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California Case Law Quarterly



Summer 2015

Judge Teri L. Jackson Speaks at the San Francisco Defense Association (SFDA)



Judge Teri L. Jackson

The San Francisco Defense Association (SFDA) was recently honored to have Judge Teri L. Jackson of the San Francisco Superior Court as a guest speaker at The City Club in San Francisco. Kevin Cholakian has been president of the SFDA since 2000.

Judge Teri L. Jackson has served on the San Francisco Superior Court since September 2002 and is the supervising judge for litigation involving asbestos and the California Environment Quality Act. She is also the supervising judge for the Criminal Grand Jury. She served on the court's Appellate Division from 2009 to 2012.

Before her appointment to the bench, from 1997 to 2002 she worked for a San Francisco law firm, specializing in complex litigation, employee defense, real

estate, trade secrets, and white-collar defense trials before state and federal courts. Prior to that, she served as a prosecutor for more than 15 years, first in the San Mateo County District Attorney's Office (1981–1984) and later in the San Francisco District Attorney's Office (1984–1997). She is an adjunct law professor at both Hastings College of the Law and the University of San Francisco School of Law.

She was appointed in 2010 to the Judicial Council as an advisory member, becoming a voting member in 2011. She served on the

council's Criminal Law Advisory Committee (2010–2011) and was a member of the council's Advisory Committee on Criminal Jury Instructions (2009–2010).

Judge Jackson was most recently elected by the San Francisco Superior Court to serve as Assistant Presiding Judge of the San Francisco Superior Court.

The SFDA is a 46 year old organization that is comprised of civil defense attorneys who practice in various areas of civil

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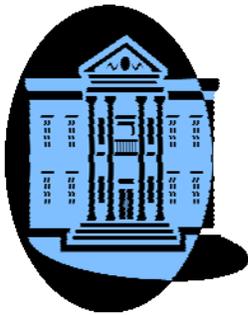
Recent Tuolumne County Trial Win, 12-0 Defense Verdict in Truck v. Motorcycle Case—Ellis v. Berger

A Tuolumne County jury recently returned a defense verdict in a truck vs. motorcycle case. Kevin Cholakian and Brian Finn were the defense trial attorneys. Plaintiff was represented by the law firm, Mardirossian & Associates. This was the first civil jury trial in the past three years in Tuolumne County.

On March 11, 2011, plaintiff Chad Ellis, 42, a decorated Sonora police lieutenant, was riding his motorcycle while off duty on Mono Lane in an unincorporated part of Tuolumne County. Ellis was involved in a collision with a truck operated by Dr. Jeffrey Berger, a local dentist, who was making a left turn onto Mono La from the Theatre Plaza parking lot. Ellis sued Berger, alleging the defendant was negligent in the operation of his vehicle.

Plaintiff's counsel contended that Berger needed five seconds to make a left turn onto Mono Lane and that it was undisputed that two vehicles ahead of Ellis, which were approaching Berger on Mono Lane, were five to six seconds away, traveling at an estimated speed of 30 to 35 mph, when Berger began his turn. The plaintiff's accident reconstruction expert opined that Ellis was going no faster than 35 mph and that Ellis, therefore, had the right of way, which meant Berger caused the accident. Defense counsel noted that the two lead vehicle drivers claimed that they did not believe Berger posed an immediate threat, or any threat, to their safety when he pulled out to make his turn. Thus, the defense contended that Berger was not negligent and the

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Judge Teri L. Jackson at SFDA, Cont'd

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litigation including intellectual property, premises liability, personal injury, and employment law. The common thread amongst these distinguished members is the fact that they practice civil defense.

Due to the diversity in the areas of practice, SFDA members benefit from discussions from the various perspectives afforded by these attorneys on numerous legal issues. Relevant topics have ranged from discussions regarding settlement and negotiation strategies, courtroom etiquette, trial strategies, the judiciary, and other pressing legal issues.

Past speakers have included California Supreme Court Chief Justice Tani Cantil-Sakauye, California Supreme Court Justice

Kathryn M. Werdegar, California Supreme Court Justice Marvin R. Baxter, California Supreme Court Justice Ming Chin, the Honorable Chief Justice Ronald George, California Court of Appeal Justice Patricia Bamattre-Manoukian, United States District Court Judge Susan Illston, Presiding Judges of the San Francisco, Alameda, and San Mateo Superior Courts, as well as Congresswoman Jackie Speier.

The SFDA was honored to have Judge Teri L. Jackson as a guest speaker. She discussed, among other things, the Superior Court's new electronic filing service, the retirement of prominent members of the bench, pre-trial planning and voluntary settlement conferences, and the selection

of visiting judges.

The SFDA has several seminars planned for 2015. For more information on the SFDA or to become a member, please contact Kevin Cholakian, President, at kcholakian@cholakian.net or Arsen Sarapinian, Secretary, at asarapinian@cholakian.net.



