THE *DYNAMICS* OF CIVIL DEFENSE

Official Newsletter of the Idaho Association of Defense Counsel

Fall 2017

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IDAHO SUPREME COURT'S DECISION IN *MARAVILLA V. JR SIMPLOT COMPANY* RECALIBRATES EMPLOYER-CARRIER SUBROGATION JURISPRUDENCE

Anne Magnelli, Anderson, Julian & Hull-Boise

On the last business day of 2016, the Idaho Supreme Court issued an opinion that would reverberate through 2017 when it handed down *Maravilla v. JR Simplot Company*, 161 Idaho 455, 387 P.3d 123 (2016), finding that any negligence at all on the part of an employer bars the subrogation recovery typically allowed by statute. Idaho Code § 72-223(3) ordinarily allows the employer's insurer or the self-insured employer to subrogate against any award or settlement received from a liable third party. ("If compensation has been claimed and awarded, the employer having paid such compensation or having become liable therefor, shall be subrogated to the rights of the employee, to recover against such third party to the extent of the employer's compensation liability.") However, while not questioning the validity of that statutory section, the *Maravilla* Court clarified that an employer who is concurrently negligent for a worker's injury is not entitled to subrogate against the third-party award.

The employee in *Maravilla* had been injured while working at a Simplot plant; he tripped on a hose that had been placed across a walkway. The hose transported a water/acid mixture to a pump. The hose had been placed by Simplot while a nearby sulfuric acid "pad" was being repaired by Idaho Industrial Contractors ("IIC"). Because of a rainstorm, the power went out at the plant, causing acid to pool on the sulfuric acid pad. When Maravilla

Continued on Page 2.

THINGS TO KNOW BEFORE YOU BECOME A MEMBER OF THE QUILL CLUB

Sara Berry, Holland & Hart-Boise

Tourists flock to Washington D.C. in the spring to see the National Cherry Blossom Festival. That is not why I was there, although I did get to enjoy one of the earliest-blooming festivals in many years. Instead, I spent a week in a conference room debating the finer points of lawful police searches, tort causation, proximate cause, and superseding cause, all in preparation to watch eight Justices of the Supreme Court of the United States engage each other and three talented appellate advocates to explore the limits of holding police officers accountable for shooting innocent civilians.

The Case

In 2010, officers near Los Angeles were looking for a parolee-at-large. A series of imprecise decisions culminated in two officers clearing the backyard of a typical residence and shooting the occupants of a separate home. The officers knew that a man and his pregnant girlfriend (now his wife) lived in a shack in the backyard of the residence. With guns drawn, the officers approached a windowless wooden shack that had an air conditioner, wood door, screen door, blue tarp roof, and

Continued on Page 3.

tripped on the hose placed by Simplot, his foot went through a plastic barrier erected by IIC and into the pooled acid. Maravilla was badly injured and required surgery and skin grafts. Simplot paid out workers' compensation benefits in its capacity as a self-insured employer. Maravilla, meanwhile, sued IIC, and eventually settled the suit for $75,000.00. Simplot thereafter sought subrogation against the $75,000.00 amount.

The employee filed a petition for declaratory ruling with the Idaho Industrial Commission, arguing that Simplot was not entitled to subrogation because any negligence on its part—such as placing the hose—cut off its right to subrogation under I.C. §72-223. "Simplot argued that as a result of Idaho's adoption of comparative fault, an employer's right to subrogation continues to exist even if the employer is shown to have been partly at fault in contributing to the employee's injury." *Maravilla*, 161 Idaho at 458. The Commission adopted a new rule "based on the fact that joint and several liability has been abolished in Idaho, stat[ing] that 'employer's negligence is no longer an absolute bar to the exercise of its right of subrogation. Rather, an employer's right of subrogation will be reduced by its proportionate share of fault in contributing to claimant's damages.'" *Id.* The parties cross-appealed to the Supreme Court, which rejected the Commission's rationale.

