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The LITIGATOR

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Inside This Issue

Please help: We are facing a legislative firefight

Bob Bale
CCTLA President

I recently tried a case in a small courthouse in Santa Maria, part of Santa Barbara County. We started picking the jury early in December, just after the election results were final. The judge was generous in the time he allowed me in *voir dire*, which took nearly three days. The outcome? *20 jurors were eliminated for cause, and of those, 17 on tort reform issues.* The attitude of these prospective jurors and the *venire* as a whole was disheartening.

Many jurors were downright hostile, not only about the concept of fair compensation for pain and suffering, but the trial-by-jury process itself. For three days in Santa Maria, the courtesy and respect that jurors typically show the judge was the exception, not the rule. Many members of the panel were borderline arrogant and disdainful in their rejection of the judge's attempt to rehabilitate, and proud of their utter rejection of the notion that injured people should be fairly compensated for harm caused by others. Although my client prevailed at trial, it was chilling to be at the eye of this particular storm. It was also instructive.

I am not the first to perceive a sea change in what constitutes a "civil" society since the election. That change has been building for a long time and now has license for free expression courtesy of the highest political source. We are entering a world of alternative facts and altered reality, where all bets are off. With that change come new challenges.

The day after the inauguration, over a million Americans marched not only in protest of what they viewed as a dangerous shift in power, but to remind us all of key values that have served as the bedrock foundation of this country since its inception. Most notable among those values is our unique appreciation of fundamental, personal liberties. One of the many hand-made signs I saw was succinct: *"When injustice becomes law, resistance becomes duty."* As of Friday, January 20 2017, we as a nation are flirting with the very real possibility that injustice will become the law of the land, and transforming us all in the process.

None of us in this line of work are strangers to injustice. We see it every day in the way that insurance companies treat our clients, who in the calculus of personal injury lawsuits are too often reduced to mere statistics. We fight against such de-

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Mike's CITES

By: Michael Jansen
CCTLA Member

Chike Okafor v. United States of America
2017 DJDAR 344 [January 13, 2017]

FACTS: In 2013, Drug Enforcement Administration agents at San Francisco International Airport seized $99,500 in cash from Okafor's carry-on bag. The DEA sent Okafor a notice on May 1, 2013, informing him that the money was subject to forfeiture under federal law. The notice stated that the deadline for Okafor to file a claim to contest the forfeiture was June 5, 2013. On June 4, 2013, Okafor's attorney tendered a claim through Federal Express for overnight delivery to the DEA. The DEA did not receive the claim until June 6 and the DEA deemed Okafor's claim untimely (one day late). Okafor filed a motion for return of property. The District Court denied the motion. Okafor appealed.

HOLDING: The District Court's denial of Okafor's motion for return of the property was affirmed by the Ninth.

Okafor argued that he is entitled to equitable tolling of the deadline. "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: 1) That he has been pursuing his rights diligently, and 2) That some extraordinary circumstances stood in his way." Pace v. DiGuglielmo (2005) 544 U.S. 408, 418. "Federal Express' purported delivery delay does not constitute the kind of extraordinary circumstances that we have found to justify equitable tolling." An attorney's filing by mail shortly before a deadline expires constitutes routine negligence. Luna v. Kernan (9th Cir.2015) 784 F.3d 640, 646 states: "We do not recognize run-of-the mill mistakes as grounds for equitable tolling because doing so would essentially equitably toll limitations periods for every person who attorney missed a deadline." Lawrence v. Florida (2007) 549 U.S. 327, 336.

[**CAVEAT:** Don't expect the courts to give you a break because you relied on Fed Ex, UPS or U. S. Mail, and they failed to deliver as promised.]

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Pierson v. Helmerich & Payne International Drilling Company
2016 DJDAR 10568 [October 24, 2016]
Going and Coming Rule

FACTS: Defendant company Helmerich and Payne (hereinafter H&P) operated oil drilling rigs 24 hours a day in South Kern County. Each oil drilling rig had two crews working 12 hour days for 14 days, followed by 14 days off. H&P provided employees who live more than two hours driving distance away from the rig location with a shared room at a Best Western Motel in the area. Employees made their motel arrangements through H&P. Typically, the employees shared a room with another employee who worked the opposite shift. H&P paid the motel bill directly. Employee spouses were not allowed to stay in the motel rooms. Out-of-town employees who stayed at the motel were responsible for arranging and paying for their own transportation between their home and the motel. Employees were responsible for arranging and paying for their transportation from the motel to the oil rig job site.

One of the H&P employees lived in the Bakersfield area and picked up two other H&P employees at the motel to take them to an oil drilling site. The H&P employees did not reimburse the driver for the rides to the jobsites. H&P never reimbursed the driver or any other employee for costs of traveling to and from the oil rig drill sites. H&P had never requested the driver to transport equipment or supplies from a rig location in his vehicle.

On one of the trips, H&P employee Mooney crossed the double yellow center line and into the lane of oncoming traffic causing a major collision with another pickup truck driven by Plaintiff Brent Pierson. Pierson named Mooney and H&P as defendants.

Travelers Property Casualty Company of America (Travelers) was the workers' compensation insurer for Pierson's

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CALIFORNIA'S WAR ON RECREATION

(Please Pardon the Hyperbole)

By: Steve Davids

Leyva v. Crockett & Co., 2017 Cal. App. LEXIS 50, Jan. 18, 2017, and Wang v. Nibbelink (2017) 4 Cal.App.5th 1

In 2013, a golf ball struck Plaintiff Miguel Leyva in the eye while he and his wife walked along a public path adjacent to the Bonita Golf Club. Defendant filed a summary judgment based on the recreational trail immunity of Government Code Section 831.4 and also the recreational immunity of Civil Code section 846. (We'll discuss both of these below.) The trial court granted MSJ only on the trail immunity. The plaintiffs appealed, and argued that the defendant was not entitled to summary judgment because the immunities above do not apply to their tort claims. The 4th DCA (San Diego) concluded section 831.4 bars Plaintiff's case, and affirmed the judgment of the trial court.

We will later address the recreational immunity of Civil Code 846, but for dealing with Leyva, we will deal only with Gov. Code section 831.4. That statute says the immunity applies to the following:

Subdivision (a) pertains to any unpaved road which provides access to hiking, recreational or scenic areas and which is not a city street, highway, county or state / federal highway, or public street or a joint highway district, etc. Subdivision (c) relates to any paved trail, walkway, path, or sidewalk on an easement of way which has been granted to a public entity, which easement provides access to any unimproved property, so long as such public entity shall reasonably attempt to provide adequate warnings.

Plaintiffs argued that the location of the trail next to the golf course was unrelated to the injury. The injury would not have occurred if Leyva had not been walking on the trail. In other words, it was the trail that was the causative element. But the DCA disagreed: "Just as the trail's location next to a hill in Amberger-Warren, supra, 143 Cal.App.4th 1074 is an integral feature of the trail, so is the trail's location next to the golf course. Further, it makes no difference whether the alleged negligence in failing to erect safety barriers along the boundary between the golf course and trail *occurred on the golf course or on the trail* itself because the effect is the same." (Leyva, supra., at pages 7-8.)

In Amberger-Warren v. City of Piedmont (2006) 143 Cal. App. 4th 1074, a pedestrian brought her dog to an off-leash area of the city's dog park. A dog bumped her, and she slipped on some debris on a paved pathway and injured her hand on an exposed cement edge. She disputed whether the pathway was a trail for purposes of Section 831.4(b). The court concluded that the pathway was a trail as a matter of law. Similar paved paths had been found to be trails in other cases. The pathway was not a sidewalk because it was not on or adjacent to a street or highway. Even though Section 831.4(c) distinguished between trails and sidewalks, it did not limit the application of Section 831.4(b) that *a pathway could be found to be a trail even if it was possible to characterize it as a sidewalk*. (As we shall see later, Civil Code 846 apparently applies its recreational immunity to

The recreational immunity says, in general, that an owner (private or governmental) of land that is open to the public is immune from liability when a person on the lane is injured. The policy imperative was to allow private and public landholders to allow more recreation, as opposed to defending lawsuits from people who should have known that being on the property could have been dangerous.

people who are not recreating, and not on recreational premises.) Trail immunity covered negligent maintenance of a trail, such as allowing accumulation of debris. Trail immunity also extended to claims arising from the design of a trail, such as the slope of the pathway and the absence of a handrail.

Also, "the erection of a safety barrier on the boundary of the golf course is equivalent to the installation of a handrail in Amberger-Warren." (Leyva, at page 8.) As we can tell, the recreational trail immunity is fairly broad in application. And it dovetails very closely with the recreational immunity of Civil Code Section 846.

The recreational immunity says, in general, that an owner (private or governmental) of land that is open to the public is immune from liability when a person on the lane is injured. The policy imperative was to allow private and public landholders to allow more recreation, as opposed to defending lawsuits from people who should have known that being on the property could have been dangerous.

A few months before Leyva, our own 3rd DCA (decision by Justice Hull, with Justices Blease and Mauro) decided Wang v. Nibbelink. (For trivia buffs, vocational rehabilitation expert Gary Nibbelink and his family were the defendants.) A horse ran away from a meadow owned by Defendants and onto adjacent property (Strawberry Lodge). The horse trampled Plaintiffs as they alighted from their car in the parking lot of the lodge. The errant horse was part of a wagon train, an annual historical event simulating Old West travel. The defendants were not involved in the event, but they had allowed the event organizers and participants to use the meadow for overnight camping and horse containment. Plaintiffs had nothing to do with the wagon train, not even as spectators. (Wang, supra, 4 Cal.App.5th at pages 6-7.)

Plaintiffs in Wang argued that "section 846 does not provide immunity because they were not on the meadow owners' property and were not 'recreating,' and even if Section 846 applied to such off-premises injuries, triable issues existed, e.g., 'parking' horses was not a recreational purpose." (*Id*., at page 8.) But the DCA held that the recreation immunity applied to off-premises injuries and to people not engaged in recreation. (*Id*., at page 23.)

I am likely not the first to wonder how a recreational immunity could apply to plaintiffs who were (a) *not* recreating, and (2) were *not* on recreational property. I would not necessarily argue for or against whether the court's formulation falls within *reductio ad absurdum*. Like Shakespeare's Antony, I am neither here to bury the court, nor to praise it. My purpose is to figure out how these cases will now be resolved in the future.