Recent Trial Win, Ellis v. Berger, Cont'd

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cause of the accident was plaintiff's excessive speed. Moreover, the defense's accident reconstruction expert established that in the last two seconds before impact, Ellis' motorcycle passed, and moved ahead of, the two lead vehicles by 80 feet and that this could only happen if Ellis had accelerated to 50 or 60 mph in the 40-mph zone. The jury found this persuasive.

Ellis sustained a concussion that left him unconscious for approximately three minutes at the scene of the accident. He had retrograde amnesia and did not remember the accident. He also sustained bodily injuries that consisted of a right occiput contusion, a fracture of the left ulna, brachial plexus palsy to the left

shoulder, supraspinatus tendinosis with partial tears of the distal (mid to anterior aspect), laceration to the left leg, blurred vision, neck strain, and multiple abrasions. He ultimately underwent a brachia plexus release surgery approximately six months after the accident due to his deteriorating condition. He then followed up with four months of physical therapy. Ellis missed approximately nine months of work due to his injuries, but he was ultimately determined to be fit for active police duty upon completion of his rehabilitation. He claimed that despite returning to work as a police officer, the injuries have devastated him, leaving him with constant pain and residual weakness. Mrs. Ellis sought recovery of damages for the loss of her

husband's love, companionship, comfort, care, assistance, protection, affection, society, moral support, and services. In total, Mr. and Mrs. Ellis sought recovery of \$2.1 million at trial.

Prior to trial, Plaintiffs had demanded \$700,000. A CCP § 998 offer of \$100,000 was made as to Chad Ellis and a \$25,000 offer to Heidi Ellis. Plaintiffs' counsel spent considerable time attacking the testimony of the eye witnesses and discrepancies in their testimony. The defense, through expert testimony, addressed how the discrepancies in witness estimation is not an appropriate form of attack on otherwise credible and consistent witnesses. The jury returned a 12-0 defense verdict in 90 minutes.

Recent San Francisco County Trial Win, Defense Verdict in Auto v. Bicycle Case—Stadulis v. Au

A San Francisco jury recently returned a defense verdict in favor of a defendant Kevin Cholaki represented in a hotly contested case. Plaintiff was represented by the San Francisco law firm, Walkup, Melodia, Kelly, & Schoenberger.

In this 9-day auto vs. pedestrian jury trial, plaintiff Daniel Stadulis was ejected from his bicycle after colliding with the car driven by defendant Theresa Au. The collision caused him to fly into the air and land face first on a busy street in San Francisco. Mr. Stadulis suffered abrasions, injuries, and fractures to his face, mouth, left eye-socket, hands and left hip. Three of his teeth were fractured, requiring root canals and dental reconstruction.

At approximately 8:15 a.m. on November 2, 2012, Daniel Stadulis was commuting to work, riding his bicycle northbound on Folsom Street on approach to its intersection with 16th Street in San Francisco. Mr. Stadulis was riding in the designated bicycle lane and intended to proceed straight on Folsom Street across the intersection.

Mr. Stadulis claimed that he approached the intersection at approximately 10-15 mph. He didn't see right-hand turn indicators flashing on any of the vehicles in the lane to his left, and didn't see any cars in front of him turn right onto 16th Street from Folsom Street as he approached the intersection.

Mr. Stadulis claimed that a BMW SUV driven by defendant Theresa Au merged into Mr. Stadulis' protected bicycle lane approximately one bicycle length ahead of him, in an attempt to execute a right hand turn onto 16th Street. Ms. Au claimed that she had previously merged 50-75 feet

before the intersection. The evidence was that she merged approximately 30-50% into the bike lane. Vehicle traffic to the right prevented her from merging further. Mr. Stadulis slammed on his brakes and swerved to the right, but claimed he didn't have enough time to avoid a collision. The defense position was that he attempted to thread the needle to go around her. Mr. Stadulis hit the vehicle somewhere near its front right wheel and was ejected from his bicycle, hitting the ground face first in the eastern crosswalk of 16th and Folsom Streets.

Emergency personnel placed Mr. Stadulis in c-spine precautions and administered morphine via IV to address his pain. He was taken via ambulance to the Trauma Center at San Francisco General Hospital, where he was given Dilaudid and Vicodin to alleviate pain related to trauma to his mouth, multiple fractures to his teeth, as well as a periorbital contusion and various abrasions to both hands and his left hip.

Mr. Stadulis' saw Dr. Daniel Simon, who performed root canals on teeth Nos. 9 and 10 on December 7 upon finding necrotic tissue indicating that each tooth had died as a result of the collision. Dr. Chiu subsequently performed reconstructive work on the same teeth in January and February of 2013.

