



www.DimalantaClark.com

March 2011

Volume 2, Issue 1

Mill Valley

Oakland

Palo Alto

Phoenix

Santa Ana



### INSIDE THIS ISSUE

- 1 Dimalanta Clark Opens New Office in Marin County, CA
- 2 Phoenix Office: Introducing Christopher B. Wencker, Esq.
- 3 Construction Practice: New Mechanic's Lien Requirements
- 4 Tool Belt: *The Digital Camera & The External Hard Drive*
- 5 Personal Injury: *Defending Fido*
- 6 CLE Presentation (Tucson, AZ) *Animal Law: Basic Legal, Client, and Damages Issues (3/10/11)*

### **Dimalanta Clark Opens New Office in Marin County, CA**

Situated on the shores of San Francisco Bay in Marin County, Dimalanta Clark's newest office has opened just north of the Golden Gate Bridge in the Shelterpoint Business Center. The Mill Valley office is managed by Andrej L. Stoelting, who resides in Mill Valley with his wife and two children.





**Christopher B. Wencker**  
*Phoenix Office*

5450 E. High Street, Suite 385  
Phoenix, AZ 85054-5458  
Main (480) 339-2001  
Fax (480) 717-6602  
[CBW@dimalantaclark.com](mailto:CBW@dimalantaclark.com)



## **Dimalanta Clark Welcomes Christopher B. Wencker**

Christopher B. Wencker recently joined Dimalanta Clark, LLP as the managing attorney of its Phoenix, Arizona office. Prior to working at Dimalanta Clark Chris worked as an associate attorney for more than eight years at a Tucson firm specializing in representing municipal corporations and special taxing districts. During that time Chris also focused heavily on civil litigation, including defense of claims against government entities, businesses, and individuals. Chris has also litigated numerous claims on behalf of plaintiffs, primarily in the areas of wrongful termination, employee discipline, and injuries to clients' companion animals. Given his in-depth knowledge of, and extensive experience with, animal cases, Chris was elected as the Chair of the Arizona Bar Association's Animal Law Section for two consecutive terms, prior to which he served as the Section's Secretary. Chris has lectured widely on animal law topics and has served as an Adjunct Assistant Professor of Law at his *alma mater*, the University of Arizona James E. Rogers College of Law, where he taught a full-credit animal law course to second- and third-year law students.

Before going to law school Chris served in the United States Air Force for more than seven years. He worked as an airborne and ground-based cryptologic linguist, specializing in Chinese (Mandarin), and also supervising several interoperability programs that allowed different military units, including those of the Army, Navy and Marine Corps, to work together effectively. Chris received his juris doctorate degree from the University of Arizona, a Bachelor of Arts degree from Thomas Edison State College, an Associate of Applied Science degree from the Community College of the Air Force, and a diploma from the Defense Language Institute.

Chris is admitted to all Arizona state and federal courts, has litigated cases in the Superior Court, the Court of Appeals, the Supreme Court, and has argued cases before the Arizona Court of Appeals. In addition, Chris has litigated cases in the U.S. District Court for the District of Arizona and the Ninth Circuit Court of Appeals.

## **New Requirements for Establishing Mechanic's Liens Favor Developers and Purchasers**

*by Andrej L. Stoelting, Esq.*

Developers and other property owners have long been frustrated with "surprise" liens and the legal expenses incurred in defending against such claims. Similarly, purchasers, especially in the residential sector, have found themselves entangled in lien disputes in which they have no fault other than unknowingly purchasing encumbered property.

These issues have not gone unnoticed. Effective January 1, 2011, the California Legislature has amended Sections 3084 and 3146 of the California Civil Code to include two additional notice requirements necessary for a mechanic's lien to be enforceable.

As amended, Section 3084 now requires subcontractors to send the property owner (by registered, certified, or first-class mail) a "Notice of Mechanic's Lien" and a copy of the lien itself prior to recording the lien. The Notice of Mechanic's Lien requirement is intended to give property owners early notice of a lien claim and provide adequate time to resolve the claim before litigation ensues. The failure to adhere to this service requirement is fatal to the successful enforcement of the lien.

In similar fashion, Section 3146 as amended now requires the filing and recording of a notice of pendency of action (*lis pendens*) within 20 days after a lawsuit to foreclose on a mechanic's lien is filed. The *lis pendens* provides notice to potential property purchasers, lenders, and others that a lawsuit has been recorded in relation to the property and that the property may be sold in foreclosure to pay the underlying debt. The new requirement ensures that lien foreclosure suits are recorded and will therefore show up on title searches, providing clear notice to all parties that there is a cloud on title as a result of the action to foreclose on a mechanic's lien.