The Court reasoned that "where the employer is concurrently at fault for the worker's injury it should not be allowed the benefit of subrogation because it runs counter to the policy of law to allow someone to take advantage of his own wrong." *Maravilla*, 161 Idaho at 463. According to the *Maravilla* Court, this concept was not a revolutionary one, and was simply a restatement of the Court's prior holding in *Liberty Mutual Insurance Company v. Adams*, 91 Idaho 151, 417 P.2d 417 (1966). In *Liberty Mutual*, according to the *Maravilla* Court, the Idaho Supreme Court first addressed the question of whether an employer whose negligence contributed to the injury of an employee may enforce its subrogation rights. In that case, the Court first "held that an employer who was concurrently negligent in the worker's injury was not entitled to subrogation." *Maravilla*, 161 Idaho at 460.

While "the Commission ruled that the Legislature's adoption of comparative negligence and subsequent abrogation of joint and several liability in the tort law system require[d] that the employer negligence rule in *Liberty Mutual* be abandoned in favor of a new rule," the Idaho Supreme Court opined that "[t]he *Liberty Mutual* rule does not rely on the principles of comparative negligence and joint and several liability." *Maravilla*, 161 Idaho at 462. So, according to the Court, "[t]he adoption of comparative negligence and the abrogation of joint and several liability do not affect the rationale behind the *Liberty Mutual* rule, let alone require its abandonment." *Maravilla*, 161 Idaho at 463. Thus, the Court stressed that its ruling was merely a confirmation of a rule that had always stood—"it is contrary to the policy of the law for an employer (or his insurer) to profit from his own wrong." *Id.*

Nevertheless, the *Maravilla* case has been hailed by claimants' and plaintiffs' attorneys as something of a sea-change, and those who represent injured workers do not appear hesitant to rely upon *Maravilla* to cut off employer-carriers' ability to subrogate. That being the case, employer-carriers and their counsel may want to reexamine their typical roles in third-party litigation, which in the past has often seen cases against negligent third parties pursued as a collaborative effort between the employee and his employer—if not outright funded by the employer's insurer. ■

Anne Magnelli is an associate in the Boise office of Anderson, Julian & Hull LLP. She has practiced insurance defense law for 13 years, the last three in Idaho with Anderson, Julian & Hull. Her practice is concentrated in litigation and trial support, with an emphasis in personal injury actions, insurance coverage issues, and subrogation cases. She graduated from the University of Miami and the University of Miami School of Law.

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DRI ANNUAL MEETING

Tara Martens Miller, Spink Butler-Boise
DRI Annual Meeting State Marketing Representative

On October 4-8, 2017, DRI, The Voice of the Defense Bar, held its Annual Meeting and Seminar at the Sheraton Grand Chicago. Our very own Elam & Burke was a generous sponsor of the event and I was happy to see John Burke and Matthew Parks as familiar faces attending the seminar and networking events. We also sincerely thank those other members of IADC who attended the events.

The Annual Meeting was highlighted by keynotes from Jon Meacham, Presidential Historian and Pulitzer Prize-winning Author; Jeffrey R. Toobin, Senior Legal Analyst, CNN, Staff Writer at the New Yorker and Author; John O. Brennan, Former Director of the CIA – National Security and Foreign Affairs and Eric H. Holder, Jr., Former U.S. Attorney General. The attendees were also provided the opportunity to earn several excellent CLE credits on several topics and to attend fun-filled networking cocktail receptions, including one at the Field Museum. The Annual Meeting concluded on Saturday night with the President's Reception and Dinner.

The DRI Annual meeting, as always, did not disappoint. Please plan to attend the 2018 Annual Meeting, much closer to home, in San Francisco. Your participation benefits us all at IADC. If you have any questions or inquiries regarding DRI and/or the Annual Meeting, please contact Julian Gabiola or me for further information and encouragement. ■

QUILL CLUB. *Cont. from Page 1.*

electrical cord running to it. There were clothes in a locker outside the home and a water hose ran into the home. The officers silently pulled back a blanket covering the doorway and peered inside. The residents of the home were asleep, but the man, Angel Mendez, sat up when he heard someone at the front of his home. He kept a bb-gun on the bed near him to deal with rats and other pests; it was not loaded. In order to sit up, Mr. Mendez moved the bb-gun. At the moment the first officer looked into Mr. Mendez's home, the bb-gun was pointed toward the open door.

