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The LITIGATOR

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Inside This Issue

Ulysses

by Alfred, Lord Tennyson

offered by CCTLA President Stephen Davids, as his term winds down

It little profits that an idle king,
By this still hearth, among these barren crags,
Match'd with an aged wife, I mete and dole
Unequal laws unto a savage race,
That hoard, and sleep, and feed, and know not me.
I cannot rest from travel: I will drink
Life to the lees: All times I have enjoy'd
Greatly, have suffer'd greatly, both with those
That loved me, and alone, on shore, and when
Thro' scudding drifts the rainy Hyades
Vext the dim sea: I am become a name;
For always roaming with a hungry heart
Much have I seen and known; cities of men
And manners, climates, councils, governments,
Myself not least, but honour'd of them all;
And drunk delight of battle with my peers,
Far on the ringing plains of windy Troy.
I am a part of all that I have met;
Yet all experience is an arch wherethro'
Gleams that untravell'd world whose margin fades
For ever and forever when I move.
How dull it is to pause, to make an end,
To rust unburnish'd, not to shine in use!
As tho' to breathe were life! Life piled on life
Were all too little, and of one to me
Little remains: but every hour is saved
From that eternal silence, something more,
A bringer of new things; and vile it were
For some three suns to store and hoard myself,
And this gray spirit yearning in desire
To follow knowledge like a sinking star,
Beyond the utmost bound of human thought.

This is my son, mine own Telemachus,
To whom I leave the sceptre and the isle,—
Well-loved of me, discerning to fulfil
This labour, by slow prudence to make mild
A rugged people, and thro' soft degrees
Subdue them to the useful and the good.
Most blameless is he, centred in the sphere
Of common duties, decent not to fail
In offices of tenderness, and pay

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Mike's CITES

By: Michael Jansen

Here are some recent cases culled from the *Daily Journal*. Please remember that some of these cases are summarized before the official reports are published and may be reconsidered or de-certified for publication, so be sure to check and find official citations before using them as authority. I apologize for missing some of the full *Daily Journal* cites.

1. Staub v. Kiley, June 16, 2014, 2014 DJDAR 7635.

EXPERT DESIGNATION, DISCOVERY AND EXCLUSION

FACTS: Plaintiff Staub appeared at Mercy Hospital of Folsom with pain and swelling in his left leg and severe pain in his left groin. Defendant Kiley, his primary care physician, diagnosed Staub with deep vein thrombosis. No ultrasound or other procedure was performed, which would have revealed the presence of a condition called May-Thurner Syndrome, which requires treatment within a week of the first symptoms appear to be effective.

Kiley was informed by a specialist that the likely cause of Staub's pain was May-Thurner Syndrome, but Kiley did not tell Staub. Staub then went to UC Davis Medical Center, which also did not test for May-Thurner Syndrome. Finally, doctors at Stanford Hospital discovered that Staub suffered from May-Thurner Syndrome eight months after Staub first appeared in Kiley's office. Staub sued Kiley and The Regents for medical malpractice because Staub felt Kiley and The Regents should have tested for May-Thurner Syndrome.

Defendants demanded designation of Plaintiff's experts. Due to extenuating circumstances, Plaintiff submitted a tardy expert witness disclosure. Defendants objected to the tardy expert disclosure by Plaintiff and then made an unsuccessful ex parte motion to prelude plaintiffs from calling any expert witnesses at trial.

Plaintiff offered the defense an opportunity to depose Plaintiff's experts. Defendants declined and claimed that they had been severely prejudiced because The Regents could not engage in their customary process of evaluating settlement options by committee if the depositions were taken so late.

On the day of trial, Defendants filed a motion in limine to preclude Plaintiffs from presenting expert testimony at trial, which was granted. The parties agreed that the trial court could rule on Defendant's motion for non-suit upon Plaintiff's presentation of an exemplar anticipated opening statement. After receiving Plaintiff's exemplar opening statement and Defendant's objections, the trial court granted Defendant's request for non-suit in its entirety and entered judgment in Defendant's favor.

LAW: "The purposes of the discovery statutes are to assist the parties and the trier of fact in ascertaining the truth; to encourage settlement by educating the parties as to the strengths of their claims and defenses; to expedite and facilitate preparation and trial; to prevent delay; and to safeguard against surprise." Boston v. Penny Lane Centers, Inc., (2009) 170 Cal App 4th 936, 950. ***CCP*** §2034.260 sets forth the general requirements for the exchange of expert witness information, including the information to be provided.

Failure to comply with these requirements can have drastic consequences. ***CCP*** §2034.300 provides that the trial court shall exclude from evidence the expert opinion of any witness that is offered by any party who has unreasonably failed to do any of the §2034.260 items. The appellate court reviews a trial court's ruling on a motion to exclude expert testimony for abuse of discretion and the biggest issue is the determination whether a party "unreasonably" failed to comply with the code. A trial court's discretion is always limited by the statutes but when the exclusion of expert testimony rests on a matter of statutory interpretation, the appellate court undertakes a de novo review. Tesoro del Valle Master Homeowner's Association v. Griffin, (2011) 200 Cal App 4th 619, 639.

HOLDING: Defendant's demand for disclosure failed to take into consideration the additional five days of ***CCP*** §1013. It

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Resource for Advocates of Civil Right-to-Counsel Movement

New Website Captures All Available Data on Civil Right-to-Counsel

BALTIMORE, MD – September 9, 2014—The National Coalition for a Civil Right to Counsel, the foremost organization leading the national movement to expand the right to counsel in basic human needs cases, has just launched the most comprehensive online resource ever created in the civil right to counsel effort.

The new website, at www.civilrighttocounsel.org, features an interactive map that tracks the status of the right to counsel in civil cases in every state of the nation, and allows users to filter information by issue, jurisdiction, and activity.

"The map shows users where the most recent civil right to counsel activities have occurred across the country, and where the NCCRC has been involved. It's an invaluable resource for lawyers, advocates, and anyone interested in the right to civil counsel movement," said John Pollock, who created the site. "It provides not just the status, but the critical source material as well."

Unlike criminal cases, people facing civil legal problems—loss of housing or medical benefits, women facing life-threatening domestic violence, parents at risk of permanently losing access to their children—often do not have a right to legal counsel. For people of low income, this lack of representation furthers inequality and injustice. With the launch of its new website, NCCRC makes available a massive clearinghouse of valuable data that will quickly become the go-to resource for right to counsel advocates involved in litigation, legislation, and legal and social science.

"Nothing of this scale has ever been built," said John Nethercut, executive director of the Public Justice Center. "It's the only central repository in the country focused on information about the national civil right to counsel effort. There is no comparable resource."

The site gathers data from every law review article, study, report, paper, news story, social media piece, and key case brief written about the civil right to counsel in the last five years. The result is a highly searchable bibliographic index that includes thousands of resources.

The site also features a large library of audio and video related to right to counsel, such as case oral arguments, speeches, public hearings, debates, panels, and videos.

***

Reprinted from the PublicJustice.org website. For more information, contact John Pollock, coordinator, National Coalition for a Civil Right to Counsel, phone: 334-956-8308 / jpollock@publicjustice.org. NCCRC is a program directed and funded by the Public Justice Center. Working through a national coalition of 260+ participants in 36 different states, NCCRC supports and coordinates advocacy to expand recognition and implementation of a right to counsel in civil cases.

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The Judge

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Galen T. Shimoda, Plaintiff Lawyer
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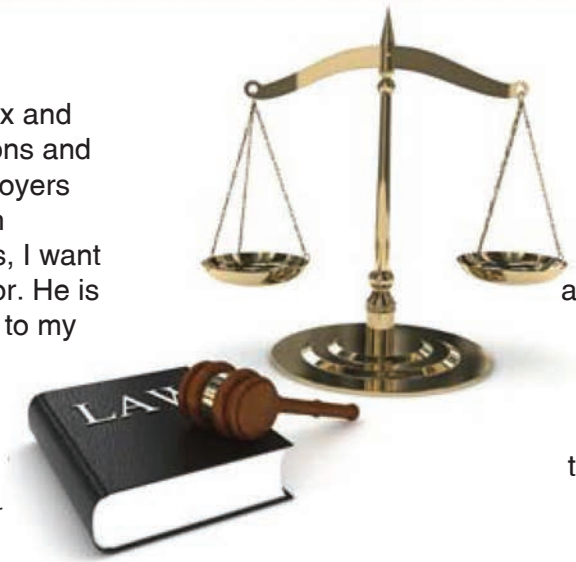

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A Primer on the Law of Expert Witnesses
Part One

By: Stephen Davids

"All generalizations are false, including this one." — Donald Rumsfeld

Primers are designed not to be comprehensive. This is both a false generalization, and an excuse. I am certain there is much more than could be discussed under this subject, but the hope is to introduce the general subjects.

