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The LITIGATOR

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Inside This Issue

We Can, and Do, Make A Difference

DAN O'DONNELL
CCTLA President

Every day, the news brings us stories about the difference attorneys make in our world through righteous litigation. From cases that advocate equality to those curtailing police brutality, attorneys can and do change things for the better. We know that CCTLA contributes to these changes by providing a network for members to share ideas and strategies with one another to optimize our representation of plaintiffs. But you may not know that CCTLA also makes a difference by participating in our community to help make it a better place.

The annual Allan Owen Spring Reception and Silent Auction is one example of CCTLA's commitment to bring change to Sacramento. This yearly event raises funds for the Sacramento Food Bank & Family Services through contributions from CCTLA members and the vendors who serve our practices and through a silent auction of items donated by the same. A CCTLA committee, chaired by Margaret Doyle, spends the first part of each year planning and executing this fabulous fete. Please join us on May 21 at 5 p.m. at the beautiful home of Noel Ferris and Parker White (1500 39th Street, Sacramento 95816), to mingle with your fellow CCTLA members and honored guests and to help alleviate hunger in Sacramento.

CCTLA recently stood side-by-side with the Jewish Federation, the NAACP, local politicians and other community organizations, standing up against hate crimes by lending our presence at a rally on the west steps of the Capitol on March 9. The rally followed an incident at the University of California, Davis, where a Jewish fraternity was vandalized with a pair of swastikas and after a resident in Sacramento posted American and Israeli flags with swastikas at his home. As attorneys, we can make a difference outside of the courtroom by joining our community in taking a public stance against discrimination.

With the impending publication of Harpers Lee's second novel this summer, attention is being renewed in her 1960 Pulitzer Prize winning book *To Kill a Mockingbird*. In *To Kill a Mockingbird*, Atticus Finch's defense of a wrongly accused black man is a fictionalized illustration of the sort of power we, as attorneys, have to make a difference professionally. As an organization, the CCTLA network of colleagues and its educational resources helps us harness that power to make positive changes for our clients who have suffered personal injury or discrimination in the workplace. By giving back to the community, CCTLA and its members make a difference well beyond the boundaries of the courtroom.

Mike's CITES

By: Michael Jansen

Motions for Summary Judgment highlighted the advance sheets this quarter. The following are a couple of examples that should "appeal" to most of our members:

Wright v. State of California, January 30, 2015, 2015 DJDAR 1383 (233 Cal.App.4th 1218)

Wright was a correctional officer at San Quentin State Prison who lived on the premises in a rental unit owned by the State of California. Wright walked to work every day. One day as he neared the bottom of the staircase just outside his apartment, a concrete step collapsed beneath him and he fell. Wright filed a claim for Workers' Compensation benefits and received $137,000. Shortly thereafter, Wright went out on early disability retirement from his job.

Wright then filed a claim for personal injuries against the State of California. The state moved for summary judgment on the grounds that workers' compensation was his exclusive remedy. The state contended that the "going and coming rule," (Zenith National Insurance Company v. Workmen's Comp. Appeals Bd. (1967) 66 Cal.2nd 944, 946-947) did not apply to bar Wright's work comp claim. The state argued that the "premises line rule" (Lefebvre v. Workers' Comp. Appeals Bd. (1980) 106 Cal.App.3rd 750) applied because he had entered his employer's premises, and therefore, Wright's exclusive remedy was workers'comp.

Wright argued that the "bunkhouse rule," (Vaught v. State of California (2007) 157 Cal.App.4th 1538, 1545), Associated Oil Company v. Industrial Accident Commission (1923) 191 Cal. 557) precluded his workers' comp claim, and thus the summary judgment by the state should be denied.

The "bunkhouse rule" holds that when an employee is injured while living on the employer's premises, the worker cannot bring a work-comp claim. The trial court granted summary judgment on the grounds that Wright's exclusive remedy was Workers' Compensation because Wright had entered the premises of his employer. The "premises line rule" was relied upon by the trial court because, at least in the trial judge's mind, the "premises line rule" was objective and fair.

The appellate court reversed. The appellate court felt that there was at least a triable issue of material fact whether Wright was acting within the course and scope of his employment at the time he was injured, and therefore the MSJ should have been denied. If the bunkhouse rule applied, Wright would have been out. However, there was a triable question of fact whether his tenancy in the state-owned housing was employment-related or not. The dual-capacity doctrine holds that if an employer occupies another relationship toward its employee that imposes a duty different from those arising from the employment relationship, the employer can be liable in tort for a breach of that duty.

State of California, Department of California Highway Patrol v. The Superior Court of Orange County Mayra Antonia Alvarado (2015) 60 Cal.4th 1002

The California Supreme Court rendered this decision because the case provided a novel question never before decided in California: ***When may an employee of a private contractor also qualify as a special public employee for purposes of vicarious liability?***

A tow truck driver hit and injured plaintiffs on an Orange County freeway. Plaintiffs sued the tow truck driver, who was an independent contractor, the California Department of Transportation (Caltrans), the Department of the California Highway Patrol (CHP) and a local transportation agency, Orange County Transportation Authority (OCTA), as well as California Coach Orange, Inc., the field supervisor and program management, who had oversight of contractor service quality under the Freeway Service Patrol (FSP) Act. The CHP moved for summary

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By: Steve Davids, CCTLA Board & Co-Editor, *The Litigator*

The use of video and other litigation-supported visual demonstrations are becoming more common, even in "smaller" cases. This is a very basic primer on some of the cases to consider.

1. People v. Duenas (2012) 55 Cal.4th 1

In a murder trial for the death of a police officer, the District Attorney put into evidence (over defendant's objection) a four-minute animation produced by biomechanical engineer Carley Ward (and her son) to illustrate Ward's testimony of how the shooting occurred. **The animation was properly admitted.**

The trial judge gave a cautionary instruction before the animation was played: "What you are going to see is an animation based on a compilation of different expert opinions. This is similar to the expert using charts or diagrams to demonstrate their respective opinion. This is not a film of what actually occurred or an exact re-creation. It is only an aid to giving you a view of as to the prosecution version of the events based upon particular viewpoints and based upon interpretation of the evidence."

This wasn't an animation in the sense of seeing people or vehicles moving. It depicted the street scene and the figures, but in three-dimensional fashion, and the "camera view" moved around. It documented the gun shots, entry wounds, and other aspects of the crime scene.

Citing out-of-state authority, the Supreme Court created a distinction between animations and simulations. Animation illustrates the expert's testimony. It is a demonstrative aid that does not draw conclusions. Simulations contain scientific principles requiring validation. Data is entered into a computer, and conclusions are reached. Animation is an aid, simulation "is itself substantive evidence."

An animation has to be a "fair and accurate representation" of what it depicts. (People v. Hood (1997) 53 Cal. App.3d 965.) A simulation requires a preliminary determination that any new scientific technology must have obtained general acceptance in the relevant scientific community, under Kelly-Frye. (See Hood.)

The parties in the People v. Duenas case agreed this was an animation, meaning it just needed to be a fair and accurate representation of the evidence. The "relevant question is not whether the animation represents the underlying events of the crime with indisputable accuracy, but whether the animation accurately represents the *expert's opinion* as to those events." (Duenas, supra., at page 21.) The expert opinions were based on physical evidence at the crime scene. Tellingly, the defendant's objection was really to the conclusions reached by the experts, based on the evidence, and not the accuracy with which the animations depicted those conclusions.

Some of the events depicted in the animation could have been speculative, but the defendant did not suggest any way in which these potential discrepancies could have altered the jury's view of the key issues: premeditation and deliberation.

The Supreme Court also rejected the view that the animation confers an air of scientific certainty to the animation. The Supreme Court believed the jury understood the animation's limited role, given the disclaimers provided by Ward and the trial court.

2. The key civil case: DiRosario v. Havens (1987) 196 Cal. App. 3d 1224

This was an intersection accident where a vehicle ran a red light and struck a child pedestrian in a crosswalk. The child had a red sweater, and was going left to right in the nearside crosswalk (see photo below).

The plaintiff did a video re-enactment of the collision, and the defense

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Animation Admissibility

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objected that it did not conform to the known facts:

A. The accident occurred on October 31, 1979, but the videotape was made in June of 1980. The sun's position on the horizon was different on the day of the accident than on the day of the videotape. (Plaintiff's expert established that the sun was above the angle of the roof of the defendant's car under either scenario.)

B. The videotape depicted a five-foot woman crossing the street, while the child was four feet tall. The district court did not comment on this discrepancy.

C. The traffic was light on the day of the accident, whereas the videotape showed heavy traffic. The district court said this actually favored the defendant, because it made the pedestrian harder to see. As a result, it was not a factor that supported inadmissibility of the video.

D. The lane markings depicted in the videotape were different from those existing the day of the accident. The District Court said this would not have affected visibility.

E. The camera was fixed toward the intersection. But, as we all know, the human eye does not view things in the same manner as a fixed camera. Drivers are constantly shifting their attention. The defense therefore argued the videotape did not accurately depict what the defendant could have or should have seen. The district court decided that the video showed what the defendant would have been able to see when he looked straight ahead.

F. Because the jury already knew that the child was wearing red, they were primed (pre-alerted) to look for someone in red crossing the street. Defendant Havens did not have the luxury of 20/20 hindsight when the accident occurred. The district court did not comment on this issue.

Most experts in this area make a big issue of pre-alerting, and it is a problem. You can tell the jury that it has to remember that the driver did not know what the jury knows: a collision was about to take place.

It is very challenging to get the jury to somehow put aside what it already knows. Your expert has to be ready to talk about the dangers of pre-alerting, and how it can skew perceptions and reactions.

The DCA rejected the above defense criticisms, because the videotape was at least "substantially similar" to the actual conditions. (DiRosario, supra., at page 1231.) In fact, the conditions in the videotape were "virtually identical" to what happened at the time of the accident, and also "substantially identical": "The videotape showed an approach to the identical intersection from the same direction that [defendant] approached. The same model car was used. The lighting conditions were the same. The person in the crosswalk was wearing red, as was [the minor plaintiff]." (DiRosario, supra., at page 1232.)

"Admissibility of experimental evidence depends upon proof of the following foundational items: (1) The experiment must be relevant (Evidence Code 210, 351); (2) the experiment must have been conducted under substantially similar conditions as those of the actual occurrence (Andrews v. Barker Brothers Corp. (1968) 267 Cal.App.2d 530, 537 … and (3) the evidence of the experiment will not consume undue time, confuse the issues or mislead the jury (Schauf v. Southern Cal. Edison Co. (1966) 243 Cal. App.2d 450, 455.) [Para.] In the case of experimental evidence, the preliminary fact . . . necessary to support its relevancy is that the experiment was conducted under the same or similar conditions as those existing when the accident took place. The standard that must be met in determining whether the proponent of the experiment has met the burden of proof of establishing the preliminary fact essential to the admissibility of the experimental evidence is ***whether the conditions were substantially identical***, not absolutely identical. (Beresford v. Pacific Gas & Elec. Co. (1955) 45 Cal.2d 738, 749 …. (Culpepper v. Volkswagen of America, Inc. (1973) 33 Cal.App.3d 510, 521 … see also People v. Roehler (1985) 167 Cal. App.3d 353, 387.)" (DiRosario, supra., at page 1231.)"

Even if there had been legal error, it was harmless, because the video depicted what other witnesses had testified to. (DiRosario, supra., at page 1233.)

