Spring 2011

The LITIGATOR

Volume X | Official Publication of the Capitol City Trial Lawyers Association | Issue 1

Inside This Issue

Record-Setting Win for Wrongful Death Compensatory Damages
Page 3

Expedited Jury Trials
Page 5

CCTLA's 2010 Honorees
Page 9

Access to Justice Before U.S. Supreme Court is in Danger
Page 11

PLUS:

Allan's Corner 2
Reptile Seminar Registration 10
Verdicts & Settlements 14
Tahoe Seminar Registration 17
CCTLA Calendar 20

CCTLA in 2011:

New Programs, Resources to Help Level the Playing Field for Consumer Attorneys

By: Wendy C. York

I am honored to be serving as president of the Capitol City Trial Lawyers Association in 2011. During my tenure as president, it will be my goal to expand upon CCTLA's services by offering new resources to support your law practice.

We are all aware of the obstacles placed in front of consumers and injured victims in the justice system. From jury bias and a belief in the mythical McDonald's coffee cup verdict, to "tort deform" rhetoric, to erosion of patient rights by way of the outdated MICRA limits, the practice of law as a plaintiff's attorney can be daunting. Combine that with the Insurance Industry's unlimited budget to delay, deny and defend against righteous claims, it is no wonder that being a plaintiff attorney can be challenging.

Yet CCTLA provides us with support and resources—from education programs tailored towards plaintiff's issues, to networking with other plaintiff's lawyers and the list serve where we can share resources. Of course, the most rewarding aspect of CCTLA is the collegial support, partnerships and friendships that are forged as we endeavor to provide access to justice.

In 2011, CCTLA will offer unique programs and new resources to enrich your law practice. First, the Expedited Jury Trials program takes effect this year. Sacramento County Superior Court judges Hight and Earl addressed CCTLA during our January luncheon about the program and its benefits (see page 5). This is a great opportunity to try your smaller cases in a cost-effective way.

In March, CCTLA and the Consumer Attorneys of California will co-sponsor the annual Tahoe Seminar with a great line-up of speakers. Some include attorneys/staff Joseph Lowe and John Zelbst from Gerry Spence's famed Trial Lawyer's College on Discovering the Story. Additionally, attorney Rex Parris will be the keynote speaker who will be addressing Creating A Relationship With Our 21st Jurors.

I am excited to announce that on April 29-30, we have a unique opportunity for CCTLA members only to attend The Reptile Seminar in Sacramento, with co-authors David Ball and Don Keenan, at a discounted rate of $650. Usually this seminar costs $800 and is held in distant locations that require additional travel and hotel costs. However, CCTLA will be offering The Reptile Seminar in Sacramento for CCTLA members at a savings of $150.

Perhaps the most exciting new resource that CCTLA will make available exclusively to our members is the creation of an expert database. The expert database is expected to be launched by May and will allow members to share depositions and DME reports of defense experts at no cost.

I look forward to serving you as president of CCTLA as we continue looking for new ways to expand services to our members that will help even the playing field in our fight to protect injured victims and consumers.

Allan's CORNER

By: Allan J. Owen

Here are some recent cases I found sitting pool side in Kauai with a Mai Tai in hand. These come from the *Daily Journal*. Please remember that some of these cases are summarized before the official reports are published and may be reconsidered or de-certified for publication, so be sure to check and find official citations before using them as authority. I apologize for missing some of the full *Daily Journal* cites.

2011 CCTLA Officers & Directors

President:
Wendy C. York

President-Elect:
Michael W. Jones

Vice Presidents:
Cliff Carter
Stephen Davids

Secretary:
Kerrie Webb

Treasurer:
Daniel G. O'Donnell

Parliamentarian:
Michelle C. Jenni

Past-President:
Kyle Tambornini

Board of Directors:
John Airola
Bob Bale
Travis Black
Lena Dalby
Linda Dankman
Matt Donahue
Glenn Guenard
Mike Jansen
Joseph H. Marman
Allan J. Owen
Rob Piering
Dave Rosenthal
Jack Vetter
Christopher Whelan
Daniel E. Wilcoxen

Executive Director: Debbie L. Keller
PO Box 541 • Sacramento, CA 95812-0541 • Website: www.cctla.com
916 / 451-2366 • Fax 916 / 451-2206
Editor, The Litigator: Jill Telfer • jilltelfer@yahoo.com

Workers' Comp/Third Party

In Stellar v. Sears Roebuck & Co., 2010 DJDAR 15887, at settlement conference in third-party case involving a disability discrimination case, parties intended to settle third-party case and Worker's Comp case. Trial court entered judgment based on settlement agreement at settlement conference. Court of Appeal construes the order/judgment as requiring WCAB approval and based on that interpretation, affirms. Court notes that settlement of a Workers' Comp claim requires WCAB approval and so cannot be done at settlement conference other than as a conditional settlement.

State Court Jurisdiction

In E Pass Technologies v. Moses & Sinner, 2010 DJDAR 16933, plaintiffs used defendants as their attorneys in patent infringement cases. Trial court granted summary judgment against Plaintiff, and appellate court affirmed in underlying case. Attorney's fees of $2.3 million were awarded against plaintiffs in the underlying action. Plaintiffs sued their attorneys for legal malpractice in state court, alleging that defendants were incorrect when they advised plaintiffs that they would make more money by suing prospective licensees than by negotiating licenses or deals and by failing to advise them that there was no evidence to support patent infringement claims. Defendants demurred on the grounds that state court had no jurisdiction because the claims involved substantial issues of federal patent law. Trial court sustained the demurrer, and appellate court reverses finding that patent law is not involved here in that you do not have to establish the validity, invalidity or proper scope of a patent to determine liability or damages and causation. Instead, the ultimate question is what would a reasonable attorney have concluded based upon the facts and evidence presented?

Insurance Law

In Levine v. Blue Shield of California, 2010 DJDAR 16939, Plaintiff filed a class action against Blue Shield, contending that Blue Shield had a duty to disclose how to lower their monthly health care premiums by designating one spouse as the primary insured and then adding the other spouse and two minors to a single family plan rather than having the minors covered under separate health plans. Trial court sustained demurrer, and appellate court affirms finding that Blue Shield does not owe a duty to disclose how an insured can lower their health insurance premiums.

Res Ipsa Loquitur

In Howe v. 742 Company, Inc., 2010 DJDAR 16961, the court holds that although the presumption of negligence established by Evidence Code §646 disappears on the introduction of evidence that rebuts the presumed fact, plaintiff is still entitled to rely on the common-law inference

Continued on page 18

Wrongful-death compensatory damages for tire-patch accident are most ever awarded in San Diego County

On Aug. 23, 2005, Casey Barber took his E350 Sportsmobile conversion van to the Mossy Ford dealership in San Diego to have a small non-leaking puncture repair done on the right rear tire of the van. The van began its life as a Ford Econoline E350 panel van, which was thereafter extensively modified by Sportsmobile to include a lifted 4x4 suspension and pop-top roof and a custom interior with a redistribution of weight.

Mr. Barber picked up his Sportsmobile and drove it for another 7,200 miles before the repaired tire suffered a tread belt separation on July 31, 2006, on a rural highway just outside of Page, AZ. The separation caused a loss of control, causing the van to leave the roadway and roll over. Casey and his wife, Melanie, both 40, were killed in the crash.

Their three young boys—ages 3, 5, and 8 at the time—survived, along with a teenaged family friend who was with them at the time.

> "Here, your verdict will serve to affirm the importance of complying with industry standards and will require adherence to an essential repair safety practice, not only at Mossy Ford, but at all other repair facilities throughout the state."
>
> — *Plaintiff Attorney Robert Buccola*

Plaintiffs alleged that the puncture to the right rear tire was located in the shoulder area of the tire outside of the proper repairable area. Instead of removing the damaged tire from service, Mossy Ford (a very popular multiple franchise new-car dealership) utilized a patch-only repair and failed to plug the injury pathway of the puncture.

Plaintiffs put on evidence of the overall poor quality of the repair work and alleged inadequate training and substandard tire repair practices by the Defendant. It was, however, undisputed that the patch held and did not leak any air at any time before the accident.

