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ISSUE 34

A QUARTERLY PUBLICATION

August 2015

Editor: Chris Schmitthenner, Partner

LGC Obtains Defense Verdict After Seven-Day Trial

Partner [Loren Young](#) and associate [Dillon Coil](#) of LGC's Las Vegas office obtained a defense verdict in *Bazan v. Aria Resort & Casino Holdings, LLC* (Case No. A-13-683248-C) following a seven-day trial in Clark County, Nevada. *Bazan* involved a plaintiff who fell while walking down stairs and sustained a trimalleolar fracture of the right ankle. The plaintiff claimed negligence, negligence per se, and negligent infliction of emotional distress based on several theories of liability pertaining to the design, construction, and maintenance of the subject stairs; slip resistance of the flooring materials; and the alleged presence of liquid.

The claims pertaining to the alleged faulty design and construction of the stairs were largely defeated through expert discovery and pretrial motions. At trial, the plaintiff's liability expert opined that the stairs were slippery based on slip resistance test results that were not disclosed and obtained using faulty

methods. The Court granted LGC's motion to exclude the undisclosed test results. LGC's liability expert, meanwhile, was able to establish that the stairs were slip resistant when tested in accordance with reliable test methods and did not cause the plaintiff to fall.

Unable to show an unreasonably dangerous condition with the design or construction of the stairs, the plaintiff changed her theory of liability to argue the stairs were wet, causing her to slip.

However, the surveillance video showed patrons walking up and down the subject stairs without issue before and after the incident, and no spill was identified. Inspection of the stairs by Aria at the scene also confirmed no liquid was found on the stairs and the video showed at least 21 instances of Aria employees inspecting the area and no spill was identified.

Evidence was also presented to show the plaintiff's own actions caused the

incident. The ambulance records identified alcohol as a contributing factor and the plaintiff admitted to the ER nurse and physician that she was drinking before the incident. This was consistent with observations at the scene that the plaintiff was glassy-eyed. Although the plaintiff contested that she was intoxicated at trial, LGC's medical expert testified that plaintiff had sufficient alcohol in her system to allow the ER physician set the fractured ankle without anesthesia.

Following arguments, the plaintiff asked the jury for an award of approximately \$1,300,000 for medical damages and pain and suffering related to alleged permanent injuries. After only one hour of deliberations, the jury returned a [unanimous verdict for the defense](#) and found no negligence on the part of Aria.

Congratulations to Loren and Dillon on their successful trial result.

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Impact Of Insurance Reductions On 998 Offers

Six years ago, the California Supreme Court ruled in *Howell v. Hamilton Meats & Provisions, Inc.* that a plaintiff may not recover the full amounts billed by medical providers if those providers accepted a reduced payment from an insurer. Since then, courts and litigants have grappled with many collateral issues related to the ruling.

- 4 Most recently, in [Lee v. Silveira](#), the Court of Appeal ruled that the negotiated rate differential between billed medical expenses and medical expenses actually paid should be deducted from a judgment before determining whether a party received a more favorable

judgment in comparison to the amount of a prior Code of Civil Procedure section 998 settlement offer.

The case arose out of an automobile accident. Lena Lee suffered multiple injuries when her SUV collided with a large manure spreader operated by Joseph M. Silveira. Lee sued Silveira and Silveira Custom Farming. Lee's attorneys served defendants with a section 998 offer in the amount of \$1 million. Defendants allowed the offer to lapse.

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LGC Obtains Summary Adjudication Of Punitive Damages

Associate [Jordan Nager](#) recently obtained summary adjudication of a claim for punitive damages in a case arising out of a dispute between two neighbors who share a property line.

The Plaintiff filed a complaint against LGC's client alleging negligence, nuisance, trespass, and encroachment. The basis of the complaint was Plaintiff's allegation that LGC's client developed his property in a manner that altered the drainage patterns on Plaintiff's property, and that LGC's client installed a boundary fence that encroached on Plaintiff's property. Plaintiff alleged that the installation of this fence was done maliciously and that she should be awarded punitive damages.

During Plaintiff's deposition, however, she admitted she had no knowledge of any malice on the part of LGC's client in erecting the fence. As a result, LGC filed a Motion for Summary Adjudication of the punitive damage claim. Bolstered with a declaration from its client and Plaintiff's

own testimony, LGC argued that the trespass claim was based on a single instance of mistaken trespass and that punitive damages were improper.

In opposition, Plaintiff argued that the bulk of her allegations, for negligence, nuisance, and the like, asserted conduct that was sufficient to award punitive damages. Plaintiff submitted a declaration detailing all the allegations in her complaint, not simply those that pertained to the fence installation at the heart of the trespass claim.

