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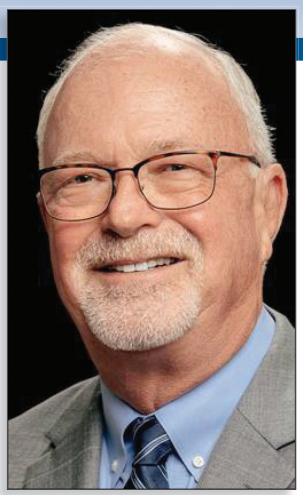
Inside

Looking forward with an odd mixture of hope and fear



Travis Black
CCTLA President

Greetings, fellow CCTLA members!

We embark on 2021 with an odd mixture of hope and fear dictated by the events of the wildest year in recent memory, 2020. I want to acknowledge the service of my friend and predecessor, Joe Weinberger, who led us through a tumultuous year. I know I speak for all of you when I compliment his leadership and flexibility in the constantly changing environment of COVID. These are the moments when we are missing the opportunity afforded us to gather in person and celebrate a job well done. Cheers, Joe!

I would be remiss if I didn't ask for a virtual round of applause for our perennial superstar, Debbie Keller. As the "glue" that holds our organization together and keeps the president on track, I share my appreciation and admiration for her efforts. I would also like to introduce and welcome our newest members to our board of directors, Dionne Choyce and Jacquie Siemens.

I am pleased to serve as your president this year. In collaboration with your very talented board of directors, I am committed to more opportunities to provide each of you with the information, education and resources to help your practice thrive. For many of us, the solitary nature of the pandemic has disrupted our normal patterns of learning and collaborating with each other. This is a big loss.

As the board comes to terms with the realistic projections of how long until we resume a "normal" business and personal life, we will be considering more chances to amend our offerings to fit the needs of this group. Many of you know that in my 14-year tenure on the board, I have had a passion for securing the best education for our members and adding to our collective skills and knowledge. I look forward to more opportunities to bring that to all of you this year.

The evolution of the workplace in light of the pandemic has impacted many of our members. How many of you have your staff working remotely? Are there new best practices to consider with clients and communication in this new, virtual world? Is the backlog of civil cases in our court system going to impact how we mediate, settle and try cases? The world post-COVID comes with as many questions as we encountered at the height of the pandemic.

Our board is prepared to source experts and content that will help you make the right decisions for you and your clients during this time. Let us know what your ques-

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Mike's CITES

By: Michael Jansen
CCTLA Member

Please remember that some cases are summarized before the official reports are published and may be reconsidered or de-certified for publication. Be sure to check for official citations before using them as authority.

Dix vs. Live Nation Entertainment, Inc.
2020 DJDAR 111607 (October 26, 2020)

GOTTA' HAVE DUTY, BUT IT IS SO HARD TO FIND

FACTS: In early 2015, Live Nation selected the Pomona Fairplex as a location for the 2015 Hard Summer Music Festival, a two-day electronic music festival, anticipating 65,000 attendees. Live Nation obtained permits from the Los Angeles Fire Department and the City of Pomona and contracted with third-party vendors to provide perimeter security and main entrance security, including approximately 400 security personnel.

Live Nation knew that some patrons would consume illegal drugs, and therefore retained security and medical vendors and coordinated with local public agencies to use reasonable measures to implement security and medical plans for the safety of attendees at the music festival. Anticipating medical emergencies, Live Nation provided medical personnel so that the local medical infrastructure was not impacted. The Los Angeles County Department of Health Services required Live Nation to prepare a medical action plan, which included five medical aide stations, two of which were primary medical centers. The primary medical centers were air-conditioned, and there was water provided throughout the grounds, inside the fence.

After approximately four hours of having fun at Hard Fest with her friends, 19-year-old Katie Dix's eyes rolled back in her head, and she collapsed and hit her head on the ground. Live Nation security guards were called, and they walked, not in a hurry, and carried Katie by her wrists and ankles to another first-aid station. It took 15-20 minutes for medical personnel to arrive at Katie's location. Medical personnel began CPR. Medical personnel stopped resuscitation measures. However, resuscitation was renewed. Katie was taken to the nearest hospital, and the emergency room doctor pronounced Katie dead from acute drug intoxication, Ecstasy.

ISSUES:

Is Live Nation liable for Katie Dix's death?
Did Live Nation have a duty of care toward Katie Dix?
Did Live Nation breach the duty of care to Katie Dix?
Did Katie Dix cause her own death by ingesting Ecstasy?

RULING: The trial court ruled that defendant Live Nation's Motion for Summary Judgment was granted. Under the *Rowland v. Christian* factors, the trial judge determined that Live Nation did not owe a duty to Dix. The trial court concluded that while it was foreseeable that Katie Dix could be injured, it was not Live Nation's conduct in promoting the Hard Music Festival that caused her demise. The trial court determined that neither moral blame nor the public policy of preventing future harm weighed in favor of imposing a duty on Live Nation. The trial court determined that Katie's parents, the Dixes, did not allege they had a special relationship with Live Nation, and therefore disregarded that theory of liability.

The appellate court reversed the trial court, finding that a special relationship did exist between Live Nation and Katie Dix, and a question of fact exists as to whether Live Nation breached that special duty of care.

REASONING: The appellate court goes through a litany of cases, starting with a foundational definition of negligence and through the creation of duty through special relationships. Relationships that had been recognized as special, and therefore supporting a finding of duty, rely on dependency of one party upon the other. If one party has superior control over the means of protection, or a party is particularly vulnerable, a special relationship or duty has been found. A business or landowner with invited guests may have a special relationship that may support a duty to protect against foreseeable risks. A common carrier and its passengers may have a special relationship, and therefore duties arise.

However, when the precautionary medical safety measures that plaintiff contends a business should have provided are costly or burdensome, rather than minimal, the common law does not impose a duty on the business to provide such safety measures in

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Fight Fake Affirmative Defenses

By: Lee Schmelter

Walter "Lee" Schmelter, Law Offices of Walter Schmelter, is a CCTLA Board Member

I try to eliminate pleadings and affirmative defenses early on to streamline my case. I like to pressure the defense in lawful ethical ways to acknowledge my claim and settle; alternately, to "put up or shut up." You can use Code of Civil Procedure §128.7 ("128.7") to require a defendant to drop fake defenses raised in Affirmative Defenses.

Here's a scenario you may recognize. You generate your best state court Complaint, taking care to state only facts you reasonably believe are or will be supported by evidence. You know that each time every attorney "presents" or "later advocates" to the court a pleading (or almost any document), the attorney represents it as an appropriate document. That is, presented not for an improper purpose like to cause harassment, unnecessary delay, or increase costs; and that the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

Further, at minimum, the factual allegations are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery. The reason is that allegations in pleading must be warranted on the evidence or, if specifically so identified, be reasonably based on a lack of information or belief. Code Civ. Proc. §128.7 subd. (b)1-4.

If you are in doubt about an allegation in a pleading, comply with 128.7 subd. (b) 3) re: alleging specific facts, specifically stating "the allegation is likely to have evidentiary support after a reasonable opportunity for further investigation or discovery." You don't often see that language in a pleading, but you as ethical counsel take care to comply with that statute and state only causes of action well grounded in law and fact. Not every attorney is so careful—some (dare I say, defense counsel?) wrongly think that because their client is not verifying the Complaint, they can allege just about anything.

Unless specifically required by a statute, Complaints are not verified in a Limited Jurisdiction ("LJ"— meaning demand $25,000 or less) case, because Defendant can file an unverified General Denial, regardless. Unlimited Jurisdiction ("UJ") cases more frequently have statutes requiring a verified Complaint (e.g., Injunction, Quiet Title), but many oft-filed types of claims (e.g., Fraud, Breach of Contract, Common Counts, most Negligence cases) do not require plaintiff verify the Complaint. Thus, many UJ Complaints are also not verified. Plaintiff's counsel generally does not want plaintiff in her first paper to go on the record in a verified pleading with factual assertions that may not, as facts unfold in discovery be entirely borne out. An unverified Complaint makes it hard to impeach plaintiff's credibility based on a Complaint signed only by her attorney. Thus, most LJ and UJ Complaints are unverified, absent a strategic purpose in the right case intended to net a verified Answer – maybe a drunk driver case.

Though *you* act honestly pleading your Complaint, will defense counsel do so in the Answer? In LJ cases, you'll almost always get a

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General Denial with a raft of Affirmative Defenses. General Denials tell nothing of possible defenses; they deny *everything*. Any clue to real defenses (if any exist!) is mostly in Affirmative Defenses. In UJ cases (only), General Denials are improper, even where the UJ Complaint is unverified. Instead, defendant must state the general or specific denial of each material allegation of the complaint controverted by the defendant, or if defendant has no info re: same, defendant can deny for lack of information and belief. Code Civ. Proc. Sec. 431 subd. (b).

Unverified Answers are signed only by the attorney, which doesn't help you pin down defendant's story with defendant's oath. Lazy or unethical defense counsel may assert a whole *truckload* of affirmative defenses that have no legal merit or any basis in fact.

To me this is the tipoff as to how to handle defense counsel: courteously—but roughly. One can file a Demurrer to an Answer or a part of it, but time to do so is super short—within 10 days of service on you (add two for e-service, five for snail mail). And you must meet and confer at least five days before filing your Demurrer. A Demurrer is your first swipe at a bogus answer containing bogus Affirmative Defenses—but time is so short! If you miss that hair trigger, you have other options.

A simple breach of contract claim for failure to pay cases are sometimes met with tort or even crazy defenses, like "Plaintiff assumed the risk"; "The plaintiff is barred by the doctrine of unclean hands"; "Defendant believes plaintiff's lawsuit is being motivated by his current wife, based on lies told by plaintiff to his wife"; "Plaintiff's claim is against public policy." At times you might see: "Plaintiff's claims are barred by various statutes of limitation"—even though S/Ls are the sole instance where the Answer must cite the statutory basis for the defense. Code Civ. Proc. §458.

Besides outright denial of claims, Answers often raise in defense "new matter" not alleged, including affirmative defenses that raise legal defenses or factual claims, such as "setoff by other debt" or "accord and satisfaction" (prior settlement).

How to plead affirmative defenses is beyond the scope of this article, but find good info in *"California Affirmative Defenses,"* by Ann Taylor Schwing.

Defense counsel sometimes disregard Rules of Court 2.112 requiring each defense identify who against whom it is claimed, and its nature. Defendants want you to forget that defendant as to each affirmative defense bears the burden of proof. 1:6. Burden of proof—Generally, 1 Cal. Affirmative Def. § 1:6 (2d ed.). For that reason alone, you should try to discover what proof, if any, exists as to each Affirmative Defense.

Worse, Answers and their separately stated Affirmative Defenses sometimes omit the critical pleading requirement that the answer allege the facts on which the defense is founded. Because this requirement is liberally construed, defense counsel may feel comfortable throwing stuff at the wall to see what sticks—and to test your mettle and acumen. That is, how much nonsense will you tolerate? Affirmative defenses based on factual claims are harder to win at Motion, courts often ruling that the trial court will decide. Instead, focus primarily on legal arguments and contentions raised in affirmative defenses without legal merit, and challenge those based on factual claims if appropriate.

Assuming no Demurrer, your Dis-

covery can attack vague Answers containing inapplicable Affirmative Defenses. UJ Form Interrogatory 15.1 requires defendant "…disclose all facts on which you base the denial of a material defense and each special or affirmative defense in your pleading…". Defendant must provide witness info and identify documents supporting such claims. Ideally, when you send this out, you will receive back "Affirmative Defenses 16-27 withdrawn." But if you get more nonsense in response, such as a claim of work product privilege or, "this was pleaded in an abundance of caution," you must meet and confer, then file your Motion to Compel as needed—within 45 days, plus service time ,of the responses to your Rogs. Delay favors defendants.

The reality is that even "won" Discovery motions mostly result in an order defendant answer your Rogs within 30 days, and sometimes you win scanty attorney fees as sanctions. A slim attorney fee award in your favor is little threat to a defendant benefitting from delay; sometimes defendant won't even pay sanctions.

In counties with Discovery facilitators, you can wind up in quasi-legal limbo for months—no compliance with Discovery facilitator rulings, and not having reasonable Discovery answers even as you approach your trial date. If you get more nonsense or non-response after an Order to Compel Further Answers is granted in your favor, consider Code of Civil Procedure sec. 128.7. You can use it to force defendant to drop fake defenses raised in the Answer including affirmative defenses.

A 128.7 motion is directed at the pleadings, not at Discovery, though inadequate defense Discovery responses/non-responses support such a motion. A 128.7 Motion has unusual qualities. It is prepared in whole and served—but not filed, unless the defective pleading is not corrected within 21 days. It is in essence an unfiled "show cause."

It has teeth that can bite hard. Consider if you were defense counsel served with a demand defendant drop bogus defenses—a ready-to-file CCP 128.7 Noticed Motion, giving you as defense counsel 21 days to abandon false defenses. The teeth are the ability of the court to strike the parts of the Answer or other pleading or document presented or advocated to the court, and award attorney fees for a non-discovery motion intended to promote ethical pleading. As defense attorney, you would certainly take a closer look at your pleadings and drop the nonsense.

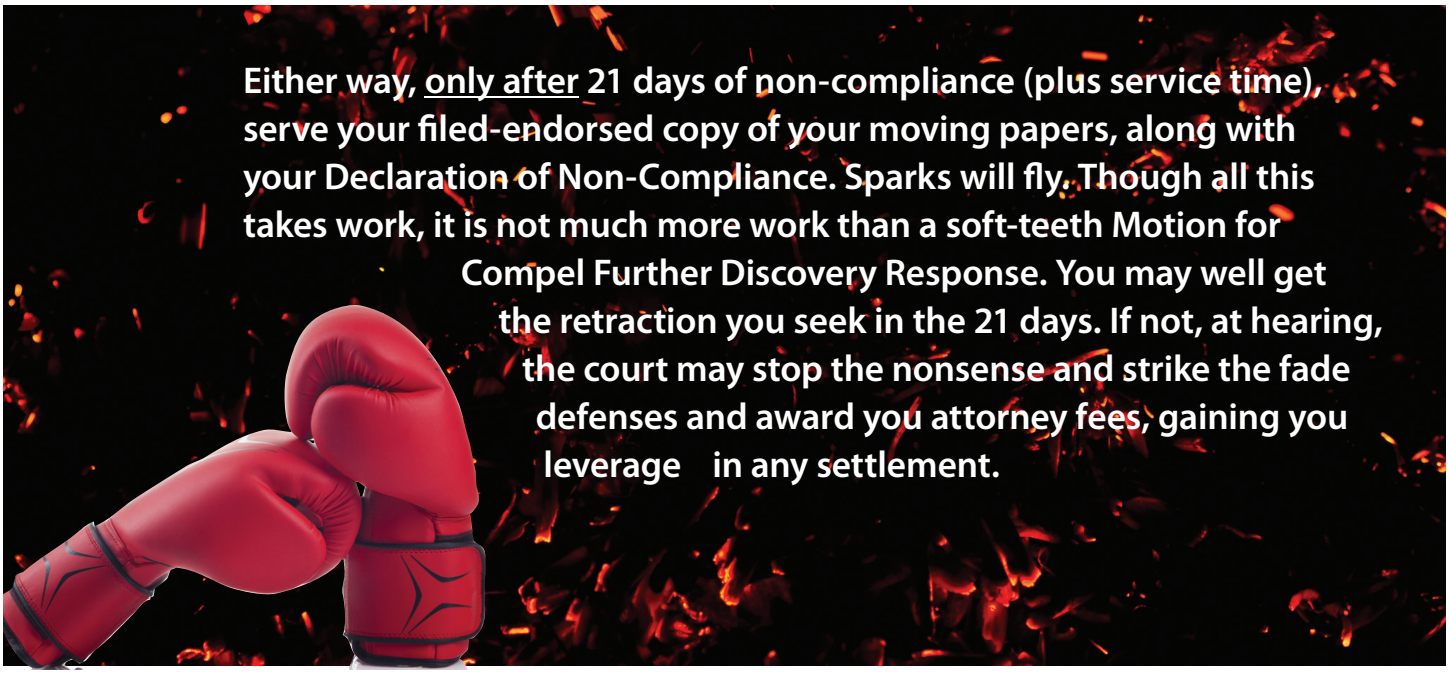
Attorney fee awards exceeding $1,000 on a non-discovery motion must be self-reported to the State Bar. When defense counsel realizes they are personally liable for the bogus pleading they drafted, and ethically accountable for the fake defenses they raised, most will drop fake affirmative defenses not supported by law or maybe some not supported by facts. No defense lawyer wants to get dinged for pleading nonsensical affirmative defenses "in the abundance of caution." (Not to knock that phrase; I use it myself at times.)

