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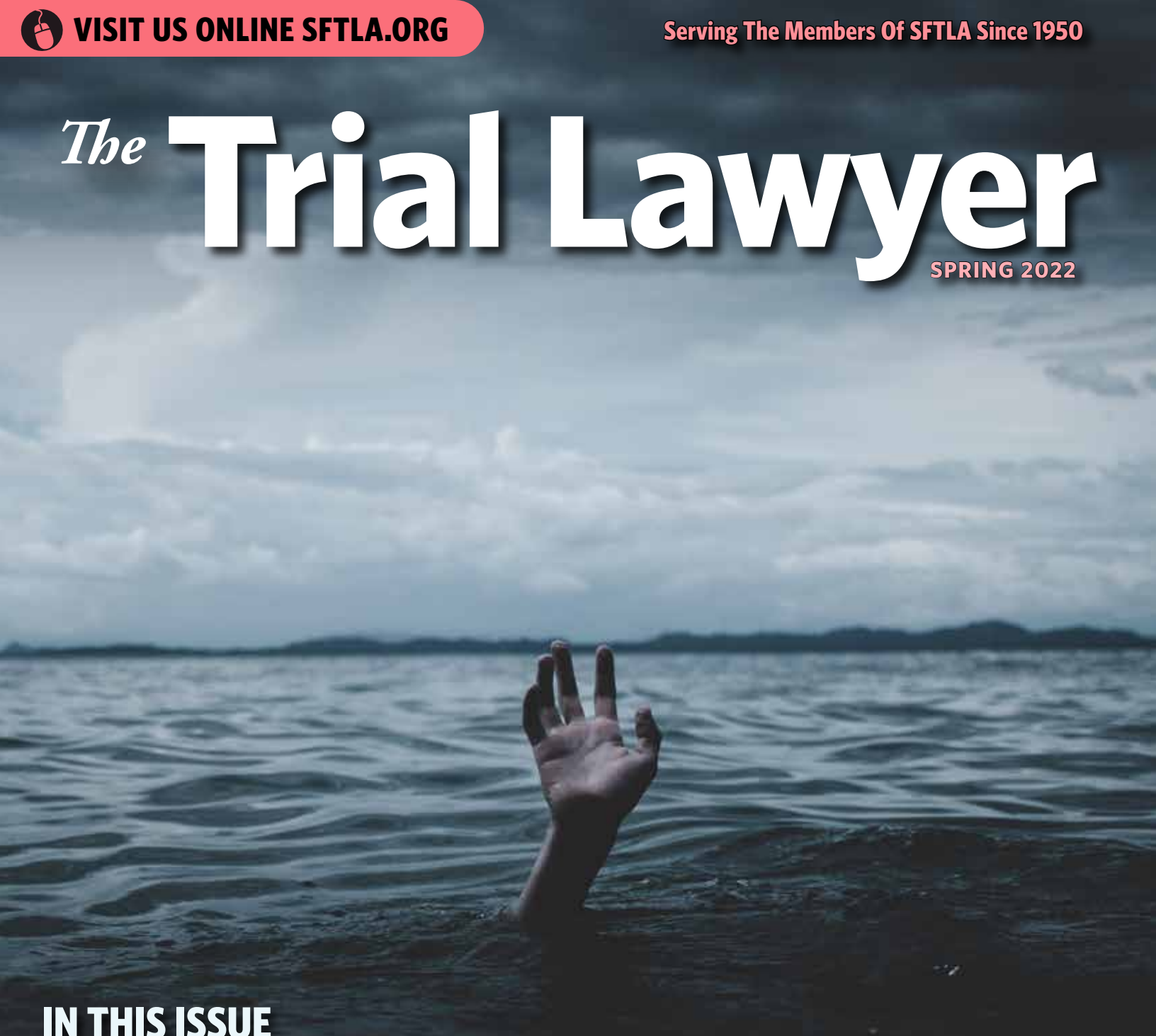
The Trial Lawyer

SPRING 2022



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2021 SFTLA RESULTS

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- William L. Veen
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The Trial Lawyer

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The **Trial Lawyer**

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311 California Street # 620 San Francisco, CA 94104
Phone: (415) 956-6401 FAX: (415) 956-6680
email: admin@sftla.org www.sftla.org

Chuck Geerhart was admitted to the California bar in 1989, and is a graduate of Cornell University and the UCLA Law School. He is also admitted to the District of Columbia Bar. He has tried 16 cases to jury verdict, and served as a juror in three trials in San Francisco. Chuck is a member of the American Board of Trial Advocates (ABOTA). He was a finalist for SFTLA Trial lawyer of the Year in 2013.
Email: cgeerhart@gmail.com.

Judicial Victories Inspire Us All

As I write this column, Supreme Court nominee Ketanji Brown Jackson has just finished two very long days of grueling testimony. After the way this distinguished jurist was treated by supposedly civilized senators, I feel like I need to take a shower. Many have speculated that these cowardly men and women were especially rude and offensive because the nominee is a Black woman. We'll never know, unless a male nominee comes along shortly. In any event, the whole sorry spectacle makes me hurt as an American.

But there are bright spots. By the time you read this, Judge Jackson will be Justice Jackson, the first African American woman ever on the Supreme Court. Additionally, there are now four women on the Court, which is a first.

Swallowed up in the very active news cycle was the historic announcement on March 23 that Judge Patricia Guerrero was confirmed as first Latina on the California Supreme Court. Guerrero, 50, grew up in the agricultural Imperial Valley and has worked as prosecutor, law firm partner, superior court judge, and appellate justice on the 4th District Court of Appeal.

Guerrero has been praised by colleagues and members of the confirmation panel, including Supreme Court Chief Justice Tani Cantil Sakauye who said she was humbled by the historic significance of her elevation to the Court. The Chief Justice said Guerrero stood on the shoulders of her grandparents and parents who immigrated from Mexico to give their children a better life. Guerrero was confirmed after a friendly hearing at the Supreme Court in San Francisco with no opposition. When viewed in contrast to the acrimony of Justice Jackson's hearing, it seems clear that California is operating in a much more professional and respectful manner than the nation at large.

Here in San Francisco specifically, SFTLA will hold its annual Trial Lawyer of the Year gala in April. This issue of Trial Lawyer may come out after that, but let me congratulate all the nominees. Larry Organ won a record setting $137 million race discrimination verdict (including over $100 million in punitive damages) against Tesla in federal court on behalf of an African American employee of a subcontractor. He was given only five days to put on his case! Elon Musk personally swore he would never settle this case.

Jen Fiore and Susan Kang Gordon won a verdict of $13,500,000 ($4.6 million in compensatory and wrongful death damages plus $8.9 million in punitive damages) against a nursing home company (Mariner Health Care), for elder abuse and wrongful death. This was a trial by Zoom which started May 18, 2021 and did not conclude until October 2021 given that there were over 40 motions in limine and 402 hearings, as well as four distinct phases of the trial. Think about how hard this trial was! Plus it took a total of 37 trial days and about four weeks of jury deliberations. Kudos to Jen and Susan for persevering.

In a rear-end automobile accident case with huge injuries where there was apportionment to another, larger collision, Matt White took the remaining claim to trial and got a 3% liability award against a deep pocket defendant. He also won a $10 million judgment (that is mostly economic damages) for his client, who now has the means to rest and heal and be financially secure.

