Recent California Tort Law

Eric A. Schneider
Anderson, McPharlin & Conners LLP
444 South Flower Street, 31st Floor
Los Angeles, California 90071
(213) 688-0080
EAS@AMCLAW.COM

TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page

CALIFORNIA CASES

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

Page

FEDERAL AND OTHER STATE CASES

CALIFORNIA STATUTES

Page

Page

Page

TREATISES

I. PREMISES LIABILITY FOR CRIMINAL ACTS

A. Introduction

California appellate courts have handed down a multitude of decisions within the past 30 years concerning the extent of the duty of a landowner to protect others from criminal attacks on the landowner's premises. Each of the cases in one fashion or another examines duty within the formula set forth in the landmark case of Rowland v. Christian (1968) 69 Cal.2d 108. The California Supreme Court set forth the considerations which should be balanced when determining whether a particular duty is owed:

> [T]he major ones are the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. [69 Cal.2d 108, at 113.]

In 1985 the Supreme Court interpreted Rowland in the context of premises liability for third-party crimes in Isaacs v. Huntington Memorial Hospital (1985) 38 Cal.3d 112. The language in that case strongly suggested that duty is normally a question of fact reserved for the jury, virtually ruling out the potential for summary judgment on the issue of duty.

The court, however, did an about face in that regard in Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666, which specifically stated that such would be an inaccurate reading of the Isaacs decision. Ann M. views the question in a wholly different light and has resulted in numerous subsequent lower appellate court decisions addressing these questions, many of which examine motions for summary judgment.

B. The *Ann M.* Case

Plaintiff Ann M. filed suit against the manager and owners of a shopping center where she was an employee of one of the tenants. She had been raped on the premises during business hours.

The defendants successfully moved for summary judgment, and eventually the case reached the California Supreme Court, which affirmed it. In so doing, the court determined that the plaintiff could not establish the element of duty given the circumstances.

The court emphasized the foreseeability factor of the duty analyses. "[W]e conclude that violent criminal assaults were not sufficiently foreseeable to impose a duty upon Pacific Plaza to provide security guards in the common areas." (6 Cal.4th 666 at 679.) It stated:

> First, Pacific Plaza did not have notice of prior similar incidents occurring on the premises. Ann M. alleges that previous assaults and robberies had occurred in the shopping center, but she offers no evidence that Pacific Plaza had notice of these incidents. While a landowner's duty includes the duty to exercise reasonable care to discover that criminal acts are being or are likely to be committed on its land.... Pacific Plaza presented uncontroverted evidence that it had implemented "a standard practice ... to note or record instances of violent crime" and that Pacific Plaza's records contain no reference to violent criminal acts prior to Ann M.'s rape. Moreover, even assuming that Pacific Plaza had notice of these incidents, Ann M. concedes that they were not similar in nature to the violent assault that she suffered. Similarly, none of the remaining evidence presented by Ann M. is sufficiently compelling to establish the high degree of foreseeability necessary to impose upon Pacific Plaza a duty to provide security guards in the common areas. Neither the evidence regarding the presence of transients nor the evidence of the statistical crime rate of the surrounding area is of a type sufficient to satisfy this burden. [6 Cal.4th 666 at 679-680; footnotes and cites omitted.]

The Ann M. case not only signals a more conservative approach toward duty analysis, but also makes summary judgment a far more workable vehicle for defending such cases. The court states in that regard:

> Moreover, broad language used in Isaacs has tended to confuse duty analysis generally in that the opinion can be read to hold that foreseeability in the

> context of determining duty is normally a question of fact reserved for the jury.... Any such reading of Isaacs is in error. Foreseeability, when analyzed to determine the existence of scope of a duty, is a question of law to be decided by the court. [6 Cal.4th 666 at 678; cites omitted.]

Regarding the foreseeability aspect of duty as a legal rather than factual issue renders summary judgment a much more attractive option than settling cases on the basis of future costs of defense which can be considerable in such cases.

C. Cases Following *Ann M.*

One of the cases following Ann M. is Sharon P. v. Arman Ltd. (1999) 21 Cal.4th 1181, *cert. den.,* which was also decided by the California Supreme Court. The plaintiff had been sexually assaulted in the subterranean parking garage of a commercial office building. After summary judgment was granted in favor of the building owner and the parking concessionaire, the plaintiff appealed.

The plaintiff pointed to a series of robberies that had occurred in the bank in the ground floor of the office building. The court, however, upheld both the trial court's summary judgment and the decision of the Court of Appeal on the basis that the other incidents were not sufficiently similar to the sexual assault to establish the requisite high degree of foreseeability which would impose an obligation to provide security guards in the garage, clearly relying upon Ann M., and those crimes in any event did not involve violence.

Furthermore, the court addressed the nature of underground parking lots and the motion that they are so inherently dangerous that even in the absence of prior incidents, providing security guards would fall within the scope of the landowner's duty of care.

In that regard, the court was not directed to any evidence or authority from which it could "confidently conclude" that all underground parking structures, regardless of their individual physical characteristics and locations, are prone to violence and therefore are inherently dangerous in nature. The court considered precedent and found that above-ground commercial and residential buildings were just as prone to violence and sex crimes by unknown third parties.

The court next criticized the ruling in Gomez v. Ticor (1983) 145 Cal. App.3d 622, a wrongful death action in which the decedent was shot and killed when he entered a parking structure in the course of a robbery. Specifically, the

Gomez court erred in holding that foreseeability, when analyzed to determine the existence or scope of a duty, is a question of fact for the jury. Duty is a question of law.

Lopez v. Baca (2002) 98 Cal.App. 4th 1008, elaborates on the concept of an inherently dangerous enterprise. Lopez had been shot in the head by another patron while attending a night club owned by Baca and, as a result, he sued for negligence claiming that Baca unreasonably failed to provide security guards to check customers for weapons before allowing them to enter the night club. The trial court granted Baca's motion for summary judgment holding that Baca did not owe a duty to provide security guards because the shooting was unforeseeable as a matter of law.

On appeal, Lopez argued that the club was an inherently dangerous property requiring its owner to provide security for its patrons regardless of whether the nightclub had experienced any prior incidents of similar criminal conduct. Citing Sharon P., the Court of Appeal held that the inherently dangerous characterization is to be used sparingly, if at all; otherwise all businesses could fall victim to a per se rule that would lead to imposition of liability even in the absence of genuine foreseeability. Further, it held that the designation of inherently dangerous property "if such a designation still exists after Sharon P. is reserved for properties that 'regardless of their individual physical characteristics and location' are by their nature, prone to violence." The Court of Appeal held that Lopez had not provided any evidence from which the court could conclude that all bars or nightclubs are inherently dangerous or even those, like Baca's club, operating in violation of statutes precluding payment for the solicitation of beverages were by their nature prone to violent crimes or attacks.

Lopez also raised on appeal the argument that the club had assumed a duty to protect its patrons on weekdays, the part of the week when he was shot, because Baca had hired security guards for the weekends. The Court of Appeal held that though Lopez was correct in stating that once one assumes a duty to act, one must use reasonable care in performing that duty, Lopez's argument failed because the fact that Baca employed security guards for the weekend only signified at most that she was aware of the potential for violence at the club on weekends, not during the week. Finally, the Court of Appeal rejected Lopez's negligence per se argument, which he based on Baca's violation of a statute precluding solicitation of patrons to purchase alcoholic beverages because the purpose of the statute was moral reasons, and assault with a deadly weapon was not the type of injury the statute was designed to prevent. Accordingly, the Court of Appeal affirmed the trial court's motion for summary judgment.

Nola M. v. University of Southern California (1993) 16 Cal.App.4th 421, *rev. den*.) features an excellent discussion of the inherent uncertainty in predicting future violence. The plaintiff was raped when she walked across a lawn on the campus.[1] There had been somewhere between 63 and 78 on-campus violent crimes during the two or three years before the incident, although the court notes that the rate of violent crime was less than 1/30 of that of the off-campus area surrounding USC. Justice Vogel observed:

> We think it comes down to this: When an injury can be prevented by a lock or a fence or a chain across a driveway or some other physical device, a landowner's failure to erect an appropriate barrier can be the legal cause of an injury inflicted by the negligent or criminal act of a third person.... But where, as here, we are presented with an open area which could be fully protected, if at all, only by a Berlin Wall, we do not believe a landowner is the cause of a physical assault it could not reasonably have prevented....
>
> Otherwise, where do we draw the line? How many guards are enough? Ten? Twenty? Two hundred? ... How much light is sufficient? Are klieg lights necessary? Are plants of any kind permissible or is USC to chop down every tree and pull out each bush? Does it matter if the campus looks like a prison? Should everyone entering the campus be searched for weapons? Does every shop, every store, every manufacturing plant, have to be patrolled by private guards hired by the owner? Does a landowner have to effectively close his property and prevent its use altogether?
>
> * * *
>
> Police protection is, and in our view should remain, a governmental and not a private obligation. Landowners in high-crime areas ought not to be forced out of the area or out of business altogether by an imposition of liability to the victims of violent crimes which the police have been unable to prevent. [16 Cal.App.4th 421, 436-438.]

---

[1] She was on her way to the USC Federal Credit Union to make a deposit.

The California Supreme Court also decided Kentucky Fried Chicken of California, Inc. v. Superior Court (1997) 14 Cal.4th 814, reversing the judgment of the Court of Appeal on a petition for writ of mandate. This case concerns a restaurant patron who was hurt because a restaurant employee had not quickly enough complied with the demand of a robber to give him the money in the register.

Writing for the slim majority of four of the seven justices, Justice Baxter opined:

> [T]he public interest would not be served by recognition of a duty to comply with a robber's demands. Unlike the Court of Appeal, we are not satisfied that persons who commit armed robbery would not become aware of and be encouraged by the existence of such a duty. Moreover, we have no basis upon which to conclude that compliance actually prevents injury to robbery victims. The public as a whole is much better served if would-be robbers are deterred by knowledge that their victims have no legal duty to comply with the robber's demands and are under no duty to surrender their property in order to protect third persons from possible injury. [14 Cal.4th at 829-30.]

Medina v. Hillshore Partners (1995) 40 Cal.App.4th 477 concerned the liability of a landowner for criminal activity off premises. Gang members had used an apartment complex as a home base to commit criminal offenses, near, but not on, the premises of the complex. They attacked and killed the decedent off site.

The decedent's mother brought suit for wrongful death, and the defendant apartment building demurred. The trial court sustained the demurrer without leave, and the court of appeal affirmed. In so doing it upheld prior California law that "premises liability is limited to the premises," (40 Cal.App.4th 477, at 482), citing Martinez v. Pacific Bell (1990) 225 Cal.App.3d 1557, 1561. The court further stated:

> Landowner had no duty to police the sidewalk and street in front of the apartment complex. The negligence and premises liability causes of action fail because no facts are alleged that the decedent entered the apartment complex or was assaulted on property controlled by landowner. [40 Cal.App.4th 477, at 483.]

The Court in Rosenbaum v. Security Pacific Corp. (1996) 43 Cal.App.4th 1084, *rev. den.,* however, was not so absolute on the subject. Although the court ultimately affirmed the lower court's granting of a motion for judgment notwithstanding the verdict in favor of the apartment owner, it acknowledged that it was possible for a landowner to bear liability for an incident off premises if either the harm was foreseeable and the owner controlled the site of the injury or there was a functional connection between the owner's conduct and the injury suffered.

The plaintiff claimed that she had been assaulted off premises due to the landlord's negligence. Because she felt it was so dangerous to park in the apartment premises where she had an assigned garage space, she parked on the street where she became vulnerable to the attack perpetrated on her. The court stated in that regard:

> The theory of liability in the present case is even more attenuated than the one rejected in Medina [see above] because here it cannot be argued the dangerous condition the defendants created on the premises spilled over into the public streets causing plaintiff's injury. Unlike the apartment building in Medina, which provided a meeting point for the gang and a launching pad for its attack on the victim, the inadequate lighting on the premises of the Plymouth Apartments played no role in facilitating the attack on Ms. Rosenbaum. This case has nothing to do with the landlord's creation of an opportunity to commit crime by providing the perpetrator a place of concealment. Plaintiff's assailants were not lurking in the shadows of her garage or the passageway to her apartment[,] nor did they originate their street attack from a dark area of the apartment building.... Furthermore, the function of adequate lighting on the premises was to protect the tenants against the risk of an attack on the premises, not to protect them against an attack on a public street. Such an attack was as likely to occur whether or not the common areas of plaintiff's apartment building were secure. [43 Cal.App.4th 1084, 1093-1094; cite omitted.]

John Y. v. Chaparral Treatment Center, Inc. (2002) 101 Cal.App.4th 565, is another sexual assault, respondeat superior case. The 11-year-old plaintiff was a resident at a facility for seriously emotionally disturbed children requiring

supervision one step below institutionalization when he was molested by a counselor (Ayala).

The plaintiff asserted a number of causes of action against both Ayala and the facility. He obtained a verdict against the defendants including punitive damages on the basis that there were enough warning signs that sexual misconduct was occurring and that the facility was sufficiently aware that its inaction constituted ratification.

The trial court, however, granted a motion for judgment notwithstanding the verdict (JNOV) as to the facility. The plaintiff appealed.

The Fourth District Court of Appeal affirmed the JNOV relying heavily on Lisa M. v. Henry Mayo Newhall Memorial Hospital, *infra,* 12 Cal.4th 291, with respect to the required nexus between the conduct and the employee's work—that the incident leading to the injury must be an outgrowth of the employment.

> Certainly, the circumstances of this case render the determination a much closer call than other situations with which the courts have grappled. Nevertheless, we find that as with teachers or scout leaders, the authority conferred upon Ayala to carry out his duties as a teacher's aide and residential counselor, and the abuse of that authority to indulge in personal sexual wrongdoing is too attenuated to permit a trier of fact to view his sexual assaults as within the risks allocable to his employer. Ayala's acts of sodomy were undertaken solely for his personal gratification and had no purpose connected to his employment. Further, while, with the benefit of hindsight, certain of his actions that may now appear questionable might have been engendered by events or conditions relating to employment duties or tasks, those deeds are not the actionable conduct for which vicarious liability is sought to be imposed. Thus, we conclude that the trial court did not err when it refused to issue jury instructions related to Defendants' vicarious liability for Ayala's sexual misconduct.

In yet another molestation case, Doe v. City of Murrieta (2002) 102 Cal. App.4th 899, the court affirmed a demurrer based upon a respondeat superior theory but allowed the plaintiff to proceed against the City on the basis of negli-

gent training of the alleged sexual exploiter because that theory did not entail vicarious liability.

Wiener v. Southcoast Childcare Centers, Inc. (2003) 107 Cal.App.4th 1429, arises out of the criminal actions of a driver who intentionally drove his car through a four-foot high chain link fence and onto the playground of the South-coast Early Childhood Learning center killing two children. The children's parents brought suit alleging negligence and premises liability against the Center and the owner of the property, First Baptist Church. The trial court granted summary judgment in favor of the defendants concluding that, without notice of prior similar crimes in the area, the defendants could not have foreseen the driver's criminal act and thus had no duty to protect against it.

The Court of Appeal reversed because, for purposes of evaluating whether a duty is owed, the issue of foreseeability refers to whether the defen-dants' alleged negligent conduct created a foreseeable risk of a particular kind of harm and not to whether the specific conduct of a particular third-party wrongdoer could be anticipated. Accordingly, the court held that the fact that the Center could not have foreseen the driver's criminal act, i.e., his specific act of intentional killing, was not the relevant inquiry in determining foreseeability. Instead, the court considered that the factors which made this incident foreseeable were that the center was located on a street immediately adjacent to a busy street corner, the owner of the center had previously requested that the church provide funds to erect a sturdier barrier, there was evidence that cars had veered off the road adjacent to the preschool in the past, there had been at least one incident where a vehicle had breached the school's chain link fence, and despite these condi-tions, the children were allowed to play in the playground.

Further, the Court of Appeal held that there was at least a triable issue of fact regarding whether the failure to erect the sturdier barrier was a proximate cause of the children's death. It also held that the issue of whether the indepen-dent criminal act of a third party was a superseding cause breaking the chain of causation was a question of fact for the jury. Accordingly, the Court of Appeal reversed the trial court's judgment.[2]

Claxton v. Atlantic Richfield Company (2003) 108 Cal.App.4th 327 is an action against the owners and operators of a gas station for failure to take reasonable steps to secure their premises against foreseeable criminal acts of third parties. The subject incident involved an attack on an African-American male by a Hispanic gang member. The trial court had granted a nonsuit in favor of the defendants on the basis that, though there had been previous robberies

[2] For information purposes only; the Supreme Court has granted review.

and assaults at the station, there had been no prior racially motivated hate crimes on the premises. Accordingly, the trial court held that in the absence of such prior incidents, there was no duty to prevent the type of attack which had occurred. The Court of Appeal reversed the trial court's judgment holding that a duty to provide additional security measures or to cease 24-hour operations existed provided that prior similar incidents had occurred or there existed other indications of a reasonably foreseeable risk of violent criminal acts. The Court of Appeal expressly rejected the trial court's reasoning that the subject incident was unforeseeable simply because prior *identical* incidents had not occurred.

In Mata v. Mata (2003) 105 Cal.App.4th 1121, the Court of Appeal held that because the proprietor of the bar had hired a security guard, the proprietor was liable if the security guard failed to act reasonably to prevent violent acts by others. Further, the court held that the fact that an angry bar patron fired a shot into the bar from the sidewalk outside the bar or from the parking lot outside the bar did not relieve the proprietor from his duty to prevent violent acts. The proprietor exercised control over that area because he lit the parking lot with a flood light, he provided electricity for the taco wagon parked next to the parking lot where patrons hung out, and the staff of the bar maintained the parking lot. Accordingly, the bar proprietor's duty encompassed violence on the parking lot aimed at bar patrons.

Delgado v. Trax Bar & Grill (2003) 134 Cal.Rptr.2d 548, *rev. granted,*[3] directly contradicts the holding in Mata v. Mata. The Delgado Court holds that a premises owner does not assume a duty to protect its patrons from the criminal acts of third parties simply by hiring a security guard or implementing other security measures. In Delgado, though bar fights had previously occurred, a gang assault on a bar patron had never occurred and, thus, in the absence of prior similar crimes, the premises owner did not owe a duty of care.

In Alvarez v. Jacmar Pacific Pizza Corporation (2002) 100 Cal.App.4th 1190, the Court of Appeal held that the murder of a restaurant patron was unforeseeable, and as a result found no duty existed on the restaurant. The court evaluated the plaintiffs' evidence and found that at most, the restaurant knew the Ajanel group that shot the victim was intoxicated; the Ajanel group made offensive comments and gestures toward the women in the plaintiffs' group; the Ajanel group challenged the plaintiffs' group to a fight; the plaintiffs' group accepted the challenge; the two groups engaged in a pushing and shoving match in the parking lot in which no one was hurt; the Ajanel group left, after stating it would return but made no threat of violence. Thus, the court held that to the extent that the restaurant had any duty, it performed that duty by calling the police.

---

[3] For discussion only; review granted.

D. Federal Case Law

The Ninth Circuit Court of Appeals decided Senger v. U.S. (9th Cir. 1996) 103 F.3d 1437, regarding the government's liability for the criminal acts of a postal worker (Brown) while he was on the job. Brown reacted violently toward the tow truck driver plaintiff who was in the course of towing Brown's car which was illegally parked.

The appellate court considered only the negligent failure to warn theory from a substantive perspective, and in so doing, interpreted Oregon law which is substantially similar to California law in this area. The court held that the government had a special relationship with the plaintiff as a business invitee giving rise to a duty to "avoid conduct that unreasonably creates a foreseeable risk to the plaintiff." (103 F.3d at 1443.) "A possessor of land has a duty to warn business invites of the intentional acts of third parties 'if he knows or has reason to know that the acts of the third person are occurring, or are about to occur.'" (103 F.3d at 1443, citing Welchel v. Strangeways (Or. 1976) 550 P.2d 1228, 1231-32.)

The court overturned the summary judgment in favor of the defendant because the plaintiff had presented substantial evidence of violent behavior and instability on the part of Brown.

In our view, this is a very poorly reasoned decision with some policy implications. Brown acted outside the course and scope of his employment, and there was no real nexus between his position as a postal worker and the attack. Using the Ninth Circuit's logic, any future employer of Brown would necessarily be negligent in hiring him for any job where he might park illegally, or even come into contact with any member of the public because Brown might react violently. In other words, the court practically mandates that Brown or anyone else with a similar background will have to turn to crime to support himself.

E. Causation

1. Introduction

There has also been a series of cases on this subject where the courts have found that even though the defendant had a duty to act reasonably to prevent criminal attacks and in fact breached that duty, there was no liability because the negligence did not proximately cause the harm.

To prove causation, the plaintiff must show:

- That the defendant's breach of duty through a negligent act or omission was a substantial factor in bringing about the plaintiff's harm; and

- That there is no rule of law relieving the defendant of liability. (Nola M. v. University of Southern California, *supra* (1993) 16 Cal.App.4th 421, 427.)

Furthermore, although normally a factual issue for the jury, when the facts are undisputed, or when reasonable minds cannot dispute the absence of causation, or when the policy determination is one of law, the issue of causation is one of law for the court to determine. (Constance B. v. State of California (1986) 178 Cal.App.3d 200, 207, *rev. den.*; Thai v. Stang (1989) 214 Cal.App.3d 1264, 1274.)

For example, in Thai, the court found a lack of causation in a case involving a drive-by shooting at a roller rink. On appeal, the court rejected Thai's expert's contention that a guard would have prevented the incident. The court held that Thai's declaration was pure speculation and that such speculation was insufficient to create any triable issue of causation. (214 Cal.App.3d 1264, 1275-1276.)

These decisions signal that summary judgment is viable relative to causation as well as duty in criminal attack cases.

The Second District Court of Appeal has decided Leslie G. v. Perry & Associates (1996) 43 Cal.App.4th 472, *rev. den.,* dealing with this causation issue.

The plaintiff brought suit after she was raped in the garage of her apartment building contending that the owners were negligent because they failed to repair a broken security gate, and that that negligence caused her rape.

The trial court granted the defendant owner's motion for summary judgment, which the court of appeal affirmed. In its opinion, the court first brought up duty, then stated that the issue was moot because of the absence of causation. It stated, "Since there is no direct evidence that the rapist entered or departed through the broken gate (or even that the broken gate was the only way he could have entered or departed), Leslie cannot survive summary judgment simply because it is *possible* that he *might* have entered through the broken gate. (43 Cal.App.4th 472 at 483.) The plaintiff failed to carry her burden on causation because there was no evidence as to how the rapist got into or out of the garage.

In 2001, the California Supreme Court handed down its decision in Saelzler v. Advanced Group 400, 25 Cal.4th 763, which significantly increases the burden on the part of plaintiffs to prove causation in cases involving criminal attacks by third parties on the defendant's premises.

Plaintiff Marianne Saelzler was a Federal Express driver who was making a delivery to a resident of a 28-building, 300-unit apartment complex when she was accosted by three men. They beat her and sexually assaulted her resulting in serious injuries. The assailants were neither apprehended nor identified.

Saelzler filed suit against the owners of the complex alleging that, even though the defendants knew of frequently recurring criminal activity not only in the neighborhood at large, but in the complex itself, they provided no security personnel during daylight hours, which is when the attack in question took place.

The defendants moved for and were granted summary judgment by the trial court. The Court of Appeal reversed, holding that the plaintiff had made a sufficient showing to raise a triable issue of fact relative to causation. The Supreme Court then reversed again, restoring the summary judgment.

For purposes of the summary judgment motion, the defendants did not contest that they may have owed and breached a duty of care, but asserted that the possible breach of duty was not a substantial factor in causing the plaintiff's injuries.

The plaintiff necessarily admitted that she could not prove the identity or background of the assailants. While they might have been unauthorized trespassers, they also could have been tenants of the apartment complex who would have been authorized and empowered to enter locked security gates and remain on the premises. The primary purpose for having functioning security gates and guards would be to exclude unauthorized individuals from entering. The court turned her assertion that if a juvenile gang was headquartered in one of the buildings against her by pointing out that the gang members would have been entitled to enter and remain on the premises. In sum, the court found that the plaintiff could not prove that it was more probable than not that additional security precautions would have prevented the attack.

The plaintiff also maintained that placing the burden on her to prove that the defendants' act or omission in such circumstance was a substantial factor in bringing about an injury would make it virtually impossible for plaintiffs to recover from landlords or other property owners for negligence in failing to take reasonable protective measures to safeguard others from the criminal assaults of third persons, as a finding of causation would be justified only where the criminal was

caught, and then only if the criminal were to testify what specific lack of deterrence on the property made it easier to commit the crime.

The court dismissed that argument pointing out that direct or circumstantial evidence, such as eyewitnesses, security cameras, fingerprints, or signs of break-in or unauthorized entry could demonstrate how the incident took place.

The Supreme Court had relatively recently made the plaintiffs' difficulty in establishing the existence of duty more onerous in Sharon P. v. Arman, Ltd. (1999) 21 Cal.4th 1181. In Saelzler, the plaintiff's burden for establishing causation has been made more difficult as well.

In Hassoon v. Shamieh (2001) 89 Cal.App.4th 1191, a bystander shopping at a grocery store was wounded by a gunshot fired from outside the store after the store owner had provided refuge to a man who was being beaten on the sidewalk. This occurred in the Tenderloin District of San Francisco.

The defendant grocery moved for summary judgment. In opposition, the plaintiff filed a declaration to the effect that he had told the checker who had been working behind the counter that he should not harbor the beating victim in the store after people outside the store had threatened to shoot the victim. The plaintiff said that keeping the victim in the store would endanger others in the store.

The court first addressed the fact that there had been no evidence of prior similar incidents at the defendant's place of business. The shooting was therefore unforeseeable. The court relied upon the Ann M. and Sharon P. cases discussed above.

The court also relied upon Medina v. Hillshore Partners, also addressed supra, because the shot came from off the property. The Hassoon court cited Medina where it stated: "Premises liability is limited to the premises." (See, 89 Cal.App.4th 1191 at 1196.)

Finally, the court analyzed the case pursuant to Rowland v. Christian. It applied the six Rowland factors and found no duty.

II. OTHER NEGLIGENCE CASES

A. Premises

1. Landowner Duty for Off-Premises Conditions

Notwithstanding Medina v. Hillshore Partners, *supra*, 40 Cal.App.4th 477, a landowner's duty can extend to incidents beyond the survey markers of the property that an individual owns or leases from another. The California Supreme Court has handed down Alcaraz v. Vece (1997) 14 Cal.4th 1149, reversing a summary judgment in favor of the defendants. The court found that there was a triable issue of material fact as to whether circumstances existed that created a duty on the part of the defendant apartment building owners to warn or protect the plaintiff from an uncovered or broken water meter box that belonged to the city.

The trial court had granted summary judgment to the landowners on the basis that they neither owned the box nor the land upon which it was located.

In a lengthy opinion, accompanied by one concurrence and two dissents, the majority surveyed prior case law, focusing upon the defendants' right or exercise of control rather than their rights arising out of a deed or lease pertaining to the real property. In the case at hand, the court determined that the property owner's erection of a fence around the area encompassing the turf upon which the box was situated may give rise to a duty and a triable issue as to whether the defendants' exercised control over that land.

The court expressly set forth no opinion as to what circumstances, if any, create a duty on the part of a possessor of land to warn people on the property of a hazard on adjacent property which he or she does not own, possess, or control. (Alcaraz, *supra*.)

The Court of Appeal considered Alcaraz in the context of a sidewalk abutting the defendant's property in Contreras v. Anderson (1997) 59 Cal.App.4th 188, *rev. den.* Before doing so, it followed Williams v. Foster (1989) 216 Cal.App. 3d 510—that a property owner is not liable to the public merely for failing to maintain a public sidewalk. That rule interpreted a variety of statutes and older cases.

Addressing Alcaraz, the Contreras court said that the defendant must maintain "control" over the property in question, and that such control requires more than "simple neighborly maintenance."

Calhoon v. Lewis (2000) 81 Cal.App.4th 108 presents somewhat similar facts but reaches an opposite conclusion. The plaintiff had gone to the home of his friend Wade Lewis to meet Wade to go somewhere else later. As Calhoon waited, he did skateboard tricks but fell and injured himself on a metal pipe in a planter adjacent to the Lewises' driveway. Calhoon sued the Lewises for negligence and premises liability.

The defendants moved for summary judgment, which was granted. The Court of Appeal affirmed. In so doing, the court found that the plaintiff's claims were barred by the primary assumption of the risk doctrine. (See Section V.)

Hoff v. Vacaville Unified School District (1999) 19 Cal.4th 925, is a California Supreme Court decision involving injuries to a non-student struck by a car driven by a high school student exiting the high school parking lot. The high court concluded that neither the school district nor any of its employees owed any duty to the plaintiff, who was not on the school property at the time.

The plaintiff had not argued that a special relationship existed between himself and the school personnel, but that there was one between the school district and its student, which imposed upon the district a duty to exercise reasonable care to control the student to protect others who would be foreseeably endangered by the students' conduct.

The court first analogized to the relationship between parents and their children. The special relationship between the parent and the child places upon the parent a duty to exercise reasonable care to control the minor child only if the parent knows or has reason to know that he or she has the ability to control the child and knows or should know of the necessity and opportunity for exercising such control, knowledge of dangerous habits being a prerequisite to imposition of liability. There has to be a manifestation of a dangerous tendency to trigger the parental duty to prevent harm to third persons.

The school personnel in this instance had considered the student in question to be "a good kid," responsible, and obedient. The district, therefore, had no reason to believe that the student had a propensity to operate his car recklessly, thus it owed the plaintiff no duty.

Similarly, another school district was not held liable when its students attended off-site basketball tournaments in Myricks v. Lynwood Unified School District (1999) 74 Cal.App.4th 231, *rev. den*.

A team affiliated with the Lynwood Girls' Basketball Development League traveled out of state to play in some basketball tournaments. En route,

several of the players were injured when the driver of their van fell asleep and lost control of the vehicle.

While there was some connection between the team and the Lynwood High School Girls' basketball team, it was ultimately determined that they were distinct entities. The undisputed evidence showed that the trip was not a school-sponsored activity for which attendance was required or attendance credit given. Accordingly, the injuries were not governed by the California Education Code.

The injured players also pursued the City of Lynwood. The driver was employed by that city. The undisputed evidence, however, showed that she was not in the course and scope of her employment at the time of the accident.

The opposite result was reached in Barnes v. Black (1999) 71 Cal. App.4th 1473. The case involved a child who resided at an apartment complex with his family. A steep driveway led down from the apartment building to a small children's play area, and then down to a busy four-lane public street. A child rode a tricycle down a sidewalk adjacent to the driveway, but then lost control and continued on the driveway into the street where he was fatally struck by a car. His family filed suit for wrongful death, pleading a number of different causes of action.

On the basis of duty, the court reversed the summary adjudication rendered by the trial court in favor of the defendants. It found that the defendants had not satisfied their burden to negate the existence of a duty of care. No evidence was offered to show that the injury was unforeseeable, that the injury was not actually suffered, that the configuration of the area was not closely connected to the injury, or to negate any of the other factors outlined in Rowland v. Christian (1968) 69 Cal.2d 108.

In Joyce v. Simi Valley Unified School District (2003) 110 Cal.App.4th 292, the Court of Appeal addressed whether a school district was liable for the plaintiff's injuries, which she suffered not on the school grounds but in a crosswalk adjacent to the school. The crosswalk had no signals and was located on a busy four-lane street. The open school yard gate at the other end of the sidewalk encouraged children to use it. The Court of Appeal cited the California Law Revision Comments to Government Code section 830, which provide that a public entity's own property can be considered dangerous if a condition on the adjacent property exposes those using the public property to a substantial risk of injury. The Court of Appeal held that the district court's liability was due to the fact that it failed to provide adequate safeguards against a known dangerous condition. The school district was aware of the dangerous intersection, but it kept the gate open after the city increased the speed limit. Further, the Court of Appeal held that Education

Code section 44808 did not protect the school district from liability because the school district failed to exercise reasonable care under the circumstances.

In Durant v. Los Angeles Unified School District (2003) 3 Cal.Rptr.3d 541, the court of appeal held that the school district had a duty to a student who was shot on the sidewalk outside of the campus by another student because it had learned of repeated threats against the victim-student and had even reassured his parents that it would take care of the problem. The court of appeal held that the fact that the student who actually attacked the victim-student was not one of the group who had been threatening him did not alter the school district's duty to supervise.

In Guerrero v. South Bay Union (2003) 114 Cal.App.4th 264, the Court of Appeal held that the school district did not owe the plaintiff a duty of care when she was injured while crossing a street adjacent to the school shortly after school had ended for the day. The Court of Appeal noted that in each of the cases in which schools have been held to have a duty of care for the safety of students off campus and after school, school personnel had done something on campus or failed in their supervisory duties on campus. In Guerrero, however, while the school provided crossing guards and notified the parents as to the location to pick up children, the school did not provide staff on the street after school to oversee the activities of the children who had been properly released from classes.

In Avila v. Jado Properties, Inc. (2003) 112 Cal.App.4th 405,[4] the Court of Appeal considered whether or not summary judgment was properly granted against plaintiffs who alleged that they were seriously injured when they were shot on the street outside a banquet room of a steak and seafood restaurant. The Court of Appeal reversed the lower court's decision as to the causes of action for negligence and premises liability. The Court of Appeal held that the fact that the incident occurred on a public sidewalk by third-party shooters was not at issue. The restaurant had promised the hosts and guests to provide security and, as a result, the restaurant had a contractual duty to provide security in a non-negligent manner whether or not the criminal conduct was foreseeable.

Morris v. De La Torre (2003) 111 Cal.App.4th 1047 addressed whether or not a business owner had a duty to respond to ongoing third-party violence that is occurring in plain view in a parking lot in front of the business. In order to determine duty various factors had to be considered, most notably whether a special relationship existed between the business and the plaintiff and whether the business owner had control over the area where the assault occurred.

---

[4] For discussion only; review granted.

In Morris, the plaintiff was violently attacked in the parking lot in front of a taco shop after the assailant had seized a knife from the shop's kitchen and used it to stab the plaintiff. The Court of Appeal held that a special relationship did exist based on the fact that the plaintiff had frequently been a customer of the taco shop on other occasions, on the night of the assault the plaintiff was with friends who had purchased food from the taco shop, the assailant had taken the knife from the taco shop, the taco shop's lease included the use of the parking lot, and the parking lot was visible through the glass front of the taco shop. These facts created a sufficient nexus between the business and the victim and the location of the assault to create a special relationship to justify imposition of a duty to respond to the assault with reasonable measures, i.e., by summoning aid.

2. Landowner Liability for Unknown Dangerous Condition

In Brantley v. Pisaro (1996) 42 Cal.App.4th 1591, a tenant sued his landlord after he was injured when a stairway railing pulled away from the wall. The Court of Appeal reversed the lower court's issuance of summary judgment in favor of the defense.

The court determined that the defendant could not establish that the stairway was not defective simply by stating that he had no actual knowledge and that the plaintiff had used the stairway and handrail many times before the accident without any problems. That burden however could have been satisfied had the defendant presented expert testimony that there was no defect in the stairway (so long as the plaintiff could not raise a factual dispute to the contrary).

Further, the fact that the defendant did not have actual or constructive knowledge of the condition was also insufficient to establish the summary judgment unless he could also prove that the condition in question did not arise until after the tenant had taken possession.

3. Liability of a Public Entity for Dangerous Condition upon the Property (Design Immunity)

Case law has held that a public entity is liable for injury proximately caused by a dangerous condition of its property if the dangerous condition created a reasonably foreseeable risk of the kind of injury sustained, and the public entity had actual or constructive notice of the condition a sufficient time before the injury to have taken preventive measures. (Baldwin v. State of California (1972) 6 Cal.3d 424, 427)

In response, the Legislature amended Government Code § 830.6 such that a public entity may avoid such liability by raising the affirmative defense of design immunity. California case law provides for the three elements a public entity claiming design immunity must establish to successfully assert the defense: (1) a causal relationship between the plan or design and the accident; (2) discretionary approval of the plan or design prior to construction; and (3) substantial evidence supporting the reasonableness of the plan or design. (*See* Grenier v. City of Irwindale (1997) 57 Cal.App.4th 931, 939; Higgins v. State of California (1997) 54 Cal.App.4th 177, 185; Hefner v. County of Sacramento (1988) 197 Cal. App.3rd 1007, *rev. den.*)

Cornette v. Department of Transportation (2001) 80 Cal. App. 4th 629, involves a design immunity claim and considers under what circumstances will a public entity lose its design immunity. The plaintiffs were driving on State Route 14 when they were sideswiped by another vehicle and forced into the traffic traveling in the opposite direction. They suffered serious injuries and brought suit against a multitude of parties, including the California Department of Transportation (CalTrans).

CalTrans requested, and the court agreed, that the trial be bifurcated with the issue of design immunity proceeding first. Over the objections of the plaintiffs, the court determined that it would be the trier of fact as to all aspects of design immunity.

The plaintiffs claimed that CalTrans had lost its design immunity. As a consequence, they bore the burden of establishing three elements:

1. The plan or design had become dangerous because of a change in physical conditions;

2. The public entity had notice of the resulting dangerous condition; and

3. The public entity had a reasonable time to obtain the necessary funds and carry out the remedial work, or that the public entity, unable to remedy the condition due to lack of funds or practical impossibility, had not reasonably attempted to provide adequate warnings.

The plaintiffs stipulated that it was reasonable to have designed the freeway without a median barrier when the freeway was constructed in 1964, but the design was unreasonable as of 1992 when the accident occurred. At issue was

whether CalTrans had adequate notice of the changed circumstances and whether the installation of a barrier was unreasonably delayed.

The Court of Appeal analyzed Government Code section 830.6, which specifically reserves the third element of loss of design immunity to the court, and for a variety of reasons determined that parties had a right to trial by jury on the other two elements.

Fuller v. Department of Transportation (2001) 89 Cal.App.4th 1109 is also a design immunity case involving CalTrans. The plaintiffs decedents had been killed on Highway 395. They had been traveling southbound when a north-bound truck stopped suddenly to avoid a collision with another vehicle and jack-knifed into opposing traffic and specifically into the decedents' vehicle.

The plaintiffs sued a number of parties including CalTrans. They theorized that CalTrans erred in setting the regulating speed limit at 55 miles per hour. They claimed that the design immunity defense did not apply to the setting of speed limits because that had nothing to do with the construction of or improvements to public property.

