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President's Message

BY: CRAIG SHEFFER, PRESIDENT 2005

We all breathed a collective sigh of relief when Phrma withdrew it's fee cap initiative last month. We dodged a bullet. Thanks again to CAOC President, Sharon Arkin, who, along with her team of former CAOC Presidents and ATLA friends, negotiated the withdrawl of the initiative. Thanks also to all of you who contributed your time and/or funds to the initiative fight. Your contributions were a critical factor in successfully negotiating the withdrawl this year, and will provide a much needed head start on formulating our message for fighting the fee cap/general damage (PICRA) initiative that we are told is coming down the pipe in '06, courtesy of the Chamber. Because this is an ongoing, year-in year-out, battle for us anymore, we must not become complacent during our temporary repreive but, instead, must continue our fundraising so that we are always prepared for these continuous attacks on the consumers of California, and our practices.

On the educational front, the Tahoe Ski Seminar was a great success. It was nice to see so many familiar, local, faces in the crowd. A big thank you to our CCTLA members who worked on the Tahoe committee, and to those who spoke at the seminar. Our monthly Lunch Seminars and Problem solving clinics continue to be popular, and well attended. Come out to these events and "rub elbows" with your fellow plaintiffs lawyers. These short seminars are fun—and you will learn at them. With Parnell now decided, a lien update seminar is planned for early fall.

I'm going to sound like a broken record here, but we still need your help with Litigator articles, as well as your ideas and speaking talent for our seminars. Contact me with items and/or suggestions in these areas.

Finally, thank you to those of you who put effort into our causes. To those who don't, get on board. Keep up the good fight.

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Check out our web page at: www.cctla.com

Lobby Day a Great Success

By: Joseph H. Marman, CCTLA Board Member

On Monday, April 11, about 80 members of CAOC came to Sacramento for a day of visiting with our legislators regarding better legislation for consumers. We met at the Sacramento Sheraton Grand Hotel, in the refurbished former Sacramento Market Place. We were prepped about the latest agenda to promote to the legislators. This year's agenda was to promote Senator Gloria Romero's bill, SB 874, which would require all companies with at least 10 employees that contract with the state of California to provide for up to 10 days of paid jury service. Our friend, Debra Ortiz is also promoting her bill, SB 815 to allow service of the summons and complaint on the defendant by serving the documents on the defendant's insurance company.

Sharon Arkin, CAOC president relayed her story of how she and others in CAOC were able to obtain PHRMA's withdrawal of the attorney 20% fee cap initiative. She also reported that It is likely in 2006 that the California Chamber of Commerce is going to run an initiative to limit injury victim's compensation as well as attorney's fees very similar to MICRA.

Although we were supposed to promote the CAOC agenda, we were also free to discuss with our legislators their perspective on their own upcoming legislative campaigns, on the gubernatorial race, the state's economy, or whatever else is on our mind.

It was disappointing to see the poor attendance from Sacramento members of CCTLA and of CAOC for this event, when many other attorneys fly here from all over California to lobby for better legislation. I hope to see you next year for this important and fun event.

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Thank you to the following Sacramento Advocates Club members.

Because of YOUR Advocates Club commitment, consumers' rights are being protected in our State Capitol, our courtrooms and our offices. Without YOU, big business would slap a permanent "gag order" on the plaintiffs' bar.

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A minimum $1.00 a day is less than a cup of coffee. We need our colleagues to understand that their clients' rights are worth at least that. They're glad YOU do!

With the tort reformers working to further erode punitive damages, cap government entity liability, go after the Americans with Disabilities Act, and expand MICRA to nursing homes ... we need more attorneys to join our fight!

If you would like information about how you can help protect consumers' rights and help your practice, please call CAOC at (916) 442-6902 or get an Advocates Club application from our website at www.caoc.com.

A listing of local Advocates Club members will run bi-monthly in this publication. We hope everyone associated with the plaintiffs' bar will thank these members for their commitment to the protection of justice and consumer rights!

tAdvocates Club list updated 1.31.05

Third DCA Paves Way for Recovery of Costs and Prejudgement Interest in Policy Limits UM/UIM Cases

By: C. Jean Cain, CCTLA Member

Until recently, it was often assumed that an insurer could not be liable for recoverable costs and prejudgment interest when the amount of an uninsured motorist arbitration award equaled or exceeded the applicable policy limits. The authority usually cited by the insurers was Austin v. Allstate Insurance Company (1993) 16 Cal.App.4th 1812; 21 Cal.Rptr.2d 56, which did not precisely address the issue. The Third District Court of Appeal now has spoken in Pilimai v. Farmers Insurance Exchange Company, 2005 WL 698132, giving claimants a strong weapon in policy limits cases to extract settlements.

