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Inside

As 2022 Wanes, Much Success, But Still, Challenges Lie Ahead

David Rosenthal
CCTLA President

I feel extremely lucky for the timing of my year as president of CCTLA. During the two years leading up to my term, everyone was hunkered down, wearing masks and avoiding each other like the plague (or the COVID). These were the circumstances under which my predecessors, Joe Weinberger and Travis Black, served their terms.

This year has seen our members re-emerge, starting with the Sonoma Seminar in the spring and, most recently, at CCTLA's Fall Fling. Now I'm looking forward to seeing everyone at the grand finale, which will be the Holiday Reception at the Sutter Club on December 8.

Speaking of the Fall Fling, it turned out to be an incredible event. Chris Wood's home was a perfect venue, and he and his wife were more than gracious hosts. There were well over 100 in attendance, and CCTLA ended up raising more than $100,000 for Sacramento Food Bank & Family Services.

The food, drink and great weather were enjoyed by our many sponsors, vendors and judges as they mingled with our members. It was great to see Margaret Doyle, who started the charity event and was the organizer for close to 20 years. We were also pleasantly surprised to see Allan Owen, who hosted the event at his historic midtown home for many years, before retiring to Hawaii. The live auction of three of the high-end donations—a one-week stay in a Hawaii condo, an overnight stay at a luxury resort in Napa Valley, and sailing with Jack Vetter— added some extra excitement. I look forward to seeing this event continue to prosper in the future.

The Holiday Reception, formally titled the "2022 CCTLA Annual Meeting & Holiday Reception & Installation," will set us on pace for 2023 under the direction of the new CCTLA officers and board. It has always been my favorite event; one where we all share the holiday spirit (*and some spirits*) with our colleagues. Of course, we will also present the Advocate of the Year and Judge of the Year awards and recognize the incoming board members for 2023. As noted, it will be held on December 8, at an exciting new venue, The Sutter Club, at 1220 9th Street in Sacramento. Included in the price of admission (free) is a live performance

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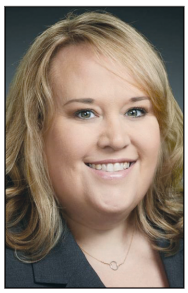
NOTABLE CITES



By: Marti Taylor
and Daniel Glass

In CASE you missed it . . .

NUNEZ v. CITY OF REDONDO BEACH
2022 2DCA/3 California Court of Appeal,
No. B308741 (July 27, 2022)

THREE-QUARTERS-INCH SIDEWALK DEFECT
IS TRIVIAL DESPITE CITY POLICY OF REPAIRING
HALF-INCH SIDEWALK DEFECTS

FACTS: On February 25, 2017, Appellant Monica Nunez went for a group fun run in Redondo Beach. After the run, she was walking back to her car when she tripped on a raised sidewalk slab which caused her to fall forward and hit the ground. As a result of the fall, she injured her left knee and right arm with fractures to her kneecap and elbow. In February of 2018, Nunez filed suit against the City of Redondo Beach, alleging causes of action for dangerous condition of public property under Government Code section 835 and failure to perform mandatory duty under section 815.6.

The City of Redondo Beach moved for summary judgement on the ground that the raised sidewalk slab was a trivial defect as a matter of law. The trial court granted the motion finding that the city had established that the sidewalk offset was trivial as a matter of law.

ISSUE: Does a city policy of repairing sidewalk tripping hazards greater than half-inch mean that offsets that are three-quarters of an inch pose a substantial risk of injury and thus are not trivial defects?

RULING: The trial court did not err in finding that the sidewalk offset was trivial as a matter of law and there were no aggravating factors that would create a triable issue as to whether the offset created a substantial risk of injury. Affirmed.

REASONING: A property owner is not liable for damages caused by a minor, trivial or insignificant defect" on it's property. (See Cadam v. Somerset Gardens Townhouse HOA (2011) 200 Cal.App.4th 383, 388.) Courts have consistently held that in the absence of aggravating factors, a sidewalk offset of three-quarters of an inch or less is a trivial defect as a matter of law.

The height differential posed some risk of injury, but the city did not have a duty to protect pedestrians from every sidewalk defect that might pose a tripping hazard—only those defects that create a substantial risk of injury to a pedestrian using reasonable care. Although the city had a policy of repairing defects of half an inch because they may have thought they posed a tripping hazard, the evidence did not support a finding that offsets that height and above posed a substantial risk of injury.

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MONTES v. YOUNG MEN'S CHRISTIAN ASSOCIATION OF GLENDALE, CALIFORNIA
2022 2DCA/8 California Court of Appeal,
No. B309454 (August 3, 2022)

DEFENDANT OWED NO DUTY OF CARE TO PLAINTIFF
WHO WILLINGLY CHOSE TO ENCOUNTER OPEN
AND OBVIOUS DANGEROUS CONDITION
WITHOUT ANY PRACTICAL NECESSITY

FACTS: On January 1, 2016, 23-year-old Abel Montes fell to his death from the steep, sloped roof of the residential building where he lived. The building was owned by Defendant Young Men's Christian Association of Glendale, California. Montes had been drinking and had ingested edible marijuana and reported feeling high and was acting erratically prior to the fall.

The roof that he fell from was sloped at a steep angle and covered with brittle, broken and unstable Spanish tiles. When Montes was discovered by a desk clerk after his fall, he was still alive, but he succumbed to his injuries shortly thereafter.

His parents filed suit against the YMCA for wrongful death with a survival action. Defendants thereafter moved for sum-

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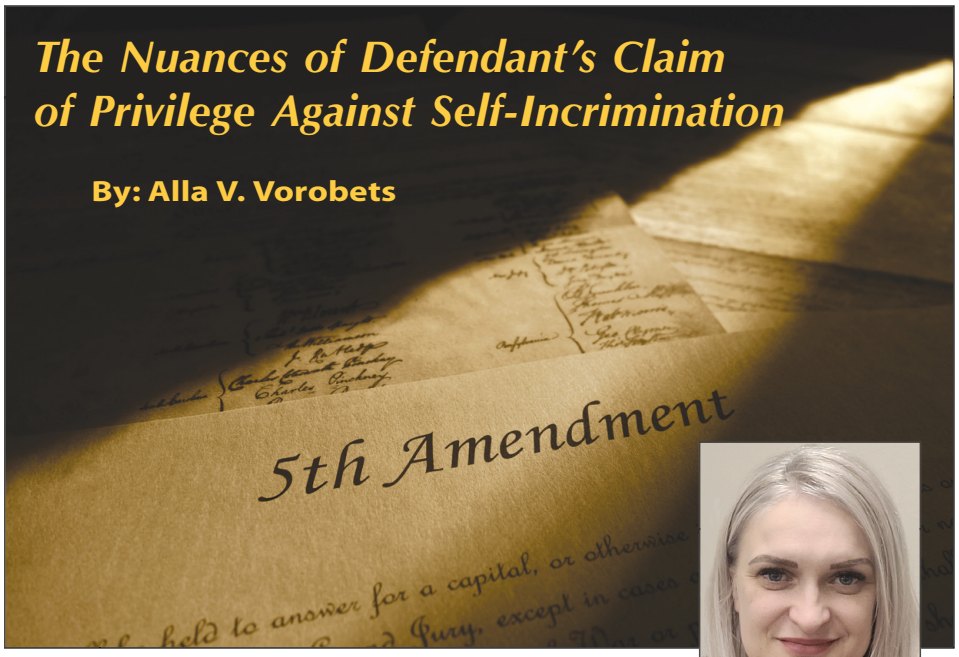
Defendant's Assertion of 5th Amendment Precludes Testimony at Trial . . . Maybe



For the readers of *The Litigator*, having to deal with the consequences of defendant(s) asserting 5th Amendment privilege/defense, albeit rare, does occur with some measured frequency. This article is intended as a brief primer on the issue of parties/witnesses asserting the 5th Amended privilege against self-incrimination.

The privilege against self-incrimination is derived from the California and United States Constitutions and codified in Cal. Evid. Code § 940. A defendant in a criminal case "has an absolute right not to be called as a witness and not to testify." People v. Merfeld (1997) 57 Cal.App.4th 1440, 1443. Any witness, in any legal proceeding, may decline to testify and/or withhold information that might tend to incriminate him/her. *Id*. A corporation has no 5th Amendment privilege against self-incrimination. Avant! Corp. v. Superior Court (2000) 79 Cal.App.4th 876, 886.

The privilege cannot be invoked as to records that are required to be maintained by law and are subject to inspection the by a regulatory authority, as is the case with the record keeping requirements applicable to California employers. *See*, e.g. Cal. Lab. Code § 1174.

In other words, no 5th Amendment protection is available where "disclosure is required and intended to promote a legitimate regulatory aim, is not directed at activities or persons that are inherently 'criminal', and only requires minimal disclosure of information of a kind customarily kept in the ordinary course of business." Craib v. Bulmash (1989) 49 Cal.3d 475, 489. The state's need to verify compliance with valid police power regulations outweighs concerns re implicating the records-keeper in criminal conduct. *Id.*

Otherwise, the privilege against self-incrimination can be asserted "in any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory." Kastigar v. United States (1972) 406 U.S. 441; Campbell v. Gerrans (9th Cir. 1979) 592 F.2d 1054, 1057; Pacers, Inc. v. Superior Court (1984) 162 Cal.App.3d 686, 688.

In deciding whether a party/witness is allowed to invoke the privilege against self-incrimination, the court is asked to consider three competing interests: (1) that of the party who invokes his privilege against self-incrimination during discovery in civil litigation to avoid exposure to criminal prosecution; (2) that of the other party in civil process who seeks to complete discovery without being unduly prejudiced if the party that asserted the privilege during discovery later waives it and testifies at trial; and (3) that of the justice system and the court in fairly and expeditiously disposing of civil cases. Fuller v. Superior Court (2001) 87 Cal. App.4th 299, 304-305; Cal. Gov. Code, §68607. This principle applies in both civil and criminal proceedings. Warford v. Medeiros (1984) 160 Cal.App.3d 1035, 1045.

In civil cases, the accommodation regarding the privilege against self-incrimination is done from the standpoint of fairness, not from any constitutional right. Oiye v. Fox (2012) 211 Cal.App. 4th 1036, 1037. Thereby, forcing a litigant to choose between invoking the 5th Amendment in a civil case (thus risking a loss there), or answering the questions in the civil context (thus risking subsequent criminal prosecution) is not considered a violation of the defendant's constitutional privilege against self-incrimination. Avant! Corp. v. Superior Court (2000) 79 Cal. App.4th 876, 882.

Alla Vorobets, Law Offices of Alla V. Vorobets, is a CCTLA Board Member

Perhaps the most significant consequence to a defendant claiming the privilege against self-incrimination in a civil case—whether in discovery or while pleading affirmative defenses and numerous allegations against the plaintiff —is the court excluding the defendant from offering testimony at trial. A&M Records, Inc. v. Heilman (1977) 75 Cal.App.3d 554, 566. The exclusion extends only to matters to which the defendant had asserted his/her privilege against self-incrimination. *Id*. Otherwise, the defendant is permitted to testify concerning matters as to which he had been forthcoming and/or present documentary evidence or the testimony of other witnesses to support his or her defenses. *Id.*

However, in dealing with the party's and/or witness' assertion of the 5th Amendment privilege, the court has

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other procedural tools at its disposal, as set forth below. In weighing which tool is the most appropriate based on the circumstances of each particular case, the court must assess and balance the nature and substantiality of the interest of the plaintiff, defendant, and the court. Fuller v. Superior Court (2001) 87 Cal.App.4th 299, 305-307.

The full scope of the procedural tools available to the court in weighing the consequences of privilege against self-incrimination being asserted in the civil matter are as follows:

1) Allow the civil defendant to claim the privilege against self-incrimination, even if doing so may limit the defendant's ability to put on a defense. Avant! Corp. v. Superior Court (2000) 79 Cal.App.4th 876, 882.