LAYPERSON OPINION TESTIMONY

We begin with the most dicey opinion testimony:

***Evidence Code section 800*:** layperson opinions under Evidence Code Section 800 are only permitted to the extent they are "rationally based on the perception of the witness" and "helpful to a clear understanding" of the witness' testimony.

The following is permissible lay opinion, per Jefferson's Bench Book:

(1) Identity of a person. (People v. Maglaya (2003) 112 Cal.App.4th 1604, officer's observation that shoe prints at the crime scene were similar to the sole pattern on defendant's shoes.)

(2) The witness's own intent, motive, emotion, or state-of-mind fact. (Cope v. Davison (1947) 30 Cal.2d 193, 200.)

(3) Measurements of speed, distance, or size. (Dean v. Feld (1947) 77 Cal.App.2d 327, 330.)

(4) Character evidence. (Evidence Code 1100, *et seq*.)

(5) Identification of handwriting, if the witness has personal knowledge. (Evidence Code 1416; People v. Perry (1976) 60 Cal.App.3d 608, 613.) This might have been true in 1976. In the electronic age, not many of us use our signature on emails or other communication. We even use "Dictated but not read…" stamps on correspondence.

(6) The witness's own health, including illness or injury. (People v. DeSantis (1992) 2 Cal.4th 1198, 1227.)

(7) In a slip-and-fall case, a layperson can testify to an "open and obvious" condition as a layperson opinion, but not about the reasonableness of the condition. (Osborn v. Mission Ready Mix (1990) 224 Cal.App.3d 104.)

"[Layperson opinion] testimony is [based] upon the same principle that permits evidence showing the strength or force of a blow, the distance at which a sound can be heard, or the direction from which it comes, the speed of a horse, the degree of cold or heat, or of light or darkness. In any such instance a witness who had a personal experience or knowledge of the sensation is competent to testify, although his answer is only his opinion of the matter." (Healy v. Visalia & Tulare Railroad (1894) 101 Cal. 585, 590.) This may be the only 119-year-old case I am familiar with.

Visueta v. General Motors (1991) 234 Cal. App. 3d 1609, 1616: the cause of an accident is a subject only for expert, and not layperson, opinion. "… [W]here expert or special knowledge is essential to formation of an intelligent opinion which would be of aid to the jury, … [a] nonexpert witness cannot express his opinion as to the cause of a particular accident. [Citation and internal quotation marks omitted; citing a Nevada Supreme Court case.]")

In personal injury cases, lawyers often try to have their accident reconstruction or law enforcement witnesses comment on the Vehicle Code. However, "It is elementary that it is within the province of the jury to determine which party, if either, was negligent and which party, if either, violated the right of way rules. Such a matter is not the subject of expert testimony and neither a police officer nor any other witness should be asked whether he had reached a conclusion as to which party violated the right of way or to state such conclusion if he had arrived at one." (Waller v. Southern California Gas Co. (1959) 170 Cal. App. 2d 747, 755.)

EXPERT OPINION TESTIMONY

Evidence Code section 801: expert opinion is limited to (1) subjects sufficiently beyond common experience such that an expert would assist the jury, and (2) based on knowledge, skill, expertise, training, and education known to the expert, whether or not admissible, that is of a type that may reasonably be relied upon by an expert in forming an opinion.

Bob Dylan and the "Common Knowledge" Exception

"Regardless of whether expert testimony is necessary, however, the standard remains constant, unaffected by the 'ordinary' or 'professional' nature of the proof upon which it rests." (Flowers v. Torrance Memorial Hospital Medical Center (1994) 8 Cal. 4th 992, 1001, footnote 4: "This rule appears to be a corollary to the observation 'you don't need a weatherman to know which way the wind blows.' (*Bob Dylan, Subterranean Homesick Blues, Bringing It All Back Home [Columbia Records, 1965]*)." To place the lyrics in context: "Look out kid / Don't matter what you did / Walk on your tip-toes / Don't try No Doz / Better stay away from those / That carry around a fire hose / Keep a clean nose / Watch the plainclothes / You don't need a weatherman / To know which way the wind blows."

Flowers involved a nurse who failed to put up a rail on a gurney. "The 'common knowledge' exception is principally limited to situations in which the plaintiff can invoke the doctrine of *res ipsa loquitur*, i.e., when a layperson 'is able to say as a matter of common knowledge and observation that the consequences of professional treatment

Continued on next page

were not such as ordinarily would have followed if due care had been exercised.'" (*Id.*, at page 1001.)

Oregel v. American Isuzu Motors (2001) 90 Cal. App. 4th 1094, 1102, footnote 8: "It is within the realm of common knowledge that a new car with an unremediable oil leak does not conform to its warranty, and no expert testimony is necessary to establish this proposition."

Carson v. Mercury Ins. Co. (2012) 210 Cal. App. 4th 409, 422: "We do not agree with [Plaintiff's] contention that a layperson observing the photographs of her damaged vehicle could say as a matter of common knowledge the vehicle could never be repaired to its pre-accident safe condition."

Blackwell v. Hurst (1996) 46 Cal. App. 4th 939, 944: "The divergence in testimony on this issue illustrates that steps that a dentist might have taken to prevent aspiration of a dropped object are not matters of common knowledge."

"Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates. Expert testimony will be excluded when it would add nothing at all to the jury's common fund of information, i.e., when the subject of inquiry is one of such common knowledge that men of ordinary education could reach a conclusion as intelligently as the witness." (Burton v. Sanner (2012) 207 Cal.App.4th 12, 19: defendant fired at home intruders, injuring his estranged wife—who was attempting to retrieve personal belongings – and killing the son of the estranged wife's boyfriend. Plaintiff's expert, a retired police officer, opined that defendant's actions were not a reasonable response. The Court of Appeal held that it was error to admit this testimony under Evidence Code Section 801 because the opinion of Plaintiff's expert usurped the jury's role).

The nature of the subject upon which an expert may base an opinion varies depending on the facts. In some areas, an expert can rely on statements and other information provided others. But in other fields, this is not allowed. A physician can rely on the patient's statements of the history of his condition. (People v. Wilson (1944) 25 Cal.2d 341.) A doctor can also rely on reports and opinions of other medical providers. (Kelley v. Bailey (1961) 189 Cal. App.2d 728; Hope v. Arrowhead & Puritas Waters, Inc. (1959) 174 Cal. App.2d 222, 344.) An expert on the valuation of real or personal property can rely on inquiries he / she made to others, as well as relying on commercial reports, market quotations, and relevant sales known to the witness. (Betts v. Southern Cal. Fruit Exchange (1904) 144 Cal. 402; Hammond Lumber Co. v. County of Los Angeles (1930) 104 Cal. App. 235; Glantz v. Freedman (1929) 100 Cal. App. 611.)

On the other hand, an expert on automobile accidents cannot rely on extrajudicial statements as a partial basis for an opinion as to the point of impact, and irrespective of whether the statements would be admissible. (Hodges v. Severns (1962) 201 Cal. App.2d 99; Ribble v. Cook (1952) 111 Cal. App.2d 903; Behr v. County of Santa Cruz (1959) 172 Cal. App.2d 697: report of fire ranger on the cause of a fire was inadmissible because it was primarily based on statements from others.)

Conjectural expert testimony is not allowed. Under Evidence Code section 801, the foundational facts for an experiment must provide a reasonable basis for the specific opinion. An opinion based on speculation or conjecture is inadmissible. (Lockheed Litigation Cases (2004) 115 Cal. App. 558, 563.)

Miller v. L.A. Flood Control District (1973) 8 Cal.3d 689 arose out of a personal injury and wrongful death case against the flood control district and a home builder. A flood destroyed Plaintiffs' home. Plaintiffs' expert was a mechanical engineer with training in hydraulics and hydrology who was familiar with characteristics of hillside flooding by virtue of previous employ-


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ment with another flood control district. (*Id*., at page 700.) Plaintiffs attempted to qualify him as an expert on the reasonable construction practices of the builder. (*Ibid*.) Plaintiff made an offer of proof that the expert would testify that a reasonably prudent builder would have utilized a retaining wall in constructing the home. The trial court refused to allow this testimony on the grounds that the expert "was not qualified to render an expert opinion on the subject." (*Ibid*; see also footnote 11.) The Supreme Court, in affirming the exclusion, acknowledged testimony that the expert had "observed the construction of several hundred residential developments" in hillside areas. (*Id*., at 701.) However, the expert still "had no close involvement in the construction of homes." (*Ibid*.)

