

Star Turn That Almost Didn't Happen Pays Off

By Jean-Luc Renault
Daily Journal Staff Writer

Roman Silberfeld never handled an entertainment case before he took over the lawsuit between production company Celador International and the Walt Disney Co. on the eve of the trial.

"I didn't even know what Celador was," said the 61-year-old managing partner of Robins, Kaplan, Miller & Ciresi LLP's Century City office.

Until then, Silberfeld specialized in medical-device and mass tort litigation.

'In my household, being a lawyer was an honorable thing to do with your life.'

Less than two years later, the case over allegedly unpaid back-end profits from the show "Who Wants to Be a Millionaire" ended in a \$319 million verdict for his production company client, one of the largest plaintiff awards last year.

The victory, which Disney has appealed, continues to win Silberfeld accolades in the entertainment and legal industries — and the Beverly Hills Bar Association plans to present him with its inaugural "excellence in advocacy" award at a dinner ceremony on Wednesday.

It's an honor for Silberfeld, who almost didn't try the case in the first place.

Celador, which created the hit game show, filed suit back in 2004. Five years in, the firm representing Celador, Dreier LLP's California affiliate, imploded upon Marc Dreier's arrest on charges of investment

fraud.

Silberfeld inherited the case in 2009 and the trial was pushed to 2010. Over the course of a month, Silberfeld and co-counsel Bernice Conn went to a work convincing a federal jury in Riverside that Disney's television companies improperly cut Celador out of the show's massive profits.

The verdict, Silberfeld said, gave him a crash course in the modern news cycle.

Days after the jury's decision, the person who tracks the firm's media mentions pointed out that 205 news outlets picked up the same wire story about the verdict — within 3 minutes.

"I was stunned," he said.

Raised in West Hollywood, Silberfeld knew from a young age he wanted to become a lawyer. His German immigrant parents saw practicing law as a revered profession.

"In my household, being a lawyer was an honorable thing to do with your life," said Silberfeld, who raised four children with his wife, former "Love Boat" actress Patricia Klous.

He attended the UCLA and Loyola Law School and joined the then-named Ermas Simke & Hecht, where he made partner before leaving for Robins Kaplan in 1995.

Silberfeld built a reputation as a skilled attorney with an easygoing demeanor who remained courteous to opposing counsel in even the most contentious disputes.

"Roman is a tremendous lawyer," said David Miyamoto, a partner with Squire, Sanders & Dempsey who faced Silberfeld in a trade-secrets arbitration in 2005.

"It was a good fight, fought hard," Miyamoto said. "Roman and his team were lawyers at the highest level. I came out of it with an enormous amount of respect for him."

To prepare for the Celador case,



Roman M. Silberfeld

Silberfeld and Conn reviewed hundreds of boxes of documents and met with industry experts who explained the hazy world of Hollywood bookkeeping.

The intense preparation paid off. Still, Silberfeld said he's humbled by the praise. That includes the Beverly Hills Bar's award, which will

be presented alongside an award for former California Chief Justice Ronald M. George recognizing the judge's legacy.

"They ought to put me in the foyer and keep him in the main room," Silberfeld said.

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Robert Levins / Daily Journal

Doll Drawings Factor In Bratz Trial Questioning

By Jason W. Armstrong
Daily Journal Staff Writer

SANTA ANA — Lawyers for Mattel Inc. homed in on a tattered three-ring binder Friday in a trial in which the toy company is trying to prove that rival MGA Entertainment Inc. pirated its idea for the billion-dollar Bratz doll brand.

Mattel lawyer William C. Price showed jurors several pages torn from the faded black binder of original sketches by Carter Bryant of the wide-eyed, pouty-lipped dolls. While Bryant contended he drew the figures in 1998 while on hiatus from a position at Mattel, Price focused on surrounding pages still in the binder to fuel an argument that Bryant created Bratz in 1999, after he returned to the company.

Price, a partner with Quinn Emanuel Urquhart & Sullivan LLP in Los Angeles, showed jurors a copy of Bryant's July 1999 bank statement. He then showed the panel Bryant's handwritten notes in the binder about banking transactions from that time period.