2) Confer immunity on the party invoking the privilege. Blackburn v. Superior Court (1993) 21 Cal.App.4th 414, 431-432 (discussing procedure for obtaining immunity). Please note, in addition to notice to all parties to the action, notice must be given to the appropriate prosecuting authority that a grant of immunity is being sought. Daly v. Superior Court (Duncan) (1977) 19 Cal.3d 132.

3) Preclude a litigant who claims the privilege against self-incrimination in discovery from waiving the privilege and testifying at trial to matters upon which the privilege had been asserted. A & M Records, Inc. v. Heilman, supra, 75 Cal. App.3d at 566.

4) Stay the civil proceeding until disposition of the related criminal prosecution and/or the running of the criminal statute of limitations. Avant! Corp. v. Superior Court, supra, 79 Cal.App.4th at 882; Pacers, Inc. v. Superior Court (1984) 162 Cal.App.3d 686, 689-690.

In determining the question of whether a civil proceeding should be stayed pending the disposition of the parallel criminal proceeding, the court can take the following further factors in consideration: (1) the interest of the plaintiffs in proceeding expeditiously with this litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation. Keating v. Office of Thrift Supervision (9th Cir.1995) 45 F.3d 322.

5) Permit the defendant to waive the privilege and testify at trial. The deadline for waiving the privilege will be defined by the court. Upon notice of the defendant's waiver, the court could stay the proceedings for the purpose of allowing the plaintiff to depose the waiving defendant about topics covered by his exercise of the privilege during discovery. The plaintiff would also be permitted to conduct any ancillary discovery which develops during further depositions. Fuller v. Superior Court (2001) 87 Cal. App.4th 299, 305-310.

Under California law, unlike the federal standard, neither the court nor counsel may, at trial, comment on the fact that a witness has claimed a privilege. Cal. Evid. Code, § 913(a); People v. Doolin (2009) 45 Cal.4th 390, 441–442; see contra, Baxter v. Palmigiano (1976) 425 U.S. 308, 319. Likewise, the trier of fact may not draw any inference from the refusal to testify as to the credibility of the witness or as to any matter at issue in the proceeding. *Id.*; see also, CACI 216. California law makes no distinction between civil and criminal litigation concerning adverse inferences from a witness's invocation of the privilege against self-incrimination. People v. Holloway (2004) 33 Cal.4th 96, 131.

President's Message

Continued from page one

by Bob Bale and his band, Res Ipsa Loquitur, which will feature a drum solo by Rob Nelsen.

I want to personally thank and recognize all of my 2022 board members. Each board member makes a sacrifice of their personal and professional time to serve CCTLA. Having been on the board for more than 10 years, I can attest that this year's group has not been exceeded in enthusiasm and effort. It was good to see that everyone from this year's board has committed to return next year.

In addition, two new board members will be added for 2023 and announced at the holiday reception. I encourage anyone who is passionate about our profession and wants to have a positive impact on the local trial lawyer community to consider serving on the board at some point their career. In my experience, it has been rewarding, both personally and professionally.

Justin Ward will assume the helm as president for 2023. Challenges the board will face include continuing to offer educational opportunities, with a goal of motivating attendance at our Problem Solving Clinics and luncheons. Attendance dramatically dropped off in the latter part of 2022. In the best of times, it is hard to come up with topics that appeal to a large audience and which have not already been covered.

The widespread availability of other educational opportunities via Zoom during the pandemic may also be having an impact. It's possible that the return to in-person events will increase attendance. As always, the board encourages members' input as to subjects they would like to see covered.

In addition to managing the day-to-day business of CCTLA, the board will continue to face other challenges. Next year will be a critical time in our efforts to fight the Civil Justice Association of California's (CJAC) initiative to cap plaintiff's contingency fees at 20%, which is headed for the ballot in 2024. The board, in coordination with CAOC, monitors these and other political developments and does its best to serve as a liaison to the membership.

Such efforts are only effective if we stand as a group. Defeating tort reform requires contributions from ***every*** CCTLA member. Everyone who reaps the benefits of our freedom to contract with clients to achieve justice for them must share in the burden of trying to win the war against those who would take that right away.

It has been my honor to serve as president of CCTLA. We hope to see you in December at CCTLA's Holiday Reception. In the meantime, stay healthy and let's be careful out there.

THANK YOU!

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Preparing and Protecting Your Client From the Defense Medical Examination

By: Marti Taylor

A Defense Medical Examination, or DME, is a discovery tool employed by the defense in almost every personal injury litigation. These exams are allowed pursuant to California Code of Civil Procedure sections 2032.210 – 2032.650 which discuss defense medical examinations and the scope within which they can be conducted. They also govern the types of restrictions placed on said examinations.

As plaintiff's lawyers, we need to be vigilant to protect our clients from the pitfalls of these defense-oriented examinations.

RESPONDING TO A NOTICE OF PHYSICAL EXAMINATION

A good plaintiff's lawyer will always carefully examine a Notice for Physical Examination and take the time to respond and/or object. Sending a response/objection as a matter of course and demanding that it be provided to the doctor ensures that you have some control over the exam itself and holds the other side accountable to the rules set forth in the code. *(Note that the response/objection is almost never provided to the doctor despite a request that it be given to them. Thus, as a matter of course you should always bring an extra copy to give them at the time of the exam.)*

My office has a standard response/objection that we send out each time we receive a notice for DME, even if it is an examination that we intend to attend. The response states that the plaintiff may be accompanied by their legal representative and that they may record the exam; that no other person other than the plaintiff, legal representative and doctor may attend the exam; that the plaintiff will not sign or fill out any paperwork; that the exam is limited to plaintiff's conditions which are in controversy; that there will no protracted or painful diagnostic testing done; that there will be no testing not named in the demand; that the doctor must be provided a copy of the response/objection; that the exam will be limited to one hour; that a copy of the doctor's report be provided to counsel and that the plaintiff will not wait more than 30 minutes for the exam to begin.

Marti Taylor, with Wilcoxen Callaham, LLP, is a CCTLA Board Member

Defense attorneys are notorious for playing fast and loose with the requirements set forth in CCP § 2032.220 which states that the notice "shall specify the time, place, manner, conditions, scope, and nature of the examination…." (CCP § 2032.220, subd. (c).)

The case of Carpenter v. Superior Court (2006) 141 Cal.App.4th 249 detailed that requires that CCP 2032.220, subsection (c) requires a party demanding a physical examination must "describe in detail who will conduct the examination, where and when it will be conducted, the conditions, scope and nature of the examination, and the diagnostic tests and procedures to be employed. The way to describe these 'diagnostic tests and procedures'—fully and in detail—is to list them by name…[and] with specificity…." (See Carpenter at p.260.)

Pursuant to Carpenter, the defense is required to state, by name, each and every test and examination that will be administered. This requirement exists so that you can determine whether the examination is proper and limited to the parts of your client's body that are at issue. Generally, DME demands will make vague references to "obtaining medical history, diagnostic examination and manipulation of plaintiff's body and any procedures which are considered part of a general physical and medical exam."

These types of demands do not comply with CCP section 2032.220, subsection (c) and should be objected to. Make the defense comply with the code and narrow the scope of their exam by specifically naming each test in detail.

MENTAL EXAMINATION

A defense mental examination is only allowed in very narrow circumstances and should be avoided if possible. CCP §2032.310 sets forth the statutory scheme regarding defense mental examinations. Section 2032.310 states "[i]f any party desires to obtain discovery by a physical examination other than that described in Article 2 (commencing with Section 2032.210), or by a mental examination, the party shall obtain leave of court."

As it pertains to a mental examination, "while a plaintiff may place his mental state in controversy by a general allegation of severe emotional distress, the opposing party may not require him to undergo psychiatric testing solely on the basis of speculation that something of interest may surface." (See Schlagenhauf v. Holder (1964) 379 U.S. 104, 116-122.)

CCP §2032.320 states in pertinent part:

"(b) If a party stipulates as provided in subdivision (c), the court shall not order a mental examination of a person

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for whose personal injuries a recovery is being sought except on a showing of exceptional circumstances.

(c) A stipulation by a party under this subdivision shall include both of the following:

(1) A stipulation that no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed.

(2) A stipulation that no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages." (CCP §2032.320)

This generally requires a showing of both "relevancy to the subject matter" and allegations showing the need for the information sought and the lack of means for obtaining it elsewhere. (See Vinson v. Sup. Ct. (Peralta Comm. College Dist.) (1987) 43 Cal.3d 833, 840.) "The requirement of a court order following a showing of good cause is doubtless designed to protect an examinee's privacy interest by preventing an examination from becoming an annoying fishing expedition." (Ibid.)

Note that you can avoid the mental health examination if you stipulate that "no claim is being made for mental and emotional distress over and above that usually associated with the physical injuries claimed" and "no expert testimony regarding this usual mental and emotional distress will be presented at trial in support of the claim for damages." (See CCP §2032.320)

PREPARING YOUR CLIENT AND ATTENDING THE EXAMINATION

A conscientious and prepared plaintiff's lawyer will **ALWAYS** personally prepare their clients for the defense medical examination. The clients have no idea what to expect when going into these exams and will fall prey to the pitfalls if not properly prepared. Take the time to meet with the client prior to the exam and go through the process with them. This should include, what to expect, what their role will be and what your role will be.

The normal lay person will instinctively trust a physician and will not realize that the DME doctor is a hired defense consultant whose job it is to discredit them. It is our job as attorneys to take the time to explain the reason for the examination, explain the process and the players. It is also imperative that the client understand that they are **NOT** the doctor's patient and that the doctor **IS NOT THEIR FRIEND!**

Most DMEs are performed after a client's deposition. The defense medical examiner is NOT entitled to take a lengthy history that is ostensibly a second bite at the deposition apple. This needs to be explained to your client in detail and they should be instructed that a history will not be given.

ATTENDING THE EXAM

Understanding that we are all busy lawyers with hectic schedules, the biggest disservice you can do to your client is not attend the exam with them or send competent staff from your office. Whenever possible, a good attorney should attend these examinations personally. If personal attendance is not possible then minimally the next best thing is a staff member from your office who is equally as familiar with the client and the file.

Clients will generally be nervous about the exam, and/or be overly trusting of the defense doctor. Attending in person or sending a staff member ensures that

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Attending the exam also ensures that you will have first-hand knowledge of everything that occurs at the exam. This is especially important because, believe it or not, DME doctors embellish, exaggerate and downright lie.

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your client will be protected from themselves and from the defense doctor.

By attending personally or sending competent staff, you can prevent several improper things that the doctor will try to intimidate your client into doing. First and foremost, your client should not fill out a "Patient Questionnaire." Your client is not the defense doctor's patient and thus is not obligated to fill anything out. This is not required by the code, and it is certainly not in your client's best interest. Allowing your client to create a writing that could be used against them later is always a bad idea.

Secondly, attending in person prevents your client from improper interrogation or giving a long history of their case, etc... Defense medical examiners almost always without fail will want to ask your client about how an accident occurred or other improper details of an incident. This is not proper and should not be allowed. This is in essence a second deposition, and the defense has no business getting a second bite at the apple. This can only hurt your client.

California courts have held that this type of improper interrogation is not allowed. Addressing the "legitimate concern" of a medical provider treating the exam as a second deposition and ordering the examiner "shall not ask [plaintiff] questions regarding the facts and circumstances of the accident to the extent those matters were already stated by [plaintiff] in his deposition or in his interview with [plaintiff's first examiner]." (See Golfland Entm't Centers, Inc. v. Superior Court (2003) 108 Cal.App.4th 739, 745-46).

Attending the exam also ensures that you will have first-hand knowledge of everything that occurs at the exam. This is especially important because, believe it or not, DME doctors embellish, exaggerate and downright lie.

RECORD THE EXAM

Pursuant to CCP section 2032.510(a) "[t]he attorney for the examinee or for a party producing the examinee, or that attorney's representative, shall be permitted to attend and observe any physical examination conducted for discovery purposes, and to record stenographically or by audio technology any words spoken to or by the examinee during any phase of the examination." A prudent attorney should always record the examination, it is your best weapon of defense against a less than scrupulous defense medical examiner. An audio recording creates an undisputable record of everything that occurred during the examination and prevents the defense doctor from misrepresenting the examination and in some instances can even be used as an impeachment tool.

