Summer 2011

The LITIGATOR

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Inside This Issue

Expedite Your Cases and Expedite Your Practice

By: Wendy C. York

It is amazing how fast the first quarter of 2011 has passed us. During the last four months, CCTLA put together a strong education program, including the free Tort & Trial Seminar, the annual Tahoe Seminar and the Reptile Seminar with David Ball.

During this second quarter, the Expedited Jury Trial Program is officially under way. Judge Russell L. Hom will oversee the expedited jury trials in Sacramento County. In fact, the first expedited jury trials begin this month. Under the new Expedited Jury Trial Program, attorneys will pick a jury on Thursday and then present their case on Friday. This is an excellent opportunity to try your soft-tissue injury cases or admitted liability cases efficiently.

Another advantage of the Expedited Jury Trial Program is that both parties agree on a pre-selected trial date, which allows you to guarantee that you will go to trial on that selected day. Several CCTLA members have already scheduled expedited jury trials in May and June. After we see the results in these first cases, CCTLA will provide feedback on how to handle your next expedited trial successfully.

Speaking of trials, unfortunately we received a bit of bad financial news. With the state budget cuts, the California courts were not immune and have been hit with budget cuts as well. These budget cuts will impact the civil cases and our ability to get a courtroom. Thus, in this ever-changing economic climate, it is to our clients' advantage to push their cases forward to trial while courtrooms are available. The adage "justice delayed is justice denied" holds true.

Finally, on a more positive note, on Thursday, May 26, CCTLA will host its annual Spring Fling at board member Allan Owen's home. One of our CCTLA colleagues, Robert Buccola, will receive the Mort Friedman Award. The proceeds from the Silent Auction at this event will benefit the Sacramento Food Bank.

This year, Spring Fling is open to everyone, including judges, attorneys, legal staff and the community. Please RSVP with Debbie Keller at debbie@cctla.com or 916-451-2366 to ensure that we have sufficient food and beverage for this wonderful event. We hope to see you on May 26!

Allan's CORNER

By: Allan J. Owen

Here are some recent cases I culled from the *Daily Journal* while viewing this sunset. 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.

Parental Duty. In Smith v. Freund, 2011 DJDAR 1935, Defendant was an Asperger's Syndrome victim and lived with his parents. He shot and killed two people and then went home and committed suicide. Plaintiffs sued the parents for wrongful death, alleging negligence supervision. The trial court granted summary judgment, finding there was no duty to unknown and unforeseeable third parties to control the son. There was no notice that he would harm third parties as opposed to his parents or himself based on the depositions of the doctors.

Insurance Law. In Blue Shield v. Superior Court (Kawakita), 2011 DJDAR 2252, the court holds that an insurer is permitted to use different language than contained in a statute so long as that language is not less favorable to the insured, and Blue Shield's policy language on the statute of limitations gives a three-year statute for tortious bad faith claims rather than just for contractual claims as the statute requires.

Drug Manufacturer Liability. In Johnson & Johnson v. Superior Court (Trejo), 2011 DJDAR 2268, Plaintiff sued in negligence and strict liability. Trial court denied motion for summary judgment on punitive damage issue and Appellate Court affirms finding triable issues of fact surround Defendant's purported failure to provide adequate warnings on Ibuprofen products and whether that constituted malice sufficient to support an award for punitive damages based on the manufacturer's knowledge of risks of which they failed to warn.

Sexual Abuse Actions. In Jackson v. Doe, 2011 DJDAR 2273, Plaintiff failed to file a certificate of merit by the attor-

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How to Tick Off a Jury

By: Susan M. Artenstein
Office Administrator, Arnold Law Firm

Being on a jury is very similar to exercise. You dread it. You think up reasons or excuses to avoid it, but when actually performed, it is a very good experience. Most trial lawyers do not get the actual "jury" experience, only the "mock jury" experience (maybe the equivalent to watching exercise). I hope sharing the experience can give each of you some new insights or re-affirm what you may have already learned.

The judge is very important to those 12 people. If they like, or in my case, love the judge, he is their idol. We (my jury) loved our judge, who was the Honorable Lawrence Brown, in Department 38 of the Sacramento Superior Court. He balanced just the right amount of humor, which made the jury comfortable, with the right amount of seriousness for his case and courtroom.

He began with his own questions of each juror with a sincere desire to know something about the 14 strangers who would be on the jury. He allowed the lawyers to also ask their questions, in detail, with no time constraints (at least vocalized). Throughout the trial, his demeanor was humble and caring, but at the same time, he was very much in charge of his courtroom and the proceedings. We respected him and admired him. He was "our" judge.

How did I perceive that "liking the judge" was important? When he read the jury instructions, they became the number one tool in the jury room and, whichever lawyer used, explained, talked about, and showed in visuals the jury instructions was equated (even subconsciously) with "our" judge. Since this was a criminal case, there was a D.A., and two defense attorneys. Since the D.A. used the jury instructions in closing arguments and explained what they meant, she captured a "piece" of us because we then equated her with the judge.

Let's talk about the lawyers. If you ever doubt that jurors talk about you in the hallway, I am here to assure you that it happens. In fact, it is quite embarrassing to admit some of the things said. If you are a man, please—if it's the only thing you do right—wear your pants at the appropriate length. I am not kidding. One day a lawyer wore, shall I say, "shorter than usual pants," and jokes were made for 15 minutes in the hallway. No one could believe there was a flood on the fifth floor, requiring those short pants.

