LOW, BALL & LYNCH
ATTORNEYS AT LAW

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ANTI-SLAPP STATUTE

***D.C. v. R.R.* (2010) 182 Cal.App.4th 1190**

Facts:

Plaintiff, a teenager with a burgeoning singing career, created a website which allowed others to make comments on it. Some of plaintiff's high school classmates anonymously put derogatory and threatening comments on the website about plaintiff's sexual orientation – e.g., a student wanted to rip plaintiff's heart out and feed it to him; that he wanted to kill plaintiff, and that he was going to pound his head in with an ice pick. Plaintiff's parents moved the family to another part of the state because of these threats. Plaintiff brought suit against the classmates and their parents under Civil Code sections 51.7(a) and 52.1 which, prohibit threats of violence motivated by hate speech based on sexual orientation. One of the defendants moved to dismiss under the anti-SLAPP statute, Code of Civil Procedure section 425.16, but the trial court denied the motion.

Appellate Court Decision:

The Court of Appeal affirmed the order denying the special motion to strike, holding that defendants failed to make the requisite showing that the post was protected speech and therefore subject to the anti-SLAPP statute. Under either a subjective or objective standard, defendants failed to show that the post, which they claimed was intended as jocular humor, was not a "true threat." Under the objective or "reasonable recipient" standard, the message was unequivocal, stating a serious expression of intent to inflict bodily harm and showing deliberation on the part of the author. It was not required that the poster have the intent to inflict bodily harm in the precise manner described, nor that he have an intent to kill. Defendants also did not make a sufficient showing of protected speech under the subjective or "actual intent" standard of the true threat analysis because they presented conflicting evidence on the subject of intent. The message itself implied that the poster intended the message to be interpreted as a threat, as did the actions of his parents and his own statements about one-upmanship, peer pressure, and idiocy; at the same time, the poster's statements about his jocular intent, good character, and specific behavior on other occasions implied that he did not have that intent. Finally, even assuming the message was a joke and thus constitutionally protected, it was not a statement made in connection with a "public issue," as that term is used in the anti-SLAPP statute. Plaintiff student was not a "public figure," even though he was using the Web site to pursue an entertainment career. The trial court, therefore, correctly denied the anti-SLAPP motion to dismiss.

***Rivera v. First Databank, Inc*. (2010) 187 Cal.App.4th 709**

Facts:

Plaintiffs, the family of Bruce Rivera who committed suicide after he began using the anti-depressant

drug Paxil, sued defendant, an independent publisher of medication databases. The suit was based on the allegedly confusing language and format of a monograph that synthesized information about the medication. Plaintiffs alleged First Databank, Inc. sold monographs to Costco with the intent they be provided to Costco customers, including Mr. Rivera. First Databank moved to dismiss under the anti-SLAPP statute – arguing the monograph was protected speech – but the motion was denied by the trial court.

Appellate Court Decision:

The anti-SLAPP statute allows a defendant to gain early dismissal of SLAPP actions designed primarily to chill the exercise of First Amendment Rights. In ruling on an anti-SLAPP motion, the trial court engages in a two-step process. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant's burden is to demonstrate that the act or acts of which the plaintiff complains were taken ‘‘in furtherance of the [defendant]'s right of petition or free speech...” If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.

The Court of Appeal reversed the trial court’s decision, reasoning that treatment for depression is a matter of public interest. Additionally, the commercial exception to the anti-SLAPP statute did not apply because First Databank was not trying to sell its goods or products. Finally, plaintiffs could not show the probability of prevailing against First Databank on the negligence and breach of contract claims. Accordingly, the matter should have been dismissed.

***Simpson Strong-Tie v. Gore* (2010) 49 Cal.4th 12**

Facts:

In February 2006, plaintiff Simpson Strong-Tie Company, Inc. filed an action for defamation against defendants Pierce Gore and The Gore Law Firm arising from a newspaper advertisement placed by Gore a few weeks earlier. The advertisement advised readers that “you may have certain legal rights and be entitled to monetary compensation, and repair or replacement of your deck” if the deck was built with galvanized screws manufactured by Simpson. Gore moved successfully in the trial court to have the entire complaint stricken under the anti-SLAPP statute and the Court of Appeal affirmed.

Supreme Court Decision:

The Supreme Court granted review to consider whether Simpson's complaint fell under the commercial speech exemption of the anti-SLAPP statute. Pursuant to Code of Civil Procedure section 425.17, if the comments made about Simpson come from a competitor and seek to promote the competitor’s business, the anti-SLAPP motion should be denied. However, in this case, Gore was not a competitor

of Simpson and was not engaged in the same business. While Gore did seek to promote a class action, he was not advertising the quality of his own services or expertise. Accordingly, the business competitor exemption which is central to the commercial speech exemption of the anti-SLAPP statute did not apply, and the anti-SLAPP motion was properly granted.

ARBITRATION

Ruiz v. Podolsky (2010) 50 Cal.4th 838

Facts:

Rafael Ruiz attended an appointment at the office of Dr. Anatol Podolsky, an orthopedic surgeon, for the treatment of a fractured hip. On the same day, they both signed a "Physician-Patient Arbitration Agreement." The agreement provided for the arbitration of any malpractice claims. The agreement further provided that it was the intention of the parties "that this agreement binds all parties whose claims may arise out of or relate to treatment or service provided by the physician including any spouse or heirs of the patient and any children, whether born or unborn, at the time of the occurrence giving rise to the claim." Elsewhere the agreement specifically provided for arbitration of wrongful death and loss of consortium claims. Ruiz died on July 25, 2006. In July 2007, Alejandra Ruiz (the "Wife") and his four adult children, filed an action against Dr. Podolsky, alleging claims for medical malpractice and wrongful death. They maintained that Dr. Podolsky failed to adequately identify and treat Ruiz's hip fracture resulting in complications, and eventually his death.

Dr. Podolsky filed a petition to compel arbitration. The Wife conceded she was subject to the arbitration agreement. However, she and the other heirs argued that because only one plaintiff was bound to arbitrate, the court should allow the parties to proceed in the trial court to avoid inconsistent verdicts. Dr. Podolsky responded that the adult children were "swept up" into the arbitration agreement along with the Wife due to the "one action rule" for wrongful death suits. The trial court disagreed. The court held that the heirs were not bound by the agreement since they were not signators. The Court of Appeal agreed that there was no reason for compelling the adult children to arbitrate their claims simply because the Wife was so compelled.

California Supreme Court Decision:

Reversed. In California, medical malpractice suits are governed by California Code of Civil Procedure, section 1295, otherwise known as the Medical Injury Compensation Reform Act, or "MICRA." MICRA's arbitration provision permits patients to bind any heirs pursuing wrongful death actions to arbitration agreements between the health care providers and the patients. The Court stated, "the purpose of section 1295 is to encourage and facilitate arbitration of medical malpractice disputes. Accordingly, the provisions of section 1295 are to be construed liberally. In other words, the

encouragement of arbitration as a speedy and relatively inexpensive means of dispute resolution furthers MICRA's goal of reducing costs in the resolution of malpractice claims and therefore malpractice insurance premiums."

Zamora v. Lehman **(2010) 186 Cal.App.4th 1**

Facts:

Plaintiff, a trustee in bankruptcy, sued defendants, three former officers of a defunct company, alleging breach of fiduciary duty. Four months before trial, defendants remembered that their employment agreements contained an arbitration provision. They moved to compel arbitration. In opposition, the trustee argued defendants had waived the right to arbitrate by delay in bringing the motions and by engaging in discovery not available under the arbitration provision. The trial court granted the motions, stating that because defendants had forgotten about the arbitration provision, they had not relinquished a known right. Further, the trial court found that the same amount of discovery would have been allowed by an arbitrator. After the ruling, the trustee claimed she lacked the funds to arbitrate the case and declined to initiate arbitration. As a consequence, the trial court entered a judgment of dismissal with prejudice.

Appellate Court Decision:

The Court of Appeal reversed, finding that forgetfulness was not an excuse. For the waiver of the right to arbitrate to exist, it is not necessary that there be an intentional relinquishment of a known right. The delay (four months) was unreasonable. In addition, defendants took advantage of judicial discovery provisions not available in arbitration. Under American Arbitration Association ("AAA") labor arbitration rules, which the parties adopted in the arbitration provision, neither side was entitled to discovery in an arbitration proceeding. Those rules accord only a right to subpoena witnesses and documents *for the hearing*. Here, defendants served a set of 236 special interrogatories, and a document demand that resulted in the production of over 60,000 documents. This behavior was inconsistent with the right to arbitrate, therefore, waiver was present.

DAMAGES

Boeken v. Philip Morris USA, Inc. **(2010) 48 Cal.4th 788**

Facts:

Mr. Boeken smoked cigarettes for years and contracted lung cancer. He sued Philip Morris and recovered a verdict of $5,539,127 for compensatory damages and $3 billion in punitive damages.