Piecemeal reforms to the mechanic's lien law over the years have provided some relief to the construction industry. However, the patchwork approach has created a hyper-technical and unsynchronized body of law. In response, the legislature has enacted a comprehensive overhaul of the mechanic's lien laws (SB 189) which will take effect January 1, 2012. Stay tuned.

---

Mr. Stoelting is the chair of the Dimalanta Clark, LLP Construction Practice Group and managing attorney of the Mill Valley office.



**Andrej L. (Andy) Stoelting**  
*Mill Valley Office*

591 Redwood Hwy, Suite 2320  
Mill Valley, CA 94941-6022  
Main (415) 381-2024  
Fax (415) 366-8298  
[ALS@dimalantaclark.com](mailto:ALS@dimalantaclark.com)

# THE DIGITAL CAMERA & THE EXTERNAL HARD DRIVE

## Important Tools for Every Construction Company

by Lee W. Clark, Esq.

*Think you are too busy to take pictures or write daily reports? Think about these two cases.*

### The \$11 Million Personal Injury Case

Following a recent trial in Marin County Superior Court we spoke at length with the jurors who sat on the bodily injury case. We learned from the jurors that two key things influenced their decision as they deliberated this construction-site injury claim:

(1) They felt pictures were missing; and (2) They wanted to see daily job reports for **every day**.

By way of background, this lawsuit was brought by a mechanic employed by an elevator company that was sub-contracted to install elevators in a new hotel project in San Rafael. On the mechanic's first day on the construction site he walked into a scaffolding cross-brace and bonked his hard hat. Over the next few days he walked into the same cross-brace five more times.

Seven weeks later the mechanic suffered a disc rupture in his neck that suddenly rendered him numb from the chest down. Following surgery, he sued the general contractor and the plastering subcontractor that had erected the scaffolding at the hotel project where he had bonked his head. His complaint alleged that the scaffolding was in violation of a Cal-OSHA requirement that calls for overhead clearance above a "walkway" to be of a height greater than 6'8" and well lighted. The complaint further alleged that the general contractor was legally obligated to keep all walkways clear of debris and that failure to do so was actionable negligence.

Following a six week trial the jury returned a verdict of \$11 million and the general contractor was found 75% responsible. The plastering subcontractor walked away unscathed because the jury was able to see that there was a 10' wide by 10' tall opening through their scaffolding. The reason the jury accepted this as fact was because there was a photograph showing this condition.

As shown in this key photograph, there was in fact an opening through the scaffolding that complied with Cal-OSHA, but the plaintiff testified that on some days this opening was blocked by crates and debris so he was forced to duck under the cross-brace at the next frame over (blue arrow).



The jury heard testimony that the general contractor was responsible for keeping this opening free from debris, but would not take the general contractor's word that it was. They needed to see daily photos to prove this was open **every day**.

The jury also heard testimony that the general contractor was contractually obligated to write **daily** job reports and take progress photographs of every area of the job site under their control **every day**. Unfortunately, during the three weeks plaintiff was on site, there were very few photographs taken and some daily job reports were missing from the file. The general contractor explained that at this late stage of the construction, they may have lost some daily reports and may not have had time to take photos of every condition because they were busy wrapping up this project.

*(Continued on next page)*

## THE DIGITAL CAMERA & THE EXTERNAL HARD DRIVE (continued)

### **The \$13 Million Building Damages Case**

In a jury trial we recently completed in Santa Clara County Superior Court, the plaintiffs were the owners of a neighboring building damaged by soil subsidence. Defendants were the developer, general contractor, and foundation contractor who were building a 23-story multi-use high rise next to plaintiffs' historic mixed use, brick building.

During soil stabilization work, the contractors were watching for soil heave that the engineers had predicted, but the ground unexpectedly settled instead. The plaintiffs' building suffered some cracks in the brittle old finishes and floors. Plaintiffs sued for repair costs, lost profits, and also sought punitive damages. In all they asked the jury to award thirteen million dollars.

The jury saw hundreds of pre-construction photographs and hundreds of photographs that were taken immediately after the building settled. They also saw daily job reports, emails, and telephone memoranda between the plaintiffs, the contractors, and the engineers. The jury could see for themselves the conditions complained of by plaintiffs and read for themselves what the contractors were doing to prevent damage to the neighboring buildings.

The jury awarded \$2 million to plaintiffs, which was almost enough to repair the building and compensate plaintiffs for lost income during the repairs. However, the jury declined to impose punitive damages against the contractors. Having detailed files containing relevant photographs, daily job reports, and emails clearly helped these contractors.

