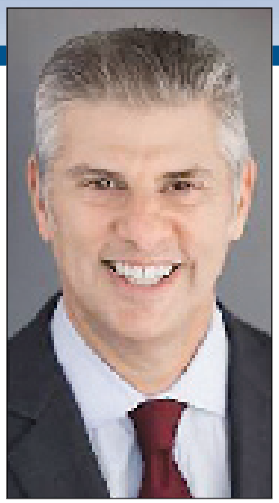
Fall 2022

The LITIGATOR

Volume XIX Official Publication of the Capitol City Trial Lawyers Association Issue 3

Inside

Fun on the horizon, but don't let your guard down



David Rosenthal
CCTLA President

Time flies when you are having fun, and serving as president of CCTLA this year has been no exception. It has been a pleasure working with a great group of board members while we transition back into normal activities, even as COVID won't seem to die. The board has been hard at work on two big upcoming CCTLA events, the Fall Fling in September and the Holiday Reception in December.

The "Fall Fling" is on Thursday, Sept. 22, at Chris Wood's home, also known as the Lady Bird House back in the fabulous 40's. We have had many sponsors step up with donations approaching $50,000 to date, but leaving us well short of the $130,000 raised for the Sacramento Food Bank in 2019. While a drop off is to be expected after the COVID interruption, we are hoping for a final push to increase donations in the next couple of months. Sponsorships at varying levels are available for as little as $1,000 up to $10,000, and come with name recognition, admission to the event and other perks. We also need auction items.

Please sponsor if you can, or if you can't sponsor yourself, contact a vendor or two who you think might want to make a tax-deductible donation to a worthy cause and attend a fun social event with 100-150 potential customers. Please donate what you can and plan on attending!

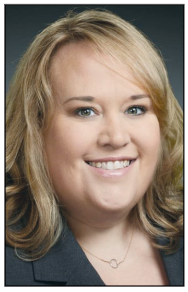
This year's Holiday Reception will take place on Dec. 8 at The Sutter Club at 1220 9th Street in Sacramento. This is an exciting new venue that promises to add some panache to this year's event. As usual, we will present the year-end awards, including Advocate of the Year and Judge of the Year, while we mingle with our colleagues to celebrate the year end and holiday season.

In addition to the lingering pandemic, we continue to be assaulted by drought, fires, inflation, a war, monkeypox and now, the United States Supreme Court. With the recent Supreme Court decision in *Dobbs v. Jackson Women's Health*, I personally feel like we have reached the lowest point in constitutional jurisprudence in my lifetime. Decisions like Roe viewed the Constitution as a living document that protected individual rights rooted in the due process and equal protection clauses of the 14th Amendment, and were an impetus for my interest in the law.

The recent shift in the make up of the justices and the adherence to so-called "originalism" is, in my view, a judicial regression spurred by reactionary political views. If Justice Thomas has his way, we can all look forward to "reconsideration" of past rulings protecting the right to contraception, same-sex relationships and same-

Continued on page 4

NOTABLE CITES



By: Marti Taylor and Daniel Glass

In case you missed it…….

Welcome to a new, albeit recycled, series in CCTLA's *The Litigator*. Longtime readers will be familiar with the "Mike's Cites" column. For many years, veteran CCTLA member Mike Jansen authored "Mike's Cites," providing a summary of recent case law relevant to plaintiff's lawyers for membership review. After his years of dedicated service to the legal profession and to *The Litigator*, Mike has retired, and we wish him well.

Stepping in will be CCTLA board members Marti Taylor, of Wilcoxen Callaham LLP, and Daniel Glass, Law Office of Daniel S. Glass, who explain:

Our goal here is to provide you with a brief summary of cases—recent decisions published during the months between Litigator issues that we find applicable to CCTLA's membership. We will present both the good news and the bad news.

Enjoy our reviews and, if they seem applicable to your situation, get the actual decision, read the full decision and cite the published decision.

Although we will be diligent and truthful in our reviews, we certainly are NOT "citable" authority. Thanks for being a CCTLA member.

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Jane Doe No. 1 v. Uber Technologies, Inc.
2022 2DCA/1 California Court of Appeal,
No. B310131 (June 1, 2022)

Ride Share Companties Do Not Have A Duty To Protect Passengers Who Are Injured By Assailants Posing As Uber Drivers Based On A Common Carrier-passenger Special Relationship

FACTS: Three women (Jane Does) were abducted and sexually assaulted by assailants posing as Uber drivers. The imposter Uber drivers lured the unsuspecting women into their vehicles by posing as authorized Uber drivers. The assailants were not Uber drivers and not affiliated with Uber in any manner. The assailants procured Uber decals from the Uber website and attached them to their vehicles to pass themselves off as legitimate Uber drivers.

All three women filed suit against Uber Technologies, Inc., arguing that Uber's business model leant itself to "the fake Uber scheme." The complaint alleged that the Uber business model created the risk that criminals would employ this scheme and that Uber failed to protect potential victims from it.

Plaintiffs also alleged that Uber negligently failed to warn the Jane Does about the fake Uber scheme, failed to implement additional safety precautions to protect them against third parties employing the fake Uber scheme, and concealed instances of sexual assault via the fake Uber scheme while they continued to advertise Uber as a safe means of transportation for women.

Uber demurred. The trial court sustained without leave to amend and dismissed the complaint with prejudice.

ISSUE: Is there a special relationship between ride share operators and their passengers that creates a duty to protect them from assaults by third parties who were able to pose as Uber drivers?

RULING: The trial court's granting of Uber's demurrer without leave to amend and dismissed the complaint with prejudice was affirmed.

REASONING: Uber entities were not in a special relationship with the Jane Does that would give rise to a duty to protect the Jane Does against third party assaults, or to warn them about the same. The complaint did not allege actionable nonfeasance nor actionable misfeasance, because the Uber entities' actions did not create the risk that criminals would take advantage of the existence of the Uber app to abduct and rape women trying to use it. Although it is foreseeable that third parties could abuse the platform in this way, such crime must be a "necessary component" of the Uber app or the Uber entities' actions in order for

Continued on page 41

Opening The Insurance Policy

By: Ognian Gavrilov and Michael Coleman

Ognian Gavrilov, of Gavrilov & Brooks, is a CCTLA Board Member

Michael Coleman also is associated with Gavrilov & Brooks

When an insurance carrier unreasonably refuses to settle a case on behalf of its insured tortfeasor, the carrier has "opened" the policy and is exposed to liability in excess of the policy limits.

For some reason, "opening" the tortfeasor's insurance policy is one of the most misunderstood and overlooked nuances of personal injury law. Attorneys representing plaintiffs and defendants seem to underestimate the impact opening an insurance policy can have on influencing the outcome of a case. For the plaintiff, it can mean an actual recovery beyond inadequate policy limits. For the defendant, it can mean unexpected liability far in excess of the policy limits.

Many cases settle for inadequate sums because the plaintiff's attorney either does not know how to open the policy at the outset of the case, or does not realize the policy is already open and understand how to exploit the opportunity before settling. Over the course of the last several years, the attorneys at Gavrilov & Brooks have opened dozens of insurance policies at mediation and trial, much to the surprise of the unsuspecting defense attorneys on the other side.

So how does one open an insurance policy and obtain a full and adequate recovery for their client? The answer lies in the nuanced dips and turns of insurance bad-faith jurisprudence.

As we all know, there is an implied covenant of good faith and fair dealing in every contract that neither party will do anything to prevent the other from receiving the benefits of the agreement. In 1958, the California Supreme Court in *Comunale v. Traders & General Ins. Co.* confirmed that "[t]his principle is applicable to policies of insurance." That the implied covenant of good faith and fair dealing applies to insurance policies cannot be understated. "When there is a great risk of a recovery beyond the policy limits so that the most reasonable manner of disposing of the claim is a settlement which can be made within those limits, a consideration of the insured's interest requires the insurer to settle the claim." *Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 659. This duty can attach at the outset of the case.

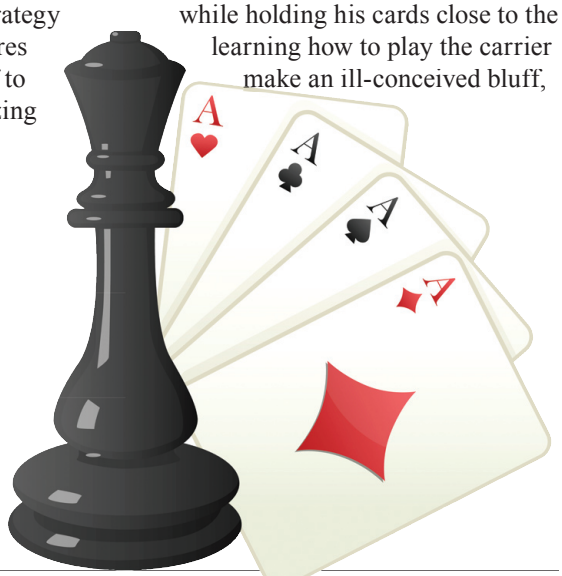
When there is any evidence or circumstance demonstrating the carrier knew or should have known settlement within policy limits was feasible, the carrier has a duty to pursue a reasonable settlement. "Where the potential value of the claim is large in relation to the policy limit, [and] where the claimant's case is comparatively strong and the potential defendant's weak, rejection of an initial offer to settle at or near the policy limit may then and there constitute a breach of the implied covenant of good faith." *Madrigal v. Allstate Insurance Company* (2016 C.D. Cal.) 215 F. Supp.3d 870, 889.

When there is any evidence or circumstance demonstrating the carrier knew or should have known settlement within policy limits was feasible, the carrier has a duty to pursue a reasonable settlement . . . Where the carrier breaches this duty, it has "opened" the policy, and the carrier is exposed to liability on a policy without limits.

Where the carrier breaches this duty, it has "opened" the policy, and the carrier is exposed to liability on a policy without limits.

While they will never admit it, insurance carriers are often strategic gamblers. They gamble–often to the detriment of their insureds–that the plaintiff will not be able to obtain a judgment at or near the policy limits. They gamble that even if the plaintiff obtains a final judgment at or near policy limits, the plaintiff's attorney will not understand how to open the policy. And they gamble that the insured will never fully understand the scope of the duty the carrier owes, or the consequences of its breach.

Opening an insurance policy requires application of clinical tactics and an understanding of the factual and legal nuances of each specific case. In essence, opening the policy is a hybrid game of chess and poker. It requires the practitioner to utilize long-term strategy while holding his cards close to the vest. It requires learning how to play the carrier against itself to make an ill-conceived bluff, and then seizing the moment to obtain the payout the plaintiff deserves.



In essence, opening the policy is a hybrid game of chess and poker. It requires the practitioner to utilize long-term strategy while holding his cards close to the vest.

From page one: Don't let your guard down

sex marriage. Meanwhile, the ability to regulate gun ownership will be virtually non-existent, no matter how much violence occurs because of the sacrosanct right to bear arms.

Speaking of wars, while we have dodged the fee-cap initiative sponsored by the Civil Justice Association of California (CJAC) for this year's ballot, it appears there will be renewed effort to get the initiative on the ballot for 2024. You wll recall that the initiative would cap all contingency fees at 20% for attorneys representing plaintiffs.