Ultimately, Philip Morris paid $80,000,000 to satisfy the judgment, although Mr. Boeken died before ever realizing any of the judgment funds. His wife had filed an action for common law loss of consortium, but for some reason, had dismissed the lawsuit with prejudice. Mrs. Boeken then filed a wrongful death action seeking loss of companionship and affection. Philip Morris demurred to the wrongful death action, claiming that Mrs. Boeken's dismissal of the loss of consortium claim barred her subsequent wrongful death suit. The trial court agreed, dismissing Mrs. Boeken's claim, and the Appellate Court affirmed the trial court.

Supreme Court Decision:

The Supreme Court affirmed. It concluded the same primary right was asserted in the loss of consortium claim and the subsequent wrongful death claim for loss of companionship and affection. Further, the loss of consortium claim sought "permanent" damages, including damages that would commence and continue after the death of Mr. Boeken. Hence, the compensation recoverable for a loss of consortium claim and a wrongful death claim were virtually identical, and the same primary right was therefore involved. Because the dismissal was the equivalent of a final judgment on the merits, Mrs. Boeken could not litigate the same primary right a second time. Accordingly, dismissal of the loss of consortium claim constituted res judicata on the wrongful death claim.

***Cabrera v. E. Rojas Properties, Inc*. (2011) 192 Cal.App.4th 1319**

Facts:

Plaintiff Cabrera was injured when she fell down a staircase on property owned by E. Rojas Properties, Inc. ("Rojas"). She sued Rojas for personal injury. Following a jury trial, the jury found Rojas was negligent in its use or maintenance of the property, and the negligence was a substantial factor in causing Cabrera's harm. Before the case was submitted to the jury, the parties stipulated that the evidence submitted to the jury would include the billed amounts, not the paid amounts, and that the jury would be instructed that the billed amounts were "reasonable and necessary." The stipulation provided that Rojas would file a post-verdict motion to reduce the recoverable amount of plaintiff's medical expenses to the amount paid by the insurer.

The jury awarded Cabrera $57,534.45 in past medical expenses and $135,556.45 in total damages. The jury further found that Cabrera was 10% negligent. Judgment was entered in the amount of $78,242.63, which reflected a reduction in damages for past medical expenses from the amount billed by Cabrera's medical provider ($57,534.45) to the amount paid by her insurer as full payment ($8,914.26).

Appellate Court Decision:

The Appellate Court held that the collateral source rule did not bar the reduction of past medical

expenses down to the actual amount paid. Thus, while the collateral source rule entitled Cabrera to recover the amount paid by the insurer, it did not extend to allow recovery of amounts exceeding the amount paid. The court reasoned that the reductions negotiated by the insurer were not from a collateral source since they were not compensation received by Cabrera from an independent source, Cabrera was not liable for the amounts written-off, and the reductions did not deprive Cabrera of the benefit of her insurance. The court followed the *Hanif/Nishihama* line of cases, which hold that it is error for a plaintiff to recover medical expenses in "an amount exceeding the actual amount paid." The court also noted that a post-trial motion, as employed by Rojas, was a valid method by which to reduce the medical expenses award to the amount paid.

***Chude v. Jack in the Box, Inc.* (2010) 185 Cal.App.4th 37**

Facts:

Teckla Chude, an uninsured driver, drove up to the Jack in the Box window and ordered a cup of coffee. As she was waiting at the drive-through window, Chude remained seated in the driver's seat of her car, in her seatbelt, with the engine running, the transmission in "drive," and her foot on the brake pedal. When the Jack in the Box employee handed her the coffee, the lid came off, spilling on the car seat and pooling beneath her. Chude pulled the car forward, but she could not open the car door to unbuckle her seatbelt because the car was too close to a wall, with the result that Chude spent two to three minutes "trying to get [her] butt off … the" seat and out of the pooled coffee. She was burned, suffered injury, lost work and had other damages, including non-economic damages. She brought her action against Jack in the Box alleging negligence and seeking both economic and noneconomic damages. Jack in the Box moved for summary adjudication contending that Chude had no automobile insurance and, therefore, was precluded from recovering non-economic damages. The trial court agreed.

Appellate Court Decision:

Proposition 213 precludes someone who has no automobile insurance from recovering non-economic damages from a defendant in a vehicle-related accident. The question here was whether Chude's lawsuit was an "action to recover damages arising out of the operation or use of a motor vehicle" such as would trigger the bar of Proposition 213. The Court of Appeals reviewed prior case law holding that although driving is included within the concepts of operation and use of a vehicle, operation is a broader concept than driving and does not require that the vehicle be in motion or even have the engine running. The court concluded that here, Chude used her car to drive up to the drive-through window, she was seated *inside* her car, with her seatbelt on, with the motor running and the transmission engaged. Thus, the accident "arose out of" her "operation" and "use of" her vehicle at the time of the incident. More important, Chude would not have been in the drive-through lane purchasing coffee but for her vehicle. The Court further determined that limiting Chude's damages arising out of an accident

for which she could have obtained insurance encourages her to obtain the required insurance. Accordingly, Proposition 213 applied, and plaintiff was barred from recovering non-economic damages.

***Clark v. Superior Court* (2010) 50 Cal.4th 605**

Facts:

Plaintiffs were senior citizens who brought an action under California's Unfair Competition Law (or "UCL," codified as Business and Professions Code section 17200, et seq.) against defendant life insurance company, alleging that the defendant engaged in deceptive business practices in connection with the sale of annuities. The plaintiffs sought injunctive relief, restitution and treble damages under Civil Code section 3345(b), which allows treble damages if the trier of fact is authorized by a statute to impose a penalty. The trial court ruled that treble damages under C.C. 3345 are not allowed in a private action under the UCL. Thereafter, the Appellate Court issued a writ setting aside the trial court decision and ruling that treble damages were permitted.

Supreme Court Decision:

The California Supreme Court reversed. Because section 3345 authorizes the trebling of a remedy only when it is in the nature of a penalty, and because restitution under the unfair competition law is not a penalty, an award of restitution under the unfair competition law, which plaintiffs sought here, was not subject to the trebling provision.

***Goodman v. Lozano* (2010) 47 Cal.4th 1327**

Facts:

Randall Goodman and Linda Guinther (plaintiffs) contracted with defendants, Jesus and Natalia Lozano, to purchase a newly constructed home. Subsequently, plaintiffs sued the Lozanos and other defendants, alleging construction defects. Before trial, plaintiffs settled with all defendants, except the Lozanos, for the total sum of $200,000. The trial judge found in favor of plaintiffs against the Lozanos for $146,000.

Under C.C.P. § 887(a), an award in a plaintiff's favor against a non-settling defendant is to be offset by the amount the plaintiff receives from settling defendants. If the settlement amount is greater than the damage award, the award is totally offset. In this case, the trial judge determined that the Lozanos should receive credit for the pre-trial settlements. Because the settlements were greater than the award at trial, the trial judge ruled that plaintiffs should receive nothing. Under C.C.P. § 1032(a)(4), a prevailing party at trial is entitled to costs and fees. The trial judge determined that the Lozanos were the prevailing party because they paid nothing, and awarded the Lozanos attorney's fees and costs.

Plaintiffs appealed relying on *Wakefield v. Bohlin* (2006) 145 Cal.App.4th 96, which held that a party who receives a damage award against a defendant, but whose judgment is offset to zero, still qualifies as a prevailing party with a net monetary recovery. The Court of Appeal disagreed with the holding in *Wakefield*, and affirmed the trial court decision.

Supreme Court Decision:

The Supreme Court agreed with the Court of Appeal rationale and disapproved of the holding in *Wakefield*. The Court held that the plain meaning of "net monetary recovery" is to "gain" some amount. The Court reasoned that a plaintiff that gains nothing after an offset for pre-trial settlements cannot be deemed a prevailing plaintiff. Further, in looking to the Legislative history of section 1032, the Court concluded that a court must factor in the offset issue before making a prevailing party determination.

***Gray v. Begley* (2010) 182 Cal.App.4th 1509**

Facts:

Steven Gray was injured in a car accident. Dameon Begley, an employee of Granite Construction Company, was the driver of the other vehicle and was on duty at the time of the collision. Gray sued Granite and Begley. Granite was insured by Continental Casualty Company and Valley Forge Insurance Company ("CNA"). Granite's excess carrier was Westchester Insurance Company. CNA and Westchester settled on behalf of Granite, but not Begley, for an amount in excess of $8 million. Gray proceeded to trial against Begley, and obtained a jury verdict against Begley for $4.5 million. Begley moved to vacate the judgment in order to offset the judgment by the amount of the settlement under Civil Code § 877. Before the motion was heard, Gray and Begley entered into a private agreement whereby Begley assigned to Gray his rights against CNA. CNA moved to intervene in order to prosecute the motion to vacate the judgment and apply the setoff. The trial court granted the motion to intervene, but denied the motion to vacate the judgment to allow for setoff. CNA filed a notice of appeal.

