

CAALA VEGAS 2017
ROCK OF AGES

SECTION 3

DAMAGES

**DAMAGES DERIVATIVE CLAIMS:
LOSS OF CONSORTIUM AND BYSTANDER EMOTIONAL DISTRESS**

By David M. Ring

Loss of Consortium

Overview: When an injury occurs as a result of an accident, it is sometimes so severe that the family unit will never be the same. In other words, members of the same household as the injured party may suffer their own detriment when the injured party becomes incapable of engaging in routine activities and contributing to the family's financial and moral support. In these cases, the injured party's spouse/partner might have their own independent cause of action – loss of consortium (i.e., loss of support, services, love, companionship, society, affection, sexual relations and solace). A loss of consortium action may be maintained even without a claim by the injured party as long as the loss of consortium plaintiff is able to prove: (1) an actionable tortious injury to the injured spouse/partner and, (2) resulting loss of consortium.

Who can recover? Recovery for loss of consortium is limited to *spouse or registered domestic partner* for injury *during* marriage or partnership. A cohabitant, regardless of their “marriage-like” relationship, has no standing to sue for loss of consortium. Also, there is no loss of consortium cause of action for injury to a parent-child relationship.

Timing of Injury: The cause of action for loss of consortium is recognized only for injury to a relationship arising out of a marriage or registered domestic partnership. An injury that occurred *before* marriage or registered domestic partnership cannot give rise to a loss of consortium claim, as neither party has the right to the other's consortium before the marriage or partnership. This is also the case even where the injured party did not discover the extent of the injury until after the parties married or entered into the partnership.

- Zwicker v. Altamont Emergency Room Physicians Medical Group* (2002) 98 Cal.App.4th 26
 - An alleged medical misdiagnosis resulted in removal of a man's testicle. The man married shortly after several tests showed the man to be infertile. Two weeks after the wedding, the couple sued the responsible medical providers. The wife had no cognizable loss of consortium claim because the injury occurred and was known before marriage.

- Leonard v. John Crane, Inc.* (2012) 206 Cal.App.4th 1274
 - A man was exposed to asbestos for several decades, but exhibited no symptoms of mesothelioma until almost 20 years after he married. The wife could bring a loss of consortium claim. The loss of consortium claim arose when the injured party's illness or its symptoms are discovered or diagnosed, not at the time of tortious act causing injury.

Actionable Harm? The injury sustained by the injured party must *incapacitate* the marital/partnership relationship for a definite or indeterminable length of time. Purely emotional injury to the injured party supports a loss of consortium action if the trauma effectively incapacitates the injured party from giving the loss of consortium plaintiff love, affection, society, comfort, and/or sexual relations. A loss of consortium claim cannot be based on the ordinary embarrassment, humiliation, anxiety and other distress that one inevitably might experience when a spouse or registered domestic partner suffers physical injury.

CAUTION: Attorney's Duty to Alert Client's Spouse/Domestic Partner to Loss of Consortium Claim
Counsel representing a personal injury victim has an *obligation* to inform the victim's spouse/partner of the possibility of a loss of consortium claim. *Meighan v. Shore* (1995) 34 Cal.App.4th 1025, 1044.
Bystander Claims for Negligent Infliction of Emotional Distress – *Dillion v. Legg*

Overview: A bystander who witnesses the negligent infliction of death or injury of another may recover for resulting emotional trauma even though the bystander did not fear imminent physical harm. The bystander negligent infliction of emotional distress cause of action was established in the landmark California Supreme Court case *Dillon v. Legg* (1968) 68 Cal.2d 728. To establish the duty element of this type of negligent infliction of emotional distress claim it must be shown that: (1) plaintiff was closely related to the injured victim, (2) plaintiff was present at the scene of the injury-producing event when it occurred and was then aware the event caused the victim injury, and (3) as a result, plaintiff suffered serious emotional distress.

Who Can Recover? Recovery is limited to a plaintiff “closely related” by blood or marriage to the injured party. Absent exceptional circumstances, recovery is limited to relatives residing in the same household, or parents, siblings, children, and grandparents of the victim. *Thing v. La Chusa* (1989) 48 Cal.3d 644, 687. An example of an “exceptional circumstance” is a close relationship between a foster parent and a child. *Long v. PKS, Inc.* (1993) 12 Cal.App.4th 1293, 1300. Aunts, uncles, and other relatives not normally part of the immediate family can state a bystander cause of action if they lived with the injured party in a functioning family unit. Cohabitation without marriage (or a registered domestic partnership) does not constitute a close relationship contemplated by *Dillon/Thing* – policy considerations dictate that a bright line be drawn here.

- **Judge vs. Jury Question?** Both CACI and BAJI provide that the *court* should determine *as a matter of law* whether plaintiff has the necessary close relationship to the injury victim.

Presence and Awareness: It is not necessary that a bystander actually have witnessed the infliction of injury, provided that the plaintiff was at the scene of the accident and was “sensorially aware” of the accident and the necessarily inflicted injury. *Wilks v. Hom* (1992) 2 Cal.App.4th 1264, 1271. Although a bystander may establish presence at the scene through nonvisual sensory perception, “someone who hears an accident but does not then know it is causing injury to a relative does not have a viable [bystander] claim for [negligent infliction of emotional distress], even if the missing knowledge is acquired moments later.” *Ra v. Superior Court* (2007) 154 Cal.App.4th 142, 149.

- Thing v. La Chusa* (1989) 48 Cal.3d 644
 - A mother could not recover for emotional distress suffered when told her son was struck by an auto even though she rushed to the scene and saw her “bloody and unconscious child, whom she believed was dead, lying in the roadway.” The mother was not present when the accident occurred and was not then aware her son was being injured.
- Wilks v. Hom* (1992) 2 Cal.App.4th 1264
 - Mother of child injured in explosion could receive damages for bystander emotional distress where mother was *contemporaneously aware* that the explosion was causing the injuries, even though mother did not actually see or hear her daughter being injured; mother was present at the scene of explosion, was blown out of house at the same instant damage was done to the child, and instantly knew of likely severe damage to child.

Actionable Harm? Under this bystander theory, the emotional distress must be “serious,” meaning a reaction beyond that which would be anticipated in a disinterested plaintiff and which is not an abnormal response to the circumstances. Proof of physical consequences is not a prerequisite to recovery.

ENHANCED REMEDIES IN ELDER & DEPENDENT ADULT ABUSE CASES

By Kim Valentine

Elder Abuse: Enhanced Remedies

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ELDER ABUSE
it's a crying shame

There are different types of Elder Abuse.....



HIS DAUGHTER WAS HIS PRIDE AND JOY, NOW SHE'S TAKING BOTH.

