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Mika J. Frisk, Esq.

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Jackson v. Park

Los Angeles County Superior Court Case No. BC611403
Trial Counsel: Kevin K. Cholakian & Melvin F. Marcia
(January-February 2019)

10-day jury trial. January 24, 2019 to February 8, 2019.

Admitted Liability – disputed causation.
Injury – Herniated L5-S1 back surgery as a result of rear-end collision into Plaintiff's trailer and truck.
C.C.P. §998 (Plaintiff) $399,999 / C.C.P. §998 (Defendant) $125,000 – the Jury came back with a $17,235 verdict for Plaintiff which was over $107,000 below Defendant's §998 offer of $125,000. In addition, the Jury decided 12-0 that the Plaintiff had not met his burden of clear and convincing evidence that Defendant Park acted with malice, fraud, or oppression and thus found that Mr. Park should not pay punitive damages.
1.2 Million Plaintiff Demand at closing.
$17,235 Verdict.

Summary of the case:

This 12-day jury trial stemmed from a motor vehicle collision which occurred in the morning of March 9, 2014. Plaintiff's trailer as a well as the Chevrolet truck, which was towing the trailer, sustained moderate damage as a result of the collision. Defendant was arrested for suspicion of DUI. Plaintiff sought punitive damages as a result of Defendant's .15 blood alcohol level and DUI and pled no contest to DUI. Defense counsel was eventually able to keep out the blood alcohol level and the conviction because the foundation requirements were not met.

Plaintiff himself was incarcerated shortly after the incident (for unrelated matter) and upon entering the correctional facility, the plaintiff was given a medical "intake" which required him to fill out a form and answer the questions relating to his medical condition; the plaintiff denied having any medical problems at the time of filling out the form on March 18, 2014, 9 days after the collision. The plaintiff denied "medical or mental problems." On March 25, 2014, Plaintiff informed Dr. Lafayette, the doctor at the Los Angeles County jail, that he wished to change his previous responses stated that he needed medication for high blood pressure and for a cold. He claimed that he had not mentioned it to the intake nurse when he was booked, because he thought he was "getting out." At no time did Plaintiff say anything about an injury to his back or neck. The Court kept out any reference to jail.

Plaintiff testified that he saw a chiropractor one time on April 22, 2014. Plaintiff stated in his verified responses to Form Interrogatories that he sustained physical injuries as a result of the motor vehicle collision on March 9, 2014; he stated that he suffered neck pain, and focal disc herniation and disc protrusion in his back. Plaintiff went on to have surgery, a laminectomy at L5-S1, with a Los Angeles surgeon, Dr. Rowshan, on July 17, 2015.

The defense admitted liability, but disputed causation. Dr. Nagelberg's expert opinion was that Plaintiff had a capacious spinal canal, and there is absolutely no visible neural compression of any sort in the MRI; similarly, there was no nerve root compression either. Dr. Nagelberg opined that there was no clinical correlation between the MRI findings and the patient's complaints. There was nothing to suggest that the minor abnormality at L5-S1 was the source of the patient's alleged pain. Dr. Nagelberg was adamant that there was absolutely no clinical indication for this surgery.

Plaintiff offered the expert opinion of neuroradiologist Dr. Watanabe, who opposed Defense radiologist Dr. Rhee's opinion and stated that the MRI reflected showed that the L-5 S-1 disk in question was recently herniated. While Dr. Watanabe is highly qualified, Defense counsel was able to demonstrate thorough cross-examination, that Dr. Watanabe could not provide an estimate, with any level of certainty, when the alleged acute injury occurred.

Dr. Judson Welcher, an accident reconstruction and biomechanical expert, testified that the relative force generated in the impact to the rear of Plaintiff's trailer, was not sufficient to cause structural damage to the Plaintiff's lower back.

The court granted Plaintiff's motion in limine to exclude evidence of plaintiff's criminal history as well as evidence of plaintiff's imprisonment; the Court stated that such "evidence has no relevance to any issue in this lawsuit, including plaintiff's credibility."

The biggest and most important motion in limine for Defendant was regarding Defendant's DUI. Defendant sought to exclude evidence of Mr. Park's criminal conviction for DUI after the accident; lying to police officers; and the blood alcohol level measured by the arresting police officer. The motion was granted in part.