Following a motor vehicle accident with an uninsured motorist, Iosefa Pilimai demanded that his insurer, Farmers Insurance Exchange, arbitrate his damage claim. Very early on, Pilimai served a §998 Offer to Compromise for $85,000.00 which was not accepted by Farmers. On November 14, 2003, the arbitrator awarded Pilimai damages in the sum of $556,972.00 less a credit of $15,000.00 or the amount of the policy limits to be proven by declaration on a petition to the court for confirmation of the award. The award was silent as to prejudgment interest and costs.

Both Pilimai and Farmers filed petitions with the court to confirm the award. In Pilimai's petition and memorandum of costs, he sought costs of $18,321.23 and prejudgment interest of $36,470.22. The court confirmed the arbitration award for the policy limit of $250,000.00 less the $15,000.00 credit, but did not look favorably on the request for costs and prejudgment interest. When the trial court denied Pilimai's request for an award of costs and prejudgment interest, Pilimai appealed from the judgment entered.

On appeal, Farmers argued that the extent of its liability was the $250,000.00 policy limit less credit, relying on the language of the policy which stated that Farmers "will pay all sums which an insured person or such other person as permitted under the law is legally entitled to recover as damages from the owner or operator of an uninsured motor vehicle because of bodily injury actually sustained by the insured person..." The statutory language of §998 (statutory offer to compromise) and Civil Code §3291 (prejudgment interest on offers to compromise) was read into the contract of insurance, finding no language in the policy that expressly waived the protection of those code sections. Costs and prejudgment interest, reasoned the court, are not an element of damages, but rather, are incidental to the underlying litigation. The maximum liability of Farmers under this provision of the contract was found by the court to refer to the compensatory damages recoverable by the claimant, not the cost of the proceedings, or prejudgment interest that arise directly from its status as a litigant in the arbitration and subsequent court proceedings. Accordingly, costs and prejudgment interest are recoverable even if they exceed policy limits and may be awarded by either the arbitrator or the court. The Pilimai decision affords a powerful weapon to use against insurers who have ignored a reasonable statutory offer to compromise in a policy limits case. No longer can insurers in those cases sit back, content in the knowledge that their maximum exposure is the limit of the policy. In the Pilimai case, that mistaken belief cost Farmers nearly $55,000.00.

The Pilimai decision expressly left open the question of whether "California's strong public policy of encouraging settlements and preserving scarce judicial resources" would prohibit insurers from contractually limiting their liability for costs and prejudgment interest in excess of policy limits. The language of the opinion, however, seems to hint that such provisions are not likely to receive a favorable treatment by the court.

Recent Verdicts & Results

- Congratulations to Bill Callaham who recently received a $88,000 verdict in the Williams case in Sac County Superior. Allstate had offered $50,000 pre-trial. With costs, post trial, it ended up writing a check for $108,000.

Please e-mail your verdicts, binding arb awards, or interesting settlements to csheffer@dbbc.com, for inclusion in The Litigator.

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In Considering the Appellate Review

By Jennifer Gibson, Gibson Appellate Law Services

As lawyers we are paid to anticipate critical issues that may affect the outcome for our clients and develop plans or a course of action for addressing those issues. One issue that should always be in the mind of the litigator well before a verdict is issued is appellate review. Some interlocutory matters must by definition be addressed before the end of a trial otherwise the right to appellate review on the issue is lost. A motion for disqualification of a judge is one such matter. Unless writ review is sought within ten days of a denial of a motion for judicial disqualification, appellate review is forever lost.

There are other issues, however, where there is a choice of choosing to seek review before the end of the trial by writ or waiting to bring an appeal after a final judgment is issued. Sometimes, the choice is not critical. Other times, however, choosing to file a writ immediately rather than waiting to file an appeal could make all the difference as the mere passage of the time may prevent reversal of a trial court's ruling. The primary objective of the article is to alert practitioners to the type of circumstances in which a writ may provide the better course of action for protecting and preserving the rights of clients. In particular, in those cases where the risk of harm is substantial and irreparable, a writ petition is probably a practitioner's best choice for successfully overturning a lower court's ruling.

At this point, some general information regarding writ and appellate procedures may be useful. As noted previously, there are two possible methods by which appellate courts can review lower court judgments and orders: by direct appeal or on a petition for an extraordinary writ of mandamus,[1] prohibition,[2] or certiorari or review.[3]

As an initial matter, trial counsel should always bear in mind that direct appeals take time, lots and lots of time. Generally a party may only file an appeal once there is a final judgment in a case.[4] So if there is an issue such as an improper evidentiary ruling, the losing party can raise the issue on appeal after conclusion of the entire matter and only after the court has entered a final judgment.

After the notice of appeal has been timely filed, the appellant must then designate the record and request the clerk's transcript.[5] Generally, it takes a few months for both to be prepared.[6] Once they are prepared, the appellant has thirty days to file the opening brief.[7] The respondent has thirty days to file its response. And the appellant then has twenty days to file its reply brief. After all the briefing is done, it still could take months before the appeals court schedules oral argument.[8] Following oral argument there may be a wait of up to ninety days before the court issues its decision. All in all, it could take up to one year or more before there is a ruling on the appeal.

