Summer 2023

The LITIGATOR

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Inside

Off to a Great Beginning in 2023

Justin Ward
CCTLA President

As I prepare this message, we have already started the second quarter of 2023. Time sure does fly. CCTLA has already accomplished a lot during the first four months of the year and has a lot more planned for the rest of the year.

I want to start this message off by congratulating Dan Wilcoxen for being voted this year's Mort Friedman Humanitarian Award winner. Additionally, I would like to recognize Steve Campora and Hank Greenblatt, who also were nominated. I would also like to congratulate Walter Loving, who received this year's Joe Ramsey Professionalism Award. Additionally, I want to recognize Chris Wood, who also was nominated. Our winners and nominees were all well qualified for their respective awards. They exemplify what CCTLA stands for and are a benefit to our legal community. Thank you for all that you do!

I am happy to announce the creation of a CCTLA Women's Caucus. The Women's Caucus will provide a platform for the women of CCTLA to tackle issues specific to women attorneys. There will be regular Zoom meetings, networking events and seminars, and a listserve specifically for the group. Thanks to Wendy York and Kelsey DePaoli for helping to make it happen.

February's Problem Solving Clinic put on by John Demas and Kate Ebert had a very good turnout. It was titled "Jury Proof: Utilizing Focus Groups During Trial Preparation," and the presentation was held at McGeorge, providing those in attendance the opportunity to view a jury focus group in action. Dates and tentative themes for coming Problem Solving Clinics are: Dog Bite Cases and Premises Liability Cases, dates to be determined; and Document Requests, Aug. 16.

We also continue to have our "Brown Bag Luncheon" Question and Answer Sessions once a month via Zoom. The Q & A Lunches are a great opportunity for lawyers of all experience levels to get some advice on their cases in a safe and judgment-free manner. If you have questions, they probably can get answered at a Q & A Lunch.

The annual CAOC and CCTLA Sonoma Travel Seminar that took place March 10-11 at the Sonoma Mission Inn was a resounding success. CAOC reported this was the most well-attended travel seminar yet. The CLE classes covered a variety of areas that were important to our membership.

On April 25, CCLTA members participated in CAOC's Justice Day at the State Capitol. We had the opportunity to discuss some important bills with many state senators and assembly members. If you have never participated in the CAOC Justice Day, please make sure to do so next year. It is a worthwhile experience, and you will likely be able to speak to the legislators from the district in which you live.

On April 26, we held our annual Judicial Luncheon, with Sacramento County Superior Court Presiding Judge Michael Bowman and Assistant Presiding Judge

See PRESIDENT on page 4

Marti Taylor, Wilcoxen Callaham LLP, CCTLA Parliamentarian

NOTABLE CITES

By: Marti Taylor

Give us your opinions

DECK v. DEVELOPERS INVESTMENT CO., INC.
2023 4DCA/3 California Court of Appeal, No. G061287
(March 24, 2023)

Monetary sanctions are appropriate where defendant served untimely discovery responses after a long period of non-compliance with the discovery process

FACTS: Karen Deck brought an action against various nursing care entities for elder abuse. During the pendency of the case, defendants failed to provide responses to discovery and produce documents. They ignored several rounds of requests and court orders.

Deck brought a motion to compel, seeking discovery responses and documents. The motion also sought sanctions both monetary and issue sanctions. Both the trial court and the discovery referee found that defendants had "continuously shown no respect for the discovery process…or for the Court's orders" and that they had "blatantly ignored warnings." The Court therefore imposed the maximum sanctions.

Defendants appealed, arguing that the monetary sanctions were impermissible because they had served responses to discovery the night before the hearing on the motion. They argued that the responses constituted a "full but untimely production" and thus sanctions were not warranted.

ISSUE: Were monetary sanctions proper where defendants served full, but untimely discovery responses.

RULING: Affirmed. The trial court may impose sanctions on any party who has engaged in conduct that is a "misuse of the discovery process."

REASONING: California Code of Civil Procedure Section 2030.030 authorizes the trial court to impose monetary sanctions against anyone who engages in conduct amounting to a misuse of the discovery process. Monetary sanctions incurred by anyone because of the offending conduct MUST be imposed unless the trial court finds that the offending party acted with substantial justification.

The court found that untimely compliance is not compliance. It noted that where a party has shown no respect for the discovery process or for court orders and blatantly ignored warnings about consequences, that maximum sanctions are appropriate.

HACALA v. BIRD RIDES, INC.
2023 2DCA/3 California Court of Appeal, No. B316374
(April 10, 2023)

Electric scooter company owes a duty of care to third party—It must exercise ordinary care in the management of it's property

FACTS: Bird Rides, Inc., is an operator of electric motorized scooter rentals in Los Angeles County. It had deployed hundreds of electric scooters around Los Angeles which patrons may rent through a smartphone app and which can be ridden around the city and left in various locations. Bird had a permit with the city with the agreement that the scooters would not be left within 25 feet of a street corner with a single pedestrian ramp and that it would have staff available from 7 a.m. to 10 p.m. to monitor the scooters with GPS and help comply with the city's parking requirements.

On Nov. 23, 2019, Plaintiff Sara Hacala and her daughter were walking on a city sidewalk around dusk. It was the busy holiday shopping season, and there were lots of shoppers out. Hacala did not see the back wheel of an electric scooter sticking out from behind a trash can. She tripped over the scooter, which caused her to fall, wherein she sustained serious injuries.

The Hacalas sued Bird for negligence and other claims. Defendants filed a demurrer arguing that Bird did not owe the plaintiffs a duty of care. They argued that it was the third-party rider

See NOTABLE CITES on page 38

HAVE YOU BEEN DUMPED?

By: Glenn Guenard & Anthony Wallen

Glenn Guenard, Guenard & Bozarth, is a CCTLA Vice President

Anthony Wallen, Guenard & Bozarth, is a CCTLA Member

If you are a personal injury attorney long enough, it would not be unusual to take over a client's case who is unhappy with their attorney, nor would it be unusual for you to be discharged by your client in favor of another attorney. Under either scenario, someone is getting dumped.

The dumped attorney is generally entitled to be compensated and ideally, they attorneys can agree on a fair amount. It is important to remember that as attorneys, we are fiduciaries who must place our client's interests above our own; that the legal profession is a game of honor, and when given the option between taking the low-road or the high-road—always take the high-road.

Our highest court has carved out a bright-line rule when it comes to a client discharging an attorney. A client has an absolute right to terminate their lawyer at any time. (*Fracasse v. Brent* (1972) 6 Cal.3d 784, 790) As clear and unambiguous as this may be, it is what happens after attorney termination that can be murky, indefinite, and sometimes downright hostile.

As the old adage goes, "All is fair in love and war." Incidentally, the practice of law can sometimes encompass both. Both love and the practice of law can require significant effort and sacrifice to achieve success. In both cases, individuals must be willing to invest time, energy, and resources in order to achieve their goals. In addition, both love and the practice of law may require individuals to confront difficult challenges and navigate complex interpersonal dynamics.

Romantically, a break-up can be an emotionally difficult experience and some common emotions that people may experience include: a deep sense of loss or grief, anger (betrayal), denial, fear and anxiety, guilt and self-doubt—and sometimes *relief*. These will be collectively referred to as "rejection emotions."

Although most attorneys would not dare admit it, the same emotions that can be felt after a romantic break-up can also be felt after an attorney is discharged by a client. After all, one human being just rejected another human being. Because the California Supreme Court has made it very easy for a client to discharge an attorney, the prospect of being discharged is the sword of Damocles that hangs above our heads. Most importantly, the rule is designed to protect the client to be free to hire anyone they want. Secondarily, it helps keep attorneys in line with the Rules of Professional Responsibility and ensure that the attorney-client relationship is properly nurtured. It is called a relationship for a reason.

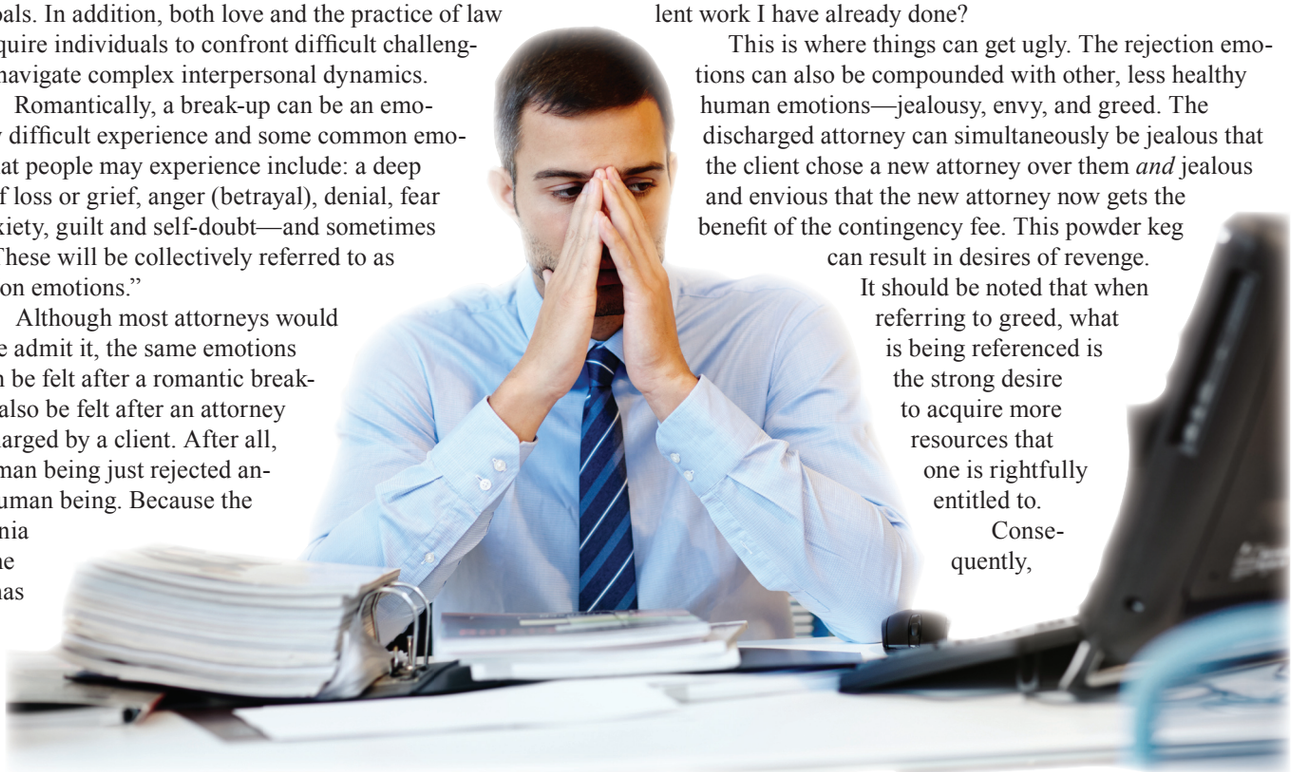
Not surprisingly, attorney discharge is a very taboo topic because it impacts egos, can trigger embarrassment, and impact peer perceptions. A discharged attorney may ask themself: Did I do something wrong? Did my staff do something wrong? Did I not keep enough contact with the client? Did another attorney lure this client away from me? I have done an excellent job so far, is something nefarious going on here? However, attorney discharge does not always mean that an attorney did something wrong. It can be as simple as the client has someone close to them who convinces them that they need the attorney they had. Nonetheless, the emotion is there because the client chose someone else over you. We are human after all.

After initial attorney termination, and after the initial emotions are felt, another factor comes into play—how am I going to be compensated for the work I have already done on this case? Why should some other attorney benefit from the excellent work I have already done?

This is where things can get ugly. The rejection emotions can also be compounded with other, less healthy human emotions—jealousy, envy, and greed. The discharged attorney can simultaneously be jealous that the client chose a new attorney over them *and* jealous and envious that the new attorney now gets the benefit of the contingency fee. This powder keg can result in desires of revenge.

It should be noted that when referring to greed, what is being referenced is the strong desire to acquire more resources that one is rightfully entitled to.

Consequently,



what are the rights, entitlements, and responsibilities of the discharged attorney?

Of course, there is no way to fully cover this broad hypothesis in this article, and there are many exceptions. However, what generally happens is that the discharged attorney will assert an attorneys' lien on the client's proceeds with the expectation to be paid when the case is over. Everyone generally agrees that a discharged attorney is entitled to quantum meruit. However, there is much debate as to what exactly quantum meruit means or how to calculate it.

As we are aware, *quantum meruit* is a Latin term that loosely means, "as much as is deserved." A discharged attorney is entitled to a reasonable fee because "... an attorney discharged with or without cause is entitled to recover the reasonable value of his services rendered to the time of discharge." (*Fracasse v. Brent*, supra, at p. 792.)

