association of southern california defense counsel

verdict

Volume 1 • 2017

- 56TH Annual Seminar Scores Big
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2017 Annual Seminar Keynote Speaker

Bill Walton

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Meeting Bill Walton

The Association of Southern California Defense Counsel got off to a fantastic start in 2017 with our 56th Annual Seminar held at the JW Marriott at LA Live in downtown Los Angeles on February 23-24, 2017. There is not enough that can be said about the countless hours that Glenn Barger, Chris Faenza and Pete Doody put into organizing the annual seminar. Kudos also need to be given to Diana Lytel (this year's President's Award Recipient), Jeff Walker, Anthony Kohrs and Alice Smith (new Los Angeles County board member). These individuals helped ensure the overall success of the annual seminar.

Our keynote speaker for the annual luncheon was Bill Walton. Those that got to attend the luncheon were not disappointed. Bill Walton recounted the highs and lows from his college days through his professional career as an NBA basketball star, up to his current work as a broadcaster. He talked of the encouragement he received from legendary coach John Wooden, described serious physical challenges that he faced and overcame with true grit, and interjected poignant anecdotes about his family. The backdrop for his speech was a big screen slide show of photos over the decades, aptly reflecting changing times over the decades of his career, and interspersing personal photos of Mr. Walton on and off the court with other pictures of well-known public figures from those times. The energy that Mr. Walton brought to the stage was palpable. Demanding to be called "Bill" by everyone that spoke to him, his speech was both motivational and highly entertaining.

Bill Walton's humility was evident at the end of the speech when he announced to the audience that he would stick around to sign autographs and take pictures with anyone who wanted. We were told by Mr. Walton's assistant that he had to be at the airport no later than 3:30 pm. Mr. Walton's speech ended at 2 pm. He insisted on shaking everyone's hand, signing every book or basketball, and standing up for every photograph for all of those in attendance.

At about 3 pm, there were still more than 50 people standing in line to have their opportunity to meet Mr. Walton. I advised Mr. Walton of the time, to which he responded "3:30 was a soft estimate." Mr. Walton remained at the hotel signing autographs and having his picture taken with *every single individual* that stayed after the luncheon. It was only then that Mr. Walton took time to grab a bite to eat (as he had skipped lunch to give the keynote address), before heading off to the airport for a broadcast at the Texas/Arizona basketball game. The selflessness that he demonstrated to give a moment of himself to the attendees of the luncheon was remarkable.

Of course, the annual seminar would not occur without the support that we receive throughout the year, and importantly for the annual seminar, from our sponsors and exhibitors. The sponsors and exhibitors are listed on the ASCDC website. I encourage each of you to look at the sponsors and exhibitors on the website or on page 13 of this issue, and take the opportunity to use the exhibitors and sponsors that have supported our organization on one of your next cases.

I'm looking forward to working with the 2017 Board of Directors and Committee chairs. Whether it be through ASCDC Amicus Committee, our new Committee on CACI Jury Instructions, the Bench Bar functions, Educational seminars or at one of the social networking events – I hope we can meet your needs for the upcoming year.

Clark R. Hudson
ASCDC 2017 President

Civil Procedure At Issue

Michael D. Belote
Legislative Advocate
California Defense Counsel

Spring is arriving in Sacramento, however slowly, and the 2017 legislative year is in full boil. Incredibly, the bill factory that is the California Legislature is actually considering *more* measures than in many years, over 3000 at last count. We also are beginning to see the impact of the two-thirds supermajorities achieved by Democrats in both the Assembly and Senate in November. The first real manifestation of the supermajority impact was the narrow passage of the transportation infrastructure passage, highlighted by increases in gas taxes and vehicle registration fees. Next may come two-thirds votes on extending the cap and trade program, moving to a single-payer health care system, and potentially tax reform (sales tax on services, anyone?)

Your advocacy arm in Sacramento, the California Defense Counsel, is actively monitoring nearly 150 different pieces of legislation. Most assuredly these bills cover every area of practice relevant to ASCDC members, including employment, toxics, transportation, public entities, construction defect, professional liability, and much more. Link to the bills through the ASCDC website to see the diversity of bills pending of interest to defense practice.

In several areas, however, the bills relate more broadly to civil procedure generally. One example is SB 658 (Wiener), relating to civil voir dire. The bill is sponsored by the Consumer Attorneys of California, whose members are concerned about reports of judges allowing too little time for jury questions by counsel, and attempting to rehabilitate prospective jurors who have demonstrated bias against classes of persons or types of actions.

CDC is participating in an informal working group of judges, defense lawyers and plaintiff's lawyers to discuss the issue. Among our representatives are former ASCDC presidents Edith Matthai and Wally Yoka. The relevant statutes under discussion include Code of Civil Procedure sections 222.5 and 225. The questions include whether specific time limits on voir dire should be permitted, whether a discussion about voir dire between counsel and court should be mandated prior to jury selection, the point at which bias should preclude further attempts at rehabilitating prospective jurors, and more.

A second bill broad application is AB 984 (Calderon), relating to sanctions. The bill purports to address ambiguities created by the legislature in 2014 in reviving Code of Civil Procedure Section 128.5, and addressed in the appellate decision of *San Diegans for Open Government v. City of San Diego*. The question is whether the bill provides clarity to the confused law of sanctions between CCP sections 128.5 and 128.7 and whether the extensive guidance to the courts contained in the bill is appropriate. Should sanctions be imposed more vigorously? Does encouraging sanctions lead to greater incivility, already a problem in our courts?

Third, protective orders and settlement agreements are at issue in AB 889 (Stone). The bill was brought to Assembly Member Stone by a U.C. Hastings law professor who believes that secrecy in protective orders and settlement agreements has led to significant numbers of deaths from defective products and environmental hazards. Judges would be required to make a series of independent findings before issuing protective orders in discovery or approving confidential settlement agreements, even when the proposed orders or settlements are stipulated.

CDC testified in opposition to AB 889, arguing that the standards imposed by the bill would make it effectively, although not legally, impossible to obtain a protective order in a products or toxics case. The California Judges Association also opposed, arguing that the obligation of judges to independently review the multitude of discovery documents in order to approve a stipulated order would be impossible to implement. The bill was approved by the Assembly Judiciary Committee, and will next be heard in the Privacy and Consumer Protection Committee.

Through all of this, the legislature is busy trying to fashion a budget for fiscal year 2017-2018, in light of very substantial questions about potential changes to federal funding coming out of Washington. D.C.

It is going to get hot in Sacramento, literally and figuratively!

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My Major's Better Than Your Major

Patrick A. Long

I'd like to take a minute or two of your time to discuss how incredibly fortunate we were when we selected our majors as undergrads, and how our eventual law degrees have equipped us to live the lives we live.

Let's go back in time, to the time when you were selecting a major for your undergraduate degree. For some of you this might have occurred at the beginning of your freshman year, but for most, perhaps as you entered your junior year. What follows is based on several informal, very informal, surveys taken concerning undergraduate majors chosen by members of our association, and majors selected by our colleagues in other professions.

First, let me list just a few of the many majors selected by members of this association as undergraduates: literature, history, political science, business administration, mathematics, languages, anthropology, biology, physics, engineering, philosophy, etc. As appeared obvious to me, young people planning a career in law are free to select any major that generates interest on their part, and will inculcate in them good study habits and discipline in organizing their time. To me, this is a definite advantage over our colleagues who planned to go into fields other than law.

A number of my friends are medical doctors. I called three of them, and got roughly the same response from each. As an undergraduate they pretty much had to major in basic premed courses like biology, chemistry or the like to become a medical doctor. And it follows, to be a high school or grammar school teacher; you must major in education, to be a chemist or pharmacist, it's chemistry. To become an engineer you must major in engineering. To be a computer guru it's computer science. My point obviously is that in many other vocational areas other than law, students are precluded from majoring in any subject other than what they will continue to study in graduate school.

> **Juris doctors, with our myriad of different undergraduate majors, are prepared to insert ourselves into a very wide variety of occupations and vocations.**

The ability to select the major we prefer is, to me, a significant benefit to those of us envisioning an eventual juris doctor degree. For one thing, it is certainly more enjoyable to study something in which you have an interest. For another, you are more likely to achieve better grades in such subject. But let me share with you what is perhaps the biggest benefit of preparing to earn a juris doctor. And let me further emphasize that I say this as one who has essentially practiced only law from the moment I passed the bar exam. Juris doctors, with our myriad of different undergraduate majors, are prepared to insert ourselves into a very wide variety of occupations and vocations. We are often politicians, bankers, businessmen and businesswomen, entrepreneurs, advertising executives, and creators of social media. My friend, and the editor of Verdict, Lisa Perrochet, cautioned me that I should not overlook the many undergraduate engineering majors who go on to become superlative patent lawyers. Excellent point Lisa, and exactly in line with the point I'm trying to make.

Here's the bottom line friends. I know many, if not most of us, work long hours and sometimes face difficult legal problems and issues. But by gosh the law, and the path that leads to it, provides many options and choices that other vocations do not. Our many choices remind me of the complaint set forth by Mr. Frost, you know, about two roads diverging into a yellow wood, and Frost wanting to take both. Still, I'm sure Mr. Frost would agree that it's better to have a choice than not to have one. I'm grateful for what the study and practice of law has brought me.

Mr. Frost and I took the road less traveled, and that has made all the difference.

Patrick A. Long
palong@ldlawyers.com


Dave Daniels
Pete Doody
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3

We Had a Ball at the Annual Seminar!

by Lisa Perrochet

Once again we had a great turnout for the Annual Seminar at the spectacular JW Marriott LA Live in downtown L.A. It was a perfect venue for building a great energy level among all who attended, from new lawyers looking to pick up practice pointers to veteran ASCDC members who look forward each year to catching up with colleagues from around the Southland.

Kicking off the session, we began with our traditional "**Year in Review**" summary of case highlights from 2016. The compendium of key civil cases recently decided as well as those pending before the California Supreme Court is an outstanding resource, organized by topic. Bob Olson and Chip Farrell put in a ton of work to synthesize these cases for you; be sure to check out the PDF that is available to attendees, via a web link, for their program materials, as well as the PowerPoint slides from other sessions.

Year in Review

We next had a series of parallel track sessions, so there was something of interest to everyone going on at all times. A key feature of many of these sessions was the inclusion of panelists from plaintiff's firms, judicial officers, and industry representatives to fill out the viewpoints offered by the expert defense counsel in each group. ASCDC strives not to be an "echo chamber," and offering a variety of perspectives is a big part of what makes the annual seminar so useful to our membership.

998s and Factors Determining Case Value

The morning discussion of section **998 offers** included some valuable tips on valuing cases, and highlighted a number of terms that are permissible and impermissible for inclusion in an offer. Meanwhile, the session

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ASCDC 56TH ANNUAL SEMINAR

Association of Southern California Defense Counsel

on **arbitration strategies** included practical advice on getting a case into arbitration, and reaching a cost-effective solution in that forum.

Arbitration: The Good, the Bad, and the Ugly

In the afternoon, one panel addressed the continually evolving law on so-called ***Howell* issues** relating to the measure of damages for medical specials, and preserving challenges to incompetent evidence of inflated damages figures. As Steve Fleischman noted, it was great to have a plaintiff's lawyer, Bill Shapiro, on this panel, and to hear Shapiro say he would not personally direct one of his patient's to treat with a lien doctor – a tactic we've seen others use to evade *Howell* limits on inflated damages claims.

Putting the "How" in *Howell*

A simultaneous panel covered *Sargon* challenges to improper expert testimony. Many of us find that both of these topics recur frequently in our cases; not being able to attend both sessions, some attendees were probably glad to have several representatives from their firms at the conference, so as to be able to split up and share notes later about all the "inside baseball" information offered by the expert panelists.

Also in the afternoon, we had a panel talking about the latest developments in the **world of the Reptile.** Again, having a plaintiff's lawyer on the panel was refreshing and informative. As Ted Xanders pointed out, there are plenty of straight shooters in the plaintiff's bar, including not only Shapiro on the *Howell* panel, but also Mike Alder, who spoke on the Reptile panel. As Ted says, "It is very easy for defense lawyers to be cynical about the plaintiffs' bar, particularly personal-injury lawyers. But we need to be careful about painting all plaintiff's lawyers with the same broad brush. I was impressed by these lawyers' candor and their ethics."

Is Reptile Working?

A second track panel during the same afternoon time slot addressed how to get away from legalese in legal writing, to maximize the persuasive value of **law and motion briefing.** Bob Kaufman, who moderated the panel, noted that avoiding personal attacks on one's opponent and doing anything else that distracts from your core message are tips that dominate the "don'ts." The "do's" can be summarized by one overriding tip – make your brief easier to digest. With the first panel covering effective advocacy before the jury, and the second covering effective advocacy to the judge, these complementary discussions were full of practical advice for lawyers at all experience levels.

Getting the Right Kind of Attention For Your Law and Motion Brief

Friday morning began with **Mike Belote** offering his insightful recap of the year in the California Legislature, with some observations about what we might expect down the road. Every year, Mike's explanations help us to make sense of what on earth is going on in Sacramento, how the judicial branch is faring, and what we can expect from the newly passed laws that directly address defense lawyers in their own practice, as well as how their clients' interests may be affected. Mike's Capitol Comment toward the beginning of each issue of *Verdict* magazine is another place to get the inside scoop.

Mike Belote's Legislative Update

We next set aside time for a distinguished panel comprised of leading trial attorneys on the topic of **Civility Matters.** The most successful defense litigators know that being the adult in the room is integral to advancing the client's interests, and they also know that courtesy and collegiality make the job of serving those clients' interests a whole lot more appealing. Developed by ABOTA, the thought-provoking presentation on civility showcased the value of integrity, honor and ethics in the practice of law.