Do not walk in late to court. We hated that and openly expressed our displeasure and our perception that our time was of no value. If the jury is there at 9 a.m., you should be there before 9 a.m. Each piece of displeasure they experience from the lawyers, they add to the positive or negative "bank" in their minds.

As to courtroom performance, jurors sit in those seats and feel like there is an invisible wall in front of them and they are watching a performance. All you have to do is make eye contact and the wall goes down. We stayed "in the performance" and listened closely when the lawyer made eye contact back and forth with each of us. One of the lawyers made "wall contact" and addressed his whole closing argument to the courtroom wall behind us. Many of us became sleepy. The lawyer said something to the effect of "concluding because he was putting us to sleep." Well, YEAH! Look us in the eye and bring us into the action.

PowerPoint needs to be used in a "powerful" way. Do not just put something in PowerPoint because all the other trial lawyers are using it. If you use it, create your presentation with bullet points that you are NOT reading. One of the lawyers had his whole closing argument on PowerPoint and clicked each slide as he was speaking. We half listened and half read. This was very ineffective, and we became slightly inattentive until.....drum

roll.....several words in the PowerPoint presentation were misspelled. I think you can imagine what many of us were thinking at that time.

Now we go into the jury room. Think about this concept: take 12 people who barely know each other, sitting in the hallway a lot, being told they cannot talk about the case, and wondering for two weeks if anyone has had the same thoughts as they have had. The minute the bailiff leaves, everyone wants to talk. In fact, they are happy to talk loud, talk over each other, and have lots to say once they have that green light.

Our jury went into the jury room about mid-afternoon and picked our foreperson. I had the pleasure of being the pick since the rest of the jurors knew I worked in a law firm with trial lawyers. I have to mention that the "job" was a little stressful at first since I did not know, and had not been told, the responsibilities of the foreperson. It may benefit you, as a trial lawyer, to prepare or read a jury instruction that addresses that issue. Luckily, for me, the rest of the jurors believed I knew my responsibilities.

Everyone wanted to talk. Everyone wanted to speculate based on their own experiences. They also talked over each other which is just craziness. It was quite stressful going home that evening wondering how we were ever going to get through the verdict forms.

The next morning we reconvened at 9 a.m. I asked everyone if they were okay with going around the table, everyone would get a chance to talk, and the rest of us would listen without interruptions. This was one of the best things we did. It forced those listening to really listen. Several people who had taken a strong stand the day before were much more open-minded. When we finished this exercise, we started going through the verdict forms. Everyone was assigned a "job." They either had a jury instruction that they would read or re-read, when applicable, or they had a piece of evidence. I read and marked the verdicts. Once finished, I was asked to re-read the counts and our decisions.

Once the manilla envelope was sealed, it was interesting to ask the fellow jurors what they liked and did not like. They did not like the lawyers being late. They did not like time spent in the hallway and viewed it as the lawyers' lack of preparation. They felt that some arguments made during the trial through direct examination or cross examination where "over done," and that we were smart enough to "get it." They liked one of the lawyers because she was humble, yet knowledgeable. She also explained the jury instructions to us via PowerPoint in her closing. They liked that a lot. One of the lawyers used PowerPoint but read everything he put up. They thought that was ineffective.

In closing, I hope that each one of you can use something from my experience that will make your trial work just a little less stressful!

Justice Day is well-organized venue for promoting bills that impact clients' ability to get justice

By: Kerrie Webb, CCTLA Board Member

I am pleased to say that this was my fourth year participating in CAOC's annual Lobby Day, now called Justice Day. The event was well-organized, well-attended and FUN!

Yes, Justice Day is *FUN!* For those of you who have attended in the past, you know what I am talking about: the camaraderie of spending the day with hardworking, committed trial lawyers, catching up with longtime friends and making new friends from across the state.

Moreover, as part of our Justice Day program, we had the honor of hearing from President Pro Tem Darrell Steinberg, Insurance Commissioner Dave Jones and Senator Kevin de Leon. Listening to them speak, and learning about the work they are doing, reinforces how important it is to support elected officials who will strive to protect consumers.

In addition to being fun, Justice Day is *IMPORTANT.* This is our opportunity to show up in force, and sit down with our legislators and their staff to talk about bills that impact justice for our clients.

This year, we had four bills that we were asking our legislators to support:

✔ AB 1063 by Assembly Member Steven Bradford

• *Why it's needed*: To ensure consumers get what they pay for in their underinsured motorist coverage. Currently, insurers can subtract the payment of an at at-fault driver from UIM policylimit.

• *The proposal:* Would allow motorists to tap the full benefit of their UM/UIM coverage to offset cost of injuries exceeding the combination of their policy and any insurance payment byan at-fault driver.

• *Its status as of May 14*: Unfortunately, it did not make it out of the Assembly Insurance Committee on May 4, and it's dead for this year.

✔ SB 558 by Senator Joe Simitian: Improving the Legal Rights of the Elderly and Disabled

• *Why it's needed*: Elder abuse is currently one of the rare areas of civil law where the burden of proof is the high

threshold of "clear and convincing" evidence.

• *The proposal*: SB 558 will bring stricter enforcement of the Elder Abuse Act and prevent the physical abuse of elderly and dependent adults by allowing proof using the "preponderance of evidence" standard.

