Summer 2008

The LITIGATOR

VOLUME VII OFFICIAL PUBLICATION OF THE CAPITOL CITY TRIAL LAWYERS ASSOCIATION ISSUE 2

Inside This Issue

The key to positive change lies in dignity and respect for all

By: Jill P. Telfer, CCTLA President

We have witnessed landmark advancement towards equality over the last several months. Progress can be slow, but with courage, perseverance and faith, positive change does occur.

This country has its first African American presidential candidate, however he is the only sitting African-American U.S. senator. The California Supreme Court has ruled all Californians are guaranteed the constitutional right to marry regardless of sexual orientation; however there is no federal law that protects those who are lesbian, gay, bisexual or transgender ("LGBT") from discrimination or harassment.

The California Supreme Court was the first to outlaw the ban on interracial marriages 60 years ago. In this day and age it is inconceivable that such a ban ever existed. I look forward to the day when we will be able to say the same about the lack of protection and equality for the LGBT population in other states and at the federal level.

I had the honor of representing a high school student who had been the victim of assaults and sexual harassment because of his sexual orientation. Although the school district had an obligation to provide a safe school for all students, it showed indifference for his safety and the safety of other gay youth. I learned how many gay students spend an inordinate amount of energy plotting how to get to classes safely, avoiding bathrooms and certain hallways where they have been targeted and are exposed to potential violence. A student's orientation and gender expression are two pieces of the mosaic of their identity. They should be encouraged to learn and grow intellectually and emotionally without being asked to deny an essential component of his or her identity.

The key to positive change lies in the recognition that all people should be entitled to the same respect and dignity. In our own community, reaching out to those who may look or live differently that ourselves expands our own understanding of the world in which we live, breaks down barriers and makes us stronger. Such outreach can be done professionally, with other lawyers (even defense attorneys) and on a personal level in our daily lives.

On May 5 CCTLA co-sponsored the Women and Minority Caucus Reception at Lucca's Restaurant and invited plaintiff attorneys from throughout the state to attend and share views and ideas toward diversifying membership in trial lawyer organiza-

Continued on page 7

Allan's CORNER

By: Allan J. Owen

New cases that affect your practice. Please remember that, as always, these cases are culled from the Daily Journal and the cites (where I remembered them) are not official. Check to be sure the case was published and not modified or decertified before citing it.

Assumption of the Risk. In Blue Tooth v. Santa Barbara Biplanes, 2008 DJDAR 532, plaintiffs went on an aerial sightseeing tour of Santa Barbara. Plane lost power and made an emergency landing and plaintiffs were injured. Thirty minutes prior to boarding the plane, they had signed a release and waiver of liability. They filed suit alleging simple negligence and breach of implied warranty stating that the defendant was a common carrier. Trial Court granted summary judgment based on the release. Appellate Court notes a common carrier may by special contract limit its liability for simple but not gross negligence and that the release was a special contract. However, plaintiffs failed to allege a violation of law or regulation (violation of Federal Aviation regulations) or gross negligence and therefore judgment affirmed.

Assumption of the Risk. In McGary v. Sacks, plaintiff was a spectator at a professional skateboard exhibition at the end of which one of the performers threw a skateboard deck into the crowd. As the "hoard of eager spectators vying for the prize" fell to the ground, plaintiff suffered injuries. He sued the skateboard store where the performance took place and the skateboard manufacturer. Summary judgment was granted and the appellate court concurred finding that primary assumption of the risk bars the suit. Moral – buy your own skateboard!

Federal Preemption. In Blanco v. Baxter Healthcare Corporation, trial court granted defendant's motion for summary judgment in a wrongful death action based on a defective mitral heart valve. The court held that the Federal Medical Devices Amendments (21 USC 360(k) (a)) preempted any state common law cause of action. Court granted summary judgment and appellate court affirms. Bad news - if a product is approved under the Federal Medical Devices Act, you're out of luck on a state court products action.

Assumption of the Risk. In Cohen v. Five Brook Stable, 2008 DJDAR 2345, plaintiff alleged that defendant's employee on a trail ride suddenly broke into a gallop and when the horses followed, she fell off and hurt herself. The trial court granted summary judgment on an express assumption of the risk and did not reach implied assumption of the risk. Appellate Court reversed finding that the release itself discussed only risks inherent in horseback riding and did not specifically release the defendants from their own negligence in clear, unambiguous and explicit language. Also, there is a triable issue of fact on implied assumption or secondary assumption of the risk since plaintiff alleged that the defendant's employee suddenly broke his horse into a gallop which substantially increased the risks of the sport of trail riding.

