PUBLICATION UPDATE

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California Damages: Law and Proof

Publication 80230 Release 15 August 2011

HIGHLIGHTS

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- This update to California Damages: Law and Proof provides the latest changes to California law on the topic of tort and contract damages, with case law updates into 2011.
- This release updates the publication in many areas noted in more detail below.

PERSONAL INJURIES

Assessment of Damages. In *Najera v. Huerta* (2011) 191 Cal. App. 4th 872, 119 Cal. Rptr. 3d 714, the plaintiff alleged that expert witness fees and prejudgment interest were recoverable under Code Civ. Proc. § 998 and Civ. Code § 3291 because defendant failed to accept an offer to compromise within 30 days after service and plaintiff obtained a damage award that exceeded the amount of the offer. The Code Civ. Proc. § 998 offer was served concurrently with the summons and complaint. The court of appeal held that there were no special circumstances present to show that at that early (and time-critical) 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. There was no free flow of information or preexisting relationship. Instead, the record reflected that when plaintiff's attorney served a prelitigation demand letter on the insurer and further information was requested by the insurer, none was provided. The exchange of letters was indicative that gaining information would likely take time and effort. Therefore, the trial court did not abuse its discretion in finding that the offer was not reasonable or made in good faith and denying recovery of expert witness fees and prejudgment interest. *See* Ch. 1, *Personal Injuries*, § 1.1(d).

Attorney's Fees. In *Estate of Manuel* (2010) 187 Cal. App. 4th 400, 113 Cal. Rptr. 3d 448, a contestant denied requests for admission which, if admitted, would have resolved the entire case in favor of the executor. The trial court ordered the contestant and her attorneys to pay costs of

proof. On appeal, the court held that costs of proof under Code Civ. Proc. § 2033.420, could be imposed only against a party, not against the party's counsel. The court further held that the award could not be upheld as a sanction for misuse of the discovery process because the executor's motion did not seek sanctions against counsel for misuse of discovery under Code Civ. Proc. § 2023.020, and unreasonably denying a request for admission was not one of the types of misconduct described in Code Civ. Proc. § 2023.020. Moreover, the trial court never found that the contestant's attorneys misused discovery or advised that their client do so. Therefore, the imposition of costs of proof against the attorneys could not be upheld on any basis. *See* Ch. 1, *Personal Injuries*, § 1.1(e).

Medical Malpractice and Wrongful Death. Civ. Code § 3333.2's $250,000 cap on medical malpractice noneconomic damages applies in wrongful death actions (*Ruiz v. Podolsky* (2010) 50 Cal. 4th 838, 114 Cal. Rptr. 3d 263, 237 P.3d 584). *See* Ch. 1, *Personal Injuries*, § 1.3(a).

Past Medical Expenses. In *Cabrera v. E. Rojas Properties, Inc.* (2011) 192 Cal. App. 4th 1319, 122 Cal. Rptr. 3d 390, the appellate court reduced plaintiff's recovery of past medical expenses from the amount billed by her medical provider to the amount paid by her private medical insurer. The court explained that under current California law, an injured plaintiff in a tort action cannot recover more than the amount of medical expenses he or she paid or incurred, even if the reasonable value of those services might be a greater sum. In the instant case, there was no suggestion that plaintiff was at any time liable for the amounts billed by her medical providers as their usual and customary charges. The reduction was not based on compensation received by plaintiff from an independent source, nor did it deprive plaintiff of the benefit of her insurance, as she was compensated for her medical expenses paid. *See* Ch. 1, *Personal Injuries*, § 1.5(a).