The writ petition, while not encouraged as a substitute for an appeal, is one means by which appellate courts can expeditiously exercise their reviewing power.[9] By its very nature, a petition for writ of mandate, prohibition, or other appropriate relief is a request for emergency or extraordinary relief. In filing a writ petition, the party is essentially saying to the court that the lower court's ruling or other matter requires the appeals court's immediate intervention without which the petitioner would suffer irreparable injury. Therefore, it should take precedence over the appeals already sitting in a justice's chambers.

Procedurally, the process is triggered when the petitioner files a writ petition asking the court of appeals to issue an order commanding the lower tribunal to take certain action or not take certain action. As a general rule, a writ petition should be filed as soon as possible following written notice of the ruling or order the petitioner wishes to challenge. For common law writs there is not hard and fast rule on time, however. Ordinarily, filing within sixty days after notice of the court's ruling may be considered timely or reasonable. (Eisenberg, Horvitz & Weiner, Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group, 2003) ¶15:146 [citing *Volkswagen of America Inc. v. Superior Court (Adams)* (2001) 95 Cal. App. 4th 695, 701]). Yet in some circumstances sixty days may be seen as dilatory especially given that in filing the petition the petitioner is claiming that the lower court's ruling requires the appellate court's immediate attention. (Eisenberg, Horvitz & Weiner, Cal. Practice Guide: Civil Appeals & Writs, *supra,* at ¶15:146.1). If the complaint is that the threat of harm is great then an unreasonable delay in filing the petition will undercut a party's claim to such extraordinary relief.

Statutory writs have jurisdictional deadlines. They must be filed within the stated time period or writ review is lost. In some cases, such as with a ruling on a motion to disqualify a judge, writ review is the only review available. Therefore, a party must file its petition within ten days of receiving notice of the decision.[10] For writ petitions seeking review of a grant or denial of a motion for summary judgment, the statutory deadline is twenty days. (Cal. Code Civ. Proc. §437c (m)(1)).

Once a writ petition has been filed, the opposing party may file a response if the court requests it. If the court is considering issuing a peremptory writ in the first instance without first issuing an alternative writ however, it must give a *Palma*[11] notice notifying the responding party that a peremptory writ is being sought and that the court is considering issuing it. (Cal. Code Civ. Proc. §1088.) It is at this point that the responding party has the right to file a response or opposition to the writ. The court may limit the time for a response to a period of several days. Once the response has been filed, the court rules on the petition very quickly, much more quickly than the ninety days it has to rule on an appeal. Such a condensed period between filing and review of the petition makes it an attractive alternative to the long appeals process.

Given the swiftness of review and that writ relief is designed to provide extraordinary relief, under extraordinary circumstances, the requirements for obtaining writ review are stringent. Those threshold requirements are: 1) an abuse of discretion or erroneous ruling; 2) threat of irreparable or substantial injury absent the writ; and 3) lack of an adequate legal remedy.[12]

The initial requirement is that there must be an abuse of discretion or other legal error by the lower court.[13] The trial court must have done something it should not have or refuse to do something it was required to do. The irreparable harm element requires a showing that the harm to the petitioner is harm that cannot be undone if the lower court's ruling is allowed to stand. And finally, it must also be shown that there is no adequate legal remedy during the normal course of the litigation proceedings to redress the harm to the petitioner. If the matter may be cured in the subsequent course of the litigation or on appeal, then the writ will generally not be issued.

Given these requirements it is no surprise that the chances for securing writ review are very small. It is after all extraordinary relief. Nevertheless, in cases where delay can forever alter the posture of the case or the issues involved, writ review may be worth pursuing.

What are those situations? For one, cases involving disclosure of private or otherwise privileged information provide some of the best opportunities for writ relief. This is because once privileged information has been disclosed, it is impossible to un-ring the bell.

Say for example, one party is ordered by the court to turn over a computer hard-drive containing private or privileged information.[14] Waiting to file an appeal after a final judgment has been entered could not undo the harm from disclosure. Writ relief would provide immediate review of and possible relief from the order. Specifically, an immediate challenge by writ may prevent disclosure in the first instance. Therefore, when it is necessary to protect a substantial right, such as a privilege or constitutional right, writ review may be the more appropriate choice. *(Schmier v. Supreme Court of Calif.* (2000) 78 Cal.App.4th 703, 707-708; *see also Raytheon Co. v. Superior Court (Renault & Handley Employees Inv. Co.)* (1989) 208 Cal.Ap.3d 683, 686 [issuing writ where discovery order compelled disclosure of documents protected by attorney-client privilege]; *Planned Parenthood Golden Gate v. Superior Court (Foti)* (2000) 83 Cal.App.4th 347, 355 [issuing writ where discovery order compelled disclosure of names, addresses, and phone numbers of Planned Parenthood volunteers and nonparty staff, infringing on constitutional right to privacy]).

