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California Supreme Court Justices Cuéllar and Kruger Speak at San Francisco Defense Association (SFDA)

The San Francisco Defense Association (SFDA) was recently honored to have Justice Mariano-Florentino Cuéllar and Justice Leondra R. Kruger, two recent appointees to the state's highest court, as guest speakers at The City Club in San Francisco. Kevin Cholakian has been president of the SFDA since 2000.

Justice Mariano-Florentino Cuéllar's previous career was in public service, university administration, and legal academia with a focus on administrative, criminal, and international law. A member of the Stanford University faculty from 2001 to 2015, Justice Cuéllar was the Stanley Morrison Professor of Law and Professor (by courtesy) of Political Science. His books, articles, and chapters focus on administrative agencies, criminal justice, executive power, and legislation, and he is co-author of one of the nation's leading administrative law casebooks.

Justice Cuéllar also served in the federal executive branch. In 2009 and 2010, while on leave from Stanford, he worked at the White House as Special Assistant to the President for Justice and Regulatory Policy. He was a presidential appointee, between 2010 and 2015, to the governing council of the U.S. Administrative Conference, an agency designed to improve fairness and efficiency in federal administrative procedures. He co-chaired the U.S. Department of Education's National Equity and Excellence Commission from 2011 to 2013. Before that, in 2008 and early 2009, he co-chaired the presidential transition team on immigration, borders, and refugees.

Justice Kruger previously served in the United States Department of Justice as a Deputy Assistant Attorney General for the Office of Legal Counsel. From 2007 to 2013, she served in the Department as an Assistant to the Solicitor General and as Acting Deputy Solicitor General. During her tenure in the Office of the Solicitor General, she argued 12 cases in the United States Supreme Court on behalf of the

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Recent Arbitration Win, In Re Baker (UIM)

By Arsen Sarapinian, Esq.
Associate

Neutral Hon. Alex Saldamando of ADR Services returned an arbitration award in favor of Respondent State Farm Auto Insurance Company, represented by Kevin Cholakian and Arsen Sarapinian of Cholakian & Associates. Claimants Stanley Baker and Virginia Baker were represented by Randall Scarlett of the law firm, Scarlett Law Group.

The subject uninsured motorist claim arose out of an automobile accident that occurred on May 8, 2006, as Claimant Stanley Baker was allegedly attempting to pass a tractor-trailer while driving southbound on I-5, just south of Lurline Road between Williams and Colusa California in a 2006 Pontiac Grand Prix. His wife, Virgina Baker, was a passenger in the Pontiac. Claimants alleged that the driver of the tractor-trailer was making a sudden lane change into their lane, and that they had to veer their Pontiac to the left to avoid the impact. The Pontiac went off the paved roadway onto an unpaved, mostly dirt median and crashed into a metal roadside divider before coming to a stop. Claimants alleged that the driver of the tractor-trailer failed to stop. Its identity was never ascertained beyond a generic description of a white truck with one or two trailers and no otherwise identifiable markers. No witnesses were to the accident were identified.

Rescuers had to use the Jaws of Life to extricate Mr. Stanley from the Pontiac after sustaining signifi-

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Justices Cuéllar and Kruger at SFDA, Cont'd

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federal government. In 2013 and in 2014, she received the Attorney General's Award for Exceptional Service, the Department's highest award for employee performance. Justice Kruger had previously been in private practice, where she specialized in appellate and Supreme Court litigation, and taught as a visiting assistant professor at the University of Chicago Law School.

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

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 both Justices as speakers. They discussed, among other things, their backgrounds and what brings them to the court, their mentors, their views on their roles on the court, the status of the state's court system, and potential upcoming challenges.

The SFDA has several seminars planned for 2016. For more information on the SFDA or to become a member, please contact Kevin Cholakian, President, at kcholakian@cholakian.net or Arsen Sarapinian, Secretary and Treasurer, at asarapinian@cholakian.net.

Recent Arbitration Win, In Re Baker, Cont'd

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cant injuries. He was transported to Enloe Hospital by helicopter for, *among other things*, a head injury. Mr. Baker sought treatment from numerous medical providers and brought this claim pursuant to his underinsured motorist policy, alleging he sustained a concussion, traumatic brain injury, memory problems, impaired cognition, speech problems, depression, right sided hearing loss, low back injury, migraines, bladder problems due to lower back injury and resultant bladder nerve pressure, shoulder pain, and neck pain. Mrs. Baker received soft-tissue trauma in the accident and sought damages for having to provide care for her husband following the brain injury.