Future Medical Expenses. In *Behr v. Redmond* (2011) 193 Cal. App. 4th 517, 123 Cal. Rptr. 3d 97, plaintiff sought damages arising from defendant's alleged tortious transmission of genital herpes. The jury awarded plaintiff $2.5 million in future medical expenses, based in part on plaintiff's claim that she is "uninsurable" because of her herpes and that her prescription medication will cost her $93,600. The evidence regarding her uninsurability consists of plaintiff's testimony that she applied for health insurance on one occasion and was told her application was denied because she had herpes. The denial, she points out, precludes "all medical coverage, not merely . . . coverage for care and treatment of conditions related to her genital herpes." The argument appears to assume that she will incur medical expenses over her life that would be covered by an insurance policy and exceed the cost of her insurance premiums. The appellate court rejected this argument, noting that even if evidence of the denial of one application for health insurance was sufficient to establish that plaintiff was uninsurable, the absence of insurance is not itself a future medical expense. Here, there was no evidence that she would need any future medical care of any kind other than her herpes medication. Nor was there evidence of the cost of health insurance, the cost of medical procedures she might encounter, or the extent to which an insurance policy would be expected to cover such costs. In short, to the extent the jury's award of future medical expenses was based on plaintiff's purported uninsurability, it was unsupported by any evidence whatsoever that she has

suffered any detriment. *See* Ch. 1, *Personal Injuries*, § 1.5(c).

Medi-Cal Reimbursement. In *Branson v. Sharp Healthcare, Inc.* (2011) 193 Cal. App. 4th 1467, 123 Cal. Rptr. 3d 462, in a proceeding to establish the appropriate amount of a Medi-Cal lien, the court must issue its findings, decision, or order, which shall be considered the final determination of the parties' rights and obligations with respect to the director's lien; a beneficiary's payment of DHCS' initial demand for reimbursement does not constitute a negotiated settlement that constituted any type of waiver or forfeiture of his right to challenge the total lien amount at the conclusion of his medical malpractice action. *See* Ch. 1, *Personal Injuries*, § 1.8(d).

Earning Capacity. In *Pannu v. Land Rover North America, Inc.* (2011) 191 Cal. App. 4th 1298, 120 Cal. Rptr. 3d 605, involving the absence of error in the admission of testimony supporting a claim of economic damages, including expert opinion about lost profits, an appellate court will affirm the judgment if substantial evidence supports the damage award. Damages, even economic damages, are difficult to measure in personal injury cases. There may be disputed facts regarding the amount of medical expenses or lost wages, or disputed inferences about the probable course of events such as the length of incapacitation or whether a continuing disability will worsen, plateau, or improve. Technical arguments about the meaning and effect of expert testimony on the issue of damages are best directed to the fact-finder. *See* Ch. 1, *Personal Injuries*, § 1.11.

Use of Vehicle. In *Chude v. Jack in the Box Inc.* (2010) 185 Cal. App. 4th 37, 109 Cal. Rptr. 3d 773, although driving is included within the concepts of operation and use of a vehicle, "operation," as referred to in Civ. Code § 3333.4, is a broader concept than driving and does not require that the vehicle be in motion or even have the engine running. Operation includes stopping, parking on the highway, and other acts fairly regarded as a necessary incident to the driving of the vehicle. Use is an even broader concept than operation. It extends to any activity utilizing the vehicle, and includes parking, leaving the doors open, and failing to set the parking brake. Further, the phrase "arising out of," as used in section 3333.4, refers to origin, such as whether something grows out of or flows from an event. The everyday meaning of the word "use" is the application or employment of something for some purpose. Proposition 213 does not apply only to accidents between two motorists, and can come into play when the injury is caused by something outside the uninsured vehicle. The test is whether the damages arose out of the operation or use of the car. Thus, when an uninsured driver brought a claim against a restaurant after suffering second-degree burns when she spilled coffee that she had just purchased at the restaurant's drive-through window, the lawsuit was an "action to recover damages arising out of the operation or use of a motor vehicle" within the meaning of section 3333.4(a), where the court found that there was a clear and direct causal relationship between plaintiff's operation of her vehicle and the accident for which she claimed defendant was responsible. *See* Ch. 1, *Personal Injuries*, § 1.31.

