CAIIA Status Report

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August 2017

Amiguous Application Questions
Credit to Haight, Brown and Bonesteel, Los Angeles, CA

In *Duarte v. Pacific Specialty Ins.* (No. A143828; filed 6/12/17, ord. pub. 6/29/17) a California appeals court held that an insurer was not entitled to summary judgment on its rescission claim because the disputed questions in the insurance application were ambiguous.

In *Duarte*, the insured/owner purchased a tenant-occupied property in Oakland. Several years later the tenant's daughter moved in, and continued living there after the tenant died. The insured/owner served the daughter with an eviction notice and shortly thereafter applied for Owners, Landlords & Tenants ("OLT") liability coverage. The tenant/daughter responded to the eviction notice by filing a habitability lawsuit, claiming emotional distress and physical injury, among other things.

The insurer denied coverage and a defense, drawing a bad faith lawsuit for failure to defend and "wrongful cancellation" of the policy. The insurer answered and raised rescission as an affirmative defense, based on alleged fraud and misrepresentation in the OLT policy application.

In cross-motions for summary judgment and/or adjudication, the insurer argued that the insured/owner had misrepresented answers to two application questions – whether the applicant knew of a dispute with tenants about the property; and whether there was any business conducted on the property. For evidence, the insurer pointed to complaints the tenant/daughter made to the City of Oakland Department of Housing Rent Adjustment Program, and evidence of testimony and statements by the insured and the tenant/daughter that she had continued to carry on her father's practice of selling motorcycle parts from the premises.

The insured/owner's cross-motion sought summary adjudication on the duty to defend. But in granting the insurer's motion, the court found the insured/owner's duty to defend motion moot, since the policy was deemed void ab initio. However, the appeals court reversed the insurer's summary judgment and remanded the case for a ruling on the insured/owner's summary adjudication motion.

First, the appeals court rejected an argument that the insurer's rescission claim was procedurally defective. The insured/owner had argued that the insurer could not rescind the policy because it had not complied with the statutory procedural requirements for notice and return of premium. The *Duarte* court pointed out that Civil Code section 1691, which governs rescission, specifically provides that service of a pleading seeking relief based on rescission constitutes notice. The court held that raising the affirmative defense of rescission in the answer to a complaint is sufficient to meet the requirement. The court also held that it is unnecessary to file a cross-complaint seeking affirmative relief, but that raising rescission as an affirmative defense will support the entry of summary judgment in the answering defendant's favor.

The *Duarte* court then addressed the substantive issue of misrepresentation. As to knowledge of prior disputes, the insured/owner had answered "no" to the question: "Has damage remained unrepaired from previous claim and/or pending claims, and/or known or potential (a) defects, (b) claim disputes, (c) property disputes, and/or (d) lawsuits?" The court found the question "utterly ambiguous" with "garbled syntax."

The court rejected the insurer's effort to rely on an attached "underwriting guideline" for "unacceptable properties" that referred to "pending claims," "property disputes," or "lawsuits," finding instead that the disputed question hinged solely on "unrepaired damage,"
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An Employer Organization of Independent Insurance Adjusters

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CAIIA Newsletter
CAIIA Office
PO Box 168
Burbank, CA 91503-0168
Website: www.caiia.com
Email: info@caiia.com
Tel: (818) 953-9200

Editor: Sterrett Harper
Harper Claims Service, Inc.
(818) 953-9200
harperclaims@hotmail.com

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California Association of Independent Insurance Adjusters, Inc.

President's Message

WILDFIRES

Steve Washington

CAIIA President

As you know, wildfires year after year throughout the west cause considerable damage. The drought along with high winds, dry conditions and dense brush with dead trees increase the risk for wildfires. Careless use of campfires, a spark from a piece of equipment or machinery or a careless cigarette and fire can spread, often unnoticed, and very rapidly.

Damage from wildfires destroy people, houses and almost anything in their path. Of course no one can place a price on one's pets, photographs and other family memories. The economic cost is also huge: chemicals, logistics, aircraft and trucks, time and personnel. Wildfires can potentially wipe away crops and the organic value of the soil. The effect on the watershed can be devastating.