Without using any pejorative implications, the DCA has divined the following maxims from Section 846: (1) the third paragraph, subpart (c), of Section 846 adds an additional immunity (from the two preceding paragraphs) that shields the landowner from liability for injuries caused by (rather than to) recreational users; (2) the third paragraph broadly relieves landowners of liability for any injury to person caused by any act of the recreational user; and (3) the third paragraph is not limited to injuries to persons on the premises and therefore on its face encompasses persons off-premises.

Like Shakespeare's Antony, I am neither here to bury the court, nor to praise it. My purpose is to figure out how these cases will now be resolved in the future.

I think it helps the analysis by presenting the third paragraph of Section 846 as follows: *"An owner … who gives permission to another for entry or use for the above purpose upon the premises does not thereby … (c) assume responsibility for or incur liability for any injury to person or property caused by any act of the person to whom permission has been granted*."

What was the plaintiffs' "act" in Wang? They were just getting out of their vehicle to patronize a restaurant. But if the Wangs were not recreating, how does the recreational immunity dissolve their lawsuit? The DCA's response: "As the trial court noted, it would make no sense for a landowner to be immunized from liability toward a bystander inches within the property line, yet be liable for injury to a bystander standing inches outside the property line. Plaintiffs disagree, viewing this as a salutary "bright line" result. But this bright line would make no sense in the context of the otherwise-existing potential liability." (Wang, at page 19.) It will be interesting to see if this issue is the subject of future appellate exegeses. What if the next plaintiff is a few feet (or yards) from the property line? As a character sang in a musical years ago (I think), "When does it stop? When does it stop?" Maybe the plaintiff in Wang was right, and a bright-line rule is necessary.

I respectfully submit that there is at least a triable issue of fact that the Wangs did not cause their own injuries, and therefore were not subject to paragraph 3 of Section 846. They were just in a parking lot and in the process of going to the Strawberry Lodge for a repast.

I further respectfully submit that Wang (at least to some extent) re-wrote Section 846 by adding provisions that were not in the statute: specifically, the idea that Section 846 applies even when the plaintiff was neither on the recreational premises, and was not at the time engaging in recreation. (Wang, supra, 4 Cal.App.5th at page 23.) Wang extrapolates its conclusion from an *omission* in the third paragraph: a property owner does not "assume responsibility for or incur liability for any injury to person or property caused by an act of the person to whom permission has been granted." Nothing in that sentence says anything about non-recreants who are not on the subject property. To the contrary, it talks about "the premises." Wang is jumping to conclusions based on omissions in paragraph 3, specifically the lack of specific references to non-recreating, and also to those not on the property.

If the Legislature had wanted to declare that off-premises non-recreants came under Section 846, it could have done so, but it did not. Part of the problem is that Wang is viewing Section 846 as a statute made up of subsections. But Section 846 is one unified whole: it has no subdivisions. Absolutely nothing in the third paragraph says that immunity encompasses people who are not recreating. In fact, the language of subsection (c) deals only with injuries to those who caused their own injuries.

I obviously honor and respect the Wang court's decision. But I also respectfully submit that there is room for doubt. At some future time, the courts may reassess Wang, but for now it is the law that must be followed.

President's Mesage

Continued from page one

humanization every time we take a case. As many political pundits have observed, the handwriting on the wall promises that things are only going to get worse. Collectively we should anticipate a reinvigorated push for tort reform by House and Senate Republicans at national and state levels.

This is not intended as a rah-rah message of hope. *Hope is not a plan*. Rather, my message is that the only way to check power is to stand up against it. California's political leaders have, at least for now, signaled they intend to erect a bulwark against attacks on universal health care, the environment, deregulation of the banking industry, education, and immigration. In our business, for our clients, we must adopt a similar stance.

One way to fight back is to recognize that, like it or not, we live and work in a political world. *The only way to survive in such an environment is to lean in*. But leaning in requires time, treasure and talent. It means engaging the political process entirely; we can't afford to be mere bystanders.

We are facing a legislative firefight. That requires all hands on deck. Every single one of us who is fiscally able to invest in CAOC's efforts to protect the rights of the citizens of this state should be pitching in. And believe me, "investment" is the right word. It is not a donation. *CAOC gets results.* No longer can those of us who can afford to fund these efforts just stand on the sidelines. That is because in the world of politics when it comes to money, *less is not more: more is more.* And if you don't have or can't spare the resources to help financially, then volunteer your time and talent by participating in phone banks, attending Lobby Day, and actively seeking out and encouraging others to step up.

The first step to bearing a fair share of the load requires every single member of this organization who has not yet joined CAOC to sign up today. In the political jungle, CAOC is our attack dog, our beast of burden, truly our best friend. This is a trade organization that serves only one interest: the protection of our clients and our ability to fairly represent them in trial by jury. Every single legislative year CAOC kills dozens, if not hundreds, of tort reform and related bills that would undermine the rights of California citizens to seek legal redress for harm they have suffered at the hands of others, and effectively put us out of business.

This past year, CAOC was responsible for the passage of six important bills that advanced our ability to protect our clients and advance their cause. We literally could not and would not still be in business if not for CAOC's efforts, and anyone who believes to the contrary just has not taken the time to learn how the sausage is made.

Unfortunately, of our current 418 CCTLA members, only 171 are also members of CAOC, or just 40% of our membership base. In terms of loss of annual revenue, this means roughly $125,000 less funds available in membership dues alone to fight the good fight on behalf of our members and our clients every single year. Given the tight budget that COAC struggles with, this is significant. And joining CCTLA is not enough. As great as this organization is, it does not possess the resources or personnel to mount legislative efforts. As the state organization, that is CAOC's role.

Thomas Jefferson famously observed that, "*the jury trial is the only anchor... by which a government can be held to the principles of its constitution*." This right to trial by jury is the foundation that supports everything we do. Even cases that settle do so because the threat of trial looms in the background. Without that right, our clients and our livelihoods would be at the mercy of insurance carriers. Each and every one of us has to step up; we cannot prevail by riding coattails anymore. If you have not joined CAOC yet, do so today. Their web address is www.caoc.org. If you are already a member, contribute to a CAOC PAC or volunteer to help raise funds to support legislative efforts. Stand up. Be counted. Be heard.

Challenging a federal court decision shutting the courthouse door on consumers, because privacy invasion supposedly wasn't an 'injury'

By: Jennifer Bennett, Public Justice Staff Attorney & Paul Bland, Public Justice Executive Director

January 10, 2017—Lots of important rights exist only because at some point, Congress passed a law saying they do. For example, there's nothing in the Constitution that prevents real estate agents from refusing to show a home to someone because of their race. The right not to suffer housing discrimination exists because Congress passed the Fair Housing Act. The right to be free from employment discrimination exists because Congress passed the Civil Rights Act of 1964. The right not to be harassed by a debt collector, the right to see what credit reporting agencies are saying about you, the right to be free from telemarketing calls at all hours of the day and night—all these are rights granted by statute.

These statutes, of course, are only effective if they can be enforced in court. Having a theoretical right to be free from abusive debt collection doesn't mean much if you can't actually sue a debt collector who harasses you.

So, for years, corporations have been trying to make it harder to get into court—and, for years, the Supreme Court has been more than happy to help them. (Hi, arbitration law!)

Last year, though, in a case called Spokeo v. Robins, the corporate winning streak came to an end. It has long been the law that plaintiffs only have what's called "standing" to bring a case in federal court if they have been injured in some way. But the injuries caused by the violation of statutory rights are often dif-

ficult to prove or hard to measure. How does one measure, for example, the harm caused when a credit reporting agency publishes false information about you on the internet? How would you quantify the injury from a real estate agent's failure to show you a particular home? Recognizing that an injury is no less harmful simply because it's hard to measure, the Supreme Court has consistently allowed plaintiffs to bring claims for the violation of their statutory rights, even when their injuries are intangible. Spokeo, corporations hoped, was their chance to get the Supreme Court to change this rule.

But the Court refused. Instead of vitiating consumers' ability to bring statutory claims, as corporations hoped, the Court merely reaffirmed its prior case law, holding that tangible and intangible injuries alike may support standing. This was an *important victory for consumers* (whom we supported in this fight).

In the wake of Spokeo, corporations have fought to get lower courts to ignore what the opinion actually said, and instead interpret the decision as if it held what corporations hoped it would. So far, most courts have rebuffed their efforts. But a few have gone dramatically astray.

In a case called Romero v. Department Stores National Bank, for example, a consumer received literally hundreds of robocalls from the banks that issue Macy's-branded credit cards, despite the fact that she repeatedly told them to stop calling her. The consumer sued the banks for violating the Telephone Consumer Protection Act—a statute that prohibits unwanted robocalls to cell phones. But the trial court held that the consumer lacked standing to bring her lawsuit.

To have standing to bring a claim under the Telephone Consumer Protection Act, the court held, a plaintiff has to show not only that each and every robocall she received injured her, but also that the injury was caused not by the call itself, but specifically by the use of a computer to make that call. The judge made pretty clear that no consumer could ever meet this test. If this opinion were widely adopted, it would pretty much be the end of the Telephone Consumer Protection Act—and, more generally, its approach to standing would gut all sorts of other crucial worker and consumer protection statutes as well.

We believe that the district court decision here misreads Spokeo. And in just the few months since the decision was issued, it has already been explicitly rejected by several other courts. But it's being widely cited by corporations who have been caught violating the law. And, if it catches on, it could threaten once again to shut the courthouse doors to numerous important statutory claims. We strongly believe, therefore, that it's important that the decision be overturned.

For that reason, we are excited to be representing the plaintiff on appeal to the Ninth Circuit—along with Ron Wilcox of Wilcox Law Firm, Andre Verdun of Crowley Law Group and Ivan Lopez Ventura of Ivan Lopez Ventura, Esq. (Our) brief explains in detail why the trial court was wrong. It demonstrates that the Supreme Court did not adopt—and, in fact, has explicitly rejected—the extreme view taken by the lower court in this case.

Corporations should not be able to get away with violating consumers' rights, simply because the harm they cause is hard to quantify. The Supreme Court agreed in Spokeo. We hope the Ninth Circuit will follow suit.

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Reprinted from publicjustice.net. There is a link to the Brief referenced above on that website, under Recent Posts in the News section of the site.