Mossy Ford contested both negligence and causation throughout the seven-week trial, before the Honorable Luis Vargas, Department 63, San Diego County Superior Court.

Mossy contended that decedent's speed of between 80-89 mph and gross driver overcorrection by Mr. Barber were the causes of the accident. Further, Mossy argued that the cause of the tread separation was NOT the repair, but instead, a severe impact blow suffered by the tire after the repair.

The tire forensics, vehicle handling

DOUG DEVRIES
Attorney at Law

35 Years Experience:
State and Federal Litigation

Lecturer & Author

Full Conference Facilities

deVries Dispute Resolution

Complex Case Resolution — Independent Mediation and Arbitration

Major personal injury, products liability, insurance coverage and bad faith, professional liability, medical device and drug liability, multi-party and class actions, and other disputes involving complex factual and legal issues.

Knowledgeable • Experienced
Diligent • Effective

Doug deVries — Attorney at Law
settle@dkdlaw.com — (916) 473-4343
Contact: Pam Pickering, Case Manager

Pavilions Professional Center
641 Fulton Avenue — Sacramento, CA 95825

Plaintiff attorneys included Robert Buccola, left, and Jason Sigel of Dreyer Babich Buccola & Wood, LLP, with offices in Sacramento.

The Barber vehicle after the accident that occurred when a Mossy Ford-repaired tire had a tread-belt separation. Three children survived the Arizona accident that killed their parents.

and accident reconstruction evidence was hotly contested. Mossy called a former in-house Goodyear tire expert, who stated unequivocally that the ultimate tire failure origin was at the precise position on the tire where notable vertical penetrating damage could be seen at the metal rim, which corresponded "perfectly" to the steel belt cord damage that was noted on the first belt of the tire. Evidence was also offered to show that there were no failure initiation signs at or near the alleged puncture site origin, or evidence of debris or water migration separation seen anywhere on the tire.

Plaintiffs countered that although the failed tire functioned without incident for almost 7,200 miles, and even though there was not the forensic finger-print failure that is often present with a repair induced separation, the "impact defense" was meritless and was simply a "broken record" defense replay used by every tire manufacturer when defending product liability cases.

Casey Barber was a master carpenter and member of the Theatrical Stage Hands' Union, and plaintiffs alleged Casey's past and future lost wages ranged from $980,000 to $1,300,000, and also claimed past and future loss of home services in the amount of $450,685 for Melanie and $177,128 for Casey. By all accounts, both Casey and Melanie Barber were loving, attentive and wonderfully devoted parents.

The suit also named several other parties, including those who performed modifications to the Ford van, allegedly making it more susceptible to handling problems and less crashworthy. The "other" defendants settled before trial for $8.2 million. Prior to trial, Mossy Ford offered $1,000,000 to settle the claim, which increased to $2,000,000 just prior to trial.

On Jan. 10, 2011, jury returned a verdict in favor of the Barber children in the amount of $14,465,864. After apportionment of fault to others and set-off for the prior settlements, the parties reached a settlement following the verdict that included payment of the $11,000,000 policy limits from Defendant Mossy Ford. The minor Plaintiffs' total recovery was $19,200,000.

As a condition of the settlement, Mossy Ford agreed to immediately (1) begin following industry guidelines for tire repair practices; and, (2) to institute a program to better train its technicians on safe tire repair practices.

The Barber family was represented by Sacramento attorneys Robert Buccola and Jason Sigel of Dreyer Babich Buccola & Wood, LLP, and Adam Shea and Spencer Lucas of Panish, Shea & Boyle, LLP, of Los Angeles.

In Plaintiffs' closing argument, Robert Buccola emphasized that the jury's finding of liability and causation would do much more than provide these deserving plaintiffs with necessary compensation. "Here, your verdict will serve to affirm the importance of complying with industry standards and will require adherence to an essential repair safety practice, not only at Mossy Ford, but at all other repair facilities throughout the state."

Ronald A. Arendt, Esq.
A Professional Law Corporation
Mediator/Arbitrator

2300 Bell Executive Lane
Sacramento, CA 95825
rarendt@arendtadr.com
CSB #085783
Tel: (916) 925-1151
Fax: (916) 929-5137
www.arendtadr.com

SACRAMENTO LEGAL VIDEO CENTER, INC.
A Solar Powered Company
916-451-7600 www.saclvc.com
Depositions ■ Synchronization
Editing ■ Trial Presentation
Duplication & Conversion

Expedited civil jury trials come to Sacramento

CCTLA, in conjunction with Judge Hight and Judge Earl of the Sacramento Superior Court, recently presented a luncheon seminar on the new Expedited Civil Jury Trial process. In essence, an expedited jury trial is a one-day jury trial, where each side gets 15 minutes of voir dire and then three hours each for direct and cross examination.

To begin the process, both sides must stipulate in writing prior to 30 days before trial. The approved form is available from the court clerk or by contacting ckreeger@kreegerlaw.com. The form is submitted directly to Judge Hight's clerk, and he will assign it to either himself, Judge Earl or Judge Hom. The parties will get a "date certain" to start their trial. The court will also order a pre-trial hearing to resolve all evidentiary issues, MILs, foundational issues, etc.

The trial is supposed to last one day. However, in Sacramento, the trial will start at 1:30 p.m. and end the following day at 1:30 p.m. Usually, a judge will hear the case, but the parties can stipulate to a commissioner or pro tem.

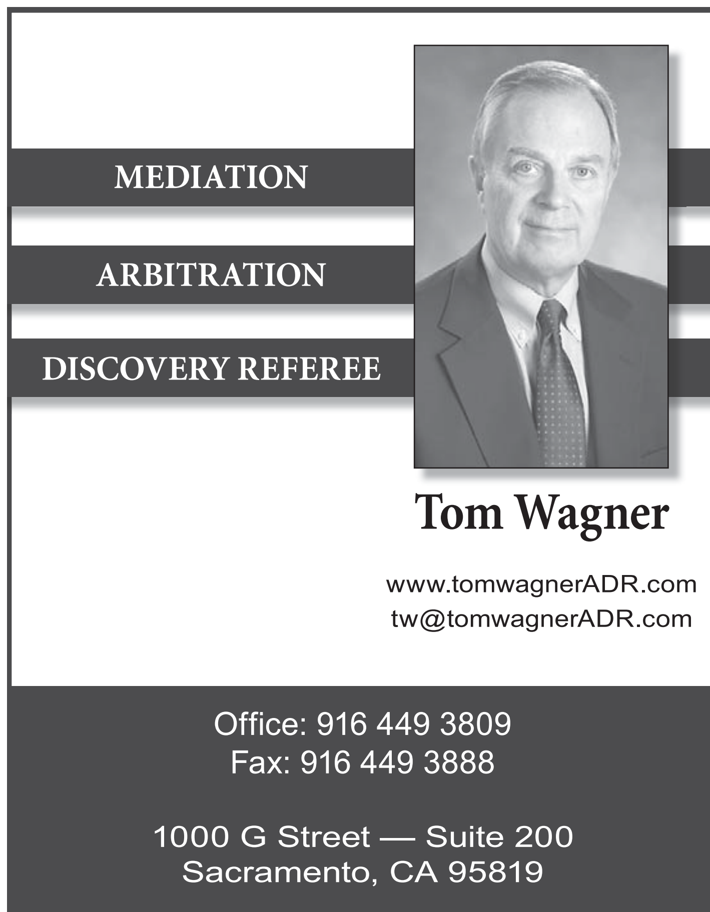
By: Christopher L. Kreeger, Esq.

- Voir Dire, one hour total; judge gets 15 minutes, and each side gets 15 minutes.
- The jurors will fill out an extensive questionnaire the morning before trial starts.
- Eight panel jury or less, 75% still required, or 6/8, no alternate.
- Each side gets three hours to present his/her case, including cross-examination. There will be two clocks, one for each side.
- The jury's decision is binding, and each side generally waives their right to an appeal, except for misconduct of judge and/or jury, or fraud.
- Juror deliberation: unlimited.
- Normal rules of evidence apply, but the parties can stipulate to relax the rules.
- There are no directed verdicts, etc., during trial.
- The parties can stipulate to a high/low to disclose to the court after the jury verdict.
- Post-trial motions are very limited, i.e. 998s, etc.

