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The LITIGATOR

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Inside This Issue

Tireless efforts appreciated, underscored

By: Cliff Carter
President, CCTLA

This is the last issue of *The Litigator* for 2013. This has been a great year for me personally, and I want to thank our CCTLA board for all of the support I have received throughout the year. The role of president is one that is supported by many people who normally are not seen by everyone else.

One of the many people who has made this year successful is Debbie Keller. I am sure all of you know Debbie is our executive director, but I am sure most of you do not appreciate the role she plays within our organization.

Debbie has been supporting the board, and the president, for 33 years. That track record alone is worth mentioning. Speaking for all of the past presidents, I can assure you that CCTLA would not run as smoothly, or as successfully, without her tireless efforts. Debbie is at every board meeting, at almost every event, and is the organizational force behind all that we do. Thank you, Debbie.

Our long-serving board member, Allan Owen, is retiring from both the practice of law and the CCTLA board this year. He is departing for Hawaii in December. Allan has been a crucial force in city and statewide politics for decades. He has tirelessly championed the causes near and dear to all of our practices. He also has been instrumental in fundraising, politicking and identifying political candidates that support our clients. He has also made his home available for our annual Spring Fling, which raises substantial donations for the Sacramento Food Bank. I personally would like to thank Allan for his efforts on behalf of all of us.

Good luck to all of you in your practices next year. I have enjoyed my year of stewardship of the organization. Steve Davids is the incoming president, and anyone who knows Steve knows he will do an excellent job next year. If you want to really help Steve, then volunteer to help next year doing something to promote our organization. Your time and efforts are invaluable to making CCTLA into the great organization it has become.

Mike's CITES

By: Michael Jansen

Here are some recent cases I culled 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.

1. *State of California Department of CHP vs. Superior Court of Orange County (Mayra Antonia Alvarado)*, September 17, 2013.

The rule of this case is that the CHP is not responsible when a tow truck driver rear-ends and seriously injures someone on the freeway. The tow truck driver had contracted with the CHP, who provided funding for the tow truck driver program, supervised the tow truck driver program, performed background checks on the tow truck drivers, trained the drivers, inspected the tow trucks, dispatched the tow truck drivers, and investigated complaints against the tow truck drivers.

The court found that the tow truck driver was a special employee and thus the State of California was not responsible for the tow truck driver.

2. *Aguilar v. Gostischef and Farmers Insurance Exchange* (October 11, 2013).

On January 3, 2004, Aguilar (Plaintiff) and Gostischef (Defendant) were involved in a serious motor vehicle collision that caused Aguilar to lose his leg. Gostischef had a $100,000 Farmers policy. Aguilar's medical bills were $507,718.

A month after the collision and pre-lawsuit, Aguilar's counsel demanded that Farmers disclose the policy limit so that Plaintiff could make a policy limits demand. Plaintiff followed up four months later asking for Farmers for their policy limits so that a policy limits demand could be made. Farmers ignored all of the Plaintiff's requests for the policy limits, and therefore Plaintiff sued Defendant in a single cause of action for personal injuries.

Two months after the lawsuit was filed, Farmers offered their $100,000 policy limit. Less than three months after the complaint was filed, Farmers, on behalf of Defendant, presented Plaintiff with a 998 offer to compromise for the $100,000 policy limit. Several months later, Plaintiff made a 998 offer

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THE ALCHEMY OF LOST EARNING CAPACITY

Turning Speculation into Fact

By: Steve Davids

It is a proposition too plain to be contested (which is judge-speak for "I believe …") that damages must be based on what is reasonably probable to occur. Perhaps the only aspect of tort law that focuses on "could be" versus "would have been" is lost earning capacity.

Think of lost earning capacity as non-economic damage. It is the loss of the opportunity and ability to work, as opposed to loss from a specific job. It should be contrasted with CACI 3903C: the plaintiff must prove the amount that he/she "will be reasonably certain to lose in the future as a result of the injury."

The lost earning capacity instruction is CACI 3903D: "The loss of Plaintiff's ability to earn money. To recover damages for the loss of the ability to earn money as a result of the injury, Plaintiff must prove the reasonable value of that loss to him/her. *It is not necessary that [he/she] have a work history.*" (Italics mine.)

These claims stand or fall on your client's credibility, and yours. It is one thing to instruct the jury that your client need not have had a work history. But that is a difficult hurdle to clear. I recommend being prepared at deposition, arbitration, mediation, and trial with a brief discussing the cases on this subject. Here is a sampling:

Handleman v. Victor Equipment Co. (1971) 21 Cal.App.3d 902, 906: impairment of earning capacity is not the same as the actual (and established) loss of wages between the occurrence of the injury and the date of trial; the latter can be proved with reasonable certainty and are recoverable, therefore, as special damages. On the other hand, "Loss of earning power is an element of general damages which can be inferred from the nature of the injury, without proof of actual earnings or income either before or after the injury, and damages in this respect are awarded for the loss of ability thereafter to earn money."

