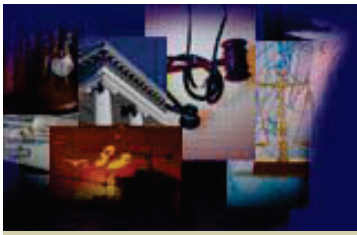


Murchison & Cumming
-Lawyers-

M&C IN BRIEF Winter 2005

CONTENTS

ARTICLES

FEATURES

For more information please contact: Kathleen Lawler, Communications Director at (213) 630-1004.

www.murchison-cumming.com

RICHARD MORENO AND WILLIAM SNYDER NAMED PARTNERS OF M&C

Richard C. Moreno is a member of the firm's Product Liability and Transportation Practice Groups in the Los Angeles office. Mr. Moreno joined the firm as an associate in 1997 after graduating from Whittier Law School and the University of Southern California. Throughout his career at Murchison & Cumming, he has successfully defended several cases that have gone to trial. Mr. Moreno is a member of the State Bar of California, the American Bar Association, the American Board of Trial Advocates Inns of Court, the Hispanic American Bar Association, and the Association of Southern California Defense Counsel.

William J. Snyder has been with the firm's San Diego office for over 7 years. He has been an attorney for over 12 years during which time his practice has focused on the areas of employment law, environmental law/toxic torts, catastrophic injury and general liability. He has earned several defense verdicts at trial and arbitration. Prior to joining Murchison & Cumming, Mr. Snyder defended and worked extensively with governmental agencies throughout Southern California. He is a member of the Association of Southern California Defense Counsel and the California State Bar. Mr. Snyder is a graduate of the San Diego School of Law (J.D.) and the University of Washington (B.A.)

CALIFORNIA SUPREME COURT CASE: ELSNER V. UVEGES

VILOATIONS OF CAL-OSHA REGULATIONS ADMISIBLE IN A THIRD PARTY ACTION

The California Supreme court has issued its opinion in the long awaited case of Elsner v. Uveges which examined the question of whether or not Cal-Osha violations are admissible in negligence actions against private third parties. The court concluded that amendments to the Labor Code in 1999, allow for such evidence to come in in all cases in which the accident was post January 1, 2000 and that such violations may be used to establish negligence per se.

To read the full opinion please visit:
www.courtinfo.ca.gov/opinions/documents/S113799.PDF

For further information about this case, please contact **Edmund G. Farrell III**, Chair of the firm's Law & Appellate Practice Group at (213) 630-1020 or efarrell@murchison-cumming.com.

M&C CASE REVIEW


RESIDENTIAL CARE FACILITY AWARDED DEFENSE VERDICT IN NEGLIGENCE CASE

Gina Och and **Hugh Grant** successfully defended a residential care facility and its owner against a negligence claim by a resident of the facility.

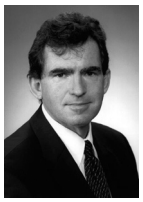
Upon admission to a residential care facility plaintiff signed documents advising her that the facility did not provide medical care and had the right to terminate her tenancy on less than 30 days notice if her mental or physical health changed and required a level of care the facility could not provide. In September 1999, plaintiff allegedly threatened to commit suicide and the facility called the hospital for a crisis intervention team. The hospital's psychiatric technician responded to the call, evaluated plaintiff, and determined that plaintiff posed a danger to herself and detained her for 72 hours pursuant to Welfare and Institutions Code § 5150. While at the hospital, the facility reassessed plaintiff's condition, and terminated her tenancy on the ground the facility was unable to provide the level of medical care she now required.

After a four week trial and granting a directed verdict on several causes of action, the jury returned a special verdict in favor of the facility and its owner on all remaining counts; namely, negligence, negligence per se based on California Code of Regulations, title 22, §§ 87570, 87583, and 87589, and intentional infliction of emotional distress. Having bifurcated the unfair business practices count, the trial court found the facility and its owner did not violate the unfair competition law.

