Winter 2024

# The LITIGATOR

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

## Inside



# Proud to have been a part of the 'big picture' of law in Sacramento

Daniel S. Glass
CCTLA President

As the saying goes, time flies when you are having fun. I cannot believe that it has already been a year, and my term as president of CCTLA will soon come to an end. I began writing this on Nov. 6, 2024, and I cannot refrain from stating that there will be a "peaceful transfer of power." Our incoming president will be Glenn Guenard, a true trial lawyer and a great advocate.

Even though my time as president was short, CCTLA will continue its mission to provide formal education seminars, informal mentoring and daily help to our members through the most helpful "list serve" I have ever seen.

My official term as a board member, which began, like most of our officers, on the seven-year journey from parliamentarian to president, will end, and I will retire to the esteemed title of past president with the privilege of continuing with the organization, but without formal responsibilities. Before I leave, I do want to reflect on what being president meant and why I strongly recommend that our members strive to become board members and officers. All CCTLA members get the benefit of guidance and suggested help on "sticky" legal and factual questions. All CCTLA members should rest assured that if they are "in trial," and something unexpected happens, they can get a consult with a member almost immediately. List serve questions during trial are posed and answered all the time.

But, being president is much more than that. As president, and a member of CAOC, I was invited to participate in CAOC's quarterly meetings of its board; I was invited to assist with the Sonoma Seminar by participating in topic and speaker selection; I was permitted to participate in the Sacramento County Superior Court quarterly meeting of the Civil Advisory Committee, and I attended the quarterly meetings of all other plaintiff trial lawyer associations in the state.

Being president was much more than the daily practice of law and working on your cases to get individual results; it was being part of the "big picture" of law practice in Sacramento and, to a small extent, California. I believe I am ending my term a little smarter than when I started. I offer my congratulations to our newest board member for 2025, Kellen B. Sinclair of Anderson and Sinclair, and to our newest board officer, 2025 Parliamentarian Margot Cutter of Cutter Law.

This year's CCTLA Holiday Reception and Installation of Officers and the Board will be Dec. 4 at the Sutter Club. Our tradition has been to honor and present awards to the Judge of the Year (and his/her clerk) and Advocate of the Year. We also award three $1,500 scholarships to local law school students who show an interest in future practice as a plaintiff's advocate.

I am happy to announce that this year's Judge of the Year is the Hon. Jill Talley, and our Advocates of the Year are Kirill Tarasenko of Tarasenko Law and Bryan Nettles of Gavrilov and Brooks. After years of contentious litigation, they caused an

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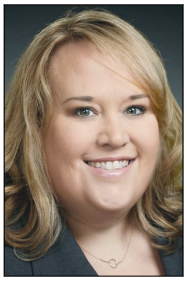


Marti Taylor, Wilcoxen Callaham LLP, CCTLA Treasurer

# NOTABLE CITES

By: Marti Taylor

***Union Pacific Railroad Co. V. Superior Court (Abrams)***
2024 5dca California Court Of Appeal,
No. F087132 (October 7, 2024)

**Landowner Does Not Owe a Duty to Protect Drivers Who Veered off the Highway from Tree on His Property**

**FACTS:** On May 25, 2016, Robert and Elise Sandiford were driving on SR 99 in Madera County when they were in a collision with Deon Abrams Sr. As a result, both vehicles veered off of the highway and struck a tree on abutting land adjacent to the highway, killing the occupants of both vehicles.

Union Pacific owns the land on which the tree was located. The land consists of a 100-foot-wide corridor that runs parallel to SR 99. Union Pacific's railroad tracks are located in the corridor. The tree was located on the east side of SR 99 at least 20 feet from the closest lane of travel.

The decedents' heirs sued Union Pacific for negligence, arguing that Defendant was negligent in failing to remove the tree or take measures to protect the public.

Defendant brought a summary judgment, asserting that the plaintiffs could not establish a duty to remove the tree. The trial court denied the motion, and Union Pacific petitioned for a writ resolving the issue of whether landowners have a duty to protect motorists by keeping their property clear of obstructions.

On appeal, Plaintiffs argued that Civil Code Section 1714(a) established Defendant's duty: Everyone is responsible for injury occasioned to another by their wont of ordinary care or skill in the management of their property.

The court granted the writ.

**ISSUE:** Does a landowner have a duty to protect motorists by keeping their property clear of obstructions?

**RULING:** No. Writ granted.

**REASONING:** A landowners' responsibility is not absolute nor based on a duty to keep their premises absolutely safe. The law does not impose a duty of extraordinary care (See *Brunelle v. Signore).*

A duty exists only if a plaintiff is entitled to legal protection against a defendant's conduct. However, absent statutory requirements, excepting Section 1714, no other exceptions should be made unless supported by public policy, which requires analyzing moral blame, policy to prevent future harm, burden and availability of insurance. (See *Rowland v. Christian* 443 P.2d 561, 69 Cal.2d 108.)

Here, analyzing the *Rowland* factors supported a judicial exception to Section 1714. First: No moral blame could be attributed to the defendant as it did not create the hazard, cause the collision or have notice of the tree's purported risk, commit any infraction or have any responsibility for the highway's design.

Second: Many engineering variables must be considered to design an accident-free zone, something lay landowners could easily botch.

Third: Holding landowners responsible for creating an accident-free zone would effectively burden the property, likened to a judgment of condemnation without compensation.

The court held such collisions may be foreseeable, but public policy considerations warranted a judicial exception to imposing a general duty of liability.

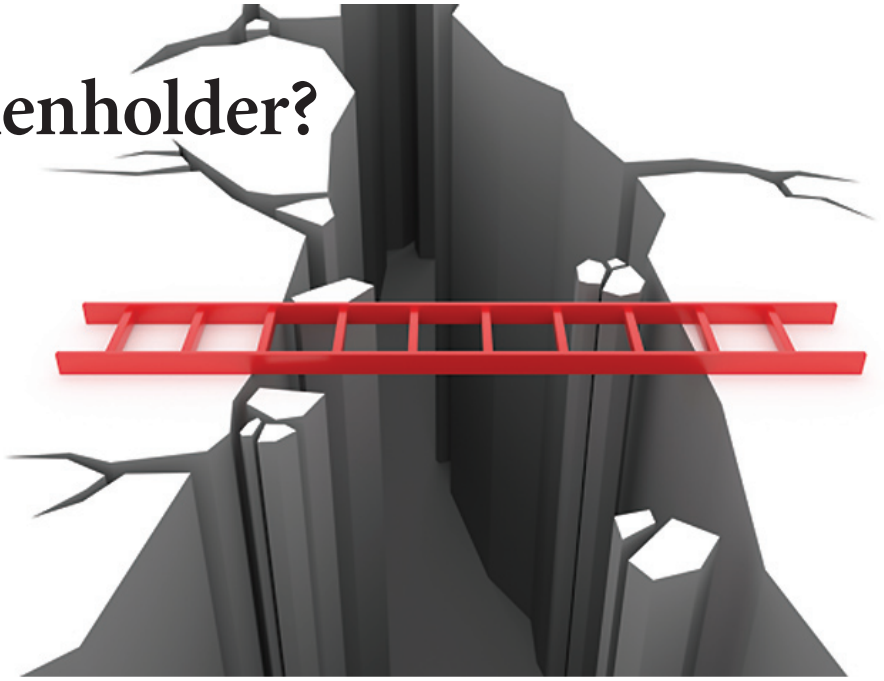
***Richard V. Union Pacific Railroad, Co.***
2024 2dca/3 California Court Of Appeal,
No. B322044 (October 24, 2024)

**Expert Train Witness Should Not Have Been Excluded as They Had Experience and Knowledge of Operating Trains and the Tracks Where the Incident Occurred**

**FACTS:** Terrence Richard, a brakeman for Union Pacific

*Continued on page 32*

# Trouble with a Lienholder? Try an *Accord and Satisfaction*



By: Anthony Garilli

Dealing with those pesky healthcare subrogation agents has become a significant part of our practice. Rawlings . . . Equian . . . Optum . . . the list of companies joining the booming business of healthcare reimbursement from personal injury actions has grown significantly. The Healthcare Insurers contract around the Made Whole Rule, ERISA plans are everywhere, some Kaiser subrogation agents now claim their initial 20% capitated reduction is "built-in" to the cost of care on the Consolidated Statement of Benefits, some hospitals still try to balance bill, and none of them want to make reductions for any comparative fault of the plaintiff absent a judgment.

One of the more recent scenarios I have run into is a few of these folks actually trying to claim an amount above the Civil Code Sect. 3040 maximum allowable recovery. If you have run into any of these scenarios, or myriad others of which I am sure you have experienced, I suggest trying an accord and satisfaction when dealing with an obstreperous "recovery analyst."

Anthony Garilli, Dreyer Babich Buccola Wood Campora, is a CCTLA Board Member

California Civil Code sections 1521–1526 provide the rules for an accord and satisfaction. An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled. Cal. Civ. Code § 1521. Acceptance, by the creditor, of the consideration of an accord extinguishes the obligation, and is called satisfaction. Cal. Civ. Code § 1523.

The operative section is Section 1526. Subsection (a) states:

> *Where a claim is disputed or unliquidated and a check or draft is tendered by the debtor in settlement thereof in full discharge of the claim, and the words "payment in full" or other words of similar meaning are notated on the check or draft, the acceptance of the check or draft does not constitute an accord and satisfaction if the creditor protests against accepting the tender in full payment by striking out or otherwise deleting that notation or if the acceptance of the check or draft was inadvertent or without knowledge of the notation.*

Under common law, you could send a check to a lienholder with "payment in full," or similar language, for the amount you believed was the proper payment they were owed and, if they cashed it, the debt was discharged. This was a "take it or leave it" choice for the creditor. In 1987, the Legislature enacted Section 1526, codifying this common-law rule; however, it also provided the creditor with an "opt out" clause by "striking out or otherwise deleting that notation." By doing so, the creditor can now accept and cash a check that the debtor sends as full payment without agreeing the check represents full payment.

Also, don't forget that if the creditor can prove they cashed the check inadvertently or without knowledge of the "payment in full" language, they can still avoid the accord and satisfaction.

So, here is what you do. You utilize the language in subsection (b)(2) because it provides a good format for putting the creditor on notice, even though subsection (b) applies to situations where the check is tendered pursuant to a composition or extension agreement. The guiding language is:

> *A creditor shall be conclusively presumed to have knowledge of the restriction if a creditor . . . (2) Has been given notice, not less than 15 days nor more than 90 days prior to receipt of the check or draft, notice, in writing, that a check or draft will be tendered with a restrictive endorsement and that acceptance and cashing of the check or draft will constitute an accord and satisfaction.*

Write a letter to the lienholder. Tell them that in no less than 15 days and no more than 90 days, they will be receiving a check for [the amount you believe is the proper amount] that will have restrictive language on it and that acceptance and cashing the check will constitute an accord and satisfaction and discharge of your client's obligation. Then, in 15 days, you send the check with the "payment in full" language on it. If the lienholder cashes it, the obligation is discharged.

But what if the lienholder just strikes or otherwise deletes the restrictive "pay-

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ment in full" language, you ask? Then, I will have just provided the creditor with a partial payment, and they will still keep coming after my client for the balance . . . . . well, you would be right. Except that, in 1992, the Legislature enacted California Commercial Code Section 3311, which provides in relevant part:

> *(a) If a person against whom a claim is asserted proves that (1) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim, (2) the amount of the claim was unliquidated or subject to a bona fide dispute, and (3) the claimant obtained payment of the instrument, the following subdivisions apply.*
>
> *(b) Unless subdivision (c) applies, the claim is discharged if the person against whom the claim is asserted proves that the instrument or accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered as full satisfaction of the claim.*

Similar to California Civil Code Section 1526, Section 3311 of the California Uniform Commercial Code also provides for an accord and satisfaction. But Section 3311 of the Cal. UCC does not provide the creditor with the ability to "opt out" by crossing out the restrictive language. Courts have considered the conflict of the two statutes and determined that they were irreconcilable. And, since Section 3311 of the Cal. UCC was the later-enacted statute, it superseded Civ. Code Sect. 1526 and, therefore, controls. See *Woolridge v. J.F.L Electric, Inc.* (2002) 96 Cal.App.4th Supp. 52; *Directors Guild of America v. Harmony Pictures,* 32 F. Supp.2d 1184 (C.D.Cal. 1998).

