Winter 2023

The LITIGATOR

VOLUME XX OFFICIAL PUBLICATION OF THE CAPITOL CITY TRIAL LAWYERS ASSOCIATION ISSUE 4

Inside

It's been a very good year for CCTLA

Justin Ward
CCTLA President

It's November 1, 2023 as I prepare this President's Message. I am almost in disbelief that this will be my final one. One, it's only November, so there are still two full months left in the year. But it also does not feel like 10 months of 2023 are gone.

We had a Problem Solving Clinic on Aug. 16 via Zoom. Ed Dudensing presented "Getting Docs So Hot The Jury Will Sweat." In the program, he discussed generating effective discovery requests, using PMQ depositions to secure documents, responding to garbage objections, discovery of emails and other electronic records, when to involve a discovery referee, meeting and conferring, and motions to compel. It was well attended, and I, for one, learned a lot.

My main goal for 2023 was to establish better relations with the local area law schools and students so that our members could attract the top students to come work for us, rather than other employers, especially the corporate firms, who have more of a presence on the campuses. Two ways I hoped to achieve this goal was to have annual mixers/presentations with each of the three Sacramento-area law schools and create scholarships for each of the law schools.

Margot Cutter is the head of the Membership Committee this year, and she has helped to get the mixers coordinated. It has not been as easy as we thought, but we had our first law school mixer/presentation with Lincoln Law School on Sept. 6 at the Lincoln Law School campus. Thank you to both Margot and to Chris Wood for helping to coordinate this. I and board members Chris, Margot, Robert Nelsen, Rob Piering, Marti Taylor, along with CCTLA member Cam Le, all spoke to about 25 Lincoln students about our experience as plaintiff attorneys, our journey into private practice, running our own firms, and other topics.

The students had a lot of questions and were well-engaged. Thank you to Rob Piering for sponsoring the mixer and providing pizza and soft drinks. We are still in the process of scheduling mixers/ presentations with McGeorge and UC Davis, though it looks like those will take place in 2024.

CCTLA's Executive Board has agreed to create $1,500 scholarships for one student from each of the three law schools. In addition to academic success, the winner must express an interest in representing plaintiffs upon admission to the practice of law. We also established a scholarship committee to review the applications and select the winners. It is my hope that CCTLA will award scholarships annually from now on. Thank you to Marti Taylor, Daniel Glass, Robert Nelsen and Dan Wilcoxen for your participation on the committee.

The scholarships were awarded to: Khalil Ferguson from University of the Pacific McGeorge School of Law; Saleshia Ellis from UC Davis School of Law; and Emma

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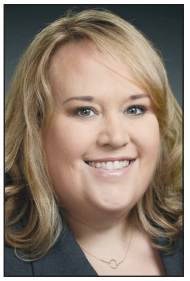

Marti Taylor, Wilcoxen Callaham LLP, CCTLA Parliamentarian

NOTABLE CITES

By: Marti Taylor

CARR v. CITY OF NEWPORT BEACH
2023 4DCA/3 California Court of Appeal, No. G061277 (August 29, 2023)

DIVING OFF A BAYSIDE CONCRETE WALL WAS DANGEROUS ACTIVITY, GIVING CITY OF NEWPORT BEACH IMMUNITY

FACTS: Plaintiff Brian Carr and a friend were drinking and kayaking in Newport Beach over a holiday weekend. Plaintiff decided to return to the beach area to swim and walked out onto a 20-inch-wide sea wall and dove headfirst into the water. He hit his head on the bottom and was rescued by lifeguards. As a result of the impact, he suffered a catastrophic spinal cord injury that left him a quadriplegic.

Plaintiff sued the City of Newport Beach, claiming two causes of action: dangerous condition of public property and failure to warn. The complaint alleged the city knew people liked to walk on the wall and dive into the water, and the city knew this activity was dangerous, particularly at low tide, and did not warn the public.

Defendant City of Newport Beach brought a motion for summary judgment, arguing it was immune from liability pursuant to Government Code Section 831.7 (hazardous recreational activity.) The court granted the motion, and Plaintiff appealed.

ISSUE: Does diving from an undesignated area constitute a hazardous recreational activity?

RULING: Affirmed.

REASONING: Government Code Section 831.7 furnishes governmental immunity for injury sustained by "any person who participates in a hazardous recreational activity…" As defined by that section, "hazardous recreational activity" includes "[a]ny form of diving into water from other than a diving board or diving platform, or at any place or from any structure where diving is prohibited, and reasonable warning thereof has been given."

Plaintiff asserted the immunity only applied to places or structures where diving was prohibited, and reasonable warning thereof was not given. The court disagreed, ruling that diving into water amounts to a hazardous activity if it occurs in either of two ways: (1) from any location other than a diving board or diving platform; or (2) from any place or any structure where diving is prohibited, and reasonable warning thereof has been given. The court further noted that diving that meets the criteria set forth in part one triggers immunity, regardless of whether any type of prohibitive warning is given.

BRANCATI v. CUCHUMA VILLIAGE, LLC
2023 2DCA/6 California Court of Appeal, No. B321616 (October 16, 2023)

TRIAL COURT'S EXCLUSION OF EXPERT WAS REVERSABLE ERROR WHERE EXPERT WAS A MEDICAL DOCTOR WITH FACTUAL-BASED TESTIMONY

FACTS: From 2012 to 2016, Plaintiff Dana Brancati was a tenant at Cachuma Village. During her tenancy, Brancati complained of mold infestation. The landlord, Cachuma Village, LLC, failed to take any action. Plaintiff was injured due to exposure to toxic mold. In 2016, Insight Environmental mold detection specialists determined there were high levels of a variety of dangerous types of molds in Plaintiff's residence at Cachuma Village.

Plaintiff filed a complaint for breach of the warranty of habitability, fraud, constructive eviction, and personal injuries for exposure to toxic mold. The case proceeded to trial, and Plaintiff's claims relied on expert Ronald Simon, M.D., to prove the causation of her injuries. At his deposition, Simon testified that as a result of living in her home environment with exposure to excess mold growth that Plaintiff had suffered a variety of adverse health effects.

At trial, Defendants filed a motion *in limine* to exclude

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Bankruptcies and ABCs:

How nursing home owners cash out, minimize liabilities, and leave taxpayers and the elderly holding the bag

By: Virginia L. Martucci

There's nothing new about wealthy corporations using bankruptcy protection to try to escape or minimize tort liabilities resulting from widespread failures to keep consumers safe. (See Johnson & Johnson's recent multiple failed attempts to resolve the talc mass tort litigation through the bankruptcy process.)[1]

A recent study shows that systematic failures in the delivery of care, resulting from placing profits over people and understaffing to meet budgetary goals, cause increased adverse outcomes and death to the elderly and vulnerable nursing home residents in for-profit, private-equity backed nursing homes.[2] These for-profit and equity-backed operators use the bankruptcy system and Assignments for the Benefit of Creditors ("ABCs") to escape responsibility to their former residents, whom they leave injured, permanently disfigured, or dead.

This should be of particular concern not only to the plaintiffs' bar because of how disruptive a bankruptcy filing can be, but also to taxpayers because nursing homes are primarily funded through state and federal taxpayer money *vis-à-vis* Medicare and Medi-Cal.

This article discusses how nursing homes use bankruptcy and ABC protection to minimize tort liabilities after they transfer their operations for no cash consideration to new operators at the expense of injured and deceased plaintiffs. The article suggests ways to respond to bankruptcy filings or ABCs to try to preserve the value and enforceability of our clients' claims.

Using Bankruptcy To Shake off Tort Liability

The bankruptcy system generally allows for corporate (and individual) debtors to either liquidate through a judicially supervised procedure or to continue to operate and maintain possession of assets and reorganize. Chapter 11 of the Bankruptcy Code permits corporate debtors like nursing homes to remain in possession of their assets and business while reorganizing.[3] Pending tort litigation is automatically stayed for the debtor defendant once the Chapter 11 petition is filed, which can stall out our cases.

One nursing home operator, Windsor, recently filed for Chapter 11 Bankruptcy for 21 of its skilled nursing facilities, an assisted living facility, a home health care center, and a hospice care center.[4] Before the filing, Windsor and its owners transferred their operations to a new operator, NewGen. At both the 341 Meeting of Creditors (a proceeding under oath where the Chapter 11 trustee and creditors can ask questions of the debtors) and in an initial Declaration filed by NewGen CFO, NewGen stated that this transaction came about because, although these 21 entities had annual revenues of $260 million, Windsor was financially distressed due in part to the more than 60 lawsuits against the debtors (which was growing and could total more than 100).[5]

Virginia Martucci, York Law Firm, is a CCTLA Board Member

Testimony at the 341 Meeting revealed: no cash consideration was exchanged for NewGen to acquire these 21 debtors; NewGen agreed to assume all liabilities of Windsor; that certain unnamed owners of Windsor retained an interest in the ongoing operations of the facilities; and some of Windsor's ownership would continue to receive payments for the next three years through note agreements and "non-competes." The publicly available filings reveal payments are being made per debtor to the prior owners' family trusts totaling tens of thousands per month.

In sum, Windsor transferred almost two dozen facilities for no cash consideration exchanged to NewGen. NewGen agreed to assume Windsor's liabilities, but immediately filed a Chapter 11 for these 21 entities to reduce the significant pending and anticipated tort litigation. On the back end, Windsor's owners retain

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some ownership and get paid through non-competes and other agreements. The injured and deceased former residents of Windsor's facilities now face automatic stays in their cases and must deal with the complicated landscape of the Bankruptcy Court. They are the ones who lose in this transaction.

What is an ABC?

I had never heard of an ABC until it happened in one of my elder-neglect cases. In my case, the owner of the facility (which had no insurance) transferred the facility to a new operator for $10, according to the bill of sale, and then liquidated through an ABC, leaving nothing for my client or other victims.

ABCs are a liquidation procedure that takes place outside of the bankruptcy process and judicial oversight. It is a statutory procedure authorized by Code of Civil Procedure sections 493.010 *et seq* and 1800 *et seq*. A debtor assigns its assets to an assignee/attorney. The assignment is made by a simple document giving the assignee authority to liquidate the assets, pay themselves in the process, and pay creditors. The assignee is required to give notice to creditors. Creditors must submit their claims by the claims bar date. After that, assets are liquidated and creditors paid. By the time unsecured tort claimants are in line to be paid, there usually is nothing left.

The upside of a bankruptcy is that all of the debtors' financials, operating information, and ownership information becomes public. The reorganization plan must be vetted by all interested parties, and creditors (such as tort plaintiffs) can oppose and comment on the plan. Unlike a bankruptcy, there is no judicial oversight in the ABC. There are no formal disclosures and no transparency as to what assets the trustee liquidates and for how much. ABCs in California do not require a court filing, so unless a creditor/plaintiff receives notice, they may not know the ABC took place.