As of this writing there are approximately nineteen (19) active fires in California. (And note the Santa Ana winds have yet to really get started). The current wildfires include the Alamo fire, Whittier fire, Wall fire, Detwiler fire.

As adjusters we watch the fires on television, check out the maps and monitor their impact and we wonder if our company is going to get any claims from the loss of structure, forest or vegetation. We live our lives, unless it affects us directly, detached and interpret what we see as disparate images.

Unless we are firefighters or work for FEMA or other government agencies there isn't a lot we can do to help……is there? How about volunteering and joining the **Angeles National Forest Fire Lookout Association (www.anffla.org).** The Fire Lookout Program is a nonprofit volunteer organization in partnership with the U.S. Forest Service. The program will train you (in about 12 hours) to call in smoke and fire reports thus enhancing the fire fighting capabilities of the U.S. Forest Service. As an ANFFLA member, among other things, you can staff and maintain the remaining fire lookouts. One such lookout is the Vetter Mountain lookout which overlooks a great swath of forest and is only a couple of miles off the Angeles Crest Highway. I would invite you to visit their website if only to view some of these lookout structures and towers perched atop a mountain and overlooking some truly spectacular views.

Further, if you wish to donate $10.00 you will receive a year's subscription to ANFFLA newsletter. This money will assist in the preservation of these historical mountain lookouts. And, one final note, as with our organization (CAIIA), volunteerism and participation is the life blood for the ongoing vitality of the ANFFLA.

Steve Washington

CAIIA President 2016-2017

Washington & Finnagan, Inc.

Steve.washington@sbcglobal.net

NEWS FROM AND FOR OUR MEMBERS

SAVE THE DATE

The CAIIA is proud to be exhibiting at or sponsoring the following upcoming events:

September 13-15, 2017	Claims Conference of Northern California, Sacramento, CA
September 28, 2017	CAIIA Annual Meeting, location TBD
October 17, 2017	CPCU Educational Event, Studio City, CA
March 6-7, 2018	Combined Claims Conference, Garden Grove, CA

DOI Curriculum Board Update

I attended the California Department of Insurance Curriculum Board Meeting on July 27th.

The pass rates for independent adjusters for the first six months of 2017 are up quite a bit. First time test takers passed 54% of the time, compared to 43% for the same period last year. Repeat test takers passed 39% of the time, compared to 30% for the same period last year. Maybe the help the CAIIA gave the DOI in updating the test had some effect on pass rates.

Also, test taking rates are up quite a bit, possibly adjusters were thinking an individual license would be needed and decide to take the test even though the bill was vetoed.

AB 1657 was discussed. It deletes the word "such" from CIC Section 14011. This is a very minor non-substantive change to the act that allows the commissioner to appoint inspectors and investigators to enforce the insurance adjuster act.

Nothing else new to report.

If anyone has a question or suggestion, please call or email me.

Peter Schifrin CAIIA – Past President

818-721-4713 ; pschifrin@sgdinc.com

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i.e., property damage, rather than disputes over possession. Thus, the insured/owner's claimed interpretation that the question referred only to "unrepaired damage from prior insurance claims" was reasonable. And, consequently, his answer of "no" was not a misrepresentation.

The insured/owner had also answered "no" to the question "Is there any type of business conducted on the premises?" But the insurer's evidence was insufficient, consisting of hearsay statements from the daughter about continuing her father's practice of selling motorcycle parts from the premises. The court was also swayed by the fact that the insurer's own underwriting inspector had reported that that there was no "business, farm or ranch operating on the property." And in any case, the court agreed with the insured/owner's argument that "business being conducted on the premises" could reasonably mean "regular and ongoing business activity." The court offered no further explanation why "business conducted on the premises" might be limited to "regular and ongoing business activity" and again, the answer "no" was deemed not to have been a misrepresentation.

Given its conclusion that the disputed questions were ambiguous, the *Duarte* court concluded that the insurer had not met its burden for summary judgment, and remanded the case for consideration of the insured/owner's motion for summary adjudication on the duty to defend.