Criminal Acts. In *Espinosa v. Kirkwood* (2010) 185 Cal. App. 4th 1269, 111 Cal. Rptr. 3d 252, the court held that plaintiffs, participants in a burglary and passengers when fleeing from the scene, sued defendant, another participant and the driver, for personal injuries suffered in a collision while trying to evade the police. The trial

court granted summary judgment for defendant, dismissing the action as barred by section 3333.3. In affirming, the court of appeal concluded the plaintiffs' injuries were, in any way, proximately caused by their flight from felonious conduct and therefore that they were barred from recovery under section 3333.3. First, in fleeing from the scene of the crime, plaintiffs were acting jointly with defendant to avoid arrest after jointly engaging in a criminal act. There was no break in the chain of events between the criminal conduct the three engaged in jointly and the attempt to flee in defendant's vehicle. Second, the act of fleeing from police in a car chase rendered an accident highly foreseeable. The fact that plaintiffs were passengers and not drivers did not shield them from application of section 3333.3 because their engagement in the criminal act with defendant and their (apparently) volitional decision to attempt to escape arrest in his vehicle made their criminal conduct or immediate flight therefrom the proximate cause of their own injuries. *See* Ch. 1, *Personal Injuries*, § 1.31.

Negligent Infliction of Emotional Distress. In *Wong v. Jing* (2010) 189 Cal. App. 4th 1354, 117 Cal. Rptr. 3d 747, the court held serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case. This articulation of "serious emotional distress" is functionally the same as the articulation of "severe emotional distress." Indeed, given the meaning of both phrases, no material distinction exists between them and there is no reason why either would, or should, describe a greater or lesser degree of emotional distress than the other for purposes of establishing a tort claim seeking damages for such an injury. *See* Ch. 1, *Personal Injuries*, § 1.36(a).

Negligent Infliction of Emotional Distress. In *Morton v. Thousand Oaks Surgical Hospital* (2010) 187 Cal. App. 4th 926, 114 Cal. Rptr. 3d 661, involving a claim for negligent infliction of emotional distress purportedly arising from medical neglect, the daughters of the patient did not satisfy the contemporaneous awareness requirement for bystander recovery, despite their allegation that their experience in the medical field enabled them to perceive the dangers faced by their mother in the event no curative action was taken. Even if courts were willing to recognize that only a specific class of nonlayperson bystanders could recover for negligent infliction of emotional distress for observing the consequences of an injury-producing event, thus limiting a potential expansion of liability, plaintiffs did not allege factually what "expertise" enabled them to understand that the medical treatment given their mother was inadequate. The allegation in their complaint that they were "experienced in the medical field" was conclusory and without factual support. *See* Ch. 1, *Personal Injuries*, § 1.36(a).

Collateral Source Rule. In *Garbell v. Conejo Hardwoods, Inc.* (2011) 193 Cal. App. 4th 1563, 122 Cal. Rptr. 3d 856, the court held the subrogation doctrine modifies the collateral source rule. The collateral source rule does not require that a tortfeasor pay double for his or her wrong to both the injured party and to reimburse the collateral source. Thus, the collateral source rule addresses whether the insured may recover against tortfeasors even though it has been compensated by the insurer; it does not address the insurer's right to recover in a subrogation action for its payments to the insured. When the insurance carrier becomes subrogated to

the claim of an insured against a third party tortfeasor, the payment of insurance proceeds is no longer a collateral source. *See* Ch. 1, *Personal Injuries*, § 1.60.

Collateral Source Rule. In *Conservatorship of McQueen* (2011) 193 Cal. App. 4th 495, 122 Cal. Rptr. 3d 580, the court held California courts have used the collateral source rule to exclude evidence of payments to a plaintiff from a gratuitous source. The rationale for the collateral source rule favors sheltering gratuitous gifts of money or services intended to benefit tort victims. There is not a critical distinction between situations where the victim receives a gratuitous payment or benefit and those where the benefit or payment arises from some obligation. Under California law, it makes no difference. There are many sorts of collateral sources and a great variety of contexts in which the collateral source rule might be applied. Courts are to take a case-by-case approach in determining whether payments paid to the plaintiff fall within the collateral source rule. The rule bends to the needs of equity and fairness. *See* Ch. 1, *Personal Injuries*, § 1.60.

Loss of Consortium. In *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal. 4th 788, 108 Cal. Rptr. 3d 806, 230 P.3d 342, the court held the plaintiff in a common law action for loss of consortium may not recover for loss during a period in which the companionship and affection of the injured spouse would have been lost anyway, irrespective of the defendant's wrongdoing, and therefore the life expectancy of the plaintiff and the life expectancy of the injured spouse, whichever is shorter, necessarily places an outer limit on damages. *See* Ch. 1, *Personal Injuries*, § 1.75.