The ABC does not automatically stay litigation (another key difference from bankruptcy). This means that a plaintiff could pursue either a default judgment or a jury verdict against a defendant who makes an ABC, but because there is no priority, the plaintiff may never be able to collect.

ABCs are particularly attractive to troubled nursing homes because they can avoid scrutiny from the court, the U.S. trustee, the unsecured creditors committee, and other interested parties. ABCs are also touted as being quicker and less expensive than a bankruptcy. Furthermore, ABCs allow operators to shake off liabilities that a buyer may be unwilling to take on, making an otherwise questionable sale or acquisition more attractive.

Proposed Solutions to Respond to a Bankruptcy or ABC?

Although a bankruptcy stay or ABC can affect the value and enforceability of a claim against a defendant, there are ways to combat the negative effects of both:

• *Participate in the Bankruptcy or ABC*

Any plaintiff who receives a notice of a bankruptcy or ABC must be mindful of the claims bar date and submit a timely claim. Plaintiffs' counsel should consider retaining bankruptcy counsel so they can participate in the bankruptcy, object to a proposed plan that may adversely affect a tort claim, or do limited discovery in the bankruptcy. Be mindful

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that the bankruptcy automatic stay does not extend to all defendants, only to the debtor defendants. Your case can still proceed against non-debtor defendants unless the Bankruptcy Court extends the stay protection.

• *Add a Claim for Constructive Fraudulent Transfer*

California law prohibits fraudulent transfers of assets that are made for the purpose of defrauding creditors. Civil Code section 3439 *et seq*. (the Uniform Voidable Transactions Act) prohibits transfers or acquisitions where no reasonably equivalent value was exchanged and where a debtor knew or reasonably should have known it would incur debts beyond its abilities to pay. (See also CACI 4200 *et seq*.) If you learn a transaction took place where no consideration has been exchanged, this could give rise to a fraudulent transfer claim that could be added to the complaint and potentially get the new owners

• *Involuntary Proceeding*

The code authorizing ABCs also permits the filing of an involuntary bankruptcy petition within 120 days of the assignment by a creditor. Where creditors suspect the ABC was entered into for improper purposes or there, an involuntary bankruptcy may be a way to challenge the ABC. This will initiate the bankruptcy process and allow for judicial oversight.

• *Preemption*

The ABC scheme could be attacked on the grounds that it is preempted by the Bankruptcy Code. The Ninth Circuit has held that at least part of the ABC statute is preempted. (*Sherwood Partners, Inc. v. Lycos, Inc.* (9th Cir. 2005) 394 F.3d 1198 [holding the statute authorizing the assignee for the benefit of creditors to avoid preferential transfers is preempted by the Bankruptcy Code].) However, at least one other California case has held there is no preemption. (See *Haberbush v. Charles & Dorothy Cummins Family Limited Partnership* (2006) 139 Cal. App.4th 1630 [holding the statute is not preempted].) This seems like a ripe area to challenge the ABC scheme in its entirety.

Whatever route you choose, we have a duty to zealously advocate for our clients and to find solutions so that a bankruptcy or ABC does not mean the end of the road for our clients.

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[1] Dietrich Knauth,"J&J effort to resolve taco lawsuits in bankruptcy fails a second time," Reuters (July 31, 2023), Reuters, available at: https://www.reuters.com/legal/jj-effort-resolve-talc-lawsuits-bankruptcy-fails-second-time-2023-07-28/.

[2] Borsa A, Bejarano G, Ellen M, Bruch J D. Evaluating trends in private equity ownership and impacts on health outcomes, costs, and quality: systematic review, The BMJ, 2023: 382 (Published 19 July 2023), available at: https://www.bmj.com/content/382/bmj-2023-075244.

[3] United States Courts,"Chapter 11 Basics," available at: https://www.uscourts.gov/services-forms/bankruptcy/bankruptcy-basics/chapter-11-bankruptcy-basics.

[4] See In Re: Windsor Terrace Healthcare, LLC, et al., Case No. 1:23-bk-11200-VK.

[5] Omnibus Declaration of Tianxiang "Shawn" Zhou in Support of Emergency First Day Motions, In Re: Windsor Terrace Healthcare, LLC, et al., Case No. 1:23-bk-11200-VK, available at: https://cases.stretto.com/public/X273/12430/PLEADINGS/1243008242380000000014.pdf.

President's Message

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Rodgers of Lincoln Law School. There were numerous qualified scholarship applicants from the three schools, but these three stood above the rest. The winners of the scholarships will receive their checks at CCTLA's Annual Meeting & Reception & Installation Dec. 14 at The Sutter Club.

On Sept. 13, we had a Problem Solving Clinic titled, "Taming Gaslighters," put on by John Roussas, of Cutter Law P.C. John gave a very informative talk in which he discussed defense attorneys' use of inappropriate objections and tactics to avoid discovery and thwart justice.

The Nominating Committee met in October and voted to make Peter Tiemann the next member of the executive board, as parliamentarian. We also reviewed the board member applications and voted that general body members Shahid Manzoor, of Manzoor Law Firm; Ian Barlow, of Kershaw Talley Barlow; and Anthony Garilli, of Dreyer Babich Buccola Wood & Campora LLP, will join the Board of Directors for 2024. Thank you to all the members who applied to join the board. There were many qualified applications, but only three spots available. If you did not make it this year, please try again next year, as we will always have at least one board seat open.

On Oct. 25, we had another Problem Solving Clinic, titled, "Understanding Facet Injuries and Facet Joint Syndrome. Learn Everything You Need to Know About Injections," put on by Dr. Nima Hosseini, M.D. It was held in person at the law office of Del Rio & Caraway, P.C. as well as available live on Zoom. Dr. Hosseini provided a lot of valuable information that benefitted anyone dealing with injuries in their area of practice.

At the November board meeting, we voted on Advocate of the Year and Judge of the Year. I am happy to announce that Edward P. Dudensing was overwhelmingly voted Advocate of the Year. Thank you, Ed, for all that you do on behalf of your clients, our members and the greater Sacramento legal community in general. You are truly an asset to our profession and an example for our members to follow.

I also have the pleasure of announcing that judges Richard K. Sueyoshi and Steven M. Gevercer were voted judges of

the year. Judge Sueyoshi's rulings in the law and motion court have been thorough and fair to both sides of the bench. Judge Gevercer has presided over numerous civil jury trials in the past year and has shown our members that he is dedicated to providing both sides of the bar with a fair trial. There was no doubt that this year was a very rare occasion in which two judges were equally deserving of the Judge of the Year Award. Judge Sueyoshi's clerk, Priscilla Lopez, will be recognized as Clerk of the Year, and Judge Gevercer's courtroom attendant, Amber Muir-Harrison will both be honored with Courtroom Attendant of the Year Award.

As a reminder, the Judge of the Year and Advocate of the Year awards will be presented at our Annual Meeting & Reception & Installation on Dec. 14, at The Sutter Club from 5:30 -7:30pm. Please save the date in your calendar. Invitations and sponsorship information has already been emailed out to the membership. Information also appear on page 15 of this issue of The Litigator.

We have created a private CCTLA Facebook page/group and are in the process of inviting members. It will only be open to those who are eligible for the listserve, i.e., civil plaintiff and criminal defense attorneys. It is our hope the group will help to get ideas shared, as well as photographs and videos from legal events attended by members. If you would like to be added to the group, please email me your Facebook contact information, and I will add you.

The CCTLA Women's Caucus continues to grow. It is in the process of getting its own listserve and is scheduling seminars and networking events. If you are interested in joining, please email Debbie Keller at debbie@cctla.com.

We 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 cases they have in a safe, judgment-free space. If you have questions, they probably can be answered there.

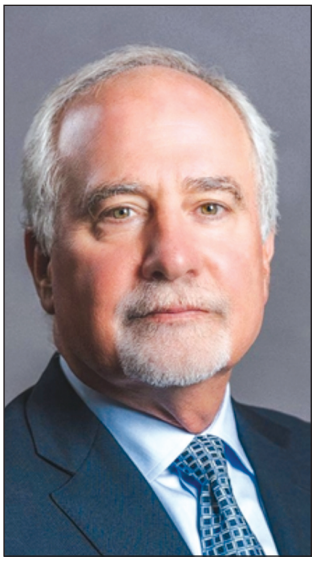
We are in the process of scheduling our next Problem Solving Clinic. As always, if you have suggestions for any programs you would like to see next year, please let me or any of the board members know.

On Sept. 20, the Sacramento County Bar Association Board of Directors voted me the 2023 Distinguished Attorney of the Year. I am humbled and honored to receive this award. I am sure that my service as CCTLA president was one of the factors the board considered in deciding to vote for me, so I appreciate CCTLA allowing me to serve as its president. The award will be presented at the SCBA Annual Meeting on Dec. 6. (*FYI, I would have congratulated any CCTLA member who received the award, so I figured I should congratulate myself. Hopefully, it does not sound too pretentious.*)

I am very happy with my year as your president. While there always is more that could be done, I think we have accomplished a lot of very good things this year. Hopefully, the board and the membership feel the same way. We have continued with the programs that have been successful in years past, but we have also added a few that I believe have made us more visible to law students. My hope is these new programs continue and that they help to create a pipeline of quality law school graduates who are interested in representing consumers for the foreseeable future. I am looking forward to finishing the year strong and to seeing all of you at our holiday reception on Dec. 14.

FRANK PENNEY

JOSHUA BOYCE



ROGER DREYER

CAOC announces 2023 Consumer Attorneys of Year and Street Fighter of the Year, plus other awards

Three CCTLA members among the honorees

CCTLA members Frank Penney, Joshua Boyce and Roger Dreyer were among those who were honored by Consumer Attorneys of California at CAOC's 62nd annual Installation and Awards Dinner Nov. 18 in San Francisco.

CCTLA's Frank Penney and Joshua Boyce, of Frank Penney Injury Lawyers, were part of a team of four attorneys recognized as this year's Consumer Attorneys of the Year, after winning justice for the family of a Ugandan woman who was decapitated by an unsecured swing-arm gate at Arches National Park in Utah.

Consumer Attorney of the Year is awarded to a CAOC member or members who significantly advanced the rights or safety of California consumers by achieving a noteworthy result in a case.

Roger Dreyer, of Dreyer Babich Buccola Wood Campora LLP, was presented with the Edward I. Pollock Award. This award is given "in recognition of many years of dedication, outstanding efforts and effectiveness on behalf of the causes and ideals of consumer attorneys." He is a longtime CCTLA member and the current chair of CAOC's political action committee board of trustees. Dreyer earned Consumer Attorney of the Year honors in 2010.

