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The Five O'Clock Whistle Just Blew

By: Michael W. Jones
President, CCTLA

Did you hear it? The five o'clock whistle just blew, and we can all go home now. Fortunately, there are many of my colleagues and friends who are deaf to the whistle. For without them, we would be just another organization of folks who don't participate in the support, services, guidance and products offered to our members. I thank them for *not* hearing the whistle.

Everyone who serves on your CCTLA board and those members who commit regularly to our efforts do so with pride, tenacity and long hours of time spent after the whistle blows. I need not spend time mentioning the names of those repeatedly seen on these pages, at our events and on our list serve. I do, however, take the time to thank each and every one of them. Thank you for *not* hearing the whistle.

I encourage our members to appreciate and support their efforts and the efforts of our board; to take advantage of the various opportunities CCTLA provides for you. Whether you attend one of the monthly luncheons or Q & A lunch, a seminar, a problem-solving clinic, a political fundraiser, Lobby Day, provide a list serve article or response, write an article for The Litigator, or support an "Off-Topic" event, spread the word of "Hot Coffee," or engage in the countless other services and events, thank you for *not* hearing the whistle.

If you have not heard the whistle, then what you have heard is "these are incredibly difficult economic times" for us as individuals, citizens, and as practitioners in the field of law. Soon our courts may change the whistle from five o'clock to an earlier time of the day. While we have many flagrant problems in our system of justice, need I say this judicial budget crisis is currently our biggest problem and challenge in the legal profession? Those involved in the daily budget battle, those seeking and assisting in proposed solutions to this crisis, thank you for *not* hearing the whistle.

Many, and indeed most folks, consider Clarence Darrow the greatest trial lawyer to ever live. He once said, "The only real lawyers are trial lawyers. Trial lawyers try cases to juries." He did not become the greatest by working nine to five. He did *not* hear the whistle. Indeed, as a member of the Illinois Legislature, he addressed fee caps over 100 years ago. There will never be another Darrow. But we have trial lawyers who, just like him, know not the five o'clock whistle.

I am proud to be president of this organization. Become involved, become committed, stay involved and stay committed. And, above all, thank you for *not* hearing the whistle.

Allan's CORNER

By: Allan J. Owen

Here are some recent cases I found while reading 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.

Intervention by Insurer. In the case of Western Heritage Insurance Company v. Superior Court (Parks), 2011 DJDAR 15131, the court holds that where an insured is non-cooperative and default is entered against the insured, an insurance carrier who may be liable for the judgment may intervene in the third-party case. This intervention allows them to dispute not only damages but also liability. This could help us in those cases where an insured under the policy refuses to cooperate. If the default of the employee/permissive user is entered, the insurer has the right (and we can argue, the duty) to intervene if they want to dispute liability or damages. They can't just sit back, let you take judgment and then try to avoid paying based on the lack of cooperation.

998 Costs. In Adams v. Ford Motor Company, 2011 DJDAR 15491, a few days before trial in an asbestos case, Ford offered $10,000 to settle. Plaintiff was seeking millions in damages and had hundreds of thousands in expert fees. The case went to trial, defense verdict for Ford, judge ordered Plaintiff to pay $187,000 in expert fees. The court held that the offers were reasonable given the substantial likelihood of losing and the substantial value of the waiver of costs and also held that expert fees of a defendant per 998 include both the pre-offer and post-offer fees.

Treating Doctor Testimony. In Dozier v. Shapiro, 2011 DJDAR 15497, Plaintiff alleged that Defendant was negligent in surgical treatment of his knee. During normal discovery, defendants deposed a subsequent treating physician. That treating physician stated that he had not formed an opinion regarding whether or not the first doctor met the standard of care. Plaintiff's counsel objected to the standard of care question because he had not been disclosed as an expert. At one point, Plaintiff's counsel

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916 / 451-2366 • Fax 916 / 451-2206
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SOCIAL MEDIA EVIDENCE: LEGAL RESOURCES

By: Doug deVries, Mediator, deVries Dispute Resolution

Attorneys now routinely "Google" the names of plaintiffs and defendants, as well as known officers, directors, employees and agents of defendants, and even spouses and other family members, "mining" for publicly available background information, and sometimes even arguably private communications.

Recent mediation experience has impressed upon me the significant impact that social media evidence can have on a case if it is relevant, legally acquired, capable of authentication and admissible.

Social-media evidence may come into play in the evaluation and mediation of any case for the simple reason that it is becoming a routine aspect of evidence gathering by all sides in litigation. People are sharing personal and sensitive business information through an increasing number of social media platforms, including Facebook, Twitter, My Space, Linked-In and, perhaps most recently, Words With Friends "Messaging." It is reported that Facebook alone has 600 million subscribers, and Twitter, 190 million. In addition, there has been a proliferation of personal and business blogs.

Attorneys now routinely "Google" the names of plaintiffs and defendants, as well as known officers, directors, employees and agents of defendants, and even spouses and other family members, "mining" for publicly available background information, and sometimes even arguably private communications. Discovery increasingly includes more searching attempts to seek access to social media-based evidence directly from an opposing party and by third-party subpoenas. Court orders to either compel or prevent disclosure are sought by parties, as well as by third parties, which turn on disputes about relevance, over breadth and privacy, among other things.

Social media and other Internet acquisitions are playing a part in case preparation on both sides of the bar. As social media started to impact litigation, it seemed that discussions of the topic focused primarily on issues related to plaintiff impeachment and juror misconduct.

However, the potential impact on defendants, including individuals, businesses and governmental entities, has become apparent. For instance, businesses use Twitter and Facebook for marketing, and employees from the bottom to the top of businesses generate social media postings (even Rupert Murdoch, to the apparent dismay of his spouse and colleagues, has "tweeted!").

The key issues addressed by statutes, rules and case law include retention and dissemination, discovery, authentication, admissibility, impeachment, juror misconduct and attorney ethical considerations (see legal resource list, page 4). As a review of the developing law in this area will indicate, a number of potential obstacles can stand in the way of acquiring social media-based evidence.

In addition, the mere acquisition of social media-based evidence does not assure that it can be introduced into evidence or otherwise used at trial for intended effect, such as for impeachment of a party or witness.

At this writing, there have been only a relative smattering of published appellate opinions on the subject, but there will be an inevitable outpouring of them in the coming years all across the country and on a wide range of issues. For instance, the U.S. Supreme Court just let stand an appellate court's rejection of school district attempts to discipline students based on "social media speech." (Kowalski v. Berkeley County Schools -No. 11-461). On January 23, 2012, the court ruled that police must obtain a search warrant before using a vehicle's GPS to track a suspected criminal (U.S. v. Jones -No. 10-1259). This case involved a vehicle GPS, but presumably its rationale would also apply to GPS devices in cell phones and computers. And to the dismay of employers, the NLRB recently began applying Section 7 of the National Labor Relations Act of 1935 to worker complaints about being disciplined or fired for disparaging their employer on social networking sites such as Facebook and Twitter (Labor Law

Applies to Social Media, *Daily Recorder*, Jan. 3, 2012).