The plaintiff appealed the judgment. The Court of Appeal affirmed the judgment after finding no substantial evidence to reverse the trial court's directed verdict, no substantial evidence to reverse the jury's findings, and no reversible error on the part of the trial court in entering judgment on the unfair business practices count.

After an unsuccessful Petition for Rehearing, the California Supreme Court denied plaintiff's Petition for Review.

Gina E. Och and Hugh J. Grant
Los Angeles, CA



DEFENSE VERDICT GRANTED IN PREMISES LIABILITY ACTION

Russell Wollman, Pamela Marantz and **Tina Varjian** successfully defended a premises liability case involving a slip and fall accident occuring at an Inn.

Plaintiff allegedly slipped on a piece of loose carpeting and, falling down two flights of stairs and injuring his shoulder, knee and back. Plaintiff claimed he required surgery on his right shoulder, neck and left knee due to the fall. His medical expenses totalled $10,000 and estimated future medical expenses would total $50,000 to $75,000. Plaintiff claimed that the Inn should have known about the dangerous condition and fixed the problem.

The case was defended on two theories: (1) that plaintiff did not offer any notice of the alleged accident and; (2) the alleged incident probably did not occur. During the trial, a witness testified that she had seen plaintiff lay down at the top of the stairs just prior to this accident occurring.

The defense presented medical records proving that plaintiff's knee, shoulder, neck and back injuries existed prior to the alleged incident. Plaintiff also testified that he had never made a claim before this accident and had never been on disability. Records were uncovered, which showed that plaintiff had been on disability multiple times prior to this incident and filed prior worker's compensation claims.

The jury decided by a 10-2 vote in favor of the defendant. Based on interviews with the jurors, they found that plaintiff had not proved that there was notice of the dangerous condition.

Russell S. Wollman, Pamela J. Marantz, Tina D. Varjian
Los Angeles, CA

M&C CASE REVIEW

DOG ATTACK RAISES PREMISES LIABILITY ISSUES

Bernadette Rigo filed and prevailed in a motion for summary judgment in a premises liability case.

Plaintiff alleged that she was attacked by a neighbor's dog when it escaped from their yard. Her neighbors lived in a rental property managed by a major property management firm. The management firm included language in their rental agreements that prohibited certain breeds of dogs. The dog kept by the tenants was listed as one of the prohibited dogs. When the tenants rented the property, they signed the rental agreement asserting that they did not have any pets. Plaintiff alleged that the landlord was negligent by not checking the rental unit to confirm that the tenants did not own a pet.

In two Nevada Supreme Court cases, landlords have been found liable on negligence claims if they have taken action to control an animal with a dangerous propensity. Plaintiff asserted that the landlord in this case had asserted control over the dog by including language in the rental agreement that prohibited tenants from keeping dangerous breeds of dogs.

The defense argued that in the pertinent cases, the landlords took an affirmative step, i.e. that the landlord knew the dog resided at the rental property and obtained a promise from the tenants to keep the animal in the yard. In this case, the landlord was unaware of the dog and the mere inclusion of the language prohibiting certain dogs did not constitute an affirmative step. The court agreed and judgment was entered in favor of the defense.

Bernadette A. Rigo
Las Vegas, NV

SUMMARY JUDGMENT IN PERSONAL INJURY CASE

Victor Lee and **Michelle Hancock** successfully defended a personal injury case involving a single car accident that occurred on Murrieta Road in Riverside County.

Plaintiff was a passenger in a vehicle being driven by her boyfriend when he lost control of the vehicle and it flipped over. Plaintiff filed suit against the County of Riverside and CP Construction, alleging the accident occurred due to a dangerous condition of public property. CP Construction completed work on Murrieta Road weeks before the accident, yet Plaintiff contended CP Construction might have left equipment or materials in the area. Plaintiff alleged that materials left in the area caused the vehicle to lose control and flip over, causing Plaintiff's serious injuries.

There was no evidence supporting Plaintiff's conditions, particularly since CP Construction had completed work at least two weeks prior to the accident. There were no other work activities taking place in the area, and the police investigation confirmed the roadway was clear at the time of the accident.