INJURED SPOUSES AND PARENTS

Loss of Consortium. In *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal. 4th 788, 108 Cal. Rptr. 3d 806, 230 P.3d 342, the California Supreme Court considered whether a spouse's wrongful death action involved the same primary right and breach as her previous loss of consortium action, and therefore whether the doctrine of res judicata barred her wrongful death action. The spouse's previous action sought compensation not only for the loss of consortium injury that she had suffered and would continue to suffer as a result of her husband's physical and emotional condition while he was still alive, but also for the loss of consortium injury that she anticipated she would continue to suffer as a result of his premature death. Her wrongful death action likewise sought compensation for the loss of consortium injury that she had suffered and would continue to suffer as a result of her husband's premature death. With respect to post-death loss of consortium, the two actions concerned the same plaintiff seeking the same damages from the same defendant for the same harm, and to that extent they involved the same primary right. The wife dismissed her previous action with prejudice. Because such a dismissal was the equivalent of a final judgment on the merits, the wife could not litigate the same primary right a second time. Thus, the court recognized that in a pre-death common law action for loss of consortium, future damages are recoverable, including damages that might result from the impending premature death of the injured spouse. *See* Ch. 2, *Injured Spouses and Parents*, § 2.2(a).

Loss of Consortium. In *LeFiell Manu-*

facturing Co. v. Superior Court (2011) 193 Cal. App. 4th 1413, 122 Cal. Rptr. 3d 841, the court held the plain language of Labor Code § 4558, which permits a civil suit arising from power press injuries where an employer acted in disregard of worker safety, does not permit an injured employee's spouse to seek loss of consortium damages. Section 4558(b) only permits a dependent to pursue a civil suit for damages upon the death of the injured worker. There is no language in the statute that would expand the exception to permit a spouse to proceed with a loss of consortium claim. *See* Ch. 2, *Injured Spouses and Parents*, § 2.2(a).

PROOF OF NATURE, EXTENT, AND CAUSE OF INJURIES

Degree of Proof. In *Morton v. Thousand Oaks Surgical Hospital* (2010) 187 Cal. App. 4th 926, 114 Cal. Rptr. 3d 661, involving a claim for negligent infliction of emotional distress purportedly arising from medical neglect, the daughters of the patient did not satisfy the contemporaneous awareness requirement for bystander recovery, despite their allegation that their experience in the medical field enabled them to perceive the dangers faced by their mother in the event no curative action was taken. Even if courts were willing to recognize that only a specific class of nonlayperson bystanders could recover for negligent infliction of emotional distress for observing the consequences of an injury-producing event, thus limiting a potential expansion of liability, plaintiffs did not allege factually what "expertise" enabled them to understand that the medical treatment given their mother was inadequate. The allegation in their complaint that they were "experienced in the medical field" was conclusory and without factual support. *See* Ch. 4, *Proof of Nature, Extent, and Cause of Injuries*, § 4.2.

WRONGFUL DEATH AND SURVIVAL ACTIONS

In *Boeken v. Philip Morris USA, Inc.* (2010) 48 Cal. 4th 788, 108 Cal. Rptr. 3d 806, 230 P.3d 342, the California Supreme Court considered whether a spouse's wrongful death action involved the same primary right and breach as her previous loss of consortium action, and therefore whether the doctrine of res judicata barred her wrongful death action. The spouse's previous action sought compensation not only for the loss of consortium injury that she had suffered and would continue to suffer as a result of her husband's physical and emotional condition while he was still alive, but also for the loss of consortium injury that she anticipated she would continue to suffer as a result of his premature death. Her wrongful death action likewise sought compensation for the loss of consortium injury that she had suffered and would continue to suffer as a result of her husband's premature death. With respect to post-death loss of consortium, the two actions concerned the same plaintiff seeking the same damages from the same defendant for the same harm, and to that extent they involved the same primary right. The wife dismissed her previous action with prejudice. Because such a dismissal was the equivalent of a final judgment on the merits, the wife could not litigate the same primary right a second time. Thus, the court recognized that in a pre-death common law action for loss of consortium, future damages are recoverable, including damages that might result from the impending premature death of the injured spouse. *See* Ch. 5, *Wrongful Death and Survival Actions*, § 5.19.