CAOC also presented its Street Fighter of the Year award, to an attorney who fought for compensation for a Navy Seal who was discharged after being injured in a car crash. Eligibility for this award is limited to CAOC members who have practiced law for no more than 10 years or work in a firm with no more than five attorneys.

To be considered for the Consumer Attorney or Street Fighter award, the case had to have been finally resolved between May 15, 2022, and May 15, 2023, with no further legal work to occur, including appeals. The winners were determined by a vote of CAOC's Board of Directors.

Consumer Attorneys of the Year

Frank Penney, Joshua Boyce, Deborah Chang, Randi McGinn, Zoe Littlepage were honored for their work representing the husband and parents of Esther Nakajjigo, a young woman who had become an icon in her native Uganda. Raised by an unwed teenage mother in a two-room home with a dirt floor, she became a spokesperson for women and girls as a teenager, and at the age of 17, she started and operated her own hospital. The next year, she became Uganda's first Ambassador for Women and Girls. Nakajjigo then created the most successful reality television show in Uganda by turning the camera's focus on the plight of unwed mothers. The television series empowered women throughout the country and led to improved gender equality in Uganda.

Nakajjigo came to the United States to attend a leadership program for humanitarian entrepreneurs. She was just 25 years old when she was tragically killed while exiting Arches National Park in Utah: an unsecured swing arm gate swung into traffic, pierced through the passenger side of the car and decapitated her. In *Michaud, Namagembe and Kataregga v. United States of America*, Nakajjigo's husband and parents alleged that the United States Park Service was negligent in maintaining and operating the park's swing gates, leading to Nakajjigo's death. The United States admitted fault, and the trial in federal court proceeded on the issue of damages.

The result was the largest wrongful death verdict issued by a federal judge in Utah history. As a result of this case, all parks in the United States Park systems now have secured posts/locking mechanisms on swing gates. This case confirms that record verdicts in important cases can be achieved by a trial team comprised entirely of women.

Street Fighter of the Year

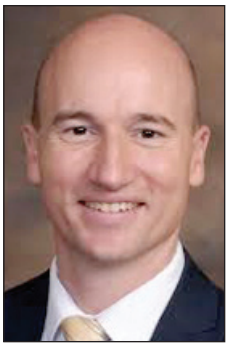
Maria Kelly was honored as CAOC's Street Fighter of the Year for Fuller v. Fox, in which she represented Jonathan Fuller, a decorated Navy SEAL who suffered ongoing head and neck pain after a rear-end crash. Two years before the crash, Fuller returned from Mosul, where he was exposed to hundreds of mortar blasts while serving as a special operations warfare fighter. Fuller had suffered dozens of concussions in service but always bounced back to defend his country. He was gearing up for his next deployment when the crash happened. However, just two months after the crash, Fuller's team leader noticed he was struggling physically and mentally and discharged him.

The defense said the driver whose vehicle hit Fuller's had a sudden medical emergency at the time of the collision, so there could be no recovery for Fuller. The driver died during the litigation, soKelly had to hunt down each of his medical records and doctors to prove there was no emergency. The defense then argued Fuller's injuries were military-related; that the collision had nothing to do with his discharge because Navy doctors had cleared him "fit for full duty."

With a team of experts and confidential testimony from several SEALs who Kelly fought hard to find in between deployments, she proved that SEAL culture does not rely on doctor's notes or medical records to determine whether one is combat-ready. The defense finally surrendered, after more than two years of litigation, and Kelly obtained a settlement for the insurance policy limits.

A SHORT GUIDE TO TREE LAW

By: Ryan K. Sawyer



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

Trees can be the source of a surprising amount of frustration and confusion. Folks who are normally calm can get very emotional, even violent. They act with certain knowledge of their "natural rights," but do so wrongly, and it can get surprisingly expensive.

Where is the Property Line?

The first question is: Where is the property line? Yes, in most cases it's where the fence is or halfway between parallel driveways or where someone planted these buses over a decade ago. But…not always—and a little bit of difference can make a big difference, especially, when a tree is very *close to* but not *on* the property line.

The first issue is to clarify with certainty the location of the property line. A surveyor (licensed by the California Board of Professional Engineers, Land Surveyors, and Geologists) can do this quickly and inexpensively. Surveyors are often also professional or civil engineers.

Whose Tree Is It?

If the tree trunk is exclusively on one side of the property line, it is owned by the property owner. (Civil Code § 833.)

However, it is a long-standing rule that if the tree stands *on* the property line, the tree is owned in common by both property owners. (Civil Code § 834; see *Scarborough v. Woodill* (1907) 7 Cal.App. 39.) If the tree has a split trunk or has two trunks, with one trunk growing *out of the ground* on each side of the property line, the entire tree is owned in common by both property owners. (*Kallis v. Sones* (2012) 208 Cal.App.4th 1274.) Even if a fence is constructed between the trunks of this qualifying, dual-trunked tree, the entire tree is owned in common. (*Ibid.*)

The co-owner of a tree can obtain injunctive relief to prevent the other co-owner from harming the tree. (*Anderson v. Weiland* (1936) 12 Cal. App.2d 730.) A tree owner's rights are subject to a municipality's right to trim or remove a tree if it is in the public interest and to easements along a public right of way, e.g. sidewalks. (*Altpeter v. Postal Telegraph-Cable Company* (1917) 32 Cal.App. 738.)

Can An Adjacent Property Owner Cut Roots and Trim Overhanging Branches?

Historically (from 1889), when the trunk of a tree was completely on one side of a property line but roots grew into and branches overhung the adjacent property, the roots and branches were "owned" by the owner of the adjacent property, even though the tree was not. The adjacent property owner could cut any portion of the tree that was on his/her property.

However, this "absolute right" changed in California, requiring the adjacent owner to act reasonably. (*Sprecher v. Adamson Companies* (1981) 114 Cal.App.3d 414.) An adjacent property owner who cuts encroaching

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branches may be liable for causing foreseeable injury to the health, functionality or aesthetics of the tree. (*Booska v. Patel* (1994) 24 Cal.App.4th 1786.)

However, this concern is balanced by the right of the adjacent property owner to be able to use his or her property. If the branches or roots of the offending tree are creating a nuisance, and the adjacent property owner is concerned about the risk of unilateral action (i.e. cutting), he or she can seek an injunction for an order allowing cutting (*Grandona v. Lovdal* (1889) 78 Cal. 611; *Bonde v. Bishop* (1952) 112 Cal.App.2d 1) or bring a civil action to force the tree owner to do so. (See *Booska* generally.)

Therefore, the owner of the tree should be mindful of whether the tree is causing damage next door, and the adjacent property owner should be judicious before cutting into the encroaching branches and roots of a tree he or she doesn't own. Clear as mud.

When is a Nuisance, Nuisance-Enough?

In general, a nuisance is anything that "interfere[s] with the comfortable enjoyment of life or property." (Civil Code § 3479.)

Historically, what constitutes an interference has been interpreted narrowly and will constitute an actionable nuisance if the encroachment interferes with an economic interest. Leaves have been held to be a nuisance, if they create a negative economic impact or harm the use of the adjacent property. (*Parsons v. Luhr* (1928) 205 Cal. 193; see, generally, *Grandona v. Lovdal* (1889) 78 Cal. 611.) In *Bonde v. Bishop*, the court held that the "continual dropping of branches" that creates an "almost daily chore to clean the debris from the tree" constituted a nuisance.

Interference with power lines constitutes a nuisance that empowers utility companies to trim trees, although the company is allowed to cut only those branches that necessarily interfere with the "proper and efficient use" of the wires. As we have all seen, this can lead to an ugly tree that may motivate the tree-owner to prune further for aesthetic concerns, but that does not create a cause of action against the utility company, even if the cutting depreciated the value of the tree. (*Altpeter v. Postal Telegraph-Cable Company* (1917) 32 Cal.App. 738.)

Tree roots that encroach into an adjacent property can also constitute a nuisance that can create grounds for an action seeking injunctive relief and/or a civil action for damages. (*Stevens v. Moon* (1921) 54 Cal.App. 737; *Fick v. Nilson* (1950) 98 Cal. App.2d 683.)

The adjacent owner used to be allowed to cut the encroaching roots (see *Stevens v. Moon*), but unilateral "self-help" is no longer available. "[The plaintiff] constructs an absolute right to do whatever he likes on his property, without regard to its impact on his neighbors. This is not the law." (*Booska v. Patel* (1994) 24 Cal.App.4th 1786, 1790.) "[A property owner] must so use his own rights as not to infringe upon the rights of another." (Civil Code § 3514.)

As we all know, a tree-owner can be liable for injuries caused by a tree whose roots have encroached under private or public sideways or walkways and created a dangerous condition. (*Moeller v. Fleming* (1982) 136 Cal.App.3d 241; *Alpert v. Villa Romano Homeowners Association* (2000) 96 Cal.App.2d 364.)

A tree-owner can be liable for creating a nuisance even if

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the owner was not negligent. In *Mattos v. Mattos* (1958) 162 Cal.App.2d 41, the owner was held liable for creating a nuisance when a storm caused a tree to fall onto the adjacent property, even though there was no evidence that the tree was somehow prone to do so or that the owner had notice of such.

The *Mattos* court also rejected the defendant's argument that the statute of limitation had run, holding: For purposes of application of the statute to actions for damages from or for the abatement of a nuisance, a distinction is drawn between those intrusions upon another's land which are 'permanent' and those which are 'continuing.' Construction of a building partly upon the land of another is a permanent encroachment thereon and the entire cause of action for past as well as prospective damages accrues when the trespass occurs. But, 'if the nuisance may be discontinued at any time' or when the encroachment 'is abatable,' the nuisance is continuing and each repetition or continuance amounts to another wrong giving rise to a new cause of action. Roots and branches of trees have been held to fall in the 'continuing' classification. (*Mattos v. Mattos* (1958) 162 Cal. App.2d 41 [at 41 – it's a mercifully short decision], internal citations omitted.)

Is Obstruction of Air and Sun Actionable?

Historically, no…but now there are solar panels.

Obstruction of air and light itself, i.e. the value of sunshine rather than the power than can now be derived from solar energy, does not create a cause of action (even as tree growth increases the obstruction over time), unless the blockage is malicious. (*Haehlen v. Wilson* (1936) 11 Cal.App.2d 437 (also

California); *Taliaferro v. Salyer* (1958) 162 Cl.App.2d 685.) Absence a local ordinance or proof of malice, a nuisance is not created. (*Venuto v. Owens-Corning Fiberglass Corporation* (1971) 22 Cal.App.3d 116.)