3. Admissibility of Photographs (DiRosario, supra., at pages 1232-1233)

"In ruling upon the admissibility of photographs, the trial judge has two primary duties; one, to determine whether the photograph is a reasonable representation of that which it is alleged to portray, and, second, whether the use of the photograph would aid the jurors in their determination of the facts of the case or serve to mislead them." Within these

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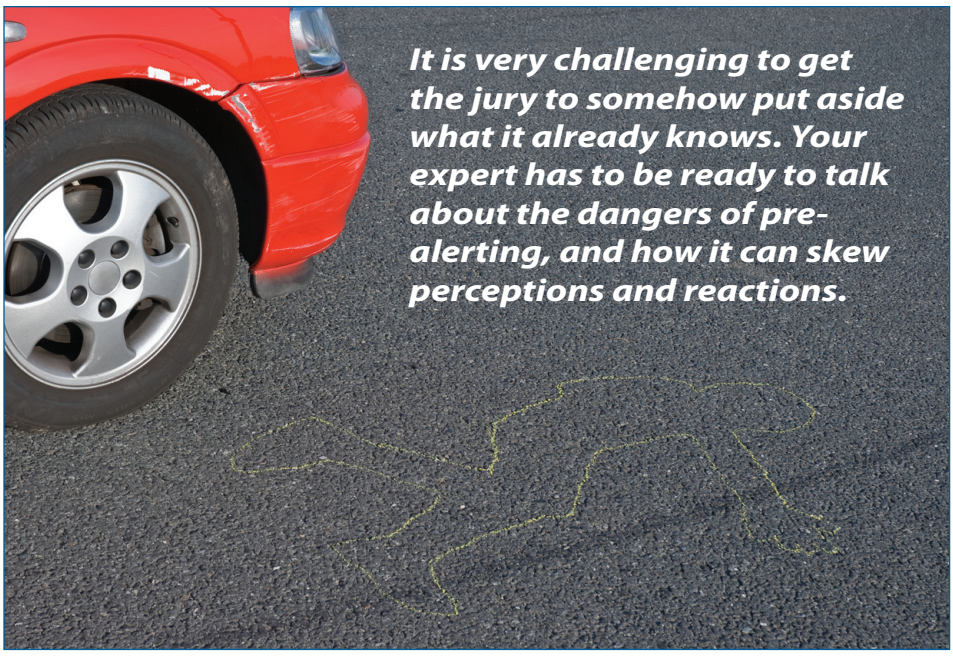

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Animation Admissibility

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limits, there is ample authority holding that the physical conditions which existed at the time the event in question occurred need not be duplicated with precision nor is it required that no change has occurred between the happening of the event and the time the photograph is taken. (18 Cal. Jur.2d, § 227, p. 708, and authorities cited therein.) (Anello v. Southern Pacific Co. (1959) 174 Cal.App.2d 317, 323; see also Hayes v. Emerson (1930) 110 Cal.App. 470 [294 P. 765].)"

SOME RANDOM CONCLUDING THOUGHTS

I hope that this brief discussion will at least arm you with questions for the opposing expert, and for a motion *in limine*. Here's what I hope is an interesting hypothetical. A disabled vehicle was stopped straddling the right edge (fog) line and the slow lane on a major freeway during rush hour. More than one vehicle was able to drive around the stopped vehicle. The defendant struck the stopped vehicle at freeway speed, causing catastrophic injury. The case was against the involved government entity and the driver.

The entity's forensic photographer did a "visibility study" using the same makes and models of the involved vehicles. But the camera field of view was very constricted: neither the driver's side view mirror nor the rear-view mirror was fully visible. The camera showed only about half of the rear-view mirror. You could see the top of the dashboard, but that was about it. The instrument panel was not depicted.

These are all things that a reasonable driver has to pay attention to during driving. The effect of the video was to focus the viewer's vision on the stopped vehicle ahead, so that the jury could conclude that the driver was clearly negligent for striking the stopped vehicle.

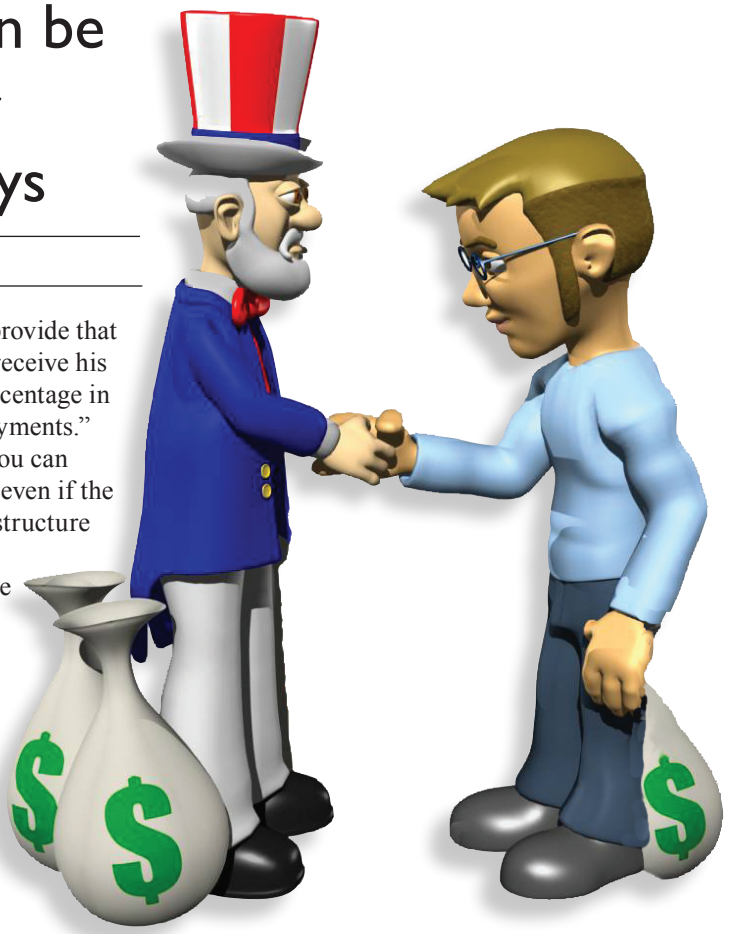
In my admittedly limited experience, judges tend to let in these kinds of visibility studies even if they are not "substantially identical" to the prevailing conditions. This is because DiRosario was pretty forgiving of the discrepancies in that case. The fall-back position that courts and attorneys take is that the video shows what was there to be seen, if the driver had been looking straight ahead. But I submit it is very unrealistic to expect a driver to be staring obsessively straight out the windshield. Drivers are supposed to "attend" to various things in their environment, including checking both rear- and side-view mirrors on a regular basis.

The law definitely favors the admissibility of photos, video and re-enactments, as long as they are at least "substantially identical" to conditions. The word "substantially" allows parties and trial courts very wide leeway in admitting or rejecting photographs or videos.

Parties may conclude that the risk of reversal on appeal is relatively small if the photograph or video is admitted. Exclusion of this kind of evidence may be more susceptible to reversal, as long as "substantial" identity to prevailing conditions can be shown.

Structured settlements can be valuable flow tools for contingency-fee attorneys

By: Stephen J. Dougan, Esq.



Most trial attorneys know that structured settlements can be a valuable tool for ensuring the future financial support of injured clients. However, most counsel never consider structured settlements for the purpose of protecting their own financial future.

Have you ever resolved a case wherein you fought zealously for years to make a substantial recovery—only to have at least 50 percent of your efforts evaporate to the "tax man"?

In Childs v. Commissioner of Internal Revenue, 103 TC 634 (1994), 89 F3d 56 (11 Cir. 1996), the U.S. Tax Court held that contingency-fee attorneys are not considered to have received income in the year a case is resolved if the fees are paid periodically in the future pursuant to an annuity contract. By virtue of this ruling, the tax court created a benefit for *contingency-fee* attorneys that no other legal practitioners (or taxpayers, for that matter) can utilize; i.e., the ability to *structure legal fees & defer taxes on earned income*.

Accordingly, a substantial fee can be paid out over several years, thus leveling a practitioner's "cash flow," or income stream. For example, a fee of $100,000 which would only net counsel $50,000 after taxes can be paid out over four years at roughly $4,000 a month with taxes being paid on the month amount versus the lump sum. Thus, it allows counsel to plan his cash flow to meet periodic needs instead of creating the feast-or-famine phenomenon of a *contingency* practice.

To consider structuring fees to level out your cash flow, here are some very important things to know and do in advance:

1. Don't wait for the case to resolve prior to considering a fee structure. If so, it's probably too late.

2. All *contingency-fee* agreements should contain boiler-plate language contemplating periodic payments for all cases. You don't need to structure all fees, but including the language always gives you the option. For example, the fee agreement should provide that "the attorney may receive his (her) applicable percentage in cash or periodic payments."

3. Know that you can structure your fees even if the client elects not to structure her fees.

4. Annuities are not the only way to structure periodic payments, but they are tried and true and generally easy to set up with the insurance carrier funding the settlement.

5. Once the payment structure is set, it cannot be altered.

6. Only *contingency fees* can be structured, and generally in situations where the case is resolved prior to judgment. (However, there are some avenues that can be employed to structure post judgments funds.)

7. Work with your financial planner and CPA in advance to make sure you understand this vehicle.

8. Consider the status of your practice. Are you a solo practitioner or in a firm? If you leave the firm, who will own the fee structure? This issue needs to be resolved in advance.

9). The Mediation Agreement and Settlement Release must contain special language confirming your election that the attorney's fee will be structured. In addition, along with the settlement release, you will need to execute structure documents that will be provided by the insurance company tendering payment. You should consult with your financial planner or broker.

10. Finally, and probably most importantly, you *cannot* ever take possession of any funds you wish to structure. If you take receipt of settlement funds—even by placing the same in an attorney-client trust account—you are considered to have "constructive receipt" of the funds and cannot structure the attorney fee.

Have you ever resolved a case wherein you fought zealously for years to make a substantial recovery—only to have at least 50 percent of your efforts evaporate to the "tax man"?

Fee structures considered in advance and executed properly can be an excellent tax-planning tool for *contingency-fee* counsel, leveling out cash flow from year to year. As with most things we encounter in the legal practice, there is no right answer as to whether fees should be structured. However, it is important to at least consider structuring attorney's fees in substantial cases. As suggested above, this new tool can be used to improve your quality of life—and ward off the feast-or-famine phenomenon.

***

Stephen Dougan is a personal-injury practitioner who utilizes fee structures. He can be contacted at sjd@attydougan.com. All information contained herein should be verified and confirmed with CPAs and financial professionals.

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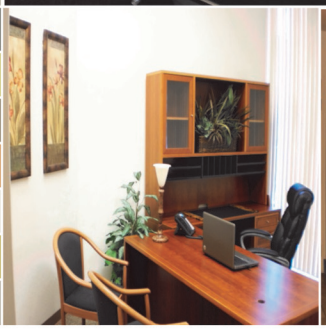

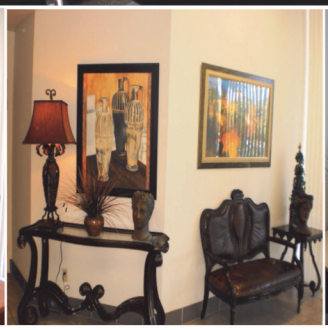

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Upfront explanation may eliminate Special Needs Trust malpractice claim

By: Daniel E. Wilcoxen

In Deborah Herting, etc. v. State Department of Health Care Services, a Sixth Appellate District case decided March 27, 2015, citable as 2015 Cal.App. Lexis 268, may have some importance to heirs of a decedent who, prior to death, was the recipient of Medicaid (Medi-Cal) funds because of the existence of a Special Needs Trust (hereafter SNT) from an earlier settlement.