Res Judicata - Wrongful Death Claims. In Boeken v. Phillip Morris, plaintiff's decedent received a $55 million judgment in his tobacco litigation case before his death. Plaintiff had filed a separate loss of consortium action that she dismissed without prejudice. After husband died, plaintiff widow filed a wrongful death case. Trial court sustained demurrer without leave to amend based on res judicata and the appellate court affirms.

Proposition 51. In Bayer-Bel v. Litovsky, one defendant was an unlicensed driver and the other two negligently entrusted the car. Jury found

Continued on page 9

CAOC urging passage of four bills

These bills are the CAOC-sponsored bills for 2008:

• AB 2947 by Assembly member Mike Eng (D-Monterey Park) would prohibit a long-term care facility, as defined, that provided care to an elder or dependent adult from requiring, as a condition of admission to, or of continued care at, the facility that an elder or dependent adult, or his or her representative waive any right afforded under the act, including the right to file a complaint with the State Department of Public Health, or a law enforcement agency, or to pursue a civil action.

• AB 2619 by Assembly Member Charles Calderon (D-Montebello) is a spot bill related to civil discovery.

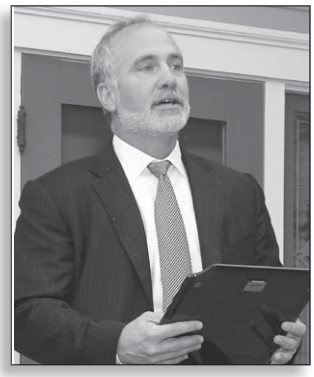
• SB 1630 by Senator Ellen Corbett (D-San Leandro) would provide that an action may be filed in, or transferred to, an appropriate alternative venue when, due to limited resources, the court in any county has a significant backlog of civil cases that has led to the delay or denial of the right to trial by jury. The bill would require the Judicial Council to establish standards for the implementation of these changes by court rule.

• AB 926 by Assembly Member Noreen Evans (D-Santa Rosa) would require that statement to provide

Continued on page 6

MORTON L. FRIEDMAN AWARD

Roger Dreyer recognized for his passion, devotion to work and community



Capitol City Trial Lawyers Association presented Roger A. Dreyer with the Morton L. Friedman Award at a May 22 ceremony attended by judges from the Sacramento County Superior Court and the Third DCA, along with many local attorneys from the Plaintiff's Bar.

Each year's recipient is chosen by the CCTLA board from trial lawyers nominated by the membership. The award is inscribed as follows: "In recognition of your heart, soul, and passion as a trial lawyer in service to the community." This sentiment perfectly describes the 2008 Award recipient.

Roger was selected for the Friedman Award in fitting recognition of the many diverse and inspirational contributions he has made to Sacramento's legal community during the course of a career that started more than 27 years ago in the Sacramento County District Attorney's office.

For the last 20 years, he and his partners—Robert Buccola, Joseph Babich and William Callaham—have built one of the state's largest, most successful plaintiff's personal injury law firms. Along the way, Rogerhas devoted as much energy to reaching out to help this community as he has to the practice of law.

That he is at the top of his profession is no secret. Roger, a long-time member of ABOTA, received the first Trial Lawyer of the Year Award from the Sacramento Valley Chapter of American Board of Trial Advocates in 2000, is the only two-time recipient of the CCTLA Advocate of the Year (1993 and 2001), is a past "Distinguished Lawyer Award" recipient from the Sacramento County Bar Association and was selected as California's Trial Lawyer of the Year in 2004.

What is less well known is his passionate and ongoing devotion to this community. Since 1998, he has served as a former chair of the board and as a board member for the Child Abuse Prevention Center of Sacramento. In 2002, the Sacramento Metro Chamber of Commerce recognized Roger as the Non-Profit Resource Center's Outstanding Board Leader. He and his wife, attorney Carol Wieckowski, are the "go to" people for a host of different charities. Between them they sponsor, support and contribute to dozens of "in need" community organizations. On top of all this, he has managed and coached various children's Little League and soccer teams for the past 12 years, including those of his four children.

As Roger noted in his acceptance speech, while he finds satisfaction as a trial lawyer, representing injured people, the true road to reward for every person who wants to help others is by reaching out to the community in every way possible.

Public Justice Files Two Lawsuits Over "CSI" Toys Containing Asbestos

By: Sarah Dean, Public Justice Correspondent

Alarmed that CBS Broadcasting, Inc. and Planet Toys, Inc. have refused to take appropriate action, Public Justice has filed state and federal lawsuits to force the companies to protect children and their families from further exposure to asbestos contained in toy science kits made by Planet Toys and licensed by CBS.