However, obstruction of light to solar panels can be actionable under the Solar Shade Control Act (Public Resources Code §§ 25980-25986) which, generally prohibits a property owner from constructing or planting anything that obstructs sunlight from (creates a shadow over) an existing solar collector or over an easement established pursuant to the Act.

The Act was passed in 1978 but has gained increasing significance as advances in technology have allowed solar panels to be installed almost anywhere (*e.g.* on rooftops, in large field arrays, to power public and private signs and gates, etc.).

In the important case of *Sher v. Leiderman* (1986) 181 Cal. App.3d 867, the court held that the scope of the Act was limited to "active solar collectors" used for "(1) water heating, (2) space heating or cooling, and (3) power generation." The court rejected that the protections afforded under the Act apply to passive solar "collectors," such as west or south facing windows used to heat a building.

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In Memory of Gary Callahan

By: Dan Wilcoxen, Wilcoxen Callaham, LLP
CCTLA Board Member and Past President

Gary Brent Callahan, my friend, was born in Ashland, OR, on April 24, 1942. He died on Sept. 17, 2023, at the age of 81. Gary graduated from McGeorge School of Law in 1970 and was admitted to the State Bar of California in 1971. Gary was subjected to a delay in grading the Bar exam results which didn't finish until 1971.

While Gary was in his last year of law school, he worked with Bill Morgan, who later became a judge. Bill and Gary had a great relationship. Both were outstanding individuals. Gary's first job as a lawyer was with the law firm of Rust, Armenis & Matheny. He convinced me to go to work at Rust's office. He told me we would never work for different firms and that we would be together for the rest of our careers. I joined the firm on Jan. 2, 1973. Six months later, Gary left with Hank Matheny and joined the firm of Barrett, Newlan & Matheny. I was very upset to be left behind.

In 1979, I finally joined Gary, and we called the firm Wilcoxen Callahan at his request. For 40 years, the firm name changed here and there, but it always included our names until Gary left the firm with Ted Deacon and opened his own firm for a few years. Several years later, he came back, and we worked together again for a few years. Gary then left to begin working as a consultant employee with Arnold Law Firm. Over the years, Gary had numerous large verdicts and tried well over 50 jury trials to conclusion.

I introduced Gary to my friend Sally Callahan. They later married in 1983 and were married for 40 years. They had one son together, Zachary—a wonderful young man. In 1985, Gary was president of CCTLA. He convinced me to join CCTLA, and I have been on the board ever since. He was also an associate of ABOTA.

Capitol City Trial Lawyers Association's Annual Meeting & Holiday Reception & Installation

To all members of the CCTLA and those who make our jobs possible, you are cordially invited to attend the 2023 CCTLA Annual Meeting & Holiday Reception & Installation of the 2024 CCTLA Officers and Board

Hors d'oeuvres! Libations! Live Music featuring Bob Bale and Res Ipsa Loquitur!

Thursday, December 14, 2023
5:30 p.m. to 7:30 p.m.
at The Sutter Club, 1220 9th Street, Sacramento

We hope to see you there!
President Justin L.Ward
& CCTLA Officers and Board Members

RSVP by Dec. 1, 2023 to Debbie Keller at debbie@cctla.com or 916/917-9744.

CCTLA RE-STATED BYLAWS VOTE

The Board has approved the re-stated Bylaws, and a vote to adopt will take place during the reception. The purpose of the re-stated Bylaws is to bring them into compliance with current legal requirements. The re-stated Bylaws have been provided to the membership for review, and hard copies will available at the reception.

LAW SCHOOL SCHOLARSHIPS

At this year's reception, CCTLA will be presenting $1,500 scholarships to three law students: Emma A. Rodgers, Lincoln Law School; Saleshia D. Ellis, UC Davis School of Law; and Khalil Ferguson, McGeorge School of Law.

2023 Honorees

Ed Dudensing
Advocate of the Year

The Honorable Steven M. Gevercer
Judge of the Year

Amber Muir-Harrison
Courtroom Attendant of the Year

The Honorable Richard K. Sueyoshi
Judge of the Year

Priscilla Lopez
Clerk of the Year

*This event is FREE to CCTLA Members, the Judiciary, and one guest per invitee.**

** Member guest must be accompanied by a CCTLA Member. Cost for other non-members: $250 (includes one guest).*

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THANK YOU to CCTLA members who have pledged to donate a total of $12,850 to Mustard Seed School this year. CCTLA is donating $1,500, bringing total-raised-to-date to $14,350! If you would like to join this fundraiser, contact Debbie Keller at debbie@cctla.com

DELIVERY DRIVERS — EMPLOYEE OR INDEPENDENT CONTRACTOR?

By Peter Tiemann

As plaintiff personal injury attorneys, we are often faced with defendants who may not have adequate insurance *or* are small companies unable to pay for the full extent of the harm that they cause. Crashes involving small (one to two trucks) delivery companies who have delivery contracts with large corporate retailers is one such area that is becoming common with our evolving gig economy.

Large corporate retailers often set up intermediaries to avoid liability. These retailers often hire a so-called broker who is recruiting drivers with trucks, or recruiting drivers and renting them trucks to perform delivery services. These corporate retailers often claim that they cannot be liable for a driver if the driver is classified as an independent contractor and is driving a vehicle that is not registered to the retailer.

In California, this argument is based on the rule that "at common law, a person who hired an independent contractor generally was not liable to third parties for injuries caused by the contractor's negligence in performing the work." (*Privette v. Superior Court* (1993) 5 Cal.4th 689, 693.). However, if the driver was mischaracterized as an independent contractor when in fact he is actually an employee, then the retailer can be held responsible as the employer.

At common law, the critical distinction between the categories of "independent contractor" and "employee" turned upon the "control of details" test. The test determines "whether the person to whom service is rendered has the right to control the manner and means of accomplishing the result desired." (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350.)[1] This test does not focus on "how much control a hirer exercises, but how much control the hirer retains the right to exercise." (*Ayala v. Antelope Valley Newspapers, Inc*. (2014) 59 Cal.4th 522, 533.)

The landmark *Borello* case then added several secondary factors derived from the Restatement ofAgency: "(a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." (*Id*. at p. 351.) These "individual factors cannot be applied mechanically as separate tests; they are intertwined, and their weight depends often on particular combinations." (*Ibid*.)

Peter B. Tiemann, Tiemann Law Firm, is a CCTLA Board Member

Plaintiffs will need to develop extrinsic evidence to show that a driver is being controlled by the retailer whose goods are being shipped despite what the written terms of any Independent Contractor or Delivery Agreement says.

It is imperative for counsel to remember that the California Supreme Court has held that the misclassification of a driver as an independent contractor in a contract is not dispositive and that such self-labeling can be rebutted. (*S.G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 350).

Counsel will need to create a triable issue of material fact regarding who controls the manner and means of the delivery system. Specific areas include: what happens at the point of sale; how the services are sold to the customer; who collects the money; how the money is shared between the parties; and whether customers are told that deliveries are being made by the retailer when in fact third parties are being hired to make the deliveries.

Counsel should also explore how the delivery services are carried out. For example, investigate who creates the routes; how, when, and by whom are delivery windows created; who controls the staging and order of loading the trucks; and is a computer application used to track and monitor the entire delivery process and the performance of the driver. Many of these computer applications require drivers to follow GPS directions and to log in every start and every stop, in real time.

Counsel's discovery efforts will be key in developing the extrinsic evidence

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to rebut the misclassification of a driver. Document requests should include production of all agreements between the entities, including delivery service agreements and fee sharing agreements. Often the contracts between the parties will address the obligations and responsibilities of the respective parties. Many of these service agreements reserve control of the manner and means of the deliveries to the retailer. All of these factors can be used to show the delivery driver was an employee rather than an independent contractor.

Consider deposing the Person Most Qualified ("PMQ") from each company. Areas of inquiry should include: how the delivery service charges are shared; whether the entities share the same technologies/or computer delivery applications; and who is in control of the decision making for the various stages of the delivery cycle.

In conclusion, discovery will often reveal whether there is an employer-employee relationship despite the misclassification of a driver as an independent contractor, and whether the retailer controls many aspects of the manner and means of the delivery cycle. Pursing the theory that the driver is an employee despite the presence of an Independent Contractor agreement can be your solution to the problem of low limits or undercapitalized companies.

***

Peter Tiemann is a principal of the Tiemann Law Firm. He focuses on personal injury and trucking cases throughout the State of California.

[1] The multifactor Borello test was later replaced in the wage order context with the "ABC test" by Dynamex Operations West v. Superior Court (2018) 4 Cal.5th 903, 951-963. It has since been held that "the Dynamex ABC test is limited to claims governed by wage orders that employ the 'suffer or permit to work' standard." Becerra v. McClatchy Co. (2021) 69 Cal.App.5th 913 934.)

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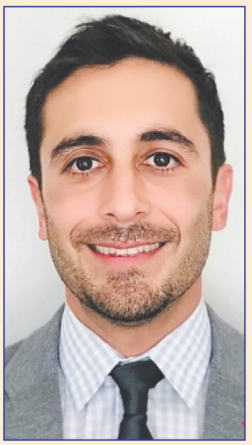

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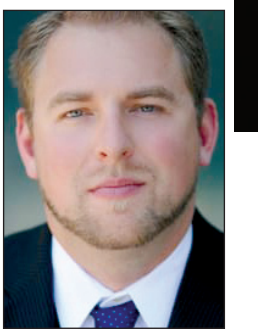
How to deal with a broadly worded request for production of documents in contention form

By: Kirill B. Tarasenko



Kirill B. Tarasenko, Tarasenko Law Firm, is a CCTLA Board Member

I began researching the issue of "contention" requests for production of documents after repeatedly receiving the following types of document requests, which all civil practitioners have likely encountered from insurance companies and their lawyers. Such requests for production come in many forms, and can sometimes look something like this:

> *Produce all DOCUMENTS and other tangible evidence that support your claims for personal injury.*
>
> *Produce all DOCUMENTS that YOU contend support YOUR claims for general damages.*
>
> *Produce any and all DOCUMENTS evidencing any claim of damages in this action or which support any claim YOU are making.*

Despite frequently receiving these types of document requests, I was never sure exactly how to respond because I didn't interpret such requests as legitimately seeking documents. Instead, the sense was always that the intent behind the requests was to cast a very wide net, followed by some sort of "gotcha" if the plaintiff responded that they had no documents to support a given contention.

Further, exactly what documents were such requests for production seeking, anyway? If it were medical records and bills, then the request would say so – not to mention the fact that several other requests for production likely already sought out medical records and bills. If it were photographs showing injuries, the request would also say that specifically.