I think it is imperative that when a SNT is created, to avoid a future malpractice case, the attorney must discuss with the relatives of the injured party the nature of a SNT. If the heirs of the beneficiary of a SNT are unaware of the rights of Medi-Cal to recover back sums paid for medical care and treatment from the SNT after the death of the owner, they can get very angry if they have to pay a large sum to the state. They probably would be unsuccessful in bringing an action against the lawyer but, to avoid the lack of knowledge, the Herting v. SDHCS case is mandatory reading.

The case dealt with the relationship between the SNT and the provisions entitling the state to recover amounts it has paid to provide assistance to the beneficiary of the SNT. Herting was the mother of, and the trustee of, the injured party, Alexandra and her SNT, respectively.

Before the death of Alexandra, a settlement was achieved for $3,175,000 as a result of extremely severe injuries arising from an automobile accident, rendering her a ventilator dependent quadriplegic. As a result of the settlement, after attorney's fees and costs, a SNT was created and funded with $1,425,000. The accident happened when Alexandra was 19 years old, in April of 2009. The SNT was created on February 1, 2011, and Alexandra died on January 19, 2013. Between February 1, 2013 and the date of her death, Medi-Cal paid $418,000 in health care costs. Mrs. Herting, the mother and trustee, filed for an accounting and was told she owed the $418,000 back to Medi-Cal. Mrs. Herting refused to pay the Medi-Cal bill, citing exceptions in 42 USC §1396p(d)(4)(A), which allegedly limited the department's right to recover from the **estate** of a decedent who received medical care while under the age of 55 years.

The Department of Health Care Services (DHCS) cited Probate Code §§3604 and 3605, which gave the DHCS priority over the funds for payment of any amounts remaining in the trust after the death of a SNT beneficiary.

As we all know, a SNT is a vehicle to allow an injured party who has sued and recovered funds to place said funds in the SNT, thereby making the beneficiary eligible for needs based programs such as SSI and Medi-Cal.

In this case, after the creation of the SNT, beneficiary Alexandra received $418,000 in Medi-Cal benefits.

Despite the fact that 42 USC 1396p(d)(4)(A) does in fact have an exemption for an individual who was 55 years of age or

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Special Needs Trust

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younger when the benefits were recovered, the court found that section only dealt with the estate of the decedent, not with the SNT. The court relied upon the guidelines set forth in Welfare & Institutions Code §14009.5, Probate Code §§3605, 3604, and California Code of Regulations, Title 22, §50489.9.

These statutes, when read together, establish the necessity of the applicants for the SNT to create a trust that establishes the rights in said trust that the Department of Health Care Services must be paid full value of all services rendered after the creation of the trust, up to the time of the death of the beneficiary as part of the mandates of the trust agreement. Thus, this mandate occurs prior to an estate being created by taking funds from the trust prior to the time the monies flow from the trust into the estate. Probate Code §3605(b) states in pertinent part:

> *"Notwithstanding any provision in the trust instrument, at the death of the SNT beneficiary or on termination of the trust, the trust property is subject to claims of the State Department of Health Care Services, the State Department of State Hospitals, the State Department of Developmental Services and any County or City in the State to the extent authorized by law as if the trust property is owned by the beneficiary or is part of the beneficiary's estate."*

It should be further noted that Probate Code §3604(d) requires that prior to the creation of a SNT, all claims to Medi-Cal must be paid prior to the creation of a SNT. It should be further noted that the Ahlborn theory of reduction of the Medi-Cal lien would not apply in the case of the death of the beneficiary, in that the Ahlborn theory in reducing the Medi-Cal lien depends on the creation of future medical care creating a value greater than the amounts received in the resolution of the case in that, upon death, there is no future care needed so the argument cannot be made.

California Code of Regulations, Title 22, Section 50489.9 states that a SNT, properly constituted, shields the trust assets **if** "the State receives all remaining funds in the trust, or respective portion of the trust upon the death of the individual or spouse, or upon termination of the trust, up to an amount equal to the total medical assistance paid on behalf of that individual by the Medi-Cal program."

In Herting, the Sixth District Court found that to be approved by the court, Alex's trust had to contain a pay-back provision to be in compliance with the federal and state statutes under which her eligibility for assistance was established.

Thus, it is important for us to speak to the parents or other relatives who would inherit the remainder of a SNT upon the death of the beneficiary of that trust to inform them that the various entities named in Probate Code §3605 (primarily Medi-Cal) will have a claim for full value of all amounts paid as against any assets of the trust that exist at the time of death. This could even include rights to ownership of real property if, for instance, a home is purchased for the beneficiary with the funds from a SNT.

If the heirs to the remainder of the SNT are not informed of this, they could be very surprised and charge the lawyer with malpractice for failing to inform them of the existence of this law. The attorney would no doubt win the case based on the fact that the clause is contained in every SNT but, to avoid the headache, explain it to the family.

***

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How to Avoid Having the Defense Use Medicare Rates for Future Medical Expenses Pursuant to Howell v. Hamilton Meats

By: Daniel E. Wilcoxen

We all ponder the situation of dealing with the defense attorneys who use Howell v. Hamilton Meats to suggest that in any lawsuit where the plaintiff will be eligible for Medicare benefits within 30 months of the date of the trial, they will attempt to state that any future medicals required can only be calculated at the Medicare payment rates. As we all know, those rates are extremely low; generally in the range of 10-15% of the billed amounts.

Such a Medicare rate reduction would be devastating to the total of future meds. As we all know from attending recent seminars on the subject, persons who receive benefits by way of settlement and/or trial within 30 months of their eligibility to receive Medicare benefits now must consider the creation of a Medicare set-aside to pay for any bills that are attributable to and/or caused by the injuries sued over.

Since Medicare is a secondary payor, Medicare has an interest in insuring that if an injured plaintiff receives compensation for past and/or future medical care, they are paid back for the past payments and a Medicare set-aside is created with the funds derived from the litigation to create a fund to pay for the injury-caused future care.

Medicare, being a secondary payor, will refuse to pay those medical expenses and thus the Medicare set-aside is to pay those expenses directly to the care providers. Those direct payments from the Medicare set-aside are not subject to reductions via contract such as is engaged in between providers and insurance carriers, or set pricing by Medi-Cal or Medicare.

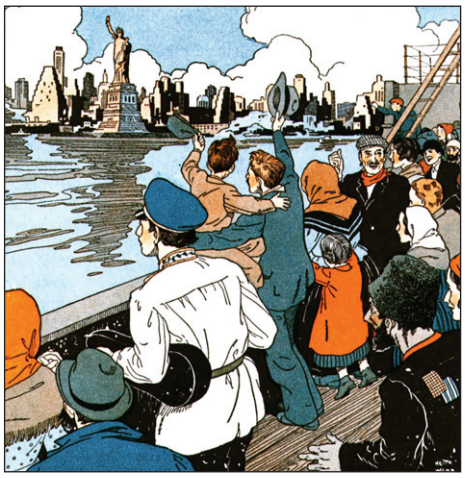
Thus, bills paid from the Medicare set-aside are paid at the billed rates. It is possible that those rates could be negotiated by the plaintiff; however, for purposes of argument at trial and/or during settlement negotiations it must be pointed out that the plaintiff will be paying those bills at the going billing rate of any and all medical providers. Thus, the defense's claimed Howell reductions to Medicare rates would be inapplicable, and the normal charges, not reduced by contract or Medicare rates would apply.

Therefore, plaintiff attorneys **must** file a motion *in limine* pointing out the fact that future meds will be charged at the market rates.

Editorial Opinion

SOME THOUGHTS ON THE CURRENT IMMIGRATION DEBATE

By: Steve Davids, Co-Editor, *The Litigator*

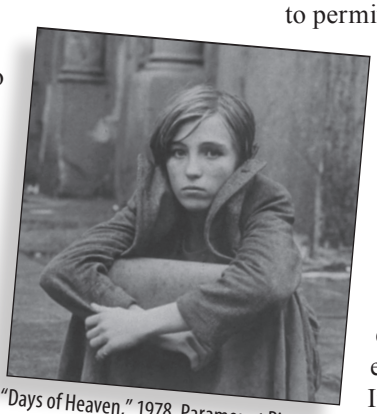


This is an editorial. The views and opinions contained herein do not reflect the views and opinions of CCTLA as an organization, nor its board members.

Criticisms, comments or opposing views should be sent directly to sdavids@dbbwc.com. Equal space can be provided in a forthcoming Litigator for other viewpoints, at the discretion of the editors.

Mona Golabek is a concert pianist who has written a book and a one-woman show about her mother, Lisa Jura. Lisa grew up in pre-war Vienna. Her father was a tailor, and Lisa's passion was playing the piano. One day in 1938, her beloved music teacher told her, tearfully, that he could no longer give her piano lessons. Under a new edict, it was *verboten* to teach Jewish children. "I am not a brave man," Professor Isseles said. "I am very sorry."

On *Kristallnacht* ("Night of Broken Glass") Nazi thugs laid waste to Jewish neighborhoods across Germany and Austria. Lisa's father was horribly beaten and humiliated. Her parents made an agonizing decision: they had friends who had an extra ticket on the *Kindertransport* ("Children's Transport") that eventually took 9,300 Jewish children from Nazi-occupied countries to England, by way of Holland. Her parents told Lisa she would have to go onboard, and leave her family. As she got on the train, Lisa's mother furtively slipped a card into her pocket that read, *"Von deine nicht vergessene Mutter"* ("From your Mother who will not forget you.")



"Days of Heaven," 1978, Paramount Pictures

All along the journey by train to Holland, and by boat to England, the children were helped by kind and generous people who supplied them with food and found them places to stay in England. The children had to work for wages in estates and factories, so as to compensate those who opened their homes to them. And they had to learn English very quickly. Lisa worked hard, hoping she could raise money to have her little sister, Sonia, come and join her in England.

"Days of Heaven," 1978, Paramount Pictures

The *Kindertransport* happened because England eased immigration restrictions for certain categories of Jewish refugees. "Spurred by British public opinion and the persistent efforts of refuge aid committees, most notably the British Committee for the Jews of Germany and the Movement for the Care of Children from Germany, British authorities agreed to permit an unspecified number of children under the age of 17 to enter Great Britain from Germany and German-annexed territories (namely, Austria and the Czech lands). [Para.] Private citizens or organizations had to guarantee to pay for each child's care, education, and eventual emigration from Britain. In return for this guarantee, the British government agreed to allow unaccompanied refugee children to enter the country on temporary travel visas. It was understood at the time that when the 'crisis was over,' the children would return to their families. Parents or guardians could not accompany the children." (United States Holocaust Memorial Museum, Holocaust Encyclopedia, "*Kindertransport*, 1938-1940", http://www.ushmm.org/wlc/en/article.php?ModuleId=10005260.) Priority was given to those whose parents were in concentration camps, and those who were orphaned and homeless. (*Ibid.*)

It is always dangerous to make analogies to the Holocaust, because of the enormity of the suffering and senseless death. But I agree with England's own John Donne that "Each man's death diminishes me / For I am a part of mankind." I am not comparing the Holocaust with the current debate about Mexican immigration, but common humanity makes us at least think about what we are doing, and not doing.

We are now hearing more and more stories that unaccompanied children (like the *Kindertranporters*) are filling up U.S.–Mexican border crossing facilities.

I try, futilely, to imagine what it is like. I envision a family living about an hour south of a border town. It could be Tijuana. But it has come under the despicable control of the gangs and cartels.

