

## Behind Walsh McKean Furcolo LLP

Walsh McKean Furcolo LLP is a mid-size Martindale-Hubbell AV rated defense firm located in San Diego, California. The firm places an emphasis on the defense and trial of construction defect, professional liability, personal injury, commercial and general liability, employment liability, insurance coverage, bad faith and product liability litigation.

### Our Size is an Advantage.

We are a mid-sized firm. We have successfully managed our growth to maintain a size which works for you as well as for us. We are small enough to provide you with personal attention, and large enough to represent you aggressively in complex legal matters. Our size truly offers you the best of both worlds.

### We are Experienced.

Plain and simple, our attorneys are good at what they do. We are a firm of substance, led by experience. Groups of our attorneys focus on civil litigation and insurance defense, others on insurance litigation, coverage and bad faith work. Experienced attorneys lead each practice group. We focus on what we know, so you can focus on something else.

### Your goal becomes our goal.

Our focus is firmly fixed on what

matters to you. You are the reason we are here. We believe practicing law is fundamentally

expectations and adapt to you, your company and your needs.

### Our Clients

#### Inspire Us.

Our representative clients include the following: Admiral Insurance Company, American Bankers Insurance Company, Tru-sonic, Inc., American Reliable Insurance Company, Berkley Specialty Underwriting Managers, LLC,

Ken Grody Ford, Secret Charm, LLP, Good & Roberts, Inc., Interstate Insurance Group, City of Long Beach, Nationwide Indemnity Company, Hughes Property Management, Nautilus Insurance Company, Nordstrom, Inc., Dermacare, Riverport Insurance Company, National Casualty Company, Advanced Geosolutions, Inc., Tone Framing, Hon Development Company, Scottsdale Insurance Company and Sunzone Real Estate Group Inc.

### Our Reputation Speaks Volumes.

Hiring a respected law firm and lawyers benefits you. We are a Martindale-Hubbell AV rated firm. Our lawyers have reached the height of professional excellence and are recognized for the highest levels of skill and integrity. AM Best's directory names us as a recommended defense firm.

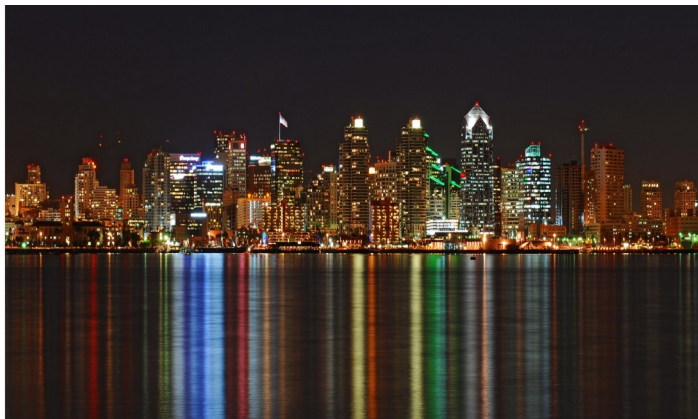
about helping you reach your goals. We focus our talents on your needs, objectives and priorities, not ours. We team with you every step of the way toward a common goal – a successful outcome for you.

### We Seek Balance.

We are dedicated to a work environment which encourages excellence. We pool our knowledge and experience, building on one another's strengths while prioritizing diversity and flexibility. We value our people, take pride in our firm and each other, and balance our lives with our careers. We appreciate that each member of our firm is essential to its success.

### Our Challenge.

Talk to us about your expectations. Tell us about your needs. Share your concerns. We are confident you will be impressed with our ability to exceed your



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**Dinah McKean,  
Partner**

## **McFann v. House of Automation**

*San Diego Superior Court – Favorable Result at Trial  
California Court of Appeal, Fourth Appellate District - Defense Verdict, Affirmed*

Plaintiff employee, a maintenance worker at a manufacturing facility, was injured when a one-ton industrial gate fell on him as he tried to troubleshoot a gate malfunction. Plaintiff sued House of Automation and others who had previously provided occasional parts and service for the gate. Plaintiff alleged defendants had a duty to warn the gate was in an unsafe condition and had a duty to recommend additional safety features which might have pre-

vented the accident. WMF partner Dinah McKean represented House of Automation in the San Diego Superior Court jury trial. Defendants established they had no contract to provide regular maintenance and were never asked to recommend design modifications to the existing gate and therefore no legal duty to warn arose. Further, defendants presented evidence that plaintiff's employer failed to provide him with any training regarding

the gate's function or safe operation. The three-week trial resulted in a verdict for defendants.

Plaintiff appealed the defense verdict and WMF partner Dinah McKean represented House of Automation as Respondent. After receiving briefs and hearing oral argument, the Court of Appeal affirmed the jury's verdict in its entirety.