• Its status: Referred back to Senate Rules Committee on May 11.

✔ SB 850 by Senator Mark Leno: Electronic Health Records

• *Why it's needed*: As a result of federal health care reform, electronic medical records are becoming commonplace. But widespread use opens up new avenues for errors. In some situations, health care providers have taken advantage of design flaws to cover up errors by modifying or deleting earlier entries.

• *The proposal*: SB 850 will ensure the accuracy, integrity and efficiency of electronic health records in order to achieve the ultimate goal of reducing medical errors.

• *Its status as of May 14*: On the Senate floor and ordered to third reading.

✔ AB 1062 by Assembly Member Roger Dickinson: Pre-Dispute Binding Arbitration Agreements

• *Why it's needed*: Hidden in the fine print of boilerplate documents, binding arbitration agreements have become a ubiquitous problem that causes consumers to sign away their legal rights without even realizing it. Arbitration agreements are increasingly being forced on consumers by lenders, the health care industry, employers and consumer product vendors.

• *The proposal*: AB 1062 proposes a procedural fix that will speed up the judicial process when the court reviews a motion to compel arbitration. The bill will ensure that these motions are speedy and efficient, saving the court time, money and avoiding stalling techniques.

• *Its status as of May 14*: On the Assembly floor for consideration.

If you attended Justice Day this year, THANK YOU for being active in our efforts to protect our clients and our community! If you have never attended Justice Day (formerly known as Lobby Day) please put next year's date on your calendar as soon as it becomes available. You do NOT have to be an expert on the bills, or an expert on talking to our elected officials. CAOC provides excellent training to give you the talking points. Moreover, you will meet with the legislator as part of a group, so you can see how your colleagues, who have been through Justice Day before, present the material. I can promise that you will not regret your participation, and I bet you'll be back to do it again.

If you want to know more about Justice Day, please feel free to e-mail me at kwebb@kcrlegal.com or contact CAOC's Legislative Director Nancy Peverini at nancyp@caoc.org.

SETTLEMENT

Traumatic brain injury: $2,100,000 settlement

CCTLA past president David Smith and CCTLA member Elisa Zitano report a $2,100,000 settlement in a motorcycle vs. automobile accident case in which the 28-year-old male plaintiff was broadsided by a pizza delivery driver who ran a red light. Liability was not seriously contested, but the defendants attempted to refute the nature and extent of the plaintiff's traumatic brain injuries and his future occupational limitations.

Plaintiff sustained major traumatic injuries, including an intracranial bleed and multiple orthopedic injuries, each of which required multiple surgical procedures, an extended acute care hospitalization and an extended rehab hospitalization. Because of his youth and pre-accident good health, Plaintiff made an good recovery from his orthopedic injuries, and the principle contested issues prior to settlement involved the extent of the residual limitations attributable to his traumatic brain injuries. Exhaustive medical work-up included a comprehensive neuro-psych evaluation by Dawn Osterweil, PhD; a PM&R evaluation by Dr. Alex Barchuk; and a life-care plan by Carol Hyland, R.N. This team of experts provided comprehensive documentation that Plaintiff was permanently and totally disabled and would require activity oversight and personal assistance for his entire life.

ARBITRATION

Jack Alexander v. California Automobile Insurance Association. Uninsured motorist action. Arbitrator Robert Drabant awarded Plaintiff Jack Alexander $468,245.45. Plaintiff's counsel: CCTLA's Mark R. Swartz, Esq. Defendant represented by R. James Miller of Powers & Miller.

Plaintiff Jack Alexander, while driving his Suburban, slowed his car to a stop for a red traffic signal that was controlling his direction of travel and then was struck from behind by the third-party defendant. The force of the collision propelled Plaintiff's Suburban into the rear of the car stopped in front of his.

As a result of the collision, Plaintiff suffered a herniated disc of his lumbar spine. He underwent medical care, medications, acupuncture and physical therapy treatment before being referred to Dr. Carol Vandenakker, a physical medicine rehabilitation physician. Dr. Vandenakker recommended a series of epidural steroid injections. From 2008 through 2010, Plaintiff underwent three epidural steroid injections per year, which provided good relief for approximately three months. The epidurals enabled him to continue riding his bike and snowboard, completing two Century bicycle rides, even though he had a herniated disc. It was plaintiff's contention that Plaintiff would continue to need three epidural injections for the remainder of his life in order to alleviate his low back pain.

According to Dr. Vandenakker, it was possible that Plaintiff could worsen and it was also possible that his pain could be resolved. However, it was her opinion that based upon the medical evidence to date, it was more likely than not that he would need to continue with epidural injections for the remainder of his life.

In contrast, the claimant retained Dr. George Picceti, a spinal surgeon practicing in Sacramento. Even though Dr. Picceti does not practice physical medicine, he opined that the epidural injections would not work indefinitely and would ultimately lose their efficacy. Dr. Picetti admitted that once the epidurals stopped working, then other treatment modalities i.e, injections, would likely be in order. However, he deferred to Dr. Vandenakker on this issue since he doesn't specialize in physical medicine rehabilitation.

The arbitrator's award is comprised of $37,745.00 for past medical expenses, $209,840.00 for future medical expenses, $16,449.60 in past income loss and $53,210.88 for future income loss, $150,000.00 for past and future pain and suffering.