This procedure seems ideally suited for the small auto case with soft-tissue injuries. Before the trial begins, the judge will have narrowed the issues and hopefully obtained all necessary stipulations regarding foundation, documents, witnesses and rules of evidence. After a jury is seated, each side has three hours total, including cross-examination, to present their case. This is probably more limiting for the plaintiff than defendant, but it cuts both ways. Presenting your case in less than three hours and leaving some time to cross-examine the defense experts will be tricky, but in a case with a low-ball offer, the plaintiff has another option other than short-settling a small auto case. Even if the case does not yet have a trial date, if both sides agree and sign the approved form, Judge Hight recommends that you file the stipulation with his clerk, and he will give the case a trial date certain. Thus, if discovery is complete and both sides agree, then this appears to be a quicker option for many injury victims.

The judges in attendance (Abbott, Hom, Sumner, Hight and Earl) felt strongly that this program could work to resolve small auto cases and give those litigants a day in court. However, it

Continued on page 7



What's your plan?

Great outcomes.
Done well.

"Not everyone needs a structured settlement, but everyone needs a plan." – Carlos Alcaine

The members of the Alcaine Group have more than 25 years combined experience specializing in comprehensive settlement planning. As fully-licensed Financial Advisors, our team offers a much broader range of options than just structured settlement annuities. These options are created with our deep expertise in addressing the long-term needs of plaintiffs. Our focus is squarely on helping to create great financial outcomes for your clients.

Baird is an independent, employee-owned financial services firm, which has provided wealth management solutions to individuals, families, and organizations for 90 years.

The Alcaine Group

Carlos Alcaine
Senior Vice President

Stephen Halterbeck
Financial Advisor

Cheryl Moore
Registered Client Relationship Associate

1663 Eureka Road, Roseville, CA 95661
916-783-6500 . 877-792-3667

Members of the Alcaine Group speak Spanish and can work directly with your clients.

Carlos Alcaine – California Insurance License 0A81941
Steve Halterbeck – California Insurance License 0F23825

Private Wealth Management | www.rwbaird.com

Capital Markets – Investment Banking
Private Equity
Asset Management

©2009 Robert W. Baird & Co. Incorporated. Member SIPC. MC-26281

iSERVE — A Professional Process Server

- Process Service
- Court Filings
- Court Research
- Records Retrieval

iServe is a professional, licensed and bonded legal services company specializing in Process Serving and Court Filings in the Greater Sacramento Area *(El Dorado, Placer, Sacramento)*

916.259.1993 — Email: iserveca@live.com
www.iserveca.com

Expedited trials

Continued from page 5

is important to discuss every evidentiary issue with opposing counsel and to make sure you agree on all evidentiary issues, and focus the trial on the disputed factual issues. If the attorneys cannot agree, then perhaps this program is not right for your case.

For more information, contact Judge Hight's clerk or ckreeger@kreegerlaw.com.

***

Christopher L. Kreeger served as president of CCTLA in 2003.

A DEDICATED, AGGRESSIVE AND AFFORDABLE RESOURCE

Hidden Property Damage • Accident Assessments
MIST Case Specialist • Litigation Support
• Expert Witness

BLUE EAGLE ASSOCIATES

A Professional Vehicle Inspection, Research and Consultation Service

John T. Martin
Phone: (916) 871-3289   Fax: (916) 334-7584
P. O. Box 21, Carmichael, CA 95609
Email: Johntmartin@prodigy.net

www.BlueEagleAssociates.com

There is No Substitute for Experience

ERNEST A. LONG
Alternative Dispute Resolution

❖ Resolution Arts Building ❖
2630 J Street • Sacramento, California 95816
Telephone: (916) 442-6739 • Facsimile: (916) 442-4107

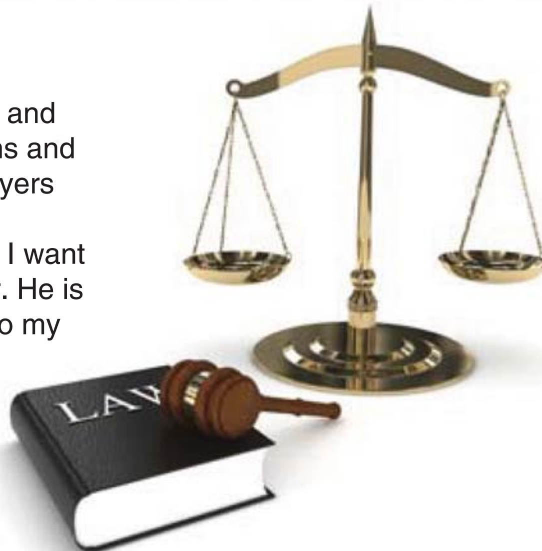
elong@ernestalongadr.com   www.ernestalongadr.com

Hon. Darrel W. Lewis (Ret.) Mediator

The Judge

"Employment law is complex and requires marshalling emotions and expectations between employers and employees. When such difficulties arise in my cases, I want Judge Lewis as the mediator. He is **respectful and thoughtful** to my clients and me throughout the process, but he **gets people to move and to compromise.**"

Galen T. Shimoda, Plaintiff Lawyer
Shimoda Law Corp



The Mediator

"This was a worrisome personal injury case, due to the lack of insurance for the defendant. **Judge Lewis persevered and convinced** my client (Plaintiff) and the defense lawyer to resolve the matter in an **amazingly short time**. Judge Lewis is truly a people person, which enables him to communicate with and to establish rapport with anyone."

Gary B. Callahan, Plaintiff Lawyer
Wilcoxen Callahan Montgomery & Deacon

Don't compromise when choosing your next mediator.
Judge Lewis is a trained and experienced mediator who listens empathetically and will also speak with the authority and stature of a retired judge when necessary.

916-483-2222 • www.mediatorjudge.com
Sacramento and all Northern California

Just pick up your phone and dial 916-483-2222

In memory of a gentle giant

By: Jill Telfer

The California legal, legislative and law enforcement communities were saddened to learn of the passing of Jim Frayne, former executive and legislative director of CAOC (formerly known as the California Trial Lawyers—CTLA), on Feb 5. To family, friends, clients and legislators, Jim stood out as a man of his word, who stressed that success in business and in life comes from nurturing relationships.

Jim was the executive director of CTLA from 1967-1986, while his wonderful wife, Bobbie, ran the day- to-day operations of the state office.Jim was on first-name basis with lawmakers and performed his job with great energy, intelligence and a disarming sense of humor.

During his career, building and nurturing a wide range of personal and professional friendships, and paying attention to every detail along the way, brought him great success for his clients. Since 1986, Jim lobbied for various law enforcement agencies, including the Sacramento County Sheriff's Association.

Former CCTLA and CTLA President Douglas DeVries shared his experience of being mentored by Jim. "The first time I testified on a bill in a legislative committee as a young lawyer, Jim took me under his wing at the state office and walked me over to the Legislature. He told me what the bill was, what the issue was, what the bill said, what the bill would do, why it was bad, who every member of the committee was, what position each would take, what to expect, who to watch out for, how to act, what to say, how to say it, what not to say and, most importantly, when to keep my mouth shut and not get baited by an opponent. Jim's advice was always astute and invaluable."

Jim Frayne, second from right, with daughters Debbie Keller (left) and Colleen McDonagh, and Judge Steve White at CCTLA's 2010 holiday reception.

Jim religiously attended CCTLA functions, supportive of our cause and that of his daughters.

He was always impeccably dressed, exhibited a positive can-do attitude and won people over with his Irish charm. Those who knew him best described him as loyal to a fault, always well prepared, quick witted and having a zest for life.

Jim was unswervingly dedicated to the mission of CTLA and its trial attorney-leaders, including those who conceived of and founded CTLA, most of them giants in the field who truly loved and respected Jim. He was

Continued on page 12

The Law Offices of
Timmons, Owen, & Owen INC.
Serving injured workers since 1966

JOHN P. TIMMONS • ALLAN J. OWEN
WILLIAM J. OWEN • DANIEL G. TICHY

General, Civil and Workers' Compensation

Personal injury actions including
product liability, auto accidents, premises liability
and professional negligence

Allan J. Owen, CCTLA Board member for over 20 years and past president, is accepting referrals, associations, consultations, arbitrations and mediations.