Appellate Court Decision:

The Court of Appeal reversed, ruling that the trial court should have heard CNA's motion for setoff because CNA had standing to appeal and was granted leave to intervene. CNA was a party for purposes of filing an appeal. The trial court's denial of CNA's motion to vacate, which prevented the hearing on the setoff motion, affected CNA's interests and thus it was an aggrieved party, entitled to appeal.

An insurer providing a defense under a reservation of rights may intervene where it has provided coverage and provided a defense. Intervention is only denied where a carrier denies coverage and

refuses to provide a defense. An insurer providing a defense may also intervene in the action where the insured attempts to settle the case to the potential detriment of the insurer. Such an insurer has a sufficient interest in the litigation to intervene when the insured reaches a settlement without the participation of the defending insurer. CNA was properly allowed to intervene to pursue its attempt to reduce the judgment. The Court of Appeal directed the trial court to vacate the judgment, to hear CNA's motion for setoff, and to enter a new judgment in accordance with its ruling.

DISCOVERY

Coito v. The Superior Court of Stanislaus (Review granted) (2010) 182 Cal.App.4th 758

Facts:

Coito's son died in a drowning incident in Modesto, California. Coito filed a complaint for wrongful death against various defendants, including the State of California. State counsel sent two investigators to take witness statements of fourteen juveniles who were present when the drowning occurred. State counsel provided the investigators with questions to ask each witness. The interviews were taken and reduced to memoranda. Coito requested the production of the written witness statements through discovery. State counsel objected to producing the statements on the basis of attorney work-product privilege. Coito filed a motion to compel. The trial court denied Coito's motion to compel citing to *Nacht & Lewis Architects, Inc. v. Superior Court* (1996) 47 Cal.App.4th 21, which held that the identity of witnesses interviewed by counsel was
entitled to qualified work product protection and witness statements were subject to absolute work-product protection because they reveal the "impressions, conclusions, opinions or legal research or theories" of counsel.

Appellate Court Decision:

Coito filed a petition for review. The Fifth District Court of Appeal disagreed with the holding in *Nacht & Lewis*, holding that written and recorded witness statements taken by counsel or counsel's representatives are "classic evidentiary material" and that such statements turned over to counsel and taken by counsel are not attorney work product. The Court of Appeal reasoned that such statements can be admitted at trial as prior inconsistent statements, prior consistent statements or past recollections recorded. The party denied access to such statements will have no opportunity to prepare for trial. The Court of Appeal held that the identity or list of witnesses interviewed by counsel is not work product either. The court, however, held that if there was something unique about a particular witness interview that revealed interpretative, as opposed to,
evidentiary information, an attorney could request in camera review of the statement to argue that it should be subject to qualified work product. A petition has been filed for California Supreme Court review of this case, and review has been granted. Review is currently pending before the California

Supreme Court.

Holmes v. Petrovich Development Company, LLC **(2011) 191 Cal.App.4th 1047**

Facts:

Plaintiff Gina Holmes was hired as an executive assistant to defendant Paul Petrovich in early June 2004. The employee handbook which Holmes admitted having read, indicated, among other things, that employees had no right of privacy with regard to the communication system, and that the employer would periodically monitor the system and computers for compliance.

Unbeknownst to Petrovich, Holmes was three months pregnant at the time she was hired, and began work. One month after she was hired, Holmes told Petrovich about her pregnancy, and that her due date was in December, 2004. Petrovich and Holmes exchanged a string of e-mails relating to the timing and length of Holmes' maternity leave, and Petrovich's concern that there would be inadequate coverage for Holmes position during her leave, causing him "hardship." He also implied that Holmes should have disclosed her pregnancy at the time she began working for him.

In the meantime, Petrovich was also concerned that Holmes might quit, so he forwarded some of the e-mails to the company's payroll and human resources personnel and in-house counsel. At some point, Holmes learned of Petrovich's dissemination of the e-mails to the other staff, and while she acknowledged that there was no agreement that those e-mails would be kept confidential, she was very upset that Petrovich had disseminated them.

Holmes then used the company e-mail system to contact Mendoza, an attorney. The two exchanged a series of e-mails discussing the pregnancy-related issues, in which Holmes stated that she felt her boss was "making it unbearable" for her and that she was working in a "hostile work environment." The next day, Holmes again e-mailed Mendoza stating that her employer's "feelings about my pregnancy" left her no alternative but to resign.

In September 2005, Holmes filed suit for sexual harassment, retaliation, wrongful termination, invasion of privacy and intentional infliction of emotional distress. The case proceeded to trial on the invasion of privacy and emotional distress claims. At trial, the defendants introduced the e-mails between Mendoza and Holmes to show that Holmes did not suffered severe emotional distress and was only frustrated and annoyed. The defendants prevailed at trial. Holmes appealed, claiming that the e-mails were erroneously introduced as evidence because they were protected by the attorney-client privilege.

Appellate Court Decision:

The Court of Appeal affirmed the trial court's decision to allow the e-mails as evidence. While Evidence Code Section 912(b) provides that a communication does not lose its privileged nature just

by being sent by e-mail, where it may be seen by persons "involved in the delivery, facilitation or storage of electronic communication," the Court of Appeal disagreed with Holmes' interpretation of the Evidence Code. The Court of Appeal reasoned that Holmes had sent the e-mails on her employer's e-mail system and computer, and had been advised that such e-mail was not private, may be monitored, and there was no reasonable expectation of privacy. The Court of Appeal likened Holmes' use of company e-mail to consulting with an attorney in the company's conference rooms, in a loud voice with the door open, yet unreasonably expecting that any conversations overheard would be privileged. The Court held that in both situations, there was no reasonable expectation of privacy in the communications.

The Court was not persuaded by plaintiff Holmes' argument that "to her knowledge" Petrovich had never exercised the right to inspect her e-mail or computer, or that she had assumed she was sending private messages because she had a private password to log on to her computer. The company's policy was clear, and there were administrative personnel with global passwords that could carry out the monitoring policy. As a result, by conversing with her attorney via company e-mail, Holmes was knowingly disclosing this information to third parties, i.e. her employer, such that no privilege could apply.

The Court of Appeal held that the e-mails were properly admitted as evidence at trial by the defendants because they were not privileged.

EMPLOYMENT LAW

***Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970**

Facts:

Plaintiff was a police officer with the Los Angeles Police Department. In 1996, while assigned to the Department's Southwest Division, plaintiff was accused of stealing payroll checks. After a lengthy investigation, the Department determined that plaintiff was not the officer who had stolen the checks. Later, plaintiff filed a lawsuit against the City and the Department, alleging claims for defamation, intentional infliction of emotional distress, invasion of privacy, and civil rights violations, all resulting from the 1996 stolen checks incident. The superior court eventually dismissed plaintiff's lawsuit. Then, on March 24, 2000, plaintiff submitted to California's Department of Fair Employment and Housing ("FEHA") an administrative complaint under the FEHA alleging unlawful employment discrimination (on the basis of race, color, marital status, medical condition, national origin/ancestry, and disability), harassment, and retaliation. All claims but the FEHA claim were decided against plaintiff by a jury. The jury awarded $11,000 to plaintiff under the FEHA claim after several years of litigation. Under FEHA, a prevailing plaintiff is entitled to attorney fees. Plaintiff submitted a request for attorney fees in the amount of $870,000, but the trial court denied the fee request.

The Court of Appeal reversed, holding that public policy promotes the granting of attorney fees to

prevailing plaintiffs in discrimination and harassment cases.

Supreme Court Decision:

The Supreme Court concluded that it was error to reverse the judgment of the trial court. The subject attorney fees provision gives a trial court discretion to deny attorney fees to a plaintiff who prevails on a FEHA claim. In light of plaintiff's minimal success and grossly inflated attorney fee request, the trial court did not abuse its discretion in denying attorney fees. Under C.C.P. § 1033(a) when a case is filed as an unlimited jurisdiction case, and the prevailing party is awarded less than $25,000, the case should have been filed as a limited jurisdictional matter. Under these circumstances, the trial court has discretion to *deny* costs to the prevailing party, including attorney fees.