What, exactly, were such requests seeking, and how should one respond when one genuinely is not sure about what is being sought, but is concerned with the potential end result of not producing anything: "Ladies and gentlemen of the jury, we asked Plaintiff to produce all documents that support their contentions, and they produced nothing. So give them nothing."

I don't know about you, but it's thoughts like that which kept me up at night until I figured out what the problem actually was – and it wasn't with my clients or with a lack of documents. No, the problem was always with the contention document requests themselves, as I will share with you here, and I hope to provide you with some useful assistance in how to deal with such requests.

Contention Requests for Production of Documents Place an Impossible Burden on the Answering Party

Fundamentally, this is really a matter of fundamental fairness and undue burden in terms of time and expense, because when the propounding party fails to identify specific documents or reasonably particularized categories of documents to be produced, then the responding party is forced to guess and speculate as to what documents would be responsive. If contention requests for documents were allowed, then the propounding party could force the responding party to rack up massive legal fees by avoiding the statutory limit of 35 for interrogatories and force unlimited contention responses to document requests.

If a party were allowed to force responses to broadly worded document requests lacking specificity, or request documents in contention form, then there would be a very real risk of evidentiary exclusion at time of trial if a given document was not produced due to the responding party not understanding that that particular document was being sought through a broadly worded request lacking specificity.

By forcing the responding party to guess and by causing uncertainty as to whether the response fully complied with the requests, the propounding party could create confusion and unduly burden the plaintiff with these vague and omnibus type of requests for production. To avoid

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this situation, the Legislature sought to prevent omnibus document production requests by narrowly defining the scope and format of document production requests, with statutory language providing clear differentiation from the statutory language allowing contention interrogatories and requests for admission.

Requests for Production of Documents Must Be Reasonably Particularized

Code of Civil Procedure §2031.030 makes clear the requirement of specificity and reasonable particularity:

> *Each demand in a set shall be separately set forth, identified by number or letter, and shall do all of the following: Designate the documents, tangible things, land or other property, or electronically stored information to be inspected, copied, tested, or sampled either by specifically describing each individual item or by reasonably particularizing each category of item. See Code of Civil Procedure §2031.030(C)(1).*

Each individual request for production of documents must narrowly describe the document or category of time to be produced, to avoid overly complex or general blanket requests. See *Calcor Space Facility v. Superior Court* (1997) 53 Cal. App.4th 216, 222-223.

The Legislature Intended to Limit Contention Discovery to Interrogatories and Requests for Admission, Not Requests for Production

In 1986, the California Legislature comprehensively revised the civil discovery rules, modeling the newly enacted Discovery Act of 1986 after the Federal Rules of Civil Procedure. See *Emerson Elec. Co. v. Superior Court* (1997) 16 Cal.4th 1101, 1108.

Because the Legislature expressly allowed contention discovery for interrogatories and requests for admissions, but did not for requests for production of documents, the Legislature's intention to not allow contention-style requests for production is evident.

Interrogatories

An interrogatory may relate to whether another party is making a certain contention, or to the facts, witnesses, and writings on which a contention is based. An interrogatory is not objectionable because an answer to it involves an opinion

Requests for Admission

Any party may obtain discovery within the scope delimited by Chapter 2 (commencing with Section 2017.010), and subject to the restrictions set forth in Chapter 5 (commencing with Section 2019.010), by a written request that any other party to the action admit the genuineness of specified documents, or the truth of specified matters of fact, opinion relating to fact, or application of law to fact. A request for admission may relate to a matter that is in controversy between the parties. See Code of Civ. Proc. §2033.010.

In drafting section 2031, the section of the Discovery Act pertaining to document requests, the Legislature decided not to include reference to "contention" style document requests, unlike its counterpart in the interrogatory portion of the Act.

Requests for Production

A party may demand that any other party produce and permit the party making the demand, or someone acting on the

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demanding party's behalf, to inspect and to copy a document that is in the possession, custody, or control of the party on whom the demand is made. See Code of Civ. Proc. §2031.010(b).

Ideas on How to Respond to Broadly Worded Requests for Production of Documents in Contention Form

I have been objecting to such contention requests for production of documents utilizing some variation of the below objection:

Objection. Vague, ambiguous and uncertain, overly broad, improper request. *Romero v. Hern*, 276 Cal. App.2d 787, 794 (1969); *West Pico Furniture Co. v. Superior Court,* 56 Cal.2d 407 (1961). These requests are not 'reasonably particularized' and constitute improper 'contention requests for production.' The Code of Civil Procedure provides that the requesting party "shall ... [d]esignate the documents . . . by specifically describing each individual item or by reasonably particularizing each category of item." CCP § 2030.030(c)(1). "Blanket requests" are prohibited. *Calcor Space Facility v. Superior Court* (1997) 53 Cal.App.4th 216, 222-223. The Code of Civil Procedure does not authorize contention requests for production of documents.

See *Singer v. Superior Court (1960)* 54 Cal.2d 318; *Rifkind v. Superior Court (1960)* 22 Cal.App.4th 1255.

In California, the requesting party bears the burden of identifying the documents that need to be produced, and cannot shift the burden to a responding party through omnibus requests. The requesting party bears the burden of identifying the documents that need to be produced, and cannot shift the burden to a responding party through omnibus requests. As such, the request violates Code of Civil Procedure section 2031.010(c)(1) by failing to reasonably particularize each category of item requested.

Conclusion

If asking a party about his or her litigation contentions by way of a request for production of documents, then requirements to specifically describe or reasonably particularize categories of items to be produced would be made unnecessary. Instead of specifying the document by name or category, a party could simply demand production of "All documents that (the adverse party) contends support (their) claims(s)" – much like many insurance company lawyers attempt to do now, which you now know is improper.

Remote lawyers working overseas — An opportunity (probably) not worth taking

By: Alla Vorobets

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

"Don't bargain for a cut that is still hidden in a bag" — African proverb

An associate of mine – sharp, efficient, bi-lingual, and passionate about the practice of law – recently passed the California Bar exam. But, within months of getting her license, my beloved associate made a decision to move to another country, Uzbekistan. As a result, I found myself exploring the opportunity of continuing to employ this associate once she changed countries.

However, when researching the issue of employment of remote attorneys living in other states or countries, I found very little guidance, apart from an invaluable counsel from fellow CCTLA member Betsy Kimball. According to her, when it comes to remote legal work, the California Bar is "something like a cross between the Army and the Hotel California – you can check out any time, but you can never really leave."

Lawyers may ethically engage in practicing law as authorized by their licensing jurisdiction(s) while being physically present in a jurisdiction in which they are not admitted under specific circumstances. American Bar Association, Formal Opinion 495 (Dec. 16, 2020). However, remote practice does not alter a lawyer's ethical duties under the California Rules of Professional Conduct and the State Bar Act. California State Bar, Formal Opinion 2023-208 (Apr. 13, 2023). Managerial lawyers must implement reasonable measures, policies, and practices that are tailored to the circumstances and remote working environment they are presented with. (*Id.*)

The primary California Rules of Professional Conduct that may be implicated by a lawyer's remote legal practice and some of the concerns within each area are:

• Duty of Confidentiality (Rule 1.6; Bus. & Prof. Code § 6068(e))

Technology/cloud providers used by a law firm and/or remote attorney to transmit and store confidential client information must be vetted to have sufficient security measures.

Remote attorneys must safeguard access to the client physical files, and also to the computer, phone, and/or printer containing client data from other household members and guests. Cal. St. Bar, Formal Ethics Opinion 2023-208 identifies reasonable security measures to include: "creating separate accounts for household members, implementing two-factor authentication, strong passwords, and automatic logging off when the computer becomes inactive, and disabling the listening capability of smart speakers, virtual assistants, or other listening-enabled devices unless needed to assist with legal services."

• Duty of Competence (Rule 1.1)

In addition to the duty to perform legal services competently, a lawyer also owes a duty of technology competence. Specifically, a law firm must utilize technology solutions that permit reasonable access to client files to its remote attorneys and regularly back up client files.

• Duty of Communication (Rule 1.4)

Remote attorneys may use a secure website portal, email, or other form of online communications to communicate with prospective or current clients. In doing so, all of the regular rules of communication continue to apply: i.e., posting appropriate disclaimers on the firm's website; conflict checks; keeping clients informed; ensuring clients understand information provided by counsel when communicating electronically, etc.

• Duty of Supervision (Rules 5.1–5.3)

California's duty of supervision: a) requires a managerial attorney to ensure the conduct of subordinate attorneys and

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non-attorney staff is compliant with the ethics rules and the State Bar Act; and b) imposes an independent duty upon subordinate attorneys to comply with the ethics rules and the State Bar Act.

Within a context of remote work, to comply with these sets of requirements, a law firm must provide sufficient equipment and information technology, technology support, training, and monitoring to its attorneys and staff.

A law firm must also develop, enact and implement reasonable rules, policies and practices related to remote work that ensure security of remote access and continued compliance of its remote attorney and staff with the Rules of Professional Conduct.

Managing and employing a remote labor force became a hot topic with the emergence of Covid-19. Within the legal field, compliance with ethics rules, particularly those related to data security and managerial supervision, add further wrinkles to an already complex set of problems presented by remote work.

Given that the world is becoming ever more interconnected, online, and increasingly reliant on gig economy – a global village – the issue of remote legal work needs more consideration.

If taking the opportunity to employ remote attorneys or other legal staff with access to client files, some of the practices a firm may employ include:

➤ Provide written disclosure to clients that some legal work will be completed remotely and/or by remote attorneys working in another state/country;

➤ Develop remote policies and practices that ensure confidentiality and security of client data consistent with ethics rules and provide training to remote attorneys;

➤ Provide to the remote staff member a computer, phone, and/or printer that can be wiped remotely;

➤ Require the remote staff member to provide description and video of living circumstances to ensure;

➤ Require the remote staff member to provide details and information on the ethics-compliant security he/she has put in place;

➤ Require regular meetings over Zoom or similar on status of completion of workload, communication with clients, and continued compliance with security measures;

➤ Require the remote staff member to notify the firm immediately of any data breach;

➤ Require the remote staff member to notify the firm immediately if any device containing client data is stolen;

➤ Provide written disclosure to clients in the event of actual or potential data breach.

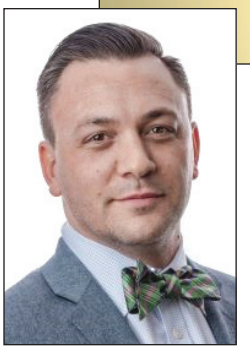
In the case of my associate, the employment of an attorney holding a California license and living in a country like Uzbekistan posed so many supervision and security challenges that it became an opportunity not worth taking.