Such radical interference with the right to contract will obviously have a dramatic impact on the ability of consumer attorneys to represent deserving clients, to obtain justice and to earn a living.

CJAC's outgoing president promised that CJAC would pursue the initiative again in 2024, and her replacement, Thomas Lawson, an executive at Ford Motor Company, is a huge proponent of tort reform. For those who feel that a fee cap is implausible, recall that in 1996 voters approved the passage of Proposition 213. That proposition was bundled with other tort reform initiatives that included a fee-cap provision. While the fee cap initiative did not pass, it was preceded by a barrage of campaign ads on radio and TV, attacking personal injury lawyers. Even with millions of dollars spent by consumer organizations to oppose the initiatives, defeat was not assured until all of the votes were counted on election night.

Rest assured that CJAC's fee-cap initiative will bring with it a similar battle against the deep pockets of auto manufacturers, big tobacco and other large corporate interests, except this time around they will be reaching millions more people through the Internet and social media. It will take a monumental effort by the plaintiff's bar and consumer organizations to defeat this attack.

The effort to defeat tort reform requires contributions from every CCTLA member, whether you are a member of a big firm or a solo practitioner; everyone who reaps the benefits of our freedom to contract with clients to achieve justice must share in the burden of trying to win the war against those who would take that right away.

The battle starts now and will continue until the initiative is defeated. CAOC is leading the effort on our behalf. Please donate now to the best of your ability and continue to fund the effort as you can: www.caoc.org/pac.

We hope to see you at our Fall Fling in September. In the meantime, stay healthy, and let's be careful out there.

Medi-Cal Asset Limits Have Increased . . . Finally!

Amar Shergill, Shergill Law Firm, is a CCTLA Board Member

By: Amar Shergill

For as long as I have been a practicing attorney, I have worried about the net value of getting good, but not huge, settlements for Medi-Cal recipients. A settlement that yields more than the $2,000 individual asset limit or $3,000 per couple asset limit renders our clients ineligible for Medi-Cal, effectively eliminating access to affordable healthcare. To counter that, the client would need to spend thousands of dollars to establish a trust that protects Medi-Cal eligibility but also restricts how funds can be used. Those worries have ceased for most personal injury cases.

As of July 1, 2022, the asset limit for Medi-Cal recipients substantially increased thanks to Assembly Bill 133. The new limit is $130,000 for one person or $195,000 for a couple and, on Jan. 1, 2024, the limit will be eliminated altogether. This change, the first since 1989, allows tens of thousands more Californians to access healthcare without having to drain their bank accounts and assets first.

For personal injury attorneys, it means more clients who have access to care, and it means that the vast majority of Medi-Cal recipients will not need a trust to protect their benefits.

With almost one in three Californians receiving Medi-Cal benefits, this reform is an important step towards the goal of providing healthcare for all Californians. It also makes life a lot less complicated for benefit recipients who are involved in motor vehicle collisions. The new limits enable low-wage earners, the elderly and the disabled to save for the future or pursue personal injury litigation without the need to remain close to destitute in order to receive benefits. No Californian should have to choose between justice and affordable medical care; now many more won't have to.

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.

HOW CAN YOU PROTECT YOURSELF & YOUR CASES . . .

. . . from being canceled off a court reporter's calendar; or worse yet, you have a trial date, but you can't find a court reporter to report the proceedings?

#1) Court proceedings are hard set, usually a long time in advance. Schedule your reporter as soon as you have a calendared date, assuring you will be covered.

#2) Videographers are in high demand, also. If you need your proceedings videotaped, make sure you do it in advance. Scheduling the week before or the day before will leave you without a videographer, as we have experienced.

#3) In 40-plus years in court reporting, we have never had to say "NO" to so many clients, old and new. Now we are scheduling the calendar out a month in advance or more, to make sure we can cover your legal needs.

BE DILIGENT: Make sure the reporter on the "remote" screen is a California-Certified Shorthand Reporter. Make sure this is a REAL court reporter, not just a videotape represented as a "digital reporter." Some out-of-state foreign corporations are using out-of-state reporters to cover your California work, unbeknownst to you, and not certified in our state and not following our court reporting requirements/laws.

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

Diversifying California's Courts

In 2022, Courts in Sacramento are Diversifying to Reflect the Underrepresented LGBTQ+ in Our Commmunity

Jill Telfer,
Telfer Law Office
is the editor of
the Litigator
and a CCTLA
past president

By: Jill Telfer

President Joe Biden's nomination of Judge Daniel Calabretta to the federal bench, the elevation of Justice Laurie M. Earl to California's Third District Court of Appeal and the appointment of Judge Andi Mudryk to the Sacramento Superior Court reflect the commitment of California to diversify the judiciary to reflect the LGBTQ+ community which has been underrepresented.

"It is essential for the judiciary to reflect the communities that it serves," stated the LGBTQ law group, Lambda Legal. "Not because it guarantees a particular outcome in a particular case, but because it helps to ensure that all who walk through the courthouse doors will be treated with dignity and view the court's decisions with legitimacy, because they will see themselves represented in the institution. This is particularly important for LGBTQ+ people, as there is overwhelming evidence of bias by the courts towards these communities."

JUDGE DANIEL CALABRETTA

JUDGE DANIEL CALABRETTA

Friday, July 29, President Biden announced his nomination of Sacramento Superior Court Judge Daniel Calabretta to a seat on the U.S. District Court for the Eastern District of California. If confirmed, Calabretta would be the first openly LGBTQ judge to serve on the federal district court.

Calabretta graduated from the University of Chicago Law School in 2003, and in that year, he began clerking for U.S. Circuit Judge William Fletcher, who serves on the U.S. Court of Appeals for the Ninth Circuit. From 2004-2005, he served as a law clerk for the late U.S. Supreme Court Justice John Paul Stevens. Between 2005 and 2008, Calabretta was an associate at the California law firm Munger, Tolles and Olson, LLP. From 2008 to 2013, he served as deputy attorney general in the California Department of Justice. In late 2018, then-California Gov. Jerry Brown named Calabretta, Brown's his deputy legal affairs secretary, to the Superior Court of Sacramento County.

JUSTICE LAURIE EARL

JUSTICE LAURIE M. EARL

With her confirmation to the state's 3rd District Court of Appeal, Justice Laurie M. Earl is now the fifth LGBTQ person serving on one of California's six appellate courts and the first on the 3rd District court bench in Sacramento. She was unanimously confirmed to the appellate bench and took her oath of office early this year.

California Supreme Court Chief Justice Tani Cantil-Sakauye and Attorney General Rob Bonta voted to confirm Earl. The State Bar Commission on Judicial Nominees Evaluation last February had evaluated Earl and found her to be "exceptionally well qualified" to serve on the appellate bench. Sacramento County Superior Court Presiding Judge Michael Bowman said of his colleague, "She will make an excellent justice; she already is an excellent

Continued to page 10

Diversifying California's Courts

Continued from page 9

judge. More importantly, she is an excellent person. She is kind, considerate and helped raise a wonderful family."

Earl, who brings the number of out women on the state appellate court bench to three, took note of the "historic nature" of her confirmation while adding she looks forward to when someone's "being the first," whether due to their ethnicity or sexual orientation, is no longer be a main focus, but rather a secondary mention, because such firsts "had been exhausted."

She graduated from UC Berkeley, then she earned her law degree at Lincoln Law School in Sacramento. In 1989, she joined the Sacramento County Public Defender's office as an assistant public defender. Between 1995 and 2004, she was a deputy district attorney in the Sacramento County District Attorney's office, where, due to her time as a public defender, Earl said that as a prosecutor she was able to recognize that it was "a person on the other side" of the courtroom and not "a bad guy."

Since 2005, she has served on the Sacramento County Superior Court, where she has also served as presiding judge. Prior to her judicial appointment by then-governor Arnold Schwarzenegger, she served roughly a year as a senior assistant inspector general at the Sacramento County Office of Inspector General.

She lives in Sacramento with her partner of nearly three decades. The couple married in 2008 and have two adult sons: Josh, 25, is in law school in Portland, and Sam, 22, is in college in San Francisco and working at a vintage clothing store in the Haight.

JUDGE ANDI MUDRYK

JUDGE ANDI MUDRYK

One of California's eight newest judges is the first openly transgender person to be appointed to the bench in Sacramento. Honorable Andi Mudryk, now serves as a Sacramento County Superior Court judge, filling the vacancy created by the retirement of Judge Benjamin Davidian. She is the second openly transgender judge in California.

Mudryk, who has lived in Sacramento since 2009, said she is proud to serve the community and pledged to use her experiences to ensure that everyone who appears before her is welcome in the court system. She said it was her experiences as a transgender woman, a person with a significant disability, the parent of an adult Black man and the descendant of Jewish Holocaust survivors that spurred a legal career spent advocating for the civil rights of all people.

Mudryk earned her law degree from George Washington University Law School in 1989 and spent the first part of her legal career in private practice, including nearly 11 years with Disability Rights California, where she served as managing attorney, director of litigation and deputy director. She also served as director of litigation and advocacy at the Arizona Center for Disability Law from 2002 to 2006.

She served as director of litigation and policy advocacy at Neighborhood Legal Services of Los Angeles County from 2017 to 2018 and executive director at Disability Rights Advocates in 2017. In 2018, Mudryk joined the California Department of Rehabilitation, becoming its chief counsel until 2020, when she was promoted to be the department's chief deputy director.

Leah Wilson, executive director of the State Bar of California, said in a statement. "The values of diversity, equity and inclusion are fundamental to the State Bar's mission, and I thank our Commission on Judicial Nominees Evaluation for their important work, and I applaud Gov. Newsom on his commitment to a diverse judiciary . . . Superior Court Judge Andi Mudryk's appointment is a touchstone moment in California history that will lead to more opportunities for transgender people throughout the legal profession."

As governors and state legislatures across the country target LGBTQ+ rights, including the trans community, increasing LGBTQ+ representation on the bench is an important step for ensuring this country's constitutional values of equal rights for all.

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Travis Black, Esq.
The Law Office of Black & DePaoli

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Joseph B. Weinberger, Esq.
Weinberger Law Firm

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We congratulate Judge Hom on his retirement from the Sacramento Superior Court after two decades of distinguished service.

During his tenure, he presided over civil trials, law and motion hearings, complex cases, and settlement conferences. As Presiding Judge in 2020, he led the court to expeditiously adapt and provide bench and jury trials during the pandemic.

Judge Hom is highly regarded by his colleagues as fair, hard-working, and compassionate, and it comes as no surprise that he has received numerous awards including "Judge of the Year" by the Sacramento County Bar Association in 2021.

Prior to the bench, he had a successful trial practice for over 20 years, with an emphasis on civil litigation. With keen insight garnered from over 40 years of combined experience, coupled with his steadfast dedication to the legal community, Judge Hom is now available to serve as a mediator, arbitrator, and private judge statewide.