The respondent offered $25,000 in new money to settle the claim. Plaintiff had previously resolved his case against the third party for his policy limits of $100,000.

VERDICT

CCTLA member Mark Swartz also won a jury verdict in Noel Lyn Roberts v. West Field, LLC, a five-day slip-and-fall action tried before the Honorable Alan Perkins. The jury verdict was $163,617.94 against Defendant Westfield, LLC, the owner of the Sacramento Downtown Plaza shopping center.

On March 1, 2007, Plaintiff and a co-worker walking through the Sacramento Downtown Plaza shopping center to their offices, which were located within the shopping center. As they crossed a tile walkway, Plaintiff fell, landing on the left side of her body. After her fall, both she and her coworker realized the floor was wet.

A janitor who was working in the area saw a floor cleaning machine being used to clean the tile floor area approximately five minutes before Plaintiff and her friend walked across the flooring. At no time did any employee put up a cautionary "wet floor" sign.

As a result of her fall, Plaintiff injured her left shoulder and was diagnosed as suffering from an impingement syndrome. She underwent a left shoulder arthroscopy with subacromial decompression. She also was diagnosed as suffering from left sided trochantericveremsitis. She underwent extensive medical care, physical therapy treatment and ultimately surgery for her left shoulder injury.

Her past medical expenses totaled $16,727.25, and

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"Pillah" Talk©

with Retired Appellate Court Justice Rick Sims

An ongoing series of interviews with pillars in the legal community
By: Joe Marman

This is a play on words, half between "Pillar of Community" and "Pillow Talk." This article is based on a speech Justice Sims gave to the Auburn Area Democratic Club in February 2011.

Q I understand that you have just retired from the Appellate Bench. What do you plan on doing now?

I am involved with the Committee for an Impartial Judiciary. Our concept is that judges are accountable. They are subject to checks and balances for all parts of government, including courts. Their decisions can be appealed, and judges are subject to ethics rules and codes of conduct.

Q How do you feel about the decision made by US Supreme Court under Justice John Roberts in Citizens United v FEC, 130 S. Ct. 876 (2010), which gives almost unlimited political campaign funding to corporations?

Let me start by stating that Roberts testified in his confirmation hearing before he became the chief justice that he would be fair and impartial, that he would be calling balls and strikes and inferred that he would not be attempting to change the direction of the court. Now I would say he is acting with unbridled judicial activism.

Citizens United was a case with the court ruling on an anti-trust matter involving Hillary Clinton and an anti-Clinton ad paid for by a political interest group 30 days before the election.

Historically, the Republicans have been vocal about criticizing the Democratic Party or the liberals for pushing a progressive agenda through the courts with activist judges and putting new laws into affect, when to do so overturns years of precedence. The new Roberts' court's rightward tilt has left its mark in several 5-to-4 decisions that advance conservative causes.

The US Supreme Court recently held, 5 to 4, that prosecutors in a criminal trial can use evidence obtained when police search a home without first knocking on the door. Kennedy and the conservatives again formed the majority, while the four liberals—John Paul Stevens, Ruth Bader Ginsburg , David H. Souter , and Stephen G. Breyer—dissented. A bad ruling.

I also have a criticism of Justice Antonio Scalia for being an activist judge. For most of the last century, the Second Amendment has been interpreted to say that the right to bear arms is a collective right, such as with military service. Scalia, in June 2008, for the first time rules that gun ownership is also an individual right. In a dramatic moment, the Supreme Court declared for the first time that the Second Amendment protects an individual's personal right to self-defense and gun ownership outside of military service.

Justice Anthony Kennedy ruled that regulations went too far when the environmental regulators applied the Clean Water Act to wetlands, rather than just lakes and rivers. The US Supreme Court ruled that Army Corps of Engineers was now exempt from the Clean Water Act. This change would now allow thousands of miles of streams in New England and hundreds of thousands of acres of wetlands to be at greater risk of being filled-in, bulldozed, or developed. Anthony Kennedy wrote many of the activist right-leaning decisions.

And worst of all is Citizens United v. FEC. The Court overturned a hundred years of case law precedence which established the concept that there is a distinction between people and corporations. The McCain/Feingold-Bipartisan Campaign Reform Act § 441(b) made it a felony for all corporations—including nonprofit advocacy corporations—either to expressly advocate the election of or defeat of candidates or to broadcast electioneering communications within 30 days of a primary election and 60 days of a general election. Roberts and the conservatives overruled 100 years of precedence, and in fact they relied on eight dissenting opinions in those hundred years of prior court rulings to get this bad result.

The Court discovered a glaring contradiction in the exemption of "media corporations" from § 441b. The Court declared that § 441b allowed print and electronic media corporations to hawk their views with impunity right up to election day due to an exemption in the law, while business and labor entities were silenced by the threat of prosecution if they did the same.

In fact, the issues the Supreme Court ruled on to overturn precedent was not even before the court, and the court asked the attorneys to brief those additional issues to get the opinion that corporations had the same standing as citizens to contribute unlimited funds to political

campaigns.

When Justice Roberts promised to not be an activist judge, this is judicial activism at its worst. His court is anything but judicial restraint.

The Senate confirmation hearings were just a charade since John Roberts began promising to be a neutral party and only call balls and strikes, and not be an activist. Justice Anthony Kennedy from Sacramento wrote most of these terrible opinions.