Two children, Erick and Marielita, live with their parents in a modest home. As things get worse, the children are rarely outside unless they are going to and from school. Both kids have heard about–and seen on TV–what it is like in the U.S. One day, Marielita does not show up at home on time. Hours later, she is found in a nearby dump, battered. She is young, strong, and filled with resolve, and she pulls through. But the parents have an agonizing decision to make.

Like the parents in 1938, these tortured souls come to the realization

that to love their children means, in these terrible times, having the courage to say goodbye. (I try to imagine what that must be like.) They scrape together everything they can for two bus tickets to the closest border town, and with the somewhat vague assurances of a distant relative that he will find someone (a *coyote*?) who will find someone else (another *coyote*?) to get them across the border. But will they avoid the human traffickers? It is better than almost certain death at the hands of the gangs at home. Marielita rests her head on her brother's shoulder, and he assures her that he will always protect her, no matter what. When they get off the bus, he holds her hand, and they look for the unknown distant relative who may (or may never) materialize.

I try to imagine what it is for parents to turn their children over to what could be a horrible fate. But hope is a truly remarkable thing. It even makes people take chances that most rational people would not dream of.

I try to envision Erick and Marielita working for a compassionate and caring farmer in south Texas or Arizona, who has them work in the fields but also sends them to a church program that teaches them English and enrolls them in American schools.

Kmiragaya / Dreamstime.com

But I also envision them in a detention facility, living as prisoners, and not even having each other for company, since boys and girls are separated. They have no constitutional rights of Americans, and can be "detained" literally indefinitely. I can also envision them never even making the journey north, being stopped and stalled in Tijuana, desperate to see their parents again, but despairing that a reunion may never happen. And I don't want to envision what might happen if the human traffickers latch onto them.

There is no *Transporte de Niño's* that can get Erick and Marielita across the border and find them a place to stay and work. American farmers and business people are being affected, too: They cannot find workers.

Canettistock / Dreamstime.com

Qualified agricultural workers, laborers and hospitality industry workers are trying their best to get in, but the process is much too long and frustrating. American employers are increasingly desperate. I had a client who was proud to be a redneck. He was a contractor, and he told me (with chewing tobacco tucked between teeth and gum) that "I only hire Mexicans." He ticked off the reasons on his fingers: (1) they always show up on time, (2) they work hard, and (3) they never complain. My client couldn't say the same for young American men.

Even if you have a relative in the United States who can vouch for you, U.S. Immigration and Customs Enforcement services says it can take "several years" for your relative to become a citizen. Erick and Marielita have no American relatives. How long could it take them? Ten years or longer? Erick and Marielita had no option to stay in their town and face the gangs. Their parents had to take action, and move quickly. Meanwhile, politicians on each side of the border do only what is best for their own selfish interests. Democrats want Mexican immigrants because they are more likely to vote Democrat. Republicans want to seal the border, and for the same reason.

On both sides, this is a cynical and despicable game being played with real people's lives and aspirations. I agree with Senator Marco Rubio's mother when she pleaded with him, "Don't be mean to the *illegales*." His reasonable compromise bill never got anywhere.

How horribly ironic it is that those who insist on sealing the border proudly trace their lineage to Europe, which means their forbears were immigrants, too. We are a nation of immigrants, whose first act in the New World was to commit what can only be called genocide of the indigenous peoples who lived here in peace and harmony with nature for millennia. And then, during World War II, while humanitarian disasters were happening across Europe, we decided to intern (imprison) American citizens just because they were of Japanese origin.

I hope that Erick and Marielita are together, wherever they are. All they have is each other. And both of them carry a card their mother quickly slipped into their pockets when they departed. It says, in the always-familiar handwriting: *"de tu madre quien nunca te olvidara."* ("From your mother who will not forget you.")

My father, Erich Max Davids, was born in Essen, Germany, in 1926 and was an only child. He left on the *Kindertrans-*

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Immigration

Continued from page 13

port soon after *Kristallnacht*. On that horrible evening (he was 12 years old), his family was somehow passed over when the SS arrived to "deport" every other Jewish family in their building. Across the street from his apartment was a city park where the Nazi youth would gather to sing songs about how Jewish blood (*Judenblut*) would drip from their knives.

In England, he was sent to a boarding school, where he fell into depression and illness. Eventually, his mother was able to immigrate to England to be with him, and his father was later able to bribe customs officials to get out as well. I still can't imagine how my grandparents put their only child on a train to a foreign country, where he didn't speak the language. But they got past it and did the right thing.

My grandmother tried to get her immediate family into the United States, but strict quotas prevented admission. While thousands of Jews immigrated to our country, there was no concerted effort to help refugees of Nazi oppression until 1944, six years after the *Kindertransport*, and one year before the end of the war.

The American Holocaust Museum website states that "serious obstacles to any relaxation of US immigration quotas included public opposition to immigration during a time of economic depression, xenophobia, and antisemitic feelings in both the general public and among some key government officials. Once the United States entered World War II, the State Department practiced stricter immigration policies out of fear that refugees could be blackmailed into working as agents for Germany."

Jan Karski was a Polish military officer and courier for the Polish underground during the Nazi occupation. He observed first-hand the atrocities of the Warsaw ghetto and was able to travel to the United States to brief President Roosevelt of the conditions. The President dismissed his report and said such things could not be happening. There are always reasons—and sometimes even valid ones—for ignoring a humanitarian disaster. In retrospect, however, the lack of response to Nazi terror can't help but seem as anything other than disgraceful.

Unable to get into the United States, my grandmother was admitted by the English as an "enemy alien," since she was from Germany. Under British law at the time, she could overcome the "enemy alien" status by making a showing that she was a "refugee from Nazi oppression." The British are not renowned for having warm personalities, but sometimes they do the right thing. The judge listened to my grandmother's broken English (she pleaded that she was a "friendly animal"), and granted her "friendly *alien*" status. She could stay in England.

Fast-forward to today, and maybe some compassionate leader will have the courage and confidence of a Ronald Reagan and go to San Ysidro or Tecate or Calexico or Nogales or Antelope Wells or Santa Teresa or El Paso or Laredo or Brownsville and say: "Mr. Obama, tear down this wall." As Robert Frost aptly put it, "Something there is that doesn't love a wall, / That wants it down." We talk about hope as the most important part of the human spirit, and it is. But I wonder if there is a more prosaic approach.

Our earliest ancestors were nomads, always on the move. From Lisa Jura to my father to Erick and Marielita, there is always the push to move on, even though the ultimate destination is not only indistinct but can be downright frightening. Barriers and obstacles are put in our way, but we continue to place one foot in front of the other. To do otherwise would go against everything we believe. And if we believe with playwright Thornton Wilder that there is something eternal about every human being, then the desire to move on against all odds is part of that eternal spirit. Erick and Marielita may not make it. But some day someone will, and bit by bit, the human river will wash over the obstacles we try to place in its way.

My grandmother worked as a "domestic" in English households during World War II. She got up at four in the morning, in the bitter English cold that made her blood freeze, so that she could start the fires for the house. My father hated her employers for how they condescended to my grandmother. He developed a dislike for many of the English and their snobbery and sense of entitled superiority.

But my grandmother wouldn't hear of it. She always had the same four-word retort in defense of the English: "They let me in."

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Author's Note: Since this editorial was submitted for publication, major news outlets have reported that Mexican emigration to the United States has slowed to a trickle. This apparently is the result of crackdowns and other measures implemented by the government of Mexico. In my opinion, the tragedy continues.

"Days of Heaven," 1978, Paramount Pictures

Using quotes to make your closing argument memorable

By: Lee Schmelter
CCTLA Board Member

In Closing Argument, counsel has broad discretion to interpret the evidence. We can say almost anything. Counsel's argument may be "as full and profound as his learning can make it . . . counsel's illustrations may be as various as the resources of his genius . . . and he may, if he will, give play to his wit, or wings to his imagination." People v. Molina (1899) 126 Cal. 505, 508.

Psychologists agree we best remember what is first and last, what rhymes, what is repeated, what is familiar and what strikes a chord. When developing the theme of your case, try blending in a lesson from learned forebears.

Emulating past CCTLA President Stephen Davids' illuminating quotes of Shakespeare in *The Litigator*, I share compiled quotes, hopefully avoiding the quotidian. I began this practice as a member of public speaking group, Toastmasters International, and I share it, hoping to elicit your own faves.

Ideally, some quotes may prove useful in your trial or helpful in your practice or personal life. Kill me if I wax poetic, fail at humor, get too personal or bloviate.

- "Better by far to be good and courageous and bold and to make difference. Not change the world exactly, but the bit around you." ? *David Nicholls, One Day*
- "There is an expiry date on blaming your parents for steering you in the wrong direction; the moment you are old enough to take the wheel, responsibility lies with you." — *J.K. Rowling*
- "If you mess up, 'fess up." — *Unknown*
- "The man who complains about the way the ball bounces is likely to be the one who dropped it." — Lou Holtz
- "A mistake is only useful if one recognizes it, admits it and learns from it. If the error causes another harm, then an apology is in order. – *Larry Hazen*

Please expand on quotes useful in our practice and lives, or just ones you like, by sharing quotes, especially your own, via saclaw@surewest.net.

- "When you put your hand in a flowing stream, you touch the last that has gone before and the first of what is still to come." — *Leonardo da Vinci*

Such is life!

Like Edgar Allan Poe, make it memorable:

"Quoth the raven, 'Nevermore' "

How new lawyers can make an IMPACT

By: Kelsey K. Ciarimboli
Associate Attorney, Bohm Law Group

The last several years have not been kind to recent law school graduates' hopes of becoming new lawyers. The economy drove many new college graduates to extend their college years and enter into graduate-level programs, such as law school. The economy's downfall also negatively impacted litigation. The end result, specifically in the field of law, is an oversaturated market. There are more and more lawyers competing for fewer and fewer jobs—a bleak outlook for young, hungry attorneys.

This nationwide situation is harrowing for all who are trying to obtain their first job as an attorney. I remember the daunting and tedious search to find employment, every day on my law school's career website searching job postings. It seemed the majority of job postings were targeted for lateral hires, requiring a minimum of three to five years of experience. I was caught in the proverbial *Catch-22* situation. How could I ever be selected for a job if all the jobs required experience, and obviously, I could never gain the required experience without a job?

This *Catch-22* situation is one that most graduating law students and new lawyers experience across our country. And many are actually fearful, as most are saddled with significant educational debt. New lawyers are hungry for work and eager to begin their chosen career. They know they can make a difference, if just given the chance. I found my chance with the Bohm Law Group, a plaintiff side trial litigation firm.

While teaching at Tulane Law School, Lawrance Bohm interviewed and hired me as a new associate for his law firm even though I had no ties to this state. I had never been to California until I arrived to study for the bar.

After taking the California bar in July 2014, I began work with the Bohm Law Group where I was immediately given various "new associate tasks" such as: writing pleadings, conducting discovery and researching various areas of the law.

However, I was also provided an opportunity a majority of new lawyers are never asked to complete: prepare an important case that was imminently going to trial. To do this, I needed to learn the case in its entirety, prepare trial briefs, organize exhibits, create trial binders, create electronic files, review motions *in limine*, review jury instructions and create a verdict form among various other tasks necessary for preparing a case for trial.

As a new lawyer who hadn't even found out bar results yet, this task seemed way out of my league. But, I embraced the challenge! Having a great mentor and great support staff to rely on made the task less daunting and more manageable.

My first experience in a courtroom as a new lawyer came the week before trial when we attended a pretrial hearing before the federal judge assigned to our case. I was especially nervous as I was to assume the role of second chair during trial. As the trial date approached, I was meeting with the client, creating demonstrative exhibits and finalizing preparation for the commencement of opening statements. I felt like I was constantly running around trying to make sure everything was in order.