Last but not least, Brian Graziani made the gutsy decision to try a medmal case in Napa County in a court trial. He made the right decision, and got a $448,000 verdict in a tough case in a conservative county.

I want to commend all of these fabulous trial lawyers, and everyone who took a case to trial in 2021. When we take cases to trial, we show the insurance carriers and corporate interests that we are not afraid. This benefits all of us. TL

A Focus On Change

Emily McGrath exclusively represents employees in trials and appeals, arbitrations, and negotiations against their employers. Since joining Barbara and Therese Lawless in 2013, Emily has fought on behalf of hundreds of clients. She is committed to providing compassionate counsel to those navigating a complicated legal system during a difficult period in their lives. Before beginning her career as an employment litigator, Emily was a misdemeanor trial attorney at the San Francisco Public Defender's Office.

As members of SFTLA, we all fight for people who we believe have suffered a wrong. Sometimes the jurors agree with us, sometimes they don't. Sometimes the laws favor us, sometimes they don't. But no matter how the case turns out, the visceral pain, despair, humiliation, rage, or whatever other feelings our clients have often resonate deep within us, because our clients are our mission. Each person we sign up to counsel is our passion. And we fight with all we have for accountability and recompense on behalf of our people.

This issue focuses on recent changes to the systems that enable us to fight these fights. Our feature piece delves into the theory and practical application of a brand-new change to the Code of Civil Procedure that helps ensure those who have wronged a now-deceased plaintiff can be held fully accountable. Feature authors Laurel Halbany and Loren Schwartz did a masterful job of analyzing the new element of Section 377.34 that permits recovery for pain, suffering, and disfigurement in survival actions. Additionally, several attorneys from our SFTLA team – including Kevin Morrison, Bobby Shukla , Jim Sturdevant, and my co-curator Brian Lance – offered their personal experiences and those of colleagues in order to compile this issue's Practice Tip, which is a status update on trial procedures and processes in courts around the greater Bay Area.

In keeping with the focus on changes to the systems that enable us to fight our fights, CAOC President Craig Peters' update is a call to arms in the face of a persistent effort to cap our contingency fees and thereby undermine our efforts to achieve justice. This CAOC Corner piece is a must-read. We all need to understand the origin and trajectory of these effort so that, as Craig tells us, we may pull together to ensure our justice system is not further eroded. And finally, our Closing Argument is from guest author John Blumberg, who provides an interesting overview of the brain structures and processes that are often at play when jurors evaluate a case. We are all somewhat familiar with the long-established basics – the "Reptile Theory" trial strategy and confirmation bias, for example – but the Closing Argument addresses some of these psychological phenomena through a modern lens and with an emphasis on practical application in today's courtroom.

Given that the only constant in life is change, I feel fortunate to be a member of our SFTLA community which is so committed to effecting positive change for those who deserve it.

Given that the only constant in life is change, I feel fortunate to be a member of our SFTLA community which is so committed to effecting positive change for those who deserve it. This year is a year of great change in the courts (at all levels, especially the highest!), the legislature, and elsewhere. Thank you to you all for your tenacious advocacy and undeniable empathy in the face of so much uncertainty. TL

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Noteworthy Verdicts *for* Deserving Plaintiffs

by Ryan H. Opgenorth

CASE: GUNDERSEN V. BETENBAUGH, ET AL.

Case Type: Cyberbullying
Court: Glenn County Superior Court
Judge: Hon. Alicia Ekland
Date: September 17, 2021

Verdict: $38,972,500 in total damages. Plaintiff Dalas L. Gundersen was awarded $8,000,000 in compensatory damages and $35,000 in stipulated punitive damages against Defendant Paul Betenbaugh, and another $30,000,000 in compensatory damages against Defendants Lisa Rodriguez and Edward D. Jones Co. LP ("Edward Jones"). An additional $937,500 in punitive damages was awarded against Defendant Rodriguez.

Plaintiff Attorneys: Ognian Gavrilov and John Garner of Gavrilov & Brooks as co-lead attorneys; Erika M. Gaspar of the Law Office of Erika M. Gaspar.

Defense Attorneys: Phillip R. Bonotto and Tracy Fritch-Thym of Gurnee Mason, Rushford, Bonotto & Forestier for Defendant Betenbaugh. Samuel A. Keesal, Jr., Julie Taylor, and Simon M. Levy of Keesal, Young & Logan for Defendants Rodriguez and Edward Jones.

Facts & Allegations: Plaintiff Dalas L. Gundersen alleged that he was harassed, intimidated, and defamed by Defendant Edward Jones' financial advisors Paul Betenbaugh and Lisa Rodriguez in an effort to injure Gundersen and gain a competitive advantage in Glenn County's financial services market. Defendant Betenbaugh allegedly created and posted anonymous Craigslist ads directing individuals interested in homosexual dating to call Gundersen's cell phone number, and Defendant Rodriguez allegedly made slanderous statements to Plaintiff's customers. Gundersen further alleged that Defendant Rodriguez was acting within the scope of her employment with Edward Jones while making said statements.

The case was tried over the course of eleven days before the Honorable Judge Ekland in Glenn County Superior Court. After ten hours of deliberation, the jury returned a unanimous verdict in Gundersen's favor on compensatory damages totaling $38,000,000. The jury returned a verdict of 11-1 in Gundersen's favor on punitive damages against Defendant Rodriguez.

Pre-Trial Offers: Plaintiff issued the following 998 offers: $500,000 to Defendant Betenbaugh, $499,999 to Defendant Rodriguez, and $999,999 to Defendant Edward Jones. Defendants rejected those offers, which resulted in the trial and verdict.

CASE: JOHNNY DOE V. CHILDREN'S MUSEUM

Case Type: Personal Injury
Date: October 25, 2021

Settlement: $7,000,000

Plaintiff Attorneys: Elinor Leary and Clifton Smoot of the Veen Firm, PC.

Defense Attorneys: Confidential

Facts & Allegations: Jane Doe took her two-year-old boy, Johnny Doe, to visit a children's museum. The museum had known for years that its young visitors climbed on the horizontal guard rails overlooking its rooftop garden. These guard rails had smooth, 3/4" bars that were easily gripped by small hands, making them easy to climb for young children. Additionally, the three-inch spacing between bars made for easy reaching to the next handhold or foothold, which is a design known as "the ladder effect." Beneath the guard rail was a six-foot drop onto sharp plant life.

On the day of the incident, Johnny climbed up the guard rail. The surveillance video suggested that Jane Doe accidentally nudged Johnny while he was at the top, causing him to lose his balance and fall face-first onto the plant life below.

The branches impaled his face, with one branch entering his eye socket and penetrating his brain. Johnny was hospitalized for two months. He was diagnosed with permanent hemiparesia (reduced strength and dexterity on one side of the body, accompanied by increased muscle spasticity), visual

Ryan H.Opgenorth is partner at Pillsbury & Coleman LLP. He exclusively represents policyholders in bad faith litigation against their insurance carriers in order to hold companies accountable for their misconduct. He has been a Northern California Super Lawyers Rising Star each year since 2013.

field cuts, and cognitive and emotional issues.

A lawsuit was filed on Johnny's behalf seeking economic and non-economic damages from Defendant Children's Museum. The case settled partway through litigation for $7,000,000 following a mediation with Matt Conant.