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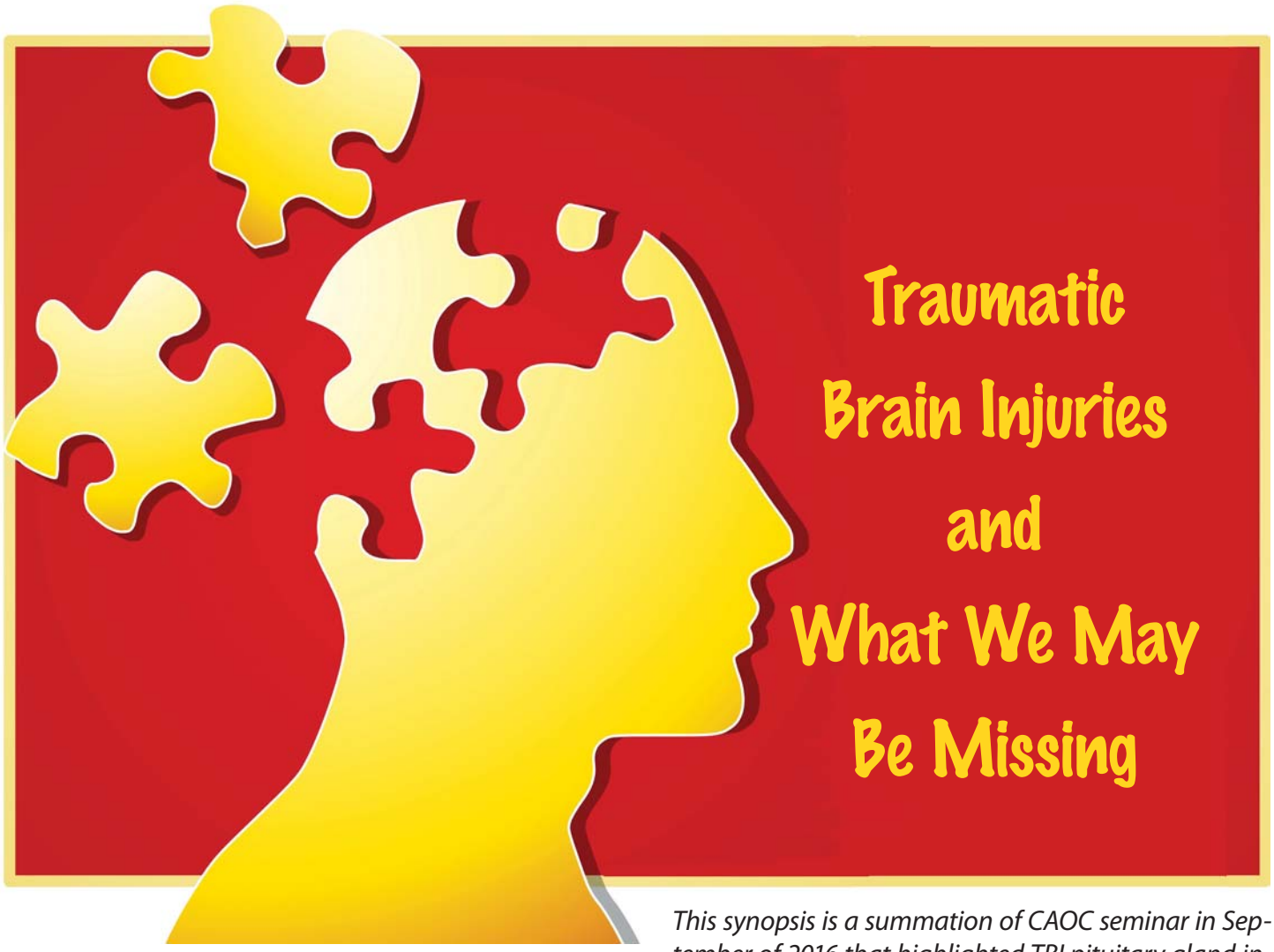


Traumatic Brain Injuries and What We May Be Missing

By: Lance J. Curtis
Carter Wolden Curtis, LLP
Member, CCTLA Board of Directors

This synopsis is a summation of CAOC seminar in September of 2016 that highlighted TBI pituitary gland injuries that often go undetected. The seminar was presented by Scott Blair of Nelson, Blair, Langer and Engle. There is a 16-page article provided for this seminar through CAOC.

One of the most difficult injuries to objectively prove for our clients is the mild traumatic brain injury (TBI). As we all know, trauma to the brain does not always show on an MRI or brain scan. This leaves us with only neuropsychological testing to verify cognitive deficits resulting from a TBI. However, this also leaves plenty of ammunition for the defense to hire their own experts to opine that our clients have other psychological issues, are faking or the test results are ambiguous.

In a recent CAOC seminar, research and data was presented that can assist attorneys in some cases in providing objective evidence of a traumatic brain injury. It may also help to give some medical reasoning and certainty supporting the fact that our clients are indeed suffering from the cognitive deficits reported, despite the lack of MRI or findings on scans which the defense uses so often to downplay the significance of these claims.

The premise of this article is to demonstrate how the existence of a pituitary gland injury in a trauma such as a whiplash or fall can be used to *objectively* prove the existence of a traumatic brain injury.

For the last 30 years, endocrinologists have suspected that TBI injuries were also responsible for pituitary damages. There was uncertainty as to how a TBI and pituitary damage may interact to cause a constellation of symptoms that could easily and objectively be explained as a result of trauma. According to statistics published by the CDC and Department of Defense (in the study of TBI injuries sustained by veterans), 30-50 percent of TBI's have pituitary issues that go undetected.

The relationship between damage to the pituitary gland and how this can result in cognitive or TBI-like symptoms is just now coming to the surface, and we should be able to understand the issues, getting our clients the proper testing which will assist in proving often undetected and unclaimed brain injuries.

In testing of volunteers simulating whiplash injuries using MRIs, it was determined that the base of the brain stem and the pituitary gland withstood much of the trauma. With the pituitary gland itself protected by a bony pocket, the "stalk" tethering the gland is stretched

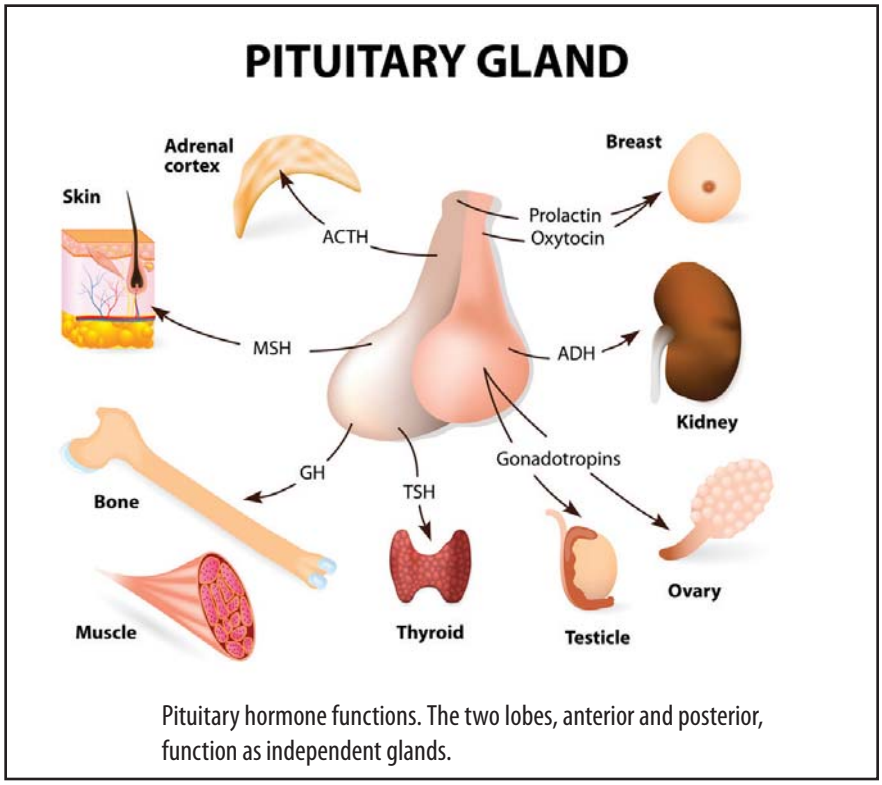
and/or twisted during the trauma, damaging nerves and capillaries to the gland. This in turn can cause hormonal signals to decrease or even stop, which results in a lack of oxytocin, HGH or anitdiruretic hormones being produced. This can result in behavior or cognitive changes which mimic a classic TBI.

One of the most significant lessons of this research and presentation is that to identify the existence of a pituitary gland injury, without more substantial objective TBI evidence, we need only get our clients to have the proper blood tests and lab work.

The client is referred by the primary care doctor to obtain the blood work that can easily identify a lack of various hormone levels that can then provide a basis for referral to an endocrinologist consult for further testing for damage to the pituitary gland. If it can be established that in fact the trauma resulted in some level of damage to the gland, or associated anatomy supporting signals to the pituitary, it will be far more difficult for the defense to refute the existence of a brain injury.

While this is a very, very brief summary of the information presented, I hope it leads to more interest and research into this developing area.

Digging a little deeper and being able to more objectively identify a basis for ongoing TBI symptoms, in the face of defense neuropsychology experts spouting nonsense from the DSM manual, will help us to get the treatment and compensation for our client's they deserve.



Pituitary hormone functions. The two lobes, anterior and posterior, function as independent glands.