"Gun!" was the first thing Mr. Mendez heard as the officers fired 15 rounds into the 7x7 dwelling. Mr. Mendez was struck at least 5 times, and Mrs. Mendez was struck twice. Mr. Mendez's right leg was subsequently amputated below the knee. The officers did not have a warrant or permission to search Mr. and Mrs. Mendez's home and the Mendezes were not the parolee-at-large; in fact, the Mendezes were entirely innocent.[1]

The Decisions

The District Court for the Central District of California awarded the Mendezes several million dollars for their injuries after finding the officers conducted an unreasonable search and were liable under the provocation doctrine. *Mendez v. Cty. of Los Angeles*, No. CV-11-04771-MWF (PJWx), 2013 WL 12162132 (C.D. Cal. Nov. 20, 2013). The 9th Circuit affirmed in part and affirmed the award. *Mendez v. Cty. of Los Angeles*, 815 F.3d 1178 (9th Cir. 2016). The officers filed a petition for a writ of certiorari ("cert"), which was granted to address the provocation doctrine and the question of superseding cause. *Los Angeles Cty. v. Mendez*, 137 S. Ct. 547 (2016); *see also* SCOTUSblog, www.scotusblog.com/case-files/cases/county-of-los-angeles-v-mendez, for the petition for cert. The 9th Circuit's provocation doctrine was unique, but it shared core elements with the *Graham v. O'Connor*, 490 U.S. 386 (1989), analysis for excessive force applied across the country.

Ultimately, the Supreme Court reversed the 9th Circuit decision, finding that the provocation doctrine as articulated by the 9th Circuit is inconsistent with the Court's excessive force jurisprudence. *Cty. of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017). However, the Justices offered several hints that the Mendezes may succeed in their claims using well-established excessive force rules set forth in *Graham*. It remains to be seen what will happen on remand. *Continued on Page 6.*

[1] For a thoughtful summary of the case, briefing, argument, and opinion, see SCOTUSblog, www.scotusblog.com/case-files/cases/county-of-los-angeles-v-mendez/.