In the original MIL ruling, the Court stated that evidence of Park's criminal misdemeanor conviction is inadmissible hearsay without an exception. (People v. Wheeler (1992) 4 Cal. 4th 284 held that it is evidence of the conduct that is admissible; evidence of the resulting misdemeanor conviction is inadmissible to show that the witness engaged in that conduct, because the conviction constitutes hearsay (for which no exception is available) when it is offered for that purpose. (Id. at p. 297.) The results of a breathalyzer test as to Defendant's alcohol blood level are admissible if a foundation is laid that the officer was properly trained in its use and the machine was working properly. The statement to the police that Defendant told police he had consumed only one beer is admissible character evidence as it is relevant to the issue of knowledge of his improper conduct or awareness of the probable dangerous consequences of his conduct in consuming alcohol to intoxication under E.C. §1101(b), but excluded mention that Defendant was convicted of misdemeanor DUI as a result of driving while intoxicated. The Court was misled by Plaintiff counsel that they would be able to lay the proper foundation for the admissibility of the BAC level; Counsel represented that The officer would be able to lay that foundation by testifying that he was trained to perform the breathalyzer test and in fact did so.

Defendant's filed a subsequent brief, arguing that Plaintiff had not been able to lay the foundation and thus all mention of alcohol consumption should not be permitted. Including the testimony of the CHP officer and the toxicology expert. Defendant essentially argued that California case law mandates that well-established foundational prerequisites be satisfied prior to the introduction of the results of any blood-alcohol breath test to the jury. The requirements are set forth in People v. Adams, 59 Cal.App.3d 559 (1976) and discussed by the California Supreme Court in People v. Williams, 28 Cal.4th 408 (2002). The Adams court authorized admitting breath test evidence after a showing of (1) the reliability of the instrument, (2) the proper administration of the test, and (3) the competence of the operator. (Adams, supra, 59 Cal.App.3d at p. 567, 131 Cal. Rptr. 190.) To meet these requirements, the evidence would be admitted upon either a showing of compliance with the title 17 regulations or independent proof of the three elements.

The Court allowed Plaintiff to ask the officer about his findings on the field sobriety tests, and his opinions on the traffic collision report. The officer was supposedly instructed by Plaintiff counsel not to mention DUI arrest or conviction, or BAC levels; nonetheless, he did. Most damaging was the officer saying, "I felt comfortable with the arrest." The Court specifically warned Plaintiff of the admissibility issue following oral arguments on motions in limine on Friday January 25, 2019, the Court warned Plaintiff that there were foundational issues relating to the breathalyzer test results.

Following the lunch break, during direct examination by Plaintiff counsel, the officer did exactly what Defendant had arduously sought to prevent; he blurted out in reference to the arrest and blood alcohol level, for which no admissible and foundational evidence had been introduced.

Defense Counsel promptly moved for mistrial again. After pondering overnight about it, the Court decided a curative intervention would suffice. The Court then admonished the jury following discussion with counsel during the break, during which Defendant argued that he did not believe the curative instruction would undo the harm already caused. The jury had heard about intoxication, DUI, levels of intoxication, and lastly about an arrest, after it was specifically prohibited by the Court.

Defense counsel also sought mistrial not just for the officer's improper testimony regarding an arrest, but also for other violations of the Pre-Trial orders, but also due to Plaintiff counsel's comments about insurance and ability to pay for medical care and conditioning the jury without a scintilla of admissible evidence as to the alleged level of intoxication.

The Court provided Plaintiff's counsel with the "benefit of the doubt" as to whether Plaintiff would ultimately lay the necessary foundation to introduce evidence of Defendant's alleged intoxication at the time of the accident, Plaintiff was never able to meet that burden. Plaintiff alleged that he is allowed to make his case for malice by continuously referencing intoxication, for which he cannot and will not be able to produce admissible evidence of. The motion for mistrial was taken under submission and the judge ultimately denied it claiming that his admonition to the jury was sufficient. In closing, Plaintiff asked for $1.4 million. Defense asked

for a defense verdict on causation or in the alternative, a $15,000 verdict based on one month of soft tissue injuries.

The jury came back 10-2, $17,235.00, and a 12-0 defense on punitive damages.