"It is well settled that a contingency fee lawyer discharged prior to settlement may recover in quantum meruit for the reasonable value of services rendered up to the time of discharge." (*Merdirossian & Associates, Inc. v. Ersoff* (2007) 13 Cal.App.4th 257, 272; citing *Fracasse v. Brent*, supra, at p. 791.)

"The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed." (*Hensley v. Eckerhart* (1983) 461 U.S. 424, 433.)

"However, providing evidence as to the number of hours worked and rates claimed is not the end of the analysis in such a quantum meruit action. The party seeking fees must also show the total fees incurred were reasonable." (*Merdirossian & Associates, Inc. v. Ersoff*, supra, at p. 273.) The court in Merdirossian outlined the following factors a trial court should consider when determining the reasonableness of a fee in the context of a discharged attorney:

1) the nature of the litigation; 2) its difficulty; 3) the amount involved; 4) the skill required and skill employed; 5) the attention given; 6) the success or failure of the attorney's efforts, and 7) the attorneys skills/learning in the particular type of work demanded. (*Merdirossian & Associates, Inc. v. Ersoff*, supra, at p. 273.)

Unfortunately, we are seeing more and more strong-arm tactics regarding discharged attorney's liens coming out of Southern California. What we often see is that the discharged attorney will send a canned letter to the carrier indicating that they want their name on any settlement check and they disappear. They will generally re-appear once the case is resolved, they want to know what it resolved for, and will attempt to come up with a subjective number based on the contingency outcome. They will often use their name of the check as leverage to get more than they deserve without consideration of holding up their prior client's money.

We must keep in mind that according to the Rules of Professional Responsibility, rule 1.9, comment 1, a prior attorney shall not do anything that will injuriously affect the former client in any matter in which the lawyer represented the former client. (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811; *Wutchumna Water Co. v. Bailey* (1932) 216 Cal. 564.) A discharged attorney must also consider that an attorney's lien claim is not against the new attorney, but against the discharging client. (*Olsen v. Harbison* 191 Cal. App.4th 325, 330.)

No one should work for free—but using a client's settlement proceeds as leverage is never appropriate. In this day of hiding behind emails, pick up the phone, call new counsel and work it out. It should not be war. *Quantum meruit* is not supposed to be decided from a subjective standard. (*Hensley v. Eckerhart*, supra at p. 433.) Prove the work you did, be honorable, be professional, be objective, check your emotions, and save the profession.

President's Message

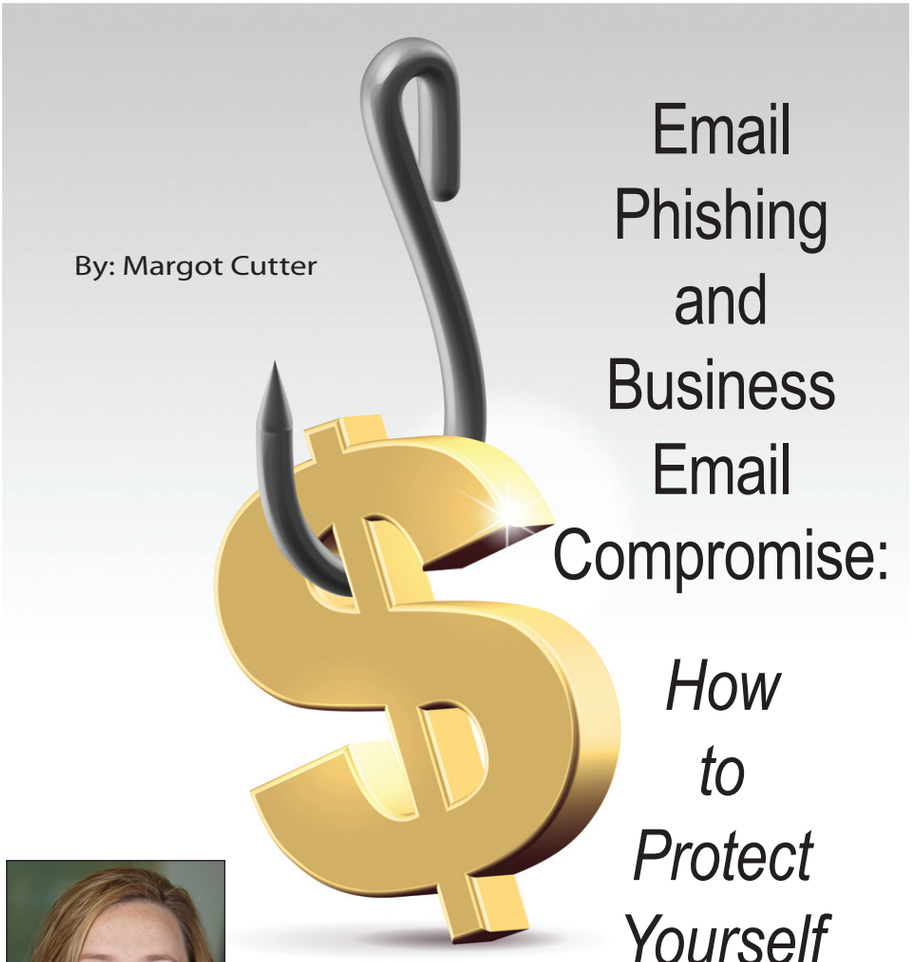
Continued from page one

Bunmi Awoniyi. It was held at 58 Degrees and Holding, owned by CCTLA board member Ognian Gavrilov and member Ed Brooks. The judges discussed the state of the court and provided a lot of valuable information. Some of the information learned: The earliest available trial dates on the court's trial-setting website are November 2024. If you want your case sent to the trial-setting process at your next case management conference, then the case must be at-issue, *i.e.* all named parties have been served and filed an answer or have been dismissed, or a request for default has been filed. If the case is not at-issue, it will likely be set for another CMC in approximately 10 to 11 months. So be sure to check the tentative rulings on your CMCs.

On May 12, we hosted "Everything You Never Wanted to Know About Liens and More" at McGeorge School of Law. The panel included CCTLA board member Dan Wilcoxen, Don M. de Camara, John J. Rice and Chris Viadro. The four presenters were some of the most knowledgeable experts in California on the topic of liens. All attendees were served lunch and received a booklet containing case law on liens and sample lien reducing letters and motions. Attendees also were able to get CLE credit for 3.25 hours, including one hour of ethics. The information learned could help participants save their clients thousands of dollars, if not tens or hundreds of thousands of dollars.

On June 1, from 5 to 7:30pm, we are having our 19th Spring Fling Reception and Silent Auction. The proceeds from this event, which will benefit the Sacramento Food Bank, will be held at the CCTLA board member Chris Wood's Lady Bird House. It is free for all CCTLA members, honored guests, reception sponsors and those who donate to the auction. Sponsorships are still available, so if you know a vendor who might want to attend, please provide them with the sponsorship flyer you should have received in your email. If you need a flyer, please email our executive director, Debbie Keller, at debbie@cctla.com. Also email Debbie if you have items to donate to the silent auction, and we will arrange to get them from you.

For the rest of the year, we are working on networking/presentations with the three Greater Sacramento area law schools and hope to have those scheduled in the next few months. We will also have more Problem Solving Clinics and our annual Holiday Party.



Email Phishing and Business Email Compromise:

How to Protect Yourself

By: Margot Cutter

Margot Cutter,
Cutter Law PC,
is a CCTLA
Board Member

Email phishing and business email compromise (BEC) are two of the most common types of cybercrime. In the recently released 2022 Internet Crime Report produced by the FBI's Internet Crime Complaint Center, the FBI reported it received 800,944 complaints, with losses exceeding $10 billion. The FBI attributed 21,832 of those to business email compromise, with adjusted losses of more than $2.7 billion.

Phishing attacks are a type of social engineering attack that uses email to trick victims into revealing personal information or financial data. The attacker sends an email that appears to be from a legitimate source, such as a bank or government agency. The email may contain a link to a fake website that looks like the real thing, or it may ask the victim to provide their personal information or financial data in response to a message.

Business email compromise (BEC) — also known as email account compromise — is a type of fraud that involves the use of electronic communication to transfer money illegally. In 2021, the FBI reported that businesses lost roughly $2.4 billion to BEC scams. The average loss per BEC attack was more than $125,000 – a 300% increase since 2015.

Many may assume they'd recognize one of these attacks. Historically, the schemes involved simple hacking or spoofing of business email accounts, accompanied by a request to send wire payments to fraudulent bank accounts. In those schemes, the attacker may have sent an email that appeared to be from a legitimate business, asking the victim to wire money to a specific account. The money was then transferred to the attacker's account, and the victim was left without their money.

Today, these schemes are much more complex and difficult to thwart. Fraudsters use custodial accounts at financial institutions for cryptocurrency exchanges. They can also intercept your or your client's emails and provide fraudulent bank account instructions. BEC bad actors also spoof legitimate business phone numbers to confirm fraudulent banking details with victims.

There are a number of things you can do to protect yourself from email phishing and business email compromise attacks.

* Be suspicious of emails that ask for personal information or financial data. Legitimate businesses will never ask for this information over email. Similarly, be suspicious of unsolicited emails and text messages. If you receive an email or text message from someone you don't know, or from a company you do business with but you weren't expecting to hear from, don't click on any links or open any attachments.

* Do not click on links in emails from unknown senders. If you are unsure whether an email is legitimate, hover your mouse over the link to see the actual URL. If the URL does not match the domain name of the company that is supposedly sending the email, do not click on it.

* Be careful about what information you share on social media. Bad actors can use information that you share on social

media to target you with phishing attacks.

* Use strong passwords and change them regularly. Do not use the same password for multiple accounts. Use a strong password manager, which can help you create and store strong, unique passwords for all of your online accounts. This will make it much more difficult for hackers to gain access to your accounts. Encourage your staff to do the same.

* Install a security software program on your computer and keep it up to date. Security software programs can help to protect you from phishing attacks and other online threats.

* Be aware of the latest phishing and BEC scams. There are a number of resources available online that can help you to stay informed about the latest scams.

* Enable two-factor authentication (2FA) for all of your online accounts and large banking transactions. 2FA adds an extra layer of security by requiring you to enter a code from your phone in addition to your password when you log in. Procedures should be put in place to verify payments and transfer requests outside of email communication. They can include direct phone calls to a known verified number without relying on information or phone numbers included in the e-mail communication.

* Be careful about what information you share on public Wi-Fi networks. Bad actors can use public Wi-Fi networks to intercept your data, including your passwords, credit card number, and bank account information.

* Keep your software up to date. Software updates often include security patches that can help to protect you from known vulnerabilities.

* Be aware of the signs of a phishing attack. Phishing emails often contain grammatical errors, typos, or unusual formatting. They may also ask for personal information or financial data that a legitimate company would never ask for over email.

There are a number of things businesses can do to protect themselves from phishing attacks. Some of these tips include:

* Never make any payment changes without verifying the change with the intended recipient; verify email addresses are accurate.

* Inform your financial institutions that they should never make any payment changes without speaking to you personally on the phone.

* Educate employees about phishing attacks. Employees should be aware of the different types of phishing attacks and how to spot them. They should also be aware of the consequences of clicking on a phishing link or providing personal information to a scammer.

* Using a phishing filter. A phishing filter can help to identify and block phishing emails before they reach employees' inboxes.

* Implement a security awareness training program. A security awareness training program can help employees learn how to protect themselves from phishing attacks and other cybersecurity threats.