Learn More About Judge Hom:

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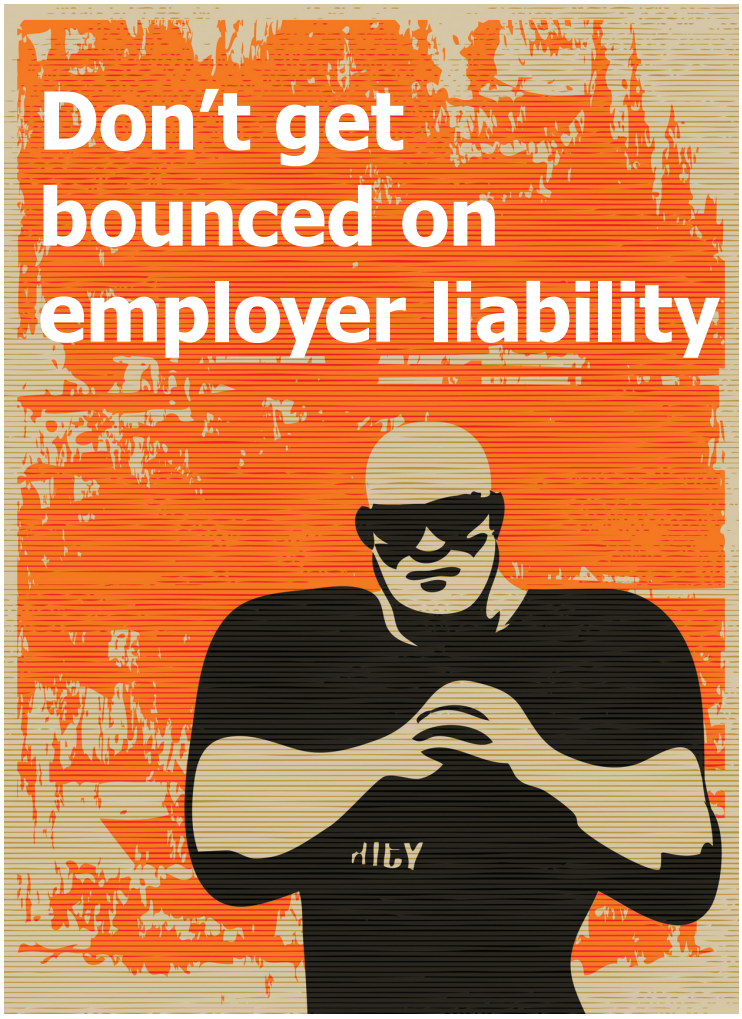


By: Glenn Guenard & Anthony Wallen

For those of us who have been to a bar or nightclub, we are sure you have also come across an overzealous bouncer who took their job a little too seriously. Sacramento is full of watering holes with machismo culture and sub-standard security training. Unfortunately, we sometimes have clients who are on the wrong end of that paradigm.

We recently handled a case where our client was outside, in line on the sidewalk, trying to get into a sports bar in downtown Sacramento. Unfortunately, another patron in line bushwhacked our client for being in the wrong place at the wrong time. The dust-up carried over across the street from the bar. A bouncer came across the street to the skirmish and thought our client was the aggressor. In essence, he took our client to the ground, put him in an "armbar" (a type of mixed martial arts maneuver), and broke his arm in two places.

Although some bouncers believe they have a license to behave badly, they do not.

Bouncers are only allowed to use force if it is first used against them or to protect innocent bystanders from violence. The most important thing to remember here is that if they do use force, it must be justified and reasonable under the circumstances.

The carrier initially denied liability with a variety of defenses—including that our client was the aggressor, mutual combat and that the bouncer was acting outside of the course and scope of his employment (acting with malicious intent).

We argued that the bar was liable for the bouncer's actions while furthering their employment duties as security at the bar. A bouncer has a duty to maintain a reasonably safe environment and conduct themselves in a reasonable manner when dealing with customers and patrons. Bouncers are generally employees of the bar or nightclub and do not have any more rights than its patrons they serve. The bouncer breached their duty of care when he used force that was in excess of reasonableness when he proximately caused the breaking of our client's arm. Our client never fought back; therefore, giving the bouncer no reason to restrain our client in such a reckless manner.

Glenn Guenard, of Guenard & Bozarth, is a CCTLA Board Member

Anthony Wallen, of Guenard & Bozarth

It is well established that an employer, or in this case a drinking establishment, is responsible for harm caused by the negligent conduct of its employees while acting within the scope of their employment. "Under the doctrine of *respondeat superior*, an employer is vicariously liable for his employee's torts committed within the scope of the employment. This doctrine is based on 'a rule of policy, a deliberate allocation of risk. The losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employee's enterprise, are placed upon that enterprise itself, as a required cost of doing business.' " (*Perez v. Van Groningen & Sons, Inc*. (1986) 41 Cal.3d 962, 967, internal quotation citation omitted.)

"Equally well established, if somewhat surprising on first encounter, is the principle that an employee's willful, malicious and even criminal torts may fall within the scope of his or her employment for purposes of respondeat superior, even though the employer has not authorized the employee to commit crimes or intentional torts." (*Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 296–297.)

"Despite the broad range of acts that may give rise to the imposition of vicarious liability, before such liability will be imposed on the employer there must be a connection between the employee's intentional tort and the employee's work." (*Perry v. County of Fresno* (2013) 215 Cal.App.4th 94, 101.) "The required connection has been described as: (1) the incident leading to injury must be an "outgrowth" of the

Continued on page 14

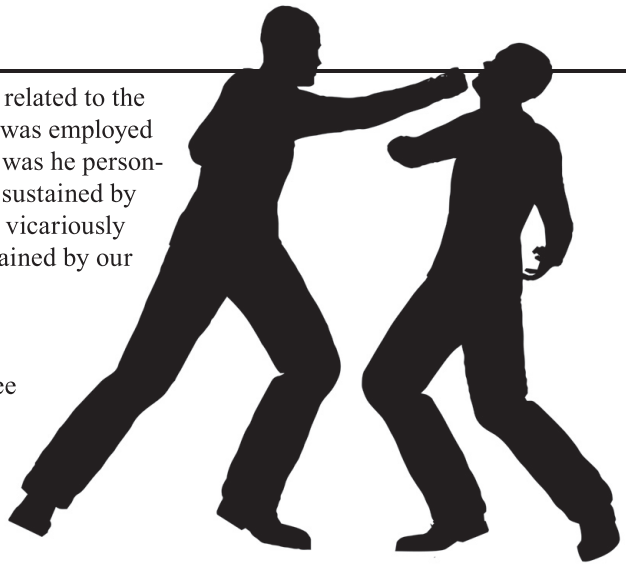
Bouncer liability

employment; (2) the risk of tortious injury is inherent in the working environment; (3) the risk of tortious injury is typical of or broadly incidental to the enterprise [the employer] has undertaken; or (4) the tort was, in a general way, foreseeable from the employee's duties." (*Crouch v. Trinity Christian Center of Santa Ana, Inc.* (2019) 39 Cal.App.5th 995, 1015, internal quotation citation omitted; citing *Lisa M. v. Henry Mayo Newhall Memorial Hospital*, supra, at pp. 298-299.)

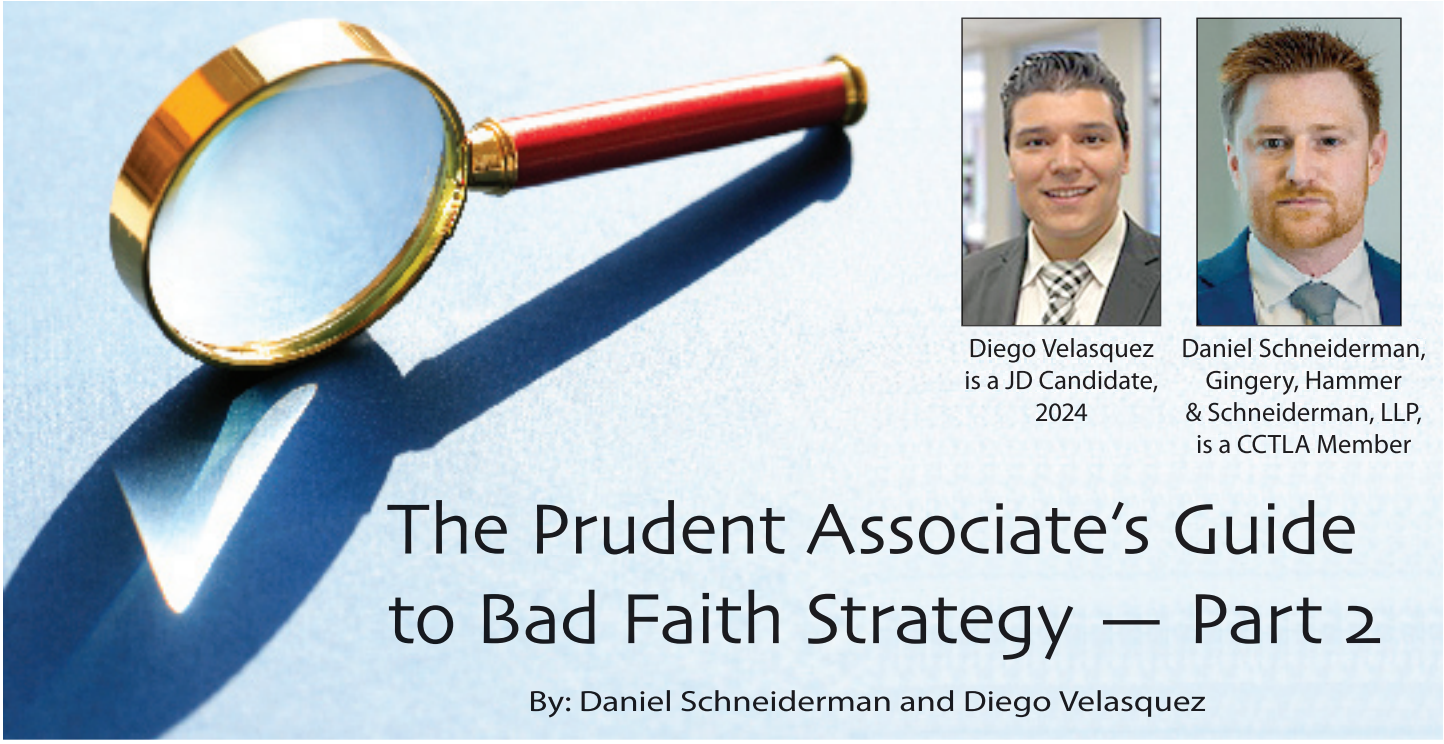
Here, the bouncer was an employee of the bar and was acting within the course and scope of his employment at the time the injury occurred. A bouncer is someone who is employed to restrain or eject disorderly persons. "A guard, 'bouncer,' or other person charged with maintaining order on premises is acting within the scope of employment in ejecting or manhandling a troublesome patron." (3 Witkin, Summary of California Law (11th ed. 2017) Agency, § 197(3).) When the bouncer ran across the street and put our client in a physical restraint, the physical contact was reasonably related to the kinds of tasks the bouncer was employed to perform. Thus, not only was he personally liable for the damages sustained by our client, the bar was also vicariously liable for the damages sustained by our client under the doctrine of *respondeat superior*.