The Court of Appeal strongly disagreed and upheld the trial court's summary adjudication and non-suit rulings in CalTrans' favor.

4. Commercial Lessor Liability to Inspect Tenant Improvements

In Lopez v. Superior Court (1996) 45 Cal. App. 4th 705, a California Appellate Court expanded the duty of a commercial property owner to inspect its tenant's improvements to the property which were made many years after the original lease, after a number of renewals. This case seems to contradict the implicit rule in Brantley v. Pisaro, *supra*, that the landlord could shield itself from liability if it could establish that the alleged dangerous condition did not come into being until after the commencement of the leasehold.

5. Easement Owner's Liability/Duty Owed by Easement Holder

Is the owner of an easement on a private road liable for injuries inflicted by a neighbor's dog to a third person on that road? The court in Cody F. v. Falletti (2001) 92 Cal.App.4th 1232, examined the scope of the easement owner's liability, even though the owner did not create the hazard, did not own the dogs, had no interest in the land from which the dogs escaped, and did not own the road where the attack took place. (Id. at 1236) The court noted that the

general rule is that a duty is imposed to prevent harm caused by a third party's animal when a defendant possesses the means to control the animal. The court held that the defendant in this situation did not have sufficient control over the neighbor's dog so as to impose a duty upon the defendant. The court reasoned that "[t]he nature of the duty owed by the owner of an interest in real property must have a relationship to the degree of control conferred by the scope of the ownership interest itself. An easement interest does not necessarily translate into a tort duty." (Id. at 1243).

Because the plaintiff's injury cannot be attributed to ingress and egress (i.e., factors within the defendant's control that bear a relationship to the easement), but instead to the neighbor's dog, no duty was owed to the plaintiff.

6. Miscellaneous Premises Cases

In Amos v. Alpha Property Management (1999) 73 Cal. App.4th 895, the court reversed a summary judgment in favor of the defendant in a situation where a young child had fallen through an open window where the sill was only 28 inches above the floor. The court relied upon the rule that the reasonableness of the landlord's conduct under all the circumstances is a question for the jury, and there is a triable issue of fact as to whether the defendant apartment owners' maintenance of the low, open, unguarded window in a common hallway where young children were likely to play constituted a breach of their duty to take reasonable precautions to prevent children falling out of that window.

In so doing, the court distinguished Pineda v. Ennada (1998) 61 Cal. App.4th 1403. In that case, the window was 44 inches above the ground, and the undisputed facts showed that the predominant cause of the plaintiff five-year-old child's accident was the careless parental placement of a bed under the window followed by parental negligence in leaving the child unattended and unsupervised.

In Lewis v. Chevron USA Inc. (2004) 119 Cal.App.4th 690, an electrical worker and his wife sued the owner of a biosciences laboratory and the worker's foreman alleging general negligence, premises liability, products liability, and loss of consortium based on an injury which resulted to the worker when a hot water copper pipe burst while the worker was working on an electrical job at the laboratory. The plaintiffs originally named as defendants the current owner of the property and the worker's foreman. The plaintiffs later substituted the prior owner of the laboratory, who had sold the laboratory over eight years prior to the accident, as a doe defendant. The Court of Appeal considered whether or not a prior owner could be held liable for injuries which were caused by a defective condition on property it had relinquished ownership and control over.

The Court of Appeal held that, absent concealment of the defective condition, the prior owner could not be held liable for the injuries. Lewis, 119 Cal. App. 4th at 695. The prior owner did not own, lease, rent, maintain, manage, supervise, operate, possess, and or otherwise have control over the premises after the sale. Id. at 699. Additionally, the worker admitted that this was true and failed to present any facts indicating that the prior owner knew or should have known of the defect in the pipe, ruling out the possibility of arguing that the prior owner concealed any facts. Id. at 699-700.

In Vasquez v. Residential Investments, Inc. (2004) 118 Cal.App.4th 269, the court considered whether an apartment building owner who failed to replace a missing glass pane in the victim's apartment door was negligent for failing to do so where the victim was fatally stabbed by her boyfriend when he entered her apartment through the door with the missing pane.

The Court of Appeals held that whether the owner had a duty to restore the protections of an intact door by replacing the pane required an evaluation of various factors. The analytical approach set forth by Vasquez to evaluate the threshold legal question of duty is an analysis of the following: (1) the specific measures the plaintiff asserted the defendant should have taken to prevent the harm, (2) how financially and socially burdensome these proposed measures would be on the landlord, and (3) the third party conduct that the plaintiff claims could have been prevented had the landlord taken the proposed measures and assess how foreseeable it was that this conduct would occur. Once the burden and foreseeability have been independently assessed, they can be compared in determining the scope of the duty the court imposes on a given defendant. The more certain the likelihood of harm, the higher the burden a court will impose on a landlord to prevent it; the less foreseeable the harm, the lower the burden a court will place on a landlord. In Vasquez, the Court of Appeal determined that the burden on the owner was minimal and that the degree of foreseeability was sufficiently high to impose a duty on the owner.

In Titus v. Canyon Lake Property Owners Association (2004) 118 Cal. App.4th 906, the Court of Appeal discussed whether a home owner's association and a private security company charged with enforcing the regulations of the community had a special relationship with a passenger of a vehicle driven by an intoxicated person. The intoxicated person was driving in the community area and crashed into a tree killing the passenger.

The Court of Appeal applied the Rowland Factors and held that neither the home owner's association nor the security company had established a special relationship with the passenger. Both the passenger and the driver resided in the community, however, there was no promise made to either upon which they

relied. Neither the homeowner's association nor the security company created the peril, i.e. the drunken driving, nor did they provide the driver with the car, the alcohol, nor did they cause the passenger to be a passenger in the driver's vehicle. Finally, the Court of Appeal held that the obligation of the homeowner's association to provide security within the community, without more, did not create a special relationship requiring an affirmative obligation to protect the community from the drunken driver.

B. Foreseeability

The Court of Appeal addressed the paramount factors of foreseeability in the analysis of a property owner's duty in Robison v. Six Flags Theme Parks Inc. (1998) 64 Cal.App.4th 1294, *rev. den*. The case arose out of injuries to some picnicking guests at Magic Mountain when they were injured by an errant driver. The picnic area was situated adjacent to the parking lot with no curb, change in elevation, tire stops, ditch, et cetera, separating the two. According to the court, "[t]he predictable eventually happened." (64 Cal.App.4th at 1297.)

The defendant took issue with that conclusion because the incident consisted of several unusual circumstances, which it maintained were not foreseeable. Specifically, the vehicle was push-started by the owner because of a defective starter, and it was operated by a developmentally disabled and unlicensed driver (because the owner was doing the pushing) who had never driven a car before and who panicked.

The court felt that the particular factors giving rise to an out-of-control car were not the material issue. It cited Bigbee v. Pacific Tel.& Tel. Co. (1983) 34 Cal.3d 49, 57-58, which also involved an out-of-control car and stated the following relative to foreseeability: "... it is settled that what is required to be foreseeable is the general character of the event or harm—e.g., being struck by a car while standing in a phone booth [the allegedly dangerous condition in that case]—not its precise nature or manner of occurrence." (Robison, 64 Cal. App.4th at 1298-99.) It also cited Bryant v. Glastetter (1995) 32 Cal.App.4th 770, 780:

"[A] court's task—in determining 'duty'—is not to
> decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced that liability may appropriately be imposed on the negligent party." [64 Cal.App.4th at 1299.]

The defendant cited Ann M. v. Pacific Plaza Shopping Center (1993) 6 Cal.4th 666 (*see* Section I.B herein) because, just as in Ann M. where the shopping center had not previously experienced a crime of violence, Magic Mountain had no prior incidents involving out-of-control cars invading the picnic area.

The Robison Court distinguished Ann M.:

> The instant case is fundamentally different. Crime can happen anywhere, but cars cannot crash into picnic tables just anywhere. In order for a car to crash into a picnic table, the picnic table must first be placed in harm's way. [64 Cal.App.4th at 1301.]

In Kadish v. Jewish Community Centers of Greater Los Angeles (2003) 112 Cal.App.4th 711, the Court of Appeal affirmed the lower court's holding that a violent assault on a child at a Jewish summer camp by a self-proclaimed anti-semite was not reasonably foreseeable. While the Jewish organization had received anonymous telephone calls, threatening violence against its members, the Court of Appeal concluded that the threats were vague and not sufficiently specific so as to require that security measures be adopted to prevent a maniac from shooting children attending the summer camp. Some threats dated back two and a half months and because they were of a general nature and had not been carried out, they could reasonably be deemed crank calls and empty threats. The Court of Appeals held that a general concern about security, absent a sufficiently specific threat, does not require an organization to prepare for the worst imaginable scenario.

1. Use of Deadly Force

In Pineda v. Ennabe (1998) 61 Cal.App.4th 1403, the court affirmed a summary judgment in favor of the defendant on the basis that a landlord has no duty of care to assure that his tenant's children do not fall out an ordinary second-story window. The court stated:

> While a landlord may arguably foresee that his tenants might carelessly leave their small children unattended and exposed to dangers, he is not required to forestall the foreseeable consequences of others' negligence—only his own. There was little likelihood that respondent's failure to place warning labels or latches on the window screens would cause an accident of the kind

which occurred here, unless the parent was negligent.[5]

III. OTHER DUTY ISSUES IN NEGLIGENCE CASES

A. Generally

In Paz v. State of California (2000) 22 Cal.4th 550, the California Supreme Court interpreted duty arising out of the negligent undertaking theory of liability articulated in RESTATEMENT SECOND OF TORTS, section 324A. That section provides as follows:

"One who undertakes, gratuitously or for considera-
tion, to render services to another, which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if [¶] (a) his failure to exercise reasonable care increases the risk of harm, or [¶] (b) he has undertaken to perform a duty owed by the other to the third person, or [¶] (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

The court first noted:

> The general rule is that a person who has not created a peril is not liable in tort for failing to take affirmative action to protect another unless they have some relationship that gives rise to a duty to act.... However, one who undertakes to aid another is under a duty to exercise due care in acting and is liable if the failure to do so increases the risk of harm or if the harm is suffered because the other relied on the undertaking. ... Section 324A integrates these two basic principles in its rule.

---

[5] The plaintiff's mother had placed a bed consisting of a mattress and a box spring directly under a window. The 5½-year-old child was bouncing on the bed without supervision, when she knocked the window screen out, fell through the window, and dropped to the ground outside the building.

The plaintiff had been injured in a vehicle collision, which he attributed to a dangerous condition at an intersection. He filed suit against various governmental entities claiming that they knew or should have known of the dangerous condition and against various contractors who had been engaged to erect a traffic signal, but had not yet done so. The plaintiff claims that by contracting to install the traffic signal, the contractors assumed a duty of care.

The Supreme Court decided the case by applying the prongs of Section 324A. It found that:

1. Even if the intersection was dangerous, nothing that the defendants did (or failed to do) increased the risk;

2. The contractors did not undertake to perform a duty owed by the governmental entities to the plaintiff because cities generally have no affirmative duty to install traffic control signals; and

3. The plaintiff did not allege, nor could he, that he relied upon the contractor's undertaking.

In Keru Investments, Inc. v. Cube Company, Inc. (1998) 63 Cal.App.4th 1412, *rev. den.,* a contractor retrofitted a building to withstand earthquake damage. The building sustained major damage in the 1994 Northridge earthquake. It was later conveyed to the holder of a first trust deed on the property. That entity brought suit against the retrofit contractor.

The Court reversed a judgment in favor of the plaintiffs and held that the contractor owed no duty to the holder of the deed of trust, employing the analysis enunciated in Biakanja v. Irving (1958) 49 Cal.2d 647, generally as to third persons not in privity with the defendant and specifically Connor v. Great Western Savings & Loan Assn. (1968) 69 Cal.2d 850. The factors to be balanced are:

1. the extent to which the transaction was intended to affect the plaintiff;

2. the foreseeability of harm to him;

3. the degree of certainty that the plaintiff suffered injury;

4. the closeness of the connection between the defendant's conduct and the injury suffered;

5. the moral blame attached to the defendant's conduct; and

6. the policy of preventing future harm.[6]

In applying these factors the court determined not only that the contractor owed no duty to the plaintiff, but that ownership of the chose in action still rested with the former owner.

Zelig v. County of Los Angeles (1999) 27 Cal.App.4th 1112, involved a woman who was shot and killed by her ex-husband at the Los Angeles County courthouse. All of her children sued the county and the sheriff's department for wrongful death and negligence, and the county for breach of contract, and the one child who saw the shooting claimed negligent infliction of emotional distress.

The case reached the Court of Appeal after the trial court had sustained the defendants' demurrer without leave to amend. The appellate court held that the plaintiffs could have alleged specifics regarding prior acts of violence in the county's courthouses, which would render the particular act foreseeable.

The court, however, let stand the ruling as to the contract claim. The plaintiffs had asserted that their filing fees were consideration for security on the premises. The court did not find that to be a fair interpretation.

The Supreme Court then reversed the judgment of the Court of Appeal. In so doing, the court held that the defendant's employees did not have a duty of care to plaintiffs because the plaintiffs had not alleged facts that establish the requisite special relationship between the court personnel and the decedent. Further, the public entity could not be held liable under Government Code section 835 because the necessary causal connection between the condition of the property and the shooting was not present. In addition, public entities and their employees are immunized for liability for failure to provide sufficient security against criminal attacks in a court facility, and finally, there is no liability under 42 U.S.C. section 1983 because it states failure to protect an individual against private violence does not constitute a violation of due process.

In Wilson v. County of San Diego (2001) 91 Cal.App.4th 974, a thirteen-year-old minor, who was placed into protective custody at a county children's center, brought a personal injury action against the county after being struck by a car while trying to escape from the center. The appellate court affirmed the trial court's granting of summary judgment in favor of the defendants. In so doing the court held that the County and its employees did not have a mandatory duty to prevent the minor from running away.

---

[6] These factors were notably adopted in Rowland v. Christian, *supra*, 69 Cal.2d 108.

As noted by the court, the Tort Claims Act bars liability against public agencies and their employees unless otherwise provided for by statute. (Cal. Gov. Code § 815.) The plaintiff asserted that Welfare and Institutions Code § 300.2 imposed a mandatory duty on the County to prevent the plaintiff from running away. In finding that the statute cited by the plaintiff did not apply, the court cited the recent California Supreme Court decision in Haggis v. City of Los Angeles (2001) 22 Cal.4th 490, and stated that "application of [Government Code] section 815.6 requires that the enactment at issue be obligatory, rather than merely discretionary or permissive, in its directions to the public entity; it must require, rather than merely authorize or permit, that a particular action be taken or not taken." (Wilson, *supra* at 980.)

The court further held that the employees of the center are considered "special employees" of the County as opposed to independent contractors, thus entitling the defendants to summary judgment.

Hansell v. Santos Robinson Mortuary (1998) 64 Cal. App. 4th 608, *rev. den.*, considered duty in the context of a claim against a mortuary for negligence relative to cremation performed by an unrelated crematorium. The family members of decedents whose remains were mishandled by a crematorium had brought an action against the mortuary which had arranged for the cremation. The court, in a non-jury trial, determined that the only duty that the mortuary had was to select a crematorium here. Judgment in favor of the defendant was appropriate because there is no evidence that the defendant mortuaries had breached that duty. Further, the crematoriums were non-agent, independent contractors. The court of appeal affirmed on that basis.

In Adams v. City of Fremont (1998) 68 Cal.App.4th 243, the Court of Appeal held that police officers responding to a crisis involving a person threatening suicide with a loaded firearm have no legal duty under tort law that would expose them to liability if their conduct fails to prevent the threatened suicide from being carried out. The court employed the Rowland v. Christian factors, finding that the foreseeability and certainty of harm factors weighed in favor of imposing a duty, but the absence of moral blame, remoteness of the connection between the conduct of the officers and the harm suffered, the policy of preventing future harm, consequences to the community, the role of law enforcement in society, and the potential detriment to the public in imposing a judicial allocation of resources, all heavily favored shielding law enforcement personnel from tort liability in this circumstance. Further, the court looked to the conduct of one of the officers whose deliberate tactical decisions were designed to maximize the safety of the responding officers which rendered the social value of that interest as the subject for consideration.

McGettigan v. Bay Area Rapid Transit District (1997) 57 Cal.App.4th 1011, *rev. den.*, posed a similar issue. The plaintiff was an inebriated train passenger. When the train reached the end of the line, the operator ordered him to leave even though he was "obviously unable to care for his own safety." After the train left the station, the plaintiff was found lying on the platform with lacerations in various places and a compound fracture of his right ankle. He claimed that "BART should have done more in the way of precautionary measures than leaving a drunk teetering on the edge of the platform with its precipitous fall, and still within harm's way of a departed train."

The court undertook a duty analysis. It first recognized that the special relationship of a common carrier and a passenger gives rise to the highest duty of care. Nevertheless, the plaintiff had exited onto the railroad platform, which by its nature is not a dangerous place. The fact that an accident could have happened there does not make the platform dangerous because an accident can happen anywhere. Those standing on a platform would have to make some effort in order to get seriously injured.

Benavidez v. San Jose Police Department [(1999) 71 Cal.App.4th 853] and Adams v. City of Fremont [(1998) 68 Cal.App.4th 243] involve the duty of police to citizenry.

In Benavidez, the plaintiff suffered a beating at the hands of her live-in boyfriend. She brought suit against the San Jose Police Department for failing to take precautions to protect her and her son.

The Sixth District Court of Appeal upheld the department's summary judgment on the basis that, while the police generally owe a duty of care to the public at large, they have no duty to offer affirmative assistance to anyone in particular unless the facts establish a special relationship, such as where the plaintiff has been placed in the care of the police.

Adams entailed the survivors of a suicide who claimed that the police of the City of Fremont had negligently handled an emergency situation. The decedent had been armed and had threatened to kill himself. The police tried to talk him out of it. The decedent insisted that the police leave, but they responded that they could not do so because they would not be doing their job. Then, the decedent said that he could make them leave or do something to make them leave followed by gunfire from him. The officers believed that the decedent had fired at them, and they returned their shots. The decedent turned out to have suffered a number of bullet wounds, including one that was self-inflicted that penetrated his heart and liver.

The court analyzed the six factors set forth in Rowland v. Christian, *supra*, and balanced them. They found that foreseeability and certainty of harm favored imposing a duty. The absence of moral blame, the remoteness of a connection between the conduct of the appellants and the harm suffered, the policy of preventing future harm, the consequences to the community, the role of law enforcement in society, and the potential detriment to the public in imposing judicial allocation of resources all heavily favored shielding law enforcement personnel from tort liability in this sort of situation. On that basis, the court concluded that the police owed the survivors no duty.

Another recent law enforcement duty case includes the California Supreme Court's decision in Lugtu v. California Highway Patrol (2001) 26 Cal.4th 703, where the court reviewed to what extent law enforcement officers owe a duty to the citizens they pull over while conducting a traffic stop. In Lugtu, the plaintiff was a passenger in an automobile that had been pulled over by the California Highway Patrol into the center median strip of the highway for a traffic violation. While the auto was stopped, a pickup truck ran into the plaintiff's vehicle from behind, causing the plaintiff to suffer injuries. The plaintiff filed suit against the Highway Patrol, contending that the officer breached the duty of care owed to the plaintiff. In reversing the appellate court's granting of the defendant's motion for summary judgment, the Lugtu court held that a law enforcement officer, in directing a traffic violator to stop in a particular location, has a legal duty to use reasonable care for the safety of persons in the stopped vehicle and to exercise his or her authority in a manner that does not expose such persons to an unreasonable risk of harm.

In Muñoz v. City of Union City (2004) 120 Cal.App.4th 1077, the Court of Appeal held that a police officer owed a duty of care not to use deadly force in an unreasonable manner. The reasonableness of a police officer's use of deadly force is judged by an assessment of the facts and circumstances to determine whether probable cause existed to believe that the suspect posed a significant threat of death or serious physical injury to the officer or others.

In Thompson v. Sacramento City Unified School District (2003) 107 Cal. App.4th 1352, the court addressed whether the school's vice pincipal had a duty to suspend a student with a history of misconduct before he attacked another student, the plaintiff. The plaintiff pointed to the fact that the assailant had been expelled from a middle school, had received suspensions, detentions, and Saturday school sessions at the high school, deliberately lit a poster on fire, and the day before the attack on the plaintiff, he threatened to hit a former girlfriend. As a result, the plaintiff contended that had the assailant been suspended on the day he threatened his former girlfriend, he would not have been attacked by the assailant.

The Court of Appeals applied the Rowland factors and, because a public agency is involved, additional factors such as the extent of the agency's powers, the role imposed on the agency by law, and the limitations imposed on it by budget. The Court of Appeals concluded that the events prior to the attack on the plaintiff were wholly unrelated to the plaintiff, that there was no logical connection between the assailant's prior conduct and the plaintiff's injury except for the fact that the school's failure to suspend the assailant allowed him to be present at school on the day he attacked the plaintiff, and that the school was required to have a pre-suspension conference before suspending the student. Accordingly, the Court of Appeals held that imposing a special duty on the school to suspend the student based on these circumstances would have interfered with administrator's role to act in a fair and unbiased manner and would have undermined his suspension authority.

In Richelle L. v. Roman Catholic Archbishop of San Francisco (2003) 106 Cal.App.4th 257, the Court of Appeal addressed whether a priest can be liable for breach of a special relationship or breach of fiduciary duty for his sexual misconduct with a parishioner. The trial court had sustained the defendant's demurrers without leave to amend ruling that subjecting a member of the clergy and his church to such tort liability would excessively entangle the court in religious beliefs and practices in violation of the religion clauses of the First Amendment.

The Court of Appeal first addressed whether a special relationship existed between a priest and a parishioner and whether the breach of such a relationship could be assessed without the court's excessive entanglement with religion. The plaintiff analogized her case to those involving physicians and attorneys. The Court of Appeal distinguished such cases because it held that their breach amounted to a breach of a professional duty of care and such a professional duty did not exist in the context of clergymen. The court explained that the reason that no such duty exists is that imposing such a professional duty would require the court to assess the training, skill, and standards applicable to members of the clergy in a wide array of religions holding different beliefs and practices, which would violate the First Amendment.

The Court of Appeal then examined whether a priest could be liable for breaching a fiduciary duty to his parishioner and concluded that liability for breaching such a confidential relationship could exist. The court held that a fiduciary relationship could likely exist between a priest and his parishioner when a priest serves as a counselor, or when factors such as "advanced age, or youth, or lack of education, or ill health, or mental weakness" are involved. The Court of Appeal held, however, that under the facts of the plaintiff's case it could not find a fiduciary relationship and, as a result, affirmed the trial court's judgment.

In another case involving a church, Jacqueline R. v. Household of Faith Family Church, Inc. (2002) 97 Cal.App.4th 198, the Court of Appeal held that a pastor who engages in consensual sexual activity with a church member does not owe her or her husband the same independent duty of care required of licensed professionals. The pastor in this action did not hold himself out to be a professional marriage counselor and was not licensed. The court did not address whether a confidential relationship existed between the pastor and plaintiffs, which may have given rise to an independent legal duty because the parties did not tender the issue.

In Eric J. v. Betty M. (1999) 76 Cal.App.4th 715, *mod., rev. den.*, a mother filed suit on behalf of her son against the family members of her boyfriend who had molested the child. She asserted that they knew, and she did not, that the boyfriend was a convicted child molester and had the duty to warn her.

The defendant property owners successfully moved for summary judgment, and the Court of Appeal affirmed. The convicted child molester's mere presence on the property could not be considered to be a dangerous condition of the property, and thus there is no basis for premises liability. Further, there was no special relationship giving rise to a duty either.

Similarly in Romero v. Superior Court (2001) 89 Cal.App.4th 1068, the Court of Appeal issued a writ of mandate directing the trial court to vacate its order granting the defendant summary judgment. The appellate court found that the negligent supervision action brought by a mother and daughter against the parents of a teenage boy in whose home an assault had occurred should be dismissed because the defendants did not owe a duty of care to the plaintiffs to the extent that the plaintiff's based their claim on a theory of the defendants' "nonfeasance."

"Nonfeasance is found when the defendant has failed to aid the plaintiff through beneficial intervention. Liability for nonfeasance is largely limited to those circumstances in which some special relationship can be established." (Id. at 1079.)

The plaintiffs claimed that the defendants were liable under a negligent supervision theory due to their failing to properly supervise the daughter and control the conduct of her assailant. The court held that even though a special relationship could be found under these circumstances, its existence is insufficient to impose a duty of care upon the plaintiffs because there was no evidence to establish that the plaintiffs had prior actual knowledge of the teenage boy's propensity to sexually assault female minors. In its reasoning, the court applied the duty rule announced in Chaney v. Superior Court (1995) 39 Cal.App.4th 152,

and held that a duty of reasonable care is owed when it can be said that the assaultive conduct was reasonably foreseeable—and conduct is deemed reasonably foreseeable only if the defendant had actual knowledge of the assaultive propensities. (Romero at 1081.) The "Chaney Rule" emphasizes actual knowledge and not merely constructive knowledge.

The court further held that the plaintiff's attempt to establish liability based upon a theory of "misfeasance" was also misplaced. "Misfeasance exists when the defendant is responsible for making the plaintiff's position worse, i.e., defendant has created a risk." (Romero at 1091.) The court reasoned that "because the record is devoid of any evidence showing that petitioners were aware of facts sufficient to put a reasonable and prudent adult on notice that Joseph had previously engaged in assaultive behavior or posed a threat of physical harm to Ryan or the other teens in petitioners' home, we conclude as a matter of law that they have no duty of care under principles of ordinary negligence to supervise these two teenagers during the entire time they were in the petitioner's home."

In M.W. v. Panama Buena Vista Union School District (2003) 110 Cal. App.4th 508, the plaintiff was an eighth grade special education student who filed suit against a school district after he was sodomized by another student in the school bathroom prior to the beginning of class. The jury had returned a verdict against the school district in excess of $2 million dollars, and the school district appealed arguing that it owed no duty of care to the student to prevent sexual assault. The Court of Appeal held that the school district did owe the plaintiff a duty of care because it was reasonably foreseeable that, given the lack of direct supervision in the early morning hours during which the minor was dropped off at school, a special education student, such as the plaintiff, was at risk for a sexual or other physical assault and that given the unique vulnerabilities of special education students, the school district knew or should have known that the minor was subject to the risk of an assault, including a sexual assault. Further, the Court of Appeal distinguished Romero and Chaney from the facts of this case because both Romero and Chaney involved private individuals inviting the plaintiffs into their homes on a voluntary basis. This case, however, involved a school district, which is subject to well-established statutory duties mandating adequate supervision for the protection of the students.

Shipman v. Boething Treeland Farms, Inc. (2000) 77 Cal.App.4th 1424, *mod.* (2000) 78 Cal.App.4th 9176, concerns a trespasser who drove his all-terrain vehicle onto private property owned by the defendants. The court interpreted Civil Code section 846 to preclude the existence of a duty.

In Anaya v. Superior Court (2000) 78 Cal.App.4th 971, the parents of a girl injured in a traffic collision brought a wrongful death action because the girl died not in the vehicle crash but as a result of a second crash that occurred while she was being transported by helicopter to a hospital. The court likened the scenario to that of malpractice following an underlying tort, and held that the helicopter crash was both foreseeable and not an intervening superseding cause.[7]

On December 20, 2001, the California Supreme Court handed down its decision in Ortega v. Kmart Corporation (2001) 26 Cal.4th 1200, and in so doing held that constructive notice of a dangerous condition in a grocery store is a question of fact that may be proved by circumstantial evidence. The burden of proving such constructive notice rests with the plaintiff.

A Kmart shopper slipped in a puddle of milk on the floor adjacent to the refrigerator and suffered significant knee injury. Neither he nor his liability expert could testify as to how long the milk had been on the floor. The former store manager testified that the store kept no written inspection records, but all personnel were trained to look for and clean up any spills or other hazards. He would expect that an employee would walk the isle where the incident occurred every 15 to 30 minutes but admitted it was possible that the milk could have been on the floor for anywhere between 5 minutes and 2 hours.

The jury found in favor of the plaintiff, and Kmart appealed. The Court of Appeal affirmed the judgment concluding that the "plaintiff could be relieved of his burden of showing how long the milk remained on the floor if he demonstrated the site had not been inspected within a reasonable period of time."

The California Supreme Court affirmed as well. It held as follows:

> We conclude the plaintiffs still have the burden of producing evidence that the dangerous condition existed for at least a sufficient time to support a finding that the defendant had constructive notice of the hazardous condition.... We also conclude, however, that plaintiffs may demonstrate the storekeeper had constructive notice of the dangerous condition if they can show that the site had not been inspected within a reasonable period of time so that a person exercising due care would have discovered and corrected the hazard.... In other words, if the plaintiffs can show an inspection was not made within a particular period of

[7] See also later case discussed *infra* under Proposition 213 at page 127.

> time prior to an accident, they may raise an inference that the condition did exist long enough for the owner to have discovered it.... It remains a question of fact for the jury whether, under all the circumstances, the defective condition existed long enough so that it would have been discovered and remedied by an owner in the exercise of reasonable care. [26 Cal.4th 1200 at 1212-1213; cites omitted.]

In coming to this conclusion, the court cited with favor Louie v. Hagstrom's Food Stores (1947) 81 Cal.App.2d 601:

> The exact time the condition must exist before it should, in the exercise of reasonable care, have been discovered and remedied, cannot be fixed, because, obviously, it varies according to the circumstances. A person operating a grocery and vegetable store in the exercise of ordinary care must exercise a more vigilant outlook than the operator of some other types of business where the danger of things falling to the floor is not so obvious. [Louie, 81 Cal.App.2d 601, 608; Ortega (2001) 26 Cal.4th 1200 at 1202.]

What is the importance of this case to defendants?

1. Summary judgments on the basis of lack of notice will be difficult to come by; and

2. Defendants would be well served to be able to prove up the nature and frequency of their inspections.

A word of caution however is in order. While "sweep sheets" can be very helpful in disproving constructive notice, they can be abused. Many retailers have abandoned them because store personnel do not maintain them as contemporaneous records, instead filling them out after the fact. In egregious situations, they have been known to be forged, a particularly unfortunate circumstance when the employee who allegedly initialed the sweep sheet was not even present at work that day.

Lindstrom v. The Hertz Corporation (2000) 81 Cal.App.4th 644, *mod., reh. den., rev. den.*, explores duty in another way. When a foreign citizen with a valid driver's license from his own country had an accident injuring the plaintiff, she brought suit not only against the driver, but against Hertz as well on the basis

that Hertz breached its duty to her by failing to provide its renter with a copy of the California Rules of the Road before allowing to rent a vehicle.

The Court of Appeal affirmed the summary judgment in favor of Hertz. It found that a car rental company's duty is limited to determining whether the customer possesses a valid driver's license from his jurisdiction and not to rent a car to a person who appears to be mentally or physically impaired or shows other signs of incompetence at the time the vehicle is rented.

Silva v. Union Pacific RR Co. (2001) 85 Cal.App.4th 1024, stands for the proposition that duty cannot be examined in the abstract: it must be applied to a particular factual context. The plaintiffs had filed a wrongful death action claiming that Union Pacific had been negligent in failing to maintain fencing around its tracks failing to protect the public from the trains. The court recognized a number of prior decisions that held that a railroad has no duty to provide fencing, but nevertheless included that there must be a clear factual or evidentiary basis to ascertain whether there would be a duty. The case was remanded.

In Craddock v. Kmart Corporation (2001) 89 Cal.App.4th 1300, the plaintiffs filed a negligence/loss of consortium action arising out of an accident suffered by plaintiff Rebecca Craddock at a Kmart store.

At issue was a special instruction that the trial court gave at the request of the plaintiff; the pertinent portion of the instruction was as follows:

> In judging the conduct of the parties, you may consider the fact that the attention of persons who visit public stores ordinarily is attracted by the display of wares offered for sale and may be more or less absorbed by the transactions which they have in mind. You may consider whether the defendant anticipated that fact with ordinary care in the exercise of the duty herein mentioned. You may also consider whether the plaintiff did or did not share that ordinary experience of store visitors, and if so, what effect that fact had on her conduct in relation to the cause of the accident, if any.

The circumstances were as follows. The plaintiff was walking down an aisle looking for towels when she reached a T-intersection with another aisle. She started to turn and looked up at the overhead directory sign to locate the linen department.

At the time, store employees were constructing a display bin in the middle of that aisle, and there were metal brackets lying on the floor. The store manager conceded that the objects on the floor created a hazard and that the brackets should not have been left there. He also acknowledged that shoppers do not always watch their feet as they walk down the aisles. There was an employee positioned in the aisle to warn shoppers of the hazard, but she was facing the wrong way to see the plaintiff coming. There were no other warnings or signals.

The court upheld the verdict and found that the instruction was appropriate. Although it was based on a Supreme Court decision (Tuttle v. Crawford (1936) 8 Cal.2d 126) that predated Rowland v. Christian (1968) 69 Cal.2d 108, it is not inconsistent, and nothing in the special instruction placed on the defendant any duty other than reasonable care.

In Moore v. Wal-Mart Stores (2003) 111 Cal.App.4th 472, the injured patron relied on the store owner's failure to correct the dangerous condition on its premises to argue that he was negligent. The Court of Appeal, however, affirming the decision in Ortega, held that the plaintiff had the burden of showing that the owner had notice of the condition in sufficient time to correct it. The Court of Appeal expressly rejected the "mode of operation" rule used by other states, which looks to a business' choice of a particular mode of operation and not events surrounding the plaintiff's accident. Under the rule, the plaintiff is not required to prove notice if the proprietor could reasonably anticipate that hazardous conditions would regularly arise. In other words, a third person's independent negligence is no longer the source of liability, and the plaintiff is freed from the burden of discovering and proving a third person's actions. The Court of Appeal in Moore held that this is not the law in California.

In Friedman v. Merck & Co. Inc. (2003) 107 Cal.App.4th 454, the Court of Appeal held that a pharmaceutical company had no duty to inform a strict ethical vegan that a tuberculosis test that he had submitted to contained animal products, despite the plaintiff's allegations that the distributors of the tuberculosis test negligently misrepresented, upon the plaintiff's inquiry, that the test did not contain animal products and was vegan "safe." The court held that there is significant authority to the effect that there is no duty to warn of the possibility of rare, idiosyncratic, hypersensitive, or unusual reactions to an otherwise safe and useful product. Thus, the foreseeability of any serious harm to a sufficiently appreciable segment of the general public was too remote to justify the imposition of a duty to warn on the defendants.

In Seo v. All-Makes Overhead Doors (2002) 97 Cal.App.4th 1193, the Court of Appeal held that the defendant, a gate repair company, owned no duty of

care to the plaintiff who was injured by an electronic sliding gate after he activated the toggle switch. The court held that since the defendant did not manufacture or install the gate or the toggle switch and did not negligently repair the gate or fail to make requested repairs, in the absence of a special relationship, it owed no duty to the plaintiff.

In Dekens v. Underwriters Laboratories Inc. (2003) 107 Cal.App.4th 1177, the Court of Appeal held that the defendant did not undertake to guarantee the safety of the decedent from illnesses resulting from exposure to asbestos simply because it tested small appliances and certified them as safe. Thus, the defendant was not liable under the negligent undertaking doctrine, i.e., the Good Samaritan rule.

In Hall v. Superior Court (2003) 108 Cal.App.4th 706, the court addressed the issue of an attorney's duty to his client's spouse. In Hall, a wife had retained an attorney to bring suit against her mother-in-law when her child drowned in the mother-in-law's pool. The wife's spouse brought suit against the wife's attorney for legal malpractice and breach of fiduciary duty. The Court of Appeal held that an attorney does not have a legal duty to his client's spouse. Further, though the presence or absence of a client's intent that a third party benefit from or rely upon an attorney's services is significant in determining the scope of an attorney's duty, in this case the estranged wife had no expectation that her husband would benefit from or rely upon her attorney's advice.

Ileto v. Glock, Inc. (2003) 349 F.3d 1191 addresses whether a gun manufacturer owes a duty to victims of a shooting rampage for negligence in the distribution of the guns. The Court of Appeal held that a defendant's duty of care extends to those individuals a defendant puts at an unreasonable risk of harm through the reasonably foreseeable actions of a third party. In Ileto, the plaintiffs alleged that the defendants' marketing and distribution strategies included the purposeful oversupply of guns to police departments and the provision of unnecessary upgrades and fee exchange of guns with police departments to create a supply of post-police guns that could be sold through unlicensed dealers without background checks to illegal buyers at a profit. The Court of Appeal held that these allegations were more than sufficient to raise a factual question as to whether the defendants owed the plaintiffs a duty of care and whether the defendants breached that duty. Further, it was reasonably foreseeable that this negligent behavior and distribution strategy would result in guns getting into the hands of people like the shooter who are forbidden by federal and state law from purchasing a weapon. It was also reasonably foreseeable that once these prohibited purchasers obtained the firearms, they would use them for criminal activity.

B. Rescue Doctrine

Harris v. Oaks Shopping Center (1999) 70 Cal.App.4th 206 involves an individual who was hurt when trying to resolve a situation which appeared to involve immediate peril, but in actuality did not. The court nevertheless found the rescue doctrine to be applicable.

The plaintiff was employed at a customer service booth of a shopping center. A large sand sculpture was under construction. The plaintiff saw sand and water rushing out of the sculpture and thought that the sculpture was about to fall and injure customers. He yelled to passers-by that the structure was falling, but no one seemed to hear him.

Then, fearing that the sculpture was about to fall on a woman pushing a baby in a stroller, he rushed in and hurt himself in the process.

The matter went to trial, and the jury found that none of the defendants was negligent. The plaintiff appealed.

The trial court rendered the rescue doctrine instruction, BAJI 4.60, but refused to give BAJI 4.40, which concerns the doctrine of imminent peril. That instruction is as follows:

> A person who, without negligence on his part, is suddenly and unexpectedly confronted with peril arising from either the actual presence of, or the appearance of, imminent danger to himself or to others, is not expected nor required to use the same judgment and prudence that is required in the exercise of ordinary care in calmer and more deliberate moments. His duty is to exercise the care that an ordinarily prudent person would exercise in the same situation. If at that moment he does what appears to him to be the best thing to do, and if his choice and manner of action are the same as might be followed by any ordinarily prudent person under the same conditions, he does all the law requires of him. This is true even though in the light of after events, it should appear that a different course would have been better and safer.

