

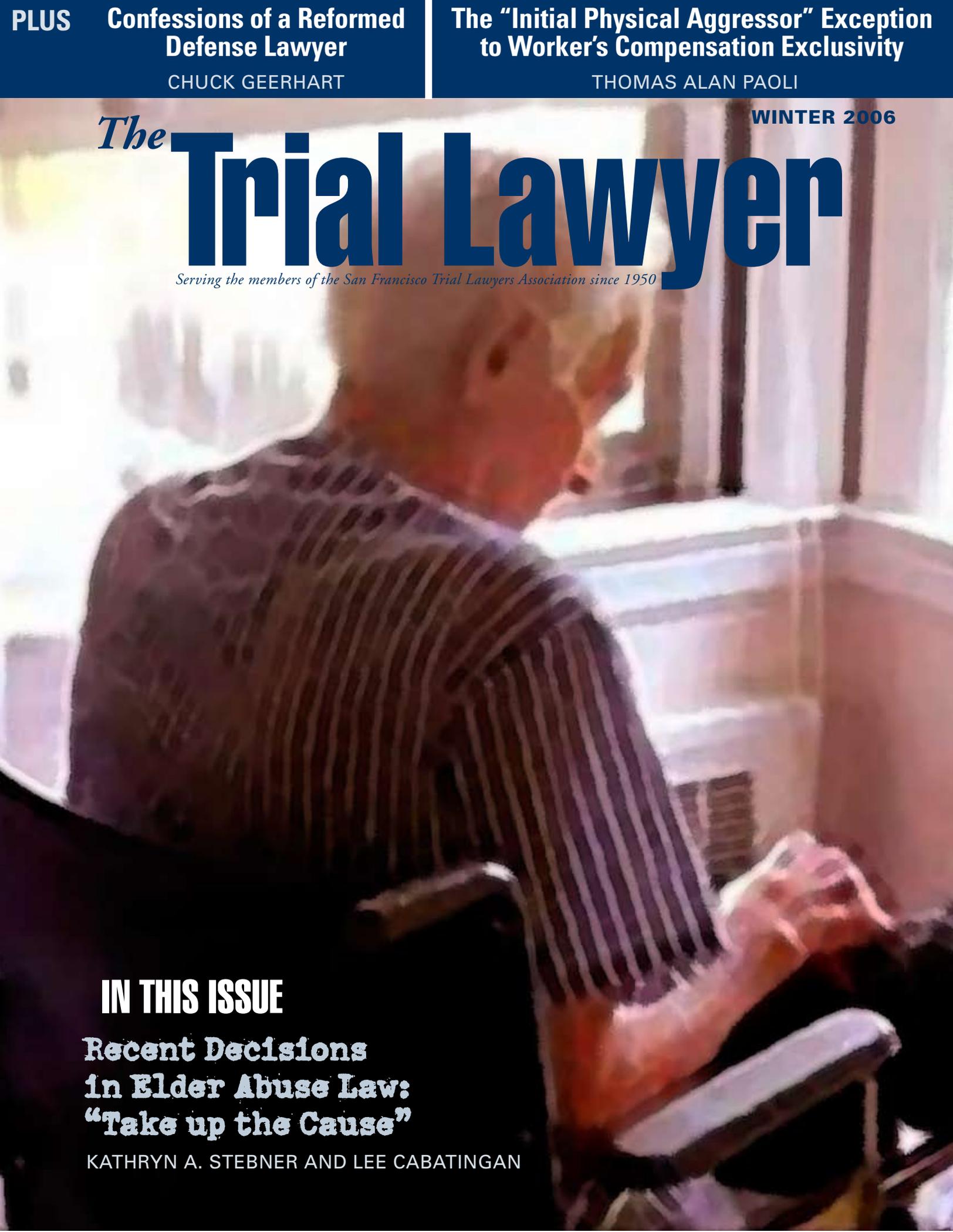
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The "Initial Physical Aggressor" Exception
to Worker's Compensation Exclusivity
THOMAS ALAN PAOLI

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The “Initial Physical Aggressor” Exception to Worker’s Compensation Exclusivity

I recently had a third-party liability case referred to me by another attorney who described it as a “serious injury, but possibly barred by worker’s compensation.” The plaintiff was a 26 year old man who suffered a brain injury in a fight at work. He had been unable to find a personal injury attorney to represent him, and had filed a complaint in pro per against the co-worker who injured him, and his employer.