Plaintiff Experts: Robert Cooper, M.D. (pediatric pain management and rehabilitation); John Culvenor (human factors engineering); Mark Vaghei (architecture); Andrea Bradford (vocational rehabilitation).

Defense Experts: William Good, M.D. (pediatric ophthalmology).

CASE: IN RE CAPACITORS ANTITRUST LITIGATION

Case Type: Antitrust Class Action
Court: U.S. District Court for the Northern District of California
Judge: Hon. James Donato
Settlement Dates: December 1, 2021 and December 15, 2021

Settlement: $5,000,000 settlement with Matsuo Electric Co., Ltd. on December 1, 2021 and $160,000,000 settlement with Nippon Chemi-Con Corp and its U.S.-based subsidiary United Chemi-Con, Inc. on December 15, 2021.

Plaintiff Attorneys: Joseph R. Saveri, Steven N. Williams, Anupama Reddy, Christopher Young, and Abraham Maggard of the Joseph Saveri Law Firm, LLP; Eric Cramer and Mark Suter of Berger Montague; Austin Cohen of Levin Sedran & Berman; and Jason Hartley of Hartley, LLP.

Defense Attorneys: Joseph Bial, Robert Finzi, Farrah Berse, Johan Tatoy, and Leah Hibbler of Paul Weiss Rifkind Wharton & Garrison, LLP for defendant Nippon Chemi-Con Corp and United Chemi-Con, Inc.; and David Cross, Bonnie Lau, Margaret Webb, and Mary Kaiser of Morrison & Foerster, LLP for defendant Matsuo Electric Co., Ltd.

Plaintiff Experts: Dr. James McClave (econometrics); Dr. Jamie McClave Baldwin (econometrics); Dr. Hal Singer (econometrics).

Defense Experts: Dr. Laila Haider (econometrics); Dr. Jerry Hausman (econometrics); and Dr. Mark Israel (econometrics).

Facts & Allegations: The Joseph Saveri Law Firm filed this case on behalf of a class of direct purchasers of capacitors in 2014 and was appointed sole lead counsel by the Court in November 2018. Capacitors are electronic widgets present in nearly every electronic device in common use, including computers, DVD players, car engines, and cell phones. The plaintiff class was composed of American companies – distributors and manufacturers – that purchased aluminum, film, and tantalum capacitors from 22 Japanese and American capacitors manufacturers.

The Joseph Saveri Law Firm first tried Capacitors before a jury in March 2020. The plaintiff class presented two weeks of its case-in-chief, but the trial was halted by the COVID-19 pandemic. After considerable effort to continue the trial with the same jury, including preparations for a remote trial, the Court declared a mistrial in June 2020. A new trial took place in November and December 2021. Plaintiffs reached settlements totaling $165 million with the remaining defendants shortly before a verdict was rendered, bringing total case settlements to $604.55 million. This figure significantly exceeds calculated single damages of $427 million, which is a rarity in antitrust law. To date, eight capacitors manufacturers and two of their individual executives have pleaded guilty and been sentenced for violating federal antitrust laws following their plea agreements with the DOJ. Additional related executives remain as fugitives.

Other Notable Rulings: The Court granted class certification based, in part, on an econometric technique that deployed a multiple regression analysis comparing the actual prices customers paid for the product at issue with the prices the regression indicated they would have paid without the alleged conspiracy. This technique's use was hotly contested, with the Court holding a "hot tub" in open court involving concurrent expert witness testimony and cross-examination of the parties' witnesses. This pitted two of Plaintiffs' econometric experts against one of Defendants'. The Court ruled in Plaintiffs' favor, allowing them to proceed to jury trial. Based on the experience in this case, the Court has adopted the "hot tub" procedure in numerous subsequent cases.

The case also featured other important rulings, including interpreting the Foreign Trade Antitrust Improvement Act to not prohibit claims based on sales that were shipped or billed to the United States. This is an important clarification of the scope of U.S. antitrust law.

CASE: WILLIAM ZMRZEL, ET AL. V. LYFT, INC., ET AL.

Case Type: Motor vehicle / wrongful death
Court: Sacramento County Superior Court
Judge: Hon. Kevin R. Culhane
Date: December 6, 2021

Verdict: $6,000,000 total damages apportioned 100% to Defendants Lyft and Rafiullah Amiri.

Plaintiff Attorneys: Kevin L. Elder and Kent M. Luckey of Penney & Associates.

Defense Attorneys: Dana A. Fox, Christopher J. Nevis, Beverly E. Narayan, and Steffanie Malla of Lewis Brisbois Bisgaard & Smith, LLP on behalf of Defendant Lyft; Wilma J. Gray of McNamara, Ney, Beatty, Slattery, Borges & Ambacher, LLP on behalf of Defendant Rafiullah Amiri; and Christopher Beeman and Ashley Meyers of Clapp Moroney Vucinich Beeman & Scheley on behalf of Defendant Jennifer Alford.

Facts & Allegations: On Wednesday, December 27, 2017 at 10:05 p.m., 22-year-old Wyatt Zmrzel used his smartphone to contact Lyft for a ride home from a Sacramento tattoo shop. Wyatt had just received a ram tattoo in celebration of a recent hunting trip and in honor of his sister, a Los Ange-

les Rams Cheerleader. Wyatt's destination was Loomis, California, which was due east of the pick-up point. Family members, including Wyatt's father, were with him as he received his tattoo.

Lyft's driver, Rafiullah Amiri, responded to the ride request within a matter of seconds and picked up Wyatt at 10:09 PM. Lyft's driver had received his California driver's license a mere seven months earlier. When he picked up Wyatt, Amiri had only been approved to drive for Lyft the preceding day. This was Amiri's first trip as a Lyft driver. Lyft provided no training of any kind to Amiri, including any training related to the safe operation of motor vehicles. Amiri had no background as a professional driver.

The most direct route to Wyatt's home was Interstate 80, east of the tattoo parlor and less than 30 minutes away. Instead, for reasons unknown, Amiri took northbound Interstate 5, then proceeded further north on Highway 99 toward Yuba City. Now more than 20 miles off course, the Lyft driver made a left-hand turn from northbound Highway 99 to the median separating the northbound and southbound lanes. Inexplicably, the Lyft driver, who disclaimed any memory of the incident, moved from the safety of the center median and accelerated from 3.7 mph to 16.2 mph into the southbound lanes of Highway 99. There, his vehicle was struck by Jennifer Alford's Toyota 4 Runner traveling in the number two southbound lane at 80.8 mph. The posted speed limit at the collision scene was 65 mph. The collision occurred at 10:30 p.m. Wyatt succumbed to his injuries proximately half an hour later.

Wyatt Zmrzel had adrenoleukodystrophy, a neurodegenerative condition that more likely than not would have resulted in a shortened life expectancy had he not been killed in the traffic collision.

Plaintiff Experts: Michael Freeman, Dr. Med., PhD (epidemiology and life expectancy); Thomas Shelton (collision reconstruction); Joseph Cohen (human factors engineering).