Section 3311 does have some requirements, however, that need to be followed. First, you must have tendered the check in good faith. Sending the letter using the notice provision of Civ. Code Section 1526 as guidance should satisfy any claim you acted in bad faith and tried to surprise the lienholder, assuming you will have exhausted good-faith negotiations to try to get this fair and reasonable subrogation claims handler, or "specialist," to reach a resolution.

Secondly, the amount must be subject to a bona fide dispute. For example, the lienholder is including post-settlement charges, or failing to adhere to Civ. Code Sect. 3040, or is refusing to consider comparative fault, or trying to make an ERISA claim with no reduction where your client is a minor (*see Dan Wilcoxen's brilliant analysis on this*), or any other number of bona fide disputes we run into with these lienholders on a seemingly much more frequent basis.

As long as you have fulfilled these requirements and you write the "payment in full" language on the check, and if they cash it, you will have an accord and satisfaction of your client's debt.

Now, there is one more pitfall of which you need to be wary. When the claimant (lienholder) is an organization, which they all are, proves that within a reasonable time before the tender of your check, sent a conspicuous statement to the person against whom the claim is asserted (your client), that any communications concerning disputed debts, including instruments tendered as full satisfaction of a debt, are to be sent to a designated person, office, or place, *and* they prove the check was not received by that designated person, office or place, then the claim is not discharged, and you have no accord and satisfaction. Cal. UCC § 3311(c)(1).

Therefore, you must review all of the correspondence associated with the lien and see if such conspicuous statement exists. Most of the time, it is not there. But I have seen it before.

If the statement does not exist, then the only option the lienholder has to avoid a valid accord and satisfaction is to tender a repayment of the check within 90 days of payment. Cal. UCC § 3311(c)(2).

If the statement does exist, you should send all of the above correspondence and the check to that designated person, office, or place at the address provided. I would send it all certified mail, and I would also send a courtesy copies of the correspondence to the claims handler with whom you are dealing, as an additional safeguard.

If you follow these steps, and the lienholder cashes the check, you should have an accord and satisfaction. The lien is satisfied, and your client's debt is extinguished.

Good luck, and enjoy explaining to the claims handler in response to their 14th form letter request for an update on the claim that they no longer have a lien!

# President's Message

*Continued from page one*

insurer to settle a death case for $11million. However, the amazing part of the settlement is that the defendant only had a $1 million policy limit. Yet, its insurer eventually, and without a trial, agreed to pay the $11 million.

This year, we also are presenting Awards of Merit to attorneys for their handling of other matters. Quite frankly, our members have had so many outstanding and far beyond "the usual" results, that the board decided that others had to be recognized. Briefly, Stuart Talley of Kershaw, Talley and Barlow, secured a $650-million settlement of a class action against CalPers arising from its sale of longterm care insurance. This was a 10-year battle with approximately 100,000 class members.

An Award of Merit will also be presented to Maria Minney for what has so far turned out to be "pro bono" work that must be recognized. Although we are a plaintiff organization, she took on the defense of three nurses who were being sued by a physician they worked for because they stood up to the doctor's unethical practices and cooperated with the Medical Board to have the physician's license revoked (*See page 35*). She defended these nurses without payment and even advanced substantial personal expense for "costs" to take the case to trial and obtain a defense verdict for her clients. All of these awards will be presented at the holiday reception.

Finally, I want to note that during my tenure as president I proposed, and the board approved, a "Trial Assistance Program." This program allows a CCTLA member to contact me to arrange for a sort of three-hour practice trial of their case before no less than three board members. The CCTLA member is permitted to put on an Opening Statement and Closing Argument, and to provide "offers of proof" for witnesses and evidence. The panel then provides constructive criticism and guidance for trial strategy. The program was only utilized once during my tenure, but it will remain available in the future. Even though I will not be an official board member, contact me to arrange for such a "practice" session.

As a closing note, I have enjoyed being the president of this organization and wish the future president and board much success in maintaining CCTLA as the great organization that it is.

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John J. Rice, Esq.
The Lien Project

Chris Viadro, Esq.
Butler Viadro LLP

*CCTLA's "Everything You Never Wanted to Know About Liens and More II" program drew 52 persons to McGeorge School of Law on October 4, 2024. Speakers Dan Wilcoxen, Don de Camara, John Rice and Chris Viadro shared a wealth of knowledge, expertise and experience and provided a 513-page binder containing sample forms and important information.*

*For those who missed this program, the recording and materials are available for purchase. Contact Debbie Keller at debbie@cctla.com.*

**THANK YOU Wilcoxen Callaham, LLP**
**for their significant contribution to the success of this program.**

# At the Intersection of Personal Injury and Bankruptcy

By: Alla V. Vorobets

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

This year, unlike others, I've had to confront bankruptcy filings on both sides of the personal injury aisle. On one hand, tortfeasors (defendants) often buy into the folklore that bankruptcy is a quick and easy solution to the threat of liability posed by a lawsuit coming from an injured party. On the other hand, the injured (plaintiffs) may be forced to file or be included in the bankruptcy filing because they're left without any other choice.

In any event, the filing of a bankruptcy petition imposes an automatic stay on any claims or litigation involving the debtor outside of bankruptcy, unless relief is granted, which continues for the duration of the bankruptcy proceedings. 11 U.S.C. §362(a). This article will serve as a brief primer on the issues that may arise in a personal injury case if and when a bankruptcy petition is filed by either party.

**Plaintiff Seeks Bankruptcy Protection**

An injured person may chose to file for bankruptcy to discharge credit card, personal loans, guarantees, or other liabilities. It may be that an injured party is forced into bankruptcy by virtue of being included in their spouse's bankruptcy case.

A claim for personal injury and associated damages are considered assets and must be disclosed in a bankruptcy petition. That is true even if the injured party has not yet filed a personal injury claim. Under 11 U.S.C. §101(a), a claim is defined broadly as a "right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured."

If the injured party files for bankruptcy during the pendency of their personal injury lawsuit, the management of the personal injury case rolls over to the bankruptcy trustee. This means that the bankruptcy trustee will become the personal injury attorney's client and will make decisions regarding the case on behalf of the bankruptcy estate.

The funds from a personal injury settlement or award may be protected from distribution to injured party's creditors by the bankruptcy trustee under either Cal. Civ. Code §703.140 or §704.140. The election of Cal. Civ. Code §703.140 allows the injured party to exempt up to $29,275.00 of the personal injury claim proceeds, while the election of Cal. Civ. Code §704.140 exempts the personal injury proceeds "to the extent necessary for the support of" the injured party and his/her spouse and dependents, except when the creditor is "a provider of health care whose claim is based on the providing of health care for the personal injury for which the award or settlement was made." Claiming an exemption either of these statutes allow a bankrupt personal injury plaintiff to keep a portion of their personal injury settlement.

**Defendant Seeks Bankruptcy Protection**

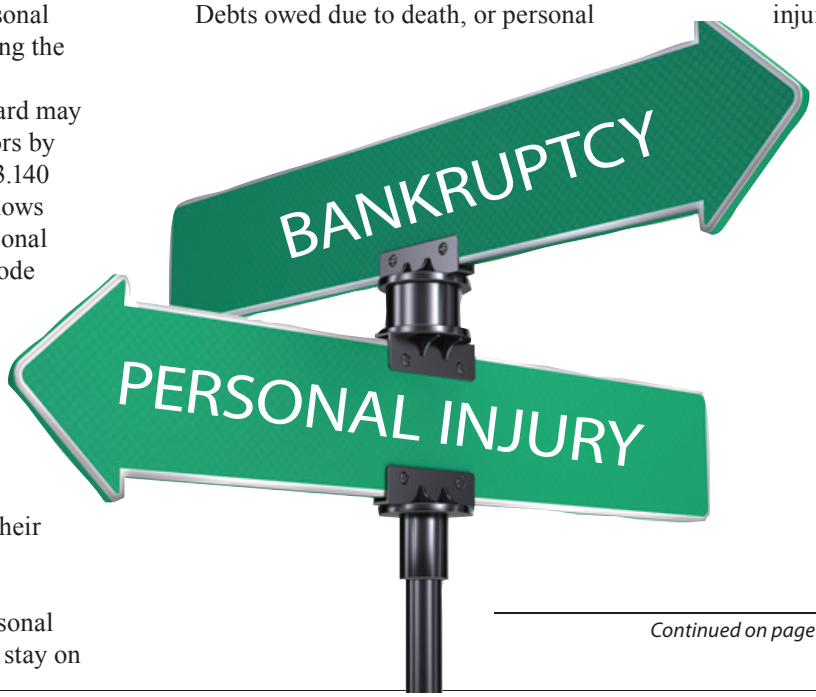
Once a tortfeasor files for bankruptcy during a personal injury case, the bankruptcy code imposes an automatic stay on all outside litigation, including personal injury litigation. A stay means that no further action may be taken in pursuit of the claim against the bankrupt business or individual. Once on notice, the plaintiff's counsel must obey the stay. Any actions taken in violation of the stay are considered void and may be punishable with sanctions. 11 U.S.C. §362(k).

An injured party who wishes to continue pursuing his/her personal injury action against the bankrupt tortfeasor can file a motion seeking to lift an automatic stay. 11 U.S.C. §362(d)(1) allows the court to terminate, annul, modify, or condition the automatic stay if cause is shown.

Alternatively, and if the tortfeasor has filed for Chapter 7 protection, plaintiff's counsel can also file a "proof of claim" against the tortfeasor's bankruptcy estate.

A tortfeasor that completes bankruptcy proceedings, is typically able to discharge most of his/her debts, including liability for personal injury claims asserted or existing against such tortfeasor pre-bankruptcy. Some types of personal injury liability, however, can be excluded from the bankruptcy discharge if resulting from: (1) willful or malicious acts and (2) driving under the influence resulting in death or injury. 11 U.S.C.S. §523.

* *Willful or malicious acts.* Plaintiff can object to the discharge of debt related to the personal injury settlement or award if both the injury and the act causing the injury was willful or malicious. 11 U.S.C.S. §523 (a)(6). Note: only debts resulting from actual intent to cause injury are non-dischargeable, excluding those from reckless or negligently inflicted injuries. *Kawaauhau v. Geiger, 523 U.S. 57 (1998).*
* *Driving under the influence resulting in death or injury.* Debts owed due to death, or personal injury

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caused by the operation of a motor vehicle, vessel, or aircraft are not dischargeable in bankruptcy if the operator of the above transports was intoxicated from using alcohol, a drug, or another substance and such operation was unlawful. 11 U.S.C.S. §523 (a)(9). Note: it is not necessary for the tortfeasor to be charged with driving under the influence, so long as the injured party establishes at trial that the bankrupt tortfeasor was intoxicated. *Schoonover v. Elford* (In re *Elford*), 618 B.R. 872 (2020).

An objection to discharge involves filing a separate court action within the tortfeasor's bankruptcy case, called an adversary proceeding (also referred to as bankruptcy litigation). An adversary proceeding is an entirely separate court action, involving investigation and discovery and eventually a trial/hearing before the bankruptcy court.

The objection to discharge under 11 U.S.C.S. §523 (a)(6) or (a)(9) must be filed in a consumer bankruptcy case (Chapter 7 or Chapter 13) within 60 days after the first date set for the meeting of creditors. Fed. R. Bankr. Proc., Rule 4004.

The party filing an objection to discharge (or creditor in bankruptcy terms) has the burden of proof that the tortfeasor's personal injury liability should be exempt from the bankruptcy discharge.

At the conclusion of an evidentiary trial/hearing in an adversary proceeding, the bankruptcy court will decide whether or not to exclude the personal injury debt from discharge. If the objection is successful, the bankrupt tortfeasor will continue to be liable for the personal injury damages sustained by the injured party.

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# Costs That Are Available to the Prevailing Party

By: Shahid Manzoor

Shahid Manzoor, Manzoor Law Firm, is a CCTLA Board Member

This article will cover which costs a prevailing party can recover if they did not serve CCP 998 offer. To recover costs, the prevailing party will need to file a memorandum of costs after the judgment has been entered in their favor.

Under Cal. Rule Court 3.1700(a)(1), relating to prejudgment costs, states, in pertinent part, that the memorandum of costs shall be verified by a statement of the party, attorney, or agent that to the best of his or her knowledge the items of cost are correct and were necessarily incurred in the case.

Initial verification will suffice to establish the reasonable necessity of the costs claimed. Thus, there is no requirement that copies of bills, invoices, statements, or any other such documents be attached to the memorandum or any other document. However, where the costs are put in issue via a motion to tax, those costs must be supported by submitting additional documentation establishing the reasonableness *and* necessity thereof.