Both the County of Riverside and CP Construction moved for summary judgment on the basis that Plaintiff had no evidence that there was a dangerous condition, and that in fact there was no dangerous condition. The Court took the matter under submission and ultimately ruled in favor of the defendants. The Court found that Plaintiff had not raised a triable issue of fact, given all of the evidence submitted.

Victor A. Lee and Michelle A. Hancock
Orange County, CA

M&C TRANSACTIONS

M&C ADVISES INTERNATIONAL BANK ON A $2.3 MILLION SECURED LOAN

Vereins-Und Westbank AG, a German-based international bank with more than €20 billion in total assets, and ConRendit 3 GmbH recently closed a secured loan facility in the sum of $23,310,000 for the acquisition of international shipping containers. The containers will be managed out of San Francisco by Container Applications International, Inc.

Given the heightened interplay of U.S. and international commercial law presented by the facility's structure, M&C was tapped as U.S. counsel to Vereins-Und Westbank and tasked to ensure the transaction comported, in all respects, with the Uniform Commercial Code. M&C's financing team was led by Los Angeles partner, James S. Williams.

Vereins-Und Westbank was also represented by German counsel, Dr. Klaus Dimigen of the Hamburg-based firm Ehlermann & Jeschonnek.

James S. Williams
Los Angeles, CA

CASE REVIEW


SUCCESSFUL MOTION IN COMPLEX EMPLOYMENT CASE

Taylor Corp v. Jukes

Thomas Dias and **Richard Newman** successfully defended an invasion of privacy and slander case arising from a complex employment dispute.

Plaintiff was employed as President of Old G. Neill, a Florida catalogue company. At the time he was hired, plaintiff signed a written contract that provided a generous compensation package, a non-competition clause in which plaintiff agreed not to compete with his employer for two year years following his discharge and contained an arbitration clause.

During plaintiff's tenure, Old G. Neill was purchased by a larger company called Centis, which later petitioned for bankruptcy in California under Chapter 11. A dispute occurred when Centis attempted to reduce plaintiff's compensation. Plaintiff accused Centis of fraud and resigned. Shortly thereafter, Centis sold its assets to Taylor. Taylor informed plaintiff that he had to honor the non-competition clause.

Plaintiff filed suit against Taylor contending that Taylor had no right to enforce the non-compete clause and that he had been unable to secure employment as a result of Taylor's intent to enforce it. Plaintiff also claimed that Taylor conspired with Centis to commit fraud, slandered him, and printed catalogues using plaintiff's picture without authorization.

Plaintiff filed a motion for preliminary injunction in an effort to preclude Taylor from enforcing the non-compete clause. The defense opposed the motion and also argued a motion to compel arbitration and a motion to dismiss for lack of subject matter jurisdiction on behalf of Taylor.

The Court granted the defense's motion to dismiss the fraud, slander and privacy claims and ordered the remaining claims to binding arbitration. The court denied plaintiff's motion for an injunction.

Thomas E. Dias and Richard D. Newman
Orange County, CA


SUCCESSFUL MOTION IN BREACH OF CONTRACT SUIT

Nancy Potter and **Casey Yim** successfully represented Kaiser Foundation Health Plan which was sued under the Employee Retirement Income Security Act (ERISA) for declining to refer a health plan member to an out-of-plan eating disorder clinic.

Plaintiff sought treatment for bulimia nervosa from a non-Kaiser facility. Plaintiff then presented a claim for reimbursement to Kaiser under their health plan.

Kaiser denied the claim because Kaiser offered a range of treatments for eating disorders, including the services sought by the plaintiff. Plaintiff utilized the appeal process within Kaiser, but was denied reimbursement for the cost of the in-patient treatment. Plaintiff then sued in U.S. District Court, under ERISA, seeking damages for reimbursement of their medical expenses, in the amount of $45,000, plus attorney's fees.