Miller makes it very clear that an otherwise-qualified expert cannot express opinions on a given subject unless he or she possesses qualifications on that particular subject. (*Id*., at pages 700-701.) Further, the fact that the expert may have qualifications in a "vaguely related" field will not suffice. (Putensen v. Clay Adams, Inc. (1970) 12 Cal.App.3d 1062, 1080-1081: a physician who was an expert in the fabrication and use of medical catheters could not testify to the "ultimate issue" regarding the catheter's chemical composition, tensile strength, or material construction relative to why it kinked. There was a "dearth of evidence" indicating that he had such experience, knowledge, or education.)

The same point was made in California Shoppers, Inc. v. Royal Globe (1985) 175 Cal.App.3d 1, 66-67: a "highly qualified trial attorney" who handled litigation against insurance companies was not allowed to testify as to insurance company practices and how the particular insurance claim at issue was handled.

But seven years earlier, Neal v. Farmers Insurance Exchange (1978) 21 Cal.3d 910 held that the plaintiff could call an attorney to testify to the insurance company's bad faith. The subject was such that the jury could benefit from expert opinions. Lexis.com does not help. It brands California Shoppers as "Questioned" because of a federal Northern District of California case, but not because of the earlier Neal opinion. (Neither Sheppard's nor the online services seem to analyze a case's validity prospectively, as opposed to retroactively.) It would seem that California Shoppers agreed with Flastaff that the better part of valor is discretion: it pointed out that Neal (and other cases) were distinguishable because the insurer failed to investigate the nature of the claim of a known insured. (California Shoppers, supra., at pages 56-57.) But the courts and bar are now left to wonder about the proper role of a bad faith expert whose expertise derives from litigating cases.

Transitioning to medicine: a surgeon was allowed to testify to interpretation of X-rays because he had special knowledge and skill beyond what the layperson would know; the fact he wasn't a radiologist didn't matter. (Mann v. Cracchiolo (1985) 38 Cal.3d 18.)

***Evidence Code section 720*:** a person may qualify as an expert based on: (1) experience, (2) training, or (3) education.

People v. Young (1970) 12 Cal.App.3d 878, 882: lab tech, through experience alone (with no educational background), qualified as an expert in the effect of a dangerous drug.

Howard Entertainment v. Kudrow (2012) 208 Cal.App.4th 1102, 1116 [yes, *that* Kudrow]: in a business dispute between an entertainer and her personal manager, a witness who was not a personal manager still had requisite knowledge of the field. He had been involved in transactions involving custom and usage of compensation in the entertainment industry. (But did he have to take care of "smelly cat"?) The degree of expertise goes to the weight of the evidence.

Personal experience is sometimes not required. (Brown v. Colm (1974) 11 Cal.3d 639: physician was allowed to testify to standard of care in 1949, even though he did not practice medicine until 1959.)

To be continued...

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From page one

Meet adoration to my household gods,
When I am gone. He works his work, I mine.

There lies the port; the vessel puffs her sail:
There gloom the dark, broad seas. My mariners,
Souls that have toil'd, and wrought, and thought with me—
That ever with a frolic welcome took
The thunder and the sunshine, and opposed
Free hearts, free foreheads—you and I are old;
Old age hath yet his honour and his toil;
Death closes all: but something ere the end,
Some work of noble note, may yet be done,
Not unbecoming men that strove with Gods.
The lights begin to twinkle from the rocks:
The long day wanes: the slow moon climbs: the deep
Moans round with many voices. Come, my friends,
'Tis not too late to seek a newer world.
Push off, and sitting well in order smite
The sounding furrows; for my purpose holds
To sail beyond the sunset, and the baths
Of all the western stars, until I die.
It may be that the gulfs will wash us down:
It may be we shall touch the Happy Isles,
And see the great Achilles, whom we knew.
Tho' much is taken, much abides; and tho'
We are not now that strength which in old days
Moved earth and heaven, that which we are, we are;
One equal temper of heroic hearts,
Made weak by time and fate, but strong in will
To strive, to seek, to find, and not to yield.

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Nominations are now being sought for Public Justice's Trial Lawyer of the Year Award, presented to the trial attorney or legal team that made the greatest contribution to the public interest within the past year by trying or settling a socially significant case.

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3. The harmfulness of the defendant's conduct. This includes the enormity of the wrong committed by the defendant and the degree of suffering or victimization of the plaintiffs.

4. The result. This includes the specific relief obtained and whether it is final, including the amount of damages and/or the nature and extent of injunctive relief obtained, any other results obtained, the current status of the case, and whether an appeal was taken and won.

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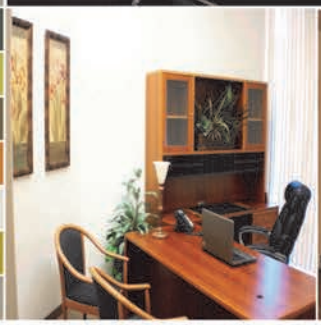

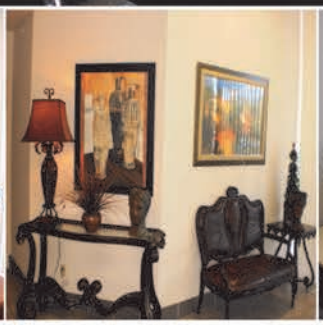

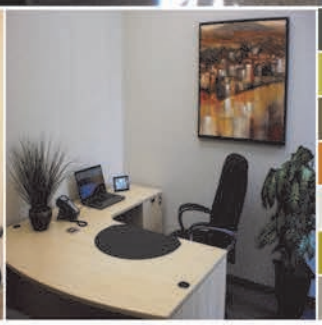

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CAOC-supported senior protection bill becomes law

SACRAMENTO – A bill supported by the Consumer Attorneys of California that would create a bill of rights for residents of assisted-living facilities in California has been signed into law by Gov. Jerry Brown.

AB 2171, authored by Assemblyman Bob Wieckowski (D-Fremont), gives residents of Residential Care Facilities for the Elderly (RCFE) protections similar to those already enjoyed by the state's nursing home residents. The measure will protect RCFE residents in areas such as visitation, privacy, confidentiality, personalized care and adequate staffing, while also strengthening a resident's right to make choices about his or her care, treatment and daily life in the facility.

"This bill will improve the dignity, safety and self-determination of our most vulnerable parents and grandparents," said CAOC president John M. Feder. "We are proud to have worked with California Advocates for Nursing Home Reform to put this important protection into law."

Additional legal protection for RCFE residents is necessary because the state agency responsible for overseeing such facilities has been decimated by cutbacks and is exceedingly slow to act in the face of an epidemic of neglect, taking months or even years to complete an investigation when complaints are filed. Thirty years ago, regulators inspected such homes every six months. Today, budget cuts have reduced government oversight to drive-by inspections once every five years.

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Reprinted from the Consumer Attorneys of California website: www.caoc.com. CAOC is a professional organization of plaintiffs' attorneys representing consumers seeking accountability against wrongdoers in cases involving personal injury, product liability, environmental degradation and other causes.

1. Lawrance Bohm, Mary-Alice Coleman, Jill Telfer, and Christopher Whelan have been jointly nominated during what some are calling the Year of the Employment Verdict.

Jill received a $2,059,000 verdict that included more than $1.5 million in emotional distress damages in federal court, against the San Joaquin District Attorney, based on retaliation/failure to prevent retaliation. Her client, Janis Trulsson, the assistant chief investigator for the DA's office, objected to the glass ceiling for women in that office and thereafter was laid off and denied promotion.

Mary-Alice and Lawrance co-tried a whistleblower case against the State Department and received a verdict of $730,000. Janet Keyser, a UC Davis administrative nurse, pointed out unethical treatment of prison inmates in a pain management study, and she was eventually laid off.

Mary-Alice also just received an affirmance from the 3rd DCA of a $1.5-million verdict (including costs and fees) in a racial discrimination case against the state. The client (Dr. Renfro) was a psychologist at Mule Creek State Prison who was dismissed for starting a prison library without authorization (which was considered insubordinate) and for sharing information with general population inmates.