***Murray v. Alaska Airlines, Inc.* (2010) 50 Cal.4th 860**

Facts:

Kevin Murray, a quality assurance auditor at Alaska Airlines brought safety concerns to the attention of the FAA. The FAA investigated and confirmed the various problems. Alaska Airlines then closed the office where Murray worked and outsourced his job, and he was not rehired. Murray brought an administrative complaint for reinstatement and back pay and other damages with the U.S. Secretary of Labor. He alleged that his superiors at Alaska admonished and chastised him for disclosing information to the FAA. The Secretary found that there was no connection between Murray's whistleblower activities and the disciplinary action taken against him, and dismissed his complaint. Murray was advised that he had 30 days within which to object to these findings, and that if he did not do so, the Secretary's findings would be final and binding and not subject to judicial review. Murray and his counsel did not file an objection, but instead, filed a lawsuit in California state court for wrongful termination and retaliation for whistleblower activity. Alaska removed the case to the federal court. The District Court held that summary judgment was in order for Alaska. The Ninth Circuit certified a legal question to the California Supreme Court regarding whether a federal administrative agency decision precludes a lawsuit filed after the plaintiff failed to object to the agency's findings by way of the administrative process.

Supreme Court Decision:

The Supreme Court reviewed prior case law which has held that the doctrine of collateral estoppel or issue preclusion is applicable to final decisions of administrative agencies acting in a judicial or quasi-judicial capacity. Ultimately, "the inquiry that must be made is whether the traditional requirements and policy reasons for applying the collateral estoppel doctrine have been satisfied by the particular circumstances of this case." Here, Murray, had been represented by counsel at every stage of the prior administrative and court proceedings. The failure to file an objection to the administrative proceedings had preclusive or collateral estoppel effect. The administrative decision was, therefore, final and

binding on Murray, and Murray had no right to further legal proceedings. Accordingly, Murray was precluded from relitigating the factual issue of causation against Alaska in his state court wrongful termination action, removed to federal court on grounds of diversity jurisdiction. Although Murray's claims would have been more fully litigated in the prior administrative proceeding had he invoked his right to a formal hearing, he never did so.

***Sandell v. Taylor-Listug* (2010) 188 Cal.App.4th 297**

Facts:

Plaintiff Sandell was the Vice-President of Sales for defendant's guitar company who suffered a stroke. He recuperated and returned to work, had generally positive job evaluations, but had to use a cane and his speech was slow. A few years later, plaintiff was terminated at age 60 for "lack of leadership" and unsatisfactory sales numbers. He sued for wrongful termination, claiming disability and age discrimination under California's Fair Employment and Housing Act ("FEHA"). The trial court granted the defendant employer's summary judgment motion and dismissed plaintiff's suit on the grounds that there was no issue of fact that plaintiff was terminated for a legitimate reason, as opposed to any discriminatory reason.

Appellate Court Decision:

The Court of Appeal reversed. There were triable issues of fact concerning evidence that defendant's sales actually increased during the time plaintiff returned to work, and that some of defendant's owners mentioned firing plaintiff because of his age and because he was walking with a cane. (One of the supervisors had stated that he would "rather get rid of an older, tenured employee and hire a younger employee because they were less expensive" and had asked plaintiff "when he was going to get rid of the cane.") Accordingly, there was sufficient evidence to support a claim for disability discrimination and age discrimination.

EVIDENCE

Cassel v. Superior Court (2011) 51 Cal.4th 113

Facts*:*

Plaintiff Michael Cassel agreed in mediation to a settlement of business litigation. Thereafter, he sued his attorneys alleging that they had obtained his consent to the settlement through bad advice, deception, and coercion and that they had a conflict of interest. His complaint alleged that by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth.

Prior to trial, defendant attorneys moved, under the statutes governing mediation confidentiality, to exclude all evidence of private attorney-client discussions immediately preceding, and during, the mediation concerning mediation settlement strategies and defendants' efforts to persuade petitioner to reach a settlement in the mediation. The trial court granted the motion, but the Court of Appeal vacated the trial court's order.

The Court of Appeal reasoned that the mediation confidentiality statutes are intended to prevent the damaging use *against a mediation disputant* of tactics employed, positions taken, or confidences exchanged in the mediation, not to protect attorneys from the malpractice claims of their own clients.

Supreme Court Decision:

The California Supreme Court reversed. The Court concluded that the plain language of the mediation statutes command that, unless the confidentiality of a particular communication is expressly waived, under statutory procedures, by all mediation "participants," or at least by all those "participants" by or for whom it was prepared things said or written "for the purpose of" and "pursuant to" a mediation shall be inadmissible in "any … civil action." Confidentiality is not confined to communications that occur *between mediation disputants* during the mediation proceeding itself. Accordingly, discussions

conducted in preparation of a mediation as well as all mediation-related communications that take place during the mediation itself are protected from disclosure, even if they do not occur in the presence of the mediator or other disputants. Neither the language nor the purpose of the mediation confidentiality statutes supports a conclusion that they are subject to an exception, similar to that provided for the attorney-client privilege, for lawsuits between attorney and client.

GOVERNMENT LIABILITY

Avedon v. State of California (2010) 186 Cal.App.4th 1336

Facts:

Some individuals built a bonfire inside a cave in Malibu Creek State Park. In the early hours of the following morning, the bonfire ignited chaparral on the surrounding hillsides, and spread through Corral Canyon toward the ocean. The fire burned almost 5,000 acres, destroyed more than 50 homes, and damaged many others. The plaintiffs' home was destroyed by the fire, and they sued the State, alleging that bonfire parties were frequently held in a cave in the park; that the State had been notified of this fact on many occasions but had done nothing to prevent this activity; that the fire spread from the cave and eventually reach plaintiffs' home; and that this was a dangerous condition of public property. The trial court granted the State's demurrer with out leave to amend, and dismissed the suit.

Appellate Court Decision:

The Court of Appeal affirmed the ruling. Plaintiffs did not demonstrate any *defect* in the public property, i.e., that there was something inherently unsafe about the cave and the nearby road to allow vehicle access to the cave. The plaintiffs did not allege facts to establish a defect in the cave itself or in the nearby vehicular access to that area of the park. The court concluded that the existence of a *defect* is necessary to plead and prove an action for dangerous condition of public property.

Barragan v. County of Los Angeles (2010) 184 Cal.App.4th 1373

Facts:

Barragan was injured in a car accident and rendered a quadriplegic. A lawyer later told her that she might have a claim against the County of Los Angeles, but the time for filing a claim had expired. Under the Tort Claims Act, an individual claiming personal injury must file a claim with the relevant governmental entity within six months. As Barragan missed that deadline, she filed an application for leave to present a late claim, which was denied. She then filed, with the trial court, a petition for relief from the Tort Claims Act filing requirements, arguing: (1) excusable neglect; and (2) physical and mental incapacity. The trial court denied the petition on the second ground, concluding that while

Barragan was disabled, Barragan had not proven that her disability was the cause of her failure to file a timely claim. The court ultimately ruled that there was no excusable neglect because Barragan had not contacted counsel within six months.

Appellate Court Decision:

The Court of Appeal reversed. The first basis for relief under the Tort Claims Act is excusable neglect. Excusable neglect "is not shown by the mere failure to discover a fact until it is too late; the party seeking relief must establish that *in the exercise of reasonable diligence*, he failed to discover it." Namely, lack of knowledge alone is not considered a sufficient basis for relief, when the claimant did not make an effort to obtain counsel. The court concluded that this rule, however, is not absolute. The issue in this case was whether a claimant's physical disability was sufficient to render neglect in obtaining counsel excusable. The fact was Barragan suffered devastating injuries, the recovery from which dominated her waking hours during the six-month period. The Court considered whether these injuries, while not sufficient to establish incapacity, were to be wholly disregarded in determining whether Barragan's neglect was excusable. The Court held excusable neglect *can* be the result of disability. If a claimant can establish that physical and/or mental disability so limited the claimant's ability to function and seek out counsel such that the failure to seek counsel could itself be considered the act of a reasonably prudent person under the same or similar circumstances, excusable neglect is established. Grounds of relief from the claim statute were therefore shown.

***Bryan v. MacPherson* 630 F.3d 805 (2010)**

Facts:

Plaintiff Carl Bryan was stopped by defendant Bryan MacPherson, a Coronado police officer, at a seatbelt check point. Bryan had already been given a speeding ticket that morning by the California Highway Patrol, and apparently had forgotten to put his seatbelt back on. When Officer MacPherson indicated he was going to give Bryan another ticket, Bryan, dressed only in boxer shorts and tennis shoes, became extremely agitated. He began banging his hands on his dashboard, and cursing to himself. He then got out of his car and began cursing again and pounding his fists on his thighs. Officer MacPherson, who was alone, ordered Bryan to get back into his vehicle. At the time, Officer MacPherson was 20 feet from Bryan. When Bryan did not get back in his car as ordered, and turned toward Officer MacPherson, Officer MacPherson deployed his taser, striking Bryan on his side. Plaintiff fell forward, knocking out four teeth.