The parties filed cross-motions for summary judgment. The key issue was the proper standard of review of Kaiser's decision denying the plaintiffs' claim - "abuse of discretion" or "de novo". Plaintiff contended that the standard should be "de novo" because Kaiser's appeal board was inherently biased and had a conflict of interest in considering the reimbursement claim.

The defense successfully argued that the applicable case law (Barnett v . Kaiser Foundation Health Plan, Inc. 32 F.3d 413, 415 (9th Cir. 1994)) established that because Kaiser was a not-for-profit entity, there could be no conflict of interest. Thus, the appropriate standard of review of Kaiser's decision was "abuse of discretion", not "de novo".

The judge agreed, finding that Kaiser had not abused its discretion in denying reimbursement, and granted Kaiser's motion for summary judgment, and denied plaintiffs' motion.

Nancy N. Potter and B. Casey Yim
Los Angeles, CA

SPOTLIGHT ON...

Jean Dalmore

CONSTRUCTION LAW PRACTICE GROUP

Victor Lee

The Construction Law Practice Group defends cases involving construction injuries and defects, landslide and subsidence, as well as miscellaneous litigation pertaining to construction.

The firm represents developers, general contractors, subcontractors and material suppliers and is thoroughly familiar with the entire spectrum of the industry, from residential, to retail, to major commercial developments.

The attorneys of the Construction Law Practice Group are also experienced in defending mold allegations in single family, multi-residential and commercial dwellings and have successfully tried construction defect cases to favorable resolution, including defense verdicts.

Murchison & Cumming attorneys adhere to specific procedures that enable them to represent their clients and execute these cases in a very efficient manner, through the early evaluation process. Special focus is placed on the assessment of the range of attributable damages, a "best practices" use of our highly qualified team of experts, and open lines of communication with our clients – never losing sight of the interest of our clients, our attorneys ensure expeditious resolution in the defense of these matters.

For more information about the Construction Law Practice Group of Murchison & Cumming, LLP, its attorneys and services, please contact:

Jean A. Dalmore, Co-Chair Direct: (213) 630-1005
jdalmore@murchison-cumming.com

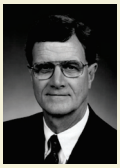
Victor A. Lee, Co-Chair Direct: (714) 972-9977
vlee@murchison-cumming.com

CONSTRUCTION LAW ARTICLES

Members of the Construction Law Practice Group frequently speak at conferences and write articles on Construction related topics. A selection of these articles are listed below. For a complete copy of any of these articles, please contact Kathleen Lawler at (213) 630-1004.

- Policy Provisions, Endorsements and Exclusions: An Ever Changing Face in Construction Coverage
- Construction Defects: Coverage Under Third Party Liability Policies
- New Residential Construction Defect Rules
- The Underwriters Response To Construction Defect Claims: Manuscript Endorsements And Other Limiting Exclusions

Construction Law Attorneys



Michael B. Lawler
Senior Partner
Los Angeles
(213) 630-1010

Ken H. Moreno
Senior Partner
San Diego
(619) 544-6838 ext. 204

James D. Carraway
Partner
Nevada
(702) 920-2311

Kasey A. Covert
Partner
Northern California
(925) 274-0944 ext. 170

James R. Childress
Los Angeles
(213) 630-1064

David M. Hall
San Diego
(619) 544-6838 ext. 224

Christopher P. Mesaros
Los Angeles
(213) 630-1029

Robert H. Panman
Los Angeles
(213) 630-1048

Event Calendar

February 16-18
DRI Product Liability Seminar
Los Angeles, CA
M&C Attendees: Friedrich Seitz, Guy Gruppie, Richard C. Moreno

February 27-March 6
FDCC Winter Meeting
Marco Island, FL
M&C Attendees: Jean Lawler, Friedrich Seitz, Michael Lawler

March 3-4
Association of Southern California Defense Counsel (ASCDC) Annual Meeting
Los Angeles, CA
M&C Speaker: Edmund Farrell

