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The LITIGATOR

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Inside This Issue

Summer Sizzle

DAN O'DONNELL
CCTLA President
. . . and his son, enjoying the last days of summer

Traditionally, summer is a time for all of us to take a break and enjoy the sun and have fun with our families. However, even the lazy, hazy days of summer did not slow down CCTLA members. As temperatures soared outside, our members sizzled, both inside the courtroom and out.

As the numerous verdicts reported in this issue of *The Litigator* show, plaintiffs were well represented by our lawyers in front of juries these past few months. CCTLA members also negotiated some noteworthy settlements, as described in this issue.

We kicked off the summer with our annual Spring Fling fundraiser which benefited the Sacramento Food Bank & Family Services. The hard work of the Spring Fling Committee raised $74,197 to help feed the hungry. CCTLA members Parker White and Noel Ferris graciously opened their lovely home as the venue for event, and CCTLA members and vendors generously contributed to the party to help achieve this phenomenal result. We were honored by the presence of many members of our local judiciary, both active and retired.

During this event, we also recognized some outstanding persons when CCTLA presented the Mort Friendman Humanitarian Award to Sue and (retired justice) Art Scotland and announced that Betsy Kimball was the recipient of the Joe Ramsey Professionalism Award. These folks are among the best in our legal community.

As summer winds down, we can look forward to CCTLA's Lien Seminar, which will take place on Oct. 30 (see page 13). The panel of speakers is once again being led by Dan Wilcoxen, lien expert extraordinaire. This CEB-approved seminar will provide valuable information to help you enhance your practice. We look forward to seeing you there.

Mike's CITES

By: Michael Jansen

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.

United States, Petitioner v. Kwai Fun Wong United States, Petitioner v. Marlene June April 22, 2015: 135 S.Ct. 1625, 191 L.Ed. 533

The Federal Tort Claims Act provides that a tort claim against the United States must be presented to the appropriate federal agency within two years after such claim accrues and then brought to federal court by way of complaint within six months after the agency acts on the claim. 28 U. S. C. §2401(b).

In these two cases, one plaintiff failed to get her claim into the agency within two years; the other plaintiff failed to file a complaint in the district court within six months. The government argued that the statute is jurisdictional, and the district court judges dismissed both cases. Plaintiffs claimed equitable tolling on the part of the government preventing them from presenting their claims within the appropriate time limitation.

Justice Kagan and the majority (5-4): equitable tolling is available in suits against the government.

In dissent, Justice Alito believes the plaintiffs lose because "I [the justice] would enforce the statute as Congress intended. … The concern was obvious: As opposed to the more predictable nature of contractual and property claims, tort-based harms are sometimes unperceived and open-ended. Even frivolous claims require the Federal Government to expend administrative and litigation costs, which ultimately fall upon society at-large. For every dollar spent to defend against or to satisfy a tort claim against the United States, the government must either raise taxes or shift funds originally allocated to different public programs." [Emphasis added.] For the majority, Justice Kagan found that Section 2401(b)'s language made it clear that equitable tolling is allowed.

Justice Kagan delivered the opinion of the Court. Kennedy, Ginsburg, Breyer and Sotomayor jointed Justice Kagan. Alito, Roberts, Scalia and Thomas dissented.

Michael Williams v. Superior Court (2015) 236 Cal.App.4th 1151

Plaintiff alleged that Marshalls of California, LLC, failed to provide its employees with meal and rest breaks, or premium pay in lieu of the breaks. Plaintiff sought discovery of the names and addresses of employees at other Marshalls in support of his Private Attorney General Act case. The appellate court denied Plaintiff's discovery, but this is a good case to use when the defense makes over-reaching discovery requests in cases.

Discovery disputes are reviewed under the abuse of discretion standard. Krinsky v. Doe 6 (2008) 159 Cal.App.4th 1154, 1161. Discovery devices must be used as tools to facilitate litigation rather than weapons to wage litigation. Calcor Space Facility, Inc. v. Superior Court (1997) 53 Cal.App.4th 216, 221.

This appellate court ruled that the plaintiff had only the allegations of his complaint to rely upon for the basis of discovery of the names and addresses of Marshall's employees. *(Mike's Note: This case has already been found "not instructive" in Sidlow v. Nexstar Broad, Inc. 2015 U.S. Dist. Lexis 76556.)*

Daniel William Bean v. Pacific Coast Elevator Corporation (2015) 234 Cal.App.4th 1423

An employee of Pacific Coast Elevator Corporation rear-ended Plaintiff. The jury awarded $126,594.74 in economic damages, and $1,145,000 in non-economic damages. The trial court allowed $34,830 in costs.

The only published holding of the case was: in deciding whether the plaintiff did better than his CCP section 998 offer, costs can't be counted.

In the unpublished portions of the opinion, the court threw out the defense claims of Plaintiff's counsel's misconduct because there had not been a single objection. Also unpublished was a discussion of the Plaintiff's use of the notorious "Reptile."

The DCA stated that any impropriety could have been cured by admonishment, and an objection was never made. This is neither a victory nor defeat for the poor lizard.

Yet another unpublished aspect of the case, Plaintiff argued damages by suggesting that the jury should imagine taking out a "want ad" describing the plaintiff and

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EMPLOYER-PROVIDED TRANSPORTATION: When is the client in the course and in the scope?

This will be the first of a series of articles discussing cases on the going-and-coming rule. This means that the employee is NOT in the course and scope of employment while commuting to and from work. But as usual, nothing is that simple. This article focuses on what happens when the client is either driving or is a passenger in the course and scope of employment. Some of the important cases are pretty hoary, so it's time to fire up the way-back machine, for those old enough to know what that even is.

By: Steve Davids

<u>Trussless Roof Co. v. Industrial Accident Commission</u> (1931) 119 Cal. App. 91

This case involved an employer who furnished both the transportation, and the means of transportation, to employees. As long as everything is within the employer's control, and the employee is using the transportation in the course and scope, he/she qualifies for workers compensation benefits.

<u>Smith v. Industrial Accident Commission</u> (1941) 18 Cal. 2d 843

A laborer on a road crew worked on Treasure Island in San Francisco Bay, which at the time was 100% under the control of the employer. The laborer got to and from Treasure Island by ferry, and the employer paid for his transportation.

The laborer was injured on his way home when he jumped from his employer's truck as it unexpectedly turned. The going-and-coming rule *did not* apply, meaning he was definitely in the course and scope. The laborer was on his employer's property as soon as he set foot on the island.

California Casualty Indemnity Exchange v. Industrial Accident Commission (1942) 21 Cal.2d 461, 463

A stenographer and several other employees lived 33 miles from their work. The employer purchased an automobile to transport them, and those who used it were charged $4 a month, representing a *pro rata* share of the running expenses, which was deducted from their wages. "The fact that the charge was deducted from the employee's wages definitely indicated the connection of the transportation with her contract of employment." (*Id*., at page 465.)

The employees also often took the mail or samples, which they then delivered. While driving home, the car was involved in an accident, and the employee was injured. Holding: if an employer, as an incident of employment, furnished its employees with transportation to and from the place of employment and the means of transportation was under the control of the employer, an injury sustained by an employee during such transportation arose out of and was in the court of employment and therefore was compensable.

1. "It is a well-recognized rule that an employee is not within the course of his employment while going to and coming from work. This rule is subject to a number of exceptions, however, among which is that if the employer, as an incident of the employment, furnishes his employee's transportation to and from work and the means of transportation is under the control of the employer, an injury sustained during the course of the transportation is deemed to be in the course of the employment." (*Id*., at page 463.)

2. The plaintiff contended that the she was not in the course and scope at the time because she was not performing any service growing out of or incidental to her employment.

The Supreme Court disagreed: "It is not indispensable to recovery, however, that the employee be rendering service to his employer at the time of the injury." (*Id*., at page 465.)

3. Further, "An agreement by an employer to furnish transportation need not be express; it may be implied from the circumstances of the case and the uniform course of conduct of the parties." (*Id*., at page 464.)

4. The plaintiff argued that an agreement could NOT be inferred, because (1) the employer was under no obligation to provide the automobile and could discontinue its use at any time, and (2) the employees were under no obligation to use it and could use other available means of transportation at any time. The Supreme Court disagreed: "The employer's right to withdraw the privilege of using the car was merely a right to terminate the contract at will, and was not inconsistent with the existence of the agreement." (*Id*., at page 464.)

5. Transportation may be incidental to employment if it was furnished to the employee because of his status as an employee. (*Id*., at page 465.)

6. If the employee knew that transportation would be furnished and actually used it, this supports an inference of an implied agreement. (*Id*., at page 464.)

7. The fact that an employer could withdraw this transportation at any time or that an employee is not required to use it are not inconsistent with an implied agreement. (*Id*., at page 464.)

<u>City and County of S.F. v. Industrial</u>

Continued on page 4

Employer-provided transportation

Continued from page 3

Accident Commission (1943) 61 Cal. App.2d 248, 250-251

A city employee-passenger was riding a city streetcar. The city issued a pass to employees that said the "pass was issued as courtesy and not as part of consideration for employment." But the court held that the employee was still in the course and scope while riding the streetcar, when he was injured in a collision when the streetcar hit a truck. The employee was stuck with the exclusive remedy.

Kobe v. Industrial Accident Commission (1950) 35 Cal.2d 33, 35

Case involved a death and injuries to roofers driving home with fellow employees. Since the employees were paid an extra hour each day to compensate them for the time spent in traveling to and from work, the Supreme Court found that the going and coming rule did not apply because there was an explicit agreement to extend the work day to include transportation. (*Id*., at page 36.) "[A]n agreement may also be inferred from the fact that the employer compensates the employee for the time consumed in traveling to and from work." (*Id*., at page 33.) An employee may contract with the employer to make the daily commute a part of the work day. It is "equally clear that such an agreement may also be inferred from the fact that the employer compensates the employee for the time consumed in traveling to and from work." (*Ibid*.) Since the employer paid them a specified amount to cover the time required to travel to and from work, this created a "permissible inference that the employer has agreed that the employment relationship shall commence at the time the employee leaves his home and continue until his return." (*Id*., at page 36.)

Where an employer furnishes the transportation there is no requirement that the employer compensate the employee for his commute time.

Sullivan v. San Francisco (1950) 95 Cal.App.2d 745, 753-754

This was a unique situation. A firefighter for the city who was entitled to ride the streetcar for free, nonetheless paid for his ticket due to his ignorance of this emolument of his employment. The Court of Appeal "presumed" that his employment agreement with the city allowed the firefighter to ride free. (*Ibid*.) Because the firefighter paid for his ticket, "it cannot be reasonably contended that he was riding pursuant to his contract of employment or as an incident thereto. He was clearly riding the streetcar as a passenger, that is, as a member of the public, and not as an employee. That being so, he was not covered by the Workmen's Compensation Act." (*Ibid*.)

Whether or not the ride is furnished on a public conveyance is immaterial if the transportation is furnished and is being used as an incident to employment.

Zenith National Insurance Co. v. WCAB (1967) 66 Cal.2d 944, 946-947

A construction worker had to travel 130 miles to the job site, for which his employer paid him $10 per day "to cover transportation costs and living expenses." The going-and-coming rule "excludes from the class of compensable [workers' compensation] injuries those sustained in transit between home and job: ordinarily, the employment relationship is suspended from the time the employee leaves work to go home until he or she resumes work. There is an exception if the employee's compensation covers the times of going-and-coming to and from work." (*Ibid*.)

There is also no minimum distance requirement when an employer furnishes the transportation. (*Id*., at page 946.)

