

## Winning At Trial... Before the Jury Sits Down

Donald D. Wilson, Esq. - **CARMEL & NACCASHA**, San Luis Obispo



### Before the Jury Sits Down

Pssst! I have a “secret” for you... well OK it’s not exactly a secret, but it is a winning device which is way too often underutilized in California... the Evidence Code “402 motion”.

All Attorneys and Claims Professionals are familiar with Motions for Summary Judgment. They can be an effective “surgical” procedure for terminating claims when used in appropriate cases. The key is to know when they are, in fact, appropriate and when the likelihood of success is in your favor. We, in fact, have prevailed in over 90% of the M.S.J.’s we have filed.

However, there are often logistical timing problems and hurdles to overcome under the present statutory scheme in California, which sometimes effectively render M.S.J.’s unavailable.

First, the case must truly be an action “without merit or defense”, meaning that, for the purpose of the motion, if we assume everything the plaintiff claims is 100% true, there must still be no “triable issues” for a jury to determine. Generally, the trial courts are required to make their determinations as to whether or not a “triable issue” does or does not exist, through a liberal interpretation of the facts of the case, most favorable to the plaintiff. That is, generally speaking, if there is any even slim set of facts which could support the claim, there is a triable issue and the motion for summary judgment will be denied. *Code Of Civil Procedure, Section 437c*

Second, under the code, an M.S.J. must be served on all parties at least 75 days prior to the hearing (more, if the motion is served by mail). This is commonly well before pivotal discovery in the case, such as expert witness depositions, has been or can be completed... discovery which may provide the foundational basis for the motion. Expert witnesses do not even need to be designated by the parties until much closer to the time of trial.

So what can be done if the foundation for the M.S.J. arises after the statutory cut off date for an M.S.J.? In the right cases, we can still defeat a claim early in the trial process, prior to selecting a jury, through the use of my “secret” . It’s called an the Evidence Code “402 motion”.

Section 402 of the California Evidence Code provides a method for an early determination of evidentiary issues. It provides that the court may hear and determine the question of admissibility of evidence, outside of the presence or hearing of the jury.

In two trial matters in the past 5 weeks, we have prevailed on two such motions, in which we argued that,

1. The evidence established through the discovery process preceding trial did not leave any issue of sufficient relevance, substance or merit to rise to the level of a “triable issue”,
2. Plaintiff would not be able to meet his/its burden of proof,
- 3) Plaintiff should, therefore, be required to provide his/its Offer of Proof to the court to show otherwise and
- 4) Barring that proof, the case should be dismissed and the Court, the parties and the jurors not be put to the burden and expense of going through the motions of a meaningless trial.

Dismissal of a lawsuit by a court is always strong and final action. All the more so, when the matter reaches the trial phase. But, with a well-crafted motion, properly documented with the evidence supporting the defense argument that all salient issues have been rendered moot or unprovable by the plaintiff, the Court can and will dismiss.

In one of our two recent cases, which involved a \$250,000 property damage claim, upon receiving a “courtesy” draft of our motion just prior to trial, plaintiff’s counsel conceded the difficulties of proof in his case and agreed to settle for a cost of defense offer of only \$2500.

In the second case, involving a personal injury demand of \$165,000+, we answered ready for jury trial, made our “402 motion” and following a four-hour hearing, in which the court invited plaintiff and defense to make their respective Offers of Proof (well documenting the evidence presented and the arguments made, to prevent the possibility of appeal), the court granted our motion in its entirety and the dismissed the action outright, finding that there were no triable issues remaining and that plaintiff had no possibility of meeting his burden of proof.

End result?

- A potential savings of the \$465,000 or more in exposure to the insureds,
- The actual savings of tens of thousands of dollars in attorneys and expert fees, jury fees and other related trial costs
- The “undying gratitude” of two very pleased clients.

**Donald D. Wilson**  
**Carmel & Naccasha LLP**  
1908 Spring Street  
Paso Robles, CA 93446  
805-226-4148 – telephone  
805-226-4147 – facsimile  
[dwilson@carnaclaw.com](mailto:dwilson@carnaclaw.com)

**Carmel & Naccasha LLP**  
1410 Marsh Street  
San Luis Obispo, CA 93446  
805-546-8785 – telephone  
805-546-8015 – facsimile  
[www.carnaclaw.com](http://www.carnaclaw.com)