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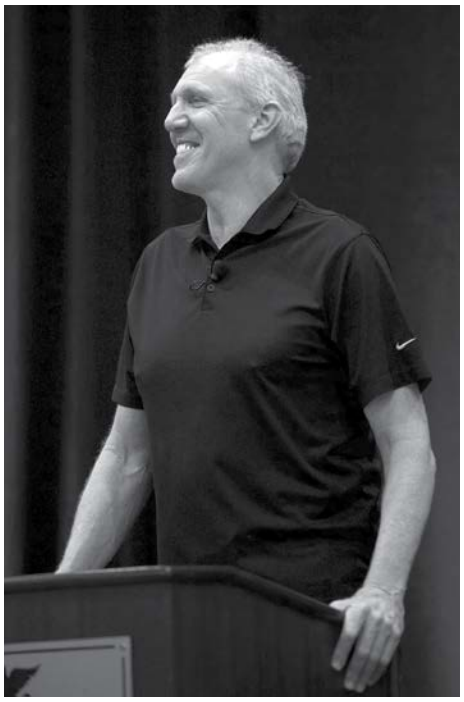
ASCDC 56TH ANNUAL SEMINAR

Association of Southern California Defense Counsel

Jim Owen: Standing Tall In an Upside Down World

A fitting follow-on after the civility panel was the inspirational talk by **Jim Owen** about what he calls "cowboy ethics," and "standing tall in an upside down world." Jim's decades of working in the corporate business world led him to believe that we need to reach kids at an early age to instill in them some basic values to help them be personally successful, and also to help our society as a whole function well. He has distilled "ten principles to live by" that can be illustrated by cowboy creed, but that apply as well to the practice of law, and pretty much to any other enterprise one might undertake. Some of those principles, which we might want our children, our associates, our partners, and our clients to live by, include: Take pride in your work; Be tough, but be fair; When you make a promise, keep it; and Know where to draw the line. The ASCDC office has extra copies of Jim's books; contact them for one.

Finally, speaking of "standing tall," we capped off the seminar with a candid, entertaining, and passionate presentation by legendary basketball player **Bill Walton.** Speaking from the heart, without notes and without a hint of self-importance, Walton shared a variety of personal stories that clearly resonated with the rapt audience on many levels. Ninos Saroukhanioff recalled the story that touched him the most, about Walton raising his three sons – one of whom, Luke Walton, is now the coach of our Los Angeles Lakers. "As Bill told the story, he was always the 'No Dad.' The dad that had to say no every time his sons wanted



Keynote Speaker, Bill Walton

something. One day, Luke says to him, 'Dad, why do you always say no, whenever we ask if we can do something?' Bill replies, "Luke, it's not that I always say no. It's just that you boys never ask me the right question. For example, if you were to ask, "Dad, can we eat all of our vegetables for dinner?" then, I would say yes. Or, if you were to ask, "Dad, can we clean up the plates and wash the dishes after dinner?" then, I would say yes. Or, if you were to ask, "Dad, can we do an extra hour of homework tonight instead of watching TV?" then, I would say yes. So, see Luke, it's not that I want to say no. It's just that you have to ask the right questions for me to say yes.' "

Clark Hudson's President's Message at the beginning of this magazine recalls other moments from Walton's talk. The message Walton delivered was a perfect wrap-up for this year's seminar, driving home the goals of never quitting, always striving, to be the best at what you do, while being the best person you can be for your family and your community.

Glenn Barger (L) with Clark Hudson (R)

Thanks to ASCDC Vice President, Chris Faenza, and the rest of the seminar committee on ASCDC's board for organizing the educational and fun event. And thanks to our vendors who helped defray the costs associated with the seminar, from "save the date" postcards and photography services, to coffee and other much appreciated refreshments at the breaks, to the rollicking Thursday night cocktail reception, to the "main event" annual luncheon. Please visit *www.ascdc.org* to see the full listing of vendors who deserve to be patronized for supporting the seminar and helping to keep your attendance costs down.

Finally, consistent with ASCDC's efforts to serve our members better and smarter, remember that the presentation handouts are available online (to Seminar attendees): *http://ascdc.camsdev.net/index.asp?varLocked2017=@scdcconf2017.* With the program schedule and materials available via a convenient meeting web link, the only things seminar attendees had to carry around was the great swag from our generous vendors, and the books available for purchase from our Cowboy Ethics speaker Jim Owen and our luncheon keynote speaker Bill Walton.

Here's hoping everyone enjoyed the conference – and if you didn't go this year, don't be left out next year! Watch your email inbox and your year-end Verdict magazine for information on saving the date and getting your tickets early for the 2018 seminar.

2017 Annual Seminar Photos



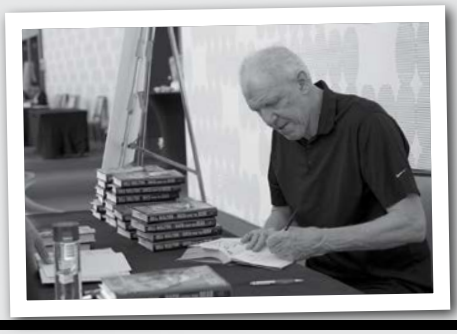










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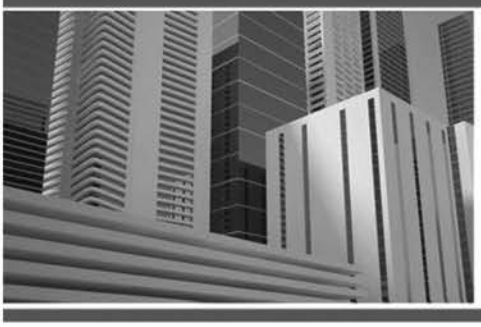

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What Defense Counsel Should Know About California and Federal Anti-SLAPP Appeals

by Alana Rotter

California's "anti-SLAPP" statute is a popular tool for defendants seeking an early end to litigation, either in state trial courts or in federal district courts applying California law. Any defendant who loses an anti-SLAPP motion should bear in mind that the denial is immediately appealable in the California courts. But appealability is more complicated in the Ninth Circuit, which treats only *some* types of anti-SLAPP rulings as immediately appealable. This article provides some basic guidelines for navigating the thicket of appealability.

Anti-SLAPP appeals in the California courts

The anti-SLAPP statute, Code of Civil Procedure section 425.16, allows courts to strike claims arising from acts of speech or petition in the public interest unless the plaintiff can establish a probability of prevailing.

Section 425.16 expressly makes orders granting or denying an anti-SLAPP motion appealable under California law. The rationale for the immediate appeal is that the anti-SLAPP statute is supposed to prevent a defendant from being dragged into litigation for exercising its constitutional rights, and deferring appellate review of an order denying an anti-SLAPP motion until after a final judgment would vitiate that protection.

Not only does section 425.16 *permit* immediate appeals, it *requires* them: In the California courts, a party aggrieved by an anti-SLAPP ruling *must* timely appeal, or forfeit review forever. For example, an order striking some claims but not others is reviewable on direct appeal but not as part of an appeal at the end of the case. (*Hewlett-Packard Co. v. Oracle Corp.* (2015) 239 Cal. App.4th 1174, 1185 & fn. 7.) This means that a defendant whose anti-SLAPP motion is denied in whole or in part can, and should, appeal the denial immediately if there is a meritorious basis for doing so.

Defendants contemplating an anti-SLAPP appeal should bear in mind that the appeal will stay all further trial court proceedings on causes of actions affected by the motion. (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 190-191.)

Anti-SLAPP appeals in the Ninth Circuit

Defendants can also use anti-SLAPP motions in federal district court to strike causes of action that are based on California law. This was not a foregone conclusion: Under the rubric known as the *Erie* doctrine, a federal court adjudicating state law claims applies state law on substantive issues, and federal law on procedural issues. (*Gasperini v. Ctr. for Humanities, Inc.* (1996) 518 U.S. 415, 427.) If federal courts viewed California's anti-SLAPP statute as purely procedural, anti-SLAPP motions would not be cognizable in federal court. The Ninth Circuit has concluded, however, that California's anti-SLAPP statute furthers "important, substantive state interests" and, on that basis, permits anti-SLAPP motions. (*United States ex rel. Newsham v. Lockheed Missiles & Space Co., Inc.* (9th Cir. 1999) 190 F.3d 963, 973.)

Beware, though, that the fact that anti-SLAPP motions are available in federal court does not mean that the rules for *appealing* an anti-SLAPP ruling are the same in federal court as in the California state courts. In the Ninth Circuit, the right to appeal is governed not by the anti-SLAPP statute – it's governed instead by general federal rules of appealability.

Federal appellate courts have jurisdiction to review two kinds of rulings: final decisions on the merits, and certain types of collateral orders. A decision is final when it ends the entire case and leaves nothing for the court to do apart from executing the judgment. An order granting an anti-SLAPP motion as to all causes of action without leave to amend meets that test. It is a final decision on the merits, and the plaintiff can immediately appeal it.

Many anti-SLAPP rulings, however, are not case-dispositive. For example, the district court might strike all causes of action *with* leave to amend, might strike only some causes of action, or might deny the motion altogether. In those situations, the ruling is not a final decision because there are still claims left to try. Such rulings are appealable in federal court only if they come within the collateral order doctrine.

To be appealable, a collateral order must meet three requirements: It must

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conclusively determine the disputed question; it must resolve an important issue completely separate from the merits of the action; and it must be effectively unreviewable on appeal from the final judgment. Different types of anti-SLAPP rulings fare differently under this test.

The Ninth Circuit has held that an order granting an anti-SLAPP motion *with leave to amend* fails the first collateral order criterion, i.e., conclusively determining the disputed question. The disputed question on an anti-SLAPP motion is whether the anti-SLAPP statute bars the suit. An order striking claims with leave to amend does not answer that question, because the district court will revisit the impact of the anti-SLAPP statute in light of the amendment. Such an order is inherently tentative, and therefore not appealable. (*Greensprings Baptist Christian Fellowship Trust v. Cilley* (9th Cir. 2010) 629 F.3d 1064, 1068-1069.) If a plaintiff appeals from an order striking causes of action with leave to amend, defense counsel should consider moving to dismiss the appeal.

By contrast, an order *denying* an anti-SLAPP motion is an appealable collateral order. The denial "is conclusive as to whether the anti-SLAPP statute require[s] dismissal" of the suit; application of the anti-SLAPP statute is "a question separate from the merits"; and because the point of the anti-SLAPP statute is to immunize the defendant from litigating meritless cases, the denial of an anti-SLAPP motion is effectively unreviewable on appeal from a final judgment. (*Batzel v. Smith* (9th Cir. 2003) 333 F.3d 1018, 1025.)

Five Ninth Circuit judges have argued that the current Ninth Circuit case law is wrong, and that orders denying anti-SLAPP motions should *not* be appealable under the collateral order doctrine. (*Travelers Cas. Ins. Co. of Am. v. Hirsh* (9th Cir. 2016) 831 F.3d 1179, 1182-1186 (concurrences by Judges Kozinski and Gould); *Makaeff v. Trump University, LLC* (9th Cir. 2013) 736 F.3d 1180, 1188-1192 (Judges Watford, Kozinski, Paez, and Bea dissenting from the denial of rehearing en banc).)

But the Circuit would have to sit en banc to change its precedent, and the majority of the judges have not voted to do so. The result is that at least for now, the denial of an anti-SLAPP motion remains immediately appealable in both California courts and the Ninth Circuit. Defendants whose anti-SLAPP motion is denied therefore should immediately assess whether to appeal, just as in state court.

The Ninth Circuit considered another variation on anti-SLAPP appealability last year in *Hyan v. Hummer* (9th Cir. 2016) 825 F.3d 1043. The plaintiff there appealed from an anti-SLAPP ruling that struck all the claims against one defendant, but that did not dispose of claims against another defendant. The Ninth Circuit dismissed the appeal for lack of jurisdiction.

Hyan reasoned that the anti-SLAPP ruling was not a "final decision" for appealability purposes because the plaintiff still had claims pending against another defendant, and under Federal Rule of Civil Procedure 54(b), a final decision must adjudicate all of the claims against *all of the parties.* (*Hyan, supra,* 825 F.3d at p. 1046.) Nor was the ruling an appealable collateral order, because it failed the third criterion, i.e., being effectively unreviewable on appeal at the end of the case. *Hyan* reasoned that "[t]he erroneous grant of an anti-SLAPP motion to strike can be fully remedied on appeal by remanding the case for proceedings on the wrongly-struck claim or claims." (*Id.* at p. 1047.) In other words, the plaintiff might eventually be able to obtain appellate review, but not until the rest of the case was over.

In a nutshell: When it comes to anti-SLAPP appealability in the Ninth Circuit, the devil is in the details. Review any ruling carefully to determine how it aligns with the final decision and collateral order standards – and when in doubt, consult an appellate lawyer.

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Defending Against Claims for Future Medical Expense Damages

by H. Thomas Watson and Karen M. Bray

Introduction

Future medical expenses may be one of the largest components of a serious personal injury case, and defense counsel need to take steps to defend against excessive damage awards and to preserve critical damages issues for post-trial motions and appellate review. This article provides tips for defending against future medical expense claims.

A brief summary of the law on the applicable measure of damages

The law regarding past medical expense damages is pretty well settled following the Supreme Court's decision in *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541, which holds that the bills of medical service providers are inadmissible because they are not evidence of the reasonable value of medical care since they are grossly inflated, and that plaintiffs may recover only the lesser of (1) the amount accepted as full payment for medical services, or (2) the reasonable value of the services. (See *Howell*, *supra*, 52 Cal.4th at pp. 555-562; ; *State Farm v. Huff* (2013) 216 Cal. App.4th 1463, 1471 [a hospital cannot satisfy its burden of proof to support a lien against the tort plaintiff's recovery by presenting unpaid hospital bills, since unpaid bills are not evidence regarding the value of medical services provided to plaintiff]; *Ochoa v. Dorado* (2014) 228 Cal.App.4th 120, 135-139 ["unpaid medical bills are not evidence of the reasonable value of the [medical] services provided" to an uninsured plaintiff, and "cannot support an award of damages for past medical expenses"].) As a result, parties often stipulate to the amount of past medical expenses incurred.