Legal resources addressing social media evidence, including statutes, rules and case law, include:

PRESERVATION AND DISSEMINATION OF ELECTRONICALLY STORED INFO:

The Stored Communications Act (18 U.S.C. §2701-2712)

Fed. Rules Civ. Proc., Rule 37(e) (safe harbor; lost information)

Cal. Code Civ. Proc. §§2031.060(i)(1) and 2031.300(d)(1) (safe harbor; lost information)

Gipetti v. UPS, Inc., 2008 WL 3264483 (N.D. Cal. 2008) (safe harbor; lost information)

Juror Number One v. State, 2011 WL 567356 (E.D. Cal. Feb. 14, 2011) (social media site motions to quash subpoena)

O'Bar v. Lowe's Homes Centers, Inc., 2007 WL 1299180 (W.D.N.C. 2007) (court guidelines)

Pension Comm. of Univ. of Montreal Pension Plan v. Bank of Am. Sec's LLC, 685 F.Supp.2d 456 (S.D.N.Y. 2010) (duty to preserve)

Suzlon Energy Ltd. v. Microsoft Corp., 2011 WL 4537843 (9th Cir. 2011) (subpoenaed e-mail)

Zubulake v. UBS Warburg LLC, 217 F.R.D. 309 (S.D.N.Y. 2003) ("Zubulake I") (standards re duty to preserve)

Zubulake v. UBS Warburg LLC, 229 F.R.D. 422 (S.D.N.Y. 2004) ("Zubulake V") (sanctions)

DISCOVERY:

Barnes v. CUS Nashville LLC, 2010 WL 2265668 (M.D. Tenn. June 3, 2010) (in camera review via "friending" party)

Bass v. Miss Porter's School, 2009 WL3724968 (D. Conn. 2009) (court-ordered production)

Beswick v. North West Medical Center, 2011 WL 7005038 (Fla. Cir. Ct., Nov. 3, 2011) (non-expectation of privacy)

Crispin v. Audigier, 717 F.Supp.2d 965 (C.D. Cal. 2010) (party motions to quash subpoena)

EEOC v. Genesco, Inc., No. 09-cv-952 WJR/RHS (D. N.M. Feb. 15, 2011) (court-ordered subpoenas and releases; suspected tampering)

EEOC v. Simply Storage LLC, 270 F.R.D. 430 (S.D. Ind. 2010) (protective orders)

Guest v. Leis, 255 F.3d 325 (6th Cir. 2001) (pre-Facebook "bulletin board" non-expectation of privacy)

Han v. Futurewei Tech's, Inc., 2011 WL 4344301 (S.D. Cal. 2011) (showing required for hard drive access)

Mackelprang v. Fidelity Natl. Title Agency of Nevada, 2007 WL 119149 (D. Nev. 2007) (narrowness of inquiry requirement) (see also T.V. v. Union Bd. of Educ., No. UNN•L-4479-04 (N.J. Supr. Ct., June 8, 2007) (non-published).

McCurdy Group v. American Biomedical Gp., Inc., 9 Fed.Appx. 822 (10th Cir. 2001) (showing required for hard drive access -mutuality of access)

Moreno v. Hanford Sentinel, Inc., 172 Cal. App.4th 1124 (2009) (whether expectation of social media posting privacy exists)

McMillen v. Hummingbird Speedway, Inc., 2010 WL 4403285 (Pa. Ct. Com. Pl. Sept. 9, 2010) (court-ordered user names and passwords)

Romano v. Steelcase, Inc., 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010) (court-orderd authorizations)

Thayer v. Chiczewski, 2009 WL 2957317 (N.D. Ill. 2009) (court-ordered personal request for e-mail)

White v. Graceland College Center for Prof. Devel. etc., 2009 WL 722056 (D. Kan. 2009) (forensic computer expert; hard drive access)

Zimmerman v. Weis Markets, Inc., 2011 WL 2065410 (Pa. Ct. Com. Pl. May 19, 2011) (court-ordered user names, passwords and log-ins)

Muniz v. United Parcel Services, Inc., 2011 WL 311374 (N.D. Cal. Jan. 28, 2011) (vagueness, over breadth, irrelevance)

AUTHENTICITY AND ADMISSIBILITY:

Commonwealth v. Williams, 926 N.E.2d 1162 (Mass. 2010) (two-fold authenticity test)

Griffin v. State, 19 A.3d 415 (Md. 2011), quoting Lorraine v. Markel Am. Ins. Co., 241 F.R.D. 534, 541 (D.Md. 2007) (authentication scrutiny)

People v. Valdez, ___ Cal. App.4th ____, 2011 WL 6275691 (2011) (burden of producing evidence; circumstantial evidence; limiting instructions)

People v. Buckley, 185 Cal. App.4th 509 (2010) (lack of reliability and authenticity)

St. Clair v. Johnny's Oyster & Shrimp, Inc., 76 F.Supp.2d 773 (S.D. Tex. 1996) (trustworthiness requirement)

St. Luke's Cataract & Laser Inst. P.A. v. Sanderson, 2006 WL 1320242 (M.D. Fla. 2006) (personal knowledge requirement)

Toytrackerz, LLC v. Koehler, 2009 WL 2591329 (D. Kan. 2009) (website security and chain of custody)

IMPEACHMENT:

Purvis v. Comm'r of Soc. Sec., 2011 WL 741234 (D. N.J. 2011) (attorney Internet research of witnesses for purposes of impeachment)

JURORS:

Carino v. Muenzen, 2010 WL 3448071 (N.J. Super. Ct. App. Div. 2010) (attorney web research of jurors during voir dire)

Wilgus v. F/V Sirius, Inc., 665 F.Supp.2d 23 (D. Me. 2009) (juror Internet research-based prejudice)

ETHICS:

ABA Model Rules of Professional Conduct, Rules 4.1, 4.2 and 8.1

New York City Bar, Formal Opinion 2010-2 (see www.nycbar.org)

New York State Bar Ethics Comm., Opinion 843

Philadelphia Bar Assn., Professional Guidance Opinion 2009-02 (see www.philadelphiabar.org)

San Diego County Bar Assn. Legal Ethics Comm., Opinion 2011-2

SOURCES:

In addition to independent research, sources also included the following:

Campbell, The Defendant's Perspective: Use of Social Media (ABA-TIPS Tort Source, Fall 2011)

Dimitroff, Social Media and Discovery (Thomson Reuters/Aspatore 2011)

Grimm et al., Admissibility and Authentication of Social Media (ABA-TIPS Tort Source, Fall 2011)

Martinez-Cid, Discoverability of Social Media from the Plaintiff's Perspective (ABA-TIPS Tort Source, Fall 2011)

Olsen and Links, The Smoking Tweet (*California Lawyer*, Jan. 2012)

Sumers, Labor Law Applies To Social Media (*Daily Recorder*, Jan. 3, 2012)

 Doug deVries is a former president of CAOC and CCTLA. His website is www.dkdresolution.com. NOTE: Mediations are completely confidential. This article does not relate to, or derive from, any mediation in which the author has participated. The sources of law and other information regarding social media are fully identified, and are publicly available to all members of the bar. This document is not intended to constitute a complete discussion of, or listing of, all potentially applicable law, or to constitute legal advice, or to be used as a substitute for personal review of the statutes, rules and cases listed herein and further research.

What Is the First Thing You Think About When You Are Taking over a Case from Another Attorney?

DISPUTE AVOIDANCE

By: Betsy S. Kimball
Certified Specialist, Appellate Law & Legal Malpractice Law

Betsy S. Kimball is a certified specialist in appellate law and legal malpractice law, State Bar of California Board of Legal Specialization, and part of Boyd & Kimball, LLP, in Sacramento, phone: (916) 927-0700.

If the answer to that question is, "How am I going to get paid?" then please continue reading. In this column, I am going to discuss the second thing that you should thinking about when you take over a case from another lawyer: How to keep yourself out of trouble if there is any chance the first lawyer malpracticed the case. I recently have handled several cases in which the second lawyer has been sued for failing to advise the client that he or she may have a legal malpractice claim against the first lawyer. If you are thinking, "But I don't do legal malpractice" or, "It's not in my fee agreement," don't stop reading yet.