In the facts at hand, after the fact it was clear that there was no actual imminent peril because the sculpture did not fall. Nevertheless, Harris had no way of knowing that, and thus the rescue doctrine was applicable.

Likewise, in Sears v. Morrison (1999) 76 Cal. App. 4th 577, the rescue doctrine also applies where the rescuer is attempting to rescue the negligent individual from that person's negligence.

C. Negligence Per Se

Whether or not a defendant owed a duty of care to a plaintiff usually involves an inquiry into the particular standard of care expected from that particular defendant. The standard of care for a reasonable person in particular situations is oftentimes prescribed by statute or ordinance. Any conduct falling below this standard is considered to be negligence per se, or negligence as a matter of law. California Evidence Code section 669 codified the negligence per se doctrine as a presumption affecting the plaintiff's burden of proof. Negligence is presumed if the plaintiff establishes four elements: (1) the defendant violated a statute, ordinance, or regulation of a public entity; (2) the violation proximately caused death or injury to person or property; (3) the death or injury resulted from an occurrence the nature of which the statute, ordinance, or regulation was designed to prevent; and (4) the person suffering the death or the injury was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted. (Daum v. SpineCare Medical Group, Inc. (1997) 52 Cal.App.4th 1285, 1306.) Thus, if the plaintiff establishes these four elements, then it is presumed that the duty and causation elements for a negligence claim have been satisfied.

Application of the doctrine depends on a showing of all four of the elements. (Capolungo v. Bondi (1986) 179 Cal.App.3d 346.) In Rosales v. City of Los Angeles (2000) 82 Cal.App.4th 419, however, the court stated that an underlying claim of ordinary negligence must be viable before the presumption of negligence of Evidence Code section 669 can be employed. In the words of the court, "it is the tort of negligence, and not the violation of the statute itself, that entitles a plaintiff to recover civil damages."[8] Id. at 430, *quoting* California Service Station etc. Assn. v. American Home Assurance Co. (1998) 62 Cal.App.4th 1166, 1177-78. Because it is left to the courts or to the legislature to create a duty of care, the presumption of negligence created by Evidence Code § 669 concerns the standard, rather than the duty, of care. Id.

Of the above-mentioned four elements to be proved to establish negligence per se, the first two are generally considered questions of fact for the trier

---

[8] Rosales also discussed *infra* at page 123 with respect to Invasion of Privacy.

of fact. (Sierra-Bay Fed. Land Assn. v. Superior Ct. (1991) 227 Cal.App.3d 318, *rev. den.*) The last two elements are reserved for the court since they involve statutory interpretation. (Id.)

In Galvez v. Fields (2001) 88 Cal.App.4th 1410, the trial court refused to give the negligence per se jury instruction out of its hostility for the negligence per se doctrine. The appellate court held that the trial court erred in so refusing, and such error was clearly prejudicial. In so doing the court stated that negligence per se was a valid doctrine in California.

In DiRosa v. Showa Denko K.K. (1996) 44 Cal.App.4th 799, 808, *reh. den., rev. den.*, the court held that a federal statute or regulation may be adopted as the standard of care in a negligence action under Evidence Code § 669.

In McQuirk v. Donnelley (1999) 189 F.3d 793, a former employee in the Glenn County Sheriff's Department sued the Glenn County sheriff for defamation for his comments concerning the plaintiff's job performance. The Ninth Circuit Court of Appeal reversed the summary judgment in favor of the defendant on the basis that California Government Code section 820.2 and Civil Code section 47(a) were inapplicable.

Government Code section 820.2 provides that a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of discretion, whether or not such discretion was abused. The court found that the statements made about McQuirk amounted to operational judgment rather than planning judgment, and thus there was no immunity from liability. Likewise, Civil Code section 47(a) did not apply because the statements were not made in the proper discharge of the sheriff's official duties.

Jenkins v. County of Los Angeles (1999) 74 Cal.App.4th 524 interpreted Civil Code section 3333.3, which had been adopted by initiative. The statute provides that in any action for damages based on negligence, the plaintiff may not recover any damages if his or her injuries were in any way proximately caused by his or her commission of a felony or immediate flight therefrom, and the plaintiff had been convicted of that felony. The statute, however, did not protect the County of Los Angeles because the alleged conduct was for intentional tort (intentional infliction of emotional distress, assault, and battery).

In Barnhart v. Cabrillo Community College (1999) 76 Cal.App.4th 818, three members of a community college soccer team sued the college and their coach for personal injuries suffered in an auto accident suffered while the coach was driving the players to a game.

The defendant coach and college moved for summary judgment on the basis of administrative immunity pursuant to a regulation within the California Code of Regulations. The trial court granted the motion, and the court of appeal affirmed. The court found that California Code of Regulations section 55450 overrode Education Code section 87706 and precluded the plaintiffs from recovery.

Becerra v. County of Santa Cruz (1999) 68 Cal.App.4th 1450, held that county social workers were immune from tort liability for discretionary placement decisions.

In Andres v. Young Men's Christian Association (1998) 64 Cal.App.4th 85, 64 Cal.App.4th 1293A, the plaintiffs of Stephan Andres filed suit against the YMCA, for their son drowned in a Jacuzzi™ located in a locker room. The paramount issue in the case was whether the trial court's refusal to instruct the jury that the defendant's failure to provide lifeguard service constituted negligence per se.

The Court of Appeal interpreted the permanent statute, which provided that lifeguard service be provided for public swimming pools for which a direct fee is charged and for all other public swimming pools that either lifeguard service be provided or there be signs indicating that such service is not provided.

The court did not agree with the plaintiff's interpretation of "swimming pool," even though it acknowledged that in the abstract, "swimming pool" would include spas or Jacuzzis. Statutes, however, should be read in context and not in isolation. The obvious public safety purposes for requiring lifeguards at public swimming pools simply would not apply to a shower room Jacuzzi, which did not pose the same drowning dangers that would a deep-water pool. "To compel Jacuzzi owners to hire professional lifeguards for such facilities would compel Jacuzzi owners to hire professional lifeguards to oversee limited-use and relatively safe facilities. This is an absurd consequence." (64 Cal.App.4th at 86.)

In Victor v. Hedges (1999) 77 Cal.App.4th 229, the plaintiff relies upon a parking statute to show negligence per se. The court, however, found that the statute prohibiting parking a car on a sidewalk did not create a presumption of negligence because the section was not designed to prevent the type of occurrence that resulted in the plaintiff's injury.

IV. RESPONDEAT SUPERIOR

The doctrine of *respondeat superior* in general terms renders an employer vicariously liable for the torts committed by an employee within the scope of employment. (Duce v. Argo Sales Co. (1979) 25 Cal.3d 707, 722-23.) "We

are not looking here for the master's fault but rather for risks that may fairly be regarded as typical of or broadly incidental to the enterprise he has undertaken.... Further, we are not looking for that which can and should reasonably be avoided, but with the more or less inevitable toll of a lawful enterprise." (Hinman v. Westinghouse Electric Co. (1970) 2 Cal.3d 956, 960.) Obvious examples of a proper application of *respondeat superior* would include a cabdriver transporting a fare causing a vehicle collision or a loan officer failing to reveal required truth-in-lending disclosures to a credit union borrower.

The courts, however, have been unwilling to extend vicarious employer liability beyond its logical parameters. In particular, recent decisions have insulated employers from liability for conduct which may have been in the course of employment, but not within its scope. Many such cases involve allegations of sexual misconduct. Such cases include Lisa M. v. Henry Mayo Newhall Memorial Hospital (1995) 12 Cal.4th 291 where the plaintiff claimed that an ultrasound technician had molested her during the course of an examination.

The trial court had granted summary judgment in favor of the defendant hospital, which was then reversed by the court of appeal on the theory of *respondeat superior*. The California Supreme Court then reversed the judgment to the court of appeal on the basis of no vicarious liability.

In so doing, the court first noted:

> While the employee ... need not have intended to further the employer's interests, the employer will not be held liable for an assault or other intentional tort that did not have a causal nexus to the employee's work. [12 Cal.4th 291, 297.]

The court then discussed the requisite nexus. First, it distinguished proximate cause from "but for" causation. "That the employment brought tortfeasor and victim together in time and place is not enough." (12 Cal.4th 291, 298.) The court also stated:

> Looking at the matter with a slightly different focus, California courts have also asked whether the tort was, in a general way, foreseeable from the employee's duties. *Respondeat superior* liability should apply only to the type of injuries that "as a practical matter are sure to occur in the conduct of the employer's enterprises." (Hinman v. Westinghouse Electric Co. (1970) 2 Cal.3d at p. 959.) The employ-

> ment, in other words, must be such as predictably to create the risk employees will commit intentional torts of the type for which liability is sought. [12 Cal.4th 291, 299, italics added.]

The court then applied those concepts to the facts before it:

> As with ... nonsexual assaults, a sexual tort will not be considered engendered by the employment unless its motivating emotions were fairly attributable to work-related events or conditions. Here, the opposite was true: a technician simply took advantage of solitude with a naive patient to commit an assault for reasons unrelated to his work. Tripoli's [the technician] job was to perform a diagnostic examination and record the results. The task provided no occasion for a work-related dispute or any other work-related emotional involvement with the plaintiff. The technician's decision to engage in conscious exploitation of the plaintiff did not *arise out of* the performance of the examination, although the circumstances of the examination made it possible. "If ... the assault was not motivated or triggered off by anything in the employment activity but was the result of only propinquity and lust, there should be no liability." (Lyon v. Carey (D.C. Cir. 1976) 533 F.2d 649, 655.) [12 Cal.4th 291, 301; emphasis in original.]

The court also examined *respondeat superior* in the context of foreseeability. The concept of foreseeability plays myriad roles in tort analysis, but in this usage it was defined to mean "that in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." (12 Cal.4th 291, 298-299.)

In K.G. v. County of Riverside (2003) 106 Cal.App.4th 1374, the trial court had granted a nonsuit in favor of the county, which had been sued by a minor girl alleging that she had been sexually abused by the county deputy sheriff, her stepfather. The Court of Appeal affirmed holding that the deputy's work and his sexual abuse of the plaintiff were so attenuated that a jury could not reasonably have concluded that the deputy acted within the scope of his employment. In this matter, the fact that the deputy sheriff controlled and intimidated his stepdaughter by threatening to use his authority as an officer against her if she

did not cooperate was not a sufficient nexus or basis for construing a personal, family matter as job-related.

Further, the court cited Mary M. v. City of Los Angeles (1991) 54 Cal.3d 202, and analyzed whether "in the context of the particular enterprise an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business." The Mary M. court held that in making this determination, the court must consider whether the following three policy objectives underlying respondeat superior liability would be achieved: (1) imposing liability on the employer to prevent recurrence of the tortious conduct by creating a strong incentive for vigilance by those in a position to guard against the evil to be prevented, (2) giving greater assurance of compensation to the victim, and (3) spreading the risk of loss among the beneficiaries of the enterprise. The Court of Appeal in K.G. held that none of these considerations was satisfied by the facts of the case because the risk of sexual assault on the stepdaughter arose primarily due to the officer's presence in the child's home as her stepfather and the fact that he capitalized on his inherent authority and power as an officer as a means of threatening his stepdaughter. Accordingly, the Court of Appeal held that it would be unfair to attribute the deputy's sexual misconduct to the county.

Respondeat superior issues also arise relative to vehicle usage. Generally speaking, an employee is not considered to be acting within the scope of employment when going to or coming from his or her place of work. (Anderson v. Pacific Gas & Electric Co. (1993) 14 Cal.App.4th 254, 258.) Worker's compensation law also applies the "coming and going" rule. In those cases the courts have carved out an exception where "an employee suffers injury from a special risk causally related to employment." General Insurance Co. v. Workers Compensation Appeals Board (1976) 16 Cal.3d 595, 600. The "special risk" exception applies "(1) if 'but for' the employment the employee would not have been at the location where the injury occurred and (2) if 'the risk is distinctive in nature or quantitatively greater than risks common to the public.'" (Parks v. Workers Compensation Appeals Board (1983) 33 Cal.3d 585, 590.)

Application in a civil context however was expressly rejected in Depew v. Crocodile Enterprises, Inc. (1998) 63 Cal.App.4th 480, *rev. den*. The heirs of a decedent involved in a late night automobile collision filed suit against the driver of the other vehicle and his employer on the basis that the employer had acted negligently subjecting the employee to excessive work hours and then allowing him to drive home in a state of exhaustion. The plaintiffs asserted that such constituted a basis for application of the special risk exception to the coming and going rule.

The court of appeal disagreed. It first noted that the workers' compensation cases were not controlling because the liberal construction favoring coverage in a workers' compensation case does not apply in a tort context because the circumstances of "social insurance" designed to protect employees from occupational hazards was not designed to protect third-party non-employees.

Because of the limitations on *respondeat superior*, plaintiffs also concurrently rely upon the liability theories of negligent hiring and negligent supervision. They usually come up in one of two circumstances:

1. Where the plaintiff wants to introduce into evidence some negative information about the employee that would otherwise be legally irrelevant. For example, a plaintiff injured in an automobile accident where there is no question that the defendant driver was in the course and scope wants the jury to know about that driver's poor driving record. He therefore includes in his complaint a count for negligent hiring or entrustment. He wants the trier of fact to be able to draw the inference that the employee operator caused the accident because he is a poor driver. The driving record would not otherwise be admissible to link the defendant driver's prior accidents and tickets to the cause of the accident being litigated. Even with a limiting instruction, most jurors would be hard-pressed to ignore the driving record when determining who was at fault with respect to the accident.

In such circumstances, the defense can argue that the evidence ought to be excluded (under Evidence Code section 353) as being overly prejudicial. The ploy can also be foiled by the defendant stipulating that the driver was acting in the course and scope of his or her employment.

2. The second and more problematic situation arises in such cases as Roman Catholic Bishop of San Diego v. Superior Court (1996) 42 Cal. App.4th 1556. A fifteen-year-old girl sued the church after a parish priest had allegedly sexually abused her. The court granted the defendant's petition for writ of mandate and directed the trial court to vacate its order denying a motion for summary judgment and to enter a new order granting the motion.

The plaintiff had to rely upon these theories because there is a long line of California cases standing for the obvious proposition that molestation is not within the course and scope of an employee's duties. The plaintiff necessarily needed the church as a defendant because the alleged bad actor had taken a vow of poverty.[9]

---

[9] The recent spate of litigation against various dioceses would suggest that this is not a good law now.

The plaintiff (Jane) first contended that the church inadequately investigated the pastor's fitness for the position. The court rejected that argument, distinguishing it from Evan F. v. Hughson United Methodist Church (1992) 8 Cal. App.4th 828, *rev. den.*, by noting that there were no facts showing an undue risk of harm that the pastor would commit criminal child abuse if he were employed by the church.

Jane next contended that had a more thorough screening process been employed, the church would have discovered that the pastor could have admitted that he had had two sexual relationships in a similar capacity in the Philippines and one in San Diego with a parishioner. She asserts that, armed with that knowledge, any reasonable employer would have done an even more extensive investigation of him "and most certainly would not have entrusted the case of minor girls to him without very close supervision." (42 Cal.App.4th 1556 at 1566.)

The court nixed that argument as well:

> Even if the church had learned of [the pastor's] prior sexual affairs with adults, it is illogical to conclude the church should have anticipated [he] would commit sexual crimes on a minor. More important, the legal duty of inquiry Jane seeks to impose on the church as an employer would violate the employee's privacy rights. Privacy is a fundamental liberty implicitly guaranteed by the federal Constitution ... and is explicitly guaranteed under the California Constitution as an inalienable right. [42 Cal.App.4th 1556 at 1566-67; cite omitted.]

Jane also argued that the defendant church had negligently supervised him based upon the general allegations that she was "entrusted to his care" in the "spiritual environment" provided by the church. There were, however, no specific allegations or facts that the church somehow placed her in his actual custody or control. Instead the evidence showed that nearly all of the sexual conduct that she had with him occurred when he took her from her home to various public places and hotels. She did not attend the church school where an affirmative duty to protect students may have existed.

Last, the court determined that there was no special relationship creating a heightened duty of care based upon a priest/parishioner relationship because the legislature had exempted clergy from licensing requirements on the basis that "the secular state is not equipped to ascertain the competence of counseling when performed by those affiliated with religious organizations." (42 Cal.App.4th

1556, 1568.) Mark K. v. Roman Catholic Archbishop (1998) 67 Cal.App.4th 603 followed the same reasoning.[10]

Juarez v. Boy Scouts of America, Inc. (2000) 80 Cal.App.4th 876, *rev. den.,* reaches a different conclusion in an action against an organization for the sexual molestation of a child by a member of the organization. The court did not find the Boy Scouts of America to have liability under respondeat superior because sexual misconduct falls outside the course and scope of employment and should not be imputed to the employer, citing, among other cases, Lisa M. v. Henry Mayo Newhall Memorial Hospital (1995) 12 Cal.4th 291, *supra.*

The court however overturned the trial court's summary judgment in favor of the Boy Scouts on the basis of direct negligence rather than vicarious liability. The court applied the Rowland v. Christian, *supra,* considerations for duty and determined that there were triable issues of fact.

A similar result was reached in Federico v. Superior Court (1997) 59 Cal. App.4th 1207, *rev. den*. The minor male plaintiff sued a hair styling college and its owner claiming that one of the defendants' employees had sexually molested him.

The court of appeal reviewed the case in the context of a petition for writ of mandate following the trial court's denial of the defendants' motion for summary judgment. The court first noted that there was a dispute in testimony as to the knowledge that the defendants had as to the college perpetrator's prior criminal background (he had been convicted of several times of sexual crimes involving minors) but ruled in the defendants' favor anyway. It found that even if they knew or should have known about the prior sex offenses against young males and should have foreseen that the perpetrator's duties would entail some degree of contact with such persons, "As a matter of law hiring [the employee] did not constitute a breach of defendant's limited duty to exercise reasonable care in his selection of employees." 59 Cal.App.4th 1207, at 1213.) The court cited Roman Catholic Bishop v. Superior Court, *supra*, in explaining that an employer's duty is "breached only when the employer, knows, or should know, facts which would warn a reasonable person that the employee presents an undue risk of harm to third persons in *light of the particular work to be performed*" (59 Cal. App.4th 1207, 1213; emphasis in original.)

The court reasoned first and foremost that the prior convictions did not involve students or customers of the hairdressing establishments in which he was employed at the time that the offenses were committed. In other words, there was nothing in the fellow's work history to indicate to a prospective employer that

---

[10] Mark K. also discussed *infra* at page 130 with respect to statute of limitations.

he posed a threat of harm to minors he might encounter in the course of his work. In so doing, it distinguished Evan F. v. Hughson United Methodist Church, *supra*, where a pastor with a history of sexual exploitation of minors had actually been entrusted with the care and supervision of minors in his capacity as a youth counselor and Sunday school teacher. "In contrast, the employee[s] required him only to supervise adult students and perform administrative tasks for the hair styling college. (59 Cal.App.4th 1207, 1215.) Secondly, even though it was foreseeable that he would come into contact with young male customers and visitors in the course of his work, "An employer is not charged with guaranteeing the safety of anyone his employee might incidentally meet while on the job against injuries inflicted independent of the performance of work related functions. Rather, as we have previously explained, liability for negligence can be imposed only, when the employer knows, or should know, that the employee, because of past behavior or other factors, is unfit for the specific tasks to be performed." (59 Cal.App.4th 1207, 1215.)

The plaintiff also alleged negligent supervision in addition to negligent hiring. Evidence was submitted that the employee had actually molested children during working hours at the hair dressing school. There is no showing however that any of those incidents have been called to the employer's attention at the time.

Muñoz v. City of Palmdale (1999) 75 Cal.App.4th 367 (reh. den.) considers *respondeat superior* in the context of whether an unpaid volunteer at a senior citizen center would be considered an employee. The court relied upon the volunteer exclusion of Labor Code section 3352(i), which excludes volunteers from workers' compensation benefits, declaring the exclusion also applies in a respondeat superior context.

Morohoshi v. Pacific Home (2003) 112 Cal.App.4th 937 considers vicarious liability in the context of a residential care facility and the nonprofit community agency that placed a severely diabetic, developmentally disabled child into that care facility. In Morohoshi, the developmentally disabled child died after the staff of a residential care facility failed to test his blood sugar. The Court of Appeal held that when an agency undertakes to provide services for the developmentally disabled, it stands in a special relationship with them in respect to the provision of those services. The agency's duties could not be delegated to the care facility and the agency was thus vicariously liable for the care facility's negligence.

Borg-Warner Protective Services Corp. v. Superior Court (1999) 75 Cal. App.4th 1203 considers the issue of respondeat superior in the context of a statutory cause of action. Business and Professions Code section 78215 renders private security licensees legally responsible for the good conduct in business of each of the licensee's employees. On that basis, the trial court denied the

security company's motion for summary judgment relative to an act of arson committed by a security guard. The guard had pled guilty to arson in connection with a fire at a manufacturing plant where Borg-Warner provided security.

By way of its motion, Borg-Warner contended that the arson was outside the course and scope of the guard's employment. The court tacitly accepted that in that there was no discussion on that issue.

Borg-Warner further contended that it could not be liable for the conduct of its employee that was not in the course and scope. The appellate court concurred and overruled the trial court ruling. In rendering a statutory analysis, it stated that in order for a statute to change common law, it must expressly state such an intention.

In Bussard v. Minimed, Inc. (2003) 105 Cal.App.4th 798, the court held that the "coming-and-going" exception to the doctrine of respondeat superior does not apply to an employee who causes an accident due to becoming sick at work from exposure to pesticide fumes.

Closely related to respondeat superior is the theory of ostensible agency as analyzed in Mejia v. Community Hospital of San Bernardino (2002) 99 Cal. App.4th 1448.

The plaintiff had sued a hospital and others for medical malpractice. Nonsuit was entered on behalf of the hospital relative to the care rendered by one of the treating physicians and his employer, MSB Radiology.

The Fourth District Court of Appeal reversed. After laying out the historical treatment of the relationship between hospitals and physicians, the court stated that the modern view is to regard hospitals as more than mere procurers of practitioners with no ability to control the physicians, and that at a minimum, there may be an ostensible agency relationship between the hospital and the doctor. Noting that "it appears difficult, if not impossible, for a hospital ever to obtain a nonsuit based on the lack of ostensible agency" (99 Cal.App.4th at 1458), the court concluded that "absent evidence that plaintiff should have known that the radiologist was not an agent of respondent hospital, plaintiff has alleged sufficient evidence to get to the jury merely by claiming she sought treatment at the hospital." (99 Cal.App.4th at 1460.)

In Serna v. Pettey Leach Trucking, Inc., (2003) 110 Cal.App.4th 1475, the Court of Appeal held that a trucking company, having undertaken an activity that can be lawfully carried on only under a public franchise or authority and which involves possible danger to the public is liable to the plaintiffs for harm

caused by the negligence of the company's independent contractor, notwithstanding that the carrier's cargo was exempt from certain economic regulations.

V. ASSUMPTION OF THE RISK

A. Generally

In Knight v. Jewett (1992) 3 Cal.4th 296, the California Supreme Court set forth the rules for distinguishing primary assumption of the risk, which imposes an absolute ban on liability, from secondary assumption of the risk which serves only as a factor of comparative negligence on the part of the plaintiff. In addressing the issue of co-participant liability in a sport such as touch football, "liability properly may be imposed on a participant only when he or she intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activity involved in the sport." (3 Cal.4th 296, 318.)

The California Supreme Court has handed down another primary assumption-of-the-risk case, Parsons v. Crown Disposal Co. (1997) 15 Cal.4th 456.

Plaintiff Parsons rode his horse on an equestrian trail adjacent to the parking lot of a restaurant. He claims that he was injured when a trash truck in the parking lot made a loud noise spooking his horse.

The trial court granted summary judgment in favor of the defendant trash company on the ground that it owed the plaintiff no duty because his claim was barred by the doctrine of primary assumption of the risk. The Court of Appeal reversed, holding that this was secondary assumption of the risk, and that the trash collector collecting trash in close proximity to a bridle trail was required to use ordinary care not to frighten horses on the trail.

Parsons views the assumption-of-the-risk issue from a different perspective than do other cases of the ilk in that the defendant was neither a co-participant in the sport, an owner of the sporting premises, nor a business renting sporting equipment to others.

Instead, the defendant was a user of heavy equipment (the garbage truck). The high court took the opportunity to cite to traditional common law by weighing the social utility of such machinery against the likelihood that horses might be frightened by the operation of such objects. It looked to the "remarkably uniform rule" that "a plaintiff whose horse 'shied' or 'spooked' and caused damage because of the noise, sight, or odor caused by the defendant's *regular and*

necessary conduct, cannot state a cause of action for negligence, because the defendant in such a case has breached no duty of care." (15 Cal.4th at 495.)

In Dilger v. Moyles (1997) 54 Cal.App.4th 1452, the court determined that a golfer who was whacked by a struck ball could not recover from either the golf club or the errant golfer in view of primary assumption of the risk.

Connelly v. Mammoth Mountain Ski Area (1995) 39 Cal.App.4th 8 (rev. den.), resulted in an appellate finding that primary assumption of the risk served as an absolute bar. A skier lost control and was injured when he banged into the ski lift tower. He sued on the basis that the defendant ski resort operator had failed to properly pad the tower.

The trial court granted the defendant's motion for summary judgment, which the Court of Appeal affirmed. The court found that there was no evidence that Mammoth had increased the inherent risk of skiers colliding with a ski lift tower, nor was there any authority to support a requirement that all ski lift towers be padded. The tower in question was observable from 200 yards.

A like result was reached in Bushnell v. Japanese-American Religious and Cultural Center (1996) 43 Cal.App.4th 525, where the plaintiff had broken his leg in a judo class and sued the judo club where it was taught.

The Court of Appeal affirmed the motion for summary judgment in favor of the defense. It stated:

> In conclusion, the record in the present case contains no evidence from which it might be concluded that defendants or their agents acted recklessly or with intention to injure Bushnell. Further, there is no evidence that Bushnell was injured by anything other than an inherent risk attending the activity of attempting to learn or improve the skills used in judo. It follows that the imposition of liability on instructors or their employers in such situations would adversely affect the activity. The doctrine of primary assumption of risk applies and summary judgment properly was entered.

The opinion, however, was split. The dissenting justice felt that while primary assumption of the risk would be a total bar as against an individual with whom the plaintiff may have been sparring, it should not have been applied to coaches and instructors. "For them, the general rule is that coaches and instruc-

tors owe a duty of due care to persons in their charge." (See dissenting opinion, 43 Cal.App.4th 525, 536.)

A number of other recent cases have come down, beginning with Fortier v. Los Rios Community College District (1996) 45 Cal.App.4th 430. The plaintiff was a student enrolled in an "advanced football" class at American River College. He was injured while engaging in a 7-on-7 drill that was intended to be non-contact, and where helmets and pads were neither required nor provided. He contended that when a suit is initiated against an instructor on a claim of negligent supervision or instruction, the doctrine of primary assumption of the risk is not applicable, but rather the issue is one of secondary assumption of the risk, which would entitle him to a trial on the merits.

The court first cited Knight v. Jewett (1992) 3 Cal.4th 296 (discussed above) with respect to Parsons to the effect that commercial operators of recreational activities "have a duty to use due care not to increase the risks to a participant over and above those inherent in this sport." (Knight, *supra*, 3 Cal.4th at 316; 45 Cal.App.4th at 435.)

The court rejected that theory:

> To encourage aggressive play football is simply to encourage the participants to play the game as it should be played. Football is a sport which is characterized by aggressive play. Wide receivers run pass patterns in an attempt to catch footballs passed to them. Defensive backs react, attempting to cover the receivers and knock down or intercept the passes intended for the receivers. Neither the game of football nor the particular exercise in which plaintiff was injured, which is an integral part of the game, can be authentically performed if the participants are not carrying out their respective roles aggressively. [45 Cal.App.4th at 436-437.]

Also:

> There is no merit in plaintiff's claim he was misled into believing there was to be no contact whatsoever in the *seven-on-seven* drill. Plaintiff asserts "non-contact" means no touching. But in the context of the game of football, it clearly does not. Whether in the *seven-on-seven* drill, or even a game such as touch or

> flag football, "non-contact" means no tackling. It is not and in the nature of the sport cannot be a guarantee of absolutely no contact.... [45 Cal.App.4th at 437-438.]

The First Appellate District handed down Staten v. Superior Court (1996) 45 Cal.App.4th 1628. The Appellate court reversed the trial court ruling and issued a peremptory writ of mandate to compel the Superior Court to grant summary judgment in favor of the defendant.

Plaintiff Mary Bafus was a 16-year-old competitive figure skater who aspired to Olympic competition or a career with the Ice Capades. She practiced at a rink that her skating club had rented during times that the public was excluded. During a practice session, she was injured when another young skater attempting a difficult maneuver collided with her.

The Appellate Court determined that collisions with other skaters in group skating sessions were inherent risks of the sport of figure skating, and thus the doctrine of primary assumption of the risk would apply. Bafus was therefore barred from recovery against the other skater, the club, and the rink.

The court took the occasion to practically beg the Supreme Court to accept the case for hearing:

> The Supreme Court has fashioned the rule of Knight [v. Jewett (1992) 3 Cal.4th 296] and propelled sports injury cases onto the playing fields of summary judgment, which, as we all know, are hardly Elysian. The Supreme Court would do well to provide further guidance by clarifying the rule book. Trial courts deciding these questions on summary judgment should not be faced with determining the inherent risks of an unfamiliar sport while bereft of the helpful factual input of experts. We suppose that a trial judge could receive expert evidence on the factual nature of an unknown or esoteric sports activity, but not expert evidence on the ultimate legal question of inherent risk and duty. This, however, is not our call: It is for the Supreme Court, in baseball parlance, to declare this suggestion fair or foul. [At 1636.]

Next, we turn to Herrle v. The Estate of Marshall (1996) 45 Cal.App.4th 1761, 53 Cal.Rptr.2d 713, *rev. den.*, which considers primary assumption of the risk in a non-sports context. The plaintiff worked at a convalescent hospital as a

certified nurse's aide. The hospital had many patients suffering from Alzheimer's disease, which features violence as a common trait. She knew that her job exposed her to patients suffering from mental illnesses that made them violent, combative, and aggressive. She sued the Estate of Helen I. Marshall, who had been suffering dementia, after Marshall struck her.

Herrle appealed after a defense verdict at trial.

The Court of Appeal affirmed the verdict relying upon the doctrine of primary assumption of risk. It applied Knight v. Jewett, *supra*, 3 Cal.4th 296, 314-315 as follows:

> Here, we have precisely the situation covered under the primary assumption of the risk doctrine. Plaintiff [Jewett] was engaged as an aide in a convalescent hospital to assume responsibility to care for mentally incompetent patients, many of whom are occasionally violent. Marshall was placed specifically in the hospital's care in part to protect her from injuring herself and others because of her violent tendencies. In the words of Knight, "The nature of the activity" was the protection of the patient from doing harm to herself or others; "The parties' relationship to the activity" was plaintiff's professional responsibility to provide this protection, the "particular risk of harm that caused the injury" was the very risk plaintiff and her employer were hired to prevent. [At 1765.]

The Supreme Court handed down another skiing case examining assumption of the risk in Cheong v. Antablin (1996) 16 Cal.4th 1063. Cheong was injured when Antablin, who admitted that he was skiing out of control, collided with him.

The plaintiff first argued that this case was not subject to the primary assumption of the risk defense analyzed in Knight v. Jewett (1992) 3 Cal.4th 296, because the two skiers were not "co-participants." He sought to distinguish skiers, who are in no way dependent upon other skiers, from football players involved in a team sport. The court found that to be too fine a distinction and underscored the fact that collision with other skiers is an inherent risk of the sport. Since the evidence did not show intent or recklessness on the part of the defendant skier, primary assumption of the risk applied as a bar.

The plaintiff next argued that there was a statutory duty of care arising out of the Placer County Skier Responsibility Code, and thus the duty was statutory rather than common law. The court determined though that the code specifically provided that skiers assumed the risks inherent in the sport. The court found that errors by other skiers were one of those risks.

Most of the subsequent cases in this area also found for the defendants:

- In Balthazor v. Little League Baseball, Inc. (1998) 62 Cal. App.4th 47, a player struck in the face by a pitch claimed that the lack of lights on the field and lack of a face guard on the helmet he was provided contributed to his injury. The Appellate Court affirmed the summary judgment in favor of the defendant because changing lighting conditions are inherent in baseball, and under primary assumption of the risk, the defendant only has a duty not to increase the inherent risks and therefore did not have a duty to provide a face guard.

- In Mosca v. Lichtenwaller (1997) 58 Cal.App.4th 551, *rev. den., reh. den.*, the court held that danger from an errant hook from another fisherman was an inherent risk in that sport.

- In Aaris v. Las Virgenes Unified School District (1998) 64 Cal.App.4th 1112, the court held that primary assumption of the risk protected defendant coaches and instructors (relative to an injury in cheerleading practice).

- An exercise rider at a racetrack was barred from recovery by the same doctrine following an equine collision on the track in Shelly v. Stepp (1998) 62 Cal.App.4th 1288.

- An employee of a company that maintains a shark aquarium for The Shark Club, was denied recovery under primary assumption of the risk when he was bitten while he was moving the shark to a bigger tank. (Rosenbloom v. Hanoch Corp. (1998) 66 Cal.App.4th 1477.)

- A cattle wrestler was found to have assumed the risk inherent in that enterprise. (Domenghini v. Evans (1998) 61 Cal.App.4th 118.)

- The primary assumption of the risk doctrine applied to the activity of being pulled on an inner tube by a motorboat. (Record v. Reason (1999) 73 Cal.App.4th 472.)

- Indoor intramural soccer was found to be hazardous recreational activity giving a university immunity from liability. (Ochoa v. California State University, Sacramento (1999) 72 Cal.App.4th 1300, *rev. den.*)

- Same result for junior life-guard competition. (Lupash v. City of Seal Beach (1999) 75 Cal.App.4th 1428.)

- Golf too entails primary assumption of the risk. (American Golf Corp. v. Superior Court (2000) 79 Cal.App.4th 30.)

- A snowboarder zooming along at 20 to 30 miles per hour bore no duty to a skier occupying an area properly used by snowboarder. (Mastro v. Petrick (2001) 93 Cal.App.4th 83, as modified.)

- On August 28, 2003, the Supreme Court reversed the Court of Appeal affirmation of a trial court summary judgment in a case where a 14-year-old novice swimmer on a high-school junior varsity swim team had filed suit after she broke her neck executing a practice dive into a 3½-foot deep racing pool. Both of the lower courts had found in favor of the defendant on the basis of primary assumption of the risk. The Supreme Court, however, concluded that the facts entailing allegations that her coach had not provided any instruction for diving into a shallow racing pool, lack of adequate supervision, the plaintiff's lack of expertise, her fear from diving, and the coach's previous promise to exempt her from diving presented a totality of circumstances that would preclude summary judgment. The high court did hold that the plaintiff would have to prove that the coach acted with intent to cause injury or at least acted recklessly. (Kahn v. Eastside Union High School District (2003) 31 Cal.4th 990.)

- The primary assumption-of-risk doctrine also applies to a spectator at a hockey game who gets hit by a puck. The Court of Appeal held that it is undisputed that ice hockey spectators face a known risk of being hit by a flying puck.

Further, though the plaintiff claimed that because her view was obstructed by a large crowd she was unable to protect herself from the flying puck, the Court of Appeal held that obstructions of view caused by the unpredictable movements of other fans are an inherent and unavoidable part of attending a sporting event. The Court of Appeal refused to impose a duty upon the defendants to eliminate all risks of injury from flying pucks because it is an inherent risk in the sport. (Nemarnik v. Los Angeles Kings Hockey Club (2002) 103 Cal.App.4th 631.)

- In Rodrigo v. Koryo Martial Arts (2002) 100 Cal.App.4th 946, during a martial arts class, the plaintiff was in line waiting for a turn to kick a target, when she was kicked from behind by one of the other class members. The Court of Appeal held that the plaintiff's case was barred by the doctrine of primary assumption of risk because being kicked, punched, or any other type of physical contact, in a martial arts class is an inherent risk in the sport. The fact that it happened while the plaintiff waited in line rather than when she was actually engaging in the sport was irrelevant. The Court of Appeal also held that, even assuming that the instructor failed to properly supervise his students, this would constitute nothing more than a failure to use due care and would not increase the risks inherent in martial arts and would not defeat the application of the primary assumption-of-risk doctrine.

- Primary assumption of risk applies in an employment context where the plaintiff, as a peace officer, was required to participate in a defensive training course and suffered injuries while performing a training maneuver. The Court of Appeal held that the plaintiff, while continuing in her role as a peace officer, assumed the risk that she might be injured by a violent juvenile offender. The fact that she was actually injured while receiving training to restrain a violent juvenile offender was irrelevant because the training was essential to the performance of her job. Hamilton v. Martinelli & Associates (2003) 110 Cal.App.4th 1012.[11]

[11] The Court of Appeal also held that the firefighter's rule also barred the plaintiff's claims and that none of its exceptions applied.

- Likewise in West v. Sundown Little League of Stockton, Inc. (2002) 96 Cal.App.4th 351, the Court of Appeal held that losing a fly ball in the sun and being hit by it is an inherent risk of baseball assumed by all players whether it happens during little league warm ups or during Game 7 of the Major League World Series. The coaches were under the obligation not to increase the risk of the game but had no obligation to affirmatively protect the players by providing non-standard equipment to its fielders to protect them from injury.

- The primary assumption-of-risk doctrine also applies to organized, long-distance bicycle riding on public highways since it is an activity engaged in for enjoyment or thrill and involves a challenge containing a risk of injury. (Moser v. Ratinoff (2003) 105 Cal.App.4th 1211.)

- In Whelihan v. Espinoza (2003) 110 Cal.App.4th 1566, the Court of Appeal held that primary assumption of risk applied to jet skiing and that Sections 655 and 655.7 of the Harbors and Navigation Code should not be construed to abrogate the common-law primary assumption-of-risk doctrine.

- Similarly, in Peart v. Ferro (2004) 119 Cal.App.4th 60, the Court of Appeal held that the doctrine of primary assumption of risk applies to the recreational use of a personal watercraft and that Harbors & Navigation Code sections 655, 655.7, 655.3, and 658.5 were not intended to abrogate or preempt the existing common law doctrine of primary assumption of risk.