Continued on page 6

Continued from page 5

Another situation in which writ relief may be a more effective alternative to filing an appeal is where the court has granted or denied a motion for disqualification of counsel. Disqualification is a prophylactic device used to prevent an attorney's conflict or unethical behavior from contaminating the entire litigation process. "Ultimately, disqualification motions involve a conflict between the clients' right to counsel of their choice and the need to maintain ethical standards of professional responsibility." *(Neal v. Health Net, Inc.,* (2002) 100 Cal. App. 4th 831, 840 [internal citations omitted]).

In those situations where there is a conflict of interest or where there is intimidation or the threat of violence from one counsel to another, a writ petition would allow immediate review of the trial court's denial of the motion well before a final judgment is entered. Conversely, where the trial court has granted a disqualification motion, writ review prevents the deprivation of a party's right to have counsel of his or her choice. *(Reed v. Superior Court* (2001) 92 Cal. App. 4th 448, 455 [approving use of writ petition to challenge disqualification orders because the "specter of disqualification of counsel should not be allowed to hover over the proceedings for an extended period of time for an appeal."]).

Waiting until a final judgment has been entered to challenge the disqualification ruling would do little to redress the harm of not having the attorney of one's choice throughout the proceedings or being involved with trial counsel who has gained an unfair advantage either through a prior representation or through physical intimidation. Writ review would offer the quickest opportunity to challenge the court's ruling.

Finally, writ review may be the better alternative for challenging a child custody order. Given what is at stake, the threshold requirements for writ review are easily met, particularly, the risk of irreparable harm that cannot be remedied during the normal course of litigation proceedings.

Recently, I observed first-hand where the failure to file a writ petition may have sealed the outcome of a custody case. The case involved an appeal by the prospective adoptive parents of a custody order granting custody to the birth parent. I was hired to draft the birth parent or Respondent's brief.

The prospective adoptive parents chose not to file a writ petition to challenge the family court's order immediately after it was issued. Instead they waited to file an appeal. About one year later the court of appeals issued a decision affirming the family court's custody order.[15]

Looking through the clerk's transcript my first thought was, "why didn't they file a writ?" I considered my client's position to be one supported by the law, and knew that ultimately the lower court's decision would be affirmed. Nonetheless, the strength of our position was bolstered by the length of time that had already passed and the length of time it would take for the court to issue its decision. This optimism was not without support.

In *Guardianship of Zachary H.* (1999) 73 Cal.App.4th 61, the court refused to order a change in custody because of the amount of time that had passed. Removing the child from the adoptive parents after years of appeals, the court concluded, would have caused "life-long permanent damage." (*Id.* at p. 59).

In line with this reasoning, the court in *Lester v. Lennane* (2000) 84 Cal.App.4th 536 observed that the non-custodial parent should have brought a writ petition to challenge the temporary custody order granting custody to the child's mother. The court specifically observed:

> A noncustodial parent who seeks to obtain custody will often be at a disadvantage by the time of trial if the child has bonded with the custodial parent. The noncustodial parent's only effective recourse is to obtain immediate review of any objectionable temporary custody order. This can be done by filing a petition for writ….

(*Id.* at 565.) From the analysis in both *Zachary H.* and *Lester,* the importance of seeking immediate writ review of custody orders is quite evident.

In sum, it is crucial that immediately upon receiving an unfavorable order or verdict lawyers give thought to whether their clients' interests will be better served if they sought a writ challenging the order instead of or in addition to filing an appeal. Given the condensed time period for writ review, it should be apparent that in cases where harm will result from a delay in review, that writ review would be the wiser alternative.

(Footnotes)

[1] A writ of mandate issues to correct an abuse of discretion or to compel the performance of a ministerial duty. (Cal. Code Civ. Proc. §1085.)

[2] A writ of prohibition issues to prevent a threatened judicial act in excess of jurisdiction. (Cal. Code Civ. Proc. §1102.)

[3] A writ of certiorari issues to correct a completed judicial act in excess of jurisdiction. (Cal. Code Civ. Proc. §1068.)

[4] California Code of Civil Procedure section 904.1, the Family Code and the Probate Code do allow some matters, like "death knell orders" an example of which is an order denying certification of a class for a class action lawsuit, to be brought up on interlocutory appeals even if there is no final judgment, (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435.) The general rule is, however, that there must be a final judgment before an appellate court will consider an appeal.

[5] See California Rules of Court Rules 2-4.

[6] There are some ways of expediting the record process. For example, the parties may elect to proceed by joint appendix rather than by clerk's transcript. See California Rules of Court Rule 5.1. Or they may proceed without a reporter's transcript pursuant to California Rules of Court Rule 4 subdivision (a) subsection (3).