Common Types of Neglect & Abuse Cases

- Pressure Sores (42 C.F.R. § 483.25(c))
- Failure to Assess Change in Condition (42 C.F.R. § 483.25)
- Administration of Psychotropic Drugs as a Chemical Restraint without Informed Consent (42 C.F.R. §§ 483.13(a); 483.25(l))
- Failure to Provide Pain Control (42 C.F.R. § 483.25)
- Multiple Falls (42 C.F.R. § 483.25(h))
- Contractures (42 C.F.R. § 483.25(e)(1))
- Fecal Impaction (42 C.F.R. § 483.25)
- Physical Assault (42 C.F.R. § 483.13(b))
- Rape (42 C.F.R. § 483.13(b))

ENHANCED REMEDIES IN ELDER & DEPENDENT ADULT ABUSE CASES

By Kim Valentine

CACI 3103 (adopted Jan. 2017) – Neglect Essential Factual Elements

[Plaintiff] claims that she was neglected by [Defendant/Defendant's employer] in violation of the Elder Abuse and Dependent Adult Civil Protection Act. To establish this claim, [Plaintiff] must prove all of the following:

- 1) That [Defendant/Defendant's employer] had a substantial caretaking or custodial relationship with [Plaintiff], involving ongoing responsibility for her basic needs, which an able-bodied and fully competent adult would ordinarily be capable of managing without assistance;
- 2) That [Plaintiff/Decedent] was [65 years of age or older/ a dependent adult] while she was in [Defendant/Defendant's Employer]'s care or custody;
- 3) That [Defendant] failed to use that degree of care that a reasonable person in the same situation would have used in providing for Plaintiff's basic needs, including: assisting in personal hygiene or in the provision of food, clothing, or shelter; providing medical care for physical and mental health needs; protecting from health and safety hazards; preventing malnutrition or dehydration, [insert other grounds for neglect] [including statutes];
- 4) That [Plaintiff/Decedent] was harmed, and
- 5) That [Defendant/Employer Defendant's Employee]'s conduct was a substantial factor in causing [Plaintiff/Decedent]'s harm.

CACI 3104 (2017) – Neglect – Enhanced Remedies Sought

[Plaintiff] also seeks to recover [attorney fees and costs/ [and] damages for [Plaintiff]'s pain and suffering.] To recover these remedies, [Plaintiff] must prove all of the requirements for neglect by clear and convincing evidence, and must also prove by clear and convincing evidence [Defendant/Employer Defendant]'s employee] acted with [recklessness/oppression/fraud/ [or] malice] in neglecting [plaintiff] If [plaintiff] proves the above, I will decide the amount of attorney's fees and costs.]



"Clear and Convincing"

ENHANCED REMEDIES IN ELDER & DEPENDENT ADULT ABUSE CASES

By Kim Valentine

“Recklessness” Defined

- CACI 3113: “Recklessness” Explained
[Defendant]/[Name of Employer Defendant’s Employee] acted with “recklessness” is [he/she] knew it was **highly probable** that [his/her] conduct would cause harm and [he/she] **knowingly disregarded this risk**.
“Recklessness” is more than just the failure to use reasonable care.



“Malice” and “Oppression” Defined

- CACI 3114:
“Malice” means that [(name of individual defendant)]/[(name of employer defendant’s employee)] acted **with intent** to cause injury or that [his/her] conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probably dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.
“**Despicable Conduct**” is conduct so vile, base, or contemptible that it would be looked down on and despised by reasonable people.
- CACI 3115:
“Oppression” means that [name of individual defendant]’s / [name of employer defendant’s employee’s] conduct was despicable and subjected [name of Plaintiff/Decedent] to **cruel and unjust hardship** in knowing disregard of [his/her] rights.
“**Despicable conduct**” is conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people.

ENHANCED REMEDIES IN ELDER & DEPENDENT ADULT ABUSE CASES

By Kim Valentine

Another 2 concepts to discuss.....



CACI 3114



CACI 3116

"Fraud" Defined

• CACI 3116:
"Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact with the intention of depriving [name of plaintiff/decendent] of property or of a legal right or otherwise to cause [name of plaintiff/decendent] injury.



• Evidence of Fraud can be found in:

- Different versions of medical records
- Computer vs. Handwritten charting
- Comparison to time cards
- Admission Coordinators do not advise potential residents of bad history
- Failures to obtain informed consent

CACI 3102A - Employer Liability for Enhanced Remedies

[Plaintiff] also claims that [employer defendant] is responsible for [attorney's fees and costs/ [and] [Decedent]'s pain and suffering before death]. To establish this claim, [Plaintiff] must prove by clear and convincing evidence [insert one or more of the following options]:

- 1) That [name of individual defendant] **was an officer, director, or managing agent of** [employer defendant] acting on behalf of [Defendant]; or
- 2) That an officer, a director, or a managing agent of [employer defendant] had **advance knowledge of the unfitness** of [name of individual defendant] and **employed him/her with a knowing disregard of the rights or safety of others**; or
- 3) That an officer, a director, or a managing agent of [employer defendant] **authorized** [name of individual defendant]'s conduct; or
- 4) That an officer, a director, or a managing agent of [name of employer defendant] knew of [individual defendant]'s wrongful conduct and **adopted or approved the conduct after it occurred.**

ENHANCED REMEDIES IN ELDER & DEPENDENT ADULT ABUSE CASES

By Kim Valentine

Employer Liability for Enhanced Remedies – “Notice”

Nevarrez v. San Marino Skilled Nursing and Wellness Centre (2013) 221 Cal.App.4th 102

- DPH Citation does not fit within “Public Records Exception” to Hearsay rule
- Evidence of DPH Citation (conclusion) improperly interfered with jury’s function as fact-finder and was prejudicial on verdict of negligence and elder abuse
- **Opinion does not preclude use of Prior DPH Citations/Deficiencies to establish Defendants’ “Notice”** of care deficiencies. Defendants’ subsequent failure to take action to correct deficiencies despite knowledge of foreseeable harm evidence Defendants authorized the conduct
- Held Maximum penalty for any number of violations of a resident’s rights under *California Health & Safety Code* Section 1430(b) cause of action is \$500.00 per lawsuit. (Note: *Jarman v. HCR Manorcare, Inc. (2017) 215 Cal.Rptr.3d 231* held statutory award of up to \$500.00 was available “per cause of action, rather than per lawsuit.” Case unciteable and on appeal).

Employer Liability for Enhanced Remedies – “Ratification”

- *Coats v. Construction & Gen. Laborers Local # 185 (1972) 15 Cal.App.3d 908* - a union’s officers were informed their employees assaulted a union member, but they refused to discipline the employee. The court found the union’s failure to discharge or discipline the offending employees amounted to ratification which justified an award of punitive damages against the employer under Civil Code 3294, subdivision (b).
- *Delfino v. Agilent Technologies, Inc. (2006) 145 Cal.App.4th 790* – “an employer may be liable for an employee’s willful and malicious actions under principles of ratification...The failure to discharge an employee after knowledge of his or her wrongful acts may be evidence supporting ratification.”

