

US

**Fifth Amendment Issues
in Civil Cases**

DAVID MICHAEL BIGELEISEN

Welcome to Sunny Puerto Rico!

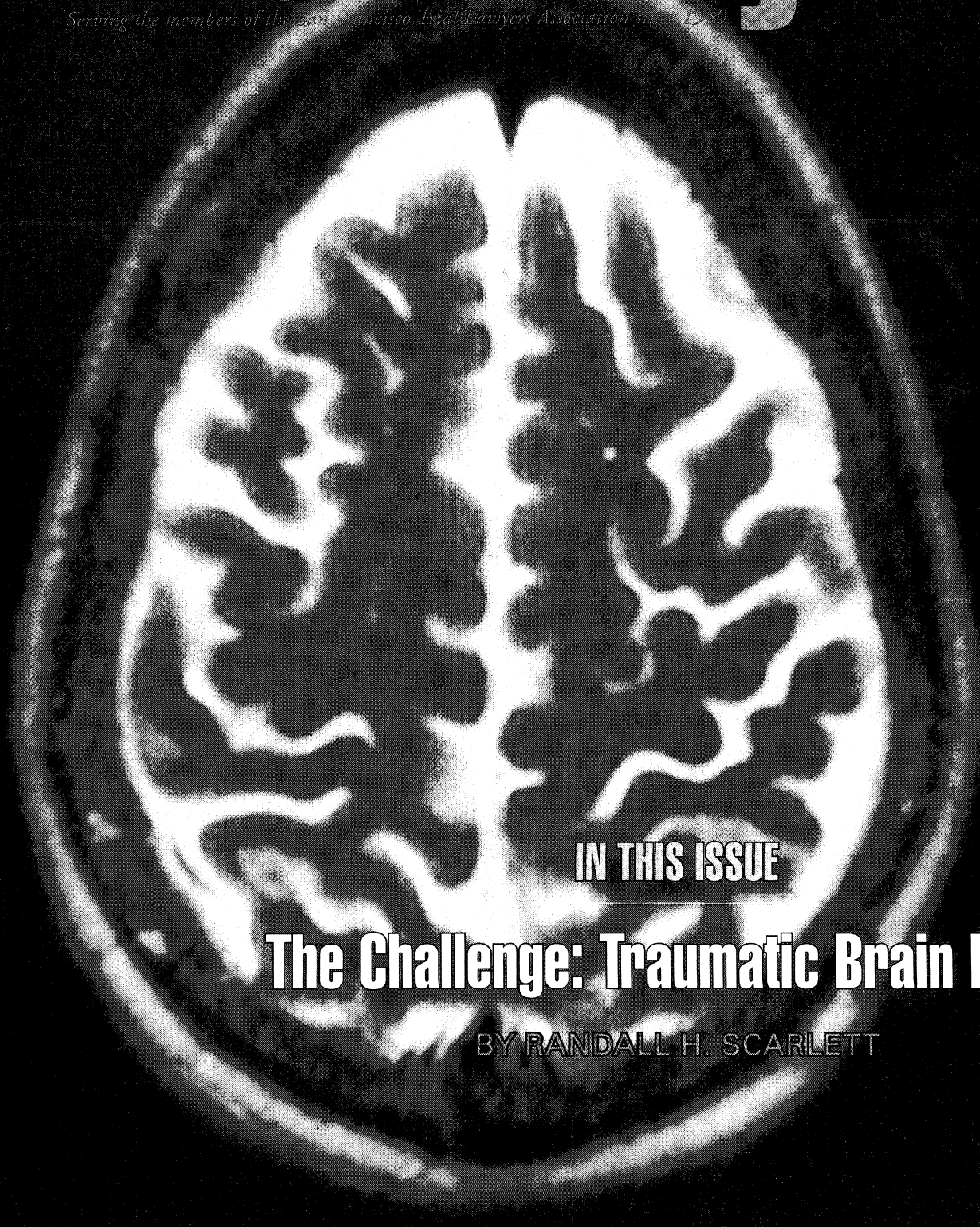
Now Let's Try a Federal Case!

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BY RANDALL H. SCARLETT

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Most California personal injury specialists try to keep their cases out of federal court jurisdiction, for any number of reasons.