The toy kits are based on the popular "CSI" television drama series, and tests of the kits' fingerprinting powder found tremolite, one of the most deadly forms of asbestos.

Public Justice's federal complaint, filed in U.S. District Court in Los Angeles, alleges that CBS and Planet Toys were negligent in their quality-control measures and that they made consumers believe the toys were appropriate playthings for children when, in fact, the toys contained a hazardous and potentially lethal carcinogen.

Because the toys were sold nationwide, the lawsuit is brought on behalf of a nationwide class of consumers who purchased or acquired the toys.

"This should be a no-brainer, said Victoria Ni, the lead Public Justice attorney in both cases. "The facts are that even small quantities of asbestos are hazardous when inhaled, that the fingerprinting powder has been found to contain asbestos, and that this powder has been marketed and sold to thousands of children who are told to spread it around and blow off the excess. It's a shame that we've had to resort to litigation to force these companies to do what they should have done in the first place to protect the American public."

Among other things, the class action asks that the defendants provide refunds to consumers, pay for asbestos testing of toys that have been opened, and pay for appropriate medical treatment for consumers who have been exposed to asbestos.

A second suit was filed in California state court, citing violations of a state law known as "Proposition 65," which requires businesses to give a "clear and reasonable warning" to California consumers if a product contains a chemical known to cause cancer or birth defects, such as asbestos.

The Prop. 65 complaint was filed, in part, on behalf of the California-based Asbestos Disease Awareness Organization (ADAO), which first publicly reported the presence of asbestos in the CSI: Crime Scene Investigation™ Fingerprint Examination Kit last November. The discovery was the result of independent laboratory tests on an array of consumer goods and toys, including the popular fingerprinting kit. ADAO commissioned the study.

Further investigation found that the fingerprinting powder containing asbestos was also in other "CSI" toy kits: the CSI: Crime Scene Investigation™ Field Kit and the CSI: Crime Scene Investigation™ Forensic Lab Kit.

"Our pleas for the companies to do the right thing have fallen on deaf ears," said Linda Reinstein, ADAO executive director. "It is unacceptable and unnecessary to have asbestos in toys, and especially in powder form, its most dangerous state. Most Americans falsely believe asbestos has been banned, but our recent product testing results prove asbestos remains a threat to public health." Reinstein's husband died from mesothelioma, a form of cancer that is almost always caused by asbestos exposure.

Both lawsuits name CBS, Planet Toys and major retailers of the toy, some of whom continue to sell the kits. The Prop. 65 lawsuit seeks civil penalties for violations of the law, in addition to injunctive relief.

The dangers of asbestos exposure have been well documented by scientists, doctors, and environmentalists since the 1970s. There is no known safe level of exposure. If inhaled, microscopic asbestos particles can penetrate lung tissue and stay there permanently, causing serious, even deadly, respiratory illnesses or cancer than might not manifest until decades after initial exposure.

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To learn more about Public Justice or to join the Public Justice Foundation, go to www.publicjustice.net.

Public Justice Wins Fair Play for Indiana Female Athlete

Heather Bauduin, a 16-year-old Wabash, ID., high school junior, was told she would not be allowed to play baseball for her school because she was a girl. But, in a victory for gender equity in athletics secured by Public Justice and Philadelphia's Hangley Aronchick Segal & Pudlin (HASP), Heather will get to go out for the Wabash High School baseball team after all.

On Feb. 28, after a sex-discrimination lawsuit was threatened by Public Justice and HASP, a review committee of the Indiana High School Athletic Association (IHSAA) reversed its commissioner's decision and granted Heather's request for a waiver of a statewide IHSAA rule that prohibits girls from participating in high school baseball if the school offers softball.

Heather, an accomplished baseball player who recently moved to Indiana from California, has spent nearly half of her life playing baseball. When she was nine years old, she signed up for her local little league team and fell in love with the game.

She excelled as she moved up the little league ranks, and was the first girl to be named to her town's All-Star teams in both the 9- to 12-year-old age bracket and the 12- to 14-year-old age bracket.

Under the IHSAA rule, Heather was denied even the right to try out for Wabash High's baseball team solely because of her gender. In a Feb. 4 demand letter, Public Justice charged that the IHSAA's rule violated both the Constitution's Equal Protection Clause and Title IX, a federal law designed to promote gender equity in school sports.

"I'm happy that I have been given the chance to play the sport I love," said Heather, who catches, plays shortstop, and has an arsenal of three different baseball pitches. "I'm a baseball player, not a softball player."