Justice Stevens dissented in Citizens United, arguing that the founders had no problem applying federal regulation of corporations, and he cited an 1819 case, Trustees of Dartmouth College v Woodward, in his argument that the First Amendment doesn't apply to corporations, except those which constitute the "institutional press." The 90-page dissent by Justice Stevens argued that the Court's ruling "threatens to undermine the integrity of elected institutions across the nation.

McCain-Feingold's Amicus Brief declared that 24 states do currently limit or prohibit corporate electioneering paid with general treasury funds.

Laurence H. Tribe, professor of constitutional law at Harvard Law School, stated that Citizens United v. FEC marks a major upheaval in First Amendment law and signals the end of whatever legitimate claim the Roberts' court could make that they uphold an incremental and minimalist approach to constitutional adjudication. In fact, a judge from Tuolumne wrote a full page opinion criticizing the Citizens United decision and asked the *Sacramento Bee* to run it at the judge's own expense. *The Bee* refused to run the editorial. This judge then paid $38K of his own money to run the article in the *San Francisco Chronicle.*

Q What do you think about the Bush v. Gore decision?

That was the second worst decision of our US Supreme Court. Most constitutional law scholars have given their opinion, that this decision again set new precedence when previously, it was exclusive the state's providence to set their own elections regulations. The worst US Supreme Court decision was the Dred Scott v. Sandford, 1857 decision that declared that blacks had no rights under the US Constitution.

Verdicts

Continued from page 7

$1,000 in future medical expenses were claimed. Plaintiff's past income loss totaled $20,992.42. No future income losses were claimed. The jury awarded Plaintiff her economic damages and $100,000 for past general damages and $25,000 for future general damages.

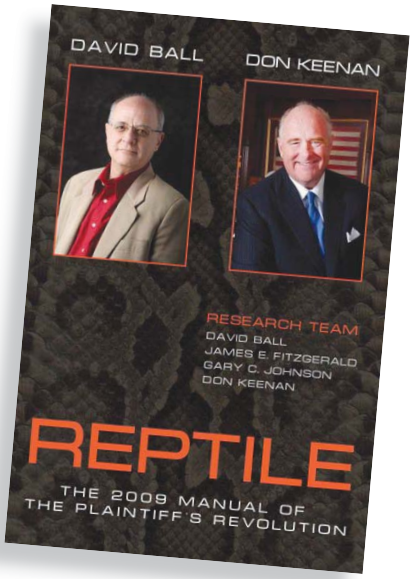
Plaintiff still experiences residual left sided low back pain and a residual dull aching pain in her left shoulder; however, she has regained full range of motion within her shoulder.

Prior to trial, an arbitrator awarded her $92,484.28. This award was rejected by Defendant. The defense Offer to Compromise was $45,001. Plaintiff's CCP §998 was $117,000.

Defense contended that a sign was present, the floor was not necessarily dangerous when wet and, in any event, that Plaintiff's doctors took her off work for too long and that most of her current symptoms are simply due to being overweight and getting older.

Reptilian tactics heralded as way to win in court

By: Chris Kreeger, CCTLA Past President



In addition to bringing back a lot of good memories for those who graduated from McGeorge School of Law, the CCTLA-hosted Reptile seminar on April 29-30 was a unique and invigorating educational event for the 55 plaintiff lawyers who attended from all over California.

David Ball and Don Keenan provide these seminars, but Don was ill, so his partner Charles Allen took his place for this event. David and Charles provided an excellent hands-on perspective for case/client preparation and "how-to" take "reptile" depositions.

The major axiom is: when "the reptile" sees a survival danger, even a small one, she protects her genes by impelling the juror to protect himself and the community. So, in trial, it should be your goal to appeal to the reptilian brain of the juror and couch the defendant's actions as threatening her survival. This is accomplished right from the beginning by focusing on the defendant's actions and identifying all of the "rules" that were broken. When rules designed to protect the community are broken, the jurors see a collective threat to the community and are motivated to spring into action.

David and Don utilize these reptilian tactics from case intake, depositions, voir dire, opening and through trial. The recommended place to start is by reading *Rules of the Road* (Rick Friedman), *Polarizing the Case* (Rick Friedman), *Damages* (David Ball) and *The Reptile* (David Ball and Don Keenan). They also suggest *Blink* by Malcolm Gladwell, and many others.

They also recommend that you attend one of their two-day seminars and begin to implement the "reptile" into your practice as the primary case presentation method. They claim in excess of $1 billion in verdicts directly attributable to use of the "reptile" thus far, and make a very convincing case.

All in all, it was a very interesting and motivational seminar, and anyone who tries cases would benefit greatly from the collective wisdom presented. For more information, visit www.keenantrialblog.com.

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RESERVE THE DATE!

The 2011 CCTLA Officers and Board cordially invite you to the

9th Annual Spring Reception & Silent Auction

Congratulations goes to Robert A. Buccola as this year's Friedman Award Recipient

Date: *Thursday, May 26, 2011*
Time: *5:30 p.m. to 7:30 p.m.*
Place: *At the Home of Allan J. Owen & Linda K. Whitney*
2515 Capitol Avenue, Sacramento

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

Reservations should be made no later than Friday, May 20, 2011, by contacting Debbie Keller @ 916/451-2366 or debbie@cctla.com

WENDY C. YORK, President & the Officers and Board of CCTLA

☞ All silent auction items have been donated and all proceeds will go to ***Sacramento Food Bank and Family Services.***

Public Justice seeking help to halt improper use of US Supreme Court's Iqbal ruling

Reprinted from the Public Justice Foundation website: www.tlpj.com or www.public justice.com

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In Ashcroft v. Iqbal, the U.S. Supreme Court held that a Pakistani Muslim's complaint of discrimination by high-level officials had to be dismissed unless its allegations were made more specific. In reaching that result, the Court said that to "survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."

