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California Law Update

Highlighting recent California Supreme Court *Howell* and *Seabright* decisions by Low, Ball & Lynch Associates Mike Beuselinck, Punam Kumar, and James Regan

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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; he wanted to kill plaintiff, and 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 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.

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.

***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. The Court of Appeal affirmed. Plaintiff petitioned the Supreme Court for review.

Supreme Court Decision:

The Supreme Court affirmed. 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. His 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 with Dr. Podolsky and determined that the heirs were not bound by the agreement since they were not signators. The Court of Appeal affirmed and held that there was no reason for compelling the adult children to arbitrate their claims simply because the wife was so compelled.

Supreme Court Decision:

The Supreme Court 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 and alleged a breach of fiduciary duty by three former officers of a defunct company. Four months before trial, defendants remembered that their employment agreements contained an arbitration provision. They moved to compel arbitration. In opposition, the trustee argued that the defendants had waived the right to arbitrate by delay in bringing their motions and by engaging in discovery not available under the arbitration provision. The trial court granted the motions on grounds that because defendants had forgotten about the arbitration provision, they had not relinquished a known right. The trial court further 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. The trial court consequently 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

***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 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.

***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.

***Howell v. Hamilton Meats & Provisions, Inc.*, (2011) 52 Cal. 4th 541**

Facts:

Plaintiff, Rebecca Howell ("plaintiff") was seriously injured in an automobile accident negligently caused by a driver for defendant Hamilton Meats & Provisions, Inc. ("defendant"). Plaintiff had private health insurance with PacifiCare and underwent two spinal fusions and surgical procedures for harvesting grafts. Before surgery, plaintiff executed an agreement with the Scripps Memorial Hospital and CORE Orthopedic Medical Center to be fully liable for all charges. Ultimately, PacifiCare paid a reduced amount for plaintiff's medical treatment, and Scripps and CORE wrote-off the balance.

At trial, defendant moved in limine to exclude evidence of medical bills that neither plaintiff nor her health insurer had paid. The trial court denied the motion, ruling that plaintiff could present her full medical bills to the jury and that any reduction in the medical damages award could be handled by a "post-trial *Hanif* motion." The jury awarded plaintiff damages for the total amount of past medical expenses billed.

Defendants moved to reduce the award pursuant to *Hanif*, by the amount "written off" by plaintiff's medical providers. However, plaintiff argued in opposition that such a reduction would violate the collateral source rule. The trial court granted defendant's motion. The Court of Appeal reversed the reduction order, holding that the reduction violated the collateral source rule. The Supreme Court granted defendant's petition for review.

Supreme Court Decision:

The judgment was reversed and remanded for further proceeding. The Supreme Court held that plaintiff could recover as damages for her past medical expenses no more than her medical providers had accepted as payment in full from plaintiff and her health insurer. Plaintiff did not incur liability for her provider's full bills, because at the time the charges were incurred, the providers had already agreed on a different price schedule for the insurer's members. Having never incurred the full bill, plaintiff could not recover it in damages for economic loss. For this reason alone, the collateral source rule was inapplicable. The court further found that plaintiff received the benefits of the health insurance for which she paid premiums – her medical expenses had been paid per the policy, and those payments were not deducted from her tort recovery. Plaintiff's insurance premiums contractually guaranteed payment of her medical expenses at rates negotiated by the insurer with the providers; they did not guarantee payment of much higher rates the insurer never agreed to pay.

***Kevin Kimes v. Charles Grosser, et al.* (2011) 195 Cal. App. 4th 1556**

Facts:

Plaintiff's pet cat Pumkin was shot with a pellet gun while perched on a fence between his property and the property of defendant Charles Grosser. Plaintiff incurred $6,000 in emergency surgery to save Pumkin's life. However, the surgery left Pumkin partially paralyzed. Plaintiff then spent an additional $30,000 in expenses caring for Pumkin because of the injury. Plaintiff filed suit against Grosser, alleging that Grosser's family willfully shot Pumkin. Plaintiff sought to recover the amounts paid for Pumkin's care as a result of the shooting, and punitive damages. As the case proceeded to trial, Grosser filed motions in limine to exclude evidence of plaintiff's expenses caring for Pumkin on the theory that any liability was limited to the amount by which the shooting reduced Pumkin's fair market value. The trial court granted the motions in limine. In granting the motions in limine, the trial court concluded that pursuant to CACI Jury Instruction 3903J, an owner of personal property is entitled to recover the lesser of the diminution in market value caused by the injury, or the reasonable cost of repairing the property. Further, the trial court agreed that plaintiff could not be compensated for Pumkin's sentimental or emotional value. As a result, plaintiff declined to proceed with the trial and a judgment of dismissal was entered. Plaintiff appealed.

Appellate Decision:

The Court of Appeal reversed. It held that Jury Instruction 3903J had no application to this case. The Court instead determined that in a case where property has no market value (but may have some other value), the general rule limiting recovery to the loss of value may not apply. If that were the case, recovery for property with no market value would invariably be precluded. In such cases, the court reasoned that the property's value must be ascertained in some other rational way. The court further held that Civil Code section 3333 applies to this type of case because it provides that the measure of damages is the amount which will compensate for all detriment proximately caused. Here, plaintiff sought to present evidence of costs incurred for Pumkin's medical care and treatment. The court held this was a rational way of demonstrating a measure of damages apart from the cat's market value. While it was for the jury to decide if such an amount was reasonable, the motions in limine should have been denied. The judgment of dismissal was therefore reversed.