Chris actually lost a summary judgment for his client on the client's retaliation claim, but still received an amazing $4.7-million verdict on the defamation claim. The jury returned a $1.7-million compensatory damage verdict, with an added $3 million in punitive damages. With about $800,000 in CCP § 998 interest, the total pay-out should be a about $5.5 million just on defamation.

2. Elisa Zitano and David Smith are jointly nominated for two medical malpractice settlements. The first was $500,000 for a 66-year-old retired repairman who suffered a kidney tumor in 2006. The plaintiff eventually underwent extensive kidney surgery in or about 2011. Elisa's and David's medical expert found that appropriate follow-up evaluation in 2001 would have confirmed recurrent disease, when the tumor was only one cm and had not yet metastasized. This tumor should have been surgically treated promptly, with an 80% chance of survival for more than 5 years.

The second settlement was for $1 million (policy limits) against a radiologist who read an MRI of the head and neck as essentially normal. The patient was suffering from left-sided numbness and weakness, as well as left shoulder pain, and the defendant failed to notice, diagnose, or report a large spinal lesion at C2-4 that was compressing the spinal cord. If properly identified, the tumor could have been addressed, less-intensive surgical treatment that could have prevented progressive deterioration.

3. Alan Laskin and John Stralen are jointly nominated for an $11.4-million verdict against a local Ford dealership for negligent repair that resulted in the subject vehicle losing control and veering into the center median. This was a very difficult liability case, and Alan and John were assisted by expert mechanic John Martin. The vehicle was taken in for service for steering problems, but Folsom Lake Ford claimed there was nothing wrong, and any odd sensations were due to the over-sized tires.

Robert Dunlap (who was borrowing the vehicle from the owner) sustained catastrophic spinal cord injuries when the steering locked up and forced him into the median, where the vehicle then rolled over twice. Dunlap's spinal injuries developed into Brown-Sequard Syndrome, which is a loss of sensation and motor function causing a hemisection of the spinal cord, resulting in paralysis. Dunlap is disabled from working and cannot undertake any of his previous activities.

The base verdict was $7.5 million ($500,000 of which were for loss of consortium). The additional $4 million came from interest and $180,000 in costs.

4. William Owen is nominated for the settlement of a motorcycle injury case for $1.125 million in an automobile-versus-motorcycle collision. An elderly driver turned in front of the plaintiff. While the plaintiff did not remember the collision, the defendant himself made admissions, and a reconstruction by Bill's expert established liability. Plaintiff suffered fractured ribs, a punctured lung, lacerated spleen, fractured pelvis, left elbow and wrist fractures, and knee injuries. He was hospitalized at UC Davis for two weeks, and returned to work after three months.

5. Robert Carichoff is nominated for a $2.2-million verdict in a bench trial before Hon. Robert Glusman in Butte County. This was a wage-and-hour case. Kyle Silvestrov was employed by NLP (a software company) as its vice president of business development, promised a $6,000 monthly salary and 15% commission on contracts secured. Two years later, the company's promises to Silvestrov had not been kept. Defense argued that the $6,000 was actually an advance on commissions. Just before trial, NLP filed for Chapter 13 protection, and the trial proceeded against the majority shareholder on an *alter ego* theory. Robert was able to pierce the corporate veil based on a lack of corporate formalities. The trial court found the defendant's conduct completely inappropriate. The $2.2-million verdict included $1.6 million, plus attorney's fees and costs.

6. Daniel Glass is nominated for an insurance bad-faith case involving a $10,000 VW that was found burned in the insured's apartment complex parking lot. Mid-Century Insurance denied the claim based on arson. Not surprisingly, Dan's clients were treated like criminals by their own insurance company. Even when arson could not be proven, Mid-Century denied the claim based on conflicting statements. The jury found a breach of contract and awarded $17,500, and also found bad faith. This was a recent result (late September), and Dan is now able to request attorney fees, which could be about $50,000.

The jury found "oppression" and hit Mid-Century with $150,000 in punitive damages. Proceedings will take place on the punitive damage amount, since Mid-Century is arguing that the punitive damages can only be a multiple of the compensatory damages, which means the $17,500, and without the attorney fees. While the numbers are not gigantic, the fact is these cases against insurers are extremely difficult, and Dan deserves recognition for a hard-fought win for his client (*See Verdicts & Settlements in this issue of The Litigator*).

To all members of the
Capitol City
Trial Lawyers Association
& those who make our jobs possible ...

CCTLA and President Steve Davids
cordially invite you to attend the
Annual Meeting / Holiday Reception
and the Installation of the
2015 CCTLA Officers and Board

Thursday, December 4, 2014
5:30 to 7:30 p.m. at The Citizen Hotel
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The Annual Meeting & Holiday Reception is free to honored guests, CCTLA members and one guest per invitee.

Reservations must be made
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by contacting Debbie Keller
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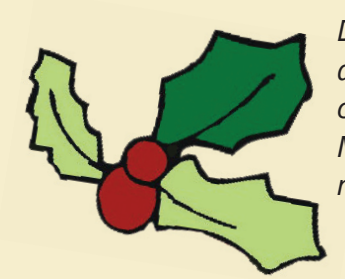
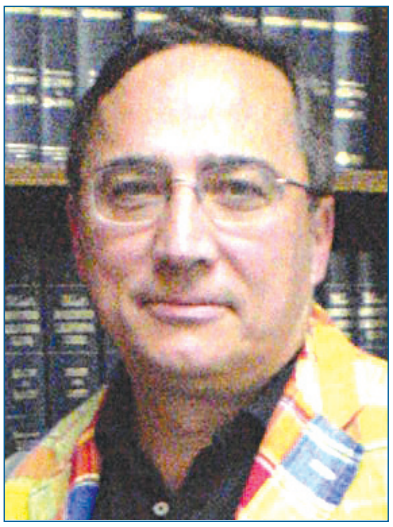


During this holiday season, CCTLA once again is asking its membership to assist The Mustard Seed School for homeless children. CCTLA will again be contributing to Mustard Seed for the holidays, and a representative from Mustard Seed will attend this event to accept donations from the CCTLA membership.

CCTLA thanks you in advance for your support and donations.

Whelan receives humanitarian award

CCTLA Board member Chris Whelan is the 2014 winner of the Joe Posner Humanitarian Award, presented by the California Employment Lawyers Association. Joe Posner was a staunch believer in bringing about positive change in the lives of the less fortunate through advocacy and the law. David M. deRubertis explains why Chris is so deserving of this award:



CHRIS WHELAN

By: David M. deRubertis

While we all agree that Chris Whelan is the undisputed "Godfather of California defamation law" and one of the best trial lawyers in the country, he is also responsible for many major developments in California employment law outside of defamation and outside of his trial work. Self-promotion is the anti-thesis of what Chris is about, so many would probably be surprised to see the degree to which Chris' cases have shaped California law.

Each of the following landmark cases were Chris' cases: Roby v. McKesson (2009) 47 cal.4th 687 (harassment); Richards v. CH2M Hill (2001) 26 Cal.4th 798 (continuing violation doctrine); Department of Health Services v. Superior Court (McGinnis) (2003) 31 Cal.4th 1026 (avoidable consequence defense); Olaes v Nationwide (2006) 135 Cai.App.4th 1501 (anti-SLAPP not applicable to defamation claim based on false accusation of sexual harassment); Page v. Superior Court (1995) 31 Cal.App.4th 1206 (individual liability for harassment); Rains v. Criterion System (9th Cir.1996) 80 F.3d 339 (reliance on federal law in support of a Tameny claim does create removal jurisdiction).

Chris deserves the credit for creating and pioneering most of California employment defamation law. When Foley came down and eliminated tort damages for a good old-fashioned breach of the implied covenant case—that is, a longtime good worker who was terminated for unfair and bogus reasons—Chris responded by trying to use defamation as the basis for a public policy Tameny claim. Unfortunately, this didn't work. Instead, the law and motion judges routinely rejected Chris' attempt to base a Tameny claim on the public policy prohibiting defamation.

Chris, being as persistent (or, perhaps one could say, stubborn) as he can be, (was) determined to find a way to use defamation as a basis for vindicating workplace rights. Failing to find a solution within the Tameny cause of action as modified by Foley, Chris went back to basic defamation law and began to plead and prove workplace defamation directly from the defamation claim rather than trying to use the defamation statute as the basis for a Tameny claim. He read every defamation case out there, eventually memorized the key passages of all of them and committed basically a massive summary of defamation law into his mind. With time, Chris eventually started crystalizing the approach, and the judiciary agreed with his approach: after all, he knew everything there was to know about defamation law making him the authority on the subject in any courtroom. Systematically applying basic, bedrock principles of defamation law to the workplace setting, Chris pioneered the use of defamation claims in employment law.