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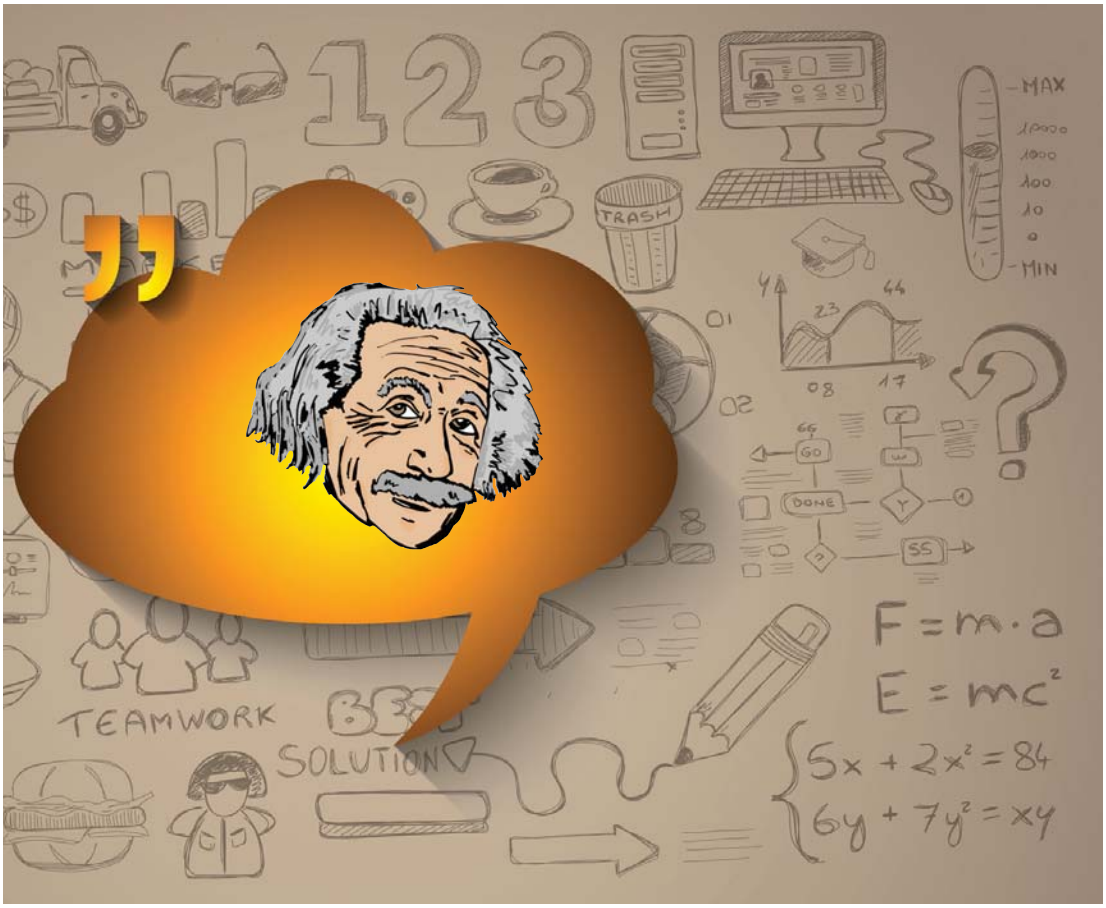
Make your arguments memorable with quotes from Einstein



By: Walter Schmelter, Member, CCTLA Board of Directors

Albert Einstein is presumed to be a pretty smart guy, despite people asking forgetful friends: "Did you lose your keys *again*, Einstein?" All quotes in this article are by *the* Albert Einstein (1879-1955), my hero, who created the best-known formula in the world.

A well-placed quote by Einstein in a legal brief in an opening statement or closing argument can by implicit association strengthen the credibility of your case. To add to your personal collection of persuasive and inspirational ideas and observations and enrich your thoughts and presentations, here listed with my intermittent comments are Einstein's own words that *will prove useful* to smart trial lawyers who save and use them. After all, "Intellectual growth should commence at birth and cease only at death."

"If you can't explain it simply, you don't understand it well enough." Einstein might have been advising trial lawyers on opening statement or closing argument, or on choosing a theme of one's case, or regarding what you should tell your experts. Einstein distilled his thoughts on his Theory of Relativity to: "When you are courting a nice girl, an hour seems like a second. When you sit on a red-hot cinder, a second seems like an hour. That's relativity." On explaining science for easier understanding, he said: "The whole of science is nothing more than a refinement of everyday thinking." He later stated, "It has become appallingly obvious that our technology has exceeded our humanity."

Use technology to better use quotes. Google "punctuation of quotes" and employ advice there. While attribution of a quote (especially in writing) is important to your credibility, feel free to paraphrase, modernize or adapt a quote to suit your needs and make it your own without attribution.

"Information is not knowledge." Practice using quotations, and you will get better at it. "Education is what remains after one has forgotten what one has learned in school." No matter that you must warm up to using quotes in your practice. "A person who never made a mistake never tried anything new."

Quotations are best used to describe or emphasize a point, or present an argument. Use quotes sparingly and with practiced timing. Don't rush through, speaking them faster than a spaceship through a wormhole. Einstein encouraged aspiring to one's best performance toward a higher goal: "Strive not to be a success, but rather to be of value." "Only a life lived for others is a life worthwhile."

Einstein could have been a jurist instead of a scientist. "Whoever is careless with the truth in small matters cannot be trusted with important matters." Note the parallel to CACI 107 subd. (e):

> …Sometimes different witnesses will give different versions of what happened. People often forget things or make mistakes in what they remem-

ber. Also, two people may see the same event but remember it differently. You may consider these differences, but do not decide that testimony is untrue just because it differs from other testimony.

However, *if you decide that a witness has deliberately testified untruthfully about something important, you may choose not to believe anything that witness said.* On the other hand, if you think the witness testified untruthfully about some things but told the truth about others, you may accept the part you think is true and ignore the rest. (Emphasis added).

CACI 107 is based on Evidence Code §780 (h) and (i):

> Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:
> (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
> (i) The existence or nonexistence of any fact testified to by him.

Albert Einstein even wrote on traffic safety: "Any man who can drive safely while kissing a pretty girl is simply not giving the kiss the attention it deserves." What a smart guy!

Refusing surgery for a brain aneurysm, Albert Einstein determined: "I want to go when I want. It is tasteless to prolong life artificially. I have done my share, it is time to go. I will do it elegantly."

"The difference between stupidity and genius is that genius has its limits."

With that, I'll stop here.

CCTLA recognizes best of the best for 2016

CCTLA presented four awards at its Annual Meeting and Holiday Reception in December, honoring the Honorable David De Alba as Judge of the Year award, William C. Callaham as the Advocate of the Year, Nita Smith as Clerk of the Year and Stewart Katz with a Special Award of Merit.

Assistant Presiding Judge De Alba was appointed to the bench in 2001. He presided over numerous significant cases in 2016, with great skill and impartiality.

Callaham, a senior partner in Wilcoxen Callaham, has 40 years of experience as a trial lawyer, and has handled a variety of cases in the western US. He has obtained 10 jury verdicts in excess of $1 million and many more multi-million dollar resolutions throught arbitration, mediation and settlement.

With the special award, Katz was recognized for his handling of cases against public entities; taking on battles that others wouldn't tackle.

About 175 persons attended the event, including 13 federal and state judges. The event also was a fundraiser for the Mustard Seed School for the homeless, including children, with $2,000 raised, including a large donaton from CCTLA past president Steve Davids.

Above right: Shelley Jenni and Advocate of the Year William Callaham; above left: Judge of the Year David DeAlba and Clerk of the Year Nita Smith.

Above left: 2016 CCTLA Pres. Shelley Jenni and 2017 Pres. Bob Bale; above right, Judge Kevin Culhane and Judge Bunmi Awoniyi

Far left, from left: William Callaham, Rob Piering, Dan Wilcoxen and David Perrault; near left: Jesse Atwal and Satnam Rattu.

Above: Ashley Amerio, John Demas and Charleen Inghram.

Above left: Geri Bradford and Judge Raoul M. Thorbourne; above right: Elisa Zitano and David Smith.

HEARSAY WITHIN MEDICAL RECORDS

By: Steve Davids

Let's say that in your next trial, the defense has a doctor on the stand and is going over medical records. Those records, of course, involve reports from other doctors and treating professionals. Does everything come in because the medical records were subpoenaed during Discovery?

1. Evidence Code 1271 (Business record) is an exception to the hearsay rule, but the following foundation has to be in place:

Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if:

(a The writing was made in the regular course of a business;

(b) The writing was made at or near the time of the act, condition, or event;

(c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and

(d) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

2. The defense in your case has to comply with all of the above.

Also, they can read entries, *but not opinion*s, because the witness is not there to be cross-examined.

Garibay v. Hemmat (2008) 161 Cal. App. 4th 735:

In a medical malpractice action against a doctor in which the doctor's medical expert witness based his opinion on facts derived from his review of hospital and medical records, the doctor failed to meet his burden of production of evidence for summary judgment.

The summary judgment motion was thus insufficient where there were no facts before the trial court on which the expert medical witness could rely to form his opinion, *because the hospital and medical records were not properly admitted into evidence under the business records exception to the hearsay rule and did not accompany the declaration or the summary judgment motion*.

In re Troy D. (1989 215 Cal. App. 3rd 889:

In a dependency hearing, the trial court properly admitted into evidence the minor's medical records over the mother's hearsay objections. The records were admissible under the business records exception to the hearsay rule (Evidence Code § 1271).

When presenting the medical records for admission into evidence, the Department of Social Services complied with the procedure required for a subpoena duces tecum (Evidence Code §§ 1560-1566), which allows for the admission of business records if accompanied by an authenticating affidavit. The medical records were delivered under seal to the court as required by § 1560, and accompanied by an affidavit as required by § 1561.

Because the department complied with these requirements, the medical records were admissible to the same extent as though the originals thereof were offered and the custodian had been present and testified to the matters stated in the affidavit.

People v. Diaz (1992) 3 Cal 4th 495:

In a homicide prosecution of a nurse for killing 12 patients with overdoses of lidocaine, the trial court properly overruled Defendant's objection to the introduction of the victims' medical records. The records were not too unreliable to satisfy the business records exception to the hearsay rule (Evidence Code § 1271). Although the custodian of the records testified that items were missing from most of the files, and that the nurses sometimes did not complete the patients' charts until hours after the events recorded had actually occurred, and there was also evidence that the nurses sometimes failed to record the administration of medication, these deficiencies were not so great as to require the trial court to exclude the records from evidence.

A hospital administrator testified that the fact that certain items were missing did not impair the accuracy of the items that remained, and the defense offered no testimony to impeach her. Further, the trial court, as trier of fact, was aware of the deficiencies in the records and could have discounted their weight on that basis.

I think all of this is double-hearsay. The defense may get over the first hoop under Evidence Code 1271: The records are an exception. But the reports and comments of doctors and staff are a second layer of hearsay.

People v. Campos (1995 32 Cal App 4th 304:

In a jury trial to review a determination by the Board of Prison Terms that Defendant was a mentally disordered offender (MDO) (Penal Code § 2960 et seq.), the People's only witness, a psychiatrist with the Department of Mental Health, testified that she relied on other medical evaluations in forming her own opinion that Defendant was an MDO. The trial court erred in admitting into evidence the reports of the non-testifying experts who evaluated Defendant's mental state, as well as Defendant's probation report. The documents were hearsay, and the business records and official records exceptions to the hearsay rule did not apply.

Such records do not qualify as business records because they contain opinions or conclusions, not records of acts, conditions, or events within the meaning of Ev Code, § 1271.

Whether the expert's conclusion is based *upon observation of an act, condition, or event or upon sound reason, or whether the expert is qualified to form the opinion and testify to it, can only be established by the examination of that person under oath.* However, the trial court's error was not prejudicial, in view of the fact that the properly admitted portion of the psychiatrist's testimony was un-contradicted and easily supported the jury's determination that defendant met the MDO criteria.