The Court surprisingly granted a Motion for New Trial on grounds that the jury should have found the treating physician more credible than the IME doctor. The defense has appealed and seeks to reinstate the Jury Verdict. The judge's order also bizarrely stated that Defense counsel "project[ed] a large image on a large screen in front of the jury in his PowerPoint presentation during his final argument that characterized plaintiff's counsel as a reptile." This never happened, and it was also not reflected as occurring in the moving papers, oral argument or trial transcript. In fact, Defendant's entire closing PowerPoint presentation is in evidence and before the Court of Appeal and does not contain any image or picture of a reptile or any images that otherwise characterize opposing counsel as a reptile. Defendant's strong appeal to reinstate the Defense verdict is pending.

CHOLAKIAN & ASSOCIATES

Winter 2019

Enforceability of Settlement Agreements

MELVIN MARCIA, ESQ.

In the case of *Sayta v. Chu*, on November 29, 2017 the Court of Appeal of the State of California, First Appellate District, clarified the requirements for enforcing settlement agreements pursuant to California Code of Civil Procedure Section 664.6 ("Section 664.6"). Most settlement agreements in pending litigation include a provision that provides for enforcement of the agreement pursuant to Section 664.6. The statute allows the parties to take advantage of an expedited procedure to enforce the agreement without filing a separate lawsuit. It's cheaper, easier, and fulfills the purpose of the agreement – to resolve the parties' dispute.

However, *Sayta* confirmed that the expedited procedure of Section 664.6 is only available when the parties request the trial court retain jurisdiction, either in writing or orally before the court, while the case is still pending, before entry of dismissal. The appellant in *Sayta* relied on the provision in the confidential settlement agreement stating that the parties agreed to enforce the agreement pursuant to Section 664.6. The Court of Appeals determined that this confidential agreement did not constitute a "request" for the trial court to retain jurisdiction, as required by Section 664.6. "'[T]he court lost subject matter jurisdiction when the parties filed a voluntary dismissal of the entire cause. Since subject matter jurisdiction cannot be conferred by consent, waiver, or estoppel, the court cannot 'retain' jurisdiction it has lost.'" (*Sayta, supra*, citing *Viejo Bancorp, Inc. v. Wood* (1989) 217 Cal.App.3d 200, 206-207.)

The *Sayta* case serves as a reminder of the requirements to enforce settlement agreements under Section 664.6. First, make sure that the parties execute a stipulation for dismissal, or stipulate on the record before the court. The stipulation must include a request for the court to retain jurisdiction to enforce the settlement agreement pursuant to Section 664.6. A stipulation by counsel is insufficient, and the request must occur prior to dismissal of the case. Use of the Judicial Council Form dismissing the case will not retain jurisdiction. If the parties to follow the requisite procedure, the party seeking to enforce the settlement agreement under Section 664.6's procedures should make a request pursuant to California Code of Civil Procedure Section 473 to vacate the dismissal. While some trial courts may be frustrated by the requests to retain jurisdiction, or by keeping a case on their dockets while the parties perform the terms of the settlement agreement, this case will make it easier to explain why the parties are making the request.

Melvin Marcia received his Juris Doctor degree from Santa Clara University School of Law, where he obtained CALI Awards, an award given to the student with the highest grade in the class, for Labor Law-Public Sector and for Constitutional Law. While attending law school, Mr. Marcia honed his legal and analytical skills while employed in Safeway, Inc.'s Risk Management Department as a Claims Examiner; he gained extensive hands-on experience with product liability, premises liability, as well as subrogation matters. Mr. Marcia also volunteered at The Katharine and George Alexander Community Law Center's worker's rights clinic, providing free legal services to low-income individuals who have experienced unfair and illegal treatment at their place of employment.

Mr. Marcia earned his Bachelor of Arts degree in Political Science from San Jose State University, graduating with honors *Cum Laude*, and being inducted to Pi Sigma Alpha (Political Science Honor Society), and was on the Dean's List. Mr. Marcia also served as treasurer for the Epsilon Iota, the local SJSU chapter of Pi Sigma Alpha.

