Summer 2021

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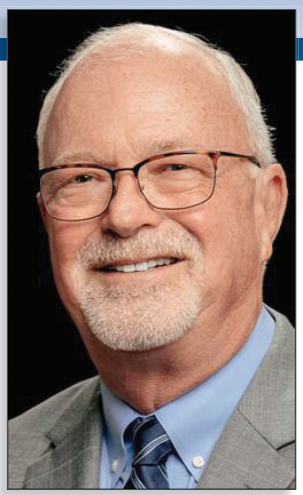
Inside

Change Is A Given; Growth Is Optional!



Travis Black
CCTLA President

As our community of trial lawyers heads into the second summer in a COVID world, we all are finding creativity and flexibility to be our most valuable tools in re-establishing best practices in our professional lives.

From client intakes to depositions and mediations, the flow of case management has been forced to change in response to the health protocols that are being established outside of our control. The decline in incoming cases, and the resulting increased competition between attorneys has changed the dynamic of our interaction. The "poaching" of available cases by Southern CA-based attorneys has added to the general frustration of many local counsel. So we must all heed the call to action right now to be professional and collaborative in our association. Our communication style reflects on each of us and sets the tone for how we want to be viewed in the community at large. We have so much to learn from one another and the success of any one of us benefits all.

As we start to emerge from the pandemic shutdown, criminal and civil trials are ever so slowly moving forward. In the meetings of the Sacramento Superior Court Judicial Council, I have been impressed by the diligence and resourcefulness of the judges as they look for options to work the trial calendar. Judge Hom and others are thinking "out of the box" to accommodate the needs of our cases. In many cases, they are actively asking attorneys to consider a bench trial to expedite the calendar. They have secured a courtroom at the Carol Miller Justice Center to accommodate some jury trials and are working through many challenges to meet the burden placed on them. On behalf of all of our members, I extend my thanks and appreciation for all they are doing to contribute to a better outcome in the coming months.

Peter Tiemann and **David Rosenthal** are taking our Education Committee on a wild ride in 2021! The opportunities for shared learning are incredible as the transition to an all-virtual format is increasing attendance and engagement in the content. I want to personally thank both Peter and Dave for their planning for and implementation of this strong program for the year. They are working tirelessly to bring us new ideas. While we all miss the face-to-face networking, the demands of

Continued on page 6

Mike's CITES

By: Michael Jansen
CCTLA Member

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

BE CAREFUL WHAT YOU WISH FOR

Michael Bacall vs Jeffrey Shumway
2021 DJDAR 2338 (March 16, 2021)

FACTS: Defendant Shumway, an attorney, represented Plaintiff Bacall, a successful actor, for years in negotiating Bacall's acting contracts.

However, in 2011, Shumway left his law firm but continued to represent Bacall. In 2014, Shumway went "inactive" with the CA State Bar. Shumway continued to perform legal services for Bacall until Bacall found out that Shumway was no longer authorized to practice law.

In 2016, Bacall's company agreed to pay Shumway's company $243,750 as a 10% management commission. In 2017, when Bacall found out that Shumway was not a lawyer, Bacall terminated their contract.

Shumway filed a demand for arbitration with the American Arbitration Association under the terms of the contract. Bacall filed a complaint with the Superior Court, alleging that Shumway represented himself as a lawyer and provided legal services to Bacall. Bacall sought rescission of the 2016 and 2017 contracts. Shumway moved to compel arbitration, which was granted by the Superior Court.

After hearing two days of evidence, the arbitrator rendered an award in favor of Bacall in the amount of $201,025.82, plus attorney's fees and costs. The arbitrator also stated that Bacall owed no money to Shumway and allowed Shumway to keep $406,393.70 in fees charged to Bacall. The arbitrator then awarded Bacall $237,607.25 in attorney's fees. Shumway, who had forced the case into arbitration, then sought to have the arbitration award vacated because he had lost.

ISSUES: Shumway argued that the arbitrator exceeded his authority by declaring the 2016 and 2017 agreements illegal because Shumway was not licensed to practice law. Shumway also argued that the arbitrator engaged in misconduct by refusing to allow Shumway to address issues related to attorney's fees and costs.

HOLDING: Plaintiff/Respondent Bacall wins. Inactive attorney loses.

REASONING: As we all know, we must always follow the **Moncharsh** rule when an arbitration is involved. An arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties. 3 Cal.4th 1 (1992). (You chose arbitration, now you are stuck with arbitration, whether you like it or not.)

If parties enter into an arbitration agreement, they know the arbitrator's decision will be final and binding and an error of law is not one of the grounds to set aside the award. CCP Section 1286.2 provides that a court **may** vacate an arbitration award if the rights of the objecting party were substantially prejudiced by the refusal of the arbitrator to hear evidence material to the controversy; or other conduct of the arbitrator that is contrary to the provisions of the California Arbitration Act.

This Appellate Court found Shumway's arguments "curious." Bacall attempted to have the legality of the agreements initially determined by the court, but Shumway successfully moved the case to arbitration. Throughout the arbitration, Shumway never suggested that the legality of the agreements was an issue but argued that Bacall should be forced to pay under the contract.

This Appellate Court felt that the arbitrator, by severing the unlawful legal services rendered on the contract issue from the services that were rendered that did not require Bar admission, maintained the enforceability of the contract and therefore the arbitration award was affirmed. As a result of the enforceability of the contract, the courts' preference for arbitration prevails.

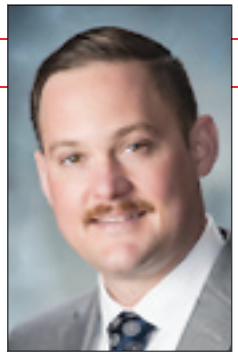
This Appellate Court shot down Shumway's arguments by going back to the rules of arbitration: "We do not review the merits of a dispute, the sufficiency of the evidence or the arbitrator's reasoning, nor may we correct or review an award because of an

Continued on page 6

The trivial-defect MSJ:
Everything matters

By: Glenn Guenard & Anthony Wallen

Glenn Guenard, Guenard & Bozarth, is the CCTLA Board Secretary



Anthony Wallen, Guenard & Bozarth, is a CCTLA Member

We recently resolved a trip-and-fall case involving an active retiree, a government entity, and challenging liability. We co-counseled the case from start to finish with fellow CCTLA member, **Michael Schaps.**

Our client, age 78, was on a sunny Saturday morning stroll with his friend through a university campus. While walking within a crosswalk, he tripped on an elevated manhole cover in the middle of the crosswalk and fell—suffering a severe shoulder injury. We were fortunate in that the friend immediately took photos of the scene.

The height deviation was approximately 3/4 of an inch. It was not a matter of if, but when we were going to have to fight off an MSJ. Schaps assisted in developing a Discovery plan that would give us the ammunition we needed to defeat the defense's inevitable dispositive motion. Without losing sight of CACI 1102, we propounded a barrage of interrogatories and requests for production of documents—in addition to about a dozen depositions.

The MSJ came, and we were ready. We had our facts through Discovery and inspection of the scene—and Michael Schaps did a scorched-earth job of extracting the applicable law.

As with all premises liability cases against a government entity, the defense argued that the subject manhole cover was simply not a dangerous condition that would offend Government Code section 830.

In other words, the deviation at play was simply *trivial*. In fact, the defense boldly contended to the court: "[i]t is well-established that height differentials ranging from three quarters of an inch to one and one-half inches are trivial as a matter of law."