IADC MEMBER PHOTO 2017 – SUN VALLEY RESORT

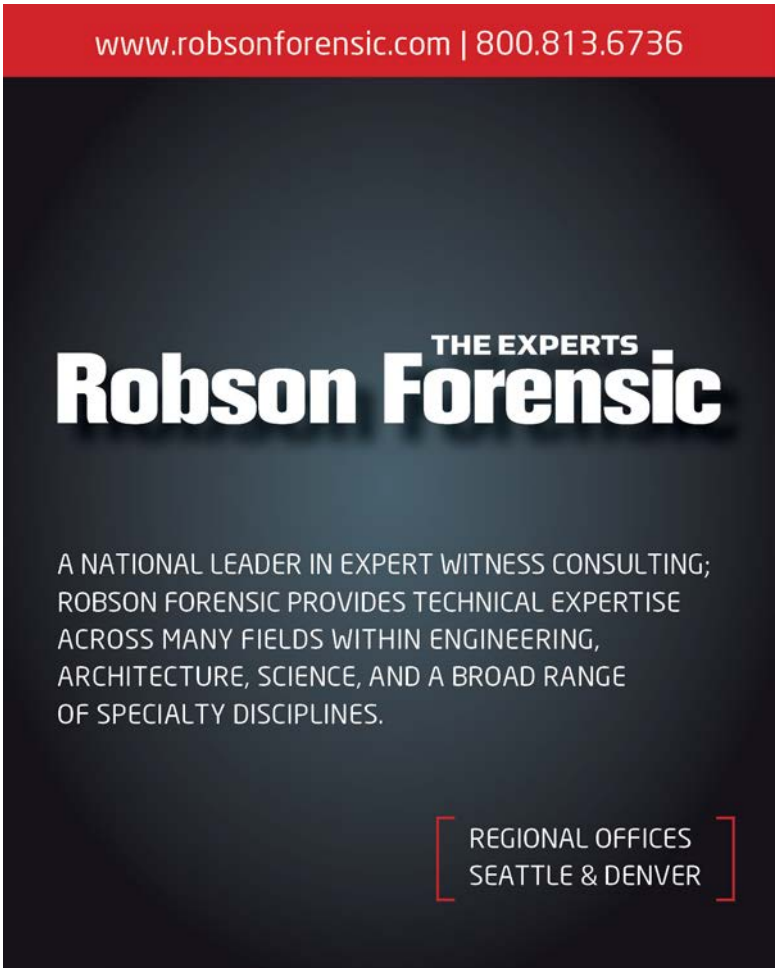
ANNUAL MEETING REPORT

Tony Sasser, Sasser Law Office-Pocatello

IADC's 53rd Annual Meeting in Sun Valley kicked off with a nice BBQ luncheon on the sunny patio at Dollar Lodge and a lively, thoughtful vinous salute from Rich Hall. The membership meeting followed and then guest speaker Stuart Simon launched our CLE sessions. His researched-based presentation covered the distinctions of various generations and how those differences and similarities should influence our communication with juries. Mr. Simon's presentation was followed by our colleagues, Joe Southers, Sonyalee Nutsch, JD Oborn and Matt Walters, reporting on the most interesting and impactful court decisions of the past year. Day one concluded with the members and their guests returning to the patio to enjoy crisp fresh air, delicious food, live music and friendly conversation for an enjoyable social and networking event.

Marc Williams' enthusiastic presentation on leadership awoke the members on a somewhat rainy Saturday morning. Josh Evett followed with a thought-

Continued on Page 8.



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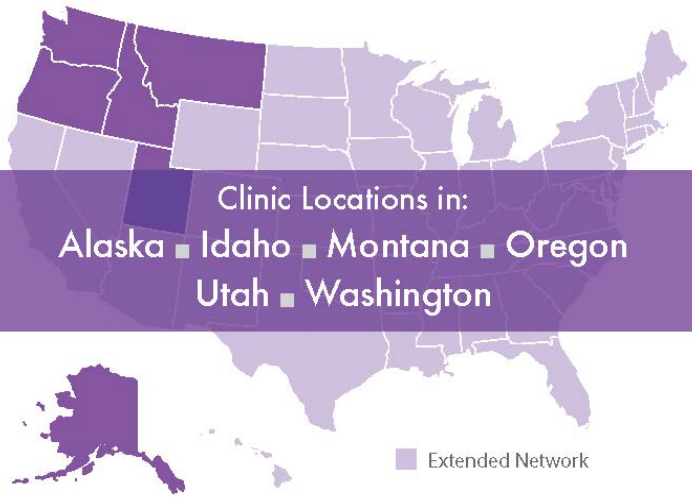

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QUILL CLUB. *Cont. from Page 3.*

The United States Supreme Court

In many cases, the respondent on appeal has an advantage defending the decision from the trial court; that is not likely to be the case if you are defending a decision from the 9th Circuit to the Supreme Court. This is because of the standard necessary for the Supreme Court to grant cert and because the 9th Circuit is regularly, although not always, reversed by the Supreme Court.[2] The Supreme Court grants cert "for compelling reasons" such as to resolve a circuit split or conflict between state courts or to resolve important questions of federal law. *See* S. Ct. Rule 10. In any case, if the Supreme Court has granted cert, it is because there is an issue in your case that the Justices want to address.

Whether you are the petitioner or respondent, there are a few key differences between an appeal to the Idaho Supreme Court or the 9th Circuit Court of Appeals and an appeal before the U.S. Supreme Court.