The first day of trial was nerve-racking, all of my hard work during the preceding couple of months was about to culminate.

Throughout the trial, our trial team consisted of Lawrance Bohm, Charles Moore and me. We threw ourselves into the case. We worked around the clock, writing and opposing trial briefs, meeting with and preparing witnesses, and planning our trial strategy. We put everything we had into helping our client. She was harassed and demoted because of her pregnancy. She was then wrongfully terminated after making protected complaints and filing a Department of Fair

Continued on page 18

Continued from page 17

Employment and Housing charge.

After a week-and-a-half of a hard-fought battle, it was time for closing arguments. I was up all night before, creating a PowerPoint to help highlight all of the evidence that had been admitted during the trial. After closing arguments, it was time for what I have come to learn is the most stressful part of being a trial lawyer: waiting for the jury to return a verdict. I remember thinking that all I wanted was a win for our client, a win that would validate all of our hard work, and where justice would truly prevail.

After a day-and-a-half of deliberations, the jury finally signaled that it had reached a verdict, and we returned to the courtroom for the verdict to be read. My stomach was in knots as the clerk slowly read out the caption of the case, the case number and started reading the verdict form. The clerk reached the end of the form: We won on all claims, and the jury made a finding for punitive damages against the Defendant company! That following Monday, we came back to put on evidence of the Defendant company's financial condition and ability to pay. The jury ended up awarding our client $185,000,000 in punitive damages.

This case was Juarez v. AutoZone Stores, Inc., and it was the first case I was ever assigned to and prepared for trial. I am sure most lawyers reading this article are shocked to know that such a young, new lawyer played such a major role in the largest single plaintiff employment verdict in the United States.

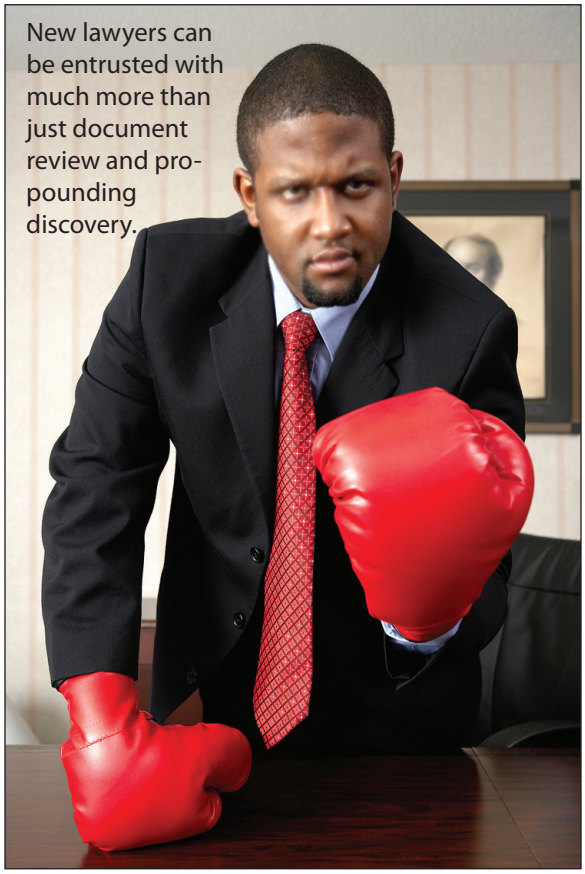
However, being a lawyer was something that I had wanted to do since I was 10 years old. Once I was given the opportunity, I threw everything I had into embracing this opportunity, doing a great job and making a difference. My boss saw this eagerness in me and gave me the chance to prove myself. Without that chance, I wouldn't have been able to make a difference so soon into my career.

Shortly after Juarez, I was given the opportunity to prepare another trial and again assume the role of second chair. I began immediately preparing this case around the clock, following the same process that I had just done months before in Juarez. In January 2015, we obtained a win for this client, a new employee who was terminated only two weeks after making a complaint that his male supervisor grabbed his buttocks. Then, not even one week after receiving this verdict, my boss asked me to jump right into the next trial and second chair a traumatic brain-injury case.

Having this trial experience has afforded me a better perspective on my pre-litigation cases because I have now seen the end result of a case and have gained insight into what is critical and what I should focus on to receive the best possible results for my client.

Lawyers reading this article should take note and realize that new lawyers can be entrusted with much more than just document review and propounding discovery.

New lawyers provide a fresh look on issues and can provide new insight as well as an unbiased opinion of the case.



New lawyers can be entrusted with much more than just document review and propounding discovery.

New lawyers are eager for work and anxious to prove themselves, so they are willing to step outside of their comfort zone of research and writing to try something that usually only experienced lawyers have a hand in, such as preparing a case for trial.

Lawyers should consider implementing different employment models and embrace the hiring and mentoring of new lawyers. Give these new lawyers a chance and a great foundation in the law. New lawyers will, in most cases, go above and beyond, both inside and outside of the courtroom. New lawyers can definitely make a difference. And importantly, on the employment rung, they cost much less.

There are many new lawyers out there who are willing to trade the idea of $160,000-a-year salary and fancy office at a large firm to join the plaintiff-side solely for the opportunity to gain needed experience and to apply those idealistic principles of actually "working for the people."

But perhaps even more surprising is the personal satisfaction that attorneys will experience in mentoring and spending time training these new attorneys. They will gain exposure to fresh ideas and experiences. And they will be afforded an opportunity to remember why they chose the law profession in the first place—a reconfirmation of career choice.

The ability to truly mentor and coach others is truly rewarding. It's a win-win situation for all involved.

This is my story. A story of success as a new attorney fresh out of law school. One that I will never forget, and one that I am extremely thankful for. There are many new lawyers out there just waiting to have their stories play out.

All they need is a chance; one chance.

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VERDICTS

CCTLA Board Member Lance Curtis won an approximate $2-million verdict, in South Lake Tahoe in front of the Hon. Steven Bailey, for his client who was the victim of an assault and battery. Unfortunately, the jury found the insured defendant not at fault and apportioned 100% to an uninsured (and likely judgment-proof) defendant.

Client was a high school senior in 2009 and took the defendant father's daughter to the prom, then they began dating. Defendant father made a disputed statement to his defendant son, "I will give you 100 bucks for every knuckle you break on his face." Defendant son believed our client to be a bad guy with a reputation for treating women poorly and did not want him dating his sister. Client was invited to defendants' home shortly after graduation for dinner and to meet the defendant father. While with defendant son in the driveway, client was beaten: struck several times in the head and knocked unconscious, while the rest of the family was inside. Police and medical services were called, and defendant son was arrested, charged and pled to assault with a great bodily injury enhancement, doing a year in jail.

Client sustained a mild traumatic brain injury and has suffered associated PTSD since, treating primarily with a psychologist. The case was pursued primarily against the father under a theory of negligence for his statement and for inciting the beating, even though potentially a "joke" and unintentional. Due to defendant son's lack of financial resources, the case proceeded primarily against defendant father and his State Farm Insurance policy.

Defendants and State Farm disputed that the statement was ever made and maintained defendant father had nothing to do with the beating. They claimed it was solely due to defendant son, who they acknowledged was a loner and a bit unstable. State Farm also claimed that even if their client father was at fault, the beating did not result in any long-lasting symptoms or mental deficiencies and that client was back to normal within a year, according to their neuro-psyche expert, Alan Shonkoff.

The jury did not assign any liability to the defendant father, instead deciding that his son was unstable which was helped by his son's over-the-top trial testimony that detracted from his father's involvement. The verdict breakdown was:

Past Income Loss: $125,000
Past Medical: $30,937
Past Non-econ: $120,000
Future Loss of Earnings: $1.1 million
Future Medical Expenses: $113,000
Future Non-econ: $700,000

Plaintiff experts: Ricardo Winkel (neuro-psyche), Gary Nibbelink (voc rehab), David Pickens (psychologist) and Craig Enos (economist).

Defense experts: Alan Shonkoff (neuro-psyche) and Sydney Nelson (psychologist).

Post verdict, jurors stated Shonkoff was not well received, particularly in his presentation of the neuro-psyche testing which they said was "confusing."

The jury also did not appreciate Shonkoff's minimization of the long-standing effects of a brutal beating. Shonkoff also made unsupported generalized statements about mild and moderate traumatic brain injury that the jury rejected. This is especially pernicious, in that current advances are showing that serious brain injury can exist even without specific radiological findings.

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CCTLA Board Director Lawrance Bohm and CCTLA member Megan O'Conner prevailed in Placer County Superior Court, in front of the Hon. Michael Jones, with an approximate $1-million recovery in a motor-vehicle collision case.

On Sept. 11, 2010 at 5 p.m., the defendant was attempting to make a left turn out of Sunsplash/Golfland. Traffic in the No. 2 lane was backed up, and eventually a driver left a space so that he could proceed. The defendant went through the gap and t-boned the plaintiff vehicle in the No. 1 lane. At trial, Defendant admitted he was at fault but denied he was negligent. His words were that he was proceeding as carefully and safely as possible.

After the collision, Plaintiff began treatment with a chiropractor. After eight months, an MRI found a herniated L4-5 disc. Appointments with doctors Goradia and Montesano followed, and ultimately, the plaintiff was seen by Phil Orisek, MD. Two years post collision, Plaintiff underwent an L4-5 disc replacement. She continues to have issues with her back and neck, and all experts agree she will need to have at least one more surgery when the disc replacement fails.

At the time of the collision, Plaintiff was 21 years old and working at Roseville Yamaha as a cashier. She also was a dancer and in very good health. After the surgery, Plaintiff married and thereafter became pregnant. As a result of the disc replacement and the lack of literature on the subject, she underwent a C-section as opposed to natural birth.

Plaintiff demanded the tender of Defendant's $100,000 on three occasions prior to the surgery. No offer was ever made until after surgery and then only for the $100,000 limits. CCP §998 was sent in April 2013 for $800,000. Defendant denied Requests For Admissions on negligence and substantial factor. Defendant's counsel was Brad Thomas.

Total verdict was $1,687,088.86. However, the jury found Plaintiff 40% at fault (no idea where they came up with this!) for a net recovery of $1,012,253.32.

Past Medical Expenses: $201,433.83 (The full amount of medical bills)
Future Lost Earnings: $391,814.00 (The number we suggested for 50% employment)
Future Medical Expenses: $693,841.03 (no idea where this figure came from)
Past Pain & Suffering - $100,000
Future Pain & Suffering - $300,000

Plaintiff experts: Robert Lindskog, accident reconstruction; Gary Moran, biomechanics; Philip Orisek, MD, surgeon; Gary RInzler, MD, physical medicine & rehab; Dora Jane Apuna, life care; John Hancock, economist.

Defendant experts: Joe McCoy, MD, orthopedics; Tamara Rockholdt, medical billing.

Mike's Cites

Continued from page 2

judgment on the grounds that the Freeway Service Patrol Act did not create a special employer relationship with the tow truck driver, and therefore the CHP could not be held liable.

The trial court granted the motion for summary judgment and the appellate court affirmed. The California Supreme Court reversed: "The Court of Appeal erred by ruling that the FSP statute categorically barred the CHP from acting as a special employer. The trial court must determine whether the facts of this case support liability even though the Supreme Court's concluded that the statutory scheme is inconsistent with a special employment relationship between the CHP and tow truck driver.