Pursuant to CCP § 1033.5 allows various costs to be recoverable as a matter of right to the prevailing party, and there are other costs that the court has the discretion to allow as reasonably necessary to conduct the litigation rather than ***merely convenient or beneficial to its preparation***. Finally, the court does need to find that those costs must be "reasonable in amount."

In specific, pursuant to CCP § 1033.5 (a), The following items are allowable as costs under Section 1032:

(1) Filing, motion, and jury fees.

(3)

(A) Taking, video recording, and transcribing necessary depositions, including an original and one copy of those taken by the claimant and one copy of depositions taken by the party against whom costs are allowed.

(B) Fees of a certified or registered interpreter for the deposition of a party or witness who does not proficiently speak or understand the English language.

(C) Travel expenses to attend depositions.

(7) Ordinary witness fees pursuant to Section 68093 of the Government Code.

(8) Fees of expert witnesses ordered by the Court.

(9) Transcripts of court proceedings ordered by the Court.

(13) Models, the enlargements of exhibits and photocopies of exhibits, and the electronic presentation of exhibits, including costs of rental equipment and electronic formatting, may be allowed if they were reasonably helpful to aid the trier of fact.

(16) Any other item that is required to be awarded to the prevailing party pursuant to statute as an incident to prevailing in the action at trial or on appeal.

(b) The following items are *not* allowable as costs, except when expressly authorized by law:

(1) Fees of experts not ordered by the Court.

(2) Investigation expenses in preparing the case for trial.

(3) Postage, telephone, and photocopying charges, except for exhibits.

(4) Costs in investigation of jurors or in preparation for voir dire.

(5) Transcripts of court proceedings not ordered by the Court

The allowance or disallowance of items for the expenses and disbursements incurred upon the trial of action must be left in nearly every instance to the discretion of the judge before whom the cause was tried. (*Security Trust & Sav. Bank v. Carrier,* 107 Cal. App. 333) The determination of the items allowable as costs is largely a question for the trial court in its discretion, and when the record is devoid of any showing of an improper exercise of such discretion, this court will not disturb such determination on appeal. (*Von Goerlitz v. Turner* (1944) 65 Cal.App.2d 425). Code of Civil Procedure section 1032(b) provides that a "prevailing party" is entitled to recover its litigation costs. . . . Further, the recovery of costs is limited to those costs that are "reasonably necessary to the conduct of the litigation rather than ***merely convenient or beneficial to its preparation***." (CCP § 1033.5(c)(2) (emphasis added)) Additionally, the costs must be "reasonable in amount." (CCP § 1033.5(c)(3).) Whether a cost is "reasonably necessary to the conduct of the litigation" is a question of fact for the trial court[.]" (*Gibson v. Bobroff* (1996) 49 Cal. App. 4th 1202, 1209.)

The courts have held in matters where there are more than one Defendant and Plaintiff does not prevail against all the Defendants but prevail against at least one Defendant, the losing Defendant is not entitled to apportionment costs. This was highlighted in *Stiles v. Estate of Ryan* (1985) 173 Cal. App.3d 1057 our first District held:

> There, plaintiffs sued numerous defendants to recover damages resulting from earth movement under their house; they received judgment in their favor against only two defendants.(*.id*. at 1065) On appeal, the losing defendant requested that the costs be apportioned. (*ibid*.) In rejecting the contention, the court stated, "Under section 1032 of the Code of Civil Procedure, plaintiffs in an action to recover money damages were entitled to costs as a matter of course. It was not necessary that they recover on all of their various theories or causes of action or counts." (At p. 256.) (*.id*. at 1066). In other words, even though plaintiffs had not prevailed against all the defendants, they were entitled to recover

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their costs against the two losing defendants. (*ibid*.) But the losing defendants were not entitled to an apportionment of the costs. (*ibid*.)

Under Code Civ. Proc., § 1033.5, subd. (a)(12), explicitly allows a prevailing party to recover the cost of photocopies of exhibits if they were reasonably helpful to aid the trier of fact. Chaaban v. Wet Seal, Inc. (2012) 203 Cal.App.4th 49.58. So, the prevailing party is able to cover costs for exhibit binders made for trial. As most plaintiffs counsel, this can be a considerable cost in complex personal injury cases.

The prevailing party can also recover deposition costs, even if those deponents did not testify at the trial. The courts have held that recovery of deposition costs does not depend on whether the deponent ultimately testifies at trial. (See Culbertson v. R.D. Werner Co., Inc. (1987) 190 Cal.App.3d 704, 711–712 [nature of plaintiff's case determines necessity of discovery].) The standard is that reasonable fees can be awarded as long as a potential witness has not actually testified at trial. (See Evers v. Cornelson (1984) 163 Cal. App. 3d 310, 317.) The court will even allow travel costs for the depositions. The trial court did not abuse its discretion under CCP § 1033.5(a)(3) in allowing the costs of travel to and from depositions in other states, including hotels, car rentals, gas, and parking. (Chaaban v. Wet Seal, Inc. (2012) 203 Cal. App.4th 49.)

In conclusion, a prevailing party is entitled to various costs as a matter of right, and there are other costs that the court may allow under its discretion.


## KAYVAN HADDADAN, M.D.

### ADVANCED PAIN DIAGNOSTIC & SOLUTIONS

Kayvan Haddadan, M.D., is board-certified in pain medicine, physical medicine and rehabilitation. As the founder, CEO and medical director of Advanced Pain Diagnostic & Solutions, he ensures that his patients receive the very best care by taking a comprehensive approach to pain management and taking the time to find the best treatment for individuals under his care. He understands that pain can be psychological as well as a physiological response and strives to provide his patients with minimally invasive, comprehensive options to ensure that they maintain better overall well-being in the long run.

**What types of pain does your practice treat?**

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Advanced Pain Diagnostic & Solutions

# Pre-Litigation Vehicle Accident Investigation: A Private Investigator's Perspective

By: Lindon Lilly

The pre-litigation stage of a personal injury case is critical for maximizing compensation and securing valuable evidence that can make or break a case. Acting promptly during this phase can have a significant impact on the outcome. For example, key evidence such as video footage that clearly identifies the involved parties and demonstrates fault may be lost forever if not collected in time. Once this evidence is gone, no amount of investigation or skilled litigation can undo the damage caused by inaction.

When selecting a private investigation firm, look for one that prioritizes site visits, even if all the information, such as a police report, is not yet available. These visits allow for gathering time-sensitive evidence, take photographs, capture video footage, and interview witnesses before crucial details disappear or are altered.

**Obtaining a Traffic Collision Report**

In California, as in most states, a police report is mandatory for accidents involving injury or death. These reports contain essential information, such as the parties involved, insurance details, and witness statements, making them an invaluable starting point for any investigation. Because these reports are considered confidential, access is restricted to involved parties and their representatives. The information in the reports helps attorneys assess the case's value and viability early in the process, guiding their decision on whether to take the case.

Lindon Lilly is a member of the CA Association of Legal Support Professionals

**Scene Canvassing**

An effective private investigator is often seen as an extension of the legal team, working in the field to gather evidence that could otherwise be lost. One of the investigator's first tasks is

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scene canvassing, which includes collecting video footage from nearby businesses, residential buildings, and municipal traffic cameras. Since many businesses only retain video footage for a short period, typically between seven and thirty days, it is crucial to issue a preservation of evidence letter during the initial canvassing phase.

Scene canvassing should be thorough, covering a 360-degree view of the location. Even seemingly inconspicuous sites without visible cameras or windows should be checked for potential witnesses or hidden footage.

Photographs of the scene are vital, especially when conditions at the time of the accident—such as ongoing construction—may have contributed to the incident. These details could impact the determination of liability or negligence.

For accidents occurring at intersections with traffic signals, traffic signal timing analysis is essential. This process helps determine whether the timing of traffic lights contributed to the crash or influenced driver behavior. Video documentation of traffic light sequences can be critical for future litigation.

**Witness Interviews**

Preserving witness statements is a key component of pre-litigation investigation. Over time, witness recollections may change, and some witnesses may become unavailable or lose interest in the case. Recorded statements ensure that the facts are preserved as accurately as possible. Regular check-ins with witnesses can also prevent the need for skip-tracing if they move or change contact information.



**Drone Photography**

Drones have become an invaluable tool in accident investigations, offering several advantages:

1. Aerial Perspective: Drones provide a comprehensive aerial view of the accident scene, capturing critical details such as road layout, vehicle positions, skid marks, and surrounding infrastructure that may not be visible from the ground. This aerial perspective aids in reconstructing the accident with greater accuracy.

2. Evidence Collection: Drones can capture detailed images and video of the scene, preserving evidence such as vehicle damage, environmental conditions, and contributing factors like road obstructions. This evidence can play a crucial role in determining liability or negligence.

3. Accident Reconstruction: The data collected by drones can be used to create 3D models or maps of the accident scene, allowing investigators to reconstruct the events leading up to the crash. This helps clarify key details such as vehicle speed, distances, and potential sight obstructions.

4. Speed and Efficiency: Drones can quickly cover large areas, making it easier to efficiently document extensive accident scenes or hard-to-reach locations. This efficiency is particularly valuable when evidence may be altered or removed after an accident.

5. Preservation of Evidence: Drone footage allows investigators to preserve the accident scene as it was shortly after the event, which is critical since weather, cleanup efforts, or resumed traffic can rapidly change conditions at the site.

Drone photography enhances the thoroughness and precision of accident investigations, providing key visual evidence that supports case findings.

**Event Data Recorder (EDR)**

Another valuable tool in accident investigations is the event data recorder (EDR), often referred to as the automotive black box. The EDR captures crucial information about the vehicle's performance in the moments leading up to a crash. Data such as speed, brake usage, airbag deployment, and seatbelt status can provide critical insight into the circumstances surrounding the collision. This information is often vital for reconstructing the accident and determining fault.

**Conclusion**

Acting swiftly in the pre-litigation phase of a vehicle accident investigation can make all the difference. Delays in collecting evidence can result in missed opportunities that may significantly impact the plaintiff's ability to maximize compensation. Whether it's securing video footage, canvassing a scene, interviewing witnesses, or employing drones and EDR data, a thorough and prompt investigation is essential to the success of the client's case.

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Lindon Lilly is a member of the California Association of Legal Support Professionals (CALSPro). He currently serves on the board of directors for the California Association of Licensed Investigators (CALI). Lilly previously served two terms as governor of CALI. By virtue of his 20 years of service in law enforcement, the California Assembly recognized him for his work with victims' rights groups. He is the founder and president of Rhino Investigation and Process Serving, with over 30 years of experience in the attorney support business. For questions in reference to article, author can be emailed at info@lllegalassistance.com.

# The Sudden Emergency Doctrine

*Under this doctrine, a person who is confronted with a sudden emergency is not held to the same standard of care as someone who has time to deliberate and make a thoughtful decision. Instead, the law acknowledges that in moments of crisis, decisions must often be made spontaneously which may not align with typical standards of conduct*

By: Peter Tiemann

The sudden emergency doctrine is a common defense, referred to as an affirmative defense by some courts, used to define conduct expected of a reasonably prudent person when faced with an unexpected and dangerous situation.

Understanding the nuances of this doctrine is essential as it plays a pivotal role in determining liability in accident cases where rapid responses are involved.

The sudden emergency doctrine addresses how a **person's conduct** is evaluated when they are faced with an unexpected and dangerous situation. Under this doctrine, a person who is confronted with a sudden emergency is not held to the same standard of care as someone who has time to deliberate and make a thoughtful decision. Instead, the law acknowledges that in moments of crisis, decisions must often be made spontaneously which may not align with typical standards of conduct.

Under the sudden emergency defense, persons who are suddenly and unexpectedly confronted with an emergency situation **they did not create** – which results in an actual or apparent danger of immediate injury – are only expected to act "as a reasonably careful person would have acted in similar circumstances, even if it appears later that a different course of action would have been safer." CACI 452; Leo v. Dunham (1953) 41 Cal.2d 712, 714. Thus, under this doctrine, a party does not need to make the best decision available, but also cannot make an unreasonable decision in relation to the circumstances.

The California Supreme Court acknowledged the doctrine of sudden emergency over 70 years ago as a potential defense that can shield a person from liability in a negligence action where a sudden and unexpected emergency situation deprives a person of the power to use reasonable judgment. Leo v. Dunham (1953) 41 C2d 712, 714; Shiver v. Laramee (2018) 24 CA5th 395, 399, see CACI 452.