The case was languishing in the pre-trial department of the San Francisco Superior Court when the client called me. He had been sanctioned for failing to attend an Order to Show Cause hearing. I agreed to specially appear at the continued

My client then punched and cracked the windshield of the co-worker’s vehicle, and reached inside and turned the co-worker’s steering wheel.

OSC, and to look into the merits of the third-party action.

My interest in the case grew when I learned that the worker’s compensation carrier was denying benefits, and that the employer was moving to compel binding arbitration under the employment contract. I liked the client and decided to represent him.

My client had been struck by the co-worker at work at a car dealership in San Francisco. He fell and suffered a closed head injury (subdural hemorrhage) requiring two operations, a craniectomy, and a bone flap replacement. His head injury

left him with mild cognitive impairments and a partial seizure disorder. His medical expenses were \$116,000 (medical lien asserted by Kaiser, his medical plan through work).

Complicating the case was the fact that my client did not remember the confrontation with his co-worker. The co-worker gave an unsworn written statement to the employer stating that the confrontation began when he and my client were both driving vehicles in opposite directions on a one-lane driveway. According to the co-worker, my client exited his vehicle and approached the co-worker, who was still at the wheel in his vehicle. My client then punched and cracked the windshield of

the co-worker’s vehicle, and reached inside and turned the co-worker’s steering wheel. The co-worker got out of his vehicle and when my client gave him a “belly bump,” the co-worker punched my client “out of self-protection.” One witness saw my client fall, but he did not see the punch, belly bump, or window smash.

I looked for ways to avoid the potential worker’s compensation exclusivity defense. At first, I focused on the “ratification/condonation” exception found in cases like *Fretland v. County of Humboldt* (1999) 69 Cal.App.4th 1478, 1486. I also decided

not to oppose the employer's motion to compel arbitration.

After the employer set a date with the arbitrator for a "dispositive motion" and I learned that the employer had promptly fired the co-worker after my client was injured, I began to think that the prospects of a successful third-party action were not good. I also began looking more carefully at the worker's compensation statutes.

I soon learned of an important exception to the exclusive remedy bar in the worker's compensation law: the initial physical aggressor exception. Under Labor Code §3600, worker's compensation is the exclusive remedy against an employer where the following conditions of compensation concur:

(7) Where the injury does not arise out of an altercation in which the injured employee is the initial physical aggressor.

Under Labor Code §3602 (c):

In all cases where the conditions of compensation set forth in Section 3600 do not concur, the liability of the employer shall be the same as if this division had not been enacted.

Thus, worker's compensation does not apply, and is not the exclusive remedy where the plaintiff is the "initial physical aggressor," and there is no bar to a third-party action against the employer.

"Initial physical aggressor" has been defined in worker's compensation case law as: "the one who first engages in physical conduct which a reasonable man would perceive to be a real, present and apparent threat of bodily harm" (*Martinez v. WCAB* (1976) 15 Cal.3d 982); and "who first introduces an element of physical violence into the confrontation, thus creating the risk of injury (and later acts of his opponent which unjustifiably increase level of violence do not absolve the initial aggressor)." (*Id.*)

I provided this authority to the employer's third-party defense lawyers and liability insurer. I argued that because my client was the initial aggressor, the employer's third-party liability was the same as if the worker's compensation law had never been enacted. Therefore, the employer could be sued on the basis of ordinary respondeat superior liability for the acts of its employee. This argument was persuasive, and taking into consideration, among other things, the potential for a finding of significant contributory negligence, we accepted a substantial offer of settlement.

Thomas Alan Paoli is a partner in the San Francisco firm of Paoli & Geerhart, LLP.

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