Gargir v. B'Nei Akiva (1998) 66 Cal. App.4th 1269: Plaintiff high schooler was injured at a summer camp, and had intended to pursue a career as a special education teacher, a career that by necessity would require physical dexterity and mobility. Proof of loss of earning capacity did *not require expert testimony* about the loss of future earnings. Loss of earning power is an element of general damages that may be inferred from the nature of the injury, *with or without proof of actual earnings or income either before or after the injury.* Plaintiff's knee injury, as well as the possibility of future surgeries, would impair her ability to effectively function in her chosen career. These physical restrictions created a reasonable inference that plaintiff's future earning capacity would be impaired. The verdict was based on her *aspirations*.

Earning capacity is not a matter of actual earnings. (Page 1283.) "The impairment of the power to work is an injury wholly apart from any pecuniary benefit the exercise of such power may bring and if the injury has lessened this power, the plaintiff is entitled to recover." (*Ibid.*)

Even if the judge allows you to instruct the jury pursuant to CACI 3903D, you still have to prove the reasonable value of the loss. However, the loss is *presumed* from the injury, so you don't have to prove that it is probable. See Ridley v. Grifall Trucking Co. (1955) 136 Cal.App.2d 682, 688: "Evidence of actual earnings before or after injury merely assists the jury, as persons of ordinary intelligence and experience, in arriving at the amount of the award which it is in their power to determine from the nature of the injury."

Amateurs present an interesting and challenging situation. A statistician can opine that there is a less-than-50% chance that a given amateur could become a professional. However, lost earning capacity differs from medical causation, which requires a greater than 50% likelihood. (Dumas v. Cooney (1991) 235 Cal.App.3d 1593, 1608.)

My thought, for what it is worth: Even though probability is not the standard, be prepared to argue it persuasively.

Connelly v. Pre-Mixed Concrete Co. (1957) 49 Cal.2d 483: Plaintiff was an amateur tennis player who planned to turn professional. There was plenty of testimony about how good she was. The Supremes affirmed the jury's verdict of loss of future earning capacity as a professional, even though Plaintiff had never earned any money as a professional.

Here's an anecdote: if you rely solely on statistics, then you wouldn't have predicted that Earvin ("Magic") Johnson, George Herman ("Babe") Ruth and Brett Favre would become professional athletes.

Lost earning capacity also affects life expectancy issues. In medical malpractice cases, the plaintiff can claim lost earning capacity for the years he/she will not live. (Fein v. Permanente (1985) 38 Cal.3d 137, 153.) *No deduction is made for expected living expenses during the "lost years,"* meaning that this is not the equivalent of the personal consumption deduction.

Even unemployed plaintiffs have

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a potential claim. An injured stay-at-home parent can still recover for loss of earning capacity, even if they were not working, and earned nothing. (Hilliard v. A.H. Robbins (1983) 148 Cal.App.3d 374, 412.) The jury awarded recovery even in the absence of evidence of any monetary loss. The test is not what the parent would have earned, but what she could have earned. This is a separate injury from a loss of earnings.

How does this apply to geriatric clients? In hard economic times, when Social Security doesn't pay the bills, people need to safeguard their capacity to earn money. In Storrs v. Los Angeles Traction Co. (1901) 134 Cal.91, a 75-year-old received an award for lost earning capacity, even though he held no positions in any financial institution (which had been his career), and was not earning any money. But he was active and in good health.

The apparent ability of the plaintiff to return to former employment is NOT proof there no loss of earning capacity! (Robison v. Atcheson, Topeka & Santa Fe Railway (1962) 211 Cal.App.2d 280, 286: 50-year-old switchman was injured in a fall. He went back to work, but had recurring problems that made it harder for him to do his job. There was evidence this condition was permanent. Even though he worked for the 4 years leading up to the trial, he received loss of earning capacity.) The jury could conclude it was reasonably certain he would suffer a future loss because he wouldn't be able to work as long as he could have.

I recommend talking to your economic damages / vocational rehabilitation experts. Data collected by U.S. Commerce Department and Bureau of Labor Statistics can establish that people with disability both earn less and work less than their able-bodied counterparts. They receive fewer salary increases, and are less likely to advance or receive recognition. Folks with chronic problems leave the work force earlier.

Now to throw a monkey wrench into the works:

We have seen that loss of future earning capacity should be non-economic. But maybe it isn't. Fein, *supra*. said lost earning capacity was actually economic damage, because it was a loss of future earnings, and therefore subject to periodic payments under Civil Code

3333.1 in medical malpractice cases. But its authority for that was Robison, which dealt with lack of earning capacity, not loss of earnings. This is going to require some argument.

Even though the case law says that you don't have to prove an earnings history, you still have to be persuasive to the jury.

Remind them that speculation is stuff that is based on conjecture, rather than knowledge or information. You and your client have empirical data about what he / she could have done based on their prior record of earnings and employment.

Be prepared to prove what the future could have been, but also encourage the jurors to think about the loss of hopes, dreams, and aspirations. It comes down to … what might have been:

From "Maud Muller," *by John Greenleaf Whittier (1807 – 1892)*

Maud Muller, on a summer's day
Raked the meadows sweet with hay.
Beneath her torn hat glowed the wealth
Of simple beauty and rustic health.