We all believe that the scope of an attorney's duty to his/her client is defined by the contract between them. (See, e.g., Expansion Pointe Properties Limited Partnership v. Procopio, Cory, Hargreaves & Savitch, LLP (2007) 152 Cal. App.4th 42, 54-55; Piscitelli v. Friedenberg (2001) 87 Cal. App.4th 953, 983-984.)

Decades of case law regarding the establishment of an attorney-client relationship recognize and protect the attorney's "right" to be free from the unilateral imposition of an attorney-client relationship solely at the (would-be) client's behest. For example, an attorney-client relationship cannot be established unilaterally by the purported client because he or she "thinks" an attorney is representing his or her interests. (See Fox v. Pollack (1986) 181 Cal.App.3d 954, 959.) By parity of reasoning, we argue, attorneys must be free to limit the scope of the representation that they agree to provide their clients—especially given the requirements that attorneys be competent to handle the matters they undertake and that they refer clients to specialists as needed. (CACI nos. 600, 604.)

Likewise, courts *should* give effect to the provisions in retainer agreements by which attorneys define the scope of the representation they agree to provide. It *is* really important to define the scope of your representation in your fee agreement.

But here's the problem. Most "not-within-the-scope-of-my-fee-agreement" arguments are met with two cases, Janik v. Rudy, Exelrod & Zieff (2004) 119 Cal.App.4th 930 [lawyer has duty to alert client to legal problems which are reasonably apparent even if outside scope of lawyer's retention], and Nichols v. Keller (1993) 15 Cal.App.4th 1672 [same].

Janik concerns the alleged failure of class-counsel in a class action to advise their clients (members of the class) about additional claims against third parties arising from the same course of conduct. (Janik, supra, at pp. 941-942.)

In Nichols, the attorney who was representing an injured client in his worker's compensation case was held to have a duty to advise the client that he might also have a civil action arising from the same injury. (Nichols, supra, 15 Cal. App.4th at pp. 1683-1684.) Neither case *should* support imposing a duty on the second lawyer to identify potential malpractice by the first lawyer whom the second lawyer replaced and to preserve the legal malpractice claim, but that has become a tough sell in law and motion court.

Here are my recommendations. First—but probably not enough—ensure that your fee agreement with the client, in the words of the Nichols court, "make[s] [the] limitations in representation very clear to his client." (Nichols, supra, 15 Cal.App.4th at p. 1687.)

Second, have a basic understanding of the legal malpractice statute of limitations, Code of Civil Procedure section 340.6. One of the few certain things about the statute is that it will not run any sooner than one year after the first lawyer has ceased representing the client in the matter in which the lawyer (arguably) malpracticed. Learn the case well in the first nine or 10 months so that you can be satisfied that there is nothing that you need to warn the client about. Third, if while learning the case or handling it, you conclude that the first lawyer may have malpracticed, notify the client immediately and in writing. Explain in plain English that you do not, and will not, handle the potential legal malpractice claim (assuming that's true) and advise the client to seek legal counsel promptly.

Bottom line: there are some local lawyers who were shocked when they were sued for allegedly failing to protect their former client's legal malpractice case against a prior lawyer. Don't be the next one.

If while learning the case or handling it, you conclude that the first lawyer may have malpracticed, notify the client immediately and in writing. Explain in plain English that you do not, and will not, handle the potential legal malpractice claim (assuming that's true) and advise the client to seek legal counsel promptly.

Above from left, tort seminar speakers Patrick Becherer, Craig Needham, Kirsten Fish and Valerie McGinty. Right: Gerald Bergen and Noah Schwartz, who sponsored the seminar that was co-hosted by CCTLA and CAOC.

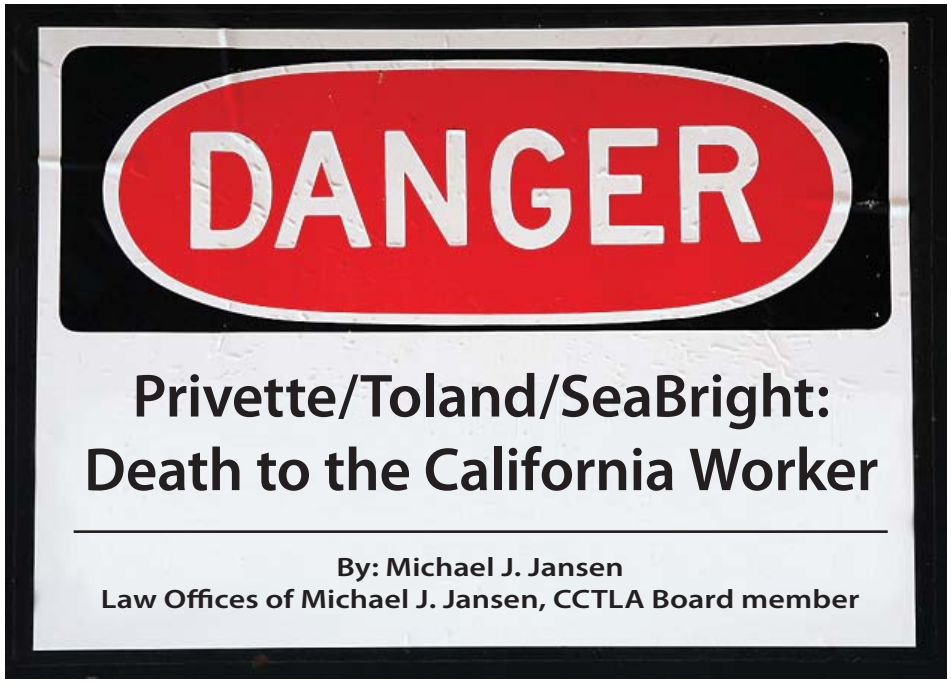
Annual tort seminar draws a crowd

It was almost a full house on Jan. 19 when CCTLA and CAOC co-hosted "What's New in Tort & Trial: 2011 in Review." Four speakers discussed judicial decisions and statutes affecting tort liability and those affecting procedure, arbitration, pre-trial and trial practice. An update on cases pending in the California Supreme Court also was provided.

There were 68 seminar attendees to hear from speakers Patrick J. Becherer, Esq., of Becherer, Kannett & Schweitzer; Craig Needham, Esq., of Needham, Kepner, Fish & Jones, LLP; Kirsten M. Fish, Esq., of Needham, Kepner, Fish & Jones, LLP; and Valerie T. McGinty, Esq., of Smith & McGinty.

CCTLA and CAOC thank the speakers, as well as program sponsors Gerald L. Bergen and Noah S. A. Schwartz, CSSC, Ringler Associates.

Tort materials were provided to attendeds. These materials are still available for $100. For more information or to order materials, contact Debbie Keller in the CCTLA office, debbie@cctla.com.



Privette/Toland/SeaBright: Death to the California Worker

By: Michael J. Jansen
Law Offices of Michael J. Jansen, CCTLA Board member

The California Supreme Court via Justice Kennard threw another bucket of rotten fish at plaintiffs this past summer with the latest iteration of Privette v Superior Court, (1993) 5 Cal.4th 689,: SeaBright Insurance Company v. US Airways, Inc.(2011) 52 Cal.4th 590. One basic fallacy appearing in these cases that make it hard to stomach is the assumption by the Supreme Court that the injured worker is made whole by workers' compensation benefits. The purpose of this article is to offer a warning that these cases may not be viable much longer if this Supreme Court continues to rule, but if you have a third-party case with an injured worker, here are some things you need to keep in mind.