- In Priebe v. Nelson (2004) 119 Cal.App.4th 235, the Court of Appeal held that the occupational assumption of risk doctrine applied as a complete defense to strict liability under the dog bite statute, Civil Code section 3342, and barred an injured kennel technician's recovery for her dog bite injuries. The Court of Appeal held that the kennel operators assumed the care and handling of the dogs entrusted to them, including assuming the foreseeable risk of being bitten that was inherent in handling dogs during the absence of their owners.

In several recent cases, however, the court did not find that the primary assumption-of-the-risk doctrine barred recovery:

- In Van Dyke v. S.K.I. Ltd. (1998) 67 Cal.App.4th 1310, *rev. den.*, a skier was injured when he struck a sign-post, which ironically admonished skiers to be aware and to ski with care. Summary judgment in favor of the defendant was reversed on the basis that the sign itself was negligently placed so that the skier would have difficulty seeing. The risk did not fall within the primary assumption of the risk;

- Likewise, in Campbell v. Derylo (1999) 75 Cal.App.4th 823, a skier was struck by a runaway snowboard. The plaintiff claimed that the defendant snowboarder was negligent because he used his snowboard unequipped with a retention strap. The skier did not assume that risk.

- Giardino v. Brown (2002) 98 Cal.App.4th 820, involved a girl injured by one of the defendant's horses when she tried to tie the horse to the hitching post and the horse became "spooked," jerked back, and caused the plaintiff's fingers to be caught in the rope, resulting in amputation of two fingers. The plaintiff presented evidence that the horse at issue was not suitable for inexperienced riders like herself. Summary judgment was reversed because the Court of Appeal held that the defendant was or should have been aware of the levels of riding experience of the children who would be riding the horses and it further held that inexperienced children riding at camp for the first time did not assume the risk of injury from horses that are inappropriate for their skill level.

- In Saffro v. Elite Racing, Inc. (2002) 98 Cal.App.4th 173, the Court of Appeal held that the plaintiff's claims were not barred by the doctrine of primary assumption of risk. It held that a race organizer who stages a marathon has a duty to organize and conduct a reasonably safe event, which includes the obligation to minimize the risks of dehydration and hyponatremia by providing adequate water and electrolyte fluids along the 26-mile course, particularly where the race organizer represents to the participants that these will be available at specific locations throughout the race.

- In Sanchez v. Hillerich & Bradsby Co. (2002) 104 Cal. App.4th 703, the Court of Appeal held that a pitcher struck by a line drive may sue the manufacturer of an aluminum bat because the particular bat at issue significantly increased the inherent risk that a pitcher would be hit by a line drive and that the unique design properties of this bat were the cause of his injuries.

The cases discussed above involving a plaintiff's participation in sports present primary assumption of the risk where the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury, and the doctrine operates as a complete bar to the plaintiff's recovery. By contrast, in Gordon v. Havasu Palms, Inc. (2001) 93 Cal.App.4th 244, the doctrine of secondary assumption of the risk came into play.

A passenger of a private plane sued the pilot for negligence and strict liability after a plane crash on an approach to a dirt airstrip. The pilot then filed a cross-complaint against the owner of that airstrip for negligence, alleging that the defendant owed him a duty to design and maintain the airstrip in a safe manner, but breached that duty in that the airstrip had an insufficient clearance approach ratio.

The Court of Appeal determined that the case presented issues of secondary assumption.

> And while we agree crashing is a risk inherent in flying a plane, "it is thoroughly unrealistic to suggest that, by engaging in a potentially dangerous activity or sport, an individual consents to (or agrees to excuse) a breach of duty by others that increases the risks inevitably posed by the activity or sport itself, even where the participating individual is aware of the possibility that such misconduct may occur." [93 Cal.App.4th 244 at 251, citing Knight v. Jewett, *supra,* 3 Cal.4th at 311.) .... [The pilot] did not consent to or agree to excuse [the defendant's] breach of its duty to design and maintain a safe airstrip. [93 Cal.App.4th at 251.]

B. Assumption of the Risk—Relative to Release from Liability

Olsen v. Breeze, Inc. (1996) 48 Cal.App.4th 608, *req. denied,* concerns a skier who sued a ski equipment shop, alleging that its poor workmanship in

adjusting his bindings resulted in his suffering an injury. He initiated the action on behalf of himself and all other Californians who have or seek to rent or purchase ski bindings of various brands. He also named as defendants six equipment dealers.

Most of the defendants moved for summary judgment in reliance on the written release they all use. The release provides that the customer releases the other party from liability for, in substance, all potential claims arising out of the products or service.

The trial court granted the summary judgment motions, and ultimately found for the remaining defendants at trial.

On appeal, the plaintiff asserted a variety of theories, none of which passed muster. The court of appeal held that:

- The use of the release forms did not constitute unfair competition;
- The use of the forms was not contrary to public policy because they involve private rather than public interests;
- The forms are not misleading; and
- The terms are not unconscionable because skiers already assume the risks inherent in a very dangerous sport.

A like result was reached in Allan v. Snow Summit, Inc., (1996) 51 Cal. App.4th 1358. A skier sued a ski resort after he was injured while attending a ski school. He had executed a document entitled "AGREEMENT AND RELEASE OF LIABILITY." The plaintiff argued that the facts presented a case of secondary rather than primary assumption of the risk. The court did not even have to address that analysis because the Knight v. Jewett (*supra*, 3 Cal. 4th 296) concerns implied assumption of the risk, whereas this case features express assumption of the risk. The court affirmed the summary judgment in favor of the defendant on the basis that the plaintiff had presented no valid or coherent reason why his contractual agreement to release Snow Summit and [the instructor] from liability should not be valid.

In Solis v. Kirkwood Report Co. (2001) 94 Cal.App.4th 354, however, the Court of Appeal overturned the trial court's summary judgment where the release executed by the skier was deemed ambiguous, on the basis that a jury could find that it potentially did not cover the particular risk of harm present. Further, there was a triable issue of fact as to whether the resort had not increased the inherent

risk of harm from skiing by fashioning a race course. (*See,* Van Dyke v. S.K.I., Ltd., *supra,* 67 Cal.App.4th 1310.)

Platzer v. Mammoth Mountain Ski Area (2002) 104 Cal.App.4th 1253 is yet another case involving a release at a ski resort. The plaintiff, however, raised a different argument on the basis that a ski lift was a common carrier with a heightened duty of care.

The Court of Appeal, however, affirmed summary judgment on the basis that a common carrier could contract away *liability for ordinary negligence*, but not gross negligence, citing Civil Code section 2175 and Donlon Bros. v. Southern Pacific Co. (1907) 151 Cal. 763, 770, and Walther v. Southern Pacific Co. (1911) 159 Cal. 769, 772-773.

The court also pointed out that, while the chairlift operations fit the statutory definition of common carrier (Civil Code § 2168), skiing is not an "essential activity."

VI. PECULIAR RISK

The California Supreme Court handed down a landmark decision regarding peculiar risk in Privette v. Superior Court (1993) 5 Cal.4th 689. The court held there that a landowner cannot be held liable for injuries to a contractor's employee under the peculiar risk doctrine largely because the workers' compensation system for recovery regardless of fault achieves the identical purposes that underlie recovery under the doctrine of peculiar risk. In so doing, the court overruled a long series of prior cases to the contrary.

The court had an opportunity to overrule Privette in Toland v. Sunland Housing Group, Inc. (1998) 18 Cal.4th 253, but elected not to do so.

The Supreme Court considered another case where injured persons (in this case, the decedent's survivors in a wrongful death action) sought to recover from the hirer of an independent contractor in Camargo v. Tjaarda Dairy (2001) 25 Cal.4th 1235.

Albert Camargo was an employee of Golden Cal Trucking when he was killed while he was operating a tractor. The tractor overturned when Camargo drove it over a large mound of manure in a corral belonging to Tjaarda Dairy. Tjaarda had hired Golden Cal to scrape the manure out of the corrals.

The survivors sued Tjaarda. One of their theories was that Tjaarda was negligent in hiring Golden Cal because it failed to determine whether Camargo was qualified to operate the tractor.

The Supreme Court followed Privette v. Superior Court, *supra,* 5 Cal.4th 689 and Toland v. Sunland Housing Group, Inc., *supra,* 18 Cal.4th 253 to the effect that the employee of an independent contractor is barred from bringing a negligent hiring action against the hiring of the contractor. The theory is that it is illogical to render the hiring person, who did nothing to create the risk of harm, to greater liability than to the hired company which created the harm. The hired company is protected, of course, by the workers' compensation scheme.

Consistent with this thinking are two more Supreme Court cases, both handed down on January 31, 2002. In Hooker v. Department of Transportion (2002) 27 Cal.4th 198, the court held that even where the hirer of an independent contractor retained control of the work or any part of it, there can be liability only if the exercise of the retained control *"affirmatively contributed"* to the employee's injuries. (27 Cal.4th 198, emphasis in original.)

And in McKown v. Wal-Mart Stores, Inc. (2002) 27 Cal.4th 219, an employee of an independent contractor could recover from the independent contractor's hirer only to the extent that the hirer provided unsafe equipment.

The common theme running through these five Supreme Court cases is that, in order for an employee of an independent contractor to recover from the hirer, the employee will need to prove some affirmative negligent act or omission: the court has essentially done away with pure vicarious liability in such circumstances.

The Fourth District Court of Appeal handed down Voigts v. Brutoco Engineering & Construction Company, Inc. (1996) 49 Cal.App.4th 354, *rev. dism.*[12] The case offers a useful survey of post-Privette cases where injured construction workers have sought to skirt around the Privette holding. By contrast, the Voigts court lauds the Privette decision and interprets it in as expansive a manner as possible.

Scott Voigts was injured when he fell from unsafe scaffolding. Because his own employer had built the scaffolding, he had to look elsewhere for damages in a civil action. (He had received Worker's Compensation benefits through his employer.) He contended that the general contractor failed to provide a safe work place.

---

[12] For information only. Review dismissed; remanded to Court of Appeal, 4th District.

The defendant successfully moved for summary judgment under Privette. The plaintiff appealed, arguing that, while he could not rely on the peculiar risk theory, the general contractor bore liability in its own right relative to the failure to provide a safe work place.

The appellate court saw through the ruse and rejected the argument:

> Thus the core of the Privette decision is the exclusive remedy provision of the workers' compensation statutes applied to liability claimed under the peculiar risk doctrine. But it would be "anomalous," to say the least, to confine the ambit of the decision to just peculiar risk. As the case before this court now demonstrates, the Privette decision could easily be rendered a dead letter, and the exclusive workers' compensation remedy easily circumvented, if all it did was preclude peculiar risk liability. Having swept away peculiar risk, the Privette court would have only made room for other causes of action, functioning essentially the same way, to move in and take its place.
>
> In the present case, for example, there is no dispute that the workplace hazard which caused the injury was created solely by the subcontractor. [Footnote omitted.] If all it takes is the assertion that the person who hires the independent contractor has a "nondelegable" duty to keep the workplace free of hazards *created by the independent contractor* to establish an independent basis for liability, then Privette might as well never have been decided. Even though the same policy concerns articulated in the Privette decision might be present, even though the exclusive workers' compensation remedy would be easily circumvented, and even though the basic relationship between the parties is the same, all the enterprising plaintiff's attorney needs to do is allege causes of action framed in different words than "peculiar risk," and, presto chango, the double recovery available prior to Privette would remain. [49 Cal. App.4th at 367-368; emphasis in original.]

The court affirmed the summary judgment. "When the hazard is created by independent (or sub) contractors, such liability is the functional equivalent of the peculiar risk liability at issue in the Privette decision." (49 Cal.App.4th at 369.)

At first blush, Zeiger v. State of California (1997) 58 Cal.App.4th 532, *rev. dism.*, would seem to run counter to Privette, *supra*, and Toland, *supra* (which had not yet been decided), because a subcontractor's employee was permitted to recover against the general contractor. Zeiger, however, involved a circumstance where the general contractor was independently negligent, and did not rely upon a theory of vicarious liability.

The court followed Privette in Zamudio v. City and County of San Francisco (1999) 70 Cal.App.4th 445. The owner of the construction project was held not to be vicariously liable to the injured employee of a subcontractor who had already received worker's compensation benefits.

Likewise, in Kinney v. CSB Construction, Inc. (2001) 86 Cal.App.4th 840, a general contractor which had assumed power to control all safety measures on the job was held to have borne no liability for damages due to an accident where the subcontractor failed to abate a safety hazard, and there was no affirmative contribution on the part of the general to the creation or persistence of the hazard causing the plaintiff's injuries.

In Kinsman v. Unocal Corporation (2003) 110 Cal.App.4th 826,[13] the Court of Appeal addressed under what circumstances a premises owner could be held liable for injuries sustained by the employee of an independent contractor due to a dangerous condition on the owner's property. The Court of Appeal held, consistent with Hooker and McKown that a premises owner has no liability to an independent contractor's employee for a dangerous condition the contractor has created on the property unless the dangerous condition was within the property owner's control and the owner exercised this control in a manner that affirmatively contributed to the employee's injury. The Court of Appeal concluded that this rule depends upon the knowledge and acts of the owner and, as a result, this rule avoided the erroneous holding announced in Grahn v. Tosco Corp. (1997) 58 Cal.App.4th 1373, that a hirer may be liable even though it did not exercise the control it had retained.

In Park v. Burlington Northern Santa Fe Railway Company (2003) 108 Cal.App.4th 595, the Court of Appeal held that a generator of hazardous waste is not ultimately liable for injuries suffered by an employee of a licensed

---

[13] For discussion only; review granted.

hazardous waste disposal company that it hired unless it affirmatively did something to contribute to the employee's injuries.

VII. PUNITIVE DAMAGES

California prohibits insurers from indemnifying against intentional acts or paying punitive damages assessed against their insureds. (Insurance Code section 533; City Products Corp. v. Globe Indemnity Co. (1979) 88 Cal.App.3d 31.) How does that firmly embedded rule comport with an insurer's duty to exercise reasonable efforts to settle within its policy limits?

In evaluating the situation where the carrier denies a demand within limits, and ultimately an excess verdict comes down, including punitive damages, the court first examined Zieman Manufacturing Co. v. St. Paul Fire & Marine Ins. Co. (9th Cir. 1983) 724 F.2d 1343, 1346:

> The proposition that an insurer must settle, at any figure demanded within the policy limits, an action in which punitive damages are sought is nothing short of absurd. The practical effect of such a rule would be to pass on to the insurer the burden of punitive damages in clear violation of California statutes and public policy.

Robert L. Cloud & Associates, Inc. v. Mikesell (1999) 69 Cal.App.4th 1141 reiterates prior law (see Adams v. Murakami (1991) 54 Cal.3d 105), which precludes punitive damages unless the plaintiff has introduced meaningful evidence of the defendant's financial condition.

Weingarten v. Superior Court of San Diego County, et al. (2002) 102 Cal.App.4th 268, addresses the situation where a defendant, the plaintiff's ex-husband, precludes the plaintiff from obtaining relevant nonprivileged financial information for the purposes of her recovery of punitive damages. The Court of Appeal held that the defendant's repeated refusal to produce relevant, nonprivileged, financial records, his production of meaningless and unreliable financial information, his pattern of improperly obstructing efforts to obtain financial records by asserting privilege when it was actually not implicated, and the fact that less intrusive measures to obtain his financial information failed, justified the trial court's order that the defendant present his most current personal tax records. The court held that this was one of the rare instances where the public policies underlying the tax privilege were outweighed by other compelling public policies. The court cautioned, however, that such compelled disclosure should not be granted where the financial records are difficult to obtain or where tax records

would be helpful. The court also cautioned that the defendant in this matter must first be given notice and an opportunity to assert his objections, and once this was done, the court would examine the tax returns in chambers and redact any information that related to his separate property.

Pavon v. Swift Transportation Co., Inc., 192 F.3d 902 (1999) is a Ninth Circuit case out of Oregon. In awarding punitive damages for discrimination under Title VII, the focus of inquiry pursuant to BMW of North America, Inc. v. Gore (1996) 517 U.S. 559 is whether the punitive damages bear a reasonable relationship to compensatory damages.

Freund v. Amersham, 347 F.3d 753 (2003) confirms what the California Supreme Court had made clear. Damages for wrongful discharge in violation of public policy are not limited to those specified in the underlying statute that was violated. Accordingly, the plaintiff in Freund was entitled to recover punitive damages in connection with his wrongful termination claim, even though the FEHA statute did not allow for a recovery of punitive damages.

Although public entities cannot be held liable for punitive damages, they are eligible to recover them. (City of Glendale v. Superior Court (2002) 95 Cal. App.4th 1266.)

One of the factors for the awarding of punitive damages is the defendant's net worth. A negative net worth, however, will not preclude the recovery of punitive damages where the defendant has the ability to pay. Such was the finding in Zaxis Wireless Communications, Inc. v. Motor Sound Corporation (2001) 89 Cal.App.4th 577. Motor Sound Corporation claimed losses of $2.5 million in 1998 and $800,000 in 1999 despite the fact that its average annual revenue for 1997, 1998, and 1999 exceeded $250 million. The court found that the defendant had the ability to pay the $300,000 punitive damage award from the trial court verdict.

In Cruz v. HomeBase (2000) 83 Cal.App.4th 160, the Court of Appeal addressed the meaning of "managing agent" for purposes of holding a corporation liable for punitive damages. The court held that a supervisor did not constitute a managing agent and, thus, HomeBase was not liable for punitive damages when the store supervisor had actual knowledge of an employee's malicious misconduct toward the plaintiff, a customer.

Under California law, a punitive damages award may be reversed as excessive "only if the entire record, viewed most favorably to the judgment, indicates the award was the result of passion and prejudice." Bardis v. Oates (2004) 119 Cal.App.4th 1, 25. "The purpose of punitive damages is a public one

to punish wrongdoing and deter future misconduct by either the defendant or other potential wrong doers." Id. at 25. Accordingly, the question for the jury, the trial court, and the appellate court is whether the amount of the award substantially serves the public interest in punishment and deterrence. Id.

A double-digit ratio between the punitive and compensatory damage award will rarely be justified and perhaps never in a case where the plaintiff has recovered an ample award of compensatory damages. Henley v. Phillip Morris Inc. (2004) 114 Cal.App.4th 1429.[14] Where a plaintiff has been fully compensated with a substantial compensatory award, any ratio over 4 to 1 is close to the line of constitutional impropriety. Id.[15]

VIII. CAUSATION

The plaintiff in Vu v. California Commerce Club (1997) 58 Cal.App.4th 229, *reh. den.*, sued a card club claiming damages from his losses due to the club not adequately protecting players from cheaters. The court held that even if there had been cheating, the inherent risk factor in gambling precluded proof with reasonable certainty that the cheating caused the losses.

IX. COLLATERAL SOURCE

In Arambula v. Wells (1999) 72 Cal.App.4th 1006, the court held that gratuitous payments by an employer to an employee who was off work due to the injury that was the subject of the litigation may be subject to the collateral source rule. The court determined that the admissibility of the payments should be left to the sound discretion of the trial judge.

Rotolo Chevrolet v. Superior Court (2003) 105 Cal.App.4th 242 arose out of a petition for writ of mandate out of a ruling on a pre-trial motion in limine. The court elected to entertain the petition because the plaintiff stated that the ruling was the only factor preventing settlement.

The court determined that disability retirement benefits were *not* a collateral source even though the employer providing those benefits was wholly independent of the tortfeasor. The case was one of first impression, which the court decided "primarily on equity and common sense." (At 372.)

---

[14] For discussion only; review granted.

[15] Cert. granted by United States Supreme Court.

In Miller v. Ellis (2002) 103 Cal.App.4th 373, the Court of Appeal held that the collateral source rule did not apply to reimburse a co-tortfeasor for money paid by his insurer to the injured victim because the co-tortfeasor was not in any way an injured party. However, the co-tortfeasor was entitled to recover one-half of the deductible he paid to his insurer.

X. DAMAGES

In Stearman v. Centex Homes (2000) 78 Cal.App.4th 611, the Fourth Appellate District Court of Appeals held that the strict liability standard for construction defects to mass-produced housing extends to defects in one component part of the house which cause damage to other component parts of the same house, but not to persons or property apart from the structure. In so doing, the court held that the rule in Seely v. White Motor Co. (1965) 63 Cal.2d 9, that damage to the defective product itself cannot be the subject of recovery under strict liability, is not applicable.

Santa Barbara Pistachio Ranch v. Chowchilla Water Dist. (2000) 88 Cal. App.4th 439, involves the somewhat arcane issue of recoverability of lost profits from diseased mature pistachio trees. The plaintiffs had filed suit against the water district alleging that irrigation water provided by the district resulted in the death of several mature pistachio trees.

At trial, the court limited discoverable damages to the diminution in land value and the cost of restoring the trees, but denied the plaintiffs the opportunity to recover for lost profits.

The Court of Appeal reversed and remanded for further proceedings. While there are few cases involving damaged fruit trees, the case is important relative to the principle that courts will be flexible in their approach to measuring damages and applying the broad scope of alternative theories to fit the particular circumstances of a case.

In Kids' Universe v. In2Labs (2002) 95 Cal.App.4th 870, the Court of Appeal addressed the issue of recoverability of future lost profits in an unestablished business. In doing so, the Court of Appeal cited the California Supreme Court case Grupe v. Glick (1945) 26 Cal.2d 680, which held that though prospective profits of an unestablished business are generally not recoverable because they are uncertain, contingent and speculative, "anticipated future profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability." Relying upon RESTATEMENT SECOND OF CONTRACTS and RESTATEMENT SECOND OF TORTS, the Court of Appeal

held that a plaintiff may establish damages with reasonable certainty by seeking the aid of experts, economic and financial data, market surveys and analyses, business records of similar enterprises, and general business conditions.

In Nelson v. County of Los Angeles (2003) 113 Cal.App.4th 783 addresses the issue of damages in a wrongful death case. The Court of Appeal held that parents who had occasional contact with their deceased son were not entitled to a $2 million damage award in a wrongful death action. "[C]ases uniformly have held that a wrongful death recovery may not include such elements as the grief or sorrow attendant upon the death of a loved one or compensation for sad emotions and injured feelings or the sentimental value of the loss." Nelson, at 12768, quoting Krouse v. Graham (1977) 19 Cal. 3d 59, 69.

Nishihama v. City and County of San Francisco (2001) 93 Cal.App.4th 298 concerns the degree to which a plaintiff is entitled to medical costs where the provider has accepted a lesser amount from an insurance carrier as payment in full. Karen Nishihama secured a judgment of $99,064 for injuries she sustained when she tripped and fell in a pothole in a crosswalk maintained by the city. Her award included $17,168 in medical costs for care received by her from California Pacific Medical Center, but the Medical Center accepted $3,600 from Blue Cross as payment in full. The court concluded that the hospital could seek recourse for the differential from the tortfeasor but not from the plaintiff, so therefore it reduced her award to a lower amount.

In Fragale v. Faulkner (2003) 110 Cal.App.4th 229, the Court of Appeal addressed what the measure of damages is for a real estate broker's intentional misrepresentation to a buyer when he is the buyer's agent and, thus, a fiduciary relationship exists. The Court of Appeal held that damages for fraud by a fiduciary should be measured under Civil Code section 3333, the general tort damage measure, rather than 3343, which provides the measure of damages for fraud. Section 3333 does not limit the plaintiff to out-of-pocket expenses. Thus, the Court of Appeal explained that applying section 3333 to cases of intentional misrepresentation by a fiduciary was consistent with the principle that a fiduciary should make good on the full amount of the loss that his breach of duty caused.

In Scognamillo v. Herrick (2003) 106 Cal.App.4th 1139, the Court of Appeal held that a damage award for future medical expenses and lost earnings should have been reduced to present cash value. Awarding damages for the plaintiff's second surgery was speculative because it was questionable whether the plaintiff would be required to undergo such surgery.

In Robinson Helicopter Co. v. Dana Corp. (2003) 105 Cal.App.4th 749, the Court of Appeal held that the plaintiff's recovery of tort damages was pre-

cluded under the economic loss rule, which restricts a plaintiff claiming economic damages to contract remedies unless the economic damages are accompanied by personal injury or property damage. Although tort damages may be recovered in cases where the fraud is independent of the contract such that it causes additional damages to the plaintiff or detrimental reliance by the plaintiff, they are not recoverable when the alleged fraud is related to the performance of the contract.

KB Home v. Superior Court of Los Angeles County (2003) 112 Cal. App.4th 1076 also addresses the economic loss rule. In KB Home, the Court of Appeal holds that determining the nature of the product at issue and whether the injury for which recovery is sought is to the product itself or to property other than the defective product, at least in cases involving component-to-component damage, is generally in the province of the trier of fact. The Court of Appeal held that it was improper for the trial court to deprive KB Homes of its right to have these material issues of fact submitted to a jury.

Olmstead v. Gallagher (2004) 32 Cal.4th 804 addressed the issue of sanctions. The Court of Appeal held that a directly false response to an interrogatory during discovery may qualify as a misuse of the discovery process subject to sanctions despite the fact it did not qualify as an evasive response under Code of Civil Procedure section 2023. Further, the court held that it was immaterial that the false answer was a mistake because a discovery abuse need not be willful to be sanctionable.

The Supreme Court then reverse the Court of Appeal because the action was filed after December 31, 1997, when Code of Civil Procedure section 128.5 ceased to be effective.

In Topanga and Victory Partners, LLP v. Toghia (2002) 103 Cal.App.4th 775, the Court of Appeal held that a defendant defending against a breach of contract cause of action and various related tort and statutory causes of action may not recover attorney fees incurred in defending the breach of contract unless he was a party to the underlying contract. Further, the defendant could not recover attorneys fees incurred in defending the noncontract causes of action, despite Civil Code section 1777, as the plaintiff filed a voluntary dismissal with prejudice.

Similarly, in Silver v. Boatwright Home Inspection Inc. (2002) 97 Cal. App.4th 443, the Court of Appeal held that a defendant voluntarily dismissed prior to trial is not the prevailing party for purposes of recovering attorney fees.

In California Wholesale Material Supply, Inc., v. Norm Wilson & Sons, Inc. (2002) 96 Cal.App.4th 598, the Court of Appeal held that given the purpose

of establishing mutuality of remedy and to prevent one-sided attorney fee provisions, where a nonsignatory plaintiff sues a signatory defendant in an action on a contract and the signatory defendant prevails, the signatory defendant is entitled to attorney fees only if the nonsignatory plaintiff would have been entitled to its fees if the plaintiff had prevailed.

XI. COMPARATIVE NEGLIGENCE

In Moureal v. Tobin (1998) 61 Cal.App.4th 1337, the defendant and cross-defendant, both of whom were traveling well in excess of the speed limit on Highway 5, claimed that the plaintiff caused the accident by dawdling along in the number one lane at 55 mph. The arbitrator who heard the matter and the trial court that upheld the award concurred, but were overruled by the Court of Appeal. It held that as a matter of law "a driver has no common-law or statutory duty under the undisputed driving conditions involved here to move to the right into the next slower lane even if, as here, other traffic is traveling in excess of the posted speed limit. We thus also conclude that such a driver cannot be held comparatively liable for any resulting damages if the speeding vehicle approaching from behind in the same lane collides into the rear of the law-abiding driver's vehicle." (61 Cal.App.4th at 1351.)

In reaching its conclusion, the court relied on the traditional duty analysis first articulated in Rowland v. Christian (1968) 69 Cal.2d 108.

XII. GOOD FAITH SETTLEMENT

California Code of Civil Procedure Section 877.6 provides a mechanism whereby a settling co-tortfeasor can free itself from exposure from claims for contribution for equitable indemnity by demonstrating that the settlement was in good faith within the meaning of the statute. In Norco Delivery Service, Inc. v. Owens-Corning Fiberglas, Inc. (1998) 64 Cal.App.4th 955, a co-defendant appealed the trial court's finding that a settlement was in good faith. The Court of Appeal affirmed, noting:

1. That the settlement was "within the ballpark"; and

2. The court's primary function in such an appeal is "simply to assess whether the good faith determination is buttressed by any substantial evidence." (64 Cal.App.4th at 962.)

The settler does not have to be a party at the time of the settlement in order to reap the benefits of Code of Civil Procedure section 877.6. (Britz, Inc. v. Dow Chemical Co. (1999) 73 Cal.App.4th 177, *rev. den.* In an extremely brief opinion, the Third District Court of Appeal denied an application for determination of good faith settlement because Code of Civil Procedure section 877.6 only authorizes trial courts to render such determination and not courts of appeal. There is no indication in the opinion as to why the motion was put before an appellate court rather than a trial court.

In Nutrition Now v. Superior Court of Los Angeles (2003) 105 Cal. App.4th 209, the Court of Appeal held that nothing in Code of Civil Procedure 877.6 precludes the consideration of an out-of-state settlement because the place of settlement is not relevant to the good faith determination.

XIII. GOVERNMENT TORT CLAIMS

The court treated harshly a plaintiff who erred in the prosecution of a government claim in Spencer v. Merced County Office of Education (1998) 59 Cal.App.4th 1429. She had presented her claim to the County of Merced rather than the Merced County Office of Education. After the County denied the claim, she filed suit against it. The Merced County Office of Education accepted service of the complaint, answered, then successfully moved for summary judgment on the basis that the plaintiff had filed the claim against the wrong entity and that it was too late for her to file the claim against the right entity.

The Court of Appeal affirmed. It held that the plaintiff attorney's error in proceeding against the wrong agency did not constitute excusable neglect because a reasonable person would have conducted a more thorough investigation.

Schonfeldt v. State of California (1998) 61 Cal.App.4th 1462, deals with the substantive aspects of the California Tort Claims Act. The plaintiff was a 15-year-old boy afflicted with attention deficit hyperactivity syndrome. He and two friends climbed over a freeway fence and ran across the highway. The buddies made it across safely, but Brian Schonfeldt was struck by a truck and sustained serious injury. He filed suit against the State of California and others, offering the theory that four defects combined to constitute a dangerous condition of property: 1) the pedestrian tunnel walkway was unsafe because it was unlit, narrow and muddy; 2) the freeway fence was 4-feet 10-inches high, instead of the recommended height of 6 feet; 3) there was a hole in the fence on the other side; and 4) there was a lack of signs warning freeway drivers that pedestrians may illegally attempt to cross the freeway.

The trial court granted judgment on the pleadings in favor of the defendant, and the Court of Appeals affirmed. While the question of whether there was a "dangerous condition" within the meaning of Government Code section 830 is a question of fact, it can be resolved as a question of law if reasonable minds can come to but one conclusion. When the property is used for a purpose for which it is not designed or which is illegal, liability can ensue only if the property creates a substantial risk of injury when it is used with due care. The court concluded:

> None of the facts alleged here constitute a dangerous condition, either by themselves or in combination.... Brian chose to do something no reasonable person using due care would do under the circumstances alleged—jump a fence and run across a freeway. [Cite omitted; 61 Cal.App.4th at 1468.]

Ketchum v. State of California (1998) 62 Cal.App.4th 957, upheld governmental immunity relative to a high speed chase. The court declined to impose a specific guideline limiting suits to certain offenses or situations. It upheld Vehicle Code section 17004.7, which immunizes public agencies that employ peace officers from liability if they have adopted a written policy on vehicular pursuits if the policy meets the standards set forth in the statute. The policy must control and channel the pursuing officer's discretion by providing objective standards by which to evaluate whether the pursuit should be initiated or terminated.

In Melendez v. City of Los Angeles (1998) 63 Cal.App.4th 1, *rev. den.*, an injured plaintiff pursued the city for conduct performed by off-duty police officers. The plaintiff and his wife (loss of consortium claim) obtained a gross judgment of $10 million against the defendants (less amounts paid by way of good faith settlement prior to trial).

The court interpreted a multitude of statutes to conclude that an off-duty police officer's principal employer (i.e., the police department) is liable for conduct on the part of the officer working as a part-time security guard for a private employer only when specified conditions exist, including the officer being in police uniform during the employment, the part-time work being approved by the governing entity of the principal employer or by the law enforcement agency as its designee, and that the principal employer approves the wearing of uniforms for such off-duty work. Because not all of those conditions were present in the Melendez case, the court reversed the judgment as against the City of Los Angeles.

Schooler v. State of California (2000) 85 Cal.App.4th 1004, involves a landowner who brought suit against the state for, among other things, general

damages arising from the loss of use and the diminished value of his property caused by erosion of a state-owned adjacent bluff. The trial court granted summary judgment for the state finding that the unimproved bluff was a natural condition as a matter of law for purposes of design immunity under Government Code section 831.25. The Court of Appeal affirmed on the basis that the unsolicited pedestrian traffic did not alter the fact that the bluff was a "natural condition" for purposes of the immunities provided in the statute.

The state prevailed also in Wyckoff v. State of California (2001) 90 Cal. App.4th 45, on the basis of design immunity in connection with a roadway lacking a center median barrier.

Design immunity is an affirmative defense for public entities. The elements are: (1) a causal relationship between the plan and the accident; (2) discretionary approval of the plan prior to construction; and (3) substantial evidence supporting the reasonableness of the design. (90 Cal.App.4th 45 at 52, citing Higgins v. State of California (1997) 54 Cal.App.4th 177, 185.)

The plaintiff contended that the design immunity defense was not available to the state because the roadway never conformed to the design plan. Specifically, the design called for minimum 46-foot median, and it was built with a 45-foot median. The court found that the improvement as built did not materially depart from the design approved by the public entity, and thus the affirmative defense was available to the state.

Bonanno v. Central Contra Costa Transit Authority (2003) 30 Cal.4th 139[16] is what appears to be the last chapter in a personal injury action that resulted in three successive appeals. The essential facts are as follows. The plaintiff was mildly retarded. She was badly injured when she was struck by a vehicle while she was crossing the street to reach the defendant's bus stop. She claimed that the totality of circumstances rendered access to the bus stop by crossing an intersection to reach the bus stop a dangerous condition. She secured a judgment in her favor with the driver of the car who hit her being found 88 percent responsible, defendant Contra Costa Transit Authority 1 percent responsible, and Kaiser Hospital (which treated her for injuries) 10 percent responsible. Central Contra Costa Transit Authority appealed.

The court shot down each of the Transit Authority's arguments. It found there was sufficient evidence for the jury to determine that the Transit Authority was negligent because the Transit Authority had control of the location and could

[16] On September 19, 2001, the California Supreme Court accepted this case for hearing. It is not citable and appears for informational purposes only.

remedy the condition. The court noted that the Transit Authority had control over the location of the bus stop even if it could not change the crosswalk or install a traffic signal. It, together with the county itself, had joint control over the location and removal of the bus stops. The court noted that the fact that the power and control were joint rather unique did not annihilate the public entity's responsibility for the dangerous condition.

In Brenner v. City of El Cajon (2003) 113 Cal.App.4th 434, the plaintiff filed suit after she was struck by a car in an intersection in the City of El Cajon. She sued the city on the basis that the intersection was dangerous.

In her second amended complaint, after two demurrers were sustained, the plaintiff alleged that the city knew, or should have known, that the intersection in which she was injured required traffic regulatory devices to manage, control, or reduce the automobile flow or speed on the street.

The city demurred to that as well, and the Court of Appeal upheld the ruling in favor of the defendant.

In its analysis, it noted that a public entity is not liable for an injury arising out of any act or omission except as provided for by statute, and that Government Code section 835 is the sole statutory basis for a claim imposing liability on a public entity based upon the condition of the property.

To state a claim under section 835, the plaintiff must plead: (1) a dangerous condition existed on the public property at the time of the injury; (2) the condition proximately caused the injuries; (3) the condition created a reasonably foreseeable risk of the kind of injury sustained; and (4) the public entity had actual or constructive notice of the dangerous condition of the property in sufficient time to have taken measures to protect against it.

Section 830 defines a dangerous condition to mean "a condition of property that creates a substantial (as distinguished from a minor, trivial, or insignificant) risk of injury when such property is used with due care in a manner in which it is reasonably foreseeable that it will be used."

In its analysis, the Court of Appeal synthesized the plaintiff's contentions into three factors: firstly, that the expansion of the street to a four-lane street resulted in an increase in the number of cars and the speed at which they traveled; secondly, that there was an increased number of pedestrians patronizing a park, two bus stops, a convenience store and a school; and thirdly, that the city did not install traffic regulation or safety devices to reduce the dangers posed by crossing the street.

The court addressed the first factor by stating that there was no allegation that the street had blind corners, obscured sight lines, elevation variances, or other unusual conditions that rendered the road unsafe when used by motorists and pedestrians exercising due care, and that the plaintiff cited no authority that a dangerous condition existed absent such factors.

The second factor also did not make the street dangerous. Heavy use of roads does not equate to dangerous conditions. There has to be some additional allegation of some peculiar condition that would make it unsafe for pedestrians to cross the street even when the motorists and pedestrians were exercising due care.

Finally, the court dismissed the third factor as well because in § 830.4, the Legislature excluded the failure to install traffic regulation as a basis for finding a dangerous condition.

The court made mention of Bonanno v. Central Contra Costa Transit Authority, *supra,* (2003) 30 Cal.App.4th 139, due to the very unusual factual conditions in that case.

Childs v. County of Santa Barbara (2004) 115 Cal.App.4th 64 considered a Government Code claim in the context of primary assumption of the risk. A child had been injured after she was riding a scooter on an uneven section of sidewalk. The defendant county, moved for summary judgment on the basis that scootering was a recreational activity for purposes of the doctrine of primary assumption of the risk.

The Court of Appeal reversed because it could not be concluded as a matter of law that the child was engaged in a sport or sports-related recreational activity covered by the assumption-of-risk doctrine. The court noted the general rule that an activity falls within the doctrine "if the activity is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury." (115 Cal.App.4th at 70, citing Record v. Reason (1999) 73 Cal.App.4th 472, at 482.) The defendant had failed to show that the child was riding at a particular speed or with other children in a structured or unstructured contest, or was testing the limits of her ability or the scooter, or that she was attempting a trick or maneuver requiring skill. She may instead have been engaged in no more than the diversion of getting from one place to another by use of a toy with wheels.

Ramirez v. Long Beach Unified School District (2003) 105 Cal.App.4th 182 illustrates the harshness that government immunity can represent. The plaintiff's defendant was a high-achieving 15-year-old student at Reid High

School. School district staff advised him to participate in R.M. Pyles Camp in Sequoia National Forest. They told him and his mother that the camp was "fun, safe, and a maturing experience."

