

REMARKS FROM THE PRESIDENT'S DESK -

By: *Fernando D. Vargas*

Manufacturers Are Making Headway on Marijuana Breathalyzers

Recreational and medical marijuana are quickly becoming legalized across the country. As states and municipalities make changes to their laws, there is one concern that has yet to be fully solved: What to do about impaired drivers? Manufacturers are quickly working to find answers in the form of breathalyzers and at least one of them seems to be on to something.

The old methods are not working

At present, the only way a police officer has to detect if a driver is under the influence of marijuana is to use older methods such as sobriety tests that were designed to fight drunk driving. These tests are highly unreliable and often do not stand up in court. The police may also try to simply use their powers of observation, but a breath mint may be all it takes to cover up recent marijuana smoking.

Hound Labs may have found the answer

Mike Lynn, the CEO of Hound Labs, is working from Oakland, California to find an answer to this problem. He claims he has made a huge breakthrough and it has resulted in the creation of what looks like nothing more than a small plastic box. In fact, he says, it is a disposable cartridge about the same size as a large iPhone. It has a small plastic tube sticking out of one end.

It takes thirty seconds of blowing into the tube for it to come back with a result. Lynn claims that the device's indicator bar will show whether or not there is any THC in the person's breath. THC, the psychoactive component in marijuana that gets a person high, can allegedly be detected if the blower has used THC within the last two hours. As an added bonus, the device also works as a breathalyzer for alcohol.

Arguments continue about the window of detection

Many wonder if this is good enough – to tell if a person has used marijuana within the last two hours. Some consider this two-hour period to be “peak impairment” and the time period in which a person should not be driving.

It seems beyond argument that this two-hour period is better than anything currently at the disposal of police. Lab results from blood, urine, and saliva tests require several days to process and these results only indicate whether a person has THC in their system. However, the results cannot confirm the time frame during which the person in question smoked the marijuana. In other words, they could have smoked as recently as one half hour before the test was taken, or several weeks before. THC dissolves into the fat and can be found more than one month after person's last use. In states where it is legal to use marijuana, these results tell law enforcement nothing about whether or not the person in question was under the influence at the time of the interrogation.

(Continued on page 9)

Hon. Joseph B. Campbell**American Inns of Court***by David P. Colella, President*

As this year's president, I am excited to continue the standard of excellence our Inn has established. I am quite proud of the fact that our Inn has been recognized as a "platinum" level Inn for the past six years. This is the highest recognition bestowed by the American Inns of Court and requires much hard work and dedication. To that end, I am honored to congratulate Mark H. McGuire on guiding last year's Inns to platinum level.

For those unfamiliar with what the Inns of Court is about, simply stated it is an association of lawyers, judges, and other legal professionals who share a passion for professional excellence. The stated mission is to inspire the legal community to advance the rule of law by achieving the highest level of professionalism through example, education, and mentoring.

Our Inn meets once a month beginning in October and running through June. Meetings are generally held at the Castaway Restaurant in San Bernardino on the second Wednesday of each month. The meetings include dinner and an MCLE program. We typically have a field trip in December and a Joint Inns dinner in February. The joint meeting is an annual gathering of the four neighboring Inns comprising our Inn, the Leo A. Deegan Inn (Riverside), the Warren Slaughter-Richard Roemer Inn (Palm Springs), and the Southwest Inn (Temecula). Our Inn hosts this year's joint meeting and we are working earnestly to secure a dynamic speaker.

Our Inn officers this year are:*David P. Colella, President**Joseph B. Widman, President-Elect**Susan B. Grabarsky, Vice President**Amar M. Hatti, Secretary**Stacey Wolcott, Treasurer**Hon. Cynthia Ludvigsen, Co-Counselor**Hon. Donna L. Connally, Co-Counselor**Hon. Christopher B. Marshall, Judicial Liaison**Hon. Gregory S. Tavit, Outreach Liaison**Eric D. Anderson, Membership Chair**Linda A. Lindsey, Co-Program Chair**Mark H. McGuire, Co-Program Chair / Immed. Past President*

Looking toward our upcoming programs, it should be an entertaining and educational year. Co-Program Chairs, Linda A. Lindsey and Mark H. McGuire, are developing a Jeopardy-themed experience focused on educating our members about the new or amended California Rules of Professional Conduct entitled "Don't be in Jeopardy of Failing the Ethics Test."

Given the fact that there are dozens of such rules, it will be a very worthwhile program year and geared to cover the specialty MCLE requirements. Also, we are seeking to obtain approval of judicial education credits for at least one program this year.