DISCOVERY

***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. One month after she was hired, Holmes told Petrovich about her pre-existing pregnancy. Petrovich and Holmes exchanged a string of e-mails relating to the timing and length of Holmes' maternity leave. Petrovich was 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. 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 also used the company e-mail system to contact her own attorney on the matters. 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 Holmes and her attorney to show that she did not suffer severe emotional distress, but was only frustrated and annoyed by the circumstances. 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 because they were not privileged. 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.

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 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 the 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. Defendants petitioned the Supreme Court for review.

Supreme Court Decision:

The Supreme Court reversed and 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.

Michael Hall v. Goodwill Industries of Southern California, (2011) 193 Cal. App.4th 718

Facts:

Plaintiff and appellant Michael Hall ("employee") sued his employer, Goodwill Industries of Southern California ("employer") for retaliation under the California Fair Employment and Housing Act (Gov. Code, section 12900 et seq.) and for wrongful termination. Employee

requested an immediate right-to-sue notice from the Department of Fair Employment and Housing ("DFEH"). A right-to-sue notice was sent to employee. Employer filed a motion for summary judgment which was granted by the trial court on the ground that employee's action was barred by the statute of limitations. Further, the court denied employee's motion for a new trial. The court concluded that employee had not presented any newly discovered evidence that was not available to his counsel in the prior motion before the court. Employee appealed the judgment.

Appellate Court Decision:

The Court of Appeal affirmed the judgment, holding that the action was properly dismissed under the one-year statute of limitations set forth in Gov. Code section 12965 (b), because the statute began to run as of the date of the right-to-sue notice was issued to the employee, rather than on the date the employee received the letter. Thus, employee's civil suit was untimely. The plain meaning of the phrase "from the date of that notice" in section 12965 (b) states, the claimant has one year to file a civil action from the date of the right to sue notice. Even under a liberal interpretation, there is nothing in the language that suggests the Legislature intended "from the date of that notice" to mean from the date of receipt of the notice. The court further held that the employee was not entitled to a new trial under Code of Civil Procedure section 657 (4), because evidence regarding the employee's treatment at a substance abuse rehabilitation program during a one-year period was not newly discovered evidence, even if it supported a claim for equitable tolling.

***Patrick C. Kelley v. The Conco Companies, et al.* (2011) 196 Cal. App. 4th 191**

Facts:

The Conco Companies, a concrete construction company, hired plaintiff as an apprentice iron worker at a job site with David Seaman as his supervisor. After he complained that Mr. Seaman subjected him to a barrage of sexually demeaning comments and gestures, he received similar comments from male co-workers. He was also subjected to physical threats by co-workers in retaliation for his complaints about Mr. Seaman. Although plaintiff's employer changed his work site, his union later suspended him, rendering him ineligible for employment. After the suspension expired, Conco did not re-hire him. Later he sued Conco and Mr. Seaman, alleging sexual harassment and retaliation under the California Fair Employment and Housing Act ("FEHA"). The trial court granted the defendants' motion for summary judgment on all claims.

Appellate Decision:

The Court of Appeal reversed the trial court's decision granting summary judgment on the retaliation cause of action under FEHA. However, the court upheld the trial court's decision that plaintiff had failed to produce evidence supporting a claim that he suffered discrimination in the workplace because of his gender. The court noted that an FEHA plaintiff must show that gender

is a substantial factor in the discrimination, and had plaintiff been the other gender, the plaintiff would not have been treated in the same manner. Accordingly, it is the disparate treatment of an employee on the basis of sex that is the essence of a sexual harassment claim. The Court further noted that this issue is more complicated to resolve in determining when same-sex harassment amounts to discrimination because of sex. The statements made to plaintiff were crude, offensive and demeaning. However, the Court found that no evidence was presented from which a reasonable trier-of-fact could conclude that they were an expression of actual sexual desire or intent by Mr. Seaman, or that they resulted from plaintiff's actual or perceived sexual orientation. The Court observed that the mere fact that words may have sexual content or connotations, or discuss sex, is not sufficient to establish sexual harassment. To establish retaliation under FEHA, a plaintiff must show that he engaged in a protected activity, the employer subjected the employee to an adverse employment action, and a causal link existed between the protected activity and the employer's action. Here, the Court found that plaintiff engaged in protected activity within the meaning of FEHA when he complained about Mr. Seaman's conduct. He also raised triable issues sufficient to defeat the motion for summary judgment as to whether his co-workers engaged in retaliatory harassment that was severe enough to constitute an adverse employment action, whether Conco knew of the improper conduct, and whether Conco properly responded to it.

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

Facts:

Kevin Murray, a quality assurance auditor at Alaska Airlines ("Alaska"), brought safety concerns to the attention of the FAA. The FAA investigated and confirmed the various problems. Alaska 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.

***Lorraine Pantoja v. Thomas J. Anton, et al.*, (2011) 198 Cal. App. 4th 87**

Facts:

Plaintiff Lorraine Pantoja ("employee") was an employee of defendant, attorney Thomas Anton, and his law firm Thomas Anton & Associates ("employer"). According to employee, employer sexually harassed her during her 10-month long employment by inappropriately touching her and using sexually charged language, including obscene language, in her presence. Employee alleged race and gender discrimination and harassment in violation of California's Fair Employment and Housing Act ("FEHA"), wrongful termination, battery, and intentional infliction of emotional distress.