ALLAN J. OWEN

1401 21st Street • Suite 400 • Sacramento, CA 95811
Telephone: (916) 444-0321 Fax: (916) 444-8723
WWW.SACLAW.NET

Making a false or fraudulent workers' compensation claim is a felony, subject to up to 5 years in prison or a fine of up to $50,000 or double the value of the fraud, whichever is greater, or by both imprisonment and fine.

what's the
BUZZ
about?

Find out at buzzwiesenfeld.com

Creative, principled, and cost-effective dispute resolution services

View online CV & Calendar of Available Dates

Resolution Arts Building
2630 "J" Street
Sacramento, CA 95816
(916) 442-1551
mediate@comcast.net

BUZZ WIESENFELD
Experienced Mediator

CCTLA's Annual Meeting & Holiday Reception at Spataro's was well attended last December. The event recognized the 2010 Honorees and included a fundraising auction for the Mustard Seed School for homeless children. CCTLA's 2010 honorees were Judges of the Year (top right, from left): the Honorable Robert C. Hight, Laurie M. Earl and Steve White, with 2010 CCTLA President Kyle Tambornini and 2011 President Wendy York; Advocates of the Year: Robert A. Buccola (not pictured) and Steven M. Campora (right); and Clerks of the Year (far right, from left): Cookie Fennessey, Patricia Banks, Valerie Butler and Kimberly Wells. Special thanks go to Debbie Frayne Keller, CCTLA's executive director, who coordinated the event and received The President's Award.

CCTLA Salutes Best of the Best for 2010

Above, from left: Candace Fields, the Honorable Morrison C. England Jr., Greg Madsen and Marisa Darden.

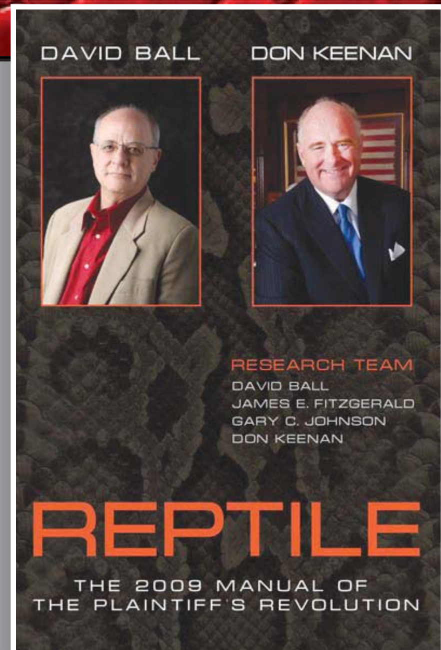
Below, enjoying the holiday party include, from left: Cookie Fennessey, Chief Justice Tani Cantil-Sakauye, Judge Laurie Earl and another guest.

Above, from left: John Demas, Matt Donahue, Nick Lowe and Roger Dreyer.

Above, from left: Catia Savaria, Hank Greenblatt, the Honorable Shelleyanne W. L. Chang and the Honorable Kevin Culhane. Right, Debbie Keller. Far right, Marcie and Mort Friedman.

"Welcome to the Revolution" The Reptile Seminar of 2011

Sacramento, CA — April 29-30, 2011
McGeorge School of Law (Lecture Hall)



Don Keenan and David Ball are bringing their critically acclaimed "Welcome to the Revolution" seminar to Sacramento! Don and David have conducted these seminars across the country, attended by more than 1,500 trial lawyers who have reported more than ***$1 Billion in Reptile Verdicts and Settlements!***

Don't miss your opportunity to hear from the researchers/authors themselves!

Don Keenan and David Ball will discuss Research Methods, Rules & Codes; The Golden Rule Law & Public Safety Law; Case Selection & Preliminary Focus Groups; Witness Preparation; Scripture; Voir Dire/Openings; Experts and Lay Witnesses; Closings; ADR in depth about why Tort "Reform" is officially over, and more!

Earn 13 MCLE credits by attending this two-day program!

Regular price: $800
CCTLA is offering this seminar to CCTLA members for $650!
Non-member price: $800

To reserve your spot, contact Debbie Keller at 916/451-2366.
Make your check payable to CCTLA and mail to P. O. Box 541 Sacramento, CA 95812

Deadline: April 15, 2011

The Reptile is Coming to Sacramento! Seminar Schedule

Friday, April 29	Saturday, April 30
Registration: 8:30am	Registration: 8:30am
Seminar: 9am-Noon	Seminar: 9am-Noon
Lunch: Noon-1pm	Lunch: Noon-1pm
Seminar: 1-5pm	Seminar: 1-5pm
Reception: 6-8pm at McGeorge School of Law	

For more details, visit www.reptilekeenanball.com

Access to Justice in Danger Before U.S. Supreme Court

By: Arthur H. Bryant, Public Justice Executive Director

Reprinted from Trial Lawyers for Public Justice website (tlpj.com)

Six years ago, Public Justice launched the Access to Justice Campaign to "expose, fight, and defeat the frontal assault now taking place on the right to a day in court." It has made an enormous difference – educating the public and winning major victories against federal preemption, mandatory arbitration, class action bans, and attacks on the Constitution, right to counsel, and right to jury trial. Now, however, especially in the first three areas, access to justice is in danger before the U.S. Supreme Court.

Federal Preemption

When the Access to Justice Campaign began, few knew that the Court could grant corporate wrongdoers total immunity and eliminate injured consumers' rights by ruling that a federal law "preempts" and wipes out all state laws that could hold the company accountable. In early 2008, however, the Court held in Riegel v. Medtronic that, because of federal preemption, millions injured by defectively designed medical devices could not sue the manufacturers at all. Those people are now barred from court, unless Congress acts.

Since then, only a slim margin in the Court has held back federal preemption. In late 2008, in Altria Group, Inc. v. Good, the Court reaffirmed 5-to-4 the "presumption against preemption" and held that federal law does not preempt lawsuits against tobacco companies for misleading the public about the health benefits of "light" cigarettes. In 2009, in Wyeth v. Levine, the Court held that federal law does not preempt failure-to-warn lawsuits against prescription drug manufacturers.

But the battle is still raging. On Oct. 12, the Court heard argument in Bruesewitz v. Wyeth on whether federal law preempts claims against vaccine manufacturers for injuring people with defectively designed vaccines. New Justice Elena Kagan will not vote because, while Solicitor General, she filed an *amicus* brief for the government arguing that it does.

We disagree. The Vaccine Act says, "No vaccine manufacturer shall be liable in a civil action for damages arising from a vaccine-related injury or death... if the injury or death resulted from side effects that were unavoidable even though the vaccine was properly prepared and was accompanied by proper directions and warnings."

We think this language shows – and our *amicus* brief argues – that Congress did not preempt claims for injuries that were avoidable if a different, better design was used. With Justice Kagan not voting, a 4-to-4 split decision would uphold the ruling by the U.S. Court of Appeals for the Third Circuit that vaccine design defect claims are preempted.

The Court will also decide this term, in Williamson v. Mazda, whether federal law preempts claims against auto manufacturers by passengers injured because their rear center seats lacked shoulder harnesses. The government says it does not – and that the lower courts are finding far too many claims preempted. We agree, but do not think the government's brief goes far enough.

Our *amicus* brief argues that the National Highway and Transportation Safety Act – which says, "Compliance with any federal motor vehicle safety standard shall not exempt any person from any liability under the common law" – precludes a finding that common law claims are preempted. It also urges the Court to rule, as Justice Thomas has argued, that the Constitution does not allow courts to find state law "implicitly preempted" by federal law when Congress has not explicitly preempted state law and the requirements of state law and federal law do not conflict.

Finally, in Mensing v. Wyeth, in which we are co-counsel, the Court has asked the federal government's views on whether federal law preempts failure to warn claims against generic drug manufacturers. We are urging the Solicitor General to agree with us that there is no preemption. And the Supreme Court's term has just yet started.