Within days, defendants across the country began moving to dismiss consumers' rights, workers' rights, and civil rights lawsuits, arguing that Iqbal dramatically changed the rules for pleading a claim in federal court.

In fact, the rule in the U.S. has always been—and continues to be—that a plaintiff's complaint need only contain a "short and plain statement" of the claim showing an entitlement to relief. Nonetheless, defendants are arguing that almost any allegation is too conclusory to be sufficient, that a wide variety of previously accepted claims are implausible, and that Iqbal eliminated supervisory liability for high-ranking officials.

What Public Justice is Doing

Public Justice's Iqbal Project is designed to stop improper use of the Iqbal decision and preserve plaintiffs' right to their day in court.

First, we are gathering materials, and we need your help! Please send us complaints that have survived Iqbal motions, successful briefs in response to Iqbal challenges and published or unpublished decisions interpreting Iqbal or rejecting Iqbal arguments. We must work together to prevent bad law. All plaintiffs and plaintiffs' counsel will suffer if cases that could have been better argued lead to poor decisions. Prevent this by sending us your materials.

Second, email us if you would like strategic assistance with your case or would like us to get involved on appeal. We want to help plaintiffs respond to arguments about conclusory allegations, plausibility, and supervisory liability, and to share useful materials as we gather them. For example, we are tracking case law developments and will be happy to provide information on useful recent decisions.

Third, we will file briefs to encourage courts to correct erroneous applications of Iqbal. (To access the amicus brief Public Justice recently filed in the Third Circuit, go to http://www.tlpj.com/Key-Issues-Cases/Access-To-Justice/Iqbal-Project.aspx and click where indicated in the article.)

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Public Justice Foundation's West Coast office is located at 555 12th Street, Suite 1620, Oakland, CA 94607. Contact info: phone 510-622-8150; fax: 510-622-8155; www.tlpj.com.

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CONSUMER ATTORNEYS OF CALIFORNIA

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L U N C H E O N

DATE: Friday, June 17, 2011
TIME: 12:00 Noon
PLACE: Firehouse Restaurant
1112- 2nd Street, Old Sacramento

SPEAKERS: MARK GERAGOS, ESQ. & BRIAN KABATECK, ESQ.

TOPIC: "LEARNING HOW TO WORK WITH THE MEDIA IN YOUR CASE"

Mark Geragos and Brian Kabateck both have experience with the media and civil litigation. They will discuss how to get the media interested in your case.

This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1.0 hour of which will apply to general civil litigation; certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

COST: **CCTLA & CAOC Members $30.00.** Please make checks payable to ***CCTLA*** and mail your payment to CCTLA, P. O. Box 541, Sacto. CA 95812-0541.

RESERVATIONS AND PAYMENTS should be made in advance (by phone or email (debbie@cctla.com)) **and must be received no later than Friday, June 10, 2011 to confirm your reservation.** Thank you! ~ *Because CCTLA is charged for no shows, we regret that you will be charged for your reservation unless canceled in advance.*

Luncheon Selections: Shrimp Louie and Balsamic Chicken

Allan's Corner

Continued from page 2

ney and a licensed mental health practitioner as required by CCP §340.1. Appellate Court affirms finding they must be filed even by a pro per plaintiff.

Assumption of the Risk. In Rosencrans v. Stover Images, Ltd., 2011 DJDAR 2601, Plaintiff signed a release as he entered the motocross track. He had several arguments why the release should not be enforced but the court held it was enforceable. The Appellate Court reversed, finding that there could be gross negligence here for failure to post a flagger. Plaintiff's expert testified that would be an extreme breach of duty and care.

Fire Insurance. In Sentry National Insurance Co., v. Garcia, 2011 DJDAR 2619, the court holds that a homeowner's policy which excludes coverage for intentional acts of any insured is void as overbroad since the insurance code only allows for exclusion of intentional acts by the insured. This means that innocent co-insureds can still collect on the policy.

Haniff. In Cabrerra v. Eurohaus Properties, Inc., 2011 DJDAR 2961, the Second District holds that the collateral source rule does not bar reducing an award of past medical expenses to the amount paid by the insurance company. Terrible decision which even notes that this issue is up before the Supreme Court. Petition for Hearing has been filed.

Bad Faith. In Hibbs v. Allstate, 2011 DJDAR 2971, the court holds that although Allstate's policy gives the insurer the option to pay for damages to an insured vehicle or to repair it, the insurer may still be liable in bad faith when it pays for repairs not authorized by the insured and then recovers from the tortfeasor in subrogation because the subrogation action might prejudice the insured's direct action against the tortfeasor. Of special interest is Business & Professions Code §9884.9 which prohibits an auto repair shop from doing any work (other than tear down) until a written estimate has been given to the customer. The court also holds (for the first time in California, apparently) that the insured does not have the right to take the cost of repairs as opposed to repair if the policy gives the option directly to the insurance carrier.

