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Editor: Chris Schmitthenner, Partner

LGC Partner Wins Defense Lawyer Of The Year Honors

LGC is proud to announce that Las Vegas Partner [Loren Young](#) was awarded the prestigious defense lawyer of the year award by Las Vegas Defense Lawyers (LVDL).

The award was given at LVDL's annual event and dinner, attended by local attorneys, trial judges, and members of the Nevada Supreme Court. Loren was selected for the award not only for his outstanding work as a defense lawyer in 2017, but also in recognition for his civility and community service.

LVDL is an organization of lawyers engaged in the defense of civil litigants. Originally founded by another LGC Partner, [Tom Lincoln](#), the goal of LVDL is to (1) provide a forum for mutual education through the exchange of ideas with counsel in the Las Vegas and Clark County area; (2) provide a balanced defense perspective; (3) promote cooperation, civility, and the overall

enhancement of its members; and (4) promote improved public perception of its members through service to the community and to maintain the standards of professional conduct.

Loren previously served as President of LVDL from 2011 through 2017.

Loren is the managing partner of LGC's Nevada office, where his practice focuses on personal injury cases, particularly product liability cases and catastrophic injuries, as well as construction defect matters. He also has experience representing clients at the appellate level, resulting in the published opinion of *GMC v. The Eighth Judicial Dist. Court of Nev.*, 134 P.3d 111, 113, 122 Nev. 466, 468, (2006).

Loren attended Weber State University where he earned a Bachelor of Science degree in 1998. He continued his education at Washburn University School

of Law, where he earned his Juris Doctorate with Deans' Honors in 2000 and was a member of the *Washburn Law Journal*.

Loren is a certified Mentor for the State Bar of Nevada's Transitioning Into Practice program for new lawyers. As Managing Partner of LGC's Nevada Office, he helps promote the CAP program at the Legal Aid Center of Southern Nevada as well as sponsor an initiative to local schools called "We the People," which promotes civic competence and responsibility among the nation's upper elementary and secondary students.

In addition to his work with Las Vegas Defense Lawyers, Loren was formerly the Vice President of the Mountain Ridge Little League Baseball organization, where his five boys enjoy playing baseball.

Congratulations to Loren for this well-deserved honor.

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LGC Prevails On SLAPP Motion In Bad Faith Case

Partner [Chris Schmitthenner](#) recently prevailed on a SLAPP Motion in a bad faith case. The ruling represents one of the first times a SLAPP motion has been successfully invoked by an insurance company in a bad faith case.

The lawsuit arose from an underlying case in which Plaintiffs Pia Altavilla and Chris Warner obtained a judgment against a contractor insured by Preferred Contractors Insurance Company ("PCIC"). Disputes arose regarding the extent to which PCIC was responsible for the judgment.

As a result, PCIC filed a declaratory relief action against Plaintiffs and the insured contractor. After attempts to resolve the case with Plaintiffs failed, PCIC and the contractor reached an agreement to each fund portions of the judgment. PCIC and the contractor delivered a check to Plaintiffs' counsel, resulting in satisfaction of the judgment.

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New Appellate Decision Impacts Experts' Use Of Hearsay

In a case that will likely impact how expert testimony is presented in both criminal and civil cases, the California Supreme Court issued a decision in [People v. Sanchez](#) limiting the extent to which experts may testify regarding hearsay.

In the case, Defendant Sanchez was charged with possession of a firearm, possession of drugs, being an active participant in the Delhi gang, and committing a felony for the benefit of that gang. The gang expert for the prosecution testified generally about gangs, their behavior, and the activities of the Delhi gang. He also testified that Defendant was a member of the Delhi gang, and described reports by other police officers who had had contact with Defendant including statements made by Defendant to another officer that he associated with Delhi gang members. The jury convicted and Defendant appealed, arguing that the gang expert's testimony about Defendant's contacts with police was testimonial hearsay.

The Court first analyzed the difference between background information and case-specific facts. An expert's testimony concerning his general knowledge is not subject to exclusion on hearsay grounds. By contrast, an expert cannot testify as to

case-specific facts if he does not have independent knowledge of them.