### **Documenting the Job File**

If you have been a defendant in an injury lawsuit or have been brought into a nasty construction defect lawsuit, you most likely received a letter from your attorney asking you to send all documents and all photographs from the job file. These two recent trials show how very important it is to have a complete job file. Most contractors I talk to about documenting the job file say the same thing; "We are too busy to take pictures or daily job reports." Just a few minutes per day spent on these two things are worth more than a month of hard work.

Documenting the job file in this electronic age does not take much time and is not very expensive to set up. For example, Best Buy has 30 digital cameras that cost less than \$100 and 25 external hard drives that hold 320 gigabytes for less than \$100.

Every crew has a foreman and every foreman should have a digital camera. At any time during the shift or at the lunch break, the foreman should take out the camera and click a dozen photographs of your work and the work area. At the end of every work day, download the photographs to the computer – this takes about two minutes. Email daily job reports to the area manager and attach the photos then drag and drop both the photos and daily report into the external hard drive. If you want to make it even more useful, separate daily data into file folders labeled with the date before dropping into the external drive.

Contracts, specifications, plans, emails, letters, scanned documents, and phone memos can also be stored on the external hard drive, and at \$100 per unit, you can maintain one for each job. Write the job number or job name on it, unplug it, and store that external hard drive with the job file.

Now, if you get a letter from your attorney asking for the job file, burn a copy to a DVD and mail it to him with contracts, change orders, and correspondence already organized. Now the file is enhanced with photos which can refresh your recollection of long-forgotten facts and details.

A picture is worth a thousand words – and it could save you millions.

## DEFENDING FIDO

*by Christopher B. Wencker, Esq.*

Dog bites cause pain – physical pain for the person who is bitten, emotional pain for the dog’s owner, and professional pain for the insurance agent who must deal with the claim. Most people, including dog owners, their insurance agents, and their lawyers understand that the “one free bite rule” is a thing of the past. In most states, including Arizona<sup>1</sup> and California<sup>2</sup>, dog owners are strictly liable for injuries caused when their dogs have bitten someone<sup>3</sup> and they must pay for the damages claimed by the victim. However, most dog bites are preventable and liability for a dog bite is not always automatic.

Like other states, Arizona<sup>4</sup> and California<sup>5</sup> have determined that when a person provokes a dog bite, the dog’s owner is not liable for the injuries suffered. While provocation, if proven, often provides a complete defense to a dog bite claim, comparative negligence principles and the doctrine of assumption of the risk can also provide a method for reducing liability for dog bites. This article will briefly address the use of each.

### **Provocation**

The issue of provocation is perhaps the least understood, but potentially the most useful, of the issues that arise in a dog bite case. Many people believe that “provocation” means some overtly aggressive act toward a dog which would cause the dog to act in “self-defense.” In this regard, many people analogize dog behavior to human behavior and assume the provocative act must be something that would cause a human to act in self-defense. In Arizona, this belief is enshrined in the provocation statute which states that “[t]he issue of provocation shall be determined by whether a reasonable person would expect that the conduct or circumstances would be likely to provoke a dog.”<sup>6</sup>

While most people would understand this phrase to mean that the provocation defense only applies to conduct that humans would find provocative, in reality what dogs find provocative is often completely different than what provokes humans. For example, a dog may bite a person who approaches the dog while she is “sleeping, eating, chewing on a toy, or caring for puppies.”<sup>7</sup> While simply approaching a *person* engaged in any of these behaviors generally would not elicit a violent response, a *dog’s* natural instinct is to consider such encroachment to be aggression. Similarly, given their territorial nature, a dog that may appear to be safely confined behind a barrier may react aggressively when that barrier is crossed.<sup>8</sup> Because dogs are hunting animals, they also are likely to chase and attack smaller persons (usually children) who run away from them and act frightened. In all of these cases, the “reasonable person” standard that has been inserted into the provocation defense will generally produce an outcome opposite to the expectations of a “reasonable dog.”

Given the fundamental misunderstanding of most people – including those who serve as jurors, arbitrators, judges, adjusters, and attorneys – regarding canine behavior and its implications for the provocation defense, it is essential in any dog bite case to consult a reputable and qualified animal behaviorist who works with dogs. Such a professional will be able to assess the dog who bit, consider likely triggers to provocation, provide important assistance during discovery, and explain the provocation issue to the person or people who will be deciding the provocation defense. In many cases, with the help of a good behaviorist, a situation that at first blush clearly appears to be an unprovoked and vicious attack will be revealed to be an instance of provocation.