Before joining Cholakian & Associates, Mr. Marcia was a Law Clerk at the San Jose City Attorney's Office (Litigation Team) where he had the opportunity to litigate cases enforcing city ordinances and also arguing Pitchess motions. He participated in various projects which dealt with identifying business in violation of public nuisance ordinances, as well as violators of the City's rent ordinances. He held an associate attorney position at the Law Office of Katherine R. Moore, where he worked in the areas of premises liability, commercial litigation, catastrophic personal injury, construction defect, and ADA litigation, Mr. Marcia is admitted to practice law in California state courts, and the U.S. District Court, Northern District of California. He is a member of the Santa Clara County Bar Association and the San Mateo County Bar Association. His areas of practice include catastrophic personal injury, wrongful death, premises liability, commercial litigation, and construction defect.

CHOLAKIAN & ASSOCIATES

Winter 2019

Cholakian & Associates Defeats Tenant's Action Seeking 2.0 Million and Building Ownership at Trial in San Francisco Superior Court

Hillman v. Jackson

Trial Counsel – Kevin Cholakian

COLIN H. JEWELL, ESQ.

Plaintiff, a 24-year tenant in a Haight Asbury Victorian flat, filed an action against his landlords (a retired general surgeon and his wife) to quiet title to the flat (appraised at between $1.9 million and $2.1 million) and for damages for breach of contract and fraudulent misrepresentation. The action was filed in response to an Ellis Act eviction by the landlords. Plaintiff claimed in his complaint that he obtained an ownership interest in the flat upon payment of a $60,000 "down payment" to the doctor in January 2002, along with "installment payments" he made thereafter. The San Francisco County Superior Court consolidated Plaintiff's complaint with the unlawful detainer action filed by the doctor. The court subsequently bifurcated the quiet title claim (an equitable claim) to be tried first. Michael R. Bracamontes of Bracamontes & Vlasak represented the Plaintiff at the court trial. Kevin K. Cholakian and Scott A. Freedman of Zacks, Freedman & Patterson represented the doctor.

Plaintiff is an electrician who performed some electrical work for the doctor over the years in various buildings in which the doctor had an ownership interest. It was undisputed that Plaintiff tendered a check for $60,000 to the doctor in 2002, but the doctor maintained the $60,000 was for an option to purchase an interest in two of the three Victorian flats in the Victorian, and Plaintiff never obtained the financing to complete the purchase. What Plaintiff claimed were agreed monthly "installment payments" towards purchase of the property were, in fact, an agreement to gradually pay back seriously delinquent rent over a period of many years. However, instead of returning to Plaintiff the $60,000 tendered in 2002, and in lieu of evicting his friend and long-time tenant, the doctor applied the money towards the delinquent rent, which did not even come close to the total back-rent Plaintiff owed.

At deposition, Plaintiff changed his theory and testified there was no agreement to make regular installment payments towards purchase of the property; rather, he and the doctor agreed that whatever payments he made in the future, and whatever work he performed for the doctor, would be applied toward the purchase price. At trial, however, Plaintiff could not establish what payments he made or place a value on the electrical work he claimed he performed for the doctor. Plaintiff signed checks that said "rent" or "back rent" on them, not "installment payments." Plaintiff had no grant deed showing his percentage Tenancy in Common interest in the property, and no TIC agreement spelling out the parties' respective rights and obligations. The doctor and his wife remained the legal owner of the property and always paid the property taxes and homeowners insurance.

Before trial, Plaintiff served a C.C.P. § 998 offer to Defendants agreeing to dismiss his case with prejudice in exchange for $795,000, each side to bear its own attorneys' fees and costs. Defendants' C.C.P. §998 $200,000 offer to Plaintiff (in exchange for a full release and Plaintiff's agreement to vacate the flat) was turned down. After a heated eight-day court trial involving testimony of the parties, several lay witnesses, construction expert Robert Tucknott and appraiser Brian Grey for Plaintiff, and construction expert Richard Norman and appraiser Larry Mansbach for Defendants, The Honorable Garrett L. Wong ruled against Plaintiff and in favor of Doctor Jackson. A settlement of $30,000 subsequently was reached in which Plaintiff agreed to vacate the flat.

Colin H. Jewell attended Department of Defense high schools in London, England, and Okinawa, Japan. He received his B.A. in History from the University of California, Berkeley, in 1980 and his J.D. from the University of San Francisco in 1985.