A few years back, my office had a case, and the defense demanded a DME. We sent a male lawyer from my office (as the plaintiff was male), and he recorded the examination with a handheld voice recorder that was open and obvious during the examination. The exam was quite short and lasted a total of five minutes. However, by the time the doctor wrote his report he stated that the exam consisted of a barrage of testing and lasted 20 minutes. Similarly, the doctor testified as such at his deposition. At the time of trial, we were able impeach the doctor with the recording proving that the exam was quite cursory and only lasted five minutes total which seriously affected his credibility.

DEMAND YOUR COPY OF THE REPORT

Last but not least: Make sure in your objection/response you demand a copy of the examiner's report. And make sure you enforce your demand for the report when inevitably the defendant fails to respond.

Pursuant to CCP section 2032.610, subdivision (a), plaintiff "has the option of making a written demand that [defendant] deliver both of the following to the demanding party: (1) A copy of a detailed written report setting out the history, examinations, findings, including the results of all tests made, diagnoses, prognoses, and conclusions of the examiner; [and] (2) A copy of reports of all earlier examinations of the same condition of the examinee made by that or any other examiner."

Pursuant CCP section 2032.610(b), the defense expert report "shall be delivered within 30 days after service of the demand, or within 15 days of trial, whichever is earlier."

"If one party to personal injury litigation is required by…her opponent to submit to a medical examination, at the very least…she is entitled to a report of the information obtained by the adversary in litigation…. [T]he Legislature expected a written report be prepared for the examinee whenever requested, even if one did not exist." (See Kennedy v. Superior Court (1998) 64 Cal.App.4th 674, 678.) To summarize, the examining doctor must write a report or otherwise face exclusion.

If the defendant fails or refuses to produce their expert's report, then you must first meet and confer on the issue. If those efforts fail, then you must then file a motion to compel pursuant to section 2032.620. A motion to compel should do the trick because pursuant to section 2032.620, subdivision (c), "[i]f a party then fails to obey an order compelling delivery of demanded medical reports, the court may make those orders that are just, including the imposition of an issue sanction, an evidence sanction, or a terminating sanction…. The court shall exclude at trial the testimony of any examiner whose report has not been provided by a party."

CONCLUSION

Without fail, a defense medical exam is requested in most of our cases. We must be vigilant to protect our clients from the improper tactics of defense lawyers and their hired experts that are employed at these exams.

We must be diligent and force defendants and their experts to comply with the CCP. The requirements set forth in the CCP are there to protect our clients from improper discovery tactics. If we do not protect our clients from these pitfalls, it can be disastrous on the outcome and value of their cases.

By utilizing the strategies and tools provided herein, you can help your client through an exercise that is foreign and nerve racking to them. Further, you can potentially set yourself up with ammunition to attack the defense expert's credibility and opinions both at their deposition and at trial.

The Benefits of Joining Bar Associations and Boards of Directors

By: Justin L. Ward

No matter how many years you've been practicing, the fact that you're an attorney means that numerous people and organizations are going to ask you to join them. I'm sure many of the people reading this article have said to themselves and/or to the people asking them, "I don't have the time to join your organization," or, "I don't have the time to be on the board." I'm writing this article in the hopes that you rethink your position.

Of course, the fewer outside obligations you have, ie: spouse, children, the easier it is to participate in outside organizations. However, your decision not to participate may actually be costing you a significant amount of revenue. Organizations such as CCTLA provide great resources for their members, and if you're reading this article, you're likely a member of CCTLA, so I'm not going to discuss joining this organization, but I will discuss joining this board of directors and other boards of directors.

I have been on the board of CCTLA since approximately 2016. During the six years on the CCTLA board, I have made invaluable connections that have helped me significantly in my legal career. And while being a member of CCTLA in general allows for participation in the list serve and attendance at functions, the board meetings are not only where decisions are made, but also where connections are made.

If you are a general member of other legal organizations, such as the minority bar associations or associations based on a specific area of law or specific geographic location, you should strongly consider joining the board of directors of those organizations. Being on the board allows you to help guide the organization, allows you to be visible to the members and provides more visibility to the general public. All of these things will likely help you generate clients.

Justin Ward, The Ward Firm, is CCTLA's President-Elect

If you're not able to join a board, then make sure to stay active and attend as many functions as possible where you'll have the opportunity to network and socialize with other members. Networking may lead to new business partners, new clients, new ideas, and new friends; all things that may benefit you and the other members.

In addition to the legal associations, you should strongly consider joining the board of directors of non-profit associations that serve a population that you care about. Those organizations need people on the board who aren't afraid to express their opinion, who know how to lead, and who can donate money and time. Except for the time part, lawyers generally make great board members. And most boards do not require a significant time commitment, usually only meeting once a month. In addition to helping guide the organization and serving its membership, you will be introduced to the membership, and when they have a legal issue, they will likely reach out to you. While you should not join a non-profit solely for the purpose of generating new business, it is definitely a nice perk.

There are also many business-centered organizations that may be a good source of clientele. Chambers of commerce host many functions that will allow you to get to meet potential clients and teach you better ways to run the business side of your law practice. Just like legal associations, there are chambers based on geographical location and heritage, but you don't have to live in a specific area to join or be of a certain race to join. They are open to all, and all of their members may be open to you becoming their lawyer if the need arises.

For those of you who attend church, get active with your church leadership. Many churches offer free legal advice clinics to their membership. If your church does not provide such a service, talk to the church leadership about starting one. It could be monthly, quarterly, or whatever frequency is necessary for the membership. You should solicit your legal

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colleagues in other areas of law to help you with the clinic. The clinics will both help the membership and could lead to potential business.

Finally, there are various leadership development programs that will help your personal and professional growth. A few in the Sacramento area are:

1) The American Leadership Forum (ALF). ALF is a non-profit organization, national in scope, dedicated to joining and strengthening diverse, influential leaders to better serve the public good. It enhances leadership capacity by building on the strengths of diversity, understanding and leveraging of differences, and by promoting collaborative problem-solving within and among communities.

2) The Nehemiah Emerging Leaders Program (NELP). NELP is a selective 10-month professional development program that prepares its Fellows for effective and ethical leadership in their companies and communities. NELP offers leadership training customized to the specific challenges faced by culturally diverse leaders. Fellows graduate to put their talents to work in the public and private sectors, acting as catalysts for positive change in our community. The Nehemiah Emerging Leaders Program is a WIN-WIN-WIN for individuals, companies and the community.

Please consider joining ... getting active ... maybe participating in a leadership development program. The activities will make you a better lawyer, business owner and person. And it will also lead to you being more successful.

3) Leadership Sacramento: Leadership Sacramento is a program of the Sacramento Metro Chamber Foundation that develops community-minded business and civic leaders of tomorrow. This year-long interactive program provides a behind-the-scenes view of the issues that impact the region's economy and culminates in the completion of a community project.

I personally completed the NELP program in 2015. I can tell you that my 15 classmates are a very close-knit group that provides advice and support to each other during good and bad times. In addition to all of the leadership development tools I learned, I also gained 15 close friends. These leadership development programs are not free, but the cost of attendance is well worth the skills and friendships. However, I must add that NELP classmates from my year and from the prior and subsequent classes have retained me on multiple cases that have covered the cost of the program one hundred times over.

In conclusion, please consider joining the boards of directors of associations you belong to, joining associations as a general member, getting active with your church or non-profit, and maybe participating in a leadership development program. The activities will make you a better lawyer, business owner, and person. And it will also lead to you being more successful.

Capitol City Trial Lawyers Association

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We hope to see you there!

President Dave Rosenthal & CCTLA Officers and Board Members

CCTLA again will be contributing to Mustard Seed for the holidays and invites members to pitch in. A representative from Mustard Seed will be on hand to accept donations.

Making the Switch and Letting Go of Physical Files

By: Ryan Sawyer

Ryan Sawyer, Law Office of Ryan K. Sawyer, is a CCTLA Board Member

So here you are—the day you swore would never come. For years you've resisted. Always telling yourself, and sometimes insisting to others, that you could never leave behind your time-tested paper filing system and switch to electronic storage in a database or on a computer. "If it isn't broke don't fix it," you say. Besides, after so many years of practicing law, you have nearly achieved the pinnacle of file-organizing perfection to suit your practicing needs.

You know the layout of your files like the back of your hand. Every file has that one special page on top. You know the one I'm talking about. Maybe it's a summary of the incident, contact information for the client, or a chronological log of case events. From there you have tabs or dividers to separate out various types of correspondence, pleadings, or written discovery. You can open any case file and quickly flip to the document you are seeking. Everything has a place—just the way you like it.

Many law firms have switched to electronic files in recent years, but the thought of doing so still makes you uncomfortable. You've had the demoralizing experience of working for hours on an important legal document, only to discover your hard work has been lost when the document failed to save, or there was some other glitch on your computer. If this kind of tragedy could happen with one document, why would anyone be crazy enough to entrust their entire practice to electronic storage? Could the pros possibly outweigh the cons?

ACCESSIBILITY

One of the great benefits of maintaining your files electronically is the ability to access them from virtually anywhere with an Internet connection. How many times have you wanted to look at something in a file, but you did not have the file with you? Perhaps you have been out of the office and received a phone call from a client or opposing counsel but could not respond immediately because you did not have the physical file in your possession. Problems like this disappear when you can access your files from any computer, tablet or smart phone.

What if you are on an airplane? What if you are in the depths of a dark court building where there is no Wi-Fi or Internet signal? Not a problem. Most common cloud-based storage providers, like Google Drive and Dropbox, allow you to always keep a copy of your files on your laptop. So in those moments where you do not have access to the Internet, an exact copy is already on your computer. You can open the files on a plane, make whatever changes you need to, and the next time you connect to the Internet, these changes will sync with your cloud-based storage provider and across all your devices. Everything is always in sync, all the time.

This allows you and your staff to work on the same case at the same time. You don't need to pass a file back and forth anymore. Most major cloud-based storage solutions even have features to keep two people at the same firm from messing up the other's work if they happen to be editing the same document concurrently.

BACKUP REDUNDANCY

What about a situation in which your computer dies or is stolen? Would you lose all your files? Not if you do things right. The solution to avoid such a tragedy is simple.

In days gone by, many firms would have to hire a technological company to install and maintain an on-site server to manage all electronic files. You may have worked at such a firm and remember the room with all the electronic equipment, cords and flashing lights. One of the problems with these setups, like having a physical file room, is that a fire or other natural disaster could wipe out your files.

One of the great benefits of storing your files electronically is the ease with which you can create backups. This process can be done automatically on an hourly, daily, weekly or monthly basis. With a simple program, such as Time Machine on a Mac computer, you can create regular backups of all your files. If

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your computer dies or is stolen, you can quickly use your backup disc to restore your files to a new computer.

Annother advantage of using cloud-based storage such as Google Drive, Dropbox or their competitors is that your files are additionally kept off-site. Meaning, in the event of a natural disaster or other tragedy, an up-to-date copy of your files is kept somewhere else, and with the use of a password, you can login and access your files without missing a beat.

Our firm maintains both on-site backups as well as cloud-based (aka off-site) backups. The cost is minimal and well worth the peace of mind to know that multiple backups are available should you ever need to use one.

EFFICIENCY

Many of us have had the experience of handling a legal issue for a second time and been unable to recall the specific case where we previously addressed that very issue. Rather than wandering through your file room in the hopes of jogging your memory, or asking every staff member, you can simply search all your electronically maintained cases for a specific word or phrase. Think about the time you could save when you can quickly locate an on-point document in this manner.

Electronically maintained files are more easily shared with a client or co-counsel. With a few simple clicks of your mouse, you can decide to share the file in its entirety or just certain documents.