***

The Judge rode slowly down the lane,
Smoothing his horse's chestnut mane.
He drew his bridle in the shade
Of the apple-trees, to greet the maid,
And ask a draught from the spring that flowed
Through the meadow across the road
She stooped where the cool spring bubbled up,
And filled for him her small tin cup
And blushed as she gave it, looking down
On her feet so bare, and her tattered gown.
"Thanks!" said the Judge, "a sweeter draught
From a fairer hand was never quaffed."
He spoke of the grass and flowers and trees,
Of the singing birds and the humming bees;

***

At last, like one who for delay
Seeks a vain excuse, he rode away,
Maud Muller looked and sighed: "Ah, me!
That I the Judge's bride might be!"

***

The Judge looked back as he climbed the hill,
And saw Maud Muller standing still.
"A form more fair, a face more sweet,
Ne'er hath it been my lot to meet.
And her modest answer and graceful air
Show her wise and good as she is fair.
Would she were mine, and I to-day,
Like her, a harvester of hay:
No doubtful balance of rights and wrongs,
Nor weary lawyers with endless tongues,
But low of cattle, and song of birds,
And health, and quiet, and loving words.
But he thought of his sisters, proud and cold,
And his mother, vain of her rank and gold.
So, closing his heart, the Judge rode on,
And Maud was left in the field alone.
But the lawyers smiled that afternoon,
When he hummed in court an old love-tune;
And the young girl mused beside the well,
Till the rain on the unraked clover fell.
He wedded a wife of richest dower,
Who lived for fashion, as he for power.
Yet oft, in his marble hearth's bright glow,
He watched a picture come and go:
And sweet Maud Muller's hazel eyes
Looked out in their innocent surprise.

***

She wedded a man unlearned and poor,
And many children played round her door.
But care and sorrow, and child-birth pain,
Left their traces on heart and brain
And oft, when the summer sun shone hot
On the new-mown hay in the meadow lot,
And she heard the little spring brook fall
Over the roadside, through the wall,
In the shade of the apple-tree again
She saw a rider draw his rein,
And, gazing down with timid grace,
She felt his pleased eyes read her face.

***

And for him who sat by the chimney lug,
Dozing and grumbling o'er pipe and mug,
A manly form at her side she saw,
And joy was duty and love was law.
Then she took up her burden of life again,
Saying only, "It might have been."
Alas for maiden, alas for Judge,
For rich repiner and household drudge!
God pity them both! and pity us all,
Who vainly the dreams of youth recall;
For of all sad words of tongue or pen,
The saddest are these: "It might have been!"

Consumer Attorneys of California

CCTLA's Steven Campora is co-winner of Consumer Attorneys of the Year Award

Christopher Dolan receives the Edward I. Pollock Award

CCTLA member Steven M. Campora, of the Sacramento firm Dreyer Babich Buccola Wood Campora, and Frank M. Pitre of the Burlingame firm Cotchett, Pitre & McCarthy, were named 2013 Consumer Attorneys of the Year by the Consumer Attorneys of California (CAOC) 2013 on Nov. 17. They were recognized for their work to force PG&E to adopt new safety measures after the San Bruno gas line explosion that killed eight people and destroyed 38 homes in September 2010 (Grieg v. PG&E/Bullis v. PG&E).

In addition, CCTLA member **Christopher B. Dolan**, owner, The Dolan Law Firm, San Francisco, received the Edward I. Pollock Award given "in recognition of many years of dedication, outstanding efforts and effectiveness on behalf of the causes and ideals."

The winners were announced during the Nov. 16 at the awards dinner that was part of CAOC's 52nd annual convention at The Palace Hotel in San Francisco.

Consumer Attorney of the Year is awarded to a CAOC member or members who significantly advanced the rights or safety of California consumers by achieving a noteworthy result in a case. To be considered for the 2013 award, the case had to have finally been resolved between May 15, 2012, and May 15, 2013, with no further legal work to occur, including appeals.

As part of *the PG&E San Bruno fire cases*, **Campora** represented the husband/father and daughter/sister of a woman and 13-year-old girl who were burned to death in the front yard of their home. Pitre represented the wife/mother of a man and 17-year-old boy who burned to death in their home.

PG&E claimed the explosion was an isolated incident resulting from a uniquely flawed weld in its pipeline, but **Campora** and Pitre proved that the explosion was symptomatic of a corporate culture that repeatedly circumvented rules and regulations necessary to assure the safety and integrity of its pipelines. PG&E engineers and other managing executives were forced to acknowledge that PG&E elected to push profits up to nearly a billion dollars per year, rather than testing and replacing its worn-out transmission lines to assure public safety.

Campora and Pitre turned down significant monetary offers to negotiate a settlement that required PG&E to conduct more rigorous safety assessments than that required by regulators of the industry.

Dolan, winner of the Edward I. Pollock Award, was recognized for "putting his heart and soul into advocacy of the issues most important to CAOC" and serving as the association president in 2010. He has frequently testified before California legislative committees to help shape laws that promote access to justice and preservation of the constitutional right to a jury trial.