[7] This time can be extended by an agreement between the parties or by a request for extension. California Rules of Court Rule 17 (a) provides an additional fifteen days without request. If a party does not file their brief within thirty days the clerk mails out a notice for the party to file its brief fifteen days after the date the notice is mailed. This is referred to as "Rule 17" time.

[8] Of course the parties can request expedited proceedings and request calendar preference.

[9] In fact, filing a writ petition does not affect a party's ability to bring an appeal of an appealable order unless there has been a disposition on the merits or unless writ review is the sole appellate remedy. (*Leone v. Medical Board* (2000) 22 Cal.4th 660, 669). Generally, a summary denial of a writ petition is not decision on the merits and does not preclude a party from raising the issue in a timely appeal. (*Kowis v. Howard* (1992) 3 Cal. 4th 888, 889).

[10] The ten day period is triggered from the moment the parties have notice such as when the court announces its decision in open court in presence of counsel. Written notice is not required to trigger the start of the ten-day time period. (*Guedalia v. Superior Court (Lomac)* (1989) 211 Cal.App.3d 1156, 1163-1165).

[11] "[A]n appellate court, absent exceptional circumstances, should not issue a peremptory writ in the first instance without having received, or solicited, opposition from the party or parties adversely affected."(*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal. 3d 171, 180)

[12] The petitioner must also establish that he or she has a beneficial interest in the lawsuit, meaning that the petitioner has some special interest to be served or some particular right to be preserved or protected over and above the interest held in common with the public at large. (*Carsten v. Psychology Examining Committee of Board of Med. Quality Assur.* (1980) 27 Cal.3d 793, 796). Unlike with a direct appeal, the petitioner need not be the aggrieved party.

[13] Appellate courts may depart from this requirement where the writ petition raises important constitutional issues or petitioner had no opportunity to present the issue.

[14] With regard to orders requiring one party to turn over documents, an appeal does not automatically stay the court's order. (Cal. Code Civ. Proc. §917.2.) Of course the party may request a stay while an appeal is pending.

[15] The court did not base its opinion affirming the family court's decision on the length of time the child had been in the birth parent's custody.

Call Me Darkbloom

THE DARK CORNER

"The path of the righteous man is beset on all sides by the iniquity of the selfish and the tyranny of evil men. Blessed is he who, through good will and charity, shepherds the weak through the valley of darkness, for he is truly his brother's keeper and the finder of lost children."

Quentin Tarantino, *Pulp Fiction*

Some time ago, Darkbloom volunteered to contribute an Op / Ed / CEB column to this estimable publication. Poor Mr. Sheffer *(CCTLA President Craig Sheffer)* likely regrets accepting the offer. For those who care, the *nom de plume* of "Darkbloom" appropriately expresses the duality and divided self inherent in the personality of someone who was an enabler of the iniquity of insurance companies and institutional self-insureds on the defense side, and a finder of lost children on the plaintiffs' side. (A bloom, after all, is associated with brightness and light.) *Caveat lector:* the opinions expressed herein are those of Darkbloom only, and not those of the Capitol City Trial Lawyers' Association (CCTLA). As for Darkbloom's identity, and assuming anyone cares, let's just say that Darkbloom humbly toils in much-deserved obscurity. As H.L. Mencken (or was it one of those fey British "wits"?) remarked of an acquaintance, Darkbloom has much to be humble about.

Amidst the collective sighs of relief last week at the apparent withdrawal of "The Initiative" were the collective re-affirmations that we on the side of truth and justice are "all about the victims" and those whose lives have been forever altered through no (or little) fault of their own. Our challenge in the 2006 election cycle is to separate from the mind of the body politic the cynical perspective that we are "all about the victims" only because our financial remuneration for being so is disproportionate to the perceived public utility of the services provided, especially when contrasted with the remuneration provided to those expected to impart certain standards of learning, knowledge, and values to our children.

So much for the Op / Ed, and now on to the CEB. On March 29, the 6th DCA decided Browne v. Turner Construction, 2005 Cal.App. LEXIS 495, in which a sprinkler fitter (and employee of a subcontractor) fell from a ladder on a commercial construction site. The owner and general contractor filed what used to be called a Privette / Toland MSJ, and is now more accurately called a Hooker motion. Plaintiff argued that he ordinarily would have used a scissor lift, but the defendants were on some kind of Spring cleaning *thing* and had moved them all out of the room. Further, the defendants had initially installed a fall protection system consisting of catenary (suspended) anchoring cables to which workers could tie off, and required *all* workers to tie off when working over six feet. However, two months before the accident, the defendants had removed the catenary lines, and so the plaintiff had nothing to which to secure his lanyard. The trial court granted summary judgment, bowing to the Hooker imperative of an "affirmative contribution" to the injury, and observing that "there was no claim that the ladder was defective, or that the defendants ordered plaintiff to work without tying off."

