



CITATIONS

JULY - TWO THOUSAND TWENTY THREE



TRIAL LAWYER OF THE YEAR

By Stephanie A. Johnson

Page 10

BRIAN C. ISRAEL

PANDA KROLL

KATHLEEN MAHEU

PRESIDENT'S MESSAGE	3
HAVE YOU HEARD	7
FANTASTIC FILMS FOR BIOETHICS BUFFS	8
CALIFORNIA RAISES PAIN AND SUFFERING CAP FOR MEDICAL MALPRACTICE CLAIMS	14
SPOTLIGHT: OJAI RAPTOR CENTER	19
CLASSIFIEDS	19



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PRESIDENT'S MESSAGE

by Brian C. Israel

In the May issue of Citations I wrote that I enjoyed this time of year and its May gray and June gloom weather. I officially rescind those statements or at least modify them to say I don't only fancy that type of weather. The sun has been hard to come by as of writing this month's message. I am hoping the sun blesses us much more often here in July. Thank you in advance for not blaming me for some sort of weather jinx.

The Bar has had a series of great events and MCLE's recently and I have been able to meet many of you at them. We have such an amazing community with great leaders. It is an honor that we will be able to celebrate our community and its volunteers and leaders! And celebrate we shall.

In my first President's Message I spoke about the Bar hosting Community Socials. There are so many of you out there who volunteer through VCBA and make our community what it is. Our goal is to not only celebrate you, but to enjoy a mix of fun and family with fellow members of the Bar. Please come join us on July 29, 2023, at Bob Kildee Park in Camarillo, at 11 a.m., for our **Bar Leadership Appreciation Family Fun Day**. This event is all about community and completely different than any event we have hosted in recent memory. This is also an event that you can make your own.

What does that mean?

First, it is on a Saturday morning at a park. Clearly, it is not a Zoom CLE, legal clinic, or speaking event during "normal hours." Usually, we shy away from something like this for many reasons. As I can attest and I know many of you will agree, we have families and lives. I get it - 11 a.m. on a Saturday. Even then, some of us attorneys are in the office catching up on work. But, ahem...soccer, baseball, ballet, dance (either for yourself or the kid(s)), or catching up on sleep? There are a plethora of reasons why our lives are busy.

Clearly, this event sounds a little different. At the Bar Leadership Volunteer Appreciation Day, you can still network with other attorneys or their spouses/partners. But your kid(s) might also make new friends.

You can also make it your own in another way. Do you play pickleball? It's the fastest growing sport in America. I have played a few times and I hear it is quite hard to find an open pickleball court. Well, good thing for you, we have reserved the pickleball courts. Just show up with your rackets and balls, and play. Maybe you will play with someone new and might develop that into a friendship.

Sure it would be nice if you at least waved "hi," but the point is, just come out and have some fun. Maybe get some exercise, if that's your cup of tea. You used your time to volunteer so please enjoy a game of pickleball with no strings attached. It's a Saturday, we want to thank you, but also want you to enjoy your weekend.

There is also a skatepark at Bob Kildee Park. Let your kids skate or scooter while you network. Or maybe you still have a passion for extreme sports. The park has it all - a playground, tennis courts, horseshoe pits, and other fields to practice various sports. Have fun and enjoy your Saturday. Or perhaps you are like Dien Le and you want to go for a nice run before the event to work up an appetite. As I said, make it yours and we thank you for adding so much to our community.

Speaking of that appetite, there will be a taco bar followed by Mr. Softee ice cream. I think everyone can hop on those trains. And lastly, for the little ones, there will be a jolly jump. Sidenote, after I left Ventura County for college and law school, I found out that most people know this as a bounce house. Apparently it's unique to Ventura County to call them jolly jumps. You may just find me hopping around in there. I know my oldest son Levi will be a fixture in the jolly jump.

Let's have some fun and celebrate those who have made our community stronger. We thank everyone for all the hard work and for having made a difference in the lives of our residents. We especially thank those who go above and beyond to volunteer and provide pro bono work to our most deserving clients. I hope to see many of you on July 29th. Fingers crossed, the sun will be shining.



Brian C. Israel is an associate attorney at Norman Dowler, LLP in Ventura. His practice focuses on estate planning, probate, and trust administration. He can be reached at bisrael@normandowler.com or at 805-654-0911.