Finding liability on an employer when an employee acts outside of pure negligence is entirely fact-driven. Prior to filing a lawsuit, it is important to piece together the facts from different angles and take as many witness statements as possible. We even got a lot of good information from the bar owner of the bar next door. After the lawsuit was filed, we applied pressure from a position of strength and did not let go.

As for our client, we litigated the case and had the defense attorney calling and begging us to come off the policy limits.



Although some bouncers believe they have a license to behave badly, they do not.



Diego Velasquez is a JD Candidate, 2024

Daniel Schneiderman, Gingery, Hammer & Schneiderman, LLP, is a CCTLA Member

The Prudent Associate's Guide to Bad Faith Strategy — Part 2

By: Daniel Schneiderman and Diego Velasquez

This article is intended to be Part 2 of a [growing] series. The previous section, Part 1, provided a 20,000-foot view of third-party bad faith strategy. Part 2 focuses on the pre-litigation demand phase. Part 3 will address litigation specific considerations (i.e., discovery timing, extension requests, etc.). Part 4 talks about CCP 998s, alternative dispute resolution and mediation-related concerns. Part 5 pertains to trial considerations, post-judgment discussions, and assignment.

Introduction

In this article we will explore just a few of the strategies available to the weary but bright-eyed prudent associate looking to develop their practice further into the world of "prospective bad-faith matters." Utilizing the demand strategies discussed in this article will help the prudent associate learn to recognize the pressure points, leverage points, and factual showings necessary for the future prosecution of a bad-faith matter. This outlook will not only improve the efficacy of your efforts in pursuit of pre-trial resolution, but it will also prepare you further for the goal of going to trial and collecting a judgment in excess of the policy limits.

I hope we can all agree that the prudent associate is not looking for a participation award when going to the boss with a potential bad faith situation. Rather, the prudent associate is going to the boss with one of two goals in mind: either you are handing over an airtight bad-faith case, or you have one that is close, and you want to update your boss. In either situation, you better be prepared. If you walk in only to say, "I sent a demand that they rejected… therefore bad faith," you could be in for an afternoon of bad-faith seminars.

The Pre-Demand Phase – "PTG"

So what comes first?

Parties, Types, Goals.

When you first start as an associate, it is common to find yourself looking for cookie-cutter approaches to the job in an effort to make sure you are doing everything you should be doing. This, of course, is a foundational step for any young associate; however, what happens when that cookie cutter gets dull? Well, it is time to make yourself some new tools, of course.

So how do you go about that? To put it simply, experience. Start today and get in the practice of evaluating your experiences with different people, be it attorneys, their staff, parties, or un-related third parties and their counsel. You need to learn to speak with each of these folks, and find out what makes their job tick. Ask yourself: where is opposing counsel or this adjuster located along the Defense hierarchy? If I were in their position, what type of information would make me evaluate this matter in favor of Plaintiff? What would make me kick it up the food chain and bring to my boss?

Ultimately, the more experience you get talking and dealing with each of these people, and LEARNING ABOUT THEIR JOB, the better. Don't take this time for granted as it is the foundational stage for your eventual litigation in a given manner, as well as your long-term professional development. Breaking down and processing this readily available information immediately when you get a case [and updating as you move forward] will maximize your opportunities to not only steer a case towards resolution, but also maximize your ability to pursue a recovery above the set policy limits.

Pre-Demand Letters

So, you get your initial PTG done, you draft and send your initial representation letter(s) (assumedly with a request for the adverse policy limit information), and you start down the path of investigation and collection of bill/record/wage-loss evidence.

What comes next? Well, you wait for all that investigation and collection of evidence to come back as you wait for the carrier to comply with the coverage request. Right? NO. Instead, the prudent associate should be asking themselves, what is the core objective at this stage? Get the carrier to disclose or fail to disclose the available liability policy limits.

This issue was addressed in *Boicourt*

Continued on page 16

Bad-Faith Strategy, Part 2

Continued from page 15

v. Amex Assurance Co. (2000) 78 Cal. App.4th 1390. In *Boicourt*, the claimant asked the insurer to disclose its policy limits. The insurer refused to do so (and did not ask its insured for permission to do so), explaining that it "had a 'policy not to disclose the amount of the policy limits.'" (*Id*. at p. 1393.) The claimant then filed suit against the insured and recovered an excess judgment. (*Ibid*.) He later testified that he would have been willing to settle for the policy limits, had he known what they were. (*Ibid*.)

The appellate court held "that a bad faith claim can be based on an insurer's prelitigation refusal to disclose the policy limits" . . . "even in the absence of a formal offer to settle within the policy limits." (*Id*. at pp. 1393-1399, 93 Cal. Rptr.2d 763.) In that situation, "A conflict of interest can indeed develop without a formal settlement offer being made by the claimant" between the insurer and the insured." (*Id*.) More specifically, the Court stated that "[A] liability insurer '"is playing with fire"' when it refuses to disclose policy limits. Such a refusal '"cuts off the possibility of receiving an offer within the policy limits"' by the company's '"refusal to open the door to reasonable negotiations."' [Citation.]" (*Id*. at p. 1391.) Thus, the court also held that "a formal settlement offer is not an absolute prerequisite to a bad faith action ...." (*Id*. at p. 1399.) "At a minimum, *Boicourt* means that the existence of an opportunity to settle within the policy limits can be shown by evidence other than a formal settlement offer." (*Planet Bingo LLC v. Burlington Insurance Company* (2021) 62 Cal. App.5th 44.)

Again, when the prudent associate runs into this issue, and they will, often, it is vitally important to memorialize any verbal conversations in writing. The core assignment: to convey that you will be pursuing a lawsuit for the specific purpose of collecting the policy limits information, that the carrier has unreasonably withheld the limits following a good-faith request, and that carrier is putting their insured at risk by not providing the policy limits. Such correspondence sets the stage for future interactions and demands, especially if carrier fails to reasonably correspond with the insured during this process.

"The Judgment-Proof Defense"

The unpredictability of bad-faith matters, at least from a business model perspective, comes from the notion that defendants "can always just declare bankruptcy," i.e., that they are "judgment-proof." Unlike **secured** judgments (i.e., judgments that have already attached to a piece of property or collateral, e.g., foreclosure of a home mortgage following default, etc.), **unsecured** judgments typically do not share similar protection under bankruptcy laws. Furthermore, unlike certain fraud or contractual litigations, California law does not allow for "prejudgment writs of attachment" (i.e., the procedural tool you can use to "secure" an anticipated future judgment) for personal injury matters.

This means that the prudent associate, or their boss, can spend all the way to trial, get a righteous judgment, only to have the defendant declare bankruptcy (i.e., Defendant says they have no cash or other fungible assets to pay or auction after satisfying secured creditors). Because the judgment is unsecured, there is a higher level of risk related to collection as an "unsecured creditor." Such a [high] risk can be a tough pill to swallow, and it is certainly the insurance lobby's intention to keep it that way.

This is what I and most of the prudent associate's colleagues have come to identify as the "judgment-proof defense." If an insurance adjuster OR attorney ever tries to use bankruptcy or insolvency to dissuade you from pursuing a matter over the policy limits, I can only tell you to do one thing: get that person to articulate their position in writing, and then promptly save that writing. In my personal opinion, an adjuster or attorney hired by the carrier to protect or represent an insured is arguably acting in actionable bad faith if they are exposing their insured to an excess judgment over policy limits while using the "judgment-proof defense."

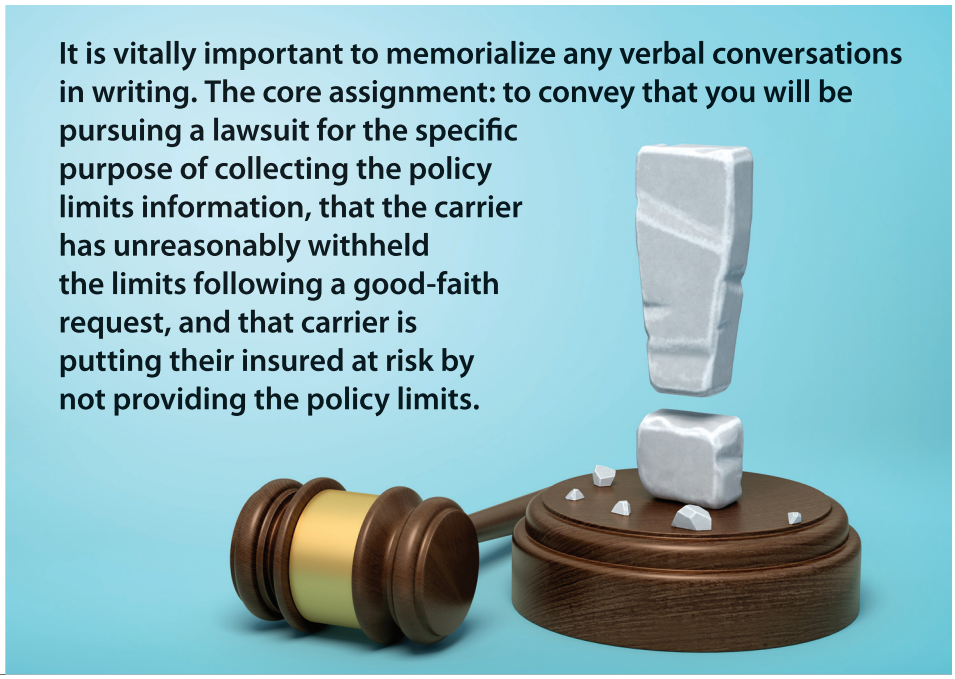
Bankruptcy is not a fun thing to go through. People do not want to declare bankruptcy. Despite the clever commercials on the radio talking about how easy it is, it is not an asset to a defendant in most situations. No one on the defense side should be using the threat of bankruptcy to protect the insurer's interests over their insured. (*Comunale v. Traders & General Ins. Co.* (1958) 50 Cal.2d 654, 658-66; *Hamilton v. Maryland Casualty Co.* (2002) 27 Cal.4th 718, 724-725.) Though evaluation of this type of conduct falls follows an objective standard, in my opinion, this is *per se* bad faith, and potentially professional malpractice.

The Policy Limit Demand

The initial demand is the prudent associate's primary opportunity to resolve the case, or alternatively, an opportunity to preserve the carrier's unreasonableness on the record. To that end, again, it is vital that you immediately begin to memorial-

Continued on page 17

It is vitally important to memorialize any verbal conversations in writing. The core assignment: to convey that you will be pursuing a lawsuit for the specific purpose of collecting the policy limits information, that the carrier has unreasonably withheld the limits following a good-faith request, and that carrier is putting their insured at risk by not providing the policy limits.



Continued from page 16

ize and highlight specific acts of unreasonableness both before and in the initial demand.

But what should go into the initial demand for the purpose of bad faith? Of course, any demand should include a thorough and accurate recitation on the basic positions and facts relative to causation, liability, and damages ("CLD"). We will skip over presentation style and content for purposes of this article. Rather, we will be focusing on those relevant conditions/terms and authorities that may impact the prudent associate's ability to pursue a bad faith action following the demand phase.