Workers Compensation Coverage
Credit to: McCormick and Barstow, Bakersfiled, CA

Workers' Compensation insurer addressing workers' compensation claim is not limited to cancellation as remedy for misrepresentations made in an application, but may also seek rescission.

Southern Ins. Co. v. Workers' Compensation Appeals Board (2nd App. Dist. 2017) ___ Cal. App. 5th ___, 2017 DJDAR 4660, Case No. B278412

UNDERLYING CLAIM

EJ Distribution ("EJ") applied for workers' compensation insurance representing that its business was a trucking company that moved containers with no loading or unloading. EJ also represented on the application that it only performed local hauling and that its employees did not travel out of state and did not have a travel radius of more than 200 miles. Southern Insurance Company ("Southern") issued a workers' compensation policy to EJ. Subsequently, an EJ employee, David Segovia, injured his back lifting a latch on the back of his truck while on a trip to Tennessee for EJ. Segovia filed a workers' compensation claim. Southern sent a letter to EJ informing it that Southern was rescinding the policy based on material misrepresentations in the application, namely that the employees did not travel out of state and that operations did not exceed a 200 mile radius. Southern returned the policy premium. Due to Southern's position, the Uninsured Employers Benefits Trust Fund was joined as a defendant in the workers' compensation claim.

The matter was submitted to mandatory arbitration under Labor Code section 5275 (a)(1) as a dispute involving insurance coverage. Southern presented testimony from an underwriter to the effect that Southern did not insure long-haul truckers and would not have insured EJ had it known that EJ traveled out of state and beyond a 200 mile radius. A special investigator hired by Southern testified that EJ engaged in out of state operations before inception of the policy, although he did not uncover any evidence of out of state operations at the time the application was submitted.

The arbitrator found that Southern could not retroactively rescind the policy. First, the arbitrator found that the only remedy available to Southern was cancellation of the policy under Insurance Code section 676.8 (b)(5) as nothing in that code section permits retroactive rescission by a workers' compensation carrier. Second, the arbitrator found that there is no mechanism for a workers' compensation insurer in California to unilaterally and retroactively rescind its policy. Finally, the arbitrator expressed concern over leaving the employee without coverage.

Southern moved for reconsideration. The arbitrator recommended that reconsideration be denied, noting that the testimony of Southern's investigator was not convincing and the record did not show when EJ began sending drivers out of state. Since the falsity may not have occurred until the day of the accident, retroactive rescission was not justified. The appeals board adopted the arbitrator's report and denied reconsideration. Southern petitioned for and was granted a writ of review.

APPELLATE COURT'S RULING

The appellate court first addressed the question of jurisdiction. Southern conceded that under Labor Code section 5275 (a)(1), insurance coverage is within the jurisdiction of the appeals board. However, Southern contended the appeals board does not have subject matter jurisdiction over contractual disputes such as the question of the validity of Southern's rescission of the policy. The appellate court disagreed, noting "where, as here, *coverage* is disputed on the ground that there is no longer a contract of insurance in existence, it is obviously necessary to rule on the defense asserted in order to determine whether there is coverage...Thus while Southern is free to litigate contractual disputes with its insured in a court of law, if Southern disputes workers' compensation insurance coverage because it claims there is no contact, it must submit to the jurisdiction of the appeals board on the issue of coverage even if that entails a ruling on whether the insurance contract is (or was) in effect."

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Admission of Vicarious Liability isn't Shield for Punitive Damages

Credit to Low, Ball, Lynch, San Francisco, CA

CRST, Inc., et al. v. The Superior Court of Los Angeles County

Court of Appeal, Second Appellate District (May 26, 2017)

In *CRST, Inc., et al. v. The Superior Court of Los Angeles County*, the California Court of Appeals held that an employer's admission of vicarious liability does not shield it from punitive damages.