In SeaBright, a defendant who took guards off a conveyor belt is declared to have no duty and therefore is immune if the defendant hired a contractor with workers' comp insurance to maintain it. Thus, it appears the Supreme Court is saying that a defendant can avoid any liability to an injured worker by hiring a company to do the job. ["By hiring an independent contractor, the hirer implicitly delegates to the contractor any tort law duty it owes *to the contractor's employees* to ensure the safety of the specific workplace that is the subject of the contract." SeaBright Insurance Company, at 594, emphasis in original]

If you are plaintiff's counsel, the only way to maintain a case past a motion for summary judgment is to get facts supporting the defendant's negligence. Privette was clear that the property-owner defendant had to be innocent of wrongdoing. Therefore, look for negligence on the part of the owner/hirer/controller/deep pockets:

> "[I]f an employee of an independent contractor can show that the hirer of the contractor affirmatively contributed to the employee's injuries, then permitting the employee to sue the hirer for negligent exercise of retained control cannot be said to give the employee an unwarranted windfall. The tort liability of the hirer is warranted by the hirer's own affirmative conduct. The rule of workers' compensation exclusivity 'does not preclude the employee from suing anyone else whose conduct was a proximate cause of the injury' (Privette, supra, 5 Cal.4th at p. 697, 21 Cal.Rptr.2d 72, 854 P.2d 721), and when affirmative conduct by the hirer of a contractor is a proximate cause contributing to the injuries of an employee of a contractor, the employee should not be precluded from suing the hirer." (Hooker v. Department of Transportation, supra, 27 Cal.4th at p. 214, 115 Cal.Rptr.2d 853, 38 P.3d 1081, italics omitted.)"

The defense will crow that they have no duty to provide a safe work place. However:

> "Given the recent decisions in Camargo, (Camargo v. Tjaarda Dairy (2001) 25 Cal.4th 1235) Hooker (Hooker v. Dept. of Transportation, (2002) 27 Cal.4th 198) and McKown, (McKown v. Wal-Mart Stores, Inc. (2002) 27 Cal.4th 219), it is clear the Privette/Toland rationale does not bar all direct liability actions filed by injured employees of independent contractors against property owners and general contractors. Appellant has framed a cause of action based on direct liability, not vicarious liability. That being so, it was error to grant summary judgment on the basis the Privette/Toland rationale precludes Appellant's action against TCA and Silverado as a matter of law." Ray v. Silverado Constructors et al., (2002) 98 Cal.App.4th 1120, 1129.

Another way to get around the motion for summary judgment is to look for failure to warn of a latent defect. Citing the Privett-Toland line of cases, but saying they do not apply, is Kinsman v. Unocal Corporation (2005) 37 Cal.4th 659, 664, which states:

> "We conclude that a landowner that hires an independent contractor may be liable to the contractor's employee if the following conditions are present: the landowner knew, or should have known, of a latent or concealed preexisting hazardous condition on its property, the contractor did not know and could not have reasonably discovered this hazardous condition, and the landowner failed to warn the contractor about this condition." [footnote omitted]

Showing defendant liability and failure to warn of a latent defect are direct liability cases. If you do not have direct liability and must rely on vicarious liability, you have to find a non-delegable duty.

The doctrine of non-delegable duties

One basic fallacy appearing in these cases that make it hard to stomach is the assumption by the Supreme Court that the injured worker is made whole by workers' compensation benefits.

is an exception to this general rule of non-liability. (Brown v. George Pepperdine Foundation (1943) 23 Cal.2d 256, 259–260] How can you tell if it is a non-delegable duty? Look at Evard v. Southern California Edison, 153 Cal.App.4th 137 (2007).

In Koepnick v. Kashiwa Fudosan America Inc. (2009), the court stated:

> "In Srithong, the owner of a mini-mall leased a portion of the premises to a restaurant, and contracted with a roofing company to repair the building's roof. The plaintiff was injured when roofing tar material being applied by the roofing company seeped through the ceiling and fell on his arm. (Srithong v. Total Investment Co. (1994) 23 Cal. App.4th 721, 725–726) The trial court ruled that the mini-mall owner had a non-delegable duty to maintain and repair the roof, and the owner and roofing company were presumed negligent under the doctrine of res ipsa loquitur. (*Ibid.*) …
>
> "It discussed the non-delegable duty doctrine in the context of vicarious liability: "Vicarious liability 'means that the act or omission of one person ... is imputed by operation of law to another [.]' [Citation.] Thus, vicarious liability is a departure from the general tort principle that liability is based on fault. [Citation.]" (*Id.* at p. 726)
>
> "Srithong went on to explain: "[T]he non-delegable duty rule is a form of vicarious liability because it is not based on the personal fault of the landowner who hired the independent contractor. Rather, the party charged with a non-delegable duty is '*held liable for the negligence of his agent*, whether his agent was an employee or an independent contractor.' [Citation.] ... [¶] The rationale of the non-delegable duty rule is 'to assure that when a negligently caused harm occurs, the injured party will be compensated by the person whose activity caused the harm[.]' [Citation.] The 'recognition of non-delegable duties tends to [e]nsure that there will be a financially responsible defendant available to compensate for the negligent harms caused by that defendant's activity[.]' [Citation.] Thus, the non-delegable duty rule advances the same purposes as other forms of vicarious liability." (Srithong, supra, 23 Cal.App.4th at p. 727) (fn. omitted.)

Frankly, it is clear the Supreme Court does not like vicarious liability. It is also clear that your only chance to get by summary judgment, if you have any chance, is to allege and be able to prove direct negligence of the defendant. Look for non-delegable duties, but the Supreme Court will try to make it non-non-delegable.

Finally, if Plaintiff carries the burden to show that Defendant did not warn of a latent defect regarding an instrumentality the defendant maintained control over, you have a better chance of survival. Good luck. You will need it.

Protect Your Clients and Yourself

Settlement Planning in a Low-Interest-Rate Environment

By: Carlos Alcaine, Senior Vice President, and Stephen Halterbeck, RSP,
Registered Settlement Planner and Financial Advisor
The Alcaine Group of Robert W. Baird & Co.

We are living in unprecedented economic times. Interest rates are at or near 50-year lows, the economy is flirting with what would be its second recession since 2007, the U.S. government continues to accumulate debt, and the financial markets remain uncertain. Times like these paralyze plaintiffs and attorneys, forestalling prudent lifelong investment decisions regarding settlement dollars.

This sort of environment emphasizes the importance of properly structured settlements. While the traditional benefits of a structured settlement—tax-free guaranteed payments, no investment risk, no management risk or cost, and protection from early dissipation—all still hold true, the volatility resulting from market uncertainty makes the guaranteed and predictable income from structured settlements even more desirable for a plaintiff seeking an income stream.

In fact, a structured settlement is a plaintiff's only opportunity to secure guaranteed and predictable tax-free income. It is also important for attorneys to realize that a decision not to structure a portion of a settlement when income is the primary objective could lead to a liability exposure.