Van Cleve v. Workers' Comp. Appeals Bd. (1968) 261 Cal. App. 2d 228

A city police officer came to work to attend a mandatory morning briefing and injured her back while getting out of her car in the parking lot. The exclusive workers' compensation remedy applied.

North American Rockwell Corp. v. WCAB (1970) 9 Cal. App. 3d 154

An employee was hurt when struck by a co-worker's automobile in a parking area provided by the employer for use of employees. The injury occurred when the employee was assisting another employee in starting his stalled vehicle. Workers' compensation benefits were available because the injury occurred on the employer's private property.

Lewis v. WCAB (1975) 15 Cal.3d 559

This is an important case: an employee parked in the employer's garage but had to walk three blocks to work. After two blocks, the claimant fell while crossing an intersection. The employee was deemed in the course and scope of employment. This is the "premises line rule." Had the employee "arrived at work"? Yes. As I learned in a case years ago, a client who parks a car in the employer's parking lot is considered on the job for workers' compensation. In my case, the employer was only a tenant in the building, meaning that the client had work comp benefits because of the "premises line rule," and also had the right to sue the building owner and manager, since they were not her employer.

General Ins. Co. v. WCAB (1976) 16 Cal. 3d 595

An employee was struck and killed by a passing motorist as he got out of his automobile in a public street in front of the employer's premises. The employer furnished no employee parking, and the employees therefore parked their automobiles on public streets. *The going-and-coming rule applied*, meaning that workers' comp benefits were not available.

Santa Rosa Junior College v. WCAB (1985) 40 Cal. 3d 345

A community college professor was not in the course and scope of employment as he drove home, even though he graded student papers and did other work at home. The professor did not have a "second jobsite" just because he occasionally took work home. (*Id*., at pages 354-358.)

And finally . . .

Fields v. State of California (2012) 209 Cal. App. 4th 1390

A cook was driving her own vehicle to work from a workers' compensation medical appointment. She collided with another vehicle, causing a death. The cook was held not to be in the course and scope of her employment. In evaluating the going-and-coming rule, courts evaluate whether the trip was of any benefit to the employer. (Id., at page 1397.)

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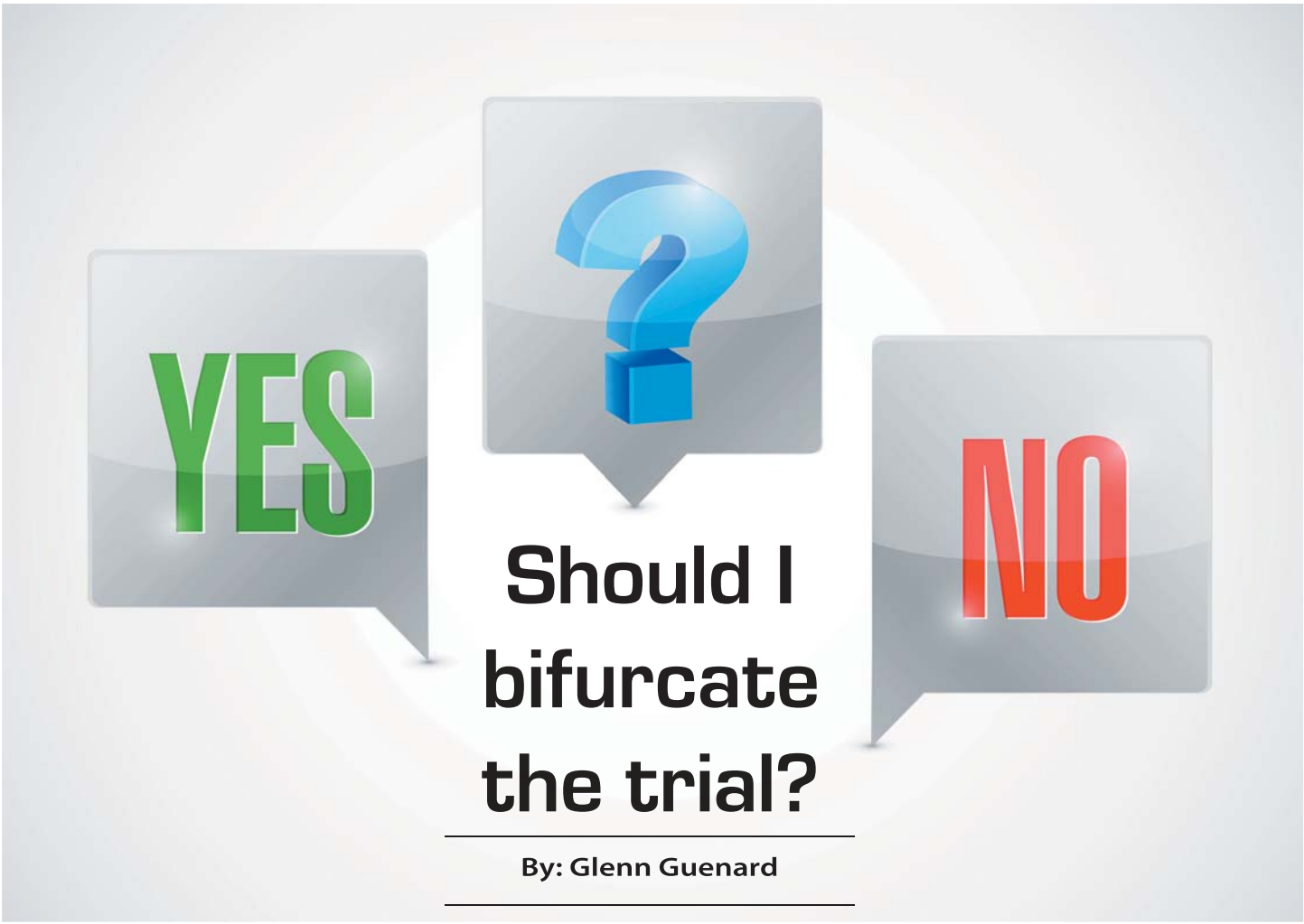
The next article in this series will discuss a hypothetical situation where an institutional employer's provision of shuttle buses either did, or did not, make a shuttle passenger a co-employee of the negligent shuttle driver. Stay tuned.



Should I bifurcate the trial?

By: Glenn Guenard

I regularly oppose defendants' motions to bifurcate a trial. However, in Johnson v. WINCO last May (Sutter County Superior Court), I proposed to bifurcate the trial. I convinced the defense to stipulate that the only issue for the jury was negligence. If the jury did not find negligence, then judgment would have been entered, and the case would have been concluded. However, if the jury found negligence, then the parties agreed to submit the issue of damages to a private high/low binding arbitration. I had multiple qualms about trying the case: (1), the Sutter County venue, (2), the case involved a slip-and-fall, and (3), the substantial workers' compensation lien.

Sutter County is known for defense verdicts and conservative non-economic damage awards. I anticipated that costs through trial would have been $30,000. The workers' compensation insurer filed a complaint in intervention and was threatening to participate in the trial in order to recover the total amount of its lien. We did some focus groups which were clearly unfavorable on negligence issues. We concluded there was less than a 50/50 chance of the jury finding negligence. But even if we cleared the liability hurdle, we definitely believed it would be difficult to obtain a decent recovery for our client, especially after deducting the workers' compensation lien.

Our focus groups gave us the clear impression that it would help our client to have the jury decide negligence *only*, and not damages. Instead, we thought out client had a much better chance of a reasonable damages award at a private, binding arbitration. It is no surprise that Sutter County has a history of very conservative verdicts. We then stipulated to bifurcate the trial, with a detailed agreement for a binding high/low arbitration if we were successful on proving negligence. Another added benefit was that the workers' compensation insurer carrier did not participate in the trial because it agreed to a percentage of the verdict after fees, costs and a percentage for the plaintiff.

I can't tell you how happy I was that we stipulated to the bifurcation. Literally *every* juror shopped at WINCO and had friends and family who worked there. During *voir dire*, there was not one negative comment about WINCO. Fortunately, the jury found WINCO 60% negligent and plaintiff 40% negligent. The case settled at mediation with Nicholas Lowe prior to binding arbitration. Any trial documents can be obtained by emailing me at gguenard@gblegal.com.

Sometimes, and in the right case, bifurcation can save you and your client considerable time and money in a difficult liability case. The difference in trial costs alone made trial bifurcation a very advantageous device for both sides in resolving the case. It also makes it easier for jurors to find negligence if they know they won't have to spend time awarding damages. There may also be times where the injuries are so extensive and/or dramatic—and the client is very presentable and sympathetic—that you should not consider bifurcation. Understanding the nuances of every case is important before deciding how to structure the trial. Focus groups can be very useful in making these assessments.

GUEST EDITORIAL

Fully funding trial courts is good for the overall economy

By: Bob Bale

This is a guest editorial, and the views and opinions contained therein do not reflect the views and opinions of CCTLA as an organization, nor its board members. Criticisms, comments or opposing views can be sent directly to sdavids@dbbwc.com. Equal space can be provided in a forthcoming "Litigator" for other viewpoints, at the discretion of the editors.

In recent years, civil litigants on both sides of the bar have dealt with funding cutbacks that have not only slowed the pace of litigation and made a virtual mockery of California's once vaunted "Fast Track" litigation deadlines, but have actually denied deserving persons access to a courtroom.

Despite valiant efforts by local judges in every county, the situation has only gotten worse as the state seeks to slash even more from a court budget that is already far too thin. But according to statistical analysis by a company called Micronomics, the economic impact of cutting courtroom budgets has a decidedly negative impact on California's struggling economy.

In 2009, Micronomics published "Economic Impact on the County of Los Angeles and the State of California of Funding Cutbacks Affecting the Los Angeles Superior Court." This study "estimated the economic impact of funding cuts for the LASC, the nation's largest trial court system." That study is reviewed in "Economic Impact of Reduced Judiciary Funding and Resulting Delays in State Civil Litigation," published by ERS Group/Micronomics in 2012. This study broadened the analysis to all 50 states. It is readily available through a quick Google search.

The analysis concludes that "projected deficits would dramatically impact not only the operating capacity of LASC, but also local and statewide economies," including declines of **$13 BILLION** in business activity in the LA metro area resulting from "decreased utilization of legal services," another **$15 BILLION** in economic losses related to lost investment income and related economic uncertainty, damage to the LA and California economies amounting to 150,000 lost jobs and lost local and state tax revenue of **$1.6 BILLION**. Against this revenue stream of direct benefit to California's economy, the amount of funding sought by our courts is not only a good investment, but a mere pittance.

As the study articulates, the primary reason for these losses is the effect of continued funding cutbacks on case clearance rates. In essence, lack of access to the courts means fewer cases resolve in a given year. Those cases are then pushed into the next year. Because the number of new civil filings each year are either static or on the upswing, this adds more cases to court calendars that are already severely overburdened in light of the cutbacks. That pile-up of cases further increases the time to clearance rate.

The negative effect of failing to clear

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Guest Editorial — Court Funding

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cases is to delay the flow of money into the economy that is associated with the prosecution and resolution of a civil case. Often cases end up settling for less than full value simply because the litigants (often, the plaintiff) simply cannot afford to wait any longer.

This important study points out something that we do not usually consider as litigators: the business of civil law is business, as much as it is justice. Before Dollar One is recovered in a civil matter, the prosecution and defense of a case costs money. That money flows into the economy in the form of payments to expert witnesses, investigation, depositions, discovery, personnel and a hundred other ways that are ingrained in the process.

As we know, it takes a village to prosecute and try a case; and the bigger the case, the bigger the village. Working up a complex matter for trial can cost in the hundreds of thousands of dollars per side.