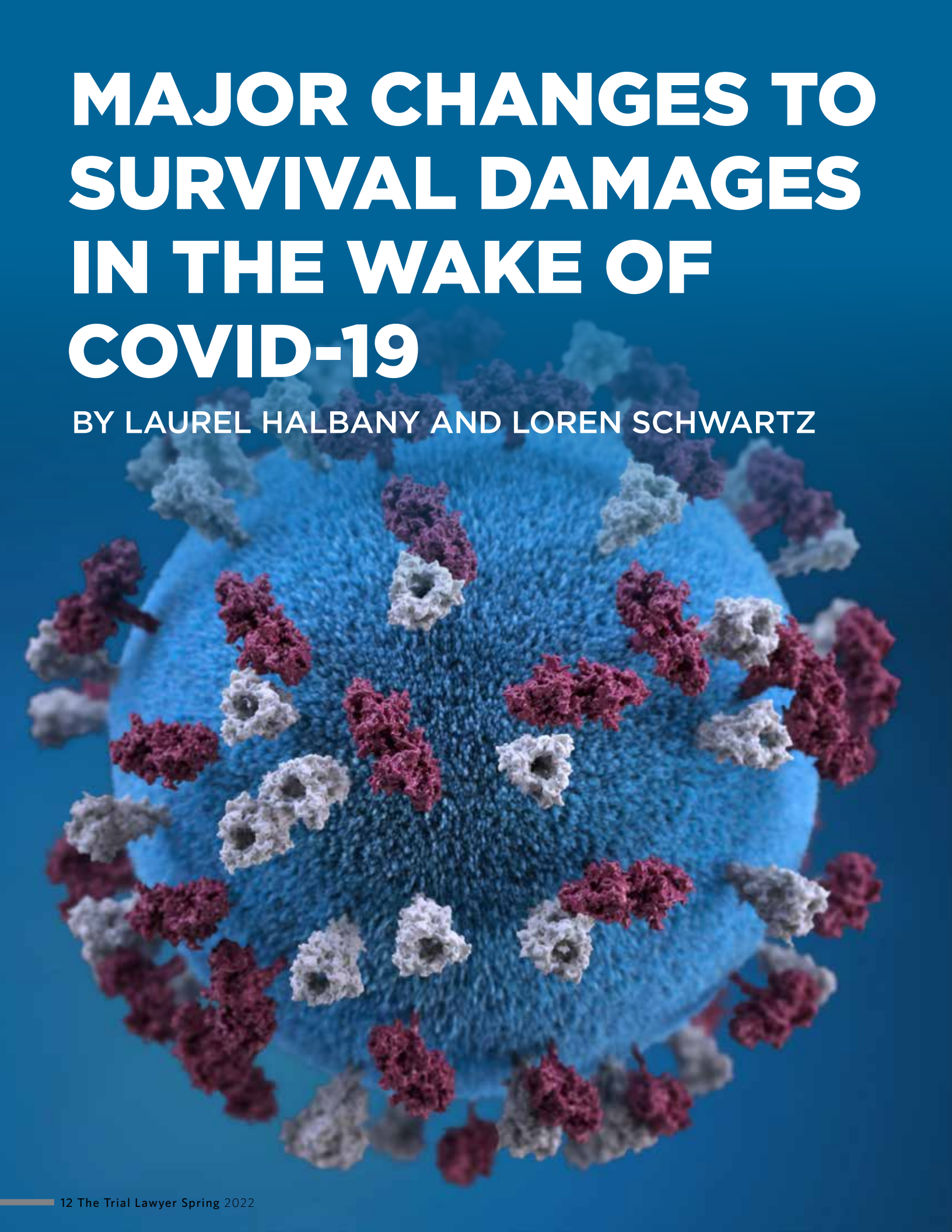
Defense Experts: Allen Bott, M.D. (neurology and life expectancy); Raymond Merala (collision reconstruction); Rene Castaneda (collision reconstruction); and David Krauss (human factors engineering).

Pre-Trial Offers: Plaintiff made a 998 offer of $7,000,000. Defense made an offer of $1,000,000, which increased to $3,000,000 just before to trial, and then increased to $5,000,000 just prior to closing arguments.

This was a 17-day jury trial. The jury deliberated for six hours before returning a verdict of 12-0 in favor of the Plaintiffs against Defendants Lyft and Amiri for negligence. The jury also returned a verdict of 9-3 in favor of Defendant Alford finding that her negligence was not a substantial factor in the death of Wyatt Zmrzel. TL

MAJOR CHANGES TO SURVIVAL DAMAGES IN THE WAKE OF COVID-19

BY LAUREL HALBANY AND LOREN SCHWARTZ



Senate Bill No. 447, signed into law in 2021, updates California damages law to preserve certain non-economic damages in a survival action following the plaintiff's death. Formerly, California Code of Civil Procedure § 377.34 permitted the successor or personal representative of an injured person to bring an action for damages suffered by that person while he or she was alive, with the notable and specific exception of damages for "pain, suffering, or disfigurement." The new law eliminates this exception for cases newly filed as of January 1, 2022 (*i.e.*, cases filed after the law takes effect), and cases that were granted preference under California Code of Civil Procedure § 36. The law also currently has a sunset clause under which it terminates on January 1, 2026 absent further amendment by the Legislature.

This change now brings California law in line with the majority of states. Only Arizona, Colorado, Florida and Idaho still extinguish pain and suffering damages on plaintiffs' deaths. The devastating impact of COVID-19 was the ultimate catalyst for this change, which has been in the making for decades.

History of the Movement to Permit Pain and Suffering Damages in Survival Actions

The California Law Revision Commission ("CLRC") is a statutorily-created, independent state agency tasked with studying California law to uncover defects and anachronisms, while also recommending legislation to make needed reforms. (See Cal. Gov't Code § 8280 *et seq.*) The nine-member CLRC includes one member from the California Senate and one member from the California Assembly, as well as seven members appointed by the Governor. In 1960, the CLRC reviewed the law relating to survival of actions.

Under common law, causes of action – including those based on physical injury to a person – did not survive the death of either the plaintiff or the defendant. This began to change when *Hunt v. Authier* (1946) 28 Cal.2d 288 was decided. *Hunt* was a murder-suicide case in which the California Supreme Court considered the claims of the victim's widow and children against the estate of his killer. Under then-existing statutes and common law, it appeared the plaintiffs' wrongful death claims were wiped out due to the death of the tortfeasor.[1] The *Hunt* Court, however, observed that the common-law rule was increasingly "looked upon with disfavor by the courts," which had gradually started to poke holes in the rule through judicially-created exceptions. Indeed, the *Hunt* plaintiffs pointed to wording in the Probate Code (specifically, section 574), which permitted actions to be brought by the administrator of an estate for recovery on an injury to property, and which suggested that such an action could be maintained even if the tortfeasor was deceased. Ultimately, the *Hunt* Court held that the Legislature had intended to enlarge the class of property rights to receive protection, and therefore the plaintiffs' claims could proceed despite the tortfeasor's death. (*Id.* at 296-297.) The *Hunt* decision, however, was limited to the estate; it did not expand damages for harm to a person.

In 1949, in an apparent effort to short-circuit any attempt to expand the *Hunt* decision to encompass injury claims, the Legislature amended Probate Code § 574 to exclude injuries to the person, while simultaneously enacting Civil Code § 956, which specifically permitted the survival of personal injury claims but limited the damages which could be recovered. Despite these specifications, there was still ambiguity as to which claims were or were not permitted under these code sections. For example, it was unclear whether actions such as malicious prosecution or libel might survive under the Probate Code if there was a pecuniary loss. Subsequent appellate decisions continued to try to align these disparate laws and existing precedent, such as when later court decisions prohibited punitive damages in wrongful death actions even though the 1949 revision contained no such specific prohibition.