First, teamwork becomes even more important. Many of the attorneys appearing before the Supreme Court have been there before. It is in your and your client's best interests to involve someone experienced with the highest court in the land. The team of attorneys representing the Mendezes was comprised of: Leonard Feldman, lead counsel and an appellate expert with Peterson Wampold Rosato Feldman Luna in Seattle, on his second trip to the Supreme Court; Eric Schnapper, Professor of Law at University of Washington School of Law who has appeared before the Supreme Court many times; Rachel Lee, appellate attorney at Stoel Rives in Portland; and myself, a senior associate in the appellate group at Holland & Hart, LLP. If your case involves issues of governmental interest, the Solicitor General will weigh in with the official government perspective. The parties are allowed, and even encouraged, to meet with the Deputy Solicitor General assigned to the case to explain why the Solicitor General should support one side over the other before the briefs are filed. The Solicitor General's support is influential with the Court.

Second, the Supreme Court shows greater concern for the impact its decision will have on cases in the future. This is generally expressed through hypotheticals. Hypotheticals may show up in your briefing, and are almost guaranteed to be discussed during oral argument. Crafting a hypothetical helps to fine-tune your arguments and explains your preferred result at its most basic level. Well-developed hypotheticals are a persuasive tool for drawing parallels between your case and the result you are advocating.

Finally, oral argument is far more of a conversation between the attorney and the Justices than most arguments before the Idaho Supreme Court or the 9th Circuit Court of Appeals. The Justices use the time to address any lingering questions, but more so to convince each other of their views of the case. Many oral arguments at the state or federal appellate level begin with the attorney speaking for a minute or more without interruption. At the Supreme Court, that time is reduced to a matter of seconds in most cases. Attorneys preparing for oral argument have the unique opportunity to moot their argument with distinguished panels of attorneys in the week prior to argument. Groups like Georgetown Law's Supreme Court Institute Moot Court Program and Public Citizen's Alan Morrison Supreme Court Assistance Project accept one side to a case for moot argument and provide critical feedback.

More than any other case you may encounter in your career, you cannot over-prepare for an appearance before the Supreme Court. When the Justices enter the fully-packed courtroom, and after you geek out over how close you are to living legends (that isn't just me, right?), your preparation will kick in and you'll be ready to answer every question and hypothetical the Justices throw at you. The courtroom may appear large from the audience, but counsel are seated as close as six feet from the Justices. And even though you cannot take souvenir pictures, appearing before the Supreme Court makes you a member of the Quill Club – so named for the hand-carved white goose-feather quills given to all arguing counsel, including those who are lucky enough to sit at counsel table in support. ■

[2] According to SCOTUSBlog's Supreme Court statistics, the 9th Circuit was reversed in 88% of the cases that were granted cert for the October 2016 term. SCOTUSblog Stat Pack, available at www.scotusblog.com/wp-content/uploads/2017/06/ SB_scorecard_20170628.pdf. Appeals from the 9th Circuit comprised 11% of the Supreme Court's docket. *Id.* For the same term, the 3rd, 7th, 8th, and 10th Circuits were reversed in 100% of the cases for which cert was granted.

Sara Berry is a litigator in Holland & Hart's Boise office. She has shaped her practice to provide the appellate perspective during trial in order to preserve issues and present a fully developed trial record on appeal. Sara applies her unique perspective to benefit clients through motions practice at the trial court, and she represents clients in state and federal courts, including the Ninth Circuit Court of Appeals and the Idaho Supreme Court.