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Rabiah Rahman became a proud mother to her beautiful baby girl named Jazmyn Charlotte-Ann Joyce born on May 24, 2023, at 5:09 am. The family is delighting in this blissful moment. Congratulations! The unstoppable **Rabiah Rahman** graced the cover of Southern California Rising Stars Super Lawyers 2023, which featured six attorneys, including Rabiah, talking about the ups and downs of solo practice. She practices employment and labor law. Way to go!



Ventura Superior Court **Judge Anthony J. Sabo** has been selected as one of the recipients of the Oxnard Knights of Columbus Public Safety Award for 2023. The award was presented at the group's Public Safety Night held on June 13, 2023, at the Knights of Columbus Hall, Council 750, in Oxnard. Each year, the Oxnard Knights of Columbus recognize and honor approximately thirteen men and women from law enforcement, the military, fire protection, and the judiciary for their service to our community and country. Well done Your Honor!



Presiding **Judge Kevin G. DeNoce** announced the formal enrobement ceremony for **Judge Paul W. Baelly** which took place on, June 15, 2023, at 4:00 p.m. in Courtroom 22 of the

Hall of Justice in Ventura. The ceremony was open to the public, elected officials, local bar association, and representatives of Court-related County departments. Scheduled speakers included Ventura County Supervisor/Chair **Matt LaVere**; VCBA President **Brian Israel**; and field representatives from the offices of Senator Monique Limon and Congresswoman Julia Brownley, respectively, and attorney and friend, **Jim Yu**.



Ferguson Case Orr Paterson LLP warmly welcomes its newest associate, **Cheyenne Martz**. After working for many years as a paralegal specializing in estate planning and probate, Cheyenne recently passed the bar on the first try. She can be reached at cmartz@fcoplaw.com, 805-659-6800.



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Mike Strauss, Esq.
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In his long career as an employment litigator, Michael (Mike) Strauss developed a creative approach to resolving employment disputes. The employer-employee relationship can operate much like a family, where strong emotions rule and hurt feelings abound. To account for this dynamic, Mike has a soft touch. He deescalates animosity by projecting calmness, reason, clarity, and understanding. Nevertheless, Mike has never been afraid to stand up for what is right and fair. Having litigated hundreds of cases for employers and employees through trial or arbitration and argued appeals at every level, including the US Supreme Court, Mike draws on his vast experience and calm demeanor to guide cases to settlement. Since 2022, Mike has used his creative approach to resolving employment disputes as a mediator for the very types of cases he litigated as an attorney: wage-and-hour class/PAGA actions and individual disputes involving harassment, discrimination, retaliation, and breaches of contract.



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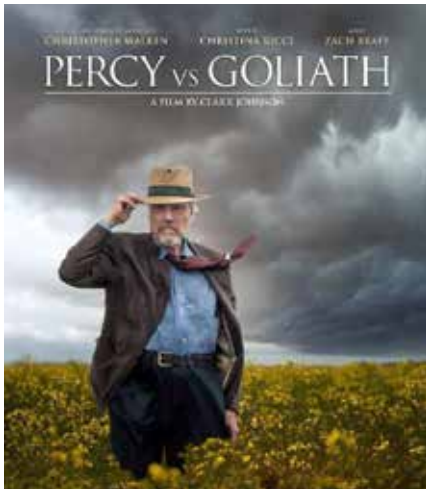


Hon. Vincent J. O'Neill, Jr. (Ret.)

Fantastic Films for Bioethics Buffs

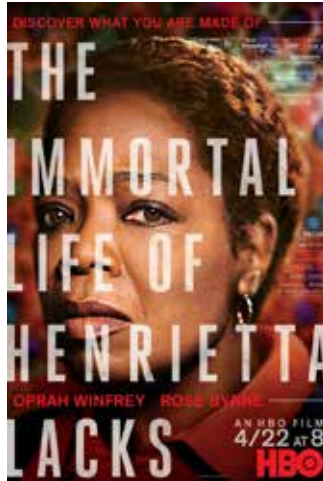
By Panda Kroll

In a recent CITATIONS article, I listed the many print, audio, docudrama and documentaries fulfilling our need for a deep dive into the true-crime story of “girl boss”-turned-prison inmate Elizabeth Holmes, the former CEO of medical technology startup Theranos who previously graced the covers of *Fortune*, *Forbes*, and *Inc* magazines. For those that crave more technology-related entertainment, here are the films I assign to CSUCI graduate students taking my class in Biotechnology Law and Regulation:



Agrobiotechnology: “Percy vs Goliath” (2020). This biopic stars Christopher Walken as Saskatchewan farmer Percy Schmeiser. Monsanto sued Schmeiser, a seed-saver, for infringing on Monsanto’s patented “Roundup Ready” canola seeds. Monsanto ultimately acknowledged that Percy’s fields had been pollinated with the proprietary trait through no fault of Percy’s, probably through gene drift. In 2001, a Canadian judge ruled that the farmer’s canola plants had violated Monsanto’s patent rights, and Schmeiser was ordered to pay Monsanto \$10,000 for licensing fees and up to \$75,000 in profits from the sales of his crop. Because it found that Schmeiser “knew or should have known” the seeds he was saving had developed Monsanto’s proprietary Roundup tolerance, the Canadian Supreme Court upheld the ruling 5-4 and ordered the farmer to destroy his seed banks, which he had cultivated over 40 years. The Court noted that Percy had not counter-claimed for contamination; theories that have since supported such claims include trespass, conversion, strict liability, and nuisance, as well as statutory claims based on unfair business

practices. Because Schmeiser never sprayed Roundup on his crops, however, and thus never used the patented genetic trait, the Court reversed the damages award; Percy called the final decision a “draw.”



HeLa Cells: “The Immortal Life of Henrietta Lacks” (2017). Produced by and starring Oprah Winfrey, this HBO film is based on the can’t-put-it-down 2010 book by Rebecca Skloot, which chronicles Skloot’s search for the origin story of the first immortal cell line and the African American woman whose tissues provided its source. The non-fiction story explores scientific ethics, race and genetics. Skloot’s book was on the New York Times Best Seller list for 75 weeks. Lesser-known but also worthwhile treatments of the same subject: “Modern Times: The Way of All Flesh,” a one-hour 1997 BBC documentary by acclaimed filmmaker Adam Curtis, and a podcast from the series “Famous Tumors,” produced by NPR’s RadioLab.

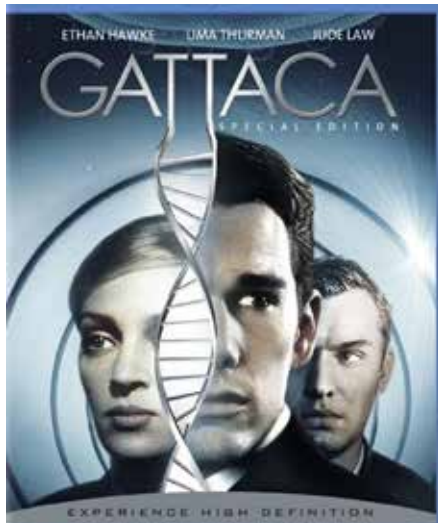


GMO Food: “Food Evolution” (2016). I have previously written (“OMG: Here Come the GMOs,” CITATIONS, August 2018) about this documentary narrated by

Neil DeGrasse Tyson. The documentary evenly tackles the chasm between consumers and scientists regarding the pros and cons of GMO food. Rotten Tomato gave the film a 100% approval rating.



Cancer Research: “Decoding Annie Parker” (2013). This biopic starring Helen Hunt, Samantha Morton and Aaron Paul, tells the story of Dr. Mary-Claire King’s breakthrough discovery of the BRCA1 breast cancer gene. Previously, scientists had believed that breast cancer was not inheritable. The same year the film was released, the patent on the gene was successfully challenged by the American Civil Liberties Union: In a watershed ruling, the United States Supreme Court held that naturally occurring DNA segments are products of nature and therefore not patent eligible. A lesser-known 2008 documentary on the decisions faced by women who test positive for the gene, “In the Family,” directed by Joanna Rudnick, is also worth a watch: The director herself was diagnosed at age 27 with the BRCA1 mutation; after making the film, she felt a lump while breastfeeding her youngest daughter and was subsequently diagnosed with Stage II breast cancer. After a double mastectomy and a prophylactic oophorectomy, Rudnick’s oncologist declared her cancer free. Rudnick joined the ACLU to fight for the right to access data about the mutations that can cause hereditary breast and ovarian cancer.



Reproductive Technology: “Gattaca” (1997). This dystopian thriller starring Ethan Hawke, Uma Thurman, and Jude Law, is a biopunk cult classic. The title references the four nucleobases of human DNA: A for adenine, C for cytosine, G for guanine and T for thymine. Science fiction became reality when Doctor He Jiankui shocked the world in 2018 by implanting embryos that had been gene-edited to confer resistance to HIV. Dr. He recruited couples in which the father was infected with HIV and the mother was not. After twin girls were born, the Chinese government fined him 3 million Chinese yuan (\$429,000) and sentenced him to three years’ incarceration for “illegal medical practices.”

