. LGC argued that the analogous

case of *Bonaparte v. Neff*, decided by the Idaho Court of Appeal, should be adopted to permit third-party defendants to recover prevailing-party costs in such a situation.

The Court agreed with LGC, adopting the reasoning of *Bonaparte* and determining that the third-party defendants were adverse to the HOA and could therefore be awarded costs under NRS 18.020. The Court reasoned, "The HOA and the third-party defendants were adverse parties because the third-party defendants' liability was contingent on the HOA's claims against the Developers."

This decision is a significant victory for subcontractors in construction defect litigation in Nevada, as it sets an important precedent for third-party defendants to recover prevailing-party costs against plaintiffs in construction defect cases.

Congratulations to Shannon and James.

INSIDE THIS ISSUE:

Pitfalls To Consider When Adverse To Pro Per Plaintiffs

Importance Of Presenting A Case Efficiently

Nevada Supreme Court Agrees To Hear Two Writs

LGC Partner Featured In Attorney At Law Profile

New CA Decision Holds Prevailing Wage Inapplicable To Materials Supplier

Decision Confirms No Duty To Defend Employee

In [Baek v. Continental Casualty Company](#), the California Court of Appeal clarified that an employer's insurer has no duty to defend against claims of intentional assault by an employee. Specifically, the Court held that a massage therapist's alleged assault on a client was not within the scope of the employee's employment or related to the conduct of the employer's business, and thus no potential for coverage existed.

In *Baek*, a client sued Heaven Massage and Wellness Center (HMWC) and Baek for sexual assault. The client alleged Baek sexually assaulted her while giving her a

massage. Baek tendered his defense of the claim to HMWC's comprehensive general liability insurer, Continental Casualty Company. Continental denied coverage because Baek was an independent contractor, not an employee, and because Baek's conduct was not in the course and scope of his employment with HMWC.

Baek sued Continental for breach of contract, bad faith and fraud, alleging he was either a partner or employee of HMWC and was thus covered under its policy.

(Continued on Page 3)

Pitfalls To Consider When Adverse To Pro Per Plaintiffs

When facing a pro per plaintiff, an attorney will often feel confident in his chances of success. After all, the attorney will presumably have superior education and experience in litigating a case. However, there are several pitfalls unique to handling a case against a pro per that an attorney should expect and consider in developing a litigation strategy.

First, be aware that a court will typically give the pro per significant leeway during the course of the litigation. At a minimum, a court will likely provide flexibility in the rules to a pro per plaintiff, and in some cases, a judge may bend over backwards to help the pro per handle his case. This can result in extra opportunities to amend pleadings, forgiveness in the discovery process, and hesitance by the judge to rule against the pro per. As a result, an attorney should expect that most procedural arguments against a pro per plaintiff will not be dispositive, and that a pro per plaintiff will be provided multiple opportunities to cure defects raised by a demurrer.

Second, an attorney will often be forced to respond to arguments from a pro per that an attorney would not typically make. In typical cases where each party is represented by counsel, there is an understanding on how the case should proceed and a level of professional respect amongst counsel. However, a pro per likely will not share this understanding.

For instance, an attorney may run into a situation where the pro per demands documents that the client either does not have or is not required to produce. Due to the layperson's inexperience, it may not be possible to explain this to the pro per in a way that will make him understand. This can result in the pro per filing frivolous motions or taking positions that no attorney would consider taking. In dealing with a pro per, an attorney should go into the case with the understanding that additional costs may be required to respond to such arguments and positions.

Similarly, an attorney should anticipate

that his patience and professionalism may be tested. As a party to the case, a pro per plaintiff will undoubtedly have a direct emotional interest in the outcome. This emotional investment can often lead to communications by the pro per plaintiff that are less than professional. An attorney should avoid taking the bait, and maintain professionalism in communications regardless of the tone set by the pro per plaintiff.

Finally, a pro per plaintiff typically will not have an attorney to advise him on strategies to resolve the case. This, combined with the emotional attachment of the pro per plaintiff, will often make such cases difficult to settle. As such, an attorney should advise his client that settlement may prove difficult, and that additional costs will likely be involved either pursuing a dispositive motion or taking the case to trial.