To use 128.7, you prepare and serve a fully completed motion, but do not file it. Like a "show cause" order, Defendant has 21 days to put up or shut up on their affirmative defense lacking legal merit, or maybe with no factual basis provided even after Discovery. One must insert into the non-filed motion documents the hearing date/time/department, at least if one can reserve a hearing date, as in Sacramento County (in some counties, that's not possible).

Either way, only after 21 days of non-compliance (plus service time), serve your filed-endorsed copy of your moving papers, along with your Declaration of Non-Compliance. Sparks will fly. Though all this takes work, it is not much more work than a soft-teeth Motion for Compel Further Discovery Response. You may well get the retraction you seek in the 21 days. If not, at hearing, the court may stop the nonsense and strike the fade defenses and award you attorney fees, gaining you leverage in any settlement.

If you win your 128.7 motion, or even if you didn't, and the case does not settle, don't forget to timely file your Motions in Limine to exclude the stricken affirmative defense. Though you have this second bite at the apple, you take your chances on Motions in Limine filed (in most counties) just 10 days before trial.

I cannot cover all challenges to fake defenses in this article, so I will end here. No, here. No… here. A good writer knows when to sto



President's Message

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tions are or what topics are front and center for you as 2021 unfolds. We are here to serve the needs of our members. The record-breaking attendance at January's virtual Tort and Trial program is a reminder of the silver lining of the pandemic: the creation of virtual programs which are easy to access and efficient for our schedules and ability to participate at the last minute. It seems some variation of these virtual education programs should stay as a part of our future calendars.

While we sort through the unfolding of the plan for vaccines and resuming "normal" life, we will be in a holding pattern on our major events for the year. Clearly, those that are essential will move to an all-digital platform. Others may be a hybrid. Stay tuned for more details as we (along with every other organization) try to determine the best path forward.

What I am focusing on, rather than all that has changed, is all that remains the same: our commitment to the rights of the injured, our endless battle against the agenda of the insurance companies, our pledge to use our network to grow our knowledge and skills and to work closely with CAOC in any way we can. This focus gives us a roadmap to follow and will certainly support the decisions we make over the next 12 months. Your feedback is valuable. Please share your thoughts and recommendations. My contact info is below, and I promise to respond to all suggestions.

Let's all commit now that CCTLA stands for justice, unequivocally and loudly. This is a basic principle we can all agree to support as we navigate 2021. I am proud to be your leader and look forward to a productive and successful year.

Travis Black: (916) 962-2686, travis@bdlawteam.com.

"I consider trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." — Thomas Jefferson

Mike's Cites

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an absence of a showing of heightened risk.

In the present case, Live Nation as the operator of an electronic music festival had a special relationship with its 65,000 festival invitees. Once they passed through security and entered the large enclosed grounds for the 11-hour festival, the festival attendees were dependent on Live Nation. Live Nation controlled not only if and when attendees could receive medical care, but also the nature and extent of the care. Live Nation, an experienced festival producer, knew of the dangers.

Live Nation's argument that it did not owe Katie Dix a duty because she voluntarily consumed an illegal drug and died from acute drug intoxication may be relevant to causation or comparative fault, but not duty. This court walked through the *Rowland* factors and found special relationship, duty and foreseeability.

Interestingly, the appellate court felt that Live Nation did not carry its burden of proof to negate the causation element of the cause of action. Live Nation did not offer any evidence other than the fact that Katie Dix died of a drug overdose to show that they did not cause her demise.

Procedural Tip: Plaintiff's counsel provided evidence to the trial court in opposition to the Motion for Summary Judgment in the form of declarations incorporating deposition testimony. The declarations stated that the deposition testimony was true and correct. However, certifications by the court reporter were not included with the deposition transcripts, and therefore the defendant objected to the evidence, and the trial court sustained the objections. The appellate court considered the depositions because the defense luckily incorporated the same depositions in their motion.

CCTLA installs Travis Black as president, presents annual awards

By: Jill Telfer, Telfer Law and Editor of *The Litigator*

CCTLA has bestowed its highest honors on Sacramento Superior Court Presiding Judge Russell Hom, Ognian Gavrilov, Patricia Banks and Kimberlee Swift. Judge Hom received the Judge of the Year Award, Gavrilov was honored as Advocate of the Year, and Banks and Swift were named Clerks of the Year—all for 2020.

Normally, CCTLA holds a year-end installation and awards celebration in December, but the Covid pandemic-related regulations made that impossible. However, CCTLA did install its 2021 board virtually, with Travis Black assuming the helm for 2021 from outgoing President Joe Weinberger. Recognition awards also have been announced and presented.

CCTLA President Travis Black presents Judge Russell Hom (above right) with CCTLA's Judge of the Year Award and the Advocate of the Year Award to Ognian Gavrilo (below left).

2020 Judge of Year – The Honorable Russell Hom

William Shakespeare once wrote that some people "have greatness thrust upon them." That seems to be the case with Judge Hom. What he has been able to achieve during this unprecedented crisis was nothing short of astonishing, and the bench, bar and citizens of Sacramento County have been well-served by his leadership. Judge Hom pulled together a team that created, implemented and communicated with local bar organizations the COVID-19 related court protocols and procedures to ensure the administration of justice continued. This included long hours and dedication with Zoom meetings to allow Q&A by attorneys to asssist them as they navigate these new rules and protocols.

Judge Hom has been a rudder during these tumultuous times and amid fluid challenges. He used creativity, adaptability and tenacity, and had the ability to inspire those who work with him. He is the first Asian-American presiding judge in Sacramento, after 17 years presiding over both criminal and civil trials.

2020 Advocate of the Year- Ognian Gavrilov

Ognian Gavrilov has handled a variety of challenging cases, including a newly evolving specialty of cutting-edge bad-faith cases. His successes in 2020 included several seven-figure judgments and settlements. An arbitration win against State Farm was 10 times the insurance company's best offer, and the case is now in bad-faith litigation in federal court.

Gavrilov, from Bulgaria, came to the United States as a foreign student in 1999. Although he did not speak much English, he worked fulltime to pay for his college and law school. Upon completing law school, he worked for a defense firm for approximately a year until he went out on his own during the 2009 recession. His life changed in 2012 when he agreed to take on a jury trial on two weeks' notice. Gavrilov explained that to his surprise, that after a multi-million dollar case concluded, several jurors told that his accent was a plus because it forced them to pay close attention. Saying he's been told that by others, "I could not have predicted what I perceived as my greatest weakness was actually an incredible advantage."

His enthusiasm for the law and his work mentoring and helping others—including providing the Sacramento County Bar Association with a new residence, rent-free for the next three years, during this financial crisis so the bar association can continue helping other attorneys stay educated and thrive—sets an example for all.

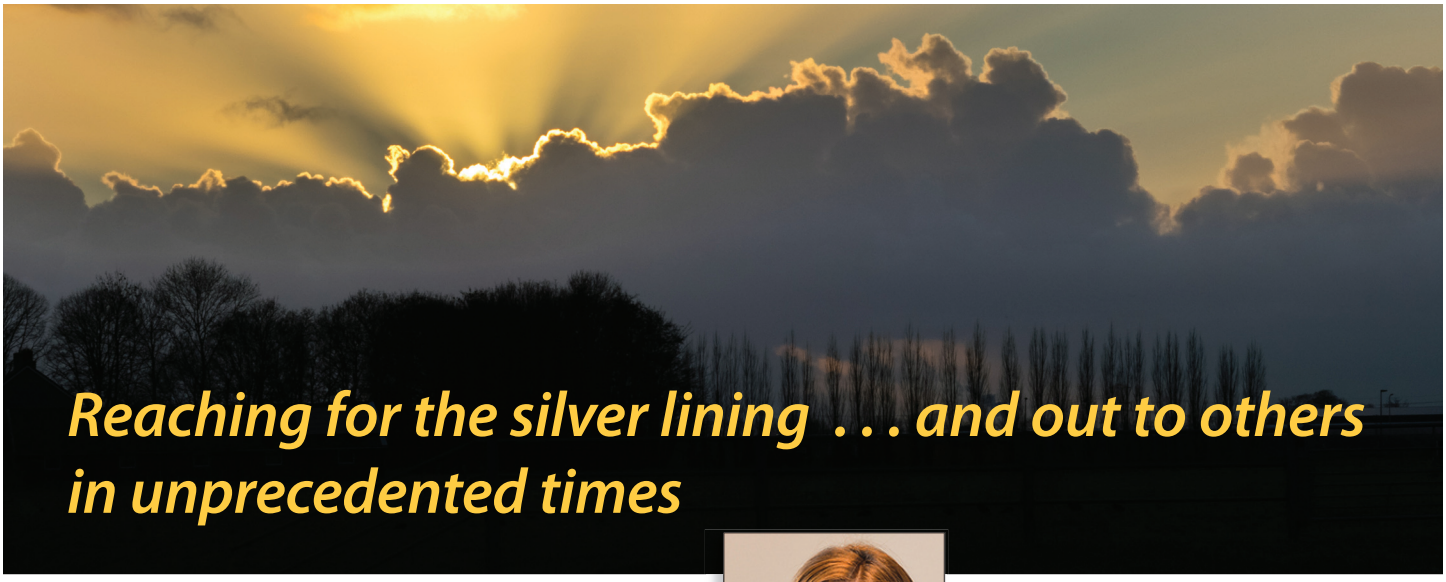
Black presents Patricia Banks (above right) and Kinberlee Swift (below right) with CCTLA's Clerk of the Year Awards

2020 Clerks of the Year – Kimberlee Swift and Patricia Banks

Both women have been the point of contact for both litigants and attorneys seeking guidance on the numerous Covid-19-related civil protocols and procedures the court has put in place. Their ability to understand the protocols and provide clarification to the public is a testament to their knowledge and patience.

Kimberlee Swift has worked with Judge Hom his entire judicial career. He commented, "Any success that I can claim as a judicial officer is in no small part due to Kim. Together, we have made a great team, and I couldn't imagine a better career partner than Kim." Swift is a consummate professional and always goes out of her way to make sure that attorneys and litigants are comfortable in the courtroom. She has excellent judgment and is extraordinarily patient.

Patricia Banks also has had a stellar career as one of the clerks for the presiding judge, and Hom stated, "Pat has been indispensable in my transition from a trial judge to the presiding judge of this court. Her historical knowledge of the substantive and procedural issues that arise in the presiding judge's courtroom have been of great assistant to me in developing procedures to reopen the civil presiding judge calendars."



Reaching for the silver lining . . . and out to others in unprecedented times

By: Kelsey DePaoli

Kelsey DePaoli, The Law Office of Black & DePaoli, PC, is a CCTLA Board Member

We are all in unprecedented times in our lives, and all of us have been dealing with the changes and challenges in very different ways. Coping with the stress of lawyering during a pandemic is something many of us never envisioned, until March of 2020 when the world changed. We were told that we needed to "shelter in place" and not leave our homes for any non-essential purpose. If you could work from home, it was highly encouraged. We were all faced with having our offices and staff learn how to implement working remotely.

I have heard that more than 50% of the US workforce holds a job that is compatible with remote work, but many of us had never worked from home, so it became quite the adjustment. With this new territory came issues each of us had to solve in our personal lives. We had to cope with finding a space to work at home, childcare, teaching our own children aftr schools closed, having the proper work equipment, etc. At first, it was stressful for many, and the media was constantly negative, making people fearful. Despite these changes, many of us found silver linings.

Appreciating the positives

Lawyering in leisure for me personally has not been not so bad. Getting up and getting dressed in professional attire over the years makes you appreciate the comforts of yoga pants while at your home office. Getting to be on that Zoom call with business wear on top, casual on bottom, has become the new normal, and I am totally okay with that. Who's with me?

Comfortable clothes are not the only blessing that came out of this. Many of us get to spend a little more time with our families. For some of us, we are getting more moments with our children than we would not have had otherwise. In the fast-paced life of a lawyer, very often there is the routine of leaving the house when it's dark and coming home when it's dark, with only enough time for dinner, limited family time and sleep. Covid-19 forced us to slow down. We now have time to have meals with our loved ones and avoid the stress of commuting. These are some blessings we can all be grateful for.

So, the question arises: Once we are all cleared to go back to the "office," will we? Or will there instead be a significant upswing in remote work? My guess is there will be many people who stay remote, full or part time.The demand by employees for flexibility has been a trend for years, and I think many employees like the option of working from home, at least some of the time.

But many employers have been hesitant to implement that change. Some may have issues trusting that the work will get done. It had been the norm to manage employees by physically seeing them throughout the day, to actually see what they are working on. But the new norm is for managers to focus on the results they see, rather than seeing the actual employee at their desk. Some employers seem to be okay with remote working, while others can't wait to have people back in the office.

Coping with the negatives

These new times do not come without some anxiety of the uncertainty. Will I have a trial this year? Will the client understand that their trial is being continued once again? Will the insurance company take advantage of the fact that we may not be able to get a courtroom this year? Will we get cases in the office if everyone is home? What is happening with the economy? Will this affect my business? Since we are working remotely, should we continue to pay rent? All these questions and thoughts are adding extra stress to the already stressful job.

With the current state of the courts, and a new way of lawyering, now is the time to get along with opposing counsel. One thing I know for sure is that judges will be less patient with lawyers filing motions that could have been worked out without court intervention. The courts simply don't have the time or the staff available for stuff that should have been worked out between lawyers.