If you believe you have been the victim of a phishing attack, you should take the following steps:

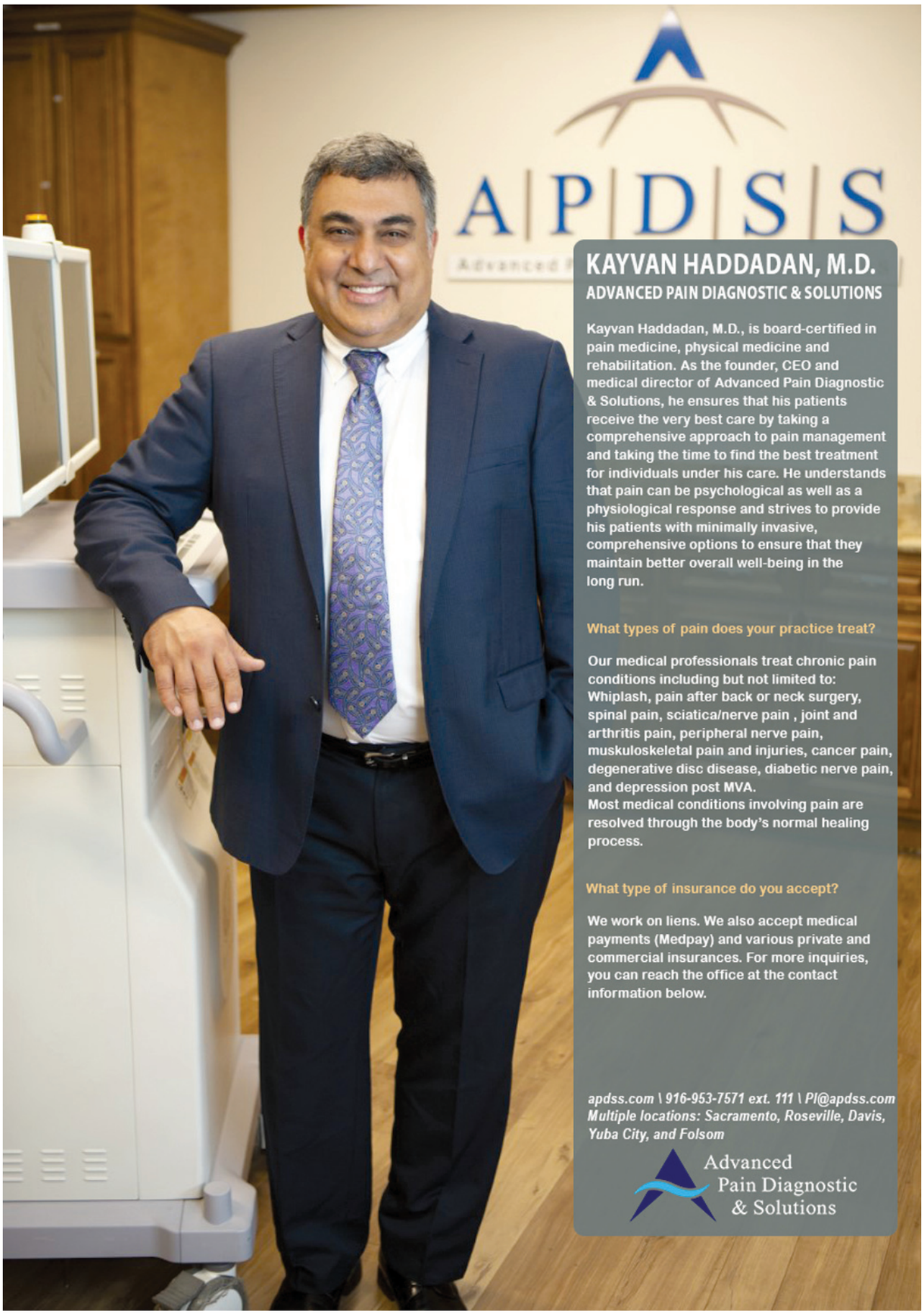
* Change your passwords immediately. Change your passwords for all of the accounts that were compromised in the attack.

* Contact the originating financial institution as soon as fraud is identified to request a recall or reversal and a Hold Harmless Letter or Letter of Indemnity.

* Monitor your credit report. You should monitor your credit report for any unauthorized activity.

* Report the attack to your local law enforcement agency and the FBI.

By taking these precautions, you can help to protect yourself from the financial and other consequences of a phishing or BEC attack.


A|P|D|S|S
KAYVAN HADDADAN, M.D.
ADVANCED PAIN DIAGNOSTIC & SOLUTIONS
Kayvan Haddadan, M.D., is board-certified in pain medicine, physical medicine and rehabilitation. As the founder, CEO and medical director of Advanced Pain Diagnostic & Solutions, he ensures that his patients receive the very best care by taking a comprehensive approach to pain management and taking the time to find the best treatment for individuals under his care. He understands that pain can be psychological as well as a physiological response and strives to provide his patients with minimally invasive, comprehensive options to ensure that they maintain better overall well-being in the long run.
What types of pain does your practice treat?
Our medical professionals treat chronic pain conditions including but not limited to: Whiplash, pain after back or neck surgery, spinal pain, sciatica/nerve pain , joint and arthritis pain, peripheral nerve pain, muskuloskeletal pain and injuries, cancer pain, degenerative disc disease, diabetic nerve pain, and depression post MVA.
Most medical conditions involving pain are resolved through the body's normal healing process.
What type of insurance do you accept?
We work on liens. We also accept medical payments (Medpay) and various private and commercial insurances. For more inquiries, you can reach the office at the contact information below.
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CCTLA was title sponsor for McGeorge's stellar ethics trial competion; more attorneys need to step up and serve as mock trial judges to safeguard the future of justice

By: Justin M. Gingery

Justin Gingery, Gingery Hammer & Schneiderman, is a CCTLA Board Member

On March 24, 2023 the University of the Pacific McGeorge School of Law hosted the 15th Annual National Ethics Trial Competition. The annual competition invites 20 of the top law school trial advocacy programs in the nation to compete. The Founding Title Sponsor of the competition every year is McGeorge's and CCTLA's own Robert A. Buccola '83. This year, CCTLA was the Title Sponsor.

The competitive teams included law schools from UCLA, U.C. Berkeley, U.C. Davis, U.C. San Francisco, University of Illinois, Loyola University of Chicago, Fordham University, Emory University, Stetson University, University of San Diego, University of Denver, University of Houston, University of South Dakota, South Texas College of Law, University of Maryland, Chicago-Kent College of Law, Charleston School of Law, University of Buffalo, Golden Gate University, and Brooklyn Law School. The competition was held at the Robert T. Matsui United States Courthouse on Friday night and continued through the weekend until the final round on Sunday.

As hosts of the event, McGeorge was not allowed to compete. The mock trial program directors and professors created the case, fact pattern, witnesses, evidence, and applicable law. Members of the mock trial team acted as bailiffs (timekeepers) in the courtrooms and informational guides for the competitors. The competition was judged by local volunteer members of the California State Bar and who receive the elusive one unit MCLE credit in ethics for their service. Some of the more prestigious judges of this year's competition were the Honorable Kevin R. Culhane (Ret.) and Sacramento County District Attorney Thien Ho.

The National Ethics Trial Competition is unique to all of the other law school mock trial competitions in that the fact pattern regularly centers around attorney ethics and the rules of professional conduct. This year's fact pattern was no exception, with a specific concentration on a lawyer's duty of competence (ABA Rule 1.1), confidentiality (ABA Rule 1.6), and ethical obligations when working remotely; the firm's ethical obligations to properly supervise (ABA Rules 5.1 through 5.3) and adequately communicate (ABA Rule 1.4) with a client and lawyer it has permitted to work remotely; and the ethical and professional obligations in conveying offers to clients.

This year's fact pattern followed a plaintiff who lost their only child in a motor-vehicle collision. The plain-

tiff was disabled at the time of their child's death and economically dependent on their child. Plaintiff sought the advice of multiple law firms and consistently received declinations, as well as estimates that the case was not worth more than $100,000.

Just about when Plaintiff was going to give up the search, they found the defendant attorney and law firm. The plaintiff made certain demands (contact the plaintiff at least every two weeks) that the defendant agreed to honor in order to obtain the plaintiff's signature on the contingency fee agreement. For the first year of the representation, the defendant complied with the frequent contact arrangement.

Shortly after the first year, the defendant law firm agreed to let the defendant travel abroad and work remotely on this case exclusively. The defendant's contact diminished as the defendant traveled to the Mediterranean and Thailand and, at times, did not have a reliable network to contact the plaintiff. During the defendant's work abroad, they retained a world-renowned economic expert who valued the plaintiff's case at $2.7 million. This expert report was communicated to defense counsel and Plaintiff who then informed Defendant they would settle for nothing less than that amount.

After reviewing the expert report, the defense counsel wrote defendant a lengthy, meandering email that contained an offer of $1.25 million, which was summarily conveyed to Plaintiff by WhatsApp. The offer was rejected by Plaintiff, with the following text: "That's all?! Let's take this all the way, I want to fight this at trial. I can't keep going back and forth listening to bad offers. Trial."

Trial was set to start the week after Thanksgiving, and the evening before Thanksgiving, defense counsel sent another lengthy, meandering email that contained an "exploding offer" of $1.75 million that would expire the day after Thanksgiving. Defendant failed to see the offer in the email and, consequently, failed to communicate the offer to the plaintiff. The plaintiff proceeded to trial and was awarded $200,000 by the jury.

After the verdict, the defendant law firm reached out to the plaintiff and admitted it failed to convey the $1.75 million offer. Plaintiff then sued the defendant for professional negligence. In discovery, Plaintiff also learned that the defendant law firm had only one 10-minute conversation with the defendant attorney while they were working remotely for six months.

The evidence at trial was limited to two witnesses (the plaintiff, the defendant attorney, and two professional negligence experts) for each side, the contingency fee contract, a law firm phone call log, and a number of Facebook, WhatsApp and text messages between the plaintiff and defendant attorney. Both sides were afforded an opportunity to argue and oppose motions *in limine* before trial. Each side had two attorneys, and each attorney

was required to perform a direct and cross examination of a witness. One attorney for each side performed the opening, while the other attorney provided closing arguments.

After an incredibly competitive weekend and a nearly impossibly difficult scoring task, the University of Illinois College of Law was declared this year's champions, defeating UCLA in the final round. Stetson and U.C. College of the Law San Francisco (formerly Hastings) were the semifinalists, and Fordham Law was awarded the Most Professional Team award, which is named after recently retired Professor Jay Leach.

The purpose of this article is twofold. First, to provide a recapitulation of the 2023 Annual National Ethics Trial Competition. The second purpose is to discuss the importance of having the attorneys of the Sacramento Metropolitan area participate as judges in this competition.

U.S. News & World Report currently ranks McGeorge as the 16th best law school trial advocacy program in the nation. One of the most significant factors in determining a law school's trial advocacy program ranking is the law school's ability to host a national competition. As such, The National Ethics Trial Competition is pivotal in maintaining and improving upon the current ranking of McGeorge.

On Feb. 17, 2023, the director of trial advocacy at McGeorge School of Law, Annie Deets, sent a request through the CCTLA list serve for volunteer judges for the competition and stated that the quality of the judging pool is the hallmark of the competition. The response was less than what was hoped for. She sent subsequent requests on March 5 and on March 16.

At the time of the competition, there were fewer than 30 attorney volunteers to judge the competition. The best competitions in the country have at least four judges in each courtroom: one presiding judge to rule on the motions, objections, and to keep order, and three judges to keep score and prevent a tie. This year, there were no more than three judges in a courtroom, and two courtrooms only had two judges present. Needless to say, the number of volunteers was less than ideal and may have an impact on McGeorge's national ranking.

Obviously, not all of us are McGeorge graduates, but we are trial lawyers, and CCTLA was the title sponsor. All of us, as members of the Capitol City Trial Lawyers Association, should endeavor to encourage and support the legal community of Sacramento, especially those interested in being courtroom advocates. McGeorge is a part of that community, and the students of McGeorge could be the future of this organization if we as members of the CCTLA show our support and help them maintain their stellar national ranking. Hopefully, when the email request reaches your inbox next year, you will find the opportunity and time to participate as a judge, even if for only one round.

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How to Handle the "Empty Chair" Defense in Your Medical Malpractice Case

By Nicholas J. Leonard and Michelle B. Hemesath

Nicholas Leonard, Ikuta Hemesath LLP, is a CCTLA Member

Michelle Hemesath, Ikuta Hemesath LLP, is a CCTLA Member

Last year, in a closing argument in front of a jury in Orange County, defense attorney Robert Mckenna III repeatedly disparaged the plaintiffs and their attorneys in a wrongful death case based on medical malpractice. He called the lawsuit an "extortion" and described the case as completely meritless. The underlying case involved the insertion of a g-tube that allegedly negligently perforated the colon, killing the 49-year old immigrant patient. During trial, McKenna pointed to errors by other physicians and hospital staff and argued the patient died from other causes.

Towards the end of his closing, McKenna remarked: "Welcome to America. Welcome to the personal injury machine, the personal injury industrial complex."

After less than half an hour of deliberations, the jury returned with a 12-0 defense verdict.

Shortly after the verdict, McKenna gathered his entire office to celebrate the verdict. He boasted that the case was about "a guy that was probably negligently killed, but we kind of made it look like other people did it." McKenna went on to remark: "And we actually had a death certificate that said he died the very way the plaintiff said he died, and we had to say: 'No, you really shouldn't believe what that death certificate says, or the coroner from the Orange County coroner's office who says . . . that it's right.'"

McKenna then stated: "Overcoming all of those hurdles, we managed to sock three lawyers in the face." After these remarks, he then invited his junior partner to ring a "victory bell" as his entire office cheered. A member of his firm posted his boast to his firm's social media pages.

Not unsurprisingly, there was significant backlash in the legal community. While we all know that defense attorneys and their insurance carriers will do everything to win at all costs, it was jarring to see a celebration of a death with the quiet part said out loud. The video and negative repercussion hit the papers, with many appalled at the conduct of McKenna and his firm.

