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Cholakian Law Firm Achieves Defense Verdict in a Highly Publicized Santa Clara County Wrongful Death Lawsuit

After three weeks of testimony a Santa Clara County jury returned a 10-2 defense verdict in a highly publicized wrongful death lawsuit in favor of Defendant 2000 Senter Road, LLC, one of the largest commercial landlords in the San Jose Vietnamese-American community, represented by Kevin Cholakian and Brian Finn of Cholakian & Associates.

Plaintiff Ba Tran (the mother of the decedent, Tommy Tran) was represented by Joseph May and Craig Peters of The Veen Firm. Plaintiff had sought over $5 million in damages from the jury. Mr. Peters is considered one of Northern California's most successful plaintiff personal injury trial attorneys.

The wrongful death lawsuit arose out of an April 6, 2013 gang-related fatal shooting of Tommy Tran which took place in a warehouse parking lot in San Jose.

Plaintiff alleged that Defendant knew, or should have known, that its tenant was operating an illegal nightclub from the warehouse as early as March 2012, but failed to terminate the club's lease or remove it from the premises. She contended that the club did not have the required building, plumbing or electrical permits, did not possess a liquor license, and illegally transformed the second floor of the space into a 2,000 square foot nightclub.

Plaintiff further argued the nightclub held regular business hours seven nights a week, employed at least 15 strippers, 5 waitresses, 3 busboys, a cook, a manager. Evidence was produced that the club served an average of 50 patrons on weeknights and 100 guests on weekends. Plaintiff claimed the property owners failed to inspect the property, were negligent in their maintenance of the warehouse, and should have known that an illegal night club was operated from the premises. Further, they claimed the property manager of the warehouse first inspected the upstairs property on March 29, one week before the deadly 2013 shooting, but took no action to shut the night club down.

Defendant denied any prior knowledge of the illegal operations and only discovered the alterations to the property a week before the shooting. Defendant told the tenant to tear the build-out down within 30 days. Defense counsel asserted that the property manager, Defendant's agent, worked normal business hours, that the club was open late from 9 p.m. to 6 a.m., and that it could not have known about the nightclub under the circumstances. The defense asserted that the nightclub's operator knew the other tenants would not be on the premises late at night and ran his business in a secretive fashion when he knew other tenants would not be there. Defendant's 86-year-old owner testified he intermittently visited the property during the week for short periods of time to sign checks and do paper work while the property manager collected rent, took care of landscaping needs, and responded to tenant complaints.

The defense established that the decedent had visited the nightclub at least three times before he was shot, knew the club attracted gang members, and was aware of any risks posed by visiting the premises. The defense further argued that prior to the incident, several complaints of illegal activity were reported to the San Jose Police Department, but the police did not disclose any investigations of these complaints to Defendant.

Plaintiffs' demand was never less than the $1 million policy limits until 10 days prior to trial, when they served a CCP 998 demand of $500k.

Defendant served a CCP 998 offer of $200k, with an indication of $300k at the MSC. Following the defense verdict, Defendant's Motion for Costs of $70,000 was granted, and Plaintiff's motion for new trial was denied.

Presiding Alameda and Contra Costa County Judges Speak at San Francisco Defense Association (SFDA) Luncheon

Hon. Ioana Petrou

Hon. Steven K. Austin

By Arsen Sarapinian, Esq.
Associate

The San Francisco Defense Association (SFDA) was honored to have Alameda County Superior Court Presiding Judge Ioana Petrou and Contra Costa Superior Court Presiding Judge Steven K. Austin (2015-2016) attend and speak at a recent luncheon at The City Club in San Francisco.

The judges were invited by SFDA President Kevin Cholakian to speak about their unique perspectives in their counties, what judges look for in effective oral advocacy in law and motion and trial practice, discovery facilitator programs, and sanctions considerations. Thirty members attended the luncheon.

Judge Petrou was appointed to the bench in 2010 by former Governor Arnold Schwarzenegger. Before her appointment she was an assistant U.S. Attorney for the U.S. Attorney's Office for the Northern District of California and Eastern District of New York and worked in private civil practice with O'Melveny & Myers and Foley & Lardner. She is a graduate of UC Berkeley (B.A. and J.D.). Judge Petrou currently presides over the civil trial departments in Alameda.

Judge Austin was appointed to the bench in 1998 by former Governor Pete Wilson. Prior to that time he worked in private practice with Buresh, Kaplan, Jang, Feller & Austin, and Cole and Scott. He is a graduate of UCLA (B.A.) and UC Hastings College of the Law (J.D.). He was a classmate of Kevins at UC Hastings. He served as Presiding Judge of Contra Costa Superior Court from 2015 to 2016.