Unanimous jury required. A judiciary that is often less than hospitable to our work, to put it kindly. And we're just more comfortable in California courts where we know the rules of evidence and procedure cold.

Now, how many of us would take an injury case that would have to be tried in federal court in Puerto Rico? What if you were told there were no significant recoverable medical bills? Can you say, "I respectfully pass this case on to my more adventurous colleagues"?

You now have the template for a case that SFTLA member John Vannucci not only signed up, he tried it and won a \$450,000 verdict for his client. In Federal District Court, Puerto Rico. The case was *Paloma Rodriguez v. Senior Frog's De La Isla, Inc.*

John, a lawyer since 1994, began his career with stints at a defense firm and as an El Dorado County Deputy District Attorney, where he tried dozens of jury trials. He was also an NCAA boxer, a trait that may explain why he took this case. Around the millennium, John made a career altering decision to start representing injured people in cases against insurance carriers and corporations. He was trained as an associate by one the best, Tom Brandi. Then about four years ago, he started his own solo practice.

How it All Began

Paloma Rodriguez was an attractive, talented 22-year-old student who was living in Puerto Rico. She was hit in her car by a drunk driver there who was deported to Mexico soon thereafter. Paloma suffered a gash to her forehead

that required 100 stitches. Paloma moved to San Francisco and retained John, who had earlier represented Paloma's mother in law in another case. Puerto Rico is a U.S. territory, with a U.S. District Court. Since Paloma was living in California at the time of filing, there was diversity jurisdiction for her case. Puerto Rico State Court was a bad option for filing because there is no right to trial by jury, and the case must be tried in Spanish.

Early investigation revealed the car belonged to Senior Frog's De La Isla, Inc. (a bar/restaurant with a predominant "party" theme), that the drunk driver was affiliated with Senior Frog's De La Isla as a trainer from the Mexican parent company, Grupo Anderson, and the driver, while having a Mexican driver's license, was not licensed in Puerto Rico. The case was viewed by the defense as a relatively low-value case because Paloma only treated at the hospital for a few hours, was stitched up, released, and made a good recovery. However, it was apparent to John when he first met Paloma that this crash had been devastating to her, and she still bore a visible scar.

Senior Frog's Tries to Escape the Net

John filed suit on behalf of Paloma against the driver (who was long gone), Grupo Anderson, and Senior Frog's based on owner liability. Written discovery ensued, with the defense stonewalling at every opportunity. John flew to Puerto Rico in September, 2008 for a pretrial conference, a settlement conference, and depositions he noticed of Senior Frog's PMQ's and of percipient witnesses. There, for the first time in the litigation that had been going for two years, Senior Frog's produced a "sales contract" signed by the President of Senior Frog's and by the

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drunk driver purporting to sell the car to the drunk driver eleven days before the crash. Senor Frog's claimed this absolved it of owner/negligent entrustment liability. John knew this contract was a fake, but it was too late in the game to retain a Bay Area questioned-documents expert, and to have such an expert travel to Puerto Rico for the December trial was unworkable. (There was no tenable expert to be found in Puerto Rico.) Senor Frog's moved to dismiss the case based on this contract. John argued that Puerto Rican state law provided that such a contract, while potentially binding between Senor Frog's and the drunk driver, could not be binding on third parties such as Paloma because the sale was not recorded with the Puerto Rican equivalent of the "DMV," and thus had no reliability. The motion to dismiss was denied.

"You'll Never Get Six Figures in Puerto Rico"

At the settlement conference in September, Senor Frog's moved to dismiss based on lack of jurisdiction – arguing the amount in controversy did not exceed \$75,000.00. Senor Frog's argued that there were no medical billings (Puerto Rico has socialized medicine and billing equivalents there were so low that John decided not to pursue any medical specials and proceed with the case as a general damages case only) or substantial lost wages and that Paloma's pain and suffering could not possibly reach \$75,000.00. The Court entertained this motion, advising John that this case "would never get six figures in Puerto Rico." John argued that just \$10 dollars a day through her life expectancy for Paloma's visible scar would exceed six figures. The Court denied defendant's motion. Sr. Frog's offered \$10,000 to settle the case, increased to \$30,000 just before trial.