In explaining the distinction, the Court provided several hypotheticals. For instance, the Court noted:

"That 15 feet of skid marks were measured at an auto accident scene would be case-specific information. Those facts could be established, for example, through the testimony of a person who measured the marks. How automobile skid marks are left on pavement and the fact that a given equation can be used to estimate speed based on those marks would be background information an expert could provide. That the car leaving those marks had been traveling at 80 miles per hour when the brakes were applied would be the proper subject of an expert opinion."

In short, based on the Court's ruling, an expert may still rely on hearsay in *forming* an opinion, and may tell the jury in general terms that he did so. The jury must independently evaluate the probative value of an expert's testimony, so an expert may describe generally the kind and source upon which his opinion rests.

However, there is a distinction between allowing an expert to describe the type or

source of the matter relied upon as opposed to presenting, as fact, case-specific hearsay that does not otherwise fall under a statutory exception. An expert *cannot* relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception.

This may have significant practical effects in presenting expert testimony to a jury. For instance, testimony that might have formerly been recited by a retained medical expert in a personal injury case based on a records review may no longer be admissible. It may instead be necessary to call the treating doctors who created the particular notes.

In construction defect cases, experts may no longer be permitted to testify regarding "facts" obtained solely from review of construction records. Instead, parties may need to call the construction personnel who actually created the records.

For more information about the case and its potential implications, contact [Chris Schmitthener](#) in LGC's San Diego office.

LGC Participates In Wills For Heroes Program



Danica Brustkern

LGC is proud to recognize associates [Darcie Colihan](#) and [Danica Brustkern](#) for their work with the [Wills for Heroes Foundation](#).

Created after 9/11, the Wills for Heroes Foundation programs provide essential legal documents free of charge to first responders,

including wills, living wills, and powers of attorney.

Surveys show 80% to 90% of first responders do not have any wills or trusts in place. Using the motto "protecting those who protect us," the organization works with local attorneys to prepare those estate-planning

documents for police, firefighters and others.

Working through the San Diego County Bar Association, Danica and Darcie volunteered their time to help Wills for Heroes.

Kudos to Danica and Darcie on their important work.

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The satisfaction of the underlying judgment rendered the declaratory relief action moot, so PCIC dismissed it.

Plaintiffs, however, had incurred attorneys' fees and costs attempting to collect on the judgment, which they could not recover due to the satisfaction of the judgment. As a result, Plaintiffs filed a new action against PCIC, alleging bad faith in delaying payment of the judgment. As part of their allegations, Plaintiffs alleged that PCIC had improperly filed a declaratory relief action.

In response, LGC filed a SLAPP Motion on PCIC's behalf (SLAPP is an acronym for Strategic Lawsuit Against Public Participation). A SLAPP Motion is a special motion to strike that can be filed in response to a claim or cause of action that arises out of a person's right of petition or free speech.

It is a powerful motion, in that it immediately stays a case pending the outcome of the motion and, if granted, the moving party is awarded attorneys' fees.

In filing the motion, the moving party must make an initial showing that the claims arise out of the moving party's right of petition or free speech, which is defined by the statute to include "any written or oral statement or writing made before a legislative, executive, or judicial proceeding." Upon making that initial showing, the burden shifts to the claimant to demonstrate, through admissible evidence, a probability of prevailing on the merits of the claim. The purpose is to prevent SLAPP suits by disposing of unmeritorious actions early in the litigation.

In bringing the Motion, LGC argued that the claim clearly arose out in part

from PCIC's right of petition, namely the filing of a prior declaratory relief action, and under the California Supreme Court's recent ruling in *Baral v. Schnitt*, a SLAPP Motion can be brought as to a component of a cause of action even if the entire claim doesn't arise out of protected activity.

LGC further argued that Plaintiffs could not demonstrate a likelihood of prevailing because that portion of the claim was barred by the litigation privilege and PCIC's prior declaratory relief claim was proper and brought in good faith.

California's absolute litigation privilege applies to all claims other than for malicious prosecution, and covers communications made in judicial proceeding by litigants to achieve the objectives of the litigation.

