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Inside This Issue

Never, Never, Never Give Up

By: Wendy C. York
President, CCTLA

While we shake our heads with disappointment at the injustice of the Howell decision, we can learn from leaders who overcame bigger obstacles. History reminds us of how Sir Winston Churchill helped steer Britain through its most difficult time in history. How could a pudgy, outcast child lead Britain against the epitome of evil during World War II? It was Churchill's unyielding determination to never accept defeat.

Churchill stated "Never give in—in nothing, great or small, large or petty—never give in except to convictions of honor and good sense. Never yield to force; never yield to the apparently overwhelming might of the enemy." In our case, the overwhelming might of the enemy is large insurance companies and the Howell decision that sided with the insurance industry.

How could the California Supreme Court's disappointing decision in Howell v. Hamilton Meats & Provisions, Inc. redefine what has been a standard of law in California regarding the Collateral Source Rule? To say that this is a setback for consumer rights and favors big business and big insurance over regular people would be a gross understatement. I cannot help but think that the supreme court has no comprehension of how much their decision *harms* injured victims and rewards tortfeasors and the insurance industry.

The court's lack of awareness that artificially low medical expenses result in juries anchoring low pain and suffering awards, which has the practical result of many injured victims who will go without any compensation for their harms and losses because the costs to try cases exceed the jury awards. The winner—tortfeasors and big insurance companies. The losers—injured victims and consumers.

As plaintiff's attorneys committed to representing the underdog, we cannot allow the disappointing Howell decision to weaken our resolve. Others can stop us temporarily—we are the only ones who can do it permanently. We must figure out how to climb over the Howell decision obstacle, go through it or work around it. And we will be better and stronger for it.

The Consumer Attorneys of California and Capital City Trial Lawyers Association, are still reviewing the California Supreme Court's 45-page decision to analyze ways to counter the injustice to consumers and injured victims. CAOC and CCTLA intend to put on an educational seminar in September. We hope you will join our efforts to counter this disappointing setback.

Allan's CORNER

By: Allan J. Owen

Here are some recent cases I found while reading the Daily Journal. These come from the *Daily Journal*. Please remember that some of these cases are summarized before the official reports are published and may be reconsidered or de-certified for publication, so be sure to check and find official citations before using them as authority. I apologize for missing some of the full *Daily Journal* cites.

Attorney Disqualification. In Liberty National Enterprises v. Chicago Title Insurance Company, 2011 DJDAR 5839, the court holds that a party impliedly waives the right to disqualify an attorney for a conflict by failing to bring a motion to disqualify in a timely manner. Any delay must be extreme or unreasonable before it constitutes a waiver and there must be extreme prejudice to the person who now retained the attorney subject to disqualification.

Good Faith Settlements. In Cahill v. San Diego Gas and Electric Company, 2011 DJDAR 5871, plaintiff was cleaning windows and was injured when he hit high voltage electric line. He sued the electric company and the electric company cross-complained against the owners of the property. Property owners paid $25,000.00 and the trial court granted a good faith settlement motion. Court first holds that a motion granting a good faith settlement can be appealed; a writ petition is not the sole means of challenging the trial court's determination. The court also goes through a very good discussion of what is required to overturn such a ruling by a trial court.

Liability to Rescuer. In Tucker v. CBS Radio Stations, Inc., 2011 DJDAR 6137, the Fourth District takes a small bite out of the rescuer doctrine. Plaintiff and another participant in a "poker run" sponsored by the radio station went off of the route because of traffic congestion and the other person's off road vehicle got stuck on the railroad tracks. Plaintiff saw a train approaching and tried to go help the other rider. The train hit the other rider's vehicle and propelled it into plaintiff causing injuries. Trial court sustained a demurrer without leave to

Continued on page 14

Class actions are not dead yet

The U.S. Supreme Court's 5-4 decision in AT&T v. Concepcion is a disturbing example of judicial activism that makes it easier for corporations to enforce mandatory arbitration clauses banning class actions, cheat consumers and workers out of millions and keep almost all of the money. But, contrary to what many corporate defense counsel claim and I feared (see Arthur H. Bryant, "Class Actions Wipe Out," NLJ, Nov. 25, 2010), Concepcion does not kill—or let corporations kill—class actions. The decision has lots of limitations.

First, the Court held that the Federal Arbitration Act of 1925 (FAA) pre-empts California's Discover Bank rule—which declared all class action bans in adhesion contracts unconscionable in cases charging companies with cheating "large numbers of consumers out of individually small amounts of money"—because, in the Court's view, the rule could force defendants into class arbitration without their consent even though the consumers' claim was "most unlikely to go unresolved" in individual arbitration.

The Court pointed to the facially attractive aspects of AT&T's mandatory arbitration clause, which the district court (in the absence of evidence) opined would "prompt full...or even excess payment to the customer without the need to arbitrate or litigate" and make consumers "better off...than they would [be] in a class action."

Few states, however, have categorical rules like the Discover Bank rule, and few companies have arbitration clauses like AT&T's (although more will be adopting them soon).