Readers: Don't be shy to suggest other films that should be included on my Syllabus.



*Panda Kroll practices complex timeshare litigation in federal court and is the founder of the **Timeshare Law Library**. She is a member of CITATIONS’ editorial board.*



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2022 Trial Lawyer of the Year

By Stephanie A. Johnson



On May 23, 2023, over a hundred members of the Ventura County legal community gathered to honor the recipient of the Trial Lawyer of the Year award for 2022. Six incredible teams were nominated with the ultimate prize going to the team of Stephen McElroy and Ashley Parris for their work on the matter of *Ell v. Loma Linda University Medical Center*. See below for a summary of all the trials nominated. From the Board of the Ventura County Trial Lawyers Association, congratulations again to Mr. McElroy and Ms. Parris and to all the nominees!

David M. deRubertis and Brennan Kahn
Martinez/Page v. SoCal Edison

Plaintiffs Martinez and Page were employees of SoCal Edison and after they reported widespread sexual and racial harassment in the workplace, both were retaliated against and forced out of their jobs. The jury awarded Mr. Martinez \$422 million including \$400 million in punitive damages. The jury awarded Mr. Page \$42 million including \$20 million in punitive damages.

Deborah Chang and Daniel Johnson
Schweissinger v. Crown Dodge

Defendant's employee was at the beach on his day off when he received a call from a co-worker letting him know his customers were picking up a car at Crown Dodge. The employee chose to leave the beach and while driving to the dealership, he struck and killed plaintiff. The dealership claimed the employee was not in the course and scope of employment pursuant to the "going and coming" rule. The jury returned a verdict finding the employee was in the course and scope of employment awarding \$4 million in wrongful death damages.

John Howard and Mark Pachowicz
Gatlin v. DoLab

Plaintiff, 20-year-old Gatlin, was attending the 2017 Lightning in a Bottle musical festival when she sought care from defendant Multidisciplinary Association for Psychedelic Studies (MAPS), a harm reduction non-profit. Plaintiff died after being unresponsive for six hours in the care of MAPS, who failed to arrange for medical care when her condition warranted it. The jury awarded \$4,000,000 with 25% liability apportioned to MAPS.

Pejman Ben-Cohen and Robert Ounjian
Hampton v. American Multi-Cinema, Inc.

Plaintiff was at AMC movie theater when she was walking down a dark hallway, turned a corner where a restroom was under repair, and abruptly fell hard onto the tile floor. The plumbing in the faulty restroom caused water to leak into the hallway where she slipped. Plaintiff suffered numerous injuries and developed complex regional pain syndrome. AMC disputed liability and damages claiming her injuries and chronic pain were caused by her pre-existing fibromyalgia and surgical history. The jury awarded over \$9 million, finding AMC 100% negligent.

Stephen McElroy and Ashley Parris
Ell v. Loma Linda University Medical Center

A mother of four disabled children was driving her family home from a doctor's appointment at Loma Linda when their van was struck by another van operated by a delivery driver for defendant. Plaintiff struck her head during the collision and lost her sense of smell, and months later, was diagnosed with a concussion with post traumatic headaches. Her condition improved with treatment but her loss

of smell and, subsequently, taste was permanent. The jury agreed plaintiff suffered a concussive disorder and improved with therapy and treatment. The jury awarded over \$2.5 million in damages.

Trevor Quirk

Reynoso v. Burch, et al.

Plaintiff was helping his brother restore an olive orchard at defendants' property when he was struck and killed by a truck driven off the road by the co-defendant. Plaintiff contended he was defendants' employee and defendants failed to take reasonable safety precautions to protect their employee performing work near the public road. Defendants disputed plaintiff was an employee and even if he was, they were not negligent in the supervision of the project. The jury awarded \$10 million, apportioning liability among the property owners, plaintiff, and plaintiff's brother. The jury further found the property owners were vicariously liable for plaintiff's brother, finding he was their agent, making them responsible for the plaintiff's brother's portion of liability.