Changes to the California Civil Code, arising from the COVID-19 pandemic, have made service by electronic means much more common. Fewer important documents are received by physical mail. Yet our profession still involves the receipt of physically mailed documents, which may come from other firms, agencies, insurance companies or clients.

To bring these incoming documents into your new electronic storage system, invest in a quality scanner. Depending on the size of your firm, you may not need a full-size scanner like those in a FedEx printing center. Instead, you can get a decent compact all-in-one scanner/printer for around $600. Be sure to select one with an automatic document feeder tray so you can drop a stack of documents in for scanning. You will also want to make sure it has automatic two-sided scanning.

Some of these scanners can scan documents directly into your cloud-based storage provider. You can create a simple folder called "scanning" and then every document scanned by your office will automatically appear in this common folder that is shared with your team. Place a staff member in charge of scanning all incoming documents and copying them to the applicable case.

Perhaps you are still thinking about potential limitations of electronically stored documents, such as highlighting a paragraph, tabbing a page or indexing a voluminous document. There are computer applications that provide solutions to many of these concerns, such as Adobe Acrobat Pro. Ask around. Many attorneys are happy to share what they have found works for them.

CONCLUSION

We all know there are situations where we must maintain original documents in physical form, so don't go throwing away all your file cabinets just yet. However, you might find that with the implementation of electronic files, your dedicated file room can be repurposed, and your file clerk can start helping your firm in other ways.

CCTLA Member Lawyers Among Nominees for CAOC Consumer Attorney of the Year

Consumer Attorneys of California president Craig M. Peters today announced this year's finalists for the organization's two major member awards, Consumer Attorney of the Year and Street Fighter of the Year.

Among the nominees are the team of Roger Dreyer, Robert Bale and Noemi Esparza and the team of Chritopher Dolan and Jeremy Jessup.

Consumer Attorney of the Year is awarded to a CAOC member or members who significantly advanced the rights or safety of California consumers by achieving a noteworthy result in a case. Eligibility for Street Fighter of the Year is limited to CAOC members who have practiced law for no more than ten years or work in a firm with no more than five attorneys. To be considered for either award, the case must have finally resolved between May 15, 2021 and May 15, 2022, with no further legal work to occur, including appeals.

The finalists for these awards were selected by a committee consisting of members of CAOC's Executive Committee; representatives of the attorney groups that won these awards in each of the last three years; and six randomly selected members of CAOC's Board of Directors. The winners will be chosen by secret ballot of CAOC board members after presentations about each case at the board meeting on September 15. The winners will be announced Nov. 19 at the Annual Installation and Awards Dinner during CAOC's 61st Annual Convention.

Here are the two cases that earned Consumer Attorney of the Year nominations for the CCTLA member finalists:

Aguirre v. Nissan North America, Inc.
Roger A. Dreyer, Robert B. Bale and Noemi Nuñez Esparza

A TEN-YEAR FIGHT TO PROVE A DANGEROUS VEHICLE DEFECT

Jose Aguirre came to America seeking a better life. Though undocumented, he worked two jobs, paid taxes for a decade, and supported his fiancée and children, aged 11 months to nine years. In August 2012, he was driving his 2001 Xterra SUV at 15 mph across his employer's parking lot when, without warning, it suddenly accelerated. Jose's efforts to brake the Xterra failed; it hit a concrete ramp, vaulted over a ramp, and submarined under a parked semi-tractor. The impact crushed through the A-pillar and firewall, leaving Jose a quadriplegic at age 28.

Past medical costs exceeded $5 million, and future medical costs were over $10 million. After spending $1 million on

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Judge Vasquez served on the Sacramento County Superior Court bench for 20 years, presiding over the general trial department, including criminal and civil jury trials and complex civil litigation. Immediately prior to her appointment, she was a shareholder at a prominent law firm, litigating trial and appellate labor and employment matters. She also practiced with various government organizations including the Fair Employment and Housing Commission and the Public Employment Relations Board.

She broke barriers when she became the first Latina judge of the Sacramento Superior Court. Judge Vasquez's commitment to the legal community, coupled with her genuine, caring nature, has inspired others and earned her numerous awards and accolades.

Based in our Sacramento office, she is now available to serve as a mediator, arbitrator, and private judge statewide.

Learn More About Judge Vasquez

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Thank You!

to CCTLA's 2022 Reception & Silent Auction Sponsors & Donors! We raised $100,640 for the Sacramento Food Bank & Family Services!

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Special Thanks to Chris & Amy Wood for hosting CCTLA's reception at their beautiful home!

Left, Fall Fling hosts Amy and Chris Wood. Above, honoree Ognian Gavrilov, CCTLA President Dave Rosenthal and honoree Glenn Guenard. **MORE PHOTOS, PAGE 24**

Right, CCTLA board members Justin Ward and Alla Vorobets.

The Capitol City Trial Lawyers Association honored two of its members at its 2022 Fall Fling & Silent Auction—and raised more than $100,000 for Sacramento Food Bank and Family Services.

Ognian Gavrilov, a CCTLA board member and the CCTLA's 2020 Advocate of the Year, was this year's recipient of Morton L. Friedman Humanitarianism Award. This year's Joe Ramsey Professionalism Award recipient was Glenn Guenard, also a CCTLA board member, serving as board secretary. Guenard was CCTLA's Advocate of the Year in 2019.

This event, a benefit for SFBFS and normally held in the spring, was held Sept. 22, after a more than two-year hiatus due to the Covid pandemic. It was held at Amy and Chris and Wood's beautiful home, with more than 130 guests in attendance.

A special thank you goes to CCTLA Executive Director Debbie Keller for her tireless work organizing the silent auction.

CCTLA's Fall Reception . . . Continued from page 23

From left: Ian Barlow and Priscilla Parker; Robyn Shaldone and Judge David Brown (Ret.); Bill Kershaw, Rick Crow, Cynthia Crow, Allan Owen and Linda Whitney enjoying the evening at CCTLA's Fall Reception & Silent Auction.

Dayo Horton and Judge Russell Hom (Ret.)

Justice Art Scotland (Ret.) and Justin Ward

Antonia Young, Margaret Doyle, John Arnold, Sian Magee, Brianne Burkhart and Blake Young

Ambulance Companies Trying to Limit Damages for Non-Patients They Have Harmed, Using MICRA

By: Jeffrey M. Schaff

Ambulance companies and another emergency service providers are pushing the bounds of MICRA (Health & Safety Code section 1440 *et seq.*) by claiming medical malpractice applies to basic auto accidents that they cause. Relying on primarily on Canister v. Emergency Ambulance Services, Inc. (2008) 160 Cal.App.4th 388, American Medical Response West, AMR, in particular, have chased the theory up and down the state with demurrers and motions for summary judgment. The shorter statute of limitations, generally just one year, versus the standard two years in a general negligence case, can also trap a lackadaisical plaintiff lawyer or an uninformed court.

When the MICRA legislation was enacted in 1975, it specifically encompassed persons licensed pursuant to Chapter 2.5 of Division 2 of the Health & Safety Code (commencing with Health & Safety Code section 1440). These provisions included "mobile intensive care paramedics." See Health & Safety Code former § 1480; see also Canister(supra) 160 Cal.App.4th 388, 396.

When the Legislature repealed that former section of the Health & Safety Code, it enacted the Emergency Medical Services System and the Prehospital Emergency Medical Care Personnel Act (Health & Safety Code section 1797 *et seq.*) [the "EMS Act"]. The EMS Act provides that: ". . . any reference to any provision of law to mobile intensive care paramedics subject to [former §1480] shall be deemed to be a reference to persons holding valid certificates under this division as EMT-I, EMT-II, or EMT-P." Health & Saf. Code § 1797.4. The enactment of Health & Safety Code section 1797.4 demonstrates a legislative intent that paramedics and EMTs be deemed "health care providers" within MICRA's purview. Canister, supra, 160 Cal.App.4th 388, 403.

Providers argue that MICRA specifically contemplated that both persons and organizations would provide emergency medical services pursuant to the local emergency services program. Health & Safety Code section 1797.178 provides: "No person or organization shall provide advanced life support or limited advanced life support unless that person or organization is an authorized part of the emergency medical services system of the local EMS agency or of a pilot program operated pursuant to the Wedworth-Townsend Paramedic Act, Article 3 (commencing with Section 1480) of Chapter 2.5 of Division 2."

More broadly, they argue "professional negligence" includes a "negligent act or omission to act by a health care provider in the rendering of professional services." Code Civ. Proc. § 340.5(2); Civ. Code § 3333.2(c). As that terminology has been interpreted by the courts, "an action for damages *arises out of the professional negligence* of a health care provider if the injury for which damages are sought is directly related to the professional services provided by the health care provider." Central Pathology Service Medical Clinic, Inc. v. Superior Court (1992) 3 Cal.4th 181, 191 (emphasis added). Consequently, the "term 'professional services' encompasses more than simply the distinct services that a health care provider is licensed to perform." Canister, supra, at 160 Cal.App.4th 388, 405.

Jeffrey Schaff, Schaff Law Group, is a CCTLA Board Member

As applicable to the events here, emergency response and transportation of patients is necessary and directly related to the professional services provided by emergency personnel, and are of the most important tasks that must be performed to successfully respond to an emergency or transport a patient to the appropriate facility. The law recognizes that, "[s]ome of those tasks may require a high degree of skill and judgment, but others do not. Each, however, is an integral part of the professional service being rendered." Canister, supra, 160

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Cal.App.4th 388, 407 (quoting Bellamy v. Appellate Department (1996) 50 Cal. App.4th 797, 808).

MICRA does not cover just "garden variety" medical malpractice actions; rather, MICRA applies whenever the negligent act or omission occurred in the rendering of services for which the health care provider is licensed. (Waters v. Bourhis (1985) 40 Cal.3d 424, 432-433.) And MICRA has been extend beyond negligence claims by the recipients services, as long as the negligence occurred during the rendering of services. (Canister v. Emergency Ambulance Services, Inc. (2008) 160 Cal.App.4th 388, 407-408 (Canister).) In other words, claims by non-patients may be subject to MICRA.

In Canister, the plaintiff was a police officer accompanying an arrestee in the back of an ambulance when the ambulance hit a curb, and the police officer was injured. Canister, supra, 160 Cal.App.4th at 404. The California Court of Appeal first determined that the EMT who was operating the ambulance at the time of the incident was a "health care provider" within the meaning of MICRA and then analyzed whether negligent operation of an ambulance constitutes an action arising from "professional negligence." *Id*. at 404.

The court held "as a matter of law, that the act of operating an ambulance to transport a patient to or from a medical facility is encompassed within the term 'professional negligence.' " *Id*. The court explained that the definition of "professional negligence" is broad and generally includes "negligence occurring during the rendering of services for which the health care provider is licensed." *Id*. at p. 406.

The court went on to hold that assessing patients, moving them to gurneys and transporting them are part and parcel of the delivery of professional services, and are "[a]n integral part of the duties of an EMT includes transporting patients and driving or operating an ambulance," such that the Canister action was deemed to be subject to MICRA, as this action should be. *Id*. at p. 407.

Canister held "[t]hat [the plaintiff] was not a patient and does not affect the application of MICRA. By its statutory terms, MICRA applies to negligent conduct by a health care professional in the rendering of professional services and is not limited to actions by the recipient of professional services." *Id*. at p. 407 (citations omitted). The court continued: "[i]ndeed, MICRA limitations apply, "to any foreseeable injured party, including patients, business invitees, staff members or visitors, provided the injuries alleged arose out of professional negligence.' " *Id*. (citations omitted).

However, Canister's sweeping application must be read with caution. A series of cases decided nearly 10 years later provide a framework for limiting MIRCA to the four-corners of the decision.

In Flores v Presbyterian Intercommunity Hospital, (2016) 63 Cal. 4th 75, the court laid out a framework for deciding when an act is considered "professional negligence" under Code of Civil Procedure section 340.5 and therefore triggers the statute. (Flores, supra, 63 Cal.4th at pp. 85–87.) That framework upended the reasoning and analysis set forth in the Canister case, decided in the District Court of Appeal.