The School District hosted the camp on a School District campus at which camp representatives assured the plaintiff that there would be more than one trained adult supervising the children and that it was safe. School District officials told the plaintiff and her son the same thing.

The School District provided transportation for the decedent and his brother from their home to Reid High School where they boarded a bus, which took them to the camp.

The camp was not safe. The decedent drowned "due to the lack of safety procedures at the camp," and there was only one counselor present.

The School District successfully demurred to the original, first amended, and second amended complaints, the last without leave.

The Court of Appeal affirmed the order of dismissal. It determined that the School District was immune from liability pursuant to Education Code section 44808, which generally provides that school districts are not responsible for the safety of students when they are not on school property, subject to limited exceptions.

The plaintiff first argued the exception that the decedent was at a school-sponsored activity, one of the exceptions. The court, however, quickly dismissed that argument citing a case defining a school-sponsored activity as "one that requires attendance and for which attendance credit may be given" (at 317; cites omitted.)

Ramirez next relied on the exception that the School District provided transportation to and from the school premises. In this case, however, the School District provided transportation from the Ramirez home to and from the school, but the camp provided the transportation to the camp. (This seems somewhat absurd: the School District provided transportation to and from the school, although the incident occurred elsewhere.)

Lastly, Ramirez contended that the School District "assumed responsibility" for the decedent's participation at the camp. There was no representation by the School District however that any School District personnel would direct or supervise the activities or that it trained, employed, or supervised the camp personnel.

In Avila v. Citrus Community College Dist. (2003) 111 Cal.App.4th 811, *rev. granted*[17], the Court discussed Government Code section 831.7, which provides that a public entity is not liable to any person who participates in a hazardous recreational activity on its property. The Court of Appeal noted that the statute was intended to prevent users of public land who chose to engage in hazardous activities such as hang-gliding from suing public entities when they got hurt. The Court of Appeal held that school sponsored and supervised athletic activities are not hazardous recreational activities under the statute.

In Nguyen v. City of Westminster (2002) 103 Cal.App.4th 1161, the Court of Appeal affirmed summary judgment in favor of the municipality where the death was caused when the driver of a stolen van that was being pursued by the police struck a trash bin, propelling the bin into a pedestrian. (Very bad luck.) Vehicle Code section 17004.7 provided immunity to public agencies employing peace officers if they have adopted a written policy of vehicular pursuits that complies with subsection (c) of the statute.

In Forbes v. County of San Bernardino (2002) 101 Cal.App.4th 48, the Court of Appeal held that, for a public entity to be liable, a statute must impose a duty on the specific public entity. In Forbes, the plaintiffs pointed to various statutes imposing a duty on court reporters and court clerks to preserve court records, but none of the statutes imposed such a duty on the state. As a result, the Court of Appeal held that no statute supported a finding of liability. Further, because a public entity may only be liable for injuries to the kinds of interests that have been protected by the courts in actions between private persons, the Court of Appeal held that the public entity could not be liable for intentional or negligent spoliation.

In Eastburn v. Regional Fire Protection Authority (2003) 31 Cal.4th 1175, a minor and her parents brought suit against the public agency that provided 911 emergency dispatch services claiming that they failed to dispatch the emergency personnel after the minor had suffered injury. The court held that Government Code section 815 and Health & Safety Code section 1799.107 rendered the defendants immune for liability except for situations of bad faith or grossly negligence conduct, which the plaintiffs could not allege.

Ma v. City and County of San Francisco (2002) 95 Cal.App.4th 488 provides a contradictory holding to that of Eastburn. In Ma, the Court of Appeal held that the city and county where 911 dispatch had responded to the plaintiff's call owed a duty of due care to citizens who utilized the 911 dispatch program and that the limited immunity of Health and Safety Code section 1799.107 did not extend to 911 dispatching. Further, the court held that the statutory immunity for

---

[17] For discussion only; review granted.

discretionary acts by public employees provided by Government Code section 820.2 did not apply in the context of this case.

In Alvarez v. State of California (1999) 79 Cal.App.4th 720, the plaintiff had brought a personal injury and wrongful death action against the state in which she alleged that the lack of a median barrier on the highway constituted a dangerous condition on public property and that even if the state established initial design immunity, the immunity was lost by changed conditions at the accident site. The Court of Appeal held that neither the installation of median barriers on portions of the highway other than the accident site nor the determination and recommendation to install a barrier at the site of the accident constituted an admission that the median on the date of the accident was a dangerous condition. Thus, the Court of Appeal affirmed the trial court's grant of summary judgment in favor of the state.

In County of Los Angeles v. Superior Court of Los Angeles County (2001) 91 Cal.App.4th 1303, the Court of Appeal upheld the trial court's decision to grant the plaintiffs' petition to file a late claim under the California Tort Claims Act because the time for filing a claim was tolled until plaintiffs' dependency status was terminated since during this time the plaintiffs were minors and had no parent or guardian legally authorized to act on their behalf.

Maria Del Real v. City of Riverside (2002) 95 Cal.App.4th 761 also addresses the issue of filing a late claim. The Court of Appeal affirmed the trial court's grant of summary judgment in favor of the city because the plaintiff had failed to present a timely claim and also failed to obtain leave to file a late claim. Further, the plaintiff's earlier letter to the police officer's counsel did not satisfy the claim requirement, since it did not substantially comply with the statutory requirement as it did not put the city on notice of the claim and it did not communicate the plaintiff's intention to litigate the matter.

In Ard v. County of Contra Costa (2001) 93 Cal.App.4th 339, the trial court had sustained defendant's demurrer without leave to amend on the ground that the plaintiff's complaint was time-barred. The Court of Appeal reversed and remanded with directions because, in opposing the defendant's demurrer, the plaintiff had specifically requested leave to amend his complaint to allege equitable estoppel, which was a factual issue not appropriate for determination by demurrer.

People Ex. Rel. Dept. of Transportation v. Superior Court (2003) 105 Cal.App.4th 39 addresses the issue of excusable neglect (Gov. Code § 946.6) as a means of obtaining relief from the claims requirement. The Court of Appeal explained that a claimant must at a minimum make a diligent effort to

obtain legal counsel within the claim-filing period. The fact that the plaintiff's theory against the state was not apparent to him was irrelevant. Further, the Court of Appeal held that the trial court should not have considered the physical and emotional effects the claimant experienced as a result of the accident which caused his wife's death as a factor in determining whether the failure to timely file a claim was the result of excusable neglect.

In Department of Water & Power v. Superior Court (2000) 82 Cal.App.4th 1288, the plaintiff had failed to timely file a claim against a county water department. The Court of Appeal held that the plaintiff's total failure to investigate the department's potential liability and take action to protect his rights was not reasonable under the circumstances. The court held that there was information readily available to the plaintiff and his counsel that could have indicated that the county was potentially at fault but the plaintiff ignored such information.

In State of California v. The Superior Court of Kings County (2004) 32 Cal. 4th 1234, the Court of Appeal held that failure to allege facts demonstrating or excusing compliance with the claim presentation requirement (Government Code sections 911.2, 945.4) subjects a claim against a public entity to a demurrer for failure to state a cause of action. Finally, the Court of Appeal held that requiring plaintiffs to allege facts sufficient to demonstrate or excuse compliance does not deprive them of their due process rights nor does it unfairly bar just claims. Various sections of the Government Code provide a detailed scheme permitting litigants to petition the public entity and the court for leave to present a late claim. They also require public entities to alert a claimant to any deficiencies in the claim or waive any defect or omission in the claim as presented. Moreover, a plaintiff need not allege strict compliance with the statutory claim presentation requirement. A claim may still be considered valid if it puts the public entity on notice both that the claimant is attempting to file a valid claim and that litigation will result if the matter is not resolved.

In G.L. Mezzetta, Inc. v. City of American Canyon (2000) 78 Cal.App.4th 1087, the Court of Appeal held that the city was not authorized to enter into an oral contract with the plaintiff and that the alleged agreement was void and unenforceable. The court based its holding on Government Code section 40602, Municipal Code section 2.08.060M, and section 2.20.030C, which provided that the mayor and city manager were required to sign all written contracts and that one of the city attorney's duties was to prepare or approve all ordinances, resolutions, agreements, and contracts. The court held that restrictions on a municipality's power to contract should be strictly construed because such restrictions are designed to protect the public and, as a result, any other methods of contract formation, even though not explicitly prohibited by the statutes, were invalid.

In George v. County of San Luis Obispo (2000) 78 Cal.App.4th 1048, the Court of Appeal addressed Code of Civil Procedure section 262.1, which immunizes sheriffs from liability for executing "process and orders" that are regular on their face.

XIV. NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Generally speaking, a party may recover for emotional distress only if the defendant breached some legal duty and the breach of that duty threatens physical injury rather than simply damage to property or a financial interest. (*See,* Potter v. Firestone Tire & Rubber Co. (1993) 6 Cal.4th 965, 985.)

In Erlich v. Menezes (1999) 21 Cal.4th 543, the homeowner plaintiffs sued the general contractor for damages, including those for emotional distress, after they discovered major pervasive problems in the construction of their home. The jury found in favor of the plaintiffs.

The Supreme Court reversed. It held that the mere breach of contract did not give rise to a tort remedy, and that in any event, even if one were to assume negligence, there was no basis for emotional distress damages. "[A] pre-existing contractual relationship, without more, will not support recovery for mental suffering where the defendant's tortious conduct has resulted only in economic injury to the plaintiff." (21 Cal.4th 543 at 554-55.)

Fluharty v. Fluharty (1997) 59 Cal.App.4th 484, *modified, rev. den.*, is a gruesome case involving a son who watched his father try to kill himself after having killed the son's mother. The son and his siblings settled a wrongful death claim against the father for the death of the mother, but also sued him for negligent infliction of emotional distress because he had witnessed the suicide attempt.

The plaintiff son sought negligent infliction of emotional distress recovery on both bystander and direct victim theories. The court disposed of the bystander claim on the basis that the plaintiff did not sensorially perceive his father killing his mother, consistent with Thing v. LaChusa (1988) 48 Cal.3d 644.

More problematic was the plaintiff's attempt to recover as a direct victim for negligent infliction of emotional distress. He asserted that the defendant's conduct, including killing the plaintiff's mother, inviting the plaintiff to view the scene, attempting to kill himself in the plaintiff's presence, struggling over the shotgun, and discharging it, was sufficiently outrageous to support a claim.

The Court of Appeal rejected this claim as well on the basis that to recognize such a duty "would be tantamount to imposing a duty on parents generally to refrain from conduct which would cause emotional distress to their emancipated, adult children." "Defendant's conduct was morally reprehensible, but not legally cognizable." (59 Cal.App.4th at 496.)

In Bird v. Saenz (2002) 28 Cal.4th 910, the California Supreme Court addressed bystander recovery and specifically discussed what Thing meant by the requirement that a plaintiff contemporaneously perceive the injury-producing event. In Bird, the plaintiffs argued that they "perceived" the injury-producing event because, while in the waiting room of the hospital where their mother was undergoing thoracic surgery, they heard a call for a thoracic surgeon, heard a report of their mother suffering a possible stroke, saw their mother in distress being rushed by medical personnel to another room, and heard a report of their mother possibly having suffered a nicked artery or vein. While the Bird court held that a plaintiff may recover based on an event perceived by senses other than sight, it also held that the event must be contemporaneously understood as causing injury to a close relative. Accordingly, the Bird court held that even if the plaintiffs' declarations were true and they did know that their mother was bleeding to death, they had no reason to know that the care she was receiving was inadequate and, as a result, did not "perceive" the injury-producing event.

Bird also held that in analyzing the recovery for negligent infliction of emotional distress under a bystander theory, the plaintiff must prove the three elements articulated in Thing and that it "expressly reject[ed] the suggestion that liability for NIED should be determined under the more general approach set out in *Rowland v. Christian* [citation omitted] for identifying duties of care.

Ess v. Eskaton Properties, Inc. (2002) 97 Cal.App.4th 120 held consistent with Thing that "foreseeability of harm alone is not a useful guideline or meaningful restriction on the scope of the action" and that recovery for negligent infliction of emotional distress "has been permitted in two types of situations, referred to as 'bystander' and 'direct victim' cases." Ess at pp. 126-127. Accordingly, the Court of Appeal held that the plaintiff could not recover under a bystander theory because she was not present when her sister suffered injury at the nursing home where she lived. Further, as to her direct victim theory, the court held the once the plaintiff's sister moved into the nursing home she was under its care and, as a result, the plaintiff only benefitted incidently from the defendant's care of her sister and that was insufficient to support a direct injury theory.

Wooden v. Raveling[18] (1998) 61 Cal.App.4th 1035, *rev. den.*, concerns non-bystander negligent infliction of emotional distress. The case discusses the difference between "bystander" and "direct victim" cases, and reversed a demurrer on the basis that outrageous conduct is not a component of non-bystander negligent infliction of emotional distress claims.

In Moon v. Guardian Postacute Services, Inc. (2002) 95 Cal.App.4th 1005, the Court of Appeal addressed whether the relationship between the plaintiff and his mother-in-law was sufficiently "closely related" to support a cause action for negligent infliction of emotional distress under a bystander theory and also whether the plaintiff could maintain a cause of action for negligent infliction of emotional distress under a direct theory. The plaintiff alleged that his mother-in-law had lived with him and his wife for months at a time since 1979, that they had a close relationship and that, when the mother-in-law began living in an assisted-living facility, he observed that she had become malnourished and suffered from various illnesses.

Steven F. v. Anaheim Union High School District (2003) 112 Cal.App.4th 904 confirms that recovery for the negligent infliction of emotional distress (NIED) on the part of third-party relatives requires that the plaintiff either be a bystander or a direct victim. Id. at 11621. The Court of Appeal also notes, however, that any decision regarding liability to relatives can be tested using the traditional seven factors bearing on the existence of duty set forth in Rowland v. Christian (1968) 69 Cal. 2d 108. This is in direct contradiction to Bird v. Saenz (2002) 28 Cal.4th 910, a California Supreme Court case where the court "expressly reject[ed] the suggestion that liability for NIED should be determined under the more general approach set out in *Rowland v. Christian* [citation omitted] for identifying duties of care."

The Court of Appeal held that the court in Thing intended to limit NIED claims to members of the immediate family unit, such as parents, spouses, siblings, children, and grandparents of the victim. Further, the court held that the plaintiff's situation did not constitute such "exceptional circumstances" that he should be allowed to recover under a bystander theory. Finally, in regard to the plaintiff's direct injury theory, the court held that the assisted-living facility did not breach any duty owed directly to him, even if the plaintiff alleged that he had a contract with the facility to provide care for his mother-in-law.

[18] Former USC basketball coach.

XV. INTENTIONAL MISREPRESENTATION

In Lovejoy v. AT&T Corporation (2001) 92 Cal.App.4th 85, the Court of Appeal held that fraud may be an affirmative misstatement of material fact or it may consist of suppression of that which it is one's duty to declare. The court then sets outs the elements of an action for fraud and deceit based on concealment as stated in Marketing West, Inc. v. Sanyo Fisher (1992) 6 Cal.App.4th 603, 612-613. Accordingly, the Court of Appeal held that a cause of action for fraudulent concealment is actionable to counter the growing practice of "slamming" committed by telephone carriers.

In Le Francois v. Goel (2004) 119 Cal.App.4th 425,[19] the plaintiffs had sued their former employer, Duet Technologies, and three Duet officers, claiming that Duet had wrongfully withheld sales commissions and that the officers had made certain misrepresentations and false promises. The defendants moved for summary judgment, which was denied by the trial court. A year later, the individual defendants moved for summary judgment before a different trial court judge, who granted the motion as to them. The Court of Appeal considered whether or not the trial court had the authority to consider a second motion for summary judgment based on similar facts and law as the first. The Court of Appeal held that the trial court was so authorized.

The Court of Appeal noted that there is nothing in Code of Civil Procedure section 437c (f)(2) that expressly deprives a trial court of jurisdiction to hear a second summary judgment motion that does not comply with its requirements. "[W]hile section 437c(f)(2) authorizes a trial court to reject a renewed motion for summary judgment if the party fails to show new facts or law, it does not render the court powerless to rule on the motion if it chooses to do so." Le Francois, 119 Cal.App. 4th at 433. The Court of Appeal held that the trial court had the inherent power to exercise its constitutionally derived authority to reconsider the prior interim ruling and correct the error of law on a dispositive issue which had been made in the first ruling. Id. at 433.

XVI. NEGLIGENT MISREPRESENTATION

Ostayan v. Serrano Reconveyance Company (2000) 74 Cal.App.4th 1411, stands for the proposition that negligent misrepresentation requires actual and reasonable reliance on the defendant's representation.

---

[19] For discussion only; review granted.

Ostayan had filed an action claiming that he had been misled into buying property at a trust deed foreclosure dale. Summary judgment was rendered against him at the trial court level and then affirmed because he was unable to prove that he actually relied on any misrepresentation made by either the seller or the entity conducting the sale.

Neu-Vision Sports, Inc., v. Soren/McAdam/Bartells (2001) 86 Cal.App. 4th 303, stands for the proposition that an opinion is not an actionable basis for a cause of action for misrepresentation. In so holding, the Court of Appeal held that the defendant's estimate that an appraiser would value the property at issue at $5 million dollars was an opinion because value is quintessentially a matter of opinion and because statements regarding future events are opinions. Further, the Court of Appeal recognized that exceptions exist where one party states an opinion as a fact or when one party possesses or holds himself out as possessing superior knowledge or special information regarding the subject of the representation and the other party is so situated that he may reasonably rely on the superior knowledge. The latter exception, however, does not apply when inequality of knowledge is not shown.

XVII. PROFESSIONAL NEGLIGENCE

In Garretson v. Miller (2002) 99 Cal.App.4th 563, following a jury verdict for plaintiff on her legal malpractice claim, the trial court granted the defendant's motion for judgment notwithstanding the verdict based on its conclusion that the plaintiff had failed to satisfy her burden of proving that any judgment she might have obtained in the underlying action would have been collectible.

The Court of Appeal addressed the elements of a cause of action in tort for professional negligence as the following: "(1) the duty of the professional to use such skill, prudence, and diligence as other members of his profession commonly posses and exercise, (2) a breach of that duty, (3) a proximate causal connection between the negligent conduct and the resulting injury, and (4) actual loss or damage resulting from the professional's negligence." *Quoting* Budd v. Nixon (1971) 6 Cal.3d 195, 200. The Court of Appeal focused on the third element because California law requires that the plaintiff prove not only negligence on the part of his or her attorney but that careful management of the case-within-a-case would have resulted in a favorable judgment and could have been collectible. The plaintiff did not present any evidence of the income, expenses, or debts belonging to the wrongdoer in the underlying action. She did not present any evidence that he was insured against property or liability, claims. Thus, she failed to satisfy her burden in proving that she would have been able to collect the underlying judgment and the Court of Appeal affirmed the trial court's ruling.

In Elcome v. Chin (2003) 110 Cal.App.4th 310, the plaintiff brought suit for medical malpractice alleging that she sustained injuries to her upper extremities after undergoing surgery for anterior and posterior repair. She attempted to use the doctrine of *res ipsa loquitur* in order to establish the doctor's negligence. The trial court granted summary judgment in favor of the defendants. The Court of Appeal affirmed holding that the plaintiff had not satisfied her burden to establish the elements of *res ipsa loquitur*. The fact that the plaintiff awoke from her surgery with pain in her upper extremities, when she claimed that she had not previously experienced significant pain in that area, was insufficient because there could have been other reasons for her injuries besides the doctors' negligence.

In Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2000) 79 Cal.App.4th 114, the court of appeal held that an insurer can maintain a cause of action for legal malpractice against attorneys who represented the insured in the underlying litigation as long as no conflict of interest existed in the attorneys' dual representation of the insured and the insurer.

XVIII. PERMISSIVE USE

In Lawson v. Management Activities, Inc. (1999) 69 Cal.App.4th 652, the court of appeal ruled against a group of employees at a Honda dealership who watched a corporate jet fall out of the sky and who sought recompense for negligent infliction of emotional distress on the basis that they feared that the plane would crash into them or that they might be injured from the anticipated ensuing explosion. The court employed the traditional Biakanja/Rowland factors. It found that foreseeability was inconsequential, but the certainty-of-injury factor squarely weighed against liability.

Baker v. Liberty Mutual Insurance Company, 143 F.3d 1260 (1998), is a wrongful death action involving the issue of permissive use of an automobile. A 15-year-old unauthorized driver of a car that had been rented from a car dealership had caused a serious accident. The court held that there was no permissive use because neither the vehicle's renter nor its owner had authorized the young girl to drive the car.

XIX. PRODUCTS LIABILITY

Artiglio v. Corning, Inc. (1998) 18 Cal.4th 604, involves silicon breast implant recipients pursuing the implant manufacturer's parent corporation for products liability. Plaintiffs relied upon RESTATEMENT SECOND OF TORTS, section 324A, which provides for liability for third persons for physical harm caused when, under

certain listed circumstances, one negligently performs an undertaking to another. The court recognized the longstanding rule that when one who has no initial duty to do so undertakes to come to the aid of another, he can incur liability if his failure to exercise care increased the risk of the harm and the harm was caused by the other's reliance upon the undertaking. The specifics of the case involved Dow Chemical Company, providing silicone toxicology research for Dow Corning Corporation, which the latter used in connection with the manufacture of breast implants. After a considerable analysis, the court concluded that Dow Chemical's research was not "an undertaking of such breadth and magnitude as to create a duty on the part of Dow Chemical to ensure the safety of all of Dow Corning's silicone products." (18 Cal.4th 604, at 617.)

Rosales v. Thermix-Thermatron, Inc. (1998) 67 Cal.App.4th 187, concerns the related issue of strict product liability for a defective product sold by a predecessor manufacturer.

The court looked to Ray v. Alad Corp. (1977) 19 Cal.3d 22, with regard to successor liability, relying upon the rule:

> Justification for imposing strict liability upon a *successor* to a manufacturer under the circumstances here presented rests upon (1) the virtual destruction of the plaintiff's remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk-spreading role, and (3) the fairness of requiring the successor to assume a responsibility for defective products that was a burden necessarily attached to the original manufacturer's good will being enjoyed by the successor in the continued operation of the business. [19 Cal.3d at 31.]

The court applied those principles and determined that the circumstances warranted successor liability.

Bockrath v. Aldrich Chemical Company, Inc. (1998) 21 Cal.4th 71, is a products case examining the issue of causation. The plaintiff contracted cancer and sued 55 defendants who had manufactured 222 products that the plaintiff was allegedly exposed to in the work place over a 21-year period. The trial court and Court of Appeal sustained the defendants' demurrer because the plaintiff could not identify which chemicals were substantial factors in causing his illness.

The California Supreme Court, however, reversed the judgment of the Court of Appeal and remanded the case back to the Court of Appeal with directions to remand the matter back to the trial court for further proceedings. The court found that the plaintiff's allegations as to causation were insufficient because they failed to allege that each product was a substantial factor in causing his cancer. He was, however, given the opportunity to raise those allegations on remand. Specifically, he had to allege that he was exposed to each of the toxic materials claimed to have caused his specific illness, each product that caused the injury, that as a result of the exposure, toxins entered his body, that he suffered from a specific illness, that each toxin that entered his body was a substantial factor in bringing about, prolonging, or aggravating that illness, and that each toxin he absorbed was manufactured or supplied by a named defendant. It may be that those burdens are simply too onerous for the plaintiff to overcome.

The single issue in Livingston v. Marie Callender's, Inc. (1999) 72 Cal. App.4th 830, was whether a restaurant offering vegetable soup "made from the freshest ingredients, from scratch, ... everyday," had an affirmative obligation to warn customers that the soup contained monosodium glutamate.

The Court of Appeal entered the case after a jury verdict in favor of the defendant. That verdict, however, was limited to a negligence issue because the trial court had granted the defendant's motion in limine for strict products liability.

The trial court had rendered that ruling finding that, as a matter of law, there is nothing wrong with the soup or the MSG in the soup. The plaintiff, however, contended that a cause of action for strict products liability arising out of failure to warn exists where a product "contains an ingredient to which a substantial number of the population are allergic, and the ingredient is one whose danger is not generally known, or if known, is one which the consumer would reasonably not expect to find in the product, [seller] has knowledge, or by the application of reasonable, developed human skill and foresight should have knowledge, of the presence of the ingredient and the danger." Further relying on RESTATEMENT SECOND OF TORTS, § 402A, comment j, the court concurred and remanded the case back to a trial court to determine whether the plaintiff could prove those contentions.

In Jimenez v. Superior Court (2003) 29 Cal.4th 473, the Fourth Appellate District Court of Appeal determined that manufacturers of defective windows installed in mass-produced homes may be subject to strict products liability. In so doing, the court directly contradicted Casey v. Overhead Door Corp. (1999) 74 Cal.App.4th 112.

Merrill v. Navegar, Inc. (2001) 26 Cal.4th 465 is a wrongful death/negligence action brought by the survivors and representatives of certain decedents who were shot by an individual using semi-automatic assault weapons. The plaintiffs brought suit on theories of common law negligence, negligence per se, and strict liability for ultra-hazardous activities. Summary judgment was granted in favor of the defendant.

The Court of Appeal reversed, but only as to the ordinary negligence claim. In so doing, the court found that the defendant owed the plaintiffs a duty to exercise reasonable care not to manufacture, market, and distribute its assault weapons in a manner that increased the risk of harm inherent in the presence of such weapons in society, and that there were triable issues of fact as to whether that duty was breached. Further, there were also triable issues as to whether the conduct was the cause in fact of the injuries, i.e., whether the perpetrator would have killed as many people as he did had those weapons not been available. The court, however, upheld the ruling as to strict liability on the basis that the manufacturer, distribution, and sale of assault weapons does not per se constitute ultra-hazardous activities.

The California Supreme Court reversed the Court of Appeal holding that the trial court had properly granted the defendant summary judgment.

In McCabe v. American Honda Motor Co. (2002) 100 Cal.App.4th 1111, the court addresses the two distinct categories of product defects, manufacturing defects and design defects. The court then explains and applies the two tests used for design defect cases, the consumer expectation test and risk-benefit test. In McCabe, the plaintiff was injured when the driver's side air bag of her car failed to deploy in a frontal collision with another car. The plaintiff sued the air bag's manufacturer and the reseller alleging that the air bag was defective in both its manufacture and its design. The trial court granted the defendants' motion for summary judgment. The Court of Appeal reversed holding that the plaintiff had raised triable issues of fact as to whether the consumer expectation test was applicable and that summary judgment was improper because the defendants failed to provide any evidence negating the alternative risk-benefit theory of design defect available to the plaintiff.

The Court of Appeal explained that "the critical question in assessing the applicability of the consumer expectation test is not whether the product, when considered in isolation, is beyond the ordinary knowledge of the consumer, but whether the product, in the context of the facts and circumstances of its failure, is one about which the ordinary consumers can form minimum safety expectations." McCabe at 1124, quoting Soule v. General Motors Corp. (1994) 8 Cal.4th 548, 568-69. Accordingly, the Court of Appeal held that there were triable issues of

fact as to the circumstances of the accident and, thus, it could not conclude that the consumer expectation test was inapplicable as a matter of law. Further, the Court of Appeal explained the risk-benefit theory, stating that under this theory, the plaintiff "need only show the design caused her injuries; if so, the burden shifts to the defendant to prove the benefits of the design outweigh its inherent risks." McCabe at 1126, quoting Bresnahan v. Chrysler Corp. (1998) 32 Cal. App.4th 1559, 1565. The Court of Appeal held that the plaintiff had done so and the fact that she did not cite any risk-benefit evidence was irrelevant because that burden belonged to the defendant.

Cryolife v. Superior Court of Santa Cruz County (Minvielle) (2003) 110 Cal. App.4th 1145, presents a case of first impression for the Court of Appeal. The court considered whether a tissue bank that supplied an allegedly infected cadaver tendon for the knee surgery of the real party in interest, Minvielle, could be liable for strict products liability. The court held that it could not and reasoned that the "blood shield law," which provides immunity to blood banks and other institutions that provide blood transfusions and blood products, should apply to tissue banks as well.

The summary judgment in favor of the defendant was affirmed as to the claims for assault and battery on the basis of workers' compensation being the exclusive remedy, but reversed relative to the statutory claims under the Fair Employment and Housing Act and the plaintiff's claims for intentional and negligent infliction of emotional distress. It held that the plaintiff could not succeed in civil litigation with the personal injury claims, but because emotional distress arising out of work-related injury discrimination is not a normal risk of the compensation bargain, it could be compensable in a civil court.

XX. WORKER'S COMPENSATION

In Fretland v. County of Humboldt (1999) 69 Cal.App.4th 1478, the court reversed in part a summary judgment in favor of an employer.

Similarly, in Weber v. United Parcel Service, Inc. (2003) 107 Cal.App.4th 801, the Court of Appeal held that the plaintiff's claim for negligence against his former employer was barred by the Workers' Compensation Act. During the administration of routine hearing tests required by UPS, the plaintiff's results had revealed abnormalities. UPS failed to have the tests analyzed by a specialist and failed to notify the plaintiff. As a result, the plaintiff developed a brain tumor and suffered other related injuries. Nevertheless, the court held that because the alleged negligent administration of these hearing tests and the resulting injury to

the plaintiff “arose out of an in the course of his employment” with UPS, the plaintiff’s exclusive remedy was under the Workers’ Compensation Act.

In Wedeck v. Unocal (1997) 59 Cal.App.4th 848, the plaintiff was denied recovery because the court had determined that she had a "special employer" as a matter of law, and was therefore, statutorily barred from bringing a tort action.

Wedeck had begun working for a company called Lab Support, an agency in the business of placing technical employees with other companies on a temporary basis. She accepted an assignment through Lab Support to work at a Unocal refinery. The court held that Unocal was a "special employer" because such a relationship arises when an employer lends an employee to another employer and relinquishes to the borrowing employer, all right of control over the employee's activities. The individual is held to have two employers, his original or general employer, and the second or special employer. If he or she is injured in the course of employment with the special employer, he cannot pursue either in tort.

Torres v. Parkhouse Tire Service, Inc. (2001) 26 Cal.4th 995 deals with the intentional tort exception to Labor Code section 3601. Subsection (a) allows for a civil remedy “when the injury or death is proximately caused by the willful and unprovoked physical act of aggression of the other employee.”

The plaintiff installed and repaired tires for a living. As he was on his knees working on a tire, a fellow employee approached him from behind, grabbed his back-support belt, lifted him off the ground, and then dropped him on his knees. Torres suffered a severe back injury.

Torres and his wife sued both the employer and the fellow employee for personal injury and loss of consortium. The trial court granted summary judgment for both defendants on the basis that worker’s compensation was the exclusive remedy.

The Court of Appeal reversed, interpreting the exception to the Labor Code section to mean that the act of aggression be willful and unprovoked rather than the injury being intentionally or willfully caused by the bad act. The fact that the fellow employee may not have intended to hurt Torres did not obviate the fact that his conduct was intentional.

The Supreme Court then reversed the Court of Appeal, remanding the case back to the trial court for further proceedings. It found that Labor Code section 3601(a) does not extend to acts traditionally viewed as “horseplay” or other conduct within the scope of employment that are otherwise subject to exclusive coverage under the workers’ compensation system. The meaning of “unprovoked physical act of agression” is not clear on its face, and it should be

construed to mean unprovoked conduct intended to convey an actual present and apparent threat of bodily injury, and the term "aggressive" suggests intentional harmful conduct.

Even allegedly criminal conduct did not overcome the exclusivity doctrine in Vuillemainroy v. American Rock & Asphalt, Inc. (1999) 70 Cal.App.4th 1280. The survivors of an employee of the defendant brought suit when the decedent was killed when the brakes failed on a truck. Even though the employer's failure to implement safety precautions, including non-compliance with safety orders, could have amounted to wrongful death, benefits were limited to worker's compensation.

Jensen v. Amgen Inc. (2003) 105 Cal.App.4th 1322, dealt with the exception to the exclusivity rule for an employer's fraudulent concealment of the existence of the injury (Labor Code section 3602). The plaintiff alleged that she suffered injuries as a result of her exposure to toxic mold in the workplace. The Court of Appeal held that even if her supervisors were aware that mold had been discovered in the workplace several years earlier and should have realized that exposure to mold was the likely cause of the plaintiff's illness, the plaintiff presented no evidence suggesting that the defendant actually made the connection. Thus, the conditions necessary for a fraudulent concealment claim did not exist and workers' compensation was the plaintiff's exclusive remedy.

Rosas v. Dishong (1998) 67 Cal.App.4th 815 presents worker's compensation issues in a different context. The defendant homeowners had hired the plaintiff to trim their tree. The facts are vague as to precisely how the injury occurred, but the parties had stipulated that the Dishongs' home had not met certain California Occupational Safety & Health Act standards, which apparently were a cause of the plaintiff falling from the tree and injuring himself.

The Court of Appeal reversed a judgment in favor of the plaintiff. First, the court held that Rosas must necessarily have been an employee of the Dishongs rather than an independent contractor because the type of tree-trimming he was performing required a license, which he did not have.

Rosas, however, was not entitled to worker's compensation coverage or benefits because his engagement did not meet the minimum requirements for time worked or wages earned.

The case then turned upon whether the Dishongs were subject to the CalOSHA regulations. By way of statutory analysis, the Court of Appeal interpreted the exception for "household domestic service," a term which is not defined in the statute, applied to the work in question. Rosas unfortunately found

himself in a position where he could not recover either tort damages or worker's compensation benefits.

XXI. SPOLIATION OF EVIDENCE

In Cedars-Sinai Medical Center v. Superior Court (1998) 18 Cal.4th 1, the California Supreme Court did away with the tort of intentional spoliation of evidence:

> ...we hold that there is no tort remedy for the intentional spoliation of evidence by a party to the cause of action to which the spoliated evidence is relevant, in cases which, as here, the spoliation victim knows or should have known of the alleged spoliation before the trial or other decision on the merits of the underlying action.... [18 Cal.4th 1, 17-18; fn. omitted.]

Although throughout the opinion the court categorized intentional spoliation of evidence as "an unqualified wrong," there were a variety of existing remedies that would in most instances be effective in insuring that the issues in the underlying litigation were fairly decided and that whatever incremental additional benefits a tort remedy might create were outweighed by policy considerations and costs. "By opening up the decision on the merits of the underlying causes of action to speculative reconsideration regarding how the presence of the spoliated evidence might have changed the outcome, a tort remedy would not only create a significant risk of erroneous findings of spoliation liability but would impair the fundamental interest in the finality of adjudication and the stability of judgments." (18 Cal.4th 1, 17.)

Although the Cedars-Sinai case did not address negligent spoliation, it is difficult to see how the reasoning would not abolish negligent spoliation as well.

The court in Sherman v. Kinetic Concepts, Inc. (1998) 67 Cal.App.4th 1152, applied a sanction of the type discussed in Cedars-Sinai Medical Center v. Superior Court, *supra*. The court granted a motion for new trial in a products case and sanctioned the defendant for litigation improprieties, including its failure to disclose certain evidence during discovery.

What had been presaged in Cedars-Sinai Medical Center v. Superior Court, *supra,* became reality when the Supreme Court handed down Temple Community Hospital v. Superior Court (1999) 20 Cal.4th 464, *corrected*. It concluded that no cause of action will lie against a party to litigation for the intentional

destruction or suppression of evidence when the spoliation was or should have been discovered before the conclusion of litigation. The court recognized the same considerations that led it to the Cedars-Sinai decision to decline to recognize a tort cause of action for spoliation when the spoliation is committed by a third party.

Then, an appellate court took the issue a step further in Farmers Insurance Exchange v. Superior Court (2000) 79 Cal.App.4th 1400, when it ruled that not only is intentional spoliation not a tort, but negligent spoliation is not either. The identical result was reached in Coprich v. Superior Court (2000) 80 Cal. App.4th 1081. Lueter v. State of California (2002) 94 Cal.App.4th 1285, agreeing with Farmers Ins. Exchange and Coprich, also held that negligent spoliation is not a tort.

Penn v. Prestige Stations, Inc. (2000) 83 Cal.App.4th 336 rendered the Cedars-Sinai decision, *supra,* retroactive.

XXII. INTERFERENCE WITH PROSPECTIVE ADVANTAGE

In National Medical Transportation Network v. Deloitte & Touche (1998) 62 Cal.App.4th 412, a company brought suit against its auditors for a variety of causes of action including negligent interference with prospective economic advantage after the defendants had resigned from their engagement without issuing an audit opinion. The plaintiff claims that it had lost a potential $10,000,000 capital investment. The defendant accountancy firm had claimed that it had good cause to resign from the engagement because it had determined that the company's management was uncooperative, rendering financial representations unreliable, and because it felt that its independence was impaired due to threats from management.

The trial court entered judgment for the plaintiff following a jury trial, but the court of appeal reversed on a number of grounds. With respect to the prospective advantage claim, it held that the jury instructions were insufficient because they did not include the "independently wrongful" element relying on Della Penna v. Toyota Motor Sales, U.S.A., Inc. (1995) 11 Cal.4th 376. In that case, the California Supreme Court had held that "A plaintiff seeking to recover for alleged interference with prospective economic relations has the burden of pleading and proving that the defendant's interference was wrongful 'by some measure beyond the fact of the interference itself.'" (11 Cal.4th 376, 392-393, cited in National Medical Transportation at 62 Cal.App.4th 412, 439.)

The "independently wrongful" element is frequently the linchpin of such cases. The nature of competition always creates situations where one party loses a business opportunity because it is usurped by another. It is only tortious, however, if the latter has employed some means of wrongful conduct in order to compete.

Marin Tug & Barge Inc. and Mudgett v. Westport Petroleum, Inc.; Shell Oil Co., 271 F.3d 825 (2001) addresses the "wrongful" element. The Court of Appeal holds that the focus for determining wrongfulness should be on the defendant's objective conduct and not on the defendant's subjective motive.

Gemini Aluminum Corp. v. California Custom Shapes (2002) 95 Cal. App.4th 1249 also addressed the "wrongful" element and highlighted that a plaintiff must demonstrate not only that the defendant knowingly interfered with the plaintiff's expectancy, but engaged in conduct that was wrongful by some legal measure other than the fact of interference itself.

In Levin v. Gulf Insurance Group (1999) 69 Cal.App.4th 1282, the Second Appellate District Court of Appeal held that where an insurer and the attorneys retained to defend the insureds received notice of a lien for attorneys' fees and costs filed in the case by the plaintiff's discharged attorney, and then pay the plaintiff and the new lawyer in settlement or in satisfaction of a judgment, both the insurer and the attorneys are liable for intentional interference with prospective advantage.