Mandatory Arbitration

Public Justice is

the acknowledged national leader in the fight against corporate attempts to force consumers, workers, and investors out of court and into arbitration. Our Access to Justice Campaign and Mandatory Arbitration Abuse Prevention Project have won more cases overturning unfair arbitration provisions than anyone in the country. Our legal treatise on the subject, Consumer Arbitration Agreements, is now in its fifth edition. But companies are still revising their agreements – and trying to impose arbitration on more and more people.

The Supreme Court has consistently issued rulings advancing arbitration and limiting access to the courts. In 2006, in Buckeye Check Cashing, Inc. v. Cardegna, the Court overturned our Florida Supreme Court victory striking down the mandatory arbitration clause in a payday lender's contract and held that, when an entire contact is challenged as illegal, the arbitrator, and not the court, must decide that challenge.

In Rent-A-Center, decided June 21, 2010, the Court gave corporations another way to expand arbitration and contract court access. It held 5-to-4 that companies can force their employees and customers into mandatory arbitration using form agreements with a "delegation clause" that delegates decisions on whether the arbitration clause is valid to the arbitrator.

Our most successful strategy for overturning unfair mandatory arbitration clauses and class action bans, see below, has been proving to courts that they are unconscionable, invalid, and unenforceable under state law. In Rent-A-Center, however, the Court changed the rules – allowing corporations to prevent courts from reviewing the validity of arbitration agreements.

Now companies can write their arbitration agreements to assign only the arbitrator, and not the court, the power to decide whether the agreements are legally valid. Unless consumers and workers specifically argue and prove to the court that the "delegation clause" assigning that power to the arbitrator is legally invalid, the court has no role at all. We are now working daily with consumers, workers, investors, and their attorneys to challenge improper "delegation" clauses, as well as mandatory arbitration.

Class Action Bans

Public Justice has also won more cases in more courts preserving class actions than any law firm in the country. Our Class Action Preservation Project has argued and won precedent-setting decisions overturning class action bans in California, Florida, New Jersey, New Mexico, Washington, West Virginia, and federal courts throughout the nation. But, again, corporate wrongdoers are hoping the Court will make them immune.

Earlier this year, our amicus brief in Shady Grove v. Allstate Insurance helped persuade the Court that Allstate Insurance cannot use state law to bar a class action against it in federal court. But in Stolt-Nielsen v. Animal Feeds, the Court held, despite our amicus urging, that class actions cannot take place when sophisticated parties arbitrate their disputes if their agreement is silent on the subject.

Earlier this year, our *amicus* brief in Shady Grove v. Allstate Insurance helped persuade the Court that Allstate Insurance cannot use state law to bar a class action against it in federal court. But in Stolt-Nielsen v. Animal Feeds, the Court held, despite our *amicus* urging, that class actions cannot take place when sophisticated parties arbitrate their disputes if their agreement is silent on the subject.

In AT&T v. Concepcion, the companies are arguing that the Federal Arbitration Act preempts all state laws that stop them from banning class actions, including the state laws we have been relying on to prove these bans unconscionable, invalid, and unenforceable. If the Court accepts that argument, then unscrupulous corporations could steal millions in small individual amounts from their customers, workers, and investors and simply walk away with the money. As our brief demonstrates, neither the facts nor the law permit allow such a result.

The Crucial Battles Ahead

In mid-June, Columbia Law School Professor Jamal Green, a former law clerk to Justice Stevens, wrote in *The National Law Journal*:

"In areas ranging from federal preemption of state tort suits to the rights of state prisoners to raise federal constitutional challenges through writs of habeas corpus to the right of private investors to sue those who aid and abet securities fraud, the Court's conservatives have consistently sought to limit the opportunity of potential victims of wrongdoing to make their case before a judge or jury. [The issue is] nothing less than the right to have rights. … The next several weeks will involve a prolonged effort to excavate the jurisprudence of Stevens' likely replacement, Elena Kagan. I hope she is asked what may be the most important question for any judge to answer: Will she keep the courthouse doors open?"

The U.S. Supreme Court is now being asked that most important question in case after case. Will it keep the courthouse doors open? The battles ahead – and the Court's answer – are crucial to our nation and our system of justice.

***

Arthur H. Bryant, Executive Director of Public Justice and the Public Justice Foundation, has won major victories and established new precedents in several areas of the law, including constitutional law, toxic torts, civil rights, consumer protection, and mass torts. The National Law Journal has named him one of the 100 Most Influential Attorneys in America.

Jim Frayne

Continued from page 8

intimately involved in building CTLA and achieving every aspect of CTLA's success in becoming the most effective organization in California preserving the tort system and the right to jury trial for consumers

Jim is survived by his wife of 49 years, his two daughters, current CCTLA Executive Director Debbie Keller and Colleen McDonagh, and by granddaughters Taylor Keller and Shannon McDonagh. In lieu of flowers, the family suggests donations be made in his memory to the Sacramento Food Bank or Christian Brothers High School.

Motion Opposes Insurer's Attempt to Take Back Victim's Recoveries

Reprinted from the Trial Lawyers for Public Justice website (tlpj.com) and dated Dec. 1, 2010:

When it comes to adding insult to injury, this takes the cake. Imagine you've been in a terrible car crash. You suffered life-threatening injuries yet lived to tell the tale. You even managed to recover some of your damages in a lawsuit against the person who ran into you—money that you and your family will need to survive, given that you can no longer make a living due to your chronic pain and debilitating injuries.

But then, just when you thought you were out of the woods, you are hit with a federal lawsuit from your insurance plan, seeking 100% repayment of all the medical expenses they covered after you were hurt. You try to fight, but the company ends up walking away with both the premiums you paid them over the years and a good chunk, if not all, of your damages, leaving you even worse off than if you had never sued the person at fault in the first place.

Sound unfair? You bet it is. But this exact scenario is playing out all across America. In case after case, self-funded ERISA health insurance employee benefit plans have been asserting first priority liens over the proceeds of third-party lawsuits, even where the victim has recovered only a fraction of her damages. This practice, known as "ERISA subrogation," has become one of the biggest threats to victims' rights in this country. And it's only getting worse.

Public Justice is fighting this practice on three different fronts. In O'Hara v. Zurich Insurance Company, we recently asked the U.S. Supreme Court to allow an injury victim to hold onto his fair share of his personal injury victory. Next month, in U.S. Airways v. McCutchen, we will be asking the United States Court of Appeals for the Third Circuit to do the same. And recently, in CGI v. Rose, we filed our motion for summary judgment on behalf of Rhonda Rose, a Washington state woman being sued by her health insurance plan for 100% of the medical expenses that it covered after she was seriously injured in an auto accident and recovered only a fraction of her damages.

In each case, Public Justice is asking the court to enforce ERISA's statutory requirement that reimbursement is only permitted to the extent that it is "appropriate." Fair-minded people would not find it "appropriate" for insurers to strip under-compensated personal injury victims of their tort recoveries and we aim to get the courts to agree.

To read Public Justice's motion for summary judgement in CGI v. Rose, go to http://www.tlpj.com/Newsroom/News/Public-Justice-Protecting-Injury-Victims.aspx and click in the article where indicated.

To read Public Justice's cert. position in O'Hara, go to http://www.tlpj.com/Newsroom/News/Public-Justice-Protecting-Injury-Victims.aspx and click in the article where indicated.

***

Public Justice's Budd-Kazan Attorney Matthew Wessler and Senior Attorney Leslie Brueckner have taken the lead for Public Justice in both cases. Co-counsel in CGI v. Rose includes Paul Stritmatter, Mike Nelson, and Mike Withey of Seattle and Caitlin Palacios of Washington, DC. Co-counsel in O'Hara is Charles M. Cook III of Macon, Georgia.

LATE-2010 SETTLEMENTS AND VERDICTS

CCTLA members Ed Smith and Alex Lichtner, working with Stephen McElroy and Ashley Parris of the R. Rex Parris Law Firm, were successful in obtaining a $2.25-million settlement for the heirs of a Ukrainian immigrant who was killed in a multi-party motor vehicle collision on Interstate 5 just north of Woodland. Decedent and her son were passengers in the back seat of a friend's van when it collided with a semi-tractor trailer.