Under the doctrine of *respondeat superior*, an employer is vicariously liable for the torts of its employees committed within the scope of the employment. There is no question the employer is liable for the compensatory damages attributable to the employee's misconduct, even when the employer is not at fault. Vicarious liability determines the employer's share of liability for compensatory damages under the comparative fault system, which allocates liability for tort damages in direct proportion to fault. It has long been established that when an employer admits vicarious liability, the plaintiff may seek compensatory damages from the employer *only* on a theory of vicarious liability.
By contrast, the standard of misconduct to be found for the recovery of punitive damages has been refined and modified over the years. Prior to the enactment of the current version of the California Code of Civil Procedure § 3294, California courts had followed the rule stated in the Restatement of Torts § 909, which permits the imposition of punitive damages on an employer in several circumstances, including when the employee was unfit and the employer was reckless in employing him. However, with the enactment of section 3294, an employer may be liable for punitive damages when 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. For 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. But the effect of admitting vicarious liability on plaintiff's ability to recover punitive damages against an employer has remained unclear.

In 2014, Hector Contreras was employed as a truck driver by petitioners CRST, Inc., CRST Expedited, Inc., CRST Van Expedited, Inc., and CRST Lincoln Sales, Inc. (CRST). On July 7, 2014, he drove a CRST freightliner on the Interstate 14 freeway. As he passed through a construction area known as the Red Rock Canyon Bridge project, he collided with a car containing Matthew and Michael Lennig. Matthew and Michael Lennig brought an action against Contreras and CRST for negligence and sought punitive damages. The Superior Court of Los Angeles County granted Contreras' motion for summary adjudication on Matthew and Michael Lennig's requests for punitive damages against the driver, but denied CRST's motion for summary adjudication regarding the requests for punitive damages against them. CRST petitioned for writ of mandate.

While neither of the leading cases on the issue, *Diaz v. Carcamo,* (2011) 51 Cal.4th 1148, or *Armenta v. Churchill,* (1954) 42 Cal. 2d 448, take up the issue of punitive damages specifically, the Second Appellate District held that nothing in the previous case law suggested that punitive damages could not be sought against an employer who admits vicarious liability. The Court found it a natural extension of previous case law to allow punitive damages to be sought against an employer who admits vicarious liability, as well as in the interest of public policy to hold employers accountable. However, in this specific case, CRST was not subject to punitive damages because the court also found a lack of any triable issues of material fact supporting plaintiff's claim of punitive damages against CRST. Accordingly, the Court granted the petition for writ of mandate and directed the Superior Court to vacate its order denying the employers' motion for summary adjudication regarding the requests for punitive damages against them, and to enter a new order granting summary adjudication on that issue.

COMMENT

The holding of *CRST, Inc., et al. v. The Superior Court of Los Angeles County* may expand the scope of damages that a plaintiff may seek when vicarious liability is admitted by an employer. If admitting vicarious liability does not shield an employer from punitive damages, employers will need to change their evaluation of exposure to take into account the potential for punitive damages, and consider the advantages and disadvantages of admitting vicarious liability in defending lawsuits based on employee misconduct.

Continued from page 4

The appellate court next addressed the issue of whether rescission is a remedy applicable to workers' compensation policies. The court noted that although Insurance Code section 676.8 provides cancellation of such policies, it in no way addresses the issue of rescission of such policies. However, Insurance Code section 650 permits rescission of insurance policies. Although that code section does not specifically mention workers' compensation policies, the appellate court determined it applies to such policies by failing to exclude them. Furthermore, although Insurance Code section 650 precludes rescission once an action on the contract has been filed, rescission was not precluded in the present case since, as the appellate court noted, "the filing of a workers' compensation claim is not the equivalent of an action on the contract. The function that an 'action on the contract' serves in section 650 is a legal remedy that precludes the filing of an equitable suit for rescission. The action on the contract also serves as an appropriate vehicle for the assertion of rescission as a defense. A workers' compensation claim is not the equivalent of a remedy at law."