In practice, "An offer to settle an insurance claim is generally multidimensional, the most obvious component being the amount demanded. Other components include the conditions for acceptance and the scope of any release." (*Pinto v. Farmers Ins. Exchange* (2021) 61 Cal.App.5th 676, 688). This evaluation must include, at the very least, a determination of what information the carrier has or reasonably needs (*Isaacson v. California Ins. Guarantee Assn.* (1988) 44 Cal.3d 775, 793), a reasonable time to respond (*Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 41, and an analyses of what impact, if any, other requirements or conditions in the demand will have on the carrier's obligation to tender or respond. (See *Heredia v. Farmers Ins. Exchange* (1991) 228 Cal.App.3d 1345, 279) [settlement offer deemed in excess of the policy limits, because it required insurer to pay the policy limits and to continue to provide a defense post-settlement]. See also *Coe v. State Farm Mut. Auto. Ins. Co.* (1977) 66 Cal.App.3d 981, 994 [timing of offer issue for jury].

In addition to the above, every policy limit demand should include a request for the carrier to provide their insured with your firm's standardized Asset Declarations Form as well as a request for a [certified] Declaration of No Additional Coverage.

Once conveyed, these requests must be communicated to the insured. If the carrier and/or its adjuster is reasonably performing their job, the next communication between the carrier and its insured will include information about the risks the insured may assume if they choose not to comply with the requests, namely that they will be subject to litigation. Such communications between the carrier or defense attorney and their insured or client, respectively, can effectively drive a wedge between the interests of the carrier and the insured by highlighting the reality that a law firm is taking stock of the insured's assets beyond the policy limits. Especially when litigation is likely to follow, involving the insured at this stage can provide significant leverage later down the line.

Conclusion

If you have accomplished and concluded the above steps, and you receive a denial to your demand, your next trip should be back to your computer. Do yourself a favor and put all of your documents and materials together into a tabbed summary and memorandum. This summary should include, at minimum, relevant dates (e.g., incident, complaint filing, demand, correspondence, pertinent procedural steps, discovery responses, depositions, etc.), but also relevant materials (with proofs of service, notices and correspondence tabbed).

Once that is complete, you are now ready to head down the hallway to your boss's office. Get after it, and good luck.

President Dave Rosenthal
and the Officers and Board
of the Capitol City Trial Lawyers Association
&
Sacramento Food Bank & Family Services

cordially invite you to

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Thursday, September 22, 2022

from 5 p.m. to 7:30 p.m.
at The Lady Bird House,
1224 44th Street, Sacramento 95819

Reservation Deadline is Friday, Sept. 16, 2022

Contact Debbie Keller: 916 / 917-9744 debbie@cctla.com

For nearly two decades, CCTLA has supported our community with its Auction & Reception, giving to those in need by raising funds for the Sacramento Food Bank & Family Services. This reception is free to CCTLA members, honored guests, reception sponsors and those who donate to the auction, with all proceeds benefiting those in need in our community.

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All Silent Auction Proceeds Benefit Sacramento Food Bank & Family Services

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For a $2,500+ donation:

- All of the above, with 1 full-page color ad in *The Litigator* instead of the 2 smaller ads
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- A sponsor ribbon attached to your name tag
- 8 registrations for "Run to Feed the Hungry"
- Your name listed as a sponsor by SFBFS on several social media sites

Your donation is tax-deductible, either by check made payable to Sacramento Food Bank & Family Services and mailed to CCTLA, or pay online via https://support.sacramentofoodbank.org/CCTLA2022 or by credit card: Call Alliyah Muhammad at SFBFS: 915-456-1980, Ext. 2537

THANK YOU!

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

If you are able to donate an item, please provide the necessary information:

Name:_____

Donated Item:_____

Item Description: _____

(with times, dates, limitations, if applicable): _____

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Value: $ _____

Minimum Bid Amount: $ _____

Donated items/certificates can be dropped off at 2114 K St, Sacramento CA, 95816 by September 16, 2022

If you are unable to drop off your donation, please contact Debbie at CCTLA: 916 / 917-9744 or debbie@cctla.com.

THANK YOU!

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MOTION FOR PREFERENCE:
Your Sword Against the Covid Backlog

By: Jacqueline Siemens

Jacqueline Siemens, Demas Law Group,, is a CCTLA Board Member

With the enormous backlog of civil cases facing courts throughout the state, utilizing Code of Civil Procedure §36 can be a significant benefit to your clients. The Motion for Preference in Trial Setting prevents the delay tactics used by insurance companies we have all seen in our practices, even more so since the pandemic. The idea that years will pass before any meaningful resolution of the plaintiffs' case has been a significant benefit to the defense. Delaying tactics and settlement offers far less that the true value of the case have become all too common. Defense counsel expect your clients will be willing to accept a reduced settlement now rather than waiting years to receive a fairer and more representative result.

Even with the passage of SB 447, preference motions are valuable tools. The first step is to determine who qualifies under the code. If your client is over the age of 70 with certain health conditions, under the age of 14 or suffering from a terminal illness, they may qualify. Under 36(a,) the court must grant preference if the qualifications are met.

Under The Age of 14
C.C.P. § 36(b)

In a personal injury or wrongful death case, a court may grant preference if a party is under 14 years of age. The intent is to ensure that children have timely access to the courts for relief, particularly in cases where are the injured party or in the case of a parent's death. (*Peters v. Superior Court* (1989) 212 Cal. App. 3d 218, 226) While preference in such cases is mandatory, they come in second to § 36(a) preference cases on the court's calendar. To meet the requirements of § 36(b), you need a showing that of the plaintiff's qualifying age AND the plaintiff's interest is not merely peripheral.

Terminally Ill Plaintiff
C.C.P. § 36(d)

A plaintiff of any age who is suffering from an illness that makes it unlikely they will survive beyond six months may be granted preference under § 36(d). Counsel must present clear and convincing medical documentation that plaintiff "suffers from an illness or condition raising substantial medical doubt of survival beyond six months," and which demonstrates to the court's satisfaction that the interests of justice will be served by granting preference.

A declaration from the plaintiff's treating physician containing information regarding the plaintiff's condition, past and current treatment must accompany the motion. The declaration requires a statement that to a degree of medical certainty, the plaintiff is unlikely to survive beyond 6 months from the date of the declaration. Medical records supporting the declaration are appropriate.

You may find the plaintiff's treating physician is unwilling to assist with a declaration for reasons such as time constraints or a reluctance to make such a declaration to the patient. Retaining an expert in the specific field of plaintiff's illness is an option. The expert will need to review the pertinent records and evaluate the plaintiff in order for the court to give appropriate weight to the expert's declaration.

Clients 70 and Over
with Health Conditions – 36 (a)

If you have an elderly client, specifically over 70, with health concerns, seeking a Motion for Preference should be on your short list of things to do for your client.

CCP 36 provides "for an early trial date for persons who because of their advanced age or serious medical problems might die or become incapacitated before their cases come to trial." (*Rice v. Superior Court* (1982) 136 Cal.App.3d 81, 88.) If the plaintiff is over the age of 70 the court **shall** grant preference if the court finds the plaintiff has a substantial interest in the action as a whole AND the health of the party is such that preference is warranted to prevent prejudicing the party's interest in the litigation. This does not mean the client must have a terminal illness, only that the client's health is such that over time, the plaintiff will be less likely to meaningfully participate in the litigation resulting in prejudice to the plaintiff.

A client over 70 years of age with cognitive or mental decline described in the medical records is a very strong motivation for pursing this motion. But also consider your 70-year-old client who has Type II diabetes, high cholesterol or a cardiac condition that does not put them at risk of imminent death but does put them at higher risk of stroke or decline. Is your client on medication that has increased in dosage over the last few years? Do they have a kidney condition that can lead to dialysis in the next two years? These con-

Continued on page 26

Motion in Preference

Continurd frompage 25

ditions should be cited in your declaration to the court regarding your client's need to move the case to the front of the line.

The motion can be supported by "nothing more than an attorney's declaration 'based upon information and belief as to the medical diagnosis and prognosis of any party.'" (*Fox v. Superior Court* (2018) 21 Cal. App.5th 529, 534) The declaration you provide for the motion is for the sole purpose of the motion and cannot be used at trial for any other purpose. (§36.5.) Your declaration needs to include statements that you have reviewed the medical records and cite the medical diagnoses that are relevant to the risk plaintiff will be unable to participate in the litigation in the future.

Although counsel's declaration can be sufficient, you may want to consider going the extra mile by including a doctor's declaration to support your motion. We have seen motions denied when they are supported by a few pages of medical records showing the plaintiff's age and general health, but do not outline the basis for the concern of declining health and therefore less opportunity to assist counsel in the future. If you have a cooperative treating physician, a signed declaration containing the client's diagnoses, symptoms, and course of treatment may be necessary to convince a judge with a heavy trial calendar and multiple preference motions on their desk, that your case deserves to be moved to the front of the line.

The potential downside of a physician's declaration is that it is not clear the §36.5 applies to a declaration from someone other than counsel. Be careful not to add information that is harmful to your client's future general damages claim however if the information is in the records, defendants have it and will use it to limit the future general damages regardless.

If you have a reluctant treating physician, consider retaining an expert for the purpose of the motion. My client's primary-care physician was extremely reluctant to participate in any way with her case. He told our client he would not provide any testimony or declaration that her health was declining despite her diagnoses of kidney failure, Type II diabetes, cardiac issues and tremors. I retained an internist to review records, evaluate the patient over Zoom (COVID issues) and provide a declaration regarding the risks associated with her medical condition. The motion was granted, and the case resolved shortly afterwards for the true value of the case.

Be ready for the defense's argument that their calendar does not accommodate an expedited trial date or they need more time to conduct discovery. Mere inconvenience to the court or to other litigants is irrelevant. (*Rice v. Superior Court*, supra, 136 Cal.App.3d at pp. 89-94.) Failure to complete discovery or other pretrial matters does not outweigh the right to preference for those plaintiffs who qualify under §36(a.) The trial court has no power to balance the differing interests of opposing litigants in applying the provision (*Koch-Ash v. Superior Court* (1986) 180 Cal. App. 3d 689, 698-699.)

Motion Granted, Now What?

Before you file your motion, make sure you are ready for what comes next, and quickly. According to CCP 36(f), the court must set trial within 120 days. Expert disclosures are going to be 60-90 days away. Prepare your client and experts for an early trial date. The court may impose conditions on the expedited case such as shorten deadlines for discovery responses and witness disclosures. Make certain you and your client are ready for the new fast pace for your case.

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Judge Lloyd Phillips (ret.), 1926-2022, recognized as a consummate judge and a philanthropist to many

Note: The basis for this article is an obituary published in the "Sacramento Bee," but includes comments from Jill Telfer, editor of the Litigator, and others within the legal community.