“Caps” on Non-Economic Damages

- *California Civil Code §3333.2* - “a) In any action for injury against a health care provider based on professional negligence, the injured plaintiff shall be entitled to recover noneconomic losses to compensate for pain, suffering, inconvenience, physical impairment, disfigurement, and other nonpecuniary damage. b) In no action shall the amount of damages for noneconomic losses exceed two hundred fifty thousand dollars (\$250,000.00).”
- *Welfare & Institutions Code §15657(b)* - “The limitations imposed by Section 377.34 of the Code of Civil Procedure on the damages recoverable shall not apply. However, the damages recovered shall not exceed the damages permitted to be recovered pursuant to subdivision (b) of Section 3333.2 of the Civil Code.”
- *California Code of Civil Procedure §377.34* - “In an action or proceeding by a decedent’s personal representative or successor in interest on the Decedent’s cause of action, the damages recoverable are limited to the loss or damage that the decedent sustained or incurred before death, including any penalties or punitive or exemplary damages that the decedent would have been entitled to recover had the decedent lived, and do not include damages for pain, suffering, or disfigurement.”

ENHANCED REMEDIES IN ELDER & DEPENDENT ADULT ABUSE CASES

By Kim Valentine

“Caps” apply to Wrongful Death actions arising from Neglect?

- No case authority which states a “cap” applies to wrongful death actions premised upon neglect or abuse, **BUT**
- Pain and Suffering damages for professional negligence (Civil Code 3333.2) and neglect (Welf. & Inst. Code 15657) are capped at \$250,000.00....

“Caps” do not apply to RCFE

- Residential Care Facilities for the Elderly (“RCFE”) are non-medical facilities. Residential Care Facilities are “expressly defined as nonmedical board and care facilities which provide a supervised and structured place to live for persons in need of such assistance” such that MICRA does not apply. *Kotler v. Alma Lodge* 63 Cal. App. 4th 1381.
- *Boice v. Emeritus* (unpublished Superior Court ruling) – “the Court finds that the specific reference to Civil Code section 3333.2(b) in Welfare and Institutions Code section 15657(b), is only a reference to the monetary cap of \$250,000 on noneconomic damages, and it is applicable to all defendants even if they do not qualify as health care providers.”

Enhanced Remedies – Attorney Fee award Welf. & Inst. 15657

- Where it is proven by clear and convincing evidence that a defendant is liable for physical abuse...or neglect... and that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of this abuse, in addition to all other remedies otherwise provided by law: a) *The Court shall award to the plaintiff reasonable attorney’s fees and costs.*”

ENHANCED REMEDIES IN ELDER & DEPENDENT ADULT ABUSE CASES

By Kim Valentine

Attorney's Fee Award - Factors

Welf. & Inst. Code 13657 states "The award of attorney's fees pursuant to subdivision (a) of section 13657 shall be based on all factors relevant to the value of the services rendered, including, but not limited to, the factors set forth in Rule 4-200 of the Rules of Professional Conduct of the State Bar of California, and all of the following:

- a) The value of the abuse-related litigation in terms of the quality of life of the elder or dependent adult, and his results obtained;
- b) Whether the Defendant took reasonable and timely steps to determine the likelihood and extent of liability;
- c) The reasonableness and timeliness of any written offer in compromise made by a party to the action.

California Rules of Professional Conduct Rule 4-200 further directs the Court to consider other factors, including:

- a) The amount of the fee in proportion to the value of the services performed;
- b) The skill requisite to perform the legal service properly;
- c) The amount involved and the results obtained;
- d) The experience, reputation, and ability of the lawyers performing the services;
- e) Whether the fee is fixed or contingent; and
- f) The Time and labor required.

Attorney's Fee Award

- Reasonableness of conduct during mediation and settlement discussions
- Risk of Litigation - *Lodestar* Multiplier



PRESENTING SPECIAL DAMAGES

By Christopher T. Aumais

- Background to Special Damages/Economic Damages
- Key Jury Instructions
- Past and Future Medical Expenses
 - *Howell* and its progeny
- Lost Earnings/Lost Earning Capacity
- Other Items of Economic Damages
- Samples of Economic Damages Presented at Trial
- Sample Questions from Newer Lawyers

Selected Reading List

- Plaintiff's Opposition To Defendant's Motion in Limine No.4 For Proper Measure Of Plaintiff's Future Medical Expenses
- Defendant's Motion In Limine No.4 For Proper Measure Of Plaintiff's Future Medical Expenses; Memorandum Of Points And Authorities; Declaration Of Jeffrey J. Olin

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF LOS ANGELES, CENTRAL DISTRICT
10

11 CHRIS WILSON,
12 Plaintiff,
13
14 v.
15 LEGEND HOMES; DANNY LERNER; and
DOES 1 Through 20, Inclusive,,
16 Defendants.
17

Case No. BC520987

*(Assigned for All Purposes to:
Hon. David Cunningham, Dept. 306)*

Action Filed: 9/11/13

**PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION *IN LIMINE* NO.
4 FOR PROPER MEASURE OF
PLAINTIFF'S FUTURE MEDICAL
EXPENSES**

TRC

Date: 9/9/2016
Time: 10:00 a.m.
Dept.: 92

TRIAL

Date: 10/4/2016
Time: 9:00 a.m.
Dept.: 306

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25 **TO THE HONORABLE COURT, DEFENDANTS AND TO THEIR ATTORNEYS OF**
26 **RECORD:**

27 Plaintiff Chris Wilson ("**Plaintiff**") hereby respectfully submits this memorandum in opposition
28 to Defendant Daniel Lerner's ("**Defendant**") motion for proper measure of Plaintiff's future medical

1 expenses.

2 This Opposition is based upon the accompanying Memorandum of Points and Authorities, the
3 pleadings and papers on file herein, and upon such further oral and documentary evidence as may be
4 presented at the time of hearing.

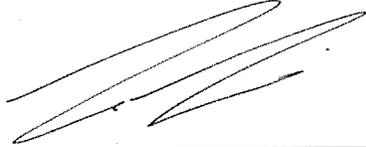
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6 DATED: October 6, 2016

GIRARDI | KEESE

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By: 

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CHRISTOPHER T. AUMAIS
Attorneys for Plaintiffs

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **SUMMARY**

4 This lawsuit arose out of an injury to Plaintiff Chris Wilson ("Plaintiff) on November 28,
5 2011, at a home being built by Defendant Daniel Lerner ("Defendant"). Plaintiff contends that the
6 Defendant negligently maintained and supervised the jobsite, and that the negligence of the Defendant
7 caused Plaintiff to suffer injuries when an outrigger from a scaffold fell – striking Plaintiff in the head,
8 knocking him to the ground, and causing a blunt trauma injury, as he entered the home. Defendant
9 denies that he was negligent and contests the nature and extent of Plaintiff's injuries.