Plaintiff alleged that Defendant violated California Vehicle Code § 22107 regarding the use of turn signals as well as acted negligently and caused this collision by failing to exercise reasonable safety. Defendant alleged that Plaintiff negligently attempted to pass on the right after she properly merged into

the bike lane.

The parties stipulated to approximately \$40,000 in past medical and wage loss. Plaintiff put on additional evidence of future dental work including the potential for implants. Plaintiff sought \$310,000.00 at trial.

The jury rendered a 9-3 defense verdict after two hours of deliberating following the 8-day trial. Defendant agreed to waive costs (pursuant to \$50,000.00 pre-trial CCP section 998 offer) in exchange for Plaintiff waiving his right to appeal.



Recent Sacramento County Trial Win – 12-0 Jury Defense Verdict in Sisto v. Les Schwab, Inc., with Costs

After a seven day jury trial, a Sacramento Superior Court jury found for Cholakian & Associates' client, Les Schwab, Inc. in a 12-0 defense verdict. Kevin Cholakian was the defense trial attorney. There were four plaintiff law firms pursuing Les Schwab, who is a self-insured.

Plaintiff Sisto alleged that because of an earlier negligent alignment repair by Les Schwab, the steering column in a truck that collided with plaintiff's SUV broke just prior to the accident, causing the driver of the truck to lose control of steering, resulting in the accident. The truck had been in a front-end accident a few days prior.

The owner then drove the truck to Les Schwab and requested an alignment. Les Schwab performed the alignment to the extent that it could be performed and told the owner of the pick-up that a complete alignment could not be performed because of damages to the truck, and that he should take the truck to a collision repair shop for a complete repair. Instead, the pick-up owner drove the truck to run errands prior to the collision with plaintiff. The investigating officer found a mechanical failure to be the cause of the accident, indirectly caused by Les Schwab. This was a major accident involving numerous vehicles. One of the plaintiffs put on evidence of the need for surgery to his cervical and lumbar spine. Damage claims exceeded \$500,000.

Les Schwab put on expert testimony testified that the steering column was broken in the accident and not when he drove his truck from Les Schwab, and that Les Schwab told the truck owner to take his pick-up to a collision repair shop immediately anyway.

Following the 12-0 jury verdict, plaintiff filed a motion for new trial alleging that the jury verdict was not supported by substantial evidence, and that there were irregularities in the evidence, the presentation of witnesses, and closing arguments at trial. The Court denied Plaintiff's motion for new trial, and Les Schwab was awarded costs, including expert witness costs, as Plaintiff did not accept Les Schwab's pre-trial statutory CCP section 998 offer to settle.

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Les Schwab was awarded expert costs, as Plaintiff did not accept a pre-trial statutory CCP section 998 Offer

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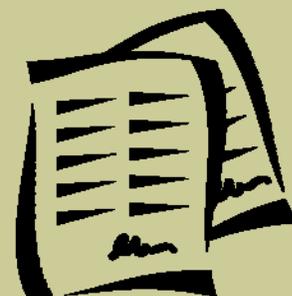
Motor Carriers may be Held Liable for the Torts of their Independent Contractors

By Colin Jewell, Esq.
Senior Counsel

In *Vargas v. FMI, Inc.* (2015) 233 Cal.App.4th 638, the Court of Appeal of California held that federal law indicates an intent to preclude delegation of the tort law duty that motor carriers owe to independent-contractor drivers. The Court of Appeal reversed the trial court's grant of summary judgment for the motor carrier, FMI, Inc., and held that motor carriers such as tractor-trailer owner, FMI, operating leased vehicles pursuant to federal motor carrier's license, have a non-delegable duty under 49 U.S.C. §14102 to "have control of and be responsible for" such vehicles in order to protect the public from tortious conduct of often judgment-proof truck lessor operators.

In *Vargas*, plaintiff, member of a two-driver team hired to drive cargo across the country, was asleep in the sleeping compartment of the tractor when the other driver lost control of the tractor-trailer, which rolled over, injuring plaintiff. The Court of Appeal declined to follow *Privette v. Superior Court* (1993) 5 Cal.4th 689, and its progeny, which hold that a property owner who hires an independent contractor to work on that property is not liable for injuries to an independent contractor or that contractor's employees incurred in the course of that work. Relevant federal statute and case law included independent contractors such as plaintiff among those to whom defendant motor carriers were liable for tortious acts committed by other independent contractors, such as the driver of the tractor-trailer.

The court determined that highway common carriers may not insulate themselves from liability for negligence occurring in the conduct of their business by engaging independent contractors to transport freight for them. If duties imposed on a public licensee could be delegated to a third party without any governmental oversight, the public licensing scheme would be meaningless because a licensee could avoid responsibilities imposed by license simply by engaging an independent contractor.