Second, the Court did not consider, much less uphold, the validity of AT&T's mandatory arbitration clause or class action ban. It simply remanded the case for further proceedings. But the facts are that AT&T's clause precludes the parties from being forced into class arbitration (it bars arbitration if the class action ban is struck down) and virtually ensures that customers' claims will go unresolved.

No evidence about the operation of AT&T's clause was introduced in Concepcion because the Discover Bank rule made it unnecessary. But in Coneff v. AT&T, in which extensive evidence was heard, the Western District of Washington found that only 170 of the company's 70 million customers (0.00024%) pursued individual arbitration, while the Federal Communications Commission, *Consumer Reports* and consumer groups were (and are) reporting record complaints (iPhone, anyone?). On remand, Vincent and Liza Concepcion should be free to develop—and challenge AT&T's clause—on the facts.

Third, the Court did not hold that the FAA pre-empts state rules of law invalidating class action bans that do not force parties into class arbitration without their consent. The clear rule in some states is that, when a class action ban is illegal, the parties may choose between class arbitration and class action litigation. More states are likely to clarify their rules now, too.

Fourth, the Court did not hold that the FAA pre-empts state rules of law declaring class action bans unconscionable when the evidence proves that they would effectively preclude consumers from vindicating their rights and immunize defendants from liability. Several states have rules like this.

The question presented in Concepcion was "whether the FAA pre-empts states from conditioning the enforcement of an arbitration agreement on the availability of particular procedures—here, class-wide arbitration—when those procedures are not necessary to ensure that the parties to the arbitration agreement are able to vindicate their claims."

The Court has never held that the FAA pre-empts states from conditioning the enforcement of arbitration agreements on the availability of procedures that are necessary to ensure the parties can vindicate their claims.

Indeed, in at least four cases, the Court has described and justified arbitration as moving parties to a cheaper, faster, less formal forum without affecting their substantive rights and said that arbitration clauses are not enforceable if they preclude plaintiffs from "effectively vindicating" their rights. Nothing in Concepcion overturned those cases.

Fifth, the Court did not hold that corporations can ban any class actions brought under federal law. Concepcion addressed whether the FAA pre-empts particular rules of state law. The FAA does not pre-empt other federal law. Moreover, several federal courts have held that class action bans violate the FAA when, for example, the costs or claims involved (e.g., antitrust claims that would require expensive and complex expert testimony) preclude individual litigation.

Sixth, there are strong arguments that Concepcion's holding does not apply in state court. Justice Clarence Thomas, who provided the critical fifth vote, has insisted in five separate cases that the FAA

> The high court's ruling in 'AT&T' was wrong, but fortunately for plaintiffs, it has lots of limitations

By Arthur H. Bryant
***The National Law Journal* — June 20, 2011**

does not apply to cases in state court. If Concepcion had come to the Court from state court, he would likely have voted against pre-emption.

Finally, the Court's ruling does not affect class actions in which arbitration clauses or class action bans were adopted with inadequate notice or consent, during the course of litigation or in circumstances of fraud, duress or mutual mistake involving the arbitration clause. Nor does it affect class actions in which clauses or bans are unconscionable or invalid for other reasons, or do not exist.

Concepcion was wrongly decided. The Discover Bank rule made common sense and was not biased against arbitration. It automatically preserved class actions when they are most needed—when corporations could otherwise cheat consumers and get off scot-free.

The facts about AT&T's arbitration clause, which the Court did not consider, demonstrate that. In contrast, Concepcion ensures that more money will be transferred illegally from consumers and workers to corporations.

The Court's dramatic expansion of FAA pre-emption is one more reason that Congress and regulatory agencies should ban mandatory arbitration of consumer and employment claims. In the meantime, however, to paraphrase Mark Twain, the reports of class actions' death are greatly exaggerated.

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Arthur H. Bryant is the executive director of Public Justice, a national public interest law firm dedicated to preserving access to justice (publicjustice.net).

Public Justice filed an amicus brief opposing federal pre-emption in Concepcion.

Something to chew on: dogs in court?

By Jill P. Telfer

Service dogs have been permitted in courts to assist the disabled for several decades, but it has only been since 2003 that courts have sparingly allowed dogs to accompany and comfort traumatized witnesses to the witness stand. This new role for dogs was initiated predominately in criminal cases. The same reasoning for allowing witness stand dogs in criminal cases could carry over to our civil practices.

However, this newer role for dogs raises different legal issues. Defense attorneys contend dogs may unfairly sway jurors because of their lovable nature, whether a witness is being truthful or not. Prosecutors and plaintiff civil attorneys explain courtroom dogs can provide necessary comfort to those enduring the ordeal of testifying.

In Poughkeepsie, New York, a criminal defense appeal involving Golden Retriever Rosie is likely to establish legal precedent on the issues of dogs in the witness box. When the New York appeals court studies the question, it is likely to look at the experience of courtroom dogs around the country. In Seattle, a developmentally disabled 57-year-old man, Douglas K. Lare, recently recalled how a Labrador Retriever named Ellie, who has made more than 50 court appearances, helped him testify against a man charged with a scheme to steal from him.