"So you can pretty much definitively [say] this page in your notebook was written sometime in 1999?" Price asked Bryant.

"Yes," Bryant testified.

Friday's testimony came in the third week of a trial in which Mattel accuses MGA of developing the mega-successful Bratz line based on Bryant's ideas while knowing he was under a noncompete contract with Mattel.

MGA lead attorney Jennifer L. Keller, a partner with Keller Rackauckas LLP in Irvine, last week succeeded in persuading the jurist hearing the matter, U.S. District Judge David O. Carter, to keep from the jury a major piece of Mattel evidence. That was the Mattel's

contention that Bryant employed a computer software blocker called "Evidence Eliminator" to try to shield his work on Bratz from Mattel investigators and lawyers.

While questioning Bryant, Price focused on several pages in the binder featuring rough sketches of figures that appeared to resemble special-edition Barbie collectible dolls Bryant designed at Mattel. Bryant answered affirmatively when Price asked him whether he developed the collectible edition in 1999 while at Mattel.

In earlier testimony, Bryant admitted under questioning by Price that he lied in a declaration as part of MGA's patent application for one of the early Bratz models.

Keller had not cross-examined Bryant by press time Friday. During a break in the trial, she declined to comment on Price's questioning or Bryant's answers.

In opening statements in the case earlier this month, Keller argued that MGA, not Bryant, was responsible for the massive success of Bratz, which generated more than \$1 billion in sales after hitting store shelves in 2001.

"It went far beyond the act of any one person," Keller said.

Mattel filed suit against MGA nearly seven years ago, after Bratz became the first product to unseat Mattel's famous Barbie line as the most popular fashion doll for girls. Mattel is seeking more than \$1 billion in damages for copyright infringement and other claims.

Bryant, who is expected to continue testifying this week, settled with Mattel for \$2 million in 2008.

The case is *Mattel Inc. v. MGA Entertainment Inc.*, CV09-9049 (C.D., Cal., filed 2004).

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Attorney Fee Dispute Boils Over in Wal-Mart Case

By Gabe Friedman
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Daily Journal Staff Writers

A heated wage-and-hour class action against Wal-Mart Stores Inc. continues to spurt new allegations — this time not about the merits of the case but the legal players involved, including hotly denied claims by one lawyer that the arbitrator colluded to edge her out of a big payout.

The fight over how plaintiffs' attorneys divvy up \$28 million in fees from the \$85 million settlement last year is playing out in federal court in Las Vegas.

San Rafael plaintiffs' lawyer Carolyn Beasley Burton alleges former U.S. District Judge Layn R. Phillips, who is now a litigation partner at Irell & Manella LLP, engaged in "fraud" and "corruption" to deprive her of her share of the fee award in the case, which he was appointed by the court to arbitrate.

'Only someone suffering from some sort of pre-frontal lobotomy would think that statement needs to be taken in a physical sense.'

— Mark Tate

In a motion filed Thursday to oppose Phillips' fee allocation order, Burton described a backdrop of several years of infighting among the plaintiffs' lawyers in the case. Burton argued her dispute with Phillips has roots in a fight she had with her former boss, Frederick P. Furth of the Furth Firm, over strategies in a separate lawsuit against Wal-Mart in Massachusetts state court.

Phillips and Furth developed an allegiance while settling that case, Burton alleged.

"Counsel have circulated e-mails acknowledging Layn Phillips was biased against Ms. Burton," she wrote in her 18-page motion citing two e-mails as evidence. "[He] gave her a 'hiding' based upon a belief she had been 'deceptive.'"

Burton, of the Mills Law Firm, apparently was included on e-mails in which other plaintiffs' lawyers described Phillips as giving her a "hiding." Phillips, however, was not included on the e-mails.

Phillips called the allegations against him "frivolous" and noted that the federal judge in Las Vegas presiding over the case rejected Burton's motion to disqualify him from acting as the fee arbitrator.

"It does not warrant the dignity of a further response," he said.

Furth also denied that he attempted to cut Burton out of a share in the attorneys fees.