PROPERTY DAMAGE

Damage by Tenant. In *Avalon Pacific-Santa Ana, L.P. v. HD Supply Repair & Remodel, LLC* (2011) 192 Cal. App. 4th

1183, 122 Cal. Rptr. 3d 417, the court held a landlord may recover cost of repair damages only in a lawsuit brought after the lease has expired or been terminated; before then, the landlord's damages are limited to the amount of injury to the reversion. A lessor is permitted to recover the cost of repair where the lessees have repudiated the lease, in effect terminating it. Where a lessee has not repudiated a lease, and it has neither expired nor been terminated, the lessor may not recover cost of repair damages. *See* Ch. 6, *Property Damage*, § 6.33.

FRAUD AND DECEIT

Alternative Remedies. In *Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal. 4th 913, 114 Cal. Rptr. 3d 280, 237 P.3d 598, where a claim is for unliquidated damages or where a settlement is made to adjust a matter in dispute, or where there is a controversy as to the amount owing, and the parties agree upon a sum that shall be paid in settlement, the amount so paid shall be returned if the party settled with seeks to avoid the settlement on the ground of fraud. In sum, the plaintiff cannot avoid the obligation to return the consideration by affirming the settlement agreement and seeking damages for fraud. *See* Ch. 8, *Fraud and Deceit*, § 8.2.

Punitive Damages. In *Behr v. Redmond* (2011) 193 Cal. App. 4th 517, 123 Cal. Rptr. 3d 97, the court rejected defendant's contention that an award of punitive damages must be reversed and retried whenever the Court of Appeal reduces an award of compensatory damages. In *Behr*, the ratio of punitive damages to compensatory damages (after the appellate's court reduction) was 1.75 to 1. Although this is higher than the ratio that would exist if the jury's compensatory award was allowed to stand, the appellate court found that it is not so disproportionate as to render it "suspect" or to otherwise require reversal. *See* Ch. 8, *Fraud and Deceit*, § 8.2.

Quasi-Contract. In *Ajaxo Inc. v. E*Trade Financial Corp.* (2010) 187 Cal. App. 4th 1295, 115 Cal. Rptr. 3d 168, the court held when calculating a monetary remedy for the past use of a misappropriated trade secret, a court may order reasonable royalties if neither damages for actual loss nor unjust enrichment caused by misappropriation is provable. In the latter situation, a reasonable royalty is an attempt to measure a hypothetically agreed value of what the defendant wrongfully obtained from the plaintiff. By means of a suppositious meeting between the parties, the court calculates what the parties would have agreed to as a fair licensing price at the time that the misappropriation occurred. In fashioning a pecuniary remedy under the California Uniform Trade Secret Act for past use of a misappropriated trade secret, a trial court may order a reasonable royalty only where neither actual damages to the holder of the trade secret nor unjust enrichment to the user is provable. *See* Ch. 8, *Fraud and Deceit*, § 8.8.

DEFAMATION (LIBEL AND SLANDER)

Libel. In *Wong v. Jing* (2010) 189 Cal. App. 4th 1354, 117 Cal. Rptr. 3d 747, the court held a statement can also be libelous per se if it contains a charge by implication from the language employed by the speaker and a listener could understand the defamatory meaning without the necessity of knowing extrinsic explanatory matter. Further, the critical question is not whether a statement is fact or opinion, but whether a reasonable fact finder could conclude the published statement declares or implies a provably false assertion of fact. *See* Ch. 9, *Defamation (Libel and Slander)*, § 9.1(a).

DISPARAGEMENT OF TITLE (SLANDER OF TITLE AND TRADE LIBEL)

Slander of Title. In *Total Call Internat. Inc. v. Peerless Ins. Co.* (2010) 181 Cal. App. 4th 161, 104 Cal. Rptr. 3d 319, the court held generally, tortious conduct in the nature of product disparagement, trade libel, or defamation involves the imposition of liability for injuries sustained through publication to third parties of a false statement affecting the plaintiff. Nonetheless, defamation is distinct from product disparagement and trade libel: whereas the former concerns injury to the reputation of a person or business, the latter involves false disparagement of the quality of goods or services. The torts in the former category require that the injurious false statement specifically refer to, or be of and concerning, the plaintiff in some way. All injurious falsehood claims sounding in defamation, however framed, are subject to requirements rooted in U.S. Const., 1st Amend. These requirements cannot be avoided by creative pleading that affixes labels other than defamation to injurious falsehood claims. Among these requirements is the demand that the injurious falsehood specifically refer to the derogated person or product. To meet this demand at the pleading stage, a plaintiff must allege that the statement at issue either expressly mentions the plaintiff or refers to him or her by reasonable implication. *See* Ch. 10, *Disparagement of Title (Slander of Title and Trade Libel)*, § 10.1(a).