California Civil Jury Instruction 452 states:

> *[Name of plaintiff/defendant] claims that [he/she/nonbinary pronoun] was not negligent because [he/she/nonbinary pronoun] acted with reasonable care in an emergency situation. [Name of plaintiff/defendant] was not negligent if [he/she/nonbinary pronoun] proves all of the following:*
>
> *1. That there was a sudden and unexpected emergency situation in which someone was in actual or apparent danger of immediate injury;*
>
> *2. That [name of plaintiff/defendant] did not cause the emergency; and*
>
> *3. That [name of plaintiff/defendant] acted as a reasonably careful person would have acted in similar circumstances, even if it appears later that a different course of action would have been safer.*

The test is whether the actor took one of the courses of action that a standard man in that emergency might have taken, and such a course is not negligent even though it led to an injury that might have been prevented by adopting an alternative course of action." Schultz v. Mathias (1970) 3 Cal.App.3d 904, 912-913. The emergency is when a person perceives – real or apparent – danger to herself or to others. Damele v. Mack Trucks, Inc. (1990) 219 Cal.App.3d 29, 36.

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**The Reasonably Prudent Motorist and Examples**

As stated above, the chosen action need not be the safest of the choices defendant faced. Liability is therefore avoided even if the injury might have been prevented had another of the potential courses of action been taken. Shiver v. Laramee, supra, 24 CA5th at 399.

The courts recognize, and continue to acknowledge, that in the context of motor vehicle incidents, the doctrine's standard is still that of a reasonable "motorist" – after an emergency occurs. Am. Law of Torts, *supra*, at fn. 8. Several of the more recent cases wherein the courts applied the sudden emergency doctrine involve multiple vehicle crashes – Abdulkadhim v. Wu (2020) 53 Cal.App.5th 298; Shiver, supra, (2018) 24 Cal. App.5th 395; Damele, supra, (1990) 219 Cal.App.3d 29.

The sudden emergency defense has been applied to exonerate truckers from negligence when a trucker has to suddenly avoid another vehicle which is stopped in the road. Abdulkadhim, supra, 53 Cal.App.5th at 301-302; Shiver v. Laramee, supra, 24 Cal App. 5th at 401. A person encountering such a situation "is not expected nor required to use the same judgment and prudence that is required … in the exercise of ordinary care in calmer and more deliberate moments." Abdulkadhim, supra, 53 Cal.App.5th at 301-302.

The incident in Shiver, where the Court held the doctrine applied as a matter of law, involved an evening freeway multi-vehicle crash. Shiver, supra, 24 Cal.App.5th at 397-398. There, one car caused another to suddenly brake in front of defendant's tractor-trailer rig. To avoid a collision, defendant braked and sounded his horn but could not stop, slow down enough, or take evasive action before his truck collided with plaintiff's car.

The court reasoned that the doctrine applied because the

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defendant did not cause the emergency and acted reasonably under the circumstances. *Shiver v. Laramee*, supra, 24 Cal App. 5th at 401. The court described the doctrine as applying in cases where an unexpected physical danger is presented so suddenly as to "deprive the driver of his power of using reasonable judgment." *Id*. at 399. "The test is whether the actor took one of the courses of action that a standard man in that emergency might have taken, and such a course is not negligent even though it led to an injury that might have been prevented by adopting an alternative course of action." *Ibid*.

Similarly, in *Abdulkadhim*, a vehicle was stopped on the highway at 1 a.m. *Abdulkadhim*, supra, 53 Cal.App.5th at 300. When the defendant noticed the vehicle (about 20 to 30 car lengths ahead), he changed lanes to pass. *Id*. Moments later, the individual who had been driving behind the defendant crashed into the stopped vehicle. *Id*. The defendant successfully moved for summary judgment based on the sudden emergency doctrine, and the court of appeal affirmed it. *Id*.

**Preparing for and Anticipating this Defense**

The sudden emergency doctrine attempts to impose a reasonable person evaluation of actions taken in the face of sudden unexpected situation. When a defendant claims the sudden emergency defense, plaintiffs should focus on negating the elements of the defense.

The sudden emergency doctrine doesn't apply if defendant's own actions created the emergency. So, a focus on the defendant's actions prior to the crash would be crucial.

For example, an avenue to explore would be whether the driver was following too close to a vehicle in front of him or traveling at unsafe speeds for traffic or weather conditions. If so, plaintiffs can argue that the defendant's actions created the sudden emergency. By focusing on defendant's actions like following too close, driving too fast for traffic or weather conditions, or distracted driving, plaintiffs can argue that defendant is not entitled to the defense because his own conduct was not reasonable for the situation at hand. So, plaintiffs should focus on establishing facts, such as defendant's driving conduct prior to the incident, traffic and weather conditions at the time of the incident, etc.

Additionally, for the sudden emergency doctrine to apply, the situation must truly be sudden and unexpected. Plaintiffs can investigate the circumstances leading up to the incident to determine whether the emergency was foreseeable. If it can be shown that the defendant should have anticipated the situation, the doctrine may not apply.

For example, if a driver fails to notice traffic slowing ahead and claims it was an "emergency," a plaintiff can argue that normal driving expectations should have alerted the driver. The focus should be on (1) Did the defendant have any advance notice of the situation? (2) Could a reasonable person have anticipated the event? (3) Was there anything on the road that should have signaled caution to the defendant?

Finally, the defendant's response must still be judged on whether it was a reasonable reaction under the circumstances. If a defendant overreacts, such as by making a sudden maneuver that endangers others, plaintiffs can argue that a reasonably prudent motorist would have taken a safer approach. This approach helps to narrow the application of the doctrine, particularly when other options, like braking, could have been safer and more controlled.

Plaintiffs should focus on whether the defendant react reasonably, and whether the defendant's response did in fact increase the risk to others? Plaintiffs should consult expert witnesses such as those who can speak to human factors, industry standards experts or accident reconstruction specialists to explain why the defendant's response was unreasonable at the time. For example, an industry standard expert could testify that defendant should have reduced his speed due to weather or traffic conditions prior to the incident, or an accident reconstruction expert could opine that a vehicle could have safely stopped or that swerving wasn't necessary.

It is important to carefully analyze the facts of a case from the outset with an eye out for anything a defendant may try to point to as an emergency, warranting an invocation of the doctrine. With proper consideration and preparation, the sudden emergency doctrine can be defeated by emphasizing factors like defendant's role in causing the emergency, the foreseeability of the emergency, and the unreasonableness of defendant's response.

**Can a Plaintiff Use the Sudden Emergency Doctrine?**

In short, yes. As this doctrine serves as a potential defense to negligent driving, in circumstances where a defendant may argue that a plaintiff contributed to the accident subject to the lawsuit, it may serve as a vital component in mitigating a plaintiff's contributive or comparative fault. It is thus sometimes useful to have an eye on this doctrine as a way of working for your own client, even as a plaintiff.

*For the sudden emergency doctrine to apply, the situation must truly be sudden and unexpected. Plaintiffs can investigate the circumstances leading up to the incident to determine whether the emergency was foreseeable. If it can be shown that the defendant should have anticipated the situation, the doctrine may not apply*


# *CCTLA's Liens Seminar Held on October 4*

Seminar recording and materials available.
Contact Debbie Keller at debbie@cctla.com

# The Theory of Litigation as Applied to Expert Witness Disclosure

By: Kirill B. Tarasenko

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There is a Fundamental Theorem of Algebra and a Fundamental Theorem of Calculus.

So why not a Fundamental Theorem of Civil Litigation? Civil litigation is a strategic contest involving incomplete information, somewhat like poker, as distinguished from board games like chess, checkers, and backgammon, where you can always see what your opponent is doing, and they can always see what you are doing. Where each competitor has real-time and transparent knowledge of what the other is doing, these are games involving complete information.

If everybody's litigation cards, so to speak, were showing at all times, then there would always be a clear and correct action to take at any given point, whether it's propounding discovery, answering discovery, in depositions or in trial. Any litigator who deviated from their correct action would then be reducing their mathematical win expectation while conversely increasing the win expectation of their opponents. But since civil litigation involves incomplete information, we can formulate a Fundamental Theorem of Civil Litigation to look something like this:

**Every time you take an action during litigation that is different from the way you would have acted if you had access to all information, you lose and your opponents gain. Every time you take an action that is the same you would have taken if you had access to all information, you gain and your opponents lose. Conversely, every time your opponents act differently from the way they would have if they had access to all information, you gain, and every time they act the same way they would have if all information was available, then you lose.**

What does the Fundamental Theorem mean? It means that there is a correct action to take at any given point, it's just not always easy to decide *what to do and when to do it* in a strategic litigation contest involving incomplete information. Accordingly, by taking actions that are as closely aligned with the actions you would have taken if you had access to all information at the time, you are making positive expectation strategic decisions and you are making your opponents act as far away as possible from this Utopian level of strategy. Let's apply the Fundamental Theorem to a real-world litigation scenario that I recently experienced – the disclosure of expert witnesses.

**Disclosure of Expert Witness Information**

The mechanism for obtaining discovery of information concerning each party's expert witnesses is making a written demand for the mutual and simultaneous exchange of expert witness information on a specified date no sooner than 20 days after service of the demand or 50 days before the initial trial date, whichever is closer to the trial date. (CCP §2034.230).

But only the party that makes a demand for exchange of expert witness information and the party upon whom the demand is made are required to comply with the statutory procedures for exchanging expert witness information. (*West Hills Hospital v. Superior Court* (1979) 98 Cal.App.3d 656, 659, 159 Cal.Rptr. 645. From this, it reasonably follows that, where no demand is made by any party, no party is required to comply with the statutory exchange requirements. (*Hirano v. Hirano* (2007) 158 Cal.App.4th 1, 6 [69 Cal.Rptr.3d 646, 649], as modified (Jan. 2, 2008).

In the case I was working on, I fully expected defense counsel to send over a demand for simultaneous exchange of expert witness information, as they always seem to do. So imagine my surprise when I opened the document that was served on

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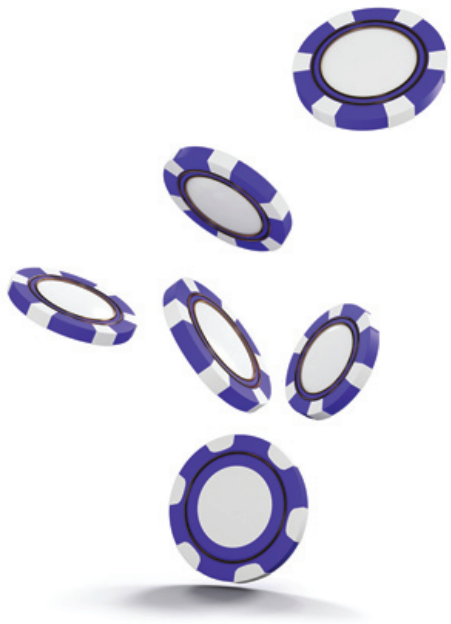
the last possible day to demand exchange, and saw that it wasn't a demand for disclosure of experts at all. Instead, defense counsel had sent over "Defendant's Designation of Expert Witnesses" with a declaration by defense counsel about the expected substance of their experts testimony, but with no demand made to plaintiff to produce their expert disclosure. Without a demand for exchange, plaintiff had no obligation to provide their designation of expert witnesses as defense counsel had missed the deadline to demand disclosure, and therefore had waived any right to expert witness information, including deposing's plaintiff's expert witnesses or even learning their identities, at least until the witness list would be disclosed just before trial.

If this had been a poker hand, defense counsel had revealed their hidden cards mid-hand, prior to the "showdown" at the end of the hand when all players still in the pot are required reveal their cards. And the court wouldn't be dealing them any new cards. At this point, we had some decisions to make regarding what action to take, with potentially significant consequences resulting. For one, we could have just sent in our disclosure of experts and proceeded with expert depositions in an ordinary fashion. But, with no legal procedural requirement to disclose, and suddenly having full information regarding defendant's expert witness opinions without their knowing anything about plaintiff's, we now had transparent access to all information and they had nothing. ***Every time you take an action during litigation that is different from the way you would have acted if you had access to all information, you lose, and your opponents gain.***

Without violating any procedural rules, we now had access to their experts but they had no access to ours, and according to the Fundamental Theorem of Civil Litigation, by disclosing our experts at that point anyway, we would have lost and they would have gained. So we proceeded with deposing defendant's experts, and defense counsel proceeded to panic. They filed *ex parte* applications seeking additional time to complete expert discovery and to continue the trial, but with no grounds for either, their motions were denied. They filed motions *in limine* seeking to limit plaintiff's treating physicians strictly to their deposition testimony taken during fact discovery, but those efforts also failed because how could they block expert opinion testimony when they had no right to obtain the expert testimony in the first place? **By acting the same way we would have if we had access to all information, we were gaining, and by their inability to act the same way they would have if they had access to all information due to their failure to demand exchange, the defense was losing. And they weren't happy about it.**



**Did We Make the Correct Decision?**

Part of the decision making process on this issue involved a significant point on which we had incomplete information – how would the trial judge rule on this issue? If the judge ruled that they were bound by their expert witness disclosure and declaration of defense counsel, then they would not be able to supplement any additional experts because there would be nothing to supplement, as they wouldn't know anything about our experts or have the ability to hear our experts' testimony until trial. We would gain and they would lost significantly.