A special employment relationship arises when a general employer lends an employee to another employer and relinquishes to the barrowing employer all right of control over the employee's activities. Marsh v. Tilley Steel Co. (1980) 26 Cal.3d 486 492. In such a situation, the special employer becomes solely liable under the doctrine of respondeat superior for the employees' job-related torts. However, where general and special employers share control of an employees' work, a dual employment arises and the general employer remains concurrently and simultaneously, jointly and severally liable for the employees' torts.

Under the Government Claims Act, a public entity is not liable except as otherwise provided by statute. (Government Code §815) With regard to respondeat superior, a public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee. (Government Code §815.2(a)) Thus, public entities are generally liable for the torts of their employees to the same extent as private employers. (Government Code §820, Hoff v. Vacaville Unified School District (1998) 19 Cal.4th 925.)

In this case, the California Supreme Court decided that the Freeway Service Patrol Act's statutes are **not** consistent with a special employment relationship between the CHP and tow truck drivers.

The FSP statutes are Streets and Highways Code §2560 et seq. and Vehicle Code §2430 et seq. The California Supreme Court went through several Vehicle Code and Streets and Highway Code sections and concluded that the statutes presume that tow truck drivers are **not** state employees, but work instead for the employers that contract with local entities to provide FSP services to motorists.

Moreover, the role laid out for CHP in the FSP statutes does not match the criterial for special employment. CHP's mission as the government agency most directly responsible for insuring highway traffic safety, and its exercise of authority in that capacity does not mean that the CHP is thus conferred the status of a special employer.

While the California Supreme Court finds that the language of the statutory scheme does not support a finding that the CHP is a special employer of FSP tow truck drivers, that holding does not eliminate the possibility that the CHP might act as a special employer if it takes on responsibilities beyond those outlined in the FSP statutes.

Thus, there might be a question of fact, but no facts were elicited in the trial court. The Court of Appeal's judgment is reversed, and the case remanded for further proceedings.

The issue of Medi-Cal liens and the Ahlborn Theory

By: Daniel E. Wilcoxen

The case of Ashlynn Aguilera, a Minor, Plaintiff and Appellant v. Loma Linda University, Defendant, and State Department of Health Care Services, Lien Claimant, decided on April 2, 2015, and citable as 2015 DJDAR 3761, deals with the issue of Medi-Cal liens; specifically, this case deals with arguments that the State of California Department of Health Services (hereafter Medi-Cal) used against reducing liens under Welfare & Institutions Code (hereafter W&I) §14124.76, the Ahlborn theory.

Medi-Cal claimed that pursuant to the Ahlborn theory, as found in W&I §14124.76(a), the plaintiff should not be allowed to claim the costs of, or value attributable to, future medical attendant care and/or the cost of future medical expenses, if Medi-Cal was paying for such expenses.

It should be noted that this argument presupposes that Medi-Cal would pay for the future medical care needs, based on the fact that a Special Needs Trust (hereafter SNT) was involved. In this case, the minor plaintiff recovered approximately $865,000 and thus would not otherwise have been eligible for Medi-Cal benefits unless there was a SNT.

The case arose from medical negligence occurring when Plaintiff Ashlynn was two months old and developed global delay mental retardation and behavior disorders, requiring feeding through a gastronomy tube.

The case was settled for $950,000. Ashlynn's parents received $85,000, and Ashlynn's gross recovery, before attorney's fees, was $865,000. Attorney's fees and costs totaled $253,000. Medi-Cal asserted a lien of $211,200 (these figures are rounded). Ashlynn filed a motion pursuant to W&I §14124.76 to reduce the Medi-Cal lien, based on the high cost of her future medical needs and attendant care needs.

In attempting to create the highest possible value for Ashlynn's case, pursuant to the Ahlborn case and W&I Code §14124.76(a), the plaintiff's attorney used the following values attributed to her injury needs:

Past Medical Costs (Medi-Cal lien): $211,191
Future Medical Costs (Present Value): $ 1,560,429
Future Attendant Costs (Present Value): $11,641,244
Loss of Earning Capacity (Present Value): $1,126,794
General Damages (Medical Malpractice Limits): $250,000
Full Value of Claim: $14,789,658

Based on the total value of the claim, divided into the amount recovered (as set forth in W&I §14124.76(a) and the Ahlborn case), $14,789,658 divided into $865,000, yields the figure of .0585, or 5.85% as the percentage amount of the recovery compared to the value of the case.

Through various calculations (not quite certain based on the numbers used in the appellate opinion), Ashlynn's calculations indicated that the lien should be reduced to $10,046. It was decided that, not only would an Ahlborn reduction apply, but the reduction for attorney's fees of 25% and a pro-rata share of costs would also apply, as is discussed hereinbelow.

Obviously, Medi-Cal disagreed with the numbers and offered to reduce by W&I §14124.72, which is a reduction of 25% and pro-rata share of costs, resulting in the amount of $154,295.

A long discussion is detailed concerning all of the cases since Ahlborn, Wos v. EMA, 133 S. Ct. 1391 (March 20, 2013), and the enactment of W&I §14124.76. Aside from the fact that, as usual, Medi-Cal argued that Ahlborn doesn't apply, and various contradictory statements, all towards the point of trying to maximize their recovery, the issues finally boiled down to the following:

1. Since this is a Special Needs Trust case, Medi-Cal argued it would be paying the cost of the future medical care of $1,560,429, and the future attendant care of $11,641,244, and thus should not be added to the value of the case.

2. Medi-Cal alleged there were three potential methodologies for reducing a lien as described in W&I §14124.785, i.e. W&I §14124.72(d), §14124.76(a), or §14124.78, and that you could only apply one.

Thus, Medi-Cal agreed that if the Ahlborn applied, the total value would not include the future medical and attendant care to be paid by Medi-Cal and, since they were using the Ahlborn theory, you could not use §14124.72(d) to account for the attorney's fees reduction.

The lower court, at trial, agreed with the argument that only one of the three methods could be used. However, the Fourth District Appellate Court stated:

"Where, as here, the Department filed a lien, Section 14124.72(d) sets forth the method for determining the Department's share of the beneficiary's attorney's fees and costs. Accordingly, the trial court erred when it refused to reduce the Department's lien to account for the attorney's fees and expenses Ashlynn incurred."

There were various arguments back and forth as to whether or not Medi-Cal would in fact pay the future attendant care and medical care needs of the plaintiff. Eventually, there was a finding by the appellate court that the case should be referred back to the trial court for a determination based on proof as to whether or not Medi-Cal would in fact pay for the future attendant care and medical care needs of the plaintiff. Thus, if Medi-Cal could prove they would pay those future costs, based on evidence, those figures would be removed from the Ahlborn evaluation.

Obviously, this makes the value of the case much lower, and the percentage of recovery for the lien much larger, a benefit to the State Department of Health Care Services, in that the Ahlborn formula value of the case was much lower, and when divided into the recovery, did not reduce the lien substantially.

CFPB Report Finds Forced Arbitration is Bad for Consumers

By: Aidan O'Shea
Communications Specialist, Public Justice

A report released this past spring by the Consumer Financial Protection Bureau has found that forced arbitration clauses—language in consumer contracts that pushes any customer dispute out of court and into a private, secret, and often expensive arbitration process—are ubiquitous, not understood by those agreeing to them, and bad for consumers.

As the CFPB report explains, the evidence shows that although tens of millions of Americans use financial products or services subject to forced arbitration, three out of four consumers could not say whether they had agreed to an arbitration clause when surveyed about the issue. The report also notes that there is no evidence that arbitration clauses lead to lower prices for consumers, a key claim made by businesses that employ forced arbitration.

The CFPB also found that it is common for arbitration clauses to include a provision blocking consumers from acting as a class, whether in arbitration or in court, a significant fact given that consumers are "unlikely" to bring a claim against a company on their own, and that "roughly 32 million consumers on average are eligible for relief through consumer financial class action settlements each year."

Speaking as part of a panel discussion at the CFPB's field hearing on the issue of forced arbitration in Newark, N.J. in March, Public Justice Executive Director Paul Bland said the CFPB report "shows that Corporate America has been lying to the public about forced arbitration . . . The CFPB has found overwhelming empirical evidence to suggest that forced arbitration keeps consumers from being able to protect themselves."

Bland added that the "CFPB should forever change the view that forced arbitration is good for consumers" by prohibiting companies from inserting forced arbitration clauses in consumer contracts to the greatest extent possible. This call was echoed by fellow attorneys and consumer advocates in attendance.

The CFPB's study has been three years in the making and was produced after an exhaustive examination of 850 consumer-finance agreements, 1,800 consumer-finance disputes filed in arbitration, 560 class-action consumer financial lawsuits and 3,500 individual federal court lawsuits in product markets, including credit cards, checking accounts, prepaid cards, payday loans, private student loans, auto loans and mobile wireless third-party billing.


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"Consumer financial laws matter. Bait and switch scams ruin lives," Bland said. "When companies violate these laws and can't be held accountable, people drop right out of the middle class. This study changes everything. The CFPB can and should use its authority to turn things around."

Reprinted from the Public Justic website: http://publicjustice.net.

California's Homeowner Bill of Rights: An Uphill Battle, But Worth It

By: Christopher J. Fry, Esq.

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Yuba County jury awards $16,200,000 to a homeowner in a wrongful foreclosure case. (See Linza v. Century 21 Mortgage (2014) Yuba County Superior Court Case No. CV12-0000714.)

Now that I've got your attention, I hate to break it to you but this award was ultimately substantially reduced to roughly $200,000—but it was a win, nonetheless.

From 2007 to 2011, there were more than 900,000 completed foreclosures in the United States, with 38 of the top 100 ZIPcodes in California. Though the numbers have declined, foreclosures are still an increasing problem. In 2014, foreclosures in California were at an eight-year low, with a still staggering 108,000 foreclosures. Until 2007, the big banks could do no wrong. However, when the market began to crash, and the government investigations started, it was quickly discovered that the banks were a huge part of the problem.

First, the bank got away with some very questionable lending practices. More importantly, the banks would simply refuse to work with borrowers who would ultimately default. The banks just didn't care whether or not borrowers kept their homes. If they pretended to care, the cost of managing all of the loan modification applications did not please the shareholders, so they simply foreclosed.

From 2007 to 2012, courts have been inundated with lawsuits against the banks with allegations from unfair business practices all the way up to product liability (*I know*). Unfortunately, the banks have been able to slither out from liability based on the case of Nymark v. Heart Federal Savings & Loan Association (1991) 231 Cal.App.3d 1089 ("Nymark").

A reading of Nymark provides a simple statement that a "lender" owes no duty of care whatsoever to a borrower. The case is essentially apples and oranges in terms of dealing with defaulting borrowers as it relates to the appraisal used to support a mortgage. It holds that the bank is not responsible for the negligence of the appraiser at the time of origination. Unfortunately, this single case has resulted in thousands upon thousands of demurrers being sustained as to each and every allegation made by a borrower against the bank. The banks were unstoppable and they continued the ruthless tactics.

FINALLY, SOME RELIEF FOR HOMEOWNERS!

In 2012, SB900 was introduced and signed into law. SB900 took effect on January 1, 2013, and was touted as the Homeowner Bill of Rights (HBOR).

The two most important provisions of the HBOR restrict "dual tracking" and require "single points of contact." Dual tracking occurs when a bank forecloses on a homeowner while the loan is being reviewed for a modification. A single point of contact has been defined as a person or group of people in which a borrower can immediately contact and receive information about their modification. These provisions only scratch the surface. Sadly, not even black letter law can put a leash on the nation's out-of-control mortgage industry.

While the HBOR provided a false sense of security to homeowners, the truth is that the mortgage industry continues to erroneously rely on Nymark and simply does not care about California law. Homeowners are still being foreclosed upon by the bank while simultaneously being reviewed for a loan modification.