Flores highlighted (in the specific context of hospital services) that such injuries to the public are not covered by

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MICRA:

> "The text and purposes underlying section 340.5 … require us to draw a distinction between the professional obligations of hospitals in the rendering of medical care to their patients and the obligations hospitals have, simply by virtue of operating facilities open to the public, to maintain their premises in a manner that preserves the well-being and safety of all users." (*Id*., at p. 87.)

In Aldana v. Stillwagon (2016) 2 Cal. App.5th 1, a motorist sued a paramedic supervisor for negligence following a collision at an intersection between the motorist's vehicle and the supervisor's pickup truck, which was on its way to an emergency. The appellate court held that MICRA did not apply, concluded that the supervisor's act in driving his pickup truck to an accident scene did not constitute "professional services" within the meaning of MICRA. The court opined that Canister's conclusion that both the EMT driving the ambulance and the EMT attending the patient were rendering professional services was "questionable" in light of Flores.

Importantly, the court stated that even if Canister were correctly decided, it was distinguishable because the negligence in that case occurred while the EMTs were transporting a patient to the hospital, which was within a paramedic's "scope of practice." (Aldana, supra, 2 Cal.App.5th at p. 7.) By contrast, the alleged negligent driving by the paramedic supervisor occurred in a non-ambulance vehicle that was going to the scene of an injured victim and which had no patient in it. This meant the conduct was not during the rendering of services for which the paramedic supervisor was licensed. (See *Id*. at p. 8, internal citations and quotations omitted.)

Finally, in Johnson v Open Door Community Health Centers (2017) 15 Cal. App.5th 153, a patient filed suit against a health clinic for personal injuries allegedly suffered when she tripped on a scale that was partially obstructing the path from the treatment room to the hall. (2017) 15 Cal.App.5th 153. The appellate court held that MICRA did not apply to the claim because the plaintiff was not injured during the provision of medical care, but rather after the provision of that care was completed and allegedly as a result of a breach of duties owed generally to all visitors to the clinic. (Johnson, supra, 15 Cal.App.5th at p. 160.)

The Johnson court stated while the court's rationale in Canister did not comport with the analysis in Flores, it explained that the outcome was still "arguably correct" in that: "(!) the negligent performance of tasks requiring no medical skill or training may nonetheless implicate professional medical services and trigger application of MICRA (*Flores*, supra, 63 Cal.App.4th, at pp. 85-86); and (2) the EMTs who allegedly operated an ambulance without due care were rendering professional services at the time and their failure to do so competently caused the officer's injuries." (Johnson, supra, 15 Cal.App.5th at p. 162.

While courts seem to understand the distinction drawn by Cannister's progeny, this has not deterred emergency service providers from filing decisive motions at the trial court level. Plaintiff's counsel must be mindful of what's coming and make sure to assess the relationship early and prepare to triage those cases that fall within the purview of MICRA.

What is the probate exception to ERISA?

By: Daniel E Wilcoxen

Daniel Wilcoxen, Wilcoxen Callaham, LLP, is a CCTLA Board Member

On August 30, 2022, the United States Court of Appeals for the Sixth Circuit issued an opinion regarding the concept known as the ?probate exception? to ERISA. The name of the case is American Electric Power Service Corporation, as fiduciary of the American Electric Power System Comprehensive Medical Plan, Plaintiff-Appelant v. John K. Fitch, as administrator of the Estate of John D. Fitch; Glori Fitch., Defendants-Appellees. The only citation available at this time is Westlaw, 2022 WL 3794841.

This is an ERISA collections case. The case arose from an automobile accident involving the death of John "Jack" D. Fitch and an attempt to collect for the payment of expenses for accident-related medical treatment by the American Electric Power System Comprehensive Medical Plan (hereafter: Plan). Decedent Jack was a beneficiary under the self-funded medical plan that his mother participated in as an employee of the American Electric Power Service Corporation (hereafter: AEP). AEP, on behalf of the Plan, sought to impose an ERISA lien as an equitable lien by agreement over an identifiable fund (third-party settlement). The funds were in the possession of Decedent's father John F. Fitch, the administrator of the estate, and Glori Fitch, Jack's mother, as Plan participant. The Federal District Court for the Southern District of Ohio dismissed the ERISA Complaint without reaching the merits, after concluding that the probate exception deprived the federal court of the subject-matter jurisdiction.

As a result of Jack's death, the administrator of his estate, his father, John, obtained two settlements: one for $500,000 from the "at-fault" driver's insurance carrier under a wrongful death liability claim, and one for $100,000 from the Fitches' own automobile policy on the medical payment claim. Regarding the settlement, the administrator filed an Application to Approve Settlement and Distribution of Wrongful Death and Survivor Claims in the Probate Court of Franklin County, Ohio.

In the application, the administrator proposed that the full amount of $600,000 in settlement proceeds be allocated to the wrongful death claims of Jack's surviving parents who suffered damages by reason of wrongful death. Anthem, on behalf of the Plan, asserted a lien of $101,582.46 for the care and treatment for the two days that Jack survived after the accident.

The probate court approved the settlement and distribution the same day, allocating $260,750 to Jack's father, John, and $250,750 to Glori, Jack's mother. In addition, $88,500 was awarded to Charles Fitch, the brother of Decedent. No amounts were awarded to Anthem for the claimed lien of $101,582.46.

The district court dismissed the Plan's ERISA action for lack of subject-matter jurisdiction based on the probate exception. The Plan expressly limited its Appeal to the Dismissal of its claim against the wrongful death proceeds in the possession of Glori Fitch, Decedent's mother and Plan member as a result of her employment.

The circuit court pointed out that the United States Supreme Court has recognized "a probate exception of distinctly limited scope," explaining that "a federal court may not exercise its jurisdiction to disturb or affect the possession of property in the custody of a state court." Marshall v. Marshall, 547 U.S. 293, 310 (2006) [this is the famous Anna Nicole Smith's claim against her 90-year old husband, who was a billionaire and who she alleged promised her 50% of everything he owned if he died.] (which quoted Markham v. Allen, 326 U.S. 490,494 (1946)). This "longstanding limitation on federal jurisdiction otherwise properly exercised," is a "judicially created doctrine stemming in large measure from the misty understandings of English legal

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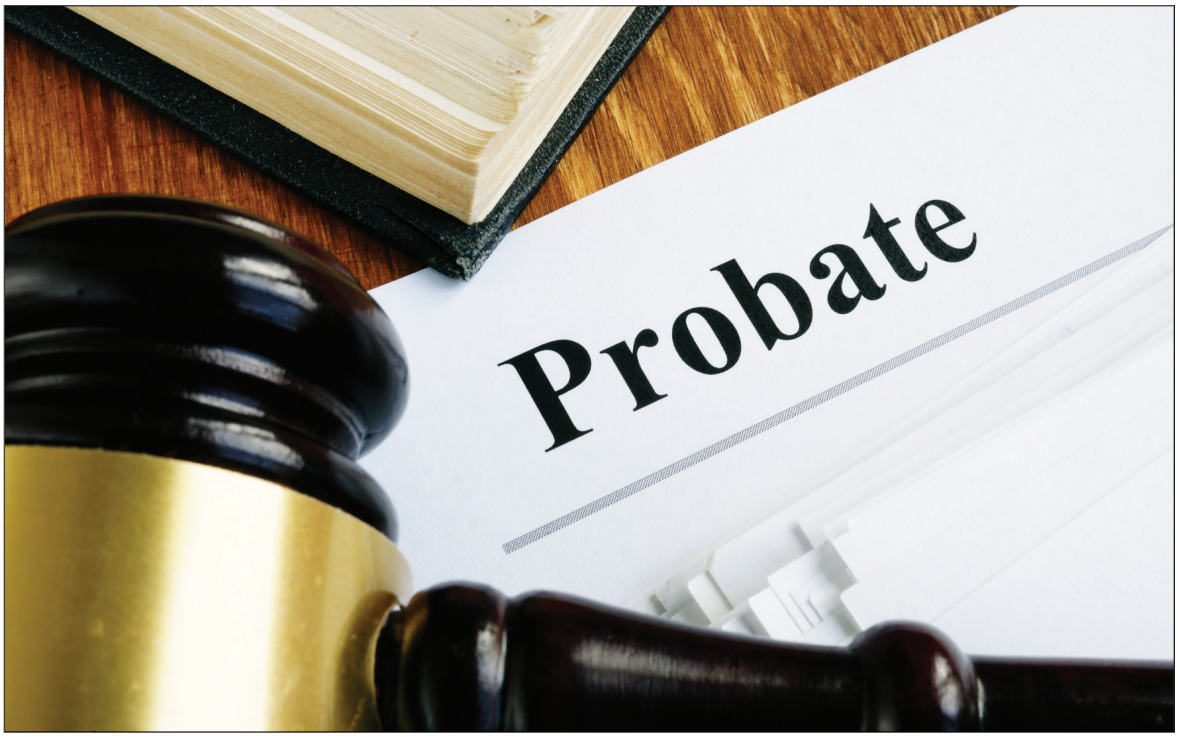

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history." Clarifying and curtailing the probate exception, Marshall reiterated that the courts "have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given."

In Marshall, the justices explained federal courts "puzzled over the meaning of the words 'interfere with the probate proceedings.' " The Supreme Court stated, "the probate exception reserves to state probate courts the probate or annulment of a will and the administration of a decedent's estate; it also precludes federal courts from endeavoring to dispose of property that is in the custody of a state probate court." They went on to state that the "interference" referred to in Markham was "essentially a reiteration of the general principle that, when one court is exercising in rem jurisdiction over a res, a second court will not assume in rem jurisdiction over the same res."

The Wisecarver decision, 489 F.3d at 749-51, dealt with a case where Plaintiff sought an order enjoining defendants of disposing of assets received from an estate,and the court concluded that the probate exception barred jurisdiction in that case to the extent that granting the requested relief "would require the district court to dispose of property in a manner inconsistent with the state probate court's distribution of the assets."

The complaint decided herein sought to impose "an equitable lien by agreement over identifiable funds in the possession and/or control of" John Fitch, as administrator of the estate, or Glori Fitch, as a Plan participant. Specifically, AEP asserted an equitable lien pursuant to 502(a)(3) of ERISA against: (1) the medical-payment settlement proceeds in the possession of the Administrator; and (2) the wrongful-death proceeds allocated to Glori Fitch. AEP claims a right to reimbursement under the written agreement to a lien including recoveries obtained by the covered person's relatives, heirs, or assignees.

The circuit court criticized AEP for not addressing why the district court's conclusion that the Plan was trying to dispose of property in a manner inconsistent with the probate court's judgment in that AEP did not address why the conclusion was wrong in its opening brief or its reply brief and thereby waive any claims they might have had. Thus, the Sixth Circuit upheld the district court's decision despite the fact that it discussed many permutations, limitations and nuances of the law that finally stated, "our duty is to identify when we lack jurisdiction, not to identify arguments that a party could have made for a why we possess it."

Thus, despite the fact that Marshall v. Marshall was cited as a Supreme Court case dealing with the probate exception, this case may not be a good example of why the probate exception exists, and even the three justices could not agree in that Justice Ralph B. Guy dissented and stated, "I have no quarrel with the court's discussion of the facts or the general principles governing the probate exception to the exercise of federal subject-matter jurisdiction. See Marshall v. Marshall, 547 U.S. 293 (2006). I cannot agree, however, that AEP forfeited review of whether the probate exception applies to its ERISA claim to the extent it seeks an equitable lien against any wrongful death proceeds in the possession or control of Glori Fitch."

After arguing numerous positions of the parties, it appears that the Dissent was really trying to deal with the simple fact it finally discussed, which was that the probate exception should be no impediment to the federal court's exercise of jurisdiction over that claim. That would leave unresolved Glori Fitch's contention on the merits that her wrongful death recovery is not subject to the reimbursement provisions of the AEP Plan because it is recovery for her own injuries from the death of her son. Therefore, this should have been sent back to the trial court to determine the ownership of that claim.