At trial, employee proffered evidence of employer's behavior directed to herself and other employees. This included the testimony of several female former employees that employer often yelled at them, used obscene language in their presence and had inappropriately touched them. Employer acknowledged that while he did sometimes use obscene language in the office, he never did so with any discriminatory intent toward women or persons of color. Employer argued that his firm had a policy of not tolerating harassment and that he never engaged in any of the sexually harassing conduct alleged by employee.

Employee moved for the admission of the "me too" evidence from the other employees and the defense opposed. The trial court agreed with the defense and denied the admission of the evidence. After the presentation of the evidence, a defense verdict was rendered in employer's favor, upon which the trial court entered judgment.

Appellate Court Decision:

The Appellate Court reversed the judgment, concluding that the trial court had abused its discretion by having excluded the "me too" evidence. The Appellate Court found the "me too" evidence was admissible under Evidence Code section 1101 because it could be relevant to prove

employer's intent in his alleged conduct toward employee, including whether his decision to fire her was motivated by gender or race-based bias. Additionally, the "me too" evidence was relevant to show employer's mental state required to prove employee's claims for harassment.

Additionally, the Appellate Court found that not only was the "me too" evidence relevant to prove gender or race-based bias and harassment, it was also admissible to rebut the defense's evidence that employer had a policy of not tolerating harassment or directing profanity at individuals. Further, the trial court erred in one of its jury instructions that a "hostile work environment" for purposes of proving harassment is not established where a supervisor simply uses crude or inappropriate language in the presence of employees without directing gender-related language toward an individual. While this was a correct statement of law, an additional instruction was necessary to make clear that abusive language or behavior indicative of a hostile working environment can be in many forms, gender-related or not. Without this clarifying instruction, the jury may be misled to focus on the presence or absence of gender-related language and ignore the possibility that other abusive conduct may evidence gender bias.

***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.

***SeaBright Insurance Company v. US Airways, Inc.* (2011) 52 Cal. 4th 590**

Facts:

While inspecting a luggage conveyor, an independent contractor's employee's arm got caught in its moving parts. Plaintiff insurer sued defendant airline seeking to recover what it paid in benefits, claiming the airline caused an injury to an independent contractor's employee. The independent contractor's employee also intervened in the action as a plaintiff. The trial court granted the airline's motion for summary judgment, finding no evidence that the airline affirmatively contributed to the accident. The Court of Appeal reversed the granting of summary judgment, concluding that the airline had a nondelegable duty to ensure that the conveyor had safety guards, and that the question whether the airline's failure to perform this duty affirmatively contributed to the employee's injury remained a triable issue of fact. The defendant airline petitioned for review with the Supreme Court.

Supreme Court Decision:

The Supreme Court reversed the appellate court's decision. The Supreme Court concluded that plaintiffs could not recover in tort from the airline on a theory that the employee's workplace injury resulted from the airline's purported breach of a nondelegable duty under Cal-OSHA regulations to provide safety guards on the conveyor. The court held that an independent contractor's hirer implicitly delegates to that contractor its tort law duty, if any, to provide the employees of that contractor a safe workplace. Any tort law duty the airline owed to the independent contractor's employees only existed because of the work that the independent contractor was performing for the airline (i.e., maintenance and repair of the conveyor). Therefore, the tort law duty did not fall within the nondelegable duties doctrine. It would be unfair to permit the injured employee to obtain full tort damages from the hirer of the independent contractor - damages that would be unavailable to employees who did not happen to work for a hired contractor. Similarly here, this inequity would be even greater when the independent contractor had sole control over the means of performing the work. Hence, the appellate court erred in reversing the trial court's grant of summary judgment for the airline.

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.

Defendant attorneys moved to exclude all evidence of private attorney-client discussions immediately preceding, and during, the mediation concerning 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 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.

ELDER LAW

Elaine Carter, et al. v. Prime Healthcare Paradise Valley, Inc., 2011 Cal. App. LEXIS 1106

Facts:

Plaintiffs Elaine Carter, Newgene Grant and Roosevelt Grant, Jr. appealed a judgment entered after the trial court sustained a demurrer without leave to amend. Plaintiffs sued defendants Paradise Valley Hospital and Paradise Valley Health Care Center, Inc. for the death of their father, 87-year-old Roosevelt Grant, on theories of elder abuse (Welf. & Inst. Code § 15600 et. seq. – the Elder Abuse Act), willful misconduct and wrongful death.

Appellate Court Decision:

The Court of Appeal affirmed. The Elder Abuse Act defines neglect as "[t]he negligent failure of any person having the care or custody of an elder or a dependent adult to exercise that degree of care that a reasonable person in a like position would exercise." Neglect includes, but is not limited to, all of the following: "(1) Failure to assist in personal hygiene, or in the provision of

food, clothing, or shelter; (2) Failure to provide medical care for physical and mental health needs. . . .; (3) Failure to protect from health and safety hazards; (4) Failure to prevent malnutrition or dehydration." In short, it refers "to the failure of those responsible ..... to carry out their custodial obligations." (*Delaney v. Baker* (1999) 20 Cal.4th 23, 34). To recover the enhanced remedies available under the Elder Abuse Act from a health care provider, the plaintiff must prove "by clear and convincing evidence" that "the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of" the neglect.