"We hope that this case prompts the IHSAA to revise its rules so that no other Indiana girls are excluded from sports simply because they are girls," McKee said. "The rule barring girls from playing baseball is unconstitutional."

In addition to McKee, Heather was represented by Bonnie Hoffman and Naomi Mendelsohn of of HASP; Cynthia Rockwell of Rockwell & Jansen, LLC in Fort Wayne, ID; Victoria Ni and Leslie Brueckner, Staff Attorneys of Public Justice; and Amy Radon, Goldberg, Waters & Kraus Fellow at Public Justice.

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To read the review committee's ruling, visit the Public Justice website at www.publicjustice.net.

Extending the Blame Game:
That empty chair next to you belongs to your doctor

By: Steve Davids

For years, the vicarious liability of a tortfeasor for medical malpractice inflicted on the tortfeasor's victim was unquestioned in California. This public policy served a salutary purpose: shifting the risk of malpractice to the defendant who brought about the need for care in the first place. I see it as akin to the concept of danger inviting rescue: injury invites care, and sometimes that care is sub-standard. The tortfeasor was always welcome to pursue an indemnity cross-complaint after settlement or judgment.

Henry v. Superior Court (2008) 160 Cal.App.4th 440 ignored the policy imperative in vicarious liability for malpractice, and has now dragged this long-held doctrine into the grubby world of Prop. 51: the "universe of tortfeasors" must be assessed and compared on the special verdict form, and that includes the plaintiff's treating health care providers to the extent they committed malpractice. (See, for example, Roslan v. Permea (1993) 17 Cal. App. 4th 110, holding that even defendants who had received a good faith settlement determination were to be placed on the verdict form for purposes of apportionment fault, because they are a part of the "universe" of fault.).

Henry blithely cast aside the previous public policy on strictly temporal grounds: the cases holding tortfeasors vicariously liable for malpractice were all decided before Prop. 51. The Supreme Court has now confirmed Jonathan Safran Foer's observation that sometimes unconditionally bad things happen to unconditionally good people: it both denied review and denied depublication of Henry. As the convicted criminal client said to the attorney after the verdict, "what do we do know?" "I don't know about you, counsel riposted, "but I'm going to lunch." I can offer the following for a lunch break.

Burden of proof. Henry neither criticized, distinguished, nor even commented on Wilson v. Ritto (2003) 105 Cal. App. 4th 361, which held that a defendant (in that case, a podiatrist sued for malpractice) can only ask the jury to apportion fault to non-party "others" if the defendant sustains its burden of proof that the non-party is a true tortfeasor. What Wilson therefore means is that the defendant must now secure testimony that the plaintiff's treating physicians fell below the standard of care. It is not enough to just argue or suggest that the treating physicians committed malpractice. I would argue that Wilson requires a defendant, in a Henry situation, to establish not only malpractice on the part of the treating physician, but also causation and degree of harm.

Enhanced Injury. Footnote 9 of Henry makes it very clear that the treating physician, if found negligent, is only responsible for any new or enhanced injury. This will be particularly tricky for the defense when, in a spine surgery case, the plaintiff testifies that they received some benefit from surgery, but the defense doctor (as it now *de rigueur*) testifies that the surgery never should have been performed.

Will Henry Defenses be Common? Many of my colleagues feel that they will be. I prefer to think that intelligent, insightful, strategically-oriented defense counsel (will flattery get me anywhere?) are more likely to recognize that attacking the treating physician can be a mixed bag, and that "playing nice" with the plaintiff's treaters can be a better way of coaxing admissions on issues like causation or future damages. More important, perhaps, is that it costs real dollars to work up a medical malpractice case. Insurers are always cognizant of the costs of litigation: will they be willing to dramatically increase the costs of litigation to go after doctors? I presume they are savvy enough to look at jury verdicts and see how difficult it is, in today's climate, to win a medical malpractice case. They will have to deal with CACI 505 and 506 which essentially state that if the doctor makes what turns out to be the wrong decision, there is no malpractice as long as the treatment pursued was an accepted form of treatment and the doctor acted in good faith. On the other hand, defendants may also see the benefit in driving a large strategic wedge between plaintiffs and their physicians.

Discovering the Henry defense. We need to disabuse ourselves of the notion that defendants will be routinely filing indemnity cross-complaints against treat-

Continued on page 8

Q & A Luncheons: Second Tuesdays!

On May 13, all attending provided informed opinions on the practical value of unusual cases including a two- or seven-foot fall from a [common carrier] carnival ride, discussed the handling of an inadvertent disclosure of psychiatric records [HIPPA], exchanged Hanif briefs and opinions and explored some parameters of unethical hourly billing…..and enjooyed a great Mexican food lunch.