Of interest discussing more simplistically the concepts regarding the probate exception is the case of In the Matter of O.D., a Minor v. The Ashley Healthcare Plan, decided September 27, 2013 (2013), WL 5430458. In this case, the court held that the administration of a minor's estate is entirely a matter of state law and is law of general application which affects a broad range of matters entirely unrelated to ERISA plans.

The case found that even where the ERISA plan contained an express subrogation clause, Mississippi law requiring prior chancery court, their "equity and probate court" approval of the assignment of a minor's rights to insurance proceeds could not be preempted by ERISA. It found that the signatures of the parents on the ERISA plan document were not enforceable without prior Mississippi chancery court approval.

Thus, despite all the complications, you should always look to an ERISA plan case to see if there is a probate exception involving wills, trusts, etc. concerning who received what money for what, and also whether it is a probate case involving a minor or an incompetent adult since the probate exception generally applies to those situations.

Although this case is complicated, and I don't think it will be relied on by anyone, it still assists in the application of the probate exception.

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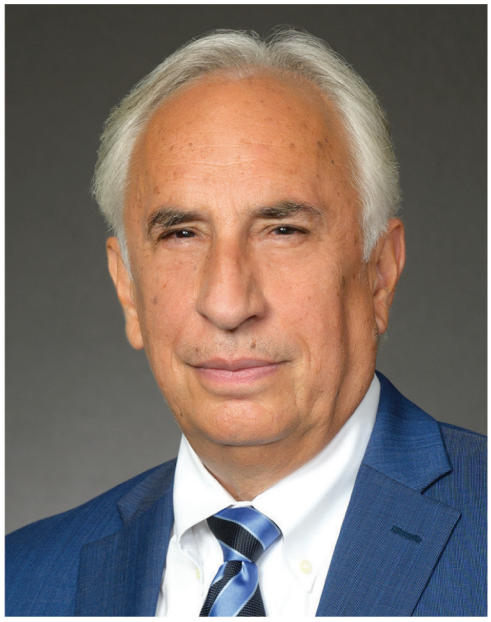

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COURT REPORTER SHORTAGE IMPACTS

The shortage of court reporters statewide has affected the legal industry's ability to forge ahead with their cases, as required by code. Since COVID-19, there have been massive numbers of tenured reporters choosing to retire, walking away from the online platforms that we were forced into following March 2020's mandates. Currently statewide, 38 counties are advertising openings for official court reporters.

Have you tried to schedule a civil trial and couldn't find a court reporter? Have you been told your deposition, which you had timely scheduled, was being cancelled, due to no reporters available to cover your job? Are you aware that statewide out-of-state CR firms that can't provide a CR for your calendared matters have been using a loophole in CA law (CCP 2025.340) to "videotape" the proceedings without a court reporter present, for which they have coined the term "digital reporter," making you believe there is a real CR present and leaving your discovery unusable unless a certified court reporter transcribes the videotape? Have you seen your discovery bills increasing? The shortage has caused the cost of court-reporting services to double since COVID-19 hit.

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COMPLAINTS: Department of Consumer Affairs, Certified Shorthand Reporters Board, has an online complaint process should you find yourself needing to file a complaint about a California CSR. The link is: www.courtreportersboard.ca.gov. To check the status of a CSR's license: www.search.dca.ca.gov

CALIFORNIA-REGISTERED COURT REPORTING FIRMS: As of July 1, 2022, all CR firms must be managed or owned by a licensed California CR. Check the above-referenced site to confirm the firm you are working with is registered with the DCA/CSR Board and is following the CR laws of the State of California.

If I can be of assistance regarding any of these topics, call 916.922.9001 — Linda Hart
L. J. Hart & Associates

NOTABLE CITES

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mary judgment, arguing that a dangerous condition did not exist, nor did any dangerous condition cause the incident or that Defendant had any duty to prevent the incident. The trial court granted the summary judgment, and Plaintiffs appealed.

ISSUE: Does a property owner owe a duty of care to a Plaintiff who willingly choses to encounter an open and obvious dangerous condition?

RULING: The trial court did not err in finding that Defendant owed no duty to do anything to protect Plaintiff from his own voluntary, unnecessary and uninvited risk taking. Affirmed.

REASONING: In this case, there was an open and obvious dangerous condition—the roof tiles of the YMCA building posed an "obvious risk" since they were placed at a steep sloped angle, broken, brittle and unstable. This was without dispute. It was also without dispute that Montes had no reason to be on the roof.

The court opined that under such circumstances, Defendant owed no duty of care to Montes. The Defendant owed no duty to do anything to protect Montes from his voluntary unnecessary and uninvited risk taking. The court noted that "there is a limit as to how far a society should go by way of direct government regulation of commercial and private activity, or indirect regulation through the tort system, in order to protect individuals from their own stupidity, daring or self-destructive impulses." (See Edwards v. California Sports, Inc., (1988) 206 Cal.App.3d 1284, 1288.)

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HOFFMAN v. YOUNG
2022 California Supreme Court,
No. S266003 (August 29, 2022)

PREMISES LIABILITY NOT IMPOSED ON PARENTS OF ADULT CHILD WHERE INVITED PLAINTIFF WAS INJURED RIDING MOTORCYCLES ON THEIR PROPERTY

FACTS: Defendants Donald and Christina Young lived on property they owned in Paso Robles with their sons, Gunner and Dillon. Part of the property included a motorcross track.

In 2014, 18-year-old Gunner invited Mikayla Hoffman to go motorcycle riding on the property. While Gunner was doing a warm up lap on the track, Mikayla entered the track, going in the opposite direction, and the two of them collided. Both were injured.

Hoffman sued Donald and Christina as well as Gunner and a business owned by Donald. Her claims included negligence, premises liability based upon negligent track design and negligent provision of medical care.

Donald's company settled, and the Youngs were all granted summary adjudication on the negligence and premises liability claims based upon a defense of assumption of the risk doctrine. Thereafter, Plaintiff petitioned for a writ of mandate, which was granted, and the case was reinstated against Donald and Christina.

At trial, Defendants sought to assert a defense that they had recreational use immunity under California Civil Code section 846. That section provides in relevant part that a landowner "owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose." However, the recreation exception does not apply when someone is expressly invited onto the property. Plaintiff argued that Defendants were stripped of that defense based upon the express invitation of their son. The court sided with the plaintiff and did not allow the defense.

ISSUE: Does an express invitation by an adult child apply to the landowner parents?

RULING: No. A landowner does not automatically authorize their child to invite others onto their property.

REASONING: An invitation by a non-landowner can occasionally trigger the invitation exception as to the property owner, but it does not always do so. General agency principals would apply. In this case, Gunner was not acting as his parents'

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agent because there was no evidence he had permission to invite others onto the property. And implicit permission based solely upon the living arrangement was not good enough.

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JORGE PEREZ v. HIBACHI BUFFET
2022 2DCA/8 California Court of Appeal,
No. BC659957 (August 30, 2022)

JNOV WAS IMPROPER WHERE THE VERDICT WAS BASED UPON A CLEAR LOGICAL INFERENCE REGARDING THE ORIGIN OF LIQUID FROM EVIDENCE OFFERED AT TRIAL

FACTS: Plaintiff Jorge Perez was having lunch with his friend at a Hibachi Buffet. At some point during the lunch, which was down a long hall that continued past the restroom into the kitchen. After leaving the restroom, he slipped on wet tile and fell to the hard floor. The fall caused him serious injury.

Perez filed suit against Hibachi Buffet. In their discovery responses, Defendant admitted that their employees used the restroom/kitchen hallway to shuttle dirty dishes to the kitchen from the dining room.Plaintiff's friend testified at trial that after Perez' fall, he saw and photographed a trail of dirty liquid from the dining room and extending into the kitchen.

Plaintiff argued at trial that the logical inference is that the water on the floor came from Hibachi Buffet employees taking dirty dishes back to the kitchen. The inference being that they must have spilled liquid in the hallway that came off of the various dishes, including cups. The jury found for Plaintiff and awarded damages. Defendants made a motion for judgment notwithstanding the verdict and requesting a new trial. The trial court granted both motions, and Perez appealed.

ISSUE: Can a verdict be supported by a logical inference based upon evidence offered at trial?

RULING: Reversed and remanded. A trial court must view the evidence in the light most favorable to the party that won the verdict and may only grant a JNOV if there is no substantial evidentiary support for the verdict.

REASONING: The standard of review is whether there was any substantial evidence that would support the jury's conclusion. The jury in this matter heard evidence that Defendant's employees frequently traversed the hallway with dirty dishes. They also heard evidence that there was a trail of dirty liquid in the hallway that extended into the kitchen. Although Plaintiff's evidence required an inference that inference was logical, fit with the other facts and was uncontroverted with any logical factual evidence. Thus, it was reasonable to accept the inference and properly supported the jury's verdict.

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ENTERPRISE RENT-A-CAR of LA v. SUPERIOR COURT (GRIGORYAN)
2022 2DCA/4 California Court of Appeal,
No. B321016 (September 15, 2022)

RENTAL CAR PROVIDER WAS NOT NEGLIGENT IN RELYING ON RENTER'S FOREIGN DRIVER'S LICENSE AND LOCAL CALIFORNIA ADDRESS TO RENT CAR INVOLVED IN ACCIDENT

FACTS: In 2015, Donara Gigoryan was injured in a car accident that was caused by Izat Murataliev, who was driving a rental car. The vehicle had been rented by Harutyan Ajaryan from Enterprise Rent-A-Car, and Murataliev was listed as an additional authorized user. At the time of the rental, Ajaryan provided Enterprise with a facially valid driver's license from Kyrgyzstan and listed a local address in California as his residence.

Grigoryan sued Enterprise and Murataliev for negligence. The case against Enterprise was based upon a theory of negligent entrustment. Specifically, that they did not comply with Vehicle Code Section 14608, which states that a person shall not rent a motor vehicle to another person unless: the person to whom the vehicle is rented is licensed or is a nonresident who is licensed under the laws of the state or country of his or her residence and the person renting to another person has inspected the driver's license of the person to whom the vehicle is to be rented and compared either the signature thereon with that of the person to whom the vehicle is to be rented or the photograph thereon with the person to whom the vehicle is to be rented.

Enterprise filed a motion for summary judgment, arguing that the claimed failed as a matter of law because it had complied with Section 14608. Grigoryan opposed the motion, arguing that Murataliev was a resident of California and that the visual inspection of a foreign license did not satisfy the requirements of Section 14608. The court sided with Grigoryan and refused to grant summary judgment.

Enterprise filed a petition for writ to reverse the trial court's order denying their motion for summary judgment.

ISSUE: Does a rental car agency have a duty to inquire further when presented with a facially valid driver's license from another country and a local address?

RULING: A rental car agency has no duty under Vehicle Code 14608 to inquire into a person's length of stay in California. Thus a writ was granted directing the trial court to enter summary judgment on behalf of Enterprise.

REASONING: Enterprise cannot be, as a matter of law, held liable for negligent entrustment based upon a failure to inquire how long Murataliev lived in California at the time he presented to Enterprise with his foreign driver's license. Enterprise was not required to investigate whether Murataliev was still a resident of Krygyzstan since the courts have repeatedly declined to impose additional duties of investigation on rental car agencies. A rental car agency is entitled to rely on the prospective renter's presentation of a foreign driver's license.

Member Verdicts & Settlements

CCTLA members are invited to share their verdicts and settlements: Submit your article to Jill Telfer, editor of *The Litigator*, jtelfer@telferlaw.com. Submissions for the next issue need to be received by January 25, 2023.

VERDICT: $3.3 Million

CCTLA Past President John Demas and **CCTLA Member Brad Schultz** won a $3.3-million verdict for their 36-year-old client in a low-speed-impact motor vehicle collusion case that was aggressively defended by Stephen Robertson and Coelle Simmons of Hardy Erich & Brown. The defense took approximately 30 depositions, including every health care provider who was still alive who ever saw the plaintiff, and filed approximately 30 motions in limine before trial.