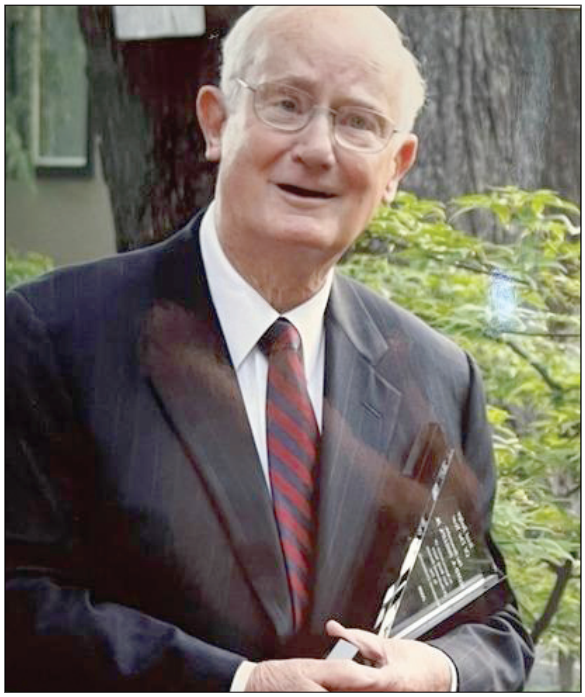
The Sacramento community has suffered the great loss of retired judge and friend Lloyd A. Phillips, who left his mark making the world, including the Sacramento community, a much better place during the 97 years of his life. He touched so many people by his selfless public service, philanthropic generosity and his incredible zest for life.

The late Adlai Stevenson once said, "It is not the years in your life, but the life in your years that counts." Lloyd Phillips had both with the combination of his service to this country during World War II, professionally as an exceptional attorney and judge, and personally treating life as an adventure by living life to the fullest.

Born on April 19, 1926, Phillips was raised in Sacramento by Lloyd, Sr., who was a lobbyist for the railroad and founded the California Railroad Association, as well as by his mother, Una.

After graduating from Christian Brothers High School in 1943, he immediately joined the United States Army Air Force, where he was a member of "The Mighty Eighth," flying 22 missions in the European Theatre as a top turret gunner on the B-17 Flying Fortress.

Following his military service, Phillips graduated from the University of California at Berkeley. In 1952, he earned a Juris Doctor degree from the UC Hastings College of Law. Phillips had a distinguished career as a lawyer and judge. After several years in a highly successful private practice, then-Governor Ronald Reagan appointed him to the Sacramento Superior Court, where Phillips ultimately presided over hundreds of jury trials until his retirement in 1988. In addition, he was a judge pro tem for the 3rd District Court of Appeal and for the Amador Court when the need for assistance arose. After his "official" retirement, he returned to the bench for more than 20 years to preside over complex and high-profile cases.



JUDGE LLOYD PHILLIPS

Roger Dreyer described Judge Phillips as the consummate trial judge; breaching the generational gap and making every litigant on both sides feel the Majesty of the courtroom and of the processes in which they were participating. *"I had the distinct privilege and opportunity to try six trials in front of Judge Phillips. I literally had everything from my first civil jury trial, which was a dog-bite case, to my last one which involved the death of a 28-year-old mother on a radio show that received national attention, the water intoxication trial. Judge Phillips handled law and motion, the media and the participants in all actions with aplomb and grace. He was never heavy-handed, but the model of judicial conduct and dignity who was absolutely in charge of the proceedings."*

Phillips founded and then taught at the Lincoln Law School for more than 20 years. He received many awards for his contributions to the legal profession, including the Presidential Award from the Capitol City Trial Lawyers Association (CCTLA) and the Judge of the Year award from the Sacramento Chapter of the American Board of Trial Advocates (ABOTA). One of the most impressive things about Phillips as a judge was that he never put his thumb on the scale of justice; he just guided the process so that justice was served.

ABOTA Chapter President Dan Kohl also tried several cases in front of Judge Phillips. Kohl said, *"He was the type of judge who was always one step ahead of the lawyers for both sides. He was fair to a fault, but also compassionate and understanding of the plight of the litigants and also the attorneys who he knew were working very hard to present their cases."*

Phillips was very active in several philanthropic organizations and social clubs. For decades he was involved in the Shriners, rising through the ranks to become the potentate of the Ben Ali Chapter. He was also a member of the Masons, the Elks and the Scottish Rite. For many years, he served on the Board of Governors for the Shriner's Hospital in Sacramento. He also supported a number of animal welfare organizations especially during the last decade of his life, including Scooter Pal's Animal Rescue. He adopted his dog Freddie from Front Street Animal Shelter, and his cat Daisy from Happy Tails Pet Sanctuary.

Dreyer also shared that he had the pleasure of visiting with Phillips over lunch and talking to him about life and the field of law. *"He was an extraordinary man who had led a remarkable life which included him having the life-altering terrifying experience of flying in B-17's over*

Continued on page 30

Continued from page 29

Nazi Germany in World War II for the Army Air Corps like my father, so as result, we formed a very special and close bond. He was an old school judge who left a thriving and successful practice for public service which he provided to this community for decades. We will not see his kind again."

Phillips' zest for life was accomplished and contagious. He climbed Mount Kilimanjaro with his daughter, Megan, and on three occasions cycled with his son across Iowa in the Register's (local newspaper) annual Great Bike Ride Across Iowa ("RAGBRAI"). He even had on his bucket list the desire to ride in the annual Sturgis Motorcycle Rally. Phillips loved to travel, enjoyed music, and had a passion for sailing, bike riding, and fishing. He explored Europe, Asia, Mexico and the Amazon.

Throughout the years, he taught himself to play the harmonica, clarinet and then spent the last few years of his life enjoying the trumpet. He was often accompanied by his dog, Freddie, resulting in a grand duet, indeed. Phillips also raced sailboats most of his life, cherishing time on the water.

He is survived by his son, John Phillips, with whom he sailed the San Francisco Bay; and by his daughter, Megan Kapinos, his son-in-law, Tom Kapinos; and five grandchildren: John Henry (25), Zoey (20), Charlie (17), Conrad (14) and Charlotte (13). Phillips celebrated them often as a member of the Grandfather's Club at the Sutter Club, where he was a member for more than 70 years.

There are some who bring a light so great to the world that even after they have gone, the light remains. Lloyd Phillips was one of those unique, kind and exceptional people whose light will continue to shine.

Judge Kathleen M. White, 1954-2022, called a 'judge's judge,' indefatigable and a woman of eclectic interests

By: Noemi Esparza

On July 31, 2022 we lost my second favorite judge, Kathleen White (second to RBG). I had the privilege of meeting her when my partners, Roger Dreyer, Bob Bale, and I tried a case before her. It was the first time for all of us appearing before her in Yolo County Superior Court in April of 2018. It was a three-month product-defect trial in which we waived jury. Through those three months. I discovered that Judge White was extremely intelligent and witty. And by the end of the trial. it was clear she had great integrity and courage. Below we share some words from her family:

Judge Kathleen M. White, 68, of Davis and Monterey, CA succumbed to neuroendocrine cancer on July 31, 2022, in her beloved Monterey home, surrounded by her family. She is survived by her husband of 35 years, Ray Ramirez; her sons James, John (Jack) and Matthew; her siblings Jeffrey White of Westport, CT, Dr. J. Douglas White of Potomac, MD, Madeleine White of Coppell, TX, and Michael White of Atlanta, GA. their spouses and 10 nieces/nephews and five grandnieces/nephews.

An indefatigably curious lifelong learner, White led a life of notable purpose and commitment. First appointed to the Yolo Superior Court bench in 2003, she served with distinction until her retirement for illness in July 2018. White was known for her ability to handle any type of case, but her skill in handling complex civil and family cases kept her docket full. She was a judge's judge, running a tight ship with extraordinary civility, compassion and irrepressible wit. She served the judicial branch statewide teaching seminars and writing numerous educational materials. She also chaired the design committee for the new Yolo County courthouse that has anchored the entry to downtown Woodland since 2015.

Often urged to apply for the appellate court, she declined, preferring the trial court where she had direct contact with the people whose lives were touched by her decisions. As she often noted, "the whole point of being a judge, or even living, is to help others." Prior to joining the bench, she served as the court administrator to the Yolo Court, and before that she was a litigator in Los Angeles for the international law firm of White & Case.

JUDGE KATHLEEN WHITE

The basis for this article is information provided by Judge White's family, with comments by Noemi Esparza, of Dreyer, Babich, Buccola Wood, Campora LLP, and a CCTLA Member

White was born in Queens, NY in 1954, the third of five children, to James and Katherine White. Her childhood was nomadic as her family moved throughout the country following her father's career in the electronics industry. She attended high school in Deerfield, IL and Guilford, CT where she distinguished herself academically and as the concert master for her school orchestra. She was frequently asked to join other orchestras and quartets in need of her violin skills and musicianship. She continued to study violin and perform through college.

After graduating from Duke University in 1976 with honors, she was a successful New York theatrical agent representing actors in television, film and theater (When confronted with contentious lawyers, she concluded they were much easier to handle than temperamental actors). She attended law school at University of Southern California's Gould School of Law from 1981-84, graduating with honors and as an editor of the law review.

While working as a young attorney in LA, White met and married the love of her life, Raymond Ramirez. Their eldest son, Jim, was born in 1989, and the identical twins, Jack and Matt, followed in 1992. She often remarked that nothing in her life was as joyous or as challenging as raising three rambunctious boys. She was immensely proud of her sons' growth from mischievous youths into men of character, integrity and compassion.

Her interests were eclectic and vast. White was an accomplished linguist, writer, musician, gardener, builder and knitter. The size of her yarn "stash" was legendary. She had a formidable knowledge of history, science, art and architecture, literature and trivia and was unbeatable at Jeopardy. She spoke three languages and could improvise in many more. She had a deep and abiding love for Yolo and Monterey counties and their residents, and for the Boston Red Sox.

She was a dedicated member of the Board of Directors for the Monterey County Salvation Army, who described her as "unselfish" and noted that during her term of service, "her generosity and passion were boundless…she brought with her a lifetime of experience solving problems. She had a quiet demeanor but when she spoke the board listened."

She also generously supported numerous other local charities and individuals in need but kept her donations confidential because she believed "charity is about the gift, not the giver." She declined press releases for the same reason. In her last few years, she found joy in kayaking in Monterey Bay and spending time with her beloved Havanese, Chico, and her husband at their artfully restored historic Monterey home.

She had asked that people celebrate her life with "music, drink and joy" in a classic Irish wake.

There are options for civil plaintiff seeking restitution when defendant has been convicted

By: Jaime Ruiz

In various situations, criminal and tort laws intersect with one another; for instance, a defendant may be charged with battery or, more commonly, a DUI where the intoxicated driver injures another person. The defendant is then charged and convicted, but what options would a civil plaintiff (victim) have to recover for the damages suffered?

In this situation, the attorney may evaluate whether the victim should approach a damages award through restitution or pursue a civil judgment, or both. For purposes of restitution, a victim is constitutionally defined as a person who suffers direct or threatened physical, psychological, or financial harm during the commission of a criminal act. Cal Const, Art. I § 28(e). A victim can even be a spouse, parent, child, sibling, guardian or a lawful representative of a deceased crime victim. *Id.*; (§83.74). The attorney should note that the victim is entitled to recovery in both venues. (Code Civ. Proc., § 32.); (Pen. Code, § 9.). However, restitution in the criminal case is limited to economic losses only. Even so, in most circumstances where the victim is injured by the defendant's criminal conduct, and the defendant is convicted of a misdemeanor or felony, there are many advantages to pursue criminal restitution for the victim's economic losses in addition to pursuing damages in a civil case.