Alternatively, if the trial judge were to follow the holding in Hirano v. Hirano and rule that since neither party demanded exchange of expert witness information that neither side was bound by the expert disclosure statute and everyone could bring whichever experts they wanted, then we would be trying a Wild West shootout of a case. So with those options in mind, we decided to chance a Wild West trial – even if that meant allowing defense to call surprise experts to trial. Because what could be more fun than both sides having to think on their feet and cross experts they were meeting for the first time?

And in the end, that's what happened – the judge ruled that defendant was not bound by their disclosure, despite a declaration from counsel stating that they had disclosed experts and would follow CCP §2034.280 if they were to disclose supplemental experts.

**Would We Make that Same Decision Again, Now that All of the Information Was Available?**

I would say yes, and that comes down to thinking it through, and being willing to step into a trial filled with unknowns – the ultimate contest of incomplete information played out before a judge and jury. It came down to knowing our player, or knowing your opponent's capabilities. After thinking it through, and considering the effects of what would happen if the defense was allowed to retain additional experts for trial, we were willing to take that chance and were prepared to cross examine surprise experts without opportunity to fully prepare, if it meant that defense counsel had to do the same. We were willing to take that chance because we felt it meant positive expectation, whether the judge ruled the defense was allowed to add additional experts or not. And tack on experts they did, as each day of trial seeming to end with defense counsel adding some other expert to their witness list.

Trying a case involving surprise experts with no opportunity to depose them may not be for everyone, but I can assure you one thing – the experience made my co-counsel and me better lawyers. And as long as we used sound logic, including the Fundamental Theorem to arrive at the conclusion we did, we felt confident we were getting the best of it with positive win expectation, which is all you can really ask for.

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*With all credit and attribution due to David Sklansky (1987), who first postulated in his writings regarding the Fundamental Theorem.*

# Protecting Vulnerable Elders

***Reprinted from the Consumer Attorney of California website at www.caoc.org***

Too often seniors are victims of financial fraud or negligent nursing home care that can lead to degrading conditions, injury, or even death. Regulatory agencies often lack the financial resources to adequately protect seniors' safety. In many cases, only the civil justice system can hold nursing home operators accountable for meeting state requirements. And when harm or death occurs, only the civil justice system can provide some measure of compensation for victims and their families.

**Fighting Against Senior Financial Abuse and Fraud**

Financial scams against elders are on the rise in California, and too often those tasked with protecting elders are turning a blind eye while scammers rob older Californians of their life savings. As mandated reporters, care custodians, investment advisers, banks, credit unions, and other financial institutions are well-positioned to detect when an elder might be the victim of a scam or other financial abuse – and take action to protect elders from the devastating loss of their life savings. In 2023, CAOC worked with senior advocates to introduce legislation ensuring elderly victims of financial scams can hold wrongdoers accountable for assisting in the financial exploitation of elderly Californians. These efforts to protect seniors who are victimized by financial fraud will continue . . .

**Strengthening our Laws to Prevent Physical Abuse, Neglect and Abandonment**

It is estimated that hundreds of thousands of elders in California are abused every year. However, for every abuse reported, research has found that at least five others go unreported, making the actual number of abused people much higher that the reported rate. Studies show that neglect and abuse of nursing home residents have reached epidemic proportions. A report by the Centers for Medicare and Medicaid Services found that at least 91% of nursing homes have been cited for health and safety deficiencies. Yet many residents who suffer neglect and abuse find it virtually impossible to seek justice in court. Current legal and evidentiary hurdles make physical elder abuse claims very difficult to prove in California.

The burden of proof required under the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) leaves seniors with the seemingly impossible task of proving by "clear and convincing" evidence that the defendant is not only liable for the physical abuse, but that the defendant is also guilty of recklessness, oppression, fraud, or malice.

Most other tort actions need only be proven by a "preponderance" of the evidence. Unfortunately, most of the elderly victims in these cases are very ill, suffer from dementia, or are otherwise severely disabled and thus may be unable to testify as to the specific facts of the abuse or neglect they suffered. In many cases, the victim is already deceased by the time the case is filed on their behalf. California must correct this injustice and impose the same standard of proof on physical elder abuse cases as most other tort actions.

Another big problem faced by many nursing home residents is caused by the lack of staff on hand when facilities fail to meet state-mandated minimums. Call lights go unanswered; soiled diapers go unchanged; patients aren't turned as needed in their beds, all of which can quickly lead to deadly pressure sores. Regulatory agencies can issue citations for inadequate staffing, but those penalties are a mere slap on the wrist for multi-million-dollar, for-profit nursing home chains.

That's when our civil justice system can help. In 2021 CAOC worked with Attorney General Rob Bonta and Assemblymember Eloise Gomez Reyes to pass a law providing residents of skilled nursing facilities and intermediate care facilities with stronger enforcement rights when pursuing legal action for violations under California's Health and Safety Code.

When consumer attorneys in Humboldt County won a verdict holding one nursing home chain accountable for failing to provide minimum staffing on more than 500 days, they insisted the company boost staffing and pay for a court-appointed monitor to ensure compliance. The civil justice system accomplished what state regulators could not: making California's system of long-term care safer for seniors.

The wildfires in California showed us aother example of how residential care facilities lack necessary emergency preparedness response criteria, as some facilities abandoned their seniors during emergency evacuations. For example, in 2018 the Department of Social Services placed two large, assisted living facilities in Santa Rosa on probation after investigations found that they abandoned large numbers of residents during a firestorm. At least 20 frail, elderly residents would have died had family members and emergency responders not arrived to rescue them before one of the facilities burned to the ground. This is simply unacceptable.

# Loss of Consortium – A True Litmus Test

By: Chris Wood

I love Loss of Consortium Claims. Over the years, I have seen the claim become an asset in bringing tort reform jurors out of the shadows during *voir dire*. As a result of their inability to consider the loss, the majority of the time, these potential jurors are dismissed for cause.

Christopher Wood, Dreyer Babich Buccola Wood Campora, LLC, is a CCTLA Board Member

For whatever reason, when the Loss of Consortium Claim is discussed in *voir dire*, the tort reform jurors cannot hold back. They rise out of their seat to object to such a vile concept that a spouse can receive compensation when they were not even involve in the incident. "For better or for worse!" is cried out by many jurors who are visibly upset by the concept. Other jurors squirm in their chairs and raise their hands when asked if anyone agrees with Mr. Grumpy about Loss of Consortium and the fact that the uninjured spouse should *not* receive compensation. There are other jurors whose facial expressions provide a window into their thoughts of just how bonkers it is that a spouse can get compensated. The responses are all across the spectrum, but one thing is consistent, those jurors are usually tort reform jurors, and they are not going to give your clients a fair shake.

In a recent experience in Los Angeles, Neil Ferrera and I had between 8 to 10 jurors dig in on Loss of Consortium and eventually, all were dismissed for cause. Our trial judge, visibly disappointed by the fact we were going to lose more jurors and may have to call another panel, did his best to rehabilitate these folks. I objected to his plan to no avail.

Neil and I were scared to death he was going to rehabilitate these folks and force us to use our preemptory challenges on these jurors. It was painfully obvious they were not going to be fair and reasonable to either one of our clients. As the judge started cross-examining them, one-by-one, they dug their heels firmly into the floor leaning back to get leverage to the judge, no matter how many times he asked them if they could be fair.

They had heard enough, and the consortium claim was where they drew the proverbial line in the sand. They made their thoughts known, and not even the man in the robe, up on the bench was going to change their minds or get them budge. They fell like dominoes, and at the end, our judge was forced to dismiss all of them for cause. We feared he would be upset with us, but shook his head and said, "I guess that backfired on me." We looked at each other and drew a sigh of relief!

Mini openings are where you want to plant the seed regarding Loss of Consortium. Mini openings are, in themselves, incredibly valuable and will be addressed on another day.

However, under Civil Code of Procedure, Section 222.5, subdivision (d), the judge is required to allow a mini opening if either side requests it – even if both sides do not agree. "Under request of a party, the trial judge shall allow a brief opening statement by counsel for each party prior to the commencement of the oral questioning phase of the voir dire process."

This is a perfect time to bring up and introduce the panel to the Loss of Consortium claim. Then, during *voir dire*, make sure it is a topic you spend time on with the prospective jurors as it is a true litmus test. In my experience, jurors can be equivocal on "pain and suffering," "non-economic damages," either because they just don't understand them yet or they are too shy to really say what they feel. This is where Loss of Consortium seems to really bring them out of their shells.

In *voir dire*, jurors will most likely not have ever heard of the concept, and you will need to define it for them. I would suggest you ask the trial judge to read the jury instruction on Loss of Consortium so that you do not misstate it in any way. I did not do that in our recent trial in Los Angeles, but in retrospect, when the first juror demonstrated confusion of the claim, I would have turned to the judge and asked him to please read the instruction.

You may even want to bring that up well before *voir dire* so you do not put the trial judge on the spot. It is a claim that is commonly misunderstood, and you certainly do not want to draw an objection by misstating it.

In our trial, the judge wanted to ask the potential jurors who clearly disdained the claim if they could "follow the law as I instruct you." We hear this every time in jury selection. I requested the judge read California Code of Civil Procedure 225 (b)(1)(c) which provides the definition of actual bias. Actual bias – the existence of a state of mind on the party of the juror in reference to the case, or to any of the parties, which will prevent the juror from acting with **entire impartiality**, and without prejudice to the substantial rights of any party. (*Emphasis added*). The phrase "entire impartiality" or "entirely impartial" then becomes the standard, and it is not whether they can follow the law or not.

This is a phrase that is incredibly helpful for us as attorneys for victims because it is hard for many jurors to be "entirely impartial" when they really do

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not like the Loss of Consortium claim. This phrase and definition of actual bias should really be integrated into *voir dire* as a whole, but certainly when discussing the Loss of Consortium claim. So, when signing up that new case, think about adding the spouse. The extra written discovery will be as painful as expected, and you will question the decision and probably have some choice words for me when responding to special interrogatories about their sex life (I waive that claim and never answer those as nobody wants to hear about your clients' sex life. Jurors certainly do not want to hear about it, and if the judge does read the instruction, I let the potential jurors know that we are not making the claim for sexual relations).

You do not have to feel compelled to ask for significant damage amounts at trial. In Santa Clara Superior Court, my partner, Larry Phan, and I asked for one dollar for the husband. He wanted his wife to be treated fairly and reasonably and in a way that reflected what he had witnessed. They awarded him the dollar, and the wife received what was fair and reasonable! It was a win for both.

*Continued from page 2*

Railroad, Co., fell from a train and broke his leg while at work. He sued Union Pacific for negligence under the Federal Employers' Liability Act.

Richard retained an expert, Richard Hess, a railroad engineer with 42 years' experience. Hess had operated trains on the same track where Richard's accident occurred. Hess intended to testify that operator error caused Richard's accident.

Union Pacific brought a motion *in limine* to exclude Hess' testimony, and the trial court granted the motion. The trial court found that Hess had no training or experience, and did not have the same or similar qualifications as the other expert witnesses who were going to testify in the trial had.

The jury returned a verdict for Union Pacific.

**ISSUE:** Is an expert qualified to testify if they have knowledge of the subject matter and the location of events?

**RULING:** Reversed and remanded.

**REASONING:** Pursuant to Evidence Code 720, a person is qualified to testify as an expert if the person has special knowledge, skill, experience, training or education sufficient to qualify as an expert on the subject to which the testimony relates.

Under Section 801, an expert may provide opinion testimony: 1. Related to a subject sufficiently beyond common experience, that the opinion would assist the trier or fact; 2. And based on matter personally known to the witness or made know to him that is of a type that reasonably may be relied upon by an expert in forming an opinion upon the subject.

