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Congresswoman Barbara Lee Speaks At San Francisco Defense Association (SFDA) Luncheon

U.S. Rep. Barbara Lee and Kevin Cholakian

The San Francisco Defense Association (SFDA) was recently honored to have Congresswoman Barbara Lee as a guest speaker at The City Club in San Francisco. Congresswoman Lee (Rep. East Bay) was invited by Kevin Cholakian to speak about the legal implications related to developing relations between the United States and Cuba, as well as the status of the United States Supreme Court.

Congresswoman Lee serves on the Budget Committee and the Appropriations Committee, which oversees all federal government spending. She serves on three subcommittees—State and Foreign Operations; Labor, Health and Human Services, and Education; Military Construction and Veterans Affairs. She is the former chair of the Congressional Black Caucus (111th Congress) and co-chair of the Congressional Progressive Caucus (109th and 110th Congress).

Congresswoman Lee gained national attention following the September 11, 2001 attacks. She was the only member of Congress to oppose the authorization for the use of military force (AUMF) following the attacks, based on her belief that AUMF would become a blank check for "endless war." She has been an outspoken opponent of the war in Iraq from its inception, advocating that once involved, America would be bogged down in an endless war or series of wars.

Congresswoman Lee's background is in psychiatric social work, having helped provide mental health services. She began her political career in 1975 as an intern and eventually rose to Chief of Staff, to former Congressman and Oakland Mayor, Ron Dellums.

She was elected to the California State Assembly and State Senate in the early 90s, where she authored 67 bills and resolutions that were signed into law by Republican Governor Pete Wilson. She's been a member of Congress since

(Continued on page 2)

California Court Of Appeal Affirms Trial Court's Granting Of Summary Judgment Motion

By Kevin Cholakian, Esq.
Partner

In an issue of first impression, the Third Appellate District of the California Court of Appeal in a published opinion recently upheld a Sacramento trial court's granting of a motion for summary judgment. Cholakian and Associates was instrumental in developing the theory and strategy behind the motion for summary judgment. The appeal was handled by another firm.

In *Yan Wang, et al. v. Gregory Nibbelink, et al.*, a horse ran away from our client's meadow onto adjacent property and trampled plaintiff Yan Wang as she and her husband were getting out of their car. Plaintiff suffered significant damages and retained the San Francisco-based firm, Dolan Law Firm. Our client owned the meadow, but not the horse. The horse was part of the "Wagon Train," an annual historical event simulating Old West travel by stage coach across the Sierras in Northern California. Our client was not involved in the event, but allowed event organizers and participants to use the meadow for overnight camping and horse containment. Plaintiffs had nothing to do with the Wagon Train, not even as spectators. Plaintiffs sued numerous parties, including the meadow owner.

In California, the general premises liability rule is "Everyone is responsible . . . for an injury occasioned to another by his or her want of ordinary care or skill in the management of his or her property or person." (Civ. Code, §1714.)

(Continued on page 2)

Congresswoman Barbara Lee At SFDA, Cont'd

(Continued from page 1)

1998.

The SFDA is a 52-year-old organization 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. It's the oldest association of defense attorneys in San Francisco.

Our most recent speakers included the two newest members of the California Supreme Court, Justice Leondra Kruger, California Supreme Court Justice Mariano-Florentino Cuéllar, the Presiding Judge of the San Francisco Superior Court, John Stewart, and San Francisco Superior Court Judge Teri Jackson.

Past speakers have included California Supreme Court Justice Kathryn M. Werdegar, California Supreme Court Justice Marvin R. Baxter, California Supreme Court Justice Ming Chin, California Supreme 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 is in the process of confirming luncheons with newly appointed United States Senator Kamala Harris, as well as with Chief Justice of the California Supreme Court, Cantil-Sakauye.

Please feel free to contact Kevin Cholakian, President, at kcholakian@cholakian.net or Arsen Sarapinian, Secretary and Treasurer, at asarapinian@cholakian.net to RSVP for these events or obtain more information about the SFDA.

Court Of Appeal Affirms Summary Judgment Motion, Cont'd

(Continued from page 1)

Negligence claims based on premises liability are governed by section 1714, absent a statutory provision declaring an exception to the fundamental principle enunciated by section 1714. In defending the litigation, our firm developed a defense pursuant to a rarely implicated statute, Civil Code section 846 which shields landowners from liability "[f]or any injury to person or property caused by any act of the person to whom permission has been granted." While courts are reluctant to grant summary judgment motions, we believed the facts of the case were such that the application of the statute was appropriate.

Plaintiffs filed a written opposition to the motion, arguing that section 846 does not provide immunity because plaintiffs were not on the meadow owners' property and were not "recreating." They further argued that even if the statute applied to such off-premises injuries, triable issues existed (e.g., whether or not "parking" horses on the land was a recreational purpose).