March 3-5
DRI Toxic Torts and Environmental Law
New Orleans, LA
M&C Attendee: Scott Hengesbach

March 10-12
USLAW Network Client Conference
New Orleans, LA
M&C Speaker: Scott Hengesbach
M&C Attendees: Russell Wollman, Tom Dias, Jean Lawler, Dan Longo

March 16
M&C Presents: 2004 Year In Review
Los Angeles, CA

March 16 - 18
DRI Medical Liability and Health Care Law
San Diego, CA
M&C Attendee: Dan Longo

March 16-17
PLUS Professional Liability Seminar
Chicago, IL
M&C Attendees: Edmund Farrell, Susan Hilton

April 1-2
FDCC/ABOTA Jury Trial Summit
Las Vegas, NV
M&C Attendee: Jean Lawler

April 21-22
FDCC Law Firm Management Conference
Chicago, IL
M&C Attendee: Friedrich Seitz

EMPLOYMENT LAW UPDATE

CALIFORNIA LEGISLATURE MANDATES SEXUAL HARASSMENT TRAINING

Thomas E. Dias

As of January 1, 2005, *Assembly Bill 1825, Section 12950.1* has been added to the California Government Code, which will require California employers with 50 or more employees to provide training and education regarding sexual harassment to all supervisory employees.

What Training is Required?

- At least two hours of sexual harassment training for all supervisory employees.
- Includes supervisors employed as of July 1, 2005 and new supervisors within six months of hire.
- Individuals promoted to supervisory positions must be trained within six months of promotion.
- Follow-up training once every two years for all supervisory employees beginning January 1, 2006.
- Sexual Harassment training must include: "the prohibition against and the prevention and correction of sexual harassment and the remedies available to victims of sexual harassment…"

Under California's Fair Employment Housing Act (FEHA and codified as Government Code §12900 et seq.) a supervisor is defined as:

"any individual having the authority in the interest of the employer to hire, transfer, suspend, layoff, recall, promote, discharge, assign, reward, or discipline other employess, or the responsibility to direct them, or to adjust their grievances, or effectively to recommend that action, if, in connection with the foregoing, the exercise of that authority is not of a merely routing or clerical nature, but requires the use of independent judgment." *Government Code §12926(r)*.

Accordingly, since the definition of "supervisor" is rather broad, most employees will require training under this new law. Realistically, an employer should routinely err on the side of caution and consider an employee as a supervisor for purposes of this new statute if there is a question concerning his or her status as a supervisor.

Most importantly, the new law requires training to be provided by " . . . trainers or educators with knowledge and expertise in the prevention of harassment, discrimination and retaliation." Strangely, the statute does not mandate how many hours of training employers must provide after January 1, 2006. However, employers should be safe if guided by the statute's language specifying at least two hours of training for supervisors employed as of July 1, 2005 and continue to provide at least two hours of training to supervisors every two years beginning January 1, 2006.

What Happens If An Employer Does Not Comply?

The short answer is that the employer will receive an order requiring compliance. Currently, there are no fines or other civil or criminal penalty for failure to comply with the statute. Moreover, *Subsection (d)* of the statute provides that a " . . . claim that the training did not reach a particular individual or individuals shall not in of itself result in the imposition of liability of any employer . . . in any action alleging sexual harassment."

Continued on Page 7

EMPLOYMENT LAW UPDATE

Continued from Page 6: Sexual Harassment Training

This means, for example, that if a company is sued in a civil action for sexual harassment, the company cannot be found liable for sexual harassment solely due to noncompliance with the training required by the new statute. However, employers, their attorneys and insurance carriers must beware as the lack of compliance will certainly be introduced prominently into evidence at trial in a sexual harassment lawsuit by any competent plaintiff attorney. The fact that a company fails to comply with this simple training requirement as required by law, will be extremely damaging at the time of trial. Unfortunately for employers, since the law does not act as a sword for a sexually harassed employee, it also does not act as a shield. The statute provides that it is not a defense for an employer to claim compliance and thereby avoid liability. Simply put, compliance, or the lack thereof, with the training requirements will be considered as evidence in an action for sexual harassment, but will not, by itself, either impose or preclude the imposition of liability. Any defense counsel would be more confident in proceeding to trial with a client who has complied with applicable state laws. Failure to comply with this simple mandate may prove to be the proverbial "last straw" for a jury which could result in returning a large plaintiff verdict. By the same token, a company that has complied with the statute is not only less likely to be found liable in a sexual harassment lawsuit, but damages awarded to a plaintiff are likely to be less as compared to those employers who have not complied.