If you are interested in joining our Inn, please e-mail our Membership Chair, Eric D. Anderson, at ericanderson@edalaw.com for an application.

One of the attractions of the Inns of Court is its rich tradition. While the first American Inns of Court was established in 1980, it is loosely patterned after the traditional English Inns of Court dating to the 14th century. With this tradition in mind, I intend to focus my articles of various maxims of jurisprudence as codified in the California Civil Code §§3509, et seq.

California's maxims of jurisprudence are essentially a collection of legal truisms which are used as rules of thumb to aid in the just application of our statutes. Nonetheless, it has been held that "neither fiction nor maxim may nullify statute." (*Lass v. Eliassen* (1928) 94 Cal.App. 175.) It is clear then, while helpful, these maxims have no application when a statute is on point. That doesn't mean they aren't interesting to examine.

Our maxims include such nuggets of wisdom as: "when the reason of a rule ceases, so should the rule itself," "for every wrong there is a remedy," "the law never requires impossibilities," and "the law has been obeyed" among others.

Throughout this year, I'll be selecting several maxims to look at, consider the historical significance and manner in which they have been applied. What purpose do these maxims really serve? Are they of any current importance in judicial interpretation? I will be calling on some of our judicial officers for their perspective as well. If you are a judicial officer with a particular opinion about the use of maxims in legal advocacy or an attorney with a penchant for citing to these maxims, please contact me at dcolella@flsd.com - I'm intrigued to hear your story. I hope these monthly vignettes will prove informative.

My hope for the Inns year is to grow our membership, provide our members with an educational, memorable year of programs, and

retain our platinum status. I am aided by an exceptional Board and I hope you take the opportunity to renew your membership or inquire into joining as a new member.

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September 2018 Calendar

September 3 - Labor Day
September 11 - Patriot Day
September 14 - "A Night of Magic"
September 17 - Constitution Day
September 19 - "Talk like a Pirate Day"
September 23 - Fall Begins
September 29 - Rosh Hashana begins

“The times...they are a changing.”

by Daren Lipinskky



Although sung fifty-four years ago, Bob Dylan’s lyrics could not be any truer today, particularly in the area of employment law. Prior to the recent decision by the Fifth District Court of Appeal in *Ly v. County of Fresno* (2017 WL 4546059, filed 9/15/17), there was a commonly held belief that an employee could pursue both workers’ compensation and civil relief under the California Fair Employment and Housing Act (FEHA) for psychological injuries caused by adverse employment actions taken in violation of FEHA independently from one another. This meant that a decision from the Superior Court was not binding on the Workers’ Compensation Appeals Board (“WCAB”), and vice versa. *Ly v. County of Fresno* has now placed some limitations on that proposition.

Prior to Ly

Prior to the Court’s ruling in *Ly v. County of Fresno*, the prevailing case law on the issue of the interaction between workers’ compensation and employment law was *City of Moorpark v. Superior Court of the County of Ventura*. In *City of Moorpark*, the plaintiff was employed as an administrative secretary for the County of Ventura (“defendant”) from May 1990 until February 28, 1994. *City of Moorpark v. Superior Court*, 18 Cal. 4th 1143, 1143. After plaintiff recovered from knee surgery and her doctor released her to return to work, the defendant terminated her employment, informing her that her residual disability prevented her from performing her essential job functions. *Id.* at 1143. Plaintiff told the defendant that she could perform her job and that she wanted to return to work. *Id.* Nevertheless, the defendant told plaintiff that she could not have her job back. *Id.* Plaintiff then filed a charge of disability discrimination with the California DFEH and received notice of a right to

sue under California *Government Code* §12965, subdivision (b). *Id.* On February 22, 1995, plaintiff sued the defendant alleging causes of action for discrimination in violation of the FEHA, wrongful termination in violation of public policy (common law wrongful discharge), breach of contract, and intentional and/or negligent infliction of emotional distress. *Id.* Plaintiff sought both compensatory and punitive damages. *Id.* at 1148-1149. In response, the defendant filed demurrers stating that the plaintiff was restricted to the WCAB, as all “injuries” related to employment fall under workers’ compensation exclusivity rule. *Id.* The trial court dismissed the defendant’s demurrers. *Id.* On appeal, the Court of Appeals denied the defendant’s writ of mandamus. *Id.* Upon petition for review, the California Supreme Court affirmed the ruling of the trial court and Court of Appeal. The Supreme Court, relying on its decision in *Shoemaker v. Myers*, reasoned that:

Though we stated that most injuries arising from termination of employment fall within the compensation bargain, we noted that the exclusive remedy provisions are not applicable [to injuries arising from] conduct where the employer or insurer stepped out of their proper roles.’ [citations] . . . (*Shoemaker, supra*, 52 Cal. 3d at p. 16.) Therefore, we concluded that an injury resulting from a wrongful termination in violation of a whistleblower statute lies well outside the compensation bargain,’ and the exclusive remedy provisions do not apply. (*Id.* at p. 23.) We reasoned that, by enacting the whistle-blower statute, [t]he Legislature clearly intended to afford an *additional* remedy to those already granted under other provisions of the law; otherwise [the

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whistle-blower statute] would be rendered meaningless. (*City of Moorpark v. Superior Court*, 18 Cal. 4th 1143, 1152; internal quotation marks omitted; emphasis in original).

Further, the Court in *City of Moorpark* held that California *Labor Code* § 132 (a) did not provide an exclusive remedy for injured employees seeking justice for wrongful discharge and did not preclude an employee from pursuing FEHA and common law remedies for said illegal acts.

California *Labor Code* § 132 (a), which prohibits employers from discriminating against employees who are injured in the course and scope of employment, was not intended to be the plaintiff's exclusive remedy, and thus FEHA and common law remedies were available. Unlike other workers' compensation remedies, California *Labor Code* § 132 (a), addresses an employer's breach of an employee's civil rights, rather than compensation for an employee's injury; the statute has no exclusivity provision. California *Labor Code* § 3600 et seq., in providing exclusive remedies, refers to "this division, and California *Labor Code* § 132 (a), appears in a different division of the Labor Code." *City of Moorpark v. Superior Court*, 18 Cal. 4th 1143 at 1152.

In other words, the employee was free to file a California *Labor Code* § 132 (a) petition before the WCAB and concurrently file a lawsuit claiming that the employer violated FEHA based on the very same alleged acts of discrimination. The Court went further to state,

Even if a workers' compensation claim is the exclusive means of pursuing a California *Labor Code* § 132 (a), claim, such a claim is not the employee's exclusive remedy...even though California *Labor Code* § 132 (a), addresses the precise wrong that plaintiff alleged, the Legislature may enact a new remedy, intending to supplement other

remedies...the broad policy behind FEHA and the mandate that it be liberally construed indicate that FEHA was intended to supplement other remedies. Finally, the mandate of California *Labor Code* 139.6, that the employers inform employees of their FEHA rights would be meaningless if the California *Labor Code* § 132 (a) remedy was exclusive *City of Moorpark v. Superior Court*, 18 Cal. 4th 1143 at 1152.

When *City of Moorpark* case was decided, it was generally understood that the California *Labor Code* § 132 (a) allegations and FEHA claims did not in any way preempt each other, but rather could proceed separately and independently from one another. While *City of Moorpark* is still applicable for the notion that a civil forum is available as a viable *alternative* to the workers' compensation forum for claims arising out of FEHA violations in the workplace, defense attorneys can now argue that under the *Ly* decision if you pursue both remedies, then a finding in one forum regarding the intent of the employer will bind the other.

The Ly Decision

In *Ly v. County of Fresno*, three Laotian employees of the County of Fresno ("County") filed parallel actions before both the WCAB and the Superior Court claiming damages arising from alleged workplace racial discrimination and harassment, including psychiatric injuries. In the three actions before the WCAB, the County, in defending against the psychiatric claims, alleged that the "injury was substantially caused by a lawful, nondiscriminatory, good faith personnel action," as the employer is expressly permitted to do by California *Labor Code* § 3208.3(h). After the WCAB conducted hearings, the WCAB denied the employees' claims in each case. The WCAB, in each case, made specific

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findings that there was no compensable injury because the County's actions were caused by "non-discriminatory, good faith personnel actions" within the meaning of California *Labor Code* § 3208.3(h). The County then filed motions for summary judgment in the Superior Court action, asserting that plaintiffs' claims were barred by the doctrines of res judicata and collateral estoppel. The trial court granted summary judgment against each of the three employees and in favor of the County.