The Court held that there were no sufficient allegations to constitute neglect within the meaning of the Elder Abuse Act. For conduct to constitute neglect within the meaning of the Elder Abuse Act, the plaintiff must allege facts establishing that the defendant (1) had responsibility for meeting the basic needs of the elder or dependent adult, such as nutrition, hydration, hygiene or medical care; (2) knew of conditions that made the elder or dependent adult unable to provide for his or her own basic needs; and (3) denied or withheld goods or services necessary to meet the elder or dependent adult's basic needs, either with knowledge that injury was substantially certain to befall the elder or dependent adult (if the plaintiff alleges oppression, fraud or malice) or with conscious disregard of the high probability of such injury." The plaintiff must also allege that the neglect caused the elder or dependent adult to suffer physical harm, pain or mental suffering. Although neglect that is fraudulent may be sufficient to trigger the enhanced remedies available under the Act, without detrimental reliance, there is no fraud.

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 without 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. An attorney 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. The application was denied. Barragan 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, 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 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, 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.

***Daniella Bologna, et al. v. City and County of San Francisco, et. al.*, (2011) 192 Cal. App.4th 429**

Facts:

Decedents were killed when an illegal immigrant allegedly shot and killed them. Plaintiffs, the

decedents' survivors and next of kin, sued the city in which the killings occurred, alleging claims for general negligence, negligent infliction of emotional distress, and violation of mandatory duties imposed by law. The issue in this case was whether plaintiffs could proceed in tort against the city under a theory that the city's policy to provide sanctuary to illegal immigrants was a legal cause of the murders because it shielded the killer from deportation in violation of state and federal statutes. The trial court entered a judgment in favor of the city after it sustained the city's demurrer without leave to amend. Plaintiffs appealed.

Appellate Court Decision:

The Court of Appeal affirmed the trial court's decision. The court concluded that plaintiff could not premise their tort claims on 8 U.S.C. § 1373(a) or Health & Saf. Code § 11369. Plaintiffs provided neither authority nor additional legislative history to contradict the conclusion that the Legislature enacted section 11369 to combat the illegal drug trade. The fact that reporting suspected illegal immigrants arrested for drug offenses to federal immigration authorities may also prevent them from committing violent crimes was not enough to warrant the conclusion that § 11369 created an actionable tort on behalf of the general public. Further, while § 11369 may benefit the public by removing violent drug offenders, the legislative history and the statute's limitation to specified drug offenses confirmed that this benefit was incidental.

***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 that he was entitled to qualified immunity. Qualified immunity should be granted when 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. 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 then re-submitted.

Ninth Circuit Decision:

The Ninth Circuit, *en banc*, 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 qualified immunity.

The Ninth Circuit 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 *Graham* 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 a child with a 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. He claims that had they done so, defendant would have discovered that the foster mother was on numerous types of medication, including pain killers and anti-depressant drugs that would have made her forgetful. Defendant agency 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:

Civil Code § 846 provides immunity to California landowners for injuries sustained by recreational users of the property. An example of when immunity would apply under § 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 § 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.

Plaintiff Richard Klein was riding his bicycle on a public, two-lane, paved road in Angeles National Forest. 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 alleging that the United States was vicariously liable for the vehicular negligence of the volunteer. The United States moved for summary judgment, asserting that § 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 § 846 applies to vehicular accidents.

Supreme Court Decision:

The California Supreme Court concluded that § 846 does *not* extend to acts of vehicular negligence by a landowner or the landowner's employee. The United States argued that § 846 should be interpreted broadly and that landowners should not have a duty to protect recreational users. The Supreme Court held that such an interpretation of the statute was inconsistent with the language of § 846 and the Legislature's intent. Civil Code § 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.

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 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. In a motion for summary judgment, the City argued 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 that 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 that the divider did not cause the collision. 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 § 835.

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 no dangerous condition 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 § 830. The trial court

adopted that analysis and denied PUC's motion. PUC petitioned the Court of Appeal 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 § 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.

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

Facts:

Virginia Sanchez was a sixth grader in the McCabe Elementary School. She attended a camp owned and run by a different school 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 School District for failing to provide adequate medical staffing at the camp. The School District moved for summary judgment pursuant to Education Code § 35330, which provides immunity to school districts for field trips. The trial court granted summary judgment for the defendant School District.

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 would likely require indemnity agreements from home districts (i.e. 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 § 35330, which is to afford immunity to *all* school districts for field trips.

***Maria Torres, et al. v. City of Madera, et al.*, (2011) 648 F.3d 1119**

Facts:

Madera City police officers arrested Everado Torres, handcuffed him, and put him in the back of a patrol car. After falling asleep, Torres awoke approximately 30-45 minutes later and began yelling and kicking the rear door from the inside. One of the officers on-scene, Marcy Noriega, walked over to the door and opened it. She intended to tase Torres in order to prevent him from injuring himself in case he kicked through the glass window. Upon opening the door Noriega accidentally pulled her gun instead of her Taser and fired one bullet into Torres. He died later that evening.

Torres' family sued in federal court pursuant to 42 U.S.C. § 1983, alleging violation of Torres' Fourth Amendment rights. Upon grant of Defendant's summary judgment motion, the Torres family filed an interlocutory appeal. In its decision on that appeal (*Torres I*), the Ninth Circuit found that Torres was seized within the meaning of the Fourth Amendment, and it established a five-factor test for whether Noriega's mistaken draw was objectively reasonable. The five-factor test is as follows: (1) nature of the training the officer received to prevent similar incidents; (2) whether the officer acted in accordance with that training; (3) whether adherence to that training would have alerted the officer that he was holding a handgun; (4) whether the defendant's conduct heightened the officer's sense of danger; and (5) whether the defendant's conduct caused the officer to act with undue haste and inconsistently with that training.