Conclusion

California has become more sensitive to issues concerning the work place and employers are faced with increasing regulatory demands as a result. Fortunately, *Government Code §12950.1* requires training that is not overly burdensome. Employers should realize that the requirements now mandated are designed to be minimum standards. In fact, the statutes specifically states that the statute is not intended to discourage or relieve any employer from providing for additional education. Ultimately, it is the employer's responsibility under State law to take all reasonable steps necessary to prevent and correct harassment and discrimination. Employers can rest assured that the one which does not take such steps will be undressed in front of a jury in the next sexual harassment lawsuit.

Thomas E. Dias
Orange County, CA

M&C PROVIDES CA MANDATED SEXUAL HARASSMENT TRAINING

Murchison & Cumming provides the required training for California employers for the prevention of sexual harassment and discrimination.

The training seminars include information and practical guidance regarding statutory provisions concerning the prohibition against and the prevention and correction of sexual harassment and discrimination. The training also includes practical examples aimed at instructing supervisors in the prevention of harassment, discrimination and retaliation. The fee for each training seminar is $1,500.00.

To scheduling an interactive training seminar, or for any other questions regarding employment practices, please contact Ms. Pamela J. Marantz at (213) 630-1070.

M&C PRACTICE AREAS

- **Business & Intellectual Property Litigation**
- **Business & Technology Transactions**
- **Construction Law**
- **Directors & Officers Liability**
- **Employment Law**
- **General Liability & Casualty**
- **Health Law**
  - Medical Malpractice
  - Long-term Care Facilities & Elder Care
- **Insurance Law & Risk Management**
- **International Law**
- **Law & Appellate Practice**
- **Product Liability**
- **Professional Liability**
- **Property Insurance & Fraud Investigations**
- **Toxic Tort & Environmental Law**
- **Transportation Liability**

Murchison & Cumming, LLP
801 South Grand Avenue, 9th Floor
Los Angeles, California 90017

LOS ANGELES ◊ ORANGE COUNTY ◊ SAN DIEGO ◊ NORTHERN CALIFORNIA ◊ NEVADA

MARK YOUR CALENDAR!

2004 Year in Review Seminar

March 16, 2005
8:00 a.m. – 12:00 p.m.
Luncheon to follow.

Omni Los Angeles Hotel
251 South Olive Street
Los Angeles, California 90012

Back by popular demand, Murchison & Cumming, LLP will host its annual Year in Review Seminar on March 16th to discuss major decisions handed down in 2004 from the California Courts of Appeal and the California Supreme Court. The topics discussed will include:

- Civil Procedure
- Employment
- Products Liability
- Insurance Coverage
- Evidence
- Intellectual Property
- Professional Liability
- Bad Faith

For more information about the seminar or to register, please visit our website at www.murchison-cumming.com

OFFICE LOCATIONS

LOS ANGELES
801 S. Grand Ave., 9th Fl.
Los Angeles, CA 90017
(213) 623-7400

ORANGE COUNTY
801 Park Tower
200 West Santa Ana Blvd.
Santa Ana, CA 92701
(714) 972-9977

SAN DIEGO
Symphony Towers
750 B. St., Ste. 2550
San Diego, CA 92101
(619) 544-6838

NORTHERN CALIFORNIA
200 Pringle Ave, Ste. 550
Walnut Creek, CA 94596
(925) 274-0950

NEVADA
2965 South Jones Blvd, Ste. B
Las Vegas, NV 89146
(702) 920-2300