Mr. Jewell began his legal career as a medical malpractice and catastrophic personal injury lawyer in San Francisco, practicing on the plaintiff side with Bostwick & Tehin (1986-1989) and as a defense attorney with Glynn & Harvey (1989-1993). He defended an officer of Technical Equities Corporation in state and federal securities fraud litigation and successfully represented Point Tiburon condominium owners and commercial tenants in construction defect litigation. He had his own litigation practice in Hayward (1993-2000), where he also was of counsel to Spile & Siegal, an Encino insurance defense firm specializing in defense of real estate agents and brokers (1997-2000).

Mr. Jewell joined the law firm of Cholakian & Associates in 2002, where he specializes in complex litigation, high exposure personal injury cases, defense of property owners, employment discrimination, construction defect, subrogation, insurance coverage, and defense of San Francisco Bay Area Public Housing Authorities. He was a Senior Associate Attorney in the general litigation group of Walsworth, Franklin, Bevins & McCall's San Francisco office (2006-2010), before returning in 2010 to Cholakian & Associates, where he is Senior Counsel.

Mr. Jewell is an experienced trial attorney and excellent writer and has briefed and argued a number of published appellate decisions, including *Demps v. San Francisco Housing Authority* (2007) 149 Cal.App.4th 564; *Martinez v. Scott Specialty Gases, Inc.* (2000) 83 Cal.App.4th 1236; *Hejmadi v. Amfac, Inc.* (1988) 202 Cal.App.3d 525; and *Elrod v. Oregon Cummins Diesel, Inc.* (1987) 195 Cal.App.3d 692. He is admitted to practice in the U.S. District Court, Northern District of California and Central District of California.

Pebley v. Santa Clara Organics, LLC (2018) 22 Cal.App.5th 1266 Plaintiffs' Recovery

ARTHUR MINASYAN, ESQ.

In 2018, Courts considered the issue of what exactly Plaintiffs can recover in the context of medical billing and liens. Specifically, the *Pebley* opinion concerned a Plaintiff who sought medical treatment on a lien-basis, despite having insurance; the Court held that if Plaintiff chooses to treat with medical providers outside his insurance plan, he must be considered uninsured for purposes of assessing his economic damages, and, as an uninsured plaintiff, the amounts billed by medical providers may be used to prove the reasonable value of those services. However, in order to admit the full billed amounts, Plaintiff must present admissible testimony that these charges are reasonable and necessary. "An injured plaintiff is entitled to recover the lesser of (1) the amount incurred or paid for medical services, and (2) the reasonable value of the services rendered." (*Pebley v. Santa Clara Organics, LLC* (2018) 22 Cal.App.5th 1266.) The billed charges for his past medical services ("the liens") alone are not admissible evidence by itself, "to establish the reasonable value of the services rendered." (*Bermudez v. Ciolek*, 237 Cal.App.4th 1311,1336.) Thus, Plaintiff will need to produce admissible evidence that the medical services rendered were indeed reasonable, and to do that, Plaintiff can introduce evidence of the full billed amounts, only if the proper foundation is laid.

In *Bermudez*, the Court held that experts are required to provide the foundation for the medical bills as to the reasonableness of those charges before the bills could be entered into evidence. When a plaintiff is not insured, medical bills are relevant and admissible to prove both the amount incurred and the reasonable value of medical services provided. (*Bermudez*, 237 Cal.App.4th at p. 1335, 1337.) The uninsured plaintiff also must present additional evidence, generally in the form of expert opinion testimony, to establish that the amount billed is a reasonable value for the service rendered. (*Bermudez*, 237 Cal.App.4th at p. 1335, 1337.) Thus, if the plaintiff has an expert who can competently testify that the amount incurred and billed is the reasonable value of the service rendered, he or she should be permitted to introduce that testimony.