Co-Counseling:
Leveraging Relationships to Maximize Success

By: Jeffrey Schaff

One of the most remarkable advantages that the plaintiffs' bar has over our foes is the collaboration that happens between attorneys. Whether it is in magazines like the *"The Litigator"* or *"Plaintiff,"* listservs from our various organizations (CCTLA, CAOC, Trial by Human, etc.), or the document banks provided by the same, the deliberate exchange of information fosters growth and provides the resources to confront much larger and better funded defendants. But it should not stop there, a more formalized collaboration can morph these small victories into larger strategic alliances.

Associating with attorneys from other firms offers advantages to both the attorneys and to the injured client; co-counseling allows the attorneys, and thus the injured, to take advantage of a broader set of knowledge, skill, and resources. When navigated effectively, the lawyers and the clients are better positioned to maximize their success.



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

Most often, when one thinks of "co-counseling," it is in the context of the trial lawyer parachuting into a case just weeks or days before the trial. These folk hero saviors have been made famous by big verdicts and better marketing. Yet, it is the less glamorous alliances that make a stronger and more lasting impression on the community. Such calculated considerations include risk management, reduced workload, flexibility, improved client service, and strategic growth alliances.

Risk Mitigation: Obviously, personal injury cases can be uncertain, and outcomes are not always predictable. Co-counseling can spread the risk and costs associated with a case among multiple firms, making it easier to manage potential setbacks or adverse rulings. Large lawsuits can be expensive, especially when it comes to covering the costs of expert witnesses, legal research, and other resources. Co-counseling enables attorneys to share these financial burdens, making it more affordable for clients. Having a trusted colleague to share the burdens and stresses of litigation can be invaluable.

Reduced Workload: The more complex cases will often require extensive discovery, research, depositions, and likely, law and motion work. Co-counseling allows lawyers to share these responsibilities, reducing the workload for each attorney. This can result in more efficient case management. Financial and Risk management

Improved Client Service: Clients benefit from co-counseling as it often results in a higher quality of service. They have access to a team of attorneys with specialized knowledge and resources dedicated to their case.

Flexibility: Co-counseling can be tailored to the specific needs of a case or the lawyers. Lawyers can collaborate on certain aspects of a case while working independently on others, providing a flexible and an adaptable approach while freeing time and resources for other cases.

Growth Alliances: Co-counseling can lead to long-term strategic alliances between law firms or individual attorneys, enabling them to take on more significant and complex cases in the future. While one firm may be best positioned for high volume, pre-litigation practice, another firm may specialize in complex litigation with a small case load. Alternatively, firms may elect to limit their overhead by employing less attorneys or not marketing while relying on partnerships to promote growth.

There are some cases where co-counseling becomes less of a strategic choice and more necessity. The various complex issues that plaintiff's face can benefit from different expertise. For example, a novel liability theory may warrant counsel with prior experience in that area—perhaps a prior defense attorney or someone with specialized knowledge from life before the law. Alternatively, a nuanced injury may warrant counsel with a particular strong medical background. And, certainly, there are those cases that need a strong trial lawyer to see it over the finish line.

An acknowledgement should also be made for the mentoring possibilities within co-counseling: experienced at-

Continued on page 30

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torneys providing guidance and stability for their less experienced colleagues to gain valuable tools. Lawyers such as Sacramento's John Demas have leveraged these relationships to expand their own practices which will water the gardens of future stalwarts.

Similarly, organizations like ABOTA offer mentor/mentee programs designed to increase access and trial skills. Capitol City Trial Lawyers Association also hosts monthly Q&A sessions, hosted by veterans Dan Glass and Jack Vetter, for those one-off brainstorming situations.

While these advantages can be great, they are not without potential pitfalls. Early communication regarding expectations, who will do what work or carry what costs, are difficult but necessary conversations. Similarly, regular communication between the attorneys ensures the work is getting done and both parties are fulfilled with the relationship.

Regardless of the nature of the relationship, all counsel are reminded of the Professional Rule of Conduct regarding attorney fee division among lawyers. Rule 1.5.1 states:

> *"(a) Lawyers who are not in the same law firm* shall not divide a fee for legal services unless: (1) the lawyers enter into a written* agreement to divide the fee; (2) the client has consented in writing,* either at the time the lawyers enter into the agreement to divide the fee or as soon thereafter as reasonably* practicable, after a full written* disclosure to the client of: (i) the fact that a division of fees will be made; (ii) the identity of the lawyers or law firms* that are parties to the division; and (iii) the terms of the division; and (3) the total fee charged by all lawyers is not increased solely by reason of the agreement to divide fees. (b) This rule does not apply to a division of fees pursuant to court order."*

So, get any agreements in writing and signed by the client!

To be sure, not every case requires multiple attorneys or co-counseling with another firm or firma, but where there is an opportunity, remember, we are stronger together.

Governor Protects Timely Access to Justice, Signs SB 365 into Law

Sacramento, CA – Governor Newsom signed SB 365 (Wiener) in October, codifying into law a new rule that prevents corporations from abusing the appeals process to delay court proceedings.

"We are grateful to Governor Newsom for signing SB 365 into law, which will balance the scales of justice for victims who have been forced to wait months — not years — for case resolution," said Greg Rizio, president, Consumer Attorneys of California (CAOC). "When corporations are allowed to wield their great wealth and power to draw out court proceedings by filing pointless arbitration appeals, access to justice suffers. SB 365, thanks to Senator Wiener's leadership, changes the paradigm for victims as they fight to hold wrongdoers accountable."

When a court rules that a company's arbitration agreement with an employee or with a consumer is either invalid or does not exist, often the corporation will file an appeal simply to activate the automatic "freeze" in California law. The "freeze" stays the victim's case and stops justice, sometimes for years on end. SB 365 provides relief to consumer and worker victims by allowing the judge discretion to determine if their cases can move forward even if a company files such an appeal.

California Restores Credibility for Expert Witness Testimony with New Law

Sacramento, CA – Governor Newsom earlier signed SB 652 (Umberg) into law. The measure, sponsored by Consumer Attorneys of California (CAOC.org), sets a uniform standard requiring all expert witnesses to testify that a given cause was more likely than not the cause of someone's injuries, instead of just "possibly" a cause of injury.

"Maintaining a high legal standard for what evidence an expert can present to a jury is critical to protecting the integrity of our justice system," said Greg Rizio, president of CAOC. "SB 652 ensures that expert testimony and the evidence that expert can present to a jury is firmly grounded in that expert's education, training and experience. Governor Newsom's signature on this bill restores a victims' confidence that jurors will not be misled by junk science or absurd expert testimony. CAOC is so grateful to Senator Tom Umberg for his hard work in making sure this important measure got across the finish line."

Senate Bill 652 corrects a recent, errant court decision that threatened to upend the credibility of expert witness testimony. The decision in *Kline v. Zimmer, Inc.* resulted in a weaker standard for defense experts only, opening the floodgates for junk science and absurd expert testimony.

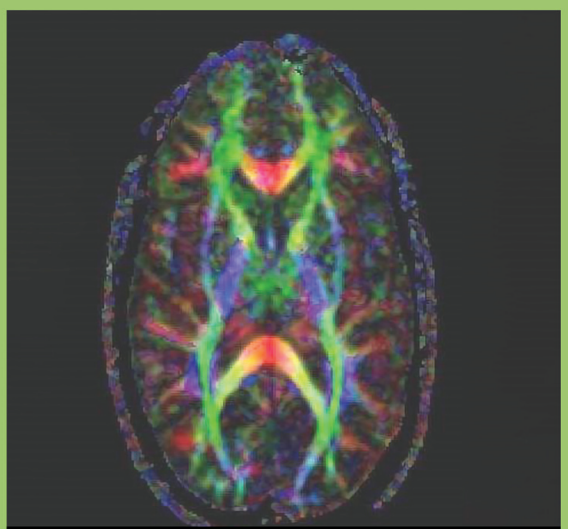
In one elder-neglect case, a woman who was left unsupervised at an assisted living facility, died after a hard fall on the concrete floor in the courtyard that left blood on her head and the cement. All experts agreed the cause of death was from severe traumatic brain injuries – an assessment that was confirmed by the coroner.

Expert witnesses for the defense, however, were able to argue that the woman could "possibly" have suffered a stroke or an aneurysm. One expert witness made the bizarre testimony that a bird could have flown into the woman's face, causing her to fall. Neither opinion was based on evidence nor a reasonable degree of medical probability. Where the errant decision in *Kline v. Zimmer* would find this absurd testimony admissible, SB 652 would see it rightly thrown out.

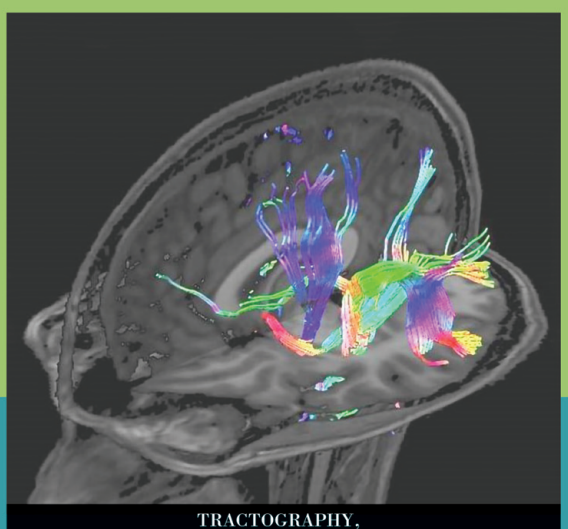
# # #

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

Standard MRI



DTI



TRACTOGRAPHY,
ISOLATED NEURAL TRACTS

DTI *and* TBI

DTI stands for diffusion tensor imaging, a type of medical resonance imaging (MRI) scan.

The DTI MRI is more sensitive than regular MRIs, so it will give you more details about a head injury, whether an explosion, anoxic injury, motor vehicle accidents, fight, fall, or another violent event was experienced. The DTI validates the injury. So, if the brain trauma does exist a DTI is your best option to detect an injury. It's more accurate than the PET Scan, CAT Scan or SPECT for determining the presence and severity of your traumatic brain injury. Particularly in cases where a CT or even a normal MRI doesn't show abnormalities, the DTI can show the real impact of your high-velocity accident.

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KAYVAN HADDADAN, M.D.

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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.

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 Continued from page 2

Simon's testimony based on Evidence Code 402, arguing that he was not qualified to testify on the medical causation of Plaintiff's illnesses due to mold. The court granted the motion, and Plaintiff was unable to proceed with trial without an expert. The court dismissed the action, and Plaintiff appealed.

ISSUE: When is it proper to exclude the testimony of a medical expert?