Rosie, named after the civil rights pioneer Rosa Parks, is the first judicially approved courtroom dog in New York. She comforted a 15-year-old girl who was testifying that her father had raped and impregnated her. The trial ended last June with the father's conviction. Now an appeal planned by the defense lawyers is placing Rosie at the heart of a legal debate that will test whether there will be more Rosies in courtrooms in the future.

Rosie is a Golden Retriever therapy dog who specializes in comforting people when they are under stress. Both prosecutors and defense lawyers have described her as adorable, although she has been known to slobber.

CCTLA again sponsors Mustard Seed Spin bike ride fundraiser on Sept. 25

By: Glenn Ehlers

For the fifth year in a row, CCTLA is sponsoring the Mustard Seed Spin, a bike ride that last year raised more than $30,000 for the Mustard Seed School, established in 1989 to meet the needs of homeless children. CCTLA also provides 50 helmets and covers the registration for children who cannot afford either, and CCTLA volunteers help during the event. This year's ride, the seventh annual, will be held Sept. 25 at William Pond Park, again on the American River Parkway.

The Mustard Seed Spin promotes total wellness for youth through safe cycling, while creating opportunities to help less fortunate children. The Mustard Seed organization, now officially a non-profit, is committed to generating financial support for the Mustard Seed School every year. The Spin will now expand its outreach beyond the annual ride.

Sponsorship is increasing year after year, and it is anticipated that this and related future events will be a mainstay in the community for many years to come. CCTLA's sponsorship has helped this evolve and is much appreciated by the Mustard Seed School and Dr. Victoria Akins and by all of the Spin volunteers.

Anyone interested in the ride or helping in any way can go the the website at www.mustardseedspin.org, where there is information about past events, this year's event and more.

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Topics discussed with include:

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- Deposing and cross-examining the defense expert
- Attacking biomechanics at trial
- Differentiating your client from statistics

For More Information or Registration Form, contact Debbie Keller at CCTLA at 916 / 451-2366 or debbie@cctla.com

RECENT VERDICTS & SETTLEMENTS

The Law Offices of Edward A. Smith obtained a $500,000 policy limit settlement for an elderly client who fell and suffered a significant head injury. This difficult, complex and disputed liability case centered around two dogs tussling, and in the melee, Plaintiff losing her grip on her dog's leash, resulting in her losing her balance and falling.

The defense in this case argued no liability; that it was unreasonable for our client to step on her dog's leash to prohibit her dog from confronting Defendant's approaching dog. As a result, Plaintiff stepped on the leash, lost her balance and fell when the leash was pulled from under her foot.

We successfully argued that the Emergency Doctrine applied in this situation and that Defendant should not escape liability because Plaintiff took whatever action she could to keep her dog restrained. Had Defendant not initially lost control of his dog, our client would not have been put in the situation that ultimately resulted in her fall.

We employed Ron Berman, a prominent Southern California animal behavioral expert, to examine Defendant's dog and, if necessary, provide expert testimony that the dog was not only improperly trained and behaviorally dangerous, but Defendant's inability to reasonably control and restrain his dog ultimately led to Plaintiff's fall and resulting injuries. We also employed a leading gerontologist, G. Jay Westbrook, M.S., to provide testimony concerning our client's injuries and their effect on her, her husband's and her family's lives. Mr. Westbrook was prepared to testify regarding the changes in our client's activities of daily living, as well as functional and emotional changes resulting from her injuries.

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A $34,436.832 product liability and negligence verdict was rendered by a Butte County jury after 49 trial days and two and a half days of deliberation. **Roger Dreyer and Bob Bale** represented their two respective clients, Nicholette Bell and Bethany Wallenburg, against MasterCraft Boat Company and boat owner Jerry Montz, in front of the Honorable Sandra L. McLean.

On July 6, 2006, 22-year-old Plaintiffs Bell and Wallenburg, both students at Chico State University, were passengers in a MasterCraft X-45 wakeboarding boat on Lake Oroville. Defendant Jerry Montz, the boat's owner, was towing a wakeboarder who fell. Montz slowed the vessel to 5mph, then made a slow 180-degree turn to retrieve the fallen boarder. Just prior to that wakeboarding run, a number of people had moved to the bow in order to produce a quality wake for the boarder.

After completing the turn and traveling partway back to the boarder at a speed of from 3-5mph, the bow of the boat swamped without warning. The force of the water carried both plaintiffs off the bow and into the lake. Montz thought it was a wake and accelerated to get through the wake. The propeller struck Bell in the head, fracturing her skull, slicing through her left frontal lobe and left eye. Bell's injuries proved nearly fatal, but she was provided tremendous medical care, which saved her. But Bell was left with significant permanent brain damage. The propeller slashed Wallenburg across her lower back, leaving deep and permanent scars, plus muscle and nerve damage.

Plaintiffs contended the design of the X-45 was defective in several ways and these defects, plus an over-sized bow seating area that invited a large number of passengers to sit in the front of the boat, combined to cause the bow to submerge without warning during normal, foreseeable operations. Plaintiffs' liability engineering experts, Dr. Ken Fisher and Executive Director Frisch, opined there was no rational basis from an architectural/engineering perspective for these design features and that the risks of the design had no cognizable benefits. MasterCraft never tested the vessel to determine its operating characteristics or assess the risks of operating the boat at its rated capacity of 2,928 pounds or 18 people. Numerous other experts testified.