However, size is not the only thing that matters. When deciding these types of MSJs, the courts look to the totality of the circumstances. "[W]hen a court determines whether a given defect is trivial, as a matter of law, the court should not rely merely upon the size of the depression. While size may be one of the most relevant factors to the decision, it is not always the sole criteria. Instead, the court should determine whether there existed any circumstances surrounding the accident which might have rendered the defect more dangerous than its mere abstract depth would indicate." (*Fielder v. City of Glendale* (1977) 71 Cal.App.3d 719, 734.) Thus, everything matters!

But the defense ignored the surrounding circumstances. The first and most important circumstance the defense ignored was the location of the defect—in the middle of a crosswalk traversing a busy four-way intersection. The cases they cited to were all related to sidewalk cases: (*Fielder v. City of Glendale*, supra, at pp. 721, 733–734 [**sidewalk** defect roughly 1/2-inch high, with "[n]o evidence…as to any other surrounding circumstances…"]; *Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092, 1108–1109 [**sidewalk** defect between 9/16 inch and one and 7/32 inches, with "no broken concrete pieces or jagged concrete edges" and no dirt or leaves that obscured the defect].) The defense did not cite to any crosswalk cases

Continued on page 4

Stock photo, used for illustration

Continued from page 3

because none of them were in their favor.

Additional surrounding circumstances that the court will consider include: "whether the walkway had any broken pieces or jagged edges and other conditions of the walkway surrounding the defect—such as whether there was debris, grease or water concealing the defect, as well as whether the accident occurred at night in an unlighted area or some other condition obstructed a pedestrian's view of the defect." (*Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 567 [citation omitted].) "The court should also consider the weather at the time of the accident, plaintiff's knowledge of the conditions in the area, whether the defect has caused other accidents, and whether circumstances might either have aggravated or mitigated the risk of injury." (Ibid.)

In our case, we also hired a safety expert to further inspect the scene, create a report and potentially assist us with educating the jury as to safety and industry standards. In our opposition, we were able to show that the defective manhole cover was obscured by a combination of factors: broken pieces and jagged edges; the splotchy, camouflage pattern of the concrete apron; debris and vegetation; and shadows cast by overhead trees. In addition, the curved shape of the manhole apron made it both more difficult to perceive the height differential and more likely to cause a trip during the swing phase of a pedestrian's gait.

The trial court agreed. The court reasoned:

> There is a triable issue of material fact as to whether the manhole cover presented a substantial risk of injury, given the surrounding circumstances. (Gov. Code, § 830.2; *Stathoulis v. City of Montebello* (2008) 164 Cal.App.4th 559, 568-570.) While the parties agree that the height differential of the concrete apron at its greatest height was less than one inch, "size alone is not determinative of whether a [defect] presents a dangerous condition." (*Stathoulis*, supra, 164 Cal. App.4th at p. 568.) Reasonable minds could differ as to whether the concrete apron had rough and jagged edges. (See, e.g., *Huckey v. City of Temecula* (2019) 37 Cal.App.5th 1092, 1108; *Stathoulis*, supra, 164 Cal. App.4th at p. 569.) Further, plaintiff has presented evidence regarding the surrounding conditions, on the day of plaintiff's injury, that may have obscured the defect. (*Stathoulis*, supra, 164 Cal.App.4th at p. 568.)

Expectedly, once the court denied the defense's MSJ, defense was more than eager to bring real money to the table to resolve the case. At the end of the day, preparing for the MSJ opposition began as soon as we took the case. As to liability, there was not one single fact in our case that was particularly advantageous. However, when we applied every factor we could, the scales of justice leaned in our favor. Remember, in trip-and-fall cases, *everything matters.*

CCTLA's Bob Bale and Chris Dolan honored for 'Ghost Ship' Fire litigation

By: Jill Telfer

Bob Bale, Dreyer Babich Buccola Wood Campora, is a CCTLA Past President

Chris Dolan, Dolan Law Firm, is a CCTLA Member

The litigation team led by CCTLA Past President Bob Bale, CCTLA member Chris Dolan, Tom Brandi and Mary Alexander has been awarded the prestigious California Lawyer Attorney of the Year (CLAY) award for their work on the "Ghost Ship" warehouse fire litigation.

On Dec. 2, 2016, a music and art event was held in an old warehouse in Oakland. This "artist colony" was an unpermitted space where people were living. About 50-60 people were present when, at around 11:20 p.m., fire broke out. The building was filled with pianos, woodcarvings, tapestries and other combustibles that rapidly fed the hungry fire, and 36 people, overcome with toxic smoke, could not find their way out through the unlit and unmarked exits. They died in what has become known as the "Ghost Ship warehouse fire," and many others were injured.

Many of the finest lawyers throughout California turned down requests for representation by victims and their families, believing there was no way to hold the City of Oakland and PG&E accountable because public entities have a wide range of immunities.

However, Bale of Dreyer Babich Buccola Wood Campora; Dolan of Dolan Law Firm; and Tom Brandi comprised the executive committee members who worked with liaison council, Mary Alexander, to spearhead a coalition of 45 attorneys from 25 firms, representing 78 plaintiffs (Ghost Ship Fire Litigation RG16843631—Alameda County Superior Court, filed Dec. 23, 2016).

The attorneys discovered that the City of Oakland never officially inspected the building. If it had, immunity might have kicked in. The plaintiffs' team's investigation showed that city police and firefighters had made hundreds of contacts with the Ghost Ship warehouse in the more than two years before the fire, learning that artists and others live there, that unpermitted musical events took place and that conditions overall were unsafe.

Jill Telfer, Telfer Law, is a CCTLA Past President & *Litigator* Editor

Ultimately, after years of relentless effort, skill and creativity, the coalition prevailed, gaining a $32.7-million settlement against the City of Oakland. Millions more to be added with PG&E paying an undisclosed amount, along with the building's owners' also paying. An electrical contractor settled for another million.

The plaintiffs' attorneys were able to hold the City of Oakland accountable and prove that the city knew what was going on but had turned a blind eye. By the time of the fire, the 10,000-square-foot warehouse was a cluttered maze that amounted to a deathtrap.

A key finding that weakened Oakland's defenses and promoted settlement talks was the discovery that days before the fire, a chief from a fire station a block away had come by to take a look at the "Ghost Ship" warehouse. He then questioned, up the line, whether an artists' collective should be on the official city inspection list, but he never heard back.

While Bale is a veteran personal-injury lawyer, he also has a background in corporate marketing, and it was his experience in the business world that was key in dealing with the property owner, Chor NS Ng, and the family trust involved. Bale's and Brandi's negotiations led to a deal in which the family trust would liquidate trust properties in bankruptcy and pay victims $7 million in cash, plus the proceeds of the liquidation. This expected to amount to at least $4.8 million—and likely more.

Bale, Dolan, Alexander and Brandi handled most of the PG&E depositions. Bale also credited others on the team, including his law partner, **Roger Dreyer,** who conducted many of the police and firefighter depositions. Bale described Dreyer as a heat-seeking missile.

President's message

Continued from page 1

busy schedules have made this virtual option a viable solution for all those looking to be informed on the key topics of the season.

Also, in the realm of virtual events, this year's Sonoma conference was a standout success. The conference delivered a 20-percent-plus increase in attendance over the prior year with 180+ attendees.

Our loyal and generous sponsors showed their commitment to our organization, and we appreciate their flexibility. Fun elements included the virtual wine-and-cheese tasting, closing reception and strong presentations from iconic leaders in our ranks. Special appreciation to our major sponsors including:

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Please join me in thanking these sponsors for their support and please consider their services as your needs dictate. We look forward to shaking hands in person at the next event!