Exclusive Remedy. In Angelotti v. Walt Disney Company, 2011 DJDAR 3014, there is a very good discussion of the exclusive remedy doctrine in a setting of special employment where there are many potential employers.

Default Judgment. In Garcia v. Politis, 2011 DJDAR 3048, Plaintiff obtained a default judgment by written declaration and then filed a post-judgment motion to seek statutory attorney's fees. Trial court denied the motion, finding it was untimely, and Appellate Court affirms finding that if you want attorney's fees, you must seek a request for them in your request for default judgment.

Duty. In Cabral v. Ralph's Grocery Company, 2011 DJDAR 3140, Ralph's truck driver parked his tractor trailer next to an interstate highway to have a snack. Plaintiff's decedent lost control of vehicle for unexplained reasons and crashed into the back of the truck and was killed. Jury allocated 90 percent fault to decedent, 10 percent to Ralph's. Trial court denied JNOV and Court of Appeal reversed. Supreme Court now reverses Court of Appeal and finds a general duty of care exists. There is no hard and fast rule exempting a parked truck from the general duty of care, and it was up to the jury to decide breach and causation.

U**ninsured Motorist Cases.** In State Farm v. Glee, 2011 DJDAR 3170, the Third District holds that an insurance carrier has the right to engage in discovery to investigate UM claim including inquiring into extraneous issues of treating chiropractors during deposition. This arises in the context of a Business & Professions Code claim against the chiropractor for basically opening an office in partnership with non-chiropractor, but will undoubtedly be cited by insurance carriers for the right to do extensive discovery in UM cases and not be in bad faith.

Appraisal. In Kirkwood v. CSAA, 2011 DJDAR 3193, the court holds that the mandatory appraisal process codified in Insurance Code §2071 applies only to the factual task of valuing items of property and not to matters of statutory construction, contract interpretation and policy coverage.

Statute of Limitations - Tolling. In Clark Family Ltd. Partnership v. Miramontes, 2011 DJDAR 3374, the Fourth District holds that CCP §351 which tolls the statute of limitations for the time that a defendant is out of state would violate the commerce clause if applied in the case of a non-resident defendant.

Insurance. In Minich v. Allstate, 2011 DJDAR 3737, Plaintiff's house was destroyed by fire. Allstate made a timely tender of the liability limit under the policy's declarations page minus $250 but refused to pay an additional approximately $65,0000 required under the policy if the insureds decided to rebuild rather than just take the money and run. This is your typical policy provision, and all require evidence that the insured is actually rebuilding as opposed to just selling the lot and moving on. Allstate did pay the additional $65,000 15 months later, once they had proof that the insureds were rebuilding. Insureds sued them, most likely a bad faith action for the delay in payment. Summary judgment was granted, and not too surprisingly, affirmed on appeal.

Spoliation of Evidence Suit. In Rosen v. St. Joseph Hospital, 2011 DJDAR 3677, Plaintiff was in a bus accident in October, 2004, and then in November, suffered a stroke. Plaintiff was admitted to the hospital, and doctor Oppenshaw performed an angiogram, which Plaintiff alleges showed the impact from the bus accident tore Plaintiff's left internal carotid artery, causing her subsequent stroke. On motion by the bus company,

the trial court barred Plaintiff's experts from testifying that the bus accident caused the stroke because the experts did not offer that opinion during their depositions. Jury verdict was a defense verdict on the breach of care duty, and thus the jury never reached the issue of whether or not the bus accident caused the stroke.

Plaintiff then sued the attorney representing the bus company, her law firm, the hospital, the doctor and the doctor's medical group, alleging that the attorney and the doctors stole the angiogram. She stated causes of action for conversion and conspiracy to commit conversion, violation of fiduciary duties, violation of privacy and intentional infliction of emotional distress.

She also sued the attorney based on an alleged misrepresentation regarding the bus company's insurance. Demurrers by the doctor and the hospital were sustained without leave to amend because these were essentially spoliation of evidence claims not recognized in California. Court of Appeal agreed with the trial court, found there is no separate cause of action for spoliation of evidence and sustained the judgment of dismissal.

Insurance Coverage. In Shanahan v. State Farm, 2011 DJDAR 3988, Plaintiff was sued for sexual harassment, gender discrimination, marital status discrimination, religious discrimination, retaliation, sexual battery, breach of oral contract, fraud and deceit, breach of written contract, and wrongful termination. He had a renter's insurance policy and a separate personal liability (umbrella) policy with State Farm. State Farm refused to defend or indemnity. After settling the lawsuit, he sued State Farm. Trial court granted summary judgment, and based on the facts here, pretty clearly it was appropriate as all non-covered acts. Affirmed on appeal.

Costs. In Brown v. Desert Christian Center, 2011 DJDAR 4001, Defendant proved its affirmative defense that the injuries were within the exclusive jurisdiction of the Workers' Compensation system and a judgment of dismissal was entered. Defendant filed a cost bill; Plaintiff moved to strike it, alleging that Defendant's success on the ground of lack of subject matter jurisdiction meant that the court lacked jurisdiction to award costs. Trial court granted the motion to strike, and the Appellate Court reverses and reinstates the cost bill. Basically, a court always has jurisdiction to determine its own jurisdiction.