The SFDA is a 53-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 is the oldest association of defense attorneys in San Francisco.

SFDA's most recent speakers included the two newest members of the California Supreme Court, Justice Leondra Kruger and Justice Mariano-Florentino Cuéllar, Congresswoman Barbara Lee, and Judge Evelio Grillo of the Alameda County Superior Court.

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 Court 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.

You can contact Kevin Cholakian, President, at kcholakian@cholakian.net or Arsen Sarapinian, Secretary and Treasurer, at asarapinian@cholakian.net to obtain information about SFDA membership or to RSVP to future luncheons.

Recent Amendments to The Unruh Act Provide Protections to Businesses

By Arsen Sarapinian, Esq.
Associate

The California legislature recently enacted legislation (Senate Bill 269) designed to curb frivolous Unruh Act claims and lawsuits by disabled individuals against California businesses. Although the legislation gained some publicity, many business owners remain unaware of legislation, and the protections that it offers.

It's well-known that individuals with disabilities are entitled to equal access to businesses under state and federal law. The Americans with Disabilities Act (ADA) affords federal protections, while the Unruh Act affords state protections. Individuals with disabilities commonly bring claims under both acts since each provides for different types of damages—the Unruh Act allows for the award of monetary damages, injunctive relief, and attorneys' fees, while the ADA only allows for injunctive relief and attorney's fees but not monetary damages.

Individuals with disabilities could opt to recover up to three times the amount of *actual* damages suffered as a result of the denial of access, or $4,000 per violation in statutory damages without any proof of actual damages. This provision affording the $4,000 in automatic statutory damages per violation incentivizes lawsuits based on technical violations without requiring proof of actual damages. Many business owners are unknowingly out of compliance for minor technical requirements, such as missing or misplaced signage, improper door handles, and various minor issues. Many businesses operate in spaces that were built according to outdated building standards, and have not been updated.

The California state legislature previously passed laws in 2008, 2012, and 2015 to, among other things, reduce frivolous lawsuits by high-frequency litigants (defined as those who have filed 10 or more accessibility-type complaints within a 12 month period).

SB 269 was another attempt to reduce minor or "technical" claims. A key provision allows businesses to correct certain technical violations within 15 days of receiving notice of a violation (whether by a claim or lawsuit). First, the alleged violation must meet the definition of technical violation as set forth in Civil Code section 55.56, subsection (e)(1):

(A) Interior signs, other than directional signs or signs that identify the location of accessible elements, facilities, or features, when not all such elements, facilities, or features are accessible.

(B) The lack of exterior signs, other than parking signs and directional signs, including signs that indicate the location of accessible pathways or entrance and exit doors when not all pathways, entrance and exit doors are accessible.

(C) The order in which parking signs are placed or the exact location or wording of parking signs, provided that the parking signs are clearly visible and indicate the location of accessible parking and van-accessible parking.

(D) The color of parking signs, provided that the color of the background contrasts with the color of the information on the sign.

(E) The color of parking lot striping, provided that it exists and provides sufficient contrast with the surface upon which it is applied to be reasonably visible.

(F) Faded, chipped, damaged, or deteriorated paint in otherwise fully compliant parking spaces and passenger access aisles in parking lots, provided that it indicates the required dimensions of a parking space or access aisle in a manner that is reasonably visible.

(G) The presence or condition of detectable warning surfaces on ramps, except where the ramp is part of a pedestrian path of travel that intersects with a vehicular lane or other hazardous area.

Assuming that the alleged violation meets the above definition, businesses have a short 15-day window to remediate the violation. This remediation creates a "rebuttable presumption" that the technical violation did not cause a person "difficulty, discomfort or embarrassment" under the law.

Kevin Cholakian has defended major restaurants and governmental entities (such as the Santa Clara Housing Authority) in defense of ADA and Unruh Act claims. Our law firm was recently retained by several businesses to defend them in response to ADA and Unruh Act claims for technical violations. The businesses were inspected by Certified Access Specialist (CASp), the minor technical violations were corrected, and claims were denied.

It is incumbent upon business owners to educate themselves regarding this developing area of the law, be prepared to appropriately respond to a claim or lawsuit alleging violations by consulting an attorney or CASp, and correct the alleged violations as soon as possible. It is also incumbent upon business owners to raise the correction of a technical violation as a rebuttable defense.

Furthermore, other mechanisms to limit damages are available even if the 15-day window has passed. Whether or not businesses have been served with a claim or a lawsuit, they should obtain a certificate from a CASp stating that an inspection has been performed. Depending on whether the claim or lawsuit is served before or after an inspection by a CASp, businesses may be either exempt from the statutory damages, or the damages may be reduced from $4,000 to $1,000 per violation, provided that certain criteria set forth in the statute are satisfied. A list of CASps can be found here: https://www.apps2.dgs.ca.gov/DSA/casp/casp_certified_list.aspx

Can Permissively Allowing Recreational Use of Property Ever Be Malicious?