Also nominated for the Consumer Attorney of the Year award was CCTLA member **Roger A. Dreyer**, along with Christine D. Spagnoli and Robert B. Bale, for their work on Mauro, et al. v. Ford

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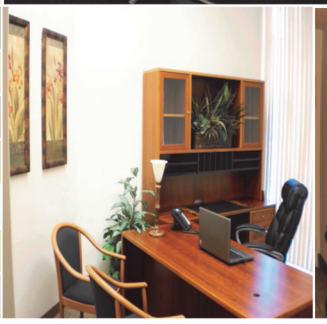

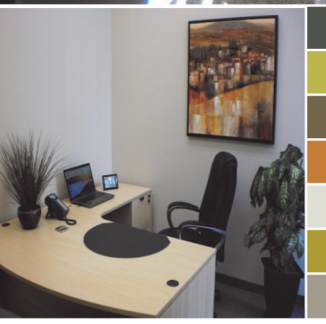

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CAOC disappointed by Brown veto of molestation bill

Will push anew to give sex crime victims shot at civil justice in court

SACRAMENTO (Oct. 12, 2013)—Consumer Attorneys of California President Brian Kabateck expressed profound disappointment over Gov. Jerry Brown's veto of a bill that would have opened courthouse doors anew for decades-old child molestation cases, giving victims of abuse a chance to hold accountable both sexual predators and the institutions that shielded them for years.

Brown's veto of SB 131 by Sen. Jim Beall (D-San Jose) comes as a big loss for childhood victims of sexual abuse while protecting the Catholic Church, the Boy Scouts of America, Swim USA and other organizations that for years did little to address concerns and shielded sexual predators in their ranks from proper accountability.

"I'm very disappointed," Kabateck said. "This measure was narrowly tailored and would have greatly helped victims of childhood sexual abuse who need and deserve to have their day in court. All victims of abuse should have adequate access to the civil justice system."

The Catholic Church and other organizations hit by molestation scandals had feared the public scrutiny that would come with an open court process. Those foes of SB 131 heavily lobbied the Legislature and governor. A church-affiliated group hired a half dozen lobbying firms and spent big money fighting SB 131. The effort by the church included visits by bishops to the Capitol as well as advocacy by priests from the pulpit to whip up parishioners who sent thousands letters and made scores of telephone calls to targeted lawmakers.

Over the past decade, California's Catholic dioceses have paid $1.2 billion in settlements and released thousands of confidential documents that showed church leaders conspired to shield admitted molesters from law enforcement. In 2002, the Legislature approved a bill that lifted the statute of limitations on lawsuits for all of 2003, allowing dozens of victims to have their day in court.

The key provision of Beall's bill would have re-opened the window on the statute of limitations in molestation claims for another year, but only for a group who were 26 or older and missed the previous deadline because of abuse-related psychological problems. Advocates say loosening time limits is crucial in sex-abuse cases because it often takes decades for victims to realize or publicly admit that they were molested and seek legal recourse.

Kabateck vowed that CAOC would not give up this fight: "We will continue our efforts both in the Legislature and the courts to make the civil justice system available for these survivors of childhood sexual abuse."

***

Reprinted from the Consumer Attorneys of California (CAOC) website at www.caoc.com. CAOC is a professional organization of plaintiffs' attorneys representing consumers seeking accountability against wrongdoers in cases involving personal injury, product liability, environmental degradation and other causes.

To all members of the
Capitol City Trial Lawyers Association
& those who make our jobs possible ...

CCTLA and President Cliff Carter
cordially invite you to attend the
Annual Meeting / Holiday Reception
and the Installation of the
2014 CCTLA Officers and Board

Thursday, December 5, 2013
5:30 to 7:30 p.m. at The Citizen Hotel
Terrace Room • 7th Floor
926 J Street, Sacramento

The Annual Meeting & Holiday Reception is free to honored guests, CCTLA members and one guest per invitee.

Reservations must be made
no later than Friday, November 29, 2013
by contacting Debbie Keller
at 916-451-2366 or debbie@cctla.com

During this holiday season, CCTLA once again is asking its membership to assist The Mustard Seed School for homeless children. CCTLA will again be contributing to Mustard Seed for the holidays, and a representative from Mustard Seed will attend this event to accept donations from the CCTLA membership.

CCTLA thanks you in advance for your support and donations.

A Special Thank You to Our Generous Donors and Sponsors Who Made the 2013 Annual "From Wags to Riches" Fundraiser A Howling Successs!

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CAOC Awards

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Motor Company, Inc., showing a vehicle maker's responsibility for known tire defects.

Others honored at the awards dinner:

• Daniel K. Balaban of the Los Angeles firm Balaban & Spielberger, was named CAOC's Street Fighter of the Year for his representation of a man who died of pancreatic cancer that went untreated for too long when he was not informed about the tumor that was detected on a CT scan. Balaban did not take a fee in the case, which saw his client win a verdict just days before his death that would have prevented his heirs from receiving any compensation for medical negligence.

• Gretchen M. Nelson, partner, Kreindler & Kreindler, Los Angeles, was winner of the Robert E. Cartwright, Sr., Award, given "in recognition of excellence in trial advocacy and dedication to teaching trial advocacy to fellow lawyers and to the public."

• Niall P. McCarthy, principal, Cotchett, Pitre & McCarthy, Burlingame, received the Marvin E. Lewis Award, given "in recognition of continued guidance, loyalty and dedication, all of which have been an inspiration to fellow attorneys.