Settlement With One Tortfeasor. In Leung v. Verdugo Hills Hospital, 2011 DJDAR 4249, the Appellate Court holds that CCP §877 does not apply once a trial court determines that a settlement with one concurrent tortfeasor is not in good faith. Under the old common-law rule, if you go ahead with the settlement, then it releases all concurrent tortfeasors for their joint and several liability (economic damages). The court did request the Supreme Court take up the matter and do away with the common-law rule.

OSHA Regulation/Negligence Per Se. In Iverson v. California Village Homeowners Association, 2011 DJDAR 4282, the court holds that OSHA regulations do not protect an independent contractor as opposed to an employee. This is really an awful decision for work-place injuries.

Privette Cases. In Teverberg v. Fillmer Construction, Inc., 2011 DJDAR 4453, the First District holds that while a hirer cannot be found liable under the peculiar risk doctrine to an independent contractor, they can be held liable on a direct theory that they retained control over safety conditions at the worksite. It does, however, require an affirmative contribution to the injury. Of greater importance, the court held that Cal-OSHA requirements may create a non-delegable duty that may form the basis of direct liability from a hirer to an independent contractor (contrast with Iverson directly above).

Reimbursement of Overpayments to Medi-Cal. In Branson v. Sharp Health Care, Inc., 2011 DJDAR 4619, the Fourth District finds that after you do an Ahlborn calculation, if the beneficiary has overpaid Medi-Cal, the court may order that Medi-Cal refund the overpayment.

Power Press Exception. In Elfiell Manufacturing Company v. Superior Court, 2011 DJDAR 4688, the court holds that a spouse of a claimant under Labor Code §4458 (punch press exception - making employer liable where the employer knowingly removes or fails to install a guard on a power press) may bring a loss of consortium action.

Compulsory Cross-Complaints. In RS v. Pacificare, 2011 DJDAR____ the Second District holds that the mandatory cross-complaint rule is alive and well. Here, an insurer filed a declaratory relief action seeking rescission of an insurance policy issued in Missouri. Plaintiff's cross-complaint for bad faith later dismissed without prejudice there and re-filed it in California. California action was stayed pending resolution of the Missouri action that was resolved in favor of plaintiffs. Stay in California was then lifted and trial court sustained a demurrer without leave to amend based upon the breach of contract and bad faith claim being a mandatory cross-complaint under Missouri law. Court of Appeal affirmed.

Fee Arbitration. In Glaser v. Goff, 2011 DJDAR 5417, the court holds that an Appellate Court reviews de novo a determination as to whether or not an attorney fee arbitration is binding or non-binding also holds that where the clients first requested binding arbitration and the law firm rejected that offer, the law firm's later (after learning who the arbitrators were) decision to do binding arbitration can't be forced upon the clients. It is hornbook law that the rejection of the offer constitutes a withdrawal of the offer.

Product Liability. In Garcia v. Becker Bros. Steel Company, 2011 DJDAR 5445, Defendant bought a machine for use in operating its steel business. Twenty-six years later, Defendant sold the machine to another company. That company ceased operation, the equipment was repossessed by bank and then bought by Plaintiff's employer. Thirty-one years after the machine was first put into operation, Plaintiff was injured and sued the machine's original owner.

Trial court granted summary judgment to the original owner on the basis that there was no duty. Court of Appeal affirms, finding that whatever duty an occasional seller of used machinery owes his immediate purchaser does not run to subsequent purchasers.

Putative Spouse. In Ceja v. Rudolph and Sletten, Inc., 2011 DJDAR 5526, court holds that the test for whether CCP §377.69 applies (putative spouse) is subject to belief in good faith, not objective.

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How to Tick Off a Jury

From a Juror's Point of View

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

CCTLA Calendar of Events

MAY

Thursday, May 26
9th Annual Spring Reception & Silent Auction
Location: Home of Allan Owen and Linda Whitney, 5:30-7:30 p.m.

JUNE

Thursday, June 9
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

Tuesday, June 14
Q&A Luncheon- Noon
Vallejo's (1900 4th Street)
CCTLA Members Only

Friday, June 17
CCTLA Luncheon
Topic: Learning How to Work with Media in Your Case
Speakers: Brian Kabateck and Mark Geragos
Firehouse Restaurant - Noon
CCTLA Members, $30

JULY

Tuesday, July 12
Q&A Luncheon- Noon
Vallejo's (1900 4th Street)
CCTLA Members Only

AUGUST

Tuesday, August 9
Q&A Luncheon- Noon
Vallejo's (1900 4th Street)
CCTLA Members Only

Thursday, August 11
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, August 19
CCTLA Luncheon
Topic: TBA - Speaker: TBA
Firehouse Restaurant - Noon
CCTLA Members, $30

SEPTEMBER

Thursday, September 8
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

Tuesday, September 13
Q&A Luncheon- Noon
Vallejo's (1900 4th Street)
CCTLA Members Only

Friday, September 16
CCTLA Luncheon
Topic: Masters in Trial: Closing Arguments
Speaker: Chris Dolan, Esq.
Firehouse Restaurant - Noon
CCTLA Members, $30

OCTOBER

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 14
CCTLA Seminar
Topic: BioMechanical Testimony: Fact or Fiction?
Speakers: Ron Haven, Glenn Guenard, Rob Piering and John Martin
Holiday Inn, 300 J St.
Time: 9:30 a.m. to 1 p.m.
Cost: TBA

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

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