The CLRC Tries to Clearly Preserve Survival Damages, But Gets Derailed by Insurance Industry Lobbyists

Enter the CLRC. In September of 1960, the CLRC issued its "Recommendation and Proposed Legislation Relating to Survival of Actions," which summarized the history of common law and California authority on survival actions, and then recommended change. Specifically, the CLRC pointed out that the common law principle under which claims for injuries to the person died with the victim was based on the old legal maxim *actio personalis moritur cum persona* – which "merely states a largely meaningless conclusion, has no compelling wisdom on its face, is of obscure origin, and appears to be of questionable application to modern condition." (California Law Review Commission, *Recommendation and Study Relating to Survival of Actions*, p. 3 (October 1960).) Accordingly, the CLRC recommended both punitive damages and "pain, suffering, or disfigurement" damages should be recoverable in a survival action.

In reaching this conclusion, the CLRC made three main arguments:

1. If such damages do not survive, "the death of a victim produces a windfall for the wrongdoer";
2. While it may be more difficult to establish evidence of "highly personal" damages such as pain and suffering, it is still possible to do so, and any difficulty should not be a basis for automatically precluding recovery; and

Laurel Halbany is an attorney at Kazan, McClain, Satterley and Greenwood in Oakland, representing victims of asbestos-related disease, particularly mesothelioma. She has represented toxic tort victims and their families for over fifteen years. She is a past chair of the AAJ LGBT Caucus and currently serves on the boards of: the American Association of Justice, the Consumer Attorneys of California, and the Alameda-Contra-Costa County Trial Association. She received the CAOC Presidential Award of Merit in 2017.

Loren Schwartz is a personal injury attorney specializing in high stakes catastrophic injury cases. He is a partner at Dunn & Panagotacos LLP in San Francisco and is on the Board of Directors for the San Francisco Trials Lawyers Association.

3. Without survival of damages for pain, suffering, and mental anguish, certain causes of action for which these are the only meaningful damages would effectively be moot.

In response to the CLRC's report, the Legislature passed Senate Bill No. 202 in 1961, which amended Probate Code § 574 and Code of Civil Procedure §§ 376 and 377. The statutes, however, did not follow the CLRC's recommendations. Instead, the Senate Judiciary Committee added statutory amendments which removed damages for pain, suffering, and disfigurement in direct contravention of the CLRC's recommendation. As explained in a contemporaneous letter from the Executive Secretary of the CLRC, it was apparent at hearings on the bill that "extensive lobbying had been accomplished by the insurance industry prior to the hearing." (John DeMoully, Letter of April 14, 1961.)

Advocates for Elders and Disabled People Sound the Alarm

This departure from the CLRC's recommendations had more drastic effects than the Legislature had anticipated. As predicted by the CLRC, the absence of pain, suffering, and disfigurement damages meant that there was little value in bringing claims for causes of action where these were all, or nearly all, of the likely damages. The elimination of these damages also effectively shut down claims for entire classes of injured plaintiffs – namely, those whose injuries did not result in large economic damages. As a practical matter, the economic viability of bringing survival actions for personal injury plaintiffs who did not have significant earned income – such as retirees, stay-at-home parents, children, and disabled persons – was effectively eliminated. The "windfall" to tortfeasors predicted by the CLRC became a jackpot when insurance companies quickly realized that delay in settlement could result in diminished liability, or even no liability at all, if they could stall negotiations until a plaintiff died.

Advocates for elders and disabled persons quickly sounded the alarm. Finally in 1982, California enacted the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) to offer civil remedies to victims of elder abuse and dependent-adult abuse or fraud. By 1992, the Legislature realized that elders and dependent adults were a "disadvantaged class," as there was a lack of incentives for attorneys to bring these cases to trial. (Cal. Welf. & Inst. Code § 15600(h).) Accordingly, the 1992 amendments included a new provision that the limitations on damages in California Code of Civil Procedure § 377.34 "shall not apply." (Cal. Welf. & Inst. Code §15657(b).)

The Widespread Impact of COVID-19 Leads to Senate Bill No. 447

While plaintiffs' advocates had long been unhappy with California Code of Civil Procedure § 377.34, these issues came to a head in early 2020 when COVID-19 abruptly closed courthouses throughout California. This was an especially devastating blow for elderly and terminally-ill plaintiffs, whose chances of surviving until trial were already tenuous. In one case, an elderly and dying mesothelioma victim had

been granted a preference trial date in June of 2020. After the trial date was continued twice and then vacated with no new date set, the plaintiff filed an emergency writ seeking to reinstate his trial date. He died while waiting for a ruling on his petition. (October 5, 2020 Order (Second Appellate District, No. B307239) in *Gillum v. Superior Court*, LASC Case No. 19STCV41833.)

Senate Bill No. 447, sponsored by Senator John Laird (D-17), sought to amend California Code of Civil Procedure § 377.34 so that damages for pain, suffering, and disfigurement – like all other damages – would be preserved in a survival action. While legislation generally is not retroactive, this bill specifically applied not only to newly-filed cases but also to existing cases that had been granted preference given the impact of COVID-19 and the particular hardships suffered by elderly and terminally-ill plaintiffs. Additionally, to address opposition by insurance companies, the bill was bracketed with a "sunset clause" and Judicial Council reporting requirements to evaluate how the new law has operated in practice.

So What Happens Next?

As of January 1, 2022, and at least through December 31, 2025, plaintiffs who file survival actions should be entitled to recover compensation for the decedent's pain and suffering. For cases that were filed before January 1, 2022, these damages will only be recoverable if there was a prior order granting preferential trial setting.

Although the statute is (for the most part) relatively clear on its face, it does leave certain questions open. A number of these questions are addressed below:

Can I Benefit from This New Law If My Previously-Filed Case Is Not a Preference Case?

For actions brought before January 1, 2022 where no motion for preference has been granted, attorneys may choose to dismiss the currently pending lawsuit without prejudice and then re-file where the Statute of Limitations has yet to expire. Having filed the new suit on or after January 1, 2022, the plaintiffs in those actions may then seek to recover pre-death pain and suffering that was otherwise unavailable in the prior case.

With that said, some defendants may seek to argue that a case that has been "filed" on or after January 1, 2022 is different from a case that has been "re-filed" on or after this date, such that pre-death pain and suffering remains unavailable in "re-filed" cases. This is an issue that may need to be litigated and resolved by the courts before definitive guidance can be provided.

How Does this Statute Affect Wrongful Death Cases Arising out of Medical Negligence?

Subsection (e) of the new statute provides: "Nothing in this section alters Section 3333.2 of the Civil Code."

Civil Code § 3333.2 indicates that with respect to an "injured plaintiff" in medical malpractice cases, "[i]n no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars ($250,000)."

Now imagine the following: Paul Patient goes to the hospital for a routine medical procedure. Unfortunately, the hospital fails to properly sterilize the equipment used in the procedure and, as a result, Paul develops a massive and painful infection. One month later, as a result of this infection, Paul dies.

Paul's wife, Wendy, retains your firm. As Paul's wife, Wendy has standing to bring both a wrongful death action and survival action.

The question then becomes: Is Wendy entitled to recover up to $250,000.00 in non-economic damages as part of the wrongful death action and a separate $250,000.00 in non-economic damages arising out of the pain and suffering sustained by her husband before he passed away?