This is the time for civility, to act in an ethical manner and to give grace. Don't oppose a reasonable request by an adversary as this is a rule of professionalism anyway, but in these times, be more

aware of your professional duties. Judges have the power under the CA code of civil procedure to enforce civility in a courtroom.

A lawyer cannot engage in conduct intended to disrupt the court. Judges have less time, less staff, less courtroom openings and the backlog of cases that is overwhelming and perhaps crippling the court system. Thus, again getting along with our adversaries and working together is more important now than ever.

Have compassion for others — and yourself

Other than trying to work with each other more and having more compassion for the person on the other end who may have a multitude of stressors we don't know about, what are some other things we can do to cope with the stress? Let's try gratitude for the fact we do still have a job, while so many have lost theirs. Try to embrace the anxiety, knowing that it will be there, and some of this is out of our control. Try to do something you love every day to take the focus off work.

Connect with other people in the same boat. Reach out to other lawyers and ask, "How are you doing?" How are they getting creative in these odd times? How are they dealing with cases differently? How are they doing work remotely? Maybe reach out to the lawyer who has struggled to go remote and offer some assistance; lend a hand.

Now is the time to raise the standards in our profession. Ask yourself, what is your opinion of what a respectable attorney should be? Who was your mentor? Who influenced you in a positive way, and what can you do to be more like that person? We must have a purpose in life, and that generally includes helping others. What things have helped your business in these odd times and what can you do to better the life of others?

When the stress feels like too much, take healthy breaks during the workday, like a walk, meditation, a moment away from the screen.

Working from home can sometimes feel like you don't get a break since you never leave your "work" environment. Choose a time at home to "clock off," no matter what, and leave work at the desk and be "home." You must take the time out of your day to decompress.

Hold onto hope for the future

The world feels very uncertain at this time, but let's all hold on to the hope that we gain some form of normalcy again, knowing that we are all in this together. We have had to learn quickly how to come together and be productive in some of the most uncharted times in our lives.

Coping with these changes in healthy ways is so important. Set yourself a daily schedule and make sure you get some time for yourself as well as staying connected with others in whatever capacity you feel safe to do so.

Taking The Biomechanical Expert Out of the Game

By: Matt Donahue

Matt Donahue, Donahue Law, is a CCTLA Board Member

As you sit at your desk, your assistant emails you the defense expert disclosure for your review. You open the disclosure, hoping the defense will not defend this low-impact case by hiring an expensive accident reconstructionist and an expensive biomechanical expert.

But you have known that is exactly what defense will do because they desperately want the photographs to come into evidence before the jury, and this ridiculously costly and irrelevant testimony from tried and (un)true defense experts is their only way of ensuring the photographs come into evidence.

Then the defense admits liability and relies on causation as their "reasonable" approach to the claimed injuries: "We have been reasonable. We admitted liability, but the damages claimed by the plaintiff are not reasonable. The plaintiff could not have been injured in this low-impact collision." We've all seen and heard this, and the photographs showing little, or no damage are displayed by the defense at every opportunity.

We work within an adversarial system, and it's our job to defeat this testimony and reveal it for the beguiling testimony that it is. It's not our job to scream our belief that this testimony "isn't fair."

The biomechanical expert and the attorneys sponsoring biomechanical testimony know the approach is specious, at best. But they use this approach because it is all too often effective. It is a thinly veiled effort to prejudice the jury with the photographs that really are not relevant to the injuries to the person inside the vehicle.

I once had a biomechanical expert, whom I hold in high regard, tell me: "I exist for the sole purpose of getting no-damage rear-end photographs into evidence and in front of the jury." I responded, "You do more than exist: you thrive. How many houses do you own?" He looked at me and said, "It's because most of 'you guys' have no idea how to hurt me on the stand..." followed by eight words that just echoed in my head: ".....or to take me out of the game." I looked at him, and he knew he went too far and that I was going to lock onto "take me out of the game."

The following is my approach. It doesn't have to be yours, and you must be yourself, but I have spent a lot of time figuring out how to take the biomechanical expert "out of the game" and then go even further, by making such testimony work against the defense.

This approach most certainly does not involve a supplemental disclosure of an accident reconstructionist or a biomechanical expert. I will, in some cases, consult with an accident reconstructionist to make sure the defense accident deconstructionist's numbers relied upon by the biomechanical expert are accurate, but I will not hire a biomechanical expert and spend $30,000 because all that does is legitimize the biomechanical testimony, which is the last thing I want to do.

Moreover, the biomechanical experts make a living stating that the forces in low-impact to moderate-impact collisions cannot cause injury and they are not about to give up that fine income by helping the plaintiff's bar. By hiring a biomechanical expert that can't help you, you are taking the most convincing argument in your arsenal right out of your hands and playing into the defense's hands.

Taking the biomechanical expert out of the game does not involve being smarter or more knowledgeable than the biomechanical experts are at their trade. We are not better versed in their trade, any more than we are better surgeons than the DME doctors hired by the defense.

Rather, it involves an approach that has only become even more understandable in the last 12 months and has never been more important in our society. It's called personalizing the case. Our clients are people, individuals and human beings. Our clients are not made up of charts, graphs, studies, and are not some ridiculous non-existent person that the biomechanical speaks of. They did not participate in any of the studies relied upon by the expert.

Our clients are unique individuals; they have unique DNA; they have children, jobs, husbands, wives, and a story to tell: a story about how the collision, regardless of the nature of the impact, substantially changed their lives for the worse.

In fact, the impact is so substantial upon the client's life that they are before the jury fully knowing they will be picked apart by the defense. Taking the biomechanical "out of the game" requires that you hammer the biomechanical expert (in a PROFESSIONAL and RESPECTFUL

Continued to page 12

Continued from page 11

manner) on these issues of individuality.

The biomechanical expert cannot and should not be able to say anything specific about your client's injuries. Rather, the expert can only talk in terms of generalities as it relates to this fictional being in the charts they rely upon. But the expert cannot say anything specific about your client's injuries or medical issues. On cross exam, I ran through all the reasons why the expert cannot provide testimony that matters or is relevant to the "human being" I represent. We went over all that he could not do in the case. The expert became irritated and said, "Look, I cannot even say her name. It's my policy not to use the person's name." That made for a fun closing argument.

I am not going to give specific questions to ask, word for word. Again, you must be yourself. If you try to be someone else, you will come across contrived. Rather, I am providing, below, the bullet points of the areas to focus on. I also have the transcript of a cross exam of a biomechanical expert that I did at trial if you want it. Please email me for the transcript if you are interested.

During your closing argument, revisit the fact that your client is an individual, has a name, has unique DNA and is before the jury as a person who has been injured. Never call your client a plaintiff. She is a person and has a name.

A BIOMECHANICAL EXPERT . . .

- *cannot / does not have a clinical practice.*
- *see injured people in any capacity.*
- *review the actual films such as the MRIs, X-rays, etc., and is not qualified to do so.*
- *does not develop a relationship with the client in any way (to be contrasted with the client's treating physicians, some of whom may have known the client for years and years.).*
- *never examined a single injured person for purposes of diagnosing or treating physical injuries, including your client.*
- *cannot prescribe treatment of any kind, including but not limited to medications, physical therapy, X-rays, or MRIs.*
- *consider the temporal role of the collision to the injuries the client suffered.*
- *consider the effects and responses of the client to the treatments rendered.*
- *obtain any kind of history from the client (contrast that to the history taken by the treating doctors to render a diagnosis).*
- *opine about the physical injuries the client suffered, but is only giving opinions about forces, and not about the effect of the forces on the human being you represent.*
- *must admit the "science" he espouses, like all science, is based on generalities and that he cannot and does not opine whether your client fits into the models upon which he relies.*
- *that your client could absolutely fall outside the "generalities" he relies upon and cannot say one way or another . . .*
- *cannot provide any testimony about the injuries suffered by the client, the way the physicians/surgeons/medical doctors that came before him over the past several days have done.*

There are many more, and this is not an exhaustive list. You should delve into the amount of money the expert has been paid. I find most jurors don't really care about how much an expert got paid: they expect experts to get paid. But by bringing out the defense paid $30,000 to just this expert, and another $30K to another expert, it certainly solidifies the jury's assumption that insurance is involved.

Then address the defense's position that they have been reasonable by admitting liability. Turn the biomechanical testimony against them. They so want to be "reasonable," but they absolutely are not. Reasonable people who take "full responsibility" for their actions, recognizing that taking responsibility for injuring someone is a multi-pronged journey. It's far more than saying, "I did this to you." It requires the next step: "I did this to you. I am sorry, I recognize the harm I caused, and I will make it right." The jury is there to make sure those final steps, or prongs, are fulfilled.

Point out the defense has hired the biomechanical and others at great expense to avoid every aspect of taking responsibility other than saying, "I did it." These thoughts are in Rick Friedman's book, *Polarizing the Case*, which is an excellent read.

Untangling confusion in the Substantial Factor Jury Instruction

By: Kirill Tarasenko

Subject to debate, controversy and much consternation, the substantial factor jury instruction comes up time and again. Until this jury instruction is simplified or otherwise fixed, it is up to all of us, as litigators, to assist trial judges and juries with this instruction to avoid confusion and miscarriages of justice for those we represent in the pursuit of justice.

CACI 430

"A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct."

Confusion in the Substantial Factor Jury Instruction

The confusing nature of a jury instructed based on different meanings of the word "substantial" is well-documented. (*Mitchell v. Gonzales, supra*, 54 Cal.3d at p. 1061 (dis. Opn. Of Kennard, J.) [noting that conflicting meanings create risk of confusion]; 6 Witkin, Summary of Cal. Law (11th Ed.), Torts §1334, citing Rest. 3d, Torts ["[t]he substantial-factor test has not . . . withstood the test of time, as it has proved confusing and been misused"].) The substantial factor standard has become "an additional barrier to liability." (See *Mitchell v. Gonzales, supra*, 54 Cal.3d at pp. 1053-1054.)

Sometimes it is jurists who are confused by the phrasing in this instruction because the substantial factor instruction defines the word "substantial" in a way that conflicts with the word's common usage, as defined in dictionaries. Consider the *Merriam-Webster* synonyms: "big, consequential, earth shattering, earthshaking, eventful … major … momentous …. monumental…. Tectonic…. weighty."

These synonyms sound more like terms one would hear describing the cause of earthquakes in California than causation of injuries due to negligence. Consider the antonyms: "Inconsequential, insignificant, ***minor*** …. negligible, small, ***trivial***…."

Kirill Tarasenko, Gavrilov & Brooks, is a CCTLA Board Member

Other times, it is fellow attorneys who feel that justice slipped through the cracks, usually in the context of a jury finding that a defendant was negligent and that the plaintiff was harmed … But still somehow finding that the defendant's negligence was *not* a *substantial factor* in causing that harm. Demoralizing, indeed, particularly where the losing counsel *just knows* that it was confusion in the substantial factor jury instruction that lead to the dissonant verdict.

In reality, " '[T]he substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical.' [Citation.] Thus, 'a force which plays only an "infinitesimal" or "theoretical" part in brining about injury, damage, or loss is not a substantial factor' (citation), but *a very* ***minor*** *force that does cause harm* is a substantial factor" (citation).' *City of Modesto v. Dow Chemical Co.* (2018) 19 Cal.App5th 130, 156, emphasis added; *Bockrath v. Aldrich Chemical Co., Inc.* (1999) 21 Cal.4th 71, 79.)

It is one thing to lose a tough case, perhaps a disputed liability case where the risk of ruin is clear and present, but another matter entirely where the treating doctors testify that plaintiff was harmed, and even the defense-retained medical experts agree that plaintiff suffered *some* harm, just not all of the harm claimed.

The defense then argues that the plaintiff was a tidbit injured, as they are wont to do, but should have recovered in a few weeks, and anything beyond that is due to plaintiff's "underlying degenerative condition." And then, notwithstanding the expert testimony of both plaintiff's treating doctors and the defense retained expert, the jury—mistakenly guided by the substantial factor instruction—concludes that the subject incident did *not* cause the plaintiff harm.

So, can something be done to avoid these (hopefully) rare, but devastating, miscarriages of justice? Can the substantial factor jury instruction be changed, and if so, to what? In some instances, can this important question be resolved early in the case, or by the trial court, and not left in the jury's hands, where even the most well-intentioned jury could get tripped up by a notoriously confusing instruction?

And finally, is substantial factor of harm a one time, yes-or-no proposition, where if yes, then the damages portion is whether the jury decides the "nature and extent of harm" or does plaintiff have to separately prove substantial factor of harm for every single injury claimed?

The answer is yes to all of the above.

Fixing Substantial Factor Standard

One need look no further than the text of the substantial factor instruction itself for a solution. The plain words of the substantial factor instruction say it is "a factor that a reasonably person would consider to have *contributed* to the harm." The current test (and jury instruction) would more accurately reflect the case law and regular English usage if it were titled "Causation: Contributing Factor" and revised to state, "A *contributing* factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. Conduct is not a *contributing* factor in causing harm

if the same harm would have occurred without that conduct." Rephrased, the test and the instruction would clarify that a contributing factor is a legal cause, and would put to rest defense counsels arguments that "defendants whose conduct is clearly a 'but for' cause of plaintiff's injury is nevertheless… an insubstantial contribution to the injury." (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 969; *Mitchell v. Gonzales, supra*, 54 Cal.3d at p. 1053.)

Getting to Substantial Factor Earlier in the Case

Unless and until this jury instruction is changed, we just have to work with what we've got.

Use the word "harm" in Discovery requests and in Requests for Admission, and define it in the question to avoid defense counsel claiming that the term is "vague." For instance, admit that [Plaintiff] was harmed as a result of the INCIDENT. (The term "harm" is used as in the CACI 400 Negligence – Essential Factual Elements jury instructions (CACI) NO. 400, approving use of the word "harm" throughout the jury instructions). Use the rest of the jury instruction language to come up with your own RFAs and other Discovery questions built around key terms, such as harm, remote factor, trivial factor, and whether the harm would have occurred without the conduct (the subject collision or incident).

Ask about contentions of alternative causation because alternate causation of injuries is an affirmative defense which the defense must prove to a reasonable degree of medical probability—not mere possibility. If no defense expert can testify to a reasonable degree of medical probability that any other event lead to the need for plaintiff's surgery, then the defense cannot introduce any theory of alternative causation to the jury.

Defense has the burden to establish alternate causes. (*Stewart v. Union Carbide Corp.* (2010) 190 Cal.App.4th 23, 33. "A defendant bears the burden of proving affirmative defenses and indemnity cross-claims. Apportionment of noneconomic damages is a form of equitable indemnity in which a defendant may reduce his or her damages by establishing others are also at fault for the plaintiff's injuries. Placing the burden on defendant to prove fault as to nonparty tortfeasors is not unjustified or unduly onerous. (*Wilson v. Ritto* (2003) 105 Cal. App.4th 361, 369.)

A possible cause only becomes "probable" when, in the absence of other reasonable causal explanations, it becomes more likely than not that the injury was a result of its action. This is the outer limit of inference upon which an issue may be submitted to the jury. (*Jones v. Ortho Pharmaceutical Corp.* (1985) 163 Cal.App.3d 396, 402-403.)