Defendant truck driver, in the course and scope of his employment, was driving his semi-tractor combination southbound on the I-5 in the right-hand lane. He was traveling approximately 55 mph, several hundred feet behind two other tractor-trailer combinations which were also traveling south in the number-two lane.

Defendants A and B were driving to the Sacramento area from Anderson when they entered the on-ramp to get back on the freeway, with Defendant A at the wheel. Rather than continuing to merge, Defendant A stopped to let the two leading trucks go by. Once they did and believing she had adequate space, Defendant A moved forward into the number-two lane. Defendant Truck Driver testified that she pulled directly in front of him, forcing him to move partly into the number-one lane to avoid hitting Defendant A.

At deposition, Defendant A's husband, Defendant B, agreed with Defendant Truck Driver and testified that his wife had accelerated much too slowly to safely merge onto the freeway. Plaintiff's theory was he failed to move out of harm's way despite seeing Defendant A's vehicle for 17 seconds and having the opportunity to safely change lanes much sooner than he did.

Defendant C, the van driver, was also approaching in the number-two lane of the I-5. Witnesses estimated her speed at up to 90 mph. As the van passed in front of the truck, it slammed into the right side guardrail and bounced back into the side of the tractor-trailer. As the van was spinning, decedent was partially ejected through the van's side window and cut in half by impact with the trailer.

Decedent's son, age 11 at the time, had nodded off to sleep just before all of this took place. When he woke up, he found himself trapped in the backseat with his mother's lower body. Her head and torso had ended up in the roadway. Defense claimed decedent and her son were not wearing their seatbelts and that if they had been, they would not have been killed/injured. All four occupants of the van were injured.

Settlements were reached before trial with Defendant C (25/50) and Defendants A and B (100/300), whose carriers had immediately tendered their policies shortly following the collision. More than 40 depositions were taken in the 60 days prior to trial. Defendant Truck Driver's insurance offered only $600,000 to the minor son, which was rejected. The case settled for the $2-million policy limits of the truck driver and his employer during jury selection on the fifth day of trial.

***

Michael Shepherd prevailed for his client injured in a motor vehicle collision with a $200,000 verdict in Butte County against AllState House Counsel. Plaintiff, who is a paraplegic, suffered a shoulder injury. A Moe Levine type argument was made that it's "not what you take, but what you leave them with." i.e. if you break the leg of a person with one leg, you have taken more than a broken leg to a person with two legs. Plaintiff was stuck on back for eight weeks while shoulder healed. Policy limits were 100k. Plaintiff demand was $90,000, defense offer was $70,000.

***

Past CCTLA President Clay Arnold and member Kirk Wolden were awarded a $2,555,825 personal verdict on behalf of Plaintiff Truck Driver. Plaintiff was picking up a load at a local trucking yard, and his last memory was of standing near the rear of his truck. Then he woke in the hospital with no idea as to what had happened. Plaintiff's experts said a forklift operator lost control of his load, and that load hit Plaintiff on the head, knocking him unconscious.

Defendant's employees said the accident was Plaintiff's fault. Defendant had many employees who said the accident happened several different ways, but the common thread was that Plaintiff caused the incident by placing himself in harm's way.

Plaintiff's bio-mehcanical expert (Shimada) said the accident could not have happened the way they claimed it happened; that in order for the injuries he received to have occurred, Plaintiff's theory of liability was the most likely. There was a history at the yard of other forklift operators losing control of their loads due to some interesting business practices. The case was tried with all

the witnesses blaming the plaintiff, and the fact that Plaintiff had no lay witnesses to counter this testimony was a unique experience.

Plaintiff's damages were primarily brain damage, and all of his future work restrictions were based on this brain injury. Plaintiff had $40,000 in medical bills. The jury award was based on past economics consisting of $38,369.20 medical and $113,000 wage loss, future economic loss consisting of $36,000 in medical and wage loss of $368,825, general damages of $1,500,000 and loss of consortium, $500,000. Defense counsel was Doug McKay of Vitale and Lowe; Judge Van Camp presided over the trial. Plaintiff CCP §998: $900,000 and Defendant:$352,000 (no other offers).

2011 VERDICTS

CCTLA Board member Joe Marman won a medical malpractice verdict in South Lake Tahoe involving a misplaced sub-muscular breast implant, where the implant ended up on top of the collar bone on each side. Case was against two doctors: the one who owned the clinic and the first surgeon who negligently performed the implant. Attorneys for the defense included the firm of Manning & Marder and local counsel.

The clinic doctors brag about needing only 40 minutes to perform an implant, but each expert testified that they would require an hour and half to properly place the implant.

Plaintiff worked in a Nevada brothel. Many potential jurors said they did not believe in granting any money for pain and suffering and if forced to, they may give one dollar. Many others said they would not rule against a doctor unless Plaintiff proved gross negligence, gross indifference or guilt beyond a reasonable doubt, and they could not accept the preponderance of the evidence concept.

Surgeon who owned the clinic moved the implants to a better positon within eight days; however, Plaintiff was upset that the implants were moved from sub-muscular to on top of the muscles. Plaintiff's expert testified that Plaintiff would need several additional surgeries to properly place the implants. Plaintiff also claimed significant ongoing arm pains due to the grossly misplaced implant. Plaintiff claimed she lost her income and became homeless for three years after the bad implants prevented her from being able to work.

The six-day trial ended after three hours of jury deliberation. The verdict consisted of $10,000 in past pain and suffering and $19,000 for out-of-pocket losses and expenses. The jury gave nothing for future pains or future medical expenses. The jury only assessed damages against the employee surgeon who performed the surgery and did not find against the other doctor who owned the clinic, despite the respondent superior jury instruction.

***

CCTLA board members Travis Black and Joseph Weinberger recently finished a two-week assault-and-battery trial in El Dorado County in front of Judge Daniel Proud. Travis represented Plaintiff John Steward, and Joe represented Plaintiff Gerald Martin. Defendant Paul Green was represented by Hames Clark. Jury awarded plaintiffs a total of $1,157,925.73.

Plaintiffs were trespassing on the elderly defendant's property, as they had in the past, and were looking for quartz crystals despite seeing clearly marked private property and the posted "No Trespassing" signs. Defendant confronted them and shot them repeatedly (or at them), as they attempted to flee. Several jurors in voir dire reportedly felt sympathy toward the elderly defendant, who claimed that he believed (and continues to believe) that he had the right to protect his property against blatant and willful trespassers. The 82-year-old defendant and his ailing wife attended every day of the trial and appeared "sympathetic," at least before Mr. Green testified.

Travis and Joe were able to prove that their clients were stalked and hunted and likely would have been killed by the relentless Defendant, who fired more than a dozen shots at close range with two handguns.

Mr. Steward, who was shot in the left thigh was treated and released that day. He claimed past medical billings of approximately $13,000 and future medicals of $45,000. The jury awarded him $650,000 for past and future non-economic damages.

Mr. Martin was shot at almost a dozen times and while not "physically" injured, he was awarded $10,000 for future medical care and $440,000 in non-economic damages. The jury also found Defendant liable for punitive damages, which will be tried separately next month.

Defendant was found guilty of six felony counts in a criminal trial, which were reduced to misdemeanors prior to this civil trial.