MALICIOUS PROSECUTION

Cause of Action. In *Mendoza v. Wichmann* (2011) 194 Cal. App. 4th 1430, ___ Cal. Rptr. 3d ___ and *Antounian v. Louis Vuitton Malletier* (2010) 189 Cal. App. 4th 438, 117 Cal. Rptr. 3d 3, the courts held the existence of probable cause is determined by an objective test. To make a prima facie case of a lack of probable cause in response to an anti-SLAPP (strategic lawsuit against public participation) motion, a plaintiff must submit substantial evidence showing no reasonable attorney would have thought a defamation action was tenable in light of the facts known to the defendant at the time the suit was filed, or that the defendant continued pursuing the lawsuit after it had discovered the action lacked probable cause. Only those actions that any reasonable attorney would agree are totally and completely without merit may form the basis for a malicious prosecution suit. However, where there is no dispute as to the facts upon which an attorney acted in filing or prosecuting the prior action, the question of whether there was probable cause to institute or continue prosecuting that action is purely legal. If there is a dispute as to such facts, that dispute must be resolved by the trier of fact before the objective standard can be applied by the court. Because the existence of probable cause may be a question of law, a malicious prosecution plaintiff opposing an anti-SLAPP motion where the facts surrounding probable cause in the underlying action are not in dispute must establish the defendant's lack of probable cause in the underlying action as a matter of law in order to survive an anti-SLAPP motion. If the undisputed facts establish the existence of probable cause as a matter of law, there is no showing the plaintiff can make to demonstrate a likelihood of succeeding on the merits of her malicious prosecution complaint. *See* Ch. 12, *Malicious Prosecution*, § 12.1.

Cause of Action. In *Mendoza v. Wichmann* (2011) 194 Cal. App. 4th 1430, ___ Cal. Rptr. 3d ___, where probable cause existed, as a matter of law, for defendants to file and prosecute a defamation action against plaintiff, plaintiff could not demon-

strate she was likely to succeed on the merits of her malicious prosecution claim. She could not prove defendants lacked probable cause, an element of her action. *See* Ch. 12, *Malicious Prosecution*, § 12.1.

ABUSE OF PROCESS

Anti-SLAPP. In *State Farm Mutual Automobile Ins. Co. v. Lee* (2011) 193 Cal. App. 4th 34, 122 Cal. Rptr. 3d 183, the court held that to establish a cause of action for abuse of process, a plaintiff must plead two essential elements: that the defendant (1) entertained an ulterior motive in using the process and (2) committed a willful act in a wrongful manner. In a case in which appellant filed a cross-complaint against an insurer alleging abuse of process and unfair business practices based on questions asked by the insurer's attorney during depositions in a prior action for recovery of medical expenses, the trial court did not err in granting the insurer's anti-SLAPP (strategic lawsuit against public participation) motion under Code Civ. Proc. § 425.16. The insurer engaged in discovery as authorized by law. The insurer's questioning about possible illegal ownership of chiropractic practices that were billing the insurer fell within the broad scope of discovery because it related to, or could lead to discovery of evidence concerning, the veracity of the claims for medical bills. Appellant failed to bear his burden on appeal of showing that the trial court erred by concluding that he did not have a probability of prevailing on the merits of his abuse of process and dependent unfair business practices causes of action. *See* Ch. 13, *Abuse of Process*, § 13.1.