Request a Directed Verdict on Substantial Factor

Because causation in a personal injury case is established by expert testimony, and where the testimony of the medical experts is that the subject incident caused the plaintiff *some* harm, the jury really shouldn't be asked to decide if the defendant's negligence was a substantial factor in causing harm. The jury should be asked to decide the issues that computers, calculators and retained experts can't decide for them – the issue of human losses. Where there is evidence of only one cause, a court can decide causation as a matter of law. (*Mitchell v. Gonzales* (1991) 54 Cal.3d 1041, 1055; *Bettencourt v. Hennessy Industries, Inc.* (2012) 205 Cal.App.4th 1103, 1123.

Where the defense admits that they were negligent and puts forth no expert or lay witness testimony that Plaintiff is at fault for her own injuries, it would be a reversible error for the jury to decide that the defendant was not negligent. Likewise, where defendant's expert witnesses also admitted that plaintiff suffered some injuries as a result of the incident, it would be a reversible error for the jury to decide that the plaintiff did *not suffer any injury (harm)*.

At the close of evidence, ask the court to enter a directed verdict that defendant was negligent, that plaintiff was not negligent, and that defendant's negligence caused plaintiff *harm*, even where the defense admitted that plaintiff was injured to some lesser extent than claimed. (Code Civ. Proc. §630(a)).

There simply should be no reason now why the jury is left with the confusing "substantial factor" jury instruction to decide where the defense has already admitted that plaintiff was harmed. If it is undisputed that plaintiff suffered at least *some* injuries as a result of defendant's negligent conduct, then it would be impossible for the jury to produce a "defense" verdict that their negligence did not cause plaintiff any harm. Thus, the only matter that should be submitted to the jury is the *extent* of plaintiff's injuries or harm, which can be

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argued by counsel in closing.

" 'A directed verdict may be granted, when, disregarding conflicting evidence, and indulging every legitimate inference which may be drawn from the evidence in favor of the party against whom the verdict is directed, it can be said that there is no evidence of sufficient substantiality to support a verdict in favor of such party....' " (*Newing v. Cheatham* (1975) 15 Cal.3d 351, 358-359.) Whether the conduct was a substantial factor in bringing about the injury is a question of fact unless the evidence can support only one reasonable conclusion. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205; *Lombardo v. Huysentruyt* (2001) 91 Cal.App.4th 656, 666.)

Counsel can then argue the ***nature and extent of the harm***, i.e., plaintiff's damages, in closing arguments. After all, that is what they've probably been saying the whole case – we don't contest that plaintiff suffered some injury, *we just dispute the nature and extent of the harm.*

Based on the evidence presented, there is simply no legal basis in such a case for plaintiff to be awarded "zero" damages by way of the jury being confused and checking the "No" box on the substantial factor question. As a matter of law, such a verdict should be overturned on appeal.

Instead, the first and only question on the special verdict form should be an itemization of plaintiff's damages as a result of the defendant's negligent conduct.

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11.75 MCLE CREDITS

FRIDAY, MARCH 19

8:45 - 9:45 AM - MCLE: 1.0 General

Liens Update
Moderator: Travis G. Black, The Law Office of Black & DePaoli
Liens: What Are They Up To Now?
Daniel Wilcoxen, Wilcoxen Callaham, LLP

10:15 - 11:15 AM - MCLE: 1.0 Competence Issues

Law Office Management/Competence Issues
Moderator: Gregory G. Rizio, Rizio Lipinsky Law Firm
Eradicating Implicit Bias From Your Legal Practice (Competence)
Sandra Speed, Ribera Law Firm
Employment Laws Governing Remote Employees: What California Law Firms Should Know (Competence)
Tamarah Prevost, Cotchett, Pitre & McCarthy, LLP
Ethical Issues of Working Remotely - Keeping Clients Information Private
Noemi Esparza, Dreyer Babich Buccola Wood Campora, LLP

11:15 AM - 12:30 PM - MCLE: 1.25 General

Government Tort
Moderator: Jamie G. Goldstein, Arias Sanguinetti Wang & Torrijos LLP
Discovery In A Dangerous Condition Case
Mary E. Alexander, Mary Alexander & Associates
What Is The Duty? Protection vs. Not Increasing The Risk Of Harm
Julie L. Fieber, Cotchett, Pitre & McCarthy, LLP
Beware of the Immunities: an Overview of the Top Ten Cases from 2019 and 2020 Decisions Addressing Immunity Defenses
Anne J. Kepner, Needham Kepner & Fish LLP
The Nuts And Bolts Of Proving A Dangerous Roadway Case Involving An Injured Bicyclist
John M. Feder, Rouda, Feder, Tietjen & McGuinn

1:00 - 2:30 PM - MCLE: 1.5 General

Tough Topics in Auto Cases
Moderator: Paul Matiasic, The Matiasic Firm, P.C.
Everything you Ever Wanted to Know about UM/UIM in 18 Minutes
Hank Greenblatt, Dreyer Babich Buccola Wood Campora, LLP
Cross Examination Of A Bio Mechanical Engineer
Robert Piering, Piering Law Firm
The Eggshell Plaintiff: Handling Pre-Existing Injuries
Deborah Chang, Athea Trial Lawyers LLP
Addressing Tough Topics Early in the Auto Case
John H. Gomez, Gomez Trial Attorneys

2:45 - 3:45 PM - MCLE: 1.0 General

Compromised Consumer Safety - A Dangerous Saga Continues
Moderator: Jennifer Fiore, Fiore Achermann, A Law Corporation
How Greed & Failed Regulatory Oversight Led To The Deaths of 346 Passengers Aboard The Boeing Max 8
Frank Mario Pitre, Cotchett, Pitre & McCarthy, LLP
Self Driving Vehicle Litigation: The Retail Consumer Is The Beta Test
Michael Kelly, Walkup, Melodia, Kelly & Schoenberger

SATURDAY, MARCH 20

9:00 - 10:00 AM - MCLE: 1.0 General

Arbitration -
Strategies For Keeping Yourself Out and Winning If You're Stuck In It
Moderator: Casey R. Johnson, Aitken*Aitken*Cohn
The Power To Bind Arbitration
Kathryn Stebner, Stebner & Associates
Nuts & Bolts Of Fighting Arbitration
Abbas Kazerounian, Kazerouni Law Group, APC
Top Ten Tips for Uninsured/Underinsured Motorist Arbitration
Chantel Laura Fitting, Law Offices of Galine, Frye, Fitting & Frangos
Avoiding Arbitration In The Class Action Setting
Emanuel Townsend, Cotchett, Pitre & McCarthy, LLP

10:15 - 11:30 AM - MCLE: 1.25 General

Trial Skills Quick Hits
Moderator: Sukhtej Atwal, Piering Law Firm
Testing The Test Case: Bellwether Developments in JUUL and TDF Cases
Sarah R. London, Lieff Cabraser Heimann & Bernstein LLP
How To Make Your Lawsuit Against Uber Or Lyft A Five-Star Ride
Robert Bale, Dreyer Babich Buccola Wood Campora, LLP
Opioid Litigation: Will It Ever Settle?
John Fiske, Baron & Budd, P.C.
Emerging Practice Area: HIV Drug Litigation
Kristy M. Arevalo, McCune Wright Arevalo, LLP

11:45 AM - 1:00 PM - MCLE: 1.0 General

Introductions and Keynote
Moderator: Micha Star Liberty, Liberty Law
A Social Worker's Approach to Lawmaking: Taking On Homelessness, Mental Health And Other Challenges of Our Time
Senator Susan Talamantes-Eggman

1:30 - 2:45 PM - MCLE: 1.25 General

Strategies for Advancing Trials in 2021
Moderator: Geoffrey S. Wells, Greene Broillet & Wheeler, LLP
Trying An Employment Case During COVID
Jill Patricia Telfer, Telfer Law
Virtual Jury Trials From Start To Finish
Elise R. Sanguinetti, Arias Sanguinetti Wang & Torrijos LLP
Emergency! How the Governor's Issuance of Emergency Orders Has Affected Civil Claims
Gretchen M. Nelson, Nelson & Fraenkel LLP
Understanding People v. Sanchez
Duffy Magilligan, Cotchett Pitre & McCarthy, LLP

3:00 - 4:30 PM - MCLE: 1.5 General

Trying Cases in 2021 From The Masters
Moderator: Anne Marie Murphy, Cotchett, Pitre & McCarthy, LLP
Virtual Focus Groups: Both Online and Actual Focus Groups
Amy Eskin, Schneider Wallace Cottrell Konecky Wotkyns LLP
The Brave New World on Trying Cases in the Time of COVID
Roger A. Dreyer, Dreyer Babich Buccola Wood Campora, LLP
Financial Fallout of Defendants And When BK Litigation Can Become Your Friend
Wendy C. York, York Law Firm
Virtual Depositions
Khaldoun A. Baghdadi, Walkup, Melodia, Kelly & Schoenberger

5:30 TO 6:30 P.M. WELCOME RECEPTION

4:30 TO 5:30 P.M. CLOSING RECEPTION

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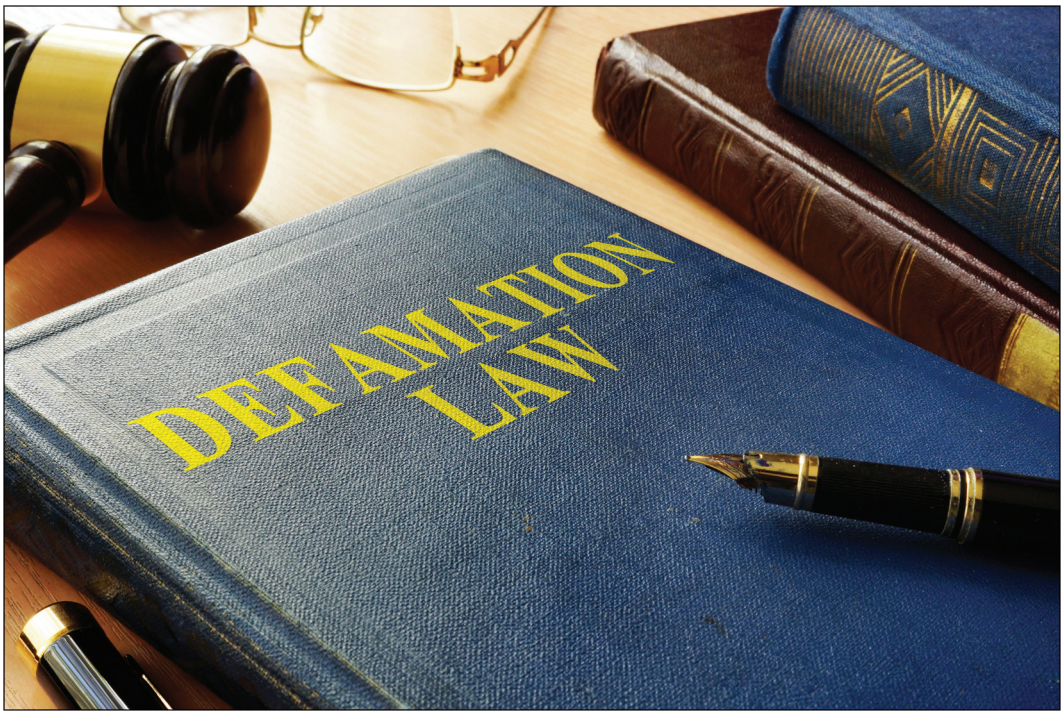
Interesting 2020 Defamation Decisions



By: Chris Whelan

This article concerns two 2020 defamation decisions, Tilkey v. Allstate Ins. Co.(2020) 56 Cal. App. 5th 521 and King v. U.S. Bank National Assn. (2020) 53 Cal. App. 5th 675. These decisions address some interesting defamation issues, including self-publication, defamation per se, malice that overcomes an employer's conditional privilege, and what justifies a finding that a low level employee is an ad hoc managing agent for punitive damages purposes.

Chris Whelan,
Law Office of
Christopher Whelan,
is a CCTLA Board Member

1. A Defamer is Liable for Damages Caused by Plaintiff's Foreseeable Self-Publication

Michael Tilkey ("Tilkey") worked 30 years selling life insurance for Allstate Insurance ("Allstate"). Unfortunately, an offsite domestic dispute with his girlfriend resulted in his arrest for criminal damage or defacement to property, possession or use of drug paraphernalia disorderly conduct, and disruptive behavior. Domestic violence charges were attached to the criminal damage and disorderly conduct charges.

When Tilkey plead guilty to disorderly conduct, the other two charges were dropped, and that charge was dismissed upon his completion of a diversion program.

However, before that charge was dropped, Allstate terminated Tilkey for, "..., engaging in threatening behavior and/or acts of physical harm or violence to any person, regardless of whether he/she is employed by Allstate." Allstate told Tilkey, and reported to the Financial Industry Regulatory Authority (FINRA) on a U5 form (Form U5), that he was terminated for threatening behavior and/or acts of physical harm or violence to another person.

Tilkey sued for wrongful termination, violation of Labor Code § 432.7, which prohibits an employer from considering "any record of arrest ... that did not result in a conviction" as a factor in an employment decision, and for self-published defamation, since he was force to republish and explain the false termination reasons to subsequent potential employers.

A San Diego jury awarded Tilkey $2.7 million in compensatory damages ($960,222 for wrongful termination and $1,702,915 for defamation) and approximately $16 million in punitive damages.

The Fourth District reversed in part, holding that Allstate had not violated L.C.§ 432.7 because Tilkey's guilty plea constituted a "conviction." However, the court affirmed the jury's verdict on the defamation claim, holding that Tilkey was foreseeably compelled to "self-publish" to potential employers to refute the false accusations published on the FINRA Form U5.

Tilkey's self-publication was foreseeable since, as a life insurance salesperson, Tilkey was required to hold a securities license. Potential employers in that industry would have access to the false accusations on the U5 Form.

Therefore, to have any hope of re-employment Tilkey had to address and refute the U5 Form accusations in

communications with potential employers. The court also reduced the punitive damages award to $2.55 million.

As the court explained, a defamer is responsible for damages caused by a plaintiff's republication because the defamer is responsible for all foreseeable republications, including those made by the plaintiff.

"For a valid defamation claim, the general rule is that 'the publication must be done by the defendant.' (*Live Oak Publishing Co. v. Cohagan* (1991) 234 Cal.App.3d 1277, 1284 (Cite omitted.) There is an exception '[w]hen it [is] foreseeable that [the] defendant's act would result in [a plaintiff's] publication to a third person.'(*Ibid*.)

For the exception to apply, the defamed party must operate under a strong compulsion to republish the defamatory statement, and the circumstances creating the compulsion must be known to the originator of the statement at the time he or she makes it to the defamed individual. (Cites omitted.)"(*Tilkey v. Allstate Ins. Co.*(2020) 56 Cal. App. 5th 521, 541-542.)