Claimants sought significant past and future damages. Prior to the arbitration hearing, Claimants served a $750k demand, which was not accepted. After unsuccessful mediation attempts, the parties agreed to arbitrate with the Honorable Alex Saldamando., retired judge.

The defense presented a strong case, reconstructing the accident to negate the claim of physical contact between the Pontiac and the supposed phantom tractor-trailer, as required under California's Uninsured Motorist Law and applicable case law. (See *Rogers v. State Farm Mut. Auto Ins. Co.* (1970) 13 Cal.App.3d 641, 644.) "The provision requiring physical contact with the unknown vehicle was added to the statute in order to eliminate such fictitious claims." (*Orpustan v. State Farm Mut. Auto. Ins. Co.* (1972) 7 Cal.3d 988, 992-993.)

Likewise, Claimants retained a well-known accident reconstructionist to establish that certain markings on the Pontiac, as well certain sounds heard by Mrs. Baker at the time of impact, established physical contact between the Pontiac and the tractor-trailer. After extensive argument, testimony, and briefing, Judge Saldamando ruled that Claimants "failed to sustain their burden of proving that it is more likely to be true than not true that the tractor trailer made 'contact', however slight, with their vehicle, as opposed to one or more of the other possible explanations []."

A Prevailing Defendant in a FEHA Case is Entitled to Statutory Costs Only if the Trial Court Determines the Case was Objectively Groundless

By Colin Jewell, Esq.
Senior Counsel

In *Williams v. Chino Valley Independent Fire District* (2015) 61 Cal.4th 97, the California Supreme Court unanimously held that a prevailing defendant in a California Fair Employment and Housing Act ("FEHA") action, California Government Code section 12900 *et seq*., is not entitled to its ordinary costs as a matter of right pursuant to California Code of Civil Procedure section 1032, but only in the discretion of the trial court pursuant to California Government Code section 12965, subdivision (b). Moreover, if the trial court exercises its discretion to award costs, that discretion must be exercised according to the rule applicable to attorney fee awards in certain federal civil rights actions under *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412, according to which a prevailing defendant receives its attorney fees only if the plaintiff's action was objectively groundless, i.e., without an objective basis for believing it had potential merit.

In *Williams*, the plaintiff sued defendant Chino Valley Independent Fire District for employment discrimination in violation of the FEHA. The trial court granted summary judgment for the District and awarded the District its court costs. In reversing and remanding the matter to the trial court, the Supreme Court resolved a split in lower court decisions, some adopting the *Christiansburg* standard for awards of fees and costs to prevailing FEHA defendants, and others concluding that ordinary litigation costs are recoverable by a prevailing FEHA defendant even if the lawsuit was not frivolous, groundless, or unreasonable.

The Supreme Court justices concluded that the FEHA statute expressly directs the use of a different standard than the general costs statute. By making a cost award discretionary rather than mandatory, Government Code section 12965(b) expressly excepts FEHA actions from Code of Civil Procedure section 1032(b)'s mandate for a cost award to the prevailing party. By contrast, several federal circuit court decisions have declined to apply the *Christiansburg* standard to costs awarded to prevailing defendants under Title VII of the 1964 Civil Rights Act. (See *Nat. Organization for Women v. Bank of California* (9th Cir. 1982) 680 F.2d 1291, 1294; *Delta Air Lines, Inc. v. Colbert* (7th Cir. 1982) 692 F.2d 489, 491, fn. 5; *Poe v. John Deere Co.* (8th Cir. 1982) 695 F.2d 1103, 1108.) The court emphasized that while Title VII does not make the award of costs discretionary with the trial court, the FEHA (like the Americans with Disabilities Act) expressly makes the award of fees and costs discretionary, not merely fees as part of the costs.

The court analyzed the language and legislative history of the FEHA and determined that the California Legislature intended the *Christiansburg* standard govern ordinary costs in FEHA cases to encourage persons injured by discrimination to seek judicial relief. Although attorney fees typically are much larger than ordinary litigation costs in FEHA cases, as in civil litigation generally, ordinary costs in FEHA cases can be substantial, and the possibility of their assessment could significantly chill the vindication of civil rights in both the employment and housing context. While Code of Civil Procedure section 1032(b) may serve an important public policy of relieving a party whose position was vindicated in court of the basic costs of litigation, FEHA expressly provides otherwise.