INTENTIONALLY CAUSED EMOTIONAL DISTRESS

Cause of Action. In *Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal. App. 4th 338, 112 Cal. Rptr. 3d 455, the court held an employer's intentional misconduct in connection with actions that are a normal part of the employment relationship, such as demotions and criticism of work practices, resulting in emotional injury is considered to be encompassed within the compensation bargain, even if the misconduct could be characterized as manifestly unfair, outrageous, harassment, or intended to cause emotional disturbance. Workers' compensation ordinarily provides the exclusive remedy for such an injury. However, conduct in which an employer steps out of its proper role as an employer or conduct of questionable relationship to the employment, such as a criminal false imprisonment, is not encompassed within the compensation bargain and is not subject to the exclusivity rule. *See* Ch. 15, *Intentionally Cause Emotional Distress*, § 15.1.

BREACH OF COVENANT OF GOOD FAITH AND FAIR DEALING

Wrongful Termination. In *SunLine Transit Agency v. Amalgamated Transit Union, Local 1277* (2010) 189 Cal. App. 4th 292, 307, 116 Cal. Rptr. 3d 839, courts have exempted wrongful termination claims from workers' compensation exclusivity, and thus have allowed an employee to recover economic damages on a wrongful termination claim because the damages arose out of the act of termination—and not out of an injury to the employee's person. *See* Ch. 16, *Breach of Covenant of Good Faith and Fair Dealing*, § 16.2.

Insurers. In *Risely v. Interinsurance Exchange of the Automobile Club* (2010) 183 Cal. App. 4th 196, 107 Cal. Rptr. 3d 343, the court held where more than one insurer has a duty to defend an insured, each insurer's duty is separate and independent from the others. However, an insured is entitled to only one full defense. An insurer that has allegedly breached its duty to

defend may demonstrate that its insured suffered no damages from its alleged breach by demonstrating that its insured received a full and complete defense, notwithstanding its breach. However, in cases in which the nondefending insurer's failure to provide a defense potentially increased the insured's exposure to personal liability, the insured may demonstrate damages from an alleged breach of the duty to defend, notwithstanding that another insurer assumed the costs of providing a defense. *See* Ch. 16, *Breach of Covenant of Good Faith and Fair Dealing*, § 16.4.

PUNITIVE OR EXEMPLARY DAMAGES

Defendant's Wealth. In *Green v. Laibco, LLC* (2011) 192 Cal. App. 4th 441, 121 Cal. Rptr. 3d 415, the court held the California Supreme Court has declined to prescribe any rigid standard for measuring a defendant's ability to pay a punitive damages award. Net worth is the most common measure, but not the exclusive measure. In most cases, evidence of earnings or profit alone is not sufficient without examining the liabilities side of the balance sheet. What is required is evidence of the defendant's ability to pay the damage award. Thus, there should be some evidence of the defendant's actual wealth. Normally, evidence of liabilities should accompany evidence of assets, and evidence of expenses should accompany evidence of income. *See* Ch. 18, *Punitive or Exemplary Damages*, § 18.25(a).

Relationship to Compensatory Damages. In *Uzyel v. Kadisha* (2010) 188 Cal. App. 4th 866, 924, 116 Cal. Rptr. 3d 244, the appellate court rejected the argument that any increase in the compensatory award, including prejudgment interest, requires a reversal and redetermination of the award of punitive damages. The court explained that if the reversal of part of a compensatory award renders the punitive damages excessive, the award of punitive damages should be reversed for a redetermination of punitive damages in light of the reduced compensatory award; the reason for this is to ensure a reasonable relationship between the compensatory award and the amount of punitive damages. However, if an appeal results in an increase in the compensatory award, the plaintiff is not entitled to a reversal of the punitive damages award to keep pace with that increase, noting that the rule that exemplary damages must bear a reasonable relation to actual damages is designed solely to guard against excessive punitive damages. Absent a showing of error in the award of punitive damages, any increase in the compensatory award as a result of this appeal cannot justify a reversal of the punitive damages award. *See* Ch. 18, *Punitive or Exemplary Damages*, § 18.26.

Relationship to Compensatory Damages. In *Behr v. Redmond* (2011) 193 Cal. App. 4th 517, 536, 123 Cal. Rptr. 3d 97, the court rejected defendant's contention that an award of punitive damages must be reversed and retried whenever the Court of Appeal reduces an award of compensatory damages. In *Behr*, the ratio of punitive damages to compensatory damages (after the appellate's court reduction) was 1.75 to 1. Although this is higher than the ratio that would exist if the jury's compensatory award was allowed to stand, the appellate court found that it is not so disproportionate as to render it "suspect" or to otherwise require reversal. *See* Ch. 18, *Punitive or Exemplary Damages*, § 18.26.