Plaintiff filed suit against the Coronado Police Department, the City of Coronado and Officer MacPherson, alleging that the use of the taser was excessive. Officer MacPherson brought a motion for summary judgment on the grounds of qualified immunity. Qualified immunity holds that a reasonable police officer would have concluded that Bryan presented an immediate danger to Officer MacPherson and that he was entitled to use the taser to protect himself. The court found triable issues of fact that

Bryan presented no immediate danger to Officer MacPherson and that no use of force was necessary.

Ninth Circuit Decision:

Officer MacPherson appealed, and on first review, the Ninth Circuit rejected the appeal. Subsequent to the holding, two other taser cases were heard by other panels of the Ninth Circuit, upholding qualified immunity. The matter was re-submitted and the court again held that there was excessive force, but now granted Officer MacPherson qualified immunity on the grounds that a reasonable police officer confronting the circumstances faced by Officer MacPherson could have made a reasonable mistake of law in believing the use of the taser was reasonable. As such, Officer MacPherson, in making a mistake of law, was granted absolute immunity.

The Ninth Circuit, en banc, upheld the ruling, and set forth factors establishing that if a taser is used in dart mode, it would be considered an intermediate use of force requiring a higher level of scrutiny to justify the use of a taser in dart mode under *Graham v. Connor*. The court reiterated that *Connor* requires that the totality of the circumstances must be examined, including the crime; the threat posed by the suspect; and the resistance of the suspect.

***Garcia v. W&W Community Development, Inc.* (2010) 186 Cal.App.4th 1038**

Facts:

Defendant government agency placed children in foster homes. A child was placed with the foster mother who left the child in the bathtub where the child drowned. The natural father sued, claiming that the agency did not properly check on the qualifications of the foster mother, and that had they done so, they would have discovered that she was on numerous types of medication, including pain killers and anti-depressant drugs that would have made her forgetful. Defendant agency successfully convinced the trial court to dismiss the case on grounds of discretionary immunity. In its motion for summary judgment, defendant also asserted that it was not liable to plaintiff under any theory of recovery alleged in plaintiff's complaint because it did not breach any duty owed to plaintiff, and it was not vicariously liable for the acts of the foster mother.

Appellate Court Decision:

The Court of Appeal affirmed that the motion for summary judgment was properly entered in defendant's favor, but on different grounds. A public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would have given rise to a cause of action against that employee or his personal representative. Thus, defendant's liability, either as a private entity or a quasi-governmental entity, for the foster mother's negligent conduct depends initially on whether the foster parent was an employee of defendant, the foster family agency. Here, the undisputed evidence showed that she was an independent contractor in

performing her responsibilities as the foster parent, and, therefore, as a matter of law, defendant was not vicariously liable for her
conduct.

***Klein v. United States of America* (2010) 50 Cal.4th 68**

Facts:

California Civil Code section 846 provides immunity to California landowners for injuries sustained by recreational users of the property. An example of when immunity would apply under section 846, is a hiker or mountain biker or who was injured in a state-owned park while hiking or mountain biking. This case involves whether section 846 applies to acts of vehicular negligence committed by a public landowners's employee (which includes a "volunteer" employee) that caused personal injury to a recreational user of the land.

In 2004, Plaintiff Richard Klein was riding his bicycle on a public, two-lane, paved road in Angeles National Forest. The park is owned by the U.S. Government. Klein was struck by an automobile driven by a volunteer for the U.S. Fish and Wildlife Service, and suffered serious injuries. Klein brought suit against the United States and the volunteer in U.S. District Court alleging that the United States was vicariously liable for the vehicular negligence of the volunteer.

The United States moved for summary judgment, asserting that section 846 provided immunity from accidents occurring on its land to recreational users. The district court granted the motion, and Klein appealed to the Ninth Circuit Court of Appeals. The Ninth Circuit requested that the California Supreme Court provide clarification as to whether section 846 applies to vehicular accidents.

California Supreme Court Decision:

The Supreme Court concluded that section 846 does not extend to acts of vehicular negligence by a landowner or the landowner's employee. The United States argued that section 846 should be interpreted broadly and that landowners should not have a duty to protect recreational users. The California Supreme Court held that such an interpretation of the statute was inconsistent with the language of section 846 and the Legislature's intent. Section 846 states: "an owner of any estate or any interest in real property ... owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose ... ." The Supreme Court focused on the phrase "keep the premises safe" to infer a premises liability duty (i.e., "property-based duties" and dangers associated with the physical condition of the property), a liability category that does not include vehicular negligence. The Court reasoned that if the Legislature had intended to provide complete immunity for recreational injuries, it would have simply included language that landowners owe no duty of care to avoid injuries to person using their land for recreation. Thus, the Court reasoned, the Legislature selected language implying a narrower immunity.

With this clarification of section 846, the case was remanded back to the Ninth Circuit for further disposition consistent with the California Supreme Court's decision. The Ninth Circuit, in turn, remanded the case to the district court with the same instruction. To date, the district court has not yet issued a ruling.

***Lane v. City of Sacramento* (2010) 183 Cal.App.4th 1337**

Facts:

Plaintiffs, an injured driver and passenger, sought to hold the City of Sacramento liable for injuries sustained when their car struck a concrete divider on a City street. The trial court granted summary judgment for the City, concluding that plaintiffs had failed to raise a triable issue of fact as to whether the divider constituted a dangerous condition of public property for which the City could be held liable under Government Code Section 835. The City's argument that the divider was not dangerous was based on evidence regarding the absence of any other claims relating to the divider. Specifically, the City offered evidence that there were no similar accidents within the last seven years. The City also argued plaintiff did not exercise due care or act in a reasonably foreseeable manner when he drove his car into the divider. Finally, the City argued the divider did not cause the collision.

Appellate Court Decision:

The Court of Appeal reversed. The City's evidence did not establish a "complete absence of any similar accidents" involving the divider in the previous seven years. Rather, what the City's evidence established was that someone acting on behalf of the City's claims administrator had searched a computerized database of claims submitted to the City for records of claims involving the center divider but found none, other than the claims submitted by plaintiffs. The City offered no evidence, however, on how the database was created or maintained, or how the search of the database was conducted. Thus, there was no evidentiary basis for determining that the database constituted a complete and accurate record of claims submitted to the City. Additionally, a tort claim filed with the City is not the same thing as an accident, and an absence of claims is not the same thing as an absence of accidents. Finally, the City cited no authority for the proposition that the absence of other similar accidents is *dispositive* of whether a condition is dangerous, or that it compels a finding of nondangerousness absent other evidence. It was therefore improper for the trial court to grant summary judgment on the issue of whether a dangerous condition of public property existed.

***Public Utilities Commission v. Superior Court* (2010) 181 Cal.App.4th 364**

Facts:

The decedent's truck collided with a train at a grade crossing. The heirs brought a wrongful death action against various defendants, including the railroad and Public Utilities Commission ("PUC"). Plaintiffs

claimed the railroad crossing constituted a dangerous condition because a 1989 PUC recommendation to upgrade the crossing's warning devices by installing a gate was not implemented. In response to PUC's motion for summary judgment, plaintiffs conceded that PUC did not own the property on which the railroad crossing was located, but contended, nonetheless, that PUC controlled the property within the meaning of Government Code Section 830. The trial court adopted that analysis and denied PUC's motion. PUC petitioned for a writ.

Appellate Court Decision:

The Court of Appeal issued a writ of mandate compelling the trial court to summarily adjudicate in PUC's favor the issue of whether PUC owed a duty to plaintiffs based upon its alleged control of the railroad crossing. Decisional law held a public entity's ability to regulate property it neither owns nor possesses is not equivalent to a public entity having control of the property within the meaning of Government Code Section 830. A public entity is liable for injuries caused by a dangerous condition of its property, but this does not include easements, encroachments and other property that are located on the property of the public entity but are not owned or controlled by the public entity. It was the railroad's responsibility to maintain the flashing signals at the crossing. PUC had no authority to correct any defects (safety or otherwise) associated with the crossing. PUC could only order others to take prophylactic measures. Summary judgment should have been granted to PUC.

Sanchez v. San Diego Office of Education **(2010) 182 Cal.App.4th 1580**

Facts:

Virginia Sanchez was a sixth grader in the McCabe Union School District, who attended a camp owned and run by another district, the San Diego School District. While Virginia was at the camp, she had an asthma attack and died while en route to the hospital by helicopter. Virginia's parents sued the San Diego School District for failing to provide adequate medical staffing at the camp. The School District moved for summary judgment pursuant to California Education Code section 35330, which provides immunity to school districts for field trips.

Appellate Court Decision:

The Court of Appeal affirmed. Plaintiffs argued that the immunity only applies to the district in which the student is enrolled. However, the statute is not so limited and applies to a cooperating district, i.e., the San Diego School District which provides the facility where the field trip is to be conducted and the personnel to run the facility. If plaintiffs' argument was adopted, cooperating school districts (San Diego), would likely require indemnity agreements from home districts (McCabe) to protect itself from potential suits such as this one. As a matter of public policy, this would frustrate the purpose of Education Code section 35330, which is to afford immunity to *all* school districts for field trips.