However, defense counsel continue to confront difficulties defending against claims for future medical expenses. The law is constantly evolving and new appellate decisions are issuing regularly. Under existing law, strong arguments can be presented to bar future medical expense projections based on current (or future projected) "billed" amounts. (See *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1325-1333 [the amount "billed" (1) "is not relevant to a determination of the reasonable value of future medical services" (2) "is inadmissible for the purpose of proving noneconomic damages" and (3) "cannot support an expert opinion on the reasonable value of future medical services"]; *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1050-1051.) Rather, future medical expenses should be calculated based on current market rates for the amounts accepted as full payment (adjusted for inflation) for the services reasonably certain to be incurred in the future.

Retain a life care planner who understands current law and can prepare a plan based upon paid rates

Defense counsel should retain a life care planner who understands current law and can prepare a life care plan based on a projection of the typical amounts that are currently *paid* and *accepted as payment in full* for those medical services that plaintiff will allegedly need. Some life care experts claim that information concerning paid rates is not available because it is confidential and payments are made pursuant to the terms of private health insurance agreements. An expert who uses that reason to rely exclusively on billed amounts that are publicly available in sources such as the Fair Health and Health Systems International database probably does not have sufficient expertise to opine on the *legally relevant* expected cost of future care. Other sources, such as Truven Health Analytics, maintain databases regarding amounts actually accepted as payment in full for healthcare services. Moreover, any life care planner can contact local healthcare providers to inquire about the actual amounts they typically accept in a variety of circumstances as payment in full for their services, without invading individual patient confidentiality.

Ideally, the defense's life care planner will prepare a report comparing the paid amounts against the amounts included in plaintiff's life care plan, because life care planners for plaintiffs typically use *billed* rates instead of *paid* rates. If the trial court rules that plaintiff's expert can present a plan based upon billed rates, the defense expert should be prepared to explain not only that the plaintiff's expert is including the costs of services that are not reasonably necessary (if true), but also why the *rates* for necessary services do not reflect reality. (See section F, *post*.) And if the defense expert's opinion is excluded, the expert's report can be submitted as an offer of proof concerning the prejudice from the trial court's ruling.

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Determine the basis for the future medical expense estimates used by plaintiff's life care planner

Defense counsel should depose the plaintiff's life care expert to determine the basis for all costs included in plaintiff's life care plan. Plaintiffs' experts may be vague in describing costs as "customary" or "reasonable," but when pressed, they may have to admit they are relying on databases containing amounts customarily "billed" or "charged." The deposition should clearly establish every amount in the life care plan that is based on such billed rates (rather than paid amounts).

Furthermore, many life care planners will base their life care plan costs on some amount greater than the *average* amount billed or paid for a particular medical service multiplied times a regional adjustment factor. For example, they may select amounts at the 70th or 80th percentile of rates (i.e., rates higher than the amounts billed by or paid to 70 or 80 percent of care providers) rather than average rates. The plaintiff is entitled to recover only damages that will *probably* be incurred, and plaintiffs usually have no basis for arguing that the actual cost will exceed the *average* amount for each medical service in the region in which plaintiff resides. Any award that exceeds that amount is excessive. (See *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 640 ["*The primary object of an award of damages* in a civil action, and the fundamental principle on which it is based, are *just compensation* or indemnity for the loss or injury sustained by the complainant, *and no more* [citations]" (original emphasis)]; *Howell*, *supra*, 52 Cal.4th at p. 555 ["We agree with the *Hanif* court that a plaintiff may recover as economic damages *no more* than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less" (original emphasis)].)

File a motion for summary adjudication and/or a motion in limine, request an Evidence Code section 402 hearing, object during trial to evidence of "billed" or "charged" rates, and consider moving for a nonsuit/ directed verdict

The cost bases of plaintiff's life care plan often is not disclosed until the eve of trial and after the deadline for seeking summary adjudication. However, if defense counsel learns in advance that plaintiff's life care plan is based upon billed rates (perhaps by reference to that expert's testimony in prior cases), counsel should consider filing a motion for summary adjudication on the future medical expense claim, arguing that plaintiff's only supporting evidence is inadmissible. (See *Corenbaum*, *supra*, 215 Cal.App.4th at pp. 1325-1333; *Markow*, *supra*, 3 Cal.App.5th 1027, 1050-1051; see also Code Civ. Proc., § 437c, subd. (f)(1).)

Likewise, the defense should file a motion in limine to bar the life care planner from testifying or presenting evidence of a life care plan that includes costs based on "billed" or "charged" amounts. Counsel should also note, if applicable, that plaintiff's life care plan inflates the amount of probable damages by using something other than the average local rates – e.g., rates charged at the 70th or 80th percentile.

Additionally, defense counsel should consider requesting a hearing under Evidence Code section 402 for the purpose of having the trial court make a preliminary finding of fact regarding whether plaintiff will have insurance covering future medical needs. (See Evid. Code, § 405, subd. (a) ["The court shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises"].) If the court rules that certain future medical expenses will probably be covered by plaintiff's health insurance, then the evidence the jury hears at trial should be based solely on negotiated insurance rates. The defense should never argue that a plaintiff *must* treat with an in-plan doctor, but can still argue that if plaintiff chooses to go out-of-plan without a medically sound reason for believing proper care cannot be provided in-plan, then the plaintiff will have failed to mitigate his or her damages, such that the extra expense is noncompensable. In other words, the defendant is not dictating plaintiff's doctor-patient relationship, but if plaintiff chooses to incur expenses that plaintiff was not required to incur (such as flying to Paris for

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green sheets

NOTES ON RECENT DECISIONS

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The Green Sheets, although published later than most current advance sheets because of copy deadlines, should serve as a useful review of recent important decisions. Readers are invited to suggest significant decisions for inclusion in the next Green Sheets edition. Please contact:

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To make the Green Sheets a useful tool to defense counsel, they are printed in green and inserted in the middle of *Verdict* magazine each issue. They can be easily removed and filed for further reference. Of course, the Green Sheets are always one attorney's interpretation of the case, and each attorney should thoroughly read the cases before citing them or relying on this digest. Careful counsel will also check subsequent history before citing.

CIVIL PROCEDURE

A parent company must have the right to substantially control its subsidiary's activities before courts may attribute the subsidiary's jurisdictional contacts to the parent under an agency theory.

Williams v. Yamaha Motor Corporation, USA (9th Cir. 2017) 851 F.3d 1015

A California plaintiff brought a breach of warranty class action in California federal district court alleging Yamaha and its U.S.-subsidiary sold defective outboard motors. Yamaha manufactured and sold the motors in Japan; its U.S. subsidiary imported and marketed the motors in California. Yamaha moved to dismiss for lack of personal jurisdiction, and the district court granted the motion.

The Ninth Circuit affirmed. Yamaha did not have contacts with California sufficient to support general or specific personal jurisdiction over it in California. And its U.S. subsidiary's contacts could not be imputed to it through an agency or alter ego theory for purposes of establishing specific personal jurisdiction absent facts that Yamaha substantially controlled its subsidiary's activities. The Ninth Circuit adopted the "substantial control" test for agency in lieu of the circuit's prior test that required a showing only that the parent company would have performed the subsidiaries' activities itself had there been no subsidiary. The court reasoned that the prior test was irreconcilable with *Daimler AG v. Bauman* (2014) 134 S. Ct. 746, which rejected that test for purposes of establishing general personal jurisdiction.

See also *Strasner v. Touchstone Wireless Repair and Logistics, Inc.* (2016) 5 Cal.App.5th 215 [Fourth Dist., Div. One: Texas cell phone repair facility lacked sufficient minimum contacts with California to permit exercise of personal jurisdiction over it with respect to New York resident's claim that it violated her privacy rights].

Summary judgment may not be defeated with a declaration from an expert who was not properly disclosed in response to a demand to exchange expert information.

Perry v. Bakewell Hawthorne, LLC (2017) 2 Cal.5th 536

Plaintiff failed to designate any experts in response to a demand, but then months later attempted to oppose summary judgment with an expert declaration. Defendant objected. The trial court excluded the declaration and granted summary judgment.

The California Supreme Court affirmed the summary judgment. "A party may not raise a *triable* issue of fact at summary judgment by relying on evidence that will not be admissible at trial." The Court overruled one of its own 1985 decisions and disapproved of a 1990 Court of Appeal (Fifth Dist.) opinion that reflected the "more restrictive approach" to summary judgment prevailing before 1992 and 1993 amendments to California's summary judgment statute. Summary judgment is "now seen as 'a particularly suitable means to test the sufficiency' of the plaintiff's or defendant's case."

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But see *Hamilton v. Orange County Sheriff's Department* (2017) 8 Cal. App.5th 754 [Fourth Dist., Div. Three: summary judgment reversed because trial court abused its discretion in failing to accommodate counsel's joint request for a 60-day continuance to allow plaintiff to take depositions of the defendant's declarants]

Before dismissing a juror for failing to deliberate, trial court must do more than just interview the complaining jurors.

Shanks v. Department of Transportation (2017) 9 Cal.App.5th 543

In this case against the State of California for negligent maintenance of a highway, two jurors complained that a third juror had prejudged the case and was refusing to deliberate. After hearing the testimony of the two complaining jurors and combining their comments with concerns raised earlier in the case that the third juror had slept during trial, the court dismissed the third juror. With an alternate in place, the jury returned a 11-1 plaintiff's verdict for over $12 million, with a 9-3 verdict assigning 90% of the fault to the State. The State moved for a new trial, and included a declaration from the third juror stating she had not slept during trial, that she had not refused to deliberate, that she was inclined to find for the State, and that the two pro-plaintiff complaining jurors had developed a friendship. The trial court denied a new trial.

The Court of Appeal (Second Dist., Div. Six.) reversed the denial of a new trial on the issue of apportionment of fault. The complaining jurors' comments did not clearly reveal the third juror had refused to deliberate, as opposed to disagreed with the majority's view of the case. Without questioning the accused juror or any other non-complaining jurors, the record did not reveal a "demonstrable reality" that the third juror had failed to deliberate or was otherwise unable to perform her duty. Excusing the juror was prejudicial as to the issue of apportionment of fault because that portion of the verdict was 9-3 and she had indicated an inclination to find for the State.

When ruling on motion for new trial, trial courts have the right *and duty* to independently assess the adequacy of the verdict.

Ryan v. Crown Castle NG Networks, Inc. (2016) 6 Cal.App.5th 775

The plaintiff alleged that his employer breached his employment contract by failing to pay out on stock options, and that the promise of stock options inspired him to leave otherwise lucrative employment. On a confusing special verdict form, the jury found for the plaintiff on his breach of contract claims, but awarded damages based on the value of plaintiff's lost employment opportunities rather than the value of the stock options. The trial court recognized that the verdict made no sense, but believed it lacked the power to substitute its judgment for the jury's. Accordingly, the trial court denied the plaintiff's motion for a new trial on damages.

The Court of Appeal (Sixth Dist.) reversed. In ruling on the new trial motion, "[t]he court was fully empowered and indeed obligated to make an independent assessment of the adequacy of the verdict." Because the verdict was fatally inconsistent, it had to be reversed for a new trial. The court also cautioned against using special verdict forms unless they can be crafted in a clear and helpful way.

Unlike the time constraints for filing a notice of motion for new trial, the time constraints for filing papers supporting a new trial motion are not jurisdictional.

Kabran v. Sharp Memorial Hospital (2017) 2 Cal.5th 330

In this medical negligence case involving a spinal injury, the jury found the defendant hospital negligently jostled the plaintiff, but its negligence was not a substantial factor in causing the spinal injury. Shortly thereafter, the plaintiff died and autopsy results called into question the jury's no-causation finding. The plaintiff's estate moved for a new trial on the ground of newly discovered evidence, but as a result of failing to pay the filing fee, the trial court rejected filing the memorandum in support of the motion and supporting declarations. The plaintiff resubmitted the papers after Code of Civil Procedure section 659a's deadline for filing papers in support of a new trial motion had passed. The defendant did not object to the trial court's consideration of the papers, and the court granted the new trial. The defendant appealed.

The California Supreme Court affirmed the new trial order. While section 659a's deadlines are mandatory in the sense that the court should not consider untimely filed papers when the opposing party timely objects, they are not jurisdictional in the sense that the court is powerless to consider them. Accordingly, an objection to their consideration may not be raised for the first time on appeal.

ANTI-SLAPP

A court has jurisdiction to grant a special motion to strike and award attorney fees and costs to the defendant, even if the defendant prevails by proving a lack of jurisdiction to hear plaintiff's claims on the merits.

Barry v. State Bar of California (2017) 2 Cal.5th 318

After being disciplined by the State Bar, the plaintiff attorney sued the Bar in the superior court for retaliation and discrimination. The Bar demurred to the complaint and filed an anti-SLAPP motion. The trial court granted the anti-SLAPP motion, concluding that all of the activities alleged in the complaint arose out of protected petitioning activity and that the plaintiff was unlikely to prevail on her claims because, among other reasons, the court lacked jurisdiction over attorney disciplinary matters. The court awarded the Bar its attorney fees. The plaintiff appealed, arguing that if the trial court lacked jurisdiction over her claims, it was powerless to adjudicate the anti-SLAPP motion and award attorney fees against her.

The California Supreme Court affirmed the trial court's jurisdiction to rule on the anti-SLAPP motion and award attorney fees. Where the trial court's grant of an anti-SLAPP motion is based on a determination that plaintiff cannot prevail on her claims because the court lacks subject matter jurisdiction (rather than on a determination that plaintiff's claims lack merit), the trial court nonetheless has jurisdiction to rule on the motion and grant fees.