Chris has done everything he can to spread the word and teach the rest of us how to do what he knows so well how to do. You will literally never hear that Chris failed to return a call or respond to an email of a plaintiff lawyer. It just doesn't happen—no matter what. Many don't know the extent to what Chris gives because he does it under the radar and without seeking anything in return.

(He) is constantly responding with treatise-like answers with full citations to cases, as well as strategy regarding litigation or trial tactics, to defamation questions on the listserv or to the many personal emails he gets day-in-day-out from plaintiff lawyers struggling through the intricacies of workplace defamation law.

The amount of time Chris has spent mentoring so many plaintiff lawyers—including myself and (finding him to be) the most influential of the many mentors I have had over the years—is just remarkable. I am not exaggerating in saying he has spent many hundreds of hours mentoring me personally (outside of our time co-counseling) on how to handle defamation cases, and some of my largest recoveries for clients have been in defamation cases because of what Chris has taught me.

Chris has also spent countless hours mentoring others (myself included) on how to litigate and try employment cases beyond just relating to defamation. Without a doubt, I have learned more about how to try an employment case from Chris than from any of the many other awesome mentors I have been so lucky to have had over the course of my career.

The mentoring one gets from Chris is just different from mentoring from just about anyone. It includes the ability to call his cell at 2:30 a.m., while in the middle of trial, and literally get a response. It includes his willingness to drop everything on his plate on a moment's notice to spend hours on the phone strategizing with someone who is engaged in trial and needs some help (whether he knows the person or not).

Chris Whelan is an amazing man who is a role model for all of us.

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VERDICTS

PERSONAL INJURY: $3,695,978.59

On Sept. 19, 2014, an Amador County jury returned a record personal injury verdict of $3,695,978.59 for injuries suffered by Tara Frisk in a December 2009 automobile collision. Plaintiff was represented by **Jason Sigel and Hank Greenblatt of Dreyer Babich Buccola Wood & Campora, LLP**. Defendant was represented by Robert Drabant of the Law Offices of Robert J. Drabant.

Defendant, age 53, denied liability for causing the collision and for Plaintiff's damages. Defendant has been a Type 1 insulin-dependent diabetic since the age of 14, and on the evening of the collision, she blacked out from low blood sugar, crossed the center line, and struck the plaintiff's vehicle. The collision occurred on Highway 49 after the defendant left the Kmart in Jackson, heading for a Chinese restaurant less than one mile away.

When she arrived at Kmart, Defendant locked her keys in her car. She then phoned her husband, who brought her a spare key. While waiting for him, Defendant felt that her blood sugar was starting to get low. She did nothing to address her condition before getting behind the wheel to drive the relatively short distance to the restaurant to eat.

Defendant's DMV record was clean prior to this collision and showed no history of other collisions or medical restrictions. Test results in Defendant's medical records admittedly demonstrated that her diabetes was well controlled, and her personal physician testified at trial that her average historical blood sugar readings were in a range that indicated an ideal level of control. Defendant's husband also testified at trial that in the moments before Defendant got behind the wheel that she seemed totally normal. He saw no outward signs that his wife was suffering any symptoms of low blood sugar, and she didn't report any subjective concerns to him before driving away.

Plaintiff alleged that a reasonable diabetic should do something to bring up their blood sugar before driving and argued that the risk of a blackout due to falling blood sugar levels was known to the defendant, that she never should have attempted to operate her vehicle while feeling the onset of such symptoms.

Plaintiff ultimately required a single-level disc replacement in her cervical spine. While the surgery alleviated much of the pain caused by the disc damaged as a result of the collision, the plaintiff is still symptomatic and limited in her recreational activities. Plaintiff's surgeon testified that she will likely need a double-level fusion surgery sometime in the future. Defendant's retained orthopedic surgery expert testified that he could not relate Plaintiff's cervical disc injuries and need for surgery to the subject collision.

Plaintiff's pain management doctor testified she will likely require pain management care and medication for the rest of her life. The defense heavily disputed the reasonable value of the past and future care, as well as the need for the past disc replacement and future fusion surgeries.

Before trial, Plaintiff amended the complaint to include a claim for punitive damages. In closing argument, Sigel argued that the defendant's conduct was egregious to the extent that it justified an award of punitive damages to punish the defendant and deter similar conduct in the future. Sigel argued that the jury should award Plaintiff the full measure of her past and future damages and only punish the defendant in the amount of $1 to send her the message that her conduct was not acceptable in the community.

The jury returned a compensatory award for the plaintiff's past and future economic and non-economic damages of $3,695,977.59 and $1 in punitive damages.

***

WRONGFUL DEATH: $3,214,134

On Oct. 6, 2014, after a 17-day jury trial, **Roger Dreyer and Josh Edlow** secured a $3,214,134 verdict in Merced County Superior Court against the City of Atwater and Defendant Michelle Carrizales. The Hon. Donald J. Proietti presided.

Plaintiffs were Genovevo Gonzales, Genovevo ("Gene") Gonzales, Graciela Alston, Gloria Gonzales, Gary Gonzales and Gilda Gonzales. The City of Atwater was represented by Bradley A. Post and Stephanie Wu of Borton Petrini, LLP, and Defendant Carrizales was represented by James Miller of Powers & Miller.

On Dec. 16, 2010, decedent Delia Gonzales was walking northbound in the crosswalk at the intersection of Bellvue and Linden in Atwater, CA. She had a green light for her direction of travel as a pedestrian. Defendant Michelle Carrizales was also headed northbound on Linden, intending to turn left onto Bellvue. She also had a green light for her direction of travel. The City of Atwater had installed a permissive phasing of lights at this location, which allowed both south and northbound traffic on Linden to proceed at the same time, with traffic yielding to oncoming traffic before making a left or right turn. This intersection and the phasing was installed and completed as of December 2001.

Plaintiffs alleged that the subject intersection was in a dangerous condition at the time of the incident, cotending that permissive phasing was never fully evaluated by the city or its vendors when it was installed.

In December 2002, an individual on a bicycle in the crosswalk at the same location where Gonzales was killed eight years later, was struck by a left turning vehicle. That driver indicated that she was waiting for oncoming traffic and was focused on that traffic before instituting her left turn. She said she was unaware that pedestrians were in the crosswalk when she made a left turn and did not see the individual on the bicycle before she struck him.

Shortly after this death, the City of Atwater hired an outside traffic engineer to create a new traffic phas-

ing plan that was approved by the appropriate City of Atwater representative and paid for. That traffic engineer had to be hired from outside of Atwater because it had lost its traffic engineer in early 2002 and had not refilled that position, with no engineer on staff from March 2002 to March 2008. The individual in charge of the Engineering Department, a non-engineer, had directed the outside vendor to prepare a new traffic phasing, called "split" phasing.

Under the split phasing plan, when northbound traffic had a green light, pedestrian traffic would have a red light so pedestrians would not be in conflict with left turning vehicles. Southbound traffic would have a red light, while northbound had a green. When northbound Linden had a red light, then southbound Linden would get a green light, which would also allow for pedestrian travel and therefore not expose pedestrian traffic to left turning vehicles. This vendor engineer indicated that this plan was appropriate and safe and would provide safer travel for the traffic and the pedestrian safety would be "part of that."

This plan was paid for and delivered to the City of Atwater, but the plan was never instituted.

In August 2008, another pedestrian was killed in the crosswalk at precisely the same location where Ms. Gonzales was killed two years later. This person also was struck by a left turning vehicle—split phasing had not been instituted. The driver testified at trial that he was waiting for oncoming traffic and was focused on that traffic before instituting his left turn when he thought it was clear. He never saw the pedestrian.

Testimony at trial was that the engineer who had been hired in March 2008 did not become aware of the 2008 traffic fatality until after the death of Delia Gonzales. The former chief of police, Richard Hawthorne, testified that he never communicated information about the August 2008 death to the engineer.

Defendant Carrizales testified that on the date of the subject incident, she had a red light for her direction of travel that then turned green. She entered into the intersection and had to stop and yield to oncoming traffic before executing her left turn. She said while she had been through this location on at least 100 occasions before, she had never encountered a pedestrian in the crosswalk and was unaware that pedestrians had a green light when she also had a green light.