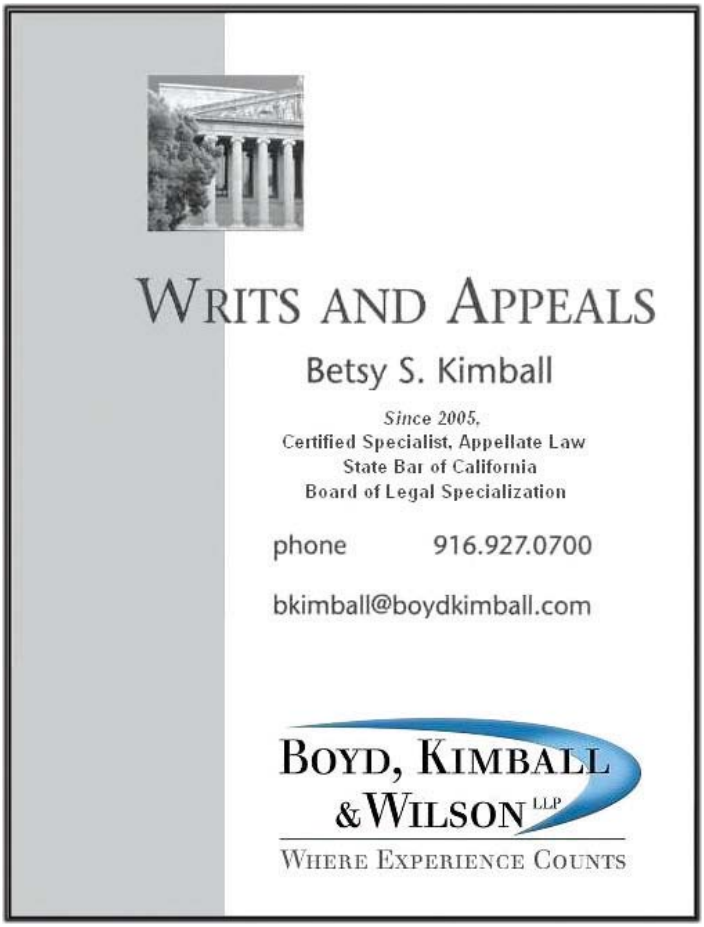
RISK VS. REWARD

We commonly hear that, because of low interest rates, people believe it more prudent to invest in areas other than structured settlements to potentially achieve higher returns (e.g., real estate, mutual funds, stock portfolios). However, even though such investments generally appear undervalued at present and have the potential to offer high returns in the future, they all carry risks and will almost certainly fluctuate in price over time. None of these alternatives will generate a guaranteed income stream or controlled payment schedule. Attorneys must remind themselves that injury victims have dramatically different objectives and needs from most investors. Some plaintiffs may never be able to return to work and will certainly never receive another settlement for their injuries. Additionally, most plaintiffs don't have the experience or ability to manage investments like stocks, large sums of cash, real estate and small businesses—especially in a volatile and uncertain marketplace—and if they fail, there is no reset button. An investment that a successful attorney might find suitable and attractive will likely not be suitable for a plaintiff and, once again, could lead to a liability exposure.

THE ADVANTAGE OF A RATED AGE

An additional benefit of a structured settlement annuity is obtaining a "rated age." A rated age is a substandard age based on a plaintiff's shortened life expectancy. This is done through a medical underwriting process with the structured settlement annuity company, who will review the plaintiff's medical records for life-threatening conditions and assume a shortened life for the plaintiff and the price the annuity accordingly based upon their professional analysis. Rated ages are most commonly given for catastrophic injuries like paraplegia or traumatic brain injury; however, they also consider conditions unrelated to the injuries, such as a history of smoking, high blood pressure, depression, being overweight and other factors. Even in a low-rate environment, a rated age can significantly improve the payout per premium dollar on a lifetime annuity, since the rated age, rather than the biological age of the annuitant, is used to price the annuity. This

Continued on page 19



Holiday Cheer!

Attendees at CCTLA's Annual Meeting and Holiday Party included, above, from left: Lea-Ann Tratten, Niall P. McCarthy and Justice Ronald Robie.

Right photo, from left: Carlos Alcaine, Margaret Doyle, Matt Malcahy and Brianne Doyle.

Top right photo, from left, Randy Roxson, Alex and Trisha Pal.

Center photo, from left: Jessica Grigsby, Jennifer Euler, Candy Ornelas, Rana Gerges, Kris McFadden and Wendy York.

CCTLA presents awards, installs officers and raises funds during holiday party

With almost 150 persons in attendance at the CCTLA Annual Meeting & Holiday Party on Dec. 8, CCTLA presented awards to three 2011 honorees.

The Honorable Robert C. Hight was recognized as Judge of the Year; Christopher Whelan as Advocate of the Year; and Kimberly Wells as Clerk of the Year.

In addition, CCTLA recognized the work and accomplishments of 2011 CCTLA President Wendy C. York and her board and welcomed 2012 President, Michael W. Jones and his board.

The event, held at the Citizen Hotel in Sacramento, also was a fundraiser for the Mustard Seed School for homeless children. Mustard Seed representatives attended the event and were presented with $2,200, donated by attendees.

Above: Gabe Toda, Kimberly Wells, Judge Robert Hight, Wendy York.

Above: Matt Donahue, Michael Jones and Craig McIntosh.

Right: Dorothee Mull, Marison Mull and Jack Vetter.

Right: Linda Whitney, Roger Dickinson and Rick Crow.

Above, from left: Judge Shelleyanne Chang, Judge Allen Sumner, Presiding Justice Vance Ray, Judge Steve White and Judge Robert Hight.

Left, from left: Judge David Brown, Judge Gerrit Wood, Judge Emily Vasquez, Judge Alan Perkins, Michael Jones and Dan Wilcoxen.

SETTLEMENTS

Product Liability/Complaint in Intervention

CCTLA Board member **David Rosenthal** was able to circumvent the running of the statute of limitations against Hoffman Enclosures, a division of Pentair, by filing a Complaint in Intervention in the product liability case originated by his client's employer, UNISYS Corporation. He settled with Hoffman around UNISYS three days prior to trial for $350,000.

Rosenthal's client's duties were to monitor and maintain remote computer tracking stations pursuant to a contract with the U.S. Army. The tracking station consisted of a computer inside a metal box mounted on a telephone pole and connected to an interrogator, or antennae, on a naval base. The interrogator would pick up a signal from military cargo that was being transported, and this information was conveyed through the computer.

The heavy metal box housing was manufactured by Hoffman. The box was unique in that the door was designed to open from the top, drop down and stop at 90 degrees to form a work station.

Through the testimony of a Hoffman sales representative and the Hoffman PMK, David Rosenthal established Hoffman had experienced a problem with the design of the latch mechanism that resulted in a design change two years before the incident. The design defect allowed the door handle on the outside of the box to turn without activating the locking mechanism on the inside of the box. Rosenthal's client was unable to operate the latching mechanism on five prior visits and had asked UNISYS to replace the entire enclosure due to the malfunctioning handle mechanism.

On the day of the incident, she was able to open the box and work on the computer. She was then able to close the door and turn the handle to the locked position. However, as she bent down to pick up her tool box, the door opened unexpectedly and struck her on the back of the head.

Unfortunately, UNISYS had disposed of the actual locking mechanism.

Fortunately, the Hoffman sales representative and a UNISYS employee testified they had seen the mechanism in person after the incident and that it had exhibited the same problem noticed after discovery of the design defect and design change two years earlier. Plaintiff's expert opined that based on this testimony, it was highly likely that Hoffman had allowed a defective latch mechanism to be used in the enclosure after its own design change, and this defect was consistent with Rosenthal's client believing the door was secured when, in fact, it was not.

She sustained neck injuries that required an epidural injection and a radio frequency neurotomy and experienced chronic headaches and some mild cognitive deficits due to post concussive syndrome. UNISYS had paid $75,000 for her past medical. She did not miss any work as a result of the incident.

Hoffman contended that both Rosenthal's client and UNISYS were negligent for various reasons, including the fact that UNISYS knew the latch mechanism wasn't working correctly and had already made the decision to replace the enclosure due to the problem. Hoffman had served a 998 for $120,000 on the client and $10,000 on UNISYS after an initial settlement conference two weeks prior to trial.