MasterCraft argued that Montz allowed too many passengers on board (19, with a combined weight of 2,830; under the weight capacity at the time), too many people in the bow and that he failed to shift the throttle to neutral once water started swamping the bow. MasterCraft argued none of these acts were foreseeable and attributed 100% responsibility for the incident to Montz.

Although Montz had been drinking before the incident, he registered below the legal limit 45 minutes after the event. He was arrested at the scene and later pleaded no contest to negligent operation of a water craft. Montz testified he was aware of the capacity limits but believed the boat could operate at maximum capacity. The parties stipulated that the total weight on board the vessel at the time of the incident was less than the boat's rated maximum capacity. Further, Defendant's expert, Robert Taylor, admitted that the capacity number provided by MasterCraft was incorrect and should have been 16 people, or 2,224 pounds.

Bell sustained multiple fractures to her skull, lost her left eye, and sustained significant, permanent brain damage and extreme emotional distress. She is living semi-independently in Chico and is able to work part time in a highly supervised and supported capacity. She requires regular monitoring, guidance and supervision throughout the day. Bell will require major assistance for activities of daily living for the rest of her life. Wallenburg requested economic damages for medical expenses in the amount of $55,688 as well as noneconomic damages for emotional distress and disfigurement due to the scarring left by the propeller striking her buttocks and back.

Bell was awarded a total of $30,906,144; Wallenburg was awarded a total of $530,688. The jury apportioned 80 percent of responsibility to MasterCraft and 20 percent to Montz.

Defense counsel was Thomas D. Nielsen and Lisa M. Estabrook for Mastercraft Boat Company, Inc., and Jerry Duncan for Jerry Montz.

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Jill P. Telfer secured a $526,717 unanimous compensatory verdict for her client in Annette Leonardi v. Five Star Quality Care, where the Sacramento jury found malice warranting punitive damages. The morning the second phase was set to begin, before the court heard a plaintiff's motion for attorney fees and costs, the parties announced a confidential settlement was reached. Annette Leonardi was an Alzheimer's lead care giver at an assisted living facility in Roseville, earning $16/hr at the time of her termination.

Based on a work-related injury in December 2005, she was unable to lift more than 25 pounds, but she continued to perform her job in a modified capacity for two years prior to Five Star's acquisition of the Roseville facility in April 2008. Rather than attempting to accommodate Leonardi's limitations by continued self-modification or another alternative job for which she was qualified, Five Star attempted to persuade her to take vocational rehabilitation through worker's compensation, effectively terminating plaintiff's employment after ten years of employment. When Leonardi refused, Five Star terminated her. Leonardi was a single mother supporting a special-needs child who had just purchased her first home at the time of her termination.

The jury awarded $376,717 in economic damages and $150,000 in pain and suffering. Plaintiff was unable to find work until one year post termination, earning $8 to $11/hr. She was unable to treat for her emotional distress because she did not have medical insurance. Plaintiff served a CCP §998 offer in the sum of $137,500 on December 22, 2009. Prior to trial, Defendant offered $250,000 at the second mediation in front of the Hon. Fred Morrison and during the second week of trial offered $125,000. The Hon. Steven Rodda (ret.) presided over the 19-day trial. Five Star Quality Care was defended by Mary Wright and Alka Ramchandani of the San Francisco law firm of Ogletree, Deakins, Nash, Smoak & Steuart., and James Jones of Jackson, Lewis, Sacramento.

Spring Fling Fundraiser

CCTLA's 8th Annual Spring Fling & Silent Auction raised $13,363 for the Sacramento Food Bank & Family Services (SFBFS). The success of the well-attended event was due to the generous donations and participation of CCTLA members, the Sacramento judiciary, consumer-friendly legislators, friends and family, and SFBFS Event Coordinator Dorothee Mull.

Bob Buccola received the Mort Friedman Humanitarian Award during the event, recognizing his significant contributions to the Sacramento community, including to Sacramento Child Advocates.

Special thanks must be given to those who worked many hours behind the scenes to make the event a success, including Debbie Keller, Margaret Doyle, Allan Owen, Linda Whitney, Kerrie Webb, Kyle Tambornini and Jenelle Moulder.

For more information on the Sacramento Food Bank & Family Services, including ways to contribute to its programs, visit www.sfbs.org or contact Executive Director Blake Young.

Robert A. Buccola received the Mort Friedman Humanitarian Award at this year's Spring Fling. The award's namesake, Mort Friedman, is pictured below (seated) with his wife, Marcie; his assistant; and Linda Whitney.

Dorothee Mull and Blake Young

Jerry Johns and Jo Pine

Allan Owen, Margaret Doyle, Kerrie Webb, Debbie Keller and Jenelle Moulder

Judge Robert Hight, Wendy York and Chris Whelan

Dan Wilcoxen, Judge David Brown, Judge Robert Hight, Judge Allen Sumner, Justice Fred Morrison, Judge James Mize and Judge John Virga

Catia Saraiva, Steven Campora and Lena Dalby

NINTH CIRCUIT:

Federal banking laws don't pre-empt California debt collection statute

From Publicjustice.net and dated Aug. 8, 2011:

In Aguayo v. U.S. Bank, the federal Ninth Circuit Court of Appeals agreed with Public Justice that national banks cannot ignore state debt collection laws that protect consumers.