Jaime Ruiz, a law clerk at Arnold Law Firm, is a third-year law student at McGeorge School of Law

Restitution is constitutionally mandated, and its purpose and objective are to rehabilitate the offender and deter future criminal conduct. Cal Const, Art. I § 28; (*People v. Baumann* (1985) 176 Cal.App.3d 67.) Courts are allowed to modify terms and conditions for restitution while the defendant is still on probation. (Pen. Code, § 1203.3(b).) Usually, this process is straightforward and uncomplicated if damages can be calculated by the time of the hearing. If the amount of loss cannot be decided when the defendant is sentenced, the court must order that the restitution be determined later. (Pen. Code, § 1202.4(f).)

If damages from the incident transpire at a later time, the victim or their attorney should contact the district attorney who represented the victim to set a hearing for restitution. This hearing is informal compared to a standard trial. (*People v. Hartley* (1984) 163 Cal.App.3d 126.) [JR1]During this process, the evidentiary standard for establishing a victim's economic loss is minimal, and courts are given unlimited discretion on what information or sources they can consider. (People v. Prosser (2007) 157 Cal.App.4th 682.)

The court may even consider documentation and recommendations regardless of their hearsay characteristics. (*People v. Cain* (1995) 10 Cal.4th 1.); (Pen. Code, § 1203(b)(2)(D)(ii)); (1203.1k). Despite the minimal threshold, the victim should present evidence demonstrating a connection between losses and the crime committed by the defendant. (*People v. Rivera* (1989) 212 Cal.App.3d 1153.). The victim should also demonstrate that the defendant's conduct was a substantial factor that affected their loss. (In *re A.M.* (2009) 173 Cal.App.4th 668.). Once the victim has presented and established their case, the defendant has the opportunity to demonstrate inaccuracies in the victim's evidence. (*People v. Goulart* (1990) 224 Cal. App.3d 71.); (Evid. Code, § 813.). However, the defendant has various restrictions; for instance, the defendant has no Sixth Amendment right to a jury trial and no right to confront and cross-examine witnesses. (*People v. Foalima* (2015) 239 Cal. App.4th 1376.); (People v. Pangan (2013) 213 Cal.App.4th 574.)

At the end of the hearing, the judge will determine whether the victim has established their case by the preponderance of the evidence. (*People v. Baumann* (1985) 176 Cal.App.3d 67.). If the burden is met, the judge will determine

Continued on page 36

Continued from page 35

the value of the actual loss and grant the restitution order. The court must award full restitution; under no circumstances may the court waive any portion of the victim's restitution. Cal Const art I, §28(b)(13); (Pen. Code, § 1204.4(f).) Additionally, attorney fees attributable to the victim's economic damage must be included, and this may include the contingency fee the victim pays to an attorney handling the civil personal injury case.

Moreover, the judge cannot consider the defendant's inability to pay when determining the amount of restitution. (Pen. Code, § 1202.4(g).) The defendant's ability to pay may only be considered for income deductions and probation or imprisonment for failure to pay. (Pen. Code, § 1202.42(a)); (Pen. Code, § 1203.2(a)); (*People v. Whisenand* (1995) 37 Cal.App.4th 1383.). After the order is granted, the victim and their attorney should request the defendant's financial asset information for purposes of collecting their award. (Pen. Code, § 155.5).

The victim's civil attorney may also choose to represent the victim without contacting the district attorney. Cal Const, Art. I § 28. If this is the case, their attorney should file a motion to modify restitution to include all economic damages. Regardless of the approach, receiving a restitution order provides the victim and their attorney a strategic advantage for establishing economic damages without the time and expense of a jury trial allowing the attorney to then concentrate more on recovery of the victim's non-economical damages in the civil case.

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 October 25, 2022.

Verdict: $767,787
Collado v Young

Glenn Guenard and Anthony Wallen of Guenard Bozarth, LLP, obtained a $767,787 verdict on July 12 for a plaintiff who was injured in a traffic accident on April 12, 2017.

The verdict broken down: past meds, $59,627; future meds, $283,160; past non-economic, $150,000; and future non-economic, $275,000. The trial judge was Alyson Lewis.

Plaintiff was injured when her car was rear-ended when she was stopped for traffic on I-80. Defendant admitted not paying attention and going 40 mph at the time of the collision. Both cars were totaled.

Plaintiff declined ambulance at scene but went to ER at Mercy San Juan an hour later, complaining of neck and back pains. Nothing was abnormal on X-rays, and she was given meds and told to follow up with her primary care physician. She had physical therapy for mostly neck duringr next few months. NCS showed radiculopathy at C6-7. Few more months of PT with no relief. MRI showed small C5-6 bulge. Dr. Varghis says if neck not better in six weeks to consider injections.

Plaintiff gets second opinion from Dr. Lemons who sends her to Dr. Parkinson for cervical medial branch blocks which confirms facet mediated pain. She undergoes radio-frequency ablation at C4-7. Neck pain returns in six months. Dr. Reddy does SI joint injections, which don't help. Second MRI now shows extrusion at C5-6. Dr. Lemons opines cervical disc replacement surgery within five years. Because of two pregnancies and COVID, Plaintiff hasn't treated in more than three years.

Defense themes at trial: Attorney referred medical treatment when Dr. Lemons took over; Dr. Lemons is tainted by his suspension from neurosurgeon society; almost all treatment on liens; prior longstanding neck complaints with chiro and massage therapy; subsequent similar MVA about eight months after this one; large gaps in treatment. Plaintiff's MILs to exclude cumulative testimony of defense docs denied (both testified the sprain/strains to neck and back should have resolved in six-eight weeks) and also MIL denied to exclude Dr. Lemon's suspension from a neurosurgeon society.

Both backfired on defense big time. Plaintiff's attorneys were able to throw cold water on what the defense thought was its "silver bullet," which was a YELP review three months before this MVA for a massage business (which Plaintiff forgot about, and we hadn't seen) where Plaintiff said she'd had neck pain for years and it was every day/every hour but that the massages helped.

Offers: Plaintiff pre-lit demand 100k policy with 50k in meds. Top offer from State Farm 55k. Served 998 for 100k with the summons and complaint more than three-and-a-half years ago. Renewed demand several times as late as fall 2020. State Farm 998 and top offer 80k. Will be getting lots of interest on 998 and attorney costs of over 100k. On the eve of trial three times before this trial.

Defendant was represented by Channone Sheller of Law Offices of Tiza Thompson (State Farm house counsel).

Plaintiff's experts were, non-retained: Dr. Neal Varghis, Dr. Stephen Parkinson; Dr. Vinay Reddy (not called); retained: Dr. Vanburen Lemons (neurosurgeon), Dora Jane Apuna-Grummer (life care plan), Craig Enos, CPA.

Defendant's experts were Dr. Eric Van Ostrand (neurologist) and Dr. Marco Mendoza (orthopedic).

Lessons: You can win cases even with all the red flags as long as you address them first and put them into context. Also, it's very helpful to have clear liability, huge impact and a credible plaintiff. She was 27 years old, working full time and very active. Plaintiff's husband, mother and best friend testified how her neck symptoms substantially impacted her. It's a good time to try cases, as we have seen from great verdicts from several of our CCTLA members recently. "Never let the fear of striking out get in your way."

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Mediation Settlement: $1,300,000

Past CCTLA President John Demas prevailed in bringing in a $1,300,000 mediation settlement with Nick Lowe. The case was worked up by **The Law Offices of Black and DePaoli**, and **Demas** was associated in to try the case.

This case arises out of injuries that plaintiff Nathan S. sustained when he was hit by the defendant, a drunk driver, on Aug. 26, 2017. Plaintiff was 27 at the time of the crash and a backseat passenger in an Uber. While stopped, the Honda (Uber) was rear-ended by Defendant, who was going approximately 40 mph (speed limit was 35 mph) in a 2007 Chevy Silverado owned by his employer.

This traffic collision was caught on a surveillance camera from a nearby gas station.

Plaintiff experienced immediate neck and low back pain. However, he did not seek treatment until 10 days after the crash. He sought conservative treatment, starting with urgent care in Chico where he complained of neck, right shoulder, mid and low back pain. He was referred to physical therapy. When that did not provide any relief, he tried chiropractic treatment and acupuncture, again with little relief. He had a lumbar a 2-3mm disc protrusion at L5-S1.

In December 2019, Plaintiff saw Dr. Reddy at Spine & Nerve Treatment Center amd received several rounds of injections, including L5-S1 ESI, bilateral SI joint injections. On June 11, 2020 he met with Dr. Travis Lodolt, who performed a bilateral SI joint fusion. He was provided with a bone-growth stimulator, and he started a course of physical therapy at Capitol PT

Continued on page 38

Member Verdicts & More

Continued from page 37

Center. The defense questioned the necessity of the SI fusion.

A big component of this case was Plaintiff's non-ecomic damages. He grew up in Chico and went to college at Chico State. In 2016, he obtained a Master's degree in English and Rhetoric and Composition from Chico State. Prior to the crash, he was an extremely active young man. At the time of the crash, he had been training for a triathlon. He was a rower through college, and he met his now wife through rowing. Plaintiff had moved back to California from Oregon just prior to the crash so that he could take care of his wife, who has an auto-immune disease.

He worked as a rowing coach and personal trainer after graduating from college. He held multiple coaching positions including working at the University of Oregon from August 2016 until May 2017 before he moved back to the Chico area. He was working as a coach at Table Mountain Rowing Club in Chico at the time of the crash. He has been forced to give up his dream of being a rowing coach.

His medical expenses were approximately $350,000. On Aug. 20, 2019, Defense served a CCP §998 for $15,000. On Nov. 9, 2021, Plaintiff served a CCP §998 for $1.49 million. Defense later sent a counter offer of $350,000, and on May 13, 2022, Defense served yet another 998 offer for $500,000.01. Demas was able to successfully settle the case for $1,300,000.

State's chief justice not seeking re-election; praised by CAOC

Sacramento, CA – Following Chief Justice Tani G. Cantil-Sakauye's announcement that she will not seek re-election as chief justice of California, Nancy Drabble, CEO of Consumer Attorneys of California, released the following statement:

"As the leader of California's Judicial System, Chief Justice Cantil-Sakauye never lost sight of a crucial guiding principle—that protecting access to the courts for the most vulnerable is of paramount importance to the health and stability of our democracy.

"Over the last decade, CAOC proudly fought alongside Chief Justice Cantil-Sakauye to expand access to justice for all Californians. Together we worked to secure significant increases in court funding, added some fifty judges to the bench, and pushed for the creation of a robust remote access system that helped bring our court system into the 21st century. Her inspirational and transformational leadership has left an indelible mark on California's judicial system, and her voice at the highest levels of our state government will be missed by all who had the privilege to work with her."

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

Continued from page 2

the Uber entities to be held liable, absent a special relationship between the parties.