Although trial courts may exclude an expert's testimony, its discretion is not unlimited, especially when its exercise implicates a party's ability to present its case. Here the trial court excluded Hess' expert opinion, concluding he had no experience or qualifications that experts who were going to testify in the case had. However, Hess' experience as a railroad engineer, including many years operating trains on the track where the accident occurred, likely would have assisted the jury. Once that threshold has been met, questions regarding the degree of his knowledge went to the weight of the evidence rather than its admissibility, and to exclude his testimony was in error.

***Vaghashia V. Vaghashia***

2024 2dca/8 California Court Of Appeal,
No. B331073 (October 24, 2024)

**Party Who Moves To Enforce Settlement Agreement Cannot Later Seek To Challenge The Agreement**

**FACTS:** Brothers Govind and Prashant Vaghashia were partners in various business ventures and real estate holdings. Over time, their relationship deteriorated, and ultimately, Prashant and his wife, Mita, sued Govind and his wife, Sonal.

In March of 2022, the case proceeded to a bench trial, which was later suspended to give the parties the opportunity to see if a settlement could be reached. In June of 2022, the parties reached a settlement and entered into a settlement agreement.

Sometime after the settlement was reached, a disagreement arose regarding the performance of the agreement. The Govind parties moved to enforce the terms of the settlement agreement. The trial court found that the settlement agreement was enforceable; however, it did not find for the Govind parties regarding their interpretations of the agreement. Thereafter, the Govind parties sought to vacate the agreement.

The trial court rejected the Govind parties' request to vacate the agreement and found that they were judicially estopped from challenging the agreement. Thereafter, the Govind parties appealed.

**ISSUE:** Is a party judicially estopped from seeking to vacate a settlement agreement that it had previously moved to enforce?

**RULING:** Affirmed.

**REASONING:** Judicial estoppel precludes a party from asserting an incompatible position to a previously asserted position. Although the application of judicial estoppel is discretionary, it can be applied under the following:

1. When the same party has taken two positions;
2. When the positions were taken in judicial or quasi-judicial proceedings;
3. When the party was successful in asserting the first position;
4. When the two positions are totally inconsistent; and
5. When the first position was not taken as a result of fraud, ignorance, or mistake.

Here, the Govind parties filed a motion to enforce the settlement and asked the trial court to determine if an enforceable settlement agreement existed and to enforce it. Thus, it was their position that an enforceable settlement agreement existed, which was the exact opposite of their position in the motion to vacate the agreement. The *Govind* parties were successful in their first motion, and thus they must be judicially estopped from now asserting a totally inconsistent argument.

# Member Verdicts & Settlements

## VERDICTS

**$8,763, 286 Million**
**Evans v. California Commission**
**for Peace Officers Standards and Training**
**Whistleblower Retaliation**
*CA Whistleblower Retaliation - Gov. Code § 8647*

**Plaintiff's Counsel: CCTLA member Lawrance A. Bohm, Lead Trial Counsel;** Jack C. Brouwer, Andrew L. Thrasher, M. Noah Cowart, J.D., all of Bohm Law Group, Inc., Sacramento; Scott A. Brown of Brown | Poore, LLP, Walnut Creek

**Verdict (P) $8,763,286:** $1,239,956 in past economic damages; $1,566,600 in future economic damages; $3,400,000 in past non-economic damages; and $2,000,000 for future non-economic damages; in addition to post-judgment interest and approximately $2,500,000 or more in attorneys' fees and costs.

**Court:** Honorable Daniel J. Calabretta, Eastern District of California, Sacramento; **Trial Dates:** September 3-26, 2024

**Defendant's Counsel:** Joseph R. Wheeler and Arang Chun, California State Attorney General's Office, Sacramento

**Case Summary:**

Plaintiff Tamara Evans was a POST law enforcement consultant, responsible for overseeing the educational services provided by providers who are paid with POST's money. After she blew the whistle on POST's mismanagement of the federal grant funds, she was fired on March 29, 2013. The articulated business reason by her employer was that Evan engaged in dishonesty, theft of public funds, poor performance, and unlawful discrimination. This was done to camouflage the retaliation by the California Commission on Peace Officers Standards and Training ("POST").

POST's mission is to improve law enforcement quality. It receives approximately $60 million annually and is supposed to use the money to pay for the training of peace officers, and it pays contracted vendors to provide its classes. It includes nearly every law enforcement agency in California. Participating agencies agree to abide by the standards established by POST as authorized by state regulations.

Evans was born in 1959 to a working-class family.

Through the encouragement of numerous police friends, Evans decided to pursue a career in law enforcement. She joined the Sparks Police Department in Nevada and promoted to police detective by obtaining the top score on a promotional exam and then quickly promoted to sergeant.

In 1995, Evans moved from patrol to administration, promoted to lieutenant. Evans left the Sparks PD to join the Washoe County School PD as chief. While serving in this role, Evans earned her Bachelor's degree from the University of Nevada.

After completing her university coursework, Evans successfully obtained employment with POST in Sacramento. Evans desired this employment, in part, so she could live closer to and spend more time with her mother who resided in the Roseville area.

From 2004 to 2010, she received high praise, until she was transferred to the Training Program Services Bureau where she was responsible for overseeing two of POST's "preferred training contractors." These contractors received special treatment and were not required to follow all the same rules as other contractors. One of these contractors, the San Diego Regional Training Center ("SDRTC"), received federal grant funds paid by POST.

In March 2010, state auditors conducted a "monitoring visit" concerning POST's federal grant fund expenditures. Before, during, and after the visit, Evans reported her concerns that POST was paying SDRTC's invoices in violation of federal law.

She reported that various SDRTC invoices falsely charged for items or personnel never utilized. Classes were invoiced as full, even when they were not. POST was paying federal grant funds for room rentals even though no room rental was incurred. POST paid SDRTC invoices without requiring submission of the backup expense.

When Evans reported the mismanagement of the federal grant funds by approving and paying vendors' "falsified invoices," her manager, Ed Pecinovsky, began treating her adversely.

The audit found mismanagement of federal grants funds. Evans refused to authorize SDRTC's invoices unless they complied with federal regulations. Pecinovsky shouted at her to approve the invoices, but she still refused.

SDRTC complained to POST Executive Director Paul Cappitelli about her efforts to enforce compliance with federal regulations. During this time, Evans required medical leave due to a knee injury. Pecinovsky and the Assistant Executive Director Alan Deal disciplined Evans based on SDRTC's false allegations. Evans was removed as the program manager, and Anne Brewer, a friend of the SDRTC staff and Pecinovsky, replaced Evans, who was given a different assignment that had nothing to do with the federal grant funds.

Following Evan's removal, Pecinovsky and Brewer began approving SDRTC's falsified invoices, and Deal instructed Pecinovsky to monitor all email communication sent by Evans to find examples of poor interaction with SDRTC.

In September 2010, Pecinovsky and Deal disciplined Evans for sending an email that provided updates on past-due assignments. POST claimed the email was "unprofessional and condescending." However, at trial, no witness was able to identify anything unprofessional or condescending about the email.

In January 2011, Pecinovsky gave Evans her first negative evaluation. It contained numerous false statements alleging she mismanaged the relationship with SDRTC. Evans complained this evaluation was unfair and due to her reported concerns about the falsified invoices. The complaint is protected by state law that encourages workers to report improper governmental activity.

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# Member Verdicts & Settlements

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Deal emailed Pecinovsky to inform him that Evans had reported "falsified invoices" and instructed Pecinovsky to investigate and prepare a memorandum regarding the situation, with recommendations for a resolution. No such memo was ever created. No investigation was performed.

In March 2011, Evans submitted a formal rebuttal to her evaluation. Her rebuttal detailed how she had reported "falsified invoices" only to face retaliation due to the improper friendship between Pecinovsky and SDRTC. No investigatory response occurred.

The state auditors returned to POST for a further and deeper audit into the grant funds during 2011. The audit revealed numerous issues of non-compliance and included grant mismanagement in the amount of over $20,000 paid for the undocumented expenses of SDRTC—the very thing Evans had refused to do.

In response, POST blamed the mismanagement on Evans and her assistant. Neither were ever told they were responsible for any of the negative audit findings, and Pecinovsky was permitted to retire immediately after the negative audit findings.

Evans applied for Pecinovsky's prior position, but was beaten out by Brewer, who had less seniority and less experience in law enforcement than Evans did. When Brewer became manager, she immediately withdrew Evans from a "command college" training class, which would have assisted Evans with any future promotional opportunities. Within three months, Brewer issued a write up. The same day as the write up, Evans also received notice that she was being placed on administrative leave with pay due to an allegation of discourteous and unprofessional behavior connected with National Car Rental in Sacramento. Evans was embarrassingly escorted out of the building without any explanation for how long she would be on leave or what would follow her leave. The video clearly shows that Evans never yelled at any customers who walked by her. No witness from National Car Rental testified at trial.

Also, numerous witnesses (mainly retired law enforcement) testified to Evans' remarkable character and work ethic. No one had ever observed Evans exhibit any of the crazy hateful behavior alleged by the National Car Rental employees.

Immediately after leaving the rental agency, Brewer called her friend Pecinovsky (who was retired) to interview him about Evans' performance. The investigation then expanded into Plaintiff having a "pattern of poor performance" dating back to her removal as program manager over the federal grants.

The investigation expanded into an allegation from Brewer that Evans was falsifying travel reimbursement claims.

When Evans was placed on administrative, she was only told her administrative leave was due to an incident at a Sacramento car rental agency involving discourteous treatment. During this time, Brewer was calling her friendly SDRTC contacts and other POST employees to collect negative statements about how Evans behaved as the federal grant manager back in 2010. Unbeknownst to Evans, Brewer followed up with every person known to have any negative information to offer about Evans.

Evans remained on suspension until she was interrogated. While on suspension, she collected numerous letters of support from POST employees and contractors, attesting to her consummate professionalism and respect for others. Evans gave these letters of support to Brewer when Evans arrived for her interrogation with her attorney. Brewer never contacted any of the supporters to interview them. The existence and content of the letters of support was entirely omitted from Brewer's investigation report.

Evans' interrogation lasted over five hours. The questioning was in the style of a criminal interrogation. Brewer insinuated that there was a video but did not mention that the video had no audio. The video was not shown to Evans. Because Evans did not know travel claims or poor performance were part of the investigation, she was not prepared to offer any detailed explanations about her expense claims.

After the interrogation, Evan's health went into a sharp decline, including numerous ulcers in her esophagus, anxiety, depression, insomnia and other symptoms of intense emotional distress.

On Mar. 20, 2013, Plaintiff was told to return to the POST headquarters. When she arrived, she was met outside of the building by two of Brewer's friends who had Evans' belongings in. She was given a Notice of Adverse Action, indicating her termination would be effective Mar. 29, 2013. The termination was publicly humiliating as POST employees walked into the building while she was being fired.

The termination decision was made by Robert Stresak, who never looked at the video of the incident. He was not told that Evans had a history of whistleblowing. He believes he should have been told and could not explain why his assistant director did not inform him of this information.

Stresak admitted that Evans' suspension was based upon false information and that her termination was unfair. He was not given the vast exculpatory information that should have been provided.

Based on the reasons for her termination, her declining health, and supporting her mother through her mother's terminal cancer diagnosis, Evans did not try to seek work until after her mother passed away in 2018. Not surprisingly, no employer was interested in hiring a disgraced law enforcement officer.

To keep herself afloat financially, Evans was forced to collect her government retirement from Nevada and California early, substantially reducing her lifetime pension benefits from both agencies. Ultimately, this cost her approximately $2,000,000 in lost wages/benefits.

In closing argument, POST argued that 1) Evans was not a whistleblower, 2) her complaints were not about POST but rather SDRTC, 3) that Brewer's report contained only truthful information communicated by witnesses, and 4) Evans acted unprofessionally at the rental agency. As to damages, POST argued there should be no damages because they did nothing improper and that even assuming POST did retaliate, her dam-

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# Member Verdicts & Settlements

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ages would be very little because, according to their vocational expert, Evans could have had a new job in three to six months.

The jury found for Evans on her whistleblower retaliation claims and awarded her $1,239,956 in past economic damages, $1,566,600 in future economic damages, $3,400,000 in past non-economic damages, $2,000,000 for future non-economic damages, and $556,730 for tax neutralization purposes for a total of $8,763,286.