For Defamation Per Se, No Actual Damages Need be Shown Since Damages are Presumed

The false statements at issue in *Tilkey* were defamatory per se since their "... meaning is so clear from the face of the statement that the damages can be presumed (Cite omitted.)" (*Tilkey, supra*, p. 452.) Therefore, no evidence of actual damages needed to be produced. The court said where both self-publication and defamation per se were involved, "[t]he presumed injury is no less damaging because the plaintiff was compelled to make the statement instead of the employer making it directly to the third party."(*Tilkey, supra*, p. 452.)

2. A Reckless Investigation Establishes Malice and Overcomes an Employer's Conditional Privilege to Publish Defamatory Statements About an Employee in the Workplace

Tim King ("King"), the plaintiff in *King v. U.S. Bank National Assn.* (2020) 53 Cal. App. 5th 675, was a hard-charging and exceptional manager of USBNA's Sacramento Region. Within a few years, through his tireless efforts, he lead the region out of the 2008 banking crisis to surpass all other USBNA's regions in many key areas of performance, and he built a national reputation for his expertise in commercial banking.

In late 2012, King was terminated based upon the false accusations by two of his subordinates who were facing discipline and potential termination for their poor performance.

In response to these false accusations USBNA rushed to terminate King and deny him a $200,000 earned bonus. USBNA's reckless "investigation" never disclosed to him that he was being investigated and failed to disclose to him the baseless charges, thereby denying him any opportunity to refute the patently false accusations.

In fact, USBNA's human resource "investigator" Maureen McGovern, who never interviewed King, admitted she "did not know and did not care" if King had facts, documents and witnesses to refute the baseless accusations. She made no effort to determine the defamers' credibility or motives to lie, and ignored obvious evidence of such motivation. She did not circle back to resolve inconsistencies or contradictions in their own stories, or with other witnesses, or with readily available documents. She internally republished the false charges and recommended King's termination based on accusations that she admittedly did not know to be true. (*King, supra* p. 685-691.)

King brought an action for Wrongful Termination in Violation of Public Policy (WTVPP), defamation and breach of the covenant of good faith and fair dealing. A Sacramento jury awarded King almost $24.3 million, including $6 million for defamation, about $2.5 million for WTVPP and $200,000 on breach of an implied covenant claim. The jury also awarded $15.6 million in punitive damages based upon his defamation and WTVPP causes of action.

On USBNA's motion for new trial, the judgment was reduced to $5.4 million based on a finding of excessive damages. King accepted the remittitur, however USBNA appealed. King was then allowed to cross-appeal and challenge the new trial order because a defendant's appeal deprives the plaintiff of the benefits of consenting to the remittitur. (*King, supra*, 681, fn.1.)

After conducting its own review, the Court of Appeal reversed the trial court's order and found the claims were supported by substantial evidence, including evidence of USBNA's failure to properly investigate, and its reliance on sources known to be unreliable or biased against King.

Further, the court found substantial evidence that the bank wanted to terminate King to deprive him of his annual bonus. The court concluded that King was entitled to the compensatory damages awarded as well as a one-to-one ratio of punitive to compensatory damages on the defamation and wrongful termination claims, leading to a judgment of about $17.2 million, and more than three and a half years of CCP§ 998 and post judgment interest. (*King, supra*, 730732.)

An Employer's Defamation About an Employee Is Generally Conditionally Privileged. However, That Privilege Can Be Lost If the Publication Is Made with Malice

Under CCP§ 47(c) "an employer's republication of defamatory statements about its employees is generally privileged "because an employer and its employees have a common interest in protecting the workplace from abuse. (Citations omitted.) " (*King, supra*, 701.) However, that conditional privilege applies only if the publication is made without malice. (CCP§ 47(c).)

"Actual malice is established by a showing that the publication was motivated by hatred or ill will toward the plaintiff or by a showing that the defendant lacked reasonable grounds for belief in the truth of the publication and acted in reckless disregard of the plaintiff's rights. ("Cites omitted.") (King, supra 701) A showing of malice may be based on direct or circumstantial evidence. "A defamation plaintiff may rely on inferences drawn from circumstantial evidence to show

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actual malice. 'A failure to investigate, anger and hostility toward the plaintiff [citation], reliance upon sources known to be unreliable, or known to be biased against the plaintiff—such factors may, in an appropriate case, indicate that the publisher himself had serious doubts regarding the truth of his publication.'" (*King, supra* 701.)

"An inference of malice may be drawn where there are obvious reasons to doubt the veracity of the informant or the accuracy of his [or her] reports. The failure to conduct a thorough and objective investigation, standing alone, does not prove actual malice, nor even necessarily raise a triable issue of fact on that controversy.' (Cites omitted.) The purposeful avoidance of the truth is, however, another matter. "[I]naction," i.e., failure to investigate, which 'was a product of a deliberate decision not to acquire knowledge of facts that might confirm the probable falsity of [the subject] charges' will support a finding of actual malice." (*King, supra* 701.)

The court held that there was "substantial evidence McGovern made a deliberate decision not to investigate facts that could have confirmed the falsity of the allegations, supporting a finding of malice," (*King, supr*a, 703) and that the record contains substantial evidence showing "McGovern lacked reasonable grounds to believe the truth of a number of the statements, and that there was further substantial evidence she acted in reckless disregard of King's rights when she republished them. Thus, the jury's actual malice finding is supported by substantial evidence." (*King, supra*, 704.)

An Employee at Any Level Can Be a Managing Agent If the Employee Exercises Discretion Resulting in the Ad Hoc Formulation of Corporate Policy

McGovern's relative low-level position of human resources generalist might initially cause one to believe she would not qualify as a "managing agent" for purposes of punitive damages. However, in explaining its finding that McGovern was an ad hoc managing agent, the court made clear that the status of managing agent "does not necessarily hinge on [an employee's] 'level' in the corporate hierarchy. Rather, the critical inquiry is the degree of discretion the employees possess in making decisions… . (Cites omitted.) Corporate policy refers to 'the general principles which guide a corporation, or rules intended to be followed consistently over time in corporate operations.' (*Cruz v. HomeBase (2000) 83 Cal.App.4th 160, 167 [99 Cal. Rptr. 2d 435].*) The scope of a corporate employee's discretion and authority … is … a question of fact for decision on a case-by-case basis." (*White v. Ultramar, Inc. (1999) 21 Cal.4th 563, 567 [88 Cal. Rptr. 2d 19, 981 P.2d 944].*)" (*King, supra*, p. 713.)

Facts cited by the court supporting its finding that McGovern was an ad hoc managing agent included the facts that USBNA's Code of Ethics promised that suspected acts of dishonesty, misconduct, or conduct inconsistent with its ethical standards "w[ould] be investigated in a fair and thorough manner." However, "[t]he bank did not have any rules, policies, procedures, practices, or criteria in place. Investigators, like McGovern, had the discretion and judgment to determine what to do and how to do it. They could determine if/when to consult with their managers on a case-by-case basis... There was no evidence suggesting McGovern's ability to determine who to interview or how to perform an interview or investigation (e.g., whether to obtain written statements) was limited in any respect." (*King, supra*, 713.)

The court ruled, "[g]iven the breadth of the discretion delegated to her in determining how to fairly and thoroughly investigate suspected acts of dishonesty or unethical misconduct (i.e., a corporate policy) and what constituted a fair and thorough investigation—the results of which would determine (and in this case did determine) whether an employee would be disciplined or terminated—the jury could have reasonably inferred she [McGovern] had the authority and discretion to interpret and apply the investigative policies for U.S. Bank's commercial banking division as she saw fit, such that her decisions ultimately determined corporate policy." (*King, supr*a, 713.) "An employee exercising authority that results in the ad hoc formulation of policy is a managing agent. (*Egan v. Mutual of Omaha Ins. Co. (1979) 24 Cal.3d 809, 823 [169 Cal. Rptr. 691, 620 P.2d 141].*) U.S. Bank cannot attempt 'to shield itself from liability by the expedient of … having a pro forma official policy— issued by high-level management—while conferring broad discretion in lower-level employees to implement company policy in a discriminatory or otherwise culpable manner. It is what the company does—including through the discretionary acts of its employees—not just what it says in a stated or written policy, that matters.' (*White v. Ultramar, supra*, *21 Cal.4th at p. 583* (conc. opn. of Mosk, J.).) U.S. Bank's attempt to classify McGovern as "an entry level employee" does not negate the discretion delegated to her." (*King, supra*, 713-714.)

HOW TO PURCHASE INSURANCE — AUTO and HOME

By: Daniel S. Glass

Daniel S. Glass, Law Office of Daniel S. Glass, is CCTLA 2nd Vice President

I have been a member of CCTLA for at least 10 years and have written at least five articles for *The Litigator*. Past articles have been about mentoring, ERISA in general, disability insurance and knowing your insurance policy—which focused on how to evaluate the third-party insurance policy in order to maximize your client's recovery.

In general, most of the articles in *The Litigator* have addressed, as they should, the continuing practice of law from the plaintiff attorney's perspective—how to take a deposition, prepare for trial, actually try a case, etc. Few articles are devoted to subjects to benefit the well-being or financial security of the CCTLA member/lawyer. I not a "life coach" and, despite my age and self-perceived wisdom, not qualified to preach how to be a better person and lawyer at the same time. However, having litigated hundreds of first-party denials of automobile, homeowner and business claims by insurance companies, I have seen many purported "exclusions" and situations where the insured is denied their rightful benefits.

In my former "life," I was an insurance company claim representative. Thus, the purpose of this article is to suggest how to actually purchase the "peace of mind" which insurance is supposed to be (This article will only address homeowner and auto insurance. A future article will address life insurance).

I begin with the obvious. I chuckle about all the television commercials for insurance: Nationwide is on your side. No, they are not, and we all know that. They are only on your side when you pay them for years and never make a claim, because if your claim is ever so slightly "out of the ordinary," you are treated like a fraudster.

GEICO commercials are just plain stupid, with a gecko mascot and all the bizarre situations they offer, only to say how easy it is to save money by insuring with GEICO. They rightfully do not even pretend to be there to protect you. GEICO's approach is just: We will charge you less than the others—15 minutes MAY save you 15%.

I am particularly fond of the Farmers' commercials—like where the dogs flood the house, and Farmers says something like, it happened, and "we covered it." I always thought they left out one word at the end of their slogan: ONCE. They covered it the first time because they did not figure they needed an exclusion for dogs who could cause a flood. I am willing to bet that it was covered in future policies.

State Farm—"like a good neighbor, State Farm is there." Sure, like your neighbor who borrowed your lawn mower a year ago and when you want it back, they never come out of their house. Where are they?

Of course, my recent favorite is Liberty Mutual's "only pay for what you need." Isn't that what EVERY insurance agent is supposed to do in order to earn their commission? Explain to you what you need and only sell you what you need? This should not make Liberty Mutual special or different.

In our daily lives, we all need insurance. As we all know, the State of California mandates the purchase of insurance to cover your vehicles. With regard to real property, if there is a mortgage, the mortgagee demands that the real property be covered by, at least, fire insurance. If it's your home, a homeowners' policy. If you are an owner/landlord, a business policy.

AUTOMOBILE INSURANCE

Start with an evaluation of what you need before you shop and obtain quotations. Although this should go without saying, honesty is of the upmost importance in applying for insurance. Insurance companies are permitted to rely on what is in your application, and they have no obligation to verify the truth of what you tell them—and they will use it against you

if the opportunity arises for them.

Over the past 20 years, I have seen so many claims denied because the potential insured wanted to save money by omitting facts which they did not think were so important—such as children over the age of 16 who live in the household and who might be driving your vehicle on a regular basis. Or, stating that a vehicle was garaged or kept in Sacramento because rates are cheaper in Sacramento, when, in fact the semi-adult (age 16 - 21, in my opinion) actually was living with friends and working in Los Angeles.

Despite the age of the Internet, there still exist dedicated insurance agents who can help you, in person—think State Farm, Allstate, Farmers, etc.— all of whom have dedicated "agents" who are insurance company employees. Then there are the "independent" agents, not affiliated directly with any specific company and who can sell you insurance from a multitude of different companies. These people are there to help and answer your questions. They are supposed to direct you to "only the insurance that you need." They have a tendency to place your insurance with the smaller companies—Anchor General, Progressive, Mercury, etc.

But, then there are the "direct write" insurance companies—think GEICO—where you purchase online without anyone to give you guidance about how much insurance you need.

With automobiles, always purchase as much insurance as you can possibly afford. Even though it might be expensive, this is not the insurance purchase where you should strive to save money. Cover everybody in your family: everybody who lives in your home who drives vehicles registered in your name, even if they only use the car on "occasion," unless you know for a fact that this person's use of your vehicle is going to be very sporadic.

The pitfall is that this "sporadic user" then gets a job, uses the car daily, has an accident, and the insurance company is notified. Yes, they will have to pay for this claim as the user was "permissive," but your policy will most likely not be renewed at the end of its term, or the premium charges will be significantly increased since the insurer would then be permitted to charge for operation of the vehicle by that particular operator (See Ins. Code sec. 381.1).

It is amazing to me what insurance companies have access to. I once sought an online insurance quotation. After I put in my name, address and driver's license number, the Internet questionnaire asked me if I owned particular cars: my cars—by make, year and license number. It also asked if my wife and licensed children lived in my home. The Internet "knows."

I once had a client who procured insurance for his vehicle. The agent purportedly found that there were other people living with the insured at the address given (his brother, sister and parents—all of whom had driver's licenses). The policy was issued, and each family member was listed on the policy as an "excluded driver." The client claims he had no idea of this. One day, he let his brother drive his vehicle. The brother wrecked it in a single-car accident. The Insurer refused to pay "collision" coverage. Unfortunately, the value of the claim was too small for me to contest the ap-

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plication so I do not know if I could have forced the insurer to pay for the sins of the agent.

As you might guess, YOUR worst day is going to be when something terrible happens and you present a claim to your insurance company, and rather than do what you expect them to do, they assert that your were not truthful on your application so they are rescinding your policy, returning your premiums and requiring you to handle your own loss.

How much insurance should you have? We all see what happens in litigation. A used Chevrolet Tahoe now costs $35,000. Most new cars cost over $40,000, and it is really not that hard to spend more than $75,000 for a new vehicle. Accidents can involve multiple vehicles.

Although California only requires insurance limits of $15,000/person, $30,000/accident and $5,000 for property damage, absolutely no one reading this should purchase an automobile policy with limits less than $100,000 per person, $300,000 per accident and $100,000 for property damage. Realistically, the numbers should be $250,000/person, $500,000/accident and $250,000 for property damage. A $500,000 combined single-limit policy should be seriously considered, and a million-dollar policy should not be dismissed without at least obtaining a quotation.

In addition, do not forget to protect the most important people: you and your family. Uninsured/underinsured motorist coverage should be at the same limits—$250,000 at a minimum, $500,000 as a recommendation. Keep in mind that NO umbrella policy provides UM/UIM coverage. It is potentially available, but it must be specifically requested and paid for. So while that $1,000,000 umbrella policy you bought for peace of mind can get paid to the third-party if you cause an accident, it is not for you or your family if some underinsured, or uninsured, person causes great harm.