Where the complaint fails to identify activity giving rise to a claim at all, there is no activity that could constitute protected activity for purposes of the anti-SLAPP statute and an anti-SLAPP motion must be denied.

Medical Marijuana, Inc. v. ProjectCBD.com (2016) 6 Cal.App.5th 602

Plaintiffs sued multiple defendants for defamation, false light, and other claims. One group of defendants filed an anti-SLAPP motion, which was denied on the ground that the activity was protected but plaintiffs had shown a probability of prevailing on the merits. Defendants appealed.

The Court of Appeal (Fourth Dist., Div. One) affirmed the denial of the anti-SLAPP motion, but on different grounds than those relied on by the trial court. A close examination of the complaint revealed that the defamation and false light claims asserted against defendants were not based on any allegations of activities undertaken by defendants. Accordingly, no allegations supported a conclusion that defendants had engaged in any activities at all, protected or not. Defendants therefore failed to meet their burden under the first prong of the anti-SLAPP statute. The court left open the possibility for defendants to demur on remand.

Under Code of Civil Procedure section 170.6(a)(2), appellate reversal of an order on an anti-SLAPP motion does not entitle the prevailing party to a second peremptory challenge of the judge whose ruling was reversed.

McNair v. Superior Court (National Collegiate Athletic Association) (2016) 6 Cal.App.5th 1227

The plaintiff sued the NCAA for various claims including defamation and interference with contract. The NCAA filed an anti-SLAPP motion, which the trial court denied because only the defamation claim arose from protected activity and as to that claim, plaintiff was likely to prevail. The NCAA appealed, and the Court of Appeal mostly affirmed, but reversed the trial court's denial of the anti-SLAPP motion as to the interference claim. The appellate court held that claim also arose out of protected activity but that plaintiff was not likely to prevail. On remand, the NCAA sought to strike the trial judge under section 170.6, which allows a party to exercise a second peremptory challenge after prevailing in an appeal. The trial judge disqualified himself. Plaintiff sought a writ of mandate.

The Court of Appeal (Second Dist., Div. Three) issued the writ. Section 170.6(a)(2) permits a second peremptory challenge after a successful appeal from a final judgment, but not following reversal of an interim decision. The trial court's anti-SLAPP ruling left many claims alive for adjudication and was therefore not a final judgment.

ATTORNEY FEES AND COSTS

Code of Civil Procedure section 2033.300(c)'s authorization of an award of "costs" as a condition of granting leave to amend discovery admissions authorizes an award of attorney fees as costs.

Rhule v. WaveFront Technology, Inc. (2017) 8 Cal.App.5th 1223

Plaintiff answered two requests for admission incorrectly and sought to amend the responses. The trial court granted the request, but on condition that plaintiff compensate defendant for its attorneys fees incurred in, among other things, retaking plaintiff's deposition in light of the changed responses. The plaintiff appealed the fee award as unauthorized under the Code of Civil Procedure and an abuse of the trial court's discretion.

The Court of Appeal (Second Dist., Div. Five) affirmed the fee award. Code of Civil Procedure section 2033.300, subdivision (c), permits trial courts to condition an order allowing amendment or withdrawal of request for admission responses on any terms that are "just, including, but not limited to" the responding party's payment of "costs." "Costs" can reasonably be read to include attorney fees, consistent with the treatment of fees as costs under other various portions of the Code of Civil Procedure. And, regardless, the court's authority to order "just" remedies can include attorney fees. Plaintiff's argument the fee award was an abuse of discretion could not be reviewed because plaintiff did not provide a reporter's transcript.

Trial court did not abuse its discretion in reducing claimed attorney fees for bringing successful anti-SLAPP motion by 80 percent.

569 East County Boulevard, LLC v. Backcountry Against the Dump, Inc. (2016) 6 Cal.App.5th 426

The defendant successfully moved to strike a complaint alleging unlawful interference with prospective economic advantage and then sought $152,000 in attorney fees under the anti-SLAPP statute. The trial court awarded only $30,000, and the defendant appealed.

The Court of Appeal (Fourth Dist., Div. One) affirmed the reduction in claimed fees. The trial court relied on opinions of experts and its personal knowledge of the local legal community to determine that lead counsel's claimed $720 per hour rate was excessive for the task, as were his claimed hours. In adopting a $275 per hour lodestar, the trial court could properly have decided that associates with lower billing rates could have done a larger share of the work, which did not involve novel or complex issues. The trial court could also have reasonably concluded that a portion of the claimed hours involved duplicative work or work unrelated to the anti-SLAPP motion.

Under Civil Code section 1717(b)(2) a defendant who prevails because plaintiff voluntarily dismissed her case before trial may not recover attorney fees on her contract claims, but defendant may recover fees on tort claims if the contract's fee provision is broad enough to encompass them.

Khan v. Shim (2016) 7 Cal.App.5th 49

This dispute over sale of a dental practice involved both contract and tort claims. The plaintiff dismissed her claims before trial, and the trial court awarded the defendant attorney fees per a provision of the contract allowing fees to the prevailing party in "any litigation [that]...is commenced between the parties concerning [this contract's] terms, interpretation or enforcement or the rights and duties of any party in relation thereto."

The Court of Appeal (Sixth Dist.) remanded for reconsideration of the fee award. Civil Code section 1717(b)(2) ["Where an action has been voluntarily dismissed or dismissed pursuant to a settlement of the case, there shall be no prevailing party for purposes of [awarding attorney fees in contract actions] precluded the trial court from finding that the defendant was the prevailing party as to the causes of action sounding in contract that

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were voluntarily dismissed by plaintiff before trial. However, that section does not prohibit recovery of attorney fees for tort claims, if the parties' contractual agreement to pay attorney fees is broad enough to encompass torts, as the language here was.

Plaintiff who prevails in California Consumer Legal Remedies Act case seeking only injunctive relief may be entitled to attorney fees despite having rejected defendant's offer to cure.

Gonzales v. Carmax Auto Superstores (9th Cir. 2017) 845 F.3d 916

The plaintiff obtained summary judgment against CarMax for claims under the Consumer Legal Remedies Act. After the summary judgment was affirmed by the Ninth Circuit, he applied for attorney fees under CLRA's provision that a "prevailing plaintiff" is entitled to attorney fees.

The Ninth Circuit remanded to the district court for a determination of the fee application. While the plaintiff was not entitled to attorney fees in connection with his damages claims because he had rejected CarMax's offer to remedy the plaintiff's complaints, rejection of an offer to cure does not bar an award of attorney fees to a prevailing plaintiff on claims for injunctive relief.

ARBITRATION

Order denying motion to compel arbitration governed by state law rather than the Federal Arbitration Act is not eligible for interlocutory appeal to Ninth Circuit.

Kum Tat Limited v. Linden Ox Pasture, LLC (9th Cir. 2017) 845 F.3d 979

The defendant in this dispute over the sale of real estate moved to compel arbitration a clause in the purchase agreement providing that the parties must arbitrate disputes under the California Code of Civil Procedure. The district court denied the motion, finding the arbitration agreement was not binding. The defendant appealed.

The Ninth Circuit dismissed the appeal. The Federal Arbitration Act authorizes interlocutory appeals, but only as to motions brought under its own provisions. Where, as here, the arbitration agreement was governed by California law and not the Federal Arbitration Act, there was no basis for appellate

See also *Bates v. Bankers Life and Casualty Company* (9th Cir. 2017) 849 F.3d 846[District court's interlocutory order striking class allegations is not an appealable final judgment even if reduced to judgment under FRCP 54(b); in suit against insurer, district court found the claim mishandling allegations would require individualized analysis; the resulting order striking those claims was equivalent to a non-appealable order denying class certification, and may be challenged only under the rules governing appeals from interlocutory orders – 28 U.S.C. § 1292 [discretionary appeal] and Federal Rule of Civil Procedure 23(f) [petition for appeal from denial of class certification].

See also *Chan Healthcare Group, PS v. Liberty Mutual Fire Insurance* (9th Cir. 2017) 844 F.3d 1133 [trial court order remanding class action to state court because it was untimely removed not reviewable where removal was based on federal question rather than diversity jurisdiction]

Arbitration provision in warranty brochure was not a binding agreement to arbitrate.

Norcia v. Samsung Telecommunications America, LLC (9th Cir. 2017) 845 F.3d 1279

Plaintiff brought a class action alleging Samsung misrepresented the performance ability of its Galaxy smart phones. The phones came with a warranty brochure containing an arbitration clause. When plaintiff purchased his phone, he signed a Verizon customer agreement that also contained an arbitration clause. Samsung moved to compel arbitration, but the district court denied the motion.

The Ninth Circuit affirmed. Applying California's general rules of contract formation, there was no evidence plaintiff consented to the arbitration provision. He did not expressly agree to the terms of the brochure, and Samsung provided no evidence supporting any exception to the general rule that silence does not equal acceptance. Further, Samsung could not take advantage of the arbitration agreement in the Verizon customer agreement because Samsung was not a party to that agreement and did not demonstrate it was an intended third-party beneficiary of the agreement.

See also *Vasserman v. Henry Mayo Newhall Memorial Hospital* (2017) 8 Cal.App.5th 236 [trial court correctly denied motion to compel arbitration of wage and hour claims under an arbitration provision in a collective bargaining agreement that did not explicitly state a clear and unmistakable waiver of the right to a judicial forum for statutory claims].

See also *Flores v. Nature's Best Distribution, LLC* (2016) 7 Cal.App.5th 1 [trial court correctly denied motion to compel arbitration where agreement failed to identify the employing entity bound by the agreement, the disputes the agreement covered, or what set of arbitration rules would apply].

CLASS ACTIONS

Demonstrating an administratively feasible way to identify class members is a manageability factor, but not an independent prerequisite to class certification under Federal Rule of Civil Procedure 23.

Briseno v. ConAgra Foods, Inc. (9th Cir. 2017) 844 F.3d 1121

Plaintiffs alleged defendant misleadingly labeled its cooking oils as "100% natural." They sought to certify a class of consumers from 11 states who purchased the oils. The defendant opposed class certification because there was no way to reliably determine who would be members of the class. The district court certified the class, reasoning that a class may be certified so long as there is an objective definition of the class, here, whether class members purchased the oils during the relevant period.

On a permissive appeal from the grant of class certification, the Ninth Circuit affirmed, joining the Sixth, Seventh, and Eight Circuits and disagreeing with the Third Circuit, to hold that Federal Rule of Civil Procedure 23 does not require the plaintiffs to demonstrate an

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administratively feasible way to identify class members as a prerequisite to class certification. Any concerns about the feasibility of identifying absent class members can be addressed in connection with the manageability requirement, as part of the larger inquiry into whether class treatment is appropriate.

TORTS

Going-and-coming rule precludes liability for employee's negligent driving from worksite to employer-provided hotel.

Pierson v. Helmerich & Payne International Drilling Company (2016) 4 Cal.App.5th 608

An oil drilling company provided hotel rooms for its employees who lived far from the drill site. Employees were responsible for arranging their own transportation to and from the site to the hotel, and they often carpooled. One employee, Mooney, was driving himself and two others, Ibarra and Stewart, from the drill site to the hotel when he caused an accident with a truck driven by Pierson. Pierson and Mooney were both injured. Pierson and Mooney's insurer sued the drilling company, seeking to hold it liable on a respondeat superior theory. The trial court granted summary judgment for the drilling company.

The Court of Appeal (Fifth Dist.) affirmed. Neither the special-errand exception nor the required-vehicle exception to the going-and-coming rule applies where the employees were responsible for arranging and paying for transportation between their jobsite and the employer-provided hotel; the employer did not require employees to carpool; and the employer did not derive any incidental benefits from its employees' carpool arrangement.

See also *Lynn v. Tatitlek Support Services, Inc.* (2017) 8 Cal.App.5th 1096 [going-and-coming rule precluded employer's vicarious liability for auto accident caused by employer's temporary worker, even though worker's employment required him to undertake a lengthy commute home from remote jobsite after working long hours]

See also *Jorge v. Culinary Institute of America* (2016) 3 Cal.App.5th 382 [reversing jury verdict against employer held liable for car accident on respondeat superior theory because required vehicle exception to the going-and-coming rule did not apply where the employee was not expressly required to use his personal car for work or job-related duties away from the worksite]

But see *Sumrall v. Modern Alloys, Inc.* (2017) __ Cal.App.5th __ [special errand exception to going-and-coming rule applied where worker was on unpaid trip to supply yard where employer required him to stop before heading to main worksite]

Code of Civil Procedure section 340.6's one-year statute of limitations for attorney malpractice **claims began to run when firm filed its motion to** withdraw—not when the motion was granted.

Flake v. Neumiller & Beardslee (2017) 9 Cal.App.5th 223

Neumiller & Beardslee represented Flake in a real estate development dispute. Flake lost at trial and became liable for a $750,000 cost judgment. Flake hired new counsel to handle posttrial proceedings and, on November 25, 2009, the Neumiller firm moved to withdraw. The withdrawal motion was unopposed, and was granted on January 7, 2010. One day before the one-year anniversary of the January 7, 2010, order permitting the withdrawal, Flake filed a malpractice action against the Neumiller firm. The Neumiller firm moved for summary judgment on the ground the one-year limitations period for filing malpractice actions expired on November 25, 2019—one year after the withdrawal motion was filed. The trial court granted the motion.

The Court of Appeal (Third Dist.) affirmed. Although the one-year statute of limitations for filing malpractice actions is tolled while the attorney continues to represent the client in the matter giving rise to the malpractice claim, there is no bright-line rule for determining when the presentation terminates. Here, because any objectively reasonable client would have understood the Neumiller firm had stopped work on Flake's behalf upon receiving the motion to withdraw, the statute of limitations accrued at that time.

"Reptile" arguments are improper, but counsel needs to make a contemporaneous objection to preserve the issue for appeal.