Personal Injury

CCTLA President **Michael W. Jones**, of Hansen, Kohls, Jones, Sommer & Jacob LLP, reports a settlement of $2,422,500 in a case where the 55-year-old plaintiff was run over by his own unmanned big rig tractor that slid down a tipper ramp with the parking brake set while he was unloading a trailer of wood chips at a north state logging mill. As the tractor rolled down the ramp, Plaintiff ran down the ramp to prevent it from injuring or killing anyone. He fell, and one leg was run over by the tractor wheels, resulting in amputation. Liability was seriously contested with the mill claiming no one was in harm's way, thus assigning 100% fault to the plaintiff for running after his tractor.

The mill was convinced that as the lifeblood of the community, the jurors would be folks they employed or who knew someone employed by the defendant mill, and the mill and primary insurer retained local known north state defense counsel to set the hometown stage.

Plaintiff filed in his own Sutter County by alleging a joint-venture theory in a biomass fuel operation between the trucking broker, agricultural broker (both domiciled in Plaintiff's

hometown and named defendants) and the mill.

Defense claimed the plaintiff was an independent trucker responsible for his own safety, including use of any safety devices. They claimed Plaintiff had a unique parking brake system that in conjunction with a unique air bag suspension system, rendered his parking brake defective and thus useless on their tipper and that they had no way of knowing these unique defects existed. They claimed no other trucks had ever escaped under these circumstances.

Plaintiff maintained the tipper was a temporary piece of equipment that was installed as a permanent piece of equipment in such a way that certain safety device features, such as chock blocks, should have been available (they were not) to prevent runaway tractors.

Plaintiff obtained the specific Bill of Materials from the manufacturer for the tractor as made. A tractor manufacturer-trained-and-certified mechanic then inspected the tractor brakes and air bag suspension system. The certified mechanic opined all systems were in place and properly working as they originally came from the manufacturer, consistent with the Bill of Materials.

Inspection testing of the tractor and tipper were conducted by the defense. Due to a lack of communication among the defense experts, they "inadvertently" used chock blocks during the first test of the day and proved the plaintiff's position that chock blocks would have prevented the tractor from escaping.

Depositions were taken of mill employees, including bucket loader drivers who moved the biomass fuel after delivery. Two of these employees admitted knowledge of other trucks escaping, including one just a month before Plaintiff's tragedy—wherein a mill crane had to be used to lift the tractor after it went over the edge of the tipper ramp. Defendant mill maintained these were not similar since they involved drivers who forgot to set their parking brakes.

After denial of Motions for Summary Judgment, denial of a third Motion to Continue and confirmation of a six-week trial to start Oct. 12, the defendant mill's primary insurer paid the policy limits, while the mill's excess carrier and co-defendants paid the balance of the settlement.

VERDICT

Motor vehicle accident

CCTLA member **Ross Bozarth's** prevailed against Farmers Insurance in a one-day expedited jury trial with a verdict of $14,308.40. The case involved a two-car motor vehicle collision on a one-way street with three lanes. Plaintiff was in car number one, Defendant in number two. At an intersection, Defendant tried to make a left turn and hit the corner of Plaintiff's car. Low-to-moderate damage to both cars. Plaintiff initially treats with Kaiser Emergency Room within a few hours and is prescribed Vicodin, and two weeks later, began chiropractic treatment for three and a half months.

The non-binding arbitration award was $7,392. Farmers rejected the award. Friday before trial, Plaintiff offered to accept the $6,035 previous settlement offer if put back on the table by 5 Friday. No response from Farmers. Day of trial, Farmers offers the $6,035, which was denied by the plaintiff who countered with $7,500. Farmers rejected the demand and did not present any witnesses to trial, not even the Defendant. Farmers stipulated to liability, the $485 Kaiser bill, and $294.40 in wage loss but disputed the $3,500 in chiropractic treatment. The jury awarded $7,000 for past emotional distress and $3,000 for future emotional distress in addition to the damages stipulated by Defendant.

APPEAL

Retaliation Case

A $1.2-million judgment against the California Department of Justice, resulting from a five-week retaliation-case jury trial prosecuted by CCTLA past president **Jill P. Telfer** on behalf of her client, Special Agent James Rodriguez, has been maintained after appeal. On appeal, the department asserted numerous errors by Telfer and presiding Judge David De Alba, including denial of bifurcation at trial for the recision cause of action and the application of a multiplier in the award of attorney fees. The appellate court, in an unpublished opinion authored by Justice Ronald Robie, found the department's arguments without merit with the exception of the post-judgment interest rate of 10 percent per annum. The court determined the rate should be seven percent because the department was a state agency. This retaliation case resulted in significant changes in the department's hiring and promotional policies.

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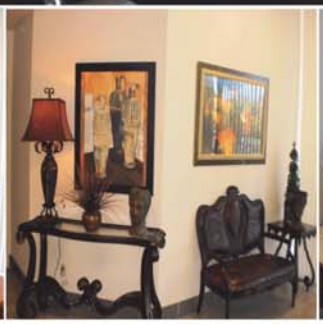

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*Moderator**

SKI WITH THE STARS! Ski Director Stuart Chandler will coordinate a meeting time and place on Thursday and/or Friday for those who would like to meet up on the hill. Call Stuart at (559) 431-7770 or stuart@chandlerlaw.com.

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Allan's Corner

Continued from page 2

stated that if the subsequent treater was designated as an expert, defense could re-depose him. They did indeed disclose this doctor as a non-retained percipient expert. They did disclose that non-retained experts might testify about the standard of care. There was a joint list of proposed witnesses filed and it included this doctor, the treating doctor/expert but not one who would testify on the subjects of liability, causation, and damages.

Defense filed a Kennemur motion to limit expert trial testimony to opinions rendered at deposition, and the trial court granted that motion to exclude the subsequent treater's testimony to the extent it was based on information received after the deposition and not in the course of treatment of the plaintiff. The trial court ruled that by providing information to the doctor after his deposition, the doctor was transformed from a treating physician to a retained expert. This ruling limited the testimony to opinions formulated at the time of deposition and precluded him from testifying to anything based on information provided after the deposition because once the other information was provided to the subsequent treater, the lawyer had an obligation to inform opposing counsel of the change in the doctor's status.

On appeal, the appellate court noted that the doctor was asked about standard of care at his deposition and did not opine that the defendant's treatment fell below the standard of care. The court then went on to hold that by failing to disclose the substance of the doctor's anticipated opinion testimony and that the opinions would be based on information received after deposition, the plaintiff did not substantially comply with expert witness disclosure code sections. The court specifically notes that the issue in this case is not whether an expert witness declaration is necessary when a treating physician testifies as an expert (it is not Schreiber v. Estate of Kiser, (1999) 22 Cal 4th 31, 38). The court goes on to note, however, when a treating physician receives material from counsel after deposition to enable him to testify to opinions about standard of care (and this may very well apply about opinions from prior doctors or subsequent doctors' treatment also), he steps out of the role of treating physician and becomes a retained expert.

Assumption of the Risk. In Amezcua v. LA Harley Davidson, 2011 DJDAR 15773, Plaintiff did not sign a registration form/release but rode in the 2006 Toy Ride sponsored by Harley Davidson. He was injured in a collision during the ride and sued Harley Davidson. Trial Court granted summary judgment based on assumption of the risk and the appellate court affirms. They noted that whether or not he signed the release is not determinative of whether implied primary assumption of the risk applies and then noted that riding a motorcycle in a toy ride is an activity to which implied assumption of the risk applies. Court found that riding a motorcycle is much like riding a personal watercraft or the risk of being burned at the Burning Man Festival, etc. There is no indication that Harley Davidson increased the risk and thus no liability.