"That's absolutely false," Furth said. "I didn't have anything to do with her share. I never talked to Judge Phillips about her share."

What is certain is that the vitriol among the plaintiffs' lawyers in this and overlapping wage-and-hour cases against Wal-Mart reached a boiling point with the latest allegations.

One lawyer involved, Mark Tate, of the Tate Law Group in Georgia, wrote last week complaining of Burton in an e-mail that was attached as an exhibit to Burton's recent motion.

"It's really time to stomp her god damn ass into a greasy spot," Tate wrote to another lawyer.

Asked Friday about the e-mail, Tate acknowledged it was not well-framed but emphasized it was intended in a metaphorical sense.

"Only someone suffering from some sort of pre-frontal lobotomy would think that statement needs to be taken in a physical sense," he said.

The divide appears to stem from previous disagreements between the various parties. Burton and Furth have been embroiled in litigation San Francisco Superior Court since after she departed his firm in 2006.

At the time, Furth won a \$172 million jury verdict against Wal-Mart in Alameda County Superior Court that included \$60 million in fees. Wal-Mart appealed that case, but ultimately settled for approximately \$150 million.

Burton continued to represent the Massachusetts class after parting ways with Furth's firm and apparently locked horns over litigation strategy. Burton and other lawyers claimed Furth tried to broker a global settlement to all of Wal-Mart's U.S. litigation over unpaid wages.

Because Phillips tried to mediate a settlement in the Massachusetts case, Burton argued that he had a conflict of interest that should have precluded him from the Las Vegas proceeding.

Burton alleged Phillips directed more than 80 percent of the "surplus" funds — that were not otherwise allocated — to one of the lawyers involved in the Massachusetts case who worked on settlement with Furth and Phillips.

The motion states that Burton and her co-counsel sole practitioner Carol LaPlant — who joined in the motion — were the only two lawyers on the court-appointed executive committee who received reductions of their submitted lodestars. Most other counsel received multiplier enhancements, the motion states.

Burton asked U.S. District Judge Philip M. Pro to appoint a special master or magistrate judge to issue a new order allocating fees in the case.

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Retaliation by Association

By Lonny Zilberman

"To retaliate against a man by hurting a member of his family is an ancient method of revenge, and is not unknown in the field of labor relations." *NLRB v. Advertisers Mfg. Co.*, 823 F.3d 1086, 1087 (7th Cir.1987). Being born and growing up in the former Soviet Union as a young child, I know too well that reprisals against an individual's family or close associates have a long history as a method of punishing enemies, deterring conduct, and coercing information. This has remained all too common in news accounts both here and abroad. Perhaps the most recent U.S. example was the "leak" of Valerie Plame's name as a covert CIA agent, after her husband, Joseph Wilson, wrote an article in the *New York Times* criticizing the Bush administration's reasons for starting the Iraq War. Ultimately, the vice president's Chief of Staff, Lewis Libby, was convicted of perjury regarding an alleged plan to discredit, punish, or seek revenge against Wilson.

Likewise, virtually all federal and state statutes governing the employment relationship prohibit employers from retaliating against employees for engaging in certain specified protected activity. The question of whether third party reprisals are forbidden has arisen under a wide variety of statutes. The problem of statutory interpretation is similar; they forbid an employer in general terms from taking action against an employee because he or she has engaged in protected activity, but are silent about third parties. Indeed, none of these statutes contains a specific list of the methods of retaliation that are forbidden, and none of these laws provide a remedial mechanism for any particular type of retaliation, especially against related third persons.

Perhaps that is why the U.S. Supreme Court took up the case of *Thompson v. North American Stainless LP*, where it considered whether victims of third party reprisals can obtain redress, because that type of retaliation can be a highly effective method of obstructing enforcement of the law.

On Jan. 24, the Supreme Court unanimously ruled for Eric Thompson, who was fired from a North American Stainless plant after his fiancé, who also worked at the same facility, filed a sex discrimination complaint with the U.S. Equal Employment Opportunity Commission (EEOC). Thompson's fiancé and now-wife filed an EEOC charge claiming her supervisors at North American discriminated against her because of her gender. The EEOC told North American of her charge on Feb. 13, 2003. Within three weeks, Thompson was fired. Coincidence? Or was the employer trying to get back at the female employee by firing her fiancé?