Although there is no known authority directly on point at this time, there is persuasive authority which suggests that the answer to this question should be "yes." Under current case law, where an individual joins his or her Loss of Consortium Claim with his or her spouse's claim for Medical Negligence, the individual alleging Loss of Consortium may recover up to $250,000.00 in non-economic damages separate and apart from the injured spouse who may also recover up to $250,000.00 in non-economic damages. (See *Atkins v. Strayhorn* (1990) 223 Cal. App. 3d 1380.)

Just as loss of consortium results in damages which are separate and distinct from the damages sustained by the physically injured spouse, the losses sustained as the result of a wrongful death are similarly distinct from the losses sustained by the physically injured (and now deceased) spouse.

The holding in *Atkins* would therefore appear to be persuasive authority that, under California Code of Civil Procedure § 377.34, a plaintiff should be able recover up to $250,000.00 in non-economic damages as part of the survival claim and a separate $250,000.00 as part of the wrongful death claim.

What About Preference Cases?

There is nothing on the face of the new statute that affects a litigant's ability to petition the court for preferential trial setting. California Code of Civil Procedure § 36 authorizes a party who is over 70 years old to petition the court for preference if "[t]he health of the party is such that a preference is necessary to prevent prejudicing the party's interest in the litigation." The intent of the legislation is to safeguard qualifying litigants against the risk that death or incapacity will deprive them of the opportunity to have their case effectively tried and provide them with an opportunity to obtain an appropriate recovery during their lifetime. (See *Swaithes v. Superior Court* (1989) 212 Cal.App.3d 1082, 1085-1086.)

With that said, a defendant may seek to argue – either explicitly or implicitly – that because the litigant's non-economic damages will survive his death, that preference might not be "as necessary" under the new statute. Such a defendant may go so far as to argue that it doesn't matter if the plaintiff dies before trial, because his or her non-economic damages will still be available to the heirs. If a defendant seeks to make this argument, the court should be reminded that preference is mandatory provided the litigant: is over 70, has a substantial interest in the action as a whole, and has a health condition such that preference is necessary to prevent prejudicing the party's interest in the

litigation. (Cal. Code Civ. Proc. § 36(a); see also *Fox v. Superior Court* (2018) 21 Cal.App.5th 529.) As courts have recognized, "[e]lderly litigants are clearly entitled to have their case effectively tried and to the opportunity to enjoy during their own lifetime any benefits received." (*Swaithes, supra*, 212 Cal. App.3d ats 1086 [emphasis in original].) Additionally, California law has a strong preference for allowing litigants of any age to participate in preparing their claims for trial, and to enjoy any recovery for their injuries while they are still alive. (*Looney v. Superior Court* (1993) 16 Cal.App.4th 521, 532, fn. 12.)

What Do I Have to Report to the Judicial Council?

Under the new statute, a plaintiff who recovers compensation for a decedent's non-economic damages "shall, within 60 days after obtaining a judgment, consent judgment, or court-approved settlement agreement entitling the plaintiff to the damages" submit to the Judicial Council a copy of the judgment, consent judgment, or court-approved settlement agreement which includes information regarding the case including: (1) the date the action was filed; (2) the date of the case's final disposition; and (3) the amount and type of damages awarded, including economic damages and damages for pain, suffering or disfigurement. (Cal. Code Civ. Proc. § 377.34.)

In short, judgments following trial and "court-approved settlement[s]" involving plaintiffs who recover compensation for a decedent's non-economic damages are required to be reported. Settlements that are not "court approved" appear to be outside the scope of these new reporting requirements.

Conclusion

The passage of California Code of Civil Procedure § 377.34 is a major victory for Californians whose family members were unable to see their cases through to conclusion. It provides a meaningful forum for these family members to tell the stories of their loved ones, even if their loved ones do not get the opportunity to tell the story themselves. It also operates to eliminate the "death discount" from which defendants were previously able to benefit when a plaintiff died before his or her case could be resolved.

At the same time, some questions remain about the new law. Unless and until an appellate court weighs in, parties on both side of the "v" will likely find room to argue differing positions as to how the statute ought to be interpreted. TL

End notes

1 The *Hunt* opinion cites the Civil Procedure Act of 1330, enacted during the reign of Edward III, as precedent.

Status Update on Courts Throughout the Area

Curated by Brian Lance and Emily McGrath

SF Superior Court

In-person civil trials have resumed in SF Superior. Judge Feng is assigning courtrooms with minimal trailing in Department 206; however, the trial judges to whom parties have recently been sent are often already in the midst of another trial and/or slated to start one shortly. This has created something like a single-assignment system wherein parties who were "sent out to trial" in mid-February, for example, continue to appear before their trial judge for the next month (or even longer) for all issues arising prior to the actual start of their trial.

Furthermore, once the trial commences, the modifications persist. It appears most judges are requiring that potential jurors must confirm they are fully-vaccinated in order to participate in voir dire, which is conducted in-person with members of the venire spaced out as much as possible throughout the courtroom. Jurors, parties, party attorneys, the judge, and the courtroom staff must all remain masked at all times while in court. Witnesses are welcome to appear in-person or via videoconference technology. Witnesses who have recently appeared in-person have sat behind a plexiglass shield and worn a clear face mask provided by the court during their testimony.

It appears deliberations are taking place mostly as normal, with the juries being assigned to the largest rooms available and directed to remain masked during their deliberation sessions.

Alameda County

In-person civil trials have resumed in Alameda County Superior Court. Potential jurors are required to self-screen by reviewing a health screening survey before entering any court facility to participate in voir dire. They are not able to enter if they answer "yes" to any of the survey questions. They must also remain masked at all times while they are in the courtroom. Attorneys, court staff, and parties must also remain masked at all times while in court. Witnesses are welcome to appear via videoconference technology or in-person. Deliberations are taking place only at Rene C. Davidson Courthouse and East County Hall of Justice because these are the largest rooms available. Jurors must remain masked at all times.

For hearings other than trials, all non-criminal departments have the ability to conduct proceedings remotely; however, not all of these departments are able to conduct "hybrid" proceedings in which some participants are physically present in the courtroom while others appear remotely. This is largely due to the requirements for physical distancing and the size of some courtrooms. Alameda provides a listing for each department that can conduct hybrid proceedings, which is available on their website at: http://www.alameda.courts.ca.gov/Resources/Documents/ExecOffice/Hybrid%20Courtroom%20Readiness.pdf.

Contra Costa Superior Court

Pursuant to Code of Civil Procedure section 367.75 and Rule of Court 3.672, all civil departments are open for in-person appearances. Parties also have the option to appear remotely using the Zoom or CourtCall platform. If a party is planning to appear remotely, notice must be provided to the court and all parties by filing and serving form RA-010. If there are any objections to a remote appearance, the opposing party must fill out Form RA-015 and explain to the court why a remote appearance should not be allowed at trial or an evidentiary hearing.

Following a Contra Costa Health Service announcement that rescinded certain indoor mask requirements for vaccinated individuals, Contra Costa Superior Court announced that there will be no change the court's masking policy. Specifically, anyone entering the court's facilities, regardless of vaccination status, must wear a mask at all times.

Marin Superior Court

Civil trials have resumed in Marin but there is a significant backlog. Judges are setting two trials each week for the remainder of 2022, prioritizing cases pending for nearly five years and those with a preference. Hearings and CMCs are still being held via Zoom but emergency orders which allowed them will soon be lifted. Check the Court's website.