Public Justice represented Jose Aguayo, who bought a car from a Southern California dealership, which then assigned his contract to a federally chartered bank in a transaction over which Aguayo had no control.

When Aguayo later ran into trouble making his payments, U.S. Bank repossessed his car and sent him a notice that did not comply with certain California consumer-protection requirements. U.S. Bank then demanded additional sums from Aguayo after it sold his vehicle—money it was not entitled to because its post-repossession notice had not complied with California law.

But U.S. Bank claimed that as a national bank, it could exercise all the debt collection rights granted under state law without having to comply with a state's consumer protection laws.

Public Justice opposed the bank's immunity argument, and the Ninth Circuit rejected it in a unanimous panel opinion, holding that federal laws governing national banks do not trump state laws that address debt collection, like those governing post-repossession notices.

The court ruled that if national banks exercise their rights under state law to collect consumer debts, they have to comply with the corresponding rules that protect consumers' rights. Any other result would leave consumers in this situation entirely unprotected because there is no federal law that applies, the court noted.

"We're extremely pleased with this victory for consumers' rights," said Public Justice staff attorney Claire Prestel, who wrote the briefs. "It is clear from federal banking law that debt-collection regulation has always been left to the states. A bank's national status does not immunize it from state laws that protect consumers."

Visit publicjustice.net for a link to the court's decision. In addition to Prestel, Aguayo was also represented by Public Justice Senior Attorney Paul Bland, Senior Attorney Leslie Brueckner, and Brayton-Thornton Attorney Melanie Hirsch; Andrew J. Ogilvie and Carol M. Brewer of Anderson, Ogilvie & Brewer LLP in San Francisco; and Michael E. Lindsey in San Diego.

An *amici* brief supporting Public Justice's arguments against U.S. Bank was filed by the Center for Responsible Lending, AARP, National Consumer Law Center, National Association of Consumer Advocates, Consumers for Auto Reliability and Safety, Asian Pacific American Legal Center of Southern California, California Reinvestment Coalition, Law Foundation of Silicon Valley, and Housing and Economic Rights Advocates.

California team wins Trial Lawyer of the Year award for case against nursing home chain

From Publicjustice.net and dated July 14, 2011

A team of California attorneys has been named the 2011 Trial Lawyers of the Year by the Public Justice Foundation, the national public interest organization based in Washington. Attorneys Tim Needham of Eureka, Calif., Michael Thamer of Callahan, Calif.; Chris Healey of San Diego; and Michael Crowley, Patrik Griego and Amelia Burroughs, also of Eureka, were announced as award winners at the Foundation's annual Gala and Awards Dinner on July 12 in New York.

The team was cited for having won a staggering $677-million jury verdict against Skilled Healthcare Group, Inc., a for-profit corporation that owns and operates nursing homes throughout the U.S. The lawyers represented a class of approximately 32,000 current and former nursing home residents and their families in Lavender v. Skilled Healthcare Group, Inc. It was the first class-wide understaffing case to be tried to verdict and the largest ever verdict against a nursing home chain.

Skilled Healthcare is the fifth-largest nursing home chain in the country, and, since going public in 2007, it has reported an average annual profit of more than $120 million. But even with such hefty assets, for years the company wasn't employing enough staff to provide the care needed by its elder residents: overstretched employees working double and triple shifts simply could not get to all the residents. Some residents weren't given their medications or pain killers in a timely manner; others weren't provided a shower or food; and some incontinent patients were left to lie in their own waste.

The California attorneys filed the class action lawsuit in May 2006, contending that 22 California nursing homes owned by Skilled Healthcare had failed to provide adequate staffing for its residents over a period from 2003 to 2010, in violation of California health and safety laws. The class sought damages of up to $500 per violation per patient day, as well as injunctive relief requiring the nursing home chain to improve its staffing levels. The lawyers gathered evidence showing that Skilled Healthcare had violated adequate staffing requirements for 9,617 days, translating to 1,178,090 patient days.

More than three years elapsed before the case went to trial in 2009. The lawyers had to slog through numerous procedural fights as the defense did all it could to slow the case to a crawl. Over 120 motions were filed; the plaintiffs' lawyers prevailed on all of them. The team defeated a motion to decertify the class, motions to change venue, and motions to disqualify the trial judge on alleged bias, among others.

The six-attorney team also prevailed on a dozen appellate writs and two appeals filed by the defendant. By the end of the case, they had logged nearly 29,000 hours and had incurred more than $1.7 million in out-of-pocket expenses. action was a massive undertaking that took seven months: 150 witnesses testified, and over 5,000 exhibits were introduced. The attorneys' main trial strategy was to avoid having the case appear to be about numbers; the goal was to get the jury to understand that the numbers equated to human suffering. Many nursing home residents and their family members testified. The attorneys also tried to show that, even when the state's Department of Public Health (DPH) issued staffing deficiency warnings against Skilled Healthcare, the company ignored them. Indeed, internal e-mails showed that the DPH warnings were treated as a running joke among Skilled Healthcare's corporate higher-ups.