Many of you may be wondering about the fate of the "Spring Fling," our always successful annual fundraiser. The committee has advised the board that they are strategizing new dates and a new approach to meet the current requirements while keeping our philanthropic efforts strong. Stay tuned for more details.

Finally, our membership numbers are growing! In a period of change, growth comes about from a desire to connect, learn and evolve as professionals and as an organization. This is a great time to reach out to new or younger attorneys and invite them to one of our education events or seminars. Use your experience to be a door-opener for the next wave of members who can sustain the important work of our association.

I appreciate all of your comments and feedback during this unusual time. If there is a way our organization can better serve your needs, please send me a quick note, and I'll follow up with a personal call.

Travis Black
(916) 962-2896 office

Mike's Cites

Continued from page 2

arbitrator's legal or factual error, even if it appears on the award's face." *Hotels Nevada, LLC v. L.A. Pacific Center, Inc.* (2012) 203 Cal.App.4th 336, 359.

Lastly, in their post-hearing arbitration briefs, Bacall requested attorney's fees and costs and submitted a declaration in support thereof. Shumway responded by sending an email to the arbitrator suggesting they wait until after the arbitrator rendered a decision on the merits of the claims.

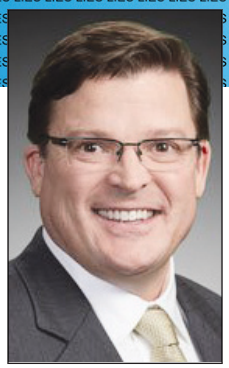
The arbitrator wrote back, "Consideration of attorney's fees will not take place until the case is decided and a prevailing party is determined. Anything submitted in that regard will not be read until then." Therefore, Shumway did not file a response, and when he tried to file a response to the $237.607.25 awarded to Bacall, the arbitrator refused to accept the opposition.

Shumway argued the arbitrator failed to give him an opportunity to present evidence on the attorney fees issue, which was a significant financial issue in the case. The Appellate Court stated that the arbitrator did not say to not submit a brief, the arbitrator said they would not read the brief until the decision was made.

The Appellate Court went back to the Rule of Arbitrations, "statutory provisions for review of an arbitration award are manifestly for the sole purpose of preventing the misuse of the proceeding, where corruption, fraud, misconduct, gross error or mistake has been carried into the award of the substantial prejudice of a part of the proceeding." *Heimlich v. Shivji* (2019) 7

Making sure you know the TRUE policy limits when accepting a settlement offer

By: John Stralen



John Stralen, Arnold Law Firm, is a CCTLA Board Member

We've all been there…The bad news is your client suffered terrible injuries. The good news is the defendant has insurance coverage. The bad news you are being told is that the insurance limits are not enough; in fact, not nearly enough. The good news is that the defendant's insurance company is willing to offer the insurance limits right now. The bad news is—*How do you know you're being told the truth?*

Even with the ability to conduct discovery, I can think of a half dozen or so cases in recent memory where the defendant's early answers about insurance coverage ended up being incorrect, and we learned later that there was substantially more insurance coverage. Other attorneys have told me about similar experiences they have encountered.

Part of the problem might be that the law on this subject is not helpful, at least for our clients. If your client accepts a "policy limit" offer, signs a release with standard language in it and later finds out there really was more insurance, your client is likely out of luck. The general rule is that statements made in the course of settlement fall under the litigation privilege. A second case for fraud might even be subject to an anti-SLAPP motion. Success with an equitable action to set aside a dismissal and the settlement agreement won't necessarily be easy. The question will turn on whether any fraud was "extrinsic" or

Continued on page 9

Continued from page 8

"intrinsic." See *Home Ins. Co. v. Zurich Ins. Co.*, 96 Cal.App.4th 17 (2002). If your client can show extrinsic fraud, the court can provide equitable relief.

This isn't meant to be a dissertation on the various types of fraud, but the basic idea is that **extrinsic** fraud is bad enough for the court to consider exercising its discretion to grant equitable relief because extrinsic fraud results in a defendant depriving the defrauded party of her opportunity to present her case. On the other hand, **intrinsic** fraud is still bad, but not bad enough for the court to grant relief, because intrinsic fraud essentially means the settling party—even though lied to—did not do enough to protect herself from those lies.

Every case is different, and if the defendant's story about insurance coverage makes sense under the circumstances, accepting the offer early with less time and expense investigating might be the best for your client, *after full disclosure of all the risks and benefits*.

In significant cases where it makes sense to do as much digging as possible, I have a few suggestions that will not solve this problem entirely, but might help with either uncovering additional insurance coverage or having more confidence with what you are being told about the insurance limits.

• When insurance limits are a concern, do not rely on the adjuster or defense counsel to make sufficient inquires to flush out all of the potential coverage. The first thing to do if there is a question or concern about what you're being told about the amount of coverage is to make sure you get the actual insurance policies and declaration pages produced in Discovery. Often, defendants will claim insurance policies are not discoverable. However, California law is clear that insurance policies must be produced. We have located additional insurance after we demanded production of the policies and the documents produced contained a schedule referencing other insurance.

• Another way to look for additional coverage is to issue a subpoena for the defendant's insurance broker's or agent's records. Person Most Knowledge ("PMK") depositions of company representatives knowledgeable about the company's liability insurance can be helpful. Ask about closely related companies and additional insured endorsements, who the broker or agent is, and find out about whether the company does the type of work where proof of insurance is required. Then subpoena the insurance records from the third parties involved. We've used some version of all of these methods successfully to find additional coverages, including policies naming the defendant as an additional insured.

• Finally, once the decision is made to accept the offer, I suggest deleting the standard language in the release that states your client is not relying on any statement made by the defendant in choosing to accept the offer. Not only is that language simply untrue with most policy limit settlements, allowing those terms to remain in the release might bar any future action against the defendant if the representation about the insurance limits turns out to be incorrect.

Bystander Negligent Infliction of Emotional Distress Enters the Digital Era

Ko v. Maxim Healthcare Services, Inc.

By: Robert M. Nelsen

Robert Nelsen, Dreyer Babich Buccola Wood Campora, is a CCTLA Board Member

Late last year, the Second DCA brought bystander liability into the digital world. In *Ko v. Maxim Healthcare Services, Inc.* (2020) 58 Cal.App.5th 1144 (Ko) the court expanded the "presence" element necessary for a bystander emotional distress claim, concluding that it was met by a family member observing the harm-inducing event in real-time via a live-stream nanny cam. This is the first time this element has been expanded since the inception of the bright-line rule in *Thing v. La Chusa* 48 Cal.3d 644 (Thing)—more than 30 years ago. The legal term of art they adopted is "digital presence," a concept that feels quite suitable to this time.

Bystander liability provides negligent infliction of emotional distress (NIED) damages as a remedy for those who suffer emotional distress after observing harm to someone they are close to as a result of another person's negligence. During the past 50-plus years, the courts have grappled with where to draw the line on who can/cannot make such a claim and under what circumstances such a claim can be made.

Bystander liability does not derive out of statute. In fact, it was only first recognized by the California Supreme Court in *Dillon v. Legg* (1968) 68 Cal.2d 728 (Dillon). The *Dillon* decision opined that it was foreseeable that a closely related individual would suffer emotional distress if in close proximity to an accident, but it provided that each matter would need to be analyzed on a case-by-case basis and gave what they thought were key considerations for courts to use when deciding whether to impose this duty on defendants. In the 30 years that followed, the California courts continued to expand the reach of *Dillon*.