Finally, the appellate court addressed the issue of whether a rescission of the policy had been effectuated. Under Civil Code section 1691, rescission is effected by providing notice and restoring the premium. Once this occurs, either party may seek legal or equitable relief based on the rescission. In the present case, although Southern had effected the rescission, it did not file an action for relief seeking a judgment that its rescission was effective, an action necessary to definitively discharge Southern's duties. The appellate court cautioned that the insurer "is well advised to avoid drastic decisions about coverage until the validity of the rescission has been adjudged." However, the appellate court concluded that it appeared the arbitrator had given little or no consideration to the facts presented which justified rescission, including evidence from which it could be reasonably inferred that EJ knew at the time it entered into the policy that its statements regarding the nature of its transportation business were false. As such, the appellate court ruled that the decision of the appeals board affirming the findings and award of the arbitrator be annulled and the matter remanded to decide whether EJ concealed material facts when it entered into the policy, thus warranting rescission of the policy by Southern.

EFFECTS OF THE COURT'S RULING

First, the appellate court's ruling is significant in that it determined that the issue of rescission of a workers' compensation policy falls within the subject matter jurisdiction of the workers' compensation appeals board. Although the Labor Code specifically provides that coverage issues are within the board's jurisdiction, rescission is not a coverage issue. It is also reasonable to conclude that an appeals board would be much more likely than a court of law to find against the insurer on this issue to ensure that coverage is in place for the injured worker. Therefore, this holding puts insurers at a disadvantage when it comes to establishing rescission in a workers' compensation context once the claim has been made and the insurer is subject to the jurisdiction of the appeals board. It is of note, however, that the court did not appear to hold that the jurisdiction of the appeals board is exclusive. Instead, by reiterating the established principle that "any party to the contract may seek legal or equitable relief based upon the rescission (citation)," it can be presumed the court recognized that the appeals board's jurisdiction is concurrent with that of a court of law. The insurer should therefore consider immediately filing a civil action on a claim of rescission so it can take advantage of the rule to the effect that when two tribunals have concurrent jurisdiction, the one first assuming jurisdiction retains it to the exclusion of all others in which the action could have been initiated. (*Scott v. Industrial Accident Commission* (1976) 46 Cal.2d 76,81.)
The court's remaining findings are in line with the clear statutory language to the effect that workers' compensation policies can be retroactively rescinded and that insurers are not limited to a cancellation remedy.

Premises Liability

Credit to Tyson and Mendes, San Diego, CA

Premises liability is a unique type of negligence. (*Brooks v. Eugene Burger Mgmt. Corp.* (1989) 215 Cal.App.3d 1611, 1619.) While a cause of action for premises liability contains the same core elements of a negligence claim (i.e., duty, breach of duty, causation, and damages), it only applies to defendants who own, occupy, or control real property and/or real property improvements. (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134; CACI No. 1000.) As such, the general rule is: One who assumes possession and/or control over a premises has a duty to keep it in a reasonably safe condition. (*Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674.) However, exceptions to this rule exist– one being recreational use immunity.

California's recreational use immunity statute carves out the following exception to premises liability:
An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purposes or to give any warning of hazardous conditions, uses of, structures, or activities on those premises to persons entering for a recreational purpose….

(Civ. Code, § 846.)
This rule applies to interests in both public and private real property. (*Hubbard v. Brown* (1990) 50 Cal.3d 189, 197.) It does not matter whether the recreational activity is performed on land suitable for recreational use. (*Ornelas v. Randolph* (1993) 4 Cal.4th 1095, 1105.) The recreational use immunity statute sets forth the following list of activities, which possess the requisite recreational purpose:
[F]ishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sightseeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, hang gliding, private noncommercial aviation activities, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

(Civ. Code, § 846.)
This activity list is, however, by no means exhaustive. (*Id.*; *Pacific Gas and Electric Co. v. Sup. Ct.* (2017) 10 Cal.App.5th 563, 569.) The list serves merely to provide an exemplar "range from risky activities enjoyed by the hardy few . . . to more sedentary pursuits amenable to almost anyone…." (*Ornelas v. Randolph*, *supra*, 4 Cal.4th at 1101.)