The actual trial of a case, especially a complex matter, costs tens, if not hundreds of thousands, of dollars, spent on witnesses, exhibits, jury fees, lodging and transportation and in compliance with court rules.

Dozens of persons are employed in the pursuit of a verdict, including court personnel, court reporters, deputies and clerks, all the way up to the trial judge. Cutbacks mean layoffs, and layoffs means less pay to fewer people. Even if the plaintiff prevails at trial, there is often more money spent on appeals, especially if the verdict is significant.

When the plaintiff finally receives his or her share of the actual judgment, that share is either spent or invested, again moving money directly into the economy. This is money that, but for the litigation process, would never have accrued to Plaintiff's benefit.

But the analysis does not end there. Most cases do not end up going to trial. Yet, as every personal-injury practitioner knows, it is a legal truism that without a firm trial date, your client will not recover full value in settlement.

Delays in access to the courts mean more cases settle for less, which means fewer settlement dollars find their way into the economy.

Finally, the reality is that if our clients recover less, those of us who practice personal-injury law on contingent fee contracts earn less. This means we spend less, pay less in taxes, employ fewer people, and ultimately, contribute less to the economy.

As the Micronomics study concludes, "significant economic harm to each state and the U.S. as a whole will result from funding cutbacks affecting state judiciaries."

We need to stop thinking about our court system as some sort of drain on the economy and appreciate it for the vital, robust and critical part of an economic model that is the business of justice in these United States.

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Editor's note: Governor Brown's initial 2015–2016 budget increased state court funding from last year's $3.29 billion to $3.47 billion, with most of that increase devoted to the 58 trial courts hit hardest by past cutbacks. Further, the governor's "May revise" increased trial court funding by an additional $90 million. Stay tuned.

This important study points out something that we do not usually consider as litigators: the business of civil law is business, as much as it is justice. Before Dollar One is recovered in a civil matter, the prosecution and defense of a case costs money. That money flows into the economy in the form of payments to expert witnesses, investigation, depositions, discovery, personnel and a hundred other ways that are ingrained in the process.

— Bob Bale

Winston gets two square meals a day, wet and dry food. Not to mention treats. Winston is very sad that too many of his human friends do not eat as well as he does.

Thanks so much to everyone who supported CCTLA's Spring Fling on behalf of the Sacramento Food Bank & Family Services!

— Steve Davids & Winston

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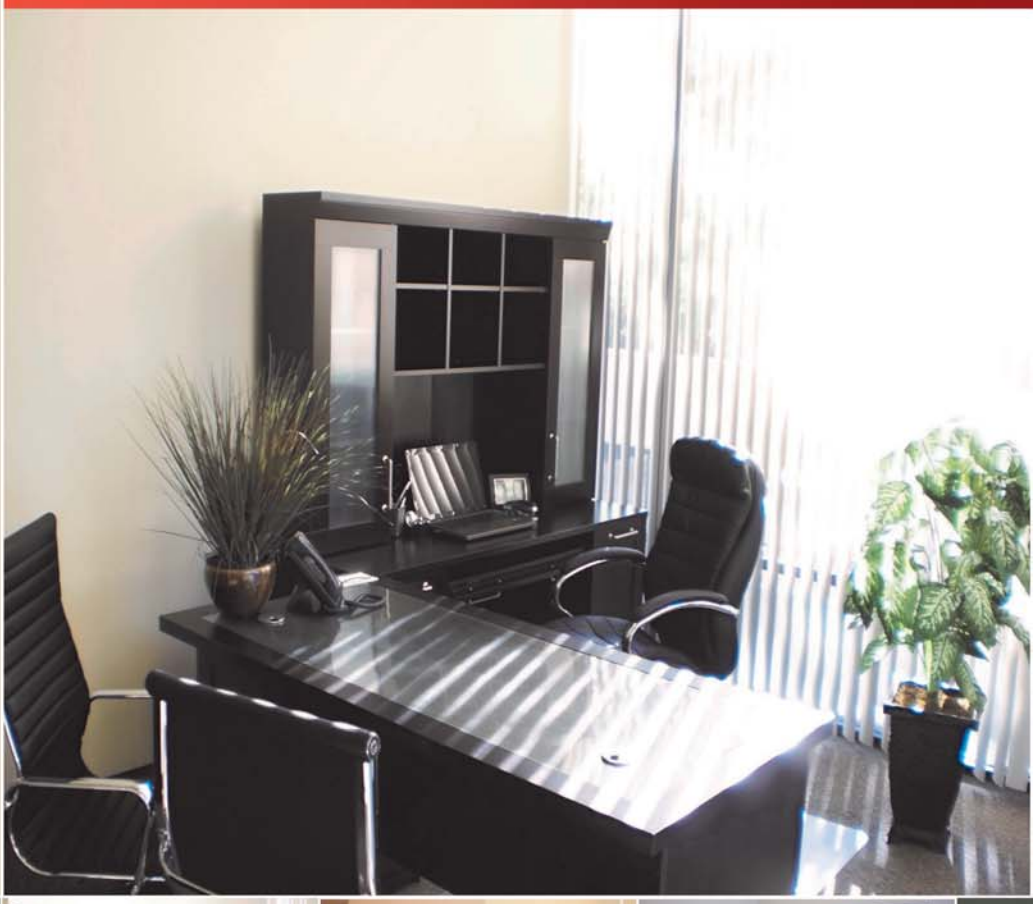

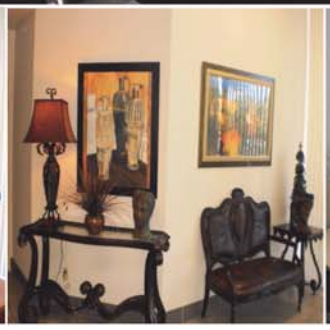

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SHADES OF GRAY

OR, LET'S CUT THE CHIEF SOME SLACK, SHALL WE?

By: Steve Davids / Co-Editor, The Litigator

This is an editorial, and the views and opinions contained herein do not reflect the views and opinions of CCTLA as an organization, nor its board members. Criticisms, comments, or opposing views may be sent directly to sdavids@dbbwc.com. Equal space can be provided in a forthcoming "Litigator" for other viewpoints, at the discretion of the editors.

My Dad used to say, A foolish consistency is the hobgoblin of little minds." I thought he was a genius, until Google told me that it was actually a quote from Ralph Waldo Emerson: "A foolish consistency is the hobgoblin of little minds, adored by little statesmen and philosophers and divines. With consistency a great soul has simply nothing to do. He may as well concern himself with his shadow on the wall. Speak what you think now in hard words, and tomorrow speak what to-morrow thinks in hard words again, though it contradict every thing you said to-day. — 'Ah, so you shall be sure to be misunderstood.' — Is it so bad, then, to be misunderstood? Pythagoras was misunderstood, and Socrates, and Jesus, and Luther, and Copernicus, and Galileo and Newton, and every pure and wise spirit that ever took flesh. To be great is to be misunderstood."

If it works for Ralph Waldo, then it should work for the Hon. Tani Cantil-Sakauye. I remember Morgan Freeman in "The Shawshank Redemption" talking about being "institutionalized." He didn't mean it in a positive fashion. Institutionalization is when thinking becomes secondary to practicality and the foolish consistency that Emerson twitted. Too often, the rules, dictates and life of an institution require absolute fealty to those rules and dictates. "Thinking outside the box" and adopting a novel interpretation are frowned upon. We personal injury lawyers reacted with fulsome umbrage when the Chief allegedly betrayed us on the important issue of recovery of medical expenses. I respectfully dissent, and submit that the Chief deserves a break.

While on the Third Appellate District, Justice Cantil-Sakauye authored an opinion siding with the plaintiff bar that an injured party was not restricted to recovery of medical expenses that were actually paid by insurance, as opposed to the higher billings generated by the health care providers. (King v. Willmett (2010) 187 Cal. App. 4th 313; superseded by grant of review.) Yet soon after being promoted to chief justice, she concurred in an opinion that took the exact opposite position and held that injured plaintiffs were limited to the amount of their medical bills actually paid. (Howell v. Hamilton Meats (2011) 52 Cal. 4th 541.) To this day, some of us still cannot fathom the apparent inconsistency.

Trying to understand what happened, I asked my appellate-specialist kid brother to explain this conundrum. He said that we have to understand that being a chief justice requires a reverence for the institution. A new chief does not write a dissenting opinion in a 5-2 vote. The chief is supposed to lead the institution, and not create debate or dissent upon her arrival. Plato and Socrates (who my kid brother studied in college) soundly explored the phenomenon of "the just" in "Republic" by constant questioning and doubting. Are they spinning in their respective graves?

With all love and respect to my kid bro, the "institutionalized" theory doesn't work with me. It's somewhat lazy and pat, and worse, potentially insulting. Instead, I think the Chief reconsidered her position. I remember the Hon. John Lewis, who once said during a law and motion hearing, "I am now explicated. Tentative ruling reversed." One of life's true intellectual pleasures is to understand that we were once wrong and are now right. We do a disservice to ourselves and our profession if we stand mired in intellectual lock-step. If we never consider our most strongly held beliefs, we are zealots, and intellectual kin to terrorists.

Playwright John Patrick Shanley wrote a beautiful introduction to his play, "Doubt," about a priest accused of inappropriate conduct with a young man. Allowing ourselves to feel and experience doubt is the coming of wisdom. It can be a freeing, exhilarating experience to realize what we never before even considered. It can also be depressing and agonizing as we wonder what we really know and really believe. But a new consciousness can be born within us. This is the importance of doubt. And the Chief Justice did us all a favor by pointing out the ramifications of re-thinking what we thought we had already noodled through the first time. CCP section 1008 allows for reconsideration. If we don't daily reconsider our most profoundly-held beliefs, we are not truly alive.

As Shanley states: "It is Doubt (so often initially experienced as weakness) that changes things. When a person feels unsteady, and falters, when hard-won knowledge evaporates before the eyes, then one is on the verge of growth. The sudden or violent reconciliation of the outer person and the inner core often seems at first like a mistake, like you've gone the wrong way and you're lost. But this is just emotion longing for the familiar. Life happens when the tectonic power of your speechless soul breaks through the dead habits of the mind. Doubt is nothing less than an opportunity to re-enter the Present. [Para.] I still long for a shared certainty, an assumption of safety, the reassurance of believing that others know better than me what's for the best. But I have been led by the bitter necessities of

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Editorial: Shades of Gray

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an interesting life to value that age-old practice of the wise: Doubt. [Para.] There is an uneasy time when belief has begun to slip, but hypocrisy has yet to take hold, when the consciousness is disturbed but not yet altered. It is the most dangerous, important, and ongoing experience of life. The beginning of a change is the moment of Doubt. It is that crucial moment when I renew my humanity or become a lie. [Para.] Doubt requires more courage than conviction does, and more energy; because conviction is a resting place and Doubt is infinite – it is a passionate exercise. You may be uncertain, and you may want to be sure. Look down on that feeling. We've got to learn with a full measure of uncertainty. There is no last word. That's the silence under the chatter of our time."

The irreducible minimum is that the Chief Justice (as with any of us) has the flexibility and discretion to do something that many of us do every day: change our minds. Perhaps the discussions at the Third District were enough for her to decide the King case, but maybe her new colleagues' comments on the High Court made her see the issue in a different light. Or maybe she just thought it through herself. We should not jump to easy, bumper-sticker conclusions, such as John Kerry's inept comment about the Iraq war: "I was for it before I was against it."