Finally, the trial team also demonstrated that Skilled Healthcare's decision to understaff its facilities was made at the highest levels of its corporate ladder. The trial strategy paid off. In July 2011, a Humboldt County jury awarded the class a historic $677 million, finding that Skilled Healthcare had failed to maintain the state-mandated 3.2 nursing hours of "direct patient care" per patient per day at all 22 of its facilities over the course of more than six years.

Because the amount of the jury's award far exceeded the defendant's net worth, the parties entered into mediation after trial. In December 2010, the court approved a settlement requiring the defendant to pay $50 million to the class and to spend $12.8 million over a two-year period to improve staffing levels in its nursing homes, which includes paying for a court-appointed monitor to ensure compliance.

Lavender has had a major impact on the nursing-home industry. The verdict forced a significant number of nursing homes to increase the level of care they provide and caused nursing homes throughout California to re-evaluate their staffing levels. The case also filled an important void by getting justice for thousands of citizens that the state could not protect: DPH, suffering from the state's significant budget deficit, simply lacked the resources to enforce its policy of protecting elders in residential care facilities. Other plaintiffs' attorneys are now helping to fill this void, thanks to the victory that this group of California lawyers achieved in Lavender.

Dinner at the Cathouse

By Allan Owen

As many of you know, one of the items up for auction at CCTLA's annual Spring Fling and Silent Auction (proceeds go to the Sacramento Food Bank and Family Services) is Dinner at the Owen-Whitney Cathouse. This year, we added a second dinner, and me being a fan of Lewis Carroll, it seemed perfectly logical to hold the second dinner first!

So, on July 9, Art and Sue Scotland, Kyle and Michelle Tambornini and Mike and Karen Jones gathered at the Cathouse for dinner with Linda and me. What a fun evening of food, spirits and conversation.

We started with some Proseco (special thanks to David Smith for introducing me to this nice aperitif) and snacks. Then on into the dining room for a "light" five-course meal prepared (mostly) by yours truly, with help from Linda.

We began with some nice flaky phyllo shells filled with mushrooms in a sherry cream sauce, served over a dab of roasted red pepper and onion coulis. With this course, we had a nice dry white wine, or at least I did. This crowd earns the record for the most sober group ever entertained at the cathouse (I'm betting the next group will make up for that— stay tuned). Then on to a nice crisp Caesar Salad with some garlicky croutons and more of the crisp white wine.

For a fish course, we had a Cathouse creation—a polenta cake (polenta, red, green and yellow onions, fresh corn and some red peppers), smeared first with a bit more of the roasted red pepper coulis, then with goat cheese, topped with a seared scallop and finally drizzled with a bit of lemon vinaigrette. With this we served a nice merlot, if I recall correctly.

While I finished prepping the main course, Linda served up some lemon sorbet made by a friend of ours; great to cleanse the palate. Since so far no one was ill, I decided to press my luck and actually serve the main course. Most of us had pan-roasted veal chops over creamy and garlicky mashed potatoes with a bit of mushroom-veal demi glaze, asparagus sautéed with red peppers and a bit of pancetta just so we could say we ate our veggies. A couple made the mistake of not wanting veal, so I overcooked a couple of pan-roasted chicken breasts for them and served the same way as the veal—sorry; these chicken breasts are really great when a fool doesn't overcook them, I promise. This course was accompanied by a nice little 1996 Beringer Private Reserve Cabernet (only one more bottle in the cellar, unfortunately). Strangely enough, there was none of this bottle left at evening's end.

Ahh—almost done! What dessert would be the perfect light snack after such a hearty meal? Well, of course, Blueberry-Lemon Meringue Pie!

I am happy to report that no one was hospitalized that evening. Conversation carried the evening and ranged from golf to swimming to theater to…. A special thanks to our three couples/six guinea pigs for their generous donation to the Food Bank and their gracious efforts at pretending to enjoy the food. I can't wait for the first dinner which, of course, comes next after the second that has already happened.

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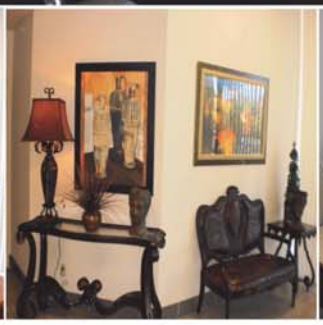

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Allan's Corner

Continued from page 2

amend finding that a duty must be owed to the other rider in order for a duty to be owed to plaintiff. Appellate court affirms finding that while the rescuer doctrine applies, there must be a duty to the person being rescued and no such duty existed here.

Defense Mental Status Expert. In Dell v. Mason, 2011 DJDAR 6011, defense sought to call a psychiatric witness to testify that plaintiff was not mentally retarded and that she had average intelligence. Trial court refused to allow the psychiatrist to testify. He had reviewed plaintiff's medical records and her videotaped deposition but had not met or personally examined her. Appellate court reverses that order finding that the expert is allowed to testify without having personally examined plaintiff.