Trivial Defect. In Cadam v. Somerset Gardens, 2011 DJDAR 15830, the Second District, Division 6, takes away a $1.3-million verdict on the trivial defect doctrine. Here, it was a trip and fall over a sidewalk gap that was between 3/4 and 7/8 of an inch. The president of the homeowner's association had tripped on a similar gap earlier and instructed the gardener to place a warning flag there. Although he had learned of the gap where Plaintiff fell a week before, he did not order any warning flags be placed at that separation. After verdict, trial court granted JNOV ruling that this was a trivial defect. The homeowners' association president had testified that any defect over a half inch was, in his opinion, "probably" dangerous.

The appellate court de novo review found that the walkway defect here was trivial as a matter of law, especially when taking into account the surrounding circumstances of the accident occurring at noon on a sunny day, no jagged separation, shadows or debris obscuring the separation, no protrusions and no one else had fallen there. Plaintiff testified she didn't see it because she wasn't looking that way (she was distracted by the gardener). Note that the court specifically rules that the trivial defect defense is not a defense but instead, an affirmative aspect of Plaintiff's burden of proof that he must plead and prove that the defect is not trivial.

Evidence - Hypothetical Questions. In People v. Vang, 2011 DJDAR 15912, the trial court, in a criminal case, but applicable to civil cases, allowed the prosecutor to ask hypothetical questions closely tracking the evidence regarding whether or not a crime was gang related. Appellate Court held the trial court erred in permitting the expert to respond to hypothetical questions the prosecutor asked because the questions closely tracked the evidence in a manner that was "only thinly disguised." The Supreme Court reverses finding that it is required, not prohibited, that hypothetical questions be based on the evidence.

Why People Hate Lawyers. In Barnett v. State Farm, 2011 DJDAR 16029, police entered Plaintiff's home pursuant to a valid search warrant and seized 12 seven-foot tall marijuana plants, several freezer bags containing approximately five ounces of marijuana and a tray with loose marijuana and rolling papers. Plaintiff made a claim on his homeowner's policy that the theft provision of the policy covered the loss of his medical marijuana. Trial Court granted summary judgment and the appellate court affirms. At least it wasn't a fire loss claim after smoking the marijuana.

Course and Scope of Employment. In Vogt v. Herron Construction, Inc., 2011 DJDAR 16119, Defendant's employee parked his pickup truck in the way of a cement pour at a work site. Plaintiff, an employee of a different subcontractor on the job, asked the employee to move the truck. While moving the truck, the driver ran over Plaintiff. Plaintiff sued the driver's employer, and the trial court granted summary judgment, finding that

the employee was not acting within the course and scope.

The Fourth DCA reverses, finding that by moving the truck, the employee furthered the overall construction of the project, that the resulting risk of injury was inherent to the enterprise, and even if his subjective purpose was to avoid damaging his own truck, the truck was necessary to his comfort, convenience and welfare while on the job. Therefore, it was within the course and scope of his employment.

Howell Cases. In Sanchez v. Strickland, 2011 DJDAR 16230, the Fourth District holds that Howell applies to Medicare payments (in the unpublished portion). In the published part of the decision, the court holds that gratuitous write offs by a medical provider are covered by the collateral source rule and therefore collectible.

Privette Cases. In Gravelin v. Satterfield, defendants were homeowners who contracted with Dish Network to replace an existing satellite dish. Dish Network outsourced the job to Linkus Enterprises, which sent Plaintiff to perform the actual job. There was a dispute as to whether Plaintiff was an employee of Linkus or an independent contractor retained by Linkus. Plaintiff determined how to access the roof (the ladder he brought was too short), told the homeowner that, and the homeowner did not disagree. The roof extension that the Plaintiff stepped onto collapsed, and Plaintiff fell to the ground, injured. He got workers' comp from Linkus and sued the homeowners for their direct liability for maintaining a pre-existing hazardous condition and failing to warn of that condition. The court held that as a matter of law, the roof extension was not a concealed pre-existing hazard because it was fit for its intended and obvious purpose of a small roof that provided rain shelter going from the garage to the house and was hazardous only when misused as an access point by climbing onto it to get to the main roof.

Duty. In Gonzales v. Southern California Gas Company, 2011 DJDAR 17858, the court holds that as a matter of law, it was not foreseeable that a vehicle driven on a residential street would leave the street, travel over an eight-inch curb and hit concrete barriers protecting a gas line 11'4" off the street. Apparently, the court failed to recognize the statement *in their own opinion* that the concrete barriers were installed to protect the meter assembly from damage from being hit by vehicles, albeit those vehicles were going to be traveling at 10 miles per hour or less rather than 25 miles per hour. Given that there was a potential for the meter to be hit by vehicles, how can this injury be unforeseeable?

Government Tort Liability. In Strong v. State of California, 2011 DJDAR 17995, Plaintiff sued the state alleging that a CHP officer negligently lost or destroyed identifying information of an individual involved in an accident causing his injuries. Judgment was entered for Plaintiff, and on appeal, the court reverses, finding that since California law bars a tort-based cause of action for spoliation of evidence, Government Code §821.6 immunity applies and therefore, there is no liability of the state.

Government Tort Liability - Evidence. In Ceja v. Dept. of Transportation, prior to 1992, there were a bunch of accidents on a stretch of Highway 99 caused by cross median head-on collisions. In 1992,

there was an investigation, and it was determined that a median barrier should be installed. Barrier was not installed because in 1994, there was a substantial reconfiguration going from four lanes to six lanes and an 84-foot median became a 60-foot median, still with no median barrier. Plaintiff's decedent was killed in a cross median accident, and Plaintiff sued the state, claiming that the lack of a median barrier created a dangerous condition. Pretrial, court granted State's motion to exclude evidence of accidents prior to the reconfiguration in 1994 because the physical conditions existing before 1994 were substantially different from those after 1994. Affirmed.

Jurisdiction for Foreign Manufacturer. In Dow Chemical Canada ULC v. Superior Court, 2011 DJDAR 18227, a division of Dow Chemical manufactured plastic gas tanks for use on Sea-Doos. These were manufactured in Canada and sold in Canada only to another Canadian corporation. Trial Court overruled Dow's motion to quash on the basis that by knowing the component gas tanks would be incorporated into products sold across the United States, Dow purposely availed itself of the benefit of this jurisdiction and therefore could be sued in California. Both the Court of Appeal and the Cal Supreme denied a writ; US Supreme Court issued a writ and directed court to reconsider in light of J. McIntyre Machinery Ltd., v. Nicastro, (2011) 564 US ____ 131, Supreme Court 2780. Issue is whether merely depositing goods in the stream of commerce with knowledge that some will end up in a finished product manufactured by another and sold in the foreign state is enough to satisfy minimum contact standard for personal jurisdiction. Court holds "no" and quashes service of the summons.

Attorney Fee Lien. In Little v. Amber Hotel Company, 2011 DJDAR 18289, defendant Amber Hotel had sued two individuals and their businesses. Individuals hired Little as their attorney, and attorney fee agreement gave Little a lien on any fee award made by the court at the conclusion of the case (Plaintiff's lease contained fee provision). Trial resulted in judgment in favor of clients and against Amber Hotel, and eventually court awarded attorney's fees and costs and amended the judgment. Hotel appealed the judgment; no separate notice of appeal from the attorney fee and cost awards. Defendant and Plaintiff settled the case directly but apparently didn't pay Little. Little sued clients for breach of contract and quantum merit sued Hotel for intentional interference with contract, constructive trust and. He alleged that the hotel knew of his lien; the settlement agreement had Defendant abandon its appeal, and Plaintiff abandoned the fee award. Jury found in favor of Little, and the appellate court affirms.