Powers v. Rug Barn (2004) 117 Cal.App.4th 1011 discusses the cause of action of interference with contract. The Court of Appeal notes that the elements usually involved in the tort of interference with contract are: (1) a valid contract between the plaintiff and a third party, (2) the defendant's knowledge of the contract, (3) the defendant's intentional acts designed to induce a breach or disruption of the contractual relationship, (4) actual breach or disruption of the relationship, and (5) resulting damage.

When, however, the defendant's disruptive conduct consists of hiring the plaintiff's employees in order to compete with the plaintiff, the law recognizes that the defendant has the right to conduct a business in competition with that of the plaintiff as long as the defendant's methods of competition are not unfair. For example, the Court of Appeal cited Buxbom v. Smith (1944) 23 Cal. 2d 535, 548, where the plaintiff had satisfied his burden by showing that the defendant had entered into a contract with him to induce him to build up his work force to perform the contract and then the defendant breached the contract with the plaintiff without justification and hired the work force that the plaintiff had built up in reliance on the contract.

A plaintiff may recover damages for intentional interference with an at-will employment relation under the same California standard applicable to claims for intentional interference with prospective economic advantage. Reeves v. Hanlon (2004) 33 Cal. 4th 1140. To recover for a defendant's interference with an at-will employment relation, a plaintiff must plead and prove that the defendant engaged in an independently wrongful act, i.e., an act proscribed by some constitutional, statutory, regulatory, common-law, or other determinable legal standard that induced an at-will employee to leave the plaintiff. Id at 1143. Under this standard, a defendant is not subject to liability for intentional interference if the interference consists merely of extending a job offer that induces an employee to terminate his or her at-will employment. Id.

Huynh v. Nguyen Vu (2003) 111 Cal.App.4th 1183 addresses when the common-law manager's privilege applies in defense of a tortious interference with contract claim. The manager's privilege is intended to protect a manager or agent who, with impersonal or disinterested motive, properly endeavors to protect the interests of his principal by counseling the breach of a contract with a third party which he reasonably believes to be harmful to his employer's best interest. The Court of Appeal held that when a manager stands to reap a tangible personal benefit from the principal's breach of contract, so that it is at least reasonably possible that the manager acted out of self-interest rather than in the interest of the principal, the manager should not enjoy the protection of the manager's privilege unless the trier of fact concludes that the manager's predominant motive was to benefit the principal.

XXIII. SETTLEMENT AND RELEASE

In Lazarus v. Titmus (1998) 64 Cal.App.4th 1242, the court considered the enforceability of a stipulation that was signed by the attorneys, but not the parties themselves relative to binding arbitration in a personal injury action. The court held that the stipulation was not binding on the party because it had not signed the stipulation, consented to binding arbitration, or ratified the act of counsel.

The court relied upon two Supreme Court decisions regarding apparent authority:

> "An attorney retained to represent a client in litigation is clothed with certain authority by reason of that relationship. 'The attorney is authorized by virtue of his employment to bind the client in procedural matters arising during the course of the action.... "In retaining counsel for the prosecution or defense of a suit, the

> right to do many acts in respect to the cause is embraced as ancillary, or incidental to the general authority conferred, and among these is included the authority to enter into stipulations and agreements in all matters of procedure during the progress of the trial. Stipulations thus made, so far as they are simply necessary or incidental to the management of the suit, and which affect only the procedure or remedy as distinguished from the cause of action itself, and the essential rights of the clients, are binding on the client"....' " [Citation] The court recognized a number of areas where there could be no presumption of authority to act for the client: "'[The attorney] has no implied or ostensible authority to bind his client to a compromise settlement of pending litigation [,] ... may not 'stipulate to a matter which would eliminate an essential defense [,] ... agree to the entry of a default judgment [,] ... stipulate that only nominal damages may be awarded [,] ... agree to an increase in the amount of the judgment against his client [,] ... waive findings that so that no appeal can be made [, or] ... dismiss [a] cross-complaint [.]' " [64 Cal.App.4th 1242, at 1248 citing Blanton v. Woman Care, Inc. (1985) 38 Cal.3rd 396, at 403-404 and 404-405, and Linsk v. Linsk (1969) 70 Cal.2d 272, 276 to 277.]

The court then determined that a stipulation to arbitrate affected an essential right of a client rather than a procedural right or remedy:

> When a client engages an attorney to litigate in a judicial forum, the client has a right to be consulted, and his consent obtained, before the dispute is shifted to another, and quite different, forum, particularly where the transfer entails the sort of substantial consequences present here. [64 Cal.App.4th 1242, at 1248, citing Blanton, *supra*, 38 Cal.3d at 407-408.]

Leon v. Family Fitness Center #107, Inc. (1998) 61 Cal.App.4th 1227 concerns the enforceability of a release executed by a health club member. He had been injured when the sauna bench he was using collapsed. The trial court rendered summary judgment in favor of defendant on the basis of the release.

The court of appeal reversed on a number of different bases:

1. The physical text of the exculpatory language within the membership agreement did not comply in a variety of respects with the provisions of Civil Code sections 1801, et seq. (the "Unruh Act");

2. The assumption of the risk portion of the document did not provide adequate notice that it was contemplated that all hazards were being waived rather than just those known to relate to the use of the health club facilities. A member could reasonably have been expected to understand that he or she was foregoing claims relative to the risks of a sprained ankle due to improper exercise or over-exertion, a broken toe from a dropped weight, or slipping in a locker room shower. "On the other hand, no Family Fitness patron can be charged with realistically appreciating the risk of injury from simply reclining on a sauna bench. Because the collapse of a sauna bench when properly utilized is not a 'known risk,' we conclude Leon cannot be deemed to have assumed the risk of this incident as a matter of law." (61 Cal.App.4th 1227, at 1234); and

3. The defendant's negligence relative to the bench was not reasonably related to the object or purpose for which the release was given, as stated, injuries resulting from participating in sports or exercise rather than from merely reclining on the facility's furniture. (61 Cal.App.4th, 1227, 1235.)

Benedek v. PLC Santa Monica (2003) 104 Cal.App.4th 1351, also addresses a release signed by a health club member. Here, the Court of Appeal held that a health club member who had signed a broad release of the health club for personal injuries suffered there whether using the exercise equipment or not was valid. The court held that the express language of the unambiguous release of the health club from premises liability defined its scope. As the broad language of the release applied to the plaintiff's injury, the Court of Appeal affirmed the summary judgment in favor of the health club.

In Sweat v. Big Time Auto Racing Inc. (2004) 117 Cal.App.4th 1301, the Court of Appeal held that in order for a release to be enforceable, the act of negligence that results in injury to the releasee must be reasonably related to the purpose of the release. In Sweat, the plaintiff went to watch an automobile race and sat on the bleachers in the restricted pit area. Before entering the pit area he had signed a waiver, releasing Big Time Auto Racing from liability for all injuries sustained while on the premises. The purpose of the release was to require the releasee to assume the risk of injury from being in the pit area, which is in close proximity to the dangerous activity of automobile racing. While the plaintiff was in the bleachers they collapsed causing him injury.

The Court of Appeal held that access to the pit area was not the purpose of the release, but rather it was the observation of the race from a close-up perspective. Such risks include being hit by a car or slipping on grease. Accordingly, the Court of Appeal held that the release did not charge the plaintiff with assuming the risk of injury from defective bleachers.

In Gauss v. GAF Corporation (2002) 103 Cal.App.4th 1110, the Court of Appeal reversed the trial court decision enforcing settlement agreements under Code of Civil Procedure section 664.6 because the settlement had been executed by a party's agent rather than by the party itself.

In Gray v. Stewart (2002) 97 Cal.App.4th 1394, the Court of Appeal held that the process of settlement and compromise is contractual. As a result, the fact that the defendant had orally accepted the plaintiff's 998 offer to compromise was sufficient to bind the parties to the agreement and the fact that the plaintiff revoked her offer the following day had no effect. Accordingly, when the plaintiff attempted to pursue her personal injury action against the defendant, she was properly barred from doing so.

Weinberg v. Safeco Insurance Company of America (2004) 114 Cal. App.4th 1075 discusses when a joint C.C.P. 998 offer to compromise is valid. The Court of Appeal held that "a section 998 offer made to multiple parties is valid only if it is expressly apportioned among them and not conditioned upon acceptance by all of them. A single, lump sum offer to multiple plaintiffs which requires them to agree to apportionment among themselves is not valid." The Court of Appeal does, however, recognize an exception to this rule. A single lump sum offer to multiple plaintiffs is valid where the plaintiffs have a unity of interest such that there is a single, indivisible injury.

In Deocampo v. Ahn (2002) 101 Cal.App.4th 758, the Court of Appeal upheld the trial court's decision to offset the plaintiff's settlement award with the settling defendant hospital against the damages owed by the nonsettling defendants, doctors, in this malpractice action. The plaintiff had received a settlement award of $1.5 million from St. Joseph Medical Center, and the trial court credited that amount to the damages the jury awarded to the plaintiff, crediting the bulk of the settlement to plaintiff's past lost wages and past medical and other expenses, which together totaled $1,122,000, and it credited the remainder ($378,000) to the $1,745,211.17 in prejudgment interest.

The Court of Appeal explained that the reason for apportioning the settlement award in this manner was due to section 667.7 which is the relevant law applicable to medical malpractice cases. In suits against providers of health care services, section 667.7 requires a court to order that the future damages of

the plaintiff be paid in periodic payments rather than in one lump sum payment if the award equals or exceeds $50,000 and if one of the parties requests such periodic payments. Quoting American Bank and Trust Co. v. Community Health (1984) 36 Cal. 3d 359, 369, the Court of Appeal held that "a procedure that provides for the periodic payment of future damages will further the fundamental goal of matching losses with compensation by helping to ensure that money paid to an insured plaintiff will in fact be available when the plaintiff incurs the anticipated expenses or loses in the future." Accordingly, the Court of Appeal held that the set-off allocation of the St. Joseph Medical Center settlement money by the trial court was proper.

In Gavin W. v. YMCA of Metropolitan Los Angeles (2003) 106 Cal. App.4th 662, however, the Court of Appeal held that a release of claims that purports to exculpate child care provider from its own negligence is void as against public policy.

XXIV. MALICIOUS PROSECUTION, FALSE ARREST, AND ABUSE OF PROCESS

In Ray v. First Federal Bank of California (1998) 61 Cal.App.4th 315, a law firm sued a bank for malicious prosecution after the bank had unsuccessfully prosecuted a malpractice claim against the law firm. Judgment had been rendered in the underlying case on a statute of limitations defense.

In the malicious prosecution suit, the bank contended that the judgment on the basis of the statute of limitations did not constitute a favorable termination within the meaning of the elements of malicious prosecution because it was rendered on procedural grounds.

The Court of Appeal first cited Lackner v. LaCroix (1979) 25 Cal.3d 747, 752 for the proposition that: "A bar raised by the statute of limitations does not reflect on the merits of the action and thus is not a favorable termination for purposes of a subsequent malicious prosecution action." (61 Cal.App.4th 315, 318.)

Had the bank simply walked away from the underlying action, it could not be subject to liability for malicious prosecution. The bank, however, appealed the underlying case, and the appellate court found not only that the limitations period had expired but also that the malpractice charges were unfounded as a matter of law. The court of appeal in the instant action found that to be a favorable termination on the merits.

In Merlet v. Rizzo (1998) 64 Cal.App.4th 53, the court held that a legal proceeding that is the continuation of existing litigation cannot in and of itself form the basis of a malicious prosecution action.

Similarly, the court in Sagonowski v. More (1998) 64 Cal.App.4th 122, *reh. den., rev. den.*, held that a private arbitration pursuant to a contractual arrangement could not give rise to a malicious prosecution action.

Zamos v. Stroud (2004) 32 Cal.4th 958 addresses a malicious prosecution claim that is properly commenced by an attorney but which the attorney later discovers is not supported by probable cause. The elements of a malicious prosecution claim are that the plaintiff must plead and prove that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in plaintiff's favor, (2) was brought without probable cause, and (3) was initiated with malice. The Court of Appeal, however, holds, based on the rule in many states and that set forth by the drafters of the Restatement Second of Torts, that the tort of malicious prosecution does include continuing to prosecute a lawsuit discovered to lack probable cause.

A malicious prosecution action may be maintained where most but not all of the amount sought in the prior action was claimed without probable cause. Citi-Wide Preferred Couriers, Inc. v. Golden Eagle Insurance Corporation (2004) 114 Cal.App.4th 906. In the underlying action in Citi-Wide, Golden Eagle admitted during discovery that the amount owed it was less than the amount for which it sued Citi-Wide. The Court of Appeal held that the fact that a small amount of the money may have been owed by Citi-Wide did not bar Citi-Wide's malicious prosecution claim.

Siebel v. Mittlesteadt (2004) 12 Cal.Rptr.3d 906 addresses whether a settlement by the parties to the underlying lawsuit after a judgment on the merits precludes a malicious prosecution action against the original plaintiff's attorneys. In the underlying action in Siebel, Siebel had obtained a favorable judgment as to five of the causes of action alleged against him by the plaintiffs. Subsequent to the judgment, he and the plaintiffs appealed; while the appeals were pending, however, they settled the case. The parties stipulated to specifically release each other from any and all obligations arising from the case. The Court of Appeal held that the underlying disposition in Siebel's favor was not modified by the agreement entered into by the parties. The agreement did not contemplate or stipulate to a new judgment.

Bell v. State of California (1998) 63 Cal.App.4th 919 is a false arrest case. The plaintiff had brought suit against the city, state, and police officers who had mistaken him for someone else and had arrested him. After the jury found in

favor of the defendants, the trial court granted the plaintiff's motion for a new trial (on the ground of juror misconduct), which the Court of Appeal affirmed.

The defendants had taken the position that the suit should have been dismissed because there was no arrest, but merely a detention. That argument was rejected because the officers had acted under a warrant for an arrest, had told the plaintiff that he was under arrest, that he was not free to leave, and that he was held in close physical restraint "Until, to their surprise, the officers discovered that he was who he said he was, which was one other than the person the warrant commanded the officers to arrest."

In Kesmodel v. Rand (2004) 119 Cal.App.4th 1128, the Court of Appeal discussed whether or not tenants of an apartment building who effected a citizen's arrest of another tenant were entitled to immunity from liability from the arrested tenant's claim of false imprisonment. The tenants claimed they were entitled to immunity under Civil Code section 47 subdivision (b), which provides that a privileged publication or broadcast is one made in any legislative proceeding, judicial proceeding, and in any other official proceeding authorized by law. The Court of Appeal, however, held that conduct beyond a pure report of alleged crime to the police was beyond the type of communication protected by section 47(b).

In Roberts v. Sentry Life Insurance Co. (1999) 76 Cal.App.4th 375, *rev. den.,* a physician brought suit against a disability insurer and its attorneys for malicious prosecution. In the underlying case, the insurance carrier had sued Roberts, a doctor, for breach of contract and tort claims including fraud and breach of the covenant of good faith and fair dealing. Dr. Roberts prevailed in that underlying case.

Summary judgment, however, was rendered against him in the malicious prosecution suit, and that judgment was affirmed on appeal. The Court of Appeals reviewed the circumstances resulting in the filing of the underlying suit and found there to be probable cause, and further determined from the fact that the trial court in the underlying case had denied Roberts' motion for summary judgment, as sufficient to establish probable cause.

In Videotape Plus, Inc. v. Vincent J. Lyons (2001) 89 Cal.App.4th 156, the videotape company had sued Dubs Co. and its president for conversion, fraud, and negligence arising out of an alleged conspiracy to sell videotapes stolen from the videotape company. The trial court granted the videotape company judgment on the pleadings in a malicious prosecution action by Dubs and its president holding that the videotape company had probable cause to file its causes of action. The Court of Appeal reversed, holding that each cause of

action had to be supported by probable cause. The fact that there was a triable issue of fact as to the existence of probable cause for conversion did not establish probable cause as to the negligence or fraud, even though the videotape company argued that the causes of action all arose out of the same primary right—the right not to have their videotapes stolen.

In Wilson v. Parker, Covert & Chidester (2002) 28 Cal.4th 811, a group of teachers had brought suit for injunctive relief and damages against a group of protesters who were demonstrating outside the public middle school. As to the claim for damages, the protestors brought a special motion to strike, which the trial court denied. The group of protesters eventually brought an action against the teachers for malicious prosecution. The Court of Appeal held that the fact that the teachers had obtained a favorable ruling on their underlying claim for injunctive relief established, as a matter of law, that the claim was brought with probable cause. Further, it held that, following the analysis in Roberts v. Sentry Life Insurance, the denial of the protestor's special motion to strike the teachers' action created a presumption of probable cause to bring the claim for damages.

Rodas v. Spiegel (2001) 87 Cal.App.4th 513 held that when a state licensing board, such as the Contractor's State Licensing Board, is "empowered and directed to conduct an investigation of complaints from the public," a person alleged to have filed a false report with the board that results in the filing of charges against the licensee is not subject to malicious prosecution.

In Arcaro v. Silva & Silva Enterprises Corp. (1999) 77 Cal.App.4th 152, the Court of Appeal affirmed the plaintiff's malicious prosecution judgment against the collection agency who had sued him to collect a debt owed by a construction company and which was allegedly guaranteed by the malicious prosecution plaintiff. The court followed Sheldon Appel Co. v. Albert & Oliker (1989) 47 Cal.3d 863 relative to the question of whether the underlying suit was "factually tenable." It upheld the judgment because the malicious prosecution defendant did not have a legitimate basis for a belief that Arcaro had signed the indemnity agreement in question.

In Sierra Club Foundation v. Graham (1999) 72 Cal.App.4th 1135, the Sierra Club Foundation (a California non-profit public corporation operating separately from the Sierra Club) sued a former substantial donor for malicious prosecution based upon the donor's "fruitless" federal suit against the foundation. The foundation prevailed in that underlying action, but a second suit, brought by the State of New Mexico, had resulted in a settlement.

The fact that the New Mexico case did not result in a favorable termination for the foundation did not preclude the foundation's malicious prosecution

action against Graham because it was able to prove all of the elements, including favorable termination, against him.

The Sierra Club Foundation case provides a useful discussion of the tort of malicious prosecution. It also upheld the punitive damage action in favor of the Sierra Club Foundation.

In Ferreira v. Gray, Carey, Ware & Freidenrich (2001) 87 Cal.App.4th 409, the Court of Appeal held that even though the underlying matter went to trial and resulted in a favorable verdict on some causes of action, for the plaintiff it still did not constitute a "favorable termination" because the litigation actually ended with a negotiated settlement between the parties. Thus, the termination of the litigation did not reflect the merits of the underlying action but the compromise between the parties and, as a result, as a matter of law, there was not a favorable termination for purposes of a malicious prosecution action.

Brennan v. Tremco, Inc. (2001) 25 Cal.4th 310 presents the issue of whether by agreeing to arbitrate certain aspects of the underlying lawsuit, the underlying defendant and malicious prosecution plaintiff has waived any claim for malicious prosecution. In reversing a demurrer sustained on behalf of the defendant corporation, the Court of Appeal found there to be a triable issue of fact as to what the parties' intent was in entering into the agreement to arbitrate. That would be an issue for the trial court.

The Supreme Court, however, reversed the judgment of the Court of Appeal and remanded the matter back to the Court of Appeal. It held that a person may not sue for the malicious prosecution of an action that the parties resolved through contractual arbitration regardless of whether the underlying action began in court or in arbitration. The two trends supporting that conclusion were the trend against creation or expansion of derivative tort remedies, including malicious prosecution, and the trend in favor of allowing parties to voluntarily choose binding, private arbitration to end the dispute without resort to the courts. To permit an action for malicious prosecution to follow contractual arbitration would defeat the purpose of that arbitration.

The malicious prosecution plaintiff also sued two employees of the corporation for malicious prosecution on the basis that they were the people responsible for instigating or maintaining the action on behalf of the corporation. The court likened the situation to cases such as Wise v. Southern Pacific Co. (1963) 223 Cal.App.2d 50[20] and Janken v. GM Hughes Electronics (1996) 46 Cal.App.

[20] Overruled by 7 Cal.4th 503 at 510, 521 (Applied Equipment Corp. v. Litton Saudi Arabia Ltd. (1994)).

4th 55, *rev. den.*, which held that a corporate employee cannot be held as a conspirator or abettor in filing a lawsuit on behalf of a corporation in concluding that such an individual could be held liable as an instigator of the filing of the lawsuit. The court also cited with favor Black v. Bank of America (1994) 30 Cal. App.4th 1.

In Northwest Airlines v. Camacho, 296 F.3d 787 (9th Cir. 2002) the court for the Commonwealth of Northern Mariana Islands looked to California law to hold that claims for malicious prosecution and abuse of process are both infringements of personal rights and, therefore, subject to a personal injury statute of limitations. Additionally, the Northwest court held that, although the defendant's claim for interference with contractual relations, according to California law, is not an action within a personal injury statute of limitations, it would treat it as being subject to the personal injury statute of limitations because the defendant's claim was based on the same factual allegations as his claims for malicious prosecution and abuse of process.

In White v. Lieberman (2002) 103 Cal.App.4th 210, the plaintiff contended that his claim for malicious prosecution was not barred by the statute of limitations. The White court explained that the statute of limitations for a malicious prosecution action is one year and that, as a rule, it accrues when judgment on the underlying action is entered in the trial court. In the event that the underlying action is appealed, the statute is tolled when the notice of appeal is filed and it begins to run again on the issuance of the remittitur. The White court noted that the rule is the same whether the court of appeals affirms or reverses the trial court's judgment. Finally, the White court held that the plaintiff should not get a windfall, i.e., more time to file his malicious prosecution claim, because the trial court waited more than a month after the remittitur issued to file a judgment. The statute of limitations begins to run again on the issuance of the remittitur.

In Ecker v. Raging Waters Group, Inc. (2001) 87 Cal.App.4th 1320, the Court of Appeal held that the trial court did not err in granting the amusement park nonsuit on plaintiff's claim of malicious prosecution because there existed sufficient evidence to constitute probable cause. When a claim of malicious prosecution is based upon initiation of criminal prosecution, the question of probable cause is whether it was objectively reasonable for the defendant to suspect the plaintiff had committed a crime. Here, the plaintiff had been videotaping adolescent boys while at Raging Waters, and security personnel caught him and viewed the videotape. Additionally, the plaintiff had been observed videotaping boys on prior visits to the park. Thus, there existed probable cause.

In Morrison v. Rudolph (2002) 103 Cal.App.4th 506, the Court of Appeal held that an attorney would not be held liable for malicious prosecution for

bringing a lawsuit on behalf of his client based on the client's representations because his representations, if believed, provided sufficient evidence to prevail in the underlying action or at least information reasonably warranting an inference that there was such evidence.

The California Supreme Court, however, implicitly overruled Morrison v. Rudolph though in Zamos v. Stroud (2004) 32 Cal.4th 958. The court adopted the majority rule in holding that attorneys who filed an underlying action with probable cause can nontheless be held liable for malicious prosecution if they continue to prosecute the case after learning that it is not supported by probable cause.

In Casa Herrera Inc. v. Beydoun (2004) 32 Cal.4th 336, the Supreme Court held that the parol evidence rule constitutes a rule of substantive law and, thus, a ruling based on the application of the parol evidence rule constitutes an action that has been terminated for reasons that do reflect on the merits of the underlying claim.

In Drum v. Bleau, Fox & Associates (2003) 107 Cal.App.4th 1009, the Court of Appeal addressed the tort of abuse of process. In order to establish this cause of action, the plaintiff must demonstrate an ulterior motive and a willful act in the use of process not proper in the regular conduct of the proceedings. In Drum, the Court of Appeal held that the act of levying on a writ of execution at a time when enforcement of the underlying judgment had been stayed, with knowledge that it had been stayed established the willful act element. Further, the ulterior motive behind levying on the writ of execution was to deplete the plaintiff's funds to hinder his ability to appeal the underlying judgment.

In Palmer v. Zaklama (2003) 109 Cal.App.4th 1367, the Court of Appeal held that, for purposes of the tort of abuse of process, the recordation of a lis pendens is not a "process" and, thus, is not a valid basis for a cause of action for abuse of process.

Hagberg v. Califiornia Federal Bank (2004) 32 Cal.4th 350, considers a multitude of torts, including false imprisonment. Plaintiff Lydia Hagberg, an Hispanic woman, had opened an account at a branch of the defendant bank. During the course of a transaction, a teller, who also happened to be Hispanic, suspected that a check that the plaintiff sought to negotiate was counterfeit and brought it to her supervisor. The supervisor also found that there were suspicious aspects of the check, so she contacted the maker and was informed that the check was not valid. The supervisor called police and said that the plaintiff had attempted to negotiate a counterfeit check. As the supervisor was talking to the police dispatcher, the bank security manager telephoned the maker and was

informed that the check indeed was valid, and that the information earlier delivered to the supervisor was erroneous. The supervisor informed the dispatcher that the bank no longer required police assistance. The dispatcher responded that the police had already arrived at the bank, and the supervisor thereupon saw an officer approaching. The police, however, proceeded with an investigation and detained the plaintiff. The plaintiff was released 20 minutes later.

The plaintiff then filed suit against the bank alleging seven causes of action including racial discrimination in violation of the Unruh Civil Rights Act (Civil Code §§ 51 and 52.1), false arrest and false imprisonment, slander, invasion of privacy, intentional infliction of emotional distress, and negligence. She sought $1.6 million in damages plus attorneys' fees and costs.

The defendant brought a motion for summary judgment asserting that statements to the police concerning suspected criminal activity were subject to the absolute privilege established by Civil Code § 47(b) and further immunity under federal statute.

The plaintiff contended that the only possible basis for the bank's treatment of her was that she was of Hispanic descent.

The trial court granted summary judgment, which was affirmed by the Court of Appeal. The case then went on to the state Supreme Court.

The Supreme Court affirmed the judgment as well emphasizing the importance of the public having unfettered rights, open channels of communications between citizens and the police. It held that the Unruh Civil Rights Act does not constitute an exception to the privilege afforded under Civil Code § 47(b).

Mulder v. Pilot Air Freight (2004) 32 Cal.App.4th 384, was decided on the same day also by the Supreme Court. The court there also upheld the absolute privilege under Civil Code § 47(b) relative to claims for false imprisonment and intentional infliction of emotional distress in connection with air freight employee's communications with police.

XXV. INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

In Ross v. Creel Printing & Publishing Co. (2002) 100 Cal.App.4th 736, the plaintiff attempted to argue that, because it was a violation of the California Rules of Professional Conduct for an attorney to threaten criminal prosecution in order to gain advantage in a civil action, he had proven extreme and outrageous

conduct when his creditor's attorney sent him a letter informing him that legal action would be taken if he did not make good on certain checks. The Ross court explained that the nature of debt collection is likely to cause emotional distress and that such conduct is only outrageous if it goes beyond all reasonable bounds of decency. Accordingly, the court held that the attorney's violation of an ethical rule was not, in and of itself, sufficient to prove that the attorney's conduct was "extreme and outrageous."

XXVI. DEFAMATION

Devis v. Bank of America (1998) 65 Cal.App.4th 1002, *rev. den., reh. den.*, is a very favorable case for financial institutions. Although there was a multitude of disputed facts, the trial court had determined there were enough that were undisputed to justify summary judgment in favor of the defendant bank. The case involved two friends of an account holder at the bank who had very similar names: David Davis and David Devis. The account holder wrote checks to both of them. Davis however deposited not only the check the account holder had given him, but also apparently an additional check on the account holder's account, which Davis had forged.

The account holder notified the bank and instructed it not to honor checks presented by Davis. A warning went in to the bank's computer reading "Stolen checks presented at the [branch in question] payee David Davis call cust before paying checks." The bank employees interpreted that to mean that the account holder should be called before any check was paid.

The next day Devis went to a different branch to cash his check. He was told to wait, and a bank employee called the account holder. There is a discrepancy in the testimony as to whether the employee told the account holder that Devis or Davis was at the branch. The testimony was consistent that the account holder wanted the person attempting to cash the check to be arrested, and the police were called.

Later the same afternoon, the account holder learned that Devis had been wrongly arrested. The account holder said that he had made repeated calls to the bank to say that a mistake had been made and that Devis should be released. The bank refused to help and told him to call the police. When he did so, he was told that the bank had to call and drop the charges. Devis ultimately spent 72 hours in jail before he was released. No charges were filed against him.

Devis then sued the bank and the account holder for false imprisonment and negligence, the bank for slander, and the bank and the account holder for negligent and intentional infliction of emotional distress.

The trial court granted summary judgment on the basis that all causes of action were barred by Civil Code section 47, which is the litigation privilege. The Court of Appeal affirmed.

The court held that reports made by citizens to police regarding potential criminal activity were communications of the type protected by section 47:

"... a communication concerning possible wrongdoing,

> made to an official governmental agency such as a local police department, and which communication is designed to prompt an action by that entity, is as much a part of an 'official proceeding' as a communication made after an official investigation has commenced ... After all, '[t]he policy underlying the privilege is to assure utmost freedom of communication between citizens and public authorities whose responsibility it is to investigate and remedy wrongdoing' ... In order for such investigation to be effective, 'there must be an open channel of communication by which citizens can call ... attention to suspected wrongdoing. That channel would quickly close if its use subjected the user to a risk of liability for libel.... The importance of providing to citizens free and open access to governmental agencies for the reporting of suspected illegal activity outweighs the occasional harm that might befall a defamed individual....' " [Id. at 1008, citing Williams v. Taylor (1982) 129 Cal.App.3d 745, 753-754 at 65 Cal.App.4th 1008; cites omitted.]

The Devis court though did limit the use of the privilege to erroneous reports that were made in good faith. The court held section 47 as applicable to the defamation and negligence claims, but the discussion concerning the negligent and intentional infliction of emotional distress causes of action was not published.

Aronson v. Kinsella (1997) 58 Cal.App.4th 254 also discusses the litigation privilege. The court there held that a demand letter written with a good faith belief in a legally viable claim in serious contemplation of litigation is absolutely privileged pursuant to Civil Code section 47(b).

Jackson v. Paramount Pictures Corporation (1998) 68 Cal.App.4th 10 concerns a summary judgment granted in favor of the defendants including on-air radio and television personalities against singer Michael Jackson. A *Hard Copy* reporter stated over both television and radio broadcast waves that authorities were reopening criminal investigation of illicit sexual relationships between Jackson and minor children, alluding to a 27-minute graphic video tape.

The opinion offers an excellent survey of the law of defamation. The court ruled in favor of the defendants because, although the reporter had obtained information that made her somewhat skeptical, the extent of data she had gathered to the contrary permitted her to report the story because she neither knew it to be false nor acted in reckless disregard of the truth.

Likewise in Melaleuca, Inc. v. Clark (1998) 66 Cal.App.4th 1344, an appellate court found in favor of the defendant, reversing a jury verdict. The case concerned statements made in the defendant's book that disparaged products distributed by the plaintiff. The court stated:

> ...[T]he law of defamation and the law of injurious falsehood require that a plaintiff prove far more than the publication of a false statement. Where, as here, the defendant has made false statements which disparage the contents of a product, the owner or distributor of the product is required to produce clear and convincing evidence that defendant acted with actual malice. A statement is made with actual malice when the publisher either knows the statement is false or has some serious subjective doubt about the truth of the statement. [66 Cal.App.4th at 1350.]

The judgment was reversed because the court had given the jury an instruction relative to actual malice on an objective basis rather than with respect to the subjective knowledge of the defendant.

In Soliz v. Williams (1999) 74 Cal.App.4th 577, a litigant from an earlier action sued a Los Angeles Superior Court judge for his conduct during the first lawsuit. Plaintiff claimed that during the course of a settlement conference, Judge Williams lambasted the plaintiff and then refused to grant the plaintiff's motion to disqualify him from the case, and then three days later, denied his actions to a reporter.

The trial court sustained the defendant's demurrer as to all causes of action on the basis that the defendant's conduct was immune from lawsuits.

The Second District Court of Appeal affirmed the judgment as to the causes of action for intentional and negligent infliction of emotional distress and the defamation arising out of the judge's statements during the hearing, but reversed the order sustaining the demurrer as to the causes of action for defamation arising out of the statements to the reporter (and for violations of civil rights) three days later because the absolute immunity to a judge's judicial function does not extend to defamatory statements made thereafter to a reporter.

Knoell v. Petrovich (1999) 76 Cal.App.4th 164, *rev. den.,* also concerned the litigation privilege. The Second Appellate District Court of Appeals affirmed the lower court's sustaining of a demurrer relating to a letter sent by the defendant lawyer to the Lompoc City Attorney's office, which the plaintiff felt was defamatory. Because the letter was sent in connection with a contemplated judicial proceeding, the litigation privilege applied.

Bardin v. Lockheed Aeronautical Systems Company (1999) 70 Cal.App. 4th 494 is another case involving the Civil Code section 47 litigation privilege. The Court of Appeal in Bardin undertook an exhaustive examination of the relationship between Section 47(b) and Government Code section 1031.1(b) with respect to the exposure of an employer communicating defamatory statements about a candidate for a position with the Los Angeles Police Department, ultimately interpreting the intent of the Legislature that there be an absolute privilege for such communications even if they were made with malice.

Such was not the case though with Nguyen v. Proton Technology Corporation (1999) 69 Cal.App.4th 140). Here, the court cited a series of superficially litigation-related statements that were held not to be protected by the privilege. In a dispute between two companies concerning rating of employees, counsel for one of them wrote to the other to the effect that plaintiff Nguyen had served time in prison for repeatedly and violently assaulting his wife. That statement, however, was untrue. Nguyen had been in jail, but the conviction was for shooting a gun at an unoccupied motor vehicle and for vandalism. The First Appellate District Court of Appeal reversed the summary judgment that had been rendered in favor of the defendant because there was only a remote relationship between the allegations and the pre-litigation dispute.

Barrett v. Rosenthal (2004) 114 Cal.App.4th 1379[21] deals with the applicability of Code of Civil Procedure 425.16 (the Anti-SLAPP Statute) to a defamation case based on allegedly libelous statements made on the internet. The Court of Appeal upheld the lower court's decision that the allegedly libelous statements were protected by the anti-SLAPP statute, which protects written or

[21] On appeal to California Supreme Court.

oral statements made in a public forum or any other conduct in the furtherance of the exercise of the constitutional right of free speech in connection with a public issue or an issue of public interest. The Court of Appeal rejected the argument that the internet sites where the statements were posted were not "a place open to the public or a public forum."

A news publication is a public forum within the meaning of the anti-SLAPP statute if it is a vehicle for discussion of public issues and it is distributed to a large and interested community. Annette F. v. Sharon S. (2004) 119 Cal. App.4th 1146, citing Damon v. Ocean Hills Journalism Club (2000) 85 Cal. App.4th 468, 475-478.

In Steam Press Holdings, Inc. v. Hawaii Teamsters & Allied Workers Union, Local 996, 302 F.3d 998 (9th Cir. 2002) the Ninth Circuit conducted a bench trial in a defamation action arising out of a labor dispute. The District Court awarded damages to the plaintiffs to be paid by the union.

The Ninth Circuit reversed finding that the language in question amounted to a "call to arms" rather than an assertion of objective fact. The statements were therefore not defamatory and fully protected by federal labor law.

Franklin v. Dynamic Details, Inc. (2004) 116 Cal.App.4th 375 discusses the difference between actionable facts or nonactionable opinions in a defamation claim. In determining whether a statement is actionable fact or nonactionable opinion, courts are instructed to use a totality of the circumstances test. Under this test, first the language of the statement is examined. For words to be defamatory, they must be understood in a defamatory sense. Next, the context in which the statement was made must be considered.

In Franklin, the defendant's email statements were protected opinions because they purported to apply copyright and contract law to facts to reach the conclusion that the plaintiffs were acting unlawfully. The emails disclosed the facts upon which the opinions were based by directing the reader to websites where the reader was free to accept or reject the defendant's opinions based on the reader's own independent evaluation.

Palm Springs Tennis Club v. Rangel (1999) 73 Cal.App.4th 1, involves a non-profit corporation that brought a libel action on the basis of a Board of Directors election campaign flier containing negative information about one of the candidates. The Fourth District Court of Appeal upheld the trial court's sustaining of the defendant's demurrer on the basis that the statements were made about the individual candidate rather than about the organization itself. The plaintiff, therefore, could not recover either on the basis of *per se* libel or *per quod* libel.

Two other recent cases concern truth as a defense. In Ferlauto v. Hamsher (1999) 74 Cal.App.4th 1473, the plaintiff was a lawyer who sued the author of a book concerning the production of the film NATURAL BORN KILLERS. The book was critical of litigation surrounding the film and, in particular, about one of the lawyers whom the plaintiff perceived to be himself even though he was never mentioned by name. The court interpreted the negative comments to be "caricature, imaginative expression, and rhetorical hyperbole," which constituted "a legitimate exercise of literary style." The court found that the statements themselves simply did not amount to untrue facts because they were in the nature of opinion rather than fact.

A like conclusion was reached in Cochran v. NYP Holdings, Inc. (9th Cir. 2000) 210 F.3d 1036. Attorney Johnnie L. Cochran, Jr. had sued the owner of the NEW YORK POST and its columnist for libel based upon the following statement about him:

"Cochran has yet to speak up [regarding his involvement in the civil damages action by a police brutality victim Abner Louima]. But history reveals that [Cochran] will say or do just about anything to win, typically at the expense of the truth."

The Ninth Circuit Court of Appeal upheld the district court judge's decision that the columnist's statement was inherently that of an opinion. A statement of opinion is not automatically entitled to First Amendment protection simply by virtue of its status as an opinion because it may be actionable to the extent that it implies a false assertion of a fact. "In this case, however, no reasonable fact-finder could conclude that Peyser's expression of opinion implies any false assertion of undisclosed facts serving as the basis for her views." (210 F.3d at 1038.)

Rodriguez v. Georgious Kyriacos Panayiotou, 314 F.3d 979 (2002) discusses the difference between a nonactionable opinion and provably false factual assertions. The court recognized that "if a statement of opinion implies knowledge of facts which may lead to a defamatory conclusion, the implied facts must themselves be true."

In Smith v. Maldonado (1999) 72 Cal.App.4th 637, a plaintiff was denied recovery in connection with an entirely truthful newspaper article where the defendants had distributed the article and highlighted the portion that contained a negative reference to the plaintiff. Since the contents of the article were true, the plaintiff was denied recovery.