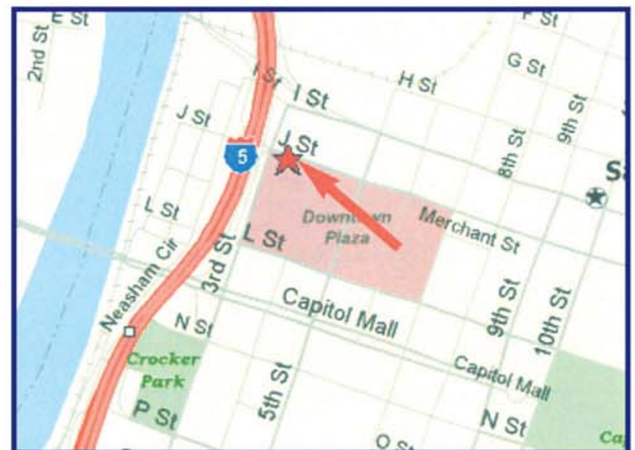
EXECUTIVE SUITES FOR LEASE

LEGAL • PROFESSIONAL

331 “J” Street, Suite 200, Sacrmento

PROPERTY AMENITIES

- Receptionist Service
- Specialized Legal Equipment
- 3 Printer/Copiers (up to 77 sheets per minute)
- 3 Conference Rooms
- 11.5 ft. Tall Exterior Window
- Exterior Patio Access
- 24 hr. Surveillance
- Basic Law Library
- Break Room (Coffee/Tea Service)



Available for a nominal fee:

- LexixNexis (Including Full Federal)
- Postage Meter
- DSL

For More Information, please contact: **Diane Stanley 916-442-0482**

CONSUMER ATTORNEYS OF CALIFORNIA
COLLEGE OF TRIAL ARTS
AND THE
CAPITOL CITY TRIAL LAWYERS ASSOCIATION

MARCH 25 - 26, 2011 • HARVEYS LAKE TAHOE

THE DONALD L. GALINE

10 MCLE CREDITS

Annual Tahoe Ski Seminar

SPEAKERS

Hon. Dave Abbott • John Airola • Tuesday Airola • Wylie Aitken • Dr. Ardavan Aslie • Robert Buccola • John Cattie • Stephen Davids • Matthew Davis • Donald de Camara • Cliff Carter • Christopher Dolan • Don Ernst • Mark Fong • Shawn Khorrami • Christopher Kreeger • Micha Star Liberty • Joseph H. Lowe, IV • John Montevideo • Anne Marie Murphy • R. Rex Parris • Dr. Jeffrey Reinking • Will Shapiro • Adam Shea • Dr. Paul Slosar • David E. Smith • Scott Sumner • John Vaclavik • Jack Vetter • Kerri Webb • Daniel Wilcoxen • Wendy York • John Zelbst • Elisa Zitano

HOTEL RESERVATIONS

HOST HOTEL: HARVEYS (800) 455-4770
Booking Code: S03GALN • Cut-Off: 3-10-11 or until sold
Lake Tower: Thurs $109 • Fri $129 • Sat $179
Mountain Tower: Thurs $79 • Fri $99 • Sat $149
ALTERNATE HOTEL: EMBASSY SUITES (800) 988-9894
Booking Code: ATT • Cut-Off: 2-23-11 or until sold
Friday: (1 King) $159 • Friday (2 Queens) $199
Saturday: (1 King) $159 • Saturday (2 Queens) $199

SKI WITH THE STARS!

Ski Director Derek Howard will coordinate a meeting time and place on THURSDAY and/or FRIDAY for those who would like to meet up on the hill. Call Derek at (415) 788-9000 or email dhoward@minamitamaki.com.

COMMITTEE

CO-CHAIRS: Derek Howard, Anne Marie Murphy, Wendy York **EDUCATION CHAIR**: Brian Chase **EDUCATION CO-CHAIR**: Ingrid Evans **COMMITTEE**: Clifford Carter, Gregory C. Cattermole, Stephen F. Davids, John N. Demas, Christopher L. Kreeger, John Montevideo, Vincent J. Scotto, III, David E. Smith, Kerrie D. Webb, Kyle Tambornini, Erika Jacobsen White, Nancy Drabble, Lori Sarracino, Wendy Murphy

REFUND POLICY: *Refunds will be honored only if a written request is submitted to CAOC at least seven days prior to the date of the seminar and will be subject to a $50 service charge. Registration substitutions may be made only when the substituting party holds the same membership category as the original registrant. MEMBERSHIP IS NON-REFUNDABLE.*

PRE-REGISTRATION

❶ PLEASE PRINT CLEARLY OR TYPE:

CAOC #____________ State Bar #____________ Bar Date________

Name____

Firm____

Address____

City____________________________St______Zip__________

E-Mail____

Phone(______)______________ Fax(______)________________

❷ TAHOE SEMINAR PRE-REGISTRATION: Pre-Registration ends March 11, 2011. Fees increase $25 after March 11. Registration includes CD syllabus and MCLE Certificate. *Cancellation fees apply.*

SPECIAL RATE FOR LAWYERS ADMITTED TO THE BAR SINCE 2001
- ❒ **$230 CAOC or CCTLA Attorney Member ($280 on site)**
- ❒ **Please assign me a mentor.**

Must use this registration form to obtain special rate

- ❒ $255 CAOC or CCTLA Attorney Member ($280 on site)
  - ❒ $230 Add'l CAOC/CCTLA Atty Member of same firm ($255 on site)
- ❒ $155 CAOC Law Office Support Member ($180 on site)
  - ❒ $130 Additional CAOC LOS Member of same firm ($155 on site)
- ❒ $355 Attorney Non Member ($380 on site)
  - ❒ $330 Additional Attorney Non Member of same firm ($355 on site)
- ❒ $50 Law Student ($75 on site)
- ❒ Free - Current Sitting Judges and Justices (must pay for ticketed events)
- ❒ $20 Saturday Lunch

❸ METHOD OF PAYMENT:

❒ Check enclosed. Check #______________
❒ Charge my credit card: ❒ MC ❒ Visa ❒ Amex

Card No.________________________________Exp. Date________

CVC Code________Signature______________________________

TL

RETURN TO: CAOC 770 L St., Ste 1200, Sacramento, CA 95814 • T (916)442-6902 • F (916) 442-7734

FOR DETAILS GO TO WWW.CAOC.COM/11TAHOE

Continued from page 2

of negligence where supported by the evidence. In this case, Plaintiff fell off a counter stool at a restaurant. Trial court found no evidence of actual or constructive notice and granted summary judgment. Plaintiff appealed, contending trial court failed to consider res ipsa loquitur.

Restaurant on summary judgment presented evidence that they inspected the bottom of the stools, where you could see only the head of the bolt, on a regular basis. Appellate court finds that it's safe to say that a counter stool does not ordinarily fail without negligence, that the stool was in the exclusive control of defendants, and that Plaintiff sat on the stool in an ordinary normal manner so therefore, res ipsa loquitur applies.

Under §646, res ipsa loquitur is a presumption of fact affecting the burden of producing evidence, and therefore once evidence was produced (here, the inspections) the presumption disappears. However, the appellate court finds that the jury can still draw an inference that the accident was caused by defendant's lack of due care even though you no longer have a presumption. Net result— you get to go forward with a very tough case.

**Intentional Torts—
Employer Liability**

In C.A. v. William S. Hart Union High School District, 2010 DJDAR 16964, plaintiff was a student at a high school, and the head guidance counselor and advisor sexually harassed, abused and molested Plaintiff. The school district demurred, and trial court sustained, finding acts were outside the scope of employment. Appellate court affirms.

Psychiatric Exams

In Toyota Motor Sales USA, Inc., v. Superior Court of LA (Braun), 2010 DJDAR 17109, plaintiff sued defendants for gender discrimination and sexual harassment among other things. Defendants moved to compel Plaintiff to submit to an independent psychiatric exam under CCP §2032.310.

Trial court granted motion but permitted plaintiff's attorney to be present in an adjoining room during the examination and to monitor it. Defendants filed a petition for writ, claiming that their psychiatric experts believed that the attorney's presence would interfere with the validity of the exam and there was no showing that the attorney's presence was necessary to protect Plaintiff's privacy.

Appellate court issued the writ, relying upon on Edwards v. Superior Court, 16 Cal 3d 905 where the California Supreme Court held plaintiff cannot have an attorney present during a psych exam. In this case, the appellate court finds there has been no showing of need for the attorney to be present because the exam is going to be audio taped and the plaintiff's attorney will be provided with a copy of the tape.

The court holds that in the absence of evidence to the contrary (and there is none here), it must be presumed that the examiners will act appropriately and not invade attorney/client privilege or make other inappropriate inquiries. Moreover, if they did, the only remedy, if the exam were monitored, would be to interrupt the proceeding and this is not allowed.

This is a terrible decision based apparently on the appellate court's belief that defense medical and psychiatric examiners are honest and trustworthy as opposed to simple hired guns.

Fee Agreements

In Arnall v. Superior Court (Liker), 2010 DJDAR 17619, the court holds that a contingency fee agreement that does not state that the fee is not set by law and is negotiable is voidable at the client's option.