Q and A Lunheons are held the second Tuesday of every month at noon at Vallejo's, on the corner of 4th and S streets. No MCLE. No Reservations. No-host food. Separate checks. And willing, personal and informed assistance shared by everyone. IF you are a CCTLA member, bring a problem or issue and get some ideas from your colleagues. It is very low key, fun and a good resource on behalf of your clients.

Reminder: You won't remember unless you write it down on your calendar right now!

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CAOC

Continued from page 3

that the party will comply with the particular demand for inspection by the date set for inspection pursuant to a specified provision.

The Civil Discovery Act permits the party demanding inspection and the responding party to agree to extend the time for service of a response to a set of inspection demands, or to particular items or categories of items in a set, to a date beyond that provided in a specified provision. This bill would permit the parties to agree to extend the date for inspection beyond those provided in specified provisions. The Civil Discovery Act requires any documents produced in response to an inspection demand to be produced as they are kept in the usual course of business, or be organized and labeled to correspond with the categories in the demand.

This bill would clarify that those documents are to be produced on the date described above or as agreed to by the parties pursuant to an extension.

President's Message

Continued from page 1

tions. Let's face it, although we want to think we are diversified, we have a long way to go. Much of the problem may lie with the fact that our work as plaintiff attorneys is extremely risky and therefore may only attract a certain type of person. That may only be part of the problem, but dialogue and candid self-analysis is key to making progress. There is much we can do to bridge the gap. I welcome your ideas and viewpoint.

CCTLA seeks inclusion in membership and Board of Director representation. Surprisingly, there have only been three female CCTLA presidents and two female CCTLA Advocate of the Year recipients since CCTLA was founded in the mid 1950s. The first woman president met with resistance in taking office. I do not have accurate records on minority or LGBT representation, but I am confident we can increase such representation by recognizing the value such members and role models have to offer.

Increasing our diversity is a main goal of CCTLA. Please appraise me of other goals you think we should establish.

Reaching Across the Bar

In addition to diversity, engaging the defense and other bar associations to work with in advancing the goals of the civil justice system is a noteworthy ambition. This does not mean we have to agree with the conduct of defense counsel's clients. But with civility and professionalism, we can work together toward the common goal of improving the image of attorneys and lawsuits. CCTLA has undertaken to sponsor a unique, annual event intended to generate a feeling of camaraderie, good fellowship and celebration in the practice of law through honoring a local Judge who has left an indelible mark on the legal community.

In organizing the event, CCTLA is working with representatives from both sides of the Bar and is reaching out to virtually every bar association and group in the Greater Sacramento area. Our goal is to involve lawyers from the broadest spectrum of practice, from personal injury to every aspect of civil litigation.

The event would feature a reception, dinner and special celebration that includes live entertainment, music and presentations. The goal would be to create a memorable, exciting and entertaining event this first year so that participants would look forward to attending future celebrations. We will pass more information along to you and to the Sacramento legal community as it becomes available.

Past and Future Educational Programs

As we work toward diversity, civility, and professionalism, we must continue staying educated. The CCTLA/CAOC annual Tahoe Educational Seminar was a success with 142 attendees from around the state. The program was of high caliber, with a variety of topics. I especially found insightful Rex Paris' presentation on Jury Bias. The TLA Regional Conference will take place June 13-15 in Napa with an all-day David Ball Seminar, Dissecting the Auto Case with an exceptional panel of past presidents Margaret Doyle, Allan Owen and board member Bob Bale, and an insightful Employment Law program for the PI practitioner. The Friday luncheons, Problem-Solving and Q&A Luncheon also continue to offer quality information. Please let us know any topics you believe should be covered in upcoming programs.

In closing, I would like to give a special thanks to the CCTLA board with its 100% participation in making the 5th annual Spring Fling a success. I am extremely proud of the event and what it represents. In addition, I am pleased to introduce Jennifer Hightower and Stephen Davids as new CCTLA board members. Each has been extremely active in the list serve and education programs and our positive additions to our leadership. Welcome.

RECENT VERDICTS

Jury Verdict of Employment Retaliation vs the California Department of Corrections

On March 25, CCTLA president, Jill Telfer secured a $1.3- million judgment against the California Department of Corrections comprising a unanimous verdict in the amount of $800,000 (exclusively emotional distress damages) and attorney fees and costs in the amount of $502,522.