WHAT DO WE DO TO STOP IT?

Last year, Mr. Johnson (name changed to protect the innocent) walked into my office. He and his wife had seen a drop in their income from slow business but had bounced back and had been negotiating a loan modification with their bank, Globobank (*Ibid.*).

The negotiations often take months as the borrowers submit a plethora of documents, and then the bank follows up with a variety of questions about those documents. This usually prompts another request for documents.

Though Johnson and his wife were under a review for a loan modification, they came home to a dozen copies of a Notice of Trustee's sale on their door. The bank was going to sell their home in less than three weeks. In one hand, Johnson held a letter from Globobank confirming review of the modification application; in the other, he held a document of legal significance authorizing the sale of his home.

TO COURT WE GO!

We filed our complaint alleging a variety of statutory violations under the HBOR and also included a negligence/negligence *per se* count for the emotional roller coaster Globobank has put our clients through. The HBOR claims provide for an injunction until the bank is in compliance with the law (i.e. a fair review of the loan modification application).

We reached out to the bank to see if the sale could be taken off so that the application could be fully reviewed, and they predictably refused. As a result, we were forced to file an ex parte application for a restraining order and request an Order to Show Cause for a preliminary injunction. Everything is opposed. Nevertheless, the judge agrees with our extensive argument and issues the temporary restraining order, and ultimately the preliminary injunction.

PROBLEM SOLVED, RIGHT? WRONG!

After we get our preliminary injunction, we reach out to continue to attempt to work out the modification and are assured the modification is under review. Our clients are thrilled.

Shortly thereafter, we receive a demurrer that is essentially identical to the opposition to the preliminary injunction. We of course oppose it and again, the judge agrees with our argument and overrules the demurrer in its entirety. Once we've earned the respect of the high-powered lawyer representing the bank, we finally get an answer on file and a request to stay the case while they review the modification application.

Close to a year later, we have been advised that the modification is in underwriting, and we should have a response.

LOVELY STORY, BUT PRO BONO WORK DOESN'T KEEP THE LIGHTS ON

One of the big problems with complex litigation is the enormous legal bills that the lay person simply cannot afford. This is especially true when the clients are homeowners struggling just to pay their mortgage.

One of the integral provisions of the HBOR is a section allowing an award of attorney's fees to a prevailing party or a borrower who obtains "injunctive relief." The provision was added to ensure that those who ordinarily could not afford an attorney could be adequately represented so David has help in his fight against Goliath.

In Johnson's case, we've easily got 100+ hours of attorney time. When we ultimately move for attorney's fees, we will undoubtedly move for a Lodestar multiplier to really make the bank think twice when noticing a sale when a modification is under review.

DON'T WANT TO TAKE THE RISK BASED SOLELY ON A CHANCE AT FEES?

While the statute calls for attorney's fees, recent case law has imposed a negligence duty of care on banks when negotiating a loan modification. In 2014, the case of Alvarez v. BAC Home Loans Servicing, L.P. was decided and held that a negligence cause of action can be sustained if a showing that the lender's mishandling of loan modification paperwork caused a loss of the opportunity to obtain a loan modification. (See Alvarez v. BAC Home Loans Servicing, L.P. (2014) 228 Cal.App.4th 941.)

While there has yet to be a case directly on point, if taken as mandating a general duty of care, this case gets over the dreaded Nymark "the bank can do no wrong" decision and can easily be interpreted to support emotional distress damages as well. These damages are in addition to damage to credit, loss of equity and improper late fees and charges, all of which were included in the roughly $200,000 verdict above.

THE BEST PART

Johnson and his wife walked into my office facing certain homelessness in three weeks. Though we had to climb a mountain to do it, they have now been in the home for over a year and will likely receive a permanent fix to keep their family home. Oh, one other perk: You get to stick it to the mega-firms from San Francisco and Los Angeles!

***

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Set Your Standards (of Review) HIGH

By: Linda J. Conrad
Certified Appellate Specialist,
Law Offices of Sargeant & Conrad

Once upon a time, a long time ago... well, really only about one year ago, our office received the opening brief in an appeal where the trial court set aside a default and default judgment under Code of Civil Procedure section 473.5. The standard of review on appeal for setting aside a default and default judgment under section 473.5 is always abuse of discretion.

To our surprise, appellant argued that the de novo, or independent standard of review, applied to both the factual findings and the trial court's discretion to grant the motion. Appellant seemed to be under the impression that the briefing could omit all facts and evidence that supported the the trial court's order and could view the evidence in the light most favorable to the appellant. Ignoring all evidence favorable to the court's order was appellant's mistake in evaluating, briefing and arguing the issue.

Our office was able to frame the facts in the light most favorable to the court's order and argue one of the most important aspects of *any* appeal—the standard of review.

As any experienced trial lawyer should know, success on appeal depends on setting up the issues in the trial court. For instance, if the appeal is from a motion, every relevant element must be in the declarations, depositions, admissions and other evidence. A court reporter must be at the hearing. The Statement of Decision must be accurate. If the appeal is following a trial, objections with their legal basis must be on the record. Evidentiary foundations must be secure. Everything (I really mean *eveything*) must be on the record. Informal discussions "off the record" will not help you. A court reporter should be present for all important motions and orders.

An appeal is won or lost based on the record. If it isn't in the record, it didn't happen. And any claim not raised below is forfeited. (Shaw v. County of Santa Cruz (2008) 170 Cal.App.4th 229, 286.)

> Most important in evaluating whether to file an appeal and how it should be argued is the standard of review. Even if you think you have great facts, if you argue the wrong standard of review, you lose.

But most important in evaluating whether to file an appeal and how it should be argued is the standard of review. Even if you think you have great facts, if you argue the wrong standard of review, you lose. The basic standards of review for the civil practitioner can be summarized as follows (but beware, because there are always exceptions and nuances):

- Independent or de novo review applies to pure questions of law-—for example, the interpretation of law, a contract, pleadings, and summary judgments [where the evidence is viewed in the light most favorable to the nonmoving party];
- Substantial evidence review applies to factual findings; and
- Abuse of discretion review applies to rulings that are in the court's discretion, such as motions to set aside defaults under Code of Civil Procedure section 473.5 and discovery orders.

Why is the standard of review more important than the facts of your case? Because how the facts must be presented and argued at the appellate level depends on the standard of review. The factual statement and arguments in the opening brief must be tailored according to the appropriate standard of review—generally emphasizing the facts that uphold the order or judgment.

Here is what the appellate courts have to say: "'Arguments should be tailored according to the applicable standard of appellate review.' Failure to acknowledge the proper scope of review is a concession of a lack of merit." (Sonic Manufacturing Tech., Inc. AAE Systems, Inc. (2011) 196 Cal.App.4th 456, 465 [citations omitted].) "In every appeal, the threshold matter to be determined is the proper standard of review—the prism through which we view the issues presented to us. [Citation.]" (People v. Lindberg (2008) 45 Cal.4th 1, 36, fn. 12.)

By failing to acknowledge the proper standard of review, appellant's opening brief fails to provide the complete and impartial statement of the facts that is required for the abuse of discretion standard of review. That failure leaves the

respondent in the position of being able to present its version of the facts in a manner that supports the trial court's order. The appellate court is likely to rely on the respondent's version of the facts and ignore your version of the facts.

At a recent conference I attended, a justice said that if the appellant's opening brief fails to provide an impartial statement of the facts, that justice puts the brief aside and begins the evaluation of the case by reading the respondent's brief. If you want the justices to pay attention to your brief, you must provide a fair statement of the facts, warts and all, in light of the actual standard of review, not the standard of review you wish would apply.

If you want the justices to pay attention to your brief, you must provide a fair statement of the facts, warts and all, in light of the actual standard of review, not the standard of review you wish would apply.

Failing to provide a fair statement of facts based on the relevant standard of review, as typically occurs when the trial attorney writes the appeal, risks not only having the justice set aside the brief, but also risks waiving any arguments based on the defective statement of facts.

As the appellate courts have stated, "It is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact." (Foreman & Clark Corp. v. Fallon (1971) 3 Cal.3d 875, 881 [Internal quotation marks omitted].) Appellants are "required to set forth in their brief all the material evidence on the point and *not merely their own evidence*. Unless this is done the error assigned is deemed to be waived." (*Ibid*. [emphasis in original].) The failure to provide a fair statement of the facts waives any issue relying on those facts. (County of Solano v. Vallejo Redevelopment Agency (1999) 75 Cal.App.4th 1262, 1274.)

Even more disastrous, a trial attorney in the appellate court risks sanctions and possible disbarment for failure to provide a fair and complete statement of the facts, failure to argue in light of the standard of review, and and failure to provide complete citations, including pinpoint citations, to relevant legal authority and the record. (*In re S.C.* (2006) 138 Cal.App.4th 396, 428.) *In re S.C.* is an extreme example and no counsel reading this article would resort to the tactics and distortions of that attorney, who was also trial counsel. However, it is worth noting that ignoring the proper standard of review and framing your arguments in light of a different standard of review never helps your client and risks your professional reputation.

Use Your Discretion Wisely

In order to win where the standard of review is abuse of discretion, you must prove that the trial court's discretion was arbitrary and capricious. While you may

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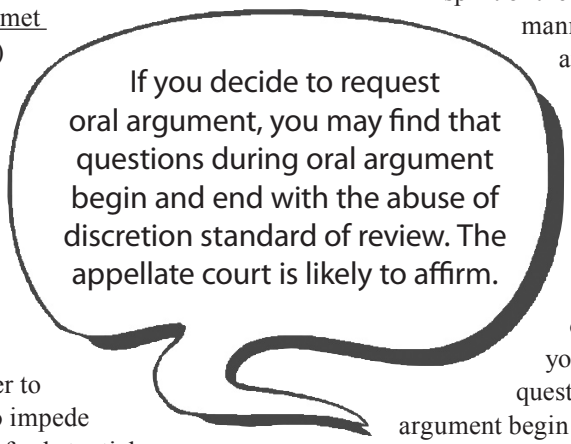
Standards of Review

Continued from page 27

believe the court was arbitrary and capricious, making that argument could have consequences beyond this case. Do you ever want to appear in that court again?

All kidding aside, appellate courts are clear that where the trial court's order granting relief is within its sound discretion, it should not be disturbed "in the absence of a clear showing of abuse of discretion." (Shamblin v. Brattain (1988) 44 Cal.3d 474, 478.) "The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Id*., at pp. 478-479.) Reversal is unlikely where the standard of review is abuse of discretion.

An appellant who nonetheless chooses to argue an issue where the standard of review is abuse of discretion is relegated to arguing that the standard is not unfettered. (Gamet v. Blanchard (2001) 91 Cal.App.4th 1276, 1283.) Or, the discretion may not be exercised arbitrarily or capriciously and must be "in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (Bettencourt v. Los Rios Community College Dist. (1986) 42 Cal.3d 270, 275.) Or, the standard does not give "an immunity bath to the trial court's rulings" or "absolve reviewing courts of the obligation to state a reasoned rule." (Hurtado v. Statewide Home Loan Co. (1985) 167 Cal.App.3d 1019, 1025, disapproved on other grounds in Shamblin, supra, 44 Cal.3d at p. 479, fn. 4.) Or, the trial court's discretion is subject "to reversal on appeal where no reasonable basis for the action is shown. [Citations.]" (Westside Community for Independent Living, Inc. v. Obledo (1983) 33 Cal.3d 348, 355; see also, Robbins v. Alibrandi (2005) 127 Cal.App.4th 438, 452.)