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

VERDICTS

CCTLA board members **Mike Jansen** and **Travis Black**, representing Plaintiff bicyclist Hutchinson, on Sept. 5 won a Yolo County jury verdict of $279,700 against Defendant Branscomb and Clark Pest Control, represented by Archer-Norris, Todd Jones and two associates.

Plaintiff was riding his bicycle home from work on the south side of Main Street in Woodland, CA, headed west. When he came to intersection with SR-113 off-ramp, he went onto sidewalk for 50 feet, then as he approached crosswalk, saw he had a green light. When Plaintiff got into the crosswalk, Defendant, in a Clark Pest Control pickup truck coming off the freeway, hit Hutchinson, knocking him into Main Street and causing comminuted depressed fracture of tibial plateau of left knee. Defendant was looking left and pulled forward, hitting Hutchinson on bicycle, seeing bicyclist for the first time when he hit him. Defense denied liability and acted as if the case was frivolous. Defense contended that Defendant did not have to look right because a bicyclist is not expected to come from that direction. They hired an expert who so testified, but given his lack of knowledge, a motion in limine excluded his opinion. Thereafter, the defense argued Defendant couldn't see Plaintiff because of "street furniture," comprised of light poles and electrical boxes, blocked view of the bicyclist.

Jury found Defendant 80% comparatively negligent, but verdict rendered was $279,700.

The defense has interpreted that verdict form to mean 20% of $279,700. Motions for new trial, motion for costs of proof, and motion to tax costs pending, to be heard Dec. 16, 2013. Two jurors wrote unsolicited letters to judge telling Judge Gaard that they meant $279,700, not 20% of that. Jury instructions were somewhat contradictory.

Defense thought they could impeach Defendant with his No Contest plea to violation of VC 21650.1 (riding bike on wrong side of road, could get police officer's opinion into evidence, and that they could say Branscomb was riding on the "wrong" side of road. A Motion in limine excluded the argument and kept out the fact Defendant was not cited. Judge granted defense motion to exclude reasonable value of medical services rendered per *Corenbaum*. When the treating physician testified at his video deposition that he has seen some patient's bills and based his opinion re future medical damages on them, defense objected that the physician had not indicated *how many* bills he had seen, so an adequate foundation for opinion was not laid. The judge agreed and wanted an Evidence Code 402 hearing. As a result, Plaintff brought the physician to trial, who testified to $185,000 in future.

Mike Jansen and Travis Black may have to try the case again, depending on post-trial rulings Dec. 13, 2013.

***

CCTLA past presidents **John Demas** and **Eric Ratinoff** won a jury verdict that rendered a total judgment after costs and interest of $945,300 for their client. The verdict included all of the client's past medical bills, $77,000 in past wage loss, $116,000 in future meds, $150,000 past generals and $200,000 in future generals.

Plaintiff was a passenger in her best friend's (Defendant's) car. Defendant was driving on Mather Field on-ramp, got a text, looked down, and when she looked back up, there was a U-haul vehicle stopped at a metering light. Defendant swerved, hit the embankment and then the U-haul. Significant impact, but no airbag deployment.

Defendant filed a motion to keep the texting evidence out, claiming it was not relevant since they admitted liability. Plaintiff argued that the texting was relevant for at least two reasons: one went to the basis of the accident reconstruction expert's opinion re: speed, since he testified that he relied on the defendant's estimate of 35mph. Secondly, that it went to Plaintiff's general damages because she knows she was injured as a result of the defendant's texting. Judge allowed evidence of texting. CHP officer testified, and Plaintiff successfully moved for a directed verdict on negligence and causation.

After the accident, Defendant was taken by ambulance to the hospital. The next day, Plaintiff went to her primary-care physician with complaints of slight low back pain and wrist pain. She had no neck complaints. She was seen again two days later, with tailbone pain that she had before the collision. Again, no mention of neck pain on this visit. Nine days after the collision, Plaintiff experiences excruciating pain in her neck and arm. Her doctor takes her off work for six weeks and orders physical therapy. She has a few PT and DC visits without much relief.

Ultimately, she is seen by Dr. Hembd, who gives her an ESI in November 2008. This helps, and she does not seek any treatment from November 2008 until January 2010. At that time, she goes off work for eight weeks and resumes treatment, including more PT, meds and another ESI, which provide no relief. Other than taking pain meds, Plaintiff does not treat much in 2010 and into late 2011. She is kept off work and eventually (September 2011) is referred to Dr. Chris Neuberger, who is reluctant to do surgery because of her young age (30). Plaintiff decides that she wants to go forward with surgery, and Dr. Neuberger does a two-level disc replacement. Plaintiff has a goodresult from the surgery and is off pain meds one month post surgery, back to a more physically demanding job within a couple of months and has not had ANY neck or arm pain for nearly two years.

DME was done in 2010 by Dr. Rao, who said then that she had a neck injury from the collision, and first level neck surgery was a reasonable alternative. Later,

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in deposition (2012), he said she should not have waited so long for surgery since she reached MMI and would not have done surgery in late 2011 without full psych workup and trying other less invasive procedures, i.e nerve ablations. On the stand, he changed his mind and claimed he had misgivings and was in internal conflict about whether the neck injury was related and testified that it was not from the collision after re-reviewing all the medical records.