10 **II.**

11 **LEGAL STANDARD IN RULING ON MOTIONS *IN LIMINE***

12 Motions *in limine* lacking factual support and argument are improper. If allowed, such
13 motions would force the court to “rule in a vacuum.” (*Kelly v. New West Federal Savings* (1996)
14 49 Cal.App.4th 659, 670.) Motions *in limine* may also be inappropriate where it is difficult to
15 specify exactly what evidence is the subject of the motion. (*People v. Morris* (1991) 53 Cal.3d
16 152, 188-190.) “Until the evidence is actually offered, and the court is aware of its relevance on
17 context, its probative value, and its potential for prejudice, matters related to the state of the
18 evidence at the time the objection is made, the court cannot intelligently rule on its admissibility.”
19 (*People v. Jennings* (1988) 46 Cal.3d 963, 975, n.3). Actual testimony often defies pretrial
20 predictions of what a witness will say on the stand. (*Morris*, 53 Cal.3d at 188.) Events in the trial
21 may change the context in which the evidence is offered to an extent that a renewed objection is
22 necessary to satisfy the language and purpose of California Evidence Code § 353. (*Kelly*, supra, at
23 671.)

24 **III.**

25 **LEGAL ARGUMENT IN OPPOSITION**

26 **A. DEFENDANT'S MOTION IN LIMINE IS NOT ADEQUATELY PRESENTED.**

27 As noted above, motions in limine must be presented with adequate factual and legal support
28 to be granted. Motions requesting rulings that would "merely be declaratory of existing law or would

1 not provide any meaningful guidance for the parties or witnesses" are improper. (*Kelly*, supra, 49
2 Cal.App.4th at p. 670.) In *Kelly*, defendant Amtech filed a number of motions in limine. Among them
3 were motions to exclude "any testimony of the plaintiffs which is speculative" and any evidence of
4 prior events that lacked foundation. (*Ibid.*) The court concluded that, without supporting facts or legal
5 bases, requests for such broad, non-specific rulings were not properly the subject of a motion in
6 limine.

7 Here, as in *Kelly*, Defendant's request lacks adequate factual bases to support the grant of a
8 motion in limine. Defendant asks only that the court limit Plaintiff to a proper measure of future
9 medical expenses. Defendant's moving papers do not specify any particular evidence that Defendant
10 wishes excluded, or argument he wishes precluded. Rather, Defendant asks only that this court restate
11 the rule announced in *Corenbaum v. Lampkin* (2013) 215 Cal.App.4th 1308. Thus, Defendant is
12 requesting from the court a ruling that would be "declaratory of existing law" that "would not provide
13 any meaningful guidance for the parties or witnesses[.]" (*Kelly*, supra at p. 670.) This court should
14 refuse to issue such an order.

15 **B. MARKOW DOES NOT CHANGE ANY EXISTING LAW REGARDING THE**
16 **COLLATERAL SOURCE RULE IN CALIFORNIA.**

17 Defendant, in his moving papers, argues that the recently decided *Markow v. Rosner* (October
18 4, 2016, B262530) _ Cal. App. 5th _, defeats the arguments asserted in Plaintiff's bench brief on the
19 issue of future medical damages. However, the holding in *Markow* does not change any existing law
20 on the issue of future medical damages. In *Markow*, the court affirmed a jury verdict on future medical
21 expenses as being supported by substantial evidence, particularly the testimony of plaintiff's life care
22 planning expert. Although the *Markow* court briefly cites to *Corenbaum*, it announces no new rule and
23 in no way clarifies the ruling in that case. Essentially, *Markow* maintains the status quo. Logically,
24 then, *Markow* cannot defeat any argument previously asserted by Plaintiff because the law has not
25 been changed or elucidated with the publishing of *Markow*. Thus, the arguments asserted in plaintiff's
26 bench brief are unaffected by that ruling.

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IV.

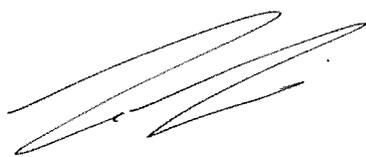
CONCLUSION

For the foregoing reasons, Plaintiff requests that the Court deny Defendant's Motion in Limine No. 4 in its entirety.

DATED: October 6, 2016

GIRARDI | KEESE

By:



CHRISTOPHER T. AUMAIS
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8 **Attorneys for** Defendants LEGEND HOMES and DANIEL LERNER (erroneously named as
9 DANNY LERNER)

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11
12 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
13 **COUNTY OF LOS ANGELES, CENTRAL DISTRICT**

14 CHRIS WILSON,

15 Plaintiff,

16 vs

17 LEGEND HOMES; DANNY LERNER;
18 and DOES 1 through 20, inclusive,

19 Defendants.

Case No. **BC520987**

Assigned to Judge Amy D. Hogue, Dept. 92

**DEFENDANTS' MOTION IN LIMINE
NO. 4 FOR PROPER MEASURE OF
PLAINTIFF'S FUTURE MEDICAL
EXPENSES; MEMORANDUM OF
POINTS AND AUTHORITIES;
DECLARATION OF JEFFREY J. OLIN;
[PROPOSED] ORDER
[C.C.P. § 2034.300, Evid. Code 801]**

Action Filed: 9/11/13

Trial Date: 5/17/16

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22 **TO ALL PARTIES AND TO THEIR ATTORNEY'S OF RECORD:**

23 PLEASE TAKE NOTICE THAT Defendants LEGEND HOMES ("LEGEND") and
24 DANNY LERNER ("LERNER") hereby moves this Court for an Order Excluding the Testimony
25 of Dr. Arthur Kowell, M.D. with regard to the neuropsychological status and history of Plaintiff,
26
27
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DEFENDANTS' MOTION IN LIMINE NO. 4 FOR PROPER MEASURE OF PLAINTIFF'S FUTURE MEDICAL
EXPENSES; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF JEFFREY J. OLIN; [PROPOSED]
ORDER

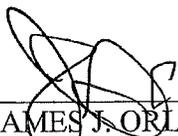
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This motion is based on the grounds that the Court of Appeals clarified the proper basis for calculating future medical expenses of insured Plaintiffs just this week in an opinion certified for publication.

This motion is based on the supporting Memorandum of Points and Authorities, the pleadings and papers on file in this action, and upon such of the argument and evidence as may be presented prior to or at the hearing.

DATED: October 6, 2016

ORLAND LAW GROUP

By: 

JAMES J. ORLAND, ESQ.
JEFFREY J. OLIN, ESQ.
Attorneys for Defendants LEGEND
HOMES and DANIEL LERNER

1 MEMORANDUM OF POINTS AND AUTHORITIES

2
3 I. RELEVANT FACTS

4 Plaintiff CHRIS WILSON (“Plaintiff”) alleges that he was injured when an outrigger
5 from a scaffold fell and struck him in the head and caused him blunt force trauma injuries. He is
6 alleging that the injury has had a permanent negative impact on his mental state.