It is important to note that the *Pebley* decision also created a circuit split with *Ochoa*, under which "the full amount billed, but unpaid, for past medical services is not relevant to the reasonable value of the services provided. (*Ochoa v. Dorado* (2014) 228 Cal.App.4th 120, 135-136) The Court made it clear that "this rule is not limited to the circumstance where the medical providers had previously agreed to accept a lesser amount as full payment for the services provided." (*Id.* See also, *State Farm Mutual Automobile Ins. Co. v. Huff* (2013) 216 Cal.App.4th 1463) When "appellate decisions are in conflict on a point, court exercising inferior jurisdiction must choose between the conflicting decisions. *Auto Equity Sales, Inc. v. Superior Court of Santa Clara County* (1962) 57 Cal.2d 450.

Pursuant to *Auto Equity Sales, Inc.*, *Pebley* departs from prior precedent and creates an incentive for artificial overbilling under the guise of "liens" which are in reality rarely collected for the full amount. *Ochoa* and *State Farm* stand for the proposition that even when there is an uninsured Plaintiff, evidence of the full billed, but unpaid amount, is not relevant to the reasonable value of the services provided.

In addition, it is likely that Defendants will object to outdated jury instructions, most notably, CACI 3903A, which refer to the reasonable "cost" of services, rather than their reasonable "value." The former is rooted in what providers actually charge; the latter is rooted in what they should charge and is a better measure of damages since it is less influenced by industry conditions, improperly inflated billing practices, or other circumstances that increase costs beyond their actual value. The *Pebley* court seemed to acknowledge that this instruction does not parallel case law that refers to "reasonable value," rather than "reasonable cost."

In sum, in establishing the measure of an award of damages for medical expenses, an inquiry into the reasonable value of the medical services provided to an uninsured plaintiff is not necessarily limited to the billed amounts. (CC § 1431.2(b)(1).) Evidence of payments made to the provider by a factor purchasing the medical lien is relevant; however, additional evidence is necessary to establish a nexus between the amount the factor paid and the reasonable value of the medical services. (*Uspenskaya v. Meline* (2015) 241 CA4th 996, 1007, 194 CR3d 364.) Further, it is important to remember that for purposes of determining the reasonable value of medical services incurred by an uninsured plaintiff, a judge has the discretion under Evidence Code § 352 to exclude evidence of the amount a medical finance company paid for the services on the ground that this evidence would have required litigation of numerous intrusive collateral issues.

Arthur Minasyan graduated from the University of North Carolina at Charlotte in 2015, earning his B.A. in Philosophy with a minor in Spanish. During his undergraduate years, Mr. Minasyan also earned his translator's certificate in the Russian language.

Three years later, Mr. Minasyan obtained his Juris Doctor degree from Santa Clara University School of Law. During law school, Mr. Minasyan participated in three Honors Moot Court Competitions, including the ABA Negotiation Competition and the Saul Lefkowitz Moot Court Competition held at the United States Court of Appeals for the Ninth Circuit. During this time, Mr. Minasyan also became a Certified Information Privacy Professional in European law.

His legal work experience during school includes areas of bankruptcy, real estate, immigration, criminal law, and general civil litigation. After graduation, Mr. Minasyan served as a judicial clerk for the Honorable Socrates P. Manoukian. Shortly thereafter, Mr. Minasyan began working at Cholakian & Associates as a law clerk, and, upon passing the California bar exam in November 2018, undertook an Associate Attorney position. He is currently a member of the Bar Association of San Francisco, the Armenian Bar Association, and the International Association of Privacy Professionals.

Summary Judgment for the Defense Granted in High Damages Injury Case

MIKA J. FRISK, ESQ.

On October 6, 2016, Plaintiff was walking her dog, a small Boxer, with her husband, on the Wildcat Gorge Trail in Tilden Park, a Regional Park in the Bay Area under the jurisdiction of the East Bay Regional Park. Many of the hiking trails within the park, including one at issue, included designated off-leash areas, where dogs are free to proceed through the trails off-leash as long as they do not bite and do not exhibit vicious tendencies. Defendant was also walking his dog, a large, burley Argentinian Mastiff/Boxer mutt weighing over 70 pounds, on the same trail with a friend.

When the incident occurred, both dogs were off-leash in a leash-optional area. When the dogs ultimately approached each other towards the end of their walks, they engaged in chase and play. Plaintiff, who was frightened of Defendant's large Mastiff dog, retreated hastily down the uneven terrain. At some point shortly after, Plaintiff fell to the ground, where she ultimately suffered serious fractures to her tibia and fibula bones in her right foot and dislocated her right ankle. Given the remote area of the incident, paramedics arrived on a helicopter to transport Plaintiff to an ambulance. The Plaintiff was then subjected to a harrowing ride in a harness dangling from the bottom of a helicopter, where she was swept through the surrounding brush. As a result, Plaintiff sustained rashes due to the poison oak exposure.