Mike Kelly of Walkup's office once mused that eventually it would be impossible to sue anyone for an injury on a construction site, but that day has not yet arrived. The 6th DCA reversed summary judgment. After a review of the cases, the 6th put an interesting and important gloss on Hooker. Speaking of the entire Privette / Toland / Hooker line, the Court said, "... these cases ... are perhaps best understood, as resting on the principle that the hirer of an independent contractor has *no duty* to protect *an employee of the contractor* from the consequences of *the contractor's negligence.* [Italics in original.]" For Hooker to apply, the court must be persuaded that it was the plaintiff's employer that was the primarily, if not solely, negligent party. In Browne, the 6th observed that the defendants had made no showing that the employer "was negligent, let alone that its negligence was the sole, or even primary, cause of plaintiff's injuries."

In an incendiary footnote 2, the 6th even went toe-to-toe with what Mr. Poswall calls the "Supreme Chamber of Commerce" in Hooker, and the insufficiency of the defendant merely permitting an unsafe work condition as opposed to affirmatively contributing to it. The 6th humbly submitted that under "general tort principles" (and everyone knows how conservative Justices simply *deplore* any deviation from established precedent, but only if they agree with that precedent) "the question is not whether the defendant *commands a* certain result but whether he or she foreseeably *causes* it – in this context, whether he or she contributed to it by something more than a failure to intervene in the contractor's practices. [Italics in original.]"

While hardly a panacea for construction accident cases, Browne is a useful medication against the hyper-Hooker-ism that seems to excuse any negligence on a job site as long as the injured party has comp coverage, and re-focuses the Hooker line of cases as dealing with attempts to make the defendant owner / contractor vicariously liable for the employer's fault. From the plaintiff's side, the focus always has to be on the defendant's own fault and not on the employer's. Steve Chew and Jim Knezovich must be smiling right about now.

Browne also comments on the pesky and rightfully-never-understood "non-delegable duty" and has some comments on summary judgment evidentiary issues that Darkbloom commends to your attention. After all, this isn't spoon-feeding, people. Read Browe for yourself and exult in a real victory for the forces of avarice, I mean *truth and right.*

Now just watch it get de-published.

The 2005 CCTLA Officers and Board cordially invite you to the

3rd Annual Spring Reception & Silent Auction

Date: Thursday, May 26, 2005 • Time: 5:30 p.m. to 7:30 p.m.
Place: At the Home of Allan J. Owen & Linda K. Whitney • 2515 Capitol Avenue, Sacramento

This reception is free to honored guests, CCTLA members, and one guest per invitee.
Hosted beverages and hors d'oeuvres will be provided.

Reservations should be made no later than Friday, May 20, 2005, by contacting Debbie Keller at the CCTLA office at 916/451-2366.

We hope to see you there!
CRAIG C. SHEFFER, President, & the Officers and Board of CCTLA

Calendar of Events …

(Capital City Trial Lawyers Association's Upcoming Activities)

TUESDAY, MAY 10, 2005
Q&A Luncheon • Time: 12 Noon
Location: Vallejo's (1900 4th St.) • CCTLA Members Only

THURSDAY, MAY 19, 2005
CCTLA Problem Solving Clinic
Topic: "Economic Litigation: How to Try Your Small Case Cheap"
Speaker: *Paul J. Wagstaffe, Esq.*
Time: 5:30 to 7:00 p.m. • Sacto Courthouse, Dept. 2
CCTLA Members Only – $25

FRIDAY, MAY 20, 2005
CCTLA Luncheon
Topic: TBA
Speaker: *Daniel E. Wilcoxen, Esq.*
Time: 12 Noon • Firehouse Restaurant
CCTLA Members Only – $25

THURSDAY, MAY 26, 2005
3rd Annual Spring Reception & Silent Auction
Time: 5:30 to 7:30 p.m. • The Home of Allan J. Owen and Linda K. Whitney
CCTLA Members and Special Guests

TUESDAY, JUNE 14, 2005
Q&A Luncheon • Time: 12 Noon
Location: Vallejo's (1900 4th St.) • CCTLA Members Only

THURSDAY, JUNE 23, 2005
CCTLA Problem Solving Clinic
Topic: TBA
Speaker: *TBA*
Time: 5:30 to 7:00 p.m. • Sacto Courthouse, Dept. 2
CCTLA Members Only – $25

FRIDAY, JUNE 24, 2005
CCTLA Luncheon
Topic: TBA
Speaker: *TBA*
Time: 12 Noon • Firehouse Restaurant
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TUESDAY, JULY 12, 2005
Q&A Luncheon • Time: 12 Noon
Location: Vallejo's (1900 4th St.) • CCTLA Members Only

THURSDAY, JULY 28, 2005
CCTLA Problem Solving Clinic
Topic: TBA
Speaker: *TBA*
Time: 5:30 to 7:00 p.m. • Sacto Courthouse, Dept. 2
CCTLA Members Only – $25