Prior motor vehicle collision complaints: 1) two years before collision, Plaintiff fell and landed on her chin with TMJ complaints but no mention of neck pain; 2) about a year before collision, Plaintiff went in with constant neck pain that was going on for four weeks with numbness in shoulders, diagnosis was possible cervical radiculopathy, and there was no further treatment; and 3), less than three months before the collision, Plaintiff had wrist pain and numbness and tingling in both hands and fingers. She was diagnosed with ulnar nerve injury.

In addition to Dr. Rao, defense also hired an accident reconstructionist, biomechanic and a radiologist. Defense had subrosa of Plaintiff over the course of two months, including video of her three days before her neck surgery where she is walking, shopping, holding her purse, talking on her phone, without any evidence of discomfort.

Defense also relied on Defendant, who testified at deposition that after the collision she moved in with Plaintiff and was going to the gym with her for several months, every other day, taking Zumba and kickboxing classes together and that Plaintiff had no problem doing the classes and never complained of any neck pain in the months they lived together. On the stand, she backed off some and said they went to the gym every other day for at least six to eight weeks.

We served a subpoena on the gym, and gym records showed the defendant was a member for FIVE DAYS, and when we matched the times they each checked in, they went two times together. Defense had other theories about how Plaintiff was injured, but no evidence for these was presented. Defense hit hard on the surgery being elective, Dr. Neuberger's reluctance to do surgery and tried to paint a picture that Plaintiff did it for the case.

Past medicals: $137,000 (paid amount); wage loss: $83,000 (defense claimed max that was attributable to the motor vehicle collision was $8,000). Future: Issue here was the fact that Plaintiff was doing so well and has not seen a doctor for neck complaints for two years. Dr. Neuberger did say she would need future neck surgery just because of her age. Plaintiff submitted $225,000 in future medical specials. No future wage loss.

Offers and Demands: Defense offer via CCP§ 998 offer: $300,000. State Farm insured w/$250,000 underlying and $1 million umbrella policy. Plaintiff's demand: $500,000 via CCP §998 offer, nearly three years before trial. Defense attorney: Gary Umipeg, house counsel for State Farm. Plaintiff demand: $500,000 via 998, more than 32 months ago. Defendant paid the entire judgment.

Mike's Cites

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of $700,000 to Farmers. The case went to trial, and a verdict of $2,339,657 was rendered in favor of plaintiff Aguilar. Aguilar sought $1,637,451.14 in costs. Farmers argued that the plaintiff's 998 offer was not made in good faith and therefore should not get the CCP section 998 costs. The defendant argued that since Plaintiff knew there was a $100,000 policy limit yet made a CCP 998 offer of $700,000, therefore the $700,000 was not reasonable. The trial court taxed costs of slightly less than $6,000 and awarded the remaining $1,631,000. Farmers appealed.

"The purpose of Section 998 is to encourage the settlement of litigation without trial. [citation omitted] To effectuate the purpose of the statute, a Section 998 offer must be made in good faith to be valid. [citation omitted] Good faith requires that the pretrial offer of settlement be "realistically reasonable under the circumstances of the particular case . . . ." [citation omitted] The offer "must carry with it some reasonable prospect of acceptance. [citation omitted]"

"Whether the offer is reasonable depends upon the information available to the parties as of the date the offer was served." [citation omitted] Reasonableness is generally measured first by determining whether the offer represents a reasonable prediction of the amount of money, if any, a defendant would have to pay plaintiff following a trial, discounted by an appropriate factor for receipt of money by plaintiff before trial, all premised upon information that was known or reasonably should have been known to the defendant, and if an experienced attorney or judge, standing in defendant's shoes, would place the prediction within a range of reasonably possible results, the prediction is reasonable.

If the offer is found reasonable by the first test, it must then satisfy a second test: whether plaintiff's information was known or reasonably should have been known to Defendant. This second test is necessary because the Section 998 mechanism works only where the offeree has reason to know the offer is a reasonable one. If the offeree has no reason to know the offer is reasonable, then the offeree cannot be expected to accept the offer. *Whatley-Miller v. Cooper* (2013) 212 Cal App 4th 1103, 1112.

In this case, Plaintiff's letter stating that he would settle for the policy limits reasonably can be understood as a settlement opportunity regardless of whether it is ultimately determined to be such. "In the current appeal, Farmers has not shown Aguilar could have no reasonable expectation of acceptance of his $700,000 offer such that the trial court abused its discretion in finding Aguilar acted in bad faith. [*Culbertson v. R.D. Werner Co., Inc.* (1987) 190 Cal App 3d 704, 710.]

Practice Tip: Letter to insurance company: "Once again, we entreat you to get permission from your insured to disclose the policy limits, provide them to us in the form of a certified policy and declaration, so that we can then immediately demand policy limits. Please favor us with a reply within the next two weeks." This is interpreted by the court as a genuine offer to settle; it was not necessarily a ploy to set up a bad faith case against Farmers.