In reply, LGC argued that the complaint only alleged punitive damages on the trespass claim, and that the remainder of Plaintiff's opposition was inapposite. LGC stressed that punitive damages are an extreme remedy, warranted in only the clearest of cases. LGC also objected to Plaintiff's declaration and documentary evidence as irrelevant to the issue of punitive damages.

The Court agreed, striking virtually the entirety of Plaintiff's declaration, and granting all of LGC's evidentiary objections. The Court then held that Plaintiff's discussion of her other allegations was not relevant to the issue of punitive damages. Finding that LGC had successfully shifted the burden to Plaintiff, the Court noted that Plaintiff failed to offer admissible evidence that LGC's client had any malicious intent in constructing his fence.

Accordingly, the Court granted LGC's motion and struck Plaintiff's claim for punitive damages. In winning this motion, LGC ensured that punitive damages, which cannot be covered by an insurance policy, could not be sought against its client.

Congratulations to Jordan on his successful motion.

LGC Names Paul James As Newest Partner



Paul James

LGC is pleased to announce that [Paul James](#) of LGC's San Diego office has been named LGC's newest partner.

A native of Northern California, Paul obtained his B.A. from University of California at Santa Cruz, and attended law school at University of San Francisco.

Paul's practice focuses on employment litigation, class actions, construction disputes, common interest development litigation, entity formation and

dissolution, contract preparation, personal injury and wrongful death litigation, asbestos litigation, insurance coverage, appeals, and post-judgment collection.

Recently, Paul was co-trial counsel for a plaintiff in a stop notice action resulting in a verdict in excess of \$1 million, and co-authored the brief that led to the Court of Appeal affirming the verdict in *Brewer Corp. v. Point Center Financial, Inc.*, (2014) 223 Cal.App.4th 831.

Paul was also co-trial counsel in a homeowner action against a homeowner association for breach of fiduciary duty, which resulted in a damage award of \$671,710.48 for his client.

Outside the office, Paul volunteers at several local charitable organizations in San Diego, including serving as the treasurer and member of the board of directors for the [Autism Society of San Diego](#).

Congratulations to Paul.

Impact Of Insurance Reductions On 998 Offers

(cont. from page 1)

During trial, the court allowed the introduction of evidence of medical expenses in the amount billed, but indicated the verdict would be reduced to reflect the amount actually paid. The jury awarded Lee damages totaling \$1,027,014, explicitly stating past economic losses included the amount billed for medical expenses, not the lesser amount actually paid. The court filed the judgment again noting that the judgment was subject to amendment in agreement with the parties' stipulated reduction for plaintiff's past medical expenses.

Defendants filed a post-trial motion to reduce the jury award in the amount of the difference between billed and actual medical expenses. Lee argued that the deduction for the negotiated rate differential should not be made until after determining her expert witness fees and prejudgment interest. The trial court agreed with the defendants, vacated the previous judgment, and entered a judgment totaling \$887,098.26, excluding the cost of expert witnesses and prejudgment interest. Lee appealed.

Lee largely relied on *Guerrero v. Rodan Termite Control, Inc.* In *Guerrero*, the plaintiff purchased a house afflicted with dry rot and sued the seller, the real estate agent, and the

home inspection firm. The inspection firm served the plaintiff with a section 998 offer in the amount of \$5,000. The plaintiff did not accept the inspection firm's offer, but went on to settle with the real estate agent for \$34,000. At trial, the jury awarded \$15,600 to the plaintiff from the inspection firm. The inspection firm moved to offset the verdict by the amount of the settlement with the real estate agent. The trial court granted the motion and reduced the judgment to zero. Despite the reduction, the appellate court agreed the plaintiff had obtained a more favorable judgment than the section 998 offer of \$5,000 because the plaintiff still had a valid claim against the inspection firm and the jury valued it at substantially more than the offered \$5,000. Lee contended that her offer, similar to the offer in *Guerrero*, was less favorable than the original award when the offer was first made.

The *Guerrero* case, however, was distinguishable based on the precedent of *Howell*. In *Howell*, the Court made it clear that a plaintiff *cannot* recover the negotiated rate differential for past medical expenses because the plaintiff did not suffer any actual economic loss in that amount and the collateral source rule "does not expand the scope of economic damages to include expenses the plaintiff never incurred."

As a result, the appellate court in *Lee* explained that, unlike the plaintiff in *Guerrero*, Lee did not receive money from another defendant, did not have money paid on her behalf, and did not suffer an economic loss in the amount of the billed medical expenses. Pursuant to the holding in *Howell*, the court interpreted section 998 to exclude damages not allowed by law or not suffered by the plaintiff when determining whether the defendant failed "to obtain a more favorable judgment" for section 998.