But apart from the outrage from McKenna's comments, there are two important takeaways from the video when it comes to trying medical malpractice cases.

First, it is hard to win medical malpractice cases. Even in a case where the defense attorney himself *knew* his client committed malpractice that ended in the death of a father, the jury returned with a unanimous defense verdict in less than 30 minutes. Statistics show that over 80% of medical malpractice cases that are tried end in defense verdicts.

Second, the "empty chair" defense is a very common strategy for medical malpractice defense attorneys. All of the attorneys at our firm first started in medical malpractice defense. When assigned to defend a case, we were instructed that one of the first things to do was to identify those non-party healthcare providers where we could attribute blame or fault. In the hospital setting, when we represented a physician, could we blame the hospital nurses for not reporting changes in vital signs or the patient's condition? Could we blame the hospitalist or internist as the quarterback and captain of the ship who was ultimately responsible for the patient's wellbeing? Could we blame a different specialist who could have more effectively treated or diagnosed the patient's condition? Could we blame a defective product or device? The list goes

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The "empty chair" defense is a very common strategy for medical malpractice defense attorneys. All of the attorneys at our firm first started in medical malpractice defense.

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on and on and as the McKenna verdict shows, it is a very effective way to defense a medical malpractice case.

I. File a Motion *in Limine* to Prevent a Defendant in a Medical Malpractice Action From Criticizing An Empty Chair

Even in cases where there does not appear to be any finger-pointing at the empty chair, the plaintiff's attorney should file a motion *in limine* to exclude any criticism at a third-party provider. Indeed, this is exactly what the plaintiff's attorney did in the case involving McKenna. The trial court ended up granting the plaintiff's motion for new trial based on the violation of the motion *in limine*.

Two cases strongly support not allowing a defendant to point at an empty chair at trial unless she has "substantial evidence" through expert testimony that a third-party healthcare provider at fault: Wilson v. Ritto (2003) 105 Cal.App.4th 361, 363 and Scott v. C.R. Bard, Inc. (2014) 231 Cal.App.4th at p. 785.

Wilson involved a medical malpractice action. (*Ibid*.) After a verdict in favor of the plaintiff, the defendant podiatrist contended on appeal that the "trial court erred in denying her motion to include on the special verdict form [an orthopedic foot surgeon] as a joint tortfeasor for purposes of apportioning liability for noneconomic damages." (*Ibid*.)

After multiple failed foot surgeries with the defendant podiatrist causing disfigurement and infection, the plaintiff went to an orthopedic surgeon. (*Ibid*.) During or after surgeries with the surgeon, the plaintiff developed a staph infection, was hospitalized for osteomyelitis, and removal of bone graft. (*Id*. at p. 365.) At trial, Defendant's expert, a podiatrist, "criticized [the surgeon] for performing the bone graft surgery before inserting spacers . . . to stretch the tissue in the area where the joint had been removed." (*Ibid*.) Moreover, the expert testified that assuming the plaintiff's contention that she had an infection was correct, the orthopedic surgeon "should not have performed the [subsequent] surgery." (*Ibid*.)

After both sides rested, the trial court refused to add the surgeon to the special verdict form. (*Ibid*.) The Court of Appeal affirmed. (*Ibid*.) It was undisputed that there was evidence that the surgeon contributed to the plaintiff's injury. (*Ibid*.) However, as the Court of Appeal explained:

> *In determining a defendant's share of fault, the court may consider other joint tortfeasors' degree of fault for the plaintiff's injuries and reduce the defendant's share accordingly. A defendant may attempt to reduce his or her share of liability for noneconomic damages by seeking to add nonparty joint tortfeasors.* ***But unless there is substantial evidence that an individual is at fault, there can be no apportionment of damages to that individual.***
> (*Id*. at p. 368 [emphasis added.])

Two cases strongly support not allowing a defendant to point at an empty chair at trial unless she has "substantial evidence" through expert testimony that a third-party healthcare provider at fault: Wilson v. Ritto (2003) 105 Cal.App.4th 361, 363 and Scott v. C.R. Bard, Inc. (2014) 231 Cal.App.4th at p. 785.

The court disagreed with the defendant's contention that "all is required is a showing of contribution." Instead, as the court explained, Proposition 51 (Civ. Code, § 1431.2) requires "fault." Therefore, the court held that there must be "wrongdoing or culpability." (*Ibid*.) Moreover, "[a]nd wrongdoing or culpability in the context of medical treatment is measured by the standard of care within the medical community." (*Ibid*.) In other words, apportionment of fault "requires evidence of medical malpractice, not only as to named defendants, but also as to nonparty doctors." (*Id*. at p. 369.)

Therefore, the instruction was properly refused because "evidence merely showing that [the nonparty surgeon's] treatment affected plaintiff's condition was not sufficient to add [him] as a joint tortfeasor. Defendant was required to establish [the surgeon] was at fault, and fault is measured by the medical standard of care." (*Ibid*.) Even though defendant's expert vaguely criticized the nonparty surgeon, "there was no testimony that the failure to insert the spacers was below the standard of care and it cannot be assumed as such." (*Id*. at p. 343.) Likewise, the expert "expressed his differing view as to treat plaintiff but did not state that [the nonparty surgeon's] treatment was below the standard of care." (*Ibid*.)

Scott, supra, 231 Cal.App.4th at p. 785 is also instructive. In Scott, a jury awarded a substantial verdict against a medical product manufacturer but also found that the implanting surgeon was 40% at fault. (*Ibid*.) Because the non-party, as here, was a medical provider, "[f]ault in the context of medical treatment is measured by the standard of care in the medical community." (*Ibid*.) "Therefore, [the defendant] was required to prove, with expert testimony, that [the doctor], a nonparty, breached the medical standard of care." (*Id*. at p. 786.) The Court of Appeal found that, unlike in Wilson, the defendant met that standard since the defendant's medical expert "opined that [the doctor] fell below the standard of care when she implanted more products than [the plaintiff] needed." (*Ibid*.)

In sum, to be able to include a third-party on the verdict form, **"there must be substantial evidence that a nonparty is at fault before damages can be apportioned to that nonparty."** (Scott v. C.R. Bard, Inc. (2014) 231 Cal.App.4th 763, 785.) Moreover, "[a]pportionment of noneconomic damages is a form of equitable indemnity in which a defendant may reduce its obligation to pay damages by establishing others are also at fault for the plaintiff's injuries. Accordingly, the burden is on the defendant to prove fault as to those nonparty tortfeasors." (*Ibid*.; see also CACI 406].) In Chakalis v. Elevator Solutions, Inc. (2012) 205 Cal.App.4th 1557, 1572, the court specifically held that it was improper to include physicians on a special jury verdict form when "there was no expert testimony regarding the element of causation." In that case,

> *While defendants' experts were critical of [the nonparty physician's] treatment and discussed the dangers and risks associated with it, they did not actually offer an expert opinion that it was a substantial factor in causing plaintiff's injuries within a reasonable medical prob-*

ability. Defendants therefore failed to meet their burden of showing [the physician] was comparatively at fault for plaintiff's damages for purposes of Civil Code section 1431.2.

(*Ibid*.) As such, the Court of Appeal reversed the jury verdict finding the non-party at fault on the special verdict form and remanded the case for a new trial. (*Ibid*.)

II. If There is a Possibility that the Defense May Point the Finger at a Peripheral Provider, that Provider Should be Named as a Defendant

Even when a plaintiff's attorney diligently files a Motion *in Limine* to exclude the empty chair defense, medical malpractice defense attorneys are trained to circumvent the motion and point the finger without calling it negligence. They will argue to the judge that including the description of the care from the other providers is important to provide the whole picture of care to the jury and that they are not crossing the line as they are not asserting the empty chairs committed malpractice. They will argue that under CACI 505, a healthcare provider is not necessarily at fault just because he made a mistake or error that was nonetheless reasonable under the circumstances.

In front of the jury, the defense lawyer will then argue: "We don't believe anyone in this case committed malpractice or negligence. This was just an unfortunate result. In fact, we are not alleging that [nonparty empty chair] was negligent or committed malpractice, but she was the one who was at the controls! If anyone is at fault, and we really don't believe anyone is, then it would have to be [non-party empty chair] and not my client!"

This is a very effective way for a defense attorney to point at the empty chair without actually pointing at the empty chair.

The only way around this defense is to simply name as defendants those peripheral healthcare providers if there is even a possibility that there may be an empty chair defense. You should then offer and agree not to oppose a motion for summary judgment in exchange for that defendant's waiver of costs. Doing so would provide protection under Code of Civil Procedure section 437c(l).

Under section 437c(l), "if a motion for summary judgment is granted on the basis that the defendant was without fault, no other defendant during trial, over plaintiff's objection, may attempt to attribute fault to, or comment on, the absence **or involvement** of the defendant who was granted the motion." (Emphasis added.)

Therefore, if the motion is granted on the basis that the healthcare provider acted reasonably, the defense is not even allowed to comment on the *involvement* of the peripheral healthcare provider. Importantly, even before the motion is filed, negotiate with that party's attorney and request that the motion be filed on standard-of-care grounds only.

Of course, there are downsides in the approach of naming peripheral defendants. Juggling multiple defendants and law firms can be expensive and time-consuming. In particular, written discovery is often extensive in medical malpractice cases, which becomes very difficult and onerous with more parties added. While our hand is being forced by the empty chair defense and the actions of medical malpractice defense lawyers, it is also not enjoyable suing peripheral providers who have little liability.

One last tip: Always serve the peripheral defendants *before* serving the primary defendants with the lawsuit. There are only a handful of medical malpractice defense firms, and it would be advantageous to conflict out the strongest firms from representing the more culpable defendants when they are already assigned to the case.

III. If the Defendant Actually Attributes Fault to a Nonparty by Pointing the Finger, Doe in that Nonparty through the Relation Back Doctrine

If Defendant actually attributes fault to an empty chair with expert testimony, this is often a gift to the plaintiff's attorney. Even if the identity of that empty chair is known, a plaintiff can add the party in place of a Doe Defendant. After doing so, there will be a natural wedge between the two defendants.

Invariably, however, the new defendant will argue that the case is not timely under the short one-year statute of limitations under MICRA's Code of Civil Procedure section 340.5. It is important that the plaintiff's attorney understands the law as to the Relation Back Doctrine under Code of Civil Procedure section 474. Fortunately, section 474 is very liberal, and all doubts are construed in favor of the plaintiff.

There are two Court of Appeal decisions involving medical malpractice actions that are extremely helpful for the plaintiff's attorney: *Fuller v. Tucker* (2000) 84 Cal.App.4th 1163 and *McOwen v. Grossman* (2007) 153 Cal.App.4th 937.

Pursuant to Code of Civil Procedure section 474:

When the plaintiff is ignorant of the name of a defendant, he must state that fact in the complaint, or the affidavit if the action is commenced by affidavit, and such defendant may be designated in any pleading or proceeding by any name, and when his true name is discovered, the pleading or proceeding must be amended accordingly. . . .

A section 474 amendment identifying an entity as a Doe defendant "relates back" to the commencement of the action. *(Smeltzley v. Nicholson Mfg. Co.* (1977) 18 Cal.3d 932.) "For the purpose of the statute of limitations, a party properly sued by a fictitious name in the original complaint in conformity with Cal. Civ. Proc. Code § 474 is deemed a party from the commencement of the action." (*Garrett v. Crown Coach Corp.* (1968) 259 Cal. App. 2d 647, 649-650.)

Moreover, the "Relation Back" doctrine is far more lenient than an analysis of Statute of Limitations under Code of Civil Procedure section 340.5. (*McOwen v. Grossman* (2007) 153 Cal.App.4th 937, 940.) Instead, "Code of Civil

If Defendant actually attributes fault to an empty chair with expert testimony, this is often a gift to the plaintiff's attorney. Even if the identity of that empty chair is known, a plaintiff can add the party in place of a Doe Defendant. After doing so, there will be a natural wedge between the two defendants.

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Procedure section 474 is to be liberally construed." (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1170 [emphasis added]; see also *General Motors Corp. v. Superior Court* (1996) 48 Cal. App.4th 580, 593 ["[S]ection 474 is to be **liberally** construed."].) Indeed, "[t]he relevant inquiry when the plaintiff seeks to substitute a real defendant for one sued fictitiously is what facts the plaintiff actually knew at the time the original complaint was filed." (*Fuller v. Tucker* (2000) 84 Cal.App.4th 1163, 1170 [emphasis in original.])

Indeed, even a plaintiff's own negligence in not discovering defendant's identity/culpability is irrelevant. As explained in *Grinnell Fire Protection System Co. v. American Sav. & Loan Ass'n* (1986) 183 Cal. App. 3d 352, 359, "a plaintiff will not be refused the right to use a Doe pleading even where the plaintiff's lack of actual knowledge is attributable to plaintiff's own negligence."