Conclusion: hearsay is hearsay, and the need to cross-examine the declarant is crucial. Don't let hearsay medical records into evidence unless the opposing party has done everything necessary under the codes and cases.

CCTLA has Tort & Trial materials available

CCTLA's What's New in Tort & Trial: 2016 in Review program drew almost 60 persons to the Holiday Inn on Jan. 19. Pictured are Noah Schwartz (left), of Ringler, sponsor of the event, and CCTLA President Bob Bale. Special thanks to the speakers, Patrick Becherer, Kirsten Fish, Anne Kepner and Valerie McGinty, who came from the Bay Area again, to provide this annual informational program to CCTLA members. CCTLA especially thanks Noah Schwartz, Ringler, for his continued sponsorship of this popular program. Tort and Trial books are available for purchase for $100. Mail your check payable to CCTLA to P.O. Box 22403, Sacramento, CA 95822.

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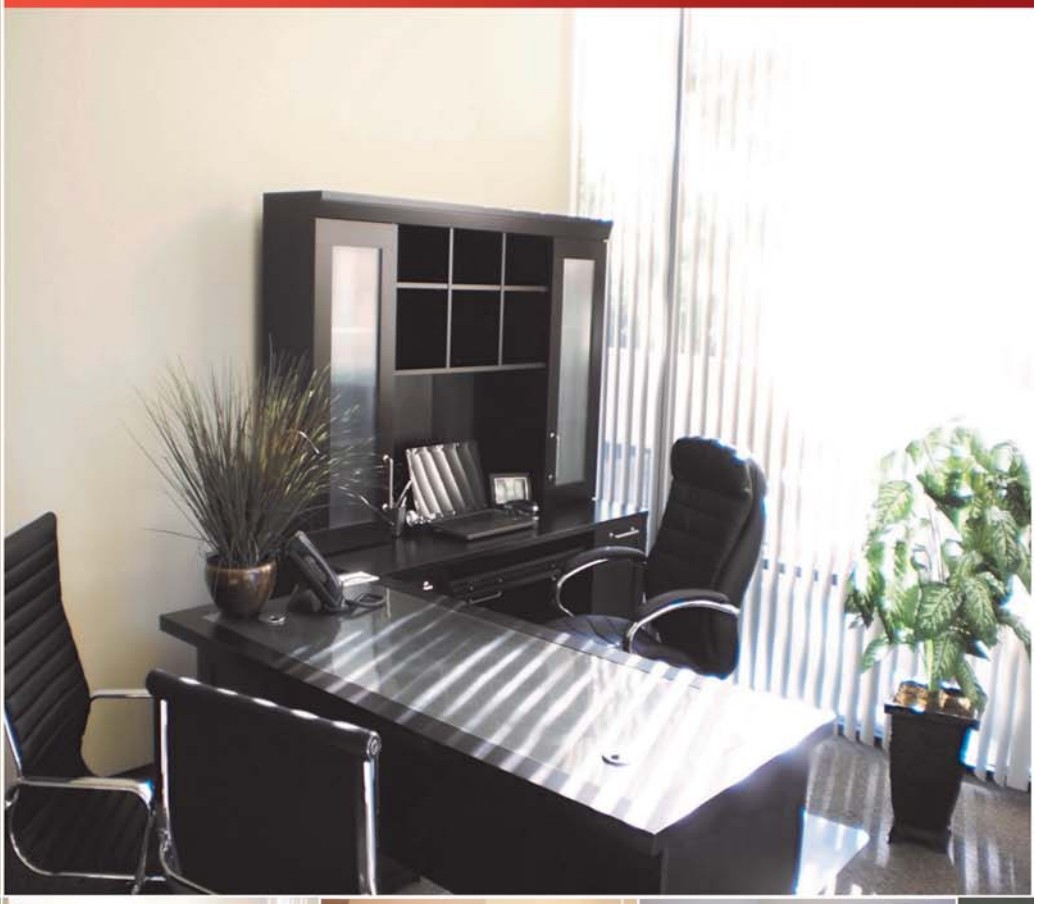

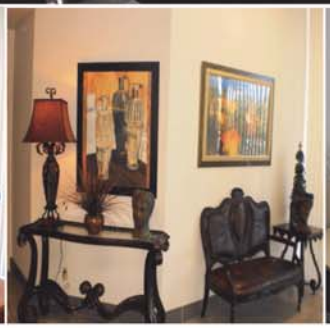

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June 8, 2017 from 5 p.m. to 7:30 p.m.
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Reservations should be made no later than Friday, May 26, 2017 by contacting Debbie Keller at 916/917-9744 or debbie@cctla.com

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

*** Deadline for Auction Items: May 26, 2017*

CCTLA Capitol City Trial Lawyers Association

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In honor of Allan Owen & Linda Whitney

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Spring Fling Reception & Silent Auction June 8, 2017

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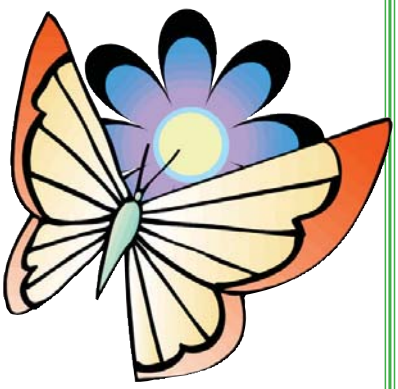

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The committee is seeking donations of goods and services for the Silent Auction. Examples might include event tickets (sports, theater, etc.), golf at a private club, lessons (water or snow skiing, sailing, hunting, crafting, quilting, etc.), vacation home/timeshare, artwork, professional services, dining, wine, gift baskets, electronics.....just about anything you can think of!

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Donated items/certificates can be dropped off at Margaret Doyle's office, located at 901 F Street, Suite 120, Sacramento, CA 95814, by May 26, 2017. If you are unable to drop off your donation, please contact Debbie at CCTLA: 916 / 917-9744 or debbie@cctla.com

THANK YOU!

Spring Fling Reception & Silent Auction

June 8, 2017

All Silent Auction Proceeds Benefit Sacramento Food Bank & Family Services

SACRAMENTO Food Bank & Family SERVICES

Sacramento Food Bank & Family Services is a local, non-profit agency committed to serving individuals and families in need.

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AAJ Class Action Litigation Group writing competition announce for law students

The American Association for Justice Class Action Litigation Group (CALG) is holding its second annual national law student writing competition. It is seeking original law student writing on any topic associated with class action jurisprudence on the state or federal level. Papers may focus on legal analysis, policy, normative considerations, procedural concerns or any other subject associated with the law of class actions.

To be eligible, students must be enrolled at any law school during the 2016-2017 academic year. Papers must be the student's original work and must not have been submitted for publication elsewhere. Papers may have been submitted for a grade at the student's law school and may incorporate feedback that was part of a course requirement or supervised research project.

All papers must be submitted on 8 x by 11 inch paper, double-spaced in 12-point Times New Roman font. The document margins must be one inch and all pages must be numbered. All citations must be in footnotes, which should be single-spaced in 10-point Times New Roman font. Submissions should not exceed 3,000 words. Students should use a citation style that conforms to the most recent edition of The Bluebook – A Uniform System of Citation. Papers that do not conform to these requirements will not be reviewed.

Papers will be judged on the quality of their analysis and writing. All submissions will be reviewed by a judging committee composed of CALG group members. The top three papers will then be presented to a final judges panel. The winning submission will be published in Advance (https://www.acslaw.org/publications/advance), an annual digital compendium of the American Constitution Society. The student authors of the top three papers will receive recognition in the CALG Summer Convention Newsletter. In addition, CALG will award cash prizes of $2,000 to the first place submission, $1,000 to the second-place submission, and $500 to the third-place submission. The winning author will also be profiled in the fall issue of Trial magazine, AAJ's award-winning magazine for attorneys, law professors, judges, and others in the legal community.

Papers must be received by April 30, 2017. Papers received after this deadline will be considered only at the discretion of CALG. Students may submit their papers electronically to AAJCALG@gmail.com. Any questions may also be directed to AAJCALG@gmail.com. For more information, please visit our website at https://www.justice.org/node/233874.

Verdict: $8,313,685 and $129,048

Roger A. Dreyer, Esq., and Noemi Esparza, Esq., obtained a $8,313,685 verdict for client Melissa Alvarez and $129,048 for Alvarez's son, Lorenzo, in an auto vs. street sweeper collision that occurred in Napa County. At the time, Melissa Alvarez was a 33-year-old wife and mother of three children.

Alvarez began her career with Napa County Juvenile Hall in her early twenties and earned the reputation of being a dedicated employee who worked hard and possessed a talent for communicating with the youth. As a Juvenile Hall counselor, she earned her badge as a peace officer.

On April 17, 2015, her car was struck by a street sweeper while traveling on Highway. Alvarez was driving, with Lorenzo in the rear middle passenger child seat. At the time, she was listening to an automated service call on her cell, through her vehicle's speaker system. Her phone was mounted on the dashboard to the right of her steering wheel.

Harold Heimbingner, a Syar Industries employee, was driving the street sweeper to clean up gravel previously spilled by truck traffic out of the Syar Industries' Napa Quarry—in the merge lane and the right hand lane on northbound Highway 221. At this location, Highway 221 has two northbound lanes and a merge lane. Heimbingner, attempting to make a U-turn, turned left into the number two lane of traffic, striking the northbound Alvarez vehicle.

There was no evidence Alvarez was distracted by the automated message, and she was using the cell in a manner allowed by law. Witnesses behind her testified in deposition that the defendant's turn was sudden, and there was nothing Alvarez could have done to avoid the collision.

Defendant Syar contested liability throughout the litigation up to trial. Defendant's carrier, AIG, retained and disclosed Joel Wilson, Ph.D., P.E., an accident reconstructionist from Exponent, and James Jay Todd, Ph.D., a human factors expert also from Exponent, to create a video simulation of the collision.

The simulation was more of a cartoon, misleading in various respects, and Plaintiff was had to hire experts to dispute the allegations of her comparative fault. Defendant ultimately stipulated to liability at the first day of trial.

Alvarez sustained several seat belt contusions, abrasions to various areas of her body, neck pain, chest pain, abrasions to her left hand, right-sided rib fractures, back pain, a right mid-shaft transverse femur fracture with lateral displacement, a right tibial plateau fracture, a right comminuted fibula fracture, a right bimalleolar ankle fracture and displaced fractures of the 4th and 5th phalanges in her left foot.