By Jeffrey Schwalbach, Esq.
Associate

When asked what "malice" means, the standard for claiming punitive damages pursuant to Civil Code section 3294 will come to mind for most civil attorneys. The "despicable conduct" requirement imposed by the 1980 and 1987 amendments to that statute, as discussed in the landmark California Supreme Court case of *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, is commonly associated with the malice standard for awarding punitive damages.

However, there is a less known "malice" standard, whose relationship with the *College Hospital* standard has yet to be articulated by case law. Sophisticated property owners are likely familiar with the "recreational immunity" affirmative defense available to landowners whose property is available to others for recreational use. (Civil Code section 846). This affirmative defense includes an exception, which precludes its application where there is conduct by the landowner similar in nature to the "despicable" conduct required for punitive damages.

The exception to the recreation immunity defense precludes its application to a property owner who is shown to demonstrate a "willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity." *Manuel v. Pacific Gas & Electric Co.* (2009) 173 Cal.App.4th 927 applied this exception to uphold summary judgment in favor of a landowner where a fourteen-year-old trespasser fatally injured herself climbing a transmission tower. The defendant had placed warning signs and "anti-climbing guards" on the tower, showing it was aware of the potential danger.

In reaching its decision, Manuel conducted an exhaustive review of case law and noted that there are "relatively few published cases" interpreting this exception to recreational use immunity. (*Id.* at pp. 940-941). The decision therefore considered the "willful" standard from multiple other contexts, pointing out that "the term 'willful' may not be precisely the same for all purposes." (*Id.* at p. 939 (quoting *Calvillo-Silva v. Home Grocery* (1998) 19 Cal.4th 714, 728-730).)

Manuel concluded that "three essential elements must be present to raise a negligent act to the level of willful misconduct: (1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to possible, result of the danger, and (3) conscious failure to act to avoid the peril." (*Id.* at p. 945.) The court applied the second of these prongs, affirming summary judgment for the defendant on the ground that the plaintiff had failed to show that the landowner knew that injury to trespassers climbing on its tower was "probable, as opposed to possible." (*Ibid.*)

After comprehensive case review, neither *Manuel* nor the Supreme Court *Calvillo-Silva* case, which *Manuel* cited, made any reference to *College Hospital*, nor to the "despicable conduct" standard which *College Hospital* recognized as a "new substantive limitation" imposed on punitive damage awards pursuant to the Legislative amendments to Civil Code section 3294. (*College Hospital*, *supra*, 8 Cal.4th 704 at 725). *Manuel* did, however, characterize it as "well-established" that "willful or wanton misconduct is intentional wrongful conduct, done either with a knowledge that serious injury to another will probably result, or with a wanton and reckless disregard of the possible results." (*Manuel*, *supra*, 173 Cal.App.4th 927 at 940.) *Manuel* also observed that the "significant majority" of cases applying the malice exception to recreational use immunity "have held for defendant – most on summary judgment." (*Id.* at pp. 940-941). This makes sense, since allowing the "recreational use" of one's property is inherently gratuitous, and therefore non-malicious.

Despite this defense-friendly case law, and the good reasons for it, there may yet come a case at some point requiring counsel to address the applicability of *College Hospital's* "despicable conduct" standard to the malice exception to the "recreational use" immunity for premises liability. In the interim, property owners can continue to assert the "recreational immunity" affirmative defense. Savvy property owners should take proactive steps to protect themselves under the second and third prongs of *Manuel*, by implementing safeguards and warnings for potential perils. These preemptive actions will help guarantee property owners prevail at summary judgment, rather than potentially creating case law that analyzes the applicability of "despicable conduct" to the "recreational immunity" affirmative defense.

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-President

NEWS

Hon. Marsha S. Berzon

The San Francisco Defense Association (SFDA) and the Cholakian Law Firm was proud to sponsor Federal Judge Marsha S. Berzon of the Ninth Circuit Court of Appeals as a keynote speaker at an SFDA luncheon at The City Club in San Francisco on August 18, 2017. Topics of discussion included: best appellate practice techniques (briefing and oral argument), tips for trial attorneys to preserve a record on appeal (pre and post-trial motion practice), followed by a question and answer opportunity.

To 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 in 2000, 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, and construction defect litigation. This also includes defense of matters involving allegations of fraud/SIU investigations, 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, which he attended on scholarship, and now serves on the Board of Trustees. 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 ten 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.