7 II. ARGUMENT

8
9 The proper basis for estimation of the reasonable market value of Plaintiff’s future
10 medical expenses is what his insurance provider is likely to pay, based upon what the insurer has
11 paid. The Court of Appeals has very recently clarified the law on this issue. In an opinion
12 certified for publication on October 4, 2016, (a true and correct copy of which is attached hereto
13 as Exhibit “A”.) the Court of Appeals very clearly articulated that:

14 Our Supreme Court has endorsed a market or exchange value as the proper way to
15 think about the reasonable value of medical services. (*Howell v. Hamilton Meats &*
16 *Provisions, Inc.* (2011) 52 Cal.4th 541, 556.) This applies to the calculation of future
17 medical expenses. (*Corenbaum v. Lampkin*, [(2013) 215 Cal.App.4th 1308, 1330–1331
18 (bolding added)].) For insured plaintiffs, the reasonable market or exchange value of
19 medical services will not be the amount billed by a medical provider or hospital, but the
20 “amount paid pursuant to the reduced rate negotiated by the plaintiff’s insurance
21 company.” ([*Bermudez v. Ciolek* (2015) 237 Cal.App.4th 1311, 1332, italics in quote.]
22 (*Markow v. Rosner* (2016) B260715, B262530 (Los Angeles Superior Court Case No.
23 BC476993), attached as Exhibit “A”, at p. 24 (“*Markow*”).)

24 The *Markow* Court further discussed how those future damages were to be calculated.
25 The plaintiff presented a life care expert who estimated that the amount billed for the plaintiff’s
26 future care would likely be about \$2 million, but that “[b]ased on her research, knowledge, and
27 experience, ... the amount actually paid is usually about 50 to 75 percent of the total amount
28 billed.” (*Id.* at p. 25.) She noted that a single bill had been reduced to 12.9%. (*Id.*) The jury
granted an award of \$1.3 million, which was approximately 65% of the bill, roughly the mid-
point between the expert’s estimate of 50-75%. (*Id.*) The defendant argued that the entire \$2
million should have been reduced to 12.9%, or an award of \$260,000. (*Id.*) The court found that

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based upon the fact that the life expert had stated that the reimbursement rates vary and her extensive experience as a life care planner, the amount awarded by the jury was reasonable.

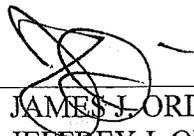
In this matter, the Plaintiff's future medical care expenses should be based upon what his insurer will be likely to pay, based upon what they have paid. The *Markow* decision clearly refutes all of Plaintiff's arguments in his bench brief. It would not be a violation of the collateral source rule for an expert to rely on the past or current amounts paid by the insurer. (*Id.*) Also, plaintiff's argument that *Howell* does not apply to future medical bills was explicitly refuted by *Markow*. (*Id.* at p. 24.)

III. CONCLUSION

It is respectfully requested that this motion *in limine* for an order limiting the future medical expenses that Plaintiff could potentially be entitled to be based up the proper measure of plaintiff's future medical expenses would be what his insurer is likely to pay, based upon what the insurer has paid.

DATED: October 6, 2016

ORLAND LAW GROUP

By: 

JAMES J. ORLAND, ESQ.
JEFFREY J. OLIN, ESQ.
Attorneys for Defendants LEGEND
HOMES and DANIEL LERNER

Filed 10/4/16

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

MICHAEL MARKOW et al.,

Plaintiffs and Respondents,

v.

HOWARD L. ROSNER et al.,

Defendants and Appellants.

B260715, B262530

(Los Angeles County
Super. Ct. No. BC476993)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Elizabeth R. Feffer, Judge. Affirmed in part and reversed in part.

Cole Pedroza, Curtis A. Cole, Kenneth R. Pedroza, E. Todd Chayet; Moore
McLennan, Raymond R. Moore and Arthur E. Zitsow for Defendant and Appellant
Howard L. Rosner.

Horvitz & Levy, S. Thomas Todd, David Ettinger; Reback, McAndrews, Kjar,
Warford, Stockalper & Moore and Robert C. Reback for Defendant and Appellant
Cedars-Sinai Medical Center.

Goldstein, Gurbuz & Robertson, Arnold E. Goldstein and Joy Lynn Robertson for
Plaintiff and Respondent Michael Markow.

Law Offices of Howard A. Kapp and Howard A. Kapp for Plaintiff and
Respondent Francine Markow.

ARGUING GENERAL DAMAGES AT TRIAL

By Geoffrey S. Wells

The general damages argument comes at the very end of your case. Most trial lawyers believe it is always best to argue general damages after you have completed your argument on economic damages. I agree with this approach and believe the jurors respond better to a general damages argument after they have heard hard numbers for medical specials, loss of earnings, loss of earnings capacity, etc. Additionally, you can refer to the expert witness testimony on the economic damages whereas you do not use expert witness testimony on general damages.

Most trial lawyers believe that the amount of general damages you should ask for is based on many things. Some of those considerations are as follows: Who and where is your jury from? Who is the defendant or defendants? How well did your case go into evidence at trial? How well did your client do on the stand? How is the defense lawyer in the trial? How did the damages testimony go in during the trial? These are just some of the factors that go into consideration when trying to decide an approach for your general damages argument at trial.

Most believe people the general rule is you do not want to overreach or overdo the general damages argument part of your case if it is a very thin liability case. If you ask for too much money on general damages on a thin liability case, you run the risk of losing the jury on liability and/or percentages and/or getting a defense verdict. Obviously, there might be exceptions to this rule but it is a pretty good rule to follow in general.

Remember, the jury will be told there is no fixed or absolute standard by which to compute the monetary value of general damages. The jury is told that they are entrusted with vast discretion in determining the amount of damages to be awarded. Every case is unique and different because your client is unique and different. Additionally, the parties in the case are unique and different. There may be a governmental entity, a school district or a sympathetic defendant in your case that might affect the way you approach general damages. Some lawyers argue that general damages is the opportunity for the jury to provide full justice for the injured plaintiff. Many lawyers state that they are not in the case at trial in order to get partial or some justice but, rather, full justice. Full justice requires full compensation on all aspects of the case including the issue of general damages.

The key instructions for general damages in CACI are 3900, 3902, 3905 and 3905A.

CACI 3905A sets forth the following:

“PHYSICAL PAIN, MENTAL SUFFERING AND EMOTIONAL DISTRESS
(Non-economic damage)

(1) Past and future physical pain, mental suffering/loss of enjoyment of life/disfigurement/physical impairment/inconvenience/grief/anxiety/humiliation/emotional distress [insert other damages].

No fixed standard exists for deciding the amount of these non-economic damages. You must use your judgment to decide a reasonable amount based on the evidence and your common sense.

To recover for future non-economic damages, the plaintiff must prove that he or she is reasonably certain to suffer that harm.

For future general damages, determine the amount in current dollars paid at the time of the judgment will compensate [name of plaintiff] for future pain and suffering. This amount of non-economic

damages should not be further reduced to present cash value because that reduction should only be performed with respect to economic damages.”

Many trial lawyers like to make a list board of all the types of things that are compensable under CACI. Such a list might include the following: Physical pain, mental suffering, loss of enjoyment of life, disfigurement, physical impairment, inconvenience, grief, anxiety, humiliation and other items that may have come up on your case. Another list can be made of all of your client’s injuries, scars and procedures, etc. This list can blossom as the evidence is presented in your case and you want to keep track of it during the trial so that you can use it in your damages argument during closing.