Twenty years later, the California Supreme Court addressed this in *Thing*, ultimately choosing to impose a more concrete bright-line collection of requirements: (1) Plaintiff must be closely related to the injury victim; (2) Plaintiff must have been present at the scene of the injury-producing event at the time it occurred and was then aware that it was causing injury to the victim; and (3) Plaintiff suffered serious emotional distress—a reaction beyond that which would be anticipated in a disinterested witness and which is not an abnormal response to the circumstances.

Since that time, California courts have consistently stressed the need for limits upon claims of these sorts. For example, in *Bird v. Saenz* (2002) 28 Cal.4th 910 (*Bird*) the Supreme Court denied an NIED claim to the two daughters of a woman who died as a result of a negligent artery transection because they weren't physically in the operating room when it occurred. The appellate courts—especially the Second District—have also been harsh on this bright-line rule. Take for example the cases of *Ra v. Superior Court* (2007) 154 Cal.App.4th 142 (the court denied NIED damages to a plaintiff who saw a sign fall in the area where her husband was shopping because she wasn't certain at the time that it hit him) and *Fortman v. Förvaltningsbolaget Insulan AB* (2013) 212 Cal.App.4th 830 (Plaintiff denied NIED damages despite observing her family member go unconscious while scuba diving due to defective scuba gear because she did not know it was due to the defective equipment as opposed to a health issue).

With this backdrop, it was welcome news—albeit a bit surprising—to see this rule expanded in the *Ko* matter. But the court got it right. And the California Supreme Court denied Defendants' petition for review on April 21, 2021, so this is now the law of the land.

The facts underlying the *Ko* matter were unquestionably tragic. Plaintiffs were the parents of a two-year old boy with a genetic disorder—Rubinstein-Taybi Syndrome. They hired Maxim to provide in-home caretaking (LVN) services for their son. While the plaintiffs were out of town at a basketball tourna-

Continued on page 12

Stock photo, used for illustration

Continued from page 11

ment for their two other children, they live-streamed video and audio from the nanny-cam in their house to their phone and observed—in real time—the LVN hitting, slapping, pinching and violently shaking their son. The abuse was allegedly so severe that it ultimately resulted in the boy requiring surgery to remove his eye. The boy passed away during the pendency of the case—unrelated to the allegations in this case —leaving just the survivor actions and the parents' NIED claims. The trial court ultimately granted the defendants' demurrers.

The Second DCA did a comprehensive analysis of the progeny of *Dillon* and *Thing* before concluding that a live-streamed nanny cam was consistent with the sort of contemporaneous observation originally set forth by the court in *Thing*, taking into account the advancements in technology since then. While the defendant did argue that remote surveillance was around at the time that *Thing* was decided, the court dismissed that argument because of the profound nature of the technological advances that have occurred—especially in cell phones—and the impact it has had on our culture, even utilizing U.S. Supreme Court decisions regarding the level of privacy afforded to us on our smart phones, which were termed, "pervasive and insistent part[s] of daily life."

Ultimately, the Second DCA rightfully pointed out how Internet-enabled smartphones have "manifestly changed the manner in which families spend time together and monitor their children" in coming to its conclusion and understanding that technology has allowed our senses to extend beyond the walls of our homes.

It is worth noting that the court stressed the need for this digital presence to be contemporaneous or simultaneous with the injury-inducing event, as the *Thing* court specifically stated that the presence be at the time the injury occurred. As such, an NIED claim would likely not survive in a setting where a family member reviewed older footage of the event or if there was a significant delay in the feed. That said, in a footnote in *Ko*, the court did leave open—as did the California Supreme Court in *Bird*—the possibility of an auditory-only form of presence, such as on a phone call. So these claims exist in ways that attorneys may not have considered before.

The concept behind bystander liability is easy to understand on a human level: We can all appreciate that a person who witnesses a horrific event that severely injures or kills another person is going to be harmed by that observation. The courts have understandably put some limitations in place to prevent an overwhelming number of claimants from coming forward after a tragic event. Once a person has been identified as being a close relative of the victim and found to have suffered more serious emotional distress than would have been anticipated from a disinterested witness, then the analysis really boils down to whether they meet the somewhat arbitrary requirements of *Thing* relative to their proximity and real-time observations.

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In *Ko*, the question was never whether the family suffered emotional distress from witnessing the abuse of their helpless son by a caretaker they hired to care for him. The question was whether they were sufficiently "present" upon witnessing that horror.

The pandemic has highlighted how much of our lives are lived out in a digital world. If someone can be deemed present by tuning into their screen for a court appearance, attending school, testifying at a congressional hearing, etc., then why should that same screen block recovery for a family who witnessed such a horrible event by that same medium? By reversing the trial court's demurrer, the court has brought its view of what it means to be "present" into the modern era. The court ultimately got this one right, and the timing could not be more apt.

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MISCARRIAGE OF JUSTICE

Justin M. Gingery, Gingery Law Group, is a CCTLA Board Member

By Justin M. Gingery

The most egregious criminal in California state history continues to be at large and seemingly doing the same business as usual, leading to the devastation and/or loss of thousands of lives and the destruction of numerous communities.

A brief look into the most egregious miscarriages of justice will lead any investigator to a list of wrongful convictions. Particularly, individuals or small groups that were wrongfully convicted and punished for crimes that they did not commit. From Alfred Dreyfus in 1894 to the Roscetti Four in 1986 and then some, American jurisprudence is replete with persons wrongfully convicted of crimes they did not commit. This article is meant to focus on a failure of our judicial system to attain the ends of justice, as opposed to the conviction of an innocent person. The most egregious criminal in California state history continues to be at large and seemingly doing the same business as usual, leading to the devastation and/or loss of thousands of lives and the destruction of numerous communities.

THE CAMP FIRE

Nov. 8, 2018 was a red-flag-warning day and, as a result, PG&E considered temporarily discontinuing power in Butte County's Table Mountain region. California's Diablo winds paired with heat and low humidity created the ideal conditions for a wildfire. Ignited around 6:20 a.m. and fueled by 50 mph winds, the Camp Fire moved three miles in its first 90 minutes, completely destroying the town of Pulga and 95% of the town of Concow. By 8:30 a.m., wind-blown embers had already started at least 30 spot fires in Paradise and Magalia, even though the main front of the Camp Fire was just reaching the towns. Within two hours, another 35 spot fires were burning in the heart of Paradise, and residents were being trapped in their homes and cars. By noon, the town had basically burned down.

The Camp Fire in Butte County burned a total of 153,336 acres, destroyed 18,804 structures (14,000 residences. leaving 30,000 people homeless) and resulted in 85 civilian fatalities and several firefighter and first-responder injuries. The Camp Fire is the deadliest and most destructive fire in California history, surpassing the Tubbs Fire which occurred just the year before. For perspective, the Tubbs Fire that raged through the city of Santa Rosa and parts of Sonoma County in 2017 destroyed 5,500 total structures.

California Fire investigators were immediately dispatched to the Camp Fire and began working to determine the origin and cause of the fire. After a 17-day battle to contain the fire, and a very meticulous and thorough investigation, it was determined by the California's Department of Forestry and Fire Protection (Cal Fire) that a nearly 100- year-old electrical transmission line owned and operated by PG&E was identified as the cause. These electrical transmission lines have an average life span of 65 years. It was concluded that the fire started in the early morning hours near the community of Pulga in Butte County.The investigation identified a second ignition sight near the intersection of Concow Road and Rim Road. The cause of the second fire was determined to be vegetation into electrical distribution lines owned and operated by PG&E. The second fire was ultimately consumed by the original fire.