Regalado v. Callaghan (2016) 3 Cal.App.5th 582

A homeowner acted as his own general contractor in building a house with a pool. A subcontractor's employee was injured during construction. The employee sued the homeowner, and the jury found the homeowner to be 40% at fault. The homeowner appealed, arguing instructional error based on the trial court's refusal to give a special instruction that he could be liable for the subcontractor's employee's injuries only if he "affirmatively contributed" to the injuries. The homeowner also argued attorney misconduct based on plaintiff's counsel's closing argument in which counsel argued the jury should act as the voice of the community to decide what is safe.

The Court of Appeal (Fourth Dist., Div. One) affirmed the verdict. CACI No. 1009B [directing that the homeowner could be liable only if he "negligently exercised" retained control over safety conditions the property] adequately addressed the homeowner's liability to the plaintiff; adding the homeowner's special instruction would have been unnecessary and potentially misleading, since an omission may be sufficient to create liability. As for attorney misconduct, the court considered the attorney's "reptile" argument to be improper. However, the issue was waived because defense counsel failed to contemporaneously object and ask for an admonition or mistrial.

But see *Khosh v. Staples Construction Company, Inc.* (2016) 4 Cal.App.5th 712 [No liability for defendant who hired electrician injured at worksite because defendant did not actively participate in the construction work that created the hazard; "A hirer's failure to correct an unsafe condition, by itself, does not establish an affirmative contribution."]

Under Civil Code section 846, subdivision (c), premises owners are immune from liability to off-site third parties who are injured by invitees using the premises for recreational purposes.

Wang v. Nibbelink (2016) 4 Cal.App.5th 1

Plaintiff was trampled by a horse that escaped a neighboring property. The neighboring landowners did not own the horse, but had allowed their land to be used by the horse's owner during a public recreational event. The landowners moved for summary judgment on plaintiff's personal injury claim, asserting they were immune from liability under Civil Code section 846 [granting qualified immunity to landowners who make their property available for public recreational purposes]. The trial court granted the motion and the plaintiff appealed.

The Court of Appeal (Third Dist.) affirmed the summary judgment. Section 846, subdivision (c) "broadly relieves landowners of liability for 'any injury to person' caused by 'any act' of the recreational user." Thus, it shields landowners from liability not only to recreational users of the their premises, but also to third parties who are injured by recreational users of their premises – even if the third parties are off-site.

See also *Leyva v. Crockett & Company, Inc.* (2017) 7 Cal.App.5th 1105 [Government Code section 831.4 ("trail immunity") immunized golf course owner who had granted public easement over path adjacent to golf course against tort claims by plaintiff hit by golf ball while walking on the path]

See also *Gonzales v. City of Atwater* (2016) 6 Cal.App.5th 929 [city was entitled to judgment as a matter of law on pedestrian's tort claim based on condition of intersection where the evidence was undisputed that the intersection's design plans were approved by officials having discretion to grant such approval and that design plans were reasonable when approved]

Special damages for medical care should be based on negotiated amounts accepted as payment in full by healthcare providers, rather than the higher amounts stated in the "bills." Ostensible agency may be lacking as a matter of law absent evidence of a reasonable belief regarding the agency.

Markow v. Rosner (2016) 3 Cal.App.5th 1027

This personal injury action was based on claims of medical malpractice that rendered plaintiff a quadriplegic. The jury found the defendant doctor's negligence had caused the injury, but the medical center where treatment occurred did not cause the injury. The jury nonetheless apportioned 40 percent fault to the medical center on an ostensible agency theory.

The Court of Appeal (Second Dist., Div. One) reversed in part. The allocation of fault to the medical center was unsupported because the plaintiff had repeatedly signed Conditions of Admission forms that explained the lack of an agency relationship, and plaintiff had selected his own doctor rather than having the medical center assign a doctor to him.

As for the measure of economic damages for future medical services, the court explained, "Our Supreme Court has endorsed a market or exchange value as the proper way to think about the reasonable value of medical services. [Citation.] This applies to the calculation of future medical expenses. [Citation.] For insured plaintiffs, the reasonable market or exchange value of medical services will not be the amount billed by a medical provider or hospital, but the 'amount paid pursuant to the reduced rate negotiated by the plaintiff's insurance company.'" Plaintiff's life care planner said the amount actually paid is usually 50-75% of amounts billed; the defense did not move to exclude her testimony (which the Court of Appeal held waived any challenge to the competence of the opinion), and the defense presented no expert on the issue. The verdict was consistent with the only expert testimony presented.

The amount a healthcare provider nominally bills (but does not collect from) an uninsured patient who is treated on a lien basis may be relevant to proving the reasonable value of medical services, and may be admissible subject to Evidence Code section 352.

Moore v. Mercer (2016) 4 Cal.App.5th 424

An uninsured plaintiff was injured in a motor vehicle accident and ultimately underwent back surgery. She executed a medical lien agreement with the hospital, which in turn sold the bills to a medical finance company, MedFin. Plaintiff moved to exclude any evidence about MedFin's purchase of her bills as irrelevant and prejudicial. The court granted the motion, reasoning that the evidence might be minimally relevant but would necessitate litigating too many collateral issues. At trial, plaintiff and other witnesses testified that the amounts "billed" by the hospital were reasonable and customary for the services provided, and the jury awarded plaintiff those amounts.

The Court of Appeal (Third Dist.) affirmed. *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th, does not cap a plaintiff's past medical damages to the amount a medical finance company pays to purchase a medical expenses lien. The amount paid for the lien may reflect business-related cost-benefit calculations more than it reflects the reasonable value of the services. The Third District followed its pre-Howell decision *Katiuzhinsky v. Perry* (2007) 152 Cal.App.4th 1288, holding that the full amount of a provider's "bill" can be relevant to prove the reasonable value of the services.

Multi-million noneconomic damages award excessive as a matter of law where plaintiff had multiple surgeries and suffered persistent and severe knee pain – but substantially recovered.

Bigler-Engler v. Breg, Inc. (2017) 7 Cal.App.5th 276

Following knee surgery, plaintiff was prescribed a device intended to provide post-surgical therapy. Using the device caused plaintiff's knee to suffer necrosis. Plaintiff was subsequently hospitalized and had to undergo further surgeries. She has a permanent scar and some diminished ability to perform at the athletic level she could perform before her knee injury. The jury awarded $5 million in noneconomic losses.

The Court of Appeal (Fourth Dist., Div. One) held the noneconomic damages award was excessive and necessarily the result of passion and prejudice. While plaintiff suffered extreme pain and other noneconomic losses for a time supporting approximately $1000 per day for the several months following her surgery, no evidence supported the multi-million award given by the jury. Plaintiff had to elect a new trial on noneconomic damages or a remittitur to $1.3 million.

EVIDENCE

Experts may not offer hearsay testimony of **case-specific facts, even if they relied on the** information in forming their opinions, unless a hearsay exception applies.

People v. Stamps (2016) 3 Cal.App.5th 988

The criminal defendant was arrested for drug possession. At trial, an expert criminologist testified some of the pills in defendant's possession contained oxycodone, a controlled substance. The criminologist reached this conclusion by comparing the pills defendant possessed to pictures of pills on a website which described the pills as containing oxycodone. The defendant was convicted.

The Court of Appeal (First Dist., Div. Four) reversed the conviction. Testimony about what the pills contained based on what was said on a website was hearsay. While experts may offer hearsay relevant to establishing the witness's expertise where that hearsay is deemed sufficiently reliable by the trial court to be presented to the jury, an expert may not offer out-of-court statements about case-specific facts for their truth unless a hearsay exception applies to the information.

Plaintiff could not avoid summary judgment by proffering expert declaration that did not explain how his opinions were based on the facts of the case or address any of defendant's expert evidence.

Sanchez v. Kern Emergency Medical Transportation Corporation (2017) 8 Cal.App.5th 146

The plaintiff suffered a head injury playing football. While at the hospital, he suffered a stroke. He sued the ambulance company for a delay in transporting him to the hospital, which the plaintiff's expert opined caused plaintiff to suffer the stroke. The ambulance company moved for summary judgment supported by evidence that any delay here was less than 20 minutes, coupled with expert testimony and medical literature that there is no scientific connection between treatment delays of less than 30 minutes and increased risk of stroke. The plaintiff opposed with his own expert declaration that the delay caused the stroke, but the expert provided no explanation of how long of a delay was required to support his opinions, nor did he respond to defendant's evidence concerning how long of a delay (or lack thereof) actually occurred in this case and that delays of less than 30 minutes are not linked to increased risk of more serious injury. The trial court sustained the defendant's objections to the plaintiff's expert declaration as speculative and lacking foundation, and granted summary judgment.

The Court of Appeal (Fifth Dist.) affirmed. The trial court did not abuse its discretion in concluding that the plaintiff's expert's opinions were based on factual assumptions unsupported by the evidence, were speculative, and lacked a reasoned explanation for the basis of his opinions. "When the moving papers undermine the assumptions on which the opposing expert's opinion is based, the opposing expert must do more than simply assert those discredited assumptions in order to meet the admissibility requirements of Evidence Code section 801, subdivision (b)."

A public entity's outside counsel's legal bills are privileged in pending litigation, but may be subject to Public Records Act disclosure long after litigation concludes.

Los Angeles County Board of Supervisors v. Superior Court (ACLU of Southern California) (2016) 2 Cal.5th 282

The ACLU filed a public records request against the County of L.A. seeking to obtain legal bills submitted by outside counsel to the County in nine pending cases involving mistreatment of prisoners. The County objected on various grounds including that the bills were protected by the attorney-client privilege. The Superior Court ordered the County to produce the bills, although it gave the County the option to redact them to eliminate privileged information. The County filed a petition for writ of mandate, which the Court of Appeal granted, holding that the bills were privileged and not subject to disclosure under the Public Records Act.

The California Supreme Court reversed. The County's bills in pending litigation are privileged, but such bills lose their privileged nature once the litigation ends and, thus, become subject to disclosure under the PRA once the litigation is concluded.

LABOR AND EMPLOYMENT

Employee could not establish prima facie case of retaliation under FEHA where he had complained about his employer's discriminatory treatment of the public.

Dinslage v. City and County of San Francisco (2016) 5 Cal.App.5th 368

Plaintiff was laid off from his job with the San Francisco parks department. He sued for wrongful termination under the Fair Employment and Housing Act, alleging that the adverse employment action was taken in retaliation for his complaints about the department's failure to provide proper accommodations for disabled members of the public. The trial court granted summary judgment for the department.

The Court of Appeal (First Dist., Div. Five) affirmed. To make out a prima facie case of retaliation under FEHA , the plaintiff must show that he was terminated for complaining about an employment practice made unlawful under the FEHA. The department's alleged discrimination against disabled members of the public (not employees) was not an unlawful employment practice under the FEHA.

See also *Bareno v. San Diego Community College District* (2017) 7 Cal. App.5th 546 [employee who was terminated after not returning from medical leave on schedule raised a triable issue of fact on her claim of California Family Rights Act retaliation by presenting evidence that she sent an email to her employer requesting further time off]

Employers may not require employees to remain "on call" during rest breaks.

Augustus v. ABM Security Services, Inc. (2016) 2 Cal.5th 257

A class of security guards brought wage and hour claims against their employer for requiring them to keep their radios and pagers on during rest breaks, in case a security need arose. The trial court found as a matter of law that this practice of requiring "on call" rest breaks did not satisfy the employer's statutory obligation to provide rest breaks and granted summary judgment for the class, awarding $90 million. The Court of Appeal (Second Dist., Div. One) reversed.

The California Supreme Court reversed the Court of Appeal. During rest breaks, an employee must be relieved of all duties and not subject to any employer control over how his or her time is spent. Requiring employees to remain "on call" does not satisfy those requirements.

See also *Lubin v. Wackenhut Corporation* (2016) 5 Cal.App.5th 926 [wage and hour claims brought by class of security guards for on-duty meal periods and rest breaks were amenable to class treatment, despite employer's defenses that the "nature of the work" made at least some of the guards' on-duty meal periods lawful and that many guards actually received off-duty meals periods and rest breaks]

But see *Driscoll v. Granite Rock Company* (2016) 6 Cal.App.5th 215 [substantial evidence supported trial court finding that employer of a class of ready-mix concrete drivers did not deny those employees statutorily mandated meal breaks where they signed valid, on-duty meal period agreements and did nothing to interfere with employees' ability to take off-duty 30-minute meal period when they wanted]

CA SUPREME COURT PENDING CASES

Addressing whether trial courts should revisit choice of law rulings throughout the life of a case.

Chen v. L.A. Truck Centers, LLC, case no. S240245 (review granted Mar. 29, 2017)

This personal injury action arose out of a bus crash that killed or injured several Chinese nationals. The plaintiffs sued Starcraft, an Indiana company that constructed the bus, and Buswest, a California company that sold the bus. Early in the case, the court held that Indiana law would apply to all parties based on Starcraft's involvement. Starcraft then settled. Before trial, the plaintiffs moved in limine for California law to apply since Buswest was the only remaining defendant. The trial court denied the motion, holding that the motion was an improper motion to reconsider the earlier choice of law ruling and was not a proper motion in limine. Applying Indiana law, the jury found for Buswest. The Court of Appeal (Second Dist., Div. Eight) reversed, holding that the trial court should have reconsidered the choice of law ruling before trial, and under California's governmental interest analysis, California had the greater interest in a lawsuit between Chinese plaintiffs and the California defendant.

The Supreme Court granted review to address the following issue: "Must a trial court reconsider its ruling on a motion to establish the applicable law governing questions of liability in a tort action when the party whose presence justified that choice of law settles and is dismissed?"

Addressing whether employee may sue payroll services provider for unpaid overtime.