FACTS: Plaintiff was stopped at a red light when he was hit from behind by Defendant's 26-foot box truck. Defendant testified he was stopped about six to eight feet behind Plaintiff when he saw a couple of bees land on his leg. When he opened the door and swatted them out, his foot came off the brake, and he rolled forward and hit the back of Plaintiff's car at less than 5mph. There was some visible damage to the back of Plaintiff's car. The parties agreed that neither side would retain an accident reconstructionist and/or bio in exchange for agreeing to the admissibility of the photos taken at the scene. **Demas** and **Schultz** then filed a *motion in limine*, preventing defense counsel from arguing that there were not sufficient forces or a mechanism of injury from this collision. The first trial judge, who recused herself two days before the trial, ruled in Plaintiff's favor, but the trial judge who presided over the case, disagreed. There was no report of pain at the scene, and no emergency personnel or authorities were called.

INJURIES: Plaintiff went to his primary-care doctor the next day with minor complaints of neck and back pain and minimal N/T down R leg. Exam was 100% normal with no objective findings. He saw a chiropractor about a week later and said his low back and R leg N/t was worse. The chiropractor suspected a possible herniation and urged him to go back to primary and get an MRI. About three weeks post-incident, Plaintiff was walking to his car from work and felt his right leg give out. He went to the Emergency Room and was diagnosed with radiculopathy and told to follow up with his primary care MD. Next visit, his primary documented some decreased strength on the right leg and sent him for an urgent MRI.

MRI showed a large L5-S1 herniation compressing R L5 nerve root. He was referred to the spine clinic at UCD and he continued to show objective signs of weakness. He was prescribed steroids and told to get 12 PT visits. He only got two and went back to the spine clinic and chose to proceed with surgery.

He had a microdiscectomy three months after the incident. Treating surgeon noted "scar tissue" in the operation report. This became a big issue as defense and their experts seized on this as evidence of a long-standing pre-existing herniation that just was not symptomatic. Unfortunately, surgery did not help, and Plaintiff continued to have right leg radicular issues. All his complaints going forward were more leg-related than low back-related. Plaintiff continued to complain of leg issues, so a new MRI was done about eight months post-surgery. This MRI revealed no new pathology.

Other than some meds and a HEP, no real treatment took place for nearly a year, when he was referred to pain management and eventually received a spinal cord stimulator two and a half years post-crash. He did well with the stimulator, and he testified and records confirmed, he got 90% relief of all his symptoms for nearly two years, when he started developing some new right leg issues.

A new MRI (now nearly four years post-crash) revealed a new herniation. Surgeon wanted to do a two-level fusion but apparently could only get approval for one, so he fused L5-S1. Plaintiff started developing left side issues shortly thereafter, so he had another fusion that included L4-5. This took place nearly five years post-crash.

The surgeries did not do much to relieve Plaintiff's right leg symptoms, which continued. A few months before trial, his pain management doctor tried to install a dorsal root stimulator but could not attach the leads to the nerve root. By then, Plaintiff was on a whole host of medications and was eventually taken off work.

PRIORS: Plaintiff had a lot of prior low back treatment but nothing significant in the seven years before the wreck. In his mid-20s, he had some treatment with frequent complaints of 7-10 /10 pain. He had an MRI, referral to pain specialist, referral for an ESI, but never got one. Prior MRI was more L4/5. Defense called nearly every provider Plaintiff saw in his 20's to testify at trial, including multiple MDs, PT etc., They played up the "bad back" defense to the jury. Plaintiff had some prior lower leg N/T, but it was on the left side.

FOCUS GROUPS: The plaintiff's team did a live and online focus groups which **Demas** reports were valuable.

JURY SELECTION: Judy Rothschild assisted the plaintiff's team in picking the jury.

RETAINED EXPERTS:

Plaintiff: Dr. Ronnie Mimran, neurosurgeon; Dr. Jerome Barakos, neuroradiology; Carol Hyland, LCP ; Craig Enos, CPA
Defense: Dr. Eldan Eichbaum, neurosurgeon; Dr. Hoddick, neuroradiology; Nancy Michalski, billing; Dr. Leon Ensalada, pain management; Dr. Stephen Mann, LCP (not called); Eric Lietzow, CPA (not called)

VERDICT:

Past meds: The plaintiff's team requested and received

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$993,000. This was a major contention in trial and the subject of several *motions in limine*. Plaintiff was a member of a capitated health plan that paid UCD $125,000 for its services. UCD balanced billed for more than $1 million. The plaintiff's team argued the true number should be the reasonable and customary number, which expert Carol Hyland determined was $993,000. Defense argued that Howell applied and so Plaintiff should only be allowed to introduce evidence of the paid amount. The court ruled in Plaintiff's favor.

Past wage loss: $193,000
Future meds: $685,000
Future wage loss: $677,000
Past non-economic: $181,000
Future non-economic. $568,000

Total verdict: $3.3 million. **Demas** and **Schultz** served a nearly five-year-old CCP 998 offer for one million. The plaintiff's team had $300,000 in costs so the total amount of the judgment should be around $5.3 million. The policy limits were demanded several times. Defense offered $225,000, until the day before closing argument, they asked if there was any interest in a $1m/400k high/low. The suggestion was rejected.

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VERDICT: $2.3 Million

CCTLA member Kevin L. Elder and associate **Garrett M. Penney** received a of $2,280,961 jury verdict in Placer County Sept 22, 2022, against Defendant CEP America and its partner, Dan Nadler MD. The jury returned the verdict after four and a half hours, including $540,961 in past economic losses, $240,000 in past non-economic damages and $1,500,000 in future non-economic losses. The general damages will be reduced to $250,000 per MICRA, leaving a net verdict of $790,000, plus prevailing party costs of several hundred thousand dollars.

FACTS: Plaintiff Austin Wentworth was 24 and at home during the late morning of March 11, 2015, when he suddenly developed pain and bilateral tingling and numbness in his lower extremities, left greater than right, below his knees without acute trauma. His fiancé drove him to the Emergency Room at Sutter Roseville Medical Center barefoot in gym shorts (without shoes, socks or flip flops) due to the perceived medical emergency.

Plaintiff was seen within 10 minutes by the triage team of T. Chambers PA and a Sutter nurse. He reported that he was an elite athlete in the NFL, playing under contract with the Minnesota Vikings as an offensive lineman. He had not played football in more than three months and had not lifted weights in more than five days. There had been no trauma. MRIs of the full spine were ordered. He was roomed about one and a half hours after presenting to the ER, which was followed by a nursing assessment and Dr. Nadler's initial exam.

Morphine was Rx'd for pain noted to be a 7-8. Foot and ankle pulses were reportedly normal, although there was documentation of "questionable" pulses. A handheld doppler was not used or considered. Dr. Nadler followed the direction of the triage team, suspecting a neurologic spine disorder, and the plan remained for MR imaging of the spine when the machine was available. Plaintiff and his fiancé waited for more than four and a half hours from presentation to the emergency department for imaging.

At about 5:15pm, as Plaintiff was being wheeled out to MR Imaging, his father complained to Dr. Nadler that his son remained in tremendous pain and asked if more medication could be given in light of the two-hour procedure for imaging. Dr. Nadler and hospital staff suddenly realized that Plaintiff's problem may have been vascular in nature. A handheld doppler was used, revealing absent pulses in his lower extremities. A CTA was ordered, and ultimately, bilateral emboli were found in his femoral arteries. Vascular surgery was consulted more than seven hours after Plaintiff presented to the hospital. He was taken to OR, and three surgeons worked side by side to perform bilateral embolectomies and fasciotomies. ICU for 10 days and discharge two weeks later. A total of five surgeries, including debridement. Plaintiff was left with left foot drop and loss of muscle/tendon, causing significant ambulation problems. He could not return to play football for the Vikings.

The cause of the emboli was found to be a fibroma in Plaintiff's heart. Clot had built up around the fibroma and finally dislodged traveling down the aorta where it split in two at the bifurcation (saddle) and then became stuck in each femoral artery of the lower legs. Defendants' vascular expert, Marc Levine, described the emboli as similar to a piece of "jerky" that after hours of resting on the aorta saddle "cleaved" and then traveled down the legs. His story was unbelievable.

In July 2015, Plaintiff was referred to the Mayo clinic by the Minnesota Vikings for a second opinion to confirm the fibroma as the cause of the emboli. He immediately underwent open-heart surgery to remove the fibroma. No complications. He was placed on blood thinners for six months post-surgery and cleared of all restrictions.

However, although his cardiovascular condition was resolved, he remained without muscle strength in his left leg and drop foot, both of which precluded him from returning to football. He was under contract with the Vikings for three years. Had his vascular condition been timely recognized, he would not have lost his motor strength in his lower left leg. Because of his open-heart surgery in July 2015, he would have had to sit out the 2015 season. George Paton, assistant general manager for the Vikings at the time, testified that it was "likely" Plaintiff would have returned to the team and made the 53-man roster, assuming a number of facts, all of which were undisputed in this last trial. He could not play during the 2016 season, which would have earned him $540,000 net, without benefits. Plaintiff did not claim loss of income other than for this single remaining year under his contract.

The complaint was filed on June 9, 2016, with the blessing of Dr. Robert Suter, an emergency medicine physician practicing out of Texas and Oklahoma. Dr. Suter made an excellent witness as his background includes the US Army Medical

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Member Verdicts & Settlements

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Corps where his current rank is brigadier general. The complaint included Sutter Roseville and T. Chambers PA for their part in the delay to diagnose. Sutter was represented by Jonathon Corr, of Porter Scott. Experts were retained by all sides (13 total), and the case tried before a jury in December of 2021, spilling over into January of 2022. Plaintiff rested before Christmas, and 10 dark court days followed, with the defense given a fresh start the first week of January 2022.

Three alternate jurors had been selected, for a total of 15 jurors. Four jurors were lost due to Covid. Eleven remained for closing arguments. The parties agreed to close with 11 jurors. The defense refused Plaintiff's request to drop the majority from nine to eight with only 11 total. During deliberations, one of the 11 jurors had to quarantine in her home, available by phone audio only. The jury returned after a few hours, finding both defendant Sutter and T. Chambers free of negligence. They were, however, deadlocked on whether Dr. Nadler was negligent, eight against him and three in favor. The jury remained out deliberating, and after three days, declared they could not reach a majority of nine. Yelling amongst the jurors was overheard as they tried to reach a verdict to no avail.

A mistrial was declared, and the case set for another jury trial to commence on September 6. A demand was made by plaintiff for Dr. Nadler's policy limits of 1M in early summer. No response was given. It remains unknown if the decision to try this case again to the jury was Dr. Nadler's by refusing to consent or his insurance carrier, the Mutual, with his consent. Plaintiff served a CCP 998 offer to compromise on defendant Dr. Nadler in the amount of $349,999 on December 30, 2019. Dr. Nadler served a 998 for a waiver of costs.

The jury did not appear to like Defendant's expert,David Barnes MD (emergency medicine), UCDMC, who has been retained 63 times on behalf of the defense and just recently a single time by Plaintiff's counsel. He admits that ER pPhysicians are "loathe" to testify against one another in California and that is the reason he only does defense work. Incredible.

Plaintiffs' causation expert, Dr. Gerald Treiman, described vascular medicine in a very simple terms for the jury. The ABCs of medicine include circulation and confirming the presence of pulses before a vascular concern can be ruled out. Dr. Mathew Budoff, cardiology, out of UCLA provided testimony that Plaintiff did not have any cardiovascular limitations to returning to the NFL. He was well liked by the jury. Dr. Eric Giza provided testimony relative to Plaintiff's current condition and limitations. Finally, Craig Enos shared his economic perspective with the jury with reference to the NFL and the collective bargaining agreement identifying the lost earnings.

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SETTLEMENT: $2 Million

CCTLA member Katrina Saleen earned a $2,000,000 policy limit defamation settlement for her clients, the CEO/ founder of a venture capital firm based in San Jose and the venture capital firm itself. The company specialized in getting large investments, mostly from Japanese corporations, and investing the funds, mostly in Bay Area startups.