**Total**

$8,763,286 + Attorney fees and costs of approximately $2,500 000 (nine years of litigation)

**Settlement Demands/Offers:**

Plaintiff demand: $475,000
Defendant offer: $0

**Plaintiff's Experts**

Amy Oppenheimer?New York, New York, specialty: human resources/workplace investigations; Phillip Allman, Ph.D., Oakland, specialty: economics

**Defendant's Experts**

Kristoffer M. Hall, Sacramento, specialty: economics; and Ronald Morrell, Campbell, CA, specialty: vocational rehabilitation

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**Mahmoud Khattab, Inc. v. Mahmoud Ali Ibrahim; Trinity Pankowski; Kyla Straw**
**Sacramento County Superior Case No. 34-2021-00297224**

**Defendant Employee Attorneys:**
**CCTLA member Maria Minney, Minney Law Firm, Sacramento;** and George Moschopoulos (Dana Point, CA)

**Plaintiff Employer Attorneys:**
Randy Merritt. Beach Law Group, Oxnard, CA (trial); Derek Decker, Krogh & Decker, Sacramento (complaint up to trial)

**Case Overview:**

This was an unusual case because the whistleblower clients were actually defendants, rather than plaintiffs, and were sued in retaliation for their testimony with the Attorney General's office against the medical doctor who employed them.

Defendants were two registered nurses and an office manager in a medical spa/cosmetic surgery practice in Elk Grove, CA. All three defendants had worked at the practice for less than a year when Dr. Mahmoud Khattab first had his medical license suspended in May of 2020. Khattab lied to his employees, saying that he just needed to take a couple of classes, and his license issues would be cleared up in a few months or so.

This was far from the truth. Khattab had his license suspended for grievous conduct that included, but was much more than, gross incompetence. He was accused of falsifying medical records, lying to investigators, fraud, aiding and abetting the unlicensed practice of medicine by having unlicensed personnel performing medical procedures and providing consults that needed to be done by a physician and false advertising.

The California Medical Board's expert who conducted the review of Khattab's practice opined that Khattab was so "dangerous" that his license needed to be suspended immediately, which is what the board did, without a hearing.

Part of the initial suspension prohibited Khattab from being present in the practice or any medical practice, managing, training or any other acts constituting the practice of medicine. But, Khattab repeatedly defied the suspension. That's where our three clients became important.

The two RN clients were the longest tenured nurses at the practice, and one, Trinity Pankowski, became a supervising nurse. For both, this was their first nursing job out of nursing school. A couple of local Sacramento news stations ran stories about Khattab's suspension, and patients started asking questions. You can find one story that ran, here:

https://youtu.be/Ufq7YnLd5yg?feature=shared

It was in or around September that employees first became aware of the gravity of Khattab's suspension. After Pankowski read the allegations by the medical board online, she submitted her resignation. The other two, Kyla Straw and Mahmoud Ali Ibrahim, resigned later, in December 2020.

In or around February 2021, an investigator for the Attorney General contacted Ibrahim, who in his role, had significant knowledge of Khattab's practices, and more importantly, his conduct following the suspension. Such conduct included performing procedures and training personnel after hours, both at the practice and at his home. Khattab continued to hire and fire employees, and managed the practice entirely, dictating tasks and orders through Ibrahim and Pankowski.

Ibrahim gave the investigator some additional names of employees who may have knowledge, such as Pankowski and Straw. All three provided recorded statements between Feb. 22, 2021 and Mar. 8, 2021. Ibrahim spoke with a current employee at the practice on or about Mar. 8 and asked if she would be willing to speak up. That employee never contacted Ibrahim again, and it was presumed that she spoke to Khattab and told him about the three who were cooperating with the Attorney General.

The three former employees were blindsided on Mar. 22, 2021 when Khattab filed the instant lawsuit accusing the three of conspiring together to embezzle over $175,000 from the practice.

The deputy attorney general handling the Khattab prosecution was so incensed she inquired about defending the three employees because she believed it was 100% retaliation. Of course, her superiors refused. The three provided written declarations to the Attorney General that were obviously damning, resulting in Khattab surrendering his license in June 2021 rather than have it be revoked.

The three employees were left with trying to find an attorney but could not find one they could afford. They finally found an attorney who agreed to take on their case on a 50-percent contingency, based on pursuing a retaliation case. That attorney asked Maria Minney to co-counsel in or around May 2021,

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and she agreed. After a few months, the first attorney dropped out of the case without even a phone call. Minney agreed to take on the case. After two unsuccessful motions, including an anti-SLAPP, it was decided not to pursue an MSJ, especially considering that most of the case would need to be resolved on credibility. It was decided to move forward to trial. After four continuances by Plaintiff, the trial began on June 24, but due to Plaintiff's attorney contracting Covid, the trial was moved a number of times, finally to Sept.17, 2024.

The trial was held in Dept. 28 in front of Judge Richard Miadich, who had recently been appointed to the bench, in January 2024. He was found to be a very smart, thorough and fair judge. With that said, he had some harsh rulings on the evidence that hampered the defense, including not allowing the presentation of evidence regarding the medical board's allegations or the basis for the suspension (or later surrender), the testimony provided to the AG by the three defendants, nor evidence about the unemployment appeal hearing (discussed more below).

The stipulation for the surrender can be found here: https://www2.mbc.ca.gov/BreezePDL/document.aspx?path=%5cDIDOCS%5c20210617%5cDMRAAAHL2%5c&did=AAAHL210617223910040.DID

The Second Amended Accusation attached as Exhibit A in the link details all allegations against Khattab.

Ibrahim resigned in December 2020 due to inconsistent pay and stress from dealing with the chaos in the practice, and he submitted an unemployment claim and started receiving benefits in January 2021. Notably, Khattab waited until April 2021 to appeal the benefits, which of course coincided with Ibrahim's testimony. A hearing was held in November 2021 where Khattab and his attorney appeared, and Minney had the opportunity to cross-examine Khattab.

The judge was quite obviously irritated with Khattab, both for his refusal to answer questions and his blatant perjury. In one instance, Minney asked Khattab if he had filed a police report. His attorney objected, based on attorney-client privilege, which was overruled by the judge, and she tried to force Khattab to answer. He refused, but Minney already knew that one had never been filed. The judge gave a scathing ruling in Ibrahim's favor, stating that there was "zero evidence of embezzlement" and calling out Khattab for an utter lack of credibility.

Coincidentally, in January 2022, Khattab finally submitted a police report, but only against Ibrahim, leaving out the two nurses. The police department reported to counsel that they found no evidence of embezzlement sufficient to warrant any further investigation.

The trial lasted about two weeks. Fortunately, Plaintiff's counsel committed a number of blunders during trial, opening the door to evidence that had been excluded (at Plaintiff's request), so Defendants were able to get certain limited items in, such as that Khattab was prevented from going to the practice as of May of 2020, that he was training a physician at his home after hours in violation of the suspension (which Khattab denied) and we were able to put into evidence an April 2021 letter Khattab himself wrote to the EDD when appealing Ibrahim's benefits, that included many false statements he could not escape.

No experts testified. Defendants only called three other RNs who worked at the practice, and their direct testimony lasted no more than 10 minutes each.

Fortunately, the jury came back in favor of all three defendants. Defendants submitted a memorandum of costs for over $25,000, and Plaintiff has since filed a motion for new trial, which remains pending.

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**$1,152,720.16**
**Yolanda Veliz v Marsaley Williams**

**CCTLA members Karill Tarasenko, Tarasenko Law Firm; and Kellen Sinclair of Stawicki Anderson and Sinclair,** obtained a verdict of $1,152,720.16 for their client Yolanda Veliz.

The case was tried by Tarasenko and Kellen Sinclair; the carrier was Liberty Mutual, and the defense firm was Brember Whyte Brown & O'Meara (Reno office) and defense counsel were Karen Wagner and Karen Baytosh, although Wagner ended up trying the case herself, because for some reason, Baytosh didn't show up at trial.

**Case Summary:**

On Nov. 10, 2000, Veliz and her fiance were sitting in their Honda Pilot at the light at the intersection of Riley and Sutter streets in Historic Folsom. A video from a nearby security camera shows a pickup truck ready to make an unprotected left turn. By law, he had to turn on his blinker, enter the intersection while the light is green or yellow, and then either wait for a clearing to turn or wait until the light turns to red, because once he was in the intersection and all light phases are red, it's safe to go.

The pickup truck driver does just that, waiting for a red light, but the last car coming down Riley runs the light and t-bones the pickup. The pickup is then lifted off the ground and comes down partly on the hood of the Honda Pilot. The Honda sustains frame damage, and the driver's seat breaks loose, resulting in Veliz's knees getting forcibly jammed into the dashboard when the hood of her car crumbles. Her claim was against the driver who ran the red light and t-boned the truck. The defendant, in turn, was blaming the driver of the pickup truck, saying that driver failed to yield to her.

When Veliz gets out of the car, she is in severe pain and cannot put weight on the left knee. Her fiance (a car mechanic) also testified that he moved the Pilot after the crash and the seat brackets had busted, resulting in the driver's seat sliding back and forth freely.

Veliz underwent surgery within three months for a Hoffa's Pad injury to the knee, and during the surgery, the doctor arthroscopically noticed a lateral meniscal tear, which he opined was traumatically caused because had it been frayed, the MRI would have picked it up. The fact that the MRI missed

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the meniscal tear was itself proof of a recent, traumatic origin for the meniscal damage which was resected through a partial meniscectomy.

A meniscectomy results in increased contact between the femur and tibia, which over time will cause early onset arthritis and will require a knee replacement if the life expectancy is long enough, in this case, 36 years. Plaintiff's life care plan was for $520,000; the defense's life care plan said $283,000. Defense had Dr. Younger testify that Plaintiff would not require a total knee replacement in the future.

Defendant denied running the light, and defense hired recon/biomechanic Nicholas Yang to testify that the forces the knee experienced were less than sitting down, standing up, bending, walking, and taking stairs. The studies the biomech relied on cautioned that the study could not be used to assess natural knees because it was a study of implants, and the study had exactly one female subject. As such, the study had neither internal nor external validity and was as junk science as it gets. It also did not consider direct contact to the knee, such as a dashboard strike.

Defense spent probably $120,000 on experts, including a psychologist to testify about the psychology of running red lights, or the "Dilemma Zone" as he called it. Basically, the Dilemma Zone is a concept that is used to make intersections safe, to study if drivers struggle with the decision as to whether try to make the light or to brake and risk being rear-ended if they brake too abruptly. But the Dilemma Zone is about designing safer intersections, not about justifying red light running or negligent driving.

There was no demand for expert disclosure, and as a result, it was sort of a wild-west trial with the defense adding an expert a day as they became increasingly desperate. Each day they would hand Plaintiff's attorneys an updated witness list that had some new name on it. They did manage to get depositions of Younger and Yang, but they had to cross cold the rest of the defense witnesses, which was actually a refreshing experience.

Plaintiff's experts were Dennis Meredith for ortho, R.W. (Bob) Snook for recon, and Erika Browning for life care planning.

Tarasenko said they ended up with a very attentive and diligent jury, and they were very generous with their time in the hallway, post trial, and when explaining their thought process. They found Snook far more credible than the defense accident recon/biomech, who really didn't recreate anything, could not offer an opinion on whether defendant ran the red light, and basically just played around with software to make the vehicles end up at their stop points to come up with his opinions, followed by ignoring the fact that the seat broke and simulating a 4 delta-V crash with no contact between the knee and the dashboard.

He said they were able to show that the defense was constantly feeding the jury irrelevant information, such as comparing forces in daily living through deceptive statistics and through interesting, but worthless, "Dilemma Zone" testimony that was nothing more than a psychologist attempting to justify running a red light.

Tarsenko said that this is four consecutive excess verdicts against Liberty Mutual now; they never learn.

## SETTLEMENTS

### $11,000,000 settlement on a $1,000,000 policy
### Andreeva v. Malibu Behavioral Health Services, Inc. - County of Riverside
### Dependent Adult Abuse and Wrongful Death

**CCTLA members Kirill Tarasenko, Tarasenko Law Firm; and Bryan Nettels, Ognian Gavrilov and Eli Cohen, Gavrilov & Brooks,** represented the mother of decedent Sasha Bukreyeva, who sued for her daughter's wrongful death in a live-in drug rehabilitation facility.

Her daughter had checked herself into the six-room Riverside facility, seeking help for her mental health struggles and for alcohol. The facility had assessed her as being unable to care for herself to the point that she met the "Dependent Adult" standard, resulting in a cause of action for dependent adult abuse, in addition to wrongful death.

Defendant Malibu is a treatment facility that provides "24-hour residential non-medical services to adults who are recovering from problems related to alcohol, drug, or alcohol and drug misuse or abuse, and who need alcohol, drug, or alcohol and drug recovery treatment or detoxification services." [Health & Safety Code § 11834.02]. Such treatment facilities are regulated under Title 9 of the California Code of Regulations.