Government Tort Claims of Minor. In E. M. v. LA Unified School District, 2011 DJDAR 5648, plaintiff filed a tort claim nine months after the last sexual encounter with a basketball coach. School district returned the claim saying it was not presented in six months. Plaintiff then filed an application for leave to present late claim less than one year after the last sexual contact. The school district denied the application and notified the plaintiff that she must file a petition for relief from the government code claims presentation requirements within six months from the date the application was denied. Plaintiff instead filed an action against the school district and then filed the petition in that action seeking relief from the claims statute. The petition was filed seven months after the district rejected the late claim application. Trial court denied it as being untimely and dismissed the action. On appeal from the notice of dismissal, the Appellate court rules that the initial claim was untimely; however, the application for leave to present a late claim was timely and should have been granted. The court held that "we reject the notion that notwithstanding a public entity's erroneous denial of a timely application for leave to present a late claim, a plaintiff must obtain judicial relief from the claim statute prior to filing a lawsuit." Interesting opinion.

Immunity Under Government Code §850.4 (Firefighting). In Varshock v. California Department of Forestry and Fire Protection, 2011 DJDAR 5572, the court holds that the immunity provided by §850.4 for any injury caused in fighting fires trumps the exception under Vehicle Code §17001 which imposes liability for death or injury caused by negligent operation of a motor vehicle. Here, injury resulted from a firefighter's negligent operation of a motor vehicle at the scene of a fire and the court confirms the grant of summary judgment.

Exclusive Remedy Rule. In Edward Carey Construction Company v. State Compensation Insurance Fund, 2011 DJDAR 5581, the court holds that the workers' compensation exclusive remedy rule does not bar an employer's breach of contract and bad faith claims against the comp insurer which arise after the employee's work-related injury.

Attorney Contingency Fee. In Lemmer v. Charney, 2011 DJDAR 6494, the court holds that a clause in a contingency fee agreement that requires the client to take the case to trial or settlement to make sure the attorney is paid a fee is void as against public policy.

998's. In Martinez v. Los Angeles County Metropolitan Transportation Authority, 2011 DJDAR 7417, the court holds that where a 998 states that "each side shall bear its own costs," the word "costs" includes attorneys' fees.

Loss of Consortium. In Mealy v. B-Mobile, Inc., 2011 DJDAR 7497, the court holds that you can have a partial loss of consortium which is compensable. Here, the trial court had ruled that because the husband and wife still lived together and loved each other as much or more than they did before the accident, there was no such claim.

998's. In Huerta v. Torres, 2011 DJDAR 7614, the court holds that a 998 that does not include a provision that allows the accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted (in other words, a 998 that doesn't have the line saying, "I hereby accept" or some such similar language with a signature) is invalid and cannot be used to augment costs.

Amending Complaint After Remittitur. In Dye v. Caterpillar, Inc., 2011 DJDAR 7747, the case went through a very convoluted history with eventually some defendants having demurrers sustained without leave to amend to a third amended complaint. A fourth amended complaint was then filed that did not name those defendants and other defendants had demurrers sustained without leave to the fourth amended complaint. On consolidated appeal, appellate court found the trial court had erred and that the charging allegations in the two complaints were sufficient. Defendants who were left out as named defendants in the fourth amended complaint because their demurrers were sustained in the third amended complaint refused to answer the fourth amended complaint because they weren't named. Plaintiff filed a motion to amend his complaint and for relief under §473 if the court should deny his motion. The court found that CCP §472(b) required that the motion be filed within thirty days and since plaintiff had failed to meet the timeline, the court denied the motion. Appellate court reversed finding that §472(b) applies only where the remittitur sends the case back for the trial court to sustain the demurrer with leave to amend, not where the reversal is because the demurrer should have been overruled.

Damages. In Kimes v. Grosser, 2011 DJDAR 7866, the court holds that when

a pet with "little market value" is injured, the pet owner may still recover the cost of care of the pet attributable to the injury so long as those costs are reasonable and necessary. If the injury was intentional, punitive damages are also available. Trial court had dismissed the case because the cost of "repair" exceeded the value of the pet, and the Appellate court reverses.

Motion for New Trial. In Collins v. Sutter Memorial, 2011 DJDAR 8031, Sutter Hospital was granted summary judgment. Plaintiff moved for new trial but cited the wrong ground in his notice of motion although arguing the correct ground in the P's & A's. Trial court granted new trial, Sutter appealed contending the order was too late after trial court lost jurisdiction and that the notice was defective and that the order specified a different ground than stated in the notice. Court of Appeal affirmed finding that Sutter was not misled and that the order was timely.

Wrongful Death. In Adams v. Superior Court, 2011 DJDAR 8079, personal representative filed a wrongful death claim against nursing home, etc. Defendants moved to abate action because she did not name the individual heirs either as plaintiffs or nominal defendants. Trial court granted motion to abate both wrongful death and survival action. Appellate court reverses finding that a personal representative need not and actually cannot join the heirs but instead represents them in a fiduciary/trustee type relationship.

Assumption of the Risk. In Nalwa v. Cedar Fair LP, 2011 DJDAR 8575, plaintiff broke her wrist on a bumper car ride at Great America. She sued the owner of the park and the trial court granted summary judgment based upon primary assumption of the risk. Appellate court reversed finding that primary assumption of the risk is inapplicable to regulated amusement parks.