Plaintiff, a U.C. Berkeley Professor, filed suit against Defendant in the Contra Costa Superior Court, alleging negligence and negligence per se (for an alleged violation of the East Bay Regional Park District Code Section pertaining to off-leash dogs). She testified that the dog was overly aggressive and not under control. She sought over $500,000 based on medical and wage loss specials in excess of $120,000. Plaintiff had issued a Code of Civil Procedure Section 998 Offer to Compromise in the amount of $399,000. Defendant extended a C.C.P. §998 Offer in the amount of $125,000 with an indication at mediation of up to $175,000 to settle prior to the motion being granted. Among her claims, Plaintiff alleged Defendant's dog struck the back of her right knee, which caused her to fall to the ground. Plaintiff's husband witnessed the dogs jumping and coming into contact with Plaintiff.

Cholakian Law Firm filed a Motion for Summary Judgment, arguing that each of plaintiff's causes of action were barred by the primary assumption of risk doctrine.

A complete defense to a claim of negligence is that the plaintiff either expressly or impliedly assumed the risk. (*Knight v. Jewett* (1992) 3 Cal.4th 296, 308, fn. 4, 309-321.) Under primary assumption of the risk, the defendant owes no duty to protect another from harm arising from simple negligence. (*Shin v. Ahn* (2007) 42 Cal.4th 482, 489; *Knight*, 3 Cal.4th at p. 314-315.)

The primary assumption of risk doctrine is not limited solely to sports but applies to "recreational activities involving an inherent risk of injury to voluntary participants . . . where the risk cannot be eliminated without altering the fundamental nature of the activity." (*Nalwa v. Cedar Fair, L.P.* (2012) 55 Cal.4th 1148, 1156.) The risk must be an integral part of the activity, such that creating a duty to avoid it would fundamentally change the nature of the activity or deter people from participating. (*Id.* at 1157-1158, 1161.)

When the tentative ruling was to grant the motion, four members of the Plaintiff's firm appeared in Court to argue the motion. The Court in Contra Costa County nevertheless confirmed its ruling in a lengthy opinion, granting summary judgment.

Mika J. Frisk joined Cholakian & Associates as an associate in 2018. Prior to joining Cholakian & Associates, Ms. Frisk began her legal career at a small San Francisco litigation firm specializing in medical malpractice and personal injury matters. She later practiced governmental entity defense, focusing on excessive force and dangerous condition of public property matters.

Ms. Frisk graduated from the University of California, Santa Cruz in 2011, earning her B.A. in Legal Studies. In 2010-2011, Ms. Frisk, who speaks fluent Japanese, attended Keio University in Tokyo, Japan as an international student studying global politics and government. She then obtained her Juris Doctor degree from Santa Clara University School of Law in 2015. While attending Santa Clara University, Ms. Frisk focused her studies on civil litigation and received the CALI Excellence for the Future Award in Mediation Theory & Practice.

Ms. Frisk has been an active member of the State Bar of California since 2015. She is admitted to practice in all California State Courts and in the Federal U.S. District Courts of the Northern and Eastern Districts.

EVENTS

Honorable Jon S. Tigar and Kevin K. Cholakian

The San Francisco Defense Association (SFDA) and the Cholakian Law Firm proudly sponsored Federal Judge Jon S. Tigar of the United States District Court (San Francisco) as a keynote speaker at an SFDA luncheon. Kevin has served as President of the SFDA (San Francisco's oldest defense organization) for a number of years. Topics of discussion included: Judge Tigar's transition from state court to federal court, notable differences or similarities, and practice advice to litigators.

KEVIN K. CHOLAKIAN

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 Kinder, Wuerfel & Cholakian (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 AV rated for over twenty years. He has been selected as Northern California Super Lawyer under the Personal Injury Defense and Environmental Defense categories for twelve 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 has also served on the Board of Trustees at UC Hastings College of the Law.