Alcohol Liability

In Ennabe v. Manosa, 2010 DJDAR 18013, social host collected an "admission fee" later used to purchase communal alcohol. Court holds that did not bring him under the exception of Business Code §25602.1 where a social host loses the alcohol immunity (Civil Code §1714(c)) if they sell or cause to be sold alcoholic beverage to an obviously intoxicated minor. The court holds that the admission fee does not mean that they have sold alcohol.

Juror Bias/Misconduct

In Grobeson v. City of Los Angeles, 2010 DJDAR 18095, jury found against plaintiff in an employment case. Plaintiff moved for a new trial, which was granted. One juror declaration stated that during a break in the testimony, another juror told the juror making the declaration that she liked defendant's voice and that she had already made up her mind and was not going to listen to the rest of the stupid argument. Juror accused of bias filed a declaration saying she had not made up her mind until the case was submitted to the jury. Trial court granted motion for new trial on the grounds that the juror committed misconduct by discussing the merits of the case prior to deliberation and by prejudging the case. Appellate court affirms.

Arbitration

In Burton v. Cruise, 2010 DJDAR 18393, trial court held and appellate court affirms that a medical malpractice plaintiff waived her right to arbi-

trate by waiting until the virtual eve of trial, long after discovery, including expert discovery, had been completed, to move for arbitration.

Attorney Fees

In Olson v. Harbison, 2010 DJDAR 19381, plaintiff's attorney decided to bring in more experienced trial counsel. He associated in Joe Harbison. Client then fired first attorney and hired Joe Harbison, who settled the case for $775,000.00. First attorney received zero attorney's fees. First attorney sued Mr. Harbison under several theories, including quantum merit, fraud, breach of contract, etc. Trial court granted various motions that resulted in judgment for Defendant, which was affirmed on appeal, the court finding the attorney should have sued the former client instead of Mr. Harbison.

Negligent Parking

In Lawson v. Safeway, 2011 DJDAR 83, Safeway truck was parked legally on the side of US 101 near Crescent City. Position of the parked truck blocked the view for driver of a vehicle trying to cross the highway at the intersection to make a left turn onto the highway. Plaintiff motorcyclist was struck by a truck whose vision was blocked by the parked Safeway vehicle.

Jury found 35 percent fault on Safeway, and Safeway appealed, contending it had no duty of care because truck was legally parked. Here, the court rules that while most times parking will create some visual obstructions, there was a duty to park safely and legally here because the particular facts of the case were the vehicle is 65 feet long, 13.5 feet tall, 8.5 feet wide, and the evidence shows that drivers of such trucks are or should be professionally trained to be aware of the risk of blocking drivers' sight lines when parking. The truck was parked at a high-speed, well-traveled intersection and a safe parking spot was available right around the corner. Here, the driver created an unreasonably great risk of harm as opposed to simply a risk of harm, and under those circumstances, there is a duty.

Summary Judgment/Assumption of the Risk

In Eriksson v. Nunnink, 2011 DJDAR 468, plaintiffs sued for the wrongful death of their daughter. She was a horseback rider competing in a cross-country event. Her horse was injured and had had prior falls. They claimed that defendant trainer increased the risk of danger by allowing her to ride an injured and unpracticed horse and concealed this from plaintiffs (the rider's parents). Trial court granted summary judgment; appellate court reverses finding that defendant failed in their separate statement of facts to negate that they increased the risk of harm and caused the injury. As to the contractual assumption of the risk claim, they failed to prove that Defendant was not grossly negligent. The case has an excellent discussion of evidence in summary judgment motions, the effect of evidentiary objections and the law on assumption of the risk.

998 Offers

In Najera v. Huerta, 2011 DJDAR 496, the Fifth District holds that where plaintiff serves a 998 offer with the complaint and there is no "free flow of information" and no extensions given so the defendant can do minimal investigation and discovery, it is within the trial court's discretion to determine the 998 offer was not in good faith. Bad decision from a very conservative panel.

Attorney/Client Privilege

In Casell v. Superior Court, 2011 DJDAR 658, the California Supreme Court holds that the mediation privilege covers evidence of private attorney/client discussions immediately preceding and during the mediation concerning mediation settlement strategies and efforts to persuade the client to reach a settlement at the mediation.

Attorney/Client Privilege

In Holmes v. Petrovich Development Company, 2011 DJDAR 671, the court in an employment harassment case holds that e-mails between a client and the attorney written on the employer's computer are not protected by the attorney/client privilege because there is an employee handbook that basically waives any reasonable expectation of privacy.

Collateral Source

In McQueen v. Drumgoole, 2011 DJDAR 793, the court holds that Social Security supplemental income (SSI) payments are collateral source and are excluded from consideration in determining the amount of damages. Great case, goes through out-of-state cases also, discussing welfare payments and basically applies collateral source to any payments received from governmental sources.

Product Liability

In Pannu v. Land Rover North America, Inc., 2011 DJDAR 931, there is an excellent discussion of both the consumer expectation test and the risk/benefit test in a Land Rover rollover case that resulted in a court trial verdict of $21 million against Land Rover.

Statute of Limitations Against Church

In Roe v. Doe, a church sexual abuse case, the court reiterates that the 2002 amendments to CCP §340.1 revived all of this type of action that were time barred before 2002; however, they were revived for one year only, regardless of whether the plaintiffs had yet discovered the link between their abuse as children and the adult onset of their psychological injuries.

Access to Justice in Danger Before U.S. Supreme Court

Page 11

Capitol City Trial Lawyers Association
Post Office Box 541
Sacramento, CA 95812-0541

MARCH

Tuesday, March 8
Q&A Luncheon - Noon
Vallejo's (1900 4th Street)
CCTLA Members Only

Thursday, March 10
CCTLA Problem Solving Clinic
Topic: Beyond Facebook, LOL and "The Cloud":
A Technology, Discovery and Ethics Update
Speakers: John Airola, Esq., Virginia Jo Dunlap, Esq., and Betsy Kimball, Esq.
Arnold Law Firm, 865 Howe Avenue, 2nd Floor
5:30 to 7 p.m.
CCTLA Members Only, $25

Friday, March 18
CCTLA Luncheon
Topic: Substance Abuse: An overview
Everything you need to complete those "hard to get" MCLE credits, presented in an interesting format by one of our own who has a fascinating story to tell.
Speaker: David Mann, J.D. - The Other Bar
Firehouse Restaurant
Noon - CCTLA Members, $30

Friday-Saturday, March 25-26
CAOC/CCTLA Annual Tahoe Ski Seminar
Speakers: See page 17, Location: Harvey's

APRIL

Tuesday, April 12
Q&A Luncheon - Noon
Vallejo's (1900 4th Street)
CCTLA Members Only

Thursday, April 14
CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
Arnold Law Firm, 865 Howe Avenue, 2nd Floor
5:30 to 7 p.m. - CCTLA Members Only, $25

Friday, April 15
CCTLA Luncheon
Topic: TBA, Speaker: R. Rex Parris, Esq.
Firehouse Restaurant - Noon
CCTLA Members, $30

Friday-Saturday, April 29-30
CCTLA Reptile Seminar (See page 10)
Topic: "Welcome to the Revolution"
Speakers : David Ball & Don Keenan
Location: McGeorge School of Law
(in the Lecture Hall)
CCTLA Members, $650
Non-members, $800

MAY

Tuesday, May 3
CAOC LOBBY DAY
Sutter Club - More details to come

Tuesday, May 10
Q&A Luncheon- Noon
Vallejo's (1900 4th Street)
CCTLA Members Only

Thursday, May 12
CCTLA Problem Solving Clinic
Topic: TBA - Speaker : TBA
Arnold Law Firm, 865 Howe Avenue, 2nd Floor
5:30 to 7 p.m. CCTLA Members Only, $25

Friday, May 20
CCTLA Luncheon
Topic: TBA - Speaker: TBA
Firehouse Restaurant - Noon
CCTLA Members, $30

Thursday, May 26
9th Annual Spring Receptio
& Silent Auction
Location: Home of Allan Owen and Linda Whitney

*Contact Debbie Keller at CCTLA at (916) 451-2366
for reservations or additional information about any of these events*

CCTLA Calendar of Events