Recreational activities aside, there is no immunity from liability under the following circumstances:
(a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

(Civ. Code, § 846.)
Neither negligence nor gross negligence satisfies the requisite intent for willful or malicious conduct. (*Manuel v. Pacific Gas & Electric Co.* (2009) 173 Cal.App.4th 927, 939-940.) To the contrary, there must be a "positive intent actually to harm another or do an act with a positive, active and absolute disregard of its consequences." (*Id.* at 940.) In other words, "the intention must relate to the misconduct and not merely to the fact some act was intentionally done." (*Id.*) For an act of negligence to rise to the level of willful misconduct, there must be: "(1) actual or constructive knowledge of the peril to be apprehended, (2) actual or constructive knowledge that injury is a probable, as opposed to a possible, result of the danger, and (3) conscious failure to act to avoid the peril." (*Id.* at 945 (internal citations omitted.))

The Takeaway
The recreational use immunity statute provides equal opportunity for immunity from premises liability to defendants of all types. It does not matter if your client is an individual, private business, or public entity. So long as (a) the plaintiff was engaging in a recreational activity on the subject premises at the time of the incident at hand, (b) your client holds some type of real estate interest in the premises (e.g., fee simple ownership, leasehold estate, grazing permit), and (c) none of the above-noted exclusions apply, your client could escape liability where the general rule of premises liability law would otherwise indicate fault for plaintiff's injuries and damages.

CCNC 2017 SCHEDULE OF EVENTS
SEPTEMBER 13 – 15, 2017

McClellan Conference Center, McClellan Park

September 13 | Wednesday

2PM – 5PM | Exhibitor Set Up

6PM – 9PM | Welcome Reception | BLACK & WHITE GALA

September 14 | Thursday

7:30AM – 8:30AM | BREAKFAST in the Exhibit Hall with Exhibitors

8:30AM – 9:30AM | KEYNOTE Presentation | HOW TO MASTER CATASTROPHE LOGISTICS | Jerry Bialick, USAA CLAIMS SERVICE DIRECTOR, LARGE LOSS OPERATIONS | Center Stage in the Exhibit Hall

As Hurricane Ike hit Houston, Texas in 2008, Jerry Bialick was chosen as USAA's first Catastrophe Logistics Director and has served in that role several times since for other catastrophes. In total, he has been deployed to 15 catastrophes around the United States. His current responsibilities are nationwide over a large team dispersed to all areas of the United States. He also serves as the Fire Chief of a large suburban fire department in San Antonio, Texas providing fire and EMS services to over 62,000 residents and $8.2B in property assets.

9:30 – NOON | CATASTROPHE STAGING EXPERIENCE
10AM – NOON | CE Presentations
NOON – 1PM | LUNCH BREAK in the Exhibit Hall with Exhibitors
1PM – 5:15PM | CE Presentations

6PM – 10PM | CARNIVAL NIGHT with FOOD TRUCKS

September 15 | Friday

8AM -9AM | BREAKFAST in the Exhibit Hall with Exhibitors
9AM – NOON | CE Presentations
NOON – 1PM | LUNCH BREAK in the Exhibit Hall with Exhibitors

1PM – 4PM | CE Presentations
4PM | CONFERENCE ADJOURNS

To register, go to: http://claimsconference.org/attend-2017/

On the Lighter Side...

The haircut, (Priceless)

A teenage boy had just passed his driving test and inquired of his father as to when they could discuss his use of the car.

His father said he'd make a deal with his son, "You bring your grades up from a C to a B average, study your Bible a little and get your hair cut.

Then we'll talk about the car."

The boy thought about that for a moment, decided he'd settle for the offer and they agreed on it.

After about six weeks his father said, "Son, you've brought your grades up and I've observed that you have been studying your Bible, but I'm disappointed you haven't had your hair cut."

The boy said, "You know, Dad, I've been thinking about that, and I've noticed in my studies of the Bible that Samson had long hair, John the Baptist had long hair, Moses had long hair, and there's even strong evidence that Jesus had long hair."

Love the Dad's reply!

"Did you also notice that they all walked <u>everywhere</u> they went?