As she struggled to remove her seat belt to get to her crying son, her vehicle began to catch fire. Two good samaritans forced the driver door open and dragged her out, causing abrasions and road rash on her buttocks and legs. They also saved her child.

Plaintiffs dismissed Heimbingner from the case in the months leading to trial in order to pursue the case only against Syar Industries. This decision was made as it became clear from Defendant employee deposition testimony that Syar was going to try garner sympathy for Heimbingner by trying to paint him as the hero who helped Alvarez out of the burning vehicle, despite the fact that the two samaritans testified in deposition that they were the ones to help her out. Additionally, Plaintiffs filed and won a motion *in limine* on no apologies, precluding Defendant from making any statements or presenting any testimony about the Defendant being sorry for the collision.

As a result of her injuries, Alvarez was transported to the emergency room via ambulance where she underwent a retrograde intramedullary nailing of her right femur and open reduction of her bimalleolar ankle fracture. From April 22, 2015, through Aug. 1, 2016, she underwent many more surgeries.

At trial, Alvarez's treating physicians opined her future care needs would include two to three knee arthroscopies, a knee replacement, an ankle arthroscopy, an ankle fusion and/or ankle replacement in her lifetime. Future care needs and timing of procedures depend on Alvarez's ability to tolerate her pain. Alvarez's physician opined the ankle fusion would occur three to five years from the date of incident and could be taken down at approximately age 55, at which time an ankle replacement could be accomplished with revisions once the life of the replacement had run its course, with subsequent revisions for the rest of her life.

For Lorenzo, Plaintiffs were not making a claim for ongoing physical injuries. Plaintiffs only presented the stipulated amount of $4,048 in past medical expenses. Plaintiff did not present evidence that Lorenzo was examined at the emergency room for left foot pain, that he underwent X-rays that were negative, that he was diagnosed with probable left foot contusion or that he was given a splint. Instead, Plaintiff focused on his non-economic damages claim.

However, during trial, Defense counsel decided to present evidence of the medical records and argued about the lack of any further care after the initial ER visit. This allowed Plaintiffs to use that evidence to bolster the non-economic damages evidence.

Prior to trial, Defendant's carrier, AIG, never engaged in meaningful negotiations. Defendant carried insurance coverage with National Union Fire Insurance Company of PA, a subsidiary of AIG, which disclosed coverage in the amount of $1.2 million in discovery responses dated Mar. 17, 2016. It was later revealed just before trial there was a significant excess policy.

Plaintiff Melissa Alvarez served a 998 offer to compromise for $1.9 million, and Plaintiff Lorenzo Alvarez made a demand in the amount of $50,000 on Sept. 2, 2016. No offer was made in response to these demands. Plaintiff Melissa Alvarez subsequently served a subsequent demand on Nov. 3, 2016, in the amount of $7 million after the depositions of her treating doctors. The parties participated in mediation on Dec. 15, 2016, which failed. Defendant's last offer going into trial was $600,000, and Plaintiff pretrial demand was $6.9 million.

Defendant's counsel during litigation, Lisa Cappelluti, Esq., of Lorber, Greenfield & Polito, LLP, repeatedly emphasized the comparative fault claim, which Plaintiff rejected. On the eve of trial, new counsel, Shawn Toliver, Esq., of Lewis Brisbois Bisgaard & Smith, LLP, was associated into the case, with Devera Petak, Esq. Defendant stipulated to liability on the first day of trial and before a jury was selected. During trial and before Plaintiff testified, AIG began to make significant offers, which were rejected.

At the time of arguments on motions *in limine*, Plaintiffs filed a motion to preclude Defendants from presenting any evidence of any prior Worker's Compensation claims or insurance claims unrelated to the issues in the case. The judge, the Honorable Diane M. Price, ruled against Defendant's arguments.

In closing, Alvarez claimed past medical expenses, which were stipulated to, in the amount of $295,000, and past loss income in the amount of $28,000 and loss of household services. She claimed future medical expenses, and she claimed she was losing her career as a Juvenile Hall counselor with no current prospect of staying with Napa County, resulting in a future income loss range, depending upon whether she would be able to return to some type of a job with Napa County. She also claimed a future loss of household services, and she claimed

past and future non-economic damages. Defendant did not dispute the past losses claimed.

The jury returned a verdict for Melissa Alvarez of: past economic loss, $340,805; future economic loss, $2,222,880; past non-economic loss, $1,750,000; future non-economic, $4,000,000. The jury returned a verdict for Lorenzo Alvarez of: past economic loss, $4,048; past non-economic loss, $100,000; future non-economic, $25,000.

***

Verdict: $5,700,000

CCTLA past president Kyle Tambornini of Eason & Tambornini obtained a $5.7M award for one of his Worker's Compensation clients, a figure the Worker's Compensation Appeals Board reported was the largest single-person Worker's Compensation resolution in Sacramento County history.

***

Verdict: $4,809,630.86
Settlements: $4,500,000+$560,000

CCTLA members Bob Buccola, Catia Saraiva and Jason Sigel of the Dreyer Babich firm obtained a remarkable result for a 17-year-old girl who suffered a traumatic above-the knee right leg amputation. Plaintiff was struck by Defendant's out-of-control vehicle on an icy road while Plaintiff was at her school bus stop. Plaintiff filed against the driver, the school district and El Dorado County. Plaintiff then settled with the school district for $4,500,000 and the county $560,000.

The case went to trial against the Defendant driver, who denied responsibility, blaming the settling parties. Plaintiff conceded the school district bore some liability for the bus stop placement but argued that the irregular banking was typical of most rural roads in the Sierra foothills and was not a cause of the subject accident.

Plaintiff's CCP section 998 offer was $2.9 million. Defendant's CCP section 998 offer was for the $100,000 policy limits. Plaintiff was no longer able to participate in the physical activities she enjoyed before the accident, including competitive volleyball, horseback riding, hiking, snowboarding and swimming. Plaintiff also contended her injuries limit her future earning potential because she is no longer able to pursue her dream to be a registered nurse and asked the jury to award future lifetime medical and prosthetic care for her injuries, as well as support services due to her inability to physically manage household chores as she ages.

The jury awarded Plaintiff $6,560,630.86 in economic damages, of which the largest item was over $4.6 million for future prosthetic expenses. Economic damages also included $2 million for future loss of ability to earn money. Non-economic damages were $1.5 million for past and future. The jury found the Defendant driver liable for causing Plaintiff's injuries and apportioned fault as follows: 50% Defendant driver; 45% El Dorado Union High School District; and 5% County of El Dorado. The jury awarded a total of $9,860,630.86. Under Espinoza v. Machonga (1992) 9 Cal. App. 4th 268 and Rashidi v. Moser (2014) 60 Cal.4th 718, the damage numbers were reduced (due to the settlements) to $4,059,630.86 economic, and $750,000 non-economic. Total net recovery: $4,809,630.86.

The trial judge was Hon. Daniel B. Proud, and the defense attorney was James Biernat (Safeco, in-house).

***

Verdict: $2,890,000

Dreyer Babich attorneys Jason Sigel and Ryan Dostart obtained a $2.89 million verdict In Sacramento Superior Court in front of Judge Judy Hersher. The case was defended by Joe Salazar, managing partner of Lewis Brisbois, and his partner Joann Rangel. The primary carrier is Great American Insurance, Co. with policy limits of $1,000,000. The excess carrier ($5,000,000) is Mid-Continent Casualty Insurance. The primary policy limits were demanded by a CCP 998 demand in October 2015. The defense's best take-it-or-leave-it offer was $350,000 two weeks before trial. With anticipated pre-judgment interest and costs, the final judgment will be approximately $3.1 million.

Plaintiff was 26 when she was rear-ended by a driver in the course and scope of his employment driving a truck pulling 1,800 pounds of equipment on a trailer. The impact pushed Plaintiff into the car in front, hard enough to deploy the airbag. She hit her face on the bag/steering wheel and lost five front teeth in her lower jaw and has a big scar under her lower her lip where she bit through it.

Defense admitted liability a week before trial and stipulated to the past and future dental damages, which totaled approximately $32,000. However, it contested a low-back injury. The client had Kaiser Medical at the time of the accident, and the medical records were challenging. There was no explicit reference to low-back pain for six weeks after the accident. Three months after the accident, there's a reference to her falling down some stairs. Most of the PT notes from the first nine months did not mention low-back complaints.

An MRI of her low back, taken 15 months after the accident, showed a single level of damage at L5/S1. The defense made this a case about the client being a liar with her lawyers directing her care and referring her to doctors of their choosing to drive up the damages.

Plaintiff had been very active as a runner who would run 8-12 miles two to three time a week prior to the accident and worked out regularly at the gym, lifting weights. Defense said that could have led to degeneration in the low back, which Plaintiff's doctors could not completely rule out. Since the accident, Plaintiff has not returned to running or weightlifting, but defense showed the jury video of Plaintiff in the gym on the elliptical machine and going on three-mile walks. Kaiser records documented her going on four to five-mile walks two to three times a week within four months of the accident.

This was a pain-management case, with Plaintiff's doctors recommending a future L5-S1 global fusion surgery. Plaintiff only had three epidurals and one facet injection in the three years after the accident, but Plaintiff argued for three ESI a year and two three-level RFA a year for the next 10 years. She is scheduled for her first RFA later this month.

The jury awarded all requested past medical specials of $115,000 and future medical specials of approximately $893,000, which included most of the pain management care requested as well as the future surgery. General damages of $125,000 past and $1,750,000 future were also awarded.

***

Verdict: $550,000

CCTLA past president John Demas and CCTLA member Adam Sorrells received a $550,000 Butte County verdict which included $450,000 pain and suffering—with interest and costs, nearly seven times the Allstate policy limits. Plaintiff was a young girl who was an unrestrained rear-seat passenger in her best friend's pickup. There was a dispute about whether the plaintiff had sufficient time to put on her seatbelt before the Defendant driver lost control and hit a utility pole, causing the plaintiff to fly forward and hit her head on the rearview mirror.

There was no diagnosis of a concussion at the emergency room, and her primary physican referred her to a pediatric neurologist, who tried different medications for Plaintiff's headaches. Plaintiff did not complete her senior year of high school, although defense claimed she would not have, regardless of the collision, because of poor grades throughout high school. She was treated by a neurologist for six months and did not see any

health care providers for her head injury for 22 months. She was released with a prescription for medications she didn't fill—and a referral to the UCSF headache clinic. During this time, defense introduced evidence the plaintiff was doing a lot of her regular recreational activities and was partying with her friends. Defense hired two separate investigators who dug into her social media accounts, which included hundreds of posts including many referencing alcohol, partying, etc., but fortunately most of that evidence was kept out.