Sacramento Superior Court

Effective January 3, 2022, the Gordon D. Schaber and Hall of Justice courthouses are open for in-person civil hear-

Brian Lance is an attorney at the firm Abbey, Weitzenberg, Warren and Emery, P.C. in Santa Rosa. Brian represents catastrophically injured clients in cases involving personal injury, medical malpractice, and elder abuse. Brian is a National Trial Lawyers Top 40 Under 40 Attorney and is a Super Lawyers Rising Star.

Emily McGrath and her partners at Lawless, Lawless & McGrath litigate employment discrimination and civil rights cases. They represent their clients in trials and appeals, arbitrations, and negotiations.

ings. The court, however, encourages all parties to appear remotely unless their matters involve an evidentiary hearing. Such matter include: civil jury trials, civil short cause trials, order of examination hearings, and civil harassment hearings or trials. Sacramento requires all persons inside the courthouse and court facilities to wear masks regardless of vaccination status. The court is significantly reducing the number of jurors being called to report for jury service at any one time, and is staggering arrival times throughout the day.

Pursuant to Code of Civil Procedure section 367.75, parties may motion the court for a remote appearance in evidentiary hearings by filing and serving a Notice of Remote Appearance (RA-010). Opposing party must file a Remote Proceeding at Evidentiary Hearing or Trial (RA-015).

Santa Clara County

In-person civil trials have resumed in Santa Clara County Superior Court. Potential jurors must wear masks in the courtroom. Plexiglass, electrostatic sprayers, and hand sanitizers are being used in all courtrooms. People entering the court facilities are not being asked about vaccination status. Witnesses are welcome to appear via videoconference technology based on current Emergency Rules, but the proceedings are conducted primarily in person.

San Mateo County

San Mateo County continues to operate remotely. Each department has a Zoom link available, and it is currently mandatory appear remotely for all civil proceedings. The court has moved to a direct calendar system wherein all civil cases are assigned to a single judge for all purposes.

Sonoma County

It appears that Sonoma County has not conducted any civil jury trials during the pandemic. This has created a significant hurdle in getting justice for plaintiffs. As a result, some plaintiffs and their attorneys have had to resort to bench trials and have had great results in what otherwise would have been a years-long wait for a jury trial date. There is a hope and expectation that Sonoma courts will begin conducting civil trials within the next few months.

Currently, all cases set for trial up until March 31, 2022 will be reset. All trial dates up until March 31, 2022 will serve as a trial setting conference. All statutory deadlines will then run from the newly-selected trial date. At this point, cases are typically being set for trial at least six months out; however, once trials actually start, it will be difficult to get a courtroom due to the backlog.

Jury selection will take place at the Sonoma County Fairgrounds due to the larger conference rooms available to accommodate potential jurors. Jury selection for criminal cases took place at this location during the pandemic, and reports are that the process took significantly longer than it did pre-pandemic. It is fair to assume that once civil trials start up again, the parties will need to account for additional time necessary to pick a jury. TL

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SFTLA

Trial Lawyer of the Year

Distinguished Mediator of the Year – Arnold Levinson

Distinguished Defense Attorney – Elizabeth Burns

Investigative Reporter Award – Jack Dolan

Presentation of the Hon. Donald J. Sullivan Award

Civil Justice Award – Mark Hooshmand

Lifetime Achievement – Gerry Mannion

Trial Lawyer of the Year - 2022 Finalists

JENNIFER FIORE, SUSAN KANG-GORDON, AND JODY MOORE

Ledesma v Mariner Health Care Inc.

BRIAN GRAZIANI

Brusco v Jackson, MD, Napa Valley Plastic Surgery

LARRY ORGAN, CIMONE NUNLEY & BERNARD ALEXANDER

Owen Diaz v Tesla

MATT WHITE

Copeland v Mogos Zeregaber Behere: Desoto Cab Co.

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We're Under Attack — Again — and We Need Everyone To Help

Imagine if your contingency fees were limited to 20 percent. How many cases could your firm afford to take? How many California consumers would be left without recourse when they are injured or cheated?

We know the devastating effects on consumer access to the courtroom resulting sfrom fee caps. This is the world that big corporations would like to create to insulate themselves from accountability for wrongdoing. That's why, last October, the deceptively-named Civil Justice Association of California (CJAC) submitted three ballot initiatives, each of which includes a 20 percent cap on contingency fees.

It's no mystery why CJAC is the face of this proposal. That organization is a front for corporations that are desperate to stay out of the courtroom and avoid accountability for their actions. Not so long ago, CJAC proudly listed the corporations on its board of directors displayed on its website. Leading up to this initiative filing, however, that information was removed because it's literally a "who's who" of corporate bad actors: tobacco, oil, pharmaceutical, insurance, banking, automotive, and medical interests who all stand to lose a lot when they are held accountable for their products and practices that harm consumers.

With supporters like these, it's no wonder CJAC wants to keep them hidden. If Californians knew who is behind this effort to keep them out of the courtroom, they would surely be wary. That's why Consumer Attorneys of California launched a website – UnmaskingCJAC.com – to show Californians how the biggest multi-billion-dollar corporations on the planet are behind the effort to limit consumers' ability to fight back against injustice.

If any of the CJAC fee cap initiatives are approved, they will reshape our typical David vs. Goliath battles. In this new world, David wouldn't even get to have a slingshot and Goliath would have a bazooka. This would be a real threat to your practice and to the ability of Californians to win justice when they are wronged.

CJAC recently put one of their initiatives out for signatures in an attempt to qualify it for the November 2022 ballot, but they soon put that effort on hold. As I write this in late January, it is unlikely any of these initiatives will be on the ballot this November, but that doesn't mean they won't resume signature gathering. In fact, CJAC has publicly stated that they aren't stopping; they are just reloading. It seems likely that they are setting their sights on qualifying the measure for the November 2024 election when Donald Trump may well be on the ballot, bringing out more conservative voters.

The main goal of these large corporations is, and always has been, to sharply limit contingency fees. They know how much this would harm consumers' ability to fight them in court. They also know that this is a result that will likely be lost on voters at the ballot. Many consumers will perceive a fee cap as a benefit to them by reducing what they will have to pay to lawyers, never realizing that it will ultimately limit access to justice. This threat hanging over our practice will not go away. Not soon... not anytime. We are always under threat. We must always be prepared to do battle.

The good news is that we're used to fighting battles... and winning. This is a battle we've fought several times before. **Our past successes give us confidence that this battle is one we can win, but only when everyone pulls together to give of their time and their treasure – doing the hard work to expose these corporate raiders.**

Our fundraising has been a visible show of strength in the fight against these initiatives. It may have been a factor in CJAC's decision to regroup and pause on collecting signatures. When our war chest is full, it is the best defense against our foes from pursuing these measures.