Sasha tested negative for drugs upon entry, and apparently did quite well in the facility for the first month or so. Within about a month of her stay, the facility admitted a male resident with a very serious heroin-dependence problem. Almost immediately, that male resident was seen on camera kissing Sasha, for which both were reprimanded.

The facility had rules against relationships between residents, but despite Malibu's resident records showing the male resident was caught in her room many times during the course of the eight months, the facility never took action, other than continually documenting that he was warned to stay out of her room or she was warned to stay out of his.

Almost immediately, Sasha's drug screens began showing up positive for 6-Momoacetylmorphine (6-MAM), morphine, and other opioids. 6-MAM is how heroin shows up on drug tests as it is rapidly deacetylated. Despite every page of Sasha's medical records warning facility staff that she was allergic to morphine, the facility still failed to take action to send her to a higher level of care or to detox her. Soon after, she began showing signs of dependence and withdrawal, indicating addiction to opioids, despite entering the facility for alcohol and having never used opioids before entering the "sober living" facility.

The allegation was that the facility failed to refer her to

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higher levels of care or to treat her appropriately because that would mean losing the $25,000 per month the facility was making for keeping Sasha there. In total, the facility ended up charging insurance more than $760,000 for Sasha's nine-month stay at the facility before her death.

**Sasha's Death at the Malibu Facility**

Sasha passed away in the middle of the night on Sept. 5, 2020. Hours before her death, the night nurse had conducted a room check and located Sasha in the male resident's room, in his bed, but did not do a breathing/welfare check to see what was going on with her. Instead of sending Sasha to her own room, the nurse went downstairs. Had she followed protocol, the night nurse would have realized that Sasha was not asleep, but was actually unconscious and at risk of expiring due to a heroin overdose. With no Naloxone available to save her life, Sasha died from an overdose.

**Narcan/Naloxone**

DHCS provides this opioid overdose reversing medication to facilities such as Malibu, free of charge, through the Naloxone Distribution Project. Had the facility had the life-saving medication on hand, there is a greater than 90% probability that Sasha's life would have been saved. Yet, the facility failed to even have Naloxone on site despite opioid abuse being rampant within the facility, and as a result, a very preventable and foreseeable death was not prevented.

**How this Became an Open Insurance Policy Case**

Defendant Malibu is insured through Allied World Surplus Lines Insurance Co. with a liability limit of one million dollars. Following Sasha's death, and with liability reasonably clear, that policy limit should have been tendered. Instead, litigation commenced, discovery was exchange, and depositions were taken. The defense at that stage was handled by Tyson Mendes.

On behalf of the plaintiff, a Policy Limit Demand and CCP §998 Offer to Compromise were sent out. The demand and the CCP 998 offer were to expire on the same day, Friday, July 28, 2023. On July 27, 2023, Mendes responded to the demand, stating that Defendant would accept the Policy Limits Demand, but added the following language: "This settlement agreement requires plaintiffs to agree to confidentiality and non-disparagement."

Plaintiff responded that Mendes's response to the demand was not an acceptance, but rather a counter-offer and rejection. Defense still had until expiration of the demand and 998 to accept by simply signing the 998 offer, but did not do so, allowing the demand to expire.

Defense counsel, as agents of the insurance carrier, rejected the settlement demand by interposing material terms to the settlement agreement, as stated in their response to the demand. It is axiomatic that any response to a demand that holds itself out as an "acceptance," but carries with it significant tax implications, is not an acceptance, but rather a counter-offer and rejection. And the tax implications to Plaintiff are significant indeed – confidentiality clauses carry with them major tax ramifications.

In the well-known case colloquially known as the "Dennis Rodman Case," the U.S. Tax Court ruled that a confidentiality clause in a personal injury settlement made 40% of the settlement taxable as ordinary income. See *Amos v. Commissioner*, T.C. Memo 2003-329 (Dec. 1, 2003). The recipient of the one million dollar confidential settlement would have to pay both federal and state taxes on the $400,000. Further, attorney fees are non-deductible in that scenario as not falling within any tax exception. No one can credibly argue that major tax implications added as a condition of settlement in response to a demand are somehow immaterial terms and should just be ignored as a qualified acceptance is a new proposal (Civil Code §1585).

After dozens of depositions, motions and protracted litigation, including teams of probate counsel, the matter finally resolved for $11 million once the carrier was forced to recognize the exposure their insured was facing on what they had allowed to become an Open-Policy case.

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**Confidential Settlement**
**Booth v. Folsom Investors, LP, dba Empire Ranch Alzheimer's Special Care Center, et al.,**
**Elder-Neglect/Wrongful-Death**

**CCTLA member Catia G. Saraiva, Esq., of Dreyer, Babich, Buccola, Wood, Campora, LLP,** obtained a confidential settlement for Alexander Booth, the son of, and the only heir to, the decedant in this elder-neglect/wrongful death case. Mediator was the Honorable Richard Silver, of JAMS. Defendant's counsel was Rima Badawiya, Esq., and Christopher Choi, Esq., of Lewis Brisbois Bisgaard & Smith, LLP.

The case resulted from the choking death of George Booth, a 73-year-old dementia resident, who was dependent on Folsom Investors, LP, dba Empire Ranch Alzheimer's Special Care Center's Resident Care Facility for the Elderly (RCFE), for most of his activities of daily living, including his safety, supervision and well-being.

At the time of admission, Booth suffered from Alzheimer's dementia, with severe loss of intellectual and cognitive functions sufficient to interfere with his ability to communicate, perform activities of daily living (including an inability to feed himself), or administer medications, as noted in his LIC 602 Physician's Report.

Empire Ranch advertised that it specialized in and was licensed to provide "memory care" to residents suffering from dementia, and in its Plan of Operation and Advertising Materials for dementia facility, Defendant indicated: "Meals: Three delicious meals served daily in a supportive dining environment. . ."

Pursuant to the California Code of Regulations (CCR), Title 22, §87464(d) Empire Ranch did not need to accept a particular resident for care. However, Empire Ranch knew, that pursuant to §87464(d) if Empire Ranch chose to accept a particular

*Continued on page 39*

# Member Verdicts & Settlements

*Continued from page 38*

resident for care, Empire Ranch was responsible for meeting the resident's needs as identified in the pre-admission appraisal (§87457) and providing the requisite services either directly or through outside resources.

Per the regulations governing RCFE, Empire Ranch was mandated to perform a pre-admission appraisal of Booth that was complete, accurate and truthful and performed in a competent manner.

At no time prior to Booth's admission was his "responsible party" provided with any pre-admission assessment(s) nor any care plan(s) for completion, review, input, approval or signature. The admission agreement Empire Ranch provided to the "responsible party" indicated Booth was a level 3 care, with monthly rate totaling $9,975, on top of a $2,500 admission fees, and that he would be served three meals in Defendants' dining rooms.

Despite Defendant's representations that Booth was going to receive meals in one of their dining rooms, Empire Ranch "neglected" him pursuant to the definition set forth in Welfare & Institutions Code § 15610.57 when Defendant failed to exercise that degree of care that a reasonable person in a like position would exercise (Welfare & Institutions Code § 15610.57(a)(1)); "abandoned" Booth (Welfare & Institutions Code §15610.05; and failed to protect Booth from health and safety hazards (Welfare & Institutions Code § 15610.57(b)(3)), by serving him dinner (beef brisket) and leaving him alone in his room, resulting in Booth choking to death on food bolus.

Through extensive discovery, Plaintiff learned that within an hour of receiving the faxed LIC 602 Physician's Report, which indicated in pertinent part that Booth lacked capacity of self-care in multiple functions, including inability to feed himself, Empire Ranch accepted Booth as a new resident and was already emailing the "responsible party" the pricing, totaling $9,975 per month for a Level 3 Care.

Empire Ranch's "person most qualified" conceded in deposition that it would be a violation of the facility's policies if the administrator and health service director did not review the assessment and resulting service plan with the resident's responsible party prior to admission, and if there was any confusion or ambiguity concerning the physician's LIC 602 report, the administrator or health service director was expected to call the physician for clarification. The PMQ conceded that it would be inconsistent with the company's policies for the administrator or health service director not to seek clarification by contacting the physician concerning his/her physician's report.

Empire Ranch denied any wrongdoing and that Booth was neglected in any way during his short seven-day residency, and claimed they were doing the best they could due to COVID-19 pandemic.

Defendant claimed Booth had no difficulties eating any of his prior meals/snacks in his room the first days of his residency; that Empire Ranch's staff did not observe any signs indicating he required any assistance/supervision during mealtimes or was at risk of choking; that the previous hospital and RCFE facility failed to inform Empire Ranch of Booth's choking incidents or that he was a choking risk; that in February 2021, all of the residents were being served meals in their rooms due to COVID19 protocols; that Booth was being quarantined as a newly admitted resident per the mandated COVID19 protocols and therefore Empire Ranch was entitled to immunity under the COVID-19 countermeasures PREP Act. Defendant also claimed that Booth's death was unrelated to any alleged short staffing and that they had to close their dining rooms due to the COVID-19 pandemic.

However, through extensive discovery and 18 depositions, Plaintiff learned that Defendant had a long track record of understaffing, resulting in the Dept. of Social Services (DSS) issuing multiple citations, ultimately revoking the facility's license in 2017, with said revocation stayed while Empire Ranch was granted a probationary license subject to several limitations and conditions.

The 2017 license revocation stemmed from the facility having staffing shortages. Plaintiff also learned through discovery that prior to the COVID pandemic, defendants would close one of the two dining rooms to help staff because it was hard for the caregivers to get residents dressed and ready for meals without enough staff.

Moreover, during the week of Booth's admission, Empire Ranch admitted five additional residents into its facility, but no agency or temp staff was called for help on three of the seven days Booth was at the facility. Similarly, and in violation of its own policies, although Booth was to be placed on 72-hours' alert charting by the LVNs, to monitor his ADLs, behaviors and care needs, the progress notes produced by Defendant showed the LVNs did not implement the 72-Hours' Alert Charting.

Following Booth's death, DSS issued two Type A deficiencies, citing Empire Ranch for not ensuring the Booth's pre-admission appraisal was completed / accurate utilizing all medical information / records from resident's hospitalization, which posed an immediate health, safety and personal rights risk to resident in their care.

DSS also cited Empire Ranch for failing to provide basic services when it failed to provide assistance with residents' activities of daily living, which posed an immediate health, safety, and personal rights risk to residents in care.

As a result of these substantiated deficiencies, DSS issued a civil penalty, per Health and Safety Code 1569.49, in the amount of $14,500 ($15,000 less $500 previously issued on June 24, 2021). Defendants appealed the DSS' citations and civil penalty; however, DSS denied the appeal.

After losing their appeal, Empire Ranch closed due to change in ownership. Thereafter, in September 2022, Defendant entered into a stipulation and waiver with the DSS, wherein Defendant's license to operate a RCFE was revoked, and Defendant was precluded from applying for any new license or certification to operate any facility licensed by the DSS, including but not limited to, a RCFE for a period of three years from the effective date of the stipulation.

# At the Intersection of Personal Injury and Bankruptcy

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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, or Alla Vorobets at allavorobets00@gmail.com**

## 2024

**Tuesday, Dec. 10, Noon**
Q & A Problem Solving Lunch - CCTLA Members Only - Zoom

## 2025

**Tuesday, Jan. 14, Noon**
Q & A Problem Solving Lunch - CCTLA Members Only - Zoom

**Wednesday, Jan. 29, 2:45-6pm**
42nd Annual Tort & Trial Program: 2024 in Review – A Joint TLA Webinar Event
More details to come soon

**Tuesday, Feb. 11, Noon**
Q & A Problem Solving Lunch - CCTLA Members Only - Zoom

**Tuesday, Mar. 11, Noon**
Q & A Problem Solving Lunch - CCTLA Members Only - Zoom

**Friday, Mar. 14 -15**
**CAOC/CCTLA Napa Sonoma Travel Seminar - The Meritage Resort**
$360 CAOC/CCTLA Attorney Member
Program topics: To Be Announced
*Room rates: $369 per night / Deluxe Suite $569 per night*

**Tuesday, Apr. 8, Noon**
Q & A Problem Solving Lunch - CCTLA Members Only - Zoom

**Tuesday, May 13, Noon**
Q & A Problem Solving Lunch - CCTLA Members Only - Zoom

**Tuesday, June 10, Noon**
Q & A Problem Solving Lunch - CCTLA Members Only - Zoom


# CCTLA Calendar of Events