3. *Lars Rouland v. Pacific Specialty Insurance Company* (October 7, 2013).

CCP §998 requires an offer must include a provision that allows an accepting party to indicate acceptance of the offer by signing a statement that the offer is accepted. In this case, Defendant sought expert witness fees under CCP §998 because the Roulands, the plaintiff, did not accept Pacific Specialty's pre-trial settlement offers and thereafter failed to obtain a more favorable judgment at trial. The defendant's 998 offer satisfied the requirement of §998 by directing the Roulands (Plaintiffs) to file an "offer and notice of acceptance" with the trial court if they accepted the proposals. The appellate court reasoned that 998 requires the offer to identify a manner of acceptance that complies with the statute's additional requirement of a signed acceptance by the party or its counsel, only. Since the offer of the defendant in this case complied with the section, the 998 offer was good.

CCP §998 offers: *Martinez v. Brownco Construction Co.* (2013) 56 Cal 4th 1014, 1019; *Chaaban v. West Seal, Inc.* (2012) 203 Cal App 4th 59, 54. *Martinez* and *Chaaban* stand for general 998 propositions.

Effective January 1, 2006, the legislature amended §998 to specify the requirements for a valid settlement: offer and acceptance. See *Whatley-Miller v. Cooper* (2013) 212 Cal App 4th 1103, 1110, fn. 3. *Puerta v. Torres* (2011) 195 Cal App 4th 1267, 1271 requires written acceptance. Lastly, see *Perez v. Torres* (2012) 206 Cal App 4th 418, 422-426.

In this case, the 998 offer was upheld because it stated, "If you accept this offer, please file an offer and notice of acceptance in the above-entitled action prior to trial or within thirty days after the offer is made." The California Judicial Council form for acceptance of a CCP §998 offer is not a mandatory form nor does it specify the exclusive means for satisfying §998's requirements. See *Berg v. Darden* (2004) 120 Cal App 4th 721, 731-732. In this case, even though the offers did not expressly require a written acceptance signed by the plaintiff's attorney, that requirement is implicit in the offer's identified means of acceptance because any acceptance the plaintiff's sought to file with the court necessarily would have to be in writing and signed by their counsel. CCP §128.7(a).

Even thought the appellate court concluded the trial court erred, the case was remanded to the trial court because the decision whether to award expert witness fees is vested in the trial court's sound discretion.

In the "more information than you wanted to know" category, this appellate court decided that the question before it was of statutory interpretation based on the undisputed terms of the 998 offer. Therefore, it was a question under the de novo standard of review. The respondents argued that the ruling should have been tested under an abuse of discretion standard, which generally favors respondents. The appellate court rejected the abuse of discretion standard in favor of the de novo standard. The appellate court indicated that the reasonableness of CCP §998 offers will be subject to the abuse of

discretion standard. Thus, if an appeal is on the reasonableness of the 998 offer, the respondent will probably win.

4. *Reid v. Mercury Insurance Company* (October 7, 2013).

Rule: If you want to set up an insurance company, you must tender the medical records and witness statements and comply with the requests of the insurance company early and often. Simply demanding the policy limits when there is a large catastrophic case is not enough.

5. *Halliburton Energy Services, Inc. v. Dept. of Transportation, Carly Baker v. Halliburton Energy Services, Inc., Michael Buxbaum v. Halliburton Energy Services, Inc.,* (October 1, 2013)

Halliburton gave a pick-up truck to employee Troy Martinez to use to get to and from work. He had the option of using his personal vehicle or being assigned a company truck and chose the company truck. Halliburton had a policy that company vehicles were not to be used for personal business but could be used to commute between home and work. Martinez decided to drive the pick-up truck to meet his wife at a car dealership to purchase a vehicle for her. Martinez then began his trip back to work from Bakersfield to Seal Beach. On the Grapevine, Martinez hit another vehicle head-on, injuring six plaintiffs. The plaintiffs sought to hold Halliburton liable for Martinez's negligence under the theory of respondeat superior. This case has a nice relatively short discussion of the general rule regarding respondeat superior,including the "going and coming" rule.

In this situation, the employee was on a personal errand and therefore Halliburton was not liable through respondeat superior for his negligence.

6. *Majid Moradi v. Marsh USA, Inc.,* (September 17, 2013).

An employee of an insurance broker was required to use her personal vehicle for office work to drive to and from the office, visit prospective clients, make presentations, provide educational seminars, follow leads, and transport company materials and co-employees to work-related destinations. In this instance, however, the employee was going for frozen yogurt and a yoga class when she hit a motorcyclist, causing serious personal injuries. When the motorcyclist brought a case against the employer as well as the employee, the employer made a motion for summary judgment which was granted. The appellate court reversed the summary judgment against the employer, finding the employer possibly liable (contrary to holding in *Halliburton* case.).

Unlike the *Halliburton* case, the employee was permitted to drive the vehicle provided by the employer. The going and coming rule was discussed ad nauseum in this opinion. The appellate court here found that this situation fell within the exception to the going and coming rule. The appellate court in this case found that the employer could "reasonably expect" that the employee would engage in some activities for her own purposes. Because of that reasonable expectation, the employer may be held liable.