Goonewardene v. ADP, LLC, case no. S238941 (review granted Feb. 15, 2017)

The plaintiff sued her employer for Labor Code violations, wrongful termination, and breach of contract. She later added a claim against ADP, the company that provided payroll services to her employer, on the theory ADP was an employer, co-employer, or joint employer. ADP successfully demurred to the complaint. The Court of Appeal (Second Dist. Div. Four) reversed the trial court's dismissal of the plaintiff's claims against ADP, holding that plaintiff should have been granted leave to amend to state claims for breach of contract, negligent misrepresentation, and negligence against ADP based on the allegations that the wage statements ADP provided were inaccurate.

The Supreme Court granted review of the following question: "Does an aggrieved employee in a lawsuit based on unpaid overtime have viable claims against the outside vendor that performed payroll services under a contract with the employer?"

Addressing timeliness of anti-SLAPP motions brought with respect to amended complaints.

Newport Harbor Ventures, LLC v. Morris Cerullo World Evangelism, case no. S239777 (review granted Mar. 22, 2017)

Plaintiffs filed a third amended complaint alleging four causes of action: (1) breach of written contract, (2) breach of the implied covenant of good faith, (3) quantum meruit, and (4) promissory estoppel arising out of a dispute about the handling of an unlawful detainer action. The first two causes of action had been pleaded in earlier complaints; the latter two were new. The defendant filed an anti-SLAPP motion arguing that its handling of the unlawful detainer action was protected activity. The trial court denied the motion on the ground it was untimely filed more than 60 days after the earlier complaints. The Court of Appeal (Fourth Dist., Div. Three) affirmed in part and reversed in part, holding that the filing of an amended complaint does not automatically reopen the period for bringing an anti-SLAPP motion. An amended complaint reopens the period for bringing such a motion only when it contains new causes or action or allegations. The trial court was therefore within its discretion not to entertain the anti-SLAPP motion as to the causes of action previously alleged, but not with respect to the two new causes of action.

The Supreme Court granted review to address the following issues: "(1) May a motion to strike under the anti-SLAPP statute be brought against any claim in an amended complaint, including claims that were asserted in prior complaints? (2) Can inconsistent claims survive an anti-SLAPP motion if evidence is presented to negate one of the claims?"

an MRI, to use an extreme example), the defendant need not pay those expenses.

Plaintiffs frequently contend that it is speculative whether they will have insurance in the future, and they should be entitled to select healthcare providers uninhibited by limitations of insurer networks, and to simply pay cash for such services. But plaintiff is arguably required to maintain insurance if feasible to do so (as part of plaintiff's duty to mitigate). And even if plaintiff were correct that insurance probably will not be available in the future, then plaintiff's future medical expenses should be based upon the lower rates that healthcare providers charge to clients who pay cash.

Plaintiffs also argue that any mention of insurance is improper. Defendants may respond that all experts can and must describe the amounts expected to be incurred by persons in plaintiff's position (i.e., an insured person) without actually mentioning the existence of insurance. This highlights the need for a 402 hearing, explaining to the judge that defense counsel needs to ask plaintiff's expert *outside the presence of the jury* whether the expert has taken into account the availability of insurance, and the amount such an insurer would pay.

If the court nevertheless rules that plaintiff may use billed amounts to project future medical expenses, defense counsel should ask the court to grant a continuing objection to that evidence or, in the alternative, object to the evidence/move to strike it at the time it is presented. Counsel might also consider moving for a partial nonsuit or partial directed verdict at the appropriate time based upon a lack of admissible evidence supporting the future medical expense claim. Such motions are generally not required to preserve the issue for appellate review, but they help remove any dispute over whether the objection was withdrawn.

Propose a jury instruction and a verdict form that prohibit the plaintiff from recovering inflated future medical expense damages.

If the court allows the plaintiff to introduce inflated evidence of future medical expense damages, defense counsel should propose the following revised CACI jury instruction and a verdict form that prohibits an inflated award (revisions to the CACI instruction are in bold type because CACI already uses brackets):

CACI No. 3903A (Modified). Medical Expenses—Past and Future (Economic Damage): [Insert number, e.g., "1."] [Past] [and] [future] medical expenses. [To recover damages for past medical expenses, [name of plaintiff] must prove the reasonable cost of reasonably necessary medical care that [he/ she] has received.] [To recover damages for future medical expenses, [name of plaintiff] must prove the reasonable cost of reasonably necessary medical care that [he/she/they] are is reasonably certain to need in the future.] **Your award[s] of medical expense damages must be based on the market value for such services. This means that the award must be based on the amounts typically accepted as payment in full for those services when rendered to patients in plaintiff's circumstances, and may not be based on amounts that will be billed but not actually paid for such services. You should award plaintiffs an amount of damages that is reasonably necessary to compensate them for any harm caused by defendant, but should award no more than that amount.**

Authorities: *Howell v. Hamilton Meats & Provisions, Inc*. (2011) 52 Cal.4th 541, 555 ("We agree with the *Hanif* court that a plaintiff may recover as economic damages *no more* than the reasonable value of the medical services received and is not entitled to recover the reasonable value if his or her actual loss was less." (original emphasis)); *Hanif v. Housing Authority* (1988) 200 Cal.App.3d 635, 640; *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308, 1330-1331 (the "full amount billed for past medical services is not relevant to a determination of the reasonable value of *future medical services*" and evidence of billed amounts "cannot support an expert opinion on the reasonable value of *future medical*

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expenses" (emphasis added)); *Markow v. Rosner* (2016) 3 Cal.App.5th 1027, 1050 (*Howell*'s market value approach "applies to the calculation of *future medical expenses*" (emphasis added)); *Hill v. Novartis Pharmaceuticals Corp.* (E.D. Cal. 2013) 944 F.Supp.2d 943, 963-964 (following *Corenbaum* under the Federal Rules of Evidence); see also *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1043 ("[A] person injured by another's wrongful conduct will not be compensated for damages that the injured person could have avoided by reasonable effort or expenditure.").

Consistent with this proposed instruction, the verdict form should ask the jury to find:

What is the present value of the medical expenses that will likely be paid by or on behalf of plaintiff in the future? $_____

Consider filling the gap in plaintiff's evidence by presenting paid rate evidence

As outlined above, the plaintiff will have arguably failed to present relevant evidence supporting the future medical expense damage claim if plaintiff's expert offers only "billed rate" calculations, and therefore the defense could seek a partial nonsuit or directed verdict, move for a partial JNOV or new trial after an excessive verdict is returned, and seek appellate relief from any final judgment that awards future medical expense damages that are supported only by inadmissible evidence of billed amounts.

On the other hand, California law regarding the admissibility of billed rates is not completely settled, so the ability to prevent or strike anaward based on billed rates is not certain. Moreover, to any extent that procuring and applying discounted paid rates involves damage mitigation principles, the defense bears the burden of proof. (See CACI No. 3930; *Jackson v. Yarbray* (2009) 179 Cal.App.4th 75, 97.) Accordingly, defense counsel might reasonably elect to introduce evidence of the *paid* cost of plaintiff's life care plan with a goal of convincing a jury to award the lower cost

instead. And as noted, if the court rejects such testimony, an offer of proof describing what the expert would have said will preserve a claim of prejudicial error in that evidentiary ruling.

File a motion for new trial on the ground of excessive damages if the jury awards future medical expenses based on billed rates.

An excessive damages claim is waived on appeal if it is not presented first to the trial court in a motion for new trial. A claim of legal error that leads to an inflated award is not waived, but it is better to be safe than sorry. Therefore, if the jury returns a verdict awarding plaintiff future medical expense damages based on a life care plan using billed rates, defense counsel should consider filing a notice of intention to move for a new trial listing excessive damages as one of the statutory grounds (Code Civ. Proc., § 657), and backing it up with points and authorities explaining why the damages award exceeds the amount permitted by law.

Conclusion

Defending against claims for future medical expenses requires a thorough understanding of constantly evolving law and a grasp of how experts may manipulate data to inflate their projection of future damages. As outlined above, steps should be taken before, during, and after trial to ensure that future medical expenses are not based upon inflated billed rates, and to ensure that a challenge to an award based on billing rates is preserved for appellate review.

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H. Thomas Watson and Karen M. Bray are partners at the California appellate law firm, Horvitz & Levy LLP, the largest firm in the nation specializing in civil appeals. They regularly consult with trial counsel concerning the development of medical damages evidence and the preservation of medical damages legal issues for appellate review.

EDITOR'S NOTE: On April 27, after this article was submitted for publication, the California Court of Appeal reaffirmed that future care costs must be measured by the amounts providers are likely to accept as payment, and reversed a multi-million dollar jury award where the trial court improperly excluded defense evidence of negotiated rates for future medical care costs under Medicaid and through agreements with insurers under the Affordable Care Act. See *Cuevas v. Contra Costa County* (2017) ___ Cal.App.4th ___ [2017 WL 1507913]. The authors of this article were counsel of record on appeal for the defendant/appellant in *Cuevas.*

Demystifying the *Qui Tam* Process

By the Time Defndants Learn About a Lawsuit, a Lot Has Already Happened

by R. Scott Oswald

Defendants in *qui tam* lawsuits – in which a whistleblower accuses someone, usually a corporation, of fraud against the government – often don't realize they've been targeted until months, or sometimes years, past the original filing date.

This is deliberate: The federal False Claims Act (FCA) requires whistleblowers to file complaints under seal so that they don't jeopardize an ongoing criminal investigation, and also so that prosecutors can decide whether to intervene and throw their weight behind the civil complaint. The initial seal period is 60 days, but it's often extended at the government's request: Few U.S. Attorney's offices are ready to act on cases – especially meritorious cases – after a scant two months.

As a result, defendants tend to learn about *qui tam* suits in three main ways:

- Via investigatory demands in a civil or criminal investigation, which may tip a savvy defendant to an underlying whistleblower action; or
- Via a limited, court-authorized disclosure for the purpose of settlement discussions after the government has reviewed significant evidence; or
- Via service of an unsealed complaint, often after the government has decided to let the whistleblower proceed without further assistance.

By the time any of these things happen, much legal maneuvering has likely occurred outside the view of defendants – and even of the judge assigned to the case. As CLE Chair of the Qui Tam Section of the Federal Bar Association (FBA), my mission is to demystify this maneuvering so that all parties can act from a shared understanding of the process.

The observations in this article are drawn from my organizing work on **The False Claims Act Today**, a series of educational seminars sponsored by the FBA's Qui Tam Section in cooperation with local FBA chapters. The next seminar will be held in Sacramento on May 15, 2017, and will focus on the practicalities of *qui tam* litigation in the Eastern District of California. (See sidebar for details.)

Obviously there's no such thing as an average FCA case; defendants range from modest dental practices to huge defense contractors. Whenever a whistleblower is represented by

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SIDEBAR

On May 15, 2017, author R. Scott Oswald will bring the FBA's The False Claims Act Today seminar to Sacramento, where panelists will discuss the logistics of FCA practice in the Ninth Circuit generally and the Eastern District of California (E.D. Cal.) in particular. Speakers will include lawyers from both sides of the aisle, as well as Colleen Kennedy, who is AUSA and ACE coordinator for E.D. Cal., and Hon. Kimberly J. Mueller, U.S. district judge for E.D. Cal. Attendees will receive 1.5 California MCLE credits.

For more details and to register, go to *www.fedbar.org/fcasacramento.aspx*

If you'd like to bring the FCA Today seminar to your district, contact Mr. Oswald at *soswald@employmentlawgroup.com.*

an experienced qui tam lawyer, however, four themes emerge – themes that may shape the thinking of defense-side lawyers, and even some judges.

1. *Qui Tam* Cases Are Highly Personal

Under the FCA, whistleblowers are designated as "relators" who file their complaints on behalf of the United States and, by extension, on behalf of taxpayers who were ripped off in areas such as military procurement and Medicare reimbursement.

If they can prove their case, relators may be rewarded with up to 30 percent of the money that's recovered from a defendant. That's a potentially rich payout, but money is seldom a relator's main motivation. Here I speak from experience: I have represented hundreds of whistleblowers, and with few exceptions they have filed their complaint as a last resort after their company failed them personally.

Typical relators are employees who were shocked to learn about shady practices at their workplace. Loyal team players, they reported these practices to their managers or elsewhere in their company, only to be rebuffed. Some whistleblowers were marginalized or fired because of their honesty, while others were merely ignored. Hurt by their treatment, these employees now seek personal vindication – and the FCA, with its relator's reward and a robust anti-retaliation provision, provides a natural cause of action. Defendants underestimate such motivated antagonists at their peril.

2. Prosecutors Have a Say in Venue Selection

In its modern form, the FCA is now *30 years old* – more than enough time for its specialists, both in the *qui tam* bar and within U.S. attorney's offices, to have developed preferences and working relationships.

As a result, the early stages of a well-considered *qui tam* case involve strong communication between a relator's attorney and the federal prosecutors in a jurisdiction where the case might be filed. Why? Because the easiest path to victory – for the relator and taxpayers alike – involves a complaint that is fully embraced by the local U.S. Attorney's office.

Our seminar series has helped to illuminate this dynamic. Based on the feedback of federal Affirmative Civil Enforcement (ACE) coordinators who have participated – typically rising Assistant U.S. Attorneys – we know that prosecutors are hungry for FCA cases that fall in their comfort zone:

- In the right industry: Some U.S. Attorney's offices are most familiar with Medicare cases, for instance, while others focus on fraud in higher education, or in military spending.
- Under the right legal theory: Some offices prefer cases of outright thievery, while others are comfortable with complaints that rely on implied certification (a theory recently *endorsed* by the Supreme Court) or kickbacks.
- Having the right connection to their jurisdiction: Some U.S. Attorneys believe they should pursue mainly corporations that are headquartered in their district, while others like reeling in "big fish" that do business all over the U.S.
- Fitting their staff capacity/philosophy: Some ACE programs have a team that's designed to investigate a small number of large, complex cases, while others can handle a more diverse caseload.
- Brought by law firms they trust: If a U.S. Attorney's office has had previous success with a law firm, it is likely to look seriously at complaints brought by the same attorneys.