RULING: Reversed and remanded.

REASONING: To be excluded, an expert's testimony much be fundamentally unsupported so that it would offer no assistance to the trier of fact (the jury). In this present case, the expert was a board-certified allergist and immunologist. He was qualified to testify on the impact of the mold on Plaintiff's respiratory tract.

The court explained that as a medical doctor and a researcher, Simon used both qualified methods to prove that Plaintiff's illness was caused by mold. As an allergist, he could identify symptoms consistent with toxic mold exposure, and he used differential diagnoses to reach his diagnosis and come to his conclusions. The court found that because Simon was a qualified expert, and his opinion was based upon facts using qualified methods of diagnosis, that the trial court erred in excluding him.

THE IRVINE COMPANY v. THE SUPERIOR COURT OF ORANGE COUNTY
2023 4DCA/3 California Court of Appeal
No. G061791 (October 24, 2023)

DEFENDANT'S RETENTION OF SECURITY SERVICES FOR PARKING STRUCTURE DID NOT CREATE A DUTY TO INTOXICATED PATRON WHO WAS INJURED

FACTS: On July 14, 2021, Plaintiff Christina Demirelli and her roommate went to a restaurant at Fashion Island and became intoxicated after drinking bottomless mimosas. They left the restaurant and walked to a nearby parking garage. During their walk, they were observed engaging in nonsensical horseplay. Once they reached the garage, they proceeded to an upper story of the garage where Demirelli seated herself on a 43-inch perimeter wall. She subsequently lost her balance and fell backward, to the ground several stories below.

She brought suit against The Irvine Company, which owned the parking structure, for premises liability. The Irvine Company filed a motion for summary judgment, which the trial court denied. Defendants thereafter brough a writ of mandate.

In her opposition, Plaintiff admitted the structure did not have a physical defect or dangerous condition but asserted a new theory of liability that by hiring a security company, Defendants had assumed a duty to detect and stop horseplay and that Defendants breached said duty, and she was injured.

The court found in favor of Defendant and granted the writ.

ISSUE: Did Defendant parking garage owe a duty to a patron injured while engaged in horseplay?

RULING: Writ granted, affirming that summary judgment should have been granted.

REASONING: The court cited the case of *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224 and noted that Plaintiff's theory of liability was not one of premises liability but one of negligent undertaking. In *Delgado* the court held that a defendant's negligent undertaking will support a finding of duty only if one of two elements can be met: (a) the defendant's action increased the risk to another or, (b) the other person reasonably relied upon the undertaking to his detriment.

The court noted in this case that hiring the security company had not increased the risk to Plaintiff. The court also noted Plaintiff did not rely on the hiring of the security company to her detriment. Thus, The Irvine Company did not owe a duty to Plaintiff and summary judgment should have been granted.

SNOECK v. EXAKTIME INOVATIONS
2023 2DCA/3 California Court of Appeal,
No. B321566 (October 25, 2023)

TRIAL COURT HAD DISCRETION TO REDUCE ATTORNEY'S FEES BASED UPON THE INCIVILITY OF COUNSEL

FACTS: Plaintiff Steve Snoeck sued ExakTime Innovations, Inc., for five claims under the FEHA. In June, 2019, the jury returned a verdict in favor of one of his claims and found for ExakTime on the remaining claims. The jury awarded Plaintiff $130,088 in damages. He filed a motion for judgment notwithstanding the verdict (JNOV), which was denied. Plaintiff appealed, which was denied, and the case was remanded back to the trial court for post judgment matters.

Plaintiff then filed a motion for attorney's fees under Government Code Section 12965 as the prevailing party on a FEHA claim. He asked for a total of $2,089,272.50, which Defendant ExakTime opposed. In its opposition, Defendant argued the amount should be reduced because of Plaintiff's attorneys unprofessional conduct during the pendency of the litigation. Defendant supported its opposition with emails from counsel and argued these were pointlessly acrimonious, they had exploited the court and utilized underhanded tactics.

The court awarded Plaintiff attorney fees, applying a positive multiplier because they had worked on the case for four years on a contingency basis. However, the court then reduced the award by applying a negative multiplier because of counsel's incivility throughout the litigation towards defense counsel and towards the court. The reduction was approximately $450,000. Plaintiff appealed.

ISSUE: Does the court have discretion to reduce attorney's fees based upon the bad conduct of counsel?

RULING: Affirmed.

REASONING: As officers of the court, attorneys have a duty and responsibility to be professionally courteous to the court as well as to opposing counsel. Moreover, civility lowers dispute resolution costs and as civility is an aspect of skill, a factor that may be considered by the court when determining attorney fees. As such, trial courts have discretion to reduce attorney fees due to the incivility of counsel.

The court in the present case found there was substantial evidence of counsel's repeated incivility which supported the trial court's finding. The court noted that counsel's verbal attacks were unnecessarily overzealous, belittling, and antagonistic. The court further noted that counsel's behavior had resulted in unnecessary time and costs.

Share your experiences, verdicts, lessons learned

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

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

The author's name must be included in the format the author wishes it published on the article. Authors also are welcome to submit their photo and/or art to go with the article (a high-resolution jpg or pdf files; no website art, which is too small).

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

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

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 Spring issue, and all submissions need to be received before February 1, 2024.

SETTLEMENT: $29.475 Million
Motor Vehicle Personal Injury

Dreyer Babich Buccola Wood and Campora LLP partners **Roger Dreyer** and **Anthony Garilli, CCTLA members,** have obtained a $29,475,000 settlement for two young plaintiffs injured in a motor vehicle accident.

On Dec. 14, 2018, cousins Brandon Kolb (30) and Logan Hiebert (21) were traveling home, southbound in the #1 lane on CA State Highway 99 near Nicolaus, CA. Traveling northbound in the #1 lane was Defendant Troy Stotka, driving a Ford F-350 truck while in the course and scope of his employment. Stotka had his cruise control set at 77.5 mph although the posted speed limit was 65 mph.

As the two vehicles approached the crossroad of Powerline Road, 72 year-old Earline Giles arrived at the stop sign limit line on Powerline Road, with her husband as a passenger. She briefly stopped before rolling forward toward the uncontrolled intersection.

At this intersection, Hwy 99 has two northbound lanes, two southbound lanes and a left turning lane in each direction for Hwy 99 traffic to turn onto Powerline Road. When Giles pulled out into the intersection and attempted to accelerate across, she did so in front of the approaching Stotka vehicle. Defendant Stotka struck Giles' vehicle broadside, killing both her and her husband. Stotka's truck went airborne after striking the the Giles vehicle, flipped upside down and crossed the freeway, landing directly on top of Plaintiff's southbound vehicle traveling at 65 mph.

Plaintiff Logan Hiebert immediately fractured his neck at the C5 – C7 levels, requiring emergency surgery. Plaintiff Kolb suffered fractures at his C6 C7 levels, as well as his T1 – T3 levels, also requiring emergency surgery. Plaintiff Kolb eventually recovered from his surgery after a lengthy rehabilitation. Plaintiff Heibert, unfortunately, was rendered a quadriplegic due to a complete dissection of the spinal cord at the C5 level.

For the plaintiffs, **Dreyer** and **Garilli** filed suit against the Giles' estate and Defendant Stotka and his employer for negligence, in addition to a claim against the State of California for a dangerous condition of public property.

The case against the Giles estate and Defendant Stotka settled in 2022 for the policy limits of those two defendants, in the amount of $100,000 and $11,000,000, respectively. The case against the State of California proceeded into 2023, after the state filed a motion for summary judgment. Early in the case, Plaintiffs' counsel retained an expert accident reconstructionist, a human factor's expert and a roadway design expert.

The state requested mediation prior to the hearing for its motion for summary judgment. In their brief, **Dreyer** and **Garilli** established the dangerous condition of the intersection by showing the difficulty with which Giles faced in attempting to negotiate the ill-fated lefthand turn that day. Plaintiffs further showed the increase in collisions at the intersection over the course of time, as well as the added difficulty that resulted from a gas station and mini-mart that was built on the southwest corner several years before the collision.

At mediation on Mar. 3, 2023, the case resolved against the remaining defendant, the State of California, for an additional $18,475,000, bringing the total settlement for these two young men to $29,475,000.

SETTLEMENT: $9.45 Million
Majewskim et. al, v, ProPark, Inc., et. al.
Golf Cart v. Automobile

CCTLA members Roger A. Dreyer and Joshua T. Edlow of Dreyer Babich Buccola Wood & Campora LLP secured a $9.4-million settlement approximately three weeks prior to trial for two clients this past August in a case venued in Alameda County.

The case stemmed from a golf cart v. automobile incident that occurred on Feb. 23, 2019. On that date, Defendant Willie Bridges was driving a golf cart shuttle through the Oracle Arena parking lot at approximately 15 mph. Plaintiffs Lee Majewski and John Scivally, DPM, were middle row passengers on Defendant Bridges' cart. Defendant was driving the cart through a cross aisle of lot B in the course and scope of his employment with Defendant Propark, Inc. shuttle services. The cross aisle had no stop sign governing Defendant Bridges' lane of traffic.

As he was traveling toward the cross aisle's intersection with the main thoroughfare of the lot, Defendant Brian Miller was driving his passenger vehicle through the main thoroughfare. Defendant Bridges entered the main thoroughfare from the cross aisle, and Defendant Miller struck the golf cart. Passenger Majewski struck his head on a plexiglass window separating the driver from middle seat passengers. He was rendered unconscious and suffered four broken teeth and a broken clavicle. Passenger Scivally was thrown from the cart, landing on his back and side.

Both passengers were treated at the emergency room. Majewski was diagnosed with a concussion, broken teeth, and a non-operative clavicle fracture. He denied neck pain. Scivally was diagnosed with "minor" injuries: low back strain and left arm pain.

Majewski had his teeth repaired and had some follow-ups for his clavicle fracture with his primary care physician at Kaiser Permanente, but he continued to deny any neck pain or

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Member Verdicts & Settlements

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other cognitive symptoms. Fifteen months later, Majewski began experiencing loss of strength and atrophy in his left arm. He continued to deny neck pain.

Several months later, he reported experiencing neck and low back pain. He was evaluated for potential cervical spine surgery with neurosurgeon Indro Chakrabarti, M.D., at Kaiser Permanente, who stated he did not believe surgery would provide Majewski any relief. He ultimately received second opinions from Pain Management Specialist Vinay Reddy, M.D., and Orthopedic Spine Surgeon Tyler Smith, M.D. They recommended injection therapy and a cervical fusion. Majewski eventually took these recommendations back to Kaiser, and eventually underwent cervical fusion with Dr. Chakrabarti. He was also diagnosed with a traumatic brain injury due to cognitive symptoms reported approximately two years post-collision.