The trial court granted the motion, ruling the statute applies to off-premises injuries caused by on-premises recreational users, no triable issues existed on the elements or exceptions of the statute, and plaintiffs failed to allege or present any independent negligence by the meadow owners that could be conceptually separated from the alleged duty on the part of the meadow owners to control the recreational users of the land.

The court's decision was heard on appeal, where similar arguments were made. The Court of Appeal closely construed the statutory language, the legislative intent behind the statute, and public policy concerns. It upheld the trial court's decision granting the motion for summary judgment.

In denying plaintiffs' plea for reversal, the Court explained that "[m]aking landowners liable when a recreational user injures an uninvolved person on adjacent property would undermine this legislative purpose to encourage private landowners to allow recreational use of their land."

"If It's Worth A Nickel Give It A Nickel; But If Its Worth A Dollar Give It A Dollar"

By James J. Ison, Esq.
Attorney

A trial court's ruling on a pre-trial motion can have a decisive effect on how a case resolves. A case we recently settled on favorable terms illustrates this point. A Hawaii-based company ("Arranger") specializing in "Cradle to Grave" disposal of hazardous waste arranged for the shipment to California of a 55-gallon drum of used refrigeration oil ("Drum") generated by its client ("Generator"). The Drum's final destination was a disposal site in Utah. After it arrived in California, the Drum was loaded onto a trailer ("Trailer") by another hazardous waste disposal company operating in California. The Trailer would be hauled by our client.

On its way to Utah, the Trailer was left overnight at a lot in Sacramento, California. The following morning, the local fire department was notified that the Trailer was emitting vapor. After deploying to the site, the fire department directed one of its response teams to open the Trailer doors. When it did, the team observed "[a] brown oily substance" on the Trailer's walls and ceiling, indicating that the oil had burst its container. The fire department watched and waited from a distance. At about 5:00 p.m., the Trailer erupted into flames. The fire department doused it with thousands of gallons of water creating a toxic soup that spilled on to neighboring properties.

The fire department "surmised" that the Drum burst because it was "overfilled" in Hawaii and did not have enough space for expansion in Sacramento's higher temperatures. The oil that escaped the Drum damaged other containers holding "incompatible substances" causing, so the theory went, those substances to come into contact with the oil and react in a manner that caused the fire.

Our client's carrier funded the cleanup. It asked the Arranger and Generator to contribute. They refused. The carrier retained our firm to file a subrogation action in federal court based primarily on the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), a strict liability statutory scheme designed to spread the cost of environmental cleanup among all "potentially responsible parties," which included our client, the Generator and the Arranger.

It soon became apparent that recovering any amount from the Generator and Arranger would be difficult. CERCLA presented legal issues vulnerable to attack created by the statutory scheme's complexity. As one court noted, "wading through CERCLA's morass of statutory provisions can often seem as daunting as cleaning up one of the sites the statute is designed to cover." The Generator and Arranger disputed all liability and its attorneys ably asserted their clients' defenses. Despite the firemen's theory, it was clear no party could conclusively prove what had caused the fire - even our own experts could only say that it was "more likely than not" that the fire was caused by the overfilled Drum.

This case was further complicated by a neighboring property owner filing a complaint in state court alleging property damage caused by its exposure to the toxic runoff and fumes. The state court plaintiff named our client and the Generator, but not the Arranger. We cross-complained against the Arranger. The Arranger filed a motion to quash for lack of personal jurisdiction. It had credible grounds to do so: it had no employees in California; it did not operate in California; it did not have a registered agent for service of process in California; and its control over the hazardous materials it shipped to California ended when it delivered the waste to a port in Hawaii.

This was a critical juncture in the litigation. After we deposed the defendants' corporate representatives, we were able to build a credible case and the Generator wished to engage in mediation. The Arranger, however, continued to disclaim all liability and offered a paltry $10,000 to settle our claims. We expected it to become more intransigent if we could not keep it in the state court case.

We discussed with our carrier the importance of defeating the Arranger's motion and the legal research, analysis, and drafting necessary to prepare an opposition brief that gave us the best chance of prevailing. I quoted my Harvard Business School trained father-in-law who often described his approach to problems he encountered during his business career: "If it's worth a nickel, give it a nickel; but if it's worth a dollar, give it a dollar." Our carrier fully understood our concerns and approved our proposed budget.

The court denied the Arranger's motion. At hearing, the judge thanked us for our "well-reasoned," well-written brief because it made it easier for him to make his decision. Two months later we settled the case and made a sizeable recovery of our carrier's cleanup costs after covering our fees and litigation costs. This recovery would not have been attainable without the support of our client carrier in a critical motion that greatly affected the outcome of the case.