I almost always use a timeline to demonstrate the general damages time periods in an injury case. The timeline should always have a section for past damages from the date of the accident until the time of the trial. Additionally, the timeline should always have a future damages section which shows the time from the date of the trial to the end of the client’s life expectancy. CACI has a life expectancy table that will be applicable to your particular client that you can use to calculate the future years for your client. Obviously, you want to make the past time period much shorter than the future time period on your timeline. The only exception to this might be if you have an elderly client who does not have a life expectancy.

Once you have made up a timeline on some type of a board or blowup, you can fill in amounts or ranges of amounts based on the evidence that was presented at the trial. For example, you might want to include a higher amount from the date of the injury through the period where your client was hospitalized, required surgery or had extreme pain and issues from the accident. Some lawyers use a per year or per month amount while other lawyers use a daily or hourly amount. You should choose whichever you feel most comfortable arguing and which best suits your case as the appropriate approach for this type of argument. It should always be based on the evidence, the injuries and the facts that were set forth concerning your particular client. There is no “one size fits all” with respect to how you do the per diem argument for a client on general damages.

Once you have laid out the past and future general damages timeline approach, it is always a good idea to then show the actual verdict form to the jury and explain how your timeline fits in with the verdict form. Almost all special verdicts have a section now for past and future general damages. You should suggest numbers and ranges for both of those areas using your timeline as demonstrative evidence during closing argument to show the jury including pictures, medical illustrations, testimony about pain or family members who talked about what your client went through and when they went through it. An example of what the verdict form looks like is set forth below.

a.	Past economic loss	
	lost earnings	\$ _____
	medical expenses	\$ _____
	Total Past Economic Damages:	\$ _____
b.	Future economic loss	
	lost earnings	\$ _____
	medical expenses	\$ _____
	Total Future Economic Damages:	\$ _____
c.	Past noneconomic loss, including physical pain and mental suffering:	\$ _____
d.	Future noneconomic loss, including physical pain and mental suffering:	\$ _____
	Total Non-Economic Damages:	\$ _____
	TOTAL	\$ _____

Regarding argument for loss of consortium in general damages in the past and in the future again you would want to set forth a timeline and talk about the loss of love, companionship, comfort, care, assistance, protection, affection, society, moral support and loss of enjoyment of sexual relations if that applies to your case. A similar timeline can be used for this argument as set forth above for the injury argument. The one exception is you want to watch out for areas that are specifically not allowed for loss of consortium damages such as personal services and costs of lost earnings and those types of things that cannot be used for loss of consortium claims.

ESSENTIAL STEPS TO SECURING PUNITIVE DAMAGES

By Douglas N. Silverstein

I. Know The Standard

a. Civil Code section 3294 – Substantive Liability

(a) “In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant”

(b) “An employer shall not be liable for damages pursuant to subdivision (a), based upon acts of an employee of the employer, unless the employer had advance knowledge of the unfitness of the employee and employed him or her with a conscious disregard of the rights or safety of others or authorized or ratified the wrongful conduct for which the damages are awarded or was personally guilty of oppression, fraud, or malice. With respect to a corporate employer, the advance knowledge and conscious disregard, authorization, ratification or act of oppression, fraud, or malice must be on the part of an officer, director, or managing agent of the corporation”

(c) “As used in this section, the following definitions shall apply:

(1) “Malice” means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

(2) “Oppression” means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights.

(3) “Fraud” means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

b. Required Showing of Defendant’s Financial Condition

i. Plaintiffs MUST present evidence of defendant’s financial condition to serve the ultimate purpose of deterrence and punishment of the defendant (*E.g., Simon v. San Paolo U.S. Holding Company, Inc.* (2005) 35 Cal.4th 1159, 29 Cal.Rptr.3d 379).

c. Essential Elements

i. “Malice, oppression or fraud”

ii. “Committed, authorized, or ratified” by

iii. “Officer, director, or managing agent”

a. Officers and directors are easy to identify, but who are “managing agents?”

i. Those who exercise “substantial discretionary authority over decisions that ultimately determine corporate policy” (*White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 87 Cal.Rptr.2d 19)

ii. Examples:

1. High level Human Resources officers
2. Managers who have input into company policies (including drafting company policy material)
3. Managers who supervise large groups of employees

iii. Helpful cases regarding managing agent status:

1. *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 87 Cal.Rptr.2d 19
2. *Major v. Western Home* (2009) 169 Cal.App.4th 1197, 7 Cal.Rptr.3d 556
3. *Roby v. McKesson* (2009) 47 Cal.4th 686, 101 Cal.Rptr. 3d 773

4. *Wysinger v. Automobile Club of Southern Calif.* (2007) 157 Cal.App.4th 413, 16 Cal.Rptr.3d 717
 5. *Gober v. Ralphs Grocery* (2006) 137 Cal.App.4th 204, 40 Cal.Rptr.3d 92
 6. *Hobbs v. Bateman Eichler, Hill Richards* (1985) 164 Cal.App.3d 174, 193, 210 Cal.Rptr. 387
 7. *Siva v. General Tire & Rubber Co.* (1983) 146 Cal.App.3d 152, 194 Cal.Rptr. 51
 8. *Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 113 Cal.Rptr. 711
- iv. Evidence of defendant's financial condition to establish amount required for deterrence and punishment
- II. Determine Whether Punitive Damages Are a Possibility
 - a. Punitive damages are NOT available:
 - i. Against public entities
 - ii. With certain legal claims (e.g., contract violation; simple negligence; Labor Code wage violation)
 - b. Punitive damages ARE generally available in tort and employment cases against private entities
- III. Understand Theory On Punitive Damages Prior to Filing Complaint
 - a. Find out from client:
 - i. All persons who may have committed, authorized, or ratified the conduct at issue
 - ii. Whether such persons are an officer, director, or managing agent of the defendant
 - iii. Evidence of malice, oppression, or fraud by such persons
 - b. Research similar complaints against the defendant:
 - i. Research prior lawsuits filed against defendant
 - ii. Research prior legal charges made against defendant (e.g., DFEH, EEOC, Labor Department, OSHA)
 - a. Public Records Act (California)
 - b. Freedom of Information Act (federal)
 - iii. Ask client and/or friendly witnesses about any similar conduct or allegations of similar conduct by Defendant
- IV. Specifically Plead Punitive Damages Where Available
 - a. Plead all essential elements for punitive damages
 - i. Specifically allege malice, oppression, or fraud, and accompanying supporting facts
 - ii. Specifically identify that alleged officers, directors, or managing agents are believed to have played a role in the alleged bad conduct, whether as a decision-maker or someone who ratified the decision
 - iii. Specifically request punitive damages for each cause of action where punitive damages are available
- V. Obtain Essential Discovery
 - a. Key Facts to Obtain
 - i. Director, officer, or managing agent's role in the decision
 1. Identify all managers who played a role in the decision(s) at issue
 - ii. Evidence of malice, oppression, fraud – or reprehensibility
 1. Lies told by managing agents regarding the issues of the case