Relief From Default. In Cowan v. Krayzman, 2011 DJDAR 9043, default was entered, then a motion to quash service was filed. Court denied motion based on lack of jurisdiction because the default and motion to set aside default was filed alleging excusable neglect on the part of client. Tentative ruling issued, counsel appears at hearing and says he had withdrawn the motion, then files a second motion that addresses the concerns raised in the tentative ruling on the first motion and now claims attorney fault. Court denied, appellate court affirms saying that the attorney neglect part of §473 involves credibility issues and so it was properly decided by the trial court.

Employer Fault. In Dizz v. Zarcamo, 2011 2011 DJDAR 9280, the court holds that where you sue for respondeat superior and negligent entrustment, if the employer admits vicarious liability, you may not pursue the negligent entrustment claim. That means you can't get in evidence of the employee's prior driving record. This is a Supreme Court decision.

Judicial Notice. In Herrera v. Deutsche Bank National Trust Company, 2011 DJDAR 9631, the appellate court applies the familiar rule that judicial notice of a document does not include taking judicial notice of the hearsay facts contained within the document. This was a chain of title, and the court took judicial notice of various deeds but unfortunately for the bank, the court cannot take judicial notice of the factual assertions in the deeds (such as who is the beneficial owner at the time of the deed, etc.).

Attorney/Client and Attorney Work Product Privilege. In Fireman's Fund v. Superior Court, 2011 DJDAR 9647, the trial court, in a bad faith case, ordered an attorney to answer questions at deposition over objections based on the attorney/client and attorney work product privilege. The trial court and the discovery referee expressed their view that the attorney/client privilege protects only communications between an attorney and the client but not an attorney's communications with members or agents (investigators) of the law firm about client matters. The referee and trial court also took the position that because the communications at issue were not reduced to writing seeking an attorney's legal opinions, only the qualified work product privilege applies, not the absolute work product privilege. Not too surprisingly, the appellate court reversed on both grounds.

Insurance Coverage. In State Farm v. Frake, 2011 DJDAR 10583, the Second District holds that deliberate conduct directly causing an injury is not an accident and therefore there is no coverage, regardless of whether the actor intends to injure or not.

Fees on Minor's Compromise. In Gonzales v. Chen, 2011 DJDAR 11007, the court holds that fees awarded to an attorney for representing a minor (in a med mal case here) are not necessarily based upon the maximum allowed under MICRA and cannot be determined based on local rules after the California Rule of Court was enacted which made all local rules of court invalid.

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Class Actions Are Not Dead Yet

High court's ruling has lots of limitations

Capitol City Trial Lawyers Association
Post Office Box 541
Sacramento, CA 95812-0541

SEPTEMBER

Tuesday, September 13

Q&A Luncheon
Q&A Luncheon- Noon
Vallejo's (1900 4th Street)
CCTLA Members Only

Thursday, September 15

CCTLA Problem Solving Clinic
Topic: Dealing with Howell
Speakers: Lawrence Knapp, Allan Owen, Jack Vetter and Stan Fleshman
Arnold Law Firm
865 Howe Avenue, 2nd Floor
5:30 to 7 p.m. CCTLA Members Only, $25

Friday, September 16

CCTLA Luncheon
Topic: Masters in Trial: Closing Arguments
Speaker: Chris Dolan, Esq.
Firehouse Restaurant - Noon
CCTLA Members, $30

OCTOBER

Friday, October 7

CCTLA Seminar
Topic: Biomechanical Testimony: Fact or Fiction?
Speakers: Ron Haven, Glenn Guenard, Rob Piering, Michael D. Freeman, Ph.D, Jesse L. Wobrock, Ph.D. & John Martin, ASE
Location: Holiday Inn, 300 J Street
Time: 9 a.m. to 1 p.m.
Cost: $200 CCTLA Members
$250 Non-members

Tuesday, October 11

Q&A Luncheon- Noon
Vallejo's (1900 4th Street)
CCTLA Members Only

Thursday, October 13

CCTLA Problem Solving Clinic
Topic: TBA - Speaker : TBA
Arnold Law Firm, 865 Howe Avenue, 2nd Floor
5:30 to 7 p.m. CCTLA Members Only, $25

Friday, October 21

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

NOVEMBER

Tuesday, November 8

Q&A Luncheon- Noon
Vallejo's (1900 4th Street)
CCTLA Members Only

DECEMBER

Thursday, December 8

CCTLA Annual Meeting & Holiday Reception
Location: TBA
Time: 5:30-7:30 p.m.

Tuesday, December 13

Q&A Luncheon- Noon
Vallejo's (1900 4th Street)
CCTLA Members Only

JANUARY

Thursday, January 19

CCTLA Seminar
Topic: What's New in Tort & Trial? 2011 in Review
Speakers: Craig Needham, Esq. and Patrick Becherer, Esq.
Location: Holiday Inn, 300 J Street
Time: 6-9:30 p.m.
Cost: $125 CCTLA Members
$175 Non-members

Contact Debbie Keller at CCTLA at (916) 451-2366 for reservations or additional information about any of these events

CCTLA Calendar of Events