Trial Begins, and Almost Ends In a Hurry

Trial began on December 8th. The Court allowed no voir dire. The trial began with a dramatic objection over what plaintiff could tell the jury about damages. In opening, John explained to the nine jurors this was a general damages case, and said he was going to come back at closing and ask for a verdict of \$450,000.00. Defense counsel jumped out of his chair and objected to the use of any dollar amount. The objection was sustained. The defense then made a motion for mistrial, which, fortunately, was denied. But there was more seemingly case-gutting fallout from the defense's objection during opening: the judge ordered that John could not in closing argument argue any specific general damages numbers. The Court relied on a Third Circuit case (where arguing a specific number for pain and suffering is prohibited) even though this was a First Circuit case. Paloma's verdict amount would be left to the imagination of the jurors.

The Defense Takes the Gloves Off

The defense contested liability, attempting to argue 1) the sale of the car; and 2) Paloma had been drinking prior to the accident. Plaintiff's motions in limine gutted these defenses. Throughout the trial, Senor Frog's attempted to blame Paloma for the accident by having put her car in a place "it shouldn't have been" (off the side of the road after a breakdown) and accused her of lying about her damages.

All of plaintiff's witnesses (besides Paloma) testified in Spanish with translation to English. Due to a scheduling problem with the percipient police officer, John called Paloma early on out of order. She was very nervous but testified well and came across credibly. Paloma testified she was devastated after the accident and spent time at her father's on the west side of the island and barely socialized for at least two months because of her scar and emotional state. On cross, the defense intro-

duced blowup pictures from a "friend's" Facebook page of Paloma celebrating with friends and laughing with drinks in her hand. These photos were dated twenty days after the accident. While these photos at first seemed substantial, actually they were 1) taken on Christmas Day; 2) taken at her father's house; and 3) depicted the fruit of her father's efforts to have Paloma's friends come over to try and get her out of her depression for a Christmas gathering. Paloma's father testified well in this regard and, his last words on redirect were translated as Paloma "lost her happiness." John felt that defendant's use of these pictures proved misguided.

The case went to the jury around 5 p.m. The nine jurors returned in less than an hour with a unanimous verdict for Paloma in the amount of \$450,000.00, completely vindicating her version of events. John reports that after the verdict, "She couldn't stop crying."

Trial Lawyer wanted to find out more about this courageous verdict in a challenging venue, and John Vannucci obliged.

Trial Lawyer: What's the status of the judgment now?

John Vannucci: The defense filed motions to dismiss, for new trial, and for remittitur. We opposed, of course. The judge has not yet ruled but I am optimistic about the results. They have not yet appealed and I think they may not.

TL: What medical experts did you use?

JV: I only called the E.R. doctor, since she was the one who saw Paloma's injuries, including her bruises and the gash to her head. There really wasn't any other medical treatment besides the E.R. and some minor follow-up with a plastic surgeon (who applied a sort of healing cream.) A big part of the defense was to

focus on Paloma's limited treatment for her injuries.

TL: How did you decide to waive medical specials and make this a general damages only case?

JV: We proceeded on general damages only since Puerto Rico medical billing equivalents were so low I feared they would "anchor" down the general damages.

TL: Did the defense use any experts?

JV: The defense had no experts.

TL: I understand your defense counsel was very well-known—the "Johnnie Cochran" of Puerto Rico — what was he like in trial?

JV: Defense counsel was Harry Anduze Montaña. He represents the (former) Governor of Puerto Rico on current fraud charges brought by the Feds set to go to trial this month. This dominated the news while I was there. He is the past president of the Puerto Rican Bar Association. He was very slick, and I felt he made various misrepresentations of fact and law to the Court. He referred to me as "inexperienced and incompetent" to the judge (when I requested a hearing on jurisdiction.) When I asked him to cite a case supporting his strong objection to my citing a general damages figure to the jury he responded, "It's not my job to teach you the law." He was arrogant, theatrical and, apparently, ineffective.

TL: Did you speak with any jurors after trial?

JV: On advice of my local counsel I did not talk with the jurors. Apparently it's not customary there and we were loathe to give these spotty defendants any ammunition whatsoever in their post-trial motions. One juror did approach my client's father and told him in Spanish outside the Court (it was around 7 at night there) "We were all with you guys all the way."

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