Plaintiff Jane Mootz was a former correctional officer who had worked for the Department of Corrections for approximately 19 years. In the mid-1990s, she prevailed in a retaliation and harassment action in federal court based on actions taken by her immediate supervisor while working at Mule Creek State Prison. After that verdict, she continued to be harassed, and as a result, the warden at Mule Creek State Prison transferred her to the northern California camp system. While working at Trinity Conservation Camp, Plaintiff was subjected to retaliatory conduct, including unwarranted investigations and discipline, defamatory comments placed in her personnel file, and set up to fail. Ultimately, Jane Mootz secured a medical retirement.

Plaintiff alleged six theories including sexual orientation discrimination, disability discrimination, and the claims for which she was ultimately successful; retaliation and failure to prevent retaliation.

Experts: Charles Mahla, Ph.D. (economist), Paul Schwartz, M.D and Richard A. Martinez (treating physicans)
Technology: PowerPoint and Sanction
Highest offer from Defendants: $0
Plaintiff's 998 Offer: $495,000
Defense Counsel: Deputy Attorney General Raymond Hamilton, Courtney Lui, and Bonnie Chen
Judge: The Honorable Judy Holzer Hersher

The Blame Game

Continued from page 5

ing physicians. If they do, then motions to sever may well be in order, since standards of care and the collateral source are both different in ordinary negligence cases versus medical malpractice cases. If they do not, then the question becomes when the plaintiff can expect to learn of the Henry defense. Judicious use of form interrogatories, and especially the 16-series, should be considered. CCP section 2030.070(b) allows supplemental interrogatories to be served twice before the initial trial setting and once after. Further, there is no rule limiting the number of sets of form interrogatories that can be served. If you are close to trial setting, a motion to strike an affirmative defense based on the fault of others may be granted if the defense has consistently refused to specifically commit to a Henry defense.

Expert Depositions and Henry. Under Kennemur v. State (1982) 133 Cal. App.3d 907, and other authorities, an expert's opinions must be revealed in *either* the expert disclosure or the deposition. If a Henry defense is not revealed until expert depositions, then the plaintiff is in the unenviable position of having to move to continue the trial and augment his / her expert witness disclosure to address the malpractice theories.

Protecting the Treater. If the defendant is arguing treating physician malpractice, then it may be prudent to advise both the physician and his / her insurer of this development. There is a chance that insurers may assist by providing defense counsel to the physician for the deposition. Creative arrangements may be possible between the plaintiff and the physician's insurer to jointly battle the malpractice claims, possibly including a sharing of expenses in defending the treater.

One of the public policies that the Henry opinion ignored was the ostensible medical insurance crisis that prompted MICRA. This decision encourages additional claims—either by defendants in indemnity cross-complaints, or by plaintiffs—against physicians.

The Defense Medical Expert. Hired guns are hired guns, and the cynics amongst us will say that defense physicians will testify as instructed to support a Henry defense. However, the word "malpractice" is a bug-a-boo for many doctors, litigation-savvy or not. At the deposition of the defense physician, it now must be probed whether they are accusing any of the treating physicians of malpractice. Even those who routinely testify that surgeries never should have been formed will sometimes stop short of branding a surgical decision "malpractice."

Statute of Limitations. The fundamental question is, must the plaintiff preserve his / her rights to sue any or all of his treating physicians in the event they are later accused of malpractice? Absent a very clear malpractice case—operating on the wrong body part—it is difficult to envision a situation where the plaintiff would want to drag MICRA and his/her own physician into the lawsuit.

One of the many un-considered drawbacks of Henry is that it totally shifts the focus of any trial from the injured party to the injured party's physicians. The cost and length of trials only increase, playing further havoc with already-crowded court calendars. As a practical matter, the plaintiff cannot, in every case, have all of the medical records evaluated by a medical-legal expert to rule out malpractice. However, if the defense eventually makes this claim, then it will often be too late (especially if the Henry defense is first sniffed out at the defense doctor's deposition) for the plaintiff to sue the allegedly-negligent doctor. In an attempted suit against his/her own treater, the plaintiff's claim of delayed discovery (in response to a statute of limitations defense) is not likely to be well-received if the defendant tortfeasor was able to discover it.

The prospect of plaintiffs being able to sue their lawyers for not investigating medical malpractice claims in routine personal injury cases again increases the amount and cost of litigation, and puts an additional burden on the insurance industry that is supposedly happy about the Henry decision. When courts fail to think through the consequences of their decisions, and instead blindly follow what they perceive to be the law, we have the opposite of the conservative nightmare: instead of being worried about judges who make the law instead of interpreting it, we have judges who are so blind to the implications of their interpretations that far greater societal ills result.

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I wish to express my thanks to my colleague Bob Bale and to the attendees at the May 30, 2008 lunch at the Firehouse for many of the concepts discussed in this article.