If there is one thing I want in any jurist it's the willingness to reconsider and ponder. That's what they are paid for. Some time ago, in a California law and motion court, an attorney was fighting disqualification in a litigated case. The tentative ruling was extensive and thoughtful, but the judge then reversed the tentative. The judge re-considered, re-read and re-thought the issue. Is this not akin to what Justice Cantil-Sakauye did? Is this not something that every judge or justice should regularly do?

I am not a US Supreme Court watcher, and all I know about the institution comes pretty much from NPR. In the cases that have broad societal and political implications, it has been my distressing observation that there are only two justices willing to think and ponder both sides of the question: Chief Justice Roberts and Justice Kennedy. As long as I am given some relatively brief synopsis of case, I can pretty much predict that the "liberal" justices will vote one way, and conservatives the other. And that Justice Scalia will mix acerbic wit with grandiloquent partisanship.

Personally, I neither want nor need intellectual ideologues deciding life-and-death issues. Please give me the California chief justice who is willing to wrestle and doubt and change her mind when needed or desired. An ideologue is always scary. I agree with the great philosopher Billy Joel that "the only people I fear / Are those who never have doubt." It's all about the shades of gray, baby. Embracing the gray does not make us wishy-washy and weak. It makes us think and feel and wonder. These are the tools that our God and gods have given us. We should use them.

Chief Justice Cantil-Sakauye not only is willing to reconsider her beliefs, but she also has another very important virtue: her colleagues respect her opinion. I have noted (as I am sure others have) that many of the civil litigation cases recently decided by the California Supreme Court were unanimous opinions. This is a testament to the Chief's intellectual and personal gifts and temperament. In a relatively short time, she appears to have forged excellent working relationships.

It may seem contradictory that an editorial about doubt ends with an encomium for conformity. But there is always the other side of the story: to the extent that the California Supreme Court votes unanimously on civil issues, we know that the Court is solid and steadfast. This allows us and our clients to have some measure of certainty as to how the Court may decide other cases. The US Supreme Court same-sex marriage 5-4 decision was a wonderful triumph for equality, but it was a deeply divided Court that sent mixed messages about a very important topic.

There must always be room for doubt, but there can also be room for consensus and consistency. This is the grappling and wrestling that our California Chief Justice has so ably displayed.

And this is what the rest of us should be doing as well. We should be proud of her leadership.

The irreducible minimum is that the Chief Justice (as with any of us) has the flexibility and discretion to do something that many of us do every day: change our minds. Perhaps the discussions at the Third District were enough for her to decide the King case, but maybe her new colleagues' comments on the High Court made her see the issue in a different light. Or maybe she just thought it through herself. We should not jump to easy, bumper-sticker conclusions...

— Steve Davids

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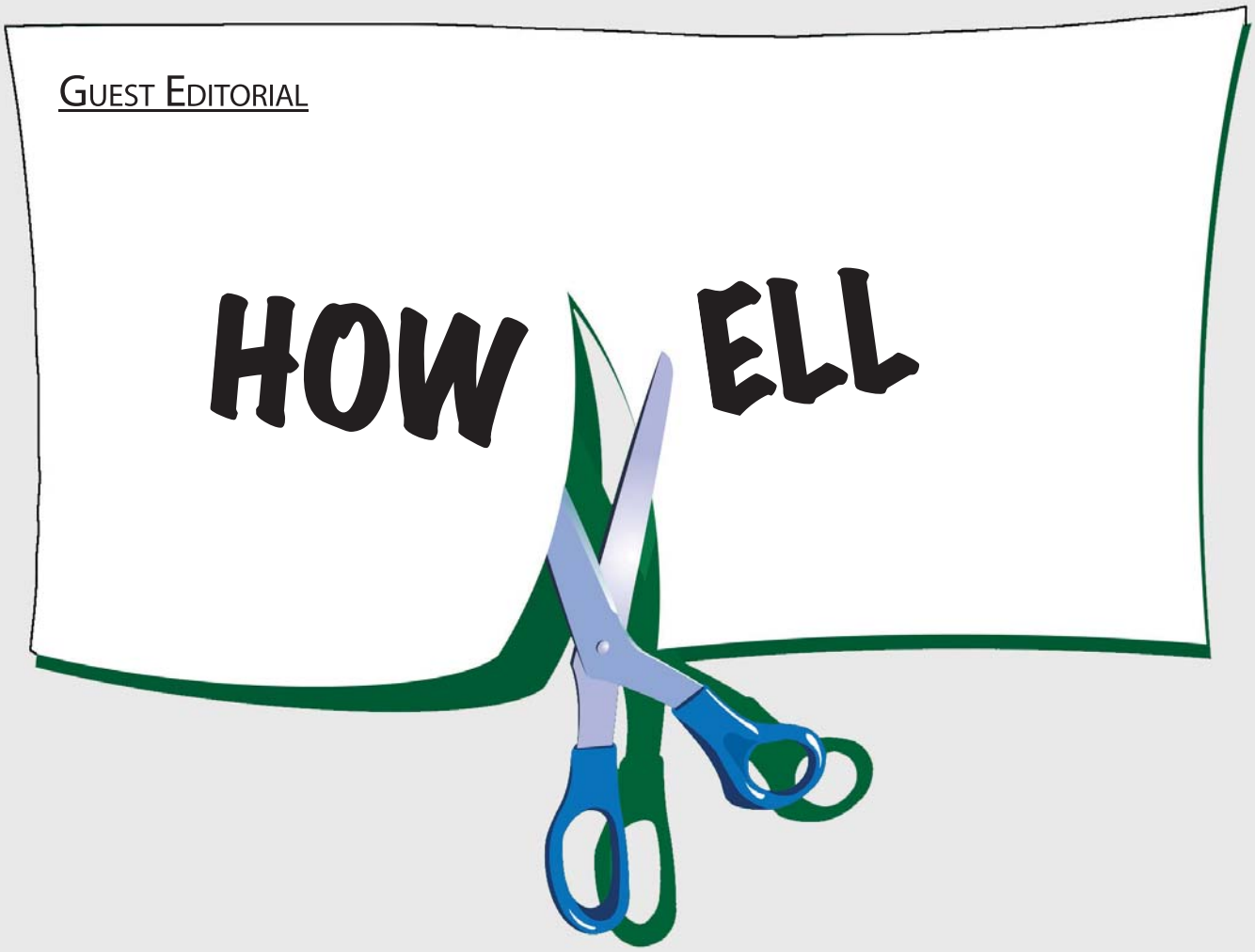
GUEST EDITORIAL



Dissecting Howell — A Catharsis

By: David Rosenthal

This is an editorial, and the views and opinions contained herein do not reflect the views and opinions of CCTLA as an organization, nor its board members. Criticisms, comments, or opposing views may be sent directly to sdavids@dbbwc.com. Equal space can be provided in a forthcoming "Litigator" for other viewpoints, at the discretion of the editors.

As plaintiff attorneys who have practiced for any period of time know, the obstacles to getting fair treatment in California courts have grown through the years. Since the Supreme Court eliminated third-party bad faith in 1988, no case is more representative of this trend than Howell v. Hamilton Meats (2011)52 Cal.4th 541. Central to the decision in Howell was the Court's interpretation and application of the collateral source rule and its prior decision in Helfend v. Southern California Rapid Transit (1970)2 Cal.3d 1.

Unfortunately, the Helfend decision did not anticipate the re-framing of the collateral source issue that would occur 40 years later in Howell. The reason seems to be that Helfend took certain principles of personal injury law for granted, i.e., that part of the "damages" a personal injury plaintiff was entitled to recover were "medical expenses," which was synonymous with "medical bills."

In Helfend, the defendant "requested permission to show that about 80% of the plaintiff's hospital bill had been paid by plaintiff's Blue Cross insurance carrier and that some of his other medical expenses may have been paid by other insurance." (*Id.* at p. 62.) However, the Supreme Court reaffirmed the longstanding collateral source rule that "if an injured party receives some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from **the damages** which the plaintiff would otherwise collect from the tortfeasor." (*Id.* at p. 63, emphasis added.)

It's unclear whether the payment of 80% of the hospital bill in Helfend satisfied the plaintiff's obligation to pay the bill in full. What is clear is that the Court in Helfend was operating on the assumption that the "damages" the plaintiff was entitled to recover were

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Editorial: Dissecting Howell

Contined from page 15

something different from what was paid by Blue Cross. If the Court felt that the amount recoverable was the paid amount, or was in any way affected by the amount paid, it almost certainly would have made that clear.

Instead, the Court's discussion focused on the potential that evidence that the bills were partially paid, or satisfied in full by a payment of a lesser amount, would *reduce* the plaintiff's recoverable "damages." Thus, the Court stated:

> *If we were to permit a tortfeasor to* ***mitigate damages*** *with payments from plaintiff's insurance, plaintiff would be in a position inferior to that of having bought no insurance, because his payment of premiums would have earned no benefit. Defendant should not be able to avoid payment of* ***full compensation*** *for the injury inflicted merely because the victim has had the foresight to provide himself with insurance. (Id. at p. 66, emphasis added.)*

If the law before Helfend was that the medical bills were recoverable amount without regard to insurance payments, that was also consistent with the practice of both the plaintiffs' bar and the defense bar for more than two decades after the decision. Calculation of medical expenses in settlement demands, mediation/arbitration briefs and trial stipulations was a simple matter of listing the amounts stated on the medical bills. It was routine for plaintiffs to object without opposition to any discovery request for health insurance information based on the collateral source rule.

Even the little-noticed publication of Hanif v. Housing Authority of Yolo County (1988)200 Cal.App.3d 645 did not immediately change the bills are recoverable landscape. Although Third District Court of Appeal's decision regarding what a Medi-Cal beneficiary could recover was based on "the notion that a plaintiff is entitled to recovery up to, and no more than, the actual amount expended or incurred for past medical services so long as that amount is reasonable" (*Id.* at p. 643, emphasis in original), the defense bar was slow to push for its application beyond Medi-Cal. For the plaintiffs' bar, the case didn't seem to threaten the collateral source rule since it involved both a public entity defendant (see Government Code §985) and a public benefit bill payer rather than private health insurance.

The tug of war in the trenches over Hanif/Nishihama continued for the next decade. Insurance companies and their lawyers often insisted on knowing the "Hanif numbers" to evaluate cases. Because there was an overall insurance industry effort to lower the value of auto claims, it was not always clear whether lower settlement offers were due to the Hanif reductions or other factors, such as the emphasis on property damage, pre-existing conditions, and the idea that general damages were just lower than what they used to be.

For more than decade after Hanif, appellate courts were silent on its application beyond Medi-Cal. Over time, however, the defense bar started to push for its application to private insurance and ultimately the First Appellate District decided Nishihama v. City and County of San Francisco (2001)93 Cal.App.4th298. For the first time, an appellate court applied the "paid or incurred" cap to a situation where private health insurance paid the medical bills.

Although the plaintiff conceded that a $3,600 payment by Blue Cross satisfied the $17,000 hospital bill at issue in full, the court went on to decide that the hospital's Civil Code §3045.1 lien was not valid, and plaintiff could therefore not recover that difference since it was not owed. (*Id.* at pp. 306-307.) Nishihama not only extended the paid or incurred limitation to private insurance, but established the precedent of a post-verdict reduction of a jury award based on that limitation.

The tug of war in the trenches over Hanif/Nishihama continued for the next decade. Insurance companies and their lawyers often insisted on knowing the "Hanif numbers" to evaluate cases. Because there was an overall insurance industry effort to lower the value of auto claims, it was not always clear whether lower settlement offers were due to the Hanif reductions or other factors, such as the emphasis on property damage, pre-existing conditions, and the idea that general damages were just lower than what they used to be.