INDEMNITY

Interstate Fire and Casualty Ins. Co. v. Cleveland Wrecking Co. (2010) 182 Cal.App.4th 23

Facts:

The general contractor on a project hired two subcontractors: Cleveland was to do demolition work, Delta was to install stairs. Both Cleveland and Delta, pursuant to their contract with the general contractor, were obliged to defend and indemnify the general, and were obliged to procure liability insurance naming the general as an additional insured. Delta complied with the purchase of insurance; Cleveland did not. Delta arranged for coverage with Interstate.

Frisby was an employee of Delta. He was hurt by some falling debris that Cleveland was moving. Frisby sued the general and Cleveland alleging negligence. The general tendered defense to Cleveland and Delta; Cleveland refused and Interstate (Delta's insurer) agreed to defend the general. Frisby then settled with the general contractor (with Interstate providing the money), and with Cleveland. The trial court said that these settlements were in good faith under C.C.P. § 877.6.

Interstate then brought a subrogation action against Cleveland seeking to recover what it had paid because of Cleveland's breach of its obligation to defend and indemnify the general (Interstate's named insured). The trial court held that the good faith settlement precluded the subrogation claim.

Appellate Court Decision:

The Court of Appeal reversed. Interstate's rights were superior to those of Cleveland (under the good faith settlement provision). A good faith settlement under C.C.P. § 877.6 only insulates the parties from implied contractual indemnity (or equitable indemnity) claims, not claims for express indemnity. Interstate's claim was based upon an express indemnity provision.

UDC-Universal Development, L.P. v. CH2M Hill (2010) 181 Cal.App.4th 10

Facts:

A condominium project was built and thereafter, the homeowners' association sued the developer for construction defects. The engineer, CH2M Hill, had participated in planning for the project. There was a contract between CH2M Hill and the developer, UDC, which provided that CH2M Hill would defend and indemnify the developer for any claims arising out of the project. When the developer tendered the defense, CH2M Hill argued it was, in fact, not negligent.

Before the matter was submitted to the jury, the developer moved for a directed verdict. The developer sought a ruling that CH2M Hill was liable for defense costs under its agreement to defend and indemnify.

One week earlier, the Supreme Court had issued its opinion in *Crawford v. Weather Shield Mfg., Inc.*, (2008) 44 Cal. 4th 541 holding that a contractual indemnitor incurs a duty to defend the indemnitee as soon as the indemnitee tenders its defense to the indemnitor. The parties stipulated that the jury would determine the factual issues of negligence and breach of contract, followed by the trial court's application of the indemnity provisions in the parties' contract in light of *Crawford*.

The trial court adhered to its earlier view that the parties' contract called for a defense upon an allegation of "some negligence in the manner in which the work was conducted." It was only the duty to indemnify, the court explained, that depended on a finding of negligence. The court stated that a separate duty to defend must occur before the duty to indemnify arises.

Appellate Court Decision:

The Court of Appeal affirmed the trial court's decision. Under *Crawford*, the duty to defend was not contingent upon the engineer being held negligent. Therefore, the finding of non-negligence on the part of the engineer was irrelevant to the duty to defend.

INSURANCE COVERAGE

Minkler v. Safeco, Inc. Co of America (2010) 49 Cal.4th 315

Facts:

Betty Schwartz had several homeowners policies with Safeco, with her son David covered as an additional insured. David sexually molested Scott Minkler, who was a player on a Little League team coached by David, at Betty's home. Scott sued, claiming that Betty failed to prevent David's molestation of Scott. Betty tendered to Safeco which rejected the tender on grounds of an exclusion in the policy precluding coverage for intentional acts "of an insured," meaning that if any insured commits an intentional act, all insured will be barred from coverage. Following rejection of the tender, Scott obtained a $5 million default judgment against Betty. Betty assigned the rights, and suit was filed against Safeco on the $5 million judgment. Safeco removed the action to federal courts. The District Court ruled in favor of Safeco's coverage position. Scott then appealed to the Ninth Circuit. The Ninth Circuit certified the question to the California Supreme Court concerning the validity of the exclusion.

Supreme Court Decision:

The Supreme Court unanimously ruled that the Safeco policy was ambiguous and, therefore, the exclusion could not be enforced against Betty. The basis of the exclusion was the "severability" provision of the Safeco policy which provided that insurance applied separately to each insured. The Court said that this created an ambiguity which had to be resolved in favor of the insured Betty. The

severability clause could lead an insured like Betty to believe that she would only be barred from coverage for her own intentional acts. Accordingly, Betty was not precluded from coverage for any personal role she played in her son's molestation of plaintiff merely because the son's conduct fell within the exclusion for intentional acts.

NEGLIGENCE

Cabral v. Ralphs Grocery Company (2011) 51 Cal.4th 764

Facts:

The plaintiff's husband, Adelelmo Cabral, was killed when his car veered off the freeway and collided with the back of a Ralphs tractor-trailer rig that had been parked sixteen feet from the freeway while its driver pulled over to have a snack. The jury held that Ralphs was ten percent at fault for the crash, but the Appellate Court reversed, finding that the crash was unforeseeable, and that truck drivers therefore owed no duty to passing freeway motorists in the manner in which they park their trucks as long as they were out of the travel lanes.

Supreme Court Decision:

The California Supreme Court reversed, explaining that its 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." The Court's concern that an approach that focused the duty inquiry on "case-specific facts" would tend to "eliminate the role of the jury in negligence cases, transforming the question of whether a defendant breached the duty of care under the facts of a particular case into a legal issue to be decided by the court." The Court further noted that a finding of no duty was an exception to the general rule that every person owes a duty of reasonable care not to injure others (Civil Code section 1714). A finding of such an exception is to be made "on a more general basis suitable for the formulation of a legal rule, rather than the facts of a particular case."

Under these circumstances, the Court found that the general foreseeability of a collision between a vehicle leaving the freeway and one stopped alongside the road, and the relatively direct and close connection between the negligent stopping and such a collision, weighed against creating a categorical exception to the duty of ordinary care. The Court also concluded that an exception to the general rule was not supported by public policy.

Camp v. State of California (2010) 184 Cal.App.4th 967

Facts:

Ms. Camp, a passenger in a car accident in which the driver was intoxicated, sued defendants, the State of California and a highway patrol officer, on the theory that her paraplegia was not caused by the driver's intoxication, but by the officer's negligence in failing to call for an ambulance.
Camp was riding with her companions when the car turned over and everyone was thrown out of the car into a field. The police came to the scene, including Officer Lewis. Most of the vehicle occupants said they were not injured. Plaintiff was lying on the ground moaning, but when Lewis asked her if she wanted an ambulance, she declined. A friend of the accident victims was on the way to pick them up, and Lewis "ordered" all of them to leave the scene, including plaintiff, who was carried into the friend's vehicle. Unbeknownst at that time, plaintiff had a spinal injury and she was rendered a paraplegic. She filed suit against the State, claiming that Lewis was responsible for her injuries. A jury returned a verdict for more than $2,000,000 against the driver and Lewis, assessing 70% to the driver. Lewis appealed.

Appellate Court Decision:

The Court of Appeal held no duty was owed by Lewis to Camp. The court recognized that under California law, a person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act. A police officer, paramedic or other public safety worker is as much entitled to the benefit of this general rule as anyone else. Further, Lewis did not increase the risk to Camp by anything that he did – he did not move her; he made no misrepresentations to her; and she did decline summoning an ambulance. Under these circumstances, no duty was owed and, therefore, the verdict against Lewis was reversed. At most, this was a case of nonfeasance rather than misfeasance.

***Collins v. Plant Insulation Company* (2010) 185 Cal.App.4th 260**

Facts:

The decedent worked as a welder at naval shipyards and other places. Throughout his career, the decedent worked extensively with asbestos-containing products, including the manufacturer's insulation products. He died of asbestosis, and a wrongful death action was filed. The Navy was not sued because it was undisputed that the Navy was immune from liability. The only defendant at the trial was Plant Insulation Company, which attempted to argue that the jury should be allowed to assign fault to the Navy under Proposition 51 (Civil Code section 1431.2) which in turn would reduce the share of fault assigned to Plant Insulation Company. The trial court disagreed, and Plant Insulation Company was found 20% liable.

Appellate Court Decision:

The Court of Appeal reversed. Even though the Navy was not a party, and even though the Navy was

entitled to immunity from suit for its discretionary acts, the jury should have been allowed to assign a share of *fault* to the Navy. Whether fault can be allocated to an immune individual or entity under Proposition 51 depends on whether the immunity is essentially an immunity from suit, or whether it is based on a predicate determination the conduct in question is not wrongful under the law. Here, the basis of immunity was not freedom from fault.