None of this dispositive, of course – and ACE teams are obliged to investigate every

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FCA complaint filed in their jurisdiction anyhow. Still, experienced *qui tam* attorneys will conduct pre-filing discussions with one or more Assistant U.S. Attorneys in candidate districts, outlining the general shape of their complaint and gauging levels of interest. Usually the district that offers the warmest reception will get the case.

3. Whistleblowers Can (and Do) Help to Direct Investigations

The primary legal document in a *qui tam* case, obviously, is the complaint. But the FCA also requires relators to file a confidential disclosure statement that contains substantially everything known by the whistleblower, along with supporting documentation. This hefty dossier serves as a jumping-off point for the government's investigation.

Defendants are forbidden from seeing the disclosure statement, even after the seal is lifted, so qui tam lawyers often present it as a detailed roadmap for the U.S. Attorney's office. As long as the tone is respectful, short-staffed prosecutors say they're happy to see everything from a chronology of events to a list of document search terms to a complete witness roster – including each witness' likely testimony. Drafting the text of civil investigative demands, a major tool in FCA probes, may be seen as a step too far; it depends on the U.S. Attorney's office.

Even after the government starts its investigation, whistleblowers and their lawyers may continue to be deeply involved in reviewing evidence and even, in some cases, gathering more.

A caveat we heard from prosecutors at this point: They want to work with relators who will be upfront about the weaker aspects of a case – and who can recognize setbacks when they occur. No one wants to waste time.

4. Non-Intervention Doesn't Mean As Much Anymore

Because of a growing backlog of *qui tam* investigations, government officials often can't reach a conclusion on whether to intervene in an FCA case within the time

allotted – and federal judges may be loath to grant endless extensions of a seal order.

One judge involved in our seminars said she doesn't believe that Congress intended to authorize years-long secret investigations; she deals with each extension request on a case-by-case basis, but becomes far more skeptical after two years have elapsed.

One result: When the clock runs out, the Department of Justice may issue a notice of *"no decision,"* allowing the seal to be lifted but reserving the prosecutors' right to intervene at a later date. Such a notice isn't formally recognized by the FCA – but it generally is accepted by courts, since the government remains a party in the case regardless, its interest represented by the relator.

Even a decision of outright non-intervention, once the sign of a relatively weak *qui tam* case, may simply mean that the whistleblower's complaint didn't catch the eye of a time-pressed ACE coordinator at the U.S. Attorney's office.

Taken together, these four themes should help defendants to understand the path taken by an FCA case before they learn about it. Increasingly, the complaint will have been vetted by an ambitious AUSA in a jurisdiction that's been hand-picked by an experienced *qui tam* lawyer with a motivated client who has gathered enough evidence to proceed – but who also has identified the case's flaws.

What happens next? According to prosecutors, a defendant's smartest move is to engage in exactly the same process already followed by the whistleblower: A frank but informal discussion of the strengths and weaknesses of the case. Stakes are high under the FCA, with its large penalties and triple damages, and every actor needs as much information as possible.

R. Scott Oswald

R. Scott Oswald represents whistleblowers in actions under the False Claims Act and other laws. He is CLE Chair of the Qui Tam Section of the Federal Bar Association. Based in Washington, D.C., Mr. Oswald is managing principal of The Employment Law Group, P.C.

New ASCDC Website Enhancements

The web team at the ASCDC Office is working hard to transform the current ASCDC website to a responsive web design. This new format will allow the website content to be reorganized to fit the screen of whatever device members are using to view the site; we are sure you will find this new format much more user friendly. Please see the adjacent page for samples of the new responsive design.

Additionally, the content and functions of the site continue to be enhanced. Watch for more information regarding alerts for Marketplace posts, searchable documents, and more. Remember that you can always renew your membership and new members can join online.

The ASCDC website is here to help you, the members. Please let us know if you have any ideas for future enhancements.

Describe your Defense Verdict For Publication in *Verdict Magazine*

Let us help you advertise your trial successes! Have you won a defense verdict in a jury trial? Have you obtained a defense judgment in a bench trial, or following a dispositive ruling during or after trial, such as by nonsuit, directed verdict, or JNOV? If so, complete the information in the form on the ASCDC website *(www.ascdc.org/publications_sub.asp)* or submit your favorable trial result to **Westlaw** *(info.legalsolutions.thomsonreuters.com/trialsdigest/form.asp)* and send us a copy in a Word or PDF file to *ascdc@camgmt.com* and we will publish it in *Verdict Magazine.*

(RIGHT SIDE) **QUICK ACCESS MENU**

This side area grant the user quick access to their user login, the event calendar, links to advertisers and helpful links to often used services like Locate a Member and the ListServ. It will retract into the right side of the site on mobile. It is accessible either by clicking or dragging the menu tab.

(LEFT SIDE) **MAIN NAVIGATION**

The main navigation rests on the left side of the website. Clicking a navigation link that has ☰ this icon will expand that link revealing any sub links.

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- ● This icon sits to the left of the navigation links, it indicates what page you are on.
- ○ This icon sits to the left of the navigation links, only for main link categories It indicates the user is on a page inside of a main navigation category
- ⓘ This icon notifies the user if there is new content. It will appear to the left of the navigation links if that links page has new content.
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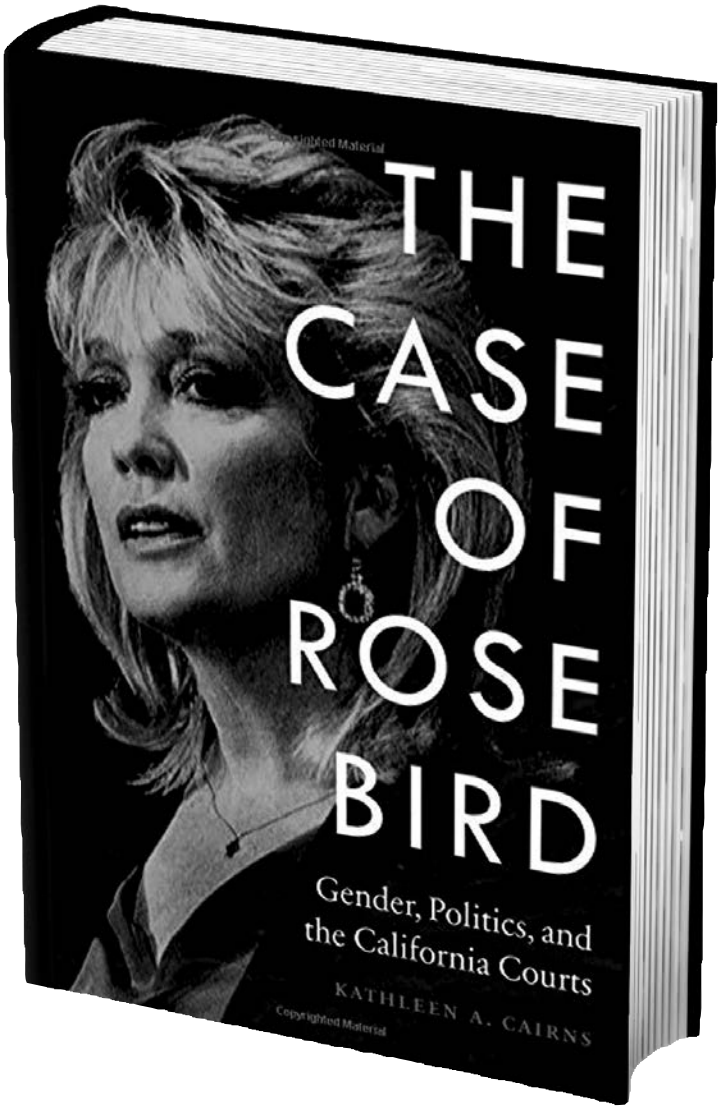
The Case of Rose Bird: Gender, Politics, and the California Courts, by Kathleen A. Cairns

by Shane H. McKenzie

The Case of Rose Bird is a compelling historical narrative of the rise and fall of the first female chief justice of the California Supreme Court. Professor Kathleen Cairns underscores the significance of death penalty politics in California, as she has in prior books on the first woman sentenced to death in California *(The Enigma Woman: The Death Sentence of Nellie May Madison)* and the third woman executed in California *(Proof of Guilt: Barbara Graham and the Politics of Executing Women in America).* Unlike her prior true-crime dramas, however, her most recent work delves into drama on the other side of the bench.



Within the context of the rise of feminism, judicial activism, and partisan politics, Cairns tells the story of an ambitious woman who dedicated her life to her career, but whose guarded nature all too often generated unnecessary animosities that turned suspicions into self-fulfilling prophesies. It is a story of tremendous personal accomplishment at the height of the second wave of feminism – Rose Bird was the first woman to win the moot court championship at Berkeley Law School, to clerk for the Nevada Supreme Court, to work in the Santa Clara County Public Defender's office, to serve in a California gubernatorial cabinet, and of course, to serve on the California Supreme Court, as chief justice, no less. But, it is also the tale of a tragic downfall – she was also the first California Supreme Court justice to be removed from office by the electorate and was so tainted by unrelenting character attacks that she never recovered, professionally or personally.

In presenting the background necessary to understand Rose Bird's leadership on the court, Cairns presents a detailed history of California law and its impact on the nation. California attorneys will appreciate how dramatically the state's Supreme Court has influenced American law. As perhaps the most pioneering and

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activist Supreme Court in the nation, California was the first state to overrule bans on interracial marriage (twenty years before *Loving v. Virginia*), to require that criminal defendants be advised of their right to counsel (a year before *Miranda v. Arizona*), and to determine that women had a fundamental right to choose whether to continue a pregnancy (four years before *Roe v. Wade*). California's high court also eliminated capital punishment (temporarily) four months before the U.S. Supreme Court did so nationally (in *Furman v. Georgia*). Though these rulings preceded Bird's time on the court, and indeed, the opinion overturning the death penalty was written by Justice Wright, a Republican appointee, it was Rose Bird that bore the brunt of the backlash that followed.

Attorneys may also appreciate Cairns' look into the inner workings of the Bird Court, which was described as "a seething cauldron of fear, suspicion, political hostility and petty jealousy." While it may be true that no one should see sausages or law being made, it is hard to look away. The personal stories about Bird and her colleagues are captivating, if not flattering, and include surprising details for those unfamiliar with these former justices, such as the fact that Marshall McComb was senile for the last seven years of his time in office, or that William Clark flunked out of college *and* law school *and* failed the bar on his first attempt before being appointed by his

close friend, Ronald Reagan. We learn that Stanley Mosk always believed that *he* deserved to be chief of the court, and never forgave Matthew Tobriner for voting to confirm Bird and helping her navigate her early days as chief justice. The justices were dismayed when Bird sold the court limousine and made them stay in cheaper hotels during conferences, and one justice even constructed wooden covers over glass partitions in his office so Bird would not know how late he worked. At times, the court of that era is portrayed more like Peyton Place than a venerated institution entrusted to protect fundamental freedoms, due process, and the rule of law. But, that is the point. As an institution run by human beings, it can be both.

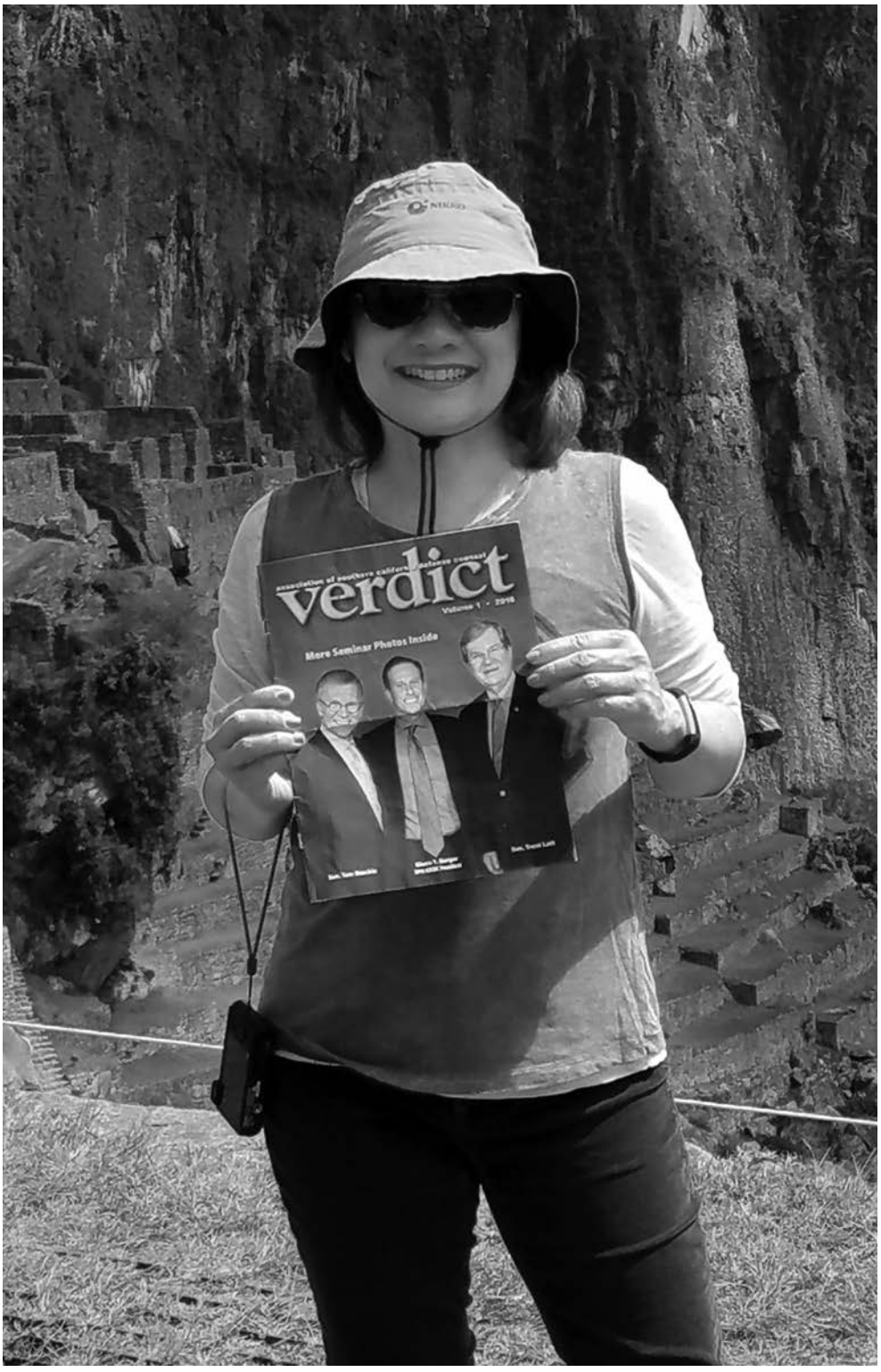
It is impossible to read a history of Rose Bird without drawing comparisons to the present. Like Hillary Clinton, Rose Bird came from humble beginnings, famously wore pantsuits, and was labelled vindictive and difficult. Like Betsy DeVos, Bird was appointed by a historically razor-thin margin while her male colleagues with similar track records and inexperience sailed through the confirmation process. However, the comparisons drawn by Cairns go deeper than gender. Pointing to subsequent judicial battles from the nominations of Robert Bork and Clarence Thomas to the recent retention elections of judges like Marsha Ternus of the Iowa Supreme Court, who authored a decision overturning Iowa's ban on gay marriage, Cairns deftly traces the history of the politicization of the American judiciary from the ousting of Rose Bird. While Cairns emphasizes that the case of Rose Bird is unique, she also makes it clear that we continue to feel the political reverberations of her trail-blazing tenure to this day.