An MRI with diffusion tensor imaging done earlier this year showed a slight decrease in the fiber tracks in the frontal lobe. Defense disputed the significance of the DTI findings. Past meds were $22,000, which Plaintiff decided to waive. Defense served a $25,000 CCP §998 offer 10 days before trial and offered the policy limits of $100,000 the day before trial. Multiple demands for the policy had been made by Plaintiff's counsel over the course of the litigation, and all were rejected.

The case was tried before Judge Candella. Defense attorney was Mark Maccauley.

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Liability Verdict Vs. Caltrans

Jason J. Sigel, of Dreyer Babich Buccola Wood Campora, LLP, obtained a Tehama County jury verdict against Caltrans for dangerous condition of public property that resulted in the death of his client's husband on June 28, 2012. Decedent was a truck driver for a meat company, and at the time of the accident, he was driving a fully loaded tractor trailer that weighed approximately 80,000 pounds.

The accident occurred in a construction zone on northbound I-5 at the Sunset Hills overcrossing in Tehama County. During construction on the southbound side, Caltrans brought one of the southbound lanes across the median and ran it down the northbound side of the interstate. This southbound lane was separated from the two northbound lanes by K-Rail. To accommodate all three lanes, the northbound lanes had to be moved to the far right of the paved surface, and, truck traffic in the number two northbound lane had to drive on what was previously the right shoulder.

Caltrans never brought the slope of the shoulder up from 5% to match the normal 2% slope of the travel lanes. As the road approached the Sunset Hills overcrossing, the realignment resulted in what had previously been 11 feet of shoulder being reduced to 13 inches. The lack of run-off space combined with the steeper-than-normal slope resulted in the top right corner of decedent's trailer striking the overcrossing support structure. If the shoulder slope had been the normal 2%, such contact would not have been possible.

This collision happened at 2 a.m. At 3 p.m. the prior afternoon, a truck had hit the overcrossing in the same place. By 5 p.m. that evening, Caltrans decided to raise the slope of the number two lane to 2% on an emergency basis out of concern that another similar collision could occur. The emergency repaving was to begin at 4 a.m. Between the time the decision was made to repave and the 2 a.m. collision, Caltrans did nothing to alert truck drivers to the danger.

Caltrans defended on the basis that it was the truck driver's fault. Physical evidence showed the truck went off the right side of the road about 75 feet south of the overcrossing in a location where there was only 10 inches between the fog line and the edge of the pavement. Plaintiff's attorneys were able to argue, based on the physical evidence associated with first contact with the guard rail that was tied in to the overcrossing support pillar abutment, that the driver had begun to perceive and react to the need to correct his steering before he left the pavement

Defense had an A/R and truck driving expert who opined that it was all the driver's fault and that if he had kept it in the lane, he would have been fine. This theme was echoed by the Caltrans employee engineers who were disclosed as experts on the design and construction issues.

Caltrans said 120,000 trucks had passed under the Sunset Hills overcrossing during construction before the first collision and that the accident occurred about 1.5 miles into the construction zone so the truck had been driving on the sloped shoulder for 90 seconds so it couldn't have come as a surprise to the driver. CHP and Caltrans witnesses testified they had no difficulty traversing this area in the number two lane.

Caltrans successfully excluded evidence of what turned out to be the first collision with the overcrossing, which happened in back in early June 2012, a few days after the construction configuration went in to effect. They knew about it all along and essentially hid it in Discovery.

"They only copped to it when I served a notice to produce at trial," Sigel said. "The judge then excluded it because we 'only' had the SWTIRS for that incident. If nothing else, the Caltrans lawyers are extremely well versed in the government code and know all of the immunities, defenses, exceptions, etc. that exist for the sole purpose of making dangerous condition cases extremely challenging."

The jury found Caltrans liable for the dangerous condition and also found that the decedent truck driver was NOT negligent. The trial was bifurcated, and the damages will be tried before another jury in the event the case cannot be resolved now that there's been a verdict on liability. Caltrans never made a pre-trial offer.

Caltrans was represented by Bruce McGagin from its legal department and John Haluck from Roseville. Lee Aiken from Aiken and Jacobsen represented the decedent's driving partner, who was asleep in the sleeping compartment at the time of the accident.

Plaintiffs' experts were Larry Neuman for A/R, Rick Ryan on traffic safety engineering and Don Hess on truck driving. Defendant used Robert Lindskog for A/R and Larry Miller for truck driving.

Settlement: Police Officer Rape

CCTLA past President Eric Ratinoff, Madison Simmons and Marla Strain represented Jane Doe, an elderly woman who suffers from aphasia due to a stroke, against the City of Sacramento and the seniors apartment complex where she lived for many years. Jane Doe became acquainted with a Sacramento police officer who patrolled the complex on occasion and assisted her in carrying her groceries. This officer sexually assaulted and raped her three times over the course of a few years.

Plaintiff is unable to engage in any lengthy speech but was able to say "police," "rape" and identify the officer's race. The city investigated but was unable to identify the attacker until he attempted the fourth assault. By that time, the family installed a motion-activated camera near Plaintiff's front door. The officer attempted to enter, but then fled. Images were provided to the police, who then identified the officer.

Jane Doe had no medical care, no medical specials and could not testify. The case was also very challenging due to the fact she needed to be able to prove the officer was on duty for the the city to be liable. The only evidence were the witness' limited words. GPS data and the images on the camera were taken while the officer was off-duty, and he was in street clothes.

The city's attorney, Chance Trimm, and the other lawyers from Lewis Brisbois aggressively defended their clients, including filing motions of summary judgment; however, Jane Doe prevailed. Mediator Ernie Long was able to get the parties to ultimately settle.

Mike's Cites

Continued from page 2

employer and intervened in Pierson's case against Mooney and H&P. H&P filed a motion for summary judgment against Pierson and Travelers, asserting that Mooney was driving home from work and the incident did not occur while he was in the course or scope of his employment.

HOLDING: Motion for Summary Judgment for H&P granted on the grounds that Mooney was going and coming from work and therefore not within the course and scope of his employment.

REASONING: The Doctrine of Respondeat Superior holds an employer liable for torts of its employees committed within the scope of their employment. Haliburton Energy Services, Inc. v. Department of Transportation (2013) 220 Cal.App.4th 87. A corollary of the Doctrine of Respondeat Superior is the "going and coming rule" which states that employees do not act within the scope of employment while going to or coming from the workplace. Jeewarat v. Warner Brothers Entertainment, Inc. (2009) 177 Cal.App.4th 427. The rationale for the rule is that the employee is not rendering service to the employer while traveling to and from work, so the employer should not be held liable.

This court concluded that the "going and coming" rule applied in torts is not identical to the rule applied in workers' compensation law. Hinman, 2 Cal.3rd 962. The tort going and coming rule is stated in Fields v. State of California (2012) 209 Cal.App.4th 1390, 1398. In tort cases, the allocation of risk and shifting the cost of torts to the community at large is the prevailing policy decision, and clearly not victim-oriented.

The Workers' Compensation going and coming rule is found in: Lantz v. Workers' Comp. Appeals Board (2014) 226 Cal.App.4th 298, 308. In workers' compensation cases, public policy favors interpreting the facts and law in a way to provide coverage for the injured worker.

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Esparza v. Kaweah Delta District Hospital
2016 DJDAR 9748 [September 21, 2016]

What facts must a plaintiff allege to adequately plead compliance with the claims presentation requirements of the Government Claims Act?

FACTS: The plaintiff checked the boxes on a judicial council form for a personal injury cause of action and alleged later in the complaint that she "served a claim on Kaweah Delta District Hospital pursuant to California Government Code Section 910, et seq. on or at December 3, 2013."

Plaintiff filed the claim and complaint because she was administered 100 mg of medication when the prescribed amount was 10 mg, and this caused her to suffer vertigo, loss of hearing, balance issues, vision issues and other damages. Defendant hospital demurred to the complaint on grounds that the complaint failed to allege compliance with a Government Claims Act or, alternatively, its allegations were uncertain, ambiguous, or unintelligible. In particular, the complaint failed to state how the government entity responded to Plaintiff's claim or whether the claim was deemed to have been rejected by law.

The trial court filed a minute order sustaining the demurrer ***without*** leave to amend.

HOLDING: Perez v. Golden Empire Transit District (2012) 209 Cal.App.4th 1228, stands for the rule that only general allegations of compliance with the Government Claims Act is necessary. The California Supremes also said that general allegations are adequate. State of California v. Superior Court (2004) 32 Cal.4th 1234.

Use of a judicial council form complaint is not a determinative factor in deciding whether or not to sustain a demurrer. In this case, Plaintiff's allegation that she "has complied with applicable claims statutes" was adequate because it properly pleaded an ultimate fact and thereby satisfied the pleading requirements set forth in Perez, supra. A plaintiff is ***not*** required to specifically plead: 1) the method of service used to present the claim to the defendant, or 2) whether the defendant explicitly rejected the claim or alternatively was deemed to have rejected the claim by failing to act within the statutory time.

LITIGATION TIP: If you have a case against a governmental entity, take a look at Government Code sections 910-915.4. The rules are all there. It could save you a lot of time and trouble later.

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Medical Records Offshoring For A Smarter Practice

The yearly average number of lawsuits filed in the United States may have stabilized due to Tort Reform and other factors, but litigation related costs have not. Offshoring medical record services, however, is primed to reverse this trend. Large corporations have already been offshoring paralegal and legal work for quite some time to India and other similar economies, but insurance companies have been slow in adopting the practice.

The terms "offshoring" and "outsourcing" have taken on a variety of different, sometimes controversial meanings, and is perhaps one reason why some companies are hesitant to investigate further despite the cost savings offered. However, "business process outsourcing," especially India based, has grown tremendously in the last decade and shows no sign of abating. With its large, educated, English-speaking workforce, Indian BPOs work with firms in dozens of countries, but nowhere is it more widely used than in the U.S.

Can Indian MDs Cure Medical Records Headaches and Costs?

Sorting and organizing large medical charts can require hundreds and hundreds of hours of billable legal time. Significant attorney and staff time is expended ordering, organizing and summarizing medical charts. Medical file services usually involve organizing a massive unstructured assortment of documents to sorted ones then delivered to the attorney, often in the form of paper binders. If these files are to be reviewed by expert consultants, copying and shipping costs are incurred and passed along. While attorneys are increasingly scanning records for electronic delivery, this can be problematic if the format does not meet the expert's specifications.