Now that I am the father of teenage drivers, I speculate that my children's teenage friends, with cars, hopefully have insurance, but it they do, it is probably less than adequate. Thus, having your children listed on a policy with high limits is a good "security blanket."

Going back to the "honesty" proposition discussed above, unless YOUR child is listed on YOUR policy as an insured, you cannot be sure they would be covered by YOUR uninsured/underinsured coverage. I have seen a denial based on the contention that, even though the child would be an "insured" while driving your vehicle with permission, the fact that they are not a "named insured" on a policy could preclude them from UM/UIM coverage while a passenger in a friend's vehicle.

Lastly, medical payments. As everyone knows, the state of our health-care insurance is ridiculous. It is very common for a family to have "bronze" level Obamacare coverage, at a cost of $2,000/month (or more) with a deductible of $5,000 per person, and as much as a $20,000 for the family. Although you cannot insure against those costs if the medical treatment is necessitated by "illness," you can insure against it if the costs are incurred due to "accident." Medical payments coverage can be used to take care of high deductibles. A $10,000 minimum should be purchased, but connect it to your health insurance deductible.

PROPERTY INSURANCE

The purchase of property insurance is much different from automobile

insurance. First, you have an asset which is specific—for instance, a 2,500 square-foot home. What you are insuring is the cost to rebuild the home and replace its contents, in the event of loss.

Contrary to intuitive belief, the amount of insurance to purchase is NOT equal to the purchase price or market value of the home. There are at least two reasons for this. First, property insurance does NOT cover "land." To the extent the "land" on which the home can be damaged by unstable soils, mudslide, etc., NO policy provides coverage. The coverage you are purchasing is for re-construction costs. All policies have written in "increases" for debris removal, building code upgrades, etc.

Therefore, if you paid $100,000 for your home 30 years ago, and it is now worth $1,000,000, neither number will be particularly relevant in determining how much insurance to purchase.

In purchasing home insurance, most insurance companies recommend, or actually demand, coverage in an amount equal to the insurance company's estimated cost to rebuild the home—per square foot. There usually are three levels

of cost: average tract type home; upgraded tract type home and fully custom home. On average, $200 - $300 per square foot in rebuild costs should be your guide. So, the 2,500 square-foot home should be insured for somewhere between $500,000 - $750,000.

Personal property coverage is automatically stated as a percentage of the structure rebuild costs. It used to be 50%. I think these days it is closer to 75%. Read the proposal and decide. If you seem to have a large amount of personal property, make sure you have enough coverage. Purchase the "full replacement cost" option. It is not that much more.

I have handled many fire losses, both as an attorney and in my prior "life" as an insurance company claim representative. It is literally impossible for a diligent homeowner to document and list what they lose in a devastating fire. All I can suggest is that the "stuff" you have been accumulating over your lifetime is expensive to replace: suits, clothes, shoes, tools, electronics—for most families, hundreds of thousands of dollars.

Once again, at some point look over your policy and adjust as necessary. Did you acquire a new "pit bull" for the family? Possibly no coverage under your policy's liability coverage if you do not tell your insurer. Do you have expensive jewelry? No coverage beyond $2,500, maybe $5,000 in total, unless specific coverage is purchased. Specifically list jewelry items of particularly high value.

BUNDLING

Every seller of insurance pushes that "bundle," offering a discount for insuring your real property and your automobiles with the same company. I am not a "fan" of the concept. Although it does permit some efficiency—making one payment—I do not believe the "discount" you receive is worth the potential problems if there is a significant loss.

Since I see the worst of insurance companies, I just assume that no claim is handled quickly, fairly and completely favorably to the insured. Every insurance company takes at least a "little bite" out of your claim. Maybe its depreciation on your property, maybe it's an under-valuation of your damaged vehicle, maybe pushing you to "their approved body shop" to cut repair costs even though the Fair Claims Regulations prohibit that. They just cause you to say, "Arrggggg! I just want to get this done. So I lose a few hundred or a few thousand dollars, but I'm paid, and I move on."

So, my "bundling" nightmare is that someone experiences a home fire, and their vehicles are in the garage, and everything is gone. Then some "super sleuth" claims person, who thinks they are going to be the next vice president of the insurance company because they know how to find "fraud" to deny a claim even when there was no fraud, says: "This was an "arson" fire, and we are not going to pay you. Get a lawyer."

Now you are faced with no money for your house or your cars because it's the same insurance company. Imagine if you had separate insurance companies but only one had that Mr./Miss/Mrs. "Super Sleuth" employee. One insurer denies your claim, but the other pays you. Not only do you receive some compensation, you have conflicting investigations—the "stuff" good lawsuits are made of.

CONCLUSIONS

If you handle personal injury matters, you are receiving way more money from insurance companies than you are paying to them. No doubt insurance is expensive. However, do not be "penny wise and dollar foolish." The persons you are protecting are you and your family. Hopefully, you never have to use your insurance. But, if you do, it is much better to have too much than too little.

Could a CCTLA mentor help you be a better lawyer?

By: Daniel Glass

Daniel S. Glass, Law Office of Daniel S. Glass, is CCTLA 2nd Vice President

CCTLA remains an organization devoted to helping its members be better plaintiff-oriented trial lawyers. Lawyers who do not just settle cases and move on, but lawyers who do their best for their clients by obtaining fair and just results.

The CCTLA Mentor Program is just one of the many benefits of membership. The following article was first published in the Spring 2019 issue of The Litigator. It is being reprinted here, with some updates, for the benefit of newer CCTLA members or those who might not have seen it two years ago.

Mentor: Definition - an experienced and trusted adviser

Mentor, schmentor, I don't need no stinking mentor;[1] the State Bar says I'm a lawyer, so I got this — or do you?

I began practicing law 30 years ago, 1989 B.C. (before computers). Life was different then. I had little trouble getting a job at a big law firm after law school. Jobs were easy to get, mostly because the pay was unbelievably terrible—$32,000/year for a first-year associate at a major insurance defense firm waiting for bar results, and a whopping raise to $36,000/year when I passed and got sworn in.

But, what I did get—since it was not money, it had to be something else—mentoring or how to be chastised for what I did not learn in law school. I was the 50th lawyer at this particular firm. We had multiple partners who had each tried more than 50 cases before I even got there (there State Bar numbers were in the 36,000 range-yes, lawyers since the 60s). Good or bad, these men and women knew what happened in a courtroom. They knew what law school never told you—and what you could not figure out in law school even if you were a diligent student.

To those beginning the practice of law as a civil litigator, I suggest that 85% of what you need to be a good trial lawyer is not even available at the best law schools.

I wrote my first trial brief for an upcoming trial the senior partner was about to start. He read my brief and said, "Did you look at BAJI to figure out the elements of Plaintiff's claims to put in the brief?" I said, "Uhhhh, no, and, what's BAJI?" (For those not practicing for more than 15 years, BAJI was the acronym for Bar Approved Jury Instructions—the predecessor of CACI, California Civil Jury Instructions).

The point being, this seasoned trial lawyer kept BAJI on his desk. He looked at those books every day for each case because that was what the jury was going to hear at trial—and I never heard of them through four years of evening law school and the bar examination. Law school did not spend any time with California's Code of Civil Procedure, so I had no clue about how to do discovery (law school for me was only the Federal Rules of Civil Procedure) and depositions—you mean I have to actually know how to ask non-compound, generally relevant questions?

I will never forget my first deposition, a construction-defect case. I was one of maybe eight defense lawyers in the room. When it got to be my turn, I knew all about construction, I had studied the file, I had a brilliant question about constructing parapet wall so as to prevent water intrusion, and one of the lawyers in the room said, "Objection, lacks foundation," even before my question was done.

I must have turned red/purple. What? Is the witness going to answer my question? Am I stupid? Should I ask another? The witness answered, and I moved on,

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[1] *Pun, and misquote of "badges, we don't need no stinking badges" from 1948 movie adaptation of "The Treasure of the Sierra Madre."*

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asked my written down questions (basically, the "note from my mommy" aka partner, who told me to ask x, y and z). I survived. I got better with practice, time and age.

So, do you need a mentor? Depends. If you left law school and got a job at a big firm, or you were recruited/hired by a small firm, and at least one of the attorneys in the hiring firm cared about whether you would ever be a good lawyer, and you worked with that lawyer for at least two years—you probably don't need a mentor now—you got it. But, once again, maybe. I took or defended more than 50 depositions my first year of practice. In recent years, I have met relatively new attorneys who have been practicing for more than five years, on their own straight out of law school, and they have not yet taken or defended 50 depositions.

Defense firms are notorious for being large. Some national firms have 1,000 or more lawyers. Insurance companies have staff counsel, again potentially 1,000s of lawyers across the country. The lawyers at those firms have access to each other for guidance, to answer questions, to train the newly hired.

Now look at the plaintiff's bar: Can you name a half dozen plaintiff firms in the Sacramento area with 20 or more attorneys? I don't think there are more than six.

Welcome to CCTLA: YOUR "big firm" for some help and guidance. CCTLA has a formal mission statement, but its true mission is to help make every one of its members better lawyers than they were when they first joined. If you are just starting out as a lawyer, CCTLA and its education programs, listserve and mentor program will help you become better.

If you are not just starting out and were a good lawyer when you joined, CCTLA may be able to help you become great, or, no matter what—better.

I did a survey for this article: CCTLA has about 20 members on its board, plus, all past presidents are members for life—about 45 people. About half responded to my survey. The "big firm" of CCTLA's board and past presidents, based on my actual survey and doubling it to cover the half who did not respond, has 1,000 YEARS of law practice under its belt and more than 800 jury verdicts. Talk about experience! No "big firm" matches us.

Now, I am not naive, and you should not be, either. The mentor program is not going to assign a lawyer with 40 years experience to you to manage your practice and tell you everything about how to get that $1,000,000 verdict on all your cases. He/she is not going to work at your office or give you 10 hours/week, every week, of training for free. To get long-term, individual "mentoring," you have to pay the price: the daily grind of employment at a firm with experienced lawyers who are willing to teach.

But, CCTLA's offer is to those who are interested in a "sounding board" for what ails you. Have you only taken a few depositions in your career and have a big one coming up? We can find an experienced attorney to sit down with you, go over your case and provide guidance. Don't know how to really deal with an expert in YOUR case? Having a difficult time with the other attorney? We will match you to a CCTLA mentor to discuss your situation.

The difference between CCTLA's mentor program and gen-

eral education programs is: The general programs talk about the general process. They provide great "war stories" of how great lawyers dealt with difficult cases or difficult situations, but they don't let you ask about YOUR case or your specific situation.

Many of our members use our listserve for general advice - i.e., defense attorney did "X," and they are demanding I do "Y." Do I have to? Should I? What's my alternative? But because the listserve is semi-public, details are not disclosed. Situations are discussed in the abstract to protect confidentiality.

Conversely, a mentor can be told actual facts, in confidence as an attorney consultant and provide specific suggestions and help.

In all candor, trying a case is not about what you learned in law school. We all go to continuing legal education because we want to learn more and because the State Bar requires we attend. Each time, we listen intently for that one tidbit of information that's going to make us better at trial. How to do jury selection, Opening, Direct Examination, Cross Examination, Experts, Closing Argument, and what about the medical bills at trial and dealing with the liens during the case and after trial?

Beginning in 2019, the State Bar promulgated revised and new Rules of Professional Conduct. Although it has always been known that an attorney must be competent and able to handle the matters they take on, Rule 1.1 of the Rules of Professional Conduct, which stems from, and is slightly revised from, prior Rule 3-110 [added words are underlined], states:

(a) A lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence.

(b) For purposes of this rule, "competence" in any legal service shall mean to apply the (I) learning and skill, and (ii) mental, emotional, and physical ability reasonably* necessary for the performance of such service.

(c) If a lawyer does not have sufficient learning and skill when the legal services are undertaken, the lawyer nonetheless may provide competent representation by (I) associating with or, where appropriate, professionally consulting another lawyer whom the lawyer reasonably believes to be competent, (ii) acquiring sufficient learning and skill before performance is required, or (iii) referring the matter to another lawyer whom the lawyer reasonably believes* to be competent.

(d) In an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required if referral to, or association or consultation with, another lawyer would be impractical. Assistance in an emergency must be limited to that reasonably necessary in the circumstances.

So what's in it for me? One thing I have unfortunately experienced for any case where I ultimately did not prevail is this: At some point, be it a non-bind judicial arbitration, mediation or settlement conference, some lawyer told me I was not going to do well here. My response: "How dare you tell me that? I have been working on this case for more than a year, and you've known about it for two hours. You can't be right."

Lesson to be learned: Sometimes an unbiased, fresh and new opinion is really important to help the lawyer over their bias, and that person whose only known about the case for two

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hours just could be right.

A mentor can be that person before it's too late to save your case; someone to whom you can tell your story, someone who you can provide with evidence and ask for direction. Discuss a real Discovery plan. Discovery can be reviewed. Depositions needed? Depositions which may not be necessary. A mentor can be that person who says, "Really, why are you going to do that?" OR, "Really, your case is great; you should do this or that to help show its true value."

Maybe, as a lawyer you already know what you think you need to know—but having a mentor does not cost you anything for a second opinion. Or even that "first opinion," if you want it. It's common knowledge that insurance companies review cases in a "round table" environment where lawyers and probably claims people sit around and discuss/evaluate cases, so why shouldn't you?

Being assigned to an experienced lawyer for guidance can be invaluable. Having a person to talk to, especially if you are a sole practitioner like me, is beyond invaluable. CCTLA is available to help those members who want it and to encourage those who think they might want help, but are reluctant, to step up and ask. You may be a good lawyer on your own, but I guarantee, no matter how good you might be on your own, you can be better with the assistance of CCTLA.

CCTLA wants it members to be the ones who get the successful verdicts and not be those who are defensed. I once heard a lawyer say, "I'm going to try the case because it's small, and I need the trial experience." Wrong. You should never try a case because YOU need it. Your "experience" will probably not be good. And, if you do that too many times, even though you now have "trial experience," the insurance companies will know of your history. Rather than taking you as more serious, they may believe there is a better chance you will lose, so they offer less. Try cases that need to be tried for the client, because the client wants to go to trial, and because the case cannot resolve for a fair amount.

I was once told that a well known Sacramento lawyer, the late Mort Friedman, had maintained (although I did not hear him say this - classic hearsay), something to the effect of "Any lawyer can get a $1,000,000 verdict . . . . on a case that's worth $10,000,000." CCTLA does not want you to be that lawyer, either.

The new Rule of Competence broadens what you have to do when accepting a case. If you have a big case, you better be able to finance it, or associate in someone who can. Or, now the rule specifically suggests referring it to someone you believe is competent to handle it. If the subject matter is well outside your area of personal injury practice (think ERISA, Workers Compensation, bankruptcy, complex product liability, medical malpractice), a mentor might save you from the proverbial "I'll just stick with it for a while and see how it goes" because by the time you realize its not going well, it might be too late.

CCTLA's Mentoring Team Awaits

CCTLA's Mentoring Committee consists of Daniel S. Glass, Christopher Whelan, Glenn Guenard, Robert Piering, Alla Vorobets and Linda Dankman. Plus, we have commitments from other members who have agreed to donate time to help those who seek it.