It is not surprising that a number of associations of public entities filed a friend of the court brief on behalf of the District, specifically the League of California Cities, California Association of Counties, California Special Districts Association, California Association of Sanitation Agencies, Fire Districts Association of California, and Association of California Water Agencies. Cash-strapped public entities, including public housing authorities, seem to be a frequent target of unsuccessful civil rights suits brought under the FEHA and incur substantial fees and costs in defending these cases through summary judgment or trial. They are now denied not only their fees, but also their ordinary costs, in successfully defending a FEHA case, unless they can persuade the trial court the case was frivolous, groundless, or unreasonable. While the California Supreme Court's decision in *Williams* was no doubt the correct one, perhaps the Legislature ought to revisit whether the public policy of encouraging persons who are injured by discrimination to have easy access to the courts outweighs the significant costs passed on to the general public of denying prevailing defendant public entities their ordinary costs of suit in FEHA cases. At least as to public entities, it would seem to benefit the public weal to amend the FEHA to bring it in line with those federal cases which decline to apply the *Christiansburg* standard to costs awarded to prevailing defendants under Title VII.

Bermudez v. Ciolek—A Recent Update to Howell v. Hamilton Meats

By Michael Mutalipassi, Esq.
Associate

As many of us in the industry are aware, *Howell v. Hamilton Meats* is a 2011 case that fundamentally changed damage calculations in personal injury cases in California. The *Howell* court held that a plaintiff is only entitled to recover economic damages in amounts no more than those paid by the plaintiff or his or her insurer for medical services that she received or still owes at the time of trial. Essentially, *Howell* stands for the principle that it is unreasonable for a plaintiff to collect the full value of the medical bills in cases in which her insurance negotiates a substantial reduction of those medical bills. The Plaintiff can only recover the amounts paid. *Howell*, however, leaves open the question of how to determine the reasonable medical damages for an uninsured plaintiff.

On June 22, 2015, the Court of Appeal for the Fourth District issued a published opinion in the matter of *Bermudez v. Ciolek*, setting forth plaintiff's burden with regard to proving the reasonableness of billed, but unpaid, medical damages. In the case, the plaintiff sustained an injury as a bystander when two vehicles collided and hit him. He did not have insurance at the time of the incident, which means that at the time of trial, his more than $450,000 in medical bills remained outstanding. Plaintiff's treating physicians testified at trial with regard to the reasonableness of the medical bills. The jury awarded Plaintiff $460,431 in medical expenses and various noneconomic damages based, in part, on the extent of the medical expenses.

Defendant appealed the case on the ground that Plaintiff had not met his burden of showing that the medical bills were reasonable such that those damages should be reduced to the reasonable amount that would be paid under *Howell* and its progeny. The Court of Appeal upheld the medical damages, and, in a published opinion, held that *Howell* merely requires that unpaid medical damages are reasonable. The Court of Appeal further held that the testimony of the medical providers that billed for the services, at least in *Bermudez*, was sufficient evidence to sustain the jury's damages award.

Bermudez is an erosion of the *Howell* doctrine. The *Bermudez* holding essentially creates an inequity between plaintiffs who pay their medical bills or carry insurance and those who do not pay their bills or carry insurance. Though it seems irrational, the present state of the case law seems to be that an insured plaintiff cannot recover the same amount as an uninsured plaintiff who suffers an identical injury with regard to medical damages. This is an inequity that will likely need to be resolved by the legislature or in future published opinions. In the meantime, it will be extremely important for defendants to employ experts to testify extensively regarding the reasonableness of the medical bills of uninsured plaintiffs.

Mitchell v Superior Court - Disclosure of Witnesses in Interrogatories

By Arsen Sarapinian, Esq.
Associate

In a December 22, 2015 opinion certified for publication, the California Court of Appeal held that it was an abuse of discretion for a trial judge to impose an evidence sanction based on a plaintiff's failure to divulge the names of three witnesses in response to form interrogatory No. 12.1 and to a defendant's general request for supplemental responses to interrogatories.

Petitioner Karla Danette Mitchell was the plaintiff in an action filed against Johnson and Doe defendants, in which plaintiff sued for personal injury and property damage allegedly suffered in a 2012 automobile accident. Defendant propounded form interrogatories published by the Judicial Council. Form interrogatory No. 12.1 relates to the general investigation of an incident and provides: "State the name, ADDRESS, and telephone number of each individual: (a) who witnessed the INCIDENT or the events occurring immediately before or after the INCIDENT; (b) who made any statement at the scene of the INCIDENT; (c) who heard any statements made about the INCIDENT by any individual at the scene; and (d) who YOU OR ANYONE ACTING ON YOUR BEHALF claim has knowledge of the INCIDENT (except for expert witnesses covered by Code of Civil Procedure section 2034)."