Continued from page 2

all three liable and apportioned fault but the trial court found that the driver was jointly and severally liable for the entire judgment including non-economic damages. Court of Appeal reversed. Of note is that the jury allocated fault 60 percent to plaintiff for failure to wear a seat belt and of the remaining 40 percent, 40 percent to the driver, 20 percent to the owner and 40 percent to the person who actually negligently entrusted the vehicle to the unlicensed driver. Trial court found this situation was akin to respondeat superior or vicarious liability and not comparative fault and therefore made all of them jointly and severally liable for the entire amount of the judgment. Appellate court reversed and applied Proposition 51 since there were separate negligent acts.

MICRA. In Canister v. Emergency Ambulance Service, the Second Appellate District holds that ambulance drivers are health care providers and negligent operation of an ambulance qualifies as professional negligence subjecting the suit to MICRA.

Proposition 51. In Henry v. Superior Court, 2008 DJDAR 2804, the Second District holds that Prop 51 does apply to a situation where a defendant claims the treating medical provider caused a portion of plaintiff's damage by aggravating the original injury. A petition for review has been filed in the Supreme Court, with CAOC and CMA as amicus on behalf of the plaintiff.

Premises Liability. In Padilla v. Rodas, 2008 DJDAR 3074, a 2-year old child drowned in the backyard pool of homeowners when the parents left him unattended. The parents sued based on negligent supervision and premises liability based on an allegedly defective gate. Trial court granted summary judgment holding they did not owe nor did they breach any duty of supervision and the parent could not establish the absence of a self-latching closing mechanism on the gate at one of the entrances to the pool area caused the accident since there was no evidence as to whether the child entered the pool area through that gate or through one of the other points of access to the pool. Affirmed on appeal. Apparently, you could get to the pool through two sliding glass doors in the living room and also from a door on the left side of the house and a door on the right side of the house as well as an iron gate that leads from the driveway between the side yard and the backyard.

Underinsured Motorist Coverage. In Wedemeyer v. Safeco, 2008 DJDAR 3596, the court holds that in order to exhaust the underlying policy, you only have to get the amount of money on the underlying automobile policy. Here, there was a non-auto policy covering the employer and that did not have to be exhausted. The proper way to do it would be to exhaust the underlying policy then go after underinsured motorist. Then, you could go after the non-auto insurance recognizing, however, that you would have to pay money back to the UIM carrier (they get either a credit or reimbursement and here, they'd get no credit because it's not an auto policy but would be entitled to be reimbursed).

Duty. In the case of Garcia v. Paramount Citrus Association, Inc., 2008 DJDAR 4219, the Fifth Appellate District holds there is no duty for an owner of a private road in an orchard who does not open that road for public use to place a stop sign at the intersection of the private road with the public roadway.

Respondeat Superior. In Flores v. Auto Zone West, Inc., 2008 DJDAR 4394, customer asked employee at Auto Zone about the price of a case of oil. Employee asked customer if he was too stupid to read the prices himself. Words were exchanged, employee hit customer with metal pipe. Trial court granted summary judgment to Auto Zone opining that the employee was not in the course and scope of his employment. Appellate court reverses with a good discussion of when an intentional assault can be within the course and scope of employment. It is sufficient if the injury results from a dispute arising out of the employment.

Product Liability - Sophisticated User Rule. In Johnson v. American Standards, Inc., 2008 DJDAR 4701, the California Supreme Court adopts the Sophisticated User Rule. This rule holds that a manufacturer is not liable for failure to warn when the plaintiff has or should have advanced knowledge of the product's inherent dangers because they are "sophisticated users." In this case, it was an HVAC repair person certified by EPA who claimed he didn't know that if he heated R22 refrigerant, it would create a gas that causes respiratory disease.

Medical Malpractice. In Prince v. Sutter Health, 2008 DJDAR 4859, the Third DCA holds that an unlicensed social worker registered with an appropriate agency and working towards licensure is a health care provider and thus any suit against them falls under the MICRA provisions.

Summary Judgment. In Garibay v. Hemmat, 2008 DJDAR 4626, defendants in a med-mal case moved for summary judgment. Their expert relied upon hospital and medical records he reviewed. These records were not admitted into evidence under the business records exception to the hearsay rule and were not attached to the doctor's declaration or the MSJ. Summary judgment motion was granted. Court of Appeal reverses finding that the records could have been properly authenticated by the doctor who performed the surgery or properly authenticated medical records could have been put before the trial court on the business records hearsay exception but, failing to do that, the records did not supply evidence to support the expert medical witness's opinion and therefore summary judgment should have been denied.