If you'd like help, ask. It's confidential. It's available to members only. If you have friends or associates who need help but are not members, suggest they join CCTLA and then they can ask.

In addition to mentoring, if you just want to discuss your case with others or you have a specific question or problem, CCLTA has informal Question-and-Answer sessions the second Tuesday of each month, currently as Zoom-hosted luncheons.

Pre-pandemic, CCTLA also hosted Problem-Solving Clinics monthly, on Thursday evenings, featuring a speaker on various topics, as well as specially set seminars. CCTLA hopes to get these programs back at some point in 2021.

To particpate in the Mentor Program, email dsglawyer@gmail.com. Indicate the guidance or mentoring you are seeking, and Glass will arrange for a CCTLA member with experience related to your situation to contact you.

There are no requirements on the mentee. If you want to meet once a month, or just once, it's up to you. By the way, this does not have to be solely related to how to prepare your cases. It could be for general information about setting up your practice, insurance for your practice, Client Trust Accounts, or anything you think will help you become a better lawyer. Because in the end, if our members are better lawyers on an individual basis, CCTLA will be a better, and even more respected, part of lawyering in the greater Sacramento area.

CAOC honors Dolan with Marvin E. Lewis award

As last year neared its end, longtime CCTLA member Christopher Dolan was recognized by the Consumer Attorneys of California (CAOC) as the winner of CAOC's Marvin E. Lewis Award. The award is given "in recognition of continued guidance, loyalty and dedication, all of which have been an inspiration to fellow attorneys."

Dolan, founder and chief legal counsel for the Dolan Law Firm, was CAOC's president in 2010 and has frequently been at the State Capitol to testify regarding legislation on behalf of the association.

For CCTLA, he has presented several programs, including "Expediated Trials" in 2014 and "Gravitational Injuries: Handling Slip and Fall Cases" in 2010.

Confidential Settlement

Robert Buccola, Ryan Dostart and Marshall Way, of Dreyer Babich Buccola Wood Campora, represented the husband and siblings of two family members who died when tons of snow and ice fell from a roof, burying and killing them, as they got to the front door of their resort condominium after an afternoon of nearby skiing. Ultimately, a confidential settlement was reached.

Late in the afternoon of March 4, 2018, Olga Perkovic, 50, and her son, Aaron, 7, were skiing back to their condominium at Edelweiss after spending the afternoon at Kirkwood Meadows resort in Alpine County. In returning to their home, they decided against a route through the parking lot that was along a raised pedestrian walkway (which was away from any rooflines) and, instead, chose an alternate, frequently used ski-in route back to their unit. It provided easy recreational access to the adjacent open meadows and was also used as a return route from the nearby ski lifts.

As the two skied towards the front door of their condominium unit, a massive snow and ice sheet was shedded from one of the adjacent metal roofs, burying them under what was later determined to be almost two tons of snow and ice. Both suffocated before rescue crews found them, approximately four hours later.

Buccola, Dostart and Way represented the surviving husband/father, David Goodstein, and his two minor daughters. Initially, media reported that his event occurred due to the Perkovic's carelessness in ignoring several entirely safe routes back to their condo and instead using a route directly adjacent to a roof, puttng herself and her son in harm's way. After an extensive investigation, suit was filed in Placer County against multiple defendants, including the homeowner's association board, the prior and current property management companies, the original roofing contractor who installed the metal roof approximately 29 years prior to the incident, and others.

Defendants contended that the roofing contractor was named only to keep the case in Placer County, versus litigating it in the always-so-generous, Alpine County. Defendants' motion to change venue to Alpine County was successfully opposed by Plaintiffs in January of 2019. [1]

Every aspect of liability and damages was hotly contested in this case. Defendant homeowner's board and property management companies argued that roof snow slides occur dozens of times per season at the subject premises and that users of the property were warned to stay away from the rooflines by signs conspicuously posted around the property, as well as in annual homeowners' newsletters that had been sent out for decades prior to this accident. Defendants also contended that Perkovic (who held a Ph.D. in physics) was personally aware of the dangers of snow shed events, especially after heavy snowfalls, and was aware of the "trajectory" of sliding snow from the roof. Defendants argued that, in spite of this knowledge, she nonetheless returned to the condo using an unsafe route that passed beneath a roofline that was visibly covered with almost four feet of snow.

Plaintiffs admitted that roof slides were a common occurrence at the property and that Perkovic (and the entire Goodstein family) were generally aware of the associated danger, but they disputed Defendants' contentions that the roof slides posed an open, obvious and well-known hazard. Plaintiffs also contended that when Perkovic and her son where struck and killed by the shedding snow, they were in an area that would have objectively appeared to be safe and out of the range of snow shedding off the roof.

During the course of Discovery, after an extensive forensic workup, Plaintiffs proved that Perkovic did what a reasonable person would have done, as she was unaware of the extreme lateral trajectory that is possible for snow shedding off a pitched metal roof. In fact, Perkovic and her son were acting carefully at the time of the accident but were the victims of an aggressive release of snow that few people could have ever anticipated.

For at least two decades prior to this accident, the installation of metal roofs throughout the Sierra/Alpine region were commonplace. These roofs are still used today because of their ability to shed snow and minimize extreme roof loads during periods of heavy snowfall. Although anyone with common sense would appreciate that any snow-loaded roof will shed, there are many characteristics of these particular types of roofs that can result in rare but extremely dangerous and aggressive shedding. This phenomenon is seldom, if ever, understood by persons outside of the fields of architecture and material science. [2]

In the case of the Edelweiss Condominiums, which have slightly pitched metal roofs, oftentimes three to five feet of snow can accumulate on them before releasing. Normally, with typical coefficients of friction (between snow and the metal surface), the snow will shed and land directly below, or very near to, the roofline, making it obvious that people should not be in those areas.

However, Plaintiffs were able to prove that Perkovic and her son were significantly farther away from the roofline—not in an apparent zone of danger, when they were buried and killed by the shedding ice and snow. Although the precise location of Perkovic and her son at the time of the accident was hotly disputed, there is no question that Perkovic reasonably believed that she and her son were in an area that was sufficiently far enough from the roof edge and safe from any roof snow release.

Plaintiffs' investigation revealed that the vast majority of time, the roofs at the condominiums shed in relatively close proximity to the rooflines, even when heavily loaded with snow and ice. However, what was not known by Perkovic, (or even by the year-round residents of the condominiums) was that, under certain circumstances, the characteristics of these roofs resulted in very danger-

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ous roof sheds so that shedding snow traveled significant distances from the roofline.

Plaintiffs proved that thin layers of ice can form and remain on the top of the metal roofs for weeks at a time, and under "perfect storm" conditions, very heavy layers of snow can form over the ice. Under these conditions, when the weight of the snow gets heavy enough, the bottom ice layer begins to slide and the entire mass will gain momentum and "shoot" off the roof like a locomotive.

The speed and trajectory of this fast moving shed can result in the snow landing as far as 25 feet away, laterally, from the edge of the roofline, creating a huge zone of danger that few people could ever expect or appreciate. It was this very unusual occurrence that caught Perkovic and her son on the day of the accident.

In prosecuting this case, Plaintiffs' counsel completed a complex forensic work-up with liability experts retained over multiple specialties, including: mechanical/structural engineering, snow retention systems, meteorology, snow dynamic movements/avalanche engineering, general construction, biomechanics, photogrammetry, and property/homeowner association management experts. Of note, Plaintiffs retained highly specialized snow and avalanche forensic experts in Canada and were able to create demonstrative models and animations of the rare, but extremely dangerous, snow shed phenomenon that caused the accident.

Additionally, Plaintiffs had to contend with ongoing questions of insurance coverage regarding the Defendants' multiple policies and issues relating to contractual indemnity claims among the Defendants. Numerous law and motion battles ensued, hundreds of hours of field investigation, thousands of pages of written discovery and document production, and nearly two dozen videotaped depositions occurred during the course of two-and-a-half years of litigation. Using public records and archived homeowners association documents, Plaintiffs had to track down and depose numerous critical liability witnesses, many of whom were elderly and had not been in contact with the condominium association for years, or even decades. Almost none of the deposition witnesses resided in the same geographic area, and Plaintiffs were required to notice and take these depositions throughout California and the rest of the country.

On the issue of damages, Defendants could not contest the close, devoted and loving nature that the Goodstein family shared with one another. Economically, Perkovic had been employed as a highly successful corporate executive two years prior to this incident but had recently taken a large salary cut at a new company. Given the decedent's stellar resume and historically large earnings, Plaintiffs' counsel argued that decedent's earnings potential alone could render Defendants' combined liability insurance limits of $27,000,000 inadequate when combined with the unthinkable losses suffered by these spectacular and devoted family members.

The case resolved just short of trial for a confidential amount. Despite the seemingly significant amount of available insurance, Plaintiffs continue to believe that a Placer County jury would have rendered an award well in excess of this sum. For several months prior to case resolution, Plaintiffs made clear that, even with a monetary settlment, the case would not resolve without the homeowner's board committing to remediate the snow shed danger, including the use of detailed warnings and barricades to keep people out of the area where this tragedy occurred.

At the conclusion of the case in late December 2020, Dreyer Babich Buccola Wood Campora (at its own expense) also provided the board with forensic engineering "fixes" so the board can implement long-term protective measures and more permanently mitigate the dangers associated with these rare, but extremely dangerous, snow shedding events. With the civil case fully resolved, and consistent with the directive of our clients, Dreyer Babich Buccola Wood Campora looks forward to working with the board to best address this danger and minimize the chance that a similar incident will ever occur again. To their credit, the board and its counsel, are well intentioned and fully cooperative. According to Attorney Ryan Dostart, "The end game here was not only to obtain full compensation for the Goodsteins, but with our clients' blessing, make certain that this unspeakable tragedy could never happen again."

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[1] Attorney Marshall Way remarked that he never thought the day would come where an injury victim or wrongful death plaintiff would ever fight so hard to keep any case in Placer County.

[2] Since the condominium complex was developed in the late 1970s, the homeowner's association at Edelweiss has been comprised of non-paid volunteer condominium unit owners. People who clearly wanted to do the right thing but who were also largely "unaware" of the scope of the dangers posed by snow shedding from the roofs. During the course of Discovery, Plaintiffs deposed nearly 20 past and current owners and board members and obtained archived records dating back nearly 40 years. Through these efforts, it became clear that the danger of roof snow slides had been consistently (albeit intermittently) reported to board members over the decades prior to the accident. In essence, the board held the good-faith belief that the problem could be adequately addressed with warnings alone and had determined (erroneously) that there were no practicable fixes that could be implemented, short of a full reconstruction of the buildings. This erroneous belief was passed down from board to board over a 30-plus-year history. Even though each board seemed to be unaware of the historical record and magnitude of the snow shed danger, Plaintiffs alleged that this ongoing failure to address the serious safety risk collectively amounted to gross negligence.

$6-Million Wrongful Death Settlement

Maldonado v. Ben Toilet Rentals, Inc. et al.

Roger Dreyer and Noemi Nunez Esparza, of Dreyer Babich Buccola Wood Campora, obtained a $6-millon settlement for a Mexican national as a result of the death from a vehicle collision of her 42-year-old husband and the father of her unborn child at the time of the collision. The case was venued in Yuba County where the collision occurred. The decedent was born in Spain but had been living in Mexico while working at an international firm that provides auditing, consulting and financial advice. At the time of the collision, he lived with his wife, a Mexican national, also employed by the same firm, in Mexico City. They were married in December 2017. At the time of the collision, Plaintiff was approximately six months pregnant.

The collision occurred in September 2018 on a two-lane road; one lane for each direction. The decedent was riding his motorcycle for pleasure during a business trip to the US. As he was coming up over a rise at an unknown speed, Defendant, traveling in the opposite direction in a Ford F-550 while in course and scope of his employment, turned left into Decedent's path. The decedent struck the back half of the defendant's truck, suffering a brain injury. Given no hope by doctors, Plaintiff took him off life support four days later. Defendant denied liability. The complaint was filed on June 17, 2020.

Soon after Defendant's deposition, Plaintiffs served Defendant with a 998 for the policy limit of $6 million, which Defendant objected to as being premature, but ultimately tendered.

$2.2-Million Confidential Settlement

"Doe" family (wife and three children) vs. Healthcare Provider

William C. Callaham, Wilcoxen Callaham, obtained a $2.2-million confidential settlement for the family after the husband and father died of a heart attack after being told he had heartburn and told to use over-the-counter heartburn medicine.

The 43-year-old husband and father of three sought help from his healthcare provider when suffering chest pain. After being told he had heartburn and to use over-the-counter heartburn medicine, he made numerous complaints to healthcare provider. Each time, he was told he had heartburn.

Two weeks before he died, decedent called healthcare provider and said, "I think I am having a heart attack." Healthcare provider says "No, you have heartburn."

Confidential Settlements

CCTLA Board Member **Chris Whelan**, Law Office of Whelan and CCTLA Board Member, recently has obtained two confidential settlements: **$19,000,000-plus: Roe v. Corp**. - Constructive termination, sexual assault and **$2,700,000-plus: Roe v. University** - Pregnancy discrimination and defamation.

$1,550,000 Settlement

E.S. (Ted) Deacon, of Wilcoxen Callaham LLP, represented Jane Doe who brought suit against Substance Abuse Rehab Facility after she was sent to the facility against her wishes and assigned a shadow person to ensure she did not harm herself. The facility attempted to claim the shadow person's employer was an independent contract, and/or the employer of the shadow person attempted to contend that her employee was an independent contractor. Plaintiff escaped from her shadow person, went to the second floor of the facility, went out a window onto the roof and jumped off a 27-foot high second story, sustaining severe orthopedic injuries. Based on Plaintiff's psychiatric condition, there was no allegation of mental capacity injury. The case was settled by both the shadow person's employer and the facility. An ERISA lien of $1,200,000 was resolved for $450,000. The cost of the facility for a 90-day stay was $126,000, and the cost for the shadow person was $1,320 per day.

$1.25-million Pre-Litigation Settlement

Accident Injury: Auto vs. Pedestrian

CCTLA members **John Demas and Tim Spangler**, of Demas Law Group, obtained $1,250,000 settlement (policy limits - State Farm) for their 43-year-old client who was hit by a car while standing in the roadway in San Carlos, taking utility pole measurements.

Plaintiff, a single dad and fitness enthusiast, was taking measurements as part of his training for a new career in telecommunications. At the time of the collision, he was an unpaid apprentice working with his brother-in-law. The goal was eventual self-employment, but in the meantime, he had left his job as a sales representative (and with it, his health insurance), ended his lease and moved in with his sister and brother-in-law to save costs. He planned to live off of his savings until his apprenticeship was complete.

As Plaintiff took his measurements in the early morning hours, a motorist sped toward him, unable to see clearly due to a fogged windshield. The motorist never saw Plaintiff near the edge of the roadway and plowed into him, launching him 10 feet into the air and back down to the pavement, 15 feet from the point of impact.