7. *Cheryl Sanders v. Constance Walsh* (September 16, 2013).

This is the defamation "Wiggin Out" case. Interesting issue: Plaintiff was convicted of a felony that was reduced pursuant to Penal Code §1203.4 to a misdemeanor and then dismissed. The defendant attempted to introduce evidence of the felony conviction despite the 1203.4. The court stated: "Penal Code §1203.4 permits a felon who has completed probation to apply to have the felony conviction dismissed. "A grant of relief under §1203.4 is intended to reward an individual who successfully completes probation by mitigating some of the consequences of his conviction and, with a few exceptions, to restore him to his former status in society to the extent the legislature has power to do so [citations omitted]." The cite is *Selby v. Dept. of Motor Vehicles* (1980) 110 Cal App 3d 470. A felony conviction dismissed pursuant to Penal Code §1203.4 is not admissible to attack a witness's credibility under Evidence Code §788(c).

The defendants still argued that the plaintiff's character and reputation was proven by the prior felony conviction and that character and reputation was in the defendant's mind when the allegedly defamatory statements were made. The court pointed out that the plaintiff's character was not at issue.

8. *Moreno v. Rowell San-Luis Quemuel,* (September 17, 2013).

Facts: When a peace officer opens his car door to exit to make contact with a motorist for a traffic stop, the peace officer is in "immediate pursuit of an actual or suspected violator of the law" for purposes of immunity set forth in Vehicle Code §17004. If a motorcyclist passing by gets picked off by the officer with his open door, the officer will be held immune.

This case has a discussion of the definition of "pursuit." Usually, it means a chase. The court here, in order to find immunity, found that the police officer was opening his door for the purpose of investigating, issuing a citation or, if appropriate, apprehending the suspect. The appellate court felt that getting out of a vehicle is part of the officer's pursuit and therefore is a chase. Arguments that a chase must be a moving vehicle pursuing another moving vehicle were not found by the court to be convincing. The requirement of an emergency was also not compelling to this court. In this case, even the police officer's department came to the conclusion that he was not in pursuit. The appellate court did not find that decision convincing.

9. *Mt. Holyoke Homes, L.P., et al. v. Jeffer Mangels Butler & Mitchell, LLP* (September 24, 2013)

TIP: Google the name of the arbitrator and check out his resume before you allow the arbitrator to make a decision in a binding arbitration. In this case, after the arbitrator ruled in favor of one of the parties, the other party found out that the arbitrator used a partner in the opposing law firm as a reference. The relationship between the partner and the arbitrator was not disclosed. The arbitration award was vacated.

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The Alchemy of Lost Earning Capacity

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

NOVEMBER 2013

Monday, November 18

CCTLA Luncheon
Topic: "Ethics and Lawyer Law - What You Need to Know Now and in the Year to Come"
Speakers: Honorable Kevin Culhane and Betsy Kimball, Esq
Firehouse Restaurant: Noon
CCTLA Members - $30 / Non-members $35

Thursday, November 21

CCTLA Problem Solving Clinic
Topic: "Hidden Money, Hidden Danger in UM/UIM Cases"
Speakers: Allan Owen and Jack Vetter
Irons Steaks Restaurant: 5:30-7 p.m.
2422 13th Street, Sacramento, CA 95818
CCTLA Members Only - $25

DECEMBER 2013

Tuesday, December 3

CCTLA Luncheon
Topic: "Dealing with Pain: A Physical Medicine and Rehabilitation Tutorial"
Speaker: Stephen I. Mann, M.D.
Firehouse Restaurant : Noon
CCTLA Members - $30

Thursday, December 5

CCTLA Annual Meeting & Holiday Reception
The Citizen Hotel: 5:30 to 7:30 p.m.

Tuesday, December 10

Q&A Luncheon
** NEW LOCATION **
Shanghai Garden: Noon
800 Alhambra Blvd
(across H St. from McKinley Park)
CCTLA Members Only

JANUARY 2014

Tuesday, January 14

Q&A Luncheon
Shanghai Garden: Noon
800 Alhambra Blvd
(across H St. from McKinley Park)
CCTLA Members Only

Wednesday, January 22

CCTLA Seminar
What's New in Tort & Trial: 2013 in Review
Speakers: Patrick Becherer, Esq., Thornton Davidson, Esq., Kevin Lancaster, Esq. & Daniel U. Smith, Esq.
Capitol Plaza Holiday Inn: 6 to 9:30 p.m.
$125 CCTLA Member / $175 Non-member

FEBRUARY 2014

Tuesday, February 11

Q&A Luncheon
Shanghai Garden: Noon
800 Alhambra Blvd
(across H St. from McKinley Park)
CCTLA Members Only

MARCH 2014

Tuesday, March 11

Q&A Luncheon
Shanghai Garden: Noon
800 Alhambra Blvd
(across H St. from McKinley Park)
CCTLA Members Only

March 21-22

CAOC TAHOE SKI SEMINAR
Details to come!

Contact Debbie Keller at CCTLA , 916/451-2366 or debbie@cctla.com for reservations or additional information about any of the the above activities.

CCTLA COMPREHENSIVE MENTORING PROGRAM

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

CCTLA Calendar of Events