Wrongful Death Cases. In Moody v. Bedford, 2012 DJDAR 265, Trial Court granted summary judgment in the wrongful-death action based on the single-action rule. One heir had settled with the insurance company for the policy limits without filing suit; the court granted summary judgment in the other heir's case. Appellate Court reverses, finding that the single-action rule does not apply to pre-litigation settlements but only to lawsuits that have actually been filed.

Laboratory's Duty to Patient. In Walker v. Sonora Regional Medical Center, 2012 DJDAR 553, Plaintiff was sent by her doctor to be tested for cystic fibrosis. Plaintiff tested positive as a carrier, and her fetus tested positive on at least one test for the disease. Physician failed to notify Plaintiff. Plaintiff miscarried that child, but during later pregnancies, same physician failed to notify her. Plaintiff sued the hospital laboratory for not notifying her directly, and the court found that the hospital had no duty to notify anyone other than the physician and sustained summary judgment.

Settlement of Minor's Claim. In Pearson v. Superior Court (Nicholson), 2012 DJDAR 1033, guardian ad litem settled minor's personal-injury claim with insurance carrier for Defendant. Settlement was on the record at a judicial settlement conference. While a petition for approval of the settlement was pending, the minor died. Defendants then opposed the petition on claiming the settlement was unenforceable because not approved prior to the minor's death and that the death extinguished damages attributable to pain and discomfort. Guardian ad litem moved to enforce the settlement agreement, contending that CCP §372 allows only the minor to repudiate the settlement agreement before being approved by the

court. Trial Court denied the petition to confirm; Appellate Court reversed, finding that while a petition to approve a minor's compromise is pending, the settlement agreement is voidable only at the election of the minor or his guardian and not by the defendant.

Privette Cases. In Tverberg v. Fillner Construction, Inc., 2012 DJDAR 1103, Plaintiff was an employee of a subcontractor. The job included constructing a canopy over fuel pumping units. Another subcontractor dug holes for footings next to the area where Plaintiff was to work. Plaintiff asked the other contractor to cover the holes with metal plates, but the other contractor did not have the equipment to do so.

Plaintiff fell into one of the holes and was injured. He sued the subcontractor that dug and failed to cover the holes and also the hirer of his company. Hirer moved for summary judgment based on the Privette line of cases, and Plaintiff opposed, con-tending that hirer had retained control over safety conditions of the job site and therefore should be held directly liable for its failure to cover the holes.

Trial Court granted summary judgment, and Appellate Court reversed in 2008 because the plaintiff was an independent contractor rather than an employee covered by the state workers' comp system. That, however, was overturned by the California Supreme Court in 2010.

In 2011, the appellate court issued a second decision, finding Plaintiff could go to trial on their negligent exercise of retained control and breach of nondelegable regulatory duty theories.

Supreme Court granted review but decided Seabright, 52 Cal 4th 590, and sent it back to the appellate court to reconsider. The court did reconsider, finds that the plaintiff cannot sue based on breach of nondelegable duty; however, finds here that there is enough evidence to take the case to trial on a retained-control theory. Tortured appellate history and difficult case.

Settlement Planning

Continued from page 9

underwriting process is unique to a structured settlement annuity.

PLANNING WITH YOUR CLIENT'S BEST INTERESTS IN MIND

The ideal settlement planning process would include a review of each plaintiff's unique situation and creating and preparing a need based plan. This review would start by assessing the plaintiff's needs, securing the minimum income requirements (living expenses, health care needs, assisted living expenses, etc.) with a structured settlement annuity. Then evaluate the plaintiff's risk tolerance and other financial goals and explore additional investments, including more traditional vehicles and/or the purchase of a home that could benefit from future price inflation and also provide emergency liquidity.

It is important to review and understand the client's needs thoroughly—specifically the need for income, long-term growth and liquidly. Attorneys should be careful that this comprehensive review is done by someone licensed and insured to provide objective financial advice. This professional should have more than an insurance license and the ability to provide structured settlement annuities. This can help ensure that the settlements are structured with clients' best interests in mind and insulate attorneys from the liability they would assume in trying to do it themselves.

***

Carlos Alcaine is senior vice president and Stephen Halterbeck, RSP, is a registered settlement planner and financial advisor for The Alcaine Group of Robert W. Baird & Co.

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Page 5:

When to Advise Your Client to Seek Additional Legal Counsel

March, 2012

Thursday, March 8
CCTLA PROBLEM SOLVING CLINIC
Topic: "Strategies for Litigating Third-Party/Workers' Compensation Crossover Cases"
Speakers: Allan Owen, Esq., Kyle Tambornini, Esq., John Timmons, Esq. & James Knezovich, Esq.
5:30 to 7 p.m. Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA Members Only - $25

Tuesday, March 13
Q&A LUNCHEON
Noon, Vallejo's (1900 4th Street)
CCTLA members Only

Friday, March 16
CCTLA LUNCHEON
Topic: "Three Keys to Going Paperless-It's Easier Than You Think"
Speakers: John Airola, Esq. & Tuesday Airola, Esq.
Noon, Firehouse Restaurant
CCTLA members - $30

March 23 - 24
CAOC/CCTLA DONALD L. GALINE TAHOE SKI SEMINAR
Harvey's Lake Tahoe

April, 2012

Tuesday, April 10
Q&A LUNCHEON
Noon, Vallejo's (1900 4th Street)
CCTLA members Only

Thursday, April 12
CCTLA PROBLEM SOLVING CLINIC
Topic: "Trial Evidence: Practical Guide to Common Issues"
Speakers: John Demas, Esq. & John O'Brien, Esq.
5:30- 7 p.m., Arnold Law Firm,
865 Howe Avenue, 2nd Floor
CCTLA members Only - $25

Friday, April 20
CCTLA LUNCHEON
Topic: "Take this Job and Litigate: Employment Cases from Client Intake through Discovery and Trial"
Speakers: Lawrance Bohm, Esq., Jill Telfer, Esq. & Chris Whelan, Esq.
Noon, Firehouse Restaurant
CCTLA members - $30

May, 2012

Tuesday, May 8
Q&A LUNCHEON
Noon, Vallejo's (1900 4th Street)
CCTLA members Only

Thursday, May 10
CCTLA PROBLEM SOLVING CLINIC
Topic: TBA, Speakers: TBA
5:30- 7 p.m., Arnold Law Firm,
865 Howe Avenue, 2nd Floor
CCTLA members Only - $25

Friday, May 18
CCTLA LUNCHEON
Topic: "Defeating the MIST Defense"
Speaker: Michael D Freeman PhD
Moderator: Christopher L. Kreeger, Esq.
Noon, Firehouse Restaurant
CCTLA members - $30

Thursday, May 24
CCTLA'S 10TH ANNUAL SPRING RECEPTION & SILENT AUCTION
Home of Allan Owen & Linda Whitney
Time: 5:30 to 7:30 p.m.

Contact Debbie Keller at (916) 451-2366 or debbie@cctla.com for reservations or additional information about any of these events

CCTLA COMPREHENSIVE MENTORING PROGRAM

The CCTLA Board has 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 in regards to one of your cases, please contact Jack Vetter: jvetter@vetterlawoffice.com, Linda Dankman: dankmanlaw@yahoo.comm Glenn Guenard: gguenard@gblegal.com or Chris Whelan: Chris@WhelanLawOffices.com.

CCTLA Calendar of Events