The Ninth Circuit remanded to the district court. Upon remand, the district court again granted Defendant's summary judgment motion. The Torres family then appealed that final judgment.

Appellate Court Decision:

The Ninth Circuit reversed and the case was remanded. The Ninth Circuit panel addressed two questions on this appeal (*Torres II*): (1) whether the facts alleged show that there was a violation of a constitutional right; and (2) whether Noriega was entitled to qualified immunity. Within the first question, the Court also addressed whether Noriega's use of deadly force was objectively reasonable under the Fourth Amendment.

The court found that a reasonable jury could conclude her mistaken draw was not objectively reasonable and that it was in violation of Torres' Fourth Amendment rights. Further, the court rejected Noriega's qualified immunity claim. Noting she would only be entitled to such immunity if she reasonably believed the actual force she used was lawful, the court stated there could be no reasonable mistake here: Noriega used deadly force against an unarmed, non-dangerous suspect.

INDEMNITY

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, participated in planning for the project. There was a contract between CH2M Hill and the developer, UDC, that provided for CH2M Hill to 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 first determine the factual issues of negligence and breach of contract. The jury determination would be 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." The court explained that it was only the duty to indemnify that depended on a finding of negligence. 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.

NEGLIGENCE

Anders v. Superior Court (2011) 192 Cal. App. 4th 579

Facts:

Civil Code §§ 895 through 945.5 set out a nonadversarial prelitigation procedure by which a home purchaser, who believes there are defects in construction, gives a builder notice and opportunity to investigate and repair the alleged defects (or make a cash offer to a homeowner) before initiating a court action. The builder also has the option under the statutes to contract for an alternative nonadversarial prelitigation procedure. Here, the plaintiff owners of 54 homes filed a complaint

seeking remedies for alleged construction defects against the defendant builder. Most of the buyers' homes were sold pursuant to sales contracts containing alternative prelitigation procedures. Two buyers had purchase agreements that provided for application of the statutory procedures. After finding the builder's alternative procedures to be unconscionable and unenforceable, the trial court instead required all of the buyers and their successors in interest to comply with the statutory prelitigation procedures. The home buyers and successors in interest of home buyers sought mandate relief with the Court of Appeal after the trial court issued an order requiring the petitioners to comply with the statutory prelitigation procedures set forth in Civil Code §§ 910-938 prior to filing suit against real party in interest builder on claims of construction defects.

Appellate Court Decision:

The Court of Appeal issued a peremptory writ of mandate directing the trial court to vacate its order as it pertained to the buyers whose agreements did not provide for application of the statutory procedures and to enter a new order denying the builder's motion to require those buyers to comply with the statutory provisions for prelitigation procedures. The Court of Appeal held that the builder's election to use the alternative procedures was binding and that Civil Code § 914(a) precluded the builder from enforcing the statutory prelitigation procedures thereafter. Civil Code § 914(a) specifically stated that the builder's election is binding "regardless of whether the builder's alternative nonadversarial contractual provisions are successful in resolving the ultimate dispute or are ultimately deemed unenforceable." A builder could not require adherence to the statutory procedures after attempting to enforce its alternative procedures, regardless of whether its alternative procedures were successful in resolving the dispute or whether they were ultimately deemed enforceable. Civil Code § 914 did not allow a builder to make only a qualified election to follow alternative procedures. Two buyers whose purchase agreements had elected the statutory procedures could be required to comply with those procedures because the builder had not attempted to enforce any alternative procedures against them.

***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 Court of Appeal reversed and found 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 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 § 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 plaintiff declined when Lewis asked plaintiff if she wanted an ambulance. A friend of the accident victims was on the way to pick the victims up. 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 reversed the judgment and held that 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 § 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.

***Cortez v. Abich* (2011) 51 Cal. 4th 285**

Facts:

Plaintiff was injured on a construction site when the roof upon which he was standing collapsed. The defendant homeowners conducted a remodeling project that included demolition of existing walls and the roof, and an addition of 750 square feet to the house. To help demolish the roof, the plaintiff was hired by an unlicensed contractor who was one of a number of individuals hired by the defendants to work on the project. Cal-OSHA imposes specific responsibilities upon employers to provide safety devices, safeguards and methods and practices to render the place of employment safe and healthful. Plaintiff brought an action against the homeowners, alleging causes of action for negligence (failure to warn and failure to make work area safe) and premises liability. The trial court granted defendants' motion for summary judgment, concluding that the homeowners were not required to comply with the California Occupational Safety and Health Act of 1973 ("Cal-OSHA") (Labor Code, § 6300 et seq.). The Court of Appeal affirmed summary judgment for defendants and held that defendants' home improvement project fell within Cal-OSHA's "household domestic service" exclusion because it was undertaken for the

noncommercial purpose of enhancing defendants' personal enjoyment of their residence. The Supreme Court granted plaintiff's petition for review of the Cal-OSHA issue.