As a result of the Cal Fire investigation, numerous lawsuits were filed, and criminal charges were brought against PG&E. Both Pacific Gas and Electric Company, and parent company PG&E

Continued on page 17

Continued from page 16

Corporation filed for Chapter 11 bankruptcy around Jan. 29, 2019 following the California required 15-day bankruptcy waiting period. PG&E settled criminal proceedings with a $3 million fine, pleaded guilty to one felony count of illegally starting a fire and 84 counts of involuntary manslaughter.

On Jul. 1, 2020, PG&E funded the Fire Victim Trust (FVT) with $5.4 billion in cash and 22.19% of stock in the reorganized PG&E, which is meant to cover most of the obligations of its settlement for the wildfire victims. Because fire survivors are unsecured creditors with the same priority as bondholders, they would only be paid in proportion to their claim size if anything is left after secured and priority claims are paid. This arrangement and order have guaranteed that the resident victims and survivors will not get paid in full. To add further insult to injury, if the amount in stock is worth less at the time of the sale than the amount accounted for when funded, that loss is further incurred by the fire survivors. Should the stock amount be worth more than accounted for, that profit goes back to PG&E.

IMPACT OF THE FIRE ON THE COMMUNITY

Nearly two and a half years after the Camp Fire, Paradise, Magalia, Concow and Pulga continue to be in a state of emergency. The arrival of the pandemic has unfortunately overshadowed the 2018 disaster and has left the communities nearly ignored and forgotten.

Privately, for most residents, everything they ever owned was lost. While some residents were adequately insured, they were still encumbered with the claims process and often agreed to unfair settlement offers out of desperation and in order not to continue to incur further delay. Many victims continue to be involved in the claims process, being offered amounts to rebuild reflective of pre -Camp Fire numbers, even though the cost of rebuilding and supplies has more than doubled since the fire due to supply and demand.

Even worse, approximately 30% of the victims were underinsured and had to rely on a modicum of assistance from FEMA and the Wildfire Victim Assistance Program. Regardless of payment amounts, there is no amount of money that can replace a lifetime of experience, memories and achievements. Most importantly, what the survivors experienced and witnessed during that preventable evacuation will haunt them forever as most continue to suffer nightmares, anxiety and post traumatic stress from the ordeal. The victims and survivors of the fire will never have justice.

Publicly, only four of the once 11 public schools are in operation, attempting to service over 40 percent of the student enrollment. For months after the fire, the Paradise Unified School District was compelled to provide transportation for the students to non-scholastic locations as far away as Chico, Oroville and Durham. The federal funding contingent upon the average daily attendance of those schools is set to discontinue this summer, leaving the school district in financial peril. Curing the contamination of the water and soil and other remediation measures are ongoing. The cost of rebuilding has skyrocketed due to the demand, and the City of Paradise is teetering on bankruptcy, if not already there. Even the neighboring cities of Oroville and Chico are suffering an extreme shortage of affordable housing due to the dramatic increase in homelessness, traffic and crime numbers as a direct result of PG&E's reckless behavior. The impacted communities have become nearly uninhabitable and unaffordable.

Nearly two and a half years after the Camp Fire, Paradise, Magalia, Concow and Pulga continue to be in a state of emergency. The arrival of the pandemic has unfortunately overshadowed the 2018 disaster and has left the communities nearly ignored and forgotten.

PG&E'S PRIOR CRIMINAL CONDUCT AND FAILURE TO TAKE CORRECTIVE ACTION

PG&E has been a criminal actor for decades and has been linked to, if not directly responsible for, some of the most catastrophic events in California's history. A brief recapitulation of PG&E's most heinous crimes are as follows:

• The groundwater contamination in Hinkley, CA, at center of the Erin Brockovich movie when, from 1952 to 1966, PG&E dumped roughly 370 million gallons of cancer causing tainted wastewater and did not inform the local water board of the contamination until the end of 1987. In 2013, it was estimated that the remediation process would take another 40 years. Hinkley is now a ghost town due to the contamination of the area.

• PG&E equipment has often been the cause of wildfires in California. PG&E has been found guilty of criminal negligence in many cases involving fires. These include the 1994 Trauner Fire, a substation fire in San Francisco in 1996, the 1999 Pendola Fire, a San Francisco substation fire in 2003, the Sims Fire and Fred's Fire in 2004, an explosion and electrical fire in San Francisco in 2005, the 2008 Rancho Cordova Gas Explosion, the 2010 San Bruno Pipeline Explosion, 2014 Carmel Gas Explosion, 2015 Butte Fire, and the 2018 Camp Fire, among others. PG&E has also been the suspected cause of a number of other catastrophic fires including, but not limited to, the 2017 Tubbs Fire and the 2016 Ghost Ship Fire in Oakland.

• Not only has PG&E been reckless in the management and maintenance of equipment, it has been equally atrocious in performing responsibilities necessary to keep the communities it serves safe. On Jun. 19, 1997, a Nevada County jury in Nevada City found PG&E guilty of "a pattern of tree-trimming violations that sparked a devastating 1994 wildfire in the Sierra." PG&E was convicted of 739 counts of criminal negligence for failing to trim trees near its power lines which resulted in the biggest criminal conviction ever against the state's largest utility.

• When PG&E has been convicted for criminal behavior, it has failed to take remedial measures to change the pattern and practice of reckless and cavalier behavior. Even in the years following the 2010 San Bruno Pipeline Explosion

Continued on page 18

Continued from page 17

disaster, PG&E failed to implement legally mandated safety procedures aimed at preventing similar disasters.

A California Public Utilities Commission report was issued in December 2018 that concluded that between 2012 and 2017, PG&E failed to locate and mark gas pipelines in a timely mannerbecause of staff shortages, and management counted, possibly, "tens of thousands" of late tickets as completed on time. Contractors rely on this process to know where they can safely dig. In fact, the same year as San Bruno, PG&E spent nearly $30 million in lobbying efforts to raise the energy rates it could charge the consumer rather than spending the $10 million it would have cost to prevent the San Bruno disaster. Currently, there are over 100 sites in PG&E's service area that are equally at risk to suffer a similar disaster as San Bruno.

• The Tubbs Fire was a wildfire in Northern California during October 2017. At the time, the Tubbs Fire was the most destructive wildfire in California history, burning parts of Napa, Sonoma and Lake counties, inflicting its greatest losses in the city of Santa Rosa. Before liability in this case could be proven against PG&E, the damages caused by the Tubbs Fire were included in the 2019 bankruptcy.

• Cal Fire previously found PG&E at fault for 17 wine country fires in 2017, including the Redwood Fire, which resulted in nine fatalities. The state agency also found PG&E responsible for the Cascade Fire that killed four in Yuba County in October 2017. Approximately 40 of the 315 wildfires in PG&E's service area in 2017 and 2018 were allegedly caused by PG&E equipment. PG&E has been found to be responsible for the Kincaid fire of 2019.

Prior to the Camp Fire, PG&E previously had said that it recognized "that more must be done to adapt to and address the increasing threat of wildfires and extreme weather" and that it was stepping up inspections, tree trimming and maintenance. This pattern of knowing, recognizing and publicly disclosing what must be done and then not doing what is prescribed has become PG&E's chosen method of doing business. As a showing of willingness to change, after filing for bankruptcy reorganization protection in January of 2019, the company appointed a new chief executive and added 11 new directors to its board.

OUTCOME OF INJUSTICE

People who lost their loved ones, homes, belongings and community to the Camp Fire will probably not know how much the company will pay them for many more months and possibly even years. As is common in civil cases, it is certain that the outcome will not sufficiently compensate the damages and losses suffered by the victims and survivors. As heartbreaking and unreasonable as this outcome may be, the true miscarriage of justice is found in the absolute lack of any punishment, consequence and debt to society paid by the criminal responsible for all of these horrific and atrocious occurrences.