She said she was focused on the traffic coming southbound on Linden, and once she saw it was clear, she executed her left turn, striking Gonzales. Defendant testified she never saw Gonzales before impact.

Requests for Admissions were read at trial where the city admitted that this was the only signalized crosswalk in the City of Atwater where a pedestrian had been killed. The city also admitted, by way of Requests for Admission, that it had ample funds to pay for split phasing. This admission prevented Plaintiffs from presenting evidence that the city installed split phasing in the weeks following Gonzales' death.

The city contended that this incident was solely caused by Michelle Carrizales' negligence. The city further contended that the city was entitled to design immunity and that there had been no change in conditions and that the original intersection permissive phasing plan had been approved and paid for by the city.

Gonzales was 73 years old at the time of her death, in excellent health and a very active individual. She and her husband of 55 years had raised their five children in the City of Atwater. All had been contributing members to the community and had gone on to outstanding careers. Gonzales, who never graduated from high school, got her GED at age 40 and created and managed the immigrant farmworker high school education program for nearly 20 years for the school district.

In that capacity she worked with Vice Principal Joan Faul, who ultimately went on to become mayor of Atwater in 2006. At the time of Gonzales' death, Mayor Faul issued a proclamation that attested to the tremendous effect that Gonzales had had on her community and her family.

Faul testified about Gonzales' experience and knowledge and to what an extraordinary person she had been throughout her years in the city. She also testified that the City of Atwater's Engineering Department had failed the citizens by failing to institute split phasing and failing to make city's engineer aware of the fatality that took place just 16 months before Gonzales' death.

Gonzales is survived by her husband Genovevo Gonzales, and by her five adult children, Gene Jr., Grace, Gloria, Gary and Gilda.

Plaintiffs served a statutory demand for $750,000. The offer by the City of Atwater, by way of CCP § 998, was $300,000. Carrizales tendered her $15,000 policy limits. Both offers were rejected.

Trial expert for the plaintiffs was Rick Ryan, RF Ryan & Associates, Inc., a traffic engineer who testified that the failure to institute split phasing constituted a dangerous condition of public property. It was his opinion that the subject intersection was in a dangerous condition at the time of the incident. He testified that had split phasing been instituted, not only would Gonzales not have been killed, but the pedestrian death in August of 2008 also would not have happened.

Trial expert for the defense was James Jeffrey, a traffic engineer, who testified that the subject intersection was not in a dangerous condition at the time of the incident and there was not sufficient accident history to warrant a change to split phasing. His opinion was the split phasing plan of 2004 was not instituted because it was not necessary.

***

INSURANCE BAD-FAITH: $167,839

Daniel Glass obtained a verdict against Mid Century Insurance before the Honorable David Abbott, Sacramento County. The case arose from a fire on Apr. 16, 2009, that totally destroyed Plaintiffs' five-year-old Volkswagen Jetta, a vehicle with a value of about $9,500.

The fire started in the interior of the vehicle. The

Continued on next page

couple, both about 28 years old with a two-year-old, were having financial difficulties, and the registration on the vehicle had expired two weeks before the fire. They admitted they could not afford to pay it and were very up front and open about their finances, including the fact that they were "upside down" on the vehicle.

Mid Century contended Plaintiffs burned their own car to get out of the car payment. Mid Century reported them to the police, but no charges were ever brought. Mid Century also reported them to the Department of Insurance for fraud, but again, no action was ever taken.

Mid Century retained a "fire expert" to testify that the vehicle was unlocked and the windows were open at the time of the fire, while the couple said in their examination under oath that the vehicle was locked, and the windows were up. Mid Century then denied the claim, not based on arson, but on the insureds' purported presentation of a "material misrepresentation during the presentation of the claim."

Mid Century, represented by Daniel V. Kohls, of Hansen, Kohls, Summer and Jacob, aggressively litigated this matter for four-and-a-half years. Four years ago, Plaintff made a CCP § 998 Offer for $29,900, which was not accepted. Mid Century offered $7,501 three years ago and again on the first day of trial, which was not accepted. We requested $50,000 on the first day of trial.

The jury found, 12-0, that there was a breach of contract, bad faith and "malice, oppression and/or fraud" pursuant to CC § 3294. The jury awarded $17,839 in compensatory damages and then awarded plaintiffs $150,000 in punitive damages.

At press time, there are post trial motions on the validity of the punitive damage award, a motion for attorney fees of about $45,000 under Brandt v. Superior, and costs.

SETTLEMENTS

$2,000,000

CCTLA member Rob Piering obtained a $2,000,000 settlement in a bar/security guard assault and battery case that resulted in a bar patron's death.

Decedent was a 34-year-old software sales associate who was with friends at a bar in San Francisco. After a few hours, as he left the bar, he got into an argument outside of the club with a security guard hired by the bar to provide on-site security. The security guard alleged the patrol threatened and pushed him. In response, the security guard punched the man in the face, and the man fell on his back, hitting his head on the concrete and losing consciousness with snoring respirations (suggestive of TBI).

The security guard made a radio call for the bar's designated medical lead, not Emergency Medical Techinican (EMT)-certified, who found the patron lying face up and mumbling. The bar's medical concluded the man was drunk lead and did not call for medical services, instead escorting the man to a nearby bus stop, and while attending to the him, took his cell phone. Bar employees and security personnel later observed Decedent vomiting blood, but again, no medical assistance was summoned.

An hour later, a passerby discovered the man unconscious, just down the street from the entrance to the bar and called for an ambulance. Decedent was taken to San Francisco General Hospital, but he never regained consciousness, dying in the hospital nine days later, the result of traumatic brain bleed. He is survived by his wife. They had no children.

The incident was investigated by the San Francisco Police Department Homicide Unit, and it was determined that the security guard was legally justified in punching the man, concluding it was a "justifiable homicide."

During the course of the wrongful death action, it was shown that the bar did not have a city-approved security plan, did not have an on-site EMT, did not have an established medical response plan, failed to call for medical care, failed to have a minimally competent medical evaluation of the decedent, and lacked a chain of command for implementation of policies to address injuries to bar patrons. It was also shown that a bar employee took the decedent's cell phone and may have also taken the decedent's wallet, which was found two months after the incident, on a public bus.

The security guard and security company that employed him were sued, along with the bar. Although they claimed self-defense, depositions revealed the security guard could have retreated without punching the patron, and that the guard wrote a text to his boss immediately after the incident, declaring, "I just knocked this dude out." It was also shown that the security guard violated company policy by not calling for medical assistance for the patron and failed to call for available back-up to assist him in dealing with the patron before he punched the man.

After lengthy depositions, the bar and security company tendered their respective policy limits of $1,000,000 each, for a combined settlement of $2,000,000.

***

$6,700,000

Roger Dreyer of Dreyer Babich Buccola Wood & Campora, LLP, obtained a $6.7-million settlement in the case of an agricultural aviator's death that resulted from an unmarked meteorological evaluation tower.

The settlement, reached on Sept. 3, 2014, in front of Judge Scott Snowden (Ret.) on the wrongful death action filed by the family of agricultural aviator Steve Allen, establishes the standard of care for the use of meteorological evaluation towers for wind prospecting in agricultural areas.

On Jan. 10, 2011, a 60-meter meteorological evaluation tower (MET) that had been erected in April 2009 caused the death of well-known and respected Northern California agricultural aviator Steve Allen.

Allen had been hired by Bouldin Farming Company to spread winter wheat on one of the fields in Webb Tract Island, in Contra Costa County. The tower was an eight-inch galvanized, unmarked, unlit tower manufactured by NRG Systems, Inc.

It had been installed by Echelon Environmental Energy and PDC Corporation, which had been hired by Renewable Resources Group, the agent and representative of ZKS Real Estate Partners and Delta Wetland Properties, to monitor wind levels to prospect for the potential of a wind energy farm on Webb Tract. This tower was constructed in a fashion to avoid being above 200 feet, which would have triggered FAA regulations that required the tower to be marked in a fashion so that it would be visible and could be seen by low flying aviators. Defendants were mindful of the FAA requirement for marking and lighting a tower if it exceeded 200 feet. All of the above defendants, through their insurance carriers, have contributed to settle this matter for the sum of $6.7 million.