Only *actual* knowledge of a defendant's identity and wrongdoing is enough to defeat a relation back claim. (*General Motors Corp.*, supra, 48 Cal.App.4th at p. 593.) Unlike the standard for timeliness under the Statute of Limitations pursuant to Code of Civil Procedure section 340.5, suspicion is *not* sufficient to bar an action under section 474. (*Ibid*. ["[T]he plaintiff does not relinquish her rights under section 474 simply because she has a suspicion of wrongdoing arising from one or more facts she does know."].)

Indeed, even a plaintiff's own negligence in not discovering defendant's identity/culpability is irrelevant. As explained in *Grinnell Fire Protection System Co. v. American Sav. & Loan Ass'n* (1986) 183 Cal. App. 3d 352, 359, "a plaintiff will not be refused the right to use a Doe pleading even where the plaintiff's lack of actual knowledge is *attributable to plaintiff's own negligence*." (Emphasis added).

In *Fuller*, supra, 84 Cal.App.4th at p.1166, the patient suffered a significant nerve injury during bladder surgery in November of 1995. (Ibid.) The patient filed a medical malpractice action but did not name the anesthesiologist. (*Ibid*.) After the statute of limitations expired, the plaintiff filed a Doe amendment naming the anesthesiologist as a Doe under section 474. (*Id*. at p. 1167.) The trial court bifurcated the trial and heard the relation back issues first. (*Ibid*.) The trial court found that the action was not timely, reasoning that the statute of limitation accrues when the "reasonable person has been put on inquiry or has the opportunity to obtain knowledge from sources open to her investigation. The test is an objective one meaning that the information or circumstances known to the plaintiff as a reasonable person would have investigated the possibility that the plaintiff's injuries were caused by the defendants or any of them." (*Ibid*.)

The trial court relied on the fact that the patient signed consent forms and testified that she knew who the anesthesiologist was prior to the filing of the complaint. (*Ibid*.) Moreover, the trial court relied on the fact that "[the anesthesiologist's] name appears unambiguously in [the patient's] medical and surgical reports" and that the "records were readily available to her and her attorneys long before the statute of limitations ran." (*Ibid*.)

After judgment in the anesthesiologist's favor, the Court of Appeal reversed, finding that the trial court applied an erroneous legal standard and "[i]t is reasonably probable that in the absence of these errors, a result more favorable [to the patient] would result." (*Id*. at p. 1173.) After noting that "section 474 is to be liberally construed," the court noted that the relevant inquiry is "what facts the plaintiff actually knew at the time the original complaint was filed." (*Id*. at p. 1170.) The Court of Appeal went on to explain: "It is when plaintiff is actually ignorant of a certain fact, not when plaintiff might by the use of reasonable diligence have discovered it. Whether plaintiff's ignorance is from misfortune or negligence, plaintiff is alike ignorant, and this is all the statute requires." (*Ibid*.) Moreover, "ignorance" is "broadly interpreted" to mean not only the identity of the defendant, but also the *culpability* of that defendant. (*Ibid*.)

Therefore, "while the duty to investigate is considered in discussing whether an initial complaint is timely, that inquiry is not relevant to whether a Doe amendment is timely." (*Id*. at p. 1172.) In other words, section 474 allows a plaintiff in good faith to delay suing a particular entity as a defendant until that plaintiff has actual knowledge of sufficient facts to believe "that liability is probable." (*Ibid*.) As such, the Court of Appeal erred in finding that the patient was "obligated to make a reasonable investigation to discover [the anesthesiologist's] identity and to determine the connection between [the anesthesiologist] (the wrongdoer) and [the patient's] injuries." (*Ibid*.) Accordingly, since the testimony and evidence revealed that the patient was ignorant of the cause of her injuries and any connection to the anesthesiologist, judgment in favor of the anesthesiologist was error. (*Ibid*.)

McOwen, involving an underlying medical malpractice action, is also very helpful. (*McOwen*, supra, 153 Cal.App.4th at p. 940.) The patient in McOwen received care and treatment from a medical group to treat his diabetes. (*Ibid*.) After ointment was ineffective, he was referred to a vascular surgeon. (*Ibid*.) The vascular surgeon ordered an angiogram of the patient's leg. (*Ibid*.) The patient ended up having his right leg amputated in July of 2003. (*Ibid*.)

The patient timely filed suit against the medical group on March 25, 2004, but did not name the vascular surgeon as a defendant. (*Ibid*.) This was despite the fact that the patient knew of the identity and role in his treatment by the vascular surgeon. (*Ibi*d.) The medical group's expert vascular surgeon was deposed on March 21, 2005. (*Ibid*.) That expert was critical of the vascular surgeon. (*Ibid*.)

On August 8, 2005, 17 months after filing the lawsuit, the patient amended his complaint to include the vascular surgeon as a defendant. (*Ibid*.) Identical to here, the patient and his attorneys contended that they were not aware of the vascular surgeon's wrongdoing until March of 2005, after the deposition of the medical group's expert revealed the vascular surgeon's wrongdoing. (*Ibid*.)

The trial court granted the vascular surgeon's motion for summary judgment, finding that the action was untimely under Code of Civil Procedure section 340.5. (*Id*. at p. 942.) The trial court stated that "Plaintiff knew he was treated by the moving defendant [surgeon], knew of his identity and the subsequent

amputation long before the Doe amendment was filed. He also deposed the moving defendant, which testimony presumably provided additional facts in support of his claim." (*Ibid*.)

The Court of Appeal reversed. (*Ibid*.) First, as explained at length by the Court of Appeal, **"section 474 is not to be confused with the statute of limitations."** (*Ibid*.) First, the court noted that "In keeping with th[e] liberal interpretation of section 474, it is now well established that even though the plaintiff knows of the existence of the defendant sued by a fictitious name, and even though the plaintiff knows the defendant's actual identity (that is, his name), the plaintiff is 'ignorant' within the meaning of the statute if he lacks knowledge of that person's connection with the case or with his injuries." (*Ibid*.)

Notably, as recognized by *McOwen*, "[w]hether the requirements of section 474 are met is different from deciding when the cause of action accrued for the purposes of the statute of limitations." (*Id*. at p. 943.) Unlike section 340.5, "[t]he fact that the plaintiff had the means to obtain knowledge is irrelevant." (*Id*. at p. 944 [see also *Ibid*. ("In short, section 474 does not impose upon the plaintiff a duty to go in search of facts she does not actually have at the time she files her original pleading.").]) As such, "While reasonable diligence may be material to the determination of the accrual of a cause of action [under section 340.5], reasonable diligence is not germane to determining whether a Doe amendment was timely." (*Id*. [emphasis added.].)

Accordingly, the Court of Appeal found that "the trial court's conclusion that the amputation of appellant's leg put him on notice and that, inferentially, appellant should have exercised due diligence based on that fact and named respondent earlier than he did, misses the mark." (*Ibid*.) As such, as the plaintiff in *McOwen* had no suspicion of wrongdoing of the newly named defendant, it was error to grant summary judgment. (*Ibid*.; see also *Mishalow v. Horwald* (1964) 231 Cal.App.2d 517, 41 Cal. Rptr. 895 [Doe amendment timely against anesthesiologist even though plaintiffs knew anesthesiologist's identity as plaintiffs were ignorant of facts giving rise to cause of action against him and did not know he had been negligent].)

One should not wait until expert depositions to inquire as to whether a defendant is making any contentions of malpractice by empty chairs. The plaintiff's attorney should send out detailed interrogatories asking whether the defense contends if any other party is negligent. The defense (even though they will send out their own contention interrogatories) will invariably just serve objections on the basis of expert testimony. It is important that the plaintiff's attorney meet and confer on these responses and file a motion if necessary.

IV. Final Thoughts Regarding the Empty Chair Defense

Lastly, one should not wait until expert depositions to inquire as to whether a defendant is making any contentions of malpractice by empty chairs. The plaintiff's attorney should send out detailed interrogatories asking whether the defense contends if any other party is negligent. The defense (even though they will send out their own contention interrogatories) will invariably just serve objections on the basis of expert testimony. It is important that the plaintiff's attorney meet and confer on these responses and file a motion if necessary. (See *Rifkind v. Superior Court* (1994) 22 Cal.App.4th 1255, 1261 [holding that contention questions are "clearly discoverable when sought by written interrogatory."].) These interrogatories will help foreclose the empty chair defense at trial.

Medical malpractice cases are hard enough to win. Jurors like doctors and do not want to believe that healthcare providers would cause patients harm. While jurors feel qualified to judge bad drivers or discriminatory employers, they do not feel qualified to judge complicated medical procedures or conditions. Not foreclosing an empty chair defense at trial will make your already difficult case that much harder.

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CCTLA's "Everything You Never Wanted to Know About Liens and More" program drew more than 70 persons to McGeorge School of Law on May 12th. Special thanks to speakers Dan Wilcoxen, Don de Camara, John Rice and Chris Viadro who provided value information regarding liens and also provided a 497-page book with important information and forms. CCTLA also sincerely thanks Noah Schwartz, Offices of Noah S. A. Schwartz at Ringler, and Nick Lowe, Law Offices of Nick Lowe, for their generous sponsorship of this popular program.

LIENS SEMINAR SPEAKERS

Dan Wilcoxen

Don de Camara

John Rice

Chris Viadro

The Evolution of Uber and Lyft Liability

By: Daniel R. Del Rio

ORIGINAL LAW

Prior to the passing and codification of California Public Utilities Code § 5431(c), persons injured during their use of prearranged transportation services via mobile applications, such as Uber or Lyft, solely had to rely on the statutory minimums of an individual driver as set forth in California Vehicle Code § 16056. Injured persons were not able to seek compensation from companies such as Uber or Lyft, nor were the companies required to have automobile liability insurance for their drivers. Presently, the automobile insurance statutory minimums are set as follows:

> *No policy or bond shall be effective under Section 16054 unless issued by an insurance company or surety company admitted to do business in this state by the Insurance Commissioner, except as provided in subdivision (b), nor unless the policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and costs, of not less than thirty thousand dollars ($30,000) because of bodily injury to or death of one person in any one accident and, subject to that limit for one person, to a limit of not less than sixty thousand dollars ($60,000) because of bodily injury to or death of two or more persons in any one accident, and, if the accident has resulted in injury to, or destruction of property, to a limit of not less than fifteen thousand dollars ($15,000) because of injury to or destruction of property of others in any one accident.*

Despite the automobile liability insurance statutory minimums providing some redress for negligence of Uber or Lyft drivers, oftentimes these minimums did not cover a fraction of the medical costs alone for the injuries suffered, not taking into account pain and suffering, wage loss, or other potential damages. The standard Uber ride can fit up to three people and can be upgraded to fit six people. Any mild to serious accident causing injuries, involving a standard Uber ride containing three people, would easily exhaust the statutory minimum, forcing injured parties to seek compensation from their own insurance carriers or pay out of pocket to be made whole.

Daniel Del Rio
Del Rio & Callaway,
is a CCTLA Board
Member

As noted in the Senate Floor Analysis of SB-1107 proposing increased automobile liability insurance limits, the California Department of Insurance estimated that 32% of all accidents in California in 2022, would have bodily injury claims that would exceed the statutory automobile liability insurance minimums. Said gaps in insurance coverage and liability between the individual driver and companies like Uber or Lyft gave way to the current laws that now account for the shortcomings and provide further compensation for injured persons by mandating that prearranged transportation services have liability insurance depending on the phase of the service.

There was also additional concern that the reclassification of drivers for Cooper and Lyft as independent contractors pursuant to Proposition 22 would be used to fight liability of the employer for the actions of their employees such as through respondeat superior.

CURRENT LAW

Now, the California Public Utilities Commission ("CPUC") has expressly determined that Transportation Network Carriers ("TNCs"), companies such as Uber and Lyft, are Charter Party Carriers that are subject to the common carrier standard of care.

"Transportation Network Company" means an organization, including, but not limited to, a corporation, limited liability company, partnership, sole proprietor, or any other entity, operating in California that provides prearranged transportation services for compensation using an online-enabled

application or platform to connect passengers with drivers using a personal vehicle. Cal. Pub. Util. Code § 5431(c).

The CPUC stated that: "It is reasonable to conclude that TNCs are charter party passenger carriers, and therefore we will exercise our existing jurisdiction over these services . . ." Rulemaking Procedure 12-12-011, Decision 13-09-045 September 19, 2013, Finding of Fact No. 16, at p. 66-67. The CPUC also stated TNCs are Charter Party Carriers as a Conclusion of Law. *Id*., Conclusion of Law No 6, at P 71.