Right after PG&E was found responsible for the Camp Fire, many elected officials seemed fed up and ready to actually do something about PG&E's continued malfeasance and criminal conduct. Many state lawmakers called for tougher oversight of the company. California Governor Gavin Newsom released a wildfire report that reprimanded PG&E for its role in major blazes and suggested the state could push to break up the utility. Now it seems that the anger and disgust has subsided again as PG&E will exit bankruptcy after reorganizing it's debts and liabilities. Even worse, PG&E has already been granted permission to increase the costs of it's energy rates to charge consumers in an effort to pay for the damages PG&E has caused.

I know that there are tireless advocates in our ranks who continue to do all they can to hold PG&E accountable, and for their tireless efforts I have great respect, admiration and am forever grateful. However, considering that no matter how many people PG&E continues to kill and injure, no matter how many lives and communities it continues to irreparably destroy and devastate, PG&E continues to suffer no real discernible consequence or deterrent for it's reckless and remorseless behavior.

It seems as though the principles of justice—the very cement of civil society and that standard or boundary of right which enables us to render unto ever person or entity it's just due without distinction—do not apply to PG&E.

By: Dan Del Rio

There is no dispute that California Governor Gavin Newsom's Executive Order N-33-20, directing all residents to heed public health directives to stay home except as needed to maintain continuity of operations of essential critical infrastructure sectors, prompted an abundance of public concern and insecurity for businesses and the community. While many people became anxious about the uncertainty, the executive order also took shape in the form of opportunity for those who were able to adapt.

While such drastic changes are often uncomfortable and sometimes disheartening, perhaps the most troubling aspect of this executive order is the ambiguous language. Governor Newsom declared that law firms (and their employees) are on the state's "Essential Critical Infrastructure Workers" list. Specifically, the "stay home" order exempts the "essential workforce, if remote working is not practical." What is per se "practical" remote working is unclear as well.

Nonetheless, the legal profession has navigated the restrictions, and the creative solutions that have been developed in response may have long term benefits.

OBSTACLE OR OPPORTUNITY?

"What is the difference between an obstacle and an opportunity?... Every opportunity has a difficulty, and every difficulty has an opportunity."

– J. Sidlow Baxter

It is certain that the current pandemic and resulting legal climate is unprecedented.

Practicing the legal profession is inherently and traditionally intimate, and moving away from having physical contact and in-person meetings presents a unique difficulty. Further, keeping employees present and productive during a pandemic can be challenging. The conversion to platforms such as Zoom requires a certain level of adaptability and open-mindedness.

While many may believe that remote working tends to appeal to those with less motivation and "get up and go," that is actually not always the case. Of 800 employers involved in a survey conducted by Mercer, 94 percent of employers said that productivity was the same as or higher than it was before the pandemic, even with their employees working remotely. What's more, according to a study by the Society for Human Resource Management (SHRM), 83 percent of respondents said that even after the health crisis has passed, they plan to put more flexible work policies in place, such as allowing more people to work from home or letting them adjust their schedules.

Dan Del Rio, Del Rio & Caraway, is a CCTLA Board Member

Is this feasible for the legal profession? Yes. The business of law and the

Continued on page 23

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Continued from page 21

vast sphere of legal work is perhaps one of the most ever-evolving sectors. Laws and statutes are routinely both created, interpreted and applied in different or disputable ways. Lawyers seem to be manufactured to adapt and evolve along with the changing social and professional climate of remote working.

A recent survey by MyCase shows that approximately 70% of law firms agree that COVID-19 will have a lasting impact way on how law firms operate and courts function. In addition, it appears that firms are ready for the transition. Data collected by MyCase showed that over 80 percent of law firms surveyed have transitioned to working remotely some or all of the time. Perhaps the legal profession, then, has a leg up on other more stagnant industries due to its ability to overcome and shed positive light on otherwise unfortunate circumstances.

Further, clients are likely more willing than ever to seek out a law firm that accepts electronic intakes, document signing and electronic communication.

People are becoming more used to interacting remotely and are choosing to skip the in-person experience in everyday life. At first this was out of necessity because of the pandemic; however, now they have realized the convenience of it, and thus they are ordering food from restaurants to be delivered, buying groceries for delivery, working remotely, and now working with professionals, such as seeing their doctor through Zoom.

THE NEW "NORMAL"

As we move away from the "old way" of running a law firm in the form of a wealth of in-person communications, modern cloud-based technology is changing the game. As stated before, the pandemic may end up being a massive opportunity for those who are able to adapt.

While we have all had to deal with tremendous challenges, both personally and professionally, there have been slivers of opportunity from a practice perspective. The pandemic has allowed for new and advanced strategies for taking and managing cases in a time that the community has been advised to avoid even leaving their homes. Seeking the help of an attorney after being injured may be intimidating in such a climate. However, tools and availability of representation have adapted to create innovative solutions and continue standing up for personal injury clients.

Remote Work

Just as COVID has advanced telemedicine to where it has now been approved by Medicare and thereby nearly all private health insurance under the President's 1135 waiver authority and the Coronavirus Preparedness and Response Supplemental Appropriations Act, our legal authority to work remotely has also been advanced due to the Judicial Council of California's response to COVID.

Originally through Judicial Council of California Emergency Rule 11, and now SB 1146 codifies Emergency Rule 11 by amending California Code of Civil Procedure section 2025.310. The party noticing a deposition, or the deponent, may elect to have the court reporter (also known as "deposition officer") attend the deposition remotely and the reporter need not be physically present to swear in the deponent.

Electronic Service

Originally, through Judicial Coun-

Continued on page 24

Continued from page 23

cil of California Emergency Rule 12, and now SB 1146 codifies Emergency Rule 12 by amending Code of Civil Procedure section 1010.6 for cases filed after Jan. 1, 2019. Represented parties, after confirming electronic service addresses, may serve other represented parties electronically. Represented and self-represented parties may require represented parties to effectuate service electronically.

These two procedural changes alone have catapulted the legal practice at least a decade forward in terms of technology and in terms of the advancement of our profession. Though, now we must think about the practical changes.

Remote Depositions

Overnight, Zoom seems to have become a household name and with it, remote depositions have become a part of every litigation practice.

Rule 11, now SB 1146, gives us the authority to use remote depositions more effectively than ever before by no longer requiring a party or non-party deponent to be present with the deposition officer at the time of the deposition.

Of note, one important change that SB 1146 added is that both the deponent or the deposing party can elect to take the deposition remotely so there could be a situation where the attorney wants one thing, but the witness wants another.

Now this is not to say that some defense attorneys have not objected to it. I've heard that they don't feel it will be as effective or that it's difficult to manage documents or even that they will not have the opportunity to meet with their client in person. I can't find any authority in the law that gives these objections any ability. In fact, there is authority for the very opposite in cases such as *Carrico v. Samsung Electronics*, Case No. 15-cv-02087 (N.D.Ca. Apr 1, 2016) where the court cited to a number of other district courts which it stated, "have found that remote videoconference depositions can be an effective and efficient means of reducing costs." In addition, I can't imagine a court looking favorably on an objection to remote depositions when the Judicial Council of California went to the trouble of enacting an emergency rule just to allow for this procedure in order to keep litigation moving.

In practice, there are couple of considerations that need to be made: the first is which platform you want to use, and the second is the hardware. As I mentioned, Zoom has become potentially the most well-known option, but many court reporters also have their own proprietary versions that will allow various capabilities from video conferencing, telephone conferencing, life transcript, exhibit presentation, etc.