Initially, the federal court threw out Thompson's lawsuit and granted summary judgment on the ground that he had never engaged in any of the conduct protected by Title VII — such as opposing the alleged discrimination or participating in the government investigation. In a 2-1 decision, the 6th U.S. Circuit Court of Appeals reversed the trial court and allowed his suit to go forward. As the majority acknowledged, "a literal reading of [Title VII] section 704(a) suggests a prohibition on employer retaliation only when it is directed to the individual who conducted the protected activity." It concluded, however, that the language of the statute itself should not be controlling because "tolerance of third-party reprisals would, no less than the tolerance of direct reprisals, deter persons from exercising their protected rights under Title VII."



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Thus, the court followed the position urged by the EEOC to extend statutory protection to any third party that is deemed to be "so closely related to or associated with the person exercising his or her statutory rights that it would discourage that person from pursuing those rights." (Citing to the EEOC Compliance Manual.) However, North American asked for a re-hearing before the entire 6th Circuit, and the *en banc* decision reversed the three-judge panel holding in a close 10-6 vote that there was no cause of action for third-party or associational retaliation based on the plain reading of the statute.

In oral argument before the Supreme Court, North American claimed that allowing the fiancé to sue would open the floodgates to retaliation lawsuits from everyone and anyone who gets fired with some connection to the complaining employee. But Justice Antonin Scalia, writing for a unanimous Court, found that Thompson clearly falls under the category of people who can sue for retaliation under Title VII.

"Thompson is not an accidental victim of the retaliation — collateral damage, so to speak, of the employer's unlawful act," wrote Scalia. "To the contrary, injuring him was the employer's intended means of harming Regalado. Hurting him was the unlawful act by which the employer punished her. In these circumstances, we think Thompson well within the zone of interests sought to be protected by Title VII. He is a person aggrieved with standing to sue."

On the other hand, Scalia also refused to create any hard and fast rules to follow because the anti-retaliation law is worded broadly. "We expect that firing a close family member will almost always meet the standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so, but beyond that we are reluctant to generalize," he wrote. In finding that North American's firing of Thompson constituted unlawful retaliation, the Court relied on its decision in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53 (2006), in which it found that Title VII's anti-retaliation provision is worded broadly to prohibit any employer action that "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."

Applying *Burlington Northern*, the Supreme Court reasoned that it was "obvious" that a worker might be dissuaded from making or supporting a complaint of discrimination if she knew that her fiancé might be terminated as a result. The Court found that hurting the fiancé was the means by which the employer intended to harm the female employee

making the complaint of discrimination.

In construing the rights provided by the California Fair Employment and Housing Act (FEHA), California courts typically follow the interpretations that federal courts have given to analogous provisions of Title VII. As a result, it is a safe bet that California courts will begin applying *Thompson* in state court FEHA actions at the first opportunity.

Employers must therefore recognize that action affecting "associated" individuals and certainly other relatives will now be subjected to increased scrutiny. For example, imagine a scenario where a small employer is being sued for discrimination, while the plaintiff's relative continues to work in the same office. The employer may rightly feel that the relative is a "risk" who may reveal confidential information to his or her relative, or that the relative's "loyalty" must inevitably be tainted. Under these circumstances, it would be tempting to terminate the relative. However, under *Thompson* this would be a very dangerous course of action.

After all, the prospect of having a close family member fired is an obvious deterrent to filing or pursuing an EEOC claim. As Scalia reasoned, a terminated family member has just as obviously suffered a significant injury as the initial complaining party, directly due to prohibited retaliation. Parsing what is acceptable conduct and what is not in the rough and tumble world of office politics will be a challenging task.

The *Thompson* decision clearly expands the circumstances under which an employee may be protected. The decision also highlights not only the fundamental precept that employers should in all cases be able to articulate legitimate, non-retaliatory reasons for their actions but also the importance of consulting with counsel where an employment action could be construed as retaliatory.