Formet v. Lloyd Termite Control Co. **(2010) 185 Cal.App.4th 595**

Facts:

A homeowner, Caskey, hired a pest control company, to inspect and fumigate her house. The pest company did not inspect a certain balcony on the property, which turned out to have dry rot. Later, Caskey had a house guest, plaintiff Formet, who was leaning against the balcony when it collapsed due to the dry rot. As a result, the plaintiff fell 10 feet to the ground, was injured, and sued the pest company. Plaintiff alleged that the pest control company knew or should have known that the balcony had a dry rot problem and should have inspected it. The trial court granted the pest company's summary judgment motion and dismissed the suit.

Appellate Court Decision:

The Court of Appeal affirmed, holding the pest company had no duty to the homeowner's invitee – only to the homeowner and intended beneficiaries of the contract. Even if the pest company had discovered and disclosed the damage, there was no suggestion that Caskey would have repaired the damage. Since a pest inspection report and termite fumigation are commercial transactions, the duty owed from disclosures made to help decide whether to purchase fumigation should be limited to the intended beneficiary – the property owner. An invitee to the home was not an intended beneficiary. Since the duty to the homeowner arose from the contract that the pest control company had with the homeowner, the company owed no duty to the guest.

Huverserian v. Catalina Scuba Luv, Inc. **(2010) 184 Cal.App.4th 1462**

Facts:

Decedent died while scuba diving from a beach. The scuba equipment had been rented from defendant Catalina. There was an exculpatory clause in the contract releasing defendant from liability, and stating that the user assumed the risk. The clause indicated that it applied to "boat dives and multi-day rentals." There was no claim that the Huverserians rented the equipment for either a boat dive or a multiple day rental. Nonetheless, defendant moved for summary judgment based upon the release, and the trial court granted the motion.

Appellate Court Decision:

The Court of Appeal reversed on the basis that the language of the rental agreement was unambiguous. The exculpatory language releasing respondent from liability was expressly limited to "boat dives or multiple day rentals." A person reading the rental agreement who was neither a boat diver nor multiple day renter could have reasonably concluded that the exculpatory language following the limiting language did not apply to him or her. Accordingly, in this situation, the exculpatory language was inapplicable and provided no defense upon which summary judgment could be based.

***Iversen v. California Village Homeowners Association* (2011) 194 Cal.App.4th 107**

Facts:

Defendant California Village Homeowners Association (California Village) hired plaintiff Kurt Iversen, an independent contractor, to service air conditioner units on the roofs of several buildings at a condominium complex. Iversen subsequently fell from a ladder attached to one of the buildings. Iversen sued California Village alleging causes of action of negligence and premises liability. Iversen alleged negligence per se because the 26 ½-foot fixed ladder was not equipped with a safety mechanism provided for by Cal-OSHA. California Village moved for summary judgment contending that Iversen could not rely on Cal-OSHA to support a negligence claim because he was an independent contractor, not an employee of California Village. The trial court granted California Village's summary judgment motion.

Appellate Court Decision:

The Court of Appeal affirmed. Under the negligence *per se* rule, a presumption of negligence arises from a defendant's violation of a statute if the violation caused the plaintiff's injury; the injury resulted from the kind of occurrence the statute was designed to prevent; and the plaintiff is a member of a class of persons the statute was intended to protect. In *Elsner v. Uveges* (2004) 34 Cal. 4th 915, the California Supreme Court held that under amendments to Cal. Labor Code section 6304.5, Cal-OSHA provisions may be admitted to establish a duty of care in negligence and personal injury actions. In this case, the issue was whether an injured independent contractor with no employees could invoke Cal-OSHA regulations to establish a claim for negligence per se against a homeowners association that hired him. The Court of Appeal interpreted *Elsner* to hold that Cal-OSHA regulations may only be introduced by employees in tort actions to establish negligence per se. The Court of Appeal concluded that Iversen was not a member of the class of persons that Cal-OSHA was created to protect. As such, California Village did not owe Iversen a duty by virtue of Cal-OSHA and could not prevail on a negligence claim. The judgment was therefore affirmed.

***Lawson v. Safeway, Inc.* (2010) 191 Cal. App. 4th 400**

Facts:

A Safeway, Inc. tractor-trailer was parked legally on the side of U.S. Highway 101 ("101") close to an intersection near Crescent City. The position of the tractor-trailer blocked the view of oncoming traffic for a driver attempting to cross and turn onto 101. The plaintiffs, Charles Lawson and Connie Lawson, suffered personal injuries when the motorcycle that Mr. Lawson was operating struck the driver's side of a pick-up truck operated by defendant Shawn Kite. The Lawsons filed suit for personal injuries against Safeway, the driver of the Safeway truck, the driver of the pickup, and the State of California. A jury awarded substantial damages to plaintiffs and apportioned 35 percent fault to Safeway, 35 percent to the State of California, and 30 percent to the driver of the pickup.

Appellate Court Decision:

The primary issue on appeal was whether the driver of the Safeway truck owed a duty of care to those injured in the accident when he parked in an area that was not prohibited by the Vehicle Code or any other statute or ordinance. The Court of Appeal concluded that the risk of harm was sufficiently great that a jury should have been allowed to determine whether the driver of the truck, in parking where he did, bore some responsibility for the accident.

A duty to park safely, as well as legally, was owed because of the particular facts of this case: the vehicle was an "extremely" large commercial truck; the evidence showed that the drivers of such trucks are or should be professionally trained to be aware of the risk of blocking other drivers' sight lines when parking; the truck was parked at a high-speed well-traveled intersection; and a safe parking spot was available right around the corner.

Taking all of these circumstances into account, the court found that the Safeway truck driver was not, as a matter of law, excepted from the duty he would ordinarily bear to exercise due care in the operation of his vehicle simply because he was parked legally, and the issue of his negligence in choosing where to park was properly submitted to a jury.

***Lobo v. Tamco* (2010) 182 Cal.App.4th 297**

Facts:

Defendant Luis Duay Del Rosario left the premises of his employer, defendant Tamco, in his personal motor vehicle. As Del Rosario left the Tamco driveway and turned onto a highway, he collided with a motorcycle driven by Deputy Daniel Lobo who was killed in the accident. Deputy Lobo's widow and minor children filed suit alleging that Del Rosario was acting within the course and scope of his employment by Tamco at the time of the accident. The trial court granted Tamco's motion for summary judgment on the basis that Tamco was not vicariously liable for Deputy Lobo's death because Del Rosario was not acting within the court and scope when he left work in his personal vehicle.

Appellate Court Decision:

On appeal, plaintiffs focused on the limitation to the going and coming rule, where an employer gains some incidental benefit by the employee using his personal vehicle. Tamco manufactured steel bars used in construction and Del Rosario was the manager of quality control. On occasion, Del Rosario would visit a client to go over quality control issues. Del Rosario was reimbursed for his driving expenses. Del Rosario also kept work equipment in his vehicle in case he was called upon to visit a client site. Based on this evidence, plaintiffs argued that Tamco received an incidental benefit from Del Rosario's use of his personal vehicle, thereby negating the going and coming rule.

Tamco contended that in all cases where the limitation to the going and coming rule was applied, driving was an "integral" part of the employee's job. Here, Tamco argued that Del Rosario's occasional use of his own car to visit client sites was insufficient to be deemed an integral part of the job. The Court of Appeal disagreed and held that it was important that Tamco relied on Del Rosario to make his personal vehicle available for the employer's benefit. The court held that Tamco benefitted when Del Rosario could promptly respond to customer complaints – even if this was rare. The court, therefore, reversed the judgment in favor of the defendants.

***Tverberg v. Fillner Construction, Inc*. (2011) 193 Cal.App.4th 1121**

Facts:

In 2006, Fillner was the general contractor on a property to expand a gas station. Fillner hired subcontractor Lane Supply, which delegated work to Perry Construction, Inc. ("Perry") to install a canopy for the project. Perry hired Tverberg, an independent contractor, to construct the canopy. On May 1, 2006, Tverberg noticed that another subcontractor had dug holes for other work and asked that they be covered. The holes were not covered when Tverberg started work, and he was injured after falling into one. Tverberg then sued Fillner for negligence and premises liability. The trial court granted summary judgment to Fillner and dismissed Twerberg's action. The Court of Appeal reversed, finding that the *Privette* doctrine – that a hirer of an independent contractor is not vicariously liable to the contractor's employees unless it retained control of the contractor's work – did not apply because the independent contractor did not have workers' compensation coverage.