The hardware side may require a little more thought because many older or less technologically sophisticated clients and witnesses may not have access to a web cam, iPhone or android phone with videoconferencing capability. So, you may have to be willing to supply a device and potentially a person to help them use it during the deposition.

There are also multiple ways to handle exhibits during a remote deposition. The simplest is to send the exhibits in advance to the court reporter who can then manage them during your remote deposition by making them visible to everyone. There are also independent software solutions, such as AgileLaw and eDepoze, that will allow you to package your exhibits for deposition, send them to all of the attendees with a link, mark them up digitally during the deposition, and securely finalize them so you can provide the final copies to all attendees and the court reporter.

Case Management Software

The practice of law being accomplished remotely presents noteworthy challenges. In recent days, technology has made doing so more accessible. Rather than dealing with paper files and archaic law books, the profession has long been using technology to aid in research, communication, and case management. Increased reliance on software tools tends to lead naturally to remote access and work. Changes that have been made technologically prove the necessity of the development of case managing using web-accessible, secure platforms. **The evolution of case management into its modern version needed an equivalent evolution of the tools essential to get the job done.**

Platforms like CasePeer, Filevine and several others allow web-accessible and secure ways to log communications with clients, store client information, and run accurate and reliable reports with an abundance of different filters. Supervisors are capable of identifying crucial things with the click of a button—including the last time client communication occurred, whether insurance information is being properly stored, medical bills and specials, task assignments, and ultimately whether cases are being managed in an efficient and meaningful way from their beginning to their end. Auditing in this capacity is immensely helpful in many ways, primarily client satisfaction and case efficiency. By having every fragment of each case in one place, seeing the case through to finality is far more comprehensive.

It seems that while the opportunities for such productive and practical platforms were always there, the pandemic has shed a new light on just how essential such accessibility and productivity are. With necessary remote work, the ability to use these tools has become even more essential. The long-term benefits of improving case management software and providing efficient and accessible administration appears unlimited.

VOIP Phones

Voice Over Internet Protocol phones are becoming more common and even offered by the major phone companies such as AT&T. These phones run over your Internet service rather than through phone lines. The advantages are usually greatly reduced costs and improved flexibility. By this I mean that you can generally plug them into the Internet, wherever you are, and they will simply pick up as the extension that

Continued on page 25

Continued from page 24

the phone is been programmed as. If you are Extension 10035 at the office, then you can now be Extension 10035 at home simply by plugging into your home network.

Mail Scan-and-Sort Companies

Another option that has become more relevant as we look at virtual offices and remote work are mail scan-and-sort companies. These companies used to be mostly used by those who were either in military service, traveling for work for extended periods of time,or working out of virtual offices.

However, now they are more attractive option for those working remotely. Rather than having someone come into the office every day just to sort the mail, scan it and get it out to the correct parties within the office, a mail scan-and-sort company will do all of that for you and email you the results.

In fact, many of them now have the ability to deposit checks on your behalf directly into your account as well. Thus, potentially eliminating the need to go into the office regularly.

Remote Client Meetings

As COVID and the shelter-in-place orders are affecting all residents of California equally, it has naturally changed the expectations of clients. Just as they are now adapting to telemedicine appointments with their doctors and socializing with friends over video conferencing apps, their expectations are changing as well as how they interact with their attorneys.

Many case-management software solutions now incorporate the ability for the client to text message or email directly into their case. Moreover, clients are used to communicating now with videoconferencing by Zoom, FaceTime, Skype, Google hangouts and many other well-known phone apps, so now scheduling a video conference call with the client is actually becoming convenient and more normal to them.

Remote Mediations and Arbitrations

Almost all mediators and arbitrators have opened up the ability to do remote mediations and arbitrations. This is an interesting concept as it could potentially allow for more cost-effective ADR without having to worry about travel and yet still be able to put on the client's testimony, document base evidence and even expert testimony without having to have a doctor shut down the office for half a day in order to travel to your location, testify and travel back. Think about it, if the doctor is currently set up to do telemedicine, which nearly all will be if they want to continue to treat patients at anywhere near the same rate during the shelter-in-place order, they are naturally set up to be able to give remote testimony.

Electronic signature

Electronic signature programs such as DocuSign, HelloSign, SignNow, etc, have now become recognized federally through the Global and National Commerce Act (ESIGN) and the Uniform Electronic Transactions Act (UETA). In addition, California has adopted the standards under California Civil Code section 1633.7 which states:

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

Furthermore, as of Jan. 1, 2021, Cal. Health and Saf. Code § 123114 was amended to allow electronic signatures from patients or patient's personal representatives in place of wet signatures.

Outsourcing/Remote workers

This used to be a very touchy subject with many vendors offering services outsourced out of state or out of country, but they have always come with the concerns of quality control and the more general concern of outsourcing American jobs overseas.

Now that the feasibility of remote work has come to mainstream attention, many people are realizing that remote workers can be anywhere and do the job just as effectively and maybe even cheaper. With the tools discussed here, we can audit work product for quality control on-the-fly or with scheduled reporting.

Also, it's no surprise that the cost of labor differs from geographic area to geographic area. So an experienced paralegal in Tennessee could do record reviews or Discovery at a fraction of the cost of an experienced paralegal in LA.

SO, WHAT'S NEXT?

While many businesses, and specifically law firms, have made the transition, is remote working here to stay? That is yet to be seen, but I would bet that at least a part of these changes is here to stay. The technology and the opportunity is far too available and apparent to now ignore, and law firms could miss out if they don't adapt and grow.

Court finds Amazon, online marketplaces must take responsibility for selling dangerous products that injure consumers

May 3, 2021: Sacramento, CA—In a landmark victory for consumer protection, Kisha Loomis, the owner of a defective hoverboard manufactured in China and purchased on Amazon.com has won her case against the online giant this week. The hoverboard burst into flames, she suffered severe burns. The court's decision is one of the first to establish Amazon and other online retailers that place themselves squarely between sellers and customers must play by the same rules of responsibility that apply to brick-and-mortar stores.

The court held that Amazon and other online retailers that serve as a "direct link" between buyers and sellers are responsible for product safety and can be held accountable when those products are defective and cause harm. The court reasoned that Amazon profited from the enterprise, had direct contact with the manufacturers and was in the best position to influence those manufacturers to make safe products.

Groundbreaking court ruling confirms that California Strict Product Liability to apply to all online companies that 'squarely place' themselves between sellers and consumers

The court also noted that oftentimes the manufacturers are in a foreign jurisdiction that are beyond accountability to injured U.S. consumers. In such cases online retailers such as Amazon are the only member in the distribution chain available for an injured consumer to recover damages.

Until now, online marketplaces would exploit the uncertainty in the state's product liability law to deny injured consumers justice or force them into years of litigation. The court's ruling comes after Assemblymember Mark Stone (D–Santa Cruz) introduced AB 1182, legislation that would have clarified California's product liability laws to include these online retailers.

"Our member attorneys have heard many tragic stories of consumers like Kisha Loomis who suffer losses at the hands of dangerous products manufactured in China and sold on online marketplaces," said Doug Saeltzer, vice president, Consumer Attorneys of California (CAOC).

"The court's ruling today finally levels the playing field, finding that online retailers like Amazon need to play by the same rules as other businesses who sell products such as Costco or Walmart. This is an important decision for the consumers of California. Assemblymember Mark Stone has always stood with us on the frontlines of the fight to protect consumers from online retailers, and we are extremely grateful for the work he has done this year to advance that cause," Saeltzer said.

Online marketplaces have seen a dramatic rise in sales during the past three years and the COVID-19 pandemic has only increased the amount of consumers who purchase products online. Before the pandemic, 40% of everything bought online went through Amazon, accounting for 5% of all retail sales in the United States. Now, "Amazon said that net sales jumped 26% year over year, to $75.5 billion as people flocked to its site."