CONTRIBUTION AND INDEMNITY

Good Faith Release. In *Leung v. Verdugo Hills Hospital* (2011) 193 Cal. App. 4th 971, 121 Cal. Rptr. 3d 913, six days after his birth, plaintiff suffered irreversible

brain damage caused by kernicterus. Plaintiff sued the hospital at which he was born and his pediatrician for negligence. Plaintiff alleged that the hospital was negligent for failing to provide his parents with adequate education on neonatal jaundice and kernicterus, and for failing to implement policies to reduce the risk of kernicterus in newborns. The hospital contended that common law, rather than Code Civ. Proc. §§ 877 and 877.6, governed the effect of plaintiff's settlement with and release of the pediatrician. According to the hospital, the release of the pediatrician in consideration of his $1 million settlement payment released the hospital from its joint and several liability for plaintiff's economic damages. The trial court approved the compromise between plaintiff and his pediatrician and found the hospital jointly and severally liable for 95 percent of all economic damages and severally liable for its 40 percent share of noneconomic damages. The court of appeal reversed the judgment insofar as it imposed joint and several liability on the hospital for plaintiff's economic damages, but otherwise affirmed the judgment. The court concluded that the effect of the settlement on the hospital's liability depended on the common law. The settlement did not fall under the provisions of Code Civ. Proc. §§ 877 and 877.6. The settlement did not meet the standard of good faith under Code Civ. Proc. §§ 877 and 877.6, because it was grossly disproportionate to the pediatrician's individual liability. The appellate court noted that although the California Supreme Court has criticized the common law release rule as applied to concurrent tortfeasors, it has never repudiated it with respect to concurrent tortfeasors who produce a single injury. *See* Ch. 19, *Contribution and Indemnity*, § 19.9(b).

Indemnity. In *Searles Valley Minerals Operations Inc. v. Ralph M. Parsons Service Co.* (2011) 191 Cal. App. 4th 1394, 120 Cal. Rptr. 3d 487, the court held one can only indemnify against claims for damages that have been resolved against the indemnitee, i.e., those as to which the indemnitee has actually sustained liability or paid damages. Indemnification is the act of saving another from the legal consequence of an act. Hence, a clause requiring the indemnitor to indemnify the indemnitee against defined claims clearly indicated that the indemnity obligation would apply only if the indemnitee ultimately incurred such a legal consequence as a result of covered claims. *See* Ch. 19, *Contribution and Indemnity*, § 19.12.

Good Faith Settlement. In *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal. App. 4th 939, ___ Cal. Rptr. 3d ___, the court held a plaintiff is not required to know of a settling defendant's potential liability before a good faith settlement can be made. *See* Ch. 19, *Contribution and Indemnity*, § 19.15(b).

REVIEW OF DAMAGE AWARDS

Appellate Review. In *Baker v. American Horticulture Supply, Inc.* (2010) 185 Cal. App. 4th 1295, ___ Cal. Rptr. 3d ___, the court held after authorizing trial courts to grant a new trial on the grounds of excessive damages or insufficiency of the evidence, Code Civ. Proc. § 657 provides that on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence or upon the ground of excessive or inadequate damages, such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons. Thus, an order granting a new trial under Code Civ. Proc § 657 must be sustained on appeal unless the opposing party demonstrates that no reasonable finder of fact could have found for the movant on the trial court's theory.

Moreover, an abuse of discretion cannot be found in cases in which the evidence is in conflict and a verdict for the moving party could have been reached. In other words, the presumption of correctness normally accorded on appeal to the jury's verdict is replaced by a presumption in favor of the new trial order. The reason for this deference is that the trial court, in ruling on a new trial motion, sits as an independent trier of fact. Therefore, the trial court's factual determinations, reflected in its decision to grant the new trial, are entitled to the same deference that an appellate court would ordinarily accord a jury's factual determinations. *See* Ch. 20, *Review of Damage Awards*, § 20.2(a).

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