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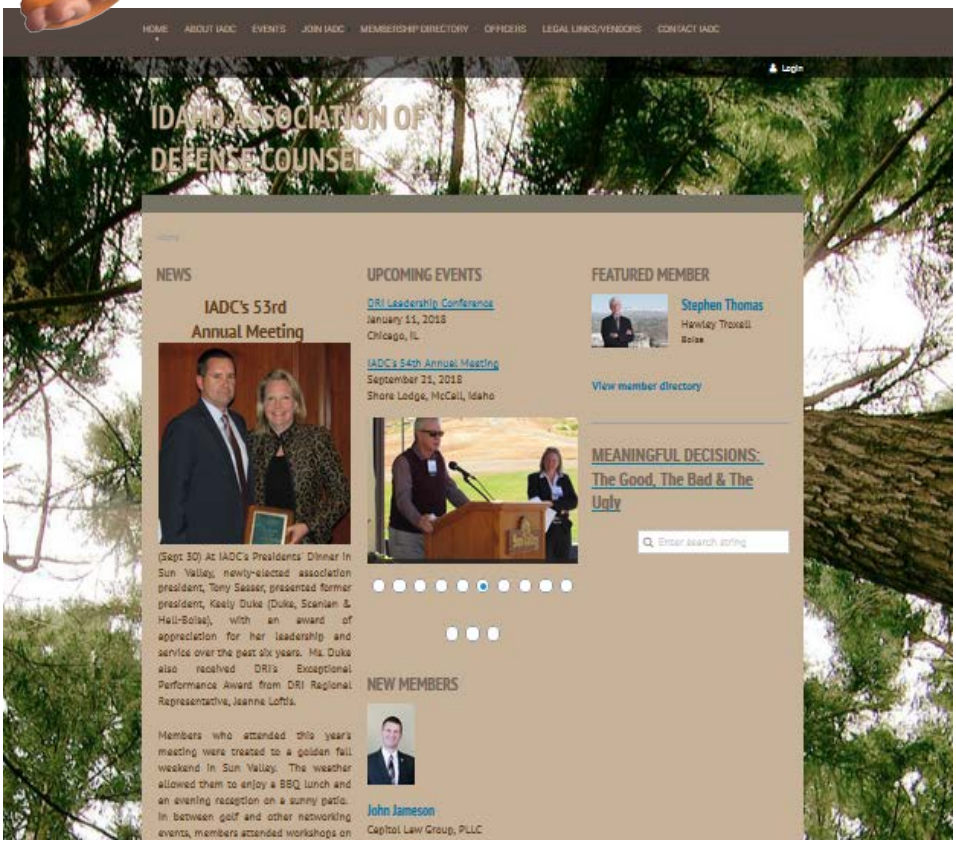

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MEANINGFUL DECISIONS

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PHOTO ALBUM

Contact Deborah at IADCoffice@idahodefense.org or 208.850.2600 if you need any assistance. ■

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Need fast information for a case? Ask your fellow IADC colleagues throughout the state by sending just one email message!

To use IADC's members-only e-mail discussion list, send an ordinary email message to the following e-mail address:

iadc_members@googlegroups.com

NOTE: If you have more than one e-mail account, the message must be sent from the account that is subscribed. If you are not subscribed and would like to be or if you have any questions, contact the IADC Office. ■

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2018 Calendar Of Events

Jan 11-12	DRI Leadership Conference (for IADC officers)	Chicago
Feb 1-3	State Legal Defense Organization Regional Mtg (for IADC officers)	Cabo, Mexico
Sept 21-22	IADC's 54th Annual Meeting	McCall
Oct 17-21	DRI Annual Meeting	San Francisco

ANNUAL MEETING REPORT. *Cont. from Page 4.*

provoking discussion regarding adjusted versus unadjusted medical billings and how to advocate for the same. Bryan Nickels wrapped up the CLE with his impression of court-appointed expert witnesses. The members who golfed, then were able to enjoy a drier day in the afternoon for the golf tournament.

The conference concluded with the President's Dinner. Ben Ritchie distributed the golf prizes and the past presidents were recognized. Keely Duke then received well-deserved acknowledgement for her six years of service as an IADC Board member and her year as president of IADC. Following the awards, The Big Wow band kicked off the dancing and helped close the weekend with a good vibe.

In addition to my gratitude to Stuart Simon and Marc Williams, a big thanks to all our colleague presenters, to Rich Hall for giving the Vinous Salute, to Matt Walters for coordinating significant decisions, to Tyler Anderson and Ben Ritchie for organizing the golf tournament and prizes. It takes a lot to organize this event and I appreciate all who pitched in to make it a success. ■

HELP IADC CONTINUE TO GROW!

Many of the benefits of membership in IADC involve interactions with other colleagues. Consequently, growing IADC's membership numbers is a goal that benefits all.

With that goal in mind, the Board would like your assistance to grow and further improve our association. Applications for membership are available on IADC's website or just give the person's name to the IADC office and we'll reach out to them. ■

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