Statutory Codification of Respondeat Superior

Pursuant to California Public Utilities Code § 5354, permit or certificate holders are responsible for acts and omissions of its officers, agents, and employees. Uber is the TNC certificate holder (TCP 38150) for Uber's TNC activities, and Lyft is the TNC permit holder (TCP 32513) for Lyft's TNC activities. Accordingly, Uber, Lyft, and all other TNC permit or certificate holders are strictly liable for the acts, omissions, or failures of their drivers during the course and scope of their employment. Therefore, codifying respondeat superior as it relates to Uber's and Lyft's liability concerning the actions of their drivers.

Establishing Common Carrier Standard of Care

Case law has since established that Uber is considered a common carrier for negligence purposes. *Doe v. Uber Techs., Inc.*, 184 F. Supp. 3d 774, 787 (N.D. Cal. 2016) ("Plaintiffs have alleged sufficient facts to plausibly claim that Uber is a common carrier. Looking beyond any conclusory assertions, plaintiffs have alleged critical underlying facts: that Uber's services are available to the general public and that Uber charges customers standardized fees for car rides.) Plaintiffs' allegations support the claim that Uber "offers to the public to carry persons," thereby bringing it within California's definition of common carrier for tort purposes. See Cal. Civ. Code § 2168; see also *Squaw Valley Ski Corp. v. Superior Court*, 2 Cal.App.4th 1499, 1508 (1992) (finding defendant to be a common carrier because it "indiscriminately offers its...chair lift to the public to carry skiers at a fixed rate").

Such a classification for Uber and Lyft requires the ride service companies to maintain a heightened standard of care during all interactions with passengers. California Civil Code § 2168 defines a common carrier as follows: "Everyone who offers to the public to carry persons, property, or messages, excepting only telegraphic messages, is a common carrier of whatever he thus offers to carry."

Pursuant to California Civil Code § 2100, "A carrier of persons for reward must use the utmost care and diligence for their safe carriage, must provide everything necessary for that purpose, and must exercise to that end a reasonable degree of skill." This duty is extended to provide vehicles "safe and fit for the purposes to which they are put and is not excused for default in this respect by any degree of care." Cal. Civ. Code § 2101. Common carriers must carry passengers [or property] safely.

Common carriers must use the highest care and the vigilance of a very cautious person. CACI No. 902 Duty of Common Carrier. They must do all that human care, vigilance, and foresight reasonably can do under the circumstances to avoid harm to passengers [or property]. Id. While a common carrier does not guarantee the safety of its passengers [or property that it transports], it must use reasonable skill to provide everything necessary for safe transportation, in view of the transportation used and the practical operation of the business. *Id*. Uber and Lyft drivers must adhere to these policies otherwise passengers may seek recourse and be compensated by Uber and Lyft when their drivers fail to uphold these safety measures put in place by the California Legislature and courts.

Based on the foregoing, Uber and Lyft, as TNCs, are classified as common carriers that will be held strictly liable for harms caused by their drivers' negligence, and Uber and Lyft owe a higher duty of "utmost care and diligence."

TNC Insurance Coverage

As with any personal injury claim, liability and the availability of insurance coverage is fact dependent. Depending on the phase in which a passenger has en-

gaged with an Uber or Lyft driver will determine the liability insurance minimum available to the passenger when seeking compensation for their injuries against Uber or Lyft.

TNC services and liability are categorized into three periods: period one, where the mobile application is open awaiting a connection; period two, where a request has been accepted but the passenger has yet to enter the vehicle; and period three, where the passenger has entered the vehicle through the passenger exiting the vehicle. Cal. Pub. Util. Code § 5351 et seq.

A potential Uber or Lyft passenger who has the mobile application active may still be compensated for the negligence of a driver through the statutory liability insurance minimums set for all TNCs including Uber and Lyft. In period one, TNCs shall provide primary insurance in the amount of at least fifty thousand dollars ($50,000) for death and personal injury per person, one hundred thousand dollars ($100,000) for death and personal injury per incident, and thirty thousand dollars ($30,000) for property damage. Cal. Pub. Util. Code § 5433(c)(1). TNCs may satisfy this requirement through: (a) TNC insurance maintained by the driver; (b) TNC insurance maintained by the TNC that provides coverage if a driver does not maintain the required TNC insurance, or if the driver's TNC insurance ceases to exist or is cancelled; or (c) a combination of (a) and (b). *Id*. This period one insurance coverage filled a gap that, prior to the codification and established caselaw, would have otherwise left an injured party with little recourse despite a negligent act being committed.

After the acceptance of a passenger by a driver, TNCs mandated minimum liability coverage significantly increases. In both periods two and three, TNCs must provide primary commercial insurance in the amount of one million dollars ($1,000,000). Cal. Pub. Util. Code § 5433(b)(1).

TNCs may satisfy these requirements through the three ways previously discussed in the period one section. This increase in coverage solidifies the statutory protections afforded to individuals and emphasizes the need for TNCs—such as Uber and Lyft—gaging in prearranged transportation services via mobile applications.

Despite period three's purported bounds, on June 30, 2021, the San Francisco Superior Court issued its ruling declaring that the Transportation Network Carrier, Uber, owed a duty to 19-year-old Stella Yeh after she was hit and killed by two cars on the freeway after being abandoned near a freeway ramp by the first driver and a second driver declining to let her into his vehicle or provide aid despite observing her walk up the freeway ramp. *McGarry v. Uber Technologies, Inc. et al.*, CGC-20-584408 (since transferred to San Diego County Superior Court, 37-2022-00051776).

This ruling extends Uber's and Lyft's duty to passengers, through the common carrier heightened duty using the utmost duty of care, to ensure the safety of their passengers not only in the vehicle, but also in the surrounding area in which a passenger may enter or exit the vehicle.

In period three, TNCs shall also provide uninsured motorist coverage and underinsured motorist coverage in the amount of one million dollars ($1,000,000) during Period 3 from the moment a passenger enters the vehicle until the passenger exits the vehicle. Cal. Pub. Util. Code § 5433(b)(2). The policy may also provide this coverage during any other time period, if requested by a participating driver relative to insurance maintained by the driver. Id. TNCs may satisfy these requirements through the three ways previously discussed in the period one section.

It is well known that a party's injuries can be compensated using Uber's or Lyft's insurance policies when it has been proven that the driver was negligent in their transportation of the passenger. Recently, the question of whether Uber's and Lyft's heightened common carrier duty to use the utmost care would extend to a passenger being injured after exiting the vehicle in a dangerous location due to the driver kicking the passenger out. Period three's coverage is well defined as starting from the moment the passenger enters the vehicle until the passenger exits. Cal. Pub. Util. Code § 5433.

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This ruling extends Uber's and Lyft's duty to passengers, through the common carrier heightened duty using the utmost duty of care, to ensure the safety of their passengers not only in the vehicle, but also in the surrounding area in which a passenger may enter or exit the vehicle.

This provides passengers with an added layer of protection when seeking compensation for the negligence of drivers.

Potential Gaps in TNCs Insurance Coverage

Despite the seemingly comprehensive coverage for each of the three periods, insurance gaps still exist. The California Public Utilities Code only mandates Underinsured/Uninsured coverage for period three while a passenger is present in the vehicle. Cal. Pub. Util. Code § 5433(b)(2). Underinsured/Uninsured coverage for periods one and two is optional depending upon the TNC and the driver.

This gap may be addressed by the statutory mandate that TNCs shall also maintain insurance coverage that provides excess coverage insuring the TNC and the driver in the amount of at least two hundred thousand dollars ($200,000) per occurrence to cover any liability arising from a participating driver using a vehicle in connection with a TNC's online-enabled application or platform. Cal. Pub. Util. Code § 5433(c)(2).

Admissibility of medical bills to prove future medical expenses following *Howell* and its progeny

By: John T. Stralen

More than a decade has passed since the California Supreme Court issued its ruling in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541. Since then, there has been a continuing debate about what evidence should be allowed to prove the cost of past and future medical services. After *Howell*, there were several unanswered questions, especially regarding proof of future medical costs. Defendants may argue that the discounted prices for future medical services are a more accurate reflection of cost than the full charges. While this might appear logical when applied to past medical bills—limiting a plaintiff's recovery to the sum actually paid by an insurer—the situation becomes more problematic when a defendant attempts to project these discounted prices into the future in an attempt to reduce its liability for future economic damages.

This article discusses the post-*Howell* cases (some with conflicting holdings) regarding the admissibility of medical bills showing the full charges and the challenges with projecting current insurance discounted rates into the future. It also suggests arguments to counter defense discount-based pricing.

Whether for past or future care, navigating the labyrinth of case law surrounding the valuation of medical services in California personal injury suits can be quite a task. First, we will review some of the key decisions that have created so much confusion on this issue.

The first relevant case, *Katiuzhinsky v. Perry* (2007)152 Cal.App.4th 1288, predates the *Howell* decision. This ruling posited that a plaintiff would remain liable for the full billed amount of past medical services, despite signing a lien for those services and then having a factoring company purchase the lien at a reduced amount. In this situation, the court ruled that the full bill retains its admissibility, provided there is expert testimony supporting the reasonable and necessary requirements.

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In *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th541 the California Supreme Court held that an injured motorist could not recover the negotiated rate differential from the at-fault party—that gap between her insurance company's actual payout and the undiscounted price. *Howell* did not abrogate the collateral source rule. The court's rationale was that the motorist only had liability for what her private insurer agreed to pay; the unpaid differential was not seen as a benefit or a form of compensation for her injuries and thus not considered a collateral source.

Howell also clarified that the evidence of a lesser amount accepted as full payment by the medical care provider was admissible, assuming it met other evidentiary foundational rules. Informing the jury that the payments were made by an insurer remained inadmissible under the collateral source rule. Nonetheless, the full billed amount was found inadmissible for proving the value of past medical services covered by insurance.

The *Howell* decision left several unanswered questions about proving damages for medical expenses for uninsured plaintiffs, as well as how insurance negotiated discounted rates affected proof of future medical expenses.

Corenbaum v. Lampkin (2013) 215 Cal.App.4th 1308 took Howell several steps further. Relying on the reasoning that the plaintiff may only recover the amount the medical provider accepts as full payment, *Corenbaum* held the billed amount for medical services when the insurer pre-negotiates a lower rate is inadmissible to prove not only past medical damages, but also future medical damages and noneconomic damages.

In *Ochoa v. Dorado* (2014) 228 Cal.App.4th 120 the court determined that the full amount billed but unpaid is irrelevant to the determination of the reasonable value of services provided, irrespective of any prior agreements by medical providers to accept a lesser amount as full payment.

Thus, the *Ochoa* case held that medical bills

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showing the full amount paid were inadmissible to prove medical expenses.

In *Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, the court addressed the situation where a plaintiff is uninsured. Under these circumstances, the court allowed for the full amount billed to be introduced as evidence of this reasonable value for past medical services. The caveat here is that the bill alone is not sufficient; it also requires the support of competent expert testimony regarding the reasonable value of services.

Markow v. Rosner (2016) 3 Cal. App.5th 1027 involved a medical malpractice case where the court provided guidance on the calculation of future medical expenses set forth in a plaintiff's life care plan. The court clarified that the reasonable value of medical services should be thought of in terms of market or insurance exchange value. For insured plaintiffs, this will not be the amount billed by the medical provider but the amount paid at the reduced rate negotiated by the plaintiff's insurance company.

Cuevas v. Contra Costa County (2017) 11 Cal.App.5th 163 was also a medical malpractice case where the court applied the logic from *Corenbaum* to future medical costs. According to *Cuevas*, future medical damages can be determined by insurance market rates for medical services. Thus, the defendant can present evidence of the discounted insurance payments for both past and future medical services. Importantly, both *Markow* and *Cuevas* allowed for some limited use of UCR (Usual, Customary and Reasonable) pricing or the full medical charges in their decisions.

At this point, the question still remained: What happens when a plaintiff, despite having health insurance, elects to seek treatment from providers outside their insurance plan (potentially on a lien basis) and consequently incurs charges exceeding what their insurance would have covered?

Plaintiffs have argued that lien-based medical treatment has multiple benefits that treating within their health insurance coverage doesn't have. This includes quicker and superior service (avoiding the hurdles of insurance referrals, HMO bureaucracy, multiple steps, delays, etc.) and the option to visit top-tier doctors. The defense argument is that a plaintiff should be confined to insurance rates because the plaintiff is under a duty to mitigate damages.

Pebley v. Santa Clara Organics, LLC, (2018) 22 Cal.App.5th 1266 provided the answer: "such a plaintiff shall be considered uninsured, as opposed to insured, for the purpose of determining economic damages." Therefore, the plaintiff may introduce the full billed amounts. Significantly for plaintiffs, the *Pebley* court highlighted its divergence from *Ochoa*. The *Pebley* court outlined the current state of the law and ruled that when a plaintiff is uninsured, medical bills are admissible to prove both the amount incurred and the reasonable value of medical services provided. However, the uninsured plaintiff must present additional evidence, typically in the form of expert opinion testimony, to establish that the amount billed is a reasonable value for the service rendered.