Most trial courts in California no longer permit plaintiffs to introduce the full amounts billed by providers at trial; rather, the evidence is limited to amounts actually paid by insurance. However, for those trial courts that still permit the full amount billed at trial and instead reserve the issue of reductions until after the verdict, this decision is significant. Under this authority, a plaintiff will not be able to use pre-reduction totals to attempt to argue the plaintiff exceeded a section 998 offer.

For more information about the decision, please contact partner [Chris Schmitthenner](#).

Partner Chris Schmitthenner Selected To Rising Stars

LGC is pleased to announce that [Chris Schmitthenner](#), a partner in LGC's San Diego office, was selected by Super Lawyers Magazine to its 2015 list of Rising Stars. He was elected to the list of Rising Stars in the category of civil litigation.

The annual [Rising Stars](#) list is a distinction given to the top 2.5% of lawyers under 40 years old. Honorees are determined through

Super Lawyers' selection process, which includes peer nomination, evaluation in 12 key categories, and peer review of a panel of lawyers within the honoree's practice area.

Chris's civil litigation practice includes personal injury, bad faith, construction claims, contract disputes, class actions, and commercial litigation.

Click [here](#) for more information about Super Lawyers' Rising Stars.



LGC Plays Role In Bringing Documentary To San Diego

The National Geographic Channel recently aired an hour-long documentary featuring San Diego as one of the “World’s Smartest Cities,” providing the region with international exposure for its leading business climate, innovative science industry, and intelligent urban development.

LGC was proud to assist in bringing this unique opportunity to the San Diego region. Partner [Teresa Beck](#) and associate [Patrick Klingborg](#) represented the San Diego Tourism

Authority in both negotiating and drafting the underlying contract with the National Geographic Society, which was necessary to make the documentary possible. The San Diego Tourism Authority is a private, non-profit corporation that seeks to drive visitor demand to economically benefit the San Diego region.

The documentary aired in May locally, and is expected to air in over 20 countries and reach 150 million households worldwide.

California Supreme Court Permits Extrinsic Evidence In More Will Contests

A recent decision by the California Supreme Court could open the door to extrinsic evidence in more will contests. In [In re Estate of Duke](#), the Court held that an unambiguous will may be reformed if clear and convincing evidence establishes that the will contains a mistake in the expression of the testator’s intent and proves the testator’s actual specific intent at the time the will was drafted.

In the case, Irving Duke prepared a holographic will providing that his wife would inherit his estate or the estate would go to named charities if he and his wife died at the same time. The will also provided Duke’s brother would receive one dollar and that all other persons not included are specifically disinherited. The will did not, however, provide for what should happen if he lived longer than his wife, which he did. Duke died leaving no spouse, children, or any other testamentary instrument.

Duke’s nephews, Seymour and Robert Radin, filed a petition claiming they were entitled to the estate as Duke’s sole heirs at law. The Radins claimed that because the will was unambiguous on its face and did not provide for the event that Duke outlived his wife, intestacy law applied. The charities argued that Duke intended for them to inherit the estate if he outlived his wife and offered extrinsic evidence to prove Duke’s intent to that effect.

The lower courts awarded the estate to the Radins, finding Duke died intestate and excluding the extrinsic evidence offered by the charities to show Duke’s contrary intent. The California Supreme Court granted review to reconsider the historical rule that extrinsic evidence is admissible only where the will is ambiguous on its face or if the description of a person or property is ambiguous.

The Court noted that extrinsic evidence was permissible to correct errors in documents, including donative documents other than wills. The Court reasoned that extrinsic evidence is just as reliable when determining ambiguities in the will as it is when admitted to correct a will, and thus concerns about reliability do not justify a categorical bar on reformation of wills. The

legislature has consistently followed the courts’ lead in adopting more flexible rules concerning the interpretation of wills and is careful not to bar the continued evolution of law. The Court held that allowing reformation is consistent with legislature’s efforts to apply the same rules of construction to all donative documents and promotes fairness in the treatment of estates regardless of the instrument used.

The Court’s new ruling in *In re Estate of Duke* makes it even more important to ensure that your will, or estate plan in general, is drafted carefully and accurately reflects your donative intentions. Doing so will help avoid probate litigation of your estate and significant fees and costs for your loved ones. If Duke had simply stated what he wished to happen to his estate if he survived his wife, his estate would have certainly been distributed pursuant to his intent and the estate would have likely avoided litigation fees and costs.

Please contact our estate planning attorneys, [Randy Gustafson](#) and [Darcie A.F. Colihan](#), to assist you in preparing or reviewing your estate plan today to avoid litigation for your heirs in the future.

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