Shane H. McKenzie is an attorney at Horvitz & Levy LLP, specializing in civil appellate litigation.

Shane H. McKenzie

Fun with *Verdict* Magazine

by Diane Mar Wiesmann



Machu Picchu was built by the Incas around 1450 AD as a retreat for its leaders. In 1572 AD, it was abandoned for reasons still unclear. It was never discovered by the Spaniards, who came to Peru during that same period, driven by gold, silver, and conquest. It remained in its state of secret abandonment until 1911 when Hiram Bingham, a Yale archaeologist, stumbled upon it. Today, it draws thousands of visitors to its scenic perch among the clouds in the Andes mountains. When (not if) you go, take lots of pictures because you will not believe you made it.

What do you pack for your trip to Machu Picchu?

During the spring here, it is autumn there, and vice versa. There are weight restrictions of 6-8 kg on what you can take into the Sacred Valley, the portal to Machu Picchu. (Yes, leave your trunks and rolling duffle bags behind in Cuzco.) It is a good idea to pack good walking shoes, layers, rain gear, a hat with chin strap, comfortable slacks or jeans, your camera, your power cords, electrical adapters, and *Verdict* Magazine. I was privileged to take my copy of *Verdict* Magazine with ASCDC Past President Glenn T. Barger, Senator Tom Daschle and Senator Trent Lott. In those far stretches of the magical earth, it was a touchstone for home base, and a tool for casual learning during downtime.

Going somewhere this year? Take *Verdict* Magazine with you: selfie, snap it, send it and we will devote space in our epic magazine to it. Go forth, defense counsel. On the steps of the courthouse for your first trial? Snap. Zip-lining in Costa Rica? "Say 'Cheese'." Yodeling in Switzerland? No better time. We welcome your pics. Send them to *ascdc@camgmt.com.*

"'Cause, remember: no matter where you go ... there you are."

– *The Adventures of Buckaroo Banzai Across the 8th Dimension, Dir. W. D. Richter, Sherwood Productions, 1984.*

amicus committee report

ASCDC's Amicus Committee continues to work energetically on behalf of its membership. ASCDC's Amicus Committee has submitted *amicus curiae* briefs in several recent cases in the California Supreme Court and California Court of Appeal, and has helped secure some major victories for the defense bar.

Please visit *www.ascdc.org/amicus.asp*

RECENT AMICUS VICTORIES

The Amicus Committee has recently participated as amicus curiae in the following cases:

1. *Perry v. Bakewell Hawthorne* (S233096, Feb. 23, 2017) __ Cal.5th __ [2017 WL 712748]: The California Supreme Court held that an expert witness who was excluded for the failure to disclose as part of expert witness disclosures cannot be used to oppose a motion for summary judgment, overruling *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, and disapproving *Kennedy v. Modesto City Hospital* (1990) 221 Cal.App.3d 575. Steve Fleischman and Josh McDaniel from Horvitz & Levy submitted an amicus brief on the merits, which the Association of Defense Counsel for Northern California and Nevada (represented by Don Willenburg at Gordon & Rees) joined, and Josh McDaniel presented oral argument on behalf of ASCDC to the Supreme Court on January 4, 2017.

2. *M. (J.) v. Huntington Beach Union High School District* (S230510, March 6, 2017) __ Cal.5th __ [2017 WL 875829]: The California Supreme Court granted review to address the following issue: Must a claimant under the Government Claims Act file a petition for relief from Government Code section 945.4's claim requirement, as set forth in Government Code section 946.6, if he has submitted a timely application for leave to present a late claim under Government Code section 911.6, subdivision (b)(2), and was a minor at all relevant times? The court ruled in favor of the defense, finding the plaintiff's claim untimely, and disapproved *E.M. v. Los Angeles Unified School Dist*. (2011) 194 Cal.App.4th 736. Susan Knock Beck from Thompson & Colegate submitted an amicus brief on the merits, which the Association of Defense Counsel for Northern California and Nevada (represented by Don Willenburg at Gordon & Rees).

3. *Sanchez v. Kern County Medical Transp. Corp.* (2017) 8 Cal.App.5th 146: The Fifth District (Fresno) affirmed the granting of summary judgment in a personal injury case, concluding the trial court did not abuse its discretion in excluding the declaration of the plaintiff's expert, Dr. Fardad Mobin. Steve Fleischman from Horvitz & Levy submitted a publication request, which was granted.

4. *Flake v. Neumiller & Beardslee* (C079790, Jan. 31, 2017) __ Cal. App.5th __ [2017 WL 839822]: The Court of Appeal in Sacramento held that, for statute of limitation purposes, an attorney's representation of a client ends when a motion to withdraw as counsel of record is filed, not when the motion is subsequently granted. Dave Pruett at Carroll, Kelly, Trotter, Franzen, McKenna & Peabody, submitted the successful request for publication.

5. *Johnson v. Arvinmeritor* (A131975, Feb. 2, 2017) __ Cal.App.5th __ [2017 WL 825272]: The Court of Appeal affirmed the granting of summary judgment in this secondary exposure asbestos case. The court held that the plaintiff failed to produce any evidence to raise a triable issue of fact as to whether the particular defendants supplied the parts as issue and that the defendants could not be held liable for defective design. The Court of Appeal granted ASCDC's request for publication and ordered the opinion partially published. David Schultz and J. Alan Warfield of Polsinelli LLP submitted the publication request.

6. *Yale v. Bowne* (B260762, Feb. 9, 2017) __ Cal.App.5th __ [2017 WL 947608]: In this legal malpractice case, the Court of Appeal affirmed the giving of a comparative fault instruction based on the client's/plaintiff's conduct. Harry Chamberlain of the Buchalter firm submitted the publication request on behalf of ASCDC, which was partially granted.

PENDING CASES AT THE CALIFORNIA SUPREME COURT AND COURT OF APPEAL

ASCDC's Amicus Committee has also submitted *amicus curiae* briefs in the following pending cases:

1. *McGill v Citibank*, docket no. S224086. The California Supreme Court granted review in this case to decide whether the Federal Arbitration Act (FAA) preempts the so-called "*Broughton-Cruz*" rule. This rule consists of two prior California Supreme Court decisions holding that parties cannot be compelled to arbitrate claims for public injunctive relief brought under California's Unfair Competition Law and Consumers Legal Remedies Act. Lisa Perrochet, Felix Shafir and John Querio from Horvitz & Levy submitted an amicus brief on the merits.

2. *Parrish v. Latham & Watkins*, docket no. S228277. The California Supreme Court granted review to address issue whether the one-year statute of limitations (Code Civ. Proc., § 340.6) applies to claims for malicious prosecution brought against attorneys. Harry Chamberlain from the Buchalter firm will be submitting an amicus curiae brief on the merits.

3. *B.C. v. Contra Costa County*, docket no. A143440. In this medical malpractice case pending before the First Appellate District, Bob Olson from Greines, Martin, Stein & Richland submitted an amicus brief on behalf of ASCDC addressing *Howell* and MICRA issues. The appeal remains pending.

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Amicus Committee Report – continued from page 33

HOW THE AMICUS COMMITTEE CAN HELP YOUR APPEAL OR WRIT PETITION, & HOW TO CONTACT US

Having the support of the Amicus Committee is one of the benefits of membership in ASCDC. The Amicus Committee can assist your firm and your client in several ways:

1. *Amicus curiae* briefs on the merits in cases pending in appellate courts.
2. Letters in support of petitions for review or requests for depublication to the California Supreme Court.
3. Letters requesting publication of favorable unpublished California Court of Appeal decisions.

In evaluating requests for *amicus* support, the Amicus Committee considers various issues, including whether the issue at hand is of interest to ASCDC's membership as a whole and would advance the goals of ASCDC.

If you have a pending appellate matter in which you believe ASCDC should participate as *amicus curiae*, feel free to contact the Amicus Committee:

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Ted Xanders (Co-Chair of the Committee)
Greines, Martin, Stein & Richland LLP
310-859-7811

J. Alan Warfield
Polsinelli LLP • 310-203-5341

Josh Traver
Cole Pedroza • 626-431-2787

Scott Dixler
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Susan Knock Beck
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Richard Nakamura
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defense successes
january – march

Sean D. Beatty
Beatty & Myers, LLLP
- *Bayindirli v. Toyota Motor Sales, U.S.A., Inc.*
- *Brand v. Hyundai Motor America, et al.*

Robert T. Bergsten
Hosp Gilbert & Bergsten
- *Crum v. International Water Polo*
- *Peacock v. FNS, Inc.*

Benjamin Coats
Engle, Carobini & Coats
- *Wilson v. Declusin*

Daniel G. Eskue
Office of the Attorney General
- *Harper v. Harold Garcia*

Christopher E. Faenza, Esq.
Yoka & Smith, LLP
- *DeLeon v. West Coast Arborist*
- *Meza-Arenas v. Kmart*

Chris Faenza
Andy Mendoza
Yoka & Smith, LLP
Kim Obrecht
Horton Obrecht
- *Pankey v. Petco and Barney's Pets*

J. Pat Ferraris & Priscilla George
Disenhouse Law APC
- *Charles v. Baner*

Thomas Feher
- *Wheeler v Mui*

Peter Felchlin
Lauren Lofton
Yoka & Smith, LLP
- *Vasquez v. Stadium Properties*

Clark Hudson
Neil Dymott Frank McFall Trexler McCabe & Hudson
- *Dixon v. McGann*

Clark Hudson & Elizabeth Harris
Neil Dymott Frank McFall Trexler McCabe & Hudson
- *Belifore-Brahman v. Rotenberg*
- *Speakman v. Kahn*

Bob Kaufman
Woodruff, Spradlin & Smart
- *Nelson v. City of Palm Springs*

Stephen C. Pasarow
Knapp, Petersen & Clarke
- *Bodian v. Ogata*
- *Espana v. Park*

Richard Ryan
Ryan Datomi LLP
- *Harrington v. Lompoc Valley Medical Center*

Linda Miller Savitt
Shant A. Kotchounian
Ballard Rosenberg Golper & Savitt, LLP
- *Vega v. Hydraulics International, Inc.*

Alice Chen Smith
Yoka & Smith, LLP
- *Gharmalkar v. Fisher*

Patrick Stockalper
Reback, McAndrews, Kjar & Stockalper LLP
- *Carrassco v. Brotman Medical Center*

Dennis Thelen
- *Barr v. Cook*
- *Pawling v. Patel*
- *Soto v. Zahriya*

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Are you now devoting a substantial portion of your professional time to the practice of the defense of civil and business matters, including the prosecution of eminent domain proceedings? ☐ Yes ☐ No ☐ Student

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If elected to membership, I agree to abide by the Bylaws of this Association.

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Contributions or gifts (including membership dues) to ASCDC are not tax deductible as charitable contributions. Pursuant to the Federal Reconciliation Act of 1993, association members may not deduct as ordinary and necessary business expenses, that portion of association dues dedicated to direct lobbying activities. Based upon the calculation required by law, 15% of the dues payment only should be treated as nondeductible by ASCDC members. Check with your tax advisor for tax credit/deduction information.

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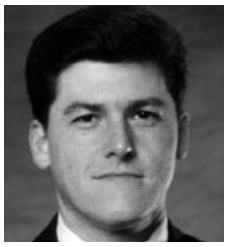
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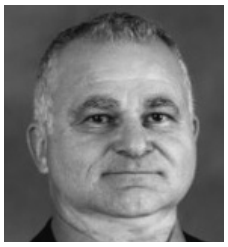
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(for law firms and risk assessment)

July 21, 2017
Brown Bag Webinar on Cyber
(how to respond to a breach and investigate)

August 10, 2017
Brown Bag Webinar on Cyber
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September 22, 2017
Live Brown Bag at LASC with Presiding Judge Dan Buckley
(regarding status of the courts and civiligity)

September 22-23, 2017
ASCDC Santa Barbara Seminar
Fess Parker DoubleTree Resort, Santa Barbara, CA

February 8-9, 2018
57th ASCDC Annual Seminar
JW Marriott LA Live, Los Angeles, CA