CHOLAKIAN & ASSOCIATES

Memberships:

Defense Research Institute (DRI)

International Association of Defense Counsel

Northern California Association of Defense Counsel

American Bar Association (ABA)

San Mateo Bar Association

Bar Association of San Francisco

Alameda County Bar Association

San Francisco Trial Lawyers Association

California Trial Lawyers Association

National Association of Subrogation Professionals (NASP) (Northern California Chair 2004-2008)

Trucking Industry Defense Association (TIDA)

San Francisco Defense Association

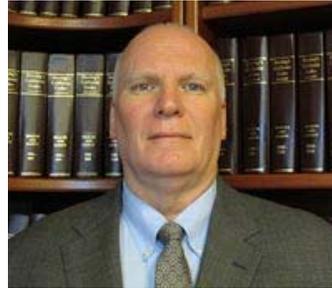


UPCOMING EVENTS

The San Francisco Defense Association (SFDA) has invited a number of distinguished speakers to attend seminars in 2015 and 2016, including Supreme Court Justices and members of Congress. For more information on the SFDA or to become a member, please contact Kevin Cholakian, President, at kcholakian@cholakian.net or Arsen Sarapinian, Secretary, at asarapinian@cholakian.net.

RECENT NEWS

Cholakian & Associates is proud to announce the elevation of Brian Finn, Esq. as Partner! Mr. Finn has been with the firm since 2011. Mr. Finn received his Bachelor of Arts degree with High Honors in Political Science from the University of Nevada, Reno in 1985 and his Juris Doctor from the University of California, Hastings College of the Law in 1989. He's an experienced trial attorney with a focus on defending catastrophic personal injury actions, premises liability, product liability, governmental defense and business litigation. He's admitted to practice in the U.S. District Court, Northern District of California and Eastern District of California. He has volunteered as mediator with San Francisco Bar Association Early Settlement Program and served as a private mediator.



Cholakian & Associates is listed in Best's Insurance Directory, has been AV rated by Martindale-Hubbell since inception, and is retained defense counsel to a dozen major commercial carriers doing business in California. This practice includes, though is not limited to, the representation of carriers regarding commercial and personal lines claims as well as the defense of insureds involved in serious personal injury, catastrophic trucking accident litigation, complex commercial litigation, product liability/fire subrogation matters and coverage litigation. This also includes defense of matters involving allegations of construction defects, mold related claims, inter and intrastate trucking, commercial landlord/tenant, environmental liability, labor and employment law, and uninsured/underinsured motorist matters. The attorneys in this practice group have significant litigation experience, with emphasis on high exposure cases.

Kevin K. Cholakian a native Californian, grew up on a family farm in the Central San Joaquin Valley. He attended Fresno and Tulare County schools until his senior year of high school, when he received a full scholarship to attend North Carolina School of the Arts in Winston-Salem, North Carolina from 1971-1972. He then attended San Francisco Conservatory of Music on a Ford Foundation Scholarship from 1972-1974. He graduated *magna cum laude* with a B.A. in Philosophy from CSU Fresno in 1977. From 1976 to 1978, he served as Chief Administrative Assistant to California State Senator Rose Ann Vuich (first woman elected to the California State Senate serving Central California), managing the Senator's Central Valley field offices stretching from Modesto to Bakersfield. In 1981, he received his law degree from the University of California, Hastings College of the Law, where he was on Law Review and which he attended on scholarship. Mr. Cholakian began his legal career practicing with the litigation sections of Littler, Mendelson, Fastiff & Tichy and McCutchen, Doyle, Brown & Enersen (Bingham-McCutchen) in San Francisco. He became an equity partner and managed the defense practice of an AV rated 25 attorney San Francisco insurance defense firm (1988 through 1999). He founded Cholakian & Associates in January 2000 and has continued to specialize in high exposure personal injury defense, product liability, environmental, and employment/housing discrimination matters. He has been selected as Northern California Super Lawyer under the Personal Injury Defense and Environmental Defense categories for seven consecutive years. He was awarded "Gladiator of the Year" in 2006 and 2009 by Farmers/Zurich for trial accomplishments and awarded the Values and Vision Medallion by the Director of Commercial Claims in 2008 and 2010. Mr. Cholakian regularly defends cases that have exposures in excess of \$1,000,000.00. His trial record is 51-1 in disputed liability jury trials.

Mr. Cholakian is a member of the following organizations: Defense Research Institute (DRI), the International Association of Defense Counsel, the Northern California Association of Defense Counsel, the American Bar Association, the San Mateo Bar Association, Bar Association of San Francisco, the San Francisco Trial Lawyers Association, the California Trial Lawyers Association, National Association of Subrogation Professionals (former San Francisco Chapter President) (NASP), and Trucking Industry Defense Association (TIDA). Mr. Cholakian is the current President of the San Francisco Defense Association, a 40 year old organization comprised of defense litigators. Mr. Cholakian sits on the Executive Committee of the Board of Governors of the City Club of San Francisco.