Comedy III Productions, Inc. v. Saderup, Inc. (2001) 25 Cal.4th 387, *cert. den.,* is not a defamation case, but one which concerns the use of a deceased celebrity's image without consent. The court relied upon Lugosi v. Universal Pictures (1979) 25 Cal.3d 813, which quoted a companion case to say that: "The right of publicity protects against the unauthorized use of one's name, likeness or personality, but that right is not discountable and expires upon the death of the person so protected." (Citing Guglielmi v. Spelling-Goldberg Productions (1979) 25 Cal.3d 860, 861.) Because of that case, the California legislature enacted Civil Code section 990, which provides for liability for the use of a deceased personality's likeness to extend beyond the personality's lifetime.

The defendant made use of sketches of the Three Stooges on prints and t-shirts. The defendant contended that the use of the Three Stooges' likenesses constitute a form of free speech protected by the United States and California Constitutions. The court distinguished between using a celebrity's image to convey an informational or other type of message from merely selling a representation of the image, and determined that the defendant's use was not the protected speech.

XXVII. NEGLIGENT PERFORMANCE OF CONTRACTUAL OBLIGATION GIVING RISE TO ACTION IN TORT

In North American Chemical Co. v. Superior Court (1997) 59 Cal.App.4th 764, the court of appeal considered the issue of when a contractual relationship gives rise to an action in negligence. The case concerned a chemical company seeking to recover money that it paid as damages to a settlement of a customer's claim which arose from a contaminated chemical product packaged and shipped for the plaintiff by the defendant shipping company.

The court held that the shipping contract imposed a duty on the shipper to reasonably and carefully perform its contractual obligations. It found that while contract law exists to enforce the intentions of the parties to an agreement while tort laws design to vindicate social policy, the same wrongful act can constitute both a breach of contract and an evasion of an interest protected by the law of torts. (59 Cal.App.4th 764, 774.) The court further stated:

> This court recently endorsed the general rule that where the "negligent" performance of a contract amounts to nothing more than a failure to perform the express terms of the contract, the claim is one for contract breach, not negligence. [Italics omitted.]

For over fifty years, however, California has also recognized the fundamental principle that:

> "Accompanying every contract is a common-law duty to perform with care, skill, reasonable expedience, and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract." The rule which imposes this duty is of universal application as to all persons who by contract undertake professional or other business engagements requiring the exercise of care, skill and knowledge; the obligation is implied by law and need not be stated in the agreement .... [59 Cal.App.4th 764, 774; cites omitted.]

XXVIII. BREACH OF IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

In Storek & Storek v. Citicorp Real Estate, Inc. (2002) 100 Cal.App.4th 44, the Court of Appeal held that the defendant could not be liable for breach of the implied covenant of good faith and fair dealing for withholding loan disbursements because the contract expressly gave the defendant the right to do so. If the plaintiff wanted to challenge the propriety of the defendant's determination, it should have made a claim of nonperformance of the contract's express terms rather than bringing suit for breach of the implied covenant.

XXIX. WRONGFUL REPOSSESSION

The trial court in McManis v. The San Diego Postal Credit Union (1998) 61 Cal.App.4th 547 overturned summary judgment in favor of the defendant credit union. In so doing, the court rendered an interpretation of the applicable law, which the plaintiff neither cited nor argued.

When the credit union lent its member money to buy a car, it concurrently sold her a disability credit insurance policy. The member became disabled and was unable to make the payments. While her disability claim was pending, the credit union repossessed the car.

Thereafter, the disability carrier honored the claim in full, and the credit union returned the vehicle.

The loan agreement provided that in the event that the borrower defaulted, the lender could repossess the collateral "if permitted by law." Civil Code section 1812.402(a) prohibits a creditor who had directly participated in, arranged, or received a commission or other compensation for the sale of credit disability insurance to the debtor from invoking any creditor's remedy against the debtor because of the debtor's non-payment (of a payment) that becomes due during any disability claim period and for which credit disability insurance coverage is provided. Section 1812.402(i) allows the debtor to bring an action for damages, equitable relief, or other relief for violations.

The plaintiff, however, did not include within her complaint a cause of action under section 1812.402(i). The credit union therefore moved for summary judgment as to the other causes of action.

The appellate court, however, held that the credit union had the burden of not only proving that the borrower had defaulted, but also that the repossession was permitted by law. It reversed the summary judgment because the credit union had not proven that it had fully satisfied all provisions of section 1812.402.

XXX. EXPERT WITNESSES

Summers v. A.L. Gilbert Co. (1999) 69 Cal.App.4th 1155, *rev. den.,* provides a useful discussion of the limitations on expert testimony. In a wrongful death action, the plaintiff had retained an attorney to testify as an expert witness and, according to the Court of Appeal, “had an opinion on almost every imaginable subject related to the case.” Among other things, this expert rendered opinions that one defendant had a non-delegable duty, that another defendant was hauling illegally, and that the contracts between the two defendants were illegal. The Court of Appeal overruled the judgment in favor of the plaintiffs as a consequence of this expert’s testimony being admitted into evidence. The fact that the expert witness is a lawyer does not entitle him or her to testify as to issues of law.

In Wilson v. Phillips (1999) 73 Cal.App.4th 250, *rev. den.,* the Court of Appeal affirmed a judgment that relied upon expert testimony on the phenomenon of repressed memory.

When an expert bases testimony on a new scientific technique, there must be a showing that the new technique has gained general acceptance in the particular field to which it belongs, that any witness testifying on general acceptance is properly qualified as an expert on the subject, and that correct scientific procedures were used in the particular case.

The court distinguished between scientific evidence and expert medical opinion, to which those standards do not apply. The court allowed the testimony because the psychologist, who specialized in the field of sexual abuse and memory, formulated her opinions based on her personal evaluations of the plaintiffs in the same way a medical doctor would study a patient to identify a physical ailment.

In Schreiber v. Estate of Kiser (1999) 22 Cal.4th 31, the Court of Appeal affirmed a lower court opinion excluding medical testimony because the Supreme Court reversed the Court of Appeal and remanded for further proceeding, holding that a treating physician is not a retained expert and does not become one merely as a consequence of giving opinion testimony. The plaintiff did not have to submit a Code of Civil Procedure section 2034(a)(2) declaration. A like matter is pending before the Supreme Court in Paxton v. Stewart (1998) 68 Cal.App.4th 331.[22]

XXXI. INDEMNITY

National Union Fire Ins. Co. of Pittsburgh, Pa. v. Nationwide Ins. Co. (1999) 69 Cal.App.4th 709, holds that, where an employee of a subcontractor is injured, the general contractor is solely at fault, and the general contractor's negligence does not arise out of its supervision of the subcontractor's work, neither the subcontractor nor its liability insurer is required to indemnify the general contractor.

Austin v. Superior Court (1999) 72 Cal.App.4th 1126 is a legal malpractice action in which the defendant attorney sought to cross-complain against the plaintiff's present lawyer for indemnity and contribution. The court of appeal found that the policies against permitting a claim of indemnity against the successor lawyer outweigh the policies favoring it.

In Expressions at Rancho Niguel Association v. Ahmanson Developments, Inc. (2001) 86 Cal.App.4th 1135, the developer of a residential project settled with the plaintiff homeowners association and then pursued a non-settling subcontractor for equitable indemnity. The developer asserted that the subcontractor was jointly and severally liable for the whole amount of the loss.)

The court held that equitable principles mandate apportionment.

In Centex Golden Construction Co. v. Dale Tile Co. (2000) 78 Cal. App.4th 992, the Court of Appeal upheld an indemnification agreement entered

[22] For discussion purposes only; review granted.

into by a subcontractor and a contractor, wherein the subcontractor promised to indemnify the contractor for all claims covered by or incidental to the subcontract, even those that involved the alleged or actual negligent act or omission of the contractor. In deciding to uphold this indemnification agreement, the court held that the issue turned primarily on contractual interpretation and that it was the intent of the parties as expressed in the agreement that controlled.

Equitable indemnity is not limited to joint tortfeasors. It can apply to acts that are concurrent or successive, joint or several, as long as they create a detriment caused by several actors. A necessary factor, however, is that there be some basis for tort liability against the proposed indemnitor. BFGC Architects Planners, Inc. v. Forcum/Mackey Construction, Inc. (2004) 119 Cal.App.4th 848. Generally, it is based on a duty owed to the underlying plaintiff. The plaintiffs in BFGC alleged that the defendants breached their duties by failing to comply with the terms of their contracts. The Court of Appeal in BFGC held that this allegation was an improper attempt to recast a breach of contract cause of action as a tort claim. Generally, a breach of a contractual promise is enforced through contract law unless the actions that constitute a breach violate a social policy that merits the imposition of tort remedies. The Court of Appeal held that without any action sounding in tort, there was no basis for a finding of potential joint and several liability on the part of the defendants, thereby precluding a claim for equitable indemnity.

XXXII. INVASION OF PRIVACY

In Simtel Communications v. National Broadcasting Company (1999) 71 Cal.App.4th 1066, the plaintiff sued NBC for "intrusion" and other causes of action arising out of an investigative journalistic enterprise. The producers of the segment for "Dateline NBC" arranged to meet with the defendant's personnel at a restaurant and videotaped the meeting with hidden cameras, later using portions of that videotape in a television broadcast.

The court cited Shulman v. Group W Productions, Inc. (1998) 18 Cal.4th 200, *reh. den.,* setting forth the elements of the cause of action of intrusion: (1) Intrusion into a private place, conversation or matter; and (2) in a manner highly offensive to a reasonable person.

The Court of Appeal affirmed the summary judgment in favor of the defendant on the basis that there both was no intrusion into a private place, conversation or matter because the participants in the meeting were in a public restaurant, and because, as a matter of law, the conduct was not offensive to a

reasonable person. Furthermore, the defendants had no objectively reasonable expectation of seclusion or solitude in a public restaurant.

By contrast, the California Supreme Court affirmed a jury verdict in favor of a psychic who had brought suit against ABC. An ABC reporter had obtained employment as a psychic with the Psychic Marketing Group, which also employed the plaintiff in the same capacity. The reporter wore a small concealed video camera while she video-taped conversations with her co-workers, including Sanders. The court stated that there did not have to be absolute or complete privacy before a plaintiff could have a reasonable expectation of privacy. The fact that other co-workers would have heard the recorded conversations did not defeat the plaintiff's claim. (Sanders v. ABC (1999) 20 Cal.4th 907.)

In Sanchez-Scott v. Alza Pharmaceuticals (2001) 86 Cal.App.4th 365, the plaintiff, a breast cancer patient, had brought suit for the invasion type of common-law invasion of privacy when a sales representative was present during her breast examination. The Court of Appeal held that the trial court should not have sustained the plaintiff's cause because jurors could have concluded that the plaintiff had an objectively reasonable expectation of privacy in the medical examination room of her oncologist and that even though the plaintiff did not object to the presence of another person in the examination room she also did not know that the person was a sales representative.

Barbee v. Household Automative Finance Corporation (2003) 113 Cal. App.4th 525, also discusses an invasion of privacy claim. In Barbee, Barbee was a national sales manager with HAFC who had a relationship with a member of HAFC's sales force. Barbee was fired for dating his subordinate, and he subsequently filed a claim for invasion of privacy, wrongful termination in violation of public policy, and sex discrimination. The Court of Appeal held that numerous cases strongly suggest that a supervisor has no reasonable expectation of privacy in pursuing an intimate relationship with a subordinate. Additionally, Barbee had been put on notice that intracompany dating was a bad idea. Accordingly, the Court of Appeal held that Barbee did not have a reasonable expectation of privacy in pursuing an intimate relationship with his subordinate and, as a result, he could not establish a necessary element of an invasion of privacy claim.

Marich v. MGM/UA Telecommunications, Inc., and Metro Goldwyn Mayer, Inc. (2003) 86 Cal.Rptr.2d 406 addresses the intentional element in a cause of action for invasion of privacy in a case involving video-taping of a police phone call informing the plaintiffs that their son had died of a drug overdose. Specifically, the intentional element of this claim requires that "the defendant intentionally intruded, physically or otherwise, upon the solitude or seclusion,

private affairs or concerns of the plaintiff." The Court of Appeal held that the trial court incorrectly instructed the jury on intent. The jury should have been told that intent is not limited to consequences that are desired. If the actor knows that the consequences are certain or substantially certain to result from his act, and still goes ahead, he is treated by the law as if he had in fact desired to produce the result, i.e., his conduct was intentional.

Another form of the tort of invasion of privacy is public disclosure of a private fact. Rosales v. City of Los Angeles (2000) 82 Cal.App.4th 419, concerns a former Los Angeles Police Department officer who brought suit against the city and a deputy city attorney for allegedly improper disclosure of his personnel file. The plaintiff claimed that in defending a civil suit where a minor claimed inappropriate sexual conduct by the plaintiff officer, the city violated sections of the Penal and Evidence Codes by disclosing his personnel records without first obtaining his consent or a court order.[23]

The defendants demurred to all seven causes of action: invasion of privacy, negligence per se, negligent infliction of emotional distress, intentional infliction of emotional distress, abuse of process, negligence, and violation of federal civil rights. The trial court sustained the demurrers without leave to amend, and the Court of Appeal affirmed.

The court first noted that the officer's statutory right to confidentiality a to these records is conditional rather than absolute. Criminal defendants have the right to discover relevant information in an officer's file, and such records can also be discovered through a procedure calling for prior judicial in-camera examination of the records. In Rosales' case, he alleged that these procedures were not followed, a fact which must be regarded as true in a demurrer context.

The appellate court first determined that because it was not provided for within the statute, no statutory cause of action existed.

The court next dismissed Rosales' claim of common invasion of privacy on the basis that he did not have a reasonable expectation of privacy in the records because the right was only conditional and it would have been unreasonable for him not to have expected his personnel file not to have been disclosed in the course of the defense of the underlying case.

The court also rejected Rosales' theory of common negligence and other torts on the basis that the statute gave rise to a standard of care but did not create a duty of care.

---

[23] Rosales also discussed *supra* at page 41 under Negligence Per Se.

XXXIII. NUISANCE

In Wilson v. Handley (2002) 97 Cal.App.4th 1301, the plaintiff brought a private nuisance action against adjoining landowners under the spite-fence statute (Civil Code § 841.4). The Court of Appeal held that a row of trees planted along or near the property line between adjoining parcels to separate or mark the boundary between the parcels, if it is an unnecessary height above 10 feet and has the dominant purpose of annoying the neighbor, could constitute a spite fence under the statute. Further, a fence that interferes only with light and air may be found to be a nuisance under the spite-fence statute.

XXXIV. PROPOSITION 51

In 1986 by way of initiative, the People of the State of California enacted into law a new scheme for apportionment of fault among joint tortfeasors. The statutes, codified as Civil Code section 1431, et seq., are still referred to as "Proposition 51." In simple terms, Proposition 51 renders economic damages or "out-of-pocket damages" joint and several, but non-economic damages several. Economic damages would consist of such things as property damage, medical bills, and lost earnings. Non-economic damages would consist largely of pain and suffering and the like.

In McComber v. Wells (1999) 72 Cal.App.4th 512, the plaintiff brought suit against a bank, a title information company, a notary, the notary's employer, and the notary's surety in connection with losses resulting from her former husband's having forged her name on a note and deed of trust.

During the course of litigation, the plaintiff reached a settlement with two of the defendants, the bank and the title information company. She went to trial against the others. The bank paid her $105,000 and the title information company paid her $100,000.

The jury found in the plaintiff's favor against the notary, awarding the plaintiff both economic damages and non-economic damages. The jury also attributed no fault at all to the settling bank and settling title information company. The fault was divided between the notary (33⅓%) and the plaintiff's ex-husband (66⅔%).

The notary claimed that she was entitled to a set-off for the settlements. The trial court disagreed and awarded the plaintiff $150,850 in damages plus costs against the notary.

The Court of Appeal reversed the judgment. Wells was entitled to a set-off relative to the economic damages. Because the economic damages were 45.89% of the total judgment, the notary was entitled to a set-off for 45.89%. Because Proposition 51 would render the notary responsible only for her percentage of the non-economic damages, there would be no set-off there.

Ehret v. Congoleum Corporation (1999) 73 Cal.App.4th 1308 also concerns apportionment of pretrial settlements to the judgment. In this case too, the court applied the same formula analysis as in the McComber case.)

A like result was reached in Union Pacific Corporation v. Wengert (2000) 80 Cal.App.4th 1225B, in the context of a settling tortfeasor seeking indemnity from a non-settling tortfeasor.

This statute has held to be both constitutional and retroactive. (Yoshioka v. Superior Court (1997) 58 Cal.App.4th 972; Honsickle v. Superior Court of L.A. County (1999) 69 Cal.App.4th 756, *rev. den*.)

In Wilson v. Ritto (2003) 105 Cal.App.4th 361, a medical malpractice action, the Court of Appeal held that apportionment among tortfeasors under Civil Code section 1431.2 requires evidence of medical malpractice, not only as to named defendants, but also as to nonparty doctors. The burden of proof in apportioning non-economic damages among joint tortfeasors should not be contingent upon whether a joint tortfeasor is a named defendant. The same burden of proving fault applies regardless of whether a joint tortfeasor is a defendant or nonparty.

XXXV. PROPOSITION 213

In 1996, the voters of the State of California passed Proposition 213, enacting into law Civil Code section 3333.4. The statute prohibits uninsured motorists and drunk drivers from recovering non-economic damages and fleeing felons from recovering any damages in any action arising out of the operation or use of a motor vehicle.

Proposition 213 does not preclude employees from recovering general damages for injuries received while they were driving their employer's uninsured motor vehicle. Montes v. Gibbens (1999) 71 Cal.App.4th 982.

Proposition 213 does not preclude an uninsured motorist from recovering non-economic damages for pain and suffering in a products liability action against a car manufacturer. (Hodges v. Superior Court (1999) 21 Cal.4th 109.)

Horwich v. Superior Court (1999) 21 Cal.4th 272 is a wrongful death case where the plaintiffs were the parents of a deceased uninsured driver. The court found that the parents were not barred for recovery for non-economic damages as a consequence of their daughter's failure to insure her vehicle because they were not uninsured owners or operators. The statute was designed to encourage people to take personal responsibility for their actions including obtaining liability insurance. The parents inherently would not have failed to take personal responsibility because they had no personal responsibility. The statute was not designed to protect the defendant.

Jenkins v. County of Los Angeles (1999) 74 Cal.App.4th 524, involves a fleeing felon, also the subject of Proposition 213. The Second District Court of Appeal found that the statute did not preclude his recovery from the intentional tort of unlawful use of force. A deputy sheriff had shot the plaintiff, rendering him a paraplegic, as the plaintiff fled in a stolen car.

In Savnik v. Hall (1999) 74 Cal.App.4th 733, the plaintiffs were an unmarried couple living together. Savnik had bought the Chevrolet Suburban involved in the accident and was driving the car. Plaintiff Conant was his passenger. When Savnik bought the car, he registered the car under the names of both himself and Conant. Conant was unaware of that. She also never drove that vehicle because it had a transmission with which she lacked familiarity.

The court discussed the meaning of the term "owner" in different contexts. It found no anomaly between an unaware registered owner, such as Conant, being held liable for permissive use and entitling her to non-economic damages notwithstanding Proposition 213. The purpose of Proposition 213 was to penalize those individuals who willingly defied the mandatory insurance requirements. Conant, of course, would lack fault because she would not have been knowingly defying the law.

In Nakamura v. Superior Court (2000) 84 Cal.App.4th 825, an uninsured motorist was ineligible to recover non-economic damages, but was entitled to punitive damages resulting from the car accident.

The preclusion of nonpecuniary damages will not apply in a situation where the operator of the vehicle does not maintain liability insurance, but the owner does. (Goodson v. Perfect Fit Enterprises, Inc. (1998) 67 Cal.App.4th 508, *rev. den*.) The limitation on recovery of non-economic damages applies even where the claim is based upon dangerous condition of private property rather

than negligent operation of a vehicle. (Krough v. Reynolds Packing, Inc. (2001) 91 Cal.App.4th 1243.)[24]

In Allen v. Sully-Miller Contracting Co. (2002) 28 Cal.4th 222, the plaintiff, an uninsured motorcyclist, sued a private construction company for premises liability when he suffered injury while turning across an unmarked elevated bus pad on a public roadway over which the construction company maintained control. The California Supreme Court reversed judgment of the Court of Appeal and held that Proposition 213 applied to the plaintiff's claim because, relying on Day v. City of Fontana (2001) 25 Cal.4th 268, "a necessary and causal relationship" existed between the uninsured motorist's use of a motor vehicle and the accident that occurred due to the defendant's negligence. Accordingly, the plaintiff was properly barred from recovering noneconomic damages.

In Anaya v. Superior Court (2002) 96 Cal.App.4th 136, the parents of a girl injured in a traffic collision brought a wrongful death action against the city because the girl died not in the vehicle crash but as a result of a second crash that occurred while she was being transported by helicopter to a hospital. The court held that the city, as owner and operator of the helicopter, was not part of the system that Proposition 213 was intended to change. Though the statute has been applied where an uninsured motorist seeks recovery against a government entity on theories of nuisance and dangerous condition of public property, it has only been so applied where there is a necessary and causal relationship between the motorist's vehicle operation and the accident for which the motorist claims the entity was responsible, but in this case there was no such connection.[25]

XXXVI. FIREFIGHTER'S RULE

In general terms, what has come to be known as the "firefighter's rule" (formerly "fireman's rule") provides that a firefighter (or police officer) assumes those risks attendant to the circumstances for which he or she was summoned. The rule does not, however, apply to independent acts of misconduct that are committed after the fire or police officer had arrived on the scene.

The court in Stapper v. GMI Holdings, Inc. (1999) 73 Cal.App.4th 787 reversed a nonsuit ruling in favor of the defendant on the basis of the independent negligence. The firefighter had brought a products defect case against the manufacturer of an automatic garage door opening that she claimed was defec-

---

[24] For discussion purposes only; review granted.

[25] Earlier case discussed *supra* under Negligence at page 35.

tively manufactured or designed. As a result, she and another firefighter were trapped in the garage while they were on a fire call. She suffered serious injury, and her colleague was killed.

Similarly, in Yamaguchi v. Harnsmut (2003) 106 Cal.App.4th 472, the Court of Appeal held that the exception to the firefighter's rule applied when the assailant either negligently or willfully injured a police officer by throwing a pot of hot oil after he knew or should have known that police officers were present. Accordingly, once the assailant knew of the presence of the officers, he owed them a duty of care.

An opposite result was reached in Tilley v. Schulte (1999) 70 Cal. App.4th 79, where a police officer was shot when answering a call at the home of a man, Mora, who had been treated by the defendant psychiatrist. Because the call was the product of Mora firing a gun, the officer was denied the opportunity to pursue the psychiatrist for his allegedly negligent care of Mora.

A different scenario was the case in the City of Oceanside v. Superior Court (2000) 81 Cal.App.4th 269. The plaintiff was a county lifeguard who was injured in the course of a joint rescue operation under the direction of another lifeguard.

The trial court had denied the defendant's summary judgment finding that the Firefighter's Rule was not applicable. The Court of Appeal reversed, holding that the rule in fact was applicable.

State of California v. Superior Court (2001) 87 Cal.App.4th 1409, stands for the proposition that a non-government employee engaged in fire-fighting activities cannot state any kind of claim against a public entity when he or she is injured.

In McElroy v. State of California (2002) 100 Cal.App.4th 546, two City of Orange police officers brought suit against the State of California and two California Highway Patrol officers for injuries sustained in a collision with the highway patrol officers after they had joined an ongoing pursuit.

The plaintiff officers sought to employ the statutory exception to the "firefighter's rule" (Civil Code § 1714.9(a)(1)), but prior case law holds that unintentional harm caused by law enforcement officers does not fall into that statutory exception. (Calatayud v. State of California (1998) 18 Cal.4th 1057.) The plaintiffs had tried to argue that the defendant highway patrol officers were not "jointly engaged" in the pursuit because they were not summoned to assist in the chase and had made no radio contact with the Orange Police Department, and consequently had

no idea what the pursuit was about). Nonetheless, the court found that the public policies underlying the "firefighter's rule" support immunity in this case.

> To limit the "firefighter's rule" to those situations where the officers are engaged in formally coordinated efforts ignores the reality that situations in the field may develop quickly and chaotically, and although officers arriving on the scene later might lack information available to officers originally summoned to the crisis, the former are nonetheless satisfying "their primary commitment to the public's essential safety and protection." [Citing Calatayud, 18 Cal.4th at 1069, 100 Cal.App.4th 546, 549.]

In Vasquez v. North County Transit District, 292 F.3d 1049 (9th Cir. 2002), the Ninth Circuit reversed a summary judgment in favor of the city because the plaintiffs' claim arose out of an allegedly malfunctioning railroad crossing gate arm, which was unrelated to the actual chase.

Similarly, in Terry v. Garcia (2003) 109 Cal.App.4th 245, the Court of Appeal reversed a summary judgment in favor of the defendant because the alleged cause of the plaintiff's injury was an act of negligence independent of the conduct that necessitated his response.

In Boon v. Rivera (2000) 80 Cal.App.4th 1322, the plaintiff police officer had arrived at the defendant's home after receiving an emergency call and found a man barricaded inside the family home. The defendant, the man's wife, told the officer that the man was not violent and, as a result, the officer responded with nonlethal force and was shot and severely injured. The Court of Appeal held that the firefighter's rule did not bar the plaintiff's claim because a police officer may expect force, even deadly force, in responding to an emergency call of a barricaded person, but the risk that someone at the scene will deceive the officer as to the nature of the violent tendencies of the person inside is not an inherent risk of a police officer's job. Further, the Court of Appeal held that the defendant owed the officer a duty of care under section 1714.9 not to affirmatively make misrepresentations as to the nature of the hazard the officer encountered.

XXXVII. STATUTE OF LIMITATIONS

Civil Code section 352 tolls statutes of limitations for the periods in which the plaintiffs were disabled due either to minority or insanity. The cause of action

would not accrue until the plaintiff had either reached the age of majority or regained sanity.

In addition, Civil Code section 340.1 extends the limitations period further in actions for recovery of damages suffered as a result of childhood sexual abuse. In such instances, the time for commencement of the action shall be within eight years of the date that the plaintiff attains the age of majority or within three years of the date that the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later. In Mark K. v. Roman Catholic Archbishop (1998) 67 Cal.App.4th 603,[26] the court interpreted subsection 1 of section 340.1(a) to limit the extension of the statute only as to claims against the individual perpetrator of the abuse and not to anyone else. The plaintiffs in Mark K. were denied recourse against the church organization based upon the alleged sexual molestation by a parish priest.

Belton v. Bowers Ambulance Service (1999) 20 Cal.4th 928 also concerns tolling of a statute of limitations, this time pursuant to Code of Civil Procedure section 352.1, which pertains to the disability of imprisonment. The Supreme Court overruled a prior appellate court decision, Hollingsworth v. Kofoed (1996) 45 Cal.App.4th 423, and held that a prisoner's time to sue a health care provider can be extended by incarceration up to the maximum three years from the time of the injury permitted by the MICRA limitations statute (Code of Civil Procedure section 340.5).

Bonifield v. County of Nevada (2001) 94 Cal.App.4th 298 considers tolling during the pendency of a related federal action as well as equitable tolling principles.

The plaintiffs, as decedent's survivors, brought a wrongful death action first in United States District Court on June 28, 1997, in connection with the death discovered on November 17, 1996.

On February 17, 2000, the plaintiffs and the defendants in that suit executed a stipulation for dismissal. The stipulation contained an order to have been executed by the court, but for some reason, the clerk filed it without the judge having ever signed it. The plaintiffs then filed a state court action on July 12, 2000. The defendants demurred on limitations grounds, and the court sustained the demurrer without leave.

---

[26] Also discussed briefly *supra* at page ? with respect to *respondeat superior*.

On appeal, the plaintiffs contended that the action was still tolled notwithstanding that the state court action was not filed within 30 days of the dismissal of the federal case because the federal case had never actually been dismissed because the court had not executed the order of dismissal.

The Court of Appeal rejected that argument relying on the language of FRCP 41(a)(1)(ii) that provides that a federal action may be dismissed by the plaintiff without an order of the court upon stipulation of the parties.

The plaintiffs also contended that 77 days remained of their six-month period following denial of their government tort claim. That argument failed as well because the 77th day was June 5, 2000, a week before they filed in state court on June 12.

The plaintiffs then turned to an equitable argument. That was rejected because they had not acted reasonably in allowing the 77 remaining days to pass without their having filed the state court case.

In Grell v. Laci LeBeau Corp. (1999) 73 Cal.App.4th 1300, which entailed two coordinated wrongful death and survival actions brought against a corporation in connection with the ingestion of the defendant's diet tea product, the trial court denied the plaintiffs' motion to vacate a summary judgment entered for the defendant on a statute of limitations ground. The plaintiffs had filed their suits beyond the period permitted by the statute of limitations, but asserted that the time was tolled because the defendant's corporate status was suspended for non-payment of taxes.

The Court of Appeal affirmed the order denying the motion to vacate the summary judgment and instead affirmed the summary judgment.

The court first noted the general rule is that the time for commencing an action continues to tick away so long as the proposed defendant can be sued and a personal judgment obtained against him or it. While a corporation suspended for failure to pay taxes may not prosecute or defend itself, nothing stops another party from suing it.

Gordon v. Law Offices of Aguirre & Meyer (1999) 70 Cal.App.4th 972 involves the statute of limitations for legal malpractice. The Fourth District Court of Appeal upheld the defendants' demurrers without leave to amend on the basis that Code of Civil Procedure section 340.6 uses the language that in no event shall the prescriptive limitation period be tolled except under the circumstances specified in the statute; the Legislature expressed an intent to disallow tolling under any other circumstances.

The plaintiffs had retained the defendant law firm to bring suit in connection with their purchase of interests in a limited partnership. On behalf of the plaintiffs, the defendants filed a class action suit in federal court.

During the course of litigation, the present plaintiff, Gordon, had met with Aguirre and Meyer and expressed concern over his obligations pursuant to certain promissory notes.

Thereafter, Aguirre and Meyer provided the plaintiff with notice of a proposed settlement of the class action claims, the notice making no mention of the fact that the class members who had signed promissory notes would still be liable under them. Gordon asked one of his lawyers how the proposed settlement would affect his liability on the promissory notes and was told that he had no reason to be concerned. He relayed that information to the other plaintiffs. Had the plaintiffs known that the settlement actually did not relieve them from liability under the promissory notes, they would not have accepted the settlement.

The federal court approved the settlement in 1991. In 1994, the creditor under the notes sued plaintiffs for the unpaid balances on the promissory notes plus interest and attorneys' fees. Then, in April 1995, the plaintiffs sued Aguirre & Meyer and individual attorneys for malpractice in Maricopa County, Arizona. The case was removed to a federal district court in Arizona, which dismissed the action on October 18, 1996, for lack of personal jurisdiction over the defendants.

Then, on December 3, 1996, the plaintiffs filed a complaint for professional negligence against Aguirre and Meyer in San Diego County Superior Court. They claimed that the statute of limitations for their malpractice suit had been equitably tolled during the pendency of the Arizona matter. They further asserted that the statute did not begin running until the plaintiffs first sustained injury in September 1994 when the suit was brought against one of their members.

Code of Civil Procedure section 340.6 codifies what is known as the discovery rule, and requires that a legal malpractice action be filed within one year of actual or constructive discovery of the elements of a cause of action. It also provides an absolute four-year time limit from the date of the wrongful act or omission, regardless of its discovery. It also provides exclusively for a certain tolling period, including the time that the negligent attorney continues to represent the client. Finally, it also states, "In no event shall the time for commencement of legal action exceed four years except that the period shall be tolled" during the time of the enumerated tolling provisions. The court held that that would be the totality of tolling, and that section 340.6 is not subject to the doctrine of equitable tolling.

Gryczman v. Pico Partners, Ltd. (2003) 107 Cal.App.4th 1 addresses the applicability of the discovery rule to breach of contract actions. In Gryczman, the plaintiff alleged that the defendant had conveyed certain real property without affording him notice and opportunity to exercise his right of first refusal as specified in the parties' contract. The trial court dismissed the action on the ground that it was barred by the applicable statute of limitations.

The Court of Appeal, however, reversed concluding that the discovery rule could be applied to breaches of contract that are committed in secret and where the harm flowing from those breaches will not be reasonably discoverable by the plaintiffs in the future. The Court of Appeal explained that there existed common factors that made applying the discovery rule proper. Those factors are "[t]he injury or the act causing the injury, or both, have been difficult for the plaintiff to detect ... the defendant has been in a far superior position to comprehend the act and the injury ... and the defendant had reason to believe the plaintiff remained ignorant he had been wronged." The Court of Appeal further explained that the discovery rule applies when the injury or the act causing the injury is difficult for the plaintiff to detect and not impossible. Accordingly, the statute of limitations was tolled until such time as plaintiff knew or should have known of the wrongful conduct at issue.

In Mills v. Forestex Co. (2003) 108 Cal.App.4th 625, the Court of Appeal addressed the discovery rule when homeowners filed an action against a contractor and a manufacturer for violations of the Song-Beverly Consumer Warranty Act, breach of express warranty, breach of implied warranty, and strict products liability based on problems with the siding that was installed on their home. The homeowners argued that although they had noticed the siding starting to warp, they had not discovered the identity of the manufacturer, the defective nature of the siding, the warranties applicable to the siding, the improper installation of the siding, and the failed attempted repairs to the siding. They concluded that the statute of limitations began to run when the damage first became appreciable and actual and they first discovered the nature and extent of the harm.

The Court of Appeal disagreed, holding that the discovery rule uses an objective test that looks not to what the particular plaintiff actually knew but to what a reasonable inquiry would have revealed. Thus, the court held that the siding problems were sufficiently appreciable to put the homeowners on notice to pursue their remedies and to start the three-year and four-year statutes of limitations to run.

In Shively v. Bozanich (2003) 31 Cal. 4th 1230, the Court of Appeal addressed the applicability of the discovery rule to a defamation case. The issue in Shively was whether the discovery rule may be employed to delay the accrual

of a cause of action for defamation beyond the point at which the defamation is published in a book. The Court of Appeal held that there could be no question that the cause of action accrued and the statute of limitations ran from the date the book was first generally distributed to the public, regardless of the date on which the plaintiff actually learned of the existence of the book and read its contents. Accordingly, the plaintiff's cause of action based upon the defamatory statements allegedly contained in the book were barred by the applicable statute of limitations.

Kline v. Turner (2001) 87 Cal.App.4th 1369 considers the three-year statute of limitations applicable to fraud. In Kline, the Court of Appeal held that the plaintiff, who had entered into a service contract with the defendants, was put on inquiry notice when the defendants without consulting the plaintiff wrote out a check that it owed under the contract with the plaintiff to the plaintiff's associate. The fact that the plaintiff's associate threatened the plaintiff if he did anything further to collect on the money had no legal consequence because the plaintiff at that point was aware of facts that should have led him to suspect wrongdoing on the part of the defendants and, thus, the statute of limitations began running as of that date.

In Lantzy v. Centex Homes (2003) 31 Cal.4th 363, the Supreme Court considered the ten-year limitations period for latent defects under Code of Civil Procedure section 337.15, holding that that statute is not subject to equitable tolling for repairs.

Similarly, in Jackson Plaza Homeowners Association v. W. Wong Construction (2002) 98 Cal.App.4th 1088, the Court of Appeal held that the ten-year statute of limitations under Civil Code section 337.15 in an action to recover against a contractor for latent construction defects is equitably tolled when the contractor attempts to repair the problem during the limitations period.

In Thomas v. Gilliland (2002) 95 Cal.App.4th 427, the plaintiff had filed a medical malpractice action three months after he discovered that he had sustained injuries as a result of medical treatment provided by defendant. The plaintiff then voluntarily dismissed the action but refiled it the same day. The Court of Appeal held that once the plaintiff dismissed the action, he did not get back the remaining nine months of the original one-year statute of limitations period.

In Artal v. Allen (2003) 111 Cal.App.4th 273, the Court of Appeal addressed Civil Code section 340.5 and specifically focused on the one-year statute of limitations that is triggered when the plaintiff discovers or through the use of reasonable diligence should have discovered the injury and also discovers its negligent cause. The Court of Appeal held that although a malpractice litigant

is required to pursue her claim diligently through discovery of the cause of her injury, the plaintiff's duty of diligence did not extend to submitting to surgery sooner in order to discover the negligent cause of her injury.

In Alcott Rehabilitation Hospital v. Superior Court of Los Angeles County (2001) 93 Cal.App.4th 94, the Court of Appeal held that the insanity tolling provision in Code of Civil Procedure section 352 applies to the one-year limitation period in Code of Civil Procedure section 340.5. Thus, the plaintiff in Alcott was able to toll the one-year statute of limitations due to her insanity in order to sue a nursing home for medical malpractice.

In Carrau v. Marvin Lumber and Cedar Co. (2001) 93 Cal.App.4th 281, the Court of Appeal addressed the future performance exception to the four-year statute of limitations (Commercial Code § 2725) to file a suit for breach of warranty. The Court held the majority of cases have concluded that the future performance exception applies only when the seller explicitly has agreed to warrant its product for a defined period of time. Thus, relying upon a majority of cases, the Court of Appeal held that generalized assertions in advertisements and literature do not rise to the level of a warranty explicitly extending to future performance.

In Robinson v. Chin & Hensolt (2002) 98 Cal.App.4th 702, the Court of Appeal addressed whether the four-year statute of limitations of Code of Civil Procedure section 337.1 applies to actions based on patent defects in improvements to realty. Section 337.1 was enacted in 1967 "in response to the construction industry's fear that it could face virtually unending liability due to the advent of discovery-based accrual rules for statutes of limitation." [Citations omitted.] The Court of Appeal held that whether or not section 337.1 applies depends on whether the defendant is a member of the classes of construction contractors designated in the statute. The Court of Appeal held that there was no dispute that the defendants as construction managers, designers, and contractors were not mere manufacturers and fell within the classes intended to be protected by the statute.