Despite the defense bar insistence that the paid or incurred limitation was established law, the Supreme Court did not seem as sure. In Olsewski v. Scripps Health (2003)30 Cal.4th 798, 827, the Court described the rule from Hanif as "a Medicaid beneficiary may only recover the amount payable under the state Medicaid plan as medical expenses in a tort action." In Parnell v. Adventist Health (2005)35 Cal.4th 595, the Court noted that it had not decided whether Hanif and Olsewski applied "outside the Medicaid context [to] limit a patient's tort recovery for medical expenses to the amount actually paid by the patient notwithstanding the collateral source rule." (*Id.* at p. 611, Fn. 16, brackets added.)

As the authors of Hanif, the Third District had no doubt its decision was a good statement of the law applicable in all contexts. In Greer v. Buzgheia (2006)141Cal.App.4th 1150, 1157, it confirmed that Hanif/Nishihama established a paid or incurred limitation on what could be recovered in the workers' compensation setting.

Following the Nishihama lead, it also ruled that the trial court properly admitted evidence of the reasonable cost of the medical care (billed amount) at trial since "[s]uch evidence gives the jury a more complete picture of the extent of a plaintiff's injuries," but that determination of what could actually be recovered was properly reserved for a post verdict

Editorial: Dissecting Howell

hearing.

In Katiuzhinsky v. Perry (2007)152 Cal.App.4th 1288, 1295-1296, the Third District reaffirmed that evidence of the medical bills were admissible regardless of whether there would be a post-verdict hearing to reduce the amount recovered. It also established that in the context of a MedFin arrangement, the full billed amount could be recovered since the plaintiff still owed the full amount of the bill even after the doctors had accepted a lesser amount as payment and assigned the debt.

As the Hanif/Nishihama controversy advanced, there seemed to be little good news for the plaintiffs' bar coming from either the trial or appellate courts. The approach varied from court room to court room, but many judges accepted Hanif/Nishihama as established law. From the plaintiffs' perspective, the courts were missing the core issue—the Hanif/Nishihama doctrine violated the collateral source rule as articulated in Helfend. Nishihama, Greer and Katiuzhinsky were correct that the billed amounts should be admitted at trial, but the policy of the collateral source rule was that the plaintiff should also recover those amounts.

The decision in Olsen v. Reid (2008)164 Cal.App.4th 200 changed the tide. Although the majority for the Fourth District, Division Three, ruled that the record was inadequate for it to decide the validity of Hanif/Nishihama, Justice Moore wrote in a concurring opinion that the reduction procedure "abrogates, in fact if not in law, the collateral source rule and the sound policy behind it," and should be invalidated. (*Id.* at p. 213.)

For the first time since Hanif became relevant, an appellate opinion expressly stated its application to private health insurance was inconsistent with the law articulated in Helfend. In a separate concurring opinion, another justice endorsed the Hanif/Nishihama rule. But to the relief of many in the plaintiffs' bar, the issue was now back in focus.

Then came the appellate decision in Howell v. Hamilton Meats (2009)179 Cal.App.4th 686, which appeared to be a major victory. The Fourth District, Division One, ruled that "the extinguishment of a portion of [plaintiff's] debt" resulting from payment of a medical bill by a private health insurance company, or the "negotiated rate differential," was a collateral source benefit within the meaning of the collateral source rule as outlined in Helfend. (*Id.* at pp. 699-700.) Citing in part Justice Moore's opinion in Olsen, the court reasoned that Hanif was distinguishable because it did not involve private insurance, and that Nishihama was wrongly decided. (*Id.* at pp. 701-703.) Finally, an appellate court had not only framed the issue properly, but decided it according to long established California law.

Seven months later, in Yanez v. Soma Environmental Engineering (2010)185 Cal.App.4th 1313, the First Appellate District repudiated its own decision in Nishihama. In a lengthy opinion analyzing the history of the collateral source rule on the one hand, and Hanif and its progeny on the other, the court concluded:

> *We need not decide in this case whether Hanif was wrongly decided on its own facts. Those facts are materially different from ours: the plaintiff tort victim in Hanif had not purchased his Medi-Cal coverage by paying premiums . . . . But, to the extent Hanif's holding has been assumed to extend beyond the Medi-Cal context, we do not find its analysis reliable. Because this court's decision in Nishihama relied on Hanif to reduce a plaintiff's jury award to the reduced rates paid by her private insurance, we must now reject that aspect of Nishihama's reasoning. (Id. at p. 1327.)*

In three consecutive opinions from three different appellate divisions, application of the paid or incurred limitation of Hanif to private health insurance was soundly rejected as contrary to the collateral source rule. Nishihama itself had been overruled by the court that wrote the decision. Only the Third District endorsed Hanif's application outside of Medi-Cal. Even in the Third District, it was established that the full amount of the medical bills were admissible at trial.

Ominously, Yanez pointed out that the issue it decided was before the Supreme Court since review had been granted three months earlier in Howell. (*Id.* at p. 1324, Fn. 9.) Two months later, the Court granted review in Yanez. But the current of legal opinion was now running in the right direction and the plaintiffs' bar was optimistic the Supreme Court would finally clarify the law consistent with its prior holding.

> Tort reformers want to eliminate liability lawsuits, but if that is not possible they want to reduce tort awards. A common refrain among tort reformers is that injury victims are awarded too much money, which represents a windfall to the injured person and their lawyers. This concept is woven through the Howell decision.

The Supreme Court issued its ruling in Howell v. Hamilton Meats (2011)52 Cal.4th 541 on Aug. 18, 2011. The facts of the case were given little attention. Ms. Howell had been "seriously injured" by a negligent driver in the course and scope of his employment. The jury awarded the full amount of her medical bills and the trial court made a post trial Hanif/Nishihama reduction of approximately $130,000. As noted above, the appellate court reversed the reduction as contrary to the collateral source rule. (*Id.* at pp. 549-550.)

Years of conservative and tort reform politics preceded the Howell decision. In that time, negative perceptions of personal injury lawsuits and lawyers had grown in the public conscience. All six justices signing onto the majority opinion in Howell come onto the Supreme Court bench after the Hanif decision. All six had been appointed by Republican governors.

Tort reformers want to eliminate liability lawsuits, but if that is not possible they want to reduce tort awards. A

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common refrain among tort reformers is that injury victims are awarded too much money, which represents a windfall to the injured person and their lawyers. This concept is woven through the Howell decision.

Howell's holding was "that an injured plaintiff whose medical expenses are paid through private insurance may recover as economic damages no more than the amounts paid by the plaintiff or his or her insurer for the medical expenses received or still owing at the time of trial." (*Id*. at p. 566.)

In justifying its holding, the initial problem for the Howell majority was that Helfend had addressed the windfall issue and expressly incorporated it into its policy rationale. Helfend determined that between the tortfeasor and the injured plaintiff, any windfall should go to the injured victim. In order to reach the desired result, the Howell Court had to reframe the issue.

It started with the assertion that "Helfend did not, however, call on this court to consider how the collateral source rule would apply to damages for past medical expenses when the amount billed for medical services substantially exceeds the amount accepted in full payment." (*Id*. at p. 552, emphasis in original.) (Note the use of when the billed amount "substantially exceeds" the amount paid, i.e., Helfend had not addressed a "substantial" windfall to the plaintiff.)

It then made the assertion that "[t]he California history of the substantive question at issue–whether recovery of medical damages is limited to the amounts providers actually are paid or extends to the amounts of their undiscounted bills—begins with Hanif, supra, 200 Cal. App.3d 635." (*Id*. at p. 552.) The statement represented an astounding admission of incompetence on the issue at hand. It was equivalent to saying California tort law regarding recovery if medical expenses started in 1988, on an appeal from a bench trial, where the issue was medical expenses paid by Medi-Cal. But Hanif contained the nuggets the Court needed to rationalize its substantial change in the law while paying lip service to precedent.

According to the Howell Court, the seminal Hanif case had apparently refined legal principles not contemplated by the Helfend Court:

> *Hanif's rational was straightforward. While California courts have referred to the "reasonable value" of medical care in delineating the measure of recoverable damages for medical expenses, in this context "[r]easonable value' is a term of limitation, not of aggrandizement." [citing Hanif.] The "detriment" the plaintiff suffered (Civ.Code, §3281), his pecuniary "loss" (id., §3282), was only what Medi-Cal had paid on his behalf; to award more was to place him in a better financial position than before the tort was committed. [citing Hanif.] (Id. at p. 553.)*

In an obscure appellate decision, the Court found the justification it needed to complete the transformation to a rule that made more sense in its world. The law no longer embodied "the venerable concept that a person who has invested years of insurance premiums to assure his medical care should receive the benefits of his thrift," or that the "tortfeasor should not garner the benefits of his victim's providence." (Helfend, 2 Cal. 3d at pp. 9-10.) Supreme Court policy had shifted from giving an advantage to the injured person over the wrongdoer, to making sure that an injured plaintiff was not in a better financial position than before his or her injury.

Chalking the Howell decision up to politics might be viewed as sour grapes. Perhaps it was as simple as the Court's inexperience with the specialized world of personal injury. As noted by one commentator after the decision, "California Supreme Court justices and staff have very little, if any, knowledge of personal-injury trial practice." ("Plaintiff's Magazine," November, 2011, "Supreme Court puts plaintiffs through the Hamilton Meats grinder," p. 2.) To be sure, the Court did not appreciate the confusion and uncertainty its decision would create in the courts and in every day practice.

Or maybe Howell would have been easier to take if the Supreme Court simply acknowledged that its vision of public policy had changed and it was overruling Helfend and the collateral source law as it had previously existed in California.

Instead, the Court claimed that "we in no way abrogate or modify the collateral source rule as it has been recognized in California." (*Id*. at p. 566.) By that statement, the Court lost any vestige of credibility on the issue among lawyers who actually practice in the area of personal injury.

Consolidating uninsured motorist arbitrations with pending civil actions for fun and (the client's) profit

By: Glenn Guenard

CCP section 1048 provides that consolidation of two pending court cases is appropriate where the cases involve common questions of law and fact. The purpose is to avoid unnecessary duplication of evidence and a substantial danger of inconsistent adjudications.

Often, defense counsel will stipulate to consolidation, especially where both cases are motor vehicle collisions and involve similar injuries and treatmen. Complications arise when there are two or more responsible drivers, and one or more of them is uninsured. Defendants and their insurers are (understandably) reluctant to stipulate to consolidation of an uninsured motorist arbitration with a pending civil action.

They will force you to file a motion to consolidate. This is not necessarily a bad thing, even though it does involve extra busy-work. My firm has filed at least a half a dozen of these motions to consolidate and has always been successful.

For once, the case law is on our side. In Prudential Property and Casualty Insurance Co. v. Superior Court (1995) 36 Cal. App. 4th 275, the plaintiff had two separate motor vehicle collisions. One of the defendants was uninsured. The plaintiff's attorney petitioned the court to join the arbitration proceeding with the pending civil action.

The court held that the trial court may order joinder of a personal injury action with a related uninsured motorist arbitration proceeding, where such joinder is necessary to prevent inconsistent rulings. The court found that CCP § 1281.2(c) specifically gives the Superior Court the authority to order joinder of an arbitration proceeding and a Civil Action to avoid the possibility of conflicting rulings.

Three years after Prudential, the California Supreme Court decided Mercury Insurance Group v. Superior Court (1998) 19 Cal. 4th 332.

The Court held: (1) a trial court has authority to consolidate a contractual arbitration proceeding (between the insurer and the insured) with the insured's pending third-party lawsuit; and (2) the trial court may join the UM insurer as a defendant to the third party lawsuit for all purposes, including trial. This, again, is to avoid conflicting rulings on a common issue of law and fact. The insurance company becomes a named defendant in the case.