Help us fortify for the battle to come. Please consider a donation to CAOC's organizational and political efforts at https://seekingjustice-caoc.com. As in the courtroom, we are the ones who will lead the fight to protect our fellow Californians! TL

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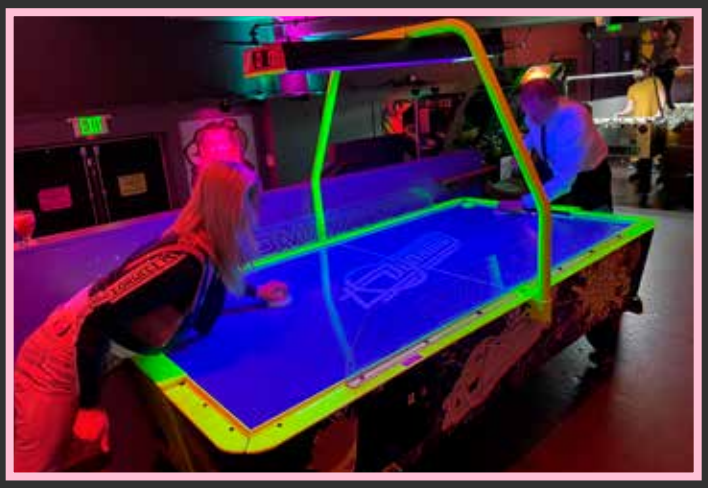

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founders. When framing plaintiff's case, instead of advocating a change in the status quo, your message should be to apply traditional values to *restore the status quo*.

Security, Conformity, and Protecting the Status Quo

One view of protecting the status quo is not to change anything. You can advocate that adherence to rules and values preserves the status quo. Thus, if the defendant violated the rules, it was the defendant, not the plaintiff, who threatened the status quo. Example: "Stability of our community comes from rules that are followed, not broken." Conservatives see tradition, stability, conformity and order as rule-based and their concern about negative outcomes results in a more harsh and demanding expectation of behavior. Therefore, it is important that the rules be presented as concrete, detailed, and clearly defined, so it's clear that the defendant knew specifically what was prohibited. Conservatives believe generally that rule violators endanger society and should be condemned for their transgressions.

Studies have shown that conservatives are more critical of transgressions than omissions. Therefore, whenever possible, an omission should be re-characterized as a rule-breaking action. For example, in a case involving a child hit by a car driving through a neighborhood, the negligence should not be described as the failure to keep a lookout, that is, an omission. Instead:

> "The driver knew that there could be children, knew that safe driving rules required that he be vigilant to protect the children, and intentionally drove as if he were on the open road. And that action had predictable consequences."

The conservative view of fairness was examined by psychologist Jonathan Haidt in his book, *The Righteous Mind—Why Good People Are Divided by Politics and Religion*, as a combination of the Protestant work ethic and the Hindu law of karma: "People should reap what they sow. People who work hard should get to keep the fruits of their labor. People who are lazy and irresponsible should suffer the consequences." This view can be used to advantage by framing the case to fit this concept of right and wrong. For example:

Lindsey always took personal responsibility for her life and the lives of her family. She didn't believe in laziness; she worked hard, but now she doesn't get to enjoy the fruits of her labor. Why not? Because of the irresponsibility of the person who took everything away from her that she had earned. That person wants a free ride, trying to blame anyone but himself and refusing to accept responsibility.

Conclusion

The status quo is not a reality; it is a perception. Viewed one way, it can cause a jury to resist change, but framed differently, it can impel the jury to require change to set things right. Liberal jurors are more likely to award damages to relieve the suffering of a plaintiff and to promote his or her well-being. But conservative moral values can result in an award of damages to the plaintiff as punishment of a defendant whose violation of the rules caused a burden on society or the damaging of a person who was an asset to the community. Together, liberal and conservative moral values, fairness, and sense of social justice and social order can combine to reach a common ground that honors each and benefits the plaintiff. TL

Persuasion Science

By John Blumberg

Isn't losing a case terrible? It is a rejection by the jury of what we believed to be true. And we ask ourselves, "Why wasn't the jury convinced?" Ten years ago, I began my search for answers to the question of why our advocacy is sometimes rejected. What I learned was that the answer is rooted in science, namely how the human brain processes and filters information, how mental fatigue and cognitive overload affect reception of information, and how information is regularly distorted so that it doesn't conflict with our view of how things are supposed to be. Understanding this science is crucial to our responsibilities as trial lawyers. I decided to write a book about it: *Persuasion Science for Trial Lawyers*. This article is adapted from some of the chapters.

We don't see things as they are; we see things as we are

Actor Colin Firth (*The King's Speech*) funded an academic study whose purpose he said was "to find out what was biologically wrong with people who don't agree with me." The study results did not find that there was anything biologically "wrong" but did confirm a possible correlation between brain structure and how different people filter information. For example, the well-known senses of sight, touch, hearing, smell, and taste allow us to experience the world. The stimuli are identical but experienced differently from person to person. This is due to differences in individual processing. In other words, everyone has "filters" that are due, in large part, to evolution.

The earliest humans lived in an environment where they faced daily threats to their existence: wild animals, natural disasters, hostile neighboring tribes, injury, infection, death. Fear of and protection against negative consequences, likely allowed their survival as a species and our existence today. Numerous studies have resulted in a theory that the fear of negative consequences created a "negativity bias" that affects everyone differently. For example, in a crisis, some see only danger, but others see opportunity. Perception is not a reflection of universal reality; rather, it is a filter created by each person's unique experience and biological brain function.

Challenging the status quo

Lawsuits are filed and prosecuted because the plaintiff wants to change the status quo. The defense tries to keep things the way they are. The jurors must decide whether the defendant keeps its money (the status quo) or gives it to the plaintiff. Long before social scientists discovered the psychological and evolutionary basis for why change is hard, philosophers had an inkling. In the 16th century, Niccolo Machiavelli stated in his political treatise, *The Prince*, "There is nothing more difficult to take in hand, more perilous to conduct, or more uncertain in its success, than to take the lead in the introduction of a new order of things." When trial lawyers present new information to jurors, their first thought isn't, "What an interesting and logical idea." More likely, it is, "Yeah, not so sure about that . . . ." Jurors will not change their beliefs, so it is incumbent on trial lawyers to frame their cases so that the message is consistent with what jurors already believe.

Understanding liberal versus conservative orientation may be the key. There is broad consensus that the brains of liberals and conservatives process information differently, leading to their respective political alignment. But beyond political alignment, their differences in cognitive processing also result in different attitudes and values. For the trial lawyer, it is important to recognize that these differences may be the reason that facts and arguments are accepted or rejected. The degree to which one's filter is focused on fear and negativity creates the liberal versus conservative belief system and worldview. Conservative inclinations include security, conformity, authority, predictability, certainty, preference for order, tradition, and traditional values. These all favor maintaining the status quo. Such pre-dispositions should be the building blocks of how you frame plaintiff's case.

An example of framing that reaches those typically opposed to change is found in the inaugural address by President Bill Clinton on January 20, 1993:

> "When our founders boldly declared America's independence to the world and our purposes to the Almighty, they knew that America, to endure, would have to change. Not change for change's sake, but change to preserve America's ideals: life, liberty, the pursuit of happiness. Though we march to the music of our time, our mission is timeless. Each generation of Americans must define what it means to be an American . . . and the urgent question of our time is whether we can make change our friend and not our enemy."

Clinton's message was carefully designed to reach conservatives who were resistant to change by framing change as the original intent of our

Continues on page 30

John P. Blumberg is board certified as a trial lawyer, a medical malpractice specialist, and a legal malpractice specialist. He serves on the boards of local and national trial lawyer organizations. This article contains excerpts from his book, Persuasion Science for Trial Lawyers, which is available in print, ebook, PDF and audio. https://www.fastcase.com/store/fcp/persuasion-science

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