These arguments are not winning arguments. And the next time the attorney appears in that trial court, perhaps, instead of hearing counsel's words, the court hears, "arbitrary...capricious...unreasonable...impeding or defeating the ends of substantial justice…". No matter how much you disagree with the court's decision, it is exceedingly rare that the trial judge's order fits into that description.

If these points don't convince you, when an opening brief nonetheless argues abuse of discretion, respondent's brief will have the opportunity to conclude with a reasonable and soothing tone:

Here, as shown, the trial court's discretion was not arbitrary or capricious, but was instead an "impartial discretion, guided and controlled in its exercise by fixed legal principles." (Stafford, supra, 64 Cal.App.4th at pp. 1180-1181.) Further, it was "exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice." (*Ibid*.)

If you decide to request oral argument, you may find that questions during oral argument begin and end with the abuse of discretion standard of review. The appellate court is likely to affirm.

Acknowledge Bad Facts

Now that you have been convinced not to file an appeal where the standard of review is abuse of discretion, you might ask about filing an appeal where the standard of review is substantial evidence? Arguing the substantial evidence standard of review is a little, but not much, better than arguing the abuse of discretion standard of review.

First, the burden of proof in the trial court is irrelevant on appeal. Regardless of the burden of proof, where the standard of review is substantial evidence, an appellate court's assessment of "the sufficiency of the evidence begins and ends with a determination as to whether or not there is any substantial evidence, whether or not contradicted, which will support the conclusion of the trier of fact." (In re Rocco M. (1991) 1 Cal.App.4th 814, 820.)

Second, substantial evidence is evidence that is "reasonable, credible, and of solid value" such that a reasonable trier of fact could make such findings. (*Ibid*.) The appellate court has no power to reevaluate the credibility of witnesses, attempt to resolve conflicts in the evidence, or reweigh the evidence. (Keys v. Alta Bates Summit Medical Center (2015) 235 Cal.App.4th 484, *reh'g denied* (Mar. 11, 2015).) The trier of fact's judgment regarding the credibility of the witnesses and factual findings are accepted as true, and the appellate court may only decide if this evidence supports the conclusions reached by the trial court. (*In re Shelly J.* (1998) 68 Cal.App.4th 322, 329.)

In other words, appellant must argue that the trial court incorrectly applied the law, because the facts are set by the trial court's actual and implied findings. Thus, the likelihood of a reversal when the standard of review is substantial evidence is arguably only slightly higher than under the abuse of discretion standard. At least counsel does not need to argue that the trial court was arbitrary or capricious.

Be Independent

As an appellant, you want to find an issue that is subject to de novo or independent review. Your chances of prevailing on appeal are much higher because the appellate court independently reviews the record, interprets statutes, and determines pure questions of law.

Under the independent standard of review, "[t]he appellate court is not bound by the trial court's stated reasons for its ruling on the motion, as the appellate court reviews only the ruling and not its rationale." (Reyes v. Kosha (1998) 65 Cal. App.4th 451, 457, *as modified* (July 22, 1998).) The appellate court is not bound by the trial court's interpretation of pure

issues of law. (Winet v. Price (1992) 4 Cal. App.4th 1159, 1166.)

The statement of the facts depends on the type of matter appealed. For instance, in appeals from summary judgment motions, the court considers "all the evidence set forth in the moving and opposition papers except that to which objections have been made and sustained." (Guz v. Bechtel Nat. Inc. (2000) 24 Cal.4th 317, 334.)

In an appeal from the sufficiency of a complaint, the appellate court only considers the properly pleaded allegations and does not consider anything beyond the complaint except matters which are judicially noticeable. (Saunders v. Superior Court (1994) 27 Cal.App.4th 832, 837.)

In the application of a statute or constitutional provision to factual findings, the issue may be a mixed question of law and fact. In that situation, the appellate court will apply de novo review to the questions of law, and substantial evidence to factual findings. (Ghirardo v. Antonioli (1994) 8 Cal.4th 791, 799-800.)

Knowing your standard of review and how it applies to your case is crucial in setting up the facts and the issues in your appeal. The standards of review and how they are applied are complicated. A misstep will lose your appeal.

Knowing your standard of review and how it applies to your case is crucial in setting up the facts and the issues in your appeal. The standards of review and how they are applied are complicated. A misstep will lose your appeal.

Don't Switch Your Standards

I have seen trial attorneys handling their own appeals try to turn an abuse of discretion or substantial evidence standard of review into an independent standard of review. It didn't work for them, and it won't work for you.

Even if the respondent doesn't point out the proper standard of review, the appellate court will find it. And it will not be pleased when it discovers that counsel, either appellant or respondent, failed to point out and argue the proper standard of review.

The importance of understanding the proper standard of review and its implications on the briefing, oral argument and the decision cannot be overestimated. The more time you spend at the beginning of your appeal to set the stage with an accurate presentation of the facts and issues based on the proper standard of review, the better you will be at evaluating your chances of success on appeal, setting up your briefing and preparing for oral argument to maximize the likelihood of success.

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SPRING

Reception & Silent Auction
May 21, 2015

All Silent Auction Proceeds Benefit Sacramento Food Bank & Family Services

Sacramento Food Bank & Family Services is a local, non-profit agency committed to serving individuals and families in need.

President Dan O'Donnell and the Officers and Board of the Capitol City Trial Lawyers Association

&

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This reception is free to honored guests, CCTLA members and one guest per invitee. Hosted beverages and hors d'oeuvres will be provided.

*** Deadline for Auction Items: May 1, 2015 ***

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Elders, workers, patients on CAOC's legislative agenda

Court funding remains a major priority for consumer attorneys

SACRAMENTO (March 4, 2015) – With the deadline for introducing bills at the California Legislature having passed, Consumer Attorneys of California will be advocating for 10 pieces of priority legislation in 2015, including key bills affecting elders, workers and patient safety.

But CAOC's most important fight at the state Capitol remains, as it has for several years now, the battle to restore adequate funding to California's courts system. More than $1.1 billion has been cut from the judicial branch budget since the start of the Great Recession in 2008, with severe impacts on court services for consumers and businesses. Gov. Brown's proposed 2015-2016 budget includes increased funding for the judicial branch that would bring it closer to the level of funding required to assure all Californians of access to justice. But there is still much more to be done to return the courts to a stable financial footing.

"CAOC will continue its focus on ensuring that California's courts are fully funded," said CAOC president Brian D. Chase. "Adequate court funding is crucial to enforce the laws passed by the legislature."

Here are the bills that CAOC will work to pass in this legislative session:

AB927

Elder assistance: In the wake of a Sacramento Bee investigative series last year, CAOC is working with the California Advocates for Nursing Home Reform (CANHR) on two bills that will ensure accountability and transparency for nursing homes and residential care facilities for the elderly. Asm. Susan Eggman (D-Stockton) is carrying AB 601, related to residential care facilities for the elderly, and Asm. Kevin McCarty (D-Sacramento) is the author of AB 927, related to skilled nursing facilities.

AB465

Workers' rights: CAOC is committed to putting an end to the unfair use of forced arbitration that requires workers and other consumers to give up their right to a trial by jury and often requires workers to give up legal rights just to file a complaint with a regulatory board. CAOC has been meeting with the California Labor Federation, and Asm. Roger Hernandez (D-West Covina) has put in a placeholder bill, AB 465.

SB482

Patient safety: CAOC is working with medical professionals, narcotics officers and other stakeholders to require prescribers of potentially addictive narcotics to check California's CURES prescription drug database before doing so, to prevent patients from receiving an oversupply of medication from multiple practitioners through "doctor shopping." Sen. Ricardo Lara (D-Long Beach) is carrying SB 482. Bob Pack, founder of the Troy and Alana Pack Foundation and creator of the CURES database, is part of this effort, and support from law enforcement and many consumer groups is expected.

SB245

Auto insurance: Uninsured and under-insured motorists (UM-UIM) coverage is designed to compensate those who are injured by drivers who are not adequately insured, but too often the minimum UM-UIM coverage required by the state falls far short of the needs of injured Californians. New Senate Insurance Committee Chair Richard Roth (D-Riverside) has put in a placeholder bill, SB 245.

SB251

Disability access: CAOC is committed to working with both persons with disabilities and the business community to address the situation where businesses are sent demand letters or receive lawsuits concerning disability access violations, but compliance isn't the primary goal. The goal of any legislation or lawsuit must be to ensure access for persons with disabilities. Sen. Richard Roth (D-Riverside) has agreed to carry SB 251, co-sponsored by CAOC and the California Chamber of Commerce.

AB555 / AB1141 / SB383

Court efficiency: Civil disputes over non-catastrophic cases can have a great impact on lower-income workers but are often lost in the system and leave vulnerable Californians without compensation. The Expedited Jury Trial Act, enacted in 2011 through the efforts of CAOC and the California Defense Counsel, provides a format to resolve these cases while saving time, expense and court resources. The act is due to sunset this year, but Asm. Luis Alejo (D-Salinas) is carrying AB 555 to extend and expand it. Asm. Ed Chau (D-Monterey Park) is carrying AB 1141, sponsored by CAOC and the California Defense Counsel, to clarify legislative history related to Code of Civil Procedure Section 998 and to address motions for partial summary adjudication, while Sen. Bob Wieckowski (D-Fremont) has authored SB 383 to examine demurrers.

AB1337

Health records: Asm. Eric Linder (R-Corona) is the author of AB 1337, requiring a standardized health records request form, and CAOC intends to work with the California Hospital Association to assist patients and health care providers in this area.

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

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Capitol City Trial Lawyers Association
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May

Thursday, May 21
CCTLA'S 13TH ANNUAL ALLAN OWEN SPRING RECEPTION & SILENT AUCTION
The home of Noel Ferris & Parker White,
500 39th Street, Sacramento, CA 95816
Time: 5 to 7:30 p.m.

Friday, May 29,
CCTLA Luncheon
Topic: "The Value of Medical Services: IF Based on Payment then Include ALL the Payments"
Speaker: Lawrence "Lan" Lievense, FHFMA, FACMPE, FHIAS
Firehouse Restaurant, Noon
CCTLA Members - $30

June

Tuesday, June 9
Q&A Luncheon
Shanghai Garden, Noon
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Friday, June 26
CCTLA Luncheon
Topic: "What Every Plaintiff's Attorney Needs to Know About Social Security Disability Insurance and Supplemental Security Income Claims"
Speaker: Bruce Hagel, Esq.
Firehouse Restaurant, Noon
CCTLA Members - $30

July 2015

Tuesday, July 14
Q&A Luncheon
Shanghai Garden, Noon
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Friday, July 24
CCTLA Luncheon
Topic: "Present Case Value Update"
Speaker: Richard S. Barnes, CPA/ABVICFF
Firehouse Restaurant, Noon
CCTLA Members - $30

August 2015

Tuesday, August 11
Q&A Luncheon
Shanghai Garden, Noon
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Friday, August 21
CCTLA Luncheon
Topic: TBA, Speaker: TBA
Firehouse Restaurant, Noon
CCTLA Members - $30

Contact Debbie Keller at CCTLA , 916 / 917-9744 or debbie@cctla.com for reservations or additional information about any of the above activities.

CCTLA COMPREHENSIVE MENTORING PROGRAM

The CCTLA board has developed a program to assist new attorneys with their cases. If you would like to learn more about this program or if you have a question with regard to one of your cases, please contact Jack Vetter at jvetter@vetterlawoffice.com / Linda Dankman at dankmanlaw@yahoo.com / Glenn Guenard at gguenard@gblegal.com / Chris Whelan at Chris@WhelanLawOffices.com

CCTLA Calendar of Events