Supreme Court Decision:

The Supreme Court reversed the judgment of the Court of Appeal and remanded the matter to the Court of Appeal for further proceedings. The Supreme Court held that work rendered on a residential remodeling project with significant demolition and rebuilding of a house, including new rooms additions, did not fall within the statutory "household domestic service" provision for employment excluded under Cal-OSHA statutes. "Household domestic service" is commonly associated with services relating to the maintenance of a household or its premises. The types of labor typically entailed in an extensive remodeling project appeared to fall outside state regulatory categories for household occupations or services. Moreover, worksite conditions associated with residential demolition, construction, and large-scale improvements can be ongoing for months. They are often vastly more hazardous than the conditions typically associated with regular household maintenance. Accordingly, the Supreme Court held that the Court of Appeal erred in applying the statutory household domestic service exclusion.

***Dawn Renae Diaz v. Jose Carcamo, et al.*, (2011) 51 Cal. 4th 1148**

Facts:

Plaintiff Dawn Diaz was driving southbound on Highway 101. Defendant Jose Carcamo, a truck driver for defendant Sugar Transport of the Northwest, LLC. ("Sugar Transport"), was driving northbound in the center of three lanes. Defendant Karen Tagliaferri was traveling directly behind Carcamo. Immediately prior to the accident, Tagliaferri passed Carcamo on the left and then, without signaling, attempted to merge back into the center lane. While merging back into the center lane, Tagliaferri's vehicle struck Carcamo's truck. Tagliaferri's vehicle went out of control and flipped over into the southbound lanes where it struck Diaz's vehicle. Diaz sustained severe injuries. Diaz subsequently filed suit against Tagliaferri, Carcamo, and Sugar Transport. Diaz alleged that Sugar Transport was both vicariously liable for Carcamo's negligent driving and directly liable for its own negligence in hiring Carcamo.

At trial, evidence was offered that both Carcamo and Tagliaferri were negligent. Sugar Transport offered to admit vicarious liability if Carcamo was found negligent. Over Sugar Transport's objections, the trial court would not dismiss the negligent hiring claim and admitted evidence of Carcamo's prior accident history; illegal residence in the country; and terminations from prior trucking jobs. The jury found for Diaz. Sugar Transport appealed arguing that the negligent entrustment claim should have been dismissed after Sugar Transport admitted liability for Carcamo's driving. The Court of Appeal affirmed the judgment. Sugar Transport petitioned the Supreme Court for review.

Supreme Court Holding:

The Supreme Court reversed the Court of Appeal and remanded for a complete retrial. The Supreme Court relied in part on its earlier decision in *Armenta v. Churchill* (1954) 42 Cal.2d 448. *Armenta* held that an employer's admission of vicarious liability made a negligent entrustment claim irrelevant. The Court of Appeal in this case distinguished *Armenta* because it involved a claim of negligent entrustment rather than negligent hiring. The Supreme Court held that whether the additional claim was for negligent hiring or entrustment- the difference was immaterial. An admission of vicarious liability removed the legal issue of liability from the case.

Diaz contended that *Armenta* was decided prior to California's decision to use a comparative fault system and the passage of Proposition 51, which defines the scope of joint and several liability. Diaz argued that in cases like this where Proposition 51 requires an allocation of fault among multiple tortfeasors, *Armenta* is inconsistent with principles of comparative fault. The Supreme Court disagreed, citing *Jeld-Wen, Inc. v. Superior Court* (2005) 131 Cal.App.4th 853. In *Jeld-Wen*, a Court of Appeal rejected a similar argument holding that negligent entrustment may establish an employer's own fault, but should not impose additional liability. An employer's liability should not exceed that of the employee. The Supreme Court in this case agreed with that holding, reasoning that to assign an additional share of fault to the employer would be inequitable. The Supreme Court, therefore, determined that the Court of Appeal erred in not relying on *Armenta* and found that Sugar Transport had been prejudiced.

***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.

***Huitt v. Southern California Gas Company* (2010) 188 Cal. App. 4th 1586**

Facts:

Natural gas supplied by defendant gas company to a construction site at a school was odorized properly at the meter. The odorant, however, was adsorbed as it traveled through the new steel gas pipes owned and installed by the school district. Plaintiffs' initial attempts to light a water heater's pilot light failed, and one plaintiff only glanced at the lighting instructions. Plaintiffs decided to bleed any accumulated air in the natural gas pipe. This caused an accumulation of natural gas in the water heater closet, resulting in an explosion and serious injuries to plaintiffs when they again tried to ignite the pilot light. Plaintiffs sued and alleged that the accumulated natural gas in the water heater closet lacked any odorant. Plaintiffs argued the company had a duty to warn that new steel gas pipes adsorb the odorant in the natural gas and, had they known of this fact, they would not have bled the gas pipe into a confined closet. A jury awarded each plaintiff in excess of $1 million in compensatory damages. The jury also awarded each plaintiff $5 million in punitive damages. The defendant gas company appealed.

Appellate Decision:
The Court of Appeal reversed the judgment and directed the trial court to enter judgment in favor of the gas company. To be liable, even under a strict liability theory, the plaintiffs must prove that the defendant's failure to warn was a substantial factor in causing the plaintiffs' injuries. The trial court improperly allowed the jury to use hindsight to conclude that plaintiffs would have acted differently and not bled the pipe if they had known of odor fade. The Court of Appeal concluded that plaintiffs were precluded from recovery because they failed to establish that a timely warning issued by the company would have prevented the accident. There was no evidence to infer that a warning would have reached plaintiffs had the company issued one. Plaintiffs' failure to read the installation manual demonstrated the difficulty in getting a warning to them. It was pure speculation for plaintiffs to assert that a warning issued by the defendant gas company would have succeeded where numerous cases and other sources of information about odor fade failed to inform plaintiffs of the hazard.