If you have any questions or for more information, please contact [Phil Simpler](#).

Importance Of Presenting A Case Efficiently



Tom Lincoln

More and more, lawyers are told by judges that the lawyers do not have unlimited time to present their case. A recent appellate case, [California Crane School, Inc. v. National Commission For Certification Of Crane Operators](#), denied an appeal from a plaintiff attorney who lost but blamed the trial judge for not giving the plaintiff enough time to put on the case. The parties were given 10 days to present their case. The plaintiff attorney did not finish within the time the court allocated

to the plaintiff's case, so counsel was precluded from calling more witnesses.

In effect, the plaintiff argued that he would not have lost if he was allowed to complete his case. The appellate court denied the appeal and said the trial court has the right and responsibility to manage the proceedings efficiently for the benefit of the court, jurors and all litigants.

It is very hard to predict the length of a trial, even for experienced trial lawyers. The bottom line to remember

is that no one wants their time wasted. Preparation and practice are key to using the courts' time efficiently. Of course, the same can be said for an attorney's actions outside of trial – from meetings to phone calls to emails. If you do not use others' time efficiently, you may not like the outcome.

Please contact LGC Partner [Tom Lincoln](#) with any questions about the case. Or, visit LGC's [website](#) for more information about our attorneys' extensive trial experience.

Decision Confirms No Duty To Defend Employee

(cont. from page 1)

The trial court sustained Continental's demurrer without leave to amend, and the Court of Appeal affirmed.

In reaching its decision, the Court of Appeal disagreed with Continental's argument that Baek was an independent contractor instead of an employee. The Court noted that a duty to defend existed unless the insurer could demonstrate there was no possible coverage under the policy. Here, there was a dispute about Baek's employment status because while he admitted signing an independent contractor agreement with HMWC, there were facts to support Baek's allegation that he was an employee. Given the disputed facts, there was at least a potential for coverage.

However, the Court determined that even if Baek were an employee, there would be no coverage because the alleged conduct was not within the course and scope of Baek's employment. The subject policy provided coverage to employees "only for acts within the scope of their employment by [HMWC] or while performing duties related to the conduct of [HMWC's] business." Based on the plain language of the policy, the Court found that Baek was entitled to coverage only if he could show that the conduct giving rise to the

underlying complaint related to his performance of acts within the scope of his employment or related to the conduct of HMWC's business. The Court found that Baek did not make such a showing.

Based on precedent, the Court reasoned that although a sexual assault may take place in a work setting during business hours, it is generally unrelated to the employee's scope of work. Although Baek's employment as a massage therapist provided him the opportunity to meet the client and to be alone with her, nothing alleged in her underlying complaint suggested that the alleged assault was "engendered by" or an "outgrowth" of his employment. In fact, the Court found the opposite was true because Baek allegedly took advantage of the privacy of the massage room to commit an assault completely unrelated to his work.

Additionally, the Court found the fact that Baek's alleged assault occurred at HMWC's place of business during work hours was insufficient to bring it within the scope of coverage. The Court focused on the nature of the conduct rather than the actual setting. Although the alleged assault occurred during a massage, the particular acts on which liability was premised were

unrelated to the conduct of HMWC's business and were not the types of acts Baek had been hired to perform. Instead, the court held that Baek's acts constituted a "stepping away" from HMWC's business because they were performed solely for Baek's own benefit. Thus, the alleged assault could not have occurred "while performing duties related to the conduct of [HMWC's] business."

This case is important in two respects. First, it demonstrates how difficult it is for an insurer to deny a defense based on a person's status as an independent contractor instead of an employee. Indeed, the employee in this case even admitted signing an independent contractor agreement, yet the Court still found there were sufficiently disputed facts to warrant a defense obligation.

Second, the case confirms a longstanding reluctance to require coverage for assaults committed by employees. That said, the language of the decision appears to create a possibility that such allegations may be covered if "engendered by" or an "outgrowth" of the employment.

Please contact LGC Partner [Chris Schmitthenner](#) with any questions.