*(Continued on next page)*

## DEFENDING FIDO (continued)

### **Comparative Fault/Assumption of Risk**

As most tort lawyers in Arizona know, comparative fault must be considered in (almost) every case.<sup>9</sup> While comparative fault is not allowed as a defense to an action under Arizona's "dog bite" statute<sup>10</sup>, it still may be considered in a dog bite claim under the common law. In such a case, all of the considerations of the dog behavior compared to human behavior discussed above apply, but because comparative fault generally considers the mental state of the parties<sup>11</sup>, actions that a dog bite victim does not realize are provocative to a dog may not provide much help to the dog's owner. Nevertheless, a good animal behaviorist may be useful in demonstrating how a bite victim's carelessness and inattentiveness to cues in the dog's behavior preceded the bite, and how the bite could have been prevented if those cues were heeded.

Often the bite victim claims his or her actions were innocent. When viewed in light of commonly understood precautions, these actions can be revealed as negligent and reduce the dog owner's liability. For example, many bites occur when a person tries to pet an unfamiliar dog on the head. Dog behavior experts indicate that one should allow a strange dog to sniff his or her hand first and then pet the dog from under the head. Failure to do so can be seen by the dog as aggressive, who may then be provoked to bite the aggressor. Viewing the situation in this light, what first seemed a case of strict liability can now be seen as a defensible case.

As with any type of lawsuit, every dog bite case is unique and presents its own peculiar problems. Because most dog bite cases involve some level of interaction between the dog and the victim before the bite occurs, it is important to examine what happened (and what did not happen) right before the bite, consider how the bite could have been prevented, and consult a knowledgeable animal behavior expert about the scenario. "Any dog can bite" is a common warning to be cautious around even familiar dogs. However, keeping these issues in mind means that you do not have to be so wary of dog bite cases.

<sup>1</sup>Arizona Revised Statutes ("A.R.S.") section 11-1025.

<sup>2</sup>California Civil Code section 3342. While this article contains references to California Law, and many of the principles discussed in this article may apply to dog bites in California, this article is based primarily on Arizona Law, and is not intended to be a detailed examination of California law on the subject.

<sup>3</sup>Note that in Arizona, a person is also liable for injuries caused by his or her dog while "at large," whether those injuries stem from a bite or not. See A.R.S. section 11-1020. This article will not discuss such injuries.

<sup>4</sup>A.R.S. section 11-1027.

<sup>5</sup>Unlike Arizona, which has established this defense by statute, in California the provocation defense is judicially created. See *Johnson v. McMahon*, 68 Cal.App.4th 173 (1998); *Burden v. Globerson*, 252 Cal.App.2d 468 (1967).

<sup>6</sup>A.R.S. SECTION 11-1027.

<sup>7</sup>"How to Avoid a Dog Bite," Human Society of the United States, available at [http://www.humansociety.org/animals/dogs/tips/avoid\\_dog\\_bites.html](http://www.humansociety.org/animals/dogs/tips/avoid_dog_bites.html) (last visited February 18, 2011).

<sup>8</sup>"Tips to Prevent Dog Bites," American Kennel Club, available at [http://www.akc.org/insurance/tips\\_dogbites.cfm](http://www.akc.org/insurance/tips_dogbites.cfm) (last visited February 18, 2011).

<sup>9</sup>A.R.S. section 12-2505.

<sup>10</sup>*Massey v. Colaric*, 725 P.2d 1099, 151 Ariz. 65 (1986). Although California's dog bite statute is materially the same as Arizona's, California courts do allow consideration of comparative fault/assumption of risk in an action under California's "dog bite" statute. See *Smythe v. Schacht*, 93 Cal.App.2d 315 (1949).

<sup>11</sup>*Williams v. Baugh*, 154 P.3d 373, 214 Ariz. 471 (Ariz. App., 2007).



## **ANNOUNCEMENT**

### **ARIZONA STATE BAR CLE PRESENTATION**

#### **“ANIMAL LAW: BASIC LEGAL, CLIENT, AND DAMAGES ISSUES”**

**Thursday, March 10, 2011**

**10:00 a.m. – 12:00 p.m.**

**Course No. 248847**

**1 hour CLE credit**

**Arizona State Bar Association**

**Southern Regional Office**

**270 N. Church Ave.,**

**Suite 100**

**Tucson, AZ 85701**

Chris Wencker will present an overview of general issues that often confront solo and small-firm attorneys wishing to include Animal Law in their practices. Topics include meeting clients and evaluating their cases, discussing the current status of Animal Law with prospective and current clients, issues involved in professional liability claims against veterinarians, claims for injuries to companion animals, the proper presentation and calculation of damages for injuries to companion animals, and the defense of vicious and biting dog claims.

Lunch will be provided during the one-hour presentation, which is approved for 1 credit of Mandatory Continuing Legal Education by the State Bar of Arizona.

©2011 Dimalanta Clark, LLP