Supreme Court Decision:

The Supreme Court reversed the Appellate Court's decision and entered judgment for Fillner. Tverberg was an *independent contractor* of the subcontractor, Perry. He was not an ordinary employee of a subcontractor, the typical plaintiff in these types of suits. Thus, Tverberg himself had control of the work site and had the duty to take care of the work site, control it in a reasonable manner, and see that the work was done safely. The general contractor, Fillner, could not be vicariously liable for Tverberg's injuries because Tverberg retained control, not Fillner. The Supreme Court then remanded the case back to the Appellate Court regarding whether Fillner could be held *directly* liable to Tverberg.

Appellate Court Decision (per remand):

Pursuant to the Supreme Court's remand, the First District Court of Appeal found that there was evidence that Fillner affirmatively contributed to the alleged dangerous condition, which was sufficient to enable Tverberg to survive summary judgment on his claim for *direct* negligence against Fillner. The Appellate Court noted that for a plaintiff to recover, the hirer must engage in some active participation. While the passive permitting of an unsafe condition to occur is not an affirmative contribution, the act of directing that it occurs is active participation.

PREMISES LIABILITY

Melton v. Boustred (2010) 183 Cal.App.4th 521

Facts:

Defendant posted an announcement on the social networking site MySpace.com about an open party featuring live music and alcoholic beverages at his home. Upon arriving at the party, plaintiffs were attacked, beaten and stabbed by a group of unknown individuals. Plaintiffs brought suit against defendant, asserting claims for negligence and premises liability. The trial court sustained defendant's demurrer.

Appellate Court Decision:

On appeal, plaintiffs argued that defendant owed them a legal duty to protect against third party criminal assault, because the risk of injury was foreseeable and the burdens of protecting against it were slight. Plaintiffs characterized the unrestricted MySpace invitation as "active conduct of a property owner" that gives rise to a tort liability for the third party criminal assault.

The Court of Appeal concluded that there was no legal duty since the case involved neither misfeasance nor a special relationship. As a general rule, an actor is under no duty to control the conduct of third parties, but that rule does not apply if the claim is grounded upon an affirmative act of the defendant. Here, the court concluded that defendant took no action to stimulate the criminal conduct. Additionally, the violence that harmed the plaintiffs was not a necessary component of defendant's MySpace party.

C.C.P. § 998 OFFERS

Najera v. Huerta (2011) 191 Cal.App.4th 872

Facts:

In this personal injury case arising out of an automobile-versus-motorcycle traffic collision, the jury found that defendant Irene Huerta was the sole negligent cause of the accident and awarded plaintiff Frankie Najera total damages of $728,703.83. After trial, plaintiff claimed entitlement to expert witness fees and prejudgment interest because defendant had allegedly failed to accept plaintiff's Code of Civil Procedure § 998 offer of settlement. Defendant argued that plaintiff's
§ 998 offer – which was served at the time of the original summons and complaint – was not made in good faith. The trial court granted defendant's motion and thereby denied recovery of the challenged costs.

Appellate Court Decision:

The Court of Appeal reviewed factors in determining whether a § 998 offer is reasonable and in good faith. Prior cases have held that "litigants should be given a chance to learn the facts that underlie the dispute and consider how the law applies before they are asked to make a decision that, if made incorrectly, could add significantly to their costs of trial." Here, there were no special circumstances present to show that at that early juncture in the case, defendant's counsel had access to information or a reasonable opportunity to evaluate plaintiff's offer within the 30-day period. Instead, the record reflected that when plaintiff's attorney served a pre-litigation demand letter on the insurer and further information was requested by the insurer, none was provided. Therefore, the trial court did not abuse its discretion in finding that the offer was not reasonable or made in good faith and denied recovery of special costs pursuant to § 998.

Low, Ball & Lynch's

WHITE PAPER

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Special Issue By: Steven Werth and Caroline Chen

California's New Expedited Jury Trials Act

Starting January 1, 2011, parties in civil actions will have the option of trying their case before a jury trial in an expedited fashion, potentially reaping significant savings in litigation costs. By the passage of AB 2284 also known as the "Expedited Jury Trials Act,"[1] which Governor Schwarzenegger signed into law on September 30, 2010, plaintiffs and defendants if they choose to, may try their case before a jury of eight members, with only three hours for each side to put on their case, and only three peremptory challenges per side for jury selection. The bill was passed unanimously by the state legislature before reaching the Governor's desk. Both the plaintiff and defense bars appear to be wholly supportive of the new trial option.

Though the goal is to conclude the case in one day, there is no restriction on the time needed by the jury to deliberate. A vote of six out of eight jurors is required for a verdict, and the verdict will be binding, subject to any "high/low" agreements.

The "high/low" agreement is probably one of the new law's most significant features. The Expedited Jury Trials Act provides for a written "high/low" agreement entered into by the parties that establishes the minimum amount of damages guaranteed to the plaintiff and the maximum amount of damages recoverable against defendant regardless of the jury's verdict. The jury will not hear about the high/low agreement or of its contents, but their verdict will be subject to it.

The purpose of the new law, introduced by Assembly Member Noreen Evans (Santa Rosa), a former insurance defense counsel, is to enable more cost-effective litigation of civil cases for litigants and the courts. Many believe the process is well-suited to smaller civil matters involving $10,000 - $30,000 at issue, cases in which the expected exposure or award hardly seems worth the cost to litigate. While this may be true, the new law has no restriction in terms of the size of the case that may use an expedited jury trial.

In other jurisdictions with similar streamlined trial systems in place, higher value cases of up to $1 million have reportedly been tried in expedited jury trials with verdict results similar to those of cases that have undergone the regular (longer) jury trial process. New York and South Carolina have had a streamlined trial system in place now for at least five years. California's Expedited Jury Trials Act is reportedly modeled after their systems.

In an expedited jury trial, the rules of evidence will apply. However, the parties may stipulate to the use of relaxed rules of evidence. In no case will such stipulations affect

[1] Code of Civil Procedure Part 2, Title 8, Chapter 4.5, Sections 630.01 - 630.12.

parties and witnesses' rights to applicable privileges and confidentiality. Also, the Act specifically provides that the expedited jury trial shall be approved even where the parties include a self-represented litigant.

To participate in this process, the parties will have to sign a proposed consent order granting an expedited jury trial. The order is binding unless the parties later agree to end it or the court finds good cause not to proceed. The proposed consent order must include a preliminary statement that all parties and responsible insurance carriers are informed of the rules and agree to participate in (or for insurance carriers, do not object to) the expedited jury trial process.

The order also must contain the parties' agreement to each be limited to three hours to put on their case, three peremptory challenges and a jury of eight or fewer members. Additionally, the order must reflect the parties' agreement to waive the right to appeal and the right to move for directed verdict, to set aside the verdict or judgment, for new trial based on inadequate or excessive damages, and the right to file any other post-trial motions, except as provided in the code section. The exceptions include motions relating to costs and attorney's fees, motions to correct a judgment for clerical error, and motions to enforce a judgment. The parties may still bring these latter motions.

The parties may move for new trial and appeal on the following grounds only: (1) judicial misconduct that materially affected the substantial rights of a party; (2) misconduct of the jury; (3) corruption, fraud, or other undue means employed in the proceedings of the court, jury, or adverse party that prevented a party from having a fair trial. By participating in the expedited jury trial process, the parties are barred from moving for new trial or appealing on any other grounds.

The Act requires the Judicial Council to adopt court rules and procedures to effectively implement the Expedited Trials Act on January 1, 2011. These rules will pertain to additional content of proposed consent orders, pretrial exchanges and conferences, time limits for jury selection and trial, and presentation of evidence and testimony.

Low, Ball & Lynch will be monitoring the implementation of this new law, and will update our clients on the rules and procedures applicable to an expedited jury trial. In the interim, should you have questions or comments, please contact Steven Werth (swerth@lowball.com) or Caroline Chen (cchen@lowball.com).

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ANNA FABIANO joined the firm's San Francisco office in 2009 as an associate in general litigation.

Ms. Fabiano was born and raised in Sun Valley, Idaho. She attended Colgate University in New York, majoring in psychology and graduating in 2002. She earned a J.D. in 2009 from the University of San Francisco School of Law with a certificate in Public Interest Law. During law school, Ms. Fabiano worked in real estate litigation and spent a summer studying mediation at Trinity University in Ireland. She also interned with the Office of the San Francisco City Attorney and worked as a research assistant for Professor Alice Kaswan.

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Ms. Li was raised in Brea (Orange County), California. She received her bachelor's degree in biology from the University of California, Berkeley, in 1997. She received her law degree from the University of San Diego in 2001. In law school, Ms. Li received the Highest Grade in Class ("AmJur") in Constitutional Law and International Business Transactions. She also served as a judicial extern for the late Hon. Don R. Work, at the California Court of Appeal, 4th District.

Ms. Li is a certified domestic violence advocate, and volunteers as a crisis counselor to survivors of domestic violence. She also enjoys snowboarding.

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