***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.

***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 Court of Appeal affirmed. 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 and 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. The issue of his negligence in choosing where to park was properly submitted to a jury.

Rosencrans v. Dover Images, Ltd. **(2011) 192 Cal. App. 4th 1072**

Facts:

Plaintiff, a motocross rider, had been riding motorcycles for 24 years. He arrived at the Starwest Motocross Track and was presented with a "Release and Waiver of Liability Assumption of Risk and Indemnity Agreement" at the entrance booth to the track. He signed his name over the words "I HAVE READ THIS RELEASE" within 10 seconds of the document being handed to him. 20 other motocross riders were practicing on the track with plaintiff – there was not a race. Plaintiff thereafter fell off his motorcycle on the downslope of a jump ramp. He was not injured by falling. He stood up and proceeded to pick up his motorcycle, but out of view of approaching motorcyclists. He was struck by another motorcyclist approximately 30 seconds after standing up. Plaintiff was struck yet again by another motorcyclist approximately 20 seconds later. Plaintiff's initial fall took place near a platform where there was typically a "caution flagger" to alert other riders that someone had fallen. A caution flagger was working at another location on the track, but nobody was working at the platform near where plaintiff fell. Plaintiff and his wife sued the defendant motocross track operator for negligence, negligent training and supervision, and loss of consortium. The trial court granted defendant's motion for summary judgment to all causes of action based on the execution of the release agreement.

Appellate Court Decision:

The Court of Appeal reversed the grant of judgment only as the gross negligence claim, but affirmed the judgment in all other regards. The Court of Appeal concluded that a release signed by the husband was not void due to fraud in the execution. Even though there were 10 cars waiting behind him at the entrance, there was nothing that prevented the plaintiff from reading the release before signing. While plaintiffs' claims for ordinary negligence were barred by the release, the gross negligence claim was not barred by the release due to public policy. Plaintiffs created a triable issue of fact as to whether defendant's failure to provide a caution flagger constituted an extreme departure from the ordinary standard of conduct. A trier of fact could reasonably find that defendant's negligence was a substantial factor in causing the husband's injuries. A trier of fact could infer that collisions were more likely to occur if adequate caution flaggers were not provided, and that the risk of the collisions was foreseeable. Since there was no specific claim of error as to the loss of consortium cause of action, the court did not reverse the trial court as to that cause of action.

***Denise Smith, et. al. v. Karen Freund, et. al.*, (2011) 192 Cal. App. 4th 466**

Facts:

In 2005, Defendant parents' 19-year-old son, who suffered from Asperger's Syndrome and lived as a dependant with defendants, shot and killed two people before committing suicide. The victims' parents sued defendants for wrongful death on the basis that their son's shooting of third parties was foreseeable and that defendants owed a duty of care to third parties to control their son and prevent him from harming other people. In 2001, a neurologist reported that the son had rages and had physically attacked his parents in the past. The trial court granted Defendants' motion for summary judgment. Plaintiffs appealed.

Appellate Court Decision:

The Court of Appeal affirmed. The Court concluded that the shooting was unforeseeable, and that defendants owed no duty of care to third parties to control their son and prevent him from harming other people. Although there may have been a foreseeable risk that the son might physically attack his parents or hurt himself, the behavior provided no forewarning that he might shoot and kill the victims in this case. In a negligence case where plaintiff alleges a defendant had a duty to control another person's conduct, special rules come into play. In general, one owes no duty to control the conduct of another person, but the courts have created limited exceptions based on various special relationships. Plaintiff must make a twofold showing that (1) the defendant had the ability to control the actor and (2) the defendant bore a duty of care based on the closeness of the connection between the defendant's conduct and the injury suffered (a *Biakanja/Rowland* analysis). In addition, the court noted that to impose a duty of care on defendants could cause greater harm in future cases by encouraging parents to disassociate from their adult children with chronic serious problems.

PRODUCTS LIABILITY

***Jerry Bailey v. Safeway, Inc.*, (2011) 199 Cal. App. 4th 206**

Facts:

Plaintiff Jerry Bailey ("Bailey"), an employee of Safeway, Inc. ("Safeway"), was stocking a display of Cook's Champagne bottles when one of the bottles exploded, causing eye injuries. Bailey sought recovery in an action against Saint-Gobain Containers, Inc. ("Saint-Gobain"), the bottle manufacturer, in strict product liability for defective design. Bailey also sued Safeway, the product retailer, under the same theory of defective design, and for negligence. Bailey reached a settlement agreement with Saint-Gobain plus an assignment of any equitable indemnity rights Saint-Gobain had against Safeway.

Following Saint-Gobain's dismissal, Bailey and Safeway proceeded to trial. The jury found that the bottle provided by Safeway to Bailey was defectively designed under the consumer expectations test. However, the jury also found that Safeway was neither negligent nor "at fault." Bailey and Safeway thereafter stipulated that the verdict be changed to reflect that Safeway was 100% liable under strict liability for design defect, and the court entered judgment in favor of Safeway.