2. Bad motives / animus to be ascribed to managing agents
3. Managing agents knowledge of the bad conduct
4. Pattern or other instances of similar bad conduct
- iii. Evidence of financial condition
 1. Relevant information to obtain:
 - a. Company's net worth
 - b. Company's assets and liabilities
 - c. Company's income and expenses
 - d. Company's cash on hand
 2. When to obtain this evidence
 - a. Civil Code section 3295 requires court order to obtain discovery of financial condition for punitive damages
 - i. Consider requesting court order if you anticipate issues with obtaining the information at trial
 - b. Civil Code section 3295 permits a trial subpoena for information pertaining to financial condition, to be provided after plaintiff has established liability for punitive damages
 - i. Must serve discovery in federal court, no similar trial subpoena
 - ii. If defendant refuses to produce, reach stipulation that it will produce at trial
- b. Depositions – videotape the depositions of key players
 - i. Who to depose:
 1. Key decision makers
 2. All potential managing agents (managers, HR) who approved of the decision(s) at issue
 3. Witnesses to the bad conduct or similar bad conduct
 - ii. Information to obtain:
 1. Establish managing agent status: reporting structure, scope of authority, involvement in forming policy, including policy recommendations, role in drafting any policy material, ability to use discretion to deviate from company policies
 - a. TIP: Ask potential managing agents questions about their role in policies at the beginning of their depositions, when discussing job duties. They often like to emphasize their high level status and contributions to the company.
 2. Establish role of managing agent in the decisions at issue (ratification or decisionmaker)
 3. Establish reprehensibility of the conduct
 - a. Violation of company policies by managing agents
 - b. Managing agents' failure to act or investigate despite reports of bad conduct (*Fisher v. San Pedro Hospital* (1989) 214 Cal.App.3d 590, 262 Cal.Rptr.842)
 - c. Lies told by managing agents regarding the bad conduct, including pretext (*Cloud v Casey* (1999) 76 Cal.App.4th 895, 90 Cal.Rptr.2d 757)
 - d. Other similar instances of bad conduct at the company
 - e. Unlawful corporate policies pertaining to the bad conduct
- c. Requests for Production
 - i. Organizational charts identifying hierarchy of potential managing agents
 - ii. Job descriptions of potential managing agents

- iii. Handbooks, policy manuals, written material on the area of operations the bad actor is responsible for
 - iv. Training materials on the area of operations the bad actor is responsible for
 - v. Prior complaints regarding conduct at issue
 - vi. Prior lawsuits regarding conduct at issue
 - vii. Corporate financial records
- VI. Defeat Summary Judgment
- a. Malice is generally a question of fact for the jury and may be proven by indirect evidence
 - i. Helpful cases to defeat motion for summary judgment
 - a) *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 185 Cal.Rptr. 270
 - b) *Johnson & Johnson v. Superior Court* (2011) 192 Cal.App.4th 757, 121 Cal.Rptr.3d 640
 - c) *Meyer v. Bryon Jackson, Inc.* (1984) 161 Cal.App.3d 402, 207 Cal.Rptr. 663
- VII. Present the Evidence at Trial
- a. First Phase of Trial: Establish Punitive Damages Liability
 - i. Integrate themes of lies, fraud, reprehensibility, exploitation, harm to plaintiff, and accountability into the entire presentation of trial, including opening statement and witness testimony
 - a) Use video deposition testimony and documents to highlight lies and inconsistencies
 - ii. Explain elements of punitive liability in closing statement, using CACI jury instructions and visual aids in closing argument
 - a) Focus on element of FRAUD because juries understand that concept
 - e. Punitive Phase of Trial: Getting Punitive Damages
 - a) Explain the purpose of punitive damages in closing argument – tell the jury that they are empowered with sending a message to the industry [see exemplar presentation]
- VIII. Defeat Post-Trial Motions
- a. Limits on Punitive Damages Awards
 - i. Constitutional due process (*E.g., BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559)
 - i. Award must be based on
 - 1. Reprehensibility of defendant’s conduct
 - a. Physical versus economic harm
 - b. Reckless disregard of health or safety of others
 - c. Plaintiff’s financial vulnerability
 - d. Repeated actions
 - e. Intentional malice, trickery, or deceit
 - 2. Relationship between the harm to plaintiff and the punitive award
 - 3. In light of defendant’s financial condition, amount needed to punish and deter future bad conduct
 - ii. Proportional limit to compensatory damages
 - 1. 9:1 ratio? (*State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408)
 - 2. 1:1 ratio? (*Roby v. McKesson* (2009) 47 Cal.4th 686, 101 Cal.Rptr.3d 773)
 - 3. No bright line rule? (*State Farm v. Campbell, supra*)
 - ii. Helpful cases allowing large punitive damages awards
 - i. *Bullock v. Philip Morris* (2011) 198 Cal.App.4th 543 (16:1 ratio)

- ii. *Saunders v. Branch Banking and Trust Co. of Va.* (4th Cir. 2008) 526 F.3d 142 (80:1 ratio)
- iii. *Kemp v. American Tel. & Tel. Co.* (11th Cir. 2004) 393 F.3d 1354 (2,000:1 ratio)
- iv. *Romanski v. Detroit Entertainment, L.L.C.* (6th Cir. 2005) 428 F.3d 629 (2,150:1 ratio)
- v. *Rodriguez v. Caribbean Forms Manufacturer* (1st Cir. 2005) 399 F.3d 52 (199,999:1 ratio)

PUNITIVE DAMAGES: EVIDENCE & ARGUMENT
By Douglas Silverstein

NOONE v. JMPP

JMPP LIES AND FRAUDULENTLY
COVERS UP ITS
RETALIATORY TERMINATION OF
EIMEAR NOONE

Why We Are Here

"Malice"

that Defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of another. A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

▶ **"Oppression"**

subjected Plaintiffs to cruel and unjust hardship in knowing disregard of their rights.

▶ **"Fraud"**

concealed a material fact and did so intending to harm Plaintiffs.

JURY INSTRUCTIONS

3949. Punitive Damages—Corporate Defendant

You must now decide the amount, if any, that you should award against JMPP, Inc. in punitive damages. ***The purposes of punitive damages are to punish a wrongdoer for the conduct that harmed the Plaintiff and to discourage similar conduct in the future.***

PUNITIVE DAMAGES: EVIDENCE & ARGUMENT
By Douglas Silverstein

PURPOSE OF PUNITIVE DAMAGES

1. **PUNISH** - *For their Intentional Conduct*
2. **PREVENT** - *Make Sure This Never Happens Again*
3. **PROVE A POINT** - *Discourage Other Employers*

1. Punish

Fraud to Avoid Responsibility

- Perjury
- Withholding of Evidence
- Intentional Misrepresentations
- Concealment



2. Prevent

- Make Sure This Does Not Happen Again
- Stand Up Against JMPP's Conduct



PUNITIVE DAMAGES: EVIDENCE & ARGUMENT
By Douglas Silverstein

3. Prove a Point



Subject: Re: Scheduling
From: "Jason Michael Paul" <jason@jimpresents.com>
Sent: 5/20/2013 7:34:59 AM
To: "Chad Seiter" <cseiter@mac.com>

I agree. I don't want to feel responsible for anything concerning a pregnancy.
Jason

Mr. Paul's Fictions- "I wasn't there for the confrontation in Baltimore"

[Jerone Moore's](#) Videotaped Deposition Played at trial on July 25, 2016

Q. Do you recall that Craig Garfinkle during that confrontation between Mr. Garfinkle with yourself, Jason Michael Paul and Chad Seiter -- that Mr. Garfinkle told you that you needed to shorten your remarks during the performance due to Eimear's condition?