"This groundbreaking court ruling will level the playing field between our neighborhood businesses and online marketplaces like Amazon, eBay and Etsy," said Amber Baur, executive director, United Food and Commercial Workers Western States Council, a co-sponsor of the bill.

"More and more consumers are buying products online without knowing they won't receive the same protections against products purchased from a brick and mortar store. Now consumers can have peace of mind that regardless of where they buy their products from, they'll be protected and corporations can't shift the costs of easily preventable injuries to their customers," Baur said.

On the heels of the court's decision, Assemblymember Stone announced his decision to designate AB 1182 a two-year bill, allowing it to be revived, if necessary, based on future legal developments to ensure California's consumers are equally protected whether they buy their products from an online marketplace or from a brick and mortar one.

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Member verdicts & settlements

CCTLA members are invited to share their verdicts and settlements: Submit your article, maximum 500-750 words, to Jill Telfer, editor of *The Litigator*, jtelfer@telferlaw.com. The next issue of *The Litigator* will be the Fall issue, and all submissions need to be received by Aug. 2, 2021.

SETTLEMENT: $1,000,000

Estate of Cherniienko v. Dunk N' Run Donuts

CCTLA board member Kirill Tarasenko, of Gavrilov & Brooks, obtained a $1,000,000 policy-limit settlement, shared with another plaintiff, for the family of an 18-year old recent immigrant. The decedent immigrant was being paid cash under the table to deliver donuts on behalf of a donut shop that did not have Workers' Comp coverage, rendering the donut shop an uninsured employer that could be sued in tort, pursuant to Labor Code §3706.

The donut shop owners had the young man making 30-40 deliveries per shift to gas stations in the middle of the night on winding roads in a decrepit old van. An investigation revealed the van had not been properly serviced since the free-maintenance period had expired years before, and the van could not handle corners without shaking badly and losing lane position.

On Oct. 22, 2019, the decedent was finishing his deliveries when he suddenly lost control of the van, and it drifted into oncoming lanes, killing him instantly and injuring the driver of the oncoming vehicle. Initially it was thought that the decedent had fallen asleep. After security camera footage was obtained from the last gas station he had stopped at prior to the crash, Plaintiffs were able to prove decedent was awake and alert just minutes before the crash, indicating the crash resulted from the negligent upkeep and maintenance of the van, not due to the decedent falling asleep behind the wheel as the defense wanted to contend.

Progressive Insurance ultimately tendered its policy limit of coverage after realizing the exposure that their insureds were facing at trial.

SETTLEMENT: $750,000

Miller v. Greenhorn Campground
(Nevada County Water District)

CCTLA President Travis Black & board member Kelsey DePaoli obtained a $750,000 settlement for a woman who fell at a campground, breaking her right elbow, which required three surgeries to repair the break.

The campground had a broken water pipe that barriers had been placed around and then wrapped with yellow caution tape. However, the water ran downhill into the campground where it made an area of grass soggy. At night, the client was walking from her car to the campground, stepped into the soggy bog and fell, landing on her outstretched arm. Several family and friends who saw her fall ran to her aid.

Defense attempted to argue that the water came from a natural spring, making them immune from liability. Defense also attempted to argue there were no waterpipes in the area.

Plaintiff's counsel did a site inspection and using a backhoe, dug down several feet, finding a broken water pipe. It was found that the campground had attempted to do a cheap repair on the pipe; however that failed, allowing water to run out. Defense was present during the inspection. Upon finding the broken water pipe, defense requested mediation.

At mediation, defense continued to argue that they were not liable; however, the pictures of the broken pipe and poor repair spoke volumes. The parties ultimately settled for $750,000.

SETTLEMENT: $400,000

Roberts vs. Petes

CCTLA board member Kelsey DePaoli and CCTLA President Travis Black settled a slip-and-fall case at a restaurant pre-litigation. Plaintiff tripped on a drain on the patio, resulting in a golf ball-sized injury to his leg. Underlying medical issues led to complications and a horrible infection. The swelling, pain and discomfort only worsened. Later, blood pooling and swelling found in the injury area led to a sepsis infection, which would later cause severe tissue damage and tissue loss. The infection ended up requiring skin grafts and left scarring. The restaurant denied liability and disputed the injuries. This continued for months. A second demand was made with the threat of filing suit if a settlement was not reached. The offer went from zero to $400,000, and the client accepted.

State Senate advances SB 447 to stop 'death discounts'

From CAOC: The California State Senate on Apr. 29 voted overwhelmingly to advance Senate Bill 447, legislation authored by Sen. John Laird (D-Santa Cruz). The bill then moved to policy committees in the Assembly for consideration.

SB 447 aims to restore the right of a victim or their loved ones to pursue human suffering damages even if they die before their trial. This critical legislation would stop wrongdoers who are taking advantage of existing law from enjoying a "death discount" by taking advantage of pandemic-induced court delays or purposefully delaying court proceedings until their victims die.

"Families deserve a chance to recover from and hold responsible parties accountable for negligence that results in human suffering and even death, but current law in California prevents victims and their loved ones from obtaining justice in those cases," said Laird. "SB 447 will end a decades-old injustice for defendants whose victims die prior to case resolution."

"We are grateful to the Senate for advancing this critical legislation that will ensure families can still recover human suffering damages even after their loved ones die," said Nancy Peverini, legislative director of Consumer Attorneys of California. "California is one of just five states in the nation that rewards deadly negligence by allowing these damages for the anguish, misery, or grief a victim has experienced to die with them. SB 447 will finally restore access to justice in these cases for victims and their loved ones."

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Consumer Attorneys of California contact: Mike Roth, (916) 813-1554.

SB2 would end law enforcement immunity

From CAOC: Senate Bill 2, legislation authored by Sen. Steven Bradford (D-Gardena) and Senate President pro Tempore Toni Atkins (D-San Diego), passed through its second policy committee hearing on Apr. 27. SB 2 represents the most significant police accountability bill before the California Legislature this year. In a 7-2 vote, the Senate Judiciary Committee advanced the bill to its next hearing in the Senate Appropriations Committee.

"To the violence and misconduct perpetrated by law enforcement officers in our communities, California must respond with justice," said Carl Douglas, a CAOC board member who testified in support of SB 2."

The Kenneth Ross Jr. Police Decertification Act of 2021 (SB 2) is named for an unarmed man who was shot and killed as he ran from Gardena police officers. Sgt. Michael Robbins, who used an AR-15, was the last officer to arrive at the scene—yet he was the first officer to draw his weapon. Ross was Robbins' fourth victim; as of Apr. 27, Robbins remained a police officer.

SB 2 would create a process by which officers could be permanently removed from active duty for serious misconduct, and it would end judicially created law enforcement immunities to allow the victims of police brutality and their families to hold officers accountable in court when their civil rights have been violated.

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Consumer Attorneys of California contact: Mike Roth, (916) 813-1554.

Court Expands 'Bystander Distress' for Digital Era

Page 11

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

MAY
Thursday, May 20
Problem Solving Clinic
5:30-7:15pm
Topic: *"Bad Faith: Fighting Insurance Abuse in UM/UIM Cases"*
Speakers: Ognian Gavrilov and Gregory O'Dea
Free to CCTLA members / RSVP: debbie@cctla.com
Zoom link will be emailed to all members who RSVP

JUNE
Tuesday, June 8
Q&A Problem-Solving Lunch
Noon — CCTLA Members Only
Zoom link will be emailed to all members by June 8

CCTLA Calendar of Events