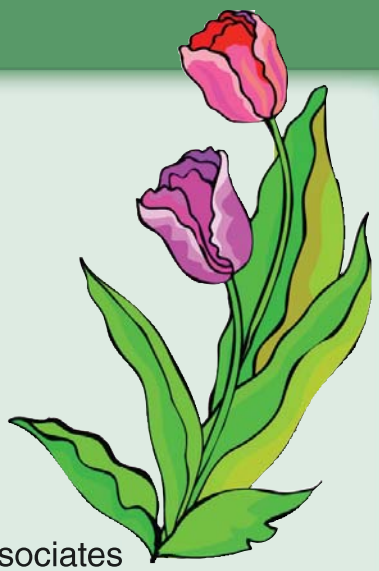
One warning is in order: when filing a lawsuit, just name the insured driver, and do NOT name your client's UM insurer as a defendant. File the third-party lawsuit, and then do the petition to consolidate, providing documentary evidence of the existence of the UM claim.

As you can imagine, it is great to get the existence of insurance before the jury, especially when the jury knows it is against the plaintiff's own insurance company!

A copy of a successful motion to consolidate an uninsured motorist arbitration with a pending civil action can be obtained by emailing me at gguenard@gblegal.com.

Thank You!

To CCTLA's Spring Reception & Silent Auction Sponsors!



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SACRAMENTO Food Bank & Family SERVICES

CCTLA Capitol City Trial Lawyers Association

CCTLA honors excellence, raises $74,000 for SFBFS with annual Spring Reception

By: Steve Davids

On May 21, the Sacramento legal community came together to support the remarkable efforts of the Sacramento Food Bank and Family Services. Capital City Trial Lawyers Association has hosted this "Spring Reception and Silent Auction" fundraiser for several years, and local attorney Margaret Doyle has been the driving force behind it.

In addition to raising $74,197 for SFBFS through this event, CCTLA also honored Betsy Kimball with the Joe Ramsey Professionalism Award and presented the Mort Friedman Humanitarian Award to Sue and (retired Justice) Art Scotland.

Approximately 150 people filled the capacious backyard of the dapper and gracious hosts, R. Parker White and Noel Ferris, who were also sponsors of the fundraiser.

Thanks to the tireless work of Retired Justice Art Scotland, $55,000 was contributed from 55 individual and business sponsors. Donations came from several aspects of the Sacramento legal spectrum: sole practitioners, law firms, litigation

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Justice Art Scotland (Ret.), above left, and his wife, Sue, right in the adjacent photo, received the Mort Friedman Humanitarian Award from CCTLA at its annual Spring Reception in late May. Also in the above photo are California Insurance Commmissioner Dave Jones, center, and Dan Wilcoxen. In the adjacent photo with Sue Scotland is Kathi Finnerty. Betsy Kimball, who was unable to attend the Spring Reception, was awarded the Joe Ramsey Professionalism Award that night.

Parker White and Noel Ferris hosted the reception at their home.

Above from left: Carlos Alcaine, John Demas, Travis Black and Noah Schwartz. In the adjacent photo, from left: SFBFS President & CEO Blake Young and Parker White

Spring Reception

From left: Jerry Johns, Jay Leone, Alicia Hartley, Brianne Doyle and Patty Doyle

Above from left: Judge Michael Bowman, Justice Ronald Robie

Below from left: Judge David Brown, Judge Jennifer Rockwell and Judge Gerrit Wood

Above from left: SFBFS's Blake Young, Spring Reception hosts Parker White and Noel Ferris, and SFBFS's Kelly Siefkin

Left: Jo Pine and Margaret Doyle

Below: Bohm Law Group members and guests

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support companies (including process servers), expert witnesses, the CCTLA list serve (several members contributed amounts to raise $1,400 to qualify the list serve as a sponsor), and a seven-year-old black-and-white shih tzu.

Another approximate $16,000 was raised through a silent auction, with items contributed by the legal community as well. The Food Bank is now about a $20 million annual enterprise, and this spring celebration is its second-largest fundraiser, after the Thanksgiving Day Run to Feed the Hungry.

CCTLA's spring celebration could not have happened without the tremendous dedication of Margaret Doyle; her daughter, Brianne; CCTLA Executive Director Debbie Keller; Jill Telfer; and CEO Blake Young, Melissa Arnold and Kelly Siefkin of the Food Bank.

CCTLA is very proud of this event, and tremendously appreciates all of the donations to this worthiest of causes.

***

Note from Litigator Co-Editor Jill Telfer: Steve Davids also deserves recognition for his efforts on behalf of CCTLA's Spring Reception.

Above from left: Denisa Palilonis, Debbie Keller and Colleen McDonough

From left: Jeremiah Rhine, Melissa Arnold and Kelly Siefkin

Chris Whelan, Noel Ferris and Dywan Williams

Above: CCTLA President Dan O'Donnell and Marcella Ramirez

Left photo: Eric Ratinoff and Ray Lewis

SETTLEMENT: $4,000,000
Kyle Doe vs. Department of Health and Human Services
Sacramento County
Plaintiff counsel: John Demas, of Demas Law Group

A teenage boy who made national headlines after escaping horrific abuse by his caregiver will receive $4 million in a settlement with Sacramento County on behalf of Child Protective Services (CPS). CPS social workers were accused of repeatedly breaking the law and violating protocol as they failed to protect Kyle, who was imprisoned, tortured and starved for seven years by his caregiver, first in Sacramento County and later in Tracy (Kyle's full name is being withheld because he was the victim of abuse as a minor).

CPS left Kyle in the care of a woman who was not a relative and never had custody. CPS records also reveal nine separate abuse reports from teachers and neighbors, yet social workers failed to take action to protect Kyle. CPS failed to follow state mandates and their own policies and procedures and left Kyle with a caretaker who brutalized and nearly killed him.

He suffered immensely until his escape in 2008 from a home in Tracy to a nearby health club. He required skin graft surgery and spent 10 days in the hospital. His tragic story drew widespread media attention and demands for CPS reform and accountability.

In a news release, John Demas stated, "This could be the biggest CPS settlement paid out in the state of California, which reveals just how poorly they handled Kyle's tragic case. We can only hope this lawsuit will bring changes to CPS. Our fear is that there are other 'Kyles' out there, suffering abuse that no child should ever endure."

Kyle's story is inspirational, as he recovers from his painful past. Kyle worked hard after his escape, so that he could graduate from high school. He is now a college student and football player and is eager to move on with his life.

SETTLEMENT: $1,000,000
Confidential—Wrongful Death
Plaintiffs' counsel: David Smith and partner Elisa Zitano, along with referring co-counsel Monrae English, of Fresno

This case involved the failure to treat a previously diagnosed peri-partum cardiomyopathy (PPCM). This caused the death of a new mother. Mediators were Craig Needham, of Needham, Kepner & Fish, San Jose; and Kenneth Gack, of JAMS, San Francisco.

The decedent was in the final month of her pregnancy when she began to experience symptoms of chest pain, dyspnea (shortness of breath), orthopnea (difficulty breathing while lying flat) and pitting edema (extreme swelling of the upper and lower extremities). She was referred by her gynecologist to a cardiologist, who diagnosed Peri-Partum Cardiomyopathy (PPCM), a potentially life-threatening, but treatable cardiac condition affecting pregnant women.

The cardiologist immediately and directly communicated this serious diagnosis to the gynecologist and suggested multiple treatment options, including the administration of diuretics, ACE-inhibitors, and beta blockers, and consideration of early C-Section delivery of the baby.

Unfortunately, the gynecologist insisted that he would assume all treatment of the condition and told the cardiologist to "stand down" on the case. The gynecologist then proceeded to do nothing to treat the condition, and he had his assistant contact the family to advise them that "everything is fine." Her cardiac condition continued to deteriorate in the following two weeks, but the gynecologist ignored the clinical signs of this progression.

The decedent died approximately 14 hours after arriving at the ER, leaving her husband and five-day old son without a wife or mother.

The case was complicated by the fact that the decedent and her husband were from Egypt, and the decedent spoke only limited English, having been in this country for only about two or so years. More importantly, her death created an impossible situation for her husband—a new and inexperienced father with no relatives or friends to help him care for his infant son. As a result, his only option was to allow his son to travel back to Egypt with the decedent's parents, who were visiting to attend the birth of their grandchild.

The son, now five years old, has been raised by his grandparents in Egypt his entire life, with only twice-yearly visits from his father. The son has been diagnosed with a mild speech delay. Additionally, now that there are settlement funds to bring the boy back to California, he will need English language tutoring, as well as significant hours of daycare while his father works a swing-shift job.

Economic Damages: In Egypt, the decedent had earned the equivalent of an American A.A. degree and had a work history that included jobs in the Egyptian travel industry and as the office manager of a small business.

Accordingly, Forensic Accountant Craig Enos calculated present value wage loss over the decedent's lifetime to exceed $884,500.

Non-economic Damages: Given Plaintiffs' profound loss of both mother and wife,

the full $250,000 MICRA cap was demanded.

This case provides compelling evidence of the extraordinary inadequacy of the maximum of $250,000 for general damages for ALL plaintiffs as against ALL defendants in a medical malpractice action.

There were two mediations, involving tremendous effort and dedication from both Craig Needham and Kenneth Gack.

SETTLEMENT: $830,000
Estate of Dean
Plaintiff counsel: Arnold Berschler of Arnold I Berschler

On July 17, 2015, a 50-year-old mother was using a motorized scooter due to disability caused by MS. She was struck and killed in a crosswalk when the driver of a tractor-trailer didn't see her, after the driver had come to a full stop at a stop sign, then proceeded. Suit not filed. Decedent survived by her estranged 17-year-old daughter who lived apart from mother. No suit filed. Claims included wrongful death and pre-death realization of impending death. No economic damages.

SETTLEMENT: $300,000
Confidential
Plaintiff counsel: Arnold Berschler, of Arnold I Berschler

This was a recreational boating accident that happened on June 5, 2015. Defense of Assumption of Risk was avoided by bringing suit in federal court under its admiralty jurisdiction (28 USC, sec. 1333). Injuries consisted of a concussion to a man over the age of 60. There was a claim for loss of self-employment income that totaled in excess of $15,000. No deposition discovery. No written discovery. No mediator.

SETTLEMENT: $250,000
Carter v. Andre Edmonds, M.D., and Tiffany's Luxury MediSpa
Plaintiff's counsel: CCTLA Past President David Smith and partner Elisa Zitano, along with Fresno co-counsel Monrae English

A $250,000 medical malpractice settlement was obtained against an orthopedic surgeon who was "moonlighting" as a plastic surgeon at a medical spa that he owned and operated with his wife. The mediator was Patricia Tweedy, Sacramento. This case involved horrific residual facial scarring when an orthopedic surgeon botched plastic surgery.

Plaintiff Carter was the attractive and successful founder of a marketing and public relations firm in the Fresno area when she began receiving spa services at Tiffany's Luxury MediSpa. Although Plaintiff was a very youthful and attractive 43-year-old woman, Defendants convinced her to undergo a minimally invasive facelift procedure known as a "Silhouette One-Hour Threaded Facelift."

It was supposed to require only tiny incisions hidden within the upper hairline. Instead and without disclosing his intentions to a sedated and anesthetized Plaintiff, Dr. Andre Edmonds performed an extensive "Skin Excision" facelift, a procedure that he had performed only a handful of times and for which he had no training other than to review some CME video tapes of the procedure.