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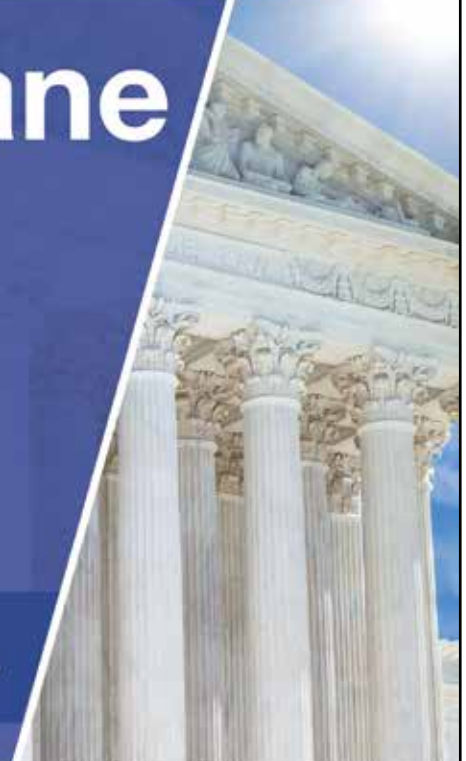
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California Raises Pain and Suffering Cap for Medical Malpractice Claims

By Kathleen Maheu, Esq.



For decades, medical malpractice judgments for noneconomic (pain and suffering) damages were limited to \$250,000, an arbitrary cap established as part of California's 1975 *Medical Injury Compensation Reform Act* (MICRA), a tort reform scheme limiting contingency fees, requiring prefiling notice of medical malpractice claims, and other particulars designed to contain rapidly escalating costs of medical malpractice insurance and limit healthcare providers' liability exposure.¹ In contrast to economic damages, which are tied to calculable losses (medical bills, physical therapy, loss of earnings, etc.), pain and suffering is an abstract concept not readily determined through a convenient mathematical formula. Noneconomic damages can also be recovered by parties not directly injured, through claims for loss of support and loss of companionship of an injured or deceased person. Juries are instructed only to award a "reasonable" amount given the evidence presented. (*Garfoot v. Avila* (1989) 213 Cal.App. 3d 1205, at 1212.) Regardless of jury determinations of medical malpractice, verdicts for noneconomic damages exceeding \$250,000 have been historically capped at \$250,000 since the enactment of MICRA.

In 1975, the minimum wage in California was \$2.00 per hour, the median cost for a new single-family home in the United States was \$39,300, and the median income of American households was \$11,800.^{2,3,4} Looking back, the \$250,000 figure represented a significant award to an injured plaintiff. Over time, this amount became less and less economically relevant. In some cases, the \$250,000 cap lacked any semblance of proportionality to the pain and suffering of an injured plaintiff.

California *Civil Code* Section 3333.2 was amended, effective January 1, 2023, to immediately raise the \$250,000 cap for noneconomic damages to \$350,000 for personal injury, and \$500,000 for wrongful death.⁵ Each January 1st thereafter, the personal injury cap will increase by \$40,000 until it reaches \$750,000, while the wrongful death cap will increase by \$50,000 annually until it reaches \$1,000,000. After these two ceilings are reached, the annual cap for each amount will be increased by 2 percent to adjust for inflation.

Until 2022, when Assembly Bill 35 was introduced by California Assembly Majority Leader Eloise Gómez Reyes and State Senator Tom Umberg, MICRA

had survived repeated challenges to its constitutionality under a variety of legal theories, including that it violated due process, equal protection, and the constitutional right to a jury trial. Critics also complained that the arbitrary cap had no provisions to keep pace with inflation, and that *Code of Civil Procedure* Section 667.7, which allows a defendant to pay out money damages over time, diminished the value of malpractice actions even further.

California courts have consistently rebuffed these critiques. As expressed by the Court in *Stinnett v. Tam* (2011) 198 Cal.App.4th 1412, 1419, "So long as the [pay over time] measure is rationally related to a legitimate state interest, policy determinations as to the need for, and the desirability of, the enactment are for the Legislature," citing *American Bank & Trust Co. v. Community Hospital* (1984) 36 Cal.3d 359, 368-369. The Court in *Yates v. Pollock* (1987) 194 Cal.App.3d 195, at 200, dismissed the "right to jury" argument, calling it "an indirect attack on the Legislature's power to place a cap on damages," and said "[I]t is well established that 'the Legislature retains broad control over the measure, as well as the timing, of damages that a defendant is obligated to pay and a plaintiff is entitled

to receive, and that [it] may expand or limit recoverable damages so long as its action is rationally related to a legitimate state interest.” (Emphasis in original.)