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LGC Participates In Race For Autism 5K

LGC teamed up with the National Foundation for Autism Research ("NFAR") to participate in the [Race for Autism](#). The event, which took place at San Diego's Balboa Park, raised money to support local autism programs, services, outreach efforts, parent support and educational initiatives.

The theme of the race was "Calling All Superheros!" so participants donned their superhero attire for the 5K run. This was the 14th year of the race, and is the largest annual race that directly supports children with autism and their families in San Diego. To date, the proceeds have funded more than 600 community programs and classrooms.

The event also featured a resource fair for vendors with services to help people autism and their families.

Autism is one of the fast-growing developmental disabilities in the United States, affecting one in every 68 children. NFAR works for fund initiatives in the areas of early identification, educational materials, equipment and technology, educational workshops and parent trainings, treatment programs, out-of-school programs and vocational tech training for young adults.

LGC is proud to participate in these and other fundraising efforts for local autism programs.

For more information about upcoming events and opportunities to help, please contact [Tom Lincoln](#) in LGC's San Diego office.

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Chris Schmitthenner

As to the legitimacy of the prior declaratory relief action, LGC pointed out that if Plaintiffs felt the action had been brought in bad faith, their remedy was to seek Rule 11 sanctions in the prior action, not file a new lawsuit.

In Opposition, Plaintiffs argued that the prior declaratory relief action was brought for an improper purpose and that, in any event, the Complaint's reference to the prior declaratory relief action was merely for context.

Ultimately, the Court agreed with LGC and [granted](#) the SLAPP Motion. The Court rejected Plaintiffs' "context" argument, finding that the reference to the prior

declaratory relief action was a substantive basis for Plaintiffs' bad faith claim. The Court further found that Plaintiffs could not demonstrate a possibility of prevailing on that component of their claim.

With the ruling, LGC was statutorily entitled to recover its attorneys' fees and costs from Plaintiffs. In light of this substantial exposure, Plaintiffs agreed to dismiss their lawsuit for a waiver of fees and costs.

For more information about SLAPP motions and their potential application to bad faith lawsuits, contact Chris Schmitthenner in LGC's San Diego office.

New Test For Employees Vs. Independent Contractors In CA

Business owners need to be aware of a recent landmark decision in California employment law. The California Supreme Court decision, [Dynamex Operations West, Inc. v. Superior Court](#), changes the nearly 30-year-old test for whether a worker is classified as an employee or an independent contractor. The two main takeaways are that (1) it will be more difficult for business owners to classify workers as independent contractors, and (2) because the decision represents an immediate change to the law, many business owners may suddenly be in violation of the law, potentially exposing them to significant legal repercussions.

For business owners, the practical distinction between whether a worker is classified as an independent contractor or as an employee is that independent contractors are less expensive. Specifically, when it comes to independent contractors, business owners need not make payroll tax contributions, need not pay unemployment insurance premiums, and need not pay workers' compensation premiums. In addition, independent contractors are not owed minimum wage, are not entitled to rest and meal breaks, and do not receive reimbursements for work-related expenses.

If a court determines that a worker was misclassified as an independent contractor and should have instead been classified as an employee, the consequences for the business owner can be severe. Business owners may have to repay wages, expenses, taxes, and insurance premiums. On top of all that, business owners need to pay penalties, remit back-taxes, pay their own legal fees, and often must pay the legal fees of the worker(s) who brought the claim against them.

Under the new test created by the Court's decision, business owners must establish **all** of the following prongs in order for a worker to be properly classified as an independent contractor:

(a) the worker is free from the control and direction of the hirer in connection with the performance of the work, both under the contract for the performance of such work and in fact; (b) the worker performs work that is outside the usual course of the hiring entity's business; and (c) the worker is customarily engaged in an independently established trade, occupation, or business of the same nature as the work performed for the hiring entity.

Whereas the prior multi-factored balancing test provided more room for employers to argue they were properly classifying workers as independent contractors, this new test makes it much more difficult for business owners to prevail in misclassification lawsuits. For more information about the new test and its implications, contact [Patrick Klingborg](#) in LGC's San Diego office.

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