FRIDAY, JULY 29, 2005
CCTLA Luncheon
Topic: TBA
Speaker: *TBA*
Time: 12 Noon • Firehouse Restaurant
CCTLA Members Only – $25

TUESDAY, AUGUST 9, 2005
Q&A Luncheon • Time: 12 Noon
Location: Vallejo's (1900 4th St.) • CCTLA Members Only

FALL 2005
CCTLA Seminar • **Topic: "Liens Update"**
Speaker: *TBD*
Time: 9:00 a.m. to 12:30 p.m.
Location: TBD

Contact Debbie Keller @ SCA @ 916/451-2366 for reservations or additional information with regard to any of the above seminars.

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Recent Public Appointments

By: Curtis R. Namba, CCTLA Public Appointments Chair

DECEMBER 3, 2004

Governor Arnold Schwarzenegger today announced the appointment of the Honorable Tani Gorre Cantil-Sakauye as justice of the Third District Court of Appeal.

Cantil-Sakauye, 45, of Sacramento, has served as judge of the Sacramento Superior Court since 1997 and for the Sacramento Municipal Court from 1990 to 1997. Her experience also includes service as deputy legislative secretary and deputy legal affairs secretary for Governor George Deukmejian.

Cantil-Sakauye earned a Juris Doctorate degree from the University of California, Davis School of Law and a Bachelor of Arts degree from the University of California, Davis. Cantil-Sakauye is an active member of the California legal community serving as a member of the Asian Bar Association, the California Bar Association and the Filipino Bar Association. She fills the vacancy created by the resignation of Justice Daniel M. Kolkey. The compensation for this position is $159,965. Cantil-Sakauye is a Republican.

FEBRUARY 16, 2005

Governor Arnold Schwarzenegger today announced the appointment of Laurie M. Earl and Alan G. Perkins to judgeships in the Sacramento County Superior Court.

Earl, 43, of Sacramento, has more than 15 years of criminal law experience in Sacramento County. She served as an assistant public defender from 1989 to 1995. Following that, she served nine years as a deputy district attorney. Recently, she served as an internal investigator for the State Office of Inspector General.

Earl earned her Juris Doctorate from Lincoln Law School and a Bachelor of Arts from the University of California, Berkeley. She is a member of the California District Attorneys' Association. She fills the vacancy created by the retirement of Judge James I. Morris. Earl is a Democrat.

Perkins, 56, of Davis, has served for the last 30 years in Sacramento as a business defense litigator and bankruptcy attorney for Wilke, Fleury, Hoffelt, Gould & Birney, LLP. He has substantial experience in alternative dispute resolution, serving as a court appointed and private arbitrator and mediator. He has also served as an adjunct professor at the University of California, Davis School of Law. He started his law career by serving as a law clerk for U.S. District Court Judge Marshall A. Neill in Washington state.

Perkins earned his Juris Doctorate from the University of California, Davis School of Law and a Bachelor of Arts from the University of California, Los Angeles. He is a member of the American Bar Association and the Federal Bar Association. He fills the vacancy created by the retirement of Judge Janice Hayes. Perkins is a Republican.

The compensation for these positions is $139,784.

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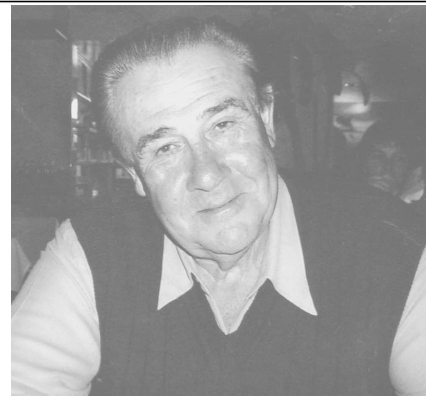

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Parnell Decided

What Contractual Nightmares May Be On The Horizon

By: Daniel E. Wilcoxen

As you know, we have all been awaiting the California Supreme Court's decision in the case of *Parnell v. Adventist Health System/West, et al.* This decision came down on April 4, 2005, basically upholding the decision of the lower appellate court found at (2003) 106 Cal.App. 4th 580 and 131 Cal.Rptr. 2d 148.

In the underlying appellate court decision, the appellate court found that there was no right on behalf of a hospital (pursuant to Civil Code section 3045.1) to collect back sums greater than those paid by the insurance carrier, stating:

> "We conclude ... a hospital that has received full payment for services under the terms of its contract with a medical insurance provider is not entitled to file a lien to recover the difference between that payment and the hospital's 'ususal and customary' charges for similar services."

The Supreme Court found that when a hospital agrees to accept amounts paid by a healthcare provider as "payment in full for healthcare services or benefits provided to beneficiaries ..." [1](p.2 of the decision), that they cannot bill for the difference between the amount that the healthcare plan paid to the hospital and the larger amount usually existing based on their usual and customary charges.