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Achay v. Huntington Beach Union High School District
2022 4DCA/3 California Court of Appeal
No. G060053 (June 28, 2022)
School District Had Duty To Protect Students On School Grounds From Third Parties

FACTS: C. Achay was a female 10th-grade student at Edison High School, within the Huntington Beach Union High School District. Achay was a member of the track team. On Friday, Mar. 18, 2018, track practice concluded early, so Achay and a friend left campus and went to Starbucks.

As they walked back to the school, they encountered a former student at the school, a "strange guy" later identified as A. Meer. The two girls returned to campus so Achay could retrieve her books from the locker room. As Achay and her friend were leaving, walking from the locker room to the school parking lot, Meer rollerbladed past Achay and stabbed her. The attack caused serious injuries, and Achay sued the school district for negligence. The district moved for summary judgment, claiming it owed no duty of care to Achay. The trial court granted the motion, and Achay appealed.

ISSUE: Does a school district owe a duty of care to protect students under their supervision from foreseeable injury at the hands of third parties?

RULING: The trial court's granting of the district's motion for summary judgment was reversed. The school district was ordered to pay Achay's costs on appeal.

REASONING: Due to the special relationship between school districts and their students, school districts owe an affirmative duty to their students to take all reasonable steps to protect the students under their supervision. This includes the duty to use reasonable measures to protect students from foreseeable injury at the hands of their parties. Importantly, schools have a general duty to supervise the conduct of children on school grounds after regular hours for track practice. Although Achay left school grounds for some time after practice ended, she returned to campus to retrieve her books, and when she was stabbed, she was on school grounds, and the campus was still open. Therefore, the school district owed her a duty to use reasonable means to protect her.

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D.D. v. Pitcher
2022 5DCA California Court of Appeal, No. F080947 (June 15, 2022)
Trial Court Can Restrict Brief Opening Statements Before *Voir Dire*

FACTS: On February 22, 2016, D.D., a minor, age 6, was involved in a bicycle accident that occurred at the residence of David Pitcher in Bakersfield, CA. On April 5, 2017, D.D.'s guardian *ad litem* filed suit against David Pitcher and his spouse, Heather Kann, (collectively, defendants) for damages resulting from personal injuries suffered by D.D. in the bicycle accident.

Trial commenced on Nov. 18, 2019. During trial D.D.'s counsel filed a motion *in limine* asking permission to make a brief opening statement prior to *voir dire*, pursuant to California Code of Civil Procedure section 222.5. Counsel for defendant opposed the motion, stating that it was "unnecessary" and a "waste of time." The trial court granted the motion, but only under very specific and restrictive conditions. Ultimately the trial court determined that the statement D.D.'s counsel intended to make did not meet with the court's approval, and the statement was precluded.

After presentation of the evidence and closing statements, the jury determined, by special verdict, that Pitcher was not negligent. Judgment was entered in favor of Pitcher.

D.D. appealed on three issues, including the trial court's limiting/preclusion of D.D.'s counsel to give a brief opening statement prior to *voir dire* questioning. A motion for new trial was denied.

ISSUE: Can the trial court limit or preclude counsel from giving a brief opening statement prior to voir dire as provided for in Code of Civil Procedure section 222.5?

RULING: The trial court's decision to limit/preclude Plaintiff's brief opening statement prior to *voir dire* pursuant to Code of Civil Procedure section 222.5 was affirmed.

REASONING: D.D. contended that the trial court violated the plain language, as well as the "purpose and spirit," of Code of Civil Procedure section 222.5 by not allowing his counsel to give a brief opening statement prior to voir dire questioning. D.D. also contended that the court's restrictions on voir dire were arbitrary and unreasonable. The Court of Appeal concluded that a trial court has discretion to restrict the content of a brief opening statement. This was consistent with the legislative history of section 222.5 which, despite use of the phrase "shall allow a brief opening statement" because the trial judge retains the discretion to allow or disallow a brief opening statement if it contains objectionable matter.

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Daniel C. v. White Memorial Medical Center
2022 2DCA/3 California Court of Appeal,
No. B308253 (May 26, 2022)
Trial Court Erred In Approving Medi-cal Lien Without Knowing What Portion Of Settlement Was For Past Medical Expenses

FACTS: Appellant Daniel C. (Daniel) is a severely disabled child whose congenital abnormalities were undetected during his mother's pregnancy until after viability. Daniel sued various medical providers for wrongful life, settling with one, Dr. Kathryn Shaw, in 2018. The trial court approved the settlement with

Continued on page 42

Continued from page 41

the defendant in the amount of $1.25 million and that $358,118 was Daniel's total past medical expenses.

The California Department of Health Care Services (DHCS) asserted a lien on Daniel's settlement to recover what DHCS paid for his medical care through the state's Medi-Cal program. DHCS argued that they were entitled to $229,709.90 ($358,118 reduced by 25 percent, representing DHCS's reasonable share of attorney's fees paid by the beneficiary, pursuant to Welfare and Institutions Code section 14124.72(d)). Daniel argued that DHCS was only entitled to 9.08% of the $358,118 because that represented only 9.08% of his total claimed damages. The trial court awarded DHCS $229,709.90 as requested, and Daniel appealed.

ISSUE: In determining how much of a Medi-Cal beneficiary's tort settlement DHCS may claim, must the trial court determine which portion of the settlement is attributable to past medical expenses?

RULING: Reversed and remanded to the trial court for further proceedings in accordance with the opinion. Appellant was awarded his appellate costs.

REASONING: The trial court failed to equitably allocate the settlement. As a predicate to deciding how much of a Medi-Cal beneficiary's tort settlement DHCS may claim, the trial court must determine which portion of the settlement is attributable to past medical expenses, against which DHCS is entitled to collect its lien, and other damages, against which it is not. In making this allocation, the trial court is not required to use the Ahlborn formula, but it must distinguish medical expenses in the settlement from other damages "on the basis of a rational approach." And while the court may exclude future medical expenses from its calculation of DHCS's lien if it finds that it is "reasonably probable" DHCS will pay such expenses, it must make such a finding based on competent evidence.

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Kline v. Zimmer, Inc.
2022 2DCA/8 Ninth Circuit Court of Appeals,
No. B302544 (May 26, 2022)

Defendant Can Offer Medical Expert Testimony To Rebut Plaintiff's Causation Claims With Alternative Causes

FACTS: Due to painful osteoarthritis in his right hip, Gary Kline underwent total hip replacement surgery in 2007, during which he was implanted with an artificial joint called the Durom Acetabular Component (Durom Cup). Zimmer was the manufacturer of the Durom Cup. The initial surgery failed, and Kline underwent a second surgery—known as a "revision surgery"—in September 2008 to replace the Durom Cup with a different device.

At some point, Kline made the decision to sue Zimmer. The thrust of his claim was that the Durom cup was defective; were it not defective, his first surgery likely would have substantially resolved his hip issues; because it was defective, he suffered ongoing pain and impairments and required a second surgery; and that the second surgery left him with permanent pain and impairments.

In 2015, a jury found the Durom Cup was, in fact, defective and awarded Kline $153,317 in economic damages and $9 million in non-economic damages. But the first trial court granted a new trial based on its view of the damages being excessive and misconduct on the part of Kline's counsel.

The second trial proceeded in 2019. The jury in the second trial heard testimony from, among others, Kline, Dr. Chabra, Kline's orthopedic surgeon, Kline's current treating physician and an expert hired by Kline to testify to the cause of his pain and other limitations.

Kline's expert testified to a reasonable medical probability that his pain and weakness were a result of a defect in the Durom Cup that caused pain, inflammation, and changes to his hip joint which necessitated a second surgery, and that the second surgery resulted in changes to Kline's muscles and soft tissues causing him chronic pain.

Prior to the first surgery, he opined, Kline had a "good high percentage potential of treatment," but because that surgery was rendered unsuccessful by the defective Durom Cup, Kline no longer has "a good high percentage treatment available."

The jury did not hear from an expert for Zimmer. Although Zimmer offered an expert, Dr. Sah, who was prepared to testify about "possible" alternative causes of Kline's pain, the trial court excluded any and all medical opinions that were expressed to less than a reasonable medical probability.

Because Dr. Sah was unable to offer an opinion to a reasonable medical probability, Zimmer had no expert testimony. The court also excluded certain testimony from Kline's treating physicians relating to potential alternative causes of his pain on the same basis.

The second trial resulted in a slightly smaller jury verdict against Zimmer: $80,460.19 in economic damages and $7.6 million in non-economic damages. Zimmer moved for another retrial based on (1) the exclusion of testimony on the grounds it was offered to less than a reasonable medical probability, (2) the exclusion of certain photographs and a video showing Kline engaged in hunting and shooting activities; and (3) excessive damages. The trial court denied Zimmer's motion.

ISSUE: Is it error for a trial court to exclude expert medical opinions proffered by a defense expert because such opinions are not stated to a reasonable medical probability?

RULING: Reversed and remanded for new trial.

REASONING: Testimony by a plaintiff's expert who cannot opine to a reasonable medical probability is properly excluded because the opinion could not sustain a finding in the plaintiff's favor. To allow a jury to consider a claim where the plaintiff's *prima facie* showing falls short of reasonable medical probability would be to allow the jury to find the requisite degree of certainty where science cannot. The same does not apply to a defendant's efforts to challenge or undermine the plaintiff's prima facie case. Even after the plaintiff has made its *prima facie* case, the general rule is that the burden to prove causation

Continued on page 43

Share your experiences, verdicts, lessons learned

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

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

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

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

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

NOTABLE CITES

Continued from page 42

remains with the plaintiff. Regardless of whether the defendant produces any evidence at all, it remains for the fact-finder to say whether the plaintiff has in fact met its burden to the requisite degree of certainty.

Plaintiff bears the burden of proving that Defendant caused his injuries to a reasonable medical probability. Defendant is entitled to put on a case that Plaintiff failed to satisfy that burden. To accomplish this, Defendant does not need to show it was more likely than not that a cause identified by Defendant resulted in Plaintiff's injuries.

In other words, Defendant does not need to show that a different cause was more likely than not the cause of Plaintiff's injuries. All that Defendant needs to show is that Plaintiff's evidence was insufficient to prove their case. Defendant without the burden of proof needs only to produce evidence sufficient to offset the effect of Plaintiff's showing; A defendant is not required to offset it by a preponderance of the evidence. Such defense expert opinions could cast doubt on the accuracy and reliability of a plaintiff's expert. The jury is entitled to consider such evidence in deciding whether the plaintiff's expert is exaggerating his or her opinion.

Opening the Insurance Policy

Page 3

Capitol City Trial Lawyers Association
Post Office Box 22403
Sacramento, CA 95822-0403

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

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

Tuesday, Sept. 20
CCTLA Luncheon Webinar, Noon-1pm
Speakers: Rob Piering and Joe Weinberger - Topic: TBA

Thursday, Sept. 22
5 to 7:30 p.m. Fall Reception benefitting the Sacramento Food Bank & Family Services - The Lady Bird House, 1224 44th Street.
RSVP: Debbie Keller @ debbie@cctla.com

Tuesday, Oct. 11
Q & A Problem Solving Lunch - Noon - CCTLA Members Only - ZOOM

Tuesday, Nov. 8
Q & A Problem Solving Lunch - Noon - CCTLA Members Only - ZOOM

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

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

CCTLA Calendar of Events