More recently, in *Qaadir v. Figuerao* (2021) 67 Cal.App.5th 790 806, the court considered whether the full amount of plaintiff's unpaid medical bills could be used as a basis to prove past and future medical damages. Similar to *Pebley*, the plaintiff in *Qaadir* had health insurance but received his medical treatment on a lien instead.

The court agreed with *Pebley* that an insured plaintiff who opts to receive medical treatment from outside of his insurance plan should be considered uninsured for purposes of proving past and future medical damages. Following *Pebley*, the court concluded that such unpaid bills are relevant for determining an uninsured plaintiff's medical expenses, again provided that the necessary foundation and expert testimony is also presented as support.

Defendants might try to leverage the *Ochoa, Markow* and *Cuevas* cases to assert that the computation of future medical damages should be anchored on the discounted rates applied to the plaintiff's past medical expenses. This contention might be supported by *Cuevas'* validation of the defendant's use of Affordable Care Act (ACA) prescribed private insurance plans as evidence of future prices.

However, an important distinction for personal injury plaintiffs is that both *Markow* and *Cuevas* were medical malpractice cases. While reference to the ACA would typically be considered inappropriate in a personal injury case, *MICRA's* partial abro-

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gation of the collateral source rule renders it permissible. Moreover, plaintiffs should keep in mind that the more recent *Pebley* and *Qaadir* rulings diverged from *Corenbaum* and *Ochoa* and allow the full billed amount to be introduced into evidence.

This flaw in the defense argument ignores the existence of hidden payments and benefits to medical providers that aren't included in the discounted price, thereby understating the actual value of the services. The actual amount a healthcare provider receives extends beyond the cash payments and can include annual stipends from insurance companies, payments based on write-offs, and non-cash considerations from insurers, such as guaranteed patient volumes and expedited payments. These factors suggest that the true value received by healthcare providers under private insurance plans is higher than what is reflected on patients' bills.

Moreover, relying only on the discounted rates paid by insurance companies to predict future costs undervalues plaintiff's true damages since this analysis does not take into account the plaintiff's cost to acquire health insurance and other out of pocket expenses such as co-pays and deductibles.

There also appears to be a trend among defendants and their experts to rely on Medi-Cal or Medicare rates as the basis for future medical plan pricing. However, there are compelling reasons why the rates for healthcare services under Medi-Cal and Medicare—which are known to be the lowest in the healthcare industry—should not be used as a gauge for your client's future medical expenses.

Plaintiff's attorneys should strongly resist defendant's attempt to use Medicare or Medi-Cal rates as the standard for future medical prices. Even the Cuevas case explicitly excluded Medi-Cal pricing. If the defense attempts to circumvent this prohibition, emphasize that Medi-Cal suffers from similar foundational issues encountered by private insurance discounts, and Medicare or Medi-Cal services may not be accessible for your client.

Also consider whether the plaintiff is eligible for these programs and whether any eligibility will continue into the future. For instance, even if the plaintiff is currently receiving Medi-Cal benefits, continued coverage is not guaranteed. Plus, the plaintiff will lose coverage in the event of even a modest damage award. Without eligibility, the lower prices are unattainable. Significantly, the *Cuevas* court endorsed the use of UCR (Usual, Customary and Reasonable) pricing for future medical costs. In situations where the plaintiff is uninsured and no negotiated discount applies, full charges are admissible as a gauge for past medical damages.

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Plaintiff's attorneys should strongly resist defendant's attempt to use Medicare or Medi-Cal rates as the standard for future medical prices. Even the Cuevas case explicitly excluded Medi-Cal pricing. If the defense attempts to circumvent this prohibition, emphasize that Medi-Cal suffers from similar foundational issues encountered by private insurance discounts, and Medicare or Medi-Cal services may not be accessible for your client.

The defense expert's use of market rates or insurance discounts may lack the necessary foundation to be admitted at trial. All expert testimony must be underpinned by a solid foundation. The trial court has the authority to disregard speculative expert opinions. (Evid. Code, § 803; *Sargon Enterprises, Inc. v. University of Southern California* (2012) 55 Cal.4th 747, 771-772.) While the plaintiff carries the burden of persuasion on the overall matter of damages, the defendant is responsible for proving any reduction from the plaintiff's claimed damages. Hypothetical deductions are not permissible. (*Cox v. Superior Court (Shields)* (2002) 98 Cal.App.4th 670.)

Arguably, the *Markow* and *Cuevas* rulings failed to sufficiently address the issue of foundation for defense opinions on future discounts. Due to the considerable uncertainty surrounding future private insurance, the use of insurance discounts for future medical damages lacks foundation, is highly speculative, and will inevitably undervalue the actual damages.

Even after *Cuevas* and other recent cases, a strong argument remains that a defendant cannot meet its burden of proof on medical pricing when attempting to project a specific insurance discount years into the future.

There are other foundational issues with defense experts using insurance discounted rates as evidence of future medical costs. One example is when the defense expert uses "allowed amount" data from Fair Health. Reportedly, such data is proprietary and at least one expert life care planner testifying for a defendant has stated that despite his reliance on the Fair Health data, it cannot be shared with plaintiff's counsel. If a proper foundation cannot be established, the defense opinion should be excluded.

Lastly, the referenced cases confirm that the collateral source rule continues to preclude mention of future insurance and negotiated prices paid by insurers. As a result, any future discounted prices for health care would need to be introduced without mentioning health insurance.

The lessons we can draw from these cases, including the more recent *Pebley* and *Qaadir* decisions, suggest that the "discounted" amounts are not the exclusive legal measure of the reasonable value of future medical care. Rather, the cases support use of the UCR and the full billed amounts to prove future medical expenses.

Moreover, when defendants attempt to use discounted rates as the basis for establishing the value of future medical care, they have the burden of proof to establish the amount of the reduction and overcome the other foundational issues exist. The failure to do so provides a basis for having the defendant's evidence of future medical costs excluded.

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. The next issue of *The Litigator* will be the Fall, and all submissions need to be received by August 1, 2023.

VERDICT - $5,461,993
Medical Malpractice

After a three-week trial, David Smith and Elisa Zitano, of the Smith Zitano Law Firm, prevailed when a Sacramento County Superior Court jury awarded $5,461,993 for their client Christine Berry, for a nearly six-year delay in the diagnosis and treatment of metastatic appendiceal adenocarcinoma (cancer of the appendix). Plaintiff's experts testified that this nearly six-year delay resulted in avoidable pelvic metastasis, necessitated two major surgeries in 2019 and 2022, and significantly reduced the now disabled plaintiff's life expectancy by several decades.

Defendant pathologist Dr. Andrea Ong, of Diagnostic Pathology Medical Group (DPMG), admitted she negligently failed to diagnose the cancer following what appeared to be a routine appendectomy in November 2013 at Sutter Davis Hospital. However, defendants Ong and DPMG aggressively pursued a "causation" defense, claiming that plaintiff's cancer was "incurable and untreatable" from the outset, and that the nearly six-year delay "made absolutely no difference in the outcome."

The defendants' retained expert witnesses Dr. Jason Hornick (pathologist) of Harvard Medical School and Dr. Ari Baron (medical oncology) of San Francisco, testified that Plaintiff suffered from an extremely rare and universally fatal "goblet cell adenocarcinoma."

The 11-1 jury verdict wholly rejected their unsubstantiated testimony, which starkly contrasted with the unanimous medical opinions of the six treating pathologists and medical oncologists who either reported or testified that the plaintiff's cancer was a treatable "appendiceal adenocarcinoma" from the outset, in 2013.

Following the apparently routine November 2013 appendectomy, Plaintiff, an emergency room nurse and mother of a severely developmentally disabled daughter, returned to work fulltime until June 2019, when she underwent a total hysterectomy for what was presumed to be metastatic ovarian cancer.

DPMG treating pathologist, Dr. Kirsten Vanderwalker, viewed the pathology slides from the 2019 hysterectomy and suspected that the "primary" site of the cancer was of GI origin, not an ovarian cancer. Vanderwalker checked the plaintiff's EMR, learned of the appendectomy in 2013, and requested the pathology slide from that surgery. Immediately upon viewing the 2013 appendectomy slide, Vandewalker identified the appendiceal cancer cells that Ong had missed in 2013. Vandewalker notified the treating medical oncologist about the appendiceal origin of the plaintiff's cancer so that future chemotherapy treatments could be specifically targeted to that cancer.

After two years of aggressive chemotherapy following the 2019 hysterectomy, Plaintiff developed further metastasis to her large and small intestines. In 2022, she underwent surgical removal of a large segment of the colon, followed by additional chemotherapy. Multiple treating and consulting oncologists testified at trial that the her cancer has resulted in total disability since 2019, and that the cancer will be most probably fatal, with substantially reduced life expectancy.

Plaintiff's treating physicians, who testified in support of her claim included treating surgical oncologist Dr. Gregory Graves and treating pathologist Vandewalker. Plaintiff's retained experts included Dr. Judith Luce (medical oncology), Dr. Raj Ramsamooj (pathology) and Craig Enos (forensic accountant).

The jury verdict included $961,993 in special damages for past medical bills and past and future income losses. General damages awarded for pain and suffering included $3,000,000 for past general damages and $1,500,000 for future general damages.

Defense counsel Bruce Salenko of Low, McKinley & Salenko, has declared his intention ask the trial judge, the Hon. Steven Gevercer, for a reduction of the total of $4,500,000 in general damages to $250,000 pursuant to the MICRA limitations of general damages.

Plaintiff is thus twice victimized: first by defendant pathologist Ong and second by the enduring and continuing negative impact of the MICRA limitations upon general damages.

VERDICT - $1,750,000
Personal Injury-Motor Vehicle Collision

CCTLA members Ross Bozarth and Glenn Guenard of Guenard & Bozarth, won a $1,745,000 verdict on April 11 in Yang v. Chavez, for their client who was injured in a traffic accident: $55,000, past meds; $1,000,000, future meds; $190,000, past non-economic; and $500,000 future non-economic. The trial was before the Hon. Andre K. Campbell in Sacramento County and lasted six days.

This was a low speed/low property damage rear-ender that had occurred on Mack Road in Sacramento five years earlier, on Aug 11, 2018. Plaintiff's Toyota Tacoma had about $1,000 in property damage. The hood of the defendant's old Mercedes was bent a little, but he said he fixed it himself. Defense admitted to negligence and substantial factor.

Plaintiff was 18 years old at the time of the accident. Over the weekend she developed concussion symptoms. Plaintiff's mother brought her to a nurse practitioner three days later, who ordered MRIs. The cervical MRI was clean, but the brain MRI showed an abnormality. Plaintiff started chiropractic but continued to complain of headaches.

Plaintiff's PCP ordered a second MRI, which showed the

development of scar tissue. The post-concussion symptoms resolved within six months, but Plaintiff developed severe anxiety and anger symptoms, as well as depression, leading to pseudo seizures and breathing problems with hospitalization for a week. Nelson Ong, DC, and David Lin, MD, testified as treaters.

Plaintiff attorneys hired Joshua Kuluva, MD, a neurologist and psychiatrist, who testified Plaintiff's TBI caused by the collision led to her developing conversion disorder. Topher Stephenson, MD, a physiatrist, testified Plaintiff's TBI and post-concussion syndrome were caused by the collision and opined future treatment included medications, neuropsychological and neuropsychiatric care, as well as future brain imaging. Dora Jane Apuna- Grummer testified regarding the lifecare plan she had prepared.

Fred Loya is the insurance carrier, who only writes 15k policies. Their top offer was $6,500, with an indication they would pay $15k at the MSC if we demanded it. Chavez Legal Group, their house counsel, defended the case until it was set for trial. They never took the case seriously because of the low speed/low property damage. Defense did not even disclose any experts or take our expert's depositions. Defense attorney was Nathan Malone of Gates, Gonter, Guy, Proudfoot & Muench.

Plaintiff has filed our cost bill for $648,000 since we did a 998 three years ago.

VERDICT - $756,500
Personal Injury-Slip & Fall

On May 5, CCTLA members **Nick Anderson, Kellen Sinclair and James Schaefers**, all of Stawaicki Anderson & Sinclair, won a jury verdict of $756,500 for their client, who on January 20, 2019, at age 75 tripped on a sidewalk raised by a tree root in Stockton. Defendant was the City of Stockton, represented by defendant counsel Marci Arredondo and Daisy Sanchez.

Plaintiff Laura Dinges was transported by ambulance from the scene to Dameron hospital where she was diagnosed with a fractured humerus and was put in a sling. She was referred to Alpine Orthopedics in Stockton. Her injury resulted in two reverse shoulder surgeries on her right shoulder. The first surgery failed because the cement failed on the implant in the humerus. One year after the first surgery, she had to have a revision, which was slightly different, and the doctor had to get a custom implant for the humerus.