Thereafter, Bailey, as the assignee of Saint-Gobain's rights, filed a separate action for equitable indemnity against Safeway. In the complaint, Bailey alleged that Safeway was found to be 100% at fault – as reflected in the modified jury verdict – and that the doctrine of collateral estoppel precluded Safeway from litigating its liability. The trial court disagreed and sustained Safeway's demurrer without leave to amend. The court ruled that Bailey could not establish that Safeway was a substantial factor in causing the harm because the jury ruled Safeway was not negligent in the first action. Bailey appealed.

Appellate Court Decision:

The Court of Appeal affirmed. Though Bailey argued that Safeway was collaterally estopped from re-litigating its liability, the Court of Appeal ruled that it was Bailey who was estopped from pursuing indemnity. Bailey was a party to the prior litigation, and was in privity with Saint-Gobain, the assignor of the right to pursue equitable indemnity.

The Court went on to clarify that its decision does not preclude equitable indemnity in a strict liability action. Principles of equitable indemnity may be applied to apportion liability among multiple strictly liable tortfeasors (*GEM Developers v. Hallcraft Homes of San Diego, Inc.* (1989) 213 Cal. App. 3d 419). Safeway's liability was not based on its independent acts or omissions.

Finally, the Court ruled that Bailey could not use the stipulated verdict finding Safeway 100% responsible to preclude Safeway's defense against the indemnity claim. Following the settlement between Saint-Gobain and Bailey, Safeway was left as the sole defendant in the action to defend Saint-Gobain's product design. As a downstream retailer, Safeway was liable for Saint-Gobain's design defect in the same degree as the manufacturer. Accordingly, it could not be said that the issue of comparative fault between Safeway and Saint-Gobain was "actually litigated," and therefore collateral estoppel did not apply.

***Garcia v. Becker Bros. Steel Co.* (2011) 194 Cal. App. 4th 474**

Facts:

In 1973, defendant Cincinnati Inc. sold a "slitter line" to defendant Becker Brothers Steel Supply Co. A slitter line is a series of machines that cuts and folds steel into rolls. Becker operated the slitter line for 26 years. During that time, the slitter line was used approximately 65,000 times,

with only one injury occurring. Lexwest thereafter acquired the slitter line sometime after 2001. In 2004, plaintiff, a slitter operator for Lexwest, had his left index finger amputated while using the machine. Plaintiff sued Cincinnati Inc., Becker and others, alleging negligence and strict products liability. He claimed that the defendants violated American National Safety Institute (ANSI) and Cal-OSHA standards by not having a guard on certain parts of the slit-line. Becker filed a motion for summary judgment arguing that it did not owe plaintiff, a subsequent user, a duty of care. The trial court granted Becker's motion for summary judgment. Plaintiff appealed.

Appellate Court Decision:

The Court of Appeal affirmed. Under California law, a manufacturer is strictly liable when a product it places on the market, knowing that it will be used without inspection for defects, proves to have a defect that causes injury. Strict liability also applies to those entities within the stream of commerce – including retailers, distributors and lessors. On appeal, plaintiff conceded that an occasional seller of used equipment is ordinarily not subject to strict liability for its sale of a defective product. He contended, however, that even an occasional seller like Becker owes a duty to those whom the seller should expect could be injured by subsequent use. Plaintiff pointed to evidence that Cincinnati had sent out warnings in the 1980's that the slitter line should have a guard. Plaintiff alleged that at a minimum, Becker had a duty of disclosure of prior notices received from the manufacturer and the fact there had been one prior injury using the slit line. The Court of Appeal rejected this argument, holding that whatever duty an occasional seller may owe its immediate purchaser, Becker owed no duty to plaintiff. Plaintiff was an employee of the purchaser who bought the machinery from a bank that repossessed it from the buyer who bought the slit line from Becker. Plaintiff was simply too far removed in the stream of commerce. Further, Becker was neither the manufacturer nor the designer of the equipment. Becker was also not plaintiff's employer. The court therefore ruled that Becker owed no duty of care to plaintiff, and summary judgment for defendant Becker was affirmed.

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 affirmed. To determine whether a § 998 offer is reasonable and in good faith, the court reviewed prior cases holding 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.

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Mr. Beuselinck attended the University of San Francisco School of Law and Carnegie Mellon University, where he graduated with University Honors for a self-designed curriculum. Mr. Beuselinck is admitted to practice in the State of California, as well as the Northern and Eastern Districts of the United States District Courts. He also is admitted to the United States Court of Appeals for the Ninth Circuit. Mr. Beuselinck's professional affiliations include the Bar Association of San Francisco, the Association of Defense Counsel, and the Energy Bar Association.

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Ms. Kumar was born in the Fiji Islands and raised in Vancouver, Canada. She was admitted to the State Bar of California in 2004 after graduating from the University of British Columbia in 1996 with a degree in Psychology and from John F. Kennedy University School of Law in 2002, where she obtained her Juris Doctor with honors.

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Mr. Regan has second-chaired trials in Sacramento and Los Angeles Counties, and throughout the Bay Area. In addition, he has been involved in mediations throughout the United States. He has also been a featured speaker at Low, Ball & Lynch seminars.

Mr. Regan attended St. Ignatius College Preparatory before graduating from the University of San Francisco, with a B.S. in Business Administration. He attended Western State University College of Law, where he was Vice President of the Student Bar Association and graduated with a certificate in Business Law. While in law school, Mr. Regan externed for then-Assistant Presiding Judge David L. Ballati of the San Francisco Superior Court. After graduation, he worked as the Research Attorney to the Presiding Judge of the San Francisco Superior Court under Hon. David L. Ballati and Hon. James J. McBride.

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