Allen was never made aware of the tower's existence by Bouldin Farming Company, and from eyewitness accounts, it was clear that he never saw it before his plane struck it and he fell to his death. Allen's death was not the first where agricultural aviators struck unmarked and unlit METs during daytime operations. These towers, in the last five to 10 years, have become much more popular and utilized as investors look for locations to install wind farms. The same towers have been the subject of NTSB advisories as to the danger they pose to agricultural aviators.

Allen, who was 58 at the time of his death, is survived by Karen Allen, his wife of more than 20 years, and two adult daughters. He had logged more than 26,000 accident-free hours in his agricultural aircraft and had a stellar reputation for safety and ability.

"He set the gold standard for aerial application," said Brent Tadman, farms operation manager for M&T Staten.

"Steve Allen was a consummate professional and our go-to agricultural aviator. His death was a tragic and unacceptable loss that we all felt," said Mark Boyd, farms operation manager for Hastings Island.

Both of these men testified that the standard of care required farmers to tell agricultural aviators of obstacles like this one once they are created, something that did not happen in this incident.

Andrew Moore, executive director for the National Agricultural Aviation Association stated, "We believe that this case, and the result, sets the standard of care in the agricultural and MET community. Now those individuals who lease land for the use of METs and wind energy investors have to recognize that the standard for them is to mark these towers and obstructions so that agricultural aviators will be able to be aware of their presence and avoid them accordingly. Strobe lighting, painting and other visible markings along with databases showing exact geographical locations of these towers are some of the proper safety standards to use to protect agricultural aviators from low-level towers."

"Agricultural aviators deal with hazards every day they are in the air, and they need to know of obstacles and hazards," said Rod Thomas, owner of Thomas Helicopters in Gooding, Idaho and 2014 president of the National Agricultural Aviation Research and Education Foundation, who also testified in this action. "We believe this case establishes a standard of care in the community, and wind energy and agricultural businesses are now on notice of this standard of care that is required of them and the potential exposure that they face, should they not properly and adequately mark these towers so that members of the aviation community are not killed."

This matter was scheduled for trial in Contra Costa County in front of Hon. Laurel Brady on Oct. 6, 2014, when the settlement was reached.

Previously, Allen's wife had helped sponsor legislation in California and Colorado to have towers of this nature marked and identified so that agricultural aviators would be notified and aware of MET's existence so they could be avoided. She continues working with the NAAA and others so these types of obstructions are adequately marked and other families do not have to suffer the tragic loss she and her daughters have had to endure.

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Mike's Cites

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is unclear whether such a premature date in the demand for disclosure invalidates the demand. Only a party that has itself "made a complete and timely compliance with §2034.260" may seek to exclude his opponent's experts for the opponent's unreasonable failure to comply with expert discovery.

Moreover, there is no evidence before the appellate court that Plaintiff's counsel behaved so unreasonably as to warrant the exclusion of their experts' opinion testimony at trial.

In Zellerino v. Brown, (1991) 235 Cal App 3d 1097, a party's production of late, incomplete expert witness information, coupled with refusal to make the experts available for deposition was deemed unreasonable gamesmanship because this conduct amounted to a comprehensive attempt to thwart the opposition from legitimate and necessary discovery, justifying exclusion of evidence.

If a party intentionally manipulates the discovery process to ensure that expert reports were not created until after the specified exchange date, the court may find the failure to produce them was unreasonable and exclude the expert's opinions. Boston v. Penny Lane Centers, Inc., (2009) 170 Cal App 4th, 936, 952.

In this case, the record does not support a determination that Plaintiff's counsel so unreasonably failed to timely disclose experts that exclusion of all expert testimony was warranted.

Plaintiff's counsel did not engage in actions that can be characterized as gamesmanship nor did they engage in a comprehensive attempt to thwart the opposition from legitimate and necessary discovery justifying exclusion of the evidence. Moreover, Defendants made a strategic choice not to depose Plaintiff's experts.

"We do not agree that a party's ability to conform to its preferred decision-making process necessarily excuses its refusal of a deposition offer; further, we are certain it does not weigh in favor of finding Plaintiff's actions 'unreasonable' so as to exclude their expert's testimony. The trial court abused its discretion in sustaining the defendant's objection to Plaintiff's experts. The conclusion of the court was further bolstered by the fact that the trial court's ruling was, in effect, a terminating sanction, as it eviscerated Plaintiff's case. The "general rule [is] that a terminating sanction may be imposed only after a party fails to obey an order compelling discovery . . ." New Albertson's, Inc. v. Superior Court, (2008), 168 Cal App 4th, 1403, 1426.

The judgment against the plaintiff was reversed with directions to reinstate the action.

2. Haver v. BNSF Railway Company (June 3, 2014) 2014 DJDAR 7063

DUTY

FACTS: Lynn Haver, Mike Haver's wife, was diagnosed with mesothelioma from which she died. Mike Haver was employed by the Santa Fe Railway, predecessor to defendant BNSF Railway Company. Husband Mike's clothes were exposed to products and equipment containing asbestos on BNSF's premises and he brought those products home on his clothes which

Continued on next page

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were transferred to Lynn.

The complaint alleged premises liability and failure to warn. Lynn's heirs brought suit, BNSF demurred, relying on Campbell v. Ford Motor Company (2012) 206 Cal App 4th 15. In Campbell, plaintiffs brought a premises liability action against Ford Motor Company alleging secondary exposure to asbestos. The Campbell decision was based on the court ruling that Ford owed no duty as a matter of law as a property owner because it was independent contractors who caused the injury or failed to warn of the asbestos.

The Campbell court stated: "In our view, the issue before us is whether a premises owner has a duty to protect family members of workers on its premises from secondary exposure to asbestos used during the course of the property owner's business. Our examination of the Rowland v. Christian (1968) 69 Cal 2d 108, 113, factors leads us to the conclusion that Ford owed the plaintiff no duty of care." Campbell, supra, 206 Cal App 4th at 29.

The Haver decision stated that employees may be independent contractors or direct employees of the defendant, it does not matter. "Under the emerging majority view, the court dismisses the suit, holding that an employer can have no legal duty to an employee's spouse who never stepped foot inside the employer's facility."

Kesner, _____ Cal App 4th ___, (2014) involved a complaint alleging negligence in the manufacture of brake linings that were tracked home in the clothes of an uncle whose nephew contracted mesothelioma. Kesner stated, "It need not question the conclusion in Campbell that a landowner owes no duty of care to those coming into contact with the persons whose clothing carries asbestos dust from the landowners' premises. Plaintiff's claim in the present case is not based on the theory of premises liability but on the claim of negligence in the manufacture of asbestos-containing brake linings."

Thus, in a case involving secondary exposure, premises liability loses while negligence may prevail. The appellate court in Haver sustained the demurrer without leave to amend because absent a duty of care, there is no reasonable possibility that the defect can be cured by amendment

This ruling seemed to ignore an earlier quote in the case opinion:

"The elements of a negligence cause of action are the existence of a legal duty of care, breach of that duty, and proximate cause resulting in injury. (Ladd v. County of San Mateo (1996) 12 Cal 4th 913, 917-918) The elements of a cause of action for premises liability are the same as those for negligence: duty, breach, causation, and damages. (Ortega v. KMart Corp., (2001) 26 Cal 4th 1200, 2015; (c) Civil Code §1714(a), Castellon v. US Bancorp (2013) 220 Cal App 4th, 994, 998."

DISSENT: Justice Mink: "While courts throughout the country are divided on the issue of liability for take-home asbestos exposure, the majority of courts which find no liability are in states which, unlike California, focus on the relationship between the parties as the primary factor in determining duty. The majority of courts which find liability are in states which share California's view of foreseeability as the primary factor in determining duty.

"They [the majority] raise the specter of a flood of lawsuits inundating the court to the point that they can no longer function and of companies being forced out of business. I question the factual basis for these concerns, but more importantly, I find stronger public policy considerations counsel imposing such a duty. Society does not benefit by allowing tortfeasors to avoid responsibility for their tortious conduct, particularly in cases such as the present one where the injury is a physical one and its cause undisputed."

"When workers [and their families] are protected from the deadly substances, society benefits. When corporations are held accountable for the consequences [of their negligence] . . . society benefits. When our justice system fairly places the burden of responsibility for dangerous products on the offending party, rather than the one who suffers, society benefits." Miller v. Ford Motor Company (2007) 740 N.W. 2d 206, 229 (dissenting opinion of Cavanaugh, J.) [fn omitted].