Insurers and defense firms have been slow to adopt the practice for several reasons. Carriers tend to be very traditional and resistant to innovation—in general, they are accustomed to delegating most record related services to counsel. These services are a profit center for law firms which are loathe to refer the work elsewhere. Furthermore firms have no incentive to reduce pass along copying and shipping costs.

Additionally, outsourcing medical records services requires some, albeit minimal, technical sophistication. Technology is one area where many carriers and law firms are lacking in. Attorneys and staff sometimes come across web browser compatibility issues when uploading files. A few questions should be asked before getting started. Can staff figure out how to compress large numbers of files into one ZIP file? Or be able to extract files from CD onto the hard drive and compress it to one ZIP file? These seemingly simple tasks can present problems but mostly, lack of experience with computers and old versions of Internet Explorer cause frustration with new users.

Several U.S. companies are now offering records services, with offshore partners in India whose staff organize records, review charts, and do hyper-linking and bookmarking (allowing rapid chart navigation for the reviewer).

Offshoring As A Solution

What qualifies these reviewers to do this work? And why is it economically viable for them to take it on in the first place?

India's Cities Swimming in Physician Labor

India has a large pool of physician labor, graduating an estimated 20,000 physicians per year. The majority of the physician workforce prefers to work in cities, saturating urban areas while causing shortages in rural ones. This concentration of physicians in urban areas is one explanation for the availability of MDs for review work. A brief review of India's medical education and professional environment offers other explanations.

India's medical training differs from ours in several respects: medical schools are 4.5 years followed by a one year general residency then application to specialized residency programs if desired. Acceptance is highly competitive–well less than half of the doctors are accepted. There is, typically a one to four year waiting period before admittance. In the interim they are involved in primary care in the community or first on-call doctor if they prefer to work in the hospitals. Many junior physicians work in government run clinics 6 hours per day, earning approximately US $1000 per month, leaving considerable time for private practice and medical – legal review work. Senior physicians looking for extra income will review legal cases or oversee the work of junior physicians who want to include chart review work to their resume.

Receive, Reduce, Review

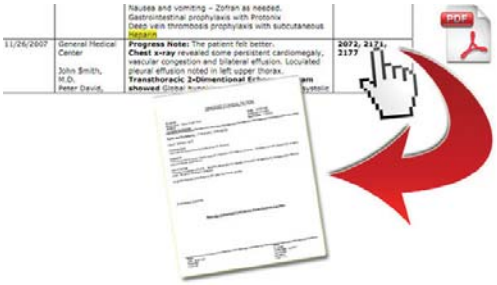
For the many firms for which piles (and boxes) of records and binders stand like skyscrapers throughout the office, taking the rather large step toward digitizing all records requires a change in business practice and mindset. While many firms claim they want to become paperless, actually taking the steps required can be daunting. Knowing some details about the process ahead of time and some of the issues to troubleshoot can save a lot of frustration later.

Online document transmission can be accomplished easily. First, legal staff scans all records and uploads them via a secure, HIPAA compliant internet portal. The most common file formats are DOC, XLS, PDF, JPG, TIF, ZIP and SIT. Thereafter, organized digital files are downloaded and returned in the identical fashion.

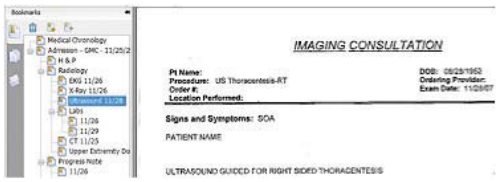
In general, firms who do this work, including ours, receive the medical records, reduce, sort and organize them into a text – based medical file. Any PDF documents are

converted into text based files as well. They capture the record dates, procedure(s), treatment/occurrence(s) and other customized data fields. The finished product is a thorough text-based medical record summary that is presented chronologically, enabling the reviewer to better and more quickly understand a sequence of events. Important points in the summary can be highlighted in yellow. The file can be delivered in either WORD or PDF formats. The PDF format option may include two digital navigation tools – Hyperlinks and Bookmarks. Hyperlinks allow for instant navigation from summaries and timelines to corresponding source pages by clicking on the desired corresponding source page. Bookmarks form a digital table of contents allowing for organization of documents by user-defined categories such as provider and date. The printable version contains tab sheets for the hard copy binders that are so familiar to PI attorneys.

Hyperlinks



Bookmarks



In addition to preparing medical chronologies and timelines, Indian physicians, in the appropriate specialties, can provide medical liability and causation opinions. While they certainly cannot testify at trial (more on this later), physician opinions are generally preferable to those by nurses or lay staff members.

Pharmaceutical and Mass(ive) Tort Records

If any type of legal work requires efficiencies that necessitate an outside solution, it would be mass tort litigation. Even with significant capacity within existing staff—sorting and organizing the records of several hundred plaintiffs requires serious stamina in terms of labor and hours. Physicians, however, have been trained to analyze complex medical content, filter out the irrelevant and quickly find the desired information. Attorneys and other staff simply cannot match their speed and accuracy; which medical review work demands.

Overseas BPOs with access to a large pool of medical staff are able to organize quickly to handle large volumes of work. Organizing medical records for mass tort litigation is similar to the general process, except that once medical staff receives the files they review and highlight key class parameters to determine claimant inclusion in the class in a chronology format. Parameters may include medical care date ranges, usage, dosage, quantity and duration, proximity of injury to dates of ingestion, confirmation of side-effects. Potential defenses including alternative causation due to predisposing risk factors including pre-existing conditions, elements of comparative or contributory negligence are evaluated and identified.

For large classes, spreadsheets can be prepared addressing individual parameters with hyperlinks embedded that link to actual chart for ease of confirmation. .

Offshoring: Advantages and Disadvantages

Offshore outsourcing medical records services to Indian BPOs offers both advantages and disadvantages. Files that are chronologically sorted into easy-to-read and navigate electronic files, reduce both attorney and expert reviewing time and billing. Billable record preparation and case review can be redirected to physicians and other medical professionals, for $US25-$50 per hr, significantly less than legal staff, U.S. nurse and physician rates. Law firm staffing size can be better managed with personnel free to focus on more productive legal work. By deciphering and interpreting illegible and complex medical terminology, physician reviewers enhance the attorney's comprehension of the chart. Indian physicians can review charts with opinions for anywhere between $US50-$75 US dollars per hour compared to $300-$500 for their US counterparts. Electronic transmission of charts eliminates the accompanying copying and shipping costs for co-counsel and expert reviews.

The time difference between the US and India and phone expense limits communication between attorney and Indian consultants mostly to email transmissions. While physicians are fluent in English, Hindi pronunciation and diction can make oral communication challenging for American English speakers. Physician's written English is usually strong and rarely poses a problem.

Further, any physicians offering medical opinions cannot testify – adding an additional layer of expense.

Carriers should carefully weigh the costs, savings and benefits of sending records work to Indian based companies (or other popular offshore outsourcing destinations.) Regardless, this service brings us another step closer to fully leveraging the business potential of the internet. Openness and receptivity to the pace of technology driven business is critical, unless insurers want to be left behind by those who have adopted the global economic mindset. For better or worse, it is the new reality and carriers need to decide whether they will continue relying on defense counsel doing business as usual - or evolve and improve the bottom line..

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This was submitted by Elliot Stone, Esq, CEO of medQuest, Ltd, whose division, Record Reform? provides medical record outsourcing services to attorneys. estone@Recordreform.com, 646-470-8730.

Traumatic Brain Injuries and What We May Be Missing

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The CCTLA board has developed a program to assist new attorneys with their cases. If you would like to receive more information regarding this program or if you have a question with regard to one of your cases, please contact Jack Vetter, jvetter@vetterlawoffice.com; Lori Gingery, lori@gingerylaw.com; Glenn Guenard, gguenard@gblegal.com; or Chris Whelan, Chris@WhelanLawOffices.com

MARCH, 2017

Friday, March 3
CCTLA Seminar
"Don't Eat the Bruises"
and "Trojan Horse Method"
Speakers: Keith Mintik, Daniel Ambrose & Alejandro Blanco
Capitol Plaza Holiday Inn, 9 a.m. to 5 p.m.
$100 CCTLA Members
$299 Non-members

Tuesday, March 14
Q&A Luncheon
Noon, Shanghai Gardens
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Thursday, March 16
CCTLA Problem Solving Clinic
Topic: "Excluding the Biomechanic from Trial"
Speaker: Glenn Guenard
5:30 to 7:30 p.m., Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA Members Only, $25

Friday, March 24
CCTLA Luncheon
"Controlling the Courtroom 4: Shock & Awe at Mediation"
Speaker: Steve J. Brady
Noon, Sacramento County Bar Association
CCTLA Member s Only, $35

APRIL, 2017

Tuesday, April 11
Q&A Luncheon
Noon, Shanghai Gardens
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Thursday, April 20
CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
5:30 to 7:30 p.m., Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA Members Only, $25

Friday, April 28
CCTLA Luncheon—Topic: TBA
Speaker: Garrett McGinn, DigiStream Investigations
Firehouse Restaurant, Noon
CCTLA Members Only, $35

MAY, 2017

Tuesday, May 9
Q&A Luncheon
Noon, Shanghai Gardens
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Thursday, May 18
CCTLA Problem Solving Clinic
Topic: TBA - Speaker: TBA
5:30 to 7:30 p.m., Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA Members Only, $25

Friday, May 19
CCTLA Luncheon —Topic: TBA
Speakers: Honorable Russell Hom & Betsy Kimball
Firehouse Restaurant, Noon
CCTLA Member, $35 / Nonmember $40

JUNE, 2017

Thursday, June 8, 2017
CCTLA's 15 Annual Spring Reception & Silent Auction
Home of Noel Ferris & Parker White
1500 39th St., Sacto
5 to 7:30 p.m.

Tuesday, June 13, 2017
Q&A Luncheon
Noon, Shanghai Gardens
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Thursday, June 15
CCTLA Problem Solving Clinic
5:30 to 7:30 p.m., Arnold Law Firm,
865 Howe Avenue, 2nd Floor
CCTLA Members Only, $25

Friday, June 23
CCTLA Luncheon
Topic: TBA - Speakers: TBA
Noon, Sacramento County Bar Association
CCTLA Members Only, $35

Contact Debbie Keller at CCTLA: 916/917-9744 or debbie@cctla.com for reservations or additional information with regard to any of the above programs.

CCTLA Calendar of Events