As we all know, most healthcare plans contract with hospitals for discounted rates for services rendered to their insureds. I think we have all encountered the situation where someone is uninsured and their charges are far in excess of those that are charged to insured patients. This is merely a benefit of having the ability to bargain with the hospital based on the fact that the healthcare plan will provide large numbers of patients to the hospital, based on contracts with the hospital wherein they get a discounted rate for having the hospital in question on their approved list of hospitals.

Parnell was one of these patients. The contract language was extremely important, because in the *Parnell* case the contract between the healthcare provider and the hospital indicated that the hospital would be paid in full based on the agreement for charges for services with the healthcare provider. Based on the Hospital Lien Act (HLA), found at Civil Code section 3045.1 through 3045.6, hospitals were seeking to recover the difference between that discounted rate (generally between 40-60% of their normal billing rate) from the tortfeasor wrongdoer and/or the patient (insurance carriers in settlements placing the hospital's name on the checks) pursuant to the terms of the HLA. We have all read *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298 and *Swanson. v. St. Johns* (2002) 97 Cal.App.4th 245. These two cases disagreed with each other. *Swanson* stated that the hospital could in fact bill for the difference between the amount paid by the health insurer (thereby allowing plaintiff's attorney to seek recovery of the full amount of the normal and customary billing regardless of what was paid to the hospital), and *Nishihama* which stated that the hospital could not seek difference, but could only be paid those amounts payable under the contract for services at the lower rate (40-60%).

At page 18 of the *Parnell* decision, the Supreme Court stated:

> "We therefore disapprove of *Swanson v. St. Johns Regional Medical Center,* supra, 97 Cal.App. 4th 245, to the extent it conflicts with our decision today and hold that a lien under the HLA requires the existence of an underlying **debt** owed by the patient to the hospital and that absent such a debt **no lien may attach.**" [Emphasis added.]

For all intent and purposes, both the *Swanson* case and the *Nishihama* case can be ignored and *Parnell* rules.

The rationale in the Supreme Court's decision in *Parnell* is based on the fact that since the hospital accepted the health insurance coverage as **payment in full,** Mr. Parnell does not owe a debt to the hospital for services. If he does not owe a debt for services to the hospital, he is not a debtor/creditor as is found in *City and County of San Francisco v. Sweet* (1995) 12 Cal.4th 105.

Since a lien arises as the result of a debt owed, there can be no lien either by Mr. Parnell or by the wrongdoer, since no debt is owed to the hospital. At page 19, the *Parnell* decision states specifically:

> "Because Parnell no longer owes a debt to the hospital for its services, we conclude that the hospital may not assert a lien under the HLA against Parnell's recovery from the third party tortfeasor."

Although the above may sound like good news, there is a down side. The down side includes the fact that the case of *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, was not touched upon in the *Parnell* decision. As you know, *Hanif* deals with the concept that you can only introduce the actual payments that were made, not the reasonable value of medical services as special damages to the jury. Although we know that it was argued in the briefing of the *Parnell* case to the Supreme Court, that you should be allowed to introduce all of this amount based on the concept that the wrongdoing party got away with paying a lesser bill than would normally be the case, this was not discussed, and therefore it appears that we are stuck with the concept of whatever the insurance company charged is all we can put before the jury, despite the fact that if the injured party had not been insured the billing would have been higher.

Further, the court stated that the legislature could, or should, fix the problem, or hospitals could alter their contracts with health plans to provide for the application of the HLA, wherein the court stated on pages 21-22 in part, as follows:

> "We also recognize that our ruling today may result in a significant hardship for many of these hospitals.. . .
>
> "As such, hospitals may look to the legislature for relief from these financial pressures, but not to this court ...
>
> **"If hospitals wish to preserve their right to recover the difference between the usual and**

Continued on page 11

PARNELL DECIDED …

Continued from page 10

> **customary charges and the negotiated rate through a lien under the HLA, they are free to contract for this right.** Our decision does not preclude hospitals from doing so." [Emphasis added.]

Further, at pages 13 through 17, and footnote 9, the court discusses the common fund doctrine, seemingly approving of same, but finds it inapplicable to the HLA.

Can we expect hospitals to create some sort of contract that says your discounted rate is 40-60%, however, in the event a third party is responsible for the injuries to your insured, we reserve the right under the Hospital Lien Act to proceed against the wrongdoing party and are allowed to do so pursuant to this contract?

(Footnotes)

[1]All page numbers cited in *Parnell* are not those that will be assigned in the official reports, but are cited from the computer online printed version.

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CCTLA New Web Addresses

NEW CCTLA List Serve Address:
cctla@litsinfostations.net

NEW CCTLA Website Address:
www.cctla.com

NEW E-Mail Address for CCTLA (Debbie Keller):
debbie @cctla.com

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