Plaintiff is a retired teacher who taught elementary school for 40 years before retiring from fulltime teaching and then subbing part time. She stopped teaching completely around 2010 and moved to Stockton in 2016 to be closer to her sister. In Stockton, she joined a handbell choir at church and volunteered at the library two days a week, tutoring refugee children who were learning English.

In discovery, Plaintiff testified she knew the sidewalk was uplifted before she fell and saw the uplift prior to tripping; however, she said she did not know exactly where on uplift she tripped. She said her left foot cleared it, but her right foot did not.

Plaintiff's counsel received work orders in discovery that showed the city had placed a temporary patch on the sidewalk uplift where Plaintiff fell, back in 2014. Plaintiff's counsel was given about five work orders between 2014-2019 which showed the city had been on the same street where client fell. But defense did not provide all the work orders. Plaintiff's counsel did a public records request after discovery closed shortly before trial and found there were 16 total work orders that showed the city had been to the street 16 times between 2014-2019. This was key in Plaintiff's theme that the city had notice. The city did not give these work orders to their expert.

Nick Anderson took the deposition of the PMK for the city, who had inspected the sidewalk after Plaintiff fell because of the tort claim she filed before retaining counsel. He had put in the inspection report that the sidewalk needed additional patching to make it safe. He testified to this, as well.

In discovery, Plaintiff learned that the City of Stockton has a complaint-based system for inspecting sidewalks. The city will not inspect unless and until there is a citizen complaint. If there is an inspection for an uplift, then the city, after determining whether a city tree is causing an uplift, likely will put a temporary patch on the ground. After that, the sidewalk goes onto a backlog list for permanent repair which happens in five to six years after the patch is placed.

Plaintiff experts were Dr. Dennis Meredith, Dr. Les Konkin, Dr. Jai Iyengar and Gary Gsell (sidewalk expert – 46 years working in Los Angeles in streets and maintenance and was PMK for sidewalks in Los Angeles). Defense experts were Larry Neuman and Dr. Robert Slater

All medical experts testified that the injuries were from fall, and the surgeries were related. Slater said Plaintiff had some underlying problems that would make it difficult for her to walk, including peripheral neuropathy. Neuman testified that the uplifted sidewalk was a dangerous condition; that the city had notice of the condition. He said the City of Stockton had a reasonable inspection system.

At trial, in San Joaquin County with Judge Kronlund presiding, **Nick Anderson** did the *voir dire*. He addressed juror biases regarding trip and falls and whether a plaintiff is partially at fault for tripping no matter what the evidence shows. He was excusing many jurors for cause.

Kellen Sinclair did the opening statement and went over what evidence would show regarding the major themes of the case:

1. Dangerous Condition – The city "person most knowledgeable" admitted in deposition and in his inspection report that the sidewalk was not safe. Those video clips were shown to the jury.

2. Notice – City knew about it because the sidewalk was re-

Verdicts

paired in 2014 but did not fix the underlying problem of the city tree. Plaintiff's counsel played a clip of Larry Neuman agreeing to this. The city had constructive notice because they had been to the area 16 times and never looked at it.

3. Inadequate inspection system – The city knew andthere was temporary patch then it needed to be inspected again. Especially if the city was in the area 16 times.

In defense's opening, they said the city had 1,600 employees, 1,400 miles of sidewalk and only two people to inspect the streets; that there were no other complaints at the sidewalk after 2014; that Plaintiff did not know exactly where she fell, and that Plaintiff knew about uplift before she fell. Defendant did not dispute injury causation, but did dispute extent of damages.

Plaintiff's counsel decided to waive the medical specials because they had all been paid by Medicare, to the tune of about $50,000, and they didn't want to anchor the generals too low. Plaintiff testified last and did an exceptional job.

On May 5, 2023, The jury returned the verdict for Plaintiff in the sum of $756,500: $322,000 in past non-economic damages, and $434,500 in future non-economic damages (based on 10-year life expectancy). The jury deliberated for about one hour and put zero percent comparative fault against Plaintiff.

Settlement offer history: April 19, 2022: Plaintiff 998 for $329,999; April 11, 2023: City's top offer was $60,000 (at MSC).

NOTABLE CITES

Continued from page 2

who had negligently parked the scooter and caused her injuries and that there was no special relationship. The Court sustained the demurrer without leave to amend. Plaintiffs appealed.

ISSUE: Does the owner of an electric vehicle rental company owe a duty to the public?

RULING: Bird may be held liable for breaching its general duty under California Civil Code 1714 that states that a general duty of ordinary care is to be presumed.

REASONING: The court found that Bird deployed its scooters onto public streets and its general duty encompassed an obligation, among other things, to use ordinary care to locate and move a scooter when the scooter poses an unreasonable risk of danger to others. The court further held that because it was foreseeable that someone could be injured by a breach of the duty and because Bird agreed to take measures to prevent such injuries when it obtained its permit, that Bird could be found liable.

DOWNEY v. CITY OF RIVERSIDE

2023 4DCA/1 California Court of Appeal, No. D080377
(April 26, 2023)

Negligent Infliction of Emotional Distress (NIED) claim is viable where plaintiff heard crash over the phone

FACTS: In December of 2018, Plaintiff Vance Downey was driving when her vehicle was struck by another vehicle. She suffered serious injuries. At the time of the collision, Vance was on the phone with her mother, Jayde Downey, who was giving her directions. Jayde heard her daughter exclaim and heard sounds of an explosive metal-on-metal vehicular crash, along with skidding tires. Jayde knew from the combinations of sounds that Vance had been injured in a high-velocity motor vehicle collision.

In November of 2019, Downey and Vance sued the City of Riverside and the defendant driver for negligence, dangerous condition of public property and negligent infliction of emotional distress.

Defendants brought a demurrer on the NIED claim, arguing that there was no contemporaneous causal connection required under the law, which was sustained without leave to amend. The Downeys appealed.

ISSUE: Can Plaintiff plead a viable cause of action for NIED based on hearing a car accident over the phone?

RULING: Yes. Recovery for Negligent Infliction of Emotional Distress may be based on events perceived by other senses, as long as the event is contemporaneously understood as causing injury to a close relative.

REASONING: In this case Jayde Downey had sensorily perceived the injury occurring to her daughter. Her complaint was deficient in showing that she had contemporaneous sensory awareness of the causal connection between the negligent conduct and the resulting injury, especially as to the dangerous condition of public property cause of action. However, the court noted that she may be able to cure said defect with an amended pleading and ruled that she be granted leave to amend.

HERNANDEZ v. CITY OF STOCKTON

2023 3DCA California Court of Appeal, No. C095259
(April 28, 2023)

Government claim must clearly state allegations against the entity and allegations in a subsequent complaint may not fundamentally differ

FACTS: On March 25, 2018, Plaintiff Michael Sanchez Hernandez was walking on a public sidewalk in the City of Stockton and tripped, fell and sustained severe injuries. On April 9, 2018, Hernandez submitted a government claim for damages to the City of Stockton, stating that he had tripped and fallen because of a dangerous condition that was described as an "uplifted sidewalk," and listed the location of the fall.

On April 24, 2018, the City of Stockton sent an investigator to examine the sidewalk where the fall took place. The investigator was unable to locate anything resembling an "uplifted sidewalk."

Thereafter a notice of insufficiency was sent to Plaintiff's counsel, stating that the claim could not be considered on its merits because it was insufficient. The notice further requested Plaintiff provide photographs or a diagram showing the exact location of the fall.

Plaintiff did not respond, and on May 31, 2018, the city rejected the claim. On June 11, 2018, Plaintiff filed suit against the city, alleging a dangerous condition of public property had caused him to fall and suffer injury.

During his deposition, Plaintiff testified he had fallen because of an empty tree well and not an uplifted sidewalk. Thereafter, the city moved for summary judgment, stating that the basis for the claim had not been properly asserted in the government claim. The court granted the summary judgment, and Plaintiff appealed that order.

ISSUE: How specific must a government claim be in setting forth the basis for the case?

RULING: Affirmed. A complaint subsequent to a government claim must set forth facts substantially similar to those contained in the claim or be subject to dismissal.

REASONING: Although a government claim need not be as specific as a complaint, it must fairly describe what the entity is alleged to have done. While a complaint may add more detail, it cannot premise liability on facts that fundamentally differ from those set forth in the government claim.

Hernandez submitted a government claim alleging he tripped and fell on an "uplifted sidewalk" when he actually fell in an empty tree well. The court deemed that those were two entirely different factual scenarios and thus he had not properly complied with the government claim requirement. The court found that was "the type of factual variance that is fatal to a civil action filed against a public entity following the rejection

of a governmental claim since it amounts to a complete shift in allegations." Thus, the action was barred.

WELLSFRY v. OCEAN COLONY PARTNERS
2023 6DCA California Court of Appeal, No. A165175
(April 27, 2023)
Golfer who stepped on tree root assumed the risk ofencountering uneven terrain while walking on an outdoor golf course

FACTS: On July 28, 2018, Walter Wellsfry was playing golf in Half Moon Bay on a course owned and operated by Defendant Ocean Colony Partners. He was leaving the tee box, going back to his golf cart on the 14th hole, when he stepped on a tree root and felt pain and fell into his golf cart.

On April 18, 2019, Wellsfry filed suit against Ocean Colony Partners for negligence, and his wife filed a claim for loss of consortium. Ultimately, Ocean Colony Partners filed a motion for summary judgment, under the assumption of the risk doctrine, arguing because he was playing golf, Wellsfry assumed the risk. The trial court granted the summary judgment, and the Wellsfrys appealed.

ISSUE: Does a participant in a sporting event assume the risk as to the sporting venue?

RULING: Affirmed. One who plays golf on an outdoor course assumes the risks associated with the topographical features of the course.

REASONING: In a sports setting, conditions of conduct that might otherwise be viewed as dangerous often are an integral part of the sport itself. Under the assumption of the risk doctrine, an ordinary recreation provider owes no duty to a participant in an active sport to use due care to eliminate risks inherent in the sport.

The California Supreme Court has held that the primary assumption of the risk doctrine applies to golf played on an outdoor course. Golf is a sport whose objective is to use special clubs to hit a small ball over lengthy distances and ultimately into a hole in the ground surface. When golf is played outdoors, it is common knowledge that the game does not use a "standardized playing area," but rather takes place on the varied natural terrain of the ground surface of the course. Because each golf course is unique, golfers can reasonably expect to encounter myriad variations in the ground surface and obstacles as they traverse a golf course.

In this case, because Wellsfry was aware of the obviously uneven grassy expanse, he "must be held to a common appreciation of the fact" that there was a risk of injury as he walked over this ground surface.

California Senate votes to protect seniors from financial scams

Legislation aimed at shielding senior citizens from the most devastating impacts of financial scams passed through a full vote on the Senate floor May 22, earning overwhelming and bipartisan support. Senate Bill 278 (Dodd, D-Napa) clarifies existing law to allow financial abuse victims to hold banks and other entities accountable for assisting in a scam.

"By advancing SB 278, California has taken a step towards justice for the victims of financial scams that could have – and should have – been prevented," said Jacquie Serna, Consumer Attorneys of California (CAOC). "Senate Bill 278 is a common-sense proposal that will motivate banks and other entities to be proactive in stopping scammers from robbing elderly Californians of their life savings, and their dignity." The bill now heads to Assembly policy committees for review.

According to a recent FBI report, Americans lost more than $10 billion dollars last year to scams, with the financial hit to senior citizens' wallets skyrocketing to over $3 billion. One of those seniors was Alice Lin of Southern California who lost nearly $1 million. Even though she exhibited the classic signs of someone being scammed, her bank failed to intervene.

CAOC is a professional organization of plaintiffs' attorneys representing consumers seeking accountability in cases involving personal injury, product liability, environmental degradation and other causes.

Avoiding Email Phishing Traps

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

Thursday, June 1
19th Spring Reception & Silent Auction benefiting the Sacramento Food Bank and Family Services
5 p.m. to 7:30 p.m. at The Lady Bird House.

Tuesday, June 13
Q & A Problem Solving Lunch - 12 noon - CCTLA Members Only - ZOOM.

Tuesday, July 11
Q & A Problem Solving Lunch - 12 noon - CCTLA Members Only - ZOOM.

Tuesday, August 8
Q & A Problem Solving Lunch - 12 noon - CCTLA Members Only - ZOOM

Wednesday, August 16
Problem Solving Clinic - 5:30 p.m. to 7:00 p.m.
Topic: Getting Docs So Hot The Jury Will Sweat – Speaker: Ed Dudensing, Esq.
CCTLA Members Only — ZOOM

Tuesday, September 12
Q & A Problem Solving Lunch - 12 noon
CCTLA Members Only — ZOOM

CCTLA Calendar of Events