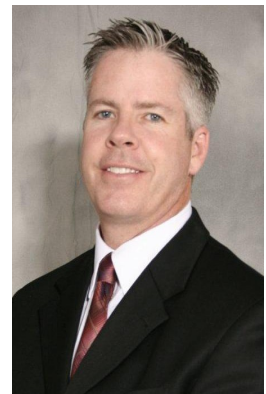
## **Pringle, et al. v. Jarvie**

*San Diego Superior Court—Favorable Result at Trial*

Plaintiff sustained injuries to her cervical facet joints in her neck during a rear end automobile accident. Defendant's auto insurer, Allstate, admitted liability but claimed Plaintiff sustained only minor, soft-tissue injuries and its only offer to

settle before trial was \$18,000.00. Despite trial testimony from Allstate's retained orthopedic surgeon that Plaintiff required at most \$1,500 in physical therapy treatment, Walsh McKean Furcolo attorney Regan Furcolo convinced the jury that Plaintiff's injuries

from the accident were real, serious and enduring. After less than an hour of deliberations, the jury awarded \$310,000.00 to Plaintiff.



**Regan Furcolo, Partner**



**Thomas Kelleher,  
Partner**

## **Branks v. R.A. Burch Construction Co., Inc., et al.**

*San Diego Superior Court—Favorable Result*

Plaintiff dismissed his action with prejudice in exchange for a waiver of fees and costs against R.A. Burch Construction Co., Inc. – a construction company represented by Walsh McKean Furcolo. The case involved allegations by an engineering employee of a civil defense contractor that he slipped and fell on an oily substance on the floor of a newly refurbished naval air hangar. Plaintiff alleged the new non-skid floor in the hangar had been defectively applied and contributed to his fall,

causing Reflex Sympathetic Dystrophy Syndrome, fractures to his right hand and elbow, injuries to his shoulder, neck, low back and right ankle, and emotional distress. However, Walsh McKean Furcolo attorney Tom Kelleher took a single deposition, i.e., plaintiff's primary treating healthcare provider, and proved that plaintiff had a pre-existing knee injury that gave way prior to the accident, that plaintiff had told the same healthcare provider that the accident was caused by his knee giving way, and that R.A.

Burch did not cause the accident. Mr. Kelleher was also successful in recouping fees and costs from the subcontractor of R.A. Burch responsible for installing the non-skid floor in the hangar pursuant to the parties' contractual defense and indemnity provision. Plaintiff had sought \$10 million from R.A. Burch.

**Group Builders, et al. v. Admiral Insurance Company, et al.**

*Circuit Court of the First Circuit, Hawaii - Summary Judgment, Granted  
Intermediate Court of Appeals of the State of Hawaii - Summary Judgment, Affirmed*

In an underlying action in Hawaii based on mold damage to the Hilton Hotel Kalia Tower in Waikiki, Walsh McKean Furcolo LLP client Admiral Insurance Company had disclaimed coverage principally due to a lack of property damage during its policy period and certain business risk exclusions. The insured, Group Builders, was defended by the insurer affording coverage prior to Admiral. After a multi-million dollar settlement, Group Builders and its defending insurer, Tradewind, sued Admiral for

breach of contract, bad faith and contribution. WMF partner John Walsh and attorney Lynn Trang served as regional counsel, with the case handled directly by local Hawaii attorneys Allen Wolff and Joseph Kotowski. In successive motions for summary adjudication, the court ruled that Admiral had not breached the covenant of good faith and fair dealing owed to Group Builders, that Tradewind had no claim for bad faith independent from Group Builders' extinguished claim and that Admiral had no

obligation to indemnify either plaintiff for settlement proceeds paid by them in the amount of \$4.3 million. Upon appeal and in a published opinion, 123 Haw. 142, the appellate court affirmed Admiral's position and held that faulty construction work by a subcontractor on a hotel construction project did not constitute an occurrence under a commercial general liability insurance policy. This issue is currently the subject of political legislation.



**John Walsh, Partner**



**Lynn Trang, Associate**



**Chris Lea, Associate**

**Eberl v. The Comedy Store, Inc.**

*San Diego Superior Court - Dismissal with Prejudice—Favorable Result*

Plaintiff tripped and fell at The Comedy Store in La Jolla, CA and sustained a severe hand injury resulting from the fall. Plaintiff sued The Comedy Store under a premises liability

theory alleging that the lighting was inadequate. During discovery, attorney Christopher Lea uncovered evidence impeaching plaintiff's account of the incident and her credibility result-

ing in the entire case being dismissed with prejudice for a cost waiver as to The Comedy Store. Plaintiff's prior demand was \$125,000.

**Construction Defect Success**

*San Diego Superior Court—Favorable Result*

Our client, a manufacturer of high-end custom made wood windows, was brought into construction defect litigation on a cross-complaint by the general contractor. The plaintiff homeowner alleged that there were leaks at a significant portion of the windows at his large home. The cross-complaint alleged claims as against our client for express, implied, and equitable indemnity, breach of express and implied warranties, breach of contract (three counts) and negligence. We successfully negotiated with general contractor's counsel

for a dismissal of the express and implied indemnity and the three breach of contract counts. Counsel for the general contractor insisted that the remaining causes of action in their cross-complaint would be maintained. We successfully pushed for priority to take the deposition of the general contractor's person most qualified as to the breach of warranty causes of action in their cross-complaint. As a direct result of Ms. Paculba's deposition, a few days after it took place, the general contractor agreed to dismiss the two breach of war-

ranty causes of action as against our client, leaving no remaining causes of action on a product liability or contractual theory against our client. Then prior to mediation, the general contractor made a large allocated demand to our client. As a result of our strategy of whittling down the causes of action in the cross-complaint, within the space of three and a half weeks of that large demand we had successfully negotiated a favorable settlement for our client of less than eight percent of the demand.