A. Yes.

Designated Clip 95:20-25

[Jason Michael Paul's](#) Videotaped Deposition Testimony Played at trial July

Q. Do you recall that during the -- I believe it was during the intermission of that show Eimear Noone's husband and manager, Craig Garfinkle, confronted you, Jerone Moore, and Chad Seiter about Eimear's need for shortened speeches?

A. That never happened.

Designated Clip 638:13-18

PUNITIVE DAMAGES: EVIDENCE & ARGUMENT
By Douglas Silverstein

Mr. Paul's Fictions- "No Concerns Were Ever Raised about Ms. Noone"

On Jul 28, 2013, at 12:59 PM, Jason Michael Paul <jason@imppresents.com> wrote:

Dear Eimear,

Thank you for the shows in Philadelphia and Baltimore. I have made the decision to not have you conduct Newark based on some of the concerns that were raised by you and Craig. We can reconvene after the birth of your child.

Sincerely, July 28, 2013- Ex. 127
Jason

Sent by Jason Michael Paul

Jason Michael Paul's Testimony Played at trial on July 21, 2016

Q. Do you remember Craig Garfinkle expressing that Eimear Noone needed some sort of accommodation for her pregnancy, either immediately before or during or immediately after the Baltimore performance?

A. Never. *Designated Clip 639:21-640:1*

Mr. Paul's Fictions- "I didn't know Ms. Noone was getting dizzy on stage"

David, *August 26, 2013- Ex. 671:*

There are a great deal of inaccuracies in your email. Eimear did not conduct Newark out of fear for her health. Craig Garfinkle said, "she is getting dizzy on stage" in Baltimore. Especially, after the full term miscarriage just

Videotaped Deposition Testimony of Jason Michael Paul Played at trial on July 21, 2016, Designated Clip 640:8-13

Q. Do you recall Craig Garfinkle telling yourself that Eimear Noone was getting dizzy on stage either immediately before, during, or immediately after the Baltimore performance?

A. Never. It's the same question you're asking me in different ways. Just so you know.

Mr. Paul's Fictions- "I didn't remove Ms. Noone from Newark because of concerns for her health"

From: Jason Michael Paul <jason@imppresents.com>
Date: Mon, 26 Aug 2013 20:24:12 -0700
To: David L. Garfinkle <dgarfinkle@cipgroup.com>
Cc: <ssaiter@me.com> <ssaiter@me.com>; <jeron@imppresents.com> <jeron@imppresents.com>
Subject: Re: Eimear Noone

David,

There are a great deal of inaccuracies in your email. Eimear did not conduct Newark out of fear for her health. Craig Garfinkle said, "she is getting dizzy on stage" in Baltimore. Especially, after the full term miscarriage just

Jason Michael Paul's Videotaped Deposition Played at trial on July 21, 2016

Did you remove Eimear Noone from the Newark performance because you were concerned for her health?

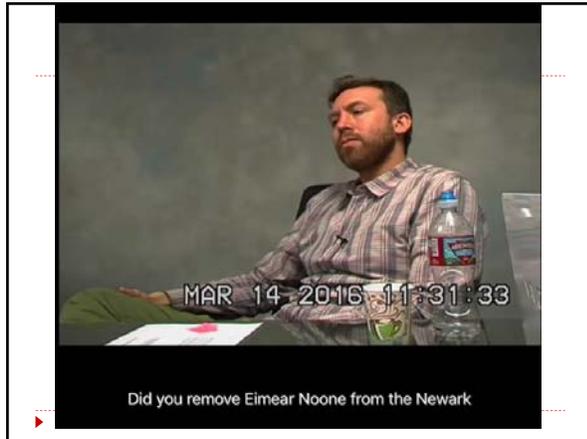
A. Didn't cross my mind. It wasn't the basis of my decision, no. *Designated Clip 645:9-13*

PUNITIVE DAMAGES: EVIDENCE & ARGUMENT
By Douglas Silverstein

Mr. Paul's Fictions- "I Lied to Ms. Noone About Why I Was Firing Her Because I Was Concerned for Her Health..."



"But Ms. Noone's Health Didn't Even Cross My Mind the Day I Decided to Fire Her"



3949. Punitive Damages—Corporate Defendant

3. Whether Wes Shaffer was financially weak or vulnerable and Morton took advantage of him;

4. Whether Morton's conduct involved a pattern or practice;

5. Whether Morton acted with trickery or deceit.

(b) Is there a reasonable relationship between the amount of punitive damages and Wes Shaffer's harm?

(c) In view of Morton's financial condition, what amount is **necessary** to punish it and discourage future wrongful conduct?

PUNITIVE DAMAGES: EVIDENCE & ARGUMENT

By Douglas Silverstein

Jason Michael Paul Productions, Inc. BALANCE SHEET As of March 31, 2016	
TOTAL ASSETS	\$1,291,700.64

Jason Michael Paul Productions, Inc. BALANCE SHEET As of March 31, 2016	
ASSETS Current Assets Bank Accounts DDA 8029 2,600.00 MoneyLine #9250 98.25 Petty Cash 34,700.71 Wells WT 8277 1,553.68 WF Checking 9135 168,181.04 WF Merchant 1820 100.00 WF Money Market 9678 0.02 WF Savings 5214 90.00 Total Bank Accounts <u>\$207,323.70</u>	

Jason Michael Paul Productions, Inc. BALANCE SHEET As of March 31, 2016	
Other current assets Coffee Bar Loan 1 (0) 0.00 Coffee Bar Loan 2 10,713.66 Coffee Culture Loan AMERICAN EXPRESS 276,848.77 Coffee Culture Loan CASH 770,594.80 Coffee Culture Loan CASH to VENDORS 2,504.24 Due from Shareholder 62,000.00 Equipment 2,548.98 Loan to Shareholder -62,000.00 Prepaid Expenses 200.00 State Tax 1,140.00 Uncategorized Asset -3,500.00 Total Other current assets <u>\$1,061,050.45</u> Total Current Assets <u>\$1,268,374.15</u> Fixed Assets Furniture & Fixtures 18,780.49 Total Fixed Assets <u>\$18,780.49</u> Other Assets Due from Coffee Bar 3,046.00 Security Deposits 1,500.00 Total Other Assets <u>\$4,546.00</u> TOTAL ASSETS <u><u>\$1,291,700.64</u></u>	

PUNITIVE DAMAGES: EVIDENCE & ARGUMENT
By Douglas Silverstein

Verdict Form – Punitive Damages

I. What amount of punitive damages do you award against JMPP?

Insert Verdict * 5-9x

\$ _____