When paramedics arrived, Plaintiff's Glasgow Coma Score was 8. He was taken to Stanford University Hospital and diagnosed with a skull fracture and closed-head injury, fractured jaw, broken teeth, cervical ligament tear, multiple rib fractures, fractured thoracic vertebrae, left fibula fracture and shoulder and knee pain. His pain was so severe that typical IV pain medication was ineffective, and he required an ESP (erector spinae plane) block. He was admitted for 8 days. The police officer who investi-

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gated the crash found that Plaintiff was the cause of the collision because he was standing in a crosswalk against a red ligh as he took the measurements.

Upon returning to Sacramento, Plaintiff was seen initially by Dr. John Champlin, who referred him to Dr. Amir Jamali (orthopedics) for his knee and shoulder, Dr. Philip Orisek (spine surgery) for his cervical spine and Dr. Topher Stephenson (PM&R) for his closed-head injury. Plaintiff was also treated by Marconi Dental Group (dentistry) for multiple damaged teeth. Unfortunately, Plaintiff was found to require three surgeries, including a two-level cervical disc replacement, ACL repair, and arthroscopic shoulder surgery. He also needed extensive dental surgery (with multiple tooth implants) and neuropsychiatric treatment for ongoing mild cognitive deficits. Plaintiff's lack of health insurance was concerning, given the cost of financing all of the necessary treatment. There was no Workers' Compensation coverage available. Though Plaintiff had received surgical recommendations, he had not undergone any procedures. As an unpaid apprentice, his wage-loss claim was difficult. As a result, it seemed that a pre-litigation policy limits settlement would be unlikely.

Demas and Spangler retained Carol Hyland to provide the future surgery costs. A past and future wage-loss claim was developed based on Plaintiff's solid past employment history and his projected advancement in the telecommunications field. A comprehensive policy limits settlement demand package was prepared that exhaustively detailed Jeff's pre-incident life and outstanding physical condition juxtaposed with his post-collision condition, medical experts' evaluation of his current and future needs, and a detailed future cost analysis and life care plan.

State Farm paid the full $250,000 underlying policy and the $1,000,000 umbrella. Plaintiff was able to use some of the proceeds of the settlement to purchase health insurance to cover his necessary surgical procedures.

$949,033 / $1,000,000 Arbitration Award / Settlement

Auto Collision UIM — *Johnson vs. USAA*

Natalie Dreyer and Anthony J. Garilli, of Dreyer Babich Buccola Wood Campora, represented a client who, on Jan. 28, 2017, was rear-ended by a third party while stopped for an emergency vehicle entering the roadway with lights illuminated and siren sounding. Claimant reached a settlement for the third party's policy limits of $50,000 and then pursued a claim through her Underinsured Motorist Coverage with USAA. Her policy limits were $1,000,000, leaving $950,000 after the credit for the third-party policy limits.

Claimant had suffered a burst fracture in her lumbar spine in 2004, resulting in a multi-level fusion. Claimant fully recovered, and by 2006, no longer had low back pain. She traveled the world extensively each year thereafter, exercised, and performed all activities of daily living without pain or restriction. After the collision, however, she injured her low back, and she returned to her surgeon for a consultation when multiple conservative therapies failed to relieve her pain. Her surgeon determined her hardware looked good and surgery was not recommended. He referred her for pain management and at the time of the arbitration hearing, claimant had undergone seven injection procedures that included epidural steroid injections (ESIs), medial branch blocks, and radio frequency ablation.

Claimant was a Medicare recipient with past paid medical expense of $9,017.53 (Howell). Claimant's recommended future medical care costs, established by her treating pain management doctor, were $515,016. Claimant was still able to travel abroad and made several overseas trips after the collision, but could only do so by planning an ESI within 30 days of her departure. While on her travels, her activity level was diminished as compared to prior trips before the collision.

Claimant made a demand for the remainder of her policy limits before initiating litigation in the first-party case. The offer was ignored by USAA. Once in litigation, claimant repeated her demand by way of a CCP §998 Offer of Compromise in the amount of $949,999. USAA asked for more time to evaluate the demand, and Claimant gave USAA an extension and opportunity to take her deposition and subpoena her medical records. USAA failed to respond to the new deadline. Claimant additionally underwent a Defense Medical Examination.

At 2 p.m. on the afternoon before the arbitration, USAA made its first offer in the case, in the amount of $150,000, which was rejected by claimant. The parties proceeded to arbitration, and the arbitrator was not made aware of the policy limits. USAA argued in closing that claimant should be awarded $50,000— $100,000 less than it had offered the previous day. Claimant was awarded $949,033, subject to any applicable third-party set-off, resulting in a net award of $899,033.

Following the arbitrator's award, claimant's counsel wrote USAA a letter setting forth its bad-faith conduct toward its insured and demanded USAA tender the full $1,000,000 policy limits with no off-set or credit for the third-party settlement. Claimant's counsel gave USAA eight days to deliver the $1,000,000 check and asserted a bad-faith lawsuit would follow should it only deliver the net sum of $899,033. Four days later, USAA tendered the full $1,000,000 policy limits to claimant.

Binding Arbitration Award

Roger A. Dreyer, Esq. and Jonathan R. Hayes, Esq., represented Claimant, who, prior to two rear-end collisions with uninsured motorists, was an active individual in his sixties who ran his own sales company. He first was rear-ended on the freeway in 2015, resulting in cervical symptoms and headaches, and he was treated conservatively for two years. The symptoms were never

resolved, with medical records and therapy notes suggesting that Claimant was still experiencing significant neck pain and headaches when he was rear-ended in a second collision, in 2017.

After the second collision, conservative care efforts failed to provide any relief, including intermittent bilateral cervical facet injections. While the facet injections provided good relief, the evidence supported the argument that Claimant would require a cervical fusion in the future.

CSAA was the respondent on both collisions. With medical expenses of approximately $10,000 between the 2015 and 2017 collisions, Claimant accepted a statutory offer to settle the 2015 claim for $350,000 on the eve of arbitration. With medical expenses of $90,000 following the 2017 collision, Claimant rejected a $150,000 statutory offer to settle on the second claim.

At arbitration, CSAA called an accident reconstructionist/biomechanist, radiologist and neurosurgeon to opine that the injuries were muscular in nature and solely attributable to the first collision. The argument largely was based on the lack of objective medical findings and the property damage, which was significant in the 2015 collision but minimal in the 2017 collision. Despite Respondent's expert testimony and arguments, Claimant received a $572,963.18 arbitration award as to the 2017 collision, beating the $450,000 statutory offer to settle that claim. This resulted in a total case outcome of $922,963.18, plus expert witness fees and litigation costs. Mary K. Talmachoff, Esq. litigated for Respondent.

$350,000 Arbitration Award

MVC / MTBI: *Walker vs Safeco*

Claimant, represented by **Noemi Nunez Esparza**, of Dreyer Babich Buccola Wood Campora, obtained an award of $350,000 for injuries she sustained in a motor vehicle collision on January 28, 2017 in Davis, CA.

Claimant was 88 years old at the time of the collision, which occurred when she was on her way home from exercising at the gym, properly restrained, driving her 2006 Toyota Prius. She stopped at a stop sign at the intersection of Pole Line Road and Picasso Avenue, looked both ways and began to turn left onto Pole Line Road. That is when her vehicle was struck by a 2011 Nissan Maxima with no headlights on, causing her vehicle to spin, her airbag to deploy, and pushing Claimant onto the sidewalk, causing her vehicle to strike the sign she had just been stopped at. Claimant made a UIM claim after exhausting the third-party limit of $50,000.

As a result of the underlying collision, Claimant suffered a concussion and cognitive deficits, including short-term memory loss and difficulty concentrating. She also experienced nausea, dizziness, neck pain, shoulder pain, a dislocation and fracture of her right thumb, several fractured ribs, bruising on the left side of her body, hip pain, back pain, and a laceration on her left lower leg.

While she made a remarkable recovery, her dizziness and neck pain persisted. Her medical specials totaled approximately $35,000. Claimant alleged the cognitive deficits were due to a mild traumatic brain injury (MTBI) she sustained in the collision.

Claimant had a history of headaches and neck pain that long predated the collision for which she had been undergoing pain management for many years. In addition, she had undergone a brain MRI only one month before the collision after going to an urgent care for "balance issues." The MRI demonstrated white matter changes.

Respondent hired a neuropsychologist who administered neuropsychological testing of Claimant and concluded that while she had suffered a concussion, any ongoing cognitive issues claimed were a result of age and pre-existing brain issues as evidenced by the white matter changes in the MRI. Respondent further argued that Claimant's injuries lasted only months and were mild in nature.

The parties participated in two failed mediations. Respondent hired a neurosurgeon who testified at arbitration that Claimant's ongoing dizziness could be caused by various brain related issues that pre-dated the collision. Much emphasis was made of the prior brain MRI.

At the Arbitration, for the first time, Respondent brought up an almost 20-year-old felony conviction for elder abuse and embezzlement to discredit Claimant. In closing, Respondent argued the Claimant should be awarded for the acute care only—approximately $12,000—and something nominal for non-economic damages.

Claimant's counsel put on her treating physicians, daughter, and neighbor, all of whom testified that Claimant's life changed after the collision and that the dizziness was not present prior to the subject collision. Claimant also put on a neuropsychologist to rebut Respondent's claims, who testified that the prior MRI showing white matter changes was consistent with age and did not prove Claimant suffered cognitive deficits before the collision especially in light of the total absence of cognitive complaints prior to the collision. Arbitration award: $350,000.

Lien Resolution

Daniel E. Wilcoxen, of Wilcoxen Callaham LLP, resolved a UCD claimed lien for care and treatment, which was initially $4.7 million. It then was reduced to $2.7 million and thereafter, reduced to $1.1 million. Wilcoxen was hired by the plaintiff's attorney to attempt to reduce the lien after UCD refused to reduce it below $1.1 million. The lien was resolved after a lawsuit was filed by Wilcoxen Callaham against UCD, the collection agency and their attorneys. The lien was resolved for $44,000. Fees were charged on a portion of the savings. The underlying case was resolved for $3 million.

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$25-million infusion offers relief from justice delayed

CAOC.org—Consumer Attorneys of California (CAOC) applauded the Judicial Council for allocating $25 million to alleviate court delays due to COVID-19, the second half of a $50-million funding stream set aside in Governor Newsom's 2020 budget. Nancy Drabble, CAOC's CEO and chief lobbyist, released the following statement Jan. 22:

"The Judicial Council's allocation of $25 million is an important step towards loosening the logjam for Californians seeking justice, who have been forced to wait in a never-ending line for their day in court. This significant funding is a relief, but we are not out of the woods yet.

"As the legislature tackles enormous challenges this year, it must also address the crippling delays in our justice system. Access to justice is critical to those fighting to protect their civil rights, like aging adults who have suffered abuse or fraud, employees experiencing discrimination at work, and victims of medical malpractice. In each case, time is always of the essence. CAOC will continue to push for more funding through the 2021 budget process to make sure every civil litigant has an opportunity to see justice served as quickly as possible."

Newsom budget offers hope for beleaguered trial courts

CAOC.org—Consumer Attorneys of California leaders have voiced optimism over court funding proposals outlined in the preliminary 2021-22 state budget released Jan. 8 by Gov. Gavin Newsom.

"The past year has been devastating for California's trial courts as the COVID-19 pandemic has slowed or shut down operations for months at a time," said Nancy Drabble, CAOC CEO and chief lobbyist. "We're pleased that the governor has recognized this problem and provided additional money for the trial courts to deal with the myriad issues created by the health crisis."

Drabble noted that 2020 saw California court trials and hearings delayed severely, with civil procedures particularly hard hit. State court leaders have focused on reducing the backlog of criminal cases, and the queue for civil cases continues to grow ever longer, putting off resolution of disputes the impact a broad swath of California citizens, organizations and businesses.

"It is helpful that the governor has proposed special funds to reduce the criminal backlog, but at the same time it is critically important that civil litigants be given an opportunity for their day in court," said CAOC President Deborah Chang. "Our civil justice system settles disputes large and small to ensure order in our society. Those affected range from big businesses trying to resolve intellectual property disputes to private citizens struggling to recover from a loss. We are talking about elderly people who have been abused, terminally ill citizens in need of quick case resolution, the impoverished struggling to make ends meet economically while a case languishes. Fully functioning courts are imperative to ensure justice for all."

Coronavirus crisis legal resources page available

SACRAMENTO—The worldwide public health crisis unleashed by COVID-19 has turned everyone's lives upside down. The impact on the courts and the ability of lawyers to represent clients seeking justice has been undercut like never in our lifetimes. CAOC, to assist its members and the general public, has created a special webpage featuring resources to help navigate these daunting times. To access the webpage and its links to a variety of useful documents and tools:

https://www.caoc.org/index.cfm?pg=Coronavirus

Among the offerings available:

- Latest COVID-19 Court News
- Court Status: All 58 CA Counties
- COVID-19 Webinars
- SBA Disaster Loains
- Crisis Business Services
- Judicial Council COVID-19 Updates
- CA Bar Association COVID-19 News
- Federal Courts Updates
- Additional Resources

Share your experiences, victories, lessons learned

CCTLA is seeking legal-themed articles for publication in its quarterly publication, *The Litigator,* which presents articles on substantive law issues across all practice areas. No area of law is excluded. Practice tips, law-practice management, trial practice including opening and closing arguments, ethics, as well as continuing legal education topics, are among the areas welcomed. Verdict and settlement information also welcome.

The Litigator is published every three months, beginning in February each year. Due to space constraints, articles should be no more than 2,500 words, unless prior arrangements have been made with the CCTLA office.

The author's name must be included in the format the author wishes it published on the article. Authors also are welcome to submit their photo and/or art to go with the article (a high-resolution jpg or pdf files; website art is too small).

Please include information about the author (legal affiliation and contact and other basic pertinent information) at the bottom of the article.

For more information and deadlines, contact CCTLA Executive Director Debbie Keller at debbie@cctla.com.

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Taking the Biochemical Expert Out of the Game

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CCTLA COMPREHENSIVE MENTORING PROGRAM — The CCTLA Board has developed a program to assist new attorneys with their cases. For more information or if you have a question with regard to one of your cases, contact: Dan Glass at dsglawyer@gmail.com, Rob Piering at rob@pieringlawfirm.com, Glenn Guenard at gguenard@gblegal.com, Chris Whelan at Chris@WhelanLawOffices.com, Alla Vorobets at allavorobets00@gmail.com or Linda Dankman at dankmanlaw@yahoo.com

FEBRUARY
Friday, Feb. 26
CCTLA Zoom Luncheon
Noon-1:30pm
Topic: *"The State of the Sacramento Court and Judiciary During the Pandemic: 2021 and Beyond"*
Speakers: Presiding Judge Russell Hom and Assistant Presiding Judge Michael Bowman
Zoom link will be emailed to all members prior to Feb. 26.

MARCH
Tuesday, Mar. 9
CCTLA Q&A Problem-Solving Zoom Lunch
Noon — Members Only
Zoom link will be emailed to all members prior to Mar. 9

CCTLA Calendar of Events