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Some of those who enjoyed Spring Fling included, above left: Robin Brewer, Kerry Kunz, Dan O'Donnell, Marc Norton and Kathleen Newman; above center: Jonathan Stein; and above right, from left: Nick Lowe, Roger Dreyer, the Honorable Darrel Lewis and Judge Robert Hight.

In the photo to the left: Blake Young and Dorothee´ Mull.

Above, from left: Michelle Jenni, Denisa Palilonis, Bob Buccola, Lori Sarracino, Madeline Doskach and Kellen Ray.

Joe Babich, Marcie Friedman, Mort Friedman and Roger Dreyer

Camille Rasmussen, Jill Telfer and Laressia Carr.

Jay Leone and Margaret Doyle

Spring Fling 2008

Spring Fling raises $15,000 for Sacramento Food Bank

Roger Dreyer received the Mort Friedman Humanitarian Award (see story, page 3) and $15,000 was raised for the Sacramento Food Bank the night of May 22 when CCTLA's 5th annual Spring Fling was held at the home of Allan Owen and Linda Whitney.

Approximately 120 were in attendance, and the night became even more memorable when Bob Bale serenading the crowd. The auction drew tremendous participation and generosity from the CCTLA board, membership and the judiciary, and the $15,000 raised for the food bank Services topped last year's amount by $4,000.

For every dollar raised the food bank is able to provide $10 worth of services. It's variety of programs bring food, clothing, child services, mother-baby care program and other resources to those in Sacramento who need assistance.

The food bank's Executive Director Blake F. Young, Senior Bridge Builders Coordinator Dorothee' Mull and Volunteer Manager Kelly Siefkin attended the auction. For more information on the Sacramento Food Bank and Family Services, go to www.sfbs.org.

Special thanks go to Allan Owen, Margaret Doyle, Linda Whitney, Jay Leone Laressia Carr, Dorothee' Mull, Robin Brewer, Kerrie Webb, Debbie Keller, Camille Rasmussen and Travis Black, who were responsible for making the event a huge success. These individuals dedicated endless time and effort. Each of them should be commended for their hard work.

CCTLA raises $15,000 for Sacramento Food Bank

Pages 10–11

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

JUNE

Tuesday, June 10
Q&A Luncheon—noon
Vallejo's (1900 4th Street)
CCTLA Members Only

Thursday, June 26
CCTLA Problem Solving Clinic
Topic: TBA, Speaker: TBA
Location: Sacramento Courthouse, Dept 5
Time: 5:30 to 7 p.m.
CCTLA Members $25

Friday, June 27
CCTLA Luncheon
Topic: TBA, Speaker: TBA
Location: Firehouse Restaurant
Time: noon
CCTLA Members $25

Friday/Saturday/Sunday, June 13-15
4th Annual California Regional TLA Conference
Topics include: David Ball on Damages,
Tips from the Masters, Dissecting the Auto Case,
Employment and Liens
Location: Meritage Resort.

JULY

Tuesday, July 8
Q&A Luncheon—noon
Vallejo's (1900 4th Street)
CCTLA Members Only

Thursday, July 24
CCTLA Problem Solving Clinic
Topic: TBA, Speaker: TBA
Location: Sacramento Courthouse, Dept 5
Time: 5:30 to 7 p.m.
CCTLA Members $25

Friday, July 25
CCTLA Luncheon
Topic: TBA, Speaker: TBA
Location: Firehouse Restaurant
Time: noon
CCTLA Members $25

AUGUST

Tuesday, August 12
Q&A Luncheon—noon
Vallejo's (1900 4th Street)
CCTLA Members Only

Thursday, August 28
CCTLA Problem Solving Clinic
Topic: TBA, Speaker: TBA
Location: Sacramento Courthouse, Dept 5
Time: 5:30 to 7 p.m.
CCTLA Members $25

Friday, August 29
CCTLA Luncheon
Topic: TBA, Speaker: TBA
Location: Firehouse Restaurant
Time: noon
CCTLA Members $25

CCTLA COMPREHENSIVE MENTORING PROGRAM

The CCTLA Board has developed a program to assist new attorneys with their cases. If you would like to receive more information regarding this program or if you have a question with regard to one of your cases, please contact:

Jack Vetter: jvetter@vetterlawoffice.com Chris Whelan: chwdefamation@aol.com
Cliff Carter: cliff@ccalawcorp.com

Contact Debbie Keller @ CCTLA at (916) 451-2366 for reservations or additional information with regard to any of these events.

CCTLA Calendar of Events