Passemger Scivally consistently experienced back pain after the collision, but did not formally treat at all until 18 months post collision. He ultimately underwent epidural steroid injections and an EMG, which confirmed radiculopathy. He underwent an L4-L5 Llaminectomy with Saqib Hasan, M.D., at Golden State Orthopedics & Spine.

Majewski's medical expenses totaled $235,643.59 in past medical expenses. He ultimately medically retired from his job as a high school teacher. His past lost income totaled approximately $93,105. Vinay Reddy, M.D., opined that Majewski would need lifetime medical care, which would total approximately $1.25 million. Economist Barry Ben-Zion, Ph.D., estimated that Majewski's future lost income would total approximately $1.8 million.

Scivally's medical expenses totaled $70,113.14. He also contended that his back pain rendered him unable to treat as many patients in his podiatry practice. Ben-Zion anticipated Scivally's past lost income totaled $587,918. Hasan opined he believed Scivally would require a lumbar fusion in the future, which would cost approximately $200,000.

Defendant Propark, Inc., denied liability for the event. They hired accident reconstructionist Jay Mandell, Ph.D., to provide an accident reconstruction, as well as four defense medical experts, Thomas Sampson, M.D. (orthopedist), Jerome Barakos, M.D. (neuroradiologist), Lawrence Shuer, M.D. (neurosurgeon) and Daniel Jacobson, M.D., to refute Plaintiffs' causation claims. Sampson opined that Majewski had a long-standing history with reports of significant and consistent neck pain dating back to 2016. He also opined that Majewski was significantly overweight, with a BMI above 40 prior to the collision.

Sampson opined that Scivally's back symptoms were unrelated to the collision due to the large 18-month gap between the collision and any report of symptoms. The complaint was filed when Plaintiffs' counsel received the case in December, 2020. Defendant Propark made no offers until July, 2023. The cumulative offer made was $625,000. The case went to mediation with Matt Conant, Esq., on Aug. 23, 2023. The mediation was unsuccessful. Conant continued to contact each party, ultimately resolving the case for $6,000,000 for Majewski and $3,400,000 million to Scivally approximately three weeks prior to trial.

SETTLEMENT: $2.725 Million

Vincent Harris, et. al. v. County of Sacramento

Race Discrimination

CCTLA member and Past President Jill P. Telfer of Telfer Law obtained a $2,750,000 settlement in a race-discrimination and retaliation case against the County of Sacramento Waste Management and Recycling Department on behalf of two African American former employees Tyrone Johnson and Marcus Ross, and current African American employee Vince Harris. The mediator was Brad Thomas of Judicate West.

The Waste Management Department has a long standing culture of racial discrimination and retaliation for decades. The county was aware of this culture due to numerous individuals notifying Human Resources and asking for help. Rather than take action to eradicate the discrimination, Human Resources covered up the discrimination and allowed, and at times even facilitated, retaliation against those who have complained.

After being denied hire by the county for almost three years, Marcus Ross was thereafter denied promotions, demoted, defamed and constructively terminated on Nov. 21, 2019, because he is African American and because he made complaints of race discrimination. During Ross' three years of employment, he was treated disparately, even though he was a hard-working exemplary employee. With his eight years' commercial truck driving experience, his skill in operating heavy equipment and his Class A driver's license, he was an asset to the department. However, the county chose to assign career-enhancing assignments and promote less-qualified Caucasian employees, while limiting Ross to manual labor.

Tyrone Johnson was denied hire for approximately two years by the county and thereafter was denied promotions and was wrongfully terminated as an Intermittent Sanitation Worker for the county on March 26, 2020, because he is African American and complained of discrimination. During Johnson's year of employment, he was treated disparately even though he was a hard-working exemplary employee. He had over 10 years' experience in construction and his skill in operating heavy equipment would have been an asset to the department.

Vincent Harris was denied hire for approximately 10 months by the county, and thereafter was made intermittent for a lengthy period of time, denied promotions, demoted and disciplined because he is African American and made complaints of discrimination. During Harris's employment, he has been treated disparately even though he is a hard-working and positive employee. He was demoted for pretextual reasons, which was rescinded because the county did not follow proper

Continued on page 39

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procedure while Harris was on probation. Harris complained of discrimination and retaliation. Following his complaints, he received increased discipline and scrutiny with the county. During his five years with the county he continues to seek promotions, but less-qualified Caucasian employees are still selected over him.

VERDICT: $300,000

Motor Vehicle Personal Injury

CCTLA members Sam Fareed, of United Citizen Law, and **Kellen Sinclair** of Stawicki Anderson & Sinclair, obtained a $200,000 verdict on Aug. 24, 2023: $188,000 in future medical expenses and $12,000 pain and suffering for a their client who was injured in a 2018 vehicle accident. With 998, the verdict will be about $300,000. The trial, in Sacramento County before Judge Andre Campbell, began Aug. 14, 2023; verdict was received Aug. 24.

The accident occurred on July 17, 2018, when Plaintiff was traveling through an intersection. At that same time, Defendant ran a stop sign and hit Plaintiff's car. Plaintiff's car then spun and hit a parked car, and airbags were deployed. Plaintiff, who works as a respiratory therapist and was 29 at the time of the wreck, went to the ER later that day. Plaintiff was treated at Kaiser through physical therapy for neck only. Then went to Dr. Leonard Wong, D.C. for neck and back, who referred the patient to Dr. Dennis Yun, M.D., who performed a PRP injection into the lumbar spine in January 2019. There was no further treatment. Plaintiff was deposed January 2020 where he testified his pain level was zero and could not recall the last time he had pain. Plaintiff then saw chiropractor Dr. Wong again two months later, complaining of unbearable low back pain—seeing Dr. Wong a couple of times through May 2020.

The next appointment was with Dr. VanBuren Lemons, M.D., in July 2022, who performed an ESI on the lumbar spine in December 2022. This was the last medical appointment Plaintiff had before trial. During discovery, Plaintiff testified in deposition and written discovery that he did not have any prior low back pain.

Plaintiff's experts were Dr. Leonard Wong, D.C. (video), Dr. VanBuren Lemons, M.D., and Dora Jane Apuna-Grummer. Defense experts were Dr. Michael Klein, M.D., and a Kaiser physical therapist (who appeared by Zoom).

During expert discovery, Dr. Lemons testified that Plaintiff suffered an L5-S1 disc injury. For future treatment, Plaintiff would need three lumbar ESI's every year. Then a lumbar laminatory. Then a L5-S1 fusion. Apuna-Grummer had created a life-care plan based on Dr. Lemons' recommendations. This included the surgical procedures, doctors visits, medicines, and medical devices (commode, grab bar in shower etc). The life-care plan was about $540,000.

Dr. Klein testified in deposition that Plaintiff suffered a lumbar sprain/strain and that the plaintiff was back to post-crash health after eight weeks.

Motions in Limine: There were about 25 in total. One included any mention of Dr. Lemons suspension from AANS. Defense stated the night before arguing motions that he would not oppose this motion. But on the day of the hearing, defense changed their mind and opposed this motion. After further briefing, the judge allowed testimony regarding the suspension. Jury didn't really care. The actual suspension on the AANS website was excluded on hearsay grounds. Defense had a MIL that Plaintiff cannot lay the foundation for a past incurred medical bill, which the judge denied.

On the day of trial, **Fareed** waived past medical bills of about $35,000. The life-care plan was about $530,000, and **Fareed** did not want to be anchored down by $35,000 in past medical specials.

This was **Fareed's** first trial. He picked the jury, did the opening, a damages witness, Plaintiff, Dr. Lemons, cross on Dr. Klein, the cross on the physical therapist, and the closing. Sinclair did the mini-opening and the direct of Dora Jane.

Plaintiff was very physically fit and continued to go to the gym through the entire case, from 2018 to present. In *voir dire*, **Fareed** discussed with prospective jurors the importance of maintaining a healthy body. In the opening, he hit on the fact that this was a big impact and that there was an objection finding (MRI) that Plaintiff suffered an injury to a disc in his lumbar spine.

When Plaintiff testified, he did well with why he went to the gym. Published to the jury was an intake form Plaintiff completed *six weeks before the wreck* during a visit to Dr. Wong. Plaintiff marked he had lower back pain on the form. The corresponding chart note said Plaintiff only had shoulder pain. He testified he marked lower back pain because he wanted a full body exam.

Plaintiff had a PRP injection at the end of 2019, and at the end of 2022, he had a ESI. When he was deposed January 2020, he testified his pain level was zero and that he could not recall the last time he had pain. Plaintiff testified at trial that he received relief from PRP and slowly the injection wore off. As he became more active with work, his back pain increased, which led him to get an injection from Dr. Lemons.

The jury believed Dr. Lemons when he said there was an objective disc injury to L5-S1 and that the client would need future treatment. Dr. Klien only did a record review but testified that in a case like this, that was more than sufficient. On cross, he admitted that he asked to examine Plaintiff but Defense said no.

Closing was focused on the MRI images and the damage to the car. It was framed around the objective finding of the MRIs. Defense closing focused on lack of records into evidence, lack of past medical bills and gap in treatment. The rebuttal was short. The focus was that the defense had the same power as Plaintiff to get into evidence whatever they wanted—they did not. Therefore, Defense cannot point the finger at the plaintiff. A few others issues taken out of contect were addressed.

After speaking with the jury, it was learned they felt Plaintiff was not really in any pain and who knows when he would feel pain in the future. The did believe he would need ESIs and possibly a laminectomy in the future.

The policy limits were $100,000. Settlement offer history:
1) July 12, 2022, Defendant 998 for $40,000
2) July 12, 2022, Plaintiff 998 for $55,000
3) April 5, 2023: Defendant 998 for $55,000

Defense Counsel was Justin McKenna and Lauren Britt, of Carbone, Smith & Koyama.

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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

DECEMBER
Tuesday, December 12
Q & A Problem Solving Lunch - noon - CCTLA Members Only - ZOOM

Thursday, December 14
Annual Meeting/Holiday Reception & Installation of the 2024 Officers and Board
5:30 to 7:30 p.m. at The Sutter Club

JANUARY
Tuesday, January 9
Q & A Problem Solving Lunch - noon - CCTLA Members Only - ZOOM

Wednesday, January 24
41st Annual Tort & Trial Program: 2023 in Review – A Joint TLA Event - Webinar

FEBRUARY
Tuesday, February 13
Q & A Problem Solving Lunch - noon - CCTLA Members Only - ZOOM

MARCH
Tuesday, March 12
Q & A Problem Solving Lunch - noon - CCTLA Members Only - ZOOM

CCTLA Calendar of Events