3. Verdugo v. Target Corporation, California Supreme Court, June 23, 2014. 2014 DJDAR 8060.
THE CHIEF JUSTICE SPEAKS FOR A UNANIMOUS SUPREME COURT ON DUTY: Under California law, a business establishment's common law duty of care to its customers does not include a duty to acquire and make available an automatic external defibrillator for use in a medical emergency.

4. Hernandez v. County of Los Angeles (June 17, 2014), 2014 DJDAR 7711.
MARIJUANA USE NOT RELEVANT IN ABSENCE OF CAUSATION

Randy Hernandez was struck and killed by a Los Angeles County Sheriff's vehicle when Randy was standing by his disabled car on the freeway after a crash. Randy's post-mortem indicated marijuana in his system. Randy's heirs made a motion in limine to exclude any evidence of marijuana usage, but that motion was denied by the trial judge. The jury rendered a verdict finding Randy 14 percent at fault. Randy's heirs appealed. ***"We conclude evidence of marijuana use is irrelevant in the absence of a causal connection between the marijuana use and the accident.*** Admission of the evidence was prejudicial, because it is reasonably probable that allocation of fault for Randy's death would have been more favorable to Joselyn (heir) if the marijuana evidence had been excluded."

5. Steve Allen v. Wallace Liberman (June 18, 2014) 2014 DJDAR 7751.
STATUTORY IMMUNITY FOR SOCIAL HOSTS WHO SERVE ALCOHOL

Civil Code §1714(c) provides that no social host who furnishes alcoholic beverages to any person may be held legally accountable for damages suffered by that person resulting from the consumption of those beverages. Seventeen year-old

Shelby Allen died when her friend, Kayli Liberman, gave her enough vodka to get her blood alcohol to .339, which caused Shelby's death. The case filed by Shelby's parents was dismissed pursuant to the statute.

6. Scottsdale Indemnity Company v. National Continental Insurance Company (September 14, 2014) 2014 DJDAR 12899.

FACTS: Independent trucker, Manuel Lainez, bought $1 million coverage with Scottsdale Indemnity Company. Lainez was dispatched by Western Transport Services, a non-asset based corporation that did nothing but arrange for pickups and deliveries throughout California and Nevada. Western Transport Services had an excess policy with National Continental Insurance Company worth $1 million.

Lainez caused an accident that killed a driver. At mediation, the wrongful death case settled for $675,000. Scottsdale paid $475,000, and National Continental Insurance Company contributed $200,000. Afterward, Scottsdale sued NCI for indemnity and equitable contribution.

Insurance Code §11580.9 contains a number of subdivisions designed to cover many common coverage dispute situations. One such subpart of the section says that if a vehicle is named in the policy, it is primary.

Judge David I. Brown of the Sacramento Superior Court ruled that since the Scottsdale policy listed Lainez's truck, Scottsdale was primary. Judge Brown cited Insurance Code §11580.9(d): "In this situation, subdivision (d) appears to be the more specific subdivision as it applies where two or more policies affording valid and collectible liability insurance *apply to the same motor vehicle or vehicles* in an occurrence out of which a liability loss shall arise, it shall be *conclusively presumed that the insurance afforded by that policy in which the motor vehicle is described or rated as an owned automobile shall be primary. The insurance afforded by any other policy shall be excess.*" Scottsdale's policy was thus primary because it described Lainez's 1999 Freightliner.

Judge Brown and the appellate court pointed out Wilshire Insurance Company v. Century Select Insurance Company (2004), 124 Cal App 4th 27, which provides authority that where policies cover both the tractor and the trailer, they can both be primary. In this case, Lainez's truck was particularized in the Scottsdale policy while not described in the NCI at all, and therefore, Scottsdale was primary.

7. Judicial Council of California v. Superior Court of Los Angeles County (Mari Bean) September 16, 2014, 2014 DJDAR 12812.

IF YOU HAVE A GOVERNMENT TORT CLAIM CASE:

When you file your government tort claim with the public entity, look at Government Code §915 to see upon whom you must serve the claim. The claim must be served upon the clerk, secretary, auditor, or board of the local public entity, the Victim Compensation and Government Claims Board for the State of California, or the California State University Trustees, or a court executive officer, court clerk, administrator, or secretariat of the judicial branch entity, depending upon who the claim is against.

If the claim is served on the wrong clerk, board, trustee, or secretariat, your case will be subject to a motion for summary judgment. Equitable estoppel will not save you.

8. Pope v. Babick and Stanley, September 18, 2014, 2014 DJDAR 12971.

FACTS: This case involves a Los Angeles freeway lane-change crash. As they proceeded down the freeway, Cars A and B sought to change into the same lane. Car A panicked, lost control and hit Car C. Car C sued cars A and B. Car A paid and trial ensued, C versus B.

As we often see in our vehicle crash cases, the defense sought to introduce the CHP officer's opinion because it favored defendant in Car B, laying blame on Car A. The plaintiff made a motion in limine, which was granted by the trial judge, excluding the officer's opinion because it lacked expert qualifications and/or percipient witness. The trial court ordered defense counsel not to elicit the officer's opinion. The defense attorney asked the officer what his opinion was, and the officer testified it was Car A. Plaintiff moved for a mistrial. Motion denied. Plaintiff Car C appealed the defense verdict against Car B.

HOLDING: The court gave a "curative" jury instruction telling the jury to disregard the officer's opinion. That corrected the problem. Because the court had ordered defense counsel not to elicit the opinion of the officer, the court sanctioned defense counsel $500.

INTERESTING POINTS: Plaintiff's counsel apparently was not a certified appellate attorney. The appellate panel chastised Plaintiff's counsel for presenting their case and not arguing the other side in their opening brief. Justices do not like trial counsel filing appellate briefs that do not lay out all of the material evidence and law in the case pursuant to Rule of Court.

The appellate court also lectured appellants on the standard of review and "substantial evidence." "In applying this standard of review, we view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor . . . [citation omitted]. Substantial evidence is evidence of ponderable legal significance, evidence that is reasonable, credible and of solid value." [Citations omitted] We do not reweigh evidence or reassess the credibility of witnesses. [Citations omitted] We are "not a second trier of fact . . . " [Citations omitted] A party raising a claim of insufficiency of the evidence assumes a daunting burden. [Citations omitted]

***BOTTOM LINE*:** Defense counsel violated the motion in limine and the court's order because it was evidence that helped his case. The sanction defense counsel paid was a $500 fine. The appellate court indicated it "strongly disapproved of Kane's (defense counsel) behavior." Nevertheless, $500 is a small price to pay for a defense verdict.

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A Primer on the Law of Expert Witnesses

November

Wednesday, November 12
CCTLA Problem Solving Clinic
Topic: "HOW TO TRY THE SMALL CASE USING A CHIROPRACTOR AS YOUR ONLY MEDICAL WITNESS"
Speakers: Travis Black, Esq. & Jeri Anderson, D.C.
5:30-7 p.m., Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA members only - $25

Friday, November 21
CCTLA Luncheon
Topic: ETHICS AND LAWYER LAW: WHAT YOU NEED TO KNOW NOW AND IN THE YEAR TO COME
Speakers: The Hon. Thadd A. Blizzard and Betsy S. Kimball, Esq.
Noon, Firehouse Restaurant
CCTLA members - $30 / Non-member $35

December

Thursday, December 4
CCTLA Annual Meeting & Holiday Reception
The Citizen Hotel
5:30 to 7:30 p.m.

Tuesday, December 9
Q&A Luncheon
Noon, Shanghai Garden
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA members only

Thursday, December 11
CCTLA Problem Solving Clinic
Topic: TBA
Speaker: TBA
5:30-7 p.m., Arnold Law Firm,
865 Howe Avenue, 2nd Floor
CCTLA members only - $25

January

Thursday, January 15
CCTLA Seminar
Topic: WHAT'S NEW IN TORT & TRIAL: 2014 IN REVIEW
Speakers: TBA
6 to 9:30 p.m., Capitol Plaza Holiday Inn
CCTLA members $125 / $175 non-member

Friday, January 30
CCTLA Luncheon
Topic: TBA
Speaker: Rodney Simmons, Esq.
Noon, Firehouse Restaurant
CCTLA members - $30

February

Friday, February 27
CCTLA & ADR Section Luncheon
Topic: TBA
Speakers: TBA
Noon, Firehouse Restaurant
CCTLA members $30 / $35 non-member

Contact Debbie Keller at CCTLA , 916 / 917-9744 or debbie@cctla.com for reservations or additional information about any of the above activities.

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