Nevada Supreme Court Agrees To Hear Two Writs

The Nevada Supreme Court has accepted two writs challenging the denial of LGC's motion to dismiss an ongoing construction defect action. LGC sought to dismiss the lawsuit brought by High Noon Arlington HOA based on the plaintiff's failure to bring the case to trial within five years.

The trial court denied the motion, but two writs were filed challenging the trial court's

decision. While over 90 percent of writs are summarily denied, the Nevada Supreme Court has accepted the writs and ordered further briefing.

LGC routinely handles appeals and writs for its clients throughout California, Nevada, and Arizona. Click [here](#) for more information about LGC's appellate practice.

Click [here](#) for more information about LGC's appellate practice.

LGC Partner Featured In *Attorney At Law* Profile



Loren Young

[Loren Young](#), the managing partner of LGC's Las Vegas office, was recently [profiled](#) by *Attorney At Law* magazine for his work with Las Vegas Defense Lawyers (LVDL). Loren, who currently serves as President of LVDL, was interviewed about the group's mission and community involvement.

As explained by Loren, LVDL was formed to provide a balanced defense perspective in the legal field and to promote cooperation, civility in the profession and overall enhancement of

its members. In addition to its legislative involvement, LVDL puts on monthly continuing legal education events for attorneys and judges. The topics range from mediation and trial tactics to learning about mechanics' liens to appellate practice tips and strategies.

For more information about LVDL and its events, or to become involved, click [here](#) to visit its website.

New CA Decision Holds Prevailing Wage Inapplicable To Materials Supplier

In [Sheet Metal Workers' International Association, Local 104 v. Russ Will Mechanical, Inc.](#), the Court of Appeal held that California's prevailing wage law does not apply to employees who fabricate materials for a public works project at a permanent, offsite manufacturing facility that is not exclusively dedicated to the project.

California's prevailing wage law generally requires that workers employed on public works jobs be paid the local prevailing wage for work of a similar character. The law covers activities integrally connected to the project that are performed at the job site. It has also been extended to fabrication at offsite facilities where the offsite facility was temporary and established specifically for the public works project. Prior to this case, however, the Court had not been presented with a circumstance of fabrication specifically for a public works project at a permanent offsite facility.

In this case, a contractor entered into a public works contract with a community college district to modernize an administrative building in Santa Clara County. The contractor then subcontracted the HVAC component of the project, but did not specify whether the subcontractor was to fabricate the HVAC materials itself. The subcontractor fabricated both standard items that could have been ordered from industry catalogues and custom items specific to the project. All fabrication was completed at the subcontractor's permanent, offsite facility at which the subcontractor already had operations.

The plaintiff argued that because the subcontractor fabricated items specifically for the public project and does not sell materials it fabricates to the general public, the prevailing wage law should apply. The defendant argued that because the fabrication was performed offsite, the prevailing wage law should not apply.

In rejecting the plaintiff's arguments, the Court noted that it makes no difference to a worker who fabricates an item according to certain specifications whether the item is "custom" or

"standard" – it must be fabricated according to given specifications either way. Additionally, turning the applicability of the prevailing wage law on whether an item is custom or standard, or whether the products are sold to the public, may have little bearing on whether the fabrication is integrated into the flow of construction.

Ultimately, the Court relied on consistent and longstanding interpretations of the statute by the Department of Industrial Relations. Since at least 1984, the department had issued coverage determinations that applied the prevailing wage law to activities at temporary facilities set up for the sole purpose of servicing a public works contract. Conversely, the department had consistently declined to extend the statute to offsite fabrication at a permanent facility. Therefore, while the prevailing wage law may extend to fabrication at an offsite facility, the existence and purpose of which relies entirely on the needs of the public works project, it does not extend to fabrication at a permanent offsite facility, the location and continuing operation of which is determined wholly without regard to the project.

If you would like more information the case, or if you have any questions about prevailing wage issues, please contact LGC Partner [Chris Schmitthener](#).

**LINCOLN, GUSTAFSON,
& CERCOS, LLP**

Experience. Integrity. Results.

California | Nevada | Arizona

www.lgclawoffice.com