The Devil Is In The Detail—Tong v. Montana

By Russell Mortyn, Esq.
Attorney

This was a high speed rear-end motor vehicle case with undisputed liability where the plaintiff, an at-risk older individual with blood-clotting disorder, developed a brain bleed weeks later and subsequently had brain surgery at Stanford Hospital. He had subsequent cognitive and stroke related claims.

The only issue initially was the level of nursing care needed for this plaintiff for the remainder of his life. Plaintiff had retained a well-respected expert neuropsychologist and a lifecare planner, who put together a detailed lifecare plan which included lifetime attendant-care with a cost in the $100,000 per-year range. Plaintiff's medical bills were in excess of $600,000. A demand for the $1.1million policy limits came early. Plaintiff delayed filing suit, and after further delay, we did what we rarely do, which is to voluntarily appear so we could subpoena records and take depositions of key witnesses and treaters.

Plaintiff's pre-existing medical condition included hepatitis-B cirrhosis and chronic thrombocytopenia (lack of "clotting factors" which made it difficult for him to form blood clots and stop bleeding once he started). Plaintiff's presentation was that this rendered him a classic "eggshell" plaintiff and our clients were liable for all medical treatment necessitated by the accident, which included life-saving brain surgery to evacuate his multiple hematomas, as well as the lifelong attendant care for his subsequent cognitive deficits, which were undisputed.

Plaintiff received his medical care at Stanford hospital, where much of the initial treatment was administered by residents. Buried in the medical records was a snippet of history taken by a resident emergency room physician: a passing reference to a possible "fall." We also noticed a reference on a radiology report where there was a reference to an orbital fracture. This history was dismissed by the treating neurosurgeon as "questionable" due to the patient's noncompliance and confused mental state when he provided it; however, it was never mentioned again throughout the extensive hospital stay. The remainder of the history came from the patient's wife, who described the subject car accident as the only prior trauma to the head (despite there being no mention of head trauma at the scene).

The treating Stanford neurosurgeon rendered a written opinion in the records stating that the car accident was the cause of the brain bleeds and the resulting cognitive deficits, and this opinion was echoed by the other treating physicians based on the wife's description of the car accident which was reiterated throughout the electronic medical records. We systematically deposed those doctors and were able to have them back off their opinions about causation due to the lack of prior records, time delay between onset of the symptoms related to the bleed (6 weeks), and lack of head-related or neurologic complaints (this was a very significant accident, and it did result in traumatically induced herniated discs).

We questioned the wife about the history of a fall; however, even though she was not present with her husband at the ER, she admitted he suffered a significant fall" to the face at home just before going to the emergency room. We also questioned the treating neurosurgeon about the CT scans of this patient, and the treating surgeon admitted there was indeed a "teeny" orbital fracture on the CT which had not been considered as part of the medical treatment or the causation opinion documented in the records.

At mediation, we presented this additional information which was not in the medical records, and we ultimately obtained a settlement of the matter for 10 percent of the original policy limit demand.

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

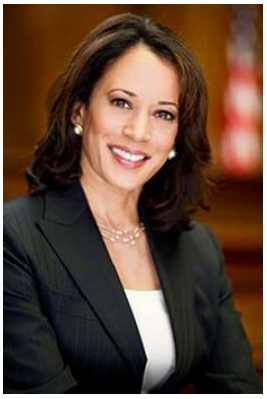
California Trial Lawyers Association

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

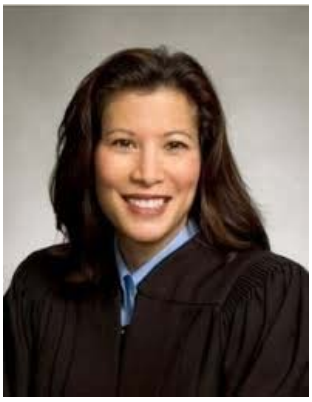
Trucking Industry Defense Association (TIDA)

San Francisco Defense Association

UPCOMING EVENTS



U.S. Senator Kamala Harris



Justice Tani Cantil-Sakauye

The San Francisco Defense Association (SFDA) is confirming luncheons with newly-appointed United States Senator Kamala Harris and Chief Justice of the California Supreme Court, Tani Cantil-Sakauye at The City Club in San Francisco.

To RSVP or obtain more information about the SFDA, please contact Kevin Cholakian, President, at kcholakian@cholakian.net or Arsen Sarapinian, Secretary and Treasurer, at asarapinian@cholakian.net.

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 eight 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 on the Executive Committee of the Board of Governors of the City Club of San Francisco. He also serves on the Board of Trustees at UC Hastings College of the Law.