FACTS: In 2017, an anonymous blog was posted on a Japanese blog site called Hatena. It showed a picture of a young Japanese woman looking away. The title roughly translated to, "I was sexually taken advantage of by a Silicon Valley VC" and was told as a firsthand account of a woman sexually harassed by a Silicon Valley VC who spoke Japanese, but was not Japanese, and was dark-skinned. The article also mentioned that the company had a large upcoming event, and it was posted a few weeks before the clients' largest event of the year, their Start Up World Cup global contest. The article never mentioned the man or the company's name, but because the niche area of venture capital firms based in Silicon Valley that get funding from Japan is so limited, only the clients matched the description. The other CEOs in this niche community were all Japanese or Caucasian, and the client is neither, but speaks Japanese and has dark skin.

The article was shared and spread quickly on social media, leading the clients to make online posts denouncing the blog article. A few days later, the article was taken down. However, the reputational damage had already been done. The clients lost investment deals that had been in the works. This was 2017, and the "Me Too" movement was just really hitting its stride. No one wanted to be connected to a sexual harassment scandal.

A lawyer in Japan obtained an order for Hatena to release the IP address of the poster of the blog article. Publicly available online search sites indicated that the IP address was a Comcast IP address from Daly City, CA. Saleen filed a defamation lawsuit in San Mateo County Superior Court against John Doe, and obtained an order allowing her to subpoena Comcast for the user information connected to the IP address. It came back with a direct hit. The Comcast subpoena response showed that the IP address user belonged to a man named Brandon Hill, who knew the clients and also worked in the Japan-Silicon Valley venture capital community as a consultant/marketer. Hill's company had its own startup competition event called Japan Night, which never became as large or successful as Saleen's client's Start Up World Cup. In addition, Hill had connections to Japanese competitors of her client.

However, Hill vehemently denied writing the post or knowing who did. He told the clients, all the employees of his business in a company-wide email, and the press that he did not author the post. This included denials in sworn discovery responses. He claimed that he often had social get togethers at his home and that he regularly gave out his home wi-fi password to his guests. He argued that someone must have used his wi-fi password from outside his home to post the blog, and that he had no part of it, nor knew who did.

For the first two years of litigation, Saleen fought hard to pin the article on Hill. One significant hurdle was that she could not compel any representative of Hatena to testify because of the treaty between Japan and the United States. So she had the information produced by Hatena showing that the blog article

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was posted from a certain IP address, but she had no witness to be able to lay the foundation to enter it into evidence for trial. Saleen was successful in a motion to compel a search of the defendant's devices, which did not lead to hard evidence showing he posted the blog, but it did lead to two incriminating discoveries. First, it was discovered that he had "returned" his work laptop to the Apple store after having an employee wipe its memory. Also, his sworn statement that he had "discarded" his router was false, and he in fact still had it.

Eventually, Saleen got a representative from Hatena to agree to be deposed voluntarily at the US consulate in Japan, and as she were taking steps to move that deposition forward, Hill eventually agreed to stipulate to the fact that the IP address used to post the blog was his IP address, though he still denied making the post. Hill's deposition had been postponed several times over the course of the litigation. When his deposition finally took place in late 2019, Saleen sat at the conference room table with loads of exhibits in the hopes of connecting technical dots and showing that it had to have been Brandon who made the post.

However, a few minutes into questioning:

10:28:03 19 MS. SALEEN: Q. When was the first time that you
10:28:31 20 saw the blog article that's contained in Exhibit 1?
10:28:36 21 A. September -- March 11th, 2017.
10:28:45 22 Q. And tell me about the first time you saw the blog
10:28:49 23 article.
10:28:49 24 A. I saw the article on my computer.
10:28:54 25 Q. Where were you?
10:28:55 1 A. My house.
10:28:56 2 Q. What time of day was it when you saw the blog
10:29:02 3 article for the first time?
10:29:03 4 A. The morning time.
10:29:06 5 Q. Do you recall what time in the morning?
10:29:08 6 A. I do not.
10:29:08 7 Q. How did you come to find the blog article on your
10:29:17 8 computer at home?
10:29:18 9 A. 'Cause I wrote the article.

Hill now admitted he had lied about writing the article, but he tried to argue that he lied because he was afraid of the clients. He tried to argue that the article was made to protect women's rights and stop sexual harassment. He argued that what he said was true based on things told to him by two Japanese women.

The problem for him with this story was that one of these woman said at deposition that she was never sexually harassed and had never received any sexual advances from my client. The second woman was in Japan. Hill admitted at his deposition that he had deleted all his communications with the second woman after finding out about the lawsuit. He argued that this was done to protect her.

DAMAGES: Plaintiffs argued three large deals were lost because of the blog, but proving economic damages was not simple because Plaintiffs had to proving causation. Two of the deals involved investors who did not want to be involved. The third was a witness from a Japanese corporation that would have invested upwards of $20 million for Saleen's client to manage, but for the blog. He agreed to testify in person at trial and was not deposed.

Plaintiff also had to show that the damages were not speculative. The plaintiff company makes money by earning a management fee for managing the invested funds, plus earning an additional split of profits that are made through the invested funds. The Plaintiff's economist had to project what the likely return on those investments would have grown to over a 10-year investment term, thereby showing the profit plaintiffs would have lost.

In 2020, Saleen brought a motion for sanctions against Brandon for discovery abuse and for admittedly lying in sworn responses. Her clients were awarded $50,000 in sanctions. She immediately moved to take Hill's debtors exam. In order to avoid going through with the debtors' exam, in exchange for a brief extension on his time to get money to pay the sanctions, Hill stipulated to allow the damages witness from Japan to testify by video if his ability to testify in person was impaired due to Covid-restrictions. The stipulation was confirmed by order of the court.

Fast forward through multiple continuances, and it became impossible for the damages witness from Japan to travel to California to testify because he is unvaccinated and not allowed entrance. The defense argued that the stipulation for video testimony could not be enforced because the defendant could not have agreed to the stipulation even if he wanted to because the treaty between Japan and the United States does not allow for someone in Japan to provide remote video testimony for a trial in the U.S. The trial court judge granted the order allowing the witness to testify by video from Japan. The defense then filed a writ, to which Saleen filed a preliminary opposition the Friday afternoon before the pretrial conference. That Friday night, the defense accepted a policy limit demand in the amount of $2 million which was set to expire the following Monday.

Issues for Defamation that Would Have Been at Play At Trial

1. Private Person v. Public Figure / Limited-Purpose Public Figure Standards and Proving Readers

If you are a "private person," you only have to show the defendant was negligent ("failed to use reasonable care to determine the truth or falsity of the statement") by a preponderance of the evidence standard. But, if you are a public figure or a limited-purpose public figure, you must prove by clear and convincing evidence that the defendant knew the statement was false or had serious doubts about the truth of the statement.

Saleen argued that the clients were private parties, but this was a bit of a challenge because she also had to show that people reasonably understood that the blog article was about the plaintiffs, even though the article did not mention them by

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Verdicts & Settlements

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name. They had to be well-known enough for the jury to believe that their reputation was harmed by the article but not well-known enough to be a true celebrity. The clients held worldwide global contests, and the founder authored multiple books and had given many media interviews, particularly in Japan. However, to be a limited-purpose public figure for the purposes of defamation, you have to have thrust yourself into a controversy that is the topic of the defamation. Saleen argued there was no actual controversy for the plaintiffs to have thrust themselves into because the story was a fictional hit piece by a competitor, and no sexual harassment controversy actually took place. Also, though well-known in his field, he was not famous to everyone, and so not an all-purpose public figure.

2. Substantial Truth

Hill was going to argue that even though the article was written as a firsthand account of a woman sexually harassed by the clients, that he reasonably believed that his statements were "substantially true" and the fact that the story was told in first-person as if by an actual victim did not change their believed "substantial truth."

3. Blaming the Plaintiffs - Law Protects Compelled Self-Publication

The defense also argued that the plaintiffs caused their own damage by posting online statements about the blog which caused it to gather more attention and caused people to think the article was about them. However, the originator of the defamatory statement is not liable for damages caused by the disclosure of the contents of the defamatory statement by the person defamed where such disclosure is the natural and probable consequence of the originator's actions. Here, the clients were defending themselves online, which was a natural and probable consequence of Hill's actions in posting the article online.

Settlement

Prior to acceptance of the policy limits demand, the highest monetary offer from Defendant had been $27,500 in late 2021.

Award Nominees

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expert investigations, the attorneys found a defect in the gas pedal and adjacent parking brake bracket that could cause the gas pedal arm to entrap on the brake bracket, inducing sudden unintended acceleration. Nissan documented dozens of reports of such accelerations, but because the pedal arm dislodged once the driver pushed the gas pedal, Nissan missed the defect, ignored the reports, and blamed the operators, including Jose. Despite Nissan's parade of experts and $5 million in defense costs, the trial court found Nissan liable under Consumer Expectation, Risk Benefit, and Negligence.

The attorneys fought Nissan's losing appeals for another three years before Nissan paid the verdict. The attorneys were especially motivated by Nissan's attempts to limit Jose's economic damages to what his income and medical costs would be in Mexico, his native country. Bob Bale raised the issue to Asm. Lorena Gonzalez at a CAOC board meeting regarding a proposed new evidence code excluding this ancient, unfair practice. CAOC took on this fight and sponsored legislation, and Noemi Esparza championed the code by testifying before the Legislature to support the bill that Gonzalez authored.

Evidence Code Section 351.2 became law on January 1, 2017, to the future benefit of literally millions of California residents.

Rice and Donahue v. City of Roy and Johnson
Christopher B. Dolan and Jeremy M. Jessup

JUSTICE IN THE NICK OF TIME FOR TWO MEN SHOT IN A POLICE AMBUSH

It snowed heavily in the city of Roy, a one-stoplight town in rural Washington State, when David Rice and his nephew, Seth Donahue, decided to "tear it up" in their unlicensed, enclosed cab (UTV) during an afternoon of drinking in February 2019. After dark, they went to a few more bars and took the railroad tracks into Roy, drifting through stop signs past Officer Chris Johnson. He turned on his lights and chased Rice and Donahue for a few laps because they were unaware of the pursuit, since the UTV has no mirrors and engine noise. They got back onto the tracks where officer Johnson couldn't follow, but Johnson managed to race down to a parallel road, turned off his lights and hid behind a tree on an intersecting street.

When Rice and Donahue arrived, officer Johnson ambushed them by activating his spotlight, drew his weapon and pointed directly in front of the UTV to stop it. Blinded by the light, Rice and Donahue couldn't see or hear Officer Johnson. Johnson, claiming he was in fear for his life, fired two shots at close range through a windshield into Rice's shoulder and groin, and two more shots through the passenger window, injuring Donahue's wrist.

Four days before trial, Dolan and Jessup both agreed to step in and try the case in a federal court in Tacoma. Upon arrival, they were shocked to learn that plaintiffs', defendants' and experts' depositions were not ordered. As depositions trickled in, they worked around the clock for three weeks, winning the excessive use of force claim and achieving the highest non-fatal police shooting verdict in Washington State, along with a commitment to provide training and enforcement to protect citizens from excessive force.

Avoiding the Dangers of the Defense Medical Examination

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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 or Alla Vorobets at allavorobets00@gmail.com

Thursday, December 8
Annual Meeting & Holiday Reception
5:30 to 7:30 p.m.
The Sutter Club, 1220 9th St, Sacramento

Tuesday, December 13
Q & A Problem Solving Lunch
Noon - CCTLA Members Only - ZOOM

2023
Tuesday, January 10
Q & A Problem Solving Lunch
Noon - CCTLA Members Only - ZOOM

Wednesday, January 25
40th Annual Tort & Trial Program:
2022 in Review Webinar

Tuesday, February 14
Q & A Problem Solving Lunch
Noon - CCTLA Members Only - ZOOM

CCTLA Calendar of Events