During the course of discovery, it was revealed that Edmonds, an orthopedic surgeon, had no special post-medical school training in plastic surgery, and he was simply "moonlighting" at his wife's spa in an attempt to make a few dollars and save the failing business.

Also during the course of investigation and discovery, two other victims of nearly identical botched skin excision surgeries by Edmonds were identified, each with unsightly bilateral scarring encircling the ears. These individuals were prepared to testify in support of Plaintiff's claim.

Economic damages: The cost of reconstructive plastic surgery to repair or reduce the bilateral scarring encircling both ears was estimated to be $30,000 or higher, depending upon the procedures most likely to yield good results in a reasonable time period.

Non-economic damages: For mediation purposes, Plaintiff argued for the $250,000 MICRA cap, based on the anguish experienced by this attractive young woman who was mutilated by these disfiguring facial scars around both ears.

Mediation: Mediation was conducted by Sacramento mediator Patricia Tweedy. The matter was not resolved at the initial mediation session; however, Tweedy continued to communicate with the parties over several months, achieving the final settlement result of $250,000.

This case is a perfect example of the injustice perpetuated by California's MICRA cap on non-economic damages.

VERDICT: $670,000
Jennifer Hollinger v. CDCR
Judge David Abbott
Plaintiff counsel: Jill P. Telfer and certified law student Patrick Crowl, Telfer Law

CCTLA members Jill P. Telfer and certified law student Patrick Crowl prevailed on failure to engage in the interactive process and failure to reasonably accommodate, with the jury awarding $670,000 on Aug. 14,

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2015. The six-week trial also involved two deadlocked claims for disability discrimination and failure to prevent discrimination resulting in a partial verdict.

Plaintiff Jennifer Hollinger worked for the California Department of Corrections and Rehabilitations for 24 years at the time of her defense-claimed AWOL separation in March 2009. Although Plaintiff had an exemplary career prior to transferring as a lieutenant to the California Medical Facility in Vacaville (CMF), while at CMF, she was denied career-enhancing assignments and promotions.

The stress at work exacerbated her migraines, and she was diagnosed with diabetes. Because of time she had taken off for these conditions and to care for her father recently diagnosed with dementia, she no longer qualified for Family Medical Leave. She requested assistance for her medical conditions, including an alternative comparable assignment, but these were never granted.

Because so much time had passed since the events, the defense claimed many of the relevant documents no longer exited. Plaintiff had to defeat demurrers based on the statute of limitations. The court ultimately found her claims were tolled while she sought internal and State Personnel Board assistance.

In addition, the Attorney General's Office aggressively defended the case, with more than four attorneys assigned to defend and high-paid experts including Charles Scott, M.D, who diagnosed Plaintiff as a malingerer. The defense ordered daily transcripts of testimony, requested four mistrials and cross examined the Plaintiff for more than eight hours.

After her so-called AWOL separation, Plaintiff did not have medical insurance until CDCR finally accepted her two worker's compensation claims filed in 2008, more than a year after declaring her AWOL, and she was paid $120,000 in late 2010.

She ultimately filed for and was accepted for disability retirement in 2011 and receives about $5,000 a month tax-free. This created additional challenges because Plaintiff receives a good income now

During *voir dire*, Plaintiff's counsel emphasized the law requires the jury to compensate a plaintiff for all of her loss, but her income probably still limited her recovery.

The case was tried in front of Judge David Abbott who exhibited great patience and adjudicated difficult issue, including the issue of a partial verdict. Plaintiff's experts were economist Charles Mahla and Laura Ines from Econ One. Plaintiff's treating physicians and worker's compensation evaluators included Dr. Bronsvaag, John Harbeson, M.D., and Janak Mehtani, M.D.

JURY TRIAL / VERDICT: $577,139.50
Personal Injury Case / Orange County
Plaintiff counsel: Ognian Gavrilov, Esq., of the Gavrilov Law firm, and Kirill Tarsenko, Esq.

Plaintiff was a young man, a soccer player, who was run over by an SUV while visiting a soccer coach in Orange County. He dreamed of playing at the Division I level. Plaintiff's injuries primarily were bulging discopathy and radiating symptoms down the right leg from a foraminal herniation at L5-S1. Medical expenses were $40,000, and there was no solid evidence regarding the need for future care. There was no surgical recommendation.

Plaintiff's economist testified regarding the value of having a college degree versus only some college classes. The expert also testified to the difference in part-time versus fulltime employment over the course of a working life (ages 25-64).

The defense had a *sub rosa* video of Plaintiff mowing the lawn, in which he bent down several times to remove the power cord from the electric mower. The argument was that Plaintiff must have been exaggerating. Plaintiff's argument was that the bending done at Dr. Hambly's office involved keeping his legs straight with his knees locked, while bending forward to see how far he could reach.

English was Plaintiff's third language, and he was answering poorly worded questions. There also was an issue about whether the video even depicted Plaintiff, given that he has six brothers, and all look similar.

Plaintiff's CCP section 998 offer was for $149,999, and the defense 998 was around $70,000. The jury came back with $577,139.50: $400,000 for pain and suffering and loss of life enjoyment (soccer).

Counsel appreciated Travis Black, who helped with ideas for closing argument. The best part of the case was watching the judge's face as she read the completed verdict form: she rubbed her temples, checked her glasses and read it again. It was a very gratifying victory.

JURY TRIAL / VERDICT: $231,879.85
Capaul v. Sommer, Sacramento County:
Hon. Gerrit Wood
Plaintiff counsel: Joseph Babich, of Dreyer Babich Buccola Wood Campora, LLP
Defense counsel: Gareth Umipeg, Tiza Serrano, Thompson and Associates (State Farm)

On Sept. 14, 2011, Steven Capaul was on his way to

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work on Highway 50 when he was rear-ended by Lisa Sommer. From the outset Defendant began defending her case by trying to portray it as a minor impact, no-injury accident. That theme was carried throughout the litigation, but it was soundly rejected by the Sacramento County Superior Court jury when it returned a verdict in his favor in the amount of $231,879.85.

As a result of the collision, Plaintiff injured his lumbar facet joints. After failing to relieve his low back pain with chiropractic care and physical therapy, he underwent two facet joint injections, approximately one year apart.

After the second injection, the low back pain returned within several months, which resulted in Plaintiff undergoing two radio frequency ablations, both of which relieved his pain. However, the low back pain returned, leaving him with a diagnosis of chronic pain. His condition has substantially interfered with his ability to enjoy his three passions in life: motorcycle riding, weight lifting, and working at his body shop.

During the trial, Plaintiff's counsel called as witnesses chiropractor Jared Thomas and pain management physician Dr. Kayvan Haddadan, as well as several friends and family members.

Defendant's counsel called defense medical examiner Mark Hambly and accident reconstructionist/biomechanic Dr. Brian Doherty. The jury rejected Dr. Doherty's testimony after he testified that based on a delta-V of 6-7 mph, the force generated in the accident was less than the force applied to the low back by

The jury deliberated over two days and awarded Plaintiff all of his claimed medical expenses, totaling $44,379.52, future medical expenses of $17,500, past non-economic damages of $20,000 and future non-economic damages of $150,000 for a total verdict of $231,879.85.

Plaintiff's policy limits CCP section 998 demand in the amount of $100,000 was rejected in 2013, resulting in recoverable costs of nearly $60,000.

JURY TRIAL / VERDICT: $87,633
Bradford v. Capps, Sacramento County:
Hon. Judy Hersher
Plaintiff counsel: Catia Saraiva, Esq.
and Ryan Dostart, Esq.,
of Dreyer Babich Buccola Wood Campora, LLP
Defense counsel: Mary Talmachoff, Esq.,
Bates Winter Mistretta (State Farm)

Plaintiff Bradford was 64 years old at the time of the collision (June 2011) and was an owner of an apartment complex. Defendant entered Bradford's lane of travel in mid-town Sacramento, causing a collision

The physical damage (crush) was not very visible or dramatic, but Plaintiff]s primary injuries were to his left shoulder, elbow and wrist. The Traffic Collision Report noted complaints of left arm and wrist pain at the scene, and Plaintiff declined medical care.

Plaintiff is a black belt with a 40-year history of martial arts experience. Causation of injury was complicated by his history of chiropractic care for various aches and pains, including his left arm. He'd had a prior motor vehicle collision in 2005, which led to a surgical decompression of the ulnar nerve of his left elbow, performed by Dr. Timothy Mar.

The injuries in the subject collision included a ligamentous tear to the outside of the elbow and shoulder pain. Unfortunately, there were few documented shoulder complaints immediately after the collision, and then nothing reported in the medical records for more than months. Plaintiff went on to have a surgical repair of a ligamentous tear in his left elbow, and also a surgery (which took place three-? years post-collision) to repair a torn labrum in his left shoulder.

State Farm admitted liability but never made a settlement offer. Plaintiffs served a CCP section 998 for $120,000. Plaintiff had $28,000 in past medical expenses (paid by Medicare), and $81,000 in future medical recommendations by doctors Mar and Hembd.

The court kept out photographs of the vehicle damage. The Court also disallowed the defense medical examiner (Robert Slater Jr., M.D.) from discussing pre-accident medical records that the defense possessed for two years but only provided to Dr. Slater after his deposition.

Dr. Slater initially related the elbow injury (including surgery) and ongoing instability, but he later changed his testimony, saying that he could not apportion between collision-related problems and pre-existing degeneration. Under cross-examination, Dr. Slater admitted that he had to defer to doctors Mar and Hembd on some of the main medical issues.

The jury awarded approximately $67,000 in past and future medical expenses. It awarded nothing for the shoulder problems. Non-economic damages were $20,000, equally divided between past and future. The total verdict was $87,633, with $15,000 in recoverable costs.

Plaintiffs' counsel reports the following lessons: perhaps more friends-and-family witnesses would have helped. Also, being more aggressive with defense counsel might have been a better strategy. As counsel stated, "It was still $87,633 more than was ever offered by the defense."

Mike's Cites

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what the injuries did to him. While such arguments are criticized as "Golden Rule" arguments, this appellate court decided the issue by pointing out defendant (once again) did not object.

Lesson: object, object, object. Unless it's too much. In a product liability case tried some years ago in Sacramento, the jury kept track of the defense objections, which numbered in excess of 150.

State Department of State Hospitals v. Superior Court (2015) 61 Cal.4th 339

The California Supreme Court again reminds us that governmental entities cannot be held liable when the government does not prevent a bad person from hurting an innocent victim.

Gilton Pitre was paroled from state prison. The Department of Mental Health was required to examine him under the Sexually Violent Predator's Act (SVPA). The department failed to follow the letter of the SVPA. Four days after his parole from prison, Pitre raped and murdered Plaintiff's 15-year old sister.

The government may be liable when: (1) a mandatory duty is imposed by a law, (2) the duty was designed to protect against the kind of injury allegedly suffered, and (3) breach of the duty proximately caused injury. The Supreme Court found that the complaint sufficiently alleged a breach of the department's mandatory duty to conduct an evaluation.

However, the Supreme Court (in my opinion) stumbled when it found no causation. Ordinarily, proximate cause is a question of fact. But not this time. Quoth the high court: "The only mandatory duty established by the complaint's allegations is the duty to use two evaluators; the details of the manner in which each evaluator conducts the review are discretionary, so long as they include the statutory criteria.

Thus, no actionable breach of duty can be found in the single evaluator's failure to conclude that Pitre was [a SVP]." (61 Cal.4th at pages 355-356.)

Jesus Castaneda v. Superior Court of Los Angeles County (2015)

This case involves the vicarious disqualification of a law firm when an attorney from that firm participated in judicial role at a settlement conference. When the conference was unsuccessful, the firm of one of the *pro tems* substituted in for the defense.