**Katherine Paculba, Associate**

**SUCCESSFUL OUTCOMES WITHIN OUR FIRM**

Walsh McKean Furcolo LLP fully recognizes that these successes, as with every good outcome, are the result of close teamwork with the claims representatives and clients who work with us every step of the way. We thank them for the confidence they have in us and we look forward to the opportunity to be of service in the future.



**Stephen Kerins,**  
Associate

## **Aroa Marketing, Inc. v. Hartford Ins. Co. of the Midwest**

*198 Cal.App.4th 781 (2011)*

In a recent decision, the California Court of Appeal applied a CGL policy's comprehensive intellectual property exclusion to an individual's underlying claim of deprivation of her right to publicity under California law. In *Aroa Marketing, Inc. v. Hartford Ins. Co. of the Midwest*, 198 Cal.App.4th 781 (2011), the Court of Appeal for the Second District held that while a right to publicity claim did fall within the defendant insurer's policy's coverage for "personal and advertising injury," an exclusion

which precluded coverage for "personal and advertising injury" arising out of "any violation of any intellectual property rights such as copyright, patent, trademark, trade name, trade secret, service mark, or other designation of origin or authenticity" nonetheless applied to the underlying plaintiff's claim based in part on the nonexclusive phrasing of the exclusion.

Although the reach of the *Aroa* decision may ultimately

be limited by variations in the comprehensiveness of IP exclusions in use today, among other factors (see generally *S.B.C.C., Inc. v. St. Paul Fire & Marine Ins. Co.*, 186 Cal.App.4th 383 [2010]), it does underscore the significance of an insurer's investment in the careful tailoring of a CGL policy's IP exclusion to ensure its fullest application without sacrificing those elements of "personal and advertising injury" coverage in high demand among insureds.



**Thomas Kelleher,**  
Partner

## **Howell v. Hamilton Meats & Provisions, Inc.**

*52 Cal.4th 541 (2011)*

es. Plaintiff put on evidence that the total amount billed for her medical care up to the time of trial was in the amount of \$189,978.63, and the jury returned a verdict awarding that same amount as her damages for past medical expenses. However, plaintiff's medical care providers had "written off" \$130,286.90, such that the defense brought a post-trial motion to reduce plaintiff's medical specials by that amount. The trial court granted the motion and reduced plaintiff's past medical specials to reflect the amount the medical providers accepted as payment in full and reduced the judgment by \$130,286.90. The appellate court reversed the reduction order on the grounds that it violated the collateral source rule. The California Supreme Court reversed the Court of Appeal and remanded for further proceedings.

California's highest court held that "an injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages

no more than the amounts paid by the plaintiff or his or her insurer for the medical services received or still owing at the time of trial. In so holding, we in no way abrogate or modify the collateral source rule as it has been recognized in California; we merely conclude the negotiated rate differential—the discount medical providers offer the insurer—is not a benefit provided to the plaintiff in compensation for his or her injuries and therefore does not come within the rule." *Howell, supra*, 52 Cal.4th at 566. In support of its holding, the Court reasoned that (1) a medical expense is generally recoverable as economic loss if it is both incurred and reasonable; (2) the collateral source rule provides that "if an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor" (*Howell, supra*, 52 Cal.4th at 566); (3) however, a plaintiff

does not incur liability for his or her medical providers' full bills, if at the time the charges were incurred the providers had already agreed on a different price schedule for its members, such that a plaintiff cannot recover the full bill in damages as economic loss; and (4) "[t]he negotiated rate differential lies outside the operation of the collateral source rule also because it is not primarily a benefit to the plaintiff and, to the extent it does benefit the plaintiff, it is not provided as "compensation for [the plaintiff's] injuries" (*Howell, supra*, 52 Cal.4th at 564).

In closing, the California Supreme Court instructed that where a trial jury has heard evidence of the amount accepted as full payment by the medical provider but has awarded a greater sum as damages for past medical expenses, the defendant may move for a new trial on grounds of excessive damages. If the trial court grants the motion for new trial, it may permit the plaintiff to choose between accepting reduced damages or undergoing a new trial.

### **IMPORTANT NOTICE**

This publication is provided only as a general discussion of legal principles and ideas. Every situation is unique and must be reviewed by a licensed attorney to determine the appropriate application of the law to any particular scenario. If you have a legal question, consult with an attorney. The reader of this publication will not rely upon anything herein as legal advice and will not substitute anything contained herein for obtaining legal advice from an attorney. No attorney-client relationship is formed by the publication or reading of this document. Walsh McKean Furcolo LLP assumes no liability for typographical or other errors contained herein or for changes in the law affecting anything discussed herein.