Apple Valley Unified School District v. Vavrinek, Trine, Day & Co. (2002) 98 Cal.App.4th 934, addresses the statute of limitations for accountant malpractice. In Apple Valley, the school district had brought suit against an accounting firm for accounting malpractice. The Court of Appeal held that the plaintiff's suit was barred by the two-year statute of limitations for accountant malpractice, which begins to run when the aggrieved party discovers the negligent conduct causing the loss or damage and suffers actual injury as a result of the negligent conduct. The court held that the fact the school district incurred out-of-pocket expenses when it engaged a new accountant and legal counsel in an effort to

limit its liability for actions induced by the defendant accounting firm constituted actual injury for purposes of the statute of limitations.

Moreno v. Sanchez (2003) 106 Cal.App.4th 1415, addresses the issue of agreements to modify the applicable statute of limitations. In Moreno, buyers brought suit against a home inspector for failing to discover and report certain defects in the house that they ultimately purchased. The parties had entered into an agreement providing that the statute of limitations for filing an action against the home inspector was one year from the date of the inspection. The Court of Appeal held that the delayed discovery rule applied regardless of the agreement between the parties because it would be unreasonable to expect the plaintiffs to have discovered any defects in the home at the moment of the inspection. Accordingly, the shortened statute of limitations accrued when the plaintiffs discovered or should have discovered the breach. In addition, the Court of Appeal held that a home inspector may be liable in tort for breach of his common-law or statutory duty to exercise due care in preparing a home inspection report.

In Jefferson v. County of Kern (2002) 98 Cal.App.4th 606, the Court of Appeal held that the plaintiff who was suing the county and a physician for malpractice and fraud was entitled to a jury trial to decide the issue of whether his action was time-barred despite the fact that his claim came under the Government Claims Act, which did not provide a right to a jury trial.

In Hydro-Mill Company v. Hayward, Tilton and Rolapp Insurance Associates, Inc. (2004) 115 Cal.App.4th 1145, the Court of Appeal discussed how to determine which statute of limitations applies to a cause of action. "[I]t is necessary to identify the nature of the cause of action, i.e., the 'gravamen' of the cause of action .... [T]he nature of the right sued upon and not the form of action nor the relief demanded determines the applicability of the statute of limitations under our code." Id. at 2202, citations omitted. Applying this criterion, the Court of Appeal in Hydro-Mill held that a claim for breach of fiduciary duty by an insured against its broker was actually a claim for professional negligence because the gravamen of the lawsuit was the broker's failure to execute its obligations as an insurance broker. Id. at 2204. As such, the two-year limitations period for professional negligence applied to the cause of action denominated breach of fiduciary duty rendering the breach of fiduciary duty claim untimely. Id.

Krupnick v. Duke Energy Morro Bay (2004) 115 Cal.App.4th 1026, addresses C.C.P. section 335.1 and former C.C.P. section 340, subdivision (3), which provided a one-year statute of limitations for personal injury actions. In 2002, the Legislature amended section 340, subdivision (3), to delete the one-year limitations period for personal injury actions. At the same time, it added section 335.1, which now provides a two-year statute of limitations for such

actions. The Court of Appeal in Krupnick held that section 335.1 does not expressly provide that it applies retroactively to claims already time-barred under former section 340(3). Id. at 1028. Rather, section 340.10 expressly states that the two-year limitations period will apply retroactively to terror victims of 9/11. Id. at 1028-1029. Given the clear language of the statute, the Court of Appeal held that it would not read any other exceptions into it. Id. at 1030.

XXXVIII. ELDER ABUSE

In 1982, the California Legislature enacted the Abuse of the Elderly and Dependent Adults Act. The stated purpose of the Act was quite noble: to encourage health care professionals to report suspected cases of such abuse, to gather information on the subject, to aid the state in establishing adequate services to aid all victims in a timely and compassionate manner, and to protect people who report such abuse.

Then in 1991, the Legislature amended the Act to impose financial sanctions upon individuals or institutions that exercise or allow physical or financial abuse to be perpetrated upon elder or dependent adults, and criminal penalties in circumstances where the elder or dependent adult is wilfully placed in a position where he or she is likely to face great bodily harm or death. The potentials of the liability for abusers is quite severe. Successful plaintiffs can in certain circumstances recover punitive damages and attorneys' fees. Such damages and attorneys' fees many times can dwarf the amounts awarded for medical bills and for pain and suffering.

The case of Covenant Care, Inc. v. Superior Court (2004) 32 Cal.4th 771 considers the imposition of punitive damages and the apparent conflict with MICRA (Civil Code § 3333.2, limiting pain and suffering damages arising out of a negligence claim against a health care provider, and Code of Civil Procedure § 425.13, which requires that a plaintiff seeking punitive damages in any action arising out of professional negligence of a health care provider obtain an order to allow him or her to seek those damages within two years of the filing of the action) and the Abuse of the Abuse of the Elderly and Dependent Adults Act. In this case, the plaintiffs were the children of a man who had been treated at a hospice facility owned and operated by defendant Covenant Care. More than two years after they filed their suit, they sought leave to file an amended complaint in which they alleged willful misconduct, elder abuse, and other intentional torts, and in which they asked for punitive damages. The defendant opposed the motion, contending among other things that the claim for punitive damages was time-barred pursuant to Code of Civil Procedure section 425.13.

The court noted that there is an inherent difficulty in trying to distinguish between the neglect addressed in the elder abuse statute and professional negligence in that some health care institutions, such as nursing homes, perform both custodial functions and provide professional medical care.

The court engaged in a thoughtful discussion of the purposes underlying MICRA and the Elder Abuse Act and ultimately determined that section 425.13 did not prohibit the plaintiffs from seeking punitive damages.

In so doing, it interpreted the California Supreme Court case of Delaney v. Baker (1999) 20 Cal.4th 23, which held generally that the intent of the Legislature in enacting the elder abuse law was to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults through the application of heightened civil remedies. The court in Covenant Care found its interpretation of Code of Civil Procedure section 425.13 to be consistent with the Delaney decision, which placed it at odds with Community Care & Rehabilitation Center v. Superior Court (2000) 79 Cal.App.4th 787, *rev. den.,* which ruled against the plaintiffs having the opportunity to recover punitive damages, relying on Code of Civil Procedure section 425.13.

The Elder Abuse statute has a one-year limitations period. Code of Civil Procedure section 343, however, provides, in pertinent part, that "unless a longer period is prescribed for a specific action, in any action for damages against a defendant based upon such person's commission of a felony offense for which the defendant has been convicted, the time for commencement of the action shall be within one year after judgment is pronounced." In Guardian North Bay, Inc. v. Superior Court (2001) 94 Cal.App.4th 963, this allowed the survivor of the decedent to recover even though the elder abuse had occurred years before the conviction of the health care facility for criminal elder abuse.

In Mack v. Soung (2000) 80 Cal.App.4th 966, the defendant claimed that only custodians or caretakers could be liable under the Elder Abuse Act and that because he was her physician and only treated her on an as-needed basis, he could not be liable under the Act. The Court of Appeal rejected his argument on the basis that both Welfare and Institutions Code section 15657, which discusses reckless neglect, and section 15657.2, which discusses professional negligence, can apply to health care practitioners who provide care or custody of the elderly if their misconduct rises to the level of neglect, abuse or abandonment.

In Conservatorship of Levitt (2001) 93 Cal.App.4th 544, the Court of Appeal affirmed the trial court's reduction of the attorney fee request by 15 percent on the basis of the size of the estate involved. The court cited to Welfare & Institutions Code section 15657.1, which provides that all factors relevant to the

value of services rendered be considered, and the value of the estate is an appropriate factor in that consideration.

XXXIX. EMPLOYMENT CASES

A. Wrongful Termination and Retaliation

In Colarossi v. Coty U.S. Inc. (2002) 97 Cal.App.4th 1142, the plaintiff brought suit against her employer for wrongful termination alleging that she was terminated because she participated in the investigation of Coty's director of merchandising who was accused of sexual harassment. The trial court granted summary judgment in favor of the defendant on the basis that the plaintiff had failed to create a triable issue of fact as to why she was terminated. The Court of Appeal reversed holding that both direct and circumstantial evidence can be used to show an employer's intent to retaliate. Circumstantial evidence typically relates to such factors as the plaintiff's job performance, the timing of events, and how the plaintiff was treated in comparison to other workers. The Court of Appeal ruled that the trial court should have taken into account the declaration of a Coty employee that he had heard the director state she would take revenge on those who cooperated in the investigation against her. Further, the plaintiff had presented evidence that she had received numerous awards and that nothing negative had ever been said about her prior to the investigation.

In Palmer v. Regents of the University of California (2003) 107 Cal. App.4th 899, the plaintiff had brought a common-law action for wrongful termination in violation of public policy against her former employer, Regents of the University of California. The trial court had granted the Regent's motion for summary judgment because the plaintiff had failed to exhaust the university's internal grievance procedures. The Court of Appeal affirmed the trial court's judgment holding that when an internal grievance mechanism has been established by a public or private entity, the plaintiff must exhaust those internal remedies before filing a common-law suit for retaliation because doing so could have eliminated or at least minimized the injury sustained by the plaintiff.

Sinatra v. Chico Unified School District (2004) 119 Cal.App.4th 701 provides that to withstand a legal challenge to a wrongful discharge claim, a plaintiff must identify a policy that is fundamental and substantial in that it is tethered to constitutional or statutory law, that inures to the benefit of the public rather than to a personal or proprietary interest of the individual employee, and that is clearly articulated at the time of discharge. The statute that the plaintiff in Sinatra relied on for his FEHA claim provided that the governing board of a school district or a county superintendent of schools may establish regulations

that allow their certificated employees to reduce their workload from full-time to part-time duties. The Court of Appeal held that this statute did not comply with what the courts have clearly and consistently demanded, i.e., that the public policy be fundamental and substantial and inure to the benefit of the public at large. This statute was established for the plaintiff's personal benefit, granted the district the discretion to implement a part-time program for senior employees, and the benefit to the public was indirect and intangible.

In Grinzi v. San Diego Hospice Corp. (2004) 120 Cal.App.4th 72, the Court of Appeal held that the First Amendment free speech provision does not support a public policy on which to base a tortious discharge claim against a private employer's termination of an employee for the employee's exercise of such First Amendment rights. The Court of Appeal relied on decisions of sister state and federal courts which held that such a claim for tortious discharge fails because a private employer is not bound by constitutional provisions guaranteeing freedom of speech.

In Jersey v. John Muir Medical Center (2002) 97 Cal.App.4th 814, the plaintiff brought an action against her former employer, John Muir Medical Center, and others for wrongful termination in violation of public policy, sex discrimination, breach of implied contract, and intentional and negligent infliction of emotional distress. The plaintiff was an at-will employee of the hospital who was terminated after she brought suit against a former patient for assaulting her during the course of her employment. The trial court granted the defendant's motion for summary judgment finding that it was not a violation of public policy for the defendants to terminate the plaintiff for refusing to dismiss her lawsuit against the former patient. The Court of Appeal held that the issue was whether the plaintiff's termination violated a public policy clearly articulated by a legislative or regulatory body. It did not find any such policy and, thus, the Court of Appeal affirmed the trial court's decision. The Court of Appeal also affirmed the trial court's judgment on the other causes of action.

In Mackey v. Department of Corrections (2003) 105 Cal.App.4th 945,[27] the Court of Appeal held that the plaintiffs' allegations that the prison warden had afforded his paramours preferential treatment from their superiors and that they suffered retaliatory treatment from their superiors as a result of their complaints neither constituted a claim for hostile work environment nor retaliation. The conduct complained of was not sexual harassment but unfairness.

In Holly D. v. California Institute of Technology and Stephen Wiggins, 339 F.3d 1158 (2003) the plaintiff alleged that she committed various sexual acts

[27] For discussion only; review granted.

with her supervisor because she believed that if she refused she would put her employment in jeopardy. The court, however, held that the fact that the plaintiff had negative reviews prior to commencing her sexual relationship with her supervisor and then received excellent reviews during the period that she was involved in a sexual relationship with him did not, without more, establish a nexus between the two to sustain a cause of action under Title VII. The Court of Appeal held that a reasonable woman in the plaintiff's position would not have concluded that the plaintiff's employment status was conditioned on accepting his sexual advances.

In Akers v. County of San Diego (2002) 95 Cal.App.4th 1441, the plaintiff, a former county deputy district attorney, brought suit against the county for various FEHA violations, including retaliation. The plaintiff contended that four months after she complained about pregnancy/gender discrimination, the county issued a negative performance review and counseling memorandum, accusing her of incompetence, dishonesty and insubordination; that she left the district attorney's office because of the adverse actions take against her and the severe damage to her reputation within the office; and that there was sufficient evidence that the county's retaliatory actions would preclude reasonable promotional opportunities. The Court of Appeal held that the plaintiff had presented sufficient evidence to support an adverse employment action, as required to demonstrate unlawful retaliation.

In Colores v. Board of Trustees of the California State University (2003) 105 Cal.App.4th 1293, the Court of Appeal rejected an employer's argument that an employee on disability retirement cannot assert a cause of action for constructive discharge. The court held that the employer's position would force employees who qualify for disability retirement and have been treated wrongfully to choose between taking the disability retirement or quitting their job in order to sue for constructive wrongful termination. The court would not put employees to such an unreasonable choice.

B. Hostile Work Environment and Harassment/Discrimination

In Yanowitz v. L'Oreal USA, Inc. (2003) 106 Cal.App.4th 1036, the plaintiff had brought an action against her former employer for unlawful retaliation under FEHA, sex, age and religious discrimination under FEHA, violation of the unfair competition law, breach of the covenant of good faith and fair dealing, and negligent infliction of emotional distress. The trial court granted the defendant's motion for summary judgment as to all of the causes of action, finding that the plaintiff had not engaged in "protected activity." The plaintiff did not appeal her sex, age and religious discrimination claims. The Court of Appeal reversed the judgment on the plaintiff's FEHA claim for retaliation holding that the plaintiff's

activity was protected. She had explicitly been ordered by a male supervisor to fire a female employee because the supervisor did not find the employee sexually attractive. The Court of Appeal found that the male supervisor's order constituted sex discrimination as he would not have ordered the employee fired had she been a man because a man's attractiveness would not have been an issue to him. The Court of Appeal affirmed the trial court's judgment in all other respects.

In Manatt v. Bank of America, 339 F.3d 792 (2003) the Court of Appeal addressed whether the trial court properly granted summary judgment in favor of the defendant on the plaintiff's hostile work environment and retaliation claims. Over a span of two and a half years, the plaintiff had been the subject of various racially derogatory jokes, on one occasion her co-workers ridiculed her because of her accent, on another occasion one of her co-workers stated that he was not a "China man," and other co-workers pulled their eyes back mocking the appearance of Asians. The Court of Appeal held that the plaintiff did not state a claim for hostile work environment because her co-workers' conduct was not sufficiently severe and pervasive. Further, as to her retaliation claims, the court held that the Bank had presented evidence indicating that the plaintiff's transfer to a different department was the result of a reduction in work volume and that she had failed to rebut the bank's legitimate nondiscriminatory reason and had failed to establish a causal connection between the bank's decision and her complaint regarding her co-workers' conduct.

In Salazar v. Diversified Paratransit, Inc. (2002) 103 Cal.App.4th 131, the Court of Appeal held that FEHA (Government Code § 12940) did not create employer liability when a non-employee client or customer sexually harasses and employee.

Similarly, in Carter v. California Department of Veteran Affairs (2003) 134 Cal.Rptr.2d 768,[28] the Court of Appeal held that FEHA does not impose employer liability for non-employee discrimination and harassment. Note though that the Legislature has amended FEHA to create liability under such circumstances.

In Herberg v. California Institute of the Arts (2002) 101 Cal.App.4th 142, the Court of Appeal held that though a single incident of harassment may be sufficient to establish an employer's liability, such an incident must be severe in the extreme and generally must include either physical violence or the threat thereof.

In Rieger v. Arnold (2002) 104 Cal.App.4th 541, the Court of Appeal interpreted the meaning of the exception to Evidence Code section 1106, which

---

[28] For discussion purposes only; review granted.

admits evidence of prior sexual conduct between the alleged victim and the perpetrator. The court held that the proper meaning of "perpetrator" included the individual defendants and those whose conduct the plaintiff ascribed to the employer, regardless of whether the sexual conduct occurred in or outside the workplace.

In Pottenger v. Potlatch Corporation, 329 F.3d 740 (2003) the Court of Appeal held that comments such as "old management team," "old business model," and "deadwood" did not sufficiently support an inference of age discrimination so as to create a triable issue of material fact that would defeat summary judgment.

C. Miscellaneous Employment Cases

In McDaneld v. Eastern Municipal Water District Board (2003) 109 Cal. App.4th 702, the employee had requested family leave to provide medical care for his father and was discharged after it was learned that he had used part of the family leave to play golf and work in his yard. The Court of Appeal held that the water district did not violate the employee's right to family leave under 29 U.S.C. §§ 2601-2619 and Government Code section 12945.2 by reasonably concluding that the employee had misused his leave and been untruthful about it during an investigation.

In O'Hare v. Municipal Resource Consultants (2003) 107 Cal.App.4th 267, the Court of Appeal held that employment contracts requiring arbitration of an employee's claims but not employer's claims is unconscionable because it lacks the required "modicum of mutuality."

In Soltani, Dowlatshahi, Vega & Kabir v. Western Southern Life Ins. Co., 258 F.3d 1038 (2001) the Court of Appeal held that contractual provisions that shorten statutes of limitation to six months in the case of filing suits for wrongful termination or unfair business practice are enforceable. Requiring ten days' written notice of "the particulars of a claim" prior to filing suit, however, is unconscionable and unenforceable because it serves no purpose. The short time period does not give sufficient time for the company to investigate the claims and also does not serve the purpose of judicial economy because it is unaccompanied by any requirement to exhaust internal intracompany grievance procedures.

In Phillips v. St. Mary Regional Medical Center (2002) 96 Cal.App.4th 218, the Court of Appeal held that FEHA did not support plaintiff's claim for wrongful termination in violation of public policy because the defendant was exempt from liability under Government Code section 12926(d) from the plaintiff's common-law claim.

In Grant-Burton v. Covenant Care, Inc. (2002) 99 Cal.App.4th 1361, the Court of Appeal held that the plaintiff's claim based on Labor Code section 232, which expressly forbids the termination of an employee for disclosing the amount of his/her wages, was sufficient to support the plaintiff's claim of wrongful termination in violation of public policy.

In Northrop Grumman Corp. v. Workers' Compensation Appeals Board (2002) 103 Cal.App.4th 1021, the Court of Appeal held that an employer faced with allegations of racial discrimination is required by the Fair Employment and Housing Act to make an investigation. Thus, in the plaintiff's case where there was no evidence of an arbitrary or unlawful motive for the employer's investigation and there was no evidence of an intent to mislead, deceive, or defraud, or of collusion or unlawful design in conducting the investigation, a finding that the action was not a "good faith personnel action" was not supported by substantial evidence.

In Kohler v. Interstate Brands Corp. (2002) 103 Cal.App.4th 1096, the Court of Appeal held that an employee's gender-based harassment claim under FEHA was barred by plaintiff's signed standard workers' compensation compromise and release agreement releasing the employer from all claims and causes of action arising from work-related stress. This case has been overruled by Claxton v. Waters (2004) 34 Cal.App.4th 367, which holds that workers' compensation releases release only workers' compensation claims and not personal injury civil claims.

Fittante v. Palm Springs Motors, Inc. (2003) 105 Cal.App.4th 708 addresses Labor Code section 970, which prohibits an employer from fraudulently inducing an employee to move to take employment. An employee's statutory rights under section 970 are unwaivable, and an arbitration agreement that encompasses such rights must satisfy certain criteria. It must provide for neutral arbitrators, provide for more than minimal discovery, require a written award, provide for all of the types of relief that would otherwise be available in court and it may not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitral forum.

In Reynolds v. Bement (2003) 107 Cal.App.4th 738, the Court of Appeal considered whether corporate agents could be personally liable for unpaid wages. The court looked to the Legislature, which has determined that the party "employing labor" bears the burden of complying with the wage and hour laws. In contrast, only misdemeanor penalties and civil fines can be imposed against persons acting on behalf of an employer or officers and agents of the employer. Thus, the court held that responsibility for compliance with wage and hour laws rests with the employer and not corporate agents.

In Cucuzza v. City of Santa Clara (2002) 104 Cal.App.4th 1031, the Court of Appeal discussed the continuing violation doctrine. The court recognized that though the doctrine allows an employee to raise a claim based on conduct that occurred in part outside the limitations period, it did not apply when the situation had reached "permanence," that is, once it was clear to a reasonable employee that any further efforts at informal conciliation to obtain reasonable accommodation or end harassment would be futile.

In Silo v. CHW Medical Foundation (2002) 27 Cal.4th 1097, the Court of Appeal considered whether a Catholic Hospital, though not an "employer" within the meaning of FEHA, could nonetheless be liable for terminating an employee for using what it considered objectionable religious speech in the workplace. The Court of Appeal held that there was no clear public policy against religious organizations prohibiting what they consider to be inappropriate religious speech and, therefore, no liability in tort for such an organization's termination of an employee who engages in such speech.

In Hernandez v. Hughes Missile Systems Company, 298 F.3d 1030 (2002) the Court of Appeal held that, under the doctrine of *respondeat superior*, an employer may be liable for defamatory statements made by its employees if the statements were made within the scope of the individual defendant's employment, such as those allegedly made by individual defendants while on the job and concerning matters of interest to the employer and its employees. After certiorari was granted by the United States Supreme Court, it was remanded on other grounds.

The Court of Appeal also held in Hernandez v. Hughes Missile Systems Company (9th Cir. 2004) 362 F.3d 566, that Title I of the Americans with Disabilities Act protects qualified individuals with a drug addiction who have been successfully rehabilitated. Thus, an employer's unwritten policy against rehiring former employees who were terminated for a violation of its misconduct rules, one of which was testing positive for drug use, violates the ADA.

In Grant v. Comp U.S.A. (2003) 109 Cal.App.4th 637, the DFEH had issued the plaintiff a right-to-sue letter but then rescinded it. It then proposed a settlement, which was not accepted. The Court of Appeal held that the employee's right to sue arose by operation of law when the DFEH failed to resolve the matter within one year from the time she filed her administrative complaint. The employee's failure to obtain a second right-to-sue letter did not preclude a finding that she had exhausted her administrative remedies.

In Waste Management, Inc. v. The Superior Court of San Diego County (2004) 119 Cal.App.4th 105, the Court of Appeal held that a parent corporation is

not responsible for the working conditions of its subsidiary's employees based on the existence of the parent-subsidiary relationship. The parent corporation may only be liable if it assumes a duty to act by affirmatively undertaking to provide a safe working environment at the subsidiary's workplace. Accordingly, the wife and children of an injured worker in Waste Management were unable to succeed on their negligence and wrongful death causes of action against the parent corporation because they did not allege an independent tort by the parent company, nor did they allege that it assumed a duty to ensure the safety of the subsidiary's employees, or that the parent company owned, operated, or serviced the truck that killed the worker.

In Enlow v. Salem-Keizer Yellow Cab, Inc. (2004) 371 F.3d 645, the Court of Appeal affirmed the lower court's denial of the plaintiff's partial motion for summary judgment. While the plaintiff presented direct evidence that would support an inference that his employment was terminated by an age-discriminatory practice, his employer presented a legitimate, nondiscriminatory reason for temporarily terminating the plaintiff's employment. Accordingly, as the evidence presented by the employer created a genuine issue of material fact regarding whether or not the termination was with discriminatory animus, the district court did not err in denying the plaintiff's motion for partial summary judgment.

Department of Rehabilitation v. Workers' Compensation Appeals Board (2003) 30 Cal. 4th 1281 addresses a claim for discrimination pursuant to Labor Code section 132a. To succeed on a 132a claim (discrimination against workers' compensation claimants), the employee must establish at least a prima facie case of lost wages and benefits caused by the discriminatory acts of the employer. The employee must establish discrimination by a preponderance of the evidence, at which point the burden shifts to the employer to establish an affirmative defense.

In Department of Rehabilitation, the employee alleged that the employer violated labor code section 132a because it required him to use sick leave and vacation leave when he was away from the workplace seeking treatment for his permanent injury. The Court of Appeal held that the employee's claim failed because he did not allege that the other employees were permitted to be away from their workplace for medical care or that they did not have to use their sick leave if they wished to be paid their full salaries. Accordingly, the employee failed to demonstrate that he was a victim of discrimination within the meaning of Labor Code section 132a.

XL. CONSPIRACY

In June 2001, the California Supreme Court handed down its decision in Aguilar v. Atlantic Richfield Co. (2001) 25 Cal.4th 826. In that case, the plaintiff had filed suit against the Atlantic Richfield Company and eight other large petroleum companies for conspiring to restrict gasoline output and consequently raise its price in violation of section 16720 of the Cartwright Act (Business and Professions' Code sections 16700, et seq.)

The defendants each filed motions for summary judgment setting forth evidence that they made their capacity, production, and pricing decisions independently. The plaintiff opposed the motions by presenting evidence of the companies' gathering and disseminating capacity, production, and pricing information.

The trial court initially granted the defendants' motions for summary judgment but later granted the plaintiff's motion for a new trial. The Court of Appeal then reversed in favor of the defendant oil companies, and the Supreme Court affirmed the judgment of the Court of Appeal. In so doing, it held that the plaintiff was required to present evidence that tended to exclude the possibility that the defendants acted independently rather than collusively, and she had not done so.

XLI. WRONGFUL DEATH: STANDING

In California, an action for wrongful death is governed solely by statute. (Marks v. Lyerla (1991) 1 Cal.App.4th 556, *rev. den*.) The right to bring a wrongful death action is limited only to those persons described by the Legislature, and the category of persons eligible is strictly construed. (Id.)

In Fraizer v. Velkura (2001) 91 Cal.App.4th 942, a trial court found that a grandmother/guardian of a minor decedent, whose parents' parental rights had previously been terminated, had no standing to bring a wrongful death action against a defendant physician. The Court of Appeal reversed, and held that the grandmother had standing under the wrongful death statute (Code of Civil Procedure § 377.60) and the intestate succession statute (Probate Code § 6402(d)). The court reasoned that the order divesting the parents of all legal rights with respect to the minor had no effect upon the grandmother because the order made no mention of the grandparents. (Fraizer, *supra* at 946, *citing* Matter of Baby Girl D.S. (D.C. 1991) 600 A. 2d 71, 84)

A. Loss of Consortium

In Zwicker v. Altamont Emergency Room (2002) 98 Cal.App.4th 26, the Court of Appeal upheld the trial court's decision to grant summary judgment against the plaintiff on her loss of consortium cause of action because she could not assert such a claim for injury that occurred prior to the marriage.

XLII. COMMON CARRIER

In Ingham v. Luxor Cab Co. (2001) 93 Cal.App.4th 1045, the 57-year-old plaintiff, who had been suffering from diabetes for some twenty years, took a cab ride to see her dentist. Her medical condition rendered her physically unstable, she suffered dizzy spells that caused her to suffer falls, and she needed a cane to stand or walk.

For his own reasons, the cab driver insisted that the plaintiff exit the cab two blocks away from her destination, even though she told the driver that there was a steep hill, she did not think she could walk to the clinic from there, and she did not feel well. Nevertheless, he told her a second time to "get out," and she did. He sped off. After she took a few steps, she "tilted," fell backwards, and fractured her hip.

The trial court granted summary judgment in favor of the taxicab company on the basis that the passenger has no contractual right to be taken to a designated place.

The Court of Appeal reversed finding that the court's analysis and conclusion were "clearly erroneous." It first noted that a taxicab is a common carrier, and as such, it is held to a higher standard of care for its passengers under Civil Code section 2100. (93 Cal.App.4th at 1050.) It cited a long line of cases to the effect that, when a common carrier contracts to convey a person, that contract gives rise to a duty to deliver the person to his or her destination. And, the failure to do so can justify tort damages. (93 Cal.App.4th at 1051.)

Platzer v. Mammoth Mountain Ski Area, *supra,* 104 Cal.App.4th 1253 discusses ski lifts as common carriers with respect to the enforceability of a release as to ordinary negligence.

XLIII. EVIDENTIARY ISSUES

In Elsner v. Uveges, 2004 Cal. Lexis 11907, the Fourth Appellate District considered the amendment to Labor Code section 6304.5, which repealed the long-standing rule prohibiting consideration of regulations of the California Occupational Safety and Health Act (Cal-OSHA) in tort actions by employees other than their own employers for injuries suffered in the work place. Notwithstanding the language of the statute, the court found the amended statute to be ambiguous and looked to its legislative history to reach the conclusion that Cal-OSHA standards remain inadmissible in third-party tort actions.

XLIV. BUSINESS AND PROFESSIONS CODE SECTION 17200, et seq.

In Schnall v. Hertz Corporation (2000) 78 Cal.App.4th 1144, a car renter had brought an action seeking damages and injunctive relief from Hertz based on Hertz's rental agreement, which required renters to choose either to purchase fuel from it at the commencement of the rental or to pay a fuel service charge if they failed to return the car with a full tank. The court of appeal held that because renters had the option of avoiding the fuel service charge it was not unlawful within the meaning of Civil Code section 1936(m)(2) which permits a rental car company to impose additional charges for optional services if the renter knows that charge is avoidable. Accordingly, it did not violate Business and Professions Code section 17200, and the Court of Appeal upheld the trial court's judgment to sustain the demurrer as to this cause of action without leave to amend.

The Court of Appeal also held, however, that a triable issue of fact existed as to whether the practice of stating the amount of the fuel service charge in a small, hard-to-read document separate from the rental agreement was an unfair and fraudulent practice. The failure to make it clear to customers that the unavoidable charge is considerably higher than the retail rate might encourage customers to incur the fuel service charge which was not the purpose of Civil Code section 1936.

Schnall also notes the important distinction between a cause of action for common-law fraud and one for fraud under the Business and Professions Code. Under the Business and Professions code, a violation can be shown even if no one was actually deceived, relied upon the fraudulent practice, or sustained any damage. It is only necessary to show that members of the public are likely to be deceived.

In Community Assisting Recovery, Ins. v. Aegis Security Ins. Co. (2001) 92 Cal.App.4th 886, the plaintiff, a non-profit corporation, brought an action against 194 insurance companies alleging that the defendants were adjusting property loss claims on the basis of replacement cost less depreciation rather than on the basis of fair market value, and this constituted a violation of Business and Professions Code section 17200. Insurance Code section 2071 provides that the insured carries the initial responsibility to determine the actual cash value or the fair market value of the property at the time of the loss. If the insurer then offers the replacement cost less depreciation, the insured may demand an appraisal. The Court of Appeal held that in light of scheme set out by Insurance Code section 2071, the practice of the insurance companies did not constitute a violation of Business and Professions Code section 17200. Accordingly, the Court of Appeal held that the trial court properly sustained the defendants' demurrers without leave to amend.

In Snapp & Associates Ins. Services, Inc. v. Robertson (2002) 96 Cal. App.4th 884, the Court of Appeal held that the discovery rule, which delays accrual of certain causes of action until the plaintiff has actual or constructive knowledge of facts giving rise to the claim, does not apply to unfair competition actions. Thus, the limitations period of Business and Professions Code section 17208 begins to run irrespective of whether the plaintiff knew of its accrual, unless the plaintiff can successfully invoke the equitable tolling doctrine.

In Lavie v. Procter & Gamble Co. (2003) 105 Cal.App.4th 496, the Court of Appeal affirmed the trial court's decision and held that the "reasonable consumer" standard was properly applied to evaluate whether commercial advertisements were likely to deceive the public.

In Smith v. State Farm Mutual Automobile Insurance Co. (2001) 93 Cal. App.4th 700, the Court of Appeal held that insurers who offered uninsured motorist coverage on an all-or-nothing basis when a single policy covered multiple vehicles did so as required by Insurance Code section 11580.2 and, thus, neither violated Business and Professions Code section 17200 nor the Cartwright Act (Bus. & Prof. Code § 16700). The court also held, however, that this same practice when there are individual policies for each of an uninsured's multiple vehicles could constitute an unfair business practice and also could violate the Cartwright Act.

In Gregory v. Albertson's Inc. (2002) 104 Cal.App.4th 845, a private citizen filed suit against Albertson's alleging violation of Business and Professions Code section 17200 on the basis that the supermarket closed its business in a mall to open another nearby, with the intention of keeping the closed location unoccupied to preclude competition. The Court of Appeal held that this did not

violate section 17200. Further, to the extent that the supermarket's actions would produce the kind of blight condemned by Health & Safety Code section 33035, the only remedy was that of public participation in a redevelopment project.

In Rosenbluth International v. Superior Court (2002) 101 Cal.App.4th 1073, the Court of Appeal held that a plaintiff who brought suit on behalf of the general public lacked standing to file suit under Business and Professions Code section 17200 against a travel agency that served large corporate clients. The Court of Appeal recognized that an action under section 17200 may be brought on behalf of the general public; however, in this instance the travel agency's customers were sophisticated corporations not the general public.

The Court of Appeal in Bowen v. Ziasun Technologies, Inc. (2004) 116 Cal.App.4th 777 addressed whether or not Business and Professions Code section 17200 was intended to apply to securities transactions. The Court of Appeal affirmed the trial court's decision that it does not. The Court of Appeal noted that in this case federal case law was quite persuasive in that section 17200 was known as California's "little FTC Act," which mirrors its federal counterpart, the Federal Trade Commission Act, 15 U.S.C. § section 45, et seq. The FTC has never undertaken to adjudicate deceptive conduct in the sale and purchase of securities. Nothing in section 17200 indicated a different intent and, accordingly, the Court of Appeal held that section 17200 does not apply to securities transactions.

A. Miscellaneous Legislation

In Bescos v. Bank of America (2003) 105 Cal.App.4th 378, the Court of Appeal interpreted the California Vehicle Leasing Act (Civil Code § 2985.7 et seq.) and the Consumer Legal Remedies Act (Civil Code § 1750 et seq.). The court defined "lessor" under the act and held that an assignee may be considered a lessor only if the assignee has a substantial involvement in the lease transaction. As the bank in Bescos was not a "lessor" and did not have the requisite substantial involvement, the Court held that it was neither liable for a violation of the Vehicle Leasing Act nor the Consumer Legal Remedies Act.

Corbett v. Hayward Dodge, Inc. (2004) 119 Cal.App.4th 915 addresses the recovery of attorneys' fees in an action based on the Consumer Legal Remedies Act. While this act permits an award of attorney fees to a prevailing defendant if the plaintiff filed the lawsuit "not in good faith," no court had previously interpreted the meaning of good faith. The Court of Appeal held that the appropriate method of assessing good faith is a subjective test, which requires a factual inquiry into the plaintiff's state of mind rather than an objective

test inquiring into whether a reasonable attorney would have found the lawsuit meritorious.

Elizarraras v. L.A. Private Security Services, Inc. (2003) 108 Cal.App.4th 237 addresses statutory immunity as expressed in Business and Professions Code section 25602, which provides immunity to those who sell, furnish, give, or cause to be sold, furnished or given away any alcoholic beverages to an obviously intoxicated person. An exception to this immunity is if alcohol is sold to an intoxicated minor.

In Elizarraras, a private security company was hired by a restaurant that serves alcoholic beverages to provide security for a dance party being held at the restaurant. Two intoxicated minors attended the party and after an altercation drove away and were involved in a fatal accident. The Court of Appeal held that the private security company was immune from liability because it did not sell alcohol to the intoxicated minors. Further, the security company did not have a legal duty to ensure that minors were not consuming alcoholic beverages or driving while intoxicated.

Brasher's Cascade Auto Auction v. Valley Auto Sales & Leasing (2004) 119 Cal.App.4th 1038 addresses former California Uniform Commercial Code section 9307, which has been revised and recodified as section 9320. As a general rule, a buyer of goods does not take free of a prior security interest. A major exception to this rule, however, was set forth in section 9307, which provided in part that a buyer in the ordinary course of business takes free of a security interest created by his seller even though the security interest is perfected and even though the buyer knows of its existence. The Court of Appeal held that for purposes of section 9307, a merchant buyer must observe reasonable commercial standards to attain the protection of buyer in the ordinary course status.

In Fernandez v. Lawson (2003) 31 Cal.4th 31, a tree-trimmer working for an unlicenced tree-trimming service was injured when he fell from a tree he was working on. He sued the homeowner claiming that the employer's licensure rendered the homeowner liable under the California Occupational Safety & Health Act (CalOSHA).

The trial court granted summary judgment on the ground that CalOSHA did not apply to non-commercial tree-trimming at a private residence. The Court of Appeal reversed, but the Supreme Court reversed the judgment of the Court of Appeal and remanded the case. In so doing, the court interpreted the "household domestic service" language of the statute as exempting a broad category of

workers doing non-commercial activities both within and outside a residence from CalOSHA regulation.

In Pastoria v. Nationwide Insurance (2003) 112 Cal.App.4th 1490, the Court of Appeal held that insureds, who had purchased health insurance policies without having been told by their insurance companies of imminent premium increases and benefit reductions, could withstand a demurrer as to their claims for unfair competition, fraud, and negligent failure to disclose. Essentially, Insurance Code sections 330, 331, 332, 334, and 361 provide that the defendants had a duty to notify them about impending changes in their insurance policy before the plaintiffs purchased it. On this basis, the plaintiffs could successfully allege that the insureds negligently failed to disclose impending changes in the insurance policy and that this also constituted a fraudulent non-disclosure of material facts. Similarly, an allegation of violation of these insurance statutes allowed for the plaintiffs to allege their unfair competition claim.

XLV. JURISDICTION

A non-party can be bound by the litigation choices made by his virtual representative if the non-party's interests are so similar to a party's that that party is considered his virtual representative. Irwin v. Mascott (2004) 370 F.3d 924. In Irwin v. Mascott, the Court of Appeal addressed whether or not a Magistrate Judge had jurisdiction over a non-party. The Court of Appeal held that the non-party, a senior corporate officer of Commonwealth, a named defendant in the action, was within the jurisdiction of the magistrate judge. The non-party had a close relationship with the named defendants, i.e., he was Commonwealth's primary corporate officer responsible for the collection letters the plaintiffs alleged were in violation of federal and state law. There was no assertion that the non-party's interests diverged from that of the named defendants. The non-party was also intimately involved in the litigation. He submitted several key declarations and sat for two depositions. He participated fully in the underlying litigation and made no objection to the Magistrate Judge's jurisdiction until the plaintiffs moved to sanction him for violation of the injunction ordered by the Magistrate Judge. Accordingly, the Court of Appeal held that when the parties consented to be bound by the orders of the Magistrate Judge, they spoke for the non-party as well.