The defense law firm claimed that they "walled off" the attorney/settlement conference judge from the employee's case. She declared that she did not receive any confidential information. The plaintiff's attorney declared that he disclosed his analysis of the issues, and a bottom line settlement figure.

The DCA relied upon Cho v. Superior Court (1995) 39 Cal.App.4th 113, where a judicial officer presided over a settlement conference and then joined the law firm that was defending the case.

The Cho opinion stated: "No amount of assurances or screening procedures, no 'cone of silence,' could ever convince the opposing party that the confidences would not be used to its disadvantage. When a litigant has bared its soul in confidential settlement conferences with a judicial officer, that litigant could not help but be horrified to find that the judicial officer has resigned to join the opposing law firm—which is now pressing or defending the lawsuit against that litigant."

In this case, the trial court expressly declined to resolve whether the attorney/*pro tem* was privy to confidential information, because the trial court believed that a satisfactory "walling off" occurred.

But the DCA followed Cho, and vicarious disqualification was mandatory. This case was remanded, however, for the trial court to determine if the attorney/*pro tem*

Mike's Cites

engaged in *ex parte* communications with the employee's attorneys. If so, the firm was disqualified.

Bermudez v. Ciolek (2015)
237 Cal. App. 4th 1311

Ya think this'd be obvious: Howell doesn't apply to medically uninsured plaintiffs.

Plaintiff was astride his bicycle and was stopped for traffic when he suffered serious personal injuries. The jury verdict was $3,751,969. Bermudez did not have health insurance, but the defense, of course, attempted to misapply Howell.

"To be clear, however, neither Howell, *supra*. nor Corenbaum, *supra*. holds that billed amounts are inadmissible in cases involving uninsured plaintiffs…

"The billed amounts are also relevant and admissible with regard to the reasonable value of Bermudez' medical expenses, at least according to the only case clearly addressing the issue in the context of uninsured plaintiffs. Katiuzhinsky v. Perry (2007) 152 Cal.App.4th 1288."

On appeal, Defendant argued that the trial judge should not have admitted Plaintiff's expert's testimony regarding the reasonable value of medical services provided.

However, the DCA pointed out that there was no objection in the trial court, nor was there a motion *in limine* by the defense to exclude Plaintiff's expert's determination of reasonable value of medical services.

Therefore, in your next trial, expect a motion under Sargon Enterprises, Inc. v. University of Southern California (2012) 55 Cal.4th 747 by the defense to exclude Plaintiff's evidence of reasonable value of medical services provided.

Sargon doesn't pertain directly to Howell issues, but its holding has to do with speculative and unreliable expert testimony.

Sargon is the most important case on expert testimony in many, many years. If you haven't read it, read it.

Martinez v. State of California, Department of Transportation (2015)
238 Cal. App. 4th 559

Caltrans defense attorney Karen Bilotti's egregious misconduct resulted in a reversal of a defense verdict, and also resulted in the DCA reporting her to the State Bar.

Plaintiff's counsel, Arash Homampour, made several motions *in limine* to prevent the defense from mischaracterizing the Plaintiff as a low-life biker with (alleged) Nazi symbols on his helmet. Another motion prevented the defense from talking about Plaintiff's termination of employment from a school district ten years previously. Another motion prevented the defense from talking about Caltrans' budget problems.

The Appellate Court counted at least 10 instances when defense counsel cross-examined the plaintiff on his job discharge of 2003. Defense attorney asked the improper question, Plaintiff's counsel objected, the judge sustained the objection, and the defense attorney continued with the same conduct, as if the judge wasn't even there. The defense attorney made a similar number of references during cross-examination of the plaintiff's wife.

Defense counsel even made a Nazi references to the insignia of Plaintiff's motorcycle club, which the DCA found particularly gratuitous, deliberate and below-the-belt.

The Appellate Court recited a list of instances of attorney misconduct that are worthy of repeating here:

1. An attorney may not pander to the prejudice, passion or sympathy of the jury. Seimon v. Southern Pacific Transportation

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Company (1977) 67 Cal.App.3d 600, 605.

2. Attorneys cannot make appeals based on irrelevant financial aspects of the case such as the hardship that would be visited on a defendant from a plaintiff's verdict. Hoffman v. Brandt (1966) 65 Cal.2d 549, 551-553.

3. Attorneys cannot make appeals based on the hardship that would be visited on a plaintiff from a defense verdict. Hart v. Wielt (1970) 4 Cal.App.3d 224, 234. (Plaintiff's counsel may not argue that Plaintiff would be a burden on the tax payers if the jury did not find in Plaintiff's favor.)

4. An attorney representing a public entity commits misconduct by appealing to the jurors' self-interest as taxpayers. Du Jardin v. City of Oxnard (1995) 38 Cal.App.4th 174, 177. (Argument that Plaintiff's verdict would mean that public services would start disappearing is misconduct.)

5. It is misconduct to appeal to the Defendant's perceived ability to pay any judgment. Stone v. Foster (1980) 106 Cal. App.3d 334, 335.

6. Irrelevant *ad hominem* attacks are prohibited, in particular when a defense attorney attempts to besmirch a plaintiff's character. Pellegrini v. Weiss (2008) 165 Cal.App.4th 515, 531.

7. Attorneys are not to mount a personal attack on the opposing party, even by insinuation. Las Palmas Associates v. Las Palmas Center Associates (1991) 235 Cal. App.3d 1220, 1246.

While attorney misconduct may occur often during the battle of trial, reversal for attorney misconduct may only be ordered when the misconduct is prejudicial. Sabella v. Southern Pacific Company (1969) 70 Cal.2d 311. The prejudice factors itemized by Sabella are:

1. the nature and seriousness of the misconduct;

2. the general atmosphere, including the judge's control of the trial;

3. the likelihood of actual prejudice on the jury; and

4. the efficacy of objections or admonitions under all the circumstances.

In ascertaining prejudice, the reviewing court makes an independent determination in light of the overall record. City of Los Angeles v. Decker (1977) 18 Cal.3d 860, 872. The appellate court herein found the defense attorney's conduct prejudicial, and reversed the defense verdict. (Good news, Arash: you get to try this case and spend all sorts of money on costs again!)

Chavez v. 24 Hour Fitness USA, Inc. (2015) DJDAR 7930 Filed July 8, 2015; 2015 Cal. App. LEXIS 598

Gross negligence saves the day! Plaintiff was working out on a "FreeMotion" cable crossover exercise machine when a back panel broke loose, struck her in the head and caused traumatic brain injury. 24 Hour Fitness moved for summary judgment on the grounds that there had been reasonable repairs and maintenance of the machine. Also, Plaintiff had signed a general release. Plaintiff countered by asking for the deposition of the maintenance person on duty at the time of the incident, and Defendant did not produce him.

While the equipment maintenance people explained what should have been done, there was no evidence as to what actually was done to maintain the machine.

Plaintiff requested a continuance of the MSJ and submitted deposition testimony of the equipment maintenance people that undermined Defendant's position.

At the MSJ hearing, Plaintiff contended that a triable issue existed on gross negligence for failure to maintain the machines according to the industry standard or as recommended in the owner's manual.

Plaintiff contended that if they deposed the maintenance man, the evidence

could show that the failure of maintenance was such a common occurrence that no reasonable juror could find it to be other than an extreme departure from the ordinary standard of conduct as to constitute gross negligence.

The motion for summary judgment was granted by the trial court, and the Appellate Court reversed and remanded. "Gross negligence is pleaded by alleging the traditional elements of negligence: duty, breach, causation, and damages. [Citation omitted.] However, to set forth a claim for 'gross negligence,' the plaintiff must" also allege conduct by the defendant involving either "want of even scant care" or "an extreme departure from the ordinary standard of conduct." Rosencrans v. Dover Images, Ltd. (2011) 192 Cal.App.4th 1072, 1082; City of Santa Barbara v. Superior Court (2007) 41 Cal.4th 747, 754.

Gross negligence connotes such a lack of care as may be presumed to indicate a passive and indifferent attitude toward results. Eriksson v. Nunnink (2011) 191 Cal. App.4th 826, 857.

Generally, it is a triable issue of fact whether there has been such a lack of care as to constitute gross negligence. The DCA herein therefore found that the maintenance notations without dates showed that no maintenance had been conducted just before the incident, which supported the inference of gross negligence.

It could also be inferred from the evidence that 24 Hour Fitness failed to perform regular preventative maintenance, which showed "scant care" or "demonstrated passivity and indifference towards results." (See also Knapp v. Doherty (2004) 123 Cal.App.4th 76, 100-101.)

The DCA reversed the judgment, and instructed the trial court to grant Plaintiffs' request for a continuance to take the key witness's deposition.

Should You Bifurcate the Trial?

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Capitol City Trial Lawyers Association
Post Office Box 22403
Sacramento, CA 95822-0403

September

Tuesday, September 8
Q&A Luncheon
Shanghai Garden, Noon
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Thursday, September 10
CCTLA Problem Solving Clinic
Topic: "Opening Statements"
Speakers: Travis Black, John Demas & Glenn Guenard
5:30-7:30 p.m., Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA Members Only - $25

Friday, September 18
CCTLA Luncheon
Topic: "Recognizing and Overcoming Bias in the Legal Profession"
Speaker: Honorable Cecily Bond (Ret.)
Firehouse Restaurant, Noon
CCTLA Members - $30

October

Tuesday, October 13
Q&A Luncheon
Shanghai Garden, Noon
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Thursday, October 15
CCTLA Problem Solving Clinic
Topic: "Direct Examination"
Speakers: TBA
5:30-7:30 p.m., Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA Members Only - $25

Friday, October 23
CCTLA Luncheon
Topic: "MSAs and Structures on Liability Cases"
Speaker: Noah Schwartz, Ringler Associates
Firehouse Restaurant, Noon
CCTLA Members - $30

Friday, October 30
CCTLA Seminar
Topic: "Medical Lien Update"
Speakers: Daniel E. Wilcoxen, John Cattie & Donald M. De Camara
10 a.m. to 2 p.m., Holiday Inn, 300 J Street
CCTLA Members - $150,
CCTLA Member staff - $100
Nonmember Plaintiff attorney - $175

November

Tuesday, November 10
Q&A Luncheon
Shanghai Garden, Noon
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Thursday, November 19
CCTLA Problem Solving Clinic
Topic: "Cross Examination"
Speakers: TBA
5:30-7:30 p.m., Arnold Law Firm
865 Howe Avenue, 2nd Floor
CCTLA Members Only - $25

Friday, November 20
CCTLA Luncheon
Topic: "Insurance Bad Faith"
Speaker: Brian S. Kabateck, Esq.
Firehouse Restaurant, Noon
CCTLA Members - $30

December

Thursday, December 3
CCTLA Annual Meeting & Holiday Reception
The Citizen Hotel - 5:30 to 7:30 p.m.

Tuesday, December 8
Q&A Luncheon
Shanghai Garden, Noon
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

January

Tuesday, January 12
Q&A Luncheon
Shanghai Garden, Noon
800 Alhambra Blvd
(across H St from McKinley Park)
CCTLA Members Only

Thursday, January 14
CCTLA Seminar
Topic: "What's New in Tort & Trial: 2015 in Review"
6 to 9:30 p.m. Capitol Plaza Holiday Inn
CCTLA Member - $150
Nonmember - $175

Contact Debbie Keller at CCTLA at 916/917-9744 or debbie@cctla.com for reservations or additional information with regard to any of the above programs.

CCTLA COMPREHENSIVE MENTORING PROGRAM

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

CCTLA Calendar of Events