On appeal, plaintiffs argued that their FEHA claims were not barred either by res judicata or claim preclusion because the WCAB and civil court are two distinct entities and the respective claims before each involved unique primary rights. The Court of Appeal disagreed, and affirmed the judgment of the trial court on the basis of res judicata. The Court of Appeal noted that workers' compensation is ordinarily the exclusive remedy for injuries incurred while performing services normally incidental to the job, but rightly distinguished that because illegal discrimination is not a normal incident of the job, a claim for damages under FEHA is not barred by the exclusive remedy provision of workers' compensation¹. Nevertheless, the Court held that under California *Labor Code* §3208.3(b)(1), an employee may choose to file a workers' compensation claim before the WCAB for psychiatric injury caused by illegal discrimination. If the employee elects to do so, the employer can defend on the basis that the injury was "substantially caused by a lawful, nondiscriminatory, good faith personnel action," within the meaning of California *Labor Code* §3208.3(h). Furthermore, the Court held that if the employee chooses to file both a claim before

the WCAB and a FEHA claim in Superior Court, then whichever jurisdiction first reaches the issues on the merits, that decision is binding on the other jurisdiction. The Court of Appeal reasoned:

There is no question here that the decisions in the workers' compensation cases were final and on the merits, and the same parties were involved in both the workers' compensation cases and the FEHA action. [As such] the case before us is analogous to *Buswick v. Workman's Comp. Appeals Bd.* (1972) 7 Cal.3d 967,973-974. There, our Supreme Court concluded that res judicata barred the worker's compensation action. The Court concluded the worker's compensation proceeding was brought on the same causes of action as in the Superior Court case. Since in the latter, the petitioner sought 'redress for injuries suffered from one tortuous act...violation of one primary right in [the worker's compensation] case constitutes a single cause of action even though the two mutually exclusive remedies are available.' *Busick, supra* 7 Cal. 3d at 975.

The Court in *Ly* found the WCAB reached the merits of the discrimination claim first, and therefore its findings were binding on the Superior Court.

What does this mean for Practitioners?

Plaintiff's attorneys should argue that the *Ly* decision is narrowly tailored to the circumstances when an employer's intent (e.g. California *Labor Code* §3208.3(b)(1)) is at issue in both the WCAB and civil forums. When the intent of the employer is being contemplated in both forums, employment attorneys must operate under the assumption that the findings of the WCAB can fatally prejudice a client's civil FEHA action for

¹See *Accardi v. Superior Court* (1993) 17 Cal. App.4th 341, 347; *Flait v. North American Watch Corp.* (1992) 3 Cal.App.4th 467, 480 [The Legislature "did not intend that its objective of providing relief from civil rights violations would be defeated by the exclusive remedy provision of the workers' compensation act"]

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unlawful discrimination, harassment, or retaliation, and vice versa. Practitioners therefore must ensure that their potential and existing clients carefully consider the benefits and disadvantages of the remedies available under both the Workers' Compensation statutory scheme and under the FEHA before filing any action. A civil action under FEHA allows for the recovery of emotional distress damages, punitive damages, and statutory attorney's fees and costs (including recovery of expert costs) that may not be provided for under the Workers' Compensation statutory scheme. See *Kelly-Zurian v. Wohl Shoe Co.* (2d Dist. 1994) 22 Cal.App.4th 397, 418; California *Government Code* § 12965. However, the Workers' Compensation statutory scheme may provide your client with certain tax benefits that cannot be accomplished through a civil action.

Conclusion

The bottom line is that the *Ly* decision does not alter the principle established in *Moorpark* that both (workers' compensation and FEHA civil) forums and remedies remain available to employees injured in the workplace by conduct in violation of FEHA. What *Ly* does hold is that, for better or for worse, an employee's entitlement to those remedies will be determined by the first forum to reach a decision on the merits. The employment attorney is therefore well-advised to consult with a workers' compensation attorney in determining whether the client's worker's compensation claim involves a determination of the employer's intent, and if so, which route is most beneficial to the client before proceeding.

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(Continued from page 1)

Other companies are coming up with their own solutions

Alcohol is much easier to detect in tests and in visible impairment. The changes in marijuana laws have happened so quickly that it is understandable that the answer to keeping inebriated drivers off the roads has not yet been found. Will this device be the answer? It may be but you can trust that plenty of other companies are working hard to find their own solution.



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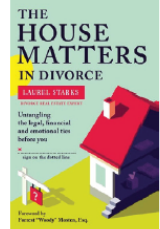
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Save the Date

Installation Awards Ceremony & Dinner

Thursday, October 4, 2018

5:00 P.M.

DoubleTree by Hilton

Ontario

Law Day

Saturday, October 20, 2018

10:00 A.M. - 2:00 P.M.

University of La Verne College of Law

320 E. D Street

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Holiday Celebration, Toys For Tots

Friday, December 7, 2018

5:00 P.M.

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