In response to interrogatory No. 12.1 and to defendant's request for supplemental answers to interrogatories, plaintiff did not identify any witness to the "incident" except one of her children, Destin Shares, who was a passenger in the vehicle. Plaintiff later identified several witnesses whom she intended to call at trial, including Steve Meier, Dante Shamburger and Khiana Ferguson, who would testify to plaintiff's physical limitations allegedly resulting from the accident. None of the three witnessed the accident.

Defendant filed a motion in limine to exclude the testimony of any witnesses not previously disclosed in discovery, arguing that the testimony of such witnesses should be excluded as an evidence sanction for plaintiff's failure to divulge their identity in response to interrogatories, in particular, interrogatory No. 12. The trial court agreed with defendant and granted defendant's motion in limine, excluding the testimony of the three witnesses at trial.

On appeal, the Justices stated that they read interrogatory No. 12.1 to seek the identities of percipient witnesses, witnesses who were at the scene immediately before or after the accident, those privy to statements by percipient witnesses to an accident and those who might have personal knowledge of the accident itself. The interrogatory does not seek the identity of witnesses—such as those whose testimony was excluded by the trial court—who may testify to the physical injuries or physical disabilities suffered by a plaintiff as a result of the accident. The Court held that interrogatory No. 12.1 should be narrowly construed to refer to witnesses of the incident itself is bolstered by other form interrogatories, in particular, Nos. 12.4 and 16.1, which distinguish between an "incident" and a plaintiff's "injuries."

Moreover, exclusion of a party's witness for that party's failure to identify the witness in discovery is appropriate only if the omission was willful or a violation of a court order compelling a response. (See Code Civ. Proc., §§ 2023.030, 2030.290, subd. (c), 2030.300, subd. (e); see also *Saxena v. Goffney* (2008) 159 Cal.App.4th 316, 333-335; *Thoren v. Johnston & Washer* (1972) 29 Cal.App.3d 270, 273-275.) Even if interrogatory No. 12.1 could be construed as a request for the identity of witnesses who would testify to post-accident physical disabilities and difficulties, there was no evidence that plaintiff's failure to identify the witnesses was willful or that plaintiff contravened a court order to provide discovery.

It is important for defense attorneys to be mindful of the *Mitchell* case, as it sheds light on the risks of reliance solely on responses to Form Interrogatories (specifically the 12-series interrogatories) and Supplemental Interrogatories. The better practice is to prepare *special* interrogatories, requesting plaintiffs to identify all witnesses with knowledge of alleged physical limitations.

The same practice should be employed in brain injury cases, where plaintiffs commonly rely on lay witnesses who have noticed cognitive changes. Our firm recently served specially prepared interrogatories in an alleged brain injury case, requesting the names and contact information of all witnesses with supposed knowledge of Plaintiff's cognitive defects. Plaintiff responded accordingly. The defense then deposed all of the lay witnesses, and filed a precautionary motion in limine to preclude Plaintiff from calling any lay witnesses not disclosed in response to the special interrogatories. This practice limits the element of surprise at trial.

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

Recent Arbitration Win - Dunn v. SFHA

By Brian J. Finn, Esq.
Partner

Recently our client the San Francisco Housing Authority prevailed in a binding arbitration in which the Painters Union challenged the termination of painter Ronald Dunn. The Union sought $180,000.00 in past wages and reinstatement for Mr . Dunn. Mr. Dunn was terminated after a coworker reported to the Housing Authority that Mr. Dunn had verbally abused, assaulted and battered him. The Housing Authority investigated the allegations and terminated Dunn pursuant to their Zero Tolerance Policy against Workplace Violence. A Skelly hearing was conducted pursuant to the Contract and the Union demanded Binding Arbitration pursuant to the agreed upon disciplinary procedures.

In a full day arbitration handled by partners Kevin K. Cholakian and Brian J. Finn, the San Francisco Housing Authority offered 6 witnesses concerning Mr. Dunn, including testimony from the battered coworker and from a witness who testified that Mr. Dunn bragged about the assault and tried to intimidate her from testifying. The Union put up 7 witnesses challenging the coworkers rendition of the story. The arbitrator issued a written decision upholding the termination and denial of damages and reinstatement.

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 a well-known 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 has been on a Blue Ribbon Panel that oversees the selection process for that organization. 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, disputed causation 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