In addition to the sweeping changes to the pain and suffering damages cap, the Legislature enacted a new “apology law” that protect “Statements, writings, or benevolent gestures expressing sympathy or regret” from subpoena, discovery, or disclosure, and making them inadmissible. (Health & Saf. Code, §104340, subd. (a).) For medical providers, this new law also prohibits use of such “benevolent statements” in any civil, administrative, regulatory, licensing, or disciplinary board, agency, or body action or proceeding. These statements are also off limits in relation to any sanction, penalty, or other liability determination, or as an admission of liability, and are protected under *Evidence Code* Sections 1119, 1152, 1157, and 1160.

Efforts to amend the MICRA pain and suffering cap have been part of a long running political battle in California. Plaintiffs’ attorneys, consumer protection groups, lobbyists and victim advocates have fought to either eliminate the MICRA cap entirely or impose annual built-in cost of living increases. Defense attorneys and medical providers have resisted these efforts. Along the way, numerous unsuccessful ballot initiatives were proposed to address the perceived inequities of MICRA. Ultimately, a compromise was reached between reform advocates and proponents of the status quo, leading to Assembly Bill 35, which was signed into law by Governor Gavin Newsom on May 23, 2022, modernizing MICRA and offering a long overdue increase to MICRA’s pain and suffering cap.

Other components of MICRA that have been changed include:

- Periodic payments of future economic damages will start at \$250,000, rather than \$50,000.
- The four-tiered attorney contingency fee scheme now has two tiers, with an option to petition the court for a higher contingency fee for cases that go to trial:

25% contingency fee for claims resolved prior to a civil complaint being filed or arbitration demand being made.

33% contingency fee for claims resolved after civil company is filed or arbitration demand is made.

The California Medical Association said the new law “strikes a prudent and patient-focused balance between fair compensation to injured patients and the need for universal, high-quality, and cost-effective health care.”⁶

¹ See, e.g., Business and Professions Code Section 6146, Civil Code Sections 3333.1 and 3333.2, and Code of Civil Procedure Section 667.7.

² State of California, Department of Industrial Relations, History of California Minimum Wage. (www.dir.ca.gov/iwcl/minimumwagehistory.htm)

³ U.S. Department of Housing and Urban Development, New Single-Family Home Prices: 1964 – 2001. (<https://www.huduser.gov/periodicals/ushmch/winter2001/histdat08.htm>)

⁴ United States Census Bureau, Household Money Income in 1975 and Selected Social and Economic Characteristics of Households. (<https://www.census.gov/library/publications/1977/demo/p60-104.html>)

⁵ Historically, a decedent’s pain and suffering damages have been unrecoverable entirely in wrongful death survival actions, regardless of whether the action involved medical malpractice. This prohibition has been temporarily suspended with the passage of SB 447 on October 1, 2021, which revised Code of Civil Procedure Section 377.34, to allow recovery of pain, suffering, or disfigurement damages, but only for actions filed between Jan. 1, 2022, and Dec. 31, 2025.

⁶ California Medical Association, MICRA Modernization 2022. (<https://www.cmadocs.org/micra2022/about>)



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Ojai Raptor Center is a fully functional and permitted wildlife rehabilitation center, specializing in birds of prey. Every year they take in 1,000-1,500 sick, injured or orphaned birds (including many non-raptor birds, and a small percentage of mammals) with the hopes of rehabilitating them and releasing them back to the wild. Their busiest time of year is nesting season (now!), when the center becomes inundated with orphaned birds that need our help to grow, learn to fly, feed themselves and socialize before their release.

The four-acre campus is comprised of a medical room and hospital, as well as outdoor flight pens, aviaries and mews. All of the housing is specialized to the species that will be placed in it. The center also features the largest flight pen in California

Ojai Raptor Center is a 501(c)(3) nonprofit organization and does not receive sustained funding from government agencies. They rely heavily on the community for

donations. The majority of the animal patients the center receives are also brought in directly by the public.

Local attorney and VCBA Board of Directors Member **Valarie Grossman** has been involved with wildlife rehabilitation and release since she was a teenager. She generally volunteers her Sunday afternoons and evenings at the center where she puts this experience to use helping to prepare food, clean cages, and care for the patients. It certainly isn't glamorous work, but she believes it is essential to help care for these beautiful creatures in whose environment we reside.

If you would like to volunteer or get involved with this nonprofit, please contact Elaine Ibarra, volunteer coordinator, elaine@ojairaptorcenter.org, 805-649-6884.

If you volunteer or are active with a nonprofit that you'd like to highlight, please email Sandra Rubio at sandra@vcba.org.

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